IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-IA-01939-SCT

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

V.

C. BRENT MEADOR, M.D. — **APPELLEE**

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 — **APPELLANTS**

V.

C. BRENT MEADOR, M.D. — **APPELLEE**

APPELLANTS' BRIEF OF TRUSTMARK NATIONAL BANK, FRANK HART AND ALVIS HUNT

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

ORAL ARGUMENT IS NOT REQUESTED

OF COUNSEL:

WATKINS & EAGER PLLC
William F. Ray (MSB #[redacted]
Brian C. Smith (MSB[redacted]
P. O. Box 650
Jackson, MS 39205
Phone No. (601) 965-1900
Fax No. (601) 965-1901

CERTIFICATE OF INTERESTED PERSONS

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

1. Trustmark National Bank, Frank Hart, and Alvis Hunt – Appellants/Defendants;

2. William F. Ray, Brian C. Smith; Watkins & Eager PLLC – counsel for Appellants/Defendants Trustmark National Bank, Frank Hart, and Alvis Hunt;

3. Mississippi Baptist Health Systems, Inc., C. Gerald Cotton, Lu Harding, Charles Harrison, Eric A. McVey, III, M.D., Kurt Metzner, and James Wigley – Appellants/Defendants;

4. D. Collier Graham, Jr., Jeremy L. Birdsall, Rex M. Shannon, and Wise Carter Child and Caraway, P.A. – counsel for Appellants/Defendants Mississippi Baptist Health Systems, Inc., C. Gerald Cotton, Lu Harding, Charles Harrison, Eric A. McVey, III, M.D., Kurt Metzner, and James Wigley;

5. William A. Causey, M.D. – Defendant;

6. Chuck R. McRae – counsel for Defendant William A. Causey, M.D.;

7. James C. Bethea, Premier Medical Group of Mississippi, PLLC, and Premier Medical Management of Mississippi, Inc. – Defendants;

8. R. Mark Hodges and Wise Carter Child and Caraway, P.A. – counsel for Defendants James C. Bethea, Premier Medical Group of Mississippi, PLLC, and Premier Medical Management of Mississippi, Inc.;

9. C. Brent Meador, M.D. – Appellee/Plaintiff

10. Michael S. Allred, Kathleen H. Eiler and the Allred Law Firm – counsel for Appellee/Plaintiff;

11. The Honorable Winston Kidd – Hinds County Circuit Court Judge

Brian C. Smith

Brian C. Smith (MSB [redacted])

STATEMENT CONCERNING ORAL ARGUMENT

Appellants/ Defendants Trustmark National Bank, Frank Hart and Alvis Hunt hereby submit that oral argument of this matter is not necessary and is therefore not requested. The record on appeal is clear and unequivocal that the claims raised in this action have already been litigated, which resulted in a judgment on the merits against Appellee/ Plaintiff Meador. The record is also clear and unequivocal that Plaintiff's alleged claims relate to loan transactions from the 1990s, and these claims were filed long after the applicable statutes of limitation had run. Accordingly, the Hinds County Circuit Court's denial of Appellants/ Defendants' motion for summary judgment must be reversed and rendered, and the claims against Trustmark National Bank, Frank Hart and Alvis Hunt must be dismissed with prejudice. Oral argument should not be needed to accomplish this result.

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STATEMENT OF THE ISSUES

1. Did the trial court err in denying Trustmark National Bank, Frank Hart and Alvis Hunt's summary judgment motion based upon *res judicata*, where the current action involves the same underlying cause of action and set of facts as a prior action in the same court, which resulted in final judgment in favor of Trustmark?
2. Did the trial court err in denying Trustmark National Bank, Frank Hart and Alvis Hunt's summary judgment motion based upon the statute of limitations, where Plaintiff's claims accrued at the latest in February 1999 and the complaint was not filed until August 31, 2004?
3. Did the trial court err in denying Trustmark National Bank, Frank Hart and Alvis Hunt's Motion to Strike Inadmissable Hearsay Portions of Affidavit of Dr. C. Brent Meador and then apparently relying on that inadmissable testimony?

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Circuit Court

This is Plaintiff Dr. C. Brent Meador's, second attempt to sue Trustmark National Bank concerning a series of promissory notes he executed in favor of Trustmark in the 1990s as part of a line of credit. Plaintiff defaulted on the last of those promissory notes. In the prior case, Trustmark filed a collection suit against Plaintiff, and Plaintiff asserted a number of counterclaims against Trustmark.

After extensive litigation, judgment was entered in favor of Trustmark, and Plaintiff's counterclaims were dismissed with prejudice. Plaintiff filed an appeal of that judgment, which was eventually dismissed. That judgment is therefore final and unappealable.

After filing for bankruptcy and receiving a discharge, Plaintiff filed the current suit, asserting

claims almost entirely identical to his prior counterclaims and concerning the same line of credit. After the case was removed from, and remanded to, the Hinds County Circuit Court, Trustmark moved for summary judgment based upon the defenses of *res judicata* and the statute of limitations. The only evidence offered by Plaintiff in opposition to Trustmark's summary judgment motion was his own affidavit. Trustmark separately moved to strike hearsay portions of Plaintiff's affidavit.

At the summary judgment hearing, Trustmark's motion to strike was denied from the bench and its summary judgment motion was taken under advisement. An order denying the motion was entered on July 3, 2009. However, the circuit clerk's office did not provide Trustmark notice of the order. Therefore, Trustmark obtained leave pursuant to Mississippi Rule of Appellate Procedure 4(h) to reopen the time to file a petition for interlocutory appeal. Trustmark's petition for permission to file an interlocutory appeal was granted by the Court on February 11, 2010. Trustmark's appeal, No. 2009-IA-01939-SCT, was consolidated with Mississippi Baptist Health Systems, Inc.'s related appeal, No. 2009-IA-01940-SCT.

B. Statement of the Facts

In this action, Plaintiff asserts claims against Trustmark National Bank, Frank Hart, a Trustmark vice president during the relevant time period, and Alvis Hunt,[1] a Trustmark director during the relevant time period (collectively, "Trustmark"), plus numerous defendants associated with Mississippi Baptist Health Systems, Inc. ("MBHS").

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[1] Mr. Hunt died on December 25, 2009, although he still is identified as a named party to this appeal.

1. Meador's Previous Claims Against Trustmark and Mississippi Baptist HealthSystems, Inc.

This case has its origin in a series of promissory notes that Plaintiff entered into with Trustmark in the 1990s as part of a line of credit, and Plaintiff's separate agreement to sell his medical practice to MBHS, formerly known as Mississippi Baptist Medical Center, in 1996. Plaintiff alleges that these two transactions are linked by a conspiracy between Trustmark and MBHS to cause him financial harm.

a. Plaintiff's Prior Claims Against Trustmark ("*Meador I*")

On May 21, 1998, Trustmark filed suit against Plaintiff in the Circuit Court of the First Judicial District of Hinds County, Mississippi, to collect the sums due on a promissory note Plaintiff executed in favor of Trustmark on September 29, 1997, in the original principal amount of $230,000.00. ("*Meador I*") (R. 123-156.) This note represented a renewal of other notes Plaintiff had previously executed in favor of Trustmark.

