SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

BRIEF OF APPELLEE

SCOTT CORLEW (MSB [redacted]
JOHN A. BANAHAN (MSB [redacted]
Bryan, Nelson, Schroeder,
Castigliola & Banahan, PLLC
1103 Jackson Avenue (39567)
Post Office Drawer 1529
Pascagoula, Mississippi 39568-1529
Telephone: (228)762-6631
Facsimile: (228)769-6392

ATTORNEYS FOR APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

I, Scott Corlew, do, pursuant to the provisions of Mississippi Rule of Appellate Procedure 28(a)(1), hereby certify that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Curtis Burnett, Jr. (Appellant)
2. R. Bradley Best, Esquire (counsel for Appellant)
3. Tiffany Hatcher Smith, Esquire (counsel for Appellant)
4. Mr. and Mrs. Curtis Burnett, Sr.
5. State Farm Mutual Automobile Insurance Company (Appellee)
6. John A. Banahan, Esquire (counsel for Appellee)
7. Scott Corlew, Esquire (counsel for Appellee)
8. The Honorable Andrew C. Baker (Trial Court Judge)

SO CERTIFIED, this the 27th day of July, 2009.

SCOTT CORLEW (MSB 10333)
JOHN A. BANAHAN (MSB 1731)

STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not feel that oral argument is necessary in this matter; however, should this Court require oral argument, Appellee would like to be heard.

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STATEMENT OF THE ISSUE

The Appellee, State Farm Mutual Automobile Insurance Company (hereinafter referred to as State Farm), submits this Statement of the Issue as a more concise version of the issue on appeal:

Whether the trial Court erred in granting State Farm's Motion for Summary Judgment on May 30, 2007.

STATEMENT OF THE CASE

The Plaintiff originally filed suit in this matter against Lee Franklin (hereinafter, "Franklin") and State Farm on April 1, 2003, regarding an automobile accident which occurred on September 21, 2001, in which the Plaintiff was a passenger in a 1985 white Buick Regal insured by State Farm and driven by his girlfriend, Shante Pratt. Burnett asserted claims of bad faith, refusal of insurance benefits, breach of the duty of good faith and fair dealing, breach of fiduciary duty and negligent procurement of insurance against State Farm. Issue was joined, and State Farm filed a Motion for Summary Judgment on August 6, 2006, asserting that due to a material misrepresentation regarding ownership of Appellant, Burnett's, vehicle the policy should deemed void *ab initio*, or, in the alternative, the Plaintiff was not an insured under Curtis Burnett, Sr.'s policy because he was not a resident relative of his father's household. In the alternative, State Farm sought partial summary judgment on the issue of bad faith and punitive damage. State Farm's motion for summary judgment was granted on June 15, 2007, and it is from that ruling the Plaintiff appeals. It should be noted that Plaintiff only appealed that ruling and the discovery arguments advanced by Plaintiff are not properly before this Court.

STATEMENT OF THE FACTS

This action arose out of an automobile accident between Shante Pratt, in which Burnett was a guest passenger, and Lee Franklin. The Plaintiff, Curtis Burnett, Jr., was the registered owner of the 1985 Buick Regal driven by Ms. Pratt. Burnett claims to have suffered bodily injuries in said collision and a knee injury which, ultimately,

required surgery. During the Plaintif's deposition, it was revealed that the Plaintiff had actual possession of the vehicle involved in the accident, was its primary driver, paid for it with money he earned, and had it titled in his name. (See deposition of Curtis Burnett, Jr., Vol. III pp. 246, 250, 262). The Plaintiff also admitted to paying the monthly insurance premiums due to State Farm on the automobile. By his own admission in his deposition, the Plaintiff channeled those monthly insurance premium payments through his father, Curtis Burnett, Sr., who had procured the policy in his own name. (See deposition of Curtis Burnett, Jr., Vol. III pp. 248, 252).

