

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

**BRIEF OF APPELLANT
ROBERT MICHAEL FULTON**

ORAL ARGUMENT REQUESTED

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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. Mississippi Farm Bureau Casualty Insurance Company, Appellee;
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.



O. STEPHEN MONTAGNET, III

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STATEMENT OF THE ISSUE

Whether the Circuit Court erred in denying the Plaintiff's Motion to Amend Judgment and to Award Attorneys Fees and Expenses, Costs and Interest based upon its determination that the motion was pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure?

STATEMENT OF THE CASE

This is an appeal in an action for contractual, extra contractual and bad faith punitive damages arising out of the failure of Defendant Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau") to adequately and promptly process and pay an uninsured motorist claim. Plaintiff / Appellant Michael Fulton was injured when he was struck in the back by an uninsured automobile being driven by Gene Pigg, who lost control of his automobile while intoxicated and driving through the spectator section of a drag race. Mr. Pigg admitted to the investigating officer that he had no automobile insurance. Nevertheless, when Mr. Fulton tendered a claim for uninsured motorist benefits, Farm Bureau refused to pay until a lawsuit was filed, and then only paid half of their insured's meager UM limits.

On April 2, 2009, the jury in this case found that Farm Bureau acted negligently in failing to timely and adequately investigate Plaintiff's UM claim and in delaying the payment of his UM claim. Appeal Record ("App. Rec.") at 7. The jury awarded extra contractual damages for emotional distress as well as the remainder of Fulton's UM limits. *Id.* On April 3, 2009, the jury decided against awarding punitive damages, and returned a 9-3 verdict in favor of the Defendant on that issue. An agreed form of the judgment based on the jury verdict was presented to the Court. The Judgment was entered. App. Rec. at 7.

Following entry of Judgment, the Plaintiff timely moved for an award of attorneys fees, costs, and prejudgment interest, as authorized by *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992). App. Rec. at 11. The motion was fully briefed. In written responses to the motion, and in separate collateral motions to compel evidence, for protective orders, and for continuances, Defendant Farm Bureau raised a multitude of defenses and objections to the merits of Plaintiff's motion. App. Rec. at 36, 99, 140 and 156. In none of those pleadings, however, did Farm Bureau raise the issue that the motion was procedurally defective. Rather, this issue was raised for the first time *at the second hearing on the motion* when Farm Bureau presented to the Court the case of *Brooks v. Roberts*, 882 So. 2d 229 (Miss. 2004) and argued that a post judgment motion for attorneys fees required a showing of the requirements of Rule 59(e) motions.

Thereafter, the Circuit Court issued an order denying the motion on the procedural grounds argued by Farm Bureau. App. Rec. at 145. The basis for the Court's ruling was that the Motion had been filed post-judgment, and as such, should be treated under Rule 59(e) of the Mississippi Rules of Civil Procedure. Finding that the Plaintiff had failed to present any of three alternative grounds for a Rule 59(e) motion, the Court refused to consider the request for relief. The Court's decision was simply stated:

This Court, after considering the motion, records and pleadings, finds that Plaintiff filed a timely Rule 59(e) motion to amend judgment but the Plaintiff's motion failed to show one of the three requirements set forth by the Mississippi Supreme Court in *Brooks v. Roberts*, 882 So. 2d 229 (Miss. 2004) which states:

[I]n order to succeed on a Rule 59(e) motion, the movant must show: (I) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice." *Brooks v. Roberts*, 882 So. 2d 229 (Miss. 2004).

The Court therefore finds that Plaintiff's Motion to Amend Judgment to award attorneys fees and expenses, costs and interest is hereby DENIED.

Plaintiff filed a motion for reconsideration with the trial court, but that motion was also denied. App. Rec. at 147, 167. Plaintiff timely perfected this appeal.

SUMMARY OF ARGUMENT

The Circuit Court's ruling is in direct conflict with this Court's holding that "motions for reassessments of costs or for attorneys 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.'" *Cruse v. Nunley*, 699 So. 2d 941, 946 (Miss. 1997). For the reasons stated below, this Court should reverse the Circuit Court's August 20, 2009 order, and remand this action for consideration of the merits of the Plaintiff's motion.

ARGUMENT

A. **The Lower Court Erred in Requiring the Plaintiff to Satisfy Rule 59(e) Requirements Before Considering the Merits of Plaintiff's Motion to Award Fees, Costs and Interest**

The Circuit Court correctly identified *Brooks* as setting forth the requirements of a Rule 59(e) motion, but neither *Brooks* nor any of the cases cited therein concerned the direct issue of whether a motion to award attorneys fees constituted a "Rule 59(e) Motion to Amend." As to that primary issue, this Court has already ruled that such motions do not touch the merits of the underlying case, are collateral to the judgment, and are therefore "outside" of Rule 59.

