**SUPREME COURT OF MISSISSIPPI**

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

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| **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**

# BRIEF OF APPELLANTS

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## CERTIFICATE OF INTERESTED PARTIES

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 the Judges of the Court of Appeal may evaluate possible disqualifications or recusals.

| PARTIES | ATTORNEYS |
|---|---|
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| Robert M. Hill<br>29 CR 663<br>Corinth, MS 38834<br>Defendant and Appellant | James E. Price, Jr., MSB[redacted]<br>PO Box 549<br>Corinth, MS 38835-0549<br>Telephone: (662) 286-8411<br>Facsimile: (662) 286-8413<br>Attorney for Appellant |

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This the 19th day of February, 2010.

James E. Price, Jr.

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## STATEMENT OF THE ISSUES

The sole issue presented for review by the appellate court is whether the trial court erred in granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

## STATEMENT OF THE CASE

### A. Nature of the Case

The Plaintiff, Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau") filed suit in the Circuit Court of Alcorn County, Mississippi, against Barbara Armstrong ("Barbara") and Robert M. Hill ("Robert") seeking to recover its medical expense subrogation interests from Barbara in the amount of $2,982.81 and from Robert in the amount of $3,075.32, plus interest.

Farm Bureau filed a Motion for Summary Judgment on the ground that it was entitled to recover its subrogated medical expense claim from Barbara and Robert because they had been made whole by the judgment they recovered against the adverse parties.

Barbara and Robert filed a Motion for Summary Judgment on the dual grounds that they were not made whole by their net recovery from the adverse parties, and that Farm Bureau had waived its right to collect its subrogation interests from them.

After receiving written memoranda of authorities from the parties, the trial court entered an order on December 28, 2009, granting the Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

Barbara and Robert have prosecuted this appeal from that order.

## B. Statement of Facts

The facts on which the trial court based its decision to grant Farm Bureau's motion and to deny Barbara and Robert's motion are not in dispute, but are admitted by all parties.

On October 8, 2006, Barbara and Robert were involved in an automobile accident when a 14-ton bakery truck owned by Flowers Baking Company and being driven by its employee, Rickey J. Benjamin ("Benjamin"), within the course and scope of his employment, hit them in the rear of the 2003 Dodge Ram pickup owned by Barbara and being driven by Robert, while they were stopped at a traffic light (R. 168, 184-185; R.E. 13, 23-24)[1].

Both Barbara and Robert were treated as outpatients at Magnolia Regional Health Center for back pain caused by this collision; and both received follow up treatment from their regular physician, Dr. Richard Hendrick, up to the time their deposition was taken on July 20, 2009, over thirty-three months after the accident. In addition, Robert was also examined and treated by a chiropractor about three to five

[1] As used herein, "R" refers to the record prepared by the Circuit Clerk, and "R.E." refers to the Appellants' Record Excerpts.

months after the collision because of persistent pain resulting from the collision (R. 172, 176, 182, 183; R.E. 16, 18, 21, 22).

On November 20, 2006, Barbara and Robert filed suit against Benjamin and Flowers Baking Company in the Circuit Court of Alcorn County, Mississippi, seeking to recover damages for their pain and suffering and medical expenses resulting from this collision (R. 142-143). Both prior and subsequent to the filing of this suit, Farm Bureau had given written notice to Barbara and Robert that it would not participate in the suit, but would make its subrogation claim against Allstate Insurance Company, the liability insurance carrier for Benjamin and Flowers Baking Company; and, in fact, Farm Bureau did not participate in the suit filed by Barbara and Robert against the adverse parties (R. 99-110, 152-162; R.E. 33-43).

On July 31, 2008, a jury returned a verdict for Barbara in the amount of $4,411, and a verdict for Robert in the amount of $3,735.30, on which verdict judgment was entered on August 7, 2008 (R. 50-51). Barbara and Robert had each entered into an employment contract with Price & Krohn LLP, under the terms of which each agreed to pay an attorney's fee of 33 1/3% of the gross amount received if the case was tried, and to reimburse the attorneys for all reasonable out-of-pocket expenses incurred in the investigation and prosecution of this case (R. 176, 178, 185, 186; R.E. 18, 19, 24, 25).

By letter dated November 17, 2008, Farm Bureau made demand on Barbara and Robert to repay its subrogation interest in the amount of $3,075.85 for Robert and

$2,982.21 for Barbara, which subrogation demand was rejected by Barbara and Robert (R. 163, 164). This suit then ensued.

