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,

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Petitioner/Defendant certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal:

1. Appellees/Plaintiffs: The heirs at law and wrongful death beneficiaries of Roswell Irving, Jr., who are believed to be:

   (a) Carla Irving Forte'

   (b) Norma Irving King; and

   (c) Kelvin Edwin Irving

2. Appellants/Defendant: Crawford Logging, Inc., and its officers and directors:

   (a) Jack R. Crawford, president;

   (b) Billie Jo Crawford, secretary/treasurer; and

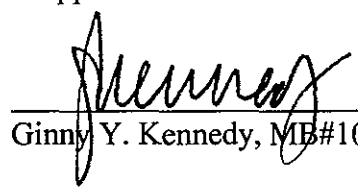
   (c) Ronald Crawford, vice president

3. Progressive Gulf Insurance Company, insurer of Crawford Logging, Inc.

4. Brandon I. Dorsey, Attorney for Appellees/Plaintiffs

5. C. Maison Heidelberg, Attorney for Appellant/Defendant

6. Ginny Y. Kennedy, Attorney for Appellant/Defendant.



Ginny Y. Kennedy, MB#102199

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, the Appellant states that oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE ISSUES

I. Whether the Irvings' claims against Crawford Logging are extinguished and barred by the doctrine of *res judicata.*

II. Whether the trial court had jurisdiction to enter the Order Granting Leave to Amend Complaint *after* settlement and dismissal of this action *with prejudice*

III. Whether the Irvings' claims are extinguished and barred because they have already been released and the Irvings unconditionally accepted settlement.

IV. Whether Crawford Logging may be held liable under the doctrine of *respondeat superior* for the negligence of its independent contractor, H.T. Trucking/ Hosie Thomas, a dismissed party.

V. Whether Crawford Logging may be held independently liable in tort under the theories of negligent hiring and negligent retention of H.T. Trucking/Hosie Thomas, an independent contractor.

STATEMENT OF THE CASE

A. Nature of the Case

The Appellees' claims in this action arise from a motor vehicle accident that occurred on September 28, 2004, near the intersection of Highway 22 and Interstate 220 in Hinds County, Mississippi, involving a truck owned and operated by Hosie Thomas and/or H.T. Trucking (hereinafter collectively "Thomas"). The Irvings allege that negligence of Thomas was the proximate cause of the death of Roswell Irving, Jr.. (R. 4) (R.E. 1). The Irvings also allege, through an amended complaint, that Crawford Logging, Inc. (hereinafter "Crawford Logging") was the employer of Thomas and is vicariously liable for the alleged negligence of Thomas. (R. 32-41) (R.E. 12-21).

B. Course of Proceedings and Disposition Below

In the circuit court, Crawford Logging moved for summary judgment seeking a ruling that: (1) the claims against Crawford Logging are barred by the doctrine of *res judicata* and/or because the claims against Crawford have been released and extinguished; (2) that Crawford Logging is not liable under the doctrine of *respondeat superior* for the negligence of its independent contractor, Hosie Thomas; and (3) that Crawford Logging is not independently liable in tort for negligent hiring and negligent retention of Hosie Thomas, an independent contractor. (R. 77-127) (R.E. 57-106). On October 17, 2007, the trial court entertained oral arguments on Crawford Logging's motion for summary judgment.[1] Nearly a year later, on August 28, 2008, the trial court entered an order denying summary judgment and stating only that

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1 There was no court reporter present and, consequently, no record of the motion hearing before the circuit court.

the court found "genuine issues of material fact do exist." (R. 262) (R.E. 111). It is from the trial court's denial of summary judgment, which involved questions of law, that Crawford Logging appeals.

C. Statement of Facts

(1) The Accident

On September 28, 2004, Roswell Irving was a pedestrian near the intersection of Highway 22 and Interstate 220 in Hinds County, Mississippi. *See* Complaint at ¶ 10 (R. 6) (R.E. 3). As Irving walked along the highway near the intersection, Thomas, who was operating a 1999 Freightliner tractor/trailer owned by his trucking company was approaching the intersection. *Id.* As Thomas proceeded through the intersection, his truck collided with Irving. *Id.* Irving died as a result of the accident. *Id.*

(2) The Thomas-Crawford Relationship

Thomas operated his own trucking business, H.T. Trucking. At the time of the accident, Thomas was driving his own truck and trailer – the 1999 Freightliner. *Id.* at ¶ 12. (R. 8) (R.E. 5). Thomas owned his the truck, maintained the truck, paid for the gas and other expenses associated with operation of his truck, including liability insurance. *See* Thomas Depo. (R. 116-19) (R.E. 95-98). Thomas paid himself a salary and paid his own taxes. *Id.*

On the day of the accident, Crawford Logging contracted with Thomas to haul wood to a facility in Vicksburg, Mississippi. *See* Crawford Depo. at 21 (R. 112) (R. 91). Thomas had hauled for Crawford Logging off and on for a number of years. *Id.* Crawford Logging paid its haulers, including Thomas, on a "per load" basis. *Id.* at 40 (R. 113) (R.E. 92). Crawford Logging and Thomas had no written contract and either could terminate their business

relationship at any time. *Id.* Crawford Logging was not obliged to offer hauling jobs to Thomas, and Thomas was not obliged to accept the work or the rate of pay when it was offered by Crawford Logging. *Id.* at 41 (R. 114) (R.E. 93). Thomas was free to go elsewhere to try to get a better rate. *Id.* Jack Crawford, president of Crawford Logging testified: "I have no control over him whatsoever." *Id.* at lines 11-12. Crawford Logging considered Thomas an "independent contractor." *Id.* at 20 (R. 111) (R.E. 90). Crawford testified: "Ever since he's worked, he's been independent. He's owned his own truck and everything is his, you know." *Id.* at 20-21 (R. 111-12) (R.E. 90-91).

