

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

REPLY BRIEF OF THE APPELLANT, BERTHA MADISON

ORAL ARGUMENT NOT REQUESTED

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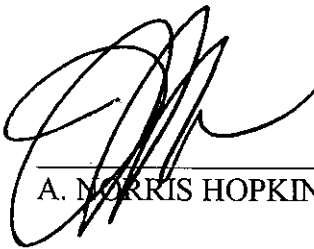
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CERTIFICATE OF INTERESTED PERSONS

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 17 day of May, 2010.



A. NORRIS HOPKINS, JR. (MSB# 10819)

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I.

REBUTTAL ARGUMENT

The Appellant, since the date of accident, contended that Mr. Ronnie Powell was an insured driver of the subject motor vehicle. Regardless of whether or not he was an excluded driver on the policy. A declaration page of an insurance policy excluding a driver does not render a motor vehicle nor its' driver without bodily injury liability insurance. The liability insurer did not legally deny coverage to the motor vehicle. It ultimately paid its policy limits. Mr. Ronnie Powell was granted permission by his father to operate the subject vehicle on the date of the accident to run errands. The Appellant contended that Mr. Ronnie Powell was a permissive driver of the subject automobile which was in fact covered by a policy of bodily injury liability insurance. It was not until July 29, 2008, after years of litigation, that Allstate tendered its policy limits to settle the case against Mary Powell for the negligent entrustment of the insured vehicle to her son, Ronnie Powell. (R.Vol.1:Pg. 91, R. Excerpt Tab 4).

The Trial Court (Circuit Court) heard oral arguments and reviewed the pleadings and rendered an opinion for which this appeal was taken. The Trial Court determined that the fact that Ronnie Powell was excluded from coverage on his parents' policy was not conclusive proof that he was uninsured. The Tower Court found the conclusive proof of Mr Powell being uninsured was an entry of a Default Judgment against Mr. Ronnie Powell. (R. Vol. 1: Pgs. 97-110). This conclusive proof, the Default Judgment of November 30, 2004, was previously set aside in the County Court lawsuit when Mr. Powell retained counsel. That being the case, there was no conclusive proof of whether or not Mr. Powell was insured or uninsured until July 29, 2008. It was at this time the bodily injury liability insurer tendered its policy limits to the Appellant.(R. Vol. 1: Pg. 91, R.Excerpt, Tab 4).

The dispute as to whether Mr. Ronnie Powell was covered under the Allstate policy was determined on July 29, 2008. The Appellee contends that the Appellant's reliance on *Vaughn v. State Farm Mutual Insurance Company*, 445 So.2d 224 (Miss. 1984), is misplaced. This is the Appellee's attempt to hide the elephant in the room. In the Appellee's own words, it states that *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/undersinsured motorist claim did not accrue until the issue regarding coverage was determined *Id. at 226*. *Vaughn* is not distinguishable but is rather directly on point. The Appellee goes to great length to argue possible dates in which the Appellant should have known the driver of the vehicle was uninsured. The Trial Court found that there was no conclusive proof as to whether or not Mr. Powell was uninsured until a Default Judgment was taken against him. The Trial Court learned that this Default Judgment was set aside. That being the case, there continued to be inconclusive proof as to whether or not Mr. Powell was an uninsured driver of the subject motor vehicle. The dispute of insurability between the parties was not yet determined. The Appellant, at all times, contended that Mr. Powell was a covered or permissive driver under his parents' policy. The dispute was ultimately resolved by the tendering of policy limits for bodily injuries of Appellant by Allstate on July 29, 2008.

The Appellee would bring this Court's attention to selective excerpts of Miss. Code Ann. §83-11-103(a)(iii) in discussing the definition of an underinsured motor vehicle. This entire subsection states as follows:

(a) The term "uninsured motor vehicle" shall mean:

(i) A motor vehicle as to which there is no bodily injury liability insurance; or

(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 or is unable, because of being insolvent at the time of or becoming insolvent during the twelve (12) months following the accident, to make payment with respect to the legal liability of its insured; or

(iii) An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage; or

(iv) a motor vehicle as to which there is no bond or deposit of cash or securities in lieu of such bodily injury and property damage liability insurance or other compliance with the state financial responsibility law, or where there is such bond or deposit of cash or securities, but such bond or deposit is less than the legal liability of the injuring party; or

(v) A motor vehicle of which the owner or operator is unknown; provided that in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by such unknown person and the person or property of the insured; or

(vii) A motor vehicle owned or operated by a person protected by immunity under the Mississippi Tort Claims Act, Title 11, Chapter 46, Mississippi Code 1972, if the insured has exhausted all administrative remedies under that chapter.

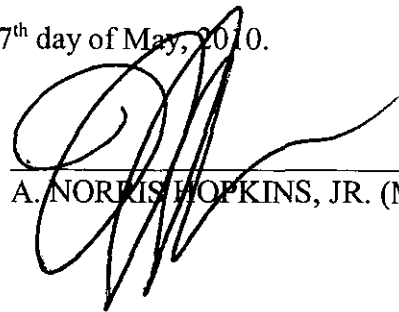
It is important to note that this section refers to "motor vehicles" not necessarily an individual. The motor vehicle operated by Mr. Ronnie Powell and owned by his parents on the date of the underlying accident had bodily injury liability insurance. Additionally, Allstate at no time legally denied liability coverage on the motor vehicle. The liability insurer tendered its limits of bodily injury coverage on behalf of its insureds' on July 29, 2008. An uninsured motor vehicle would not have such benefits to tender. The fact that the liability carrier noted on its' declarations page of the policy that Ronnie Powell was an excluded driver does not deem the "motor vehicle" was

“uninsured”. Hence, the longstanding dispute as to whether or not the driver of the motor vehicle involved in the accident was covered under the policy of liability insurance. Hence, the Appellant bringing this Court’s attention *Vaughn v. State Farm Mutual Insurance Company*, 445 So.2d 224 (Miss. 1984). The underinsured motorist claim of the Appellant did not accrue until the issue of whether or not the driver of the motor vehicle was insured by a policy of liability insurance. This issue was determined on July 29, 2008. The Appellant’s filing of her underinsured lawsuit on September 26, 2008, was well within the applicable statute of limitations.

CONCLUSION

For the reasons stated hereinabove and those expressed in Appellant’s brief this matter should be remanded for a trial. The filing of Madison’s underinsured Complaint on September 26, 2008, was made less than two (2) months after the accrual date of her claim and well within the three (3) year statute of limitations as prescribed in Miss. Code Ann. 15-7-49.

RESPECTFULLY SUBMITTED, this the 17th day of May, 2010.



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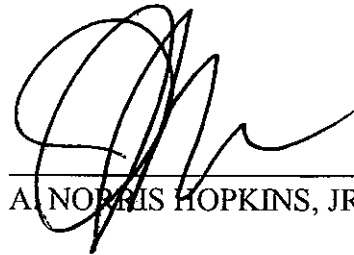
CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, do hereby certify that I have this date mailed, postage prepaid by United States Mail, a true and correct copy of the above and foregoing Appellant's Reply Brief to the following:

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This the 17th day of May, 2010.



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