

IN THE COURT OF APPEALS 11/14/95
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00041 COA

YOLANDA DUPREE APPELLANT

v.

KEN DAVIS, D/B/A FUNTIME, USA APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): VINCENT J. GLORIOSO, JR.

ATTORNEY(S) FOR APPELLEE(S): DOUGLAS BAGWELL

MATTHEW G. MESTAYER

NATURE OF THE CASE: PREMISES LIABILITY/SLIP AND FALL - SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: REQUEST FOR ADMISSIONS DEEMED ADMITTED;
SUMMARY JUDGMENT GRANTED; DENIAL OF PLAINTIFF'S REQUEST TO WITHDRAW
ADMISSIONS AND TO AMEND ORIGINAL COMPLAINT TO ADD PROPER PARTY
DEFENDANT

BEFORE BRIDGES, P.J., McMILLIN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This slip and fall, and resultant premises liability case can be resolved by application of the Mississippi

Rules of Civil Procedure. The trial court found that the request for admissions of the Defendant/Appellee, Ken Davis, d/b/a Funtime, USA (Davis), were to be deemed admitted and granted summary judgment to Davis, who it said therefore had no control over the premises. It also considered moot the motion to withdraw admissions and to amend the complaint of the Plaintiff/Appellant, Yolanda Dupree (Dupree). On appeal, the issues raised consist of the following:

I. DID THE TRIAL COURT ERR IN RULING THAT DAVIS'S REQUEST FOR ADMISSIONS WERE TO BE CONSIDERED ADMITTED AND IN EFFECTIVELY DENYING DUPREE'S MOTION TO WITHDRAW THE ADMISSIONS BY CONSIDERING THAT MOTION MOOT?

II. DID THE TRIAL COURT ERR IN GRANTING DAVIS'S MOTION FOR SUMMARY JUDGMENT?

III. DID THE TRIAL COURT ERR IN DENYING DUPREE'S MOTION TO AMEND HER COMPLAINT BY RULING THAT HER MOTION WAS MOOT?

Upon application of the Mississippi Rules of Civil Procedure, we find that the trial court was correct in its decision that Davis's request for admissions should be deemed admitted, thereby denying Dupree's motion to withdraw admissions, and its granting summary judgment as to Davis. However, we find that the trial court was in error in refusing Dupree the opportunity to amend her complaint for the purpose of naming a proper party defendant. We therefore reverse to allow that amendment and for trial on the merits.

FACTS

On July 1, 1990, Dupree was involved in a slip and fall accident as she was boarding bumper boats at Funtime, USA, an amusement park in Gulfport. On July 1, 1993, Dupree and her Louisiana counsel filed a complaint alleging that the Defendants, M. J. Williams, d/b/a Funtime, USA Go-Carts (Williams) and Ken Davis, d/b/a Funtime, USA, were owners, managers, and operators of the amusement park. Williams filed his answer and denied involvement in the accident. Davis filed his answer and denied ownership, management, and operation of the amusement park. Davis propounded written discovery through interrogatories and request for production of documents to Dupree on July 28, 1993, and through request for admissions on August 16, 1993. Williams propounded written discovery, including request for admissions, to Dupree on August 9, 1993. After Dupree failed to respond to any discovery requests, both Defendants filed a motion to deem request for admissions admitted and for summary judgment on October 10, 1993. The court scheduled a hearing for December 6, 1993. On December 3, Dupree's Mississippi counsel filed a motion for continuance and a motion to withdraw admissions. The court rescheduled the December 3 hearing for May 2, 1994. Dupree filed a motion for leave to file amended complaint, to add Beach Amusements, Inc. (Beach) as a defendant, on April 28, 1994. The president of Beach was Ken Davis.

On May 2, 1994, oral arguments were heard, resulting in the trial court's determination that: (1) Davis's request for admissions should be deemed admitted, and therefore, Dupree's motion to withdraw admissions should be denied; (2) summary judgment should be granted to Davis due to his lack of control over the premises and to Dupree's Louisiana counsel's failure to respond to discovery requests and practicing law in Mississippi without either a license or a *pro hac vice* order; (3) Williams should be dismissed as a defendant based on agreement of all parties; and (4) Dupree's motion for leave to file amended complaint was moot. Dupree filed a motion for reconsideration on May 18, 1994, which the court denied. Dupree then filed her appeal on January 9, 1995.

