IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01619

DIANE SMITH, R.N. — APPELLANT

V.

WESLEY HEALTH SYSTEM, LLC — APPELLEE

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

Frank "Kim" Breese, III, (MB[redacted]
BREESE LAW OFFICE, PLLC
800 Woodlands Pkwy., Suite 103
Ridgeland, MS 39157
601-359-3339
Fax 601-487-6942

Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01619

DIANE SMITH, R.N. **APPELLANT**

V.

WESLEY HEALTH SYSTEM, LLC **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for the Appellant, Diane Smith, R.N., 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 Walker, attorney for Appellee
5. Erin Patten Lane, attorney for Appellee
6. Law firm of Butler, Snow, O'Mara, Stevens & Cannada, attorneys for Appellee
7. The Honorable Prentiss Harrell, Lamar County Circuit Court Judge

Frank "Kim" Breese, III
Attorney for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. The facts and issues in the case are such that oral argument would be helpful to the Justices of this Court in understanding those facts and issues and would thereby aid them in rendering their decision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01619

DIANE SMITH, R.N. APPELLANT

V.

WESLEY HEALTH SYSTEM, LLC APPELLEE

STATEMENT OF THE ISSUE

THE TRIAL COURT ERRED IN RENDERING SUMMARY JUDGMENT AND FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER AN EMPLOYMENT CONTRACT EXISTED BETWEEN THE PARTIES AND THAT APPELLANT, THEREFORE, WAS AN EMPLOYEE AT WILL.

STATEMENT OF THE CASE

Procedural history

This case is an appeal from a summary judgment issued by Judge Prentiss Harrell of the Circuit Court of Lamar County. Diane Smith, R.N. ("Smith") filed suit in that court on September 27, 2007 alleging breach of an employment contract by the defendant, Wesley Health System, LLC d/b/a Wesley Medical Center ("Wesley" or "the hospital"). Smith claimed Wesley breached the contract by terminating her without cause, by failing to fulfill its duty of good faith and fair dealing, by acting in bad faith and by failing to pay a contractual bonus pursuant to terms of the contract. She also alleged that Wesley had defamed her.

Wesley filed its motion for summary judgment December 31, 2008 based upon multiple grounds. One of those grounds was that Smith was an employee at will and that, under Mississippi law, she could be terminated for any reason or for no reason. As to the defamation,

Smith agreed to not contest summary judgment on any of the defamation issues raised in her complaint except for alleged untrue statements made by Wesley to the Mississippi Board of Nursing. Wesley took the position these statements were subject to a qualified privilege and that, therefore, there could be no liability for defamation.

No hearings were had on the summary judgment motion. Instead, counsel met with Judge Harrell in chambers twice to discuss the case. He then communicated to counsel that he was going to rule for Wesley and asked counsel for Wesley to prepare an order to that effect. Counsel and Judge Harrell then had a conference call in which counsel for Smith asked for clarification as to the grounds for the ruling. In that conversation, Judge Harrell said he found there was no valid employment contract and that Smith was therefore an employee at will and that other issues regarding her termination were moot. Counsel and Judge Harrell had a subsequent conference call in which counsel asked for clarification of the defamation issue. Judge Harrell's law clerk later sent an email to counsel stating that Judge Harrell found that communication with the Mississippi Board of Nursing was privileged and that he was ruling in favor of Wesley on that ground also. Counsel for Wesley then prepared an order for the judge's signature. Counsel for Smith objected to the proposed order on the grounds it was too broad and went beyond the judge's ruling. There was no further discussion, and Judge Harrell signed the order, which counsel had not agreed to as to form, on August 31, 2009. It was entered on September 4, 2009.

Smith appeals on the ground that Judge Harrell erred in his finding that Smith was an employee at will. Smith does not appeal the finding that there was no defamation. If this Court finds that there is a genuine issue of material fact as to whether Smith had a valid employment contract for a fixed term, then the summary judgment should be overturned and the case returned

to the circuit court for disposition. If the Court determines there is no such genuine issue of material fact and that Smith was, in fact, an employee at will, then summary judgment should be upheld.

