IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2009-CA-01529

ROBERT MICHAEL FULTON — PLAINTIFF/APPELLANT

V.

MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY — DEFENDANT/APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF YAZOO COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY

ORAL ARGUMENT NOT REQUESTED

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MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY **DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defendant/Appellee, Mississippi Farm Bureau Casualty Insurance Company, 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:

PARTIES:

1. Robert Michael Fulton, Plaintiff/Appellant;
2. Mississippi Farm Bureau Casualty Insurance Company, Defendant/Appellee;

ATTORNEYS:

3. Michael W. Baxter and Walker R. Gibson, attorneys of record for Defendant/Appellee, Mississippi Farm Bureau Casualty Insurance Company;
4. O. Stephen Montagnet, III and W. Thomas McCraney, attorneys of record for Plaintiff/Appellant, Robert Michael Fulton; and
5. Carlton W. Reeves, Pigott Reeves & Johnson, P.A., attorney of record for Plaintiff/Appellant, Robert Michael Fulton.

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STATEMENT OF THE ISSUE ON APPEAL

The only issue properly before this Court is whether the Circuit Court of Yazoo County, Mississippi, correctly denied Plaintiff/Appellant's Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This case involves a claim for uninsured motorists benefits asserted by Fulton under his Farm Bureau insurance policy for an accident he was involved in at the Little Yazoo Dirt Racetrack in Yazoo City, Mississippi. The operator of the vehicle involved in the accident, Lofton Eugene Pigg, Jr. (hereinafter "Pigg"), denied fault for the accident. Farm Bureau asserted a Third-Party Complaint against Pigg for reimbursement of any amounts it was required to pay Fulton. Following a four day trial that started on March 30, 2009, the jury deliberated and found Pigg to be at fault for the accident and awarded Fulton the remainder of his uninsured motorists policy limit, $24,497.50, as compensatory damages.[1] (Verdict No. 1)(RE 1:8)[2] Next, the jury found that Farm Bureau did not breach the insurance contract by failing to pay what was owed to Fulton to compensate him for his damages. (Verdict No. 2)(RE 1:8) The jury did, however, find that Farm Bureau could have been more timely in its investigation and awarded Fulton $10,000.00 in extra-contractual damages. (Verdict No. 2)(RE 1:9)

The jury next returned a defense verdict in Farm Bureau's favor on the alleged bad faith breach of contract and punitive damages claim. (Verdict No. 4.)(RE 1:9) The jury also found the tortfeasor, Pigg, to be liable to Farm Bureau and awarded Farm Bureau $65,000.00 on its cross-claim against Pigg. (Verdict No. 3)(RE 1:9) **In total, Farm Bureau prevailed on three of the five verdicts returned by the jury.**

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[1] In July of 2008, Farm Bureau paid Fulton $25,502.50 of his total available $50,000.00 in uninsured motorists benefits.

[2] References are to the Record ("R") and Record Excerpts ("RE"). The number preceding the colon of the Record Excerpt represents the tab of the Record Excerpt where the pertinent information may be located. The numbers following the colon represent the page number in the record.

After the trial court's entry of the April 20, 2009 Final Judgment, Fulton filed his Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest. (R 11) On or about August 24, 2009, the trial court entered its Order denying Fulton's motion, finding that Fulton failed to meet the requirements of Rule 59(e), M.R.C.P. (RE 3:145)

On or about August 31, 2009, Fulton filed his Motion to Vacate and for Reconsideration of the trial court's August 24, 2009 Order denying his Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest. (R 147) On or about September 18, 2009, the trial court entered an Order denying Fulton's Motion to Vacate and for Reconsideration. (RE 4:167) Fulton subsequently filed a notice of appeal to this Court.

B. STATEMENT OF THE FACTS

On or about April 21, 2007, Michael Fulton was a spectator at the Little Yazoo Dirt Racetrack in Yazoo City, Mississippi, when he was struck by a vehicle being operated by Pigg. The allegation on page 1 of plaintiff's Statement of the Case that Fulton subsequently tendered a claim for uninsured motorists benefits and Farm Bureau "refused to pay until a lawsuit was filed and then only paid half of its insured's meager uninsured motorists limits" is disingenuous to say the least. First, it was obviously Fulton's own choice and decision to purchase only $50,000.00 in uninsured motorists coverage and if Fulton chooses to now characterize that as "meager," so be it. Moreover, while this accident happened on April 21, 2007, Fulton inexplicably delayed for over six months before notifying Farm Bureau of his decision to pursue an uninsured motorists claim. (Supplemental RE 5, page 2)[3] He then gave Farm Bureau a unilateral deadline of just over two months in order to

