IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-CA-00028

CLAUDINE BROWN — APPELLANT

V.

PROGRESSIVE GULF INSURANCE COMPANY — APPELLEE

**********

APPEAL FROM JUDGMENT OF YAZOO
COUNTY CIRCUIT COURT
ORAL ARGUMENT REQUESTED

**********

# BRIEF OF APPELLANT

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OF THE STATE OF MISSISSIPPI

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant certifies that the following are listed in order that the justices of this Court may evaluate possible disqualification or recusal.

1. Claudine Brown, Appellant, 340 West 6th Street, Yazoo City, Mississippi, 39194; Administrartrix of the Estate of Charles Brown, Deceased and his widow ;
2. Ms. Gadhi Manning, 918 Grady Avenue, Yazoo City, Mississippi 39194, Daughter of Charles Brown, Deceased;
3. LaToya Teri Johnson, 900 White Avenue, Yazoo City, Mississippi 39194; Daughter of Charles Brown, Deceased;
4. Mr. Charles Gray, 3542 Joann Drive, Jackson, Mississippi 39213, son of Charles Brown, Deceased
5. James W. Nobles, Jr., Attorney for Appellant, 201 Clinton Parkway, Clinton, Mississippi 39056;

6. Travis T. Vance, Attorney for Appellant, Post Office Box 750, Vicksburg, Mississippi 39181-0750;

7. James K. Littleton, Attorney for Appellant, 402 East Market Street, Post Office Box 1155, Greenwood, Mississippi 38935;

8. Frances McLean, Yazoo City, Mississippi

9. The Estate of Jessie Woods, Chancery Court Yazoo County, Mississippi;

10. Craig R. Sessums, Attorney for Defendant Frances McLean, Jones Funderburg Sessums & Peterson, PLLC, Post Office Box 13960, Jackson, Mississippi 39236

11. Sam Thomas, Esquire, Attorney for Defendant Scott Penn, Inc., Underwood & Thomas, P.O., Post Office Box 2790, Madison, Mississippi 39130

12. Maison Heidelberg, Esquire and Ginny Kennedy, Attorneys for Appellee Progressive Gulf Insurance Company, 795 Woodlands Parkway, Suite 220, Ridgeland, Mississippi, 39157

13. Roger C. Riddick, Esquire, % Upshaw Williams Biggers Beckham & Riddick, LLP Upshaw, Williams Law Firm, Post Office Box 9147, Jackson, Mississippi 39286-9147 Attorney for Intervener SRC Trucking & Transportation and Mississippi Trucking Association Self Insurer's Fund

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

WITNESS MY SIGNATURE this the 23rd day of June, A.D., 2008.

JAMES W. NOBLES, JR.

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Appellant Brown submits that oral argument would be helpful to the Court in this cause since it involves substantial question of law regarding hired and non-owned automobile liability vehicle coverages which have not heretofore been addressed by any reported case in Mississippi which addresses the use of hired and non-owned vehicles in the furtherance of the business of the insured. Brown submits that oral argument would be helpful to the Court to discuss these matters, especially in light of all the facts of this case.

## STATEMENT OF THE ISSUES

The Circuit Court of Yazoo County erred in granting Summary Judgment to Progressive Gulf Insurance Company and denying Brown's Motion for Summary Judgment, holding that no coverage existed under Progressive Gulf Insurance Company's automobile liability insurance policy because the named insured was not liable under agency, joint venture or vicarious liability theories where coverage existed on the non-owned truck and trailer which was being used at the time of the wreck in question to carry out the business of the insured and where the facts are undisputed that coverage for non-owned vehicles was bound by Progressive's agent to comply with specific requirements of a contract between its insured and a third party, requiring automobile liability coverage for hired and non-owned vehicles used by the insured in the furtherance of its business.

## STATEMENT OF THE CASE
## COURSE OF PROCEEDINGS BELOW
## PERTINENT FACTS

The wrongful death beneficiaries and the Estate of Charles T. Brown, Deceased, filed suit in the Circuit Court of Yazoo County, Mississippi, against the Estate of Jesse Woods and Frances

McLean, the driver and owner of an 18 wheeler log truck, for the wrongful death of Brown which occurred on November 8, 2005 in Warren County, Mississippi. Subsequently, Brown filed several amended complaints making allegations that Scott Penn, Inc., was liable as a joint venturer with McLean as to the logs which were delivered to International Paper Company's woodyard at Redwood, Mississippi by McLean's truck and trailer driven by Jesse Woods. The head-on collision occurred less than a mile north of IP's woodyard after Woods had delivered a load of logs to International Paper for Scott Penn,.Inc.'s account under Penn's Master Wood Producer Contract with IP. Brown amended the Complaint seeking a Declaratory Judgment that Progressive Gulf's policy provided coverage to McLean and Woods for the death of Brown.

After extensive discovery, and shortly before the case was to be tried on the liability and damage issues, both Brown and Progressive filed Motions for Summary Judgment as to the coverage vel non, provided by the Progressive Gulf policy to Scott Penn, Inc., for hired and non-owned vehicles, of which McLean's was one. The Court Granted Progressive Gulf Summary Judgment that in order for coverage to apply, Scott Penn, Inc., had to be held liable, either as a master, joint venturer, or vicariously as exercising the right of control over McLean, Woods and the vehicle that Woods was driving. The Court denied Brown's Motion for Summary Judgment holding that no coverage existed under the Progressive policy.