Facts

Appellant Diane Smith, R.N. is a registered nurse. In November 2005, she began working for Wesley as a nurse. She went to work pursuant to a program the hospital had put into effect to recruit nurses. Under the program, nurses who worked for the hospital were encouraged to recruit new nurses to work for one-year assignments. If the recruited nurse was hired, both the recruiting nurse and the recruited nurse would receive bonuses after the new nurse worked six months and additional bonuses if the new nurse worked the next six months. Appellant was recruited as a new nurse pursuant to this program.

On November 28, 2005, the hospital presented Smith with a document to sign as part of the hiring process. The document was entitled "Recruitment Sign on Bonus." R. 88. Section 4.11 of the "Recruitment Sign on Bonus" document states: "Any qualified candidate who accepts a sign on bonus at Wesley Medical Center agrees to the terms and conditions of the sign on bonus agreement." R 88, Section 4.1.1. (emphasis supplied.) Section 4.1.2 states: "The qualified candidate agrees to 12 months of employment...." R 88, Section 4.1.2. The document goes on to set out the terms of employment, including payment of the bonus. The document is signed by Smith and erroneously dated November 28, 2006 instead of 2005. R. 88.

On October 6, 2006, ten months after Smith began working for Wesley, she was fired. Wesley claimed that Smith, while working on the labor and delivery unit of the hospital on September 26, 2006, had accepted responsibility for another nurse's patient when that nurse left the unit and that Smith failed to properly monitor that patient. R. 53. Smith denied she had

accepted responsibility or had in any way acted improperly. She invoked the hospital's internal grievance procedure after which the discharge was upheld. R. 87.

Smith filed suit against the hospital on September 25, 2007 claiming she was wrongfully discharged when the hospital breached the employment contract by terminating her without cause, by failing to fulfill its duty of good faith and fair dealing, by acting in bad faith and by failing to pay the contractual bonus called for in the contract. R. 7. Smith sought specific performance, compensatory damages, punitive damages and attorney fees and costs. R.8,9.

In addition, Smith claimed defamation by the hospital. R. 7,8. Judge Harrell, as part of the summary judgment proceedings, found that any alleged defamatory statements were subject to a qualified privileged. That finding by the trial court is not being appealed.

On December 31, 2008, Wesley filed a motion for summary judgment claiming "no material fact exists as to any of Smith's claims" and that Wesley "is entitled to judgment on each of Smith's claims as a matter of law." R 53. As part of its motion, Wesley asserted that "(a)t all times, Smith was an at-will employee of Wesley." R72.

In her response, Smith asserted she was not an employee at-will, but was working subject to a valid employment contract with a fixed term. R. 202-205. She cited the "Recruitment Sign on Bonus" and asserted it had all the necessary elements of a contract – offer, acceptance and consideration. In addition it was for a specific term – one year. Smith's assertion was that because she was working subject to a valid employment contract with a fixed term of employment, she was not an employee at-will and could be fired only for good cause.

Judge Harrell of the Lamar County Circuit Court ruled that there was no genuine issue of material fact as to whether or not a valid contract, as claimed by Smith, did, in fact, exist and that she was thereby an at-will employee. R 358-360. The sole issue before this Court, therefore, is

whether Smith was an at-will employee. If so, the summary judgment must be upheld. If not, the summary judgment must be overturned and the case returned to the circuit court for disposition.

SUMMARY OF THE ARGUMENT

Smith asserts the document (the Recruitment Sign on Bonus, R. 88) signed by Smith on November 28, 2005 was either a valid written contract of employment with a fixed term or, in the alternative, a memorialization of a valid oral contract of employment with a fixed term. She further asserts that because she was working subject to a valid employment contract with a fixed term, she was not an at-will employee and could be fired only for cause.

She argues that a genuine material issue of fact exists as to whether such a contract did, in fact, exist; and, therefore, summary judgment was not warranted.

ARGUMENT

Summary Judgment Standard

"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....*" *Glover ex rel. Glover v. Jackson State University*, 968 So.2d 1267, 1274 (Miss. 2007) (emphasis supplied).

