

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HOMER D. THOMPSON, III

APPELLANT

VS.

CAUSE NO.:2010-CA-10351

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**STEPHEN M. BROWN AND TRUE TEMPER
SPORT, INC. A/K/A TRUE TEMPER
CORPORATION**

APPELLEE

CERTIFICATE OF INTERESTED PERSONS:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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. Homer D. Thompson, III;
2. Jeffery M. Navarro;
3. Stephen M. Brown;
4. True Temper Sports, Inc., a/k/a True Temper Corporation;
5. Sheryl Bey; and
6. Kirk D. Tharp.

Respectfully Submitted,
HOMER D. THOMPSON, III,

Appellant

By 

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CAUSE NO.:2010-CA-10351

**STEPHEN M. BROWN AND TRUE TEMPER
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CORPORATION**

APPELLEE

**Appeal from the Circuit Court of Monroe County, Mississippi
Cause No.: :CV10-005-GM**

BRIEF OF APPELLANT, HOMER D. THOMPSON, III

STATEMENT OF THE ISSUES:

1. Is there a set of facts which would support a claim against the Defendant, TRUE TEMPER SPORTS, INC.?

A) In General, for negligence, under *M.R.C.P.* 12 (b)(6)?

B) Under a Theory of Vicarious Liability?

STATEMENT OF THE CASE:

A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW:

The Appellant filed an original complaint in the Circuit Court of Monroe County, Mississippi against the Appellees, Stephen M. Brown, and his employer, True Temper Sport, Inc., a/k/a True Temper Corporation for alienation of affection due to an affair that developed between the aforesaid Appellee, Stephen M. Brown, and the Appellant's wife who worked for the aforesaid Stephen M. Brown. (ROA, p. 7). The Appellees each filed Answers to the Complaint. (ROA, p. 26; p. 33). The Appellee, True Temper Sport, Inc., a/k/a True Temper Corporation, also filed a separate Motion to Dismiss for failure to state a claim pursuant to *M.R.C.P.* 12 (b)(6). (ROA, p. 42). The Motion was briefed by both the Appellee, True Temper Sport, Inc., a/k/a True Temper Corporation, and the Appellant, Homer D. Thompson. A hearing on the Motion to Dismiss was held on 4 June, 2010. There was no proof put on at the hearing, there was argument only. The trial court granted the Motion to Dismiss by Order entered on 21 June, 2010. (ROA, p. 72). The Appellant filed a Motion to Alter or Amend the aforesaid

Order pursuant to *M.R.C.P.* 59 on 25 June, 2010. (ROA, p. 77). The Appellee, , True Temper Sport, Inc., a/k/a True Temper Corporation, filed a response in opposition to the Motion on 30 June, 2010. (ROA, p. 83). Thereafter, the trial court entered its Order denying the Appellant's Motion to Alter or Amend on 14 July, 2010. (ROA, p. 87). On 13 August, 2010, the Appellant filed his Notice of Appeal in this cause. (ROA, p. 88).

B. STATEMENT OF THE FACTS:

The Plaintiff filed this action in the Circuit Court of Monroe County, Mississippi on 4 January, 2010, against the Defendant, STEPHEN M. BROWN, and the Defendant, TRUE TEMPER SPORTS, INC. for alienation of affections, seeking damages. (ROA, p. 7). The Defendants have both filed Answers to the Complaint. (ROA, p. 26; p. 33). The Defendant, TRUE TEMPER SPORTS, INC., filed a MOTION TO DISMISS pursuant to *M.R.C.P.* 12 (b) (6), (hereinafter "the Motion") alleging that the Complaint failed to state a claim upon which relief can be granted. (ROA, p. 42).

The salient facts alleged in the Plaintiff's Complaint, insofar as the Motion is concerned, are as follows (ROA, p. 7):

1. **(Para. No.: 4 of the Complaint)** That Plaintiff is the lawfully wedded husband of Barbara Thompson to whom he was married for approximately 10 ½ years, having married on 17 October, 1998, prior to the relationship that developed between Defendant, STEPHEN M., BROWN, and the aforesaid Barbara Thompson.

