IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PATRICIA MYATT, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF TODD DAVID MYATT, DECEASED AND WINSTON BAILEY — **APPELLANTS**

VS. — **CAUSE NO. 2007-TS-01824**

PECO FOODS OF MISSISSIPPI, INC. — **APPELLEE**

BRIEF OF APPELLEE, PECO FOODS OF MISSISSIPPI, INC.

Appeal From The Circuit Court of Neshoba County, Mississippi

ORAL ARGUMENT NOT REQUESTED

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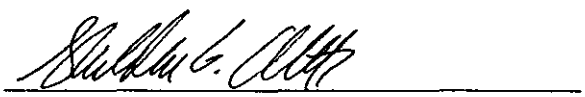
CERTIFICATE OF INTERESTED PERSONS

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. Patricia Myatt, Appellant;
2. Winston Bailey, Appellant;
3. Peco Foods of Mississippi, Inc., Appellee;
4. Honorable Judge Marcus D. Gordon, Neshoba County Circuit Court Judge;
5. John B. MacNeill, Esq. and Susan R. Bryan, Esq. of MacNeill & Buffington, P.A., Counsel for Appellant, Winston Bailey; and
6. J. Ashley Ogden of Ogden & Associates, PLLC and Tanya N. Carl, Counsel for Appellant, Patricia Myatt; and
7. Sheldon G. Alston, Esq. and Jonathan R. Werne, Esq. of Brunini, Grantham, Grower & Hewes, PLLC, Counsel for Appellee.



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STATEMENT OF THE ISSUES

1. Whether the trial court erred in finding that Peco Foods of Mississippi, Inc. was relieved of its duty to inform Todd Myatt of the alleged danger regarding the eighteen-wheel truck due to the fact that Myatt and/or his employer had knowledge of such alleged danger.

2. Whether the trial court abused its discretion in entering a Final Judgment dismissing Peco Foods of Mississippi, Inc. with prejudice pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure.

STATEMENT OF FACTS

This cause of action arises from the death of a construction worker, Todd Myatt, at the Peco Foods' facility in Philadelphia, Mississippi ("Philadelphia facility"). On July 7, 2005, Myatt was struck and killed by the back tires of an eighteen-wheel truck, owned and operated by Winston Bailey. (R. 24). At the time of his death, Myatt was employed by Mid-Mississippi Sales and Services, Inc. ("Mid-Mississippi"), an independent contractor performing work for Peco Foods at the Philadelphia facility. (R. 83, pg. 64, ln. 13-15).

Peco Foods hired Mid-Mississippi to construct a new feed mill for its Philadelphia facility. (R. 88, pg. 84, ln. 17-24). On the day of the incident, Myatt and his co-workers arrived at the Philadelphia Facility around 8:30 a.m. (R. 82, pg. 61, ln. 20-21). According to Daryl Robinson, a co-worker of Myatt, Gary Nelson, the manager of the Philadelphia Facility, instructed him and Myatt to paint portions of the new feed mill; Nelson also indicated the area where they were to paint. (R. 70, pg. 11, ln. 20-23, pg. 12, ln. 3-4; R. 79, pg. 46, ln. 18-22; R. 90, pg. 93, ln. 12-23).

According to Robinson, trucks began lining up at the Philadelphia facility around 9:30 or 10:00 a.m. on the day of the incident. (R. 70, pg. 12, ln. 11-24). All of the trucks left their engine running while waiting to unload their truck. *Id.* Both Myatt and Robinson were familiar with the traffic on the site of the Philadelphia facility. According to Robinson, trucks had been coming and going from the Philadelphia facility during the three months he had been there. (R. 70, pg. 13, ln. 7-25; R. 88, pg. 82, ln. 5-14). It was not usually for a truck to park and remain idle for a period of time. (R. 71, pg. 14, ln. 5-11). One of those trucks lined up that morning on the day of the incident was driven by Winston Bailey, and according to Robinson, Bailey parked his truck in the vicinity of where Myatt and Robinson were working. (R. 71, pg. 16-17). The

truck driven by Bailey stayed in its location idling from that morning until three hours after Robinson returned from lunch. (R. 71, pg. 17, ln. 15-18).

