IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-M-00821-SCT

ANDERSON TULLY TIMBER COMPANY **APPELLANT**

VS.

BRYAN EDWARD NEWMAN **APPELLEE**

APPEAL FROM CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT, ANDERSON TULLY TIMBER COMPANY

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TABLE OF CONTENTS FOR REPLY BRIEF OF APPELLANT

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Anderson Tully Timber Company (hereinafter "AT Timber") demonstrated in its opening brief that the trial court committed reversible error by denying its Motion for Summary Judgment.

More specifically, AT Timber was a general contractor/statutory employer under the Mississippi Workers' Compensation Act. Accordingly, the claims of Appellee, Bryan Edward Newman (hereinafter "Newman"), are barred by the exclusivity provisions of the Mississippi Workers' Compensation Act, *Miss. Code Ann.* § 71-3-1, *et seq.*

Despite Newman's attempts to get around the exclusivity provisions of the Mississippi Workers' Compensation Act, the undisputed facts clearly reveal that the subject property where the accident occurred was owned, managed, and controlled by Anderson Tully Company (hereinafter "AT Company" or "ATCO"). In an effort to properly manage the timber on its property, AT Company entered into a contract with AT Timber known as the "2002-IV Timber Harvest Agreement". Pursuant to the terms of that contract, AT Timber was required to harvest the merchantable timber designated in the "Harvest Plan" prepared and provided by AT Company. Moreover, the contract between AT Company and AT Timber specifically gave AT Timber the right to enter into subcontracts with subcontractors who could perform any portion of the logging or transportation operations described in the contract. The agreement between AT Company and AT Timber is extensive with regard to the requirements and responsibilities of both parties and unquestionably is a contract between the two parties.

Likewise, the facts clearly show that AT Timber subcontracted the harvesting of the subject timber to Newman's employer, The Equipment Place (hereinafter "TEP"). Said subcontract was styled the "Cutting and Harvesting Agreement."

Despite Newman's claims to the contrary, AT Company was the owner of the subject premises; AT Timber was a general contractor/statutory employer; and Newman (who has received workers' compensation benefits from his employer, TEP) is barred by the exclusivity provisions of the Mississippi Workers' Compensation Act from bringing negligence claims against AT Timber.

ARGUMENT

I. AT Timber was a general contractor/statutory employer.

In its principal brief, AT Timber demonstrated that it was a general contractor/statutory employer at the time of the subject accident. AT Timber clearly contracted with AT Company to perform certain acts; then, subsequently contracted with TEP to perform all or part of those same acts.

In an attempt to create some ambiguity regarding AT Timber's status as a general contractor/statutory employer, Newman has argued that the contract between AT Company and AT Timber was nothing more than a simple sales agreement. However, a careful analysis of the contract between AT Company and AT Timber reveals that it is a detailed contractual agreement between two parties wherein AT Company is never referred to as a seller and AT Timber is never referred to as a buyer. Indeed, the first page of the 2002-IV Timber Harvest Agreement specifically states as follows:

> "Whereas, **ATCO owns and controls certain timberlands....**"
> ....
>
> "Whereas, the employees and officers of **AT Timber** have considerable **expertise in harvesting and merchandising timber** ...."
> ....

> "Whereas, both parties hereto desire to enter into an agreement under which **ATCO will manage the Timberlands and AT Timber will harvest a portion of the timber ....**"

Moreover, Article 3 of the Timber Harvest Agreement between AT Company and AT Timber specifically sets forth that throughout the term of the agreement/contract, AT Company shall manage and maintain all of the timber lands and AT Timber shall harvest the merchantable timber designated in the Harvest Plan within the term of the agreement. AT Timber did not simply purchase the timber on the land owned by AT Company; rather, AT Timber contractually agreed with AT Company to cut and haul the subject timber consistent with the Harvest Plan that was prepared by AT Company.

Newman has cited *Rodgers v. Phillips Lumber Company*, 130 So.2d 856 (Miss. 1961) as the case that should control the question regarding AT Timber's position as a general contractor in this matter. However, the facts in *Rodgers* are significantly distinguishable from the facts in the instant case. Indeed, unlike AT Timber, Phillips' Lumber Company was in the business of manufacturing rough lumber into finished lumber; bought its timber from a landowner; and "contracted with Metts to cut the timber, have it to Metts' mill, saw the logs into rough lumber and deliver it to Phillips' mill." *Rodgers*, 130 So.2d at 857. Notably, AT Timber is not in the business of manufacturing rough lumber into finished lumber; it did not simply buy timber from a landowner; and it contracted with AT Company to harvest timber from AT Company's land pursuant to the Harvest Plan prepared by AT Company. Subsequently, AT Timber subcontracted the actual harvesting of the timber to Newman's employer, TEP.

In its 2008 decision, the Court of Appeals addressed the application of §71-3-7 and discussed the *Rodgers* decision. *Mississippi Loggers Self Insured Fund, Inc. v. Andy Kaiser*

Logging, et al, 992 So.2d 649 (Miss.App.Ct. 2008). "Section 71-3-7 makes a contractor liable for the payment of compensation to a subcontractor's employees, 'unless the subcontractor has secured such payment.'" *Mississippi Loggers,* citing *Lamar v. Thomas Fowler Trucking, Inc.*, 956 So.2d 878, 882-83 (¶ 15) (Miss. 2007), at 656 (¶ 19). The Court of Appeals said, quoting *Rodgers* quoting Dunn, "'A subcontractor is one who enters into a contract, express or implied, for performance of an act with a person who has already contracted for its performance [ ].'" *Mississippi Loggers,* citing *Rodgers*, 241 Miss. 590, 593, 130 So.2d 856, 857 and Dunn [cite omitted],992 So.2d, at 656 (¶ 18). (Emphasis added.) The Court of Appeals noted that "The supreme court [in *Rodgers*] rejected the employee's claim because the timber owner 'had not already contracted for the performance of that done under its contract with [the logger]." " *Mississippi Loggers,* 992 So.2d, at 656, citing *Rodgers*, at 241 Miss., at 593, 130 So.2d, at 857.

