

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLIE HONEYCUTT

APPELLANT

VS.

Cause No. 2010-CA-01470

TOMMY M. COLEMAN,
ATLANTA CASUALTY COMPANIES,
ATLANTA CASUALTY COMPANY, AND
AMERICAN PREMIER INSURANCE COMPANY

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF ATLANTA CASUALTY COMPANIES, ATLANTA CASUALTY COMPANY, AND AMERICAN
PREMIER INSURANCE COMPANY, APPELLEES

ORAL ARGUMENT NOT REQUESTED

Thomas Y. Page, MSB # [REDACTED]
PAGE, KRUGER & HOLLAND, P.A.
10 Canebrake Blvd., Suite 200
P.O. Box 1163
Jackson, MS 39215-1163
(601) 420.0333
(601) 420.0033 – facsimile

COUNSEL FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

- a. Charlie Honeycutt, Appellant;
- b. Sam Bernice Honeycutt, Appellant's Father;
- c. Barbara Honeycutt, Appellant's Mother;
- d. Joe Roberts, Counsel for Appellant;
- e. Tommy M. Coleman, Appellee;
- f. John W. Crowell and M. Jay Nichols, Counsel for Appellee, Tommy M. Coleman;
- g. Atlanta Casualty Companies, Appellee;
- h. Atlanta Casualty Company, Appellee;
- i. American Premier Insurance Company, Appellee;
- j. Thomas Y. Page, Counsel for Appellees, Atlanta Casualty Companies, Atlanta Casualty Company, and American Premier Insurance Company;
- k. Honorable James T. Kitchens, Jr., Trial Judge.

THIS, the 12th day of August, 2011.



Thomas Y. Page

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
STATEMENT REGARDING ORAL ARGUMENT	vi
STATEMENT OF THE ISSUES	vii
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	5
III. THE FACTS	6
IV. SUMMARY OF THE ARGUMENT	9
V. CONCLUSION	25
A. Standard of Review	12
B. Applicable Law	13
C. Legal Argument	16
 (1) Whether the Uninsured Motorist Coverage Selection or Rejection provision of the policy applications signed by Barbara Honeycutt (Atlanta Casualty Company policy) and Sam Bernice Honeycutt (American Premier policy) were effective and enforceable such that no uninsured motorist coverage was purchased or available on the date of the May 15, 1994 accident.	
 (2) Whether the March 21, 1994 Atlanta Casualty 10-day cancellation for non-payment of premium notice was effective on the 10 th day, the 11 th day or on any other day prior to the May 15, 1994 accident.	
CERTIFICATE OF SERVICE	27

TABLE OF AUTHORITIES

CASES

<i>Albert v. Scott's Truck Plaza,</i> 978 So.2d 1264 (Miss. 2008).....	13
<i>Albert v. Scott's Truck Plaza,</i> 978 So.2d 1264 (Miss. 2008).....	13
<i>Booker v. American General Life & Accident Ins. Co.,</i> 257 F.Supp. 2d 850 (S.D. Miss. 2024).....	22,23
<i>Branch v. State Farm Fire and Casualty Company,</i> 759 So.3d 430 (Miss. 2000).....	24
<i>Carter v. Union Security Life Ins. Co.,</i> 148 F.Supp. 2d 734 (S.D. Miss. 2001)	22
<i>Cherry v. Anthony,</i> 501 So.2d 416 (Miss. 1987).....	24
<i>Howard v. Citifinancial, Inc.,</i> 195 F.Supp.2d 811 (S.D.Miss. 2002)	22
<i>Hynes v. Ambling Management,</i> 2011 WL 2536189 (Miss.App. June 28, 2011)	12
<i>Iverson v. Iverson,</i> 761 So.2d 329 (Miss. 2000).....	24
<i>Kendrick v. Quin,</i> 49 So.3d 645 (Miss. App. 2010)	13
<i>Kimbrough v. Keenum,</i> 2011 WL 1467623 (Miss.App. Apr. 19, 2011)	12
<i>Lott v. Purvis,</i> 2 So.3d 789 (Miss. App. 2009)	13
<i>O'Meara v. Market Insurance Company,</i> 482 F.2d 1373 (5 th Cir. 1973).....	25

<i>Owens v. Mississippi Farm Bureau Casualty Insurance Company,</i> 910 So.2d 1065 (Miss. 2005).....	20,21,22
<i>Patterson v. Tibbs,</i> 60 So.3d 742 (Miss. 2011).....	13
<i>Reid v. Stanley v. Mississippi Farm Bureau Casualty,</i> 63 So.2d 1238 (Miss. 2011).....	22
<i>Rainwater v. Lamar Life Ins,</i> 207 F.Supp2d 561 (S.D. Miss. 2002)	23
 OTHER	
Mississippi Code Ann. § 83-11-101.....	vii
Mississippi Code Ann. § 83-11-5.....	18, 22
Mississippi Code Ann. § 83-11-3.....	18, 22
M.R.A.P. 34 (a)(3).....	vi

STATEMENT REGARDING ORAL ARGUMENT

Appellees submit that oral argument is not necessary to a resolution of the issues on appeal. The issues presented involve application of law to undisputed material facts and documentation; the parties' positions are clear and the record uncomplicated. The facts and legal arguments can be adequately presented in the briefs and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUES

(1) Whether the **Uninsured Motorist Coverage Selection or Rejection** provision of the policy applications signed by Barbara Honeycutt (Atlanta Casualty Company policy) and Sam Bernice Honeycutt (American Premier policy) were effective and enforceable such that no uninsured motorist coverage was purchased or available on the date of the May 15, 1994 accident.

