IN THE SUPREME COURT 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

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT NOT REQUESTED

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INTRODUCTION

The positions the Irvings take in this case – (1) that Thomas was an "employee" of Crawford Logging; and (2) that Thomas and Crawford Logging had "no relationship" for purposes of privity – are mutually exclusive. That is, if at the time of the accident, Thomas was "in the course and scope" of "employment" with Crawford Logging, as the Irvings assert, as opposed to an independent contractor, then Crawford Logging is "in privity" with Thomas so as to benefit from the Release. However, if there was "no relationship" between Thomas and Crawford Logging, as the Irvings argued before the trial court, then Crawford Logging can have no liability for Thomas. In other words, as a predicate for liability to trigger from Thomas' hauling work – either independent liability for negligent hiring or retention, or vicarious liability through the doctrine of *respondeat superior* – there must be some employment relationship.

But, here, the facts as to the Thomas/Crawford Logging relationship are undisputed and they mirror those in *Stewart v. Lofton Timber Co., LLC,* 943 So. 2d 729 (Miss. Ct. App. 2006) in which an independent contractor relationship was found. Thomas owned and operated his own truck, through his company, H.T. Trucking. Thomas paid himself a salary. Thomas paid his own taxes. Thomas paid his own expenses associated with operation of his truck. There was no contract between Thomas and Crawford Logging. Thomas could accept a hauling job from Crawford Logging if he wanted to, or Thomas could – and sometimes did - haul for others. Thomas was paid "by the job" and received a 1099. In short, Crawford Logging exercised no control and had no right of control over Thomas and the job Thomas was performing as is required to find an "employer/employee" relationship. *See Stewart*, 943 So. 2d 729. As a matter of Mississippi law, Thomas is an independent contractor.

As such, Crawford Logging is not liable under the doctrine of *respondeat superior* for Thomas' alleged negligence – which has already been settled and compromised. Moreover, according to controlling Mississippi law, the Irvings' claims of vicarious liability under the doctrine of *respondeat superior* were merged into the claims against Thomas upon the settlement. *See Granquist v. Crystal Springs Lumber Co.*, 1 So. 2d 216 (Miss. 1941) (when the plaintiff having full knowledge has "by suit or action" recovered against the agent or employee for the wrong committed by the agent or employee as the "sole actor," the derivative liability of the master "becomes merged into the judgment recovered against the agent or servant . . . for that the wrong has then been legally satisfied and **no subsequent or separate action against the principal or master will be allowed.**") (emphasis added).

As to the Irvings' claims of negligent hiring or negligent retention, Crawford Logging is not liable because Mississippi law does not recognize those causes of action absent an employer/employee relationship. *See Doe ex rel. Brown v. Pontotoc County School Dist.*, 957 So. 2d 410 (Miss. Ct. App. 2007) (*citing Eagle Motor Lines v. Mitchell*, 78 So. 2d 482 (Miss. 1955)). Further, the Irvings have failed to point to record evidence to establish those claims.

On the other hand, should this Court deem Thomas an "employee," Mississippi law is clear: an "employer" and "employee" are "in privity." *See Black v. City of Tupelo*, 853 So. 2d 1221, 1225 (Miss. 2003); *See also Vice v. Danvid Window Co.*, 2007 WL 1668637 *1, * 4 (S.D. Miss., June 6, 2007) (*relying on Black*, 853 So. 2d 1221). Therefore, the claims against Crawford Logging have been released and extinguished.

In either event, it is clear this case must be dismissed because Thomas' insurer paid and the Irvings accepted valuable consideration to settle the Irvings' claims arising out of Thomas'

operation of the truck which led to the accident. As such, the Irvings were contractually bound to dismiss *the action* with prejudice.

Additionally, this case in fact was dismissed with prejudice by agreed order entered January 19, 2006, which neither party challenged or appealed, and the circuit court was without jurisdiction to revive the action by allowing the Irvings to file their Second Amended Complaint. The Irvings' attempts to re-litigate their claims against Crawford Logging, through the Second Amended Complaint, are barred by the doctrine of *res judicata*, because Crawford Logging was a defendant prior to dismissal of the initial action and all claims which were or could have been brought were dismissed *with prejudice*.

