SUPREME COURT OF MISSISSIPPI
CASE # 2008-CA-00781

SHANNON LEWIS AND JANA LEWIS, Individually, and on Behalf of the Wrongful Death Beneficiaries of Minor WILLIAM ROBERTSON LEWIS, Deceased; AND CALVIN E. ROBERTSON, Individually, and on Behalf of all the Wrongful Death Beneficiaries of DOROTHY P. ROBERTSON, Deceased — **APPELLANTS**

VS.

PROGRESSIVE GULF INSURANCE COMPANY, INC. — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF ATTALA COUNTY, MISSISSIPPI

ALCORN COUNTY CIRCUIT CAUSE NO. 04-0267-CV-M

BRIEF OF APPELLANTS

B. WAYNE WILLIAMS, MSB [redacted]
REAGAN D. WISE, MSB [redacted]
WEBB, SANDERS & WILLIAMS, P.L.L.C.
363 NORTH BROADWAY
POST OFFICE BOX 496
TUPELO, MISSISSIPPI 38802
TELEPHONE NO.: (662) 844-2137
FACSIMILE NO.: (662) 842-3863

Attorneys for Appellants

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for the Appellants, Shannon Lewis and Jana Lewis, et al., hereby 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 possible disqualifications or recusals.

PARTIES	ATTORNEYS
Calvin E. Robertson 355 SW Depot Street P.O. Box 227 Durant, Mississippi 39063	B. Wayne Williams, MSB [redacted] Reagan D. Wise, MSB [redacted] 363 North Broadway P.O. Box 496 Tupelo, Mississippi 38802 Telephone: (662) 844-2137 Facsimile: (662) 842-3863 *Attorney for Appellants*
Shannon and Jana Lewis P.O. Box 188 Sallis, Mississippi 39160 *Plaintiffs and Appellants*	
Progressive Gulf Insurance Company *Defendant and Appellee*	James Lynn Perry Daniell, Upton, Perry & Morris, P.C. Post Office Box 1800 Daphne, Alabama 36526 Telephone: (251) 625-0046 Facsimile: (251) 625-0464 *Attorney for Appellee*

For Albert Nickerson, Individually
And d/b/a Nickerson Trucking, and
Cleansy L. Barksdale
Defendant

Craig R. Sessums
Jones, Funderberg & Sessums, PLLC
901 North State Street (39201)
Post Office Box 13960
Jackson, Mississippi 39236

Honorable Joseph H. Loper, Jr.
Circuit Judge, District Five
P. O. Box 616
Ackerman, MS 39735

This the 29th day of July, 2008.

Reagan D. Wise

SUPREME COURT OF MISSISSIPPI
CASE # 2008-CA-00781

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JANA LEWIS, Individually, and
on Behalf of the Wrongful Death
Beneficiaries of Minor WILLIAM
ROBERTSON LEWIS, Deceased; AND
CALVIN E. ROBERTSON, Individually,
and on Behalf of all the Wrongful Death
Beneficiaries of DOROTHY P. ROBERTSON, Deceased

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i, ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
I. STATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Statement of Facts	2
III. SUMMARY OF THE ARGUMENT	4
IV. ARGUMENT	5
V. CONCLUSION	8
CERTIFICATE OF MAILING	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

CASES

Brown v. Credit Center, Inc.
444 So.2d 358, 363 (Miss. 1983) 5

Burton v. Choctaw County
730 So.2d 1, 8 (Miss. 1999) 6

Cruse v. Aetna Life Ins. Co.
369 So.2d 762, 764 (Miss. 1979) 7

Henderson v. Unnamed Emergency Room, Madison County Medical Center
758 So.2d 422¶7 (Miss. 2000) 5

Johnson v. Preferred Risk Auto. Ins. Co.
659 So.2d 866 (Miss. 1995) 6

Malone v. Aetna Casualty and Surety Co.
583 So.2d 186 (Miss. 1991) 7

Nationwide Mut. Ins. Co. v. Garriga
636 So.2d 662 (Miss. 1994) 6

Ratliff v. Ratliff
500 So.2d 981 (Miss. 1986) 5

State Farm Mut. Auto Ins. Co. v. Scitzs
394 So.2d 1371, 1373 (Miss. 1981) 7

I. STATEMENT OF THE ISSUES

The sole issue presented for review by the appellate court is:

(a) Whether the trial court erred in granting summary judgment in favor of Progressive Gulf Insurance Company.

