IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA0063

D. J. SHUTTLE AND TOURS — APPELLANT

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY
D/B/A SCOTTSDALE INSURANCE COMPANY — APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

BRIEF OF APPELLEE SCOTTSDALE INSURANCE COMPANY

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Oral Argument
Not Requested

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate disqualification or recusal.

1. D. J. Shuttle and Tours, Appellant.

2. Vanessa Jones, Jones Law Firm, counsel for Appellant.

3. Scottsdale Insurance Company, Appellee.

4. Scott Ellzey, Michael Held, Phelps Dunbar LLP, counsel for Appellee.

5. Alvin Flowers, Sr., Carolyn Flowers, Linda Dillon, Alisha Leggett, John Rawls, Alvin Flowers, Jr., Diamond Watts, Beverly Watts, Aaron Rawls, and Cicily Toney Watts, Plaintiffs in lower court proceeding.

6. Darryl M. Gibbs, Tabor, Chhabra & Gibbs, P.A., counsel for Alvin Flowers, Sr., Carolyn Flowers, Linda Dillon, Alisha Leggett, John Rawls, Alvin Flowers, Jr., Diamond Watts, Beverly Watts, Aaron Rawls, and Cicily Toney Watts, Plaintiffs in lower court proceeding.

7. Honorable Robert B. Helfrich, Circuit Court Judge, Circuit Court of Forrest County, Mississippi.

SO CERTIFIED, this the 3rd day of November, 2010.

SCOTT ELLZEY

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INTRODUCTION

Plaintiffs filed their Complaint against D. J. Shuttle & Tour ("D. J. Shuttle"), asserting that that they were injured in a single-vehicle incident that occurred in Gadsden, Alabama. Plaintiffs asserted that D. J. Shuttle negligently serviced the van in which they were riding and that this negligence caused their injuries. Plaintiffs' only claim against D. J. Shuttle is for negligence. Scottsdale Insurance Company ("Scottsdale") was the liability insurer of D. J. Shuttle. Scottsdale denied D. J. Shuttle's request for defense and indemnity as to Plaintiffs' negligence claim.

D. J. Shuttle's liability policy with Scottsdale clearly and unambiguously provides that coverage is not afforded for bodily injury that occurs away from the premises in Hattiesburg, Mississippi. The Plaintiffs and D. J. Shuttle admit that the bodily injuries took place in Gadsden, Alabama. As a matter of law, there can be no coverage afforded under the policy.

While some insurance coverage issues can involve complex facts and analysis, this one does not. The alleged bodily injuries did not occur on the designated premises. Therefore, the subject liability policy does not afford coverage to D. J. Shuttle for Plaintiffs' negligence claim.

The Circuit Court of Forrest County held that the policy does not provide coverage to D. J. Shuttle for Plaintiffs' claims and dismissed Scottsdale with prejudice. This Court should affirm the Circuit Court's ruling.

STATEMENT OF THE ISSUES

I. **Whether The Circuit Court's Holding That Scottsdale Has No Duty To Defend Or Indemnify Should Be Affirmed.**

II. **Whether The Rule 54(b) Final Judgment As To Scottsdale was proper.**

STATEMENT OF THE CASE

I. Course Of Proceedings

On March 4, 2009, Plaintiffs Alvin Flowers Sr., Carolyn Flowers, and Linda Dillon filed their initial Complaint against Enterprise Rent-A-Car Company and D. J. Shuttle.[1] On June 2, 2009, Plaintiffs filed an Amended Complaint adding Alisha Legget, John Rawls, Alvin Flowers, Jr., Diamond Watts, Beverly Watts, Aaron Rawls and Cicily Toney Watts as plaintiffs.[2] On July 1, 2009, Plaintiffs filed their Second Amended Complaint adding Scottsdale as a defendant and removing Enterprise Rent-A-Car Company as a defendant.[3] On September 4, 2009, Scottsdale filed its Motion to Dismiss in response to Plaintiffs' Second Amended Complaint.[4] On September 10, 2009, D. J. Shuttle filed an Answer to Plaintiffs' Second Amended Complaint.[5] Also on September 10, 2009, D. J. Shuttle filed a Crossclaim (which was improperly titled a "Counter Complaint") against Scottsdale.[6] On October 12, 2009, Scottsdale filed its Motion to Dismiss in response to D. J. Shuttle's Crossclaim.[7]

