

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

BRIEF OF THE APPELLANT

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

Oral Argument Requested

Phillip Londeree MS Bar# 104050
LONDEREE & TOWNSEND, LLC
ATTORNEYS AND COUNSELLORS AT LAW
529 EAST CENTRAL AVE.
P.O. BOX 445
PETAL, MS 39465
PHONE: (601) 336-5033
FAX: (601) 336-6483
EMAIL: Phillip@ltzlaw.com

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.
Attorney for the Appellee

Phillip Londeree, Esq.
Attorney for the Appellant

Mr. Mickey Lyon
Appellant

Mr. Billy McGee
Appellee

s/PHILLIP LONDEREE

Phillip Londeree, Attorney for the Appellant
LONDEREE & TOWNSEND, LLC
ATTORNEYS AND COUNSELLORS AT LAW

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	2
TABLE OF CONTENTS.....	3
TABLE OF AUTHORITIES.....	4
STATEMENT OF THE ISSUES	5
STATEMENT OF THE CASE.....	6
A. Nature of the Case, Course of Proceedings, and Disposition in the Lower Court...	6
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT.....	12
A. Issue One.....	12
B. Issue Two.....	17
CONCLUSION.....	19
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

CASES:

<i>Ratliff v. Ratliff</i> , 500 S0.2d 981 (Miss. 1986).....	9, 13
<i>Brown v. Credit Center, Inc.</i> , 444 So.2d 358 (Miss. 1983).....	9, 13
<i>Miller v. Meeks</i> , 762 So.2d 302, 304 (Miss. 2000).....	12
<i>Illinois Central R. Co. v. Jackson</i> , 179, So.3d 1037, (¶16) (Miss. 2015).....	12
<i>Hosemann v. Harris</i> , 163 So.3d 263, 267 (Miss. 2015).....	12
<i>Roebuck v. McDade</i> , 760 So.2d 12 (¶9) (Miss. Ct. App. 1999).....	12
<i>Fitch v. Valentine</i> , 959 So.2d 1012, 1025(¶ 36) (Miss.2007).....	12
<i>Camp v. Roberts</i> , 462 So.2d at727 (Miss. 1985).....	12
<i>Stuckey v. The Provident Bank</i> , 912 So.2d 859 (¶15) (Miss. 2005).....	13
<i>Heigle v. Heigle</i> , 771 So.2d 1051, 1052 (Miss. 1986).....	14
<i>City of Jackson v. Jackson Oaks Limited Partnership</i> , 792 So.2d 983, 985 (Miss. 2001).....	17
<i>Brooks v. Robertson</i> , 882 So.2d 229, 233 (Miss. 2004).....	17

RULES OF PROCEDURE:

Miss. R. Civ. Pro. 56(a).....	17
Miss. R. Civ. Pro. 56(c).....	12
Miss. R. Civ. Pro. 56(e).....	13, 14, 17

STATEMENT OF THE ISSUES

- I. 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

- II. WHETHER THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR RECONSIDERATION

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).

This appeal followed therefrom.

SUMMARY OF THE ARGUMENT

This appeal, like so many others, is grounded in the mechanism for summary judgment, and the particular requirements thereof. It is long established that a trial court shall grant a motion for summary judgment where there is no genuine issue of material fact, when the evidence offered is interpreted in a light most favorable to the non-moving party. The elements which must be established to prove alienation of affection are similarly clear: wrongful conduct of a defendant, a loss of affection or consortium, and a causal link between the wrongful conduct of the defendant and the loss of affection or consortium.

In this cause, the trial court ruled that there was no genuine issue of material fact as to the third element, the causal link between wrongful conduct and loss of affection, based on the claim by the appellee in his *Answer* that he had no relationship with the Appellant's wife (or alternatively that their sexual affair had not yet begun) before the date on which the Appellant and his wife separated. This is, ultimately, the crux of this appeal.

The trial court granted the motion for summary judgment of the Appellee, finding no causal link as outlined above, and upheld that ruling on reconsideration/rehearing, finding that there was no genuine issue of material fact. The Appellant alleges herein that the Appellee failed to support the claim that no issue of fact existed, and that the standard for summary judgment requires that such a contention be made and supported, or summary judgment cannot be granted.

