IN THE SUPREME COURT OF MISSISSIPPI

TEQUILA THOMAS — APPELLANT

v. — No. 2008-CA-00315

ANTHONY JONES
PHILADELPHIA INSURANCE COMPANY — APPELLEES

BRIEF OF APPELLANT

ORAL ARGUMENT IS REQUESTED

SORIE S. TARAWALLY, Esq.
MBN: [redacted]
P.O. Box 31027
JACKSON, MS 39286-1027
ATTORNEY FOR APPELLANT
Tel. (601) 906-0352
Fax. (662) 541-0545

IN THE SUPREME COURT OF MISSISSIPPI

TEQUILA THOMAS — APPELLANT

v. — No. 2008-CA-00315

ANTHONY JONES
PHILADELPHIA INSURANCE COMPANY — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Mississippi Supreme Court may evaluate possible recusal or disqualification:

1. Tequila Thomas, Vicksburg, Mississippi — Appellant

2. Anthony Jones; MDOC Perchman, Mississippi — Appellee

3. John C. Hall II, Esq. — Counsel, Philadelphia Ins. Co.
P.O. Box 119
Jackson, MS 39205-0119

4. Philadelphia Insurance Companies — Appellee
One Bala Cynwood Plaza
Suite 100
Bala Cynwood, PA 19004

5. Judge Frank Vollor — Circuit Court Judge
Warren County Circuit Court
P.O. Box 351
Vicksburg, MS 39181

6. SORIE S. TARAWALLY, Esq.
P.O. Box 31027
JACKSON, MS 39286-1027 — ATTORNEY FOR APPELLANT

Respectfully Submitted, this 31st, July, 2008.

By: Sorie S. Tarawally

SORIE S. TARAWALLY, Esq.
MISSISSIPPI BAR NUMBER: [redacted]
ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF MISSISSIPPI

TEQUILA THOMAS — APPELLANT

v. — No. 2008-CA-00315

ANTHONY JONES
PHILADELPHIA INSURANCE COMPANY — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Mississippi Supreme Court may evaluate possible recusal or disqualification:

1. Tequila Thomas, Vicksburg, Mississippi — Appellant

2. Anthony Jones; MDOC Perchman, Mississippi — Appellee

3. John C. Hall II, Esq. — Counsel, Philadelphia Ins. Co.
P.O. Box 119
Jackson, MS 39205-0119

4. Philadelphia Insurance Companies — Appellee
One Bala Cynwood Plaza
Suite 100
Bala Cynwood, PA 19004

5. Judge Frank Vollor — Circuit Court Judge
Warren County Circuit Court
P.O. Box 351
Vicksburg, MS 39181

6. SORIE S. TARAWALLY, Esq.
P.O. Box 31027
JACKSON, MS 39286-1027 — ATTORNEY FOR APPELLANT

Respectfully Submitted, this _____, July, 2008.

By: _____

SORIE S. TARAWALLY, Esq.
MISSISSIPPI BAR NUMBER: [redacted]
ATTORNEY FOR APPELLANT

TABLE OF AUTHORITIES

CASES:

STATEMENT OF ISSUES

1. THE ENTRY OF SUMMARY JUDGMENT BY THE TRIAL COURT WAS ERROR GIVEN THE POSTURE OF THE PROCEEDINGS.

2. THE ENTRY OF SUMMARY JUDGMENT AS A PUNITIVE MEASURE WAS UNDULY HARSH AND LESS DRACONIAN SANCTIONS WERE AVAILABLE TO THE COURT.

3. THE ENTRY OF SUMMARY JUDGMENT FORECLOSES AN INQUIRY INTO THE PROBABILITY OF ASSESSING PUNITIVE DAMAGES AGAINST THE APPELLEES.

