IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANT

VS. — CAUSE NO. 2008-CA-01727

JERRY P. JONES — APPELLEE

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

Appeal From: Circuit Court, Jones County, Mississippi

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VS. **CAUSE NO. 2008-CA-01727**

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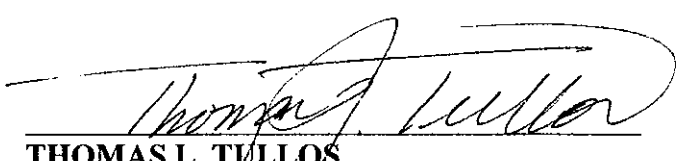
CERTIFICATE OF INTERESTED PERSONS

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 Judiciary may evaluate possible disqualifications or recusal.

1. Jerry P. Jones, Appellee
2. Thomas L. Tullos, Attorney for Appellee
3. State Farm Mutual Automobile Insurance Company, Appellant
4. Phillip W. Gaines, Attorney for Appellant
5. William W. McKinley, Jr., Attorney for Appellant
6. Honorable Gaylon Harper, County Court Judge
7. Honorable Billy Joe Landrum, Circuit Court Judge

Certified, this the 16th day of April, 2009,



THOMAS L. TULLOS
Attorney for Appellee

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This appeal grows out of the underlying case of Jerry P. Jones v. Ryan Presher, His Mother and Next Friend, Linda Presher, and Linda Presher, Individually, bearing cause no. 2006-79, in the County Court of the Second Judicial District, Jones County, Mississippi. The underlying case stemmed from a motor vehicular accident.

Jerry P. Jones submitted discovery to the Defendants requesting a copy of the repair estimate made by the Defendants' insurance carrier in regards to the Plaintiff's car. On numerous occasions the Defendants denied having a copy of the repair estimate or even that there was a repair appraisal. The Plaintiff discovered that a repair appraisal did exist and filed a motion to strike the Defendants' answer. At a hearing before the County Court Judge, the trial judge did not strike the Defendants' answer, but he did impose sanctions upon State Farm Mutual Automobile Insurance Company (hereinafter referred to as State Farm) for the Defendants' failure to respond truthfully and completely to the discovery requests.

Thereafter, State Farm appealed the ruling to the Circuit Court of Jones County. The Circuit Court affirmed the lower court's ruling, and the case was then appealed to this court.

FACTS

On September 2, 2005, a car wreck occurred when Ryan Presher lost control of Linda Presher's car, and backed into the car in which Jerry Jones was a passenger. Mrs. Jones received an injury to her knee which necessitated a surgical procedure. Afterwards, Mrs. Jones filed suit against the Preshers. At the same time the Plaintiff submitted interrogatories and requests for production of documents to the Defendants.

In regards to the request for production of documents submitted unto the Preshers, request to produce no. 7 requested that the Defendants produce any documents which were relevant to the issues raised by the claim or defenses of any party to the litigation. Linda Presher responded "None at this time. Defendant reserves the right to supplement this request pursuant to Mississippi Rules of Civil Procedure".(County Ct. Tr. 15) Also, Interrogatory no. 1 requested the names, last known addresses, present addresses, and telephone numbers of all persons having knowledge of any discoverable facts in the case. Ms. Presher only gave the names of Linda Presher, Ryan Presher, Jerry Jones, Sedrita Jones, and Officer Ray Williams. No mention was made in regards to the claim adjuster who had made a repair estimate or appraisal of Mrs. Jones' vehicle. Mrs. Jones' interrogatory no. 6 also requested the Defendant, Ms. Presher, to state the point of impact on the vehicle that Ryan Presher was driving, and the point or points of impact on the Jones' vehicle that was involved in the accident. Ms. Presher responded that "My vehicle did not impact the Jones' vehicle. There was another vehicle between my vehicle and the Jones' vehicle. My vehicle struck that vehicle and it struck it into the Jones' vehicle." (County Ct. Tr. 43-46)

In answer to interrogatory no. 12, Ms. Presher stated that the vehicle between the Presher vehicle and the Jones' vehicle was an older blue vehicle. (County Ct. Tr. 48) Ms.

Presher answered these interrogatories and request for production of documents through her counsel, Mark Norton, on June 2, 2006.