At the time of the automobile accident the Plaintiff was twenty-three years old, and he resided in an apartment in Batesville, Mississippi, with his girlfriend, Shante Pratt. (See deposition of Curtis Burnett, Jr., Vol. III pp. 261 - 262, Vol. II p. 220 - Vol. III p. 221). State Farm obtained the lease to the apartment which was signed for by Curtis Burnett, Jr., and it was also Curtis Burnett, Jr. who turned on the utilities and bought groceries for the apartment in Batesville. (See deposition of Curtis Burnett, Jr., Vol. II p. 220 - Vol. III p 221). Furthermore, Curtis Burnett, Jr. admitted that he lived in the apartment before the accident, on the day of the accident, and for one year after the accident. (See deposition of Curtis Burnett, Jr., Vol. III pp. 221 - 224). Finally, he testified that prior to the accident, Ms. Pratt was "at home . . . at our apartment." (See deposition of Curtis Burnett, Jr., Vol. III pp. 271-272).

Summary Judgment was heard before the Honorable Andrew C. Baker on May 30, 2007, and Judge Baker entered an Order Granting State Farm's Motion for Summary Judgment on June 15, 2007.

SUMMARY OF THE ARGUMENT

On September 21, 2001, Curtis Burnett, Jr. was the owner of the Buick Regal involved in the accident. He was paying for the car himself. However, Curtis Burnett, Jr. had never purchased insurance, although the car was titled in his name, and he was twenty-three years old and owned his own apartment. As the Mississippi Court of Appeals has held, a material misrepresentation in the context of an insurance application will permit the insurer to void or rescind the policy, before or after a loss. Wilson v. State Farm Fire & Cas. Co., 761 So. 2d 913 (Miss. Ct. App. 2000). In the case at bar, the vehicle involved in the accident was not owned by the State Farm policyholder, but, in actuality, was owned by the policyholder's twenty-three year old son. This misrepresentation regarding ownership is material as State Farm would not have issued the policy on the same terms had it known that the vehicle was actually owned by Curtis Burnett, Jr. as opposed to Curtis Burnett, Sr., the party who took out the policy.

In order to recover uninsured motorist benefits, the Plaintiff is required to be an insured under the policy or, in the alternative, an insured under the terms of the uninsured motorist statute. As Curtis Burnett, Jr. was not residing at his father's home at the time of the accident, he is not a resident relative as defined by the State Farm Mutual Automobile Insurance policy or the uninsured motorist statute. Therefore, he is not deemed an insured under the State Farm policy and no policy obligations are owed him.

Finally, the Appellant tries to insinuate discovery arguments into the appeal when they were not raised in the Notice of Appeal and are not properly before this Court.

ARGUMENT AND CITATION OF AUTHORITY

In determining whether the trial court properly granted a Motion for Summary Judgment, the Appellate Court employs a *de novo* review of the record. See, Presswood v. Cook, 658 So.2d 859, 862 (Miss. 1995) (citing Owen v. Pringle, 621 So.2d 668, 670 (Miss. 1993)); Daniel v. G&B Inc., 629 So.2d 595, 599 (Miss. 1993); Mentachie Natural Gas District v. Mississippi Valley Gas Co., 694 So.2d 1170, 1172 (Miss. 1992). A grant of summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party, "[t]he 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...". Miss. R. Civ. P. 56(c). The nonmoving party is obligated to oppose the motion either by referring to evidentiary material already in the record or by submitting additional evidentiary documents which set out specific facts indicating the existence of a genuine issue for trial. Miss. R. Civ. P. 56(e). If the opponent fails in his duty summary judgment is appropriate. Newell v. Hinton, 556 So.2d 1037, 1041-42 (Miss. 1990).

Due to the material misrepresentation regarding ownership of the vehicle, the policy should be deemed void *ab initio*

The Mississippi Court of Appeals has held that a material misrepresentation in the context of an insurance application will permit the insurer to void or rescind the policy, before or after a loss. Wilson, 761 So. 2d 913. (citing Coffey v. Standard Life Ins. Co. of the South, 238 Miss. 695, 120 So. 2d 143 (Miss. 1960)). In Wilson, the Court held that a material misrepresentation was made by the insured as to his loss history and, thus, the contract could be voided, even after another the loss occurred.

Id. at 922. The Court also found that by accepting premiums and renewing the policy, the insurer had not waived its right to void the contract *if it found that a material misrepresentation had been made.* Id. at 921. (emphasis added).

