IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00258 COA

CONSOLIDATED WITH

NO. 94-CA-00622 COA

JAMES HOWARD FORD, NATURAL FATHER AND NEXT ADULT FRIEND OF JAMES C. FORD, A MINOR, FOR AND ON BEHALF OF JAMES C. FORD AND NATASHA FORD — **APPELLANTS**

v.

REED RUSHING, A/K/A REID RUSHING, AND WALTHALL WOOD PRODUCTS, INC. — **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	02/19/96
TRIAL JUDGE:	HON. JERRY OWEN TERRY, SR.
COURT FROM WHICH APPEALED:	STONE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	MICHAEL V. RATLIFF
ATTORNEYS FOR APPELLEES:	RICK NORTON
	WILLIAM A. WHITEHEAD, JR.
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	GRANTED SUMMARY JUDGMENT DISMISSING REED RUSHING, A/K/A REED RUSHING, AND WALTHALL WOOD PRODUCTS, INC., AS DEFENDANTS
DISPOSITION:	AFFIRMED - 2/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

BEFORE McMILLIN, P.J., HINKEBEIN, AND COLEMAN, JJ.

COLEMAN, J., FOR THE COURT:

The Circuit Court of Stone County granted Reed Rushing and Walthall Wood Products, Inc.'s motion for summary judgment in the matter of the complaint which the appellants filed against them for the wrongful death of Vina Dale Ford Flores, mother of James Howard Ford and Natasha Ford. Ms. Flores was killed when an empty log truck being driven by Norman C. Connerly collided with the pick-up which she was driving. The issue on which the circuit court granted summary judgment was whether Connerly was an employee of Rushing and Walthall Wood or, instead, an independent contractor. We affirm the circuit court's grant of summary judgment because we find that there was no genuine issue as to any material fact relevant to whether Connerly was an independent contractor.

I. FACTS

A. Cause of action

On October 15, 1990, Connerly hauled a load of logs from a tract of land located in Slidell, Louisiana, which belonged to Walthall Wood Products, Inc. (Walthall), to a lumber mill located in Wiggins, Mississippi. Shelton Dantzler was harvesting the timber for Walthall, a Mississippi corporation. During his return from the lumber mill to Walthall's tract of land, Connerly collided with the pickup which Vina Dale Ford Flores was driving. Ms. Flores's two children, James C. Ford and Natasha Ford, were in the pick-up with her. Ms. Flores was killed, and both of her children were seriously injured.

B. Relation of Connerly to Rushing and Walthall

Connerly and Rushing had been friends since they were in high school. Connerly paid Rushing $8,000 for a used cab-over diesel truck and a log trailer so that Connerly might begin hauling logs. Walthall Citizens Bank loaned Connerly the full amount of the purchase price. Included in the consideration for Connerly's purchase of the truck and log trailer was Rushing's agreement to pay for certain repairs to the truck. The bank's collateral for the loan consisted of a lien on the truck, trailer, and Connerly's pick-up truck. In addition, Rushing signed the note as surety for the repayment of Connerly's debt. When the loan was closed at the bank, Connerly endorsed the loan-proceeds check and handed it to Rushing.

Rushing owned ninety percent of the stock in Walthall and was its president. Between May of 1990 and October 15, 1990, Walthall bought and harvested no less than thirty-five tracts of timber in Louisiana and Mississippi. Walthall hired various loggers to harvest and transport its timber from these tracts to lumber mills. Rushing and his loggers executed contracts by which the loggers agreed that they were independent contractors and that they, the loggers, would require all their truckers to carry liability insurance on their log trucks. Walthall's contracts with its loggers required its loggers to insure that each of their log-truck drivers furnished Walthall and the logger a certificate of liability insurance.

Shelton Dantzler was among the eight persons whom Rushing identified as loggers with whom he had contracted to harvest and transport Walthall's timber. In response to Dantzler's telephone conversation with Rushing, during which Rushing told Dantzler that he knew a man who would haul logs for Dantzler and gave Dantzler Connerly's telephone number, Dantzler called Connerly and hired him to haul logs which Dantzler had harvested from Walthall's tract of land in Louisiana. However, after Connerly allowed the liability insurance on his truck to lapse, Eugene Matthews, the timber

cruiser for Walthall, advised Connerly that he could no longer drive for any of Walthall's loggers until he obtained liability insurance on his truck. When Connerly renewed the liability insurance coverage on his truck, Rushing allowed his loggers, like Dantzler, to employ Connerly.

Dantzler, not Rushing and not Walthall, paid Connerly for hauling the logs. Connerly was paid proportionately to the tonnage of the loads of logs he hauled. Connerly bought the fuel for his truck and paid for all of its repairs except for those repairs which Rushing had agreed to pay when he sold Connerly the truck. The depositions of Rushing, Dantzler, and Connerly make it clear that Connerly determined the number of loads of logs he hauled each day and even whether he worked on any particular day. Connerly was free to select the route he traveled from the logging tract to the mill and back, but his choice of route was affected by the usual economic factor of distance traveled between the two sites. The record in this case demonstrates that the Fords were unable to develop any evidence that either Rushing or Walthall paid Connerly for hauling logs in Connerly's truck. The record in this case further reveals that the Fords were unable to develop that either Rushing or Walthall controlled Connerly's activity as he hauled Walthall's logs to the mills.

