IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-CA-01774-SCT

ARTIS AND MARILYN BOLDEN,
INDIVIDUALLY AND MARILYN BOLDEN AS
EXECUTRIX OF THE ESTATE OF BRANDON J.
BOLDEN, ON BEHALF OF THE ESTATE AND ALL
THE WRONGFUL DEATH BENEFICIARIES
OF BRANDON BOLDEN, DECEASED — APPELLANTS

VS.

JAMAAL L. MURRAY; AND MISSISSIPPI
FARM BUREAU CASUALTY INSURANCE
COMPANY, A MISSISSIPPI CORPORATION, AND
JOHN DOE DEFENDANTS 1-10 — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY

James R. Moore, Jr. (M[redacted]
Dale G. Russell (MB [redacted]
COPELAND, COOK, TAYLOR& BUSH, P.A.
600 Concourse, Suite 100
1076 Highland Colony Parkway
P. O. Box 6020 [39158]
Ridgeland, MS 39157
Telephone: (601) 856-7200
Facsimile: (601) 856-7626

ATTORNEYS FOR APPELLEE
MISSISSIPPI FARM BUREAU CASUALTY
INSURANCE COMPANY

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CERTIFICATE OF INTERESTED PERSONS

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 judges of this Court may evaluate possible disqualification or recusal:

1. Artis Bolden, underlying Plaintiff/Appellant;
2. Marilyn Bolden, underlying Plaintiff/Appellant (hereinafter collectively sometimes "Plaintiffs" or "Boldens");
3. Dennis C. Sweet III, Esq., attorney for underlying Plaintiffs/Appellants;
4. Rick D. Patt, Esq., attorney for underlying Plaintiffs/Appellants;
5. Jamaal L. Murray, underlying Defendant/Appellee;
6. Mississippi Farm Bureau Casualty Insurance Company (hereinafter "Farm Bureau"), underlying Defendant/Appellee;
7. Sam S. Thomas, Esq., attorney for Defendant/Appellee Jamaal L. Murray;

8. James R. Moore, Jr., Esq., attorney for Defendant/Appellee Farm Bureau;

9. Dale G. Russell, Esq., attorney for Defendant/Appellee Farm Bureau;

10. Honorable Jeff Weill, Sr., current Hinds County Circuit Court Judge.

Respectfully submitted, this the 7th day of June, 2011.

DALE G. RUSSELL, attorney of record for Mississippi Farm Bureau Casualty Insurance Company

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STATEMENT OF ISSUES

1. Whether or not the trial court correctly granted Farm Bureau's summary judgment motion.

2. Whether or not the trial court should recognize an independent tort of spoliation.

3. Whether or not the trial court abused its discretion in limiting the scope of Plaintiffs' additional discovery.

4. Whether or not the trial court correctly denied Plaintiffs' Motion to Recuse Counsel of Record.

STATEMENT OF THE CASE

I. Nature of Case

This action arises out of a June 14, 2007, automobile accident in which Brandon Bolden – Plaintiffs' decedent – was killed. Plaintiffs sought to recover uninsured motorist ("UM") benefits from Farm Bureau. Additionally, Plaintiffs asserted a claim of spoliation of evidence, whereby Plaintiffs sought to hold Farm Bureau responsible, not only for uninsured motorist benefits, but also for any damages Plaintiffs allegedly might have recovered from other persons or entities based on causes of action having nothing whatsoever to do with Farm Bureau – for example, negligence or products liability concerning the vehicle.

II. Course of Proceedings and Disposition Below

Plaintiffs brought suit against Farm Bureau and Murray on February 20, 2009, when they filed their Complaint in the First Judicial District of the Circuit Court of Hinds County, Mississippi. *R. 6-70.* In their Complaint Plaintiffs asserted claims of negligence and gross negligence against Murray for allegedly driving the subject vehicle and/or causing and/or contributing to or causing Brandon Bolden to lose control of the vehicle (Count One); a declaratory action seeking UM benefits under the Farm Bureau policy (Count Two); and negligence and gross negligence against Farm Bureau for the alleged intentional and/or negligent spoliation of evidence (Count Three). *Id.* Plaintiffs sought to recover wrongful death benefits against Murray and Farm Bureau including, but not limited to lost wages, medical and funeral expenses, loss of enjoyment of life, pain and suffering, emotional distress and any other recoverable damages including punitive damages. *Id.* Plaintiffs also sought to recover UM benefits in the amount of the UM limits afforded by the Farm Bureau policies. *Id.*

Farm Bureau responded to Plaintiffs' Complaint on May 7, 2009, when it filed its Answer and Affirmative Defenses to the Complaint and Counterclaim and Cross-Claim for Declaratory Judgment. *R. 73-123.*

During the course of the claim and lawsuit, over 800 photographs of the accident scene and vehicle were produced. The Plaintiffs even produced 65 photographs, 32 of which were of the vehicle as it existed after the accident. *R.E. Tab 4; R. 394-427.*[1] Farm Bureau obtained and produced the 124 Jackson Police Department photographs of the accident scene and the vehicle at the accident scene. *R.E. Tab 4; R. 394-395.* Farm Bureau produced over 600 additional photos taken by its adjusters and accident reconstruction experts who examined the accident scene and vehicle. Over 300 of those photos are of the vehicle as it existed after the accident. *Id.*

Farm Bureau filed its Motion for Summary Judgment on November 30, 2009, arguing Plaintiffs are not entitled to UM benefits because Brandon Bolden was the driver of the Mercedes vehicle and there was not a second vehicle involved in the accident (i.e., there was no contact by a second vehicle causing the accident). *R.141-427.* Murray filed his Motion for Summary Judgment on or about December 9, 2009. *R. 446-575.* Instead of responding to Defendants' Motions for Summary Judgment, Plaintiffs filed a Rule 56(f) Motion for Continuance to Respond in Opposition to Motions for Summary Judgment filed by Defendants; to which Defendants opposed. *R. 576-590.* Plaintiffs filed a Notice of Additional Discovery Related Matters; Support for 56(f) Continuance; and Opposition to Defendants' Motions for Summary Judgment vaguely itemizing the additional discovery they previously failed to obtain and claimed they needed to respond to the Motions for Summary Judgment. Despite Plaintiffs' failure to provide the requisite proof and abide by Rule 56(f)

1

The photos of the vehicle produced by the Boldens are attached to the Russell Affidavit, *R.E. Tab 4,* at attachments numbered PL.00112 through PL.00142 and PL.00175.

