

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2008-CA-00028

CLAUDINE BROWN

APPELLANT

V.

PROGRESSIVE GULF INSURANCE COMPANY

APPELLEE

APPEAL FROM JUDGMENT OF YAZOO
COUNTY CIRCUIT COURT

REPLY BRIEF OF APPELLANT

JAMES W. NOBLES, JR., MSB # [REDACTED]
201 CLINTON PARKWAY
CLINTON, MISSISSIPPI 39056
TELEPHONE: (601) 926-1912
TELECOPIER: (601) 926-1914

JAMES K. LITTLETON, MSB# [REDACTED]
402 EAST MARKET STREET
GREENWOOD, MISSISSIPPI, 38935

TRAVIS T. VANCE, JR. MSB # [REDACTED]
914 GROVE STREET
VICKSBURG, MISSISSIPPI, 39180

ATTORNEYS FOR APPELLANTS

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ARGUMENT

Progressive Gulf Insurance Company's Response to Brown's Appellant's Brief is a long, detailed, copiously footnoted Brief in which the real issues in this case were not addressed. The legal issue which the Circuit Judge erroneously decided in the insurer's favor, was whether there was liability insurance coverage for owned, hired and non-owned vehicles which Scott Penn, Inc., utilized to deliver wood to International Paper Company to or for the account of Scott Penn, Inc. "HIRED" and "NON-OWNED" vehicle coverage was required by ¶ 12 of Scott Penn, Inc.'s Master Wood Producer and Service Agreement contract with International Paper Company which reads:

12. Insurance: Seller shall carry, with insurers satisfactory to Buyer, during the term hereof, 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, for both bodily injury liability and property damage liability each occurrence.....

Prior to commencing operations hereunder, a Certificate of Insurance evidencing such coverage, satisfactory to Buyer, shall be furnished to Buyer, which shall specifically state that such insurance shall provide for at least ten (10) days' notice to Buyer in the event of cancellation or any material change in such insurance policies.

Scott Penn, Inc., purchased coverage for all "hired" and "non-owned" vehicles which hauled wood to International Paper Company for Scott Penn, Inc.'s account from Ed Sanford Insurance Agency, Progressive's duly authorized agent. Sanford possessed both apparent and binding authority. (RE- Tab 19).

In order for Scott Penn, Inc. to sell wood to IP, all vehicles which hauled wood into IP's wood yards for Penn's account, whether Penn owned them, hired them or were owned by other

people or firms were required by the contract provision, referenced above, to be covered for automobile liability insurance coverage in the amount of at least 1 Million Dollars. (RE-Tab 15), (R-976, 978 ¶ 12).

Just minutes before the fatal crash which caused the death of Charles T. Brown, Jessie Woods drove Frances McLean's truck and trailer into the International Paper Company wood yard at Redwood, Mississippi loaded with wood for the account of Scott Penn, Inc. The truck and trailer was owned by Frances McLean. To enter International Company premises with the load of wood, Jesse Woods was required to deliver to the IP wood yard gate house the authorization card issued to Scott Penn, Inc., bearing Penn's name and contract number, signifying that the load of wood on the truck and trailer was Scott Penn, Inc.'s and which was sold to International Paper Company by Penn under his Master Wood Producer's Contract. This procedure designated that Frances McLean's truck and trailer, loaded with Scott Penn, Inc. logs, was covered for liability insurance coverage by the Progressive liability policy issue to cover the obligation that any vehicles utilized by Penn entering IP's wood yard under Penn's contract were to be covered. Penn and McLean agreed for McLean's truck and trailer to deliver wood for Penn's account. Penn accepted this arrangement and profited from the transaction. All of International Paper Company's accounting for and payments made for the load of logs were to Scott Penn, Inc., Scott Penn, Inc., then paid McLean a portion of the proceeds of the subject load of logs so delivered.

The commercial auto liability insurance policies bound by Progressive's agent Sanford, and paid for by Scott Penn, Inc., allowed and permitted such arrangements. (R976-978). The Progressive Automobile Liability Insurance Policy #02601592-01 issued to S & S Trucking, Inc., and Scott Penn, Inc., is patently ambiguous because it lacks any definition of "hired vehicle".. (Depo. Progressive,

Scullin, 30(b)(6) witness, (RE-Tab 9)

The truck and trailer owned by Frances McLean and driven by and Jessie Woods, was not owned by Scott Penn, Inc., but it was used by Scott Penn, Inc., to deliver the load of logs in question. It was a non-owned vehicle described by the International Paper Company contract with Scott Penn, Inc. Progressive's policy was modified by the Agent to conform to the contract requirements between IP and Penn. To evidence this point, Certificates of Insurance issued by Ed Sanford Insurance Agency to IP, clearly show that Penn's policy provided Penn's requirements for liability insurance for not only the Frances McLean truck and trailer, but the small percentage of trucks and trailers which Penn utilized to haul wood to IP for his account which Penn did not own. Ed Sanford Insurance Agency, Progressive's Insurance Agent, possessed both the apparent and binding authority, per the Agency Contract and the agent's actions both of which were admitted by Progressive.(R-924, RE-8) Scott Penn testified, that he purchased what he mistakenly called "uninsured motorist" coverage, and when corrected, stated that the coverage was purchased for vehicles which he did not own, but were used by "gate wooders" such as Frances McLean and persons like her whose vehicles were used by Penn to deliver wood to IP for Scott Penn, Inc's account. (R521,522) (RE 17). Penn's uncontradicted and unchallenged testimony graphically shows what he purchased.

