

IN THE SUPREME COURT OF MISSISSIPPI

NANCY LOTT

PLAINTIFF-APPELLANT

VS.

NO. 2007-CA-02082

HARRIS D. PURVIS & BRJ, INC.

DEFENDANTS-APPELLEES

**On Appeal from the Circuit Court of Lamar County, Mississippi
Cause No. 2007-28**

BRIEF OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

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

1. Defendants-Appellees: Harris D. Purvis; and BRJ, Inc.
2. Plaintiff-Appellant: Nancy Lott.
3. Counsel for Defendants-Appellees: Edwin S. Gault, Jr., and Brian B. Hannula of Forman Perry Watkins Krutz & Tardy LLP.
4. Counsel for Plaintiff-Appellant: Alexander Ignatiev, Esq.
5. Honorable Prentiss Harrell, Lamar County Circuit Court Judge.

Dated this the 2nd day of May, 2008.

Respectfully submitted,



Brian B. Hannula

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STATEMENT OF THE ISSUE

Whether the trial court abused its discretion by denying Plaintiff's Motion to Set Aside Summary Judgment entered in favor of Defendants.

STATEMENT OF THE CASE

Plaintiff, Nancy Lott, filed her Original Complaint in this case on January 25, 2007 against Harris D. Purvis ("Purvis") and Keithco Petroleum, Inc. R. at 5-8. By Agreed Order entered May 25, 2007, BRJ, Inc. was substituted for Keithco Petroleum, Inc. as a party-defendant in this action since BRJ, Inc., not Keithco Petroleum, Inc., employed Purvis and owned the vehicle driven by Purvis at the time of the parking lot incident. R. at 62.

Plaintiff was originally represented in this matter by the law firm of Richard Schwartz & Associates ("Schwartz firm"). However, the Schwartz firm moved to withdraw as counsel due to "[c]ertain circumstances . . . which cause said attorney and firm to believe that they cannot effectively communicate with the Plaintiff and therefore cannot render unto her proper legal representation." R. at 70. The Order permitting the Schwartz firm to withdraw as counsel was entered on August 6, 2007. R. at 90. Plaintiff's current counsel, Mr. Alexander Ignatiev, entered an appearance in this matter on August 8, 2007. R. at 92.

Defendants filed a Motion for Summary Judgment on July 23, 2007 asserting there was no evidence linking Defendants' alleged wrongful conduct to Plaintiff's alleged injuries. R. at 78-82. Defendants properly noticed this Motion for Summary Judgment for October 2, 2007. R. at 102. Defendants served the Notice of Hearing concerning the Motion for Summary Judgment on Plaintiff's current counsel, Mr. Alexander Ignatiev, on September 18, 2007. R. at 102-03. The trial court granted Defendants' Motion for Summary Judgment, and an order was entered on October 22, 2007. R. at 153.

Plaintiff filed a Motion to Set Aside Summary Judgment on October 5, 2007. Appellees's RE Tab C, 105-130. The trial court conducted a hearing on Plaintiff's Motion to Set Aside Summary Judgment on October 18, 2007. After hearing arguments from both Plaintiff and Defendants, the trial court rejected Plaintiff's arguments. Appellees' RE Tab E, 5-11. An order denying Plaintiff's Motion to Set Aside Summary Judgment was entered on October 30, 2007. Appellees' RE Tab B, 166.

Plaintiff filed a Motion to Alter or Amend Judgment on October 26, 2007. R. at 155-64. Plaintiff abandoned the Motion to Alter or Amend Judgment and elected to appeal the Order Denying Motion to Set Aside Summary Judgment. R. at 168.

STATEMENT OF THE FACTS

Plaintiff alleged that Purvis, while driving a tanker truck owned by BRJ, Inc., backed into the vehicle she was driving. The incident at issue occurred on March 24, 2006 in the parking lot of a convenience store as Purvis was positioning the tanker truck to offload gas into an underground storage tank. At the time of the incident, the truck was moving only a few miles an hour. As a result of the parking lot fender bender, Plaintiff alleged only minor injuries.

