IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case No. 2009-CA-01401

FREDDIE L. KNOX, *et al.* — APPELLANTS

V.

RUSSELL MAHALITC, *et al.* — APPELLEE

On Appeal from the Circuit Court of
Washington County, Mississippi; Cause No. 2008-0055-CI

PRINCIPAL BRIEF OF APPELLEE RUSSELL MAHALITC
(Oral Argument Not Requested)

Bradley F. Hathaway, MSB N[redacted]
Campbell DeLong, LLP
923 Washington Avenue (38701)
P.O. Box 1856
Greenville, Mississippi 38702-1856
Telephone: (662) 335-6011
Facsimile: (662) 334-6407

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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate the need for disqualification or recusal.

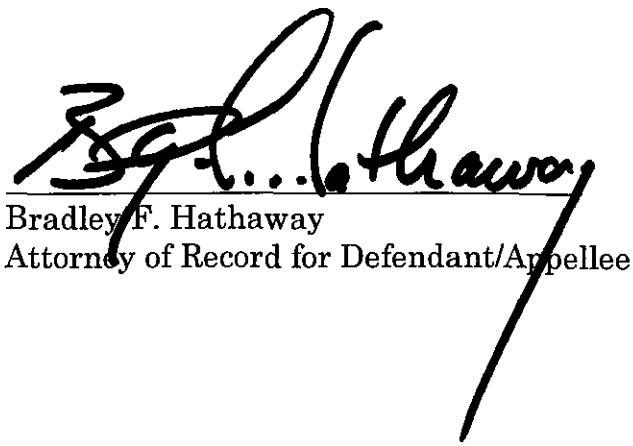
A. PARTIES:

Plaintiffs/Appellants	Freddie L. Knox Fredrick Knox Jeremy Knox Kishun Knox Markeya Knox Natasha Knox Tyangela Knox Yolanda Knox Walter Watson
Decedents	Lakidra Ramone Knox Mary Knox Deliyah Watson
Defendants/Appellees	Russell Mahalitc Magnolia Plantation David McCoy

B. ATTORNEYS:

For Plaintiffs/Appellants	Oby T. Rogers, Esq. OBY T. ROGERS, PLLC Thomas S. Moore, Esq. MOORE LAW GROUP, LLC Eddie J. Abdeen, Esq.

For Defendants/Appellees	Bradley F. Hathaway CAMPBELL DELONG, LLP
C. TRIAL JUDGE:	Honorable Richard A. Smith



Bradley F. Hathaway
Attorney of Record for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUE

1. Whether the Circuit Court of Washington County, Mississippi, adhered to Rule 56 and correctly held that Russell Mahalitc was entitled to summary judgment, when the uncontested record evidence demonstrated that Mahalitc merely held title to the vehicle David McCoy was driving and that Mahalitc did not have control of the vehicle or the driver at the time of the accident at issue.

2. Whether it can be said with definite and firm conviction that the trial court abused its discretion by denying the plaintiffs' Rule 59(e) motion to amend summary judgment after weighing all relevant factors.

STATEMENT PERTAINING TO ORAL ARGUMENT

Because the record is devoid of evidence establishing that Russell Mahalitc had any control over either David McCoy or the vehicle he was driving at the time of the accident at issue, Mahalitc does not believe that oral argument would assist this Court in resolving any issue presented by the appeal. As such, Mahalitc is not requesting oral argument.

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition in the Court Below

Around 8:30 a.m. on the morning of October 7, 2006, in Issaquena County, Mississippi, a collision occurred between a car being driven by Yolanda Knox and a truck being driven by David McCoy. This litigation ensued.

On March 4, 2008, the plaintiffs below ("**Knox Plaintiffs**") filed suit against David McCoy ("**McCoy**") and Russell Mahalitc d/b/a Magnolia Plantation ("**Mahalitc**").[1] The Knox Plaintiffs sued Mahalitc on the ground that he "**was the employer of McCoy on the occasion of the incident made the basis of this lawsuit.**" Not only did the complaint repeatedly recite this allegation, but the Knox Plaintiffs expressly incorporated and re-incorporated it as the factual basis for Mahalitc's supposed liability.

On March 27, 2008, Mahalitc and McCoy both responded to the suit by denying these allegations. McCoy was not an employee or agent of Mahalitc. He was employed by GM Farms, an unrelated farming entity, at the time of the accident. Moreover, although Mahalitc held title to the truck, the truck was on loan to GM Farms and it was GM Farms who controlled and had authority over the truck and who was using it in connection with its business when the collision occurred. Throughout discovery,

---

[1] Russell Mahalitc is actually a partner of Magnolia Plantation, a Mississippi partnership. At various times in the record of the proceedings below, "Mahalitc" and "Magnolia Plantation" were used interchangeably. However, since the trial court's order granting summary judgment identified this defendant as "Mahalitc" – and to promote clarity – that is how he will be referred to throughout this brief, except where otherwise noted.

both McCoy and Mahalitc iterated these facts, but the Knox Plaintiffs, without amending or modifying their complaint, maintained their suit against Mahalitc.

On December 9, 2008, Mahalitc moved for summary judgment pursuant to Rule 56 of the *Mississippi Rules of Civil Procedure.* To support his motion, Mahalitc submitted affidavit testimony, sworn answers to discovery, answers to requests for admissions and pleadings, all of which is recognized as competent Rule 56 evidence. Mahalitc also served an itemization of undisputed material facts as required by local rule.

For their part, the Knox Plaintiffs would wait until the day of the motion hearing – March 9, 2009 – to file their response. While claiming to oppose summary judgment, they failed to set forth, by affidavit or any other Rule 56 evidence, specific probative facts demonstrating a triable issue with respect to their claims against Mahalitc – and they submitted no affidavit attesting that they were unable to present Rule 56 evidence essential to oppose Mahalitc's motion. *See* MISS. R. CIV. PROC. 56(f).

The trial court received oral argument on the motion and, on March 27, 2009, the Circuit Court of Washington County, Mississippi, entered its "Order Granting Defendant Russell Mahalitc's Motion for Summary Judgment and Directed Verdict."