STATEMENT OF THE CASE

Ms. Tequelia Tavert Thomas ["Ms. Thomas"] was employed by Five County Child Development Program, Inc. ["Five County"]. Five County has a fleet of automobiles for which it procured automobile liability insurance from Philadelphia Insurance Companies ["PIC"]. Five County provided Ms. Thomas an insured automobile that she keeps and uses seven days a week, twenty-four hours a day. On September 7, 2003, Ms. Thomas's vehicle was hijacked by defendant Anthony Jones as she was in the process of entering the vehicle to go and pick up one of her employer's clients who was getting off work earlier than scheduled from one of the casinos operating in Vicksburg, Mississippi. Resulting from this hijacking and kidnaping incident, Ms. Thomas sustained numerous debilitating injuries. She filed a claim for workers compensation benefits under our MWCC laws which claim was contested by Employer and its Carrier; she was denied benefits by the Commission and affirmed by Judge Vollor, sitting as the presiding and appellate judge of the Circuit Court of Warren County, Mississippi. See: Thomas v. Five County and Commerce and Industry Insurance Company, Circuit Court of Warren County, Mississippi; #2005-0294-CI. See also Thomas v. Five County and Commerce and Industry Insurance Company, Ms. Sup. Ct. Docket No. 2006-TS-00121 (2006-WC-00121-COA)[Mississippi Appeals Court reversed a dismissal by Judge Vollor of Appellant's Workers Compensation case].

On September 6th, 2006, Tequelia filed a complaint against the uninsured hijacker, Anthony Jones, and the automobile liability insurer, Philadelphia Insurance Company. This was followed by an amended complaint filed on September 20, 2006 and served on each defendant. The amended complaint alleged Breach of Contract/Unfair Claims Handling Practices/Bad Faith against PIC and Negligence against Jones. On October 12, 2006, defendant Anthony Jones filed his request for Admissions propounded to Ms. Thomas. On or about October 25, 2006, PIC filed its Answer, Affirmative Defenses and a Motion to Stay. From October to December 2006, pleadings and responses were filed by Jones and the Plaintiff in this Circuit Court Proceedings.

Meanwhile, from January to April, 2007, Plaintiff and PIC litigated PIC's Declaratory Judgment Action in federal court. This action was dismissed by the federal court on May 31st, 2007. In spite of PIC's motion to stay the state court action and its initiation of litigation on the issue of coverage in federal court in its Declaratory action, the circuit court entered a Scheduling Order in April 2006 and the parties commenced or continued discovery. PIC deposed Ms. Thomas. Counsels for PIC and Ms. Thomas engaged in discussions to conduct a 30(b)(6) deposition of a PIC designated representative. Counsel for PIC, upon being given the parameters of the deposition could still not designate a deponent. Counsel for Ms. Thomas as agreed between he and counsel for PIC

filed a Notice of Deposition styled Re-Notice of Deposition in the docket entry. This notice as agreed upon between counsels left blank the identity of the deponent to allow counsel for PIC to designate the deponent and the date of the deposition open as counsels contemplated a deposition to be taken in Philadelphia, Pennsylvania. Both counsels further discussed the necessity to extend the discovery period beyond that prescribed in the scheduling order.

On October 16th, 2007, without having the 30(b)(6) deposition, PIC filed its motion for summary judgment and served it only on Ms. Thomas. On November 7, 2007, PIC filed its Notice of Hearing and this was received by Ms. Thomas' attorney on the 12th November, 2007, as he was leaving for an emergency trip to Freetown, Sierra Leone, West Africa. Counsel for Ms. Thomas immediately called PIC's counsel to advise him of his unavailability and faxed him a notation to that effect on PIC counsel's letter and Notice. As a result of this fax and telephone call, counsel for PIC via his assistant in his office assured counsel for MS. Thomas that the hearing would be rescheduled. In spite of this assurance, counsel for PIC wrote a letter with an "Agreed Order of Dismissal" to the presiding judge on November 16, 2007; in this letter he pursued a ruling on his motion without informing the court of his prior contacts with Ms. Thomas' counsel nor to even advise the court that counsel for Ms. Thomas was out of the country. We further note

here that the noticed hearing was indeed cancelled.

The Court, this writer assumes, being unaware of counsel's absence and presented with a fact scenario of just unresponsiveness by counsel for Ms. Thomas wrote a letter dated November 20th, 2007, to Ms. Thomas' counsel that required a response by December 4th, 2007; as it turned out, this deadline was a day before counsel's return on the evening of December 5th, 2007. Counsel for MS. Thomas on his return and discovery of the deadline letter from Judge Vollor, immediately sent a letter, via facsimile, to the Court advising it of his absence and return and asking for fifteen additional (15) days to file a response. The Court responded via a note scribbled on the letter that the request was not in a proper (motion) form. [Rec. at 174].

