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APPELLANT'S REPLY TO APPELLEE'S ARGUMENTS

As Mississippi jurisprudence has consistently held, simple negligence in the handling of a workers' compensation claim does not give rise to any cause of action. The reason our courts have set such a standard in these cases is because of the literally hundreds and thousands of transactions which take place in this state each year in the handling of workers' compensation claims. If the Court were to allow claims based in negligence, there would be some instance of negligence found in a countless number of cases. A claim for punitive damages requires an intentional denial of benefits.

To prevail on a claim for bad faith, Plaintiff must prove the carrier denied her compensable claim without a legitimate or arguable reason. There was no such denial in this case. Appellant's brief previously filed herein makes this abundantly clear by dividing the relevant time periods into five parts:

(1) May 11, 2001, Amfed received its first notice of the claim. Amfed immediately commenced payment of death benefits.

(2) On April 11, 2003, Amfed received its first notice of the Lump Sum Award. Amfed promptly investigated the circumstances surrounding the award and requested a calculation of benefits owed to Jordan. On May 16, 2003, Amfed received its first notice of the mistake in weekly payment amounts.

(3) On May 27, 2003, Amfed requested a calculation of benefits from the MWCC so the lump sum and mistake in weekly benefits amount due could be determined.

(4) On May 30, 2003, the Commission issued its calculation and upon receipt Amfed began processing payment of the benefits owed to Jordan.

(5) From July 2003 to August 13, 2003, the attorneys were discussing whether a penalty was owed and if so, what penalty should apply. All penalties owed to Jennifer Brown Jordan, Justin Matthew Brown and Laura Elizabeth Brown, pursuant to Miss. Code Ann. § 71-3-73 have been paid.

The parties do not dispute that the law established in *Holland, Rogers* and their progeny applies to the issues presented in this case. As Appellee's brief correctly states, this case does not center around the initial investigation, acceptance and commencement of benefits to Jordan and the minors. Rather, Appellee admits "the actions complained of in this litigation began to occur on April 11, 2003, when Jennifer contacted Nita Cox, an adjuster for Amfed to see why she had not gotten the lump sum benefit." (P. 2, Appellee's Brief) The parties agree that the period in which Amfed's actions are in question is between April 11, 2003, Amfed's first notice of the lump sum award, and June 26, 2003, Amfed's payment of the lump sum award to Jennifer Brown Jordan and correction of the underpayment of benefits to Jordan and the minors.

When this two and a half month period is broken down and each necessary step is examined, it is clear that Amfed conducted a reasonable and timely investigation of Jordan's claim and none of Amfed's actions can be considered a willful, intentional, or malicious denial of Jordan's claim for benefits. It was not logical for Amfed to simply issue a check immediately for the benefits, penalties and interest. Amfed complied with the Mississippi Workers' Compensation Act and Rules of the Commission and conducted a reasonable investigation and timely payment under the circumstances.

A summary of the necessary steps involved in this process is as follows. On April 11, 2003, Jordan contacted AmFed adjuster, Nita Cox, to inquire why she had not received her lump sum payment. (T.112) This was AmFed's first notice of the existence of the Lump Sum Order. (T.187)

Cox told Jordan she would look into the matter and call her back. (T.115) Cox contacted her attorney, T.G. Bolen, who did not have a copy of the Order in his file, but advised he would go to the Workers' Compensation Commission and review the file. (T.192, 269)

During the April 11, 2003, conversation Jordan also informed Cox that she had remarried on August 10, 2002, and Cox terminated her weekly benefit payments pursuant to the Mississippi Workers' Compensation Act. (T.187, 190) On April 14, 2003, Jordan contacted Cox again and Cox advised she had not been able to locate a copy of the Order, but would continue to investigate it. (T.116, 191) Jordan could have faxed or mailed a copy of the Order to Cox, but she chose not to do so. Jordan argues that Cox could have obtained the information on the Lump Sum Order from the MWCC website. This simply is not true. The MWCC website was not fully functional during the time in question and Orders were not available online at the time. Jordan did not submit any evidence otherwise.