II. STATEMENT OF THE CASE

A. Nature of the Case

On February 12, 2004, Dorothy P. Robertson and William Robertson Lewis, a minor infant, were passengers in a vehicle owned by Dorothy P. Robertson and operated by William Shannon Lewis (the father of William Robertson Lewis). (R. 10; R.E. 6).[1] The Lewis vehicle was stopped at the intersection of Highway 35 and Highway 19 when Cleansy Barksdale, who was operating a 1987 International eighteen (18) wheeled logging truck and trailer owned by his employer, Nickerson Trucking, Inc., failed to stop at the stop sign and violently collided with the Lewis vehicle. (R. 10-11; R.E. 6-7). In addition, the logs fell onto the back of the Lewis vehicle where Dororthy P. Robertson and William Robertson Lewis were seated. (R. 253; R.E. 144). Dorothy P. Robertson and William Robertson Lewis were killed as a result of the collision caused by the negligence of Cleansy Barksdale. (R. 253; R.E. 144).

The wrongful death beneficiaries filed suit against Barksdale, Nickerson Trucking, Georgia Pacific, Lofton Timber Company, Charles Donald, Jr., Charles Donald Pulpwood, Inc. and Progressive Gulf Insurance Company, Inc. (R. 7-10; R.E. 3-6). Georgia Pacific, Lofton, Charles Donald and Charles Donald Pulpwood, Inc. are no longer parties to this action.

In the Complaint the Appellants sought a declaratory judgment that the $1,000,000.00 policy issued by Progressive to Lofton Timber Company, LLC, which was in force and effect on February

[1] As used herein, "R" refers to the Record prepared by the Circuit Clerk, and "R.E." refers to the Appellant's Record Excerpts.

12, 2004, also provides coverage to Nickerson Trucking and Barksdale for the claims made by the Appellants. (R. 15; R.E. 11). On April 9, 2008, the trial court granted summary judgment to Progressive on this coverage issue without a hearing. (R. 559-567; R.E. 178-186) In addition, Appellants were never given the opportunity to depose any of Progressive's or Lofton's representatives with respect to the coverage issue at hand. (R. 256-257; R.E. 147-148). Appellants now appeal the trial court's ruling in favor of Progressive. (R. 1-2; R.E. 1-2).

B. Statement of Facts

On February 12, 2004, Cleansy Barksdale was driving a 1987 International truck for Albert Nickerson d/b/a Nickerson Trucking. (R. 252; R.E. 143) At that time, Barksdale was hauling a load of timber that he picked up at Lofton Timber Company. (R. 252; R.E. 143). The timber was owned by Georgia-Pacific. (R. 252; R.E. 143). While Barksdale was operating the truck he lost control of the vehicle causing it to crash into a vehicle occupied by Plaintiffs Shannon and Jana Lewis, their infant son, William Robertson Lewis, and Dorothy Robertson. Minor William Robertson Lewis and Ms. Robertson were in the back seat. (R. 252-253; R.E. 143-144). When the Barksdale vehicle crashed into their vehicle the timber shifted from the trailer and fell onto the rear part of the Lewis vehicle. Both the minor, William Robertson Lewis, and Ms. Robertson died as a result of the accident. (R. 252- 253; R.E. 143-144).

On April 27, 2003, Lofton Timber Company and Georgia-Pacific entered into a "Loading, Unloading, Storing and Watering Contract". (R. 253, 259-269; R.E. 144, 150-160). This contract specifically requires that Lofton maintain certain types of insurance coverage including hired auto coverage. (R. 259-269; R.E. 150-160). The contract states:

> **18. During the performance of this contract, CONTRACTOR shall maintain and keep in force, at its own expense, the following insurance coverage and minimum limits:**

(d) Comprehensive automobile liability covering all owned, non-owned, and hired vehicles, with limits as follows:

Combined single limit as follows:

For bodily injury, death and property damage per occurrence	**$500,000.00**

Or

Split liability limits as follows:

For bodily injury per person	**$500,000.00**
For bodily injury per occurrence	**$500,000.00**
For property damage	**$250,000.00**

(R. 253, 259-269; R.E. 144, 150-160).