Notably, the fact that a misrepresentation was unintentional is irrelevant so long as the misrepresentation was material. Dukes v. S. Car. Ins. Co., 590 F. Supp. 1166 (S. D. Miss. 1984); See also, Fidelity Mut. Life Ins. Co. v. Miazza, 46 So. 817, 819 (Miss. 1908) (holding that if the misstatement is material, it makes no difference whether it was made in good faith); Coffey, 120 So. 2d at 148-49 (citing Cooperative Life Ass 'n v. Leflore, 53 Miss. 1 (Miss. 1876) for the proposition that "a contract of insurance, like other contracts, is avoided by an untrue statement by either party as to a matter vital to the agreement, though there be no intentional fraud in the misrepresentation.").

In this case, it is clear that the vehicle involved in the underlying accident was not owned by the policyholder. It was owned by the Plaintiff, the policyholder's twenty-three year old son. (See deposition of Curtis Burnett, Jr., Vol. III p. 262). The Plaintiff had actual possession of the vehicle, was its primary driver, paid for it with money he earned, and had it titled in his name. (See deposition of Curtis Burnett, Jr., Vol. III pp. 246, 250, 262). The Plaintiff even paid the monthly insurance premiums due on the State Farm auto policy covering the vehicle; however, he channeled those premium payments through his father, Curtis Burnett, Sr., who had procured the policy in his own name. (See deposition of Curtis Burnett, Jr., Vol III pp. 248, 262). A misrepresentation regarding ownership is material because, had State Farm known who the true owner of the vehicle was, it would not have provided coverage on the same terms. (Affidavit

attached as Exhibit "D" to State Farm's Motion for Summary Judgment Vol. II p. 111). A material misrepresentation of this nature provides a sufficient basis upon which State Farm may void the policy, even though a loss has occurred. State Farm's prior acceptance of premiums, its payment of medical expenses or other actions indicative of coverage do not constitute a waiver of its rights since the truth about the ownership of the vehicle was not known at those times.[1] Under these circumstances, the policy should be declared void *ab initio* and the claims against State Farm should have been dismissed as the trial court correctly ruled.

Appellant argues that State Farm failed to show that a material misrepresentation was ever made. Considering the substantial evidence presented regarding the Plaintiff's actual residency, this argument is rather absurd; however, if in fact no misrepresentation was made, then the policy would be unenforceable as Curtis Burnett, Sr. would have not had an insurable interest in the automobile. This Court in Southern Fidelity Ins. Co. v. Gann quoted with approval Appleman's Insurance Law and Practice stating, "the reason for a rule requiring interest in property upon which insurance is sought is to prevent the coverage from becoming a wagering contract contrary to public policy." Southern Fidelity Ins. Co. v. Gann, 340 So.2d 429, (Miss. 1976) (quoting from Appleman, Insurance Law and Practice, 2121 (1969)).

Appellant contends State Farm admitted Plaintiff was a resident relative of Curtis Burnett, Sr.'s household in their Answer to the Complaint. This is true; however, as argued at the hearing in this matter this Answer was prepared and filed long before any

[1] It was not until discovery was conducted that it was learned the Plaintiff actually was living in an apartment with his girlfriend at the time of the accident..

information regarding Plaintiff's true residency at the time of the lawsuit was uncovered. Plaintiff's argument that this should prevent the court from granting summary judgment ignores judicial economy and the fact that amendments are to be liberally granted. It also rewards the Plaintiff for making material misrepresentations in their application for insurance and in the Complaint at issue. Should this Court remand this case, State Farm would then move to amend its answer to deny the residency allegations contained therein. Further, had Plaintiff timely filed a response to the Motion for Summary Judgment, State Farm would have had the opportunity to address this before the summary judgment hearing; however, Plaintiff elected to file its response the day before the hearing on State Farm's motion preventing State Farm from correcting its error. This type of gamesmanship was what the Court was trying to avoid when it stated:

> These rules shall be construed to secure the just, speedy and inexpensive determination of every action.
>
> Miss. R. Civ. P. 1.

B. Resident Relative

Although, not addressed by the Court in its Order granting State Farm's motion for summary judgment, the Plaintiff does not qualify for uninsured motorist benefits under either the uninsured motorist statute or the State Farm policy. In order to qualify for uninsured/underinsured motorist benefits the claimant must first prove that he is an insured under the policy of insurance at issue or under the terms of the UM statute. State Farm Mutual Automobile Insurance Co. v. Davis, 613 So.2d 1179 (Miss. 1992); Miller v. Allstate, 631 So.2d 789 (Miss. 1994); Meadows v. Mississippi Farm Bureau Insurance Co., 634 So.2d 108 (Miss. 1994); Johnson v. Preferred Risk Insurance Co.,

659 So.2d 866 (Miss. 1995); Mississippi Farm Bureau Casualty Insurance Co. v. Curtis, 678 So.2d 983 (Miss. 1996); and Box v. State Farm Mutual Automobile Insurance Co., 692 So.2d 54 (Miss. 1997).

