IN THE SUPREME COURT OF MISSISSIPPI
CASE NUMBER 2008-WC-01840-COA

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION — APPELLANT

VERSUS

BRIDGETT BLAKENEY — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
JONES COUNTY, MISSISSIPPI

BRIEF OF APPELLEE
BRIDGETT BLAKENEY

Oral Argument Is Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have a possible interest in the outcome of this case:

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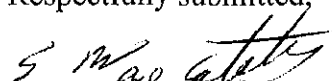
Respectfully submitted,



S. WAYNE EASTERLING

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STATEMENT REGARDING ORAL ARGUMENT

Claimant-appellee does not believe that oral argument would assist in resolution of the issues raised in this appeal.

Respectfully submitted,

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STATEMENT OF ISSUES

In addition to the issues raised by the defendant, the claimant respectfully contends that she should be entitled to a hearing as a result of contested issues raised by the defendant in the motion filed by it before the Administrative Judge to suspend benefits.

STATEMENT OF THE CASE

Claimant-appellee agrees with the defendant-appellant's statement of the case.

STATEMENT OF FACTS

On June 3, 2002, claimant was involved in a very serious automobile accident while a passenger in an automobile driven by a co-worker. Both were employed by the Laurel Housing Authority; the vehicle was owned by their employer, and it is undisputed that the claimant was in the course and scope of her employment at the time of the accident. The driver of the third-party vehicle was Ray Arrington, and the accident was totally his fault. His vehicle was insured by Progressive Gulf Insurance Company through a $10,000/$20,000 policy of insurance.

The claimant sustained extremely serious injuries in the accident. She continues to incur very substantial medical expenses and is in need of additional surgery. Her medical payments thus far are in excess of $60,000.

Laurel Housing Authority had, prior to the date of the accident, maintained uninsured motorist coverage on its fleet of vehicles. Section 83-11-101 of the Mississippi Code of 1972 requires that all liability insurance policies contain uninsured motorist coverage unless the owner rejects the coverage in writing. The Laurel Housing Authority's liability and uninsured motorist coverage was written through Coregis Insurance Company in the amount of $100,000 for both liability and uninsured coverage. When demand was made upon Coregis, that company took the position that uninsured motorist coverage had been rejected in writing by the Laurel Housing Authority.

Claimant filed a lawsuit in the Circuit Court of the Second Judicial District of Jones County, Mississippi, against Ray Arrington and Coregis Insurance Company. Arrington's insurer promptly offered its $10,000 limits to the claimant, and this sum is presently in the trust account of the claimant's attorney awaiting final instructions. Coregis filed for summary judgment in the Circuit Court proceeding based upon its claim that uninsured motorist coverage had been rejected in writing. Claimant took the position in this proceeding that the document asserted as constituting a written rejection of uninsured motorist coverage was not adequate. The Circuit judge overruled the summary judgment motion, and Coregis promptly filed notice of interlocutory appeal of this ruling.

With the appeal to the Supreme Court of Mississippi having been noticed, Coregis and the attorney's for the claimant entered into settlement negotiations, recognizing that the issue of notice of cancellation was tenuous and could very easily be resolved adversely to the claimant.

An agreement was reached that Coregis would pay $60,000 for a settlement of the claim against it.[1]

Thus, claimant has received certain benefits pursuant to the worker's compensation coverage provided by her employer; she has received $10,000.00 from Progressive, the carrier of the third-party tort-feasor; and she has received $60,000.00 pursuant to the Laurel Housing Authority's uninsured motorist coverage. She continues to incur medical expenses which are not being paid by the Guaranty Association. It is apparent that in a perfect world she would have received recovery of several times this total amount inasmuch as her injuries are extremely serious, disabling, and painful. In short, the total of $70,000.00 received is insufficient to make her whole for the pain and suffering she has endured without regard to medical expenses and lost wages.

