IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAUSE NO. 2009-CA-01349

DR. RICK HOOVER — APPELLANT

VERSUS

DR. ROBERT HOLBERT — APPELLEE

APPELLEE'S BRIEF

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
CIVIL ACTION NO. CO-2008-00527

ORAL ARGUMENT IS NOT REQUESTED

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

DOCKET NO. 2008-00527

DR. ROBERT HOLBERT — PLAINTIFF/ APPELLEE

VERSUS

DR. RICK HOOVER — DEFENDANT/ APPELLANT

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Plaintiff/Appellee, Dr. Robert Holbert, hereby certifies that the following listed persons have an interest in the outcome of this civil action. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Robert Holbert, M.D., Plaintiff/Appellee
2. William T. Reed, Attorney for Robert Holbert, M.D.
3. Rick Hoover, D.O., Defendant/Appellant
4. Kristopher W. Carter, Attorney for Rick Hoover, D.O.
5. Honorable T. Larry Wilson, County Court Judge
6. Honorable Robert P. Krebs, Circuit Court Judge
7. Honorable Kenneth L. Swarthout (deceased), former attorney for Defendant/Appellant
8. Brenda Janz Hoover, former spouse of Defendant/Appellant

Respectfully submitted,

ROBERT HOLBERT, PLAINTIFF/ APPELLEE

By: _____
WILLIAM T. REED, Attorney

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STATEMENT OF THE ISSUES

The Circuit Court upheld the County Court's ruling in favor of Dr. Holbert and granting his Motion for Summary Judgment, finding that the promissory note sued upon was enforceable and implicitly holding that the Asset Purchase Agreement for the sale of Gautier Medical Clinic P.A. and its assets did not supercede the promissory note. The promissory Note was signed by different parties than the Asset Purchase Agreement, and was for remuneration and services, not for property and assets. The promissory note and the Asset Purchase Agreement were separate parts of the same transaction. Gautier Medical Clinic P.A. did not sign the promissory note and Robert Holbert, not Gautier Medical Clinic P.A. owned one of the parcels of real estate.

STATEMENT OF THE CASE AND COURSE OF THE PROCEEDINGS BELOW

The parties are both medical doctors. The Appellee herein, Robert Holbert, owned the stock of Gautier Medical Clinic, P.A., a building, equipment, charts, and accounts receivable and two separate parcels of real estate in Gautier, Mississippi, one titled in the Clinic and the other titled in Robert Holbert. Dr. Holbert decided to sell and Rick Hoover decided to purchase these

assets with the exception of the accounts receivable. The purchase price was $400,000.00. (C.P. 68)

Dr. Holbert received the promissory note for $100,000.00 and $300,000.00 from Dr. Hoover via the bank. (C.P. 69-70)

Dr. Holbert prepared the Note sued upon (R.E. 1) which set forth that the Note was for $100,000.00, (R. 206) due five years from the date of the Note at the rate of 5% interest, and the last paragraph of the Note stated:

> **This note represents a complete contract and does not require any further documentation for payment due.** (C.P. 64)

Rick Hoover, Robert Holbert, Brenda Hoover, and Judy Holbert signed the Note on August 18, 2000, at the medical clinic office in Gautier. (C.P. 64-65) They then traveled to George Murphy's law office in Ocean Springs where Mr. Murphy closed the loan for Dr. Hoover to borrow the remaining money from the bank, and Dr. Hoover individually, and Dr. Holbert individually and on behalf of Gautier Medical Clinic, P.A., (a separate legal entity) executed the documents. (C.P. 64-67) These two signings (Note and other documents) were about one hour apart. (C.P. 78-79)

Dr. Hoover made no payments on the $100,000.00 Note, Dr. Holbert filed suit on the Note on August 16, 2004, a trial was held, and the County Court issued its ruling, and held that the Note was valid and that the Note did not mature and the interest payments did not mature until August 18, 2005. (C.P. 78-79) Dr. Hoover appealed to the Circuit Court, Dr. Holbert cross-

appealed on the interest issue, and the Circuit Court affirmed. (September 25, 2007, Cause No. 2005-00,059(3).) (C.P. 157-158)