As a matter of law, the Irvings are precluded from re-litigating the claims they already settled and which have been dismissed with prejudice. The circuit court improperly denied Crawford Logging's motion for summary judgment.

ARGUMENT

I. THE IRVINGS' CLAIMS AGAINST CRAWFORD LOGGING ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

The Irvings expressly agreed to dismiss this case with prejudice in its entirety and the case was dismissed by agreed Order of Dismissal, which was signed by the Irvings' counsel. As a matter of law, any claims, which the Irvings raised or could have raised in that action are now barred and precluded. *See Vice v. Danvid Window Company,* 2007 WL 1668637 *1, *3 (S.D. Miss. June 6, 2007) (*citing Little v. V&G Welding Supply, Inc.,* 704 So. 2d 1336, 1337-78 (Miss. 1997); *Anderson v. LaVere*, 895 So. 2d 828, (Miss. 2004) (citations omitted); *Est. of Anderson v. Deposit Guaranty National Bank,* 674 So. 2d 1254, 1256 (Miss. 1996). The Irvings are precluded from re-litigating the dismissed claims through their Second Amended Complaint.

A. This Argument Is Not Procedurally Barred

Before addressing the merits of Crawford Logging's *res judicata* argument, the Irvings contend the *res judicata* issue is not properly before this Court and, therefore, is procedurally barred. For this proposition, the Irvings cite *Wayne General Hosp. v. Hayes*, 868 So. 2d 997, 1005 (Miss. 2004) (holding, where the appellant failed to include an assignment of error in its petition for interlocutory appeal, the Court was procedurally barred from considering that issue on appeal). Here, the issue of *res judicata* was raised by Crawford Logging in the trial court and, further, was identified as the first assignment of error in Crawford Logging's Petition for Permission to Take Interlocutory Appeal. (*See* Petition to Take Interlocutory Appeal). The issue is properly before the Court and there is no procedural bar.

B. The Four Identities Are Satisfied

Here, the four identities necessary to implicate *res judicata* are satisfied: "(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." *LaVere*, 895 So. 2d at 832. *See also Norman v. Bucklew*, 684 So. 2d 1246, 1253 (Miss. 1996). The Irvings concede the first two identities, but they deny the third and fourth prongs are met.

(iii) Identity of the parties

The Irvings contend that Crawford Logging was not a party in the original action and that there is not "privity" between Thomas and Crawford Logging. But this argument fails as a matter of fact and law. First, Crawford Logging *was, in fact* a defendant in the action prior to its dismissal. Moreover, assuming *arguendo* that Thomas was an "employee" of Crawford Logging, as the Irvings argue, privity is established as a matter of Mississippi law.

(a) Crawford Logging was a party in the original action which has been settled and dismissed

Crawford Logging was a "John Doe" Defendant in the Irvings' original Complaint (R. 4) (R.E. 1). In their Complaint, the Irvings named John Doe Defendants and pled:

> That John Doe Defendants 1 through 25 are those entities, corporations, partnerships and/or individuals whose names and identities are presently unknown to the Plaintiffs, who caused and/or contributed to the events which form the basis for the instant civil action. Plaintiffs will amend their Complaint and name any and all presently unknown individuals and/or entities as party defendants when their identity [sic] become known to Plaintiffs.

Id. at ¶ 7.

On January 3, 2006, the Irvings filed their First Amended Complaint[1] naming Crawford Logging as a defendant in substitution of John Doe Defendant 1" and alleging claims of liability pursuant to *respondeat superior* as well as negligent hiring and retention.[2] (R.32) (R.E. 12). Their First Amended Complaint was filed *prior to* the Order of Dismissal with Prejudice. (R. 60) R.E. 40). So, Crawford Logging in fact was a defendant in the dismissed action. As Crawford Logging is also defendant in the "second action," this identity is satisfied.

