

**IN THE COURT OF APPEALS 02/27/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00644 COA**

**JOHNNY L. HOGGATT A/K/A JOHN LOWERY HOGGATT AND KIMBERLY LYNN  
HOGGATT**

**APPELLANTS**

**v.**

**MEDICAL CREDIT SERVICE, INC. AND BRUCE CORNELL**

**APPELLEES**

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

TRIAL JUDGE: HON. JERRY O. TERRY

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

DONALD C. DORNAN

J.D. LEE

ATTORNEY FOR APPELLEES:

DAVID A. ROBERTS

NATURE OF THE CASE: GARNISHMENT OF WAGES

TRIAL COURT DISPOSITION: GRANT OF SUMMARY JUDGMENT ENTERED IN COUNTY  
COURT AND AFFIRMED BY THE CIRCUIT COURT

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

COLEMAN, J., FOR THE COURT:

This is an appeal from the Harrison County Circuit Court affirming a summary judgment originally entered by the Harrison County County Court against the Appellants, Johnny L. Hoggatt and Kimberly L. Hoggatt (the Hoggatts), in favor of the Appellee, Medical Credit Service, Inc. (MSC). The genesis of the Hoggatts' claim was MSC's garnishment of the Hoggatts' accounts at Magnolia Federal Bank for Savings. The Hoggatts maintain that the garnishment was wrongful. They argue on appeal that there were material issues of fact relevant to the law which created their claim against MSC. Thus, their purpose here is to persuade this Court that the county court erred when it granted MSC's motion for summary judgment and that the circuit court erred when it affirmed the county court's grant of summary judgment to MSC. However, we affirm the judgment of the Harrison County Circuit Court.

### **I. Facts**

The Hoggatts owed Memorial Hospital at Gulfport a balance of \$5, 890.75 for services which it rendered in 1986. The hospital authorized MCS to collect this debt from the Hoggatts. Through its attorney, Bruce Cornell, MCS sued the Hoggatts for the balance of \$5, 890.75 which they owed the hospital. On September 26, 1988, the Harrison County County Court entered its judgment "in the sum of \$5,890.75 plus costs" against the Hoggatts for the benefit of MSC. In its judgment the court further provided for a "stay of execution so long as the [Hoggatts] pay [MCS] the sum of \$50.00 per month commencing 1 October 1988 and continuing monthly on the 1st of the month until paid in full." The Hoggatts agreed to the entry and terms of this judgment.

After the entry of this judgment, the Hoggatts made the following payments on the following dates:

#### **Due date: Amount due: Date Paid: Amount paid:**

10/01/88 \$50.00 10/18/88 \$50.00

11/01/88 \$50.00 1/09/88 \$50.00

12/01/88 \$50.00 12/09/88 \$50.00

01/01/89 \$50.00 01/25/89 \$50.00

02/01/89 \$50.00 02/15/89 \$50.00

03/01/89 \$50.00 03/07/89 \$50.00

03/15/89 \$50.00

04/01/89 \$50.00 04/24/89 \$50.00

05/01/89 \$50.00 05/19/89 \$50.00

06/01/89 \$50.00 06/23/89 \$50.00

07/01/89 \$50.00 08/04/89 \$50.00  
08/01/89 \$50.00 09/01/89 \$50.00  
09/01/89 \$50.00 09/29/89 \$50.00  
10/01/89 \$50.00 11/09/89 \$50.00  
11/01/89 \$50.00 12/08/89 \$50.00  
12/01/89 \$50.00  
01/01/90 \$50.00 01/18/90 \$100.00  
02/01/90 \$50.00 02/18/90 \$50.00  
03/01/90 \$50.00 03/20/90 \$50.00  
04/01/90 \$50.00  
05/01/90 \$50.00 05/07/90 \$100.00  
06/01/90 \$50.00 06/10/90 \$50.00  
07/01/90 \$50.00 07/20/90 \$50.00  
08/01/90 \$50.00 08/23/90 \$50.00  
09/01/90 \$50.00 10/01/90 \$50.00  
10/01/90 \$50.00 11/01/90 \$50.00  
11/01/90 \$50.00 12/10/90 \$50.00  
12/01/90 \$50.00 02/01/91 \$50.00  
01/01/91 \$50.00 02/25/91 \$50.00  
02/01/91 \$50.00 04/08/91 \$50.00  
03/01/91 \$50.00 04/26/91 \$50.00  
04/01/91 \$50.00 05/28/91 \$50.00  
05/01/91 \$50.00 07/15/91 \$50.00  
06/01/91 \$50.00 08/21/91 \$50.00  
07/01/91 \$50.00  
08/01/91 \$50.00

