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IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHESTER COUNTY  
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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

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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, Appellants,

v.

Myers Timber Company, Inc, Respondent.

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COURT OF APPEALS

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

v.

Myers Timber Company, Inc, Respondent.

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FINAL REPLY BRIEF OF APPELLANTS

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## ARGUMENT

### RESPONDENT'S ADDITIONAL SUSTAINING GROUND:

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

Respondent posits as an additional sustaining ground that the trial court erred in finding that the agreement between Levister and Myers was terminable at will. In support of its contention, Respondent cites deposition testimony that it claims suggests that the agreement was terminable only upon a breach by either party. The evidence in the record does not support such a conclusion. In fact, the undisputed testimony in the record as cited in the Initial Brief of Appellants is that either party could terminate the agreement for any reason. The deposition testimony of David "Mitch" Stines cited in Respondent's Initial Brief at pp. 19-20 clearly establishes that Myers could terminate Levister for any reason:

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

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

Q: Okay.

A: -- the way it goes.

(R. p. 43, lines 10-17.)

Despite Respondent's contention to the contrary, none of the remaining deposition testimony cited in Respondent's Initial Brief in support of its additional sustaining ground supports the conclusion that the agreement was not terminable at will. A close reading of the quoted testimony merely reveals examples of circumstances under which Myers would have terminated the agreement, for example, if a logger was "cutting over the line". (R. p. 130, lines 7-18.) There simply is no evidence in the record that the agreement between Myers and

Levister was terminable only upon the breach by one of the parties. As such, the trial court did not err in finding as a matter of law that the agreement was terminable at will.

Moreover, even if there were evidence in the record suggesting that the agreement was terminable only upon a breach by one of the parties, when taken together with the deposition testimony of Mr. Stines cited above that Myers could terminate the agreement at any time "we want to", it would only create a genuine issue of material fact with respect to the issue which would be for a jury to decide. The materials Respondent cites with respect to whether a contract is divisible are not relevant to the analysis of whether the entirely oral agreement here was terminable at will.

**I. DID THE TRIAL COURT ERR IN GRANTING MOTION FOR SUMMARY JUDGMENT BY FINDING AS A MATTER OF LAW THAT LEVISTER WAS AN INDEPENDENT CONTRACTOR OF MYERS?**

Respondent cites previous logging cases for the proposition that the relationship here between Respondent and Levister was that of an independent contractor as a matter of law. While it is correct that of the reported cases involving the nature of relationships in the logging industry the majority have found the existence of an independent contractor relationship, the analysis of such relationships are necessarily fact specific and each must be determined on its own facts. *See Norris v. Bryant*, 217 S.C. 389, 398, 60 S.E.2d 844 (1950) ("It is generally recognized that it is impossible to formulate a fixed or absolute rule applicable to all cases and that each must be determined on its own facts.") As discussed below, *Norris* is the most factually analogous case to the instant case. There, the Court held that a relationship substantially similar to the one at issue here created a jury question as to the nature of the relationship precluding the entry of a directed verdict.

**A. The trial court erred 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.**

Respondent apparently contends that it had no right or power to control or direct the manner or performance of Levister's work relying on its argument that the agreement was not terminable at will. As discussed above, there is at least a genuine issue of material fact as to whether the agreement was terminable at will. As such, and as discussed more fully in Appellants' Initial Brief, there is at least a genuine issue of material fact as to whether Appellants had the right or power to control or direct the manner of performance of Levister's work, which is the "decisive test in determining whether the relation of master and servant exists . . ." See *Jamison v. Morris*, 385 S.C. 215, 684 S.E.2d 168, 171 (2009). Moreover, as stated in Appellants' Initial Brief, the absence of any terms in the agreement beyond the cut and haul rate necessarily required Respondent to direct and control the manner or performance of Levister's work in order for Respondent to comply with the terms of its contract with the landowner.

**B. The trial court erred in finding as a matter of law that Myers Timber had no right to fire Levister's personnel, including George Rogers.**

In response to Appellants' arguments in this regard, Respondent relies on its contention that the trial court erred in finding as a matter of law that the agreement here was not terminable at will. As discussed above, there is at least a genuine issue of material fact as to whether the agreement was terminable at will. As such, and as discussed more fully in Appellants' Initial Brief, there is at least a general issue of material fact as to whether Respondent had the right to fire Levister's personnel thereby precluding the entry of summary judgment.

