IN THE SUPREME COURT OF MISSISSIPPI

NO: 2015-TS-00029

JOHN A. BROWN **APPELLANT**

VERSUS

COLLECTIONS, INC., AS AUTHORIZED AGENT AND REPRESENTATIVE OF MEMORIAL HOSPITAL AT GULFPORT **APPELLEE**

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

On Appeal from the County Court of Harrison County, Mississippi
No. D2401-10-02209; and
On Appeal from the Circuit Court of Harrison County, Mississippi
No: 24Cl1:13-cv-00249-CLS

L. CHRISTOPHER BREARD (MSB #4352)
BREARD LAW FIRM, LTD.
1317 B 24TH AVENUE
GULFPORT, MS 39501
TELEPHONE: 228-897-2222
FACSIMILE: 228-575-9218
ATTORNEY FOR APPEALLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellant, L. Christopher Breard, certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualification or recusal. The persons are:

John A. Brown, Defendant

L. Christopher Breard
Attorney for Defendant
Breard Law Firm, Ltd
1317 B 24th Avenue
Gulfport, MS 39501

Collections, Inc.
304 32nd ½ Street
Gulfport, MS 39507

Memorial Hospital at Gulfport
4500 13th Street
Gulfport, MS 39501

David Frazier
Attorney for Plaintiff
Frazier Law Firm, PLLC
P.O. Drawer 1170

Pascagoula, MS 39568-1170

William V. Westbrook, III (MSB #7119)
Attorney for Plaintiff
Page, Mannino, Peresich & McDermott, PLLC
2408 14th Street
Gulfport, MS 39501

Honorable Robin Alfred Midcalf
P.O. Box 1889
Gulfport, MS 39502
Telephone: 228-865-4109
Facsimile: 228-865-4485

Honorable Michael H. Ward
Retired County Court Judge
4806 Harrison Circle
Gulfport, MS 39507
228-867-6210
228-861-8731

RESPECTFULLY SUBMITTED, this the 15th day of June, 2015.

/s/ L. Christopher Breard
L. Christopher Breard
Attorney for Appellant

BREARD LAW FIRM, LTD.
1317 B 24TH Avenue
Gulfport, MS 39501
Telephone: 228-897-2222
Facsimile: 228-575-9218

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STATEMENT OF THE CASE AND UNDERLYING PROCEEDINGS

Memorial Hospital at Gulfport ("Memorial") is a community hospital and a political subdivision of the State of Mississippi. Collections, Inc., ("Collections") is the "authorized agent and representative of Memorial Hospital at Gulfport." Memorial authorized Collections to sue John Brown ("Brown") to collect the full medical bill he allegedly incurred due to a stroke during his ordeal at Memorial's Emergency Room. (County Court, No: D2401-10-02209, R13-17)

From the beginning, Brown has alleged a misdiagnosis of his stroke. Thus he has disputed the bill was correct due to his misdiagnosis and due to procedures that were not fully performed and/or not performed at all. Despite his best efforts, there were no reductions made to the bill. Brown was billed $45,074.05 for charges he allegedly incurred during his three day ordeal of emergency room visits and being admitted and discharged from Memorial. If Brown's stroke would have been discovered during the first ER visit, there is no doubt that Brown would not have been left with the excessive charges he allegedly incurred.

Brown's original Answer to the Complaint was filed by his former attorney on March 22, 2011. (County Court, No: D2401-10-02209, R29-30) The Answer set forth the following defense: "Defendant has a claim against Plaintiff which exceeds the amount against Defendant, and Defendant pleads set off, and any other defense available to him which would require or permit reduction of Plaintiffs claim by the amount of Defendants claim."

In order to clarify and more clearly set forth his defense, Brown, through his present attorney, filed an Amended Motion For Leave to Amend Answer to Complaint on February 16, 2012. (County Court, No: D2401-10-02209, R194-203) Brown pled the defense of "set-off and/or recoupment as Defendant's claims against Plaintiff may exceed the amount of Plaintiff

claims against Defendant, however, Defendant may only use said set-off and/or recoupment (sic) against this Plaintiff for defensive purposes only." (County Court, No: D2401-10-02209, R201) There was no counterclaim asserted against Plaintiff. The proposed Amended Answer set forth in detail the facts upon which the claim for set-off and/or recoupment was alleged, which included the misdiagnosis of Brown's stroke and incorrect billing. (County Court, No: D2401-10-02209, R197-203) On September 19, 2011, Brown submitted an affidavit setting forth the events giving rise to his complaints and defenses. (County Court, No: D2401-10-02209, R54-57) He also attached his medical records to the affidavit. (County Court, No: D2401-10-02209, R58-74)

