IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-00028

CLAUDINE BROWN, INDIVIDUALLY
AND AS ADMINISTRATRIX OF THE ESTATE
OF CHARLES BROWN, DECEASED, AND ON
BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES
OF CHARLES BROWN, DECEASED — APPELLANT

VS.

PROGRESSIVE GULF INSURANCE COMPANY — 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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. C. Maison Heidelberg, Attorney of record for Progressive Gulf Insurance Company.
2. Ginny Y. Kennedy, Attorney of record for Progressive Gulf Insurance Company.
3. Progressive Gulf Insurance Company.
4. James W. Nobles, Jr., Attorney of record for Claudine Brown and wrongful death beneficiaries of Charles Brown, deceased.
5. James K. Littleton, III, Attorney of record for Claudine Brown and wrongful death beneficiaries of Charles Brown, deceased.
6. Travis T. Vance, Attorney of record for Claudine Brown and wrongful death

beneficiaries of Charles Brown, deceased.

7. Claudine Brown, Appellant

8. Wrongful death beneficiaries of Charles Brown, believed to be:

   (a) Claudine Brown, widow

   (b) Gadhi Manning, daughter

   (c) LaToya Teri Johnson, daughter

   (d) Charles Gray, son

9. Craig R. Sessums, Attorney of record for Frances McLean.

10. Frances McLean

11. The Estate of Jessie Woods

12. Honorable Jannie M. Lewis, Circuit Court Judge

GINNY Y. KENNEDY, MB[redacted]
Attorney of record for Appellee,
Progressive Gulf Insurance Company

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, the Appellees state that oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

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STATEMENT OF THE ISSUES

I. Whether the circuit court properly entered summary judgment in favor of Progressive Gulf Insurance Company because:

A. The Progressive Gulf Insurance Company's named insured, Scott Penn, Inc. ("SPI"), had no liability to the Browns under *respondeat superior* or any other legal theory, and therefore SPI's liability insurance was not implicated;

B. Defendants Jessie Woods and Frances McLean are not "insureds" as defined by the Progressive Gulf Insurance policy covering Scott Penn, Inc., and therefore coverage does not and cannot flow to the Browns through McLean or Woods; and

C. The vehicle operated by Jessie Woods was not a "non-owned" or a "hired" auto, as defined by the Progressive Gulf Insurance commercial automobile liability policy covering Scott Penn, Inc., so no coverage is afforded under those provisions.

II. Whether the circuit court properly concluded that the policy definitions and provisions of coverage in the Progressive Gulf automobile liability policy were not altered or modified by Progressive Gulf's agent's issuance of certificates of insurance to International Paper at the request of Scott Penn, Inc.

IIII. Whether the circuit court properly concluded that Progressive Gulf Insurance Company's separate action against its agent does not estop Progressive Gulf Insurance Company from raising defenses of non-coverage under the SPI policy in this case.

STATEMENT OF THE CASE

A. Nature of the Case

The Appellants' claims in this action arise from a motor vehicle accident that occurred on November 8, 2005, involving Charles Brown, and Jessie Woods ("Woods"), in Yazoo County, Mississippi. Woods and Brown were both operating logging trucks at the time of the accident. Both Brown and Woods died in the accident.

On December 6, 2005, Claudine Brown, individually and as Administratrix of the Estate of Charles Brown, deceased, and on behalf of all wrongful death beneficiaries of Charles Brown (the "Browns" or "Appellants"), filed suit against Woods' estate asserting Woods was negligent in the operation of the truck and seeking damages for Brown's death. *See* Complaint (R. 8-10) (R.E. 1-3). On January 19, 2006, the Browns filed their Second Amended Complaint, in which Frances McLean ("McLean"), the owner of the tractor/trailer operated by Woods, was joined. *See* Second Amended Complaint (R. 26-30).[1] The Browns specifically asserted that Woods was acting in the course and scope of his employment with McLean and claimed McLean was liable for Woods' negligence under the doctrine of *respondeat superior*. *Id.* ¶¶ 4, 6 (R. 26-30).

On November 14, 2006, the Browns amended their complaint again and joined Scott Penn, Inc. ("SPI") and its insurer, Progressive Gulf Insurance Company ("Progressive Gulf").

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[1] The Second Amended Complaint followed a series of amendments to add and correct the names of the defendants. At first, McLean's husband, Henry McLean, was joined and claims were asserted against him based on the Browns' belief McLean owned the vehicle operated by Woods and employed Woods. *See* Amended Complaint (R. 15-17). However, upon learning Frances McLean actually owned the vehicle, Henry McLean was dismissed with prejudice by Agreed Judgment on January 18, 2006. (R. 23).

See Fourth Amended Complaint ¶ 4 (R. 94-100, at 95) (R.E. 5-11, 6).[2] In the lawsuit, the Browns attempted to link Woods and McLean to SPI by asserting that McLean and SPI were engaged in a "joint venture" and that Woods was therefore an employee of both McLean and SPI because of the joint venture. *Id.* The Browns further sought a declaratory judgment that one or more policies issued by Progressive Gulf to SPI provided coverage for the November 7, 2005 accident. *Id.* ¶ 10 (R.99-100) (R.E. 10-11).

B. Course of Proceedings and Disposition Below

In the circuit court, the Browns filed a motion for summary judgment seeking a ruling that: (1) Woods was an employee of SPI or the "joint venture" between McLean and SPI; and (2) the Progressive Gulf policy(ies) issued to SPI provided coverage for the accident. (R. 857). Both Progressive Gulf and SPI countered with motions for summary judgment as to the respective claims against them. *See* SPI's Motion for Summary Judgment (R. 383-403); Progressive Gulf's Motion for Summary Judgment (R. 548-551) (R.E. 21-24). In its motion, SPI argued Woods was *not* an employee of SPI and, further, that there was *no* joint venture between McLean and SPI through which SPI could be held vicariously liable for Woods and/or McLean acts or omissions. (R. 383-403). The Browns ultimately confessed SPI's motion, agreed to entry of judgment in favor of SPI, thereby *conceding* there was no employer/employee relationship between Woods and SPI *and* no joint venture or other relationship between McLean and SPI through which SPI

Was McL not liable on the SPI contract of IP?

