

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00516

ADVANCED MEDICAL, INC.

APPELLANT

VS.

ADVANCED MEDICAL SYSTEMS, INC.

APPELLEE

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

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**BRIEF OF APPELLANT**

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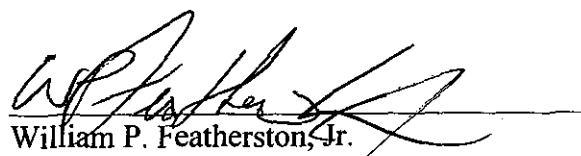
APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

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

1. Advanced Medical, Inc., Appellant
2. Advanced Medical Systems, Inc., 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.

  
William P. Featherston, Jr.  
Attorney for Appellant

## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
CERTIFICATE OF INTERESTED PERSONS .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE	
1. Nature of the Case .....	2
2. Course of Proceedings and Disposition in the Court Below .....	2
3. Statement Facts .....	2
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT AND AUTHORITIES .....	5
CONCLUSION .....	9
CERTIFICATE OF SERVICE .....	10

## **STATEMENT OF THE CASE**

### **1. Nature of the Case**

This is an appeal from a Judgment of the Harrison County Chancery Court permanently enjoining Appellant, Advanced Medical, Inc., from using the name "Advanced Medical" as its business name on the Mississippi Gulf Coast.

### **2. Course of Proceedings and Disposition in the Court Below**

Appellee, Advanced Medical Systems, Inc., filed its Complaint against Appellant, Advanced Medical, Inc., requesting that the Chancery Court of Harrison County, Mississippi, either revoke Appellant, Advanced Medical, Inc.'s, incorporation, or, in the alternative, dissolve Advanced Medical, Inc. as a corporation, or, in the alternative, require Advanced Medical, Inc. to change its name.

Advanced Medical, Inc., Appellant, denied that Appellee, Advanced Medical Systems, Inc., was entitled to the relief requested and following a trial on January 19, 2007, the Chancery Court of Harrison County, Mississippi, First Judicial District, entered its Judgment permanently enjoining Appellant, Advanced Medical, Inc., from using the name "Advanced Medical" as its business name on the Mississippi Gulf Coast.

### **3. Statement of Facts**

References to the record are cited as "[Volume] R. [Page]."

Advanced Medical Systems began business in Gulfport, Mississippi, in March of 1999, selling durable medical equipment and specializing in rehabilitation equipment. Advanced Medical Systems incorporated on March 23, 2005, in the State of Mississippi. At the time of incorporation, Advanced Medical Systems, Inc. was not advised by the Secretary of State that there was a problem with the name "Advanced Medical Systems". (2 R. 6, 7)

Advanced Medical Systems, Inc. handles durable medical equipment used for rehabilitation such as wheelchairs, canes, crutches, bracing and continuous passive motion devices (CPM). American Medical, Inc. (Appellant), on the other hand, deals with motorized wheelchairs, lift chairs, pharmacy products, and oxygen. The only products that the two companies sell in common are CPAP machines, which are used for people who have sleep apnea to help them breath and doctors and patients have confused the two companies with regard to the prescriptions for CPAP machines and the filling of the prescriptions by the patients. This confusion began in the summer of 2005 when Appellant, Advanced Medical, Inc., began business in Gulfport, Mississippi. (2 R. 6 through 19)

Advanced Medical Systems, Inc., Appellee, claimed that it had suffered a monetary loss because of the confusion of the two companies but had not arrived at a monetary figure (2 R. 20)

At the time Advanced Medical Systems, Inc., Appellee, started its business in March of 1999, it made no efforts to register its name with the Secretary of State as a trademark. (2 R. 32, 33)

At the time Advanced Medical Systems, Inc., Appellee, began business, there was another business operating on the Gulf Coast known as "Advanced Medical Billing" which was a company that did medical billing but did not do the same thing that Advanced Medical Systems, Inc. did. (2 R. 34)

Appellant, Advanced Medical, Inc., incorporated on March 11, 2005, prior to the incorporation of Advanced Medical Systems, Inc. on March 23, 2005. At the time Appellee, Advanced Medical Systems, Inc., incorporated, the Mississippi Secretary of State's Office did not indicate there was a problem with using that name. Ruth Morris, Principal of Appellee, Advanced Medical Systems, Inc., testified that she was aware that the law on corporate names says that names must be distinguishable. (2 R. 34 through 37)

The record from the Office of the Mississippi Secretary of State show that Advanced Medical, Inc., Appellant, incorporated on March 11, 2005. (Exhibit 1)

The records of the Office of the Mississippi Secretary of State show that Advanced Medical Systems, Inc. incorporated on March 23, 2005. (Exhibit 2)

On June 30, 2005, Appellant, Advanced Medical, Inc., filed Articles of Dissolution, and on the same day, filed Articles of Incorporation, naming new incorporators, and on May 11, 2005, filed a form changing the registered agent/office. (Exhibit 1)