On July 19, 1999, Plaintiff filed an amended answer and counterclaim against Trustmark in *Meador I.* (R. 157-165; R.E. Tab 5.)[2] The counterclaim alleged, *inter alia*, that:

> During early 1996 Trustmark agreed to extend a line of credit of up to $500,000.00 to Meador for the purchase and operation of a medical clinic located in Byram, Mississippi.
>
> Based upon that loan commitment, Dr. Meador entered into an agreement to purchase and lease the facility in Byram and to operate it as a medical clinic in association with Mississippi Baptist Medical Center ("MBMC").
>
> During the course of purchase and operation of the clinic by Meador, Trustmark refused to loan the full amount of the line of

[2] Citations to the record on appeal are designated as R. _____. Citations to the record excerpts are designated as R.E. Tab ____.

> credit which it had given to Dr. Meador. As a result, Dr. Meador's clinic suffered serious cash flow difficulties which were a significant contributing cause of Dr. Meador's forced sale of his clinic to MBMC.
>
> During the course of the purchase and operation of the Byram clinic, Trustmark also permitted another entity, Central Medical Management, Inc., to borrow money against the credit line which it had established for Dr. Meador without the knowledge or permission of Dr. Meador.
>
> These actions by Trustmark were a significant contributing cause of Dr. Meador's being unable to meet his financial obligations with respect to the Byram clinic and being forced to sell the clinic to MBMC at a substantial loss.

(R. 160-161; R.E. Tab 5.)

Plaintiff asserted claims against Trustmark for breach of contract, breach of fiduciary duty, conversion, breach of implied covenant of good faith and fair dealing, interference with business relations, invasion of privacy and negligence. (R. 162-164; R.E. Tab 5.)

b. Plaintiff's Prior Claims Against MBHS, Allegations of Collusion Between Trustmark and MBHS

During the pendency of *Meador I*, on February 17, 1999, Plaintiff, through counsel, sent a letter and draft complaint to MBHS. (R. 166-184; R.E. Tab 9.) The draft complaint alleged that MBHS breached a contract with Plaintiff in connection with MBHS's 1996 purchase of Plaintiff's Byram clinic. The draft complaint also alleges that MBHS breached an agreement with Plaintiff to purchase Mobile Physicians Services, Inc. ("MPS"), which was solely owned by Plaintiff. (R. 174-175; R.E. Tab 9.) Specifically, the draft complaint alleged:

> Later in 1996, Dr. Meador was induced by representatives of Defendants to enter into a different arrangement under which Dr. Meador became an employee of MBMC, and MBMC acquired the assets of the Byram Family Medical Clinic, Inc.
>
> One of the inducements offered by Defendants to Dr. Meador

> to enter into the employment agreement was that MBMC would purchase Mobile Physicians Services, Inc. for the sum of $250,000.00. This amount was sufficient to pay off a note which MPS and Dr. Meador had at Trustmark National Bank which had arisen because of previous actions of Defendant MBMC.
>
> The agreement for the purchase of MPS was memorialized in writing by MBMC and forwarded to Dr. Meador for his signature.
>
> Immediately after MBMC sent Dr. Meador the agreement for the purchase of Mobile Physician Services, Inc. by MBMC for $250,000.00, Dr. Meador was advised that MBMC would not honor the agreement.
>
> MBMC subsequently reduced its offer to purchase MPS to $100,000.00, which was a breach of its previous agreement and which, if accepted by Dr. Meador, would have left MPS and Dr. Meador still subject to a claim against them from Trustmark National Bank in excess of $100,000.00.
>
> MBMC has failed and refused to honor its obligation for the purchase of MPS for $250,000.00 to the injury of Dr. Meador.

(R. 174-175; R.E. Tab 9.)

Plaintiff's counsel's letter of February 17, 1999, accompanying the draft complaint stated: "We 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." (R. 168; R.E. Tab 9.)

The *Meador I* litigation was extensive, lasting for over three years and including thorough discovery. (R.185-190; R.E. Tab 8.) Trustmark filed several partial motions for summary judgment seeking dismissal of the various counterclaims asserted by Plaintiff. (R. 191-192; R.E. Tab 6.) With respect to Plaintiff's claims for breach of contract, breach of fiduciary duty, conversion, breach of implied covenant of good faith and fair dealing, and negligence, Trustmark contended, *inter alia*, that Plaintiff waived any alleged claims upon the execution of renewal notes with knowledge of said claims. Plaintiff responded that he did not have the requisite knowledge to voluntarily waive the

claims.

On July 11, 2001, the circuit court entered its memorandum opinion and order granting Trustmark's motion for summary judgment and dismissing with prejudice Plaintiff's counterclaims against Trustmark in *Meador I.* (R. 191-208; R.E. Tab 6.) The court held that by renewing the subject indebtedness, Plaintiff waived all alleged defenses and counterclaims he knew or should have known existed.[3] (R. 193-197; R.E. Tab 6.)

On September 10, 2001, the circuit court entered its final judgment in *Meador I*, awarding Trustmark $308,839.58, together with interest and attorneys' fees. (R. 209; R.E. Tab 7.) On October 5, 2001, Plaintiff filed a notice of appeal to the Mississippi Supreme Court. (R. 210.) Plaintiff's appeal of the *Meador I* judgment was eventually dismissed. (R. 190; R.E. Tab 8.)

2. Plaintiff's Bankruptcy

On June 6, 2002, Plaintiff filed his first petition for relief pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Mississippi, Case No. 02-03179. (R. 218-219.) On June 12, 2002, the bankruptcy court gave notice to the Mississippi Supreme Court of Plaintiff's bankruptcy and his appeal was stayed. (R. 220.) Plaintiff's first bankruptcy case was dismissed by the bankruptcy court on July 7, 2002, for failure to file schedules and statements. (R. 219.)

On August 14, 2002, Plaintiff commenced his second Chapter 7 bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of Mississippi, Case No. 02-04514.

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[3] With respect to Plaintiff's claim for invasion of privacy (which was not asserted in the current action), the court held that Trustmark, as Plaintiff's creditor, possessed a qualified privilege to disclose Meador's default to a third party. (R. 202-205; R.E. Tab 6, *quoting Hopewell v. Enters., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 817-18 (Miss. 1996).) Plaintiff voluntarily withdrew his claim for interference with business relations.

