IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-IA-00821-SCT

AT Timber — APPELLANT

V.

BRYAN EDWARD NEWMAN — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
WARREN COUNTY, MISSISSIPPI

# BRIEF OF APPELLEE

## BRYAN EDWARD NEWMAN

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IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-IA-00821-SCT

ANDERSON TULLY TIMBER COMPANY — APPELLANT

V.

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WARREN COUNTY, MISSISSIPPI

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant certifies that the following are listed in order that the justices of this Court may evaluate possible disqualification or recusal.

1. Bryan Edward Newman, Appellant, 215 West Street, Mangham, Louisiana 71259;
2. Anderson Tully Timber Company, Vicksburg, Mississippi, 39180.
3. James W. Nobles, Jr., Attorney for Appellant, 201 Clinton Parkway, Clinton, Mississippi 39056;
4. Travis T. Vance, Attorney for Appellant, Post Office Box 750, Jackson, Mississippi 39181-0750;
5. Michael Kramer, Esquire, 6658 Kinloch Street, Winnsboro, Louisiana., 71295;

6. W. Hugh Gillon, IV, Esquire, Upshaw Williams Attorneys for AT Timber , Post Office Box 9147,, Jackson, Mississippi 39286-9147;

7. The Equipment Place, Employer of Appellee Bryan Edward Newman, 195 Tiffentown Road, Vicksburg, Mississippi 39180;

8. Honorable Isadore A. Patrick, Circuit Court Judge for 9th District, Warren County, Vicksburg, Mississippi 39180.

WITNESS MY SIGNATURE this the 22nd day of December, A.D., 2010.

JAMES W. NOBLES, JR.

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## BRIEF OF APPELLEE

Comes Bryan Newman, through his attorneys, and files this his Brief in Response to the Interlocutory Appeal filed here by AT Timber , and responding to same says:

The issues on Appeal here are:

1. Whether Appellant, AT Timber, at the time of the underlying accident was a general contractor/statutory employer under the Mississippi Workers Compensation Act, including Miss. Code. Ann. §71-3-7.
2. Whether the claims of Appellee, Bryan Edward Newman, are barred by the exclusivity provisions of the Mississippi Workers Compensation Act.
3. Whether the Trial Court's denial of Appellant's motion for summary judgment was erroneous.

## STATEMENT OF THE CASE

On June 27, 2003, Ryan Edward Newman sustained a traumatic amputation of his right leg below the knee when a log penetrated the cab of the Caterpillar Trac Hoe he was operating, loading and bunching logs for The Equipment Place, his employer. The Equipment Place was a cutting and hauling logging contractor which entered into a Cutting and Hauling Agreement with AT Timber purchased the timber rights to and owned the logs which were being cut from lands owned by Anderson Tully Company. Anderson Tully Company elected to be taxed as a Real Estate Investment Trust [REIT] under 26 United States Code § 631, which allowed it to sell its timber to another entity and treat the gain or loss on the sale of the timber as a long term capital gain. AT Timber exercised control over the premises, told the employees of The Equipment Place where to construct logging roads across the property and directed which trees were to be cut and where the

timber severed was to be cut and hauled. While, distinct and different corporations, the use of the names employed by Anderson Tully Company and Anderson Tully Timber Company are designed blur their true identities. They are different corporations with separate identities. Through out the rest of this Brief, Anderson Tully Timber Company will be referred to as "AT Timber.

The 2002-IV Timber Harvest Agreement between Anderson Tully Company, the owner of the lands on which the standing timber was growing, and AT Timber , the purchaser of the timber rights and the rights to cut and own or dispose of the timber cut, clearly delineates this separateness between them. Set forth below are excerpts from that Timber Harvest Agreement which clearly and unmistakably shows that AT Timber became the "owner" of all timber severed from Anderson Tully Company lands covered by this timber contract.

AT Timber was not, and could not be a contractor. It was and had to be the purchaser of the timber from Anderson Tully Company so that Anderson Tully Company could avail itself of the benefits of 26 United States Code § 631. As can be seen below, the last sentence of § 631(b) clearly defines AT Timber as the "owner" of the timber which was being cut and hauled by Newman's employer. AT Timber was given access to and control over the land and the timber cutting and hauling operations being carried out for it by The Equipment Place. ( R 17-46 ) (RE 17-46 )(Tab 1).

