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IN THE MISSISSIPPI SUPREME COURT
No. 2014-CA-00180

KATRICE JONES-SMITH and NANCY JONES
Appellants

v.

SAFEWAY INSURANCE COMPANY
Appellee

APPELLANTS' BRIEF

Appeal from the Circuit Court of Rankin County,
No. 2013-0035, the Hon. William E. Chapman, III, presiding

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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 justices of this Court may evaluate possible disqualifications or recusal.

Katrice Jones-Smith
Nancy Jones
Appellants/Plaintiffs

Taurean Buchanan
Attorney for Appellants/Plaintiff

Safeway Insurance
Appellee/Defendant

Jeremy T. Hutto
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Attorneys for Appellees/Defendants

Hon. William E. Chapman, III
Rankin County Circuit Court Judge

SO CERTIFIED, this the 1st day of August, 2014.

/S/ TAUREAN BUCHANAN
TAUREAN BUCHANAN

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STATEMENT OF THE CASE

This is a declaratory judgment action that arose out of a car accident that occurred on December 18, 2012, on Interstate 20 in Rankin County. On that day, William Busby was driving westbound on I-20 when he crashed into the rear of another vehicle which caused that vehicle to crash into a vehicle driven by Katrice Jones-Smith. Busby was driving a vehicle owned by his mother Michelle Busby. Michelle insured the car through Safeway Insurance Company.

In the insurance application, Michelle was asked to warrant that she was the only regular, frequent driver or household resident fourteen (14) years of age or older. Although her son William allegedly resided with her and was fifteen at the time, Michelle did not indicate that he was another household resident.[1]

In February 2013, Safeway filed a declaratory judgment action asking the Court to find Michelle Busby's policy void due to Michelle's omission on the application regarding her son William.[2] Katrice Jones-Smith and Nancy Smith filed a counterclaim.[3] Both sides filed for summary judgment and the Court ended up finding for Safeway and entered a final judgment to this effect on January 2, 2014. CP. 180; RE. 8. It is from this order that the instant appeal was taken.

[1] The application can be found at CP. 86. Part 4 states that "APPLICANT WARRANTS THAT ALL REGULAR, FREQUENT DRIVERS, AND/OR RESIDENTS OF THE HOUSEHOLD FOURTEEN (14) YEARS OF AGE OR OLDER ARE LISTED BELOW WITH THEIR NAMES AND DATE OF BIRTH EVEN IF NOT AN OPERATOR (INNCLUDING STUDENTS AND MILITARY PERSONNEL) AS LISTED BELOW."

[2] Named as Defendants were Katrice Jones-Smith and Nancy Jones as well as Michelle Busby, William Busby, Pioneer Credit Company and Kenneth Tarleton.

[3] They also cross-claimed against William Busby.

SUMMARY OF THE ARGUMENT

This case presents the same question that the Mississippi Supreme Court recently decided in *Lyons v. Direct Gen. Ins. Co.*, 138 So.3d 887 (Miss. 2014), reh'g denied 2014 Miss. LEXIS 275 (June 5, 2014). The only difference is that the permissive driver in *Lyons* was a named excluded driver. In this case, the driver was just omitted on the application. Notwithstanding this small difference, the holding in *Lyons* controls: an insurer may not rescind a policy after an accident so as to deny an injured innocent third party the benefit of the minimum $25,000 liability coverage required by Mississippi law.

LAW AND ARGUMENT

5. This case is controlled by the Mississippi Supreme Court's opinion in *Lyons v. Direct Gen. Ins. Co.*

This case is controlled by the Mississippi Supreme Court's opinion in *Lyons v. Direct Gen. Ins. Co.*, 138 So.3d 887 (Miss. 2014), reh'g denied 2014 Miss. LEXIS 275 (June 5, 2014). In that case, Lyons was injured in a single car accident wherein Lyons was a passenger and Roderick Holliday was driving his mother's car. Holliday's mother, Daisy Lang, had insurance on the car through Direct General but that policy **specifically excluded** Holliday as a driver. *Lyons*, 138 So.3d at 888. Notwithstanding the fact that Holliday was an excluded driver, Lyons sued Direct General and the trial court granted summary for Direct General. On appeal, the Mississippi Court of Appeals reversed finding that a named-driver exclusion cannot defeat mandatory liability coverage for persons operating a covered vehicle with the permission of the insured, at least up to the statutorily required minimum coverage. *Lyons v. Direct Gen. Ins. Co*., 138 So.3d 930, 933 (Miss. App. 2012).

