

No. 2010-CA-00041

IN THE COURT OF APPEALS OF MISSISSIPPI

BARBARA ARMSTRONG AND ROBERT M. HILL

Defendants- Appellants

v.

MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY

Plaintiff-Appellee

On Appeal from the Circuit Court of Alcorn County
The Honorable Paul Funderburk
Case No. CV-09-134-FA

BRIEF OF PLAINTIFF/APPELLEE
MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY

H. Scot Spragins, MSB # [REDACTED]
Amanda Povall Tailyour, MSB # [REDACTED]
HICKMAN, GOZA & SPRAGINS, PLLC
P. O. Drawer 668
Oxford, MS 38655-0668

Counsel for Appellee
MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY

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 this court may evaluate possible disqualification or recusal.

- | | | |
|----|--|------------------------|
| 1. | Barbara Armstrong | Appellant |
| 2. | Robert M. Hill | Appellant |
| 3. | James E. Price, Jr., Esq. | Counsel for Appellants |
| 4. | Mississippi Farm Bureau Casualty Insurance Company | Appellee |
| 5. | H. Scot Spragins, Esq. | Counsel for Appellee |
| 6. | Amanda Povall Tailyour, Esq. | Counsel for Appellee |

Respectfully Submitted,

MISSISSIPPI FARM BUREAU CASUALTY
INSURANCE COMPANY



H. Scot Spragins, MSB [REDACTED]
Amanda Povall Tailyour, MSB # [REDACTED]
HICKMAN, GOZA & SPRAGINS, PLLC
Postal Drawer 668
1305 Madison Avenue
Oxford, MS 38655

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW	2
B. STATEMENT OF FACTS	2
SUMMARY OF ARGUMENTS	4
LAW AND ARGUMENT	5
A. STANDARD OF REVIEW.	5
B. FARM BUREAU'S SUBROGATION RIGHTS	5
C. THE LOWER COURT DID NOT ERR WHEN IT FOUND THAT A JURY VERDICT CONSTITUTES A FULL RECOVERY FOR THE PURPOSES OF THE "MADE WHOLE" DOCTRINE	6
D. FARM BUREAU DID NOT WAIVE ITS RIGHT OF SUBROGATION.	8
CONCLUSION	11
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

CASES	PAGES
<i>Bartunek v. Geo. A. Hormel & Co.</i> , 513 N.W.2d 545 (Neb. App. 1994)	8, 9
<i>Bellemere v. Geico General Ins. Co.</i> , 977 So.2d 363 (Miss. App. 2007)	8
<i>Box v. Early</i> , 178 So. 793, 796 (Miss. 1938)	5
<i>Hare v. State of Mississippi</i> , 733 So.2d 277 (Miss. 1999)	4, 7, 11
<i>In Motor Club Ins. Ass'n v. Bartunek</i> , 526 N.W.2d 238 (Neb. App. 1995)	9
<i>Quinn v. Miss. State University</i> , 720 So.2d 843 (Miss. 1998)	5
<i>Raymond James Fin. Servs. v. Saldukas</i> , 896 So.2d 707 (Fla. 2005)	8
<i>Robinson v. Sullivan</i> , 59 So. 846, 847 (Miss.1912)	5
<i>Ronald Adams Contractor, Inc. v. Miss. Transp. Commr.</i> , 777 So.2d 649 (Miss. 2000)	5
<i>Sadler v. Glen</i> , 199 So. 305, 307 (Miss.1940)	5
<i>St. Paul Property and Liability Ins. Co. v. Nance</i> , 577 So.2d 1238 (Miss. 1991)	5
<i>Stonewall Life Ins. Co. v. Cooke</i> , 165 Miss. 619, 144 So.217 (1932).	9
<i>Tampa Port Auth. v. M/V Duchess</i> , 65 F. Supp.2d 1299 (M. D. Fla. 1997)	8
<i>United Pac. Ins. Co. v. Boyd</i> , 661 P.2d 987 (Wash. App. 1983)	8
<i>U. S. Automobile Assn. v. Stewart</i> , 919 So.2d 24 (Miss. 2005)	7
<i>Yerby v. United Healthcare Ins. Co.</i> , 846 So.2d 179 (Miss. 2002)	8
 STATUTES/RULES 	
Miss. R. Civ. P 56	<i>passim</i>

I. STATEMENT OF THE ISSUES

1. Whether the lower court correctly granted Farm Bureaus's motion for summary judgment and denied Appellants' motion for summary judgment, finding that Appellants were "made whole" by the jury verdict in *Barbara Armstrong and Robert M. Hill. v. Rickey J. Benjamin and Flowers Baking Company*, Cause No. CV 06-483 GA, Circuit Court of Alcorn County, Mississippi.