The issue before the Court is whether AT Timber was a prime other contractor which was obligated to Anderson Tully Company to cut, bunch, load and haul the timber in question, or whether AT Timber , as the owner of the timber rights and the timber, contracted with the Equipment Place to cut and haul the timber for its own account.

Appellant maintains that Newman's exclusive remedy was workers compensation benefits,

since AT Timber maintains that Newman was its statutory employee. The facts here clearly show that such is not the case. In two contracts, AT Timber specifically agreed : (1) that it was not a contractor of any sort of Anderson Tully Company, [Section 17.2 , 2002-IV Timber Harvest Agrement] ( R-44) and (2) that it was the "owner" of the timber which was being cut and hauled[ Cutting and Hauling Agreement with The Equipment Place, Sections A and 1 ]( R-51).

AT Timber is a third party tort feasor pursuant to § 71-3-71 of the Mississippi Code of 1972, and is amenable to the suit which Newman has lodged against it and is not a prime contractor who engaged The Equipment Place as a sub contractor. Section 71-3-9 of the Mississippi Code of 1972 (anno.) has no application here.

## SUMMARY OF THE ARGUMENT

Simply put, AT Timber is not and cannot as a matter of law be a Prime Contractor who subbed out to The Equipment Place the cutting and hauling of timber which it owned and which it purchased from Anderson Tully Company. Therefore, the exclusive remedy defense asserted as a bar to Newman's claims for damages under § 71-3-9 of the Mississippi Code of 1972, is not applicable. Appellant's reliance on the cases it cites is misplaced and inapplicable to the facts of this case. The only contract for the performance of cutting and hauling the timber in question was between AT Timber and The Equipment Place. AT Timber owned the timber rights and the timber which was cut from the lands in question. It was not obligated to Anderson Tully Company to perform cutting and hauling operations under the 2002-IV Timber Harvest Agreement since it bought and was granted timber rights and the timber for which it was obligated to pay. AT Timber was the "owner" of the timber and the constructive owner the premises over which it exercised control,

pursuant to the timber rights it purchased from Anderson Tully Company.

Appellant occupies the same legal status as the operator of an oil well pursuant to a lease and a contractor who engages another to perform work on its premises and retains or exercises the right of control over the work being done. Given the owner status of AT Timber, Newman's suit is not barred by his acceptance of workers compensation benefits from his employer, The Equipment Place. AT Timber had no legal obligation under the law to furnish workers compensation insurance coverage to The Equipment Place or its employees, so that Newman cannot be classified as a statutory employee of AT Timber .

The issue of control was not addressed by AT Timber in its Brief so that issue is not included here. The Honorable Circuit Court Judge thrice denied the Motions for Summary Judgment on this issue. Newman does not address the control issue here, since its omission under the Mississippi Rules of Appellate Procedure constitutes an abandonment of that issue on appeal here.

Since AT Timber has assigned an issue of the Trial Court's Denial of its Motion For Summary Judgment, a de novo review of the applicable facts in keeping with the standard for application of Summary Judgment is appropriate here.

## SUMMARY JUDGMENT STANDARD

**Smith ex rel. Smith v. Gilmore Memorial Hosp., Inc.**, 952 So.2d 177 (Miss.,2007) reiterates and restates the standard for the grant or denial of summary judgment pursuant to Rule 56 M.R.C.P.

> ¶ 8. "We employ the de novo standard in reviewing a trial court's grant of summary judgment." **Brown v. J.J. Ferguson Sand & Gravel Co.**, 858 So.2d 129, 130 (Miss.2003) (citing **O'Neal Steel, Inc. v. Millette**, 797 So.2d 869, 872 (Miss.2001)). The moving party shall be granted judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss.

