IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-IA-01939-SCT

TRUSTMARK NATIONAL BANK, FRANK HART AND ALVIS HUNT — **DEFENDANTS/APPELLANTS**

VS.

C. BRENT MEADOR, M.D. — **PLAINTIFF/APPELLEE**

consolidated with

NO. 2009-IA-01940-SCT

MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC., C. GERALD COTTON, LU HARDING, CHARLES HARRISON, ERIC A. MCVEY, III, M.D., KURT METZNER, AND JAMES P. WIGLEY — **DEFENDANTS/APPELLANTS**

VS.

C. BRENT MEADOR, M.D. — **PLAINTIFF/APPELLEE**

REPLY BRIEF OF DEFENDANTS/APPELLANTS MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC., C. GERALD COTTON, LU HARDING, CHARLES HARRISON, ERIC A. MCVEY, III, M.D., KURT METZNER, AND JAMES P. WIGLEY

Interlocutory Appeal from the Circuit Court of the First Judicial District
of Hinds County, Mississippi, Hon. Winston Kidd Presiding
Cause No. 251-04-1065CIV

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Defendants/Appellants Mississippi Baptist Health Systems, Inc., C. Gerald Cotton, Lu Harding, Charles Harrison, Eric A. McVey, III, M.D., Kurt Metzner, and James P. Wigley submit that oral argument of this appeal is appropriate pursuant to the standard set forth in MISS. R. APP. P. 34(a). The issues presented on appeal involve the application of well-established law to the particular facts of this case. The Court will undoubtedly wish to explore the trial court's misapplication of settled law, and the decisional process would be significantly aided by oral argument, even though the arguments are also well presented in the briefs.

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INTRODUCTION

MBHS[1] was and is entitled to summary judgment on its statute of limitations defense because Plaintiff/Appellee C. Brent Meador, M.D., ("Dr. Meador") has not and indeed cannot point this Court to any evidence in the record substantiating actionable conduct by MBHS within the governing one (1) and three (3)-year statute of limitations periods. Dr. Meador has equally failed to point this Court to any record evidence substantiating a specific, affirmative act of MBHS that was designed to and did prevent him from discovering his alleged claims.

In evident recognition of his inability to create a fact issue on the record before this Court, Dr. Meador has concocted the bizarre fantasy, presented as fact, that the court below never denied MBHS's summary judgment motion on the merits. Rather, in Dr. Meador's utterly fictitious account of this action's procedural posture, he misrepresents to this Court that the impetus for the trial court's denial of MBHS's motion was so that Dr. Meador could "take discovery from [a witness]," Brief of Dr. Meador at 2, because the witness "should be heard from before a ruling on the merits," *id.* at 8. As the record before this Court bears out, Dr. Meador never requested any such accommodation in the court below, nor did the purported need for such discovery have any bearing whatsoever on the trial court's ruling. For Dr. Meador to suggest otherwise on this record is disingenuous and should be viewed for what it is—a transparent attempt to distract this Court's attention from Dr. Meador's abject failure to meet his responsive burden on summary judgment.

As set forth in detail in MBHS's principal brief, on February 17, 1999, Dr. Meador's attorney sent a demand letter and proposed complaint to MBHS asserting the following causes of action: fraud, promissory estoppel, detrimental reliance, intentional infliction of emotional

[1] "MBHS" as used herein collectively refers to Defendants/Appellants Mississippi Baptist Health Systems, Inc., C. Gerald Cotton, Lu Harding, Charles Harrison, Eric A. McVey, III, M.D., Kurt Metzner, and James P. Wigley.

distress, breach of contract, breach of implied covenant of good faith and fair dealing, conversion, unfair competition, interference with business relations, tortious breach of contract, unjust enrichment, and punitive damages. R. 340-42, R.E. Tab 1; R. 392-406, R.E. Tab 1.[2] On August 31, 2004—over five (5) years later—Dr. Meador filed the instant lawsuit predicated on the same nucleus of operative facts and alleging claims of breach of fiducial duties, interference with fiducial duties, interference with contract rights, interference with prospective business advantage, intentional infliction of emotional distress, deceit, fraud, retaliatory discharge, conspiracy, gross negligence, state law antitrust claims, tort arising out of contract, and breach of covenants of good faith and fair dealing. R. 480-514, R.E. Tab 1. The claims Dr. Meador threatened in February 1999 are essentially the same claims he sued upon over five (5) years later in August 2004, well outside the governing one (1) and three (3)-year statute of limitations periods. It remains undisputed that with the exception of Dr. Meador's retention of staff privileges at Mississippi Baptist Medical Center, Dr. Meador and MBHS had no business dealings whatsoever after August 27, 1999. R. 439 at ¶ 5, R.E. Tab 1. Dr. Meador has wholly failed to point this Court to any fact in the record substantiating specific, alleged actionable conduct on the part of MBHS since the parties' business relationship terminated in August 1999.

