

**IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI**

2009-CA-00200

TALMADGE MILLER

APPELLANT

VS.

ANN MYERS, M.D.

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BRIEF OF APPELLANT

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Oral Argument is Requested

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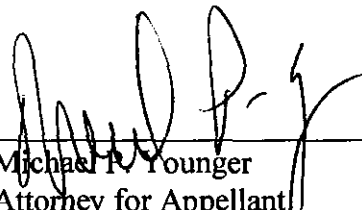
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Pepper Miller, widow of the Appellant
2. Ann Myers, M.D., Appellee
3. Michael P. Younger, Esq., attorney for Appellant
4. Mildred Morris, Esq., attorney for Appellee
5. Honorable Judge Tommie T. Green, Hinds County Circuit Court Judge

Respectfully submitted,



Michael P. Younger
Attorney for Appellant

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STATEMENT OF THE ISSUES

ISSUE ONE

THE LOWER COURT CIRCUIT JUDGE IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT WITHOUT A HEARING AND IN DENYING A REHEARING REQUEST WITHOUT GRANTING A HEARING.

STATEMENT OF THE CASE

CASE

The Appellant, Talmadge Miller, was treated by Dr. Ann Myers, the Appellee, for rheumatoid arthritis.

On March 24, 2003 the Appellant was presented to the emergency room of Baptist Hospital and was transferred to the University of Mississippi Medical Center and was diagnosed with Guillian-Barre Syndrome and Lupus.

On the 29th day of March, 2006, the Appellant filed suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi alleging that the Appellee's conduct and negligence and the application of the drug Remicade had caused damages to the Appellant.

It is very crucial in stating the one issue in this case before the Court as to the resident address of the attorney of the Appellant as of December 13, 2005. Prior to December 13, 2005 the attorney for the Appellant maintained his primary office at 1700 W. Government St., Ste. 102, Bldg. B, Brandon, Mississippi 39042.

Several years prior to December 13, 2005 the undersigned attorney of record moved his office from 168 W. Government St., Brandon, Mississippi 39042 to the above referenced 1700 W. Government St, Ste. 102, Bldg. B, Brandon, Mississippi.

Nothing could be any clearer on the letterhead of the letter dated December 18, 2005 mailed to Dr. Ann Myers by certified mail. A copy of which was attached to the complaint as if fully copied as an exhibit. (R.E. 7) (T.7-8)

On the 21st day of February, 2006, the Honorable Mildred Morris filed an answer in the above referenced cause and erroneously, on the Certificate of Service, lists 168 W. Government

St., Brandon, Mississippi 39042. (R.E. 7) (T. 11)

On the 28th day of March, 2006 the attorney for the Appellee filed a Motion for a Summary Judgment and again listed the wrong address of the Younger Law Firm showing on their Certificate of Service that the pleadings were mailed to 168 W. Government St., Brandon, Mississippi 39042.

One other red flag, as far as the Appellee's apparent either negligence in sending documents to the wrong address or otherwise, appears in (R.E. 21) (T.21) wherein the attorneys for the Appellee cited an exhibit to their Motion for Summary Judgment, a transcript which plainly stated that the Younger Law Firm was located at 1700 W. Government St., Bldg. B., Ste. 102, Brandon, Mississippi 39042.

The undersigned did not discover the filing of these until a personal inspection of the actual court file was conducted.

On August 11, 2006, the undersigned mailed to Hon. Judge Tommie T. Green a response to the Motion for Summary Judgment which the undersigned had discovered had been filed along with a brief in opposition to the Motion.

For whatever reason, the undersigned's response to the Motion for Summary Judgment does not appear in the Court file; however, it is readily apparent that the attorney for the Appellee knew of same since on August 14, 2006 a Motion to Strike the Response was filed.

It is respectfully requested that the August 11, 2006 letter to Judge Green and the response to the Motion for Summary Judgment be placed as an exhibit to this brief as if fully incorporated and referenced in the Court file.

