

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. AND
GRIFFIN INDUSTRIES, INC.
WINSTON BAILEY AND JOHN DOES 1-5**

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF NESHOBAMA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

Oral argument is 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

- I. Patricia Myatt, Individually and on Behalf of the Wrongful Death Beneficiaries of Todd David Myatt, Deceased, Appellant
- II. Winston Bailey Trucking, Appellant
- III. Peco Foods of Mississippi, Inc., Appellee
- IV. Honorable Marcus D. Gordon, Circuit Judge
- V. Honorable Sheldon G. Alston, Esq., of Brunini, Grantham, Grower & Hewes, PLLC, Attorney for Appellee
- VI. Honorable John B. MacNeill, Esq. and Honorable Susan R. Bryan, Esq., of MacNeill & Buffington, P.A., Attorney for Appellee
- VII. Honorable Tanya N. Carl, Attorney for Appellant
- VII. Honorable J. Ashley Ogden, Attorney for Appellant

RESPECTFULLY SUBMITTED, this the 21st day of March, 2008.

BY: J. Ashley Ogden
J. Ashley Ogden

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STATEMENT OF THE ISSUES

Whether the trial court erred when it granted Defendant Peco Foods of Mississippi, Inc.'s Motion for Summary Judgment on September 6, 2007.

STATEMENT OF THE CASE

This case is an action for damages by Patricia Myatt individually and on behalf of all wrongful death beneficiaries of Todd David Myatt. ("Myatt") against Defendant Peco Foods Of Mississippi, Inc. ("Peco"), for failure to warn of a dangerous condition, failure to maintain the premises in a reasonably safe condition, among other things, and for not preventing the foreseeable death of Todd David Myatt which occurred while Myatt was working on the premises of Peco Foods in July 2005. On September 17, 2007 the Circuit Court of Neshoba County, Mississippi, Honorable Marcus D. Gordon, presiding, weighing the greater weight of the credible evidence entered an Order granting the Defendant Peco's Motion for Summary Judgment. Plaintiff perfects this her appeal from the lower court's judgment.

FACTS

Peco Foods operates a chicken processing plant at 999 Herman Alford Memorial Highway in Philadelphia, Mississippi. On July 7, 2005, the decedent, Todd David Myatt, entered the property as a business invitee to do contract work at the plant for his company Mid Mississippi Sales. (R. 69, pg. 8, ln. 19-22). Myatt was working as an employee for his company Mid Mississippi Sales and Services, Inc. as part of a work crew performing work at the Peco feed processing plant. Each day Myatt and other independent contractors working for Mid Mississippi would be assigned various duties in different parts of the plant by the Peco plant manager Gary Nelson. (R. 70, pg. 10, ln. 16-18). On the morning of the accident Myatt and a co-worker named Daryl Robison were instructed and directed by the Peco plant manager, Gary Nelson, to begin a painting job in an area adjacent to the paved road where tractor trailers were entering and unloading at the plant. (R. 79, pg. 46, ln. 3-22; R. 90, pg. 93, ln. 12-23). This was