Brown asserted on August 21, 2008, he lost feeling on the left side of his body and went to the ER at Memorial. He complained of severe pain and weakness on the entire left side of his head and body. His blood pressure was 185/100. While at the ER an EKG, CT Scan and lumber puncture (spinal tap) was performed. After the spinal tap procedure, the Memorial doctor stated he did not get enough fluid, but the fluid **looked** ok. (emphasis added) (County Court, No: D2401-10-02209, R54 & R60) The doctor threw the fluid away without sending it for testing. Brown should not be charged for this test because it was not fully performed nor analyzed. Brown was prescribed a pain medicine and discharged with a diagnosis of a headache. (County Court, No: D2401-10-02209, R54 & R60)

Brown experienced continuing excruciating pain and weakness during the night so he returned to the ER at Memorial for another evaluation. His blood pressure was now 134/100. Tests were again performed, however, the Memorial ER doctor noted the previous days' lumber puncture was negative (County Court, No: D2401-10-02209, R54, R55, & R62). This was the same fluid that was discarded since not enough fluid was collected. (County Court, No: D2401-10-02209, R55 & R59) Brown repeatedly told the ER doctor the pain in his head was

excruciating, yet the ER doctor again discharged him with a diagnosis of a headache. (County Court, No: D2401-10-02209, R54, R64) Brown had no history of headaches/migraines and repeatedly requested an MRI be performed. The doctor initially refused to perform the MRI but after much persistence by Brown, he was told the approval of his cardiologist, Dr. Mullen was needed. (County Court, No: D2401-10-02209, R55)

Soon thereafter, Dr. Mullen was contacted and the MRI was scheduled for 9:00 p.m. that same night. (County Court, No: D2401-10-02209, R55 & R64) Meanwhile, Brown was again discharged from the ER. The diagnosis at discharge was "headache/ near syncope." (County Court, No: D2401-10-02209, R55 & R64) He was told to return to the hospital in less than 5 hours for his MRI. There was absolutely no reason for Brown to be discharged in the condition he was in.

Brown arrived a little before 8:30 p.m. that night, as directed, and the MRI was performed, as scheduled. Brown requested and received a copy of the MRI DVD that night. It was not interpreted by a radiologist before he was again negligently discharged from the hospital. Brown's friend, who is also doctor, reviewed the MRI DVD when Brown arrived home that night. His friend was shocked and immediately insisted Brown return to Memorial. (County Court, No: D2401-10-02209, R55)

Per his friend's advice, Brown returned again for the **fourth** time in **two** days to Memorial around 11:15 p.m. He was admitted into the hospital at 12:25 a.m. on August 23, 2008 with a diagnosis of "CVA."(Cerebral Vascular Accident) He was evaluated by Neurologist, Lee Voulters, M.D., and was finally diagnosed with a left cerebellar infarction, probably secondary to an ischemic lesion. (County Court, No: D2401-10-02209, R74) Dr. Voulters continues with the following statement:

> "…this gentlemen requires a **complete and aggressive** non-TPA ischemic stroke protocol paying particular attention to his history of coagulopathy and also **aggressively** view his intracranial and extracranial blood vessel architecture with MRI scanning and possible CTA too." (emphasis added) (County Court, No: D2401-10-02209, R74)

Unfortunately without a doubt, Brown had indeed had a stroke. Dr. Voulters was displeased and apologize for the treatment Brown had received. He even admitted Brown should not have been treated that way especially since Memorial was a certified stroke center. (County Court, No: D2401-10-02209, R55-56) Nonetheless, Brown was finally now on right road to recovery.

Brown alleges Memorial and its ER doctors demonstrated a complete lack of care and that their negligence caused the delay in diagnosing of his stroke. As a result, Brown argues he incurred unnecessary pain, suffering and medical expenses. Had he been properly evaluated, diagnosed and treated during his first visit, two days prior on August 21, 2008, he would not have incurred the additional tests and ER bills. Brown contends there is also no doubt that an MRI should have been performed during Brown's initial visit on August 21, 2008. Brown asserts it was negligent not to perform one. (County Court, No: D2401-10-02209, R56)

Prior to being sued, Brown tried to negotiate the medical bills with Memorial, voicing his opinion and complaints relative to his misdiagnosis and treatment. He was told if he sued Memorial, he would be reported to the IRS for failure to report income from his health insurance. Brown cashed his medical payment check he received from Blue Cross, his health insurer. He was negotiating the bill, thus did not pay Memorial until a satisfactory resolution was on the table for both parties. (County Court, No: D2401-10-02209, R56) Since Memorial was not a preferred healthcare provider for Blue Cross, the medical check was written to Brown instead of Memorial. Continued negotiations to resolve Browns complaints were not fruitful. Memorial was obviously angered because Brown cashed the Blue Cross check and kept the money pending

negotiations. Brown was sued by Collections, as "authorized agent and representative" of Memorial on November 5, 2010, a little over 2 years and 2 months after his treatment. (County Court, No: D2401-10-02209, R13)

