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Mississippi Court Rejects Expansive Reading of Oral Construction Contracts

BY:

In *McKean, et. al. v. Yates Engineering*, 2015 Miss. App. LEXIS 446 (2015), the Court of Appeals of Mississippi affirmed the Circuit Court's dismissal of four (4) plaintiffs' personal injury claims stemming from the collapse of scaffolding at a construction site in Meridian, Mississippi.

The project at issue involved the construction of a new multi-story medical building, a parking garage and other structures at the Anderson Regional Medical Center ("ARMC"). Foil Wyatt Architects and Planners PLLC ("Foil") was retained to prepare overall design drawings for the project. Yates Construction ("YC") was retained as the general contractor pursuant to an oral contract. YC in turn hired Spectrum II ("Spectrum") to perform concrete work. All plaintiffs were employed by Spectrum.

Excavation and other work began in 2008. By September, 2008, foundation walls and the first floor concrete slab had been poured. YC asked engineer Ted Pope to draft drawings of scaffolding and formwork necessary to complete the second story concrete work. Pope was employed by Yates Engineering ("YE"), described as a "sister company" of YC. YE's retention to design the scaffolding and formwork was not reduced to writing. The scaffolding was intended not only to permit workers access to elevated work areas; it was also designed to keep the concrete forms properly positioned while the concrete cured.

Engineer Pope's design contemplated the use of 4" x 4" posts in 24 foot lengths. However, the posts were not milled at that length. Nevertheless, YC accepted the design drawings without comment. YC installed 12 foot long posts that were "spliced" together with short lumber pieces nailed to each of the 12 foot posts. YC never informed Mr. Pope or anyone else at YE that the scaffolding being installed was in derogation of Pope's scaffold requirements and design. In November, 2008, while Spectrum workers were on the scaffolding pouring the concrete slab for the second floor, the scaffolding collapsed, causing plaintiffs to fall and allegedly sustain various injuries.

In September, 2010, plaintiffs filed a tort suit against YC in Mississippi Circuit Court. YC filed a pre-answer motion to dismiss, arguing that it was the "statutory employer" of the plaintiffs and thus immune to suit based upon the excessive nature workers compensation coverage and benefits to the plaintiffs. In February, 2011, the plaintiffs amended their complaint and added YE and Foil as defendants. Plaintiffs alleged that the new defendants negligently designed and inspected the scaffolding and formwork, leading to the structural failure of the scaffolding.

YC's general liability insurer filed a declaratory judgment action in Federal court, arguing that plaintiffs were statutory employees and thus YC was immune from tort suit. In March, 2013, the U.S. District Court for the Southern District of Mississippi issued a ruling agreeing with the insurer, and the state court action against YC was subsequently dismissed.

Plaintiffs then amended their complaint to add ARMC, alleging that the Medical Center negligently failed to obtain a written contract with YC, failed to supervise and inspect YC's work and failed to maintain its premises in a reasonably safe condition and warn of potential dangers.

Following a series of dispositive motions filed by each of the defendants, the Circuit Court found that neither YE, Foil or ARMC assumed the duty to inspect the construction work. Plaintiffs' action was thus dismissed.

Plaintiffs appealed the dismissal of their claims to the Court of Appeals of Mississippi. In an 8-1 decision, the Circuit Court's decision(s) was upheld. The appellate court initially noted that YE performed its design work without benefit of a written contract or specifically, language requiring YE to inspect the scaffolding and formwork. The court then examined a series of factors to assist in its determination of whether YE was nevertheless bound by a duty to inspect the work and discover the noncompliant scaffolding. In this regard, plaintiffs argue that engineer Pope visited the worksite and observed the concrete formwork being installed. However, the court pointed out that the formwork installation observed by Pope was for the lower portions of the building, not the second floor scaffolding and formwork. That one visit was found insufficient to impose a duty to inspect the structures and equipment YE designed.

The court next examined the causes of action asserted against ARMC. No written contract was available which defined the rights and obligations of the owner, ARMC, and its general contractor, YC. The court found that ARMC had "surrendered" the property to the general contractor at the excavation phase, prior to the concrete formwork being built. It also examined ARMC's role at the project after YC took over the site. "[W]hen a property owner contracts its responsibility for the site to a general contractor, and there is no evidence that the property owner maintained any control over an instrumentality that injured a subcontractor's employee, the property owner is not liable for the employee's injuries." *McKean* at 31. This conclusion is supported by the fact that ARMC administrators were not permitted to enter the construction area without first obtaining YC's permission. ARMC retained no control over the worksite.

Finally, the liability claims against architect Foil were evaluated. Its contract with ARMC stated, in pertinent part, that "[Foil] shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or safety precautions and programs in connection with the work, since these are solely the [general] Contractor's responsibility." Plaintiffs argued that Foil representatives visited the site on a weekly basis and checked the work to ensure that it conformed to the "Contract Documents." However, the appellate court found that this inspection practice supported Foil's "general authority to *reject* work that did not conform to the Contract Documents" but did not create a right of Foil "to *stop* the work." *Id.* at 40 [italics in original]. Thus, Foil lacked true supervisory authority that might permit extending liability in this suit.

In a lengthy dissent, Court of Appeals Judge Ceola James argued that inspection duties could be extended to YE as there was no contract language available to specifically rule out extending such duty. Judge James also pointed out that YE's engineer Ted Pope visited the site and observed that work had already begun on the lower building forms, although Pope had not yet submitted his overall plans for the scaffolding and forms to YC. Judge James reasoned that this situation arguably should have raised a "red flag" for Pope, and invited further inquiry. Also, compliance with YE's plans and lumber requirements was impossible, and should have triggered questions about the safest manner to complete the scaffolding.

In considering ARMC's liability, Judge James found the general consensus of the parties that ARMC retained the authority to stop work that was sufficient to raise a question of fact. This was so even though ARMC was required to ask YC for permission to enter the worksite.

Finally, the dissenting Judge noted that architect Foil exercised broad authority to supervise the work pursuant to its written contract and as reinforced by actual practice at the site. Judge James recounted the evidence supporting a supervisory role for Foil: weekly site visits, attending frequent onsite meetings involving the general contractor and subcontractors, worksite "walkthroughs" by Foil representatives and Foil's submission of specifications for the formwork and rebar to be utilized in constructing the second story. "It would seem natural that the supervision of safety is encompassed in the duty to supervise, and no separate agreement to supervise safety is necessary where the architect is supervising the details of every other aspect of the project." *Id.* at 64.

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The plaintiffs' application for an appellate rehearing was denied in early 2016. 2016 Miss. App. LEXIS 116. More recently, plaintiffs' application for a writ of certiorari to the Supreme Court of Mississippi was granted. 2016 Miss. LEXIS 246. Accordingly, that court will examine whether the conduct and unwritten authority of ARMC, YE and Foil are sufficient to deny defendants' summary judgment motions and leave the supervision question for the trier of fact.