**C. The trial court erred in failing to find that Myers Timber' right to exercise control over material elements of payment to Levister created a genuine issue of material fact precluding the entry of summary judgment.**

Respondent does not appear to address this argument in its Initial Brief except perhaps to argue that the Court's decision in *Norris v. Bryant*, 217 S.C. 389, 398, 60 S.E.2d 844 (1950) supports the entry of summary judgment here. Respondent, and the trial court, are mistaken in this regard.

In *Norris*, the Court examined two separate relationships and determined that one such relationship, between Poinsett Lumber and Manufacturing Co. and a logger name Grant, was an independent contractor relationship as a matter of law, justifying the entry of a directed verdict on that issue. As to the other relationship, between Grant and another logger, Chappell, the Court held that the evidence created a factual question for the jury as to the existence of a master-servant relationship precluding the entry of a directed verdict. Respondent argues, and the court below found, that the relationship between Respondent and Levister in the instant case was more like the relationship between Poinsett and Grant than the relationship between Grant and Chappell. Respondent is mistaken.

In *Norris*, Poinsett and Grant entered into a rather lengthy written contract that detailed the relationship between the parties and set forth the duties and obligations of each. 217 S.C. at 395-98. The written contract also specified that the parties agreed that Grant was an independent contractor of Poinsett. *Id.* at 397. The Court analyzed the relationship between the parties with reference to the terms of the written contract and concluded that "the contract in question created the relation of independent contractor." *Id.* at 398.

By contrast, the Court concluded that the trial court had erred in directing a verdict in favor of Grant on the ground that Chappell was an independent contractor. A fundamental difference in the analysis of the two relationships was

the absence of a written contract between Grant and Chappell. Grant had a verbal contract with Chappell pursuant to which Chappell was to furnish a truck and driver and haul logs from the loader to the pond at Poinsett's plant on the basis of \$12.50 per thousand feet. *Id.* at 400-01. Grant testified that he did not own the truck, that he had no control over the driver and gave no instructions to him, that he did not carry liability insurance on this truck, and that his understanding was that Chappell was an independent contractor. *Id.* at 401. In addition, the agreement was indefinite as to duration and the quantity of logs to be hauled and was subject to termination by either party at any time. *Id.* at 404. As such, the Court concluded that "[i]t could be reasonably inferred that through the power to terminate the contract, Grant could control and direct the means and manner of the performance of the work and place Chappell in a position of complete subservience." *Id.* The Court held that [a]ll 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." *Id.*

Here, as it was between Grant and Chappell, the contract was verbal, terminable at will and the only terms were the cut and haul rate Respondent was to pay Levister. As such, the question of whether Levister was an employee or an independent contractor of Respondent is a question for the jury precluding the entry of summary judgment.

**D. The trial court erred in failing to find that Myers Timber' 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.**

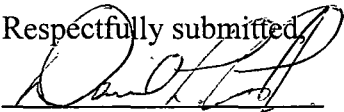
Respondent argues that because the agreement here was not terminable at will, this factor supports the finding of an independent contractor relationship as a matter of law. As discussed above, there is at least a genuine issue of material fact as to whether the agreement was terminable at will. As such, it is for a jury to

determine that issue, as well as the impact that issue has on the analysis of this factor, thereby precluding the entry of summary judgment.

### CONCLUSION

Appellants have demonstrated that there exists evidence of material fact supporting that Myers Timber retained sufficient control over operational aspects of Levister's work so that Myers Timber may be liable for negligent acts of Levister. Wherefore, the Order of the court below granting Respondent's Motion for Summary Judgment should be reversed.

September 11, 2012

Respectfully submitted,  
  
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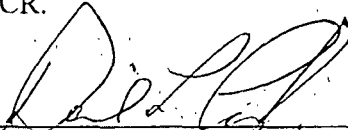
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CERTIFICATE OF COMPLIANCE

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I hereby certify that the Final Brief of Appellants and the Final Reply Brief  
of Appellants comply with Rule 211(b), SCACR.

September 11, 2012



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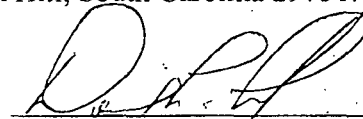
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PROOF OF DELIVERY

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I certify that I have served the Final Brief of Appellants and the Final Reply Brief of Appellants on Respondent Myers Timber Company, Inc. by hand delivering a copy of them on September 11, 2012, to its attorney of record, Forrest C. Wilkerson, 223 E. Main St., Suite 402, Rock Hill, South Carolina 29731.

September 11, 2012



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