the first time the two men were placed in this area to work. (R.70, pg. 15, ln. 11-17 and R. 87, pg 78, ln. 24). When they started working at 7:00 a.m. (R.70, pg. 11, ln 6) no tractor trailers were in their work area. (R. 70, pg. 12, ln. 7-10). During the morning the plant had a back up because train railcars were blocking the unloading area. (R. 103, pg. 33, ln. 4-6). Peco allowed the trucks entering the property with the purpose of unloading to park off the paved road in the adjacent dirt area. (R. 104, pg. 35-37). That day Peco specifically asked a tractor trailer operated by Winston Bailey to pull into the dirt area and wait. (R.110, pg. 61, ln. 17-24). The dirt floor work area was already occupied by Myatt and Robinson. (R. 70, pg. 11, ln. 3-6; R. 70, pg. 12, ln. 7-16; R. 71, pg. 16, ln. 1-21). Winston Bailey's tractor trailer was parked directly in the Myatt work area (R. 71, pg. 16, ln. 20-25) and was only about three to four feet away from where Myatt was painting under Peco's direction. (R. 84, pg. 67, ln. 24 to pg. 68, ln. 1; pg. 68, ln. 3-21). While Myatt was in the work area changing out a paint gun with Robinson, (R. 89, pg. 86, ln. 11-14; pg. 87, ln. 15-17) Gary Nelson, Peco plant manager, who could not see down the Bailey tractor trailer's right side to see if Myatt was next to the truck working, signaled the Bailey truck to pull forward. (R. 105, pg. 40, ln. 12-20). Gary Nelson saw Myatt by the trailer earlier that day, (R. 107, pg. 47, ln. 16-22) within hours of seeing Myatt, Nelson ordered the Bailey truck to move forward. (R. 103, pg. 30, ln. 23). Nelson moved the tractor trailer forward without verifying whether anyone was next to the truck. (R. 107, pg. 46, ln. 1-6). When the tractor trailer moved forward the trailer pulled to the right towards Myatt who was standing next to the tire and Myatt was crushed. (R. 73, pg. 22, ln. 16-18). Peco never warned Myatt or his co-workers the trucks parked in their work area would be moving while the workers were in the work area. (R. 92, pg. 98, ln. 5-8). And before manager Nelson signaled the tractor trailers to move he did not go to the work area and tell Myatt or the other worker the trucks were going to start moving. (R. 73, pg. 23, ln. 13-16).

On July 7, 2005, Peco was in charge and in control of the work area of Myatt (R. 90, pg. 93, ln.15-23) and parking area of the tractor trailers. Peco did not put up any cones, no striping on the ground, or designate the work area as a work area so that trucks would not park in the work area. (R.111, pg. 62, ln. 17 to pg. 63, ln. 21). Peco was in sole control of when and how the tractor trailers could move forward. Peco manager Gary Nelson was the person signaling the movement of the trucks. (R.105, pg. 40, ln. 12-15). Peco manager Gary Nelson signaled the tractor trailer that ran over Myatt to move without checking to see if Myatt was in the work area or foreseeable zone of danger. (R.107, pg. 46, ln. 1-6). Peco manager Nelson signaled for the tractor to move without ever warning Myatt of the tractor's movement (R. 73, pg. 23, ln. 13-16) even though Nelson admits he knew that Myatt was next to the truck working. (R. 107, pg. 47, ln. 16-22). The Peco safety documents that were controlling the work activity of Mid Mississippi clearly state that Peco's own Job Site Safety Inspection Overview required Peco to "monitor and evaluated the safety of contractors." (R. 132-134 at 133). The Peco safety documents also provide a check list for Peco to provide safe work areas for independent contractors. (R. 132-134 at 134). After Myatt was run over Peco manager Nelson admitted he should not have had Myatt working in that area (R. 90, pg. 92, ln. 7-17) and he instructed Robinson to rope off the area so trucks could not get that close to workers again. (R. 93 pg. 102, ln. 2-6).

SUMMARY OF THE ARGUMENT

Patricia Myatt argues that the lower court erred in granting Defendant Peco's Motion for Summary Judgment on September 17, 2007 on the grounds that Peco provided a reasonably safe place to work and that Myatt was aware of the danger. The evidence proves Myatt was an invitee at the property when he was injured, and that Peco had cause to anticipate the injury of Myatt.