On or about December 13, 2011, Brown, through his new counsel, filed his first set of discovery, which included Interrogatories, Request for Admissions, and Request for Production of Documents. (County Court, No: D2401-10-02209, R78-79) Brown was seeking, among other things, information regarding his medical treatment, billing and the relationship of the ER physicians to the hospital. Collections filed its answers/objections on or about January 13, 2012, virtually objecting to all the discovery. (County Court, No: D2401-10-02209, R94-95) Due to the Collections inadequate responses to the discovery requests, Brown filed his Motion to Compel Discovery on June 20, 2012. (County Court, No: D2401-10-02209, R256-280)

Brown asserted if Collections is in fact an "authorized agent and representative" of Memorial, as stated in its pleadings, it, as Memorial's "agent", should have access to the requested information through Memorial. Therefore, Collections should be required "as agent" of Memorial to produce the requested information, including copies of the medical records, billing, and policy manuals by going to its principle, Memorial, and producing the information, just as though it were Memorial itself. (County Court, No: D2401-10-02209, R256-257)

Collections argued since Memorial is a political subdivision of the State of Mississippi, a one (1) year Statute of Limitations applied and therefore a claim for set-off and/or recoupment should not be allowed, as it was time barred. (County Court, No: D2401-10-02209, R114-118) Collections also argued since the Amended Complaint had not been allowed, the discovery was premature. (County Court, No: D2401-10-02209, R164) Brown challenged that a set-

off/recoupment defense is not time barred by the statute of limitations and the discovery was calculated to lead to the discovery of relevant admissible evidence.

Brown argued Collections should have required to answer the Request for Admissions, including but not limited to Request for Admission No. 7 relating to the spinal tap fluid from the lumber puncture (County Court, No: D2401-10-02209, R273), Brown contends Collections, as "authorized agent and representative" of Memorial should be required to fully and completely answer and explain its qualified Answers to the Request for Admissions. "As authorized agent and representative of Memorial," Collections stands in the shoes of Memorial. Collections should be required to admit or deny the Request for Admissions, as though it was Memorial itself. Brown alleged Collections is obligated to seek information for the responses to the Request for Admissions from its principal Memorial, particularly since Collections sought money from Brown for those services on behalf of Memorial, as their "agent." (County Court, No: D2401-10-02209, R256-257)

Brown also asserted the Interrogatories should have been answered by Collections. (County Court, No: D2401-10-02209, R256-257) Brown requested Collections be compelled to answer all Interrogatories. Brown alleged "as authorized agent and representative" of Memorial, Collections stands in the shoes of Memorial and cannot hide behind its objection that: "…Information sought is exclusively in the possession of Memorial…" (County Court, No: D2401-10-02209, R257) Brown argues he was entitled to know the relationship between the ER doctors and Memorial, as requested in Interrogatory No. 6. (County Court, No: D2401-10-02209, R264) Brown argues an agent is an agent, period. The pleadings did not limit Collections "agency" position. Therefore, Collections should be compelled to provide all the information sought in the Interrogatories. (County Court, No: D2401-10-02209, R260-267) Failure to do so

only unbalances the legal system and prejudices Brown. Brown's right to conduct discovery was wrongfully taken away from him.

Brown requested the County Court reverse its ruling rendered from the bench at the June 28, 2012 hearing wherein the Court overruled Brown's Motion to Amend the Complaint and Motion to Compel. (County Court, 24Cl1:13-cv-00249-CLS, Doc 11-5, Tr. June 28, 2012, p. 34) There was no order entered on the County Court's June 28, 2012 ruling regarding the Amended Complaint and the proposed order submitted by Collections was ultimately withdrawn. (County Court, 24Cl1:13-cv-00249-CLS, Doc 11-5, Tr. October 4, 2012, p. 66 & Tr. October 11, 2012, p. 116-117)

On June 23, 2012, Brown filed Defendants Motion to Reconsider Plaintiff's (sic) (Defendants) Motion to Amend Answer and/or For Clarification of the Courts (sic) Ruling (County Court, No: D2401-10-02209, R376-378) and a Motion to Reconsider the County Court's Ruling Granting Plaintiff's (Collections) Motion for Protection Order Relative to Defendant's (Brown's) Discovery. (County Court, No: D2401-10-02209, R379-396) Brown challenged the County Court's findings that the State Tort Claims Act's 1 (one) year Statute of Limitations and Notice Provisions barred Brown's defense of recoupment. Furthermore based upon Collections counsel assertions that Brown had the right to challenge the reasonableness and necessity of the medical bills, Brown requested clarification as why he was not allowed to conduct discovery in this regard and assert the reasonableness and necessity of the procedures and bills as a defense. (County Court, No: D2401-10-02209, R377)

This issue of negligence, inadequate treatment and/or lack of treatment are inescapably intertwined with whether or not Memorial, through its agent Collections, is entitled to recover payment for said services. In order to fully defend himself and determine whether or not the

charges are fair, necessary and/or reasonable, Brown argued he should be entitled to discovery regarding the care and treatment rendered, the reasonableness and necessity of the medical services, tests, and medicines provided and also how that medical service was provided. He should be able to determine how the charges were arrived at for Brown, as opposed to other insured and uninsured medical patients of Memorial and most importantly he should be entitled to an itemized bill from Collections. Brown argues all of these issues relate to the fairness, necessity, and reasonableness of the charges sought to be recovered by Collections. Brown argued there needed to be clarification on these issues. (County Court, No: D2401-10-02209, R377-378)