At-will Employee

Mississippi law is clear that if an employee has no employment contract or has a contract with no fixed term, that employee is an employee at-will and may be terminated for good cause, bad cause or no cause at all. *Perry v. Sears Roebuck & Co.,* 508 So.2d 1096 (Miss. 1987). But if an employee has a contract, and the contract is for a fixed term, then the employer does not have the same rights to terminate as it has for an at-will employee. The employer must have

good cause to terminate such a contract prior to expiration. *Diamondhead Country v. Montjoy,* 820 So.2d 676 (Miss. App. 2000).

Hence, if Smith had an employment contract with a fixed term, she is not an employ at-will and may be terminated only with good cause.

Contract

A valid, enforceable contract requires an offer, acceptance of the offer and consideration. *Serv. Elec. Supply Co. v. Hazlehurst Lumber Co.,* 932 So.2d 863, 869 (Miss Ct. App. 2006) (citing *Krebs v. Strange,* 419 So.2d 178, 181 (Miss. 1982). In this case, there was an offer by Wesley (of employment for one year), an acceptance of that offer by Smith and consideration (promise by Smith to work and promise by Wesley to pay, among other consideration).

The contract was in the form of a written agreement dated November 28, 2005 (incorrectly dated by Smith as November 28, 2006). The heading on that document was "Recruitment Sign on Bonus." It was drafted by Wesley and given to Smith to sign at the time she began her employment. The document, in the body, was termed a "sign on bonus agreement." R. 88., Section 4.1.1 It is obvious that Wesley, the drafter of the document, considered this document to be a contract.

The contract also contained a fixed term of employment: "The qualified candidate agrees to 12 months of employment...." R. 88, Section 4.1.2(A).

If there was a contract, as asserted by Smith, with a fixed term of employment (12 months), Smith is not an employee at-will under Mississippi law.

Wesley denies there was an employment contract and advances several arguments for that denial.

(1) Wesley points to Smith's application for employment. On the employment form there is language that states: "I understand that my employment and compensation can be terminated with or without notice at anytime at the option of WMC or myself." R.188, 189, 195. Wesley relies on this language to show that Smith was an at-will employee. The application was signed by Smith on November 7, 2005. R. 195. The Bonus Sign on Agreement was signed on November 28, 2005. So, even if the application constituted an agreement between the parties that Smith would be an at-will employee, that "agreement" was modified by the subsequent agreement 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).

(2) Wesley also points to an acknowledgement card signed by Smith when she received Wesley's employee handbook. That card includes the following provision: "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." R. 189, 196. Then, above the employee signature line, the form states: "I HAVE READ AND UNDERSTAND THE ABOVE STATEMENT. I AGREE TO READ THE EMPLOYEE HANDBOOK WHICH I HEREBY ACKNOWLEDGE HAVING RECEIVED." Directly beneath this statement, Smith signed and dated the form. R. 196.

Wesley seems to take the untenable position that it can enter into an employment contract, and then sometime the same day present the employee with an acknowledgement card that says the contract is no good because it isn't signed by the chief executive officer. In addition, Smith points out that she did not agree to this provision regarding employment contracts. By her signature she merely acknowledged that she understands the statement, not that she agrees to its terms. She also acknowledges receiving the handbook, and she agrees to read it. R. 196.

Wesley's position that the signing of such an acknowledgement card somehow nullifies the contract signed the same day flies in the face of well established principles of contract interpretation.

(3) Wesley argues that the Recruitment Sign on Bonus agreement merely enumerates the "guidelines for payment and repayment of the sign on bonus at Wesley Medical Center." R. 189. Wesley goes on to argue that the agreement says that, in order to qualify for the bonus, Smith had to be employed for twelve months and that such requirement does not translate into a right to remain employed for twelve months. R. 189. But Wesley seems to ignore the clear language of the agreement itself that states: "The qualified candidate agrees to 12 months of employment at Wesley Medical Center...." R. 88. What clearer language could there be that this agreement is for a fixed term of 12 months.

(4) Wesley argues finally that the Recruitment Sign on Bonus Contract, when read as a whole, means that Smith could be fired for "whatever reason."

