

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CA-00982 COA**

**JOHN L. LOPER**

**APPELLANT**

**v.**

**REGINA LOPER**

**APPELLEE**

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

DATE OF JUDGMENT:	08/15/96
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	NEWTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	LAUREL G. WEIR
ATTORNEY FOR APPELLEE:	NONE
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	DISMISSED THE CASE
DISPOSITION:	REVERSED AND RENDERED - 2/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

BEFORE McMILLIN, P.J., DIAZ, AND HERRING, JJ.

HERRING, J., FOR THE COURT:

John L. Loper appeals to this Court from a final order of the Circuit Court of Newton County, Mississippi, which denied Loper's application for a default judgment and dismissed Loper's complaint against his wife in which he charged her with malicious prosecution, false arrest, damage to reputation, and attorney's fees. Regina Loper made no appearance and filed no brief in opposition to the appeal filed herein. We conclude that the trial court abused its discretion in denying John Loper's application for a default judgment. Accordingly, we reverse and render.

**A. THE FACTS**

John L. Loper filed this action against Regina Loper in the Circuit Court of Newton County, Mississippi, on February 23, 1996. The parties were legally married at the time, although they were separated, and divorce proceedings were pending. The Appellant alleged that Mrs. Loper had

maliciously brought false criminal charges against him which were later dismissed and that he had been falsely arrested and detained as a result of the charges. Mr. Loper further asserted that Mrs. Loper committed perjury in falsely signing an affidavit and charging him with burglary when she knew the charges were false. As a result of Mrs. Loper's actions, Mr. Loper alleged that he had suffered mental and physical anguish and embarrassment and that the criminal charges caused his reputation to be permanently damaged. Thus, he sought \$3,000,000 in actual and punitive damages, together with all costs of court. He also sought attorney's fees incurred to defend himself against the charges brought against him.

Regina Loper was properly served with alias summons and a copy of the complaint on March 26, 1996. Thereafter, on July 29, 1996, the Appellant filed a "Request For Default," accompanied by an affidavit by the Appellant's counsel, which requested the Circuit Clerk of Newton County, Mississippi, to enter a default against Regina Loper pursuant to the provisions of Mississippi Rule of Civil Procedure 55(a). The clerk duly entered his default against Mrs. Loper on that same day. The Appellant then simultaneously filed his application requesting the circuit court to "hear the matter on the merits and enter Final Judgment" in favor of Mr. Loper against Mrs. Loper. No certificate of service was attached to this application indicating that notice of the application for a final judgment was given to Mrs. Loper. However, there is nothing in the record to indicate that Mrs. Loper ever appeared in the action by filing an answer to the complaint or otherwise, either pro se or by representative. A brief hearing was conducted without a jury by the circuit court in these proceedings on August 15, 1996. This hearing was apparently conducted without notice to Mrs. Loper because there is no indication in either the pleadings or the testimony that such notice was ever given.

Mr. Loper was the only witness called to testify at the August 15, 1996, hearing. He stated that after he separated from his wife, he returned two months later to the marital home at a time when he knew Mrs. Loper would not be present and confiscated items within the home which he believed to belong to him. He entered the house, with the use of his house key, through the front door, and took a television set, a VCR, a microwave oven, and clothes. When Mrs. Loper discovered that he had taken these items, she charged Mr. Loper criminally with "breaking and entering and theft of a dwelling." While he was never "locked up," Mr. Loper was taken into custody by the sheriff's department and was required to make bond in the sum of \$5,000. According to the testimony, he made a property bond with the help of his employer and paid a \$25 bond fee. The criminal charges against Mr. Loper were later dismissed.

In regard to the damages suffered by the Appellant as a result of the criminal charges brought against him, Mr. Loper stated that he was required to hire an attorney who charged him \$3,000 to represent him in the divorce case against his wife and to also represent him in the criminal action filed against him. Mr. Loper also stated that he "missed a lot of work" because he had to go before the grand jury. He stated that his salary at work fluctuated, depending upon the number of hours he worked. He stated that his salary was "probably around eighty or a hundred dollars a day." Moreover, Mr. Loper estimated that he probably lost "six or seven" days from work as a result of the charges brought against him. In summary, the other damages suffered by Mr. Loper included (1) detention and "a lot of lost sleep;" (2) attorney's fees, the exact amount of which he could not establish; (3) humiliation as a result of his employer becoming aware of the charges against him when he posted bond for Mr. Loper; and (4) humiliation as a result of a lot of "ragging" or ridicule which he endured from others who heard about the charges brought against him.

