IN THE SUPREME COURT OF MISSISSIPPI

D.J. SHUTTLE AND TOURS, NATIONWIDE MUTUAL INSURANCE COMPANY D/B/A SCOTTSDLE INSURANCE COMPANY; AND JOHN AND JANE DOES #1-10 — APPELLANT

VERSES — CAUSE NO. 2010-CA0063

ALVIN FLOWER, SR., CAROLYN FLOWERS, LINDA DILLONS, ALISHA LEGGETT, JOHN RAWLS, ALVIN FLOWERS, JR., DIAMOND WATTS, BEVERLY WATTS, AARON RAWLS AND CICILY TONEY WATTS — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. D.J Shuttle – Appellants.
2. Vanessa J. Jones – Attorney of Record for Appellants.
3. Darryl M. Gibbs Esquire, Chhabra, & Gibbs, P.A., Attorney for Appellees, Flowers, et al
4. Alvin Flowers, Sr., Carolyn Flowers, Linda Dillon, Alisha Leggett, John Rawls, Alvin Flowers Jr., Diamond Watts, Beverly Watts, Aaron Rawls and Cicily Toney Watts
5. Scott Ellzey Esquire, Phelps Dunbar, LLP,, Attorney for Scottsdale Insurance Company
6. Robert Helfich, Circuit Clerk Judge, Forrest County, Mississippi.

Respectfully submitted,

By: Vanessa J. Jones

Vanessa J. Jones
MSB No [redacted]

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STATEMENT OF THE CASE

On July 10, 2006, Alvin Flowers, Sr., et al suffered physical and emotional damages as a result of an automobile accident resulting from the passenger's side front tire separating from the passenger van they were driving. The passenger van was rented from Enterprise Rent-A-Car (hereinafter "Enterprise"). Appellant, D.J. Shuttle and Tours (hereinafter "Defendant D. J.") contracted with Enterprise to perform service and maintenance of vehicles owned by Enterprise.

The passenger van driven by Alvin Flowers, Sr., et al was serviced by D.J. Shuttle prior to the automobile accident in which the front tire separated from the vehicle while traveling at approximately 65 mile per hour on Interstate 59, near Gadsden, Alabama.

That on March 4, 2009, Alvin Flowers, Sr., et al filed their initial Complaint against Enterprise Rent-A-Car and D. J. Shuttle and Tours alleging negligence in servicing of this van by D.J. Shuttle which caused the accident.

Scottsdale Insurance Company issued a General Liability Commercial Policy to D.J. Shuttle, and the policy was in effect at the time of the accident. In response to the complaint, D.J. Shuttle and Tours made a request to Scottsdale for legal defense and indemnity pursuant to the Commercial Policy and advised that the van was serviced by his business prior to the accident.

By letter dated May 19, 2009, Scottsdale denied coverage alleged that it owed no obligation to pay damages for the accident under said policy, if defendant D.J. Shuttle was found to be negligent for its services to the van.

On July 1, 2009, Alvin Flowers, Sr., et al filed their Second Amended Complaint. On September 4, 2009, Defendant Scottsdale filed its Motion to Dismiss. On September 10, 2009, Defendant D.J., filed its Answer to Alvin Flowers, Sr., Second Amended Compliant and further brought a cross claim alleging bad faith against Scottsdale for failing to defend D.J. Shuttle and Tours in this action for damages arising during the course of his business. Scottsdale has continued to deny compensability of this claim contrary to the General Liability Insurance Policy.

A hearing in this matter was held on March 26, 2010, before the Honorable Robert Helfrich, Forrest County Circuit Court Judge. The issues at the time of the hearing were (1) whether a commercial policy of insurance was in effect at the time of the accident; (2) if so, did the commercial policy of insurance provide coverage for the accident which occurred in Gadsden, Alabama and (3) did Scottsdale have a duty to defend D.J. Shuttle and Tours in the present claim for damages.

By Order of the circuit judge dated March 26, 2010, Judge Helfrich granted Defendant, Scottsdale Insurance Company's, Motion to Dismiss Plaintiff's Second Amended Complaint; granted Defendant , Scottsdale Insurance Company's Motion to Strike Plaintiffs' Joinder in Defendant, D.J. Shuttle and Tours; granted Defendant, Scottsdale Insurance Company's Motion to Dismiss Crossclaim of D. J. Shuttle and Tours; Dismissed with prejudice Scottsdale Insurance Company from this lawsuit; and ruled that the style of the lawsuit shall henceforth remove any

reference to "Nationwide Mutual Insurance Company d/b/a Scottsdale Insurance Company" as a named defendant in this matter.

