IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLOTTE MOORE — PLAINTIFF/APPELLANT

VS. — No. 2008-CA-01519

M&M LOGGING, INC. — DEFENDANT/APPELLEE

BRIEF OF M&M LOGGING, INC. APPELLEE

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CIRCUIT COURT OF CHOCTAW COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

a. Charlotte Moore, Appellant;

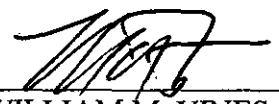
b. M&M Logging, Inc., Appellee;

c. William M. Vines, Esq., Page, Kruger & Holland, P.A., Counsel for Appellee;

d. J.C. Patton, Esq., Counsel for Appellant

e. Honorable Joseph H. Loper, Jr., Choctaw County Circuit Judge.

This, the 17th day of June, 2009.



WILLIAM M. VINES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

RULES	**PAGE**
M.R.A.P 34 (a)(3)	vii
Miss. R. Civ. P. 56	viii, 7,11,16,17
Miss. R. Civ. P. 59	viii, 3,9,10,12
Miss. R. Civ. P. 60	viii, 3,9,12,13,14,15

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the facts and legal arguments are adequately presented in this brief and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUES

The Appellee, M&M Logging (hereinafter "M&M Logging"), submits the following as the principal issues on this appeal:

(a) Whether the lower court erred in entering summary judgment on behalf of M&M Logging where the Appellant, Charlotte Moore (hereinafter "Charlotte"), failed to provide the court with any affidavits, admissions, or evidence of any kind in support of her opposition to the motion for summary judgment;

(b) Whether Charlotte's failure to file a motion to strike constitutes a waiver of her right to challenge the sufficiency of the affidavit submitted in support of M&M Logging's motion for summary judgment;

(c) Whether the lower court abused its discretion in denying Charlotte's motion to set aside the summary judgment under Miss. R. Civ. P. 59 and 60;

(d) Whether Charlotte's affidavit – which she submitted after entry of summary judgment and which she later withdrew – constitutes "newly discovered evidence" upon which the lower court should have set aside the summary judgment;

(e) Whether "exceptional" or "extraordinary" circumstances exist so as to entitle Charlotte to relief from the summary judgment under Miss. R. Civ. P. 60(b); and

(f) Whether the lower court abused its discretion in refusing to grant Charlotte's request for additional discovery under Miss. R. Civ. P. 56(f).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

This is an appeal of a summary judgment entered in favor of the Defendant/Appellee, M&M Logging, Inc. (hereinafter "M&M Logging"), by Choctaw County Circuit Judge Joseph H. Loper, Jr. M&M Logging moved for summary judgment arguing that at the time of the alleged incident giving rise to this cause of action, Plaintiff/Appellant, Charlotte Moore (hereinafter "Charlotte") was a licensee, not an invitee, on M&M Logging's premises. (R. 180). M&M Logging argued that since there was no evidence that M&M Logging or its employees willfully or wantonly injured Charlotte, or committed any tort against her, it was entitled to judgment as a matter of law. (R. 180). Judge Loper agreed, and on February 27, 2008, signed an opinion and order granting M&M Logging's motion for summary judgment. (R. 201). A separate judgment was entered that same date. (R. 205). Charlotte subsequently filed a Motion to Set Aside Summary Judgment, Alternatively, for Reconsideration of Summary Judgment, for Hearing on Defendant's Motion for Summary Judgment and for Other Relief (R. 207) which was denied by Judge Loper on August 18, 2008. (R.237). Charlotte then perfected this appeal. (R. 238).

B. Statement of the Facts

This is a premises liability claim in which Charlotte seeks damages for alleged bodily injuries sustained from an incident that occurred on December 29, 2003, in Weir, Mississippi. Charlotte claims she was on the premises of M&M Logging when a truck tire exploded near her, causing her bodily injury.

M&M Logging is a logging business with offices in Weir, Mississippi. Charlotte is married to and resides with the co-owner and president of M&M Logging, John Moore (hereinafter "John"). M&M Logging conducts some of its business in a garage located behind

the Moore's residence at Route 2, Box 3-1A, in Weir.

