IN THE SUPREME COURT OF MISSISSIPPI

MARK L. PEARSON — APPELLANT

VERSUS — CASE NO.: 2008-IA-01300-SCT

DAVID NUTT & ASSOCIATES, P.C. et al. — APPELLEES

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

Authority **Page(s)**

Constitutions

STATEMENT OF THE ISSUES

I. WHETHER APPELLANT PEARSON IS ENTITLED TO A TRIAL BY JURY IN CHANCERY COURT?

II. WHETHER APPELLANT PEARSON IS ENTITLED TO HAVE THE CASE TRANSFERRED TO THE CIRCUIT COURT OF HINDS COUNTY BASED UPON HIS CLAIMS FOR ACTUAL AND PUNITIVE DAMAGES AND/OR HIS REQUEST FOR A JURY TRIAL?

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BRIEF OF APPELLANT MARK L. PEARSON

COMES NOW THE APPELLANT, Mark L. Pearson (hereinafter "Appellant" or "Pearson"), and files this its Appellant's Brief, and would respectfully show unto the Court the following, to-wit:

STATEMENT OF THE CASE

In early 2000, Mark L. Pearson, and Harold J. Barkley III, (hereinafter Barkley III) investigated and became aware of potential claims for personal injury and property damages resulting from alleged environmental pollution created by Kuhlman Electric Corporation located in Crystal Springs, Mississippi. Mr. Pearson and Barkley III entered into a joint venture agreement to pursue the claims. At a later date Harold J. Barkley Jr. (hereinafter Barkley Jr.) was brought in to work with Pearson and Barkley III. Thereafter the three joint venturers seeking a financial partner to finance the litigation went to David Nutt and Associates who were then brought in for the purpose of financial backing. On November 3, 2000, David Nutt & Associates, Harold J. Barkley, Harold J. Barkley, III, (collectively referred to as "The Nutt Group") and Mark L. Pearson entered into a fee and cost splitting agreement concerning the referral, handling and litigation of certain lawsuits known as the "Kuhlman Electric Company Litigation", attached as (Appellant's R.E. 1).

On April 15, 2002, The Nutt Group sent Pearson a letter attempting to "rescind, revoke and terminate" their fee splitting association with him on the Kuhlman litigation, (Appellant's R.E. 2). In response to said correspondence, Mr. Pearson, through counsel, stated categorically that if Nutt, et al., was rescinding the fee split arrangement, that he, then, claimed an entitlement to one-third (1/3) of the attorney's fees received from the Kuhlman litigation, attached as (Appellant's R.E. 3). Mr. Pearson made this demand based upon the long standing law of Joint Venture that if no other split of profits is agreed upon then profits are split evenly. *Macro v. Miele*, 418 So. 2d 1158 (Fla. Dist. Ct. App. 4th Dist. 1982). In this case each set of members getting thirty-three and one third percent (33⅓%). Mr. Pearson expressly, in the April 23rd letter rejected Mr. Nutt's proposal that Pearson reduce his claim for attorneys fees to two percent (2%) of the net attorneys fees received from the litigation as proposed in the 2% fee spit agreement dated April 5, 2002, attached as (Appellant's R.E. 4). Mr. Nutt and the Barkley's had previously, on April 15th, presumably after they prepared the letter proposing to reduce Mr. Pearson's fees, prepared a second contract among themselves, whereby Nutt and the Barkley's reallocated attorney's fees, providing that Nutt would receive seventy-two and one-half percent (72.5%) and the Barkley's twenty-five and one-half percent (25.5%) thereby taking eighteen percent (18%) from Mr. Pearson and distributing twelve and one-half percent (12.5%) to Nutt and five and one-half percent (5.5%) to the Barkleys. Under the April 15, 2002 split agreement, Mr. Pearson remained a member of the joint venture and was to receive two percent (2%), attached as (Appellant's R.E. 5).

No action was ever taken to terminate the Joint Venture. The dispute centered on the division of fees. Pearson never agreed to allow Nutt, et al., to retain all control over the Kuhlman litigation,

as reflected by the remainder of the July 1 letter, attached as (Appellant's R.E. 6). Said letter further stated,

> "Mr. Pearson spent much time and expense initially evaluating the case, generating the client base and otherwise performing good and valuable services. It is my understanding that the parties expected Mr. Pearson to act as lead counsel at trial, and this, coupled with his earlier efforts would entitle him to his share of the fees. As I have previously stated, Mr. Pearson expects to perform the services required of him in this matter and will continue to work in his client's best interest."