On April 12, 2010, D.J. Shuttle and Tours filed his Notice of Appeal to this Court.

STATEMENT OF THE FACTS

On July 10, 2006, Alvin Flowers, Sr., et al were passengers in a van they rented from Enterprise Rent-A-Car. They were in an accident in Gadsden, Alabama when the front tire separated from the vehicle. D.J. Shuttle and Tours serviced the van prior to the accident. Scottsdale issued a General Liability Commercial Policy to D.J. Shuttle and Tours, and the policy was in effect at the time of the accident. However, Scottsdale alleges that it owes no obligation under the policy to provide legal defense for D.J. Shuttle and Tours or pay to indemnify him if he is found to have negligently serviced the van, because the accident did not occur on the business premise.

The alleged liability in this action was a result of alleged negligent actions or conduct performed by D.J. Shuttle and Tours on the premises covered under the Commercial Policy issued by Scottsdale. A jury could find a direct link between the alleged negligent service and maintenance performed on the covered premises covered under the policy and subsequent automobile accident that occurred later in Gadsden, Alabama.

ARGUMENT

I. STANDARD OF REVIEW

This Court applies a de novo standard of review to a trial court's grant or denial of summary judgment. Young v. Meacham, 999 So.2d 368, 371 (Miss. 2008). It 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, there is no genuine issue of material fact and, 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 demonstration that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt. Heigle v. Heigle, 771 So.2d 341, 345 (Miss. 2000) (quoting McCullough v. Cook, 679 So.2d 627, 630 (Miss. 1996).

Where a summary judgment dismisses some of the parties to a lawsuit, but not all of the parties, Rule 54(b) of the Mississippi Rules of Civil Procedure governs." Myatt v. Peco Foods of Miss., Inc., 22 So.3d 334, 336 (Miss. Ct. App. 2009) (quoting Fairley v. George County, 800 So.2d 1159, 1161 (Miss. 2001).

Rule 54(b) provides an exception to the final-judgment rule. The rule allows the trial court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties"

in an action. M.R.C.P. 54(b). But the trial court may do so "only upon an expressed determination that there is no just reason for delay upon an expressed direction for the entry of judgment." Id. Absent a Rule 54(b) certification, any judgment- regardless of how designated- is not final if it "adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties." M.R.C.P. 54(b).

Mississippi Rule of Civil Procedure 54(b) is designed to facilitate the entry of judgments upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving more than one claim or party. It was proposed because of the potential scope and complexity of civil actions under these rules, given their extensive provisions for the liberal joiner of claims and parties. 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.

The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it 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. Absent a certification under Rule 54(b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separable portion of the controversy, is null and void.

If the court decides that an order that does not dispose of all the claims of all the parties and that is not appealable under any other statute or rule should be given the status of a final

judgment, Rule 54(b) requires it to take two separate steps before an appeal can be perfected. The court must make "an express determination that there is no reason for delay" and it must make "an express direction for the entry of judgment."

When the court is asked to direct the entry of judgment under Rule 54(b), it must consider whether the entire case as a whole and the particular disposition that has been made and for which the entry of a judgment is sought falls within the scope of the rules. The general requirements are that the case includes multiple claims, multiple parties, or both, and that either one or more but fewer than all the claims have been decided, or that all the rights and liabilities of at least one party have been adjudicated.

Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions. 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. If there are multiple parties, there need only be one claim in the action. All of the rights or liabilities or one or more of the parties regarding that claim must have been fully adjudicated. *A decision that leaves a portion of the claim pending as to all defendants does not fall within the ambit of Rule 54(b).*

I. THE CIRCUIT COURT ERRED IN GRANTING SCOTTSDALE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

In the case at bar, D.J. Shuttle and Tours purchased a General Commercial Insurance Policy from Scottsdale Insurance Company. The Policy included an endorsement entitled "Limitations of Coverage to Designated Premises". This Endorsement provided that, "This insurance does

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I. THE CIRCUIT COURT ERRED IN GRANTING SCOTTSDALE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

In the case at bar, D.J. Shuttle and Tours purchased a General Commercial Insurance Policy from Scottsdale Insurance Company. The Policy included an endorsement entitled "Limitations of Coverage to Designated Premises". This Endorsement provided that, "This insurance does

not apply. . . . .to 'bodily injury,'. . . . Occurring on any premises other than the designated premises listed above." For the Designated Premises, the endorsement states, "See Schedule of Locations." The Policy's Schedule of Locations, 101 Hardy Street, Hattiesburg, MS 39401 and 1601 Corrine Street, Hattiesburg, MS 39401.

