IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01723

BERTHA MADISON — APPELLANT

VERSUS

GEICO GENERAL INSURANCE COMPANY — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL
DISTRICT, CAUSE NO. A2401-2008-417

BRIEF OF APPELLEE, GEICO GENERAL INSURANCE COMPANY

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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This the 30th day of March, 2010.

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I.

STATEMENT OF ISSUES ON APPEAL

COMES NOW, the Appellee, Geico General Insurance Company, (hereinafter referred to as "Appellee"), who by and through the undersigned counsel of record, Daniel Coker Horton and Bell, PA, states that the issues before the Court presented by the Appellant are as follows:

A. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT BASED ON AN EXPIRATION OF THE STATUTE OF LIMITATIONS FOUND IN MISS. CODE ANN. §15-1-49.

II.

STATEMENT OF THE CASE

This matter is a lawsuit seeking uninsured/underinsured motorist benefits arising out of an automobile accident which occurred on December 6, 2000. In the collision, a vehicle driven by Ronnie Powell, and owned by Mary Powell impacted an automobile driven by the Appellant. As a result of the vehicle collision, Appellant alleged she received bodily injuries. The Appellant was informed by her physician on August 22, 2002, that she would probably need surgical intervention for some of her injuries and that the potential cost of the surgery would be $30,000 to $35,000. (R. Vol.1 pages 126-128; Excerpt tab 1)

Appellant alleged that she was entitled to the payment of her medical expenses and otherwise entitled to compensation as a result of her injuries and filed suit against Mary Powell on June 17, 2003, alleging that Mary Powell was the operator of the vehicle which collided with her. (R. Vol. 1 pages 27-29; Excerpt tab 2) This allegation seemed to be supported by the accident report prepared by the Gulfport Police Department at the time of the accident which listed the Appellant and Mary Powell as the operators of the two vehicles involved in the accident. (R.

Vol. 1 page 30; Excerpt tab 2)

In her Answer to the initial complaint in *Madison v. Powell*, Mary Powell denied that she was the operator of the vehicle that collided with Appellant. (R. Vol. 1 pages 31-35 ; Excerpt tab 2) Discovery then proceeded in the matter and the depositions of both Mary Powell and the Appellant were taken on December 29, 2003. Excerpts of those depositions were placed in the court file of *Madison v. Powell*, in an untitled filing. (R. Vol. 1 pages 36-46; Excerpt tab 2)

In the excerpt of the deposition of the Appellant, she stated that the person driving the vehicle that impacted hers was a male who stated to her at the time that he didn't have a drivers license or insurance. (R. Vol. 1 page 41; Excerpt tab 2) The Appellant goes on to state in her deposition that she was present and did not object to Mary Powell telling the police officer that she, Mary Powell, was the driver of the colliding car because "...she was the one that's insured". (R. Vol. 1 page 42; Excerpt tab 2) The facts of the occurrence were verified in the deposition of Mary Powell where she admits she falsely informed the police officer she was driving the vehicle. (R. Vol. 1 page 44; Excerpt tab 2)

Powell also stated in her deposition that she informed the Appellant at the scene of the accident that her son Ronnie was not covered on her insurance policy but that she, Mary, had insurance. (R. Vol. 1 page 44; Excerpt tab 2) In addition to the deposition information included in the untitled filing is an exhibit from the deposition testimony of Mary Powell listed as "Exhibit 1 Powell" with the date of 12-29-03. (R. Vol. 1 page 46; Excerpt tab 2) This document is the declarations page of Mary Powell's Allstate auto policy and specifically lists Ronnie Powell as an excluded driver.

Following the depositions, the Appellant filed a motion to amend the complaint on January 8, 2004. (R. Vol. 1 pages 57-59; Excerpt tab 2) This motion was subsequently granted and

Appellant filed an amended complaint naming Ronnie Powell as an additional defendant on July 8, 2004. (R. Vol. 1 pages 60-65; Excerpt tab 2) The amended complaint alleges that Ronnie Powell was the operator of the vehicle which impacted the Appellant's car and alleges that Mary Powell negligently entrusted the vehicle to Ronnie.

