IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2006-CA-00707

SHERRY SCALES — **APPELLANT**

VS.

LACKEY MEMORIAL HOSPITAL — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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Oral Argument is Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following parties have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sherry Scales, Appellant
2. Tim Goodwin
3. Dovis Goodwin
4. Lackey Memorial Hospital, Appellee
5. Michael P. Younger, Esq., attorney for Appellant
6. Louis G. Baine, III, attorney for Appellee
7. Honorable Judge Vernon Cotten, Scott County Circuit Court Judge

Respectfully submitted,

Michael P. Younger
Attorney for Appellant

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ISSUE ONE

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STATEMENT OF THE CASE

CASE

On April 22, 2003, the Appellee filed suit in the Circuit Court of Scott County, Mississippi against Lackey Memorial Hospital alleging negligence in failing to diagnose a heart attack in process and for failure to use the applicable standard of care in her treatment.

Ms. Scales went to the emergency room at Lackey Memorial Hospital on the 17th day of January, 2002 and was admitted to the emergency room suffering from extreme chest pains.

The mother and brother of the Appellant were present in the emergency room and relayed to the hospital a detailed history of heart trouble within Sherry Scales' family.

Many uncles and cousins in the family had died within their thirties and forties with severe heart trouble and Ms. Scales was experiencing extreme pain.

After begging the on-call doctor for some Nitroglycerin, which Ms. Scales' father had used for his heart, they finally gave Ms. Scales Nitroglycerin and the pain subsided.

After a while the pain returned and the emergency room staff failed to recognize and diagnose this as a heart attack in progress.

Later that same evening, Ms. Scales had to be transported to the Baptist Medical Center and then the next day underwent triple by-pass surgery after having suffered a heart attack.

For a long period of time, after the suit was filed, it was uncertain to the undersigned who the attorney of record was for the hospital itself. Honorable Bruce Smith of Mendenhall, Mississippi had contacted the undersigned and stated that he was the attorney for the hospital and he was unsure whether there was insurance coverage or not and this situation rocked on for many months.

It is important to note at this juncture, for later reference, that during the 2004-2005

period the undersigned had severe health problems and had undergone five surgeries in thirteen months.

Page, Kruger, & Holland was hired to represent the hospital and filed an answer and propounded some limited discovery, being one set of interrogatories directed to the Appellant.

During the course of answering the discovery, the Appellant's brother and mother and the Appellant herself executed sworn affidavits furnished to Lackey's counsel indicating the events that unfolded on the night of the heart attack and many offers were extended for their depositions to be taken by the attorney for the Appellee.

The treating physicians were listed in the answers to the interrogatories and said interrogatories were later supplemented to include another expert witness who is licensed to practice medicine in Mississippi, who practices in Birmingham, Alabama.

Counsel for the Appellee never noticed any of the persons listed in the answers to interrogatories for depositions and subsequently filed a motion for summary judgment.

After a hearing on the motion for summary judgment, the trial court granted same as will be stated more particularly in the statement of the facts.

This appeal is taken to challenge the granting of the summary judgment due to the limited amount of discovery that had gone on in the case at the time the motion for summary judgment was heard.

On the 22nd day of April, 2003 the Appellant filed a complaint in the Circuit Court of Scott County, Mississippi accusing the Appellee, Lackey Memorial Hospital of medical malpractice and negligence. (T.2)

On October 23, 2003 and answer and affirmative defenses were filed on behalf of the Appellee by the law firm of Page, Kruger & Holland. (T.9-12)

As is evident by the excessive amount of time between the filing of the complaint and the filing of the answer, it is important to note that there were other issues involved during this time period involving insurance coverage and who would be counsel for the Appellee.

Initially, after the complaint was served, the undersigned was contacted by Honorable Bruce Smith who was the attorney for the Appellee. A considerable amount of time, several months, passed before there was an issue as to whether there was or was not insurance coverage and whether or not Mr. Smith would be the one who would be handling the defense of the case.

The undersigned did not press the issue or request an answer believing in good faith that these issues would be resolved and the litigation could move forward.

Eventually, interrogatories were propounded from the Appellee to the Appellant and said interrogatories were answered on the 24th day of November, 2003. (T.Vol.1 Supplemental) (R.E.39)

The court should bear in mind that by the time these interrogatories had been answered, sworn affidavits had been furnished to counsel opposite from Dovis Goodwin, Tim Goodwin, and Sherry Scales detailing the events of the night in question involving the heart attack. Also, prior to this discovery being answered, offers were made to let those three individuals be deposed as well as the treating physicians.