II. LITIGATION

Acting for and on behalf of James C. Ford and Natasha Ford, his natural children, James Howard Ford filed a complaint against Connerly, Rushing, and Shelton Dantzler Logging Company (Dantzler) in the Circuit Court of Stone County to recover damages for the wrongful death of Vina Dale Ford Flores and for injuries to her son, James C. Ford, caused by the collision of the log truck driven by Connerly with the pick-up driven by Ms. Flores. In his complaint, James Howard Ford charged that Connerly negligently operated the log truck, the proximate consequence of which was the death of Ms. Flores and the injuries to his son, James C. Ford. Ford then charged that Rushing and Dantzler were responsible for his negligence through the theory of *respondeat superior*. Eventually, the Fords amended their complaint to include Walthall Wood Products, Inc., as a defendant on the same theory of *respondeat superior*.

Rushing and Walthall moved for summary judgment. They asserted that because Connerly was an independent contractor -- and not their employee -- they were not liable for Connerly's negligent operation of his log truck. After the circuit judge heard the respective arguments of the parties on Rushing and Walthall's motion for summary judgment, he rendered his quite detailed findings of fact and extensive conclusions of law from which he determined that "there [was] no material issue of fact as to the employment status of either Connerly [or] Dantzler and that the Defendants, Reed Rushing and Walthall Wood Products, Inc., are entitled to [j]udgment as a matter of law pursuant to Miss. R. Civ. P. 56(b)." The circuit judge then entered a judgment of dismissal with prejudice as to defendants, Reed Rushing and Walthall Wood Products, Inc. However, he further ordered that "the Plaintiffs' cause of action against all other Defendants not specifically dismissed hereby shall continue until further order of the Court."

The Fords appealed from the summary judgment in favor of Rushing and Walthall, but on Rushing and Walthall's motion to dismiss, the supreme court dismissed their appeal because the circuit court had not entered a final judgment. The lack of a final judgment rendered the appeal interlocutory in nature. In the spring of the following year, the Fords settled with the remaining defendants, Connerly and Sheldon Dantzler Logging Company. The settlement with the remaining defendants rendered the

summary judgment final, so the Fords have again appealed from the circuit court's order which dismissed with prejudice their complaint against Rushing and Walthall.

III. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUES

We quote the Fords' issues from their brief:

> **1. Did the Circuit Court err in finding as a matter of law that Norman C. Connerly, Jr. was an independent contractor and not an employee of Reed Rushing and Walthall Wood Products, Inc., therefore dismissing these defendants from the action?**
>
> **2. Did the Circuit Court err in finding as a matter of law that Reed Rushing was entitled to a dismissal from this action?**

A. Summary Judgment

1. Standard of Review

An appellate court in Mississippi reviews a trial court's decision to grant summary judgment *de novo.* ***Spartan Foods Systems, Inc. v. American Nat'l Ins. Co.*, 582 So. 2d 399, 402 (Miss. 1991); *American Legion Ladnier Post 42, Inc. v. Ocean Springs*, 562 So. 2d 103, 105 (Miss. 1990); *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993).*** "The evidentiary matters--admissions in pleadings, answers to interrogatories, depositions, affidavits--are viewed in the light most favorable to the nonmoving party, as he is given the benefit of every reasonable doubt." ***Spartan Foods*, 582 So. 2d at 402.** The central focus of the review of an order granting summary judgment is whether there was "no genuine issue of *material* fact." ***Erby v. North Miss. Med. Ctr.*, 654 So. 2d 495, 499 (Miss. 1995).** A fact will be considered to be material if it has any tendency to decide any of the issues of the case which have been properly raised by the litigants. ***Pearl River City Bd. of Supervisors v. S. E. Collections Agency, Inc.*, 459 So. 2d 783, 785 (Miss. 1984).**

If the appellate court finds beyond a reasonable doubt that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law, it will affirm the trial court's decision to grant summary judgment. ***Spartan Foods*, 582 So. 2d at 402; *Yowell v. James Harkins Builder, Inc.*, 645 So. 2d 1340, 1343 (Miss. 1994)**. However, if it finds that there are disputed issues which are material to the case, the appellate court will reverse, for the purpose of a motion for summary judgment is not to resolve issues of fact but to determine whether issues of fact exist. ***Spartan Foods*, 582 So. 2d at 402; *American Legion*, 562 So. 2d at 106**. Above all, a trial court should take great care in granting a motion for a summary judgment. ***Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995).** If the trial court is doubtful as to whether a genuine issue of material fact exists, it should deny the motion for summary judgment. ***American Legion*, 562 So. 2d at 106; *Daniels*, 629 So. 2d at 599.**

