ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case Nos.: 2010-CP-12-00137; 2010-CP-12-00136; 2010-CP-12-00135; 2010-CP-12-00134; 2010-CP-12-00133

Jane Cherry, Personal Representative of the Estate of Nicholas Wayne Cherry, Appellant,

v.

Myers Timber Company, Inc, Respondent.

Taylor C., a minor under the age of 14 years, by and through mother and natural guardian, Jane Cherry, Appellant,

v.

Myers Timber Company, Inc, Respondent.

Carlton Quinton as Personal Representative of the Estate of Hannah Nicole Quinton, Deceased, Appellant,

v.

Myers Timber Company, Inc, Respondent.

Alice Quinton and Carlton Quinton, Appellents,

v.

Myers Timber Company, Inc, Respondent.

Carlton Quinton as Guardian for Timothy Q., a Minor under the Age of Eighteen,
Appellent,

v.

Myers Timber Company, Inc, Respondent.

# FINAL BRIEF OF RESPONDENT

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## RESPONDENT'S STATEMENTS OF THE ISSUES ON APPEAL

In addition to the statement of the issues on appeal set forth in appellants' statement of the issues on appeal, the respondent, pursuant to Rule 208(b)(2) contends, as an additional substaining ground, that the trial judge erred in determining that the agreement between Levister and Myers was terminable by either party at will and therefore submits an additional issue.

Did the trial court err in finding that the agreement between Levister and Myers was "terminable by either party at will"?

## STATEMENT OF THE CASE

This action involves several law suits that were consolidated by a consent order dated July 21, 2010. The actions were filed on March 24th and 25th of 2010.

On March 26, 2007 George Rogers was driving a logging truck and was involved in a traffic accident with a vehicle driven by Alice Quinton. Alice Quinton had as passengers in her vehicle Timothy Quinton, Hannah Quinton, Jane Cherry and Nicholas Cherry. Nicholas Cherry and Hannah Quinton were killed, the other occupants of the Quinton vehicle were injured. Suit has been brought against Myers Timber Company on behalf of all of the occupants of the Quinton vehicle and these suits have been consolidated. At the time of the collision George Rogers was an employee of a logging

company entitled Charles Levister d/b/a Levister Logging and was driving one of their trucks within the scope of his employment.

The complaints in the consolidated law suits allege that Myers Timber is liable for the acts of George Rogers. Myers Timber contends that Charles Levister d/b/a Levister Logging, the employer of George Rogers was an independent contractor and Myers Timber is not liable or responsible for the acts of Levister Logging's employees. Myers made a motion for summary judgment on this ground. The motion was granted by order of Judge Brooks P. Goldsmith dated September 23, 2011. Appellants' motion to alter or amend the judgment was also denied by order of Judge Goldsmith filed January 18, 2012. The amount involved on the appeal is undetermined; the appellants are seeking to recover damages for the wrongful death of two children and injuries to three other occupants in the appellants' vehicle.

The appellants served notice of appeal on February 9, 2012. No changes have been made in the parties by death, substitution, or otherwise.

## STATEMENT OF FACTS

### (Submitted pursuant to Rule 208(b)(1)(D))

Myers Timber Company was in the business of purchasing timber from land owners and selling the timber to various consumers such as Bowater, Chester Wood Supply, Beal Lumber Company, and others. Myers Timber Company is a timber broker.

Myers Timber contracted with independent logging companies to harvest and deliver the timber that Myers purchased. Myers Timber entered into an oral contract with Charles Levister d/b/a Levister Logging whereby Levister was obligated to harvest timber from a tract of land owned by Faulkenberry and transport it to purchasers designated by Myers Timber.

As shown by the Affidavit of Fred Myers dated August 18, 2010:

1. Myers Timber had no control and exercised no control over how the timber was cut, loaded and hauled.

2. Myers Timber instructed Levister where to harvest the timber (the boundary lines of the tract to be harvested) and where to deliver the timber (the mill of the purchaser).

3. Myers Timber paid Levister $14.00 per ton to haul the timber 40 miles or less from the harvesting site. Myers Timber paid Levister an additional $.10 per mile per ton if the delivery site was more than 40 miles from the harvesting site.

4. Levister furnished all equipment necessary to harvest and haul the timber; Myers Timber owned no such equipment and furnished Levister with no such equipment. Myers Timber owns no real estate or timber.

5. Levister had the right under the contract to haul the timber any route he elected to use however the pay to Levister by Myers was based upon the shortest route.

There is no credible evidence that Myers Timber Company was responsible for the actions of George Rogers on the date of this collision, March 26, 2007. In an effort to

produce such evidence, the Plaintiffs' took the depositions of Fred Myers, David Stines, and Paul Davis, employees of Myers; and Chuck Levister, and Charles Levister, the sons of the owner of Levister Logging who is now deceased. According to Plaintiffs' response to interrogatories, Plaintiff is also relying upon the deposition of George Rogers that was taken in a prior action. In Myers' deposition he states that his company uses independent contractors to do logging; the only thing a logger has to supply Myers with is a Top Logger Certificate issued by the South Carolina Forestry Commission and proof of worker's compensation insurance. (Myers Deposition P31 L2-8 and P35 L16-24) There is nothing in the deposition evidencing the fact that Levister Logging Company and its employees were agents or employees of Myers Timber, Inc. Myers states on page 32 line 13-22, in response to a question posed by Dale Dove; "Because they are independent contractors, I don't have a right to make them do anything." Plaintiff took the deposition of David Stines, an employee of Myers Timber, and his testimony was similar to Fred Myers concerning Myers' Timber operation. The timber buyers contact land owners and representatives of land owners to buy the timber, they contract with the plants to purchase the timber, and they contract with the loggers to harvest and transport the timber. The contract entered into by Myers Timber and Levister Logging established the logging rate for the timber tract involved (in this case the Faulkenberry tract), required Levister to have worker's compensation insurance, established Myer's right and obligation to tell Levister which mills to deliver the timber to and the dimensions of for the timber, and set forth the day of the week Levister was to be paid. The logger is an independent contractor (P26 L3-P27 L12 of Stines' deposition; questions by Dove)

