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

COPY

NO. 2008-CA-01519

CHARLOTTE MOORE — APPELLANT

VERSUS

M & M LOGGING, INC. — APPELLEES

BRIEF OF APPELLANT,
CHARLOTTE MOORE
(Oral Argument Requested)

Appeal from the Circuit Court of
Choctaw County, Mississippi

ATTORNEY FOR APPELLANT:
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I. 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 justice of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Charlotte Moore, Appellant
2. M & M Logging, Inc., Appellee
3. James C. Patton, Jr., Esq., Attorney for Appellant
5. William M. Vines, Attorneys for Appellee M & M Logging, Inc.
6. Honorable, Circuit Court Judge, Joseph H. Loper, Choctaw County, Mississippi

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IV. STATEMENT OF ISSUES

THE TRIAL COURT ERRED IN GRANTING THE SUMMARY JUDGMENT MOTION OF THE DEFENDANT M&M LOGGING, INC., AND IN FAILING TO SET ASIDE SAID SUMMARY JUDGMENT BASED ON PLAINTIFF CHARLOTTE MOORE'S MOTION TO SET ASIDE SUMMARY JUDGMENT AND FOR RECONSIDERATION OF SUMMARY JUDGMENT.

V. STATEMENT OF THE CASE

Statement of the Facts Included

The case *sub judice* is a premises liability case involving a tire explosion in M&M Logging, Inc.'s (herein "M&M") shop for that resulted in serious injury to Charlotte Moore. (Hereinafter "Charlotte") M&M is a logging operation in Weir, Mississippi. Charlotte is married to the principal of M&M, John Moore (hereinafter "John").

On December 29, 2003, Charlotte was seriously and permanently injured as a result of a tire explosion occurring after John and two (2) M&M employees struggled for two hours with a tire mount. (T Vol. 2, pp. 7 thru 9)

The incident literally "blew" Charlotte's shirt off and caused injury to her eyes, head, neck and right hand. (T Vol. 1, p.8) Charlotte was in the M&M shop several times on the day in question and John acknowledged her presence. (John Moore affidavit, T Vol.2, pp. 183 thru 185)

M&M filed a Motion for Summary Judgment claiming that Charlotte was licensee at the time of her injury and therefor the only duty to her was the duty to refrain from willfully or wantonly injuring her. (T Vol. 2, pp. 180 thru 182) A short synopsis of the events

most critical to proceedings in this civil action are set out as follows, to-wit:

TIMELINE

- December 29, 2003: Occurrence and injury
- February 2, 2005: Complaint Filed
- March 3, 2005: Answer filed by Defendant
- August 25, 2005: Plaintiff's Deposition
- March 2006: Substitution of Counsel
- May 2006: Demand made by Plaintiff per Defendant's Request
- May 31, 2006: John Moore Affidavit
- January 1, 2007: Defendant's Motion for Summary Judgement
- March 30, 2007: Plaintiff's Response to Motion for Summary Judgement (After Court granted extension of time for response)
- January 7, 2008: Defendant's Rebuttal in Support of Summary Judgement
- February 27, 2008: Summary Judgement for Defendant
- March 10, 2008: 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
- August 18, 2008: Order denying Plaintiff's Motion

The initial Summary Judgment was rendered without hearing and almost 14 months after the motion was filed. M&M's Motion for Summary Judgment and John's supporting

affidavit failed to address any exception to the duty owed a licensee and only affirmed that John did nothing to willfully or wantonly injure Charlotte. (T Vol. 2, pp. 180 thru 185)

In the Circuit Court's written opinion supporting said Court's Summary Judgment the Court opines as follows,

> M&M rebuts by claiming their actions were, if anything "passive" not "active" negligence thus, not meeting the standard for the exception. [1] Further, M&M claims that their conduct did not subject Charlotte to "unusual danger or increase the hazard to her"[2] (T Vol. 2, p. 203)

Further, the lower court states,

> ... according to Rule 3(b) of the Local Rules for the Fifth Circuit Court District all discovery should have been completed within ninety (90) days of the filing of the answer to the Complaint. This court, therefore, believes this is an untimely request and believes it should be denied. (T Vol. 2, p. 204)

thus the lower Court denied Charlotte's M.R.C.P. Rules 56(f) request (for additional discovery) in its Summary Judgment opinion and accepted M&M's rebuttal argument.