On Sept. 5, 2005, while the parties were in the midst of settlement talks to resolve the fee split dispute regarding the settlement of the litigation, the Nutt Group filed a Complaint for Declaratory Judgment, Injunctive Relief and for an Accounting in Madison County Chancery Court, an improper venue, attached as (Appellant's R.E. 7). Only when the settlement talks stalled did the Plaintiffs seek to serve Mark L. Pearson with the suit. The Nutt group's sole purpose for filing the Complaint, while settlement discussions were ongoing, was to allow the Nutt group to be able to select the court of jurisdiction and venue for the litigation. The Nutt group chose the Chancery Court in order to deprive Pearson of his right to a trial by jury. The Nutt group chose Madison County for its own personal convenience.

On December 15, 2005, Pearson filed a Motion to Dismiss or in the Alternative, to Transfer to Hinds County, Mississippi, attached as (Appellant's R.E. 8). Thereafter, both Madison County Chancery judges and one specially appointed judge recused themselves. After several hearings, the matter was finally on April 4, 2007 ordered by the Honorable Jon M. Barnwell to be transferred to the proper venue in Hinds County, attached as (Appellant's R.E. 9). On June 4, 2007, Pearson filed his Motion to Dismiss, Answer, Defenses, Request for Jury Trial and Counterclaim for Actual and Punitive Damages, attached as (Appellant's R.E. 10).

In his Counterclaim, Defendant seeks actual and punitive damages. Pearson also alleges that the Nutt Group breached their fiduciary duty to him by conducting settlement without his advice or consent. Pearson alleges he is entitled to either thirty three and one-third (33⅓%) or twenty percent (20%) of the recovered attorney's fees. Pearson asserts a claim for punitive and/or exemplary damages on the basis that the Plaintiffs/Counter-Defendants actions are so willful, malicious in and in a total and utter disregard for the rights of Pearson, as to warrant punitive damages.

On June 4, 2007, Pearson had filed his Motion for Jury Trial, or in the Alternative, to Transfer Action to Circuit Court. After receiving briefs from the parties and conducting a hearing, the Chancery Court denied the motion, in the Order and Opinion, attached as (Appellant's R.E. 11). The Trial Court in the July 9, 2008 Order and Opinion (Appellant's R.E. 11) gave a recitation of the facts as presented by the Plaintiffs Nutt et al. The defendant Pearson vehemently denies many of those "Facts" and would state the facts are as outlined above. It is from this denial of Pearson's right to a jury trial or in the alternative to transfer to the Circuit Court of Hinds County that Pearson appeals this matter to this Court.

SUMMARY OF THE ARGUMENT

Appellees rushed to the courthouse and filed a complaint alleging equitable claims, in the improper venue of Madison County Chancery Court, when the actual dispute between the parties involves matters of law that should be tried in the Circuit Court of Hinds County. Chancery courts have limited jurisdiction and circuit courts have general jurisdiction. In this matter, the more appropriate court is the Circuit Court of Hinds County where Pearson's claims for actual and punitive damages can be litigated and tried before a jury. The precedent in Mississippi favors having equitable claims brought before a Circuit Court when they are connected to a contractual relationship

or other claims tied to questions of law, such as in our case.

Honorable Patricia Wise, Chancellor of Hinds County, denied Pearson's request to a trial by jury in her court (Appellant's R.E. 11). Since trials by jury are left to the discretion of the chancellors in chancery courts, Pearson is being denied his substantive right. Pearson is entitled to a trial by jury as provided by the Mississippi Constitution Article 3, § 31. Public policy of allowing a plaintiff "to choose his or her forum does not outweigh [a defendant's] constitutional right to a jury". *Union Nat'l Life Ins. Co. v. Crosby*, 870 So.2d 1175, 1182 (Miss. 2004). Pearson request that this Court revers the lower court's decision and allow Pearson to have a jury trial or in the alternative to transfer the case to appropriate court for matters of law, the Circuit Court of Hinds County.

Standard of Review

Jurisdiction is a question of law which the Supreme Court reviews de novo. *Trustmark Nat'l Bank v. Johnson*, 865 So. 2d 1148, 1150 (Miss. 2004). The court uses this same standard of review when examining a ruling on a motion to transfer from Chancery Court to Circuit Court, or vice-versa. *ERA Franchise Systems Inc. v. Mathis*, 931 So. 2d 1278, 1280 (Miss. 2006).

ARGUMENT AND LAW

I. It is more appropriate for a Circuit Court to hear equity claims than it is for a Chancery Court to hear actions at law since Circuit Courts have general jurisdiction but Chancery Courts enjoy only limited jurisdiction.