(b) Crawford Logging and Thomas are "in privity"

As to identity of the parties, this Court has ruled, even a non-party defendant can assert *res judicata* if it is "in privity" with a defendant to the first action. *See Little*, 704 So. 2d at 1339. "Strict identity of parties is not necessary." *Id.* The *Little* Court explained, "Privity is a word which expresses the idea that as to certain matters and in 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." *Id.* at 1339. In *Little*, the Court held defendants Mid-South and V&G, who were downstream-distributor retailers in "chain of sale" of propylene gas "in privity" with the bulk-distributor defendant, Liquid Air, who purchased gas from manufacturer, Chevron, and then re-sold it, so as to

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The First Amended Complaint, which was filed before the case was dismissed, appears identical in all respects to the Second Amended Complaint, except that in the Second Amended Complaint, Hosie Thomas and H.T. Trucking Company are no longer named as defendants. (R.50-59) (R.E. 30-39); (R.63-70) (R.E. 43-50).

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In the First Amended Complaint, the named Defendants included Hosie Thomas, H.T. Trucking Company, Crawford Logging, and John Doe Defendants 2-10. (R.50-59) (R.E.30-39). In other words, Crawford Logging was substituted in place of John Doe Defendant 1.

implicate *res judicata*. *Id.* Like Liquid Air and the down-the-stream distributors in *Little*, Crawford Logging is "in privity" with the hauler, Thomas, so as to satisfy this identity.

Nonetheless, assuming *arguendo* an employer/employee relationship, as the Irvings allege, privity is established. *See Black*, 853 So. 2d at 1225(holding that police officers were in privity with their employer, the City of Tupelo Police Department). *See also Vice*, 2007 WL 1668637 at * 4 (*relying on Black*, 853 So. 2d 1221). This case is closely analogous with *Vice*, which the Irvings do not discuss or even attempt to distinguish. Rather, the Irvings would ask this Court to overlook controlling Mississippi law directly on-point. As a matter of law, if Thomas is Crawford Logging's "employee," then Crawford Logging is "in privity" and this identity is satisfied.

(iv) Identity of the quality of character of the parties against whom the claim is made

As to this identity, the Irvings cite *McCorkle v. Loumiss Timber Co.*, 760 So. 2d 845 (Miss. Ct. App. 2000) for the proposition that, "where someone is sued in a limited or representative capacity in one cause and then personally in another, the party's 'quality or character' is not the same in both actions." *Id.* at 856.[3] But this argument overlooks the fact that Crawford Logging *was sued* in the original action not only in a representative capacity, as Thomas' purported employer, but also on claims of independent tort liability (negligent hiring and negligent retention). In addition to being present as one of the "John Doe Defendants" in the original Complaint, Crawford Logging was a named defendant in the Irvings' First Amended

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Implicit in their argument is a tacit admission by the Irvings that Crawford Logging was sued – at least in his representative or vicarious capacity – in the original complaint.

Complaint, filed January 3, 2006, prior to the Order of Dismissal with Prejudice.[4] But, as a matter of law, that complaint was dismissed and rendered moot when the circuit court entered the Order of Dismissal with Prejudice on January 19, 2006. *See Pharmacia Corp. v. Suggs,* 932 So. 2d 95, 99-100 (Ala. 2005) (*citing Deposit Guaranty Nat'l Bank v. Roper,* 100 S. Ct. 1166 (1980)). In reality, the Second Amended Complaint is a second action, because there was no complaint surviving which could be amended as of the time the circuit court granted leave to amend. *Id.*

Moreover, all claims which were asserted or which could have been asserted in the previous action were dismissed with prejudice upon entry of the Order of Dismissal. *See Little,* 704 So. 2d at 1337-38 ("*Res judicata* bars all issues that might have been (or could have been) raised and decided in the initial suit, plus all issues that were actually decided in the first cause of action.") (*citing Est. of Anderson v. Deposit Guaranty National Bank,* 674 So.2d 1254, 1256 (Miss.1996)). Yet, the Second Amended Complaint, filed March 15, 2006, asserts the same claims against the same defendant, Crawford Logging.