of the Mississippi Rules of Civil Procedure, the trial court, in its discretion, allowed 45 days for the Plaintiffs to conduct limited discovery with regard to the identity of the driver of the accident vehicle at the time of the accident. *R. 683-684.* Following the additional discovery, Plaintiffs filed their Supplement to Opposition to Defendants' Motions for Summary Judgment, and the Defendants responded. *R. 688-706.*

Plaintiffs also filed a Motion to Recuse Counsel of Record on February 1, 2010, requesting that counsel for Farm Bureau be recused alleging the law firm of Copeland, Cook, Taylor & Bush, P.A. ("Copeland Cook") had previously represented the Boldens thereby creating a conflict of interest. *R. 591-596.* Farm Bureau responded proving that Copeland Cook did not represent the Boldens and there was no conflict of interest. *R. 597-661.*

Following hearings on the Motions, the trial court granted Farm Bureau and Murray's Motions for Summary Judgment; and the trial court denied Plaintiffs' Motion to Recuse Copeland Cook and awarded judgment as a matter of law to Farm Bureau and Murray. *R. 685-687; 728-732.* From those decisions, Plaintiffs appeal.

III. Statement of Facts

A. The Farm Bureau Policy

Plaintiff Marilyn Bolden was the owner of a two-door 2003 AMG Mercedes SL55 Kompressor automobile, bearing VIN Number WDBSK74F03F051542. *R.E. Tab 2; R. 6-70, 385-387.* At the time of the accident involved in this case, it was insured under Farm Bureau policy number A30024446, and had applicable per person bodily injury liability limits of $300,000. *R. 235-236.*

The policy on the vehicle provided uninsured motorist bodily injury per person limits of $50,000. *Id.* Another vehicle insured under the same policy also had $50,000 bodily injury per

person uninsured motorist coverage limits. *Id.* Artis and Marilyn Bolden also had other vehicles insured under separate policies with Farm Bureau, which had applicable per person bodily injury uninsured motorist limits totalling $400,000. *R. 266-286.* Thus, the Boldens' policies provided a stacked total of $500,000 in uninsured motorist coverage for bodily injury per person.

The Farm Bureau policy issued to the Boldens regarding the Mercedes provided in pertinent part:

> **INSURING AGREEMENT**
>
> **1.** We will pay compensatory damages which any **Insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> **1.** **Bodily Injury** sustained by an **insured** and caused by an auto accident . . .
>
> . . .
>
> **C.** **Uninsured Motor Vehicle** means a motor vehicle:
>
> **2.** That is an underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle or **trailer** for which the sum of the limits of liability under all **bodily injury** liability policies applicable at the time of the auto accident is less than the sum of:
>
> **a.** The limit of liability for uninsured motorist coverage applicable to the vehicle the **insured** was occupying at the time of the auto accident; and
>
> **b.** Any other limits of liability for uninsured motorist coverage applicable under policies affording uninsured motorist coverage to the **insured** as a named insured or **family member**.
>
> . . . .
>
> **4.** Which is a hit-and-run vehicle whose operator or owner cannot be identified and which makes actual physical contact with:
>
> . . . .

> **b.** A vehicle which you or any **family member** are **occupying** . . . .

R. 249. Under the provisions of the Farm Bureau policy, the Plaintiffs are not entitled to recover uninsured motorist benefits since Brandon Bolden was driving the Mercedes and there was no unidentified hit-and-run vehicle which made contact with the Mercedes, causing or contributing to the accident. *Id.*

B. The Accident

On June 14, 2007, Brandon Bolden was using the 2003 AMG Mercedes belonging to his mother, Marilyn. *R.E. Tab 1; R. 293, 296-298, 301.* Brandon Bolden and a friend, Jamaal Murray, went to a Jackson bar and restaurant called Hamp's Place, where they spent part of the evening. *Id.* After leaving Hamp's Place for a brief period of time, they returned and picked up food that Murray had ordered. *R.E. Tab 1; R. 293, 298-301.* The two then left Hamp's Place in the Mercedes to go to a different bar. *R.E. Tab 1; R. 293, 301.* Brandon Bolden was driving the vehicle while Murray was eating his food. *R.E. Tab 1; R. 301, 304-306, 310, 324.*

Bolden was speeding and lost control of the vehicle near the intersection of Medgar Evers Boulevard and Sunset Drive in Jackson, Hinds County, Mississippi. *R.E. Tab 1; R. 293, 301-305.* The Mercedes left the roadway, rolled over, and ultimately came to rest against a tree. *Id.* No other vehicle was involved in the accident or made contact with the Mercedes. *R.E. Tab 1; R. 304-305, 310, 319.* Brandon Bolden, the driver of the Mercedes, died. *R. 6-70.* Murray was thrown from the vehicle and injured. *R.E. Tab 1; R. 301-304, 306, 319.*

Murray borrowed a cell phone from some passers-by and called a friend to report the accident. *R.E. Tab 1; R. 306-307.* When Murray saw emergency vehicles beginning to arrive at the

scene, he left because he was concerned there was a warrant out for his arrest in a separate matter. *Id.* He later had a friend drive him to a hospital for treatment. *R.E. Tab 1; R. 321.*

The Mercedes was rendered a total loss. *R.E. Tab 4; R. 396-427.* Following the accident, the Mercedes was towed and stored at the City of Jackson impound lot. *R.E. Tab 2, R. 385-387.* The Boldens contacted Farm Bureau to make a collision claim regarding the damage to the Mercedes. They did not lodge any uninsured motorist claim at that time. *R. 6-70.*

In early July 2007, the Plaintiffs caused the vehicle to be moved from the City of Jackson impound lot to ABC Towing. *R.E. Tab 2; R. 385-387.* Mrs. Bolden informed Farm Bureau's Senior Claims Representative, Barry Kelley, on July 5, 2007, that the vehicle was moved to ABC Towing because the Boldens wanted to have a "specialist" look at it. Mrs. Bolden also asked to be present during the inspection of the vehicle by an accident reconstruction expert employed by Farm Bureau. Kelley advised her she was welcome to be present and advised her of the time of the inspection. *Id.*

C. Copeland Cook's Representation of Farm Bureau

In early July 2007, Farm Bureau retained Copeland Cook to represent Farm Bureau with regard to investigation of the accident. Specifically, Farm Bureau retained Copeland Cook to represent it concerning any potential uninsured motorist claim that might arise out of the accident. *R.E. Tab 5; R. 609-617.* Farm Bureau did not retain Copeland Cook to represent it, or anyone else, with regard to any liability claim made, or that might be made, by Jamaal Murray. *Id.* Farm Bureau did not retain Copeland Cook to represent the Boldens in any capacity. *Id.*