On the day of the incident, John was in the garage inflating a truck tire. This was a normal part of M&M Logging's business and on that day, the standard and customary procedure was followed regarding mounting and inflating the tire in question. (R. 183-84). Charlotte was also in the garage putting away Christmas decorations from the Moore's personal residence. (R. 183-84). M&M Logging had no Christmas decorations of its own and Charlotte was not in the garage performing any services that benefited M&M Logging in any way. (R. 183-84). Charlotte needed a box to store some of the decorations and began walking to the opposite corner of the garage to retrieve one. (R. 183-84). Charlotte claims that as she walked through the garage, a bubble formed on the tire and burst, expelling a rush of air which apparently caused her to fall backwards and sustain injuries. (R. 186).

SUMMARY OF THE ARGUMENT

The lower court correctly entered summary judgment in favor of M&M Logging. M&M Logging argued that Charlotte was a licensee, not an invitee, on its premises on the day of the accident. (R. 180). M&M Logging's motion was supported by the affidavit of John Moore (R. 183-84) as well as a long line of Mississippi cases. In her response to the motion for summary judgment, Charlotte submitted nothing except a copy of her complaint. (R. 194-197). She submitted no affidavits or other evidence in support of her response. Under Mississippi law, Charlotte was required to rebut M&M Logging's motion with sworn evidence. *In re Last Will and Testament of Smith*, 910 So. 2d 562, 571 (Miss. 2005); *MST, Inc. v. Miss. Chemical Corp.*, 610 So. 2d 299 (Miss. 1992). Instead of presenting the court with sworn evidence, Charlotte relied solely upon the conclusory allegations in her pleadings. The lower court correctly found that this was insufficient under Mississippi law and correctly entered summary judgment in favor

of M&M Logging.

Charlotte's assertion that the lower court erred in considering the affidavit of John Moore is meritless. Under Mississippi law, a party desiring to challenge the sufficiency of an affidavit submitted in support of a motion for summary judgment is required to file in the lower court a motion to strike the affidavit. *Hare v. State*, 733 So. 2d 277, 285 (Miss. 1999). Failure to file a motion to strike constitutes a waiver of any objection to the affidavit. *Bd. of Education of Calhoun City v. Warner*, 853 So. 2d 1159, 1165 (Miss. 2003). Charlotte did not file a motion to strike the affidavit of John Moore and has therefore waived any right to challenge the affidavit. Therefore, the lower court did not err in entering summary judgment in favor of M&M Logging and this Court should affirm.

The lower court did not abuse its discretion in denying Charlotte's motion to set aside the summary judgment under Miss. R. Civ. P. 59 and 60. Charlotte presented the lower court with no "newly discovered evidence" to support her motion to set aside. She did file a self-serving affidavit containing alleged "admissions" by John Moore (R. 210-11). The affidavit, however, states that the "admissions" were made on the day of the accident and at later times. Thus, the affidavit does not constitute "new" evidence within the meaning of Rules 59 or 60. In addition, Charlotte withdrew her affidavit prior to the hearing on her motion and never filed another one. (R. 218, 234). The lower court properly denied Charlotte's motion to set aside. There certainly is no evidence that the lower court abused its discretion in denying Charlotte's motion. The Mississippi Supreme Court has held that Miss. R. Civ. P. is to be applied only in "extraordinary" and "exceptional" circumstances. *Mitchell v. Nelson*, 830 So. 2d 635, 639 (Miss. 2002); *Lose v. Ill. Cent. Gulf RR Co.*, 584 So. 2d 1284, 1286 (Miss. 1991). The case at bar presents no such circumstances. The lower court considered Charlotte's motion, heard oral argument, and denied

the motion. This Court should affirm.

ARGUMENT

A. THE LOWER COURT DID NOT ERR IN GRANTING M&M LOGGING'S MOTION FOR SUMMARY JUDGMENT

1. Charlotte failed to provide the trial court with any sworn evidence in support of her opposition to M&M Logging's motion for summary judgment.

