IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-IA-00869-SCT

BAPTIST MEMORIAL HOSPITAL-GOLDEN TRIANGLE, INC. — **PLAINTIFF-PETITIONER**

V.

GEORGE V. SMITH, M.D. — **DEFENDANT-RESPONDENT**

BRIEF OF APPELLEE, GEORGE V. SMITH, M.D.

Respectfully submitted,

Dewitt T. Hicks, Jr.
Mississippi State Bar No[redacted]

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George V. Smith, M.D.

Oral argument is NOT requested.

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CERTIFICATE OF INTERESTED PERSONS

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

1. George V. Smith, M.D., Appellee;
2. P. Nelson Smith, Jr., Attorney for Appellee;
3. Dewitt T. Hicks, Jr., Attorney for Appellee
4. Hicks & Smith, PLLC, Attorneys for Appellee;
5. Baptist Memorial Hospital, Inc. ("BMHGT"), a Mississippi not-for-profit hospital corporation, Appellant;
6. Michael F. Rafferty., Attorney for Appellant;
7. Harris, Shelton, Harnover, Walsh, PLLC, Attorneys for Appellant; and
8. Judge James T. Kitchens, Jr., 16th District Circuit Court Judge.

This the 26th day of January, 2010.

P. NELSON SMITH, JR, MSB #[redacted]

DEWITT T. HICKS, JR. MSB[redacted]

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STATEMENT OF THE CASE

Plaintiff filed an action on March 26, 2004, alleging a breach of contract by the Defendant. The Defendant answered on September 13, 2004 asserting affirmative defenses in the claim against the Plaintiff. Within the answer under the heading "Affirmative Defenses" the Defendant alleged, inter alia, that the documents which Baptist has asserted were the controlling documents were the product of fraud and coercion upon the Defendant and therefore void as a matter of law and could not be enforced. Further, the Defendant also alleged that the Plaintiff coerced the Defendant into signing the alleged documents. Finally, the Defendant asked the court to award him attorney's fees and any and all other relief by virtue of Baptist's fraud and coercion. Thereafter, only limited written discovery was conducted between the parties. On November 18, 2008, the Defendant filed a motion for leave to file a counter-claim to basically put meat on the bones of his claims and allegations and prayed for relief made in the original answer. There had been no depositions by the time a hearing was held on the motion. There was no trial date set on this matter at the time of the hearing of this case. To date, there is no trial date set on this matter. Baptist asserted through its counsel at the hearing that it has been well aware of Dr. Smith's position against Baptist since the filing of Dr. Smith's answer. Thus there was no surprise or prejudice for Baptist that Dr. Smith sought to pursue his claims against Baptist. The hearing on Dr. Smith's Motion of Leave to file a counter-claim was held on March 2, 2009. Afterwards, the Court directed the parties to submit

proposed findings of fact and conclusions of law (T.T. 16); (RE 73-78). No where in Baptist's proposed finding of fact and in no pleading since then has the Plaintiff addressed that issue because it is a death blow to them. The trial Court granted Dr. Smith's motion. Baptist filed a petition for the interlocutory appeal on June 1, 2009, which this Court granted. Significant, factual issues exist between the Plaintiff's representation as to the occurrences and what Dr. Smith will show actually happened. Baptist has been aware, since the filing of Dr. Smith's Answer of Dr. Smith's allegations and claims. Thus there has been no surprise or prejudice to Baptist. There also could not be any prejudice because discovery is ongoing and trial has not been scheduled. Baptist filed its *Notice Of Appeal* on July 16, 2009.