R. Civ. P. 56(c).

¶9. "Summary judgments, in whole or in part, should be granted with great caution." Brown, 444 So.2d at 363. However, "[s]ummary judgment is mandated where the respondent has failed 'to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " **Wilbourn v. Stennett, Wilkinson & Ward**, 687 So.2d 1205, 1214 (Miss.1996) (citing **Galloway v. Travelers Ins. Co.**, 515 So.2d 678, 683 (Miss.1987)) (quoting **Celotex Corp. v. Catrett**, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

See also: **Gregory v. Audubon Indem. Co**. 951 So.2d 600 (Miss.App.,2007); where the

Court of Appeals held:

¶ 10. According to Rule 56 of the Mississippi Rules of Civil Procedure, a circuit court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "A fact is material if it 'tends to resolve any of the issues, properly raised by the parties.' " **Webb v. Jackson**, 583 So.2d 946, 949 (Miss.1991). The moving party bears the burden of showing that no genuine issue of material fact exists. **Tucker v. Hinds County**, 558 So.2d 869, 872 (Miss.1990). Additionally, the circuit court must view the evidence in the light most favorable to the non-moving party.**Russell v. Orr**, 700 So.2d 619, 622 (Miss.1997). Because it is generally better to err on the side of denying the motion, it has been said that the circuit court must consider motions for summary judgment with a skeptical eye. **Ratliff v. Ratliff**, 500 So.2d 981, 981 (Miss.1986).

## ARGUMENT

### FACTS WHICH PRECLUDE SUMMARY JUDGMENT FOR AT Timber AS TO THE STATUTORY EMPLOYER AND EXCLUSIVE REMEDY DEFENSE THAT WORKERS COMPENSATION BENEFITS ARE NEWMAN'S SOLE REMEDY

Conducting a ***de novo*** review of the facts on which AT Timber claims entitle it to a summary judgment on the statutory employer and exclusive remedy issues, each is capable of simple disposition based on several clauses in two documents which AT Timber executed. The starting point for the examination of the facts is the 2002-IV Timber Harvest Agreement between Anderson-

Tully Timber Company and Anderson Tully Company as of November 26, 2002. (Record. pp. 17-46), and the Cutting and Hauling Agreement between AT Timber and The Equipment Place, Newman's employer. (R-51-52).

These contracts clearly dispose of the issue of whether AT Timber was or under any set of facts be a Contractor under Anderson Tully Company, prime or otherwise. AT Timber clearly was not a contractor. It purchased certain timber rights from Anderson Tully Company, executed and signed contracts which clearly state and unequivocally state that AT Timber was the owner of timber which was being cut and hauled from Anderson Tully Company lands. The 2002-IV Timber Harvest Agreement between Anderson Tully Company and AT Timber is clearly shows that AT Timber was the purchaser and owner of the timber rights for the lands described in the agreement and the timber in question which had been severed from Anderson Tully Company's lands which were described in the Timber Harvest Agreement. Anderson Tully Company utilized The Timber Harvest Agreement as a legal device to avail itself of the tax benefits of being a Real Estate Investment Trust which sold the rights to standing timber to another party, so that capital gains taxes would apply to the gain or losses from the sale of the timber, rather than straight profits and losses from the growing, cutting, hauling and marketing the timber cut. The difference between the long term capital gains taxes and ordinary corporate income taxes was the motive and objective. The election to come under the Real Estate Investment Trust taxation scheme allowed Anderson Tully Company to own the land and manage same but prevented it from continuing to own the timber rights and the ownership of the timber severed from its lands. It therefore, could not contract for the cutting and hauling of the timber which it could no longer own. AT Timber was a buyer, not a cutting and hauling contractor who subbed out cutting and hauling of the timber for Anderson Tully

Company.

AT Timber contracted with The Equipment Place to cut and haul the timber purchased from Anderson Tully Company. Newman was injured while bunching and loading timber from the timber owned by and from tracts controlled by AT Timber , while exercising its timber rights on said lands.

The 2002-IV Timber Harvest Agreement between AT Timber and Anderson Tully Company (R-17-50) specifically provides that Anderson Tully Company and AT Timber are independent entities and that all operations of AT Timber shall be performed entirely for AT Timber's account, and not as the agent, representative, employee or *contractor* of Anderson Tully Company. The exact verbiage of Section 17.2 provides:

> No Agency or Fiduciary Relationship. It is understood and agreed that AT Timber and ATCO are independent entities; and that all operations of AT Timber hereunder shall be performed entirely for AT Timber's account and not as an agent, representative, employee or contractor of ATCO; and that all operations of ATCO hereunder shall be performed entirely for ATCO's account and not as an agent, representative, employee or contractor of AT Timber. Nothing in this Agreement shall be construed as creating any partnership or other fiduciary relationship between AT Timber and ATCO. (R-44)

The 2002-IV Timber Harvest Agreement is a contract between two independent entities which have similar names , one of which is a purchaser and owner of the timber and which is in the timber production business (ATTCO) (AT Timber )and the other (ATCO) (Anderson Tully Company), a Real Estate Investment Trust which owns and manages the land on which the timber is grown. Buried deep in the Timber Harvest Agreement in Section 7.8 is the key to the relationship and status of Anderson Tully Company and AT Timber here. Anderson Tully Company elected to operate and be taxed as a Real Estate Investment Trust. It had the option of selling its timber to

a separate entity and treating the gain or loss on the sale of the timber as a capital gain, so long as it held the timber and the lands on which the growing timber for more than one year.

