

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 THE APPELLANT, BERTHA MADISON

ORAL ARGUMENT NOT REQUESTED

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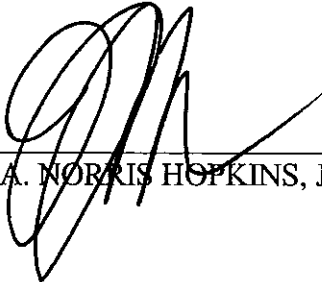
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CERTIFICATE OF INTERESTED PERSONS

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 2 day of March, 2010.



A. NORRIS HOPKINS, JR. (MSB [REDACTED])

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I.

STATEMENT OF ISSUES ON APPEAL

COMES NOW, the Appellant, Bertha Madison, (hereinafter referred to as "Appellant"), who by and through the undersigned counsel of record, Hopkins, Barvié & Hopkins, P.L.L.C., states that the issues before the Court presented by Appellant are as follows:

- A. **WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS AS FOUND IN MISS. CODE ANN. §15-7-49.**

II.

STATEMENT OF THE CASE

Appellant, Bertha Madison, is a resident of Gulfport, Mississippi, who filed this 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 December 17, 2008, Appellee filed a Motion for Summary Judgment.(R Vol. 1:Pgs. 21-79) On March 5, 2009, the Appellant filed her Response to the Motion for Summary Judgment.(R Vol. 1:Pgs. 80-96) On May 11, 2009, the trial court entered an Order granting the Appellee's Motion for Summary Judgment.(R Vol. 1:Pgs. 97-100) On May 19, 2009, the Appellant filed her Motion for Reconsideration.(R Vol. 1:Pgs. 101-106) On September 9, 2009, the trial court entered an Order denying Appellant's Motion for Reconsideration. (R Vol. 1:Pg. 132) As a result, Appellant has filed this appeal.

This cause, *Bertha Madison v. Geico General Insurance Company*, is an underinsured motorist lawsuit that was filed in the Circuit Court for the First Judicial District of Harrison County.

Appellant, Bertha Madison, filed her original Complaint in this case on or about September 16, 2008. (R Vol. 1:Pgs. 7-11).

On or about December 6, 2000, the Plaintiff was involved in an automobile accident. (R Vol. 1:Pg. 37) The Plaintiff filed a lawsuit against Mary N. Powell on or about June 17, 2003, in keeping with the Mississippi Uniform Accident Report which supported the fact that Mary N. Powell was the operator and tortfeasor.(R Vol. 1:Pgs. 27-29) Mary Powell was an insured of Allstate Insurance Company.

Subsequent to the initial filing of the lawsuit on behalf of Bertha Madison, it was determined through the discovery process that Mr. Ronnie Powell, son of Mary Powell, was the operator of the vehicle which was involved in the accident with Mrs. Bertha Madison. On or about July 8, 2004, an Amended Complaint was filed.(R Vol. 1:Pgs. 60-65) The Plaintiff continued to pursue Mr. Ronnie Powell as a permissive driver under the Allstate policy as well as Mary Powell on grounds of negligent entrustment.

On November 30, 2004, Judge Robin Midcalf executed a Default Judgment against Defendant, Ronnie Powell as he had not answered the Amended Complaint at that time.(R Vol. 1:Pg. 74) The Default Judgment entered against Mr. Ronnie Powell, in that particular litigation, was set aside on March 28, 2005.(R Vol. 1: Pg. 104) On March 9, 2005, Ronnie Powell retained counsel to represent him in that underlying matter. (R Vol. 1:Pgs. 105-106). Due to Hurricane Katrina, there was unexpected delay in the pursuit of the Plaintiff's claims against Mary and Ronnie Powell. Plaintiff continued her litigation against the Defendants and concluded the discovery and re-set the case for trial on September 29, 2008. On July 29, 2008, Bertha Madison resolved her case against Mary Powell's insurer. See correspondence from attorneys for Allstate enclosing check. (R Vol. 1:Pg. 91)

On September 26, 2008, Bertha Madison filed the instant lawsuit against Geico under the provisions of her underinsured motorist coverage. The Plaintiff would show that her filing of the lawsuit for underinsured motorist coverage is well within Mississippi's three year statute of limitations found in Miss. Code Ann. §15-1-49. Counsel for Plaintiff submitted to Geico, in keeping with its policy, notification of accident, representation, potential uninsured claim as well as a copy of the supporting Mississippi Uniform Accident Report. Correspondence by Plaintiff's counsel provided the required notification to Geico so that they would not be prejudiced in anyway to include subrogation rights or intervention. These rights were waived.