Thomas had hauled for Crawford Logging "off and on" for about fifteen years, but Crawford testified Thomas hauled for others and Crawford Logging did not mind. *Id.* "He didn't work with me." *Id.* at 41:19 (R.114) (R.E. 93).

(3) Procedural Facts

On or about November 22, 2004, 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 (hereinafter "the Irvings"), filed a Complaint in the Circuit Court of Hinds County, First Judicial District. (R. 4) (R.E. 1). The Irvings' Complaint named as defendants Hosie Thomas, H.T. Trucking Company, and John Doe Defendants 1-10, and alleged that negligence of Thomas was the proximate cause of the death of Roswell Irving, Jr. *Id.*

Through the deposition of Thomas, the Irvings learned that, at the time of the accident, Thomas was hauling logs as a contractor with Crawford Logging. (R. 116-119) (R.E. 95-98). In June 2005, the Irvings' counsel deposed Jack Crawford, a principal of Crawford Logging, and

inquired into the relationship between Thomas and Crawford Logging. (R. 110-115) (R.E.89-94). The testimony of Thomas and Crawford is undisputed and clearly establishes Thomas was an independent contractor.

Following Crawford's deposition, in November, 2005, the parties participated in mediation which was successful and resulted in a compromise and settlement of the Irvings' claims asserted in this action. (R. 217). (R.E. 110). The settlement was consummated shortly thereafter and the Irvings executed a Release of All Claims in which they agreed to dismiss their lawsuit with prejudice. (R. 92-95) (R.E. 71-74). At the time of the mediation and settlement the Irvings had full knowledge Thomas was hauling as a contractor for Crawford Logging on the day of the accident giving rise to this suit. (R. 116-19) (R.E. 95-98). The settlement agreement and Release were unconditional and did not except or exclude any claims and the Irvings did not reserve any rights to pursue any further claims arising out of the accident. *See id.* Rather, the Release obligated and bound the Irvings to dismiss this lawsuit *in toto*. *See id.*

An Order of Dismissal with Prejudice, which was agreed and approved by counsel for the Irvings, was presented to and signed by the trial court on January 18, 2006. (R. 60) (R.E. 40). The Order of Dismissal was entered by the clerk of court on January 19, 2006. *Id.* *See also* Certified Copy of Docket Entries (R. 1-3) (R.E. 112-114). The dismissal order states: "[T]his case is dismissed *with prejudice*, with each party to bear its own costs." (R. 60) (R.E. 40). The order was entered in accordance with Miss. R. Civ. P. 79(a). *Id.* The Irvings neither sought to amend or modify the January 18, 2006 order, as provided by Miss. R. Civ. P. 59(e), nor did they seek any relief from the January 18, 2006 order,as provided by Miss. R. Civ. P. 60(b). The order was final.

Nevertheless, on January 23, 2006, the trial court entered an order granting the Irvings leave to file a Second Amended Complaint.[2] (R. 62) (R.E. 42). And, on or about March 15, 2006, Plaintiffs filed their Second Amended Complaint nearly identical to their First Amended Complaint, except Thomas was not named as a defendant, and the number of John Does was reduced from 1-10, to 2-10. (R. 63) (R.E. 43).

2

The Irvings' motion for leave to amend the complaint was filed **before** entry of the Agreed Order of Dismissal with Prejudice. Entry of the Agreed Order effectively mooted the motion for leave to amend.

SUMMARY OF THE ARGUMENT

This action has already been mediated, settled, and dismissed. Nevertheless, the Irvings wish to re-litigate its claims against Crawford Logging. Through their Second Amended Complaint, filed after settlement and dismissal with prejudice of the case, the Irvings attempt to collect again on claims for which the Irvings have already been compensated.

The Irvings' settlement and the Order of Dismissal with Prejudice entered in this action operate as a bar to the claims in the Second Amended Complaint. The claims are precluded by the doctrine of *res judicata.*

The Irvings' claims were extinguished by virtue of their unconditional and unequivocal acceptance of the monetary settlement and the Release of All Claims executed by them. The Irvings were contractually bound, as a result of the Settlement Agreement and Release of All Claims, to dismiss the pending lawsuit *in toto.*

Moreover, their settlement and the Order of Dismissal with Prejudice ended the case and mooted all previous pleadings and motions. Thus, the circuit court was without subject matter jurisdiction at the time it granted the Irvings' motion for leave to file their Second Amended Complaint. The Order Granting Leave to Amend is thus null and void and must be vacated. The Order of Dismissal with Prejudice is final and this case is closed.

In any event, Crawford Logging is entitled to summary judgment as to the Irvings' claims because the claims are dependent on the finding of an employer/employee relationship, and the undisputed facts establish Thomas was an independent contractor. Thomas was driving a tractor-trailer which he owned and Crawford Logging exercised no control and had no right of control over Thomas as is required to find an "employer/employee" relationship. As Thomas is an independent

contractor, as a matter of law, Crawford Logging is not liable under the doctrine of *respondeat superior* for Thomas' alleged negligence, nor is Crawford Logging liable under the tort theories of negligent hiring or negligent supervision.

As a matter of law, Crawford Logging is entitled to judgment and dismissal of the Irvings' improperly brought claims.

ARGUMENT

The Standard of Review

When reviewing a circuit court's grant of summary judgment, this Court employs a *de novo* standard of review. *Hudson v. Courtesy Motors, Inc.*, 794 So. 2d 999, 1002 (Miss. 2001). Summary judgment is appropriate when "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 a judgment as a matter of law." *Byrne v. Wal-Mart Stores, Inc.*, 877 So. 2d 462, 465 (Miss. Ct. App. 2003) (citing Miss. R. Civ. P. 56(c)). The burden rests on the moving party to show that no genuine issues of material fact exists, while the benefit of reasonable doubt is given to the non-moving party. *Id.* However, the non-moving party cannot "sit back and produce no evidence." *Id.* To survive summary judgment, the non-moving party must offer "significant probative evidence demonstrating the existence of a triable issue of fact." *Id.* "The presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense . . . . [T]he 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." *Hudson*, 794 So. 2d at 1002.

