IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-IA-01939-SCT

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

V.

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

V.

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

PLAINTIFF/APPELLEE MEADOR'S CONSOLIDATED OPPOSITION BRIEF

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

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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. C. Brent Meador, M.D., Respondent;
2. Michael S. Allred, Counsel for Respondent;
3. Mississippi Baptist Health Systems, Inc., C. Gerald Cotton, Lu Harding, Charles, Eric A. McVey, III, M.D., Kurt Metzner, and James P. Wigley, Defendants;
4. D. Collier Graham, Jr., Jeremy L. Birdsall, and Rex M. Shannon III, Counsel for Defendants;
5. Trustmark National Bank, Alvis Hunt, and Frank Hurt, Defendants;
6. William F. Ray and Brian C. Smith, Counsel for Defendants Trustmark National Bank, Alvis Hunt, and Frank Hurt;
7. William A. Causey, M.D., Defendant;
8. Chuck R. McRae, Counsel for Defendant William A. Causey, M.D.;
9. James C. Bethea, Premier Medical Group of Mississippi, PLLC, and Premier Medical Management of Mississippi, Inc., Defendants;
10. R. Mark Hodges, Counsel for Defendants James C. Bethea, Premier Medical Group of Mississippi, PLLC, and Premier Medical Management of Mississippi, Inc.;
11. Honorable Winston Kidd, Hinds County Circuit Court Judge

MICHAEL S. ALLRED

STATEMENT CONCERNING ORAL ARGUMENT

Plaintiff does not believe that oral argument should be necessary for the proper disposition of this interlocutory appeal.

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I. STATEMENT OF THE ISSUES

1. This is not an appeal from a summary judgment on the merits. It is an appeal from a purely discretionary ruling on a procedural issue, to wit: allowing the deposition of Brent Farris, an absent witness identified with the Defendant MBHS before ruling on the merits, if an alleged basis for summary judgment remains after an evidentiary deposition. The trial court neither finally sustained nor denied Defendants' Motions for Summary Judgment on the merits. A ruling on the merits remains available to the trial court under Rules 50 and 56, Mississippi Rules of Civil Procedure, and otherwise, after the deposition of an absent and absconding witness is taken.

2. The 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. Any disputed issues of material fact will preclude summary judgment. A trial court's discretionary ruling that such summary judgment evidence is to be allowed will not be disturbed on appeal.

3. There are issues of fact and unresolved discovery issues which preclude summary judgment on the merits under rule 56 (b), (c), (d), (e) and (f), Mississippi Rules of Civil Procedure. Granting a summary judgment against a discretionary ruling of a trial judge's on unresolved discovery issues flies in the face of this Court's Rule 56 jurisprudence.

4. Plaintiff's claims are not barred, without dispute of material fact, by res judicata.

5. Plaintiff's claims are not barred, without dispute of material fact, by any statute of limitations

6. Plaintiff's contemporaneous Motion to Take Limited Discovery strongly supports affirming and remanding this case without prejudice to re-

urging all of these points of law and fact after remand, if appropriate, in the light of the summary judgment evidence then appearing.

II. STATEMENT OF THE CASE

The decisive and outcome determinative issue presented by this appeal is, as is so often the case, what is the question? Defendants have briefed this interlocutory appeal as if the trial court, in ruling on the Summary Judgment Motions, fully considered all of the convoluted and voluminous issues briefed by the Defendants and made a preclusive, final ruling on the merits thereof. In fact, the trial judge made an interlocutory ruling -- in no way purported to be or intended to the final -- that the Plaintiff should be allowed to take discovery from Brent Farris, a witness identified as a senior management consultant with the Defendant Mississippi Baptist Health Systems (MBHS), who was a fugitive from federal justice and as a result could not be deposed during the pendency of this case, and that there are material facts which preclude summary judgment

All of the questions presented to the Court in this case should be reframed in the light of that fact. The 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 -- a senior management consultant employed on relevant occasions by MBHS -- having absconded and remaining a fugitive. Furthermore, Plaintiff did bring in opposition to the Summary Judgment Motions preclusive summary judgment evidence.