26 United States Code, § 631 (a) and (b) clearly elucidate the issue. The applicable portions of those sections read:

> **(b) Disposal of timber.**--In the case of the disposal of timber held for more than 1 year before such disposal, by the owner thereof under any form or type of contract by virtue of which such owner either retains an economic interest in such timber or makes an outright sale of such timber, the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof, shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber.....
>
> ..... For purposes of this subsection, the term "owner" means any person who owns an interest in such timber.....

AT Timber was the "Owner" of the timber rights and the timber purchased from Anderson Tully Company. AT Timber was obligated to pay Anderson Tully Company for all merchantable timber cut [from Anderson Tully Company's designated lands ]. Evidence of it being the purchaser and the prices for the timber for which AT Timber was obligated to pay Anderson Tully Company for the timber which it had cut and hauled from Anderson Tully Company's lands is set forth below.

> 6.2 Stumpage Prices
>
> (a) AT Timber shall make payments with respect to all Merchantable Timber cut in any calendar quarter at a price (per MBF, per cord or per ton, as applicable under then current Industry Practice) equal to the Market Stumpage Price prevailing during such quarter for the applicable Product, as determined in accordance with this Section 6.2 Market Stumpage Prices shall be established each calendar quarter, for each Fiber Category and, if Market Stumpage Prices are different for different species, diameter classes or other classifications within a Fiber Category, for each specific Product to be harvested.
>
> (Record p. 27, 28)

Payment for the timber cut was due by the last calendar day of each month, and a Monthly Payment Report setting forth the volume of each product scaled during such month showing the consideration for each such product derived by applying such Market Stumpage Price to such volume. Section 6.3 specifies the time and method of payment:

6.3 Payments.

(a)No later than the sixteenth (16th )day of each month, AT Timber will remit to ATCO the amount equal to the sum of the volume of individual Products cut and scaled times their respective Market Stumpage Prices for the preceding month (such amount being the "Monthly Payment") All payments to be made under this Agreement by either party to the other shall be made in lawful money of the United States to the other party at its address for notices as provided in Section 16.1, or at the request of the party entitled to payment, by wire transfer or automatic funds transfer to such account as such party may designate in writing from time to time.

(b) Any amount payable under this Agreement which is not paid when due shall bear interest, from the date payment is due through the date paid, at a variable rate (the "Default" Rate") equal to the sum of (I) the Prime Rate then in effect, plus (ii) two (2) per cent.

Section 6.6 (a) sets forth that AT Timber will pay all of its own costs, including Costs of Log and Haul. Subsection (b) obligates AT Timber to pay all yield taxes, sales taxes, harvest taxes and other taxes assessed in respect of timber harvested. These taxes are required to be paid on the timber severed from Anderson Tully Company's lands by AT Timber . (Record p. 29)

Section 6.7 requires AT Timber to maintain detailed operating and financial records of all harvest operations carried out pursuant to the agreement including operating records setting forth the volumes of each product cut and scaled and the date and location of each scaling. (Record p. 30)

Evidence of ownership of the timber cut and hauled by the Equipment Place under the Timber Cutting and Hauling Agreement with AT Timber is found in Article 7 of the ATCO/ATTCO agreement.

Section 7.1 provides with regard to Logging Practices in General:

***All Merchantable Timber with respect to which AT Timber shall make payments hereunder*** shall be cut in accordance with the applicable Harvest Plan and AT Timber shall remove all Merchantable Timber cut from the logging areas. .... (Record p. 30)

Section 7.5 (a) provides that " In the Event that AT Timber contracts with a contractor or subcontractor of any tier to perform any portion of the logging or transportation operations described in this agreement as being performed by AT Timber, it shall ensure that any such contractor or subcontractor shall be made aware of and shall abide by all pertinent provisions of this agreement." (Record p. 31)

The rights of AT Timber to cut the timber from Anderson Tully Company lands is set forth in Section 8.2 :

> AT Timber's Right to Cut. From and after the Commencement Date and during the entire Term, AT Timber shall have, as to all of the Timber growing on the Timberlands from time to time and subject to any harvest plan, only the rights to cut such Timber as provided in this agreement.

