IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
2008 - IA - 01560 - SCT

CRAWFORD LOGGING, INC. APPELLANT

VS.

THE ESTATE OF ROSWELL IRVING, JR.,
DECEASED; CARLA IRVING FORTE';
NORMA IRVING KING AND KELVIN EDWIN IRVING
AS WRONGFUL DEATH BENEFICIARIES, SURVIVING
CHILDREN AND SOLE SURVIVING HEIRS AT LAW
OF ROSWELL IRVING, JR., DECEASED APPELLEES

On Appeal From Interlocutory Order Of The Circuit Court Of The First Judicial District Of Hinds County, Mississippi

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Respondents / Appellees / Plaintiffs do hereby certify that the following listed persons have an interest in the outcome of the instant civil action. These representation (s) are made in order that the judges of this Honorable Court may evaluate possible disqualification (s) or recusal (s):

1. Appellees / Plaintiffs - The heirs at law and wrongful death beneficiaries of Roswell Irving, Jr. include:

    A. Carla Irving Forte';

    B. Norma Irving King and

    C. Kelvin Edwin Irving

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 (b) of the Mississippi Rules Of Appellate Procedure, the Appellees / Plaintiffs state that oral argument (s) are necessary and this Court's decisional process can be significantly aided by oral argument.

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STATEMENT OF THE CASE

A. Nature Of The Case

Appellees' claim (s) arise (s) from a pedestrian - motor vehicle accident that occurred on or about September 28, 2004 at a certain stop sign located at the intersection of Mississippi Highway 22 and U.S. Interstate 20. (R. 65) (R.E. 6). Appellees assert that Hosie Thomas was in the course and scope of his employment with Crawford Logging, Inc. at the time of the subject accident that serves as the basis for the instant civil action. (R. 65) (R.E. 6). Appellees assert that Crawford Logging, Inc. owed their decedent an independent duty to exercise reasonable care in selecting drivers to haul

products for them on the roadways within the State Of Mississippi. (R. 65) (R.E. 6).

B. Course Of Proceedings And Disposition Below

In the Circuit Court Of The First Judicial District Of Hinds County, Mississippi, Crawford Logging, Inc. (i.e. hereinafter referred to as "Crawford") moved for summary judgment only asserting in pertinent part: (1) that Crawford was not vicariously liable to the Irvings for the alleged negligent acts of independent contractor, Hoise Thomas and (2) alternatively, any and all vicarious liability claims against Crawford are extinguished by the Irvings' settlement and release of Hosie Thomas, H.T. Trucking Company and Progressive Gulf Insurance Company. (R. 78) (R.E. 13). On or about October 17, 2007, the lower court heard oral arguments on Crawford's Motion For Summary Judgment.[1] On or about August 28, 2008, the lower court entered its Order Denying Crawford Logging, Inc.'s Motion For Summary Judgment, finding in pertinent part that: (1) Rule 56 (c) of the Mississippi Rules Of Civil Procedure outlined the required test for summary judgment and (2) that genuine issues of material fact did exist, which would not entitle the Defendant to a judgment as a matter of law, as much, the motion was not well taken and should be denied. (R. 121) (R.E. 61). It is from the lower court's denial of summary judgment that Crawford now asserts, involves question (s) of law, that they now appeal.

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[1]Appellees "join - in" with Appellant's representation that the above referenced summary judgment hearing was conducted without a court reporter, therefore there is no record of the hearing.

C. Statement Of The Facts

(1) The Accident

That on or about September 28, 2004, at approximately 8:10 a.m., the deceased, Roswell Irving, Jr., was lawfully walking along the northbound shoulder of Mississippi Highway 22 on the northbound right of way, within the city limits of Edwards, Mississippi, near the intersection of U.S. Interstate 20 and Mississippi Highway 22. While the deceased was walking along the shoulder of the highway, in a reasonably prudent manner, Hosie Thomas, while in the course and scope of his employment with Crawford, drove off of U.S. Interstate 20 onto exit ramp #27, intending to make a left turn on to Mississippi Highway 22. See Second Amended Complaint at paragraph 10 (R. 64) (R.E. 5).

