

**IN THE SUPREME COURT
FOR THE STATE OF MISSISSIPPI**

PEKIN INSURANCE COMPANY

APPELLANT

V.

CAUSE NO. 2014-IA-01820-SCT

**MARSHA R. HINTON, and THOMAS F.
HINTON, Individually and, as the wrongful
death beneficiaries of TIMOTHY R. HINTON,
deceased**

APPELLEES

BRIEF FOR APPELLANT

An Appeal of the December 10, 2014 Order Denying
Defendant's Motion to Dismiss for Lack of Personal Jurisdiction
From the Jones County Circuit Court
Civil Action Number 2013-112-CV10

ORAL ARGUMENT IS REQUESTED

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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 the Supreme Court and/or the judges of the Court of Appeals 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 Manufacturers Association
6. C & S Global Imports, Inc.;
7. Dorrance Aultman, attorney for Appellant;
8. S. Beth Windham, attorney for Appellant;
9. Robert Marc Chemers, *pro hac vice* attorney for Appellant;
10. Richard M. Burgland, *pro hac vice* attorney for Appellant;
11. Lawrence E. Abernathy, III, attorney for Appellees;

12. Leslie D. Roussell, attorney for Appelles;
13. Sam McHard, attorney for Appellees;
14. Mark D. Miller, attorney for Defendant The Sportsman's Guide;
15. Mark D. Morrison, attorney for Defendant Treestand Manufacturers Association ;
16. The Honorable Billy Joe Landrum (ret.), Circuit Court Judge of Jones County, Mississippi; and
17. The Honorable Dal Williamson, Circuit Court Judge of Jones County, Mississippi.

Respectfully submitted this the 30th day of July, 2015.

s/Dorrance Aultman
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested by Appellant, as the facts regarding whether Appellant Pekin Insurance Company is subject to personal jurisdiction in this State are in dispute.

STATEMENT OF THE ISSUES

1. Did the Circuit Court abuse its discretion striking the Affidavit of Tim Manning?
2. Did the Circuit Court err as a matter of law in denying the Defendant/Appellant Pekin Insurance Company's motion to dismiss for lack of personal jurisdiction?

STATEMENT OF THE CASE

Plaintiffs Marsha R. Hinton and Thomas F. Hinton, individually and as the wrongful death beneficiaries of Timothy R. Hinton (hereinafter "Plaintiffs"), filed a Second Amended Complaint against C&S Global Imports, Inc. (hereinafter "C&S"), The Sportsman's Guide, Inc. (hereinafter "TSG"), and Pekin Insurance Company (hereinafter "Pekin"), among others, in connection with the death of their adult son, who on October 6, 2012, fell from a hunting tree stand allegedly manufactured by C&S and sold by TSG (See Second Amended Complaint at Record (hereinafter "R." 3-31 and at Appellant's Record Excerpts (hereinafter "R.E.")10-38).

Plaintiffs joined Pekin as a Defendant to their wrongful death action, seeking a declaration in Count Twelve as to Pekin's rights and responsibilities in connection with certain insurance policies issued to C&S. In Count Thirteen, Plaintiffs seek recovery for damages they allegedly sustained as a result of purported misrepresentations that Pekin made to TSG regarding insurance coverage for C&S's products (See Second Amended Complaint at R. 25-28 and R.E.32-35).

Pekin moved to dismiss Counts Twelve and Thirteen of the Second Amended Complaint because of a lack of personal jurisdiction (See Pekin Insurance Company's Motion to Dismiss Counts Twelve and Thirteen of Plaintiffs' Second Amended Complaint at R. at 681-689 and R.E.43-51). In support of its motion, Pekin attached an affidavit of one of its Litigation Managers, Tim Manning, who averred that Pekin had not entered into a contract with a resident of Mississippi, had not committed a tort in whole or in part in Mississippi, and did not conduct any business in Mississippi (*Id.* at R. 686-689 and R.E. 48-51).

Plaintiffs filed their response in opposition to Pekin's motion to dismiss, asserting that the Circuit Court had personal jurisdiction over Pekin pursuant to the Mississippi long-arm statute, and that such exercise of personal jurisdiction did not violate Pekin's due process rights. Plaintiffs asserted that a basis for the assertion of personal jurisdiction over Pekin was that Pekin Life Insurance Company (hereinafter "PLIC"), an affiliate of Pekin, was licensed to and did transact business in Mississippi. Incorporated into their response, Plaintiffs moved to strike the Manning Affidavit for the reason that it consisted "primarily" of legal conclusions.

In rebuttal and response, Pekin asserted that none of the bases raised by the Plaintiffs justified the exercise of personal jurisdiction over Pekin under the Mississippi long-arm statute. (See Pekin Insurance Company's Rebuttal and Response to Hinton's Response in Opposition to Pekin Insurance Company's Motion to Dismiss Counts Twelve and Thirteen of Plaintiffs' Second Amended Complaint at R. 1208-1238 and R.E. 52-82) Pekin attached the Affidavit of Scott A. Martin, President of PLIC, who averred that while the majority shareholders of PLIC are Farmers Automobile Insurance Association and Pekin, PLIC strictly adheres to corporate formalities. Pekin also attached

correspondence from the Mississippi Commissioner of Insurance's Office, stating that it was not listed as a "non-admitted" insurer eligible for writing business in the State of Mississippi. (See Affidavit of Scott A. Martin, at R. 1309-1311 and R.E.147-149 and Correspondence from Mississippi Commission of Insurance Office at R. 695 and R.E. 151)

On December 10, 2014, the Circuit Court entered an order denying Pekin's motion to dismiss and striking the affidavit of Tim Manning. (See Circuit Court's December 10, 2014 Order at R. 1373-1377 and R.E.5-9). Pekin timely filed a Petition for Interlocutory Appeal by Permission, requesting appeal of the Circuit Court's December 10, 2014 Order.