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[1] CP 1:8-11. The Record is cited herein as "CP [volume:page(s)]." Appellee's Record Excerpts are cited herein as "RE [tab number]."

[2] CP 1:12-16.

[3] CP 1:18-29; RE 6.

[4] CP 1:38-104.

[5] CP 1:105-110.

[6] CP 1:111-123.

[7] CP 1:132-207.

On March 26, 2010, a hearing was held on Scottsdale's Motion to Dismiss Plaintiffs' claims against Scottsdale and on Scottsdale's Motion to Dismiss Crossclaim of D. J. Shuttle.[8] Also on March 26, 2010, the Circuit Court of Forrest County entered a Final Judgment of Dismissal as to Scottsdale Insurance Company Pursuant to Rule 54(b).[9] D. J. Shuttle appealed the Rule 54(b) Final Judgment.[10] The Plaintiffs did not appeal the Circuit Court's ruling.

II. Statement Of Facts

On or about August 31, 2005, Scottsdale issued insurance policy number CLS1177552 (hereinafter sometimes referred to as the "Policy") to D. J. Shuttle.[11] The Policy was a Commercial General Liability policy, which had a policy period of August 31, 2005 to August 31, 2006.[12] The Policy included an Endorsement entitled "Limitation of Coverage to Designated Premises" ("Endorsement").[13] This Endorsement provides that, "This insurance does not apply . . . to 'bodily injury,' . . . occurring on any premises other than the designated premises listed above."[14] For the Designated Premises, the Endorsement states, "See Schedule of Locations".[15] The Policy's Schedule of Locations includes only two locations, 101 Hardy Street, Hattiesburg South, MS 39401-0000 and 1601 Corrine Street, Hattiesburg South, MS 39401-0000.[16]

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[8] CP 1:240-241; RE 2.
[9] CP 1:240-241; RE 2.
[10] CP 1:242-244.
[11] CP 1:152.
[12] CP 1:152.
[13] CP 1:194; RE 3.
[14] CP 1:194; RE 3.
[15] CP 1:194; RE 3.
[16] CP 1:195; RE 4.

After Plaintiffs filed their initial Complaint, D. J. Shuttle made a request to Scottsdale for defense and indemnity under the Policy.[17] By letter dated May 19, 2009, Scottsdale denied D. J. Shuttle's request for coverage based on the Policy's Limitation of Coverage to Designated Premises Endorsement.[18]

Plaintiffs' Second Amended Complaint alleges that on or about July 10, 2006, Plaintiffs were injured while traveling on I-59 near Gadsden, Alabama in a van rented from Enterprise Rent-A-Car Company.[19] Plaintiffs allege that the passenger side, front wheel separated from the van and that as a result of this incident, Plaintiffs suffered injuries to their respective backs, necks and bodies as a whole.[20] The Second Amended Complaint also alleges that Enterprise Rent-A-Car Company retained and contracted with D. J. Shuttle for maintenance and servicing of their fleet and that D. J. Shuttle performed maintenance and service on the van in question including tire service and rotation.[21] Plaintiffs only claim against D. J. Shuttle in this matter is for negligence and is based on the alleged negligence in servicing the van.[22]

D. J. Shuttle's Crossclaim asserts claims against Scottsdale based solely on Scottsdale's denial of coverage in this matter.[23]

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[17] CP 1:203-207; RE 5.
[18] CP 1:203-207; RE 5.
[19] CP 1:20; RE 6.
[20] CP 1:21; RE 6.
[21] CP 1:21; RE 6.
[22] CP 1:21; RE 6.
[23] CP 1:111-123.