Dr. Holbert re-filed suit in County Court (Cause No. CO-2007-21748), Dr. Hoover answered, and both parties filed for Summary Judgment, the Court held a hearing and denied both Motions for Summary Judgment, allowed sixty days for the parties to supplement the record previously made which included the transcript of the original County Court trial (C.P. 59-96) and then set the matter for trial if either party chose, absent which the Court would rule. Neither sought an additional trial setting. Dr. Hoover produced the Affidavit of George Murphy. The Court entered it's Order on October 7, 2008. (C.P. 176-177)

Dr. Hoover appealed to the Circuit Court of Jackson County, oral argument was held, and Judge Krebs on July 27, 2009, entered an order affirming the County Court's decision. (C.P. 244-245)

Dr. Hoover now appeals from that Order.

SUMMARY OF THE ARGUMENT

The decision of the County Court of Jackson County as affirmed by the Circuit Court of Jackson County is supported by substantial evidence, not manifestly wrong, and should be affirmed. The decision of the county court and affirmed by the circuit court was based upon both parties testimony, relevant documents, and briefs of both parties. The granting of the

summary judgment is supported by both the law and the facts and should be affirmed.

ARGUMENT

A previous trial was held in the County Court before the same Judge who ultimately entered summary judgment on behalf of the appellant. This decision affirmed by the Circuit Court specifically found that the Appellee had failed to meet its burden to overturn the County Court's decision. Prior to reaching this conclusion the Circuit Court stated:

> **THE COURT: * * * The Court has (sic) read the briefs and the transcripts of the trial, and having practiced 30 years, and I don't mean to denigrate a profession, but this isn't the first case I've seen where doctors have tried to practice law and set up their business, and I think I'm always amazed at some of the problems they get into. But I have to note that even through the signatures, or the documents occurred - - - the signing of same on the same day, that the Asset Purchase Agreement is clear, and I don't find it unambiguous. I mean, it makes it very clear that these two men entered into a contract for $300,000 to sell the business, and Dr. Hoover signed it, Dr. Holbert signed it in his individual capacity, and his corporate capacity and it sets out with specificity what is being purchased, and that is tangible assets, real property, building, et cetera. The promissory Note, on the other hand, is signed by different signatories, and it is for remuneration and services. Totally different from assets.**
>
> **I find that the appellant has failed to meet the burden, and I'm affirming the decision of the County Court.** (T. 14, 15) (Appellee's R.E. 15-16)

Dr. Hoover's appeal is couched in terms of the Parol Evidence rule and the Court's failure to grant his Motion for Summary Judgment. This argument is without merit, baseless, and must be denied.

In the initial trial, a transcript of which was included as an Exhibit in the County Court, Dr. Holbert introduced the $100,000.00 Note without objection. Dr. Hoover's counsel voir dired Dr. Holbert (C.P. 65-66) and the Note was admitted into evidence (C.P. 67)).

Dr. Hoover then attempted to introduce the Asset Purchase Agreement to which Dr. Holbert objected (C.P. 76-77) on the basis that it was not relevant and not the basis of the $100,000.00 Note. The Court overruled Dr. Holbert's objection and allowed the Asset Purchase Agreement to be admitted into evidence. (C.P. 77)

Dr. Hoover's analysis of the Parol Evidence rule is argued as if the Asset Purchase Agreement was the contract being sued upon. That is not the case.

Both the Promissory Note and the Asset Purchase Agreement are facially valid and contain clauses indicating that they are the sole agreement.

The Asset Purchase Agreement clause which Hoover relies upon and characterizes as an integration clause is found on the next to last page (Page 9 of 10) under the heading "Seller's Right of

Employment", and the first sentence of the paragraph dealing with Holbert's compensation, Holbert being the seller, and then Hoover's attorney, George Murphy, inserted the boiler plate relative to the contract.