On June 7, 2006, Mrs. Jones submitted her second set of request for production of documents unto Linda Presher. On June 19, 2006, Linda Presher responded to these requests. The request to produce and Ms. Presher's response are as follows:

> Request No.1: Please produce true and correct copies of all repair estimates and/or repair appraisals made of the Jones' vehicle and of the Presher vehicle which would be in the possession of State Farm Mutual Automobile Insurance Company. (emphasis added)
>
> Response: No repairs have been made to the Presher vehicle as a result of this accident. No estimate for repairs that might be necessary exist. The defendant does not possess a copy of a repair estimate for the Plaintiff's vehicle. However, a computer note in the claim file references a repair estimate of $1,581.35.
> (County Ct. Tr. 78)

In response to a letter from Mrs. Jones' attorney, on October 17, 2006, the Preshers' attorney, Mark Norton, sent a letter to the Jones' attorney and stated:

> Enclosed, please find a copy of the repair estimate, $1,581.35, that you requested in regard to the above referenced matter. I have not included other portions of that page because they are protected by attorney-client privilege, work product doctrine, and were prepared in anticipation of litigation. I have also requested colored copies of the pictures of the vehicle that the plaintiff was riding in at the time of the accident. I will provide you with those copies once I have received them. (County Ct. Tr. 90-91)

On November 7, 2006, the Defendants took the deposition of Dr. James Green, the treating physician of Mrs. Jones. On page 12 of the deposition, the Defendants' attorney posed the following question:

> And that if the impact to the vehicle that was shown in exhibit 1 to the front of the vehicle –and now, for the record, I will tell you that the testimony has been that the front of the vehicle was struck and

> pushed the vehicle backwards, and that the rear of the vehicle impacted a vehicle behind it in a traffic line. If that was the scenario that occurred, that would not involve any twisting motion. (County Ct. Tr. 69)

Later, defense counsel asked the following question of Dr. Green:

> Doctor, based on a reasonable medical probability and based on the history that you have, both of the medications she was taking, the damage to the vehicle shown in the exhibits, the swelling that was described in August by Dr. Whitehead, and by the degenerative process and the history that you know of in Mrs. Jones from 1996, based on a reasonable medical probability, is it your opinion that the problems that you repaired in October, 2005, were the national (natural) progression of a preexisting degenerative knee? (County Ct. Tr. 70)

It is obvious from this line of questioning that the Defendants were attempting to imply that the impact between the blue vehicle and the Jones' vehicle was minimal at best. Further, the photographs finally produced by the Defendants actually reflect very little damage, and do not adequately reflect the actual damage done to the Jones' car. (County Ct. Tr. 36, 37, 38, 39, 40,)

On January 30, 2007, the Plaintiff's attorney spoke to the Defendants' attorney and specifically asked him if there was a repair estimate or appraisal of the Jones' vehicle. At that time the Defendants' attorney stated that there was no repair appraisal, and he did not know of the existence of any repair appraisal. (County Ct.Tr. 7)

Shortly after the Plaintiff's attorney became involved in the underlying action, he contacted Danny Dykes, the body shop repairman who repaired the Jones' vehicle, and requested a repair estimate from him. Mr. Dykes performed a thorough search of his records, but could not find any repair estimate or appraisal in regards to the Jones' vehicle. On several occasions the Plaintiff's attorney and Danny Dykes spoke about this matter, but Mr. Dykes was unable to find a repair estimate. On January 30, 2007, the Jones' attorney and Danny Dykes once again discussed the issue of no repair appraisal being in the possession of State Farm. At that time Mr. Dykes

stated that he felt certain that State Farm had a copy of the repair appraisal, and that he did believe that he could obtain a copy of the same. Mr. Dykes then contacted State Farm in Birmingham, Alabama, spoke to the appropriate persons at the regional office, and at 2:44 p.m., January 30, 2007, State Farm faxed a copy of the damage appraisal to Mr. Dykes. The damage appraisal clearly showed that repair work needed to be done to the front bumper, front bumper impact absorber, front upper retainer, front bumper reinforcement, the luggage lid panel, luggage lid adhesive name plate, the back up lamp, the rear bumper assembly, the rear bumper cover, the rear bumper impact cushion, and that corrosion protection had to be restored. In other words, the repair appraisal clearly indicated that a substantial impact had occurred to the front and back of the Jones' car. Further, it reflected that there was blue transfer paint on the back portion of the Jones' car. (County Ct. Tr. 7, 8, 73, 74, 75, 76, 77)

The damage appraisal report was prepared by Donald Watkins, an employee of State Farm, on September 27, 2005, at 3:56 p.m. It is obvious that State Farm had in its possession at all times the damage repair appraisal report but that it had steadfastly denied the existence of the repair appraisal. It should be noted that the repair appraisal prepared by the State Farm adjuster had been requested by Mrs. Jones' first set of interrogatories, first set of requests for production of documents, second request for production of documents, by letter from Mrs. Jones' attorney, and by telephone call from Mrs. Jones' attorney to the Defendants' attorney. Throughout this entire period of time, Ms. Presher and State Farm denied the existence of the repair appraisal. It is further obvious that the reason why these denials were made was in order to not weaken the Defendants' argument that the impact between the Presher vehicle and the Jones' vehicle was extremely minimal. Further, State Farm knew that if it produced the repair appraisal that it would certainly show that extensive damage was done to the front and to the back of the Jones' car.

