

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-01105

**Civil Action No. 251-02-1269-CIV
Circuit Court of Hinds County, Mississippi**

**THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA and PRUCO LIFE INSURANCE COMPANY**

Appellants/Defendants

vs.

**PATTY STEWART, SALLY STEWART HESTER, GILES STEWART,
and LARRY STEWART, Individually and as Co-Executors of the Estate of
Edsel Stewart; and LARRY STEWART and GILES STEWART as
Co-Trustees of THE STEWART FAMILY LIFE INSURANCE TRUST**

Appellees/Plaintiffs

**RESPONSE TO APPLICATION FOR
WRIT OF MANDAMUS AND MOTION FOR REHEARING**

**Alex A. Alston, Jr. (Miss. Bar No. 1543)
1304 Poplar Boulevard
Jackson, Mississippi 39202
Telephone No. (601) 969-5450**

ATTORNEY FOR APPELLEES

**RESPONSE TO APPLICATION FOR
WRIT OF MANDAMUS AND MOTION FOR REHEARING**

The Stewart Children simply attempted to require Prudential to honor its commitment to pay the face value of its life insurance policy after the death of their beloved father, Dr. Edsel Stewart. The jury unanimously agreed with them, but this Court in a pernicious and distorted opinion, authored by then Justice Charles Easley, unconstitutionally overruled the solemn verdict of the jury and constructed a perverted opinion to justify a ruling in favor of Prudential and awarded all costs to Prudential.

To punish the Stewart Children further, Prudential has filed an unconscionable cost bill and filed its Motion asking the Court to award Prudential nearly one half million dollars in costs. Since the very able and learned Trial Judge has refused to rule on this Motion within 6 months, the Office of the Supreme Court Clerk has filed its Notice to this Court which in accordance with Rule 15, M.R.A.P. is treated as an application for a Writ of Mandamus.

This filing constitutes the Stewart Children's Response to the Writ of Mandamus in which they also incorporate a Motion for Rehearing since any Response to the Motion is inextricably intertwined with the Opinion of the Mississippi Supreme Court rendered in this case. The Stewart Children readily admit that the lower Court has not ruled on the outrageous cost bill by Prudential. However, since this counsel is ethically prohibited from communicating with the Trial Judge who has this Motion under advisement, one can assume that the Trial Judge has not rendered an opinion since he refuses to lend his hand to the unconstitutional and pernicious Opinion of this Court. The Trial Judge observed the entire trial and ruled repeatedly that the issues were questions for the jury. He watched the witnesses testify, carefully read all documents and followed the rule of law in

submitting the issues to the jury. Undoubtedly the lower court recognizes that this Opinion of the Supreme Court simply substituted the solemn verdict of the jury to that preferred by the Supreme Court. The lower Court must have considered this to be so very wrong and indeed unconstitutional.

To refresh this Court of the facts, no one denies that Prudential made an offer to Dr. Stewart to insure his life for One Million Dollars as early as August 19, 1999. The premiums would be high because of Dr. Stewart's age and prior medical conditions. Over a dozen exhibits and massive testimony evidence clearly that the premium would be \$105,000 per annum.¹ This offer was accepted as evidenced in numerous documents but the one most specific was the document signed on August 31, 1999. Dr. Stewart at the same time paid the insurance agent a check in the sum of \$20,000 for the initial premium. At that point, the contract was consummated. It is difficult to imagine how an offer, acceptance and consideration could have been proven more clearly. Unfortunately, the next day Dr. Stewart suffered a stroke and died about 1½ months later.

It is beyond comprehension to understand why this Court held that when the contract arrived showing an annual premium of \$105,000, "the only possible conclusion" was that the policy "constituted a counteroffer." How in the world can this be? The premium stated in the policy was precisely the premium quoted on numerous documents and the same as the testimony of numerous witnesses.² Were all of Plaintiffs' witnesses unworthy of belief? Why would the author of this Opinion wish to distort these facts in such a way to make the Opinion no more than a fabrication?

