

**IN THE COURT OF APPEALS 2/27/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00658 COA**

**MARY JANE SMITH**

**APPELLANT**

**v.**

**MARVIN WHATLEY, JR., AND JIMMIE WHATLEY**

**APPELLEES**

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

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

DANA J. SWAN AND RALPH E. CHAPMAN

ATTORNEY FOR APPELLEES:

S. DAVID NORQUIST

NATURE OF THE CASE: PREMISES LIABILITY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO DEFENDANTS

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

Mary Jane Smith brought a premises liability action against Marvin and Jimmie Whatley [the Whatleys] for injuries sustained while Smith was in the Whatleys' home. The trial court dismissed Smith's complaint under Rule 12(b)(6) stating that "[t]he complaint fails to allege any conduct on the

part of the Defendants proximately caused her injury." Smith subsequently filed an amended complaint under Rule 15(a). After motions were made by the Whatleys, the trial court converted its 12(b)(6) order of dismissal into a summary judgment.

Feeling aggrieved of the trial court's order, Smith appeals to this Court assigning four alleged errors. Finding that the trial court was in error in altering the order dismissing under Rule 12(b)(6) to an order for summary judgment under Rule 56, we reverse and remand.

## FACTS

Mary Jane Smith was looking at the house trailer owned and occupied by her brother, Marvin Whatley, Jr. and his family. Smith was looking at the Whatleys' trailer in anticipation of purchasing the mobile home. As Smith entered the front door she had to step to the side to avoid stepping on some children's toys that were lying inside the trailer near the doorway. As stated in Smith's complaint as she stepped to the side "her right foot went completely through the floor causing her to fall backward into the door facing of the [Whatleys'] trailer." Smith alleged that as a result of her accident she suffered "severe damages to her back which have been diagnosed as a herniated lumbar disc" and has had to undergo surgery and "has had almost constant back and leg pains." Smith further alleged that the Whatleys' negligent acts proximately caused Smith's injuries, particularly, the Whatleys' negligent repair of the floor, and their failure to inspect the floor.

## PROCEDURAL HISTORY

On January 19, 1994, the Whatleys filed a motion for summary judgment submitting a memorandum brief, a copy of Smith's complaint, and the depositions of the Whatleys and Smith. On March 4, 1994, the trial court entered an order finding that because the Whatleys' motion for summary judgment was not supported by an affidavit it was for all practical purposes a motion to dismiss under Rule 12(b)(6). The trial court then dismissed Smith's complaint, without prejudice, for failure to state a claim upon which relief could be granted. The trial court found that:

The complaint fails to allege that any conduct on the part of the Defendants proximately caused her injury. Nor does the complaint allege that the Defendants fail [sic] to warn her of any danger and that such failure to warn proximately caused her injury. The only allegation of the complaint is that because of the unsafe condition of the trailer Plaintiff sustained an injury to her back.

On March 9, 1994, Smith, pursuant to Rule 15(a), filed an amended complaint. In the amended complaint Smith alleged that because she was a business invitee the Whatleys owed her a duty to exercise reasonable care to keep the mobile home safe and to warn her of any conditions which were not readily apparent to her. Smith further alleged that either, the Whatleys knew of the dangerous condition but failed to warn her, or, with reasonable diligence should have known of the dangerous condition of the floor.

Whatley never answered Smith's amended complaint. However, on April 5, 1994, the Whatleys filed a Motion to Alter or Amend Order, asking the court to reconsider its order dismissing Smith's cause of action pursuant to Rule 12(b)(6) without prejudice, and change it to dismissal with prejudice

pursuant to Rule 56. In support thereof, the Whatleys submitted the affidavit of the Whatleys denying any knowledge of the danger and denying any negligence. Smith asked for and was granted an extension of time to answer the Whatleys' motion, but no response was filed by Smith.

On May 2, 1994, the trial court granted the Whatleys' motion and subsequently entered summary judgment in their favor pursuant to Rule 56. The trial court stated:

Defendants' Affidavit, which is not rebutted, states that repairs to the floor were made by an independent contractor, that they made an inspection of the repairs, and that they had no knowledge of any unsafe condition. Upon the trial of this case, plaintiff would shoulder the burden of proving that defendants knew or should have known about the unsafe condition and failed to warn plaintiff about it. In light of the facts established by defendants' Affidavit, there are no material facts in dispute in this case, and defendants are entitled to the entry of summary judgment in their favor pursuant to Rule 56 M.R.C.P.

Smith subsequently filed a motion to reconsider. In support, Smith submitted the deposition of Marvin Whatley, Jr. In this deposition, Whatley states that prior to the accident, in the area where the accident occurred, he was aware of the fact that the floor boards were rotten. He stated that the front door leaked when it rained, which caused the floor boards near the front door to become rotten.

Whatley stated that while he was away on business his wife called and told him that she wanted a new front door placed on the mobile home. Whatley agreed. Whatley stated that when he returned he stated that the floor was solid, but he was unsure if the floor was repaired. In response to a question as to whether he knew whether any work was done on the floor, Whatley responded "I'm not sure that it was any. I mean it was solid where it was weak when I got back, but I don't know exactly."

The trial court subsequently denied Smith's motion to reconsider. The trial court stated:

The Motion to Reconsider offers no reason why Plaintiff failed to respond to Defendants' Motion for Summary Judgment even though this Court granted Plaintiff's request for additional time to respond to the motion. Furthermore, Plaintiff submitted no response to Defendants' Motion to alter or amend the pleading which was treated as a renewal of the Motion for Summary Judgment.

That material facts may have been in dispute is no longer the relevant issue. What is important is that Plaintiff failed to respond to Defendants' Affidavit, and she has offered no explanation for her failure to do so. As Plaintiff has failed to explain or justify her failure to respond to the Affidavit, the Court has no basis upon which to reconsider the matter. Accordingly, the motion is denied.

## DISCUSSION

We hold that the trial court was procedurally without authority to dismiss Smith's claim. Smith filed a

complaint which was dismissed without prejudice under Rule 12(b)(6). Smith was then entitled, under Mississippi Rule of Civil Procedure 15(a), to file an amended complaint within thirty days. This was done. The Whatleys failed to answer this amended complaint, but instead chose to petition the court to change its Rule 12(b)(6) dismissal to a Rule 56 dismissal with prejudice. Smith never responded to this motion, and the trial court subsequently entered an order dismissing Smith's cause.

We hold that the trial court was without authority to dismiss Smith's case under the motion then pending before the court. The original complaint was already dismissed, and a new amended complaint was on file. At that point, the trial court could not grant a Rule 56 dismissal as to the original complaint because it had been dismissed already.

The trial court should have dismissed the Whatley's motion to alter or amend the trial court's previous order of dismissal. The Whatleys, if they desired to have Smith's case dismissed, then needed to file a motion for summary judgment based upon the amended complaint.

Part of Smith's appeal involves a question of whether the trial court's actions under a local rule were in conflict with Mississippi Rules of Civil Procedure 56, citing *Koerner v. Crittenden*, 635 So. 2d 833, 835 (Miss. 1994). In view of our disposition of this case, we need not address this issue but suggest on remand that the trial court closely review its local rules in view of *Koerner*, which was decided shortly after the trial court's action in this case and may not have been brought to the court's attention.

**THE GRANT OF SUMMARY JUDGMENT ON BEHALF OF THE WHATLEYS IS REVERSED AND THE CAUSE IS REMANDED TO THE TRIAL COURT. COSTS ARE ASSESSED TO THE WHATLEYS.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**