IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-M-00821-SCT

ANDERSON TULLY TIMBER COMPANY APPELLANT

VS.

BRYAN EDWARD NEWMAN APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons listed have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification of recusal.

APPELLANT:	Anderson Tully Company
APPELLANT'S TRIAL COUNSEL:	W. Hugh Gillon IV The law firm of Upshaw, Williams, Biggers & Beckham, LLP
APPELLEE:	Bryan Edward Newman
APPELLEE'S TRIAL COUNSEL:	Travis T. Vance James W. Nobles, Jr.
APPELLEE'S EMPLOYER:	The Equipment Place
APPELLEE'S WORKERS' COMPENSATION CARRIER:	
TRIAL JUDGE:	The Honorable Isadore A. Patrick Circuit Court Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — **Page Ref.**

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

Pursuant to the Mississippi Rules of Appellate Procedure, Rule 28(a)(3), Appellant states that the issues on appeal 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

Nature of the Case:

The case is one in tort for injuries the Plaintiff, Bryan Edward Newman, received while operating logging equipment on property belonging to AT Company. Newman's employer was The Equipment Place.

AT Timber was a general contractor hired by the owner, AT Company, to harvest timber. AT Timber contracted with The Equipment Place ("TEP") to do the job of harvesting. Therefore, the question is one of exclusive remedy for the general contractor, AT Timber, under the Mississippi Workers Compensation Act, where the sub-contractor's employee was injured in the course and scope of harvesting timber.

Course of the proceedings:

Plaintiff, Bryan Edward Newman, filed the suit in the Circuit Court of Claiborne County, Cause No. 2005-04, on January 7, 2005, seeking damages for injuries received while he was operating a track hoe machine to load logs on June 27, 2003. (Complaint, R. at 6.) Newman's claim was brought against TEP Enterprises, LLC, Anderson Tully Company ("AT Company"), and others. Plaintiff alleged that his employer, TEP, was negligent in furnishing a machine that was not equipped with safety devices, and that TEP should be held strictly liable in tort for furnishing a dangerously defective machine. (Complaint, ¶ 7.) Plaintiff alleged that AT Company owned the land and controlled the premises being logged at the time of the accident. (Complaint, ¶ 8.) Plaintiff alleged that AT Company had a non-delegable duty to inspect the track hoe being used by Newman and to supervise the TEP foremen

regarding the track hoe's use. (*Id.*) By agreed Order, the case was transferred to the Warren County Circuit Court on April 20, 2005. (Docket, R. at p. 3; R.E. 1.) AT Company filed its Answer and Affirmative Defenses on May 21, 2007. (Docket, R. at p. 3; R.E. 1.) On September 4, 2007, by agreed order, AT Timber was substituted for AT Company. (Docket, R. at p. 4; R.E. 2; Agreed Order Substituting AT Timber for A T Company Pursuant to Rule 15 of the M.R.C.P., R. at p. 12.)

Three depositions were taken. The deposition of Plaintiff Bryan Edward Newman was taken on August 3, 2006. The deposition of Danny Emfinger, owner of the log trailer, was taken on August 3, 2006. On June 6, 2007, the AT Timber corporate deposition was taken under Rule 30(b)(6), designating Fred Newcomb.

On November 19, 2007, Defendant / Appellant filed its Motion for Summary Judgment pursuant to M.R.C.P. Rule 56 from which the Trial Court's decision is herein appealed (Defendant, AT Timber's Motion for Summary Judgment, R. at p. 14; R.E. 4-6) and its itemization of undisputed facts (AT Timber's Itemization of Undisputed Facts, R. at p. 80; R.E. 13-15).

Defendant AT Timber's Motion for Summary Judgment was heard on April 13, 2010. The Order (Denying Motion for Summary Judgment) was entered on April 29, 2010. (Docket, R. at p. 4; R.E. 2, R. at p. 291; R.E. 3.) The original transcript was filed with the Court on July 22, 2010.