## SUMMARY OF THE ARGUMENT

Barbara and Robert are entitled to summary judgment because if they are required to reimburse Farm Bureau for its subrogation claim, they would not be "made whole" for their injuries and damages by their net recovery from the adverse parties, instead they would receive absolutely nothing at all from their net recovery to compensate them for their injuries, and actually would have to pay Farm Bureau an additional amount from their own funds over and above their net recovery. Such a result is inherently unfair, and is contrary to the "made whole" doctrine as it exists in this state.

Barbara and Robert are also entitled to summary judgment because Farm Bureau waived its right to recover its subrogation interest from them and elected to pursue that claim against the liability insurance carrier for Benjamin and Flowers Baking Company, as shown by correspondence from Farm Bureau to Barbara and Robert's attorney and to the liability insurance carrier for Benjamin and Flowers Baking Company.

## ARGUMENT

### Point No. 1: The Uncontroverted Facts Establish Conclusively That Barbara And Robert Would Not Be "Made Whole" If They Are Required To Reimburse Farm Bureau For Its Subrogated Medical Expense Claim.

There is no dispute between the parties about the existence of the "made whole" rule in Mississippi, nor about its relevance to this case. The only dispute concerns its application to the specific facts involved in this litigation.

In the case of *Hare v. State, 733 So.2d 277 (Miss., 1999)*, the Mississippi Supreme Court defined the "made whole" rule in these words (¶ 14):

> "The 'made whole' rule, as it is sometime called, is the general principal that an insurer is not entitled to equitable subrogation until the insured has been fully compensated."

In that case, the Court adopted this rule with respect to insurance companies attempting to recoup their subrogation interests from their own insureds, stating (¶ 7):

> "For the reasons explained above, this Court adopts the 'made whole' rule and holds that it is not to be overridden by contract language, because the intent of subrogation is to prevent a double recovery by the insured...Until the insured has been fully compensated, there cannot be a double recovery. Otherwise to allow the literal language of an insurance contract to destroy an insured's equitable right to subrogation ignores the fact that this type of contract is realistically a unilateral contract of insurance and overlooks the insured's total lack of bargaining power in negotiating the terms of these types of agreements."

And in reversing the judgment for the insurer in the lower Court, and rendering judgment for the insured, the Court concluded (¶ 31):

> "For these reasons, this Court adopts the "made whole" rule of subrogation, because the general intent of subrogation...is to prevent a double recovery by the insured. Until the insured has been fully compensated there cannot be a double recovery. Therefore we reverse the judgment of the Hinds County Circuit Court, and we render judgment here in favor of *Hare*."

The key holding is that "[u]ntil the insured has been fully compensated, there cannot be a double recovery," and the insurer is not entitled to enforce its subrogation claim against its insured. In *Hare*, the Court held that the insured had not been fully compensated for his injury even though he had received $10,000 from his uninsured motorist coverage and his subrogated medical expenses were only $6,000.

In *U.S. Auto. Assn. v. Stewart, 919 So.2d 24 (Miss., 2005)*, *Hare* was cited with approval as adopting the "made whole" rule, which was restated as follows (¶ 11):

> "The 'made whole' rule is the general principal that an insurer is not entitled to equitable subrogation until the insured has been fully compensated."

It is the purpose, intent, and specific holding of the "made whole" rule that an injured party is to be fully compensated for his injuries before his insurer is entitled to recover its subrogated medical expense claims from him. Or stated another way, if payment of the subrogated claim will keep the insured from being fully compensated, then the insurer is not entitled to recover its subrogation claim from him. And that is exactly what would happen in our case if Farm Bureau were allowed to recover from Barbara and Robert.

In our case, Barbara received a judgment for only $4,411; and she was legally obligated to pay 33 1/3 of that amount or $1,470 to her attorney, leaving her a net of only $2,941, not counting her share of the litigation expenses. Farm Bureau is seeking to recover $2,982.21 from her, which means that she not only would recover nothing from her litigation as compensation for her injuries, but she would actually owe Farm Bureau an additional $41.21 out of her own pocket, in spite of the fact that she had been paying premiums to Farm Bureau for medical expense benefits. In view of these figures, it is ludicrous to say that she would be fully compensated for her injuries after she paid Farm Bureau's subrogation claim.

And the same is true for Farm Bureau's subrogation claim against Robert. He recovered a judgment for $3,735.30. Subtracting the attorney fee of 33 1/3% or $1,245.10 leaves him a net recovery of $2,490.02, again not counting his share of the litigation expenses. Farm Bureau is seeking to recoup $3,075.85 from Robert, which means that he would receive nothing to compensate him for his injuries, but would have to come up with an additional $585.83 over and above his net recovery in order to reimburse Farm Bureau.