(2) Whether the March 21, 1994 Atlanta Casualty 10-day cancellation for non-payment of premium notice was effective on the 10th day, the 11th day or on any other day prior to the May 15, 1994 accident.

(3) Whether the Trial Court properly granted Summary Judgment in Defendants' favor.

I. INTRODUCTION

Charlie Honeycutt was injured in an automobile accident in Lowndes County, Mississippi on May 15, 1994. He was a passenger in a vehicle being driven by Matthew Blaxton when it collided with a Mississippi Highway patrol cruiser driven by MHP Officer Tommy M. Coleman.

Honeycutt quickly advanced his liability claim against Blaxton. In response to multiple liability claims arising out of this accident, Blaxton's insurance carrier, State Farm, filed a Complaint in Interpleader on September 16, 1994 in the Chancery Court of Lowndes County, Mississippi. Honeycutt recovered approximately \$23,000.00 from the Blaxton automobile liability insurance carrier.

Honeycutt did not pursue the uninsured motorist coverage until seven (7) years later when on April 16, 2001 he filed his Complaint against Atlanta Casualty Companies, Atlanta Casualty Company and American Premier Insurance Company demanding \$30,000.00, the stacked gross uninsured motorist benefits arguably available. He also demanded punitive damages for "bad faith.

The Honeycutt Complaint failed to mention his 1994 settlement with Blaxton and State Farm.

Honeycutt's parents are Sam Bernice Honeycutt and Barbara Honeycutt.

On April 16, 2001, Charlie Honeycutt, a resident relative of his parents' / insureds' household, filed his underinsured motorist claims against Atlanta Casualty Company ("Atlanta Casualty") and American Premier Insurance Company ("American Premier"). (C.P. 8-11).

Inasmuch as Atlanta Casualty Companies is a trade name and not an insurer or other

legal entity it will not be further mentioned.

As the overwhelming evidence shows, uninsured motorist coverage was repeatedly rejected in writing when the Honeycutt policy application processes were completed at the local agent's office in Columbus, Mississippi.

The Honeycutt policy with Atlanta Casualty bearing policy number 03010110 effective for the six (6) month period from 9-15-93 to 3-15-94 listed Barbara Honeycutt as the named insured and insured three vehicles: 1991 Chevrolet - 1988 Ford Mustang - 1988 Ford Aerostar. The rejection of UM coverage is properly documented in the application and confirmed in the subsequently issued declarations page of this policy (no UM premiums or coverage) which were provided the insureds. The application includes this form:

Uninsured Motorist Coverage Selection Or Rejection

State law requires that no automobile liability insurance policy be issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury, death or property damage from the owner or operator of an uninsured motor vehicle and permits any insured named in the policy to select or reject uninsured motorist coverage for this policy and any renewal hereof.

I acknowledge and agree that I have been given the option to purchase uninsured motorist coverage within limits no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law and up to an amount not to exceed that provided in the policy of bodily injury liability insurance or to reject the coverage entirely. **After having uninsured motorist coverage offered and explained, I have voluntarily and intentionally exercised this option, as indicated below and as shown on the other side of this application. [Emphasis Supplied]**

☐ I select uninsured motorist bodily injury and property damage coverage limits of ____/____/____

☐ I reject uninsured motorist property damage coverage, but select uninsured

motorist bodily injury coverage limits of ____/____.

x I reject uninsured motorist coverage in its entirety.

I am authorized to procure automobile liability insurance and to select or reject uninsured motorist coverage for the applicant or any insured.

x Barbara Honeycutt 9-14-93
Signature of Applicant or Insured-Must be of Majority Age

As a result, while this Atlanta Casualty policy provided liability coverage, it did not provide uninsured motorist coverage or medical payments coverage. No premiums were ever charged or collected from Sam Bernice Honeycutt or Barbara Honeycutt for UM coverage.

On 02/10/94, Atlanta Casualty issued its six (6) month Automobile Insurance Policy Renewal Certificate for Policy No. 03010110 with the effective date of renewal to be 03/15/94 with an expiration date of 09/15/94.

This Renewal Certificate was cancelled effective March 31, 1994, for non-payment of premium. No renewal premiums were ever paid by the Honeycutts on this Atlanta Casualty policy. No other automobile coverages were in effect after March 31, 1994, through Atlanta Casualty.

On March 11, 1994, Sam Bernice Honeycutt submitted an application for automobile coverage through the A-1 Insurance Agency with American Premier on the same three Honeycutt vehicles insured previously by Atlanta Casualty. In this application Sam Bernice Honeycutt made written rejection of Uninsured Motorist coverage.

Uninsured Motorist Coverage Selection Or Rejection

State law requires that no automobile liability insurance policy be issued or delivered unless it contains an endorsement or provisions undertaking to pay the

I acknowledge and agree that I have been given the option to purchase uninsured motorist coverage within limits no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law and up to an amount not to exceed that provided in the policy of bodily injury liability insurance or to reject the coverage entirely. **After having uninsured motorist coverage offered and explained, I have voluntarily and intentionally exercised this option, as indicated below and as shown on the other side of this application. [Emphasis Supplied]**

O I reject uninsured motorist property damage coverage, but select uninsured motorist bodily injury coverage limits of / .