¹ One document showed the annual premium to be only \$100,000.

² Certainly if there was any question whether the offer was \$100,000 or \$105,000, this was a jury question. The jury found there was no counteroffer.

Furthermore, to further fabricate the facts, the Opinion stated that one of the documents that would constitute an acceptance “was signed on September 10, 1999.” (Opinion, p. 4, fn. 4). How could the author of this Opinion make such an egregious mistake? On that date, Dr. Stewart had already suffered a stroke and was comatose. So why would the Court emphasize and fabricate that date when the first such document was signed on August 31, 1999, when Dr. Stewart was alive and well and his health was the same as shown in the application? The words were printed in bold letters on the instrument:

“I believe this contract meets my insurance needs and financial objectives.”

Dated 8/31/99 and signed by Larry Stewart.

Can this Court just pick a date out of thin air and declare it to be the date the contract was accepted? How can this document be simply disregarded? Again, this is not only incomprehensible but unconscionable.

But even if these two examples of numerous misstatements and perversions in this Opinion were not enough, what is more disturbing about the Opinion is that it simply disregarded the jury verdict for the Plaintiffs. The Court commandeered the jury’s role as a fact finder. This Court lacks constitutional authority to weigh conflicting evidence in its Opinion and it is completely void by being in violation of the Constitution of the United States.

The Opinion of this Court does great violence to the Constitution of this State as well. Twelve reasonable men and women sitting on the jury in this case found for the Plaintiffs, the Trial Judge of Hinds County denied the motions for a directed verdict and for JNOV. There is no reason to believe that these twelve jurors, who listened to the evidence for two weeks and are the only

persons who can weigh the credibility of the witnesses and observe their manner and demeanor, were not reasonable and fair-minded. Nor is there any reason to believe that the Trial Judge was not honest and fair-minded when he denied the numerous motions to dismiss, to direct a verdict, and for judgment JNOV. Can it be said that five Justices who found for Prudential at another time were more fair-minded than the twelve jurors and the Trial Judge who actually smelled the “smoke of battle,” were there at the scene, and “sensed the interpersonal dynamics between the lawyers and the witnesses?” Culbreath v. Johnson, 427 So. 2d 705, 708 (Miss. 1983); Tetoni v. Slayden, Mississippi Supreme Court, 2005-CT-00529 (decided Nov. 8, 2007).

The Stewart Children have filed their Amended Response to Prudential’s Motion to Tax Costs and Enter Judgment in Favor of Prudential, a copy of which is attached as Exhibit A, and shows that the costs were wrongly calculated both in amount and longevity and which were unnecessary and unreasonable for Prudential to incur and that such punishment on the Stewart family is both unfair and unconscionable. A proposed Order furnished to the Trial Judge is attached as Exhibit B.

This Court is not powerless to correct its error although a Mandate has been issued. This Court should feel compelled to correct an obvious error or unconstitutional Opinion. Although the Rules stipulate only one Motion for Rehearing may be filed, this Court has specific authority and jurisdiction to “suspend the requirement or provisions of any of these rules...” Rule 2(c), M.R.A.P. The law provides that a matter which has already been tried and then resolved before the Mississippi Supreme Court can be reviewed again. The Court acknowledges:

“the well-recognized rule that the court, ordinarily, after having laid down principles governing a case on one appeal, will not review its holdings on a subsequent appeal, but will ordinarily adhere to its former decision and not inquire into its correctness. We do not think, however, that this rule is so fixed and binding upon the court that

it may not depart from its former decision on a subsequent appeal if the former decision in its judgment after mature consideration is erroneous and wrongful and would lead to unjust results... This court has, on more than one occasion, departed from its first announcement on subsequent appeal of the same case where there had been no change of conditions, or accrual of other rights that would be harmed or prejudiced by the other decision.