In *Lyons,* the Mississippi Court of Appeals held that under Mississippi law, where the policyholder allows another person to use her car, with permission being either express or implied, the policy shall pay up to the mandatory minimum even if the driver is named as an excluded driver. "We believe the Legislature intended to provide a minimum level of financial security to third parties who might suffer bodily injury or property damage from negligent drivers. That is the mandatory coverage requirements of a minimum of $25,000 for bodily injury to one person, $50,000 for bodily injury to two or more persons, and $25,000 for property damage. But above our statutory minimum coverage, an insurer and insured may agree to a named-driver exclusion." *Lyons*, 138 So. 3d at 933.

The statute being interpreted in *Lyons* is M.C.A. § 63-15-4(2)(a) which states as follows:

> Every motor vehicle operated in this state shall have an insurance card maintained in the motor vehicle as proof of liability insurance that is in compliance with the liability limits required by Section 63-15-3(j). The insured parties shall be responsible for maintaining the insurance card in each motor vehicle.

M.C.A. § 63-15-4(2)(a); *Lyons*, 138 So.3d at 888.[4] This is Mississippi's compulsory insurance law. *Lyons*, 138 So.3d at 889. "The purpose of a compulsory [automobile] insurance statute is to assure, so far as possible, that there will be no certificate of registration outstanding without concurrent and continuous liability insurance coverage . . . .". 7 AM JUR. 2d Automobile Insurance § 37 (1980). "[A]ll courts that have

[4] In granting certiorari, the Mississippi Supreme Court stated that the Court of Appeals reached the right result, it just relied on the wrong statute when it cited M.C.A. § 63-15-453 instead of M.C.A. § 63-15-4(2)(a). *Lyons*, 138 So.3d at 888.

considered the question as it pertains to an innocent third party have held that an insurer cannot, on the ground of fraud or misrepresentation, retrospectively avoid coverage under a compulsory insurance or financial responsibility law so as to escape liability to an innocent third party" *Dunn v. Safeco Ins. Co. of Am*., 798 P.2d 955, 958 (Kan. App. 1990).

The Court of Appeals' opinion in *Lyons* was decided on December 11, 2012. When Katrice Jones-Smith filed her motion for summary judgment on July 3, 2013, she urged the trial court to find for her based on *Lyons.*[5] CP. 63. As Jones-Smith pointed out, the only difference between this case and *Lyons* was that the at-fault driver in *Lyons* was a named excluded whereas the at-fault driver here was merely never named. Either way, both drivers were using the insured vehicle with the permission of the insured owner.

In response, Safeway argued that *Lyons* did not control because 1) it was just a Mississippi Court of Appeals opinion and the Appellee had filed for certiorari,[6] and 2) the opinion did not state that it overruled the Mississippi Supreme Court's earlier opinions in *State Farm Mut. Auto. Ins. Co. v. Mettetal,* 534 So.2d 189 (Miss. 1988), and *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 797 So.2d 981, 987 (Miss. 2001).

The argument that Lyons was **only** a Court of Appeals opinion was settled once and for all when the Mississippi Supreme Court granted certiorari in *Lyons* and affirmed the Mississippi Court of Appeals' decision. *Lyons v. Direct Gen. Ins. Co.*, 138 So.3d 887

[5] Since Safeway was arguing that *Lyons* was not the law*,* Katrice Jones-Smith argued in the alternative that the trial court should postpone making any decision until the Mississippi Supreme Court decided *Lyons.* But the trial court's decision in favor of Safeway was issued approximately a month prior to the Mississippi Supreme Court's decision in *Lyons.*

[6] Safeway's argument starts at CP. 126, RE. 5.

(Miss. 2014). The Mississippi Supreme Court's decision in *Lyons* was handed down on February 13, 2014, a little over a month after the trial court entered a final judgment in favor of Safeway in this case.