On March 27, 2015, this Court granted Pekin's Petition for Interlocutory Appeal by Permission.

SUMMARY OF THE ARGUMENT

Pekin submits that the Circuit Court's decision to strike the Affidavit of Tim Manning was improper, because in a pre-trial Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction a non-resident, such as Pekin, may litigate inherent factual questions through the use of affidavits. *Canadian Nat'l Ry. Co. v. Waltman*, 94 So. 3d 1111, 1117 (Miss. 2012) (citing *R.C. Constr. Co. v. Nat'l Office Sys.*, 622 So. 2d 1253, 1255 (Miss. 1993)). Since the Manning Affidavit consisted of relevant and admissible evidence to the jurisdictional question before the Circuit Court, it should have been considered, not stricken.

In addition, the Circuit Court found that Pekin was subject to personal jurisdiction under the Mississippi long-arm statute and that the exercise of jurisdiction over Pekin did not offend federal Due Process. To the contrary, Pekin submits that it is not subject to

jurisdiction under the long-arm statute because it did not engage in any of the activities that would subject it to long-arm jurisdiction. Even assuming it had, Pekin submits that the exercise of long-arm jurisdiction violates due process because Pekin does not have sufficient minimum contacts with the State of Mississippi.

ARGUMENT

I. Standard of Review

This Court reviews the Circuit Court's denial of a motion to strike an affidavit for an abuse of discretion. *Trustmark Nat'l Bank v. Meador*, 81 So. 3d 1112, 1116 (Miss. 2012).

This Court reviews jurisdictional issues pursuant to a *de novo* standard of review. *Joshua Props., LLC v. D1 Sports Holdings, LLC*, 130 So. 3d 1089, 1092 (Miss. 2014). The question whether a court has jurisdiction over a non-resident is decided based on facts existing at the time the action is commenced. *Id.*, citing *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1137 (Miss. 2008). The Plaintiffs bear the burden of establishing that Mississippi courts have personal jurisdiction over Pekin. *Nordness v. Faucheux*, No. 2013-IA-01479-SCT, ¶12 (Miss. May 28, 2015).

II. The Affidavit of Tim Manning Should Not Have Been Stricken.

Pekin submits that the attestations in Manning's Affidavit demonstrate the Circuit Court's decision to strike the affidavit was incorrect.

In *Canadian Nat'l Ry. Co. v. Waltman*, this Court held that "[a] non-resident defendant may, on his pre-trial Rule 12(b)(2) motion to dismiss, litigate the inherent factual questions through the use of live testimony or affidavits" 94 So. 3d 1111, 1117 (Miss. 2012) (quoting *R.C. Constr. Co. v. Nat'l Office Sys.*, 622 So. 2d 1253, 1255

(Miss. 1993)). That is precisely what Pekin did by submitting the affidavit of its Litigation Manager, Tim Manning.

The Manning Affidavit contained relevant and admissible evidence for the jurisdictional question before the Circuit Court. *See* Mississippi Rule of Evidence 401 and cmt (“Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case...If the evidence has any probative value at all, the rule favors its admission”); *see also* M.R.E. 402 and 403. Manning, a Litigation Manager for Pekin, averred, in pertinent part, that he had personal knowledge that Pekin: is not incorporated, qualified, or licensed to do business in Mississippi; is not admitted as an insurer in Mississippi; does not transact business in or otherwise sell insurance in Mississippi; has no offices or physical facilities in Mississippi; does not possess, own or lease real property in Mississippi; does not have a registered agent in the State of Mississippi; does not have employees, sales representatives or agents in Mississippi; has no telephone numbers, bank accounts, mailing addresses, officers, directors or employees in Mississippi; pays no taxes in Mississippi; does not advertise or solicit business in Mississippi; has no assets in Mississippi; does not collect or receive premiums from anyone in Mississippi; and has never committed a tort in Mississippi. These attestations were relevant and admissible for the jurisdictional question before the Circuit Court. *See Canadian Nat’l Ry. Co.*, 94 So. 3d at 1116 (holding that circuit court properly considered sworn affidavits of company personnel in deciding a motion to dismiss for lack of personal jurisdiction).

Furthermore, in Paragraphs 20 through 28, Manning averred, in pertinent part, that Pekin did not initiate the sale of the policies to C&S and no part of the insurance sales transactions in connection with those policies took place, or was consummated in

Mississippi, that the application, underwriting, issuance and delivery of the policies all occurred in the State of Illinois, and that the collection of all premiums for the policies occurred in the State of Illinois. These averments are evidence that Pekin did not engage in activities in Mississippi which would subject it to personal jurisdiction under the long-arm statute, therefore, they are directly relevant to the jurisdictional question raised by Pekin's motion to dismiss. See, *e.g.*, *Yatham v. Young*, 912 So.2d 467, 469-70 (Miss. 2005).