Clearly, the quality and character of Crawford Logging's presence in both actions is the same – Crawford Logging was present in both actions and the claims are the same. This final element is satisfied.

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The Irvings state, "In the initial action, . . . the present Defendant [Crawford Logging] was never made a party thereto, . . ." (*See* Appellees' Brief at p. 17). But this is factually incorrect – Crawford Logging was named as a Defendant in the First Amended Complaint which was *filed* prior to entry of the Order of Dismissal with Prejudice. The Irvings cannot create issues of fact through allegations or arguments in their briefs which are not supported by the record. *See Magee v. Transcontinental Gas Pipeline Corp.*, 551 So. 2d at 186.

The four identities necessary to apply the doctrine of *res judicata* are present, and the agreed Order of Dismissal with Prejudice is a bar, as a matter of law, to the Second Amended Complaint, which is nothing but an opportunistic attempt to recover again for the same claims they have already settled.

II. THE TRIAL COURT WAS WITHOUT JURISDICTION TO GRANT THE IRVINGS LEAVE TO AMEND THE COMPLAINT

The Order of Dismissal with Prejudice,[5] entered January 19, 2006, was final.[6] (R. 60-61) (R.E. 40-41). The order was not challenged by appeal, modified, or vacated; thus, it stood as a final judgment. *See* Miss. R. Civ. P. 58. As such, the instant civil action was dismissed and closed, leaving the circuit court powerless to take action in the case. Nevertheless, on January 23, 2006, *after* entry of the Order of Dismissal with Prejudice, the circuit court entered an order granting the Irvings leave to file their Second Amended Complaint. (*See* Order (R. 62) (R.E. 42)).

The Irvings argue, that by appearing and defending in response to the Second Amended Complaint, Crawford Logging has waived any argument as to jurisdiction. But there is no support in law for such a proposition. As a fundamental principle of law, a court must have both *in personam* and subject matter jurisdiction. *In re Conservatorship of Murphy*, 910 So. 2d 1234,

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As a condition of the settlement, the Irvings agreed to dismiss the pending lawsuit *with prejudice*, and the Order of Dismissal with Prejudice is the product of that agreement. (*See* Release of All Claims (R.92-95) (R.E. 71-74)).

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At no time did the Irvings either seek to alter or amend the judgment as provided by Miss. R. Civ. P. 59(e), or seek relief from the Order of Dismissal as provided by Miss. R. Civ. P. 60(b). *See* Certified Copy of Docket Entries (R. 1-2) (R.E. 112-14).

1240 (Miss. Ct. App. 2005) (*quoting Petters v. Petters*, 560 So. 2d 722, 723 (Miss. 1990)). While personal jurisdiction may be waived by consent and through appearing and defending, clearly, the same is not true as to subject matter jurisdiction. "'Subject matter jurisdiction deals with the power and authority of a court to consider a case.'" *Esco v. Scott,* 735 So. 2d 1002, 1006 (Miss. 1999) (*quoting Matter of Adoption of R.M.P.C.,* 512 So. 2d 702, 706 (Miss.1987)). Unequivocally, this Court has ruled, "**[S]ubject matter jurisdiction may not be waived and may be asserted at any stage of the proceeding** or even collaterally." *Id.* (*citing Penrod Drilling Co. v. Bounds,* 433 So. 2d 916, 924 (Miss.1983)) (emphasis added).

In the absence of subject matter jurisdiction, the court is powerless to act and any judgment it might render is void. *Carney v. Moore*, 94 So. 890 (Miss. 1923). *See also Pharmacia Corp. v. Suggs,* 932 So. 2d 95, 99-100 (Ala. 2005) (*citing Deposit Guaranty Nat'l Bank v. Roper,* 100 S. Ct. 1166 (1980)) (holding,"Because the [plaintiffs] accepted the settlement that resulted in the entirely appropriate dismissal of their claims in this case, the matters made the basis of the complaint became moot, and the trial court no longer had subject-matter jurisdiction to entertain a motion to amend the moot complaint.").