In the response to the interrogatories, the Appellant gave the history that she had previously placed in her sworn affidavit, specifically interrogatory number 18. The Appellant was asked to identify every doctor or medical provider who has treated the Appellant for injuries received as a result o f the incident and the interrogatories listed Dr. George Reynolds and Dr. Steve Hindman, both of whom had treated the Appellant.

It is important to note again that these doctors were never deposed by the Appellee

although offers were extended for said depositions to be taken.

In response to interrogatory number 22, the response was that the mother, brother and Appellant will be testifying as well as George Reynolds and Steve Hindman and possibly the medical staff at Lackey Memorial Hospital on the date in question.

By the time these interrogatories were answered, there was ample time to depose both of the doctors who were occurrence witnesses and also potential expert witnesses in order to discover their opinions and their course of treatment for Ms. Scales.

On the 19th day of October, 2005, almost two years after the interrogatories had been answered, the Appellee filed a motion for summary judgment. (T.19-21) (R.E. 18-20)

Again, it is important to note the length of time that transpired from the time of the answering of the interrogatories until the motion for summary judgment was filed. Other than the interrogatories, no discovery had been conducted in two years on behalf of the Appellee, and as will be pointed out later, this was the period of time when the undersigned was undergoing some severe health problems that necessitated five surgeries in thirteen months.

On February 9, 2006 the undersigned filed a response to the motion for summary judgment. (T.32-33) (R.E. 21-22)

In the response on behalf of the Appellant to the motion for summary judgment the undersigned stated in paragraph number 5 that "summary judgment would be premature because none of the experts listed or designated by the Plaintiff had been deposed, nor had any of the occurrence witnesses been deposed."

Also, on the same day as the response to motion for summary judgment the Appellant sent supplemental answers to interrogatories which were attached as an exhibit to the response. (T.35-38) (R.E. 23)

In the supplemental answers to interrogatories, it was disclosed that George Reynolds and Steve Hindman were the treating physicians of the Appellant and that they had become the physicians for Ms. Scales beginning the night of her heart attack.

Also, Dr. Donald H. Marks was designated as an expert witness. Dr. Marks is a medical doctor who examined the medical records of Ms. Scales as well as sworn affidavits submitted by the Appellant, her mother and brother and based on the examination in the medical records he formulated an opinion that the hospital failed to use ordinary care and skill in treatment of Ms. Scales.

In arguing the summary judgment motion in the lower court, the undersigned argued all of the points that had been raised in the response as well as informing the Court of the health situation of the undersigned during the time frame of this litigation. (T. Vol.2 13-19) (R.E. 26-32)

On March 27, 2006 the Court issued an order sustaining the motion for summary judgment. (T.39-46) (R.E. 1-8) Most notably in the opinion of the lower court judge (T.45) he recites:

> "Plaintiff's counsel, in his letter memorandum dated 03/08/06 relates in detail personal health problems as well as disorganization of his law practice because of Hurricane Katrina. While the Court notes these problems and would struggle mightily to give broad deference to counsel because of these uncontrollable events, yet, examining all of this within the time from of the filing of this cause (04/22/03) and the date of said hurricane 08/28/05, the Court is not persuaded those misfortunes should now be controlling."

It is important to note that the undersigned did have multiple health problems during this time frame; however, there was a large amount of time that was wasted or consumed by trying to find out who the legal counsel was going to be as well as whether there was or was not insurance that would cover this type of claim.

During all of the period of time from the filing of the Complaint to the date of the motion for summary judgment, other than the interrogatories propounded to the Appellant, no other discovery was propounded by the Appellee or its counsel.

The undersigned had sent sworn statements of the occurrence witnesses and had listed the treating physicians who also would have been doubling as expert witnesses; however, no effort was made on the part of the Appellee to conduct the discovery in order to formulate their defense.

The lower court judge, basically in his opinion, stated that the defense would be prejudiced by lack of information from the Plaintiff.

The undersigned would purport that the failure of the Appellee to conduct discovery to all of the witnesses that had been furnished to the hospital created the situation that Judge Cotten blamed the Appellant for.

In other words, any alleged lack of information furnished or not furnished to the defense was blamed on the Appellant rather than the lack of due diligence on the part of the defense.

From this order sustaining motion for summary judgment we would appeal.

ARGUMENT

The undersigned would argue that the lower court's ruling granting summary judgment was erroneous and contrary to all legal principles involving summary judgments.