Peco maintained substantial de facto control of Myatt and Myatt's work area. And Peco was responsible for acting as a reasonable person when directing the movement of the tractor trailers. In considering the trial court judge's failure to deny the Defendants' Motion for Summary Judgment, Patricia Myatt as Appellant asks this Court to address these issues:

1. Whether Myatt presented a genuine issue of material fact regarding whether defendants provided a reasonably safe place to work or gave warning of danger to Myatt;
2. Whether Myatt presented a genuine issue of material fact as to whether the defendants were negligent for not complying with their duty to provide a reasonably safe place to work or give warning of danger;
3. Whether Myatt presented a genuine issue of material fact regarding whether defendants had substantial de facto control of Myatt and his work area;
4. Whether Myatt presented a genuine issue of material fact as to whether the issue of proximate cause of Myatt's injuries was a question for the jury.
5. Whether Peco acted negligently for failing to warn Myatt before it moved the tractor trailer.
6. Whether the Court erred stating that Peco's actions fell under the open and obvious rule instead of the contributory negligence standard.

ARGUMENT

I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT

A. Standard of Review for Summary Judgment

This Court conducts a de novo review of orders granting or denying summary judgment. *Mantachie Natural Gas v. Mississippi Valley Gas Co.*, 594 So.2d 1170 (Miss. 1992). The moving party must show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss.R.Civ.P. 56(c). Upon review, "[a]dmissions, and pleadings, answers to interrogatories, depositions, affidavits are viewed in

light most favorable to non-moving party, as he is given the benefit of every reasonable doubt.” *Spartan Food Systems, Inc. v. American National Insurance Co.*, 582 So.2d 399, 402 (Miss.1991); *see also*, *McFadden v. State*, 580 So.2d 1210, 1213 (Miss.1991); *Benjamin v. Cornwell Well Service*, 836 So.2d 792, 793 (Miss. Ct. App. 2002). “Summary Judgment in whole or in part, should be granted with great caution.” *Brown v. Credit Center, Inc.*, 444 So.2d 358, 365 (Miss.1984).

Simply filing a motion for summary judgment does not entitle the movant to a favorable ruling. “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). Further, “motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion.” *Id.* at 328; *See also*, *Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss. 1986). It is better for the circuit court to err on the side of denying the motion. *Id.* **The Court will overrule a summary judgment motion unless “beyond any reasonable doubt [the] Court believes that [the] non-moving party would be unable to prove any facts which would support his claim.”** *McFadden* at 1213-1214 (emphasis added). A “[m]otion for summary judgment should be denied unless it is established beyond a reasonable doubt the plaintiff would be unable to prove any facts to support the issues presented in the complaint.” *Branch v. State Farm Fire and Casualty Co.*, 759 So.2d 430 (Miss. 2000). “Issues of fact sufficient to require denial of a motion for summary judgment obviously 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).

B. Mississippi Premises Liability Law for Independent Contractors

The general rule is that an owner has a duty to furnish contract employees with a “reasonably safe place to work or give warning of dangers.” *Ratcliff v. Georgia Pacific Corp.*, 916 So.2d 546, 549 (Miss. Ct. App. 2005)(citing *Miss. Chemical Corp. v. Rogers*, 368 So.2d 220, 222 (Miss. 1979)). Additionally, the owner will be liable for contractor injuries if it maintains “substantial *de facto* control” over the “aspect of the work that has given rise to the injury.” *Magee v. Transcontinental Gas Pipe Line*, 551 So.2d 182, 185 (Miss. 1989).

An exception to this general rule of property owner liability to independent contractors is that an owner has no liability for injuries experienced by the contractor’s workers where those injuries arose out of the work itself. *Magee*, 551 So.2d at 185. If the danger arises out of the something intimately connected with the contract work the premise owner is relieved of his duty. *Nelson v. Sanderson Farms, Inc.*, 969 So.2d 45 (Miss. Ct. App. 2006) (rehearing denied).

The case law shows that an independent contractor who injures himself while doing his own work with his own tools can not allege negligence of the premises owner. But if the premises owner creates the condition that causes the injury or maintains control over the job being performed, the property owner then has a duty to the independent contractor. *Magee*, 551 So.2d 182.

