2008-CA-00315 E

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons listed have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Appellee
(1) Philadelphia Indemnity Insurance Company, incorrectly referred to as Philadelphia Insurance Company

Counsel for Appellee
(2) John C., Hall, II, Esquire
(3) Shunda L. Pounders, Esquire
(4) Brunini, Grantham, Grower & Hewes, PLLC
248 East Capitol Street
Suite 1400
Jackson, Mississippi 39201

Appellant
(5) Tequila T. Thomas

Counsel for Appellant and Cross-Appellee
(6) Sorie Tarawally, Esq.

Circuit Judge
(7) Honorable Frank G. Vollor

Appellee
(8) Anthony Jones

Respectfully submitted,

PHILADELPHIA INDEMNITY INSURANCE COMPANY.

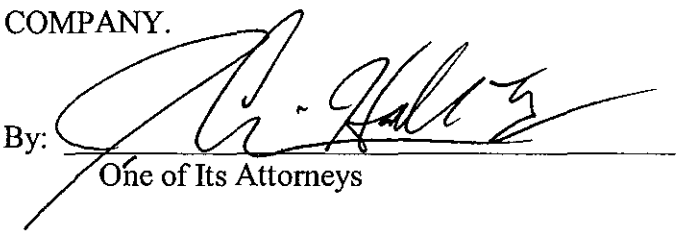
By: 
One of Its Attorneys

TABLE OF CONTENTS

TABLE OF CASES & OTHER AUTHORITIES

I. STATEMENT OF THE ISSUES

A. SUMMARY JUDGMENT WAS APPROPRIATE AS PLAINTIFF FAILED TO PROVIDE SIGNIFICANT PROBATIVE EVIDENCE SHOWING THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL

1. Thomas Is Not Entitled to UM Coverage Because She Was Not an Insured Under the PIIC Policy;
2. Thomas Was Not "Occupying" a Covered Vehicle at the Time of Her Injuries;
3. Thomas Was Not "Using" The Covered Vehicle and Cannot Enjoy UM Benefits;
4. Thomas Is Specifically Excluded from Benefits under the Philadelphia Policy

B. THE CIRCUIT COURT'S REFUSAL TO SET ASIDE ITS ORDER TO DISMISS PIIC WAS NOT IN ERROR.

III. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Appellant, Tequila T. Thomas ("Thomas") appealed the Order of Dismissal of the Honorable Frank G. Vollor ("Judge Vollor"), dated December 6 , 2007 ("Judge Vollor's Order") (R. At 168). In this case, Thomas alleges she is entitled to uninsured motorist benefits as a result of injuries she sustained while operating her employer's vehicle without their permission. The record and the law in the state of Mississippi are clear. To begin, the Thomas never offered any responsive pleading or supporting affidavits or other sworn testimony in opposition to PIIC's Motion for Summary Judgment. As a result, no genuine issues of material fact are present in the record below. Notwithstanding, Plaintiff is not entitled to UM coverage under her employer's commercial automobile insurance policy because she was not an uninsured under the PIIC policy and because she was specifically excluded from being covered under the PIIC policy. Appellant incorrectly attempts to stretch the terms of UM coverage to extend to Thomas, even going so far as to argue that coverage exists if she were "headed to the whorehouse in the vehicle. " (See Appellant's Brief at p. 16, paragraph 4, line 14). Moreover, Appellant's argument that the lower court granted summary judgment as a way of punishing the Plaintiff for not timely filing her response to PIIC's Motion for Summary Judgment is patently false. The Order of Dismissal specifically states that the court considered the Motion, and then decided to dismiss the case. Furthermore, Appellant's Statement of the Case is devoid of any factual support and must be disregarded.

