MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-TS-01668-COA

MARCY WRIGHT **APPELLANT**

VS.

ROYAL CARPET SERVICES, INC. **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Marcy Wright, Appellant;
2. John Adams Wright, Former Plaintiff;
3. Jim Waide, Esq., Attorney for Appellant;
4. Waide & Associates, P.A., Attorneys for Appellant;
5. Royal Carpet Services Inc., Appellee;
6. Paul Jenkins, Esq., Attorney for Appellee; and
7. Wayne Williams, Esq., Attorney for Appellee.

This the 2nd day of February, 2009.

Jim Waide

JIM WAIDE

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STATEMENT REGARDING ORAL ARGUMENT

This case presents a simple issue for which oral argument is not needed.

STATEMENT OF THE ISSUES

WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ALLOWING DEFENDANT TO PUT ON EVIDENCE CONCERNING WRIGHT'S BEING COVERED BY INSURANCE.

STATEMENT OF THE CASE

A. Course and Proceedings Below

1. On February 13, 2004, Marcy and her son, John Adams Wright, filed their Complaint in the Lowndes County Circuit Court alleging breach of contract, negligent failure to warn of a known danger, and for products liability against Metropolitan Property and Casualty Insurance Company, Metlife Auto and Home, Economy Premier Assurance Company, Royal Carpet Service, LLC, Service Pro South, Microban Systems, Inc., and II Rep-Z Inc. [R:8][1]

2. On March 3, 2004, the Wrights filed their Amended Complaint. [R:71]

3. On March 26, 2004, the insurance companies removed the case to federal court. [R:146, 148]

4. On March 12, 2006, the federal court remanded this case back to the Circuit Court of Lowndes County, Mississippi, after the Wrights compromised and dismissed their claims against all the defendants except Service Pro South and Royal Carpet Service. [R:158]

5. On July 7, 2006, Royal Carpet filed its motion for summary judgment [R:163], with memorandum [R:413]

6. On November 21, 2006, the Circuit Court denied Defendant's motion for

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[1]Citations to the Record will be as follows: [Record: Page Number]. Citations to the Trial will be as follows: [Transcript: Page Number]

summary judgment.[2] [R:843]

7. On August 16, 2007, the Wrights[3] filed a motion *in limine* to exclude evidence of Wright's homeowner's insurance having settled, citing the collateral source rule and Miss. R. Evid. 403. [R:902]

8. On August 21, 2007, trial commenced. [T:2]

9. On August 23, the jury returned a verdict in favor of Royal Carpet. [R:1018]

10. On September 6, 2007, the Circuit Court entered a judgment in favor of Royal Carpet. [R:1024]

11. On September 24, 2007, Marcy Wright filed her notice of appeal to this Court. [R:1026]

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[2]The Court also denied Defendant's motion to strike experts. [R:842]

[3]After trial, John Adams Wright was dismissed from the case. [R:1022]

STATEMENT OF FACTS

In 1978, Marcy Wright moved to Columbus, Mississippi, with her husband who was in the Air Force, and her infant child. [T:37]

Around 1987 or 1988, Marcy Wright, now divorced, bought the house at issue in this lawsuit. [T:38] Marcy Wright lived in the house with her emotionally disturbed child, John Adams Wright. [T:38] Later, Wright's seriously ill mother would move into a trailer behind her house. [T:40] Prior to the damage to her house, Wright valued the house as between $60,000 and $65,000. [T:39]

On Saturday, October 6, 2001, Wright spent the night with her ailing mother in the trailer behind her house. [T:42] On Sunday, October 7, Wright returned to her house around 5 a.m. and discovered that water was coming out of her house. [T:43] Upon entering the house, Wright noticed that there was an inch or more of water covering the floor caused by busted pipes. [T:43] Wright spent all day Sunday trying to remove the water from the house. [T:44]

On Monday and Tuesday, Wright contacted numerous companies trying to find one with the expertise to do water restoration. [T:45-46] On one of those days, Wright called Royal Carpet concerning the matter and spoke with its owner, Danny Madison. [T: 45-47] Madison agreed to remedy the problem but did not arrive at the house until Thursday, October 11, 2001, two or three days after he was contacted.