Nor has Dr. Meador pointed to any facts in the record before this Court substantiating a specific, affirmative act of concealment on the part of MBHS vis-à-vis Dr. Meador's utterly unsubstantiated allegations of conspiracy (or otherwise). While MBHS emphatically denies that it is or ever was engaged in a "conspiracy" to harm Dr. Meador's interests, it is undisputed that Dr. Meador made the very same claim of conspiracy in February 1999, when he claimed to have "significant evidence that other parties, including Trustmark Bank, have colluded with MBMC in seeking to destroy Dr. Meador and take his business from him," thereby revealing Dr. Meador's

[2] Citations to "R." and "Tr." herein reference the record and transcript, respectively. Citations to "R.E." reference MBHS's Record Excerpts filed previously.

awareness of an alleged conspiracy claim *at least* as early as February 1999. R. 336-39, R.E. Tab 1. Furthermore, Dr. Meador fails to point to any record evidence whatsoever substantiating any specific alleged act of MBHS in furtherance of an alleged conspiracy *since* February 1999.

Dr. Meador fails to cite this Court to any facts in this record substantiating actionable conduct on the part of MBHS within the governing one (1) and three (3)-year limitations periods preceding his filing of this action in August 2004. His allegation of fraudulent concealment remains equally baseless. In short, Dr. Meador has not and cannot create a genuine issue of material fact precluding summary judgment in favor of MBHS on its statute of limitations defense. The Hinds County Circuit Court[3] erred in holding otherwise. For these reasons and those set forth hereinbelow, the Court should reverse the trial court's denial of summary judgment and remand this case to be dismissed with prejudice.

ARGUMENT

I. DR. MEADOR HAS FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT IN FAVOR OF MBHS ON ITS STATUTE OF LIMITATIONS DEFENSE.

A. Dr. Meador has not and cannot point to any fact in the record substantiating actionable conduct on the part of MBHS within the governing one (1) and three (3)-year statute of limitations periods.

As set forth in detail in MBHS's principal brief, MBHS's instant appeal is an appeal of the trial court's denial of its motion for summary judgment on its **statute of limitations defense exclusively**. Nevertheless, of the nine and a half (9.5) pages constituting the argument section of Dr. Meador's responsive brief, he devotes approximately two (2) pages (*viz.*, Points One and Four) to a continuation of the smoke-and-mirrors show he begins on page 1, whereby he insults this Court's intelligence with the absurd fiction that the court below never denied MBHS's summary judgment motion. *See infra*, Part II. In his remaining seven and a half (7.5) pages of

[3] Hon. Winston Kidd presiding.

argument (*viz.*, Points Two and Three), Dr. Meador focuses exclusively on MBHS's *release* defense and Trustmark's[4] *res judicata* defense, neither of which is or ever has been the subject of MHBS's instant appeal. *See* Brief of MBHS at 4, note 3.

As a matter of law, once MBHS came forward with its considerable and undisputed proof that all of Dr. Meador's claims against it were time-barred, the burden shifted to Dr. Meador to establish a genuine issue of material fact precluding summary judgment. *See McMichael v. Nu-Way Steel & Supply, Inc.*, 563 So. 2d 1371, 1377 (Miss. 1990) (holding that once defendant has met its burden on summary judgment predicated on statute of limitations defense, burden shifts to plaintiff to rebut defense by "producing supportive evidence of significant and probative value"); *Carr v. Carr*, 784 So. 2d 227, 229 (Miss. Ct. App. 2000) (affirming summary judgment on statute of limitations grounds where plaintiff failed to establish a genuine issue of material fact). Tellingly, nowhere in Dr. Meador's nineteen (19) page, untimely responsive brief does he point to **any fact whatsoever in the record before this Court** showing that *any* of his claims accrued within the governing statute of limitations periods.