Mary Powell filed an answer to the amended complaint on July 8, 2004. (R. Vol. 1 pages 66-72; Excerpt tab 2) Ronnie Powell did not file an answer to the amended complaint and a Judgment by Default was entered against him by Judge Robin Midcalf on November 30, 2004. (R. Vol. 1 pages 74-75; Excerpt tab 2) The Default Judgment was later set aside by agreement of the parties on March 9, 2005. (R. Vol. 1 page 104; Excerpt tab 3)

After the Default Judgment against Ronnie Powell was set aside, the Appellant's attorney took Ronnie Powell's deposition on July 5, 2005. (R. Vol. 1 pages 117-126; Excerpt tab 1) In this deposition Ronnie Powell informed counsel for the Appellant that he did not have any automobile liability insurance at the time of the December 2000, accident. (R. Vol. 1 pages 120, 122, 123, 124; Excerpt tab 1)

Evidently, prior to trial the parties reached a settlement wherein Mary Powell's insurer, Allstate, agreed to pay its policy limits of $10,000 to settle the case against Mary Powell regarding the negligent entrustment issue. (R. Vol. 1 page 91; Excerpt tab 4)

On two separate occasions during the litigation of the case of *Madison v. Powell*, counsel for the Appellant placed Geico on notice of a potential UM claim by letters dated September 2, 2002, and January 7, 2004. (R. Vol. 1 pages 77-79; Excerpt tab 2) The Appellant made no further efforts to collect UM benefits from the Appellee until after the resolution of *Madison v. Powell*, in the summer of 2008.

The Appellant filed the instant lawsuit in the Circuit Court of the First Judicial District of

Harrison County, Mississippi styled *Bertha Madison v. Geico General Insurance Company*, and bearing cause number A2401-08-417 on September 16, 2008. (R. Vol. 1 pages 7-11; Excerpt tab 5) On December 17, 2008, the Appellee filed a Motion for Summary Judgment which argued that the statute of limitations for the Appellant's uninsured motorist claim had expired by virtue of the fact that the Appellant had knowledge of the tortfeasor's lack of insurance at several points at least 3 years before suit was filed. (R. Vol. 1 pages 21-79; Excerpt tab 2) The Appellant filed her Response to the Motion for Summary Judgment on March 5, 2009, (R. Vol. 1 pages 80–96; Excerpt tab 4) and the trial court heard oral arguments regarding the Motion for Summary Judgment on March 12, 2009. Subsequent to the hearing on the Motion for Summary Judgment, the court entered an opinion on May 11, 2009, finding in favor of the Appellee herein and ordered the case dismissed. (R. Vol. 1 pages 97-100; Excerpt tab 6) In support of its Order on Motion for Summary Judgment, the trial court stated that the Entry of the Default Judgment against Ronnie Powell was conclusive proof that the actual tortfeasor was uninsured.

The Appellant filed a Motion for Reconsideration on May 19, 2009. (R. Vol. 1 pages 101-106; Excerpt tab 3) In her response, the Appellant pointed out that the Default Judgment against Ronnie Powell had later been set aside by agreement of the parties on March 9, 2005. The Appellant argued that since the Default Judgment had been set aside, the trial court's reliance on the date of the Default Judgment made the decision invalid.

The Appellee filed a Response to the Motion for Reconsideration filed by the Appellant. (R. Vol. 1 pages 107-114; Excerpt tab 7) After being made aware that the Default Judgment had been set aside in Appellant's filing, the Appellee discovered that Ronnie Powell's deposition had been taken by the Appellant. In the July 5, 2005 deposition, Ronnie Powell informed counsel for the Appellant that he had been without automobile liability insurance at the time of the collision

with the Appellant. (Ronnie Powell also informed the Appellant at the scene of the accident on December 6, 2000 that he was uninsured.)The Appellee obtained copies of the relevant portions of the deposition transcript of Ronnie Powell and provided it as an exhibit in support of its Motion for Summary Judgment and Response to Plaintiff's Motion for Reconsideration. (R. Vol.1 pages 117-125; Excerpt tab 1)

The Court heard argument regarding the Motion for Reconsideration on July 30, 2009. The Court entered an Order denying the Motion for Reconsideration on September 9, 2009 and the Appellant filed the present appeal. (R. Vol. 1 page 122; Excerpt tab 1)

III.