The definition of an insured in the State Farm policies the appellants seek to stack is as follows:

> Who is an insured?
>
> When we refer to your car, a newly acquired car or a temporary substitute car, insured means
>
> (1) you;
>
> (2) your spouse;
>
> (3) the relatives of the first person named in the Declarations;
>
> (4) any other person while using such a car if its use is with the consent of you or your spouse; and (Emphasis is ours)
>
> (5) any other person or organization liable for the use of such car by one of the above insureds.

The UM statute defines an insured as:

> The term insured shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, express or implied, of the named insured, the motor vehicle to which the policy applies or the guest in such motor vehicle which the policy applies or the personal representative of any of the above . . . MISS. CODE ANN. § 83-11-103(b) (1972).

To recover UM benefits, the Plaintiff must prove that he is an insured under the policy or the terms of the UM statute. Johnson, 659 So. 2d at 873 (citing State Farm Mut. Auto. Ins. Co., 613 So. 2d at 1179).; Gillespie v. Southern Farm Cas. Ins. Co., 343

So. 2d 467, 471 (Miss. 1977). MISS. CODE ANN. § 83-11-103(b) (1972) defines "insured" as "the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either . . ." The UM provisions of State Farm's policy define an "insured" as "the person or persons covered by uninsured motor vehicle coverage. This is: you; your spouse; your relatives ... [etc.]" (See Policy, Vol II p. 124). A "relative" is" a person related to you or your spouse by blood, marriage or adoption who resides primarily with you" and "you" is "the named insured or named insured shown on the declarations page." (See Policy, Vol. II p. 115). To recover med-pay benefits, the Plaintiff must prove he is an insured under State Farm's policy. Since there is no statutory law which would limit the definition of an insured for purposes of the med-pay provisions of an insurance contract, the language of the policy is controlling. The policy states "[w]e will pay medical expenses for bodily injury sustained by 1. a. the first person named in the declarations; b. his or her spouse; and c. their relatives." (See Policy, Vol. II p. 121). As discussed above, the term "relative" is defined as "a person related to you or your spouse by blood, marriage or adoption who resides **primarily** with you." (See Policy, Vol. II p. 115) (emphasis added).

"Whether a person 'resides' at a particular location is a practical question which turns on the degree of one's attachment to a particular place of abode." Johnson, 659 So. 2d at 873. The determination rests upon the following three part analysis:

> (1) the subjective or declared intent of the person remaining, either permanently or for an indefinite or unlimited period, in the place he contends is his 'household;'
>
> (2) the formality or informality of the relationship between such person and the members of the household; and

(3) whether the person alleging his residence to be a particular household has another place of lodging.

Id. at 874 (citations omitted).

In this case, the Plaintiff was seeking UM coverage under a policy of insurance owned by his father. (See deposition of Curtis Burnett, Jr., Vol. III, p. 248). Mississippi's UM statute defines an insured as a relative of the named insured, while a resident of the same household. State Farm's policy is in accord with statutory law in that an insured includes a person related to the named insured who resides primarily with the named insured. Thus, under the statute and the policy, the Plaintiff must prove he was a resident of his father's household at the time of the accident to qualify for UM coverage.

Although the Plaintiff contends he was residing in his father's household at the time of the accident, it does not reasonably appear that he can meet the requirements for residency established by the Court in Johnson. The Plaintiff may certainly allege that he and his father had a close, formal relationship. However, he cannot meet the other factors set out in the Johnson analysis because he had another place of lodging (i.e., an apartment which he leased with his girlfriend, Shante Pratt), and a subjective and declared intent to live separate and apart from his father, either permanently or for an indefinite and uncertain period of time.[2]

The Plaintiff's intent to reside outside of his father's household is evidenced by his statement that prior to the accident Ms. Pratt was "at home ... [a]t our apartment."

[2] The Plaintiff lived in the apartment for a year after the accident. (Exhibit "A," p. 28, Vol. I. p. 84).