On April 16, 2003, Bolen wrote to Cox advising he had been to the Mississippi Workers' Compensation Commission and located the Order in the Commission file and enclosed a copy of the Order. (Ex.D-19) Cox was out of the office on her honeymoon the week Bolen's letter was received. (T.213) Cox returned to the office on April 30, 2003, and discussed the Order with her supervisor, Bob Blacklidge. (T.214-215) That same day, April 30, 2003, Cox asked Bolen to obtain a calculation from the Mississippi Workers' Compensation Commission so Amfed could pay the benefits. (T.214)

On May 5, 2003, Cox followed up with Bolen and he advised he was preparing a letter to the Commission. (T.215-216) Cox provided the necessary payment information for him to submit with the request. (T.216) On May 12, 2003, Cox again followed up with Bolen concerning the status. (T.217)

On May 16, 2003, Bolen advised Cox that he had a letter drafted to the Commission concerning the lump sum calculation, but wanted to discuss it with her before he sent it. (T.217) He had discovered the calculation error and underpayment of benefits to the widow and children. (T.218, Ex.D-21) Bolen discussed the matter with Cox and made a note in his file to obtain a calculation of benefits owed to the children in addition to those owed to Jordan. (Ex.D-20)

On May 27, 2003, Bolen wrote to Ben Barrett Smith, MWCC Chairman, advising that AmFed was not aware of the Lump Sum Order until Jordan's recent telephone call and that Amfed was ready and willing to forward the appropriate lump sum amount immediately upon receipt of the calculation. (Ex.D-21) This correspondence also advised that Amfed had discovered the mistake with the payment amounts and requested a calculation of additional benefits owed to James H. Brown, IV, Laura Elizabeth Brown, and Justin Matthew Brown. (Ex.D-21)

Shortly after her conversation with Nita Cox on April 14, 2003, attorney Glenn White referred Jordan to attorney William H. Jones to discuss non payment of the lump sum award. (T.101) On May 29, 2003, attorney Jones filed this bad faith lawsuit on Jordan's behalf. (R.3-12) Appellee's brief states "a simple telephone call to her, or her attorney would have sufficed." (Appellee's Brief, Page 36) But why did attorney Jones, who was first contacted in April, not pick up his phone and call Amfed or their attorney before he filed his lawsuit?

On May 29, 2003, the MWCC issued a calculation of benefits, with interest, owed to Jennifer Brown Jordan, Justin M. Brown, Laura E. Brown, and James H. Brown, IV. (Ex.D-22) The calculation was mailed to Bolen with a letter from the MWCC dated May 30, 2003. (Ex.D-23)

On June 9, 2003, Cox contacted Bolen regarding the status of the calculation. (T.224-225) On June 10, 2003, the calculations were faxed to Amfed. On June 26, 2003, Bolen sent the checks to Jordan's attorney (Ex.D-25) The letter further informed Jones that the checks payable to Jordan

for the children were to cover the under payment resulting from the error in entering the biweekly payment amounts. (Ex.D- 25) Prior to receiving this letter, neither Jordan, nor her attorneys, were aware of the under payment and had not made a claim for it. (T.119-120)

The Circuit Court allowed the Jury to consider evidence of bad faith during the period between the time the Lump Sum Order was issued, June 5, 2001, and the time Amfed received knowledge of the Order. This is clearly erroneous and prejudicial to Amfed. Jordan agrees that the actions complained of in this litigation began to occur on April 11, 2003, not in 2001.

Appellee's brief discusses at length the assertion that upon receiving notice of the lump sum award Amfed should have contacted Jordan to notify her that payment of the lump sum would be forthcoming and failure to do so amounts to bad faith. Appellee asserts that Amfed had a clear affirmative obligation to notify Jordan that her claim would be paid. Appellee does not cite any law to support this premise, and *Holland*, and its progeny simply do not establish such a duty.