[3] Fulton's appeal is over the denial of a post trial motion. Thus, Farm Bureau did not anticipate Fulton's attempt to spin Farm Bureau's pre-lawsuit conduct as a "refusal to pay" as Fulton does on page 1 of his Brief of Appellant. In light of Fulton's misstatement, Farm Bureau has filed a motion to supplement the Record on Appeal with Farm Bureau's motion for partial summary judgment so that the true facts can

make a decision to pay the entire policy limits or threatened to file a lawsuit. While Farm Bureau was still investigating the claim, Fulton filed his lawsuit on January 10, 2008. (R 1) Thus, to say that Farm Bureau refused to pay until a lawsuit was filed, when in fact Farm Bureau was still investigating the claim and had not reached a decision is, again, disingenuous.

Farm Bureau never denied Fulton's UM claim. (Supplemental RE 5, Exhibit F to motion, Affidavit of Jack Williams, page 2) There was a coverage issue involved and Pigg was facing criminal charges from the accident that were ultimately dropped. *Id.* Farm Bureau believed Pigg would not discuss the accident while facing criminal charges and Pigg later confirmed this belief when he was deposed. *Id.* Prior to Pigg's deposition, and Pigg's denial of fault based on the accelerator stick, Farm Bureau paid Fulton $25,502.50 in uninsured motorist benefits. At his deposition, Pigg denied fault for the accident. *Id.* Pigg blamed the accident on an accelerator stick in the vehicle he had just purchased earlier the same day as the accident. *Id.* At trial, the trial court did not grant a motion for directed verdict as to Pigg's negligence in Fulton's favor, as evidenced by the fact that the jury was required to deliberate and decide the issue of whether Pigg was guilty of negligence which caused the accident. Pigg's denial of fault regarding the accelerator stick created a fact issue for the jury to decide. The jury ultimately ruled that Pigg was at fault and awarded Fulton the remainder of the UM benefits under the policy. (Verdict No. 1)(RE 1:7)

The jury, however, also rendered a verdict that Farm Bureau was not guilty of breaching the insurance contract (RE 1:8) and that Farm Bureau was not guilty of any bad faith. (RE 1:9) Lastly, the jury concluded that Fulton was not entitled to any punitive damages. (RE 1:9)

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be set forth with accurate cites to the Record.

SUMMARY OF THE ARGUMENT

Fulton is asking for attorney's fees in a case where the claim was never denied, where the jury returned a verdict that held that Farm Bureau did not breach the contract by failing to pay what it owed (Verdict No. 2, RE 1:8), and where no punitive damages were awarded. (Verdict No. 4, RE 1:9) Based on the jury's verdicts, and based upon the American Rule concerning awards of attorneys' fees, no attorneys' fees could be awarded on the merits of this case. Moreover, there is no contract and no statute that allows for such an award in this case in the first instance. Nevertheless, one does not even have to reach the merits of this question due to the fact that Fulton's motion for attorneys' fees, expenses, costs and prejudgment interests fails because of a procedural bar.

Specifically, Fulton waited until *after* the entry of the Final Judgment in this case to seek attorneys' fees, expenses, costs and prejudgment interest. Because Fulton sought to "amend" the Final Judgment, his motion was clearly governed by Rule 59(e), M.R.C.P. However, Fulton failed to meet the requirements of Rule 59(e) because he was unable to show an intervening change in controlling law, the availability of new evidence not previously available or a need to correct a clear error of law or to prevent manifest injustice. *See Brooks v. Roberts*, 882 So.2d 229 (Miss. 2004). Fulton has no one to blame but himself for waiting until after the entry of the Final Judgment to seek attorneys' fees and expenses. By waiting, Fulton forced the trial court to apply Rule 59(e) to his motion. Due to Fulton's failure to meet the requirements of Rule 59(e), the trial court committed no error by denying Fulton's motion. Therefore, this Court can and should dispose of this appeal based on Fulton's procedural deficiency under Rule 59(e) by affirming the trial court's ruling.

Looking past the failure of Fulton to comply procedurally with Rule 59(e), there are substantive grounds why his request for attorneys' fees, expenses, costs and prejudgment interest still

fails under Mississippi law. Mississippi follows the American Rule that states, in the absence of a contract or statute providing otherwise, a plaintiff's attorneys' fees and expenses are not recoverable in an action unless punitive damages are proper. *See In re Guardianship of Duckett*, 991 So.2d 1165, 1179 (Miss. 2008). *See also, Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So. 2d 495, ¶68 (Miss. 2007). Because the jury rejected Fulton's request for punitive damages, and no contractual or statutory provision requires the award of attorneys' fees in an uninsured motorists insurance dispute, the trial court committed no error by denying Fulton's request.