Generally speaking, Circuit Courts are Courts of law and Chancery Courts are Courts of equity. See Miss. Const. art. 6, § 159 (granting Chancery Courts jurisdiction over "all matters in equity"); Miss. Const. art. 6, § 156 (granting Circuit Courts "original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other Court"). However, Chancery

Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 112 (Miss. 1998) (citing Hall v. Corbin, 478 So. 2d 253 (Miss. 1985)). While the higher Courts have allowed a Chancery Court to retain jurisdiction over cases involving questions of both law and equity, our more recent cases have held that equitable claims are more appropriately brought before a Circuit Court when they are connected to a contractual relationship or other claims tied to questions of law. See *Copiah Med. Assocs'n v. Mississippi Baptist Health Systems*, 898 So.2d 656 (Miss. 2005); *Union National Life Ins. Co. v. Crosby*, 870 So-2d 1175, 1180 (Miss. 2004); *Re/Max Real Estate Partners v. Lindsley*, 840 So.2d 709 (Miss. 2003).

The Court also reasoned in *Crosby* that "it is more appropriate for a Circuit Court to hear equity claims than it is for a chancery Court to hear actions at law since Circuit Courts have general jurisdiction but chancery Courts enjoy only limited jurisdiction," especially in light of the fact that it is in Circuit Court that the constitutional right to a jury trial is preserved. *Crosby* at 1182. "[T]here is no right to trial by jury in chancery Court. *Poole v. Gwin, Lewis & Punches, LLP*, 792 So. 2d 987, 990 (Miss. 2001). "The Constitution and the rules pertaining to jury trial have no effect in Chancery Court unless a particular statute requires a jury. *Id.* While chancery Courts may certainly award legal and punitive damages as long as chancery jurisdiction has attached, damages are traditionally considered a legal remedy. *Tillotson v. Anders*, 551 So. 2d 212, 214 (Miss. 1989). But, "if some doubt exists as to whether a complaint is legal or equitable in nature, that case is better tried in Circuit Court" since Circuit Courts have general, rather than limited, jurisdiction. *Burnette v. Hartford Underwriters Ins. Co.*, 770 So.2d 948, 952 (Miss. 2000).

In a recent Hinds County Chancery Court Order Granting Transfer the Honorable Edward C. Prisock in *Langston v. Patt* et al. Cause Number G2007-1474 granted a transfer based on the

review of the claims in the opinion and finding that "all of them are either legal claims or remedies which are available in circuit court", attached as (Appellant's R.E. 12). *Id.* Particularly, "injunctive relief, is now a remedy available to both circuit and chancery courts." *Id.* Also, at the time of the order a motion for an accounting by the plaintiffs was before the court to which the court noted "can be resolved through the discovery process." *Id.* Counsel realizes that this order has no precedential value and the Court is not bound to follow the reasoning contained therein, but it may be illustrative of the opinion of other judges on this issue.

A. This case contains matters of law that must be decided in Circuit Court and before a jury. Appellees' original complaint is moot since the claims for injunctive relief have been resolved and the sole remaining claim of an accounting can be resolved through discovery in Circuit Court.

In the Order and Opinion denying the Defendant's Motion for Jury Trial, or in the Alternative, to Transfer Action to Circuit Court the Chancery Court the Honorable Patricia Wise in her Order made findings of fact without any basis in proof (Appellant's R.E. 11). As of yet there has been no testimony under oath or affidavits in this case, and yet the factual history presented by the Court suggests that there is no question of the facts as they have been presented. When depositions are taken and affidavits are signed it will become clear that the facts set out by Judge Wise in her opinion are a far cry from the events as they actually occurred.

The case at issue involves matters of equity as well as matters of law, and case law is well established that in such a case, the case should be transferred to the Circuit Court. See *Copiah Med. Assocs'n.* 898 So.2d 656 (Miss. 2005). In the Order the Chancery Court found that based on the original complaint there are only matters of equity. The plaintiff sued in the middle of contract negotiations for the purpose of denying the defendant of his right to a trial by jury.

In *Burnette* we see that "if some doubt exists as to whether a complaint is legal or equitable in nature, that case is better tried in Circuit Court" since Circuit Courts have general, rather than limited, jurisdiction. *Burnette*, 770 So.2d at 952. The persuasive opinion in *Langston v. Patt* (Appellant's R.E. 12) would allow for enough doubt to transfer this case to Circuit Court because it points out that injunctive relief may be brought in both Chancery and Circuit courts and that accounting can be resolved in the discovery process of Circuit Court. Declaratory judgments, are also seen as "jurisdictionally neutral." *Burnette v. Hartford Underwriters Ins. Co.*, 770 So. 2d 948, 952 (Miss. 2000). It would seem that each of the aspects of the Plaintiff's complaint can be heard in Circuit Court.

