

VEASLEY DAMAGES

"Mississippi caselaw provides for more than one form of damages when an insurance company has tortiously breached its contract." *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 451 (5th Cir. 2008) (on petition for rehearing). This intermediate form of relief is a tier of damages "between simply receiving incidental costs of suit (but not attorneys' fees and other damages), and getting punitive damages." *Essinger v. Liberty Mut. Fire Ins. Co.*, 529 F.3d 264, 270 (5th Cir. 2008).

This intermediate tier of damages "may be appropriate where the insurer lacks an arguable basis for delaying or denying the claim, but the conduct was not sufficiently egregious to justify. . . . punitive damages." *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d at 451. The insurer's *negligent* conduct can justify a recovery of damages for attorney's fees, inconvenience, and the additional expense the insured incurred to have the insurer's "oversight corrected." *Id.* Therefore, an insurer that breaches an insurance contract may have extra-contractual tort liability for compensatory damages, even if the insurer's conduct is not sufficient for a punitive damages recovery.

The leading case is *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss. 1992). The insurer in *Veasley* made a clerical error and *negligently* refused to pay a life insurance claim. The court said:

" . . . , it is entirely foreseeable by an insurer that the *negligence* of its employees should cause some adverse result to one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional inconvenience and expenses, attorney's fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries." *Id.*, at 295.

This means that an insurer's tortious conduct can result in liability "for the full measure of the reasonably foreseeable consequences" of the insurer's actions. *Id.* *Veasley* supplies an additional tier of damages when the insured cannot prove that the insurer lacked an arguable reason to deny a claim or when the insurer's conduct was insufficiently egregious for punitive damages. Jackson, *Miss. Ins. Law and Prac.* §13:21.

The Mississippi Supreme Court allowed *Veasley* damages in a suit for a commission, where the Court found exceptional circumstances to award fees the plaintiff paid to an oil and gas accounting expert. The defendant argued that the plaintiff was not entitled to recover accounting fees as costs under Miss.R.Civ.P. 54(d). *Allred v. Fairchild*, 916 So.2d 529, 532 (Miss. 2005). The plaintiff argued that he would not have incurred the accounting expert's fees, except for the defendant's misconduct. Citing *Veasley*, the Mississippi Supreme Court held that the substantial litigation and accounting costs were reasonably foreseeable consequences of the defendant's conduct, and found exceptional circumstances that justified the award. *Id.*, at 533.

Two District Judges have explained *Veasley* damages. One court has described *Veasley* damages as the "*Veasley* exception" that applies in bad faith insurance cases where the insurer lacks an arguable reason to deny a claim, but the plaintiff-insured can recover attorney's fees. *Wise v. Kansas City Life Ins. Co.*, 433 F.Supp.2d 743, 753 (N.D. Miss. 2006) (Davidson, J.). The Court described the "*Veasley* exception" as a "very narrow exception" to the American Rule on recovery of attorney's fees. *Id.* The Court in *Wise* did not apply the *Veasley* exception, because the case did not involve an insurer's bad faith failure to pay benefits and did not involve exceptional circumstances. *Id.*

In *Simpson v. Economy Premier Assur. Co.*, 2006 WL 2590620 (N.D. Miss. 2006) (Mills, J.), the Court examined *Veasley* damages when the defendant moved *in limine* to exclude evidence of the plaintiff's emotional distress. The Court first addressed the sufficiency of emotional distress evidence in simple negligence cases. The Court recognized that *Veasley* represents a "separate tier of damages" where the evidence is insufficient for a punitive damages recovery. The Court denied the *in limine* motion, finding that "in cases where an insurance claim was denied negligently and/or unreasonably, the Supreme Court has adopted a particularly low standard of proof for the recovery of emotional distress damages." *Id.* At the same time, the court cautioned that plaintiffs do not have an automatic right to recover emotional distress damages.

The Mississippi Supreme Court limited *Veasley* in *Willard v. Paracelsus Health Care Corp.*, 681 So.2d 539 (Miss. 1996). The Court noted that *Veasley* addressed "a problem peculiar to the insurance industry, specifically the lack of proper damages when there is a failure to pay on an insurance contract without an arguable reason, and the circumstances do not warrant punitive damages." *Id.*, at 545.