[T:49-50]

Madison informed Wright that the water moisture level had absorbed into the wall up to four inches; however, inexplicably, he did not remove the baseboards to dry that area out. [T:50-51] All Madison did was put out de-humidifier and fans, and spray Microban. [T:50-51]

On Monday, October 15, 2001, Madison returned and picked up his equipment; he never checked in on the house during those intervening four days. [T:52] After Madison left, when Wright would return to her house she would detect a strong odor, cough and sneeze, and get welts on her skin and for that reason, she was unable to stay there long. [T:52-53]

A few months later, Wright removed the baseboards and discovered mold behind them. [T:59] Wright was unable to move back into her house because there was mold behind the baseboards of every room and it made her sick. [T:60]

Plaintiff's expert, Joseph M. Drapala, an environmental engineer, provided testimony that the damages claimed by Wright were proximately caused by the negligence of Royal Carpet in failing to respond rapidly to the problem and to adequately remedy the water problem at the Wright residence. [T:238-47] Drapala also opined that Royal Carpet failed to properly inform Wright about the dangers of the antimicrobial compound he applied in the home. [T:238-47] His ultimate opinion

is that Royal Carpet's delay and/or failure to properly address the water damage at issue caused the subject home to experience, and continue to experience, a substantial biological contamination. [T:238-47]

The Wrights sought around $98,000.00 in damages to personal property on their negligence and breach of contract claims. [T:62]

Prior to trial, Plaintiffs filed a motion *in limine* to exclude mention of the insurance companies who insured the house, and the settlement with those companies. [R:902]

At trial, Wright argued the motion asking this Court to exclude evidence that Marcy Wright had homeowners' insurance coverage, that she had filed suit against the insurance company, that the case was settled, and that the insurance coverage was paid. [T:9] Wright argued that the insurance is a "collateral source" and the fact that she had insurance and it was paid is not relevant, highly prejudicial and confusing to the jury. [T:9]

Royal Carpet responded that Marcy Wright made admissions to the insurance company that should be presented to the jury, and the jury would not get the whole story without this information. [T:13] Royal Carpet further argued, "Because if the homeowners' insurance won't come in, I will not be able to get into the mitigation of damages issue." [T:13]

The Court ruled that since Marcy Wright had received remuneration from another outside source, not a party to this litigation, Defendant had the "right to cross-examine her concerning a statement she might have made against her interest in this litigation. But that's as far as it goes." [T:21-22]

At trial, during cross-examination, Defendant's attorney asked Wright, "And the insurance company even offered to have your clothes cleaned early on, did they not?" [T:92] Wright's attorney objected because this was a collateral source issue that was irrelevant. [T:92-93] The Court overruled the objection. [T:93] As Defendant's attorney continued to pursue this line of questioning, Wright's attorney asked to approach the bench, where again he argued that the testimony was irrelevant and unduly prejudicial under the collateral source rule. [T:94-95]

Later during cross examination, Defendant's attorney asked Wright about the list that was submitted to her insurance company. [T:107] Again, Wright's attorney objected citing the collateral source rule. [T:107] The Court overruled the objection. [T:107]

STANDARD OF REVIEW

According to this Court:

> We utilize an abuse of discretion standard when reviewing evidentiary rulings by a trial judge. *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So.2d 200, 210 (Miss.1998). In order to reverse a case on the admission or exclusion of evidence, the

> ruling must result in prejudice and adversely affect a substantial right of the aggrieved party. *Terrain Enters., Inc. v. Mockbee,* 654 So.2d 1122, 1131 (Miss.1995). Thus, not only must the trial judge abuse his discretion, the harm must be severe enough to harm a party's substantial right.