(R. 222.) A Chapter 7 trustee was appointed.

On August 30, 2002, Plaintiff, via counsel, filed his Statement of Affairs and Schedules pursuant to 11 U.S.C. § 521. In Schedule B, he was required to describe by category each item of personal property he owned, including any unliquidated tort claims. In response to the question of whether he had any "other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims," Plaintiff stated, "None." (R. 235.)

On February 26, 2004, nearly one and one-half years later, Plaintiff amended his Schedule B to list as an asset, "Possible lawsuit against companies, entities and related parties affiliated with MS Baptist Medical Center." (R. 231-256.) He did not mention any claim against Trustmark.

On July 7, 2004, the bankruptcy court entered an order discharging Meador of his pre-petition debts, including the debt to Trustmark. (R. 265-266.) On July 20, 2004, Trustmark filed a proof of claim based upon its judgment against Plaintiff in *Meador I*. (R. 267-268.)

3. <u>The Current Action</u>

On August 31, 2004, Plaintiff filed this new lawsuit in Hinds County Circuit Court against Trustmark and MBMC. None of the defendants was served with that complaint. On December 30, 2004, Plaintiff filed an amended complaint in the Hinds County Circuit Court adding, *inter alia*, Mr. Hart and Mr. Hunt as defendants. Trustmark removed the action to the United States District Court for the Southern District of Mississippi. (R. 49-108.) Plaintiff filed a motion to remand. On March 6, 2007, the case was remanded to the circuit court. (R. 109-114.)

The amended complaint makes few allegations specific to Trustmark, even fewer with respect to Mr. Hunt, and none specific to Mr. Hart. Some of the allegations concerning Trustmark in this case are the exact same as made in Plaintiff's counterclaim in *Meador I*: (1) Trustmark provided Plaintiff with a line of credit to finance Plaintiff's Byram medical clinic (*compare* R. 37-38;

R.E. Tab 3 *with* R. 160-161; R.E. Tab 5); (2) Trustmark would not extend Plaintiff additional credit beyond this line of credit (*compare* R. 40-41; R.E. Tab 3 *with* R. 160-161; R.E. Tab 5); and (3) Trustmark allegedly allowed Central Medical Management to make unauthorized draws upon Plaintiff's line of credit to pay for clinic expenses and expenditures (*compare* R. 38; R.E. Tab 3 *with* R. 161; R.E. Tab 5). All of the allegations in Plaintiff's amended complaint arise out of the same body of fact as did *Meador I.*

SUMMARY OF THE ARGUMENT

The Hinds County Circuit Court's order denying Trustmark's summary judgment motion should be reversed because all of Plaintiff's claims are barred by the doctrine of *res judicata* and the applicable statute of limitations. The circuit court also abused its discretion by denying Trustmark's motion to strike the hearsay portions of Plaintiff's affidavit in support of his response in opposition to summary judgment, which was the only evidence submitted by Plaintiff.

To begin, Plaintiff has already litigated these claims against Trustmark in the Hinds County Circuit Court, which resulted in their dismissal with prejudice in *Meador I.* Plaintiff's appeal of the *Meador I* judgment was dismissed. The *Meador I* judgment is now final and unappealable.

Under Mississippi law, the doctrine of *res judicata* requires the presence of four identities: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person against whom the claim is made. All of these identities are clearly present with respect to Trustmark National Bank. As vice-president and director, respectively, Frank Hart and Alvis Hunt have the requisite privity with Trustmark National Bank to satisfy the identity of the parties requirement. During summary judgment proceedings, Plaintiff has not contested that the identities are satisfied, or that

Mr. Hart and Mr. Hunt are in privity with Trustmark.

Instead, Plaintiff argued that the *Meador I* judgment should be ignored, because he alleges it was procured through fraud. Plaintiff has never moved pursuant to Rule 60(b) for relief from the *Meador I* judgment. Nor has he identified the alleged fraud by which Trustmark supposedly obtained the prior judgment in *Meador I*. Plaintiff wholly failed to either: (1) argue that the four *res judicata* identifies are not satisfied, or (2) follow the proper procedure for setting aside a judgment. Accordingly the *Meador I* judgment bars Plaintiff's current action.

The statute of limitations with respect to Plaintiff's claims has long since run. The circuit court in *Meador I* held that Plaintiff's claim with respect to the promissory notes accrued at the latest in September 1997. Plaintiff's "conspiracy" claim accrued, at the latest, in February 1999 when his counsel alleged that Plaintiff was in possession of "significant evidence that ... parties, including Trustmark Bank, have colluded with MBHS in seeking to destroy Dr. Meador and take his business from him." All of Plaintiff's claims, except the intentional infliction of emotional distress claim, are subject to Mississippi's general three-year statute of limitations. The intentional infliction of emotional distress claim is subject to the one-year statute of limitations for intentional torts. Accordingly, the last of Plaintiff's claims became time barred, at the latest, in February 2002.

To avoid the statute of limitations, Plaintiff asserts that these claims were fraudulently concealed from him, and therefore the statute of limitations was tolled. Fraudulent concealment requires Plaintiff prove: (1) some affirmative act or conduct was done and prevented his discovery of a claim; and (2) due diligence was performed on his part to discover it. In support of his fraudulent concealment claim, Plaintiff submitted his own affidavit, alleging he was told by someone named Brent Farris that MBHS and Trustmark had entered into a conspiracy to financially destroy him. At the time of the summary judgment hearing, Farris was a convicted felon who absconded

prior to reporting to federal prison.

Trustmark moved to strike these blatant examples of hearsay. No written response to Trustmark's motion to strike was ever filed. At the hearing, Plaintiff did not argue that his affidavit testimony concerning what Farris told him fell within any of the hearsay exceptions contained in the Mississippi Rules of Evidence. The circuit court denied the motion to strike from the bench without explanation. This was clearly an abuse of discretion.

Plaintiff's affidavit testimony is plainly offering an out-of-court statement by Brent Farris (namely that Trustmark and MBHS entered into a conspiracy to destroy Plaintiff) to prove the truth of the matter asserted (namely, that the conspiracy exists). This is a textbook example of hearsay. No exception has been offered. The hearsay portions of the affidavit should have been stricken. Without these statements, there is no record evidence of an affirmative act of concealment on the part of Trustmark. Plaintiff has also wholly failed to prove he used due diligence in attempting to discover his claims. The fraudulent concealment claim fails as a matter of law. Accordingly, Plaintiff's claims are barred by the statute of limitations.

ARGUMENT

Trustmark has raised as defenses to these claims both the doctrine of *res judicata* and the statute of limitations. Both of these defenses were pled in Trustmark's answer. (R. 269-277; R.E. Tab 4.) The Court applies a *de novo* standard of review to a circuit court's grant or denial of a summary judgment motion. *See, e.g., Crawford Logging, Inc. v. Estate of Irving*, 41 So. 3d 687, 689 (Miss. 2010).