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

The Irvings' claims against Crawford Logging are barred by the doctrine of *res judicata* because the agreed Order of Dismissal applied to the entire case and serves to bar all claims the Irvings raised or could have raised in that action.[3] The January 18, 2006 dismissal order, which the Irvings' counsel agreed to and signed expressly states: "[T]his case is dismissed with prejudice, with each party to bear its own costs." *See* Order of Dismissal with Prejudice (R. 60) (R.E. 40) (emphasis added).[4]

"Under the doctrine of *res judicata*, parties are prevented from litigating issues tried in a prior lawsuit, as well as matters which could have been litigated in the prior suit." *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). *See also Anderson v.*

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3 The fact that the dismissal was by agreed order is of no significance. *See Smith v. Malouf*, 826 So. 2d 1256, 1259 (Miss. 2002) (holding "a 'consent judgment acquires the incidents of, and will be given the same force and effect as, judgments rendered after litigation. It is binding and conclusive, operating as *res judicata* and an estoppel to the same extent as judgments after contest.'") (*quoting Guthrie v. Guthrie*, 233 Miss. 550, 556-57, 102 So. 2d 381, 383 (1958)).

4 Pursuant to Miss. R. Civ. P. 59(e), "A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment." Miss. R. Civ. P. 59(e) (emphasis added)). In addition, Rule 60(b) provides relief from judgment or order "on motion and upon such terms as are just" for the following reasons, among others: "(1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . ." *Miss. R. Civ. P. 60(b).* The Irvings neither sought to amend or alter the judgment nor did they seek relief from the judgment. The Order of Dismissal with Prejudice was final and this case was closed, rendering any pending motions moot and depriving the circuit court of subject matter jurisdiction. *See* argument *infra.*

LaVere, 895 So. 2d 828, (Miss. 2004) (citations omitted) ("[*Res judicata*] precludes parties from litigating in a second action claims within the scope of the judgment of the first action. This includes claims which were made or should have been made, in the prior suit."); *Est. of Anderson v. Deposit Guaranty National Bank,* 674 So. 2d 1254, 1256 (Miss. 1996).

Res judicata is applied where the following four identities are present: "(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).

In this case, the Irvings' pursuit of claims against Crawford Logging through their Second Amended Complaint amounts to a second action to litigate the claims already dismissed in the first action.[5] As the four identities are satisfied, the Irvings' attempt to relitigate the dismissed claims through their Second Amended Complaint (the "second action") is barred.

(i) Identity of subject matter

The claims in the Irvings' both their first action and their second action arise out of the September 28, 2004 accident and both seek damages for the wrongful death of Roswell Irving, Jr. *See* Complaint (R. 4-14) (R.E. 1-11); First Amended Complaint (R. 32-41) (R.E. 12-21); and Second Amended Complaint (R. 63-70) (R.E. 43-50). The first identity is satisfied.

(ii) Identity of the cause of action

5

For purposes of ths argument, all filings from the original Complaint through entry of the Order of Dismissal are referred to as the "first action," and all filings subsequent to the January 18, 2006 Order of Dismissal with Prejudice are referred to as the "second action."

"Cause of action" is defined as "'[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; claim.'" *LaVere*, 895 So. 2d at 835 (*quoting* BLACK'S LAW DICTIONARY 214 (7th ed.1999)). Through both actions, the Irvings assert negligence and tort claims based on the same set of facts and same event, and they seek damages for the wrongful death of Roswell Irving, Jr. *See* Complaint (R. 4-14) (R.E. 1-11); First Amended Complaint (R. 32-41) (R.E. 12-21); and Second Amended Complaint (R. 63-70) (R.E. 43-50). This identity is satisfied.

(iii) Identity of the parties

"In order for *res judicata* to bar litigation of a claim in a second proceeding, the parties to the second action must have also been parties to the first action, *or* have been in privity with a party in the first action." *LaVere*, 895 So. 2d at 835. Under Mississippi law, "strict identity of the parties is not necessary." *Little*, 704 So. 2d at 1339. Rather, a defendant that is "in privity" with a defendant in the previous action can assert *res judicata*. *Id.*

Here, there is no doubt the Irvings are the plaintiffs in both the "first action" and the "second action." *See* Complaint (R. 4) (R.E. 1); Second Amended Complaint (R. 63) (R.E. 43). And Crawford Logging, the only named Defendant in the "second action," was, *in fact*, a party in the "first action" as well. Crawford Logging was a "John Doe" Defendant in the Irvings' original Complaint (R. 4) (R.E. 1), and it was formally named as defendant in the First Amended Complaint (R. 32) (R.E. 12), which was dismissed with prejudice (R. 60) (R.E. 40). So, Crawford Logging is, in fact, a defendant in both "actions."

In any event, there is privity between Thomas and Crawford Logging sufficient to satisfy this identity. Though Crawford Logging does not agree with the Irvings' characterization of Thomas as an "employee," -- he was as a matter of law, an independent contractor, *see infra.* But assuming *arguendo* an employer/employee relationship, privity is established. *See Black v. City*

of Tupelo, 853 So. 2d 1221, 1225 (Miss. 2003) (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., June 6, 2007) (*citing Black*, 853 So. 2d 1221).