Copeland Cook did not, in fact, represent the Boldens in any capacity. *Id.* In communicating with Tucker Mitchell at Copeland Cook, Marilyn Bolden knew and understood that she was speaking with an attorney who represented Farm Bureau. *R. 618.* The Boldens retained their own counsel to represent them concerning the accident. *R.E. Tab 5; R. 609-617.*

D. Transfer of the Accident Vehicle to Insurance Auto Auctions

By way of a July 10, 2007, letter written by Tucker Mitchell of Copeland Cook, Farm Bureau instructed the Boldens that the vehicle should be preserved in its then-current condition while at ABC Towing, pending Farm Bureau's investigation of the accident and pursuant to the Boldens' duty to cooperate under the insurance policy covering the vehicle. Farm Bureau also asked that the vehicle be moved to Insurance Auto Auctions in order to avoid further storage fees at ABC Towing. *R.E. Tab 2; R. 385-387.*

By letter dated July 16, 2007, Farm Bureau offered to settle the Boldens' collision claim regarding the vehicle. Farm Bureau again advised the Boldens that there would be no storage fees for the vehicle if it were moved to Insurance Auto Auctions ("IAA"). Farm Bureau told the Boldens that Farm Bureau would be responsible for storage fees at ABC Towing only through July 31, 2007, and after that, any fees for further storage at ABC Towing would be the Boldens' responsibility. *Id.* On July 23, 2007, Farm Bureau settled the Boldens' collision claim regarding the vehicle. Title to the vehicle salvage was assigned to Farm Bureau. The Boldens did not desire to incur storage fees at ABC Towing. The vehicle was moved to IAA on July 24, 2007. *Id.*

Upon the vehicle being moved to IAA, Barry Kelley, on behalf of Farm Bureau, contacted IAA and placed a "hold" on the vehicle salvage, instructing IAA that it be preserved and not disposed of in any way. *Id.* Business records obtained from IAA *via subpoena* confirm that Farm Bureau placed a hold on the vehicle so that it would be preserved. Specifically, as of July 24, 2007, at 8:57:41 a.m., the IAA records concerning the vehicle salvage state: "Vehicle needs to be preserved per Barry." *R.E., Tab 3; R. 388.*

In early November 2007, Farm Bureau learned that on September 6, 2007, contrary to Farm Bureau's instructions, IAA had sold the vehicle salvage to an entity known as Unique Auto Sales

in Opa Locka, Florida. *R.E. Tab 2; R. 385-387.* Farm Bureau, with the assistance of Copeland Cook, then made efforts to determine if the vehicle, in whole or part, could be retrieved. *R.E. Tab 5; R. 609-617.* Unique Auto Sales' representative, Eddie Mustafa, advised that the vehicle salvage had been largely dismantled and already sold to yet another buyer whom Mr. Mustafa would not identify. Farm Bureau was ultimately unsuccessful in retrieving any portion of the vehicle wreckage remains. *R.E. Tab 2; R. 385-387.*

Neither Tucker Mitchell, nor any other attorney at Copeland Cook was involved in (a) making arrangements for the vehicle salvage to be moved from ABC Towing to IAA; (b) moving the vehicle salvage to IAA; or (c) re-titling of the vehicle salvage. *R.E. Tab 5; R. 609-617.*

E. Liability Claim Asserted by Jamaal Murray

Through his own counsel, Jamaal Murray presented a liability claim against Brandon Bolden's estate. Murray's liability claim was not handled by Copeland Cook. Rather, Murray's liability claim was handled by Barry Kelley on behalf of Farm Bureau. *R.E. Tab 6; R. 620-629.* Following the June 14, 2007, auto accident, Farm Bureau was notified by facsimile letter addressed to Barry Kelley that the law firm of Byrd & Associates, PLLC, represented Murray regarding the accident. Mr. Murray, through his counsel, took the position that the accident was caused by the negligence of Brandon Bolden. *Id.*

Mr. Kelley acknowledged receipt of the letter. He sought to meet with Murray and Murray's legal representatives to discuss the matter and to obtain a recorded statement from Murray. *Id.* On September 10, 2007, as part of Farm Bureau's investigation into all potential claims arising out of the accident, Mr. Kelley took Jamaal Murray's recorded statement at the offices of Byrd and Associates, PLLC. *Id.*

On September 17, 2007, Mr. Kelley wrote to Byrd & Associates regarding any medical bills incurred by Murray as a result of the accident. *Id.* On November 9, 2007, Mr. Kelley forwarded a check for $30,000 and a Full & Final Release to Kwame Moore at Byrd and Associates, PLLC, in settlement of Murray's liability claim regarding the accident. *Id.*

On November 13, 2007, Mr. Kelley received a return of the notarized, executed, Full & Final Release by Jamaal Murray, which Murray executed in favor of Artis Bolden, Marilyn Bolden, and Brandon J. Bolden on November 9, 2007. *Id.* Mr. Kelley did not notify the Boldens about the liability claim and settlement, as it was not required by Farm Bureau's policy. Rather, the policy provides that Farm Bureau has the discretion, as it sees fit, to settle any such liability claim within policy limits, with or without notice to or consent by the insured. *Id.; R. 643.* Accordingly, Farm Bureau was not represented by or assisted by Tucker Mitchell or the law firm of Copeland Cook with regard to handling the liability claim made by Jamaal Murray. *R.E. Tab 5-6; R. 609-617; 620-629.*

SUMMARY OF ARGUMENT

The trial court properly sustained Farm Bureau's Motion for Summary Judgment. Plaintiffs failed to present evidence that contradicted the testimony of Jamaal Murray or created a genuine issue of fact to oppose Farm Bureau's Motion for Summary Judgment. The trial court was correct to not recognize an independent tort of spoliation of evidence because such is contrary to well-established Mississippi law. The trial court also did not abuse its discretion in limiting Plaintiffs' additional discovery to respond to Defendants' Motions for Summary Judgment. Further, the trial court properly denied Plaintiffs' Motion to Recuse Counsel of Record as there was no conflict of interest between Copeland Cook and the Plaintiffs.

Accordingly, the trial court's award of Summary Judgment to Farm Bureau, limiting discovery of Plaintiffs to respond to Farm Bureau and Murray's Motions for Summary Judgment and the denial of Plaintiffs' Motion to Recuse Counsel of Record should be affirmed.