Despite relevant and admissible evidence contained in the Manning Affidavit, the Circuit Court struck it *in toto*, stating as its only reason that the affidavit "contained improper legal conclusions." Doing so, the Circuit Court cited only one of Manning's twenty-eight (28) numbered attestations: that Pekin had never committed a tort in Mississippi. (See Circuit Court's December 10, 2014 Order at R. 1373-1377 and R.E.5-9). Assuming this attestation was conclusory, which Pekin denies, the Circuit Court's decision to strike the entire affidavit for a single conclusory attestation was improper. This Court's decision in *Schmidt* helps explain why.

In *Schmidt v. Catholic Diocese*, this Court upheld the circuit court's denial of the plaintiffs' motion to strike an affidavit which, according to the chancellor, was laden with "conclusory allegations" and offered "limited probative value." 18 So. 3d at 832. Since the affidavit was not wholly without value or relevance, the Court affirmed the trial court's decision not to strike it from the record. *Id.* As in *Schmidt*, assuming there are legal conclusions in the Manning Affidavit, which Pekin denies, the affidavit was not wholly without value or relevance, and it should have properly been considered by the Circuit Court.

Pekin submits that the Circuit Court abused its discretion by striking the affidavit of Tim Manning and failing to consider the relevant and admissible attestations therein in ruling on Pekin's motion to dismiss for lack of personal jurisdiction.

III. The Circuit Court Lacked In Personam Jurisdiction Over Pekin Insurance Company, and Pekin's Motion to Dismiss Should Have Been Granted.

Pekin submits that the evidence submitted in support of its Motion to Dismiss shows that it has not engaged in any of the three activities or jural acts to make it amenable to suit in Mississippi under the long-arm statute. See Miss. Code Ann. § 13-3-57.

There is a two-tier test to determine whether it is appropriate for a Mississippi court to exercise personal jurisdiction over a nonresident defendant. *Horne v. Mobile Area Water & Sewer Sys.*, 897 So. 2d 972, 976 (Miss. 2004). First, the nonresident defendant must have engaged in activities that make it amenable to suit in Mississippi under the Mississippi long-arm statute. *Id.* Second, the nonresident defendant must have availed itself of Mississippi in a manner that the exercise of personal jurisdiction would be consistent with the due process clauses of the federal and state constitutions. *Id.*

The long-arm statute sets forth the following occurrences which subject a nonresident to personal jurisdiction within the State of Mississippi:

“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.”

Miss. Code Ann. § 13-3-57. The unrefuted evidence demonstrates that Pekin engaged in none of these activities.

A. The Contract Prong.

The Circuit Court did not make a specific finding that the contract prong of the long-arm statute conferred jurisdiction over Pekin; however, in striking the Manning Affidavit, the Court found that certain letters authored by Manning and sent to TSG's counsel in Mississippi could constitute a breach of contract in Mississippi. (See Circuit Court's December 10, 2014 Order at R. 1375-1376 and R.E.7-8) Pekin submits that there is no basis for personal jurisdiction pursuant to the contract prong because Pekin did not allegedly or in fact make a contract with a Mississippi resident.

Under the long-arm statute, a nonresident defendant *must* "make a contract with a resident of this State" to be amenable to process. Miss. Code Ann. § 13-3-57. This requirement is noticeably absent here. There are no allegations in the Second Amended Complaint that Pekin entered into a contract with a Mississippi resident in this litigation or indeed, ever. Moreover, while Plaintiffs allege they are third-party beneficiaries of Pekin's insurance policies, even 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. See *Johnson v. Warnaco, Inc.*, 426 F. Supp. 44, 47 (S.D. Miss. 1976); *accord Martin & Martin v. Jones*, 616 F. Supp. 339, 343 (S.D. Miss. 1985). Furthermore, the plain language of the policies at issue provides that no person has a right under the policy to join Pekin as a part or otherwise bring Pekin into a suit asking for damages from an insured, or to sue on the policy unless all of the terms have been policy complied. (See Section E.4., Business owners Liability Coverage Form, page 9 of 12 at R. 72 and 177 and R.E.41-42)

With no allegations or evidence that Pekin contracted with a resident of Mississippi, there is no jurisdiction over Pekin pursuant to the contract prong of the long-arm statute.

B. The Tort Prong.

In its Order denying Pekin's Motion to Dismiss, the Circuit Court found that Pekin may have committed a tort in the State of Mississippi by "adjusting" the wrongful death claim and denying coverage to TSG in Mississippi. (See Jones County Circuit Court's December 10, 2014 Order at R. 1374 and R.E. 6) Pekin submits that this finding is both factually inaccurate and inconsistent with the allegations of the Second Amended Complaint.

Initially, there is no evidence that Pekin "adjusted" the wrongful death claim or denied coverage to TSG in the State of Mississippi. The determination of whether the claim was covered under Pekin's policy was made in the State of Illinois, therefore, the potentially tortious activities relied upon by the Circuit Court to subject Pekin to jurisdiction occurred in Illinois, not Mississippi.

Next, the torts alleged against Pekin in the Second Amended Complaint were not based on claims handling or adjusting; rather, they dealt only with purported misrepresentations regarding whether TSG had been added as an additional insured to Pekin's insurance policies. Specifically, Plaintiffs alleged that they sustained damages as a result of Pekin's alleged negligent and intentional misrepresentations to TSG in that Pekin failed to provide indemnification and/or a defense for their claims. But the evidence shows that the alleged misrepresentations could only have occurred in the State of Illinois, where the certificate of insurance containing the purported misrepresentation

was issued. (See Certificates of Insurance at R. 257-258 and R.E.39-40). The Plaintiffs do not allege that any misrepresentations occurred in Mississippi.

