IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01619

DIANE SMITH, R.N. — APPELLANT

V.

WESLEY HEALTH SYSTEM, LLC — APPELLEE

BRIEF OF APPELLEE WESLEY HEALTH SYSTEM, LLC

APPEAL FROM THE CIRCUIT COURT OF LAMAR COUNTY, MISSISSIPPI
THE HONORABLE PRENTISS HARRELL, PRESIDING

ORAL ARGUMENT IS NOT REQUESTED

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WESLEY HEALTH SYSTEM, LLC **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for the Appellee, Wesley Health System, LLC, does hereby certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Diane Smith, R.N., Appellant
2. Frank "Kim" Breese, III and Breese Law Office PLLC, attorney for Appellant
3. Wesley Health System, LLC d/b/a Wesley Medical Center, Appellee
4. Jeffrey A. Walker, attorney for Appellee
5. Erin Patten Lane, attorney for Appellee
6. Butler, Snow, O'Mara, Stevens & Cannada, PLLC, attorneys for Appellee
7. The Honorable Prentiss Harrell, Lamar County Circuit Court Judge

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Attorneys for Appellee Wesley Health System, LLC

STATEMENT REGARDING ORAL ARGUMENT

The law applicable in this case is well settled; the facts in this case are straightforward and undisputed. Because this case does not present a novel legal or factual issue, Wesley does not believe that oral argument is necessary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01619

DIANE SMITH, R.N. APPELLANT

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STATEMENT OF THE ISSUE

Whether – in light of two separate documents signed by Ms. Smith that contained at-will disclaimers – the Circuit Court correctly held that a Recruitment Sign-On Bonus Agreement (that did not limit Wesley's right to discharge Ms. Smith) did not alter Ms. Smith's employment-at-will status.

STATEMENT OF THE CASE

Diane Smith, R.N. was employed by Wesley as a nurse in its Labor and Delivery Unit. When Ms. Smith applied for employment and again when she began employment, she signed at-will disclaimers confirming that she understood her employment could be terminated by Wesley at any time and for any reason. Ms. Smith received a sign-on bonus from Wesley when she was hired; in connection with that bonus, she executed a "Recruitment Sign-On Bonus Agreement" that confirmed she would receive half of the bonus when she started work and the other half if she remained employed for twelve months.

Wesley terminated Ms. Smith's employment when she accepted responsibility for monitoring a patient and then admittedly failed to do so. Now, despite her unequivocal acknowledgment on two separate occasions that her employment could be terminated by Wesley at any time and for any reason, Ms. Smith attempts to recast that Sign-On Bonus Agreement as a

contract of employment for a definite period carrying with it an implied provision that she could be discharged only for cause.

Ms. Smith's Complaint against Wesley alleges wrongful discharge based on her contention that Wesley could only terminate her employment for good cause.[1] Following discovery by both parties, Wesley moved for summary judgment on Ms. Smith's claims.

The lower court granted summary judgment in favor of Wesley on Ms. Smith's wrongful discharge claim.[2] The lower court correctly held that Ms. Smith was an at-will employee and that Wesley could terminate her employment with or without cause. The "Recruitment Sign-On Bonus Agreement" is nothing more and nothing less than what its title suggests – an agreement to pay Ms. Smith a bonus *if* she remained employed for twelve months. The terms of that agreement (which provide for termination for "whatever reason"), combined with Ms. Smith's admitted understanding that she could be discharged at any time for any reason, conclusively establish that neither party intended or understood the Sign-On Bonus Agreement to contractually mandate that Ms. Smith's employment could only be terminated for just cause.

Ms. Smith's attempt to create some new exception to the employment-at-will doctrine in Mississippi should be rejected. Simply put, the facts in this case do not warrant deviating from this Court's well-established precedent. Ms. Smith's argument that a Sign-On Bonus Agreement, which merely sets a compensation goal for an employee, somehow excepts that employee from employment-at-will would result in an exception that swallows the rule.

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[1] Ms. Smith's Complaint asserted additional claims which are not at issue in this appeal.

[2] The lower court granted summary judgment in favor of Wesley on all of Ms. Smith's putative claims. Ms. Smith appeals only the grant of summary judgment with regard to her wrongful discharge claim.