The Irvings miss the point in their attempt to distinguish *McNeil v. Hester*, cited by Crawford Logging. Indeed, in *McNeil*, both parties agreed the chancery court lacked jurisdiction when it entered an order discharging the executor and closing the estate after the matter had already been appealed to this Court. *See McNeil*, 753 So. 2d at 1056 (reasoning that the properly filed notice of appeal absolved the trial court of subject matter jurisdiction). But *McNeil* stands for the proposition that orders or judgments entered by the trial court in the absence of subject

matter jurisdiction are null and void and must be vacated. *See also Bert Allen Toyota, Inc. v. Grasz*, 948 So. 2d 358, 363 (Miss. Ct. App. 2007); *Carney v. Moore*, 94 So. 890 (Miss. 1923.

Here, as the Order of Dismissal with Prejudice was final, the trial court was deprived of subject-matter jurisdiction to take any further action and, the court's Order Granting Plaintiffs' Motion for Leave to Amend is null and void and must be vacated.

III. THE IRVINGS' CLAIMS AGAINST CRAWFORD LOGGING HAVE BEEN EXTINGUISHED BY THE RELEASE OF ALL CLAIMS.

The Irvings continue to maintain Thomas was an "employee" in the "course and scope" of his employment with Crawford Logging at the time of the accident. However, an employer/employee relationship is fatal to the Irvings' claims because, as a matter of Mississippi law, an employer and employee are "in privity." *See Black*, 853 So. 2d at 1225 (holding that police officers were in privity with their employer, the City of Tupelo Police Department). *See also Vice*, 2007 WL 1668637 at * 4 (S.D. Miss. 2007). The Irvings expressly released all persons or entities in "privity" with Thomas, thus, the release encompasses Crawford Logging. (*See* Release of All Claims) (R. 92-95) (R.E. 71-74).

Besides, there is no dispute the Irvings *knew* at the time they agreed to settle and dismiss this lawsuit, that Thomas was hauling on the day of the accident for Crawford Logging. (*See* Thomas depo.) (R. 116) (R.E. 95)).[7] Thus, *Granquist* dictates that the vicarious liability claims against Crawford Logging in which the Irvings seek to hold Crawford Logging for the alleged

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In Appellant's Brief, counsel inadvertently stated that Jack Crawford's deposition was taken in July 2005. In fact, Irvings' counsel has correctly stated that Crawford's deposition was taken in July 2006. But this is not material to the arguments, as the Irvings knew well before July 2006 that Thomas was hauling on the day of the accident for Crawford Logging. They knew this by virtue of Thomas' deposition testimony *prior to the mediation and settlement* giving rise to their dismissal of the action.

negligence of Thomas (as the truck driver and sole tortfeasor) became "merged" into the judgment collected against Thomas and were "legally satisfied." *Granquist*,1 So. 2d at 218. This subsequent action against Crawford Logging is barred as a matter of law. *Id.* Moreover, the Irvings' continued litigation against Crawford Logging through the Second Amended Complaint constitutes a breach of their contractual obligations not only to Crawford Logging as a "Releaseee" under the Release, but also Thomas and his insurer who paid to settle and end this lawsuit forever.[8]

The Irvings deny the settlement and Release had the effect of discharging Crawford Logging, whom they allege has independent, as well as vicarious liability. They cite dicta from *Country Club of Jackson v. Saucier*, 498 So. 2d 337 (Miss. 1986) as support for their argument. But *Country Club* is inapposite to the case at bar and is, otherwise, distinguishable.

