IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01619

DIANE SMITH, R.N. — APPELLANT

V.

WESLEY HEALTH SYSTEM, LLC — APPELLEE

REPLY BRIEF OF APPELLANT DIANE SMITH, R.N.

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

ORAL ARGUMENT IS REQUESTED

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V.

WESLEY HEALTH SYSTEM, LLC **APPELLEE**

ARGUMENT

A. The "Sign on Bonus Agreement" was a valid employment contract with a fixed term of employment.

Despite Appellee Wesley's assertions to the contrary, the document at the center of this litigation was executed and meets all the requirements for a valid contract under Mississippi law and under common law. There is an offer (of twelve months of employment), an acceptance (of that offer) and consideration (mutual promises to perform). See *Serv. Elec. Supply Co. v. Hazlehurst Lumber Co.,* 932 So.2d 863, 869 (Miss. App. 2006) (citing *Krebs v. Strange,* 419 So.2d 178, 181 (Miss. 1982).

The contract clearly states: "The qualified candidate agrees to 12 months of employment...." R. 88, Section 4.1.2(A). Thus the parties entered into a contract with a fixed term of employment. Under Mississippi law, that fact is determinative that Smith was not an employee-at-will. See *Diamondhead Country v. Montjoy,* 820 So.2d 676 (Miss. App. 2000) (if an employee has a contract and the contract is for a fixed term, then the employer does not have the same right to terminate as it has for an at-will employee; the employer must have good cause to terminate such a contract prior to expiration).

B. The application and acknowledgment form signed by Smith do not override the contract.

Wesley asserts the contract is not valid because Appellant Smith signed an employment application stating that she understood her "employment and compensation can be terminated with or without notice at anytime at the option of WMC or myself," (R.188, 189, 195) and signed an acknowledgment form stating she understood that "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." (R. 196)

The application was signed on November 7, 2005. If Wesley intended to rely upon the application to establish that Smith was hired as an employee-at-will, it should not have entered into the employment contract with Smith some three weeks later on November 28. If the application established a contractual agreement, that agreement was modified by the employment contract entered into three weeks later. It is fundamental that parties to a contract can modify a contract. *Kelso v. McGowan,* 604 So.2d 726, 731 (Miss. 1992) (citing 3 A. Corbin, Contracts § 574 at 373-75 [1960]) (it is well established that contracts may be modified by a subsequent agreement between the parties).

The acknowledgment form signed by Smith was merely an acknowledgment that she received the employee handbook and the statement regarding at-will employment. She did not "agree" to the terms of the acknowledgment card presented to her. She merely "acknowleged" that she understood it. Without agreement there was no contract. Even if there were, the "agreement" would have been modified by the employment contract.

C. The words "if an employee should terminate for whatever reason" in the contract do not create an at-will employment relationship.

Wesley continues to argue that somehow paragraph 4.1.2(C) of the contract provides the right to fire Smith for any reason and thereby renders her an at-will employee. But that paragraph, entitled "Repayment of bonus" is simply a provision that if Smith does not complete her 12-month employment contract, she is required to repay the bonus. The words "for whatever reason" mean simply that if the contract is not fulfilled, regardless of the reason, the bonus must be repaid. As Smith pointed out in her brief, employment may be terminated for any number of reasons including death, disability, loss of life or termination for cause, any of which would trigger this provision of the contract.

At best, the provisions of this paragraph are ambiguous, in which case they must be interpreted against Wesley, the drafter of the language. *Wade v. Selby*, 722 So. 2d. 698, 701 (Miss. 1998) (citing *Estate of Parker v. Dorchak*, 673 So.2d 1379, 1382 [Miss. 1996]) (any ambiguities in the contract will be construed against the party who drafted it).

In addition, as pointed out by Smith in her brief, Wesley was perfectly capable of drafting clear, unambiguous language in an employment contract that would create an at-will employment relationship. See the case cited therein: *Miranda v. Wesley Health*, 949 So.2d 63 (Miss. App 2006).

D. Contrary to Wesley's assertions in its brief, Smith did raise the issue of oral contracts in the lower court.

Smith, in a supplemental brief filed with Judge Harrell and, later, filed into the record, pointed out the oral contract cases referred to in Smith's appellee brief. (R 384) The significance of these cases is that at-will employment, in Mississippi, may be overcome by a simple oral

contract whereas in the case at hand there is a clear unambiguous written contract which should make Smith's case much stronger that the case of the plaintiffs in the cases cited.

See *Rosen v. Gulf Shores, Inc.*, 610 So.2d 366 (Miss. 1992) (a one-year term might be inferred from a letter from the employer that offered an annual salary, required the new employee to give up his existing job and move and provided for payment of moving expenses); *Greer v. Crawford Corp.*, 220 Miss. 97, 70 So.2d 69 (1964) (employee was not an employee at will where there was an oral contract to employ the plaintiff "for another term of one year beginning June 1, 1949, and ending May 31, 1950," with the understanding that if said manufacturing plant was efficiently managed and continued in operation that he would then be employed from year to year thereafter....); *Lee v. Hampton*, 79 Miss. 321, 30 So. 721 (1901) (a binding employment agreement with a fixed term existed where plaintiff had been employed as manager of a plantation for eight years under year-to-year oral contracts and asked if he could be manager for 1900 to which the owner replied, "You can stay if you wish").

E. The facts and merits of Wesley's termination of Smith is not an issue in this appeal.

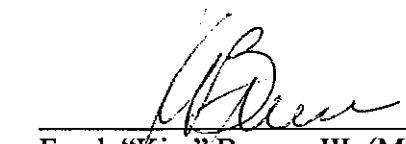
Wesley included in its brief its argument as to why Smith should have been fired for cause. Since the reason for the discharge is not an issue in this appeal, this argument could have been inserted only to impugn Smith and make her an unsympathetic appellant in the eyes of the justices of this Court.

In fact, Smith asserts that she has a strong case as to why she was unjustly discharged and was made a scapegoat by Wesley for the wrongdoings of other, permanent employees of Wesley. Smith is confident that if this Court overturns the lower court's summary judgment and returns the case for trial, Smith will prevail on the merits.

CONCLUSION

The trial court's granting of summary judgment was in error. A number of genuine issues of material fact exist rendering summary judgment inappropriate. This Court should overturn the lower court's ruling and return the case to that court for trial on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Frank "Kim" Breese, III, attorney for Appellant, do hereby certify that I have served a copy of the foregoing document by U. S. Mail, postage prepaid, upon the following attorneys of record:

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The Honorable Prentiss Harrell
Circuit Court of Lamar County
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This the 5th day of March, 2010.

FRANK "KIM" BREESE, III