STATEMENT OF FACTS

What transpired between the parties constitutes hotly contested facts. Dr. Smith contends and Baptist has admitted that he was forced and coerced into signing the second contract or settlement agreement. What basically happened is Baptist lured him to Columbus from Grenada, Mississippi, through contacts, and contracts proposed and prepared by Baptist. In 2001 Baptist Hospital through its agents, Dean Griffith and Anita Murray, contacted Dr. Smith and induced him to come to Columbus. Baptist was eager to complete the process so they could have Dr. Smith on board by July 1, 2001. Baptist represented that there would be no problems. The original contract "agreed" to between the parties was duly executed by the parties. Dr. Smith closed his successful practice in Grenada, Mississippi, and made arrangements to, and did move to Columbus, Mississippi. Upon arrival, Mr. Griffith, on behalf of Baptist advised the Baptist could not now afford the existing executed contract which was in the amount of approximately $400,000.00 in favor of Dr. Smith, due to exhaustion of recruiting funds. Griffith then stated that Dr. Smith would either have to sign a new contract or sue over the first contract. This was put forth to Dr. Smith in an animated and aggressive manner. Though requested by Dr. Smith, Dean Griffith could not produce

a copy of the first executed contract during this discussion. The first contract, upon review, clearly states that the first contract is not voidable or cancellable by Baptist at any time without cause. The second agreement states that Baptist could cancel without cause. Dr. Smith was faced the prospect of being unemployed having closed his practice in Grenada and moved to Columbus based upon the first contract signed by the parties. Because of the coercion by Baptist, Dr. Smith was forced to sign the new contract. Then mal-practice premiums sky rocketed. The original contract, the $400,000.00 plus contract, would have allowed Dr. Smith some freedom of moving dollars around to re-allocate funds to pay mal-practice premiums and expenses. However, at the time, due to the fraudulent document, this was not possible, and Dr. Smith was faced with the prospect of again being unemployed. In violation of the agreements between Baptist and Smith, Baptist set out on a course of conduct to try and terminate Dr. Smith. Ultimately, Dr. Smith was illegally and improperly terminated by Baptist. However, none of that would have been possible had not Baptist forced and coerced Smith into signing the second settlement agreement. Why would Baptist require Smith to sign a settlement agreement in which they allege Smith agreed to release and discharge any and all claims arising out of or relating to the physician agreement, unless Baptist knew that it was in the wrong and wanted to avoid claims based upon its coercion. Prior to litigation Baptist was well aware that Dr. Smith had a viable claim of fraud and coercion. What it boils down to is that Baptist lured Dr. Smith from Grenada, with the $400,000.00 contract. However, upon his closing the practice and moving to Columbus Baptist then performs the old "bait and switch" routine saying, "well, we no longer have that contract but here is the other one. Sign it or be unemployed." Faced with that prospect, Dr. Smith had no choice but to sign it. That is the claim which Baptist tried to terminate in its coerced settlement agreement and is the claim Baptist, through its counsel, admitted at its hearing on the motion at issues that it was fully aware of.

SUMMARY OF ARGUMENT

Baptist has acknowledged the claims of Dr. Smith and has conducted discovery and depositions in defense of the counter-claim asserted against it. Baptist has had full knowledge Smith asserted claims against Baptist by virtue of Smith's Answer and the claim stated therein. Baptist has not shown any actual prejudice it would suffer by allowing any amending of the Answer, and indeed, asserts it doesn't have to show such prejudice. The substance of a pleading is what controls, not its mere form. Technical pleading requirements have long since been abolished and amendments are freely given. Baptist has been put on fair notice of Smith's intent to pursue a claim against it.

ARGUMENT

Whether or not the substance and content of the pleading control over the form of a pleading, when there has been no showing of actual prejudice by the opposite party an amendment of a pleading has been freely allowed under the Mississippi Rules of Civil Procedure and Mississippi case law.

Neither in its argument nor in any filed petition in opposition to the motion for leave to file the counter-claim, nor even in the petition for interlocutory appeal nor in its appellate brief, has Baptist raised any objection based on actual prejudice. Baptist candidly asserted at the hearing and has asserted all along that it has been well aware of Dr. Smith's allegations and claims since the filing of the answer. Thus, there was no surprise or prejudice to Baptist that Smith sought to pursue his counter-claim. There has not and could not be any prejudice because discovery is ongoing and no trial date has been scheduled.

