IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2016-CA-00637

DAVID MICHAEL LYON, JR. APPELLANT

VS. CAUSE NO.: C114-0186

BILLY McGEE APPELLEE

REBUTTAL BRIEF /BRIEF OF CROSS-APPELLEE

APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI
HONORABLE L. BRELAND HILBURN, SENIOR STATUS JUDGE, PRESIDING

Oral Argument Requested

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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 possible disqualification or recusal.

The Honorable L. Breland Hilburn
Senior Status Judge

Patrick Zachary, Esq.
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Phillip Londeree, Esq.
Attorney for the Appellant

Mr. Mickey Lyon
Appellant

Mr. Billy McGee
Appellee

s/PHILLIP LONDEREE
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STATEMENT OF THE CASE

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

This is an alienation of affection case, originally brought by the appellant following the end of his marriage.

Mickey Lyon filed his *Complaint* on October 3, 2014 seeking damages for the conduct of the appellee resulting in alienation of the affections of the appellant's spouse. (Rec. Ex. 2). Subsequently on November 7, 2014 the appellee filed his *Answer to Complaint.* (Rec. Ex. 3).

The appellee filed his *Motion to Dismiss or In the Alternative for Summary Judgment* and his *Memorandum Brief in Support of Motion for Summary Judgment* and supporting documents on January 20, 2016. (Rec. Ex. 4 & 5). The appellant filed his *Memorandum Brief in Opposition to Motion for Summary Judgment* on February 3, 2016, and the appellee filed a *Rebuttal Memorandum Brief of Defendant* on February 10, 2016. (Rec. Exs. 6 & 7).

Thereafter, following a hearing on February 11, 2016, the trial court entered its *Order*, granting the appellee's motion for summary judgment, finding no evidence tending to support involvement by the appellee with the wife of the appellant before July 12, 2013, and finding that the Plaintiff failed to adequately rebut this claim. (Rec. Ex. 8)

Following this order, the Appellant filed his *Motion for Reconsideration or, Alternatively, Motion for Rehearing* on March 9, 2016. (Rec. Ex. 9). The Appellee then filed his *Response of Defendant, Billy McGee to the Motion for Reconsideration (Or Alternatively, Motion for Rehearing) Filed by the Plaintiff* on March 23, 2016. (Rec. Ex. 10).

Following a hearing on March 31, 2016, the trial court entered its *Order* denying the Appellant's motion for reconsideration or rehearing. (Rec. Ex. 11).

These appellate proceedings follow there from.

SUMMARY OF THE ARGUMENT

The Appellee and Cross-Appellant's arguments have been distilled in his brief to two contentions: (1), that the motion for summary judgment was adequate, and that a lack of sworn evidence in the response thereto resulted in a lack of articulable differences of fact; and (2), that because the Appellant and Cross-Appellee's divorce was granted, via settlement, on the grounds of irreconcilable differences, the Appellee and Cross-Appellant could not possibly have been a third party interferer in the Appellant and Cross-Appellee's marriage.

The former argument is insufficient in that the motion for summary judgment was unsupported by any sworn statements of fact rebutting the allegations of the *Complaint* in this cause. The only documents offered in support thereof are pleadings that were offered to support the argument of judicial estoppels. They support no allegations of fact beyond the claims of parties and non-parties in pleadings. A copy of sworn interrogatory answers filed after the Court's summary judgment ruling and ruling on post-judgment motions is untimely, was not before the trial court, and fails to remedy the insufficiency of the motion for summary judgment.

The latter argument is insufficient because it contends that there is no adverse party requirement for judicial estoppels in alienation of affection claims, and because it relies upon the unsupportable claims that interference by a third party and/or adultery are mutually exclusive with irreconcilable differences as a ground for divorce. This argument also appears to rely on the imputed claim that adultery is necessary to sustain an alienation of affection.

ARGUMENT

ISSUE ONE: WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE PLAINTIFF FAILED TO ADEQUATELY RESPOND THERETO

The Appellee and Cross-Appellant herein has relied almost solely upon the claims in their filed pleadings, and has not meaningfully responded to the central feature of the Appellant and Cross-Appellee's arguments. It is not challenged that parties may not rest upon the mere allegations or denials of their pleadings in seeking or opposing summary judgment. *Stuckey v. The Provident Bank*, 912 So.2d 859 (¶15) (Miss. 2005)(citing Miss. R. Civ. Pro. 56(e)).