[2] Between the Second and Fourth Amended Complaints, the Browns filed a Third Amended Complaint on April 3, 2006, naming SPI and Progressive *Casualty* Insurance Company. (R. 36-60). But, Progressive Casualty was not the proper entity that insured SPI and the Browns' pleadings were again amended so as to reflect the proper name of the insurer.

could be held liable for any acts of Woods or McLean. (R. 1020-21) (R.E. 27-28). Judgment in favor of SPI was entered, and the Browns have *not* appealed that judgment.

At a hearing on the merits of Browns' and Progressive Gulf's opposing motions on the coverage issues, the circuit court *granted* Progressive Gulf's motion for summary judgment and *denied* the Browns' motion, finding no genuine issues of material fact as to either (1) the Browns' claims of coverage under any of the Progressive Gulf policies and (2) Progressive Gulf's claims of non-coverage under the policies. *See* December 12, 2007 Order (entered December 14, 2007) (R. 1101-02) (R.E. 29-30). The trial court simultaneously entered its final judgment in favor of Progressive Gulf (R. 1103-04), and the Browns filed the instant appeal to this court. (R. 1105-07).

C. Statement of Facts

On November 8, 2005, Charles Brown ("Brown") and Jessie Woods ("Woods"), were both operating logging trucks in Yazoo County, Mississippi. They collided, and both Brown and Woods died in the accident. Woods, driving a 1988 International tractor with a log trailer attached, both owned by Defendant Frances McLean (*See* Fourth Amended Complaint at ¶ 5) (R. 95-96) (R.E. 6-7), had been hauling to International Paper in Redwood, Mississippi. The Browns maintain that Woods was negligent and that both Woods and McLean, the owner, are liable for Brown's death. *Id.* at ¶ 5, 9 (R. 95-99) (R.E. 6-10).

Scott Penn, Inc., for whom McLean had contracted to haul, was later added as a defendant. The theory against SPI was that it was in a joint venture with McLean and therefore the "joint employer" of Woods, thereby vicariously liable for Woods' negligence. *Id.* ¶¶ 5,6 (R.

↳ Could that still be a collateral auto under SPI's policy since work was for SPI?

95-97) (R.E. 6-9). The Browns ultimately conceded they had no viable legal claim against SPI, and SPI was dismissed through unopposed judgment. (R. 1020-21) (R.E. 27-28).

At the time of the accident, Progressive Gulf insured SPI and its commercial vehicles.[3] The SPI policies were scheduled-auto and rated-driver policies and insured specifically-identified logging trucks owned by the respective insured trucking entities affiliated with SPI and/or SPI. (*See* Policy Declarations attached as Exhibit "B" to Notice of Filing; *see also* depo. of Chris Scullin at p. 15) (R. 948) (R.E. 79). It is *undisputed* in the record that *neither* the McLean-owned accident vehicle nor its driver, Jesse Woods, were listed in any capacity any of the SPI policies. As such, neither the truck nor the driver, Woods, were insureds under any SPI policies, and the circuit court properly reached this conclusion on the undisputed facts.

What about hired & non-owned reputation?

But later changed to reflect West state?

[3] The Plaintiff identifies some thirteen (13) policies issued by Progressive Gulf to various trucking entities purportedly affiliated with SPI. *See* Fourth Amended Complaint, ¶ 5 (R. 95-97) (R.E. 6-8).

SUMMARY OF THE ARGUMENT

Given the crippling, undisputed facts that neither the vehicle nor the driver appear in any way, shape, or form on any Progressive Gulf policy, the Browns' present claim for coverage is premised on a number of highly creative theories. They first say a Certificate of Insurance provided by Progressive Gulf's agent, Ed Sanford Agency ("Sanford") to International Paper creates "hired" and "non-owned auto" coverages on the SPI policy(ies), that the McLean-owned vehicle was "hired" and "non-owned," and that coverage therefore attaches. *See* Appellants' Brief. The circuit court correctly concluded, however, that under the plain language of the policies at issue, the McLean-owned vehicle was neither "hired" nor "non-owned," even assuming such coverages were provided in the policy(ies).[4]

The Browns then argue that the "hired" and "non-owned" coverages should be extended *beyond the policy language*, ultimately urging that the SPI-IP Master Wood Producer Agreement – not the insurance policy – defines and exponentially expands "hired" and "non-owned" coverage to create benefits to the Browns. *Id.* This far-fetched theory not only ignores the policy language, but it connected to any recognized legal cause of action.

Finally, the Browns argue that the fact that Progressive Gulf has sought legal redress against its agent for issuing an unauthorized certificate of insurance legally estops Progressive Gulf from denying coverage to the Browns. *Id.* Again, no cogent, legally-rooted theory is

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[4] All thirteen policies referenced in the Fourth Amended Complaint (¶ 5), are based on the same underlying policy form and endorsements. *See* Mississippi Commercial Auto Policy Agreement (R. 678-708) (R.E. 33-63). However, the certificate(s) of insurance provided to IP reference only one of these policies, policy number 2601592-1, which was issued to S&S Trucking, Inc., a related entity to SPI (hereinafter the "SPI policy"). *See* Certificates of Liability Insurance (R. 116, 918) (R.E. 65-66).

offered for this argument, and the Browns wholly mistate the basis for Progressive Gulf's case against the agent.