I am authorized to procure automobile liability insurance and to select or reject uninsured motorist coverage for the applicant or any insured.

American Premier caused its policy of automobile insurance No. 05088064 to be issued one-year effective period of 03/15/94 to 03/15/95.

4

STATEMENT OF THE CASE

This appeal originated in April 2001 when Charlie Honeycutt filed a complaint against Atlanta Casualty and American Premier for uninsured motorist bodily injury damages arising out of a May 1994 automobile accident. (C.P. 8-11) This complaint alleges that Charlie Honeycutt was entitled to uninsured motorist benefits provided by Atlanta Casualty and American Premier for injuries he received in this accident. (C.P. 8-11) Atlanta Casualty and American Premier answered in a timely fashion, denied all allegations regarding the uninsured motorist claims and asserted certain defenses, including that Sam Bernice Honeycutt and Barbara Honeycutt as Charlie's parents and as the applicants and named insureds in these respective policies had rejected uninsured motorist coverage. (C.P. 12-20)

On October 31, 2008, Atlanta Casualty and American Premier filed their Motion for Summary Judgment. (C.P. 143-181) On December 2, 2008 Charlie Honeycutt filed a Response to Itemization of Facts (C.P. 182-185) and his Response to the Motion for Summary Judgment. (C.P. 185-202) Judge Kitchens entered an Agreed Judgment as to Punitive Damages Claim in favor of Atlanta Casualty and America Premier on March 6, 2009. (C.P. 203-204) On May 5, 2010 Charlie Honeycutt filed a pleading styled "Depositions Submitted in Support of Plaintiff's Response to Motion for Summary Judgment." (C.P. 207-231)

On May 7, 2010 Atlanta Casualty and American Premier filed their Rebuttal Memorandum in Support of Motion for Summary Judgment. (C.P. 233-246) On May 25, 2010 Charlie Honeycutt filed his Memorandum Brief in Opposition to Motion for Summary Judgment. (C.P. 247 -257). On June 4, 2010 Atlanta Casualty and American Premier filed their Reply to

Plaintiff's Memorandum Brief. (C.P. 258-273)

On August 5, 2010, the trial court granted summary judgment in favor of Atlanta Casualty and American Premier. (C.P. 273-276). Final Judgment in favor of Atlanta Casualty and American Premier was entered on August 27, 2010. (C.P. 277-278)

FACTS

Sam Bernice Honeycutt and Barbara Honeycutt were lawfully married prior to the birth of Charlie Honeycutt on July 26, 1977.(C.P. 189-190)

On September 15, 1993, as well as on March 11, 1994, and continuing to May 15, 1994, Sam Bernice Honeycutt and Barbara Honeycutt owned three motor vehicles: a 1991 Chevrolet Geo Prizm; a 1988 Ford Mustang; and a 1988 Ford Aerostar Van. (C.P. 156-158)

The Honeycutts were required to list the National Bank of Commerce as a lienholder on their policy and were required to provide comprehensive and collision coverages. (C.P. 159, 162, 164, 167)

The Honeycutt policy with Atlanta Casualty bearing policy number 03010110 effective for the six (6) month period from 9-15-93 to 3-15-94 listed Barbara Honeycutt as the named insured and insured three vehicles: 1991 Chevrolet - 1988 Ford Mustang - 1988 Ford Aerostar. (C.P. 159) The rejection of UM coverage is properly documented in the application and confirmed in the subsequently issued declarations page of this policy (no UM premiums or coverage) which were provided the insureds.(C.P. 159, 270)

Uninsured Motorist Coverage Selection Or Rejection

State law requires that no automobile liability insurance policy be issued or delivered unless it contains an endorsement or provisions undertaking to pay the

insured all sums which he shall be legally entitled to recover as damages for bodily injury, death or property damage from the owner or operator of an uninsured motor vehicle and permits any insured named in the policy to select or reject uninsured motorist coverage for this policy and any renewal hereof.

I acknowledge and agree that I have been given the option to purchase uninsured motorist coverage within limits no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law and up to an amount not to exceed that provided in the policy of bodily injury liability insurance or to reject the coverage entirely. **After having uninsured motorist coverage offered and explained, I have voluntarily and intentionally exercised this option, as indicated below and as shown on the other side of this application. [Emphasis Supplied]**

☐ I select uninsured motorist bodily injury and property damage coverage limits of / /

☐ I reject uninsured motorist property damage coverage, but select uninsured motorist bodily injury coverage limits of / .

☒ I reject uninsured motorist coverage in its entirety.

I am authorized to procure automobile liability insurance and to select or reject uninsured motorist coverage for the applicant or any insured.

× Barbara Honeycutt 9-14-93
Signature of Applicant or Insured-Must be of Majority Age

As a result, while this Atlanta Casualty policy provided liability coverage, it did not provide uninsured motorist coverage or medical payments coverage. No premiums were ever charged or collected from Sam Bernice Honeycutt or Barbara Honeycutt for UM coverage.

On 02/10/94, Atlanta Casualty issued its six (6) month Automobile Insurance Policy Renewal Certificate for Policy No. 03010110 with the effective date of renewal to be 03/15/94 and the expiration date of 09/15/94.

This Renewal Certificate was cancelled effective March 31, 1994, for non-payment of

premium. No renewal premiums were ever paid by the Honeycutts on this Atlanta Casualty policy. No other automobile coverages were in effect after March 31, 1994, through Atlanta Casualty.

