IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01519

CHARLOTTE MOORE — APPELLANT

VERSUS

M & M LOGGING, INC. — APPELLEES

REPLY BRIEF OF APPELLANT, CHARLOTTE MOORE

Appeal from the Circuit Court of
Choctaw County, Mississippi

ATTORNEY FOR APPELLANT:
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III. ARGUMENT

1.

The appellee M&M Logging, Inc. (hereinafter "M&M") focuses its argument to this Court on the insuffiencies/deficiencies of any actions and responses of appellant Charlotte Moore (hereinafter "Charlotte"). Ironically, M&M, as movant in the case at bar fails in sustaining its burden to prevail on a motion for summary judgment. In Hurst v. Southwest Miss. Legal Service Corp., 610 So. 2d 374 (Miss 1992), the Court made a clear statement of the parties respective burdens in summary judgment proceedings.

> This Court has held that when a motion for summary judgment is filed, the mon-moving party "must rebut by producing significant probative evidence showing that there are indeed genuine issues for trial" *Michael c. Nu-Way Steel & Supply,* 563 So. 2d 1371, 1375 (Miss 1990); *Newell v. Hinton,* 556 So.2d 1037, 1041 (1990). **This burden of rebuttal arises, however, only after the moving party has satisfied its burden of demonstrating that no genuine issue of material fact exists. Otherwise, there would be nothing for the non-moving party to "rebut."** (Id. p. 383)

In the case at bar, M&M, as movant, hasn't adequately presented any basis for summary judgment. The Court need only look as far as M&M's own summary judgment motion to see that the material fact issue over which M&M seeks summary judgment is the absence of willful or wanton injury to the plaintiff; and consistent therewith, M&M's sole sworn affidavit , if in fact sufficient, acts merely to deny the existence of "willful or wanton conduct" toward Charlotte, a licensee.

Defendant's Motion for Summary Judgment reads in paragraph 2 as follows, to wit:

> **"Plaintiff was a licensee at the time of the incident. Therefore, the only duty owed to her was the duty to refrain from willfully or wantonly injuring her. Since there is no evidence the Defendant willfully or wantonly injured Plaintiff, the Defendant is entitled to summary judgment.** (T Vol. 1, p. 180)

and, John Moore's affidavit states in summary fashion in paragraph 13, as follows, to-wit:

> **"No employee of M&M Logging intended this accident. No employee of M&M Logging was guilty of willful or wanton conduct toward Charlotte Moore."** (T Vol. 2, p. 184)

Charlotte filed a timely response[1] setting out the correct rule of law in the case *sub judice* and M & M filed a rebuttal[2] ten (10) months late arguing that Charlotte's exception argument, though correct law, was not applicable in this case at bar because the actions of M & M were "passive" in nature. (T Vol. 2, pp. 194 thru 196 and T Vol. 2, p. 203) M&M's characterization of mounting and inflating tires as"passive," not "active" conduct, defies simple logic and reason; inflating and mounting tires is not a "condition of the premises". More importantly, such argument in and of itself places material facts in issue. Do M&M's actions constitute active conduct? Further, do these actions amount to ordinary reasonable care and thus create an exception to the law regarding the duty of a premises owner to refrain from willful and wanton conduct towards a licensee? Lucas v. Buddy Jones Ford Lincoln Mercury, Inc. 518 So.2d 646 (Miss 1988); Adams v. Fred's Dollar Store of Batesville, 497 So 2d. 1097 (Miss. 1986); Hughes v. Star Homes, Inc., 379 So. 2d. 301 (Miss. 1978); Hoffman v. Planter's Gin Co., Inc., 358 So. 2d. 1008 (Miss. 1978)

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[1] M&M agreed to 2 (two) separate extensions for Charlotte to file her Response and the Court was copied on both.
[2] This rebuttal should not even be considered in this Court's de novo review, except for purposes regarding Charlotte's MRCP Rule 59 "manifest injustice" argument because it has not been made a part of the Record.

Surprisingly, the trial court considered M&M's 10-month late reply/rebuttal and refers to it in the court's opinion, but ignored the premise that M&M's argument addressed a material fact issue. M&M stated "The facts make clear that the actions of M&M logging were, if anything, "passive" in nature." Clearly, facts are in dispute, thus we have a jury question. The case of law of this state and Rule 56 of the Mississippi Rules of Civil Procedure clearly empower our trial courts to determine whether there are issues of fact to be tried, but **not to try issues of fact**. (*see comment to MRCP Rule 56*)

Also, M&M's argument that Charlotte has yet to come forward with sworn proof to establish an issue of material fact is incorrect. Charlotte's affidavit is part of the record and clearly constitutes admissions of fault by John Moore. (T Vol. 2, pp. 210 and 211) The trial Court's failure to consider the affidavit of Charlotte filed with her *Motion to Set Aside Summary Judgment (MRCP Rule 60(b)(6), Alternatively, for Reconsideration of Summary Judgment (MRCP Rule 59), for Hearing on Defendant's Motion for Summary Judgment and for Other Relief* (hereinafter "Charlotte's motion") was error.