The Plaintiff brought three claims which include; a declaratory judgment to determine the rights of the Nutt group with respect to the joint venture, injunctive relief and a request for accounting. In his Counterclaim, Defendant seeks actual and punitive damages. Pearson also alleges that the Nutt Group breached their fiduciary duty to him by conducting a settlement without his advice or consent. Pearson also asserts a claim for punitive and/or exemplary damages on the basis that the Plaintiffs/ Counter-Defendants are "so willful and malicious in and in a total and utter disregard for the rights of Pearson." Appellees claims have been resolved and the sole remaining allegations are Pearson's claims for actual and punitive damages.

B. Pearson's right to a trial by jury is inviolate.

Pearson should be allowed to have his day in court before a jury and should not be denied his fundamental right simply because Appellees fraudulently rushed to a court of improper venue (Chancery Court of Madison County) and filed their complaint first. The basis of the dispute between the parties involves matters of law and not equitable claims; thus, the action should be

transferred from the Chancery Court of Hinds County and litigated in the Circuit Court of Hinds County.

Appellees, David Nutt & Associates, et al., filed the present action while the parties were attempting to resolve the dispute and were in serious settlement negotiations. Appellees sole purpose of filing their action in chancery court of Madison County was an attempt to control the litigation through a favorable venue and without the obligation of facing a jury. This case is an example of a race to the Courthouse where the plaintiff filed in both an improper venue and in a Court without the authority to truly address all the issues involved in an attempt to delay and avert the judicial process. If the Order stands the defendant will suffer substantial and irreparable injury to his cause of action, and will have effectively been denied his right to jury trial. The Mississippi Constitution Article 3, § 31 states, "[t]he right of trial by jury shall remain inviolate...in all civil suits tried in the circuit and chancery court...". Because the right to a trial by jury in chancery court is at the discretion of the chancellor and Chacellor Wise has denied Pearson's request for a jury trial, Pearson is thus being denied his Constitutional right to a jury trial. In *Union Nat'l Life Ins. Co. v. Crosby*, 870 So.2d 1175 (Miss. 2004), this Court found that the defendant's right to a jury trial under Miss. Const. Art. 3, § 31, "would be infringed upon if this case were heard in chancery court. *Id.* at 1181. This finding was based on the fact that"[i]n '[c]hancery court, with some few statutory exceptions, the right to jury is purely within the discretion of the chancellor, and if one is empaneled, its findings are totally advisory.' " *Id.* at 1181-82 (quoting *Louisville & Nashville R.R. v. Hasty*, 360 So.2d 925, 927 (Miss.1978)). The *Crosby* Court further reasoned that the public policy of allowing a plaintiff "to choose his or her forum does not outweigh [a defendant's] constitutional right to a jury trial." *Id.* at 1182. {emphasis added}. The basis of the dispute between the parties is a matter of law

and Pearson should not be denied the opportunity to have the fraudulent actions of the Appellees tried by a jury of his peers.

Moreover, Plaintiff/Appellees filed suit in anticipation of the Defendant's suit in Order to choose the Court and venue for the trial. The Defendant's counterclaim is the most substantial of the claims, and the Defendant is forced to bring it in a bench trial because the Plaintiff jumped the gun, severed the negotiation talks, and filed suit in the Court and venue that would look the most favorably on his plight. To allow the Order to stand would hinder the judicial process and provide lopsided scales for one party.

CONCLUSION

It is true that the initial complaint is normally the basis of determining where a case will be heard, but in this case of blatant forum shopping, the defendant appeals in order to be saved from an unfair and unbalanced administration of justice. A court of general jurisdiction will be more likely to adjudicate the entirety of the claims in the most efficient way possible and allow a jury to decide the issues. Public policy dictates that Pearson's Constitutional right to a trial by jury outweighs plaintiff/appellees right to a choice of forum. The defendant prays that the decision of the Hinds County Circuit Court be reversed and Appellant be awarded a jury trial before Honorable Patricia Wise or in the alternative have the case transferred to the Circuit Court of Hinds County.

RESPECTFULLY SUBMITTED, this the 5th day of February, 2009.

MARK L. PEARSON, APPELLANT

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His Attorneys

BY: John N. Satcher II
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CERTIFICATE OF SERVICE

I, Gary D. Thrash/John N. Satcher, II, attorneys for Appellant, do hereby certify that I have this date caused to be mailed, via U. S. Mail, a true and correct copy of the above and foregoing Brief of Appellant and Record Excerpts to the following attorney for the Appellees:

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So certified, this the 5th day of February, 2009.

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