

CASE NO. 2013-CA-01002

**IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI**

**BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.,
BAPTIST MEMORIAL HEALTH SERVICES, INC.**

APPELLANTS

V.

C. JAKE LAMBERT, M.D.

APPELLEE

**(On Appeal from the Circuit Court of
Lafayette County, Mississippi, Civil Action No.L06-011)**

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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BAPTIST MEMORIAL HEALTH SERVICES, INC., *APPELLANTS***

V.

C. JAKE LAMBERT, M.D., *APPELLEE*

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.

The Honorable Andrew K. Howorth	Trial Judge
Baptist Memorial Health Services, Inc.	Defendant and Appellant
Baptist Memorial Hospital – North Mississippi, Inc.	Defendant and Appellant
C. Jake Lambert, Jr., M.D.	Plaintiff and Appellee
Stephan L. McDavid	Lead Attorney for Appellants
Rebecca Wilks	Attorney for Appellants
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SUMMARY OF THE ARGUMENT

Lambert's responsive appellate brief focuses on **his** Motion for Summary Judgment, despite the fact that his Motion need not be considered on appeal if this Court reverses the lower court's ruling on either of Baptist's two prior-in-time motions.¹ Lambert's brief also attempts to mislead this Court into believing that he did not need to assert the affirmative defense of impossibility until this appeal, arguing either (1) impossibility is not an affirmative defense, or (2) Baptist should have anticipated this defense, despite Lambert repeatedly arguing in his pleadings that he was fit to practice medicine.²

The gateway issue on appeal is whether the lower court erred by denying Baptist's two motions for summary judgment when Lambert failed to identify any fact in dispute, produce any case law or statutes, or respond *at all* to Baptist's second motion. The Mississippi Supreme Court has made clear that its review on appeal is limited to the evidence, arguments, and pleadings available to the lower court **at the time that it entered each individual order**. By failing to produce any legal authority to the contrary, Lambert tacitly agrees that the focus of appeal for Baptist's two motions is the evidence, arguments, and defenses before the lower court at the time it entered each order.

Baptist's first Motion for Summary Judgment should have been granted. Baptist clearly proved each element of its breach of contract claim, and Lambert failed to satisfy his burden of offering a material issue of fact. Further, Baptist's second motion should have been granted because Lambert failed to respond at all to this motion. If this Court agrees that either of these

¹ Counsel files this brief on behalf of Baptist Memorial Hospital North Mississippi, Inc. ("BMH-NM") and Baptist Memorial Health Services, Inc. ("BMH-SI"). The two entities are hereinafter collectively referred to as "Baptist," unless otherwise noted.

²Baptist agrees with Lambert that impossibility and impracticability of performance may be used interchangeably. See Brief of Appellee, p. 9, Footnote No. 4. Throughout this brief, Baptist intends any reference to one affirmative defense to serve as a reference to the other defense, as well.

Motions should have been granted, the lower court's Order granting Lambert's Motion for Summary Judgment must be reversed and rendered in favor of Baptist, as if Lambert's motion was never before the lower court.

Even if this Court affirms the decisions regarding Baptist's motions, it should still reverse the lower court's order granting summary judgment for Lambert. In that order, the lower court improperly relied on the affirmative defense of impossibility which Lambert waived by failing to properly raise in his answer, or his response to Baptist's motions for summary judgment, or even in his own motion and brief in support of his motion for summary judgment. Furthermore, because Lambert vehemently argued that his performance was possible and even produced multiple expert medical testimonies to that effect, the law of the case prevents him from now changing his legal position to claim impossibility of performance.

The Mississippi Supreme Court has found that a lower court errs when basing its decision on an unpled affirmative defense. Because Lambert failed to properly plead impossibility or impracticability, the lower court erred in granting summary judgment on those grounds.