2. **(Para. No.: 5 of the Complaint)** That the aforesaid Barbara Thompson went to work for the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION in October, 2008, as Human Resources/Safety Assistant at its Amory, Mississippi plant. The Defendant, STEPHEN M. BROWN, is a Vice-President of Human Resources of the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, and has been serving as the plant manager of the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION's Amory, Mississippi plant. The aforesaid Barbara Thompson works for and is the subordinate of the Defendant, STEPHEN M.

BROWN, at the Amory, Mississippi plant of the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION. The relationship between the Defendant, STEPHEN M. BROWN, and Barbara Thompson, grew out of the working relationship between the two. Inasmuch as the Defendant, STEPHEN M. BROWN, is in charge of the day to day operations of the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, at its Amory, Mississippi plant, and considering that the aforesaid Defendant, STEPHEN M. BROWN, is the Vice-President of Human Resources for the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, the adulterous relationship which developed between the Defendant, STEPHEN M. BROWN, and Barbara Thompson, is the product of an atmosphere engendering the development of said relationship which was permitted by the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION.

3. **(Para. No.: 6 of the Complaint)** That Defendant, STEPHEN M. BROWN, willfully, actively, wrongfully and intentionally interfered with the martial relationship of Plaintiff and his wife, Barbara Thompson, thereby causing an alienation of her affections toward the Plaintiff; and, by reason thereof, depriving Plaintiff of the society, companionship and marital harmony to which

was entitled by virtue of their marriage.

4. **(Para. No.: 16 of the Complaint)** The relationship between the Defendant, STEPHEN M. BROWN, and Barbara Thompson, grew out of the working relationship between the two. Inasmuch as the Defendant, STEPHEN M. BROWN, is in charge of the day to day operations of the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, at its Amory, Mississippi plant, and considering that the aforesaid Defendant, STEPHEN M. BROWN, is the Vice-President of Human Resources for the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, the adulterous relationship which developed between the Defendant, STEPHEN M. BROWN, and Barbara Thompson, is the product of an atmosphere engendering the development of said relationship which was permitted by the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION. The actions or lack thereof on the part of the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, in employing the aforesaid Defendant, STEPHEN M. BROWN, in a supervisory capacity and entrusting him as the head of human resources when there was no means of controlling the

development of a relationship between the Defendant, STEPHEN M. BROWN, and the Plaintiff's wife, Barbara Thompson, amounts to such negligence as to constitute gross negligence. The Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, knew or should have known that by entrusting and, in effect, empowering the Defendant, STEPHEN M. BROWN, such as was done without supervising him in any manner so as to prevent the development of a relationship between the Defendant, STEPHEN M. BROWN, and Barbara Thompson, would result in the herein complained of damage to the Plaintiff or some other husband. In the alternative, due to the unique capacity of the Defendant, STEPHEN M. BROWN, as both the plant manager of the Amory, Mississippi plant of the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, and as the Vice-President of said corporate Defendant in charge of human resources, the actions of the Defendant, STEPHEN M. BROWN, hereinabove and hereinafter complained of are attributable to the Defendant, TRUE TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, under a theory of vicarious liability.

The Defendants, as noted earlier, each filed Answers. (ROA, p. 26, 33). Then, the Defendant, TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION,

filed its Motion pursuant to *M.R.C.P.* 12 (b) (6). (ROA., p. 42). No discovery was taken in the proceedings below, and the trial court had before it only the Complaint and Answers of the parties to consider. The trial court has dismissed the action as to the Defendant, TEMPER SPORTS, INC. a/k/a TRUE TEMPER CORPORATION, only. (ROA, p. 72).

The Appellant, HOMER D. THOMPSON, III, filed his Complaint for Alienation of Affections against the Defendants alleging liability against the Defendant, TRUE TEMPER SPORT, INC. A/K/A TRUE TEMPER CORPORATION (hereinafter "True Temper") on general liability grounds and those of vicarious liability for the actions of its employee, the Defendant, STEPHEN M. BROWN.

SUMMARY OF THE ARGUMENT:

There are two (2) separate theories of liability as to the Appellee, TRUE TEMPER SPORT, INC. The first is under a general negligence theory. The second is as to vicarious liability.

The Supreme Court has recently and clearly ruled that an alienation of affections claim against an employer for general negligence should survive a Motion to Dismiss under *M.R.C.P.* 12 (b)(6). *Children's Medical Group, P.A. v. Phillips*, 940 So.2d 931, 933 (Miss., 2006).

