IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
Cause No. 2010-CA-01306-COA

CARL KEITH BLACKSTON and JOSHUA M. STAPLETON — **APPELLANTS / CROSS-APPELLEES**

VERSUS

GEORGE COUNTY, MISSISSIPPI — **APPELLEE / CROSS-APPELLANT**

ON CROSS-APPEAL: REPLY BRIEF OF CROSS-APPELLANT GEORGE COUNTY, MISSISSIPPI

On Appeal from the Circuit Court of George County, Mississippi
Civil Action No. 2007-0165(2)

KIMBERLY S. ROSETTI, ESQ. (MSB[redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
2781 C.T. Switzer Sr. Drive, Suite 200
Biloxi, MS 39531
Post Office Box 10
Gulfport, MS 39502-0010
(228) 863-6101 (telephone)
(228) 868-9077(facsimile)

(ORAL ARGUMENT REQUESTED)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

A. **A governmental entity's insurance carrier *can* bind the governmental entity with respect to the notice provisions of Section 11-46-11.**

B. **If the MTCA must be applied to the letter, then Blackston and Stapleton failed to file the required "notice of claim" under Section 11-46-11(1).**

REPLY TO CROSS-APPELLEE'S RESPONSE BRIEF

ARGUMENT

The Cross-Appellant, George County, Mississippi, hereby incorporates all the facts, authorities, and legal arguments contained in its Brief of Appellee/Cross-Appellant previously filed in this appeal, as if said Brief had been fully copied herein. In Reply to the Response Brief of the Cross-Appellees, George County would show unto this Court the following:

The Cross-Appellees, Carl Keith Blackston ("Blackston") and Joshua M. Stapleton ("Stapleton"), present the question at issue in this cross-appeal as whether a governmental entity can delegate its duty to send a "notice of denial of claim" under the Mississippi Tort Claims Act ("MTCA"). (*See* Cross-Appellees' Brief in Response to Cross-Appeal at p. 2). They assert that the duty to deny a claim cannot be delegated. They cite several cases in support of this assertion and for the proposition that the MTCA must be interpreted and applied as written. (*See id.* at pp. 2-6).

However, none of the cases cited by Blackston and Stapleton address the situation where an agent of the governmental entity, such as its insurer, sends the "notice of denial of claim" under Section 11-46-11(3). Nonetheless, the statutory scheme and the precedents of this Court establish that governmental entities can be bound by their insurance carriers with respect to the notice provisions of the MTCA. And moreover, interpreting and applying the MTCA "as written" and as argued by Appellants Blackston and Stapleton, invalidates Blackston's and Stapleton's "notice of claim" under Section 11-46-11(1).

A. A governmental entity's insurance carrier *can* bind the governmental entity with respect to the notice provisions of Section 11-46-11.

The cases cited by Blackston and Stapleton for the proposition that governmental entities cannot delegate their duty to deny claims cannot be applied to the facts of this case. First, in *Lee v. Memorial Hosp. at Gulfport*, 999 So.2d 1263 (Miss. 2008), the claimant, Lee, sent Gary Marchand, chief executive officer of Memorial Hospital of Gulfport, notice of her claim. "Marchand received the notice of claim on July 28, 2006[,]" and "Marchand [himself] denied Lee's claim by letter dated August 28, 2006." *Id.* at 1264-65 (¶ 3). Moreover, there was no notice of denial of claim at all in *Delta Regional Medical Center v. Green*, 43 So.3d 1099, 1100 (¶ 3) (Miss. 2010). These cases are distinguishable from the instant lawsuit.

Next, Blackston and Stapleton rely upon *Caves v. Yarbrough*, 2007 MSSC 6006-CA-01857 (Miss. 2007), and *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815 (Miss. 2006), for the proposition that the MTCA is to be construed as written. But the *Caves* opinion referred to was withdrawn and replaced on rehearing. *See Caves v. Yarbrough*, 2007 WL 3197504 (Miss. 2007); *Caves v. Yarbrough*, 991 So.2d 142, 144 (Miss. 2008). And in the opinion on rehearing, the only issue was whether the discovery rule applied in MTCA actions. Moreover, *Easterling* involved the interpretation and application of the claimant's "notice of claim" requirement under Section 11-46-11(1), not the "notice of denial of claim" under Section 11-46-11(3). *Easterling*, 928 So.2d at 819-20. Therefore, the question at issue in this case was not addressed in any of the cases cited by Blackston and Stapleton and, again, is clearly distinguishable.

