

IN THE SUPREME COURT
FOR THE STATE OF MISSISSIPPI

PEKIN INSURANCE COMPANY

APPELLANT

VERSUS

CAUSE NO. 2014-M-01820-SCT

MARSHA R. HINTON, and
THOMAS F. HINTON,
Individually and, as the Wrongful
Death Beneficiaries of
TIMOTHY R. HINTON, Deceased

APPELLEE

APPELLEES' BRIEF

An Appeal of the December 10, 2014 Order Denying
Pekin's Motion to Dismiss for Lack of Personal Jurisdiction
From the Jones County Circuit Court
Second Judicial District
Civil Action No. 2013-112-CV10

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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 this Court may evaluate possible disqualification or recusal.

1. Pekin Insurance Company;
2. Marsha R. Hinton;
3. Thomas F. Hinton;
4. The Sportsman's Guide, Inc.;
5. Treestand Manufacturer's Association;
6. C & S global imports, Inc.;
7. Dorrance Aultman, attorney for Appellant;
8. S. Beth Windham, attorney for Appellant;
9. Robert Marc Chemers, attorney for Appellant;
10. Richard M. Burgland, attorney for Appellant;
11. Lawrence E. Abernathy, III, attorney for Appellees;
12. Leslie D. Roussell, attorney for Appellees;
13. Sam McHard, attorney for Appellees;
14. Mark D. Miller, attorney for the Sportsman's Guide;
15. Mark D. Morrison, attorney for Treestand Manufacturer's Association;
16. Hon. Billy Joe Landrum, former Circuit Court Judge of Jones County, Mississippi;
17. Hon. Dal Williamson, Circuit Court Judge of Jones County, Mississippi.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
CITATIONS	iii
STATEMENT REGARDING ORAL ARGUMENT	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I: WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT STRUCK THE AFFIDAVIT OF TIM MANNING..	6
II: WHETHER THE CIRCUIT COURT WAS CORRECT IN FINDING IT HAD PERSONAL JURISDICTION OVER PEKIN INSURANCE COMPANY.	10
A. THE CONTRACT PRONG	12
B. THE TORT PRONG.	14
C. THE DOING BUSINESS PRONG	16
1. COVERAGE TERRITORY	16
2. THE PETITIONER’S CORRESPONDENCE IN MISSISSIPPI.	19
3. PEKIN INSURANCE IS THE ALTER EGO OF PEKIN LIFE INSURANCE.	20
THE EXERCISE OF LONG-ARM JURISDICTION DOES NOT OFFEND DUE PROCESS.	22
CONCLUSION.	26

CITATIONS

<i>Bullion v. Gillespie</i> , 895 F.2d 213 (5th Cir.1990)	8, 9
<i>D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.</i> , 754 F.2d 542 (5th Cir.1985)	8
<i>Dunn v. Yager</i> , 58 So. 3d 1171 (Miss. 2011)	10, 11, 14
<i>Estate of Jones v. Phillips</i> , 992 So.2d 1131 (Miss.2008)	10
<i>Evanston Ins. Co. v. W. Cmty. Ins. Co.</i> , No. 2:13 CV 1268 GMN CWH, 2014 WL 1302100 (D. Nev. Mar. 31, 2014)	18
<i>Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.</i> , 907 F.2d (9th Cir.1990)	16, 18
<i>Ferrell v. W. Bend Mut. Ins. Co.</i> , 393 F.3d 786 (8th Cir. 2005)	17
<i>First Mississippi Corp. v. Thunderbird Energy</i> , 876 F.Supp. 840 (S. D. Miss. 1995)	13
<i>First Mississippi National Bank v. S & K Enterprises of Jackson</i> , 450 So.2d 839 (Miss. 1984)	12
<i>Horne v. Mobile Area Water & Sewer System</i> , 897 So.2d 972 (Miss.2004)	14, 23
<i>Int'l Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)	23
<i>Internet Doorway, Inc. v. Parks</i> , 138 F.Supp.2d 773	19
<i>John Mozingo Real Estate and Auction, Inc. v. National Auction Group, Inc.</i> , 925 So. 2d 141	9
<i>Johnson v. Warnaco, Inc.</i> , 426 F. Supp. 44 (S. D. Miss. 1976)	13
<i>Joshua Properties, LLC v. D1 Sports Holdings, LLC</i> , 130 So. 3d 1089 (Miss. 2014)	23
<i>Lewis v. Allstate Insurance Company</i> , 730 So.2d 65	13
<i>Liberty Mutual Ins. Co. v. Holliman</i> , 765 So.2d 564	20

<i>Martin & Martin v. Jones</i> , 616 F. Supp. 339 (S. D. Miss. 1985)	13
<i>Med. Assurance Co. of Miss. v. Jackson</i> , 864 F.Supp. 576 (S.D.Miss.1994)	19, 23
<i>Milliken v. Meyer</i> , 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940)	23
<i>Miss. Municipal Liability Plan v. Jordan</i> , 863 So.2d 934 Miss.2003)	14
<i>Payne v. Motorists' Mut. Ins. Co.</i> , 4 F.3d 452 (6th Cir.1993)	16, 17
<i>Paz v. Brush Engineered Materials, Inc.</i> , 445 F.3d 809 (5th Cir.2006)	14
<i>Poindexter v. Southern United Fire Ins. Co.</i> , 838 So.2d 964 (Miss.2003)	14
<i>Rossman v. State Farm Mut. Auto. Ins. Co.</i> , 832 F.2d 282 (4th Cir.1987)	16
<i>Rossman v. Consolidated Ins. Co.</i> , 832 F.2d 282 (4th Cir.1987)	17
<i>Robinson Corp. v. Auto Owners Ins. Co.</i> , 304 F. Supp. 2d 1232 (D. Haw. 2003)	17
<i>Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.</i> , 9 F.3d 415 (5th Cir. 1993)	23
<i>Sealy v. Goddard</i> , 910 So.2d 502 (Miss.2005)	10
<i>Smith v. Temco, Inc.</i> , 252 So. 2d 212 (Miss. 1971)	8, 15
<i>Snavelly v. Nordskog Elec. Vehicles Marketeer</i> , 947 F. Supp. 999 (S.D. Miss. 1995)	9
<i>Sorrells v. R & R Custom Coach Works, Inc.</i> , 636 So.2d 668 (Miss.1994)	14
<i>Tel-*Com Mgmt., Inc. v. Waveland Resort Inns, Inc.</i> , 782 So.2d 149 (Miss.2001)	10
<i>Thomas v. Skrip</i> , 876 F. Supp. 2d 788 (S.D. Miss. 2012)	14, 19
<i>Tustmark Nat'l Bank v. Meador</i> , 81 So. 3d 1112 (Miss. 2012)	6