SUMMARY OF THE ARGUMENT

The Policy excludes coverage for bodily injury occurring on any premises other than the designated premises in Hattiesburg, Mississippi. Plaintiffs and D. J. Shuttle admit that the subject bodily injuries occurred in Gadsden, Alabama. Therefore, as a matter of law, the Policy excludes coverage for Plaintiffs' claims against D. J. Shuttle. Scottsdale was properly dismissed by the Circuit Court.

The Circuit Court ordered that there was no just reason for delay and that final judgment should be entered as to Scottsdale. Therefore, the Rule 54(b) Final Judgment was proper and should be affirmed.

STANDARD OF REVIEW

The Supreme Court reviews a motion to dismiss *de novo*. *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006). When reviewing a motion to dismiss, all of the allegations in the plaintiff's complaint must be taken as true. *Id.* The motion should not be granted unless "it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Id.* (*quoting Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1236 (Miss. 1999)). The findings of the trial court will not be disturbed on review unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Id.* (*citing Bell v. City of Bay St. Louis*, 467 So. 2d 657, 661 (Miss. 1985)).

D. J. Shuttle incorrectly argues that Scottsdale was granted Summary Judgment. Scottsdale filed a Motion to Dismiss in response to Plaintiffs' Second Amended Complaint and a Motion to Dismiss as to D. J. Shuttle's Crossclaim. Both Motions to Dismiss were granted.

ARGUMENT

I. The Scottsdale Policy Does Not Provide Coverage For D. J. Shuttle

A. The Limitation of Coverage to Designated Premises Endorsement bars coverage to D. J. Shuttle for Plaintiffs' negligence claim

The Limitation of Coverage to Designated Premises Endorsement excludes coverage for bodily injury occurring on any premises other than the designated premises listed on the Schedule of Locations.[24] The Designated Premises refers to two locations in Hattiesburg, Mississippi (101 Hardy Street, Hattiesburg South, MS 39401-0000 and 1601 Corrine Street, Hattiesburg South, MS 39401-0000).[25] The Endorsement also bars coverage for bodily injury that occurs away from the designated premises caused by supervision, hiring, training, organizing, or any other activities conducted on or from the designated premises.[26] The Endorsement also bars coverage for bodily injury included within the products-completed operations hazard.[27]

Because Plaintiffs' alleged bodily injuries occurred on I-59 near Gadsden, Alabama, *i.e.*, away from the designated premises in Hattiesburg, Mississippi, no coverage is afforded under the Policy based on the application of the Limitation of Coverage to Designated Premises Endorsement.

D. J. Shuttle argues that a genuine issue of material fact exists. With respect, that is simply not the case. The Policy is clear and unambiguous and speaks for itself. D. J. Shuttle admits that the bodily injury occurred in Gadsden, Alabama and not Hattiesburg, Mississippi.[28] There are no facts in dispute. "The mere fact that the parties disagree about the meaning of a

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[24] CP 1:194; RE 3.
[25] CP 1:195; RE 4.
[26] CP 1:194; RE 3.
[27] CP 1:194; RE 3.
[28] Appellant's Brief, pp. 1, 3, and 8.

provision of a contract does not make the contract ambiguous as a matter of law." *Burton v. Choctaw County*, 730 So. 2d 1, 8 (Miss. 1999). The plain terms of the insurance contract are binding and controlling. *Sennett v. U.S. Fidelity and Guar. Co.*, 757 So. 2d 206, 212 (Miss. 2000). The trial court, not the jury, must determine the meaning and effect of an insurance contract if the contract is clear and unambiguous. *Jackson v. Daley*, 739 So. 2d 1031, 1041 (Miss. 1999) (*citing Overstreet v. Allstate Ins. Co.*, 474 So. 2d 572, 575 (Miss. 1985)). Indeed, it must be noted that D. J. Shuttle does not even allege that the Policy is ambiguous. Here, the Policy is written in plain terms and there are no issues of material fact. Therefore, the Circuit Court and this Court can, and should, issue a ruling as a matter of law regarding coverage.