ARGUMENT

I. The Trial Court was Correct in Sustaining Farm Bureau's Motion for Summary Judgment.

A. Standard of Review

The standard of review of a trial court's grant of summary judgment is *de novo*. *Williams v. Bennett*, 921 So.2d 1269, 1271 (Miss. 2006). Summary judgment "shall be rendered forthwith" when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." MISS. R. CIV. P. 56(c); *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545 (5th Cir. 1989). "Once the movant carries its initial burden, the burden shifts to the nonmovant to show that summary judgment is inappropriate." *Fields v. City of S. Houston*, 922 F.2d 1183, 1187 (5th Cir.1991).

Further, once the initial burden is met, the opponent of summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (U.S. 1986)(citations omitted). "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (citing Fed. R. Civ. P. 56(e)).

More recently, the Mississippi Supreme Court noted, "[f]or summary judgment review, the mere existence of triable issues do not entitle one to a trial. This legal tenet has been clearly expressed by the Fifth Circuit Court of Appeals and the United States Supreme Court: '[t]he mere

existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material.'" *Williams*, 921 So.2d at 1272, ¶ 10 (citing *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir.1986); (*See also Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986)).

The *Williams* Court also held, "[w]here the summary judgment evidence establishes that one of the essential elements of the plaintiffs' cause of action does not exist as a matter of law, . . . , all other contested issues of fact are rendered immaterial." *Williams*, 921 So.2d at 1272, ¶ 10 (citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (U.S. Dist. Col. 1986)("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."); *Topalian v. Ehrman*, 954 F.2d 1125, 1138 (5th Cir.1992). In the present case, Plaintiffs failed to establish essential elements of their claims against Farm Bureau. Therefore the trial court's award of summary judgment in favor of Farm Bureau was correct and should be affirmed.

B. Plaintiffs did not provide any genuine issues of material fact to oppose Farm Bureau's Motion for Summary Judgment.

Plaintiffs claim that they provided genuine issues of material fact with the deposition testimony of Jackson Police Department officers thereby defeating Farm Bureau's Motion for Summary Judgment. However, Plaintiffs provided nothing that disputed the uncontradicted evidence and testimony of Jamaal Murray or created a genuine issue of fact. At most, Plaintiffs merely showed "some metaphysical doubt as to the material facts," which is not enough to defeat summary judgment. The "evidence" provided by Plaintiffs to oppose Farm Bureau's summary judgment motion requires the use of speculation and conjecture to conclude, as Plaintiffs do, that genuine issues of material fact exist as to whether Brandon Bolden was driving the accident vehicle at the

time of the accident. However, it is established by **uncontradicted evidence** that Brandon Bolden was driving the accident vehicle at the time of the accident by the undisputed testimony of Jamaal Murray. *R.E. Tab 1; R. 301, 304-306, 310, 324.* The testimony of the City of Jackson Police Department Officers deposed by Plaintiffs, that Plaintiffs contend creates a triable issue, **do not contradict Murray's testimony**.

JPD Officer Joseph Cotton is an "accident reconstructionist;" and his "full investigation of the accident showed no physical or other evidence that anyone other than Brandon Bolden was operating the accident vehicle." *R. 713.* The accident vehicle went through a "pretty good wreck" before any photographs were taken of the seats in the accident vehicle; and both of the backs of the two seats in the accident vehicle appeared to be in the same relative position after the accident, as demonstrated by photographs taken at the scene of the accident. *Id.* JPD Officer Robert Bufkin testified that he has no "personal knowledge of who was driving the accident vehicle." *R. 714-715.* Detective Perry Tate testified that he, also, has no "personal knowledge" as to who was driving the accident vehicle; but that he was told by witnesses on the scene that Brandon Bolden was driving the accident vehicle when it left a club not far from the accident scene. *R. 710-717.* Detective Tate further testified that he would have to "defer" to Officer Cotton, the accident reconstructionist, as to any and all conclusions about the accident and/or who was driving the accident vehicle. *Id.*

Plaintiffs speculate that if the driver's side seat was moved forward some, then Murray was driving the vehicle and not the decedent, Brandon Bolden. However, when shown a photo of the driver's side seat, JPD accident reconstructionist Cotton, testified that he believed the driver's seat was all the way back. *R. 723.* Officers Bufkin and Tate could not say if the driver's seat was all the way back or pushed forward some. *R. 725; 727.* Further, Officer Bufkin pointed out that the vehicle

had rolled several times in the accident and that the rollovers could have changed the original seat position. *R. 725.*

Argument by Plaintiffs concerning their speculative interpretation of the driver's side seat position in a post-accident photo and what the claimed seat position may suggest cannot create a genuine issue of material fact in regard to who was driving the subject vehicle. The speculation of Plaintiffs concerning the seat position is no substitute for the uncontradicted admissible testimony of Jamaal Murray that Brandon Bolden was the driver of the subject vehicle. Such speculative and circumstantial evidence is not sufficient to defeat a motion for summary judgment. *Higginbotham v. Hill Bros. Constr. Co.*, 962 So.2d 46, 62 (Miss. Ct. App. 2006). Because Brandon Bolden was driving the vehicle and a second vehicle was not involved in the accident, Plaintiffs are not entitled to UM benefits under the Farm Bureau policy. Therefore, the trial court was correct in granting Defendant Farm Bureau judgment as a matter of law.

II. Plaintiffs are Not Entitled to a Spoliation Inference that Defeats Summary Judgment.

The simple fact that evidence is gone does not entitle a party to a general adverse inference based on spoliation of evidence. Rather, the absence of the evidence must be due to some intentional or negligent act of the alleged spoliator. *Thomas v. Isle of Capri*, 781 So.2d 125 ¶¶ 41, 42 (Miss. 2001)(inference arises against spoliator only based on intentional or negligent loss of evidence) (quoting *DeLaughter v. Lawrence Co. Hospital*, 601 So.2d 818, 822 (Miss. 1992)); *Young v. Univ. of Miss. Med. Center*, 914 So. 2d 1272, 1277 (¶20) (Miss. Ct. App. 2005)(affirming trial court decision which held mere loss of surgeon's surgical preference card did not entitle plaintiff to spoliation inference against hospital absent evidence that loss of the card was negligent). Farm

Bureau bears the burden to demonstrate that it did not act either intentionally or negligently such that the vehicle salvage was lost. *DeLaughter*, 601 So. 2d at 823. Farm Bureau met its burden.

