

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 2000-CA-01233-COA**

GEORGE A. COLE

APPELLANT

v.

METHODIST MEDICAL CENTER

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 06/26/2000

TRIAL JUDGE: HON. JAMES E. GRAVES JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: KENNETH K. CRITES

ATTORNEYS FOR APPELLEE: HEBER S. SIMMONS III

C. YORK CRAIG III

TINA LORRAINE NICHOLSON

NATURE OF THE CASE: CIVIL - PERSONAL INJURY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED APPELLEE

DISPOSITION: AFFIRMED - 6/18/2002

MOTION FOR REHEARING FILED:

CERTIORARI FILED:

MANDATE ISSUED: 7/9/2002

BEFORE KING, P.J., BRIDGES, AND CHANDLER, JJ.

KING, P.J., FOR THE COURT:

¶1. George A. Cole filed a lawsuit in the First Judicial District of Hinds County Circuit Court against Methodist Medical Center (Methodist) on July 9, 1998, requesting damages for injuries he alleged to have been caused by Methodist's negligent acts and omissions. Methodist filed its response and a motion for summary judgment. The trial court granted Methodist's motion. Aggrieved, Mr. Cole appeals and cites the following issues as error:

I. May a default judgment be entered against a party on summary judgment solely for failure to respond?

II. Assuming arguendo that the court could enter a default judgment, would such a judgment be appropriate in the case at bar?

FACTS

¶2. On September 2, 1998, Mr. Cole filed an amended complaint (which changed only the name of the defendant from Methodist Medical Center to Methodist Healthcare-Jackson Hospitals) against Methodist.

Cole alleged that Methodist failed to monitor his needs while in the hospital on August 31, 1996. Cole alleged that the lock on the bathroom door was defective. His complaint alleged that because the door was not secure and he did not receive the assistance of hospital personnel, he "fell injuring the right side of his chest and right shoulder."

¶3. The record reflects the following chronology of events:

07/09/98: complaint filed against Methodist

08/13/98: Methodist filed its answer and defenses

09/02/98: Cole filed an amended complaint

09/30/98: Methodist filed its answer to amended complaint

02/11/99: scheduling order entered

06/28/99: Methodist filed a motion for summary judgment

06/28/99: Methodist filed affidavit of Jim Baxter, Director of Plant Operations of Central Mississippi Medical Center in support of the motion for summary judgment

06/28/99: Methodist sent a letter to Cole advising that the hearing date on the motion for summary judgment had been set for September 7, 1999 at 9:00 a.m.

07/01/99: notice of setting on motion for summary judgment for September 7, 1999

07/13/99: Cole by letter to Methodist requested thirty-day extension in which to respond to motion for summary judgment

07/15/99: Methodist by letter to Cole agreed to extension until August 1, 1999 to respond to motion for summary judgment

08/02/99: phone call requesting a further extension until August 6, 1999

08/03/99: Methodist by letter to Cole agreed to an extension until August 6, 1999 regarding the response to the motion for summary judgment

09/09/99: Methodist granted summary judgment

09/22/99: Cole filed a motion to vacate summary judgment

10/08/99: Methodist filed a response to the motion to vacate

11/04/99: Methodist wrote Cole and questioned that he either secure a hearing date for his motion to vacate or abandon the motion

01/11/00: Methodist again wrote Cole to request that the motion to vacate be set for hearing or abandoned

03/01/00: Cole's attorney by letter to trial judge advised that he had obtained a job out-of-state and

needed to withdraw from the case. He gave the name of the attorney who would continue representation of Cole.

03/10/00: order granting motion of Cole's attorney to withdraw

03/17/00: Methodist filed a motion to confirm order of dismissal

05/24/00: letter to trial judge from Cole's "former attorney" and an accompanying affidavit stating that he received neither defendant's request for admissions nor a notice of the hearing on defendant's motion for summary judgment

05/30/00: Cole responds to Methodist's motion to confirm order of dismissal

06/26/00: order granting the motion to confirm an order of dismissal

ISSUES AND ANALYSIS

I.

May a default judgment be entered against a party on summary judgment solely for failure to respond?

¶4. Cole contends that summary judgment should not be granted where it is based solely upon the failure to respond to a motion for summary judgment sought pursuant to rule 56(c) of the M.R.C.P.⁽¹⁾ Cole maintains that the trial court should have, but failed to consider the factual basis for the motion. He states that the order entered in this action does not reflect that the court made any factual inquiry or analysis as to the merits of this case but, granted a default judgment⁽²⁾ based on his failure to respond. When asked to review a trial court's grant of summary judgment, this Court employs the following standard:

The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court under Rule 56(c). This Court conducts 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 evidence must be viewed in the light most favorable to the party against whom the motion has been made. The burden of showing that no genuine issue of material fact exists lies with the moving party, and we give the benefit of every reasonable doubt to the party against whom summary judgment is sought. We do not try issues. Rather, we only determine whether there are issues to be tried. Furthermore, it is well-settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion. The focal point of our de novo review is on material facts

Dailey v. Methodist Med. Ctr., 790 So. 2d 903 (¶3) (Miss. Ct. App. 2001) (citations omitted).

¶5. While there is no transcription of any argument regarding the motion for summary judgment, this Court has reviewed what limited information has been provided to it. This information includes copies of the pleadings, responses to the pleadings, the motion for summary judgment, and the order granting the summary judgment.

¶6. Cole suggests that a genuine issue of fact exists as to whether or not Methodist provided adequate

assistance and monitoring while he was a patient at the hospital. He argues this issue of fact precluded summary judgment.

¶7. A trial court must deny a summary judgment motion, even if the non-moving party makes no response whatsoever, so long as all the data before the court, including "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any," viewed in the light most favorable to the non-moving party, raises a triable issue concerning a disputed material fact. *Foster v. Noel*, 715 So. 2d 174 (¶36) (Miss. 1998). The determining factor involved in granting a summary judgment is whether or not there is a "genuine issue as to any material fact." *George County By and Through Bd. of Sup'rs v. Davis*, 721 So. 2d 1101 (¶13) (Miss. 1998).

¶8. Cole's claim is one of negligence. The elements of proof required for a negligence claim include duty, breach of duty, proximate cause and damages. *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990). Cole has failed to provide evidence to establish negligence as a genuine issue of material fact in response to the motion for summary judgment and that the trial court erred in granting summary judgment. Our review of the information provided to this Court reveals that Cole failed to raise any genuine issue of material fact regarding the motion for summary judgment. Therefore, we affirm the trial court's decision.

II.

Assuming arguendo that the court could enter a default judgment, would such a judgment be appropriate in the case at bar?

¶9. Our finding on issue I renders moot this matter.

¶10. THE JUDGMENT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, LEE, IRVING, MYERS, CHANDLER AND BRANTLEY, JJ., CONCUR.

1. **M.R.C.P. RULE 56-SUMMARY JUDGMENT:** (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. . .

2. **M.R.C.P. RULE 55(a)(b) - DEFAULT:** (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default. (b) Judgment. In all cases the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative,

his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice. If in order to enable the court to enter judgment or to carry it into effect it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing with or without a jury, in the court's discretion, or order such references as it deems necessary and proper.