IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

H. L. MERIDETH, JR. — APPELLANT/PLAINTIFF

V. — CAUSE NO. 2007-CP-00501

PHILIP T. MERIDETH, M.D. — APPELLEE/DEFENDANT

APPEAL FROM THE CHANCERY COURT
OF
HINDS COUNTY, MISSISSIPPI

CAUSE NO. G2006-1294-O/3

BRIEF OF APPELLANT

SUBMITTED BY:

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CERTIFICATE OF INTEREST PERSONS

The undersigned counsel certifies that the following persons have an interest in the outcome of this case.

These representations are made so that the Justices of The Supreme Court may evaluate possible disqualifications:

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Attorneys for Philip T. Merideth, M.D.

RESPECTFULLY SUBMITTED THIS 1st DAY OF AUGUST 2007

H. L. MERIDETH, JR.

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STATEMENT OF THE ISSUE

1. The issues on this appeal are whether the trial court erred in (1) imposing sanctions and awarding attorney's fees and expenses to the appellee, Philip T. Merideth, in the amount of Eight Thousand Two Hundred and Ninety Eight Dollars ($8,298.00) and (2) denying the appellant's Motion to Amend the Complaint.

REFERENCES TO PARTIES

2 The appellant, plaintiff, H. L. Merideth, Jr., is referred to by the trial court as "Mr. Merideth," and by counsel opposite as "Sonny." The court and counsel opposite refer to the appellee/defendant, Philip T. Merideth, M.D., as "Philip." Therefore, the appellant/plaintiff, H. L. Merideth, Jr., will be referred to herein as "Sonny." The appellee/defendant, Philip T. Merideth, M.D., will be referred to herein as "Philip," M.R.A.P. 28(d)

REFERENCE TO RECORD

3. Citation or references to the record prepared by the clerk will be referred to as "C" followed by the reference to the page of the record. References to the court reporter's transcript will be referred to as "C.R." followed by the page number. There are six (6) exhibits in a manilla envelope that are not part of the bound volumes of the clerk's papers or the court reporter's transcript. These exhibits will be referred to as "E" followed by the exhibit number. References to the record excerpts will be referred to as "R.E." followed by the page number. The record excerpt page numbers are located in or near the left margin at the bottom of each page.

STATEMENT OF THE CASE

4. Sonny filed an action in The Chancery Court of Hinds County against Philip on July, 24, 2006, on a Promissory Note dated May 7, 1997, signed by Philip and payable to Sonny in installments that admittedly remain unpaid. Philip filed a Motion on August 24, 2006, to dismiss under M.R.C.P. 12 (b) (6) and for sanctions under M.R.C.P. 11 and The Mississippi Litigation Accountability Act. The Motion to Dismiss was predicated on the statute of limitations.

5. Sonny filed a Motion on September 11, 2006, to amend the Complaint based upon equitable estoppel.

6. The trial court denied the Motion to Amend and imposed sanctions against Sonny in the amount of Eight Thousand Two Hundred and Ninety Eight Dollars ($8,298.00).

SUMMARY OF LITIGATION BETWEEN SONNY AND PHILIP

7. Intermingled in the record are references to other litigation between Sonny and Philip. It would therefore be helpful to this court in understanding the record to explain the background of the litigation between Sonny and Philip referred to in the record.

8. The first action by Sonny against Philip was filed on October 31, 2005, in The Chancery Court of Madison County, referred to as Merideth I, wherein Sonny sought a Declaratory Judgment adjudicating that his Last Will and Testament dated April 20, 2005, was legally valid. Philip did not contest the case. The court entered a Final Judgment on October 26, 2005, granting Sonny the relief prayed for, i.e. the Will was legally valid. (C. 89-94, R.E. 16-21)

9. The second action (Merideth II) was filed on February 21, 2006, to resolve a dispute about the sale of land in Madison County, Mississippi. (C. 100-104, R.E. 22-26)

Philip was represented by the Copeland Cook law firm. The case was settled by an Escrow Agreement, a Consent Judgment that was approved by the parties but not entered by the court pursuant to the Escrow Agreement, and an Agreed Order of Dismissal with Prejudice that was approved by Sonny but not entered by the court. Sonny prevailed in this action. Philip deeded his interest in the lands for Two Hundred Forty Three Thousand Ninety Dollars and Sixty Three Cents ($243,090.63) to a third party pursuant to a contract with the third party. (E. 2, R.E. 27) This case is on appeal to The Mississippi Supreme Court from an imposition of sanctions. Cause No. 2006-CP-02135.