In *Vice*, the plaintiff, who alleged she was injured due to the negligence of a truck driver delivering windows for Danvid, instituted suit against Danvid and "John Doe," because she did not know the name of the truck driver. *Id.* at *1. Danvid did not appear in that action and the plaintiff obtained a default judgment. *Id.* A little over one year later, the plaintiff filed another almost identical action, again naming Danvid and John Doe. *Id.* at *3. After learning the identity of the driver, Vice amended her complaint to substitute the truck's driver, Fuller, in place of defendant John Doe. *Id.* The truck driver sought dismissal of the action against him on the basis that the suit was barred by the doctrine of *res judicata* due to the default judgment entered against his employer, Danvid, in the first suit. *Id.* Fuller argued that he was a party in the first suit even though he was named as "John Doe." *Id.* Applying Mississippi law, the district court held, "[R]egardless of whether Fuller's 'John Doe' status in the 2003 suit qualified him as a party, it is sufficient that Fuller was in privity with Danvid, due to the fact that Fuller was Danvid's employee at the time of the accident." *Id.*

Just as in *Vice*, Crawford Logging was a party in the first action. In fact, Crawford Logging was more than a "John Doe" in that action – Crawford Logging was named in the First Amended Complaint filed by the Irvings *prior to* entry of the Order of Dismissal. *See* First Amended Complaint (R. 32) (R.E. 12); Order of Dismissal with Prejudice (R. 60) (R.E. 40). The third identity is satisfied.

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

This final element is present as the parties are the same (alternatively, there is privity), and both Thomas and Crawford Logging are logging contractors. *See Little*, 704 So. 2d at 1339

(holding gas distributors in chain of sale were in privity of interest and satisfied the fourth identity necessary to apply *res judicata*).

The four identities necessary to apply the doctrine of *res judicata* are present, and the agreed Order of Dismissal with Prejudice is a bar to the Irvings' claims asserted in the Second Amended Complaint against Crawford Logging.

Moreover, under long-established Mississippi law, the Irvings' suit against Thomas and resolution of that suit by settlement, which was paid and accepted unequivocally and without reservation, and along with the Order of Dismissal with Prejudice, acts as a bar to the suit against Crawford Logging, as Thomas' master. *See Granquist v. Crystal Springs Lumber Co.*, 1 So. 2d 216 (Miss. 1941). There, the Court explained, that when liability of a master for the wrong of his servant, or of a servant for his master, is premised solely on the act of one of them and the liability is imputed to the other under the doctrine of *respondeat superior*, such "liability is joint and several, but they [servant and master] are not joint tortfeasors." *Id.* at 218. The Court ruled that, 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.**" *Id.*

Here, the Irvings knew as of Thomas' deposition on August 11, 2005 (*see* Thomas depo.) (R. 116) (R.E. 95) – but in any event no later than July 18, 2006, when Jack Crawford was deposed (*see* Crawford depo.) (R. 110) R.E. 89) – well before they settled and agreed to dismiss their claims and this lawsuit, that Thomas was hauling on the day of the accident for Crawford

Logging. The vicarious liability claims against Crawford Logging in which the Irvings seek to hold Crawford Logging for the alleged negligence of Thomas (as the truck driver and sole tortfeasor) therefore "merged" into the judgment collected against Thomas and were "legally satisfied." *Granquist*,1 So. 2d at 218. As such, this subsequent action against Crawford Logging is barred. *Id.*

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

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

This lawsuit was successfully mediated and settled in November 2005. *See* Settlement Agreement (R. 217) (R.E. 110). The settlement was consummated and, in exchange for payment of the agreed-upon monetary settlement, the Irvings executed a Release of All Claims on November 29, 2005. *See* Release of All Claims (R. 92-95) (R.E. 71-74). As a condition of the settlement and the Irvings' Release, an Order of Dismissal with Prejudice was signed by the trial court on January 18, 2006, and entered by the clerk of court on January 19,2006. *See* Order of Dismissal with Prejudice (R. 60-61) (R.E. 40-41). At no time did the Irvings or any party move for any relief from the Order of Dismissal with Prejudice or to have the Order vacated, amended, or altered. *See* Certified Copy of Docket Entries (R. 1-3) (R.E. 112-14)).

On January 3, 2006, *before* entry of the Order of Dismissal, the Irvings filed their First Amended Complaint, in which Crawford Logging was named and substituted as a defendant in place of John Doe Defendant 1. *See* First Amended Complaint with Discovery Attached (R. 32)

(R.E. 12). The First Amended Complaint named "H.T. Trucking Company, Hosie Thomas, Crawford Logging, Inc., and John Doe Defendants 2-10." *Id.* On January 9, 2006, also *before* entry of the Order of Dismissal, the Irvings filed their Motion for Leave to Amend Complaint. *See* Motion for Leave to Amend Complaint (R. 42) (R.E. 22).

On January 23, 2006, *after* entry of the Order of Dismissal with Prejudice, the trial court executed an Order Granting Plaintiffs' Motion for Leave to Amend Complaint. *See* Order (R. 62) (R.E. 42). Noticeably absent from that Order is any approval as to form by counsel for Thomas or Crawford Logging, nor is there any indication the Order was ever provided to counsel for Thomas or Crawford Logging before it was presented to the trial court. *See* Order (R. 62) (R.E. 42).

The Irvings unconditionally accepted the settlement and executed the Release of All Claims, which bound them to dismiss this lawsuit with prejudice. *See* Release (R. 92-95) (R.E. 71-74). The Release does not except or reserve any claims and the Irvings' acceptance of the settlement was unconditional and unequivocal. The case was dismissed with prejudice and the Order of Dismissal with Prejudice final.[6] As such, all pleadings or motions – including the Irvings' Complaint, First Amended Complaint, and Motion for Leave to Amend Complaint – pending at the time of entry of the Order of Dismissal, were mooted. *See Pharmacia Corp. v.*

6

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).