SUMMARY OF THE ARGUMENT

It is respectfully submitted that there is a possible conflict between Sections 83-11-101, *et seq*, and Section 83-23-123 of the Mississippi Code of 1972. There is also a possible conflict between the application of Section 71-3-71 and Section 83-23-123 of the Mississippi Code. The Workers' Compensation Commission and the Circuit Court of Jones County resolved these conflicts in favor of the plaintiff, and it is respectfully submitted that this was the proper result.

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[1]As authorized by state law and pursuant to the policy of insurance, Coregis was entitled to off-set from its limits any amount paid by another insurance company. Thus, Coregis was entitled to off-set from its $100,000 policy limits the $10,000 paid by Progressive, leaving total maximum exposure of Coregis of $90,000.

ARGUMENT

1. The Workers' Compensation Commission Was Correct in Refusing to Allow Mississippi Insurance Guaranty Association to Recover or Off-Set the Amount Paid by It from the Funds Paid by the Uninsured Motorist Carrier.

While Section 71-3-71 of the Mississippi Code authorizes a compensation carrier to (1) recover an off-set paid by it out of any recovery against a "third-party " or (2) the compensation carrier can maintain its own action at law against any "third-party," this Court has clearly ruled in a number of cases that this off-set does not apply to funds received pursuant to uninsured motorist coverage. Thus, this Court has distinguished between sums received from a third party tort-feasor and those received from an uninsured motorist carrier. In the case at bar, therefore, the $10,000 received from Progressive should be considered separately from the $60,000 received from Coregis pursuant to its uninsured motorist coverage.

Two cases clearly supporting this point are *Hare v. State of Mississippi, et al*, 733 So.2d 277 (Miss. 1999), and *Cossitt v. Nationwide Mutual Insurance Company*, 551 So.2d 879 (Miss. 1989). In *Hare, supra*, this Court definitively answered the issue of whether a compensation carrier was entitled to off-set sums received by the employee from personal coverage or from uninsured motorist coverage:

> *Additionally, in Nationwide Mutual Ins. Co. v. Garriga,* 636 So.2d 658 (Miss. 1994), this Court answered the question of whether an insurer can contractually limit, credit or offset the amount of worker's compensation benefits received by its insured to the extent the insured's uninsured motorist coverage exceeds the statutory minimum required. There, we hold that insurers are mandated by statute to provide uninsured motorist coverage up to the amount of liability insurance purchased when the insured so desires. *In other words, insurers cannot reduce the value of uninsured motorist benefits by offsetting worker's compensation benefits. Id.* At 663. Persuaded by the reasoning in Garriga, we hold that the State is not entitled to recover a portion of Hare's

uninsured motorist benefits to offset payments to Hare under the State Health Plan. (Emphasis added.)
Hare, *supra,* at 284.

The Mississippi Insurance Guaranty Association confesses that the holding in *Hare* is good law but seeks to evade this clear holding by claiming statutory rights pursuant to the act creating the Guaranty Association. Simply stated, the Guaranty Association takes the position that if Coregis had remained solvent, it could not off-set; but with the Guaranty Association now in the shoes of Coregis, this Court's holding in *Hare*, *supra*, is not applicable.

Such a position is contrary to the public policy of this state and would result in a very inequitable result. The Uninsured Motorist Act (Sections 83-11-101, *et seq*, of the Mississippi Code) was passed pursuant to concerns about the number of motorists injured by uninsured drivers. It is remedial in nature, designed to cure this specific ill, and creates a special category of insurance coverage that is in a sense personal to the covered individual. To that extent, it is analogous to personal coverage such as life insurance or disability coverage. This Court has repeatedly held that the purpose of the Uninsured Motorist Act is to "provide[s] innocent injured motorists a means of recovery of all sums to which they are entitled from an uninsured motorist." *Wickline v. United States Fidelity & Gauranty Company*, 530 So.2d 708, 712 (Miss. 1988).

