SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF MISSISSIPPI

2008-CA-01148

ROBERT REED AND JENNIFER REED

Plaintiffs - Appellants

versus

D&D DRILLING & EXPLORATION, INC.
and JAMES POLK

Defendant - Appellees

APPEAL FROM THE LAMAR COUNTY CIRCUIT COURT

BRIEF OF APPELLEE
D & D DRILLING AND EXPLORATION, INC. AND JAMES POLK

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vs.

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and JAMES POLK — **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

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 disqualifications or recusal.

Plaintiffs-Appellants

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STATEMENT REGARDING ORAL ARGUMENT

D & D Drilling & Exploration, Inc. (D & D) and James Polk do not believe oral argument will assist this Court's review of the circuit court's dismissal by summary judgment of Reed's premises liability claims.

Reed does not dispute the material facts that the circuit court relied upon and considered when it granted summary judgment in favor of D & D Drilling & Exploration, Inc. (D & D) and James Polk. Reed does not argue that the circuit court misread or misapplied Mississippi's premises liability jurisprudence or Mississippi statutory law and applied the law to the material and undisputed facts. Instead, Reed argues the circuit court should have considered immaterial facts and disregarded the clear statutory language of MISS. CODE ANN. § 11-1-66 when ruling on summary judgment. Reed further argues that the circuit court should have applied inapplicable law to the facts of this case.

Under this appeal record, D & D Drilling & Exploration, Inc. (D & D) and James Polk requests the Court to rule on the appeal without requiring oral argument.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The circuit court's dismissal by summary judgment of Reed's premises liability and negligence claims was based on two grounds.

I. The circuit court granted summary judgment after considering the clear and unambiguous contractual language coupled with documented evidence that demonstrated that the events occurring at the time of the accident were under the sole direction and control of Reed and his employer Directional Drilling. The issue presented by this ruling is:

> Did the district court err by finding Reed was in control of the activities at the time of the accident and that these activities were intimately connected to the work Reed was hired to perform?

II. The circuit court granted summary judgment on Reed's claims after it considered the sworn testimony and admissions made by Reed and his co-workers regarding the installation of the "come along" by Reed and the "come along's" purpose, the known dangers associated with attaching the "come along" to a spinning motor in light of Reed's status on D & D's rig. The issues presented by this ruling are:

> Did the circuit court err when it granted summary judgment on Reed's claims when it found that Reed, a business invitee, knew of the dangers associated with installing the "come along" on D & D's rig and that the installation of the "come along" and all activity connected therewith was intimately connected to the job Reed was hired to perform?

III. The circuit court granted summary judgment on Reed's claim when it applied well-settled Mississippi statutory law along with the two (2) long standing exceptions to the general duty owed

to a business invitee who is an independent contractor or the employee of an independent contractor. The issue presented by this ruling is:

> Did the district court err by failing to address Reed's 'common law negligence' claim?

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Court Below.[1]

On March 2, 2006, Reed filed his negligence claim complaint in the Circuit Court of Lamar County against Penn Virginia Oil & Gas Corporation[2], D & D Drilling & Exploration and its employee, James Polk (collectively D & D) alleging that D & D was liable for injuries he sustained when a "come along" attached to D & D's rig released striking him and causing severe injuries. (R. at 495-501; R.E. at 193-99). Specifically, Reed claimed that James Polk negligently caused the "come along" to release and D & D is liable under the doctrine of respondeat superior. (R. at 497; R.E. at 195). Reed also claimed that D & D failed to uphold its duty to keep its premises safe, provide adequate warnings and protection regarding the perils associated with the work the Reed was performing and failed to provide suitable employees to perform the work on the rig. (R. at 498; R.E. at 196). Jennifer Reed brought a claim for loss of consortium.

D & D denied Reeds' claims and discovery commenced.

During discovery, Reed's employer produced several documents and drilling logs demonstrating that the sole activity in progress at the time of the accident was directional drilling, which was precisely what Reed was hired to perform by and through his employer Directional Drilling Contractors (DDC). (R. at 307-09, 447; R.E. at 7-9, 147). Reed also provided testimony that revealed he was the individual who installed the "come along" on D & D's rig earlier during his shift, before James Polk and his crew reported for their day shift. (R. at 395; R.E. at 95).

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[1] The following citation format is used throughout this Brief: Citations to the Record (R. at___); citations to Appellee's Record Excerpts (R.E. at ___).

[2] Penn Virginia Oil & Gas filed its summary judgment motion which was granted on February 8, 2007. Reed did not appeal the Circuit Court's ruling in this regard. (R. at 491-94; R.E. at 189-92)

D & D moved for summary judgment on January 29, 2008. D & D argued that the undisputed evidenced demonstrated that Reed was injured while performing tasks that were intimately connected with the job he was hired to perform and that Reed not only knew of the dangerous condition the "come along" presented, but that Reed actually created the dangerous "come along" he complained injured him. On March 10, 2008, the circuit court denied D & D's summary judgment and held that:

> ...more documentation of the contract or "proposal" between Penn Virginia Oil & Gas and Directional Drilling needed to be present and without the production of such documents or supplementation of deposition describing the relationship and contractual agreement, the Court is unable to determine that D & D Drilling did or did not have a duty and to define such duty if any.

(R. at 297-300; R.E. at 3-6). D & D then attempted to address the lower court's concerns regarding the contractual relationship between the parties with a supplemental brief. However, the lower court considered this supplementation as an attempt to file a motion for reconsideration and announced to all parties that it was disregarding and refused to read D & D pleadings in this regard. With the trial date approaching, counsel for Reed announced that he was not available for the scheduled trial date and requested a postponement, which the court granted.

Therefore D & D moved for summary judgment again, addressing all issues to include the relationship between all parties by submitting additional documents, affidavits and supplemental deposition testimony as the Court intimated it required.[3] In his response to this summary judgment motion, Reed did not refute the material evidence presented by D & D and which the lower court relied upon in reaching its opinion. Instead, Reed argued irrelevant facts and attempted to dispute

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[3] Contrary to Reed's characterization that D & D filed three (3) summary judgment motions, D & D only filed two (2) motions as the lower court explained in its June 11, 2008 Order. (R. at 617; R.E. at 201).

the very documented evidence and testimony he provided during discovery.