Brown filed a timely Notice of Appeal, and Designation of Contents of Record on Appeal, and filed the requisite Certificate of Compliance under Rule 11(b) of the Mississippi Rules of Appellate Procedure.

## SUMMARY OF THE ARGUMENT

The Circuit Court erred in Granting Summary Judgment to Progressive Gulf Insurance Company that no coverage existed under the insurance policy in question because Scott Penn, Inc., was not primarily or secondarily liable as a master or joint venturer because:

1. Ed Sanford Insurance Agency was a duly authorized agent for Progressive Gulf Insurance Company who possessed apparent and binding authority, both by actions and by agency contract with Progressive; ( R 923-930) (RE 8)
2. Sanford exercised that binding authority and caused automobile liability insurance coverages to be issued by Progressive Gulf Insurance Company to Scott Penn, Inc., to cover the liability insurance requirements of a Master Wood Producers Agreement with International Paper Company which required that all trucks and trailers used to transport wood to IP's woodyards to Scott Penn's account under the Master Wood Producers Agreement, be insured for automobile liability insurance with limits of at least $1,000,000., whether such vehicles were owned, hired or non-owned vehicles. ( R. 1083) (RE 9).
3. Progressive Gulf Insurance Company's policy issued to S & S Trucking, Inc., and Scott Penn, Inc., contains no definition of " hired vehicles" and is therefore, ambiguous. ( R 1958).
4. Progressive Gulf Insurance Company issued, retroactively, an endorsement to the Scott Penn, Inc., policy adding Jesse Woods as an insured driver, and charging Scott Penn, Inc., for the accident in question as a covered under the policy. (R936 ) (RE 10)

5. At the time of the fatal collision, the non-owned truck and trailer, were being used in the furtherance of the business of Scott Penn, Inc., which was covered under the policy. ( R117, 118, 119, 120, 933, 935, ) (RE 11)

6. Progressive further acknowledged that its Agent, Ed Sanford Insurance Agency, had bound coverage where it filed suit against the Agent in Federal Court alleging that the agent negligently bound coverage for the loss in question; ( R923-930).

7. Progressive Gulf Insurance Company authorized its agents to issue and bind coverage to specifically address the requirements of International Paper Company's contracts with wood producers who utilized non-owned and hired vehicles to deliver wood to IP. ( R.936-938 Letter from Tony Dengel to Agents with attached underwriting guidelines) ( RE 12 ).

8. The Certificates of Insurance to International Paper Company by Progressive's agent, Sanford, showing hired and non-owned vehicle coverages; (R116,918)

9. Documents from Progressive Gulf Insurance Company's files which include:

(a) retroactive endorsements adding Jesse Woods as an insured driver and the endorsement accepting the wreck as a covered accident and surcharging Scott Penn, Inc for coverage extended to the wreck in question; ( R 795, 936 ); (RE 13 ).

(b) Progressive's Commercial Auto Product Manager's letter to Progressive Agents allowing them to bind and write hired and non-owned vehicle coverages for logging accounts such as Scott Penn, Inc., under the circumstances extant in this case;, where the hired or non-owned vehicles were to be used to deliver logs to the mill, in the furtherance of the contract and business of the insured; (R-937-939)

(c) Progressive's admission by its allegations against its agent in Federal Court which claim that Ed Sanford Insurance Agency had both binding and apparent authority to bind coverages, that Ed Sanford Insurance Agency negligently bound coverage for hired and non-owned vehicles for Scott Penn, Inc., under the S & S Trucking, Inc., Progressive Gulf Insurance Company Policy # 2601592-1 used in the furtherance of the business of Scott Penn, Inc. (R-923-930).

All these undisputed facts add up the policy in question providing coverage to Brown for the death of Mr. Brown and the damages flowing from his death in the wreck caused by Jesse Woods while he was driving Frances McLean's truck and trailer, both "non-owned vehicles", which had just delivered a load of wood to International Paper Company, credited to and for which Scott Penn, Inc., was paid by International Paper Company under the Master Wood Producers Agreement. Progressive provided coverage to cover Scott Penn, Inc.'s contractual obligations under the Master Wood Producers Agreement ( R. 976-978). Prevailing Mississippi Law requires that coverage be found to exist per **Mississippi Farm Bureau Insurance Company v Todd.** 492 So2d 119 (Miss. 1986) and the cases cited therein.

## FACTS PRECLUDING ENTRY OF MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BROWN'S MOTION FOR SUMMARY JUDGMENT AS TO COVERAGE

On November 8, 2005, Jesse Woods was driving a International Tractor pulling a log type trailer, which was owned by Frances McLean, and which was being used in connection with fulfilling

Scott Penn, Inc.'s wood producer contract with International Paper Company. Both the truck and the trailer which were being driven by Jesse Woods were "non-owned" vehicles under Scott Penn, Inc.'s Progressive Gulf Insurance Company policy. Woods collided head-on with a truck and trailer being driven by Charles T. Brown on Mississippi Highway 3, just North of the International Paper Company Redwood, Mississippi, mill wood yard in Warren County, Mississippi. Both Jesse Woods and Charles T. Brown were killed by the violent head-on collision between the two 18 wheelers.