The *Hare, Garriga* and *Cossitt*, *supra*, cases expressly forbid subrogation or off-set against a plaintiff's uninsured motorist coverage. Thus, the statutes cited by the defendant Guaranty Association collide with these cases. It is, therefore, respectfully submitted that equitable considerations and the public policy of the State of Mississippi should be considered in resolving these conflicts. These issues have not been resolved in this state and are unique to Mississippi jurisprudence. Therefore, it is respectfully submitted that the line of cases involving

jurisprudence of foreign jurisdictions have very limited application to an interpretation of this state's uninsured motorist statutes. See *Harris v. Magee*, 573 So.2d 646 (Miss. 1990), *Wickline v. United States Fidelity & Gauranty Company*, 530 So.2d 708, 714 (Miss. 1988), and *Dunnam v. State Farm Mutual Automobile Insurance Co.*, 366 So.2d 668 (Miss. 1979).

The Court of Appeals for the Fifth Circuit in *Boatner v. Atlanta Speciality Insurance Company*, 115 F.3d 1248 (5th Cir. 1997), in an *Erie* interpretation of Mississippi law, stated the following:

> The Mississippi Supreme Court has applied a relatively thick coat of judicial gloss to the UM Act. Four principles form the basis of our Erie guess.
>
> First, the Mississippi Supreme Court has repeatedly stated that courts should liberally construe the provisions of the UM Act to effectuate the remedial and humanitarian purposes of the Act. Second, uninsured motorist provisions within automobile insurance policies must be interpreted from the standpoint of the injured insured. Third, if the provisions of the UM Act provide broader protection than the uninsured motorist policy, then the terms of the Act become part of the policy, providing the insured a statutory level of monetary protection. *Fourth, although the Mississippi Supreme Court has not always closed its judicial eye to the insurance law of other jurisdictions, the court has more recently suggested that courts interpreting Mississippi uninsured motorist law should be "guided by [the terms of Mississippi's] uninsured motorist statute, not the jurisprudence of foreign jurisdictions."* (Emphasis added.)
> *Boatner, supra*, at 1253.

Claimant can invoke strong equitable considerations in support of her position. She has been injured considerably in excess of her total recovery. She will never receive adequate monetary compensation for her injuries. Her pathetic condition will be made even worse if the Mississippi Insurance Guaranty Association's position is adopted. The public policy of this state obviously encourages compensation being received by those entitled to it. The claimant took the

initiative in pursuing her claim against both the third-party defendant and her uninsured motorist carrier. She, alone, assumed the expense and risk of litigation.

The Guaranty Association, on the other hand, cannot advance a single equitable argument. While it may argue that allowing the Guaranty Association to off-set may help it remain solvent, this argument fails because it took no action to protect its rights. It seeks to penalize the claimant for her affirmative action, and one can only imagine the affect on others in a similar situation who will have absolutely no incentive to pursue similar claims in the future if they know that the Guaranty Association can require them to repay any sums they recover through their initiative. In short, the Guaranty Association took no action to pursue its statutory right created by Section 71-3-71 of the Mississippi Code to file a lawsuit and now attempts to feast on the carcass of a successful recovery obtained by the claimant. To adopt the Guaranty Association's position would be to frustrate future attempts by injured persons to make themselves whole and would contribute absolutely nothing to the solvency of the Guaranty Association. In fact, an adoption of the position asserted by the Guaranty Association would actually make the condition of injured person's worse. If the Guaranty Association is entitled to assert that the off-set to which it is entitled is only limited by the amount of the uninsured motorist coverage available, then the claimant would be penalized by entering into good faith settlement negotiations with its uninsured motorist carrier.

2. The Workers' Compensation Commission Correctly Resolved Any Conflict Between Section 71-3-71 and Section 83-11-101 of the Mississippi Code.

Coregis, the uninsured motorist carrier, raised very serious issues in its defense in the circuit court action pending in Jones County. The claimant was confronted with a long and

winding litigation path that could very well have resulted in Coregis prevailing before a jury or an appellate court on the question of sufficiency of the cancellation notice. She determined, in consultation with her attorneys, that the up-side risk (receiving $90,000) did not justify the down side of receiving northing. Therefore, she settled her claim against Coregis for $60,000.