On April 6, 2009, the Plaintiffs moved, pursuant to Rule 59(e) of the *Mississippi Rules of Civil Procedure,* to amend or alter the summary judgment order. Mahalitc opposed the Rule 59(e) motion on the grounds that the Knox Plaintiffs had failed to articulate any recognized ground for altering or amending a judgment. No rebuttal brief was submitted by plaintiffs.

On June 21, 2009, a hearing was conducted on the Rule 59(e) motion. At the hearing, the Knox Plaintiffs offered nothing additional to demonstrate grounds for amending the grant of summary judgment. On July 17, 2009, the trial court entered its order denying the Rule 59(e) motion.

On August 14, 2009, the Knox Plaintiffs perfected an appeal from these rulings.[2]

B. Statement of Facts Relevant to the Issues Presented for Review

The origin of this lawsuit is a vehicular collision which occurred on October 7, 2006, on Highway 16 in Issaquena County, Mississippi, resulting in the death of three passengers who occupied a vehicle being driven by Yolanda Knox ("**Yolanda**"). The essential facts of the accident are as follows: In broad daylight, Yolanda who was trailing McCoy in her car, collided with McCoy's tractor-trailer truck as he was turning off the highway into a private driveway. On the back of McCoy's trailer was a John Deere farm tractor, with its customary green hue. McCoy was hauling the tractor to a mechanic's shop for repairs. (C.P.[3] 131-47; 148-64; 165-66; 175-82; and 252).

The truck McCoy was driving at the time of the accident was titled in Mahalitc's name but was on loan to GM Farms, a separate farming entity, for its sole use and benefit. (C.P. 148-64; 165-66; 172-73). McCoy was an employee of GM Farms and was acting exclusively as an agent for GM Farms in furtherance of its business at the time of the accident. *Id.* GM Farms also owned the John Deere farm tractor McCoy was hauling to the mechanic's shop. (C.P. 148-64). In contrast, Mahalitc had no control or

---

[2] The Knox Plaintiffs' claims against McCoy were not affected by the trial court's rulings and he is not a party to this appeal.

[3] The designation "C.P." is used to refer to the clerk's papers.

authority over McCoy; had no control or authority over the truck; had no control or authority over GM Farms' use of the truck; and had no interest in the purpose for which GM Farms was using the truck. *Id.*; (C.P. 172-73).

On March 4, 2008, the Knox Plaintiffs, as representatives of the decedents, filed suit against McCoy and Mahalitc. The Knox Plaintiffs sued Mahalitc claiming that he was McCoy's employer. In particular, they alleged:

> Defendant, Russell Mahalitc, is an adult resident citizen of Washington County, Mississippi, who does business as Magnolia Plantation (hereinafter referred to collectively as "Magnolia") and may be served with process of this Court at 1366 Marathon Pt., Glen Allan, Mississippi 38744. ***Magnolia was the employer of McCoy on the occasion of the incident made the basis of this lawsuit.***

(C.P. 1-13 at ¶9) (emphasis added). The Knox Plaintiffs expressly incorporated this allegation into each count of their complaint, beginning each count with the allegation that: "**Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if set forth fully herein[.]**" *Id.* at ¶¶ 11, 17, and 22. These allegations would remain unchanged.

Twenty-three days later – on March 27, 2008 – Mahalitc and McCoy answered the complaint, sharply denying all allegations of liability advanced by the Knox Plaintiffs. Needless to say, it was specifically denied that Mahalitc employed or otherwise controlled McCoy, it was denied that Mahalitc had any control of the truck McCoy was driving and it was denied that Mahalitc had any interest in GM's use of the truck. (C.P. 25-35; 36-48).

With their complaint, the Knox Plaintiffs also propounded a series of requests for admissions to Mahalitc, which he timely answered as follows:

REQUEST NO. 4: Admit or deny that on October 7, 2006, Defendant David McCoy was employed by Defendant Russell Mahalitc d/b/a Magnolia Plantation.

RESPONSE: ***Denied.***

REQUEST NO. 5: Admit or deny that at the time of the accident described in Plaintiffs' complaint, Defendant David McCoy was acting in the course of his employment with Defendant Russell Mahalitc d/b/a Magnolia Plantation.

RESPONSE: ***Denied.***

REQUEST NO. 6: Admit or deny that the accident described in the Plaintiffs' complaint occurred in the course of Defendant David McCoy's employment with Defendant Russell Mahalitc d/b/a Magnolia Plantation.

RESPONSE: ***Denied.***

REQUEST NO. 7: Admit or deny that the accident described in the Plaintiffs' complaint arose out of Defendant David McCoy's employment with Defendant Russell Mahalitc d/b/a Magnolia Plantation.

RESPONSE: ***Denied.***

(C.P. 110).

Other adverse discovery was conducted by the Knox Plaintiffs in an attempt to establish some sort of agency relationship between Mahalitc and McCoy or to establish that Mahalitc had an economic interest in the trip. Such discovery proved to be futile for the Knox Plaintiffs. (C.P. 131-47; 148-64; 165-66).

Unmoved by this, Plaintiffs continued to prosecute their complaint against Mahalitc. Nine months after suit was filed, Mahalitc moved for summary judgment. (C.P. 70-72).

In particular, Mahalitc moved for summary judgment "on the complaint of the Plaintiffs," praying that "summary judgment be entered in his favor and against

Plaintiffs **on all claims and in regards to all damages and relief sued for herein."**[4] *Id.*

With his motion, Mahalitc submitted a memorandum of authorities – citing relevant authorities supportive of Mahalitc's dismissal on account of his mere title-ownership– and an itemization of undisputed material facts. (C.P. 172-74; 175-82). Mahalitc also came forward with affidavit testimony, sworn answers to discovery, answers to requests for admissions and pleadings, all of which is recognized as competent Rule 56 evidence. (C.P. 70-169).

In violation of Rule 4.03 of the Uniform Circuit and County Court Rules, it was not until March 5, 2009 – some 86 days later – that the Knox Plaintiffs certified service of their response and it was not until March 9, 2009 – the day of the hearing on summary judgment – that the response was filed.[5] (R.E. 1; C.P.191-200). Even then, the Knox Plaintiffs never responded to Mahalitc's itemization of undisputed material facts by indicating either agreement or specific reasons for disagreement that such facts were undisputed and material. Apart from this, the Knox Plaintiffs failed to otherwise demonstrate that Mahalitc controlled McCoy or the truck he was driving and the trial court would ultimately find that the Knox Plaintiffs "wholly failed to produce competent evidence of [their] claims." (R.E. 2; C.P. 222).