A. This Action is Barred by *Res Judicata*

Because Plaintiff has unsuccessfully litigated similar and/or identical claims arising out of the same set of facts, which resulted in a final judgment against him (R. 209; R.E. Tab 7), his claims in this action are barred under the doctrine of *res judicata*. As a preliminary matter, it should be noted that, although Plaintiff voluntarily dismissed his appeal to the Mississippi Supreme Court in the first action, the underlying judgment is still final[4] and unappealable. *See* MISS. R. APP. P. 42 cmt. ("Once an appeal is voluntarily dismissed, no further appeal may be brought.") (citing MISS. CODE ANN. § 11-3-15 (1991)). Therefore, for purposes of *res judicata*, the judgment is final. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982) ("The rules of res judicata are applicable only when a final judgment is rendered.").

"'[R]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'" *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 232 (¶ 22) (Miss. 2005) (quoting *Brown v. Felson*, 442 U.S. 127, 131 (1979)). "'It is a doctrine of public policy designed to avoid the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Id.* (¶ 23) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). "'Under Mississippi law, the doctrine of res judicata bars parties from litigating claims within the scope of the judgment in a prior action.'" *Black v. North Panola Sch. Dist.*, 461 F.3d 584, 588 (5th Cir. 2006) (quoting *Anderson v. LaVere*, 895 So. 2d 828, 832 (Miss. 2004)). The bar of *res judicata* includes claims that

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[4] A judgment is considered "final" for purposes of *res judicata*, even if appealed, until it is reversed or vacated. *See Smith v. Malouf*, 597 So. 2d 1299, 1301-02 (Miss. 1992).

were or should have been made in the first case. *Anderson*, 895 So. 2d at 832.

In Mississippi, in order for *res judicata* to apply, there must be four identities present: "(1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person against whom the claim is made." *Harrison*, 891 So. 2d at 232 (¶ 24) (citing *Quinn v. Estate of Jones*, 818 So. 2d 1148, 1151 (Miss. 2002)). "In addition to the four identities, a fifth requirement is that the prior judgment must be a final judgment that was adjudicated on the merits." *EMC Mortgage Corp. v. Carmichael*, 17 So. 3d 1087, 1090 (¶10) (Miss. 2009). As discussed below, all of the identities are present in this action. The judgment in *Meador I* is final and was adjudicated on the merits. Plaintiff's claims are therefore barred by *res judicata*.

1. <u>Identity of the Subject Matter</u>

The first requirement is that there be identity of "the subject matter of the original action when compared with the action now sought to be precluded." *Reid ex rel. Reid v. Am. Premier Ins. Co.*, 814 So. 2d 141, 145 (¶ 16) (Miss. 2002). "[I]dentity of subject matter turns on a general characterization of the suit. It is the substance of the action." *Black*, 461 F.3d at 591 (applying Mississippi law). With regard to the claims against Trustmark (and Mr. Hart and Mr. Hunt), the subject matter and substance of this action are the same as in the previous action. Both concern the promissory note (and subsequent renewals) entered into by Plaintiff to obtain operating capital for his medical clinic in Byram, Mississippi; Plaintiff's subsequent default; and the financial difficulties of his medical clinic. *See Estate of Anderson v. Deposit Guar. Nat'l Bank*, 674 So. 2d 1254, 1256 (Miss. 1996) ("Because both causes of action involved the same written instrument, we find there is identity in the subject matter and causes of action."). Therefore, this identity is satisfied.

2. Identity of the Cause of Action

The second requirement is that there be identity of the cause of action. "Identity of the cause of action exists when there is a commonality in the underlying facts and circumstances upon which a claim is asserted and relief is sought from two actions." *City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So. 2d 742, 749 (Miss. 1996) (citation omitted; emphasis added). In discussing this identity, the Mississippi Supreme Court has recently noted:

> This identity, which has proven to be difficult to apply, requires that the 'cause of action' be the same. As an initial note, MISS. R. CIV. P. 2 was specifically promulgated to relieve confusion as to the term 'cause of action.' The purpose of the rule was to replace 'cause of action' with 'claim' or 'claim for relief', and therefore provide our courts with 'the freedom and authority to deal pragmatically with any aggregate of operative fact which gave rise to a right enforceable in the courts, consistent with the jurisdiction of the courts.' In cases involving claim preclusion, this distinction is indeed very important and requires that the parties, as well as the courts, distinguish between what body of fact constitutes a claim and what legal theories attach to that body of fact.
>
> ....
>
> The procedural impetus created by allowing parties to assert all possibilities for recovery and, in essence, blueprint their suit with numerous claims and legal theories, is buttressed by the specter of claim preclusion. Res judicata serves as a mandatory device for claim joinder by restricting the claims which a party may refrain from asserting against the opposing party. According to Professors Wright, Miller and Kane, '[t]he possibility of being barred from asserting a particular claim in a second suit undoubtedly has an *in terrorem* effect and encourages cautious attorneys to join claims ....' 6A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1582 (1990). The ramifications of splitting a claim among two or more suits were outlined by this Court in *Alexander* [*v. Elzie*, 621 So. 2d 909 (Miss. 1992)] when we stated that '[r]es judicata and the issue of splitting a cause of action are closely related.' *Id.* at 910. Citing language from Restatement (First) of Judgments § 62 (1942), we further stated in *Alexander*:
>
> 'Where a judgment is rendered, whether in favor of

> the plaintiff or the defendant, which precludes the plaintiff from thereafter maintaining an action upon the original cause of action, he cannot maintain an action upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action, except ... ' (c) where the defendant consented to the splitting of the plaintiff's cause of action. *Id.* at 910.

Harrison, 891 So. 2d at 233-34 (¶¶ 27, 29) (emphasis added; footnotes omitted).

Accordingly, for purposes of *res judicata*, the Court is to determine whether the claims arose out of the same "body of fact" as opposed to determining whether the same claims were asserted in the pleadings. *See State v. Pittman*, 744 So. 2d 781, 785 (¶ 12) (Miss. 1999) ("An identity among causes of action exists when there is a commonality in the 'underlying facts and circumstances upon which a claim is asserted and relief sought from the two actions.'") (quoting *Lakeland Lounge of Jackson, Inc.*, 688 So. 2d at 749). In making this determination, the Mississippi Supreme Court adheres to the "transactional approach" detailed in the Restatement (Second) of Judgments § 24 (1982). *See Hill v. Carroll County*, 17 So. 3d 1081, 1086 (¶ 15) ("[T]he Court looks past the legal bases asserted and relies more on the factual and transactional relationship between the original action and the subsequent action.") (citing *Harrison*, 891 So. 2d at 234).