Prior to the time Appellant, Advanced Medical, Inc., started business, Michael Waites, the Principal of Advanced Medical, Inc., checked with the Secretary of State and did not find any other businesses in Gulfport, Mississippi, operating with the name "Advanced Medical". Mr. Waites testified that when he checked with the Secretary of State in March of 2005, there was another company entitled "Advanced Medical Equipment, Inc." located in another city not on the Gulf Coast. When Appellant commenced business on the Gulf Coast, Mr. Waites was not aware of any other business on the Gulf Coast doing similar business with a similar name. Mr. Waites picked the name Advanced Medical so that he would have priority on the discharge planning list at the hospitals as well as being first in the phone book and went to great expense to advertise and publicize the name "Advanced Medical, Inc." on the Gulf Coast. (2 R. 49 though 51)

### **SUMMARY OF THE ARGUMENT**

Appellant, Advanced Medical, Inc., contends that the Chancery Court below was manifestly wrong, clearly erroneous or applied an incorrect legal standard by finding that Appellant should be permanently enjoined from using the name "Advanced Medical" as its business name on the Mississippi Gulf Coast and that the name "Advanced Medical Systems, Inc." had developed a secondary meaning and was entitled to legal protection and exclusive use.

## **ARGUMENT AND AUTHORITIES**

The Chancery Court erred by permanently enjoining Appellant, Advanced Medical, Inc., from using the name "Advanced Medical" on the Mississippi Gulf Coast.

### **A. Standard of Review**

The Standard of Review employed applicable to a Chancery Court's decision is abuse of discretion. *McNeil v. Hester*, 753 So. 2d 1057 (Miss. 2000). A Chancery Court's findings of fact will not be disturbed upon review unless the Chancery Court was manifestly wrong, clearly erroneous or applied an incorrect legal standard. *Miller v. Panell*, 815 So. 2d 1117 (Miss. 2002).

**B. The decision of the Chancery Court to permanently enjoin Appellant, Advanced Medical, Inc., from using the name "Advanced Medical" was an abuse of discretion.**

Advanced Medical Systems, Inc., Appellee, sued Appellant, Advanced Medical, Inc., and alleged that at the time of Advanced Medical Systems, Inc.'s incorporation, Advanced Medical, Inc., Appellant, existed but had been dissolved on March 11, 2005, and was reinstated on June 30, 2005. Appellee, Advanced Medical Systems, Inc., alleged that its corporation was established after Appellant's dissolution but before Appellant's reinstatement. (1 R. 1-2)

Appellee alleged in its Complaint in the Court below that pursuant to Mississippi Code Annotated § 79-4-4.01 (b), Appellant's corporate name must be distinguishable upon the records of the Secretary of State from: (2) a corporate name reserved or registered under § 79-4-4.02 or 9-4-4.03 and may only apply to the Secretary of State for authorization to use a name that is not distinguishable upon his records from one or more of the names described and the Secretary of State shall only authorize use of the name applied for if: (1) the other corporation (Appellee) consents to the use in writing and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name

of the applying corporation; or (2) the applicant delivers to the Secretary of State a certified copy of the Final Judgment of a Court of competent jurisdiction establishing the applicant's right to use the name applied for in this State. (1 R. 2)

Appellee alleged further in its Complaint that Appellant had not met any of the criteria required by law to use the name Advanced Medical, Inc., which name is not distinguishable from that of Appellee, Advanced Medical Systems, and requested that Appellant's incorporation be revoked, or, alternatively, dissolved, or, in the alternative, Appellant should be required to change its corporate name. (1 R. 2, 3)

The basis of Appellee's lawsuit in the Court below was that Appellee had incorporated as Advanced Medical Systems, Inc. after Appellant, Advanced Medical, Inc., had dissolved its corporation and before Appellant had reincorporated which, therefore, entitled Appellee the exclusive use of the name "Advanced Medical". However, the true facts established in the Court below, show unequivocally that Advanced Medical, Inc. incorporated on March 11, 2005, and was still in existence at the time Advanced Medical Systems, Inc. incorporated on March 23, 2005. (See Exhibits 1 and 2)

Appellant did file Articles of Dissolution and new Articles of Incorporation on the same date, June 30, 2005, which was after the date of incorporation of Advanced Medical Systems, Inc. Therefore, it is clear that Appellant, Advanced Medical, Inc., incorporated first and was legally entitled to the use of the name "Advanced Medical" prior to the incorporation of Advanced Medical Systems, Inc., Appellee, herein. The Court below found that according to Mississippi Code Annotated § 75-25-1 (d) "the term "trade name" means any name used by a person to identify a business or vocation of such person. The Court below failed to mention, however, that Appellee had the legal right to register its name as a trade name pursuant to Mississippi Code Annotated § 75-25-5



which would have given notice to the general public and any other persons or companies that were interested in using that name that the name was reserved. Ruth Morris, the Principal of Appellee, Advanced Medical Systems, Inc., testified below that she made no efforts to register the name Advanced Medical Systems as a trade mark with the Secretary of State's Office. (2 R. 32, 33)

Even though Appellee sought relief from the Court below under the mistaken belief that it had incorporated after Appellant had dissolved its corporation and was, therefore, entitled to the use of the name under the corporate laws of the State of Mississippi, the Court below granted it relief and issued its injunction on the basis that Appellee's name had been established as a trade name and had acquired a special significance and secondary meaning to the extent that the phrase has become a trade name.