The standard of review which the trial court should have applied to the Appellant's complaint pursuant to *M.R.C.P.* 12 (b)(6) was that "it must appear to a *certainty* that the plaintiff is entitled to *no relief under any set of facts* that could be proved in support of the claim." *Children's Medical Group, P.A. v. Phillips*, 940 So.2d 931, 933 (Miss., 2006). The trial court failed to employ this standard in the case before it. As in *Children's Medical Group, P.A. supra.*, it is not possible for the Court to say that "there are no possible facts which could result in" TRUE TEMPER SPORT,

INC.'s "liability for alienation of affections." *Id.* at 935.

As to the sustainability of the Appellant's complaint under a theory of vicarious liability, admittedly the Court's ruling in *Children's Medical Group, P.A, supra*. appears to be a barrier. However, the unique position occupied by the co-defendant/ Appellee, Stephen M. Brown, as both the plant manager and head of human resources for the Appellee, TRUE TEMPER SPORT, INC., creates a factual situation making the applicability of vicarious liability to the Appellant's claim reasonable.

ARGUMENT:

A. ISSUE I:

Is there a set of facts which would support a claim against the Defendant, TRUE TEMPER SPORTS, INC.?

A) In General under *M.R.C.P.* 12 (b)(6)?

The trial court, in granting TRUE TEMPER SPORTS, INC.'s Motion to Dismiss, relied upon *Children's Medical Group, P.A. v. Phillips*, 940 So.2d 931 (Miss. 2006), as stating the standard of review for the Court for a *M.R.C.P.* 12 ((b) (6) motion to dismiss. That standard, as stated by the Court was: "There must be no set of facts that would support a claim before an opposing party is entitled to dismissal." (ROA, p. 72). In fact, the standard of review as set out by the Supreme Court in *Children's Medical Group, supra*, is

"it must be such that no set of facts would entitle the opposing party to relief." *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893 (Miss. 2006); *see also* M.R.C.P. 12(b)(6) cmt. (to grant a Rule 12(b)(6) motion to dismiss, "there must appear to a *certainty* that the plaintiff is entitled to *no relief under any set of facts* that could be proved in support of the claim") (emphasis added).

Children's Medical Group, supra at 933.

The Appellee, TRUE TEMPER SPORTS, INC., and the trial court relied upon

Children's Medical Group, P.A. v. Phillips, 940 So.2d 931 (Miss. 2006) as its primary authority in sustaining TRUE TEMPER SPORTS, INC.'s Motion. In

Children's Medical Group, supra, the Court, as in the case sub judice, was faced with a situation wherein:

A husband claims in a lawsuit that the medical clinic employing his wife recklessly allowed her and a coworker to engage in an extramarital affair in the workplace and, therefore, is liable to him for alienation of affections. The husband alternatively claims the employer is vicariously liable for its employee's actions. The question presented is whether either claim can survive a motion to dismiss under Mississippi Rule of Civil Procedure 12(b)(6).

Id. at 932.

In other words, as in the Appellant Thompson's Complaint, the plaintiff in

Children's Medical Group, supra, sued the employer for alienation of affections under two (2) theories: 1) for recklessly permitting the employees to engage in an extramarital affair, and 2) under a theory of vicarious liability. The employer attacked the plaintiff's complaint by means of a motion under ***M.R.C.P.*** 12 (b) (6), challenging the complaint under both of the plaintiff's theories. The trial court denied the motion, and the employer took an interlocutory appeal.

The Supreme Court began its analysis in that case by stating that:

Our inquiry on a Rule 12(b)(6) motion to dismiss is not limited to the specific allegations in Robert's complaint, which we must accept as true. *Poindexter v. S. United Fire Ins. Co.*, 838 So.2d 964, 966 (Miss. 2003). We are charged to consider

only whether *any* set of facts could support Robert's action for alienation of affections against CMG. *Cook v. Brown*, 909 So.2d 1075, 1078 (Miss. 2005).

Children's Medical Group, supra at 934.

The Court went on to say that:

It is true that Robert fails to specify CMG's conduct that directly and intentionally interfered with his marriage. However, under our rules, Robert is not required to plead the specific wrongful conduct. At the pleading stage, he is required only to place CMG on reasonable notice of the claims against it and to demonstrate that he has alleged a recognized cause of action upon which, under *some set of facts*, he might prevail. Consequently, in order to succeed in having this case dismissed pursuant to Rule 12(b)(6), CMG must demonstrate that Robert cannot prevail under any set of facts. This is the analysis we must apply. *See Ralph Walker, Inc.*, 926 So.2d at 893; *Cook*, 909 So.2d at 1078; *Poindexter*, 838 So.2d at 966; *Little*, 835 So.2d at 11.

