IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01857-COA

LORA LOPEZ, A MINOR, BY AND THROUGH HER GUARDIAN, LESLIE ZHE, AND JACLYN HUGHES, A MINOR, BY AND THROUGH HER PARENTS AND GUARDIANS, HENRY AND VANESSA HUGHES — **APPELLANTS**

v.

ROBERT D. MCCLELLAN, A MINOR, BY AND THROUGH HIS FATHER, ROBERT MCCLELLAN, JOINTLY AND SEVERALLY — **APPELLEES**

DATE OF JUDGMENT:	10/16/2008
TRIAL JUDGE:	HON. JERRY O. TERRY, SR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	SHANNON ADELE LADNER RUSSELL S. GILL
ATTORNEYS FOR APPELLEES:	DONALD C. DORNAN, JR. KELLY PENDERGRASS DEES
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	GRANTED SUMMARY JUDGMENT TO MCCLELLANS
DISPOSITION:	REVERSED AND REMANDED: 04/27/2010
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GRIFFIS, J., FOR THE COURT:

¶1. Lora Lopez appeals the Circuit Court of Harrison County's grant of summary judgment to Robert D. McClellan ("McClellan") and his father Robert McClellan. The trial court found that Lopez failed to produce any evidence that the negligence of McClellan

caused Lopez's injuries stemming from a three-car accident.

FACTS

¶2. On February 13, 2004, Lopez was a passenger in a 2000 GMC Sonoma pickup truck driven by her friend, Jaclyn Hughes. Lopez and Hughes were traveling westbound on Old Highway 67 in Biloxi, Mississippi. McClellan was traveling immediately behind Lopez's vehicle, in the same direction. At the same time, a 1996 Jeep Grand Cherokee driven by Linda Nesline was traveling eastbound, the opposite direction, on Old Highway 67. As the vehicles converged, Nesline's vehicle crossed the centerline into the westbound lane of traffic and struck Lopez's vehicle head-on. Almost immediately thereafter, McClellan's vehicle then struck Lopez's vehicle from behind.

¶3. As a result of injuries sustained in the accident, Lopez was transported via ambulance to Biloxi Regional Medical Center. She was treated by various physicians, including Dr. Charles Winters, an orthopedic surgeon. Dr. Winters testified that Lopez had been referred to him by another physician in March 2004, and that Lopez complained of lower-back pain and a decreased range of motion. Dr. Winters determined that Lopez had a pre-existing back condition that had been exacerbated by the accident. Surgery – a lumbar laminectomy with fusion – was ultimately required, but because of continuing pain after the surgery, Lopez was left with a nine-percent whole-body disability rating. Dr. Winters also opined that additional surgery would be required to alleviate Lopez's pain.

¶4. On February 23, 2005, Lopez filed a lawsuit in the Circuit Court of Harrison County naming Nesline and McClellan as defendants. Lopez alleged that McClellan negligently

allowed his vehicle to collide with the vehicle occupied by Lopez. The complaint further alleged that as a result of McClellan's negligence, Lopez sustained injuries and damages. Prior to trial, Lopez settled her claim against Nesline, and Nesline was dismissed from the lawsuit.

¶5. Lopez offered Dr. Winters as an expert in the field of orthopedics, and he was deposed. On August 22, 2008, McClellan filed a motion to exclude expert witnesses, which essentially sought to strike Dr. Winters's deposition testimony regarding the "apportioned causation" of Lopez's injuries between the two collisions.[1]

¶6. On September 16, 2008, the date trial was scheduled, the trial court heard arguments on the motion. The trial court took the motion under advisement and granted it the next day, September 17, 2008. Following a hearing held the same day, the trial court granted summary judgment in favor of McClellan.

ANALYSIS

1. Whether it was error to grant summary judgment with less than ten days' notice under Rule 56(c).

¶7. Lopez cited the issue as "[w]hether the trial court erred in granting a sua sponte Motion for Summary Judgment, thereby dismissing that action with prejudice." There is absolutely no legal authority or case-law precedent for a trial court to grant a sua sponte motion for summary judgment under Rule 56 of the Mississippi Rules of Civil Procedure.

[1] "Apportioned causation" is the term used by the parties and the trial court to describe the testimony at issue.

This is a fundamental error that would require this Court to reverse and remand the case for further proceedings. However, Lopez's counsel failed to object to this error before the trial court and apparently consented to the trial court's action. Lopez's counsel certainly waived any objection to this error.

