IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES ROBIN ROBINSON, JR.	**APPELLANT**
VS.	**CASE NO. 2009-TS-00864**
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	**APPELLEE**

REBUTTAL BRIEF OF THE APPELLANT JAMES ROBIN ROBINSON, JR.

APPEAL FROM THE GRANT OF SUMMARY JUDGMENT BY
THE CIRCUIT COURT OF SMITH COUNTY, MISSISSIPPI
HONORABLE ROBERT G. EVANS, CIRCUIT JUDGE

ORAL ARGUMENT IS NOT REQUESTED

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REBUTTAL ARGUMENT

The issue before this Court is simply whether Christy Robinson Best (hereinafter Best) was a resident of the same household as the Appellant, James Robin Robinson, Jr. (herein after Robinson) on the date of his accident. Robinson asserts that she was, and quite naturally, State Farm disputes this fact. State Farms attempts to down play the four (4) affidavits of persons with actual personal knowledge of the residence of Best at the time of the accident by stating that the affidavits contain "magical" language that Best was residing in her parents' home on the date of the accident. There is nothing magical about this fact of Best's residence. The affidavits presented were made by persons with personal knowledge of Best's residency and clearly create a genuine issue of material fact which should preclude summary judgment.

There is no dispute that under §83-11-103 Christy Best is the insured, and under the State Farm policy any relative related by blood or marriage "residing" with the insured, or with whom the insured resides should be covered under the policy. Interestingly, State Farm cites virtually the same case law regarding how this Court determines residence as the Appellant. However, State Farm asserts that Best did not *intend* on residing with her parents and relies exclusively on her deposition to support this contention. State Farm correctly argues that Best's actions **AFTER** the accident have

no bearing on her residence, likewise, her *intentions* regarding residency **AFTER** the accident have no bearing. (Page 12 of Appellee's brief) That is to say, the Court must look at her ***actions*** up to and as of the date of the accident with regard to her residency. Although Best testified that she had a martial dwelling at 444 SCR 106, she also testified that she vacated that dwelling before the date of the accident because she and her husband had separated. In Best's deposition she states that she filed for divorce in August of 2005, and that she moved to Raleigh to live with a girlfriend, but moved back to Mize within about a month. [R.E. 56-58] She testified that she and her husband Mr. Best resided at 444 SCR 106 "before" she filed for divorce [R.E. 57] Best then testified she moved to Raleigh to live with a girlfriend for about a month.

The affidavits submitted by Robinson clearly indicate that Best did in fact reside with Robinson at their parent's home. Robinson's father, mother, brother, and a friend of the family all signed sworn affidavits that James Robinson Jr., and Christy Best were both residing at their parent's home at the time of the accident. The father of Robinson and Best stated that both James Robin Robinson, Jr., and Christy Best were residing in his residence on September 6, 2005. [R.E. 19] The mother of Robinson and Best also executed a sworn affidavit stating that both were residing in her residence on September 6, 2005. [R.E. 20] Ben Robinson is the brother to both Robinson and Christy Robinson Best and he also states that he, along with both of his siblings, were residing with his parents (Robin and Carolyn Robinson) in their household at the time of the accident. [R.E. 21] Finally, Keith Brewer executed a sworn affidavit that he is friends with Robinson and was dating Christy Robinson Best and that on September 6, 2005, he had personal knowledge that both Robinson and Christy Robinson Best were residing with their parents in the same home. [R.E. 22] Four people (in addition to Robinson) who have personal knowledge of the fact that Best was residing with her parents and Robinson have sworn that Best was residing with her parents at the

time of the accident in question.

State Farm argues that the insufficiency of the affidavits is best understood not by what they state, but what they fail to state. (Appellee's Brief page 15) State Farm argues that the affidavits do not address where Best's belongings were kept, and that because the affidavits do not state where the personal belongings were being kept the affidavits are "insufficient". While this argument by State Farm may raise a material question of fact for the jury to decide, it certainly does not invalidate the affidavits. In Johnson v. Preferred Risk Auto. Ins. Co., 659 So.2d 866, 868-869 (Miss. 1995) this Court held that a married couple ***temporarily*** residing with their respective parents prior to their moving to a new home were eligible to recover uninsured motorist benefits under insurance policies issued to their parents. The relevant facts as related by the Court in Johnson are as follows:

> On **June 10, 1988**, Ronald Glen Johnson ("Ron") and his wife Sara Ballard Johnson ("Dee") were injured in an accident in Lee County, Mississippi, with an uninsured motorist. The Johnson's pickup truck was uninsured. At the time of the accident, Ron was **temporarily** living with his parents in Columbus, Mississippi, and Dee was **temporarily** living with her parents in Plantersville, Mississippi. Happily, their separation was not caused by marital discord. Rather, the Johnsons, married in 1986, had been living in Knoxville, Tennessee, while Ron attended graduate school. Ron graduated on **June 1, 1988**, and the couple planned to move to Little Rock, Arkansas, where Ron had secured a job with Proctor and Gamble. Ron was to begin work on **June 24, 1988**, and the couple intended to move to Little Rock on **June 15, 1988.** Ron and Dee stayed with Ron's parents from June 1 through June 3, 1988; Dee then went to her parent's home from June 3 to June 10, 1988. Each spouse attended to personal affairs.

