

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**

APPELLANT

VS.

CAUSE NO. 2007-TS-01824

PECO FOODS OF MISSISSIPPI, INC.

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
NESHOPA COUNTY, MISSISSIPPI**

REPLY BRIEF OF APPELLANT

Oral argument is not requested

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I. PECO FOODS OWED A DUTY TO WARN MYATT REGARDING ANY ALLEGED DANGER IT CREATED

A. Whether Myatt Knew Of Any Danger Created By Peco Is A Question Of Fact For The Jury.

Peco argues Myatt's knowledge of any danger would be "common sense." An argument based on "common sense" implies what would be generally known by the group. But in this case the standard is what did Myatt know or not know. Only a jury should be determining what Myatt may have known or not known. Most important is there is no testimony in the record that Myatt had actual or constructive knowledge of when the tractor trailers were going to move. But the testimony does show Peco created the condition and failed to warn Myatt about it. The facts show:

1. The day the accident occurred was the first day that Myatt and Robinson had worked in that particular area of the Peco plant (R. 79, pg. 46, ln. 1-8; R. 91, pg. 95, ln. 24 to pg. 96, ln. 2). On prior days they worked in different areas. (R. 70, pg. 10, ln. 16- 18). They were following the instructions of Peco manager Gary. (R. 92, pg. 99, ln. 20-25).
2. Prior to the date of the accident tractor-trailer trucks had never lined up in that work area before. (R. 71, pg. 14, ln. 1-4). The tractor trailers would come in to the dock area, a different area, unload and leave. (R. 70. pg. 13, ln. 13-25)
3. Myatt and his co-worker Robinson were placed in this particular work area by Peco manager Gary Nelson (R. 71, pg. 15, ln. 1-6; R. 90, pg. 92, ln. 10-13; R. 90, pg. 93, ln. 18-21).

4. Myatt and Robinson were placed in the work area with no tractor trailers in the area. (R. 70, pg. 12, ln. 7-10). The tractor trailers were then lined up between 9:30 and 10:00 a.m. inside the same work area. (R. 70, pg. 12, ln. 11-16)
5. Once the trucks were lined up in the work area they were left running and were not shut off. (R. 70, pg. 12, ln. 17-24). The line consisted of 7 to 8 tractor trailers. (R. 70, pg. 13, ln. 1-2).
6. In the days prior to the accident there were never more than 1 or 2 trucks at a time on the property and they unloaded in a different area at the dock. A line had never formed before (R. 70, pg. 13, ln. 7-21).
7. Before the Bailey tractor trailer was motioned to move forward by Peco in the afternoon the line of tractor trailers had not moved all day. (R. 71, pg. 17, ln. 15-21).
8. Myatt was having to paint only 5 feet away from Bailey's tractor trailer. (R. 72, pg. 18, ln. 12-14).
9. No Peco employee told Myatt or Robinson that the line of trucks would start moving. (R. 73, pg. 23, ln. 13-16). Gary Nelson, Peco manager did not warn Myatt or Robinson before he motioned the line of tractor trailers to start moving. (R. 92, pg. 98, ln. 5-8).
10. Peco did not provide Myatt or Robinson with any markers, cones, flags, or any other equipment to designate their work area. (R. 75, pg. 31, ln. 11-25).
11. There were no warning signs in or around the work area or anywhere on the Peco property indicating there were moving trucks that workers should be aware of. (R. 79, pg. 46, ln. 23-25; R. 79, pg. 47, ln. 1-4).

12. At the time of the accident the loading mill at the Peco plant had been shut down for several hours, causing the trucks to form a line off to the side of the travel lane and sit still for several hours while waiting to unload. (R. 71, pg. 17, ln. 15-25; R. 85, pg. 70, ln. 3-8).
13. The tractor trailer involved in the accident had arrived at the Peco plant between 9:30 and 10:00 a.m. and had remained idling in the same position all day next to the area where Myatt and Robinson were working. (R. 91, pg. 95, ln. 9-14).
14. Peco manager Nelson directed the Bailey tractor trailer to move even though he knew Myatt was next to the tractor trailer working. (R. 107, pg. 47, ln. 16-22).
15. After Myatt was run over by the truck Peco manager Gary Nelson instructed the contractors to rope off the work area. (R. 93, pg. 102, ln. 2-6).

Under these facts the danger was created by Peco, controlled by Peco, and preventable by Peco. Any assertion that "Myatt should have known better than to let us endanger his life" is not a correct assertion under the facts.