Petition for Interlocutory Appeal by Permission was filed by Defendant AT Timber. The Petition was granted on June 16, 2010. (Order executed by Randy Grant Pierce, Justice, R. at p. 292.)

Statement of facts relevant to the issues presented for review:

TEP's employee, Bryan Edward Newman, was injured June 27, 2003, while operating a track hoe, harvesting timber under the contract between AT Timber and TEP. On the date of the work accident, AT Timber was not the owner of the property, the equipment or the timber. It was not directing Newman on the operation of his track hoe. As shown in Plaintiff Newman's deposition testimony, a fellow TEP employee, "Bo Butler," had instructed Newman how to operate the track hoe, including picking up and loading logs. (Deposition of Bryan Edward Newman, Exhibit "5" to Defendant AT Timber's Motion for Summary Judgment, R. p. 66 at 67; R.E. 10 and11.) As Newman attempted to load a log onto the truck, the log slipped and came through the cab of the track hoe which resulted in amputation of the lower part of his leg. (R. p. 66 at 69; R.E. 10 and 12; Defendant AT Timber's Itemization of Undisputed Facts, ¶ 5 and 6, R. at p. 80; R.E. 13 and 14.) At the time of the accident, the only people working in or around the area of the accident were employees of TEP. (R. at p. 70; Itemization of Undisputed Facts, ¶ 7, R. at p. 80, R.E. 14.) TEP owned the track hoe on which Newman was injured. (Plaintiff's Complaint, ¶ 7, R. at p. 6, 8; Defendant AT Timber's, Itemization of Undisputed Facts, ¶ 4, R. at p. 80; R.E. 13.) Newman does not know of anything that AT Timber did or failed to do that may have caused this accident. (Newman deposition, *Id.*; and Itemization of Undisputed Facts, ¶ 8, R. at p. 80; R.E. 14.)

AT Company owned the land and the timber on it. (Exhibit "4" to Defendant AT Timber's Motion for Summary Judgment, "Special Warranty Deed," R. 59, at page 1.) On November 26, 2002, AT Company contracted with AT Timber, giving AT Timber the

right to harvest AT Company's timber off AT Company's land. (Exhibit "1" to Defendant AT Timber's Motion for Summary Judgment, "2002-IV Harvest Agreement," R. 18, at page 1; R.E. 7.) On May 1, 2003, AT Timber contracted with TEP to harvest and remove the timber from the land. (Exhibit "2" to Defendant AT Timber's Motion for Summary Judgment, "Cutting and Hauling Agreement," R. 51, at page 1; R.E. 8.) Plaintiff Newman was an employee of TEP. (Defendant, AT Timber's, Itemization of Undisputed Facts, ¶ 4, R. at p. 80; R.E. 13.)

SUMMARY OF THE ARGUMENT

By the facts and exhibits, the following evidence is undisputed: (1) the subject property belonged to AT Company; (2) AT Company is not a party to this action; (3) in November 2002 AT Company contracted with AT Timber to harvest timber off the property of AT Company; (4) in May 2003, AT Timber contracted with TEP to harvest and remove said timber; (5) Bryan Edward Newman was an employee of TEP; (6) the equipment being operated by Newman belonged to and was furnished by his employer, TEP; (7) instruction for Newman's operation of the equipment was by his fellow-employee; and (8) pursuant to the contract between AT Timber and TEP, Newman's employer, TEP, maintained workers compensation insurance for its employees which paid the medical bills and benefits arising from said accident. 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.

ARGUMENT

I.

AT Timber was a general contractor/statutory employer.