Q. And can we say this: Since you started having contracts with IP, did you always have hired and non-owned ?

A. Always. They would not accept a certificate without saying it.

Q. And you wouldn't have been able to do business with IP-

A. No.

Q.-without having their insurance requirements met ?

A. No.

Q, In regard to Progressive, who were you relying upon to make sure that your insurance needs were met ?

A. Progressive.

Q. Who was your contact with Progressive ?

A. Ed Sanford.

Not one tittle, word, sentence or paragraph was interposed by Progressive to contradict Penn's testimony, and not one tittle, word, sentence or paragraph was provided from the Sean Hoffman, the insurance agent with Ed Sanford Insurance Agency to contradict Scott Penn's testimony or to dispute or explain Progressive's Agent's issuance of the Certificates of Insurance to International Paper Company for Scott Penn, Inc., and S & S Trucking, Inc. These certificates of Insurance evidenced coverage for hired and non-owned vehicles for vehicles delivering wood for Penn's account at IP under Penn's contract with IP. This absence of any contradictory evidence to refute the presence of coverage on vehicles which Penn did not own and which it used to deliver wood to IP is deafening, especially when coupled with the allegations Progressive against Ed Sanford Insurance Agency in The United States District Court for the Southern District of Mississippi, Jackson Division, claiming that the agent violated the agency contract by issuing the Certificates of Insurance evidencing coverage for hired and non-owned vehicles on Penn's policy, without collecting the premium and allegedly without the knowledge or permission of Progressive. (RE- Tab 8).

Objective facts present here clearly show that liability insurance coverage for the McLean truck and trailer and for Jessie Woods, the driver, was both required and obtained by Scott Penn, Inc., from Progressive, evidenced by the Certification of Insurance furnished to International Paper Company, to which the load of wood was delivered via McLean's truck and trailer, driven by Jesse Woods. Further objective evidence is supplied through the Memo and Letter from Tony Dengel,

Commercial Auto Product Manager for Progressive, sent to Progressive Agents allowing such coverage for Mississippi wood producer entities such as Scott Penn, Inc., to be issued and bound for non-owned and hired vehicles used to haul wood into International Paper Company wood yards. Progressive clearly recognized that these arrangements took place and allowed coverage to comply with the requirements of IP's contract with Mississippi wood producers. (RE-Tab 12) (R-937-938)

The Honorable Circuit Court Judge committed error in granting Progressive Summary Judgment and denying Brown's Motion for Summary Judgment. The Circuit Court granted Summary Judgment on the flawed premise that there was a lack of agency, joint venture or control by Penn over McLean and Woods. Penn's wood producer business was being serviced and Penn derived financial benefit from the load of logs delivered by McLean and Woods to Penn's credit at International Paper Company. Neither control by Scott Penn, Inc., nor agency, nor joint venture between Scott Penn, Inc., and Frances McLean and Jesse Woods, were required to be shown for hired and non-owned vehicle coverage to exist under Progressive's policy. The hired and non-owned vehicle coverage was for the vehicles which Penn authorized, as here, to haul his wood into IP's wood yards. Coverage on these vehicles necessarily included coverage for the drivers of those vehicles. Control, agency, joint venture or the lack thereof was not and is not the question. The issue is whether, under all the circumstances present here, not considered in a vacuum, coverage existed on the truck and trailer Jesse Woods was driving for Frances McLean which, within minutes before the fatal crash, had delivered a load of wood, under Scott Penn, Inc.'s contract with IP for the account of Scott Penn, Inc. This delivery was via Frances McLean's truck and trailer, neither of which were owned by Scott Penn, Inc., was a "hired vehicle" shown on the Certificates of Insurance to IP, as described by the IP Contract with Penn. Progressive Gulf Insurance Company's

own underwriting documents clearly show that automobile liability coverage was contemplated and would be supplied to wood producers, such as Penn, who utilized other persons vehicles which were hired or non-owned vehicles to deliver wood to International Paper Company. See Memo and Letter from Tony Dengel, Commercial Auto Product Manager for Progressive. (RE 12) (R-937-938). Dengel's memo stated:

COVERAGE SPECIFICS-MISSISSIPPI

"Hired and Non Owned coverage may be available if both of the following criteria apply:

- *Logging risk where Hired Auto and Non Owned is required for accessing pickup or delivery sites*
- See Hired Auto Coverage Guidelines or Non Owned Coverage Guidelines

Note: Coverage is only available upon agent request-we are not promoting this coverage broadly. To be considered, agent must complete and fax in the questionnaire (attached below) for PM review " (R-938).

Since Progressive admits there is no definition of "hired vehicle" in the Progressive Policy in question, McLean's truck and trailer were covered vehicles Penn's and S&S Trucking Company, Inc.'s Progressive Commercial Auto Policy, #02601592-1. That lack of a definition of "hired vehicle" in the policy makes the policy patently ambiguous, which, under Mississippi rules of construction for insurance contracts, yields a construction in favor of coverage and against the insurer, contrary to contentions of Progressive here. This Court's de novo review of these facts mandates reversal of the Summary Judgment since there is, at the least, a genuine issue of material fact as to coverage vel non.

Progressive attempts to slip in a Hired Auto Coverage Endorsement Form # 1891 into the

issued in this case. That form, contained the Record and Record Excerpts (R709, RE Progressive 0124) was neither included in nor attached to the S & S Trucking, Inc., and Penn's Policy. Therefore, neither Form # 1891 nor any of its contents are applicable or play any part regarding the coverage issue in the case sub judice.