In his brief, Fulton asks this Court to disregard and ignore established Mississippi precedent, including this Court's recent **June 10, 2010** ruling in *Miller, et al. v. McCurley Prop. LLC, et al.*, __ So.3d __, 2010 WL 2305757 (Miss. - June 10, 2010)(no award for attorneys' fee absent a contractual or statutory provision, or an award for punitive damages) and award him attorneys' fees and expenses. Fulton makes this request even though Mississippi appellate courts have *never* affirmed an award of attorneys' fees and expenses in an insurance breach of contract case in the absence of an award of punitive damages. Fulton tries to overcome this hurdle by citing to cases that allowed the recovery of attorneys' fees absent bad faith. However, Fulton conveniently omits that those cases granted attorneys' fees based solely on a statutory provision that allowed the award of attorneys' fees - which is clearly absent in the case at bar. For these reasons, this Court should affirm the trial court and find that the trial court did not abuse its discretion by denying Fulton's motion.

As to Fulton's request for costs and prejudgment interest, the trial court correctly rejected Fulton's motion. Prejudgment interest is not recoverable unless (a) the amount in dispute in the case was liquidated, or (b) the defendant acted frivolously or in bad faith. *Moeller v. American Guar. and Liab. Ins. Co.*, 812 So. 2d 953, ¶11 (Miss. 2002); *Warwick v. Matheney*, 603 So. 2d 330, 342 (Miss. 1992). Neither of these situations exist in the case at bar. The damages for Fulton's bodily injury

claim were disputed and unliquidated and were not fixed until the jury rendered its verdict and fixed them. Moreover, the jury found that punitive damages were not proper and returned a defense verdict in Farm Bureau's favor on this part of Fulton's claim. Therefore, the trial court did not commit error by refusing to amend the Final Judgment to allow Fulton to recover prejudgment interest and the trial court's denial of prejudgment interest should be affirmed on appeal.

In the final analysis, Fulton's motion for an award of attorneys' fees, expenses, costs and prejudgment interest is procedurally defective in that it was filed after the entry of the Final Judgment and does not comply with M.R.C.P. 59(e). Fulton's motion is also contrary to well-established Mississippi law which follows the American Rule regarding awards for attorneys' fees and was correctly denied by the trial court. For the reasons set forth herein, this Court should affirm the decision of the trial court that denied Fulton's Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest.

STANDARD OF REVIEW

A trial court should treat a motion to amend a final judgment and/or for reconsideration as a post-trial motion under Mississippi Rule of Civil Procedure 59(e). *See Cooper, et al. v. Glider, et al.*, __ So.3d __, 2009 WL 1058634, ¶ 35 (Miss. App. 2009), citing *Brooks v. Roberts*, 882 So.2d 229, 233 (¶15)(Miss. 2004). In reviewing a trial court's ruling on a motion to amend and/or for reconsideration, "this Court will review the denial of such a motion under an abuse of discretion standard." *Brooks*, 882 So.2d at 233. *See also, Bellemere v. Geico Gen. Ins. Co.*, 977 So.2d 363, 368 (Miss. App. 2007)(standard of review regarding a motion to amend judgment is an abuse of discretion).

ARGUMENT

I. FULTON CHOSE TO FILE A RULE 59 MOTION AND SHOULD NOT BE HEARD TO COMPLAIN FOR FAILING TO MEET ITS REQUIREMENTS.

Fulton argues that the trial court erred by failing to grant his Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest. He argues that the trial court should not have applied Rule 59(e) of the M.R.C.P. to his motion, which requires the movant seeking to alter or amend a final judgment to show: (1) an intervening change in controlling law; (2) availability of new evidence not previously available; or (3) a need to correct a clear error of law or to prevent manifest injustice. *See Brooks v. Roberts*, 882 So.2d 229 (Miss. 2004).

However, it cannot be overlooked that Fulton chose to seek attorneys' fees and costs in the form of a motion to "amend" the Final Judgment entered by this Court on April 20, 2009. By waiting until after the entry of the Final Judgment, Fulton procedurally tied the trial court's hands and required his motion to be reviewed under the dictates of Rule 59(e). Because Fulton chose that avenue of recovery, which is clearly governed by M.R.C.P. 59(e), he cannot ignore its requirements. The trial court correctly held in its August 24, 2009 Order that Fulton failed to show an intervening change in controlling law, the availability of new evidence or a need to correct a clear legal error. (RE 3:145) The trial court did not abuse its discretion by ruling that Fulton failed to meet his burden of proving any of the elements under Rule 59(e). Because Fulton sought to amend the Final Judgment under Rule 59(e), he should not be heard to complain. The trial court's denial of Fulton's request should therefore be affirmed.