Dale Dove questioned Stines about his dealings with loggers. Mitch Stines stated that he would show the logger a tract, tell the logger what Myers would pay the logger to harvest the tract and if the logger agreed, Myers would give the logger a map of the tract if Myers had one, mark the boundaries of the tract, give the logger the appropriate delivery cards and tell the logger to which mills the timber was to be delivered. (Stines Deposition P42 L3-L17) If the logger does not know the dimensions of the wood for the mill the timber was going to, Mitch would give him a "Specification Sheet" stating how to cut and process the wood to deliver to the mill. These Specification Sheets are prepared by the mill, the mill delivers the sheets to Myers and Myers delivers the sheets to the logger (Stines Deposition P43 L10-L20) The Specification Sheets would contain the minimum and maximum butt diameter, minimum top diameter, minimum and maximum lengths, and information concerning the quality of the tree as to knots, crooks, scars, etc. The Specification Sheet does not have any instructions concerning how the timber was to be loaded on the trailer or transported (Stines Deposition P43 L21-P44 L12)

The amount the logger is paid by Myers is based upon two factors. The logger gets paid so much a ton to cut and load the wood and so much for hauling the wood (Stines Deposition P46 L1 –L15) The logger determines what route to take to deliver the timber.

Upon arrival at the mill the logger pulls up to the scaler house and hands the scaler the delivery card. The loaded truck is weighed and the logger unloads the truck, comes back to the scale house and the truck is weighed again and the driver is handed a scale ticket. The logger presents the scale tickets to Myers once a week and Myers pays the logger based upon the scale tickets. The mill sometimes deducts what it pays Myers for timber with a crook or a scar or some other defect and Myers deducts that amount from the amount the logger is paid (Stines deposition P46 L16 – P49 L17).

Plaintiff took the deposition of Paul Davis, another employee of Myers Timber. His testimony was that he showed Levister the boundaries for the tract Levister was to cut, there was no issue about where the loading deck was to be located and there was no issue about ingress or egress. The logger determines where to haul wood on any given day, not Myers (Davis Deposition P14 L3 –L24) Davis did not check the safety record for Mr. Levister because it is the loggers responsibility to ensure that his equipment is safe to operate (P17 L18 – L24). If a logger left the property in bad shape, Davis would tell the logger they needed to clean up the property (Davis Deposition P18 L23 – P19 L8). Davis testified that it is the loggers responsibility to make sure his trucks are loaded properly, not Myers (Davis deposition L1-L6).

The ultimate decision on where on the tract to put the loading deck and what routes to use for ingress and egress is up to the logger. (Davis Deposition P28 L7-L13)

I asked Mr. Davis the following questions to show that Levister is an independent contractor:

"Examination- (By Mr. Wilkerson)

Q: Your contract you had with Levister is an oral contract. Right?

A: Correct.

Q: And under that contract, he's required to cut the timber from the tracts that you designate–that Myers Timber designates. Is that correct?

A: Correct.

Q: And he's legally contracted– contractually obligated to haul that wood to the designation that Myers Timber designates. Is that correct?

A: Yes.

Q: Do you have any contractual right to tell him who to hire?

A: No.

Q: Do you have any contractual rights to tell him what type of trucks to use?

A: No.

Q: Do you have any contractual right to tell him what other kind of equipment to use?

A: No.

Q: Do you have any contractual right to tell him what routes to take?

A: No.

Q: If you don't like the way he's performing the job, the only remedy you have is to terminate the contract. Is that right?

A: Correct.

Q: You can't tell him to use or not to use a certain truck, can you? You have no contractual right to tell him that.

A: No." (P31 L1 – P32L7)

The Plaintiff's took the depositions of Chuck and Charles of Levister, sons of the owner of Levister Logging who is now deceased. Chuck worked for Levister Logging and testified that Myers Timbers would show Levister a tract of wood, including the boundary lines, then they would only come out to the site occasionally to make sure Levister was inside the boundary lines and was "cutting the wood right".

Chuck Levister's deposition P12 L12-23 states:

"Q: When you say see every now and again, what do you mean by that?

A: They'd take us out and show us a tract of wood and Daddy would determine whether or not he wanted to cut it, or not. He'd show us basically the boundary lines and then they might pop up. And, after we'd get it started, they might pop up once or twice while we was cutting that wood. They just come out there and check and see – make sure that we wasn't cutting across the line, or make sure that we was cutting the wood right, and that was it. I mean, you didn't really see them often."

No one from Myers Timber talked to Chuck about the work that needed to be done. Myers Timber would buy the wood, then hire contractors to cut the wood (Chuck Levister's deposition P24 L16 – P25 L2). Chuck testified as follows:

"Q: When Myers Timber would buy timber, talk to the landowner, was there ever a time when they told you or your father, you know, "We want your loading site here."

A: They can make a suggestion, if they think this is a good spot. But if- Like my Daddy, for instance, if he didn't think the trucks would be able to get out of that hole or this hole, he could put the load wherever he wanted to. It didn't matter...." (Charles Levister's deposition P25 L16 – L25).

Q: They would've dealt with your father on that.

A: Yeah, mostly everything would've been dealt with Daddy.

Q: Was there ever a time when any employees from Myers would help load?

A: No, they never got on a loader. They're always in a pickup truck. They'd come out there in real nice clothes and talk to you. But, that's it. They never got on a piece of equipment." (Chuck Levister's deposition P26 L5 –L13)

Myers never said anything about how the trucks were loaded, it made no difference to the timber owner if the trucks were under loaded or over loaded (Chuck Levister's deposition P59 L14-L21). The logger chooses the route to take to haul the wood to the plant; the timber owner would have no right to designate the route (Chuck Levister's deposition P60 L1-L18).

I asked Chuck the following series of questions:

"Q: And when you were working, did Myers have any right to control what you did or what your other employees did?

A: No, sir.

Q:Who did have the right to tell you what to do or what not to do?

A: My daddy.

Q: And is that because he was the owner of the company?

A: Yes, sir.

Q: Who had the right to fire you?

A: My daddy.

Q: Did Myers have that right?

A: No, sir.

Q: Who owned all the equipment- the equipment that y'all used on this Faulkenberry tract to harvest and deliver the timber?

A: My daddy owned it all.

Q: To your knowledge, did Myers own any equipment that's used in harvesting and/or delivering timber?

