STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0501

WALTER WILLARD FEE

VERSUS

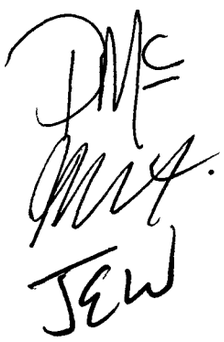
PINEVILLE FOREST PRODUCTS, INC.,
SOUTHERN PACKAGING, INC.

c/w 2017 CA 0502

WALTER WILLARD FEE

VERSUS

CAPITAL CITY INSURANCE CO.,
PINEVILLE FOREST PRODUCTS, INC.



Judgment Rendered: NOV 0 1 2017

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On Appeal from the Office of Workers' Compensation
In and for the Parish of Pointe Coupee
State of Louisiana
No. 1507759

Honorable Pamela A. Moses-Laramore, Judge Presiding

* * * * * *

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* * * * * *

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McCLENDON, J.

Walter Fee seeks review of a workers' compensation judgment granting the appellee's motion for summary judgment decreeing that the appellee was not Mr. Fee's statutory employer. For the reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

In May 2007, the plaintiff, Walter Fee, was injured while in the course and scope of employment with B&W Logging Company, LLC when he was struck by a tree limb, allegedly resulting in permanent and disabling injuries to Mr. Fee's head, brain, and neck. At the time of the accident, Mr. Fee was conducting logging operations on a piece of land owned by the Pourciau family in New Roads, Louisiana. Southern Packaging, Inc., which owns a sawmill and is in the business of manufacturing, marketing, and delivering wooden pallets, had previously purchased the timber rights to the Pourciau tract in October 2006. Southern Packaging was required to harvest the timber within a year, or the timber rights would revert back to the Pourciau family.

B&W had a workers' compensation policy with Timberman's Self Insurers' Fund, which was in effect on the date of the accident. Timberman's accepted and paid out medical and indemnity benefits arising from Mr. Fee's injuries from the date of the accident until Timberman's "went bankrupt," on or about September 14, 2015. B & W is also alleged to be bankrupt.

In November 2015, Mr. Fee filed a Form 1008/Disputed Claim for Compensation with the Office of Workers' Compensation ("OWC") against Southern Packaging, asserting that Southern Packaging was Mr. Fee's statutory employer at the time of the accident such that Southern Packaging would be responsible for the payment of Mr. Fee's workers' compensation benefits.

In December 2015, Mr. Fee filed a separate Form 1008/Disputed Claim for Compensation with the OWC, alleging that Southern Packaging had hired Pineville Forest Products, Inc., a timber dealer, to harvest the timber, who in turn, subcontracted

the work to B&W. As a result, Mr. Fee alleged that Pineville was also his statutory employer and thus responsible for the payment of his workers' compensation benefits.[1]

Both Southern Packaging and Pineville filed motions for summary judgment, each alleging that they were not Mr. Fee's statutory employer. Following a hearing, the OWC denied Southern Packaging's motion, but granted Pineville's motion.[2]

Mr. Fee has appealed the judgment granting Pineville's motion and dismissing Mr. Fee's claims against it,[3] assigning the following as error:

> 1. The [OWC] committed factual and legal errors in granting the motion for summary judgment by concluding there are no genuine issues of material fact as to whether Pineville Forest Product's, Inc. was Walter Fee's statutory employer at the time of the May 2, 2007 accident at issue[.]
>
> 2. The [OWC] committed factual and legal errors in granting the motion for summary judgment by evaluating the weight of the evidence and determining the truth of the matter as opposed to determining only whether there was a genuine issue of triable fact.

DISCUSSION

The determination of motions for summary judgment in workers' compensation cases is subject to the same standards utilized in ordinary civil actions. See **Lilly v. Allied Health Care**, 07-0590 (La.App. 1 Cir. 6/6/08), 991 So.2d 1096, 1097-98, writ denied, 08-2081 (La. 12/12/08), 996 So.2d 1117. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(A)(3). The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. LSA-

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[1] Mr. Fee filed a motion to consolidate the two claims, which was granted by the OWC.