At the hearing on Charlotte's motion, the trial court made it clear that said Court's primary reason for granting Summary Judgment was M&M's affidavit and Charlotte's lack of an affidavit for consideration. Interestingly, the Court acknowledged that it may have acted hastily in ruling on summary judgment motion without a hearing, and even erred in not having a hearing to start with; however, the trial court went on to say that there was still no affidavit in front of the court for consideration because Charlotte withdrew her affidavit. (T Vol. 3, pp. 28 thru 30) Charlotte did move to substitute an affidavit identical to her "filed" affidavit, excluding the

last numbered paragraph of said original affidavit that is an exhibit to Charlotte's motion (T Vol. 2, pp. 210 thru 211), and M&M responded acknowledging the affidavit and indicating it had no objection to the substitution (T Vol. 2, p. 225). The trial court's mistake was in ignoring Charlotte's affidavit at Charlotte's motion hearing. The Court entered an Order allowing Charlotte to withdraw her affidavit and to substitute a second affidavit. **The Court did not enter an order striking Charlotte's original affidavit... it remained in evidence as filed due to the failure to substitute**. (T Vol. 2, p 234) Charlotte's affidavit clearly establishes issues of material fact for a jury to decide.

2.

M&M is incorrect in its argument that Charlotte could not challenge the sufficiency of John Moore's affidavit because of her failure to file a motion to strike. Clearly, Charlotte would have been allowed to file a Motion to Strike at any point prior to the day of the hearing on any motion for summary judgment; but, more importantly Charlotte properly raised the question of the insufficiency of M&M's affidavit in her response which clearly challenged the sufficiency of John Moore's affidavit. (T Vol. 2, p. 195) Mississippi's rules of procedure, and specifically MRCP Rule 12(b), require raising defenses in responses and asserting such arguments in responsive pleadings. Such responsive assertions are an alternative to motions which can be filed before a MRCP Rule 56 hearing.

Second, Charlotte raises a separate legal argument as to John Moore's affidavit being inadequate to stand alone as the basis for a summary judgment. If taken as it exists, it is self-serving, conclusory and made by a party. These factors and characteristics are not necessarily questions of sufficiency of the affidavit itself, but merely factors for consideration of the law of

this state that precludes a trial court from granting a summary judgment solely on the basis of single, self-serving affidavit made by a party. This is an additional argument to Charlotte's argument that the affidavit fails to state that it is made on personal knowledge and includes hearsay testimony of the actions of other employees of M&M. Charlotte does not have to move to strike M&M's affidavit to make her additional argument. Matthews v. Horseshoe Casino, 919 So. 2d. 278 (Miss. 2005); Evan Johnson and Sons Construction v. State, 877 So.2d. 360 (Miss. 2004); Quay v.Crawford, 788 So. 2d. 76 (Miss. 2001); Burton v. Choctaw County, 730 So. 2d. 1 (Miss 1997)

3.

Finally, the brief argument of M & M does not even address Charlotte's argument for relief under Rules 59 and 60(b)(6). M&M argues that Charlotte fails to produce newly discovered evidence as required by Rules 59 and 60(b)(3). First, M&M's focus on Charlotte's motion and affidavit having to create new evidence in order to prevail under Rule 59 ignores its own "briefed statement of the law which includes the three (3) bases for success on a Rule 59(e) motion, including as basis number three (3) the "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).

Also, M&M's argument against the absence of manifest injustice in the case at bar addresses the wrong motion. The manifest injustice created in the case at bar was the trial court's grant of M&M's untimely summary judgment motion not the court's decision on Charlotte's motion. The trial court's Opinion on M&M's summary judgment motion referenced consideration of a rebuttal argument by M&M that was ten (10) months late. (U.C.C.R. 4.03)

The trial court's Opinion on summary judgment clearly evinces consideration of M&M's Rebuttal Brief. The trial court used its local Rule 3(b)to deny Charlotte's request for discovery as untimely but did not use Rule 3(b)(3) to deny M&M's motion for summary judgment that was equally untimely according to said local rule. (T Vol. 2, p.204 and Appendix C) In other words, the trial court ignored dilatory and untimely pleadings on the part of M&M in two (2) instances, but penalized Charlotte for her dilatory discovery request. How can such an action not constitute an abuse of discretion by the trial court that resulted in manifest injustice.