09/01/91 \$50.00

10/01/91 \$50.00

**TOTALS:** \$1,850.00 \$1,700.00

The foregoing account demonstrates that as of October 1, 1991, the Hoggatts owed MCS \$1,850.00, but they had paid MCS only \$1,700.00. Thus, as of that date, the Hoggatts owed MCS \$150.00, or the equivalent of three monthly payments. Stated in another way, the Hoggatts were behind in making their payments which were due for the months of August, September, and October, 1991.

The record includes sixteen letters which Bruce Cornell, MCS's attorney, sent to the Hoggatts in which he advised them that they owed specific monthly payments. The dates of these sixteen letters and the delinquent monthly payments which they identified were as follows:

08/28/89 (requesting payment for August)

10/25/89 (requesting payment for October)

11/24/89 (requesting payment for November)

12/26/89 (requesting payment for December)

02/05/90 (requesting payment for February)

03/05/90 (requesting payment for March)

04/09/90 (requesting payment for April)

06/15/90 (requesting payment for June, 1990 and noting the \$100.00 payment received for April and May, 1990)

07/16/90 (requesting payment for July)

08/26/90 (requesting payment for August)

09/20/90 (requesting payment for September)

10/22/90 (requesting payment for October)

11/20/90 (requesting payment for November)

04/01/91 (requesting payment for March)

06/25/91 (requesting payment for June)

09/25/91 (requesting payment for September)

On October 4, 1991, Cornell wrote the Hoggatts his seventeenth letter in which he advised them that he was preparing to file a garnishment unless payments for September and October were made "this week." While the Hoggatts deny that they received this letter, they mailed a check for \$100.00 to Cornell on Thursday, October 10, 1991. On October 14, 1991, Cornell filed a complaint of garnishment on judgment against the Hoggatts with the clerk of the county court. Two days later, on October 16, 1991, MCS negotiated the Hoggatts' check for \$100.00 which paid the August and September payments. The Hoggatts still owed MCS \$50.00 for the payment which had become due on October 1, 1991.

However, Cornell did not notify the Hoggatts that his client MCS had initiated this garnishment on October 14, 1991. On October 23, 1991, the clerk of the county court issued the writ of garnishment to Magnolia Federal Bank for Savings (bank) against the Hoggatts' accounts in that institution. When the writ of garnishment was served on the bank on October 28, 1991, the bank froze the Hoggatts' checking and savings accounts. On October 30, Magnolia Federal notified the Hoggatts of the garnishment, after which they contacted their attorney, Donald Dornan. Thereafter, Dornan consulted with Cornell, who voluntarily submitted to the county court an order to dismiss the garnishment. The county court judge entered the order of dismissal on November 4, 1991, but the bank did not release the Hoggatts' account from the garnishment until November 22, 1991. Magnolia Federal did not release the Hoggatts' accounts until it received a communication which Hoggatts' attorney faxed on that date.

## **II. Course of Litigation**

On November 15, 1991, the Hoggatts filed suit in the county court of Harrison County alleging *inter alia* wrongful garnishment on the part of Cornell and MCS. The complaint sought both compensatory and punitive damages. On June 30, 1992, after the Hoggatts and MCS had completed discovery, MCS moved for summary judgment on all issues. On August 31, 1992, the Hoggatts responded to MCS's motion for summary judgment by filing both their response to the MCS motion and their cross motion for summary judgment on the issue of liability. After MCS had filed its response to the Hoggatts' cross motion for summary judgment, the county court conducted a hearing on both motions. On February 19, 1993, the county court entered its judgment in which it found "[t]hat the garnishment sued on herein by the [Hoggatts] was filed while the [Hoggatts] . . . were in arrears and that as a matter of law said garnishment was lawfully filed, and that [MCS's] motion [for summary judgment] should be granted." The county court also denied the Hoggatts' cross motion for summary judgment. On appeal to the Harrison County Circuit Court, that court found that "the grant of summary judgment entered by the County Court Judge was proper in that there is no material question of law or fact," and affirmed the county court's grant of summary judgment in favor of MCS. The Hoggatts have appealed from this judgment of the circuit court.