ARGUMENT

I. The Lower Court Erred in Denying Baptist's May 24, 2011 and June 7, 2012 Motions for Summary Judgment

Baptist appeals the lower court's decisions denying Baptist's motion for summary judgment, R. 344-345, and Baptist's Rule 57 Motion, R. 382. Baptist's two motions were filed on May 24, 2011, and June 7, 2012, respectively, while Lambert's motion for summary judgment was not filed until months later on October 26, 2012. R. 483-512.

A. The Lower Court's Rulings on Baptist's Two Motions Are Gateway Issues on Appeal

Mississippi Supreme Court precedent makes clear that this Court should limit its review of each order to the record that was available to the lower court **at the time it decided each motion**. See *Mitchell v. Nelson*, 830 So.2d 635, 640 (¶ 14) (Miss. 2002). In *Mitchell*, Appellants asked the Supreme Court to consider an affidavit that was brought forth *after* the lower court's order regarding summary judgment and had not been available to the trial court when it granted summary judgment. 830 So.2d at 640 (¶ 14). The Supreme Court refused to consider the affidavit, holding that the Court "should only review orders granting summary judgment by examining the evidence before the trial court and not consider new evidence." *Id.*

The facts in the present case parallel those in *Mitchell*. Baptist is not asking this Court to ignore evidence that was part of the record when the lower court ruled on each respective motion. Rather, Baptist respectfully requests that this Court limit its review of each lower court order to only the evidence, arguments, and defenses that were before the trial court at the time of each ruling.

Lambert fails to offer *any* case law or other authority to oppose Baptist's position that these orders should be reviewed with only the evidence, arguments, and defenses offered during

each motion. By failing to produce legal authority to the contrary, Lambert tacitly that agrees no legal authority exists to contradict that this Court should review each Motion in isolation.

B. The Lower Court Erred in Denying Baptist's Motion for Summary Judgment

On May 24, 2011, Baptist filed its first motion for summary judgment. R.288-321. In that motion, Baptist proved each of the following elements for breach of an employment contract: 1) the existence of a valid and binding contract; (2) that the defendant has broken or breached the contract; and (3) that the plaintiff has been thereby damaged monetarily. *See Suddith v. University of Southern Mississippi*, 977 So.2d 1158, 1175 (¶ 35) (Miss. Ct. App. 2007). Proof of each element is outlined in detail in Baptist's appellate brief. (*See Primary Brief of Appellant*, Section I(a): "Baptist Proved the Elements of Breach of Contract by a Preponderance of the Evidence" pp. 8-10).

Indeed, the first two elements of breach have been conclusively established by this Court. *See Jake Lambert, Jr. M.D. v. Baptist Memorial Hospital – North Mississippi, Inc. and Baptist Memorial Health Services, Inc.*, 2010-CA-00043-COA, ¶¶ 2, 13 (Miss. Ct. App. 2011). This Court determined that there was an employment contract. *Id.* at ¶ 2. Further, it found that BMH-SI could terminate said agreement "for cause" and that there was "no dispute that this was the reason for the termination." *Id.* at ¶ 13. Because the Court found that Baptist had "cause" to terminate, it implicitly found that Lambert had breached his contract. Without a breach by Lambert, Baptist would not have had any "cause" to terminate. Baptist also submitted Affidavit evidence of damages that was unchallenged throughout these proceedings.³

³ Baptist attached an Affidavit of Dana Williams, BMH-NM's Chief Financial Officer, to its May 24, 2011 Motion for Summary Judgment. In said Affidavit, Dana Williams testified that Baptist suffered at least \$951,852.00 in damages. R. 292, ¶ 12. This minimum amount was determined by \$723,600.00 cost incurred in exercising an agreement with Cardiovascular Surgery Clinic, PLLC, for coverage during Cardiovascular Surgeon's scheduled leave time as well as a minimum of \$228,252.00 in lost profits. R.