The alleged liability in this action arose out of alleged negligence associated with D.J. Shuttle and Tours business, ownership, operation and use of the insured premises. There is a significant casual connection between the accident in this case, work performed during normal course of business on the insured premises, and D.J. Shuttle and Tour's business operations for the alleged accident to be covered by the Commercial policy, if D.J. Shuttle and Tours is found to be negligent in the servicing of the van owned by Enterprise Rent-A-Car. Therefore, Scottsdale had a duty to provide legal defense and indemnify if D.J. Shuttle and Tours was found to be negligent in its repairs to the van.

D.J. Shuttle and Tours contracted with Scottsdale for a Commercial General Liability Policy for its business, not a Premise Liability Policy. This Commercial General Liability Policy applies to "bodily injury," "property damage," "personal and advertising injury" that the insured becomes legally obligated to pay as damages. Contrary to the Commercial General Liability Provisions, the Limitations of Coverage Endorsement contradicts the intended purpose of the policy. Consistent with commercial general liability coverage, the endorsement specifically covers "advertising injury," which is predicated on continuing general liability coverage. D.J. Shuttle and Tours contracted for a General Liability Commercial Policy to cover his vehicle repair shop.

The trial judge stated at the hearing on this matter, "If D.J. Shuttle was misled or misconstrued the policy, then, he should take it up with his agent." His agent was an employee of Scottsdale Insurance. Scottsdale has attempted to construe the terms of the policy in order to severely limit the scope of coverage to covered premise is flawed and constitutes willful attempts to deprive D.J. Shuttle and Tours of insurance coverage. There are genuine issues of material fact and different interpretations by Scottsdale and D.J. Shuttle about the applicability and coverage provided in the insurance policy Scottsdale sold to D.J. Shuttle and Tours that a jury or trier of fact should decide.

The Supreme Court of Mississippi has held "An injury of plaintiffs could not, as a matter of common sense, take place had it not been for the conduct in the county of origin." Flight Line, Inc. v. Tanksley, 608 So.2d 1149, 1156 (Miss. 1992). In Flight Line, the plaintiff was injured in Chicago while unloading equipment that was loaded into the airplane in Vicksburg, Mississippi. Id. In construing the words, the Supreme Court of Mississippi held that "Occur" is a less formalistic term than "Accrue." Id. at 1156.

The facts in the case at bar are similar because the automobile accident could not, as a matter of common sense, take place near Gadsden, Alabama, had it not been for the alleged prior negligent conduct of D.J. Shuttle and Tours premises covered under the policy issued by Scottsdale. Therefore, Scottsdale had a duty to defend and indemnify.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION BY GRANTING FINAL JUDGMENT TO DISMISS CONTRARY TO THE REQUIREMENTS OF MISSISSIPPI UNIFORM CIRCUIT AND COUNTY COURT RULE 54(B).

Mississippi Rule of Civil Procedure 54(b) is designed to facilitate the entry of judgments

Upon one or more but fewer than all the claims or as one or more but fewer than all the parties in an action involving more than one claim or party. It was proposed because of the potential scope and complexity of civil actions under these rules, given their extensive provisions for the liberal joinder of claims and parties. 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 all of the parties until the final adjudication of the entire case by making an immediate appeal available.

The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it 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.

Absent a certification under Rule 54 (b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separable portion of the controversy.

If the court decides that an order that does not dispose of all the claims of all the parties and that it is not appealable under any other statute or rule should be given the status of a final judgment, Rule 54(b) requires it to take two separate steps before an appeal can be perfected. The court must make "an express determination that there is no reason for delay" and it must make "an express direction for the entry of judgment."

When the court is asked to direct the entry of judgment under Rule 54(b), it must consider whether the entire case as a whole and the particular disposition that has been made and for which the entry of a judgment is sought falls within the scope of the rules. The general requirements are that the case include either multiple claims, multiple parties, or both, and that

either one or more but fewer than all the claims have been decided, or that all the rights and liabilities of at least one party have been decided, or that all the rights and liabilities of at least one party have been adjudicated.

Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions. 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. If there are multiple parties, there need only be one claim in the action. All of the rights or liabilities or one or more of the parties regarding that claim must have been fully adjudicated. A decision that leaves a portion of the claim pending as to all defendants does not fall within the ambit of Rule 54(b).

Nearly a quarter of a century ago, in Sears Roebuck & Co. v. Mackey, 351 U.S. 427 (1956), Steps were outlined in making determinations under Rule 54(b). A Court must determine that it is dealing with a "final judgment". It must be a "judgment" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." 351 U.S. at 436.