On June 9, 2008, the lower court issued an Order granting summary judgment in favor of D & D and James Polk. (R. at 616-21; R.E. at 200-05). On July 1, 2008, Reed filed his Notice of Appeal. (R. at 622-23; R.E. at 206-07).

2. Statement of Facts

Relevant to the lower court's ruling on Reed's claims, the summary judgment records includes, Reed's Complaint (R. at 495-501; R.E. at 193-99); Affidavit of James McKinney (R. at 307-66; R.E. at 7-66); DDC Website Information (R. at 367-70; R.E. at 67-70); Robert Reed's Deposition Excerpts (R. at 371-98; R.E. at 71-98); Duane Tater's Deposition Excerpts (R. at 399-405; R.E. at 99-105); James Polk's Deposition Excerpts (R. at 406-10; R.E. at 106-10); Directional Drilling End of Well Report, (R. at 411-53; R.E. at 111-53); Tim Spicer's Deposition Excerpts (R. at 131 and 454-65; R.E. at 2, 154-65); D & D - Penn Virginia Contract (R. at 466-77; R.E. at 166-77); DDC Job Description (R. at 480-81; R.E. at 178-79); DDC's Invoice to Penn Virginia (R. at 482-84; R.E. at 180-82); Jason Brown's Deposition Excerpts (R. at 485-87; R.E. at 183-85); Dencil Powell's Deposition Excerpts (R. at 488-90; R.E. at 186-88); Order from Lamar County Circuit Court Denying D & D's Summary Judgment (R. at 297-300; R.E. at 3-6); Order from Lamar County Circuit Court Granting Summary Judgment to D & D (R. at 616-21; R.E. at 200-05); and, Order from Lamar County Circuit Court Granting Summary Judgment to Penn Virginia (R. at 491-94; R.E. at 189-92). Although other items are contained in the records, the aforementioned items are the factual source of the district court's summary judgment ruling as well as this Statement of Facts.

A. The Parties Involved

1. Penn Virginia Oil and Gas Corporation

Penn Virginia Oil and Gas Corporation (Penn Virginia) is the Operator and developer of various wells (oil and gas) across the United States, including Mississippi. (R. at 307; R.E. at 7). Relevant to the case *sub judice*, Penn Virginia is the Operator of a particular well located in Baxterville Field, Mississippi. The well is known as Weyerhauser 19-3 118 Re-entry. (R. at 308; R.E. at 8).

2. Directional Drilling Contractors, LLC and Robert Reed

Directional Drilling Contractors, LLC (DDC) is located in West Virginia and holds itself out as "a leader in innovation, design and implementation of oilfield tools" and a company that continually strives to find the most effective means to fulfill the needs of customers in all aspects of directional drilling. (R. at 368; R.E. at 68). DDC "employs only the best personnel and the most up-to-date equipment to lead the way in directional drilling" and has been servicing the oil and gas industry since 1984. (R. at 368-69; R.E. at 68-69). DDC offers "a complete package of premium drilling products and services" to include: Directional, Horizontal and Under-balanced Drilling, Measurement While Drilling (MWD) Services (with Gamma), Steering Tool Services (with Gamma), Survey Services, Wireline Services and Core Orientation Services. (R. at 368; R.E. at 68).

Robert Reed began working for DDC as a directional driller in January 2004 and has continued to be so employed to this day. (R. at 372; R.E. at 72). Reed held the position of Directional Drilling Supervisor on March 22, 2005, the day of the accident.

3. D & D Drilling & Exploration, Inc. and James Polk

D & D Drilling & Exploration, Inc. (D & D) is a drilling contractor hired to drill oil and gas wells. D & D provides a fully equipped drilling rig and manpower to operate the rig in accordance

with the instructions and guidelines of the Operator.

James Polk was employed by D & D and had been so employed approximately four (4) years prior to the accident subject to this case. (R. at 407; R.E. at 107). For the majority of his employment with D & D, Mr. Polk held the positions of derrickhand and floorhand and had only advanced to the position of driller one (1) month prior to the accident subject to this case. (R. at 408-09; R.E. at 108-09).

B. The Parties' Relationship.

1. <u>Penn Virginia's Relationship with Directional Drilling Contractors, LLC</u>

In February 2005, Penn Virginia decided to deviate a dry hole well and drill a high angle directional well at the Weyerhauser 19-3 118 Re-entry Well located in Baxterville Field, Mississippi ("The Project"). (R. at 308; R.E. at 8).

On March 10, 2005, at the behest of Penn Virginia DDC submitted a Proposal to drill a high angle directional well. The Proposal detailed the drilling path necessary to accomplish Penn Virginia's targeted objective, from "kick off" point to total depth. (R. at 308; R.E. at 8). Penn Virginia accepted DDC's proposal and on March 20, 2005, DDC arrived at the well and was expected to provide directional drilling services, equipment and personnel to perform the angle drilling or directional drilling aspect for the Project on a daywork contractual basis. ("The Proposal") (R. at 308; R.E. at 8).[4]

Reed, in clarifying his role on the Project testified:

> A. ...As far as what I don't think anybody really understands, when we come on to a job we have a proposal that we try to follow, okay. That's the game plan that you're shooting for.

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[4] *See also* Duane Tater Depo (R. at 400-01; R.E. at 100-01).

Q. The proposal is submitted by whom?

A. That would be the company people that you are working for who is contracting out, such as DDC or be it Union Drilling or CDX or anybody. You've got the drilling contractor and then you've got the directional contractors....

(R. at 374; R.E. at 74). Specifically, Penn Virginia 's Vice President and Regional Manager testified that Penn Virginia hired DDC solely because of their expertise in directional drilling and expected DDC and their directional drillers to command, instruct and control all aspects of the drilling operations during the directional drilling phase of the Project.(R. at 309; R.E. at 9).

DDC sent directional drillers, Robert Reed and Tim Spicer, to the well site to carry out Penn Virginia 's objectives. Reed and Spicer arrived at the well site on March 20, 2005.