On March 11, 1994, Sam Bernice Honeycutt submitted an application for automobile coverage through the A-1 Insurance Agency with American Premier on the same three Honeycutt vehicles insured previously by Atlanta Casualty. In this application Sam Bernice Honeycutt made written rejection of Uninsured Motorist coverage.

Uninsured Motorist Coverage Selection Or Rejection

State law requires that no automobile liability insurance policy be issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury, death or property damage from the owner or operator of an uninsured motor vehicle and permits any insured named in the policy to select or reject uninsured motorist coverage for this policy and any renewal hereof.

I acknowledge and agree that I have been given the option to purchase uninsured motorist coverage within limits no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law and up to an amount not to exceed that provided in the policy of bodily injury liability insurance or to reject the coverage entirely. **After having uninsured motorist coverage offered and explained, I have voluntarily and intentionally exercised this option, as indicated below and as shown on the other side of this application. [Emphasis Supplied]**

☐ I select uninsured motorist bodily injury and property damage coverage limits of / /

☐ I reject uninsured motorist property damage coverage, but select uninsured motorist bodily injury coverage limits of / .

☒ I reject uninsured motorist coverage in its entirety.

I am authorized to procure automobile liability insurance and to select or reject uninsured motorist coverage for the applicant or any insured.

× Bernice Honeycutt

3-11-94

Signature of Applicant or Insured-Must be of Majority Age

American Premier caused its policy of automobile insurance No. 05088064 to be issued with a one-year effective period of 03/15/94 to 03/15/95.

This American Premier policy provided liability coverage. It did not provide uninsured motorist coverage or medical payments coverage. No premiums were ever charged or collected from Sam Bernice Honeycutt or Barbara Honeycutt for UM coverage.

On March 11, 1994, Sam Bernice Honeycutt made application to American Premier through the A-1 Agency for a policy of automobile insurance on the three listed motor vehicles. Pursuant to Miss. Code Ann. ("MCA") 83-11-101, Uninsured Motorist ("UM") Coverage was offered to Sam Bernice Honeycutt with the written option to either accept or reject UM coverage. He elected to reject UM coverage.

American Premier issued its Automobile Policy No. 05088064 as a one-year policy, to Sam Bernice Honeycutt on the three Honeycutt motor vehicles, supra, with the policy having an effective date of March 15, 1994, at 1:20 p.m. to expiration date of March 15, 1995, at 1:20 p.m.

SUMMARY OF THE ARGUMENT

Charlie Honeycutt would only have uninsured motorist coverage for the May 15 1994, accident if policies purchased by his parents provided such coverage.

Both of Charlie's parents, Barbara Honeycutt in 1993 and Sam Bernice Honeycutt in 1994, applied for automobile policies through their local agent, Larry Phebas, in Columbus

Mississippi. Because one or more of the listed vehicles had been financed through the National Bank of Commerce the Honeycutts were required to carry comprehensive and collision coverage. They selected these coverages, and those coverages were reflected on the policy declarations. Premiums were charged for these coverages.

Other than required coverages i.e. bodily injury and property damage liability, comprehensive and collision, no other coverages were purchased. They did not purchase uninsured motorist coverage nor did they purchase medical payments coverage or rental reimbursement coverage.

Barbara Honeycutt and Sam Bernice Honeycutt specifically, clearly and knowingly rejected uninsured motorist coverage in writing. Both insureds signed a UM rejection form wherein they acknowledged and agreed they had been given the option to purchase uninsured motorist coverage, that uninsured motorist coverage had been offered and explained to them and they had voluntarily and intentionally decided to reject uninsured motorist coverage in its entirety.

Consistent with their selections, policies and policy declaration pages were subsequently provided to the Honeycutts well before the May 15, 1994 accident to confirm all coverages requested, selected and paid for.

Atlanta Casualty policy number 03010110 was properly cancelled for non-payment of premiums on March 21, 1994 with a date of cancellation of March 31, 1994.

MCA §83-11-5 (1972) effective from July 1, 1989 until July 1, 2006, provides that a notice of cancellation in accordance with §83-11-3 is not effective unless mailed or delivered by

the insurer at least thirty (30) days prior to the effective date of cancellation. However, ten (10) days notice for non-payment of premium is required.

The Honeycutts claim the attempted cancellation was defective because it was mailed on March 21, 1994 with a date of cancellation of March 31, 1994. As a result the Honeycutts claim the Atlanta Casualty policy remained in force and affect through the May 15, 1994 date of accident i.e. a 45 day unpaid benefit of sorts.

The cancelation was proper and documented by the certificate of mailing to the proper address.

Atlanta Casualty Company issued a renewal certificate but cancelled the coverage for non-payment of premiums by mailing a notice of cancellation on March 21, 1994, to the Honeycutt residence mailing address listed in this policy and on previous applications and policies.

The Honeycutts failed to pay the premium due so coverage ended on March 31, 1994. If not effective on March 31, 1994, the 10 day date on the notice, then cancellation occurred on the following day or the day after.

Only ten (10) days notice is required when cancellation is the result of the insured's failure to pay premiums. Clearly the 10 day requirement was met well before the accident of May 15, 1994.

This policy clearly provides:

This certificate is subject to all of the terms and conditions of the policy and shall continue in force for the period shown provided the required premium is paid by the effective date.