The trial court in the instant case held that the denial letter sent by George County's insurance carrier, Zurich, was not binding on George County, so no "notice of denial of claim" under Section 11-46-11(3) had ever been sent. Thus, the real question here is whether George County can be bound by the actions of Zurich, its insurance company, under the MTCA.

Interestingly, *Caves* provides an analytical framework to answer this question. The *Caves* Court ultimately held that the MTCA does include a discovery rule, even though no such rule appeared in the statutory text of the MTCA. The Court explained that, "[b]ecause it is this Court's duty to apply the law as written, not as we think it should have been written, we concluded in our original opinion in this case that the absence of any discovery rule within the provisions of the MTCA was binding on this Court." *Caves*, 991 So.2d at 150 (¶ 32). On rehearing, though, the Court held that its previous decision in *Barnes v. Singing River Hospital*, 733 So.2d 199, 205 (Miss. 1999), had incorporated a discovery rule into the MTCA, and the Legislature had tacitly approved the discovery rule by reenacting the statute without addressing *Barnes*. *Id.* at 154 (¶ 47).

The same exact thing has occurred with respect to an insurance carrier's ability to bind the governmental entity by corresponding with the claimant. In *Smith County School District v. McNeil*, 743 So.2d 376 (Miss. 1999), the claimant, McNeil was injured at a football game. *Id.* at 376 (¶ 1). McNeil corresponded with the school district and its insurance carrier, Coregis, and Coregis sent a denial letter to McNeil, denying her claim. *Id.* at 377 (¶ 2). After this correspondence, McNeil filed her complaint. *Id.* at 376 (¶ 1). But she never filed a written notice of claim with any appropriate representative of the school district. *Id.* at 378 (¶ 8).

The school district filed a motion to dismiss for McNeil's failure to comply with the notice requirement of Section 11-46-11(1). But during the era of "substantial compliance" with the notice requirement, the Supreme Court affirmed the trial court's denial of the school district's motion. The Court held that genuine issues of fact existed as to whether the school district had knowledge of the claim and how the insurance carrier got involved before McNeil filed her Complaint. But in so doing, the Court strongly implied that the insurance carrier had acted as

agent for the school district, and it expressly held that the school district might be bound by those actions. The Court explained that:

> ¶ 16. There were some negotiations between the insurance carrier and McNeil. There was a letter sent from the insurance carrier to McNeil, confirming a previous conversation between McNeil and the carrier, initiated by the carrier, which indicates evidence that the carrier was notified of the claim by someone from the school district. This warrants further discovery as to how the carrier came to be notified of the accident, especially in light of the fact that it made the initial contact with McNeil.
>
> ¶ 17. McNeil later received another letter in which the carrier denied liability, but acknowledged its ability to pay medical bills up to a certain amount. The actions of the carrier may be sufficient to estop the defendant from asserting lack of actual notice. *See Ferrer v. Jackson County Bd. of Supervisors*, 741 So.2d 216 (Miss. 1999).

McNeil, 743 So.2d at 379 (emphasis added).

Therefore, the Supreme Court clearly held in *McNeil* that a governmental entity's insurance carrier acts as the entity's agent in communicating with the claimaint, and, for the purposes of the notice provisions of Section 11-46-11, a governmental entity can be bound by the actions of its insurance carrier, to the point where the governmental entity may be estopped from asserting lack of notice under the MTCA. *Id.* at 380 (¶ 21).

McNeil was decided on August 26, 1999. Since that date, Section 11-46-11 was amended by Laws 2000, Chapter 315, § 1, effective from and after passage (approved April 8, 2000), and again by Laws 2002, Chapter 380, § 1, effective from and after passage (approved March 18, 2002). The 2000 amendment merely added subsection (4), relating to persons under a disability, and the 2002 amendment, substituted in subsection (4) "April 1, 1993" for "May 15, 2000". *See* Miss. Code Ann. § 11-46-11 ("Credits" and "Historical and Statutory Notes"). Thus, in amending and reenacting Section 11-46-11 in 2000 and 2002, the Legislature did not address or countermand the Supreme Court's decision in *McNeil*. Accordingly, as in *Caves*, the Legislature

tacitly adopted the *McNeil* holding, that a governmental entity can be bound by the actions of its insurance carrier for purposes of the notice provisions in the MTCA.

