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I. INTRODUCTION

Appellants (hereinafter "the Boldens"), as set forth in their principal brief, present to this Court the issues of whether the trial court erred in: 1) granting summary judgment and dismissing all the claims against the Defendant on the basis of no genuine issue of material fact as to whether any person other than Brandon Bolden was driving the vehicle or the accident was caused by a person other than Brandon Bolden, finding that there was no cause of action for a spoliation claim, and not addressing Plaintiff's adverse inference instruction issue; 2) granting the June 11, 2010 Order Staying Consideration of Defendants' Motions for Summary Judgment by improperly restricting discovery of the Plaintiff by limiting discovery only to the issue of whether or not Brandon Bolden was the driver of the vehicle; and 3) entering its Order Denying Motion to Recuse Counsel on June 11, 2010, finding that the firm in question did not represent the Boldens or Jamaal Murray and did not have any involvement in the moving of the vehicle.

The Boldens will reply to the Briefs submitted by Appellees' Jamaal Murray (hereinafter "Murray") and Mississippi Farm Bureau Casualty Insurance Company (hereinafter "Farm Bureau"), and will endeavor only to rebut certain claims made by Appellants in their briefs and not to unnecessarily repeat arguments made in their initial pleading. The initial brief submitted by the Bolden Appellants provides the proper caselaw and supporting records arguments against the position of the Appellees Murray and Farm Bureau.

II. REPLY TO APPELLEES' STATEMENT OF THE CASE

As set forth previously, and recapped herein in an abbreviated manner, this case arises out of an automobile accident which occurred on or around June 14, 2007 in Hinds County, Mississippi. Two persons, Brandon Bolden and Jamaal Murray, were in the subject vehicle, a

Mercedes convertible, which was owned by the mother of Brandon Bolden, Marilyn Bolden. The vehicle left the road, careened into a tree and ejected Brandon Bolden completely from the automobile. Murray then called the police, but left the scene of the accident before the arrival of the police or EMT personnel.

After Farm Bureau requested that the vehicle be moved and stored at a location it recommended, the vehicle was moved to Insurance Auto Auctions. Farm Bureau denied the uninsured motorist coverage, stating that no other uninsured actor contributed to the collision and that there did not appear to be a second vehicle involved. After Marilyn Bolden inquired about the vehicle in order to do an inspection, she was informed that the vehicle had been sent from the storage location, and was eventually informed later that it had been sold out-of-state.

The Bolden Appellants object to statements in both of the Briefs of the Appellees, wherein both Appellants state that the vehicle "rolled over". (Brief of Appellee Farm Bureau, p. 6, 13 and Brief of Appellee Jamaal Murray, pages 6, 15), citing the deposition of Jamaal Murray, R. 293, 301-305. But in point of fact, in his deposition, Appellee Jamaal Murray simply stated the vehicle "spun out" and "...the car was turning around...". (R. 302; Brief of Appellant Murray, p. 6). He never testified that that the vehicle "rolled over", but rather that it just spun around. Appellee Farm Bureau, at the bottom of page 13 of its Brief, stated the testimony of Office Bufkin that the vehicle "rolled over" several times (R. 725), but in fact Officer Bufkin actually clarified and said it "appeared to have rolled several times". Additionally, Officer Bufkin was simply a crime scene investigator who was on the scene, and had no training in any type of accident reconstruction. Officer Bufkin even stated in his deposition that the crime scene unit was not responsible as accident investigators, and that was why Officer Cotton was called out. Officer Cotton, who had accident reconstruction training, never testified that the vehicle

"rolled over". The issue of whether the vehicle "rolled over" is important in discussing the issue of the position of the seat.

Additionally, on page 14 of the Brief of Appellant Jamaal Murray, his argument that the position of the seat would change "every day" (R. 692) supports the Appellants' arguments that this is a matter to be left up to the jury, as the position of the seat is crucial evidence as to who was driving, and the position of the seat may be used by a jury to determine the identity of the driver. Therefore, these factual issues incorrectly set forth in the Appellees' Summaries of Facts support the Appellants' contention that a jury issue remains and summary judgment was imprudently granted.

III. REPLY TO ARGUMENTS OF APPELLEES

As set forth previously, the Circuit Court erred in granting summary judgment and entering a Final Judgment dismissing all claims with prejudice against the Defendants, and committed reversible error in finding that there was no genuine material issue of fact remaining. The trial court abused its discretion in granting summary judgment and finding that there was no evidence that any person other than Brandon Bolden was driving the vehicle or the accident was caused by a person other than Brandon Bolden or another vehicle. In so doing, the Court erred in not addressing Plaintiff's spoliation adverse inference instruction, which, when combined with the evidence about the position of the seat and the statements of the officers on scene that they had no way of knowing from the evidence at the scene who was or was not driving, would preclude the granting of a summary judgment at this stage of the proceeding. Plaintiffs put forward evidence and raised a reasonable issue of doubt to justify an adverse inference instruction, so that a finder of fact would likely be instructed that it was to consider that an examination of the vehicle would lead to evidence unfavorable to the Defendant Farm Bureau.

