

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**PATRICIA MYATT, INDIVIDUALLY AND ON BEHALF  
OF ALL WRONGFUL DEATH BENEFICIARIES OF TODD  
DAVID MYATT, DECEASED and WINSTON BAILEY**

**APPELLANTS**

**VS.**

**CAUSE NO. 2007-TS-01824**

**PECO FOODS OF MISSISSIPPI, INC.**

**APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF NESHOBAMA COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEE**

**Oral argument is not requested**

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**APPELLEE**

**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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

- I. Patricia Myatt, Individually and on Behalf of the Wrongful Death Beneficiaries of Todd David Myatt, Deceased, Appellee
- II. Winston Bailey Trucking, Appellant
- III. Peco Foods of Mississippi, Inc., Appellee
- IV. Honorable Marcus D. Gordon, Circuit Judge
- V. Honorable Sheldon G. Alston, Esq., of Brunini, Grantham, Grower & Hewes, PLLC, Attorney for Appellee
- VI. Honorable John B. MacNeill, Esq. and Honorable Susan R. Bryan, Esq., of MacNeill & Buffington, P.A., Attorney for Appellant
- VII. Honorable Tanya N. Carl, Attorney for Appellee
- VII. Honorable J. Ashley Ogden, Attorney for Appellee

RESPECTFULLY SUBMITTED, this the 24 day of June, 2008.

BY: *J. Ashley Ogden*  
J. Ashley Ogden

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### **STATEMENT OF THE ISSUES**

Whether the trial court properly entered a Rule 54(b) Judgment finally dismissing defendant Peco Foods of Mississippi, Inc.

### **PROCEDURAL CLARIFICATION**

Plaintiff Patricia Myatt filed an appeal on the issue of summary judgment and was assigned cause number 2007-TS-01824. Defendant Bailey filed a separate appeal on a procedural issue and was assigned the same style number 2007-TS-01824. Myatt has submitted a brief on the issue of fact argument as an appellant. Bailey has submitted a separate brief on the procedural argument and has erroneously listed Myatt as a co-appellant on this issue. Myatt is not a co-appellant on the procedural issue and is in fact an appellee in the procedural issue. This response brief by plaintiff Myatt is not as a co-appellant but as an appellee.

### **STATEMENT OF THE CASE**

This appeal arises from the trial court's entry of an order of a final judgment dismissing Peco Foods pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure on September 17, 2007. (R. 7). On October 9, 2007 Patricia Myatt, Individually and on Behalf of all Wrongful Death Beneficiaries of Todd David Myatt filed an appeal to this Court arguing the trial court erred in granting Peco Foods Motion for Summary Judgment and finding no genuine issue of material fact existed against defendant Peco. (R. 9). Myatt argued there was a genuine issue of fact which precluded the trial court from dismissing Peco Foods. On October 22, 2007, Defendant Winston Bailey then filed an appeal arguing the trial court erred procedurally in the final dismissal of Peco Foods under Rule 54(b). (R. 13). Myatt is not a co-appellant with Bailey and does not join in Bailey's appeal on the procedural issue. Myatt has filed a separate appeal only as to the granting of defendant Peco's summary judgment on the fact issues. On October 24, 2007, the Circuit Court of Neshoba County, Mississippi stayed the October 29, 2007 trial and other proceedings in this matter pending resolution of the appeals filed. Appellee Myatt now files this her Appellee Brief in response to Bailey's Appellant Brief.

## **SUMMARY OF THE ARGUMENT**

Appellant Bailey requests this Court dismiss Appellant Myatt's appeal of the grant of defendant Peco's Motion for Summary Judgment as violative of Rule 54(b). Bailey claims that defendant Peco should not be finally dismissed from the case until the trial is complete. At that point Bailey argues it would be proper to dismiss Peco. The Appellant Bailey is not prejudiced by the trial court's procedural dismissal of Peco Foods under Rule 54(b) under a final judgment. Summary judgment should not have been granted in favor of the defendant Peco Foods because issues of material fact exist. However, procedurally the trial court did not err in applying Rule 54(b) to the dismissal of Peco Foods. A trial court in its discretion may dismiss a party or claim under Rule 54(b) when there is no just reason for delay. It was not an abuse of discretion to apply Rule 54(b) in this case. Even if entry of dismissal under Rule 54(b) was an abuse of discretion, Myatt's appeal to resolve the question of fact issue against Peco should not be dismissed. Dismissal of Myatt's appeal would be contrary to the interests of justice and would be a failure to efficiently use judicial resources to resolve the matter.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The standard of review for a Rule 54(b) judgment is abuse of discretion standard. *Laird v. Era Bayshore Realty*, 841 So. 2d 178, 180 (Miss. Ct. App. 2003) (citing *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.*, 512 So. 2d 897, 899 (Miss. 1987)). The comments to Mississippi Rule of Civil Procedure 54(b) indicate the purpose of the rule is to "avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available." Rule