A: No, my daddy owned everything out there.

Q: Who had the right to say what equipment was going to be used in the harvesting and delivery process that Levister was doing?

A: My daddy.

Q: Did Myers have any say-so in that?

A: No, sir.

Q: Who had the right to say how the trucks were loaded and how much timber was put on each truck? Who had the right to make that decision?

A: My daddy.

Q: Did Myers have any say-so in that?"

A: No, sir.

"Q: Could the Levister employees take any route they wanted to?

A: They could drive anywhere. It didn't make no difference. Like sometimes, like, if they left late in the evening, they'd take it home with them first; then they'd get up early in the morning, then go. They didn't have to go- They went the way they thought was best.

Q: So, Levister controlled the route that the drivers took. Is that correct?

A: Yes, sir.

Q: And, of course, Levister was in an entirely different business from Myers, where Myers was in the business of buying and selling timber and Levister was in the business of harvesting and delivering timber. Is that correct?

A: Yes, sir, that's basically the whole thing right there. They bought and sell; Daddy would cut it and deliver it, basically..." (Chuck Levister's deposition P77 L24-P80L11)

Under Myers agreement with Levister, Myers controlled where the timber was harvested and where it was delivered and I asked Chuck if Levister controlled everything else and his response was:

"A: Yeah, he determined where you're going to cut, where you're going to put what, where you're going to start at, what kind of wood he's going to start cutting. That was all Daddy's decision." (Chuck Levister's deposition P81 L18-P82 L4)

Q: I believe you've already answered this question, but Myers, under its agreement with Levister, had the right to tell you where to cut and where to take the timber, but they did not have the right to exercise any control over the details of the work, did they?

A: No, they just basically showed you where to cut, where it went to; and from there, it was on you..." (Chuck Levister's deposition P85 L19-P86 L1)

Charles Levister, Chuck's brother, didn't go to work for his dad until approximately a year after the accident. Although Charles didn't work for his father at the

time of the wreck, he knew that Myers didn't have anything to do with how Levister harvested and hauled the wood. In response to questions by Dale Dove, Charles state in his deposition:

"Q: Do you know, if after this thing, that your dad had any conversations with anybody from Myers about the wreck?

A: Not that I know of. I mean, really, I mean the wreck was on my dad. I mean, I don't really see why he would talk to Myers about anything of it.

Q: Okay.

A: Because, I mean, the only think Myers had anything to do with was the timber; and it went to the wood yard anyway, so..." (Charles Levister's deposition P28 L18-P29 L4)

Charles testified that his dad hired all employees of Levister Logging, his dad had the right to fire all employees of Levister Logging, his dad paid the employees of Levister Logging. Myers had nothing to do with the hiring of Levister employees and had no control over Levister's employees. Levister used its own equipment and the only thing Myers had to do with Levister Logging was to show Levister where to cut the timber and tell Levister where to haul the timber. (Charles Levister's deposition P32 L1-P33 L4)

In the suit brought against George Rogers by the victims of this collision, Rogers' deposition was taken. The respondent served the plaintiffs with interrogatories. Interrogatory 8 and appellent's response was:

"8 State in detail all evidence you have, including any anticipated testimony that Myers Timber Company Inc. was responsible for the actions of Levister Logging and/or George Rogers at the time of this collision. RESPONSE: See attached deposition of George Rogers."

The only evidence appellants had at the time they answered respondent's interrogatories that Myers was responsible for the actions of George Rogers, March 16, 2010, was the deposition of George Rogers. After bringing the suit the appellants attempted to uncover evidence of agency through discovery and numerous depositions but there is none because no agency relationship existed.

Rogers testified he had worked for Levister for about one year and Dale Dove asked him about Levister's relationship with Myers Timber. "Q: I don't understand the relationship that Charles Levister then had a boss man. Help me understand what that means? A: Ok, it's, like, he's got a man that go around and don't do nothing but buy wood for certain people. Ok? Q: Ok. A: Charles cut the wood, hauled it, then on Friday he would take these tickets to this man and this man would pay him off." (George Rogers deposition P12 L2-L12)

On the day of the accident, Mr. Levister and a representative of Myers Timber were walking the line around the Faulkenberry tract. (P16 L17-L20) Rogers' truck was

loaded by Levister employees (P19 L23-L25) Rogers didn't see the Myers employee do anything else except show Levister the property line and redirect the truck Rogers was driving to Chester. The Myers representative suggested that the load be sent to Chester and "Mr. Levister told us, he'd say, well, that's ok with him. We would go ahead and finish it like that, send it over to Chester, then, if that's what he wanted you to do." (P26 L11-L14) The Myers representative didn't do anything about helping with the loading or tell anybody anything else to do that day. (P28 L1-L3) The amount of wood to put on the truck was left entirely up to Mr. Levister." (P28 L13-L23) Rogers was paid weekly with a check from Levister Logging. (P31 L5-L21) "Q: On that day, did Mitch Myers participate in anyway at all...in the loading of that truck? A: No." (P49 L20-L23)

Rogers generally drove Levister's truck home (Rogers deposition P33 L8-12). The night before the accident, Rogers had kept the truck overnight. (Rogers deposition P9 L15-P10 L3)

As a result of injuries received in this collision, Rogers filed a worker's compensation claim with Forestry Mutual Insurance Company, worker's compensation coverage Charles Levister provided. (P45 L15-P46 L15)

In his criminal trial, State of South Carolina vs. George Rogers (2007-GS-12-333 & 334), Rogers testified that he worked for Mr. Levister and was paid $35.00 a load (P4 L3-L7). On this day Mr. Levister's son loaded the truck, he determined how much timber to put on the truck. Rogers relies on "the loader man" to properly load the truck (P9 L6-L23). Mr. Levister provided and maintained the trucks (P4 L8-P4 L4).

There is nothing in George Rogers' testimony at his criminal trial or in his deposition in the prior suits evidencing agency between Levister and Myers.