Once Baptist satisfied its burden, the burden shifted to Lambert to demonstrate a genuine issue of material fact. In his response, Lambert only said “there exist genuine issues of material facts and Defendant is not entitled to summary judgment as a matter of law.” R. 326. Mere denials are not enough. *Lumberman's Underwriting Alliance v. City of Rosedale*, 727 So. 2d 710, 712 (¶ 10) (Miss. 1998). Lambert failed to list a single fact in dispute, much less point to an issue of *material* fact. Beyond that, Lambert failed to cite to a single case, statute, or secondary source to support his position. Therefore, Lambert failed to satisfy his burden.⁴

This Court should review *de novo* only the pleadings which were available at that time of the lower court’s order: (1) Lambert’s original Complaint and the subsequent, related pleadings; (2) Baptist’s counterclaim; (3) Lambert’s Affirmative Defenses and Answer to Baptist’s counterclaim; (4) Baptist’s Motion for Summary Judgment; and (5) Lambert’s Combined Response and Brief in Support of Response to Defendants’ Motion for Summary Judgment. None of these pleadings showed *any* issue of material fact. Further, none of these pleadings *ever addressed* the affirmative defense of impossibility. No language in any pleading used the words “impossible,” “impracticable,” or any variation thereof.

At the time of the lower court’s order, Lambert had never raised impossibility and no such defense should be considered when reviewing the lower court’s decision on Baptist’s first motion for summary judgment. Further, because of the absence of material fact at the time of the lower court’s order denying summary judgment, Baptist respectfully requests that this Court

292, ¶ 12. Further, a chart outlining some of the expenses suffered by BMH-SI and BMH-NM was attached to the Motion for Summary Judgment. R. 320.

⁴ Lambert now claims on appeal that Baptist “conceded” in the Primary Brief of Appellant that Lambert argued impracticability or impossibility in the initial response. (*See* Appellee Brief, p. 20, ¶ 2). Nowhere in Baptist’s brief does it make such a concession. Rather, it makes a point, for the sake of argument, that even to the extent Lambert *may* have pled such a defense, it was not raised in Lambert’s Answer, was improperly pled, and could not constitute an affirmative defense. (*See* Primary Brief of Appellants, p. 10-11).

reverse and render the ruling and grant summary judgment in favor of Baptist, based on the evidence of damages submitted.

C. The Lower Court Erred in Denying Baptist's Rule 57 Motion or, in the Alternative, Motion for Partial Summary Judgment

On June 7, 2012, Baptist filed a Rule 57 Motion for Declaratory Judgment or in the Alternative Motion for Partial Summary Judgment. R. 349-381. Lambert **failed to respond at all** to this motion. When a party fails to respond, summary judgment shall be entered against the party, if appropriate. *See* M.R.C.P. 56(e). This Court should review *de novo* only the pleadings which were available at that time of the lower court's order. Since Lambert failed to respond, the only pleadings available to the lower court were those mentioned in Section I(B), *supra*, p. 5, and Baptist's Rule 57 Motion.

Once again, there was no issue of material fact on the record at the time of Baptist's motion. Lambert failed to produce any such material by his lack of response and never presented any argument based on impossibility. Therefore, summary judgment should have been granted in favor of Baptist.

If this Court agrees that either of Baptist's motions should have been granted, it need not consider any subsequent pleadings. Because appellate review is isolated to evidence, arguments, and defenses asserted at the time of the lower court's decision, the lower court's Order denying Baptist's motion should be reversed and rendered against Lambert.

II. The Lower Court Erred in Granting Lambert's Motion for Summary Judgment

Lambert spent a major portion of his appellate brief arguing the validity of an impossibility defense. The issue on appeal is not the validity of this defense. Rather, the issue is whether Lambert properly raised this affirmative defense, thereby preserving his right to appeal it at all.

A. Impossibility and Impracticability are Affirmative Defenses

Lambert claims that impracticability and/or impossibility of performance are not affirmative defenses because, (1) they are not specifically enumerated in Rule 8(c) of the Mississippi Rule of Civil Procedure, and (2) he found no Mississippi case law concluding that they are affirmative defenses. *See* Brief of Appellee, p. 17. This argument is unpersuasive and unavailing.

First, the plain language of Rule 8(c) of M.R.C.P. explicitly states that, in addition to the affirmative defenses specifically enumerated, it also includes “*any other matter* constituting an avoidance or affirmative defense.” (Emphasis added).