A. Proceedings in the Trial Court and Posture of the Case

A list and index of the submissions to the trial court which predicated Defendants' Summary Judgment Motions is attached to Defendant Trustmark's Record Excerpts, including the summary judgment Order entered by the trial court sua sponte, correctly referring to the Order of the trial court as an "interlocutory order of the Hinds County Circuit Court, denying Trustmark National Bank, et als' Motion for Summary Judgment." (Trustmark TAB 2). In addition, attached is the Affidavit of Dr. Brent Meador submitted in opposition to Defendants' Motions for Summary Judgment (TAB 10), and the transcript of the summary judgment hearing. (TAB 11)

A list and index of Defendant MBHS's Record Excerpts is also attached. This includes the Transcript of the summary judgment hearing (MBHS TAB 7), and Order denying Defendant's Motions for Summary Judgment. (MBHS TAB 8) These are incorporated by reference and submitted for the purpose of aiding the Court in considering the summary judgment evidence in the trial court, compiled by the Defendants. Also attached to Plaintiff's Motion to Take Limited Discovery is the Second Affidavit of Brent Meador, showing significant need of the deposition of Brent Farris for such purposes, in considering the merits of this interlocutory appeal. The Second Affidavit of Brent Meador, sets forth the current location and expected testimony of Brent Farris, who has been located in the interval since this interlocutory appeal was taken and is available for deposition. This is attached to Plaintiff's Motion for Leave to Take Limited Discovery filed herewith and incorporated herein by reference.

The transcript of the hearing on Motions for Summary Judgment is very significant to this Court's decision of this appeal. The trial court directed that the Motion to Strike the Affidavit of Meador be taken up first at the hearing as disposition of it would significantly affect the outcome of the other motions. MBHS TAB 7, page 3 In arguing the Motion to Strike, defense counsel made a summary of some facts dispositive of the case now before the bar which were not before the trial court in the prior litigation and settlement, including: (1) facts indicating fraudulent concealment of Defendants' concert and conspiracy to destroy Meador's business; (2) events and activities entirely perpetrated and carried out after the execution of the settlement and release not subsumed by the release; (3) facts and circumstances known to Brent Farris, a senior management consultant closely identified with the Defendants MBHS who was at the time of the hearing a felon and fugitive from justice, whose deposition for evidence and other purposes this Court needs in connection with its ruling in this case, (4) all of the facts related to Defendant Trustmark, none of which were available or included within any settlement worked out with MBHS, and all of the facts concerning Defendants' conduct in violation of the state antitrust laws..

Clearly Brent Farris, formerly a senior management consultant with MBHS, was not available for deposition at or before the summary judgment hearing, MBHS TAB 7, page 8. Plaintiffs' 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.

With all of the same contentions and arguments made here having been made before the trial court, the Motion to Strike was overruled and denied. MBHS TAB 7, page 9. This is a discretionary ruling of the trial

court, especially in connection with considering the evidence to be allowed in connection with summary judgment motions, and cannot constitute assignable error on this interlocutory l appeal.

MBHS argued its alleged statute of limitations defense, MBHS TAB 7, page 10 and an alleged accord and satisfaction and release defense MBHS TAB 7, page 12. Trustmark argued only its alleged res judicata defense, there being no Trustmark related release. It was placed before the Court by Plaintiff that Meador learned from Brent Farris in 2004 that Farris had, at a time while he was wearing a wire as a senior management consultant of MBHS, acting as a federal grand jury informant, learned of MBHS conspiring with Trustmark to call all of Meador's loans, throwing him into bankruptcy and destroying his business. Trustmark misinformed the trial judge that Plaintiff had not briefed the issue of res judicata and was corrected by reference to Plaintiff's Brief TAB 2, page 7,R. 546, 470.

The trial court did not as directed by Rule 56 (d) when "judgment is not rendered on the whole case or for all the relief asked and a trial is necessary" . . . "make an order specifying the facts that appear without substantial controversy, . . . directing such further proceedings in the action as are just." There is nothing about the trial court's interlocutory ruling which precludes the trial court from revisiting these issues at a later date in the light of the evidentiary deposition of Brent Farris and the documents to be produced by the federal grand jury and Mr. Farris, and it is clear that the absence of this proof at the time of the summary judgment hearing without the fault or connivance of the Plaintiff is the gravamen of the trial judge's ruling overruling and denying the motions.