<i>Unified Brands v. Teders</i> , 868 F. Supp. 2d 572 (S.D. Miss 2012)	15
<i>Walden v. Fiore</i> , —U.S. —, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014)	18
<i>Walker v. FFVA Mut. Ins. Co.</i> , 2014 WL 2683579	13
<i>Yatham v. Young</i> , 912 So.2d 467 (Miss.2005)	10

STATUTORY LAW

Miss. Code Ann. 13–3–57	10
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OTHER AUTHORITIES

86 C.J.S. Torts s 21 (1954)	14
Miss. R. Civ. P. 57	13, 14

STATEMENT OF ORAL ARGUMENT

The Hintons believe that oral argument would assist this Court in resolving the issues which are in dispute.

STATEMENT OF ISSUES

I: Whether the Circuit Court abused its discretion when it struck the affidavit of Tim Manning.

II: Whether the Circuit Court was correct in finding it had personal jurisdiction over Pekin insurance Company.

STATEMENT OF THE CASE

In August of 2009, Timothy R. Hinton (Tim) purchased a treestand, which included a safety harness, from The Sportsman's Guide (Sportsman's Guide). The treestand and harness bore the Hunter's View logo and contain labels which show it was manufactured by C & S Global Imports, Inc. (C & S Global). The safety harness stated it would arrest a fall of an individual weighing up to 350 pounds and it would last five years.

On October 6, 2012, approximate three years after he purchased the safety harness, Tim was hunting on his own property and fell from the treestand to the ground when the safety harness failed to arrest his fall. Tim was taken by ambulance to a field in Jasper County and was airlifted to Forrest General Hospital. Tim stayed in the Critical Care Unit until November 18, 2014, when he passed away. At the time of his fall, Tim weighed about 250 pounds.

In October of 2013, the Hintons filed suit against Hunter's View, Ltd., (Hunter's View), C & S Global, the Treestand Manufacturers Association (TMA) and Sportsman's Guide in the Circuit Court of Jones County, Mississippi. The Defendants removed to Federal Court in Hattiesburg, Mississippi, but the case was remanded. The Hintons have not been able to serve Hunter's View. The TMA and Sportsman's Guide have answered and Default Judgment has been taken against C & S Global, but no hearing on damages has taken place. The Hintons believe that C & S Global is out of business and is no longer a viable company.

Pekin Insurance Company (Pekin) is the insurance company which wrote the liability coverage for C & S Global (the stand and harness manufacturer). In March of 2014, Pekin filed a declaratory suit against the Hintons in the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois (See Exhibit 7 to Exhibit 4 of Pekin's Petition for Interlocutory Appeal).

On July 15, 2014, while the Illinois case was still pending, Pekin filed for Declaratory Judgment against the Hintons and Sportsman's Guide in the Federal District Court in Hattiesburg (See Exhibit 10 to Exhibit 4 of Pekin's Petition for Interlocutory Appeal). Pekin did not include its insured, C & S Global in the Hattiesburg action. The Hintons and Sportsman's Guide moved to dismiss the action filed in federal court.

On August 22, 2014, the Circuit Court in Illinois dismissed the Declaratory Action filed by Pekin and invited Counsel for the Hintons to file a Motion for sanctions (See Exhibit D to Exhibit 10 to Exhibit 4 of Pekin's Petition for Interlocutory Appeal).

On August 25, 2014, in the Circuit Court of Jones County, Mississippi, the Hintons filed their Motion for Leave to File Second Amended Complaint, which included claims for a Declaratory Judgment against Pekin (See Exhibit 1 to Exhibit 5 of Pekin's Petition for Interlocutory Appeal). On September 9, 2014, the Jones County Circuit Court entered its Order Allowing the Second Amended Complaint and the Hintons filed their Second Amended Complaint instantly (See Exhibit 1 to the Hintons' Response to Pekin's Petition for Interlocutory Appeal). The Summons and Second Amended Complaint were served on Pekin on or about the 15th day of September, 2014 (See Exhibit 2 to Pekin's Petition for Interlocutory Appeal). On October 15, 2014, Pekin filed its first Motion to Dismiss Counts Twelve and Thirteen of the Hintons' Second Amended Complaint, claiming that the Jones County Circuit Court did not have jurisdiction. The Hintons filed their Response to Pekin's Motion (Exhibit 4 to Pekin's Petition for Interlocutory Appeal). In their Response, the Hintons moved to strike the Affidavit of Tim Manning, alleging that Mr. Manning's Affidavit contained improper legal conclusions. The Hintons provided the Court with copies of pages and information from Pekin's website which contradict Manning's Affidavit. The Hintons also provided evidence that Pekin Insurance is a group name used for the business conducted by five different companies. (R 737, Appellees' Record Excerpts 1) Pekin Life is one of those companies and it is licensed to do business in Mississippi. (Appellees' Record Excerpts 25)

The Circuit Court entered an Order Denying Pekin's Motion on December 12, 2014. (R 1373) In its Order, the Circuit Court specifically found that the Hintons had submitted evidence which demonstrated that Pekin had in fact done business within the

State of Mississippi and that Pekin's conduct may in fact constitute the commission of a tort in the State of Mississippi.

When Pekin filed its Declaratory Action in Federal Court, it attached a copy of the application for insurance which was purportedly completed when C & S Global applied for coverage. This application, dated February 1, 2011, is not signed by any representative of C & S Global and provides in part, "POLICY EXCLUSION: THIS POLICY SHALL NOT IN ANY WAY EXTENT (sic) COVERAGE TO DEER/TREE STANDS OR ANY RELATED EQUIPMENT." This purported exclusion was tendered by Pekin despite the fact that the primary business of C & S Global is believed to be the sale of deer stands and related equipment. In response to Requests for Admissions, Sportsman's Guide has admitted that the only products offered for sale by Sportsman's Guide which were manufactured or distributed by C & S Global were treestands and related equipment.