Throughout the day of the incident, Richard McRaney, the on-site foreman for Mid-Mississippi, inspected the work being performed by Myatt and Robinson. (R. 69, pg. 9, ln. 13-19, R. 91, pg. 97, ln. 6-8). McRaney visited Myatt and Robinson at their worksite at these three times during the day of the accident. (R. 91, pg. 95, ln. 5-23). Furthermore, according to Robinson, McRaney was present when Nelson instructed Myatt and Robinson where to work earlier that morning. (R. 90-91, pg. 93-94).

According to Robinson, that afternoon, he and Myatt ran out of paint. (R. 89, pg. 86, ln. 11-15). While he and Myatt were changing the paint gun, McRaney walked around the back of Bailey's truck to inspect the work of Myatt and Robinson. (R. 73, pg. 22, ln. 3-18; R. 89, pg. 86, 13-25). After Myatt completed changing the paint gun, Myatt started to walk over to McRaney and Robinson, who were talking. (R. 89, pg. 87, ln. 13-24). As Myatt was standing, Bailey's truck moved forward and the tire caught Myatt's foot and pulled him underneath it. (R. 73, pg. 25, ln. 12-20; R. 83, pg. 64, ln. 16-23; R. 89, pg. 88, ln. 9-14).

SUMMARY OF THE ARGUMENT

A premises owner does not have a duty to give warning of a danger that is known by an independent contractor and its employees. In this case, Peco Foods did not have a duty to warn Myatt of the danger associated with an idling eighteen-wheel truck. Everyone, including the contractor and deceased, were fully aware of the dangers of a tractor trailer rig pulling forward. Moreover, Myatt had intimate knowledge about the facility and the activity that took place there everyday. Myatt had been working for Mid-Mississippi for over a year and he had been working on the construction of the feed mill for at least three months.

Even if Myatt was unaware of any potential danger, his employer, Mid-Mississippi, was certainly aware of any danger near its employees' work area. Mid-Mississippi had been on the property for more than eight months constructing the feed mills. The on-site foreman for Mid-Mississippi, Richard McCraney, inspected Myatt's work area on three separate occasions on the day of the incident. Thus, Peco Foods did not have a duty to warn Myatt of any danger related to Bailey's truck.

The trial court properly entered final judgment in favor of Peco Foods pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure. The entry of a Rule 54(b) judgment is appropriate when the judgment terminates the case as to one of the parties involved. Here, the trial court's decision fully adjudicates Myatt's claims against Peco. Furthermore, in this case, the Rule 54(b) judgment supports judicial economy and the equities involved. The Rule 54(b) judgment ensures that only one trial will be held in this matter. Thus, this Court should affirm the trial court's decision to enter a 54(b) judgment.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for motions for summary judgment is well established under Mississippi law. *See, e.g., Green v. Allendale Planting Co.*, 954 So. 2d 1032, 1036 (Miss. 2007). The Mississippi Supreme Court reviews summary judgment motions de novo. *Green*, 954 So. 2d at 1036. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." MISS. R. CIV. P. 56(c). The Court should view the evidence in the light most favorable to the non-moving party. *Green*, 954 So. 2d at 1036. The party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." MISS. R. CIV. P. 56(e).

"The presence of fact issues in the record does not per se entitle a party to avoid summary judgment." *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985). "The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense." *Shaw*, 481 So. 2d at 252. Finally, "the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact." *Id.*