So, Safeway's argument that *Lyons* can be ignored won't work. As for Safeway's argument that *Mettetal and Universal Underwriters* control, as noted in *Lyons,* those two cases have been superceded by statute. *Lyons*, 138 So. 3d at 887. In *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.,* Fitzgerald was having his car serviced by a car dealership which loaned Fitzgerald a car while Fitzgerald's car was out of service. Fitzgerald hit another car while returning to the dealership. The injured party submitted a claim against Fitzgerald for property damage and personal injuries. State Farm, though, insisted that the dealership's insurer should pay arguing that when the dealer represented that an insurance policy was in place, it was implicitly saying that its policy complied with the requirements of the Mississippi Motor Vehicle Safety Responsibility Law which set forth the minimum requirements for an insurance policy. *State Farm Mut. Auto. Ins. Co.*, 797 So. 2d at 986**.** At that time, though, there was no mandatory liability insurance and the court held that the provision of the Motor Vehicle Safety Responsibility Law applied **only** to policies that had been certified as proof of financial responsibility. As explained in *Universal Underwriters Group, Inc. v. State Farm Fire & Cas. Co.*, 931 So. 2d 617 (Miss. App. 2005), the 2001 *State Farm Mut. Ins. Co. v. Universal Underwriters Ins. Co.* case was decided before the "Mississippi legislature amended the 'Mississippi Motor Vehicle Safety Responsibility Law' by enacting mandatory insurance coverage." Once the legislature required all vehicles to carry minimum liability insurance, where a vehicle was insured there was liability

coverage for anyone driving the vehicle with proper permission. *Universal Underwriters Group, Inc. v. State Farm Fire & Cas. Co.*, 931 So. 2d at 620. If one Shepardizes the 2001 *State Farm Mut. Ins. Co. v. Universal Underwriters Ins. Co.* case, one sees that the 2001 case has been "[s]uperceded by statute as stated in *Universal Underwriters Group, Inc. v. State Farm Fire & Cas. Co.*, 931 So. 2d 617, 619 (Miss. Ct. App. 2005).[7] The 2001 *State Farm Mut. Ins. Co. v. Universal Underwriters Ins. Co.* case, then, has not been the law for some time.

As Justice Dickinson, writing for an *en banc* Court, wrote in *Lyons*:

> Prior to 2001, Mississippi law contained no general requirement that the owner or operator of a vehicle carry liability insurance. Instead, Mississippi law required that the Department of Public Safety suspend all automobile registrations of an owner – or the driver's license of an operator – of any vehicle involved in an accident without liability insurance, unless the owner or operator could produce proof of future financial responsibility by "providing a written certificate of an insurance company 'certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility.'"

Lyons, 138 So. 3d at 889. The two *State Farm* cases involved accidents that occurred prior to Jan. 1. 2001, which was the date that M.C.A. § 63-15-4 (requiring all vehicles to carry mandatory minimum liability insurance) became effective. At the time *State Farm Mut. Auto. Ins. Co. v. Mettetal* was decided, Mississippi had what the Court described as a "first bite" law in that an automobile owner could have one accident before being required to furnish proof of financial responsibility. *State Farm Mut. Auto. Ins. Co. v. Mettetal,* 534 So.2d at 192. Under this scheme, it could not be said that it

[7] A writ of certiorari was denied June 15, 2006. See *Universal Underwriters Group, Inc. v. State Farm Fire & Cas. Co*., 2006 Miss. LEXIS 324 (Miss. 2006).

violated the public policy of the state to allow an automobile owner (or, really, his insurer) to escape liability through the use of a named exclusion. *State Farm Mut. Auto. Ins. Co. v. Mettetal,* 534 So.2d at 194. In holding as it did, the Court stated, "we are not unmindful of public policy considerations which might dictate a different result. If, however, the public interest demands a change in the Safety Responsibility Law, then it will be up to the legislature to make such change." *State Farm Mut. Auto. Ins. Co. v. Mettetal*, 534 So. 2d at 194. That is exactly what happened in 2000 when the Mississippi legislature mandated minimum liability insurance for all vehicles. See *Lyons*, 138 So. 3d at 887 (**"**Since the *Mettetal* decision, the Legislature has repealed the requirement for proof of future financial responsibility following an accident, and has adopted a requirement that all vehicles operated within the State have liability insurance). Which all goes to say that the holdings in *State Farm Mut. Auto. Ins. Co. v. Mettetal,* 534 So.2d 189 (Miss. 1988), and *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, have no application here. There is no way to distinguish this case from *Lyons* other than that the driver by permission in *Lyons* was a named excluded and the driver here was just omitted. The result is the same. "[E]ven though Holliday was an excluded driver under the Direct General policy issued to Daisy Lang, the exclusion did not operate to eliminate liability coverage in the minimum amounts required by statute." *Lyons,* 138 So.3d 887 at 891. Or, in this case, even though William Busby was omitted on the application as a driver under the Safeway policy issued to Michelle Busby, that fact did not operate to eliminate liability coverage in the minimum amounts required by statute." (Miss. 2014).