A. Procedural History

PIIC filed its Motion for Summary Judgment on October 15, 2007 and Plaintiff's response was due on October 29, 2007.[1] (R. at 109) PIIC's notice of hearing for its Motion was subsequently filed on November 5, 2007. (R at 107). Seven days later, on November 12, 2007, Plaintiff's counsel faxed a handwritten note to defense counsel advising of his unavailability. (R. at 125). Specifically, the note stated "... I will be out of the country as you should learned on the Magbar List Serve. ..."[2] *Id.* On November 16, 2007, PIIC advised the lower court that Plaintiff had not offered any proof to defeat summary judgment and enclosed an Order Granting Summary Judgment for the Court's review and execution. (R. At 172). Plaintiff's counsel was noticed on that correspondence. *Id.* On November 20, 2007, the lower court faxed a notice to Plaintiff's counsel giving him until December 4, 2007, to respond to PIIC's Motion. (R. At. 163, 168). It is undisputed that Plaintiff's counsel never advised PIIC's counsel when he would return, nor did he ask for an extension of time to file a response. It is further undisputed that Plaintiff's counsel never filed a pleading requesting an enlargement of time from the lower court to file a response to Defendant's Motion for Summary Judgment. The lower court's December 4, 2007 deadline was ignored by Thomas' attorney and the Circuit Court entered its Order of Dismissal, dismissing PIIC on December 7, 2007 (R. At 168).

---

[1]URCCC 4.03 provides, "In circuit court a memorandum of authorities in support of any motion to dismiss or for summary judgment shall be mailed to the judge presiding over the action at the time that the motion is filed. Respondent shall reply within ten (10) days after service of movant's memorandum."

[2]The Magnolia Bar Association maintains a listserve which allows for the posting and dissemination of information among its members. Appellant's counsel and undersigned Appellee's counsel are both members of the Magnolia Bar Association with access to this listerve. However, this listserve has never been an accepted manner of communicating about the instant litigation between counsel of record and undersigned counsel did not see any posting by counsel opposite relating to his travel plans prior to noticing the Motion for hearing.

B. Philadelphia Insurance Company Uninsured Motorist Policy Provisions

On or about October 1, 2002, Philadelphia issued Commercial Lines Policy No. PHPK033615 to Five County Child Development (Five County) as the named insured (R at 26). The one (1) year policy period was from October 1, 2002 -October 1, 2003. (Id.) The uninsured motorist provisions of the policy define the following as insureds:

> **B. Who is Insured**
> 1. If the Named Insured is designated in the Declarations as:
> a. The Named Insured and any "family members".
>
> b. Anyone else "**occupying**" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
>
> * * *
>
> d. Any person who uses a covered "auto" with the Named Insured's expressed or implied consent.
>
> (R at 60)

The policy also lists certain individuals as being excluded from coverage under the policy:

> **C. Exclusions**
> This insurance does not apply to:
> 1. Any claim settled with the owner or operator of the "uninsured motor vehicle" without our consent.
> 2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.
> 3. ***Anyone using a vehicle without a reasonable belief that the person is entitled to do so. (Emphasis added).***
>
> * * *

(R at 61)

The policy further sets forth the following additional definitions:

> **F. Additional Definitions**
> As used in this endorsement:
> 1. "Family member" means a person related to an Individual Named Insured by blood, marriage or adoption who is a resident of such Named Insured's household, including a ward or foster child.
> 2. "Occupying" means in, upon, getting in, on, out or off.
> * * *

(Id.)

C. Facts Giving Rise to This Action

Tequila Thomas was employed by the Five County Child Development Program as a transportation driver. Thomas was primarily responsible for transporting Five County clients to and from work from their homes. She was provided a Five County company vehicle for her job which was to be used exclusively for the fulfillment of her job duties for Five County. Five County had in effect at the time of the incident PIIC Commercial General Liability policy number PHPK033615 which also provided uninsured motorist coverage.