10. Sonny filed a Complaint against Philip on July 24, 2006, in the Chancery Court of Hinds County, Mississippi, on a Promissory Note signed by Philip and payable to Sonny that was not paid when due. This is the case now before the court. This case will be referred to herein as Merideth III. (C. 1-2, R.E. 42-43)

11. The court imposed sanctions in Merideth III without specific reference to any authority, but held that Sonny's claim was frivolous and without substantial justification. (C. 123-126, R.E. 12-15)

SUMMARY OF THE ARGUMENT

12. The action by Sonny against Philip was neither frivolous or without substantial justification.

13. The court erred in denying Sonny's Motion to Amend the Complaint to plead estoppel.

APPLICABLE LAW

14. It cannot be determined with certainty whether the court imposed sanctions under The Litigation Accountability Act §11-55-5 (1) et. seq., or under M.R.C.P. 11, or both.

15. The pertinent parts of §11-55-5 (1) reads as follows, to wit:

> (1)...in any civil action commenced..., the court shall award, as part of its judgment...reasonable attorneys fees and cost against any party or attorney if the court...finds that an attorney or party brought an action...that is without substantial justification or that the action... was interposed for harassment..."(emphasis added) (R.E. 44-48)

16. Sanctions may be imposed under §11- 55-5 if the court finds that a party filed a frivolous motion or pleading without substantial justification. *State Dep't of Human Servs. v. Shelby*, 2000-CA-00033-SCT (¶32), 802 So.2d 89, 96 (Miss. 2001).

17. M.R.C.P. 11(b) provides as follows, to wit:

> "(b)...if any party files a...pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such party...to pay the opposing party...the reasonable expenses incurred by such party...including reasonable attorneys fees." (R.E. 49)

18. This court has held that a pleading is frivolous under M.R.C.P. 11 if the pleader or movant has no hope of success. *Tricon Metals & Services, Inc. v. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989).

STANDARD OF REVIEW

19. The imposition of sanctions raises a question of law and the standard of review is *de novo*. *Estate of Ladner v. Ladner*, 2002-CA-01705-SCT (¶15), 909 So. 2d 1051, 1055 (Miss. 2004). In reviewing an award of sanctions under the Litigation Accountability

Act, the appeal court is limited to whether the trial court abused its discretion. *Foster v. Ross*, 2000-CA-01741-SCT (¶13), 804 So.2d 1018, 1022 (Miss. 2002).[1]

FACTS

20. Sonny is Philip's father. (C. 3 ¶1, R.E. 50) Sonny filed a Complaint against Philip in the First Judicial District of Hinds County on July 24, 2006, to collect on a Promissory Note signed by Philip and payable to Sonny, dated May 7, 1997, in the amount of Twenty One Thousand Dollars ($21,000). (C. 1-2, R.E. 42-43) Philip's attorney, by letter to Sonny dated August 7, 2006, asked that the Complaint be voluntarily dismissed and, if not, sanctions would be sought under M. R. C. P. 11 and The Litigation Accountability Act. (C. 16, R.E. 51) Sonny, by letter dated August 10, 2006, replied to the letter dated August 7, 2006, declining to dismiss the Complaint and pointing out that the statute of limitations may be overcome by equitable estoppel. In addition, Philip was out of the state for two (2) years, §15-1-64 Miss. Code Ann. 1972 (absence from state tolls statute of limitations). (C. 49, R.E. 53)

21. Sonny addressed discovery on September 11, 2006, to learn, among other things, the exact dates that Philip was out of the state. Philip admitted that the note was unpaid. (E. 4, Interrogatory 1, R.E. 54)

22. Philip, in response to interrogatories, said that he was out of the state July 1, 1994, to June 30, 1997, and that by silence Sonny had forgiven the note. (E. 4, Interrogatory 1, R.E. 54)

23. Sonny filed an Affidavit at the hearing, stating:

[1] These cases appear in conflict unless Ladner addressed the initial question of the imposition of sanctions and Foster addresses the amount of any sanctions.