¶8. In *Pope v. Schroeder*, 512 So. 2d 905, 907 (Miss. 1987), the supreme court held that Mississippi Rule of Civil Procedure 56(c) required service at least ten days before the hearing; therefore, it could not be made ore tenus on the same day as the hearing. The court reasoned:

> The requirements of Rule 56(c), far from being a mere extension of our liberal procedure [exalting] substance over form, represent a procedural safeguard to prevent the unjust deprivation of a litigant's constitutional right to a jury trial. Miss. Const., art. 3, § 31 (1890). Thus, we cannot stress too strongly that a trial court should require compliance with Rule 56(c) before entertaining a motion for summary judgment. The failure to do so here was error which requires reversal.

Pope, 512 So. 2d at 908.

¶9. Here, the case was set for trial on September 16, 2008. Counsel appeared that day and argued McClellan's motion to exclude expert witness. The trial judge took the matter under advisement until the next day.

¶10. On September 17, 2008, the trial judge sustained the motion and decided to strike a portion of Dr. Winters's testimony. After the trial judge made his ruling, the following transpired:

> BY [MCCLELLAN'S COUNSEL]: May it please the Court. In view of Your Honor's rulings on the two motions to strike with regard to the medical causation testimony of each of the plaintiffs . . . our belief is that in the absence

> of medical opinion testimony that passes muster and is admissible, that their cases on causation would not rise to the level of jury submissible issues. *And so I'm a little uncertain at this point, in view of your rulings, ... I'm really not sure what the procedural device is at this point. But I think simply the defendant at this time moves to dismiss, or for an involuntary dismissal, or for a directed verdict or summary judgment, whatever the proper procedural device is at this point* on the grounds that in [the] absence of those medical opinions which are required in order to establish any causal relationship between the second impact with the defendant and damages claimed, those cases must fail . . . . There is no jury submissible issue[;] there is no genuine issue of material fact based on the record now as made and as ruled on by the Court that would create any jury issue on causation of injuries. *And so we would move to dismiss the plaintiff's case at this point on that basis.*
>
> We, in support of that motion, would like to offer the depositions of the two plaintiffs for the record and the deposition of Linda Nesline for the record.
>
> . . . .
>
> BY THE COURT: Well in some instances there's always an issue as to whether a motion should be granted or whether a motion should be denied, and so it's either granted or denied, and also whether it should be dismissed as a directed verdict or whether it should be on a summary judgment, both being somewhat of the same effect. And at this stage with these proceedings, I would think that the motion for the granting of a directed verdict is not the term that should be used, but more so that the matter is dismissed based upon summary judgment based upon my ruling on the medical itself, and the medical only. That there's no genuine issue of fact to be submitted to the jury on the causation as to the results of impact number one and the results of impact number two. *So I'll call it summary judgment.*
>
> BY [LOPEZ'S COUNSEL]: We agree with that, Your Honor. And for the record purposes, we're not contesting that it's a summary judgment type of motion.

(Emphasis added).

¶11. While we conclude that a motion for summary judgment may not be decided by the court sua sponte and that only a motion for summary judgment filed at least ten days before

the hearing may be entertained by the court, we cannot and do not ignore the significance of the statement by Lopez's counsel.

¶12. This presents us with an illustration of the problem caused by the parties and more troubling the problem caused by the trial court when the Mississippi Rules of Civil Procedure are not followed or ignored.

¶13. The rules provide a procedure to have a case decided prior to trial. If McClellan's counsel thought a summary judgment was appropriate to terminate the case prior to trial on the merits, McClellan was required under Rule 56 to file a written a motion for summary judgment *along with* the motion to exclude the expert witness. Had they done so, McClellan's attorneys would have also been required to submit an itemization of facts relied upon and not genuinely disputed to comply with the specific requirement of Rule 4.03(2) of the Uniform Rules of Circuit and County Court. A written motion for summary judgment and written itemization of facts are necessary for the trial court's initial review and the appellate court's review. We have the benefit of neither.

¶14. The standard of review applied to the grant or denial of a motion for summary judgment is de novo. *Lewallen v. Slawson*, 822 So. 2d 236, 237 (¶6) (Miss. 2002). A de novo review "means that the case shall be tried the same as if it had not been tried before, and the court conducting such a trial may substitute its own findings and judgment for those of the inferior tribunal from which the appeal is taken." *California Co. v. State Oil & Gas Bd.*, 200 Miss. 824, 838-39, 27 So. 2d 542, 544 (1946) (citing *Knox, Attorney General, v. L.N. Dantzler Lumber Co.,* 148 Miss. 834, 114 So. 873, 876 (1927)). Thus, this Court's

review of the trial court's decision to grant a motion for summary judgment should be conducted just as if this Court were sitting as the trial court.