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[1] Charlotte raised the Hoffman vs. Planters Gin Co., Inc., 358 So. 2d 1008 (Miss 1978) exception in her response regarding the higher duty created when a premise owner engages in active conduct.

[2] The trial court obviously relied on M&M's Rebuttal to Charlotte's Response which is not a part of the appeal record and was filed nine (9) months late according to the requirement of Uniform Circuit Court Rule 4.03(2) for submission of a rebuttal.

VI. SUMMARY OF THE ARGUMENT

The Circuit Court incorrectly granted M&M's Summary Judgment Motion and upon hearing for reconsideration of its Judgment incorrectly failed to set aside said Judgment. Charlotte assigns as error four (4) reasons for her appeal, to-wit:

a) M&M Logging, Inc. was not entitled to Summary Judgment based on premises liability law applicable to controlling the case *sub judice*;

b) M&M Logging, Inc. was not entitled to Summary Judgment based solely on the affidavit of John Moore;

c) The affidavit of Charlotte Moore filed with her Motion to Set Aside Summary Judgment should have been considered by the trial court, excepting paragraph (6) thereof;

d) Charlotte Moore's Motion to Set Aside Summary Judgment should have been granted to avoid manifest injustice.

Charlotte's Complaint and Response to M&M's Summary Judgment motion were sufficient to defeat said motion. When all for (4) assignments of error are considered it is clear that a "domino" effect was created by the Court's ruling that resulted in an unsubstantiated Judgment. Charlotte's Complaint and M&M's own Motion and supporting documents reflect the fact M&M never presented any acceptable proof that there was no jury issue as to the reasonableness of M&M's active conduct on the day in question.

VII. ARGUMENT

A. M&M was not entitled to Summary Judgment based on premises liability law applicable to the case *sub judice*.

The law of this state is clear that status of a person on any premises has little significance when that person's presence is known by the premises's owner and active conduct causes injury to the visitor. Hoffman vs. Planters Gin Co., Inc., 358 So. 2d 1008, 1012 (Miss 1978) The case at bar clearly involves active conduct on the part of M&M and not a case dealing with the condition of the premises. First, Charlotte's deposition (T vol. 2, pp. 186 and 212), M&M's Itemization of Material and Undisputed Facts (T vol. 2, pp. 190 thru 192) and even John's affidavit supporting M&M's Summary Judgment Motion (T vol. 2, pp. 183 thru 185) discuss "mounting tires". M&M's attempt to attach "passive" conduct to "mounting tires" is not reasonable. Second, M&M does not dispute that Charlotte's presence was known to M&M. Lastly, M&M has argued that M&M's conduct did not "increase the hazard to her (Charlotte)." How could continuing to pursue an unsuccessful task for "a couple of hours" not increase the risk that such a problem might result in disaster to a person whose presence is known? (T vol. 2, pp. 186 and 212)

The Hoffman exception is well documented in our case law, and it applies to "those cases involving injury resulting from active conduct as distinguished from conditions for the premises, or passive negligence."(Little vs. Bell, 719 So. 2d 757 (Miss 1998) All Charlotte had to show to defeat M&M's Summary Judgment Motion and create a jury

issue on the doctrine of reasonable care was affirmative action on the part of M&M. (Hoffman, p. 1012) Clearly, Charlotte did this thru her Complaint and M&M's own supporting pleadings, own excerpts from Charlotte's deposition, and own affidavit of John Moore.

B. M&M was not entitled to Summary judgment based solely on the affidavit of John Moore.

John's affidavit wholly fails on it face and cannot be considered as evidence that Charlotte is required to rebut. The affidavit is conclusory and self-serving; it purports to provide a statement of the actions of others without indicating uninterrupted observation of such actions; it is limited to a denial by John of "willful or wanton" conduct; and, it fails to specifically allege competence and a basis of personal knowledge. (T vol.2 pp. 183 thru 185)

First, John's affidavit states as follows,

> 9. On this day in question, each employee of M&M Logging followed standard and customary procedures for mounting and inflating tires. (T vol. 2, p.)

As this Court has stated in Evan Johnson & Sons Construction v. State, 877 So. 2d 360 (Miss 2004).