2. Burdens of Production and Persuasion

Summary judgment will be granted "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." **M.R.C.P. 56(c); *Spartan Foods,* 582 So. 2d at 402.** The burden of persuasion is on the movant to show that (1) there is no existing genuine issue of material fact "on each element of his claim or defense" and that (2) he is "entitled to judgment as a matter of law." ***American Legion*, 562 So. 2d at 106; *Webster v. Mississippi Publishers Corp.*, 571 So. 2d 946, 949 (Miss. 1990).** This is a burden of "production and persuasion;" it is not actually a burden of proof in the true sense of the word. ***Yowell,* 645 So. 2d at 1343.**

On the other hand, the opposing party only has to demonstrate that a genuine issue of material fact exists to withstand the test of summary judgment. ***Spartan Foods,* 582 So. 2d at 402.** However, where the party opposing the motion would shoulder the burden of proof at trial, he must produce "supportive evidence of ***significant*** and ***probative*** value" to defeat the motion for summary judgment. ***Daniels*, 629 So. 2d at 600.** The non-movant is obliged to rebut the movant's assertions by producing particular facts which demonstrate that there is a genuine issue of material fact; he cannot rely solely on his pleadings. ***Travis v. Stewart*, 680 So. 2d 214, 217 (Miss. 1996); *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985); *Erby*, 654 So. 2d at 499.**

3. Summary Judgment in Respondeat Superior Cases

Commonly, issues involving *respondeat superior* raise factual disputes which should be presented to the jury for resolution. ***Blackmon v. Payne,* 510 So. 2d 483, 489 (Miss. 1987)** (quoting *Royal Oil Co. v. Wells*, 500 So. 2d 439, 446 (Miss. 1986)). On the other hand, where the facts are undisputed, the determination of whether an independent contractor or employer/employee relationship was formed is a question of law to be decided by the trial judge. ***McKee v. Brimmer*, 39 F.3d 94, 96 (5th Cir. 1994); *Richardson v. APAC--Mississippi, Inc.*, 631 So. 2d 143, 152 (Miss. 1994); *Webster*, 571 So. 2d at 949, 951.** However, where undisputed facts can have more than one interpretation, summary judgment should not be granted. ***Canizaro v. Mobile Communications Corp.*, 655 So. 2d 25, 28 (Miss. 1995).**

In the case *sub judice*, the burden of production of genuine issues of material fact rested with the Fords because they bore the burden of proving at trial that Connerly was an employee of Rushing and/or Walthall instead of an independent contractor. Rushing and Walthall bore the burden of persuading the trial court that there was no "genuine issue of material fact" with regard to whether Connerly was an independent contractor so that they were "entitled to judgment as a matter of law." **M.R.C.P. 56 (c).**

B. Independent Contractors

1. Independent Contractor Defined

An independent contractor is a person who enters a contract to perform a service for another person but who is not subject to the control of that other person in the performance of the contract. ***Richardson,* 631 So. 2d at 148** (quoting *Texas Co. v. Mills*, 171 Miss. 231, 243, 156 So. 866, 868-69 (1934)). The Mississippi Supreme Court has enumerated numerous factors to be considered when determining whether an individual is the employee of another or an independent contractor. ***Id.* at 148-49.** These factors are as follows:

> Whether the principal master has the power to terminate the contract at will; whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; whether he furnishes the means and appliances for the work; whether he has control of the premises; 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; whether he has the right to prescribe and furnish the details of the kind and character of work to be done; whether he has the right to supervise and inspect the work during the course of the employment; whether he has the right to direct the details of the manner in which the work is to be done; whether he has the right to employ and discharge the subemployees and to fix their compensation; and whether he is obligated to pay the wages of said employees.

Id. (quoting *Kisner v. Jackson*, 159 Miss. 424, 428-29, 132 So. 90, 91 (1931)). ***See McKee,* 39 F.3d at 97.** Nevertheless, the right to control and actual control have always carried more weight than the other factors in this analysis. ***McKee,* 39 F.3d at 96.** The court quite frequently focuses on those two during its determination of whether a contractor is truly independent. ***Id.***

In *Richardson v. APAC--Mississippi, Inc.*, the supreme court added another factor to those listed above. **631 So. 2d at 150.** The court stated that where two parties make a contract that creates an independent contractor relationship between them but entails work which would normally be performed under an employer/employee relationship, their contract will be upheld as one for an independent contractor relationship. ***Id.*** However, where a third party is harmed, the court will examine the contract closely to determine whether or not "public policy should permit the transformation of an ordinarily employer/employee relationship into that of an independent contractor." ***Id. See McKee,* 39 F.3d at 97.**

2. De Novo Review of the Facts in the Case Sub Judice

In his findings of fact and conclusions of law, the trial judge found the following facts:

> 1. Neither Rushing or Walthall controlled the actions of Norman C. Connerly, Jr. on the day of the accident;
>
> 2. That Connerly determined what roads he would travel to and from the timber hauling staging area;
>
> 3. That Connerly owned his own equipment and paid taxes on his equipment and tools;
>
> 4. That although Rushing recommended the employment of Connerly, Shelton Dantzler had the authority to hire, fire, use or not use Connerly;
>
> 5. Neither Rushing or Walthall could direct or control Connerly as to where he would work, whether he would work, when he would work, or how he would perform his work;
>
> 6. That both Rushing and Walthall were only concerned with the end result, that is the cutting of the timber and delivery of that timber to an appropriate mill site;
>
> 7. That neither Rushing or Walthall made any deductions for social security or income tax from Connerly's check;