At the outset of their response, the Knox Plaintiffs merely re-stated the

---

[4] Plaintiffs would later feign surprise and assert that they did not know that Mahalitc's motion was for complete summary judgment.

[5] Mahalitc moved to strike the response for untimeliness. The trial court acknowledged Mahalitc's motion to strike in its ruling on summary judgment but did not adjudicate the matter on that ground. (C.P. 219-222 at ¶ 2).

allegations in their complaint in what was essentially a cut-and-paste format. (R.E. 1; C.P. 191-92). Then, they proffered the generic contention that "**[we] contend that [Mahalitc] is the defendant who placed a truck/trailer unit on the roads of Mississippi that was negligently inspected, equipped and maintained.**" (C.P. 192). Of course, the affidavit testimony, answers to discovery and answers to requests for admissions offered by Mahalitc proved otherwise and, in their response, the Knox Plaintiffs failed to offer any Rule 56 evidence which contested or disputed these material facts. Confusing repetition for substance, the Knox Plaintiffs asserted what they were supposedly *claiming* and made oblique allusions to maybe trying to develop a theory of liability against Mahalitc for loading the John Deere tractor that was being hauled at the time of the wreck (which Mahalitc had nothing to do with either). (C.P. 191-97 at ¶¶ 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 3 and 4).

Notably, though, the Knox Plaintiffs' principal argument in opposition to summary judgment was the contrived theory that Mahalitc was McCoy's so-called "statutory employer" – a legal doctrine unique to the arena of commercial interstate trucking law which has no application to this case. (R..E. 1; C.P. 193-96). Although the complaint was noticeably devoid of a statutory employer claim, the Knox Plaintiffs continued to maintain that McCoy was an agent of Mahalitc. Quoting directly from the plaintiffs' response in opposition to summary judgment: "**In accordance with federal leasing regulations and case law, [Mahalitc] is responsible for the driver, David McCoy's actions.**" (R.E. 1; C.P. 193 at ¶6).

On March 9, 2009, a hearing was held on Mahalitc's motion. At the hearing, the

Knox Plaintiffs, in an about-face, announced they were now abandoning the statutory employer theory. Counsel for the Knox Plaintiffs stated:

> [O]ur client has given us permission not to bring those for procedural reasons and strategic reasons. It has to do a little bit with insurance.

(*Transcript* at p. 17). Thus, their leading legal argument was jettisoned the same day they filed their response.

Then, counsel for the Knox Plaintiffs proceeded to argue to the Court what their new *contentions* were in the case:

> On the back of the trailer, David McCoy was hauling . . . a farm tractor. Your Honor, that stopped for some reason. All right.
>
> Now, our ***contention*** is that the farm tractor rolled forward, went off the trailer and actually impeded the movement of the commercial tractor because it touched the rear tandem wheels. We have a witness that says it was in that position when it came to rest.
>
> When it came to rest, Your Honor, this long, long part of the trailer that extends far beyond the rear part of the trailer that extends far beyond the real duals of the trailer was sticking out in the roadway when our clients came ***by driving directly into the sun*** and could never see that and drove into it.

(*Transcript* at pp.18-19). None of these "contentions" appeared in the record and they were made without any supporting evidence.

At the hearing, counsel for the Knox Plaintiffs made the additional assertion that the trailer which Yolanda Knox collided with in broad daylight (and, according to her attorney, while the sun was in her eyes) lacked certain lights or other reflectors. Counsel for the Knox Plaintiffs then referred the trial court to three photographs and contended that they were self-proving of the claims which had been made against Mahalitc.

The trial court would later hold that although "three photographs of the truck were attached to [to the plaintiff's response], no affidavits were filed," and rejected them as constituting sufficient evidence to overcome Mahalitc's motion for summary judgment.[6] While the Knox Plaintiffs now contend that no objection was made to the lack of evidentiary value of the photographs, that is incorrect. Twice – once in Mahalitc's brief and again at the hearing – Mahalitc protested that the photographs were incompetent of proving anything relative to the plaintiffs' claims on account of no accompanying Rule 56(e) affidavit. (*Transcript* at p.7; C.P. 207). Moreover, the photographs did nothing to refute Mahalitc's evidence showing that he did not have control of or authority over the truck. This obviously did not escape the trial court as it picked up on the fact in its summary judgment order. (R.E. 2 at ¶ 7; C.P. 220).

On March 27, 2009, the Circuit Court of Washington County, Mississippi, granted Mahalitc's motion for summary judgment and entered final judgment in his favor. (R.E. 2; C.P. 219-222). In its order, the court undertook a studied review of Rule 56 law. In particular, the court noted that "the purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial." *Id.* at ¶ 12. The trial court also recited the requirement of Rule 56(e) that "supporting and opposing affidavits shall be made

---

[6] Although the trial court properly adhered to the rule of law in finding that the photographs were not supported by an affidavit comporting with Rule 56(e), the Knox Plaintiffs cannot presume that the trial court did not also detect that they clearly showed lights and reflectors at the rear of the trailer. The photograph labeled Exhibit "3" provides one of the better views of an amber marker on the rear, passenger's side of the trailer. Regardless of what the photographs show – or fail to show – is immaterial, however, to the grounds on which the claims against Mahalitc were dismissed.

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." *Id.* at ¶ 15. Furthermore, the trial court acknowledged the rule of law that once the party moving for summary judgment has shown an absence of a genuine issue of material fact, the "burden of rebuttal falls upon the [non-moving] party" to "produce specific probative facts showing that there is a genuine material issue for trial." *Id.* at ¶ 17. Continuing in this vein, the trial court held that "the [non-moving] party's claim must be supported by more than a mere scintilla of colorable evidence" and, by comparison, "[b]are assertions are not enough to avoid summary judgment and the non-movant may not rest upon allegations[.]" *Id.*

Applying these legal principles, the court first held that Mahalitc's motion went "factually unchallenged," stating:

> Using the above rules, Respondent herein has wholly failed to produce competent evidence of its claims which challenge Movant's competent Rule 56 evidence (Responses to Requests for Admissions; Responses to Interrogatories; Affidavit of Defendant). Plaintiff's counsel's restating allegations of the Complaint is not evidence.