After Mr. Loper completed his testimony, the trial court found that Mr. Loper suffered no damages and refused to enter a default judgment. Thereafter, the court issued its final order in this action on August 15, 1996, in which it dismissed the action because of "failure of proof by a preponderance of the evidence to support the complaint." Mr. Loper then perfected his appeal to this Court. Mrs. Loper has neither filed a response to Mr. Loper's appeal nor has she otherwise made an appearance on appeal in these proceedings.

## **B. THE ISSUES**

In that portion of his brief entitled "Statement of the Issues," Mr. Loper makes a lengthy statement in support of a single issue which he raises on appeal:

### **THE DECISION OF THE TRIAL COURT IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

## **C. ANALYSIS**

Mr. Loper is correct that "interspousal immunity" has been abolished in Mississippi, and that a husband can sue his wife. *See Miss. Code Ann. § § 93-3-1 and 93-3-3 (Rev. 1994); Burns vs. Burns, 518 So. 2d 1205 (Miss. 1988)*. Thus, Mr. Loper was within his rights to bring this action against Mrs. Loper. However, in resolving the issue raised on appeal, we must first consider (1) the effect of Mrs. Loper's failure to appear or file a brief in reply to Mr. Loper's appeal; and (2) the extent of the authority of a trial judge to grant or deny a default judgment.

### **THE FAILURE OF MRS. LOPER TO FILE A BRIEF OR OTHERWISE ENTER HER APPEARANCE**

The Mississippi Supreme Court has stated on a number of occasions that the " failure to file a brief is tantamount to confession of error and will be accepted as such unless the reviewing court can say with confidence, after considering the record and brief of appealing party, that there was no error." *Reddell v. Reddell, 696 So. 2d 287, 288 (Miss. 1997)* (quoting *Dethlefs v. Beau Maison Dev. Corp.*, 458 So. 2d 714, 717 (Miss. 1984)). Nevertheless, automatic reversal is not required. The Appellant's argument on appeal should "at least create enough doubt of the judiciousness of the trial court's judgment" that an appellate court is unable to "say with confidence that the case should be affirmed." *Muhammad v. Muhammad, 622 So. 2d 1239, 1242 (Miss. 1993)* (quoting *Griffin v. Breckenridge*, 204 So. 2d 855, 855 (Miss. 1967)). Therefore, we must review the actions of the trial court to determine whether we can say with confidence that the trial court's actions should be affirmed without regard to the lack of an appearance by Mrs. Loper.

### **THE EXTENT OF THE TRIAL COURT'S AUTHORITY TO GRANT OR DENY A DEFAULT JUDGMENT**

A trial judge has broad authority to determine whether to grant or deny a motion for a default judgment and such a decision is generally "committed to the sound discretion of the trial court. . . ." *King v. Sigrest, 641 So. 2d 1158, 1162 (Miss. 1994)*. However,

[t]his has never meant that the trial judge could do anything he or she wished. Sound discretion imports a decision by reference to legally valid standards [and] [w]here a trial judge in determining a matter committed to his sound discretion makes his decision by reference to an erroneous view of the law, this Court has authority to take appropriate corrective action on appeal.

**Id. at 1162** (citing *Bell v. City of Bay St. Louis*, 467 So. 2d 657, 661 (Miss. 1985)). Moreover, default judgments, which are regulated procedurally by Mississippi Rule of Civil Procedure 55, are not favored and trial courts "have traditionally been lenient when it comes to relieving a party of the burden of a default judgment." *Bell*, 467 So. 2d at 661. Thus, an appellate court will not disturb a trial court's ruling on a default judgment unless, in making that ruling, the trial court has abused its discretion in some way. *Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1993). According to the *Williams* case, an appellate court should consider three factors in determining whether the trial court, in either granting or denying a motion for default judgment, abused its discretion: (1) whether the defendant has good cause for default; (2) whether the defendant has a colorable defense to the merits of the claim; and (3) the nature and extent of prejudice which may be suffered by the plaintiff if a default is set aside. *Id.* In this case and as stated above, a default was entered by the clerk but a default judgment was denied.