On 6th December, 2007, the Court signed an order dismissing the case because of Plaintiff's failure to respond. This order was entered on the 7th, December, 2007. On December 10th, 2007, unaware of the entry of the order, counsel for Ms. Thomas filed her Motion to Compel Discovery, Deny or Stay Motion for Summary Judgement with exhibits attached to support her contentions. This motion was never ruled upon by the Court. On December 17th, 2007, Ms. Thomas now being aware of the Court's entry of the order of dismissal filed her motion to set aside the Order of Dismissal which was denied. Feeling aggrieved, Ms. Thomas, appellant herein, files this appeal.

The entry of summary judgment is premature, arbitrary and capricious, an abuse of discretion and was pursued by counsel for PIC without disclosing to the court all the facts and circumstances surrounding the case and its progress. Counsel for PIC was less than forthcoming in giving ful information to the Court in its pursuit of the summary judgment motion and order, especially as it cancelled the noticed hearing but then sent a letter the day after seeking the entry of summary judgment without apprizing the court of all pertinent facts, to-wit, counsel's absence from the country.

STATEMENT OF FACTS

I

The incident at the basis of this suit occurred on September 7, 2003. On that day, Ms. Thomas was about to enter into her employer provided automobile and insured by PIC when she was accosted by Anthony Jones, a former boyfriend. Anthony Jones pulled a gun and pointed it to her head, grabbed the keys from her as she was opening the driver side door, opened the door and shoved her into the vehicle and attempted to drive off with her. She fought for her freedom and a struggle ensured. She was able to free herself from Jones and jumped out of the moving vehicle. Jones drove over her prostrate body as he made his getaway from the scene of the carjack and attempted kidnap. Anthony Jones is presently serving fifty-three year sentence at Parchman for his crimes that day.

Five County provided to Ms. Thomas the vehicle, seven days a week, twenty-four hours per day. As we say it in our colloquial expressions, "twenty-four seven," meaning twenty-four hours a day and seven days a week, at all times. That vehicle was insured with PIC. See *Commercial Lines Policy Common Policy Declaration*, attached to the *Amended Complaint* and also an exhibit in PIC's *Motion for Summary Judgment*.

On September 7, 2003, Ms. Thomas received a call from her charge for that day to pick her up from the casino where she had

earlier dropped her off for work as she was getting off work earlier than scheduled. She was attempting to enter into the vehicle provided for her by Five County, and insured by PIC when Jones struck. Jones put a gun to her head, took the keys from her, shoved Ms. Thomas into the vehicle and took control of the insured vehicle without her permission. She struggled with him, fought him off and was successful in freeing herself. She jumped out of the moving vehicle and Jones even ran over her with the vehicle. Ms. Thomas was badly injured. See Exhibit 4 at 10, 11, 13, and 15; *Plaintiff's Motion to Compel Discovery, Deny or Stay motion for Summary Judgment*. [Rec. at 169-71].

It is important to re-state that this is an automobile liability case and PIC is the insurer for auto liability, comprehensive, uninsured and medical coverage that arise from the use and operation of the insured vehicle. Ms. Thomas is an insured under the policy [under the policy definitions of "insured"] because she was entrusted with the vehicle seven days a week and twenty-four hours a day to use as she deems fit, including the employer's purposes for which employer would provide gas and pay her for her time. On personal uses, she would buy her own gas. But she would not be paid for that time.

So even if she was on a pleasure trip or a private errand, her employer would not pay her for her time nor provide gasoline, but it it is immaterial to the coverage on the vehicle. In a nutshell,

where she was going and what she was doing is immaterial as long as it was not a criminal venture. She was at all times a permissive user and as such an insured. The operator of the vehicle at the time of her injury - Anthony Jones - was not a permissive user. Therefore, he was not insured. The insurance policy clearly states this under exclusions. He caused her the injury and compensation is due under the policy coverage. See *Policy of Insurance* attached to PIC's *Motion for Summary Judgment*.