C. Peco’s Duty Owed to Myatt as Invitee and Independent Contractor

Peco owed a duty to Myatt under general premises duties. Commercial property owners and those in control of the premises owe a duty to invitees, tenants and their guests to exercise reasonable or ordinary care to keep their premises reasonably safe and secure. *Wilson v. Allday*, 487 So.2d 793 (Miss. 1986); *Minor Child ex rel. John Doe v. Mississippi State Federation of Colored Women’s Club Housing*, 941 So.2d 820 (Miss. 2006). The commercial property owner

owes a duty to the invitee to use ordinary care to protect them from reasonably foreseeable dangers. *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186 (Miss. 1994); *O'Cain v. Freeman & Sons, Inc. of Mississippi*, 603 So.2d 824 (Miss. 1991); *Kelly v. Retzer*, 417 So.2d 556, 560 (Miss. 1982); *May v. VFW, Post No. 2539*, 577 So.2d 372 (Miss. 1991); *Grisham v. John Q. Long VFW Post*, 519 So.2d 413 (Miss. 1988); *McWilliams v. City of Pascagoula*, 657 So.2d 1110, 1111-1112 (Miss. 1995); *Gibson v. Wright*, 870 So.2d 1250 (Miss. 2004).

Peco also owed Myatt a duty as an independent contractor. For independent contractors the duty of the premises owner is to provide the independent contractor with a reasonably safe place to work or give warning of danger. The premises owner holds no duty to make safe or warn of dangers that arise out of or that are intimately connected with the contract work. The exception to the "intimately connected" exception is if the premises owner maintains substantial de facto control over those features of the work out of which the injury arose the premise owner's duty is resurrected. *Nelson v. Sanderson Farms, Inc.*, 969 So.2d at 50. The premises owner has a heightened duty to a contractor in that they have a duty to warn of dangerous conditions of which they knew or should reasonably have known about through the exercise of reasonable care. *Anderson v. B.H. Acquisition Inc.*, 771 So.2d 914, 918 (Miss. 2000).

II. MYATT IS CLASSIFIED AS AN INVITEE AND INDEPENDENT CONTRACTOR

"A business invitee is defined as someone who enters onto another's premises at the invitation of the owner for the purpose of benefiting both parties." *Nofsinger v. Irby*, 961 So.2d 778, 782 (Miss. Ct. App. 2007)(citing *Ball v. Dominion Ins. Corp.*, 794 So.2d 271, 273 (Miss. Ct. App. 2001)). Myatt entered Peco as a business contract worker. Myatt entered Peco premises to complete contract work. Myatt, as a Mid-Mississippi contractor, expressly entered the Peco

plant to benefit the owner and himself therefore classifying Myatt as a business invitee. Myatt was also injured in a common area controlled by Peco. Since Myatt was injured in a common area where he was authorized to be he is considered an invitee under general negligence principals.

III. PECO DID NOT PROVIDE MYATT A REASONABLY SAFE PLACE TO WORK

The general rule is an owner has a duty to provide an independent contractor with a “reasonably safe place to work or to give warning of dangers.” *Ratcliff*, 916 So.2d at 549. Myatt was injured by a hazard created by Peco Foods when it allowed tractor trailers to park and move in the same limited work area Peco had also placed Myatt to paint. Peco provided the work area for Myatt. Peco also designated the area for Bailey to wait in his tractor trailer.

A. Peco Designated the Worksite for Myatt and Placed Myatt in the Worksite.

Each day Myatt and the other workers from his company went to the Peco plant and were assigned tasks on a day by day basis. (R. 69, pg. 9, ln. 22-24). On July 7, 2005 Myatt and co-worker Daryl Robinson were placed in a particular spot to paint for the first time. (R. 71, pg. 15, ln. 13-17). On the day Myatt was run over by Winston Bailey’s tractor trailer Peco Foods’ plant manager, Gary Nelson, specifically designated Myatt’s work site and directed Myatt to work in that area.

A: Gary [Peco manager] – we was standing there, and Gary said this is where y’all will be working at.

