IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLIE HONEYCUTT — APPELLANT

V. — 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

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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A. Claims against Tommy Coleman

It is Tommy Coleman's burden to prove that he was acting within the course and scope of his employment with the Mississippi Highway Patrol at the time of the accident in order to avail himself of the exclusivity and protections of the MTCA. He has not met that burden in this case.

Pursuant to Miss. Code Ann. §11-46-5(3), there is a rebuttable presumption that any act or omissions committed by Coleman within the "time and place" of his employment are presumed to be within the course and scope of his employment. Coleman claims that at the time of the accident he was working within the "time and place" of his employment with the Highway Patrol and is therefore entitled to that presumption. This presumption, however, does not entitle Coleman to summary judgment, if there is a genuine issue of material fact as to whether he was acting within the time and place of his employment at the time of the accident. This issue is a matter of proof.

Honeycutt does not concede that Coleman was in either the "time" or the "place" of his employment at the time of the accident. At the time of the accident, Coleman was assigned to Clay County, Mississippi, as a state trooper and was on his way home from a roadblock that had been conducted in Lowndes County, Mississippi. Since Coleman was heading home, the accident did not occur within

the "time" of his employment. The accident occurred when Mr. Coleman was in Lowndes County, Mississippi. Since the Lowndes County roadblock had been completed, and Clay County was his assigned county, Coleman was not in the "place" of his employment at the time of the accident. For these reasons, the rebuttable presumption afforded in the above section is not applicable.

Even if Coleman was within the time and place of his employment at the time of the accident, the presumption set out in the above section is rebutted if during the accident Coleman was engaged in the commission of a criminal offense. Miss. Code Ann. §11-46-7(2) permits employees engaged in the commission of a variety of intentional acts, including any criminal offenses to be named individually in civil actions, even if they were within the time and place of his employment at the time of the injury causing act. Based upon the foregoing, whether Coleman was acting within the time and place of his employment and whether he was engaged in the commission of a criminal offense are questions of fact for the fact finder. These issues are not the proper subject for a Motion for Summary Judgment.

Although Honeycutt agrees that the MTCA is the exclusive route for filing civil actions against governmental entities and its employees, that route is only exclusive if the employee is in fact acting within the course and scope of that

employment at the time of the injury causing action. Simply proving that the employer is receiving an indirect benefit from the actions which the employee committed which caused the accident is not the appropriate test for determining whether an employer is responsible for an employee's actions. *Commercial Bank v. Hearn*, 923 So. 2d 202, 207, ¶13 (Miss. 2006). In *Hearn* the Court stated that in determining whether a particular act is committed by a servant within the scope of his employment, "the decisive question is not whether the servant was acting in accordance with the instructions of the master, but, was he at the time doing an act in furtherance of his master's business." *Id.*

In this case Coleman was heading home after working a road block when the accident occurred. While Honeycutt does not dispute that Coleman had completed a road block detail and was heading home, it is disputed that he was acting within the course and scope of his employment at the time of the motor vehicle accident. While Coleman claims that he was "patrolling home" to Clay County at the time of the accident, that does not mean that he was engaged in conduct in furtherance of his master's business. It is Coleman's burden to prove that this act of heading home is in furtherance of his master's business. The mere fact that Coleman was present in his patrol car does not prove that his actions in causing the accident were in furtherance of the interests of his employer. If that

was the case, then Coleman would be protected by the MTCA for any act he committed while operating his patrol car regardless of what he was actually doing at the time he committed the injury causing act.