In point of fact, Dr. Meador's brief barely mentions MBHS's statute of limitations defense *at all*. On page 1 of his brief (and again verbatim on page 7), Dr. Meador makes the conclusory assertion that "Plaintiff's claims are not barred, without dispute of material fact, by any statute of limitations." Brief of Dr. Meador at 1, 7. Dr. Meador offers no citation to authority or the record to support this statement. *Id.* On page 2 of his brief, Dr. Meador contends that "Plaintiff did bring in opposition to the Summary Judgment Motions preclusive summary judgment evidence." *Id.* at 2. Again, Dr. Meador fails to support this assertion with any citation of evidence in the record. On page 8 of his brief, Dr. Meador contends that "[t]here is very substantial evidence creating genuine disputes of material fact over and above the

[4] "Trustmark" as used herein collectively refers to Defendants/Appellants Trustmark National Bank, Frank Hart, and Alvis Hunt.

proposed testimony of Brent Farris, which the trial court found." *Id.* at 8. Once again, Dr. Meador fails to cite any such evidence in the record. On page 10 of his brief, Dr. Meador states that "[t]here are genuine issues of disputed facts which are material to the merits of Plaintiff's claims which preclude summary judgment," including his assertion that "Plaintiff's claims accrued later." *Id.* at 10. Yet again, Dr. Meador does not elaborate, providing no supportive record or case citations whatsoever. With the exception of these unsupported assertions and several equally unsupported references to his fraudulent concealment allegation, see *infra*, Part I.B., Dr. Meador's brief does not even address MBHS's statute of limitations defense, the singular subject of MBHS's appeal.

Given Dr. Meador's absolute failure to come forward with any specific, material facts (and indeed any facts whatsoever) substantiating actionable conduct on the part of MBHS ***after February 1999***, it remains undisputed that Dr. Meador at that time had actual knowledge, or at least notice, of the factual events on which the totality of his various claims against MBHS were predicated. As was the case in the court below, Dr. Meador has not and cannot point this Court to any evidence of record showing specific, alleged actionable post-1999 conduct by MBHS. Because Dr. Meador failed to create a genuine issue of material fact that all or any part of his claims against MBHS were not time-barred on the day he filed suit in August 2004, the trial court erred in denying MBHS's motion for summary judgment on its statute of limitations defense.

B. <u>Dr. Meador has not and cannot point to any fact in the record substantiating a specific, affirmative act of MBHS that was designed to and did prevent him from discovering his alleged claims.</u>

In his untimely responsive brief, Dr. Meador continues to make the conclusory assertion that MBHS fraudulently concealed one or more of his claims, thereby tolling the governing statute of limitations and precluding summary judgment. Because Dr. Meador *still* has not and

cannot point to any affirmative act of concealment by MBHS, his invocation of the fraudulent concealment doctrine fails as a matter of law and thus avails him nothing.

As set forth in MBHS's principal brief, in order to establish a claim of fraudulent concealment, the plaintiff must show "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." *Sanderson Farms Inc. v. Ballard*, 917 So. 2d 783, 790 (Miss. 2005). The affirmative act must be designed to prevent the discovery of the claim and must occur after and apart from the discrete acts upon which the cause of action is premised. *Channel v. Loyacono*, 954 So. 2d 415, 423 (Miss. 2007); *Stephens v. Equitable Life Assurance Soc'y of the U.S.*, 850 So. 2d 78, 83-84 (Miss. 2003). A plaintiff does not satisfy the "affirmative act" requirement by simply alleging that he could not uncover the cause of action sooner because the defendant was in complete control of the information. *Sanderson Farms*, 917 So. 2d at 790. Rather, the plaintiff must allege the "affirmative act" with specificity. *Peavey Elecs. Corp. v. Baan U.S.A., Inc.*, 10 So. 3d 945, 953 (Miss. Ct. App. 2009). Furthermore, a fraudulent concealment claim must be proven by clear and convincing evidence. *Banks v. S. Farm Bureau Cas. Co.*, 912 So. 2d 1094, 1098 (Miss. Ct. App. 2005).

Dr. Meador has wholly failed to identify any affirmative act whatsoever on the part of MBHS that was designed to and did prevent discovery of his alleged claims, and certainly he has identified no such act by clear and convincing evidence and with the requisite specificity demanded by Mississippi law. Dr. Meador's brief contains conclusory references to his allegations of fraudulent concealment at pages 6, 13, 14, and 15. Brief of Dr. Meador at 6, 13-15. He therein continues to allege that MBHS fraudulently concealed his conspiracy claim, which he alleges he did not discover until 2004. *Id.* at 14-15. Notwithstanding his allegations, Dr. Meador has not and cannot point to one scintilla of competent evidence in the record before this Court substantiating an affirmative act of concealment by MBHS. Moreover, Dr. Meador

does not dispute that his attorney's February 1999 demand letter (discussed in detail in MBHS's principal brief) advised MBHS that Dr. Meador then claimed to have "significant evidence that other parties, including Trustmark Bank, have colluded with MBMC in seeking to destroy Dr. Meador and take his business from him," thereby revealing Dr. Meador's awareness of an alleged conspiracy claim *at least* as early as February 1999. R. 336-39, R.E. Tab 1.