II. PECO FOODS DID NOT OWE A DUTY TO WARN MYATT REGARDING ANY ALLEGED DANGER REGARDING THE EIGHTEEN-WHEEL TRUCKS.

Under Mississippi law, a premises owner has a duty to an independent contractor and its employees to "furnish a reasonably safe place to work or give warning of danger." *Miss. Chem. Corp. v. Rogers*, 368 So. 2d 220, 222 (Miss. 1979). A premises owner is not, however, "an insurer of the invitee's safety, and he is not liable for injuries which are not dangerous or which

are, or should be known to the business invitee." *Jackson Ready-Mix Concrete v. Sexton*, 235 So. 2d 267, 270 (Miss. 1970). Thus, a premises owner is relieved of its duty if the independent contractor or its employees has actual or constructive knowledge of the danger. *See Miss. Chem.*, 368 So. 2d at 222 (holding that the premises owner "did not have the duty to notify [Plaintiff] of the danger . . . because his employer, an independent contractor, had knowledge of the danger . . . ."); *Hill v. Int'l Paper Co.*, 121 F.3d 168, 176 (5th Cir. 1997)(holding "[t]here is no duty to warn an independent contractor of a defect or danger of which it has actual knowledge or of which it, in the exercise of reasonable care, should have knowledge."); *Jones v. James Reeves Contractors, Inc.*, 701 So. 2d 774, 783 (Miss. 1997)(stating "no warning need be given to employees of a contractor so long as the contractor knows of the danger.").

A. *Myatt Had Knowledge Regarding Any Danger Related To The Eighteen-Wheel Trucks.*

Common sense dictates that Myatt knew about the dangers related to Bailey's eighteen-wheel truck. As a result of this knowledge, Peco Foods did not have any duty to warn Myatt of the idling eighteen-wheel truck. The Mississippi Court of Appeals considered this very question of whether an employee's actual knowledge of a particular condition absolved the premises owner of any liability. *See Ratcliff v. Ga. Pac. Corp.*, 916 So. 2d 546, 549 (Miss. Ct. App. 2005). In *Ratcliff*, plaintiff "went to the Georgia Pacific plant . . . to pick up a load of particle board for his employer . . . ." *Ratcliff*, 916 So. 2d at 547. While covering the load of particle board with a tarpaulin, plaintiff slipped on a clear plastic material covering the load and fell to the concrete below. *Id.* According to the Court of Appeals, plaintiff knew that "the clear plastic was slippery on prior occasion" and he previously "testified that he covered and secured similar loads with the clear plastic on at least twenty prior occasions." *Id* at 549. Thus, the Court held that plaintiff's "knowledge that the clear plastic material was slippery and his experience securing loads with that material relieved the [premises owner] of any duty to warn." *Id.*

In this case, Myatt had been employed with Mid-Mississippi for a little over a year. (R. 83, pg. 64, ln. 13-15). Robinson and Myatt had been coming to the Philadelphia facility every day for at least three months before the accident. (R. 69, pg. 8, ln. 15-22). The facility is a feed mill which receives various products by rail and eighteen wheelers, mixes them together, and sends feed out through eighteen wheelers to the surrounding chicken farms. Similar to the facts in *Ratcliff*, Myatt had previous experience working at the facility and had knowledge about the site itself. Based on the deposition of Robinson, Myatt knew that trucks were constantly coming in and out of the Philadelphia facility. (R. 70, pg. 13, ln. 7-25; R. 88, pg. 82, ln. 5-14). Furthermore, Myatt knew that it was typical for the trucks to line up and sit idle at any point during the day. (R. 71, pg. 14, ln. 5-11). On the morning of the incident, trucks began lining up around 9:30 a.m. or 10:00 a.m. (R. 70, pg. 12, ln. 11-24). As the trial court stated, "there must be some lineup of the vehicles there for [the] purpose [of processing chicken feed], and it would be common judgment for any person to know that there is a lineup and that the last vehicles would be moving at some point in time." (Tr. at 15, ln. 4-11).