Again, as has been previously noted, the Motion to Strike the Motion for Summary Judgment was mailed to 168 W. Government St., Brandon, Mississippi 39042. (R.E. 30) (T.30)

Being more fully discussed in the statement of the facts, the handling of the file has been done in such a way to make the Appellant appear either tardy or using delay tactics when nothing could be further from the truth.

A very cursory examination of the entire transcript will show that important documents were mailed to the Appellant at the wrong address and crucial time passed as the Appellant was not aware of the filing of the documents which has ultimately worked to the Appellant's disadvantage.

An argument on the summary judgment and the response to the summary judgment was conducted in the Circuit Court of Hinds County, First Judicial District in front of Honorable Judge Tommie Green on August 15, 2006.

At the conclusion of that hearing, the lower court basically denied the summary judgment but stated at the end of the summary judgment that the Court wanted to look at some documents from a previous filing in Rankin County Circuit Court. The evidence that this was argued unsuccessfully by the Appellee would be shown in the document filed on August 20, 2006 explaining the Appellee's apparent concern about the Hinds County summary judgment hearing. (R.E. 35) (T.35)

It is important to note that the filing of that supplement was the first instrument in this entire transcript which correctly identified the office of the Younger Law Firm. (R.E.41)(T.41)

The next matter of any importance in the transcript is a letter dated October 16, 2008 to Barbara Dunn, Circuit Clerk concerning a Notice of Hearing for re-argument of the original summary judgment. (R.E. 68,69) (T.68,69)

In the re-noticing of the summary judgment hearing, the attorneys for the Appellee went to great lengths to show that they had tried to serve the Notice of Hearing on the undersigned on

October 16, 2008 and October 17, 2008. On October 15, 2008 the undersigned was a temporary resident of River Oaks Hospital where the undersigned underwent a total knee replacement, being hospitalized from the 15th of October until the following Sunday. Four days after the release from River Oaks Hospital the undersigned had to undergo a second surgery to remove a blood clot from that artificial joint.

Again, however, the attorneys for the Appellee tried to convince the lower court, and apparently did, that the undersigned was totally ignoring or delaying the progress when nothing could be further from the truth. Up to this point in history ninety percent (90%) of the pleadings had gone to the wrong address and the undersigned was certainly unable to be at work on October 16 for basically was out the whole the month of October due to the two (2) knee surgeries that occurred during the middle of the month. (R.E. 71) (T.71)

The undersigned does acknowledge receiving the Notice of Hearing for the Summary Judgment argument to be held on Tuesday, December 16, 2008 at 9:00 a.m. (R.E. 69) (T.69)

It is important to note that the undersigned arrived at 9:00 a.m. at the Circuit of the First Judicial District of Hinds County, Mississippi on the 16th day of December, 2008 only to find none of the attorneys for the Appellee present and further, finding that the case did not appear on Judge Green's docket.

When the undersigned inquired about the status of this case on the docket, the undersigned was told to look at the Court file. The undersigned looked at the court file moments later and discovered nothing that shed any light on this situation whatsoever and then on December 16, 2008, the undersigned, via email, received an Order of Dismissal which had been executed the day before the hearing date. The actual Order of Dismissal was executed by Judge Green on December 15, 2008 and not filed until December 16, 2008. (R.E. 79,80) (T.79,80)

On December 22, 2008 the undersigned attorney for the Appellant filed a motion to reconsider the order of dismissal. (R.E. 81,82)(T.81,82)

The lower court, without giving the undersigned a hearing, denied the motion to reconsider on January 8, 2009. (R.E.83)(T.83)

STATEMENT OF THE FACTS

As has been pointed out heretofore, from the inception of the litigation, in the Hinds County Circuit Court, it was clear from Exhibit "A" attached to the Complaint, that it was known to the attorneys for the Appellee that the undersigned's address was 1700 W. Government St., Bldg. B, Ste. 102, Brandon, MS 39042 and not 168 W. Government St., Brandon, Mississippi 39042.