STATEMENT OF THE FACTS

A. Ms. Smith Was An At-Will Employee.

Wesley operates Wesley Medical Center, a hospital in Lamar County, Mississippi. 1 R. 77. Ms. Smith was employed by Wesley as a part-time nurse in its Labor and Delivery Unit from November 28, 2005 through October 6, 2006. 1 R. 77.

Ms. Smith executed two separate documents memorializing her understanding that she was an at-will employee of Wesley. First, Ms. Smith's signed Application for Employment clearly states: "I understand that my employment and compensation can be terminated ***with or without notice at anytime*** at the option of WMC or myself." 2 R. 195; R.E. 3 (emphasis added). Second, the Acknowledgment Card and Receipt for Handbook signed by Ms. Smith also explicitly states:

> . . . NEITHER THIS HANDBOOK NOR ANY PROVISION OF THIS HANDBOOK OR IN OTHER PERSONNEL POLICIES AND PROCEDURES IS AN EMPLOYMENT CONTRACT OR ANY OTHER TYPE OF CONTRACT. . . .
>
> * * *
>
> ALL EMPLOYEES ARE EMPLOYED FOR AN INDEFINITE TERM AND EMPLOYMENT MAY BE TERMINATED WITHOUT CAUSE AT ANY TIME, AT THE WILL OF EITHER THE EMPLOYEE OR THE FACILITY. This status can only be altered by a written contract of employment, which is specific as to all material terms and is signed by both the employee and the Chief Executive Officer of this Facility.

2 R. 170; R.E. 4; 1 R. 78.

B. Wesley Terminated Ms. Smith's Employment Because She Accepted Responsibility For A Patient And Then Admittedly Failed To Carry Through With Monitoring That Patient.

Ms. Smith's employment was terminated on October 6, 2006, for a critical offense – namely, Ms. Smith accepted responsibility for a patient and then admittedly failed to monitor the

patient. 1 R. 78. More specifically, Ashlee Flynt, R.N. asked Ms. Smith to "watch my [patient's] strip." 1 R. 113 (*Smith Deposition* at 80). Ms. Smith understood Flynt's request to mean that there was a fetal monitoring strip to be monitored. 1 R. 125 (*Smith Deposition* at 128). Ms. Smith admittedly accepted responsibility for the patient and then she admittedly failed to monitor the patient. 1 R. 78, 84, 126 (*Smith Deposition* at 129-30). Ms. Smith now claims that she was too busy to accept the responsibility of monitoring the patient in question, but she admits that she did not tell Flynt, the charge nurse on duty or anyone else that she was too busy to monitor the patient in question at the time. 1 R. 117-18 (*Smith Deposition* at 93, 98).

Ms. Smith acknowledges that employees of Wesley who commit a "critical offense" can be terminated. Ms. Smith also admits that among the "critical offenses" for which an employee of Wesley may be terminated are "[a]cts or conduct detrimental to patient care, customer service, or facility operations." 1 R. 112 (*Smith Deposition* at 73). Based upon Ms. Smith's admitted failure to monitor the patient in question, Wesley terminated Ms. Smith's employment. 1 R. 78; 1 R. 102 (*Smith Deposition* at 33–34).

C. Ms. Smith Received A Sign-On Bonus When She Was Hired.

When Ms. Smith was hired, Wesley agreed to pay her a recruitment sign-on bonus. Smith and Wesley entered into a "Recruitment Sign-On Bonus Agreement" that merely memorialized Wesley's agreement to pay Ms. Smith a bonus ($6,000.00, less taxes) if she remained employed for a certain length of time. 1 R. 78; 2 R. 172-73; R.E. 5-6; 1 R. 101 (*Smith Deposition* at 30– 32); 1 R. 102-03 (*Smith Deposition* at 36–38).