It is clear from reading Johnson, that the Plaintiffs in that case had personal belongings potentially at two or three locations in possibly three different states on the date of the accident. It is also clear from the facts in Johnson, that the Plaintiffs were only at their parent's homes for a very short time, and in fact ***intended*** to move within just a few weeks. Ron graduated on June 1, 1988, and had a job in Little Rock, Arkansas which was to begin on June 24, 1988. In fact, the Johnson, case states that

Ron and Dee had rented a home in Little Rock, and were receiving mail to that address (as well as some mail in Knoxville, Tennessee, and at his parents' home in Mississippi) at the time of the accident. Johnson, at 869. Yet the Court in Johnson, found that coverage existed as they were "residents" of their parent's households. Regardless of Best's intentions to either permanently or temporarily reside with her parents, it was her actions at the time of the accident which are relevant.

State Farm also argues that the Johnson case along with the Mcleod case are distinguishable from this case. In Johnson, the facts are clear that the Plaintiffs were simply "passing through" from June 1, 1988-June 15, 1988, when they *intended* to move to Little Rock at the home that was rented at that location and were in the process of attempting to purchase. However, the Court found that they were legal residents of their parents home in Mississippi although they had been there for less than two weeks when the accident occurred and did not intend on staying. Clearly, in Johnson, the Plaintiff's intent was known.

Interestingly, State Farm also argues that McLeod, is distinguishable because the name insured died as a result of the accident and her ***intent* was not known**, but in this case Best testified that she did not intend on residing with her parents. This testimony by Best was naturally after the accident, but nevertheless, it is clear from the affidavits that Best was residing with her parents as was Robinson at the time of the accident. It is Best's actions at the time of the accident which are relevant, not her subjective intentions. For this reason, State Farm erroneously argues that the affidavits do not support and/or are silent as to any specific facts to support the Plaintiff's contention.

The owners of a residence are the best persons to know who is residing with them in their home. Robinson and Best's parents were in the greatest position to know who was residing with them than anyone else. Best's father and mother both signed sworn affidavits stating that their daughter was residing with them on September 6, 2005. [R.E. 19, 20] The next best person to have

personal knowledge as to the residence of another would be a sibling who was residing in the same home. Ben Robinson also executed a sworn affidavit that Best was living with him and his parents and his other brother Robinson at the time of the accident. [R.E. 21] Finally, a friend of the family, and "boyfriend" of Best also signed a sworn statement that Best was residing in the home with Robinson and his parents at the time of the accident. [R.E. 22]

These affidavits, "bring forward significant probative evidence demonstrating the existence of a triable issue of fact." McMichael No Way Steel and Supply, 562 So.2d 1371 (Miss. 1990). Contrary to State Farm's contention, the Plaintiff in this case has brought forth this evidence in the form of sworn affidavits by persons with ***close personal ties and first hand personal knowledge*** of Best's situation regarding her separation from her husband and resulting residence at the time of the accident in question. Further, State Farm correctly cites to Rule 56(e) regarding affidavits. The affidavits submitted by Robinson meet the standard required of Rule 56(e) to set forth material issues of fact. Rule 56(e) requests provides, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matter stated therein." Clearly persons with whom Best was living would the ones to know the circumstances of her residency at that time. Further, a friend of the family who was dating Best at that time would also have personal knowledge of where she was living. Furthermore, because each person who signed a sworn affidavit has person knowledge, he or she could testify at trial about their personal knowledge regarding Best's residence.

Regardless of whether Best's residence with her parents was temporary due to her separation and pending divorce from her husband or not, this Court has stated that temporary residence will suffice with regard to UM coverage. *See* Johnson, and McLeod. Further, this Court has recognized that a person may have more than one residence at the same time and have a domicile in a totally

different location. . This court reaffirmed this in McLeod at 806 ¶¶ 13-14 stating,

> In Aetna, we concluded that a broad reading of the term "resident" was appropriate and in keeping with the intent of the legislature, which in defining an "insured," chose the more inclusive term, "residence" as opposed to "domicile." *Id.* at 1009. A person may have only one domicile at a time. However, we have held that a person may have multiple residences simultaneously. Once established, a person's domicile remains intact "absent a clear indication of intent to abandon the existing domicile and to establish another." [A] person can reside at one place but be domiciled at another. However, residency is a more flexible concept, and permanency is not a requirement for residency. Even a temporary and transient place of dwelling can qualify. (Citations omitted).

CONCLUSION

"The language of the Mississippi Uninsured Motorist Coverage Act must be construed liberally to provide coverage and strictly to avoid or preclude exceptions or exemptions from coverage." Aetna Cas. & Sur. Co. v. Williams, 623 So.2d 1005, 1008 (Miss. 1993) This Court has repeatedly stated that broad reading of the term "resident" is appropriate and in keeping with the intent of the legislature, which in defining an "insured," chose the more inclusive term, "residence" as opposed to "domicile". Because there exists conflicting credible evidence as to the material fact of Best's residence the trial court erred in granting summary judgment.

The affidavits of Best's parents, brother, and close personal friend support the fact that Best was in fact residing in the same household as Robinson. Best's parents, brother, and friend all have intimate personal knowledge of the daily life of Best at the time of the accident. They are also in a position to provide admissible credible evidence to the fact that Best was residing in the same household as Robinson. As such, the trial court erred in granting summary judgment by not allowing this testimony to be presented to a jury for a determination of the facts.

As this Court is aware, the evidence must be viewed in the light most favorable to the party against whom the motion has been made, and given the benefit of the doubt when it comes to

reviewing a grant of summary judgment. "In the context of insurance cases, summary judgment is improper where there exists a material question of fact with regard to coverage." Wright v. Allstate Indem. Co., 618 So.2d 1296, 1300 (Miss. 1993). For these reasons, the Appellant respectfully requests that the gant of the summary judgment by the trial court be reversed and remanded.

Respectfully submitted,

James Robin Robinson, Jr.

By: Eugene C. Tullos
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day, via U.S. Postal Service, postage prepaid, served a copy of the Appellant's Brief to the following:

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This the 29th day of January, 2010.

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