At approximately 2:00 p.m. on the afternoon of September 7, 2003, Thomas used her Five County vehicle to drop off a client at the Ameristar Casino in Vicksburg, Mississippi. She was to pick that client up from work to take her home at 10:30 p.m. or 11:00 p.m. later that night. Instead of returning home, Thomas drove her employer's vehicle to her mother's home to pass time while she waited to pick her client up. (R. At . 131). At approximately 6:00 p.m., Thomas set out to leave

her mother's home to go to the store for her mother's friend.[3] As she attempted to enter her company vehicle, she was accosted by Anthony Jones who held a gun to her head. (Id. At 132, Line 8). Jones then took her keys from her and shoved her into the driver's door across the front seat to the passenger side of vehicle. (Id.). Jones got in the vehicle and then attempted to back the van from the driveway. (Id.) At some point, Thomas jumped out of the passenger side and attempted to flee the vehicle. (Id.). She then ran up to another vehicle and attempted to gain entry into that vehicle to escape Jones. (Id at 133). The occupants of the other vehicle locked their doors and drove away. (Id.) Thomas then tried to run away, but she unfortunately was struck by the Five County vehicle driven by Jones. (Id. at 134.). At the time of the accident, Thomas by her own admission did not have a right to use the Five County vehicle.[4] Moreover, she was struck by the vehicle several yards away from the point where she exited the vehicle, and was in fact attempting to enter another vehicle around the time she was ultimately struck. Thus, she was not "occupying" an insured vehicle at the time of her injuries. Finally, the Five County vehicle was not in "use" as a vehicle at the time of the accident to trigger UM benefits. To the contrary, the Five County vehicle was merely the situs of a crime and was being utilized as a weapon rather than a vehicle when Thomas sustained her injuries. The facts applied to the law in this state do not allow Thomas to recover under the UM portion of the Philadelphia policy.

---

[3]Thomas offers two versions of the purpose of her trip. In her deposition in this action, she testified that she was running a personal errand for her mother's friend. That transcript is attached as Exhibit B to PIIC's Motion for Summary Judgment in the lower court file.

[4]See deposition transcript attached as Exhibit B to PIIC's Motion for Summary Judgment in lower court.

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing a trial court's grant of summary judgment, this Court applies a de novo standard of review. ***Busby v. Mazzeo***, 929 So.2d 369, 372(¶ 8) (Miss.Ct.App.2006). ***Rule*** 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment is proper 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." When considering a motion for summary judgment, the deciding court must view all evidence in a light most favorable to the non-moving party. ***Busby***, 929 So.2d at 372(¶ 8). "Only when the moving party has met its burden by demonstrating that there are no genuine issues of material fact in existence should summary judgment be granted." ***Morton v. City of Shelby***, 984 So.2d 323, 329 (¶10) (Miss.Ct. App.2007). When the moving party has satisfied its burden of proving that no genuine issue of material fact exits, the responding party must rebut by producing "significant probative evidence" showing that there is a genuine issue of material fact for trial. ***Foster v. Noel***, 715 So.2d 174, 180(¶ 35) (Miss.1998). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." ***M.R.C.P.*** 56(e).

B. SUMMARY JUDGMENT WAS APPROPRIATE AS PLAINTIFF FAILED TO PROVIDE SIGNIFICANT PROBATIVE EVIDENCE SHOWING THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL

Summary Judgment was correct in this matter because the Plaintiff failed to file her responsive pleading to PIIC's Motion for Summary Judgment in a timely manner and because summary judgment was appropriate. The facts of this case are as follows: PIIC filed its Motion for Summary Judgment on October 15, 2007, making Thomas' response due on October 29, 2007. The October 29, 2007 deadline came and went without the filing of Plaintiff's response. PIIC's then filed its Notice of Hearing on November 5, 2007. (R at 104). Seven days later, on November 12, 2007, Plaintiff's counsel faxed a handwritten note to defense counsel advising of his unavailability. Yet, Plaintiff did not file her response. It is undisputed that Plaintiff's counsel never advised PIIC's counsel when he would return, nor did he ask for an extension to file his responsive pleading. It is further undisputed that Plaintiff's counsel never filed a pleading requesting an enlargement of time from the lower court to file a response to Defendant's Motion for Summary Judgment. In fact, the court wrote Thomas' attorney on November 20, 2007, giving him until December 4, 2007 to respond to PIIC's Motion. (R. At 163,168) That deadline passed, and the Circuit Court entered its Order of Dismissal, dismissing PIIC on December 7, 2007. (R. At 168).