Pekin issued a Certificate of Insurance dated January 31, 2011. (R 1207, Appellees' Record Excerpts 3) This Certificate shows that Pekin issued a policy of insurance to C & S Global, which provides, among other things, Products Completed coverage with a \$4 million aggregate. This Certificate further provides that the "CERTIFICATE HOLDER SHOWN BELOW IS INCLUDED AS AN ADDITIONAL INSURED PER CG2015 VENDORS ENDORSEMENT". The Certificate Holder listed is the Sportsman's Guide. Notably, this Certificate does not advise the Sportsman's Guide that there is an exclusion for "deer/tree stands or any related equipment". Sportsman's Guide has stated in response to Request for Admissions, "TSG would not have agreed to sell, market and/or distribute products manufactured and/or distributed by C&S had

C&S not obtained insurance coverage to indemnify TSG for any claims made concerning products received from C&S and sold by TSG”.

STANDARD OF REVIEW

In this case, there are two standards of review which are applicable. The standard of review relating to the striking of an affidavit of abuse of discretion. The standard of review as it relates to personal jurisdiction over a non-resident Defendant is *de novo*.

SUMMARY OF THE ARGUMENT

The Circuit Court did not abuse its discretion when it struck the affidavit of Tim Manning. The Appellees produced evidence to the Court which contradicted the affidavit of Manning and the Court was well within its discretion to view the Manning affidavit with suspicion and deem it unreliable. This is especially true when viewed in light of the law requiring the Court, on a motion to dismiss for lack of jurisdiction, to accept as true, any uncontroverted allegations in the Hintons' complaint. The Court is also required to resolve conflicts between the facts contained in the parties' affidavits in the Hintons' favor for purposes of determining whether a prima facie case for personal jurisdiction exists.

Pekin Insurance is subject to Mississippi jurisdiction because they meet all three prongs under the Mississippi Long-Arm statute. Pekin committed a tort in Mississippi, breached a contract in Mississippi and does business in Mississippi. Further, Pekin insurance has sufficient minimum contacts with Mississippi so as not to offend the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

ARGUMENT

I: Whether the Circuit Court abused its discretion when it struck the affidavit of Tim Manning.

The standard of review to be used in reviewing the Circuit Court's striking of an affidavit is whether the Circuit Court abused its discretion. *Tustmark Nat'l Bank v. Meador*, 81 So. 3d 1112, 1116 (Miss. 2012).

Pekin Insurance provided an affidavit signed by Tim Manning, Litigation Manager for Pekin Insurance Company. (Appellant's Record Excerpts 48-51) Many of the statements contained in Mr. Manning's affidavit were mere conclusions intended to support Pekin's claim that Pekin does not do business in Mississippi, has entered into no contracts in Mississippi, nor has it committed any torts in Mississippi.

The Circuit Court found that the affidavit contained improper legal conclusions. As an example, the Circuit Court used the fact that Mr. Manning himself in fact wrote a letter to Mississippi Counsel for the Sportsman's Guide, Matthew Miller, Esq. stating that it would not provide coverage to the Sportsman's Guide. (R 921, Appellees' Record Excerpts 4) The Court went on to say that said denial may in fact be a tortious denial of a claim and/or a violation of a contract in Mississippi.

Some of Mr. Manning's other claims can be rebutted by viewing the Pekin website. The Pekin website clearly admits that "Pekin is a group name adopted to designate the combined operation of The Farmers Automobile Insurance Association, Pekin Insurance Company, PAC, Inc. and Pekin Life Insurance Company." (R 737, Appellees' Record Excerpts 1) Pekin has not, and can not dispute that Pekin Life Insurance Company is authorized to sell insurance by the Mississippi Insurance

Department. (Exhibit 6 to the Hintons' Response to Pekin's Motion for Interlocutory Appeal) Thus, not only are Manning's conclusions improper, but also are contrary to the underlying facts, the very reasons that conclusions are not permitted.

Manning's Affidavit further stated that the application for insurance was submitted to Pekin by Comprehensive Insurance Services, an independent agency. Because the website for Comprehensive Insurance Services is listed as "www.pekininsurance.com", it does not appear that this agency is in fact independent of Pekin. (Appellees' Record Excerpts 18)

Manning's Affidavit also claimed that Pekin had never committed a tort in Mississippi. The Circuit Court's order indicates that it did not agree. The Hintons demonstrated that Pekin not only contacted the Hinton's Counsel in Mississippi to adjust the underlying wrongful death claim but also denied coverage to the Sportsman's Guide by letter delivered to its Counsel in Hattiesburg, Mississippi. (R 921-30, Appellees Record Excerpts 4-13) Either of these actions may be considered to be a tort, and/or a breach of contract, and if so, each act was committed in Mississippi. Further, by supplying The Sportsman's Guide with a certificate of insurance showing the Sportsman's guide as an additional insured for products liability claims, and now producing an entirely different certificate of insurance purporting to exclude coverage for deer stands, Pekin is potentially liable for fraud to The Sportsman's Guide, and for the damages that the Hinton's have sustained as a direct result of that fraud. This is another potential tort that was consummated in Mississippi, because it affects the Hintons. Further the denial of a defense to the Sportsman's Guide was done by letter delivered to Matt Miller in Mississippi. (R 921-30, Appellees' Record Excerpts 4-13)

Damage resulting from a breach of a duty and invasion of a right is a necessary element of tort. In addition to the elements of tort heretofore discussed, a third element requisite thereto is damage resulting from the breach of duty and invasion of right. The tort is not complete until the injury occurs, and if the injury occurs in this State, then, under the amended statute, the tort is committed, at least in part, in this State, and personam jurisdiction of the nonresident tortfeasor is conferred upon the Mississippi court.

Smith v. Temco, Inc., 252 So. 2d 212, 216 (Miss. 1971).

In its Order, the Circuit Court found:

1. that Pekin adjusted the wrongful death claim in Mississippi;
2. that Pekin denied coverage to Sportsman's Guide in Mississippi;
3. that Pekin performed the business of insurance in Mississippi as contemplated by the "territory of coverage" clause of Pekin's policy;
4. that Pekin operated its various subsidiaries as one global entity; and
5. that one of Pekin's subsidiaries is licensed to do business in Mississippi.

If it is determined that the Circuit Court was correct on any one of these bases for maintaining jurisdiction, then the striking of the entire Manning Affidavit, if error at all, is harmless, because any of the aforementioned acts substantiates Mississippi jurisdiction over Pekin.