An instant replay (de novo review) of the facts adduced by Brown here, calls for reversal of the call by the Honorable Circuit Judge. The proper legal answer should be that Progressive's liability insurance coverage was in full force and covered the McLean truck and trailer at the time of the fatal accident. The Honorable Circuit Court's denial of Brown's Motion for Summary Judgment should be reversed and judgment rendered here that coverage was in force and effect.

Chris Scullin, a 30(b)(6) designee for Progressive, testified *that there was no definition of "hired vehicle" on the face of the policy and that in order to determine what the term "hired vehicle" vehicle meant, one would have to consult Webster's dictionary.* (R-958) (RE-31). The absence of a definition of "hired vehicle" makes the subject policy patently ambiguous, 1) taking into consideration the Certification of the Agent that hired and non owned vehicle coverage was supplied under the S&S Trucking, Inc., and Penn Policy in question; 2) the IP contract referenced above required such coverage, 3) Tony Dengel acknowledged the need for and authorization to the agents to bind such coverages for wood producers such as Penn under IP contracts in Mississippi. Scullin admitted that Ed Sanford Insurance Agency had binding authority. (R- 1083) (RE-27 , page 8, lines 16-25, and Page 9, Lines 1-21). Scullin also admitted that if Progressive's Agent, Ed Sanford Insurance Agency bound the coverage, Progressive had no authority to dispute or knowledge that Ed Sandford Insurance Agency lacked the power to bind Progressive by issuing the Certificate of Insurance to International Paper Company showing coverages for hired and non-owned vehicles

under the S & S policy on which Scott Penn, Inc., was an additional named insured..

Stated previously, Progressive acknowledged notice of the accident and the loss which occurred on November 08, 2005. Progressive further acknowledged that it conducted an investigation when it acknowledged that the driver at the time of the loss (wreck) was Jessie Woods, an unlisted driver. It further knew that the truck and trailer which Jesse Woods was driving was not listed on the Penn Policy and was a non-owned truck and trailer. Progressive wrote in the March 14, 2006 memo sent to the insurance agent and the insured, and that Jessie Woods was added "to the policy" (retroactively) *along with a surcharge for the accident.*", meaning additional premiums to be collected from Penn for the McLean truck and trailer. (R936) RE-25).

The effect of the March 14, 2006 written document from Progressive Policy Service, Commercial Vehicle Division, to S & S Trucking, Inc.,(a copy of which was sent Ed Sanford Insurance Agency,) Policy No. 02641592-1 was endorsed to add Jesse Woods as a listed driver and assessed Penn and S & S Trucking, Inc. with a surcharge for the accident on the policy. (R936) (RE-Tab 10). The addition was made during the policy period and specifically referred to Policy No. 02641592-1. The policy which was upcoming for renewal bore Policy No. 02641592-2. Penn did not renew coverage with Progressive. Christine Somrak's , Progressive' other 30(b)(6) designee, attempt to destroy the efficacy of the March 14, 2006 written document, therefore, fails.

Somrak, acknowledged that Progressive made the investigation noted in the document before Progressive sent or served any reservation of rights letter on Scott Penn, Inc., or S & S Trucking, Inc. Progressive is therefore, estopped to deny coverage. (R-1047, Lines 3 through 13, page 16 of 30(b)(6) witness Somrak)

In American Bankers' Ins. Co. v. Lee, 161 Miss. 85, 134 So. 836(Miss. 1931) this Court

held:

In the case of Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 609, 613, this court said: "The powers possessed by agents of insurance companies, like those of any other corporation or of an individual principal, are to be interpreted in accordance with the general law of agencies. No other or different rule is to be applied to a contract of insurance than is applied to other contracts."

And in that case, on the question of estoppel, the court further said: "The essence of estoppel is that the party asserting the agency was deceived by the conduct of the party against whom it is asserted, and, though fraud may be an ingredient of the case, it is not essential. The principal need not authorize the agent to practice a fraud on third parties, yet if he authorize his agent to transact the business with a third party, and in so doing the agent practices the fraud on the party, the principal is liable. The estoppel may be allowed on the score of negligent fault of the principal. Where one or two innocent persons must suffer loss, the loss will be visited on him whose conduct brought about the situation."

Progressive's own actions, the actions of its agent, Ed Sanford Insurance Agency, both before and after the fatal wreck, clearly show that Progressive sued Sanford Insurance Agency for what it claimed was negligence in binding the coverage, and Progressive acknowledged that coverage when it issued the March 14, 2006 retroactive endorsement and surcharge on the policy for that coverage for the wreck in question.

Jesse Woods' Estate, Frances McLean, Scott Penn, Inc., and the Estate of Brown are innocent persons juxtaposed to Progressive who have suffered and will suffer the loss. Browns' loss of their husband and father and the damages associated with his wrongful death, McLean and the Estate of Jesse Woods being exposed to substantial money damages as a result of the wreck, which was clearly the fault of Jesse Woods. The loss should be visited on Progressive, whose agent Ed Sanford Insurance Agency, and Progressive's own conduct before and after the wreck and death of Brown, brought about the situation at hand. The objective manifestation of the intent of Progressive's agent, Scott Penn, Inc., International Paper Company and Progressive was such that liability insurance

coverage would and could be bound by the agent for any hired or non-owned vehicle or truck and trailer hauling wood to the IP wood yards for the account of Scott Penn, Inc., is supported by the facts present as presented in the Court below. The Circuit Court's failure to consider these facts resulted in an erroneous granting of Progressive's Summary Judgment of no coverage and denial of Brown's Motion for Summary Judgment that coverage existed. Coverage was bound and was in force on the non-owned Frances McLean truck and trailer at the time of the fatal crash which claimed the life of Mr. Brown.