Q: Who is Gary?

A: He is the one that ran the Peco place.

(R. 70, pg. 11, ln. 20 to pg. 12, ln. 4).

Q: How did y’all get stuck with that painting job that day? Was there any particular reason?

A: Me and him [Myatt] was standing over when Gary [Peco manager] come up and said he needed it done.

(R. 79, pg. 46, ln. 18-22)

Q: ...did Gary tell you and Todd to work or do you think he told Richard and then Richard told you?

A: Richard never told us. Gary told us, but Richard was standing there with us. He was like telling Richard and us at the same time.

-Omitted lines 6-10-

A: Well, Gary run everything, but Richard just did exactly what he told them mostly.
(R. 90-91, pg. 93, ln. 25 to pg. 94, ln. 21)

Q: Could Richard McRaney (Mid Mississippi foreman) have moved it (the work area)?

A: No, he had to go where Gary told us to go.
(R. 91, pg. 97, ln. 3-5)

Q: No one instructed you or told you that you couldn't be there working (at that particular work site), 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)

This was the first time that Myatt and Robinson had been assigned to work in that work area. (R. 71, pg. 15, ln. 13-17; and R.79, pg. 46, ln. 3).

B. Peco Placed the Tractor Trailer in Myatt's Work Area

After Peco placed Myatt in the work area it made a decision to park a tractor trailer in the work area. Peco Manager Nelson verified Peco directed the tractor trailer to park in the Myatt work area.

A: If he (Winston Bailey) was asked to move over and get out of the way and wait, he would pull over to the side.

Q: So who pulled him over there and asked him to wait, who got Mr. Bailey off to the side to wait? Was that something Peco did?

A: We [Peco] asked him to wait until we moved the cars.
-Omitted pg. 61, ln 25 to pg 62, ln 12-

Q: So it's your testimony, then, that is the generic designated waiting area for Mr. Bailey and other trucks dropping fat, right?

A: Right.
(R. 110-111, pg. 61, ln 17 to pg. 62, ln.16)

Once the tractor trailer was in the same area as Myatt the trailer was only about three feet away from where Myatt and Robinson had to paint and change out the paint gun. (R.73, pg. 24, ln. 23 to pg. 25, ln. 3). Myatt and Robinson were so close to the trailer they could reach out and touch the trailer while they were painting. (R. 72, pg. 21, ln. 16-18). The trailer was practically parked on top of the two men while they were trying to paint.

C. Peco Did Not Secure the Work Area for Myatt

Peco never marked the work site or truck parking site to designate or warn either the workers in the area or the truck drivers that two entities were operating in the same space and time frame. Peco admits it did not designate the area with any type of markings on July 7, 2005 to indicate the area was a waiting or sitting area for trucks. (R. 111, pg. 62, ln. 17-21). Peco placed no striping on the ground. (R.111, pg. 62, ln. 22-24). Peco put up no signs indicating if the work area was a waiting area or holding area for trucks. (R. 111, pg. 63, ln. 3-5). Peco did not put up any cones or yellow tape or markings or anything that would indicate to the trucks that there were workers in the same area or put up anything to separate the workers from the trucks. (R. 111, pg. 62-63). Peco admits it did nothing prior to the incident to mark the Myatt work area for safety purposes. (R.111, pg. 63, ln. 18).

D. Peco Maintained Control Over the Worksite and Movement of Tractor Trailers

Peco was in control of the area that Myatt was to work. They also controlled where the trucks were placed and most importantly they controlled when and how the trucks would move in the work area. Peco Foods was solely in charge of moving the trucks in and around the work area. Usually a regular Peco employee would wave the tractor trailers to come forward. (R.106, pg. 45, ln. 19). On July 7, 2005 Peco manager Gary Nelson waived Winston Bailey to pull his truck forward. (R.106, 45, ln, 12). Peco's manager, Gary Nelson, was the person who signaled

driver Winston Bailey to pull his truck forward. (R. 105, pg. 40, ln. 12-15). Nelson testified he signaled the truck to move forward when it was unsafe to do so.