ISSUE ONE

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN AWARDING SUMMARY JUDGMENT TO THE APPELLEE.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Miss.R.Civ.P. 56(c))

A party is not entitled to summary judgment by default just because the non-movant has not filed counter affidavits and documents in opposition to the motion for summary judgment. Allen v. Mayer, 587 So.2d 255 (Miss. 1991)

The Allen case also states that if any document before the Court presents a material factual issue, the granting of summary judgment is improper.

Material issues of fact are those which effect the outcome of the case. Prescott v. Leaf River Forest Products, Inc., 747 So.2d 301 (Miss. 1999), Shaw v. Birkfield, 481 So.2d 247 (Miss. 1985).

The Shaw case also states the Court must be convinced that the facts in issue are a material and that matter in the outcome of the determination of the case.

The Court should deny the summary judgment motion if there is any doubt about whether a genuine issue of material fact exists or the record is incomplete in regard to a material matter. Prescott v. Leaf River Forest Products, Inc., 747 So.2d 301 (Miss. 1999).

A party establishes that a dispute on a material issue is genuine if there is sufficient evidence on that issue for a jury to find in favor of the party. Circumstantial evidence will be sufficient to create a genuine issue of material fact. Leflore County v. Givens, 754 So.2d 1223 (Miss. 2000)

A defendant needs to come forward with some proof that the plaintiff cannot prove the central element of a prima facie case. Hurnandez v. Vickery Chevrolet, 652 So.2d 179 (Miss. 1995)

In the case at bar with the lack of discovery conducted in this case, the motion for summary judgment and the granting of same were very premature since the defendant, other than issuing a set of interrogatories, had done no other discovery with the witnesses that had been listed in the interrogatory answer.

Given this fact, the undersigned does not believe that the lower court could have been put in the position to determine that the plaintiff could not establish or have insufficient proof to establish a genuine issue of material fact.

A party need not file affidavits in support of or in opposition to a summary judgment. Miss.R.Civ.P. 56(a)

The Mississippi Supreme Court in Marx v. Truck Renting and Leasing Assn., Inc., 527 So.2d 1333 (Miss. 1987) set forth the following directive.

"The Court at its discretion may, if it finds the reasons offered to be sufficient, postpone consideration of the motion for summary judgment and order among other things that discovery be completed. The rule, (Miss.R.Civ.P 56(f)) contemplates that the completion of discovery is in some instances desirable before the Court can determine whether there is a genuine issue of material fact, however, the party requesting summary judgment must request specific facts why he cannot oppose the motion and must specifically demonstrate how postponement of the ruling on the motion will enable him, by discovery or other means, to rebut the movant showing of the absence of a genuine issue of fact."

In the case at bar the lack of discovery propounded by the Appellee to the Appellant,

which the Appellant has no control over, should have signaled the lower court judge that in the interest of justice a continuance or additional discovery should have been ordered.

Even though the party opposing the summary judgment motion has not formally complied with Rule 56(f) by filing an affidavit in support of a request for continuance, the Court properly grants a continuance when the party has been diligent and acted in good faith. Owens v. Tomae, 759 So.2d 1117 (Miss. 1999)

In the case at bar, there was a long delay between the time of the filing of the complaint and the motion for summary judgment argument due to several factors.

There was a long delay to determine who was going to be the attorney for the hospital and whether the hospital had insurance coverage or not.

Then there was a long period of delay due to the health issues involving the undersigned that had been pointed out in the record.

Also, there was a long period of delay in that the Appellee would conduct no discovery although names and sworn affidavits had been furnished to the Appellee outlining the facts and issues in the case.

CONCLUSION

It is proposed that the lower court erred in granting summary judgment. The undersigned would submit to this Court that summary judgment was premature due to the lack of discovery conducted by the Appellee and also due to the issues of the undersigned outlined in this brief.

It is respectfully submitted that this summary judgment should be reversed and this matter be placed back in the lower court for trial.

Respectfully submitted this the 13 day of September, 2007.

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CERTIFICATE OF SERVICE

I, Michael P. Younger, do hereby certify that I have this date mailed a true and correct copy, via U.S. Mail, of the above and foregoing to:

Louis Baine, III, Esq.
P.O. Box 1163
Jackson 39215-1163

Honorable Vernon Cotten
205 Main St.
Carthage, MS 39051

This 13 day of September, 2007.

MICHAEL P. YOUNGER