Progressive's feeble attempt to explain away the retroactive endorsement March 14, 2006 document, under the guise of the upcoming renewal of the policy fails. (R1047) This was a patent effort to get around Canal Insurance Company v Bush, 247 Miss. 87, 154 So2d 111 (Miss. 1963), where essentially the same scenario existed regarding a policy provision as to the radius of operation of Bush's truck. Canal contended the truck was outside the radius of operation provision of the policy so that no coverage existed while the vehicle was being driven outside the prescribed radius. There, Canal's insurance agent had assured Bush that he had coverage which the agent had orally bound to Bush for a greater radius of operation than that shown on the policy. The retroactive endorsement by Canal was sufficient for this Court to hold that liability coverage existed, based on the binding coverage representations of the agent. The holding in Canal Insurance Company v. Bush, supra, should be applied here. Canal was in possession of all the facts and the representations of its agent. Canal Insurance Company retroactively endorsed the policy which sprang the coverage which Bus Construction Company purchased which was bound by the agent, who modified the policy provisions to extend the radius of operation for Bush's trucks. Here, Progressive was in possession of all the facts when it issued the March 14, 2006 written endorsement, retroactively

adding Jesse Woods and charging Scott Penn, Inc., with the accident under the existing policy.

Progressive studiously avoids any response to Mississippi Farm Bureau v Todd, 492 So.2d 119 (Miss. 1986) because it cannot refute the fact that Scott Penn, acting as the Officer of Scott Penn, Inc., furnished a copy of the Master Wood Producer and Purchasing Agreement to Ed Sanford Insurance Agency and requested vehicle liability insurance coverages from Progressive to conform with the requisites of said contract for coverage on hired and non-owned vehicles delivering wood to IP's yards for the credit of Scott Penn, Inc., under said contract. The reason why no response was made is obvious. Progressive knows that its agent bound such coverage, issued the Certificates of Insurance evidencing such coverage. It essentially acknowledged such by the allegations made against Ed Sanford Insurance Agency that its agent negligently breached the agency agreement and issued the certificates of insurance to IP evidencing such coverages in the Federal Court suit allegations which are incorporated, infra.

Progressive attempts to distinguish the Louisiana Cases cited in Appellant, Brown's brief relating to hired and non-owned vehicles fail. Those cases stand for the principle that if the vehicle is being used in the furtherance of the business of the insured, coverage exists. Such is clearly the case here. The undisputed documented, written facts here clearly show:

1. The Authorization Card from Scott Penn, Inc. to McLean allowing McLean's truck and trailer to deliver the load of logs to IP bearing Scott Penn, Inc.'s Contract No. CG-164
2. The International Paper Company Scale House tickets on the load of logs delivered by McLean's truck and trailer, driven by Jesse Woods upon entry and departure from IP.
3. The International Paper Company Scale Ticket Listing showing the Load of Logs # 510653 delivered on November 8, 2005, credited to Scott Penn, Inc., under Contract # CG 164;

4. International Paper Company Wood Settlement Statement to Scott Penn, Inc., showing the load in question, the pay for same to Scott Penn, Inc., and referencing the load and the contract(s) under which payment was made to Scott Penn, Inc.

5. Scott Penn, Inc.'s Vendor Ledger showing payment for the logs delivered to IP by Frances McLean for the account of Scott Penn, Inc.

6. The pertinent portions of the Master Wood Producer and Service Contract between Scott Penn, Inc., and International Paper Company, including Paragraph 12 which required liability automobile insurance on hired and non-owned vehicles.

7. Certificate of Insurance evidencing such coverage issued by Ed Sanford Insurance Agency to International Paper Company.

8. Progressive's allegations against Ed Sanford Insurance Agency made in the Federal Court suit.

INTERNATIONAL PAPER
VICKSBURG MILL
FIBER SCALE TICKET
11/08/2005 14:41:11
COPY: 3

TICKET NUMBER: 510653
PRIMARY CONTRACT: CG164
VENDOR: SCOTT PENN INC
SPECIES: MIXED HARDWOOD
PRODUCT: LONG PULPWOOD
TRACT: GREEN
PRICE CODE: 03
TRIP TICKET #: 4024T-8
TRUCK ID: 400PK GIBBS COTTON
TRAILER ID: COMPANY, INC.
PRODUCER: MADISON, MISSISSIPPI
COUNTY/STATE:
SECONDARY HAULING: DATE IN: 08/NOV/05 14:16
DATE OUT: 08/NOV/05 14:41
INBOUND WEIGHT: 69740 POUND
OUTBOUND WEIGHT: 27800 POUND
NET WEIGHT: 41940 POUND
NET TONS: 20.97 TON
SCALER: T. WJOTEN
COMMENTS:
CHIP BARCODE WDY:



Authorization Card #AL16416311

INTERNATIONAL PAPER

Contract: CG164

AUTHORIZATION CARD

Regional Gulf Operations (4)

State: MISSISSIPPI (05)

Country: 77041501

Tract: Green

Expiration Date: 02/31/2008

Origin: 402

Sp. class:

Product: LONG PULPWOOD (22) PUL

Price Code: 03

Fiber Category: Unbleached (08)