The Browns *conceded* there is no employer/employee relationship between Woods and SPI and that no joint venture or relationship between McLean and SPI. Accordingly, the only named insured under any policy in issue, SPI, was dismissed as a defendant with consent from the Browns' counsel. As SPI was not liable, SPI's liability insurance policies cannot be triggered to provide coverage in favor of Woods or McLean, who are not insureds. Moreover, the log truck operated by Woods, and owned by McLean, was not a listed vehicle on any of the policies. Nor was Woods (or McLean for that matter) a listed driver on any SPI policy.

Ultimately because the clear policy language fails them, the Browns divert to alternative theories attempting to stretch this Court to conclusions well beyond established Mississippi jurisprudence. The Browns cannot create insurance where there is none. The trial court properly granted judgment in favor of Progressive Gulf.

ARGUMENT AND LEGAL ANALYSIS

I. The Standard of Review

When reviewing a trial court's grant of summary judgment, this Court employs a *de novo* standard of review. *See Stewart v. Lofton Timber Co., LLC*, 943 So. 2d 729, 733 (Miss. Ct. App. 2006) (citing *Hudson v. Courtesy Motors, Inc.*, 794 So. 2d 999, 1002 (Miss.2001)). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (citing M.R.C.P. 56(c)).

"If the moving party shows a complete failure of proof on an essential element of the claim . . . , then the moving party is entitled to a judgment as a matter of law." *Keszenheimer v. Boyd,* 897 So. 2d 190, 193 (Miss. Ct. App. 2004) (citing *Galloway v. The Travelers Ins. Co.*, 515 So. 2d 678, 683 (Miss.1987)). *See also Grisham v. John Q. Long V.F.W. Post No. 4057 Inc.*, 519 So. 2d 413, 415-16 (Miss.1988).

II. The trial court properly granted summary judgment in favor of Progressive Gulf because there are no genuine issues of material fact in dispute as to coverage for the November 8, 2005 accident under the policies at issue.

The trial court granted judgment in favor of Progressive Gulf because there were no genuine issues of material fact in dispute as to the claims of coverage under the policies insuring SPI at issue. *See* Order (R. 1101-02). The policy terms are clear, express, and unambiguous, and the facts are not in dispute. Summary judgment was properly granted in favor of Progressive Gulf, and the Browns' cross-motion was properly denied.

A. Progressive Gulf's insured, SPI, had no liability under *respondeat superior* because Woods was not an employee of SPI, and therefore, coverage cannot be invoked through the only named insured, SPI.

Realizing there was no viable theory of recovery against SPI for the November 8, 2005 accident, the Browns confessed SPI's motion for summary judgment and agreed to entry of a final judgment with prejudice. *See* Agreed Order Granting Summary and Final Judgment in favor of Defendant Scott Penn, Inc. (R. 1020-21) (R.E. 27-28). Once SPI, the insured under the policies at issue, was dismissed (by consent of the Browns), Progressive Gulf's potential obligation of coverage disappeared. The trial court properly recognized that "without the liability of Scott Penn, there's no issue as to whether or not Progressive should be liable as far as . . . insurance coverage on this incident." *See* Dec. 14, 2007 Order (R. 1101-02) (R.E. 29-30).

B. McLean and Woods are not "insureds" under the policy

The Browns now assert, however, that no link to SPI is necessary to obtain coverage under SPI's policy because both Woods and McLean[5] are "insureds" in their own right. The Browns urge this Court to find that McLean and Woods – who were neither named insureds nor listed in any capacity on any policy at issue – are "insureds" through "Hired Auto Coverage" and/or "Non-Ownership Liability Rider" provisions.[6]

(i) The "non-owned auto" coverage

The Browns argue that the McLean-owned vehicle operated by Woods is a "non-owned" auto. But coverage does not and cannot trigger under the "non-owned" endorsement because

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[5] McLean, admittedly had no insurance on the truck or her driver at the time of this accident. *See* Frances McLean depo., p. 34:1-2 (R. 730) (R.E. 76).

[6] Certificates of insurance provided by Progressive Gulf's agent to International Paper showed "hired" and "non-owned" coverage to be in effect. (R. 116, 918) (R.E. 65-55). Progressive Gulf did not authorize its agent to issue this certificate of insurance. But even accepting the Browns' argument that SPI's policies had "hired" and "non-owned" coverage, the express terms of the policy exclude coverage as to McLean and Woods.

In a separate filed in federal court, Progressive Gulf has challenged the propriety of its agent's actions in providing these certificates without first obtaining written authorization from Progressive Gulf as required by the contract governing the relationship between Progressive Gulf and its agent. (R. 923-931) (R.E. 12-20).

Woods was not an employee of the named insured, which is one requirement for coverage under this endorsement. The trial court correctly found that this fact was fatal to the Browns' claim for coverage under "non-owned" endorsement. (T. at 90).

The Employers **Non-Ownership Liability Rider** provides as follows:

> "We agree with you that the insurance provided under the Bodily Injury and Property Damage Coverages of the Policy for your insured auto applies to any non-owned auto used in your business **by any of your employees** subject to the following provisions:
>
> Insureds. The "insured" provisions under the Bodily Injury and Property Damage Coverages apply to the insurance provided by this endorsement ***except*** that **none of the following is an insured with respect to a non-owned auto**:
>
> **a. the owner of a non-owned auto and any agent or employee of that owner.**
>
> * * *

See SPI policy, pp. 36-37 (emphasis added). (R. 698) (R.E. 53). To implicate coverage under this endorsement, there are three necessary elements: (1) a "non-owned auto," (2) used in the business of SPI, and (3) *operated by an employee* of SPI. Coverage cannot trigger here because Woods was not an employee of SPI, and the Browns conceded as much.[7]

As support for their argument that the McLean-owned/Woods-operated vehicle is a "non-owned auto" under the SPI policy, the Browns cite two Louisiana cases: *Green v. Freeman*, 759 So. 2d 201 (La. Ct. App. 2005) and *Huddleston v. Luther*, 897 So. 2d 887 (La. Ct. App. 2005). However, neither case supports their position. The Browns' reliance on *Huddleston* is erroneous

[7] As explained earlier, the Browns initially contended in this action that SPI and McLean were engaged in a joint venture and that McLean's uninsured vehicle, driven by McLean's employee, Woods, was being used in the joint venture at the time of the accident. *See* Fourth Amended Complaint, ¶¶ 5-6 (R. 95-98) (R.E. 6-9). But, the Browns abandoned this claim and confessed SPI's motion for summary judgment. (R. 1020-21) (R.E. 27-28). The trial court properly concluded the Browns' inability to link Woods or McLean to SPI is fatal to their claim for coverage under SPI's policy.

for a number of reasons, but primarily because the driver of the purported "non-owned auto" in that case *was an employee* of the insured. *Id.* at 890. Likewise, the driver in *Green* was determined as a matter of law to be an *employee* of the insured. *Green*, 759 So. 2d at 204.