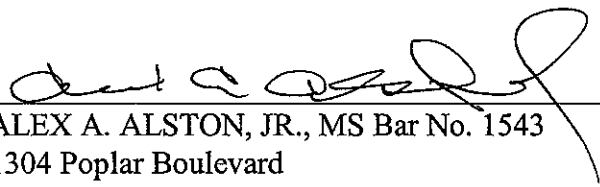
Brewer v. Browning, 76 So. 267, 260)(Miss. 1917).

Indeed, this Court has specifically held that the issuance of a mandate does not deprive this Court of jurisdiction and that this Court does not, by issuing a mandate, divest itself of the power to correct a grievous error into which Prudential has led this Court. White v. State, 195 So. 479 (Miss. 1940). See also, Mississippi Power and Light v. Town of Coldwater, 106 So. 2d 375 (Miss. 1958)(matter arising from Public Service Commission). Rule 2(c) of the Mississippi Rules of Appellate Procedure is consistent with these long-established common law rules regarding jurisdiction. That rule allows the Court to consider another petition for rehearing and grant it to correct an error or injustice in the original opinion. Shaw v. State, 702 So. 2d 386 (Miss. 1997). See also, Carter v. State, 754 So.2d 1207 (Miss. 2000)(suspending rules to consider State's petition for *certiori*); Town of Lucedale v. George County Nursing Home, 482 So. 2d 223 (Miss. 1986)(suspending rule requiring dismissal for case inactive too long). There is no impediment to this Court's review of this matter at this time.

Although Counsel knows he is making an unconventional plea to this Honorable Court before whom he has practiced over 45 years, he feels compelled to do so as an officer of this Court. An egregious wrong has not only been laid upon the Stewart Children but also upon our constitutional rule of law. Our entire system of justice is meaningless if a superior court can simply disregard a verdict of a jury and manipulate the facts to support an opinion contrary to that of the jury. This *is* a constitutional right that is being abrogated.

With all deference to this Honorable Court, this counsel, as an officer of this Court, feels compelled to “sound the alarm” in every meaningful manner when he has observed his highest court taking steps to abrogate the right of trial by jury – a right guaranteed to us by our Constitution and for which our forefathers died. On such overriding constitutional issues we just cannot tolerate the sin of silence (see, Ezekiel 33:6).

Counsel pleads, prays and begs that this Court exercise its historical courage and look again at the underlying facts and correct this wrong by granting a rehearing and denying the Motion for Writ of Mandamus.



ALEX A. ALSTON, JR., MS Bar No. 1543
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Telephone No. (601) 969-5450

ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

I, Alex A. Alston, attorney for Appellees/Plaintiffs, hereby certify that I have this day served a true copy of the above and foregoing via First Class Mail to the following:

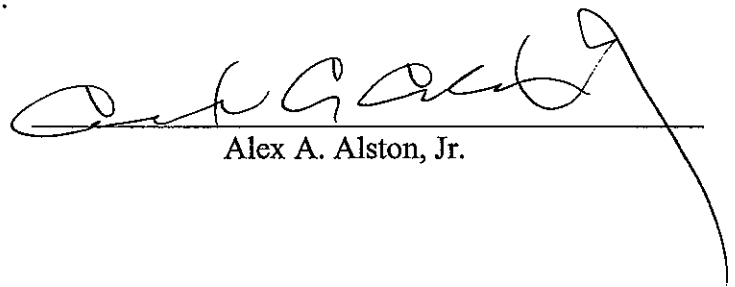
Roy H. Liddell, Esq.
Walter D. Willson, Esq.
Richard G. Norris, II, Esq.
WELLS MARBLE & HURST, PLLC
300 Concourse Boulevard, Suite 200
Ridgeland, Mississippi 39157

ATTORNEYS FOR APPELLANTS/DEFENDANTS,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA and
PRUCO LIFE INSURANCE COMPANY

Honorable Winston L. Kidd
Circuit Judge
Hinds County Courthouse
407 East Pascagoula Street
Jackson, Mississippi 39201

TRIAL COURT JUDGE

This the 12th day of February, 2009.