In this case, there is no doubt that the claims asserted in the amended complaint in this action arise out of the same "transaction" and "body of fact" as did the counterclaims asserted by Plaintiff in *Meador I*. Plaintiff's claims against Trustmark in the current action are based upon the same line of credit used to finance his Byram medical clinic as were his counterclaims in the original action. (*Compare* R. 37-38; R.E. Tab 3 *with* R. 160-161; R.E. Tab 5) Plaintiff again complains that unauthorized draws were made upon the line of credit by Central Medical Management. (*Compare* R. 38; R.E. Tab 3 *with* R. 161; R.E. Tab 5) These are the same allegations that were rejected by the

circuit court in *Meador I*:

> Meador testified that Trustmark's alleged conversion of Meador's assets took place, if at all, between February 16, 1996, and September 1, 1996. As previously stated, Meador knew that he had [a] $250,000.00 credit line and that the credit line was fully extended prior to September 1, 1996. Meador also testified that in June, July and August of 1996, in the context of negotiations with Mississippi Baptist Medical Center ("MBMC") for the sale of Meador's medical clinic, a consultant hired by MBMC advised Meador of Central Medical Management's ("CMM") alleged financial difficulties. CMM was the entity alleged in Meador's Amended Counterclaim to have wrongfully drawn against Meador's line of credit.
>
> Meador knew in the summer of 1996 that the credit line had been exhausted, and he also supposedly knew in the summer of 1996 that CMM allegedly had financial difficulties. Armed with such knowledge, before he executed the final renewal note on September 29, 1997, Meador was under a duty to at least make inquiry as to application of the funds advanced under the line of credit. If he had any concerns as to the number, timing, amounts, manner, or anything else touching upon draws against the credit line, he should have made them known prior to executing the final renewal note. He did not do so and thereby waived any claim or defense related thereto.

(R. 195-196; R.E. Tab 6; emphasis added.)

Plaintiff's current complaint also alleges that Trustmark failed to extend additional credit to Plaintiff, "causing the loss of Plaintiff's family medical practice and clinic at Byram ...." (R. 40-41; R.E. Tab 3.) Again, however, these allegations have already been addressed in *Meador I*. The Hinds County Circuit Court found:

> In the case at bar, Meador prepared cash flow projections which indicated that he might need a line of credit of as much as $500,000.00; that he gave that information to Trustmark; that Trustmark never issued any written commitment to extend credit of $500,000.00 to Meador; that Trustmark never expressed orally or in writing any commitment to extend credit of $500,000.00 to Meador; that Meador's subjective impression of Trustmark's willingness to extend such a line of credit was the basis for his belief that such an agreement existed; that Meador never discussed the matter of a $500,000.00 credit line with Trustmark after the initial meeting in

> which he delivered his projections to Trustmark; that the only statement allegedly made by Trustmark concerning extending any line of credit to Meador was that Trustmark would 'not have a problem with it.' No document exists that commits or details the terms of an agreement between Trustmark and Meador for the former to extend a $500,000.00 line of credit to the latter.

(R. 197-198; R.E. Tab 6.)

It is obvious that both of these suits arise out of the same set of facts. They involve the same line of credit and promissory note, the startup and failure of the same medical clinic by Plaintiff, and the same decision by Trustmark not to extend additional credit. Although not necessary for *res judicata* to apply, it is telling that several of the legal theories asserted by Plaintiff in this action are the same as those asserted in his previous counterclaim: breach of fiduciary duty; interference with business relations; breach of covenant of good faith and fair dealing; and punitive damages. (*Compare* R. 162-164; R.E. Tab 5 *with* R. 43-48; R.E. Tab 3.)

Plaintiff is attempting to re-litigate many of the same claims, based upon the exact same set of facts. The identity of the cause of action is clearly satisfied.

3. <u>Identity of the Parties</u>

"Although identity of the parties is a necessary element of res judicata, this Court repeatedly has held that strict identity of parties is not necessary for either res judicata or collateral estoppel to apply, if it can be shown that a nonparty stands in privity with the party in the prior action." *EMC Mortgage Corp.*, 17 So. 3d at 1090-91 (¶ 13); *see also Black v. City of Tupelo*, 853 So. 2d 1221, 1225 (Miss. 2003). "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." *Williams v. Vintage Petroleum, Inc.*, 825 So. 2d 685, 689 (¶ 17) (Miss. App. 2006);

see also EMC Mortgage Corp., 17 So. 3d at 1091 (¶ 13) ("Privity is a broad concept, which requires us to look to the surrounding circumstances to determine whether claim preclusion is justified.") (internal quotations omitted). In this case, it is beyond dispute that Trustmark National Bank and Plaintiff were both adversarial parties in the previous action, in which Plaintiff asserted his counterclaims that were dismissed. Accordingly, this prong is satisfied with respect to Trustmark.

With respect to Mr. Hart and Mr. Hunt, both individuals were in privity with Trustmark during the relevant time period in 1997. Mr. Hunt served on the Trustmark board of directors. (R. 40; R.E. Tab 3.) Mr. Hart was an employee (vice president) of Trustmark during the relevant time period. (R. 278.) These relationships have been deemed sufficient to establish privity with a party for purposes of *res judicata*. *See Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1175 (5th Cir. 1992) (noting that most federal circuit courts "have concluded that employer-employee or principle-agent relations may constitute grounds for application of res judicata")[5]; *Fox v. Maulding*, 112 F.3d 453, 459 (10th Cir. 1997) ("A director's close relationship with the corporation will generally establish privity.") (10th Cir. 1997); *Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976) (finding that where "there was no question that the employee had been acting within the scope of his employment at the time of his actions relating to the [incident] which occurred", then privity exists for purposes of *res judicata*); *Spector v. El Ranco, Inc.*, 263 F.2d 143 (9th Cir.1959) ("Where, as here, the relations between two parties are analogous to that of principal and agent, the rule is that

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[5] The Mississippi Supreme Court and Court of Appeals have both cited with approval the Fifth Circuit's *Russell* case, and its concept of privity, when applying the doctrine of *res judicata* to non-parties in a subsequent action. *See Little v. V & G Welding Supply, Inc.*, 704 So. 2d 1336, 1339 (Miss. 1997) (citing *Russell* and finding downstream distributors of product to be in privity with manufacturer for purposes of *res judicata*); *Quinn v. Estate of Jones*, 818 So. 2d 1148, 1151-53 (Miss. 2002); *McCorkle v. Loumiss Timber Co.*, 760 So. 2d 845, 855-56 (Miss. App. 2000) (citing *Russell* and finding timber company in privity with landowner for purposes of *res judicata*).

a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against the plaintiff's right of action against the other."); *see also Restatement (Second) of Judgments*, § 59(1).