¶15. Normally, we begin a de novo review of the grant of a summary judgment by reading the motion for summary judgment. Here, no motion was filed. This Court does not have the benefit of reviewing McClellan's basis upon which he claims that he is entitled to a judgment as a matter of law. Further, since McClellan did not submit the required itemization of facts relied upon and not genuinely disputed, this Court does not have the benefit of reviewing McClellan's itemization of the facts that are undisputed.

¶16. The record before this Court consists of a complaint, an answer, a motion to strike expert opinions, a response to the motion to strike, and several exhibits. The exhibits include the police report, Lopez's medical bills, a copy of an x-ray, Lopez's medical records, Dr. Winters's deposition, and photographs of the vehicles involved in the accident.

¶17. The substance of the motion to strike Dr. Winters's testimony is the subject of the trial judge's decision to grant the summary judgment. In the motion to exclude and at the hearing, McClellan's counsel argued that Lopez could not sustain her burden to establish the elements of her claim for negligence. McClellan's attorney used the imprecise nature of Dr. Winters's testimony to argue that Lopez's claim could not succeed because she could not establish the element of causation. McClellan's motion was a clever use of imprecise questions and answers given during a discovery deposition.

¶18. The most fundamental principle in considering motions for summary judgment was announced by the supreme court in the seminal case of *Brown v. Credit Center, Inc.*, 444 So.

2d 358, 363 (Miss. 1983). There, the court held that "[s]ummary judgments, in whole or in part, should be granted with great caution." *Id.*

¶19. Essential to this principle is that counsel and the trial court must follow the procedures established by Rule 56 of the Mississippi Rules of Civil Procedure. Compliance with the Uniform Rules of Circuit and County Court is likewise necessary.

¶20. The facts used in this opinion come from the motion to strike, the exhibits attached, and argument of counsel. This case comes to this Court absent an acceptable factual record.

¶21. However, this Court is not willing to reverse the trial judge's judgment based on the record before the Court. Indeed, Lopez's counsel waived any error on this issue when: (1) he had an opportunity to object and did not; and (2) he made the statement on the record, immediately after the trial judge concluded that "I'll call it summary judgment," that "[w]e agree with that, Your Honor. And for the record purposes, we're not contesting that it's a summary judgment type of motion."

¶22. Since we do not have a motion for summary judgment or an itemization of facts, the remainder of this opinion will be based on our analysis of the record before the Court, which includes the pleadings, motions, and exhibits that were before the trial judge.

2. Whether it was error to exclude Dr. Winters's testimony.

¶23. The real question to be decided in this case is whether the trial court erred when it determined that Dr. Winters's testimony should be excluded based on Rule 702 of the Mississippi Rules of Evidence. The trial court concluded that Dr. Winter's opinion was based on speculation and was, therefore, inadmissible.

¶24. We disagree. We conclude that Dr. Winters's testimony was, in fact, admissible. Dr. Winters testified that his opinion was based on his knowledge, skill, experience, training, and education as an orthopedic surgeon. The question then centers on the witness's ability to distinguish the injuries that occurred when Lopez was involved in two instantaneous collisions.

¶25. Dr. Winters testified:

> Q. If I ask you to assume that that vehicle absorbed an impact from the front first and then an impact from the rear[,] would that be important to your opinion?
>
> A. Not necessarily, I don't think. I think . . . that it was a significant blow both front and back. But I don't know that the sequence makes a difference.

In response to questioning from McClellan's counsel, Dr. Winters's testimony continued:

> Q. Can you give me - - can you give the jury the basis for that opinion?
>
> A. There is no - - basis for that opinion.
>
> Q. Okay.
>
> A. That is - - that is an estimate. Because in my - - in my opinion, the accident kind of basically acts as a whole. There is no way for me to sort that out. But if I - - if I'm asked to try to apportion it, the only thing I can do is apportion it equally. Because I view the accident as a whole. It all happened at the same time. There is no way for me to know which - - which one is which percentage. So if I'm - - if I have to give a percentage, I just give fifty/fifty.
>
> Q. Okay. So would you agree with me that the fifty/fifty assessment is your speculation?
>
> A. It is. It's not scientific in any way.

. . . .