Alex A. Alston, Jr.

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

FILED

FEB 07 2008

BARBARA DUNN, CIRCUIT CLERK

BY _____ D.C.

PATTY STEWART, SALLY STEWART HESTER,
GILES STEWART AND LARRY STEWART,
Individually and as Co-executors of the Estate of
Edsel Stewart; and LARRY STEWART and
GILES STEWART as Co-Trustees of THE
STEWART FAMILY LIFE INSURANCE TRUST

PLAINTIFFS

vs.

CIVIL ACTION NO: 251-02-1269-CIV

THE PRUDENTIAL LIFE INSURANCE COMPANY
OF AMERICA; PRUCO LIFE INSURANCE
COMPANY; JAMES BATEMAN and JMB
FINANCIAL GROUP

DEFENDANTS

**AMENDED RESPONSE OF PLAINTIFFS IN OPPOSITION TO MOTION TO
TAX ALL COSTS TO PLAINTIFFS, TO ENTER JUDGMENT IN FAVOR
OF PRUDENTIAL FOR SAME AND TO ISSUE EXECUTION FOR COSTS**

Plaintiffs, the Stewarts, deny that Prudential is entitled to the relief sought and would show:

1. Prudential has a net worth that exceeds 7.4 billion dollars. (Tr. 1905).
2. In the underlying action, the Stewarts simply attempted to collect on a life insurance policy issued by Prudential on the life of their father. Although prevailing before a duly constituted jury in the First Judicial District of Hinds County, Mississippi, the Mississippi Supreme Court reversed and rendered, choosing to substitute its opinion for the solemn verdict of the jury.
3. Prudential now attempts to further punish the Stewarts for even bringing this action demanding astronomical costs against them in the total sum of \$491,428.50.
4. This is wrong and unconscionable. The bulk of the cost bill is for *supersedeas* bond premium which has been wrongly calculated both in amount and longevity and which was unnecessary and unreasonable for Prudential to incur. It was not the Stewarts that required the Bond, but Rule 8 of the Mississippi Rules of Appellant Procedure that mandates a bond to stay execution

EXHIBIT

A

of any judgment pending appeal. The Rules do not mention or intimate a waiver of this clear Rule. The Stewarts only required that Prudential comply with the law on appeals but in no way attempted to specify the method. Furthermore, the fact that the Stewarts insisted on their right under Rule 8 is immaterial on the question of whether premiums on an appeal bond should be assessed against appellee. Northern Electric Company v. Phillips, 673 So.2d 1384, 1386 (Miss. 1986).

5. Plaintiffs will further show that Prudential is required to mitigate any alleged costs and attempt collect only reasonable and necessary expenses. To the end, Prudential could have put up its own security in any form or require one of its own or subsidiary bonding insurance companies to place the appropriate bond for little or no premium costs. A bond is the typical means of giving appellees security, but an appellant can satisfy the requirement in a multitude of ways. For example, our court recently held in Tupelo Redevelopment Agency v. The Gray Corporation, Inc., 2006-CA-002-18-SCT (Oct. 18, 2007) quoting the earlier case of Estate of Taylor, 539 So.2d 1029 (Miss. 1989) as follows:

“The bond is the typical means of giving the appellee security. However, the Court may approve security in the form of cash or property. The judgment may be secured in other ways such as the Court’s taking possession of personal property or otherwise providing for a method to insure payment of appellee’s judgment.”

See also, Sumner vs. City of Como Democratic Executive Committee, No. 2006-EC-02096-SCT (Miss. 01/17/2008)(Holding cash bond sufficient under jurisdictional statute requiring cost bond “with two (2) or more sufficient sureties.”)