Scott Penn, Inc., purchased automobile liability insurance from Ed Sanford Insurance Agency, Carthage, Mississippi, for the period from April, 2005 through April, 2006 for its owned trucks and trailers which were scheduled on each policy issued by Progressive and for hired and non-owned vehicle coverage required by the International Paper Company's Master Wood Producer Agreement which Scott Penn, Inc., had entered into with International Paper Company. Unknown to Scott Penn, Inc., and its employees and officers, the Sanford Insurance Agency issued policies in the names of fictitious corporations, one of which was S & S Trucking, Inc., because Progressive Gulf Insurance Company's underwriting guidelines allowed only ten tractor trailer units to be listed on any one policy. However, such fact is not important because Scott Penn, Inc., was named as an additional named insured on each and every policy. Under the Insurance Agency producers agreement, between Ed Sanford Insurance Agency and Progressive, the Sanford Agency had authority to bind and issue automobile liability insurance coverages in the State of Mississippi, and possessed apparent authority to act for and on behalf of Progressive Gulf Insurance Company. (Progressive Gulf Insurance Company's Amended Complaint, U. S. District Court Southern District of Mississippi, Jackson Division, Cause No. 3:06-CV-00457, ¶ 7 & 8) ( R.923-930 ) (RE 14 ).

What did policy show? Notice?

As a wood producer under its Master Wood Purchase and Service Agreement Contract

with International Paper Company, Scott Penn, Inc., was obligated to sell and deliver and/or cut, convert and/or transport certain species of wood to IP at delivery points and wood yards designated by International Paper Company Buyer for prices set for specific blocks of time and for certain species of wood, which were specified by a purchase order. (R976-981) (RE 15 ).

The Master Wood Producer Agreement between International Paper Company and Scott Penn, Inc., Penn was specifically obligated to:

1). furnish a sufficient number of safe and operationally sound tractors, trailers, and other transportation equipment of sufficient capacity,

2.) which were licensed, and ***insured***, competent drivers

Paragraph 12 on page 2 of the Master Wood Purchase and Service Agreement reads:

> **12. <u>Insurance:</u> Seller(Scott Penn, Inc.) shall carry, with insurers satisfactory to Buyer,(International Paper Company) 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. .(R.978),( RE 16 )**

Scott Penn, Inc., was therefore required to carry at least $1 million in automobile liability insurance coverage on all trucks and trailers which were "owned", or "hired" or "non-owned" used to transport wood sold by Scott Penn, Inc., in the furtherance of its business in fulfilling its Master Wood Producer Contract with International Paper Company.

Scott Penn, Inc., purchased what Scott Penn, its President and Chief Officer, thought to be the requisite coverages from Ed Sanford Insurance Agency. ( R521, 522 ) (RE 17 ). On April 5,

2005, A Certificate of Insurance was sent by Ed Sanford Insurance Agency to International Paper Company showing Scott Penn, Inc., was insured, under Policy No. 2601592-1 showing "Progressive" as the insurer and showing the policy period to be April 04, 2005 to April 4, 2006, with Automobile Liability Insurance Limits of $1,000,000. This certificate of insurance showed coverages for scheduled autos, hired autos, and non-owned autos and was signed by Gwen Hoffman, an authorized person with Ed Sanford Insurance Agency. ( R.918 ) ( RE 18 ) Another Certificate of Insurance dated July 18, 2005, and signed by Akemie Willis, showing the same information, was sent by the Sanford Insurance Agency to International Paper Company. ( R.116 ) (RE 19).

It is undisputed that Master Wood Purchase and Service Agreement with International Paper Company was provided by Scott Penn, Inc. to Ed Sanford Insurance Agency. As such Progressive, through its agent Sanford, knew that coverage was required for "hired and non-owned vehicle coverages" under the IP Contract. Scott Penn, Inc., was required by the contract to provide evidence of such coverages, and that if the certificates did not contain the exact same required coverages Scott Penn, Inc., would not have been allowed to do business with International Paper Company. Penn bought the insurance coverage from Ed Sanford Insurance Agency and Progressive to comply with the IP Contract. Penn further stated that it had wood producer business with other companies which had the same auto liability insurance requirements.

Had Scott Penn, Inc. not had hired and non-owned vehicle coverage in force on November 8, 2005, the load of logs aboard the truck and trailer owned by Frances McLean and driven by Henry Woods would not have been allowed to enter International Paper Company's wood yard to deliver logs to Scott Penn, Inc.'s account. ( R 922) ) (RE 20 ).

Penn described McLean as one of a group of people with whom he did business as "Gate

Wooders". Gate Wooders and Scott Penn, Inc.,operated under an arrangement and procedure was as follows:

a. Scott Penn would issue an Authorization Card given him by International Paper Company to McLean. The load of wood, identified as being wood produced by Scott Penn. Inc., and listing its contract number, and the truck and trailer on which it was loaded would not be permitted to pass the gate of IP into the wood yard without the Authorization Card. The driver of the truck hauling the load of wood hands the authorization card to the gate house and he is allowed to enter the wood yard to deliver the wood. ( R.117 ) (RE 21 ).

b. the authorization card Identifies the load of wood as belonging to Scott Penn, Inc. It bears Contract: CG164, which is the Purchase Order) Number issued to Scott Penn, Inc. by International Paper Company. ( R 117. )( RE. 21 )

c. The wood yard gate house then issues a Fiber Unloading Document which bears the ticket number (510653) date and time the truck and trailer entered the wood yard, ( 11/08/2005 14:16:56); the primary contract number, (CG164) the name of the vendor, (Scott Penn, Inc.) the weight of the truck, trailer and wood delivered, (69740 pounds); the Species (mixed hardwood; the product (long pulpwood); the tract (Green); the price code (03) and the scaler's name.(J. Burton). ( R 117 ) (RE. 21 )

d. International Paper Company prepares and prints a Scale ticket after the truck and trailer are weighed again to determine the net weight of the wood delivered. This Scale Ticket printed: it contains the ticket number, primary contract number, vendor's name, species; product; tract and price code. It also contains a trailer ID number which, here, was 4024T-8, It shows the producer's name, and the date in and date out and the inbound and outbound weight of the truck and

trailer. The net weight of the wood delivered (here 20.97 ton) ( R.117 ) (RE 21 ).