8. That Connerly alone fixed his days and hours of work;

9. That Connerly was paid a unit price plus mileage for delivery of timber;

10. That Connerly was not paid unless he loaded and delivered the timber to an appropriate mill;

11. That neither Rushing or Walthall exercised control over the details or methods of Connerly's work;

12. That neither Rushing or Walthall assisted Connerly in loading or hauling the timber; and

13. That neither Rushing or Walthall provided insurance for Connerly.

The circuit judge then concluded:

> Based upon the facts, which are undisputed, Connerly was sufficiently independent of both Rushing and Walthall at the time of the accident so that in justice and fairness neither Rushing or Walthall should not be held liable for Connerly's negligence, if any. This Court specifically finds that Norman C. Connerly, Jr. was an "independent contractor" with respect to his relationship with Reed Rushing and Walthall Wood Products, Inc.; that neither Rushing or Walthall had a right to control the activities of Connerly at the time of the accident; that the concern of both Rushing and Walthall was the finished product; and that neither Rushing or Walthall should be held liable for the torts, if any, of Connerly absent independent negligence. That the Plaintiffs have not alleged nor do the facts reflect any independent negligence on the part of either Rushing or Walthall.

3. The Fords' arguments

The Fords do not argue that there are any genuine issues about the last twelve of the thirteen findings of fact which the trial judge made. Instead, they assert that there is a genuine issue about the circuit judge's first -- and ultimate -- finding of fact that "[n]either Rushing or Walthall controlled the actions of Norman C. Connerly, Jr. on the day of the accident." We find the following paragraph which we quote from the Fords' brief to be a fair synopsis of their argument that there were genuine issues about the fact of whether Rushing and/or Walthall controlled Connerly's actions "on the day of the accident":

Thus, the facts clearly show that [Rushing and/or Walthall] exercised direct control over Connerly. They financed his truck, sold him the truck, made repairs on the truck, obtained employment for him, terminated his employment, and set requirements on the terms of his employment. For these reasons, Connerly was not an independent contractor of [Rushing and Walthall].

Thus, the Fords' argument requires this Court to refer to the previously recited aspect of the standard of review that "where undisputed facts can have more than one interpretation, summary judgment should not be granted." ***See Canizaro,* 655 So. 2d at 28.**

C. Review and application of precedent to the Fords' first issue

An explanation for a principal's liability for the negligence of a servant or agent but not for the negligence of an independent contractor is found in ***Webster v. Mississippi Publishers Corp.*, 571 So.2d 946, 952-53 (Miss. 1990)** (Robertson, J., dissenting):

> An employee has been thought one who works at the employer's direction in exchange for a wage. Because the employer supervises the details of the employee's work, the employer has practicable power to prevent the employee from committing torts; and the rule of respondeat superior gives the employer a strong incentive to do this. The independent contractor by definition does not work under the employer's (more properly, the principal's) direction but rather promises a certain output in exchange for the contract price. Because the principal does not supervise the inputs into this contractual performance, he is not in a good position to prevent the independent contractor's torts and should not in justice be held liable for those torts absent independent negligence.

(citations omitted). We interpret the Fords' argument to be their assent to the proposition that for Connerly to be the servant of Rushing and/or Walthall, there must be evidence that either or both of them exercised direct control over Connerly. Otherwise, the Fords would not have asserted in their brief that "the facts clearly show that [Rushing and/or Walthall] exercised direct control over Connerly."

Two cases on which the Fords rely are ***Georgia-Pacific Corp. v. Crosby*, 393 So. 2d 1348 (Miss. 1981)**, which involved a claim for benefits under the Workers' Compensation Act, and ***W. J. Runyon & Son, Inc., v. Davis*, 605 So. 2d 38, 40-41 (Miss. 1992),** which involved a claim for personal injuries sustained by the appellee, Steve L. Davis, when the small Ford pick-up truck which he was driving collided with the rear of a thirty-five-foot-long asphalt-carrying truck which Ernest L. Whigham was driving. In *Crosby*, the Mississippi Supreme Court held that the evidence sustained the Workers' Compensation Commission's finding that Crosby, who was working as a sawyer for Hosey Bros., a logging company that had a contract to cut timber for Georgia-Pacific Corporation, was entitled to receive compensation benefits from Georgia-Pacific Corporation. ***Crosby*, 393 So. 2d at 1351.** In *Crosby*, the Mississippi Supreme Court quoted the following from ***Brown v. L. A. Penn & Son*, 227 So. 2d 470, 474 (Miss. 1969)**:

> The right of control rather than the actual exercise of control is a primary test of whether a person is an independent contractor or employee. In the instant case there is direct evidence of the right to control, the express or implied exercise of that right, the method of payment, the furnishing of equipment by financing its purchase, and the right to fire.

393 So. 2d at 1350.

The Fords assert that *Crosby* supports their position on this issue with the following argument:

> Dantzler's testimony substantiates that Connerly was in essence paid with Walthall's money. Rushing and/or Walthall sold and in effect financed Connerly's truck. And these defendants [Rushing and Walthall] had the right to and did fire Connerly. [Rushing and Walthall] are four for four on the *Crosby* test.