2. Whether the lower court correctly granted Farm Bureau's motion for summary judgment and denied Appellants' motion for summary judgment, finding that, under its right of subrogation, Farm Bureau was entitled to reimbursement of the medical payments that it paid on behalf of Appellants in the amount of Six Thousand and Fifty-Eight Dollars and Three Cents (\$6,058.03).

3. Whether the lower court correctly found that Farm Bureau did not waive its rights of subrogation and could reasonably rely upon its contractual rights and assurances of the counsel for Appellants.

II. STATEMENT OF THE CASE

A. Course of Proceedings And Disposition In The Court Below.

Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau") commenced this action pursuant to its contractual and equitable rights of subrogation, seeking reimbursement of medical payments benefits that it made on behalf of Appellants. R: 4-6. Appellants filed their *Joint Answer of Defendants* and discovery followed. R 7-9. At the close, Farm Bureau filed its Motion for Summary Judgment. R:27-144. Defendants then filed their cross-motion under Miss. R. Civ. P. 56. R:145-186. Farm Bureau replied to the cross-motion. R:187-204. Then the circuit court held a hearing after proper notice. On January 4, 2010, the lower court granted Farm Bureau's motion for summary judgment and denied Defendants' cross-motion. The lower court held that Farm Bureau was entitled to reimbursement of the medical payments that it made on behalf of Defendants in the amount of Six Thousand and Fifty-Eight Dollars and Three Cents (\$6,058.03). R:205-206. On January 5, 2010 Appellants filed a *Notice of Appeal* to this court. R:208

B. Statement of the Facts

On October 8, 2006, Appellants, Barbara Armstrong ("Armstrong") and Robert M. Hill ("Hill") were involved in a motor vehicle accident. R:5; 152; 168. Farm Bureau provided automobile insurance coverage and, under the terms of that policy, made medical payments of \$2,982.81 on behalf of Armstrong and \$3,075.32 on behalf of Hill. R:157-158, 160, 161. Subrogation receipts were executed. R:83, 84, 102.

Three days after the accident, Attorney James E. Price, Jr. ("Price") advised Farm

Bureau that he represented Armstrong and Hill in "their claim for property damage and personal injuries against" a third-party. R:152. Price further represented that "[w]hen we are successful in recovering from the adverse party's liability insurance carrier, we will repay your subrogation claim" *Id.* Farm Bureau acknowledged Price's representation of Appellants, advised him of the coverage available, and reserved its right of subrogation. R:153-154.

Price then went about attempting to settle Armstrong's and Hill's claims with the liability insurer for the third-party. When doing so, Price presented as evidence the exact medical expenses paid by Farm Bureau. Price made a settlement demand of \$17,000 to settle the two personal injury claims, "which would be in addition to the subrogation claim of Farm Bureau for the medical expenses which that company paid." R:157-158. Farm Bureau later alerted the liability insurer, with a copy to Price, of the medical payment coverage available and its rights of subrogation. R:159.

Within ten (10) days of the settlement demand, on November 20, 2006, Armstrong and Hill filed suit in the Circuit Court of Alcorn County naming the third-party and his employer as defendants and demanding damages of \$75,000, plus costs. R:142-143 (*Armstrong and Hill v. Rickey J. Benjamin and Flowers Baking Company*, No. CV06-483 GA, Circuit Court of Alcorn Count, Mississippi). Over the next two (2) years, settlement offers were exchanged and rejected, R:160-161, while Farm Bureau periodically reminded both Price and the liability insurer for the third-party of its interest. R:162.

Unable to agree, the dispute was set for trial, which commenced on July 28, 2008. R: 144. To support her claim, Armstrong presented the exact \$2,982.21 of medical bills and expenses paid by Farm Bureau. To support his claim, Hill presented the exact

\$3,075.32 of medical bills and expenses paid by Farm Bureau. R:173-174, 183. The jury was instructed that, if it found for plaintiffs, Armstrong and Hill, their damages should be “awarded for the purpose of making the Plaintiff[s] whole again . . .” R:61 (emphasis supplied). The jury was to consider “reasonable and necessary medical expenses incurred by the Plaintiffs as a result of their injuries, if any, sustained in this accident,” R:63, which “do not include attorney’s fees . . .” R:65. There was no issue for contributory negligence and no jury instruction to the effect was submitted. The jury found for Armstrong and Hill and measured their damages at \$4,422 and \$3,735.30, respectfully. R:50. No post-trial motions were filed nor was the verdict appealed.