[2] The OWC originally signed a single "order" denying Southern Packaging's motion for summary judgment and granting Pineville's motion. Due to the fact that the ruling on Southern Packaging's Motion for Summary Judgment was interlocutory, and the ruling on Pineville's motion was a final, appealable judgment, the OWC signed an unopposed motion to nullify its initial judgment containing both rulings. Thereafter, the OWC signed separate judgments on January 3, 2017 reflecting its ruling, but making no substantive changes in the judgments.

[3] Southern Packaging sought supervisory review of the denial of its motion for summary judgment, which was denied by this court. See **Fee v. Southern Packaging, Inc.**, 2017 CW 0251 (La.App. 1 Cir. 5/25/17)(unpublished writ action).

C.C.P. art. 966(A)(4). On appeal, appellate courts review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the OWC's consideration of whether summary judgment is appropriate. See **Schultz v. Guoth**, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005-06.

In ruling on a motion for summary judgment, the OWC's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of material fact. See **Hines v. Garrett**, 04-0806 (La. 6/25/04), 876 So.2d 764, 765 (*per curiam*). A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. All doubts should be resolved in the non-moving party's favor. **Id.**, 876 So.2d at 765-66. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can only be seen in light of the substantive law applicable to the case. **Pumphrey v. Harris**, 12-0405 (La. App. 1 Cir. 11/2/12), 111 So.3d 86, 89.

Mr. Fee argues that the OWC erred in concluding that no genuine issue of material fact remained regarding whether Pineville was Mr. Fee's statutory employer. Whether a statutory employer relationship exists is governed by LSA-R.S. 23:1061. Specifically, LSA-R.S. 23:1061(A)(1) provides that when a "principal" undertakes to execute any work, "which is a part of his trade, business, or occupation" and contracts with a "contractor" for the execution of "the whole or any part of the work undertaken by the principal," the principal, as a "statutory employer," shall be liable to pay to any employee employed in the execution of the work "any compensation" under the Workers' Compensation Act. Thus, a "statutory employer" is liable to pay any employee employed in the execution of the work any compensation due under the Workers' Compensation Act. LSA-R.S. 23:1061(A)(1).

Louisiana Revised Statutes 23:1061(A)(2) provides that "[a] statutory employer relationship shall exist whenever the services or work provided by the immediate

employer is contemplated by or included in a contract between the principal and any person or entity other than the employee's immediate employer." Otherwise, "a statutory employer relationship shall not exist between the principal and the contractor's employees, whether they are direct employees or statutory employees, unless there is a written contract between the principal and a contractor which is the employee's immediate employer or his statutory employer, which recognizes the principal as a statutory employer." LSA-R.S. 23:1061(A)(3). This is commonly called the "two contract" rule.

In the instant case, there are no written contracts by and between Southern Packaging, Pineville, or Mr. Fee's immediate employer, B&W. Therefore, as noted by Mr. Fee, the only way Pineville can be considered his statutory employer is under the "two contract" rule set forth in LSA-R.S. 23:1061(A)(2). The "two contract" rule applies when: (1) the principal enters into a contract with a third party; (2) pursuant to that contract, work must be performed; and (3) in order for the principal to fulfill its contractual obligation to perform the work, the principal enters into a subcontract for all or part of the work performed. **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 02-1072 (La. 4/9/03), 842 So.2d 373, 379.

It is undisputed that Southern Packaging purchased the timber rights in the Pourciau tract directly from the landowners. According to the Timber Deed agreement, the right to harvest and remove the hardwood remained valid until September 15, 2008. As part of the deal, on September 15, 2008, the remaining standing timber would revert to and become the property of the landowners (the Pourciau family). The Timber Deed signed by the parties states that Southern Packaging was not obligated to cut or remove any particular quantity or kinds of timber, nor did Southern Packaging have to carry on operations at any particular time or in any particular manner.

In support of its motion for summary judgment, Pineville relies upon the depositions of Mr. Kenneth Tuminello, former president of Southern Packaging, and David Andrus, Pineville's owner at all pertinent times at issue.[4] According to Mr.