## LAW

"South Carolina Requests to Charge" by Ralph Anderson, under the title, "Test for Independent Contractor vs. Employee" states:

*"The determination of whether the relationship of independent contractor and contractee has been established, rather than that of master and servant, depends largely on the facts of each case, subject to certain established general principles. Although the general test applied is one that focuses on control by the employer, it is not actual control then exercised, but whether there exists a right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment. The fundamental test is the right of the employer to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, that gives rise to the relationship of employer and employee.*

*Generally, the relations of independent contractor and an employee are distinguished by the extent of the control which the employer exercises over the employee*

*in the manner in which he performs his work. Where the will of the employer is represented only in the result, and not in the means by which it is accomplished, and the employer retains no control over the employee as to the manner or means of accomplishing the desired result, the employee is an independent contractor, and he, not his employer, is responsible for his own acts and contracts....*

*The four elements which determine the crucial right of control are:*

*(1) direct evidence of the right to or exercise of control;*

*(2) method of payment;*

*(3) furnishing of equipment; and*

*(4) right to fire."*

*See also Young vs. South Carolina Department of Disabilities and Special Needs, 649 SE 2d 488, 374 S.C. 360 (2007) and Porter vs. The Labor Department, 643 SE 2d 96, 372 S.C. 560 (2007)*

In this case, Myers had no right to exercise control over Levister. Levister could harvest the timber and transport it in any manner Levister saw fit. Myers paid Levister based on the end result, the amount of timber harvested and delivered. Levister furnished

all of its own equipment. Myers had no right to hire or fire employees of Levister including George Rogers.

In Young vs. Warr, 165 SE 2d 797; 252 SC 179 (1969) our Supreme Court held:

*"The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the result of his work."*

In this case, Levister contracted to do a piece of work according to his own methods, without being subject to the control of Myers Timber except as to the result of his work. Levister could harvest in any manner he wanted to, load the trucks in any manner he wanted to, transport the timber in anyway he wanted to. The Young vs. Warr Court cited with approval Moller vs. DeRose, California Appellant, 222 P 2d 107 for the proposition that, *"the belief of the parties to the contract as to whether the relationship between them was that of an employer and employee or was that of an independent contractor...was entitled to some weight in determining the nature of the relationship."*

In this case, as can be seen from the depositions, both parties believed the relationship between them was that of an independent contract. The Warr case cited with

approval Bersons vs. Raven, 187 Or. 1, 207 P 2d 1051, for the fact that issuance of safety regulations by a lumber company to an independent contractor operating log trucks could not be regarded as the giving of directions so as to change their status to that of servants. *"In the case of Dave Lehr vs. Brown, 127 Tex. 236, 91 SW 2d 693, it was held that where the alleged employer reserved the right to refuse to give a truckman further work if he disobeyed traffic rules had no substantial evidentiary value in determining whether employer-employee relation existed."*

*"The right on the part of Southeastern to designate the place where the automobiles were to be picked up and the route to follow in delivering the cars to Darlington was but a right to designate the result to be obtained and did not give Southeastern any control for the obtaining of that result.*

*The mere fact that one of the contracting parties is entitled to give general directions as to what is to be done without control of the method or means of doing it does not necessary have the effect of creating the relationship of principle on agent or master and servant because such relates only to the result to be attained...*

*Here, the evidence is susceptible of the conclusion that Southeastern was interested only in the result to be obtained but had no supervision or control over the details of how the respondent would perform to work."*

Creighton vs. Coligny Plaza Limited Partnership, 334 SC 96, 512 SE 2d 510 (1998) was a case in which the issue was whether the lessor of premises to a lessee who conducted a restaurant on the premises was responsible to a patron injured in a slip and fall action on the premises because the lessor hired D&M Company to perform landscaping and maintenance at the premises. D&M was required to maintain the shrubs and bushes around the lessee's building and therefore voluntarily assumed a duty to maintain the entrance steps to the lessee's restaurant. The trial court ruled that D&M was an independent contractor and the lessor was not liable for any negligence by D&M in maintaining the entrance. The Court held:

*"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work."* In the Creighton case, the lessor did not furnish any equipment to D&M to perform the maintenance at the Plaza, the lessor had no authority to hire of fire D&M employees. Periodically, the lessor's agents walked the grounds and showed D&M specific things that needed to be done such as repairing pot holes and replacing or moving shrubbery but nothing in the record showed that the lessor controlled the manner or means that D&M used to accomplish the requested work. Our Court of Appeals held the trial court correctly rule that D&M was an independent contractor.

In Grey vs. Clud Group, Limited 528 SE 2d 435, 339 SC 173 (2000) our Court of Appeals cited Young vs. Warr, supra, in stating that there are four factors to determine

the right of control. *They are: (1) direct evidence of the right of or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Tharpe vs. G.E. Moore Co. 254 SC 196, 200, 174 SE 2d 397, 399; Spivey vs. B. G. Construction Company 321 SC 19, 467 SE 2d 117.*

In Chapman vs. Jones 212 SC 215, 47 SE 2d 302 (1948) our Supreme Court was called upon to interpret whether a contract created an employee/employer relationship or whether one of the parties to the contract was an independent contractor. At issue was a contract between the owner of a minstrel show and respondent Jonny Jones Exposition, Inc. which booked the minstrel show. In holding that Minstrel show was an independent contract, our Supreme Court noted that the owner of the Show, Hauser *"was engaged in a distinct and independent business which required skill... Respondent (Jones Exposition) had no right to hire or discharge any member of the minstrel and it is difficult to see how there could be very effective control without such right. He could not change or modify the various acts and could not direct any entertainer as to what he should do....The mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control over the methods or means of doing it does not necessarily have the effect of creating the relation of principle and agent or master and servant." The Court cited with approval Rigers v. Florence Railroad Company, 31 S.C. 378, 9 SE 1059 for the proposition that the reserved control, to have the effect of making the relation of that the employer and employee "must be both general and special, and not only as to what work shall be done, but also how it shall be done."*

In Tharpe vs. G.E. Moore Company, 254 S.C. 196, 174 SE 2d 397 (1970) our Supreme Court held:

*"Tharpe was entitled to payment only on a completed project basis, which is indicative of independent contractor status...He did not earn wages or salary as an employee."*

The case of Fulton vs. Westvaco decided by the United States Disctrict Court for the District of South Carolina, 930 F Supp. 1115; March 27, 1995, is almost identical to this case. It was a tort action arising out of an automobile accident between the Plaintiffs, Fulton, against a timber broker, Westvaco, because the Plaintiffs were injured by an employee of Ard Logging Company which was cutting and hauling timber for Westvaco. Westvaco moved for Summary Judgment. The Federal Court stated in that case:

*"In this case, the facts are not in dispute. Westvaco operates a chip mill in Andrews, South Carolina. In order to supply wood to the mill, Westvaco enters into contracts with independent logging companies. At the time of the Plaintiff's accident, Ard Logging was operating under one such contract called a Cut & Haul Agreement. Under this Agreement, Westvaco was 'entitled to the cutting and hauling of wood on the conditions set forth in [the[] Agreement' but had 'no right to control the manner of performance by [Ard Logging].' Under the Agreement, Ard Logging agreed to:*

*Furnish its own equipment;*

*Hire, fire and supervise its own employees;*

*Pay its own employees;*

*Keep all employee records and make all payroll payments and deductions;...*

*Obtain and maintain its own insurance, including general liability, public liability, and worker's compensation;...*

*Westvaco paid Ard logging for wood "by the ton" at the end of each week. Deductions were taken from Ard Logging's compensation for insurance and to repay a bank loan with South Carolina National Bank. Ard Logging chose to have these deductions made and expressly agreed to these deductions each week.*

*Ard Logging always supplied all of its own equipment...The vehicle Britton was driving at the time of the Plaintiff's accident belonged to Ard Logging...*

*Ard Logging had eight of its own employees. All of the employees were hired, supervised, disciplined, and fired by Ard Logging.*

*Ard Logging paid its employees directly, by check,...*

*No income or social security taxes were withheld by Westvaco from Ard Logging's compensation.*

*Ard Logging withheld taxes for each of its employees...*

*Ard Logging acquired insurance through the Davis-Garvin Agency, a company that offered group rates to Westvaco loggers.*

*Westvaco did not supervise Ard Logging's operations...*

*Ard Logging maintained its own schedule,...*

*Under South Carolina law, an employer is not liable for the torts of an independent contractor...*

*In determining the nature of the parties' relationship, South Carolina courts consider a number of factors:*

*(1) The contract between the parties;*

*(2) Whether there is direct evidence that the employer had the right to, or did, exercise control;*

*(3) The method of payment;*

*(4) Which party furnishes the tools and equipment used by the worker; and*

*(5) Which party has the right to terminate the relationship...*

*South Carolina case law is replete with timber cutting and hauling cases which address this specific issue. The case of Norris v. Bryant, 217 S.C. 389, 60 SE 2d 844 (1950), is particularly persuasive because (1) the contract involved in Norris contained many of the same provisions found in the Westvaco-Ard Logging Agreement; (2) both cases involve an "employer" who hires an independent contractor to perform cutting and hauling services; (3) both "employers" required the logger to cut trees of certain type and dimensions; (4) both of the independent contractors were paid on a "per foot" or "per ton" basis; (5) both contractors were required to obtain insurance; (6) both "employers" deducted money for insurance payments; (7) both contractors were required to comply with state and federal laws; and (8) both cases involve a third person injured by an independent contractor who seeks to hold the "employer" liable. In addition, Norris involved a motion for directed verdict which was granted by the trial judge, Judge Robert Martin, Jr., who found the logger to be an independent contractor as a matter of law. This Motion fo Summary Judgment requires that I apply a similar standard of review.*

*In addition to the Norris decision, an analysis of the traditional factors considered by South Carolina courts in determining the character of the parties' relationship compels the conclusion that, as a matter of law, Ard Logging was an independent contractor for Westvaco.*

*First, considerable weight is given to the contract between the parties.... The contract states that Ard Logging is an independent contractor of Westvaco, and the parties conducted themselves accordingly. This factor must be given considerable weight..." Young, 165 SE 2d at 802...*

*Second, the right or power to control retained by Westvaco is an "essential criterion."*

*In the timber cases, South Carolina's Supreme Court has consistently found that no master-servant relationship exists where the employer's relationship to the worker is limited to the delivery of a commodity under a contract. See, e.g., Pyett v. Marsh Plywood Corp., 240 S.C. 56, 124 SE 2d 617 (1962); Norris, 217 S.C. 389, 60 SE 2d 844; Miles v. West Virginia Pulp & Paper Co., 212 S.C. 424, 48 SE 2d 26 (1948); McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 SE 2d 872 (1947). In this case, Westvaco did not have the right to, nor did it, exercise control over the method of performance by Ard Logging...Ard Logging was solely responsible for hiring, firing, and supervising its own employees. South Carolina's Supreme Court has held that "it is difficult to see how there could be very effective control" without the right to hire or discharge the employees*

*performing the work. Chatman v. Johnny J. Jones Exposition, 212 S.C. 215, 47 SE 2d 302, 304 (1948)...*

*The third factor to be considered is the method of payment between Westvaco and Ard Logging. In the timber cutting and hauling cases where workers were not paid by salary or wages, the South Carolina Courts have frequently rejected arguments that master-servant relationships exist....*

*In the case at bar, Ard Logging was not paid a wage or salary. Westvaco paid Ard Logging based [**11] on the number of tons and type of wood delivered. Westvaco did not pay Britton or any of Ard Logging's employees ...Payment to Ard Logging on a "per ton" [81120] basis is the third factor which indicates an independent contractor relationship existed.*

*In many cases, the South Carolina Supreme Court has also considered failure to deduct taxes from the earnings of the worker as an indicator that no master-servant relationship exists. See Young v. Warr, 165 SE 2d at 804; Chatman, 47 SE 2d at 302.*

*The fact that Westvaco did not furnish Ad Logging with any tools or equipment is a forth factor which indicates an independent contractor relationship. In the timber cutting and hauling cases, the South Carolina Supreme Court has consistently found that the worker who furnishes his own vehicle and equipment is not a "servant."... Pyett, 240 S.C. 56, 124 SE 2d 617, and Norris, 217 S.C. 389, 60 SE 2d 844...*

*The fifth and final factor that South Carolina courts consider is whether the employer has the "right to fire" the worker. Where the parties' relationship is defined by contract, the courts have rarely found a master-servant relationship. See, e.g., Pyett 240 S.C. 56, 124 SE 2d 617; Norris, 217 S.C. 389, 60 SE 2d 844: Chatman, 212 S.C. 215, 47 SE 2d 302. In Norris, the court found that the worker was an independent contractor where the principal had no right to terminate the contract as long as the contractor fulfilled the conditions and requirements set forth therein. 60 SE 2d 844."*

## ARGUMENTS

RESPONDENTS ADDITIONAL SUSTAINING GROUND:

DID THE TRIAL JUDGE ERR IN FINDING THAT THE AGREEMENT BETWEEN LEVISTER AND MYERS WAS "TERMINABLE BY EITHER PARTY AT WILL"?