The fact that this Court has not addressed whether impossibility is an affirmative defense does not mean that it is not or cannot be classified as such. This Court recently addressed for the first time whether condonation was an affirmative defense. *See Ashburn v. Ashburn*, 970 So.2d 204 (Miss. Ct. App. 2007). Condonation is not enumerated in the list set forth in M.R.C.P. 8(c) and the Court of Appeals was unaware of any Mississippi authority addressing the issue. *Id.* at 212, ¶ 24. Despite the lack of precedent, this Court found that condonation **was** an affirmative defense under the meaning of Rule 8(c). *Id.*

Applying the *Ashburn* rule, Baptist need only show that impossibility satisfies the definition of affirmative defense under Mississippi law. The Supreme Court has defined an affirmative defense as one that “assumes the plaintiff proves everything he alleges and asserts, even so, the defendant wins.” *Hertz Commercial Leasing Div. v. Morrison*, 567 So.2d 832, 835 (Miss. 1990).

In his brief, Lambert mistakenly claims that impossibility of performance and impracticability do not come under the *Hertz* standard. *See* Brief of Appellee, p.17-19. Specifically, Lambert claimed:

[I]t cannot be assumed, even for the sake of argument, that Appellants can establish everything they allege in their counterclaims . . . By its very definition, the doctrine of impracticability and/or impossibility makes it impossible for Appellants to establish the second element of breach of contract claims they allege, even hypothetically. Brief of Appellee, p.18, ¶ 1.

Lambert’s illogical application of *Hertz* would cause every affirmative defense to “prevent” proof of plaintiff’s claim, and therefore not be an affirmative defense. On the prior appeal before this very Court, it was clearly articulated that Lambert was terminated “for cause”, i.e. he breached his obligations under the contract. R. 338, ¶ 13.⁵ To avoid the “law of the case” finding of breach, he is now actually arguing that . . . “even though Baptist has proven the breach, I win because of impossibility.” What more perfect example of the *Hertz* definition could there be?

The *Hertz* holding is simple: something is an affirmative defense if it will prevent the plaintiff from winning his case, even if the plaintiff, hypothetically, proves everything he alleges. *Hertz*, 567 So.2d at 835. The *Hertz* holding does **not** require the plaintiff to actually prove each element of his claim before requiring the defendant to **raise** his affirmative defense. Under the *Hertz* standard, then, impossibility and impracticability are certainly affirmative defenses subject to the pleading requirements of M.R.C.P. 8(c).

Further, numerous other jurisdictions have determined that impossibility is an affirmative defense. In *Ashburn*, this Court specifically looked to other jurisdictions in making its determination that condonation was an affirmative defense. *See Ashburn*, 970 So.2d at 212 (¶ 24). Texas, Indiana, and Pennsylvania all treat impossibility and/or impracticability as an

⁵ R. 338, ¶ 13: “The employment agreement unambiguously provides that Baptist Health Systems could terminate the agreement *for cause* upon the termination or restriction of Dr. Lambert’s staff privileges at the Hospital. There is no dispute that this was the reason for the termination of the agreement.” (emphasis added).

affirmative defense. *See Key Energy Services, Inc. v. Eustace*, 290 S.W. 3d 332, 339 (Tex. App. 2009); *see also* 9 Ind. Prac., Procedural Forms With Practice Commentary § 41.53 (3d ed.) (quoting *Drester v. Duitz*, 883 N.E. 2d 1194 (Ind. Ct. App. 2008)); Pa. R. Civ. P. 1030(b).

B. Affirmative Defenses Must be Raised in Answer or They are Waived

Affirmative defenses must be raised in the answer or they are waived. *See Ashburn*, 970 So. 2d at 212, ¶ 24 (“Mrs. Ashburn at no time sought to amend her answer to plead the defense of condonation; nor is there any reason to believe that the chancellor would not have allowed such an amendment. Accordingly, Mrs. Ashburn waived the right to rely on the affirmative defense of condonation”); *see also Hutzel v. City of Jackson*, 33 So.3d 1116, 1120 ¶ 15 (Miss. 2010) (“ . . . this Court consistently has held that, absent a reasonable explanation, failure to plead an affirmative defense according to Rule 8(c) will result in a waiver of that defense”).