That as Hosie Thomas approached the intersection of Mississippi Highway 22, a Hinds County Public School bus was also traveling along Mississippi Highway 22 in opposing directions. Hosie Thomas attempted "to beat" the school bus and the other vehicle and proceeded through the stop sign without making a complete stop. Id. At the same time, however, Appellees' decedent was walking about the northbound shoulder of Mississippi Highway 22 and U.S. Interstate 20 and was struck to the pavement. While Appellees' decedent was lying on the pavement, Hosie Thomas ran over his legs, completely severing one (1) leg and crushing the other. Id.

As a result, Appellees' decedent suffered personal bodily injuries, endured conscious pain and suffering, as well as mental and emotional distress which ultimately led to his untimely demise on or about October 8, 2004. Id at paragraph 11.

(2) The Thomas - Crawford Relationship

Hosie Thomas indicated that he worked for Crawford and that his only source of income was obtained from such employment with Crawford. (R. 136) (R.E. 72). Hosie Thomas testified that the relationship with Crawford could be terminated at any time and that no advance notice was required prior to the "cessation" of such employment. (R. 136) (R.E. 72) See Jack Crawford deposition. Hosie Thomas was paid "by the trip" and his pay is determined by Jack Crawford. (R. 136 - 138) (R.E. 72 - 74).

On the day of the subject accident, Crawford contracted with Hosie Thomas to haul wood to a facility in Vicksburg, Mississippi. See Jack Crawford deposition at 21 (R. 112) (R.E. 46).

(3) Procedural Facts

On or about November 22, 2004, Appellees filed their Complaint in the Circuit Court Of The First Judicial District Of Hinds County, Mississippi. (R. 4) (R.E. 148) Appellees named Hosie Thomas, H.T. Trucking and John Doe Defendants 1 through 10, and alleged that Hosie Thomas caused the death of Roswell Irving, Jr. Id. Through

Hosie Thomas's response to Appellees' First Set Of Interrogatories, Appellees learned that he (i.e. Hosie Thomas) worked for Crawford. (R. 136) (R.E. 72). In fact, Hosie Thomas responded as follows, to wit:

> "On Monday before the accident on Tuesday, I was hauling logs for Crawford Logging to Anderson Tully in Vicksburg, Mississippi and that he did not receive any other income from any other source.

Id. In June 2006[2] , Appellees deposed Jack Crawford and had an opportunity to inquire about the relationship that existed with Hosie Thomas. The parties participated in "mediation" in November 2005, after the deposition (s) of only Hosie Thomas and Carla Irving Forte' not Jack Crawford and a settlement was reached only between Hosie Thomas and H.T. Trucking. (R. 217) (R.E. 159).

Appellees filed their Motion For Leave To Amend Complaint on or about January 9, 2006 without any opposition whatsoever from Crawford. (R. 42 - 59) (R.E. 160 - 177). The lower court granted Appellees Motion or about January 23, 2006. (R. 62) (R.E. 187). On or about March 15, 2006, Appellees filed their Second Amended Complaint substituting Crawford in the place of an "unnamed" John Doe Defendant. (R. 63 - 70) (R.E. 4 - 11). That Crawford filed its Answer on or about

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[2]Appellant's representation in their Appellant's Brief that Jack Crawford's deposition was taken in June 2005 is not correct, as same was taken in June of 2006, after the Court granted leave of court allowing Appellees to file their Second Amended Complaint.

April 28, 2006 and failed to raise any defense with respects to the lower court not having jurisdiction nor any claim that said action was barred under the doctrine of res judicata. (R. 71 - 76) (R.E. 178 - 183).

SUMMARY OF THE ARGUMENT

This action has been litigated, but viable actions remain of and against Crawford. The action against Crawford is based on theories of negligent hiring and negligent retention. The settlement with Hosie Thomas and H.T. Trucking do not bar claims of and against Crawford pursuant to the doctrine of res judicata. Any claims that the lower court was without jurisdiction were "waived" when Crawford failed to assert any response to the Motion For Leave To Amend or raise an affirmative defense in its Answer.