It is undisputed here that Woods was *not* an employee of the insured. And, to have coverage under the clear, unambiguous policy provision, the "non-owned" vehicle must be operated by an SPI employee. *Huddleston* and *Green*, therefore, provide more support for Progressive Gulf's position than for the Browns' position because an employer/employee relationship was a prerequisite to a finding of coverage in those cases. Just as in the policies examined in *Huddleston* and *Green*, "non-owned" coverage under the SPI policy applies only if the"non-owned" vehicle is operated by one of SPI's employees, which Woods was not.[8]

(ii) Neither Woods nor McLean are "insureds" under the non-owned automobile endorsement.

Independently, there is no coverage under the "non-owned" provision because both McLean and Woods, as the truck owner and employee, are specifically excluded from the definition of "insureds" under the unambiguous language of this provision. Again, the policy provides:

> The Employers **Non-Ownership Liability Rider** provides as follows:
>
> * * *
>
> Insureds. The "insured" provisions under the Bodily Injury and Property Damage Coverages apply to the insurance provided by this endorsement *except* that **none of the following is an insured with respect to a non-owned auto**:
>
> **a. the owner of a non-owned auto and any agent or employee of that owner.**

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[8] The *Huddleston* policy defined "nonowned autos" as: "Only those 'autos' you do not own, lease, hire, rent or borrow that are used in connection with your business. This *includes* 'autos' owned by your employees or partners or members of their households but only while used in your business or your personal affairs." *Huddleston*, 897 So. 2d at 889 (emphasis added). The policy at issue in *Green*, contained the same definition. *Green*, 897 So. 2d at 889.

* * *

See Policy, at pp. 36-37 (emphasis added). (R. 698) (R.E. 53). This language specifically provides that the *owner* of the truck (McLean) and the *driver who is employed by the owner* (Woods) are excluded from this coverage.[9] The record establishes that McLean was the owner of the vehicle and Woods was McLean's worker. *See* Certificates of Title (R. 809-10) (R.E. 31-32); Frances McLean Depo., pp. 6, 9-11 (R. 723-24) (R.E. 74-75). So under the clear terms of this provision, McLean and Woods are not "insureds" under the "non-owned" endorsement.

The Browns seem to recognize that the clear policy language in the "non-owned" provision dooms their position. They implicitly admit there is no coverage when they argue in their Brief that ". . . the definitions for non-owned vehicles [in the Progressive Gulf policy] do not comply with the requirements of the IP Master Wood Producer Agreement." *See* Appellant's Brief, at 18. In essence, the Browns suggest that the policy does not provide what the IP-SPI Master contract requires and, therefore, they reason, the policy language should be overlooked, ignored, or even expanded. To the contrary, the plain language of the policy precludes coverage under the "non-owned" encorsement.

C. The "hired auto" coverage

Alternatively, the Browns assert that "hired auto" coverage provides Woods or McLean with "insured" status under the Progressive Gulf policy. The Browns contend that the term "hired auto" is undefined by the policy and, therefore, ambiguous, and they urge the Court to look beyond the language of the insuring contract to find coverage. *See* Appellant's Brief, at 13.

For this argument, the Browns cite this Court to a portion of the deposition testimony of Chris Scullin, Progressive Gulf's 30(b)(6) representative. But Mr. Scullin's testimony has been

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[9] The policy at issue in *Huddleston*, cited by the Browns, *did not* contain this exclusionary language, which is another reason that case does not support the Browns' position.

taken out of context and mischaracterized by the Browns.[10] Mr. Scullin testified that the underlying policy form (Mississippi Commercial Automobile Liability Policy) (R. 678-708) (R.E. 33-63) contained no specific definition for a hired vehicle, but that "[s]ome of these booklets don't have [the hired vehicle coverage] attached. . . . we'd have separate endorsements for it, and I would have to refer to that endorsement." Scullin Depo. at p. 53:22:25 (R. 958) (R.E. 80). When asked if the endorsement for hired vehicle [(R. 709) (R.E. 64)] comprised part of the SPI policy, Mr. Scullin responded, "It's not part of the policy that Progressive issued. . . . But had we issued this coverage on the policy, this would be, this would have been the form." Scullin Depo. at p. 55:5-11 (emphasis added) (R. 958) (R.E. 80).[11]

Mr. Scullin then referred the Browns' counsel to the "hired auto" endorsement, which defines the term and expressly states:

> When used in this endorsement, **"hired auto" means** an auto which is not owned by you, registered in your name, or borrowed from your employees and ***which is obtained under a short-term rental agreement*** not to exceed thirty (30) days.

See "Hired Auto Coverage," policy Form No. 1891 (11-94) (emphasis added) (R. 709) (R.E. 64). The words used in this provision are clear and ordinary and there is no ambiguity.