Peco makes a general assertion that Myatt knew trucks were moving in the area in which he was working. (R. 70, pg. 13, ln. 7-25; R. 88, pg. 82, ln. 5-14). A reading of these excerpts cited by Peco does not support their contention that Myatt knew about the trucks. It is witness Robinson explaining how trucks would come in and unload during the day at the mill no more than one or two at a time. The area Myatt was working was a substantial distance away from where the actual unloading site was. (R. 79, pg. 46, ln. 5-8). His work area was not at the unloading dock. It was far enough away to not be around a tractor trailer that was unloading. It is mere speculation on the part of Peco to state that a contractor would know when an idling tractor trailer that had been sitting still all day would move, especially when the

truck is in a different area than the loading dock and the contractor had no notice of when or how the tractor trailer would move.

There is no testimony which says that Myatt had actual knowledge of when the trucks would move. Peco alleges there is constructive knowledge; however, the constructive knowledge argument is based on the trial court's opinion of "common knowledge." If we are going to start speculating on what someone knew or didn't know based on generalizations when there is no clear fact testimony to follow then a jury needs to make that decision.

Peco relies on *Ratliff v. Ga. Pac. Corp.*, 916 So.2d 546 (Miss. Ct. App. 2005) to suggest that where there is actual knowledge of an unsafe condition by the employee said knowledge absolves the premises owner of any liability. In *Ratliff* there was testimony that the plaintiff was injured when he slipped on the clear plastic material he was covering his load with. The key testimony was that the plaintiff knew "the clear plastic was slippery on prior occasion" and he testified he had covered his load with the plastic on at least twenty prior occasions. Myatt's facts are distinguishable. Most importantly, Myatt was working in the designated work area for the first time ever. Robinson testified it was their first time working in this area.

Q: Okay. Before, when you've been working on that property, had you had other areas that you were working on?

A. Yeah, that was the first time we had been that close to the trucks to the driveway.

Q. So, and the other days when you worked there, Peco never put you out in the truck travel lane, did they?

A. Right, we was further down the driveway.

(R. 78, pg. 45, ln. 25; R. 79, pg. 46, ln. 1-8).

See also,

Q: You hadn't worked – and you hadn't worked in that spot any other days?

A: Not in that same spot, no.

Q: Because it was a different project, painting the stuff was different?

A: Right.

(R. 91, pg. 95, ln. 24-25, pg. 96, ln. 1-4).

Further, Myatt had been placed in that work area by the Peco manager, Gary Nelson.

Q: No one instructed you or told you that you couldn't be there working, right?

A: Right, that's where they told us to be.

Q: So would it be fair to say that all you did was follow the instructions provided by Gary?

A: Right.

(R. 92, pg. 99, ln. 20-25).

Peco manager Gary Nelson did not warn Myatt and Robinson that trucks would park in their work place all day and then suddenly start moving without notice.

Q: Daryl, after lunch, when you were at the Peco plant working, did Gary warn you that the trucks were going to be moving after lunch?

A: No.

(R. 92, pg. 98, ln. 5-8).

For Myatt to have actual knowledge of the trucks moving in and out of his work area there must be some testimony in evidence for the Court's consideration. There is none. There is testimony that Myatt and Robinson were working in the area for the first time. (R. 71, pg. 15, ln. 16). They were placed there by Peco. (R. 71, pg. 15, ln. 1-5). Peco then parked a line of trucks in their work area. (R. 70, pg. 12, ln. 7-24). The trucks sat idling from between 9:30 and 10:00 a.m. for several hours without moving. (R. 71, pg. 16, ln. 7-10; R. 92, pg. 98, ln. 19-25; R. 92, pg. 99, ln. 1-3). These tractor-trailers were parked in Myatt's work area and only about 5 feet away from where Myatt and Robinson were actually painting. (R. 72, pg. 18, ln. 12-14). The key issue here is not whether Myatt knew he was working 5 feet away from a line of parked trucks but what duty Peco had to Myatt when they told him to paint in that particular spot and then parked tractor-trailers on top of his work area. It was error for the trial court to assume Myatt wasn't using common judgment when working in the area. He was put there by Peco. He had to do his job. Any potential danger in the work area was created by Peco when they stuck Myatt and the trucks and trailers in the same space and then failed to warn Myatt