On October 11, 2012, the County Court heard Brown's Motion to Reconsider. (County Court, 24Cl1:13-cv-00249-CLS, Doc. 11-5, Tr. October 11, 2012, p. 109) The County Court recognized this was a case of first impression with very important issues for both clients. The Court believed Brown made some very convincing arguments and that Collections was "coming from behind with this argument." (County Court, 24Cl1:13-cv-00249-CLS, Doc. 11-5, Tr. October 11, 2012, p.113-114) The County Court, however, ultimately ruled the defense of recoupment was barred by the State Tort Claims 1 (one) year Statute of Limitations and denied Brown's Motion to Reconsider. (County Court, 24Cl1:13-cv-00249-CLS, Doc. 11-5, Tr. October 11, 2012, p.192 -193 & R489-490) It was further understood Brown's Motion to Amend was only meant to clarify his original Answer, the County Court further ruled from the bench an Interlocutory Appeal would be allowed. (County Court, No: D2401-10-02209, Transcript, Doc. 11-6, p 201-202) The Court then certified the order under M.R.C.P. 54 (b) so an appeal could be had. (County Court, 24Cl1:13-cv-00249-CLS, Doc. 11-6, Tr. October 11, 2012, p.207 & R509)

On November 14, 2012, the County Court entered its Order on the June 28, 2012 hearing denying Brown's Motion to Amend and Compel Discovery. (County Court, No: D2401-10-02209, R489-490) On December 19, 2012, the County Court filed its' Memorandum Opinion Denying Defendant's (Brown's) Motion to Reconsider. (County Court, No: D2401-10-02209, R492-507) On January 7, 2013, the County Court entered its' Partial Final Judgment Denying Defendant's (Brown's) Motion to Reconsider [#31] and Containing Rule 54 (b) Certification. (County Court, No: D2401-10-02209, R509-511) It is from those Orders that Brown appealed to the Circuit Court by timely filing his Notice of Appeal on January 23, 2013. (County Court, No: D2401-10-02209, R512-513)

The appeal was briefed and argued before the Honorable Michael Ward, who was appointed temporary Circuit Court Judge to fill the vacancy left by Judge Gargiulo after he was appointed U.S. Magistrate. Brown filed his Appellant's Brief with the Circuit Court on May 12, 2014 (Circuit Court No: 24Cl1:13-cv-00249-CLS, R20-50) and refiled on July 7, 2014 correcting only the caption. Collections filed its' Brief of Appellee on June 25, 2014. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R93-132) Collections did not seek sanctions at that time. Brown filed his Corrected Reply Brief of Appellant of the July 9, 2014 correcting only the caption. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R224-241)

The Circuit Court, sitting as an appellate court, heard oral arguments and entered its' Opinion on December 3, 2014 affirming the trial court's ruling. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R244-247) Subsequent thereto Collections filed a Motion to Alter or Amend Judgment to Include Sanctions Award to Plaintiff Appellee. (Collections) (Circuit Court No: 24Cl1:13-cv-00249-CLS, R262-320) This was the first such request for sanctions that was actually sought from the Court. Collections raised no jurisdictional questions of the Circuit

Court, sitting as an appellate court, at that time. Collections also filed its' Memorandum in Support of its' Motion to Award Sanctions to Plaintiff Appellee. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R248-261)

Brown filed his Motion to Alter or Amend Judgment on December 12, 2014 to include, out of an abundance of caution, an M.R.C.P. 54 (b) certification of a final judgment, exactly as the trial court had done. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R326-331) On December 17, 2014, Brown filed his Appellant Brown Response to Collections' Motion to Alter or Award Judgment to Include Sanctions Award to Plaintiff, Appellee. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R332-341) Brown also requested therein attorney's fees and sanctions against Collections and its attorney, Westbrook, under Rule 11 and Section 11-55-5 the Litigation Accountability Act for filing a patently frivolous motion for sanctions. Brown cited in support of his request for sanctions, the bench opinion of the trial court regarding the merits of Brown's argument, the lack of specific controlling authority for either side on the specific issue and the need for the Mississippi Supreme Court to address the issue on appeal. Brown further cited Westbrook's admission that the Mississippi Tort Claims was modeled after the Federal Tort Claims Act. Brown argued Westbrook and Collections Motion for Sanctions was frivolous and had no hope for success.

Collections filed its' Response in Opposition to Brown's Motion to Alter or Amend Judgment, bringing up for the first time questions as to the propriety of the trial court's M.R.C.P. 54 (b) certification and the Circuit Court's Appellate jurisdiction. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R352-383) Brown filed his Rebuttal to Collections Response in Opposition to Browns Alternative Motion to Alter or Amend Judgment [Doc. #32 and Doc. #33.] (Circuit Court No: 24Cl1:13-cv-00249-CLS, R388-399) The trial court unquestionably wanted a final

appealable judgment. On December 31, 2014, the Circuit Court, sitting as an appellate court, filed its Amended Judgment and certified the issue as a final judgment pursuant to M.R.C.P. 54 (b). (Circuit Court No: 24Cl1:13-cv-00249-CLS, R401-406) The Circuit Court entered its' Order denying Collections' request for sanctions without comment. Brown's request for sanctions was not referenced or ruled upon by the court.