Rule 6(b) of the Mississippi Rules of Civil Procedure applies to a case where the non-movant for summary judgment untimely serves affidavits on the opposing party. ***Richardson v. APAC-Mississippi, Inc.***, 631 So.2d 143, 147 (Miss.1994) (citing ***Lujan v. Nat'l Wildlife Fed'n***, 497 U.S. 871, 895-97, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)). Rule 6(b) states:

> When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the

> period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect....

"[T]he decision to allow the late filing rests within the court's discretion and must be for cause shown and is only permissible where the failure to meet the deadline was the result of excusable neglect." ***In re Will of Smith***, 910 So.2d 562, 568(¶ 23) (Miss.2005).

In this case, the lower court, on its own motion extended the time for Plaintiff's response to December 4, 2007, thirty six days after it was due. Thomas still failed to file her response, citing that her attorney was out of the country, and that excusable neglect should be disregarded by the Court to allow the untimely filing of the response. However, this Court recently held that a busy schedule of plaintiffs' attorney did not constitute "excusable neglect" that would warrant allowing plaintiffs to untimely file summary judgment affidavits on the day of the hearing on a hospital's motion for summary judgment in a medical malpractice case. ***Maxwell v. Baptist Memorial Hospital-DeSoto, Inc.***, --- So.2d ----, 2008 WL 2170726 (Miss.App.2008.) See also ***In re Estate of Ware***, 573 So.2d 773, 775 (Miss.1990). Moreover, "***Rule*** 56(f) is not meant to afford protection to the dilatory litigant." ***Stallworth v. Sanford***, 921 So.2d 340, 43)(¶ 11)(Miss.2006). As a result, Thomas' dilatory actions must not be disregarded and this Court should affirm the lower court's granting of summary judgment.

1. Thomas Is Not Entitled to UM Coverage Because She Was Not an Insured Under the PIIC Policy

Thomas' claims also fail as a matter of law because she simply was not an insured under the PIIC policy for two reasons. First, at the time of her injuries, Thomas was using her employer's

vehicle to run a personal errand, without permission. Second, Thomas was not occupying the vehicle when she was injured, as she was required to do pursuant to the express terms of the PIC policy.

a. Thomas was a non-permissive driver over whom coverage does not apply.

Miss. Code Ann. § 83-11-103(b) (1999) defines an "insured" as follows:

> The term "insured" shall mean the named insured and, . . . and any person who uses, ***with the consent, expressed or implied, of the named insured***, the motor vehicle to which the policy applies, and a guest in such motor vehicle to which the policy applies, or the personal representative of any of the above. The definition of the term "insured" given in this section shall apply only to the uninsured motorist portion of the policy." (Emphasis added).

Likewise, the PIIC policy considers "any person who uses a covered "auto" with the Named Insured's expressed or implied consent" an insured. (R at 60). As stated above, Thomas was employed by Five County to transport clients in the company van and she was only authorized to use her company vehicle in the course and scope of her employment. In fact, the employer's policies and procedures handbook specifically states that, "The use of Agency vehicles for personal use by employees is prohibited."[5] However, Thomas testified that she dropped her client off at work around 2:00 p.m. and went to her mother's house to pass time until she was supposed to pick the client up again at 10:00 p.m.[6] She then testified that the purpose of her trip at the time of her assault was to run an errand at the grocery store for her mother's friend. By her own admission, Thomas states that she did not have a right to use her company vehicle at the time of this incident.

---

[5]Thomas' employee handbook is attached to PIIC's Motion for Summary Judgment as Exhibit C in the lower court.

[6]See Exhibit B attached to PIIC's Motion for Summary Judgment in the lower court.

b. Thomas was not acting in the course and scope of her employment.