B. Statement of the Facts

Defendants have been disingenuous to say the least in characterizing the facts and allegations of Plaintiff's case. Plaintiff first pleads in the Amended Complaint, Trustmark TAB 3, the details of Defendants' efforts to establish monopoly power and the relevant product and geographic markets. Paragraphs 48 -- 69. As part of this scheme to acquire monopoly power, Defendants formed Central Medical Management Paragraphs 70 -- 77. Defendants had a motive to destroy Plaintiff's business, Paragraph 78, and entered into a concert and agreement to do so. Paragraph 83. Defendants caused CMM to manage Plaintiff's medical clinic, Paragraph 86, and to draw excessively against Plaintiff's loan line. Paragraph 87.

Then currently, Defendants fired Meador as medical director of Baptist CDU, Paragraph 92, and caused Trustmark to discontinue making loan advances and to call Meador's loan. In furtherance of this concert and conspiracy, Paragraph 100, Trustmark sued Meador on his promissory note. Paragraph 101.

In these premises, Plaintiff filed claims, counts and causes of action for several forms of interference, fraud and deceit, retaliatory discharge, conspiracy, and negligence, in addition to the Mississippi state law antitrust claims. This is not the lawsuit which the Defendants have described to this Court. It is a lawsuit which has not previously been filed, against parties not previously joined arising largely out of premises which occurred after the prior lawsuit and which was fraudulently concealed until Plaintiff learned from Brent Farris, a senior management consultant with MBHS, of these anti-competitive and fraudulent activities.

III. SUMMARY OF THE ARGUMENT

1. This is not an appeal from a summary judgment on the merits. It is an appeal from a purely discretionary ruling on a procedural issue, to wit: allowing the deposition of Brent Farris, an absent witness identified with the Defendant MBHS before ruling on the merits, if an alleged basis for summary judgment remains after an evidentiary deposition. The trial court neither finally sustained nor denied Defendants' Motions for Summary Judgment on the merits. A ruling on the merits remains available to the trial court under Rules 50 and 56, Mississippi Rules of Civil Procedure, and otherwise, after the deposition of an absent and absconding witness is taken.

2. The 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. Any disputed issues of material fact will preclude summary judgment. A trial court's discretionary ruling that such summary judgment evidence is to be allowed will not be disturbed on appeal.

3. There are issues of fact and unresolved discovery issues which preclude summary judgment on the merits under rule 56 (b), (c), (d), (e) and (f), Mississippi Rules of Civil Procedure. Granting a summary judgment against a discretionary ruling of a trial judge on unresolved discovery issues flies in the face of this Court's Rule 56 jurisprudence.

4. Plaintiff's claims are not barred, without dispute of material fact, by res judicata.

5. Plaintiff's claims are not barred, without dispute of material fact, by any statute of limitations

6. Plaintiff's contemporaneous Motion to Take Limited Discovery strongly supports affirming and remanding this case without prejudice to re-

urging all of these points of law and fact after remand, if appropriate, in the light of the summary judgment evidence then appearing.

IV. ARGUMENT AND AUTHORITIES

POINT ONE: This is not an appeal from a final judgment on the merits. It is an appeal from a purely discretionary ruling on a procedural issue, to wit: the availability of a key witness. The trial court neither sustained nor denied Defendants' Motions for Summary Judgment on the merits.

Sometimes Mississippi trial judges will make ore tenus announcements concerning rulings on motions for summary judgment, but it is most common for judges to enter an order simply finding that there are genuine issues of material fact which preclude summary judgment, which is exactly what the trial judge did in the case at bar. A review of the arguments at the hearing will indicate that 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. There is very substantial evidence creating genuine disputes of material fact over and above the proposed testimony of Brent Farris, which the trial court found. For all of these reasons, this interlocutory appeal is improvidently taken and there is no basis for reversing an interlocutory order overruling and denying the Summary Judgment Motions which remains subject to a reconsideration under Rules 50 and 56, Mississippi Rules of Civil Procedure.