Here, in response to George County's Motion to Dismiss and/or for Summary Judgment (Record on Appeal ("R.") at 107-09), the Plaintiffs argued, and the trial court held, that the Zurich denial letter which was sent on behalf of George County to Blackston and Stapleton on April 30, 2007, was not binding on George County and thus was not effective as a "notice of denial of claim" under Section 11-46-11(3). (*See* R. at 150). Specifically, the Court held that, "[w]hat the Court has before it is a letter from the County's insurer declining to pay a claim because they evaluated the claim and see no fault on the part of the County. That evaluation is in no way binding on the County . . . ." (*Id.*) Therefore, the court found that no "notice of denial of claim" was issued by George County, the 120-day "tolling period" was not stopped, and the Plaintiffs' Complaint was timely filed. (*Id.*)

The trial court's holding in this regard is in direct conflict with the Supreme Court's holding in *McNeil.* Therefore, the trial court clearly erred in denying George County's Motion to Dismiss and/or for Summary Judgment, and this Court should reverse and render that decision.

The statutory scheme of the MTCA recognizes that governmental entities, such as George County, will contract with private liability insurance carriers. Section 11-46-16 allows governmental entities to purchase such liability insurance policies to cover wrongful or tortious acts of itself or its employees. Miss. Code Ann. § 11-46-16. And Section 11-46-17(3) requires all political subdivisions of the state, including George County, to procure such coverage, either through private liability insurance or a self-insurance fund or a combination of both. Miss. Code Ann. §11-46-17(3). And as discussed above, the *McNeil* decision adopts the proposition that a

governmental entity can be bound by the acts of its liability insurer, an agent of the governmental entity.

Thus, a common-sense interpretation of the "legislative intent" of Section 11-46-11(3) is that a denial letter sent by a governmental entity's insurance carrier is sent on behalf of the governmental entity, and thus, qualifies as a "notice of denial of claim" under Section 11-46-11(3). Therefore, the trial court erred in denying George County's Motion to Dismiss, and this Court should reverse and render that decision.

B. If the MTCA must be applied to the letter, then Blackston and Stapleton failed to file the required "notice of claim" under Section 11-46-11(1).

Blackston and Stapleton argue in their Response Brief, however, that Zurich had no authority to act on behalf of George County because the express language of the MTCA and several other cases require the "notice of denial of claim" to come directly from the governmental entity itself. (*See* Cross-Appellees' Brief in Response to Cross-Appeal at pp. 4-5).[1] [2]

Nonetheless, if Section 11-46-11(3) is to be interpreted and applied *to the letter*, as Blackston and Stapleton argue, then they should agree that Section 11-46-11(1) should be applied *to the letter*, as well.

Section 11-46-11(3) states, in pertinent part, that:

> [F]iling of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations [for either 95 or 120 days], during which

[1] Strict compliance is required for the duty to send a notice of claim under Section 11-46-11(1), and substantial compliance is required with respect to the contents of the notice. *See Price v. Clark*, 21 So.3d 509, 520 (Miss. 2009).

[2] There is no case law or other authority requiring strict compliance as to "who" sends the "notice of denial of claim," much less which expressly requires a "notice of denial of claim" to come directly from the governmental entity itself.

> time no action may be maintained by the claimant unless the claimant has received a notice of denial of claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice. However, should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant's receipt of notice of denial of claim from the governmental entity. [A]ll notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only.

Miss. Code Ann. § 11-46-11(3) (emphasis added). Thus, the "notice of denial of claim" is mentioned three times in Section 11-46-11(3).

It is undisputed here that George County denied Blackston's and Stapleton's claim and that Blackston and Stapleton "*received a notice of denial of claim.*" *Id.* Blackston and Stapleton rely on the second and third instances in which the "notice of denial of claim" is mentioned, which provide that it must come "*from the governmental entity*" and be served "*by [the] governmental entit[y].*" (*See* Cross-Appellees' Brief in Response to Cross-Appeal at pp. 3-4).[3] Based on this language, they argue that "the insurance adjusters and attorney[s], etc., do not have authority to bind the governmental entity to notice." (*Id.* at p. 5) (emphasis added).[4]

But if Blackston and Stapleton are correct, then this case should still be dismissed because they failed to provide George County with the required "notice of claim" under Section 11-46-11(1). Section 11-46-11(1) clearly states, in pertinent part, that:

> [A]ny person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to

[3] They also assert that the word "only" at the end of the cited portion of Section 11-46-11(3) refers to "who" serves the notice of denial of claim (*i.e.*, "only" the governmental entity can serve it). But the word "only" clearly applies to "how" the notice of denial of claim is served (*i.e.*, it can be served "only" by certified mail, return receipt requested).