SUMMARY OF THE ARGUMENT

The issue presented to the Court for review is, in the words of Plaintiff, whether or not “[t]he Chancery [sic] Court of Lamar County erred as a matter of law when it denied the Motion of Nancy Lott to set aside the Summary Judgment entered for the Defendants.” Appellant Br. at p. 5. As such, the trial court’s denial of Plaintiff’s Motion to Set Aside Summary Judgment entered for Defendants is reviewed under an abuse of discretion standard, not de novo as suggested by Plaintiff. The trial court should be affirmed for the following reasons:

1. The arguments asserted in Plaintiff’s brief must be disregarded as none of these arguments were presented to the trial court.
2. If the Court considers Plaintiff’s arguments, the trial court properly denied Plaintiff’s Motion to Set Aside Summary Judgment as she failed to show (a) an intervening change in controlling law, (b) availability of new evidence not previously available, or (c) need to correct a clear error of law or to prevent manifest injustice.
3. If the Court considers Plaintiff’s arguments regarding the alleged deficiencies with Defendants’ Motion for Summary Judgment, Plaintiff’s arguments contradict the plain language of Miss. R. Civ. P. 56.
4. Plaintiff has not produced any evidence (affidavit, medical record, or expert report) linking Defendants’ alleged wrongdoings to Plaintiff’s purported injuries.

ARGUMENT

I. PLAINTIFF'S ARGUMENTS WERE NOT PRESENTED TO THE TRIAL COURT.

Plaintiff's brief asserts that Defendants' Motion for Summary Judgment should not have been granted as (a) it was not properly pled since it lacked supporting affidavits or other evidence, and (b) it was not accompanied by a memorandum of authorities. Despite the fact that these arguments lack substantive merit (as discussed below), these arguments were not before the trial court when it granted Defendants' Motion for Summary Judgment, or when it denied Plaintiff's Motion to Set Aside Summary Judgment.¹

This Court's long-standing "[p]recedent mandates that this Court not entertain arguments made for the first time on appeal as the case must be decided on the facts contained in the record and not on assertions in the briefs." *Chantey Music Publ'g, Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1060 (Miss. 2005). Since Plaintiff failed to present the arguments contained in her appellate brief to the trial court, this Court should not entertain them now. *See City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 66 (Miss. 2005) (noting that the City was barred from asserting a certain issue on appeal due to its failure to present the issue to the trial court in its motion). Accordingly, the trial court's Order Denying Plaintiff's Motion to Set Aside Summary Judgment must be affirmed.

II. PLAINTIFF FAILED TO SATISFY HER BURDEN TO SET ASIDE THE SUMMARY JUDGMENT.

Plaintiff appeals the trial court's order denying her motion to set aside the summary judgment entered for Defendants. Appellant Br. at p.5. This Court has stated that "a motion to set aside or

² Plaintiff raised these arguments in a Motion to Alter or Amend the Judgment filed subsequent to the Order from which she appeals. R. at 155-64. However, Plaintiff abandoned these arguments to pursue the instant appeal. R. at 168. Thus, the trial court was never confronted with the arguments Plaintiff asserts in this appeal.

reconsider an order granting summary judgment will be treated as a motion under Rule 59(e).” *Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004). As a result, and contrary to Plaintiff’s plea for a de novo review, “[t]his Court reviews a trial court’s denial of a Rule 59 motion under an abuse of discretion standard.” *Id.* “The grant or denial of a Rule 59 motion is within the discretion of the judge and we will not reverse the denial absent an abuse of discretion or if allowing the judgment to stand would result in a miscarriage of justice.” *Journey v. Berry*, 953 So. 2d 1145, 1160 (Miss. App. 2007).

To succeed on a motion to set aside an order granting summary judgment, the movant must establish: “(i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice.” *Brooks*, 882 So. 2d at 233. Plaintiff does not address either of these points in her brief before this Court. Thus, Plaintiff has offered nothing to demonstrate an abuse of discretion by the trial court in denying her motion to set aside the summary judgment entered in favor of Defendants.

Likewise, Plaintiff failed to show (a) an intervening change in controlling law, (b) availability of new evidence not previously available, or (c) need to correct a clear error of law or to prevent manifest injustice in her Motion to Set Aside Summary Judgment denied by the trial court. Instead, Plaintiff argued that Defendants’ had only one summary judgment motion on file that was rendered moot by an agreed order between the parties permitting Plaintiff to amend the Complaint to name the proper Defendant (BRJ, Inc.). Appellees’ RE Tab C, 105-07. However, as Defendants pointed out in their response to the motion to set aside, Defendants filed a motion for summary judgment due to Plaintiff’s lack of evidence establishing that Defendants’ alleged wrongful conduct caused Plaintiff’s alleged injuries. Appellees’ RE Tab D, 135-41. In fact, Plaintiff admitted “missing the summary judgment” at the hearing on her Motion to Set Aside Summary Judgment. Appellees’ RE

Tab E, 8.