In an attempt to circumvent the uncontradicted facts that Brandon Bolden was driving the accident vehicle at the time of the accident, Plaintiffs contend that "Defendant Farm Bureau caused the vehicle to be lost;" and therefore is a spoliator of evidence, and thus Plaintiffs are entitled to a spoliation inference instruction to the jury. *Brief at p. 14.* In support of this contention, Plaintiffs rely on *Thomas* and *DeLaughter*, *supra*, which are distinguishable from the instant matter.

In *Thomas*, James Thomas claimed to have won a progressive jackpot on a slot machine owned by Casino Data Systems ("CDS") at the Isle of Capri Casino two times. *Thomas*, 781 So.2d at 126. After playing a short period of time, the slot machine locked up and began to make noises and flashing lights, which Thomas thought indicated he had won the jackpot. *Id.* at 127. Thomas was approached by some Isle employees, including a slot technician, who opened the slot machine door to inspect it. *Id.* The slot technician told Thomas he did not hit the jackpot. *Id.* at 128. Thomas continued to play the same slot machine and it locked up a second time making noises and flashing lights like Thomas had hit a jackpot. *Id.* The slot technician again came to inspect the machine and informed Thomas that he had not hit the jackpot. *Id.* Thomas was then told to call the Gaming Commission to report the incidents if was dissatisfied. *Id.* Thomas contacted the Gaming Commission and sent it a summary of the events that had transpired. *Id.* A hearing was held where it came to light that Isle and CDS did not follow the statutory or internal procedures in handling disputes with patrons and that the Central Processing Unit of the slot machine Thomas was playing and claimed to have won the jackpot twice was never tested, preserved or located after it was removed from the Isle of Capri, nor was proper video evidence collected and maintained, which was in violation of the Isle's policy. *Id.* at 129-30. A simple test of the CPU wold have rendered

dispositive evidence in the dispute. *Id.* at 130. The actions of the Isle and CDS caused the permanent and irretrievable loss of the information as to whether Thomas hit the jackpot or not on that slot machine. *Id.* The court determined that due the destruction of the evidence contained in the CPU by CDS and the Isle, Thomas was entitled to the presumption that the evidence contained in the CPU was unfavorable to CDS and the Isle. *Id.* at 134. However, in spite of the presumption, the hearing officer had ample secondary evidence to base his findings, which did not require reversal. *Id.*

DeLaughter was an action filed by Robbie DeLaughter for the wrongful death of his mother, Tera Lambert, against the Lawrence County Hospital and some of its doctors. *DeLaughter*, 601 So.2d at 820. The Hospital refused to release Lambert's medical records that it was required by statute to keep and maintain, to her family without proper authorization. *Id.* at 821. Following Lambert's death, the records custodian was instructed to lock up Lambert's records. *Id.* When following the directions, the records custodian discovered that Lambert's hospital records were missing. *Id.* The Hospital then set about reconstructing Lambert's hospital records, but they were incomplete. *Id.* The court opined that the jury was entitled to be told why the original hospital record was missing. *Id.* at 822. Then, the jury could determine whether the loss of the original medical record was deliberate or negligent on the part of the Hospital. *Id.* If the jury determined that the loss of the original medical record was deliberately or negligently brought about by the Hospital, the jury could infer that the missing original medical record contained information unfavorable to the Hospital. *Id.*

In the instant matter, Farm Bureau did not physically control nor was it in physical possession of the vehicle that Plaintiffs claim to have been spoiled and destroyed by Farm Bureau. Whereas, the lost and destroyed evidence in *Thomas* and *DeLaughter*, *supra*, was in the actual physical control

and possession of the Isle of Capri and Lawrence County Hospital. Farm Bureau did not actively lose or destroy the evidence or cause the destruction of the physical evidence of the vehicle. Further, hundreds of photographs of the vehicle were taken and produced by the parties during the course of this claim and lawsuit to photographically preserve the evidence of the vehicle wrecked remains, therefore not all evidence was destroyed as in *Thomas* and *DeLaughter*. Farm Bureau did not intentionally nor negligently destroy or sell the wrecked vehicle remains. Farm Bureau did all it could to preserve the vehicle remains when it requested IAA put a "hold" on it. Accordingly, as there was no intentional or negligent act on the part of Farm Bureau related to the loss or destruction of the vehicle remains by IAA, Plaintiffs are not entitled to a spoliation inference. Therefore, the trial court's award of summary judgment should be affirmed.

III. Mississippi Does Not and Should Not Recognize an Independent Tort for Spoliation of Evidence.

Plaintiffs are requesting this Court to carve out a special set of circumstances for the instant matter, disregard well-established Mississippi law and now suddenly recognize an independent tort of spoliation. Mississippi does not and it should not now recognize an independent cause of action for spoliation.

In *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124 (Miss. 2002), the Mississippi Supreme Court rejected the proposition that Mississippi law would allow an independent cause of action for intentional spoliation of evidence, stating:

> **We refuse to recognize a separate tort for intentional spoliation of evidence against both first and third party spoliators.**

Id. at ¶ 28. (*Emphasis added.*) Less than a year later, in *Richardson v. Sara Lee Corp.*, 847 So. 2d 821 (Miss. 2003), the Mississippi Supreme Court rejected the proposition that Mississippi law would allow an independent cause of action for negligent spoliation of evidence, stating:

> The *Dowdle* reasoning in refusing to recognize an independent cause of action for intentional spoliation of evidence gains even more force when applied to the issue of whether to recognize an independent cause of action for negligent spoliation of evidence. Accordingly, we decline Richardson's invitation to recognize this independent tort.

Richardson, 847 So. 2d at ¶ 6.

In refusing to recognize an independent tort of spoliation, the Mississippi Supreme Court in *Dowdle Gas*, opined:

> We find persuasive the opinions of the California Supreme Court in *Cedars-Sinai* and *Temple.* Obviously, the preservation of items which might be relevant evidence in litigation is desirable. Nevertheless, the foundation of an inquiry into whether to create a tort remedy for intentional spoliation of evidence must be based on the recognition that "using tort law to correct misconduct arising during litigation raises policy considerations not present in deciding whether to create tort remedies for harms arising in other contexts." *Cedars-Sinai [v. Superior Court,]* 74 Cal.Rptr.2d 248, 954 P.2d [511, 515 (1998)].
>
> Chief among these concerns is the important interest of finality in adjudication. **We should not adopt a remedy that itself encourages a spiral of lawsuits, particularly where sufficient remedies, short of creating a new cause of action, exist for a plaintiff.** Closely akin to the interest in finality of litigation is the concern espoused by the Texas Supreme Court in *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex.1998):
>
> > While the law must adjust to meet society's changing needs, we must balance that adjustment against boundless claims in an already crowded judicial system. We are especially averse to creating a tort that would only lead to duplicative litigation, encouraging inefficient relitigation of issues better handled within the context of the core cause of action. We thus decline to recognize evidence spoliation as an independent tort.
>
> Furthermore, weighing against recognition of the tort is the uncertainty of the fact of harm. As the Arkansas Supreme Court stated in *Goff v. Harold Ives Trucking Co.*, 342 Ark. 143, 27 S.W.3d 387 (2000), "the question goes not only to the amount of damages caused by the destruction of evidence, but also to the very *existence*