Based on the deposition of Robinson, Myatt also knew that Bailey's truck had remained idle for over three hours in the same location. (R. 71, pg. 17, ln. 15-18). As the trial court stated, "[c]ounselor [for Myatt] just argued that the truck was sitting there idling for some one hour before the incident. This would certainly be knowledgeable to the Plaintiff in this case." (Tr. at 15, ln. 12-15). It is evident that Myatt had actual knowledge of the daily traffic at the Philadelphia facility and had actual knowledge of Bailey's idling truck.[1] Thus, Myatt knew of any potential danger from working in the vicinity of the line of trucks. As the trial court stated,

[1] Even if Myatt did not have actual knowledge of the dangers, he had constructive knowledge of the danger as pointed out by the trial court: "it would be *common judgment* for any person to know that there is a lineup and that the last vehicles would be moving at some point in time." (Tr. at 15, ln. 4-11)(emphasis added). Since Myatt at least had constructive knowledge regarding the trucks, Peco Foods did not have a duty to warn. *See Sexton*, 235 So. 2d at 270.

"I find it very difficult to understand that before they move up the vehicles in line, that [Peco Foods has] a duty to go out and warn a subcontractor there who has been there for some several months, familiar with the operations." (Tr. at 15, ln. 18-23). As a result of this knowledge by Myatt, just as in *Ratcliff*, Peco Foods is relieved of its duty to provide warning of any danger related to an idling eighteen wheel truck and cannot be held liable for the death of Myatt.

B. *Mid-Mississippi, Myatt's Employer, Had Knowledge Regarding Any Danger Related To The Eighteen-Wheel Trucks.*

Even if Myatt was somehow unaware of the potential danger related to the idling trucks, his employer, Mid-Mississippi, was certainly aware of the danger. This knowledge by Mid-Mississippi absolved Peco Foods from any liability in this case. Mid-Mississippi started construction on the feeding bins at the Philadelphia facility in October of 2004 - over eight months before the incident. (R. 101, pg. 24, ln. 19-25). Mid-Mississippi had been using the same work area Myatt and Robinson were working on the day of the incident off and on for eight months. (R. 113, pg. 73, ln. 20-25). According to Robinson, McRaney was next to Myatt and Robinson when Nelson told them where they would be working that day. (R. 90-91, pg. 93-94). In fact, McRaney, the on-site foreman of Mid-Mississippi, inspected the work area of Myatt at least three times during the day - once only moments before Bailey's truck moved forward. (R. 73, pg. 22, ln. 3-18; R. 89, pg. 86, 13-25; R. 91, pg. 95, ln. 5-23). Thus, Mid-Mississippi, the employer of Mr. Robinson and Mr. Myatt, knew of any danger associated with the location of the employees' workplace.[2] Since Mid-Mississippi was aware of any potential danger, Peco Foods cannot be held liable for the death of Mr. Myatt.

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[2] Once again, even if Mid-Mississippi did not have actual knowledge of the dangers associated with the eighteen-wheel trucks, it had constructive knowledge of these dangers based upon the actions of McRaney. As previously stated, constructive knowledge of the danger still relieves Peco Foods of its duty to warn Myatt. *See Sexton*, 235 So. 2d at 270.

In *Mississippi Chemical*, the Mississippi Supreme Court considered a similar situation where an employee of a contractor was injured while working on a premises owner's building. 368 So. 2d at 211. The Court, after stating that Mississippi Chemical had an obligation to provide a safe working environment and to warn of any latent dangers, found that Mississippi Chemical deserved a preemptory instruction based on the fact that the contractor was told of the danger which caused the accident. *Id.* The Court stated, "[a]ssuming that Mississippi Chemical did not furnish [plaintiff] with a reasonably safe place to work, it did not have the duty to notify [plaintiff] of the danger of walking on transite because his employer, an independent contractor, had knowledge of the danger of walking on transite . . . ." *Id.* Certainly, in this case, Mid-Mississippi knew of the dangers of a tractor trailer rig moving forward or even working where a tractor trailer rig could possibly move forward.