SUMMARY OF THE ARGUMENT

State Farm was duly brought before the lower court because Jones specifically requested that State Farm produce the repair appraisal made of the Jones' car. State Farm, responding through counsel hired and compensated by State Farm, responded that the Defendant (Linda Presher) did not possess a copy of the repair estimate. Interestingly, State Farm supplied all of the documents relied upon by the Preshers in their defense. State Farm was duly placed on notice of the motion to strike the Defendants' answer because the attorneys employed by State Farm and paid by State Farm were served with notice of the Plaintiff's motion.

State Farm was given every consideration in this matter. Simply put, State Farm attempted to fraudulently conceal a relevant piece of evidence but was caught in its dishonest concealment. State Farm is very fortunate to have gotten off as lightly as it did. The lower court could very well have dismissed the Defendants' answer, and State Farm would have been under a duty to pay for the default judgment.

State Farm's constitutional rights were not violated. It was appropriately put on notice of the hearing and was appropriately sanctioned for its wrongful acts.

ARGUMENT

STANDARD OF REVIEW

In Scoggins v. Ellzey Beverages, Inc., 743 So. 2d 990, 995 (Miss. 1999), the standard of review in regards to a trial court's rulings in regards to discovery matters was set out as follows:

> Trial courts have considerable discretion in discovery matters and decisions will not be overturned unless there is abuse of discretion. Robert v. Colson, 729 So.2d 1243, 1245 (Miss. 1999) (citing Dawkins v. Redd Pest Control Co., 607 So.2d. 1232, 1235 (Miss. 1992)).

ISSUE I

THERE WAS NO ABUSE OF STATE FARM'S DUE PROCESS RIGHTS

State Farm was appropriately placed on notice of the Jones' motion to strike. First, Jones' supplemental request for production of documents was aimed directly at State Farm. The request asked for a copy of the repair appraisal or estimate in the possession of State Farm. The Preshers' attorney did not object to the form of the request. The Defendants' attorneys were hired by State Farm and paid by State Farm. All documents in the possession of the Defendants' attorneys were given to them by State Farm. It is inconceivable that State Farm did not know about the progress of the case and of the discovery requests. To argue now that it did not is as fraudulent as its actions were when it said that no repair estimate or appraisal existed. Furthermore, State Farm was put on actual notice of the motion. At the hearing on Jones' motion to strike, Rick Norton, the Defendants' attorney who was hired and paid by State Farm, made the following statement:

> Now, as soon as this motion was filed, then I called State Farm- or Mark (Norton) did, an associate in my office- and said, Look- we're dealing with a Flowood-Jackson, Mississippi office- or Flowood office right outside of Jackson. And they said, well,

> obviously, there is one. Birmingham is the office that handles the initial property damage claims. (County Ct. Tr., 6)
>
> We didn't have it in our claim file. Ms. Presher didn't have it in her possession. (County Ct. Tr., 7)

Based upon Mr. Norton's statement, it is abundantly clear that Mr. Norton, State Farm's lawyer, put State Farm on notice of the motion and of the hearing. Once again State Farm is playing fast and loose with the truth when it says it was not put on notice.

This court has already ruled in an earlier case that sanctions may be levied against a party who has not formally been brought into the action. In Karenina By Vronsky v. Presley, 526 S0.2d 518 (Miss. 1988), Kiril Vronsky was not a party to a paternity action which involved his wife, her minor child, and a former lover. Vronsky was assessed with certain sanctions because of his failure to respond to the discovery process in the action. The court wrote:

> Those sanctions were occasioned by Kiril's failure to respond to discovery process in the paternity action and were within the Court's authority notwithstanding that Kiril was not formally a party litigant therein. Pg. 525.

Consequently, the trial court had the inherent authority to sanction State Farm as it was a quasi-party for its failure to respond to the discovery directed to it on more than one occasion.

ISSUE II

STATE FARM WAS A PARTY TO THE ACTION

State Farm argues and takes cover behind a legal fiction. Although State Farm was not named as a party defendant, it was bound to indemnify the Preshers up to $100,000.00, and was required to procure and pay for the Defendants' counsel in the underlying cause of action.