Crawford is not entitled to summary judgment in that it (i.e. Crawford) owed Appellees' decedent an independent duty to hire and retain competent drivers for purposes of hauling their products on public roadways. As a matter of law, Appellees' claims are proper and this matter should be remanded to the lower court so that same may be set for trial.

ARGUMENT

The Standard Of Review

That when reviewing issues of law, this Court engages in de novo review. J&J

Timber Co. v. Broome, 2004 - IA - 01914 - SCT (Miss. 2006). (Citing Sealy v. Goddard, 910 So.2d 502, 506 (Miss. 2005); Ellis v. Anderson Tully Co., 727 So.2d 716, 718 (Miss. 1998); Ostrander v. State, 803 So.2d 1172, 1174 (Miss. 2202)). That Rule 56 (c) of the Mississippi Rules Of Civil Procedure allows summary judgment where there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Heirs And Wrongful Death Beneficiaries Of Branning v. Hinds Community College, 743 So.2d 311 (Miss. 1999).

That to prevent summary judgment, the non - moving party must establish a genuine issue of material fact by means allowable under the rule. Hernandez v. Vickery Chevrolet - Oldsmobile Co., Inc., 652 So.2d 179, 181 (Miss. 1995). If any triable issues of material fact exist, the lower court's decision to grant summary judgment will be reversed. Id. Emphasis added. The Court, however, views the evidence in the light most favorable to the non - moving party. Turner v. Johnson, 498 So.2d 389, 390 (Miss. 1986).

A trial court may grant summary judgment "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 a judgment as a matter of law.[3]

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[3]See Rule 56 (c) of the Mississippi Rules Of Civil Procedure

An appeal from summary judgment is reviewed de novo. Richardson v. Audobon Ins. Co., 2005 - CA - 01215 - COA (Miss. 2006)(Citing Jacox v. Circus Circus Miss., 908 So.2d 181 (Miss. Ct. App. 2005)). The standard by which we review the grant or denial of summary judgment is the same standard as is employed by the trial court under Rule 56 (c) of the Mississippi Rules of Civil Procedure. (Citing Dailey v. Methodist Med. Ctr., 790 So.2d 903, 906 - 7 (Miss. Ct. App. 2001).

A fact is material if it "tends to resolve any of the issues properly raised by the parties. See Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So.2d 790, 794 (Miss. 1995). Furthermore, a motion for summary judgment should be overruled unless the court finds beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim. Id. The trial court is prohibited from trying the issues, it may only determine whether there are issues to be tried. (Emphasis added).

Moreover, the evidence must be viewed in the light most favorable to the non - moving party. Simpson v. Boyd, 880 So. 2d 1047 (Miss. 2004). In a negligence action, the non - moving party bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach, proximate causation and damages. Id.

Summary judgment is only proper only where there is no genuine issue of material fact and the movement is entitled to a judgment as a matter of law. Owen v. Pringle, 612 So.2d 668 (Miss. 1993). The party seeking summary judgment bears the burden of showing that there is no genuine issue of material fact to be tried. Pearl River County Board v. South East Collection, 459 So.2d 783, 785 (Miss. 1984). A motion for summary judgment lies only where there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed issues. When doubt exists, however, concerning whether there is a fact issue, the non - moving party should be given the benefit of every reasonable doubt. Donald v. Reeves Transport Co., 538 So. 2d 1191, 1195 (Miss. 1989).

The Mississippi Supreme Court has acknowledged that a trial judge has some discretion in determining whether to grant summary judgment, holding "even where the moving party seems to have discharged the burden of demonstrating that no genuine issue of material fact exists, the trial judge is not required to grant summary judgment." Donald v. Reeves Co., 538 So.2d 1191 (Miss. 1989). Moreover, the Court has opined that "if there is to be error at the trial level, it should be in denying summary judgment and in favor of a full trial. Id. 538 So.2d 1195. See also, Doe v. Stegall, 757 So.2d 204 (Miss. 2000).

Interlocutory appeals, however, are granted only to resolve questions of law, including the application of facts to that law. Deere & Company v. First National Bank Of Clarksdale, 2009 - MS - 0622.245 (Miss. 200) (Citing Rule 5 Of The Mississippi Rules Of Appellate Procedure)). The Court employs a de novo standard in reviewing questions of law. Russell v. Performance Toyota, Inc., 826 So.2d 719, 721 (Miss. 2002).