Q: When the accident actually happened, you were the guy who was waving Mr. Bailey's truck forward is that correct?

A: That's correct.

Q: At the time you were doing that, before you waved him forward, were you in a position where you could see down the left side of the truck to see if there was anybody there?

A: No.

(R. 105, pg. 40, ln. 12-20)

E. Peco Moved the Tractor Trailer without Warning Myatt

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; R. 105, pg. 41, ln. 22-25) and in the work area occupied by Myatt. (R. 110, pg. 61, ln. 19-24). Gary Nelson admits he 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 admits he had seen Myatt in the work area by the truck earlier (R. 107, pg. 47, ln. 16-22) and within hours of him ordering the trucks to move. (R. 103, pg. 30, ln 20- pg. 31, ln. 1). Yet Nelson still waved the truck forward without being able to see down the side of the truck to make sure no one was next to the trailer. (R. 75, pg. 32, ln. 8-11). And Peco provided no flagman to warn Myatt of the trucks moving. (R. 78, pg. 45, ln. 15-24). And 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).

An owner is liable to employees of an independent contractor for his own negligence. *Miss. Power Co. v. Brooks*, 309 So.2d 863, 866 (Miss. 1975). Only Peco could control the movement of the trucks into the drop off area. And, 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 foreman) told us to go.

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

Peco admits they never marked the area where Myatt was working as a work area for workers. (R. 111, pg. 63, ln. 18-21). Peco admits they did not mark the area as a waiting area for trucks. (R. 111, pg. 63, ln. 3-5). Peco admits they 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 argues they are not liable because Myatt should have known the trucks would move. But the evidence shows the truck that hit Myatt was parked for several hours idling in the work area. The trucks lined up in the morning. (R. 70, pg. 12, ln. 11-16). They sat all day in the work area idling. (R. 71, pg. 16, ln. 5-10). And three hours after Myatt and Robinson took a lunch break at one in the afternoon the trucks were still parked and idling in their work area. (R.71, pg.17, ln.15-21). Robinson testified that prior to the date of the incident no trucks had lined up in that work area before. (R 71, pg. 14, ln. 1-4). On the day of the incident the trucks had been lined up and sitting for over three hours and had not moved forward all day. (R.71, pg. 17, ln. 17-21). This was because the feed mill was broke down or having problems and not operating. (R.71, pg. 17, ln. 22). There was no reason for Myatt to expect the trucks to move or have cause to anticipate their movement. Yet, Peco chose not to warn Myatt of the dangers of the moving trucks in his area and failed to mark the area for the truck drivers to be aware that workers were present. Peco also did not warn Myatt that the trucks that were parked in his work area would be moving (R. 75, pg. 32, ln. 8-11) and Peco provided no flagman to warn Myatt of the trucks moving. (R. 78, pg. 45, ln. 15-24).

In *Bevis v. Linkous Construction Company, Inc.*, 856 So.2d 535 (Miss. Ct. App. 2000) this Court held a landowner had a duty to warn the contractor of any hidden defects or hazards

the landowner created. Witness Robinson testified that Peco manager Nelson never warned Myatt or himself that the parked trucks in their work area were going to be moving. (R. 92, pg. 98, ln. 5-8). These tractor trailers in Myatt's work area and only three feet away that could move without notice would be both a hidden defect and hazard created by Peco.