For purposes of the tort prong of Mississippi's long-arm statute, consequences stemming from the actual tort injury do not confer personal jurisdiction at the site where such consequences happen to occur. *Dunn v. Yager*, 58 So. 3d 1171, 1184–85 (Miss. 2011). In this case, the Plaintiffs allege that they are suffering consequences of Pekin's purported Illinois torts, but they allege no tort injuries in this State.¹ Pekin submits that because Plaintiffs have not alleged actual tort injuries in Mississippi, there was no just basis for the Circuit Court to assert personal jurisdiction over Pekin under the tort prong of the long-arm statute.

C. The Doing Business Prong.

The long-arm statute, by its plain terms, applies to any person or corporation performing any character of work in Mississippi. *Joshua Props., LLC v. D1 Sports Holdings, LLC*, 130 So. 3d 1089, 1093 (Miss. 2014). Pekin submits that the unrebutted evidence in the record shows that it does not and has not performed any character of work in this State which would justify the Circuit Court's exercise of personal jurisdiction pursuant to the doing business prong of the long-arm statute.

If Plaintiffs had alleged that Pekin was doing business in this State, which they did not, the averments in Manning's affidavit rebutted any *prima facie* presumption of jurisdiction. See *R.C. Constr. Co.*, 622 So. 2d at 1255. In particular, Manning attested

¹ Putting aside that Count Thirteen fails to state a claim upon which relief may be granted because it is an impermissible direct action against an insurance company (see Miss. R. Civ. P. 57 cmt.), Plaintiffs have sustained no injuries by Pekin's apparent misrepresentations to TSG. First, it is to Plaintiffs' advantage to have a less than vigorous defense from TSG, that is, Plaintiffs would benefit if Pekin does not defend TSG against their claims. Second, since there is no judgment against TSG, Plaintiffs have no present claim to the proceeds of the Pekin policy (even assuming the policy covered TSG, which Pekin denies).

that Pekin: is not incorporated or licensed to do business in Mississippi; is not authorized to write insurance in Mississippi; does not transact business or otherwise sell insurance in Mississippi; does not maintain an office or physical facility in the State of Mississippi; does not possess, own or lease real property in Mississippi; does not maintain a registered agent in Mississippi; has no employees, sales representatives or agents in Mississippi; does not have a telephone number, bank account, mailing address, officer, director or employee in Mississippi; does not pay taxes in Mississippi; does not solicit, market, underwrite, issue or deliver policies of insurance in Mississippi; and did not initiate the sale of the insurance policies at issue or consummate any part of the insurance sales transactions in connection with those policies in Mississippi. (See Affidavit of Tim Manning at R. 686-689 and R.E. 48-51). These un rebutted attestations, alone, preclude exercise of jurisdiction pursuant to the doing business prong of the long-arm statute.

i. “Coverage Territory.”

The Circuit Court found that because the insurance policy defines “Coverage Territory” as the “United States of America,” the assertion of personal jurisdiction over Pekin was proper. Pekin submits that this provision does not justify the extension of jurisdiction under the long-arm statute.

It is true that Pekin’s insurance policies contemplate coverage for an “occurrence” that takes place anywhere in the United States, but the scope of the policy’s coverage does not mean that Pekin may be haled into any court in this nation. See, e.g., *Carter v. Miss. Farm Bureau Cas. Ins. Co.*, 109 P.3d 735, 739 (Mont. 2005) (“[I]t is important to emphasize that this appeal is not about whether Carter and Schmidt are covered by Carter’s [insurance] policy; rather, the question is whether or not they can litigate the coverage dispute in Montana.”) The Mississippi long-arm statute, by its plain terms, does

not provide for jurisdiction over a nonresident defendant that merely contemplates doing business in Mississippi. Rather, the plain and unambiguous language of § 13-3-57 provides that one is “deemed to be doing business” if he “perform[s] any character of work or service in this state.” Miss. Code Ann. § 13-3-57; *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 882 (5th Cir. 1993). To accept the Circuit Court’s interpretation of the policy’s coverage territory provision would require a finding that the long-arm statute applies not only to nonresidents who actually perform work in this State, but also to nonresidents who merely contemplate performing work in this State. This would result in an unprecedented enlargement of the long-arm statute.

The relevant inquiry for the doing business prong of the long-arm statute is not whether Pekin’s policy might cover an incident in Mississippi but whether Pekin actually performed any character of work in this State. Since Pekin does not and has not conducted any business in Mississippi, as Tim Manning averred, it is not subject to *in personam* jurisdiction pursuant to the doing business prong of the long-arm statute. See *King v. American Family Mut. Ins. Co.*, 632 F.3d 570, 578 (9th Cir. 2011).

ii. Pekin’s Correspondence to Mississippi.

The Circuit Court found that a letter addressed to counsel for TSG and delivered in Hattiesburg constituted doing business for purposes of the Mississippi long-arm statute. To the contrary, Pekin submits that this letter was insufficient to rise to the level of “doing business” in Mississippi so as to allow for the extension of long-arm jurisdiction. *Roxco, Ltd. v. Harris Specialty Chems, Inc.*, 133 F. Supp. 2d 911, 916 (S.D. Miss. 2000), is instructive.