Standard procedure was certainly for the Preshers' counsel to keep their employer, State Farm, informed of everything that occurred during the prosecution of the case.

State Farm was under a duty to truthfully respond to Jones' Second Set of Requests for Production. The request specifically asked for all repair estimates or appraisals of the Jones' vehicle which were in the possession of State Farm- not Linda Presher. Mark Norton, the Defendants' counsel, answered that the Defendant did not possess a copy of a repair estimate for the Jones' vehicle. (County Ct. Tr. 78) Subsequent events proved this to be untrue.

State Farm was under an affirmative duty to produce the estimate. Its failure to do so was an egregious violation of the discovery process. Am Jur 2nd., Vol.23, Depositions and Discovery, §126, states the law in this regard:

> ...In fact, although a party should not be required to enter upon extensive independent research in order to acquire information requested by interrogatories, interrogatories properly addressed to a party and making no reference to his or her personal knowledge must be answered with all the information possessed by that party, as well as with that of his or her attorney and experts, insurer, agents, and representatives. (emphasis added)

In Wycoff v. Nichols, 32 F.R. D. 370, 372 (W.D. No. 1963), the United States District Court wrote:

> ...If an appropriate interrogatory is propounded, the defendants will be required to give the information available to them, if any, through their attorney, investigators employed by them or on their behalf, their insurer or other agent or representatives, whether personally known to the defendants or not. (emphasis added)

Based upon the above statements of the law, State Farm was under an affirmative duty to produce the repair estimate. This is especially true when the request to produce was actually directed to State Farm.

Further, State Farm did not have to be a party to the law suit to be sanctioned. In Nichols v. Munn, 565 So.2d 1132, (Miss.1990), the plaintiff had given a false answer to a defendant's

interrogatory. The trial court imposed sanctions, and the Supreme Court wrote as follows:

> The sanction may have been more appropriately processed under Rule 37 M.R.C.P., but we see no reason a party or his attorney, or both, may not be monetarily sanctioned for either a deliberately or recklessly false answer to an interrogatory duly filed and propounded under our rules.

In this cause the guilt lies with State Farm. The request for the repair estimate was directed to State Farm. State Farm denied its existence. State Farm was deceitful. Consequently, if a party's lawyer can be sanctioned, then a fraudulent insurer can also be sanctioned.

ISSUE III

THE PLAINTIFF PROPOUNDED DISCOVERY TO STATE FARM

State Farm was not a named party. However, the Plaintiff's second request for production was aimed squarely at State Farm. State Farm, answering through one of its hired attorneys, said that the Defendant did not possess the requested documents. However, as shown above, not only is the named Defendant under a duty to respond, but his attorney, insurer, agents, and representatives must answer as well. Therefore, State Farm's argument is specious.

State Farm makes much of the fact that the Plaintiff did not issue a subpoena duces tecum to it. However, that is misleading to say the very least. The Plaintiff had been informed by State Farm's lawyer, Mr. Mark Norton, that no repair estimate existed. The Plaintiff could only be expected to rely upon this falsehood. If the Plaintiff believed that no repair estimate existed, then the Plaintiff would have had no reason to issue a subpoena duces tecum to State Farm.

State Farm misses the point that the issue was moot at the time of the hearing. State Farm had attempted to commit a fraud upon the court. It would have gotten away with its fraud but for the actions of Danny Dykes, the repairman. In effect, State Farm committed perjury. Now it argues that since the Plaintiff discovered the perjury and brought it to the attention of the court, that the issue is moot, or as said by Defendants' counsel in his reply to Plaintiff's motion- no harm, no foul. (Tr. 87)

It is inconceivable that State Farm does not realize the seriousness of its offence. Numerous plaintiffs' cases have been dismissed with prejudice because of discovery offences. See: Scoggins v. Ellzey Beverages, Inc., 743 So.2d 990 (Miss. 1999); Pierce v. Heritage Properties, Inc., 688 So.2d 1385 (Miss. 1997).

State Farm should consider itself lucky. It was only assessed attorney fees when the Defendants' answer could very well have been stricken and default judgment entered.

ISSUE IV

STATE FARM WAS GIVEN NOTICE OF THE HEARING ON FEBRUARY 7, 2007

State Farm was given notice of the hearing. First, it employed the Defendants' attorneys in the underlying case. When a pleading is served on a lawyer it is considered to be served on his client. State Farm was the client of Mark Norton and Rick Norton. Second, it was under a duty to respond to discovery in the same manner as the Preshers, the Nortons, and any other agents of the Preshers.