Title to the standing timber remained in Anderson Tully Company until it was cut. By implication, Section 8.3 passes title to the severed timber to AT Timber .

It reads:

> Title and Risk of Loss to Cut Timber: Title to all timber included in the Harvest Plan pursuant to this agreement remains in ATCO until it has been cut in the case of standing Timber.

Defaults and Remedies are found in Article 12 of the agreement. Defined as one of the

'Defaults' on the part of AT Timber is:

> a. failing to pay ATCO any amount owed within thirty (30) days after receipt of written notice from ATCO that such amount is due. (Record P. 38).

Of utmost importance here, is Section 17.2 of the Timber Harvest Agreement which is incorporated above since the parties agreed that neither Anderson Tully Company nor AT Timber was or could be the agent for or contractor of the other. Each specifically disavowed any contractor relationship by the Timber Harvest Agreement. (R-44).

AT Timber was further given the right to sell or assign its rights to the timber on Anderson Tully Company's lands to other parties, so long as it complied with the terms and provisions of the Timber Harvest Agreement, i.e. paid Anderson Tully Company for the timber harvested.

> 14.3 Partial Assignment by AT Timber Permitted. (a) **AT Timber** shall have the right, from time to time, to assign to any Person or Persons the right to harvest during the Term any portion of the Timber specified to be harvested in the Harvest Plan for such Term, provided that: (i) the assignee shall comply with all of the terms and provisions of this Agreement applicable to the assigned rights; and (ii) no such assignment shall reduce or otherwise modify the primary obligations of **AT Timber** under this Agreement.
> (R-43)

The Second Contract Document which contains relevant information regarding the status of AT Timber Company is the Cutting and Hauling Agreement between "The Equipment Place" and AT Timber Company. (R-51-52). AT Timber clearly and unmistakably represents itself as ***"owner" of certain timber "rights" acquired from Anderson Tully Company pursuant to the Timber Harvest Agreement***(referenced above). The Equipment Place is designated as "Contractor", engaged in the business of cutting timber, converting it into forest products, and transporting same,

and has available all necessary labor and equipment to preform such services."

This Cutting and Hauling Agreement further states in paragraph D (1) :

> "Contractor agrees to furnish and provide all labor, tools, materials, and equipment for the cutting and converting into forest products, ***all trees that have been designated by AT Timber, said trees being owned by AT Timber*** and located on the following lands located in the County of Warren and State of Miss, and being referred to as AT Timber Tract No. 338127, Comp 014." (Record p. 51) (emphasis added)

Newman was employed by the Equipment Place to operate a Caterpillar Track Hoe used to move logs. Newman was working on the timber and on property over which AT Timber Company maintained control. The issue of control is not the focus of the AT Timber Company's interlocutory appeal here. AT Timber's focus is that Newman was a statutory employee of AT Timber Company since it claims AT Timber Company was and is a Contractor of Anderson Tully Company, and that the Equipment Place, Newman's employer, was a sub-contractor of AT Timber Company with regard to the logging operations being carried out at the time of Newman's injuries.

As can be seen from the written agreements entered into by the parties, Anderson Tully Company sold its timber to AT Timber . As the purchaser of the timber rights and the timber cut from Anderson Tully Company lands, It was obligated to pay Anderson Tully Company for the timber. By the specific terms of the 2002-IV, Timber Harvest Agreement between them, AT Timber cannot be a contractor under or for Anderson Tully Company. AT Timber was the Owner of the timber being cut, bore the risk of defective timber costs, was required to pay its own taxes and severance taxes resulting from exercising its rights as the owner of the severed timber. AT Timber , therefore, is the owner of a premises on which the work is being done rather than a prime contractor which had agreed to perform such work which it contracted out to other entities to

perform.