When jurisdiction is to be decided by the court on the basis of affidavits, the plaintiff need only present facts sufficient to constitute a prima facie case of personal jurisdiction. The plaintiff is not bound to prove these facts under the higher standard of proof by a preponderance of the evidence. *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir.1990), and *D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 545–46 (5th Cir.1985). Moreover, on a motion to dismiss for lack of jurisdiction, the court accepts as true any uncontroverted allegations in the plaintiff's complaint and resolves conflicts between the facts contained in the parties' affidavits in the plaintiff's favor for purposes of determining whether a prima facie case for personal jurisdiction exists. *Bullion*, at 217.

Snavely v. Nordskog Elec. Vehicles Marketeer, 947 F. Supp. 999, 1005 (S.D. Miss. 1995).

Snavely is relevant here because the Plaintiff's presented evidence to the Court that contradicted the Manning affidavit. As stated above, "on a motion to dismiss for lack of jurisdiction, the court accepts as true any uncontroverted allegations in the plaintiff's complaint and resolves conflicts between the facts contained in the parties' affidavits in the plaintiff's favor for purposes of determining whether a prima facie case for personal jurisdiction exists". *Bullion*, at 217.

With further regard to affidavits, in the case of *John Mozingo Real Estate and Auction, Inc. v. National Auction Group, Inc.*, 925 So. 2d 141, in paragraph 22, the Court stated:

Therefore, Wills's affidavit was directly contradicted by his previous sworn stipulation agreeing to the sale of the property, and was properly disregarded by the court. As with Mr. Mozingo's affidavit, regardless of whether the court should have stricken the affidavit in its entirety, the self-serving and contradictory nature of the affidavit entitled the court to disregard it when granting summary judgment. Therefore, any error in striking the affidavit was harmless.

The Hintons provided the Court with evidence which contradicted the Manning affidavit and showed that the Affidavit was not reliable. The Court properly disregarded those contradicted statements, and striking the balance of the Affidavit cannot be seen as an abuse of discretion. When the Court determined that Manning had made false and/or unreliable statements in his affidavit, it was not an abuse of the Court's discretion to disregard the entirety of the document. When a person has proven to give a false or misleading statement, it is certainly reasonable to disregard any future statements they may make as their propensity to provide false information has been established.

II: Whether the Circuit Court was correct in finding it had personal jurisdiction over Pekin insurance Company.

A *de novo* standard of review applies to the issue of whether a Mississippi court has personal jurisdiction over a non resident. See *Sealy v. Goddard*, 910 So.2d 502, 506 (Miss.2005) (citing *Tel-Com Mgmt., Inc. v. Waveland Resort Inns, Inc.*, 782 So.2d 149, 151 (Miss.2001)). *Dunn v. Yager*, 58 So. 3d 1171, 1184 (Miss. 2011). “The proper order when analyzing personal jurisdiction over non-resident defendants is to first consider whether the long-arm statute subjects a nonresident defendant to personal jurisdiction and then to consider whether the statute's application to that defendant offends the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.” *Estate of Jones v. Phillips*, 992 So.2d 1131, 1137 (Miss.2008), *Dunn v. Yager*, 58 So. 3d 1171, 1184 (Miss. 2011).

The Mississippi Long-Arm Statute states:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Miss. Code. Ann. § 13-3-57.

Accordingly, there are “three activities” which will permit Mississippi courts to exercise personal jurisdiction over a nonresident defendant: “(1) if that person has entered into a contract to be performed in Mississippi; (2) has committed a tort in Mississippi; or, (3) is conducting business in Mississippi.” *Yatham v. Young*, 912 So.2d 467, 469–70 (Miss.2005),

Dunn v. Yager, 58 So. 3d 1171, 1184 (Miss. 2011).

The Hintons allege that all three prongs of Mississippi's Long-Arm Statute reach Pekin thus subjecting it to jurisdiction in Mississippi. Pekin committed a tort in Mississippi; Pekin breached a contract in Mississippi; and Pekin does business in Mississippi. In support of the Hinton's contention, the Circuit Court found twelve (12) different reasons for subjecting Pekin to the Mississippi Long-Arm Statute. In those twelve, all three prongs on the Mississippi Long-Arm Statute are met:

- a. The Pekin policy provides that Pekin , “. . . will have **the right and duty to defend any “suit”** seeking . . . damages. . . “.
- b. The Pekin policy defines the “Coverage Territory” of the policy as “The United States of America . . . “.
- c. Pekin adjusted the wrongful death claim in Mississippi (See Exhibit 8 to Plaintiff's Response) (R 921-30);
- d. Pekin has denied coverage in Mississippi to The Sportsman's Guide for the instant wrongful death suit (See Exhibit 8 to Plaintiff's Response);
- e. Pekin, in denying coverage to The Sportsman's Guide in connection with this pending wrongful death suit in Mississippi may have committed a tort and/or a breach of contract in Mississippi;
- f. Pursuant to the Mississippi Long Arm Statute Pekin performed the business of insurance in Mississippi as contemplated and required by the “territory of coverage” clause of the Pekin Policy;
- g. Portions of the Pekin website (Exhibit 3) clearly show that Pekin uses Pekin Insurance as a group name to designate the combined operation of Farmer's Automobile Insurance Company, Pekin Insurance Company, PAC, Inc. and Pekin Life Insurance Company; Pekin Life Insurance Company is licensed to do business within the State of Mississippi;
- h. Because Pekin has represented on its website that it uses Pekin Insurance as a group name to designate the combined operations of several of its related entities and because Pekin Insurance Company, Pekin Life Insurance Company and Pekin Farmers Life Insurance Company all share a common physical address, this Court is persuaded that Pekin has

operated its various subsidiaries as one global entity, and because one of the companies is licensed to do business within the State of Mississippi, Pekin is subject to jurisdiction of this Court;

- i. Pekin has demonstrated its willingness to litigate these issues in Mississippi by electing to file suit in Mississippi Federal Court;
- j. C & S Global Imports, Inc. (C & S Global) is a necessary and indispensable party to any action regarding the insurance coverage provided by Pekin to C & S Global, which may provide coverage in connection with the underlying claims for the death of Plaintiffs' son, and C & S Global is properly before this Court;
- k. Pursuant to the "covered territory" provision of the Pekin policy Pekin has without a doubt issued a policy which contemplates injuries occurring as a result of the products manufactured by its insured in all fifty states, and Pekin has therefore acknowledged that its coverage extends to all fifty states, including Mississippi; and
- l. The action pending by the Hintons against The Sportsman's Guide, the Treestand Manufacturers Association, C & S Global Imports, Inc. and Hunter's View is properly before this Court and the interests of judicial economy would best be served by maintaining the declaratory action against Pekin Insurance Company in this case, where all necessary and interested parties are properly before the Court.