Brown filed his Notice of Appeal from the Circuit Court to this Honorable Court on December 31, 2014, the same day as the Amended Judgement was entered. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R 407-408) On January 8, 2015, Collections filed its' Notice of Cross Appeal pursuant to M.R.A.P. Rule 4 and M.R.C.P. 54 (b), if applicable.(Circuit Court No: 24Cl1:13-cv-00249-CLS, R409-410) Collections further filed a Petition pursuant to M.R.A.P. Rule 5, in Supreme Court No. 2015-M-00092-SCT. It conveniently failed to appeal as Collections, "as authorized agent and representative" of Memorial, as the original complaint against Brown was filed. Collections then filed its' Motion to Dismiss Brown's Appeal, in Supreme Court No. 2015-TS-00029, which was denied on April 1, 2015. This appeal now proceeds.

SUMMARY OF ARGUMENT

The defense of recoupment is a viable defense against the State and its political subdivisions. Brown should have been allowed to assert his defense of recoupment to Collections attempt to sue him for the unpaid medical bills. Brown should have been allowed to conduct discovery relevant to the issues, which were calculated to lead to the discovery of admissible evidence. Neither the State Tort Claims Act nor the doctrine of sovereign immunity bars that defense nor do they bar discovery relating to a recoupment defense. A recoupment defenses is not made for offensive purposes to recover a judgment from the political subdivision or "its

agent" and does not allow a recovery in excess of the amount Collections has sued for in this case.

Regardless, Brown should have been allowed to challenge the reasonableness and necessity of the medical services and bills for which he was being sued. This inquiry is not barred by the State Tort Claims Act or the doctrine of sovereign immunity as a patient being charged for medical services, Brown had standing to challenge the billing. In the alternative, Brown argues Memorial should have been added as a necessary and indispensable party and/or real party in interest allowing all of these inquiries to be made of Memorial should Brown's defense of recoupment be allowed and if Collections is found not to be the legal "agent or representative" of Memorial for the purpose of discovery. The discovery was not allowed to proceed, as Brown was erroneously denied the opportunity to defend himself and conduct critical discovery. Finally Collections and its attorney, Westbrook, should have been sanctioned under Rule 11 and the Litigation Accountability Act for seeking sanctions as it did against Brown for asserting a recoupment defense. The Honorable Circuit Judge erred and abused his discretion in failing to address the issue.

STANDARD OF REVIEW

The grant or denial of a motion for leave to amend a complaint is within the sound discretion of the trial court, *McDonald v Holmes,* 595 So. 2d 434, 436 (Miss. 1992) Appellate courts review such determinations under an abuse of discretion standard and unless convinced that the trial judge abused his discretion, they are without authority to reverse, *McCarty v Kellum*, 667 So. 2d 1277, 1283 (Miss. 1995) (citing *Frank v Dore*, 635 So. 2d 1375 (Miss. 1994); *Bourn v Tomlinson Interest Inc*., 456 So. 2d 747, 749 (Miss. 1984)).

"An appellate court is to review de novo the grant, or denial, of a motion to dismiss for failure to state a claim." *Ralph Walker, Inc. v. Gallager*, 926 So. 890, 893 (Miss. 2006) (citing *Webb v DoSoto County*, 843 So. 2d 682, 684 (Miss. 2003); Miss R. Civ. P. 12(b) (6)). A motion to dismiss based upon the plaintiff's failure to file a complaint within the time permitted by the applicable statute of limitations is reviewed under this standard. *Howard v Wilson*, 62 So. 3d 955, 956 (Miss. 2011). In the case *sub judice*, Brown timely filed his defense of recoupment and stated a specific basis for the defense. The trial court abused its discretion by rejecting Brown's recoupment defense and discovery, based upon the State Tort Claims Act's 1 (one) year statute of limitations, its notice provisions and Brown's standing to challenge the billing.

ARGUMENT AND AUTHORITIES

I.

THE TRIAL COURT ERRED IN FAILING TO ALLOW BROWN TO ASSERT AND CLARIFY HIS DEFENSE OF RECOUPMENT BY FINDING THE DEFENSE WAS TIME BARRED BY THE MISSISSIPPI TORT CLAIMS ACT AND ITS NOTICE PROVISIONS.

The amendment of complaints is government by Rule 15 of the Mississippi Rules of Civil Procedure. M.R.C.P. 15 (a) declares that leave to amend:

> "…shall be freely given when justice so requires"; this mandate is to be heeded…if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reasons—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowances of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given." See *Jones v Lovett*, 755 So. 2d 1243, 1245-1246 (Miss Ct. App. 2000) favorably quoting *Forman v Davis*, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)

Brown's defense of recoupment was generally set forth in the original answer filed by his former attorney and was not barred by the doctrine of sovereign immunity or time bared by the State Tort Claims Act's one year statute of limitations.