In *Roxco*, the district court for the Southern District of Mississippi held that the defendant’s mailing of two letters to the plaintiff in Mississippi were not the type of

“consistent business contacts contemplated as ‘doing business’ in [Mississippi] to warrant personal jurisdiction.” 133 F. Supp. 2d at 916-17. In so holding, the Court cited a number of cases interpreting the doing business prong of the long-arm statute which held that simply mailing letters to a resident of this State is not “doing business,” as that term is used in the long-arm statute. See *id.* So too here. The record does not support a finding that Pekin has a consistent business presence in this State, or that it performed any character of work here to subject it to *in personam* jurisdiction under the long-arm statute.

iii. Piercing the Corporate Veil.

The Circuit Court found that it was proper to pierce the corporate veils of Pekin and Pekin Life Insurance Company (hereinafter “PLIC”) because portions of Pekin’s website used “Pekin Insurance” as a group name to designate the operations of, among others, Pekin and PLIC, and because PLIC does business in Mississippi. The Court was further persuaded that Pekin “operated its various subsidiaries as one global entity” because Pekin and PLIC share a common physical address. Pekin submits that the Court’s decision to pierce Pekin’s and PLIC’s corporate veils was incorrect.

This Court has held that use of the “alter ego” or “piercing the corporate veil” theory to extend long-arm jurisdiction over a nonresident corporate defendant is not “lightly undertaken” by Mississippi Courts. *Canadian Nat’l Ry. Co. v. Waltman*, 94 So. 3d 1111, 1115 (Miss. 2012). “Mississippi case law generally favors maintaining corporate entities and avoiding attempts to pierce the corporate veil. [T]he cardinal rule of corporate law is that a corporation possesses a legal existence separate and apart from that of its officers and shareholders. . . . [t]his rule applies whether such shareholders are individuals or corporations.” *Id.* (quoting *Buchanan v. Ameristar Casino Vicksburg, Inc.*,

957 So. 2d 969, 977 (Miss. 2007)).

In *Canadian*

Nat'l Ry. Co., this Court reasoned:

“[T]he corporate entity will not be disregarded . . . unless the complaining party can demonstrate: (1) some frustration of expectations regarding the party to whom he looked for performance; (2) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and (3) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder.”

94 So. 3d at 1115, citing *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 431 (Miss. 2007).

This Court further explained that Mississippi Courts do not take piercing of the corporate veil lightly because of the chilling effect it has on corporate risk-taking. *Canadian Nat'l Ry. Co.*, 94 So. 3d at 1115 (citing *Nash Plumbing, Inc. v. Shasco Wholesale Supply, Inc.*, 875 So. 2d 1077, 1082 (Miss. 2004)).

“This Court ‘decline[s] to pierce the corporate veil except in those extraordinary factual circumstances where to do otherwise would subvert the ends of justice. [Citations omitted.] This Court ‘recognize[s] that the corporate veil will not be pierced, in either contract or tort claims, except where there is some abuse of the corporate form itself.’”

Id. at 1116 (quoting *Ratliff*, 954 So. 2d at 431, 432).

Pekin submits that the evidence in the record shows this is not an extraordinary factual circumstance which would allow for a piercing of the corporate veil to subject Pekin to personal jurisdiction where it otherwise would not be. Pekin submitted evidence in rebuttal which demonstrates that its subsidiary, PLIC, strictly adheres to corporate formalities, thereby keeping it separate and distinct from Pekin. For instance, Pekin submitted its and PLIC's individualized 2013 Audit Reports, showing that PLIC has assets, liabilities, and revenue sources distinct from Pekin (See Pekin Insurance

Company's Rebuttal and Response to Hinton's Response in Opposition to Pekin Insurance Company's Motion to Dismiss Counts Twelve and Thirteen of Plaintiffs' Second Amended Complaint at R. 1245-1307 and R.E.84-145). Additionally, Pekin submitted the affidavit of Scott Martin, President of PLIC, who attested, in relevant part, as follows: PLIC is a capital stock company; the majority shareholder in PLIC is Farmers Automobile Insurance Association ("FAIA") and Pekin, with the remaining shares traded publicly; PLIC writes a full array of life, health, and annuity products; PLIC's principal place of business is 2505 Court Street, Pekin, Illinois 61558; PLIC is licensed and authorized to write life insurance policies in Mississippi; PLIC holds annual shareholder meetings at which the shareholders elect directors; PLIC holds annual board of directors meetings; PLIC holds special meetings whenever important corporate decisions must be made; PLIC keeps separate financial records and records of corporate activities such as meetings of minutes and corporate tax activity; PLIC follows PLIC's Bylaws, Articles of Incorporation, and other related PLIC documents; PLIC issues periodic letters to its shareholders which summarize PLIC's operating results; PLIC issues an Annual Report; PLIC develops its own growth and business strategy; and PLIC pays its own operating expenses and taxes (See Pekin Insurance Company's Rebuttal and Response to Hinton's Response in Opposition to Pekin Insurance Company's Motion to Dismiss Counts Twelve and Thirteen of Plaintiffs' Second Amended Complaint at R. 1309-1312 and R.E.48-51). All of these uncontroverted facts show that contrary to the findings of the Circuit Court, PLIC is not a sham corporation, or the alter ego of Pekin. All of these uncontroverted facts further show that PLIC's contacts with Mississippi should not have been imputed to Pekin for the exercise of personal jurisdiction.