There were discussions between Ms. Thomas and PIC on the scope of coverage and the benefits due her. But these discussions were not satisfactory. The medical benefits due an insured may have been paid by the insurer or offered to be paid. But we are faced with medical bills of over two hundred thousand dollars ($200,000.00) or more as against a liability cap of five thousand dollars ($5000.00) in the policy. Their offer to pay her medical bills to the limits of the cap rang shallow.

This law suit followed[1], and the Amended Complaint was filed on September 20, 2006. [Rec. at 5-8]. The defendants are Anthony Jones and PIC, as the uninsured motorist carrier. We have in the Statement of the Case provided a narrative of events during this

[1] Thomas timely filed a claim under the workers compensation laws and that claimed was denied by the Commission and dismissed by Circuit judge Vollor which dismissal was reversed by the Court of Appeals and upon remand the case was gain dismissed by Circuit judge Vollor. This dismissal was entered on December 10, 2007, three days after the dismissal of the negligence and bad faith claim.

period and in the interests of brevity, a reprise here is not necessary. But we add here an exchange between counsels for Thomas and PIC via e-mail in August 2007 on the need for the 30(b)(6) deposition.

Sorie: John, I am waiting for your response. I am also contemplating a motion of recusal of Judge Vollor.

Hall: Hello Sorie. I have been out of the office. At any rate, I am working on a Motion for Summary Jmt. and hope to have it filed early next week. I suggest holding off on making plans to go to Philadelphia until we get a ruling. What do you think? I will probably oppose a motion to recuse Judge Vollor.

Sorie: John: I am laughing here and hard; you want to file a motion to kill my case but I should hold up on discovery to buttress my case until there is a ruling on your kill motion. I am laughing all the way to the poor house. Look, your client insured a vehicle and my client suffered a loss during the operation and use of the vehicle. This is not the MWCC case and i(sic) have to admit that my client gave testimony that kills her MWCC case during the deposition but she told me she was confused; her deposition testimony if allowed to stand kills the MWCC case theory but I am not trying a MWCC case with you. Our case with Philadelphia is a coverage question and Ms. Thomas could be headed to the whore house in the vehicle, she is covered. My client needs money and the cost of settlement increases every day Philadelphia holds out. Coverage in this case should not have been denied as there is a plethora of cases dealing with getting into and alighting from a covered vehicle. I need to schedule the deposition because of the scheduling order. See also *Plaintiff's counsel's letter to PIC dated September 20, 2007 and an exhibit numbered 1 attached to Motion to Compel Discovery, Deny or Stay Motion for Summary Judgment. [Rec. at 175]*.

It was in the midst of this exchange that counsel for PIC filed his Motion for Summary Judgment on October 16, 2007, but after Plaintiff's counsel had filed his notice to do the 30(b)(6) deposition of the corporate designee. Instead of agreeing to setting and doing the deposition of the corporate designee, counsel proceeded on his course to pursue his summary judgment objective, and especially at a time when he knew that counsel was out of the country. This is what was alluded to in the telephone messages left on November 12th, 2007 and the letter and notice of hearing received that day and responses faxed to the court and counsel for PIC.

II

In November 2007, counsel for Ms. Thomas had to leave for an emergency trip to Sierra Leone. This information was posted on the LISTSERV to which both counsels belong. Counsel's trip was posted to cover a period from the end of the first week in November to its end. Counsel for PIC without any prior notice or consultation nor agreement from counsel for Thomas set his motion for summary judgment in the middle of November, November 15th, 2007, a time known to counsel that counsel opposite was absent or would be absent from the country. As fate would have it, counsel's Notice of Hearing and Letter to Circuit Clerk arrived at departing counsel's office as he was leaving on the 12th to catch a plane from Jackson to Baltimore, on the first leg of his journey. He

hurriedly scribbled notes on the Letter and Notice. Exhibits 2 and 3 to *Plaintiff's Motion to Compel Discovery, Stay or Deny Motion for Summary Judgment*. [Rec. at 175]. We must emphasize that this hearing date was selected without input from the counsel for Ms. Thomas. On receipt of notice of the hearing, counsel for Ms. Thomas reminded counsel for PIC that the date selected would not be convenient since he would be out of the United States for an emergency trip. [Rec. at 189, Ex. 3]. Counsel for Ms. Thomas requested that the hearing be re-scheduled. [Rec. at 189, Ex. 3]. The paralegal for PIC counsel called and had a discussion with counsel for Ms. Thomas on the evening of November 12, 2007, when counsel was in transit in Baltimore that they would reschedule the hearing on the summary judgment motion. So when counsel boarded the plane for his trip to Africa, it was with the assured knowledge that the hearing was going to be removed from the schedule and reset by counsels upon his return. The hearing was indeed never had as noticed.