Another case directly on point is *Jones v. James Reeves Contractors, Inc.*, 701 So. 2d 774 (Miss. 1997). In *Jones*, a "worker and two others were killed when the walls of a ditch being excavated for a sewer line caved in, burying the workers and smothering them to death." *Jones*, 701 So. 2d at 775. The Mississippi Supreme Court, citing *City of Jackson v. Ball*, 562 So. 2d 1267, 1270 (Miss.1990), stated, "no warning need be given to employees of a contractor so long as the contractor knows of the danger." *Id.* at 783; *see also Bevis v. Linkous Const. Co., Inc.*, 856 So. 2d 535, 540 (Miss. Ct. App. 2003)(stating, "actual knowledge on the part of the contractor of a hazardous condition absolves the property owner of any further duty to warn or otherwise protect the contractor and its employees . . . ."). In *Jones*, the workers' supervisor was on the site at all times and represented to the premises owner that he had visited the site and had familiarized himself with the soil conditions. *Jones*, 701 So. 2d at 783. As a result of the supervisor's knowledge, the premises owner "had no duty to warn of a danger which [the supervisor] should reasonably have appreciated before exposing himself (and by extension, his

employees) to it." *Id.* Here, McRaney was on site at all times while Myatt and Robinson worked at the Philadelphia facility and McRaney inspected Myatt and Robinson's work area at least three times prior to the incident. (R. 73, pg. 22, ln. 3-18; R. 89, pg. 86, 13-25; R. 91, pg. 95, ln. 5-23). Myatt's employer had familiarized himself with the work area and appreciated any dangers associated with the work area. Based upon this knowledge, Peco Foods had no duty to warn of any danger related to Bailey's truck.

The concept that when an employee of a contractor or the contractor is aware of a danger, the owner of the premises is relieved of a duty to warn of that danger is not a mere technicality of premises liability law. The law is based on sound reasoning. If such was not the law, the premises owner would be forced to warn any contractor and all of the contractor's employees of any and all known or obvious dangers. That would be simply impossible. As the lower Court pointed out, "I find it very difficult to understand that before [Peco] move[s] up the vehicles in line, that they have a duty to go out and warn a subcontractor there who has been there for some several months, familiar with the operation." (Tr. at 15, ln. 18 – 23). The Judge was correct, and the law does not require such a warning.

C. *It Is Irrelevant Whether Peco Foods Maintained Substantial* De Facto *Control Over Myatt's Work Area.*

Myatt in his brief argues that there is a genuine issue of material fact as to whether Peco Foods maintained substantial *de facto* control over Myatt's work area. *See* Brief of Myatt at 18. However, whether Peco Foods maintained substantial *de facto* control over Myatt's work area is irrelevant. As previously stated, the general rule under Mississippi law is a premises owner has a duty to an independent contractor and its employees to "furnish a reasonably safe place to work or give warning of danger." *Miss. Chem.*, 368 So. 2d at 222. As an exception to this general rule, a premises owner "does not have a duty to protect an independent contractor against risks arising from or intimately connected with the work . . . ." *Int'l Paper Co. v. Townsend*, 961 So.

2d 741, 749 (Miss. Ct. App. 2007)(quoting *Coho Res., Inc. v. McCarthy*, 829 So. 2d 1, 11 (Miss. 2002)). However, this exception does not apply when the premises owner "maintains substantial de jure or de facto control over the work to be performed." *Townsend*, 961 So. 2d at 749 (quoting *McCarthy*, 829 So. 2d at 13).

In this case, Peco Foods is not relying on this exception. Peco Foods did not have a duty to warn Myatt of any danger related to Bailey's idling truck since he and his employer had knowledge of the danger – not because the risks associated with the eighteen-wheel trucks were intimately connected with Myatt's work. Thus, it is irrelevant as to whether Peco Foods maintained substantial *de facto* control over Myatt's work area and is not a genuine issue of material fact.