Notably, the fact that Pekin, PLIC, and Pekin's parent corporation, FAIA, operate

as a group of insurers with the common name “Pekin Insurance,” and PLIC, a member of the group, is licensed to do business in Mississippi does not, by itself, show that all the members of Pekin Insurance group are subject to personal jurisdiction in Mississippi. “The fact that a parent company has a subsidiary which is listed with the Secretary of State is not enough to show that a different subsidiary of the same company is qualified to do business in Mississippi. In order for there to be jurisdiction, related corporations must disregard their separate legal character in the manner that they operate.” *Hogrobrooks v. Progressive Direct*, 858 So. 2d 913, 921 (Miss. Ct. App. 2003). Only if it can be established that the corporations do not recognize their separation, then the corporate veil may be pierced allowing one corporation to be subject to jurisdiction. *Id.*

The un rebutted evidence submitted by Pekin demonstrates that Pekin and PLIC do not disregard their separate legal character in the way they operate. Quite the opposite, the un rebutted evidence shows that PLIC strictly adheres to corporate formalities to keep it separate and distinct from Pekin.

Rather than show a disregard for corporate formalities, Pekin’s and PLIC’s operations under the common group name “Pekin Insurance” demonstrates that they are separate corporations working together, which is typical of most parent-subsidiary corporate relationships. See, e.g., *Jackson v. Tanfoglio Giuseppe S.R.L.*, 615 F.3d 579, 587 (5th Cir. 2010) (finding that contacts *could not* be imputed where two companies were “operated in a way that their brands and products appear identical and their business relationships are deeply intertwined, . . . shared office space, phone numbers, . . . officers and directors, [and the employees of a close business associate] testified that they . . . viewed [the companies] as one company”).

The Circuit Court additionally found that Pekin operated its various subsidiaries

as one “global entity,” because the “Pekin Insurance” group companies share a common physical address. (See Circuit Court’s December 10, 2014 Order at R. 1375 and R.E.7) However, the mere sharing of corporate headquarters is not enough to support the extreme act of piercing the corporate veil. See, e.g., *Replogle v. Shoreline Transp. of Ala., LLC*, No. 3:11cv83, 2012 U.S. Dist. LEXIS 143823, 2012 WL 4755039, at *3 (S.D. Miss. Oct. 4, 2012) (finding insufficient proof of an alter ego relationship even though parent and subsidiary entities shared headquarters); *Samples v. Vanguard Healthcare, LLC*, No. 3:07cv157, 2008 U.S. Dist. LEXIS 70822, 2008 WL 4371371, at *3-4 (N.D. Miss. Sept. 18, 2008) (declining to exercise personal jurisdiction over a parent company that shared officers and headquarters with its wholly owned subsidiary).

Pekin submits that review of the unrefuted evidence shows that PLIC is not the alter ego of Pekin, therefore, the Circuit Court should not have imputed PLIC’s Mississippi contacts to Pekin to exercise personal jurisdiction.

iv. The Mississippi Federal Complaint.

In its Order, the Circuit Court additionally found that it could exercise jurisdiction over Pekin because Pekin “demonstrated its willingness to litigate the[] [insurance coverage] issues in Mississippi by electing to file suit in Mississippi Federal Court.” See Circuit Court’s December 10, 2014 Order at R. 1375 and R.E.7) Pekin submits that the long-arm statute cannot reasonably be interpreted to support the Circuit Court’s conclusion.

First, there is nothing in the long-arm statute itself which allows the exercise of jurisdiction because of a nonresident’s “willingness to litigate” in Mississippi Federal Court. The long-arm statute enumerates three activities that would subject a nonresident to suit in Mississippi: (1) making a contract with a Mississippi resident to be performed

in whole or in part in Mississippi; (2) committing a tort in Mississippi; or (3) doing business in Mississippi. See Miss. Code Ann. § 13-3-57. Litigating in Mississippi Federal Court is not on the list. Thus, a “willingness to litigate” in Mississippi Federal Court was not a factor the State’s Legislature deemed relevant when determining whether a nonresident, such as Pekin, is subject to long-arm jurisdiction in Mississippi.

Second, the State Legislature has affirmatively stated that litigating a lawsuit in this state is not tantamount to doing business in Mississippi. Section 79-4-1.01 of the Mississippi Code expressly provides that “[m]aintaining, defending or settling any proceeding” does not constitute “transacting business” in Mississippi. Miss. Code Ann. § 79-4-15.01(b)(1).

In sum, it is apparent that Pekin’s “willingness to litigate” in Mississippi Federal Court is not a statutory or valid basis for the exercise of personal jurisdiction over Pekin pursuant to the long-arm statute.

v. The Interests of Judicial Economy.

The Circuit Court also found that it had jurisdiction over Pekin because the “interests of judicial economy would be best served” as “all necessary and interested parties were before the court.” See Circuit Court’s December 10, 2014 Order at R. 1375 and R.E.7) As with a nonresident’s willingness to litigate in federal court in Mississippi, whether joining a nonresident would satisfy the “interests of judicial economy” is not pertinent to the jurisdictional issue. Nowhere does the statute provide that a nonresident shall be subjected to the jurisdiction of the Courts of Mississippi if service on the nonresident suits the interests of judicial economy.

