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IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

CASE NO. 2007-^{CA}CS-02082

NANCY LOTT

APPELLANT

VERSUS

HARRIS D. PURVIS AND BRJ, INC.

APPELLEES

FILED

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BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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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 Supreme Court may evaluate possible disqualification or recusal.

1. Hon. Prentiss Harrell
Circuit Court Judge of Lamar County
2. Brian B. Hannula, Esq.
Attorney for Appellees Harris D. Purvis & BRJ, Inc.



ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE

The Chancery 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.

STATEMENT OF THE CASE

This matter arises from the Order Denying Plaintiff's Motion to Set Aside Summary Judgment entered October 30, 2007. Appellant Nancy Lott timely perfected her appeal.

NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

The car Nancy Lott was driving was backed into by a tanker truck driven by Harris D. Purvis ("Purvis"), who was working for BRJ, Inc. ("BRJ"), at the time. R., 5-8. Lott retained Richard Schwartz, Esq. ("Schwartz"), to pursue her negligence suit against Purvis and BRJ. *Id.* Following depositions and discovery, Schwartz withdrew with the permission of the Court, and Lott retained new counsel. R. 90-4. The original trial date was kept, and the scheduling order was modified by agreement of the parties. R. 105-131.

Purvis and BRJ brought forward their second Motion for Summary Judgment on October 2, 2007, which was filed on July 23, 2007 at the same time that Purvis and BRJ filed their response to Schwartz's motion to withdraw. R. 78-83, 102-4. Schwartz received the permission of the Court to withdraw on August 6, 2007. R. 90-1. Lott's present counsel entered his appearance on August 8, 2007, and filed a motion to amend Plaintiff's Complaint on September 19, 2007. R. 92-101. Counsel for Purvis and BRJ

filed a notice of hearing to bring their motion for summary judgment before the Court on October 2, 2007. R. 102-4. Counsel for Purvis and BRJ agreed on September 28, 2007 to permit Lott to file an Amended Complaint, and agreed to an amended scheduling order. R. 121, 123-6. Counsel for Lott failed to appear at the hearing on the Motion for Summary Judgment, and the Circuit Court granted that motion, although the order was not entered until October 22, 2007. T. 1, 2-3; R. 153-4.

Counsel for Lott filed a Motion to Set Aside Summary Judgment on October 5, 2007. R. 105-131. This motion displayed the ignorance of Lott's attorney of the second Motion for Summary Judgment, and was set for hearing on October 18, 2007. R. 132-4. In the meantime, Counsel for Lott discovered the second Motion for Summary Judgment and filed a response on October 18, 2007, after receiving the response of the Defendants to the Motion to Set Aside on October 17, 2007. R. 143-52. The Circuit Court denied Lott's Motion to Set Aside on October 30, 2007, and Lott filed a Motion to Alter or Amend the Judgment. R. 166-7, 155-65. Lott perfected her appeal on November 19, 2007. R. 169-171.

STATEMENT OF THE FACTS

Lott was involved in a car accident with Purvis, who was driving a truck owned by BRJ, Inc., on March 24, 2006. Following discovery, entry of scheduling order, and change of counsel, the Circuit Court of Lamar County granted summary judgment to the Defendants when counsel for Lott failed to appear at the motion hearing on October 2, 2007. The motion for summary judgment was unsupported by affidavits, testimony, or other evidence.

SUMMARY OF THE ARGUMENT

The Circuit Court of Lamar County erred when it refused to set aside the summary judgment for Purvis and BRJ, which was not properly filed. Under MRCP 56, a motion for summary judgment cannot be granted if it is not supported by facts. The motion for summary judgment was unaccompanied by affidavits or other evidence, and did not comply with the Local Rules of the 15th Circuit Court, inasmuch as it lacked a supporting memorandum brief.

The sole reason for the Circuit Court granting the motion for summary judgment was the failure of Lott's counsel to appear at the motion hearing on October 2, 2007, in Columbia, Mississippi. The record indicates that Lott's counsel was unaware of the second motion for summary judgment in this matter. But even if Lott's counsel was aware, under MRCP Rule 56, he was not required to attend the motion hearing, and the motion should not have been granted.

A grant of summary judgment is reviewed *de novo*. It may only be upheld if there are no genuine issues of material fact when viewed in the light most favorable to the non-moving party, and no reasonable fact-finder could find for the non-moving party. It is not appropriate when no facts are alleged beyond the filing of a complaint and the substitution of a party.

The motion for summary judgment failed to comply with the Uniform Rules of Circuit and County Court Practice, as it lacked supporting evidence, and Defendants did not provide a memorandum of authorities to the Court or the Plaintiff. The motion was therefore defective on its face, and should not have been granted.

ARGUMENT

The Chancery 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.

STANDARD OF REVIEW

Motions for summary judgment are reviewed *de novo*. *Jacox v. Circus Circus Mississippi, Inc.*, 908 So. 2d 181, 183 (¶4) (Miss. Ct. App. 2005). Summary judgment is appropriate when there are no genuine issues of material fact such that, when viewing all the evidence in the light most favorable to the non-moving party, no finder of fact could find in favor of the non-moving party. M.R.C.P. 56, *Price v. Park Management, Inc.*, 831 So. 2D 550, 551 (¶4) (Miss. Ct. App. 2002).