The U.S. District Court for the Southern District of Mississippi has noted that:

> where a plaintiff has sued parties in serial litigation over the same transaction; where there was a 'special relationship' between the defendants in each action, if not complete identity of parties; and where, although the prior action was concluded, the plaintiff's later suit continued to seek essentially similar relief--the courts have denied the plaintiff a second bite at the apple.

Hallal v. Hopkins, 947 F. Supp. 978, 989 (S.D. Miss. 1995); *see also A & F Properties, LLC v. Madison County Bd. of Supervisors Lake Caroline, Inc.*, 414 F. Supp. 2d 618, 624 (S.D. Miss. 2005) ("This court finds the relationship between the interests of the Madison County Board of Supervisors and that of Lake Caroline, Inc., and Lake Caroline Owner's Association in preventing the change to the common development scheme close enough to justify finding this cause of action *res judicata*."); *see also Restatement (Second) of Judgments*, § 51 & cmt. b.

In this case, the amended complaint does not contain any allegations that Mr. Hunt or Mr. Hart acted outside of their official capacities as officers or employees of Trustmark. The amended complaint contains no allegations of conduct specific to Mr. Hunt or Mr. Hart. Instead, Mr. Hunt and Mr. Hart are referred to as "the Trustmark affiliated defendants." (R. 22-23; R.E. Tab 3.) Concerning Mr. Hunt, the amended complaint alleges:

> On all relevant occasions Defendant Alvis Hunt was a director of the Mississippi Baptist Medical Center and also a director of Trustmark National Bank, having a fiduciary duty to both entities. Said Defendant Hunt was directly involved in these matters <u>on behalf of the Trustmark National Bank affiliates</u> and the Mississippi Baptist affiliated Defendants.

(R. 40; R.E. Tab 3; emphasis added.) No allegations are made in the amended complaint concerning

Mr. Hart's involvement.

The amended complaint itself establishes the necessary relationship between Trustmark, and Mr. Hunt and Mr. Hart. It names them the "Trustmark affiliated defendants" and alleges that Mr. Hunt's involvement in this matter was "on behalf of" Trustmark. (R. 22-23, 40; R.E. Tab 3.) Mr. Hunt's and Mr. Hart's relationships with Trustmark, as a director and employee, respectively, have been deemed sufficiently close for purposes of *res judicata*. *See, e.g.*, *Russell*, 962 F.2d at 1175. Trustmark, Mr. Hunt and Mr. Hart are "sufficiently related" to be in privity. Accordingly, this identity has been met.

4. Identity of the Quality or Character Against Whom the Claim is Made

"If someone appears in some limited or representative capacity in one case and personally in another, then the parties[']quality or character of the two actions is different." *Davis Island Land Co., LLC v. Vicksburg Warren Sch. Dist.*, 949 So. 2d 754, 758 (¶ 15) (Miss. App. 2006) (citation omitted); *see also McCorkle v. Loumiss Timber Co.*, 760 So. 2d 845, 856 (¶ 47) (Miss. App. 2000) ("It just means that if someone is appearing in some limited or representative capacity in one case and personally in the other, that party's 'quality or character' is not the same in the two actions."). In this case, Trustmark has never been involved in a limited or representative capacity – either in the prior action or in the current one.

As discussed above, although Mr. Hart and Mr. Hunt were not parties to the previous action, they are in privity with Trustmark. They could not have made an appearance in a limited or representative capacity. *See McCorkle*, 760 So. 2d at 856 (holding that defendants in privity with prior litigant satisfy this requirement). Therefore, this identity is satisfied with respect to all three defendants. The four identities are thus satisfied, and this action is barred by *res judicata*.

5. Plaintiff Failed to File the Requisite M.R.C.P. 60(b) Motion to Obtain Relief From a Judgment and He is Now Precluded from Doing So

Plaintiff's response in opposition to summary judgment and oral argument at the hearing did not deny that any of the *res judicata* identities were present. (R. 546-572; Transcript from Summary Judgment Hearing, Volume 7 of Record on Appeal; R.E. Tab 11.) Instead Plaintiff asserted merely that "any judgment obtained by fraud, accident, or mistake may be corrected by the courts." (R. 570.) The only mechanism provided by the Mississippi Rule of Civil Procedure for setting aside a judgment is Rule 60(b), which provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (2) accident or mistake;
>
> . . . .
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. . . . The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

(Emphasis added.) Plaintiff has never filed a Rule 60(b) motion or an independent action[6] seeking to set aside the judgment obtained by Trustmark against Plaintiff in *Meador I*. Where the grounds for the motion are for fraud, accident, or mistake (the three grounds mentioned by Plaintiff), the motion must be made not more than six months after the judgment was entered.

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[6] The current action filed by Plaintiff cannot be considered an independent action to set aside the prior judgment. Plaintiff's amended complaint does not mention the prior judgment, does not request any relief from it, and does not provide any grounds to justify setting it aside.

In this case, final judgment in *Meador I* was entered on September 10, 2001. (R. 209; R.E. Tab 11.) Meador had until March 2002 to file a Rule 60(b) motion to set aside that judgment based upon "fraud, accident, or mistake." This action was not filed until August 31, 2004. (R. 280-288.) Accordingly, any attempt to set aside the judgment for fraud, accident or mistake would be untimely. *See Tirouda v. State*, 919 So. 2d 211, 214-15 (¶ 8) (Miss. App. 2005) ("We agree that this Court is without authority where Rule 60(b)(1), (2) or (3) is the basis for an action and the motion is brought beyond the six month limitation.").

In any event, the record is absolutely devoid of any evidence (or even allegations) of the nature or type of fraud allegedly perpetrated by Trustmark in obtaining the judgment against Plaintiff. Plaintiff's brief in support of his summary judgment response simply implies that Trustmark's judgment is fraudulent, without providing any basis. (R. 570.)

Plaintiff is asking the courts to simply ignore a final judgment in Trustmark's favor concerning the same matters raised in the current lawsuit. Plaintiff has never disputed that the four identities necessary for *res judicata* are satisfied. He has not moved pursuant to Rule 60(b) to have the judgment set aside, and he had no grounds to do so. He has not presented any evidence (or even allegations) of the alleged "fraud, accident, or mistake" by which Trustmark obtained the judgment in *Meador I*. More is required to avoid the preclusive effect of a judgment than the mere act of stating it was obtained by fraud. Plaintiff's claims are indisputably part of the same cause of action which was litigated for over three years and resulted in a judgment in favor of Trustmark. Trustmark should not be required to bear the extraordinary burden and expense of having to re-litigate a matter in which it has already prevailed. The denial of summary judgment based upon Trustmark's *res judicata* defense should be reversed.