Nor is this a case in which counsel were not reasonably diligent. To the contrary, the absent witness is identified with MBHS -- not with the Plaintiff -- and through no fault of the Plaintiff was absent, upon information and belief, in Mexico, Italy, Indonesia and various other unknown places prior to being located and arrested by federal officials. The witness in question is now in jail and available for deposition. It is simply true that the deposition of this important witness should be taken and documents

available through him should be examined, and the trial court after remand should be given an opportunity to examine the status of these Motions for Summary Judgment in the light of those facts.

This is largely a factual matter: the Defendants have briefed this case as if all of the discovery and evidence was closed in advance of the summary judgment hearing and there was no relevant evidence to be made available. That is not true. Through fortuitous good fortune, it is true that the missing witness is now available. It is unthinkable that this Court would convert the judge's interlocutory ruling into a final judgment on the merits in this procedural posture without allowing the deposition of the missing witness.

POINT TWO: Plaintiff's claims are not barred without dispute of fact by a release.

A. Summary Judgment Standard.

The summary judgment standard is provided by Miss. R. Civ. P. 56(c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in a light most favorable to the non-movant.[1] Also, "the non-movant is granted the benefit of all inferences that can be adduced from the evidence."[2] The Mississippi Supreme Court has stated:

> All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion. When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the

[1] *Brent Towing Co., Inc. v. Scott Petroleum Corp.*, 735 So.2d 355 (Miss.1999)
[2] Id.

> party against whom the summary judgment is sought should be given the benefit of every reasonable doubt.[3]

The granting of summary judgment may not be appropriate for allegations of fraud.[4] If a jury applying the standard of proof for fraud could reasonably find that a fraud was committed, granting of summary judgment in a fraud cause is inappropriate.[5] To have power to generate a genuine issue of material fact to overcome summary judgment, the non-movant's affidavit, depositions, answers to interrogatories, or otherwise must: (1) be sworn; (2) be made upon personal knowledge; and (3) show that the party providing the factual evidence is competent to testify.[6]

There are genuine issues of disputed facts which are material to the merits of Plaintiff's claims which preclude summary judgment, argument of which is contained hereinbelow. These include: (1) the fact that the alleged release instrument on the basis of which MBHS claims summary judgment is not authentic, (2) the release in question when properly identified contains reservations and limitations in scope which do not bar the Plaintiff's claims; (3) Plaintiff's claims accrued later, and (4) the other matters of material disputed facts listed and described hereinabove and in the Affidavit of Dr. Meador.

As a starting point, Dr. Meador submits that the copy of the Mutual Release and Termination Agreement supplied by the Defendants is not authentic.[7] Meador asserts in his Affidavit that he crossed out and initialed the portion of the authentic release that called for the release of "unknown claims" against MBHS and its affiliates.[8]

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[3] *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993)
[4] *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 643 (Miss.1996); *Cunningham v. Lanier*, 555 So.2d 685, 687 n. 2 (Miss.1989)
[5] *McGee v. Swarek*, 733 So.2d 308 (Miss.Ct.App.1999)
[6] *Watson v. Johnson*, 848 So. 2d 873 (Miss. Ct. App. 2002).
[7] See Defendant's Exhibit, Mutual Release and Termination Agreement
[8] See Exhibit 1, Affidavit of Meador

Furthermore, Meador asserts that he initialed the first five pages of the Release upon its execution. Without initials on each page, there is no guarantee that the parties agreed to anything other than paragraph 16, which states that Mississippi law will be controlling on the issue. He also asserts that the original Release had a place for a notary to seal the document, but no such location and no such seal exists on the copy of the purchase and sale agreement containing a release term which was attached to Defendants' Motions for Summary Judgment during this litigation.[9]

Lastly, the copy of the Release provided by the Defendants is dubious for another reason -- the footnote and page numbers on pages one through five are much higher than the same exact footnote and page numbers on the last two pages-- which happen to be the only two pages that contain signatures. Presumably, the identical date and time stamps on all pages implies that each page is part of the same computer file, yet for no apparent reason, the footnotes on the last two pages are irregularly placed on the page when compared with the first five pages.