Suggs, 932 So. 2d 95, 99-100 (Ala. 2005) (*citing Deposit Guaranty Nat'l Bank v. Roper,* 100 S. Ct. 1166 (1980)).[7]

In *Suggs,* a putative class action, the class representatives settled their claims and unequivocally accepted advance settlement proceeds. *Id.* at 97. The plaintiffs refused to join in the stipulation of dismissal as requested by the defendants and, instead, moved to substitute six new plaintiffs as class representatives. *Id.* Subsequently, they filed a motion to amend to add a seventh plaintiff. The trial court granted the plaintiffs' motion and allowed them to amend their complaint naming the new representatives as parties plaintiff. *Id.* However, on appeal, the Alabama Supreme Court reversed and held, "Because the Suggses 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." *Id.* at 99-100.

Discussing the issue of mootness, the *Suggs* court analyzed the Supreme Court's holding in *Roper* regarding the question of mootness in the settlement context. "[There,] the defendant tendered the amount of the individual claims of each class representative. The class representatives, however, *declined* the defendant's tender." *Id.* at 99. "The United States Supreme Court rejected the defendant's contention that the tender, albeit declined, nonetheless rendered the action moot. Justice Rehnquist noted in his special concurrence that '[t]he distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim.'" *Id.* (*quoting Roper*, 100 S. Ct. at

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7

After diligent research by counsel, no reported Mississippi cases or authority as to this issue were located. However, the *Suggs* case is instructive and does not apply any rule or law specific to Alabama.

1166 (Rehnquist, J., concurring)). As reasoned by the *Suggs* court, "The converse of Justice Rehnquist's observation supports the view that mere acceptance of the tender by the class representatives would have rendered the action moot." *Suggs*, 932 So. 2d at 98.

Concluding that, "The Suggses' unqualified acceptance of the [] settlement offer rendered the matters made the basis of the amended complaint moot at that moment and deprived the Jefferson Circuit Court of subject-matter jurisdiction," the *Suggs* court reversed and remanded to the trial court for dismissal. *Id.* at 100.

Here, the Irvings accepted the agreed upon settlement without qualification or condition. All previous pleadings and motions, including the Complaint and First Amended Complaint, were rendered moot at that time and there nothing alive to be amended. The trial court was deprived of subject-matter jurisdiction to take any further action at that time and, in the absence of jurisdiction, the court's Order Granting Plaintiffs'Motion for Leave to Amend is null and void and must be vacated. *See McNeil v. Hester*, 753 So. 2d 1057, 1075 (Miss. 2000); *see also Bert Allen Toyota, Inc. v. Grasz*, 948 So. 2d 358, 363 (Miss. Ct. App. 2007).

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

In both actions, the Irvings maintained Thomas was an employee of Crawford Logging. Again, the undisputed facts establish Thomas was an independent contractor, as a matter of law. *See infra.* However, an employer/employee relationship is dispositive of the Irvings' claims as the Irvings have expressly settled and released their claims against Crawford Logging. That is, undisputedly the Irvings compromised their claims and released Thomas from liability, and the Release of Claims expressly includes all those in "privity" with Thomas, which is Crawford

Logging. *See* Release of All Claims (R. 92-95) (R.E. 71-74). The Release of Claims states, ". . . the undersigned . . . do hereby release Hosie Thomas, H.T. Trucking Company. . . and other entities *in privity of interest therewith* . . . from any and all claims, demands or causes of action of any kind . . . which arise out of or are in any related to [the September 28, 2004] accident." *Id.* at ¶ 1 (emphasis added).

As demonstrated above, Crawford Logging, as Thomas' purported employer is "in privity of interest" with Thomas. *See supra.* Therefore, the Release encompasses Crawford Logging and Crawford Logging is entitled to summary judgment.

At a hearing on October 17, 2007, on Crawford Logging's summary judgment motion, the trial court asked counsel for the Irvings to describe the relationship between Crawford Logging and Thomas, to which counsel for the Irvings emphatically replied, there was "no relationship."[8] That admission alone was sufficient to grant summary judgment in favor of Crawford Logging, since, absent any employment relationship between Crawford Logging and Thomas, there is no basis for the Irvings' claims against Crawford Logging. *See Stewart v. Lofton Timber Co.,* 943 So. 2d 729 (Miss. Ct. App. 2006); *Chisolm v. Miss. Dept. of Transp.,* 942 So. 2d 136 (Miss. 2006); *Owens v. Thomae,*759 So. 2d 1117 (Miss. 1999). Realizing the gravity of this admission, the Irvings responded that their abdication of any relationship applied solely to the issue of whether Crawford Logging was released as one in privity with Thomas. *See*

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There was no court reporter present at this hearing and, consequently, no record of the arguments made at the hearing. However, counsel for the Irvings does not dispute his admission, as this was raised in later motions and responses filed in the record. *See* Crawford Logging's Combined Response in Opposition to Plaintiffs' Motion to Order Case for Mediation and Plaintiffs' Motion for Trial Setting at ¶ 6 (R. 244-247) (R.E. 115-18); and Plaintiffs' Response in Opposition thereto at ¶ 8 (R. 254-259) (R.E. 119-24).

Plaintiffs' Response in Opposition to Defendant Crawford Logging, Inc.'s Combined Response to Plaintiff's Motion to Order Case for Mediation and Plaintiff's Motion for Trial Setting, at ¶ 8 (R. 256) (R.E. 121).

Either there is a relationship or there is not. The Irvings may not have their cake and eat it too. If there is a relationship, the Irvings have released their claims against Crawford Logging and summary judgment is warranted. If there is not, summary is warranted because there is no basis under established Mississippi law for any claims against Crawford Logging, direct or indirect.

Moreover, pursuant to the Release, the Irvings were contractually bound to dismiss the 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). The Release provides, "For the same consideration, the lawsuit styled "*The Estate of Roswell Irving Jr., et al. v. H.T. Trucking, et al.*, Cause No. 251-04-1265CIV, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, is to be dismissed with prejudice as to Releasees with each party to bear its own costs." *Id.* The Release continues: "The consideration has been paid by Releasees and received by Releasors as full accord and satisfaction of all matters claimed against Releasees in the said lawsuit or that could have been claimed against Releasees in the said lawsuit." *Id.*

As established above, Crawford Logging was "in privity" with Thomas, and, therefore, Crawford Logging was in fact a "Releasee" under the Release. The Irvings' "second action" through the Second Amended Complaint constitutes a breach of their contractual obligations to Crawford Logging, as a "Releaseee," under the Release.

