IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01529

ROBERT MICHAEL FULTON **APPELLANT**

V.

MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY **APPELLEE**

On Appeal From The Circuit Court of
Yazoo County, Mississippi

REPLY BRIEF OF APPELLANT ROBERT MICHAEL FULTON

ORAL ARGUMENT REQUESTED

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O. Stephen Montagnet, III (MSB[redacted])
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Robert Michael Fulton, Appellant; and

2. O. Stephen Montagnet, III, McCraney Montagnet & Quin, PLLC, attorney for Appellant; and

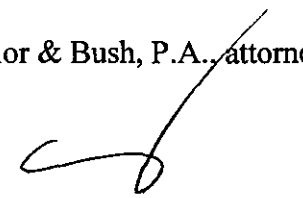
3. W. Thomas McCraney, McCraney Montagnet & Quin, PLLC, attorney for Appellant; and

4. Carlton W. Reeves, Pigott, Reeves, Johnson, P.A., attorney for Appellant; and

4. Mississippi Farm Bureau Casualty Insurance Company, Appellee; and

5. Michael Baxter, Copeland Cook Taylor & Bush, P.A., attorney for Appellee; and

6. Walker R. Gibson, Copeland Cook Taylor & Bush, P.A., attorney for Appellee.



W. THOMAS MCCRANEY, III

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ARGUMENT

A. Appellee Does Not Contest That the Procedural Error was Made Below.

This appeal presents a discrete procedural question previously answered by this Court in prior decisions. The issue raised by this appeal is whether a motion to award attorneys fees following entry of judgment constitutes a Rule 59(e) motion. Appellant's principal brief discussed the prior authority of this Court and of the federal courts establishing that motions for fees "lie outside Rule 59(e), because they are 'collateral' and do not seek a change in the judgment but 'merely what is due *because of* the judgment.'" *See* Appellant's Principal Brief at pp 3 (citing *Cruse v. Nunley*, 699 So. 2d 941, 946 (Miss. 1997); *Bruce v. Bruce*, 587 So. 2d 898 (1981); *Buchanan v. Stanships, Inc.*, 585 U.S. 265 at 267-28 (1991); *White v. New Hampshire Dept of Empl. Sec.*, 455 U.S. 445, 451 (1982)). Accordingly, "*the fact that [a] fee request was made after the entry of judgment is not a proper basis for denying the fee award.*" *Cruse*, 699 So. 2d at 946. The court below denied the Plaintiff's fee request solely because it was filed after entry of judgment, and under the erroneous premise that such motions must meet the requirements of Rule 59. Under established precedent, this was an improper basis for denial.

In its response, Appellee Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau") has not offered any authority that directly contradicts Appellant's position on this appeal. It cites no authority supporting the lower court's procedural basis for denying the subject motion, or that fee requests should be denied simply because they are made post-judgment. Instead, Farm Bureau urges this Court to recognize that the cases cited by the Appellant involved requests for fees that were statutorily authorized, implying that fees authorized by the decisions of this Court should be treated differently. Farm Bureau does not explain the significance of the distinction, and there

is none. Regardless of whether a successful litigant's fees are authorized by statute or decision, the relief is collateral to, and derivative of, a judgment, and therefore "outside Rule 59(e)."

There is no cause to disturb the previous pronouncements of this Court concerning the application of Rule 59 in this context, and Farm Bureau offers no argument that directly opposes the Appellant's position concerning the procedural question on appeal. For this simple reason, the decision of the lower court denying the Appellant's motion should be reversed.

B. Farm Bureau's Attempt to Overrule *Veasley* is Misplaced and Otherwise Without Merit.

Without a direct argument concerning the procedural issue before this Court, Farm Bureau attempts to re-characterize this appeal so as to challenge whether the Appellant had any substantive right to seek attorneys fees. Of course, the Court below never reached that decision because it made the threshold determination that the request for fees could not be considered at all due to the requirements of Rule 59. Thus, the substantive issue of whether the Appellant's successful prosecution of his claim for negligent claim handling authorized an award of attorneys fees is not properly before this Court, and Farm Bureau's arguments in this regard should not be considered. Even if that issue were properly before the Court, there should be little difficulty in resolving it in Appellant's favor.

