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

BAPTIST MEMORIAL HOSPITAL-
GOLDEN TRIANGLE, INC. PLAINTIFF-APPELLANT

v.

GEORGE V. SMITH, M.D. DEFENDANT-APPELLEE

REPLY BRIEF OF APPELLANT BAPTIST MEMORIAL HOSPITAL-GOLDEN TRIANGLE, INC.

Interlocutory appeal from the "Order Granting Defendant Leave to Amend to File Counterclaim" entered by the Circuit Court of Lowndes County, Mississippi, Hon. James T. Kitchens, Jr., presiding.

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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The Court should grant oral argument in this appeal because this is a case of first impression under Mississippi law.

The issues raised in this appeal appear to be questions of first impression in Mississippi, and the appellant Baptist Memorial Hospital-Golden Triangle believes that oral argument will help the Court and significantly aid it in rendering its decision. The procedural issue of whether the defendant's failure to assert a counterclaim at the same time that he filed his answer and the requirement for setting up an omitted counterclaim under Rule 13(f) does not appear to have been directly addressed by this Court. It also does not appear that the Court has directly addressed the question of the futility of allowing a counterclaim to be amended when the proposed cause of action would clearly be barred by the applicable statute of limitations, although this Court has previously addressed the issue in dicta.

Dr. Smith's brief to this Court is so blatantly out of compliance with the Mississippi Rules of Appellate Procedure that it should be stricken or disregarded.

Rule 28(a) of the Mississippi Rules of Appellate Procedure provides that the briefs of the parties shall include a statement of facts "relevant to the issues presented for review, with appropriate references to the record."

Rule 28(d) provides that: "All briefs shall be keyed by reference to page numbers (1) to the record excerpts filed pursuant to Rule 30 of these Rules , and (2) to the record itself."

The "Statement of the Case" in Dr. Smith's brief contains one citation to the record.

The "Statement of Facts" in Dr. Smith's brief contains no citations to the record and is simply an extension of his argument under a false heading.

At a minimum, the purported Statement of Facts and Statement of the Case in the brief of the appellee Dr. Smith should be stricken or disregarded.

Dr. Smith's brief fails to address the issues raised in the present appeal.

The portion of Dr. Smith's brief that is explicitly identified as his "Argument" asserts a position that fails to squarely address the issues raised in this appeal. Among other things, Dr. Smith still fails to provide any explanation for why he waited four years to set up a counterclaim after he filed an answer without alleging a counterclaim.

The issue in the present case is whether Dr. Smith should be allowed to set up a counterclaim four years after he filed his answer without asserting a counterclaim and seven years after the events alleged as the bases for his counterclaim. Remarkably, Dr. Smith cites no cases involving the issue of an omitted counterclaim.

Dr. Smith's untimely motion for leave to file a counterclaim should have been denied for two reasons: (1) Dr. Smith failed to make any showing under Rule 13(f) of the Mississippi Rules of Civil Procedure, which governs omitted counterclaims, to explain why he waited four years after filing his answer to assert a counterclaim or explain why he should be allowed to set up a counterclaim at this late date; and (2) Dr. Smith's counterclaim is based upon a transaction or occurrence that happened more than seven years ago and it would be futile to allow him to file a counterclaim that is barred by the applicable three-year statute of limitation.

The "Brief of Appellee, George V. Smith, M.D." ignores the two issues raised in the appellant's brief. Instead, he purports to re-cast the issues on appeal into the following single issue:

> 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.

The fundamental distinction between a complaint, an answer and a counterclaim is crucial to a meaningful and sensible application of the Mississippi and Federal Rules of Civil Procedure and a just adjudication of claims on their merits. The most important difference is that a plaintiff is not required to respond to an answer, while the defendant and the counter-defendant are required to respond to a complaint and a counterclaim. Dr. Smith's argument would render these distinctions meaningless and result in utter chaos. In the procedural world proposed by Dr. Smith, there would be no rules, only guidelines or suggestions. Parties – and courts, apparently – would be required to search through every document that is served and filed to determine if the pleading is one that is mis-named (either by design or ineptitude) and includes a hidden claim to which a responsive pleading is required.

Dr. Smith argues (incorrectly) in his brief to this Court that "No counter-claim was omitted when Dr. Smith filed his answer." (Appellee's Brief at page 6). Dr. Smith's own conduct in the trial court refutes this statement, as evidenced by the title of his motion: "Motion for Leave to File Counterclaim to [*sic*] the Defendant."