There are several fatal flaws to Hoover's argument. The Courts have consistently found documents executed at different times, but as parts of the same transaction, are to be construed together. (C.P. 130)

> * * * Additionally, "under general principles of contract law, separate agreements executed contemporaneously by the *same parties*, for the same purposes, and as a part of the same transaction, are to be construed together." *Doleac v. Real Estate Professionals, LLC*, 911 So.2d 492, 506 (Miss. 2005) (quoting *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) ("although the parties used multiple agreements to delineate their relationship, each agreement was dependant upon the entire transaction... The individual agreements were integral and interrelated parts of the one deal.")). By construing the contracts together, the intent of the parties and the meaning of the two documents must be determined from the entire transaction. That being said, the only logical inference is that the intent of the parties and the meaning of the two documents should not be construed from isolated portions of the contracts. Therefore, the trial court erred in its finding that, since the guaranty *1165 agreement did not contain specific language addressing the payment of attorney's fees, an assessment of attorney's fees against the guarantors was inappropriate. **One South, Inc. v. Hollowell, 963 So.2d 1156, 1164 (Miss. 2007).**

See also: **Crawford v. Butler, 924 So.2d 569, 574 (Miss. App. 2005)** and **Sullivan v. Mounger, 882 So.2d 129, 139, (Miss. 2004).**

Fatal to Dr. Hoover's argument is the fact that the parties signatory to the documents are not the same. The Gautier Medical Clinic, P.A. (a separate legal entity), is not a party to the Promissory Note. Gautier Medical Clinic, P.A., is a party to the Asset Purchase Agreement.

Hoover's Brief (Page 11, footnote 4) is not factually correct. There were different signatories to the promissory note and to the Asset Purchase Agreement.

It is undisputed that the medical clinic owned one parcel of the real property and Robert Holbert owned the other. (C.P. 78-80) Dr. Hoover cannot seriously argue that the Asset Purchase Agreement offered by him at trial as a back door defense to the Promissory Note superceded the Promissory Note when the two contracts have different parties in interest.

Dr. Hoover's recitation of the applicable law concerning contract interpretation, the Parol Evidence rule, and summary judgment are accurate statements of the law but do not apply here.

The Promissory Note sued on is the contract before the Court. (C.P. 137) (Appellee's R. E. 1) It stands on its own and was proved to the satisfaction of the County Court and affirmed by the Circuit Court. (C.P. 244) The standard for this review now is the same as it was at the time of Judge Harkey's Opinion dated September 5, 2007: "The judgment from County Court was rendered after a bench trial was conducted. Under such circumstances this Court is

constrained to the County Court's findings if they are supported by substantial evidence and are not manifestly wrong."

> **The county court is the finder of fact, and we, like the circuit court, are bound by the judgment of the county court if supported by substantial evidence and not manifestly wrong. *Patel v. Telerent Leasing Corp.* 574 So.2d 3, 6 (Miss. 199). Such findings may not be disturbed on appeal provided there is substantial supporting evidence in the trial record. *Duncan v. Dick Moore, Inc.*, 463 So.2d 1094, 1100 (Miss. 1985). CEF Enterprises, Inc. v. Terry BETTS, 838 So.2d 999 (Miss. 2003).**

The Asset Purchase Agreement offered by Hoover over the objection of Holbert should not have been admitted for any purpose because it violates the Parol Evidence rule.

It is basic Mississippi Law that Parol Evidence may not be offered to defeat a Note. If admissible at all Parol Evidence may be admitted to explain a note.

> **In *Busching v. Griffin*, 542 So.2d 860, 865 (Miss. 1989), this Court stated that "That point implicates our Parol Evidence Rule. That rule provides that where a document is incomplete, Parol Evidence is admissible to explain the terms, but, in no event, to contradict them."** Estate of Parker v. Dorchak, 673 So. 2d 1379, citing Busching, supra.