As a fundamental principle of contract construction, courts "are bound to enforce contract language as written and give it its plain and ordinary meaning if it is clear and unambiguous." *Miss. Farm Bureau Cas. Ins. Co. v. Britt,* 826 So. 2d 1261, 1265 -66 (Miss. 2002) (*citing*

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[10] This is not the only instance in their Brief in which the Browns overstate or misconstrue Mr. Scullin's testimony. The Browns state "[Mr. Scullin] testified that if the [SPI-IP agreement] required [SPI] to have hired and non-owned coverage for any truck and trailer that entered IP's wood yard, and the non-owned vehicles were being used as a part of [SPI]'s business, these vehicles would be covered under the Progressive policy." *See* Appellant's Brief, at p. 12. The Browns cite the Court to pages 6 and 7 of Mr. Scullin's deposition (R. 946) (R.E. 78). However, this is not at all consistent with what Mr. Scullin testified to. (R. 946) (R.E. 78). Because there is no real support in the record for their theories, the Browns must distort the facts and evidence to fit their arguments.

[11] This testimony actually underscores Progressive Gulf's claims in the federal court action that its agent acted without permission and outside Progressive Gulf's knowledge by providing the certificates of insurance to IP.

Jackson v. Daley, 739 So. 2d 1031, 1041 (Miss.1999); *Lewis v. Allstate Ins. Co.,* 730 So. 2d 65, 68 (Miss.1998); *National Bankers Life Ins. Co. v. Cabler,* 90 So. 2d 201, 204 (Miss. 1956); *Farmers Mut. Ins. Ass'n v. Martin,* 226 Miss. 515, 521, 84 So. 2d 688, 690 (Miss. 1956). Under Mississippi law, "[I]f a contractual term is unambiguous and not subject to interpretation, then it will be enforced as written, without attempting to surmise some 'possible' but unexpressed intent of the parties." *Clark v. State Farm Mut. Auto. Ins. Co.*, 725 So. 2d 779, 781 (Miss. 1998) (quoting *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987)). The Browns simply choose to ignore the policy definition because to acknowledge it is to defeat the coverage. Instead, they want the Court to look beyond the policy, which is neither necessary nor permitted because the policy itself is clear and unambiguous.

Here, the policy language requires that for a vehicle to be insured as a "hired auto" there must be a "rental agreement of not more than thirty (30) days." Even if "rental agreement" is undefined, Mississippi law would require that the term be given its plain and common, everyday meaning. *See Liberty Mutual Fire Ins. Co. v. Canal Ins. Co.,* 177 F.3d, 326, 333 (5th Cir. (Miss.) 1999). But SPI did not rent or hire McLean's truck, and the Browns do not even attempt to identify any rental agreement. Moreover, McLean specifically testified:

> Q: Did you ever rent or lease the blue International trailer and truck, the tractor to anybody?
>
> A: No.
>
> Q: You always owned it and used it for your business?
>
> A: Yes.

(Frances McLean depo. at p. 62, lines 21-35, p. 63, lines 1-2.) (R. 737) (R.E. 77). Scott Penn similarly testified he "did not even know the blue International truck existed in the world." Penn depo. at p. 29:14-15. (R. 771) (R.E. 82).

In addition, even in policies without express language requiring a short -term rental agreement, as the SPI policy requires, other courts have held that, "for a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control." *See Sprow v. Hartford Ins. Co.*, 594 F.2d 418, 422 (5th Cir. 1979) (*citing Johnson v. Royal Indemnity Co.,* 206 F.2d 561 (5th Cir. 1953) (interpreting Mississippi insurance contract); *Russom v. Ins. Co. of North America*, 421 F.2d 985, 993 (6th Cir. 1970); *Fertick v. Continental Casualty Co.*, 351 Fo.2d 108, 110 (6th Cir. 1965); *American Casualty Co. v. Denmark Foods*, 224 F.2d 461, 463 (4th Cir. 1955) (additional citations omitted)).

The Mississippi Court of Appeals recently affirmed an award of summary judgment in favor of an insurer in which the sole issue was whether a "hired auto" provision extended coverage to the insured's independent contractor and its driver/employee. *See Phillips v. Enterprise Transp. Serv. Co.*, 988 So. 2d 418 (Miss. 2008). There, Enterprise contracted to provide transportation services for NTC, which contracted with DHS, to transport needy individuals to and from work or school. *Id.* at 418. The vehicle in which Phillips was a passenger was operated by an employee of Enterprise. *Id.* at 419. Phillips sued Enterprise and its driver for injuries sustained in an accident as a passenger in the Enterprise vehicle and he joined NTC and its insurers, seeking coverage for the accident under the "hired auto" provision NTC's policy. *Id.* at 419-20. Finding the relationship between NTC and Enterprise was that of independent contractor, and that Hall, the driver, was not an employee of NTC, the circuit court granted summary judgment in favor of NTC. *Id.* The trial court later granted judgment in favor of NTC's insurers as to Phillip's claim of coverage under the "hired auto" provision, finding "**NTC hired transportation services and not an automobile** from Enterprise; therefore Enterprise and Hall were not covered under the 'hired auto' provisions." *Id.* (emphasis added).

On appeal, Phillips argued the term "hire" was not defined in the insurance contract and that it could be reasonably interpreted to provide coverage, making it ambiguous. *Id.* at 421. The

Court disagreed, holding, "The initial question of whether the contract is ambiguous is a matter of law. . . ." *Id.* (citing *Clark v. State Farm Mut. Auto. Ins. Co.*, 725 So. 2d 779, 781 (Miss. 1998). "The fact that parties may disagree over the meaning of a contractual term does not, by itself, render that term ambiguous." *Id.* The Court found no ambiguity in the term "hire" as used in the policy and refused to look beyond the plain written words. *Id.*

The Court next examined the policy's "hired auto" provision, which defined "hired autos" as "**Only those 'autos' you lease, hire, rent[,] or borrow**. This does not include any 'auto' you lease, hire, rent, or borrow from any of your 'employees,' partners . . . or members of their households." *Id.* at 422 (emphasis added). The Court expressed, "The 'hired auto' provision in [NTC]'s policy specifically provided for leasing, hiring, renting, or borrowing of an automobile. It did not cover the contracting for transportation services of an independent contractor." *Id.*[12]