Pursuant to Mississippi law, AT Timber was a general contractor/statutory employer at the time of the subject accident

A statutory employer is one that is **compelled by law** to provide workers' compensation coverage to the employees of another. 82 Am. Jur.2d *Workers' Compensation* § 229 (emphasis added). Under MCA § 71-3-7, "[t]he statute makes the contractor stand in the place of the subcontractor...." *Richmond v. Benchmark Construction Company*, 692 So. 2d at 63 (emphasis added). Thus, the determination of whether AT Timber was the statutory employer of Plaintiff depends on whether AT Timber was the kind of "contractor" contemplated by § 71-3-7 that was obligated to provide compensation coverage to Plaintiff in the event TEP failed to do so. The answer to that question is dependent upon three ultimate issues: (1) Whether AT Timber was a contractor on the subject project; (2) Whether TEP was its subcontractor; and (3) Whether Plaintiff was an employee of TEP.[1] Since the Plaintiff does not dispute that he was an employee of TEP that was acting in the scope and course of his employment, the only issue remaining is whether TEP was a subcontractor of AT Timber at the time of accident. That question must manifestly be answered in the affirmative as will be shown by the overwhelming weight of the evidence in this case.

---

[1] *See Armstrong v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 3103003, at *2 (S.D. Miss. Oct. 31, 2006) (applying Mississippi law).

While the Workers' Compensation Act does not define the words "contractor" or "subcontractor," those terms have generally understood meanings, as illustrated in decisions that have followed wherein general usage of those terms has been applied. For example, "contractor" has been defined as one that occupies the position that "persons of common understanding would label that of a general or prime contractor."[2] An entity can only be deemed a general contractor within the meaning of § 71-3-7 if that entity first executes a contract to perform some act, and then subsequently contracts with another party (i.e., the subcontractor) to perform **all or part** of that same act.[3] AT Timber fits that mold perfectly:

- The nature of AT Timber's business is that of a general contractor that routinely hires subcontractors in connection with its ongoing projects.
- AT Timber entered into a contract with AT Company. Thus, it was contractually obligated and responsible to AT Company for completion of the project in a satisfactory manner.
- AT Timber entered into a contract with TEP to perform certain of its obligations under its contract with the AT Company.
- AT Timber was paid by AT Company for all of the work done on the job. AT Company did not make any payments to TEP or its employees.

A subcontractor is one who has entered into a contract, with the original contractor for the **performance of all or part** of the work or services which such contractor has himself contracted to perform." *O'Neal Steel Co. v. Miles*, 187 So. 2d

---

2 *See Salyer v. Mason Technologies, Inc.*, 690 So. 2d 1183, 1186 (Miss. 1997); *Nash v. Damson Oil Corp.*, 480 So. 2d 1095, 1098 (Miss. 1985).

3 *Armstrong v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 3103003, at *2 (S.D. Miss. Oct. 31, 2006) (applying Mississippi law).

19, 24 (Miss. 1966) (citations omitted).[4] TEP satisfies Mississippi's definition of a subcontractor. The Equipment Place entered into a contract with AT Timber for the performance of an act for which AT Timber had already contracted to complete, harvesting AT Company's timber. Thus, pursuant to Mississippi law, TEP was working as a subcontractor of AT Timber.

Pursuant to the responsibilities set forth in the agreement between AT Timber and AT Company (Exhibit "1" to Defendant AT Timber's Motion for Summary Judgment, "2002-IV Harvest Agreement," R. 18, at page 1; R.E. 7), AT Timber contracted with TEP to conduct the harvest on May 1, 2003, under a contract between them, entitled "Cutting and Hauling Agreement." (Exhibit "2" to Defendant AT Timber's Motion for Summary Judgment, "Cutting and Hauling Agreement," R. 51, at page 1; R.E. 8.) TEP's duties under the contract were to process, load, transport and deliver the timber. (*Id.*) The contract provided that TEP would select, pay and manage its employees, and that "[s]uch agents, servants, and employees shall not be subject to any orders, directions, or control of AT Timber but shall receive instructions from and be solely responsible to [TEP]." (*Id.*, "Cutting and Hauling Agreement," R. 52, ¶ 7 at page 2; R.E. 9.) In addition to an indemnification provision (*Id.*, R. 52, ¶ 10 at page 2; R.E. 9), the agreement specifically provided that TEP would maintain Workers' Compensation and Employer's Liability Insurance "for any and all persons or employees employed by Contractor [TEP] to perform the work...." (*Id.*, R. 52, ¶ 11 (a), at page 2; R.E. 9.) "This