when they decided to move the tractor trailers. According to Robinson the mill had been broken down all day and therefore the trucks had not moved for hours. (R. 71, pg. 17, ln. 15-25; R. 72, pg. 18, ln. 1-4). The line of trucks was at least seven or eight long. (R. 70, pg. 13, 1-2). No one from the Peco plant came to tell Myatt and Robinson that they were going to start moving the trucks forward. (R. 73, pg. 23, ln. 13-16). Myatt and Robinson were asked by Peco to paint 5 feet away from the side of the tractor-trailer. When the trailer suddenly moved it swung over into the last 5 feet of space between Myatt and the trailer and ran him over. (R. 74, pg. 28, ln. 4-19). The trial court was too generous in its assumption of what Myatt could have known or not known. The testimony of witness Robinson verifies that Myatt was in an environment controlled by Peco. No testimony indicates that Myatt knew or had reason to know he would be run over or was in any type of danger. Reviewing the testimony in the light most favorable to the plaintiff shows that there was a question of fact regarding whether Myatt had actual or constructive knowledge of the danger of a moving tractor-trailer.

B. Whether Myatt's Employer Was Aware Of The Dangerous Condition Is A Question Of Fact For The Jury.

Peco makes two arguments here: the first is that Myatt's supervisor was aware of the potential danger. This argument fails for two reasons: 1) there is no testimony in the record to support this, and 2) Peco put Myatt in that work area and gave him or his boss no warning before it began moving the trucks which had sat immobile for hours.

No testimony submitted before the trial court by any witness or plaintiffs experts indicates Myatt's supervisor or Myatt himself were aware of any potential danger. The record consists of testimony from witnesses Daryl Robinson, Peco manager Gary Nelson, expert

David Monistere's report, accident reconstructionist Tim Corbitt's report, and job safety inspection documents, among other things. No one testified that Mid-Mississippi manager Richard McRaney knew that the area was unsafe or that the tractor-trailers were going to move. This theory by Peco operates under the same premise asserted against Myatt – that Myatt or his boss had some power to override the direction of Peco. Only Peco could control the movement of the trucks in the waiting area. Only Peco controlled the area where Myatt was working.

Q: Could Richard McRaney [Myatt's boss] have moved it [the work area]?

A: No, he had to go where Gary [Peco manager] told us to go.

(R. 91, pg. 97, ln. 3-5).

Myatt's boss could stop by the area and check to see the progress of the painting job by Myatt and Robinson, but as an employee of Mid-Mississippi he had no control or authority to move them to a safer area or to control where the tractor trailers were to park or when they were to be moved. Only Peco could do that. Therefore, to say that Myatt or his boss knew of the danger is inaccurate. There is no testimony in the record to support that theory because the ultimate control over the work area was maintained by Peco and the level of danger existing in the work area was the sole responsibility and control of Peco.

The premises owner must provide a reasonably safe place to work or must give warning of danger. But if the danger arises out of or is intimately connected with the contracted work the premises owner is relieved of his duty. *Nelson v. Sanderson Farms, Inc.*, 969 So.2d 45 (Miss. Ct. App. 2007). There is an existing question of fact about whether Peco provided a reasonably safe place for Myatt to work. Peco designated the work site. (R. 70, pg. 11, ln. 20-25; R. 70, pg. 12, ln. 1-4; R. 79, pg. 46, ln. 18-22). Peco put Myatt in the work site. (R. 92, pg. 99, ln. 20-55). Peco did not relinquish control of the site to Myatt's boss. (R. 91, pg. 97,

ln. 3-5). Peco placed the trucks in the work site after putting Myatt in it. (R.110-11, pg. 61, ln. 17 to pg. 62, ln. 16). Peco maintained control over the work site and movement of the tractor-trailers. (R. 106, pg. 45, ln. 12). Peco moved the tractor-trailers without warning Myatt or signaling they were moving the trucks. (R. 78, pg. 45, ln. 15-24). Peco admits they signaled the truck to move even though Gary Nelson could not see down the left side of the truck to make sure no one was next to the truck. (R. 105, pg. 40, ln. 12-20). And after Myatt was run over Gary Nelson admits he had seen Myatt in the work area by the truck earlier (R. 107, pg. 47, ln. 16-22). Peco provided no flagman to warn Myatt of the trucks moving. (R. 78, pg. 45, ln. 15-24). Finally, Peco did not go down to the work area and tell Myatt the trucks were going to move. (R. 73, pg. 23, ln. 13-16).