Additionally, the trial court improperly restricted the discovery process by its order limiting further discovery to the identity of the driver only, which did not allow the Plaintiffs to explore further evidence intended to bolster its showing of genuine issues of material fact. The trial court also erred in finding that the law firm of Copeland Cook should not be required to recuse itself from representation due to its having entered into a settlement for Farm Bureau on behalf of the Bolden parents and Brandon Bolden himself, though deceased.

A. Reply to Appellant Farm Bureau's Spoliation Instruction Argument

Appellee Farm Bureau argues that since it claimed that since "Farm Bureau did not physically control nor was it in possession of the vehicle" (Brief of Farm Burueau, p. 16), the cases cited by Plaintiff (*Thomas v. Isle of Capri Casino*, 781 So.2d 125, 133-34 (Miss. 2001), and *DeLaughter v. Lawrence Co. Hospital*, 601 So.2d 818, 821-23 (Miss. 1992), are distinguishable. Farm Bureau would naturally assert this interpretation, as *Thomas* and *DeLaughter* hold that when evidence is lost or destroyed by a party, thus hindering another party's ability to prove his or her case, a presumption is raised that this missing information would have been unfavorable to the party responsible for the loss or destruction of such evidence. The Boldens never claimed that the vehicle was actually on the property of Farm Bureau, but rather that Farm Bureau, through the July 10, 2007 letter from its attorney at Copeland Cook and the July 16, 2007 letter from Farm Bureau, requested that the vehicle be stored at Insurance Auto Auctions. In its Brief (p. 8), Farm Bureau admitted that it was using the attorney at Copeland Cook to write the letter to the Boldens requesting that the vehicle be moved to Insurance Auto Auctions, and that Farm Bureau wrote a follow-up letter requesting the same action.

Now, in its Brief, Farm Bureau presents the argument since it did not "actively" lose or

destroy the evidence (Brief of Farm Bureau, p. 17), but requested that a "hold" be placed on it. In support of this contention, Farm Bureau submitted an affidavit of Barry Kelley of Farm Bureau, wherein he stated that he put a hold on the vehicle. Of course, this argument begs the questions: 1) was it reasonable to use Insurance Auto Auctions to store the vehicle; 2) had they ever had a history of selling vehicles in situations where requests were made to hold them; 3) was it reasonable to have only oral instructions to hold the vehicle without following up with a letter or fax to confirm in writing the instruction to hold the vehicle; 4) did Farm Bureau have any liability for the actions or inactions of Auto Insurance Auctions after and/or because of the fact that it gave them the title; and 5) did Farm Bureau properly monitor or keep tabs on the vehicle at Insurance Auto Auctions in order to ensure that it was preserved so that if it were sold or transferred, it could be recovered before destroyed. Farm Bureau argues that since it didn't actively destroy it, such instruction could not be given, neglecting to address the above-noted questions which may be considered in deciding if Farm Bureau's use and monitoring of Insurance Auto Auctions was negligent so that an adverse inference instruction could be given to the finder of fact on the issue of the identity of the driver or the involvement of another vehicle. As the Boldens argued, an easy way to make sure that a "hold" was actually effective was not to send the title with the vehicle, so that it couldn't be sold or transferred without prior warning. If the title were sent with the vehicle supposedly "on hold", it is a genuine issue of fact as to whether Farm Bureau was negligent in this action and in using this storage facility.

However, due to the restriction placed on the discovery of Plaintiffs that only discovery as to the driver of the vehicle could be conducted, Plaintiffs were not able to obtain evidence as to the propriety of the use of Insurance Auto Auctions by the Farm Bureau. Additionally, such questions of negligence were properly to be determined in the granting of the adverse inference

instruction which may have been used by the Plaintiffs. Therefore, the Court erred in refusing to consider the issue of the effect of an adverse inference instruction and the limiting of discovery on this issue, so that such was not able to be used by the Boldens to contest the granting of the summary judgment motion.

B. **Reply to Appellant Farm Bureau's Spoliation Independent Tort Argument**

Appellees Farm Bureau and Murray cites *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1127 (Miss. 2002) and its citation of *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998) for the proposition that an independent tort of spoliation is not needed due to not wanting to "adopt a remedy that encourages a spiral of lawsuits, particularly where sufficient remedies, short of creating a new cause of action, exist for a plaintiff." But one must be aware that the "sufficient remedies" referred to in that case include the adverse inference instruction that the Appellants in this matter are denying should even be applied.

Therefore, Appellants' argument is that an independent tort is not needed because there are other mechanisms to address the problem. However, Farm Bureau also argues that it is not responsible for what happened to the evidence since it only recommended it be sent there and caused the Boldens to send it there, but didn't actually have in on their property. In those cases, a party could never have any negative consequence to taking actions to destroy evidence as long as they didn't have it in their actual (or figurative) hands. Because of the actions of Farm Bureau, any potential case that the Boldens had in a products liability matter, and an important piece of evidence which could have shown the involvement of another vehicle, was destroyed with the car.