SUMMARY OF THE ARGUMENT

The Appellant's claim for uninsured/ underinsured motorist benefits is barred by the statute of limitations. Appellant's claim for uninsured/ underinsured motorist benefits accrued no later than July 5, 2005, more than three years prior to the initiation of the instant lawsuit. Appellant was aware on the date of the collision, December 6, 2000, that the actual tortfeasor, Ronnie Powell was an uninsured motorist. Additionally, Appellant was informed again at the December 29, 2003, deposition of Mary Powell that there was no coverage under the Allstate policy for Ronnie Powell because he was a named excluded driver under the policy. (R. Vol. 1 page 46; Excerpt tab 2)

Appellant was provided further evidence that Ronnie Powell was uninsured when Default Judgment was entered against him on November 30, 2004. (R. Vol. 1 pages 74-75; Excerpt tab 2) Finally, if there was any remaining doubt regarding Ronnie Powell's status as an uninsured driver, it was put to rest when Ronnie Powell himself stated under oath in his deposition of July 5, 2005 that he was uninsured as the time of the accident. (R. Vol. 1 pages 117-126; Excerpt tab 1)

Although Geico asserts that Appellant knew or should have known Ronnie Powell was uninsured as early as December 29, 2003, giving the Appellant every benefit of the doubt, she knew definitively no later than July 5, 2005, that Ronnie Powell was uninsured. It was at a point in time no later than this that her claim for uninsured motorist benefits accrued and the statute of limitations began to run. Plaintiff failed to file her action within three years of the accrual of the claim, waiting instead until September 16, 2008. (R. Vol. 1 pages 7-11; Excerpt tab 5)

Finally, the argument advanced by Appellant that she could not proceed against the uninsured motorist carrier until after the adjudication or settlement of the claim against Mary Powell's insurer is contrary to established law.

IV.

STANDARD OF REVIEW

The determination of whether a statute of limitations has expired is a question of law. *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, 1000 (Miss. 2004). The proper standard of review in the grant or denial of a motion for summary judgment is de novo. *Knight v. Terrell*, 961 So.2d 30, 31(Miss. 2007). If no genuine issue of material fact exists and the moving party is entitled to summary judgment as a matter of law, summary judgment should be entered in that party's favor. *Id.* The burden is upon the moving party, and the evidence should be viewed in the light most favorable to the nonmoving party.*Id.*

V.

ARGUMENT

A. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT BASED ON AN EXPIRATION OF THE STATUTE OF LIMITATIONS FOUND IN MISS. CODE ANN. §15-1-49.

The allegations of this cause are governed by Mississippi's general three (3) year statute

of limitations under Miss. Code Ann. §15-1-49(1). The relevant statute provides:

§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for

(1) **All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.**

The plaintiff in this case did not file suit against Geico until nearly eight years after the initial collision. She was aware, or should have been aware at the time of the collision that a uninsured/ underinsured motorist claim existed against Geico. Even in the most favorable light possible for the plaintiff, it is clear she was aware of, and the uninsured/ underinsured motorist claim against Geico accrued at the latest on July 5, 2005.

B. WHEN CAUSE OF ACTION ACCRUES

The issue of when an uninsured/ underinsured motorist claim accrues has previously been considered by the Mississippi courts. In *Jackson v. State Farm Mut. Auto. Ins. Co.*, 880 So.2d 336 (Miss. 2004), the Mississippi Supreme Court held that a claim for uninsured/ underinsured motorist benefits accrues "[o]nce someone who possesses uninsured motorist coverage **knows, or reasonably should know**, that the damages he or she claims to have suffered exceed the limits of insurance available to the alleged tortfeasor, the cause of action against the uninsured motorist carrier has accrued. It is at this point in time the potential plaintiff has a legally enforceable claim against the uninsured motorist carrier." *Id.* at 342. **(Emphasis added.)**

In *Jackson*, the Court was faced with an amended complaint five years and five months after the accident wherein the plaintiff added the uninsured/ underinsured motorist claim against its insurer to the action. In reaching its opinion in *Jackson*, the Court discussed the earlier decision of *Lawler v. Geico*, 569 So.2d 1151 (Miss. 1990). The Court stated that *Lawler* stood for the proposition that what was necessary for accrual of a uninsured/ underinsured claim was some

assurance that there was not going to be insurance from the tortfeasor to cover plaintiff's claim. Once that occurs, the claim has accrued, a court decision or settlement against the tortfeasor is not required. *Jackson* at 341.

