

**SUPREME COURT OF MISSISSIPPI**  
**COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

BARBARA ARMSTRONG AND ROBERT M. HILL, )

APPELLANTS )

VS. )

**NO. 2010-CA-00041**

MISSISSIPPI FARM BUREAU )  
CASUALTY INSURANCE COMPANY, )

APPELLEE )

**APPEAL FROM THE CIRCUIT COURT**  
**OF ALCORN COUNTY, MISSISSIPPI**

**REPLY BRIEF OF APPELLANTS**  
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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
1. Made Whole Doctrine .....	1
2. Waiver .....	1
CONCLUSION.....	5
CERTIFICATE OF SERVICE .....	6

## TABLE OF AUTHORITIES

### CASES

Hare v. State 733 So.2d 277 (Miss., 1999) .....	1
State Farm Mut. Auto Ins. Co. v. Lindsey 388 So.2d 1189 (Miss., 1980).....	4
Stonewall Life Ins. Co. v. Cooke 165 Miss. 619, 144 So. 217, (1932).....	4
Stutts v. Miller 2008-CA-01866-SCT, (Miss., 3/18/10) .....	2

## ARGUMENT

### 1. Made Whole Doctrine.

In its brief, Farm Bureau does not dispute the fact that the “made-whole” doctrine was adopted as the law in this State in the case of *Hare v. State*, 733 So.2d 277 (Miss., 1999), and that it remains the law to this day. Under that doctrine, an insurer cannot enforce its right of subrogation against an insured until and unless the insured has been fully compensated.

Farm Bureau claims that the jury verdict conclusively established the amount necessary to fully compensate Barbara and Robert for their damages, which included medical expenses and pain and suffering; but Farm Bureau then conveniently overlooks the undisputed fact that after deduction of their attorney’s fee and repayment of Farm Bureau’s subrogation claim, they not only would receive nothing to compensate them for their undisputed pain and suffering, but they would have to use some of their own funds to pay Farm Bureau, even though Barbara had paid a premium to secure the medical payments coverage. That contention borders on the absurd.

Under the “made whole” doctrine an insured is not only entitled to recover full compensation from a third party tortfeasor, but such insured is also entitled to retain the amount necessary from the gross recovery to fully compensate the insured for his or her damages before they are required to pay their insurer’s subrogation interests. Under the “made whole” doctrine, Barbara and Robert are entitled to summary judgment.

### 2. Waiver

In its response to Barbara and Robert’s motion for summary judgment Farm Bureau did not dispute or even mention their claim that it had waived its right to recover its subrogation interest from them (R. 187-193; R.E. 46-52). Even more importantly, the

lower court did not address this issue in its order (R. 205-206; R.E. 53-54). This failure by the lower court would probably require a reversal and remand of this case under the ruling in *Stutts v. Miller*, 2008-CA-01866-SCT, (Miss., 3/18/10) that "[a] trial court's failure to include specific findings of fact on an issue may be fatal error." However, no remand is required in this case since the uncontradicted facts show conclusively as a matter of law that Farm Bureau did, in fact, waive its right to recover its subrogation interest from Barbara and Robert.

Farm Bureau either completely misunderstands, or deliberately misrepresents, Barbara and Robert's basis for contending that Farm Bureau waived its right of subrogation. According to Farm Bureau, "Appellants argue that Farm Bureau waived its right of subrogation because it failed to intervene in appellant's (sic) suit against the third party." (Brief, p. 8.) The real basis for this waiver was not Farm Bureau's failure to intervene, but rather the oral and written statements made by its representatives concerning its intention to recover its subrogation interests from the third party tortfeasor's liability insurance carrier.

Barbara and Robert testified in their depositions that when they were asked to sign the Subordination Receipts on October 16, 2006, they were specifically told by Farm Bureau's representative that this was necessary so that Farm Bureau could pursue its subrogation claim against Allstate, which testimony was never disputed (R. 170, 171, 182; R.E. 14, 15, 21). This oral statement was corroborated by several written statements made by Farm Bureau's representatives.

This correspondence began with a letter from Barbara and Robert's attorney to Farm Bureau dated October 11, 2006, which stated: "When we are successful in recovering from the adverse parties' liability insurance carrier, we will repay your subrogation claim, less your prorata share of the attorney's fees." The term "successful" was used with reference to the "made whole" doctrine, meaning that the subrogation interests would be repaid if Barbara and Robert recovered a sufficient amount to compensate them for their damages after repayment of the subrogation interests. And

even this offer, was conditioned on Farm Bureau paying its prorata share of the attorney's fees. Nowhere in that letter was Farm Bureau asked to intervene in any litigation, since no suit had been filed at that time.<sup>1</sup> In response to that letter, Farm Bureau's representative replied by letter dated October 17, 2006, that "Mississippi Farm Bureau reserves the right to make a subrogation claim against the party found to be responsible for this accident should any payments be made under the applicable coverages provided by this policy. At this time we are processing both collision and the medical payments coverage and *will subrogate against Allstate Insurance Company*, who is Mr. Benjamin's carrier of his liability coverage." (Emphasis added) (R. 153-154; R.E. 34-35).