Finally, M&M argues that Charlotte's motion sought relief under Rule 60(b)(3); such an argument is simply misplaced. A simple reading of Charlotte's motion clearly sets out a request for relief under Rule 60(b)(6) and no reference to 60(b)(3) is made by Charlotte anywhere in her motion. (T Vol. 2, pp. 207 thru 209) M&M argues that Charlotte's affidavit is filed in support of a Rule 60(b)(3) request and as such is untimely, again such is not the case. Charlotte's motion makes it clear that the affidavit is filed to show the prejudice suffered by Charlotte in the trial court's denial of her request for continuance for discovery purposes.[3]

Charlotte's motion shows that Charlotte does in fact, and can in fact, present an issue of material fact with her affidavit filed therewith. If only Charlotte had been given the opportunity to file her affidavit after the trial court denied her continuance and request for an extension of discovery, the affidavit would have cured the absence of a deposition from John Moore.

[3]An initial Order denying Charlottes 56(f) request and a mandate to move forward on M&M's summary judgment motion would have allowed Charlotte to file her affidavit up until the day before any hearing. The trial court could have simply denied Charlotte's request and much like in its standard Order compelling Charlotte to file a response issued a year earlier, compelled any evidentiary matters be submitted along with available hearing dates for the summary judgment motion forthwith. (T Vol. 2, p.193)

Yes, Charlotte had months between the filing of her response and M&M's rebuttal to take John's deposition or file her affidavit, but since M&M did nothing to rebut Charlotte's Response, nor to set a motion hearing, for ten (10) months, and since Charlotte knew of John's admissions of fault, it was reasonable for her to assume that those same admissions were made to some M&M's representatives and the motion wouldn't be pursued. No rule or law obviates the provision of MRCP Rule 56(c) that allows a party adverse to a summary judgment motion to file opposing affidavits prior to the day of the hearing. Actually, Charlotte's affidavit is much like a proffer to show what her sworn evidence could have been had she been giving an opportunity to file an affidavit prior to a Rule 56 hearing.

Finally, M&M cites Mitchell v. Nelson, 830 So. 2d. 635 (Miss 2002) in support of an argument that Charlotte's affidavit could not have been considered by the trial court under a MRCP Rule 60 motion. M&M's reliance on Mitchell as authority to prohibit consideration of Charlotte's affidavit in the case at bar is unfounded. In Mitchell, the Court found that the Mitchell tried to "cloak" their 60(b)(3) claim under 60(b)(6) because a60(b)(3) claim was untimely. Charlotte has clearly sought relief under 60(b)(6) and is entitled to relief because exceptional circumstances exist. Mitchell actually includes a statement of the law that accurately defines the basis for Charlotte's 60(b)(6) motion, "this provision of the rule is a catch all provision to allow relief when equity demands." (Id. p. 639) Local rules should be equitably applied by the trial court, whether in favor or against the respective parties.

IV. CONCLUSION

Charlotte seeks nothing more than the truth about the facts and circumstances giving rise to her injuries. It is unusual in a civil action that the plaintiff and defendant, M&M principal John Moore, are married to each other and constantly exchanging information in an adversarial proceeding. Charlotte knows that John Moore accepts responsibility for her injuries; Charlotte also knows that John Moore did not intend to harm her. M&M's motion for Summary Judgment merely confirms John Moore's position that he, nor in his mind anyone else at M&M, intended to harm Charlotte. However, M&M's summary judgment motion and supporting affidavit was not sufficient to address anything but the issue of wilful or wanton injury to Charlotte. No basis exists for M&M's Motion for Summary Judgment to have been granted. The summary judgment granted to M&M should be reversed and this civil action remanded for further action and to proceed to a trial on the merits of the matter, if necessary.

This the 11th day of August, 2009.

Respectfully submitted,
CHARLOTTE MOORE,
APPELLANT

By: _____
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IX. CERTIFICATE OF SERVICE

I, James C. Patton, Jr., attorney for plaintiff, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to:

William M. Vines, Esq.
PAGE, KRUGER & HOLLAND, P.A.
Post Office Box 1163
Jackson, MS 39215-1163

This the 11th day of August, 2009.

_____
JAMES C. PATTON, JR.

VI. APPENDIX OF AUTHORITIES

Local Rules

LOCAL RULES
FOR
FIFTH CIRCUIT COURT DISTRICT OF MISSISSIPPI

[Renumbered and codified by order of the Supreme Court effective May 18, 2006.]