IV. The Exercise of Personal Jurisdiction Over Pekin Insurance Company Violates Due Process.

Pekin submits that the evidence in the record does not allow for the Circuit Court's exercise of specific personal jurisdiction or general personal jurisdiction over Pekin under the federal Constitution.

This Court recently explained the requirements of federal due process in the context of long-arm jurisdiction as follows:

"To ensure that the application of the long-arm statute over a nonresident corresponds with the requirements of due process, it must be shown that there are sufficient minimum contacts with the state such that allowing suit within the state ". . . does not offend 'traditional notions of fair play and substantial justice.'" *Phillips*, 992 So. 2d at 1139 (quoting *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))). "Conduct in connection with the forum state must be such that he 'should reasonably anticipate being haled into court' in the forum state." *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 778 (S.D. Miss. 2001) (citations omitted); see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Due process requires minimum contacts with the forum state to prevent nonresidents from becoming bound by judgments in a state where ". . . no meaningful 'contacts, ties, or relations'" have been established. *Internet Doorway*, 138 F. Supp. 2d at 778 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 (1985)).

Minimum contacts with the forum state may trigger either specific personal jurisdiction or general personal jurisdiction. *American Cable Corp. v. Trilogy Commc'ns, Inc.*, 754 So. 2d 545, 550 (Miss. Ct. App. 2000) (citations omitted); see *Phillips*, 992 So. 2d at 1140; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-415, 104 S. Ct. 1868, 80 L. Ed. 2d 404 nn.8- 9, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); *Burger King Corp.*, 471 U.S. at 473 n.15. General personal jurisdiction is appropriate over a nonresident when no nexus exists between the defendant's activities in the forum state and the litigation, and the contacts with the state are "systematic and continuous." *Phillips*, 992 So. 2d at 1141 (citing *Helicopteros*, 466 U.S. at 415-418, 104 S. Ct. 1868). Specific personal jurisdiction is exercised over a nonresident when a nexus exists between the litigation and the activities. *Id.* See *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 2579, 53 L. Ed. 2d 683 (1977).

. . . "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.” *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))). Minimum contacts may be sufficient under specific jurisdiction when the nonresident’s act or acts “. . . purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Med. Assurance Co. of Mississippi*, 864 F. Supp. at 579 (quoting *Ruston Gas Turbines*, 9 F. 3d at 419).”

Joshua Props., LLC v. DI Sports Holdings, LLC, 130 So. 3d 1089, 1094-1095 (Miss. 2014).

Although Pekin submitted un rebutted, relevant and admissible evidence showing that it has no “systematic or continuous” contacts with this State, and that by issuing insurance policies to C&S, it did not anticipate being haled into Court in Mississippi (See Pekin Insurance Company’s Motion to Dismiss Counts Twelve and Thirteen of Plaintiffs’ Second Amended Complaint at R. at 681-689 and R.E.43-51), the Circuit Court found that its exercise of personal jurisdiction over Pekin did not violate the due process clause of the Constitution of the United States or offend traditional notions of fair play or substantial justice because Pekin had sufficient minimum contacts with this State. The Circuit Court further stated that Pekin purposefully availed itself of the courts of this state by: (1) including Mississippi in its “territory of coverage;” (2) licensing one of its subsidiaries in Mississippi; and (3) by filing suit in Mississippi. (See Circuit Court’s December 10, 2014 Order at R. 1374-1376 and R.E. 5-9). None of these activities, however, is sufficient to allow for the exercise of personal jurisdiction under the Constitution.

To begin, the “territory of coverage” clause is not a basis for general or specific jurisdiction over Pekin. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086

(10th Cir. 1998), is helpful. In *OMI*, the defendant in a patent infringement suit filed a declaratory judgment action against its insurers in a Kansas federal district court to establish coverage. *Id.* at 1090-91. The insurers moved to dismiss the action, based on a lack of personal jurisdiction. The district court denied the motion, reasoning that, by agreeing to defend the policyholder against claims anywhere in the United States, the insurer created the minimum contacts necessary for personal jurisdiction. *Id.* at 1092.

The Tenth Circuit Court of Appeals reversed, finding that the nationwide-territory-of-coverage clause was not sufficient to support the district court's exercise of jurisdiction. In its analysis, the Court criticized courts applying the analysis adopted by the Circuit Court here. It stated that such reasoning is "troublesome" because:

"[f]irst, the court's holding is based almost entirely on foreseeability. The Supreme Court, however, has cautioned that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. Second, within its foreseeability analysis, by chastising the defendant for having the ability to exclude certain forums from coverage and not exercising that ability, the court placed great weight on what the defendant did not do. Such reliance, however, is clearly at odds with the Supreme Court's mandate that minimum contacts be based on the defendant's affirmative actions which create a substantial connection with the forum state."

Id. at 1094.

The Court further stated that it disagreed with the assumption that "by agreeing to defend its insured in any forum, an insurer foresees being sued by its own insured in any forum when a coverage dispute arises." *Id.* at 1095. The Court correctly reasoned that it does not logically follow that, by agreeing to provide a defense to its insured in a particular state, the insurer also agrees to allow itself to be sued personally in the same state. This Court should likewise find that the territory of coverage provision in Pekin's

policy does not permit the Pekin to be sued in any jurisdiction which it includes in its coverage territory, including the State of Mississippi.