The evidence was clear that NTC had no control over Enterprise's operations or vehicles and there was no agreement or contract between NTC and Enterprise regarding Enterprises's vehicles, leading the Court to conclude the vehicle in which Phillips was being transported at the time of the accident "was not a 'hired auto' within the plain meaning of that phrase." *Phillips*, 988 So. 2d. at 422-23. *Phillips* is closely analogous to the case at hand.[13]

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[12] As support for its conclusion that the Enterprise automobile was not a "hired auto" within the meaning of the NTC policy, the *Phillips* court examined cases in which the Fifth Circuit has interpreted Mississippi insurance contracts, including *Sprow v. Hartford Ins. Co.*, 594 F.2d 418, 422 (5th Cir. 1979), in which the Fifth Circuit reviewed rulings from other courts holding, "'**for a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control.**'" *Id.* (quoting *Sprow*, 594 F.2d at 422 (citations omitted)) (emphasis added). The *Phillips* court also cited *Toops v. Gulf Coast Marine, Inc.*,, in which the Fifth Circuit held, "**[H]iring an independent contractor [does] not create insurance coverage under a 'hired auto' clause.**" 72 F.3d 483, 487-88 (5th Cir. 1996) (emphasis added).

[13] *Huddleston* is instructive to this part of the analysis. In that case, the Louisiana court examined the definition of "hired auto" and refused to find coverage under that provision because there was *no agreement* between Luther, the truck's driver/owner, and Durand, the insured, involving "the lease of a specific thing, *i.e.*, the vehicle." 897 So. 2d at 889.

Here, no ambiguity exists and the clear policy language controls. There was *no short term rental agreement* and the agreement for hauling services between McLean and SPI was not an agreement for SPI to rent McLean's truck. There is no "hired auto" coverage under the clear policy language.[14]

D. The post-accident letter does not make retroactively create coverage that did not exist.

Recognizing there is no coverage under the express and unambiguous terms of the SPI policy, the Browns argue that a *post-accident letter* written by Progressive Gulf retroactively binds coverage in favor of Woods. This is a red herring that is refuted by undisputed testimony in the record and the plain language of the policy. On March 14, 2006, some six months after the subject accident and after Brown's counsel reported this accident to Progressive Gulf's claims department, Progressive Gulf wrote a letter to SPI *during SPI's policy renewal process and as part of the proposed renewal*:

> Dear S&S Trucking Inc,[15]
>
> A loss occurred on the above referenced policy on 11/08/05. Our investigation revealed that the driver at the time of the loss was Jesse Woods, an unlisted driver. We have added this driver to the policy along with a surcharge for the accident.
>
> . . .

Id. (R. 936) (R.E. 73). The Browns contend that, by virtue of this letter, Woods was transformed into an "insured," *retroactive* to the date of the accident.

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[14] To conclude that SPI "hired McLean's truck and her driver," would require this Court to take the terms "hired" and "rental agreement" out of their context – an approach the Fifth Circuit has flatly rejected. *See Liberty Mutual Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d 326, 335 (5th Cir. (Miss.) 1999).

[15] The correspondence is addressed to SPI's related entity, S&S Trucking, the named insured under the policy. SPI was an "additional insured" under this policy.

(i) The letter does not extend coverage retroactively for this accident.

First, Christine Somrak, Progressive Gulf's Manager of Administrative Claims Support, testified regarding this letter and her testimony stands unrefuted.

> Q: Did your company, by this document, extend liability insurance coverage to Jesse Woods as a driver for this accident?
>
> A: No.
>
> Q: They didn't?
>
> A: No.
>
> Q: What was the purpose of this document then?
>
> A: The policy was *coming up for renewal at this time* and that is when our customer service rep reviewed the policy and noted that there was a loss and there was a loss with an unlisted driver and *they were adding him going forward.*

See Somrak depo. at pp. 15:16-25, 16:1-2 (objections omitted) (emphasis added) (R. 1047) (R.E. 87). Ms. Somrak also specifically testified that the addition of Woods as a listed driver was not retroactive:

> Q: Okay. Now, before this customer service department issued document . . . 1609, that's the document where Jesse Woods was added to this policy retroactively for the accident in question?
>
> A: He was not added retroactively.
>
> Q: Oh, he wasn't?
>
> A: No.

Id. at p. 43:3-14 (R. 1054) (R.E. 88). As Ms. Somrak further explained, the March 14, 2006 letter was sent in connection with the upcoming renewal of the S&S/SPI policy.

A: Well, he [Woods] was not added effective March 14th, the letter was issued March 14th. *He was listed on a renewal quote*. We were offering a renewal and that's when they listed him as a driver.

Id. at pp. 43:24-25, 44:1 (emphasis added) (R. 1054) (R.E. 88).

Perhaps more importantly, it is also undisputed that the proposed renewal (with Woods as a listed driver) *never occurred* because SPI changed insurance carriers at the April, 2006, renewal time. *See* Penn depo. at p. 13:2-16 (R. 767) (R.E. 81); Somrak depo. at p. 123 (R. 1074) (R.E. 89). Scott Penn similarly testified that he never requested that Woods be added as a listed driver on any of SPI's policies because SPI did not employ Woods. *See* Penn depo. at pp. 78:22-79:23 (R. 783) (R.E. 85). Further Penn did not authorize Progressive to in any way suggest any relationship between SPI and Woods. *Id.* at p. 91:1-5 (R. 786) (R.E. 86).

So, no matter how the Browns distort the March 14 letter, Ms. Somrak's testimony is undisputed that this letter addresses a proposed, going-forward renewal that never occurred.

(ii) To be an "insured" under the policy, a listed driver must be operating an "insured auto," and Woods was not.