In *Cruse v. Nunley*, 699 So. 2d 941, 946 (Miss. 1997), the Mississippi Supreme Court, following its previous rulings and the decisions of the United States Supreme Court, unequivocally held that motions for attorneys fees *are not Rule 59(e) motions*. In *Cruse*, the Plaintiff prevailed on

a claim that permitted the awarding of attorneys fees. *Following judgment*, the Plaintiff moved for such an award. As below, the motion was accompanied by a summary of the work performed, along with affidavits from the attorneys performing the work and from other attorneys attesting to the reasonable and customary rates for such litigation. The Circuit Court of Tishomingo County denied the request, however, “because Cruse failed to request attorney’s fees prior to the entry of judgment.” On appeal, the Mississippi Supreme Court reversed and remanded for findings as to the reasonableness of the requested award, consistent with the factors established in *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982) . In support of the decision, the Court stated:

This Court has specifically held that “. . . motions for reassessments of costs or for attorneys 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.’” *Bruce v. Bruce*, 587 So. 2d 898 (1981) (quoting *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). . . . *Regardless of when attorney’s fees are requested*, the court’s decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits – an inquiry that cannot even commence until one party has prevailed. . . . In light of the language in *Bruce* and *White*, *the fact that the 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.

Rule 59 is worded *verbatim* as its federal counterpart, and “[w]e have consistently and almost routinely said that, where this is the case, the federal construction of the counterpart rule will be “persuasive of what our construction of our similarly worded rule ought to be.” *Bruce v. Bruce*, 587 So. 2d 898, 903 (Miss. 1991) (*citing Smith v. H.C. Bailey Companies*, 477 So.2d 224, 233 (Miss. 1985); *Bourn v. Tomlinson Interest, Inc.*, 456 So.2d 747, 749 (Miss. 1984). “We have specifically followed this policy in the construction of Rule 59.” *Bruce*, 587 So. 2d at 903 (*citing Clark v. Vinard*

By and Through Vinard, 548 So.2d 987, 991 (Miss. 1989)).

Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to “[m]ake clear that the district court possesses the power” to rectify its own mistakes in the period immediately following the entry of judgment. . . .Consistently with this original understanding, “the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. By contrast, a request for attorney’s fees . . . raises legal issues collateral to the main cause of action -- issues to which Rule 59(e) was never intended to apply.”

White v. N.H. Dep’t of Employment Sec., 455 U.S. 445, 452 (U.S. 1982). “[A] motion for attorney’s fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e).” *Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980). *See also Campbell v. Bowlin*, 724 F.2d 484, 488 (5th Cir. 1984) (“defendants’ post-judgment motion for an award of attorneys’ fees was improperly characterized as a Fed.R.Civ.P. 59(e) motion . . .”).

As noted above, attorneys fee awards are derivative of the judgments that permit them. Because they are not appropriate matters for jury consideration, and because they require the Court’s initial consideration *after trial*, such motions do not ask the Court to “reconsider” anything. By contrast, Rule 59(e) “embraces motions urging ‘reconsideration of matters properly encompassed in a decision on the merits.’” *Bruce*, 587 So. 2d at 903. Because motions for attorneys fees are judgment derivative and not Rule 59(e) motions, Mississippi trial courts routinely consider such motions, and award such fees, after the initial judgment is entered and without the necessity of showing any of the three circumstances typically required of Rule 59(e) motions. *See, e.g. Romney v. Barbetta*, 881 So. 2d 958, 963 (Miss. Ct.. App. 2004); *Gordon v. Gordon*, 929 So. 2d 981 (Miss.

Ct. App. 2006); *Shipley v. Ferguson*, 638 So. 2d 1295, 1299 (Miss. 1994); *Prescott v. Prescott*, 736 So. 2d 409, 412 (Miss. Ct. App. 1999) (awarding post-judgment motion to amend to award attorneys fees). As a matter of Mississippi law, the Circuit Court's designation of the Plaintiff's motion for attorneys fees as a "Rule 59(e) motion" was error, and the requirements under that rule were inapplicable to the motion before the lower court. Accordingly, the Circuit Court's August 20, 2009 Order should be reversed, and this matter should be remanded for consideration of the merits of Plaintiff's motion.

CONCLUSION

For the foregoing reasons, 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 24th day of March, 2010.

By: *O. Stephen Montagnet*

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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:

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Post Office Box 6020
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The Honorable Jannie M. Lewis
Yazoo County Circuit Judge
Post Office Box 149
Lexington, Mississippi 39095-0149

THIS, the 24th day of March, 2010.



O. Stephen Montagnet, III