Plaintiff's counsel also argued to the trial court at the hearing on Plaintiff's Motion to Set Aside Summary Judgment that he was unaware of Defendants' "second" Motion for Summary Judgment until he received Defendants' Response to the Motion to Set Aside Summary Judgment. Appellees' RE Tab E, 5-9. (It is not disputed that Defendants' counsel sent a notice of the hearing to plaintiff's counsel.) This argument was rejected by the trial court. Furthermore, the fact that counsel for Plaintiff claims he was not aware of Defendants' joint motion for summary judgment does not provide a valid basis for setting aside an order granting summary judgment as it does not amount to (a) an intervening change in controlling law, (b) availability of new evidence not previously available, or (c) need to correct a clear error of law or to prevent manifest injustice. "[I]gnorance on the part of a party's attorney does not give rise to [relief from judgment]." *Stringfellow v. Stringfellow*, 451 So. 2d 219, 222 (Miss. 1984).

Counsel for Plaintiff offered no credible excuse to the trial court, and offers no credible excuse to this Court, as to why he did not appear at the hearing on Defendants' Motion for Summary Judgment based on Plaintiff's lack of evidence establishing that Defendants' alleged wrongful conduct caused his client's alleged injuries. It is undisputed that (a) counsel for Plaintiff entered an appearance in this matter on August 8, 2007 after the trial court permitted the Schwartz firm to withdraw as counsel (R. at 92-93); (b) Defendants properly noticed their Motion for Summary Judgment for October 2, 2007, nearly two months after counsel opposite's entry of appearance (R. at 102-103; Appellees' RE Tab E, 10); and (c) Defendants served the Notice of Hearing on Mr. Alexander Ignatiev (not the Schwartz firm) on September 18, 2007 (R. at 102-03; Appellees' RE Tab E, 10). Indeed, Plaintiff's counsel could have easily obtained a copy of the docket sheet maintained by the Circuit Clerk of Lamar County in this matter to learn of the existence of Defendants' joint

motion for summary judgment. Appellees' RE Tab D, 138-39. Accordingly, Plaintiff does not provide a sufficient reason to set aside the order granting Defendants' Motion for Summary Judgment.

III. SUMMARY JUDGMENT WAS PROPER.

Plaintiff's entire brief is focused on her perceived flaws with Defendants' Motion for Summary Judgment. As noted above, Plaintiff's failure to raise her perceived flaws before the trial court prevents this Court from considering them on appeal. *See Chantey Music Publ'g, Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1060 (Miss. 2005); and *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 66 (Miss. 2005). Notwithstanding this fatal flaw, Plaintiff's arguments asserting that she was not required to respond to, or attend the hearing on, Defendants' Motion for Summary Judgment since the Motion was not properly pled are without merit.

First and foremost, Plaintiff informed the trial court at the hearing on the Motion to Set Aside Summary Judgment that she clearly should have responded to Defendants' Motion for Summary Judgment. Appellees' RE Tab E, 9. Thus, Plaintiff's argument that she was not required to respond to Defendants' Motion for Summary Judgment contradicts the representation made to the trial court.

Second, Plaintiff's assertion that Defendants' Motion for Summary Judgment was not properly pled since it was not accompanied by a memorandum of authorities is nonsense. Plaintiff cites no authority to support this proposition. "This Court is under no obligation to consider this [argument] without citation to authority." *Brown v. State*, 534 So.2d 1019, 1023 (Miss. 1988); *see also Smith v. State*, 430 So.2d 406, 407 (Miss. 1983) (an argument not supported by authority lacks persuasion). Further, the authorities relied on by Defendants to support their Motion for Summary Judgment were clearly set forth in the Motion itself. In fact, section II of Defendants' Motion for Summary Judgment was titled "ARGUMENT AND AUTHORITIES." R. at 78.

Further, Mississippi Rule of Civil Procedure 56(b) clearly states:

A party against whom a claim, counterclaim, or cross-claim is asserted . . . **may, at any time, move with or without supporting affidavits for a summary judgment** in his favor as to all or any part thereof.

Miss. R. Civ. P. 56(b)(emphasis added). Thus, Plaintiff's assertion that Defendants' Motion for Summary Judgment was unsupported by affidavit or other evidence fails based on the clear language of Miss. R. Civ. P. 56(b). Moreover, "[t]he burden of producing evidence in support of or in opposition to a motion for summary judgment is a function of our rules regarding the burden of proof at trial on the issue in question." *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198 (Miss. 1988). Accordingly, if the movant does not have the burden of proof at trial on the issue in question, then the movant's only burden is one of persuasion.

