

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

**2009-CA-200
~~2006-CA-01108~~**

TALMADGE MILLER

APPELLANT

VS.

ANN MYERS, M.D.

APPELLEE

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

REPLY BRIEF OF APPELLANT

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Oral Argument is Requested

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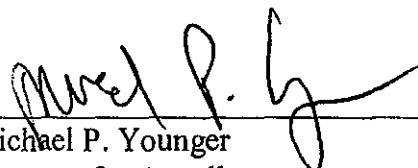
APPELLEE

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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REPLY

The Appellee in their Reply Brief stated that no authority existed to have a hearing on a Motion for Summary Judgment.

The plain language of Miss.R.Civ.P. 56 references hearings in all of their sections even concerning the manner of serving the opposite party with the hearing notice.

Summary Judgments must be served ten (10) days before the hearing on the Summary Judgment motion. This is specifically cited in Miss.R.Civ.P 56(c).

After a movant files a Summary Judgment motion the respondent may file any type of response. Under the rule, a respondent may or may not file affidavits with the court up to the day of the motion hearing. All of the references in Rule 56 always point to a "hearing."

In the case at bar in the original Summary Judgment motion, the response was timely filed with Judge Greene and the Circuit Clerk of Hinds County, Mississippi who apparently had misfiled said document.

As was noted in the original brief of the Appellant, it is obvious that the counsel opposite received the response to the motion for summary judgment because they filed a response to my response.

In the argument of the initial summary judgment motion, Judge Greene basically denied the motion for summary judgment; however, wanted to look at the prior case that had been filed in the Circuit Court of Rankin County, Mississippi.

The undersigned would affirmatively show again that the office of the attorney for the Appellant did not receive the August hearing notice and after the undersigned received a show cause motion from the court the matter was to be placed back on the docket.

As was pointed out in the original brief of the Appellant, the undersigned had suffered a

severe knee injury during the last week in September which can be verified by the law firm of Watkins and Eager since the firm was involved in a domestic case with the undersigned in Rankin County, Mississippi with Honorable Susan Steffey, a member of that firm.

The undersigned had a total knee replacement on October 15, 2008 and spent four (4) days in River Oaks Hospital which was the same time frame that the Appellee that says that there were attempts to serve notices to my office.

The undersigned would assert that he missed the total month of October from his employment due to the knee situation and, once the matter was re-noticed for hearing, the undersigned was prepared to argue same.

The Appellee, in their brief, tried to assert that no response to the original summary judgment was ever prepared and sent.

In looking at the pleadings, the responses to the response to the motion for summary judgment would indicate that they were fully aware and had complete notice of the response and position of the Appellant.

The Court, in Prescotte vs. Leaf Forest Products, Inc., 747 So.2d 301 (Miss. 1999), said the lower court should deny any summary judgment that if there is any doubt whether a genuine issue of material facts exists or that the record is incomplete in regards to a material fact.

When the Court considers matters outside the pleadings, the Court must provide the party opposing the motion with a reasonable opportunity to provide pertinent material because consideration of a motion for summary judgment requires a careful review by the trial court of all pertinent evidence most favorable to the non-movant. Cunningham vs. Lanier, 55 So.2d 685 (Miss.1989).

On appeal the Court must examine all of the evidentiary matters before it including

admissions and pleadings, answers to interrogatories, affidavits, and other evidence. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. Quinn vs. Mississippi State University, 720 So.2d 843 (Miss. 1998).

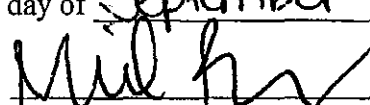
The case at bar, after arguing the original motion for summary judgment before the lower court, after the lower court taking same under advisement, it is the position of the Appellant that the Appellant was not afforded the opportunity in December of 2008 to state the Appellant's position to the lower court, nor was the undersigned given the opportunity to have a hearing on a motion to reconsider the granting of the motion for summary judgment that was held without a hearing.

The record in this cause indicates that an original suit was filed in the Circuit Court of Rankin County, Mississippi against Dr. Myers with all of the appropriate notices attached to said suit, including a letter to Dr. Myers in conformance with the Mississippi Tort Reform Act.

The undersigned would argue that the filing of that suit and the serving of process on the office of Dr. Myers tolled the statute of limitations; therefore, the statute of limitations should not be an issue in this cause.

It would seem equitable, fair and just that the Motion for Summary Judgment order be reversed and said remanded to the lower court for disposition.

Respectfully submitted this the 23rd day of September, 2009.



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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 23rd day of September, 2009.



MICHAEL P. YOUNGER