The appellants set forth this finding in their statement of the facts (P5) and in their argument of every issue set forth in appellants' brief (P8, 11, 12, &14). In support of this proposition appellants give two cites: Stines' deposition at page 27 Lines 10-17 and Myer's deposition at page 89 Lines 7-18. Taken in context, it is clear that Stines and Myers are testifying that they had no right to fire Levister employees and in the event

Levister breached the contract, Myers could terminate the contract. Stines' deposition Page 26 Line 24-Page 27 Line 17 states; (questions by Dove)

"Q: Have you ever had to fire a logger for safety or causing a problem?

A: No sir, not to my recollection.

FCW: I'm going to object to the form of that question, as to "firing." When you're a logger, I think according to Mr. Myers' deposition, they terminated the contract. And I assume that's what you meant by "firing"?

Dove: Yes.

FCW: Okay, withdraw my objection.

Q: So, the loggers don't actually – they're not employees for Myers Timber.

A: No, Independent contactors. They can leave anytime we want to and we can tell them, you know, "We don't want y'all cutting anymore wood for us. That's kind of, you know, -"

Q: Okay.

A: The way it goes."

Putting the portion of the Myers' deposition cited by appellants to support this proposition, which is page 89 line 7-18, in context, Myers' testimony was; (Question by Dale Dove):

"Q: Mr. Myers, do you maintain that your employees were out there to make sure they weren't cutting over the line. Is that correct?

A: Correct.

Q: And, if you found out that a logger was cutting over the line, what would y'all do?

A: Well, the first thing we would do is we would correct it from the standpoint of going to Levister, or whoever the foreman was on the job, and make them aware of it. And the very next thing we would do would be to pick up the phone and try to find out who the adjoining landowner is by going to the county tax office; and then, you would, of course, go to them and have them come out, you know, and show them what happened.

Q: Okay.

A: Hopefully, that doesn't happen.

Q: What if you got out there and you found out that the logger wasn't – I mean, he just is a wreck. I mean, he was – you know, he won't keep it neat for the landowner. Suppose you got out there and it wasn't neat; I mean, they weren't doing the job you wanted them to do. What would you do, at that point?

A: Stop them from harvesting. I'd go to Levister and say, "This relationship's not working."

Both Stines and Myers are stating Myers could terminate the contract if Levister breached it, they aren't stating Myers could terminate the contract for no reason.

In the Beach Company vs. Twillman 566 SE2d 863, 351 SC 56 (2002) our court of appeals held:

"The entirety or severability of a contract depends primarily upon the intent of the parties rather than up the divisibility of the subject, although the latter aides in determining the intention."

The nature of the Levister/Myers contract clearly shows it was not the intent of the parties that the contract be terminable at will. Under the contract, before Levister could receive any compensation for his work, he had to deliver timber to the purchaser of the timber. Prior to delivering any timber Levister had to learn the boundaries of the tract to be harvested, clear a place to load, move all of his harvesting equipment onto the tract, including skidders, loaders, knuckle booms, saws, trucks, etc., construct a loading dock, and construct an avenue or avenues of ingress and egress.

The harvesting equipment is substantial consisting of trucks, a knuckle boom, skidders, a loading dock, and loaders. Also, in regard to the Faulkenberry job, a road had to be built. George Rogers, at his criminal trial, was asked by his attorney, Carl Grant:

"Q: They had just cut the road to get you in the woods, right?

A: Yes, sir." (Transcript of George Rogers' testimony at his Criminal trial, P24 L24-P25 L1)

George Rogers' deposition states P7 L23- L25 "Well we had to clear off a place to put the load in the trucks, to drag the wood up to load the truck, make a dock, you know."

In his deposition, Dale Dove asked Fred Myers about how the cut and haul rate is set. Myers' response was:

"Some tracts would require....the rougher tracts would require a higher cut and haul.

Q: I got you.

A: Each tract of wood stands on its own.

Q: Okay.

A: So, if it is level and flat, it is sitting beside a paved road, it is going to carry one cut and haul rate. If it is a mile and a half back in the woods and you got to build roads to it, then it is going to carry another cut and haul rate." (Myers deposition P27 L18 – P28 L3).

The Faulkenberry job required the construction of an ingress and egress road and the whole job was only going to take a couple of weeks. Dale Dove asked Stines, in Stines' deposition:

"Q: Do you know, on the Faulkenberry job.....Faulkenberry tract, about how many acres that would have been.

A: Not exactly, no.

Q: Do you know about how long you would have expected it to take for a logger to do that work on that property, the work that they needed to do?

A: Probably a couple of weeks." (Stines' deposition P38 L4-11)

All of the evidence, as stated in the appellant's statement of the case, is that the contract was for Levister to harvest the Faulkenberry tract. Am Jur 2nd under Contracts Section 414, states:

"It seems clear that where one party contracts to do certain work or furnish certain property and the other to pay a certain price for the same the contract is entire, that is, indivisible."

Section 420 states:

"The fact that a contract calls for performance in installments does not necessarily make it a divisible contract. Whether such a contract is divisible or entire generally depends upon the intention of the parties ascertained by a construction of the contract. A provision in an entire contract for payment in installments, which installments are not referable to severable items or portions of the performance but are referable to the performance of the whole, does not render or categorize such contract severable."

This quote describes the Levister/Myers contract.

The payments by Myers were not referable to portions of the performance but referable to the performance of the whole. A substantial part of Levister's obligation consisted of setting up and preparing the Faulkenberry site to be harvested, for which there was no set amount to be paid. Levister had partially performed his contract obligation.