But even assuming *arguendo* that Woods was added retroactively as a *listed driver*[16] to SPI's policy through this letter, being a listed driver is not the equivalent of being an "insured." Even if Woods was a "listed driver" retroactive to the accident date, he would not qualify as an "insured" because Woods was not an employee and Woods was not driving an "insured auto" under the terms of any policy provision – scheduled auto, hired auto, or non-owned auto. *See supra.* Progressive Gulf's Commercial Auto Casualty Manager, Chris Scullin, explained – consistent with the language of the policy itself – that coverage does not extend to a "listed driver" unless he is driving an "insured auto."

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[16] The March 14, 2006 letter states that Woods was added as a *listed driver*. *See id.* The letter does not state that the addition of Woods was retroactive and nowhere in this letter does Progressive Gulf say it is extending coverage retroactively to Woods for this accident.

auto" under the policy definitions.[18] So Woods could not be an "insured" even if the March 14, 2006, letter applied retroactively to make him a "listed driver," which it did not.

III. The policy's terms are not modified by Progressive Gulf's agent's representations.

Again recognizing that the policy as written provides no coverage for this accident, the Browns further urge this Court to ignore the actual language in the policy and hold that Progressive Gulf's agent *implicitly or orally* bound Progressive Gulf to provide coverage well beyond the language in the contract itself. The argument is that SPI provided Progressive Gulf's agent, Ed Sanford Insurance Agency ("Sanford"), with a copy of SPI's contract with International Paper (R. 801-06) (R.E. 67-72); Sanford, in turn, provided International Paper with one or more certificates of insurance on which "hired" and "non-owned" were marked (R. 116, 918) (R.E. 65-66); and, they argue, Sanford, as a consequence *modified the express terms of the policy* to insure *all vehicles* that delivered wood to the IP wood yard under SPI's contract – no matter who drove them, and no matter who owned them.[19]

In other words, the Browns ask this Court to disregard what the policy endorsements say about "hired" and "non-owned" coverage and instead rule that these coverages cover *all vehicles and drivers in the world* entering IP who deliver through the SPI-IP contract. This position, of course, leaves the policy's express definitions and exclusions meaningless. And carrying this theory to its ultimate conclusion, Progressive Gulf would then be the insurer of a limitless number of unknown vehicles and unknown drivers.

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[18] These policy terms and definitions are controlling here because they are unambiguous and, despite Brown's argument to the contrary, the policy's terms may not be modified by any representations of the agent. *See Stewart*, 846 So. 2d 192.

[19] Significantly, the IP Master Wood Producer Agreement does not even require what the Browns want this Court to impose. Rather, the agreement only requires SPI to "carry, with insurers satisfactory to [IP] . . . Auto Liability Insurance, including either 'owned, hired and non-owned vehicles' or 'hired, non-owned and scheduled vehicles' with limits of not less than $1,000,000, combined single limit . . . ." *See* Master Wood Producer Agreement, ¶ 12 (R. 803) (R.E. 69). And, the terms "hired" and "non-owned" are not defined in the SPI-IP agreement. *Id.*

A. The certificates of insurance do not change the policy definitions.

First, even assuming the agent told SPI or IP that "all" vehicles and "all" drivers who ever entered IP were covered – and there is absolutely no evidence of that[20] – the agent cannot extend the terms of coverage beyond what the policy says. While an agent can bind a principal to a contract of insurance through its representations, the agent *cannot alter the substance of the written contract* through oral representation. *See Stewart v. Gulf Guaranty Life Ins. Co.*, 846 So. 2d 192 (Miss. 2003); *American Income Life Ins. Co. v. Hollins*, 830 So. 2d 1230 (Miss. 2002). *See also Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 319 (5th Cir. (Miss.) 2007); *Preferred Risk Mut. Ins. Co. v. Springer*, 1996 WL 672116, *1 (N.D. Miss., Sept. 13, 1996). In other words, Mississippi law consistently provides that an agent's representations may not change the policy's coverage terms or definitions. *See Stewart*, 846 So. 2d 192; *American Income Life Ins. Co. v. Hollins*, 830 So. 2d 1230 (Miss. 2002). *See also Leonard*, 499 F.3d 319; *Springer*, 1996 WL 672116, *1. The law does not allow an agent to re-write an insurance contract: "It is well-settled under Mississippi law that **an agent's representations cannot modify an insurance policy so as to create coverage or expand existing coverage to a risk that is specifically excluded under the terms of the policy**." *Springer*, 1996 WL 672116 at *2 (citing *Miss. Hosp. & Med. Serv. v. Lumpkin*, 229 So. 2d 573 (Miss. 1969); *Employers Fire Ins. Co. v. Speed*, 133 So. 2d 627 (Miss. 1961)) (emphasis added).

The Browns' last-ditch argument requests an unprecedented and untenable expansion of law inconsistent with established precedent. At best, the "hired" and "non-owned" coverages *as defined by the referenced policy* were in force, not limitless coverages *now desired* by the Browns. To suggest that coverage under the SPI policy was expanded exponentially (and beyond the actual "hired" and "non-owned" policy coverages) merely because Sanford issued a

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[20] In fact, Penn testified that, prior to the November 8, 2005 accident, he never had any discussions with the Sanford agency about the hired and non-owned coverages, other than that SPI needed "Symbol 1" coverages, which he understood to include scheduled, hired, and non-owned autos. *See* Penn depo. at p. 44:15-45:3. (R. 774-75) (R.E. 83-84).

certificate of insurance indicating that "hired" and "non-owned" endorsements were in place is absurd.