The Sign-On Bonus Agreement provides:

- The first payment of the sign on bonus, less taxes, will be paid after the employees [sic] 90th day of employment at Wesley Medical Center. Payment will be in conjunction with the normal payroll cycle of Wesley Medical Center

- The second payment of the sign on bonus, less taxes will be paid after 12 months of employment at Wesley Medical Center. Payment will be in conjunction with the normal payroll cycle of Wesley Medical Center

2 R. 172; R.E. 5 (emphasis in original);1 R. 79.

The Sign-On Bonus Agreement further states:

> 4.1.2 (C). Repayment of bonus. If an employee should terminate **for whatever reason** or change their status of employment to Per Diem (PRN) within their 12-month time frame, then they must repay the sign on bonus to Wesley Medical Center.
>
> * * * * *

2 R. 172; R.E. 5 (emphasis added); 1 R. 79.

Ms. Smith received the first installment of the sign-on bonus. 1 R. 103 (*Smith Deposition* at 37); 1 R. 79. Based upon Ms. Smith's November 28, 2005 date of hire, she had not been employed for one year at the time of her termination on October 6, 2006. 1 R. 103 (*Smith Deposition* at 38). Accordingly, Wesley did not pay Ms. Smith the second installment of her sign-on bonus. 1 R. 80. Ms. Smith did not repay the first installment of her sign-on bonus after her termination. 1 R. 103 (*Smith Deposition* at 39).

SUMMARY OF THE ARGUMENT

Ms. Smith signed two separate documents acknowledging that she understood her employment with Wesley was at-will and could be terminated at any time and for any reason. Ms. Smith now attempts to contort the terms of a Sign-On Bonus Agreement into a contract of employment that mandates Wesley could only terminate her employment for cause. Her attempt to make an end-run around the employment-at-will rule with a simple Sign-On Bonus Agreement fails.

The terms of the Sign-On Bonus Agreement demonstrate that it merely sets a goal for Ms. Smith; remain employed for twelve months and Wesley will pay you a bonus. The terms of

that Agreement, combined with the fact that Wesley included at-will language in two separate documents that Ms. Smith signed, conclusively establish that neither party understood or intended the Sign-On Bonus Agreement to constitute a contract of employment for a definite period providing for discharge only with just cause.

Even if the Sign-On Bonus Agreement were somehow construed as an employment contract for a definite period, that Sign-On Bonus Agreement does not place any restriction on Wesley's right to terminate Ms. Smith's employment. In fact, the only mention of termination within the Sign-On Bonus Agreement references termination "for whatever reason." As a matter of law, then, the Sign-On Bonus Agreement did not restrict Wesley's right to terminate Ms. Smith's employment.

ARGUMENT

I. STANDARD OF REVIEW.

"This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it . . . ." *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26 (Miss. 2003). "Summary judgment in Mississippi is governed by Rule 56 of the Mississippi Rules of Civil Procedure, which clearly and unambiguously provides that summary judgment '*shall* be rendered forthwith . . . [if] there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1274 (Miss. 2007) (emphasis in original).

II. THE TRIAL COURT CORRECTLY HELD THAT MS. SMITH WAS AN AT-WILL EMPLOYEE OF WESLEY.

Despite two separate documents that unambiguously inform Ms. Smith she is an at-will employee and can be discharged at any time and for any reason, Ms. Smith contends that the

Sign-On Bonus Agreement constitutes a contract of employment. The Circuit Court rejected Ms. Smith's argument and held that Ms. Smith was an at-will employee. That holding is manifestly correct and should be affirmed.

A. The Sign-On Bonus Agreement Does Not Constitute A Contract Of Employment, Especially In Light Of Two Separate At-Will Disclaimers That Ms. Smith "Acknowledged" And "Understood."

The "Recruitment Sign-On Bonus Agreement" is nothing more and nothing less than what its title suggests: an agreement that Wesley would pay Ms. Smith a bonus *if* she remained employed for twelve months. Ms. Smith's attempt to recast that Sign-On Bonus Agreement as an employment contract is simply an ineffective attempt to make an end-run around Mississippi's well established, firmly embedded employment-at-will rule.

"Mississippi is an employment-at-will state." *Buchanan*, 852 So. 2d at 26. This law is clear and unambiguous: "an employment contract at will may be terminated by either party with or without justification." *Miranda v. Wesley Health Sys., LLC*, 949 So. 2d 63, 65 (Miss. Ct. App. 2006).