D. *Myatt Does Not Have A Separate Independent Action Against Peco Foods.*

In his brief, Myatt argues Peco Foods is still liable to Myatt for an "independent act of negligence" by Gary Nelson. *See* Brief of Myatt at 18. Myatt cites *Mississippi Chemical Corp.* as law in support of this assertion: "[O]ne who employs an independent contractor is nevertheless answerable for his own negligence." *Miss. Chem.*, 368 So. 2d at 222. However, Myatt fails to quote the remaining portion of the law regarding premises owners as set forth in *Mississippi Chemical*. The Mississippi Supreme Court continued in *Mississippi Chemical* and stated that "an employer owes a duty to an independent contractor and the latter's employees to turn over to them a reasonably safe place to work or to give warning of danger." *Miss. Chem.*, 368 So. 2d at 222. Further, The Mississippi Supreme Court set forth the exceptions to the general rule imposed on employers or premises owners. *Id.* Based upon the Court's decision in *Mississippi Chemical*, there is not an additional act of negligence that can be asserted against the premises owner. Thus, Myatt cannot assert an independent action for negligence against Peco Foods in this case separate from the duties set forth in *Mississippi Chemical* for premises owners.

E. *Open And Obvious Defense Is A Complete Bar For Recovery By Independent Contractors.*

Myatt in his brief argues that the trial court incorrectly held that the "open and obvious rule would apply as an ultimate bar to Myatt's claim . . . ." *See* Brief of Myatt at 20. Myatt asserts that "Mississippi is a comparative negligence jurisdiction and 'open and obvious' is not a complete bar to recovery." *Id.* (citing *Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss. 1994)). There is no Mississippi Supreme Court opinion directly on point on whether the open and obvious defense still applies to independent contractors.

It is not the first time, however, that a plaintiff on appeal has made this argument. *See Jones*, 701 So. 2d at 783. In *Jones*, the Plaintiff "claim[ed] that the trial court based its decision on the 'open and obvious' defense" and the trial court should have done so since the the Mississippi Supreme Court "abandoned the 'open and obvious' defense as a complete bar to recovery in premises liability cases in *Tharp v. Bunge Corp.* 641 So. 2d 20 (Miss. 1994)." *Id.* In response, the Court stated "after reading the entire ruling of the trial court, especially as it pertains to [the premises owner], it is apparent that the words 'open and obvious' or any hint that such a defense might have been the basis for the trial court's decision are strictly a figment of the plaintiffs' attorney's imagination." *Id.* Here, the trial court did not make any mention of the words "open and obvious" or any hint that it relied upon the defense for the basis of its decision. Thus, as in *Jones*, the Court should not address this point and affirm the trial court's decision.

Although the Mississippi Supreme Court has not directly opined whether the "open and obvious" defense still applies to independent contractors, the Fifth Circuit Court of Appeals has made an *Erie* guess based upon its interpretation of Mississippi law. *See Stokes v. Emerson Elec. Co.*, 217 F.3d 353, 357-58 (5th Cir. 2000); *Hill*, 121 F.3d at 175-76. In *Strokes v. Emerson Electric Co.*, plaintiff, an independent contractor, was injured when the scissor lift he was driving fell as he was going down a loading ramp. *Strokes*, 217 F.3d at 355. Looking to Mississippi

law, the Court of Appeals acknowledged that "[t]he Mississippi Supreme Court eliminated the open and obvious exception in *Tharp v. Bunge Corp.*" *Id.* at 357. However, after examining the *Jones* decision, the Court of Appeals determined that the knowledge exception survived *Tharp* based on the Mississippi Supreme Court's holding in *Jones* that even though the premises owner had a duty to make the premises safe, the duty only remained intact if the employer did not know of the danger condition. *Id.* Thus, the Court of Appeals held "that, by reintroducing the contractor's knowledge as a factor in determining the negligence of the premises owner [in *Jones*], the Mississippi Supreme Court brought the open and obvious bar back into Mississippi law through the back door in cases dealing with independent contractors." *Id.* at 357 (quoting *Hill*, 121 F.3d at 174)(internal quotation marks omitted).

The Fifth Circuit Court of Appeals correctly interpreted Mississippi law. The open and obvious defense is a complete bar for recovery by independent contractors. Myatt and his employer had knowledge about the dangers of Bailey's truck. Thus, since Myatt and his employer had knowledge of this condition, Myatt is barred under the open and obvious defense from recovering any damages from Peco Foods.