During the course of litigation, Meador turned over various records to the Federal Bureau of Investigation and the United States Attorney who were investigating MBHS at the time. It is his belief that a correct copy of the original release is located at the offices of the United States Attorney or elsewhere, as Meador and his legal counsel are presently unable to locate a great volume of documents given to the United States Attorney's Office in response to a federal grand jury subpoena duces tecum. Both Meador and his counsel are continuing to actively search for the missing release.[10]

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[9] *Id.* As a practical aside, it seems highly suspect that the experienced attorneys for MBHS would allow a release transferring over $350,000 to an individual to be fashioned with as much self-authenticating formality as a personal letter.

[10] Of course, the inability to locate the actual release does not directly prove that the release submitted by the defendants is authentic. Defendants bear the burden of proving its authenticity to the jury. Given the format of the document, any sheet of paper placed before the signatures could be switched, changed, or rescinded and easily made to look like a part of the original contract.

Miss. R. Evid. 901 governs the authentication requirements for evidence. "The requirement for authentication is . . . satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[11] Even if the Defendants can make a prima facie showing of authenticity, "the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic [or not]."[12]

The Mississippi Supreme Court has clearly stated "that where there are allegations made as to the validity of a release due to fraud, misrepresentation, adhesion or other inequities then the case properly goes to the jury or fact finder."[13] The authenticity of the Release is clearly a disputed issue of material fact, and a jury should be able to hear both arguments regarding the same.

B. The Release Instrument As Written Is Limited in Scope and Does Not Bar the Claims Pleaded

According to 17 Am.Jur.2d Contracts § 297 n. 74 (1991): "Clauses limiting liability are given rigid scrutiny by the courts, and will not be enforced unless the limitation is fairly and honestly negotiated and understandingly entered into."[14] The Mississippi Supreme Court has held that the issue of whether a release is void because of "an absence of good faith and full understanding of legal rights [and the] nature and effect of instrument was misrepresented" is a question of fact for the jury.[15]

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[11] Miss.R.Evid. 901(a) (as cited in *Sewell v. State*, 721 So.2d 129 (Miss. 1998))
[12] *Sewell v. State*, 721 So.2d 129 (Miss. 1998) (citing *United States v. McGlory*, 968 F.2d 309, 328-29 (3rd Cir.1992)
[13] *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748 (Miss. 2003)
[14] *Farragut v. Massey*, 612 So.2d 325 (Miss.1992)
[15] *Willis v. Marlar*, 458 So.2d 722, 724 (Miss. 1984)

Any ambiguities in the document itself are to be construed against the drafter,[16] and it is the role of the fact-finder to determine whether a contract actually exists.[17] Similarly, the party (in this case MBHS) hoping to gain a benefit from the Release Agreement must show by a preponderance of the evidence that there was a meeting of the minds.[18] In that vein, the Supreme Court has overturned a grant of summary judgment when the jury should have been allowed "to consider whether the so-called release was void because of an absence of good faith and a full understanding of legal right, misrepresentation of the nature and effect of the document or lack of adequate consideration."[19]

As Meador alleges in both his Amended Complaint and Affidavit, MBHS's bad faith actions misrepresented the nature and effect of the release in such a way that it subjugated Meador's ability to fully understand the release's ramifications [actually resulting in Meador rejecting a sweeping, all-encompassing release], thereby causing him to receive no consideration or inadequate consideration for execution of the release.

At the time the release was signed, Meador was unaware that Trustmark and MBHS had entered into a conspiracy against his financial interests, and would not have signed the release for the amount stated had he known this. In fact, clearly because both Trustmark and MBHS fraudulently concealed a continuing course of conduct, Meador did not learn about the conspiracy until 2004, when Brent Farris, a former MBHS Senior employee or consultant, told Meador what had transpired and about the existence of audiotapes documenting the same.