2. Penn Virginia's Relationship with D & D Drilling

On or about March 11, 2005, Penn Virginia entered into a written Daywork Drilling Contract with D & D to furnish equipment, labor and services on the Project. (R. at 308; R.E. at 8). Specifically, Penn Virginia contracted D & D to provide a drilling rig, standard rig equipment, rig hands and services to include setting the rig up, picking up pipe to trip in the well bore, circulate and condition and prepare to set the cement "kick off" plug and other preparations so the directional drilling company, DDC, could "kick off" the directional portion of the well bore. (R. at 308; R.E. at 8). D & D also was contracted to provide manpower to the directional drilling contractors hired for the job, once they arrived. (R. at 308; R.E. at 8).

Specifically, the D & D - Penn Virginia contract required D & D to "furnish equipment, labor, and perform services . . . under the direction, supervision and control of Operator (inclusive of any employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations.)"

(R. at 466; R.E. at 166). D & D arrived at the well site on March 15, 2005 and began to set the rig and prepare for the arrival of DDC and the directional drilling phase of the Project.

3. Directional Drilling Contractor's Relationship with D & D Drilling

Above and beyond the language in the Penn Virginia - D & D contract that specifies that D & D operated "under the direction, supervision and control" of Penn Virginia, the contract also specifically required that D & D operated "under the direction, supervision and control" of DDC–the subcontractor engaged by Penn Virginia to direct the drilling operations. Specifically, "[b]ecause Penn Virginia hired DDC to perform all aspects of the directional drilling phase of the Project, D & D operated under the direction, supervision and control of DDC and its representative employees during the directional or angled phase of the Project." (R. at 308-09; R.E. at 8-9).

In addition to the contractual language stated above, the conduct and opinion of DDC's Operational Manager, as well as those of DDC Drillers assigned to the Project was consistent with their superior status over D &D. For example:

DDC's Operations Coordinator, Duane Tater, testified that because directional drilling is such a specialized field, "DDC does not expect the hands of the drilling contractor, such as James Polk, to be familiar with the intricacies that goes along with the specialty of directional drilling." (R. at 405; R.E. at 105).

Reed testified that DDC was the "ultimate authority on how to make [the drill] happen" because they were the experts. (R. at 397; R.E. at 97). When Reed was asked what he did during his shift on the Project, Reed testified:

> Q. And from 6:00 at night until 6:00 in the morning what do you do?
> A. You do your duties as a directional driller. Like I say, we had the steering tools in the hole. Everything went pretty good all night long. We were sliding. When you're building a curve you're doing what they call sliding.

(R. at 376; R.E. at 76). Documents produced by DDC detail the duties and responsibilities of a Directional Driller Supervisor as follows:

> After the customer [*here Penn Virginia*] has approved the directional plan, the Directional Driller **supervises** the assembly of the downhole tools by rig personnel[5], **instruct[s]** the Driller[6] (employed by the Drilling Contractor) on the appropriate drilling parameters to be used (weight on bit, rpm's, pump output) to drill the directional plan. The Directional Driller also does the calculations to plot the current bottom hole location and uses his experience and knowledge to decide what corrections are needed to maintain a trajectory that will accomplish the customer's goals....

(R. at 480; R.E. at 178). (emphasis added). In addition, Section 1 of DDC's Report contains the "Well Proposal[7] and Final Survey." It is this "Proposal" that Mr. Reed referred to when he testified he had the authority to instruct the D & D crew on what to do during the drilling phase.

Q. You instruct who what to do?
A. The drilling crew.
Q. And in the case it would have been D & D?
A. Yes.
Q. How can you instruct them what to do?
A. Because we have the proposal.

(R. at 377; R.E. at 77). When DDC arrived at the well site and on the D & D rig, DDC's Directional Driller and Reed's Relief, Tim Spicer, testified:

A. We [DDC] put the assembly together and run it in the hole. I guess I should rephrase that. The drilling hands, the [D & D] rig hands, put the tool together as I instruct them, and they run it in the hole.
Q. So you would be instructing the D&D drilling crew hands?
A. Yes.
Q. And would the same thing be for Mr. Reed as your relief?
A. Yes.

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[5] Here, the D & D crew.

[6] Here, James Polk.

[7] Here the Proposal is part of the DDC Report, Section I. (R. at 413-417; R.E. at 113-17).

(R. at 460; R.E. at 160). As it concerns the specific services DDC provided while on the Project, Tim Spicer testified that,

> We [DDC] provide our service for so much a day. I mean, it is pieced out like so many - - - so much for motor hours, so much for drill collars, so much for MWD, so much for supervision.

(R. at 461; R.E. at 161). This testimony is consistent with DDC's invoice to Penn Virginia for its services on the Project and specifically where DDC charged Penn Virginia for "Directional and Wireline Supervision" as a separate line item. The daily charges for this line item commenced on March 20, 2005, the day DDC arrived at the Project, and continued until March 26, 2005. (R. at 482; R.E. at 180). Additionally, Spicer testified:

Q. Do you consider yourself the one over the entire drilling operation?
** Objection Omitted **
A. No. I don't tell - - - I mean, I control the directional tools that are in the hole. That is my responsibility.
Q. Okay, and if they are being ran or manipulated or operated from the rig during the directional phase do you or your relief instruct, for example, the D&D crew and hands on what to do?
A. Yes.

(R. at 462; R.E. at 162).

C. The Project

On March 15, 2005, D & D moved its rig on the well site, set the rig up, picked up pipe and prepared the well bore for the directional drilling phase. Mr. Polk's tour of duty started at 5:30 A.M. and lasted until 5:30 P.M., when his relief would come on duty. (R. at 386; R.E. at 86) It is undisputed that there were no incidents during D & D's preparation stage and the "come along" was not in service. In fact, Reed testified:

Q. Okay. You don't know, sir, do you, whether D & D had any problems with the straight down hole because of the rotary table, do you?
A. They shouldn't have, no.
Q. Okay.

A. I might add, being a re-entry there wasn't very much other than going in and pulling out pipe and then getting ready to do the kick off.

(R. at 384; R.E. at 84).

On March 20, 2005, DDC arrived at the well site and commenced the directional drilling phase of the project. It was at this time that Reed testified the "come along" was attached so DDC could begin building their designated curve and sliding the drill string. (R. at 381; R.E. at 81). According to Spicer, "If you are sliding, you're actually guiding the hole, you're making angle in the direction you are trying to achieve." (R. at 465; R.E. at 165). Spicer also testified that when they are sliding aka slide drilling aka making an angle, the Directional Driller will be on the rig floor. (R. at 465; R.E. at 165).