Brandon HMA, Inc. v. Bradshaw, 809 So.2d 611, 618 (Miss.2001).

SUMMARY OF THE ARGUMENT

Wright argued the motion asking this Court to exclude evidence that Marcy Wright has homeowners' insurance coverage, that she had filed suit against the insurance company, and that case was settled and the insurance coverage was paid. Wright argued that the insurance is a "collateral source" and the fact that she had insurance and it was paid is not relevant, highly prejudicial and confusing to the jury. [T:9]

Royal Carpet responded that Marcy Wright made some admissions to the insurance company that it should be able to present to the jury, and the jury would not get the whole story without this information. Royal Carpet also argued that the evidence goes to whether she mitigated her damages. [T:13]

The Court ruled that since Marcy Wright had received remuneration from another outside source, not a party to this litigation, Defendant had the "right to cross-examine her concerning a statement she might have made against her interest in this litigation. But that's as far as it goes." [T: 21-22]

At trial, during cross-examination, Defendant's attorney asked Wright, "And the insurance company even offered to have your clothes cleaned early on, did they not?" Wright's attorney objected because this was a collateral issue that was irrelevant. The Court overruled the objection. [T: 92-93]

Also during cross examination, Defendant's attorney asked Wright about the list that was submitted to her insurance company. Again, Wright's attorney objected citing the collateral source rule. The Court overruled the objection. [T: 107]

Permitting this evidence was clear error. Under Mississippi law, "indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance, cannot be set up by the latter in mitigation or reduction of damages...." *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 618 (Miss. 2001).

ARGUMENT

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ALLOWING DEFENDANT TO PUT ON EVIDENCE THAT WRIGHT HAD INSURANCE AND THAT THE INSURANCE COMPANY OFFERED TO PAY OFF HER CLAIM

At trial, Wright argued that Royal Carpet should not be allowed to put on evidence that she had insurance, but the Circuit Court rejected her argument stating that Royal Carpet was allowed to do so in order to show that Wright failed to mitigate her damages. In doing so, the Circuit Court committed reversible error.

In fact, the rule is specifically designed to prevent a Defendant from mentioning insurance in order to mitigate their damages: "t]he collateral source rule in Mississippi provides that "[c]ompensation or indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance, cannot be set up by the [defendant] *in mitigation or reduction of damages.*'" *Burr v. Mississippi Baptist Medical Center*, 909 So.2d 721 (Miss.2005)(Citing *Busick v. St. John,* 856 So.2d 304, 309 (Miss.2003) (emphasis added in original)). *See also Coker v. Five-Two Taxi Serv.,* 211 Miss. 820, 826, 52 So.2d 356, 357 (1951) (quoting 25 C.J.S. *Damages,* § 99). *Accord, Baugh v. Alexander,* 767 So.2d 269, 272 (Miss.Ct.App.2000).

As the Court stated in *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 618 (Miss.2001):

> Mississippi has recognized the collateral source rule for decades. It states, "[c]ompensation or indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance, cannot be set up by the latter in mitigation or reduction of damages...." *Coker v. Five-Two Taxi Serv., Inc.,* 211 Miss. 820, 826, 52 So.2d 356, 357 (1951) (citing 25 C.J.S. *Damages* § 99). In other words, a tortfeasor cannot use the moneys of others (insurance companies, gratuitous gifts, etc.) to reduce the cost of its own wrongdoing. *See McCary v. Caperton,* 601 So.2d 866, 869 (Miss.1992); *Star Chevrolet Co. v. Green,* 473 So.2d 157, 162 (Miss.1985); *Clary v. Global Marine, Inc.,* 369 So.2d 507, 509 (Miss.1979). *See also Guyote v. Mississippi Valley Gas Co.,* 715 F.Supp. 778, 780 n. 1 (S.D.Miss.1989).