54(b) dismissals should be entered in the interest of sound judicial administration in order to preserve the established judicial policy against piecemeal appeals. See, *May v. V.F.W. Post No. 2539*, 577 So. 2d 372, 374-75 (Miss. 1991).

**II. THE LOWER COURT PROPERLY ENTERED A FINAL AND APPEALABLE ORDER DISMISSING PECO FOODS PURSUANT TO MISSISSIPPI RULE OF CIVIL PROCEDURE 54(B)**

Rule 54(b) allows a court in its discretion to enter a final judgment upon multiple claims or involving multiple parties. Rule 54(b) states in pertinent part the following:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment.

The lower court procedurally dismissed Peco Foods properly pursuant to Rule 54(b). By doing so it allowed plaintiff Myatt and defendant Peco to allow this Court to resolve in finality the issue of whether any issue of fact exists against Peco.

The final judgment was appropriate procedurally under Rule 54(b) because the claims and issues against Peco Foods are not the same or closely related to the claims Myatt has made against Bailey. Myatt's claims against Peco Foods are based on premises liability and general negligence of an agent of Peco Foods. These claims are independent of Myatt's claims against Bailey. Myatt's claims against Bailey are founded on negligent operation of a motor vehicle. The negligence of Peco Foods' agent and claims based in premises liability cannot be attributed to Bailey. As such it can not reasonably be said that the issues presented are such that they should be brought before this Court as a single unit. See, *Laird*, 841 So. 2d at 180-81 (holding the trial court did not abuse its discretion in entering a Rule 54(b) final judgment in favor of



realtor and pest control service where the appellant provided merely a blanket statement claiming that courts disfavor Rule 54(b) judgment); *Mid-Delta Home Health, Inc. v. Miss. Ass'n for Home Care*, 822 So. 2d 336, 341-42 (Miss. Ct. App. 2002) (holding the entry of final judgment under 54(b) in favor of the association was appropriate because the issues present were different from those ultimately to be litigated); *Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co.*, 456 So. 2d 750, 753 (Miss. 1984) (the entry of 54(b) dismissal of defendant repairman was proper because the plaintiff's theory of liability against the remaining defendant was different and unrelated).

Appellant Bailey claims the instant appeal is akin to *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.*, 512 So. 2d 897, 899 (Miss. 1987). The instant appeal is clearly distinguishable from *Cox*. In *Cox*, the Court held it was an abuse of discretion to dismiss one count of a counterclaim procedurally under Rule 54(b). In the instant appeal the Rule 54(b) dismissal was of Defendant Peco Foods. This is not **one count of a counterclaim**. The claims asserted against Defendant Bailey and Defendant Peco Foods are based on different theories of liability. There is no just reason for delaying an appeal of the dismissal of Peco Foods.

Perhaps the only similarity in the instant appeal and *Cox* is the fact that Appellant Bailey should have filed a motion to dismiss the appeal. The Appellant Bailey filed his notice of appeal October 22, 2007 (R. 16) and the record was certified in January 2008. It has taken Appellant Bailey over five months since the certification of the record and three extensions of time for filing to complete a ten page brief requesting a procedural dismissal when the matter could have been addressed by the trial court with a motion to clarify or motion to reconsider. Bailey did not file a motion to reconsider the entry of final judgment pursuant to Rule 54(b) with the trial court. The lower court has stayed proceedings against Bailey pending the outcome of Myatt's appeal.

This Court should review Myatt's appeal on the merits rather than dismissing her appeal and requiring a trial on the separate claim against Bailey before hearing an appeal on Myatt's claims against Peco Foods. It would be contrary to the interests of justice and a failure to efficiently use judicial resources to dismiss Myatt's appeal, require Myatt to litigate her case against Defendant Bailey and then at the end of that case re-appeal the summary judgment issue as to the second defendant Peco. Since the Rule 54(b) was proper this Court is able to and should resolve the plaintiff's appeal of the dismissal of Peco.