A. It's not scientific. It's just an estimation.

Q. Okay. Can you make that fifty/fifty assessment to a reasonable degree of medical probability?

A. No.

Q. Are you aware of any treatises or any publications that support the apportionment in the manner you did, fifty/fifty to the two impacts?

A. No, I am not.

Q. So that's strictly your best guess, an estimate?

A. *That's an estimate based on the fact that - - that I'm being asked to try to divide up which accident caused this problem when the two accidents occurred at the same time*.

On redirect, Dr. Winters testified:

Q. In your letter to me of May 12th, you stated: with regard to the two collisions, it is impossible for me to state which of those two is the direct cause. And that's your opinion; is that right, Doctor?

A. Yes.

Q. The direct cause. I would have to approximate or portion - - apportion fifty percent to each accident. That's still your opinion; is that correct?

A. Yes.

Q. And that - although as [McClellan's counsel] points out, there may not be a scientific treatise to support that. How long have you been a doctor?

A. Since 1983. . . .

Q. And you've been around orthopedic injuries for - -

A. Since 1988.

Q. 1988. So is it fair to say that your opinion that fifty percent should be apportioned to the rear-end collision and fifty percent to the front collision - - *is that based on your training and experience as a professional orthopedic surgeon*?

A. *Yes.*

Q. Is that, again, your opinion to a reasonable medical probability?

A. I think - - yes. I think that's reasonable.

(Emphasis added).

¶26. Dr. Winters's testimony opined that: (1) both the frontal and rear-end impacts were significant and contributed to Lopez's injuries, and (2) he cannot tell which bruise occurred or which bone was broken as a result of the frontal or the rear-end collision. This testimony does not make Dr. Winters's opinion inadmissible or unreliable simply because Dr. Winters acknowledges that his medical knowledge and training does not allow him the ability to stop time and that he did not have the opportunity to observe Lopez during the period of time between the two impacts.

¶27. Indeed, Dr. Winters's testimony was sufficient to establish the element of proximate cause and was admissible for the jury to consider in the apportionment of damages. The jury would not be required to accept Dr. Winters's testimony to apportion damages but may take his testimony into consideration along with any other evidence.

¶28. We perceive that the problem presented in this case is the use and application of the term "apportioned causation" when the trial court considered whether Lopez had established

the necessary element of proximate cause. Causation is not apportioned. However, damages may be apportioned based upon a percentage of fault. It is only in the apportionment of damages that the percentages of fault, i.e. percentage of causation, is to be considered.

¶29. In a negligence claim, there are four elements that must be established by the plaintiff: (1) duty or standard of care, (2) breach of that duty or standard of care, (3) proximate cause, and (4) damages or injuries. *Thomas v. The Columbia Group, LLC*, 969 So. 2d 849, 852 (¶11) (Miss. 2007). This case considers the relationship between the elements of proximate cause and damages.

¶30. The element of proximate cause is a separate element from damages. However, causation does bear a relationship to the actual award of damages when there are multiple tortfeasors. The question considered here is, did McClellan's breach of a duty proximately cause Lopez's damages?

¶31. Whether the element of proximate cause has been established in a case is like asking whether you are a little pregnant. Either the plaintiff has established proximate cause or has not; you either are pregnant or you are not. There is no *absolutely no consideration of "apportionment"* when the court or a jury considers whether the element of proximate cause has been established.

¶32. Proximate cause is a concept which is more accurately defined by reference to the distinct concepts of which it is comprised, which are: "(1) cause in fact; and (2) foreseeability." *Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 411 (¶48) (Miss. Ct. App. 2006) (quoting *Ogburn v. City of Wiggins*, 919 So. 2d 85, 91 (¶21) (Miss. Ct. App. 2005)).

"Cause in fact means that the act or omission was a substantial factor in bringing about the injury, and without it the harm would not have occurred." *Id.* "Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others." *Id.* A part of proximate cause is proximate contributing cause which our supreme court has defined as "a substantial factor in producing an injury." *McCorkle v. United Gas Pipe Line Co.,* 253 Miss. 169, 183, 175 So. 2d 480, 487 (1965).

¶33. The element of damages does consider "apportionment of causation" or "fault." For example, under Mississippi Code Annotated section 11-7-15 (Rev. 2004), the court and the jury will consider the plaintiff's contributory negligence to reduce the plaintiff's award of damages. This is the legal doctrine of comparative negligence. McClellan did not assert a defense that Lopez's damages should be reduced by her contributory negligence.