I. CRAWFORD'S CLAIM (S) OF RES JUDICATA IS / ARE PROCEDURALLY BARRED

Crawford's claim (s) of res judicata are procedurally barred. Appellees contend that the lower court did not err in its refusal to grant Crawford's motion for summary judgment. Appellee further contend that this Court can not adjudicate the issue of res judicata as same is not contained in "the record" before this Honorable Court. Pursuant to Wayne General Hospital v. Hayes, 868 So.2d 997 (Miss. 2004), res judicata is not proper before this Court because there is no record that such "claim" was actually asserted. Therefore, this Court is procedurally barred from deciding this issue.

II. THE IRVINGS' CLAIMS AGAINST CRAWFORD LOGGING, INC. ARE NOT BARRED BY THE DOCTRINE OF RES JUDICATA

This Court has held that:

> four identities must be present before the doctrine of res judicata will applicable: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action and (4) identity of the quality or character of a person against

> whom the claim is made. Where these four identities are present, the parties will be prevented from re - litigating all issues tried in the prior law suit, as well as matters which should have been litigated and decided in the prior suit.

Hogan v. Buckingham, 730 So.2d 15, 17 (Miss. 1998). Res judicata requires a finding that of all four identities. EMPHASIS ADDED.

In the instant matter, only the first and second prongs of the analysis are met. The third and fourth prongs, however, are not met in these premises.

The identity of the parties must "at least" be in privity with one another. Williams v. Vintage Petroleum, Inc., 825 So.2d 685, 689 (Miss. Ct. App. 2002). "Privity" is a word which expresses the idea that as to certain circumstances persons who are not parties to an action, but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. Williams, 825 So.2d 689 (quoting Little, 704 So.2d at 1339 (Miss. 1997). "Privity is concept that requires the Court to look at the circumstances to determine whether "claim preclusion" is justified. Id.

First, the case at bar is not a separate law suit. Initially, Plaintiffs brought the action against Hosie Thomas, H.T. Trucking and John Doe Defendants. Subsequent to settling their claim (s) with Hosie Thomas and H. T. Trucking, Plaintiffs requested leave of court and amended their Complaint interjecting Crawford in the place of the

unknown John Doe Defendants. Contrary to Crawford's request for "interlocutory" relief, Jack Crawford's deposition was not procured until 2006, which was subsequent to the Agreed settlement. Therefore, the third prong of the analysis is not met in these premises.

Crawford can not establish the fourth prong of the "claim preclusion" analysis. This Court has held that "... where someone is sued in a limited or representative capacity in one (1) cause and then personally in another, the party's "quality or character" is not the same in both actions." McCorkle v. Loumiss Timber Co., 760 So.2d 845, 856 (Miss. Ct. App. 2000). In the instant civil action, Hosie Thomas and H.T. Trucking always maintained that he was a separate and distinct entity of and from Crawford. Jack Crawford even testified that Thomas was an "independent contractor." Crawford was never represented as a party that was in privity with Hosie Thomas nor H.T. Trucking and they were certainly not represented as consideration for purposes of settlement that was entered November 2005. After all, the same attorney that represented Hosie Thomas and H. T. Trucking is now the same attorney that represents Crawford in the instant action. Ironically, the same attorney prepared the settlement agreement as well. As such, this Court should not excuse the failure to include Crawford in consideration for settlement in 2005.

In Deere & Company there were two (2) actions, one filed in State court and another filed in Federal court. In the "state" case, Johnson sued Parker Tractor for negligence and breach of warranty. In the "federal" case, Deere sued Johnson for breach of his loan agreement and Johnson counterclaimed against Deere for breach of implied and express warranties, breach of the implied warranty of fitness for a particular purpose, and intentional misrepresentations. Although Deere argued that the same breach of warranty claims are raised in both suits, it was unclear from the record whether that was so. The warranties for which a seller is responsible are not necessarily the same warranties for which a manufacturer is responsible - - and may be very different. Royal Lincoln - Mercury Sales, Inc. v. Wallace, 415 So. 2d 1024, 1027 - 28 (Miss. 1982) (holding that the implied warranty of merchantability is applicable only to the seller of a defective automobile, while the manufacturer could be held liable for breach of express warranties).