Instead of keeping this commitment, Counsel for PIC instead sought an entry of an Agreed Dismissal Order without Thomas counsel's signature on the 16th, a day after the date scheduled for the herring. See Exhibit 1, PIC's counsel's letter to Judge Vollor. *Motion to Set Aside Order of Dismissal*. Counsel for Ms. Thomas returned to Jackson from Sierra Leone on December 5, 2007. [Rec. at 173]. He found a letter from Judge Vollor dated November

20, 2007, giving him until December 4, 2007, to respond to the motion for summary judgment. [Rec. at 173]. Counsel immediately responded by writing a letter to the trial judge the next day, explaining that he had just returned to Jackson, and asked for fifteen days within which to respond. As proof of his travel outside the United States, counsel attached copies of the travel itinerary and the flight ticket. He explained also that there were pending discovery issues, and that he and counsel for PIC had been in communication on those issues. The court acknowledged receipt on December 7, 2007, of this letter but advised counsel that the letter did not constitute a proper pleading, and a formal motion needed to be filed. [Rec. at 174].

In the meantime, the court signed an Order of Dismissal for failure to file a responsive pleading to the summary judgment pleadings filed by PIC. That Order is dated December 6, 2007 snf filed on the 7th :

> THIS CAUSE came on for hearing on Defendant Philadelphia Indemnity Insurances Company's Motion For Summary Judgment for an order of dismissal of this action with prejudice, and this Court after having considered said Motion and in light of the Plaintiff's failure to respond to said Motion or to offer specific facts showing there are genuine issues for trial, finds that the Motion is well taken and that summary judgment is proper and is of the opinion that Plaintiff's action against Defendant, Philadelphia Indemnity Insurance's Company should be dismissed with prejudice, with the parties to pay their own court costs. IT IS THEREFORE ORDERED that Plaintiff's claims and actions herein be dismissed with prejudice with the parties to pay all outstanding costs.

Rec. at 168.

Counsel for Ms. Thomas thereafter filed *Motion To Set Aside Order Of Dismissal: Rule 59(e) and Rule 60(b)(1)(6)*. [Rec. at 171]. This motion was supported and evidenced with exhibits 1 to 6, consisting of correspondence between counsels, the Re-Notice of 30(b)(6) deposition, e-mails between counsels excerpted above. On February 22, 2008, the Motion was denied. [Rec. at 191].

This appeal has followed.

SUMMARY OF THE ARGUMENT

In reviewing a trial court's granting of a motion for summary judgment, the appellate court must examine at what point or under what circumstances the motion was granted. Where the motion is granted after both parties have filed all the required pleadings, affidavits, admissions and exhibits, the all too familiar analysis follows, i.e. the presence or absence of genuine material issues militates against the entry of summary judgment. But in this case as happens in other instances, summary judgment was granted because of a default by the losing party. When the motion is granted solely on the basis of the default, the motion is granted not because of the absence of any genuine issues of material facts, because such facts may even be present in the prevailing parties submissions as we submit they do here in the insurance policy, but purely for the failure of the losing party to file a response. Where this is the case, the focus of appellate analysis should the justification, if any, for the failure to respond which constitute the default and hence the order of dismissal. This case from an evidentiary standpoint, is qualitatively different from other cases in which summary judgment is granted.

The parties have not completed discovery, a fact known to the counsel for PIC when he filed the motion for summary judgment. Indeed, much of the information needed for the resolution of this matter was in his exclusive control except for what has been

tendered by all parties that is contained in the insurance policy.