The parties do not dispute the applicable law on this subject. The test of whether Amfed committed bad faith is not whether Amfed failed to communicate with Jordan, but whether Amfed intentionally denied her claim for benefits. In a claim for bad faith, the defendant's actions must be a positive action, not inaction. "It is conduct which violates standards of decency, fairness, or reasonableness." *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992). Bad faith requires a showing of more than bad judgment or negligence; rather, it implies some conscious wrongdoing because of dishonest purpose or moral obliquity. *Bailey v. Bailey*, 724 So.2d 335, 338 (Miss. 1998). Amfed's actions simply can not be considered willful and intentional acts to deny Jordan's benefits. *Davis v. Pioneer, Inc.*, 834 So.2d 739 (Miss. App. 2003).

Nearly two years passed between the time Jordan obtained the lump sum award from the MWCC and the time she first notified Amfed of the award. (T.111) Neither Jordan, nor either of her

two attorneys, ever contacted Amfed to ask why the Order had not been paid. Appellee suggests that a simple telephone call from Amfed might have avoided this litigation. The same can be said for Jordan's actions. As Amfed's actions clearly demonstrate, Jordan's benefits would have been investigated, calculated and properly paid long before 2003, if Jordan, or her legal representatives, had simply called during that two year period to give Amfed notice of the Order. Jordan was satisfied to wait for two years and received regular weekly benefit payments without interruption during the entire time.

Appellee also asserts that Amfed acted in bad faith in terminating Jordan's weekly benefits when she had remarried. Section 71-3-25 of the Mississippi Workers' Compensation Act unquestionably provides that a surviving spouse's benefits under the Act are only payable during widowhood. The Act mandates termination of weekly benefit payments upon the widow's remarriage. During the April 11, 2003, conversation Jordan informed Cox that on August 10, 2002, she married Jay Jordan. (T.187) Because the Act provides that widow's benefits are terminated upon remarriage, Cox properly terminated Jordan's weekly benefit payments upon receiving this information. (T.190)

Appellee's next argument centers around whether Amfed acted in bad faith "by not immediately tendering, on May 16, 2003, those unpaid portions of the weekly benefits owed both to the widow and children, it discovered had not been paid for the previous two years." As Appellant's brief clearly explains, and as is discussed above, the existence of the Lump Sum Order was being investigated, the calculation error was being investigated, a calculation was being requested from the MWCC and calculation of penalties and interest were being investigated. Amfed did in fact immediately take action to obtain a calculation of the lump sum and the underpayment to the children and made reasonable efforts to correct it. There is no proof whatsoever that Amfed

ever intentionally denied benefits to Jordan or to the minors. Further, there is no proof that Amfed unreasonably delayed payment of the past due benefits.

On May 27, 2003, Bolen wrote to the MWCC Chairman, advising that Amfed was not aware of the Lump Sum Order until Jordan's recent telephone call and that Amfed stood ready and willing to forward the appropriate lump sum amount immediately upon receipt of the calculation. (Ex.D-21) (Ex.D-21) Bolen's letter, which is supported by Bolen, Blacklidge and Cox's testimony, summarizes Amfed's actions upon discovery of the mistake and clearly demonstrates Amfed's intent to pay the appropriate benefits upon receipt of the calculation of proper benefits owed to Jordan and the minors. Once Amfed had the information necessary to correct the mistake they promptly investigated, calculated and then paid all the benefits owed.

**THE CIRCUIT COURT COMMITTED MULTIPLE REVERSIBLE
ERRORS IN INSTRUCTING THE JURY**

The Appellants' brief identifies and fully develops the multiple errors committed by the Trial Court in instructing the jury in both the compensatory damage and punitive damage phases of the trial. These errors fall within these general areas: (a) incorrect statements of the law and facts; (b) peremptory instructions on matters which were not issues to be decided by the jury; (c) abstract statements of legal principals which are not related to the evidence and issues in the case; (d) impermissible oral instructions by the Court on the substantive issue of punitive damages; (e) failure to instruct on the standard of proof required to establish a claim for punitive damages; and (f) summarily refusing to consider instructions offered by Amfed on the issue of punitive damages.