When Ms. Smith applied for employment with Wesley, she signed an Application for Employment that clearly states: "I understand that my employment and compensation can be terminated ***with or without notice at anytime*** at the option of WMC or myself." 2 R. 195; R.E. 3 (emphasis added). When Ms. Smith began her employment, she also signed a separate Acknowledgment Card and Receipt for Handbook that unambiguously states she "UNDERSTAND[S]" that:

> . . . NEITHER THIS HANDBOOK NOR ANY PROVISION OF THIS HANDBOOK OR IN OTHER PERSONNEL POLICIES AND PROCEDURES IS AN EMPLOYMENT CONTRACT OR ANY OTHER TYPE OF CONTRACT. . . .
>
> * * *

> ALL EMPLOYEES ARE EMPLOYED FOR AN INDEFINITE TERM AND EMPLOYMENT MAY BE TERMINATED WITHOUT CAUSE AT ANY TIME, AT THE WILL OF EITHER THE EMPLOYEE OR THE FACILITY. This status can only be altered by a written contract of employment, which is specific as to all material terms and is signed by both the employee and the Chief Executive Officer of this Facility.

2 R. 170; R.E. 4; 1 R. 78.

Simply stated, the at-will disclaimer in the Acknowledgment applies with equal force and effect to the bonus document. There is no evidence in the record that Ms. Smith was a party to a written contract of employment specific as to all material terms (such as job title, job duties and salary) and signed by the Chief Executive Officer of Wesley. Absent such a contract, Ms. Smith's employment could be terminated with or without justification.

Ms. Smith admits that her signature on the Acknowledgment indicates that she understands that she was "employed for an indefinite term" and her "employment may be terminated without cause at any time, at the will of either [Ms. Smith] or [Wesley]," but contends in the same breath that her signature does not mean she *agreed* to these principles. (Appellant's Brief at 8). Ms. Smith relies on mere semantics in an attempt to gain the benefit of a bargain that neither she nor Wesley contemplated or agreed to.

The undisputed fact is that Ms. Smith "unders[tood] that she was "employed for an indefinite term" and her "employment may be terminated without cause at any time, at the will of either [Ms. Smith] or [Wesley]" – and the undisputed fact that Wesley included at-will employment disclaimers in two separate documents that it required Ms. Smith to sign – means that neither Ms. Smith nor Wesley intended the Sign-On Bonus Agreement to constitute a contract of employment for a definite period terminable only for good cause. One of the most basic elements of establishing a contract – a meeting of the minds – did not exist. *See Phelps v. Dana*, 121 Miss. 697, 83 So. 745, 746 (1920) ("The elementary general rule . . . is that the

contract must be specific and distinct in its terms, plain and definite in its meaning, and must show with certainty that the minds of the parties had met and mutually agreed as to all its details upon the offer made upon the one hand, and accepted upon the other."); *see also Dean v. Fed. Home Loan Mortgage Co.*, No. 104CV616, 2006 WL 3802093, at *2 (S.D. Miss. Dec. 20, 2006) (enforcement depends upon proof of meeting of the minds as to essential elements of the contract).

Instead, it is evident that both Ms. Smith and Wesley understood the Sign-On Bonus Agreement to be just that – an agreement to pay Ms. Smith a certain amount of money *if* she remained employed for twelve months. As the Circuit Court recognized, one of the most telling provisions in the Sign-On Bonus Agreement provides that Ms. Smith could be terminated for "***whatever reason***."[3] Ms. Smith contends that this language really means that Wesley would not have to pay the sign-on bonus if Ms. Smith's employment terminated because she "die[s], become[s] disabled, lose[s] her nursing license or [is] terminated for **good cause**." (Appellant's Brief at 9) (emphasis added). However, that is *not what the Sign-On Bonus Agreement says.* In fact, the words "good cause" do not appear in the Sign-On Bonus Agreement. The only language included in the Sign-On Bonus Agreement that addresses termination is clear: "terminate for **whatever reason**." 2 R. 172; R.E 5 (emphasis added).

As a matter of settled Mississippi law, the bonus document's reference in Section 4.1.2(A) to "12 months of employment" does not alter the at-will employment relationship. When the contract is read as a whole, it is abundantly clear that the reference to "12 months of employment" is nothing more than a statement concerning eligibility for the sign-on bonus. The

[3] "4.1.2(c). Repayment of bonus. If an employee should terminate for **whatever reason** or change their status of employment to Per Diem (PRN) within their 12-month timeframe, then they must repay the sign-on bonus to Wesley Medical Center." 2 R. 172; R.E. 5 (emphasis added).

statement does not limit Wesley's right to terminate Ms. Smith's employment for any reason nor does it limit Ms. Smith's right to terminate her own employment for any reason. The statement purely and simply applies to a condition for the payment of the sign-on bonus.