II. THE CASES RELIED ON BY FULTON DERIVE THEIR ENTITLEMENT TO ATTORNEYS' FEES DIRECTLY FROM A STATUTE AND THUS HAVE NO APPLICATION IN THE CASE AT BAR.

In his brief, Fulton cites to several cases for the proposition that a request for attorneys' fees

is not considered part of a Rule 59(e) motion. Unfortunately for Fulton, the cases he cited derive their entitlement to attorneys' fees directly from a statute. Put another way, Fulton's cases found an independent statutory right to attorneys' fees separate and apart from the underlying case that could be requested at any point. Because attorneys' fees are not mandated by Mississippi law in the context of an uninsured motorists insurance case, the cases relied upon by Fulton have no application here.

Specifically, Fulton relies on *White v. New Hampshire Dept. of Employment Sec., et al.*, 455 U.S. 445 (1982). Although the United States Supreme Court in *White* found that attorneys' fees were not part of a motion to amend or alter a final judgment, the *White* court made it very clear that its decision was based on an independent statutory right to attorneys' fees under the **Civil Rights Act of 1976 (42 U.S.C. § 1988)**. The court in *White* specifically held that "a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action - issues to which Rule 59(e) was never intended to apply." *Id.* at 451. The *White* court further explained that § 1988 provides for attorney's fees only to a prevailing party "regardless of when attorney's fees are requested." *Id.*

Fulton also relies on *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980). Like the holding in *White*, the 5th Circuit's holding in *Knighton* allowing attorneys' fees outside of Rule 59 was based on the **Civil Rights Act of 1976** which created an independent statutory basis for attorneys' fees that did not have to be requested before the entry of a final judgment. *Id.* at 796.

Fulton also relies on several Mississippi appellate court cases where attorneys' fees were awarded based on a statutory right of recovery. The cases cited by Fulton obviously have no bearing on the present case involving a claim for uninsured motorists benefits because there exists no statute requiring an award for attorneys' fees in this context. For example, Fulton cites on - *Cruse v. Nunley*, 699 So.2d 941 (Miss. 1997)**(attorneys' fees allowed under Civil Rights Act, 42 U.S.C. § 1988)**;

Romney v. Barbetta, 881 So.2d 958 (Miss. App. 2004)**(attorneys' fees allowed under M.C.A. § 11-55-5)**; and *Gordon v. Gordon*, 929 So.2d 981 (Miss. App. 2006)**(attorneys' fees allowed under M.C.A. § 89-1-33)**. These courts made it very clear that when an independent statutory right to attorneys' fees exists, a motion for attorneys' fees can be filed at any point after the entry of a final judgment and outside of Rule 59. Neither the uninsured motorists statutory scheme, nor any other Mississippi statute authorizes an award of attorneys' fees in the case at bar, especially where the claim was never denied, the jury found no breach of the insurance contract and awarded no punitive damages.

By relying on cases that awarded attorneys' fees based on an independent statutory right, Fulton is comparing apples to oranges. **The hurdle that Fulton simply cannot overcome is that there is no statutory right to attorneys' fees under Mississippi law in the context of an insurance case.** Fulton's reliance on cases that provide a statutory basis for attorneys' fees must be disregarded as being entirely irrelevant because they have no bearing on Mississippi insurance cases. As established, *supra*, Mississippi appellate courts have *never* affirmed an award of attorneys' fees and expenses in an insurance breach of contract case in the absence of a finding of a breach of contract and an award of punitive damages. Neither circumstance exists in the case at bar as the jury ruled Farm Bureau did not breach the insurance contract (Verdict No. 2)(RE 1:8), and refused to award Fulton any punitive damages. (Verdict No. 4)(RE 1:9) Likewise, there is no statutory authority mandating an award of attorneys' fees in the insurance or insurance bad faith context. Thus, for Fulton to argue on page 4 of his brief that attorneys' fees are always a "collateral" recovery outside of Rule 59 in the Mississippi insurance context is simply not accurate and should be rejected.