Myatt submitted expert reports to confirm Peco's general negligence in failing to provide a safe worksite. Expert David Monistere, Certified Safety Professional and expert in the field of work site safety and industrial safety testified that Peco failed to provide a safe work area for Myatt by not having barricades or similar devices to warn the workers and drivers of the commingled work area. (R. 135-136). Monistere stated Peco was negligent for failing to move the work area to a spot not being used at the same time as a driveway for trucks. (R. 135-136). He also testified that Peco should have assigned a safe work area for Myatt or at the very least traffic should have been redirected and appropriate traffic devices put in place to separate the moving vehicles from workers. (R. 135-136). Accident Reconstruction expert John T. Corbitt also found Peco to be generally negligent for failing to provide a safe work environment, failing to put up barriers, cones, markers, flags to separate Bailey's tractor trailer from the Myatt work area. (R. 137-144). Corbitt also found Peco at fault for not marking the ground to designate driving areas or lanes of travel for tractor trailers to separate driving areas from pedestrian areas and for not giving proper instruction to Bailey when directing him to move his tractor trailer. (R. 137-144). He further found Peco at fault in not properly waving the Bailey truck forward since the movement of the truck was not deemed safe before it was attempted. (R. 137-144).

IV. PECO DID NOT WARN MYATT OF DANGER IT CREATED

The tractor-trailers had been idling in line all morning and for about three hours after lunch without moving. (R. 71, pg. 16, ln. 7, 8; pg. 17, ln. 15 – 21). Like the *Nelson* case the idling trucks represented a hidden danger because the trucks had been stationary all day and were moved without warning Myatt. Peco, as set out above, controlled the placement of Myatt, the placement of the trucks, and the movement of the trucks. Peco also provided no warning to Myatt before it instructed the Bailey truck to move. (R. 75, pg. 32, ln. 8-11). It was very noisy with the plant running and the trucks running. (R. 73, pg. 22, ln. 19 to pg. 23, ln. 3). With the excessive noise Myatt would not be able to know if a tractor was moving based on what he heard while his back was to the tractor. Myatt would have to rely on someone to tell him to look out for the trailer and its movement. Peco sent no one to tell Myatt or Robinson the truck was going to move. (R. 73, pg. 23, 13-16). Gary Nelson just waived the truck to pull forward without warning and without checking to see if anyone was close enough to the trailer to get run over. (R. 105, pg. 40, ln. 12-20). After Gary Nelson waived the truck forward he turned around and walked away (R. 106, pg. 43, ln. 17) without attempting to make sure the truck was pulling forward safely. Peco had a duty to warn Myatt before signaling the tractor-trailers to move. Myatt did not have intimate knowledge of the facility nor the activity that took place there every day. Even assuming he did, the activity that took place on July 7, 2005 was out of the ordinary. Co-worker Daryl Robinson testified that prior to July 7, 2005 the trucks had never been backed up in a line before. (R. 71, pg. 14, ln. 1 – 11). Since Peco controlled the movement of the trucks and the placement of Myatt as a worker it held a duty to warn Myatt before it began moving trucks in and out of his work area. This issue should be determined by a jury.

V. PECO MAINTAINED SUBSTANTIAL *DE FACTO* CONTROL OVER THE MYATT WORK AREA

One of the arguments submitted by Peco to the Circuit 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 185. 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).

The area in which they were told to work was 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).

Gary Nelson now claims he did not designate the work area for Myatt. (R. 127, pg. 129, ln. 16, 17). This statement is direct contradiction to the statements allegedly made to witness Robinson. "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 very recent and similar case regarding substantial control by a premises owner, 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, 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*, 969 So.2d at 52. In the case *sub judice* the issue of whether Peco was in control of Myatt’s work site is in dispute and must be determined by a jury.

VI. PECO’S ACTIONS ARE A INDEPENDENT ACT OF NEGLIGENCE

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.*, 368 So.2d at 222. 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.