Brown would show his Amended Motion to Amend was filed to clarify his original Answer and Defenses of Setoff and/or Recoupment. The original Answer under the Second Defense stated as follows:

> "Defendant has a claim against Plaintiff which exceeds the amount of Plaintiff's claims against Defendant, and Defendant pleads set-off and **any other defense available to him which would require or permit reduction of Plaintiff's claim by the amount of Defendant's claim**." (County Court, No: D2401-10-02209, R29-30) (emphasis added)

This clearly stated a claim for set-off and/or recoupment. Brown's Amended Motion For Leave to Amend Answer to Complaint sought to explain and clarify this point. (County Court, No: D2401-10-02209, R194-203) There was no counterclaim or claim for excess damages asserted against Collections or Memorial. This point had been conceded before the original hearing on the Motion to Amend and multiple times thereafter on the record by Brown's counsel. Clearly this was a case of recoupment used for defensive purposes only, asserted to reduce or cancel the debt sought to be recovered by Collections.

The Mississippi Supreme Court in *Shapleigh Hardware Co. v Brumfield,* 159 Miss. 175, 181; 130 So. 98; 132 So. 93; (Miss. 1930) LEXIS 355 addressed the substance of a plea versus what it is named and states in pertinent part:

> "But the trouble with appellant's position is that appellees did not plead the eight dollars and fifteen cents by way of recoupment, but as set-off [HN3] It is entirely immaterial with what name appellees labeled their plea; **the substance of the plea controls, and not its name**." Id *181 (emphasis added)

Even though, Brown argues recoupment had been pled as a defense in his original Answer, he deemed it was best to amend his original Answer to clearly state the basis of his defense of recoupment and refer to it by the proper name. Regardless, the trial court and appellate court erroneously denied the defense of recoupment as being time barred under the Mississippi Tort Claims Act one (1) year statute of limitations and its notice provisions.

Collections' argument that the Medical Malpractice Act was passed only in response to a perceived medical crises and that there was no exception for a set-off or a recoupment counterclaim defense contained in the act is completely irrelevant to the defense of recoupment. (County Court, 24Cl1:13-cv-00249-CLS, Doc 11-6, Tr. October 11, 2012, p. 154) This assertion completely ignores the policy behind the recoupment defense and would leave anyone who receives medical treatment liable for whatever charges the hospital or "its agent" wants to charge, whether proper or not. It would also allow the hospital and/or "its agent" to wait until all defenses are time barred to file their suit. Brown's recoupment defense would have no effect on malpractice insurance rates or the health care providers' ability to obtain liability insurance. The defensive claim for recoupment is strictly over his medical bills and would not result in an excess judgment for damages relating to medical malpractice. The defense of recoupment was obviously not a cause of, nor related to the "perceived" malpractice crisis, as argued by Collections. Recoupment was not even contemplated.

Contrary to Collections' assertion, the findings of the trial court in its' Memorandum Order (County Court, No: D2401-10-02209, R497-498) and the appellate court's findings, the case of *FDIC v Cheng*, 787 F. Supp. 625 (N.D. Tex 1991) does not support Collections' claim that Brown's recoupment defense was not viable or that it was prohibited by the MTCA. The

Cheng court analyzed the claim against the backdrop of the decision in *Fredrick v United States*, 386 F. 2d 481 (5th Cir. 1967). The Court in *Cheng* held:

> "The basic problem with Hutton's position is that the counterclaim does not meet the requirement of Rule 13(a) and *Fredrick* that a counterclaim arise "out of the transaction or occurrence that is the subject of the opposing parties claim." The FDIC correctly contends that Hutton's counterclaim is directed towards the FHLLBB's acts as a federal regulator, not toward the FDIC in its capacity of assignee of Guaranty Federal's Claim. The counterclaim is not asserted against the "same party" as Plaintiff." *Id*. 632

In this case, Collections was undeniably the "agent/assignee" of Memorial to collect this bill and the recoupment claim undeniably arises out of the same medical treatment and medical billing for which Collections attempts to recover on behalf of Memorial. The Court should have looked more closely at the Fifth Circuit ruling and rationale in *Fredrick v United States* instead of erroneously applying the facts of *Cheng* to the case *sub judice*.

Collections and its' attorney, Westbrook, initially went to the Federal Court rulings to support their position due to the lack of state authority. Then when they discovered *Cheng* did not actually support their position, they began to criticize Brown for citing Federal and out of state cases. Afterwards, they began to put all their legal eggs in the MTCA basket.