Once having found finality, the court must go on to determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separate from the remaining unresolved claims. The function of the court under the Rule is to act as a "dispatcher".

There are thus two aspects to the proper function of a reviewing court in Rule 54(b) cases. The court of appeals, must scrutinize the district court's evaluation of such factors as the

interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed as single units.

The Circuit Court failed to provide a written statement of reasons supporting its decision to certify the judgment as final. It failed to acknowledge that Rule 54(b) certification was not to be granted as a matter of course, and that this remedy should be reserved for the infrequent harsh cases. It failed to state whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants.

The Circuit Court failed to identify the relevant factors in the case before it, which is needed in order to decide id certification would not result in unnecessary appellate review. Whether the claims or counterclaims involved; whether review of adjudicated claims would not be mooted by any future developments in the case; and that the nature of the claims was such that no appellate court would have to decide the same issues more than once, even if there were subsequent appeals.

Turning to the consideration of justice to litigants, the Circuit Court failed to examine the presence of D.J. Shuttle's counterclaims and the possibility of a setoff recovery which are factors which weigh against certification.

In Allis-Chalmers Corp. v. Philadelphia Electric Company, 521 F.2d 360 (1975), the United States Court of Appeals for the Third Circuit held stated:

In the absence of unusual or harsh circumstances, we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the Plaintiff, weighs heavily against the grant of 54(b) certification. Id. at 366.

In Allis-Chalmers, the court defined unusual or harsh circumstances as those factors "involving considerations of solvency, economic duress, etc." Id. at 36, n. 14.

In the Third Circuit's view, the question was which of the parties should have the benefit of the amount of the balance due pending final resolution of the litigation. Allis-Chalmers dictated, "That the matter remains in status quo when non-frivolous counterclaims are pending, and in the absence of unusual or harsh circumstances."

In the case at bar, the circuit's order granted summary judgment to far less than all defendants. But the court failed to expressly determine there was no just reason for delay and did not expressly direct the entry of a final judgment as to some of the defendants. See M.R.C.P 54(b).

Our supreme court has advised that "it is incumbent on trial attorneys and trial judges to recognize that Rule 54(b) judgments must be reserved for rare and special occasions." Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 512 So.2d 897, 900 (Miss. 1987). In addition, the trial court's use of the operative language from Rule 54(b) does not ensure that the dictates of Rule 54(b) have been met. See Myatt, 22 So.3d at 338-40. The Supreme Court has instructed trial judges on the impropriety of granting a Rule 54(b) judgment where it would result in piecemeal litigation or multiple appeals of the same issue. Reeves Constr. & Supply, Inc. v. Corrigan, 24 So.3d 1077, 1083 (Miss. Ct. App. 2010). A Rule 54(b) judgment should only be granted when "the remainder of the case is going to be inordinately

delayed, and it would be especially inequitable to require a party to wait until the entire case is tried before permitting him to appeal." Cox, 512 So.2d at 900. The Supreme Court has urged trial courts to make specific findings in granting a Rule 54(b) judgment. Id. at 900-01.

The Circuit Court failed to identify the relevant factors in the case before it, which is needed in order to decide if certification would not result in unnecessary appellate review. Whether the claims if finally adjudicated were separate, distinct, and independent of any of the other claims or counterclaims involved; Whether review of adjudicated claims would not be mooted by any future developments in the case; and that the nature of the claims was such that no appellate court would have to decide the same issues more than once, even if there were subsequent appeals.

CONCLUSION

First, Appellant argues that genuine issues of material fact exist and that summary judgment should have been denied.

Second, argues that the trial court improperly applied Rule 54(b) by failing to do it a definite and unmistakable manner.

There are genuine issues of material fact regarding the liability of D.J. Shuttle and Tours for the alleged accident, issues of material fact regarding the interpretation of the General Liability Insurance Policy issued by Scottsdale, issues of material fact regarding Scottsdale duty to provide legal representation and to indemnify. Thus, the decision of the trial court granting of a summary judgment in this matter was improper and the matter should be reversed.

RESPECTFULLY SUBMITTED, this the 7th day of September, 2010.

D.J. SHUTTLE AND TOURS

BY: JONES LAW FIRM

BY: Vanessa J. Jones
Vanessa J. Jones
MS Bar No [redacted]

CERTIFICATE OF SERVICE

I, Vanessa J. Jones, attorney for the Appellants, do hereby certify that the foregoing Brief of Appellants has been this day mailed, via U.S. Mail, postage prepaid, a true and correct copy to:

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THIS the 7th day of September, 2010

BY: Vanessa J. Jones
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