When finally learning of the trial and verdict, Farm Bureau sought reimbursement for its payments. R:163. Price’s response was that neither Armstrong or Hill were “willing to voluntarily reimburse your company for **any** medical expenses paid by it.” R:164 (emphasis supplied). Price contended that Armstrong and Hill were not “made whole” by the jury verdict and, under the holding of *Hare v. State of Mississippi*, 733 So.2d 277 (Miss. 1999), Farm Bureau was not entitled to any amount for subrogation. *Id.*

Unable to resolve this dispute, Farm Bureau initiated the present action. The course of this proceeding is set forth above.

III. SUMMARY OF ARGUMENTS

The prior jury verdict established the value of Armstrong’s and Hill’s claims against the third-party. They have been paid and, therefore, were compensated and “made whole.” The major basis for their claim was the exact medical expenses paid by Farm Bureau. Armstrong and Hill had agreed by way of contract to reimburse Farm Bureau, but

they failed to do so. Also, Armstrong's and Hill's counsel agreed to reimburse Farm Bureau, but failed to do so. Equity also requires Farm Bureau to be reimbursed. Armstrong and Hill should have not been allowed to avoid repayment – especially in toto – simply because they believed the jury should have awarded them more. Farm Bureau did not waive its claim for subrogation. To the contrary, it relied upon the statements of Armstrong, Hill and their counsel that it would be paid when they were paid.

IV. LAW AND ARGUMENT

A. Standard of Review

On appeal, the grant of summary judgment is reviewed *de novo*. *Ronald Adams Contractor, Inc. v. Miss. Transp. Comm'r*, 777 So.2d 649, 652 (Miss. 2000). The appellate court “examines all the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.” *Quinn v. Miss. State University*, 720 So.2d 843, 846 (Miss. 1998). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in its favor. *Id.* As Appellants had the burden of proving their waiver argument, Farm Bureau is entitled to all favorable inferences negating waiver under the facts to which no genuine dispute was made out below.

B. Farm Bureau's Subrogation Rights.

The law of subrogation is of ancient and equitable origins. *St. Paul Property and Liability Ins. Co. v. Nance*, 577 So.2d 1238 (Miss. 1991) (citing *Sadler v. Glen*, 199 So. 305, 307 (Miss.1940); *Box v. Early*, 178 So. 793, 796 (Miss. 1938); *Robinson v. Sullivan*,

59 So. 846, 847 (Miss.1912). The relationship between an insurance company and its insured is contractual in nature, with the rights and duties set out and memorialized by the provisions of the insurance contract. Farm Bureau's policy states in pertinent part:

OUR RIGHT TO RECOVER PAYMENT

A. If we make a payment under this policy and the person to or for whom the payment was made has a right to recover damages from another, we shall be subrogated to that right. That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and
2. Nothing after the loss to prejudice our right.

However, our right in paragraph A, do not apply under **Part D - Coverage for Damage to Your Auto**, against any person using any **covered auto** with permission of any **insured**.

B. If we make a payment under this policy, and the person to or for whom payment is made recovers damages from another, that person shall:

1. Hold in trust for us the proceeds of the recovery; and
2. Reimburse us to the extent of our payment.

If such payment is for uninsured Motorist Coverage, we shall be entitled to recovery only after the **insured** has been fully compensated for damages.

R:136-137

Neither Armstrong nor Hill argue or can argue that Farm Bureau did not have rights of subrogation – whether contractual or equitable.

C. The lower court did not err when it found that a jury verdict constitutes a full recovery for the purposes of the “made whole” doctrine.

The jury verdict and final judgment in *Barbara Armstrong and Robert M. Hill v. Rickey J. Benjamin and Flowers Baking Company*, Cause No. CV 06-484 GA, Circuit Court

of Alcorn County, Mississippi, conclusively established the value of Armstrong's and Hill's claim/cause of action. The verdict was not questioned through post-trial motions or appeal. Liability was not disputed. R. 60 (Jury Instruction C-7). The sole issue in the trial was the amount of damages to be properly awarded to Armstrong and Hill. The jury awarded Appellants \$8,146.20 in damages. In the estimation of the jury, that was the sum of money needed to make Armstrong and Hill whole again. R. 61 (Jury Instruction C-8); R. 62 (Jury Instruction C-9). That verdict cannot be collaterally attacked here.