Unlike the parties in both *Rodgers* and *Mississippi Loggers*, AT Timber contracted with AT Company to harvest timber consistent with the Harvest Plan prepared by AT Company, and AT Timber subcontracted the actual harvesting of the timber on the subject tract to TEP. Accordingly, in the instant case, AT Timber was a general contractor/statutory employer and is entitled to the exclusivity provisions of the Mississippi Workers' Compensation Act.

II. Facts in this case do not fall within the narrow exceptions created by *Nash, Falls* and *COHO*.

It is undisputed that AT Company, not AT Timber, owned the premises where the subject accident occurred. Moreover, it is undisputed that AT Timber was not a lessee (as in *Nash v. Damson Oil Corp.*, 480 So.2d 1095 (Miss. 1985) and *COHO Resources, Inc. v. McCarthy*, 829 So.2d 1 (Miss. 2002)) nor was it a permitee (as in *Falls v. Mississippi Power & Light*, 477 So.2d 254 (Miss. 1985)).

In both *Nash* and *COHO* the appellant defendants were lessees who were operators of oil wells that contracted with others to perform works or services on the subject wells. Accordingly, those appellant defendants did not occupy "the position persons of common understanding would label general or prime contractor" *Nash*, 480 So.2d at 1100. On the other hand, AT Timber had no lease with AT Company; rather, it contracted with AT Company to harvest timber pursuant to the Harvest Plan, and it subcontracted with TEP to do the actual harvesting. Clearly, AT Timber occupied the position that persons of common understanding would label general or prime contractor.

In *Falls*, MP&L was a permitee who contracted with the plaintiff's employer to clear a right-of-way across the Natchez Trace Parkway, along which the utility company was running its power lines pursuant to its permit with the National Park Service. Notably, the owner of the premises (the National Park Service) did not request that MP&L clear the right-of-way across the Natchez Trace Parkway, nor did it have any interest in getting the right-of-way created or constructed. Rather, at MP&L's request, the premises owner simply permitted MP&L to enter the property and create the right-of-way for the benefit of MP&L.

In this case, AT Timber was not a permitee, and AT Company had a financial interest in getting its timber timely and properly harvested. Accordingly, it contracted with AT Timber for those purposes and AT Timber subcontracted the actual cutting of the subject timber to TEP.

III. The trial court erred in denying AT Timber's Motion for Summary Judgment

In this case, the applicable and relevant law are undisputed. Accordingly, AT Timber is entitled to a judgment as a matter of law, and the trial court erred when it denied AT Timber's motion based on a finding that there was a question of fact related to control of the work place.

AT Timber was a general/prime contractor that entered in a contract with AT Company to harvest timber. AT Timber subcontracted the actual timber harvesting on the subject tract to TEP, and had TEP failed to obtain workers' compensation insurance coverage for its employees, those employees, including Newman, if injured on the job would have had a valid workers' compensation claim against AT Timber as their statutory employer. "[A] prime contractor . . . is always afforded tort immunity as a statutory employer." *Salyer v. Mason Technologies, Inc.*, 690 So.2d 1183, 1186 (Miss. 1997) (emphasis added).

CONCLUSION

AT Timber contracted with the land and timber owner, "to harvest ATCO's Merchantable Timber." [Article 1, 1.1 (b), 2002-IV Timber Harvest Agreement] (R 18) (Appellant R.E. 7; Appellee R.E. 18.) AT Timber then contracted with TEP to perform the actual harvesting. ["Cutting and Harvesting Agreement."] (R 51-52) (Appellant R.E. 8 - 9; Appellee R.E. 51-52.) Newman was an employee of TEP who was working in the harvesting operations when he was injured. Under the Mississippi Workers Compensation Act, AT Timber was a contractor and TEP its subcontractor. The Act provides:

> In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor had secured such payment.
>
> Miss. Code Ann., §71-3-7.

The status between AT Timber and TEP, and therefore Mr. Newman, was dictated by Miss. Code Ann., §71-3-7 ("the contractor shall be liable for [ ]."). Consequently, the "exclusiveness of liability" statute, Miss. Code Ann., §71-3-9, would also control the recovery available to Newman. ("The liability of an employer to pay compensation shall be exclusive and

in place of all other liability of such employer to the employee [ ].") Therefore, by its relationship with Newman's employer, Appellant AT Timber is a general contractor/statutory employer entitled to the protection of the exclusive remedy provision of the Workers' Compensation Act. As such, AT Timber is entitled to judgment as a matter of law.

Respectfully submitted, this the 9th day of February, 2011.

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CERTIFICATE OF FILING AND SERVICE

Pursuant to the Mississippi Rules of Appellate Procedure, Rules 25(a), (b) and 31(b), (c), W. Hugh Gillon IV, counsel for AT Timber Company, hereby certifies that the original and three(3) copies of the above and foregoing Reply Brief of Appellant have been filed with the Clerk of the Supreme Court, and that true and correct copies have been served, via U.S. Mail, first class, postage pre-paid to each of the following, trial judge and counsel:

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The Honorable Isadore A. Patrick
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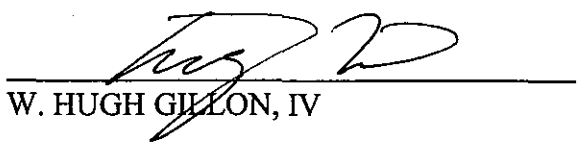
This, the 9th day of February, 2011.



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