RULE 1.
ASSIGNMENT OF CIVIL CASES AND TRIAL SETTINGS FOR CIVIL CASES

(a) All civil cases that are filed in this court shall be randomly assigned to one of the judges by the clerk of the court by lot, with the clerk placing the names of the judges in a box, and drawing one of the names from the box. The last letter in the assigned cause number shall begin with the first letter of the last name of the judge to whom the case is assigned. The clerk shall notify the party filing a complaint, and when an answer is filed, the party answering the complaint, of the case assignment.

(b) Excepted from this procedure are motions for post-conviction collateral relief. Those motions shall be assigned to the judge who originally presided over the criminal proceeding that is the subject of the motion.

(c) In the event that cases are consolidated that had originally been assigned to separate judges, the consolidated case will be assigned a judge by the clerk of the court in the same manner as if the case were an original filing. If a case is assigned to a judge that has a conflict of interest that necessitates the recusal of the judge, the case shall be assigned to the other judge.

(d) Any party that wishes to have a case set for trial shall contact the court administrator for the judge to whom the case is assigned, at least thirty (30) days prior to the commencement of the term of court in which that judge is to preside, to obtain a trial setting. If a case is triable at a term of court that is being held by a judge to whom the case is not assigned, the case may be tried by that judge, irrespective of case assignment, so long as both judges, and all parties are in agreement.

(e) Any party that desires a vacation trial setting shall contact the administrator of the judge to whom the case is assigned, concerning possible vacation trial settings. Trials will be held in vacation when the time and schedule of the judge, and the parties, can accommodate a vacation setting.

RULE 2. NON-FILING OF DISCOVERY MATERIALS

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(a) Rule 7(a) of the Mississippi Rules of Civil Procedure limits and defines the pleadings which are allowed to be filed in any action. Therefore, due to the considerable cost to the parties of furnishing discovery materials, and the problem encountered with storage, this Court adopts the following procedure with regard to the non-filing of discovery materials with the Court:

(1) Interrogatories under Rule 33, M.R.C.P., and the answers thereto, Requests for Production or Inspection under Rule 34, M.R.C.P., Requests for Admissions under Rule 26, M.R.C.P., and responses thereto, and depositions under Rule 30 and 31, M.R.C.P., shall be served upon other counsel or parties as provided by the Rules, but shall not be filed with the Circuit Court Clerk. The party responsible for service of the discovery material shall retain the original and become the custodian.

(2) If relief is sought under the Mississippi Rules of Civil Procedure concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories, responses to requests for admissions or depositions, copies of the portions of the interrogatories, requests, answers, responses or depositions in dispute shall be filed with the appropriate Circuit Court Clerk and with the assigned Judge contemporaneously with any motion filed under said Rules.

(3) If interrogatories, requests, answers, responses or depositions are to be used at trial or are necessary to a pre-trial motion which might result in a final order on any issue, the portions to be used shall be considered an exhibit and filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated.

(4) When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel, the necessary discovery papers shall be filed with the Clerk.

The Clerk of this Court is authorized and directed to return forthwith any discovery materials submitted for filing which does not comply with the requirements set forth herein above.

RULE 3. SCHEDULING ORDERS

(a) Counsel in all civil cases shall, within fifteen (15) days after answer is filed, submit to the Court an agreed scheduling order setting forth:

(1) The date by which all discovery, including all evidentiary depositions and all supplementation of responses to discovery, shall be completed.

(2) The date by which all motions to amend, and all motions to additional parties, shall

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be served.

(3) The date by which all other pre-trial motions, both dispositive and non-dispositive excepting only evidentiary in limine motions, shall be served.

(b) If no scheduling order is presented to the Court within fifteen days after the answer is filed the following schedule will be in effect, to-wit:

As to Item 1 above, 90 days after answer
As to Item 2 above, 45 days after answer
As to Item 3 above, 90 days after answer.

RULE 4.

[Rule 4 as submitted to the Supreme Court was disapproved by order entered September 4, 2003.]

RULE 5.

TRANSFER OF MISDEMEANOR CRIMINAL CASES TO JUSTICE COURT

In the best interest of justice, and for the efficient administration of the criminal docket of the court, and based on the inherent authority of this court to transfer cases with concurrent jurisdiction to an inferior court, any misdemeanor criminal case that is initially filed in this court, whether by indictment, bill of information, or affidavit, may on motion of either party or on the court's own motion, be transferred to the justice court.

[Adopted by order entered June 9, 2003 and approved by the Supreme Court by order entered September 4, 2003.]

[Note: By order of the Supreme Court issued December 15, 2005, the local rule approved March 5, 1979 was, at the request of the judges of the district, repealed.]

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