ARGUMENT AND DISCUSSION OF LAW

I. DID THE TRIAL COURT ERR IN RULING THAT DAVIS'S REQUEST FOR ADMISSIONS WAS TO BE CONSIDERED ADMITTED AND THEREBY DENYING DUPREE'S MOTION TO WITHDRAW THE ADMISSIONS BY CONSIDERING THAT MOTION MOOT?

Dupree argues that her original Louisiana counsel did not intend to circumvent local discovery rules, but simply withheld her responses to the Defendants' request for admissions and tried to resolve the matter through settlement. She contends that her Mississippi counsel eventually did file an answer to the Defendants' request for admissions and a motion to withdraw admissions in an attempt to preserve her rights to a trial on the merits. She also contends that the trial court should have reviewed all circumstances surrounding her untimely filings prior to considering the request for admissions as admitted.

The Mississippi Supreme Court has stated that the standard of review is abuse of discretion regarding a lower court decision granting a motion to deem a request for admissions as admitted. *Skipworth v. Rabun*, 568 So. 2d 289, 291 (Miss. 1990). Mississippi Rule of Civil Procedure 36(a) states that "[t]he matter is admitted unless, within thirty days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter," M.R.C.P. 36(a). Rule 36(b) further states that:

[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Id. The court has stated that "Rule 36 means what it says." *Towner v. Moore ex rel. Quitman Sch. Dist.*, 604 So. 2d 1093, 1099 (Miss. 1992) (citations omitted). It has also stated that "[c]ourts cannot give or withhold [benevolent gratuity about the administration of Rule 36] at pleasure. Rule 36 is to be enforced according to its terms." *Skipworth*, 568 So. 2d at 290 (quoting *Educational Placement Serv. v. Wilson*, 487 So. 2d 1316, 1318 (Miss. 1986)). Moreover, inaction can be justification for deeming a request for admissions admitted. *Sawyer v. Hannan*, 556 So. 2d 696, 698 (Miss. 1990). In the case at bar, Davis propounded his request for Admissions to Dupree on August 16, 1993. Dupree

filed her answers to Davis's request for admissions on December 2, 1993, and filed her motion to withdraw admissions on December 3, 1993. This delay clearly was beyond the thirty-day mandate of Rule 36(a). As a matter of law, the admissions must be deemed admitted and the trial court was correct in so doing.

Subsection (b) of Rule 36 gives a court the discretion to allow withdrawal of admissions. Moreover, the Mississippi Supreme Court has stated that good and sufficient reason should be offered, such as justifiable excuse for the delay, for allowing the withdrawal of admissions. *Martin v. Simmons*, 571 So. 2d 254, 257 (Miss. 1990); *Skipworth v. Rabun*, 568 So. 2d 289, 291 (Miss. 1990); *Sawyer v. Hannan*, 556 So. 2d 696, 698 (Miss. 1990) (court impliedly required some excuse for failure to timely file answers to request for admissions, and stated that no abuse of discretion existed for it to refuse withdrawal of matter which had been deemed admitted by operation of Rule 36). In the case at bar, Dupree's counsel withheld her responses to the request for admissions in the hope of obtaining a settlement. Dupree further contended that she assumed strict discovery procedures would not be required. Although the trial court never ruled on Dupree's motion to withdraw admissions since it rendered the issue moot, it effectively denied that motion. We believe, on the merits, that Dupree failed to establish a good and sufficient excuse for the delay in filing answers to Davis's request for admissions to warrant withdrawal of the admissions. We also believe that the trial court's determination of mootness on this particular issue was correct based upon its decision to deem the request for admissions admitted and upon its grant of summary judgment for Davis, to be discussed forthwith.