Handler: Gibbs Cotton Co

Contractor: SCOTT PENN INC

Producer: 400 PK

Comment: 61665 Cotton Co

This card is good for the following destination(s):

Trailer ID#: 403415

Driver's Signature: J. WJOTEN

INTERNATIONAL PAPER
VICKSBURG MILL
FIBER UNLOADING
11/08/2005 14:16:56

TICKET NUMBER: 510653
PRIMARY CONTRACT: CG164
VENDOR: SCOTT PENN INC
SPECIES: MIXED HARDWOOD
PRODUCT: LONG PULPWOOD
TRACT: GREEN
PRICE CODE: 03
TRIP TICKET #: 400PK GIBBS COTTON
PRODUCER: COMPANY, INC.
DRIVER NAME:
DATE IN: 08/NOV/05 14:16
INBOUND WEIGHT: 69740 POUND
SCALER: J. BURTON
COMMENTS:
LOOP PASS: 108



CHIP BARCODE:



INTERNATIONAL PAPER WOODINFO
SCALE TICKET LISTING BY CONTRACTOR AND CONTRACT
30911

10/1/2005 - 11/30/2005

<u>SCALE TICKET NUMB</u>	<u>TICKET DA</u>	<u>SPECIES COD</u>	<u>PRODUCT COD</u>	<u>PRICE ZON</u>	<u>ET TONS</u>	<u>NO LOADS</u>
SCOTT PENN INC						
Contract Number CG164						

510653	11/2/2005	30	52	03	20.97	<i>Load in question</i>
--------	-----------	----	----	----	-------	-------------------------

11/14/05
 20:44:24
 RID: WL031004

International Paper
 Wood Settlement Statement
 GULF OPERATIONS Region
 From - 11/05/05 through - 11/11/05

Page No: 2
 Week No: 46

Contractor: SCOTT PENN INC
 304 YANDELL AVENUE
 CANTON, MS 39046

Contractor Number: 02230

←→ 3	62600 CG164	03	510653 11/08/05 4024T-	06	045	20.970 TON	22.00	461.34 ←→	<i>11/16</i>
2	62600 CG164	03	510653 11/08/05 4024T-	06	045	20.970 TON	22.00	461.34	

1/19/06 at 09:11:59.09

SCOTT PENN, INC.
Vendor Ledgers

Page: 1

For the Period From Jan 1, 2005 to Dec 31, 2005

Filter Criteria includes: 1) IDs: FRAMCL. Report order is by ID.

Vendor ID Vendor	Date	Trans No	Type	Paid	Debit Amt	Credit Amt	Balance
FRAMCL FRANCIS MCLEAN	11/11/05	39755	CDJ		4,471.00	4,471.00	0.00

percent of the delivered price. This remedy shall be in addition to any other remedies permitted herein or by law, including Buyer's right to immediately terminate this Agreement as well as any other agreement Buyer may have with Seller.

12. Insurance: Seller shall carry, with insurers satisfactory to Buyer, during the term hereof, 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, for both bodily injury liability and property damage liability each occurrence; Commercial General Liability Insurance, including all contractual liability hereunder, with limits not less than \$1,000,000, combined single limit, for both bodily injury liability and property damage liability each occurrence; and Worker's Compensation Insurance meeting all state statutory requirements, and Employer's Liability Insurance with limits not less than \$100,000 each accident/\$500,000 disease - policy limit/\$100,000 disease - each employee. Workers' Compensation Insurance and Employer's Liability Insurance shall fully cover all employees, supervisors, owners, partners and/or executive officers participating in Seller's operations hereunder. Prior to commencing operations hereunder, a Certificate of Insurance evidencing such coverage, satisfactory to Buyer, shall be furnished to Buyer, which shall specifically state that such insurance shall provide for at least ten (10) days' notice to Buyer in the event of cancellation or any material change in such insurance policies. Should Seller fail to furnish current evidence upon demand of any insurance required hereunder, or in the event of cancellation or adverse material change in any such insurance, Buyer may, at its option, suspend this Agreement until insurance is obtained or terminate this Agreement immediately without further action.

Should Seller elect to purchase Auto Liability Insurance including hired, non-owned, and scheduled vehicles, in consideration for Buyer accepting such coverage, Seller further represents and warrants that (a) Seller has provided a complete, true and accurate schedule of all vehicles used in the business to Seller's insurance agent/broker/company; (b) Seller has discussed with insurance company/agent/broker and/or has carefully reviewed the terms of all insurance policies in regard to the requirements for reporting and paying premiums on additions of vehicles during the policy period, and certify that these requirements will be fully complied with at all times; and (c) Seller grants permission to International Paper, on the basis of this document alone, to obtain from insurance company/agent/broker at any time a certified copy of Seller/Vendor's schedule of insured vehicles.

Should Seller elect not to include the owner(s), partners and/or executive officers of such operation in Worker's Compensation Insurance, in consideration for Buyer accepting such coverage, Seller further represents and warrants that (a) Seller is an independent contractor and each owner, partner and/or executive officer of Seller is not an employee(s) of Buyer, and has no right to claim any benefits, including workers compensation benefits, under any Buyer plan, policy, or coverage; and (b) Seller acknowledges that (s)he may purchase a Worker's Compensation plan, insurance or otherwise, insuring any of the owners, partners and/or executive officers but has elected NOT to do so as allowed by law and assume all risks as a result of this decision.