In addition to complaining about the size of the verdict generally, Appellants argue they cannot be considered to have been made whole by the verdict in light of the fact that they had to pay their attorney one-third of the damages awarded in the underlying lawsuit. Brief of Appellant at p. 7. According to Appellants, this Court's decision in *Hare* prevents reimbursement to Farm Bureau for any of the medical payments that it made on their behalf. *Id.*

Appellants' continued reliance on *Hare* is misplaced.¹ This is not a situation where, like *Hare*, the value of a claim clearly exceeded funds necessary to satisfy the claim. Here, the jury has determined the value and that value was paid. The question here is why should the insurer not be repaid amounts upon which the very claim was established.

Other jurisdictions have applied the doctrine of collateral estoppel and concluded that "once the issue of damages was fully litigated before the jury, the insured was precluded from claiming that the damages awarded by the jury did not constitute full

¹Appellants also cite *U. S. Automobile Assn. v. Stewart*, 919 So.2d 24 (Miss. 2005), as "adopting the 'made whole' rule." See Appellants' Brief at p. 6. However Appellant's statement is misleading in that *Stewart* not only did not involve subrogation, but also *Stewart* holds that the "made-whole" rule does not apply to uninsured motorist coverage, thus allowing the insurer to setoff the amount of at-fault liability coverage. *Id.* at 29.

compensation.” *Tampa Port Auth. v. M/V Duchess*, 65 F. Supp.2d 1299, 1302 (M. D. Fla. 1997) (citing *Bartunek v. Geo. A. Hormel & Co.*, 513 N.W.2d 545, 554 (Neb. App. 1994); *United Pac. Ins. Co. v. Boyd*, 661 P.2d 987, 990 (Wash. App. 1983)). While recognizing that the insured – like Appellants – may place a greater value on their damages than the jury did, the law considers that they have obtained a full recovery when the jury has spoken.

D. Farm Bureau did not waive its right of subrogation.

Waiver is “the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right.” *Bellemere v. Geico General Ins. Co.*, 977 So.2d 363 (Miss. App. 2007) (quoting *Raymond James Fin. Servs. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005)). Appellants argue that Farm Bureau waived its right of subrogation because it failed to intervene in Appellant’s suit against the third-party. This begs a question. Why would Farm Bureau intervene when it had been told that it would be reimbursed by Price, on behalf of Armstrong and Hill? Price specifically told Farm Bureau “[w]hen we are successful in recovery from the adverse party’s liability insurance carrier, we will repay your subrogation claim.” R: 152.² We can only assume now that Price was really saying, “We’ll reimburse you, but don’t believe me; don’t rely upon what I have promised.” Why would Farm Bureau intervene and interject the issue of insurance into Armstrong’s and Hill’s case when it had been specifically told there was no need to do so? Armstrong, Hill and Price should all be the ones estopped.

²It should be noted that Price gave Farm Bureau further assurance by framing his settlement offers on behalf of Armstrong and Hill in terms of the demand “would be in addition” to the subrogation claim of Farm Bureau for the medical expenses which they allegedly paid.” R:157-158.

They should be held to their word.

Armstrong, Hill and Price cannot point to any communication to Farm Bureau which would put it on notice that they did not intend to comply with the terms of the policy and assurances to "repay your subrogation claim." R:152. Price's assurance was unconditional and never revoked. He did not say, "we will repay you unless we go to trial; we will repay you if we receive more than X, Y or Z; we will repay you if you pay all attorney's fees." Had any of those statements been made, then Farm Bureau could have made the appropriate steps to defend its rights.³

In support of their position, Appellants seize upon a 1932 case that involves waiver of a forfeiture provision of life insurance, not a right of subrogation under an automobile insurance policy. See *Stonewall Life Ins. Co. v. Cooke*, 165 Miss. 619, 144 So.217 (1932). "Paraphrasing" language from *Stonewall*, Appellants argue that if a forfeiture provision can be waived then a subrogation provision can also be waived. Brief, p. 8. However, Plaintiffs cite no case law for this proposition and further fail to show where Farm Bureau either implicitly or impliedly waived its right of subrogation. Brief, p. 9. The undisputed facts show otherwise.