As stated by the U.S. Supreme Court in *Bull v U.S.*, 295 US 247, 55 S. Ct. 695, 79 L. 2d 1421 (1935):

> " A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, **but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction**. *United States v Macdaniel*, 7 Pet. 1, 16, 17, 8 L. Ed. 587; *United States v Ringgold*, 8 Pet. 150, 163, 164, 8 L. Ed. 899. In the latter case this language was used: "No direct suit can be maintained against the United States; **but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very**

> **rigid principle, to deny to him the right of setting up such claim in a court of justice**, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States (FN9 citation omitted) If the claim for income tax deficiency had been the subject of a suit, **any counter demand for recoupment of the overpayment of the estate tax could have been asserted by way of defense and credit obtained**, **notwithstanding the statute of limitations had barred an independent suit against the government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded**. **Such a defense is never barred by the statute of limitations so long as the main action itself it timely**. *Id. 262-263, 701-702* (emphasis added)

Clearly Brown was entitled to plea the defense of recoupment and the trial court erred in denying that defense.

Collections, the trial court's and the appellate court's reliance on *United States, ex. Rel. Westrick v Second Chance Body Armor*, 893 F. Supp. 2d 258, (D.D.D. 2012) to support the position that the Tort Claims Act bars Brown's recoupment defense and that the amendment would be futile, was totally misplaced. The amendment sought by *Second Chance* was not one seeking a defense of recoupment growing out of the same claim as in the case *sub judice*. *Second Chance* sought to add a counterclaim for malicious prosecution, which was not ripe, and for tortious interference with a contract. This unrelated tortious interference counterclaim had not been administratively reviewed, as is required by the Federal Tort Claims Act, and this was a completely different factual and legal scenario compared to the case *sub judice.* It was not a recoupment defense. *Second Chance* obviously does not support the trial court's ruling.

The declaration of legislative intent contained in Miss. Code. Ann. Section 11-46-3(1) of the Mississippi Tort Claims Act that: "the "State" and its "political subdivisions" as such terms

are defined in Section 11-46-1 are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission or breach of…contract…" as quoted by the trial court in its' Memorandum Opinion (County Court, No: D2401-10-02209,R499) was also totally irrelevant to the defense of recoupment. First, recoupment is a defense and not "a suit at law" for damages. Secondly, the Mississippi Supreme Court in *Raymond v State*, 54 Miss 562, 563 (Miss 1877) WL7389 undeniably acknowledged a recoupment defense is available even in the face of sovereign immunity. It is clear in *Raymond*, originally cited by Collections, that **set-off** cannot be plead against the State to obtain a judgment **in excess** of the claim by the State. This is the basis for which *Raymond* was cited by Collections and for the Court's ruling. However, Collections and the trial court failed to recognize the Court in *Raymond* also said: "It may be remarked, to prevent misconception that the foregoing views have no application to defenses to suits brought by the State against individuals, growing out of **recoupment**." *Id* * 4 (emphasis added) *Raymond* involved sovereign immunity and the Court specifically acknowledged a recoupment defense was a viable defense.

The argument that sovereign immunity, the State Tort Claims Act 11-46-3(1) and the Mississippi Code Annotated Section 15-1-36 relating to Limitations of Actions Applicable To Medical Malpractice prohibits the defense of recoupment is totally misplaced. Sovereign immunity is sovereign immunity, period. You either have it or you do not. You certainly cannot have any greater sovereign immunity than was available at the time *Raymond* was decided. Yet, *Raymond* recognized the recoupment defense was available against the sovereign.

One of the continued misinterpretations and/or misrepresentations by Collections in this matter was its' failure to draw a distinction between a counterclaim, set-off and recoupment and

how statute of limitations affects each defense. In *Feld v Coleman*, 17 So. 378, 379 (Miss 1895), the Mississippi Supreme Court stated:

> "Under this clause, a defendant whose demand against the plaintiff is not barred when the plaintiff's action is commenced, and which, but for the statute, would be barred when pleaded as a set-off, is given the right to use such demand defensively and offensively as against the plaintiff.
>
> 3. The third clause of this section was found for the first time in the code of 1880 (§ 2687), and was intended to meet the precise case now presented--i. e., cases in which persons having mutual and subsisting demands against each other, which might be used by either as a set-off in a suit brought by the other, the right of one becomes barred by limitation, and thereafter the other sues upon his unbarred claim. **In such cases the right of the defendant to interpose his demand, though barred, defensively, is preserved. He may not recover over against the plaintiff any excess of his demand above that of the plaintiff, but may defeat any recovery by the plaintiff.**
>
> The complainants demand for the purpose being used as an extinguisher of the judgment secured by Portwood in the attachment suit, is unaffected by the statute of limitations, and the demurrer should have been overruled. ….." *Id. at 379* (emphasis added)

A true counterclaim for an excess judgment based upon medical malpractice would be barred by the Statute of Limitations, however, a recoupment defense most certainly is not, which is exactly the situation we have at hand. It would clearly be unjust, unequitable, against public policy and unjustly enrich the hospital to recover its entire bill if the service they provided was negligent if it unreasonably harmed a patient/defendant, or if a patient/defendant was charged for services that were not even performed or considered unnecessary. Brown should have the right to recoup his damages up to the amount of the hospital's claim against him for the bill, but nothing more. Regardless, this recoupment defense is not defeated by any Statute of Limitations, Tort Claims Act or Notice requirements. It must be remembered, *Raymond* was decided when there was no MTCA. There was total sovereign immunity at the time which barred only a counterclaim but a

recoupment defense was recognized against the sovereign state. Unfortunately, Collections and the trial court erred by misapplying and misinterpreting the law and facts relative to Brown's recoupment defense.