The facts were simply that the undersigned had moved from the 168 location several years before the filing of this Complaint and this should have been extremely evident to the attorneys for the Appellee. However, as it has been previously been pointed out, the answer and the first motion for summary judgment were all mailed to the wrong address and it took quite some time for the undersigned to know the existence of particularly the summary judgment.

As has been pointed out, the summary judgment was actually argued in front of Judge Green on August 15, 2006 and as could be gleamed from the Appellee's Supplement for the Motion for Summary Judgment which is in the transcript (R.E.35) (T.35) the Court would readily see that the summary judgment argument made for and on behalf of the Appellee on that occasion had not been very well taken by the lower court.

The subsequent noticing of the summary judgment hearing and the attempts to show the number of times in October that this matter was presented to or brought by my office was an attempt on the part of the Appellee to try to portray the Appellant and his counsel as someone who was tardy and/or wanting delay. Nothing could be further from the truth.

The undersigned states strongly that the Appellant did not get a hearing on the re-noticing of the summary judgment and did not get an argument on the re-noticing of the summary judgment and, did not even get to present any evidence to show that the undersigned was

hospitalized on the dates that the Appellee say they tried to serve this notice.

The undersigned would argue on behalf of the Appellant that this violates the Appellant's due process and ask that the order of dismissal of the summary judgment be overturned.

ARGUMENT

As is known throughout the judicial system, the lower court's task, in deciding summary judgment motions, is not to try the case; the Court's task is to determine if there is a case for the jury to try. Seymour v. Brunswick Corp., 655 So.2d 892 (Miss.1995).

Summary judgments are proper if the pleadings, depositions, answers to interrogatories, and/or motions on file, together with any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law.

Miss.R.Civ.P.56(c)

A party is not entitled to a summary judgment by default just because the non movant does not file counter affidavits or documents in opposition to the motion for summary judgment. Allen v. Mayer, 587 So.2d 255 (Miss.1991). A court should deny any motion for summary judgment if there is any doubt that a genuine issue of material fact exists or if the record is incomplete with any material facts. Scott Prescotte vs. Leaf River Forest Prodcuts, Inc., 747 So.2d 301 (Miss. 1999)

The key to all of these arguments, however, is a matter of having a hearing and being granted due process in order to make the above referenced representations for and on behalf of your client. As has been stated previously, in the August, 2006 argument for summary judgment, the judge basically declined to grant the summary judgment as is evidenced by the supplemental responses filed by the Appellee.

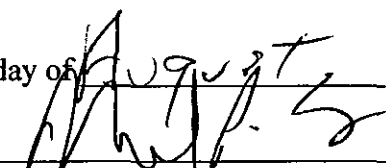
In the case at bar, no discovery had been conducted in this cause. I do not see how the ruling of the lower court can be substantiated when the case had not progressed even to the point of knowing all of the material facts by discovery

CONCLUSION

Because of the issues raised here concerning the address of the Appellant's attorney as well as the hospitalization of the Appellant's attorney during October of 2008 it would be considered by the undersigned to be an extreme miscarriage of justice for this summary judgment to stand.

It is respectfully requested that the Order of Dismissal on the summary judgment at the lower court be reversed.

Respectfully submitted this the 11 day of August, 2009.



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Brandon, MS 39042

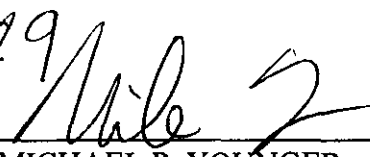
CERTIFICATE OF SERVICE

I, Michael P. Younger, do hereby certify that I have this date mailed a true and correct copy, via U.S. Mail, of the above and foregoing to:

Hon. Judge Tommie T. Green
P.O. Box 327
Jackson, MS 39205-0327

Mildred Morris, Esq.
P.O. Box 650
Jackson, MS 39205-0650

This 5 day of August, 2009



MICHAEL P. YOUNGER