Rule 15 in Mississippi Rules of Civil Procedure states, *inter alia*, that whenever a claim or defense to be asserted in an amended pleading arose out of a conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment dates back to the date of the original pleading. *See Rule 15 of the Mississippi Rules of Civil Procedure.* The Trial Court, as

is evident through its granting of the motion for leave to amend, believed that a counter-claim, in substance, though perhaps not in exact form, was set forth or was attempted to be set forth in the original pleadings. (RE 47-48).

Mississippi law is well established that amendments are to be freely given when justice requires, and that such granting of amendments is a mandate that must be heeded. *Moeller v. American Guaranty and Liability Insurance Company*, 812 So.2d 953 (Miss. 2002); *Fletcher v. Lyles*, 999 So.2d 1271 (Miss. 2009); *Walker v. Gallagher*; 926 So.2d 890 (Miss. 2006); *Poindexter v. Southern United Fire Insurance Company*, 838 So.2d 964 (Miss 2003); *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008); *Webb V. Braswell*, 930 So.2d 387 (Miss. 2006).

The mere fact that an opposing party will be put to the trouble of moving to dismiss as Baptist has complained that it would have to do, does not rise the level of actual prejudice discussed in the above cases. See also *Poindexter v. Southern United Fire Insurance Company*, 828 So.2d 964 (Miss. 2003).

In *Wal-Mart Supercenter v. Long*, 852 So.2d 568 (Miss. 2003), the county court was determined to have properly grant a leave to amend as Wal-Mart did not show its ability to defend was hindered. In *Wal-Mart*, Wal-mart arguably lost its right to seek removal to federal court. Id. The Court there stated that even the loss of the right to seek removal did not cause Wal-Mart to suffer actual prejudice. Id. No where in any of the briefs or in any filings at the trial court level has Baptist shown how its ability to defend would be hindered. That is because it cannot show prejudice since it was well aware of the claims of Dr. Smith set forth in his answer. Again, Baptist has admitted to the trial court that it was well aware of Dr. Smith's position and allegations since "day one". Thus, there can be no prejudice to Baptist.

This court has held that no technical form of pleadings or motions is required and that a party can advance alternative or inconsistent claims. *Jordan v. Wilson*, 5 So.3d 442 (Miss. 2008). The

Court of Appeals cited the 5th Circuit concerning the relaxed pleadings requirements finding that the "function of a claimant under the Federal Rules is to give [a party] fair notice...and on the grounds upon which "the claim or party "relies." *Doss v. South Central Bell Telephone Company*, 834 F.2d 421 (5th Cir. 1987). No question here that Baptist has had notice of Dr. Smith's counter-claim and the grounds upon which he asserts that claim. Again, at the risk of sounding redundant, Baptist has admitted on the record, and off, that it was well aware of Dr. Smith's position of claims since day one. (T.T. 20). As the Court of Appeals stated in *Jordan*, 5 So.3d 442 (Miss. 2008), the simple language there was sufficient to provide a party with fair notice of a party's claims and the intent to prove certain claims. Id. Here, Baptist acknowledges that it had fair notice that Smith intended to prove certain claims against it and was well aware of the basis of Smith's assertions or claims against Baptist. It has even conducted discovery and depositions in defense of the counter-claim.

In *Jordan*, Court of Appeals also found that although a Plaintiff did not specifically refer to certain claims, that such causes of action were clearly implied in the complaint. Id. Here, all the parties concur that from day one Smith, if not specifically, clearly implicitly asserted the counter-claim against Baptist in his answer. Baptist had "fair notice" from the Defendant of the basis of any claims against it. Id. If Baptist had wished to file a motion to dismiss based on the statute of limitations, it certainly could have done so. However, it never filed or pursued any type of motion based on statute of limitations. What it has done is defend against the counter-claim.