Even if the Levister/Myers contract was terminable at will, this does not establish agency. In the case of Norris vs. Bryant, 217SC389;60SE2d844, the portion relied on by the appellants the court took the terminality of the contract into consideration with a number of other factors and stated:

"All of these circumstances although no one of them is conclusive, tend to negative the independence of the contract and are sufficient to support a relation of mere casual employment." This case is discussed at length later herein.

Volume 17A if Am Jur 2nd, section 415 states:

"A factor in determining whether a contract is entire or separable is whether the parties reached an agreement regarding the various items as a whole or rather the agreement was reached by regarding each item as a unit. (131 ALR 779) The contract may, both in its nature and by its terms, be severable and yet be made entire by the intention of the parties." (415)

Section 416 states the criterion is whether the service as a whole is of the essence of the contract. "If it appears that is to performed only as a whole, the contract is entire....that is, if it appears that the purpose is to take the whole or none, the contract is entire; otherwise it is severable."

1A. DID THE TRIAL COURT ERR IN FINDING AS A MATTER OF LAW THAT MYERS HAD NO RIGHT OR POWER TO CONTROL OR DIRECT THE MANNER OR PERFORMANCE OF LEVISTER'S WORK?

Appellants argue that since Myers redirected George Rogers to a different mill than the mill he was initially scheduled to deliver the logs, Myers was controlling the details of Levister's work. Under the contract Myers told Levsiter where to deliver the logs; not how this result was to be accomplished.

The appellants argue that the Myers/Levister contract was terminable at will citing Norris vs. Bryan, supra. This issue was discussed under respondents' additional sustaining issue above. Appellant then states again, with cites: "the only terms in the oral agreement between Myers Timber and Levister were the cut and haul rates Levister was to be paid for the timber he cut and hauled."

Plaintiffs state, in the last paragraph of their argument concerning this issue, that since there was no written contract which set out the requirements of the work Levister was to perform, this required Levister to get directions from Myers Timber about numerous aspects of Levister's work. In support of this proposition, the Plaintiff's quote from Stines' deposition and Myers' deposition. The quotes do not support the statement

that Levister received directions on how to perform his job; the quotes simply state what Levister did to perform his job.

1B. THE TRIAL COURT ERRED IN FINDING AS MATTER OF LAW THAT MYERS TIMBER HAD NO RIGHT TO FIRE LEVISTER PERSONNEL INCLUDING GEORGE ROGERS. Appellants base their argument of this issue on the fact that the contract between Myers and Levister was terminable at will. This has already been discussed.

1C. DID THE TRIAL COURT ERR IN FAILING TO FIND MYERS RIGHT TO AND EXERCISE OF CONTROL OVER LEVISTER'S USE OF EQUIPMENT CREATED A GENUINE ISSUE OF MATERIAL FACTS PRECLUDING THE ENTRY OF JUDGMENT?

Myers contract with Levister required Levister to harvest the timber on the Faulkenberry tract and deliver it to purchasers designated by Myers. It is clear from the record that Levister controlled the means of accomplishing this result.

Appellents next discuss the fact that a Myers Timber employee, Stines, suggested that a load of logs that had been loaded for the New South Mill but couldn't be delivered because the New South Mill was inoperable be sent to Chester. There is no question that pursuant to Myers contract with Levister, Myers directed where the timber was to be hauled, but Myers had no control over the manner in which it was hauled. Rogers' deposition on page 26 lines 3 – 18, states, (Questions by Dove):

"Q: When you told him about loading pulpwood on your truck did the bossman Myers actually respond to your comment?

A: Yeah. He said, well, since you already got logs on there let's just finish the load and send it on to Chester. That was his idea.

Q: Okay. And then, I mean, did somebody say, yeah, we'll do that or who made that decision?

A: Well, Mr. Levister told us, he say, well, that's okay with him. We should go ahead and finish it like that, sent it over to Chester, then, if that's what he wanted you to do.

Q: And then, who told Chuck what to do, or –

A: Mr. Levister"

The case of Norris vs. Bryant et. al. (supra) is similar to the case at bar.

Norris brought an action against a timber broker like Myers named Poinsett Lumber and Manufacturing Co. and a logger named Grant. The relationship between Poinsett and Grant was very similar to the relationship between Myers and Levister with the exception that Poinsett owned the land from which the timber was to be harvested and owned the sawmill to which the timber was to be transported. The trial judge directed a verdict in favor of Poinsett ruling that Grant was an independent contractor as a matter of law. In that case, as in the case at bar, Grant was paid by Poinsett a specific rate, $23.00 per thousand board feet, to harvest and haul the timber. In that case, Poinsett had more

authority over Grant than Myers had over Levister. Poinsett reserved the right to limit the cutting and hauling of the timber during a period of not more than three months or to entirely stop same for such length of time. As far as deemed necessary for the protection of the future stand of timber, the plan of logging operations was to be approved by Poinsett. All felling and bucking were to be done according to the instructions by representatives of Poinsett when he deemed such instructions were necessary. All logs cut were to be hauled within a certain time and as far as practicable in the order in which they were cut. Grant was to be governed solely by Poinsett's needs and condition of the logs to be harvested. Grant was authorized to build on the lands of Poinsett any necessary camps and roads, but they were to be located and operated to the satisfaction of Poinsett's manager. Grant had to assist in fighting forest fires on the property. Poinsett deducted from the amounts paid Grant [$23.00 per thousand board feet] funds to apply against insurance payments defrayed by Poinsett and funds for the purpose of insuring the payment of all indebtedness owing by Grant to Poinsett and any sum which Poinsett was required to pay on account of the acts or conduct of Grant or his employees.

Poinsett had the right under its contract with Grant to require satisfactory proof of payment by Grant of all monies owed and payable for any labor or services performed or rendered to Grant, or for any goods or materials furnished to, or on behalf of, or on the request of Grant in connection with his performance of the contract. Poinsett had the right to deduct any amount so owed from any amount owing to Grant in connection with this performance of the contract at any time and to pay the deducted funds to the party to whom the same may be owed and payable.