While Farm Bureau is not aware of any Mississippi appellate court decisions that discuss

attorneys' fees under Rule 59 as they relate to bad faith, there are Mississippi federal court cases that provide guidance. In *Stacy v. Williams*, 50 F.R.D. 52 (N.D. Miss. 1970), the court disallowed attorneys' fees under Rule 59 where they were not included in the final judgment. The court even tried to find an independent statutory basis to award attorneys' fees that would take the award outside of the requirements of Rule 59, but none existed. *Id.* at 55. Even more damaging to Fulton's argument is the holding in *Snyder v. Leake,* 87 F.R.D. 362 (N.D. Miss. 1980). In *Snyder*, the court rejected a request for attorneys' fees under Rule 59, by stating:

> **Initially, the court should point out that this action is different from those actions where the prevailing party seeks an award of fees pursuant to statutory authority. ... This is so because attorney's fees based on bad faith, which are awarded through the court's equitable powers, are not "part of the costs awarded after litigation, but should be sought as part of the litigation itself."**

Id. at 363-4 (emphasis added).

This Court should follow the holdings in *Stacy* and *Snyder*, which unquestionably held that absent a statutory right of recovery, requests for attorneys' fees must be requested as part of the litigation itself and included in a final judgment. If, like here, a plaintiff fails to show an independent statutory right to attorneys' fees and fails to seek attorneys' fees before the entry of a final judgment, his claim for attorneys' fees is waived. **Based on the above authority, Fulton waived his request for attorneys' fees, costs, expenses and pre-judgment interest by waiting to request them until after the trial court's April 20, 2009 entry of the Final Judgment.**

III. MISSISSIPPI FOLLOWS THE AMERICAN RULE AND DOES NOT ALLOW ATTORNEY FEES ABSENT A PUNITIVE DAMAGES AWARD, A CONTRACTUAL PROVISION OR STATUTORY AUTHORITY.

Although Fulton chose to file his attorneys' fees request as a motion to amend a judgment, which is governed by Rule 59(e), he argues that motions seeking attorneys' fees fall outside of Rule 59(e). Fulton's argument is an incorrect statement of Mississippi law. As this Court is aware,

Mississippi appellate courts have followed the American Rule that, absent a contractual provision or statutory basis, a plaintiff's attorneys' fees and expenses are not recoverable in an action unless punitive damages are proper. *See In re Guardianship of Duckett*, 991 So.2d 1165, 1179 (Miss. 2008). In *In re Guardianship of Duckett*, the Mississippi Supreme Court held:

> **The law in Mississippi with respect to awarding of attorney's fees is well settled: '[I]f attorney's fees are not authorized by the contract or by statute, they are not to be awarded when an award of punitive damages is not proper.'** *Hamilton v. Hopkins*, 834 So. 2d 695, 700 [¶16] (Miss. 2003) (collecting authorities).

Duckett, 991 So.2d at 1179. The *Duckett* Court rejected the plaintiff's request for attorneys' fees because punitive damages were improper. *See also, Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So. 2d 495, 517 (Miss. 2007)(attorneys' fees award not proper absent punitive damages award, contractual provision or statutory authority).[4]

The American Rule was reaffirmed by this Court as recent as June 10, 2010 in *Miller, et al. v. McCurley Prop. LLC, et al.*, __ So.3d __, 2010 WL 2305757 (Miss. June 10, 2010). In *Miller*, the plaintiff filed a breach of contract lawsuit over a seller-financing agreement to purchase a residential property that was later destroyed by Hurricane Katrina. *Id.* at ¶ 1. During the chancery court trial, the plaintiff/purchaser (Miller) sought attorneys' fees, among other things. *Id.* at ¶ 6. However, the chancery court denied the plaintiff's request for attorneys' fees. *Id.* at ¶ 20. **On appeal, this Court affirmed the chancery court's ruling by finding that an award for attorneys'**

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[4] *See also, Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So.2d 954, 971 (Miss.1999); *Miss. Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n*, 740 So.2d 925, 937 (Miss.1999); *Century 21 Deep S. Props., Ltd. v. Corson*, 612 So.2d 359, 375 (Miss.1992); *Smith v. Dorsey*, 599 So.2d 529, 550 (Miss.1992); *Grisham v. Hinton*, 490 So.2d 1201, 1205 (Miss.1986); *Stanton & Assocs., Inc. v. Bryant Constr. Co.*, 464 So.2d 499, 502 (Miss.1985); *Bellefonte Ins. Co. v. Griffin*, 358 So.2d 387, 391 (Miss.1978) (alleged breach of insurance contract).

fees is <u>not</u> proper absent a punitive damages award, a contractual provision or statutory authority providing for attorneys' fees. This Court in *Miller* specifically held:

> The judge correctly found no provision for attorney's fees in the event of breach of contract in the Agreement between the parties, and no statutory basis for awarding attorney's fees for a breach of contract. Mississippi law is well-settled with respect to awarding attorney's fees. **"If attorney's fees are not authorized by the contract or by statute, they are not to be awarded when an award of punitive damages is not proper."** *In re Guardianship of Duckett*, 991 So.2d 1165, 1179 (Miss. 2008)(quoting *Hamilton v. Hopkins*, 834 So. 695, 700 (Miss. 2003)).