M&M Logging moved for summary judgment arguing it was entitled to judgment as a matter of law because (1) Charlotte was a licensee, not an invitee, at the time of the incident, and (2) there was no evidence that M&M Logging "willfully" or "wantonly" injured her. M&M Logging attached to its motion for summary judgment an affidavit of John Moore setting forth the facts of the incident. (R. 183-84). His affidavit states that he and the other employees of M&M Logging followed customary and normal tire inflating procedures on the day of the accident. (R. 184). His affidavit states that employees of M&M Logging were not responsible for the bubble forming on the tire, and he states that no one willfully or wantonly injured Charlotte. (R. 184).

Charlotte filed a response to M&M Logging's motion for summary judgment arguing that M&M Logging was not entitled to summary judgment because it was guilty of "active negligence." (R. 194-197). Charlotte, however, presented the trial court with absolutely no evidence in support of her contention that M&M Logging was guilty of any actively negligent conduct. Charlotte's response to M&M Logging's motion for summary judgment included only a copy of her complaint. (R. 194-200). Charlotte submitted no affidavits to counter the affidavit of John Moore. She submitted no discovery responses. She submitted no deposition testimony. She submitted nothing but her complaint in support of her opposition to M&M Logging's motion for summary judgment.

In granting summary judgment to M&M Logging, the lower court applied the applicable standard of review for motions filed under Miss. R. Civ. P. 56. The lower court's opinion and order correctly states:

> To withstand summary judgment, the party opposing the motion must present sufficient proof to establish each element of each claim. *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss. 1987). Mere allegation or denial of material facts is insufficient to generate a triable issue of fact and avoid an adverse ruling of summary judgment. *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1356 (Miss. 1990) (citing *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986)). The party opposing summary judgment may not rely solely upon the unsworn allegations in the pleadings or "arguments and assertions in briefs or legal memoranda." *Id.* (quoting *McGee v. Transcon. Gas Pipe Line Corp.*, 551 So. 2d 182, 186 (Miss. 1989)).

(R. 202).

Judge Loper's opinion and order discusses the law of licensees and invitees, as well as the limited exception for actively negligent conduct. (R. 202-03). The court found that while Mississippi law does impose liability for actively negligent torts in some instances, Charlotte "has offered no proof that the conduct of M&M was actively or passively negligent." (R. 203). The court correctly stated, "Charlotte had a duty, when opposing summary judgment, to present sufficient proof of each essential element of her claim, and to do so by not relying solely on unsworn allegations in her pleadings." (R. 203). Instead of presenting facts in opposition to M&M Logging's motion for summary judgment, Charlotte "present[ed] a copy of her unsworn complaint that is signed only by her attorney." (R. 203). For these reasons, the lower court correctly determined that Charlotte had failed to satisfy the requirements imposed on summary judgment respondents, and correctly entered summary judgment in favor of M&M Logging.

Mississippi law is very clear on the issue of what non-movants must do to avoid summary judgment. In *Key Constructors v. H&M Gas Co.*, 537 So. 2d 1318, 1323 (Miss. 1989), the Mississippi Supreme Court stated, "Rule 56 requires that the non-moving party wishing to avoid

summary judgment be diligent in presenting sworn allegations based on first hand knowledge showing that there are genuine issues of material fact" (quoting *Grisham v. John Q. Long VFW Post No. 4057, Inc.*, 519 So. 2d 413, 415 (Miss. 1988)).

In *McGee v. Transcon. Gas Pipe Line Corp.*, 551 So. 2d 182, 186 (Miss. 1989), the Supreme Court stated:

> To have power to generate a genuine issue of material fact, any other documents, including but not limited to depositions, answers to interrogatories, or affidavits must, first, be sworn; second, be made upon personal knowledge; and third, show that the party giving them is competent to testify.

More recently, in *In re Last Will and Testament of Smith*, 910 So. 2d 562, 571 (Miss. 2005), the Mississippi Supreme Court held that when a party responds to a motion for summary judgment, he or she must "rebut by some sworn testimony." Indeed, the Court held that the failure to do so constitutes a "failure to diligently prosecute the case." *Id.*, citing *MST Inc. v. Miss. Chemical Corp.*, 610 So. 2d 299 (Miss. 1992).