Without citing *Veasley*, the Fifth Circuit Court of Appeals addressed *Veasley* damages in *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618 (5th Cir. 2008).

"Insurers who are not liable for punitive damages may nonetheless be liable for 'consequential or extra-contractual damages (e.g., reasonable attorney's fees, court costs, and other economic losses)' where their decision to deny the insured's claim is without 'a reasonably arguable basis' but does not otherwise rise to the level of an independent tort." *Id.*, at 628.

Therefore, where State Farm was liable to the Broussard's for minor hurricane damage based on State Farm's expert's estimate of shingle loss, State Farm lacked an

arguable basis for denying *that portion* of the claim. Hence, the Court said additional actual or consequential damages might be appropriate on remand. *Id.*, at 629, citing, *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1186 (Miss. 1990) (fn. 13); *Southwest Miss. Reg'l. Med. Ctr. v. Lawrence*, 684 So.2d 1257, 1267-69 (Miss. 1996) (reversing punitive damage award but affirming award of consequential damages including emotional distress following claim denial).

Veasley damages may be awarded in cases outside an insurance claim context. In *Garner v. Hickman*, 733 So.2d 191 (Miss. 1999), the Mississippi Supreme Court noted in *dicta* that *Veasley* damages would be appropriate in construction cases. *Id.*, at 198. The Mississippi Supreme Court has approved an award of accounting fees as *Veasley* damages in a non-insurance case where “exceptional circumstances” existed. *Allred v. Fairchild*, 916 So.2d 529, 532-33 (Miss. 2005). In *Allred*, a lessee abused a confidential relationship with a broker and acted in a fraudulent and deceptive manner by denying the existence of an oral contract that required him to pay oil lease profits to a broker. *Id.*, at 530. The court approved extracontractual damages, because it was foreseeable that the lessee’s fraud would cause the broker to incur substantial litigation and accounting costs. *Id.*, at 532.

Mississippi has a bifurcated proceeding under *Miss. Code Ann.* §11-1-65(1)(c) for punitive damages claims. Regardless, the Mississippi Supreme Court has affirmed a recovery of extra-contractual emotional distress damages in the compensatory damage phase of a bad faith claim. *United American Ins. Co. v. Merrill*, 978 So.2d 613, 630 (Miss. 2007).

The District Court chose a different procedure in *Medical Plaza, L.L.C. v. United States Fidelity & Guar. Co.*, 2008 WL 4446524, *1 (S.D. Miss. 2008) (Senter, J.). The Court bifurcated the case in two phases, with the first phase considering the underlying contract-coverage claim. The extracontractual claims were left for a second phase. Judge Senter noted that “*Broussard* suggests that consequential or extra-contractual damages may be appropriate when punitive damages are not.” *Id.* But Judge Senter held that the plaintiff’s non-contractual damages do not come into play until after the first phase of the trial. *Id.*

In *Fowler v. State Farm Fire & Cas. Co.*, 2008 WL 3050417, *2, 3 (S.D. Miss. 2008) (Ozerden J.), the Court noted that Mississippi’s punitive damages statute, *Miss. Code Ann.* §11-1-65(1)(c), required bifurcation of punitive damages claims into a second phase, but that the statute *does not* mention extra-contractual *compensatory* damages. The Court bifurcated the punitive damages claim from coverage, liability, and actual damages issues. *Id.*, at *3; *Briggs v. State Farm Fire & Cas. Co.*, 2016 WL 347018, *2-3 (S.D. Miss. 2018) (Jordan, J.).