With regard to the "method of payment," we cannot agree that "Dantzler's testimony substantiates

that Connerly was in essence paid with Walthall's money." Dantzler's and Rushing's testimony in their depositions establishes that Walthall had a contract with Dantzler to harvest the timber on the Louisiana tract. The terms of that contract are not contained in the record, but Dantzler's and Rushing's testimony establish without issue that Dantzler paid Connerly for Connerly's transportation of the logs which Dantzler harvested from Walthall's tract of timber on a tonnage basis per load that Connerly carried. Thus, we conclude that the evidence does not substantiate that "Connerly was in essence paid with Walthall's money." To the contrary, we find that the evidence establishes without issue that Dantzler, not Rushing, paid Connerly on a per-load basis proportionately to the weight of the load of logs which Connerly hauled for Dantzler.

The Walthall Citizens Bank financed Connerly's purchase of the used truck and log trailer from Rushing, and Rushing served as a surety for Connerly's payment of his debt to the bank. However, we remain unpersuaded that Rushing's sale of the used truck and log trailer to Connerly constituted such "furnishing of equipment" as would give Rushing and/or Walthall the right to control Connerly's delivery of the logs which and thus render Connerly the servant or agent of Rushing or Walthall. We are equally unpersuaded that Rushing's serving as surety for Walthall Citizens Bank's loan of $8,000 to Connerly constituted "the furnishing of equipment by financing its purchase" so as to render Rushing and/or Walthall liable to the Fords as the principals for Connerly.

While it does not disclose the reason for it, the record reflects that Connerly hauled no more loads of logs for Dantzler after August 15, 1990, the date of the accident which killed Ms. Flores and seriously injured her son, James C. Ford. The evidence is that Dantzler hired Connerly after Rushing told him that he "knew a man" who could haul the logs that Dantzler had harvested and then gave him Connerly's telephone number. Neither Rushing nor Dantzler nor any other witness testified that Rushing forced Dantzler to hire Connerly or that Rushing forced Dantzler to continue to employ Connerly to haul the logs which Dantzler had harvested. To summarize our analysis of *Crosby* as it might pertain to the case *sub judice*, we reject the Fords' contention that "[Rushing and Walthall] are four for four on the *Crosby* test." To the contrary, this Court concludes that Rushing and Walthall are zero for four on the *Crosby* test.

The second case on which the Fords rely is ***W. J. Runyon & Son, Inc. v. Davis,* 605 So. 2d 38 (Miss. 1992).** Because the Mississippi Supreme Court expressly overruled *Runyon* in part in ***Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143, 152 (Miss. 1994),** and because Rushing and Walthall rely on *Richardson* to support their opposition to the Fords' position on this issue, this Court feels compelled to analyze these two opinions with no less caution and deliberation than that used by a soldier who is ordered to clear a mine field by probing with a bayonet. Our slip in comparing and applying these two cases to this issue can be no less damaging to justice than can a slip in the soldier's probe with a bayonet be to his life or limb!

In *Runyon*, the plaintiff, Steve L. Davis, was driving south in a small pick-up truck on U. S. Highway 61 north of Vicksburg when he collided from the rear with an asphalt truck which had just entered Davis's lane of travel from the west side of that highway in an opaque cloud of dust. ***Runyun,* 605 So. 2d at 40**. The driver of the truck, Ernest L. Whigham, had just delivered and dumped his load of asphalt on the site where Runyon was paving the new highway. As in the case *sub judice*, the issue in *Runyon* was whether Whigham, driver of the asphalt truck was a servant of Runyon or an independent contractor. ***Id*. at 45.** Unlike the case *sub judice*, *Runyon* proceeded to trial after Davis

had settled with Whigham, and the jury returned a verdict for Davis in the amount of $1,200,000, on which the trial court entered judgment against Runyon. ***Id.* at 42.** In an opinion without dissent in which eight of the justices of the supreme court joined, the Mississippi Supreme Court affirmed the trial court's judgment for Davis. ***Id.* at 50.**

The supreme court found that "Runyon was tortiously and causally negligent through Whigham *without regard to him*," because "Runyon was charged in law to appreciate the dust hazard and take reasonable steps that it not create undue dangers to the motoring public." ***Runyon*, 605 So. 2d at 44.** In short, the supreme court thought that Runyon's negligence in failing to spray sufficiently the right-of-way with water to suppress the dust coalesced with Whigham's driving the asphalt truck to "create a danger to approaching motorists." ***Id.*** In the case *sub judice*, the Fords do not charge Rushing or Walthall with negligence independent of Connerly's negligence. Instead, the Ford's claim for compensation from Rushing and Walthall rests entirely on the doctrine of respondeat superior.