I. *Issue One*

In this case, the Appellee argued in his memorandum in support of his motion for summary judgment that issue preclusion and/or judicial estoppel barred recovery in an alienation of affection action in this cause, because the Appellant and his wife had entered

into a settlement in their divorce action, which was finalized on the grounds of irreconcilable differences. (See Memorandum Brief in Support of Motion for Summary Judgment; Rec. Ex. 5 at 3). In the Appellee's *Motion*, paragraph 3 contends that there is no alleged conduct or contact with the Appellants former spouse before the separation of the Appellant and his wife; no affidavits, depositions, discovery materials or other sworn statements are included in support thereof – only a copy of the Appellee's answer. (Rec. 4 Ex. at 2; Exhibit B in Record at Bates No.: 47-61). As noted above, the burden to prove a lack of genuine issue as to material fact rests with the Movant. Here, other than repeating an unsupported claim offered in the Appellee's *Answer*, no such effort was made. All proof offered by the Appellee supported his allegation that issue preclusion or judicial estoppel barred the Appellant's suit.

The Appellant moved for reconsideration or rehearing, arguing most pertinently that the Appellee failed to demonstrate the absence of a genuine issue of material fact, and failed to support such a claim with any affidavits or other sworn statements, and as a result could not be sustained. *Ratliff v. Ratliff*, 500 So.2d 981 (Miss. 1986)(citing Miss. R. Civ. Pro. 56(e); *Brown v. Credit Center, Inc.*, 444 So.2d 358 (Miss. 1983)). Certainly the exhibits and other evidence proffered by the Appellee, which addressed only the procedural posture of the Appellant's divorce case, fail to support any claim of a lack of genuine issue of material fact.

II. *Issue Two*

The trial court overruled or denied the motion of the appellant for reconsideration or rehearing. (Rec. Ex. 11). No opinion or analysis is provided in the trial court's *Order*, but

the court's analysis from the bench reflects that the court found a copy of the Appellee's *Answer* to be sufficient proof of the allegations raised in the Appellee's *Answer*, that no relationship existed between the Appellee and the Appellant's wife before their date of separation. (See Transcript at 60).

It is noteworthy that the Court found this issue to be a 'tough question'. (See Transcript at 60). Such uncertainty should favor the non-moving party, in conformity with the standards for Summary Judgment; here, it appears that ambiguity was found by the trial court, and construed in favor of the moving party. Specifically, the trial court found that: "Since this is in regard to one of the very essential elements of the cause of action of alienation of affections and because there is no response by the plaintiff to that very succinct and important issue to be resolved by this Court, the Court is going to find that the motion to reconsider will be overruled..." (See Transcript 60 – 61).

It is true that the Appellant did not file any sworn statements or discovery materials to rebut the 'throw-away' statement of the Appellee that there was no genuine issue of material fact as to causation in the initial response to the motion for summary judgment. No such filings are required to rebut a self-serving assertion made in a defendant's pleadings that "I didn't do it."

Nonetheless, the Appellant provided as exhibits to the motion for reconsideration or rehearing discovery documents clearly disproving the unsupported claim of the Appellee (accepted by the trial court in its first *Order*, Rec. Ex. 8) that no contact occurred between the Appellee and the Appellant's wife occurred before July 12, 2013. First, the Appellant

offered Exhibit 6, a receipt log reflecting the Appellant's wife's phone number as 601-606-8726. (Exhibit 6 in Record at Bates No.: 524).

The Appellant further offered Exhibit 5, telephone records reflecting that regular telephone contact between the Appellee and the Appellant's wife at her normal telephone number began in April of 2013. (Exhibit 5 in Record; Pertinent Part Beginning at Bates No.: 266). In fact, eighteen telephone calls were exchanged among them in April of 2013; forty-four in May of 2013; forty-six in June of 2013; and sixty-five in July of 2013. There is no dispute that this contact occurred as the Appellant's marriage unraveled, culminating in his wife's separation from him on or about July 12, 2013, and following co-habitation with the Appellant.