This is in accord with the principle that "[a]n insurer has an obligation to its insureds to do its underwriting at the time a policy application is made, not after a claim is filed." *Lewis v. Equity Nat'l Life Ins. Co.*, 637 So. 2d 183, 188-89 (Miss. 1994). This is especially true where the policy is one designed to meet a mandatory minimum statute enacted for the purpose of protecting third persons harmed by the insured.

Given the public policy of Mississippi that one who is injured by an excluded driver is still entitled to the statutory minimum coverage, it is clear that public policy would also prohibit an insurer from invaliding or voiding a policy once the insured has caused damage to a third party merely because the driver was not mentioned in the application.

6. *Lyons* is in accord with the law of other states which have compulsory liability insurance.

The *Lyons* opinion reflects the approach taken by many other states which have held that their various statutory provisions relating to compulsory automobile liability insurance prevent post-loss rescission to defeat the insurer's liability vis-a-vis an innocent third party. It is generally agreed that rescission of a non-void contract is inconsistent with the public policy that underlies compulsory automobile liability insurance. Thus, "[f]ollowing an accident, the insurer can not cancel the policy ab initio for a misrepresentation which led to the inducement to write the policy, so long as the policy was issued in conformity with the statute." 6bf-183f Appleman on Insurance § 4301. Safeway contends that the cases from these states, with the exception of Michigan, Oklahoma, New Jersey and Massachusetts, deal with compulsory insurance laws that are

applicable to all motor vehicle liability policies – unlike Mississippi. But, as made clear above, Mississippi has adopted mandatory liability insurance for all motor vehicles, a fact Safeway apparently does not realize. M.C.A. § 63-15-4(2); *Universal Underwriters Group, Inc. v. State Farm Fire & Cas. Co.*, 931 So. 2d 617, 619 (Miss. Ct. App. 2005); *White v. Universal Transp., Inc*., 2006 U.S. Dist. LEXIS 72193 *7 (S.D. Miss. 2006).

Where a state has compulsory insurance, as here, the courts generally hold that an insurer cannot rescind a policy post-accident as to the claims of an innocent third party, at least up to the minimum required coverage. For instance, in Kansas, the insurer may rescind only the **nonliability** portions of the policy. "Where claims have been made by both the insured acquiring the insurance through fraudulent misrepresentation and an injured innocent third party, severance of the nonliability, noncompulsory features of the policy is proper, thereby permitting rescission ab initio as to the claim of the insured involving provisions not mandated by the Kansas Automobile Injury Reparations Act." *Continental Western Ins. Co. v. Clay*, 811 P.2d 1202 (Kans. 1991). Or, as stated in *Teeter v. Allstate Ins. Co*., 192 N.Y.S.2d 610 (N.Y. App. Div. 1959), aff'd. 9 N.Y.2d 655, 212 N.Y.S.2d 71, 173 N.E.2d 47 (N.Y. 1961):

> It is impossible to reconcile the existence of a right to rescind ab initio with the general scheme of the compulsory insurance law. The purpose of the statute is to assure, so far as possible, that there will be no certificate of registration outstanding without concurrent and continuous liability insurance coverage. . . . But it would be obviously impossible for an insured to comply with his statutory obligation if a common-law right to rescind ab initio were allowed to exist alongside the statutory provision for termination by notice. If a rescission were allowed to be effective retroactively as of the date of the issuance of the policy, it would be impossible for the insured to do what the statute requires him to do, i. e., either procure new insurance or surrender his number plates, prior to the date

> upon which the termination of the coverage became effective.