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[16] *One South, Inc. v. Hollowell*, 963 So.2d 1156 (Miss. 2007) citing *Leach v. Tingle*, 586 So.2d 799, 801-02 (Miss.1991) and *Stampley v. Gilbert*, 332 So.2d 61, 63 (Miss.1976).
[17] *Ammons v. Cordova Floors, Inc.*, 904 So.2d 185 (Miss. Ct. App. 2005)
[18] *Viverette v. State Highway Comm'n of Miss.*, 656 So.2d 102, 103 (Miss. 1995)
[19] *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994)

C. The Release Instrument As Written Does Not Bar Claims Which Were Fraudulently Concealed

"Equity mandates that wrongdoers should be estopped from enjoying the fruits of their fraud."[20] For this reason, Mississippi law will always refuse to enforce a release agreement procured by fraud.[21] If the Release Agreement is found to be non-authentic -- a question of fact for the jury -- equitable maxims demand that it be held a legal nullity. Even if the purported release term of the purchase and sale agreement supplied by Defendants is determined to be authentic, any claims hidden by fraudulent conduct of MBHS and/or Trustmark would not be encompassed by the Release Agreement -- and the release instrument does not run in favor of Trustmark.

Although settlement of disputes is usually encouraged by the courts, logic and public policy dictate that a perpetrator of fraud should not be able to enjoy the fruits of his conduct. As a result, a signed release may be partially valid as to the known causes of action, yet invalid as to those claims which have been fraudulently concealed.[22]

Fraudulent concealment serves to toll the statute of limitations for any cause of action.[23] In the present case, Meador was unaware of the conspiracy until 2004, when Brett Farris presented him with information stating that MBHS and Trustmark had engaged in a common scheme and plan to thwart his business opportunities and that these facts were documented only tape recording generated as a result of a federal grand jury investigation. Thus, the statute of limitations did not begin to run until shortly before December 2004. Shortly after learning of this knowledge, Meador timely filed an Amended Complaint alleging these facts.

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[20] *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608 (Miss. 2008)
[21] *McManus v. Howard*, 569 So.2d 1213, 1215 (Miss. 1990)
[22] For the sake of argument, this line of thought hinges on the Release Agreement being authentic. Of course, as stated repeatedly, Meadors asserts that the Release Agreement is inauthentic.
[23] *Myers v. Guardian Life Ins. Co. of America, Inc.*, 5 F.Supp.2d 423, 431 (N.D.Miss.1998); Miss. Code Ann. Section Miss.Code Ann. § 15-1-67 (1995).

In order to prove fraudulent concealment, "there must be shown some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim."[24] In essence, Plaintiff is required to show an affirmative act of concealment[25] coupled with the inability to discover the cause of action after exercising due diligence.[26]

As stated in Meador's Affidavit prior to learning of the knowledge gleaned from Brent Farris directly as a result of the federal grand jury investigation carried out in 2004, Meador did not have and had no means to obtain the relevant information.

Meador's affidavit makes it clear that he was unable to discover the nature of the conspiracy claims until Brent Farris former MBHS Senior employee or consultant, informed him that MBHS and Trustmark were engaged in a conspiracy to cause Meador financial ruin and the loss of business opportunities.

D. The Release Instrument As Written Does Not Bar Claims Based on a Course of Conduct Which Occurred or Accrued after August 27, 1999

A party can not use an anticipatory release to escape liability for tortious acts.[27] Thus, the Release does not govern the potential liability of any acts committed by Trustmark and MBHS after August 27, 1999, or such acts which were part of a continuing course of conduct before, during and after that date. The Affidavit of Brent Meador establishes that MBHS and Trustmark were engaged in a conspiratorial and continuing course of conduct after the purchase and sale agreement containing a release term was signed on August 27, 1999. Therefore, even if the release term of the purchase and sale agreement submitted by the

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[24] *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss.1988)
[25] *In re Catfish Antitrust Litigation*, 826 F.Supp. 1019, 1030 (N.D.Miss.1993)
[26] *Wilson v. Retail Credit Co.*, 325 F.Supp. 460, 465 (S.D.Miss.1971), *affd on other grounds*, 457 F.2d 1406 (5thCir.1972)
[27] *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994) (*citing Yazoo & Mississippi Valley R.R. v. Smith*, 90 Miss. 44, 43 So. 611 (1907))

Defendants was authentic -- and Meador shows that it is not -- it would still not serve to shield the Defendants from claims arising after August 27, 1999.

POINT THREE: Plaintiff's claims are not barred, without dispute of fact, by *res judicata*.