In her brief the Appellant seeks to direct the Court's attention to *Vaughn v. State Farm Mutual Insurance Company*, 445 So.2d 224 (Miss. 1984), for the proposition that some type of judicial determination regarding coverage is needed before an uninsured/ underinsured motorist claim accrues. Appellant's reliance on *Vaughn* is misplaced. *Vaughn* involved a situation where there was a dispute as to whether or not the driver of the vehicle involved in the accident was covered under the policy of liability insurance on the vehicle. The Court held that the uninsured/ underinsured motorist claim did not accrue until the issue regarding coverage was determined. *Id.* at 226. *Vaughn* is easily distinguishable from the instant matter.

In the instant case, the Plaintiff knew that the tortfeasor was not insured. Additionally, even assuming arguendo that he was insured under his mother's policy, the amount of of coverage was clearly known to be only $10,000. There was no dispute regarding coverage in this instance which left uncertainty as in *Jackson*.

Applying the rule of *Jackson* to the instant case, it becomes readily apparent that Appellant knew at the time of the accident, or should have known sometime in 2002, 2003, 2004 or at the very latest, July 5, 2005, the tortfeasor had no insurance. At the time of the accident it is undisputed that the alleged tortfeasor (Ronnie Powell) told the Appellant that he was not covered under the insurance on his mother's vehicle. (R. Vol.1 page 41) This should have given the Appellant some reasonable assurance that there was not going to be sufficient liability insurance to cover her injuries.

When Appellant filed her suit against Mary Powell, she knew that she had some amount

of damages. At that time the Appellee would assert the claim for uninsured/ underinsured motorist benefits had without a doubt accrued (known uninsured tortfeasor equaling zero coverage compared to damages greater than zero). However, giving the benefit of the doubt to Appellant that she should not yet have reasonably known an uninsured/ underinsured motorist situation existed one can look to the initial proceedings in the action filed by Appellant against Mary Powell.

When Mary Powell filed her Answer to Appellant's initial Complaint, she stated that she was not the driver.(R. Vol.1 pages 31-35; Excerpt tab 2) In depositions both Mary Powell and the Appellant admitted under oath that the actual driver of the vehicle which impacted the Appellant was Ronnie Powell.(R. Vol.1 pages 41, 42, 44; Excerpt tab 2) Additionally, both parties admitted that they had attempted to perpetuate a fraud on the law enforcement officer that investigated the accident. (R. Vol.1 pages 41, 42, 44; Excerpt tab 2) Importantly at the time of the depositions of the parties, which occurred on the same date of December 29, 2003, the declarations sheet from Mary Powell's liability insurer, State Farm was made an exhibit. (R. Vol. 1 page 46; Excerpt tab 2) The declarations sheet explicitly listed Ronnie Powell as a named excluded driver. (R.. Vol. 1 page 46; Excerpt tab 2) This event should have given the Appellant even further assurance that the tortfeasor had no liability insurance sufficient to trigger a uninsured/ underinsured motorist claim–yet it did not.

However, based on correspondence between Appellant's attorneys and Geico, it is clear that such a claim was contemplated, both before and after the depositions of the parties. Based on the correspondence of September 3, 2002, wherein Appellant's counsel placed Geico on notice of a potential uninsured/ underinsured claim and the correspondence of January 7, 2004, which took place after discovery had begun, and shortly following the depositions of the parties, in

Appellant's lawsuit against the tortfeasor. (R. Vol. 1 pages 77-79; Excerpt tab 2) Accordingly, it is seems apparent that Appellant was on notice that she had a potential uninsured/ underinsured motorist claim against Geico.

Even assuming all of the events above did not give the Appellant reasonable assurance that there was no coverage for the tortfeasor, the deposition of Ronnie Powell should have provided absolute assurance of no coverage. In the deposition of Ronnie Powell taken on July 5, 2005, by counsel for Appellant, Powell stated definitively that he had no liability insurance in effect at the time of the collision. (R. Vol. 1 pages 117-125; Exerpt tab 1) This should have provided the Appellant absolute assurance that there was no liability coverage for the tortfeasor. Assuming arguendo that the deposition of Ronnie Powell provided the date of absolute assurance regarding coverage, the latest Appellant's claim for uninsured/ underinsured motorist benefits could have been filed within the statute of limitations is July 5, 2008, well prior to the actual filing of the Complaint on September 16, 2008.

