SUPREME COURT OF THE STATE OF MISSISSIPPI

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANT

VS. — CAUSE NO. 2008-CA-01727

JERRY P. JONES — APPELLEE

REPLY BRIEF OF APPELLANT

ON APPEAL FROM ORDER ASSESSING SANCTIONS AGAINST STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AUTHORIZING APPELLEE TO AMEND HER ORIGINAL COMPLAINT, AND AWARD OF REASONABLE ATTORNEY'S FEES THAT WAS ENTERED IN CAUSE NO. 2006-79 OF THE COUNTY COURT OF THE SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI, ON FEBRUARY 23, 2007

PHILIP W. GAINES ([redacted]
WILLIAM W. McKINLEY, JR. ([redacted]
CURRIE JOHNSON GRIFFIN GAINES
& MYERS, P.A.
P. O. BOX 750
JACKSON, MS 39205-0750
TEL.: (601) 969-5120
FAX: (601) 969-5120

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

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 this Court may evaluate possible disqualification or recusal.

State Farm Mutual Automobile Insurance Company, Appellant
Philip W. Gaines and William W. McKinley, Jr., Attorney for Appellant
Jerry P. Jones, Appellee
Thomas Tullos, Attorney for Appellee
Honorable Gaylon Harper, County Court Judge

CERTIFIED, this the 3rd day of June, 2009.

WILLIAM W. McKINLEY, JR.
Attorney of Record for Appellants

1. Introduction

The Appellee's Brief contains numerous and repetitious misstatements, and mischaracterizes the events in order to attempt to save the fatally flawed Order entered below. The underlying Order granted relief that was; not requested; against a non-party; and done without requisite due process. In her argument, Appellee also makes two factual misstatements, the opposite of which is shown to be true by the record.

1. The Appellee falsely states that the Preshers denied the existence of a repair appraisal for the Jones vehicle; and
2. The Appellee falsely states that State Farm denied the existence of a repair appraisal for the Jones vehicle.

In making these repeated inaccurate statements, the Appellee mischaracterizes (or ignores): who the parties were in the lawsuit, what the Mississippi Rules of Civil Procedure and Constitutional authority require in terms of due process for an award of sanctions against a non-party witness, what the rules of discovery require with a discovery request against a non-party witness; and the well-established (and appropriately followed) dictates of behavior of outside defense counsel retained by an insurer to represent a defendant in a third-party tort liability action.

As noted in our initial brief, State Farm does not suggest that a Mississippi Trial Court does not have the legal authority to impose punitive sanctions against a non-party who fails to respond to a validly served discovery request, as such valid service would meet the necessary Constitutional Due Process requirements for such. In the present case, however, these fundamental prerequisites were absent; the Sanction imposed was made outside of the request for relief in Plaintiff's Motion and was imposed against a non-party

which had never received service of the Motion nor any discovery request. State Farm was not a party to the action in question at the time, and was not a party in any other consolidated nor related action at the time (although subsequently added as a party, with that cause then being severed and, after a proper grant of due process and discovery rights, dismissed with prejudice and on an admission by Plaintiff's counsel in such Final Judgment that he had subsequently determined that no valid cause existed against State Farm). The discovery served upon the Preshers was only proper as to the Preshers, and honest disclosure was even shown to be provided by them, contrary to the false characterizations repeated herein by Appellees.

The Order entered below cannot properly stand. State Farm was not a party to the action. State Farm was never served with any discovery request and thus, never failed to respond to any discovery requested of it. Jones. It is undisputed that Plaintiff, never even specifically sought sanctions against State Farm in the Motion before the Trial Court. State Farm was not provided with notice of the supposed charge against it (which was not even requested in the Appellee's written Motion), nor was State Farm summoned nor served with a Notice for the hearing at which the sanction was ordered. The sanction assessment violated State Farm's rights to due process. Therefore the Order Awarding Sanctions is void and this Court should reverse and vacate.

