IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00390 COA

JUDY S. BANKSTON, INDIVIDUALLY, AND JUDY S. BANKSTON, AND JOHN W. BANKSTON, AS NATURAL PARENTS AND NEXT FRIENDS FOR AND ON BEHALF OF JULYN BANKSTON, ASHLEY BANKSTON, AND GAIL BANKSTON, MINORS

APPELLANT

v.

GRADY PERKINS, JR. D/B/A G& G FARMS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

LELAND H. JONES, III

ATTORNEY FOR APPELLEE:

LAWRENCE D. WADE, RANDALL E. DAY

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED

BEFORE BRIDGES, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Albert Jackson (Jackson) and the Appellants (Bankstons) were involved in an automobile accident on December 21, 1992. At the time of the accident, Jackson was driving a truck owned by his employer, Grady Perkins, Jr. The Bankstons subsequently filed a complaint against Grady Perkins, Jr., d/b/a G&G Farms (Perkins) alleging that Jackson was the sole and proximate cause of the accident at issue, and that he was acting within the course and scope of his employment at the time of the accident. The Circuit Court of Leflore County granted summary judgment in favor of Perkins. Aggrieved, the Bankstons appeal to this Court. Finding no reversible error, we affirm the circuit court's decision.

FACTS

PROCEDURAL FACTS

The original complaint was filed on October 15, 1993. Grady Perkins, Jr. d/b/a G&G Farms was the only defendant named. The court granted the Bankstons' motion to amend their complaint at which point Grady Perkins, Sr.,and the estate of Albert Jackson were also added to the list of named defendants. The amended complaint was filed on July 20, 1994. On September 29,1994, the court granted summary judgment in favor of Perkins, Sr. The complaint against him was dismissed with prejudice. The court subsequently granted Perkins' motion for summary judgment on April 11, 1995 and dismissed the complaint against him with prejudice. The Bankstons filed their notice of appeal on April 12, 1995. Mary Jackson, Albert Jackson's widow, was served with process on April 25, 1995.

SUBSTANTIVE FACTS

Jackson was killed as a result of injuries he sustained from an automobile accident which occurred on December 21, 1992 between Jackson and the Bankstons. At the time of the collision, Jackson, an employee of G&G Farms, was driving a truck owned by Perkins, Jr., d/b/a G&G Farms. Jackson had been employed by G&G Farms for twelve to thirteen years before this fatal accident. As an equipment operator, Jackson was an hourly employee whose duties were driving the tractor and performing any other tasks that needed to be done around the farm. His duties did not require him to check on the farm or the equipment. Jackson had access to the truck owned by Perkins, Jr. which was to be used only for work purposes. Harry Roland, Perkins' farm supervisor testified that he had never known Jackson to use the truck for any purpose other than farm business. He also testified that any other use of the truck would have been unauthorized. Roland had not assigned Jackson any work to be done on the date of the accident.

Jackson and his family lived in a mobile home behind the equipment shed located on Perkins' property. Roland testified that the mobile home belonged to Jackson, and that he had previously asked permission to put the trailer on the property. The fact that his mobile home was on the farm was completely unrelated to his employment.

On the day of the accident, Jackson and his wife had been Christmas shopping and had purchased a video cassette recorder. Upon returning home from their shopping trip, Jackson told his wife that he was going to check on the farm and then go to the video store to rent some movies. Jackson took Perkins' truck and subsequently the accident happened at approximately 5:26 P.M. After the accident, Joe Alford, another employee of Perkins inspected the truck Jackson was driving. He found

in it some fruit, a carton of milk, and several video tapes. An employee at the video store verified that Jackson had rented several tapes just prior to the accident.

In an affidavit, Perkins states that G&G Farms has interest in a piece of property several miles north of the shopping center that Jackson visited to rent the videos; however, the land was not used for farming purposes, nor had it been used for such purposes for many years prior to the accident.