## APPLICABLE LAW

The real issue on this Interlocutory Appeal is whether Ryan Edward Newman could ever be a statutory employee of AT Timber . The premise on which Appellant bases its argument is fatally flawed since AT Timber was not a prime contractor or a contractor of any sort under Anderson Tully Company. Purely and simply, it was a timber purchaser. AT Timber is a separate entity from Anderson Tully Company, the same as if they had totally dissimilar and less confusing names. The issue is whether AT Timber is a 'third party' under § 71-3-71 of the Mississippi Code of 1972 (anno.), or whether Newman is barred from his suit against AT Timber under § 71-3-9 of the Mississippi Code of 1972 (anno) because of the "Exclusiveness of Liability" being workers compensation benefits as provided by that section.

ATTCO cites numerous cases in support of its position and claims that it is entitled to the protection accorded a prime contractor who subs out the work or part of the work which the prime contractor agreed to perform for another so that the employees of the sub are statutory employees of the prime. ***Doubleday v. Boyd Construction Company,*** 418 So.2d 823 (Miss. 1982); ***Richmond v. Benchmark Construction Corp.,*** 692 So.2d 60, (Miss. 1997);***Salyer v Mason Technologies, Inc.,*** 690 So.2d 1183 (Miss. 1997); ***Mosley v Jones,*** 80 So.2d 819 (Miss. 1955); ***McCluskey v Thompson,*** 363 So.2d 256 (Miss.1978); ***Mills v Barrett,*** 56 So.2d 485 (Miss. 1952); ***Jackson v Fly,*** 60 So.2d 782 (Miss. 1952); are all clearly distinguishable and are not applicable to the facts of this case.

AT Timber was not, is not, and cannot under the facts of this case be deemed a contractor for Anderson Tully Company . There is a complete disconnect and a complete lack nexus between Anderson Tully Company and the Equipment Place which would make The Equipment Place a

subcontractor for AT Timber . There was no contract between Anderson Tully Company and AT Timber which obligated AT Timber to cut and haul the timber which AT Timber purchased from Anderson Tully Company. AT Timber was exercising its timber rights over the land and to the timber purchased from Anderson Tully Company.

***Index Drilling Company v. Williams***, 242 Miss. 775, 137 So.2d 525 (1962) is factually similar here. There, Williams was employed by one of several corporations owned and controlled by the Martin Brothers. Each was a separate corporate entity, all operated out of the same premises. Williams was injured by the negligence of the employee of Index Drilling Company, one of the Martin Brothers' corporations. Williams was employed by Production Service , Inc., another of the Martin Brothers' corporations. The accident occurred on the yard where all the corporations maintained their operations. The issue was whether Williams's exclusive remedy was the recovery of workers compensation benefits or whether Index Drilling Company was third party as contemplated by what is now § 71-3-71 of the Mississippi Code of 1972 (anno.).

The Court held that Williams was neither a loaned servant nor a statutory employee of Index Drilling Company, since he was not employed by and was not under the the control of Index Drilling Company as a loaned servant. Index Drilling Company determined by the Supreme Court to be a third party amenable to being sued in tort by Williams.

The proper test here is to determine whether AT Timber was a Contractor ***vel non***. If not, AT Timber is not entitled to assert § 71-3-9 of the Mississippi Code of 1972 as to Newman's exclusive remedy being workers compensation benefits. AT Timber as the owner of the timber which was being cut and hauled (which it claims to be in Cutting and Hauling Agreement), ( and t he timber rights and timber which it purchased from Anderson Tully Company through the Timber

Harvest Agreement) has control over the premises and allowed it, for its own account, to sever the timber, bunch and load it to be hauled the mill. Under these agreements AT Timber cannot be a contractor for Anderson Tully Company, and hence no sub contract can exist for the cutting and hauling of the timber. AT Timber is legally categorized as the "owner" rather than a contractor. References to 26 United States Code § 631(b) which is incorporated into the Internal Revenue Code and Anderson Tully Company's status as a Real Estate Investment Trust, is further evidence of the fact that there was no contract between Anderson Tully Company and AT Timber for the cutting and hauling timber from Anderson Tully Company's lands.