---

[4] *See also Rodgers v. Phillips Lumber Co.*, 130 So. 2d 856, 857 (Miss.1961) (same); *Frazier v. O'Neal Steel, Inc.*, 223 So. 2d 661, 665 (Miss. 1969) ("in order to constitute a subcontractor . . . it is necessary that there be a contract to construct a part or all of the building contract undertaken by the contractor...").

Agreement shall be construed and its performance determined in accordance with the laws of the State of Mississippi." (*Id.*, R. 52, ¶ 15 at page 2; R.E. 9.) Under this arrangement, AT Timber was a general contractor. TEP was its sub-contractor, with responsibilities for its employees and obligations to maintain workers' compensation insurance in accordance with the laws of Mississippi. Furthermore, as general contractor, AT Timber was the statutory employer of TEP's employees, including Bryan Edward Newman.

II.

Bryan Edward Newman's Claims are Barred by the Exclusivity Provisions of the Mississippi Workers' Compensation Act Because AT Timber was his Statutory Employer

AT Timber is protected by the exclusivity provisions of the Mississippi Workers' Compensation Act, *Miss. Code Ann.* § 71-3-1, et seq. (hereinafter "the Act"). The Act was implemented by the legislature for the purpose of replacing traditional negligence actions with a no-fault compensation system. *McCluskey v. Thompson*, 363 So. 2d 256, 259 (Miss. 1978); *Miss. Code Ann.* § 71-3-3(b); *Miss. Code Ann.* § 71-3-7. While the Act represents a wide departure from common law by precluding tort actions by the employee against the employer, in return, it assures the employee an award without the necessity of showing fault or negligence of the employer. *Id.* The Mississippi Supreme Court has held that any construction given to the Act "must be sensible as well as liberal." *Id.*

Pursuant to the terms of the Act, all employers, except those otherwise exempt, are required to protect their employees by providing workers' compensation coverage,

and, in exchange, the employers receive tort immunity. *See Miss. Code Ann.* § 71-3-7 and § 71-3-9. The exclusiveness of liability section states:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death ...

Miss. Code Ann. § 71-3-9.

A contractor is liable under § 71-3-7 for the employees of its subcontractors if the subcontractor has not secured coverage. In *Mills v. Barrett*, a case decided over 50 years ago, the Mississippi Supreme Court held that the language of the statute (i.e., § 71-3-7) was "plain, clear, and unambiguous" and stressed that in the event a subcontractor fails to secure workers' compensation insurance, then § 71-3-7 shifts that responsibility to the contractor, and, for all purposes of the Act, that contractor becomes the statutory employer of the subcontractor's employee. *Mills v. Barrett*, 56 So. 2d 485, 486-87 (Miss. 1952). The general contractor's liability to the subcontractor's employees remains constant, even in circumstances where a subcontractor has less than the threshold number of employees required by statute to be liable for workers' compensation payments to employees. *Id.*; *see also Jackson v. Fly*, 60 So. 2d 782, 785-86 (Miss. 1952).

In *Mosley v. Jones*, the Mississippi Supreme Court, addressing the issue for the first time, held that the tort immunity granted to an employer under the Act applies up the line to a general contractor deemed to be a statutory employer of its subcontractor's

employees.[5] *Mosley*, 80 So. 2d 819, 820-21 (Miss. 1955). Since that time the Court has repeatedly reaffirmed that decision and has further opined that the umbrella of immunity provided to employers under the Act extends to officers, directors and agents of the employer, as well as to co-employees.[6]