Teeter, 192 N.Y.S.2d at 615. See also *American Centennial Ins. Co. v. Sinkler*, 903 F. Supp. 408, 415 (E.D. N.Y. 1995) (noting "post-loss rescission is incompatible with protections enacted to guaranty compensation to innocent accident victims"); *Omaha Prop. and Cas. Co. v. Crosby,* 756 F. Supp. 1380, 1384 (D. Mont. 1990) ("When a state compulsory insurance statute exists, courts have 'universally held or recognized that an insurer cannot, on the ground of fraud or misrepresentations relating to the inception of the policy, retrospectively avoid coverage . . . so as to escape liability to a third party.'" (citation omitted)); *Douglass v. Nationwide Mut. Ins. Co.*, 913 S.W.2d 277, 282 (Ark. 1996) ("While we uphold the right of an insurance company to rescind coverages based on fraud by the insured . . . , we underscore the point that this right is unavailable when third-party claims are at issue."); *Pearce v. Southern Guar. Ins. Co*., 268 S.E.2d 623, 628 (Ga. 1980) ("an automobile insurance policy providing basic third party liability insurance and basic personal injury protection benefits (no-fault) issued pursuant to Georgia law cannot be voided retrospectively"); *Dunn v. Safeco Ins. Co. of Am*., 798 P.2d 955, 958 (Kan. App. 1990) ("all courts that have considered the question as it pertains to an innocent third party have held that an insurer cannot, on the ground of fraud or misrepresentation, retrospectively avoid coverage under a compulsory insurance or financial responsibility law so as to escape liability to an innocent third party"); *Van Horn v. Atlantic Mut. Ins. Co.*, 641 A.2d 195, 199-200 (Md. App. 1994) ("we hold that an insurer's common law right to void ab initio an automobile insurance policy, when the applicant had made a material misrepresentation in the application for the policy, has been statutorily abrogated with regard to claims of persons not involved in making the

misrepresentation"); *United Sec. Ins. Co. v. Commissioner of Ins.*, 133 Mich. App. 38, 348 N.W.2d 34, 36 (Mich Ct. App. 1984) ("the liability of an insurer with respect to insurance becomes absolute whenever injury covered by the policy occurs and . . . no statement made by or on behalf of the insured or violation of the policy may be used to avoid liability [when innocent third parties are involved]"); *Mooney v. Nationwide Mut. Ins. Co.*, 149 N.H. 355, 822 A.2d 567, 570 (N.H. 2003) ("courts have uniformly held that an insurer cannot avoid coverage under a compulsory insurance or financial responsibility law because of fraud when the claimant is an innocent third party"); *Harkrider v. Posey*, 24 P.3d 821, 828 (Okla. 2000) ("a misrepresentation which would relieve an insurer of liability to its insured . . . does not relieve the insurer of liability to an innocent third party whose protection is mandated by Oklahoma's compulsory insurance law"); *Midland Risk Management Co. v. Wofford*, 876 P.2d. 1203, 1208 (Az. 1994); *Shockley v. Sallows*, 615 F.2d 233 (5th Cir. 1980); *Richard v. Fliflet*, 370 N.W.2d 528, 535 (N.D. 1985); Annot., *Rescission or avoidance, for fraud or misrepresentation, of compulsory, financial responsibility, or assigned risk automobile insurance,* 83 A.L.R.2d 1104 (1962), and cases collected therein; C.C. Marvel, Annotation, "Rescission or avoidance, for fraud or misrepresentation, of compulsory, financial responsibility or assigned risk automobile insurance", 83 A.L.R.2d 1104 (1962) (citing cases).

The purpose of the mandatory liability laws is to protect innocent victims of motor vehicle accidents; that policy would be contravened if rescission were permitted **after** an accident. That is the law in Mississippi and that is the law that should be applied here consistent with the Mississippi Supreme Court's opinion in *Lyons.*

Conclusion

Because Mississippi law disallows Safeway from voiding Michelle Busby's policy now that her vehicle has been involved in an accident, at least with respect to injured third parties, this Court should reverse the trial court's judgment in favor of Safeway and remand the case with instructions to grant Katrice Jones-Smith and Nancy Jones' Motion for Summary Judgment on the issue of coverage and proceed accordingly.

Respectfully submitted,

KATRICE JONES-SMITH and NANCY JONES

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CERTIFICATE OF SERVICE

I, Taurean Buchanan, hereby certify that I have this day filed the foregoing via the Court's e-filing system which should electronically deliver a copy of the Brief to the following:

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This, the 1st day of August, 2014.

/S/ TAUREAN BUCHANAN
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