However, the collateral source rule applies only when the compensation is for the same injury for which the damages at issue are sought. *Baugh v. Alexander,* 767 So.2d 269, 272 (Miss.Ct.App.2000).

Further:

> In *Baugh,* which involved an automobile accident, a motion in limine was filed by the plaintiffs to exclude evidence of health insurance and workers' compensation benefits which the plaintiff had been receiving for a previous and distinct injury from the accident. *Id.* at 272. There, this Court found the trial court did not err in denying the motion because the compensation was received for a different injury than those of the case under consideration, and thus the collateral source rule was inapplicable. *Id.* at 272.
>
> Virginia Geske cites three cases in her brief for the proposition that when the collateral source rule is violated, the admission of evidence is reversible error: *McCary v. Caperton,* 601 So.2d 866 (Miss.1992); *Cent. Bank of Miss. v. Butler,* 517 So.2d 507 (Miss.1987); and *Preferred Risk Mut. Ins. Co. v. Courtney,* 393 So.2d 1328 (Miss.1981). These three cases are distinguishable from the instant case in that in the cited cases the sources of compensation are all for the *same* injury. However, in this case, the compensation at issue was for the injury of Jerald's mesothelioma due to asbestos exposure, and not for the damages caused by the alleged unlawful termination of insurance benefits. Since this source of damages is derived from separate and distinct alleged torts, the collateral source rule is inapplicable.

Geske v. Williamson, 945 So.2d 429 (Miss. App.2006)

That is not the case here, where the injuries that the insurance company paid for were the same injuries for which Wright sued Royal Carpet.

In *Smith v. Crawford*, 937 So.2d 446, 447 (Miss.2006), the Court stated:

> There are numerous Mississippi cases which stand for the proposition that references to liability insurance are generally impermissible and constitute reversible error. *See Jackson v. Daley,* 739 So.2d 1031, 1039 (Miss.1999); *Morris v. Huff,* 238 Miss. 111, 117-20, 117 So.2d 800, 802-03 (1960); *Snowden v. Skipper,* 230 Miss. 684, 697, 93 So.2d 834, 840 (1957); *Avent v. Tucker,* 188 Miss. 207, 225-26, 194 So. 596, 602 (1940); *Herrin v. Daly,* 80 Miss. 340, 341-42, 31 So. 790, 791 (1902).
>
> There appears to be one exception to this rule:
>
> this Court has made one exception to this general prohibition. Where a defendant makes an impermissible statement intimating that he does not have insurance, the plaintiff is justified to inform the jury just the opposite. *Snowden v. Webb,* 217 Miss. 664, 674-76, 64 So.2d 745, 750-51 (1953). In *Snowden,* the defense counsel told the jury that any verdict returned would have to be paid out of his client's wages. *Id.* at 674, 64 So.2d at 750. Plaintiff's counsel then informed the jury that "not one cent of this would come out of Mr. Snowden's pocket or wages." *Id.* at 674, 64 So.2d at 749. The trial court sustained the defense's objection and instructed the jury to disregard the remark. *Id.* at 676, 64 So.2d at 751. On appeal, this Court held that the response by plaintiff's counsel was justified and did not constitute reversible error, especially since the circuit judge instructed the jury to disregard the statement. *Id.*

Smith, at 447 -448.

This exception is not applicable to the case *sub judice* because Wright never intimated that she did not have insurance, opening the door to proof that she did.