Each error committed by the Trial Court contravenes the well settled legal principles established by this Court which apply to instructing the jury. These errors resulted in the jury being mislead and confused regarding the issues submitted to them. They were highly prejudicial to Amfed at the trial and are critical to the review of the issues presented by this appeal. The

Appellee's only response is that no legal authorities are cited to support the claims of error other than a reference to Miss. Code Ann. § 11-1-65.¹ This rather cavalier approach does not address the issues and is really not a response at all. Either the Appellee is unwilling to recognize the impact of the Trial Court's actions on the Appellants' right to a fair trial or is unable to offer any explanation of or defense for them. The Appellants suggest that the latter is the most probable of the two.

To dispel any doubt regarding the Appellants' objections to the instructions and the grounds for them, the Appellants will discuss the applicable legal principles and address the reasons why the actions by the Trial Court constitute error and require a reversal of this case. First, giving instructions P-1, P-2, P-3, P-6, P-8 and P-12 at the conclusion of the compensatory damage phase. Second, giving instructions P-15, P-21 and P-23 at the conclusion of the punitive damage phase. Third, the summary refusal to even consider instructions D-10, D-11, D-12, D-13 and D-16 requested by Amfed at the conclusion of the punitive damage phase. Fourth, the attempt to orally instruct the jury on the issue of punitive damages followed by reading instruction D-23. Fifth, the failure to instruct the jury on the "clear and convincing" standard of care applicable to the punitive damage issue.

A. The Legal Principles Applicable to the Jury Instructions in Issue

The general law applicable to jury instructions has been well settled by a long and unbroken line of case decided by the Court and are not subject to debate. In *Beckwith v. Grant*, 861 So.2d 299, (Miss.2003) the Court stated that these include the principle that instructions are to be read as a whole and that the trial judge has considerable discretion in instructing the jury. (*citing Southland Enterprises, Inc. v. Newton County*, 838 So.2d 286, 289 (Miss.2003); *citing Splain v. Hines*, 609

¹ See Appellee's Brief, Section J, p.48, "Jury Instructions."

So.2d 1234, 1239 (Miss.1992)). *Beckwith* also holds that a party is entitled to an instruction which presents his side of the case **but the instruction must correctly state the law.** (emphasis supplied) (citing *Humphrey v. State*, 759 So.2d 368, 380 (Miss.2000); citing *Heidel v. State*, 587 So.2d 835, 842 (Miss.1991)). Finally and most appropriately, the Court stated that it is error to grant an instruction which is likely to mislead or confuse the jury in regard to the principles of law applicable to the facts in evidence. (citing *Southland Enterprises*, 838 So.2d at 289; citing *McCary v. Caperton*, 601 So.2d 866, 869 (Miss.1992)).

It is also well settled that instructions which simply state a legal conclusion, without incorporating the specific facts of the case are abstract, improper and should not be given. This is because that even if the abstract statement is correct in principle, a statement taken out of context has a great potential to mislead or confuse the jury if it is not related to the facts of the case. In *Nelson v. Miller*, 259 So.2d 702, 706 (Miss.1972), this Court held that an instruction was abstract because it did not relate to the facts in the case and was erroneously given. The Court referred to this as a long standing rule and cited a number of supporting cases and secondary authorities including *Lawson v. State*, 87 Miss. 562, 40 So. 325 (1905); 53 Am.Jur. Trial, § 573, p. 451 (1945); and 38 Am.Jur. Negligence, § 370, p. 1089 (1941). (See also *Phillips v. Illinois Central Railroad Company*, 797 So. 2d 231 (Miss.App. 2000); and *Beckwith v. Shah*, 964 So.2d 552 (Miss.App. 2007) which affirm the Court's adherence to this principle.

Additionally, the Court provided a test to determine if an instruction is abstract and that is whether or not the instruction relates to facts shown by the evidence on the issues involved. If an instruction merely states a principle of law without relating it to an issue in the case, it is an abstract instruction and should not be given. *McCarty v. Kellum*, 667 So. 2d 1277 (Miss. 1995) (quoting *Freeze v. Taylor*, 257 So.2d 509 (Miss.1972)).

Finally, jury instructions are governed by Rule 51 of the Mississippi Rules of Civil Procedure. Subparagraph (a) of the Rule pertains to oral instruction and provides that at the commencement of, and during the course of a trial, the trial court may orally give the jury cautionary and other instructions of law relating to trial procedure, the duty and function of the jury, and may acquaint the jury generally with the nature of the case. However, Subparagraph (c) limits the trial court's authority to orally instruct the jury to those matters identified in subparagraph (a) and expressly provides that all other instructions must be in writing.