In *Indiana Lumbermen's Mutual Insurance Co. v. Curtis Mathes Manufacturing Co.*, 456 So. 2d 750 (Miss. 1984) this Court found in cases involving multiple parties that the trial judge is authorized to enter a final judgment for one or more parties. In *Curtis Mathes* this Court agreed the trial court had properly entered a Rule 54(b) final judgment to a defendant because the charges were on different theories of liability. In the instant case the plaintiff has also presented two separate theories of liability for the negligence of Peco and Bailey. Peco was charged with negligence for failing to provide a safe work environment or safe work area to a contractor among other things and Bailey was charged with negligence in operation of a vehicle. The grounds for the theory of liability while based in general negligence as to all parties are different in their respect to the type of negligence. The claims in *Curtis Mathes* were separable against the defendants and the dismissed defendant was independent of the other defendant. In the case *sub judice* there are two distinct defendants with distinct theories of liability to address.

### **III. PLAINTIFF MYATT AND DEFENDANT PECO WOULD BE INEQUITABLY PREJUDICED BY DELAY OF THEIR RIGHTS TO APPEAL**

The Mississippi Supreme Court has stated in *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.* 512 So.2d 897 (Miss. 1987) the Rule 54(b) should be reserved for rare

occasions. Such rare occasions arise when a party would be inequitably prejudiced by delay of his rights of appeal until a final adjudication of the entire case. The Court held “when there is a judgment dismissing one count of a complaint or counterclaim, a Rule 54(b) finality should never even be considered by the trial court unless the remainder of the case is going to be inordinately delayed, and it would be especially inequitable to require a party to wait until the entire case is tried before permitting him to appeal.” Id at 900. In the instant case the dismissal was not just of a count or counterclaim but of a complete party defendant and separate theory of liability. The court dismissed the entire claim against Peco. Myatt is making a separate claim against Peco on liability. It would be impractical and create an inordinate delay to both Peco and Myatt to have to wait until the conclusion of the Bailey case to find out if they will have to move forward on the other case. Plaintiff would anticipate that at some point the defendant Bailey or Peco may wish to place blame on each other. To do this it would be more practical to have one trial with both defendants at the same time. Otherwise plaintiff Myatt would have to litigate the Bailey trial and possibly appeal any issues, then at the final conclusion of all trials and appeals start a new case against the other defendant, Peco. This is not practical for either the plaintiff Myatt or defendant Peco. The economical and judicial thing to do is to allow this Court to make a determination on plaintiff Myatt’s appeal of the granting of Peco’s Motion for Summary Judgment. That would resolve the issue of Peco’s involvement now and allow the parties to have a resolution of one trial instead of two trials and two appeals.

Rule 54(b) certificates are reserved for a case where a delay in the appeal would result in prejudice to a party. If the Rule 54(b) judgment is tossed out both the plaintiff Myatt and the defendant Peco would be subject to prejudice in how they present and defend their cases. Plaintiff would be forced to litigate against one defendant, Bailey, and then at a later date litigate

a second, separate trial against Peco. Peco would have to wait for several years to find out if it will be a defendant in the future. Even Bailey will be prejudiced in its defenses because it would be estopped from raising any claims asserting Peco was negligent because, as it stands under 54(b), Peco has been dismissed by the trial judge with an indication that they did nothing wrong. Bailey would be estopped from raising any defenses that would assert any apportionment of fault to Peco. Based on the logic of judicial economy to all parties and the court it would be more reasonable for this Court to resolve the issue of fact question against Peco since the matter is now properly before this Court.

### CONCLUSION

There are genuine issues of material fact which should have precluded the lower court from entering summary judgment in favor of Peco Foods; however, it was not an abuse of discretion to apply Rule 54(b) when dismissing Peco Foods in this case. Furthermore, even if entry of dismissal under Rule 54(b) was an abuse of discretion, dismissal of Myatt's appeal would be contrary to interests of justice and would be a failure to efficiently use judicial resources. Myatt respectfully requests this Court review her appeal on the merits and vacate the procedural appeal filed by defendant Bailey.

Respectfully submitted this the 24 day of June, 2008.

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**CERTIFICATE OF SERVICE**

I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to:

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So certified, this the 27 day of June, 2008

  
\_\_\_\_\_  
J. Ashley Ogden