Dr. Holbert objected to the Asset Purchase Agreement being admitted into evidence on the grounds of relevance. The Judge, sitting without a Jury, admitted the Agreement and explained:

> THE COURT: Let me say, as I understand the doctor's testimony, I understand that we're here on this note, but even on direct the testimony was that it is in some way tied into the other part that there was a reduction, there's testimony that there was a $400,000 price that

was reduced by this note. In his opinion it was drawn up to stand on it's own, but he reduced it to the $300,000. It has some relevance, I think. I'll let it in. Exhibit No. 2 for ID only will now be Exhibit No. 2. (C.P. 77)

Dr. Hoover's initial Answer (C.P. 144) in paragraph 3 states:

> **Defendant admits that he signed a document on or about the date alleged, but a copy was not furnished as Exhibit to the Complaint served on him. subsequent to said filing an, on October 6, 2004, Plaintiff's Counsel furnished a copy of the alleged document to counsel for Defendant. Defendant states that said document is ambiguous and the true meaning of the parties is not reflected therein; that the said document was prepared by the Plaintiff, or at his insistence and under his control and, therefore, must be construed against the interests of the Plaintiff. The specification of interest payments does not provide for late penalties or interest. In spite of the allegation in said document, it is not complete as to the transfer of ownership of the real estate situated at the site of the Clinic referred which is not mentioned therein, nor is there any reference to radiological equipment, or other equipment, furnishings and fixtures, accounts receivable, accounts payable, or other assets under the wording contained in the alleged document referred to as Exhibit "A",** ... (C.P. 144)
>
> * * * "[u]nder Mississippi law ... parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it." *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 177 (Miss. 2006). **Bailey v. Kemp, 955 So.2d 777 (Miss. 2007).**

Based upon the County Court's ruling on this issue it is clear that the Court found that the Promissory Note was not superceded by the Asset Purchase Agreement.

The County Court did find the Promissory Note ambiguous as to the interest payment and construed that ambiguity against Dr. Holbert. The Circuit Court Judge's Order Affirming stated:

> Based upon the record before the Court, the promissory note at issue here was drafted by Holbert. The County Court found the issue of [interest] to be ambiguous and properly construed the ambiguity against the drafter of the document. ***Estate of Parker v. Dorchak*, 673 So.2d 1379 (Miss. 1996).** With the issue of interest settled it is clear that the indebtedness in its entirely was not due until August 18, 2005, a date subsequent to the filing of the Complaint. (CP 22,23)

Parker v. Dorchak, supra, also stands for the proposition that since Parol Evidence is a matter of substantive law, the issue can be raised for the first time on appeal under certain circumstances. Dr. Holbert objected contemporaneously, therefore the Asset Purchase Agreement should never have been admitted into evidence and should not be allowed for purposes of contradiction. **Estate of Parker v. Dorchak**, 673 So. 2d 1379, citing Busching, supra.

CONCLUSION

The County and Circuit Courts of Jackson County found and held that the promissory note drafted by Robert Holbert and executed by Rick Hoover was a valid and enforceable promissory note.

It was a separate part of the transaction whereby Dr. Hoover purchased the Gautier Medical Clinic, P.A.

The Gautier Medical Clinic, P. A., was not a party to the promissory note and was not the owner of one of the parcels of real estate that was part of the transaction. One of the parcels was owned by Dr. Holbert and his wife and was not owned by Gautier Medical Clinic, P. A.

Dr. Hoover's attempted reliance on the parole evidence rule to avoid his responsibility and legal obligation under the promissory note has no basis in law or in fact.

The decision of the Circuit Court of Jackson County dated July 27, 2009, should be affirmed because the decision of the County Court of Jackson County in its Order of October 7, 2008, is supported by substantial evidence and is not manifestly wrong.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William T. Reed, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing APPELLEE'S BRIEF to Honorable Kristopher W. Carter, Denham Law Firm, Ltd., Post Office Box 580, Ocean Springs, MS 39566-0580, and to Honorable T. Larry Wilson, County Court Judge, Post Office Box 998, Pascagoula, MS 39568-0998, and to Honorable Robert P. Krebs, Circuit Court Judge, Post Office Box 998. Pascagoula, MS 39568-0998.

This the 29th DAY OF March, 2010.

WILLIAM T. REED