B. The Erroneous Instructions in the Compensatory Damage Phase

1. Instructions P-1 and P-12 (R.390, 398)

Instructions P-1 and P-12 constitute error because they peremptorily instruct the jury to return a verdict for the Appellee on the contractual claims for the widow's lump sum plus the penalty and the deficiency in the payment of the children's benefits plus the penalties, even though these claims were unquestionably paid some four years prior to the trial. The fact that the claims had been paid was omitted from the instructions. In order to properly assess the prejudicial effect of these instruction to the Appellants, it is necessary to understand that the contractual claims had never been denied and were paid on June 26, 2003. Thus, there were no unpaid claims due under the contract at the time of the trial with the possible exception of a \$349.00 penalty to each of the two children.

The only issues which the Trial Court could consider submitting to the jury in the compensatory damage phase was whether or not Amfed acted in bad faith between April 11, 2003, when they were notified of the Lump Sum Order and June 26, 2003, when the contractual claims and penalties were actually paid and, if so, whether Jordan was entitled to recover extra contractual (or *Veasley* damages) for emotional distress.

By giving these instructions in the form in which they were given, the jury was confused over the status of the contractual claims and were misled by the false impression that these claims had not been paid.. This constitutes reversible error on the grounds that the jury was not properly instructed on the real issues and created the highly unfavorable and prejudicial impression that Amfed had not paid the claims under the contract.

2. Instruction P-2 (R.391)

Instruction P-2 is a classic example of an abstract instruction which this Court has repeatedly held to be erroneous and clearly demonstrates the reason for the rule. The following quote illustrates the prejudicial effect of the instruction:

The Court instructs the jury that the purpose of the Mississippi Workers' Compensation Act is to facilitate payment of compensation to an injured worker, or in the event of the death of the worker to his widow and children without delay and without unnecessary cost.

The purpose of this Act is to relieve society and the public of the burden of having to support children and widows who have been left without means of support because of the death of the worker in an industrial accident. (Instruction P-2)

The instruction is an abstract statement, not related to the issues and facts of the case, which was likely to and did confuse and mislead the jury by leaving the impression that Amfed in some way violated the Act. This is clearly contrary to the rule announced in the cases cited above and constitutes reversible error.

3. Instruction P-3 (R.392)

Instruction P-3 is erroneous because it purports to impute the acts of Amfed Companies LLC to American Federated Insurance Company on the theory that Amfed Companies LLC acted as its agent and is an incorrect statement of the law applicable to cases alleging bad faith.

4. Instruction P-6 (R.395)

Instruction P-6 is objectionable on two grounds. First, it is an incorrect statement of the law of damages as it pertains to this case and the elements to be considered by the jury. It instructs the jury that, if they find for the Plaintiff, it is their duty to award damages “which will completely compensate her reasonably for all detriment suffered by her . . .” It further instructs the jury that in arriving at the amount of the award they “**shall** compensate her reasonably for any fears, anxiety, or other mental or emotional distress, including economic distress or losses (sic) resulting therefrom . . .” (emphasis supplied) Second, it peremptorily instructs the jury to award damages for “fears,” “anxiety,” and “economic distress or losses” without informing the jury what these terms mean and what facts are necessary to support them. These are not proper elements of damages. Even if these were proper damages, the jury should be instructed what facts the Plaintiff must prove by a preponderance of the evidence before the jury can make an award. The instruction fails to do this and therefore constitutes reversible error.

5. Instruction P-8 (R.397)

Instruction P-8 is an attempt to instruct the jury on the award of damages, but is fatally flawed for several reasons. First, it instructs the jury that they may consider “the full measure of all damages reasonable foreseeable by the failure of the Defendants to pay the workers’ compensation benefits including the amount owed under the lump sum order . . .” This again gives the impression that the contractual claims, including the widow’s lump sum award, had not been paid when in fact they had been.