1. Unsupported motions for summary judgment should not be granted, much less upheld.

The party moving for summary judgment bears the burden of proving that there are no disputed material facts. *Young v. Wendy's Intl., Inc.*, 840 So. 2d 782, 783 (¶13) (Miss. Ct. App. 2003). Unsupported motions for summary judgment need not be replied to, and the non-moving party may rest entirely upon the mere allegations and denials of his pleadings. “When a motion for summary judgment is **made and supported as provided in this rule**, an adverse party may not rest upon the mere allegations or denials of his pleadings.” M.R.C.P. 56 (e) (emphasis added). The failure to respond to a motion for summary judgment, even one properly supported, is not fatal to the non-moving party's case. “If he does not so respond, summary judgment, **if appropriate**, shall be

entered against him.” M.R.C.P. 56 (e) (emphasis added). It follows that even if a motion for summary judgment is supported, no response is filed, and the opposing party fails to show up at a properly noticed hearing, the Court must find that no material facts are in dispute and that the moving party is entitled to judgment as a matter of law, before granting a motion for summary judgment.

Defendants' Second Motion for Summary Judgment was unsupported by any affidavits, testimony, interrogatories, or requests for admissions. The motion was also made moot by Defendants' agreement to Plaintiff's Motion to Amend her Complaint, which Defendants' agreed to on the last business day before the hearing. Unsupported motions for summary judgment should not be granted and are disfavored as a matter of law. “A motion for summary judgment unsupported by affidavit or other sworn statements should not be sustained.” *Ratliff v. Ratliff*, 500 So. 2d 981 (Miss. 1986). “Furthermore, it is well-settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion.” *Crum v. Johnson*, 809 So. 2d 663, 665 (¶4) (Miss. 2002).

The motion for summary judgment was properly noticed by the Defendants. Counsel for Lott was aware of the motion setting, although he did not know that there was a second motion for summary judgment. Nonetheless, the motion should not have been granted, as it was not properly pled. The Circuit Court should have granted Lott's motion to set aside the summary judgment.

2. Motions for summary judgment that violate the Uniform Circuit and County Court Rules should not be granted.

Motions for summary judgment or for motions to dismiss must be accompanied by a memorandum of authorities sent to the Court and the opposing party, but not filed with the clerk. URCCC 4.03 (2). Motions for summary judgment must also include attached copies of the complaint and answer, and an itemization of undisputed facts must be filed as well. *Id.* There were only two undisputed facts itemized to accompany the Defendants' Motion, and they are reproduced below in their entirety for the convenience of this Court:

1. Plaintiff filed her Original Complaint in this case on January 25, 2007 against Harris D. Purvis and Keithco Petroleum, Inc., alleging that collisions which occurred March 24, 2006 between plaintiff's vehicle and the vehicle driven by Defendant Harris D. Purvis caused damage to plaintiff's automobile and caused plaintiff to sustain bodily injury.

2. By agreed order entered May 25, 2007, BRJ, Inc. was substituted for Keithco Petroleum, Inc., as party-defendant in this action.

These two facts, certainly undisputed and indisputable, cannot provide the basis for any grant of summary judgment, other than a wholly superfluous liability determination involving Keithco Petroleum, Inc., which is no longer a party to this case. If summary judgment can be granted on this basis, without any evidentiary support or accompanying memorandum, then the practice of law may as well cease in Mississippi. Importantly, the pleadings lack any other evidence to support a grant of summary judgment on the pleadings.

It cannot be disputed that counsel for Lott failed to appear at the motion hearing on October 2, 2007. It also cannot be disputed that counsel for Lott was wholly unaware of the second motion for summary judgment, which was the motion set for hearing that day.

CONCLUSION

The grant of a motion for summary judgment must be carefully scrutinized. Such motions cannot be sustained if they should never have been granted. The Defendants' motion was not properly pled. No response was called for from the Plaintiff, and Plaintiff was not bound to be present at the hearing.

To uphold this grant of summary judgment would ratify a grotesque injustice and set a dangerous precedent where parties need not demonstrate that they are entitled to summary judgment so long as the opponent failed to be present at hearing. Summary judgment is not analogous to a default judgment; it can only be granted if there are no material facts in dispute, such that the moving party is entitled to a judgment as a matter of law.

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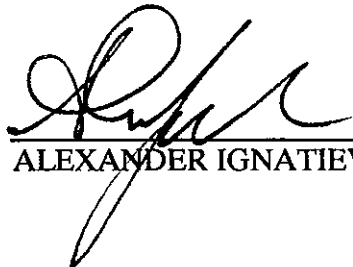
APPELLEES

CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this day mailed for filing, via United States mail, postage prepaid, the original and four (4) copies of the foregoing Brief of the Appellant to the Clerk of the Supreme Court of Mississippi, Ms. Betty Sephton, Post Office Box 249, Jackson, Mississippi, 39205-0249.

THIS the 3/st day of March, A.D. 2008.

ALEXANDER IGNATIEV, ESQ.
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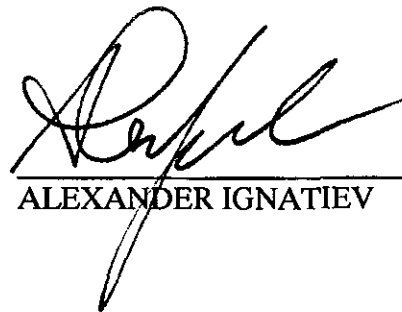
CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a copy of the foregoing Brief of the Appellant to the following:

Hon. Prentiss Harrell
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Purvis, MS 39475

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Attorney for Harris D. Purvis & BRJ, Inc.

THIS the 31st day of March, A.D. 2008.



ALEXANDER IGNATIEV