The Mississippi Appellate Courts have declined to extend liability to employers when their employees were not acting in the course and scope of their employment. Likewise, this court should apply that same standard when determining whether UM coverage extends to an employee not acting in the course and scope of their employment. "Mississippi law provides that an activity must be in furtherance of the employer's business to be within the scope and course of employment." ***L.T. ex rel. Hollins v. City of Jackson***, 145 F.Supp.2d 750, 757 (S.D.Miss.2000) (***citing Estate of Brown ex rel Brown v. Pearl River Valley Opportunity, Inc.***, 627 So.2d 308 (Miss.1993) Therefore, if an employee steps outside his employer's business for some reason which is not related to his employment, the relationship between the employee and the employer "is temporarily suspended and this is so 'no matter how short the time and the [employer] is not liable for [the employee's] acts during such time.' " ***Id.*** at 311. , aff'd mem., 245 F.3d 790 (5th Cir.2000). To be within the course and scope of employment, an activity must carry out the employer's purpose of the employment or be in furtherance of the employer's business. ***Seedkem South, Inc. v. Lee***, 391 So.2d 990, 995 (Miss.1980). The Court in ***Otts v. Lynn,*** 955 So.2d 934 (Miss.App.,2007) (Employee not acting in course and scope of employment when involved in an altercation during non-business hours and no evidence that employee was acting on behalf of employer)"An employee's personal unsanctioned recreational endeavors are beyond the course and scope of his employment." ***Hollins***, 145 F.Supp.2d at 757.

While Mississippi Courts have not addressed this issue, other jurisdictions have declined to extend UM coverage to employees not acting in the course and scope of their employment. The Ohio Court of Appeals held that an employee who was struck by a car while walking in a parking

lot during her lunch break to run a personal errand was not acting within course and scope of employment and, thus, was not insured under her employer's business automobile insurance policy for purposes of entitlement to uninsured/underinsured motorist (UM/UIM) coverage. ***Norman v. Estate of Keller***, 2005 WL 940857 (Ohio App. 11 Dist. 2005). The Court declined to find coverage because the employee was not injured while conferring any benefit on her employer by performing a personal errand. ***Id.*** See also ***Johnson v. Auto-Owners Ins. Co.,*** 2005 WL 124078 (Ohio App. 11 Dist.2005) (Corporate employee was not entitled to uninsured/ underinsured motorist (UM/UIM) coverage under commercial automobile liability policy when accident occurred on employee's day off, while she was engaged in private errand.). Consequently, an employee not acting in furtherance of their employer's business should not be afforded UM coverage.

c. PIIC and Five County intended to offer UM coverage to employees acting in the course and scope of their employment.

It is well settled in Mississippi that "the first rule of interpretation of contracts is to follow the intent of the parties." ***Smith v. Smith***, 656 So.2d 1143, 1147 (Miss.1995). In this case, Five County contracted with PIC to provide commercial liability coverage for the corporation, its employees, and its clients. There are certain provisions in the PIC Commercial General Liability policy that specifically refer to Five County's employees:

The PIC policy provides:

2. Each of the following is also an insured:
a. Your. . . "employees", . . . , but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. . . .

It defies logic for a corporation to procure liability insurance or uninsured motorist insurance to cover employees while they are not acting in the course and scope of their duties. To the contrary, Five County and PIIC both intended insurance coverage to be extended for employees who were within the scope of their employment by Five County or while performing duties related to the conduct of Five County's business. Thomas was doing neither, but was clearly on a frolic during the time she was injured, and as such, she was not an insured under this policy and as such is not entitled to UM benefits under this policy. Moreover, as pointed out by Appellant's Brief, the Circuit Court of Warren County also dismissed Thomas' worker's compensation claims as she was not acting in the course and scope of her employment when she sustained her injuries. (See Appellant's Brief; footnote 1 on page 15). This Court can take judicial notice of this fact. Logic and justice both dictate that coverage does not exist on this business commercial uninsured policy for Appellant.