The Appellant further offered Exhibit 8, e-mails from the Appellee's wife, reflecting the existence of recordings of the Appellee and the wife of the Appellant *in flagrante delicto* before the date of separation, and the Appellee urging the Appellant's wife to get a divorce, obtain counsel, and how best to accomplish a divorce. (Exhibit 8 in Record at Bates No.: 588).

The trial court did not consider this evidence, and did not remark significantly on it.

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

A. *Standards:*

The standard of review for a trial court’s grant of summary judgment is *de novo*. *Miller v. Meeks*, 762 So.2d 302, 304 (Miss. 2000).

The standards applicable to summary judgment are long established: “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.” Miss. R. Civ. Pro. 56(c). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Illinois Central R. Co. v. Jackson*, 179, So.3d 1037, (¶16) (Miss. 2015) (citing *Hosemann v. Harris*, 163 So.3d 263, 267 (Miss. 2015)). All evidence is to be considered in the light most favorable to the nonmoving party. *Id.* The Court gives the benefit of every reasonable doubt to the party against whom summary judgment is sought. *Roebuck v. McDade*, 760 So.2d 12 (¶9) (Miss. Ct. App. 1999).

Similarly, the elements of alienation of affection are straightforward: This cause is an alienation of affection case; and as such is subject to three elements: “(1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss.” *Fitch v. Valentine*, 959 So.2d 1012, 1025(¶ 36) (Miss.2007). *See also Camp v. Roberts*, 462 So.2d at 727 (“where a husband [wife] is wrongfully deprived of his [her] rights to the ‘services and companionship and consortium of his [her] wife [husband],’ he [she] has a cause of action ‘against the one who has interfered with his [her] domestic relations.’ ... The husband [wife] might then sue for ... alienation of affection....”).

B. Competing Pleadings Alone are Insufficient to Meet Movant's Burden

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)). In the matter *sub judice*, such reliance by the Appellee on his *Answer* and *Motion for Summary Judgment*, alone, is precisely what happened, in that the trial court found that a lack of refutation of a an unsupported claim raised in pleadings, the same already refuted in the *Complaint* of the Appellant and in oral arguments, justified the grant of summary judgment on the basis of a claim by the Appellee – and the Appellee alone, as raised in his pleadings – that, basically, “it wasn’t my fault.”

In this cause, the trial court granted the Appellee’s motion for summary judgment, based on the claim therein that the Appellee had no alleged conduct or contact with the Appellant’s wife until long after the separation of the parties. (Rec. Ex. 8). In support thereof, the Appellee 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. No affidavits, depositions, discovery materials, or other proof beyond the blanket refutation in the *Answer* were offered.

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.

“Issues of material fact sufficient to require denial of a motion for summary judgment obviously are present where 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).

One of two things must, here, be true: either there 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.

It is 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 provision of more than the denials raised by the Appellant in oral arguments.

C. Evidence On Record Establishes Clear Issue of Fact as to Appellee's Relationship with Appellant's Wife:

Upon filing his motion for reconsideration or rehearing, the Appellant provided discovery materials and sworn statements demonstrating regular and constant telephone contact between the two; e-mails from the Appellee's (still current) wife attesting to the affair; and the deposition testimony of the Appellant asserting the same. (See Complaint, Rec Ex. 2; Phone Records, Pertinent Part In Record Beginning at Bates No.: 266; E-mails, In Record at Bates No.: 588; Exhibit 10, Deposition Testimony, In Record at Bates No.: 613). The phone records in particular are of interest; the Court's *Order* granting summary judgment finds no evidence of a relationship between the parties before July 12, 2016; the same was upheld in the denial of the Appellant's motion for reconsideration or rehearing. The phone records of the Appellee clearly reflect eighteen telephone calls were exchanged with the Appellant's wife¹ in April of 2013; forty-four in May of 2013; forty-six in June of 2013; and sixty-five in July of 2013.

These documents clearly reflection a relationship between the Appellee and the Appellant's wife predating July 12, 2016, contrary to the finding of the trial Court. They further demonstrate a basis in fact for a causal link between the wrongful acts of the Appellee and the Appellant's loss of his wife's affection and consortium. A *de novo* review of the record – even if arguments as to the sufficiency of allegations raised in the motion for

¹ Telephone Number of Appellant's Wife: 601-606-8726; see Record at Bates No.: 524.

summary judgment are accepted – militate toward the denial of a motion for summary judgment.