Defendants moved for summary judgment due to the absence of evidence to establish a causal link between Defendants' alleged negligence and Plaintiff's claimed injuries. Defendants satisfied their burden of persuasion by pointing out that Plaintiff failed to designate a fact and/or expert witness to provide a causal link, and that plaintiff's medical records did not support a causal link between plaintiff's claimed injuries and Defendants' alleged wrongdoing. "[W]here the party opposing the motion for summary judgment on a claim or defense upon which it bears the burden of proof at trial, and the moving party can show *a complete failure of proof* on an essential element of the claim or defense, other issues become immaterial and the moving party is entitled to summary judgment as a matter of law." *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1188 (Miss. 1994); *see also Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss. 1987) and *Fruchter*, 522 So. 2d at 198.

Plaintiff's claim against the Defendants are based in negligence. To succeed on her

negligence claim, Plaintiff was required to show (a) the duty owed to her by Defendants; (b) a breach of that duty; (c) damages; and (d) a causal connection between the breach and the damages, such that the breach of duty is the proximate cause of her injuries. *See Crain*, 641 So. 2d at 1189 (Miss. 1994). It is a well established rule that the plaintiff must show not only that the defendant was negligent, but also that the defendant's negligence was the proximate cause of the injury. *Scoggins v. Vicksburg Hospital*, 91 So. 2d 837, 842 (Miss. 1957). "Plaintiff's evidence must be such from which reasonable men may conclude it is more probable that the event was caused by the defendant than it was not." *Jackson v. Swinney*, 140 So. 2d 555, 557 (Miss. 1962). Since Plaintiff was strapped with the burden of proof at trial to establish that Defendants' alleged wrongdoing was the proximate cause of her alleged injuries, then Plaintiff had the burden of producing evidence to establish the presence of a genuine issue of material fact with respect to the element of causation.

In the proceedings before the trial court, Plaintiff failed to produce an affidavit, medical record, expert report, or other evidence to show there was a genuine issue of material fact as to whether or not Defendants' alleged wrongdoing was the proximate cause of her alleged injuries. In fact, Plaintiff failed to respond to Defendants' Motion for Summary Judgment, failed to attend the properly noticed hearing of Defendants' Motion for Summary Judgment, and failed to present any argument in her brief to this Court rebutting Defendants' contention that there is a complete absence of evidence establishing that Defendants' wrongful conduct proximately caused her alleged injuries. Plaintiff remained silent at her own peril. *See Fruchter*, 522 So. 2d at 198. As a result of Plaintiff's failure to produce evidence to show that a genuine issue of material fact existed, the trial court properly granted Defendants' Motion for Summary Judgment. *See Crain*, 641 So. 2d at 1192 ("This failure on the part of [plaintiff] to make any showing as to proximate cause, an essential element of his claim, makes summary judgment in favor of Defendant appropriate in this instance.").

Finally, Plaintiff contends that Defendants' agreement to permit Plaintiff to file an Amended Complaint naming the proper parties to the lawsuit rendered Defendants' Motion for Summary Judgment moot. Defendants agree that the motion for summary judgment filed on behalf of Keithco Petroleum, Inc. is moot. In fact, this motion has been moot since May 25, 2007, the date the agreed order substituting BRJ, Inc. in place of Keithco Petroleum, Inc. was entered. Further, as explained above, Defendants' Motion for Summary Judgment was based on Plaintiff's lack of evidence to establish that Defendants' alleged wrongful conduct proximately caused Plaintiff's injuries. It is unclear how the agreement to allow Plaintiff to file an amended complaint identifying the proper parties satisfies Plaintiff's burden to produce evidence to show the presence of a genuine issue of material fact with respect to the causation element. Reliance on allegations in Plaintiff's complaint is not sufficient to create a genuine issue of material fact to avoid summary judgment. *Fruchter*, 522 So. 2d at 198. "Rather, the party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial." *Id.* at 199. As noted above, Plaintiff has offered no evidence to dispute Defendants' Motion for Summary Judgment.

CONCLUSION

For the reasons set forth above, Defendants respectfully request this Court affirm the trial court's Order Denying Plaintiff's Motion to Set Aside Summary Judgment. Alternatively, Defendants request this Court to affirm the trial court's Order Granting Summary Judgment if this Court elects to review the same.

Respectfully submitted,

Harris D. Purvis and BRJ, Inc.

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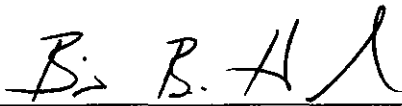
CERTIFICATE OF SERVICE

I, Brian B. Hannula, one of the counsel for Defendants-Appellees in this appeal, hereby certify that I have this day caused to be mailed, U.S. Mail, first class postage prepaid, a copy of Brief of Defendants-Appellees to the following interested parties:

Alexander Ignatiev, Esq.
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Hattiesburg, MS 39401

Honorable Prentiss G. Harrell
P.O. Box 488
Purvis, MS 39475-0488

This the 2nd day of May, 2008.



Brian B. Hannula