The Lofton policy issued by Progressive contains a $1,000,000.00 combined single limit for hired auto bodily injury and property damage. (R 253-254, 270-283; R.E. 144-145, 161-174). The policy was specifically issued to provide coverage to the vehicle which Barksdale was driving at the time of the accident. The "HIRED AUTO COVERAGE" form which modifies Part I of the policy. (R. 253-254, 282; R.E. 144-145, 173). This form reads as follows:

HIRED AUTO COVERAGE

We agree with you that the insurance provided under **Part I - Liability to Others** section of **your** Commercial Vehicle Policy is modified as follows:

1. The definition of **your Insured auto** includes hired **autos**. Such insurance also applies to:
   a. **You**, as rentee of such auto, in the same manner as if you were the owner, and
   b. each of the following, as **Insureds**:
      (i) the owner of such **auto**,
      (ii) any lessee of whom **you** are a sub-lessee,
      (iii) any agent or employee of such owner or lessee,

   while such **auto** is being used in **your** business or by **you** for personal or pleasure purposes.
2. When used in this endorsement, "**hired auto**" means an **auto** which is not owned by you,

registered in **your** name, or borrowed from **your** employees and which is obtained under a short-term rental agreement not to exceed thirty (30) days. (R. 282; R.E. 173).

This endorsement provides $1,000,000.00 in coverage for the vehicle being driven by Barksdale. Because there is $1,000,000.00 in coverage for the Barksdale vehicle the trial court erred in granting Progressive summary judgment. (R. 270-283; R.E. 161-174).

III. SUMMARY OF THE ARGUMENT

Lofton and Georgia Pacific entered into the "Loading, Unloading, Storing and Watering Contract" and, of course, Lofton then hired Nickerson/Barksdale to haul the logs from Lofton's timber yard. Although Nickerson/Barksdale may have been an independent contractor they were specifically hired by Lofton to transport the logs from Lofton's yard to Georgia-Pacific. The "Loading, Unloading, Storing and Watering Contract" specifically required that Lofton maintain hired auto coverage for the vehicles that would be transporting Georgia-Pacific's logs. Thus, Lofton purchased a policy from Progressive that provided $1,000,000.00 in hired auto coverage. Progressive argues that the Nickerson vehicle being driven by Barksdale is not a hired auto under the policy because it was not obtained under a "short term rental agreement not to exceed thirty (30) days." However, Lofton hired Nickerson/Barksdale on a job-by-job basis. Thus, every time Nickerson/Barksdale hauled logs for Lofton the Nickerson/Barksdale vehicle was being operated under a "short term rental agreement." Importantly, the term "short term rental agreement not to exceed thirty (30) days" is not even defined in the Progressive policy. It is only logical that the hired auto coverage purchased by Lofton was specifically purchased to provide coverage for the vehicles/haulers Lofton hired to transport the logs. Because the Nickerson/Barksdale truck was not owned by Lofton, not registered in Lofton's name, or borrowed from Lofton's employees and which was obtained under a short-term rental agreement not to exceed thirty (30) days there is hired auto coverage in the amount of $1,000,000.00 for Nickerson and Barksdale for the claims asserted against

them by Appellants.

IV. ARGUMENT

Standard of Review

The standard for reviewing the granting or denying of summary judgment in the Supreme Court is the same standard as is employed by the trial Court. The Supreme Court conducts a de novo review of orders granting or denying summary judgment and examines all the evidentiary matters before it. The evidence must be reviewed in the light most favorable to the party against whom the motion has been made. If in this view there are genuine issues of material fact and the moving party is not entitled to judgment as a matter of law, summary judgment should not be entered in his favor. ***Henderson v. Unnamed Emergency Room, Madison County Medical Center***, 758 So.2d 422, ¶7, (Miss. 2000). It has been held that all motions for summary judgment should be viewed with great skepticism and if the Trial Court is to err, it is better to err on the side of denying the motion. When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the summary judgment is sought, should be given the benefit of every reasonable doubt. ***Ratliff v. Ratliff***, 500 So.2d 981 (Miss. 1986). The Court also consistently held that summary judgment is not a substitute for the trial of the disputed fact issues. According, the Court cannot try issues of fact on a Rule 56 motion, it may only determine whether there are issue of fact to be tried. ***Brown v. Credit Center, Inc.***, 444 So.2d 358, 363 (Miss. 1983).