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

The Irvings allege that Thomas was an employee of Crawford Logging and that, when Thomas was driving his truck at the time of the accident, Thomas was acting in the course and scope of his employment with Crawford Logging. *See* Second Amended Complaint, ¶¶ 10-14 (R. 63) (R.E. 43). The Irvings seek to hold Crawford Logging vicariously liable for the alleged negligence of Thomas. *See id.* Specifically, the Irvings plead, "That as a direct and proximate result of the careless, reckless and negligent acts of [Crawford Logging's] employee, in failing to come to a complete stop at the intersection and failing to yield the right of way, the decedent was caused to suffer personal bodily injuries, endure conscious pain and suffering, mental and emotional distress, resulting in his untimely demise on or about October 8, 2004." *Id.* ¶11. However, Thomas was not an employee of Crawford Logging. Rather, as a matter of law, Thomas was an independent contractor as to Crawford Logging for whom Crawford Logging is not vicariously liable.

The doctrine of *respondeat superior* generally provides that an employer is liable for the negligent acts of its employee performed in the course and scope of his employment. *See Owens v. Thomae*, 759 So. 2d 1117, 1122 (Miss. 1999). But, as a matter of firmly-rooted Mississippi law, one who hires an independent contractor is not liable for the negligence of that independent contractor or the independent contractor's employee. *See id. See also Stewart v. Lofton Timber Co.*, 943 So. 2d 729, 733 (Miss. Ct. App. 2006) ; *Blackmon v. Payne*, 510 So. 2d 483, 488 (Miss. 1987) (*citing Miss. Power Co. v. Brooks,* 309 So. 2d 863 (Miss.1975); *Ingalls Shipbuilding*

Corp. v. McDougald, 228 So. 2d 365 (Miss.1969); *Federal Compress & Warehouse Co. v. Swilley,* 252 Miss. 103, 171 So. 2d 333 (1965)). *See also Brooks,* 309 So. 2d at 866; *Smith v. Jones,* 220 So. 2d 829, 832 (Miss.1969); *Carr v. Crabtree,* 55 So. 2d 408, 413-14 (1951)).

Generally speaking, a "servant" or "employee" is one who is "employed by a master [or employer] to perform service in his affairs whose physical conduct in the performance of his service is controlled or is subject to the right of control by the master." *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143, 148 (Miss. 1994) (citations omitted). *See also Stewart*, 943 So. 2d at 734 (holding "An employer is one who exercises control over the details of the employment.").

An "independent contractor," on the other hand is one "who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right of control with respect to his physical conduct in the performance of the undertaking." *Richardson*, 631 So. 2d at 148. In *Stewart*, the Court of Appeals held, "the right of control, rather than the actual control exercised, should be the determining factor." *Stewart*, 943 So. 2d at 734.

This Court has established the following factors to be considered in determining whether a person is an independent contractor or an employee: (1) whether the principal master has the power to terminate the contract at will; (2) whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; (3) whether he furnishes the means and appliances for the work; (4) whether he has control of the premises; (5) whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output; (6) whether he has the right to prescribe and furnish the details of the kind and character of work to be done; (7) whether he has

the right to supervise and inspect the work during the course of the employment; (8) whether he has the right to direct the details of the manner in which the work is to be done; (9) whether he has the right to employ and discharge the sub-employees and to fix their compensation; and (10) whether he is obliged to pay the wages of said employees. *Id.* (*citing Richardson*, 631 So. 2d at 148-49). *See also Kisner v. Jackson*, 132 So. 2d 90, 91 (Miss. 1931).

It is not necessary that each factor favors an independent contractor relationship in order to find that such a relationship existed. The linchpin is whether the contractor is actually independent. *Richardson*, 631 So. 2d at 148. Applying these factors to the undisputed facts in the instant case, it is undeniable that Thomas was an independent contractor at the time of the accident giving rise to the Irvings' action.

1. *Whether the master has the power to terminate the contract at will.*

There is no dispute that here either party, Thomas or Crawford Logging, could terminate the relationship at any time without advance notice. When asked in his deposition, Crawford testified:

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

Depo. of Jack Crawford at 40:15-20. (R.113) (R.E.92).

In the court below, the Irvings argued that Crawford had the power to terminate the relationship; however, they offered no evidence to refute Crawford's clear testimony. But, even assuming *arguendo* that Crawford alone held the power to terminate, this alone would not be

enough to establish an employment relationship. *See Crosby Lumber & Manufacturing Co. v. Durham*, 179 So. 2d 285, 287 (Miss. 1938) (power to terminate contract at will does not constitute such control as to establish an employment relationship).

Further, it is clear from the undisputed testimony that Crawford was not obligated to provide work to Thomas.

> Q: So you would offer him to come drive if you needed him. But, if you didn't need him, you wouldn't even offer him the opportunity to work with you, right?
>
> A: No, he didn't work with me.

Crawford depo. at 41:14-19. (R. 114) (R.E. 93). Likewise, Thomas was free to come and go and work for others as he chose. *Id.* at lines 2-6. And come and go he did. *Id.* at 21:2-8 (R. 112) (R.E. 91).

This evidence establishes Crawford had no control or right of control over Thomas. This factor weighs in favor of an independent contractor relationship.

2. *Whether the master has the power to fix the price in payment for the work, or vitally controls the manner and time of payment.*

Crawford did not pay Thomas a salary; rather, Thomas was paid solely on the basis of the amount of wood he hauled ("per load"). *See id.* at 41:20-25 (R. 114) (R.E. 93). Crawford testified: "It's on a per load. . . . Whatever the company pays me, the hauler gets 30 percent." *Id.* *See also Id.* at 20:5-12 (R.111) (R.E. 90).