Under the identical Federal Rule, one of the most frequently cited cases held that “it is within the Court’s discretion to fashion a security arrangement that protects the right of the judgment creditor and the judgment debtor.” Prudential Insurance Co. V. Boyd, 781 F.2d 1494 (11th Cir. 1986). Moreover, our Court has specifically held that a Plaintiff cannot be charged with cost for a

supersedeas bond if the bond premium was unreasonable or unnecessary. Board of Trustees of the Hattiesburg Municipal Separate School District v. Gates, 467 So.2d 216 (Miss. 1985).

6. Prudential uses the processes of this court to attempt to disparage the Plaintiff Larry Stewart by alleging that he had once sued for costs. Of course he did. The article attached illustrates a case in which the attorney was wrong and sued the wrong doctor (Dr. Larry Stewart) in a medical liability case. The lawyer refused to dismiss Dr. Stewart even when shown by irrefutable proof that he was not the doctor involved and that the attorney was mistaken. Dr. Stewart continued to pay his costs even though the attorney knew he had sued the wrong doctor. The Court very properly found that Dr. Stewart was entitled to his costs. This is a far cry from a family attempting to recover on an insurance policy that was admittedly issued by Prudential to the Plaintiffs' father.

7. The imposition of a judgment for costs for bond premiums in this case in the amount demanded is unfair, unconscionable, unnecessary and unreasonable.

WHEREFORE, the Stewarts' pray that this Court will exercise its discretion and disallow all costs associated with premium costs and grant the Stewarts such relief as may be just and proper.

This the 7th day of February, 2008.

Respectfully submitted,



ALEX A. ALSTON, JR., MS Bar No. 1543
ELIZABETH L. DECOUX, MS Bar No. 6019
SHELDON G. ALSTON, MS Bar No. 9784
SHARON F. BRIDGES, MS Bar No. 99423
ATTORNEYS FOR PLAINTIFFS

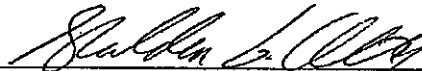
CERTIFICATE OF SERVICE

I, Sheldon G. Alston, one of the attorneys for Plaintiffs, hereby certify that I have this day served a true copy of the above and foregoing **Amended Response of Plaintiffs in Opposition to Motion to Tax All Costs to Plaintiffs, to Enter Judgment in Favor of Prudential for Same and to Issue Execution for Costs** via First Class Mail to the following:

Roy H. Liddell, Esq.
Walter D. Willson, Esq.
Richard G. Norris, II, Esq.
WELLS MARBLE & HURST, PLLC
300 Concourse Boulevard, Suite 200
Ridgeland, Mississippi 39157

ATTORNEYS FOR DEFENDANTS, THE PRUDENTIAL
INSURANCE COMPANY OF AMERICA and PRUCO LIFE INSURANCE COMPANY

This the 7th day of February, 2008.



Sheldon G. Alston

**IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

PATTY STEWART, SALLY STEWART HESTER,
GILES STEWART AND LARRY STEWART,
Individually and as Co-executors of the Estate of
Edsel Stewart; and LARRY STEWART and
GILES STEWART as Co-Trustees of THE
STEWART FAMILY LIFE INSURANCE TRUST

PLAINTIFFS

vs.

CIVIL ACTION NO: 251-02-1269-CIV

THE PRUDENTIAL LIFE INSURANCE COMPANY
OF AMERICA; PRUCO LIFE INSURANCE
COMPANY; JAMES BATEMAN and JMB
FINANCIAL GROUP

DEFENDANTS

**ORDER DENYING DEFENDANTS' MOTION TO TAX ALL COSTS
TO PLAINTIFFS, TO ENTER JUDGMENT FOR PRUDENTIAL
AND TO ISSUE EXECUTION OF COSTS**

This Matter came on for hearing on the Motion of the Prudential Defendants to tax costs, and the Court having read the material submitted by the parties and having heard argument of counsel and having fully considered Prudential's Motion, finds that under the facts of this case, the Motion should be and it is hereby denied, for the following reasons, to wit:

(1) Insofar as Prudential Defendants seek to recover costs of the Hinds County Circuit Clerk in a sum of \$9,862.50, they are judicially estopped from doing so. The Defendants repeatedly stated in their briefs before the Mississippi Supreme Court that "Prudential seeks only to recover the cost of the appeal bond..." (Prudential's Response to Retax Costs, March 10, 2008, p. 2). Prudential now comes in this Court asking just the opposite. Judicial estoppel is a common-law doctrine by which a party is estopped from assuming a position contrary to a position previously assumed. The

purpose of the doctrine is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the Courts to suit the exigencies of self-interest. “Because of judicial estoppel, a party cannot assume a position at one state of a proceeding and then take a contrary stand later in the same litigation.” Pursue v. Miss. St. Tax Comm’n, 968 So.2d 368, 377 ¶19 (Miss. 2007). The Prudential Defendants are accordingly judicially estopped from these particular costs.

(2) Next, the Defendants attempt to assert costs for an appeal bond which costs must be denied for several reasons.

First, the numbers or sums claimed have no bearing on the actual costs that should be assessed for this bond even assuming that the rate was reasonable. The principal amount of the bond far exceeded the 1.25% statutory bond required and the time that Prudential was at risk was grossly exaggerated. In the second year, for example, Prudential is attempting to charge the Stewart children more than 160 days of excess bond coverage. Any attempted recapitulation of the bond costs claimed of nearly \$500,000 just cannot be made. The number and figures are wrong. The law is as old as the hills that evidence to support costs or damages must be made with “reasonable certainty” (e.g., Chevron Oil Co. v. Snellgrove, 175 So. 2d 47 (Miss. 1965); Missouri Bag Co. v. Chemical Delivery Co., 58 So.2d 71 (Miss. 1952)). Prudential failed to prove damages or costs of the appeal bond with such reasonable certainty for this trial judge to make an intelligent finding as to the amount of their specific claim for costs.

Second, as to the alleged bond costs, as with damages in general, our Supreme Court has from the beginning of time insisted that before one can recover for costs the costs must be “reasonable and necessary.” The Court finds that the bond costs here were neither reasonable nor necessary. The Prudential Defendants have a net worth which exceeds \$7 Billion. They could have

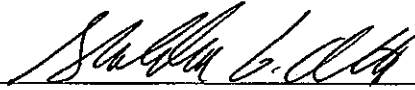
easily put up a cash bond or property bond without any costs to Prudential. Cash bonds are utilized in this Court and may be placed in financial institutions so that the bond will earn interest alleviating Prudential of any expenses for the bond. Our courts have traditionally recognized that cash bonds are satisfactory and approved (The Tupelo Redevelopment Agency v. The Gray Corporation, Inc., 972 So.2d 495, ¶91 (Miss. 2007) and often preferred. Id at ¶92. Cash bonds are generally preferred. A cash bond has been approved by the Supreme Court under a particular statute that required that the appellant “shall give cash bond.” Sumner v. City of Como, 972 So.2d 616 (Miss. 2008). It is clear under the comments of Rule 8, Mississippi Rules of Appellate Procedure, that security may be given in “the form of cash or property bond.” A cash bond could have been secured by this \$7 billion company without it incurring any costs. To now attempt to impose nearly half a million in costs to secure a judgment that could have cost Prudential nothing, the Court finds this to be unreasonable and unnecessary. Board of Trustee v. Gates, 467 So.2d 216. The law requires that costs to be taxed must be reasonable and necessary. Clark v. Whiten, 508 So.2d 1105 (Miss. 1987).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion of Prudential to tax costs be and the same is hereby denied.

ORDERED AND ADJUDGED, this the ____ day of _____, 2008.

CIRCUIT COURT JUDGE

SUBMITTED BY:



Alex A. Alston, Jr., MS Bar No. 1543
Elizabeth L. Decoux, MS Bar No. 6019
Sheldon G. Alston, MS Bar No. 9784
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