Miller, 2010 WL 2305757 at ¶ 20 (emphasis added).

Based on this line of clear Mississippi caselaw, it cannot be argued by Fulton with a straight face that attorneys' fees are recoverable where there is no punitive damages award, or a statutory provision or by contractual agreement. Because the jury in the case at bar rejected Fulton's punitive damages demand, and there existed no contractual or statutory right for attorneys' fees against Farm Bureau in the case at bar, Fulton cannot recover attorneys' fees or expenses. This Court should, therefore, affirm the trial court's denial of Fulton's Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest.

IV. *VEASLEY* DOES NOT SUPPORT FULTON'S CLAIMS FOR ATTORNEYS' FEES AND EXPENSES.

Fulton argues that attorneys' fees are proper under *Universal Life Inc. Co. v. Veasley*, 610 So.2d 290 (Miss. 1992). In *Veasley*, the Court considered a suit for breach of a life insurance contract, in which the insurer admittedly made a mistake in initially denying benefits to the insured. When Universal Life realized its mistake, it admitted the wrongful denial and tendered policy benefits to the insured. Nevertheless, the insured sued, alleging bad faith. *Veasley*, 610 So. 2d at 291-92. The *Veasley* Court recognized that Universal Life had *no arguable reason* for having

initially denied Veasley's claim and had no explanation for the denial other than a *mistake* resulting from a failure of competence. *Id.* at 294. Nevertheless, the award of punitive damages was reversed and rendered on appeal because there was no evidence that Universal Life acted maliciously. *Id.*

In regard to extracontractual damages, the *Veasley* Court affirmed an award of emotional distress damages in Veasley's favor because the initial claim denial was *a mistake made without any arguable reason* and was therefore negligent. *Id.* at 295-96. However, there was no award whatsoever of attorneys' fees and expenses to Veasley. *Id.* Consequently, language in *Veasley* suggesting that attorneys' fees and expenses might be recoverable when punitive damages were not appropriate was mere *dicta*. That *dicta* was actually contrary to long-established Mississippi law regarding awards of attorneys' fees and expenses, i.e., the American Rule now recently affirmed in *Duckett* and *Miller* – that attorneys' fees and expenses are not recoverable when punitive damages are not awarded. *Duckett*, 991 So.2d 1165, 1179 (Miss. 2008), *Miller*, __ So.3d __, 2010 WL 2305757 ¶ 20 (Miss. - June 10, 2010). Therefore, for Fulton to argue *Veasley* allows for attorneys' fees in all insurance contract cases where punitive damages are rejected is a gross misstatement of the law in Mississippi.

Moreover, shortly after the *Veasley* opinion was rendered in 1992, this Court confirmed that *Veasley's* language regarding attorneys' fee and expense awards was no more than *dicta*. In *Miller v. Allstate Ins. Co.*, 631 So.2d 789, 792 (Miss. 1994), rendered less than two years after *Veasley*, the Court followed established precedent set forth in the American Rule. The *Miller* Court held that, as the case was not one for punitive damages, there was no merit to an insured's argument of entitlement to attorneys' fees and costs. *Miller*, 631 So.2d at 792. The *Miller* Court appended and quoted with approval the trial court's opinion, which stated:

> **Plaintiff's prayer for attorneys fees is denied. In the absence of a showing of gross or willful wrong entitling the Movant to an award of punitive damages, the Mississippi Supreme Court has never approved of awarding attorneys fees to the successful litigant.** *See e.g., Central Bank of Mississippi v. Butler*, 517 So.2d 507, 512 (Miss. 1988); *Aetna Casualty & Surety Company v. Steele*, 373 So.2d 797, 801 (Miss. 1979).

Miller, 631 So.2d at 795.

The holding in *Miller*, 631 So.2d at 795, is still good law to this day, as reaffirmed by *Miller, et al. v. McCurley Prop. LLC, et al.*, __ So.3d __, 2010 WL 2305757, ¶ 20 (Miss. - June 10, 2010)(no award for attorneys' fee absent a contractual or statutory provision, or an award for punitive damages). To Farm Bureau's knowledge, no Mississippi appellate court has ever approved an award of attorneys' fees and expenses based on *Veasley* where punitive damages were not also awarded. The bottom line is that the jury in the case at bar rejected Fulton's claim of bad faith, thereby rejecting Fulton's claim for punitive damages. (RE 1:9) For this reason, Fulton is <u>not</u> entitled to recover attorneys' fees and expenses.