Other defendants have attempted to establish exceptions to the rule, such as for the purpose of impeachment, but have failed to do so:

> In *McCary v. Caperton,* 601 So.2d 866 (Miss.1992), we held that the trial court committed reversible error in allowing the defendant to introduce evidence of McCary's insurance coverage or benefits of sick leave. *Id.* at 869. We were asked to rule on the issue of whether an

> impeachment exception should be recognized under the collateral source doctrine. *Id.* Our decisions have not recognized an exception to the collateral source rule. *E.g., McCollum v. Franklin,* 608 So.2d 692, 695 (Miss.1992) (holding collateral source doctrine precludes defendant in automobile accident from cross-examining plaintiff as to whether plaintiff has received insurances proceeds, including plaintiff's health insurance); *Eaton v. Gilliland,* 537 So.2d 405, 408 (Miss.1989) (holding that defendant's attempted elicitation of evidence of insurance proceeds paid with respect to the accident by a collateral source could have been prejudicial and confusing, further the jury could have been left with the impression that the plaintiff was attempting to improperly and illegally "double dip" or receive a "wind fall" to which he was not entitled); *Central Bank of Miss. v. Butler,* 517 So.2d 507, 511 (Miss.1987) (holding that collateral source doctrine properly applied to prevent elicitation of evidence that plaintiffs received compensation from surety bond maintained completely independent of any efforts made by defendant); *Star Chevrolet Co. v. Green by Green,* 473 So.2d 157, 162 (Miss.1985) (holding that insurance in behalf of the plaintiff cannot be set up by the adverse party in mitigation of the loss); *Preferred Risk Mut. Ins. Co. v. Courtney,* 393 So.2d 1328, 1332-33 (Miss.1981) (holding that under the collateral source rule, a tortfeasor is not entitled to have the damages for which he is liable reduced by proving that an injured party has received compensation from a collateral source wholly independent of the tortfeasor).

Busick v. St. John, at 309.

Even if a defendant could show that the evidence is being offered for another purpose, it still must be filtered through Miss. R. Evid. 403:

> In view of the well-established policy of this State against interjecting such information in the trial without legitimate purpose other than as an attempt to color the juror's view of the case, we conclude that this policy ought to weigh heavily against admitting such evidence under Rule 403 even though some alternate basis for admitting it might have some arguable legal basis.

Toche v. Killebrew. 734 So.2d 276, 283 (Miss. App.1999)

The reason for the rule is that this evidence is substantially more prejudicial than any probative value this evidence might have, as stated in *Eaton v. Gilliland*, 537 So.2d 405 (Miss.1988):

> We are unable to say that the violation of this rule in attempting to reduce Gilliland's liability before the jury was not prejudicial and confusing. For certain the jury could have gotten the impression that Eaton was attempting to improperly and illegally "double dip" or receive a "wind fall" to which he was not entitled because 80% of the medical and hospital bills had already been paid by an insurance company which was, as a matter of law, wholly independent of him (Gilliland), the wrongdoer. . .Finding reversible error, we have no alternative except to remand this case to the Circuit Court of Forrest County for a new trial in a manner not inconsistent with this opinion.

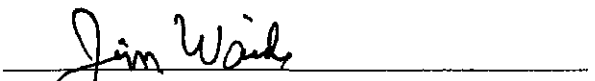
Here, as in *Eaton*, the Court permitted a defense based on a theory that by having her own insurance coverage, Wright was attempting to "double dip" or "receive a windfall." As in *Eaton*, this is reversible error.

CONCLUSION

Because of the prejudicial injection of the insurance issues, Wright asks this Court to reverse and remand this case to the Circuit Court. The Circuit Court abused its discretion in allowing evidence concerning insurance before the jury, and the harm was severe enough to harm Wright's substantial right to a fair trial.

Respectfully submitted,

WAIDE AND ASSOCIATES, P.A.

BY: 

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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The Honorable Lee J. Howard
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THIS the 2 day of February, 2009.

JIM WAIDE

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-TS-01668-COA

MARCY WRIGHT

APPELLANT

VERSUS

ROYAL CARPET SERVICES, INC.

APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32(c), the brief contains:

A. 3,236 words in proportionally spaced typeface.

2. The brief has been prepared:

A. In proportionally spaced typeface using WordPerfect 12.0 in Times New Roman, 14 point.

3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Rule 32, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

This, the 2nd day of February, 2009.

BY: _____
JIM WAIDE