II. DID THE TRIAL COURT ERR IN GRANTING DAVIS'S MOTION FOR SUMMARY JUDGMENT?

Dupree contends that both parties have different opinions as to who is liable so that a genuine issue of fact exists and summary judgment was not proper. This argument is intertwined with her contention that the trial court erroneously refused her request to add a proper party defendant to the original complaint by amendment. If the lower court had allowed the amendment and granted her motion to withdraw admissions, Dupree argues that genuine issues would still have existed to be addressed based on the difference in the allegations of the parties involved.

In determining whether the trial court properly granted a motion for summary judgment, this Court employs a *de novo* review of the record. *Presswood v. Cook*, 658 So. 2d 859, 862 (Miss. 1995) (citing *Owen v. Pringle*, 621 So. 2d 668, 670 (Miss. 1993)); *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993); *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992). A trial court may grant summary judgment "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." M.R.C.P. 56. A fact is material if it "tends to resolve any of the issues, properly raised by the parties." *Webb v. City of Newton*, 583 So. 2d 946, 949 (Miss. 1991) (citing *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So. 2d 431, 433 (Miss. 1988)). The evidence must be viewed in the light most favorable to the non-moving party. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993) (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). If, in this view, the moving

party is entitled to a judgment as a matter of law, then summary judgment should be granted in that party's favor. *Id.* Otherwise, the motion should be denied. *Id.* Reasonable minds may often differ on whether there exists a genuine issue of material fact. *Donald v. Reeves Transp. Co.*, 538 So. 2d 1191, 1195 (Miss. 1989) (citing *Brown*, 444 So. 2d at 362-63). "If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial." *Id.* (citations omitted). Therefore, summary judgment should be granted with great caution. *Womble v. Singing River Hosp.*, 618 So. 2d 1252, 1256 (Miss. 1993) (citing *Brown*, 444 So. 2d at 362).

In the case at bar, the trial court properly determined that the request for admissions were deemed admitted by operation of law. As a result, Dupree admitted that Ken Davis, d/b/a/ Funtime, USA was not the owner and had no control over the amusement park or the bumper boat ride. Moreover, Dupree admitted that the bumper boat ride was owned and operated by Beach Amusements, Inc. Therefore, there is no genuine issue of material fact regarding liability of Ken Davis, d/b/a Funtime, USA, to Dupree since she cannot prove an essential element of her case against Davis. Davis is entitled to summary judgment since the non-movant Dupree has failed to make a sufficient showing, for which she has the burden of proof, to establish an essential element of her case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 683 (Miss. 1987). Dupree has failed to establish that Davis owed a legal duty to her as a premises or a bumper boat ride owner, manager, or operator. Rather, it was established by Dupree's admissions that another separate entity, Beach, was the owner and operator of the amusement park. Since Davis had no ownership or control over the premises or the bumper boat ride, these facts having been conclusively established by operation of law under Mississippi Rule of Civil Procedure 36(b), he owed no legal duty and had no liability to Dupree. He was therefore entitled to summary judgment as a matter of law. The trial court did not err in that decision.

III. DID THE TRIAL COURT ERR IN DENYING DUPREE'S MOTION TO AMEND HER COMPLAINT BY RULING THAT HER MOTION WAS MOOT?

Dupree argues that the trial court erred by ruling moot her motion to amend the original complaint to add a new party defendant and effectively denying her motion. Davis contends that the trial court was correct in its ruling since Dupree's motion to amend was simply an attempt to circumvent his motion for summary judgment. He argues that Dupree was clearly placed on notice at least twice as to the correct defendant, but failed to take action, prior to his motion for summary judgment. Davis finally states that the grant of summary judgment in his favor rendered Dupree's motion to amend her complaint moot.