Farm Bureau argues that, even if such a tort is created, it did not commit negligent spoliation because it had no duty to preserve the wrecked remains of the automobile. As set out

in their initial brief, under Mississippi tort law, a person does not possess an "affirmative duty" to act, absent "particular circumstances." *Higginbotham v. Hill Bros. Const. Co.*, 962 So.2d 46, 56 (Miss Ct. App. 2006). However, anyone who undertakes the performance of an act possesses an "affirmative duty" to exercise care. *Dr. Pepper Bottling Co. of Miss. v. Bruner*, 148 So.2d 199, 201 (Miss. 1962). If one undertakes an "affirmative duty" and subsequently breaches that duty, he may be held "accountable at law for an injury to person or property, which is directly attributable to a breach of such duty. *Id. Restatement (Second), of Torts*, §324A (1965) states that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

By affirmatively taking steps to make sure the auto was sent to Insurance Auto Auctions in order to preserve it and to have Farm Bureau pay the storage fees, Farm Bureau undertook this duty to make sure that the vehicle was secure and should be liable for any negligent acts in having the auto disappear. On page 20 of its Brief, Farm Bureau stated that it was not their decision to move it to IAA, but was solely the Boldens'. The letters speak for themselves. Farm Bureau strongly insisted, in two letters less than one week apart, that the Boldens allow them to move it to IAA, and the Boldens acquiesced. Therefore, Farm Bureau did state steps to send it to this location, and should be held liable if such entity was either not qualified to keep it or took action to dispose of the vehicle because of inadequate safeguards of Farm Bureau.

C. **Reply to Appellant Farm Bureau's Limtiation of Discovery Argument**

Farm Bureau and Murray stated that they filed the Motions for Summary Judgment in November 2009, nine months after the Plaintiffs filed the lawsuit. While this timeline is correct, those parties failed to put that timeframe into proper context. The case was filed on February 20, 2009, but the Defendants were not served right away. Summons were not issued until the end of March. In fact, when Farm Bureau filed its Answer, it included a Counterclaim, and the Plaintiffs timely answered the Counterclaim on or around the same date (June 8, 2009) that the Defendant Jamaal Murray filed his Answer. So it was almost four of those nine months before even the Answers had been filed by the parties. That next month, the deposition of Jamaal Murray was taken, and all during this time, full and complete written discovery was being conducted and exchanged by and between all of the parties, even though a scheduling order had not yet been entered. Therefore, the implication that the Plaintiffs were somehow "lazy" and the implication that the Plaintiffs sat on their hands for nine months doing nothing until Defendants filed a summary judgment motion is false.

After the Plaintiffs requested additional discovery, Court restricted the discovery to the sole issue of the driver of the automobile, even though the presence of another vehicle in the accident could have made the UM coverage on the vehicle collectable. Plaintiffs' counsels were not allowed to get into any matter in the subsequent depositions except the driver of the vehicle, and were not to get into the area of the involvement of another vehicle. (Of course, the destruction of the vehicle made such examination more difficult, if it were allowed.) Additionally, Plaintiff was not allowed to conduct any other discovery on the actions or inactions of Farm Bureau or Insurance Auto Auctions as to what happened to the vehicle and whether such procedures used by Farm Bureau were negligent. Therefore, Plaintiffs were hampered in every

aspect of the case by the ruling of the trial court restricting discovery, although it was only over five months since the Answers had been filed in the case before the Summary Judgment motion was filed.

D. Reply to Appellant Farm Bureau's Attorney Recusal Argument

On page 25 of the Brief of Appellee Farm Bureau, Farm Bureau states that no attorney from Copeland Cook was involved in making arrangements or moving the vehicle to IAA. However, the letter from Copeland Cook of July 10, 2007 (R. 51) clearly puts the attorney at Copeland Cook in the middle of the effort to convince the Boldens to move the vehicle to IAA, and the Boldens relied on the recommendation of Copeland Cook to agree to have it moved. Therefore, the Court erred in refusing to recuse the law firm from the matter.

V. CONCLUSION

For these reasons, and the reasons set forth in Appellants Artis and Marilyn Bolden's initial Brief in this matter, the Appellants respectfully request that the Mississippi Supreme Court reverse the ruling of the Circuit Court of the First Judicial District of Hinds County, Mississippi, and remand the case to the lower court for proceedings related to the declaratory action against Farm Bureau and the negligence action against Farm Bureau and Jamaal Murray. There are genuine material issues of fact which preclude summary judgment, based on the evidence presented by the Plaintiffs and the adverse inference instruction which will be used to support the same.

Additionally, the Court should take steps, insomuch as it has the authority as an intermediate Court of Appeals, or the Supreme Court if ultimately decided therein, and take this occasion to establish the independent tort of spoliation of evidence, thereby allowing to proceed a negligent spoliation case against Defendant Farm Bureau, and saving that, the Supreme Court

should allow such claim to proceed under a general theory of negligence. Further, the Court should rule that the trial court erred in limiting discovery of Plaintiff, and failing to order the recusal of the firm Copeland Cook from the matter in circuit court.

The errors of the lower court require this matter be reversed and remanded, or alternatively, the cumulative errors pointed out mandate such reversal for proceedings consistent with the dictates of this Court.

Respectfully submitted, this the 25 day of July. 2011.

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CERTIFICATE OF SERVICE

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