In *Runyon*, the trial judge rejected Runyon's defense that Whigham, driver of the asphalt truck, was an independent contractor and peremptorily instructed the jury "that at the time of the accident which is the subject of this lawsuit, Ernest Whigham was an employee of . . . Runyon . . . ." ***Id.* at 43-44.** In its appeal, Runyon argued that the trial judge erred when he instructed the jury as a matter of law that Whigham was Runyon's employee. ***Id.*** The supreme court thoroughly analyzed the issue of whether the trial judge erred when it instructed the jury that Whigham was Runyon's employee and ultimately concluded that he had not erred. ***Id.* at 47**. The supreme court acknowledged the trial judge's "limited authority to decide the question and withhold it from the jury;" nevertheless that court continued:

> Still, we think the evidence, taken in the light most favorable to Runyon, nevertheless shows that Runyon had sufficient *de facto* and *de jure* control over those aspects of Whigham's work proximately leading to the accident that the Circuit Court was correct when it held Runyon vicariously liable.

***Id.* at 47.**

In *Richardson* the supreme court opined that "while *Runyon* was correct in its holding that where the facts are undisputed, the type of relationship [independent contractor or servant] is a legal one, there were insufficient facts in [*Runyon*] to support its conclusion that Whigham was an employee as a matter of law." ***Richardson*, 631 So. 2d at 152.** Thus, "anything stated in *Runyon* to the contrary to today's holding [that McCandless was an independent contractor] is expressly overruled." ***Id.***

Now that we have established the specific and some-what restricted manner in which the supreme court "expressly overruled" *Runyon* in *Richardson*, we begin our review of *Richardson*. In *Richardson*, the plaintiff, Patricia M. Richardson, sustained injuries when the vehicle she was driving collided with an asphalt truck as she emerged on a green light from a parking lot at a street intersection in Columbus. ***Id.* at 144**. Berg McCandless, a/k/a Orlanda McCandless, d/b/a B & P Trucking, was driving the asphalt truck loaded with materials to APAC's asphalt plant when the collision occurred. ***Id.* at 145.** As in the case *sub judice*, the trial judge granted APAC's motion for summary judgment. ***Id.* at 146**. On appeal, the supreme court noted that it was "concerned . . . with whether this was a master/servant (or employer/employee) relationship or independent contractor." ***Id.* at 148.** Unlike the case *sub judice*, there was a written contract between APAC and McCandless. ***Id.* at 153-54**. The supreme court resolved the issue adversely to Richardson by holding that "[t]here

is no question but that the contract itself . . . is that of a principal and independent contractor and not master-servant." ***Id.* at 150.**

The court then elaborated that "especially where third parties are affected, courts are not confined to the terms of the contract, but may look as well to the conduct of the parties." ***Id.* at 151** (citations omitted). However, the supreme court concluded that not only did APAC and McCandless "intend[] that their relationship be that of principal and independent contractor, not master-servant, but their conduct was that of principal and independent contractor . . . . [E]very factor used in determining which of the two relationships existed predominates in favor of a principal and independent contractor relationship." ***Id***. Although the supreme court affirmed the trial court's grant of summary judgment to APAC, it remanded the case to the trial court to consider further Richardson's late filed motion to amend her complaint to allege a separate ground for APAC's liability to her. ***Id.* at 144**.

From our foregoing review and analysis of *Runyon* and *Richardson*, we conclude as a general maxim of the law that the principal's control of the primary tortfeasor or the principal's right to control the primary tortfeasor must determine whether the principal is to be held liable for the primary tortfeasor's negligence purely as a matter of respondeat superior. If there is a contract between the principal and the primary tortfeasor, whether written or oral, the terms of that contract, if not ambiguous, may well determine whether the principal had the right to control the activity of the tortfeasor in which the tortfeasor was negligent and thus damaged a third party or whether the tortfeasor was indeed an "independent contractor." If the tortfeasor was an independent contractor pursuant to the terms of the contract, then the law will not hold the principal accountable for the primary tortfeasor's negligence because "the principal does not supervise [the primary tortfeasor's] contractual performance, . . . [and therefore is] not in a good position to prevent the independent contractor's torts . . . ." ***Webster,* 571 So.2d at 952-53** (Robertson, J., dissenting); ***see Richardson,* 631 So. 2d at 150**. Even if the terms of the contract establish that the primary tortfeasor was an independent contractor, the conduct of the principal and the primary tortfeasor may belie the intended independence of the primary tortfeasor and establish instead that the relationship between the two was that of master-servant. ***Webster,* 571 So. 2d at 955.**

With our review of the foregoing authority in mind, we resume our consideration of the Fords' argument that there were genuine issues of fact which were material to the issue of whether Connerly was an independent contractor or the servant of Rushing and/or Walthall. Because it was Connerly's negligence in operating the log truck on which the Fords' claim for damages against Rushing and Walthall must depend, implicit in our consideration of the Fords' argument is their proposition that Rushing and/or Walthall either controlled or had the right to control Connerly's operation of his log truck in some way while he was engaged in hauling the logs from the timber tract to the mill and then returning to the timber tract for another load of logs.