As was the case in the court below, Dr. Meador has not and cannot point this Court to any facts in the record substantiating an affirmative act on the part of MBHS that was calculated to and ultimately did prevent discovery of his alleged claims, much less any specific facts supported by clear and convincing evidence. Because Dr. Meador failed to establish this essential element of his fraudulent concealment allegation both here and in the court below, the fraudulent concealment doctrine has no application in this case, and Dr. Meador's claims against MBHS are time-barred in their entirety.

II. DR. MEADOR'S MISCHARACTERIZATION OF THE TRIAL COURT'S RULING FINDS NO SUPPORT IN THE RECORD AND UNDERSCORES HIS FAILURE TO CREATE A FACT ISSUE PRECLUDING SUMMARY JUDGMENT.

Apparently in recognition of his inability to create any fact issue precluding summary judgment, Dr. Meador has opted instead to provide this Court with a fictionalized account of what occurred in the court below. This Court requires no assistance from MBHS to detect the glaring inaccuracies in Dr. Meador's characterization of this action's procedural posture. Nevertheless, Dr. Meador's misrepresentations regarding the nature and rationale for the trial court's ruling exceed the bounds of zealous advocacy and merit a response from MBHS.

The consistent theme running through Dr. Meador's brief is that the trial court "neither sustained nor denied Defendants' Motions for Summary Judgment on the merits." Brief of Dr. Meador at 8. Rather, in the parallel universe concocted by Dr. Meador to suit his purposes on appeal, "[t]he Circuit Court Judge ruled that Defendants would not be allowed to escape liability

on motions which the Plaintiff could not fully answer with the most important witness – [Brent Farris] – having absconded and remaining a fugitive." *Id.* at 2. Dr. Meador misrepresents to this Court that at the hearing on MBHS's motion for summary judgment, "the trial judge was told that a very important witness having important information was unavailable **but should be heard from before a ruling on the merits**." *Id.* at 8 (emphasis added). Building on this misrepresentation, Dr. Meador makes the inferential leap, presented to this Court as fact, that the trial court's denial of MBHS's motion for summary judgment was "a purely discretionary ruling on a procedural issue," *id.* at 8, and that the trial court ruled that "**[Dr. Meador] should be allowed to take discovery from Brent Farris**." *Id.* at 2 (emphasis added).

While Dr. Meador's fictional rendition of events may reflect what he *wishes* would have occurred in the court below, a review of the record unquestionably reveals that it is *not* in fact what actually occurred. First of all, it strains credulity for Dr. Meador to suggest that the trial court's order was anything other than an outright denial of MBHS's summary judgment motion on the merits. Following the February 19, 2009, hearing on MBHS's summary judgment motion, Tr. 1, R.E. Tab 7, the trial court failed to rule within sixty (60) days, thereby necessitating MBHS's MRAP 15 mandamus petition, see R. 2, R.E. Tab 14. Thereafter, on July 3, 2009, the trial court finally entered its order disposing of MBHS's motion, which order stated the following, in pertinent part:

> **THIS CAUSE** came on for hearing before this Court on Defendants, Mississippi Baptist Health Systems Inc., C. Gerald Cotton, Lu Harding, Charles Harrison, Eric A. McVey, III M.D., Kurt Metzner and James Wigley's Motion for Summary Judgment and Motion to Dismiss. The Court, having **reviewed the pleadings and other submissions**, having **heard the argument of the parties**, and being otherwise advised in the premises finds that the motions are not well taken and **should be denied**.
>
> **IT IS THEREFORE ORDERED AND ADJUDGED** that **Defendants' Motion for Summary Judgment is denied** and Defendants' Motion to Dismiss is denied.

R. 655, R.E. Tab 8 (bold caps in original; bold underscore added). For Dr. Meador now to posit that this order was anything other than an outright denial, on the merits, of MBHS's summary judgment motion is preposterous.[5] Dr. Meador has not and cannot point to anything in this record justifying such an outlandish characterization of the trial court's order.

If Dr. Meador had stopped there, perhaps the Court could pardon his liberty with the record as overzealous advocacy gone awry. However, Dr. Meador did not stop there. As set forth above, he proceeded to advise this Court that the impetus for the trial court's denial of MBHS's motion was (1) so that Dr. Meador could "take discovery from Brent Farris," Brief of Dr. Meador at 2 (2) based on Dr. Meador's purported argument at the hearing that Farris "should be heard from before a ruling on the merits," *id.* at 8. Neither of these statements finds any factual support in the record. In truth, they should be recognized for what they are—outright fabrications. As the hearing transcript demonstrates, while Dr. Meador advised the trial court of Farris' present unavailability for a deposition, Tr. 8, he never once requested that the trial court defer ruling on MBHS's motion until Farris could be deposed.[6] *See* Tr. 1-26, R.E. Tab 7. Nor did he voice any objection whatsoever to the trial court's proceeding to hear argument and issue its ruling on MBHS's motion for summary judgment based on the record then before the court.