e. After delivery International Paper Company' pays Scott Penn, Inc for the wood delivered. A Scale Ticket Listing is provided periodically to Scott Penn by IP showing the date of delivery, the scale ticket number, and the weight, which allows Scott Penn, Inc., to determine the weight of the wood delivered. ( R. 118 ) (RE 22 )

f. International Paper Company then pays Scott Penn, Inc., for the wood delivered accompanied by a "Wood Settlement Statement" identifying each load of wood by scale ticket number, contract number, price, location delivered, date received, the vehicle number on which it was delivered, and the dollar value of the load delivered. On the Wood Settlement Statement for 11/05/2005 through 11/08/2005, payment for the 10 loads of wood delivered by McLean's truck and trailer no. 4024T-8 were paid to Scott Penn, Inc. ( R.119 ) (RE 23 ).

g. After receiving payment from IP, Scott Penn, Inc., compensated itself, $1.00 per ton for each ton of wood delivered by McLean to IP, and paid the balance of the proceed over to Frances McLean on 11/11/2005. ( R.120 ) (RE 24). The "Gate Wooders" arrangement and method of doing business was in furtherance of the business of Scott Penn, Inc., under its wood producer contract with International Paper Company.

The fatal wreck occurred on November 8, 2005 while all of Scott Penn, Inc.'s automobile liability insurance Policies with Progressive Gulf Insurance Company, including Policy No. 2601592-1 were in full force and effect.

Even though Progressive Gulf Insurance Company denied that the polices provided automobile liability coverage to Frances McLean and Jesse Woods for the non-owned vehicle Woods was driving at the time of the accident in question, on March 14, 2006, approximately four

months after suit was filed in this cause, Progressive's Policy Service Commercial Vehicle Division sent issued to S&S Trucking, Inc., an endorsement adding Jesse Woods, an unlisted operator, retroactively to the policy for the wreck in question and that a surcharge would be added to the policy for the 11/08/05 loss. (R. 936 ) ( RE 25 ). Progressive further issued a written document Bates Stamped (000001609) which is addressed to

> S & S Trucking, Inc.,
> Date 03/14/06,
> Policy Number CA 02601592-1,
> Insured S & S Trucking, Inc.
>
> Dear S & S Trucking Inc,
> 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 OPERATOR.
> WE HAVE ADDED THIS DRIVER TO THE POLICY ALONG WITH A SURCHARGE FOR THE ACCIDENT.....
>
> THANK YOU, PROGRESSIVE POLICY SERVICE, COMMERCIAL VEHICLE DIVISION....

Progressive Gulf Insurance Company's Commercial Auto Product Manager for Mississippi accounts, Tony Dengel, sent a Letter to the Progressive Agents in Mississippi with the heading Re: Hired/Non-Owned exceptions for Logging Accounts.(Progressive Documents No. 000003535-3536 and 000002449 ) ( R 937-939). Progressive specifically recognized the necessity for automobile liability insurance coverage for hired and non-owned vehicles under International Paper Company contracts with wood producers such as Scott Penn, Inc. This letter and the underwriting guidelines which are attached to it specifically and unequivocally recognized that Mississippi wood producers were required to furnish such insurance for **"Logging risk where Hired Auto and Non Owned is required for accessing pickup or delivery sites."**, which the wood producer utilizes to allow the

owned and hired vehicles to pick up and deliver logs to the destination and that Progressive its were authorized to bind and write such coverages. Progressive Document No. 000003535, t. 938 ).

Neither the truck nor the trailer owned by Frances McLean and driven by Jesse Woods to aul logs into International Paper Company's yard on the date of the fatal wreck in question had primary automobile liability insurance on them. Frances McLean owned the truck and trailer. ( R. 941-942, Certificates of Title,) R 755, 756 McLean Dep. 135, 136, 137-140). She testified that she was operating under Scott Penn. Inc.'s contract (which required Penn to have liability insurance for non-owned vehicles)and his liability insurance because neither she nor Jesse Woods would be allowed to haul loads into International Paper Company without being insured .(R 731-732) (RE 26).

Progressive's 30(b)(6) designee testified that if the International Paper Company Master Wood Producer Agreement Contract with Scott Penn, Inc. required Penn to have hired and non-owned vehicle coverage for any truck and trailer that entered IP's wood yard, and the non-owned vehicles were being used as a part of Scott Penn, Inc.'s business, these vehicles would be covered under the Progressive policy.. (Depo. Scullin, pp 6 &7) ( R. 1083 ). (RE 27 ).

Progressive also issued an endorsement to Policy # 02601592-1 dated March 15, 2006 which listed Jesse Woods as an insured driver. ( R 536) ( RE 28)

6. Progressive Gulf Insurance Company 's Policy # 2601592-1, is attached to Record Excepts ( RE 29) and in contained in the record at pages 678-709.