[4] The deposition of Bradley Tuminello, who was an owner of Southern Packaging, was also introduced into evidence. His testimony corroborated that of his brother, Kenneth Tuminello. However, unlike

Tuminello, Southern Packaging paid for the right to purchase and remove the timber from the Pourciau land. Mr. Tuminello testified that on all occasions when Southern Packaging purchased a timber tract directly from a third-party landowner, Southern Packaging would subcontract a logger to harvest the timber on the landowner's property.[5]

Mr. Tuminello also stated in his deposition that he made a verbal agreement with Mr. Fee to cut and haul the timber. Mr. Tuminello indicated that it was Mr. Fee, on behalf of B&W, who likely requested to go through Pineville so that B&W could get paid every week, instead of being paid per Southern Packaging's practices. Specifically, Mr. Tuminello testified:

> As I recall, [Mr. Fee] probably asked for payment every week and I probably told him that wasn't our payment practice, that we would pay everybody the same and we stuck to that. I felt like [Mr. Fee] then suggested well, if I go through these guys [Pineville], they can pay me every week. I believe that to be the nature of our discussion.

David Andrus provided deposition testimony similar to that of Mr. Tuminello. Mr. Andrus said that generally, Pineville would buy the tracts and make arrangements with timber cutters to have the timber delivered to a mill. Under this normal arrangement, Mr. Andrus indicated that a Pineville representative would walk the timber tract, have specific discussions with the logging company regarding what needed to be done, and visit the site to ensure that the logging contractor was operating according to the contract requirements.

However, Mr. Andrus testified that the instant situation was unique. He indicated that Pineville never inspected the Pourciau tract and did not even know where in New Roads the tract was located. Mr. Andrus also testified that, unlike a normal arrangement, he had no obligations to the landowners or to the mill. Rather, he stated that the arrangement and specifications for the job had been made solely between Mr. Fee and Southern Packaging. In describing the arrangement, Mr. Andrus testified:

Bradley, Kenneth was directly involved with the pertinent transactions at issue. Throughout the opinion, a reference to Mr. Tuminello is a reference to Kenneth Tuminello.

[5] Tuminello stated in his deposition that the reason Southern needed to use loggers was because Southern did not have the employees or equipment to perform such work itself.

> ... Mr. Fee come[s] to me and said he had arranged some work with Southern Packaging and that he needed, because of cash flow issues, to be paid on a very timely manner, to get paid on the Friday of the week the work was conducted. He had made all the arrangements with Southern Packaging on this particular project. And he proposed to me because he needed to, like I say, get paid on a timely fashion, as opposed to possibly having to wait a week or two to be paid directly from Southern Packaging, that he proposed to me that he would allow Southern Packaging pay me and I would in turn pay him. Not in that order, but I'd actually pay [Mr. Fee] first and then later get paid from Southern Packaging. And he proposed to me that in order to do that, [Mr. Fee] was willing to allow me to make a very small margin of profit, pay him slightly less than what [Southern] Packaging had agreed to pay him for the work.[6]

Mr. Andrus testified that Pineville made much less under this arrangement than it would under its normal arrangement with loggers.

In opposition to the summary judgment, Mr. Fee relies upon his deposition and the deposition of his wife, Barbara Fee, along with the affidavit of Mr. Tuminello. Mr. Fee, in contrast to the depositions relied upon by Pineville, testified that he learned of the job through Pineville. Mr. Fee indicated, however, that "the deal was made ... between Dave Andrews [Pineville] and Ken [Southern Packaging]," but that Southern Packaging "carried me out there and showed [the job] to me" and provided the job specifications. Mr. Fee, however, reiterated that "[i]t was Pineville Forest Products' job and I was just moving timber for [it]."

Similarly, Mrs. Fee testified that Pineville contacted her husband about the job. She indicated that Pineville "buys timber ... and gets people to cut the timber and all that." She acknowledged that Southern Packaging, however, told Mr. Fee "what [it] wanted done" and "how [it] wanted the timber cut."

In granting summary judgment in favor of Pineville, the OWC reasoned, in part:

> Mr. Fee's testimony is very difficult. The gentleman had a brain injury, and it was very – and I think the few places where I couldn't jive the testimony of Mr. Tuminello, Mr. Andrus, and Mr. Fee, and I put in Mr. Fee's inability to really remember everything precisely and give good discussion.
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> ... I grant the motion for summary judgment on Pineville Forest Products. The only reliable testimony, real reliable testimony, I have is that of Ken Tuminello and David Andrus as to what really happened. Barbara Fee

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[6] In exchange for paying B&W directly, Pineville allegedly received a fee of $.75 per ton of timber delivered to Southern.