Second, the instruction goes further and defines reasonable foreseeable damages to include anxiety and emotional distress “especially in the area of insurance where the loss of a loved one is exacerbated by the attendant financial effect of that loss. Also to be considered is the additional

inconvenience and expense in effort to have the nonpayment or under payment correct.” This language serves no purpose other than to inflame and prejudice the jury against the Amfed by further suggesting that the contractual claims had not been paid. The mention of the loss of a loved one is highly prejudicial in any context but especially when the loss of the loved one occurred some two years before the claim for the lump sum benefits was made and completely disregards the fact that Amfed had been paying biweekly benefits since Brown’s death.

Third, the concluding paragraph allows the jury to award damages for “past mental anguish, if any, anxiety or emotional distress caused to the Plaintiff, if any, and additional inconvenience and expense, if any.” The instruction does not define what additional inconvenience and expense means and does not give the jury any guidelines for making an award for them even if they are valid elements of damage.

C. The Erroneous Instructions in the Punitive Damage Phase

The only instructions given to the jury on the issue of punitive damages were P-15, P-21, P-23 and the Trial Court’s oral instruction. Although, Amfed’s attorneys attempted to offer instructions D-10, D-11, D-12, D-13 and D-16 on the issue, the Trial Court summarily declined to consider them and they were accordingly marked as having been refused. The errors committed by the Trail Court in this regard are discussed below.

1. Instruction P-15 (R.399)

Instruction P-15 is a statement of the implied covenant of good faith and fair dealing inherent in contract between parties. The statement is not related to the facts or issues in the case and does not instruct the jury to do anything. It is another example of an abstract instruction which this Court has repeatedly condemned. It is a perfect illustration of the reason for the condemnation. The only purpose of the instruction is to imply to the jury that Amfed had in some way breached this

covenant of good faith and fair dealing with Jordan without informing the jury what facts must be established to support such a conclusion. It is highly prejudicial to Amfed especially when it is given to a jury considering whether or not to award punitive damages.

2. Instruction P-21 (R.400)

Instruction P-21 is an incorrect statement of the law and a mischaracterization of the evidence for several reasons. First, it omits the standard of proof and consequently does not inform the jury that the Plaintiff is required to prove the elements by clear and convincing evidence. Second, it mischaracterizes the evidence by framing the instruction in the context of a denial of the claims when the evidence is clear that there never was a denial of the claim and the only issue was whether or not there was an unjustified delay in paying the claims. Third, the third element states that the Defendants knew or should have known that there was no legitimate reason for not paying the benefits. This casts the elements in the context of negligence, rather than in the context of bad faith litigation where the applicable standard is whether the action was intentional, malicious or performed with a gross and reckless indifference for the rights of others. It is another example of an incorrect statement of fact and law with a very great potential to confuse and mislead the jury.

3. Instruction P-23 (R.401)

Instruction P-23 is an effort to instruct the jury on the issue of punitive damages. It erroneously states the wrong standard of proof for punitive damages by allowing the jury to make an award based on “the preponderance of the evidence” rather than on “clear and convincing evidence.” Thus, it constitutes reversible error. (See Miss. Code Ann. § 11-1-65)

Under section 11-1-65 punitive damages are only allowed where a plaintiff shows by clear and convincing evidence actual malice, gross negligence evidencing a willful, wanton, or reckless disregard for the safety of others, or the commission of actual fraud. (*See also, Bradfield v.*

Schwartz, 963 So.2d 931, 937 (Miss.2006). In order for punitive damages to be awarded, the plaintiff must demonstrate a wilful or malicious wrong, or the gross, reckless disregard for the rights of others. Punitive damages are only appropriate in the most egregious cases. *Bradfield*, at 931. (citing *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 442 (Miss. 1999).

