

IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-CA-01337

WANZA MCGUFFIE

APPELLANT

VS.

RAY HERRINGTON AND
JO ANN HERRINGTON

DEFENDANTS

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT NOT REQUESTED

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TABLE OF AUTHORITIES

CASES:

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<i>Stevens v. Luke</i> , 615 So.2d 1177 (Miss. 1993)	3
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RULES:

Mississippi Rules of Civil Procedure Rule 56	3, 4
Mississippi Rules of Civil Procedure Rule 78	2
Mississippi Rules of Civil Procedure Rule 83	2

II. REPLY ARGUMENTS AND LEGAL ANALYSES

A. SUMMARY JUDGMENT STANDARD

Plaintiff does not dispute the standard for summary judgment in Mississippi.

B. DISPUTED FACTS EXIST

Defendants allege that there are no material issues that are disputed in this cause.

Plaintiff would show that there are material issues of fact which are in dispute as to all of the plaintiff's claims. Plaintiff will only address the issues raised by the defendants in their Appellees' Brief which, in this section, was only the fact that plaintiff supposedly relied on the allegations in her pleadings and filed no affidavits to show that a genuine issue of material fact existed. However, our appellate courts have stated:

“Our appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it — **admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.** The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. **Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt.**” (emphasis added) *Heigle v. Heigle*, 771 So.2d 341 (¶ 8) (Miss. 2000).

The plaintiff does not have to file any affidavit, even though she would have filed one had a hearing been scheduled on the summary judgment motion. Plaintiff is not required to file

affidavits, since her interrogatories and Judy Martin's affidavit are in the record. *Id.*

Plaintiff answered the defendants' Motion For Summary Judgment setting forth nine material issues of fact that are in dispute. (R.62) The defendants alleged that the statute of limitations had run, which was just not the case. Plaintiff was found not guilty on the charge of petit larceny on July 9, 2003 (R.78), and filed the instant action on July 8, 2004. (R.1) As the trial court correctly found, the statute of limitations had not run on the claims of malicious prosecution, false imprisonment, and false arrest. (R.78)

Since the defendants' did not brief each individual claim, the plaintiff relies on her Principal Brief for those issues.

C. A HEARING ON THE SUMMARY JUDGMENT MOTION WAS REQUIRED.

The defendants assert that there was no reason why the circuit judge could not grant summary judgment. (Appellee's Brief p. 4) Pursuant to Mississippi law, a hearing was required in this instance because no local rule had been promulgated under M.R.C.P. Rule 78 nor published as required by Rule 83. See M.R.C.P. 78, 83 and published local rules in M.R.C.P. Therefore, granting of summary judgment without a hearing was plain error. The Mississippi Supreme Court has said that granting of summary judgment without a hearing is error due to the finality of summary judgment. *Croke v. Southgate Sewer District*, 857 So.2d 774(¶ 10) (Miss. 2003). "Moreover, our case law on this subject clearly says that the notice and hearing requirements of Rule 56 are to be strictly enforced." *Partin v. North Mississippi Medical Center*, 929 So.2d 924(¶37) (Miss. App. 2005). As there are genuine issues of material fact at issue as set forth in plaintiff's Principal Brief, summary judgment could not be granted by the circuit

court without a hearing pursuant to the M.R.C.P. Rule 56, Rule 78 and Rule 83.

D. CLAIMS

The defendants have not appealed the trial court's ruling in regard to the statute of limitations not having run. Even if they had, the defendants waived their right to a statute of limitations defense when they failed to affirmatively plead it in their answer. (R.16-21) *Sears, Roebuck & Co. v. Devers*, 405 So.2d 898 (Miss. 1981)

The defendants set out on a continuing course of action concerning filing civil and criminal charges against Wanza McGuffie with these actions terminating with a not guilty verdict on the last action to be terminated in her favor on July 9, 2003. (R.78) All of the prior actions survive pursuant to Mississippi law on continuing torts whereas all of the actions of defendants are actionable. If the claim is a continuing tort, the statute of limitations does not begin to run until the date of the last injury. *Smith v. Sneed*, 638 So.2d 1252, 1255 (Miss. 1994). A continuing tort is a tort that is "inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action." *Stevens v. Lake*, 615 So.2d 1177, 1183 (Miss. 1993). Accordingly the torts of false arrest, false imprisonment, civil conspiracy, malicious prosecution and intentional infliction of emotional distress survive. The claim of malicious prosecution, false imprisonment and false arrest are not time barred as the circuit court correctly ruled. (R.78)

The claim of negligent infliction of emotional distress survives as well. The Herringtons embarked on a continuing course of filing civil and criminal charges against Wanza McGuffie without speaking with the eye witnesses to the stroke suffered by Sedgie Herrington and his asking Wanza McGuffie to safeguard his personal property until he was well. There were

numerous witnesses to his act as set forth in Ms. McGuffie's Interrogatories. (R.55) As the defendants correctly urge, one must look to the nature of Defendant's conduct, not the extent of emotional distress suffered. In *University of Southern Mississippi v. Williams*, 891 So.2d 160, 172-73 (¶ 31) (Miss. 2004) (decided November 10, 2004 and rehearing denied January 20, 2005) (footnotes and citations omitted), the Mississippi Supreme Court advanced this theory. On Page 819 the Court focused on what it called "the nature of the incident": Thus, "the nature of the incident" can be important in two ways. First, understanding the nature of the incident is essential in establishing whether emotional distress is foreseeable. In this case, the circuit court ruled that emotional distress was foreseeable and was caused by the defendants given what the Herringtons did. (R.80) Additionally, in cases where the defendant's conduct is more egregious, the plaintiff's burden of establishing specific proof of suffering will decrease. *Williams*, 891 So.2d at 173 (¶ 33). If the Herringtons had not been grossly negligent and had only spoken with the witnesses to the stroke, they could not have entertained an honest belief that Wanza McGuffie had stolen anything from their relative.

CONCLUSION

Summary judgment was not proper because there were genuine issues of material fact for a jury to decide and the summary judgment was granted without a hearing in violation of M.R.C.P. 56, 78 and 83.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that true and correct copies of the above and foregoing Reply Brief have been filed with the Clerk and deposited into the United States mail, first class postage prepaid, to the following addresses:

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SO CERTIFIED, this the 2ND day of May, 2007.


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