The sole issue the Bankston's raise on appeal is that the lower court erred in granting summary judgment in favor of Perkins. In reply, Perkins asserts that this Court is without jurisdiction to hear this appeal because Jackson's estate was subsequently served after the entry of summary judgment, and therefore, the summary judgment order was not a final judgment, but merely interlocutory. Accordingly, Perkins argues that this appeal is premature.

DISCUSSION

JURISDICTION

Rule 54(b) of the Mississippi Rules of Civil Procedure allows the court to enter a judgment as to one or more, but fewer than all the claims or parties; however, there must be an expressed determination that there is no just reason for delay and there must be an expressed direction for the entry of judgment. M.R.C.P. 54(b). The rule goes on to state:

> In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties *shall not terminate* the action as to any claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id. (emphasis added).

At first blush, it would seem that the summary judgment entered in favor of Perkins was merely interlocutory because a claim still existed as to Albert Jackson's estate, and therefore, the judgment is not a final judgment until the claim against Jackson's estate is adjudicated. *See Briscoe's Foodland, Inc. v. Capital Assocs.*, 502 So. 2d 619, 622 (Miss. 1986). Furthermore, the lower court did not make an express determination that there is no just reason for delay. Thus, the requirements of Rule 54(b) were not satisfied. Following this reasoning, this appeal is seemingly not proper under Rule 54(b).

Despite this however, we do find that this Court has jurisdiction to hear this appeal. The supreme court has stated that a person named as a defendant in a complaint does not become a party until served with process. *Stanley v. Allstate Ins. Co.*, 465 So. 2d 1023, 1025 (Miss. 1985) (citations omitted). Looking at the record, Mary Jackson was not served with process until April 25, 1995, fourteen days after the entry of summary judgment in favor of Perkins. Since a defendant is not made a party until served, the summary judgment entered on April 11, 1995, in favor of Perkins was a final judgment adjudicating all the claims of all the parties to the action at the time. Therefore, this Court does have proper jurisdiction to hear this appeal.

SUMMARY JUDGMENT

With regard to summary judgment, we review the record de novo. *Beverly v. Powers*, 666 So. 2d 806, 808 (Miss. 1995) (citations omitted). In reviewing the evidentiary matters, the trial court must view the evidence in the light most favorable to the party against whom the motion has been made. *Beverly*, 666 So. 2d at 808-09 (citations omitted). If in this view, the moving party is entitled to judgment as a matter of law, summary judgment should be entered in his favor. *Id.* (citations omitted) . Otherwise, the motion should be denied. *Id.* (citations omitted).

The Bankstons argue that they established a rebuttable presumption that Jackson was acting within the scope of his employment. The evidence they presented showed: 1) when Jackson left his house, he told his wife he was going to check on something on the farm; 2) Jackson was driving Perkins' truck; and 3) Roland's testimony that as far as he knew, Jackson never took the truck out for personal reasons. The Bankstons contend that this sufficiently established a rebuttable presumption. We disagree.

The trial court correctly held that there were no genuine issues of material fact. It is well settled law that when determining whether an act is committed by a servant within the scope of his employment, the determinative question is whether he was doing any act in furtherance of his master's business, and not whether the servant was acting in accordance with the instructions of the master. *Holliday v. Pizza Inn, Inc.* 659 So. 2d 860, 864 (Miss. 1995) (citations omitted). "If a servant, having completed his duty to his master, then proceeds to prosecute some private purpose of his own, the master is not liable; but if the servant, while engaged about his master's business, merely deviates from the direct line of duty to accomplish some personal end, the master's responsibility may be suspended, but it is re-established when the servant resumes his duty." *Holliday*, 659 So. 2d at 864-65 (citations omitted) .

Clearly, Jackson was not acting within the scope of his employment the evening that he met with his unfortunate fate. Jackson was an hourly employee who had no reason to check on the farm or the equipment on that day. In fact, all of the employees of G&G Farms had been on Christmas vacation for approximately one week prior to the date of the accident. After reviewing the record, we do not think the trial court erred in granting summary judgment in favor of Perkins, Jr.

THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

FRAISER, C.J., NOT PARTICIPATING.