Under Mississippi law, where the motion for summary judgment is supported by an affidavit, and where the non-movant fails to include an affidavit or other sworn proof in his or her response, the trial court is duty bound to accept as true the movant's affidavit. This was the holding in *MST Inc. v. Miss. Chemical Corp.*, 610 So. 2d 299 (Miss. 1992). In *MST Inc.*, the defendant moved for summary judgment and supported its motion with affidavits. The plaintiff responded, but put forth no affidavits or other sworn testimony. In granting summary judgment, the Mississippi Supreme Court stated, "[s]ince MST presented no sworn evidence in opposition to the motion for summary judgment, the trial court correctly took as true the allegations in the affidavits provided by [the defendant], as shown by its findings of facts and conclusions of law." *MST Inc.*, 610 So. 2d at 304.

In the case at bar, M&M Logging's motion for summary judgment was supported by the affidavit of John Moore. Charlotte failed to submit any sworn proof to the trial judge in response, and chose instead to rely solely on her unsworn allegations in her pleadings. The lower court was bound to "take as true" the allegations in John's affidavit insofar as they were unchallenged by Charlotte. *MST Inc.*, 610 So. 2d at 304. Clearly, Charlotte failed to satisfy her obligations as a respondent to summary judgment under Miss. R. Civ. P. 56, and the trial court correctly granted summary judgment to M&M Logging.

2. Charlotte has waived her right to challenge the sufficiency of John Moore's affidavit.

On appeal, Charlotte challenges the sufficiency of John's affidavit. She claims that the affidavit is deficient because it fails to contain magic words to the effect that John possessed "first hand knowledge" of the facts set forth in the affidavit. Charlotte complains that the trial judge erred in granting summary judgment based on this ostensibly defective affidavit.

Charlotte's argument regarding the sufficiency of John's affidavit is without merit. Under Mississippi law, where a party desires to challenge the sufficiency of an affidavit submitted in support of a motion for summary judgment, that party is required to file a motion to strike the affidavit. In *Hare v. State*, 733 So. 2d 277, 285 (Miss. 1999), the Mississippi Supreme Court held, "where the party against whom a motion for summary judgment is made wishes to attack one or more of the affidavits upon which the motion is based, he must file in the trial court a motion to strike the affidavit" (quoting *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 265 (Miss. 1983)). In *Hare*, the non-movant failed to file a motion to strike the affidavit submitted in support of the motion for summary judgment, and simply objected to the affidavit at the hearing. The Supreme Court held that this was insufficient, and stated, "[t]he [non-movant] made no other objection than the one at the hearing until its argument in its brief before this Court. Therefore,

we hold that since [it] failed to file a motion to strike the affidavit, it has thus waived any objection now." *Hare*, 733 So. 2d at 285. See also *Haygood v. First Nat'l Bank of New Albany*, 517 So. 2d 553 (Miss. 1987) (same holding).

More recently, in *Bd. of Education of Calhoun City v. Warner*, 853 So. 2d 1159, 1165 (Miss. 2003), the Mississippi Supreme Court stated, "[a] party must move to strike an affidavit that violates the rule [56], and if he fails to do so, he will waive his objection, and, in the absence of a gross miscarriage of justice, the court may consider the defective affidavit" (emphasis added). The Court in *Warner* made it crystal clear that a party who wants to challenge the sufficiency of an affidavit must not merely state an objection to the affidavit in a brief or at a hearing; it must actually file a motion to strike. *Warner*, 853 So. 2d at 1163. The Court stated that filing a motion to strike was a "necessity." *Id.* This is in accord with *Hare*, which held that it was incumbent on one wishing to challenge an affidavit to "file in the trial court a motion to strike the affidavit." *Hare*, 733 So. 2d at 285.

In the present case, Charlotte never filed a motion to strike the affidavit filed by John. Had she desired to challenge the sufficiency of John's affidavit, she could have and should have filed a motion to strike. Her failure to do so constitutes a waiver of her right to challenge the affidavit. Therefore, the trial court did not err in considering John's affidavit submitted in support of M&M Logging's motion for summary judgment.