In *Dollar Department Stores, Inc. v. Laub*, 127 So. 2d 139, 141 (Miss. 1960), the Mississippi Supreme Court stated that the use of a name by a business "does not become a trade name until it has become known in the markets for the products that it represents. When that occurs, such special significance becomes the primary meaning. Whether or not a designation has acquired such special significance is a question of fact in each case."

As stated by the Court below in its opinion, the issue to be determined is whether or not the phrase "Advanced Medical" as used by Appellee in the course of its business on the Mississippi Gulf Coast has acquired a special significance and secondary meaning to the extent that the phrase has become a trade name. The Court below found that because Appellee had been in business as Advanced Medical Systems since 1998, it has established a reputation among providers and the public on the Mississippi Gulf Coast and the words "advanced" and "medical" when used together in that order have acquired a secondary meaning of Plaintiff's business and thus has become Appellee's trade name. Although Ruth Morris testified on behalf of Appellee that doctors and

patients have confused Appellant's and Appellee's businesses on occasion, Appellee put on no proof that the confusion harmed the public or resulted in unfair competition or resulted in injury to Appellee. Appellee put on no testimony or evidence from any other witnesses in the community to establish that the community has associated the name "Advanced Medical" with Appellee's business or its products or services.

In the case of *Meridian Yellow Cab Co. v. City Yellow Cabs*, 41 So. 2d 14 (Miss. 1949), the Mississippi Supreme Court, quoting American Jurisprudence, stated as follows:

The inquiries when equitable relief is sought must be whether it is likely that the public will be mislead and whether the complaining corporation is likely to be injured. Experience, not in the particular case, but in other cases, must be employed in determining the fact. Mere conjecture is not sufficient. Moreover, whether the Court will interfere in a particular case must depend upon circumstances; the identity or similarity of the names; the identity of the business of the respective corporation; how far the name is a true description of the kind and quality of the articles manufactured or the business carried on; the extent of the confusion which may be created or apprehended; and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy. 13 Am. Jur. Corporations § 137, page 274

The Court below found that "Plaintiff (Appellee herein) had developed a reputation in the community and is well known for its products and services. Given the similarity between the names and resulting confusion, Defendant (Appellant herein) cannot be said to have not fairly unprofited from Plaintiff (Advanced Medical Systems, Inc.'s) reputation in the community. The confusion and resulting problems will likely continue and even increase, particularly if and when Defendant (Appellant herein) also becomes a preferred provider with Tricare." (1 R. 11, 12)

As the Court below stated in its opinion, the Mississippi Supreme Court upholds that "the party requesting an injunction must show a threat of imminent harm, rather than mere fear or apprehension alone" *Heid Kamper v. Odom*, 880 So. 2d 362, 365-66 (Miss. 2004). Appellant

submits that there was inadequate proof to show a threat of imminent harm and the finding of the Court below that the phrase "Advanced Medical" as used by Appellee in the conduct of its business on the Mississippi Gulf Coast has acquired a special significance and secondary meaning to the extent that the phrase has become a trade name is not supported by the evidence and, therefore, the decision of the Chancellor below is manifestly wrong, clearly erroneous, and is an abuse of discretion.


For the reasons that Appellant incorporated its business first with the name "Advanced Medical" and Appellee failed to take any measure to protect the name "Advanced Medical" by either registering the name as a trade mark or trade name with the Secretary of State's Office or reserving the name for use as a corporation and the fact that there was inadequate proof to show that Appellee has developed a reputation in the community and is well known for its products and services under the name "Advanced Medical", Appellant requests that this Court reverse the decision of the Court below issuing a permanent injunction from use of its corporate name.

### CONCLUSION

For the reasons set forth above, Appellant submits that this Court should reverse the Court below and render a decision that Appellee is not entitled to permanent injunctive relief against Appellant.

RESPECTFULLY SUBMITTED, this the 22nd day of October, 2007.

ADVANCED MEDICAL, INC.

By:   
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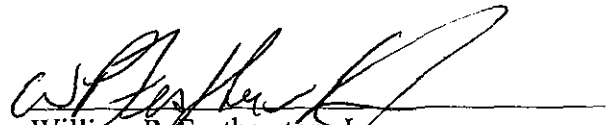
**CERTIFICATE**

I, William P. Featherston, Jr., of counsel for Appellant, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Brief of Appellant to:

Honorable Margaret Alfonso, Chancellor  
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Robert H. Koon, Esq.  
2222 17<sup>th</sup> Street  
Gulfport, MS 39501

THIS, the 22<sup>nd</sup> day of October, 2007.

  
William P. Featherston, Jr.