B. The coverage issue concerns where the alleged *bodily injury* occurred

If the alleged bodily injury did not occur on the designated premises, by its terms, the subject liability Policy does not afford coverage.

D. J. Shuttle has argued that the Mississippi Supreme Court decision of *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149 (Miss. 1992) stands for the proposition that the Endorsement does not operate to limit coverage to claims which occur on the designated premises. That is sophistry. The *Tanksley* decision had nothing to do with the application of the contractual terms of an insurance policy. The *Tanksley* court considered whether venue was proper under the venue statute, which provided that venue lies where "the *cause of action* may occur or accrue . . . ." *Id.* at 1155 (emphasis added). There, a charter airplane company improperly loaded cargo on a plane in Warren County, Mississippi; and, the plane tilted while in Chicago, Illinois, causing personal injuries to a passenger on the plane. *Id.* at 1153-1154. The court found that, since the actionable conduct occurred in Warren County, venue was proper there since, for purpose of the venue statute, the "cause of action" could be said to have occurred there. *Id.* at 1157.

However, where a "cause of action" may have "occurred" for purpose of the venue statute is of no consequence to the issue of whether the subject liability Policy affords coverage for that "cause of action."[29] To determine whether the Policy provides coverage for the claim, the court, as a matter of law, must look to the terms of the insurance contract.

The plain language of the subject Endorsement requires that – in order for liability coverage to exist – the alleged "*bodily injury*" must have occurred on the designated premises.[30] As admitted by D. J. Shuttle and Plaintiffs, and as a matter of law and indisputable fact, the alleged "bodily injury" in this matter did not occur on the designated premises.[31]

Regardless, the Endorsement also provides that, "This insurance does not apply . . . to 'bodily injury,' . . . that occurs away from the designated premises caused by . . . any other activities conducted on or from the designated premises."[32] Therefore, D. J. Shuttle's argument that the alleged negligence occurred at the designated premises is also of no consequence because the Endorsement specifically excludes coverage for bodily injury that occurs away from the designated premises even if caused by activities that occur at the designated premises. D. J. Shuttle asserts that the bodily injuries were caused by negligent actions on the designated premises.[33] Even if this were true, coverage is still excluded by the plain and unambiguous terms of the Policy. This is still clearly and unambiguously excluded by the Endorsement.

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[29] The subject Endorsement was specifically written so that there can be no issue with regard to a court having to consider whether a liability claim *arises out of* a designated premises. In other words, for purpose of the coverage issue presented in the present matter, it makes absolutely no difference if the Plaintiffs alleged that the insured committed actions or made decisions on the designated premises which later led to some sort of accident "occurring" at another location. The issue for the court's determination as to the subject Endorsement is whether the "bodily injury" occurred on the designated premises. Here, it admittedly and most certainly did not, so that is the end of the matter.

[30] CP 1:194; RE 3.

[31] CP 1:21; Appellant's Brief, pp. 1, 3, and 8.

[32] CP 1:194; RE 3.

[33] Appellant's Brief, p. 7.

C. Scottsdale has absolutely no duty to defend D. J. Shuttle because Plaintiffs' negligence claim is outside the coverage of the Policy