Thomas' own testimony sums up the relationship and establishes Thomas was his own employer:

Q . . . what are your expenses?

A: I got to pay myself for driving the truck.

Q: So, you pay yourself a salary?

A: Well, I wouldn't exactly say that. I guess so, yeah, if any be left.

Q: When you say you guess so, what do you mean? I mean, either you do pay yourself a salary or you don't?

A: Well, I do.

Q: You do?

A: Yeah.

Id. at 85:1-10. (R. 119) (R.E. 98). This testimony is compelling and is sufficient to conclude that there was no employer/employee relationship.

Though Crawford set the "per load" rate for the hauling, Thomas was free to accept or reject the work if he did not like the rate offered by Crawford, and Thomas was free to go elsewhere to try to get a better rate. *See* Crawford depo. 41:7-13 (R. 114) (R.E. 93). In this regard, Crawford testified "I have no control over him whatsoever." *Id.* Clearly, Thomas was his own "employer."

3. *Whether the master furnishes the means and appliances for the work.*

Crawford Logging did not own the truck used by Thomas to perform the work and involved in the wreck. Crawford testified, "Ever since he's worked he's been independent. He's owned his own truck and everything is his, you know." *Id.* at 20:24-25, 21:1. (R. 111-112) (R.E. 90-91).

Rather, Thomas owned his own truck. In this regard, Thomas testified:

Q: Do you remember what type of truck you were driving that day?

A: A Freightliner.

Q: What year model?

A: '99.

Q: Did you purchase that truck new?

A: Yeah.

Thomas depo. at 67:4-12 (R. 117) (R.E. 96). Further, Thomas paid his own expenses associated with operation of his hauling business, including insurance premiums. *Id.* at 84:10-85:2 (R. 118-19) (R.E. 97-98). Crawford's testimony is consistent:

Q: You didn't pay for Mr. Thomas' truck, did you?

A: No.

Q: You didn't pay for his gas?

A: No.

Q: You didn't do regular inspections on his truck or his equipment or anything like that, did you?

A: No.

Q: You didn't carry any insurance on him; he had to get his own, right?

A: Right.

Crawford Depo. at 42:12-23 (R. 115) (R.E. 94).

In sum, Crawford did not furnish or control the means and equipment used for Thomas' hauling work – the "ultimate job in question." *See Stewart*, 943 So. 2d at 733. This factor

weighs heavily in favor of an independent contractor conclusion. *See Hercules Powder Co. v. Westmoreland*, 164 So. 2d 471, 475 (Miss. 1964) (finding independent contractor relationship where driver owned his own trucks).

4. *Whether the master has control of the premises.*

The "premises" involved in Thomas' hauling work are the roads and highways that Thomas chose to travel to haul the timber. While neither party here "controls" these premises – undisputedly, they are in the hands of the county and state – certainly, Crawford Logging does not control them. Neither did Crawford Logging dictate or direct which roads or route Thomas would take to haul the timber. *See* Crawford depo. at 42:2-11 (R. 115) (R.E. 94). This evidence is undisputed, and this factor supports an independent contractor relationship.

5. *Whether the master furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output.*

There is little evidence in the record for analysis of this factor. But, again, Thomas owned his own truck and was solely responsible for its upkeep and maintenance, insurance, and operating expenses. The furnishing of the timber and loading equipment to load Thomas' trailer is irrelevant because Crawford Logging contracted with Thomas only to haul the timber, not to load it. And, though Crawford Logging contracted with those to whom he was supplying wood, Thomas, as the hauler, dealt with the employees at those woodyards with respect to the weighing and unloading of the timber.

This factor indicates an independent contractor relationship.

6. *Whether the master has the right to prescribe and furnish the details of the kind and character of the work to be done.*

The "work to be done" at issue is Thomas' hauling. Other than to tell Thomas where to haul the wood, there is no evidence Crawford Logging prescribed or furnished any details of the work to be done. As shown earlier, Crawford Logging did not direct the route Thomas would take or which roads to use in Thomas' hauling. Those details were controlled or furnished by the county's road weight restrictions and/or other regulations or circumstances outside Crawford Logging's control. This factor favors an independent contractor finding.

7. *Whether the master has the right to supervise and inspect the work during the course of the employment.*

There is no record evidence to indicate Crawford Logging retained or exercised the right to supervise or inspect Thomas' hauling work. In fact, the only reasonable conclusion to be drawn from the evidence in the record is that, once Thomas' trailer was loaded and Thomas was told where to deliver the timber, Thomas was responsible for the method and manner of performing his hauling with no oversight or supervision from Crawford. Thomas was his own employer and, again, Crawford Logging did not regularly inspect Thomas' truck. If anything, this factor is neutral in the analysis.

Nevertheless, the *right* of inspection, if it exists, simply does not amount to the level of control necessary to establish an employment relationship. *See e.g,. Leaf River Forest Prods., Inc.*, 392 So. 2d at 1143 (holding that logging operator and its log truck driver were independent contractors of sawmill operator where sawmill operator never supervised logging operators or its employees even though there were inspections).

8. *Whether the master has the right to direct the details of the manner in which the work is to be done.*

Again, Thomas chose his own routes and methods to perform his hauling services. Crawford Logging did not control Thomas' working hours, how many loads he hauled, or even whether he worked. *See* Crawford depo. at 41 (R. 114) (R.E. 93). *Cf. Richardson*, 631 So. 2d at 144-45 (same). Crawford Logging merely notified Thomas when hauling work was available, and Thomas could choose to work or not. Thomas, of course, was free to haul for others, and did. *Id.* And Thomas, not Crawford Logging, determined how many loads Thomas hauled and how many hours and days he worked. *Id.* These facts are not in dispute.