> didn't have anything to do with those contracts. She handled the business ends of things; she was not there; she didn't have anything to do with it.
>
> And the cut sheet that Mr. Tuminello agreed was, you know, his handwriting, his instructions with regard to how to cut the timber and provide it to the mill also supports that he is the statutory – that Southern Packaging was the statutory employer in this situation. The only evidence of Pineville having anything to do with it is the tickets in their name, and the checks coming out. And although there was testimony, from Mr. Fee and Mrs. Fee ... that they could not deal with mills individually, they had to use a dealer, Mr. Andrus said that's not true and Mr. Tuminello, who is the owner of Southern Packaging said if they had come up with their insurance, we would've dealt with them.

On appeal, Mr. Fee contends that the OWC committed legal error in granting summary judgment insofar as it gave more weight to the testimony of Mr. Andrus and Mr. Tuminello, and discounted the deposition testimony of Mr. and Mrs. Fee wherein they testified that the deal was through Pineville. Moreover, Mr. Fee points to a seeming conflict in Mr. Tuminello's affidavit wherein Mr. Tuminello attested that "Southern Packaging had a verbal agreement with Pineville ... to harvest timber to be used in the manufacturing of wooden pallets." Mr. Fee avers that Mr. Tuminello's affidavit clearly contradicts the statements Mr. Tuminello made in his deposition. Mr. Fee concludes that the OWC is certainly free to weigh this evidence at a trial on the merits, but such weighing is inappropriate on a motion for summary judgment.

In reply, Pineville notes that oral contracts over $500.00 must be proved by "at least one witness and other corroborating circumstances." See LSA-C.C. art. 1846. Pineville also notes that if a party serves as his or her own witness, the corroborating circumstances must come from a source other than the party alleging the existence of the contract. See **Pennington Const., Inc. v. R A Eagle Corp.**, 94-0575 (La.App. 1 Cir. 3/3/95), 652 So.2d 637, 639. Pineville avers that neither Mr. nor Mrs. Fee were privy to any contracts between it and Southern Packaging. Pineville recognizes the statement in Mr. Tuminello's affidavit regarding the contractual relationship between the two entities, but avers that Mr. Tuminello corrected the statements in deposition, specifically testifying that Southern Packaging did not contract with Pineville. Accordingly, Pineville concludes that Mr. Fee cannot demonstrate or corroborate that an oral contract existed between Southern Packaging and Pineville to harvest timber, and

therefore Pineville does not fit within the definition of a "principal" under the two contract theory.

In essence, Pineville is asking this court to give more weight to the statements made by Mr. Tuminello in his deposition and disregard those made in his affidavit. We note, however, that Mr. Tuminello specifically stated in his affidavit that Southern Packaging contracted with Pineville to harvest the timber on the Pourciau tract. While Mr. Tuminello seems to have explained the discrepancy in his deposition, we cannot weigh the evidence or make credibility determinations on summary judgment. Pineville is also asking this court to accept the deposition testimony of Mr. Tuminello and Mr. Andrus and to discredit the testimony of Mr. Fee that he was working on behalf of Pineville, which would require weighing evidence on summary judgment. The law does not permit such weighing on summary judgment. See **Hines**, 876 So.2d at 765.

Taking Mr. Tuminello's affidavit along with the deposition testimony of Mr. Fee, and given that we are precluded from weighing evidence or making credibility determinations on summary judgment, we are constrained to find that a disputed issue of material fact remains regarding whether Pineville was Mr. Fee's statutory employer under the "two contract" rule. Accordingly, we find merit in Mr. Fee's assignments of error and conclude that the OWC erred in granting summary judgment in favor of Pineville.

CONCLUSION

For the foregoing reasons, the trial court's January 3, 2016, judgment granting summary judgment in favor of Pineville Forest Products, Inc. is reversed. Costs of this appeal are assessed to Pineville Forest Products, Inc.

REVERSED AND REMANDED.