D. J. Shuttle filed its Crossclaim against Scottsdale based on Scottsdale's denial of coverage to D. J. Shuttle for Plaintiffs' negligence claim.[34] An insurer has absolutely no duty to defend those claims which fall outside the coverage of the policy. *Farmland Mutual Insurance Company v. Scruggs*, 886 So. 2d 714, 719 (Miss. 2004). To determine if a duty to defend exists, one turns to the allegations of the Complaint. *Id.* Here, Plaintiffs' only claim against D. J. Shuttle is for negligence, and the Policy clearly and unambiguously does not provide coverage for this negligence claim. Therefore, Scottsdale has absolutely no duty to defend D. J. Shuttle in this lawsuit. *See Stennett v. United States Fidelity and Guaranty Company*, 757 So. 2d 206 (Miss. 2000) (holding that a commercial general-liability policy clearly drafted to exclude coverage for injuries to employees did not cover action against the insured by the estate of an employee killed on the job at the workplace). It is undisputed that the alleged bodily injuries occurred in Gadsen, Alabama, and not on the designated premises.[35] With that, as a matter of law, Scottsdale can never have any obligation to defend or indemnify under the Policy.

II. The Rule 54(b) Final Judgment Is Proper

The Circuit Court entered its Rule 54(b) Final Judgment as to Scottsdale.[36] The judgment provided that Scottsdale's Motion to Dismiss Plaintiffs' Second Amended Complaint was granted.[37] The judgment also provided that Scottsdale's Motion to Dismiss Crossclaim of D. J. Shuttle was granted.[38] The judgment also dismissed Scottsdale with prejudice.[39]

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[34] CP 1:111-123.
[35] CP 1:21; Appellant's Brief pp. 1, 3, and 8.
[36] CP 1:240-241; RE 2.
[37] CP 1:240; RE 2.
[38] CP 1:241; RE 2.
[39] CP 1:241; RE 2.

Within the Final Judgment, the Court ruled that Scottsdale had, "no duty to defend or indemnify D. J. Shuttle and Tours for the claims asserted in this lawsuit."[40] Further, the Court expressly stated that, "The Court further finds, pursuant to Rule 54(b), that there is no just reason for delay, and that final judgment of dismissal should be entered as to Scottsdale Insurance Company."[41]

Plaintiffs and D. J. Shuttle asserted claims against Scottsdale, alleging that the Policy provided coverage for Plaintiffs' claims against D. J. Shuttle. The only issue involving Scottsdale is whether the Policy provided coverage. Once the Circuit Court ruled that Scottsdale had no duty to defend or indemnify D. J. Shuttle, there was absolutely no reason for Scottsdale to remain in the case. Failure to issue a final judgment as to Scottsdale under the circumstances, dismissing Scottsdale with prejudice, would impose a manifest injustice, and would be contrary to the law. The court cannot re-write the terms of the insurance contract to impose an obligation where none exists. The Policy does not provide coverage for this claim, and will never provide coverage for this claim, and the Court cannot impose an obligation to provide a defense to a claim that will never be covered.

Now, *after filing its notice of appeal on the subject final judgment*, D. J. Shuttle argues that the judgment should not have been deemed a final judgment under Rule 54(b). However, D. J. Shuttle has not and cannot provide any reasonable basis as to why the Rule 54(b) Final Judgment is improper and should be reversed. D. J. Shuttle's argument in this regard is merely an effort at misdirection, away from the plain and unambiguous terms of the Policy.

A Rule 54(b) judgment is reviewed under an abuse of discretion standard. *Laird v. ERA Bayshore Realty*, 841 So. 2d 178, 180-181 (Miss. Ct. App. 2003) (*quoting Cox v. Howard, Weil,*

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[40] CP 1:240; RE 2.
[41] CP 1:240; RE 2.

Labouisse, Friedrichs, Inc., 512 So. 2d 897, 899 (Miss.1987)). Here, the Circuit Court did not abuse its discretion and its Rule 54(b) judgment should be affirmed.

Mississippi Rule of Civil Procedure 54(b) provides:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Because there are multiple claims for relief and multiple parties involved in this case, the Circuit Court had authority to enter final judgment as to one or more but fewer than all of the claims or parties. Here, the Circuit Court entered final judgment as to all claims against Scottsdale, leaving only the claim of negligence asserted by Plaintiffs against D. J. Shuttle. Rule 54(b) obviously allows for such a final judgment. Rule 54(b) requires that a final judgment can be entered: (1) only upon an expressed determination that there is no just reason for delay, and (2) upon express direction for the entry of the judgment. Here, the Circuit Court clearly and expressly stated, "pursuant to Rule 54(b), that there is no just reason for delay, and that final judgment of dismissal should be entered as to Scottsdale Insurance Company."[42] The Circuit Court complied with all requisites of Rule 54(b). The final judgment is proper, and should be affirmed.