Myatt and Robinson were painting pipes and a metal box sitting on the ground. (R. 86, pg. 74, ln. 19 to pg. 75, ln. 2). Getting run over by a tractor-trailer is not the type of outcome “intimately connected” to painting in a side lot. Myatt was not killed by an exploding paint gun, nor did the box bin he was painting fall on him and crush him. Myatt was killed because Peco placed him in an unsecured work area and then parked tractor-trailers on top of the work area. After creating a hazardous situation which Myatt could not move from, Peco held a duty to provide some type of protection or warning. They chose not to. Reviewing the facts in a light most favorable to the plaintiff, the trial court erred by ignoring issues of fact. Remember, Peco’s own Job Site Safety Inspection Program (R. 132-134) gave Peco the power to “monitor and evaluate the safety of contractors” (R. 133) and “to admit the safety practices being carried out by outside contractors during their work routines while performing work at Peco Foods, Inc. facilities.” (R. 133).

Just being at the work site is not enough to prove constructive or actual knowledge of a dangerous condition on the part of Myatt and his boss. There must be undisputed facts to support this contention. There are none. At best there is a question of fact about what Myatt and his supervisor did or did not know, and at worst the facts support Peco creating a dangerous work area and placing Myatt in the middle of it without regard for his safety. The trial court erred in making assumptions not supported by the evidence and which were questions for the trier of fact to consider.

C. De Facto Control Of Peco Is Important Issue

The “intimately connected with the work” exception states that 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). This exception does not apply when the premises owner “maintains substantial de jure or de facto control over the work to be performed.” *Townsend*, at 749. The facts presented create a question for the jury as to whether Peco was controlling the work to be done.

One of the arguments submitted by Peco to the trial court is that they could not be held responsible because Peco had no control over the work area where they placed Myatt. In *Magee v. Transcontinental Gas Pipeline*, the Court held that where the owner “devolves (passes down) upon the contractor the right and fact of control of the premises and the nature and details of the work, the owner has no liability.” *Magee*, 551 So.2d at 182 (Miss. 1989). But if the owner maintains control over the work site or control over the work being conducted he is **not** relieved of his duties. The evidence submitted by plaintiff at least presents a jury question as to Peco’s control over Myatt and Myatt’s work area. Robinson testified that the Peco Foods

manager told them (Mid-Mississippi workers) what job to do each day. (R. 79, pg. 46, ln. 12 – 14; R. 91, pg. 97, ln. 3 – 12). Robinson also testified that Peco mill manager Gary Nelson personally designated the work area for Myatt the morning of the incident. (R. 70, pg. 11, ln. 20 to pg. 12, ln. 4; R. 90, pg. 92, ln. 8 – 17; R. 91, pg. 94, ln. 1 - 12). And Nelson directed Myatt and Robinson to work in the specific area. Robinson testified “[G]ary said this is where y’all will be working at.” (R. 70, pg. 12, ln. 1). Gary put us in that place to work that morning. (R. 71, pg. 15, ln. 1-6).

Myatt and Robinson were told to work in a makeshift dirt area next to the concrete driveway for 18-wheeler trucks that were pulling up to load and unload. Once the tractor trailers were parked in the Myatt work area and off the paved driveway Myatt and Robinson were working so close to the trucks they could reach out and touch them. (R. 72, pg. 21, ln. 16). They were three to four feet away from the idling trucks. (R. 73, pg. 24, ln. 24). Robinson testified that after Myatt was run over the Peco manager Gary Nelson admitted he never should have put the workers in that spot. (R. 76, pg. 35, ln. 6-15). Robinson testified that after Myatt was run over Peco manager Nelson instructed him to clean up the work area, pick up the paint gun and air lines and move everything so the ambulance could get in. (R. 75, pg. 32, ln. 21- pg. 33, ln. 8).

Peco’s own safety documents show that they maintained control over the manner in which the independent contractors were working. Peco’s Job Site Safety Inspection Overview procedure specifically states, “The Job Site Safety Inspection program is designed to monitor and evaluate the safety of contractors and also determine the effectiveness of the Contractor Safety Program at Peco Foods, Inc.” (R. 132-134 at 133). The inspection process comes with an inspection report of areas that Peco has power to control. The area over which Peco has control over the independent contractors is vast representing twenty different categories. They include