Dr. Smith was characteristically vague when he filed his motion because he did not specify what pleading he sought to amend, but the only pleading that he had on file was an answer.

Dr. Smith's position that a pleading's substance is more significant than its form is a legitimate argument that simply has no application in the present case. Dr. Smith, in defiance or disregard of the procedural avenue available to him under Rule 13(f), has chosen to simply ignore the Rules and argue that he should not be required to make the showing required by the very Rule that is applicable to situation of an omitted counterclaim. The reason for Dr. Smith's position is transparent: He cannot make the requisite showing. The only reason that it is even necessary for Dr. Smith to resort to arguing that he is the purported victim of form over substance is that he deliberately chose not to avail himself of the method set forth in the Rules of Civil Procedure which was designed to address an omitted counterclaim. Thus, Dr. Smith's predicament is not that he is a victim of form over substance, he is consciously choosing to pursue an alternative course that is not allowed by the applicable rules because he refuses to follow the course that is open to him.

Issue No. 1: A defendant who files an answer and omits a compulsory counterclaim should not be granted leave to file an omitted counterclaim four years after filing his answer when he has failed to make the showing required by Rule 13(f) of the Mississippi Rules of Civil Procedure.

Rule 13(a) of the Mississippi Rules of Civil Procedure requires a defendant to ginclude as a compulsory counterclaim with his responsive pleading "any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction."

The "transaction or occurrence that is the subject matter" of Dr. Smith's proposed counterclaim quite clearly arises out of the same transaction or occurrence that is the subject matter of the claim made against him by the plaintiff Baptist Memorial Hospital-Golden Triangle ("BMHGT"), and his counterclaim does not require the joinder of a third party for adjudication. Dr. Smith's proposed counterclaim is a compulsory counterclaim that he was required to assert when he filed his answer in September 2004.

Dr. Smith makes no effort to distinguish or even discuss the case authorities cited in the appellant's brief of BMHGT. In the appellee's brief to this Court, Dr. Smith string-cites cases for points of law that are not applicable to the issues in the present appeal, and some of the cases actually support BMHGT's position. Remarkably, no case cited by Dr. Smith involves an omitted counterclaim, and Rule 13 is not even mentioned in Dr. Smith's brief.

A careful reading of the cases that Dr. Smith cites to support his superficial argument reveals the danger of engaging in such casual advocacy: The cases simply do not stand for the propositions that Dr. Smith suggests that they do.

Dr. Smith relies on *Jordan v. Wilson*, 5 So.3d 442 (Miss. Ct. App. 2008), although it does not arise from the denial or allowance of a counterclaim. In *Jordan*, the trial court dismissed a plaintiff's complaint on the ground that it alleged a non-existent cause of action for "negligent assault." 5 So.2d at 445. The Court of Appeals reversed, holding that the plaintiff had sufficiently alleged a cause of action for both negligence and assault. 5 So.3d at 447.

The Court of Appeals in *Jordan* relied on an opinion of the United States Court of Appeals for the Fifth Circuit, *Doss v. S. Central Bell Tel. Co.*, 834 F.2d 421 (5th Cir. 1987), a case that involved neither a counterclaim nor a motion to amend. *Doss* stands for the proposition that "notice pleading" is sufficient under the Federal Rules of Civil Procedure: "The function of a *complaint* under the Federal Rules of Civil Procedure is to give the defendant fair notice of plaintiff's claims and the grounds upon which plaintiff relies." 834 F.2d at 424 (emphasis added).

Dr. Smith relies on *Wal-Mart Super Center v. Long*, 852 So.2d 568 (Miss. 2003), another case that does not involve a motion to assert an omitted counterclaim. In fact, *Long* does not involve the issue of a counterclaim at all. In *Long*, the plaintiff filed a complaint in the County Court alleging damages of $75,000 arising out of a slip-and-fall at a Wal-Mart. After the case had been on file for more than a year (which is the time limit for a non-resident defendant to remove a case to federal court), the plaintiff moved to amend to increase her ad adamnum and to transfer the case to Circuit Court. The

defendant objected, arguing that the plaintiff was guilty of "forum manipulation." 852 So.2d at 570. In *Long, t*he Supreme Court of Mississippi held that the defendant had options available to it to prevent the type of prejudice it argued would arise from allowing the plaintiff to amend her complaint, including removal to federal court after more than one year had elapsed. 852 So.2d at 573. The ruling in *Long* has no bearing, either directly or indirectly, on the issues raised in the present appeal.