Because we are dealing with the propriety of the trial judge's grant of summary judgment to Rushing and Walthall, it is important to observe that none of the facts which the evidence establishes in this case are disputed by either the Fords or by Rushing and Walthall. In their argument, the Fords do not identify any evidence that would indicate that Rushing and/or Walthall controlled, or had the right to control, Connerly's hauling of their logs from the tract of timber in Louisiana which Dantzler had harvested to the Hood Industries' mill in Wiggins. Instead, the Fords argue that because Rushing and/or Walthall "financed his truck, sold him the truck, made repairs on the truck, obtained

employment for him, terminated his employment, and set requirements on the terms of his employment," Connerly was not an independent contractor. These facts are undisputed, but unless they can be interpreted to demonstrate that Rushing and Walthall controlled, or had the right to control, Connerly's hauling logs when his log truck collided with Ms. Flores' pick-up, then the trial judge did not err when he granted Rushing and Walthall's motion for summary judgment. ***See Canizaro,* 655 So. 2d at 28**. Now we consider each of these facts to determine if it is possible to interpret any of them to demonstrate that Rushing or Walthall are liable for Connerly's negligence solely on the basis of *respondeat superior*.

1. Rushing's financing Connerly's purchase of the truck

The undisputed facts are that Walthall Citizens Bank loaned Connerly the sum of $8,000 with which to pay Rushing for the second-hand truck and log trailer. A lien on Connerly's pick-up truck secured Connerly's payment of his debt as did Rushing's signing the note as its surety. After Connerly defaulted in repaying the loan, Rushing paid some of the remaining monthly payments on Connerly's $8,000 debt. The Fords cite no authority to support the proposition that serving as a surety for the primary tortfeasor's debt renders the surety the primary tortfeasor's master. In the absence of such precedent, we decline to interpret Rushing's serving as surety for Connerly's debt, which he incurred to buy Rushing's used truck, as creating a genuine issue of fact which is material to Rushing and/or Walthall's right of control over Connerly's hauling of logs to Rushing and Walthall.

2. Rushing's sale of the used truck and log trailer to Connerly

While there is no dispute that Rushing sold the truck and trailer to Connerly, the Fords again fail to cite any authority to support their proposition that Rushing and Walthall's control over Connerly's hauling of logs can be inferred from Rushing's sale of the truck and trailer to Connerly. In *Richardson*, the Mississippi Supreme Court opined that "whether [the principal] furnishes the means and appliances for the work" can be determinative of whether the worker is an employee, servant, or independent contractor. ***Richardson,* 631 So. 2d at 148** (quoting *Kisner*, 159 Miss. at 428, 132 So. at 91). Connerly's ownership of the truck and trailer, regardless of the person or entity from whom he purchased it, can only be interpreted to support the proposition that Connerly was an independent contractor.

3. Rushing made repairs to Connerly's truck

In his deposition, Connerly testified that when he bought the truck from Rushing, Rushing paid a company in McComb $1,200 to repair the truck's starter. Connerly explained that the garage billed Rushing directly, that Rushing gave Connerly a check payable to the company in the amount of $1, 200, and that he, Connerly, took the check to the company. Rushing explained that the truck he sold Connerly was one of three used trucks that he had purchased from a seafood company with the intention of using the trucks for spare parts. When Connerly asked him to sell one of the trucks to him, Rushing finally agreed. Included in the terms of the sale was Rushing's agreement to repair the truck at Rushing's expense. The repairs which Connerly described were those which Rushing had agreed to make as a portion of the consideration for Connerly's purchase of the truck

Connerly testified that he had to pay for all repairs to his truck after he bought it from Rushing. The Fords offer no evidence to contradict Rushing's assertion that he paid $1,200 to repair the truck as a

part of the sales contract which he made with Connerly to buy it. But again, the Fords cite no authority to support their proposition that Rushing's payment for those particular repairs created a genuine issue of fact which was material to Rushing and Walthall's control over Connerly's hauling of logs, and we decline to so interpret it in that fashion.

4. Rushing obtained employment for Connerly with Dantzler

Rushing testified in his deposition that he told Dantzler during a telephone conversation that he knew someone who could haul logs for him and that he gave Dantzler that person's telephone number. Dantzler's deposition corroborated Rushing's testimony. Dantzler, not Rushing, called Connerly. This evidence does not support the Fords' argument that Rushing obtained Connerly's employment by Dantzler, but even if it did, Dantzler's employment of Connerly to haul logs which Dantzler was harvesting pursuant to his contract with Walthall can hardly be interpreted to create a genuine issue of fact about whether Rushing and/or Walthall controlled Connerly's log-hauling activity for Dantzler.

5. Rushing terminated Connerly's employment

Rushing testified in his deposition that he had a contract with Dantzler, by which Dantzler stipulated that he was an independent contractor who was responsible for insuring that the log truck drivers who hauled logs for him had adequate liability insurance on their trucks. The record reflects, and the Fords concede in their brief, that there was no contract between Rushing or Walthall and Connerly. Instead, the contract was between Walthall and Dantzler, and it was this contract which obligated Dantzler to insure that Connerly's truck was insured for liability purposes.

The record does disclose that it was Walthall's timber cruiser who advised Connerly that he could no longer haul for any of Walthall's loggers until he had obtained new liability insurance for his truck, but neither Rushing nor Walthall had the right to terminate Connerly's employment. Only Dantzler could terminate Connerly's employment. The record also discloses that once Connerly obtained new liability insurance for his truck, he resumed hauling for Walthall's loggers. While Connerly did not work for any of Walthall's loggers after October 15, 1990, the date of the fatal collision, the record does not disclose why Connerly did not work after that date.