Here, the Appellee and Cross-Appellant has re-asserted his reliance on his *Answer* and *Motion for Summary Judgment*, alone. The Appellee and Cross-Appellant recommends to this Court's attention that the pleadings filed before the trial court were sufficient, in that they clearly contended a lack of causal link between the Appellee and Cross-Appellant's conduct and the harm suffered by the Appellant and Cross-Appellee.

This argument remains insufficient, not because the trial Court should ignore the pleadings of the parties, but because those pleadings, alone, are insufficient to support summary judgment. *Id.* There is no apparent basis in law for a revised standard for summary judgment in which a pleading filed by a defendant claiming that "No, this really isn't my fault," without further support justifies relief to the defendant.

The Appellee and Cross-Appellant relies exclusively on his pleadings. In support of his motion for summary judgment, he offered a copy of his *Answer* to the original complaint; nothing else. The various exhibits provided in support of the Appellee's motion for summary

judgment were gauged to support arguments of issue preclusion and judicial estoppels, which the Appellee has raised in his cross-appeal. It appears uncontested by the Appellee and Cross Appellant that no affidavits, depositions, discovery materials, or other proof beyond the blanket refutation in the *Answer* were offered. Attempts to compound this strategy by referencing additional pleadings previously filed by the Appellee and Cross Appellant cannot cure this deficiency, and nor can the late filing of the Appellee and Cross-Appellant's interrogatory responses after the pertinent rulings had already been made.

The controlling law is unambiguous: where a motion for summary judgment is unsupported by affidavits or other sworn statements, it should not be sustained. *Ratliff v. Ratliff,* 500 S0.2d 981 (Miss. 1986)(In which movant provided no affidavit or discovery material; citing *Miss. R. Civ. Pro. 56(e); Brown v. Credit Center, Inc.,* 444 So.2d 358 (Miss. 1983). Similarly, where a motion for summary judgment includes exhibits, affidavits, or sworn statements addressing only the procedural posture of another case, any such elements of the Motion for Summary Judgment addressing issues of fact should not be sustained or granted. No authorities questioning this proposition are offered by the Appellee and Cross Appellant.

"Issues of material fact sufficient to require denial of a motion for summary judgment obviously are present were one party swears to one version of the matter in issue and another says to the opposite. In addition, **the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of any doubt.** *Heigle v. Heigle*, 771 So.2d 1051, 1052 (Miss. 1986)(emphasis added).

Further, it does not appear to be contested by the Appellee and Cross-Appellant that one of two things must logically be true: either there were was no sworn documentation appropriate to a motion for summary judgment tending to prove the Appellee's claim that none of his

misconduct occurred before the Appellant's wife separated from him, in which a grant of summary judgment is inappropriate; or the Appellee's claim is refuted directly by the representation in the Appellant's *Complaint* that the Appellee's conduct was the cause of the Appellant's separation from his wife.

In short, while the controlling case law appears to decisively require support for the movant's request for relief, it seems inescapable that if pleadings are sufficient for the summary judgment movant, they are also sufficient for the respondent; if not (which appears to be the case as a matter of law) then unsupported requests for summary judgment relief cannot be granted.

It remains noteworthy that the provision of a copy of the Appellee's *Answer* as a supporting document for the claim that the Appellee engaged in no misconduct before the Appellant's separation from his wife fails to satisfy the elements of Miss. R. Civ. Pro. 56(e), in that it fails to establish specific admissible evidence; fails to establish personal knowledge by the claimant; and fails to establish that the affiant/claimant is competent to testify. Notably, the rule provides that when a motion for summary judgment is made and supported in conformity with the rule, the adverse party may not rest upon mere denials of the movant's allegations. No such conformity with this rule having taken place, there is no basis for the requirement of more than the denials raised by the Appellant in oral arguments.

Conclusion

On its face, the motion for summary judgment in this cause was deficient; it lacked material support for the claimed lack of causal relationship between the conduct of the Appellee and Cross-Appellant and the harm suffered by the Appellant and Cross-Appellee.

Reliance upon the self-serving statements of a defendant, alone, are not sufficient for a grant of summary judgment.