2. Thomas Was Not "Occupying" a Covered Vehicle at the Time of Her Injuries.

Thomas cannot be considered an insured under the PIC policy because she sustained her injuries while she was outside of the covered vehicle. According to the PIC policy, an insured is "Anyone else '**occupying**' a covered 'auto'... (R. At 60,¶ B.1.b.) The policy further defines occupying as "getting in, on, out or of." (R. At. 61, ¶ F.2.). Thomas testified that she jumped out of the van in the middle of the street and attempted to enter another vehicle in hopes of escaping from Jones. (R. At. 132-134). She was unsuccessful at gaining entry into the other vehicle, so she continued to run in the street, away from Jones. (Id.). She was ultimately struck with the vehicle several yards away from where she first exited the insured van. (Id.) She clearly exited the van and was attempting to enter another vehicle, thus breaking the chain of causation needed to recover under an uninsured motorist theory. Consequently, the purpose of the UM statute would be controverted

if the court extended UM coverage to Thomas, who by her own admission was not occupying the covered vehicle at the time of her injuries, a fact which is undisputed. As a result, coverage may not be extended to Thomas as a matter of law and the lower court must be affirmed.

3. Thomas Was Not "Using" The Covered Vehicle and Cannot Enjoy UM Benefits.

Thomas' injuries did not arise from her use of the PIC insured vehicle. In fact, she was injured by a spurned lover who intentionally used an automobile to assault her. In determining whether a vehicle was in "use" to qualify for UM benefits, the Court in ***Alfa Ins. Corp. v. Ryals ex rel. Wrongful Death Beneficiaries of Ryals***, 918 So.2d 1260 (Miss.2005) noted that "an accident must be connected with the actual operation of a motor vehicle in its intended use as transportation". The Court further relied on persuasive decisions from other states confirming the significance of the distinction between the intended design and actual use of a vehicle. In ***Progressive Cas. Ins. Co. v. Yodice***, 180 Misc.2d 863, 694 N.Y.S.2d 281, 283-84 (N.Y.Sup.Ct.1999), aff'd, 276 A.D.2d 540, 714 N.Y.S.2d 715 (2000) the Court held:

> Not every accident involving an automobile concerns the use or operation of that vehicle. The accident must be connected with the use of the automobile qua automobile. The use of the automobile as an automobile must be the proximate cause of the injury. The inherent nature of an automobile is to serve as a means of transportation to and from a certain location. The accident in question did not arise out of the use or operation of the truck as a truck, i.e., as a means of transportation; it arose out of the operation of a business operating a ride, which happened to be permanently secured to the back of a stationary vehicle.

In ***Ryals***, the Court held that an MDOT truck used to knock down a dead tree was not "in use", as required for uninsured motorist (UM) benefits under a motorist's policy arising from the death of the motorist and wife when the dead tree fell on their car. ***Alfa Ins. Corp. v. Ryals ex rel. Wrongful Death Beneficiaries of Ryals***, 918 So.2d 1260 at 1262. The Mississippi Supreme Court addressed

the issue of whether a vehicle incidentally used in a crime qualifies under the "use" provisions of a UM policy. In ***Spradlin v. Atlanta Cas. Co.***, 650 So.2d 1389 (Miss.1995), the plaintiff sought uninsured motorist benefits when he was injured by gunshots fired from an uninsured vehicle. The Court held that "the intent of the statute is complied with by UM coverage under the policy by affording to a person injured by an uninsured motorist the same protection he would have if injured by a financially responsible driver. The shooting did not arise out of the "ownership, maintenance or use" of an uninsured motor vehicle. The use of the uninsured vehicle was merely incidental to what was an intentional and deliberate act." ***Id.*** at 1392. See also ***United Services Auto. Ass'n v. Shell***, 698 So.2d 96 (Miss.,1997) citing ***Coleman v. Sanford***, 521 So.2d 876 (Miss.1988). In ***Roberts v. Grisham***, 487 So.2d 836 (Miss.1986), the Court declined to extend UM coverage to a driver who was fatally shot as he sat in his parked truck because the shooting of the driver was an intervening cause that broke the use sequence of the uninsured car and the driver's death.