Further, the federal action included Johnson's claim that he revoked acceptance of the combine. The "state" action included no claim, but did include a negligence claim not found in the "federal" action. For those reasons, the Court held that Deere failed to establish the "second" identity required for res judicata to have conclusive effect and therefore, the refusal to grant summary judgment was appropriate.

tortfeasors are involved, and it does not affect claims against an employer who was independently negligent. J&J Timber Co. v. Broome, 2004 - IA - 01914 - SCT (Miss. 2006).

In Broome, the Court held that an action could not be maintained because there were no allegations of independent negligence on the part of J&J Timber Co. Unlike the instant case, there are allegations of independent negligence of and against Crawford as to whether they breached any duties with respects to the hiring and retention of Hosie Thomas.

That " ... discharging a co defendant and 'all others whatsoever' could not be construed to release another co defendant absent a manifest intent to do so. Smith v. Falke, 474 So.2d 1044 (Miss. 1985).

That the Court in Country Club opined that the parties did not intend for the Country Club to benefit from the "release." The Court further opined that it was "clear that the Country Club was a 'stranger' to he release contract and paid no consideration, nor was consideration paid for its benefit. Country Club Of Jackson v. Saucier, 498 So.2d 337 (Miss. 1986).

Appellees state that there was never a "manifest" intent to release Crawford from liability in these premises as a result of their independent negligence. That this Court has held that the language of a release discharging a co - defendant and "all

others whatsoever" could not be construed to release another co defendant absent a manifest intent to do so. Country Club Of Jackson, Mississippi, Inc. v. Saucier, 498 So.2d 337 (Miss. 1986). Emphasis added.

That in the initial action, which was commenced solely against Hosie Thomas and H.T. Trucking, Crawford, the present Defendant, was never made a party thereto, and therefore there was no consideration offered in exchange for their respective release.

That there was never any "manifest intent" whatsoever to release Crawford. The "Release" was only concerning Hosie Thomas and H.T. Trucking, never Crawford. Appellant knows "that" and had it been meant for Crawford to be released, they should have included Crawford in the language of the "Release."

V. AS A MATTER OF LAW, HOSIE THOMAS WAS AN EMPLOYEE OF CRAWFORD

That whether there exists a sufficient degree of control to consider a relationship to be that of master/servant, principal/agent or independent contractor has long been considered a jury issue by this Court. Whether a project owner or manager maintains a significant de jure or de facto power to control the performance of the elements of the work from which the injury has arisen has always been a jury question. (Emphasis added). Magee v. Transcontinental Gas Pipe Line Corp., 551 So.2d 182 , 186 (Miss. 1989).

That as the Runyon Court, opined, whether Whigham was so "independent" of Runyon, that Runyon should not be held for his conduct, is the sort of question courts label a "mixed question of law and fact", a question of ultimate fact. (Emphasis added). Runyon & Son v. Davis, 605 So.2d 38 (Miss. 1992). It is in this sense analogous to the question of whether a party was negligent. We hold such an issue ordinarily one for the trier of fact. Id. (Citing Luke Construction Company v. Jernigan, 252 Miss. 9, 15 (Miss. 1965).

There are three (3) types of situations in which a party principal may seek to have someone else perform some service for him: (1) principal and agent; (2) master and servant and (3) independent contractor. Richardson v. Apac - Mississippi, Inc., 631 So.2d 143 (Miss. 1994). Section 2, comment b; 1 Mechem on Agency (2 Ed.), Section 40 of the Restatement of Agency states in pertinent part:

> The words "independent contractor" are used in contrast with the word "servant" and not the word "agent", for both and independent contractor and a servant are agents of their principal.

That determining which is which can be difficult. Id. (Citing Kisner v. Jackson, 132 So. 90 (Miss. 1931)). In Kisner, the Court stated in pertinent part:

> There have been many attempts to define precisely what is meant by the term "independent contractor", but the variations in the wording of these attempts have resulted only in establishing the proposition that it is not possible within the limitations of language to lay down a concise

applying them.