> of injury." *Id.* at 390. And, finally, **the costs to defendants and courts would be enormous**, particularly from the risks of erroneous determinations of liability due to the uncertainty of the harm and from the extraordinary measures required to preserve for indefinite periods items for the purpose of avoiding potential spoliation liability in future litigation. **Nontort remedies for spoliation are sufficient in the vast majority of cases, and certainly, as the California courts learned after 14 years of experience with this tort, any benefits obtained by recognizing the spoliation tort are outweighed by the burdens imposed.**

Dowdle Gas, 831 So. 2d at 1135. (*Emphasis added.*) Nothing has changed in the area of law regarding spoliation since this Court decided not to recognize an independent tort of spoliation. The facts of the instant matter do not warrant Mississippi law to be disregarded and changed. Therefore, this Court should reject the Boldens' invitation to recognize an independent cause of action for spoliation in this case, and the trial court's award of summary judgment to Farm Bureau should be affirmed.

A. Farm Bureau did not commit negligent spoliation.

For the sake of argument, if this Court should decide to disregard law and precedent and recognize an independent tort of spoliation of evidence as urged by Plaintiffs, Farm Bureau did not commit negligent spoliation as Plaintiffs claim. Plaintiffs rely on the Florida case of *Continental Ins. Co. v. Herman*, 576 So. 2d 313 (Fla. Dist. Ct. App. 1990), for the elements of the tort of negligent spoliation, which include: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. *Herman*, 576 So. 2d at 315.

In *Herman*, it was not found that the insurance company's placement of the wreckage at a salvage business constituted an affirmative duty as Plaintiffs suggest. *Id.* at 314. However, it was found that Herman had no cause of action for destruction of evidence because she suffered no significant impairment in an ability to prove the underlying suit. *Herman*, 576 So. 2d at 315.

In the instant matter, Farm Bureau had no duty, statutory or contractual, to preserve the wrecked remains of the Bolden Mercedes, nor can Plaintiffs put forth evidence of such duty. Farm Bureau, like the Plaintiffs, wanted the vehicle preserved so that further examination, including the car's "black box," could be conducted. It was not Farm Bureau's decision to move the Mercedes to IAA. In order to avoid personal storage expenses, Plaintiffs decided to move the Mercedes to IAA. Nevertheless, the vehicle remains were moved to IAA and Farm Bureau instructed IAA to place a "hold" on the vehicle for its preservation. Farm Bureau did not promise or represent to Plaintiffs that the vehicle remains would be absolutely safe. Such actions by Farm Bureau do not constitute an "affirmative duty" as Plaintiffs contend.

Plaintiffs also claim that the "loss of the Mercedes significantly impaired the Boldens' ability to prove their case . . . ." *Brief at p. 23.* This is not true. The evidence of the wrecked remains were photographically preserved by the hundreds of photographs taken of the accident scene and of every angle of the vehicle. Additionally, Plaintiffs had every opportunity to inspect and have an expert inspect the vehicle prior to the vehicle's move to IAA. In fact, the Plaintiffs did inspect and photograph the vehicle after the accident, which is evident by the photos Plaintiffs produced during discovery. For the Plaintiffs to claim that they did not get the opportunity to do so because Farm Bureau destroyed the evidence is disingenuine. The truth of the matter is that Plaintiffs had no viable claim of negligence against Murray or UM benefits against Farm Bureau to begin with because the uncontradicted evidence shows that Brandon Bolden was the driver of the vehicle and no other

vehicle was involved in the accident. Furthermore, as state previously, Farm Bureau did not destroy the vehicle remains. Farm Bureau expressly instructed the storage facility – IAA – that the vehicle salvage was to be preserved. IAA's business records show that it received and recorded that instruction. IAA simply did not follow Farm Bureau's instruction.

Accordingly, the elements of the non-recognized tort of negligent spoliation are not satisfied in the instant matter because: (1) there was no legal or contractual duty to preserve the evidence; (2) Farm Bureau did not destroy the evidence; (3) there was no significant impairment in the Plaintiffs' ability to prove their claims (if such claims were viable to begin with); (4) there was no causal relationship between the evidence destruction and Plaintiffs' inability to prove their claims; and (5) Plaintiffs have not been damaged due to the destruction of the evidence by IAA. Therefore, Farm Bureau has not committed negligent spoliation even if such a cause of action were to be recognized in the State of Mississippi.

IV. Farm Bureau is not Liable for Spoliation Under a General Theory of Negligence.

A. Farm Bureau used reasonable care with regard to preserving the vehicle salvage.

Just as the uncontradicted facts demonstrate there can be no claim that Farm Bureau intentionally disposed of the Mercedes salvage, the uncontradicted facts also demonstrate that Farm Bureau was not negligent with regard to the wrecked remains. Farm Bureau expressly instructed the storage facility – IAA – that the vehicle salvage was to be preserved. IAA's business records show that it received and recorded that instruction. IAA simply did not follow Farm Bureau's instruction.

Farm Bureau acted with reasonable care. Negligence consists of the following: (1) a duty, (b) breach of that duty, (c) causing (d) damage. *Thomas v. Columbia Group, LLC*, 969 So. 2d 849 (¶ 11) (Miss. 2007). Even assuming Farm Bureau had a duty to act with reasonable care to preserve the

vehicle salvage, it did so. Farm Bureau's instructions to IAA were that the salvage was to be preserved. IAA received and noted that instruction. IAA then proceeded to disregard Farm Bureau's instruction. It was IAA's disregard of Farm Bureau's instruction that caused the vehicle salvage to be sold and unrecoverable – **not any action by Farm Bureau**. Under the facts of this case, Farm Bureau cannot, as a matter of law, be found negligent with regard to the Mercedes salvage. Rather, Farm Bureau (desiring too, that the vehicle be preserved, so that the vehicle's black box could be extracted) acted with reasonable care. Farm Bureau did not have physical control or possession of the vehicle wreckage. It was the negligence of a third party – IAA – that caused the loss of the remains of the vehicle.