The policy definition of "non-owned vehicle precedes the Insuring Agreement and reads:

"11. **Non-owned auto'** means any auto which is:

a. not owned by or registered to you, **your** nonresident spouse or

a resident of the household in which you reside;

b. not hired, owned by or borrowed from **your** employees or members of their households; or

c. not hired by **you** or an employee of **yours**, and if **you** are a person, not hired by a resident of the household in which **you** reside unless it is specifically listed on the policy Declarations. " ( R.29 ) ( RE 678-709)

7. The Insuring Agreement, Liability to Others for Bodily Injury, Coverage A, and Property Damage, Coverage B reads:

" We will pay damages, OTHER THAN PUNITIVE OR EXEMPLARY DAMAGES, for which an **insured** is legally liable because of an **accident.** We will defend any lawsuit for damages which are payable under this Policy or settle any claim for those damages as we think appropriate. We have no duty to make any additional payments after we have paid or offered to pay the Limit of Liability for this coverage".

**Additional Definitions used in this Part Only:**

1. **You;**

2. Any additional driver listed on your policy but only while driving **your insured auto.**

3. Any other person driving **your insured auto** with your permission and within the scope of that permission;

4. Any other person or organization, but only with respect to the legal liability of that person or organization for the acts or omissions of any person otherwise covered under this PART I- LIABILITY TO OTHERS-while driving **your insured auto.**

However, the owner or anyone else from whom **you** hire or borrow **your insured auto** is an **insured** with respect to that auto only if it is a trailer connected to **your insured auto**. ( R29 ) ( RE 678-709).

The Progressive policy contains no definition of "hired vehicles" (Depo. Scullin, pp.53-56) ( R 958) ( RE 30 ). Scullin testified that one would have to go to Webster's Dictionary to determine

what "hired vehicle" meant. The absence of the definition makes the policy ambiguous.

It undisputed that the truck and trailer which Jesse Woods was driving, at the time of the wreck belonged to Frances McLean and these vehicles were "non-owned automobiles" as defined by the policy definitions which were placed in the policy booklet before the insuring agreements.

The Certificates of Insurance, coupled with Ed Sanford Insurance Agency's binding of the hired and non-owned vehicle coverage commensurate with the requirement of the IP Master Wood Producer Contract with Scott Penn, and Progressive's retroactively adding Jesse Woods to the policy as an unlisted driver more than four months after he was dead and surcharging Penn's policy for the accident and the patent ambiguity between the Declarations, the Certificates of Insurance and the Endorsement adding Jesse Woods subsequently issued in March, 2006, requires the Court to examine extrinsic evidence to determine the issue of coverage.

Progressive Gulf Insurance Company's policy contains no definition of "hired vehicles' and is therefore, ambiguous, and extrinsic evidence may be considered to determine coverage under the policy, that being the intent of the parties and the documentary evidence related to the policy and the loss involved. ( R.958-959 ) (RE 31 ). (Depo. Scullin p. 54-57).

## SUMMARY JUDGMENT STANDARD

The Mississippi Supreme Court and the Court of Appeals has often stated the standard to be applied in determining whether Summary Judgment is appropriate. Three recent cases recite the standard:

**Smith ex rel. Smith v. Gilmore Memorial Hosp., Inc.**, 952 So.2d 177(Miss.,2007):

¶ 8. "We employ the de novo standard in reviewing a trial court's grant of summary

judgment." Brown v. J.J. Ferguson Sand & Gravel Co., 858 So.2d 129, 130 (Miss.2003) (citing O'Neal Steel, Inc. v. Millette, 797 So.2d 869, 872 (Miss.2001). The moving party shall be granted judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R.Civ. P. 56(c.)

**Harmon v. Regions Bank**, 961 So.2d 693 (Miss. 2007):

¶ 10. The Court applies a de novo standard of review to a trial court's grant or denial of a motion for summary judgment. McKinley v. Lamar Bank, 919 So.2d 918, 925 (Miss.2005). Our rules of civil procedure require the trial court to grant summary judgment where "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." Miss. R. Civ. P. 56(c). The facts are viewed in the light most favorable to the nonmoving party, with the movant bearing the burden of demonstrating that no genuine issues of material fact exist for presentation to the trier of fact. Hardy v. Brock, 826 So.2d 71, 74 (Miss.2002). However, the party opposing the motion must be diligent and "may not rest upon the mere allegations or denials of the pleadings, but instead the response must set forth specific facts showing that there is a genuine issue of material fact for trial." Harrison v. Chandler-Sampson Ins., Inc., 891 So.2d 224, 228 (Miss.2005) (citing Miller v. Meeks, 762 So.2d 302, 304 (Miss.2000). If any triable issues of material fact exist, the trial court's decision to grant summary judgment will be reversed.

**Glover ex rel. Glover v. Jackson State University**, --- So.2d ----, 2007 WL 2325291(Miss. 2007):

*12 ¶ 61. In Titus v. Williams, 844 So.2d 459, 464 (Miss.2003), this Court set forth the standard of review for motions for summary judgment as follows:

*12 The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court under M.R.C.P. 56 ( c). This Court conducts de novo review of orders granting or denying summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exits is on the moving party. That is, the non-movant would be given the benefit of the doubt. **McCullough v. Cook**, 679 So.2d 627, 630 (Miss.1996) (collecting authorities).