(See deposition of Curtis Burnett, Jr., Vol. III, pp. 271 - 272). The Plaintiff's intent to live in the apartment is further evidenced by the fact that he signed a lease for it,[3] turned on the utilities, and bought groceries. (See deposition of Curtis Burnett, Jr., Vol. II p. 220 - Vol. III p. 221). Based on these facts, it is clear that on the date of the accident, the Plaintiff had a place of lodging other than his father's house where he intended to reside. Thus, despite the formal relationship between the Plaintiff and his father, the Plaintiff was not a resident of his father's household.

Likewise, the Plaintiff does not qualify for med-pay benefits. Even if it could be shown that the Plaintiff was maintaining multiple residences at the time of the accident, it certainly cannot be said that he was primarily residing in his father's household. Unlike the UM provisions of the policy, the med-pay provisions are not limited by statute. Thus, State Farm need only show, as it has already done herein, that the Plaintiff did not reside "primarily" in his father's household in order to deny coverage under the medical payments coverage of the policy.

C. Discovery Disputes

This Plaintiff asserts widespread discovery and judicial abuse throughout the pendency of this litigation and has sought to insert those arguments in their brief in this matter. This attempt ignores the seminal issue on appeal, and the only issue raised in Plaintiff's Notice of Appeal which was whether the trial court was correct in granting State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment.

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[3] The lease documents clearly show that the plaintiff submitted an apartment lease application on July 6, 2001 with occupancy to begin on August 1, 2001. (Exhibit "B").

Furthermore, as reflected in State Farm's Objection to Plaintiff's Written Statement of Proposed Corrections to the Appellate Record. M.R.A.P. 10(b)(3), states:

> (3) Matters Excluded Absent Designation:
>
> "ii. papers relating to discovery including depositions, interrogatories, requests for admission, and all related notices, motions or orders"

As discussed in State Farm's objection the Plaintiff's Notice of Appeal concerns exclusively the Court's ruling on Defendant's Motion for Summary Judgment; therefore, it was Defendant's position to the trial court and to this Court that discovery disputes between the parties are irrelevant to this Court's consideration in this matter.

Finally, Plaintiff asserts that there was a dispute as to the available uninsured motorist coverage, because as he asserts, State Farm did not have a selection/rejection form for one of Plaintiff's father's vehicles. However, as State Farm represented numerous times to Plaintiff the selection/rejection requirement is a statutory obligation and follows the policy not the vehicle as Plaintiff alleges. The statute clearly reads:

> The coverage herein required shall not be applicable where any insured named in the policy shall reject the coverage in writing and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in any renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.
>
> MISS. CODE ANN. § 83-11-101 (1972).

CONCLUSION

As set out in the Court's order the Plaintiff owned the vehicle in question. In addition, the Plaintiff was not a named insured under his policy as he was not a resident

relative of his father's household. Therefore, the Circuit Court was correct in granting State Farm's summary judgment motion in this matter and the Order of the lower Court should be affirmed.

Respectfully submitted,

BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
Attorneys for Appellee/Defendant,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BY: _____
SCOTT CORLEW (MSB [redacted]
JOHN A. BANAHAN (MSB [redacted]

CERTIFICATE OF SERVICE

I, **SCOTT CORLEW**, attorney for Defendant/Appellee, **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing **Appellees' Brief** to:

The Honorable Andrew C. Baker
Panola County Circuit Court
Post Office Drawer 368
Charleston, MS 38921-0368

Betty W. Sephton, Clerk
Mississippi Supreme Court
P O Box 249
Jackson, MS 39205-0249

R. Bradley Best, Esquire
Tiffany Hatcher Smith, Esquire
Holcomb Dunbar, P.A.
P O Drawer 707
Oxford, MS 38655

H. Scot Spragins, Esquire
Hickman, Goza & Spragins
P O Box 668
Oxford, MS 38655-0668

DATED, this the 22nd day of July, 2009.

SCOTT CORLEW (MSB [redacted]
JOHN A. BANAHAN (MSB [redacted]

BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
1103 Jackson Avenue (39567)
Post Office Drawer 1529
Pascagoula, MS 39568-1529
Tel: (228)762-6631
Fax: (228)769-6392
scott@bnscb.com
john@bnscb.com