These twelve (12) factors, which the Appellees re-allege here and make a part of their argument, cover each of the three prongs of the Mississippi Long-Arm Statute. Any one of the above twelve findings by the Circuit Court would be enough to confer Mississippi jurisdiction over Pekin.

A. The Contract Prong

Pekin's policy and conduct satisfy the contract prong. Courts have long held that if a contract provides for performance in Mississippi, then the contract prong of the question of personal jurisdiction is satisfied. *First Mississippi National Bank v. S & K Enterprises of Jackson*, 450 So.2d 839 (Miss. 1984). The Courts have also held that if the parties had an obligation or duty to perform under the contract within the State of

Mississippi, the contract prong is also satisfied. See *First Mississippi Corp. v. Thunderbird Energy*, 876 F.Supp. 840 (S. D. Miss. 1995).

Under its contract, Pekin clearly had the obligation to perform, defend and indemnify claims against C & S Global and Sportsman's Guide within the State of Mississippi, as set out by the Covered Territory provision of its policy. Thus, the contract prong is satisfied.

In its Petition, Pekin cites *Johnson v. Warnaco, Inc.*, 426 F. Supp. 44, 47 (S. D. Miss. 1976) and *Martin & Martin v. Jones*, 616 F. Supp. 339, 343 (S. D. Miss. 1985) as purported support for its position that a third-party beneficiary may not obtain *in personam* jurisdiction over a nonresident defendant by utilizing the contract prong of the Mississippi Long Arm Statute. However, to the contrary, this Court decided the case of *Lewis v. Allstate Insurance Company*, 730 So.2d 65 (Miss. 1999), and ruled as follows:

¶ 26. We take this opportunity to state that if an insurance company can conduct a declaratory action regarding coverage prior to resolution of an underlying wrongful death trial, then the insureds and third party beneficiaries should be able to raise the coverage question in the underlying lawsuit as well. Pursuant to our rules of civil procedure, a hearing to determine coverage may be conducted if necessary. See Miss. R. Civ. P. 57 cmt. (recognizing that a plaintiff may ask for a declaratory judgment either as his sole relief or in addition or auxiliary to other relief). Such reviews of insurance contracts do not involve the jury and are often cursory. Accordingly, if a question of insurance coverage exists, a party should be able to bring the insurer into a lawsuit and have the coverage question resolved by the judge.

Likewise, more recently, in the case of *Walker v. FFVA Mut. Ins. Co.*, 2014 WL 2683579, the Court held:

In its motion, State Farm argues that it has not denied coverage under the subject insurance policy; therefore, Walker cannot maintain a direct or declaratory action against it. Mississippi law prohibits direct actions by third parties against insurance companies, except where the third party brings a declaratory action

against an insurer who has denied coverage. See Miss. R. Civ. P. 57(2); See Miss. Municipal Liability Plan v. Jordan, 863 So.2d 934, 941–*42 (Miss.2003); Poindexter v. Southern United Fire Ins. Co., 838 So.2d 964, 967–*68 (Miss.2003).

In this case, Pekin has denied coverage. Read together, these cases make it clear that the case at issue is exactly the type case authorized under Miss. R. Civ. P. 57.

B. The Tort Prong

As is pertinent to this case, Mississippi's long-arm statute confers personal jurisdiction over “[a]ny nonresident person ... **who shall commit a tort in whole or in part in this state against a resident or nonresident of this state....**” Miss.Code Ann. 13–3–57. Under this provision, “**personal jurisdiction is proper if any element of the tort (or any part of any element) takes place in Mississippi.**” *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809, 812 (5th Cir.2006). *Thomas v. Skrip*, 876 F. Supp. 2d 788, 792 (S.D. Miss. 2012).

“[u]nder now well established law, Mississippi's long-arm statute contains no requirement that the part of the tort which causes the injury be committed in Mississippi.” *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So.2d 668, 672 (Miss.1994). Rather, for purposes of our long-arm statute, a tort is committed in Mississippi when the injury results in this State. *Id.* This is true because an injury is necessary to complete a tort. *Id.*

Dunn v. Yager, 58 So. 3d 1171, 1184 (Miss. 2011).

“[F]or purposes of our long-arm statute, a tort is committed in Mississippi when the injury results in this State.” *Horne v. Mobile Area Water & Sewer System*, 897 So.2d 972, 977 (Miss.2004). (citing *Sorrells*, 636 So.2d at 672).

In 86 C.J.S. Torts s 21 (1954), it is stated: Damage resulting from a breach of a duty and invasion of a right is a necessary element of tort. In addition to the elements of tort heretofore discussed, a third element requisite thereto is damage resulting from the breach of duty and invasion of right. The tort is not complete until the injury occurs, and if the injury occurs in this State, then, under the

amended statute, the tort is committed, at least in part, in this State, and personam jurisdiction of the nonresident tortfeasor is conferred upon the Mississippi court.

Smith v. Temco, Inc., 252 So. 2d 212, 216 (Miss. 1971).

All of these cases clearly show that if the injury and/or damages from a tort committed outside of Mississippi, occur or are otherwise consummated in Mississippi; or if any part of the tort connects in any manner to Mississippi, then jurisdiction is proper in Mississippi.

Pekin adjusted the wrongful death claim in Mississippi and denied coverage to The Sportsman's Guide for a claim brought against it in a Mississippi Court. Further, the denial of the claim caused damages to the Hintons in Mississippi. Sportsman's Guide has acknowledged that had Pekin not provided proof of insurance coverage, it would not have offered the deer stand and harness manufactured by C & S Global for sale. Had the defective harness not been offered for sale, it would not have been purchased by Tim Hinton. Had it not been purchased by Tim Hinton, chances are that he would be alive and well today.

