

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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NO. 2011-CA-00225

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FALESCA MONTGOMERY

PLAINTIFF-APPELLANT

versus

JEREMY HELVESTON  
AND  
SAFECO INSURANCE COMPANY OF ILLINOIS

DEFENDANT-APPELLEE

---

BRIEF OF APPELLANT

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APPEAL FROM THE CIRCUIT COURT  
OF STONE COUNTY, MISSISSIPPI  
CAUSE NO. 2008-223

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MS BAR # [REDACTED]  
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ORAL ARGUMENT IS NOT REQUESTED

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
NO. 2011-CA-00225**

**FALESCA MONTGOMERY**

**APPELLANT**

**VS.**

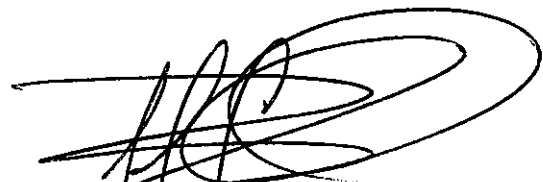
**JEREMY HELVESTON AND  
SAFECO INSURANCE COMPANY OF ILLINOIS**

**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and/or entities have an interest in the outcome of this cause. These representations are made in order that the Justices of the Supreme Court and/or the Judges of Court of Appeals may evaluate possible disqualification or recusal:

1. The Honorable Roger Clark - Circuit Court Judge of Stone County.
2. Safeco Insurance Company of Illinois - Defendant/Appellee.
3. Wright Hill Jr. - Attorney for SafeCo Insurance Company of Illinois
4. Falesca Montgomery- Plaintiff/Appellant
5. Andrew C. Burrell - Attorney for Falesca Montgomery.



\_\_\_\_\_  
ANDREW C. BURRELL  
ATTORNEY FOR APPELLANT  
FALESCA MONTGOMERY

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**VS.**

**JEREMY HELVESTON AND  
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**APPELLEE**

**I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Whether the Circuit Court erred in granting, Defendant's, Safeco Insurance Company of Illinois, Motion to Dismiss.

## **STATEMENT OF THE CASE**

References to the Record Excerpts submitted by Montgomery shall be by notation. (R. Ex.).

On or about November 14, 2008, Plaintiff, Ms. Falesca Montgomery, filed her Complaint against Jeremy Helveston due to a motor vehicle accident which occurred on or about December 5, 2005. (R. 3-5). Plaintiff then filed an Amended Complaint before service of process was completed on March 5, 2009. (R. 6-9). Defendant, Safeco Insurance Company ( hereinafter "Safeco"), was served on June 22, 2009 (R. 12-13) and Defendant, Safeco, filed its answer July 26, 2009 (R. 20-24). Defendant, Helveston avoided process for some time resulting in an extension of the time to serve (R. 15).

Defendant, Helveston has not filed an answer nor responded in anyway to the litigation of this claim.

Defendant, Safeco, file their first Motion to Dismiss on September 3, 2009. (R. 31). Plaintiff, Montgomery, filed her Response to Defendant's Motion on November 4, 2009 (R. 52). The Court denied Defendant's Motion for Dismiss on February 22, 2010. (R. 83-84). Defendant's, Safeco, Petition for Interlocutory appeal was denied by this Court on April 7, 2010. (R. 85.) Defendant, Safeco, then filed its Second Motion to Dismiss on November 15, 2010 (R. 90-117). Plaintiff filed her Response on January 11, 2011 (R. 119 -121). The Court granted the second Motion to Dismiss on January 27, 2011. ( R. 129-130). Plaintiff filed her Notice of Appeal on February 9, 2011 (R. 131-137) and her Amended Notice on February 14, 2011. (R. 138-144).

## **STATEMENT OF FACTS**

On or about December 5, 2005, Plaintiff, Ms Falesca Montgomery, was a restrained passenger of a motor vehicle traveling south on Highway 49 in McHenry, Mississippi when Defendant, Jeremy Helveston, attempted to cross the southbound lanes and collided with Plaintiff's vehicle. (R. 3). The accident report shows no proof of insurance for the Defendant, Jeremy Helveston, and the vehicle was owned by another party, Burnell Fairley. (R. 84). The Plaintiff received a copy of the accident report approximately 10 days after the accident and it showed no proof of insurance for the driver, Defendant, Helveston. (R. 55-60). The accident report shows no answer toward coverage for the owner of the vehicle, Burnell Fairley. (R. 55-60). Plaintiff's first attorney on the matter at bar as a matter of policy placed Plaintiff's own carrier on notice of a potential uninsured claim on January 4, 2006. (R. 116). Specifically, the letter reads "I believe it is unlikely that there will be no liability insurance coverage, and would like to take this opportunity to give you notice of the potential for an uninsured motorist claim." (R. 116). At that time no discussion or conversations were had with Mr. Helveston or Burnell Fairley other than a brief telephone call the Defendant, Helveston, made to the Plaintiff, in which said Defendant stated he had no insurance. (R. 115). To date, there has been no communication with Burnell Fairley or Helveston through Plaintiff's counsel's of record.