B. This Action is Barred By the Statute of Limitations

Plaintiff's complaint asserts a myriad of causes of action, including: (1) breach of fiduciary duty; (2) interference with fiduciary duties; (3) interference with contract; (4) interference with prospective business advantage; (5) intentional infliction of emotional distress; (6) deceit; (7) fraud; (8) retaliatory discharge; (9) conspiracy; (10) gross negligence; (11) state law antitrust claims; (12) tort arising out of contract; and (13) breach of covenants of good faith and fair dealing. (R. 43-48.) It is undisputed that almost all of these claims are subject to the three-year general statute of limitations contained in MISS. CODE ANN. § 15-1-49(1) (2003). The exception is Plaintiff's claim for intentional infliction of emotional distress, which is subject to the one-year statute of limitations for intentional torts. *See* MISS. CODE ANN. § 15-1-35; *see also Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 741 (5th Cir. 2005) ("[C]laim under Mississippi common law for the intentional infliction of emotional distress is subject to the one-year statute of limitations contained in MISS. CODE ANN. § 15-1-35."); *Air Comfort Sys. v. Honeywell, Inc.*, 760 So. 2d 43, 47 (¶ 19) (Miss. App. 2000) ("If the claim is seen as intentional and not negligent infliction of emotional distress, a one-year statute of limitations applies.").

Mississippi's general statute of limitations states: "All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." MISS. CODE ANN. § 15-1-49(1). A "cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested." *Estate of McCullough v. Yates*, 32 So. 3d 403, 410 (Miss. 2010) (quotation omitted).

The allegations are based upon the same line of credit extended by Trustmark to Plaintiff during 1996 and 1997. A review of the Hinds County Circuit Court opinion in *Meador I* establishes without a doubt that Plaintiff's alleged claims accrued, at the latest, in September 1997:

Meador's own testimony establishes that he knew or should have known of the claims and defenses potentially available to him set forth in his Amended Counterclaim prior to executing a final renewal note. Meador alleges that Trustmark breached a contract with Meador arising from Trustmark's failure to fund an alleged loan commitment of $500,000.00. The undisputed facts of this case show that Meador renewed the subject indebtedness in the amount of $230,000.00 as a term installment note on September 29, 1997. Prior to that date, the line of credit had been fully advanced. In deposition under oath, Meador testified that, in May or June, 1996, he met with Trustmark because the original credit line had been fully funded; that Trustmark agreed to make the additional loan but required that it be secured; that Meador understood the requirement of collateral to indicate that Trustmark would not extend further credit to Meador; that he requested no additional extensions of credit from Trustmark after that date; and, that he knew he had a line of credit with Trustmark of only $250,000.

If Meador's testimony is taken as true, then he admits that he knew in May or June of 1996 – some fifteen or sixteen months before he signed the final renewal note – that Trustmark would not be extending credit to him of $500,000.00. Nevertheless, Meador signed the final term renewal note on September 29, 1997, thereby waiving any claim or defense predicated upon Trustmark's alleged failure to fund the alleged loan commitment.

The final renewal date also follows the months during which the line of credit was advanced for clinic operations. Meador testified that Trustmark's alleged conversion of Meador's assets took place, if at all, between February 16, 1996, and September 1, 1996. As previously stated, Meador knew that he had a $250,000.00 credit line and that the credit line was fully extended prior to September 1, 1996. Meador also testified that in June, July and August of 1996, in the context of negotiations with Mississippi Baptist Medical Center ("MBMC") for the sale of Meador's medical clinic, a consultant hired by MBMC advised Meador of Central Medical Management's ("CMM") alleged financial difficulties. CMM was the entity alleged in Meador's Amended Counterclaim to have wrongfully drawn against Meador's line of credit.

....

Meador's Amended Counterclaim alleges that Trustmark owed and breached a fiduciary duty to Meador to 'handle his funds and financial affairs.' If Trustmark 'handle[d] his funds and financial

> affairs,' then it did so prior to the time that all obligations were reduced to a final installment renewal note on September 29, 1997. Upon execution of the renewal note, Meador waived any such claims, including any claims of breach of fiduciary duties arising from the alleged conversion, as a matter of law.
>
> Meador further alleges that Trustmark breached the implied covenant of good faith and fair dealing. For the reasons stated above, Meador waived his claims of breach of the implied covenant of good faith and fair dealing with the execution of the final renewal note on September 29,1997.

(R. 194-196; R.E. Tab 6; emphasis added.) It is therefore clear that any claims Plaintiff may have had against Trustmark, Mr. Hart or Mr. Hunt accrued, at the latest, in September 1997. The statute of limitations expired on these claims in September 2000. With regard to his alleged conspiracy claim, Plaintiff's counsel in *Meador I* stated as far back as February 1999 that he had evidence of collusion between Trustmark and MBHS. (R. 168; R.E. Tab 9.) Accordingly, even based on that letter alone, the latest the statute could have run on the conspiracy claim would have been February 2002. Plaintiff's claims became time barred before the filing of his first bankruptcy petition on June 6, 2002. (R. 218-219.) This action was filed August 31, 2004. (R. 280.) Accordingly, these claims are time barred.

1. <u>Fraudulent Concealment</u>

In an attempt to avoid the statute of limitations, Plaintiff's amended complaint alleges, in a single sentence, that "[d]efendant (sic) fraudulently concealed the several claims and causes of action pleaded against Defendants herein." (R. 45-46.; R.E. Tab 3) The fraudulent concealment of a cause of action can toll the running of the statute of limitations:

> If any person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been first known or discovered.

MISS. CODE ANN. § 15-1-67 (2003).

In order to establish fraudulent concealment, plaintiff has "a two-fold obligation to demonstrate that (1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed on [his] part to discover it." *Stephens v. Equitable Life Assur. Socy' of U.S.*, 850 So. 2d 78, 84 (¶ 18) (Miss. 2003). Because fraudulent concealment is a species of fraud, the Mississippi Supreme Court has held that it "must be pled with specificity and particularity under M.R.C.P. 9(b)." *State Industries, Inc. v. Hodges*, 919 So. 2d 943, 946 (¶ 6) (Miss. 2006). This requires pleading "matters such as the time, place, and contents of the false representation, in addition to the identity of the person who made them and what he obtained as a result." *Id.* (quoting MISS. R. CIV. P. 9(b)).

In this case, Plaintiff fails to plead either of the elements of fraudulent concealment, much less plead them with particularity. The amended complaint does not identify any affirmative act or conduct that prevented Plaintiff's discovery of the alleged claims, or any due diligence performed on his part. Plaintiff's single sentence stating that the alleged claims were fraudulently concealed from him is clearly inadequate to satisfy Rule 9(b). Certainly Plaintiff offered no evidence to defeat summary judgment on that basis.