In the instant case, the uninsured vehicle itself was used as the instrumentality of harm and ceased being a vehicle and ultimately became a weapon. If Jones had opted to shoot Thomas out of the van, it is well settled that there would be no UM coverage available. Rather than shooting from the uninsured vehicle, Jones used the vehicle itself to commit a criminal act. Similar to ***Spradlin, Shell, Coleman***, and ***Roberts***, above, Thomas's injuries were incidental to an intentional or deliberate act, Jones hitting her with the van. As a result, Thomas was denied coverage and the lower court must be affirmed.

4. Thomas Is Specifically Excluded from Benefits under the PIIC Policy

Thomas is specifically excluded from being insured by the very terms of the PIIC policy. The Mississippi Supreme Court has held, "while clear and unambiguous policy language will be

enforced according to its terms, 'recovery cannot be limited by an insurer for benefits for which a premium is paid by an insured, notwithstanding clear and unambiguous language of attempted limitation by the insurer.'" ***Gov't Employees Ins. Co. v. Brown***, 446 So.2d 1002, 1006 (Miss.1984). Clauses in a policy seeking to limit coverage "must be written in clear and unmistakable language" and are strictly construed. ***Miss. Farm Bureau Mut. Ins. Co. v. Jones***, 754 So.2d 1203, 1204(¶ 8) (Miss.2000). But, when stated without uncertainty or ambiguity, exclusionary language is binding upon the insured. ***Lewis v. Allstate Ins. Co.***, 730 So.2d 65, 70(¶ 25) (Miss.1998).

The PIIC policy states that "This insurance does not apply to ...Anyone using a vehicle without reasonable belief that the person is entitled to do so." (R. At 61, ¶ C.3.) It has been established above that Thomas was injured while using the company vehicle for a personal errand for her friend and that she did not have a right to use the vehicle for that purpose. As such, she is specifically excluded from being an insured under the policy and the Court should honor the parties' intent for this unambiguous exclusion.

C. THE CIRCUIT COURT'S REFUSAL TO SET ASIDE ITS ORDER TO DISMISS PIIC WAS NOT IN ERROR.

Plaintiff's Motion to Set Aside was properly denied by the lower court because Plaintiff failed to offer any legal or factual reason justifying same. As discussed in the Procedural History portion of the Statement of Facts above, PIIC filed its Motion for Summary Judgment on October 15, 2007 and Plaintiff's response was due ten days later on October 29, 2007. Appellant never filed a response to the Motion for Summary Judgment. The lower court, after considering the Motion and the fact that no response was filed entered its Order of Dismissal on December 7, 2007, thirty eight days after the Appellant's response was due.

In order to set aside an Order, Appellant must satisfy the requirements of ***Miss. R. Civ. P. 60(b)*** provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) fraud, misrepresentation, or other misconduct of an adverse party;
>
> * * *
>
> (6) any other reason justifying relief from the judgment.

Appellant fails to show where any fraud, misrepresentation, or other misconduct of the Defendant or defense counsel occurred as required to set aside the dismissal. Instead, Appellant's argument is primarily based on the fact that she was not given a right to be heard. However, Appellant wholly neglects to address the fact that no responsive pleading was ever filed in opposition to PIIC's Motion for Summary Judgment.

Appellant's counsel produces no evidence whatsoever that he notified defense counsel of his unavailability prior to the initial setting of the hearing for Defendant's Motion for Summary Judgment. Instead, he faxed a note to defense counsel essentially advising that knowledge of his unavailability should have been gleaned from a posting on a bar association listserve, which is sent to over six hundred people. This assertion by Appellant is absurd given the fact that it assumes that Appellee's counsel should vigilantly monitor this public listserve in an effort to obtain information from Appellant's counsel regarding this litigation. Upon learning of Appellant's counsel's unavailability, Appellee's counsel cancelled its hearing and never attempted to re-schedule the hearing[7].