In order for res judicata to effectively preclude a claim, four elements must be met: (1) identity of the subject matter; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the "quality or character of a person against whom the claim is made."[28]

Any judgment obtained by fraud, accident or mistake may be corrected by the courts.[29] This is doubtless a natural extension of the ancient maxim whereby a wrongdoer cannot gain a benefit from his fraudulent acts.[30] Although not directly discussed in Mississippi case law, other jurisdictions have extended this doctrine and held that a judgment obtained by fraud is not entitled to any res judicata preclusive effects.[31]

POINT FOUR: Plaintiff's contemporaneous Motion to Take Limited Discovery strongly supports affirming and remaining this case.

To avoid prolixity and repetition, Plaintiff incorporates by reference the Motion for Leave to Take Limited Discovery filed herewith together with the Brief in support thereof and the Second Affidavit of Brent Meador. Through good fortune and fortuitous circumstances, Brent Farris has been arrested and incarcerated and as a result is available for deposition.

Brent Meador relates that he is informed and believes and upon the basis of such information and belief alleges that Brent Farris will give testimony that, as

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[28] *McCorkle v. Loumiss Timber Co.*, 760 So.2d 845 (Miss. 2000)
[29] *Harrigill v. State*, 381 So.2d 619 (Miss. 1980)
[30] *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608 (Miss. 2008)
[31] First *Heights Bank, FSB v. Josef Marom and Marcus Investments Corporation* (Tex. App. Ct. 1996) citing *Rawlins v. Stahl*, 329 S.W.2d 308, 311 (Tex.Civ.App. 1959) and *Brammer & Wilder v. Limestone County*, 24 S.W.2d 99, 105 (Tex. Civ.App.1930) (op. on reh'g) (stating that any judgment obtained through fraud is voidable, and may be set aside upon the establishment of fraud) See Also *In re Cassidy's Estate*, 270 P.2d 1079 (Ariz.1954)

alleged in Plaintiff's case in chief, the senior management of MBHS directly communicated with the senior management of Trustmark Ble for Depos for the purpose of inducing theHe Is not to honor Meador's loan line up to $500,000, to call Meador's loans as they stood at the time, and to sue Meador to collect the loans, for the purpose of and with the affect of destroying Meador's business and casting him into bankruptcy.

This is at the heart of the case and this Court should order that the deposition of Farris is allowed, lifting this day to that limited extent, and allowing the deposition to be taken, either affirming and remanding to the trial court to manage that matter, or in the alternative, staying consideration of this interlocutory appeal until that has been accomplished.

V. CONCLUSION

As stated in the beginning, genuine issues of material fact preclude summary judgment. Defendants' interlocutory appeal must be affirmed and remanded. Plaintiff should be given leave forthwith to depose Brent Farris, before or after affirmance and remand.

Respectfully submitted this 19th day of May, 2011.

C. BRENT MEADOR

By: _____
Michael S. Allred (MSB#[redacted]

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CERTIFICATE OF SERVICE

I, Michael S. Allred, attorney for Plaintiff/Appellee C. Brent Meador, do hereby certify that I have this date cased to be served via U.S. Mail, postage prepaid, and by electronic mail, a true and correct copy of the above and foregoing to the following:

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Brian C. Smith, Esq.
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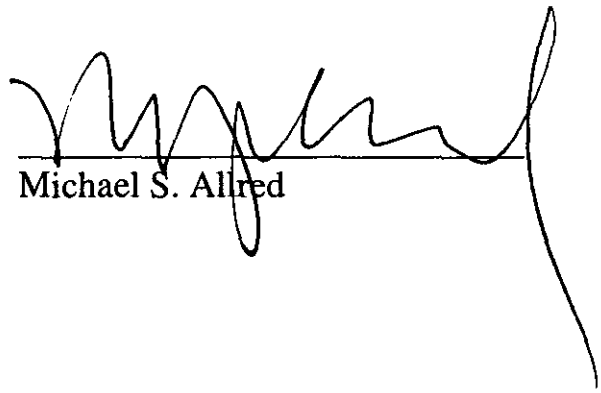
This 19th day of May, 2011.



Michael S. Allred