On November 16, 2007, when PIC's counsel wrote to Judge Vollor advancing his motion, he knew that counsel for Ms. Thomas was out of the country and he had assured counsel that he will reschedule the hearing and in fact did remove the matter from the hearing docket for the noticed date. However, on the 16th, the next day, he wrote his letter to the Judge seeking the entry of the dismissal order without advising the Court of his contacts with counsel for Thomas. On November 20, 2007, when counsel for Ms. Thomas was out of the United States on an emergency trip, Judge Vollor sent his letter to counsel's office, giving him until December 4, 2007 to respond to the motion for summary judgment. Judge Vollor was not given the information that counsel was out of the country by PIC's counsel and was scheduled to return at the end of the month nor did he inform the Court of his contacts with counsel before his departure. On return, counsel for Ms. Thomas showed every willingness to defend the matter, as he indeed has at all stages of the case. He immediately sent a responsive letter to Judge Vollor. The Court elected to ignore this letter response to its letter because the response is not in a motion form, we are told. This we submit is an anomaly because here, the court speaks to counsel via letter but will deny counsel's request because it is not written as a motion.

The punishment: The Court imposed the death penalty on the

party litigant although viewed in its worst light, it is a defalcation of the attorney. We submit counsel's defalcation is the equivalent of excusable neglect. Is the ultimate sanction of dismissal the most appropriate? We submit, No! If any sanctions are warranted, the court could craft less draconian means other than a dismissal of the case with prejudice.

The entry of summary judgment also makes it impossible for Ms. Thomas to pursue her claim against Jones and for punitive damages against PIC. The court should allow a full inquiry into those issues, along with all the other claims in the case. As we urge this, we remind this Court as we did the lower court that this is an automobile insurance liability case and not a workers compensation case as PIC argues extensively in support of its motion for summary judgment.

In every case, summary judgment at this point is against the slender weight of the evidence thus far adduced in the case nor is it appropriate given the procedural history of the case and the conduct of the parties and their counsels. If sanctions are appropriate for counsel for Thomas' absence on the 15th, other less draconian sanctions are available to the trial court.

ARGUMENT

The key issues can be phrased under three general questions:

1. **THE ENTRY OF SUMMARY JUDGMENT BY THE TRIAL COURT WAS ERROR GIVEN THE POSTURE OF THE PROCEEDINGS.**

2. **THE ENTRY OF SUMMARY JUDGMENT AS A PUNITIVE MEASURE WAS UNDULY HARSH AND LESS DRACONIAN SANCTIONS WERE AVAILABLE TO THE COURT.**

3. **THE ENTRY OF SUMMARY JUDGMENT FORECLOSES AN INQUIRY INTO THE PROBABILITY OF ASSESSING PUNITIVE DAMAGES AGAINST THE APPELLEES.**

By every measure, the entry of summary judgment was an abuse of discretion.

1. **THE ENTRY OF SUMMARY JUDGMENT BY THE TRIAL COURT WAS ERROR GIVEN THE POSTURE OF THE PROCEEDINGS.**

A

Rule 56 of the Mississippi Rules of Civil Procedure provides that summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record which it believes demonstrates the

absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247. 48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Williams v. Adams, 836 F.2d 958, 960 (5th Cir.1988). See also Rigby v. Sugar's Fitness & Activity Center, 803 So.2d 497 (Miss. 2002); Robinson and Robinson v. Ratliff and Johnson, 757 So.2d 1098 (Miss.Ct. App.1999) (quoting Spartan Foods Systems, Inc., v. American Nat'l Ins. Co., 582 So.2d 399, 402 (Miss.1991)).

Once the moving party satisfies its initial burden, the nonmoving may not rest on the pleadings, but must "identify specific evidence in the . . . record demonstrating that there is a material fact issue concerning the essential elements of its case." Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415, 1429 (5th Cir.1996) (citation omitted); see also Celotex, 411 U.S. at 322-23, 106 S.Ct. 2548; Anderson, 477 U.S. at 257, 106 S.Ct. 2505.

Further, the evidence must be viewed in a light most favorable to the non-moving party. Cole v. Buckner, 819 So.2d 527, 530 (¶6) (Miss. 2002).

B

This case is unique in that summary judgment was entered as a sanction for failure to file a responsive pleading. And to that extent, summary judgment here is akin to a default judgment. City

of Jackson v. Presley, 942 So.2d 777, 780 (Miss. 2006).