Children's Medical Group, supra at 934 -935.

The trial court herein relied upon a string of unconnected cases beginning with ***Children Medical Group, P.A, supra***, and ending with *Ainsworth v. Gildea*, 2009 WL 3336111 (S.D. Miss., 2009) for the proposition that it appeared beyond a reasonable doubt that the Appellant, Thompson, could not prove any set of facts supporting his claim against the Appellee, TRUE TEMPER SPORTS, INC., that it

should be held accountable for his claim for alienation of affections. In

ChildrenMedical Group, P.A., the Supreme Court, faced with a complaint filed against a paramour and his employer for alienation of affections, ruled that:

There is a vast difference between the pleading burden necessary to survive a Rule 12(b)(6) motion to dismiss and the evidentiary requirements necessary to survive a motion for summary judgment under Mississippi Rule of Civil Procedure 56. A motion to dismiss under Rule 12(b)(6), as opposed to other devices in civil law, contemplates a high degree of speculation by the reviewing court. In *Stuckey*, we explained the differences between Rule 12 and Rule 56:

While the two rules provide for dismissal of actions, their bases are completely different. Accordingly, a Rule 12(b)(6) motion tests legal sufficiency, and in applying this rule 'a motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim.' *Missala Marine Services, Inc. v. Odom*, 861 So.2d 290, 294 (Miss. 2003). Quite differently, Rule 56 tests the notion of well-pled facts and requires a party to present probative evidence demonstrating triable issues of fact.

Children's Medical Group, at 934.

In fact, in ***Children's Medical Group, supra***, the Supreme Court ruled that as to the first theory of liability, recklessly permitting the plaintiff's wife to engage in an affair, that the employer's motion to dismiss should be denied, stating that:

We are unable to say, as a matter of law, that there are no possible facts which could result in CMG's liability for alienation of affections. Accordingly, we affirm the trial court's denial of CMG's motion to dismiss for failure to state a claim insofar as Robert alleges CMG committed the tort of alienation of affections based on its own actions.

Children's Medical Group at 935.

Nonetheless, the trial court sustained TRUE TEMPER SPORTS, INC.'s Motion to Dismiss.

Another case relied upon by the trial court, ***Ainsworth v. Gildea, supra***, was an alienation of affections case filed by a wife against a woman and her *parents* which was removed to federal court. The Federal District Court for the Southern District of Mississippi in ***Ainsworth v. Gildea*** found that the complaint should be dismissed both under ***F.R.C.P.*** 56 as a summary judgment, and that a motion to dismiss should be granted under ***F.R.C.P.*** 12 (b) (6). The court, in discussing the Mississippi state court case of ***Children's Medical Group***, noted that "It is worth noting that *Phillips* denied a motion to dismiss, but did so under Mississippi's markedly different approach to Rule 12(b)(6)." ***Ainsworth v. Gildea***, Fn. 2. In other words, the federal court case relied upon by the trial court was one in which the federal district court admitted that a different result would have occurred in the event that its case had been before a Mississippi state court.

The Appellant, TRUE TEMPER SPORT, INC., couched its argument in the lower

court in support of its Rule 12 (b) (6) Motion for the general liability theory, by employing facts inappropriate to the focus of consideration of a Rule 12 (b) (6) motion. Namely, it asked the Court to consider what *wrongful conduct* occurred on the part of the Defendant to make it liable. The trial court did consider that question. However, as the Court in *Children's Medical Group*, stated:

There is a vast difference between the pleading burden necessary to survive a Rule 12(b)(6) motion to dismiss and the evidentiary requirements necessary to survive a motion for summary judgment under Mississippi Rule of Civil Procedure 56. A motion to dismiss under Rule 12(b)(6), as opposed to other devices in civil law, contemplates a high degree of speculation by the reviewing court. In *Stuckey*, we explained the differences between Rule 12 and Rule 56:

While the two rules provide for dismissal of actions, their bases are completely different. Accordingly, a Rule 12(b)(6) motion tests legal sufficiency, and in applying this rule 'a motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim.' *Missala Marine Services, Inc. v. Odom*, 861 So.2d 290, 294 (Miss. 2003). Quite differently, Rule 56 tests the notion of well-pled facts and requires a party to present probative evidence demonstrating triable issues of fact.