1. That on March 18, 1988, he loaned the sum of Ten Thousand Dollars ($10,000.00) to Philip, evidenced by Promissory Note, that the Note was not paid, but was cancelled by Sonny on January 9, 1995. The copy of the Note with the cancellation is attached to the Affidavit as Exhibit 1. (E.1, R.E. 57)

2. That on May 1, 1991, he loaned the sum of Eight Thousand Ninety Nine Dollars and Ninety Two Cents ($8,099.92) to Philip evidenced by Promissory Note, that the Note was not paid, but was in fact cancelled by Sonny in full on January 8, 1992. A copy of the note is attached to the Affidavit as Exhibit 2. (E. 1, R.E. 57)

3. That on May 7, 1997, he loaned the sum of Twenty One Thousand Dollars ($21,000.00) to Philip evidenced by a Promissory Note. The Note has never been paid in whole or in part or cancelled in whole or in part by Sonny. A copy of the Note is attached to the Affidavit as Exhibit 3. (E. 1, R.E. 57)

24. The trial court applied the three (3) year statute of limitations and held that Sonny's claim was clearly time – barred. (C.R. 53-55, R.E. 4-6) (C. 118-122, 119 ¶4, R.E. 7-12)

25. The court also held that it would be futile to allow the proposed amendment to the Complaint. (C. 118-122, 121 ¶9, R.E. 7-12)

26. The court entered a Final Judgment on February 26, 2007, and discounted Philip's bill for Twelve Thousand Three Hundred Eighty Five Dollars and Twenty One Cents

($12,385.21) by one-third, and entered Judgment in the amount of Eight Thousand Two Hundred Ninety Eight Dollars and Nine Cents ($8,298.09). (C. 123-126, R.E. 12-15)

ARGUMENT

Whether the trial court erred by imposing sanctions

27. The imposition of sanctions raises a question of law, the standard of review of which is *de novo*. *In re Estate of Ladner v. Ladner,* 2002-CA-01705-SCT (¶15), 909 So. 2d 1051, 1055 (Miss. 2004). Sanctions are warranted when a pleading or motion is frivolous or is filed for the purpose of harassment or delay. *Bean v. Broussard*, 587 So. 2d 908, 912 (Miss. 1991). In the instant case, the trial court found that Sonny was placed on notice of Philip's intention to assert a statute of limitations defense by letter dated August 7, 2006. (Final Judgment for the Recovery of Fees and Expenses (C.122-126, 125 ¶5, R.E. 11-15). As a result, the trial court made two findings. First, the trial court that the claim was frivolous. *Id.* Secondly, the trial court found that maintenance of the claim after notice of Philip's position was frivolous and without justification. *Id.*

28. This finding overlooks the fact that Sonny promptly responded by letter declining to dismiss the Complaint and pointing out that the statute of limitations may be overcome by equitable estoppel. In addition, Philip was out of the state for two (2) years, a fact that, depending upon the times involved, might toll the statute of limitations. *See* Miss. Code Ann. §15-1-64 (1972) (absence from state tolls statute of limitations). (C. 49, R.E. 53). Further, Sonny propounded discovery shortly thereafter on September 11, 2006, to learn, among other things, the exact dates when Philip was out of the State. Philip

responded, indicating the periods in which he was absent, and admitting that the note was unpaid. (E. 4, Interrogatory 1, R.E. 54).

29. A plea of the statute of limitations is an affirmative defense and carrying the burden of proof lies on the party who relies upon that defense. *Graham v. Pugh*, 417 So. 2d 536, 540 (Miss. 1982). The trial court found that Philip had indicated to Sonny that Philip would assert the statute of limitations defense on August 7, 2006. (Final Judgment for the Recovery of Fees and Expenses (C. 123-126, 125 ¶5, R.E. 12-15). However, the trial court failed to note that this was after the Complaint was filed on July 24, 2006, and before Philip had responded to discovery requests on November 2, 2006, regarding his absence from the State. (C. 1, R.E. 42 and E. 4, R.E. 54).