Even if this Court were to ignore Charlotte's failure to file a motion to strike, however, M&M Logging submits that John's affidavit is more than sufficient. It is true that the affidavit does not contain magic words that he possesses "first hand knowledge." This technicality becomes immaterial, however, once one reads the affidavit. The affidavit sets forth facts that John personally witnessed and in which he personally participated. The affidavit describes the

tire mount on the date of the incident and what John was doing at the time of the incident. It is obvious from reading the affidavit that it is based on John's personal, first hand knowledge. Charlotte's argument that the affidavit is somehow deficient is completely without merit.

It is clear that Judge Loper correctly granted summary judgment to M&M Logging. Charlotte submitted no sworn evidence of any kind in support of her opposition to M&M Logging's motion for summary judgment. She relied only on her pleadings which is insufficient under Mississippi law. The lower court considered the affidavit of John Moore, the applicable law, and properly entered summary judgment in favor of M&M Logging. Charlotte waived her right to challenge the sufficiency of John's affidavit by failing to file a motion to strike the affidavit in the trial court. Thus, the summary judgment should be affirmed.

B. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING CHARLOTTE'S MOTION TO SET ASIDE THE SUMMARY JUDGMENT UNDER MISS. R. CIV. P. 59

Following the entry of summary judgment, Charlotte filed a Motion to Set Aside Summary Judgment, Alternatively, for Reconsideration of Summary Judgment, for Hearing on Defendant's Motion for Summary Judgment and for Other Relief. (R. 207). The motion was based on Miss. R. Civ. P. 59 (which governs motions for altering or amending a judgment) and Miss. R. Civ. P. 60 (which governs motions for relief from judgment). Her motion to set aside included an affidavit signed by Charlotte. (R. 210-11). Charlotte's affidavit describes alleged "admissions" by John Moore that were said to have been made on the date of the accident and at other times following the accident. (R. 210-11). Charlotte's motion to set aside asked the trial court to overturn the summary judgment based upon the alleged new evidence contained in Charlotte's post-judgment affidavit.

After receiving Charlotte's motion to set aside, counsel for M&M Logging contacted Charlotte's counsel concerning some of the statements in Charlotte's affidavit, particularly the statements in paragraph 6, in which Charlotte claimed that John Moore "admitted" to her on one occasion that the affidavit attached to M&M Logging's motion for summary judgment did not contain some information he had ostensibly supplied to "a representative of M&M Logging." M&M Logging's counsel advised Charlotte's counsel that paragraph 6 was patently false insofar as it might be interpreted as suggesting that counsel for M&M Logging had submitted a false or incomplete affidavit on behalf of John Moore. Charlotte then agreed to withdraw her affidavit. Charlotte then filed a motion to withdraw her affidavit (R. 218), which was subsequently granted by the trial court (R. 234). Charlotte, however, never filed another affidavit.

On August 18, 2008, a hearing was held on Charlotte's motion to set aside. Following oral argument, Judge Loper denied Charlottes' motion and entered an order that same day. (R. 237).

On appeal, Charlotte claims that the lower court erred in failing to overturn the summary judgment under Miss. R. Civ. P. 59(e). The standard of review for a denial of a Rule 59 motion is abuse of discretion. *Bang v. Pittman*, 749 So. 2d 47 (Miss. 1999). This is the same as the federal court standard. *Jones v. Central Bank*, 161 F. 3d 311, 312 (5th Cir. 1998). Thus, unless this Court determines that Judge Loper abused his discretion in denying Charlotte's motion to set aside, that order should be affirmed.

The Mississippi Supreme Court has held, "in order to succeed on a Rule 59(e) motion, the movant must show (1) an intervening change in controlling law, (2) availability of new evidence not previously available, or (3) need to correct a clear error of law or to prevent manifest injustice." *Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004) (quoting *Bang v. Pittman*, 749

So. 2d 47, 52-53 (Miss. 1999)). M&M Logging submits that when these factors are applied to the case at bar, it is clear that the lower court did not abuse its discretion in denying Charlotte's motion to set aside.