Id. at ¶ 18.

Secondly, the trial court, in response to the Knox Plaintiffs' reference to trying to discover if just maybe Mahalitc had something else to do with the accident (*e.g.*, loading the tractor) – which he did not – held that "further discovery was not available." *Id.* at ¶ 19. Citing *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004) and *3M v. Glass*, 917 So. 2d 90 (Miss. 2005), the trial court adhered to the rule of law that attorneys must know "prior to filing suit the litigable event consisting

of just what it is each defendant did wrong." *Id.*

Finally, even though the Knox Plaintiffs had abandoned the statutory employer theory which they vehemently advanced in opposition to summary judgment, the trial court ruled that it had no application in any event. *Id.* at ¶ 20.

The Knox Plaintiffs subsequently moved to alter or amend the order granting summary judgment under Rule 59(e). (C.P. 223-24). In their Rule 59(e) motion, the Plaintiffs rehashed many of the same arguments made in opposition to summary judgment. *Id.*

By order dated July 17, 2009, the trial court denied Plaintiffs' Rule 59(e) motion on the grounds that the Knox Plaintiffs had wholly failed to demonstrate the existence of (1) an intervening change in controlling law, (2) the availability of new evidence not previously available or (3) the need to correct a clear error of law or prevent manifest injustice. In contrast, the trial court found that the Knox Plaintiffs were impermissibly using their Rule 59(e) motion to rehash rejected arguments and/or to introduce new arguments in another shot at swaying the court. (R.E. 3; C.P. 252-60).

In support of their Rule 59(e) motion, the Plaintiffs also attached an excerpt from a deposition transcript which was available prior to summary judgment being granted. (C.P. 223-34). Noting that the only type of evidence which is potentially relevant in a Rule 59(e) proceeding is new evidence not previously available, the court correctly held that facts or evidence developed prior to summary judgment being granted could not form the basis of a motion to amend. (R.E. 3; C.P. 251).

The trial court also addressed the Knox Plaintiffs' contention that the court had

erroneously applied Rule 56 to all the claims contained in their complaint. (C.P. 257-260). Rejecting this argument, the trial court quoted at length from *Stuckey v. Stuckey*, 912 So. 2d 859, 56 U.C.C. Rep. Serv. 2d 867 (Miss. 2005), which in relevant part held:

> Summary judgment, as defined under both our state and federal rules of civil procedure is a mechanism by which a moving party is able to pierce the allegations made in the opponent's pleadings and, quite simply, place the non-moving party (opponent) in a position of having to convince the trial court ***via discovery documents (depositions, answers to interrogatories, admissions, etc.) and/or sworn affidavits*** that there are genuine issues of material fact which require resolution by a plenary trial before the trier-of-fact. In this way, summary judgment roots out mere accusation and conjecture in favor of merit and ultimately functions to force a non-movant to present some modicum of material evidence. While summary judgment is not a substitute for the trial of disputed fact issues, it is an effective rule of procedure which forces parties to produce evidence sufficient to convince a trial court that a genuine issue of material fact exists.

Id. (emphasis supplied).

SUMMARY OF THE ARGUMENT

As much as anything else, at stake on this appeal is the authority of Rule 56 and the upholding of trial courts which properly adhere to the rule of law.

The comment to Rule 56 instructs that the rule "provides the means by which a party may pierce the allegations in the pleadings" and should "operate to prevent the system of extremely simple pleadings from shielding claimants without real claims." MISS. R. CIV. PROC. 56, cmt. The rule "serves as an instrument of discovery in calling forth quickly the disclosure of the merits of . . . a claim . . . on pain of loss of the case for failure to do so." *Id.*

Here, after discovery demonstrated the absence of a triable issue on the Knox Plaintiffs' claims against Mahalitc, he utilized Rule 56 for the purpose for which the

drafters intended. By employing this mechanism, Mahalitc placed the Knox Plaintiffs in a position of having to convince the trial court with depositions, answers to interrogatories, admissions and/or sworn affidavits that there were genuine issues of material fact which required resolution by a trial before a jury. *A fortiori*, Mahalitc sought to root out mere accusation in favor of merit and he carried his burden. The Knox Plaintiffs did not.

Regardless of the various characterizations given by the Knox Plaintiffs to their claims against Mahalitc, the facts showing that Mahalitc merely held title to the vehicle McCoy was driving at the time of the accident and that he had no control over McCoy or the truck went factually unchallenged.

On appeal, the Knox Plaintiffs tacitly concede this point by attempting to create error with references to information and so-called evidence which is either outside the record, unverified, mere assertion or all of the above.

On that premise, the Knox Plaintiffs seek to reverse the dismissal of their claims against Mahaltic by asking this Court to stack inference upon inference and draw presumptions, which is legal heresy. At the same time, the Knox Plaintiffs protest that it was Mahalitc who failed to come forward with evidence, representing a gross misapprehension of who properly bears that burden – namely, the Knox Plaintiffs. Regardless, the record, including the well-reasoned written, opinions of the trial court, eviscerate such contentions.

The record in this case portrays a trial judge who carefully and methodically considered all matters properly presented to the court and then followed the rule of

law. No less should be expected but no more can be done. In *United Services Auto Association v. Stewart*, the Mississippi Supreme Court noted the critical need to adhere to accepted rules of law "so that trial courts can make correct decisions [.]" 919 So. 2d 24 (¶ 21) (Miss. 2005).

Respectfully, the rulings of the trial court in this matter demand, on the merits, the affirmation of this Court.

ARGUMENT

A. The Differing Standards of Review – Rules 56 and 59

It is often mere formality for parties to include a statement of the standard of review for the appeal of any given issue. Here, such treatment of the applicable standards is inadequate.

The Knox Plaintiffs appeal from two rulings of the trial court – the first being a grant of summary judgment under Rule 56 and the second being a denial of a Rule 59 motion. The standards of review are different for each.