The failure of the insurer to intervene in an insured's suit against the third-party does not constitute a waiver of the right of subrogation. See *In Motor Club Ins. Ass'n v. Bartunek*, 526 N.W.2d 238, 243 (Neb. App. 1995)(citing *Bartunek v. Geo. A. Hormel & Co.*,

³Appellants complain that they had to pay Price's attorney's fee and, as a result they were not ultimately made whole. This is a problem created by Armstrong, Hill and Price. They could have done a number of things which would have prevented this situation. For example, they could have: 1) told Farm Bureau of the need to intervene; 2) told Farm Bureau to pursue its claim in another suit; or, 3) told Farm Bureau that they would honor Farm Bureau's subrogation rights only if they pay all attorney's fees. Under any of these circumstances, Farm Bureau would have reason to make a decision. Instead, Price repeatedly assured Farm Bureau that it would be paid.

513 N.W.2d 545, 554 (Neb. App. 1994)). Like the case *sub judice*, the insurer paid medical expenses for the insured. *Id.* at 240. The insurance policy, like Farm Bureau's policy, contained a subrogation clause stating that the insurer would be subrogated to the rights of any person to whom payment was made under the policy. *Id.* The insured, like Appellant Armstrong, executed a subrogation receipt, which provided that the insurer was subrogated to any right of recovery that the insured had as a result of the accident and that the insured would hold the funds in trust for the insurer. *Id.* The insured filed a lawsuit against the third-party tortfeasor and received damages in a final judgment. *Id.* When the insurer, like Farm Bureau, demanded reimbursement of the medical expenses pursuant to its right of subrogation, the insured, like Appellants, refused. *Id.* The insurer filed a lawsuit pursuant to its right of subrogation. *Id.* The insured, like Appellants, claimed *inter alia* that (1) it had not received its full amount of loss in the third-party action, and (2) the insured had waived its subrogation interest. Taking judicial notice of a case that it had earlier decided that was factually related to the case before it, the Nebraska court held that the insured was not only collaterally estopped from asserting that he did not fully recover his medical expenses, but also the failure of the insurer to intervene in an insured's suit against the third-party did not constitute a waiver of the right of subrogation. *Id.* at 242.

V. CONCLUSION

The lower court correctly decided this case. It is undisputed that Farm Bureau had contractual rights of subrogation and was to be reimbursed. Armstrong, Hill and Price all acknowledged those rights prior to trial and gave Farm Bureau assurance it would be repaid. These assurances were unconditional. It would be contrary to the contract and equity for Appellants to keep all the money when their claim was based on payments made by Farm Bureau. Appellants cannot point to any reason why, under these circumstances, Farm Bureau should have done anything other than to wait to get paid.

Equity demands Farm Bureau being paid. Farm Bureau reasonably relied upon Appellants' representatives. It is certainly not equitable for Appellants to keep all the proceeds simply because they agreed to pay all attorney's fees.⁴⁵

The lower court should be affirmed in all respects. Appellees so pray.

⁴Some (but not Appellants) could argue that Farm Bureau should be forced to suffer a share of attorney's fees and be reimbursed its proportional share of the verdict. To do so now would force an attorney client relationship with Price upon Farm Bureau. It would be inappropriate to do so when Price, himself, could have and should have addressed this situation prior to the trial of the underlying claims. As previously noted, this would have allowed Farm Bureau to make certain decisions to protect its interest. One option would have been to retain Price if the terms were agreeable. He did not but, instead, agreed on behalf of himself, Armstrong and Hill to reimburse Farm Bureau upon recovery without a fee.

⁵Farm Bureau also questions the manner in which the funds were handled. Rule 1.15, Rules of Professional Conduct, seems to indicate that Price should have notified Farm Bureau and should have held in trust all funds to which Farm Bureau may have an interest.

Respectfully submitted, this the 23rd day of April, 2010.

**MISSISSIPPI FARM BUREAU
CASUALTY INSURANCE COMPANY**

HICKMAN, GOZA & SPRAGINS
Attorneys at Law
Postal Drawer 668
1305 Madison Avenue
Oxford, MS 38655
Telephone: (662) 234-4000
Facsimile: (662-234-2000)
sspragins@hickmanlaw.com

H. SCOT SPRAGINS, MSB# [REDACTED]
AMANDA POVALL TAILYOUR, MSB# [REDACTED]

CERTIFICATE OF SERVICE

I, H. Scot Spragins, do hereby certify that I have this date mailed, postage prepaid a true and correct copy of the above and foregoing document to:

James E. Price, Jr.
PRICE & KROHN LLP
Post Office Box 549
413 Cruise Building
Corinth, MS 38835-0549

Honorable Paul S. Funderburk
Circuit Court Judge of Alcorn County
P. O. Drawer 1100
Tupelo, MS 38802-1100

This the 23rd day of April, 2010.



H. SCOT SPRAGINS