---

[7]Appellee's counsel denies that he or anyone on his behalf ever advised Appellant's counsel that the Motion for Summary Judgment would be re-scheduled.

Appellant's argument to set aside the lower court's Order o f dismissal relies on the fact that she was not given a hearing on PIIC's Motion, yet offers no explanation as to why a response was not filed. The two issues are independent. A hearing was never conducted, with or without Appellant's participation. If a hearing had occurred while Appellant's counsel was unavailable, then Appellant may have an arguable basis for setting aside the Court's Order. However, that is not the case here and therefore, this argument fails. Moreover, Appellant's counsel did not advise Appellee's counsel or the court of the fact that he would be out of the country for an extended period of time. Now, because of his own failures, Appellant's counsel places the burden on Appellee's counsel and the lower Court for not knowing his schedule, and conforming thereto. Appellant fails to offer the requisite factual or legal proof to set aside the lower court's Order of Dismissal.

V. CONCLUSION

Appellant's claims fail as a matter of law rather than as a basis of dilatory conduct on the part of counsel opposite. The underlying question in this litigation is whether uninsured motorist coverage exists for Thomas. The answer, is an overwhelming no, for several reasons. There is ample proof in the record to indicate that she is not entitled to coverage for the following reasons: (1) she was not an "insured"under the policy because she was not acting in the course and scope of her employment, nor was she occupying the vehicle at the time of her injuries; (2) the accident did not arise out of the "use" of the vehicle; and (3) she is specifically excluded from coverage under the policy because she did not have a reasonable belief that she had permission to use the vehicle. Conversely, Appellant advanced no proof whatsoever to the court before its ruling to demonstrate any genuine issues of material fact. As such, the lower court must be affirmed, with all costs assessed to the Appellant.

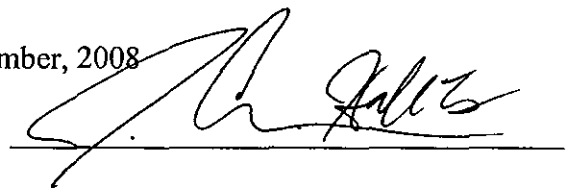
CERTIFICATE OF SERVICE

I, John C. Hall, II, do hereby certify that I have caused the foregoing to be served by electronic transmission and/or by placing a true and correct copy of the same in the United States Mail, First Class postage prepaid and properly addressed to the following:

Sorie S. Tarawally, Esq.
William E. Catledge, Esq.
Catledge Tarawally & Associates
600 Millsaps Building
201 W Capitol Street, Suite 600
P. O. Box 31027
Jackson, MS 39286-1027

Anthony Jones #K3994
Unit 29-A Bed # 35
Parchman, MS. 38738

This the 2nd of September, 2008



John C. Hall II

CERTIFICATE OF SERVICE

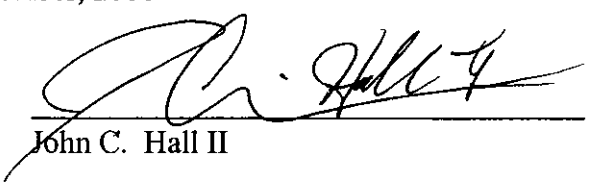
I, John C. Hall, II, do hereby certify that I have caused the Appellees Brief to be served by electronic transmission and/or by placing a true and correct copy of the same in the United States Mail, First Class postage prepaid and properly addressed to the following:

Sorie S. Tarawally, Esq.
William E. Catledge, Esq.
Catledge Tarawally & Associates
600 Millsaps Building
201 W Capitol Street, Suite 600
P. O. Box 31027
Jackson, MS 39286-1027

Anthony Jones #K3994
Unit 29-A Bed # 35
Parchman, MS 38738

Honorable Frank G. Vollor
Warren County Circuit Court
P. O. Box 351
Vicksburg, MS 39181-0351

This the 3rd of September, 2008



John C. Hall II

00553654