2. Misstatements Contained in the Appellee's Brief

It is a matter of serious concern that still, in her Brief, the Appellee repeatedly misstates key facts stating that the Preshers and State Farm denied that a repair appraisal of the Jones' car existed. Appellee's brief, pp. 1, 5, 7, and 10. These statements are untrue, as shown by the record. The Preshers, through counsel representing them,

advised Plaintiff in writing that regarding the Jones vehicle "a computer note in the bodily injury claim file references a repair estimate of $1,581.35." How can a noted reference to the Repair Estimate, along with the also honest communication that a copy of such Estimate is not contained in the file, be honestly construed as a supposed representation that there was no such estimate? It cannot, yet Plaintiffs/Appellees still charge such, and seek to affirm a sanctions assessment based on such false construction and done without a grant of fundamental defense, due process, and discovery rights to the accused. Appellee's misstatement of fact is contradicted by the bodily injury claim file note which was also produced by the Preshers, as well as the letter of the Preshers' defense counsel sent to the Appellee on October 17, 2006, which states, in relevant part that "enclosed please find a copy of the repair estimate, $1,581.35, that you requested in regard to the above-referenced matter." It defies logic for the Appellee to state the exact contrary proposition of that which is contained in the record below, especially where the Appellee, in her own brief, relies on the very same record provisions that contradict her misstatements.

It is undisputed that the record contains uncontested testimony and exhibits, from which the Appellee quotes, demonstrating that the Preshers and their counsel were aware of references to the existence of a repair estimate, and that they informed the Appellee of that fact. As the record in this case clearly indicates, the Appellee was informed of the existence of a repair estimate of the Jones vehicle, and the exact amount of that repair estimate - $1,581.53, but was further honestly advised that Ms. Presher did not have a copy of that repair estimate (which Plaintiff's own repairman and witness, by the way, would be expected to have and who did obtain and provide one within hours of request for

such by Plaintiff's counsel, independent of any formal discovery processes). The misstatement of Appellee's counsel is based on a false reading of the Preshers' truthful response to discovery. As the Court will recall, in her second set of Request for Production, the Appellee requested repair estimates and/or appraisals on the Presher **and** Jones vehicle. The unambiguous answer stated that no estimate existed for the Presher vehicle as it had not been repaired. As to the Jones vehicle, (on which the Appellee misstates the facts), the discovery response truthfully indicates that the Preshers did not have a copy of the repair estimate, but noted that a repair estimate in the exact amount of $1,581.35, was referenced as having existed, in the State Farm Bodily Injury Claim File that Presher's counsel had access to. This Court should strike the misstatements of fact from the brief of the Appellee, or at a minium, disregard such misstatements, where the undisputed facts of the record demonstrate that the Preshers (much less State Farm) did not state that a repair estimate for the Jones vehicle did not exist, but instead honestly reported that references to a repair estimate existed and provided copies of the very material from the claim file referencing such.

Having misstated that the **Preshers** and Preshers' counsel affirmatively denied the existence of a repair estimate, the Appellee then attempts to turn this misstatement into a mischaracterization that the non-party, **State Farm** also denied the existence of a repair estimate or appraisal for the Jones vehicle. [1]Appellee's Brief at pp. 5, 6, 7, 10, and 13. As discussed, *supra*, the fact that the defense counsel indisputably noted that a Repair

[1]This even though, as also discussed at the hearing, and as otherwise is undisputed in this matter, Plaintiff's counsel, through Plaintiff's Repairman and listed witness, obtained a copy of the Estimate from the Repairman's State Farm liaison personnel who had handled that repair with him, within a matter of hours of actually asking State Farm for it.