No counter-claim was omitted when Dr. Smith filed his answer. Under the cases cited herein including the *Jordan* case, *supra*, Smith set forth a claim against Baptist in his answer. Mississippi jurisprudence has stated that pleadings in court shall be treated with great liberality with a view to bring the issues and disputes between the parties to trial on the merits. The substance of the cause of action as stated by the writings lodged to the court should be looked to, not the form. *Town v. Lumpkin & Son*, 114 Miss. 693, 75 So. 546 (Miss 1917). In subsequent decisions this proposition

has always been upheld, that is mere appearance and external form are of secondary consideration and the Court is to deal with actual substance, so as not to permit a mere technicality to conceal the real position of the parties or any mere form to divert the attention of the Court away from the actual merits of the cause. *Gardner v. State of Mississippi*, 125 So.2d 730 (Miss. 1960). In *Jimmy Lee Shannon v. Charles Henson*, 499 So.2d 758, (Miss 1986), the Court opined that to have a point turn upon the label placed upon a pleading would be the "ultimate exaltation of form over substance". In that case the party attempted to assert a counter-claim and labeled it a cross-petition. Id. The Court found that generically, it was a counter-claim under whatever label. Id. The court looks at the content of the pleading to determine the nature of the action and the label is not controlling. *Medlin v. Hazelhurst Emergency Physicians*, 889 So.2d 496 (Miss. 2004); *Sims v. Collins*, 762 So.2d 785 (Miss. 2005).

CONCLUSION

In conclusion, Baptist has not alleged, or did it show in any brief or arguments that it would suffer any actual prejudice, by allowing the amendment. Baptist, as stated by its counsel, has admitted that Baptist was fully aware of Dr. Smith's allegations against it since Dr. Smith filed his answer. Additionally, since there is no trial date, Baptist will have ample time to defend itself on the counter-claim. In fact, it has deposed Dr. Smith and spent considerable time questioning him on his counter-claim. Since Baptist cannot show that it will sustain any actual prejudice by the allowance of the counter-claim, this appeal should be dismissed.

It has long been a part of Mississippi law, both pre-rule and post-Rules of Civil Procedure, that the form of a pleading in either a declaration or a subsequent pleading is not material, but rather the substance thereof. Mississippi jurisprudence states that pleadings shall be treated with great liberality with the view to bringing the issues in dispute between the parties to trial upon the merits. It is the substance of the cause of action stated by the writings lodged with the court that should be

looked to, and not the form. It would be the ultimate exaltation of form over substance to have this issue turn upon the label placed the pleading rather than its substance. The Mississippi Court of Appeals, in looking to the 5th Circuit, has stated that fair notice of a claim and the ground upon that claim is all that is required. There is no doubt Dr. Smith gave fair notice of his intent to pursue a claim, or counter-claim, against Baptist and he has asserted the basis of that claim. Baptist has even conducted written discovery and depositions pursuing a defense of Dr. Smith's counter-claim. Thus, it has had fair notice and sufficient notice that Dr. Smith intended to prove the counter- claim against it. The appeal of the trial courts decision should be dismissed.

RESPECTFULLY SUBMITTED, this the 26th day of January, 2010.

GEORGE V. SMITH, M.D., Individually, Appellee

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CERTIFICATE OF SERVICE

I, the undersigned attorney, P. Nelson Smith, Jr., counsel for the Appellee, do hereby certify that I have filed this ***Brief of Appellee*** with the Clerk of this Court, and have served a true and correct copy of this ***Brief of Appellee*** by United States first class mail, postage prepaid, to the following:

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Honorable James T. Kitchens, Jr.
CIRCUIT COURT JUDGE, DISTRICT 16
P. O. Box 1387
Columbus, MS 39703

SO CERTIFIED, this the 26th day of January, 2010.

P. NELSON SMITH, JR.