

**IN THE COURT OF APPEALS 10/01/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-01059 COA**

**RAYMOND KELLY**

**APPELLANT**

**v.**

**COMMONWEALTH PUBLISHING COMPANY, INC.**

**APPELLEE**

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

TRIAL JUDGE: HON. HOWARD Q. DAVIS, JR.

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN S. KNOWLES, III

ATTORNEY FOR APPELLEE:

MARC A. BIGGERS

PAUL L. GOODMAN

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: GRANTED SUMMARY JUDGMENT IN FAVOR OF  
DEFENDANT

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

The Appellant, Raymond Kelly (Kelly), sued the Appellee, Commonwealth Publishing Company (Commonwealth), for personal injuries under the doctrine of respondeat superior for personal injuries. The Circuit Court of Leflore County granted Commonwealth's motion for summary judgment. Kelly has appealed from the circuit court's grant of summary judgment. We affirm.

## FACTS

Al Peterson (Peterson) and Commonwealth entered into a contractual agreement on October 1, 1991, whereby Peterson would deliver newspapers to certain residential subscribers. On December 1, 1993, while delivering newspapers, Peterson was involved in a collision with another vehicle in which Kelly was a passenger. Kelly filed suit against Commonwealth, alleging that Peterson was an employee of Commonwealth and negligently caused the injuries to Kelly while acting within the scope of his employment. Commonwealth denied liability, alleging that Peterson was an independent contractor.

The contract entered into between Commonwealth and Peterson provided, among other things, that Peterson shall purchase sufficient copies of the newspaper to fulfill the needs of the route he is serving, shall ensure delivery to the subscribers each day, and must find a suitable person to act for him if he is absent. Commonwealth was to provide Peterson with a list of subscribers on his designated route and sell him papers at wholesale rates. The contract also maintains that the relationship between Peterson and Commonwealth is that of an independent contractor and not an employee of Commonwealth.

Following discovery by both parties, Commonwealth filed a motion for summary judgment under Mississippi Rule of Civil Procedure 56 asserting that the affidavits of Timothy Kalich and Hazel Peterson, the deposition of Kalich, and the contract entered into by Commonwealth and Peterson, show that there is no genuine issue of material fact, and that Commonwealth is entitled to judgment as a matter of law.

Discovery by both parties developed the following facts:

- 1) Either party may terminate the agreement upon giving the other party thirty days written notice;
- 2) Peterson was assigned a certain route where he was responsible for delivering papers;
- 3) Peterson supplied his own equipment and supplies and the means of effecting delivery was solely within Peterson's discretion;
- 4) Peterson was to deliver Commonwealth's Delta Advertiser on a weekly basis and was paid a separate, pre-determined price for the delivery of each copy;
- 5) The contract calls the relationship one of an "independent contractor," and provides that Peterson be solely responsible for all damages which may occur in his performance of the contract;

- 6) Peterson was paid a "mileage allowance";
- 7) Peterson may add or drop subscribers from his route;
- 8) Commonwealth established a time frame in which the papers were to be delivered;
- 9) Commonwealth provides no liability insurance for its carriers;
- 10) Peterson was to purchase the newspapers from Commonwealth at the usual wholesale rates.

These facts were established through depositions, affidavits and documentary exhibits. Commonwealth's motion for summary judgment was based on the above facts, and Kelly presented no evidence to dispute the facts. The circuit court granted summary judgment and dismissed Kelly's complaint against Commonwealth.

## DISCUSSION

### *Standard of Review*

Rule 56(c) of the Mississippi Rules of Civil Procedure provides:

The [summary] judgment sought shall be rendered forthwith 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.

Miss. R. Civ. P. 56(c). The burden of proving by production that no genuine issues of material fact exist is borne by the movant. *Newell v. Hinton*, 556 So. 2d 1037, 1042 (Miss. 1990); *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990); *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198 (Miss. 1989). On appeal, this Court must approach the issue of the propriety of the granting of summary judgment on a *de novo* basis. The concept of a *de novo* review to the issue of whether a trial court erred when it granted summary judgment was well articulated by the Mississippi Supreme Court in *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894-95 (Miss. 1995):

We employ a *de novo* standard of review in reviewing a lower court's grant of summary judgment. Thus, we use the same standard that was used in the trial court. We must review all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc. The evidence must be viewed in the light most favorable to the nonmoving party who is to be given the benefit of every reasonable doubt. The burden of demonstrating that no genuine issue of material fact exists is on the moving party. However, this burden on the moving party is one of production and persuasion, not of proof. A motion for summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law.

If this Court can find a "genuine issue as to any material fact" in the case *sub judice*, then the lower court's grant of summary judgment must be reversed, and the case remanded for further proceedings.

A recent Mississippi case on the issue at bar is *Webster v. Mississippi Publishers Corp.* 571 So. 2d 946 (Miss. 1990). In *Webster*, the court established several factors to be considered in determining whether the employer has sufficient control to establish an employer/employee relationship. These factors included: (1) the presence of a termination clause; (2) who supplies the equipment to be used in the performance of the contract; (3) the presence of a delivery route or schedule; (4) the length of the business relationship; (5) the method of payment; (6) the contractual language describing the relationship; and (7) the presence of "fringe benefits." *Id.* At 948

Many of the factors set out in *Webster* are present in the case *sub judice*. As in *Webster*, either party could terminate the contract with thirty days written notice. Peterson provided his own equipment and supplies, and Commonwealth pre-determined a route to be serviced. And the contract expressly described the relationship as one of an independent contractor. Additionally, Peterson received no health insurance, Workers Compensation, retirement, or other benefits from Commonwealth. However, Kelly argues that since Commonwealth directly pays Peterson a monthly mileage allowance and allows Peterson to collect money from the subscribers, that these facts are sufficient to create a question as to the right to control. We disagree.

Based upon the record, there is no "genuine issue as to any material fact," and therefore, the trial court did not abuse its discretion in granting the motion for summary judgment.

**THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT TO THE APPELLEE IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**