In their Complaint, the Hintons clearly allege that Pekin intentionally and negligently misrepresented its coverage to C & S Global and Sportsman's Guide and that the Hintons have been damaged by this misrepresentation in that Pekin has failed to provide indemnification or a defense. It is well established that the tort prong is satisfied if the alleged damage of the tort occurs in Mississippi – as the Hintons allege here. *Unified Brands v. Teders*, 868 F. Supp. 2d 572 (S.D. Miss 2012). Accordingly, the Hintons have been damaged by the torts of Pekin.

C. The Doing Business Prong.

The Pekin website shows that Pekin Insurance is the group name established to designate the combined operations of the Farmers Automobile Insurance Management companies. (R 737, Appellees' Record Excerpts 1) Pekin Life Insurance is one of those companies. Pekin Life Insurance is licensed to do business in Mississippi. (Appellees' Record Excerpts 25)

1. "Coverage Territory"

It does not appear that Mississippi has, as yet, addressed the question of whether an insurance policy which includes a national "Coverage Territory" clause subjects the insurer to personal jurisdiction within the state. Several other Courts have addressed the question.

We conclude that the insurance policy's territory-of-coverage clause establishes sufficient contact between West Bend and Arkansas to satisfy the strictures of the Due Process Clause. West Bend purposefully contracted with Hi-Tech to provide insurance coverage within foreign States, including Arkansas. As the district court observed, West Bend presumably offered a broad "coverage territory" in order to make its policies more marketable and profitable. Thus, not only was it foreseeable that West Bend might be sued in Arkansas in connection with a dispute relating to its policy, but the "expectation of being haled into court in a foreign state is an express feature of its policy." *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 286 (4th Cir.1987). Stated differently, "litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer." *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 (9th Cir.1990). If West Bend wished to avoid lawsuits by a third party in any particular forum, then it could have excluded that forum from its territory-of-coverage clause, although such an exclusion likely would have made its policies less marketable. We thus follow the reasoning of our sister circuits in *Rossman* and *Farmers* in holding that the nationwide territory-of-coverage clause that West Bend included in its policy with Hi-Tech establishes sufficient minimum contacts with Arkansas to satisfy due process. See also *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 455–56 (6th Cir.1993).

Ferrell v. W. Bend Mut. Ins. Co., 393 F.3d 786, 791 (8th Cir. 2005).

Auto–Owners argues that it has not purposefully availed itself of the benefits of the forum's laws because Auto–Owners has no connection with Hawaii and none of the activity giving rise to this action occurred in Hawaii. (Motion to Dismiss, at 6–8). Caesars Cleaners argues that by contracting to provide coverage for DynaClean throughout the United States, Auto–Owners should have reasonably anticipated being haled into court in any forum within the coverage territory. (Memo in Opp., at 9–14). The Court finds that Ninth Circuit precedent—although not so broad—resolves the issue in favor of Caesars Cleaners.

In *Farmers Insurance*, the court held that an insurance company purposefully avails itself of a forum when “[i]ts policy coverage extends into [the state] and an insured event” occurs there. 907 F.2d at 913. The issue in *Farmers Insurance* arose when a vehicle insured by the defendant, Portage La Prairie Mutual Insurance Company (“Portage”), was involved in a traffic accident in Montana. *Id.* at 912. Portage refused to indemnify the driver for claims brought by an injured passenger. *Id.* The driver's insurer, Farmers Insurance Exchange (“Farmers”), subsequently settled the claim. *Id.* Farmers brought federal court action against Portage in Montana for bad faith failure to reimburse Farmers. *Id.*

The Ninth Circuit reversed. The court found that “Portage's territorial policy limit included Montana within its scope” and, therefore, “Portage controlled its own amenability to suit.” *Id.* at 914. Accordingly, the court held that Portage could reasonably anticipate being haled into court in Montana or any other forum within the coverage territory where an insured event occurred. *Id.*; see also *Payne v. Motorists' Mut. Ins. Co.*, 4 F.3d 452, 456 (6th Cir.1993); *Rossman v. Consolidated Ins. Co.*, 832 F.2d 282, 286 (4th Cir.1987).

Caesars Cleaners alleges that the Policy's coverage territory includes Hawaii. (Complaint 10). Caesars Cleaners further alleges that an insured event resulted in litigation in Hawaii. (Complaint ¶ 14). Based on those uncontroverted allegations, the Court finds that Caesars Cleaners has made a prima facie showing that Auto–Owners purposefully availed itself of the forum state.

Robinson Corp. v. Auto Owners Ins. Co., 304 F. Supp. 2d 1232, 1238 (D. Haw. 2003).

Evanston also argues that Western sufficiently directed its activities to Nevada through the nationwide territorial coverage clause in the Western Policy. (Wieczorek Aff. Ex. 1, at 37, ECF No. 9–2.) The Court agrees. Specifically, the Western Policy defines “Coverage territory” as “The United States of America (including its territories and possessions), Puerto Rico and Canada.” (*Id.*) If Western had wished to avoid suit in all fora except Idaho, it could have limited the

coverage territory to the state of Idaho. See *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913–14 (9th Cir.1990) (holding, in a dispute between two insurance providers, that an insurance provider purposefully avails itself of the forum when it could have controlled its amenability to suit by limiting the territorial policy limit, but declined to do so); see also *Walden v. Fiore*, —U.S. —, 134 S.Ct. 1115, 1122, 188 L.Ed.2d 12 (2014) (noting that the Court has previously “upheld the assertion of jurisdiction over defendants who have purposefully ‘reach[ed] out beyond’ their State and into another by, for example, entering a contractual relationship that ‘envisioned continuing and wide-reaching contacts’ in the forum state.” (emphasis added) (quoting *Burger King*, 471 U.S. at 479–80, 105 S.Ct. 2174)). By declining to limit the territorial reach of its insurance policy, Western purposefully availed itself of the benefits of conducting business beyond the borders of Idaho to Nevada. Therefore, the Court concludes that Evanston has carried its burden of establishing the first prong of the specific jurisdiction inquiry.

Evanston Ins. Co. v. W. Cmty. Ins. Co., No. 2:13 CV 1268 GMN CWH, 2014 WL 1302100 (D. Nev. Mar. 31, 2014).

As explained by the *Ferrell* Court, insurance companies offer coverage for a broad territory in order to entice insureds into doing business with them. These Courts have held that when an insurer elects to provide a coverage territory that extends to every state, it should logically anticipate claims in every state and should expect to be “haled into Court” in every state. Pekin’s insurance policy lists the entire United States as its coverage territory.