It is true that among the factors which determine whether a person is an independent contractor is "[w]hether the principal master has the power to terminate the contract at will; . . . [and] whether he has the right to employ and discharge the subemployees and to fix their compensation; and whether he is obliged to pay the wages of said employees." ***See Richardson,* 631 So. 2d at 148** (quoting *Kisner*, 159 Miss. at 428, 132 So. at 91). The record contains no evidence that Rushing and/or Walthall had the right to terminate Connerly's hauling logs for Dantzler, who hired Connerly and paid him based on the number of tons of logs he hauled from the tract of timber that Dantzler was harvesting. We reject the Fords' argument that Rushing could terminate Connerly's employment by Dantzler simply because there is no evidence in the record that Rushing could do so.

6. Rushing and/or Walthall set requirements on the terms of Connerly's employment.

The Fords assert that Rushing and/or Walthall set requirements on Connerly's employment because "Rushing personally, in direct conversations with Dantzler, secured Connerly's employment" by Dantzler to haul the logs which Dantzler had harvested and because Rushing and/or Walthall had

"required Connerly to maintain liability insurance **for their protection**." We have already dealt with the manner in which Dantzler employed Connerly to haul the logs.

In ***Hercules Powder Co. v. Westmoreland,* 249 Miss. 849, 164 So. 2d 471 (1964)**, it was argued that a truck driver was an employee rather than an independent contractor because his principal required him to maintain liability insurance on his truck which he drove to haul stumps for his employer. However, the Mississippi Supreme Court opined that the employer's insistence that its employee obtain liability insurance for his truck did not alter the driver's independent contractor status because this "occasional, limited, and conditional act[] on the part of the [employer] . . . [did] not alter the basic, independent, contractual, relationship existing between [the driver and the principal]." ***Hercules,* 249 Miss. at 860, 164 So. 2d at 475.**

While there can be no doubt that requiring a log-truck driver to have liability insurance through its contracts with its loggers protected Walthall and Rushing, there is no evidence in this record that Rushing and Walthall imposed this requirement directly on Connerly. We reiterate that Walthall's contract with Dantzler required Dantzler to compel Connerly to have liability insurance. The fact that Walthall's timber cruiser informed Connerly that he must obtain new liability insurance for his truck before he could haul any more logs for Walthall's loggers, including Dantzler, does nothing to establish a genuine question about whether Rushing or Walthall had imposed that condition directly on Connerly.

D. Summary of the Fords' first issue

The record reflects, and the Fords concede, that "no written contract defines the relationship between the parties." The record does contain evidence that there was a contract between Walthall and Dantzler. Dantzler hired Connerly in response to Rushing's comment to Dantzler over the telephone that he knew someone who would haul logs for him and then gave Dantzler the man's number. The Fords do not dispute that Dantzler, not Rushing and not Walthall, paid Connerly for hauling logs on a tonnage basis. The circuit judge's findings of fact numbers 2 through 13 are consistent with Connerly's being an independent contractor, but the Fords do not contest the evidentiary basis for nor the accuracy of those findings of fact. Instead, the Fords have argued that six other facts can be interpreted to create a genuine issue of fact which is material to the issue of whether Connerly was a servant of Rushing and/or Walthall or was, instead, an independent contractor.

While the results of earlier decisions of the Mississippi Supreme Court on this issue have been disparate, as that court has acknowledged more than once, the matter of the principal's control or right to control remains the fulcrum on which that court has rested its lever of its decision-making process. Indeed, as we have quoted from their brief, the Fords acknowledge that control is the key factor to be used in resolving the issue of whether a principal is to be held liable for the primary tortfeasor's negligence. Our analysis of the cases relevant to this issue in the light of the evidence in the record, when evaluated in terms of the somewhat elaborate standard of review for granting summary judgment, compels us to conclude that the Fords, upon whom the burden of proof rested in this case, failed to establish that there were any genuine issues of fact which were material to the legal issue of whether Connerly was the servant or employee of Rushing and/or Walthall, rather than an independent contractor. Thus, we affirm the circuit judge's grant of summary judgment to Rushing and Walthall.

E. The Fords' second issue

For their second issue, the Fords ask, "Did the Circuit Court err in finding as a matter of law that Reed Rushing was entitled to a dismissal from this action?" While this issue may appear to be but another way of stating the Fords' first issue as it would pertain exclusively to Rushing, they argue that because Rushing was the "alter ego" of Walthall Wood Products, Inc., the circuit court ought to have pierced Walthall's corporate veil to render Rushing personally liable for Walthall's liability as Connerly's principal. Our affirming the summary judgment for Walthall renders it free from all liability to the Fords. If Walthall is freed from all liability to the Fords, which this court has affirmed, then nothing remains for Rushing to be liable as an officer of Walthall. Thus, our affirming the grant of summary judgment has rendered this issue moot, and we need not decide it.

THE JUDGMENT OF THE STONE COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN P.J., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.