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[42] CP 1:240; RE 2.

The comments to Rule 54(b) provide further basis for affirming the Circuit Court's Rule 54(b) Final Judgment. Those comments provide in pertinent part:

> *The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available.*
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> *The rule . . . . gives the court discretion to enter a final judgment in these circumstances and it provides much needed certainty in determining when a final and appealable judgment has been entered. If the court chooses to enter such a final order, it must do so in a definite, unmistakable manner.*
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> . . . . .
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> *The rule itself sets forth three basic conditions on its applicability. The first requirement is that either multiple claims for relief or multiple parties be involved.*
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> . . . . .
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> *The second prerequisite for invoking Rule 54(b) is that at least one claim or the rights and liabilities of at least one party must be finally decided.*
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> . . . . .
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> *The third prerequisite to the issuance of a Rule 54(b) certificate is that the court must find that there is no just reason for delaying an appeal.*

The Circuit Court's Rule 54(b) Final Judgment complies with the basic purpose of Rule 54(b) in that it avoids the injustice of not finalizing the judgment as to the distinctly separate claims against Scottsdale. The coverage issue is on appeal before this Court now. There is no reason this Court should not hear the coverage issue and affirm the Rule 54(b) Final Judgment, allowing Scottsdale to have finality with regard to this matter.

The Rule 54(b) Final Judgment in this case obviously provided D. J. Shuttle with the certainty needed to determine whether the judgment was final and appealable because D. J.

Shuttle filed a Notice of Appeal and brought this appeal before this Court.[43] Therefore, there can be no issue as to whether the Rule 54(b) Final Judgment was entered in a definite and unmistakable manner.

Finally, the Rule 54(b) Final Judgment meets all three requirements outlined in the comments. First, the Circuit Court matter involved both multiple parties and multiple claims.[44] Second, all claims as to Scottsdale have been finally decided.[45] Third, the Court found and expressly stated that there was no just reason for delay.[46]

The issue is whether or not there is coverage for the claim. The Circuit Court ruled that there was no coverage for this claim.[47] D. J. Shuttle has appealed that ruling – i.e. whether the Policy provides coverage for this claim. That is the issue that is before the Court now. D. J. Shuttle's entire argument about Rule 54(b) is a red herring.

This Court has held that when claims against two different defendants are on different theories and unrelated, and one of the defendants is granted dismissal, then there is no reason for the dismissed defendant to be kept in the case. *Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co.*, 456 So. 2d 750, 753 (Miss. 1984). In *Indiana Lumbermen's*, there were claims of negligence asserted against a repairman for failure to use reasonable care in repairing a television set. *Id.* The negligence claims against the manufacturer consisted of negligence in design, manufacture and testing, failure to warn, and breach of warranty. *Id.* This Court noted that the claims of negligence against the two defendants were on different theories and were unrelated. *Id.* This Court held that after the trial judge granted the repairman's motion for

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[43] CP 1:242-244.
[44] CP 1:18-29; RE 6.
[45] CP 1:240-241; RE 2.
[46] CP 1:240-241; RE 2.
[47] CP 1:240-241; RE 2.

judgment upon the pleadings, there was no reason for the repairman to be kept in case. *Id.* This Court affirmed that the trial judge correctly entered final judgment for the repairman and certified the case as authorized by Rule 54(b). *Id.*