## APPLICABLE LAW

Mississippi substantive law applies to the interpretation and construction of an insurance contract. That substantive law was discussed by the Fifth Circuit in **Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.**, ,177 F.3d 326(C.A.5 (Miss.),1999.), citing **Canal Ins. Co. v. T.L. James & Co., Inc.**, 911 F.Supp. 225 (S.D.Miss.,1995):

> Mississippi's law recognizes the general rule that provisions of an insurance contract are construed strongly against the drafter. ***Consistent with this principle, insuring clauses are construed broadly to effect coverage, and exclusionary clauses that restrict coverage are construed narrowly against the insurer. So, to benefit from an exclusionary provision in an insurance contract, the insurer must show that the exclusion applies and that it is not subject to any other reasonable interpretation that would afford coverage. Nationwide Mut. Ins. Co. v. Garriga, 636 So.2d 658 (Miss.1994)*** *(emphasis added)*

In the absence of clear proof of an exclusion of coverage from an insurance policy which the insurer drafted and assembled, the coverage should be construed in the insured's favor. : **Krebs By and Through Krebs v. Strange**, 419 So.2d 178, 181, 182 (Miss.,1982):

> We begin with the proposition which requires no citation of authority that insurance policies are matters of contract and the interpretation of insurance contracts is according to the same rules which govern other contracts. In order to have an enforceable insurance contract, the essential elements are an offer and an acceptance, supported by consideration. *When the insurance company's offer to issue the insurance is accepted by the insured and premium payment is made, the contract is formed and the rights and obligations of the respective parties "lock in". The rights under the policy may be altered only through a modification to the insurance policy, and such a modification constitutes a new agreement which must likewise be supported by a consideration.* United States Fidelity and Guaranty Company v. Mathis, 236 So.2d 730, 732 (Miss.1970). (emphasis added).

The Fifth Circuit examined the Mississippi Rules for Construction of an insurance policy contract in **Centennial Ins. Co. v. Ryder Truck Rental, Inc.**,149 F.3d 378, 383 (C.A.5 (Miss.),1998.), as follows:

> The controversy here implicates Mississippi's rules for construction of insurance policies,

which are as follows. First, where an insurance policy is plain and unambiguous, a court must construe that instrument, like other contracts, exactly as written. [FN11] See George v. Mississippi Farm Bureau Mut. Ins. Co., 250 Miss. 847, 168 So.2d 530, 531 (1964). Second, it reads the policy as a whole, thereby giving effect to all provisions. See Brown v. Hartford Ins. Co., 606 So.2d 122, 126 (Miss.1992). ***Third, it must read an insurance policy more strongly against the party drafting the policy and most favorably to the policyholder. See Canal Ins. Co. v. Howell, 248 Miss. 678, 160 So.2d 218, 221 (1964). Fourth, where it deems the terms of an insurance policy ambiguous or doubtful, it must interpret them most favorably to the insured and against the insurer. See Mississippi Ben. Ass'n v. Majure, 201 Miss. 183, 29 So.2d 110, 112 (1947). Fifth, when an insurance policy is subject to two equally reasonable interpretations, a court must adopt the one giving the greater indemnity to the insured. See Caldwell v. Hartford Accident & Indem. Co., 248 Miss. 767, 160 So.2d 209, 213 (1964). Sixth, where it discerns no practical difficulty in making the language of an insurance policy free from doubt, it must read any doubtful provision against the insurer. See State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So.2d 1371, 1372 (Miss.1981).*** Seventh, it must interpret terms of insurance policies, particularly exclusion clauses, favorably to the insured wherever reasonably possible. See id. at 1373. Finally, although ambiguities of an insurance policy are construed against the insurer, a court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured. See id. (Emphasis added)

Examining the facts in light of the Summary Judgment Standard and the Summary Judgment granted Progressive below and the denial of Brown's Motion For Summary Judgment, this Court's de novo review must include whether 1.) Ed Sanford Insurance Agency, Progressive's Agent had binding and apparent authority, 2.) Whether Ed Sanford Insurance Agency had knowledge of the requirements of Scott Penn, Inc.'s Master Wood Producer Contract for hired and non-owned vehicle coverages for trucks and trailers delivering logs to IP for Scott Penn's account to be insured under Penn's policy and whether Ed Sanford Insurance Agency bound those coverages. 3.) That Scott Penn, Inc. was issued an auto liability insurance policy to S& S Trucking, Inc., and Scott Penn, Inc. as an additional named insured; 4.) which policy Progressive claims contained no hired and non-owned vehicle coverages; 5.) That Ed Sanford Insurance Agency, Progressive's agent, sent two Certificates of Insurance to IP confirming that Progressive's policy issued to Penn provided hired

and non-owned vehicle coverages; 6.) which coverages were required by and which were in conformity with the requirements of IP's contract provisions of Penn's Master Wood Producers Agreement. 7.) Four months after the wreck and after suit was filed in this case, Progressive retroactively added Jesse Woods to the S & S Trucking, Inc., and Scott Penn, Inc. Policy as an insured driver and surcharged the Scott Penn, Inc. for the additional premium for the November 8, 2005, accident in question. 8.) Tony Dengel, Progressive's Mississippi Commercial Auto Products Manager's letter to Progressive agents in Mississippi with the accompanying underwriting guidelines and description of the coverages for non-owned vehicles and the reasons why such coverages were needed by entities such as Scott Penn, Inc., and which specifically mentioned contracts with International Paper which required such coverages.

Progressive claims, that even if hired and non-owned vehicle coverage was issued, there is no coverage under its policy verbiage, in spite of the undisputed fact that its policy contains no definition of "hired vehicles" and the definitions for non-owned vehicles do not comply with the requirements of the IP Master Wood Producer Agreement.