As it concerned the "come along", and why it was being used at all, Spicer testified:

Q. Were you experiencing any problems with the well that required you to use the comealong?
A. No, I wasn't having any problems with the well. The comealong is what I was using to guide the well.

(R. at 464; R.E. at 164). Specifically, Spicer explained, that he was "trying to control the reactive torque" because if "you set it on bottom and just let it go it will drill off to the left side normally. You have to pull it to the right to compensate for the reactive torque to keep it lined up in the direction I need to be heading." (R. at 459; R.E. at 159). Similarly, Reed explained that the "come along" was attached to the D & D rig so Reed could make the necessary corrections to the drill, during the directional drilling phase, because the wire in the hole would trail in the wrong direction or deviate from the planned coordinates according to the Proposal. (R. at 379-80; R.E. at 79-80).

It is undisputed that before DDC arrived at the Project, the "come along" had not been used for any purpose. (R. at 382; R.E. at 82). It is further undisputed that no one on the D & D crew had ever seen a "come along" used for the purpose Reed and DDC used it for here. (R. at 410; R.E. at

110);(R. at 486; R.E. at 184); (R. at 489; R.E. at 187)

D. The Day of the Accident, March 22, 2005

In the early morning hours of March 22, 2005, Reed was working his 6:00 P.M. to 6:00 A.M. tour of duty. (R. at 382; R.E. at 82). Reed testified that during this shift and before Polk arrived for his shift at 5:30 A.M. on March 22, 2005, Reed put the "come along" on D & D's rotary motor. (R. at 394-95; R.E. at 94-95). Thereafter, according to Reed, the events leading to the accident, or the following fifteen minutes of overlap between the end of Reed's shift and the beginning of Polk's shift, happened as follows:

> A. I'll have to elaborate a little bit here, but it was almost, like I say, 5:30. Mr. Polk and his crew had come on. I don't think they were there much before that because 5:30 was their relief time. I went up on the floor at approximately 15 til or almost 6:00. And at that time he was having some problems. Pressure was up.
> Q. What kind of problems?
> A. The hole pressure. The hole pressure was up for some reason. So I told him to work the string.... I told him to work it.
> Q. Work it. What does that mean?
> A. That means pick it up off bottom so your pressure will drop back down. We picked it up, worked it about four times.
> Q. When you say we?
> A. Yes, James.
> Q. Who is we?
> A. I'm there but I told James to do it. His crew was also there. They had just come on at 5:30.
> Q. Okay. But maybe I just need you to be a little bit more clear or specific. When you say we picked it up, does that mean you?
> A. No. I told James. He picked it up.

(R. at 386-87; R.E. at 86-87). After Polk "picked it up" as Reed told him to, Reed told Polk to "kill the mud pump," which Polk did. (R. at 387-88; R.E. at 87-88). Reed then testified that he told Polk to turn the mud pump back on, which Polk did. (R. at 388; R.E. at 88). Thereafter, Reed told Polk and the D & D crew that the "come along" had to be released and Reed proceeded to the rig floor to help with the removal. (R. at 389-90; R.E. at 89-90). When the "come along" came loose, it

started swinging wildly around and struck Reed several times injuring him.

The above material and relevant facts are not in dispute and are supported by documentary evidence, affidavit and deposition testimony. However, various versions exist concerning *how* the "come along" was released and *who* released it. To this end, Reed claims that Polk struck the "come along" with a hammer in the split second Reed shouted the word "no!" (R. at 391; R.E. at 91). Polk denies he struck the "come along" with anything. The only other eyewitnesses to the accident, Jason Brown and Dencil Powell, both former employees of D & D who worked the same shift with Polk, testified that there was no hammer used during this time at all. (R. at 490; R.E. at 188) and (R. at 487; R.E. at 185). While Reed disputes these facts, the lower court correctly ruled that, under prevailing Mississippi law, these facts were immaterial and irrelevant to Reed's claims against D & D and James Polk.

SUMMARY OF THE ARGUMENT

This court reviews a circuit court's grant of summary judgment *de novo*, applying the same standards as the circuit court. Following a *de novo* review, this Court should affirm the lower court in all respects.

First, this Court should affirm the dismissal of Reed's premises liability claims because Reed failed to demonstrate that (1) a task *other than* directional drilling was taking place at the time of the accident and (2) that he was not only aware that the "come along" was a attached to D & D's rig and created a danger, but that he was the one that attached it to D & D's rig in the early morning hours of March 22, 2005, just hours before it came loose. Instead, Reed merely argues that it was his co-worker, Tim Spicer, who first introduced the "come along" to D & D's rig on March 20, 2005[8] and since there were accidents then, accordingly, that the use of the "come along" must have posed no danger.

Second, this Court should affirm the dismissal of the Reed's claim because all the documented evidence, including the D & D–Penn Virginia Contact; DDC's End of Well Report, invoicing to Penn Virginia for work completed; Reed's job description; sworn deposition testimony, including that provided by Reed; and the uncontroverted affidavit testimony of Penn Virginia's James McKinney prove that Reed, by and through his employment with DDC and as contractually obligated, was in control of the drilling activities that were in progress at the time of the accident. In efforts to avert this finding, Reed summarily argues, without any credible or probative evidence to support his contention, that the "ultimate right to control D & D employees remained with the D & D supervisor or toolpusher." In fact, all the evidence in this case supports the lower court's findings on the issue of control and contractual superiority.

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[8] Appellant's Brief at 4, Section B.

ARGUMENT

D & D's summary judgment motion argued that dismissal of Reed's negligence claim was appropriate because Reed, an independent contractor aboard D & D's rig, was in control of all aspects of the tasks being performed at the time of the accident and because the undisputed and material evidence demonstrated that Reed's injuries were intimately connected with the job he was specifically retained to perform and Reed had knowledge of the dangerous condition created when he placed the "come along" on D & D's rig earlier the morning of the accident.