Similarly, the Mississippi Court of Appeals has held that entry of final judgment in favor of a home health care association was appropriate in a health care services provider's action against the home health care association and its members for tortious interference with business relations because there was no evidence that the association had any involvement in the member's allegedly malicious dissemination of information. *Mid-Delta Home Health, Inc. v. Mississippi Ass'n for Home Care*, 822 So. 2d 336, 342 (Miss. Ct. App. 2002). The issues presented on appeal were different from those ultimately to be litigated at the trial court and there was no just reason for the delay of entry of final judgment in favor of the association. *Id.*

Here, the claim against Scottsdale concerns the construction of the Policy for the purpose of determining whether the Policy provides liability coverage for this matter. The question of whether the terms of the Policy provide insurance coverage are separate and distinct from the question of whether D. J. Shuttle is liable to Plaintiffs for its alleged negligence. The Policy speaks for itself, and the Circuit Court properly entered its Rule 54(b) Final Judgment in favor of Scottsdale, just the same as other Mississippi courts have done.

In *Olin Corp. v. Insurance Co. of North America*, 771 F. Supp. 76, 80 (S.D. N.Y. 1991), the court ruled that where a policy does not provide coverage, final judgment in favor of the liability insurer is proper. There, the court noted that any delay in the entry of final judgment would merely impose litigation expenses and costs for no purpose. *Id. See also Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 323 F. Supp. 2d 709, 723 (E.D. Va. 2004), *rev'd on other grounds,* 407 F.3d 631 (4th Cir. 2005); *State of N.Y. v. Amro Realty Corp.*, 745 F. Supp. 832, 840 (N.D.Y.Y. 1990), *aff'd*, 936 F.2d 1420 (2d Cir. 1991).

In *Symington v. Walle Mut. Ins. Co.*, an insured sued his agent and his insurer regarding coverage under a farm property policy. 563 N.W.2d 400, 401 (N.D. 1997). The insured alleged the insurer's farm policy provided coverage for a loss and, alternatively, if the policy did not provide coverage, the agent had negligently failed to procure coverage and had misrepresented that coverage had been provided. *Id.* The trial court ruled in favor of the insurer, concluding the policy did not provide coverage for the insured's loss, and entered a Rule 54(b) final judgment. *Id.* On appeal, the North Dakota Supreme Court held that the remaining claims against the agent, although contingent upon a determination that the insurer's policy did not provide coverage to the insured, were separate and distinct from the issue of coverage. *Id.* at 402. The court noted that the insured's claims against the agent alleged negligent failure to procure coverage and misrepresentation that coverage had been provided and no matter how those remaining contingent claims against the agent were decided, the coverage issues raised in the appeal would always need to be resolved and would never be mooted by future developments in the trial court. *Id.* Ultimately, the North Dakota Supreme Court held that the trial court did not abuse its discretion in granting Rule 54(b) certification. *Id.* at 402-403.

In the present matter, of course, D. J. Shuttle did not assert a claim against its insurance agent in this lawsuit – but the point of the matter is that it would not change things if it had. The Policy does not provide coverage for the claim, and the Circuit Court's entry of a Rule 54(b) Final Judgment in favor of Scottsdale is proper. D. J. Shuttle has appealed the Circuit Court's ruling – which simply makes its entire argument about whether the ruling is appealable inapposite to the issue that is before the Court. The question is whether there is insurance coverage for this claim. The question is not whether the Circuit Court's ruling is appealable. D. J. Shuttle has appealed the ruling. D. J. Shuttle's argument concerning Rule 54(b) is merely an

effort to impose unnecessary expenses and costs on Scottsdale for no legitimate purpose, and in spite of the fact that the Policy clearly does not provide coverage for the claim.

D. J. Shuttle cites a Third Circuit Court of Appeals case for the proposition that when counterclaims and set-off issues are involved in a lawsuit, Rule 54(b) certification is improper. There is no such parallel situation here. There simply are no counterclaims or set-off issues involved in this matter.