Progressive did two affirmative things **after** the November 8, 2005 fatal wreck in question which confirmed coverage for the truck and trailer driven by Jesse Woods as covered under Scott Penn, Inc.'s automobile liability insurance policy. **First,** It made an investigation of the wreck and based on that investigation it issued an endorsement on March 16, 2006, adding Jesse Woods as an unlisted driver, retroactive to November 8, 2005, the date of the wreck and the date of death of Jesse Woods; **Second,** Progressive sued Ed Sanford Insurance Agency in the United States District Court for the Southern District of Mississippi, alleging that Ed Sanford Insurance Agency had both binding and apparent authority to bind Progressive to polices of automobile liability insurance and that Ed

Sanford Insurance Agency was negligent in binding that coverage to Scott Penn, Inc. for the wreck in question.

The Court must also determine whether, when the policy is read as a whole, it is consistent and unambiguous. Looking at the definitions of "non-owned autos" and the insuring agreement, and the endorsement of the policy adding Jesse Woods as an insured and surcharging the policyholder for the coverage extended by the written modification for the accident in question, plus the glaring absence of any definition of "hired vehicle", in the policy, these things yield the unmistakable conclusion that the policy, is at the least, ambiguous. The policy definitions themselves are inconsistent with each other and are capable of more than one construction. Extrinsic evidence, both before and after the fatal collision yield the unmistakable conclusion that coverage exists under the Progressive Gulf Insurance Company policy for the non-owned truck and trailer driven by Jesse Woods, and owned by Frances McLean which was being used in the furtherance of Scott Penn, Inc.'s business with International Paper Company. Where ambiguity exists, the policy is construed most strongly against the insurer who drafted same. **J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.** 723 So.2d 550 (Miss.,1998.):

> Mississippi law also recognizes the general rule that provisions of an insurance contract are to be construed strongly against the drafter. Nationwide Mut. Ins. Co. v. Garriga, 636 So.2d 658, 662 (Miss.1994); Williams v. Life Ins. Co. of Georgia, 367 So.2d 922, 925 (Miss.1979). This rule of insurance construction dictating that ambiguities be resolved in favor of the insured is sometimes referred to as the "contra-insurer rule," which is based upon the doctrine of omnia praesumuntur contra proferentem, literally meaning "all things are presumed against the offeror." See generally 2 Lee Russ and Thomas Segalla, Couch on Insurance, § 22.14 (3d ed.1995); Restatement (Second) of Contracts § 206 (1981).

**State Farm Mut. Auto. Ins. Co. v. Taylor**, 233 So.2d 805(Miss. 1970.), adds a supplemental rule of construction:

> A supplemental rule of construction is that when the provisions of an insurance policy are subject to two interpretations equally reasonable, ***that interpretation which gives greater indemnity to the insured will prevail.*** Caldwell v. Hartford Accident & Indemnity Co., 248 Miss. 767, 160 So.2d 209 (1964). (emphasis added).

The Honorable Circuit Court below erroneously held that in order for coverage to apply, Scott Penn, Inc., must be held liable in some legal way. **Such is not required.** Agency, control or joint venture between Frances McLean, Jesse Woods and Scott Penn, Inc., need not be shown or proven for the hired or non-owned automobile liability insurance coverage to apply. Mississippi law has yet to address this issue. However, our sister state of Louisiana has examined the "hired vehicle" and "non-owned auto" coverage issue many times in the context of the factual situation presented here.

In **Green v Freeman**, 759 So2d 201, 205,206, (La. Ct Appeal, 3rd Circuit, 2005), the Court considered the issue of coverage under a logging contractor's automobile liability policy under facts which are substantially similar to the case sub judice. There the Court held that the truck was a "non-owned auto" and was covered under the logging contractor's liability insurance policy:

> It is clear in this case that Ivy exercised no control regarding Green's truck itself, other than to direct how the logs were to be loaded on the truck. Even though Green was employed by Ivy, Green was responsible for maintaining his own truck and could use whatever route he wanted. ***We find that Green's truck was not a hired or borrowed auto and therefore, the policy would provide coverage for his truck as a covered non-owned auto under the endorsement to the Empire Policy.*** Even Ivy admits that the Green vehicle was not a hired auto. (Emphasis added)

In **Huddleston v Luther,** 897 So2d 887 ( (La.App. 3 Cir. 3/9/05) the Court examined an automobile liability policy to determine the coverage status of the vehicle which caused Plaintiff's

injury under a policy, which contained a definition of "hired autos".

> The Clarendon policy defines these terms and provides coverage under the following terms and conditions of the policy:
>
> HIRED "AUTOS" ONLY. 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 or partners or members of their households.**
>
> ****3** NONOWNED "AUTOS" ONLY. 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.**(Emphasis added).
>
> If the Luther vehicle meets the policy definition of a "hired auto," it is not a "covered auto" under the Clarendon policy due to the employee exclusion. [FN1] **If the vehicle is a "non-owned auto," it is a "covered auto" as long as it was being used in Durand's business, which is not disputed.** (emphasis added)

The Master Wood Supplier Agreement is clear that any truck and trailer which is used in the furtherance of Scott Penn, Inc.'s business **shall** be covered with automobile liability limits of at least $1,000,000. Scott Penn, Inc,. through Scott Penn, expected Ed Sanford Insurance Agency to bind the necessary coverage required under Penn's contract with IP. The Certificates of Insurance sent by Sanford, Progressive's agent to IP evidencing these liability insurance coverages were bound for owned, hired and non-owned vehicles, are a manifestation and confirmation of the agent's having bound such coverages. On the face of this record, is undisputed that Ed Sanford had the contractual and apparent authority to bind the coverages required under the IP contract. Progressive is bound by the representations to International Paper Company contained in the Certificates of Insurance supplied. Progressive produced no evidence below which shows anything except that hired and non-owned vehicle coverage was bound and existed under the S & S Trucking, Inc., Policy No. 02601592-1 issued to Scott Penn, Inc., and Scott Penn's assertions that he understood without question that the automobile liability insurance coverage as required by the Master Wood Producer Agreement was

bound by the agent.