The Honeycutts never argue that they paid the premiums and that they should get the product they bought.

Honeycutt's interpretation of the applicable cancellation statute and purpose is strained and incorrect. Mailing of the notice with an explanation of the reason for the cancellation (non-payment) satisfies the statute. The cancelled policy remains in effect for 10 days after mailing. Had the underlying accident happened on March 30, March 31 or April 1, 1994, the 10 day argument might apply. Here, however, the accident happened on May 14, 1994, nearly 45 days after the noted expiration date of March 31, 1994.

As provided by statute, the policy was cancelled 10 days after March 21, 1994, the date proper notice was mailed to the Honeycutts' home address and NBC, the lienholder on the policy. Mailing is properly documented.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ATLANTA CASUALTY AND AMERICAN PREMIER BECAUSE, AS A MATTER OF LAW, NO UNINSURED MOTORIST COVERAGE HAD BEEN REQUESTED, PURCHASED OR WRITTEN

A. Standard of Review

This Court reviews a circuit court's grant of summary judgment *de novo*. *Kimbrough v. Keenum*, 2011 WL 1467623, at *2 (¶ 9) (Miss.App. Apr. 19, 2011) (citations therein omitted); *Hynes v. Ambling Management*, 2011 WL 2536189, at *1 (¶ 5) (Miss.App. June 28, 2011) (citation therein omitted). If the evidence, viewed in the light most favorable to the non-movant, reveals no genuine issue of material fact and the moving party is entitled to judgment in his favor, summary judgment is appropriate. *Kimbrough*, 2011 WL 1467623, at *2 (¶ 9). The evidence considered includes all pleadings, depositions, answers to interrogatories and

admissions, and any affidavits. *Hynes*, 2011 WL 2536189, at *1 (¶ 5).

The non-movant may not rest on the pleadings, but must set forth specific facts showing there is a genuine issue for trial. *Kimbrough*, 2011 WL 1467623, at *2 (¶ 9). The non-movant's rebuttal must be supported by significant, probative evidence on each element of his claim, which requires more than a "mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Hynes*, 2011 WL 2536189, at *3 (¶ 10) (quoting *Lott v. Purvis*, 2 So.3d 789, 792 (¶ 11) (Miss. App. 2009)); *Kendrick v. Quin*, 49 So.3d 645, 648 (¶ 7) (Miss. App. 2010) (citation therein omitted). Bare assertions are insufficient to avoid summary judgment. *Hynes*, 2011 WL 2536189, at *3 (¶ 10) (citations therein omitted). If the non-movant fails to sufficiently establish any essential element of his claim, summary judgment is mandated. *Patterson v. Tibbs*, 60 So.3d 742, 753 (¶ 41) (Miss. 2011) (citing *Buckel v. Chaney*, 47 So.3d 148, 153 (Miss. 2010)); *Albert v. Scott's Truck Plaza*, 978 So.2d 1264, 1266 (¶ 6) (Miss. 2008) (citations therein omitted).

B. Applicable Law

Miss. Code Ann. §83-11-101 provides for the mandatory inclusion of uninsured motorist coverage as follows:

Automobile liability policies to contain uninsured motorist and property damage provisions.

(1) No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law, as amended, under provisions approved by the commission of insurance; however, at the option of

the insured, the uninsured motorist limits may be increased to limits not to exceed those provided in the policy of bodily injury liability insurance of the insured or such lesser limits as the insured elects to carry over the minimum requirement set forth by this section. The coverage herein required shall not be applicable where any insured named in the policy shall reject the coverage in writing and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in any renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

(2) No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1980, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for property damage from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law, as amended, under provisions approved by the commissioner of insurance; however, at the option of the insured, the uninsured motorist limits may be increased to limits not to exceed those provided in the policy of property damage liability insurance of the insured or such lesser limits as the insured elects to carry over the minimum requirement set forth by this section. The coverage herein required shall reject the coverage in writing and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in any renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

The property damage provision may provide an exclusion for the first two hundred dollars (\$200.00) of such property damage; however, the uninsured motorist provision need not insure any liability for property damage, for which loss the policyholder has been compensated by insurance or otherwise.

(3) The insured may reject the property damage liability insurance coverage required by subsection (2) and retain the bodily injury liability insurance coverage required by subsection (1), but if the insured rejects the bodily injury liability coverage he may not retain the property damage liability coverage. No insured may have property damage liability insurance coverage under this section unless he also has bodily injury liability insurance coverage under this section.

§ 83-11-3. Cancellation of policy; exceptions

(1) A notice of cancellation of a policy shall be effective only if it is based on one

or more of the following reasons:

(a) nonpayment of premium;

(b) the driver's license or motor vehicle registration of the named insured, or of any other operator who either resides in the same household or customarily operates an automobile insured under the policy, has been under suspension or revocation during the policy period or, if the policy is a renewal, during its policy period or the one hundred eighty (180) days immediately preceding its effective date, unless within seven (7) days from the date of any such cancellation or suspension, the insured shall give insurer written notice of such revocation or suspension and shall direct the insurer to exclude from coverage under said policy the person whose license was so suspended or revoked; further use of the insured vehicle by an excluded driver shall be grounds for immediate cancellation of a policy; or

(c) failure to make timely payment of dues to, or to maintain membership in good standing with, a designated association, corporation, or other organization where the original issue of such policy or renewal was dependent upon such membership.