In the first place, there has been no "intervening change in controlling law." There has been no change in the controlling law of premises liability, nor has there been any change in the law as it relates to Miss. R. Civ. P. 56 and the duties of non-movants to which Charlotte did not adhere in the lower court.

In the second place, Charlotte has not produced any "new evidence not previously available." The only "evidence" she attempted to produce in the lower court in support of her motion to set aside was her affidavit. There are at least four reasons why Charlotte's affidavit cannot support reversal of the summary judgment. **First**, Charlotte's affidavit was untimely. Charlotte did not produce her affidavit until after the lower court entered summary judgment. Affidavits submitted after entry of judgment are not to be considered by the trial court. *Russell v. Williford*, 907 So. 2d 362 (Miss. App. 2004); *Koestler v. Mississippi College*, 749 So. 2d 1122 (Miss. App. 1999). **Second**, Charlotte's affidavit did not constitute "new evidence." Instead, her affidavit recited alleged facts of which she had been aware for years, including alleged "admissions" by John Moore that he ostensibly made on the date of the accident. (R. 210-11). Charlotte obviously possessed this information before entry of summary judgment; therefore, the information in her affidavit certainly does not qualify as "new evidence." *Bang v. Pittman*, 749 So. 2d 47 (Miss. 1999). **Third**, the alleged "admissions" by John Moore set forth in Charlotte's affidavit constitute, at most, an inconsistent statement when compared to his own affidavit. The Mississippi Supreme Court has held that inconsistent statements of the defendant do not in themselves create a genuine issue of material fact. *Page v. Wiggins*, 595 So. 2d 1291 (Miss.

1992). Judge Loper did not abuse his discretion in refusing to consider Charlotte's self-serving affidavit that sets forth alleged "admissions" in conflict with John's affidavit. **Fourth**, and perhaps most important, Charlotte withdrew her affidavit and never substituted another one. Thus, at the time Judge Loper denied Charlotte's motion to set aside, there was no affidavit on file for him to consider. It certainly cannot be said that the lower court abused its discretion in failing to consider Charlotte's affidavit in light of the fact that it was withdrawn and never substituted. For these reasons, there was no "new evidence" presented in the lower court that could have served as a basis for setting aside the summary judgment under Miss. R. Civ. P. 59.

Finally, it cannot be credibly maintained that the lower court made a "clear error" of law or committed "manifest injustice" in denying Charlotte's motion to set aside. The court considered Charlotte's motion, heard oral argument, and then denied the motion. The ruling of the lower court accords with Mississippi law and the standards announced by this Court for considering motions under Miss. R. Civ. P. 59. Again, unless there has been an abuse of discretion by the trial court, this Court should affirm. *Bang v. Pittman*, 749 So. 2d 47 (Miss. 1999). Since there is no evidence Judge Loper abused his discretion in denying Charlotte's motion to set aside under Rule 59, this Court should affirm.

C. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING CHARLOTTE'S MOTION TO SET ASIDE THE SUMMARY JUDGMENT UNDER MISS. R. CIV. P. 60

Charlotte also contends that the lower court erred in failing to set aside the summary judgment under Miss. R. Civ. P. 60(b). The standard of review for a denial of a motion under Miss. R. Civ. P. 60 is abuse of discretion. *Accredited Sur. and Cas. Co., Inc. v. Bolles*, 535 So. 2d 56 (Miss. 1988); *Stringfellow v. Stringfellow*, 451 So. 2d 219 (Miss. 1984); *Richardson v. Derouen*, 920 So. 2d 1044 (Miss. App. 2006). Thus, unless there has been an abuse of

discretion, this Court should affirm the lower court's decision to deny Charlotte's motion under Rule 60(b).

Miss. R. Civ. P. 60(b) states as follows:

> (b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (2) accident or mistake;
>
> (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
>
> (6) any other reason justifying relief from the judgment.