Children's Medical Group, supra at 934.

In fact, in *Children's Medical Group*, the Supreme Court ruled that as to the first theory of liability, recklessly permitting the plaintiff's wife to engage in an affair, that the employer's motion to dismiss should be denied, stating that:

We are unable to say, as a matter of law, that there are no possible facts which could result in CMG's liability for alienation of affections. Accordingly, we affirm the trial court's denial of CMG's motion to dismiss for failure to state a claim insofar as Robert alleges CMG committed the tort of alienation of affections based

B. ISSUE II:

2. Is there a set of facts which would support a claim against the Defendant, TRUE

TEMPER SPORTS, INC.?

B) Under a Theory of Vicarious Liability?

The Court in *Children's Medical Group, supra*, addressed the employer's liability under the vicarious liability theory by setting forth its limitations on liability as follows:

Under the doctrine of respondeat superior, the master is liable for the acts of his servant which are done in the course of his employment and in furtherance of the master's business." *Sandifer Oil Co. v. Dew*, 220 Miss. 609, 630, 71 So.2d 752, 758 (1954). Under Section 228 of the Restatement (Second) of Agency:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master, and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Children's Medical Group, supra at 935.

In ultimately ruling that the employer was not liable to the plaintiff under a theory of vicarious liability, the Court held that "It defies reason to argue that

engaging in an affair at work or during working hours in any way furthered the business interests of CMG or enhanced the medical care of CMG's pediatric patients.” *Children’s Medical Group, supra* at 936.

However, in the case sub judice the Court is presented with an unusual circumstance. First, the Appellee, STEPHEN M. BROWN, served as the plant manager of Appellee, TRUE TEMPER SPORT, INC.’s, Amory, Mississippi plant where both he and the Plaintiff’s wife were employed. Secondly, the Appellee, STEPHEN M. BROWN, served as the Vice-President of Human Resources for the Appellee, TRUE TEMPER SPORT, INC., charged with enforcing discouragement of the development of relationships of the sort complained of herein. In other words, it was within the scope of the Appellee’s, STEPHEN M. BROWN’s, employment to investigate and prohibit relationships between co-workers. Consequently, due to the unique position occupied by the Appellee, STEPHEN M. BROWN, with the Appellee, TRUE TEMPER SPORT, INC., vicarious liability should lie against the Appellee, TRUE TEMPER SPORT, INC.

CONCLUSION:

As to the vicarious liability theory, the Court should find for the Appellant, and allow him to proceed with this litigation by doing discovery inasmuch as the Defendant, STEPHEN M. BROWN, served as both the plant manager of the Defendant, TRUE TEMPER SPORT, INC.'s Amory, Mississippi facility, and as the Vice-President of Human Resources for the Defendant. As to the general liability theory, consistent with *Children's Medical Group, supra*, the Court find for the Appellant, as any number of factual settings could justify liability on the part of the Appellee, TRUE TEMPER SPORT, INC.

Respectfully submitted,
HOMER D. THOMPSON, III,
APPELLANT



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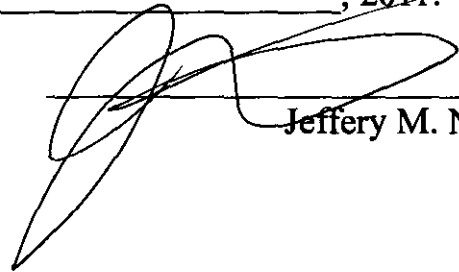
CERTIFICATE OF SERVICE

I, Jeffery M. Navarro, Attorney for the Plaintiff, do hereby certify that I have this day mailed, by U.S. Mail, first class, postage prepaid, a true and correct copy of the above and foregoing APPELLANT'S BRIEF to the following at their usual addresses:

Hon. Sheryl Bey
P.O. BOX 14167
Jackson, MS 39236

Hon. Kirk D. Tharp
P.O. BOX 7332
Tupelo, MS 38802

CERTIFIED, this the 1st day of Feb., 2011.



Jeffery M. Navarro