(2) This section shall not apply to any policy or coverage which has been in effect less than sixty (60) days at the time notice of cancellation is mailed or delivered by the insurer, unless it is a renewal policy.

(3) Modification of automobile physical damage coverage by the inclusion of a deductible not exceeding one hundred dollars (\$100.00) shall not be deemed a cancellation of the coverage or of the policy.

(4) This section shall not apply to nonrenewal.

§ 83-11-5. Effective date of cancellation; notice

No notice of cancellation of a policy to which Section 83-11-3 applies shall be effective unless mailed or delivered by the insurer to the named insured and to any named creditor loss payee at least thirty (30) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given. Unless the reason accompanies or is included in the notice of cancellation, the notice of cancellation shall state or be accompanied by a statement that upon written request of the named insured, mailed or delivered to the insurer not less than fifteen (15) days prior to the effective date of cancellation, the insurer will specify the reason for such cancellation.

This section shall not apply to nonrenewal unless there is a named creditor loss payee.

ARGUMENT

MCA §83-11-101(1), **Mandatory Provisions in Automobile Policies**, is clear and unambiguous. Uninsured Motorist coverage is not mandatory. The insurance applicant can reject UM coverage in writing.

The applicable Uninsured Motorist Coverage Selection or Rejection forms found in the September 1993 application signed by Barbara Honeycutt and the March 1994 application signed by Bernice "Sam" Honeycutt are likewise clear and unambiguous.

NOTE: For clarification purposes and in response to Appellants' statement on page 6 of their Brief to the affect "Although it has not been produced.." with "it" being the insurance application signed and completed by Barbara Honeycutt on September 15, 1993, Appellees would show that this application was made an Exhibit to the Amended and Corrected Affidavit of Larry Phebas (C.P. 269-272) and as Exhibit 1 to the sworn deposition testimony of Sam Bernice Honeycutt taken on February 25, 2009. However, these exhibits have not been included in the official record. A Motion addressing this will be filed as this document was apparently omitted by mistake.

The Atlanta Casualty and American Premier policy applications provide:

Uninsured Motorist Coverage Selection Or Rejection

State law requires that no automobile liability insurance policy be issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury, death or property damage from the owner or operator of an

uninsured motor vehicle and permits any insured named in the policy to select or reject uninsured motorist coverage for this policy and any renewal hereof.

I acknowledge and agree that I have been given the option to purchase uninsured motorist coverage within limits no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law and up to an amount not to exceed that provided in the policy of bodily injury liability insurance or to reject the coverage entirely. **After having uninsured motorist coverage offered and explained, I have voluntarily and intentionally exercised this option, as indicated below and as shown on the other side of this application. [Emphasis Supplied]**

☐ I select uninsured motorist bodily injury and property damage coverage limits of ____/____/____

☐ I reject uninsured motorist property damage coverage, but select uninsured motorist bodily injury coverage limits of ____/____.

☒ I reject uninsured motorist coverage in its entirety.

I am authorized to procure automobile liability insurance and to select or reject uninsured motorist coverage for the applicant or any insured.

x Barbara Honeycutt

9-14-93

Signature of Applicant or Insured-Must be of Majority Age

In spite of signing a statement confirming uninsured motorist coverage had been offered and explained to them Barbara Honeycutt and Sam Bernice Honeycutt now, post accident, claim that "at no time was the uninsured motorist coverage rejection on either policy explained to either Barbara or Sam Honeycutt and neither Barbara nor Sam Honeycutt understood or appreciated the impact of any such rejection of uninsured motorist coverage."

Neither Barbara Honeycutt nor Sam Bernice Honeycutt ever raised any objection with their local agent regarding coverages which had been omitted from their policy. Each received several policy declaration pages prior to the accident. Sam Bernice Honeycutt, although he

claimed he always bought "full coverage", intentionally and knowingly rejected uninsured motorist coverage when he applied on March 11, 1994.

On April 16, 2001 well after the May 15, 1994 accident Barbara Honeycutt claimed no one ever explained UM coverage to her. Prior to the accident and as part of the application process which included selecting needed coverage and agreeing on the cost of same, Barbara Honeycutt signed and affirmed as the applicant or insured that:

- (1) UM coverage was explained to her;
- (2) UM coverage was offered to her;
- (3) she voluntarily opted to reject UM coverage in its entirety; and
- (4) she intentionally opted to reject UM coverage in its entirety.

The policy declarations confirm no premiums were charged for UMBI or UMPD coverage and no coverage provided.

On April 16, 2001 well after the May 15, 1994 accident Sam Bernice Honeycutt claimed no one ever explained UM coverage to him. Prior to the accident and as part of the application process which included selecting needed coverage and agreeing on the cost of same, Sam Bernice Honeycutt signed and affirmed as the applicant or insured on the 3-11-94 application he submitted that:

- (1) UM coverage was explained to him;
- (2) UM coverage was offered to him;
- (3) he voluntarily opted to reject UM coverage in its entirety; and
- (4) he intentionally opted to reject UM coverage in its entirety.

The policy declarations confirm no premiums were charged for UMBI or UMPD coverage and no coverage provided.

Defendants required the writing agent to offer and explain uninsured motorist coverage to each applicant so an informed decision could be made by the applicant/insured to select or reject UM coverage. Defendants are in the business of selling insurance coverage of all types. UM coverage is sold for a premium if the applicant wants this coverage and is willing to pay the premium.