B. The Browns may not reasonably rely on the Certificate(s) of Insurance provided to International Paper

Moreover, the Browns have no standing to hold Progressive Gulf liable for coverage based on Sanford's issuance of the certificate(s) of insurance to International Paper. To bind a principal through apparent authority, which is the legal theory the Browns use for this argument, there must have been reasonable reliance and a detrimental change in position: "One seeking to recover based on the theory of apparent authority must show 1) acts or conduct on the part of the principal indicating the agent's authority, 2) reliance on those acts, and 3) a detrimental change in position." *Dixie Ins. Co. v. Mooneyhan*, 684 So. 2d 574, 587 (Miss. 1996) (citing *Gulf Guaranty Life v. Middleton,* 361 So. 2d 1377, 1383 (Miss.1978); *Steen v. Andrews,* 223 Miss. 694, 697-98, 78 So. 2d 881, 883 (1955)). The certificate was issued to IP, and the Browns had no knowledge of it until after this lawsuit was filed and discovery exchanged. Nor did Woods or McLean have any knowledge of or reliance on any representations the agent made to SPI or IP. The Browns have submitted no contrary evidence.

In short, the Browns were not parties to the insurance contract between SPI and Progressive Gulf. They were not recipients of the certificates of insurance provided to International Paper. Thus, the Browns could not possibly have relied on the insurance certificates or changed position in reliance on the certificates. In fact, there is no reason to believe the Browns would even have had knowledge of the certificates, except that they were produced in this litigation. Therefore, recovery by the Browns under the theory of apparent authority is simply an attempt to fit a square peg in a round hole through a hyper-creative, but ill-conceived, argument.

IV. Progressive Gulf has not taken inconsistent positions in litigation and is not estopped from raising defenses as to coverage.

Finally, the Browns assert that Progressive Gulf should be estopped from denying coverage because, they say Progressive Gulf has taken inconsistent positions in this action and the federal court indemnity action against its agent. It appears the Browns are invoking the equitable doctrine of judicial estoppel. "Judicial estoppel is . . . applied by a trial court . . . where a party asserts one position in a prior action or pleading but then seeks to take a contrary position to the detriment of the party opposite." *Mississippi Power & Light Co. v. Cook*, 832 So. 2d 474, 482 (Miss. 2002) (citing *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 264 (Miss.1999); *Skipworth v. Rabun*, 704 So.2d 1008, 1015 (Miss.1996). The Mississippi district court recently recognized, "In the Fifth Circuit, the party raising judicial estoppel must prove: (1) that the position of the party to be estopped is clearly inconsistent with an earlier position; (2) that the party convinced the court to adopt that position; and (4) that the non-disclosure was inadvertent." *McBride v. Bilberry Family Limited Partnership*, 2008 WL 4286532 *1, *2 (S.D. Miss., Sept. 16, 2008) (citing *In re Superior Crewboats*, 374 F.3d 330, 335 (5th Cir. 2004)). Here, the Browns have failed to establish – and cannot prove – these elements to allow application of estoppel. The analysis fails and ends at the first element because they have failed to show any inconsistent positions.

Progressive Gulf has sought indemnity from its agent, Sanford, through a federal court suit. Progressive Gulf's theory is that the agent issued certificates of insurance without first obtaining permission from Progressive Gulf, and that the issuance of the unauthorized certificate is the reason SPI and Progressive were sued in this case. *See* First Amended Complaint (R. 923-931) (R.E. 12-20). Contrary to the Brown's assertion, Progressive Gulf has *not* taken inconsistent positions and does not deny here or in the federal court action that Sanford, as its agent, had apparent authority to issue certificates. Rather, the federal court action., *Progressive Gulf Insurance Company v. Ed Sanford Insurance, et al.*, is premised on a very specific

provision of the Producer Agreement between Progressive and its agent, which required the agent to obtain written permission from Progressive before issuing certificates of insurance. *See* First Amended Complaint. (R. 923-931) (R.E. 12-20).

In that action, Progressive Gulf invokes its rights under the Producer Agreement and seeks indemnity, as well as recovery of costs incurred, as a result of Sanford's issuance of certificates of insurance to International Paper without authority from Progressive Gulf, in violation of the agreement between Progressive Gulf and Sanford. *Id.* ¶¶ 12, 13, 15, 16. (R. 925-27) (R.E. 14-16). Progressive Gulf pleads, "If the *Brown* plaintiffs are successful in their action against Progressive, Progressive will be required to provide coverages that it did not issue, bind, or write and for which Progressive did not bargain and received no premium." *Id.* ¶ 20. (R. 927) (R.E. 16). So far, the Browns have *not* been successful in their coverage action. However, Progressive Gulf has still incurred costs defending the action against it and SPI, all of which are the result of the agent issuing unauthorized certificates that invited the lawsuit.

As shown, Progressive Gulf has been entirely consistent in these two actions. Progressive Gulf has chosen to enforce and protect its contractual rights under the Producer Agreement by seeking indemnity from its agent. The Browns desperately misconstrue and overstate the federal court allegations in an effort to obtain the result they want here. But, the allegations are clear and Progressive Gulf has not taken inconsistent positions. Because the first element is not established, no further analysis under this doctrine is necessary. *See McBride*, 2008 WL 4286532 at *3, fn 5.

Perhaps most importantly, even if Progressive Gulf took inconsistent legal positions, which it did not, the Browns make no effort to explain how that would create legal rights in their favor under any legal theory. Like their other theories, this one also fails for lack of factual and legal basis.

CONCLUSION

The Browns cannot "get to" the Progressive Gulf policies. There is no Progressive Gulf insured who is liable for this accident. The facts are undisputed and the policy language is unambiguous, clear, and controlling. The trial court properly found there was no coverage under the Progressive Gulf policies for Woods' liability. Accordingly, the judgment in favor of Progressive Gulf and against the Browns must be affirmed.

THIS the 26th day of September, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ginny Y. Kennedy, attorney for the Appellee, Progressive Gulf Insurance Company, do hereby certify that I have this day served a true and correct copy of the above and foregoing document via electronic transmission and United States Mail, postage prepaid, on the following:

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and to

Honorable Jannie M. Lewis
Circuit Court Judge
P.O. Box 149
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THIS, the 26th day of September, 2008.

GINNY Y. KENNEDY