If Barbara and Robert had been made whole by the amount of the jury verdict, a contention which is highly questionable, they were less than made whole after deducting their attorney's contingent fee of 33 1/3% and the expenses of trial from the amount of the verdict. If they are now required to pay Farm Bureau its subrogation claim, they not only would not be made whole by their net recovery, but they actually will lose money for undergoing the time, tension, and expenses of litigation in which Farm Bureau was not willing to participate. Such a result is clearly contrary to the law in Mississippi; and Barbara and Robert are entitled to summary judgment on the ground that they were not made whole by their judgment against the adverse parties after deducting the fees and expenses incurred in that suit.

Point No. 2: The Uncontroverted Facts Establish Conclusively That Farm Bureau Waived Its Right To Recover Its Subrogation Interests From Barbara and Robert.

There is a second and equally cogent reason why Barbara and Robert are entitled to summary judgment. By its actions, Farm Bureau waived its right to recover its subrogation interests from them. The law is well established in Mississippi that an insurance company can waive provisions in its policies which are beneficial to it. In the case of *State Farm Mut. Auto Ins. Co. v. Lindsey, 388 So.2d 1189 (Miss., 1080)* where the issue was whether the insurer had waived a lapse or forfeiture of its insured's automobile policy, the Court held that an insurance company could waive the forfeiture provision in its policy, stating (p. 1193):

> "As a general rule, a contract of insurance is to be strictly construed against the insurer, and is to be liberally construed in favor of the insured, and, with respect to forfeitures, the courts will adopt that construction most favorable to the insured...
>
> "The right to insist upon a forfeiture of a liability under a contract being a right which may be waived by the party in whom the right resides, such waiver may be implied from conduct inconsistent with the intention to exercise it..."

Paraphrasing, it is clear that with respect to subrogation, as well as forfeiture, that "the courts will adopt that construction most favorable to the insured;" and if a forfeiture provision can be waived by the insurer's conduct, a subrogation provision, which is far less erroneous, can also be waived.

And, with respect to the quantity of evidence required to establish a waiver, the Court, citing with favor and quoting from *Stonewall Life Ins. Co. v. Cooke, 165 Miss. 619, 144 So.217, (1932)*, said (p. 1192):

> "If the insurance company has notice of the fact or facts which work a forfeiture at its option, any statement or conduct on its part inconsistent with forfeiture, but consistent with nonforfeitures, will constitute a waiver of the forfeiture...
>
> "Slight circumstances of intention to waive a forfeiture will be sufficient. The law will seize upon slight circumstances as evidence of such intention."

Thus, if there is any evidence of slight circumstances of intention to waive a beneficial provision, the law will seize upon that to find a waiver.

Applying these legal principles to the facts in the case *sub judice*, it is apparent that there is far more than slight circumstances to show an intention on the part of Farm Bureau to waive its right to recover its medical expense subrogation from Barbara and Robert, and to focus on making such recovery solely from the adverse parties' liability insurance carrier.

By letter dated October 11, 2006, Farm Bureau was notified that Barbara and Robert had retained an attorney in their claim for damages against the adverse parties, and that Farm Bureau's subrogation interest would be repaid when they were successful in recovering from the adverse parties, less Farm Bureau's pro rata share of the attorney's fees (R. 101, 152; R.E. 33).

At this point, Farm Bureau had the choice to wait and recoup its subrogation interest from Barbara and Robert, less its pro rata share of the attorney's fees, or to proceed directly against the adverse parties and/or their liability insurance carrier. Whether to avoid paying its pro rata share of the attorney's fees, or some other reason known only to it, Farm Bureau chose to pursue its subrogation claim directly against the adverse parties' liability insurance carrier. By letter to Barbara and Robert's attorney, dated October 17, 2006, Farm Bureau's agent, Charles Childers, stated that "Mississippi Farm Bureau reserves the right to make a subrogation claim against the party found to be responsible for this accident...and will subrogate against Allstate Insurance Company, who is Mr. Benjamin's carrier of his liability." (R. 103, 153; R.E. 34). This represented a clear choice on the part of Farm Bureau to pursue its subrogation claim against the adverse parties' liability insurance carrier, and not to participate in Barbara and Robert's proceedings against the adverse party. And that is exactly what Farm Bureau did.