In *Country Club*, the plaintiff, Saucier, a guest passenger in a vehicle operated by Stevens, settled her claims against Stevens' estate. *Id.* at 338. Following this settlement, Saucier sued the Country Club of Jackson for "dram shop" liability, alleging the Country Club had served alcohol to Stevens when he was visibly intoxicated. *Id.* at 338. The issue on appeal in that case was not whether the release operated to bar the claims against the Country Club, but rather, "whether the release entered between Saucier and Stevens' estate could be modified or rescinded to exclude a non-participating and non-contributing third party who alleges beneficiary status [the Country Club], without consent of such party." *Id.* at 337. There, this Court affirmed the

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As a matter of contract, the Irvings were bound, pursuant to the Release, to dismiss this civil action with prejudice. *See* Release of All Claims at ¶ 2 (R. 92-94) (R.E. 71-73); *see also* Settlement Agreement (R. 217) (R.E. 110).

circuit court's ruling that, as to the release, the Country Club was a stranger and had no third-party beneficiary standing to object to the stipulation to modify the release. *Id.* at 340.

Recently, in *Scott v. Gammons*, 985 So. 2d 872 (Miss. Ct. App. 2005), the Court of Appeals distinguished *Country Club of Jackson*, finding it inapplicable to the issue of whether an alleged joint tortfeasor could benefit from a release which did not specifically mention her by name. *Id.* at 875. The Court noted that, in *Country Club of Jackson*, the Country Club of Jackson, who was attempting to benefit from the release of the driver, was premised upon a completely independent tort from that of the released driver (serving too much alcohol vs. negligent operation of motor vehicle). *Id.* at 875-76. In other words, their negligence was "concurrent" and each could be held independently liable for their own tortious conduct. But in *Scott,* as is the case here, the allegations arise from the same conduct – negligent operation of a motor vehicle.[9] *Id.* at 876. The *Scott* Court found *Country Club* inapplicable and held the release of the driver constituted accord and satisfaction and barred the plaintiffs' further claims arising from the same accident – even though the release did not expressly name the third-party. *Id.*

Further, the Irvings say Crawford Logging could not have been released because was never made a defendant in the initial action, but this simply does not comport with the procedural history of this case as established by the record. Crawford Logging was a John Doe Defendant in

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There, the vehicle was owned by Spencer, but allegedly was operated by Conway. *Id.* Spencer's insurer, Direct, defended and indemnified Spencer and Conway against Scott's claims and negotiated a settlement of those claims and obtained a release. *Id.* Subsequently, Scott sued Gammon, alleging he was the driver of the Spencer vehicle and sought to collect from Gammon for negligent operation of the Spencer-owned vehicle. *Id.* Direct, as the insurer of the vehicle, defended and indemnified Gammon. *Id.*

the original Complaint and then was substituted in by name, for John Doe Defendant 1, in the Irvings' First Amended Complaint filed before entry of the agreed Order of Dismissal with Prejudice. *See supra.*

So, it matters not whether the relationship is that of employer/employee or independent contractor. For if it is employer/employee, as the Irvings allege, Crawford Logging was "in privity" with Thomas, and Crawford Logging is, therefore, a "Releasee," entitled to all the benefits of the Release of All Claims and Settlement Agreement. But if Thomas was an independent contractor, summary judgment is warranted because there is no basis under established Mississippi law for any claims against Crawford Logging, direct or indirect.

IV. AS A MATTER OF LAW, THOMAS WAS AN INDEPENDENT CONTRACTOR, AND CRAWFORD LOGGING IS NOT LIABLE UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR*.

The underlying facts in this case as to the Thomas/Crawford Logging relationship are undisputed[10] and they drive the undeniable conclusion that Thomas was an independent contractor – not an employee – as to Crawford Logging, leaving the Irvings' theories of liability without support in fact or law. The facts of this case mirror those in *Stewart v. Lofton Timber Co., LLC,* 943 So. 2d 729, 733-34 (Miss. Ct. App. 2006). In *Stewart*, the Court found:

- "Nickerson [the driver] was under no contractual obligation to haul for Lofton. If drivers came to the wood yard and did not like the price Lofton was paying to haul

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10 The Irvings argue the determination of independent contractor or employee is an issue for the jury, however, where, as in this case, the underlying facts are undisputed, the question is a legal one for the court. *See Richardson*, 631 So. at 152; *Leaf River Forest Prods., Inc.*, 392 So. 2d at 1143.

lumber then they were free to leave." *Id.* at 733-34. Here, Thomas had no obligation to haul for Crawford Logging. *(See* Crawford depo.at 41 (R.114) (R.E. 93)). Thomas could, and sometimes did, haul for others. (*Id.*; *see also* Crawford depo. at 21 (R.112) (R.E. 91)).