The contract required Grant to procure a public liability insurance policy and a workman's compensation liability insurance policy covering all Grant's employees. The foregoing are the provisions of the contract the Supreme Court stated were relevant to the question of whether the contract created the relation of independent contractor. The Court determined Grant was an independent contractor stating:

"The foregoing conclusion is fully sustained by the decisions of this Court in *Rogers v Florence Ry. Co., 31 S.C. 378, 9 S.E. 1059; McDowell et al. v. Stilley Plywood Co., et al., 210 S.C. 173, 41 S.E. 2d 872; and Chatman v. Johnny J. Jones Exposition, Inc, 212 S. C. 215, 47 S.E. 2d 302,* Hauling contractors of a similar nature have also been held to create the relation of employer and independent contractor in other jurisdictions. *Arkansas-[**848] Louisiana Gas Company et al. v. Tuggle, 201 Ark. 416, 146 S.W.2d 154; Marion Machine, Foundry & Supply Co. v. Duncan, 187 Okla. 160, 101 P.2d 813; Bryson et al. v. Gloucester Lumber Co. et al., 204 N.C. 664, 169 S.E. 276; [***15] Johnson v. Bryne & Speed Coal Corporation, 271 Ky. 216, 111 S.W. 2d 671; Smith Bros., Inc. v. O'Bryan, 127 Tex. 439, 94 S.W.2d 145; Crosby Lumber & Manufacturing Co. et al. v. Durham, 181 Miss. 559, 179 So. 285,; 854; Burton-Lingo Company v. Armstrong, Tex. Civ. App., 116 S.W.2d 791.*

*It is argued that under the terms of the contract Poinsett had control over a substantial portion of the work. But it is clear from a consideration of the entire contract that the general direction and supervision reserved to Poinsett related only to the result to be attained and not to the details of the operation. The general control reserved to*

*Poinsett was not nearly as strong as that reserved in the contracts involved in the decisions of this Court heretofore mentioned."* [emphasis added]

The general control reserved to Myers was not nearly as strong as that reserved to Poinsett.

Another issue on appeal in *Norris v. Bryant* was whether or not Chappell, who furnished a truck and driver to Grant, was an independent contractor. The trial court ruled that he was and directed a verdict in favor of Grant on that issue; the Supreme Court reversed. In addressing that issue, which is not factually similar to the case at bar, the Court stated the contract between Grant and Chappell was subject to termination by either party at any time, therefore Grant could control and direct the means and manner of the performance of the work and placed Chappell in a position of complete subservience. Myers had no right to terminate its contract with Levister absent a breach of the contract by Levister, and the relationship between Grant and Chappell is not factually similar at all to be the Myers/Levister relationship.

In discussing the Norris vs. Bryan case of the trial court , it stated in Judge Goldsmith's order. "The relationship between Levister and Myers is much closer to the relationship between the landowner and Grant than the relationship between Grant and Chappell." It is clear from the Supreme Court's decision and Judge Goldsmith found:

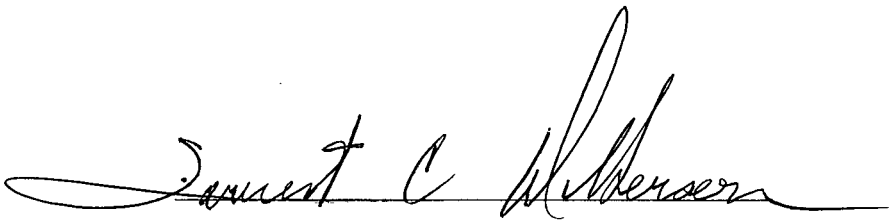
The relationship between Grant and Chappell appeared to be suspect. While Grant asserted that Chappell was an independent contractor, Grant could recall few facts concerning the business relationship that he had with Chappell. Shortly after the

accident, Grant bought the truck that had been involved in the accident. Chappell did not testify. Chappell is the brother-in-law of Grant. Hauling timber was not part of Chappell's regular business. Grant testified that either could terminate their relationship and the Court found that such an arrangement could infer that Grant had the right to control Chappell which is the essence of an employee-employer relationship. The Court said that the arrangement in question could be that of a casual employee and that this was a question for the jury.

1D. DID THE TRIAL COURT ERR IN FAILING TO FIND THAT MYERS RIGHT TO AND EXERCISE OF CONTROL OVER LEVISTER'S USE OF EQUIPMENT CREATED A GENUINE ISSUE OF MATERIAL FACT PRECLUDING THE ENTRY OF SUMMARY JUDGMENT? Appellents again mention that Myers Timber had the right to terminate Levister at will; this issue has already been discussed. The other arguments that Myers had the right to exercise control over Levisters' use of equipment is not supportive by the record.

**Conclusion**

The appellants initiated this suit with no evidence that Myers was responsible for the actions of Levister or Levister's employees. (Response to defendant's interrogatory number 8.) They initiated this suit hoping to discover evidence of agency relationship but none exists.



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*MYERS TIMBER COMPANY, INC.*

September 7, 2012

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case Nos.: 2010-CP-12-00137; 2010-CP-12-00136; 2010-CP-12-00135; 2010-CP-12-00134; 2010-CP-12-00133

Jane Cherry, Personal Representative of the Estate of Nicholas Wayne Cherry, Appellant,

v.

Myers Timber Company, Inc, Respondent.

Taylor C., a minor under the age of 14 years, by and through mother and natural guardian, Jane Cherry, Appellant,

v.

Myers Timber Company, Inc, Respondent.

Carlton Quinton as Personal Representative of the Estate of Hannah Nicole Quinton, Deceased, Appellant,

v.

Myers Timber Company, Inc, Respondent.

Alice Quinton and Carlton Quinton, Appellents,

v.

Myers Timber Company, Inc, Respondent.

Carlton Quinton as Guardian for Timothy Q., a Minor under the Age of Eighteen, Appellent,

v.

Myers Timber Company, Inc, Respondent.

PROOF OF DELIVERY

I certify that I have served Respondent's Final Brief on the Appellants by hand delivering a copy to D. Bradley Jordon, one of the attorneys for the Appellants, at 546 East Main Street Rock Hill, SC on September 7, 2012.

September 7, 2012

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CERTIFICATE

I certify that Respondent's Final Brief complies with Rule 211(b) except that Respondent made a motion to change its Initial Brief in 16 particulars, that motion was uncontested therefore the Final Brief also includes those 16 changes.

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