A review of the record in this case clearly shows that the Trial Court was in error when it granted summary judgment in favor of Progressive finding that the Progressive policy does not provide hired auto coverage which provides coverage to Nickerson and Barksdale for the claims made against them by Appellants.

A. The trial court erred in granting Progressive summary judgment.

1. The 1987 International truck that was being driven by Barksdale at the time of the accident was a "hired auto" under the HIRED AUTO COVERAGE endorsement.

The contract between Lofton and Georgia-Pacific specifically required that Lofton maintain hired auto insurance coverage for situations exactly like this. (R. 259-269; R.E. 150-160). Section 2 of the HIRED AUTO endorsement defines "hired auto" as "an auto which is not owned by you, registered in your name, or borrowed from your employees and which is obtained under a short-term rental agreement not to exceed thirty (30) days." (R. 282; R.E. 173). The vehicle Barksdale was driving at the time of the accident meets the definition of "hired auto" as defined by the policy. (R. 255, 282; R.E. 146, 173). First, the vehicle is not owned by Lofton, but was owned by Nickerson. (R. 255; R.E. 146). Secondly, the vehicle is not registered in Lofton 's name. (R. 255; R.E. 146). Next, the vehicle was not borrowed from Lofton's employees. (R. 255; R.E. 146). Finally, the term "short-term rental agreement" is not defined anywhere in the policy. (R. 255; R.E. 146). It is undisputed that Lofton hired Nickerson to transport the timber from Lofton's yard. (R. 255; R.E. 146). Lofton knew the timber would be transported by Nickerson and/or one of his drivers using one of Nickerson's trucks. Clearly, Lofton hired Nickerson to transport the timber and Lofton certainly knew Nickerson would use its own vehicle. The policy Lofton purchased was for this exact situation. (R. 255; R.E. 146). In other words, the Nickerson vehicle was being used by Lofton under a "short-term rental agreement." Lofton hired Nickerson/Barksdale on a job-by-job basis. Thus, every time Nickerson/Barksdale hauled logs for Lofton the Nickerson/Barksdale vehicle was being operated under a "short term rental agreement." There is no requirement in the policy that this so called "rental agreement" had to be in writing nor did Lofton require Nickerson to sign any type of written contract. Thus, the vehicle being driven by Barksdale was a "hired auto" as defined by the policy. (R. 255, 282; R.E. 146, 173).

Insurance contracts are liberally construed in favor of the insured and strictly construed against the insurer. (R. 256; R.E. 147). Burton v. Choctaw County, 730 So. 2d 1, 8 (Miss. 1999) ("our jurisprudence requires that the language in insurance contracts, especially exclusionary clauses, be construed strongly against the drafter.") (emphasis added); Johnson, 659 So.2d at 871; Garriga,

636 So.2d at 662; State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So.2d 1371, 1373 (Miss. 1981); Cruse v. Aetna Life Ins. Co., 369 So.2d 762, 764 (Miss. 1979). The vehicle Barksdale was driving at the time of the accident was a hired auto as defined under the policy. Any ambiguities with regard to the policy should be construed in favor of the insured, Lofton, and not Progressive. (R. 256, 270-283; R.E. 147, 161-174). The Progressive policy issued to Lofton does provide $1,000,000.00 in coverage for Barksdale/Nickerson because the Nickerson vehicle is a hired auto under the policy.

2. **Nickerson and Barksdale are additional insureds under the HIRED AUTO COVERAGE endorsement.**

Section 1 of the HIRED AUTO COVERAGE endorsement clearly states that Lofton is an insured. (R. 256, 282; R.E. 147, 173). Importantly, Nickerson and Barksdale are also insureds under this endorsement. (R. 256, 282; R.E. 147, 173). The policy clearly states that the "owner of such auto" and "any agent or employee of such owner or lessee" are also insureds under the policy. Albert Nickerson is the owner of the vehicle and Barksdale was Nickerson's employee at the time of the accident. (R. 256, 270-283; R.E. 147, 161-174). They are both additional insureds under the policy. (R. 256, 270-283; R.E. 147, 161-174).