1. Rule 56

In *Angle v. Kopper, Inc.*, the Mississippi Supreme Court recently enunciated the standard of review applicable to the grant of a Rule 56 motion:

> This Court conducts a *de novo* review of orders granting or denying summary judgment and looks at all the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." The moving party "bears the burden of persuading the trial judge that: (1) no genuine issue of material fact exists, and (2) on the basis of the facts established, he is entitled to judgment as a matter of law." However, the movant bears the burden of production if, at trial, he would have the burden of proof on that issue. Furthermore, the nonmoving party cannot survive a motion for summary judgment by relying on a "[m]ere allegation or denial of material fact." In other words,

> "the plaintiff may not rely solely upon unsworn al legations in the pleadings, or 'arguments and assertions in briefs or legal memoranda.'"

--- So.3d ----, 2010 WL 2106043 (May 27, 2010) at ¶6 (internal citations omitted).

2. Rule 59

The standard of review applicable to the denial of the Knox Plaintiffs' motion to alter or amend the trial court's judgment is abuse of discretion. *Brooks v. Roberts*, 882 So. 2d 229 (¶15) (Miss. 2004). Under this standard, the appellate court must affirm "unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." *Peters v. State*, 971 So. 2d 1289 (¶3) (Miss. App. 2008). The factors relevant to a Rule 59(e) motion are whether the movant has shown: (i) an intervening change in controlling law, (ii) the availability of new evidence not previously available, or (iii) the need to correct a clear error of law or to prevent manifest injustice. *Brooks*, 882 So. 2d at ¶15.

When viewed under these pronouncements, the rulings of the trial court call for affirmation.

B. Summary Judgment was Proper on all Claims of the Knox Plaintiffs

The Knox Plaintiffs labor under the misapprehension that it was improper for the trial court to grant complete summary judgment on their claims and that, instead, summary judgment should only have been granted on the plaintiffs' *respondeat superior* claims. Further to this point, the Knox Plaintiffs suggest that their complaint "also included claims against Mahalitc, ***as the owner of the subject tractor-trailer***, for wrongfully and/or negligently maintaining, equipping and/or inspecting the [truck]

in violation of, among other things, Mississippi law." Out of the litany of conclusory allegations in their complaint, this is the only allegation which the Knox Plaintiffs contend should have survived summary judgment. The Knox Plaintiffs' argument on this account is unavailing.

Foremost, the only *factual* basis set forth by the plaintiffs as establishing liability against Mahalitc was that he "was the employer of McCoy on the occasion of the incident made the basis of this lawsuit" (¶9). The Knox Plaintiffs specifically incorporated this allegation by reference as the basis for each of their claims. The first paragraphs of Count One, Count Two and Count Three of the complaint are identical, with each stating: **"Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if set forth fully herein."**

Rule 10(c) of the *Mississippi Rules of Civil Procedure* uniquely permits this sort of adoption by reference pleading "where a factual averment has bearing in subsequent allegations of a pleading." MISS. R. CIV. PROC. 10(c), cmt. No legitimate disagreement can be taken with the fact that the Knox Plaintiffs utilized Rule 10(c) to adopt by reference the allegation that Mahalitc had an agency relationship with McCoy *and thus* was liable for the other conclusory allegations contained within the complaint. The complaint in the record speaks for itself on this point. (C.P. 1-15).

Of course, the Knox Plaintiffs now concede, as they must, that the undisputed material facts demonstrated that Mahalitc held title to the truck but that it was on loan to GM Farms; however, their complaint does not set forth those allegations. Instead, even after discovering (while the case was still in its infancy) that Mahalitc

merely held title to the truck, the Knox Plaintiffs deliberately pursued an agency theory of liability, contesting summary judgment on the ground that Mahalitc was McCoy's statutory employer, contending that, under this legal principle, the trial court should find that Mahalitc retained "exclusive possession and control of the truck" and that Mahalitc had "full responsibility to control [the truck] and [McCoy]." (C.P. 195).

It is "well-settled law in Mississippi that plaintiffs are bound by what is alleged in the complaint, absent a subsequent amendment or modification." *Powell v. Clay County Bd. of Supervisors*, 924 So.2d 523 (¶ 11) (Miss.2006). "[E]ven under the liberal pleading requirements of Rule 8(a) [of *the Mississippi Rules of Civil Procedure*], ***a plaintiff must set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.***" *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So.2d 427 (¶ 11) (Miss.2007) (quoting *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 240 (1st Cir. 2004)) (emphasis supplied). Thus, the plaintiffs, as masters of their complaint, cannot stand to be heard on claims that were not pled or on wrongfully pled claims that were not amended.

The matter does not end there. Even assuming the allegations of the complaint included theories of liability based on Mahalitc's holding title to the truck, that benefits the Knox Plaintiffs nothing. Under Mississippi law, a person is liable for injuries resulting from a motor vehicle accident only if he actually operates or controls the motor vehicle, or is master or principal of the person who was operating the vehicle. See *West Brothers, Inc. v. Herrington*, 139 So. 2d 842 (Miss. 1962). Ownership of the

vehicle is irrelevant – the key issue is control of the vehicle. *Id.* As such, the claim that Mahalitc's potential liability stems from his ownership of the truck was not a sufficient factual basis to survive summary judgment.

For their part, the Knox Plaintiffs insist that Mahalitc, as the title holder, owed and breached certain statutory duties "to equip and/or maintain the trailer with the proper lamps and/or lights and related safety devices." They claim that such duty and breach of duty is demonstrated by three photographs attached to the plaintiffs' response in opposition to summary judgment. Their argument goes: see, look at these pictures, end of story. The Knox Plaintiffs submit that, on the sheer strength of the photographs, the case is reduced to nothing more than a jury question on the issue of causation, notwithstanding any of the uncontested facts offered at the summary judgment stage. This, too, falls short of the mark.