The U. S. Fish and Wildlife Service’s National Hunting License Report shows that as of May 5, 2015 over 35 million hunting licenses were issued within the United States and that the State of Mississippi has issued over 400,000 hunting licenses, tags, permits and stamps so far this year. Surely, Pekin foresaw the possibility that an insured product would fail and that it could be haled into Court in any state in the nation.

2. Pekin's Correspondence in Mississippi.

Pekin's contention that its correspondence in Mississippi to investigate and adjust the Hintons' claim should not justify Mississippi jurisdiction is without merit as evidenced by the cases below.

In the case of *Thomas v. Skrip*, 876 F.Supp2d 788, Judge Lee ruled that the requirements for personal jurisdiction under Mississippi's Long-Arm Statute were satisfied. In that case, Denise Lynn Thomas met Mr. Skrip, an attorney from Boston while she was visiting New Orleans. After Ms. Thomas returned to Mississippi and Mr. Skrip returned to Boston, the two communicated by text messages and e-mails. Ms. Thomas left her husband and children to be with Mr. Skrip. Mr. Thomas filed an alienation of affection suit in Mississippi and the Court ruled that because Mr. Skrip had sent Ms. Thomas e-mails, and texts, and that those contacts resulted in her leaving for Mr. Skrip, the injury occurred in Mississippi, and personal jurisdiction was appropriate, even though Mr. Skrip was never physically present in Mississippi.

In the case of *Internet Doorway, Inc. v. Parks*, 138 F.Supp.2d 773, Judge Barbour held that an e-mail transmission to a Mississippi recipient advertising a pornographic website satisfied the tort prong of Mississippi's long-arm statute. He further held that an e-mail transmission to a Mississippi resident in an attempt to solicit business satisfied the "doing business" prong of Mississippi's long-arm statute.

In *Medical Assurance Company of Mississippi v. Jackson*, 864 F.Supp. 576, 577 (S.D. Miss. 1994), a Mississippi insurance company sued an Alabama attorney and his Alabama client for breach of a settlement agreement in which the Alabama attorney and

client had never physically been in Mississippi. The attorney and the client moved to dismiss the action for lack of personal jurisdiction. *Id.* at 577. The district court denied the motion. *Id.* at 579–80. After noting that "[a] single act by the defendant directed at the forum state ... can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted," the federal district court reasoned:

[D]efendants ... had sufficient contacts with Mississippi ... for the court to exercise 'specific jurisdiction.' ... Jackson, on Moore's behalf and presumably with his authority, initially wrote a letter to MACM in Mississippi to settle a medical malpractice claim Jackson rejected that offer by telephone and made a counter-offer Jackson telephoned Dunn in Mississippi to accept the offer and thereafter, wrote a letter to Dunn in Mississippi confirming the settlement....

Id. at 579.

Based on these cases, Pekin's correspondence in Mississippi to adjust this claim establishes Mississippi jurisdiction.

3. Pekin Insurance is the Alter Ego of Pekin Life Insurance.

Pekin attempts to focus this Court on the concept of piercing the corporate veil. Actually, Pekin Insurance is the alter ego of Pekin Life Insurance, and Pekin Life Insurance is licensed to do business in Mississippi.

The concept of alter ego corporations is often addressed in Mississippi in the workers' compensation setting. In those cases, this Court views all related corporations as being covered under the exclusivity provision of the workers' compensation law. The concept here is no different. See *Liberty Mutual Ins. Co. v. Holliman*, 765 So.2d 564, which held:

After a thorough review of the record, we conclude that there is sufficient evidence to support the Commission's finding. The record shows that Resource One and Resource Services were both under the ownership of Douglas Shanks

and Donald Shanks. Both corporations share the same business address and used the same attorney to file the articles of incorporation for Resource One and the articles of amendment for Jobmate South Services/Resource Services.

Further, the record shows that Tri-State received assignment forms and a check that used the name Resource Services, but both the forms and the check were sent under a cover letter that used the name Resource One. After reviewing the record, we are satisfied that there is sufficient evidence to support the Commission's finding that Resource One and Resource Services are one and the same or alter egos. (Emphasis added).

Pekin acknowledges that it uses one name to identify a family of five of its corporations. (R 737, Appellees' Record Excerpts 1) Appellees' Record Excerpts 14-7 are four pages containing information relating to Pekin and its officers. Page 14 is a letter from Pekin Life Insurance to its stockholders. The letter is on Pekin Insurance letterhead and directly addresses the shareholders of Pekin Life Insurance. The letter is signed by Gordon M. Walker, the Chairman of the Board and Scott A. Martin, CEO of Pekin Life.

Page 15 shows that Scott Martin was elected as CEO of Pekin Insurance, not Pekin Life. Page 16 shows that Pekin Insurance held its 2014 annual meeting and listed the officers who would head Pekin Insurance Company. Mr. Walker is Chairman of the Board and Mr. Martin was elected President and CEO of Pekin Insurance.

Page 17 comes from YAHOO! Finance. It provides information relating to Pekin Life. It shows that Mr. Walker is the President of an operating unit and Mr. Martin is the CEO. This document also names Mr. Daniel V. Connell as the Chief Financial Officer for Pekin Life. He is listed as the CFO of Pekin Insurance on page 16. Brian K. Lee, listed on page 14 as the Chief Operating Officer is also listed on page 16 as the COO of

Pekin Insurance. Pekin Life's Vice-President of Marketing is also listed on page 16 as the Vice-President of Marketing for Pekin Insurance. It's all one big, happy family.

Pekin has quoted law informing the Court that it is almost impossible to pierce the corporate veil. The law provided by Pekin for the most part deals with a party attempting to hold a parent corporation liable for the acts of its subsidiary. As the Court is well aware, this is because many parent corporations sweep the bank accounts and drain the assets from the subsidiary in order to avoid the subsidiary having enough assets to be liable for a Judgment rendered against it. Most of the law relating to piercing the corporate veil has been rendered because corporate "families" want to avoid liability for their actions. The majority of this law was made prior to the internet being used on a regular basis to obtain information. Certainly, most of this law was made prior to insurance companies establishing their own websites and providing information relating to their activities to the general public. At this juncture, it is not unusual for a company to try to convince the general public to do business with it, and to represent that it is one big happy family of companies, and thereby lead the public to believe that it has assets which far outreach the actual assets of the one company through which a policy would be issued. It leads the public to believe that there is more stability with the insurer. Pekin Insurance has taken the position that it is the name used for five separate entities. Now, Pekin should be bound by its words.