The Mississippi Supreme Court has held that a final judgment should be set aside under Miss. R. Civ. P. 60(b) only in "exceptional circumstances." *Mitchell v. Nelson*, 830 So. 2d 635, 639 (Miss. 2002); *Moore v. Jacobs*, 752 So. 2d 1013, 1017 (Miss. 1999). See also *Lose v. Ill. Cent. Gulf RR Co.*, 584 So. 2d 1284, 1286 (Miss. 1991) (holding that the rule should be applied only in "extraordinary circumstances").

Charlotte does not specify which sub-part of Rule 60(b) entitles her to relief; however, it appears she is claiming relief under sub-part (3) dealing with "newly discovered evidence" and/or sub-part (6), the "catch-all" provision. With regard to alleged "newly discovered evidence," it is clear that Charlotte did not present the lower court with any such evidence within the meaning of Miss. R. Civ. P. 60(b)(3). As discussed above, Charlotte filed an affidavit (which she later

withdrew) in support of her motion to set aside containing alleged admissions made by John Moore going back to the time of the accident. M&M Logging submits that Charlotte's affidavit does not constitute "newly discovered evidence" under Rule 60(b)(3).

In *Sullivan v. Heal,* 571 So. 2d 278, 281 (Miss. 1990), the Mississippi Supreme Court stated:

> A party asking for a new trial on the ground of newly discovered evidence must satisfy the court that the evidence has come to his knowledge since the trial, and that it was not owing to a want of diligence on his part that it was not discovered sooner; and he must go further and show that the new evidence would probably produce a different result if a new trial were granted.

(Emphasis added); citing *Hutto v. Kremer*, 76 So. 2d 204, 209 (Miss. 1954).

In *Richardson v. Derouen*, 920 So. 2d 1044 (Miss. App. 2006), the plaintiff lost at trial, and then later moved for relief under Rule 60 arguing that some medical records used in the trial had been altered. The trial court denied the motion and the Court of Appeals affirmed. The Court of Appeals stated, "Richardson had access to send these records [to a forensic document examiner] before the trial; therefore, this is not newly discovered evidence." *Richardson v. Derouen*, 920 So. 2d at 1050. The Court stated, "[i]n order for a party to be granted a new trial on the ground of newly discovered evidence, the party must prove to the court that the evidence has come to his knowledge since the trial and that no amount of diligence on his part would have discovered said evidence sooner." *Id.* Accord, *In re V.M.S.*, 938 So. 2d 829 (Miss. 2006).

In *Mitchell v. Nelson*, 830 So. 2d 635 (Miss. 2002), the Mississippi Supreme Court addressed the issue of how the courts must deal with affidavits filed in support of motions under Rule 60. In *Mitchell*, the defendant moved for summary judgment, which the trial court granted. The plaintiffs filed a motion for relief under Rule 60 and submitted an affidavit in support. The trial court denied the plaintiffs' motion, and the Supreme Court affirmed. The Court stated, "the

plaintiff opposing the motion for summary judgment to set forth, by affidavit or some other form of sworn statement, specific facts which give rise to genuine issues that should be submitted to a jury" (quoting *Holbrook v. Albright Mobile Homes, Inc.*, 703 So.2d 842, 845 (Miss.1997)). The Court then stated:

> The [plaintiffs] did not set forth any of this type of material evidence before the trial court. In fact, the affidavit presented to this Court from the previous owner of the residence was only brought forth in the motion for new hearing on May 14, 2002. According to the applicable standard of review, this Court should only review orders granting summary judgment by examining the evidence before the trial court and not consider new evidence. *McCullough v. Cook*, 679 So.2d at 630. Thus, this affidavit is not admissible based on this premise in addition to the previously discussed Rule 60(b) exclusion.

Mitchell, 830 So. 2d at 640 (emphasis added).

Applying these cases to the case at bar, it is clear that the lower court did not abuse its discretion by denying Charlotte's motion under Rule 60. The "evidence" she presented (and then withdrew) was a self-serving affidavit which did not set forth any "newly discovered evidence." The affidavit contains statements allegedly made by John Moore on the date of the accident. Clearly, this does not qualify as "newly discovered evidence."