However, this is not a case where counsel has shown a total unwillingness to defend. And to that extent, dismissal amounts to an abuse of discretion because of the excuses for absence out of the country. Put another way, there was excusable neglect on the part of counsel for Ms. Thomas. Further, this was the first time any motion has been scheduled before this court on this matter. If anything, PIC had stayed this proceeding to allow it to pursue its declaratory action in federal court which it lost.

Even assuming the court went on the pleadings and exhibits, the case at worst should be decided against PIC because the policy, as a matter of law, indicates the existence of coverage. It is not even a colorable issue if we take PIC's exhibits and the insurance policy to determine the issue of coverage and liability.

This presence of a good faith controversy should preclude the entry of summary judgment. "Issues of fact sufficient to require a denial of a motion for summary judgment are obviously present where one party swears to one version of the matter in issue and another party takes the opposite position." Price v. Purdue Pharma Co., 920 So.2d 479, 483 (Miss.2006); (citing American Legion Ladnier Post No. 42 v. Ocean Springs, 562 So.2d 103, 106 (Miss.1990)); Green v. Allendale Planting Co., 954 So.2d 2007 (Miss. 2007).

2. THE ENTRY OF SUMMARY JUDGMENT AS A PUNITIVE MEASURE WAS UNDULY HARSH AND LESS DRACONIAN SANCTIONS WERE AVAILABLE TO THE COURT.

The imposition of the sanction of dismissal of the litigant's case is tantamount to the imposition of the death penalty on an accused who is an accomplice after the fact but may not even be aware of the principal defendant's wrongs. Ms. Thomas was not even aware of the absence of her attorney nor was she provided notice of the impending dismissal. Suppose the attorney had not returned when he did; suppose he had met an unfortunate fate, Ms. Thomas would have no notice of her case until probably long after all relief is foreclosed or time barred. We do not argue here that there should be no consequences for attorneys' failures; but the consequences should be measured to correct the evils and not punish the unsuspecting party litigant.

> Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases. Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril.

Bowie v. Montfort Jones Mem'l Hosp., 861 So.2d 1037, 1042 (Miss.2003).

The lapse that gave rise to the summary judgment now at issue was not intentional. When counsel for PIC scheduled a hearing

date, he did not consult his counter-part for a mutually agreeable date. In fact, he received the notice of hearing on his way to the airport for an emergency trip to Sierra Leone. He communicated that fact to the counsel for PIC.

His conduct was not intentional or disrespectful and he has otherwise shown every effort to defend this cause and get it on track. The Mississippi Supreme Court has indicated that striking untimely filed responses and affidavits is a drastic measure that should be inflicted in limited circumstances. See Thompson v. Patino, 784 So.2d 220, 223-24(¶ 25) (Miss.2001). See also Guar. Nat'l Ins. Co. v. Pittman, 501 So.2d 377, 387-88 (Miss.1987)).

It is regrettable that counsel had to leave the United States on an emergency around the time this matter was noticed for hearing. If events around then were happening fast and he was unable to participate then, all was made good upon his return. He communicated with the trial judge, counsel opposite, filed the necessary papers and otherwise showed every intention to defend this matter. Given the excusable happenings taking place that time, and the continuing show of readiness to defend, a default judgment in these circumstances would be too drastic. Chassaniol v. Bank of Kilmichael, 626 So.2d 127, 135 (Miss.1993); Guar. Nat'l Ins. Co. v. Pittman, 501 So.2d 377, 387-88 (Miss.1987)).

3. THE ENTRY OF SUMMARY JUDGMENT FORECLOSES AN INQUIRY INTO THE PROBABILITY OF ASSESSING PUNITIVE DAMAGES AGAINST THE

APPELLEES.

A

For more than a generation now, Mississippi has allowed that punitive damages can be assessed against an insurance company but such "damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort." Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975). This is but a variation of Miss. Code Ann. § 11-1-65 which requires that a plaintiff prove "by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.". See also Polk v. Sexton, 613 So. 2d 841, 845 (Miss. 1993) (quoting Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 465-66 (Miss. 1983)). But even then, the Mississippi Supreme Court has warned that the law generally does not favor punitive damages and that such damages should be allowed only "with caution and within narrow limits." Standard Life Ins. Co. v. Veal, 514 So. 2d 239, 247 (Miss. 1977). A plaintiff who seeks punitive damages or any special or extraordinary damages based on bad faith of an insurance company has a heavy burden to carry. Life & Casualty Ins. Co. v. Bristow, 529 So. 2d 620, 622 (Miss. 1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 794, 102 L. Ed. 2d 785

(1989).