Additionally, Plaintiffs cannot prove that they were damaged as a result of the loss of the vehicle remains. Despite IAA's disposition of the vehicle salvage contrary to Farm Bureau's instructions, the evidence the Boldens seek was actually preserved. Over 350 photographs exist of the vehicle's condition after the accident with every conceivable angle and portion of the vehicle has been photographically preserved. This includes the seat positions in the Mercedes, to which the Boldens have referred for their attempt to claim that Jamaal Murray was driving. The photographs cover every inch of the exterior of the Mercedes such that any actual evidence of impact by an alleged hit-and-run vehicle would be evident. Therefore, despite the actions of IAA, the evidence regarding the vehicle's post-accident condition has been preserved for examination by all parties.[2]

Because the uncontradicted evidence shows that Farm Bureau neither intentionally nor negligently lost the Mercedes salvage, as a matter of law, Farm Bureau used reasonable care with

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The Boldens had access to the Mercedes at the City of Jackson impound yard and/or while it was in their possession at ABC Towing. Having produced photos of it, they cannot complain that they had no opportunity to examine it. Additionally, the Boldens were provided the opportunity by Farm Bureau to keep the Mercedes at ABC Towing at their own expense, and they chose not to do so.

respect to the Mercedes following the accident, and therefore is not liable for spoliation under the general theory of negligence. Accordingly, the trial court's decision should be affirmed.

V. The Trial Court Did Not Abuse its Discretion in Limiting Discovery.

Farm Bureau filed its Motion for Summary Judgment **over nine months** (283 days, to be exact) after Plaintiffs initiated their lawsuit. During those 283 days, Plaintiffs had ample time and every opportunity to conduct discovery as to the issue of the identity of the Mercedes driver at the time of the accident and even whether a second vehicle was involved in and/or caused the accident, as Plaintiffs speculatively allege. Plaintiffs even had the time and opportunity to designate expert(s) to support their speculative allegations. However, Plaintiffs were lazy and dilatory and did not conduct any discovery besides propounding written discovery that was served with their Summons and Complaint.

During those nine months prior to filing its Motion for Summary Judgment, Farm Bureau conducted written discovery and deposed Murray (the only deposition taken prior to summary judgment motions being filed). It is Murray's undisputed and uncontradicted testimony that Brandon Bolden was the driver of the Mercedes at the time of the accident and no other vehicle was involved and/or caused the accident. *R.E. Tab 1; R. 301, 304-306, 310, 324.* In Response to Farm Bureau's Motion for Summary Judgment, Plaintiffs claimed they needed additional discovery in order to respond, when in fact they had sat idly by and failed to pursue the discovery they now claimed they needed.

Plaintiffs rely on *Owens v. Thomae*, 759 So. 2d 1117 (Miss. 1999), for the claim that the trial court below erred by limiting the additional discovery Plaintiffs claimed they needed in order to respond to Defendants' motions for summary judgment. In that case, discovery had been requested but not provided where the trial court was found to have erred in not granting additional discovery.

Owens, 759 So. 2d at 1123. In the instant matter, Plaintiffs did nothing, nor made any effort to conduct discovery beyond the written discovery they served with their Complaint; particularly not to the extent Plaintiff claimed they needed to conduct in their Rule 56(f) Motion.

The trial court has full discretion in its handling of discovery matters and "[t]he decision to grant additional time for discovery in lieu of summary judgment is within the sound discretion of the trial judge and will not be reversed . . . unless the decision can be characterized as an abuse of discretion." *Vaughn v. Miss. Baptist Medical Center*, 20 So.3d 645, 656 (Miss. 2009) (other citations omitted). At the time Farm Bureau filed its Motion for Summary Judgment any additional discovery and/or depositions were not requested by the Plaintiffs nor outstanding on the part of Defendants, like in *Owens, supra.* Rule 56(f) is not to protect the lazy or dilatory litigants. *Id.* at 1120 (citing 10A Wright, Miller & Kane, Federal Practice & Procedure, § 2741 at 549). Therefore, considering the uncontradicted testimony of Murray, **the only live witness of the accident**, that Brandon Bolden was driving at the time of the accident and no other vehicle was involved, the trial court properly exercised its discretion in limiting Plaintiffs' additional discovery to respond to the motions for summary judgment filed by Defendants. Accordingly, the trial court's decision should be affirmed.

VI. The Trial Court Properly Denied Plaintiffs' Motion to Recuse Farm Bureau's Counsel of Record.

Plaintiffs claim that: (1) that lawyers employed with Copeland Cook were involved in loss of the salvage of the Mercedes driven by Brandon Bolden; and (2) that lawyers employed by Copeland Cook had an attorney-client relationship with the Boldens because Copeland Cook allegedly participated in Farm Bureau's settlement of a liability claim made by Jamaal Murray concerning the subject accident thereby creating a conflict of interest requiring the recusal of Farm Bureau's counsel. *Brief at p. 30.*

Copeland Cook was not involved in transfer of the Mercedes to Insurance Auto Auctions. Copeland Cook did not represent Farm Bureau with regard to the liability claim made by Jamaal Murray. Copeland Cook never acted on behalf of the Boldens and/or Brandon Bolden's estate and has not represented them in any way. *R.E. Tab 5; R. 609-617.*

As factually demonstrated previously, no attorney at Copeland Cook was involved in (1) making arrangements for the vehicle salvage to be moved from ABC Towing to Insurance Auto Auctions; (2) moving the vehicle salvage to Insurance Auto Auctions; or (3) re-titling of the vehicle salvage. While attorneys from Copeland Cook assisted in Farm Bureau's attempts to locate and retrieve the vehicle salvage **after** it was sold by Insurance Auto Auctions, that activity **postdates** the spoliation alleged by Plaintiffs. No attorney with Copeland Cook had an attorney-client relationship with the Boldens or did any act on behalf of the Boldens.

As a legal and ethical matter, even if Tucker Mitchell or his associate, Mike Gatling, could arguably be witnesses in this matter, it would not disqualify the entire Copeland Cook firm from representation of Farm Bureau. Rule 3.7 of the Mississippi Rule of Professional Conduct provides:

> **Rule 3.7. Lawyer as Witness**
>
> **(a)** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> **(b)** *A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.*

Miss. R. Prof. Conduct 3.7 (*Emphasis added*). Neither Mr. Mitchell nor Mr. Gatling are acting as advocates for Farm Bureau in this case. Rather, other attorneys employed with Copeland Cook are handling the litigation. This is permissible under Rule 3.7.