Estimate in the amount of $1,581.35 was referenced in the Bodily Injury Claims File note, but that no copy of the Estimate itself was in the file, with production of a copy of that very claims file note, cannot honestly be construed as a representation that no Estimate existed. The **Preshers** never stated that a repair estimate of the Jones vehicle did not exist. Moreover, **State Farm** never denied the existence of the report and it is undisputed that, on the day the fine was ordered by the Court to be assessed against State Farm, Plaintiff's counsel unequivocally knew the contrary - that State Farm had confirmed the existence of the referenced $1,581.35 Repair Estimate and had retrieved it from the previously resolved Property Damage claim materials for prompt (within a couple of hours of receipt of the request via telephone) provision of a copy of it to the Joneses. The uncontested evidence is that when State Farm was first contacted (said contact not being made through any subpoena nor other formal discovery process, but by a simple, mere telephone call) by Plaintiff's/Appellee's own Repairman and Witness, with a request to obtain a copy of the repair estimate, one was retrieved and immediately faxed to her by the State Farm office that had handled that repair and Property Damage Claim. It is obvious that from the record that the Plaintiff's Repairman/Witness, Mr. Dykes, who had repaired Ms. Jones' car in the initial Property Claim which was quickly resolved well prior to the Bodily Injury Claim Litigation subsequently initiated in Mississippi, as well as the Joneses themselves, obviously had the Estimate and would have had to utilize it for the Repair and Payment for the Repair even before this suit was even filed. Yet, Plaintiff here seeks to confirm a sanctions fine against State Farm (while they also confirmed in statements made to the Trial Court at the Hearing, contrary to the request made in the written Motion, that they

knew without dispute that it was not the Preshers nor Presher's attorneys who did any improper communication nor withholding, but instead the huge out-of-state Insurance Company doing so) based on a change that Plaintiff's counsel had to know was false at the time of that Hearing and Award. The Estimate itself even contains the Joneses' name and address, and they undisputably knew that a copy had actually been given to them immediately, printed on the spot, when it was prepared.

3. State Farm Was Not a Party to the Action

The Appellee concedes that State Farm was not a named defendant in this suit and that no subpoena nor other discovery instrument was ever submitted to State Farm. The Appellee does not dispute, and therefore also concedes, that the motion she filed, on its terms, did not even request that sanctions be awarded against State Farm. As to State Farm, the motion only requested leave of court for Jones to Amend her Complaint to add State Farm as a defendant. (State Farm, as noted earlier, does not object to the Court's adding them as a party and subsequently severing - and eventually dismissing with prejudice - that cause, on the same allegations in question here, but with the difference being that State Farm was thereby accorded its requisite due process, confrontation, discovery, and defense rights with regard to the charges made against it.)

On appeal, the Appellee argues that the fact that State Farm was not a party, and that no relief was requested against State Farm in the Motion present before the Trial Court is irrelevant - or as she puts it - a "legal fiction" (Appellee's Brief at p. 8). Such argument is in conflict with the long-standing principle of Mississippi law that liability insurance carriers are not real parties in interest in liability cases. *Hunt v. Preferred Risk Mutual Ins. Co.*, 568 So.2d 253 (Miss. 1990); *Westmoreland v. Raper*, 511 So.2d 885

(Miss. 1987); *Clark v. City of Pascagoula*, 507 So.2d 70 (Miss. 1987); *Jackson v. Daley*, 739 So.2d 1031, 1038 (Miss. 1999) (direct action not allowed; but declaratory judgment is allowed to determine coverage where denial or reservation of rights is asserted). More importantly, however, it contradicts the most fundamental rights and principles of our Court system - than an accused is to be granted due process rights and the ability to confront his accuser in Court and to conduct discovery to determine and establish the truth for that Court, before being subjected to punitive State action exercised through that Court. We therefore respectfully submit that the Court should reject the Plaintiff's argument that merely because an entity provides for a defense of a party, that entity may therefore be subject to fine without being given the right to defend itself from (knowingly false,here) charges. As Appellee's argument is made with reference to cited facts or authority, and is actually therefore also subject to being procedurally barred and denied, on that basis, even if it did not so fundamentally conflict with a well established legal and Constitutional principles.