D. Conclusion

In this cause, the motion for summary judgment was deficient as to the claim of a lack of a genuine issue of material fact as to the third element required for an alienation of affection. This deficiency results from the lack of any support for the claim that there is no such genuine issue of material fact beyond the claim of the Appellee that he didn't engage in wrongful conduct until after the Appellant's wife separated from him. Claims included in pleadings by the parties are not sufficient to satisfy the standards for summary judgment.

Even if the bald refutation of an answer filed by a defendant was sufficient to constitute support for a motion for summary judgment, here there is clear evidence in the record indicating that the representations of the Appellee as to the nature and beginning of his relationship with the Appellant's wife are untrue.

In light of the foregoing, the Appellant prays that this Court will reverse the trial court's grant of summary judgment and denial of reconsideration or rehearing, and remand this cause for further proceedings.

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

Post order or judgment motions filed within 10 days are treated as motions raised pursuant to Miss. R. Civ. Pro. 59(a). *City of Jackson v. Jackson Oaks Limited Partnership*, 792 So.2d 983, 985 (Miss. 2001). Despite the use of somewhat backward language seeking reconsideration or rehearing, the substance of the post-order motion filed by the Appellant sought relief in the form of a new hearing or an amendment of the Court’s previous *Order*. The commentary to Miss. R. Civ. Pro. 59 notes that: “If a motion is mislabeled as a motion for reconsideration and was filed within ten days after the entry of judgment, the trial court should treat such motion as a post-trial motion to alter or amend the judgment pursuant to M.R.C.P. 59(e).”

In such a motion, the Movant must show “(i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law to prevent manifest injustice.” *Brooks v. Robertson*, 882 So.2d 229, 233 (Miss. 2004).

In the case *sub judice*, the Appellant argued that a clear error of law was made in the grant of a motion for summary judgment where 1.) no support other than the allegations of the Appellee in his pleadings was offered to contend a lack of a genuine issue of fact; and 2.) evidence offered by the parties and uncontested among the parties clearly underscored the existence of genuine issues of fact.

To fail to permit this matter to proceed to trial could constitute manifest injustice; overwhelming evidence on the record reflects a strong basis for each element of alienation of

affection. Further, 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.

In conformity with the foregoing, the Appellant prays that this Court reverse and remand for further proceedings.

CONCLUSION

This appeal arises from the grant of a motion of summary judgment that was clearly intended to advance legal arguments of issue preclusion and judicial estoppels. The trial court ruled, based on a ‘throw-away’ argument raised in the motion for summary judgment and the Appellee’s *Answer*, unsupported by any affidavits, depositions, discovery materials or other proofs, that no genuine issue of material fact existed as to a causal link between the Appellee’s actions and the Appellant’s loss. This finding was based entirely on the Appellee’s claim that his relationship with the Appellant’s wife occurred only after the separation of the Appellant and his wife on July 12, 2013.

Such an unsupported claim cannot sustain a grant of summary judgment. Even if such a finding was appropriate, evidence offered on the record establishes clearly that the Appellee’s relationship with the Appellant’s wife existed before they separated, and included advice as to whether or not she should leave the Appellant; how she should do so; what attorney she should hire; and how she should go about the litigation. Other evidence strongly supports the conclusion that the Appellee was *in flagrante delicto* with the Appellant’s wife long before the date of their ‘separation’, and that their relationship continued while the Appellant attempted to reconcile his marriage.

The trial court’s decision to grant the motion for summary judgment was in error; the appropriate requirements of proof were never offered by the Appellee; the matter was found by the trial court itself to be ambiguous, but the matter was construed in favor of the moving party, erring on the side of granting summary judgment – a clear departure from the established law as it governs summary judgment.

The Appellant prays that this Court reverse and remand this cause, that it may proceed to trial and that substantial justice may be done among the parties.

CERTIFICATE OF SERVICE

I, the undersigned attorney for MICKEY LYON, do certify that I have, this date, electronically filed this, the Brief of Appellant 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 29th of December, *anno Domini* 2016.

s/PHILLIP LONDEREE
Phillip Londeree