Still, punitive damages may be assessed against an insurer only when the insurer denies a claim (1) without an arguable or legitimate basis, either in fact or law, and (2) with malice or gross negligence in disregard of the insured's rights. Aetna Casualty & Sur. Co. v. Day, 487 So. 2d 830, 832 (Miss.1986); State Farm Fire and Casualty Co. v. Simpson, 477 So. 2d 242, 250, 252 (Miss.1985); see also Larr v. Minnesota Mutual Life Ins. Co., 924 F.2d 65, 67 (5th Cir. 1991); Guy v. Commonwealth Life Insurance Co., 894 F.2d 1407 (5th Cir. 1990); Peel v. American Fidelity Assurance Co., 680 F.2d 374, 376 (5th Cir. 1982) (per curiam).

In a punitive damages context, "legitimate or arguable reason" not to pay a claim:

> ... is nothing more than an expression indicating the act or acts of the alleged tortfeasor do not rise to the heightened level of an independent tort. Additionally, the very term expresses the holding of this Court establishing a distinction between ordinary torts, the product of forgetfulness, oversight, or the like; and heightened torts, which are the product of gross, callous or wanton conduct, or, if intentional, are accompanied by fraud or deceit.

State Farm Fire & Casualty Company v. Simpson, 477 So. 2d 242, 250 (Miss. 1985).

In other words:

> An arguable reason is one in support of which there is some credible evidence. There may well be evidence to the contrary. **A person is said to have an arguable reason for acting if there is some credible evidence that supports the conclusions on the basis of which he acts.**

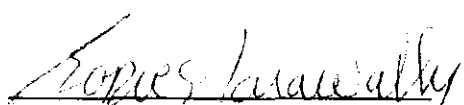
require a denial of a motion for summary judgment are obviously present where one party swears to one version of the matter in issue and another party takes the opposite position." Price v. Purdue Pharma Co., 920 So.2d 479, 483 (Miss.2006); (citing American Legion Ladnier Post No. 42 v. Ocean Springs, 562 So.2d 103, 106 (Miss.1990)); Green v. Allendale Planting Co., 954 So.2d 2007 (Miss. 2007).

CONCLUSION

The entry of summary judgment in this matter was an abuse of discretion. There are issues of fact over which the parties have divergent views, a point which alone should preclude summary judgment. The insurance contract which defines the relationship between the parties was before the court and an examination of it supplies the necessary information to dispose of defendant's motion. So what the court below held by its findings and dismissal order is not the absence of a material issue of genuine fact but the failure to respond by counsel for Ms. Thomas.

Further, the failure by counsel to file a pleading was not intentional. There are less drastic means to sanction counsel for the excusable neglect. The dismissal of the case with prejudice is unduly harsh.

Respectfully submitted:



Sorie S. Tarawally
Counsel for Thomas

CERTIFICATE OF SERVICE

This is to certify that I, Sorie S. Tarawally, attorney for the Appellant, do hereby state that on July 29th, 2008, I did mail a true and correct copy of the forgoing document to the attorneys for the Appellees at their regular business address: Hon. John C. Hall, Brunini Granthams & Hewes, Attorneys, Post Office Box 119, Jackson, MS 39205-0119; Anthony T. Jones, #K3994, Unit 29-A, Bed # 35, Perchman, MS; 38738; Judge Frank G. Vollor, Warren County Circuit Court, Post Office Box 351, Vicksburg, MS 39181.

Dated this the 29th day of July, 2008.

Sorie S. Tarawally

Sorie S. Tarawally, Esq
MBN[redacted]
CATLEDGE TARAWALLY & ASSOCIATES
Attorney for Tequelia Thomas
201 West Capitol Street, Suite 600
Post Office Box 31027
Jackson, MS 39286-1027
Tel. (601) 906-0352
Fax (662) 841-0545