

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00010 COA

MICHAEL S. BUTLER APPELLANT

v.

APACHE PRODUCTS CO. AND JOHN DOES

ONE THROUGH TEN APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: JOSEPH E. ROBERTS

ATTORNEYS FOR APPELLEES: ALBEN HOPKINS

NATURE OF THE CASE: WORKER'S COMPENSATION

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR APPELLEE/DEFENDANTS

MANDATE ISSUED: 7/8/97

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

THOMAS, P.J., FOR THE COURT:

Michael S. Butler appeals a grant of summary judgment favoring Apache Products Company, raising the following issue as error:

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THIS CAUSE.

Finding no error, we affirm.

FACTS

Michael Butler was an employee of Express Temporary Services, Inc. (Express), a temporary employment agency. While so employed for Express, he worked at Apache Products Company (Apache) in maintenance. Butler stated that he reported to work each morning at Apache and drove himself to the Apache plant. No one from Express accompanied him. Butler received all orders and directions from Apache employees or supervisors. Butler's general assignments at Apache consisted of cleaning up, stacking materials, sweeping and so forth. Apache supplied all the tools necessary for Butler to do his job. While working at the Apache plant, Butler was cleaning a trash compactor and was injured when his head became entangled and crushed by moving parts of the compactor.

Butler filed suit against Apache and John Does One Through Ten alleging that he was injured as a proximate result of the negligence of Apache. Apache filed a motion for summary judgment based upon the loaned servant doctrine, stating that Butler's exclusive remedy was through workers' compensation benefits pursuant to the Mississippi Workers' Compensation Act. Butler did receive workers' compensation benefits from Express. The trial judge granted Apache's motion for summary judgment stating:

At all times relevant to this lawsuit, the Plaintiff was employed through Express Temporary Services, Inc. ("Express"), a temporary employment service agency and at the time of the subject accident was working at the Defendant, Apache's facility in Hinds County Mississippi. The Plaintiff was in the general employment of Express who loaned his work services to the Defendant, Apache. At all times while the Plaintiff, Michael S. Butler, was on the Apache premises, he was working pursuant to the exclusive orders of Apache employers and supervisors. At no relevant time were any Express employees or supervisors ever on the premises of Apache to supervise the Plaintiff. The Plaintiff acknowledged his understanding that this was the arrangement and that he was performing the work that Apache needed pursuant to Apache's supervisor's instructions. At all relevant times, Apache controlled the details of the work to be performed by the Plaintiff and provided the Plaintiff with the tools necessary to perform said work. The Plaintiff and other Express temporary employees were performing the same type of work that Apache's regular employees performed. The Plaintiff has received his workers compensation benefits from his general employer, Express.

The Court is of the opinion that these and other facts, as put forth in the materials on file herein, demonstrate that the Defendant is entitled to a ruling as a matter of law that the Plaintiff was, at all times relevant, a loaned servant as defined by Mississippi substantive law and was in the special employment of the Defendant at the time of the alleged accident. This being established, there exists no genuine issue as to any material fact with regard to this issue and the Plaintiff's exclusive remedy for the subject accident is pursuant to the Mississippi Workers' Compensation Act. The Defendant is therefore entitled to judgment as a matter of law and this pending action must be dismissed as against the Defendant herein with prejudice.

ANALYSIS

I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THIS CAUSE.

This Court conducts a de novo review of the record to determine whether the trial court properly granted a motion for summary judgment. *Jones v. James Reeves Contractors, Inc.*, 690 So. 2d 1166, 1169 (Miss. 1997); *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 661 (Miss. 1994); *Pace v. Financial Sec. Life*, 608 So. 2d 1135, 1138 (Miss. 1992); *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988). The de novo review includes viewing the evidentiary matters in the light most favorable to the non-movant. *Garriga*, 636 So. 2d at 661. The movant has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). However, this burden on the moving party is one of production and persuasion, not of proof. *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894-95 (Miss. 1995).

In *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983), the supreme court interpreted Rule 56 and the standards that the trial courts should use when considering whether to grant a motion for summary judgment. The *Brown* court stated that:

The trial court must review carefully all of the evidentiary matters before it--admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise the motion should be denied.

Brown, 444 So. 2d at 363.

The case of *Northern Elec. Co. v. Phillips*, 660 So. 2d 1278 (Miss. 1995) is dispositive of this issue. In *Northern Electric*, Phillips was an employee of Kelly Services, a temporary employment agency in Hattiesburg. *Id.* at 1279. Kelly assigned Phillips to work temporarily as a maintenance helper with Northern Electric Company. *Id.* Phillips was injured while working for Northern Electric, and subsequently, received workers' compensation benefits through Kelly. *Id.* Phillips filed suit against Northern Electric alleging negligence on the part of Northern Electric. *Id.* Northern Electric moved for a summary judgment, but the motion was denied because the motion was untimely filed. *Id.* at 1279-80. After trial, Northern Electric moved for a directed verdict. *Id.* at 1281. This motion was denied by the trial judge. *Id.* The jury returned a verdict in favor of Phillips. *Id.* Northern Electric then filed a motion for a judgment notwithstanding the verdict, or in the alternative for a new trial. *Id.* The trial judge denied these motions. *Id.*

The Mississippi Supreme Court, in reversing, found that the trial judge should have granted either the directed verdict or the judgment notwithstanding the verdict in favor of Northern Electric. *Id.* at 1282. In coming to its decision, the supreme court noted that the loaned servant doctrine has long been observed in Mississippi Workers' Compensation Law. The court stated:

Indeed, as a general proposition, if one person lends his servant to another for a particular employment, the servant, for anything done in that employment, is dealt with as the servant of the one to whom he had been lent, although he remains the general servant of the person who lent him. The fact that a person is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may be held liable for his acts. We noted

that 'it is well settled in other states that a person in the employ of one person or company whose services are loaned by his employer to another company or person becomes, for the purpose of the work assigned to him, the servant of the latter company, that is to say, the company for whom the work is performed.'

Northern Elec. Co., 660 So. 2d at 1281 (citing *Runnels v. Burdine*, 234 Miss. 272, 276, 106 So. 2d 49, 51 (1958)).

The *Northern Electric* court held that "[s]ummary judgment is appropriate where a temporary employment agency assigns an employee to another employer and the employee performs the normal work of the second employer and is controlled and supervised by that employer." *Northern Elec.*, 660 So. 2d at 1282. Further, "one may be employed by more than one employer and both employers gain immunity from common-law negligence actions." *Id.* In finding that Phillips was engaged in the "dual employment" of Kelly and Northern Electric, the court held that Phillips' exclusive remedy was through workers' compensation benefits. *Id.*

In the case at bar, Butler was employed at Express Services, a temporary employment agency. He was assigned to Apache Products by Express. While at Apache, Butler injured his head while cleaning a trash compactor. Butler was performing the normal work of Apache workers, and he was under the exclusive orders of Apache employers and supervisors. Butler received workers' compensation benefits for his injury from Express. Therefore, in following *Northern Electric*, the trial judge did not err in granting summary judgment in favor of Apache Products and John Does One Through Ten. Butler had one means of recovery, and this was through workers' compensation benefits. Butler is unable to recover under a common-law negligence theory against Apache and John Does One Through Ten.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.