Further, the Supreme Court has consistently held that failure to pursue an affirmative defense, coupled with active participation in litigation, serves as a waiver of any defense. *See Estate of Grimes ex rel. Grimes ex rel. Wrongful Death Beneficiaries v. Warrington*, 982 So. 2d 365, 370 (Miss. 2008); *See also East MS State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007). The Supreme Court has advised that to pursue an affirmative defense means “to plead it, bring it to the court’s attention, and request a hearing.” *Estate of Grimes*, 982 So.2d at 370, ¶ 23. As noted throughout this Reply Brief, Lambert failed to plead impossibility/impracticability in his answer, failed to plead or argue it in response to Baptist’s motions, and failed to plead it in his motion and brief in support of motion for summary judgment.

Lambert’s answer and response to summary judgment clearly do not raise the affirmative defense of impossibility but assert election of remedies, along with other affirmative defenses never pursued. Lambert’s motion and brief in support of his motion for summary judgment make abundantly clear that he was *only* asserting an election of the remedies defense.

“Accordingly, since BMH-SI did **elect** to terminate Dr. Lambert’s employment, thereby **availing itself of the sole remedy** available to it under the express terms of the employment contract, Counter-Plaintiffs’ claims against Dr. Lambert should be dismissed pursuant to Miss. R. Civ. P. 56 as a matter of law.” R. 487, ¶ 1.

“Based on the clear, unambiguous language of the employment contract at issue, Counter-Defendant urges this Honorable Court to determine that BMH-NM and BMH-SI have already **availed themselves of the only remedy available to them under the contract**, namely, the termination of Dr. Lambert’s employment contract with BMH-SI.” R. 488. (emphasis added)

These excerpts make clear that Lambert did not raise impossibility or impracticability.

Consequently, Baptist had no opportunity to anticipate or prepare for either of these affirmative defenses.

C. Baptist Did Not Inject Impossibility or Impracticability Into Litigation

Lambert’s brief also claims that he was excused from properly pleading the affirmative defense of impossibility because Baptist “interjected the factual issue of impracticability/impossibility into the litigation” by relying on Lambert’s medical inability as the sole basis for its breach of contract claim. *See Brief of Appellee*, p. 19, ¶ 2. To support this argument, Lambert cites the following excerpt from BMH-NM and BMH-SI’s counterclaims: “Plaintiff breached his contractual obligation through his . . . failure to maintain staff privileges at BMHNM.” *See Brief of Appellee*, p. 19, ¶ 2.

Lambert conveniently left out a highly relevant portion of Baptist’s statement. In addressing the basis for its breach of contract counterclaim, Baptist actually stated the following: “Plaintiff breached his contractual obligations through **his disruptive and unprofessional behavior** and his failure to maintain staff privileges at BMHNM . . .” *See* R. 63, ¶ 91; R. 104, ¶ 92 (emphasis added).

Additionally, Lambert offers no Mississippi authority to support his theory that Baptist “injected” the affirmative defense into litigation. Rather he offers one Texas case, which is not binding upon this Court. In that case, the defendant was excused from raising the affirmative defense of penalty because the plaintiff’s complaint established that plaintiff was relying on an unenforceable penalty. *Phillips v. Phillips*, 820 S.W. 2d 785, 790 (Tex. 1991). The court noted that this holding should be applied narrowly and that the defense **must be pleaded** by the defendant “when the defense is not clearly established on the face of the pleadings.” *Id.* at 790. Even if this court applies the non-binding *Phillips* holding to this case, Lambert would still fail on his injection theory because the defense is not clearly established on the face of the pleadings.