To avoid situations such as this (i.e. post accident UM coverage repudiation disputes), the applicant is required to sign and acknowledge that UM coverage was explained and offered.

The applicant then selects one of three options:

- (1) I select uninsured motorist bodily injury and property damage coverage limits of ____/____/____.
- (2) I reject uninsured motorist property damage coverage, but select uninsured motorist bodily injury coverage limits of ____/____.
- (3) I reject uninsured motorist coverage in its entirety.

There is no legitimate dispute regarding the sufficiency of the UM rejection form and procedure such that while other coverage may have been available, UM coverage was not.

Appellants contend on page 7 of their brief that Larry Phebas, the insurance agent, changed his testimony when it was pointed out to the defendants that the rejection had to be signed by the named insured. This is blatantly false as shown in the amended Phebas affidavit. (C.P. 269-272) . The defendants discovered that Sam Honeycutt had signed the 3-11-94 application using "Bernice Honeycutt." When Larry Phebas originally reviewed the application he mistakenly took the "B" name to be that of Barbara Honeycutt rather than Sam Bernice Honeycutt.

At the trial court level Honeycutt actually attempted to convince Judge Kitchens that this mistake created a genuine issue of material fact such that defendants' summary judgment motion should be denied and a jury empanelled to decide who signed the application.

While *Owens v. Mississippi Farm Bureau Casualty Insurance Company*, 910 So. 2d 1065 (Miss. 2005) is important and instructive, it does not address this rejection issue, the specific language of the rejection form and does not address this subsequent repudiation scenario. This specific detailed reasoning and guidance was not available to insurance carriers and agents in Mississippi in 1993 and 1994.

The unambiguous language found in the statute was the gold standard.

The *Owens* court stated:

Although we question the seemingly absolute requirement of explanation by the insurance agent, we fully agree and hold that the statutorily required waiver of UM coverage may be obtained only from a fully informed insured. That is to say, the waiver must be knowing and intelligent. *Owens*, 910 So. 2d at 1073 (¶ 34).

The court did not address the same or similar language found in the Atlanta Casualty

and American Premier policy application forms. Here, both Barbara Honeycutt and Sam Bernice Honeycutt admit uninsured motorist coverage was explained to them before they made their decision to reject the coverage.

Alternatively, the Honeycutts plead that even if the rejection was explained to them they did not understand or appreciate the impact of such a rejection.

Does this court want to impose a burden or requirement on insurance companies and their agents to withhold needed insurance products because the insured applicant may not “understand and appreciate the impact” of their choices? How does one grade, gauge or confirm this? Does the agent need to have uninterested witnesses at hand when discussions take place? Does he video the conversation?

In *Owens*, 910 So. 2d at 1074 (¶ 384), the language of a waiver form was addressed. Without direct comment it appears the court believed the following language was more than sufficient to waive benefits.

I do not want my uninsured motorist limits increased. Please leave them at 50/100/300. I also waive all benefits above these amounts and all benefits of the umbrella policy.

As the defendants discovered during the discovery phase of the state court action, it is next to impossible to elicit sworn post-accident testimony or admissions from an insured that he or she fully understood uninsured motorist coverage and made an intelligent choice to reject it when that will likely be the only automobile coverage available to pay damages and medical expenses following an accident. This may be particularly true when this injured person is the insured’s child.

Appropriate uninsured motorist rejection forms were signed repeatedly by either Sam Bernice Honeycutt or Barbara Honeycutt as they procured automobile insurance coverage through their agent, Larry Phebas, and continued that coverage past the date of this accident. From March 1994 through March 1999, the Honeycutts rejected UM coverage seven (7) times.

Neither *Owens* nor *Reid v. Mississippi Farm Bureau Casualty* 63 So. 2d 1238 (Miss. 2011) address the issue to be determined here.

Does the post-accident repudiation of a prior signed statement in an insurance policy application form create a genuine issue of material fact precluding summary judgment when the language of the rejection form complies with the statute and the statement was relied upon by the insurance carrier in accepting risks and pricing products?

Although Barbara Honeycutt and Sam Bernice Honeycutt claim they did not read the policy application before initialing and signing it, Mississippi law provides they had a duty to read the application before they signed it and their failure to do so does not provide them relief from what is contained in the application. *Booker v. American General Life & Accident Ins. Co.*, 257 F.Supp.2d 850 (¶ 9) (S.D. Miss. 2003).

In *Booker*, the Plaintiff admitted in her deposition that she had an opportunity to review and read the application before she signed it, and the application specifically states that the policy would be issued in reliance upon the truth of the representations made in the application. Where the terms of the contract are made available to a contracting party, any reliance on alleged misrepresentations of the terms of the contract, is unreasonable as a matter of law. See *Carter v. Union Security Life Ins. Co.*, 148 F.Supp.2d 734 (S.D. Miss 2001); *Howard*

v. Citifinancial, Inc., 195 F.Supp2d 811 (S.D. Miss 2002). Since the Plaintiff had an opportunity to read and review her insurance application and initialed her answer beside the bankruptcy question on the application and then signed the application, any reliance by the Plaintiff on these alleged misrepresentations was not reasonable and as a result, the Plaintiff's claim for intentional misrepresentation failed as a matter of law.

Although the Plaintiff claimed she did not read the policy application before initialing and signing it, Mississippi law provides that she had a duty to read the application before she signed it and her failure to do so does not provide her relief from what is contained in the application. *Booker v. American General Life & Accident Ins. Co.*, 257 F.Supp.2d 850 (S.D. Miss. 2003).