The Mississippi Supreme Court has held that "[m]otions for leave to amend are left to the sound discretion of the trial court. *Frank v. Dore*, 635 So. 2d 1369, 1375 (Miss. 1994) (citations omitted); *see also Simmons v. Thompson Mach. of Mississippi, Inc.*, 631 So. 2d 798, 800 (Miss. 1994) (citations omitted). The Court reviews such decision under an abuse of discretion standard and will reverse only where it is convinced the trial judge abused his discretion. *Id.* (citation omitted). Mississippi Rule of Civil Procedure 15 allows for amended and supplemental pleadings. M.R.C.P. 15; *see also Hester v. Bandy*, 627 So. 2d 833, 839 (Miss. 1993). Rule 15(a) states that "leave [to amend] shall be freely given when justice so requires." *Id.* The rule allows an amendment as a matter of course only before a responsive pleading is served or if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar. *Id.* Otherwise, a party

may amend a pleading only by leave of court or upon written consent of the adverse party. *Id.* "While a trial court has discretion to allow amendment and should do so freely under the proper circumstances, amendment should not occur when to do so would prejudice the defendant." *Hester*, 627 So. 2d at 839. "[I]t is [sometimes] necessary that courts permit liberal amendments of the pleadings in order to reach the actual merits of a controversy." *Simmons*, 631 So. 2d at 800-01 (quoting *William Iselin & Co. v. Delta Auction & Real Estate Co.*, 433 So. 2d 911, 913 (Miss. 1983)). The comment to Rule 15 states that "[i]n practice, an amendment should be denied only if the amendment would cause actual prejudice to the opposite party." M.R.C.P. 15 cmt. (citing 6 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1484 (1971)). Finally, Rule 15(c) reads as follows:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

M.R.C.P. 15(c).

In the case at bar, the trial court, by rendering moot the motion to amend, precluded Dupree from amending her complaint to add the proper party defendant. The judge abused his judicial discretion by not granting Dupree's motion to amend and add Beach as a proper defendant. Dupree's motion to amend did not alter the substance of her allegations, but merely set forth the proper party defendant. Neither Davis nor the trial court identified any undue prejudice toward Davis in the event the motion to amend had not been rendered moot and had been granted. Moreover, Rule 15(c) allows Dupree to amend her original complaint and change the party against whom her claim had been asserted. Her amendment would relate back to the date of the original pleading since her claim in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading. Since Ken Davis of Funtime, USA, is also president of Beach, the second element of Rule 15(c)'s relation-back requirement has been met. The party to be brought in by amendment, Beach, received notice of the institution of the action and would not be prejudiced in maintaining a defense on the merits. Beach also knew, or should have known that, but for a mistake regarding identifying the proper party, the action would have been brought against it. In the final analysis, we hold that Dupree should have been granted leave to file an amendment to her original complaint in order to name the proper party defendant. It should be noted that allowing Dupree to amend her original complaint to add a proper party defendant in no way affects our affirmance of the trial court's grant of summary judgment for the Defendant, Ken Davis, d/b/a Funtime, USA. We therefore reverse and remand on this single issue to allow Dupree to amend her original complaint, by naming the proper party defendant, and for trial on the merits consistent with this opinion.

CONCLUSION

The trial court did not err in deeming Davis's request for admissions admitted and thereby denying Dupree's motion to withdraw admissions by considering that motion moot. Likewise, the court did not err in granting the motion for summary judgment in favor of the Defendant, Ken Davis, d/b/a Funtime, USA. However, under Mississippi Rule of Civil Procedure 15(c), Dupree should have been allowed to amend her original complaint to name the proper party defendant. We reverse and remand to allow an amendment and for trial on the merits.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY, DEEMING THE REQUEST FOR ADMISSIONS OF THE DEFENDANT/APPELLEE, KEN DAVIS, D/B/A FUNTIME, USA, AS ADMITTED, GRANT OF SUMMARY JUDGMENT FOR THE DEFENDANT, AND DENIAL OF THE MOTION TO WITHDRAW ADMISSIONS OF THE PLAINTIFF/APPELLANT, YOLANDA DUPREE, IS AFFIRMED.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY, DENYING THE MOTION OF PLAINTIFF TO AMEND ORIGINAL COMPLAINT TO ADD PROPER PARTY DEFENDANT, IS REVERSED AND REMANDED.

THREE-FOURTHS OF THE COSTS OF THIS APPEAL ARE TAXED TO THE PLAINTIFF/APPELLANT, YOLANDA DUPREE. ONE-FOURTH OF THE COSTS OF THIS APPEAL IS TAXED TO THE DEFENDANT/APPELLEE, KEN DAVIS, D/B/A FUNTIME, USA.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.