Dr. Smith also cites *Moeller v. American Guarantee & Liability Ins. Co.*, 812 So.2d 953 (Miss. 2002), which involves the amendment of a complaint (to include a claim for prejudgment interest), not an omitted counterclaim. *Moeller* has no application to the present case.

Another case cited by Dr. Smith in his brief to this Court is *Poindexter v. Southern United Fire Ins. Co.*, 938 So.2d 964 (Miss. 2003). *Poindexter* is also cited by BMHGT in its brief for the proposition that this Court has recognized, in dicta, that it would be proper to deny a motion to amend on the ground that the amendment would be futile.

Poindexter involved a motion to amend an original complaint and the interplay between Rules 12 and 15(a) of the Mississippi Rules of Civil Procedure, the latter of which includes a mandatory allowance of an amendment within 30 days of a motion to dismiss (which, in turn, eliminates an objection on the basis of futility, since the allowance is mandatory). 838 So.2d at 970-71. To the extent that *Poindexter* is applicable to the present case, it supports the position of BMHGT, not Dr. Smith.

Other cases cited by Dr. Smith in his brief to this Court also support BMHGT's position. *See Fletcher v. Lyles*, 999 So.2d 1271 (Miss. 2009), *Ralph Walker, Inc. v.*

Gallagher, 926 So.2d 890 (Miss. 2006), and *Webb v. Braswell*, 930 So.2d 387 (Miss. 2006).

In *Fletcher*, the trial court granted summary judgment to the defendant on the ground that plaintiff's claims – arising out of a contract to purchase real property – were barred by the 3-year statute of limitation, and the Supreme Court reversed, because the limitation period did not begin to run until the closing on the sale (as opposed to the date of the sales contract). Notably, though, the Supreme Court in *Fletcher* held that the trial court did not abuse its discretion in denying the plaintiff's motion to amend the complaint on the ground of futility as to a cause of action arising from a statute that requires real estate brokers to keep certain documents for a period of three years because the parties conceded that the transaction was never actually completed which was a requirement of the statute. 999 So.2d at 1279.

In *Ralph Walker, Inc. v. Gallagher*, the Supreme Court held that the trial court should have granted a newly-added defendant's motion to dismiss, based on the three-year statute of limitation, when the defendant was joined as a party five years after the subject automobile accident. This Court rejected the plaintiff's argument in *Gallagher* that "the trial judge should have granted leave to file the amended complaint under Miss. R. Civ. P. 15(a)," stating that the issue before the Court was very narrow: "Our only question today is whether the amended complaint relates back to the original complaint, not whether leave should have been granted to amend the complaint." 926 So.2d at 897.

In *Webb v. Braswell*, the trial court denied the plaintiffs' motion to amend their complaint which was made four years after the case was filed. This Court affirmed the trial judge's denial of the motion, stating that "[t]his Court does not view lack of

diligence as a compelling reason to amend," and noting that "[w]e have previously rejected the argument of an absolute right to amend, disallowing such amendments based on reasoning that *a party should not be allowed to later complain on an issue, when that party 'had ample opportunity and time to amend its complaint, and has offered no justification for why it did not do so.*'" 930 So.2d at 395 (emphasis added).

The other cases cited by Dr. Smith either pre-date the adoption of the Mississippi Rules of Civil Procedure, *Town v. H. Lupkin & Son*, 114 Miss. 693, 75 So. 546 (1917), or pertain to peculiar causes of action that do not have general application beyond the facts of the particular cases or the statutes involved. *See Shannon v. Henson*, 499 So.2d 758, 765 (Miss. 1986)("The nature of judicial review in an election contest is neither fish nor fowl in the sense that Special Tribunal's authority and mode of proceeding are quasi-original and quasi-appellate."), and *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008)(legislative requirement that imposed procedural requirement not mandated by Mississippi Rules of Civil Procedure was unconstitutional).

Citing cases such as *Sims v. Collins*, 762 So.2d 785 (Miss. 2005), *Medlin v. Hazelhurst Emergency Physicians*, 889 So.2d 496 (Miss. 2004), and *Gardner v. State*, 125 So.2d 730 (Miss. 1960), Dr. Smith argues as follows: "The substance of the cause of action as stated by the writings lodged to the court should be looked to, not the form." This is a perversion of the sound legal analysis set forth in the cited cases, none of which involved a motion to amend or a counterclaim.