Progressive conveniently omitted this crucial portion of its policy from its motion for summary judgment which unequivocally defines Nickerson and Barksdale as insureds under the HIRED AUTO COVERAGE endorsement. (R. 282; R.E. 173). Again, Georgia-Pacific required Lofton to maintain hired auto coverage for situations just like this. Nickerson and Barksdale are clearly insureds under the plain terms of the policy. (R. 256, 270-283; R.E. 147, 161-174).

3. **Progressive's motion for summary judgment should also be denied because Plaintiffs did not have the opportunity to conduct adequate discovery.**

Progressive filed its motion for summary judgment knowing that Plaintiffs had made repeated requests to depose Progressive's corporate representative. (R. 130-251; R.E. 21-142). However, Progressive ignored Appellants' requests or simply refused to put up its corporate representative for deposition. (R. 284-286; R.E. 175-177). ***Malone v. Aetna Casualty and Surety Co.***, 583 So.2d 186 (Miss. 1991)(Although a motion for summary judgment can be made at any time after expiration of

thirty days from the date the suit was filed, the court should allow the parties reasonably sufficient time to complete discovery and develop their theories.) Appellants first submit that Progressive is not entitled to summary judgment because Nickerson and Barksdale are insureds under the policy and the vehicle Barksdale was driving at the time of the accident was a "hired auto" covered by the policy. (R. 257; R.E. 148). In addition, the trial court prematurely ruled on the Progressive's motion for summary judgment because Appellants should have been given the opportunity to depose Progressive's corporate representative before any motion for summary judgment was ruled upon so the trial court would have had all of the evidence and testimony before it. (R. 257, 284-286; R.E. 148, 175-177). Here, Progressive took the position that because it thought it was entitled to summary judgment that it did not have to allow its corporate representative to be deposed. (R. 257, 284-286; R.E. 148, 175-177) Appellants should have been allowed to conduct such discovery before the trial court ruled upon Progressive's motion. Plaintiffs should also be allowed the opportunity to depose Lofton's corporate representative on these issues as well. (R. 257; R.E. 148).

In addition, the trial court did not even give the Appellants the opportunity to have an oral argument. The trial court granted Progressive's motion without even conducting a hearing.

CONCLUSION

Based on the foregoing, the trial court's ruling granting summary judgment in favor of Progressive should be reversed.

WEBB, SANDERS & WILLIAMS, P.L.L.C.

By: _____

B. Wayne Williams, MSB #9769
Reagan D. Wise, MSB #100309
P.O. Box 496
Tupelo, Mississippi 38802
Telephone: (662) 844-2137
Facsimile: (662) 842-3963

CERTIFICATE OF MAILING

This is to certify that I, Reagan D. Wise, attorney for Appellants, has this day mailed via Federal Express, the original and three (3) copies of the Appellant's Brief to Betty W. Sephton, Clerk, Supreme Court of Mississippi at the address of said Court, 450 High Street, Jackson, Mississippi, 39201-1082.

This the 29th day of July, 2008.

REAGAN D. WISE

CERTIFICATE OF SERVICE

I hereby certify that I have mailed via U. S. Mail, postage prepaid, and via Federal Express, a true copy of the foregoing *Brief of Appellants* to:

Via Federal Express

James Lynn Perry
Daniell, Upton, Perry & Morris, P.C.
Post Office Box 1800
Daphne, Alabama 36526
Attorney for Appellee, Progressive Gulf Insurance Company

Via U. S. Mail

Honorable Joseph H. Loper, Jr.
Circuit Judge, District Five
P. O. Box 616
Ackerman, MS 39735

Craig R. Sessums, Esq.
JONES, FUNDERBERG & SESSUMS, PLLC
901 North State Street (39201)
Post Office Box 13960
Jackson, Mississippi 39236
For Albert Nickerson, Individually and d/b/a Nickerson Trucking, and Cleansy L. Barksdale

This the 29th day of July, 2008.

Reagan D. Wise, MSB [redacted]