Moreover, if Thomas had chosen to take the entire day to haul one load of timber, it was beyond Crawford Logging's interest or control. This is because Crawford Logging was interested only in the ultimate result of Thomas' contracted work – the hauling of the timber to the woodyard – not the details. *See Stovall's Estate v. A. Deweese Lumber Co.*, 77 So. 2d 291, 294 (Miss. 1995) (finding independent contractor relationship where lumber hauler contracted with lumber company to haul logs and "the lumber company was interested only in the ultimate result of the work as a whole and not in the details of its performance.").

This factor weighs in favor of the conclusion that Thomas was an independent contractor. As held in *Stewart*, "An employer is one who exercises control over the details of the employment." 943 So. 2d at 734. Where no such control is evidenced, there is no employer/employee relationship, and summary judgment is appropriate. *Id.*

9. *Whether the master has the right to employ and discharge the sub-employees and to fix their compensation.*

and

10. *Whether the master is obliged to pay the wages of said employees.*

There is no evidence Thomas had any employees or "sub-employees" other than himself, so this factor is not applicable in this case. Again, Thomas paid his own salary and taxes. *See* Thomas depo. at 85:6-25 (R. 119) (R.E. 98). The only reasonable inference or conclusion to be drawn from this evidence that Crawford Logging would have neither the right of control nor the obligation to pay any of Thomas' employees.

Clearly, Thomas was self-employed and he hauled for Crawford Logging on an independent contractor basis. The facts critical to this analysis are undisputed. Thomas owned his own truck; he paid all his own operating expenses of operating his truck and hauling business; and he paid himself a salary and paid his own taxes. Thomas had the right to control whether he accepted a hauling job or did not accept a hauling job; Thomas set his own hours and was not obligated to report to Crawford Logging; Crawford Logging was not obligated to provide work to Thomas. Thomas *See Stewart*, 943 So. 2d 729. *See also McKee v. Brimmer*, 39 F.3d 94, 95-96, 98 (5th Cir. 1994) (concluding that owner of logging company was independent contractor for pulpwood company that hired him to haul timber because logging company was paid on production basis; pulpwood company made no loans or advances to logging company, and did not deduct any taxes from the payments; logging company used its own equipment and pulpwood company made no inspections of equipment or work; and there was no evidence that pulpwood company had the right to control or controlled the time, manner, or routes used in hauling the timber).

The facts are undisputed. When, as in this case, the facts are undisputed, the employee/independent contractor question is a legal one for the court. *See Richardson*, 631 So. at 152 (finding, as a matter of law, that the relationship was that of independent contractor); *Leaf*

River Forest Prods., Inc., 392 So. 2d at 1143 (concluding that logging operator was independent contractor of sawmill operator and reversing jury verdict finding employment relationship because the case should not have been submitted to the jury).

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

Although their Second Amended Complaint is less than clearly plead, the Irvings apparently claim Crawford Logging is independently liable, relying on the theories of negligent hiring and retention. *See* Second Amended Complaint at ¶¶ 13-15 (R. 67-68) (R.E. 47-48). These claims fail because, as shown above, Thomas was an independent contractor and Mississippi law does not recognize the theories of negligent hiring or retention in the independent contractor context. But again, it cannot be overlooked that, even if Thomas were determined to be an "employee" of Crawford Logging, the Irvings settled and released their claims and dismissed this action with prejudice against Thomas and the Release operates to bar the Irvings' claims against Crawford Logging. *See supra.*

In Mississippi, liability under the tort theories of negligent hiring and negligent retention are predicated on the finding of an employer/employee relationship. An employer may be held liable to a third party for negligent hiring or retention of an employee "if the employer knew or should have known of the employee's incompetence or unfitness." *Doe ex rel. Brown v.*

Pontotoc County School Dist., 957 So. 2d 410, 416 -417 (Miss. Ct. App. 2007) (*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) (Recognizing claims against school district for liability of bus driver were premised on respondeat superior and negligent hiring since bus driver was an employee.).

As a matter of law, there is no employer/employee relationship here – Thomas is an independent contractor. Therefore, Crawford Logging may not be held liable for negligent hiring or retention. These claims are without basis in fact or law and the trial court erroneously denied Crawford Logging's motion for summary judgment.

CONCLUSION

Crawford Logging, Inc. was improperly denied judgment as a matter of law to which it was entitled on a number of independent bases: First, the Irvings' Second Amended Complaint is an attempt to relitigate the earlier action against the same defendant. The claims are barred by the doctrine of *res judicata.* Second, the *respondeat superior* claims against Crawford Logging, which are based solely on the alleged negligence of Thomas, as Crawford Logging's purported employee or agent, are barred by virtue of the suit against Thomas, and settlement and judgment in that action. *See Granquist, supra.* Third, the Irvings' claims against Crawford Logging are extinguished and barred because the Irvings expressly released all claims and were contractually bound to dismiss the entire lawsuit.

Fourth, as a matter of Mississippi law, Thomas is an independent contractor with respect to Crawford Logging, Inc. As such, Crawford Logging, Inc. may not be held liable under the doctrine of *respondeat superior* for any alleged negligence of an independent contractor. And,

finally, Thomas' status as an independent contractor drives the conclusion that Crawford Logging cannot be held liable for negligent hiring or retention because these theories of tort liability are predicated on an employer/employee relationship and there is none.

This lawsuit, including any claims against Crawford Logging, were mediated and settled, and the lawsuit, *in its entirety*, was dismissed with prejudice and by agreement on January 18, 2006. The Irvings are improperly and opportunistically seeking to take a second bite at the apple.

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: June 25, 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:

Hon. Winston L. Kidd
Circuit Judge
P.O. Box 327
Jackson, MS 39205

Brandon I, Dorsey, Esq.
P.O. Box 13427
Jackson, MS 39236-3427

THIS, the 25th day of June, 2009.

Ginny Y. Kennedy