Next, although the United States Supreme Court has acknowledged the theory of piercing the corporate veil for jurisdictional purposes (see *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857, 180 L. Ed. 2d 796 (2011)), Pekin submits, as explained in detail above, that the unrefuted evidence in the record demonstrates that PLIC and Pekin are separate and distinct corporations such that their corporate veils should not be pierced to exercise general jurisdiction over Pekin based on PLIC's contacts with Mississippi.

Finally, the filing of Pekin's lawsuit in Mississippi Federal Court fails to support the exercise of specific personal jurisdiction. Because Pekin's federal lawsuit did not give rise to Plaintiffs' state court claims, requirements for specific jurisdiction under the federal constitution are lacking. See *Horne v. Mobile Area Water & Sewer Sys.*, 897 So. 2d 972, 979 (Miss. 2004) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)) ("[a] defendant has 'minimum contacts' with a state if 'the defendant has "purposefully directed" his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." (Emphasis added.)) While there is no question Pekin sued Plaintiffs' in federal court in Mississippi, the case before this Court does not allege injuries arising out of or relating to the filing of Pekin's federal lawsuit. Accordingly, the act of filing a lawsuit in Federal Court in Mississippi is insufficient to confer personal jurisdiction over Pekin under federal due process.

CONCLUSION

Based upon the foregoing arguments and authorities, Pekin respectfully request that this Court find the Circuit Court abused its discretion in striking the Affidavit of Tim Manning and that Counts Twelve and Thirteen of the Plaintiffs' Second Amended Complaint should be dismissed for lack of personal jurisdiction over Pekin.

Respectfully submitted,

PEKIN INSURANCE COMPANY

By:s/ Dorrance Aultman
COUNSEL FOR PEKIN

CERTIFICATE OF SERVICE

I, Dorrance Aultman undersigned counsel for Pekin Insurance Company, do hereby certify that I have this day filed the Brief of Appellant by electronic submission via the Mississippi Electronic Courts website.

I further certify that I have caused a true and correct copy of the foregoing to be delivered via U.S. Mail, postage prepared to:

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This the 30th day of July, 2015.

s/Dorrance Aultman
DORRANCE AULTMAN

CERTIFICATE OF FILING

This will certify that the undersigned, Dorrance Aultman, counsel for Appellant Pekin Insurance Company, and pursuant to Mississippi Rule of Appellate Procedure 25, has this day filed the Brief of Appellant by electronic submission via the Mississippi Electronic Courts website.

THIS THE 30th DAY OF JULY, 2015.

s/Dorrance Aultman
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ADDENDUM

West's Annotated Mississippi Code
Title 13. Evidence, Process and Juries
Chapter 3. Process, Notice, and Publication

Miss. Code Ann. § 13-3-57

§ 13-3-57. Service on nonresidents; generally

Currentness

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.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident as is provided by the Mississippi Rules of Civil Procedure, and when such process or summons is served, made or had against the nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi or the Mississippi Rules of Civil Procedure, jurisdiction over the cause of action and over such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

Credits

Laws 1940, Ch. 246, § 1; Laws 1958, Ch. 245, § 1; Laws 1964, Ch. 320, § 1; Laws 1968, Ch. 330, § 1; Laws 1971, Ch. 431, § 1; Laws 1978, Ch. 378, § 1; Laws 1980, Ch. 437, § 1; Laws 1991, Ch. 573, § 98, eff. July 1, 1991.

Notes of Decisions (639)

Miss. Code Ann. § 13-3-57, MS ST § 13-3-57

The Statutes and Constitution are current through the End of the 2015 Regular Session.

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West's Annotated Mississippi Code
Title 79. Corporations, Associations, and Partnerships
Chapter 4. Mississippi Business Corporation Act
Article 15. Foreign Corporations
Subarticle a. Certificate of Authority (Refs & Annos)

Miss. Code Ann. § 79-4-15.01

§ 79-4-15.01. Activities requiring certificate; exempt activities

Currentness

(a) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a):

(1) Maintaining, defending or settling any proceeding;

(2) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;

(3) Maintaining bank accounts;

(4) Maintaining offices or agencies for the transfer, exchange and registration of the corporation's own securities or maintaining trustees or depositories with respect to those securities;

(5) Selling through independent contractors;

(6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;

(7) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;

- (8) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
 - (9) Owning, without more, real or personal property;
 - (10) Conducting an isolated transaction that is completed within thirty (30) days and that is not one in the course of repeated transactions of a like nature;
 - (11) Transacting business in interstate commerce;
 - (12) Being a shareholder in a corporation or a foreign corporation that transacts business in this state;
 - (13) Being a limited partner of a limited partnership or foreign limited partnership that is transacting business in this state;
 - (14) Being a member or manager of a limited liability company or foreign limited liability company that is transacting business in this state.
- (c) The list of activities in subsection (b) is not exhaustive.
- (d) A foreign corporation which is general partner of any general or limited partnership, which partnership is transacting business in this state, is hereby declared to be transacting business in this state.

Credits

Laws 1987, Ch. 486, § 15.01; Laws 1990, Ch. 538, § 9, eff. July 1, 1990. Amended by Laws 2012, Ch. 481, § 38, eff. January 1, 2013.

Notes of Decisions (71)

Miss. Code Ann. § 79-4-15.01, MS ST § 79-4-15.01

The Statutes and Constitution are current through the End of the 2015 Regular Session.