The Guaranty Association now takes the position that Section 83-23-123(1) gives it the right to off-set the entire potential liability of Coregis against its requirements to pay worker's compensation benefits to the claimant.[2] Section 71-3-71 of the Mississippi Code, on the other hand, only allows the compensation carrier to recover the net payment by it, less cost of recovery, from any sum recovered from a third party tort-feasor. Thus, the Guaranty Association is taking the position that no matter how tenuous the liability of a "third-party," it is entitled to an off-set against this potential liability.

The Guaranty Association's proposed interpretation of the two statutes was rejected by the Workers' Compensation Commission (R.E. 6-8). The Commission interpreted the case of *Bobby Kitchens v. Mississippi Insurance Guaranty Association*, 560 So.2d 129 (Miss. 1989), as holding that the Guaranty Association had the same rights and, more importantly, the same responsibilities as the insolvent workers' compensation carrier. The Commission then also pointed out that the Guaranty Association has in the past successfully taken a contrary position to the position it now takes. In the case of *Mississippi Insurance Guaranty Association v. Brewer*, 922 So.2d 807 (Miss. Ct. App. 2005), the Guaranty Association prevailed in arguing that Section

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[2]"Any person having a claim against an insuror under any provision in an insurance policy other than a policy of a solvent insuror, which is also a covered claim, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this article shall be reduced by the amount of any recovery such insurance policy."

71-3-71 of the Mississippi Code does control its subrogation rights. In the *Brewer* case, the Guaranty Association suggested that Section 71-3-71 and Section 83-23-123 could be harmonized by allowing recovery of the "net proceeds" rather than the face amount of the policy.

The Commission, after a well-reasoned analysis of the public policy underlying the uninsured motorist statutes and the laws governing worker's compensation, reasoned that public policy of this state requires rejection of the Guaranty Association's position.

Finally, the Commission reasoned that inasmuch as Section 71-3-71 controlled, the uninsured motorist carrier was not the "third-party" to which reference in made in this section; and, therefore, there was no right of subrogation extended to the Guaranty Association.

3. The Subrogation Interests of the Mississippi Insurance Guaranty Association Are Subject to Reasonable Costs of Collection.

In this case, the claimant has entered into a contract to pay her attorneys 40 percent of that recovered through her litigation against the third party and the uninsured motorist carrier. Thus, she has paid her attorneys $24,000.00 of her recovery of the $60,000.00 against the uninsured motorist carrier and also paid expenses consisting of filing fee of $95.00, service of process charges of $80.11, the costs of obtaining medical records from various providers that total $367.85. When other out-of-pocket expenses are deducted, she has actually received a total of $34,092.04 from the $60,000.00 received. The Guaranty Association, which has contributed absolutely nothing to this recovery, now wants to recover the total of $70,000.00 plus receive a credit for $30,000.00 in future compensation payments that would otherwise be made to the claimant.

As previously stated, the claimant received terrible injuries in this accident. She is entitled

to receive more than $70,000.00 for pain and suffering; and if she is mistaken in her contention that the Guaranty Association is entitled to recover nothing, the Association should be required to prove what portion of this recovery is identified with compensation injury. It should also be required to deduct costs of collection, including attorney fees and expenses from that it receives. See *Federated Mutual Insurance Company v. McNeal*, 943 So.2d 658 (Miss. 2006). It is, therefore, respectfully submitted that the Mississippi Insurance Guaranty Association will not be able to establish that it is entitled to any reimbursement or off-set because the amount recovered by the claimant is insufficient to cover her non-worker's compensation covered injuries.

Respectfully submitted,

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CERTIFICATE

A true copy of the foregoing brief has been mailed, postage prepaid, to the Honorable Clifford C. Whitney, III, Post Office Box 1237, Vicksburg, Mississippi 39181-1237, and to the Honorable Michelle Mims, Post Office Box 13429, Jackson, Mississippi 39236-3429; to the Mississippi Workers' Compensation Commission, 1428 Lakeland Drive, Jackson, Mississippi 39216; and to the Honorable Billy Joe Landrum, Circuit Judge, Eighteenth Judicial District, Post Office Box 685, Laurel, Mississippi 39441, on this 31st day of March, A.D., 2009.

S. Wayne Easterling

S. Wayne Easterling