personal protective equipment of the independent contractors like hard hats, gloves, safety harnesses, safety glasses etc.; public protection including review of fences, barricades/reflectors, flagging/signs, traffic control; tools and equipment like air tools and couplings. (R. 132-134 at 134). The list of inspection areas that Peco can supervise or control over an independent contractor is very extensive and deliberate. (R. 132-134 at 134). Peco admits in its own safety documents, a Job Safety Inspection Overview (R. 132-134), that Peco plant personnel are “to audit the safety practices being carried out by outside contractors during their work routines while performing work at the Peco facilities.” One of the areas to be monitored by Peco is “barricades/reflectors, flagging/signs, traffic control.” Yet Peco admits they did not mark the area as a work area, mark the ground to designate where trucks could go and not go, and put up no warning cones. (R. 111, pg. 62, ln. 17 to pg. 63, ln. 21). And, Peco admits that pursuant to its safety policy it had the authority to move contractors from the work area or shut them down or send them somewhere else and that Peco had the authority to correct any safety violations by Mid-Mississippi and Todd Myatt. (R. 129, pg. 134, ln. 1 to pg. 135 ln. 13).

“Issues of fact sufficient to require denial of a motion for summary judgment are present where one party swears to one version of the matter in issue and another says the opposite.” *Titus v. Williams*, 844 So.2d 459, 464 (Miss. 2003). The issue of whether Peco Foods maintained substantial *de facto* control over Myatt’s work and work area on July 7, 2005 is a question for the finder of fact to weigh and determine.

In this case plaintiff presented evidence of Peco’s control over the work, work area and aspects of the work. The testimony showed Peco specifically directed Myatt where to work (R. 70, pg. 12, ln. 1), and specifically directed Myatt what to do each day. (R. 79, pg. 46, ln. 12-22; R. 76, pg. 35 ln. 6-15). Peco also specifically instructed Myatt and his co-worker Robinson to

paint in the area they were placed on July 7, 2005. (R. 90, pg. 93, ln. 12-22). After Myatt was run over Peco instructed the independent contractors to put up yellow tape to mark off the work area. (R. 77, pg. 38, ln. 22 – pg. 39, ln. 7). Additionally the Peco manager, Gary Nelson, instructed Robinson to clean up the work equipment at the accident site before the ambulance arrived. (R. 89, pg. 88, ln. 22).

In a similar case the Mississippi Court of Appeals reversed and remanded the trial court's grant of summary judgment. See, *Nelson v. Sanderson Farms, Inc.*, 969 So.2d 45 (Miss. 2006), finding there was a material fact existing as to whether Sanderson Farms retained substantial control over the job site and whether or not a de-energized bridge represented a hidden danger about which there was a duty to warn before re-energizing. In *Nelson*, the plaintiff was working as a contractor to repair a leak in an air pipe in close proximity to a rotating bridge. Nelson, while taking a short break, placed his hand on the bridge, which he believed was stopped, the wheel rolled over his left hand causing him to sustain severe injuries. There was conflicting testimony as to whether the bridge had been de-energized. The Court held "a genuine issue of material fact exists as to whether the bridge was shut down and restarted unbeknownst to Nelson and whether or not a de-energized bridge, under the circumstances present, represented a hidden danger about which Sanderson Farms had a duty to warn before re-energizing. These issues are properly jury issues." *Nelson* at 51. In the case *sub judice* the issue of whether Peco was in control of Myatt's work site and its actions created a hidden danger is in dispute and must be determined by a jury.

D. Myatt Holds A Separate Independent Action Against Peco.

The actions of Peco foreman Gary Nelson in moving the Bailey tractor trailer when he knew it was unsafe to do so is an independent act of negligence preventing dismissal of Peco. “[O]ne who employs an independent contractor is nevertheless answerable for his own negligence.” *Miss. Chemical Corp. v. Rogers*, 368 So.2d at 220 (Miss. 1979). Peco Foods is negligent in their placement of Myatt to work in an unsafe area. Peco is negligent for signaling the Bailey truck to move when it could not know if it was safe to move the truck. Peco is negligent for allowing vehicles to drive off the paved driveway and into the work area. Peco is negligent for not designating the area by lines or markings to show where the trucks could travel without hitting pedestrians. Peco manager Gary Nelson testified he was the one who placed the Bailey truck off the concrete driveway designated for trucks (R. 110, pg. 61, ln. 9-11) and in the work area occupied by Myatt. (R. 110, pg. 61, pg. 23). Gary Nelson signaled the Bailey truck to pull forward even though he admits he could not see down the left side of the truck to make sure no one was next to the truck. (R. 105, pg. 40, ln. 12-20). Gary Nelson testified had thought he had seen Myatt by the truck earlier (R. 107, pg. 47, ln. 16-22) and saw Myatt next to the trailer within hours of him ordering the trucks to move. (R. 103, pg. 30, ln. 23). Yet Nelson still waved the truck forward without being able to see down the side of the truck to the back side of the trailer where Myatt was located to verify it was safe to move it. After Peco manager Nelson motioned the trucks to move forward he “turned around and walked away.” (R.106, pg. 43, ln. 17-18). He never even considered the ramifications of his dangerous actions.

