

IN THE SUPREME COURT OF MISSISSIPPI

NO 2002-CA-00516

ADVANCED MEDICAL, INCORPORATED

APPELLANT

VERSUS


ADVANCED MEDICAL SYSTEMS, INCORPORATED

APPELLEE

RESPONSE TO APPEAL FROM THE CHANCERY COURT OF THE FIRST
JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

SUBMITTED BY:

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APPELLANT

VS.

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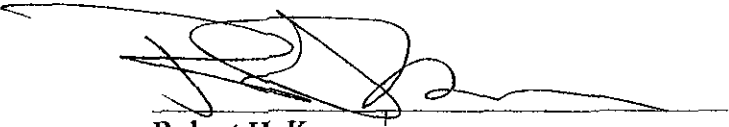
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee certifies that the persons having an interest in the outcome of this case are those listed below:

1. Advanced Medical, Incorporated, Appellant
2. Advanced Medical Systems, Incorporated, Appellee
3. William P. Featherston, Jr., Attorney for Appellant
4. Robert H. Koon, Attorney for Appellee

This Certificate is made so that the Judges of the Court may evaluate possible disqualification or recusal.



Robert H. Koon
Attorney for Appellee

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STATEMENT OF THE ISSUES

Whether or not the Chancery Court erred in permanently enjoining the Appellant from using the name "Advanced Medical" as its business name on the Mississippi Gulf Coast.

STATEMENT OF THE CASE

This appeal results from a decision of the Chancery Court of the First Judicial District of Harrison County, Mississippi in which the appellant was permanently enjoined from using the words "Advanced Medical" in its business name on the Mississippi Gulf Coast.

On or about the 22nd day of June, 2006 appellee herein filed its Complaint for Revocation, or in the alternative, Dissolution, or in the alternative, to Force Change of Corporate Name against the appellant. The appellant properly filed an Answer denying the allegations contained in the Complaint. A trial was held before the Honorable Margaret Alphonso on January 19, 2007 the result of which was the appellee being granted the relief requested. The appellant was permanently enjoined from using the words "Advanced Medical" in its business name on the Mississippi Gulf Coast.

The appellee, in business on the Mississippi Gulf Coast since 1999, is called Advanced Medical Systems or Advanced Medical for short. It operated under this business name by Ruth Morris without incident until the summer of 2005, when the appellant began doing business on the Mississippi Gulf Coast. It is undisputed that Mrs. Morris incorporated her business on March 23, 2005. The appellant originally incorporated on March 11, 2005 only to dissolve this corporation and reincorporate June 30, 2005. The parties engage in similar businesses. Each sells certain medical equipment which they have in common but each also engages in related areas that the other does not.

The appellee filed suit alleging that the appellants continued use of the words "Advanced Medical" in its name was causing tremendous confusion for its customers and billing. The continued use of its name was causing harm to its business and would continue to do so if the

appellant was allowed future use of an almost identical name as that of the appellee. Appellant denied that the use of almost identical names was causing the appellee any problems and that because it incorporated first, continued use of the terms "Advanced Medical" should be allowed.

SUMMARY OF THE ARGUMENT

Appellant argues that because it incorporated first, it should be allowed continued use of its name or in the alternative, that the terms "Advanced Medical" are not a trade name for the appellee entitling same to exclusive use as against related businesses. Appellee contends that continued use of the above referenced terms has caused and will cause irreparable damage to its business, that who was incorporated first is not dispositive and, that the name "Advanced Medical" is its trade name entitling it to exclusive use of same as between businesses of a similar nature.

ARGUMENT AND AUTHORITIES

The appellee contends that the Chancellor in this cause made the correct decision and this Court has very limited review thereof. When reviewing decisions rendered by our chancery courts we must remember that our chancellors are vested with broad discretion, and this Court will not disturb the chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or if the court applied an erroneous legal standard. *Lupo v. State Dept. Of Transp.*, 771 So.2d , 360-61 (Miss. 2000).

The appellant first relies on the argument that because it incorporated a mere twelve (12) days prior to the appellee that it has the right to use the corporate name and that this argument is strengthened by the fact that the Secretary of State allowed both parties to incorporate their respective names because they are alleged to be distinguishable. This is an erroneous argument.

Nothing in the law gives the appellant the exclusive use of the terms "Advanced Medical" merely because they incorporated first or because the Secretary of State did impliedly deem the two names distinguishable. The fact that the appellant incorporated first is not dispositive.