In his brief Coleman argues that the cases of *Jackson v. Hodge*, 911 So. 2d 625 (Miss. App. 2005) and *City of Jackson v. Harris*, 44 So. 3d 927 (Miss. 2010) are controlling over the issue of whether a governmental employee who is engaged in the commission of a traffic offensive which causes a motor vehicle accident is protected by the MTCA for his injury causing actions. The *Hodge* case, and now the *Harris* case, look to Miss. Code Ann. §11-46-5(2) to determine that traffic offenses should be excluded from the phrase "criminal offenses" for purposes of determining whether a government employee is acting within the course and scope of that employment pursuant to §11-46-7(2). Honeycutt would respectfully suggest that the utilization of §11-46-5(2) to exclude traffic offences from the phrase "any criminal offense" in §11-46-7(2) is misplaced.

In order to determine whether Coleman is individually liable for his actions or whether the exclusivity provisions of MTCA are applicable to his injury causing actions, you must look to Miss. Code Ann. §11-46-7(2), not to §11-46-5(2). Miss. Code Ann. §11-46-7(2) specifically provides that an employee cannot be held personally liable for his actions, unless he commits a variety of intentional

acts including "any criminal offense". This statute does not exclude traffic offenses from the definition of "any criminal offense". Miss. Code Ann. §11-46-7(2) specifically exempts governmental employees from the protection of the MTCA if they committed any criminal offense.

Unlike §11-46-7(2), the purpose of §11-46-5(2) is not to determine whether the employee should be protected by the MTCA, but instead to determine whether the governmental entity can be held vicariously liable for the acts of its employee. Said another way, the Mississippi Legislature in §11-46-5(2) determined that the Mississippi governmental entity is responsible for traffic offenses which its employees commit during the course and scope of their employment; however, determined that they would not be responsible for any other intentional actions and criminal offenses. In §11-46-7(2) the Mississippi Legislature determined that the MTCA would not protect a governmental employee individually if he was engaged in the commission of any criminal offense, notable leaving out traffic offenses from its definition of "any criminal offense". These statutes are clear. "It is only when a statute is unclear or ambiguous that we look beyond the language of the statute to determine its meaning. . . . The Court has no right to add anything to or take anything away from the statute when the meaning of the statute is clear." *Coleman v. State*, 947 So. 2d 878, 881 ¶10 (Miss. 2006) Honeycutt has not filed a

lawsuit requesting that the Mississippi Department of Public Safety be held vicariously liable for the actions of Coleman in causing the accident in this case. Instead, Honeycutt has filed this civil action against Coleman individually in that his actions in committing a traffic offense exclude him from the protections of the MTCA. Since Miss. Code Ann. §11-46-7(2) is specific to the issue of whether Coleman can be sued individually and it applies to all criminal offenses, even traffic offenses, there is no reason to create an ambiguity by looking to §11-46-5(2) to determine whether "traffic offenses" are included in the phrase "any criminal offense" in §11-46-7(2). Even if this Court were to find an ambiguity in the statutes, ambiguities are resolved by the specific statute controlling the general. *Hood v. Madison County*, 873 So. 2d 85, 91 ¶22 (Miss. 2004) Therefore, the issue of whether Coleman could be sued individually would be controlled by §11-46-7(2), not §11-46-5(2).

Based upon the foregoing, "traffic offenses" should not be excluded from the definition of "any criminal offenses" in Miss. Code Ann.§11-46-7(2). The trial court erred in determining that there was no genuine issue of material fact whether Coleman was acting within the course and scope of his employment at the time of the accident. Therefore, the trial court erred in granting Summary Judgment finding that Coleman is entitled to the protections of the MTCA.

B. Claims against the Insurance Companies[1]

The Insurance Companies' protest in their brief that Honeycutt comments on their agent, Larry Phebus, changing his testimony/affidavit, as to whether the named insured Bernice (Sam) Honeycutt or his wife Barbara Honeycutt signed the application and uninsured motorist rejections for the American Premier policy of insurance. (R-163-166) This discrepancy with regard to Mr. Phebus' testimony in and of itself creates a genuine issue of material fact precluding summary judgment on the issue of whether there was a valid rejection of uninsured motorist insurance coverage in the American Premium policy. Changes or discrepancies in testimony are matters for a credibility determination by the fact finder. This Court has stated, "We note at the outset that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge when he is ruling on a motion for summary judgment." *Stegall v. WTWV, Inc.*, 609 So. 2d 348, 352-53 (Miss. 1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). *Giles v. Brown*, 962 So. 2d 612 ¶16 (Miss. App. 2006) In that changes or discrepancies in testimony can create genuine issues of material fact,