The lower court agreed with D & D's arguments and granted summary judgment under the negligence theory Reed pled. Reed's brief addresses the circuit court's ruling as it concerns the issue of control and knowledge of the danger and argues immaterial facts and unsupported assertions, which the circuit court did not rely upon in reaching its decision. Additionally, Reed argues, for the first time here, a concept of agency law and implores this Court to find Polk negligent under a theory of agency never presented to the lower court.

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AFTER CONSIDERING THE INDISPUTABLE DOCUMENTED EVIDENCE, DEPOSITION TESTIMONY PRESENTED BY REED AND AFFIDAVIT TESTIMONY.

A. Summary Judgment Standard

The standard of review by which an appellate court reviews the grant or denial of a motion for summary judgment under Rule 56(c) of the Mississippi Rules of Civil Procedure is *de novo*. *Nofsinger v. Irby*, 961 So.2d 778, 779-80 (¶7)(Miss. App. 2007).

Rule 56(c) of the MISSISSIPPI RULES OF CIVIL PROCEDURE states that the motion for summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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. PROC. 56(c).

Where a party has moved for summary judgment on an issue, the burden of production rests on the party who, at trial, would have the burden of proof on that issue. *Webster v. Mississippi Publisher's Corp.*, 571 So. 2d 946, 949 (Miss. 1990). The movant has no duty to provide an evidentiary predicate to negate the existence of a material fact as to those issues on which he does not bear the burden of proof at trial. Rather, as to issues where the movant does not bear the burden of proof at trial, he must initially only make a sufficient "informing," "pointing out," or "showing" that there is an absence of evidence to support the non-movant's case. *McFarland v. Leake*, 864 So.2d 959, 961 (¶3)(Miss. App. 2003).

To avoid summary judgment, the non-moving party must establish a genuine issue of material fact within the means allowable under the Rule. *Vaughn v. Estate of Worrell*, 828 So.2d 780, 783 (¶10)(Miss. 2002). A material fact is a factual issue "that matters in an outcome determinative sense." *Vaughn*, 828 So.2d at 783 (¶9). A material fact is one which resolves any "of the issues, properly raised by parties." *Stegall v. WTWU, Inc.* 609 So. 2d 348, 351 (Miss. 1992). In *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985), the Mississippi Supreme Court held:

> Of importance here is the language of the rule authorizing summary judgment "where there is no genuine issue of *material* fact." ....[W]e have kept ever before us that basis tenet of Rule 56 theology that 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. [emphasis added].

Shaw, 481 So. 2d at 252. *See also Otts v. Lynn*, 955 So.2d 934, 939 (¶14) (Miss. Ct App, 2007)(restating the same standard twenty-two years after *Shaw*.)

B. The Circuit Court Applied the Correct Negligence Standard When it Dismissed Robert Reed's Claims.

Mississippi law requires that a premises owner (here D & D as owner of the subject rig) to furnish the employees of an independent contractor with a "reasonably safe place to work or give warning of danger." *Mississippi Chemical Corp. v. Rogers*, 368 So.2d 220, 222 (Miss. 1979) (citing *Mississippi Power Co. v. Brooks*, 309 So.2d 863 (Miss. 1975)). However,

> [a]s an exception to the general rule requiring the owner or occupier of premises to furnish a safe place of work to an independent contractor and employees thereof, the owner or occupier is under no duty to protect them against risks arising from or intimately connected with defects of the premises, or of machinery or appliances located thereon....Additionally, the owner is not liable for death or injury of an independent contractor or one of his employees resulting from dangers which the contractor, as an expert, has known, or as to which he and his employees "assumed the risk." When a danger exists, which is inherent to the work the independent contractor is employed to perform, or which arises from or is intimately connected with the work to be performed, the employer's duty to protect the contractor is absolved. Additionally, the premises owner's liability is limited by the extent to which he has "devolved upon the contractor the right and fact of control of the premises and the nature of the work."

Nofsinger, 961 So.2d at 781 (¶10) (internal citations omitted)

The lower court correctly examined the undisputed and relevant material facts in light of the above long-standing Mississippi case law and prevailing statutory law and correctly found that any and all of these three factors, i.e., intimately connected, knowledge of the danger and right and fact of control, warranted dismissal of Reed's claims.

1. The lower court correctly found that Robert Reed, by and through his employment with DDC controlled, by right and fact, all aspects of the work during the directional drilling phase of the Project and those in progress at the time of the accident.

It is undisputed that Robert Reed was an independent contractor while on D & D's rig. It is undisputed that Robert Reed was on D & D's rig for the specific purpose of performing all tasks associated with the directional drilling aspect of the drill. It is undisputed that Reed, as the on-duty

Directional Driller, supervise[d] the assembly of the downhole tools by rig personnel[9], instruct[ed] the Driller[10] on the appropriate drilling parameters to be used (weight on bit, rpm's, pump output) to drill the directional plan. (R. at 480; R.E. at 178) In fact, not only did Reed's employer, DDC, charge Reed with supervisory duties over the D & D rig crew during the directional drill, but Penn Virginia specifically arranged with DDC to perform all aspects of the directional drilling phase of the Project and contractually required D & D to operate under the direction, supervision and control of DDC and its representative employees during the directional or angled phase of the Project. (R. at 308; R.E. at 8).

Other factors that unquestionably confirm that Reed was in control of the rig and the operations ongoing at the time of the accident include Reed's testimony wherein he admittedly dictated and ordered every action taken by the D & D crew (R. at 386-91; R.E. at 86-91), the testimony of his counterpart, Tim Spicer (R. at 460; R.E. at 160) and the very billing submitted to Penn Virginia from DDC. (R. at 483-84; R.E. at 181-82).

As it concerns the circumstances surrounding the "come along", it is undisputed that Reed attached the "come along" to the rotary table to guide the drill string during his directional drill, before Polk and his crew even arrived at the rig. (R. at 394-95; R.E. at 94-95). It is undisputed that Reed, in carrying out his supervisory role, ordered Polk to work the string, which is attached to DDC truck and manipulated by the "come along" multiple times because of hole problems during the directional drill. (R. at 378, 385-86; R.E. at 78, 85-86). It is undisputed Reed ordered Polk to turn the pump motor off and then on again. (R. at 396; R.E. at 96). It is undisputed that Reed instructed the D & D crew to quickly remove the "come along" and began to help take it off seconds before the

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[9] Here, the D & D crew.