The Appellee argues that not only is a named party under a duty to respond, but that all of a party's attorney liability insurer, agents, and representatives "must answer as well," or be subject to imposition of penalty even without notice nor opportunity to defend themselves from changes arising from responses made by the separate party defendant. We respectfully submit that such contention is not consistent with law and precedent. Appellee's citation to 23 Am Jur.2d 126, *Wycoff v. Nichols*, 32.F.R.D. 370, 372 (W.D. No. 1963) and *Cunningham v. Mitchell*, 549 So. 2d 955, 958 (Miss. 1989), actually refers to authority that states the contrary of Appellee's position - that the **party** must answer, but

that the party in doing so, should reasonably include in that response all of the information possessed by that party and her attorney, insurers, experts, agents, etc. No authority states, as Appellee argues, that those separate representatives are parties or that they must answer the discovery propounded to a party, especially with regard to an incidental matter or document not contained in the files related to the suit in question but which was already provided to the inquiring Plaintiff in a previous claim and which was honestly referenced in detail in the party Defendant's response.

This does not mean that defense counsel (nor any party's counsel), as part of the representation of the Preshers, should not reasonably investigate to obtain information from all relevant sources. That was done here and an honest, detailed response was given (although that is not disputed here, as Plaintiff's counsel confirmed on the record at the Trial Court Hearing). The entire Bodily Injury Liability Claim File was obtained by the counsel for the Preshers, and they referred to the file in providing information responsive to the discovery propounded to the Preshers. (RE 3 at p. 6). Where no estimate was found relating to the Jones vehicle, counsel for the Preshers even referred to, and provided a copy of, a claim log note in that State Farm Bodily Injury Liability Claim File that referred to the existence of an estimate, while also noting that he did not have a copy of the estimate itself. (R. 72). With hindsight, we do wish that further extraordinary efforts had been undertaken by that attorney to also seek out the previous Property Damage Claim File, but notably, it was the Plaintiff and her Counsel and Repairman Witness who had superior knowledge of and access to that previous claim matter and the State Farm office that had handled it with them, rather than Ms. Presher and Attorney Norton.

If Plaintiffs' counsel's inquiry to the Preshers had been consistent with the knowledge already held by Plaintiff herself (having obviously received payment for the repair and a copy of the estimate upon it originally being written) (R. 72) and her Repairman Witness (who stated he previously had received a copy of the estimate himself, but could not find a copy of the estimate in his present file, *and* who readily got another believed that he could readily get another copy of it by calling the separate State Farm office in Alabama which had handled the previous Property Damage Claim)[2] (R. 77), or if Plaintiff's Counsel had honestly himself disclosed his knowledge regarding the other State Farm office's possession and production of the Estimate in his communications with Attorney Norton, then the Preshers' counsel could have determined (as they did after the Motion for Sanctions was filed) that a separate State Farm Property Damage claim file had existed over in Alabama for the separate and previous resolved property damage claim, and that such Property Damage Claim File actually held a copy of the Estimate in question. Counsel for the Preshers, Mark Norton, (having been an attorney for only a few months at the time) did not know to chase down other separate State Farm files maintained in other states that had separately processed the Property Damage Liability Claim. (RE 3 at p. 6). Notably, Attorney Tullos also confirmed to the Trial Court that he did not accuse nor suspect any wrongdoing on Attorney Norton's part in this matter (RE3 at 15-16). However, to suggest that State Farm, or Attorney Norton or Ms. Presher, caused or gave a "deliberately or recklessly false answer" to the discovery propounded to Presher is wholly

[2] As the Court is doubtless aware, insurance companies may often, as occurred in this case, have separate claims files set up to resolve different claims, made by multiple persons, involving different coverages, in multiple states.

inconsistent with the full text of Presher's discovery response, which is obviously an honest reference to the full scope of information contained in the relevant State Farm file utilized for the full defense of Plaintiff's Bodily Injury Claim and suit. The Preshers and the Preshers' counsel provided honest and truthful responses that the Appellee's car's damages had been estimated and repaired by State Farm, providing the date and amount paid for the repair (the facts of which were already known to the Appellee, her auto repairman and counsel). Yet, in this matter, Appellee continues to claim that a non-party is responsible for a "dishonest" answer. The accusations of Appellee are themselves misstatements on top of misstatements, made while Appellee's Counsel obviously knows of their undisputed falsehood, and would themselves be more appropriately subject to sanction than the honest, if imperfect, attempt to disclose all known relevant information and documents that was done by Attorney Norton.