## **III. Issues and the Law**

We quote from the Hoggatts' brief to state the two issues which they request this Court to consider:

1. Whether summary judgment was improperly granted below in light of disputed material questions of fact regarding the propriety of the garnishment action filed by Bruce Cornell on behalf of Medical Credit Service, Inc.

2. Whether summary judgment was improperly granted as there existed disputed material questions of fact and law concerning Medical Credit Service's waiver of its right to insist on timely payment.

### **A. Standard of Review for Summary Judgment**

Rule 56(c) of the Mississippi Rules of Civil Procedure provides:

The [summary] 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.

M.R.C.P. 56(c). The burden of proving by production rather than by persuasion that no genuine issues of material fact exist is borne by the movant. *Newell v. Hinton*, 556 So. 2d 1037, 1041-42 (Miss. 1990); *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990); *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198 (Miss. 1988). The Mississippi Supreme Court explained these requirements for the entry of summary judgment in *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 683 (Miss. 1987):

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

As an appellate court, we approach the issue of the propriety of the granting of summary judgment on a *de novo* basis. The Mississippi Supreme Court elaborated on the concept of a *de novo* approach to the issue of whether a trial court erred when it granted summary judgment in *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894-95 (Miss. 1995):

We employ a *de novo* standard of review in reviewing a lower court's grant of summary judgment. Thus, we use the same standard that was used in the trial court. We must

review all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc. The evidence must be viewed in the light most favorable to the nonmoving party who is to be given the benefit of every reasonable doubt. The burden of demonstrating that no genuine issue of material fact exists is on the moving party. However, this burden on the moving party is one of production and persuasion, not of proof. A motion for summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. This Court does not try issues on a rule 56 motion, it only determines whether there are issues to be tried. In reaching this determination, this Court examines affidavits and other evidence to determine whether a triable issue exists, rather than for the purpose of resolving that issue.

(citations omitted).

## **B. The Applicable Law**

### **First Issue:**

Whether summary judgment was improperly granted below in light of disputed material questions of fact regarding the propriety of the garnishment action filed by Bruce Cornell on behalf of Medical Credit Service, Inc.

Section 11-35-1 of the Mississippi Code of 1972 creates the action of garnishment. Its provisions entitled MCS to file its suggestion for the issuance of a writ of garnishment against Magnolia Federal Bank, unless the Hoggatts had satisfied and were in compliance with the terms of the judgment which the county court had issued against them for the benefit of MCS. Thus, this Court considers whether as a matter of law the Hoggatts had fully complied with the terms of the judgment as of October 14, 1991, the date that MCS filed its complaint for writ of garnishment against Magnolia Federal Bank for Savings. The fulcrum on which this Court must balance this issue is the fact that as of October 14, 1991, the Hoggatts owed MCS \$150.00, which was the equivalent of the monthly payments that were then due for the preceding months of August, September, and October, 1991.

*Boydston v. Pearson*, 239 Miss. 479, 123 So. 2d 621 (1960) involved a suit to collect the balance due on an installment promissory note. *Boydston*, 123 So. 2d at 622. When the suit was filed, the debtor, Boydston, had not paid twelve of the seventeen monthly payments of \$150.00 each. *Id.* While the Mississippi Supreme Court dealt with other issues in this case, *i.e.*, the effect of an amended bill on the validity of the creditor's claim filed after all seventeen monthly payments were in default, the supreme court opined:

Indeed, the action, at the time of filing, was complete for the twelve installments, which were past due. Where the instrument is payable in installments at fixed times, each installment becomes due at the time specified.

Id.

Harmoniously with *Boydston*, this Court holds that as of October 14, 1991, the date that MCS filed its complaint for the issuance of a writ of garnishment, the Hoggatts owed MCS \$150.00 pursuant to the terms of the judgment on which the garnishment had been issued. MCS relies on *Wilkerson v. Randall*, 254 Miss. 546, 180 So. 2d 303 (1965), to support its contention that this issue has no merit. *Wilkerson* is not directly on point because in that case the creditor filed its suggestion for the issuance of a writ of garnishment on a debt for which the then justice of peace court had not first entered a judgment against its debtor, *Wilkerson*. *Wilkerson*, 180 So. 2d at 304. We view that case as primarily a claim for damages for the creditor's abuse of process which resulted when it proceeded to "garnish" *Wilkerson's* wages which his employer, Magnolia Mobile Homes Manufacturing Company, owed him before a judgment for *Wilkerson's* debt had first been entered by the justice court. *Id.* In the case *sub judice*, the judgment for the benefit of MCS against the Hoggatts had already been entered.