[10] Here, James Polk.

"come along" released. (R. at 389-90; R.E. at 89-90); (R. at 490; R.E. at 188)

Reed argued in the lower court, as he does here, that D & D never relinquished "control" of its rig because D & D "retained control over all the moving parts." However, Reed does not and cannot dispute the fact that while the D & D crew may had retained physical contact with the "moving parts" of the rig, every action and reaction performed by the D & D crew, including Polk, was directed by Reed as to when, where and how the "moving parts" were to be moved. Even Reed testified that he had the authority to "instruct" the D & D crew while on their rig because Reed and DDC "had the proposal." (R. at 377; R.E. at 77). Reed did not dispute any of these facts while before the circuit court and he does not dispute these facts here, because he cannot. The law does not require D & D and Mr. Polk to throw in the towel and walk off the rig to demonstrate that Reed controlled the rig and all aspects of the work at the time he was injured. Rather, what is critical is whether the D & D maintained any right of control over the performance of that aspect of the work that has given rise to the injury. *Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So.2d 182, 186 (Miss. 1989). The facts of this case clearly demonstrate that Reed exercised control over the performance of the directional drilling operations.

Having correctly found that Reed was in control over the performance of the aspect of work that was taking place at the time he was injured, the circuit court then determined the status of the parties and the duty owed as a result of that status. Based on the contractual language finding that "D & D employees were under the direct control and supervision of DDC employees throughout the course of its work on th[e] Project, specifically the day of th[e] incident" (R. at 619; R.E. at 203) the circuit court determined, as Reed argues as well, that Reed was a business invitee. (R. at 619; R.E. at 203).

In accordance with Mississippi law, the circuit court held that D & D, as the owner of the rig, owed Reed the duty to use reasonable care to keep its premises in a reasonably safe condition and furnish the employees of an independent contractor with a reasonably safe place to work or give adequate warnings. The circuit court also correctly determined that the two long held exceptions to this duty applied.

2. The lower court correctly found that Robert Reed's injuries were intimately connected to the directional drilling activities he was hired to perform and was performing at the time of the accident

The "intimately connected" exception to the general duty a premises owner owes to an independent contractor provides that a premises owner or lessee is not liable for injuries sustained by an independent contractor working on the premises where the injuries arise out of and are intimately connected to the work the independent contractor is performing at the time of the accident. *See Vu v. Clayton*, 765 So.2d 1253 (Miss. 2000).

In efforts to avoid the intimately connected exception to the general duty owed to an independent contractor while on the premises of another, Reed argues, *albeit* incorrectly, that D & D never relinquished control of the jobsite to DDC and the contract for services was between D & D and Penn Virginia and not DDC and D & D.

First, Reed's argument that "DDC had no authority to supervise or control D & D's employees" is negated by the overwhelming evidence, *i.e.*, Reed's job description, DDC's End Well Report, DDC's invoicing, Reed's deposition testimony and affidavit testimony–all of which clearly demonstrate that DDC–and specifically Reed –was indeed in control of the operations that were being conducted at the time Reed was injured.

Second, though Reed provides no legal authority for his position, Reed argues that because DDC and D & D were not contractually engaged with each other, Reed is not subject to the

intimately connected doctrine. Twenty eight years ago, the Mississippi Supreme Court disagreed with the position Reed takes here in the matter of *Fortenberry Drilling Co., Inc. v. Mathis*, 391 So.2d 105 (Miss. 1980), which remains the prevailing law today.

In *Fortenberry*, Damson Oil Corporation (Damson) engaged the services of several independent contractors to perform a variety of services on its oil well. *Fortenberry*, 391 So.2d at 105. Damson (like Penn Virginia here) engaged the services of Fortenberry Drilling Company, Inc. (Fortenberry) as the independent drilling contractor and to supply a rig (like D & D here). Damson also engaged the services of independent contractor, Oil Field Rental Service, who employed Mathis to run casing into the well (like DDC and Reed in the case *sub judice*). *Id.* On January 31, 1977, the night of the accident, there was an irregular stacking of the drill collars left by the Fortenberry drilling crew. *Id.* at 106. Mathis and his fellow crew members from Oil Field Rental straightened the pipe rack, and while doing so Mathis fell and suffered multiple serious injuries. *Id.* Mathis brought suit against Damson and Fortenberry for his injuries.

Like Mr. Reed here, Mathis claimed that Damson and Fortenberry were negligent in failing to provide him a safe place to work.[11] *Id.* at 107. Although Mathis recovered in the lower court, the Mississippi Supreme Court reversed and rendered the judgment holding:

> We also recognize the rule that an owner or occupier of premises owes no duty of protection to an independent contractor when the contractor or his employee is injured by an activity which is intimately connected with defects which the contractor has undertaken to repair. *Spruill v. Yazoo Valley Oil Mill, Inc.*, 317 So.2d 140 (Miss.1975); *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss.1970), cert. denied, 400 U.S. 916, 91 S.Ct. 174, 27 L.Ed.2d 155; *United Roofing & Siding Co. v. Seefeld*, 222 So.2d 406 (Miss.1969). In this case, the Oil Field Rental crew had undertaken the rearrangement of the pipes upon the rack and thus Mathis cannot recover [from Damson or Fortenberry] for injuries occurring as he was performing this task.

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[11] Reed originally brought his claims against Penn Virginia and D & D Drilling equally. On February 8, 2007, this Court granted summary judgment to Penn Virginia. (R. at 491-494; R.E. at 189-92)

Id. at106.

As demonstrated above, there is no question that Reed was injured while performing the very task he was hired to perform–the directional drill and specifically making corrections to guide the drill in accordance with Penn Virginia's objectives. The DDC Report clearly indicates that Reed was "slide drilling" at the time of the accident or 5:45AM. (R. at 309; R.E. at 9); (R. at 336; R.E. at 36). It is also undisputed that the only reason that the "come along" was placed on the rig by Reed at all was for purposes of performing the directional drilling aspect of the project. As Reed explained, the "come along" was attached to the D & D rig so he could make the necessary corrections to the drill, during the directional drilling phase, otherwise, according to Reed, the wire in the hole would trail in the wrong direction or deviate from the planned coordinates according to the Proposal. (R. at 380; R.E. at 80). Reed ordered Polk to turn the motor off and then on again to avoid circulation problems during the directional drilling phase. Next, Reed ordered the D&D crew to remove the "come along." (R. at 388-89; R.E. at 88-89). Finally, it is undisputed that while Reed and others manipulated the "come along," the "come along" came loose and the trapped torque (caused from the spinning motor) empowered the "come along" to swing about and strike Reed.