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[5] It is equally preposterous for Dr. Meador to represent that "[t]he standard applicable to this appeal from a procedural ruling of the trial court is 'clear error' subject to the requirements of Rule 56, Mississippi Rules of Civil Procedure and Rule 5, Mississippi Rules of Appellate Procedure." Brief of Dr. Meador at 1. It is well settled that "[t]his Court reviews the circuit court's denial of summary judgment under a de novo standard of review." *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So. 3d 474, 484 (Miss. 2010).

[6] Dr. Meador similarly asserts that at the hearing on MBHS's motion for summary judgment, "Plaintiffs' [*sic*] counsel informed the Court that Plaintiff needed but did not have the federal grand jury documents collected in connection with the federal grand jury investigation of MBHS concerning these very premises." Brief of Dr. Meador at 4. Dr. Meador implies that the alleged unavailability of such documents likewise played into the trial court's purported decision to allow Dr. Meador time for additional discovery. In actuality, when Dr. Meador's counsel attempted to explain the purported significance of such documents at the hearing, the trial court interposed with the following finding: "Mr. Allred, those [documents] are not relevant to the matters before the court today." Tr. 9, R.E. Tab 7 (emphasis added). Therefore, quite obviously, the alleged unavailability of such documents had no bearing on the trial court's denial of MBHS's motion.

See id. What Dr. Meador *did* do was file a response to MBHS's summary judgment motion (along with a 14-page opposition brief), R. 546-72, joining issue on the merits, and argue his opposition on the merits at the hearing. *See* Tr. 1-26, R.E. Tab 7. Moreover, nothing in this record supports Dr. Meador's assertion that the trial court denied MBHS's motion so that Dr. Meador could conduct discovery vis-à-vis Brent Farris. As the record reflects, the trial court *never* so advised or even intimated as much at the hearing, see *id.*, and its order denying MBHS's motion certainly contains no hint of any such rationale. *See* R. 655, R.E. Tab 8. Dr. Meador, of course, provides no record citation supporting this unsubstantiated mischaracterization of the trial court's reasoning.

In short, Dr. Meador's revisionist portrayal of this matter's procedural posture flies in the face of the record at every turn. It should be viewed for what it is—a desperate and transparent attempt to distract this Court's attention from Dr. Meador's wholesale failure to create a fact issue on MBHS's statute of limitations defense. In that same vein, and contemporaneous with the filing of his untimely responsive brief, Dr. Meador filed an untimely motion with this Court seeking leave to depose Brent Farris. In response, MBHS filed a timely motion to strike Dr. Meador's motion, supporting brief, and accompanying affidavit, which motion (along with the arguments and authorities set forth therein) MBHS incorporates by reference as if fully and completely set forth herein.[7] Dr. Meador's antics aside, the inescapable truth lies in the record before this Court. The Court need look no further than that. At the end of the day, the record is devoid of any fact issue precluding summary judgment on MBHS's statute of limitations defense. Dr. Meador has not pointed this Court to one iota of evidence to the contrary.

[7] For the reasons set forth in detail in MBHS's motion to strike, Dr. Meador's motion is not only untimely and supported by nothing more than a single affidavit not based on personal knowledge, but it fails as a proffer to create any fact issue in any event.

CONCLUSION

For the reasons set forth herein and in MBHS's principal brief, this Court should reverse the order of the Hinds County Circuit Court denying its motion for summary judgment and remand this case with instructions that Dr. Meador's amended complaint against MBHS be dismissed with prejudice.

THIS the 15 day of June, 2011.

Respectfully submitted,

MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC., C. GERALD COTTON, LU HARDING, CHARLES HARRISON, ERIC A. MCVEY, III, M.D., KURT METZNER, AND JAMES P. WIGLEY

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CERTIFICATE OF SERVICE

I, REX M. SHANNON III, one of the attorneys for Defendants/Appellants Mississippi Baptist Health Systems, Inc., C. Gerald Cotton, Lu Harding, Charles Harrison, Eric A. McVey, III, M.D., Kurt Metzner, and James P. Wigley, do hereby certify that I have this day caused a true and correct copy of the above and foregoing document to be served via United States Mail, postage prepaid, to the following:

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THIS the 15th day of June, 2011.

REX M. SHANNON III