Plaintiff has long been on notice of the supposed facts which he contends support his claims. He has already litigated counterclaims (beginning in July 1999, *see* R. 157-165; R.E. Tab 5) against Trustmark arising out of the exact same facts. Plaintiff's counsel in the previous actions stated in February 1999 that he had "significant evidence that other parties, including Trustmark Bank, have colluded with MBMC in seeking to destroy Dr. Meador and take his business from him." (R. 168; R.E. Tab 9.) Plaintiff was thus on notice of his alleged claims by February 1999 at the latest. His claim of fraudulent concealment fails as a matter of law, and his claims are barred by the statute of

limitations.

2. The Circuit Court Abused Its Discretion by Failing to Strike the Hearsay Portions of Plaintiff's Affidavit

The only evidence submitted by Plaintiff in support of his fraudulent concealment claim was his own affidavit. ®. 549-555; R.E. Tab 10.) Among other things, Plaintiff's affidavit states that Trustmark and MBHS entered into a conspiracy to damage Plaintiff's financial interest. Plaintiff states that this allegation is based upon statements Brent Farris ("Farris") told him.

Farris is a former consultant for MBHS, who was retained by MBHS in the 1990s. Plaintiff's affidavit states that Farris allegedly informed him of these allegations in 2004. There is no suggestion that Farris's supposed statement has an adequate foundation, indeed this alleged conversation would have occurred several years after Farris's consulting relationship with MBHS ended. ®. 629-630.) At the time of the filing of the summary judgment motion and the summary judgment hearing, Farris was a fugitive from justice. ®. 623.)

Because the Plaintiff's statements concerning the alleged conspiracy are based upon statements by Farris and not on Plaintiff's personal knowledge, they are hearsay. Trustmark moved to strike these hearsay portions of the affidavit. No written response was ever filed by Plaintiff. The circuit court denied the motion to strike from the bench without explanation. (Transcript from Summary Judgment Hearing, Volume 7 of Record on Appeal at p. 8; R.E. Tab 11.)

A court's decision to grant or deny a motion to strike an affidavit is reviewed under an abuse of discretion standard of review. *See, e.g., Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 832 (Miss. 2009). Mississippi Rule of Civil Procedure 56(e) requires, *inter alia*, that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the

matter stated therein." Accordingly, if the affidavit contains inadmissible testimony or allegations that are not based on personal knowledge, it must be stricken and cannot be considered as part of the summary judgment record. *See Levens v. Campbell*, 733 So. 2d 753, 758 (Miss. 1999) (inadmissible hearsay portions of affidavit are not competent summary judgment evidence and should be stricken).

The allegations concerning an alleged conspiracy between Trustmark and MBHS are based upon statements Farris allegedly told Plaintiff and are therefore inadmissible hearsay. *See Branch v. Durham*, 742 So. 2d 769, 771 (¶ 6) (Miss. App. 1999) (out-of-court statements being offered for their truth are "rank hearsay"). Hearsay is defined by Mississippi Rule of Evidence 801(c) to be "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." The allegations in the Plaintiff's affidavit concerning the alleged conspiracy are clearly hearsay, as they are out of court statements by Brent Farris offered to prove the existence of a conspiracy between Trustmark and MBHS.[7]

The contested allegations in Plaintiff's affidavit are not based upon Plaintiff's personal knowledge. "Personal knowledge" is defined as "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." BLACK'S LAW DICTIONARY 877 (7th ed. 1999). Plaintiff's affidavit testimony concerning the alleged conspiracy and the existence of tapes confirming the conspiracy does not in any way purport to be based upon his firsthand knowledge or experience. Instead, Plaintiff admits that this testimony is based upon

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[7] *See* Plaintiff's Affidavit ¶ 20 ("Brent Farris informed me in 2004 at about the time of my Amended Complaint, for the first time, that there had been an agreement between MBHS and Trustmark National Bank to exert financial duress upon me in order to deprive me of my medical clinic in Byram, Mississippi and also Mobile Physicians Services, a company I had organized. Mr. Farris informed me that there are available through the United States Department of Justice taped conversations between Trustmark and MBHS confirming that fact.") (R. 553; R.E. Tab 11; emphasis added).

statements that Farris "informed" him about in 2004.

As stated by the United States Supreme Court:

> The hearsay rule ... is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court.

Williamson v. U.S., 512 U.S. 594, 598 (1994). The rules of evidence "recognize that some kinds of out-of-court statements are less subject to these hearsay dangers, and therefore except them from the general rule that hearsay is inadmissible." *Id.* These exceptions are contained in Mississippi Rules of Evidence 803 and 804.

The hearsay contained in Plaintiff's affidavit does not fall under any recognized exception to the hearsay rule contained in the Mississippi Rules of Evidence. Plaintiff did not argue any exception at the hearing. Accordingly, the circuit court abused its discretion in failing to strike the statements in Plaintiff's affidavit based upon statements made by Farris. Without these statements, there is no record evidence of any affirmative act of concealment by Trustmark with respect to the fraudulent concealment claim. The statute of limitations was not tolled, and Plaintiff's claims are time barred.

CONCLUSION

Based on the foregoing, the denial of Trustmark National Bank, Frank Hart and Alvis Hunt's summary judgment motion based upon *res judicata* and the statute of limitations should be reversed and rendered, and all claims against these parties should be dismissed with prejudice.

Respectfully submitted,

TRUSTMARK NATIONAL BANK, FRANK HART, AND ALVIS HUNT

By: BRIAN C. SMITH (MSB [redacted]

WATKINS & EAGER PLLC
William F. Ray (MSB [redacted]
Brian C. Smith (MSB #[redacted]
P. O. Box 650
Jackson, MS 39205
Telephone: (601) 965-1900
Facsimile: (601) 965-1901

CERTIFICATE OF SERVICE

I, Brian C. Smith, one of the attorneys for Appellants Trustmark National Bank, Frank Hart and Alvis Hunt, 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:

Michael S. Allred, Esq.
The Allred Law Firm
P. O. Box 3828
Jackson, MS 39207-3828

D. Collier Graham, Jr., Esq.
Jeremy L. Birdsall, Esq.
Rex M. Shannon, III, Esq.
Wise Carter Child & Caraway, P.A.
P. O. Box 651
Jackson, MS 39205-0651

R. Mark Hodges, Esq.
Wise Carter Child & Caraway, P.A.
P. O. Box 651
Jackson, MS 39205-0651

C. R. McRae, Esq.
William B. Kirksey, Esq.
Kirksey & Associates
P. O. Box 33
Jackson, MS 39205-0033

The Honorable Winston Kidd
Hinds County Circuit Court
P. O. Box 327
Jackson MS 39205

This the 8th day of December, 2010.

Brian C. Smith

Brian C. Smith