¶34. Instead, the real confusion here is over the "*apportionment of damages*" based on the percentage of fault where the damage has been caused by two or more persons. Indeed, Mississippi Code Annotated section 85-5-7 (Supp. 2009), in pertinent part, provides:

> (1) As used in this section, "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.
>
> (2) Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent

> shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.
>
> . . . .
>
> (5) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor.

¶35. McClellan, as the driver of the second car to hit the vehicle in which Lopez was riding, is responsible only for the amount of Lopez's damages that were based on his fault allocated by the jury in accord with section 85-5-7. Said differently, Mississippi's law of negligence limits Lopez's recovery of damages from McClellan based on the apportionment of his fault under this statute.

¶36. The record reveals that the accident in issue here was the result of "two nearly concurrent impacts." Dr. Winters's testimony was that it was "impossible" for him to separate which collision caused the injuries to Lopez. Dr. Winters's testimony was that the two collisions happened so fast that there was no way possible to determine which of Lopez's injuries were caused by the head-on collision and which injuries were caused by the rear-end collision. In fact, Dr. Winters testified:

> Q. Well, Doctor, the reason I ask about these photos and the accident report is the mechanism of injury. Are you aware that this was a three-car collision type situation?
>
> A. I saw that both the front and the back of the vehicle was [sic] damaged.
>
> . . . .

Q. If I ask you to assume that that vehicle absorbed an impact from the front first and then an impact from the rear would that be important to your opinion?

A. Not necessarily, I don't think. I think . . . that it was a significant blow both front and back. But I don't know that the sequence makes a difference.

Q. Well, let me refer you to your May 12th letter in your records.

A. Uh-huh (indicating yes).

Q. Doctor, I'd asked you through earlier correspondence if you could apportion the causal connection for the surgery to the two impacts related to this . . . collision. And in that letter, you replied to me. Can you tell the jury what your opinion is about the apportionment of the causal connection?

A. I said I couldn't really accurately do that. And I would as a best estimate apportion fifty percent to each.

Q. So then it would be fair to say that your opinion is that fifty percent of the need for the surgery would be attributed to the front collision and fifty percent to the rear collision?

A. You know, it's hard for me to – like I said, it's impossible for me to really separate that. I think you have to take the motor vehicle as a whole - -

Q. Uh-huh (indicating yes).

A. - - that - - that the accident in itself is the - - the causation and that since there were essentially two accidents at the same time - - you know there is no way for me to really accurately say seventy-five percent came from one and twenty-five percent came from the other. *I think they're both the cause.*

(Emphasis added).

¶37. According to the police report, McClellan "stated he saw [Lopez's vehicle] slam on

brakes and try to avoid [the vehicle that caused the head-on collision] and when they collided he tried to avoid them and could not and ran off the road to the left." Thus, the evidence is that the two impacts were not simultaneous but instantaneous, and the two accidents were separated only by a matter of seconds or possibly milliseconds.

¶38. We find this evidence is sufficient to establish the element of proximate cause. In *Goudy v. State*, 203 Miss. 366, 370, 35 So. 2d 308, 309 (1948), the supreme court reasoned:

> In this, as in all cases, it is necessary to a cause of action on account of negligence that the latter shall have been the proximate, or a contributing cause of injury to another; and in order that it shall be a proximate or contributing cause it must have been a substantial factor in producing the injury.

¶39. In *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d 721, 732 (¶52) (Miss. 1998), the court considered a negligence action where the mother of a passenger brought suit against the driver of the car that hit a utility pole and against the utility company which owned the pole that the driver hit. The supreme court agreed that evidence that the driver was drinking should have been heard by the jury. *Id.* The utility company argued that the driver's drinking was "clearly relevant" to determine the driver's degree of negligence and the passenger's negligence, if any, by riding in the car with a driver who was drinking. *Id.* The supreme court held the evidence would allow the jury to determine "whether [the driver] was the sole proximate cause or a contributing proximate cause, and what apportionment of fault his negligence deserves." *Id.*

¶40. Finding the element of proximate cause has been established, we should then move to the question of damages. In consideration of damages, Mississippi Code Annotated

section 85-5-7 requires that the jury consider the "allocation" and "apportionment" of "fault" or "causation."

¶41. Accordingly, we find that the trial court committed reversible error in granting summary judgment. We reverse and remand this case for further proceedings consistent with this opinion.

¶42. **THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

KING, C.J., LEE, P.J., ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. BARNES, J., CONCURS IN PART AND IN THE RESULT. MYERS, P.J., AND IRVING, J., CONCUR IN RESULT ONLY.