The powers of the Agent and the expectations of the insured are discussed in **Canal Insurance Company v Bush,** 247 Miss. 87, 154 So.2d 111 ( Miss. 1963). There, this Court held that the agent of an insurance company who is clothed with binding and apparent authority, may bind coverage, and alter or modify any of the policy provisions. Ed Sanford Insurance Agency unquestionably, had such authority. Sanford exercised that authority and to the extent necessary to provide coverage to Scott Penn, Inc. to comply with Penn's contractual obligations per the terms and provisions of the policy to fit the International Paper Company Master Wood Producer Agreement requirements, modified the terms of the policy as as to hired or non-owned vehicles used by Scott Penn to deliver wood to IP's wood yards. Coverage exists, whether the vehicles utilized by Scott Penn, Inc., were owned by Scott Penn, Inc., owned by a contract hauler, were hired vehicles or non-owned vehicles, as were McLean's vehicles here. The automobile liability insurance coverage required by the IP contact, was bound and is supplied by the actions of the agent, which binds Progressive.

In **Canal v Bush**, supra, the Automobile liability insurance policy was retroactively endorsed to effect the radius of operation coverage which the insured, based on a reasonable man standard in his dealings with the agent, expected and was assured he had purchased and was bound. The same principles apply in this case. (R-936)

**McPherson v McLendon,** 221 So.2d 75, (Miss. 1969), examined the powers of an independent insurance agent with binding authority and who acted with apparent authority in light of whether an oral contract binding insurance coverage was valid and whether his or her actions bound the principal insurer to the coverage promised:

This Court has long held that the general laws of agency apply to agency relationships in the insurance industry. We stated in Germania Life Insurance Co. v. Bouldin, 100 Miss. 660, 56 So. 609 (1911):

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. The agent of an insurance company possesses such powers only as have been conferred verbally or by the instrument of authorization, or such as third persons had a right to assume that he possesses under the circumstances of each particular case. (100 Miss. at 678, 56 So. at 613).

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 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, ss 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, s 96 (c). 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, s 96(e). (223 Miss. at 697, 698; 78 So.2d at 883).

One seeking insurance from a general agent is not bound to inquire as to the precise instructions he has received from his company. ***The restrictions and limitations existing upon the authority of a general agent as between such agent and the company are not binding upon policy holders in their dealings with such agent, in the absence of knowledge of their part of such limitations. Thus, a limitation upon the authority of a general agent, having power to make contracts of insurance, would not relieve the insurer from liability on a policy issued by such agent, though in violation of the limitation, where the insured had neither actual nor constructive notice of such limitation. (16 Appleman, Insurance Law and Practice s 8693 (1968).***

(Emphasis Added)

**Mississippi Farm Bureau Insurance Company v Todd,** 492 So2d 119 (Miss. 1986) holds

that the insurance agents' action which binds the coverage to comply with the requirements of a contract which the insured has entered into, modifies the coverages to comply with the insured's obligations under such a contract so that the insurer is liable under the insurance policy issued for that purpose. See also: **Smith Trucking Co. v. Cotton Belt Ins. Company,** 556 F2d 197 (5th Cir. 1977); as to the principles involved where the agent has binding authority and by his actions binds the insurer.

## CONCLUSION

Brown is entitled reversal of the Summary Judgment granted Progressive by the Circuit Court of Yazoo County and reversal of the denial of Brown's Motion for Summary Judgment, and rendering of Judgment here that automobile liability insurance coverages exist under Progressive Gulf Insurance Company's policy for the truck and trailer which Jessie Woods was driving and which were owned by Frances McLean. The facts are undisputed that Ed Sanford Insurance Agency bound Progressive Gulf Insurance Company for hired and non-owned vehicle coverages, as required and defined by the International Paper Company Master Wood Producer Agreement between it and Scott Penn,.Inc. and that the McLean truck and trailer were being used in the furtherance of the business of Scott Penn, Inc., to deliver wood to International Paper Company under the Master Wood Producer Contract. Progressive recognized these facts and issued two endorsements to the policy, adding Jesse Woods posthumously as an insured driver and surcharging the policy for the at fault accident based on its investigation of same. That admission alone, requires reversal of the Judgment of the Court below and entry of Judgment for Brown here that the coverage was in force and covers the accident in question. There is no requirement that vicarious liability of Scott Penn, Inc., be proven for liability insurance coverage to exist on the non-owned vehicles owned by Frances McLean since

CERTIFICATE OF SERVICE

I, James W. Nobles, Jr., do hereby certify that I have this day served by United States Mail, or Hand-Delivered, as indicated, a true and correct copy of the above and foregoing to:

Ms. Betty Sephton
Supreme Court Clerk
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Third Floor
Jackson, Mississippi 39205

**VIA UNITED STATES MAIL**

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SO CERTIFIED this the 23rd th day of June A.D., 2008.

JAMES W. NOBLES, JR.