When making their argument of a statutory breach, the Knox Plaintiffs fail to acknowledge the uncontested evidence showing that Mahalitc was not in control of the tractor-trailer, its use, or its method of use and that merely holding title is insufficient to impress him with liability. The Knox Plaintiffs take those facts and, without citation to authority, conveniently claim that such facts are only relevant to a *respondeat superior* claim. This is an inaccurate and self-serving application. Under the principles enunciated in *West Brothers, Inc. v. Herrington, supra,* control of the vehicle (or the driver) is the touchstone of liability *vel non* against Mahalitc and the record is bankrupt of any evidence disputing this issue.[7] Accordingly, Mahalitc moved

[7] The undersigned has reason to believe that the Knox Plaintiffs may, in their reply brief, cite the recent Mississippi Supreme Court decision in *Utz v. Running & Rolling*

for summary judgment on *all* claims and for *all* relief asked for in the complaint – not just *respondeat superior* claims. (C.P. 70-72).

From the record, we find the Knox Plaintiffs arguing against summary judgment with the allegation that Mahalitc "**was the defendant who placed a truck/trailer unit on the roads of Mississippi that was negligently inspected, equipped and maintained.**" But, the facts – supported by Rule 56 evidence – demonstrated otherwise. There is no error to be found in the ruling of the trial court.

If the Knox Plaintiffs are suggesting that they are now attempting to make some sort of negligent entrustment claim on account of Mahalitc's loaning the truck to GM Farms, they do not say that nor does the record show where they set out any such factual allegations, much less came forward with any Rule 56 proof respecting each material element of such a claim. *See Savage v. LaGrange*, 815 So. 2d 485 (¶¶18-19) (Miss. App. 2002) (reviewing elements of negligent entrustment). Regardless, Mississippi case law holds that "the most critical consideration in a claim for negligent entrustment is the issue of right of control," (*id.*) which Mahalitc did not have and which is the likely explanation for why the Knox Plaintiffs made no such claim against Mahalitc in the first instance. No – the plaintiffs deliberately pursued an agency theory against Mahalitc. After learning of Mahalitc's true role in the matter, the

---

Trucking, Inc., 32 So. 3d 450 (Miss. 2010), for the proposition that where a motor carrier violated certain Federal Motor Carrier Safety Regulations, it was for the jury to decide whether such violations were the proximate cause of the accident at issue in that case. In *Utz*, not only had the violations of the FMCSR been properly established through competent evidence, but the violator *controlled* the truck and *employed* the driver of the truck at the time of the accident. *Id.* at ¶¶1-2. Control of the truck or the driver was not an issue. Suffice it to say, *Utz* is a horse of a different color.

plaintiffs attempted to morph the allegations of their complaint into a "statutory employer" claim – which they then abandoned for reasons having "to do a little bit with insurance."[8] As pointed out by Mahalitc to the trial court, the fact that a party has insurance should play no role in our system of justice.

Circling back, then, to the photographs of the tractor-trailer, the Knox Plaintiffs would have this Court stack inference upon inference that these create some sort of negligence in the air with respect to Mahalitc. This defies Rule 56 and is more of the same sort of mischief that was rejected when the trial court properly adhered to the rule of law in finding that the photographs were not supported by a Rule 56(e) affidavit and, besides, did not constitute probative evidence on viable claims against Mahalitc. Apart from the fact that the photographs proved nothing with respect to the issue of who controlled the truck, their relevance as to any party in the case would wholly depend upon facts not in the record. But, no form of testimony was offered with the photographs which supported plaintiffs' counsel's *assertions* that they allegedly show certain defects (notwithstanding that the photos themselves called these assertions into question); no form of testimony was offered which supported plaintiffs' counsel's *assertion* that they depict the tractor-trailer in its condition on the day of the accident; no form of testimony was offered to show that they bore any rationale relationship to a viable claim against Mahalitc. Even now, the Knox Plaintiffs concede that the photographs, if relevant at all to any claim against any party, are not sufficient to

[8] This is a perfect example of how the plaintiffs' characterization of their claims against Mahalitc was a moving target which varied from proceeding to proceeding as it suited them.

create a triable issue on their own but depend on certain evidence that is not supported by the record (*e.g.*, testimony from expert and fact witnesses). Yet, the Knox Plaintiffs ask this Court to draw certain outside the record inferences from the photographs and to make certain presumptions about them, but it is not within the province of this Court to indulge the plaintiffs with such presumptions. *See Almond v. Flying J Gas Co.*, 957 So.2d 437 (¶10) (May 2007) (rejecting efforts to defeat summary judgment by stacking inferences and making presumptions).

Further to this point, the Knox Plaintiffs argue that there are certain items of evidence which they "will present to the jury" along with the photographs such as: (1) that, at the time of the collision, the sun did not affect the vision of Yolanda Knox[9]; (2) that Yolanda did not see the trailer in her lane of travel until right before the collision occurred; and (3) that, while Yolanda attempted to make a defensive driving maneuver to avoid the impact, she had insufficient time to do so under the circumstances that existed at the time of the collision. *Plaintiffs' Principal Brief*, p. 16-17.

This is high-order appellate alchemy which cannot be tolerated. It takes no special measure of analysis to determine that these assertions are completely unsupported by the record, and it is old hat that this Court "may not consider information outside the record." *Hardy v. Brock*, 826 So.2d 71, 76 (¶ 26) (Miss.2002). Appellate courts are confined to those matters actually appearing in the record from the trial court. *See* M.R.A.P. 10(f).

Moreover, the Knox Plaintiffs presented none of this so-called evidence which

[9] Parenthetically, it bears noting that this assertion stands at odds with plaintiffs' counsel's assertion at the summary judgment hearing that the sun was in Yolanda's eyes.

they "will present to the jury" in the form of Rule 56 evidence to the trial court and, as both the bench and bar are well aware, a plaintiff "may not rely solely upon unsworn allegations in the pleadings, or arguments and assertions in briefs or legal memoranda" to overcome summary judgment. --- So.3d ----, 2010 WL 2106043 (May 27, 2010).