Plaintiff and her husband, Paul, were both injured as a result of their involvement in the accident. Both received treatment for various injuries. Paul Montgomery's injuries were not as severe as his wife's and thus he completed treatment earlier and in August 2007, a demand for settlement was made under the uninsured motorists provisions of the

Plaintiff's own policy, that of Defendant, Safeco Insurance Company, and negotiations on that demand began in August 2007. ( Hearing Transcript pg 7).

Plaintiff continued care and as a result filed her Complaint against Defendant, Helveston, on November 14, 2008. (R. 3-9). Plaintiff then filed an Amended Complaint to include, Defendant, Safeco, on March 5, 2009. (R. 6-9). Defendant, Safeco, filed its answer to the Amended Complaint, on July 8, 2009. (R. 20-24 ). Defendant, Safeco, then filed its first Motion to Dismiss the Complaint on September 3, 2009. (R. 31). A response was filed by the Plaintiff (R. 52-53) and the Court denied said motion "stating that the question of whether Helveston is uninsured and was not it also not conclusive as to whether Fairley was insured. Thus, the proof presently before the Court is insufficient to make a determination of the day when Montgomery "knew or should have known" that Helveston was uninsured, but it was some time after December 5, 2005, the date the Defendant argued triggered the running of the statute of limitations." (R. 83-84). This Court denied Interlocutory Appeal on this issue on April 12, 2010. (R. 85).

Defendant, Safeco, then filed its Second Motion to Dismiss on November 15, 2010. (R. 90-118). Defendant cited and attached to its motion two letters from Plaintiff's first attorney, dated January 4, 2006 and January 19, 2006, wherein medicals of both Mr. and Ms Montgomery were attached. (R. 116-7). Plaintiff filed her response. (R. 119-21). The Court at that time granted Defendant, Safeco's Motion, stating that within a week to ten days after receiving the accident report and by sending a letter dated January 4, 2006 of a potential uninsured motorist claim was sufficient of the date of when Plaintiff knew or should have known that she had a claim for uninsured motorist benefits to start the statute of limitations. ( R. 129-30). Plaintiff then filed her Notice of Appeal to this Court. (R. 139).



### **III. SUMMARY OF THE ARGUMENT**

The trial court erred in granting Defendant's Motion for Dismiss as it was still unlikely that the Plaintiff knew or should have known that the Defendant or the owner of the vehicle which caused the accident was uninsured for the purpose of beginning to run the three year statute of limitations which governs these actions.

In granting the Second Motion to Dismiss, the lower court stated that there were enough facts known at the time of the receipt of the accident report and that the Plaintiff's letter to the Defendant, Safeco, advising of a "potential" uninsured claim was enough to begin running of the statute of limitations as the Plaintiff, Montgomery, "knew or should have known" that she had a claim for uninsured motorist benefits against Safeco. In *Jackson v. State Farm Mut. Auto. Ins. Co.*, 880 So.2d 336, 343 (Miss. 2004), this Court states that the statute of limitations accrues in an uninsured motorist claim when the Plaintiff knew or reasonably should have known that the damages exceeded the insurance limits available from the alleged tortfeasor. *Id.* at 341. In the case at bar, the reliance on the accident report which does not state "no insurance", but rather, "no proof of insurance," should not be found to be sufficient to begin the running of the statute of limitations. Further, this statement of no proof of insurance on the accident report is only toward the driver, Helveston not the owner of the vehicle Fairley. Then, within the writing of the Plaintiff's first attorney's letter it is only stating there may be a "potential" uninsured motorist claim. It is unreasonable to say by that date the Plaintiff knew or should have known what claims existed as the investigation had not been completed. Rather, the Court should find that the statute of limitations began to run around August, 2007, when Defendant Safeco, accepted the demand for uninsured motorist benefits on Plaintiff's husband Paul

Montgomery, thus confirming at that point, that the Plaintiff knew or should have known that no recovery could be made from the Defendant, Helveston and thus the Amended Complaint was timely filed.

Thus, the ruling of the lower court should be reversed and the claim be remanded for continuance as the Plaintiff's Amended Complaint was timely filed.

#### **IV. ARGUMENT**

A cause of action against an insurer for uninsured-motorist benefits is subject to a three-year statute of limitations. Miss. Code Ann. Sec. 15-1-49. See *Mitchell v. Progressive Ins. Co.*, 965 So.2d 679, 683 (Miss. 2007). The issue in the case at bar is when the statute of limitations begins to run.