VII. OPEN AND OBVIOUS IS NOT A BAR FOR RECOVERY

The trial court indicated that Peco was not at fault because Myatt should have known the trucks were going to move. This rationale is incorrect because it assumes that Myatt knew the trucks were going to move when no evidence to that effect was presented and it assumes that the open and obvious rule would apply as an ultimate bar to Myatt's claim when that would not be proper law. Mississippi is a comparative negligence jurisdiction and "open and obvious" is not a complete bar to recovery. *See*, Miss. Code. Ann. sec. 11-7-15; *Strong v. Southside Baptist Church*, 823 So.2d 608 (Miss. Ct. App. 2002); *Tharp v. Bunge Corp.*, 641 So.2d 20 (Miss. 1994). The court granted summary judgment for the defendant Peco holding, "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." (Trans. of Hearing pg. 15, ln. 9-11). This is contrary to Mississippi law, "open and obvious . . . is only a mitigation of damages on a comparative negligence basis under Miss. Code. Ann. sec. 11-7-15." *Tharp v. Bunge Corp.*, 641 So.2d at 25.

Further the trial court actually stated in its own comments that there was something Peco could have done to prevent the accident. "I really don't know what better facility that they [Peco] could do to make a safer place to work than to put a designated place for a lineup of these vehicles." (Trans. of Hearing pg. 15, ln. 15-18). The trial court actually agrees with the statement of plaintiff's experts who stated that a designated drive and marked driving area for the tractor trailers should have been created (R. 137-144). There is testimony that this was the first time Myatt worked in this particular area. (R.70, pg. 15, ln. 11-17 and R. 87, pg 78, ln. 24). There was no testimony indicating Myatt was familiar with the movement of the trucks. Assuming this fact that was not in evidence would be improper. The parking of the trucks in Myatt's work area occurred that day because during the morning the plant had a back up because train railcars were

blocking the unloading spot. (R. 103, pg. 33, ln. 4-6). The work site had already been designated for Myatt. (R. 79, pg. 46, ln. 3-22; R. 90, pg. 93, ln. 12-23). Under these facts Peco should have a duty to provide either a safe work area or some type of warning to Myatt before moving the tractor trailer.

Plaintiff's experts provided testimony that Peco could have done something to make the movement of the trucks safe. (R. 135-144). Likewise, testimony was provided indicating that Myatt was not familiar with the operation and was unaware when or if the vehicles would be moving. This was the first time that Myatt and Robinson had been assigned to work in that work area. (R. 71, pg. 15, ln. 13-17; and R.79, pg. 46, ln. 3). "Issues of fact sufficient to require denial of a motion for summary judgment obviously 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 trial court's assumptions that Peco was not liable based on a theory of open and obvious is incorrect. At least the Court should allow the jury to determine the percentage of fault, if any, between the parties. The trial judge voiced his concern about his reservations on granting the defendant's motion, "I and the Supreme Court agree that we don't like to take cases away from the jury unless it complies with the rules regarding summary judgments." (Trans. of Hearing pg. 21, ln. 3-7).

CONCLUSION

The testimony from defendant and the plaintiff's witnesses contain sufficient discrepancies and present an issue of fact that is best resolved by the trier of fact. The facts presented prove that Todd David Myatt was an invitee of Peco in July 2005. Peco maintained substantial de facto control over Myatt's worksite area. Peco failed to meet its burden proving

beyond a reasonable doubt that there are no issues of material fact and at best have raised issues for the trier of fact to determine. Peco owed invitee Myatt a duty of care to keep the premises reasonably safe or to warn of dangers. They fell below the standard. The facts raised by plaintiff and presented to the trial Court indicate that the deceased, Todd David Myatt, was an invitee and that there is a genuine issue of material fact best answered by the jury in regards to whether Peco had substantial *de facto* control of the work area and whether Peco provided reasonably safe work area or warned of dangers. There further exists a question of fact as to whether Peco's general negligence and failure to provide reasonable safety precautions for workers such as Myatt proximately caused the death of Myatt. These issues would preclude the trial judge's *granting* of the Defendants' Summary Judgment Motion. Plaintiffs move that the trial court's Order granting the Defendant's Motion for Summary Judgment be reversed and this matter remanded for a trial on the merits.

Respectfully submitted this the 21st day of March, 2008.

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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 Appellant's Brief to:

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So certified, this the 21st day of March, 2008



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