Waiver

To recover *Veasley* damages, the plaintiff must ask for *Veasley* damages and pursue the claim throughout the litigation. The Fifth Circuit Court of Appeals found that the plaintiff abandoned a *Veasley* claim when the plaintiff did not specifically respond to the insurer’s summary judgment motion by making the claim in briefs or at least seeking clarification of the judgment that dismissed the complaint. *Essinger v. Liberty Mut. Fire Ins. Co.*, 529 F.3d 264, 270-74 (5th Cir. 2008) (“We have found no denial of a proper claim, but

there certainly was damage. Extra-contractual damages *might* have been available to make the insured whole had they been pursued.”; citing *Veasley*), *reh. denied*, 534 F.3d 450, 452-53 (5th Cir. 2008) (“The central problem with arguing that *Broussard* is relevant here is that we are concerned with the failure to argue error, *i.e.*, we are facing the problem of waiver.”)

Post-Trial Motions For Attorney’s Fees

The issue is whether the motion for attorney’s fees should be *filed* within 10 days after entry of judgment under Miss.R.Civ.P. 59(e) or whether the claim for attorney’s fees is derived from the judgment because it is authorized by a statute, a contract, a recovery of punitive damages, or otherwise positive case law.

“Attorney’s fees, . . . , are not merely a procedural matter separate from the substantive merits of an action. The right to attorney’s fees is substantive law.” *Fulton v. Miss. Farm Bureau Cas. Ins. Co.*, 105 So.3d 284, 287 (Miss. 2012). “A judge may award attorney’s fees collaterally only if statutorily or contractually authorized, or punitive damages are also awarded.” *Id.*, citing, *Miss. Power & Light Co. v. Cook*, 832 So.2d 474, 486 (Miss. 2002); *Garner v. Hickman*, 733 So.2d 191, 198 (Miss. 1999) (attorney’s fees recovered when allowed by statute, contract, or when punitive damages are awarded).

“Without an independent right to attorney’s fees, a post-judgment motion to amend for attorney’s fees falls under Rule 59(e).” *Fulton*, 105 So.3d at 287.

Although Mississippi has long followed the American rule on recovery of attorney’s fees, the court may award attorney’s fees collaterally if there are independent grounds to recover fees. *Id.*, at 288. Established precedent can also support an award of attorney’s

fees as collateral to the judgment. *Id.*; *Bruce v. Bruce*, 587 So.2d 898, 903 (Miss. 1991) (attorney's fees awarded post-judgment in divorce action based on established precedent and financial need of spouse).

If no independent grounds support a post-judgment request for attorney's fees, Rule 59(e) applies. "Mere negligence, without bad faith, 'is not such an independent tort that would support extracontractual damages.'" *Fulton*, 105 So.3d at 288, quoting, *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 295 (Miss. 1992); *USAA v. Lisanby*, 47 So.3d 1172, 1178 (Miss. 2010) (attorney's fees not warranted where insurer has arguable, good-faith basis for denying claim; plaintiff's burden to prove bad faith refusal claim goes beyond proving mere negligence.).

"Extracontractual damages" means damages not justified by a contract. "But in the insurance context, 'extracontractual damages' are not punitive damages in the traditional sense." *Fulton*, 105 So.3d at 289. Extracontractual damages can be awarded when punitive damages are not, and extracontractual damages cover reasonably foreseeable costs and expenses, like attorney's fees. *Id.* As "extracontractual damages" include costs and expenses like attorney's fees, the court cannot allow attorney's fees on top of extracontractual damages. *Id.*, at 289-90.

X "Extracontractual damages include emotional distress, attorney fees and legal expenses reasonably and necessary incurred, inconvenience, accounting fees, and economic loss." *Spansel v. State Farm Fire & Cas. Co.*, 683 F.Supp.2d 444, 448 (S.D. Miss. 2010) (Guirola, J.) (without reliance, insurer's alleged false statements to insured that its investigation established that flood caused damage to vacation home were not

actionable; citing *Veasley* and collecting cases).

Like *Veasley*, the jury verdict in *Fulton* included an award of extracontractual damages but not punitive damages. *Fulton* did not appeal the award of extracontractual damages as inadequate. “Had *Fulton* appealed the award of extracontractual damages, claiming it was inadequate, we could have considered whether the jury’s award of extracontractual damages was appropriate.” *Fulton*, 105 So.3d at 291. Following the jury’s award of \$10,000.00 in extracontractual damages, the trial court properly considered the post-judgment motion for attorney’s fees under Rule 59(e). *Id.*