It hardly escapes notice that the Knox Plaintiffs cite to excerpts from the deposition of Yolanda Knox for these assertions which they *plan* to prove. But, in footnote 7 to their brief, the Knox Plaintiffs confess they did not rely on Yolanda's deposition testimony to contest summary judgment and they insist they "are not improperly attempting to utilize such deposition testimony to 'create error' on the part of the trial court (by relying on such testimony when it was not presented at summary judgment)." Undaunted by their own stipulation, the Knox Plaintiffs proceed anyway to argue that this testimony is the very evidence which shows "why a jury questions exists." Since the Knox Plaintiffs admit that the evidence which they claim creates a triable issue was not relied on to defeat summary judgment and since they further admit they are not relying on it to prove any assignment of error on appeal, the only plausible explanation for this tack is that they seek to impermissibly influence this Court to form a presumption of error based on information not in the record. Such maneuvering is duplicitous, and represents an unnecessary point in these proceedings. The rules of appellate procedure will not stand to be flouted so easily. This inscrutable evidence the plaintiffs "will present to the jury" and any argument related to it should be stricken and not considered.

Regarding the Knox Plaintiffs' assertion that Mahalitc waived any objection to the photographs, that argument, too, has no merit. Mahaltic has already shown where – not once, but twice – he argued that the photographs lacked any evidentiary value on account of no accompanying testimony, but the larger point, which the plaintiffs seem to miss, is that the trial court specifically found in its order granting summary judgment that no affidavit accompanied them and that the photographs simply were not probative of the relevant issues based on the uncontradicted facts. That this was a proper finding cannot be disputed. The trial court cannot be taken to task by the plaintiffs for refusing to give Rule 56-weight to evidence which is not Rule 56-worthy.

At the end of the day, regardless of how the plaintiffs cast their claims, the trial court was left with unsworn allegations, arguments and assertions, which, as a matter of law, cannot carry the day in opposing summary judgment. The trial court was offered nothing which demonstrated Mahalitc's control of the truck or its driver and the credible and uncontested evidence was to the contrary. The trial court adhered to the rule of law in finding that the undisputed material facts demonstrated there was no triable issues on the any of the plaintiffs' claims against Mahalitc and properly dismissed the complaint against him. The Knox Plaintiffs' assignment of error on the grant of summary judgment is without merit.

C. The Trial Court did not Abuse its Discretion in Denying Plaintiffs' Rule 59(e) Motion

Although the Knox Plaintiffs argue that the trial court failed to correct a clear error of law when denying their Rule 59(e) motion to amend the order granting summary judgment, they fail to articulate any abuse of discretion on the part of the

trial court. The Knox Plaintiffs merely recite the very same arguments which they offered in opposition to summary judgment and posit that it was "clear error" for the trial court to grant summary judgment.

Under the abuse of discretion standard applied to denials of Rule 59 motions, the appellate court must affirm the ruling of the trial court "unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." *Peters v. State*, 971 So. 2d 1289 (¶ 3) (Miss. App. 2008). That the Knox Plaintiffs cite no legal authority supporting their challenge to the trial court's denial of their Rule 59 motion should procedurally bar the issue from consideration. *In re Adoption of Minor Child*, 931 So. 2d 566, 578 (Miss. 2006).

Even if not barred, it cannot be said that the trial court committed a clear error of judgment upon weighing the relevant factors. The opinion of the lower court included a detailed review of each available ground for amending a judgment and made a principled application of the law. (The plaintiffs' appellate brief quotes only a small portion of the trial court's opinion, and does not do justice to the entirety of it.)

Rule 59(e) is recognized to be "an extraordinary remedy that should be used sparingly." See *Point Southland Trust v. Gutierrez*, 997 So. 2d 967 (¶ 24) (Miss. 2008) (quoting *LeClerc v. Webb*, 419 F.3d 405, 412 n. 13 (5th Cir. 2005)). A party who is seeking reconsideration of a judgment "may not . . . rehash rejected arguments or introduce new arguments." *Id.* Nor may a motion to amend or alter judgment be used as a device "to resolve issues which could have been raised during the prior

proceedings." *Id.* (quoting *Westbrook v. Comm'r of Internal Revenue*, 68 F.3d 868, 879 (5th Cir. 1995)). In *Snavely v. Nordskog Elec. Vehicles Marketeer*, 947 F. Supp. 999 (S.D. Miss. 1995),[10] that court held that it was impermissible for a party to use "after-thought" evidence in a Rule 59(e) motion. *Id.* at 1011 (citing *Frito-Lay of Puerto Rico, Inc. v. Canas*, 92 F.R.D. 384 (D.C.P.R.1981) ("Rule 59(e) motions should not be permitted to give unhappy litigants an additional chance to sway a judge.")).

The trial court tracked this law when rejecting the argument which the Knox Plaintiffs now make on appeal – namely, that the lower court failed to analyze all of the plaintiffs' claims under Rule 56. This argument is at sharp odds with the record. Quoting directly from the trial court's opinion at ¶20 (which was omitted from the excerpt quoted by the Knox Plaintiffs):

> [T]he Court, in its order granting summary judgment, specifically addressed the Plaintiffs' claim that Mahalitc negligently, maintained, inspected and equipped the trailer at issue. The Court cited those claims at paragraph 7 of its order. Then, addressing those claims, the Court reviewed Rule 56 and the cases interpreting the rule which make clear to both the bench and the bar that claims of a party and assertions by counsel of what a law suit is about are no substitution for Rule 56 evidence and are unworthy of consideration on motions for summary judgment. See Order of the Court at ¶¶12-18.

The plaintiffs' Rule 59(e) motion did not challenge either the relevance or the

---

[10] Though *Snavely* was a federal court case, it was cited with approval by *Bang v. Pittman*, 749 So. 2d 47 (Miss. 1999) (overruled on other grounds). In *Bang*, it was noted that "because Rule 59 is worded verbatim from Rule 59 of the Federal Rules of Civil Procedure, Mississippi will interpret its rule in accordance with the federal construction." *Id.* at ¶ 28 (citing *King v. King*, 556 So. 2d 716, 720 (Miss. 1990) (Robertson, J. and Pittman, J., concurring)). "We have consistently and almost routinely said that, where this is the case, the federal construction of the counterpart rule will be "persuasive of what our construction of our similarly worded rule ought to be." See *Smith v. H.C. Bailey Companies*, 477 So. 2d 224, 233 (Miss. 1985); *Bourn v. Tomlinson Interests, Inc.*, 456 So. 2d 747, 749 (Miss. 1984).

application of any of the authorities relied upon by the trial court in making the above determination. Ultimately, the Plaintiffs' motion to amend amounted to a rehashing of already rejected arguments. See *Point Southland Trust*, 997 So. 2d at ¶ 24 (holding that it is improper to use a motion to alter or amend "to rehash rejected arguments.")