In *Richmond v. Benchmark Construction Corp.*, the Supreme Court of Mississippi clarified that the tort immunity provided to the general contractor stems from the fact that the contractor is subject to contingent liability under the special relationship created by § 71-3-7. *Richmond*, 692 So. 2d 60, 63 (Miss. 1997) (statute makes contractor stand in place of subcontractor if subcontractor fails to obtain coverage).[7] **The law in this state is clear . . . "[i]f a contractor-subcontractor relationship exists, the employee of a subcontractor covered by workers' compensation insurance is**

---

[5] The general contractor in *Mosley* protected itself from tort liability by providing workers' compensation insurance for the employees of its subcontractor. Quoting 2 Larson, *Workmen's Compensation Law* (1952), the *Mosley* court reasoned that since the general contractor is, "in effect, made the employer for the purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation." *Mosley*. 80 So. 2d at 821.

[6] *See, e.g., Christian v. McDonald*, 907 So. 2d 286, 288-91 (Miss. 2005) (court granted employer's and co-employee's request for interlocutory appeal and held that immunity under the Act extends to co-employees); *Powe v. Roy Anderson Construction Co.*, 910 So. 2d 1197, 1200 (Miss. 2005); *Medders v. USF&G Co.*, 623 So. 2d 979, 984 (Miss. 1993) (workers' compensation immunity extends to actions between co-employees); *Sawyer v. Head*, 510 So. 2d 472, 476 (Miss. 1987) (acts of co-employee merge into and remain sole act of employer; liability of employee vanishes); *Brown v. Estess*, 374 So. 2d 241, 242-43 (Miss. 1979) (corporate officer, who was also general manager of employer, was entitled to immunity provided by Act); *McCluskey v. Thompson*, 363 So. 2d 256, 259 (Miss. 1978) (negligence actions by employee against co-employee are barred by Act).

[7] *See also Lamar v. Thomas Fowler Trucking, Inc.*, 956 So. 2d 911, 921 (Miss. Ct. App. 2006) ("Immunity flows from the statute, not from any contractual relationship created between the parties.").

prohibited from making a common law claim for negligence or gross negligence against the contractor." *Id.*, at 63. (Emphasis added.)

Therefore, as general contractor/statutory employer, AT Timber is protected by the exclusivity provisions of the Mississippi Workers' Compensation Act, *Miss. Code Ann.* § 71-3-1, *et seq.*, and is entitled to a judgment as a matter of law.

III.

The Trial Court Erred in Denying AT Timber's Motion for Summary Judgment

The Circuit Court denied AT Timber's Motion for Summary Judgment and stated as its basis the following:

> [W]hether or not there was sufficient control of the work place by either Anderson Tully Company who owned the land and timber such that TEP or Anderson Tully Timber [AT Timber] could not be considered an independent contractor is a question of fact to be determined at trial.

(Order, executed by Isadore W. Patrick, Circuit Judge, R. 291; R.E. 3.)

The Circuit Court's basis was erroneous because the degree of control is only relevant if the defendant seeking protection of the exclusive remedy provision is the owner of the premises where the accident occurred. The premises owner, AT

Company, was voluntarily substituted out of this case by Plaintiff. [8] The defendant, AT Timber, was not the owner; therefore, control is irrelevant.

The Circuit Court's ruling was erroneous because "[A] prime contractor ... is always afforded tort immunity as a statutory employer." *Salyer v. Mason Technologies, Inc.*, 690 So. 2d 1183, 1186 (Miss. 1997).[9] (Emphasis added.) The facts are undisputed and the law is clear that the exclusive remedy protection provision applies to AT Timber.

CONCLUSION

The undisputed owner of the subject property, AT Company, has been dismissed and is no longer a party. The statutory employer of Mr. Newman, AT Timber, is

---

[8] In his Complaint, Plaintiff initially named AT Company, and most of the allegations against AT Company were based on claims that it was the owner of the subject property and as the owner it was exerting various levels of control over the project, it was negligent and responsible for the Plaintiff's injuries. However, after the filing of the Complaint, the Plaintiff agreed to an Order substituting the owner, Anderson Tully Company, out of the case and the general contractor, AT Timber, into the case. Accordingly, the Plaintiff has knowingly allowed the owner of the property out of the case such that it is no longer a defendant, and Plaintiff's negligence claims based on allegations of ownership are no longer at issue.