Q: Did you think to yourself, maybe I should look down on that right side of that truck to make sure nobody is standing next to that truck when it moves, is that anything that crossed your mind?

A: No.

(R. 107, pg. 46, ln. 1-6)

Peco also admits that it never marked the area as a work area for workers (R. 111, pg. 63, ln. 18-2), did not mark the area as a waiting area for trucks (R. 111, pg. 63, ln.3-5) and did not put out any cones or yellow tape or markings so workers could know trucks would be using the work area to park and wait to unload. (R. 111, pg. 63, ln. 16-17).

Peco Foods holds a duty to warn Myatt that tractor-trailers would be moving in his work area and to warn him that it would be motioning the trucks to move since the trucks had been stationary all day long. Peco holds a general duty to act as a reasonable person when moving trucks that are in close proximity to pedestrian workers. It breached its duty by moving the tractor trailers without verifying the workers that were seen next to the trailer were not safely out of the way. The preponderance of evidence when viewed in the light most favorable to the plaintiff indicates a question of fact for the jury as to whether Peco acted negligently.

E. Trial Court Referred To Open And Obvious Rule As Bar To Myatt's Claim.

When the trial court granted Peco's Motion for Summary Judgment the court stated that "it would be common judgment for any person to know that there is a lineup and that the last vehicle would be moving at some point in time." (Trans. of hearing pg. 15, ln. 9-11). The trial court's comments are conclusions it reached regarding fact issues. The court is not allowed to reach conclusions that are questions of fact for the jury. The trial court is only allowed to determine if there are facts in dispute for the trier of fact to review. "The Court does not try issues; rather, the Court only determines whether there are issues to be tried." *Burkes v. Fred's Stores of Tennessee, Inc.* 768 So.2d 325 (Miss. 2000). When the trial court claims "it would be common judgment for any person to know" the trial court has now entered an area reserved for the jury. The sweeping assertion that everyone would know when, where and how the tractor

trailers would move is an “open and obvious” argument. The court’s reliance on the open and obvious theory to exclude Peco is incorrect and should be reversed.

To clarify that a question of fact existed even the trial court made statements in its ruling indicating that summary judgment should be denied. “It would be easy for me to say that the jury should resolve these issues and pass the burden to the jury.” (Transcript pg. 14, ln. 28 to pg. 15, ln. 3). “I say all of that to say with reluctance I don’t find there is a genuine issue of fact in this case and with reluctance I sustain the motion for summary judgment.” (Transcript pg. 15, ln. 24-27). Upon review the evidence is reviewed in the light most favorable to the nonmoving party, and he is given the benefit of every reasonable doubt.” *Spartan Food Systems, Inc. v. American Nat. Ins. Co.*, 582 So.2d 399, 402 (Miss. 1991). Based on the trial court’s own expressed reluctance to grant Peco’s Motion for Summary Judgment it is obvious this motion should not have been granted. The generalization reached by the trial court amounts to conclusions which infer movement of the truck was open and obvious. Based on the testimony of Daryl Robinson that the tractor-trailers had been sitting in the same spot all day and he and Myatt had no idea or warning that the tractor-trailers were going to be moved without notice, a question of fact exists for the jury and the trial court erred when it granted Peco’s Motion for Summary Judgment.

II. TRIAL COURT PROPERLY ENTERED FINAL JUDGMENT

Myatt agrees the trial court properly entered a 54(b) Final Judgment against Peco. Plaintiff has briefed this argument in his Appellee’s Brief in Response to Bailey’s appeal of this issue. See Appellee’s Brief. Myatt asks this Court to determine that Peco was properly

dismissed under Rule 54(b) and to determine the trial court's grant of Peco's Motion for Summary Judgment was improper due to existing issues of facts left for the jury to determine.

III. CONCLUSION

Myatt requests this Court hold that the trial court committed reversible error by granting Peco's Motion for Summary Judgment and requests this matter be remanded to the trial court for a jury trial on the merits of the case.

Respectfully submitted this the 17 day of July, 2008.

BY: J. Ashley Ogden
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CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant to:

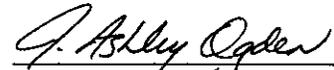
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So certified, this the 14 day of July, 2008



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