That in the instant case, Hosie Thomas indicated that he worked for Crawford Logging, Inc. Hosie Thomas also indicated that his only source of income was that which he received from Crawford Logging, Inc. Thus, the first prong of the test (i.e. whether the principal has the power to terminate the contract at will), Jack Crawford, owner Crawford Logging, Inc., stated in pertinent part as follows:

> Question: Can either party terminate the relationship?
> Answer: Yeah.
> Question: Is any advance notice required before the relationship is terminated?
> Answer: No.

According to Jack Crawford's testimony, Appellees have satisfied the "first prong" of the analysis that Defendant, Crawford, had the power to terminate the relationship.

That with respects to the second prong of the test (i.e. whether he (i.e. the principal) has the power to fix the price in payment for the work or vitally controls the manner and time or payment), in the instant matter, it has been stated as follows:

> Question: Let me ask you this, how do you determine his pay?
> Answer: He gets paid by the trip.
> Question: That's it?
> Answer: That's it.
> Question: Who determines that price?
> Answer: I do.

That in addition, Hosie Thomas testified as follows:

> Question: Who decides on the amount of money you receive from Crawford, who decides on the rate of pay?
> Answer: He does.
> Question: He does?

That according to the testimony of Hosie Thomas and Jack Crawford, Plaintiffs have established the second prong of the analysis, that Defendant had the power to fix the price of the payment that Hosie Thomas received.

That with respects to the third prong (i.e. whether he (i.e. the principal) furnishes the means and appliances for the work), the fourth prong (i.e. whether he (i.e. the principal) has control of the premises) and the fifth prong (i.e. whether he (i.e. the principal) furnishes the materials upon which the work is done and receives the output thereof), Appellees contend that they have satisfied same. According to Jack Crawford, Crawford, cuts timber for other people and purchase timber. In fact, Mr. Crawford stated that most of the time, they (i.e. Crawford) work for Anderson - Tully. Moreover, Jack Crawford articulated that Hosie Thomas would get "loads" from him. Defendant, nor, Hosie Thomas have failed to provide any affirmative proof to the contrary, therefore, Appellees have prevailed with respects to these prongs of the analysis.

That with respects to the next prong in the analysis, (i.e. whether he (i.e. the principal) has the right to prescribe and furnish the details of the kind and character of work to be done), Appellees would state that Appellant has failed to proffer any affirmative evidence to show that Hosie Thomas had any authority to prescribe the details of the kind and character of the work to be done. According to Mr. Crawford, his company was in the business of timber and he, nor Hosie Thomas indicated that Mr. Thomas performed no other function but haul timber from one place to another, at the direction of Crawford.

That with respects to the remaining prongs of the analysis, Appellees state that no consideration is necessary in as much as Hosie Thomas failed to allege that he had employees. Based upon the foregoing, however, Plaintiffs contend that Hosie Thomas was an employee of Crawford.

VI. THERE IS A LEGAL BASIS TO HOLD CRAWFORD LOGGING, INC. LIABLE FOR NEGLIGENT HIRING AND NEGLIGENT RETENTION OF AN INDEPENDENT CONTRACTOR

Section 411 of the Restatement of Torts, (Second Edition), states in pertinent part that " an employer is subject to liability for physical harm to third persons caused by the failure to exercise reasonable care to employ a competent and careful contractor to do work which will involve a risk of physical harm unless it is skillfully and carefully done." Moreover, Section 414 of the Restatement of Torts (Second Edition), states in

pertinent part " one who entrusts work to an independent contractor, but who retains any control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care."

When a contract is made between two parties that as between themselves an independent contractor relationship and involves employment generally performed under a simple master / servant or employer / employee relationship, it will be upheld as between the parties. When, however, third parties are adversely affected, this Court will closely scrutinize the contract to see whether public policy should permit the transformation of an ordinary employer / employee relationship.

That where persons and firms put worn - out trucks into the possession of penniless persons, to be operated upon the heavy laden highways of this state under the guise and legal fiction that such operators are independent contractors or timber buyers and sellers, when in fact and truth they are financially unable to buy gasoline or tags which to operate the trucks, or even buying food for themselves, ... these facts are for the jury's consideration. Richardson v. Apac - Mississippi, Inc., 631 So.2d 143 (Miss. 1994).