Farm Bureau argues that attorneys fees are recoverable only when statutorily authorized or when punitive damages have been awarded. While this may be generally correct Farm Bureau ignores an established exception to the American Rule. Prior to *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992), insurers could not be held liable for extra contractual damages absent a finding of bad faith. In *Veasley*, the Mississippi Supreme Court recognized that an insurer should reasonably foresee that its tortious conduct would cause damage to its insured, and that

attorneys fees should be awarded *even in those cases in which punitive damages were not imposed. See Veasley*, 610 So.2d at 295 ("Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.").

In *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539 (Miss. 1996), this Court revisited *Veasley*, and refused to extend its application outside of the insurance context.

> The Court went on to say, "additional inconvenience and expense, attorney's fees and the like should be expected in an effort to have the oversight corrected." This is the language relied on by Willard and Sumner. However, *Veasley is addressing a problem peculiar to the insurance industry, specifically the lack of proper damages when there is a failure to pay on an insurance contract without an arguable reason, and the circumstances do not warrant punitive damages. Its application should be limited.*

Willard, 681 So. 2d at 545. Subsequent decisions have confirmed the viability of the exception to the American Rule in these limited circumstances. *See Sports Page, Inc. v. Punzo*, 900 So. 2d 1193, 1205 (Miss. Ct. App. 2004) ("*Veasley* declares that an insurer should foresee that failure to timely pay . . . will cause various damages to the beneficiaries, including attorney's fees."); *Garner v. Hickman*, 733 So. 2d 191, 198 (Miss. 1999) ("In cases involving insurance contracts, we have found that extra-contractual damages such as attorney fees may be warranted even where the facts are not such to support a punitive damages claim."); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1186 n. 13 (Miss.1990) ("Conceivably, upon presentation of sufficient proof, consequential or extra-contractual damages (e.g., reasonable attorney fees, court costs, and other economic losses) may be awarded in cases involving a lack of a reasonably arguable basis--notwithstanding that the insurer is not liable for punitive damages.").

Most recently, the Fifth Circuit Court of Appeals discussed "*Veasley* damages" at length.

> In practice, two separate categories of damages are recognized. Punitive damages are available for egregious conduct. The lesser level of damages may be appropriate where the insurer lacks an arguable basis *for delaying or denying* a claim, but the conduct was not sufficiently egregious to justify the imposition of punitive damages. *See Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992). These damages are an intermediate form of relief between simply receiving incidental costs of suit (but not attorneys' fees), and getting punitive damages. *Id.* at 295 ("Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.").
>
> The Mississippi Supreme Court described the kind of conduct that gives rise to the lower level of damages: Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. *Id. Thus, Mississippi law recognizes that negligent conduct of the insurance company can justify recovery of, for example, attorneys' fees; punitive damages require bad faith by the insurance company.*

Essinger v. Liberty Mut. Fire Ins. Co., 534 F.3d 450, 451 (5th Cir. Miss. 2008).

The recognized exception to the American Rule supplies an important form of relief to insureds who are often at the economic mercy of the insurance company's claim handlers. In cases where extra contractual damages for negligent claim handling are proven, "attorneys' fees [are] proper even though punitive damages [are] not, because attorneys' fees [are] a foreseeable consequence of the negligence of the company's employee in failing to pay a valid claim." Encyclopedia of Mississippi Law § 8:2 (discussing *Veasley* recovery). *See also* Mississippi Insurance Law and Practice § 13:21 ("Veasley allows the insured less recovery than permitted under a bad-faith claim, but greater than that allowed under an ordinary breach of contract claim.").

