IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FEDERAL INS. CO., ROBERT REED, and JENNIFER REED — APPELLANTS

VS. — NO. 2008-CA-01148

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

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE CIRCUIT COURT
OF LAMAR COUNTY, MISSISSIPPI
Case No. 2006-71P

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I. SUMMARY JUDGMENT STANDARD

The Appellants do not dispute the standard for summary judgment in Mississippi under the *Mississippi Rules of Civil Procedure*, 56(c).

II. GENUINE ISSUES OF MATERIAL FACT EXIST

The Appellee alleges that there are no genuine issues of material fact disputed in this case. However, there *are* genuine issues of material fact in the matter *sub judice* appropriate for a jury to decide. These issues include deciding who was in control of the jobsite at the time Mr. Reed's injury occurred, or alternatively, whether the issue of control is a relevant inquiry given that Mr. Reed (who was employed by a subcontractor) was injured by another subcontractor. Also at issue is the question of whether Mr. Polk struck the come-along with a hammer and caused Mr. Reed's injuries.

A. D & D owned and maintained control of the drilling rig and its equipment at the time of the accident

Even though DDC was responsible for the directional drilling aspect of the drilling operation, D & D was the actual owner of the rig[1] and its employees operated all equipment on the drilling rig. Mr. Reed argues that because he was a business invitee, and D & D was occupying the area where the injury occurred, D & D must be held to the standard of care due to an invitee. As stated by this Court, a duty is owed to an invitee for hidden or latent defects which are known to the owner in the exercise of reasonable care. *Lumbley v. Ten Point Co.*, 556 So. 2d 1026, 1029 (Miss. 1989).

DDC did not assume control over the operation of the rig just because it was making sure the drill was moving in the right direction. Furthermore, Mr. Reed's control over the directional

[1]CR, 0297

drilling aspect of the drill did not (and under no circumstance would not) relieve Polk from his duty to exercise reasonable care while working around fellow subcontractors. Mr. Reed's "control" would only extend to Polk in the sense that Polk should have heeded Mr. Reed's warning to release the come-along one notch at a time.

At no time was complete control of the jobsite relinquished to DDC. Therefore, Appellee should not be awarded protection under the "intimately-related" defense, and the question of who controlled the drilling rig at the time of the injury should be a question for the jury to decide.

B. The come-along was installed by D & D's employees and Mr. Reed's immediate supervisor; not by Mr. Reed

Appellee is mistaken about the facts in this case. Much like the incorrect statement in Appellee's Brief that there "were accidents" on March 20, 2005[2],and that "Reed created the dangerous "come along" he complained injured him,"[3] Appellee also incorrectly states that Mr. Reed installed the come-along on D & D's rig. This is contrary to evidence that D & D employees James Brown and Dencil Powell removed and then reinstalled the come-along during drilling operations prior to the incident.[4] As such, D & D cannot claim that "it is undisputed that Reed attached the come-along to the rotary table,"[5] and a jury should be able to decide this genuine issue of material fact.

C. Polk unilaterally struck the come-along with a hammer supplied by D & D in direct contravention of Mr. Reed's instructions

D & D asserts that Polk did not strike the come-along with a hammer, and eyewitnesses to the accident (Jason Brown and Dencil Powell) testified that there was not a hammer used

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[2]Appellee's Brief at 15, Summary of the Argument

[3]Appellee's Brief at 4, Statement of the Case (Section 1)

[4]CR, 0253 and 0252

[5]Appellee's Brief at 15 and 19, Section I(B)(1)

during the incident.[6] However, D & D conveniently ignores the original statement given by Dencil Powell to D & D's private investigator in which Powell clearly states that he saw Polk strike the come-along immediately prior to the incident.

Furthermore, Mr. Reed did not instruct or know that Polk was going to strike the come-along with a hammer. Polk was instructed by Mr. Reed to release the come-along a few notches at a time. Therefore, because there was no danger in releasing the come-along a few notches at a time, Mr. Reed did not have knowledge of any danger. More importantly, though, there was no way for Mr. Reed to have prior "knowledge of the danger" that Polk created when he struck the come-along with a hammer. Accordingly, whether Polk struck the come-along with a hammer and caused Mr. Reed's injuries should be left for the jury to decide.

III. APPELLANTS' COMMON LAW NEGLIGENCE CLAIM

Although raised in pleadings, the Trial Court completely ignored Mr. Reed's common law negligence claims against Polk. It is well-settled law in Mississippi that all persons have a duty to use that which he controls so as not to injure another. *Miss. Power & Light Co. v. Smith*, 153 So. 376, 280 (Miss. 1995). Mr. Reed alleged that Mr. Polk breached his duty by striking the come-along with a hammer which was obviously under his control. Accordingly, the issue of whether Polk was actively negligent is also a question of fact appropriate for a jury to decide.

CONCLUSION

There are genuine issues of material fact in the case *sub judice* that are appropriate for a jury to decide. Therefore, the granting of summary judgment by the Lamar County Circuit Court was improper and should be reversed.

RESPECTFULLY SUBMITTED, this the 15th day of December, 2008.

FEDERAL INSURANCE COMPANY, ROBERT REED and JENNIFER REED, APPELLANTS

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CERTIFICATE OF SERVICE

I, ALEX J. SHOOK, of the law firm of HAMSTEAD WILLIAMS & SHOOK PLLC do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS to all interested parties, addressed as follows:

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Honorable R.I. Prichard, III
Lamar Count Circuit Court Judge
P.O. Box 1075
Picayune, MS 39466

SO CERTIFIED, this the 15th day of December, 2008.

FEDERAL INSURANCE COMPANY, ROBERT REED and JENNIFER REED, APPELLANTS

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