The potential legal liability of the Owner of the premises who or which contracts with another entity to do work on its premises for injuries sustained by the contractor's employees where the owner retains the right to exercise or exercises some control is found in numerous Mississippi Cases: ***Magee v. Transcontinental Pipe Line Corporation*** , 551 So.2d 182, (Miss. 1989); ***Mississippi Power Co. v. Brooks,*** 309 So.2d 863, 867( Miss. 1975). ***Nash v. Damson Oil Corp.*** 480 So.2d 1095, (Miss. 1985).; ***Falls v Mississippi Power & Light Co*** , 477 So.2d 254, 255 (Miss.1985), and ***Coho Resources, Inc. v. McCarthy,*** 829 So.2d 1(Miss.,2002) and in a related case, the same principle allowing tort liability applied where the Owner interjected itself into the control of operations being performed by an independent contractor and directed some of the activities, even those specifically prohibited by the contract. ***Texas Eastern Transmission Corp. v. McMoRan Offshore Exploration Co.,*** 877 F.2d 1214, 1222 (5th Cir. 1989).

Where the operator of an oil well contracts with others to perform work or services on premises over which he has control by virtue of a mineral lease , he is considered by law as the owner. ***Nash v. Damson Oil Corp***, and ***Coho Resources, Inc. v. McCarthy*** supra. These cases

clearly distinguish the difference between the legal status of a Prime or General Contractor who contracts with a sub-contractor to perform work on a project which the Prime Contractor had agreed to perform, and an Owner who contracts directly with a party to perform work or services on his property. The immunities provided by the Workers Compensation law have nothing whatsoever to do with the duties and the exclusive remedy protections which Anderson Tully Timber Company claims here. AT Timber 's duties under the law were to furnish Newman with a safe place to work on the premises which it, as the owner of the timber rights and the timber severed from the land, controlled.

Decided almost five decades ago was a case which raises the reverse of precise issue here as to whether the worker who was injured while working for a logging contractor was properly denied workers compensation benefits from the owner of the timber. The issue was whether the owner of timber was a contractor and whether the employer of the injured worker was a subcontractor of the owner of the timber. ***Rodgers v Phillips Lumber Company,*** 241 Miss. 590, 592 , 130 So.2d 856, (1961), affirmed the denial of workers compensation benefits to Rodgers:

> Phillips Lumber Company was the owner of the timber upon severance from ** the land. ***It was not a prime contractor-it had not already contracted for the performance of that done under its contract with Metts . Its contract with Metts was a contract, not a subcontract.*** We find no merit in the contention based on the last paragraph of Code, Section 6998-04. (emphasis added).

In a related, but factually different case , by analogy, the same legal principle was applied. In ***Frazier v. O"Neal Steel, Inc.,*** 223 So.2d 661(Miss. 1969) the Court held:

> In order to constitute a subcontractor under section 9014, Mississippi Code 1942 Annotated (1956), it is necessary that there be a contract to construct a part or all of the building contract undertaken by the contractor, and the mere fabrication of material furnished to the general contractor is not enough to constitute a materialman to be a subcontractor. See Annot., 141 A.L.R. 321 (1942).

We are of the opinion, therefore, that the decree entered by the Chancery Court of Lincoln County, Mississippi in favor of O'Neal Steel, Inc. against C. E. Frazier, A. W. 'Slick' Morton, and Fidelity & Deposit Company of Maryland for the value of the steel furnished by O'Neal Steel, Inc. to Ramsey Steel and Supply Corporation, based upon the claim that Ramsey was a subcontractor and not a material man, is not authorized under the terms of section 9014, Mississippi Code 1942 Annotated (1956), and is not authorized under the law and facts in this case.

In ***Mississippi Loggers Self Insured Fund, Inc. v. Andy Kaiser Logging***, 992 So.2d 649, 656 (Miss. Ct. App. 2008) the Court of Appeals examined the specific and exact issues presented here. Citing ***Rodgers v. Phillips Lumber Company, supra,*** the Court held:

> The facts surrounding Kaiser's performance of logging activities for KCS, Columbus, and Mississippi Pacific/Tri-Lake are almost exactly the same as those in *Rodgers*. Neither of the three companies had already contracted for the performance of the work done by Kaiser; therefore, Kaiser was a contractor, not a subcontractor, of the three timber owners. Clearly, the Commission correctly determined that neither KCS, Columbus, nor Mississippi Pacific/Tri-Lake was McDonald's statutory employer under section 71-3-7 and had no statutory responsibility to insure McDonald.