Fulton argued before the trial court and Farm Bureau anticipates he will argue before this Court that the *dicta* in *Veasley* suggesting that attorneys' fees and expenses might be recoverable when punitive damages were not appropriate has been adopted in Mississippi. In support, Fulton relied on *Sports Page, Inc. v. Punzo*, 900 So.2d 1193, 1205 (Miss. App. 2004) and *Garner v. Hickman*, 733 So.2d 191, 198 (Miss. 1999). However, Fulton conveniently selected self-serving quotes from these cases while ignoring their holdings.

In *Punzo*, the Mississippi Court of Appeals **reversed and rendered** the trial court's grant of attorneys' fees to a contractor who sued a restaurant owner over a renovation project. *Id.* at 1205. The *Punzo* Court stated that the "general rule" in Mississippi is that attorneys' fees are not

recoverable absent punitive damages, contractual agreement or a statutory provision. *Id.* at 1203-4. In its ruling, the *Punzo* Court held that attorneys' fees were improper because no contract or statute allowed for them and no bad faith was committed by the plaintiff. *Id.* The *Punzo* Court reaffirmed that the language in *Veasley* was mere *dicta* by holding: **"While there may be some uncertainty about what conduct exactly gives rise to an award of 'Veasley damages,' we can safely say that the general rule on attorney's fees remains intact."** *Id.* at 1204.

As discussed in more detail later in Farm Bureau's brief, Fulton also relies in error on *Garner v. Hickman*, 733 So.2d 191, 198 (Miss. 1999), for the position that attorneys' fees may be warranted absent punitive damages. However, Fulton again fails to point out that the award for attorneys' fees was **reversed and rendered** in *Garner* because the action did not violate Miss. Code Ann. § 11-55-5, which is the Litigation Accountability Act of 1988. *Id.* at 198. Miss. Code Ann. § 11-55-5 only allows for attorneys' fees where a lawsuit was filed to harass the defendant or is found to be without merit. As this Court is aware, no statutory requirement for attorneys' fees exists for insurance cases in Mississippi. There certainly is no basis in the uninsured motorists statutes for such an award. Therefore, Fulton's reliance on *Garner* is misplaced and has no application to the case before this Court.

Although not cited in his Brief of Appellant, Fulton relied upon and cited *United American Ins. Co. v. Merrill*, 978 So. 2d 613 (Miss. 2007), to the trial court and Farm Bureau anticipates Fulton will cite it in his reply. However, Fulton should take little comfort in *Merrill* because the Court there affirmed an award of attorneys' fees and expenses only because punitive damages were also awarded. In its holding concerning attorneys' fees, the *Merrill* court expressly stated:

> **Additionally, '[w]here punitive damages are awarded by the jury, attorney's fees are justified.'**

Id. at 636.

The *Merrill* court's only citation to and quote of *Veasley* was in the section of its opinion affirming an award of emotional distress damages. *Merrill*, 978 So.2d at 630. The *Merrill* decision did not rely, at any point, on *Veasley* in awarding attorneys' fees and expenses. Rather, in the section of its opinion concerning attorneys' fees and expenses, the *Merrill* court relied on *Mississippi Power & Light v. Cook*, which holds as follows:

> **Absent some statutory authority or contractual provision, attorneys' fees cannot be awarded unless punitive damages are also proper.**

Mississippi Power & Light Co. v. Cook, 832 So.2d 474, 486 (Miss. 2002), citing *Aetna Cas. & Surety Co. v. Steele*, 373 So.2d 797, 801 (Miss. 1979).[5]

Turning back to *Veasley*, it cannot be overlooked that the carrier *denied* a claim without an arguable reason. *Veasley*, 610 So.2d at 295. Farm Bureau never denied Fulton's claim and the jury concluded that Farm Bureau did not breach the insurance contract. (Verdict No. 2)(RE 1:8) Accordingly, Fulton's reliance on *Veasley* is faulty. Because the jury found that Farm Bureau did not deny Fulton's claim, or breach the insurance contract, because Farm Bureau did not commit bad faith, and because no punitive damages were awarded [Verdict No. 4 (RE 1:9)], Fulton is not entitled to any attorneys' fees or expenses under *Veasley*. Thus the trial court should be affirmed and Fulton's appeal dismissed with prejudice.