[1]Atlanta Casualty Companies, Atlanta Casualty Company and American Premier Insurance Company are jointly referred to as "the Insurance Companies".

the change in testimony/affidavit by Mr. Phebus as to who signed the UM rejection, and therefore whether there was a knowledgeable rejection, would preclude summary judgment.

With regard to whether there is a valid rejection of uninsured motorist coverage, the two cases cited by Honeycutt in his original brief, *Owens v. Mississippi Farm Bureau Casualty Insurance Company*, 910 So. 2d 1065 (Miss. 2005) and *Reid v. Mississippi Farm Bureau Casualty*, 63 So. 3d 1238 (Miss. 2011) address the exact issues that are presented to this court on the uninsured motorist rejection. The decisions in those cases should be followed.

While Honeycutt agrees that the named insured has a duty to read the application, the Insurance Companies also have the obligation, through their agent, to fully explain to the named insured the statutorily mandated uninsured motorist coverage prior to the named insured signing a rejection of the statutorily mandated uninsured motorist coverage and to obtain a knowing and intelligent waiver.

The Insurance Companies have cited to the Court the cases of *Agnew v. Washington Mutual Finance Group, LLC*, 244 F. 2d 672 (N.D. Miss. 2003), *Rainwater v. Lamar Life Ins. Co.*, 207 F. Supp. 2d 561 (S. D. Miss. 2002), *Ivison v. Ivison*, 761 So. 2d 329 (Miss. 2000) and *Cherry v. Anthony, Gibbs, Sage*, 501

So. 2d 416 (Miss. 1987) in support of their position that an insured cannot escape contractual provisions by claiming that they have not read the contract. As pointed out by Honeycutt in his original brief, these cases do not address the issue before the Court which is where an agent has failed to adequately explain the rejection of a statutory mandated provision in the contract. The Mississippi Supreme Court has made it clear that in order for there to be a valid rejection of uninsured motorist coverage there has to be a full and complete understanding by the named insured of what is being rejected and what statutory rights are being waived. *Owens* and *Reid* or clear that in order for the rejection to be effective, there has to be a "knowing and intelligent" waiver. As proven by the affidavits of Mr. and Mrs. Honeycutt. (R189-192) such "knowing and intelligent" waiver does not exist in this case. This genuine issue of material fact precludes summary judgment from being granted to the Insurance Companies on this issue.

Finally, with regard to whether the Notice of Cancellation of the Atlanta Casualty policy was valid, in its brief Atlanta Casualty does not offer any argument which calls into question the argument made by Honeycutt in his original brief. Atlanta Casualty Company did not prove that it complied with the notice provisions for cancellation of an automobile liability policy pursuant to Miss. Code Ann. §83-11-5. Since the policy was never effectively cancelled, at

the time of the accident the coverage was still in effect including the uninsured motorist coverages. The trial court erred in granting summary judgment to Atlanta Casualty on this issue.

II. CONCLUSION

Based upon the foregoing, the trial court erred in determining that Coleman was protected by the MTCA, in determining that the Mr. and Mrs. Honeycutt, knowingly and intelligently waived the uninsured motorist coverages and in determining that there was a valid cancellation of the Atlanta Casualty policy.

DATED, this the 3rd day of October, 2011.

Respectfully,

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III. CERTIFICATE OF SERVICE

I, Joseph E. Roberts, Jr., attorney for Appellant, do hereby certify that I have this day delivered via United States mail with postage prepaid a true and correct copy and an electronic copy of the above and foregoing Reply Brief of Appellant to the following:

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