30. More importantly, on September 11, 2006, Sonny sought to amend his complaint. (C, 52-54, R.E. 68-70). The trial court, however, refused to permit the Complaint to be amended to reflect additional contentions that Philip was equitably estopped from pleading the statute of limitations due to his confidential relationship with his father, Sonny; and that Philip was equitably estopped from pleading the statute of limitation because of his actions or inactions. (C. 53, par.5-6, R.E. 69).

31. There is no argument that the note has not been paid. The debt existed. The trial court, by finding that the claim was frivolous before Sonny was notified of Philip's intention to assert the statute of limitations, effectively found that the assertion of an affirmative defense may retroactively render a complaint frivolous, regardless of whether a plaintiff actually knew the defense would be asserted, or indeed, knew whether the defendant was entitled to assert the defense.

32. Further, had the trial court permitted an amendment to the Complaint, Sonny would have been permitted to attempt to support his Amended Complaint with sufficient evidence to demonstrate that his claim was not frivolous.

Whether the trial court erred by denying Sonny's Motion to Amend Complaint

33. The trial court found that Sonny had "failed to come forward with specific evidence of alleged equitable or fraudulent conduct on Philip's part, which is Mr. Merideth's burden." Based on this, the trial court found that the proposed amendment to the complaint would be futile. (C. 118-122, 121 ¶9, R.E. 7-11).

34. This appears to present a case of first impression in Mississippi as to the standard by which a proposed amended complaint is deemed futile. The Mississippi Supreme Court has noted the standard used by federal courts in determining futility, but has not yet stated the appropriate standard in Mississippi courts. See *Poindexter v. S. United Fire Ins. Co.*, 2001-CA-01512-SCT n.1, 838 So. 2d 964, 971 n.1 (Miss. 2003)(wisdom of this approach not to be decided in this case).

35. The standard by which federal courts determine the futility of a proposed amendment to a complaint was articulated in *Stripling v. Jordan Prod. Co.*, 234 F.3d 863 (5th Cir. 2000), a case procedurally very similar to Merideth III. In *Stripling* the plaintiff filed "Plaintiffs' Motion for Leave to File an Amended Complaint and Join a Party-Defendant" (the "Motion to Amend"). *Id.* at 867. The Motion to Amend came a month and a half after the deadline to file motions for joinder of parties as set out in the Case Management Plan Order. *Id.* Despite recognizing that "Rule 15 requires that leave to amend be freely given," the magistrate judge determined that the proposed amendment

would be futile because Stripling "failed to point to any facts indicating that in entering the agreement with [Stripling], Jordan was acting on behalf of Guardian," and thus, "there [was] no basis for [Stripling] to recover from Guardian under the contract with Jordan." *Id.* Accordingly, the magistrate judge denied Stripling's Motion to Amend. *Id.* The district court affirmed. *Id.* The Fifth Circuit Court of Appeals reversed. *Id.* at 873.

36. The appellate court noted that the refusal of a trial court to permit an amendment of a complaint was reviewed for abuse of discretion. *Id.* at 872. However, the court reasoned, the discretion is limited so that leave to amend must be "freely given when justice so requires." *Id.* Noting that there is a strong bias in favor of permitting amendment, the court stated, "Unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Id.*

37. In explaining its decision, the *Stripling* court noted that a district court was within its discretion to deny a motion to amend if the amendment was futile. *Id.* The court then turned to determining the meaning of "futile" within this context. *Id.* at 873. The court chose to adopt the standard by which the other circuits determined futility, and chose "the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Id.*

38. According to the court, "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* Further, the court "may not dismiss a complaint under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

39. The court then examined the basis by which the magistrate found the amendment futile. *Id.* It noted that the magistrate based his finding on the lack of facts that might

show liability. *Id.* Because of this lack of facts, the magistrate judge concluded there was no basis for Stripling to recover from Guardian. *Id.* The Fifth Circuit disagreed. *Id.* The court determined that under the "low threshold" by which a dismissal under Rule 12(b)(6) was evaluated and by resolving any doubt in favor of Stripling, that Stripling had adduced facts in support of its claim that would entitle it to relief. *Id.*