13. Indemnity: Seller agrees to indemnify, reimburse and hold Buyer harmless from and against any and all claims, losses, demands, liens, causes of action or suits, judgments, fines, assessments, liabilities, damages and injuries (including death) of whatever kind or nature, including to all persons or property, arising out of, on account of, or as a result of, directly or indirectly, Seller's or its subcontractors' operations, performance or nonperformance under this Agreement, whether or not caused or alleged to have been caused, in part, by the negligence of Buyer. Seller hereby waives as against Buyer any immunity from suit afforded by applicable workers compensation laws.

At Buyer's request, Seller shall afford to Buyer at Seller's expense, a complete defense of any such claim, demand, cause of action or suit; and (whether or not Seller undertakes said defense) Seller shall bear all attorneys' fees, costs of preparation and maintenance of the defense, all court costs and expert, discovery and investigative fees, and any associated appeal costs, to the end that Buyer shall incur no cost whatsoever as a result of such claim, demand, cause of action or suit, or ensuring compliance with this indemnity provision. Buyer expressly reserves the right to be represented by counsel of its own selection, at Seller's expense. The exercise of Buyer's right to select its own attorneys will in no way detract from or release Seller from Seller's obligation to indemnify and hold Buyer harmless hereunder.

14. Assignments: Seller shall not transfer or assign its rights or obligations under this Agreement without the prior written approval of Buyer. If Buyer approves the assignment of this Agreement, Seller shall remain liable for the liabilities and obligations herein.

15. Independent Contractor Status: No relationship of employer-employee or master and servant is intended, nor shall it be construed, to exist between Seller and Buyer, or between Buyer and any servant, agent, employee and/or supplier of Seller. Seller shall select and pay its own servants, agents, employees and/or suppliers and neither Seller nor its servants, agents, employees, or suppliers shall be subject to any orders, supervision or control of Buyer.

ACORD CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD)

4/05/21

Produced by
Ed Sanford Insurance 601-288-1105
P.O. Box 449
Carthage, MS 39051
Thanks for your business

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURER A: Progressive
INSURER B:
INSURER C:
INSURER D:
INSURER E:

INSURED
Bookit Penn, Inc.
304 Yundell Avenue
Canton, Ms 39046

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED. MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	UNITS
GENERAL LIABILITY COMMERCIAL GENERAL LIABILITY CLAIMS MADE OCCUR GENERAL AGGREGATE LIMIT APPLIES PER POLICY				EACH OCCURRENCE PROPERTY DAMAGE (Any one person) BODILY INJURY (Any one person) PERSONAL AND ADJ INJURY GENERAL AGGREGATE PRODUCTS - COMPOUND AGG
AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS X SCHEDULED AUTOS X HYBRID AUTOS X NON-OWNED AUTOS	02601592-1	4/04/2005	4/04/2006	COVERED SINGLE LIMIT (Per accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)
GARAGE LIABILITY ANY AUTO				AUTO ONLY - EA ACCIDENT OTHER THAN AUTO ONLY EA AGG AGG
EXCESS LIABILITY OCCUR CLAIMS MADE DEDUCTIBLE RETENTION				EACH OCCURRENCE AGGREGATE
WORKERS COMPENSATION AND EMPLOYERS' LIABILITY				WORKERS COMPENSATION EA EACH ACCIDENT EA DISEASE - EA EMPLOYEE EA DISEASE - POLICY LIMIT
OTHER				

DESCRIPTION OF OPERATIONS, LOCATION, BY ENDORSEMENT, EXCLUSIONS, ADD-ONS BY ENDORSEMENT AND SPECIAL PROVISIONS

SEE ATTACHED LIST

CERTIFICATE HOLDER

ADDITIONAL INSURED (INSURED LISTED)

CANCELLATION

International Paper
P O Box 158
Redwood, Ms 39156
Fax 601-691-8235

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE WRITING INSURER WILL endeavor TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE
Gwen Hoffman

ACORD 26-S (7/77)

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EXHIBIT

D 918

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

PROGRESSIVE GULF INSURANCE COMPANY
and PROGRESSIVE CASUALTY INSURANCE COMPANY

PLAINTIFFS

VS.

CIVIL ACTION NO. 3: 06CV457TSL-JCS

ED SANFORD INSURANCE and JOHN and JANE
DOES 1-5

DEFENDANT

**FIRST AMENDED COMPLAINT
(JURY TRIAL DEMANDED)**

COME NOW the Plaintiffs, Progressive Gulf Insurance Company and Progressive Casualty Insurance Company, pursuant to 28 U.S.C. § 2001(a), Fed. R. Civ. P. 57, and other applicable authorities, and file this Complaint for Damages and for Declaratory Judgment against the Defendant, Ed Sanford Insurance, and, in support thereof, states as follows:

.....

7. Prior to April, 2005, Progressive and Sanford entered into a Producer's Agreement, by which Progressive authorized Sanford to solicit, provide quotes, receive applications, bind coverage, and to demand, collect, and receive premiums for Progressive insurance products in the state of Mississippi. (*See* Progressive Producer's Agreement, attached hereto as Exhibit "A").

8. As an agent for Progressive, Sanford had certain authority to act for and/or on behalf of Progressive. Sanford also had apparent authority to act for Progressive because of the principal agent relationship, which relationship, in itself, created a legal duty in favor of Progressive

.....