Here, Crawford's actions, independent of the actions of Hosie Thomas, were negligent in that they (i.e. Crawford Logging, Inc.) failed to hire to hire drivers that would:

a. keep and maintain the vehicle that they were operating under due and reasonable control;

b. keep a proper lookout;

c. yield the right of way;

d. give signal and/or warning to Plaintiffs' decedent of the approach and movement of the vehicle being operated;

e. exercise reasonable care to avoid the collision described herein above;

f. operate their vehicle in a cautious, prudent manner, and with extreme care so as to avoid accidents and/or collisions with pedestrians and

g. observe continuously.

Here, Appellees contend that Crawford, independent of the actions of Hosie Thomas, was negligent in retaining a driver that would not:

a. keep and maintain the vehicle that they were operating under due and reasonable control;

b. keep a proper lookout;

c. yield the right of way;

d. give signal and/or warning to Plaintiffs' decedent of the approach and movement of the vehicle being operated;

e. exercise reasonable care to avoid the collision described herein above;

f. operate their vehicle in a cautious, prudent manner, and with extreme care so as to avoid accidents and/or collisions with pedestrians and

g. observe continuously.

In the instant matter, Jack Crawford demonstrates that a "separate" and "independent" duty existed of and against Crawford. In pertinent part, he states as follows:

> Question: Tell me, what are your requirements for an independent contractor?
> Answer: Well, if he got a good truck and insurance is the main thing.
> Question: The truck and the insurance?
> Answer: Right.
> Question: What do you do to determine whether or not he has a good truck?
> Answer: You can look at a truck and tell whether it's a good truck or not.
> Question: Tell me what you mean.
> Answer: I mean, you can tell an old car from a new car, it's the same thing.

Moreover, Mr. Crawford further testified that:

> Question: Now, when you checked out his truck, did you do it personally or did you have a mechanic to do it?
> Answer: I didn't check it out.
> Question: Who checked it out?
> Answer: I see his trick all the time, you know, off and on. He always have kept a clean, good truck.

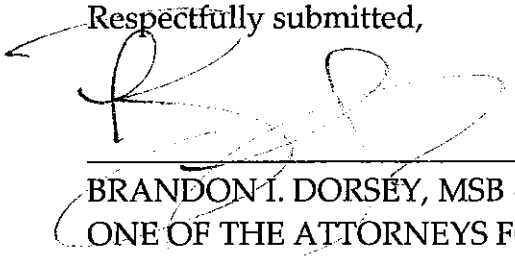
Appellees contend that the foregoing evince jury questions that should be left to the trier of fact to determine whether: (1) having a "good" truck and (2) "insurance" was an exercise of reasonable care with respects to the hiring and retention of Hosie Thomas. In addition, a question of fact exists as to whether Defendant breached any duties when they failed to perform a background check on Hosie Thomas either prior to or during their relationship. Appellees contend that a fact question exists as to whether that was a breach of a duty. Arguably, had such a check been performed, Crawford would have been aware of: (1) another accident that Hoise had caused (i.e. wherein said accident resulted in litigation) and (2) prior traffic citations Hosie received for speeding.

CONCLUSION

The lower court was correct in denying summary judgment as a matter of law. Appellees' Second Amended Complaint is not an attempt to re - litigate the earlier action regarding Hosie Thomas. Appellees contend that Crawford owed an independent duty, regardless of what Hosie Thomas did or did not do, to hire competent drivers. Whether this Honorable Court finds that Hosie Thomas was an employee or an independent contractor, that "distinction" is not dispositive of Crawford's independent duty that was owed to Appellees. Appellees respectfully request that this Court affirm the lower court's denial of Crawford's request for

summary judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Brandon I. Dorsey, one of the attorney for Appellees, do hereby certify that I have on this day caused to be served, via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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Ginny Y. Kennedy, MSB # 102199
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Honorable Winston L. Kidd
Circuit Judge
Post Office Box 327
Jackson, Mississippi 39205

SO CERTIFIED, this the 16th day of September of 2009.

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