40. Should Mississippi adopt the measure of futility applied in federal courts, then the true test is whether the amended complaint could withstand a motion under Miss. R. Civ. P. 12(b)(6). When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim. *Arnona v. Smith*, 1998-CA-01360-SCT (¶6), 749 So. 2d 63, 65 (Miss. 1999)

41. The trial court referred to discovery responses regarding the period during which Philip was outside of the state. (C. 118-122, 120 ¶7, R.E. 7-11). The court further held that Sonny had failed to come forward with specific evidence of equitable estoppel as alleged in the proposed amended complaint. (C 118-122, 122 ¶9, R.E. 7-11). In ruling on the futility of the proffered amended complaint, the trial court apparently applied the standard appropriate for evaluating whether a claim is subject to summary judgment. Of course this was done prior to the amendment having been permitted by the court, and prior to Sonny having offered evidence in support of it.

42. Had the trial court correctly applied the motion to dismiss standard in order to test the sufficiency of the proposed amended complaint, the trial court would have considered whether the pleadings, themselves, stated a claim for relief. See *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)(a trial court weighing a motion to

dismiss asks "not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims").

43. If the trial court is to determine whether an amended complaint is frivolous by applying Rule 12(b)(6) scrutiny, rather than that of summary judgment, the court should neither consider facts outside of the pleadings nor the absence of facts. As the D.C. Circuit has held, "Consideration of external materials, which would normally initiate conversion of the motion to one for summary judgment, cannot properly take place under a dismissal for failure to state a claim." *Tele-Communications of Key West, Inc. v. United States,* 757 F.2d 1330, 1335 (D.C. Cir. 1985). Rather, in granting a Rule 12(b)(6) motion to dismiss, the court must look solely to the pleadings, and determine whether, on the face of those pleadings, resolving all factual doubts and inferences in favor of the plaintiff, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ramirez de Arellano v. Weinberger,* 745 F,2d 1500, 1506 (D.C. Cir. 1984)(quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). If this standard is not met, then the court must deny the motion. *United States ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 2007 U.S. Dist. LEXIS 18952 (¶13) (D.D.C. Mar. 19, 2007) (R. E. 62-67)

44. By considering facts beyond the pleadings and making reference to the absence of facts to support the pleadings, the trial court applied an incorrect legal standard to determine whether the proposed amended complaint was frivolous. This is particularly true in view of the fact that Mississippi is a notice pleading state. See *Bedford Health Props., LLC v. Estate of Williams*, 2005-IA-01274-SCT (¶41), 946 So. 2d 335, 350 (Miss. 2006)(Mississippi is notice pleading state).

But fraud has to be specifically pleaded.
Claiming ee due to conf. relationship fraud?

45. This Court is urged to adopt the measure of futility of a proffered amended complaint used by federal courts. The proposed amendment would then be examined for sufficiency under Miss. Rule Civ. P. 12(b)(6). Evaluation under Rule 12(b)(6) would require that the allegations in the complaint be taken as true, and the motion should not be granted unless it appears beyond doubt that the plaintiff would be unable to prove any set of facts in support of his claim. *Arnona v. Smith*, 1998-CA-01360-SCT (¶6), 749 So. 2d 63, 65 (Miss. 1999). If this standard for futility is adopted by Mississippi courts, the trial court would simply be required to take the amended allegations as true. If Sonny could, then, possibly prove any set of facts to support his amended claims, the amendment of the complaint was not futile.

46. Adoption of the futility standard used by the federal courts comports with the requirement that leave to amend be freely given when justice so requires. Further, evaluation under Rule 12(b)(6) avoids the inherent difficulties that may arise from requiring a plaintiff to support the allegations of his amended complaint before the amendment has been actually permitted by the court, and possibly before the plaintiff has been able to fully develop his case based on the amended allegations.

CONCLUSION

47. The Judgment of the trial court should be reversed and the case dismissed.

DATED THIS 1st DAY OF AUGUST 2007.

H. L. Merideth, Jr.

CERTIFICATE OF SERVICE

I, H. L. Merideth, Jr., Appellant, certify that I have this day served a copy of this *Brief of Appellant* on the following persons:

Honorable Denise Owens
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SO CERTIFIED this the 1st day of AUGUST, 2007.

H. L. MERIDETH, JR.