D. J. Shuttle argues that there might be piecemeal litigation and multiple appeals of the same issue, but that is simply not the case. The only claim against Scottsdale is premised on the question of whether the Policy provides coverage for this claim. It does not, and that is the end of the matter. There can be no threat of piecemeal litigation or multiple appeals because once the coverage issue is finally resolved there can be no further appeal of that issue. Further, the insurance coverage issues raised in this appeal can never be mooted by future developments in the trial court. The Policy simply does not and cannot provide coverage for the Plaintiffs' claim against D. J. Shuttle.

There is no just reason for delaying final judgment as to Scottsdale, and to do so would impose a manifest injustice. The coverage issues raised in this appeal will always need to be resolved and can never be mooted by future developments in the trial court. A final determination as to coverage will also likely have an impact on the remaining claims because it will give finality to the assets available for recovery by the Plaintiffs. Scottsdale is entitled to final judgment under the circumstances and the Circuit Court's Rule 54(b) Final Judgment should be affirmed.

III. The Insurance Procurement Issues Raised By D. J. Shuttle Are Not Valid Bases For Appeal

In Appellant's Brief, it asserts that there are genuine issues of fact pertaining to the procurement of coverage by the retail insurance agent.[48] There are no such claims asserted in the Second Amended Complaint, and those issues are not a part of this litigation nor are those issues properly before this Court on appeal.[49] Any such argument must be disregarded as irrelevant. Moreover, as noted above, even if a claim for failure to procure proper insurance coverage had been asserted – as a matter of law, it still would not change the fact that the Policy does not provide coverage for this claim. Scottsdale must be dismissed with prejudice, now, and not be forced to expend resources and incur expenses remaining a part of a lawsuit which asserts no valid claim for recovery against it. The Policy does not provide coverage and will never provide coverage for this matter, and that is the end of it as to Scottsdale. The Circuit Court's Rule 54(b) Final Judgment must be affirmed.

IV. Plaintiffs Did Not Appeal The Circuit Court's Grant Of Scottsdale's Motion To Dismiss Their Second Amended Complaint

Plaintiffs filed a claim against Scottsdale in their Second Amended Complaint seeking a declaratory judgment that the Policy provided coverage to D. J. Shuttle.[50] In response, Scottsdale filed its Motion to Dismiss.[51] Thereafter, D. J. Shuttle filed its Crossclaim (which was improperly titled a "Counter Complaint") against Scottsdale seeking coverage.[52] In response, Scottsdale filed a Motion to Dismiss the Crossclaim.[53] The Circuit Court granted both of

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[48] Appellant's Brief, p. 8.
[49] CP 1:18-29; RE 6.
[50] CP 1:18-29; RE 6.
[51] CP 1:38-104.
[52] CP 1:111-123.
[53] CP 1:132-207.

Scottsdale's Motions to Dismiss.[54] Only D. J. Shuttle has appealed.[55] Plaintiffs did not appeal the Rule 54(b) Final Judgment against them, which provided that there was no coverage available under the Policy. Plaintiffs' time for appeal has expired and the judgment, as to them, is final. D. J. Shuttle cannot appeal the final judgment entered against Plaintiffs.

The Rule 54(b) Final Judgment denying Plaintiffs' request for declaratory judgment regarding coverage is the law of the case. The Circuit Court's ruling should not be disturbed on appeal.

CONCLUSION

Under the circumstances, there is no just reason for delaying final judgment; the final judgment was properly and unmistakably entered. The Circuit Court properly applied the applicable law to the plain and unambiguous terms of the Policy and found that there is no duty to defend or indemnity. The Policy does not provide coverage to D. J. Shuttle, and the Circuit Court's Rule 54(b) Final Judgment should be affirmed.

RESPECTFULLY SUBMITTED, this the 3 day of November, 2010.

SCOTTSDALE INSURANCE COMPANY

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[54] CP 1:240-241; RE 2.
[55] CP 1:242-244.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the ***BRIEF OF APPELLEE SCOTTSDALE INSURANCE COMPANY*** has been served via UPS overnight delivery, on the following:

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This, the 3rd day of November, 2010.

SCOTT ELLZEY