However, MCS relies on the following quotation from the *Wilkerson* opinion to support its contention that the circuit court did not err when it affirmed the county court's summary judgment:

In 38 C.J.S. Garnishment § 310 (1943) at page 607, it is said: "[a] garnishment is wrongful where the grounds on which it is obtained do not in fact exist, even though the person who secured the writ or made the affidavit believed, or had reasonable cause to believe, that the alleged facts were true."

*Wilkerson*, 180 So. 2d at 307. This Court finds that the grounds on which MCS filed its complaint for the issuance of a writ of garnishment on October 14, 1991, did in fact exist. The grounds were the Hoggatts' having failed to make their monthly payments of \$50.00 for the months of August, September, and October as of that date. The Hoggatts' sending MCS a check for \$100.00 on October 10, 1991 does not change the validity of these grounds because they still owed MCS \$50.00 for the payment that the judgment required to be paid on October 1, 1991. In other words, after MCS negotiated the Hoggatts check on October 16, 1991, which was two days after MCS filed its complaint for the issuance of a writ of garnishment against Magnolia Federal, the Hoggatts still owed MCS \$50.00.

This Court concludes that as a matter of law the Hoggatts owed MCS \$150.00 on October 14, 1991, the date that MCS filed its complaint for the issuance of the writ of garnishment. There can be no issue about this fact. Section 11-35-1 of the Mississippi Code provides for the creditor's garnishment of a third party who owes its judgment debtor if the judgment on which the writ of garnishment has been issued remains unsatisfied. A garnishment is not wrong if the grounds on which it has been issued exist. The Hoggatts' unpaid payments of \$150.00 which were due August, September, and October 1, 1991, facts about which there were no material issues, were the existing grounds on which MCS initiated its action of garnishment against Magnolia Federal on October 14, 1991. Even after MCS received and negotiated the Hoggatts' check for \$100.00 two days later on October 16,

1991, which was one week before the county court clerk actually issued the writ of garnishment on October 23, 1991, the Hoggatts remained indebted to MCS in the amount of \$50.00 for the payment which had become due on October 1, 1991. There can be no issue, material or otherwise, about this fact. We decide this issue against the Hoggatts.

**Second Issue:**

Whether summary judgment was improperly granted as there existed disputed material questions of fact and law concerning Medical Credit Service's waiver of its right to insist on timely payment.

The Hoggatts concede that they are unable to offer any Mississippi precedent to support their argument of this issue. Instead they offer us cases from other jurisdictions which "reflect that routine acceptance of late payments constitutes a waiver of the right to demand timely payment by the debtor." They then cite *Scarfo v. Peever*, 405 So. 2d 1064 (Fla. Dist. Ct. App. 1981); *Smith v. Landy*, 402 So. 2d 441 (Fla. Dist. Ct. App. 1981); *Duncan v. Lagunas*, 316 S.E. 2d 747 (Ga. 1984); *Reed v. Seghers*, 485 So. 2d 519 (La. Ct. App. 1986). Without exception these cases deal with a creditor's right to accelerate the unpaid balance of a debt under the terms of the note and/or mortgage which evidences and/or creates the debt. None of them hold, as the Hoggatts argue, that a creditor waives future timely payments if it has previously accepted untimely payments from its debtor. Instead, these cases deal with the right of the creditor to accelerate the entire balance of the debt, usually without further notice, if the creditor has accepted an untimely payment. In some cases, the creditor had accepted the untimely payment and then proceeded to accelerate the balance of the debt without further notice to the debtor. Acceleration of the balance due was the key feature of all these out-of-state cases. In the case *sub judice*, acceleration of the entire unpaid balance of the Hoggatts' debt secured by the judgment is not at issue. At issue is whether MCS's complaint for the issuance of a writ of garnishment was a wrongful garnishment for which it was liable to the Hoggatts.

