

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00619

**JEFFERY B. HODGES,
AVIS H. HODGES AND
BRITTANIE H. BURRELL**

APPELLANTS

VS.

ATTALA COUNTY, MISSISSIPPI

APPELLEES

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT IS REQUESTED

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ARGUMENT IN REPLY

Attala County demeans the contract language upon which the Plaintiffs rely as a mere “partial quote” and urge this Court to ignore the contract language so that the County can escape the legal duty and corresponding liabilities which the County contracted to undertake.¹ However, the so-called “partial quote” is the contract language that distinguishes the instant contract from the contract considered by this court in the case of *Chisolm v. Mississippi Dep’t of Transp.*, 942 So.2d 136 (Miss. 2006). Moreover, the County’s apparent pique betrays an aversion to precisely the analytical exercise undertaken by the court in *Chisolm*, which had before it the same formulaic contract, without an amendment vesting additional responsibility in a specific individual, and a record that was not devoid of incipient discovery. The County wants the benefit of *Chisolm* without the burden of its exhaustive scrutiny; the reward without its exacting rationale.

The court in *Chisolm* did not, as the County urges here, simply stop its inquiry with language contained in the contract between the Mississippi Department of Transportation and its contractor, Great River Stone Company, that “evidence[d] the parties’ intent for Great River to serve as an independent contractor.” *Id.* at 141 (¶ 7). It proceeded to assess the “public policy factor” requiring “recharacterization of the [independent contractor] relationship to allow the

¹The contract language demeaned as a mere “partial quote” by the County is:

Christian Gardner is designated as the responsible person to insure the Contractor constructs, installs and maintains the devices called for on the Traffic Control Plan. An inspection of the traffic control signs and devices shall be performed at periods not exceeding one week regardless of construction activity within the project. The Contractor will be required to immediately rectify any noted deficiencies.

injured party to recover, *id.* at 142 (§ 10); the “inherent danger” and “non-delegable duty” exceptions to the “general rule that a principal is not liable for the torts of its independent contractor,” *id.* at 143 (§ 16); whether the Manual on Uniform Traffic Control Devices could be considered the source of a legal obligation that avoided the “general rule,” *id.* at 143 (§ 15); and whether sufficient facts were alleged to hold the Mississippi Department of Transportation liable for its own conduct, *id.* at 144 (§ 18). The court also acknowledged implicitly the venerable rule in Mississippi that “[t]he relationship between the parties may be that of employer/employee for one purpose and some other relationship for other purposes.” *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 152, n. 8 (Miss. 1994). “What is critical is whether the [principal] maintains any right of control over the performance of *that aspect of the work that has given rise to the injury*. . . . If [the plaintiff] can show that, the contract notwithstanding, the [principal] maintained substantial de facto control over *those features of the work out of which the injury arose*, [the plaintiff could] . . . survive summary judgment.” *Magee v. Transcontinental Gas Pipeline Corp.*, 557 So.2d 182, 186 (Miss. 1989) (emphasis added).

This postulate was discussed by the Mississippi Supreme Court in *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d 1355 (Miss. 1989) (cited in *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143 (Miss. 1994)), in which an owner of premises and a prime contractor entered a construction agreement that defined the relationship as that of principal/independent contractor. The prime contractor became delinquent in paying his subcontractors and suppliers, and a subsequent agreement, explicitly amending the original contract, was executed by the parties, according to which the duty to pay suppliers was assumed and actually discharged by the owner. In the following suit against the owner by a supplier for payment of materials furnished to the

prime contractor, the owner argued in defense that his relationship with the prime “remained that of owner--- independent contractor” pursuant to the original contract. *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d at 1357-58. Rejecting that argument, the court observed:

Our law recognizes that a person may be an independent contractor as to certain work and a mere agent as to other work for the same employer. . . . We have also recognized that the subsequent actions of the parties pursuant to a contract may support a finding that the original contract has been modified to an extent consistent with the subsequent course of conduct. . . . Put otherwise, what the parties to a contract do thereunder is often the best evidence of what the contract requires them to do.

. . .

[I]t is not unreasonable to conclude that [the owner] exercised complete control over the payment of the suppliers and sub-contractors . . . and to this limited extent [the prime contractor] ceased to function as an independent contractor.

Id. at 1359 (citations omitted). Thus, contractual indicia of intent to establish an independent contractor relationship in Mississippi simply are not decisive in the presence of evidence of conduct or modification of a contract, however limited in scope, which is inconsistent with that relationship.

The lower court in this case turned a blind eye to such evidence. Unlike *Chisolm*, the court below had before it specific contractual language from which, for purposes of summary judgment only, it could easily, let alone reasonably, have inferred that, with respect to construction, installation and maintenance of traffic control and safety devices, Attala County reserved some “right of control over the performance of that aspect of the work that [allegedly gave] rise to the injury,” *Magee v. Transcontinental Gas Pipeline Corp.*, 557 So.2d 182, 186 (Miss. 1989), and that “to this limited extent” Ausbern Construction Company “ceased to function as an independent contractor.” *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d 1355,

1359 (Miss. 1989). Its refusal to do so, especially in the absence of an opportunity to conduct any meaningful discovery, contravenes familiar standards governing summary judgment and flouts the expository methodology traditionally employed by Mississippi courts in cases involving an independent contractor defense.

CONCLUSION

Mississippi cases counsel that truth cannot be disguised by perfunctory professions of intent. Attala County persuaded the lower court to credit only such contractual professions in this case as were identical to those recited by the court in *Chisolm*, thus creating a false factual equivalence; to ignore terms that are arguably inconsistent with an independent contractor relationship; to adopt the result in *Chisolm* without resort to its reasoning; and to deny the Survivors an opportunity to pursue the truth even through discovery. For these and other reasons assigned in their principal brief, the decision of the lower court should be reversed forthwith.


Respectfully submitted,


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CERTIFICATE OF SERVICE


The undersigned counsel does hereby certify that I have this day filed the original and all copies required with the Clerk of the Supreme Court of the State of Mississippi and that I have caused to be served a true and correct copy of the foregoing on the following persons:

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So certified, this the 3rd day of December, 2009.



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