It bears repetition here that the Appellee and Cross-Appellant's motion for summary judgment was supported by four Exhibits, as noted and referenced in the Brief of the Appellant; Exhibit A thereunto was the original *Complaint* in this cause; Exhibit B was the *Answer* filed in response; Exhibit C was the *Complaint* for divorce filed by the Appellant and Cross-Appellee in his divorce proceeding; and Exhibit D was the *Child Custody, Support, and Property Settlement Agreement* in the Appellant and Cross-Appellee's divorce proceedings. All were offered in support of the judicial estoppels argument that was the basis of the motion for summary judgment; none support any assertions of fact. Further filings, made after judgment was rendered, are insufficient to 're-write' the history of this litigation; the late filing of sworn interrogatories, referenced several times by the Appellee and Cross-Appellant, are insufficient, untimely, and unable to remedy the motion for summary judgment's deficiencies.

No evidence in support of the summary judgment grounds relied upon by the trial court has been offered in support of the motion for summary judgment, and where both parties swear in their pleadings that the other party is wrong, the Court ought, always, to side with the non-moving party.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR RECONSIDERATION

The Appellee and Cross-Appellant relies principally, on the same arguments advanced in regard to Issue One. The only addition is the contention that the Appellee and Cross-Appellant's sworn interrogatory responses are sufficient to remedy the lack of support provided with his motion for summary judgment. No such sworn exhibits were included with the Appellee and Cross-Appellant's motion for summary judgment, or any filings in support thereof. Additional filings were added to the record after the trial court ruled on these motions; any such filings are not timely, and were not before the Court when this ruling was made.

As noted above, where a motion for summary judgment is unsupported by affidavits or other sworn statements, it should not be sustained. *Ratliff v. Ratliff,* 500 S0.2d 981 (Miss. 1986).

The trial court should have amended, altered, or vacated its grant of summary judgment in light of the failure of the moving party to provide affidavits, sworn statements, or other satisfactory proofs in support of his motion, as a matter of law. The Appellee and Cross-Appellant advances the argument that unsupported claims by a summary judgment movant are sufficient if not refuted by sworn filings by the respondent. This claim is supported by authorities that note that where a summary judgment motion is supported by sworn statements, a respondent must also present sworn statements, which are easily distinguishable from this case in that no such sworn statements were offered with the summary judgment motion.

Conclusion

The Apellant and Cross-Appellee's motion for reconsideration, which constitutes a motion to alter or amend the trial court's judgment, ought to have been well-taken as a matter of law due to the lack of support provided by the Appellee and Cross-Appellant; failure to grant this motion is a separate issue, the procedural elements of which are uncontested by the Appellee and Cross-Appellant.

To fail to permit this matter to proceed to trial under these circumstances could constitute manifest injustice; the claim in a pleading that no issue of fact exists, unsupported by any other proofs, is insufficient to sustain a motion for summary judgment, if it does not constitute abandonment of such a claim outright.

CROSS-APPEAL: ISSUE ONE

I. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BILLY MCGEE ON THE ADDITIONAL GROUNDS OF JUDICIAL ESTOPPEL

The Cross-Appellant's argument in this cause is a simple one, and it has been directly addressed by this state's appellate courts. The Appellee and Cross-Appellant argues that agreement to a divorce on grounds other than adultery preclude any attempt by an aggrieved spouse to support an alienation of affection claim.

As referenced above, this matter has already been specifically addressed and decided by our courts with regard to alienation of affection cases; the controlling authority recites that judicial estoppel is designed to expedite litigation *between the same parties*, and does not permit a defendant in an alienation of affection case to gain summary judgment by arguing that adultery was not the final cause of the aggrieved party's divorce as stated in a final divorce judgment. *Wood v. Cooley*, 78 So.3d 920 (Miss. 2011) at ¶15, citing *Thomas v. Bailey*, 375 So.2d 1049, 1052 (Miss. 1979)("The doctrine of judicial estoppel 'is based on expedition of litigation *between the same parties* by requiring orderliness and regularity in pleadings'"). Here, the Appellee and Cross-Appellant was not a party to the Appellant and Cross-Appellee's divorce; the notion that he was is preposterous.

The Appellee and Cross-Appellant argues that the controlling authority is *Kirk v. Pope*, 973 So. 2d 981, 991 (Miss. 2007), which notably lacks recency in comparison to *Wood v. Cooley*. *Kirk* is also easily distinguished; in *Kirk*, the court found that failure to list a pending plaintiff's lawsuit in bankruptcy proceedings, and subsequent pursuit of said lawsuit is impermissible. *Kirk*, at ¶38.