- "Nickerson used his own trucks to haul the lumber." *Stewart*, 943 So. 2d at 734. Likewise, Thomas used his own truck, which he owned and operated under his own company, H.T. Trucking Company. (*See* Thomas depo. at 67, 84 (R.117, 118-19) (R.E. 96-98); *see also* Crawford depo. at 20, 21, 42 (R.111-12, 115) (R.E. 90-91, 94)).
- "Lofton had control over the wood yard where the timber was stored but had no control over Nickerson's trucks. . . . The trucks that hauled the wood, the ultimate job in question, were owned by Nickerson." *Stewart*, 943 So. 2d at 734. Here, Crawford Logging contracted with Anderson-Tully and others to cut wood from their property and deliver it to their mills, so it cannot be said Crawford Logging exercised control over the premises. (*See* Crawford depo. at 14 (R.209) (R.E. 144)). But as to the truck that hauled the wood – "*the ultimate job in question*" – it is clear Thomas owned and controlled his own truck. (*See* Thomas depo. at 67, 84 (R.117, 118-19) (R.E. 96-98); *see also* Crawford depo. at 20, 21, 42 (R.111-12, 115) (R.E. 90-91, 94)).
- "Lofton did not inspect Nickerson's trucks or do background checks on the drivers." Neither did Crawford Logging. (*See* Crawford depo. at 26) (R.211-12) (R.E. 146-47)).

- "Nickerson's employees mapped their own routes." *Stewart*, 943 So. 2d at 734. Similarly, Thomas chose his own route to the mill. (*See* Crawford depo. at 42) (R.115) (R.E. 94).
- "Nickerson decided how many loads to haul. . ." *Stewart*, 943 So. 2d at 734. So was the case with Thomas. Crawford merely notified Thomas when work was available and Thomas could choose to work or not. (*See* Crawford depo. at 41 (R.114) (R.E. 93)).
- "Lofton provided Nickerson with a 1099 form." *Stewart,* 943 So. 2d at 734. Crawford Logging paid Thomas once a week based on the number of loads he hauled, and provided him with a 1099 form at the end of the year. (*See* Thomas depo. at 85) (R.119) (R.E. 98)); *see also* Crawford depo. at 41 (R.114) (R.E. 93)).

Based on these facts, the *Stewart* Court concluded, "Lofton exercised control over its own facility but not over Nickerson's trucks. The ultimate job of hauling wood from Lofton's facility to Georgia Pacific was not under Lofton's right of control." *Stewart*, 943 So. 2d at 734. "An employer is one who exercises control over the details of employment. No control was evidenced in this case sufficient to find an employer/employee relationship." *Stewart*, 943 So. 2d at 734 (affirming summary judgment in favor of Lofton based upon finding that Nickerson was an independent contractor).

As a matter of law, Thomas was an independent contractor and Crawford Logging is not vicariously liable for the alleged negligent acts of Thomas. As such, the trial court erroneously denied Crawford Logging's motion for summary judgment.

V. THERE IS NO LEGAL BASIS TO HOLD CRAWFORD LOGGING LIABLE FOR NEGLIGENT HIRING OR NEGLIGENT RETENTION OF AN INDEPENDENT CONTRACTOR

A. There Is No Employer/Employee Relationship

The Irvings' counsel said it best when responding to the trial court's inquiry: there is "no relationship." In the absence of an "employer/employee" relationship, the Irvings' theories of negligent hiring or negligent retention fail because liability under such theories is predicated on an employer/employee relationship. *See Pontotoc County School Dist.*, 957 So. 2d at 416 -417 (*citing Eagle Motor Lines v. Mitchell,* 78 So.2d 482, 486-87 (1955)) (emphasis added). *See also Jackson Public School Dist. v. Smith*, 875 So. 2d 1100 (Miss. 2004).