Under Mississippi law, a party to a contract is obligated to read the contract before signing it and cannot be heard to complain of an oral misrepresentation, which would have been disclosed by reading the contract. *Agnew v. Washington Mutual Finance Group, LLC*, 244 F.Supp.2d 672 (N.D. Miss. 2003). Where the terms of a contract are made available to a contracting party, any reliance on alleged misrepresentations of those terms, is, as a matter of law, unreasonable. *Rainwater v. Lamar Life Ins. Co.*, 207 F.Supp2d 561 (S.D. Miss. 2002).

Because the language used in the insurance contract in question is clear and unambiguous, any reliance upon purported oral misrepresentations by the agent regarding coverage under the insurance contract was unreasonable as a matter of law. A court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous. The parties are bound by the language of the contract

where a contract is unambiguous. *Ivison v. Ivison*, 761 So.2d 329 (Miss. 2000). Knowledge of unambiguous contents of an insurance policy, including any endorsement, is imputed to the insured, as a matter of law. *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss.1987) (explaining that this principle of contract law applies even if insured has not read policy).

**THE NOTICE OF CANCELLATION/NONRENEWAL OF THE ATLANTA CASUALTY
COMPANY POLICY (03010110) WAS EFFECTIVE**

MCA §83-11-5 (1972) effective from July 1, 1989 until July 1, 2006, provides that a notice of cancellation in accordance with §83-11-3 is not effective unless mailed or delivered by the insurer at least thirty (30) days prior to the effective date of cancellation. However, ten (10) days notice for non-payment of premium is required.

Honeycutt argues that the attempted cancellation of the Atlanta Casualty Company (ACC) policy number 03010110 was defective because it was mailed on March 21, 1994 with a date of cancellation of March 31, 1994. (C.P. 161-162) As a result Honeycutt claims the policy remained in force and affect through the date of the accident. Alternatively, Honeycutt argues that if not defective as a matter of law, there exists a genuine issue of material fact requiring a trial on the nonrenewal issue. The cancelation was proper and documented by the certificate of mailing to the proper address. (C.P. 193)

In *Branch v. State Farm Fire and Casualty Company*, 759 So.2d 430 (Miss. 2000) (¶ 7,8,9) the Court decided that a certificate of mailing established notice of cancellation without sending a letter by registered or certified mail and created a rebuttable presumption of receipt and the insured's denial of receipt was not enough to rebut the presumption. At the time of the Honeycutt cancellation only ten (10) days notice was required.

There is no Mississippi authority on point on the issue of how the ten days notice for cancellation of a policy is computed. The general rule of law is that the computation does not include the date of mailing and is not effective until the 11th day. In other words, in this case, if the notice was mailed on March 21, March 31 would be the 10th day and the cancellation could not be effective until April 1st.

In a Louisiana case, *O'Meara v. Market Insurance Company*, 482 F.2d 1373 (5th Cir. 1973) (¶ 1,2,3,4), the notification of cancellation was mailed on August 24th and provided that cancellation was effective at 12:01 a.m. on September 3rd. The court ruled, however, that the policy cancellation was not effective until September 4th and that the insured's accident, which occurred on September 3rd at 6:30 p.m., was covered.

Even if the cancellation was ineffective, the policy arguably left in force on the date of the accident did not provide UM coverage. Barbara Honeycutt signed a written UNINSURED MOTORIST COVERAGE SELECTION OR REJECTION form. The policy, see Exhibit "B", did not provide UM benefits and no premium was paid for UM coverage.

CONCLUSION

Appellants suggestion on Page 14 of their brief that Appellee's position at the trial court level was "the insurance agent had no legal duty to fully explain to the Honeycutts their right to purchase UM coverage" is intentionally false and misleading. Appellees legal position all along has been that the UM rejection form signed by both Barbara Honeycutt and Sam Bernice Honeycutt satisfied the requirements of the applicable statute and was sufficient to exclude

UM coverage, particularly when the Honeycutts affirmed UM coverages had been offered and explained to them before any decision was made.

As the undisputed credible evidence shows, uninsured motorist coverage was rejected in writing when the Honeycutt policy application process was completed at the local agent's office in Columbus. The rejection of UM coverage is properly documented in the applicable declarations page of the policy which was provided the insured. As a result, while the policy provided liability coverage, it did not provide uninsured motorist coverage or medical payments coverage. No premiums were charged or collected from the Honeycutts for UM coverage.

The Honeycutts can hardly claim that anything the agent did or failed to do was the proximate cause of their rejection of uninsured motorist limits up to the limits of liability coverage. The documents and affidavits clearly paint a picture of the insured's purchasing only the absolute minimum coverages and limits. They did this time and time again. There is no credible evidence that had additional information been given the Honeycutt's they would have elected to carry uninsured motorist coverage. The suggestion by Sam Bernice Honeycutt that he wanted full coverage does not ring true. Mr. Honeycutt

There is nothing "penal" about the treatment afforded the Honeycutt. They knew they had not paid their insurance premiums and could not have reasonably expected to be insured.

The summary judgment entered in the lower court was appropriate and should be affirmed.

Respectfully submitted, this the 12th day of August, 2011.

ATLANTA CASUALTY COMPANIES,
ATLANTA CASUALTY COMPANY, AND