By letter dated November 2, 2006, Farm Bureau advised Allstate of its property damage subrogation claim, and stated that "Farm Bureau, as subrogee of our insured, is now looking to you for reimbursement of the damages our insured has incurred;" and with respect to its medical payments subrogation, stated that "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," concluding "I look forward to receiving your payment" (R. 105, 155; R.E. 36).

Following receipt of a copy of this letter, Barbara and Robert's attorney made a written offer of settlement to Allstate, specifically excluding Farm Bureau's subrogation interest because Farm Bureau was pursing that claim on its own, stating that "I understand that Farm Bureau, who has paid these medical expenses under its medical payments provision, will provide you with copies of these medical bills at the time they make a claim for their subrogation interest" (R. 157; R.E. 38).

By letter dated November 13, 2006, from Farm Bureau's senior claims representative to Allstate, Farm Bureau requested that "[p]rior 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 settlement of this matter." And, further, the letter stated that "[w]e appreciate your protection of our subrogation interests in this matter" (R. 107, 159; R.E. 40).

On January 5, 2007, Farm Bureau's senior claim representative again wrote Allstate advising them of the amount of medical bills it had paid out on behalf of Barbara and Robert, and then stating that "[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. James Price, that you would honor our subrogation amounts at that time." The letter then concluded that "[w]e appreciate your protection of our subrogation interest" (R. 108, 160; R.E. 41).

Subsequently, on May 1, 2007, Farm Bureau's senior claims representative wrote once more to Allstate concerning his failure to receive a response with reference to their subrogation claim. In this letter he stated 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).

On June 2, 2008, once again Farm Bureau's senior claims representative wrote Allstate concerning their medical payments subrogation claims, giving the amounts of each, and 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).

In addition to this correspondence, it is undisputed that at the time Barbara and Robert 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 (R. 170, 171, 182; R.E. 14, 15, 21).

For some unknown reason, Farm Bureau did not secure payment of its subrogation from Allstate, and after Barbara and Robert had received a jury verdict for nominal amounts, for the first time, by letter dated November 17, 2008, over two years after it had elected to pursue its subrogation interest against Allstate, Farm Bureau demanded payment of $6,058.03 from both, which was $627.16 more than their net recovery, as reimbursement of its subrogation interest (R. 111, 163; R.E. 44). The contents of Farm Bureau's correspondence with Allstate, and the statement against interest made by Farm Bureau's representative at the time the Subordination Receipts were executed, constitute considerably more then some "slight circumstances" of Farm Bureau's intention to waive its subrogation claim against Barbara and Robert. It is significant that in its response to Barbara and Robert's Motion for Summary Judgment in the trial court, Farm Bureau did not even address, much less refute, this second ground for summary judgment, i.e., that Farm Bureau waived its right to recover its subrogation claim from Barbara and Robert by electing to pursue that claim directly against the third parties' liability insurance carrier (R. 187). This failure to respond is understandable in view of the above correspondence from Farm Bureau's representative to Barbara and Robert's attorney and to Allstate. However, it is difficult to understand why the trial court did not discuss, nor even mention, this ground for summary judgment in its Order (R. 205; R.E. 53). Barbara and Robert are clearly entitled to summary judgment because of Farm Bureau's waiver of its right to collect its subrogation interests from them.

## CONCLUSION

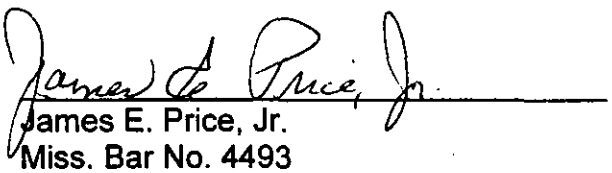
Farm Bureau is not entitled to recover its medical expense subrogation claim from Barbara and Robert because such recovery would result in Barbara and Robert

receiving absolutely nothing to compensate them for their pain and suffering, but instead would require them to pay some additional funds of their own, in violation of the "made whole" rule.

And Farm Bureau is also precluded from recovering this claim from Barbara and Robert because it elected to pursue its claim directly against the liability insurance carrier for the adverse parties, thereby waiving its right to collect from Barbara and Robert.

Both of these grounds entitle Barbara and Robert to summary judgment; and the decision of the lower court should be reversed and rendered by granting summary judgment to Barbara and Robert.

PRICE & KROHN LLP

By: 

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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 Brief of Appellants, Barbara Armstrong and Robert M. Hill, to:

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This the 19th day of February, 2010.

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