Moreover, under the *Mitchell* decision, this Court should review the summary judgment based on the information submitted to the lower court at the time the order was granted. As discussed above, Charlotte submitted nothing to Judge Loper besides her complaint prior to the entry of summary judgment. It was not until after the summary judgment was entered that Charlotte filed an affidavit, only to withdraw it later. Clearly, there was no abuse of discretion on the part of the lower court in denying Charlotte's motion under Miss. R. Civ. P. 60(b)(3).

With regard to the "catch-all" provision set forth in Rule 60(b)(6), M&M Logging submits that Charlotte has not identified any legitimate "reason justifying relief from the judgment." In *Mitchell*, supra, the Supreme Court held that a Rule 60(b)(6) motion "must be

based on some reason other than the first five enumerated clauses of the rule." *Mitchell,* 830 So. 2d at 639. Charlotte has not articulated any reason for invoking Rule 60(b)(6) as a basis to set aside the summary judgment entered in favor of Charlotte. As discussed above, the lower court considered Charlotte's motion to set aside, heard argument on the motion, and then denied it. There is no basis for concluding that the lower court abused its discretion or committed any gross error that would warrant reversal of its decision. Therefore, M&M Logging submits there is no legitimate "reason justifying relief from the judgment" entered in the lower court.

D. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING CHARLOTTE'S REQUEST FOR ADDITIONAL DISCOVERY

Charlotte also contends that the trial court erred by failing to grant her request for additional discovery under Miss. R. Civ. P. 56(f) prior to ruling on M&M Logging's motion for summary judgment. It is well settled that a decision to grant or deny a request for additional discovery under Rule 56(f) is within the sound discretion of the trial judge. *Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc.,* 873 So. 2d 103 (Miss. 2004); *Terrell v. Rankin,* 511 So. 2d 126 (Miss. 1987). Absent an abuse of discretion, appellate courts in Mississippi will not reverse a trial court's decision not to allow additional discovery. *Id.*

In *Hobgood v. Koch Pipeline Southwest, Inc.*, 769 So. 2d 838 (Miss. App. 2000), the Mississippi Court of Appeals held that the need for additional time under Rule 56(f) is not established simply through allegations. Instead, the party seeking additional discovery must show what steps have been taken to obtain access to information in the other party's possession. In *Marx v. Truck Renting and Leasing Ass'n, Inc.*, 520 So. 2d 1333, 1344 (Miss. 1987), the Mississippi Supreme Court that a party seeking additional discovery under Rule 56(f) "must present specific facts why he cannot oppose the motion and must specifically demonstrate how

postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact" (emphasis added).

In the case at bar, Charlotte has not produced any specific information showing how or why additional discovery would have created any genuine fact issues. This case sat on the lower court's docket for years prior to the filing of the motion for summary judgment. Charlotte had ample time to engage in whatever discovery she wanted, yet she failed to do so. As the Mississippi Supreme Court has held, "Rule 56(f) is not designed to protect the litigants who are lazy or dilatory." *Marx*, 520 So. 2d at 1344. There simply is no reason for assuming that additional discovery would have created any genuine issues of material fact. Moreover, there is no reason to believe the lower court abused its discretion in refusing to allow additional discovery. For these reasons, the lower court properly denied Charlotte's request for additional discovery, and this Court should affirm the summary judgment entered in favor of M&M Logging.

CONCLUSION

Based on the foregoing, the Appellee, M&M Logging, respectfully requests this Court to affirm the judgment of the trial court.

Respectfully submitted this 17th day of June, 2009.

M&M LOGGING, INC., *Defendant/Appellee*

By: _____

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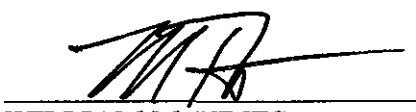
CERTIFICATE OF SERVICE

I, the undersigned counsel for Defendant/Appellee, M&M LOGGING, INC., do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

James C. Patton, Jr., Esq.
Patton Law Office
107 E. Lampkin Street
Starkville, Mississippi 39759
Attorney for Plaintiff/Appellant

Honorable Joseph H. Loper, Jr.
Choctaw County Circuit Judge
Post Office Box 616
Ackerman, Mississippi 39735

THIS the 17th day of June, 2009.



WILLIAM M. VINES