Pursuant to **M.R.C.P. Rule 55(a)**, the Circuit Clerk of Newton County entered his default against Mrs. Loper after (1) she failed to answer the complaint filed by Mr. Loper against her in these proceedings; and (2) after Mr. Loper filed his request for default with the clerk, along with a sworn affidavit that no answer had been filed. Once the default had been entered, Mr. Loper filed an application with the circuit court pursuant to Rule 55(b) in which he requested a default judgment against Mrs. Loper. The trial court held a hearing on the application for a default judgment without the normal three-day written notice to the defendant which is required by Rule 55(b). The apparent reason that no notice was given to Mrs. Loper is simply that there was no indication in the record that Mrs. Loper had made an appearance in the action. Rule 55(b) allows a trial court to enter a default judgment against a defendant without notice where the defendant has not answered or *otherwise defended* against the claim brought against him.

The trial court held a brief hearing and concluded that the evidence presented did not support the damages Mr. Loper claimed to have suffered as a result of the charges Mrs. Loper filed against him. The trial court was well within its authority to hold such a hearing. According to **M.R.C.P. Rule 55(b)**,

[i]f 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.

Thus, a trial court may, in its sound discretion and prior to entering a judgment by default, entertain and hear proof on a wide variety of issues, including not only proof of damages but also some proof on factual matters which must be established in order to determine liability. *Id. See also Danning v. LaVine*, 572 F. 2d 1386, 1388 (9th Cir. 1978); *In re Kasden, Miller v. Kasden*, 209 B.R. 236,

238-39 (8th Cir. 1997).

### RESOLUTION OF ISSUES

Mr. Loper contends, as his single assignment of error on appeal, that the ruling of the trial court dismissing the Appellant's case was contrary to or against the overwhelming weight of the evidence. Findings of fact supported by credible evidence may not be set aside on appeal. *Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985); *Herrington v. Spell*, 692 So. 2d 93, 99 (Miss. 1997). However, we cannot say with confidence that decision of the trial court should be affirmed. A review of the record indicates that the trial court abused its discretion in denying the default judgment. Upon the entry of a default by the circuit clerk and after Mrs. Loper failed to appear and otherwise defend the complaint filed against her, Mr. Loper was entitled to a judgment of default.

The trial court went on to determine that the evidence of damages presented by Mr. Loper did not support his complaint by a preponderance of the evidence. On this issue, we agree with the trial court. Mr. Loper failed to prove the amount of his attorney's fees with any reasonable certainty. He testified that his attorney was representing him in his divorce action, in regard to the criminal charges filed against him, and in his suit for malicious prosecution. While he stated that his attorney fees totaled approximately \$3,000, Mr. Loper was unable to say with any degree of certainty what his attorney's fees were in regard to the criminal charges filed against him.

Mr. Loper also failed to prove his damages for loss of income because he was unable to adequately show with any reasonable certainty the wages which he lost as a result of the criminal charges filed against him. The Appellant testified that he lost six or seven days of work and that his daily wages varied. He offered no documents or other evidence to show with certainty the amount of his lost wages and offered no documents to show what his average daily wages were. Finally, Mr. Loper failed to present any credible evidence supporting his claims of pain and suffering, anxiety, mental and physical anguish, embarrassment, permanent damage to his reputation, and continued degradation and ridicule from members of his community which resulted from the charges his wife filed against him. At the hearing, Mr. Loper stated only that he had been "ragged" about the incident. In addition, he stated that he had lost some sleep as a result of his arrest. No evidence was presented to prove any permanent damage to his name and reputation. The only loss that Mr. Loper could put a dollar figure on was the \$25 bond fee which his employer paid on his behalf to post his bond.

The trial court determined that Mr. Loper failed to establish compensable damages with the degree of certainty which Mississippi law requires. *See Chevron Oil Co. v. Snellgrove*, 253 Miss. 356, 175 So.2d 471 (Miss. 1965) (holding that damages must be established with reasonable certainty). However, nominal damages are appropriate in cases of intentional tort in the absence actual injury. *Williams v. Wiggins*, 285 So. 2d 163, 164-65 (Miss. 1973). As such, we award Mr. Loper \$25 and trial court costs, as well as the costs of this appeal.

**THE JUDGMENT OF THE CIRCUIT COURT OF NEWTON COUNTY IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.**

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