It is true that the appellant is incorporated under the laws of this State. However, "that does not mean that it has the legal right to the unlimited use of that name. *Dollar Dept. Stores of Miss., Inc. v. Alvin Laub d.b.a. The Dollar Store*, 134 Miss 708, 120 So.2d 139, 148 (Miss. 1960). This is because a business name can also become a trade name or trademark.

Miss. Code Ann. Sec. 75-25-1(d) (1977) defines trade name as any name used by a person to identify a business or vocation of such person. Mrs. Morris has been using "Advanced Medical Systems" as the name of her business since 1999. The Chancellor agreed that "Advanced Medical" was a trade name that deserves protection. Her Honor came to this conclusion after a careful examination established that the words in question had acquired a "special significance and secondary meaning" to the extent that the phrase has become a trade name. A protectible right in the use for trade purposes of a word in common use may be acquired under the doctrine of secondary meaning. See *Dollar Dept. Stores v. Alvin Laub d.b.a. The Dollar Store*, 134 Miss. 708, 120 So.2d 139 (1960); *Dixie Oil Co. v. Picayune "66" Oil Co.*, 245 So.2d 839 (Miss. 1971).

This Court further concluded that said trade name should be protected for the benefit of the appellee only after making the following findings of fact: 1) the parties engage in similar businesses; 2) the appellee had been using the name for six (6) years prior to the appellant doing business in the area; 3) although the name of appellee's company is Advanced Medical Systems, Inc., it is often referred to as simply Advanced Medical; 4) both parties claimed a loss of business at trial; 5) the similarity of the names has caused confusion for the patients and health care

providers; 6) both parties share some of the same vendors, which has resulted in billing and delivery errors. These findings eliminate any argument, much less an abuse of discretion, that there was no threat of imminent harm as required for injunctive relief. Injunctive relief as a remedy is preventive in its nature, and ... it is not necessary to wait for the actual occurrence of the injury, since, if this were required. The purpose for which the relief is sought would, in most cases, be defeated. *Heidkamper v. Odom*, 880 So.2d 362, 365-66 (Ms. App. 2004).

A trade name will be protected by injunction where there is likelihood of confusion in the minds of the public. *Id. citing California Prune & Apricot Growers Assn. V. Dobry Flour Mills*, 101 Fed.2d 838; *Celotex Co. V. Bronson*, 49 Fed.2d 1048; *Cockrell v. Davis*, 198 Miss. 660, 23 So.2d 256. Although it derives its name through the authority of the state, that name cannot be used in a manner which will result in fraud or deception. *Id. citing 13 Am.Jur., Corporations*, Section 138, page 275; *Meridian Yellow Cab Co. v. City Yellow Cabs*, 206 Miss. 812, 41 So2d 14 (1949). If the use of similar names results in confusion or unfair competition, the use is constructively fraudulent even though the act may be done innocently. *Id.*

An argument is also raised by the appellant that other businesses in the immediate area of the Mississippi Gulf Coast use the phrase in question in the names of their businesses and are allowed to do so. This argument is also without merit. No proof at trial indicated that the other businesses are engaged in the same or similar business as the appellee, therefore no confusion or irreparable harm results.

The appellant also makes issue that the appellee's business name should not be considered a trade name because it was not registered with the State of Mississippi. *Miss. Code Ann. Sec. 75-25-5* (1997) provides "any person who uses a mark may (emphasis added) file in the office of the


secretary.....an application for registration of that mark The language of the statute is clearly permissive as opposed to required and therefore, registration with the State is not required to have a trade name.

CONCLUSION

The appellant has not established that the Court was manifestly wrong or has abused its discretion in determining that the phrase "Advanced Medical" is a trade name that deserves protection by and through injunctive relief of and from the appellant. Being incorporated is not dispositive because of the existence of trade names. All the criteria established to determine the whether or not the phrase in question is a trade name have been met as well as the requirements to obtain injunctive relief. The decision of the Chancellor should be affirmed.

RESPECTFULLY SUBMITTED this the 14 day of January, 2008.

ADVANCED MEDICAL SYSTEMS, INC.


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CERTIFICATE OF SERVICE

I, Robert H. Koon, of counsel for Appellee, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Brief of Appellee to:

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THIS the 14 day of January, 2008.


Robert H. Koon