On March 12, 2009, Defendant, Geico General Insurance Company, filed its Motion for Summary Judgment based upon Mississippi's three year statute of limitations found in Miss. Code Ann. §15-1-49. On May 11, 2009, the trial court entered its order granting Defendant's Motion for Summary Judgment. The trial court found that this action against Geico had accrued on November 30, 2004, when the Default Judgment was entered against Ronnie Powell. The court took into consideration the fact that Bertha Madison had knowledge she was involved in a collision with an uninsured driver; that Madison knew that the owner of the vehicle was insured and that Madison did not know the extent of her injuries and damages. The court ruled that the fact that Ronnie Powell was excluded from coverage on his mother's policy was not conclusive proof that he is uninsured but that the entry of Default Judgment against Mr. Ronnie Powell was conclusive proof.(R Vol. 1:Pgs. 97-100). The court relied upon the Default Judgment of November 30, 2004, against Mr. Ronnie Powell as the date of accrual which, in fact, had been set aside.(R Vol. 1:Pg. 104). Allstate Insurance Company, the liability insurer, ultimately provided its limits of bodily injury liability for its insured on July 29, 2008.

III.

SUMMARY OF THE ARGUMENT

The underinsured claim of Bertha Madison did not accrue for purposes of the Statute of Limitations as set out in Miss. Code Ann. §15-1-49 until July 29, 2008. On this date the tortfeasor's insurance company tendered policy limits on behalf of Mary Powell. Although Ronnie Powell was excluded from coverage on his mother's policy, he was granted permission and provided the keys to operate this motor vehicle which caused the underlying lawsuit. Up until the tendering of the policy limits for bodily injury by Allstate on behalf of Mary Powell, its' insured or a verdict, there remained reasonable uncertainty in this particular case as to whether the tortfeasor had adequate insurance and therefore no cause of action accrued under Bertha Madison's underinsured motorist coverage until July 29, 2008. Therefore, the filing of Madison's underinsured claim on September 26, 2008, was made less than two (2) months after the accrual date and well within the three (3) year statute of limitations as prescribed in Miss. Code Ann. 15-7-49.

IV.

ARGUMENT

A. WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS AS FOUND IN MISS. CODE ANN. §15-7-49.

On September 26, 2008, Bertha Madison filed the instant lawsuit against Geico under the provisions of her underinsured motorist coverage. Miss. Code Ann. §83-11-103(a)(iii) provides the definitions of an underinsured motor vehicle. This subsection states as follows:

(c) 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.

Allstate Insurance Company, the liability insurer of Mary Powell, ultimately provided its limits of bodily injury liability for its insured on July 29, 2008. As such, Bertha Madison became an underinsured motorist.

The underinsured claim of Bertha Madison did not accrue for purposes of the Statute of Limitations as set out in Miss. Code Ann. §15-1-49 until July 29, 2008. Miss. Code Ann. §15-7-49 states as follows:

(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.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury of disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

The filing of Madison's underinsured claim on September 26, 2008, was made less than two (2) months after the accrual date and well within the three (3) year statute of limitations as prescribed in Miss. Code Ann. 15-7-49.

In *Jackson v. State Farm Mutual Automobile Insurance Company*, 880 So.2d 336(Miss. 2004), the Supreme Court held,

At least when there is reasonable uncertainty about whether the other party to an accident has adequate insurance, there is under this case law no accrual of a cause of action under a person's uninsured motorist policy.

The court further held,

Once 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.

Bertha Madison had reasonable uncertainty as to whether or not there was adequate insurance until such time the tortfeasor's liability insurance company tendered its' policy limits for bodily injuries or, alternatively, a verdict.

In Vaughn v. State Farm Mutual Automobile Insurance Company, 445 So.2d 224 (Miss.

1984), the Supreme Court held that,


A father's cause of action did not accrue until driver of the car was finally adjudged, in previous action by father against owner of vehicle, to be an uninsured motorist under owner's automobile policy, which final adjudication occurred when the Supreme Court affirmed the trial court's judgment against father in the previous action.

CONCLUSION

In keeping with Vaughn and Jackson, Bertha Madison had reasonable uncertainty as to whether there was adequate insurance of the tortfeasor, therefore, there was no accrual of her cause of action for underinsured motorist coverage until such time Mary Powell's insured tendered policy limits. The filing of Madison's underinsured claim on September 26, 2008, was made less than two (2) months after the accrual date and well within the three (3) year statute of limitations as prescribed in Miss. Code Ann. 15-7-49.

RESPECTFULLY SUBMITTED, this the 2 day of March, 2010.


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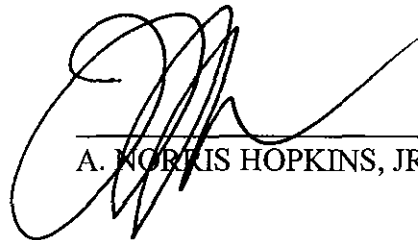
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CERTIFICATE OF SERVICE

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 Brief to the following counsel of record:

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