4. Oral Instruction on Punitive Damages

The Trial Court gave the following oral instruction to the jury on the issue of punitive damages:

THE COURT: Let me see it. I'll go ahead and be explaining to you what it's for. In a case like this there's been some testimony about the conduct of these people, how they handled this case. You're very familiar with that. I'm sure you have considered that. Where you have conduct where it's questionable as to whether or not it was done in a way that would be satisfactory to the community or to the general public, you have a right to consider whether or not in their handling, the way they handled the case and the way this case came about and the question came up as to whether or not it was sufficiently handled, in accordance with what you've already found in a compensatory matter, as to whether or not the way the case was handled that the people should be punished, not for the sake of giving these people a lot of money or whatever, but for the purpose of protecting the public so that if they have done something wrong this would deter them from doing the same thing in the future to other people in the community, other people in society that might be having a problem like this. Do you understand what I'm saying? You all heard about what punitive damages is. You can't put a corporation or an insurance company in jail. The only way you can affect the outcome or control their conduct, if that's what you should decide you should do, is by penalizing their pocketbook. Does that sound simple enough? They say they have an instruction. I thought they did. I'm not going to delay this trial and go try to type up one now. It's the Court's responsibility to instruct you, but the lawyers usually bring that law for me to do that.

The oral instruction on a substantive issue clearly violates Rule 51 of the Mississippi Rules of Civil Procedure and constitutes reversible error for that reason alone. However, in addition, the instruction is not a correct statement of the law and does not instruct the jury that the claim for

punitive damages must be established by clear and convincing evidence. To compound this error and to amplify the harmful and prejudicial effect of the oral instruction, the Trial Court then read Instruction No. 23 (which is discussed in Paragraph 3 above) to the effect that the standard of proof is “from a preponderance of the evidence.” This unquestionably resulted in the jury being confused and misled on the elements of the punitive damage claim as well as misinformed on the standard of proof necessary to establish the elements.

5. Instructions D-10, D-11, D-12, D-13 and D-16 (R.429-433)

Instructions D-10, D-11, D-12, D-13 and D-16 were requested by Amfed, and refused by the Trial Court. The colloquy between the Trial Court and counsel regarding these instructions is quoted below:

THE COURT: I’m giving all these instructions. Let’s go.

MR. THOMPSON: Your Honor, I’ve got a few more that I know you’re going to reject.

THE COURT: Be refused. The Court is not going to even look at any more instructions from you.

MR. THOMPSON: Yes, sir. And I know you’re going to refuse them but can I just –

THE COURT: You can enter them into the record for the purpose of –

MR. THOMPSON: Thank you, Your Honor. Instruction D-10, we would want that instruction for the punitive damage. D-11, D-12, D-13 and D-16.

These instructions constitute a correct statement of the law on the issue of punitive damages as it pertains to the evidence in this case and would have accurately instructed the jury on the elements and standard of proof. It was error for the Trial Court to refuse them.

6. The Only Instructions Given to the Jury on the Issue of Punitive Damages were P-15, P-21, P-23 and the Trial Courts Oral Instruction

Instructions P-15, P-21, P-23 and the Trial Courts oral instruction are all incorrect statements of the law and none of them instruct the jury on the clear and convincing standard of proof

necessary to prove punitive damages. Therefore, reading the instructions on this issue as a whole does not cure the error and requires that the case be reversed on the issue of punitive damages.

CONCLUSION

Jordan's evidence was totally insufficient to establish a claim of bad faith. The verdicts were the result of the Jury being confused or misled by various errors committed by the Circuit Court during the trial, including the Court's instructions on the law applicable to both the compensatory and punitive phases of the trial. Consequently, the verdicts are contrary to law and against the overwhelming weight of the evidence and the Judgment should be reversed.


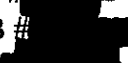

Respectfully submitted, this the 5th day of January, 2009.

AMFED COMPANIES, LLC and
AMERICAN FEDERATED INSURANCE
COMPANY, APPELLANTS

By: 

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CERTIFICATE OF SERVICE

I, Lori Jordan Graham, one of the attorneys of record for Appellant in the above referenced action, do hereby certify that I have this day caused to be delivered, via United States Postal Service, first class, postage prepaid, a true and correct copy of the above and **APPELLANTS REPLY BRIEF** to the following:

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ATTORNEY FOR APPELLEE

Honorable Billy Joe Landrum
Post Office Box 685
Laurel, Mississippi 39441
CIRCUIT COURT JUDGE

THIS the 5th day of January, 2009.


LORI JORDAN GRAHAM