> 18. We agree with the trial court that the Cooper affidavit was conclusory and did not present a material issue of genuine face. In his Memorandum Opinion and Order, the circuit judge stated:
>
> > In particular, Cooper states in conclusory fashion that the plans and specifications were defective, unclear and/or ambiguous. (Evan, p. 365)

Also, John cannot and does not attempt to address the absence of negligence. At best,

John's affidavit is self-serving and when taken alone a parties affidavit cannot be the basis for summary judgment. (Quay v. Crawford; 788 So. 2d 76 (Miss 2001) John's affidavit refers to "M&M Logging employees", "two M&M Logging employees and I", "each employee" and "no employee of M&M." Surely, M&M cannot believe that John's status as part-owner of M&M lends competency to his ability to characterize the actions of employees without any allegation that he personally observed every move they made and even more unacceptable is John's affidavit testimony amounting to a state-of-mind assertion as to his employees "intentions." (T vol. 2, pp. 183 thru 185) John can only swear to his actions as not being willful or wanton.

Finally, John's affidavit, does not indicate he had "personal knowledge" of the facts alleged herein, or that was competent to testify to such facts.[3] As stated in Rule 56(e),

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn and certified copies of all papers or parts thereof to in an affidavit shall be attached thereto or served therewith.

The case law is very clear that the affidavit must state that the affiant has personal knowledge of the facts alleged herein. Farragut vs. Massey, 612 So. 2d 325 (Miss 1992) and Briscos's Food Land vs. Capital Associates, Inc., 502 So. 2d 619 (Miss 1986)

[3]As pointed out herein, it would have been impossible for M&M to show that John was competent to testify to some of the matters contained in his affidavit regarding other employees.

C. **The affidavit of Charlotte Moore filed with her Motion to Set Aside Summary Judgment should have been considered by the trial court, excepting paragraph (6) thereof.**

Charlotte's affidavit filed with her Motion to Set Aside the Circuit Court's Summary Judgment, or for Reconsideration of the same, should not have been ignored because of the ill-fated attempt made by her counsel to withdraw paragraph 6 of the affidavit to eliminate any offensive interpretation that M&M's counsel had of said paragraph 6.

Charlotte's affidavit is a part of the record in both its original form, inclusive of paragraph 6, (T. Vol. 2, pp. 210 and 211) and its sought-to-be amended form deleting paragraph 6 (T. Vol. 2, pp. 221 and 222). M&M had notice and received a copy of each affidavit and could not in any way claim prejudice. The original affidavit was never withdrawn, though the Order Allowing Withdrawal was entered, as such, after Charlotte's request in open court at the hearing on reconsideration, the affidavit should have been considered.

D. **Charlotte Moore's Motion to Set Aside Summary Judgment should have been granted to avoid manifest injustice.**

The Circuit Court made a clear ruling that Charlotte's request in "her response" pursuant to M.R.C.P. Rule 56(f) was "untimely", because "according to Rule 3(b) of the Local Rules for the Fifth Circuit Court District, all discovery should have been completed within ninety (90) days of the filing of the answer to the complaint." (Appendix of Authorities "A") Importantly, Local Rule 3(b) also says that "all other pre-trial motions, both dispositive and

non-dispositive, excepting only evidentiary *in limine* motions, shall be served ninety (90) after answer.

It is manifestly unjust for the Circuit Court to invoke a rule to penalize the respondent to a motion when the proponent of that motion is in direct violation of that very same rule; M.R.C.P. Rule 59, as well as, Rule 60(b)(6) ("exceptional circumstances"), provide for relief to correct a clear error of law or *prevent* a manifest injustice. Charlotte sought relief under both these rules. The Circuit Court has every right to invoke local rules to penalize or sanction litigants, but the Court must take equal action with respect to the parties.

M&M's motion was almost two (2) years after the local rule deadline, and after the motion was filed and response thereto, no action was taken for almost another year, and then M&M filed its rebuttal nine (9) months late; the Circuit Court should have denied or ignored both M&M pleadings to remain consistent in its application of the same rule.

VIII. CONCLUSION

Charlotte Moore did more than enough to defeat M&M's unsupported Motion for Summary Judgment. The grant of Summary Judgment and denial of Charlotte's motion to set aside the same was incorrect and should be overturned and this case move forward for trial on the merits for the action.

This the 16th day of April, 2009.

Respectfully submitted,
CHARLOTTE MOORE,
APPELLANT

By: _____
James C. Patton, Jr.

OF COUNSEL:
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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

Honorable Joseph H. Loper, Jr.
Circuit Court Judge, District 5
P.O. Drawer 616
Ackerman, MS 39735

This the 11th day of April, 2009.

JAMES C. PATTON, JR.

X. 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

A

(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.]