These are the facts. This is the material evidence that was before the circuit court, that was undisputed by any credible evidence and that Reed only disputes here with unsubstantiated, unsupported dialogue and a complete absence of legal authority. The lower court correctly found Reed was in control, by right and fact, of the directional drilling operations that were on going at the time of the accident and that which he was specifically hired to perform. Based on the facts and the prevailing legal authority in Mississippi, this Court should affirm the lower court's ruling in this regard.

3. The circuit court correctly applied the "knowledge of the danger" exception codified at MISS. CODE ANN. § 11-1-66 to Reed's claims

Next, the circuit court also acknowledged and applied the "knowledge of the danger" exception, which generally provides that a premises owner or lessee is not liable for injuries sustained by an independent contractor where the independent contractor has actual or constructive notice of the condition causing the injuries. *See City of Jackson v. Ball*, 562 So.2d 1267, 1270 (Miss. 1999).

As to this exception, Reed argues there is no evidence that Reed knew or should have known of the dangerous condition and argues, again, that the dangerous condition did not exist until Polk allegedly struck the "come along." However, the undisputed evidence demonstrated that Mr. Reed ordered the pump motor to be turned on while attempting to release the "come along." (R. at 388;-89 R.E. at 88-89). Reed also testified that if the motor had been cut off, the accident "very possibly" would not have occurred. (R. at 396; R.E. at 96). Reed also testified that if the "come along," he placed on the rotary motor, had not been there at all the accident would not have occurred. (R. at 392-93, 395; R.E. at 92-93, 95).

Additionally, Reed's argument that "D & D failed to submit any summary judgment evidence that releasing the "come along" while the pump motor was idling was dangerous" is simply false. Specifically, D & D pointed out that Spicer, Reed's counter-part and relief man, testified that it is well known that torque is going to build up if the pump is left running because "as you let it out, the drill string will keep rolling with you, so it always has tension if the pump is running." (R. at 463; R.E. at 163). Spicer further testified that he never released a "come along" and left the pump motor running, because "when the motor stalls it creates a lot of torque, so I usually kill the pump so that the torque is gone and then I release the come along." (R. at 131; R.E. at 2). Tater, another DDC employee, testified that it is well known that the difference between releasing a "come along" with

the motor on as opposed to the motor being shut off is that there is still a minimal amount of torque on the drill string. (R. at 403; R.E. at 103).

The knowledge of the danger exception is codified at MISS. CODE ANN. § 11-1-66 and provides:

> No owner, occupant, lessee or managing agent of property shall be liable for the death or injury of an independent contractor or the independent contractor's employees resulting from dangers of which the contractor knew or reasonably should have known.

In *Jackson Ready-Mix,* 235 So.2d at 270, the Mississippi Supreme Court stated:

> The basis of the inviter's liability for injuries sustained by the invitee on the premises rests on the owner's superior knowledge of the danger, and as a general rule, he is not liable for an injury to an invitee resulting from a danger which was known to the invitee or which was obvious or should have been observed by the invitee in the exercise of reasonable care . . . .

As the knowledge of the danger exception relates to the intimately connected exception, the Court in *Stokes v. Emerson Elec. Co.*, 217 F.3d 353 (5th Cir. 2000)(applying Mississippi law) stated:

> The ability of the contractor to avoid injury where he knows that a dangerous condition exists does not depend on his control over the manner in which the work is being performed or his reason for being on the premises. Under circumstances such as these, where the contractor is merely traversing the owner's premises, he reasonably can be expected to use his knowledge of dangerous conditions to avoid falling victim to them.

Stokes, 217 F.3d at 359 and n.25 (*citing General Tire & Rubber Co. v. Darnell*, 221 So.2d 104 (Miss. 1969) (emphasis added); *see also Mississippi Power & Light Co. v. Nail*, 211 So.2d 815 (Miss. 1968) and *Mississippi Chemical Corp.* 368 So.2d 220 (Miss. 1979)(each holding that employee of contractor cannot recover for injuries arising from condition -- not necessarily "intimately connected" with work being performed and without regard to "control" -- where contractor and/or its employee had actual or constructive notice or knowledge of condition).

Thus, under *Stokes* and the plain language of MISS. CODE ANN. § 11-1-66, the issue of

"control" is not relevant to the applicability of the "knowledge of the danger" exception to the general duty owed by premises owners to invitees.

Under the credible, undisputed and relevant facts of this case, coupled with well-settled Mississippi case law and statute, the circuit court correctly found, for the second time[12], that "it is apparent that [Reed] knew the "come along" was attached to the drive bushing" and as "a long time directional driller had to know that since the well drive spins, if the "come along" were to become detached, it could swing and injure someone." (R. at 620; R.E. at 204).

Thus, as the circuit court correctly held, "applying either doctrine [intimately connected of knowledge of the danger] would relieve the defendant of liability." (R. at 620; R.E. at 204).

II. IN FINDING THAT REED COULD NOT PREVAIL ON HIS NEGLIGENCE CLAIM, THE CIRCUIT COURT ONLY RELIED UPON THE UNDISPUTED EVIDENTIARY FACTS.

Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

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[12] In granting summary judgment in favor of Penn Virginia, the circuit court held:

> In regards to the "knowledge of the danger doctrine", it is apparent that the plaintiff knew the "come along" was attached to the drive bushing. More importantly the plaintiff had to know that since the well drive spins, if the "come along" were to come detached it could swing and injure someone. Therefore, the plaintiff should be charged with at least constructive knowledge of the danger.