> 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. R. 189, 88.

Wesley asserts that this contract language somehow provides that Wesley may fire Smith for any reason and that she, therefore, is an employee at-will.

Smith argues that this language merely states that she must repay her bonus if her employment is terminated for any reason. Employment could be terminated for any number of reasons for any employee who is not at-will. For example, she could die, become disabled, lose her nursing license or be terminated for good cause. It is a stretch of contract interpretation and simple logic to argue that this language gives Wesley the right to terminate Smith for any reason.

If Wesley, the drafter of the contract, wanted termination language that gave it the right to terminate for any reason, it certainly knew how to draft such language. In a 2003 Mississippi Court of Appeals case, the court reviewed another case in which Wesley terminated an employee with an employment contract that had been drafted by Wesley. In that case, *Miranda v. Wesley Health,* 949 So. 2d 63 (Miss. App 2006), the court found the employee, a physician, was in fact an employee at-will because his contract stated:

> 3.2 Termination Without Cause Either party may terminate Physician's employment hereunder, without cause, at any time upon sixty (60) days prior written notice to the other party.
>
> 3.3 Termination by Employer Employer may terminate Physician's employment hereunder at any time for "cause." In the event Physician is terminated for cause, termination shall be effective immediately upon notification by employer. Employer shall have the sole discretion in determining if cause exists. Cause includes, but is not limited to, the following: ....
>
> (Fourteen examples of cause follow.)

Id, at p. 64.

The Court of Appeals affirmed summary judgment against the employee because of the above-cited contract language. Because the contract language clearly gave Wesley the right to

terminate the employee at any time for cause with the employer having the sole discretion to determine cause, the contract was to be treated as an at-will contract.

In the present case, there was no similar language (or any other termination language) in the agreement. Wesley, the party drafting the contract, could have easily inserted the same contract sections that were in the physician's agreement but either chose not to do so or failed to do so. In either case, Smith's contract provides no right for Wesley to terminate for any reason and is for a fixed term and therefore not to be treated as an at-will contract as asserted by Wesley.

In addition, the contract language may be considered ambiguous. If so, it should be interpreted against Wesley, the drafter. *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).

Oral Contract

If it were determined, for any reason, that the Recruitment Sign on Bonus agreement itself is not a valid written contract, Smith asserts that the document, at the least, memorializes a valid oral agreement.

In a number of Mississippi cases, the Supreme Court has found there to be an enforceable employment contract with a fixed term even where there was no written document or any formal contract document. *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.*, 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,

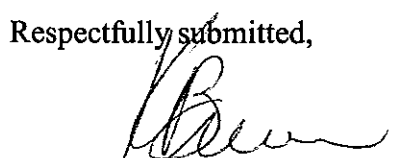
1949, and ending May 31, 1950, with the understanding that if said manufacturing plant was efficiently managed and continued in operation that he would then be employed from year to year thereafter....); *Lee v. Hampton*, 30 So. 721 (1901) (a binding employment agreement with a fixed term existed where 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.")

In the current case, the argument for a fixed-term employment contract is even stronger than the cited cases because not only were all the elements of the contract in place, but there was also a document memorializing the agreement.

CONCLUSION

If Smith was working under a valid employment contract with a fixed term and there was not contract language giving Wesley the right to terminate for any reason, she was not an employee at-will and could be fired only for good cause. Clearly, there are numerous genuine issues of material fact as to whether or not such a contract was in effect. Those issues include whether there was an offer, an acceptance, consideration, a fixed term and language giving Wesley the right to terminate her employment for any reason. The lower court erred in finding no genuine issue of material fact existed and entering summary judgment for Wesley. The summary judgment should be reversed and the case returned to the circuit court for disposition.

Respectfully submitted,



Frank "Kim" Breese, III
Attorney for Appellant Diane Smith, R.N.

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:

Jeffrey A. Walker
Erin Patten Lane
Butler Snow
P.O. Box 6010
Ridgeland, MS 39158-6010

This the 19th day of January, 2010.

FRANK "KIM" BREESE, III