For example, *Medlin* involved an attempt by a plaintiff to sue medical professionals for substandard treatment of injuries sustained in an automobile accident after the plaintiff had already recovered damages in settlement of his claim against the

parties responsible for the accident. The trial court held that the plaintiff could not recover for the same damages under the doctrine of "accord and satisfaction," 889 So.2d at 498, which was not the correct legal theory. The Supreme Court held that the trial court's conclusion was correct, although its stated legal theory was incorrectly identified. The *Medlin* case has no application to the present appeal.

In *Sims*, the plaintiff alleged in his complaint that the defendant had threatened him with a pistol at the scene of an automobile accident. The trial court granted a motion *in limine* which precluded the plaintiff from presenting evidence at trial pertaining to these allegations, apparently because the claims were made in a single count instead of two separate counts pursuant to Rule 10 of the Mississippi Rules of Civil Procedure. A plaintiff's failure to assert claims in separate counts as a basis for a trial court's motion *in limine* which precluded the plaintiff from presenting evidence of the claims, as in *Sims*, is simply not analogous to a defendant's failure to allege a counterclaim when he filed his answer, as in the present case.

Dr. Smith relies on *Gardner v. State*, a 1960 decision which pre-dates the Rules of Civil Procedure by more than 20 years. In Gardner, the defendants paid certain sums into court without expressly imposing any conditions on the payment which was apparently in connection with lengthy litigation involving a dispute over mineral rights. After noting that courts must, as a general proposition, look to the substance and not permit injustice from a "mere technicality," 125 So.2d at 732, this Court also noted that it would be a "travesty of justice" to require the defendants to satisfy a judgment for a debt "long since barred by the statute of limitations, when the justification for such requirement rests upon a mere slip in the pleadings." *Id.*, at 732.

For reasons that are unexplained, Dr. Smith failed to assert a counterclaim when he filed his answer to the complaint in September 2004. Four years later, Dr. Smith filed a motion entitled "Motion for Leave to File Counterclaim to [*sic*] the Defendant." Instead of stating a reason for his omission of the counterclaim, which is expressly provided (and required) in Rule 13(f) of the Mississippi Rules of Civil Procedure, Dr. Smith has steadfastly refused to offer any explanation whatsoever for his failure. On appeal, Dr. Smith now argues that he has always asserted a counterclaim. Instead of stating a reason for his omission, Dr. Smith argues that this Court should ignore the Rules and search through his answer to discern a counterclaim, thus championing the victory of form over substance. The problem with Dr. Smith's argument is that the record simply does not support the conclusion that his answer is really a counterclaim in disguise. The fundamental distinction between an answer and a counterclaim, the latter of which carries with it an obligation to respond, is too great to be so cavalierly disregarded.

Contrary to Dr. Smith's argument, the failure to set up a counterclaim in responding to a complaint is not a mere "technicality," and BMHGT is not advocating form over substance.

> Issue No. 2: A defendant's motion for leave to file a counterclaim which asserts a cause of action subject to the 3-year statute of limitations in Miss. Code Ann. § 15-1-49 should be denied because it would be futile when the motion is made more than seven years after the alleged conduct, transaction or occurrence.

In his brief to this Court, Dr. Smith ignores the issue of whether granting his motion to assert a counterclaim, arising from events that occurred more than seven years prior to his motion to amend, would be futile since the counterclaim would be barred by the 3-year statute of limitation. Clearly, even if his untimely motion to amend could be

procedurally justified, his claim cannot be salvaged because it is barred by the applicable statute of limitation. Therefore, granting Dr. Smith's motion to assert a counterclaim seven years after the events that form the bases for the counterclaim would be futile, since the counterclaim would be barred by the 3-year statute of limitations. Dr. Smith presents no argument to refute BMHGT's position on this issue.

CONCLUSION

The "Order Granting Defendant Leave to Amend to File Counterclaim" entered by the trial court in this case on May 11, 2009, should be vacated, and this case should be remanded to the trial court with instructions to deny the defendant Dr. Smith's motion for leave to file a counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed, U.S. mail, postage prepaid, to Mr. DeWitt T. Hicks, Jr., and Mr. P. Nelson Smith, Jr., Hicks & Smith, AMSOUTH Bank, Second Floor, 710 Main Street, P. O. Box 1111, Columbus, MS 39703-1111, this 10th day of March, 2010.

Michael F. Rafferty