Pursuant to *Veasley*, the jury in this case awarded extra contracted damages as a result of

Farm Bureau's negligent claims handling. Pursuant to this same authority, Plaintiff is entitled to an award of attorneys fees. Farm Bureau acknowledges Plaintiff's right to recover emotional distress damages under *Veasley*, yet finds that any language supporting an award of attorneys fees to be mere *dicta*. As support for its position that *Veasley* fee awards are not actually authorized, Appellee points to the cases of *Miller v. Allstate Ins. Co.*, 631 So. 2d 789, 792 (Miss. 1994), *In Re Guardianship of Duckett*, 991 So.2d 1165, 1179 (Miss. 2008), and *Miller v. McCurley Prop., LLC*, _____ So.3d _____, 2010 WL 2305757 (Miss. June 10, 2010). These cases are cited for their recitation of the general American Rule. Significantly, none of these cases are the types of cases that *Veasley* addressed, *i.e.*, where an insured seeks extra-contractual damages from his insurance company for tortious claim handling. Indeed, of the three cases, only *Miller v. Allstate* involved an insurance claim, but that case was a declaratory judgment action that did not involve claims of an insurer's tortious conduct. None of the cases relied upon by Farm Bureau even mention *Veasley*, and they certainly do not repudiate the authorities that recognize the propriety of fee awards in the limited circumstances that were presented below.

In sum, it is the recognized law of Mississippi that an exception to the American Rule exists in the limited context of cases where an insured suffers extra-contractual damages caused by negligent claim handling, even when bad faith punitive damages are not established. Accordingly, to the extent this Court reaches the substantive question of whether Plaintiff was entitled to an award of attorneys' fees, that question should be answered affirmatively.

C. The Requests for Costs, Expenses and Pre-Judgment Interest are Not Severable Issues for Purposes of This Appeal, and They Were Improperly Denied Below.

Appellee argues separately that the requests for costs and pre-judgment interest were properly denied. Again, these requests for relief were never considered below on the merits, but were rather

denied for the same procedural reason for which consideration of fees was rejected, *i.e.*, that they were sought post-judgment. Rule 59 does not apply to requests for these amounts either. Like the fee request, these amounts are collateral to the judgment and derivative therefrom. Appellee again offers no authority that such requests must precede entry of judgment, and again places the cart before the horse by arguing on appeal that the appellant had no substantive right to seek these amounts. The issues raised by the Appellee therefore are not proper issues for appeal and should not be considered by this Court.

The substantive arguments are also without merit. "[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs." M.R.C.P. Rule 54. The Court below never considered the motion for costs, and so there has been no directive with respect to the substance of that request. Moreover, under *Veasley,* costs, like fees, are specifically authorized to insureds who prove that their insurance company negligently mishandled their claim and caused them to suffer extra-contractual damages. *See Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1186 n. 13 (Miss.1990) ("Conceivably, upon presentation of sufficient proof, consequential or extra-contractual damages (e.g., reasonable attorney fees, court costs, and other economic losses) may be awarded in cases involving a lack of a reasonably arguable basis--notwithstanding that the insurer is not liable for punitive damages.").

As to pre-judgment interest, Farm Bureau mischaracterizes the entire judgment as for unliquidated damages, failing to point out that the jury below found that Farm Bureau negligently delayed payment of *liquidated* insurance proceeds. Unreasonable delay in payment of liquidated insurance proceeds supports an award of pre-judgment interest. *See, e.g., Butcher v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 10782 (S.D. Miss. Jan. 21, 2010) (awarding pre-judgment interest on

amount of claim paid after improper delay).

Again, the propriety of such an award was never considered by the court below, because the request was erroneously deemed to be an untimely Rule 59(e) motion. Because the timing of the request was not prohibitive, the decision of the lower court should be reversed, and the substance of the request should be considered.

CONCLUSION

For the foregoing reasons and for the reasons stated in Appellant's principal brief, Appellant requests that this Court reverse the Circuit Court's August 20, 2009 order and remand this case with instructions to consider the merits of the Appellant's motion to award attorneys fees and expenses, costs and interest.

RESPECTFULLY SUBMITTED, this the 14th day of July, 2010.

By: _____
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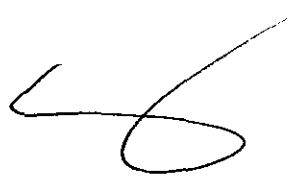
CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by personal delivery, a true and correct copy of the above and foregoing to:

Walker R. Gibson
Michael Baxter
Copeland Cook Taylor & Bush, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158

The Honorable Jannie M. Lewis
Yazoo County Circuit Judge
Post Office Box 149
Lexington, Mississippi 39095-0149

THIS, the 14th day of July, 2010.



W. Thomas McCraney, III