Testimony regarding Copeland Cook's involvement with regards to requesting the vehicle remains be moved to IAA and determining whether the vehicle remains could be retrieved after it was learned that IAA disregarded Farm Bureau's instruction to place a hold on the remains would do nothing to disqualify the entire Copeland Cook firm from representation of Farm Bureau in this matter. Rules 1.7 and 1.9 concern conflicts of interest involving current and former clients. There is no conflict of interest here. As noted by the Comment to Rule 3.7:

> Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved . . . .

Comment, Miss. R. Prof. Conduct Rule 3.7. *See also* 6 JEFFREY JACKSON ET AL., ENCY. OF MISS. LAW § 59:119 (2009), *available at* MSPRAC-ENC § 59:119 (Westlaw) ("Although a lawyer may be disqualified from acting as an advocate...that disqualification is not imputed to the lawyer's law firm. The law firm may act as the advocate at trial even though a lawyer in the law firm will be a material witness.") (citing MISS. RULES OF PROF'L CONDUCT R. 3.7(b), 1.10(a)); Miss. Bar Op. No. 195 (1991) (concluding that lawyer's partner may continue to represent executrix in will contest and other lawyer could continue to represent executrix in other matters regarding administration of estate where latter had been long-time attorney for deceased, no substantial conflict between likely testimony of lawyer and client, and lawyer's withdrawal would work substantial hardship to client); Miss. Bar Op.

No. 122 (1986) (concluding that a lawyer representing a client in pending litigation may continue the representation after he learns or it is obvious that he or a lawyer in his firm may be called as a witness on behalf of the adverse party unless it is apparent that the testimony is or may be prejudicial to the client).[3]

There is no evidence that would be adverse to Farm Bureau concerning settlement of Jamaal Murray's liability claim. Copeland Cook did not represent Farm Bureau in handling that claim or that settlement, much less the Boldens. *R.E. Tab 5-6; R. 609-617; 620-629.* The settlement of Murray's liability claim was handled by Barry Kelley on behalf of Farm Bureau. *R.E. Tab 6; R. 620-629.* Because Copeland Cook did not deal with the liability claim, and there was no attorney-client relationship between Copeland Cook and the Boldens, there is no basis for disqualification of Copeland Cook as Farm Bureau's counsel. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 so. 2d 1206, ¶56 (Miss. 2002) (required element of motion to disqualify counsel based on conflict of interest is "an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify"). Therefore the trial court's decision should be affirmed.

Additionally, Jamaal Murray's claim was handled directly by Farm Bureau through its own Senior Claims Representative, Barry Kelley. There was nothing wrong with this. Further, the Boldens' auto policy with Farm Bureau provided in pertinent part:

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See also Comment to Rule 3.7 of the American Bar Association Model Rules of Professional Conduct.

INSURING AGREEMENT

A. We will pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident and arising out of the ownership, maintenance or use of any **covered auto** including loading and unloading thereof. Damages include prejudgment interest awarded against any **insured**. *We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. . . .*

R. 643. (Italics are emphasis added.) Farm Bureau had the right under the policy to settle the Jamaal Murray claim as it thought appropriate. *See Louque v. Allstate Ins. Co.*, 314 F.3d 776, 782-83 (5th Cir. 2002) (Louisiana) (insuring agreement language gives insurer total authority to settle claims within policy limits, with or without consent of the insured).[4] *See also* Lee R. Russ et al., Couch on Insurance §203:7 (3d 2009), *available at* Couch §203:7 (Westlaw) (policy language granting insurer the right to investigate, negotiate and settle any claim as it finds "expedient vests the insurer with absolute authority to settle claims within policy limits, and the insured has no power to compel or prevent such settlement."). Farm Bureau acted within its own valid rights under the policy. Therefore, the trial court was correct in denying Plaintiffs' Motion to Recuse Counsel of Record and should be affirmed.

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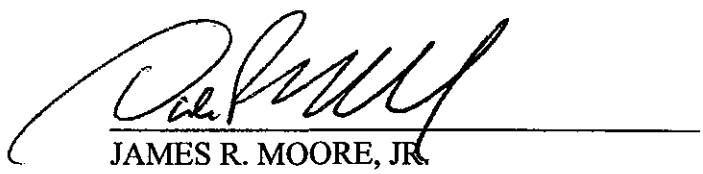
Mississippi law does impose duties of notice to an insured regarding settlement offers within policy limits, if a third-party claim exceeds an insured's policy limits. *Hartford Acc. & Indem. Co. v. Foster*, 528 So. 2d 255, 265 (Miss. 1988). Jamaal Murray's claim, however, did not exceed the Boldens' policy limits.

CONCLUSION

For the foregoing reasons, the trial court was correct in awarding summary judgment to Farm Bureau; correct in not recognizing an independent tort of spoliation; correct in exercising its discretion in limiting Plaintiffs' additional discovery to respond to motions for summary judgment; and correct in denying Plaintiffs' Motion to Recuse Counsel of Record. Therefore, this Court must affirm the trial court's decisions.

Respectfully submitted, this the 7TH day of June, 2011.



JAMES R. MOORE, JR.
DALE G. RUSSELL
Attorneys of record for Mississippi Farm Bureau Casualty Insurance Company

CERTIFICATE OF FILING

I, DALE G. RUSSELL, do hereby certify that I have this day caused to be delivered, **via courier**, the original and three true and correct paper copies and a diskette of the Brief of Appellee Mississippi Farm Bureau Casualty Insurance Company., to:

Kathy Gillis, Clerk
Supreme Court of the State of Mississippi
Office of the Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Jackson, MS 39201

THIS the 7th day of June, 2011.

DALE G. RUSSELL

CERTIFICATE OF SERVICE

I, DALE G. RUSSELL, do hereby certify that I have this day forwarded by U. S. mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Dennis C. Sweet, III, Esq.
SWEET & ASSOCIATES
158 East Pascagoula Street
Jackson, Mississippi 39201

Rick D. Patt, Esq.
PATT LAW FIRM, PLLC
1520 North State Street
Jackson, Mississippi 39202
Attorneys for Plaintiffs

Sam S. Thomas, Es.
Underwood Thomas PC
115 Homestead Drive
Post Office Box 2790
Madison, MS 39110
Attorney for Jamaal Murray

Honorable Jeff Weill, Sr.
Circuit Court Judge
Post Office Box 327
Jackson, MS 39205

THIS the 7th day of June, 2011.

DALE G. RUSSELL