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[5]Both the *Duckett* (June 12, 2008) and *Tupelo Redevelopment Agency* (October 18, 2007) decisions were rendered after the opinion in *Merrill* (September 6, 2007). Before *Merrill*, during *Merrill*, and after *Merrill*, the Supreme Court continues to apply the American Rule to claims seeking recovery of attorneys' fees and expenses.

V. FULTON IS NOT ENTITLED TO COSTS.

For the same reasons that Fulton is not entitled to attorneys' fees or expenses as set forth above, he is not entitled to costs. Fulton is not entitled to costs under the American Rule because the jury found Farm Bureau committed no bad faith (Verdict No. 4)(RE 1:9), and there is no contract or statute that contemplates an award of attorneys' fees, expenses *or costs* in an uninsured motorists insurance case. Furthermore, the trial court committed no error by rejecting Fulton's request for costs because he failed to meet any of the three requirements under Rule 59(e). The trial court committed no error by rejecting Fulton's request for costs and this Court should affirm the trial court's ruling on appeal.

VI. FULTON IS NOT ENTITLED TO RECOVER PREJUDGMENT INTEREST.

Fulton lastly seeks prejudgment interest in the amount of $3,399.96. However, prejudgment interest is not allowed in cases involving bodily injuries in a car wreck where the amount of damages is unknown, uncertain, disputed and not fixed until a jury fixes it. Indeed, in *USF&G v. Francis*, 825 So. 2d 38, 50 (Miss. 2002), **which was an uninsured motorists case - like here**, the *Francis* Court reversed and rendered a trial court's award of prejudgment interest in favor of the insured. The *Francis* Court held that prejudgment interest is allowed only in cases where the amount due is liquidated when the claim is originally made or when the denial of a claim is frivolous or in bad faith. *Id.* **No award of prejudgment interest is allowed where the principal amount has not been fixed prior to judgment**. The Court in *Francis* further expressly held the following with regard to the trial court's award of prejudgment interest:

> The damages suffered by Francis/Draper were in dispute and unliquidated. Had they been liquidated, there would have been no need for a finding from the trial court on

> that matter. Bad faith on USF&G's part was never alleged nor proven. It was error for the trial court to award prejudgment interest.

Francis, 825 So.2d at 50.

Like the damages suffered in the car wreck by the insured in *Francis*, the damages suffered by Fulton here were disputed and unliquidated. Had they been liquidated, there would have been no need for a finding by the jury on that matter. While Fulton here alleged breach of contract and bad faith on Farm Bureau's part, he failed to prove this claim and, in fact, the jury returned a defense verdict in Farm Bureau's favor on that claim. Just as the *Francis* Court held, the trial court committed no error by rejecting Fulton's request for prejudgment interest.

Moreover, Fulton's prejudgment interest is based on the total jury verdict of $34,497.50, which includes a $10,000.00 award for Fulton's extra-contractual damages for Farm Bureau's delay in paying the remaining uninsured motorists benefits. The $10,000.00 award was never part of Fulton's automobile insurance policy with Farm Bureau and certainly cannot be argued as a liquidated amount. The trial court did not abuse its discretion by denying Fulton's request for prejudgment interest. Therefore, the trial court's denial of Fulton's request for prejudgment interest should be affirmed on appeal.

To sum up, this is a case in which Farm Bureau never denied the claim, the jury found Farm Bureau did not breach the insurance contract and no punitive damages were awarded. Moreover, there is no contract or statute that allows for an award of attorneys' fees or costs. Under the American Rule, which Mississippi has adopted and follows, Fulton's request for attorneys' fees and costs must be denied on its merits. However, one need not reach the merits of this issue in the case at bar and can dismiss this appeal because of a procedural reason: Fulton failed to file his motion

prior to the entry of the Final Judgment and failed to then meet the requirements under M.R.C.P. 59(e) for altering or amending the Final Judgment. Therefore, the trial court's denial of the motion for attorneys' fees, expenses, costs and prejudgment interest must be affirmed on appeal.

CONCLUSION

For the reasons set forth herein, Defendant/Appellee, Farm Bureau, respectfully requests the Court to affirm the trial court's denial of Plaintiff/Appellant's Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest, and dismiss this appeal with prejudice, with all costs taxed to the Plaintiff/Appellant.

Respectfully submitted, this the 29th day of June, 2010.

MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY

BY: _____

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CERTIFICATE OF SERVICE

I, Walker R. Gibson, do hereby certify that I have this day caused to be mail, via U.S. Mail, a true and correct copy of the above and foregoing to:

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This, the 28th day of June, 2010.

WALKER R. GIBSON