In *Jackson v. State Farm Mutual Insurance Co.*, 880 So.2d 336, 343 (Miss. 2004), the Mississippi Supreme Court held that the statute of limitations for an uninsured-motorists claim begins to run when it can be reasonably known that the damages suffered exceed the limits of insurance available to the alleged tortfeasor.

The Circuit Court ruled that the accident report received some six to ten days after the accident and the letter sent by Plaintiff's first attorney of a "potential" uninsured claim was sufficient to start the statute of limitations on January 4, 2006 thus making the Plaintiff's Amended Complaint filed March 6, 2009 untimely.

However, the Court should find error in this decision. First, the accident report, shows only "no proof of insurance" to the driver, Defendant, Helveston. There is no information as toward the owner of the vehicle, Fairley, being insured or uninsured. The accident report, no matter when it was received, only begins the investigation period to determine what claims if any exist.

Further, by statute and by insurance policy terms, notice of the claim must first be given the insurance company. Miss. Code Ann. Sec. 83-9-5(e) (Rev. 1999). No suit may be brought sooner than sixty days after written proof of loss has been given, nor later than three years after the proof of loss. Miss. Code Ann. Sec. 83-9-5(k) (Rev. 2002). Thus, based on the statute, the statute of limitation on the case at bar could not begun to run on January 4, 2006 or before.

The Plaintiff's attorney simply notifying Defendant, Safeco, of a "potential" uninsured motorists claim on January 4, 2006, is simply that. A notification of a possible claim, with no certain ideal as towards the existence of insurance from the tortfeasor, the owner of the the vehicle, nor the amount of damages by the Plaintiff; that date and letter are insufficient to start the running of the statute of limitations. Further, there has still been no proof of insurance or lack thereof from either Defendant, Helveston or owner, Fairley. There has been no default taken against Defendant, Helveston, or owner Fairley, which would clearly begin the running of the statute of limitations. See *Madison v. Geico General Ins. Co.*, 2009-CA-01723-COA (MSCA 2010).

In *Madison*, this Court, found that the complaint was untimely found, when the Plaintiff had taken a party's deposition and that party admitted under oath that there was no insurance. The court found that was when it was clear that Madison was put on notice that she would need to pursue a claim under the uninsured-motorist provision of her policy.

At the case at bar, there has been no such taking of depositions or statements by both of the at fault parties that insurance does or does not exist and thus it should be found that on the day of accident, or even after the receipt of the accident report, some six to ten

days later, that enough evidence existed for the Plaintiff to "know or should have known" the limits of any policy or the extent of her claim and how to pursue it.

However, it is evident that both Plaintiff's husband, Paul Montgomery, and Defendant, Safeco, began settlement negotiations in August 2007. It can be reasonably determined at that point, all parties determined that recovery for parties Helveston and Fairley was unlikely and thus it is that date that should start the running of the statute of limitations as that is when the Plaintiff knew or should have known that the claim which existed out of the motor vehicle accident was an uninsured motorist claim.

Thus, the Circuit Court's granting of the Defendant's second Motion to Dismiss of the Plaintiff's claim was in error as the Amended Complaint including the Defendant, Safeco was filed properly and within the three year statute of limitations.

#### **V. CONCLUSION**

Since the filing of the Amended Complaint was done within three years of when the Plaintiff "knew or should have known" that she had a claim for uninsured motorist benefits against Defendant, Safeco, the Circuit Court decision to grant the Defendant's Motion to Dismiss was in error and thus the decision should be reversed and the case remanded back to the lower court as the Plaintiff could not have known or should have known by January 6, 2006 what claims if any existed.

Respectfully submitted this the 24, day of May, 2011.

FALESCA MONTGOMERY

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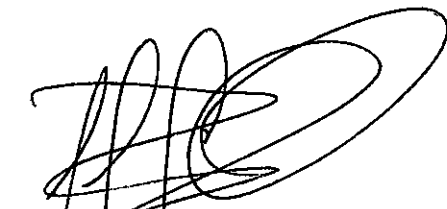
**CERTIFICATE OF SERVICE**

I, Andrew C. Burrell, do hereby certify that I have this day filed this Appellant's Brief with the Clerk of this Court on behalf of the Supreme Court of Mississippi, and have served a copy of this Notice of Appeal by United States mail, with postage prepaid, to counsel for Defendant/Appellee, as follows:

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Honorable Roger Clark  
Circuit Court Judge of Stone County  
323 Cavers Ave  
Wiggins, MS 39577

This the 24<sup>th</sup> day of May, 2011



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