Appellant failed to protect her rights by not filing suit against Geico until September 16, 2008. Accordingly, a period of more than three years passed after Appellant was aware of her claim and the filing of the instant case.

Appellant argues that she could not proceed against her UM carrier while there was reasonable uncertainty regarding the coverage available from the tortfeasor's insurance policy. As a matter of law this argument must fail. The alleged tortfeasor in this matter was Ronnie Powell. At no point in time has any insurance policy providing coverage for Powell been produced. Accordingly, the act of Mary Powell's insurer tendering its policy limits of $10,000, does nothing to affix coverage to Ronnie Powell.

Under the pertinent portions of Miss. Code Ann. §83-11-103(a)(iii):

> (c)The term "uninsured motor vehicle" shall mean:
> ...(ii) a motor vehicle as to which there is such insurance in existence, but the insurance company writing the same has legally denied coverage thereunder..."

In this instance the liability carrier legally denied coverage by providing the declarations page indicating that Ronnie Powell was not insured. For the purposes of Miss. Code Ann. §83-11-103(a), the automobile was uninsured at the time Appellant became aware that coverage was being denied. This occurred at the latest at the time of Appellant's deposition on December 29, 2003.

Appellant further argues that there was not reasonable assurance regarding the potential coverage available to the Appellant under the tortffeasor's mother's policy until such time as the policy limits were tendered to settle the negligent entrustment claim. It strains the mind to understand how the Appellant would not have been able to determine if there was adequate insurance for her injuries under Mary Powell's policy until she received the policy limits–when the maximum amount of coverage available ($10,000) had been known to her since at least December 29, 2003.

As reflected in the medical record's of the Appellant, she had been informed no later than August 22, 2002 that she was likely going to require surgical intervention for her injuries. (R. Vol. 1 pages 126-128; Exerpt tab 1) The physician indicated that the probable cost for the surgery would be in the range of $30,000 to $35,000. This amount is clearly in excess of the $10,000 potential coverage available to Ronnie Powell under his mother's policy. A policy under which he was expressly excluded from coverage.

VI.

CONCLUSION

In accordance with the prior opinions of the Mississippi Supreme Court in *Jackson* and *Vaughn*, the Appellant's claim for UM benefits accrued when she became aware or should have become aware that there was not adequate coverage on the part of the alleged tortfeasor to cover her damages. As detailed above, the Appellant knew on the day of the accident that the tortfeasor had no coverage and attempted to manufacture coverage by perpetuating a fraud on the law enforcement officer responding to the accident. Even giving the Appellant every benefit of the doubt regarding the accrual of the claim for UM benefits, it is clear that the claim accrued no later than the deposition of Ronnie Powell on July 5, 2005. The Appellant failed to file her suit within the three year statute of limitations which applies to the claim. Accordingly, her claim is barred as a matter of law.

RESPECTFULLY SUBMITTED, this the 30th day of March, 2010.

EDWARD C. TAYLOR, ESQ.

CHRISTOPHER H. MURRAY, ESQ.

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CERTIFICATE OF SERVICE

I, the undersigned, of counsel for GEICO General Insurance Company, do hereby certify that I have this day served via U.S. First Class Mail, postage prepaid, a true and correct copy of the above and foregoing *Appellee's Brief* to:

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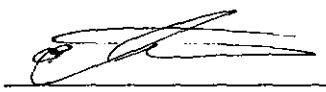
THIS the 30th day of March, 2010.



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CERTIFICATE OF SERVICE

I, the undersigned, of counsel for GEICO General Insurance Company, do hereby certify that I have this day served via U.S. First Class Mail, postage prepaid, a true and correct copy of the above and foregoing *Appellee's Brief and Record Excerpts* to:

Honorable Roger Clark
Post Office Box 1461
Gulfport, MS 39502
Trial Court Judge

THIS the 30th day of March, 2010.

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