12. On or about April 5, 2005, Sanford issued a Certificate of Insurance on policy number 02601592-1 (named insured S&S Trucking, Inc.) and marked on the certificate "hired" and "nonowned" coverage (*See* Exhibit "C"). This certificate ("COI") is signed by Sanford's employee, Gwen Hoffman, and identifies "Scott Penn, Inc." as the "insured," and International Paper in Redwood, Mississippi, as the "certificate holder." *Id.* Sanford's issuance of the COI was contrary to the express restriction in the Producer's Agreement and contrary to its legal duties as an agent purporting to act for or on behalf of its principal. Sanford's issuance of the COI was also negligence because Sanford acted unreasonably and beyond the scope of what a reasonable agent would have done.

13. Also contrary to the Producer Agreement and its common law duties, on or about July 18, 2005, Sanford negligently issued a second COI on policy number 02601592-1, again marking the "Hired Autos" and "Non-Owned Autos" indicators. (*See* Certificate of Insurance, attached hereto as Exhibit "D"). This COI, like the one issued April 5, 2005, is signed by Sanford's employee, Akemie Willis, and identifies "Scott Penn, Inc." as the "insured," and International Paper in Canton, Mississippi, as the "certificate holder." *Id.* Sanford may have similarly issued COIs in addition to those identified in this and the preceding paragraph.

14. Upon information and belief, the COIs were issued by Sanford at the request of S&S Trucking, Inc. and/or Scott Penn ("Penn") and/or Scott Penn, Inc.

.....

21. If Progressive is held liable on its policy, liability will necessarily be based on a finding or conclusion that the Sanford COIs bind Progressive.

24. Sanford negligently failed to obtain permission from Progressive to issue the COI as

to policy number 02601592-1 and negligently issued and delivered the COI to International Paper. On information and belief, Sanford negligently relied on past communications with Progressive for its actions with respect to the COIs; but, regardless, Sanford acted unreasonably and beyond what a reasonable agent would have done.

25. As Progressive's agent, Sanford owed a duty to exercise reasonable skill, care, and diligence in transactions involving Progressive.

26. Sanford breached its duty to Progressive by negligently issuing the COIs and by negligently delivering the COIs to International Paper and by failing to require, collect, or receive premiums, and all constitutes unreasonable action and omission toward the principal, and as such the actions and inactions of Sanford constitute negligence provide coverages that it did not issue or bind and for which Progressive received no premium, and all constitutes unreasonable action and omission toward the principal, and as such the actions and inactions of Sanford constitute negligence.

27. As a direct and proximate cause of Sanford's negligence, Progressive has incurred and continues to incur legal fees and expenses in defending the *Brown* action. In addition, if the *Brown* plaintiffs are successful in their action against Progressive then Progressive will be required to Progressive may also be held liable for any judgment rendered against McLean and/or Wood in the *Brown* action.

28. Sanford is liable to Progressive for all damages and losses incurred as a result of Sanford's negligence, which are ongoing and will be established at trial.(RE-Tab 9).

The case law governing this transaction has been enunciated numerous times over the years that the acts of the insurance agent bind the insurer principal and that an agent with binding authority may alter, change or modify any of the terms or provisions of the policy. See: **Smith Trucking, Inc. v. Cotton Belt Insurance Company**, 556 F.2d 1297, 1301-02 (5th Cir. Miss. 1997), where that Court reviewed the case law concerning oral representations and binding actions of the insurance agent whom the Court described as the alter ego and pro hac vice of the insurer, and held.

An oral contract to insure is valid in Mississippi. *Southern Ins. Co. v. Ryder Truck Rental, Inc.*, 240 So.2d 283 (Miss.1970), *McPherson v. McLendon*, 221 So.2d 75 (Miss.1969), *Canal Ins. Co. v. Bush*, 247 Miss. 87, 154 So.2d 111 (1963). The above cases hold that the general agent of an insurance company, such as Dupuy-Busching in this case, has very broad authority to act on behalf of its principal, the insurance company. Indeed it acts "in the stead of" the insurance company. With respect to the authority of the local soliciting agent, Tate Agency, Mr. Dupuy testified that under certain conditions that agency had authority to bind Cotton Belt. Under the circumstances of this case, Tate Agency was clearly the agent of Dupuy-Busching, the agent of Cotton Belt, the insurer in this transaction, and under these circumstances Tate Agency was pro hac vice the agent of Cotton Belt. *Bankers Fire and Marine Ins. Co. v. Dungan*, 240 Miss. 691, 128 So.2d 544 (1961); *Canal Ins. Co. v. Bush*, supra; Miss.Code s 83-17-1.

See: **Continental Ins. Co. v. Transamerica Rental Finance Corp.**, 748 So.2d 725 (Miss.,1999); summary judgment reversed on presence of jury question as to oral modification between agent and insured; **Johnson v. Rao**, 952 So.2d 151(Miss.,2007) which reiterated the principles of agency stated many times by this Court:

¶ 12. In *McPherson v. McLendon*, 221 So.2d 75, 77-78 (Miss.1969), this Court reversed the circuit court's grant of directed verdict where the acts on the part of the insurance company were sufficient for the jury to find that the insurance company had clothed Christine McLendon with the apparent authority to contract on their behalf and the plaintiffs had detrimentally relied on the insurance company's actions. However, relevant to our review, the Court examined the general laws of agency and stated:

A general statement of the rule governing apparent authority is found in *Steen v. Andrews*, 223 Miss. 694, 78 So.2d 881 (1955), recently cited with approval in *Union Compress & Warehouse Co. v. Mabus*, 217 So.2d 23 (Miss.1968)[:]

The power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound if the conduct *155 of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have. The agent's authority as to those with whom he deals is what it reasonably appears to be. So far as third persons are concerned, the apparent powers of an agent are his real powers. 2 C.J.S. Agency, §§ 95, 96. This rule is based upon the doctrine of estoppel. A principal, having clothed his agent with the semblance of authority, will not be permitted, after others have been led to act in reliance of the appearances thus produced, to deny, to the prejudice of such others, what he has theretofore tacitly affirmed as to the agent's powers. 2 C.J.S., Agency, § 96©). There are three essential elements to apparent authority: (1) Acts or conduct of the principal; (2) reliance thereon by a third person, and (3) a change of position by the third person to his detriment. All must concur to create such authority . 2 C.J.S., Agency, § 96(e). (223 Miss. at 697, 698, 78 So.2d at 883).