III. TRIAL COURT PROPERLY ENTERED FINAL JUDGMENT PURSUANT TO RULE 54(B) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

In dismissing Peco Foods, the trial court entered the judgment pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure. (R. 7-8). Rule 54(b) provides, "when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the . . . parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment." MISS. R. CIV. P. 54(b). "The general requirements [of Rule 54(b)] are that the case include . . . multiple parties . . . and . . . that all the rights and liabilities of at least one party have been adjudicated." MISS. R. CIV. P. 54(b) cmt. The decision to enter a Rule 54(b) final judgment rests in the discretion of the trial

court due to its familiarity with the case. *Ind. Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co.*, 456 So. 2d 750, 753 (Miss. 1984). "On appeal, a 54(b) final judgment may be reviewed and reversed if [the Mississippi Supreme Court] finds the trial judge abused his discretion in entering the final judgment." *Ind. Lumbermen*, 456 So. 2d at 753.

The Mississippi Supreme Court first considered the application of Rule 54(b) in *Indiana Lumbermen Mutual Insurance Co. v. Curtis Mathes Manufacturing Co.* In *Indiana Lumbermen*, a homeowners' television set caught fire and damaged their home. *Ind. Lumbermen*, 456 So. 2d at 753. As a result, the plaintiff, the homeowners' insurance company, sued the manufacturer of the television set and the repairman and his employer who repaired the television set only twelve days before it caught fire. *Id.* The repairman and his employer filed a motion to dismiss on the basis the plaintiff's cause of action was barred by the statute of limitations. *Id.* at 752. The trial court rendered a final judgment for the repairman and his employer under the provision of Rule 54(b). *Id.*

In *Indiana Lumbermen*, the Mississippi Supreme Court affirmed the trial court's entry of a 54(b) judgment for the repairman and his employer. *Ind. Lumbermen*, 456 So. 2d at 753. The Court recognized that "[i]n cases involving multiple parties, a trial judge is authorized to enter a final judgment when it terminates the case as to one or more of the parties." *Id.* at 752; *see Laird v. ERA Bayshore Realty*, 841 So. 2d 178, 180-81 (Miss. Ct. App. 2003). Furthermore, the Court noted that the plaintiff sued the manufacturer, and the repairman and his employer on different theories of negligence. *Id.* at 753. Plaintiff sued the manufacturer for a products liability claim and the repairman and his employer for failing to use reasonable care in repairing the television set. *Id.* Thus, the Court held that "the trial judge correctly entered final judgment and certified the case as authorized by Rule 54(b)." *Id.*

The facts of *Indiana Lumbermen* are very similar to the facts presented to the Court.[3] In this case, Myatt filed his cause of action against Peco Foods, the owner of the property where the incident occurred, and Winston Bailey, the driver of the truck. Similar to *Indiana Lumbermen*, "[t]he charges of negligence against the two defendants are on different theories and are unrelated." *Indiana Lumbermen*, 456 So. 2d at 753. The cause of action against Peco Foods is based upon premises liability and the cause of action against Bailey is based upon negligent operation of a motor vehicle. Even Bailey admits this fact in his Brief: "The claims asserted against Winston Bailey and Peco Foods might be legally distinct[4] in that the theories of negligence on which they are based apply to different types of alleged tortfeasors." *See* Brief of Bailey at 7. Furthermore, like *Indiana Lumbermen*, the 54(b) judgment fully adjudicated the claims against Peco Foods. Thus, based upon *Indiana Lumbermen*, this Court should affirm the trial court's decision to enter a 54(b) final judgment for Peco Foods.