[4] However, as discussed above, the *McNeil* Court clearly held that insurance companies can bind the governmental entity under the notice provisions.

> maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity . . . .

Miss. Code Ann. § 11-46-11(1) (emphasis added). Thus, the MTCA requires the "*person having the claim*" to proceed with his action, and "*such person*" must file the notice of claim, not that person's agent, attorney, or other representative.

Here, the "persons having the claim" (*i.e.*, the claimants) are Blackston and Stapleton. But the "notice of claim' was prepared and signed, and sent to and filed with George County, by their attorney, A. Malcolm Murphy, not Blackston and Stapleton themselves. (*See* R. at 119-26). The signatures of Blackston and/or Stapleton do not appear anywhere on either of the "notices of claim." (*See id.*). If George County's "notice of denial of claim" does not satisfy Section 11-46-11 because it was sent by Zurich, its representative insurer, then Blackston's and Stapleton's "notice of claim" also does not satisfy Section 11-46-11 because it was sent by Murphy, their representative attorney.

The courts of this state have never held that a claimant's "notice of claim" under the MTCA cannot be sent by the claimant's attorney. But when you reduce Blackston's and Stapleton's argument, that George County's "notice of denial of claim" cannot be sent by its insurer, down to its logical conclusion, the only fair and reasonable outcome would be to hold that Blackston's and Stapleton's "notice of claim" cannot be sent by their attorney, either. Therefore, either (1) George County's "notice of denial of claim," sent by Zurich, was *sufficient* and Blackston's and Stapleton's Complaint was untimely filed and should be dismissed, or (2) Blackston's and Stapleton's "notice of claim" was *insufficient*, and the case should have been dismissed from the start. It cannot be both or neither. Accordingly, this Court should reverse

the trial court's denial of George County's Motion to Dismiss and/or for Summary Judgment, grant the Motion, and dismiss this case with prejudice.

CONCLUSION

The Supreme Court has held that governmental entities can be bound by the actions of their insurance carriers with respect to notices under the MTCA. The Legislature tacitly adopted this holding when it reenacted the statute twice thereafter. Thus, the MTCA permits the governmental entity's "notice of denial of claim" to be sent by its liability insurance carrier, and the denial letter sent by George County's insurer, Zurich, satisfied the statute.

WHEREFORE, PREMISES CONSIDERED, George County respectfully requests that this Court issue an opinion reversing and rendering the trial court's denial of George County's Motion to Dismiss, or in the Alternative, for Summary Judgment, and granting said Motion. In the alternative, George County respectfully requests that this Court issue an opinion affirming the trial court's ultimate verdict in favor of George County, as said verdict is supported by substantial, reasonable, and credible evidence and is not manifestly wrong, clearly erroneous, or against the overwhelming weight of the evidence.

RESPECTFULLY SUBMITTED, this the 7th day of September, 2011.

GEORGE COUNTY, MISSISSIPPI

BY: COPELAND, COOK, TAYLOR & BUSH, P. A.

BY: Kimberly S. Rosetti

KIMBERLY S. ROSETTI, ESQ. (MSB [redacted])
Attorney of Record for Appellee/Cross-Appellant, George County, Mississippi

CERTIFICATE OF SERVICE

I, the undersigned, attorney of record for the Defendant, Marion County, do hereby certify that I have this day forwarded, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

A. Malcolm N. Murphy
P.O. Box 35
Lucedale, MS 39452

Darryl A. Hurt
385 Ratliff Street
Lucedale, MS 39452

Hon. Robert P. Krebs
P.O. Box 998
Pascagoula, MS 39568-0998

THIS, the 7th day of September, 2011.

Kimberly S. Rosetti

KIMBERLY S. ROSETTI

KIMBERLY S. ROSETTI, ESQ. (MSB #[redacted]
NICHOLAS K. THOMPSON, ESQ. (MSB [redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
2781 C.T. Switzer Sr. Drive, Suite 200
Biloxi, MS 39531
Post Office Box 10
Gulfport, MS 39502-0010
(228) 863-6101 (telephone)
(228) 868-9077(facsimile)