The Appellee and Cross-Appellant also appeals to *Clark v. Neese*, 131 So.3d 556, 561-562 (Miss. 2013) for the proposition that the adverse party requirement of judicial estoppel was eliminated by the Court in its *Kirk* decision. Even if controlling in an alienation of affection case, the *Clark* court found judicial estoppel inapplicable in that case because there was no clear inconsistency in the Appellant's claims; similarly, because adultery and irreconcilable differences are not mutually exclusive or inconsistent, judicial estoppel is not appropriate here. *Clark v. Neese*, 131 So.3d 556, 561-562 (Miss. 2013)22-24.

It is also noteworthy that the *Kirk* Court noted that judicial estoppel is "... designed to protect the judicial system and applies where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."" *Kirk* at ¶31. Further, the Court recites three elements for judicial estoppel: (1) a position clearly inconsistent with a previous position; (2) a court must have accepted the previous position; and (3) the nondisclosure of the conflict between positions must not have been inadvertent. *Kirk* at ¶32.

Here, there is no intentional self-contradiction has been used to obtain unfair advantage; the relief sought is fair, and does not represent intentional self-contradiction. The Appellant and Cross-Appellee in this cause contented adultery as a cause in his complaint for divorce, and at no time contradicted that position. There is no basis in law for the proposition that irreconcilable differences and adultery are factually mutually exclusive; nor is a decision by a party litigant in a divorce to consent to a final divorce on irreconcilable differences grounds contradictory to a future claim for alienation of affection. Put more frankly but more practically, untold numbers of litigants in adultery cases ultimately agree to irreconcilable divorces, and logic would tend to

support the observation that a decision by one party in a marriage to commit adultery will tend to be an irreconcilable difference between the parties.

Conclusion

The Appellee and Cross-Appellant relies exclusively on the contention that there is no adverse-party requirement for the application of judicial estoppel, and that a divorce granted on the grounds of irreconcilable differences contradicts a claim of alienation of affection.

These claims are insufficient because the adverse party element should still apply in alienation of affection cases; because adultery is not a required element for alienation of affection; and because adultery and irreconcilable differences are not mutually exclusive.

It is also problematic that the creation of a new rule of law in this case barring alienation of affection claims following irreconcilable differences divorces creates a presumed requirement that actual adultery occur for alienation of affection to be a viable claim, contradicting the established body of law pertinent to alienation of affection: the elements of Alienation of Affection do not require sexual intercourse. *See Fitch v. Valentine*, 959 So.2d 1012, 1025(¶ 36) (Miss.2007). After all; there is no 'third party interference' ground for divorce.

The first reported Alienation of Affection cases in this state clearly do not include a sexual relationship. In *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955 (Miss. 1896) a woman sued her father in law for causing her husband to abandon her; in *Sivley v. Sivley*, 50 So. 552, 553 (Miss. 1909), a woman successfully sued her mother in law for harming her marriage. Adultery was not a feature of either case. These precedents, the body of case law on the subject of alienation of affection, and the stated elements of Alienation of Affection underscore that the law seeks to protect marriage from intrusion by non-spouses, regardless of the nature of that intrusion. There

is no reasonable basis for the conclusion that irreconcilable differences cannot include such an intrusion, whether it is grounded in adultery or not.

It may also be worth consideration that if this Court finds that a divorce granted based on a settlement agreement asserting irreconcilable differences precludes an alienation of affection claim, there will be a material interest on the part of divorce litigants to never settle cases featuring adultery for fear of abandoning their right to recover against third-party interference in their marriages. Conscientious attorneys in this state will have no alternative but to advise many divorce litigants against such settlements, which would in all likelihood severely negatively affect divorce litigants in our Chancery courts and their families by encouraging additional contentious litigation in adultery cases. Worse, it will set an uncertain precedent in third party interference cases where there is no adultery, in that no ground for divorce will be consistent with alienation of affection claims. Where divorces result from third party interference in marriage, there will be no recourse against the tortfeasor interfering in marriages.

CERTIFICATE OF SERVICE

I, the undersigned attorney for MICKEY LYON, do certify that I have, this date, electronically filed this, the Brief of Appellant/Cross-Appellee via MEC, and have thereby provided an electronic copy to the following:

Clerk of Appellate Courts
P.O. Box 249
Jackson, MS 39205
(via MEC filing)

Hon. L. Breland Hilburn
(via electronic transmission)

Hon. Patrick Zachary
(via MEC filing)

SO CERTIFIED on this, the 24th of April, *anno Domini* 2017.

/s/PHILLIP LONDEREE
Phillip Londeree