The Appellee also sets up a false straw man in arguing that State Farm was "lucky" that it was only sanctioned. Such argument is itself also based on a false supposition - that the only ruling of the Trial Court was to sanction State Farm. The record provides otherwise. State Farm does not contest the portion of the trial court's order in which the Appellee was allowed to amend her Complaint to sue State Farm for its allegedly improper acts, but notes that it did occur and that State Farm of course had to incur significant expense in the defense of that baseless suit before obtaining a dismissal of it with prejudice. State Farm does, however, pray that this Court will vacate that portion of the County Court Order awarding sanctions against State Farm.

The Appellee provides no basis in fact or law for a contention that a fine should have been imposed even on party defendant and counsel actually present in the underlying

case; yet, in the Trial Court and through this appeal, the Appellee seeks imposition of a fine against a non-party, based on a false charge of dishonesty raised through the Defendant and her counsel, in the absence of procedural and constitutionally required prerequisites for such. State Farm was not a party to the action; the Appellee failed to issue and serve State Farm with a subpoena to obtain documents; the Appellee failed to file a motion requesting sanctions against State Farm; and the Appellee failed to formally serve even the Motion that did not seek to sanction State Farm, nor a Notice of Hearing, on State Farm. The Court should firmly reject the Plaintiff's argument that an insurer may be sanctioned in a third party liability case to which it is not a party, especially absent the presence of a dishonest response in the first place. The award of sanctions below is void and should be reversed and vacated.

4. Appellee Did Not Propound Discovery and Neither Issued Nor Served Any Subpoena on State Farm

The Brief of Appellee repeatedly states that discovery was actually propounded to State Farm, as the documents referenced in the Request for Production #1 would be in the possession of State Farm. The Appellee ignores the fact that the discovery documents are themselves propounded either to "Presher" or to "Defendants." Our rules do allow for such discovery to non-parties, by subpoena and otherwise. However, no such discovery was propounded to State Farm and no subpoena was issued or served (a necessity for non-party).

The Brief of Appellee, at page 8, states that the Mississippi Supreme 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." *Karenina by Vronsky v. Presley*, 526 So.2d 518

(Miss.1988). The Appellee's brief argues that "Vronsky was not a party to the paternity action" . . . ." but was "assessed with certain sanctions because of her failure to respond to the discovery process in the action." The *Vronksy* case is easily distinguished, however, as the Appellee fails to note that the trial court there had "directed consolidation. . .for all purposes" of a paternity action (to which Vronsky was not a party to action) with an adoption proceeding (which Vronksky filed and in which he therefore was of course a party). *Id.* at 520. While the record does not reflect the precise discovery process used, Vronksy was therefore, unlike State Farm in the present action (at the time the sanctions were imposed), clearly a present party in one of the two cases which had been consolidated together for all (including discovery) purposes.

5. State Farm Was Neither Served Nor Given Required Notice of the Motion or the Hearing on February 7, 2007

In addition to not serving State Farm nor even referencing a demand for imposition of a sanction against State Farm in the Motion before the Trial Court, the Appellee seeks to enforce a sanction that was ordered essentially out of the blue, spontaneously at the Hearing, against a non-present entity, while a confession of the inappropriateness of sanction against the present Defendant and her Counsel was simultaneously made on the record by Plaintiff's counsel. The spontaneously granted fine award against State Farm violates the:

> cardinal principle in the administration of justice that no man can be condemned, or divested of his rights, until he has had an opportunity of being heard. He must, by service of process, by publication of notice or in some equivalent way, be brought into court, and if judgment be rendered against him before that is done, the proceedings will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance.

First Jackson Securities Corp. v. B. F. Goodrich Co., 253 Miss. at 541, 176 So.2d at 28. The award below was made without even the hint of due process. State Farm was not party to the underlying actions; State Farm was not served with any discovery request or subpoena to obtain documents; no motion was ever filed requesting sanctions against State Farm; and no formal service or notice of any hearing on the issued was served on State Farm. The award of sanctions below is void and should be reversed and vacated.