In support of their Rule 59(e) motion, the Plaintiffs also attached an excerpt from Yolanda Knox's deposition transcript which was available prior to summary judgment being granted. (C.P. 223-34). Noting that the only type of evidence which is potentially relevant in a Rule 59(e) proceeding is new evidence not previously available, the court correctly held that facts or evidence developed prior to summary judgment being granted could not form the basis of a motion to amend. *Brooks*, 882 So. 2d at ¶ 15. The Knox Plaintiffs do not assign any error to this ruling (and there was none).

As Plaintiffs have wholly failed to demonstrate that the trial court abused its discretion when in denying the Knox Plaintiffs' Rule 59(e) motion after weighing the relevant factors, the ruling of the trial court must, respectfully, be affirmed.

CONCLUSION

On the foregoing grounds, it is respectfully submitted that the final judgment of the Circuit Court of Washington County, Mississippi, dismissing the Knox Plaintiffs' claims against Mahalitc should be affirmed.

RESPECTFULLY SUBMITTED, this, the 16th day of July, 2010.

RUSSELL MAHALTIC, Appellee

By: _____

BRADLEY F. HATHAWAY, MSB NO. [redacted]
Attorney for Appellees

OF COUNSEL:

CAMPBELL DELONG, LLP
923 Washington Avenue (38701)
P.O. Box 1856
Greenville, MS 38702-1856
Telephone: (662) 335-6011
Facsimile: (662) 334-6407

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on the **16th day of July, 2010**, he filed and served ***Via U.S. Mail*** the original and three (3) copies of the foregoing Principal Brief of Appellee Russell Mahalitc on the Clerk of Court and has served a copy of same ***Via U.S. Mail*** on the below-named Circuit Court Judge and counsel, and further certifies that all persons required to be served have been served:

Honorable Richard A. Smith
Circuit Court Judge
P.O. Box 1953
Greenwood, MS 38935-1953

Oby T. Rogers, Esq.
Oby T. Rogers, PLLC
P.O. Box 700
Collins, MS 39428

Thomas S. Moore, Esq.
Moore Law Group, LLC
3532 Vann Road, Suite 106
Birmingham, AL 35235

Eddie J. Abdeen, Esq.
P.O. Box 2134
Madison, MS 39130

THIS, the 16th day of July, 2010.

BRADLEY F. HATHAWAY

C

We. St's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Appellate Procedure (Refs & Annos)
Appeals from Trial Courts
→ **Rule 10. Content of the Record on Appeal**

(a) Content of the Record. The parties shall designate the content of the record pursuant to this rule, and the record shall consist of designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries prepared by the clerk of the trial court.

(b) Determining the Content of the Record.

(1) *Designation of Record.* Within seven (7) days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and serve both on the court reporter or reporters and on the appellee a written designation describing those parts of the record necessary for the appeal.

(2) *Inclusion of Relevant Evidence.* In cases where the defendant has received the death sentence, the entire record shall be designated. In any other case, if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) *Matters Excluded Absent Designation.* In any case other than a case where the defendant has received a death sentence, the record shall not include, unless specifically designated,

i. subpoenas or summonses for any witness or defendant when there is an appearance for such person;

ii. papers relating to discovery, including depositions, interrogatories, requests for admission, and all related notices, motions or orders;

iii. any motion and order of continuance or extension of time;

iv. documents concerning the organization of the grand jury or any list from which grand or petit jurors are selected;

v. pleadings subsequently replaced by amended pleadings;

vi. jury voir dire.

(4) *Statement of Issues.* Unless the entire record, except for those matters identified in (b)(3) of this Rule, is to be included, the appellant shall, within the seven (7) days time provided in (b)(1) of this Rule, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the designation and of the statement. Each issue in the statement shall be separately numbered. If the appellee deems inclusion of other parts of the proceedings to be necessary, the appellee shall, within 14 days after the service of the designation and the statement of the appellant, file with the clerk and serve on the appellant and the court reporter a designation of additional parts to be included. The clerk and reporter shall prepare the additional parts at the expense of the appellant unless the appellant obtains from the trial court an order requiring the appellee to pay the expense.

(5) *Attorney's Examination and Proposed Corrections.* For fourteen (14) days after service of the clerk's notice of completion under Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period, appellant's counsel shall deliver or mail the record to one firm or attorney representing the appellee, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service. Counsel for the appellee shall examine the record and return it to the trial court clerk within fourteen (14) days after service, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service. Corrections as to which counsel for all parties agree in writing shall be deemed made by stipulation. If the parties propose corrections to the record but do not agree on the corrections, the trial court clerk shall forthwith deliver the record with proposed corrections to the trial judge. The trial judge shall promptly determine which corrections, if any, are proper, enter an order under Rule 10(e), and return the record to the court reporter or the trial court clerk who shall within seven (7) days make corrections directed by the order.

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. If no stenographic report or transcript of all or part of the evidence or proceedings is available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or his counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee objects to the statement as filed, the appellee shall file objections with the clerk of the trial court within 14 days after service of the notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this Rule.

(d) Agreed Statement as the Record on Appeal. In lieu of a record on appeal designated pursuant to subdivisions (b) or (c) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the Supreme Court as the record on appeal.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to

the Supreme Court or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. Any document submitted to either appellate court for inclusion in the record must be certified by the clerk of the trial court. All other questions as to the form and content of the record shall be presented to the appropriate appellate court.

(f) Limit on Authority to Add to or Subtract From the Record. Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

CREDIT(S)

[Adopted to govern matters filed on or after January 1, 1995; amended October 15, 1998, effective from and after January 1, 1999; amended June 24, 1999.]

Current with amendments received through June 1, 2009

END OF DOCUMENT

C

We. St's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter VII. Judgment
→ **Rule 56. Summary Judgment**

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. 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 matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Current with amendments received through June 1, 2009

END OF DOCUMENT

C

We. St's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter VII. Judgment
➞ Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

CREDIT(S)

[Amended effective July 1, 1997.]

Current with amendments received through June 1, 2009

END OF DOCUMENT