In ***Mississippi Loggers,*** supra, the Court considered the status of the parties:

> ¶ 5. Kaiser was a logging company owned and operated by Andy Kaiser, with several subordinate employees. KCS operated a high-grade hardwood sawmill. On March 18, 1996, KCS purchased all the merchantable hardwood and pine timber, with certain exclusions, on the Selman tract. Columbus, which operated a pine sawmill, bought the pine timber from KCS. Tri-Lake was in the business of buying miscellaneous wood and selling it to various sawmills, and it purchased the low-grade hardwood pulpwood logs from KCS.

> ¶ 6. KCS, Columbus, and Tri-Lake each arranged for Kaiser to harvest its wood from the Selman tract and to haul it to the specific sawmills. Kaiser used its own equipment during the operations. Representatives from each company occasionally came to the Selman tract to check on Kaiser's operations. Company representatives told Kaiser what size logs to cut for each sawmill, but they did not direct how Kaiser's work was to be performed. Each company paid Kaiser per load of logs, and none of the companies paid unemployment taxes for Kaiser.

The Mississippi Loggers Self Insured Compensation Fund sought to recover the benefits paid

to Selman, an employee of Kaiser, under Kaiser's workers compensation policy. Mississippi Loggers Self Insured Compensation Fund claimed that Kaiser's workers compensation policy had been cancelled. It attempted to have Selman determined to be a statutory employee of the owners and the purchasers of the timber cut and hauled by Kaiser, so that the Loggers Compensation Fund could recoup the workers compensation benefits paid to the injured worker. The Court affirmed the Circuit Court and the Workers Compensation Commission's determination that none of the timber buyers or owners were contractors so that Kaiser could not be a subcontractor under any of them. The Court found that were were simply owners or purchasers of same at the sawmills of the timber cut by Kaiser under Kaiser's cutting and hauling contracts with KCS, Columbus or Tri-Lake. Since no legal or statutory obligation existed requiring those companies to provide workers compensation to Kaiser's employees under the Act, Kaiser's employee, Selman, was not their statutory employee and no obligation extended to them to procure and furnish workers compensation insurance benefits coverage. Thus, Selman was not a statutory employee of the owners and purchasers of the timber cut by Kaiser.

AT Timber is in the same position here as KCS, Columbus or Tri-Lake. It contracted with The Equipment Place to cut the timber owned by it and haul it to the mill. There was no contract with Anderson Tully Company under which AT Timber could be considered as a contractor of any sort. Absent any duty on the part of AT Timber to provide workers compensation insurance coverage to The Equipment Place employees, Newman cannot be a statutory employee of AT Timber and there can be no application of the statutory employee, exclusive remedy defense to preclude Newman's claims against AT Timber. Since the Petition for Interlocutory Appeal and the Appellant's Brief do not address the issue of control, that matter is left to determination of the Trial

Court as to whether Newman has adduced sufficient evidence of the right of and/or the exercise of the right of control by AT Timber over the operations taking place on lands controlled by it under the timber rights ceded to it by the land owner. See: ***Nelson v. Sanderson Farms, Inc.***, 969 So.2d 45, 50, 51 (Miss.App.,2006). ***Magee v. Transcontinental Gas Pipe Line Corp*** ., supra, ***Coho Resources v. McCarthy,*** supra; ***Nash v Damson Oil Co***, supra, ***Falls v Mississippi Power & Light Co***, supra.

## CONCLUSION

The Trial Court below made the correct decision in denying AT Timber 's Motion for Summary Judgment. There are sufficient substantial facts in the record which dispels the theory advanced by AT Timber that Newman was its statutory employee and that his exclusive remedy was workers compensation benefits. This Court should deny the relief sought by AT Timber , send this case back to the Circuit Court of Warren County, Mississippi and allow this case to proceed as may be appropriate in the Court below.

Respectfully submitted,

James W. Nobles, Jr.

## CERTIFICATE OF SERVICE

I, James W. Nobles, Jr., do hereby certify that I have this day served by United States Mail, or Hand-Delivered, as indicated, a true and correct copy of the above and foregoing to:

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
The Gartin Building
Post Office Box 117
Jackson, Mississippi 39205

**VIA UNITED STATES MAIL**

Honorable Isadore Patrick
Warren County Circuit Court Judge
Post Office Box 351
Vicksburg, Mississippi 39180

W. Hugh Gillon, IV
Upshaw Williams
Post Office Box 9147
Jackson, Mississippi 39286-9147

SO CERTIFIED this the 22nd day of December, A.D., 2010.

JAMES W. NOBLES, JR.