(R. at 493-94; R.E. at 191-92). Reed did not object or contest the circuit court's finding in this regard when presented with Penn Virginia's summary judgment. Thus, as to this issue, Reed is *collaterally estopped* from asserting that he had no idea "that releasing the "come along" while the pump motor was idling was a dangerous condition." *See Bush Construction Company v. Walters*, 254 Miss. 266, 271-72, 179 So.2d 188, 190 (Miss. 1965)(and cases cited therein).

which that party will bear the burden of proof at trial and the opposing party must accomplish this requirement by presenting more than a metaphysical doubt about the material facts in order to preclude the grant of summary judgment." *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Reed's argument that the circuit court erred in granting D & D and Polk summary judgment because he testified contrary to what the evidence proved is unpersuasive. To support this argument, Reed re-argues, without any supporting evidence, that D & D maintained control over the rig and Polk allegedly struck the "come along" with a hammer causing the injuries. Reed even argues, incorrectly, that the circuit court held "Polk's actions were negligent."[13]

In the first instance, the circuit court never made a finding that Polk's actions were negligent. The Order of the circuit court merely applied the summary judgment standard properly and viewed the facts presented in the light most favorable to Reed, but expressly stated,

> It should be noted that solely for the purposes of this opinion, viewing facts in the light most favorable to the non-moving party, this Court will be *assuming* James Polk's alleged actions were negligent. This opinion is not to be read as factually determinate or placing any sort of liability upon James Polk.

(R. at 616 (fn*))(emphasis added); R.E. at 200)(R. at 616; R.E. at 200). As to this issue, though not material, after nearly two years of discovery, Reed never brought any information before the circuit court to corroborate his version that Polk struck the "come along" with a hammer. In fact, Polk denied he struck the "come along" with anything and the only other eyewitnesses to the accident, Jason Brown and Dencil Powell, both former employees of D & D, testified that there was no hammer used during this time at all. (R. at 490; R.E. at 188) and (R. at 487; R.E. at 185)

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[13] Reed's brief at 12 Section B.

Reed also argues that because D & D owned the rig, D & D was in "control." Yet, Reed failed to produce any evidence, other than his own testimony and denials of the undeniable and proven facts, to substantiate this assertion. In fact, all the evidence which included affidavit testimony, the testimony of Reed and his counter-part (Tim Spicer), D & D contract language and indisputable documentation from DDC, Reed's employer, proved that Reed and DDC were in charge and in control, as a matter or right and fact, of every aspect of the drilling operations at the time of the injury.

The lower court properly reviewed all the relevant facts and material evidence in reaching its finding that summary judgment in favor of D & D was appropriate and warranted and this Court should affirm the circuit court's ruling in all regards.

III. THE CIRCUIT COURT APPLIED THE PROPER ANALYSIS WHEN RULING ON REED'S NEGLIGENCE CLAIMS.

Finally, Reed argues that the lower court erred when it failed to address Reed's common law negligence claims against Polk. Here, Reed seems to suggest that even though summary judgment was appropriate and warranted under well settled Mississippi law as to D & D, that a claim against Polk, under the law of agency, should still stand. Reed is mistaken.

Reed's complaint makes clear that he named James Polk as a negligent actor, acting within the course and scope of his employment and looked to D & D (as the deep pocket) for liability of James Polk's conduct through the doctrine of respondeat superior.[14] (R. at 495-501; R.E. at 193-99). At no time did Reed pursue Polk in his individual capacity or as a joint tortfeasor in this cause. Instead, every time Polk's name is mentioned in the Complaint, Reed qualified Polk's role by

[14] Complaint at ¶¶ 13-15, 19.

pleading: "(which is attributable to Defendant D & D through the doctrine of respondeat superior)."

An action against an employer based on the doctrine of respondeat superior is a derivative claim arising solely out of the negligent conduct of its employee within the scope of his or her employment. *J & J Timber Co. v. Broome*, 932 So.2d 1, 5 (Miss. 2006). *See also Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 1 So.2d 216, 218 (1941)(where the liability of the master for the wrong of a servant has grown out of a tort in which the servant is the sole actor, the liability of the master is an imputed or constructive liability and has its sole basis in the doctrine of respondeat superior and in nothing else).

Here, for the first time, Reed seems to argue that his claims against Polk are separate and distinct from those against D & D and therefore, deserving of a separate analysis. Moreover, in doing so Reed argues inapposite case law. For example, Reed relies upon *American Fire Protection, Inc v. Lewis*, 653 So.2d 1387 (Miss. 1995) and *Mullican v. Meridan Light & Ry.Co.*, 121 Miss. 806, 83 So. 816 (Miss.1920) which were breach of contract actions, while *Holland v. Mayfield,* 826 So.2d 664 (Miss. 1999) was a fraud case and *Mississippi Power & Light Co. v. Smith*, 296 Miss. 447, 153 So. 376 (Miss. 1934) establishes only the proposition that employers have a duty of reasonable care to provide employees with a safe place of work. None of these cases address the issues presented by the case *sub judice* where an independent contractor is injured on the premises of another while performing and controlling all aspects of the work he was hired to perform. As such, Plaintiff's argument in this regard is without merit and should be disregarded.

CONCLUSION

The circuit court committed no error when it granted summary judgment after considering documentation from DDC, the Penn Virginia–D & D contract, affidavit testimony, and deposition testimony from Reed, and his DDC co-workers, because that evidence and that evidence alone, demonstrated that Reed could not meet his burden and prove any of the essential elements of his negligence claim. Under the undisputed material facts, D & D Drilling and James Polk was entitled to summary judgment.

For these reasons, D & D Drilling respectfully asks this Court to affirm the circuit court in all respects and dismiss Reed's appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Miss. R. App. P. 25 and 31, I hereby certify that I have this day served the foregoing Brief of Appellee by causing a true and correct copy to be placed in the United States Mail, First-Class Postage Pre-Paid, addressed, as follows:

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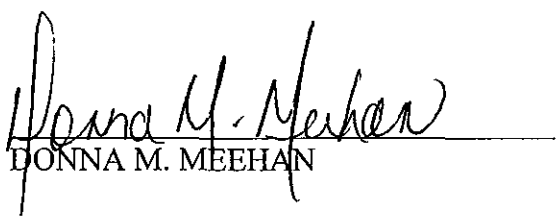
THIS, the 25th day of November, 2008.



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