The Appellee wholly fails to distinguish the case of *In re Hines*, 978 So.2d 1275 (Miss. 2008), arguing that where Presher's counsel had told State Farm about the Motion filed against the Preshers, that State Farm therefore had adequate notice that it may also, though outside the scope of the relief requested in the filed Motion itself, be separately subject to imposition of a fine through that Motion. The first obvious breakdown in the Appellee's argument is that the Appellee's motion did not request any relief against State Farm, a fact that the Appellee does not rebut. It is absurd for the Appellee to argue, that, since the Preshers' counsel told State Farm about a motion seeking relief against the Preshers, State Farm waived its Constitutional and Procedural rights by not submitting a Response to a change not even levied against it at the time. It is equally obvious that, even if that relief had been sought against State Farm in that Motion, such mere oral communication is insufficient as a matter of law, to meet the constitutional prerequisites of due process. The Mississippi Supreme Court correctly reasoned that a non-party cannot be held in contempt for failing to appear at a hearing of which he did not have written notice. *Id.* at 1279-1280.

In fact, the *Vronsky* case supports State Farm's position that formal service of process is a prerequisite to a valid judgment. Failure of process, and service of same may be properly asserted, at any time, by the party not properly served. *Karenina by Vronsky v. Presley*, 526 So.2d 518 (Miss.1988). In *Vronsky*, a putative father (listed as Alexander Karenin on the child's birth certificate as such), was arguably not provided with appropriate service of process as he was served by publication. *Id.* at 522. While the Court ruled that Vronksky had no standing to pursue Alexander Karenin's personal defense of lack of *in personam* jurisdiction due to improper process and service of same, the Court held that Alexander Karenin could, at any time, "then or now," assert the defense of failure of service necessary to provide *in personam* jurisdiction. *Id.* at 523. The Court so ruled even where Alexander Karenin obviously had notice of the paternity action as he had voluntarily appeared for a blood test. Thus, the *Vronksy* case supports State Farm's position that the trial court below did not acquire *in personam* jurisdiction of State Farm, necessary to sustain an award against State Farm, where, it is uncontested that State Farm was not served with any formal process and, in fact, the Appellee had not requested monetary sanction relief of or from State Farm.

6. Conclusion

The Appellee's brief contains numerous misstatements of fact that are contradicted by the record below. The Appellee cannot even justify an assessment of sanctions against the actual party to the action, much less a non-party which withheld nothing ever requested of it. Moreover, the Appellee cannot show that any of the fundamental prerequisites for imposition of any penalty against State Farm are present. It is uncontested that State

Farm was not a party to the action and was furthermore never served with any discovery nor even informal request submitted to them. The Appellee did not even request relief in the form of sanctions against State Farm in the Motion present before the Trial Court. State Farm was not provided notice of any supposed charge against it prior to the Ruling itself. The Order violated procedural, as well as State and Federal Constitutional, rights. We therefore respectfully submit that the February 22, 2007, Order Awarding Sanctions should be reversed and vacated, and State Farm prays for an Order and Mandate to such effect, with all costs of this appeal to be assessed against Appellee.

Respectfully submitted,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BY: _____

PHILIP W. GAINES ([redacted]

WILLIAM W. McKINLEY, JR. [redacted]

OF COUNSEL:

CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
1044 River Oaks Drive
Post Office Box 750
Jackson, Mississippi 39205
Telephone: (601) 969-1010
Facsimile: (601) 969-5120

CERTIFICATE OF SERVICE

I, William W. McKinley, Jr., do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Notice of Appeal to the following:

Thomas L. Tullos, Esq.
P. O. Drawer 567
Bay Springs, MS 39422

Honorable Gaylon Harper
Jones County Judge
P.O. Box 754
Ellisville, MS 39437

Honorable Billy Joe Landrum
Jones County Circuit Judge
P.O. Box 685
Laurel, MS 39441

This the 3rd day of June, 2009.

WILLIAM W. McKINLEY, JR.