The Exercise of Long-Arm Jurisdiction Does Not Offend Due Process.

Pekin, in effect, "haled" itself into Court in Mississippi when it filed its Declaratory Action against the Hintons in Federal Court in Hattiesburg. It should not be heard to complain.

The United States Supreme Court has stated that:

Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.

Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)

(quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

“A single act by the defendant directed at the forum state ... can be enough to 1095 confer personal jurisdiction if that act gives rise to the claim being asserted.” *Horne v. Mobile Area Water & Sewer Sys.*, 897 So.2d 972, 980 (Miss.2004) (citing *Med. Assurance Co. of Miss. v. Jackson*, 864 F.Supp. 576, 578–79 (S.D.Miss.1994) (quoting *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 419 (5th Cir.1993))).

Joshua Properties, LLC v. D1 Sports Holdings, LLC, 130 So. 3d 1089, 1094-95 (Miss. 2014)

As found by the Circuit Court of Jones County, Mississippi, Pekin has several contacts with Mississippi, any one of which would be sufficient to satisfy the minimum contacts requirement of Due Process.

- b. The Pekin policy defines the “Coverage Territory” of the policy as “The United States of America . . . “.
- c. Pekin adjusted the wrongful death claim in Mississippi (See Exhibit 8 to Plaintiff’s Response);
- d. Pekin has denied coverage in Mississippi to The Sportsman’s Guide for the instant wrongful death suit (See Exhibit 8 to Plaintiff’s Response);
- e. Pekin, in denying coverage to The Sportsman’s Guide in connection with this pending wrongful death suit in Mississippi may have committed a tort and/or a breach of contract in Mississippi;
- g. Portions of the Pekin website (Exhibit 3) clearly show that Pekin uses Pekin Insurance as a group name to designate the combined operation of Farmer’s Automobile Insurance Company, Pekin Insurance Company,

PAC, Inc. and Pekin Life Insurance Company; Pekin Life Insurance Company is licensed to do business within the State of Mississippi;

- h. Because Pekin has represented on its website that it uses Pekin Insurance as a group name to designate the combined operations of several of its related entities and because Pekin Insurance Company, Pekin Life Insurance Company and Pekin Farmers Life Insurance Company all share a common physical address, this Court is persuaded that Pekin has operated its various subsidiaries as one global entity, and because one of the companies is licensed to do business within the State of Mississippi, Pekin is subject to jurisdiction of this Court;
- i. Pekin has demonstrated its willingness to litigate these issues in Mississippi by electing to file suit in Mississippi Federal Court;

The minimum requirements necessary to satisfy any Due Process concerns are met.

One final note: Pekin is Forum Shopping. Pekin filed a Declaratory Action against the Hintons in Illinois, which included its insured. The Hintons filed a Motion to Dismiss, but before the Illinois Court could hear the Hintons' Motion, Pekin filed for a Declaratory Action in Federal Court in Hattiesburg which did not include its insured, quite simply because that would destroy diversity jurisdiction.

Pekin has filed two declaratory actions, and is obviously very anxious to litigate the question of coverage for the wrongful death of Timothy R. Hinton . . . but only in a forum of its choosing. Strangely, however, Pekin has never moved to join the underlying wrongful death case which triggered the coverage issue. Why not? All other parties necessary for a complete resolution of all matters are already involved in the wrongful death action pending in the Circuit Court of Jones County, Mississippi. The answer is that Pekin is improperly forum shopping.

In fact, it appears that something foul is afoot. The Hintons filed their original Complaint in October of 2013. Gregory Mescher, an attorney in Illinois was listed as the

agent for service of process for C & S and was in fact served with process by the Hintons on December 31, 2013. Pekin filed suit in Illinois in March of 2014. Mr. Mescher was served on behalf of C & S Global and Pekin requested and received a Default Judgment against its insured on June 20, 2014. (See Exhibit 5 to the Hintons' Response to Pekin's Petition for Interlocutory Appeal) Exhibit 4 to the Hintons' Response to Pekin's Petition for Interlocutory Appeal is a print-out from the Illinois Secretary of State, which shows that the agent for service of process for C & S Global was vacated on June 30, 2014.

On August 22, 2014, the Illinois Court entered an order, which stated in part:

3. This Court finds that the default against C & S Global Imports, Inc. Entered on June 22, 2014 stands and further Orders that the Court has never made any finding on the insurance coverage for C & S Global Imports, Inc., or any Defendant and this Court leaves all issues of coverage to another Court in another jurisdiction. No Judgments have been entered against C & S Global Imports, Inc.

(See Exhibits 12 and 13 to Exhibit 4 to Pekin's Petition for Interlocutory Appeal)

This, in effect, makes service of process on C & S Global by any other party difficult if not impossible. But, C & S is already subject to the jurisdiction of the Circuit Court in Jones County, and C & S is certainly necessary for full resolution of all issues.

By filing suit in the Federal Court in Hattiesburg, Pekin has acknowledged that Mississippi is the proper place for all coverage issues to be addressed. In its Response to the Sportsman's Guide's Motion to Dismiss the federal action, Pekin admitted, "Finally, if the [federal] action is dismissed, Pekin's only alternative is to litigate its claims in the pending wrongful death case in the state court of Mississippi". Judicial economy

would seem to demand that all the issues should be resolved in one action, and that action is pending in Jones County.

CONCLUSION

The Circuit Court did not abuse its discretion in striking the affidavit of Tim Manning, nor did it err when it found it had personal jurisdiction over Pekin. The Hintons Request this Court affirm the findings of the Circuit Court for the Second Judicial District of Jones County in its entirety.

This the _____ day of _____, 2015.

Respectfully submitted,

MARSHA R. HINTON and THOMAS F. HINTON

/S/ LAWRENCE E. ABERNATHY, III

LAWRENCE E. ABERNATHY, III

CERTIFICATE OF SERVICE

I, LAWRENCE E. ABERNATHY, III, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing by posting a copy of the same on the Mississippi Electronic Filing System. I further certify that I have mailed a copy of the foregoing to Honorable W. Dal Williamson and Honorable Billy Joe Landrum by U. S. Mail, postage prepaid, at their usual and last known mailing addresses.

This the _____ day of _____, 2015.

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