The Supreme Court also provided further guidance regarding the application of Rule 54(b) in *Cox v. Howard, Weil, Labouisee, Friedrichs, Inc.*, 512 So. 2d 897 (Miss. 1987). In *Cox*, the Court observed that the trial court's discretion to enter a Rule 54(b) judgment "must be exercised in the interest of sound judicial administration, taking into account judicial

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[3] Conversely, Bailey argues that this case is not similar to *Indiana Lumbermen*, but is similar to the facts in *Cox v. Howard, Weil, Labouisee, Friedrichs, Inc.*, 512 So. 2d 897 (Miss. 1987). *See* Brief of Bailey at 7-8. However, *Cox* is distinguishable from the facts of this case. In *Cox*, the trial court only dismissed one of the defendant's three counterclaims against the plaintiff. *Cox*, 512 So. 2d at 899. The Court in *Cox* held that "[w]hen there is a judgment dismissing one count of a complaint or counterclaim, a Rule 54(b) finality should never even be considered by the trial court unless the remainder of the case is going to be inordinately delayed, and it would be especially inequitable to require a party to wait until the entire case is tried before permitting him to appeal." *Id.* at 900. Here, the trial court dismissed Peco Foods as a party and not simply one claim against Peco Foods. Thus, *Cox* is inapplicable to this case.

[4] In his Brief, Bailey argues that although the claims against the two defendants are legally distinct, "there is no factual distinction in the time, location or course of the occurrence . . . ." *See* Brief of Bailey at 7. "The fact that the claims arise from the same transaction or occurrence, however, is not alone sufficient to show that the [trial court] abused its discretion." 10 MOORE'S FEDERAL PRACTICE § 54.23 (2008). Thus, this fact alone is not sufficient for the Court to reverse the trial court's entry of the Rule 54(b) judgment.

administrative interests, as well as the equities involved." *Cox*, 512 So. 2d at 900 (citation and internal quotation marks omitted). Furthermore, the Court noted that a Rule 54(b) judgment "should be reserved for a case where a delay in the appeal might result in prejudice to a party." *Id.*

Here, all the parties involved would be prejudiced if the trial court did not enter a Rule 54(b) judgment. Without the Rule 54(b) judgment, Peco Foods would be forced to wait until after the trial between Myatt and Bailey for a determination of whether the trial court properly dismissed it. *See Cox*, 512 So. 2d at 900 (holding "it would be especially inequitable to require a party to wait until the entire case is tried before permitting him to appeal."). Likewise, Myatt would potentially have to litigate this case multiple times depending on the outcome of the appeal on the trial court's dismissal of Peco Foods. If after the trial against Bailey the Supreme Court reverses the trial court's decision against Peco Foods, then Myatt would be forced to litigate this matter against at least Peco Foods, if not both Peco Foods and Bailey.

Bailey will also be prejudiced if this Court reverses the 54(b) judgment. If the 54(b) judgment is reversed, then during the trial between Myatt and Bailey, Bailey will not be able to argue that Peco Foods is comparatively negligent for the death of Todd Myatt. If after the trial between Myatt and Bailey, it is determined on appeal that the trial court erred in granting summary judgment on behalf of Peco Foods, then all of the parties will have to re-litigate the case at trial. The Rule 54(b) judgment ensures Myatt and the other parties will only have to litigate this case once. Thus, the trial court's entry of the Rule 54(b) judgment not only supports sound judicial administration, but also minimizes any potential prejudice against the parties. Since the trial court did not abuse his discretion in entering a 54(b) judgment in favor of Peco Foods, this Court should affirm his decision.

CONCLUSION

The trial court's holdings should be affirmed in all respects. The trial court properly granted summary judgment for Peco Foods based upon the knowledge of Myatt and his employer regarding any dangers related to Bailey's truck. Furthermore, the trial court did not abuse his discretion in his entry of a Rule 54(b) Final Judgment in favor of Peco Foods.

This the 30th day of June, 2008.

Respectfully submitted,

PECO FOODS OF MISSISSIPPI, INC.

By: _____
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CERTIFICATE OF SERVICE

I, one of the attorneys for Appellee, Peco Foods of Mississippi, Inc., do hereby certify that I have this date served a true copy of the above and foregoing Brief of Appellee, via United States Postal Service, postage prepaid, on the following:

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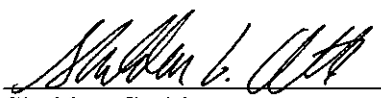
THIS, the 30th day of June, 2008.



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