B. Even If The Sign-On Bonus Agreement Were An Employment Contract, The Bonus Agreement Did Not Limit Wesley's Right To Terminate Ms. Smith's Employment And Thus It Was A Contract For At-Will Employment.

Even if the Sign-On Bonus Agreement were a contract with a fixed term of employment, Ms. Smith's breach of contract claim fails because the Sign-On Bonus Agreement does not limit Wesley's right to terminate Ms. Smith's employment. The Sign-On Bonus Agreement could never be more than an *at-will employment contract*. Settled Mississippi law provides that "[a] contract for a stated term removes employment from the at-will doctrine only if there is an enforceable right for the employee to remain for that length of time. The period of time must be definite legally; it must be a promise and not just a goal." *Miranda v. Wesley Health Sys., LLC*, 949 So. 2d 63, 67 (Miss. Ct. App. 2006), *cert. denied*, 949 So. 2d 37 (Miss. 2007).

The Sign-On Bonus Agreement, when read as a whole, makes clear that Ms. Smith could be discharged for "***whatever reason***." 2 R. 172, 197; R.E. 5 (emphasis added). The agreement does **not** say "if an employee is terminated for ***good cause***" – quite the opposite. Thus, the Circuit Court correctly held that even if the Sign-On Bonus Agreement is an enforceable *employment* contract with a definite term (rather than a *bonus* contract setting a goal for Ms. Smith), the terms of that "contract" make clear that Plaintiff was an at-will employee who could be fired for ***whatever reason***. *See, e.g., Shaw v. Burchfield,* 481 So. 2d 247, 253 (Miss. 1985) (despite being contracts for definite terms, contracts provided that no "cause" was required for termination; thus, employee could be discharged for good reason, bad reason or no reason at all). "With an unfettered right to terminate, the contract's length [is] irrelevant." *Miranda v. Wesley Health Sys., LLC*, 949 So. 2d 63, 68 (Miss. Ct. App. 2006) (upholding summary judgment and

treating contract for definite term of one year as an at-will contract where contract set no limit on the reasons for which hospital could terminate physician's employment).

C. Ms. Smith's Argument Regarding An Oral Contract Was Not Raised In The Lower Court. That Argument Must Fail Since Ms. Smith Fails To Advance Any Oral Promise Of Employment.

According to Ms. Smith, if the Sign-On Bonus Agreement itself is not a valid written contract, then the document "memorializes a valid oral agreement." (Appellant's Brief at 10-11). Ms. Smith did not raise this issue in the trial court. It is well settled that "[q]uestions will not be decided on appeal which were not presented to the trial court." *Jones v. State*, 915 So. 2d 511, 513 (Miss. Ct. App. 2005).

In any event, Ms. Smith's argument necessarily fails since *she does not point to any oral representation whatsoever* – much less an oral promise of employment for a definite term. The cases cited by Ms. Smith in support of her "oral contract" argument are distinguishable on their face because they involved some oral promise made to the plaintiff. *See, e.g., Greer v. Crawford Corp.*, 70 So. 2d 69 (1954) (construing an *oral promise* to employee the plaintiff "for the term of one year").

CONCLUSION

The Circuit Court's ruling granting summary judgment in favor of Wesley is manifestly correct and should be affirmed. Ms. Smith failed to raise a genuine issue of material fact to demonstrate that she was anything other than an at-will employee. Her attempt to create some new exception to the employment-at-will rule is simply not supported by the facts in this case. Accordingly, her claim for wrongful discharge fails as a matter of law.

Respectfully submitted, this 17th day of February, 2010.

WESLEY HEALTH SYSTEM, LLC

By: _____

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant Wesley Health System, LLC, does hereby certify that the foregoing Brief of Appellee Wesley Health System, LLC was served this day via United States mail, postage prepaid upon the following:

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SO CERTIFIED, this the 17th day of February, 2010.

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