McPherson, 221 So.2d at 78.

Here, one does not have to guess as to Ed Sanford Insurance Agency's apparent authority to act on behalf of Progressive. It comes from Progressive's own allegations against its agent in the Federal Court Suit shown above. (RE-Tab 9). Sanford had binding and apparent authority to deal with Scott Penn, Inc., on behalf of Progressive, its principal. An oral modification of a written contract may be valid, even though the original contract has provisions in it that the only modifications must be in writing. **Tupelo Redevelopment Agency v. Gray Corp., Inc.**, 972 So.2d 495, 508 (Miss.,2007) dealing with additional work under a written contract which required that a written change order be secured before pay for any additional work outside the contract would be paid, citing **Eastline Corp. v. Marion Apartments, Ltd.**, 524 So.2d 582 (Miss.1988) where this Court held:

This Court reversed the chancellor and reiterated a long-standing Mississippi principle that "a written contract can be orally modified." Id. ("An oral modification may be made even

where the contract provides that modification must be in writing.”).

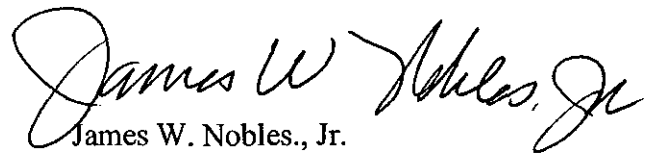
Four things are present on the face of this record which precluded the entry of Summary Judgment for Progressive and require reversal and entry of judgment for Brown here. **First.** Ed Sanford Insurance Agency had both contractual binding authority and apparent authority to bind Progressive (Paragraphs 7 and 8 of Progressive’s Federal Suit against Ed Sanford Insurance Agency) by providing hired and non-owned vehicle coverage to Scott Penn, Inc., to comply with Paragraph 12 of the International Paper Company Master Wood Producer and Service Contract. **Second.** Progressive acknowledged the wreck and the claim and on March 14, 2006, retroactively generated a written document which added Jesse Woods as an insured driver to the policy;. **Third.** Acting within its Agency Agreement and with apparent authority to act for Progressive, Ed Sanford Insurance Agency issued and sent International Paper Company the two certificates of insurance which showed evidence that Scott Penn, Inc., acquired and had liability insurance on each and every truck and trailer, owned and non-owned, which were utilized to haul logs and wood to International Paper’s wood yards under Penn’s contract. **Fourth.** Progressive admits that it had no definition of “hired vehicle” on the face of its policy and referred one to Webster’s Dictionary for the definition.

CONCLUSION

Utilizing the principles of agency and the principles of construction of insurance contracts and applying them to the facts of this case, it is clear that the truck and trailer driven by Jesse Woods and owned by Frances McLean, used to haul wood to the International Paper Company wood yard for the account of Scott Penn, Inc., under its IP Contract, were covered for liability insurance as a “hired or non-owned” vehicle as under IP’s contract. The agent modified the Progressive coverages

to conform to IP's contract requirements Mississippi Farm Bureau Insurance Company v Todd, supra. Such was the intent of the agent and Scott Penn, Inc. and was permitted by Progressive. The Summary Judgment Granted Progressive of no coverage should be reversed and rendered here and Judgment Granted Brown as a Matter of Law that Progressive's Liability Insurance Policy was in full force and effect and covered the truck and trailer being driven by Jesse Woods which caused the death of Charles T. Brown.

Respectfully submitted.


James W. Nobles., Jr.

CERTIFICATE OF SERVICE

I, James W. Nobles, Jr., do hereby certify that I have this day filed the original and the requisite number of copies with the Clerk of the Mississippi Supreme Court and served by United States Mail, or Electronic Mail, true and correct copy of the above and foregoing Appellants Reply Brief on:

Honorable Jannie M. Lewis
Yazoo County Circuit Court Judge
Post Office Box 149
Lexington, Mississippi 39095

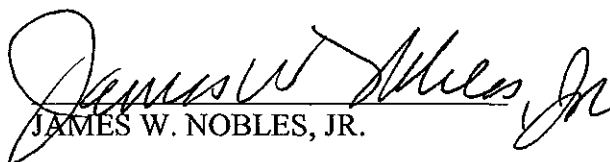
Craig R. Sessums
Jones Funderburg Sessums & Peterson, PLLC
Post Office Box 13960
Jackson, Mississippi 39236-3960

Sam Thomas, Esquire
Underwood & Thomas, P.A.
Post Office Box 2790
Madison, Mississippi 39130

Maison Heidelberg, Esquire
795 Woodlands Parkway
Suite 220
Ridgeland, Mississippi, 39157

Roger C. Riddick, Esquire
Upshaw Williams Biggers Beckham & Riddick, LLP
Post Office Box 9147
Jackson, Mississippi 39286-9147

Witness my signature this the 14th day of November A.D., 2008.


JAMES W. NOBLES, JR.