D. Lambert Repeatedly Argued That his Performance Was Possible

Lambert unconvincingly argues that Baptist should have known that he would rely upon the impossibility defense. In addition to the lack of any Mississippi authority to support Lambert’s position, Baptist would also point to the numerous instances throughout the record where Lambert specifically argued that he was fit to practice medicine. In his own words, Lambert claimed:

“Plaintiff was, therefore, unaware of Anderson’s negative opinion regarding his ability to practice and that Anderson had informed others that he was unfit to practice, *which was entirely false.*” Complaint, R. 5, ¶ 19 (emphasis added).

“Dr. Lambert thereafter received two separate evaluations, one from Dr. Pfifferling and thereafter, one from Talbott. Neither opinion indicated that there were any of the alleged extreme behavioral issues or concerns addressed by Anderson and Pine Grove *and especially nothing to indicate that Dr. Lambert was unfit to practice medicine.*” Complaint, R. 8, ¶ 31 (emphasis added).

“Dr. Lambert received a second diagnosis that found him fit to practice, and had Defendants not terminated his employment Contract *Dr. Lambert would have been able to fulfill the obligations for his contract.*” Plaintiff’s Combined Response and Brief in Support of Response to Defendants’ Motion for Summary Judgment, R. 327 (emphasis added).

Baptist could not possibly have anticipated that Lambert would rely on the affirmative defense of impossibility or impracticability when Lambert repeatedly maintained that he **was not** incapacitated, **was** fit to practice medicine, and **was** capable of completing his performance.

E. The Lower Court Improperly Injected Impossibility and Impracticability into Litigation

Because Lambert failed to affirmatively plead impossibility or impracticability, it was error for the lower court to grant summary judgment on grounds not asserted. In *Wholey v. Cal-Maine Foods, Inc.*, the Supreme Court found error in an almost identical situation and noted the following:

Indeed, the first point in the record at which res judicata is raised is Chancellor Robinson's order dismissing both cases . . . Since res judicata was not affirmatively plead by Cal-Maine it was error for the lower court to grant summary judgment on this basis. 530 So.2d 136, 138-39 (Miss. 1988).

CONCLUSION

Baptist proved every element for breach of contract in its May 24, 2011 Motion for Summary Judgment. Lambert failed to produce *any* genuine issue of material fact and further failed to plead or argue the affirmative defense of impossibility. As a result, the lower court erred in denying Baptist's motion. Baptist respectfully requests that this Court (1) grant summary judgment in favor of Baptist in the amount of \$951,852.00 and (2) reverse and render the lower court's order granting Lambert's later motion, as if it was never before the lower court.

If this Court upholds the lower court's ruling on Baptist's May 24, 2011 motion, Baptist then requests that this Court reverse and render the lower court's order denying Baptist's Rule 57 Motion, or in the Alternative, Motion for Summary Judgment. In that motion, Baptist sought declaratory judgment that Lambert had breached his contract. Lambert failed to respond at all to this motion or offer any issue of fact. Baptist respectfully requests that this Court (1) grant

summary judgment in favor of Baptist as to Lambert's breach of contract; (2) render damages in the amount of \$951,852.00 based on Dana Williams's Affidavit; and (3) reverse and render the lower court's order granting Lambert's later motion, as if it was never before the lower court.

If this Court agrees with the lower court's orders denying Baptist's two motions, the lower court still erred in granting summary judgment in favor of Lambert. Lambert failed to plead the affirmative defenses of impossibility and impracticability, and the lower court improperly relied on these defenses as the basis of its order. Baptist respectfully requests that this Court reverse the lower court's decision and remand to the lower court for determination.

RESPECTFULLY SUBMITTED, this the 24th day of June, 2014.

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.,
& BAPTIST MEMORIAL HEALTH SERVICES, INC.

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CERTIFICATE OF SERVICE

I, Stephan L. McDavid, certify that I filed the foregoing with the Clerk of Court via the Mississippi Electronic Courts (MEC) and sent a copy of the same via U.S. mail to the following:

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THIS, the 24th day of June, 2014.

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