[9] *See, e.g., Castillo v. M.E.K. Const., Inc.*, 741 So. 2d 332, at 336-339 (Miss. App. 1999) (court concluded that construction company was more akin to the companies in *Doubleday v. Boyd Constr.*, 418 So.2d 823 (Miss. 1982), *Richmond v. Benchmark Const. Corp.*, 692 So.2d 60 (Miss. App. 1997), and *Salyer v. Mason Technologies, Inc.*, 690 So.2d 1183 (Miss. 1997), in that it had no ownership interest in the property, and that its activities in relation to the construction was of the kind that persons of common understanding would classify as those of a general or prime contractor); *Richmond*, 692 So. 2d at 63 (court ruled *Nash v. Damson Oil*, 480 So.2d 1095 (Miss. 1985) and *Falls v. Mississippi Power & Light*, 477 So.2d 254 (Miss. 1985), inapplicable, because defendant was contractor of the project, not owner of the property); *Salyer*, 690 So. 2d at 1186 (court found that clearly the defendant, Mason Technologies, fell, not only within the meaning of "contractor" as contemplated by *Doubleday*, but also as contemplated by *Nash* and *Falls*, because Mason had no ownership interest in construction site and could be seen as nothing more than what persons of common understanding would label a prime contractor).

protected by the exclusivity provisions of The Act. Accordingly, as a matter of law, AT Timber is entitled to a summary judgment.

Respectfully submitted, this the 23rd day of November, 2010.

ANDERSON TULLY TIMBER COMPANY

BY: _____
W. HUGH GILLON, IV

OF COUNSEL:

W. HUGH GILLON IV (MSB [redacted]
UPSHAW, WILLIAMS, BIGGERS,
BECKHAM & RIDDICK, LLP
713 South Pear Orchard Road, Suite 102
Ridgeland, Mississippi 39157

Mailing address:
Post Office Box 9147
Jackson, Mississippi 39286-9147

Telephone: (601)978-1996

CERTIFICATE OF FILING AND SERVICE

Pursuant to the Mississippi Rules of Appellate Procedure, Rule 25(a), W. Hugh Gillon IV, counsel for AT Timber Company, hereby certifies that the original and one copy of the above and foregoing Appellant's Brief and Record Excerpts 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 the following:

Travis T. Vance, Jr., Esquire
Post Office Box 750
Vicksburg, Mississippi 39181-0750

James W. Nobles, Jr., Esquire
Post Office Box 1733
Jackson, Mississippi 39215-1733

This, the 23rd day of November, 2010.

W. HUGH GILLON, IV

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-IA-00821-SCT

ANDERSON TULLY TIMBER COMPANY — APPELLANT

VS.

BRYAN EDWARD NEWMAN — APPELLEE

REVISED CERTIFICATE OF SERVICE

On November 23, 2010, Appellant filed it's Brief and Record Excerpts with the Supreme Court of Mississippi. It's Certificate of Service attached to the brief and filed with the Court omitted Honorable Isadore W. Patrick, Circuit Court Judge. A copy of the brief and record excerpts were forwarded by mail to Judge Patrick on November 23, 2010. Appellant is therefore filing its' revised Certificate of Service to Certify that it's brief and record excerpts were sent to the following on November 23, 2010.

Travis T. Vance, Jr., Esquire
Post Office Box 750
Vicksburg, Mississippi 39181-0750

James W. Nobles, Jr., Esquire
Post Office Box 1733
Jackson, Mississippi 39215-1733

Honorable Isadore W. Patrick
Warren County Circuit Judge
Post Office Box 351
Vicksburg, Mississippi 39181-0351

So certified this, the 24th day of November, 2010.

W. HUGH GILLON, IV