The Hoggatts cite the Mississippi case of *State ex rel. Attorney General v. Mize*, 204 Miss. 886, 36 So. 2d 143 (1948) for the following proposition, which the supreme court included in that opinion:

When a party tenders a payment to another, the latter must accept or reject the tender as made. If he accepts he is bound by all the terms of the tender and he can avoid it only by return of the tender.

*Mize*, 36 So. 2d at 144. Thus, they contend that because MCS accepted their check for \$100.00 two days after it initiated the garnishment action against Magnolia Federal, MCS was obligated to accept "all the terms of the tender" or else return the tender. That argument begs the question because the terms for the payment of \$100.00 had been reached and settled by the consent judgment on which the writ of garnishment was issued. Under those terms, the Hoggatts owed MCS \$150.00 when MCS initiated the garnishment on October 14, and they continued to owe MCS \$50.00 after it had received and negotiated the Hoggatts's check for \$100.00.

The Hoggatts candidly acknowledge that they have no on-point Mississippi precedent to support their position of this issue. With regard to their assertion that this Court should adopt the reasoning of these courts in other jurisdictions (even if we found them factually similar to the case *sub judice*, which we do not ) we find *Griffith v. Gulf Refining Co.*, 215 Miss. 15, 61 So. 2d 306 (1952), relevant to the Hoggatts' argument on this issue. In *Griffith*, the vanquished appellee filed a petition for rehearing in which it urged the Mississippi Supreme Court to rely on decisions rendered by appellate courts in other states to reverse its decision for the appellant. In response to the petition for rehearing, the supreme court wrote:

It is our conception that we are free to decide for ourselves all questions arising under the common law or under the statutory provisions of this state, that we are not bound by the decisions of courts of other jurisdictions on similar questions, that it is proper for us to consider them and that we may follow them only if we are satisfied of the soundness of the reasoning by which they are supported. Such decisions may have persuasive authority and we may still refuse to follow them if opposed to the public policy of this state. They may be entitled to respectful consideration if well reasoned and are promotive of justice, but they are not technically of force as precedents and we are at perfect liberty to disregard them.

*Griffith*, 61 So. 2d at 307 (citations omitted). We find in the case *sub judice* that Mississippi statutes and cases are adequate precedent on which to rest our conclusion that the trial court did not err when it entered summary judgment for MCS.

#### **IV. Summary**

We return to our standard of review to emphasize that when we review a trial court's grant of summary judgment, our fundamental task is to determine whether there are material issues of fact to be tried. If we find such material issues where the trial court has granted summary judgment, we reverse the summary judgment and remand to the trial court. If the appellant fails to demonstrate to our satisfaction that there are material issues of fact to be tried, then we affirm the trial court's entry of summary judgment for the appellee. The law determines what facts are relevant to a plaintiff's claim or to a defendant's defense, and the evidence determines whether there are material issues about those relevant facts.

Here the evidence is undisputed that from and after October 1, 1991, the Hoggatts were in arrears in paying their debt to MSC, the terms of which were established by the original judgment which was entered against them with their consent. The action of garnishment created by section 11-35-1 of the Mississippi Code was an appropriate remedy to collect the amount of the debt in arrears which the Hoggatts owed MCS as of October 1, 1991, even though the original amount of the debt was reduced from \$150.00 to \$50.00 by MCS's acceptance of the Hoggatts' check for \$100.00 two days after it had initiated its garnishment action against Magnolia Federal.

The only conceivable material issue of fact would have been whether MSC waived the timeliness of future payments by its acceptance of past-due monthly payments. The Hoggatts admit they have no Mississippi precedent to support their argument on this issue, and we find the out-of-state cases which they cite to support them on this issue to be factually inapposite. But even if these cases were not inapposite, we would reject them as we are entitled to do because of the tumultuous havoc such law would reap for creditors who were attempting to collect debts where some of the payments on which had not been timely.

We hold that MCS was entitled to "garnish" Magnolia Federal to recover the debt of \$50.00 which the Hoggatts owed it on October 16, 1991. We conclude that the county court's grant of summary judgment for MCS, which the circuit court affirmed, was proper because there were no issues of fact which were material to the legal question of whether MCS's garnishment of the Hoggatts' accounts in Magnolia Federal was wrongful.

**THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS AFFIRMED.  
APPELLANTS ARE TAXED WITH THE COSTS OF THIS APPEAL.**

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