B. The Irvings' Public Policy Argument Fails

In the face of clear evidence establishing the independent contractor relationship, the Irvings invoke public policy and urge this Court to "transform" the relationship to one of employer/employee. (*See* Appellees' Brief at 24-25 (*relying on Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143 (Miss. 1994)). But the *Stewart* Court rejected this very same argument. *See Stewart*, 943 So. 2d at 735.

In *Stewart,* the Court held, "While unfortunate for the Stewarts, this argument fails for two reasons. First no written contract existed characterizing the employment relationship." *Id.* Significantly, and identical to *Stewart*, here there is no written contract between Thomas and Crawford Logging. "Second, the Fifth Circuit . . . explained that the public policy factor from *Richardson* only becomes 'an issue when the relationship between the alleged employer and the alleged employee would *ordinarily* be characterized as that of an employer/employee, but they

have a contract which defines their relationship as that of independent contractors.'" *Id.* (*quoting McKee v. Brimmer*, 39 F.3d 94, 98 (5th Cir. 1994)). The *Stewart* Court concluded, "Since this relationship is not one that would ordinarily be characterized as employer/employee, and there is no evidence of an attempt to control Nickerson through a written contract or otherwise, the Stewarts' public policy argument fails." *Id.* This case is "on all fours" with *Stewart* and the Irvings' public policy argument should be rejected.

Finally, the Irvings argue Crawford Logging's requirements that its independent contractors have a "good truck" and carry insurance establish an independent duty against Crawford Logging. But the Irvings fail to cite any authority for this proposition. As such, this argument is not properly raised and should not be considered. *See In re Est. of Laughter*, __ So. 3d ___, 2009 WL 3030969 *1, *7 (Miss. 2009) (*citing Shavers v. Shavers*, 982 So. 2d 397, 401 (Miss. 2008); *Ellis v. Ellis*, 651 So. 2d 1068, 1072 (Miss. 1995)).

Moreover, in support of their theories of negligent hiring and negligent retention, the Irvings have yet to point to any *evidence* in the record which would support such claims. Allegations and arguments of counsel in briefs are not evidence. *See Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 186 (Miss. 1989) (holding "The non-moving party wishing to avoid summary judgment must be diligent in opposing a motion for summary judgment. . . .He may not rely upon the mere unsworn allegation in his pleadings. . . . More to the point here, the party opposing summary judgment may not create an issue of fact by arguments and assertions in briefs or legal memoranda.") (internal citations omitted). The Irvings have failed, as the party with the burden of proof at trial, to provide affirmative evidence to establish their claims of

negligent hiring and negligent retention. As such, these claims fail and Crawford Logging is entitled to summary judgment.

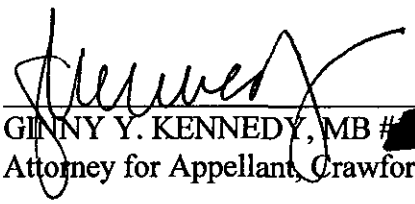
These claims are without basis in fact or law and the trial court erroneously denied Crawford Logging's motion for summary judgment.

CONCLUSION

As set forth herein and in Appellant's Brief, Crawford Logging, Inc. was improperly denied judgment as a matter of law to which it was entitled. Crawford Logging, Inc. respectfully requests that this Court grant summary judgment in favor of Crawford Logging, Inc. as to all claims, and that this case be finally dismissed as a matter of law.

Dated: November 3, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Ginny Y. Kennedy, attorney for Crawford Logging, Inc., do hereby certify that I have this day served a true and correct copy of the above and foregoing document via United States Mail, postage prepaid, on the following:

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THIS, the 3 day of November, 2009.

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