Thereafter, Farm Bureau's correspondence was solely with the third party's liability insurance carrier. By letter dated November 2, 2006, Farm Bureau's representative stated that "[o]ur investigation shows that your insured was involved in the above-cited accident and they are responsible for the damages incurred by our insured. Farm Bureau, as subrogee of our insured, is now *looking to you* for reimbursement of the damages our insured incurred." After requesting repayment of the amount Farm Bureau had paid for its collision coverage, the letter further stated: "Please be advised we are additionally processing medical payments coverage on behalf of Barbara Armstrong and Robert M. Hill and *will present that subrogation claim to you* once all payments are complete" (Emphasis added) (R. 155; R.E. 36). Subsequently, by letter dated November 13, 2006, Farm Bureau's representative stated that "prior to making settlement with these individuals or any representative of them, please take into consideration our medical payments subrogation claim and *at that time honor it prior to making a settlement of this matter.*" (Emphasis added) (R. 159; R.E. 40). Again by letter dated January 5, 2007, Farm Bureau's senior claim representative stated: "[w]e would like to submit these amounts as our medical payments subrogation claim and ask that prior to making settlement with these individuals or their attorney, Mr.

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<sup>1</sup> In Footnote 3 on Page 9 of its Brief, Farm Bureau states that "Price repeatedly assured Farm Bureau that it would be paid", meaning its subrogation interests. That is a deliberate misstatement of facts, because the only correspondence that Price had with Farm Bureau was this one letter of October 11, 2006.

James Price, that you would honor our subrogation amounts at that time." (R. 108; R.E. 41.) Later on May 1, 2007, Farm Bureau's representative again wrote concerning his failure to receive a response from Allstate with reference to their subrogation claim, stating that: "[w]e again ask that prior to your settling with these individuals or their attorney, James Price, you take into consideration our medical payments subrogation claim and protect it prior to settlement. Your protection of our medical payments subrogation claim is greatly appreciated." (R. 109). And once more, by letter dated June 2, 2008, Farm Bureau's representative wrote Allstate stating that "[w]e would like to submit these amounts as our medical payments subrogation claim and ask that prior to settling with these individuals or their attorney that you take this into consideration." (R. 110, 162; R.E. 43).

It is these oral and written statements by Farm Bureau's representatives that is the basis for Barbara and Robert's claim that Farm Bureau waived its right to recover its subrogation interests from them, not its failure to intervene in the suit against the third party. In its brief, Farm Bureau does not quote from any of these letters; and as a matter of fact, does not even mention them. Their failure to do so is understandable in view of the established law in Mississippi that a contract of insurance is to be strictly construed against the insurer and liberally construed in favor of the insured, and that a waiver by an insurance company of a policy provision favorable to it may be implied from conduct inconsistent with the intention to exercise it. *State Farm Mut. Auto Ins. Co. v. Lindsey*, 388 So.2d 1189 (Miss., 1980); and that the law will seize upon even slight circumstances as evidence of an intention by an insurance company to waive a favorable provision in its policy. *Stonewall Life Ins. Co. v. Cooke*, 165 Miss. 619, 144 So. 217, (1932). These oral and written statements of Farm Bureau's representatives, not its failure to intervene in the subsequent litigation, establishes conclusively, as a matter of law, that Farm Bureau waived its right to recover its subrogation interests from Barbara and Robert; and they are entitled to summary judgment on this ground also.

## CONCLUSION

If it required the amount of the jury verdict to fully compensate Barbara and Robert for their damages, then anything less than that would deprive them of full compensation contrary to the "made whole" doctrine. Under that doctrine an insurer is entitled to recover its subrogation interests from its insured only when the insured has been fully compensated by a recovery from a third party tortfeasor and when there are excess funds available over and above the amount required to fully compensated the insured. Since in this case, to allow Farm Bureau to recover its subrogated interests from Barbara and Robert's net recovery would leave them nothing to compensate them for their injuries, and actually require them to pay some of their own funds to Farm Bureau in addition to Barbara's premiums, the "made whole" doctrine precludes Farm Bureau from recovering; and Barbara and Robert are entitled to summary judgment under this doctrine.

Because Farm Bureau never indicated to Barbara and Robert in any manner that it expected them to repay its subrogation interests until its letter of November 18, 2008, over two years after the accident, and in the interim provided them with copies of written communications stating that Farm Bureau intended to recover its subrogation interests from the adverse party's liability insurance carrier, Farm Bureau waived its right to collect that subrogation from Barbara and Robert; and they are entitled to summary judgment on this further ground also.

For these reasons, this Court should reverse the order of the trial court and render summary judgment for Barbara and Robert, and remand this case to the trial court for a determination of the amount Barbara and Robert are entitled to recover from Farm Bureau and/or it's attorney for reasonable attorney's fees and costs in defending this action since this action was brought without substantial justification.



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CERTIFICATE OF SERVICE

I hereby certify that I have mailed by First Class Mail, postage prepaid, a true copy of the foregoing Reply Brief of Appellants, Barbara Armstrong and Robert M. Hill, to:

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Honorable Paul S. Funderburk  
Circuit Court Judge  
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This the 4th day of May, 2010.

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