For State Farm to argue that it did not know about the hearing is just unbelievable. As stated above, either Rick Norton or Mark Norton actually informed State Farm of the motion.

ISSUE V

THERE WAS NO DIRECT ACTION AGAINST STATE FARM

Jones admits that she is precluded from bringing a direct action against State Farm. Hegwood v. Williams, 949 So. 2d 729, 731(Miss. 2007), stands for the proposition that:

> ...Hegwood would be prejudiced if the jury learned of her insurance coverage while it was deciding liability and damages... The comments to Rule 411 provide further elucidation: One of the primary reasons for excluding evidence of insurance or the lack of it is to prevent the jury from deciding the case on improper grounds. Rule 411 reflects existing Mississippi practice.

This action is not a suit against State Farm in regards to the underlying cause of action. This is an action to penalize and sanction State Farm for its violation of the rules of discovery. There is no doubt that State Farm was under a duty to truthfully respond to discovery as shown in the preceding arguments.

The only real issue is whether or not a trial court had the authority to sanction State Farm. From a close reading of earlier cases decided by the Mississippi Supreme Court, it is clear that it did have such authority. We find the following language in Cunningham v. Mitchell, 549 So.2d 955, 958 (Miss. 1989):

> Sanctions are covered by Rule 37, Miss. R. Civ. P. Cunningham argues that sanctions for discovery violations are specifically covered by Rule 37(b)(2), and therefore the $200.00 fine against her attorney was not authorized by Rule 37(b)(2), which in and of itself constitutes an abuse of authority by the trial court. Rule 37(b)(2) is not totally controlling. Rule 37(e) states that the court may impose such sanctions as may be just, including the payment of reasonable expenses and attorney fees. The trial court has need of and the use of additional flexibility to deal with abuses. We have stated that the trial court has considerable discretion in the imposition of sanctions. White v. White, 509 So.2d 205, 209

(Miss. 1987); Kilpatrick v. Mississippi Baptist Medical Center, 461 So.2d 765, 767 (Miss. 1984).

In the case at bar, State Farm abused the discovery process by failing to truthfully respond to discovery aimed directly at it. The lower court ascertained the facts and imposed sanctions against State Farm. The lower court exercised its considerable discretion in dealing with this matter.

CONCLUSION

A law suit is simply a way to find the truth. As such the parties, their lawyers, and insurance companies are under a duty to be truthful. If not, then the ends of justice are subverted. In the underlying case, State Farm attempted to subvert justice in order not to pay Mrs. Jones.

State Farm, just like Ms. Presher and the Nortons, should be required to tell the truth. If not, then justice is not served. Further, when State Farm is found to be lying or concealing evidence, then it should be sanctioned.

Seemingly, the trial courts and appellate courts have taken strong steps against plaintiffs and their attorneys when they have violated the discovery process. So tough that plaintiffs have had their cases dismissed with prejudice. Now the shoe is on the other foot. State Farm has been found to be in violation of the discovery process. If sanctions are appropriate against plaintiffs, then sanctions should be appropriate against State Farm.

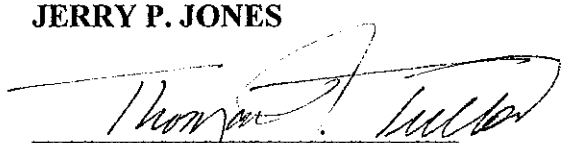
If sanctions against State Farm are not allowed, then this court will, in effect, give the green light to defendants, their attorneys and their insurance companies to violate the discovery

rules. This must not be allowed. The playing field must be kept level, and all parties must adhere to the rules.

As said by the Supreme Court in Pierce v. Heritage Properties, Inc., 688 So.2d. 1385, 1389 (Miss. 1997), " An implicit condition in any order to answer an interrogatory is that the answer be true, responsive and complete. A false answer is in some ways worse than no answer; it misleads and confuses the party." No truer words have ever been written.

This case should be affirmed. If not then the Court's admonition in Pierce will go for naught.

Respectfully Submitted
JERRY P. JONES



BY: THOMAS L. TULLOS
Her Attorney

CERTIFICATE OF SERVICE

I, Thomas L. Tullos, Attorney at Law, do hereby certify that I have this date, mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

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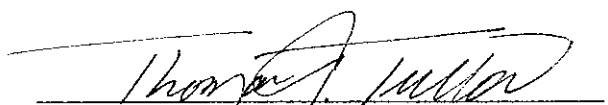
This the 16 day of April, 2009.



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