Sisters of Mary v Dennigmann, 730 S.W. 2d 598 (Mo.App.1987) is an example of a case showing the use of recoupment as a defense in a medical malpractice case. In that case, the Court denied a patient's malpractice recoupment counterclaim in a hospital's collection action based on a Statute of Limitations defense to the medical malpractice claim. The defendant in *Sisters of Mary* suggested that as a matter of public policy it was unjust for them to preclude the recoupment defense to the hospital's claim. The Court noted:

> "In *Campbell*, a hospital filed a counterclaim against a patient for unpaid medical bills after the expiration of the medical malpractice statute of limitations. The trial court refused to grant summary judgment. For two reasons we held the trial court exceeded its jurisdiction in applying principles of "fairness" to the question of law. First, the question of "fairness" is a matter of legislative discretion. Second, **the statute did not prevent the patient from alleging in defense of the counterclaim recoupment in the hospital's collection action**. *State ex rel. Sister of St. Mary v Campbell*, 511 S.W. 2d 150. *Id. at 594* (emphasis added)

Brown would argue Collections and the trial court have misapplied and misinterpreted the law as it relates to the facts in the case *sub judice* relative to recoupment. In looking at the above cases, it is clear that Brown's defense of recoupment is a valid defense. Clearly the recoupment defense of Brown arose out of this same negligent medical treatment and questionable medical billing, as these are the same bills and treatment for which Brown is being sued. The argument by Collections that the recoupment defense is barred by Section 15-1-71 is misplaced, particularly when you recognize recoupment is used for defensive purposes only. The recoupment defense is otherwise not "an action" brought against Memorial for medical

negligence seeking recovery in excess of the amount Brown is being sued for. A true counterclaim for medical negligence and seeking an excess judgment would trigger the notice provisions and Statute of Limitations argued by Collections. But not in the case *sub judice*.

The case of *Fredrick v US*, 386 F 2d 481, (5th Cir 1967) dealt with a counterclaim asserted against the Small Business Administration. *Fredrick* was the case preceding and distinguishable from *FDIC v Cheng*. The counterclaim in *Fredrick* was limited by the defendant to an amount not to exceed the government's claim against the defendant. While the government's claim was purely contractual resulting in foreclosure, the defendant's claim arose out of the tort at a foreclosure sale conducted by the SBA. The 5th Circuit noted: "The distinction between recoupment and set-off has significance where a defendant sued by the United State asserts a claim as to which the government has made no statutory waiver of its sovereign immunity. 3 Moore Federal Practice para. 13.02 at 9n. 1. (2d ed.1966)" *Id. 488* The recoupment defense was allowed.

The Federal Rule of Civil Procedure 13 (d) regarding counterclaims is identical to M.R.C.P. 13 (d). In interpreting the Federal Rules of Civil Procedure on counterclaims and sovereign immunity, the 5th Circuit in *Fredrick* noted:

> "Both 13(a) and (b) are qualified by 13 (d) in cases against the United States. *United States v Lashlee et al.*, 105 F. Supp. 184 (W.D. Ark., 1952). Rule 13 (d) provides:
>
> > "Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."
>
> "Thus a defendant is either compelled by 13(a), or permitted by 13(b), to counterclaim against the sovereign within the limits to which the sovereign immunity has been given up by

> the United States by other provisions of law. The waiver can be by statutory consent to be sued [11]**or by the institution of the particular action. Our conclusion is that [HN4] when the sovereign sues it waives immunity as to claims of the defendant [**18] which assert matters in recoupment -- arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim but not the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government's claims**…." Id 489 (emphasis added)

So the consent to be sued or assert the recoupment defense can come from the dictates of the MTCA **or** by the mere act of the sovereign filing suit as happened in the case *sub judice*.

The 5th Circuit in *Fredrick* went further in analyzing the lower court's improper dismissal of the recoupment counterclaim wherein it held:

> "It would be anomalous to hold that a defendant, in court in an action he did not bring, is required to plead a counterclaim against the government because it is compulsory under Rule 13(a) but once pleaded has counterclaim is subject to dismissal on the ground he had not, before being sued, taken affirmative action to seek administrative "credit" of the General accounting office" *Id. 489*

Recoupment is not an affirmative claim to go after government coffers, as is contemplated by Section 11-46-11 (3), but only an equitable defense. Section 11-46-1 (3) does not even mention or prohibit a recoupment defense.

As previously argued, the Statute of Limitations never runs on a recoupment defense. *United States of America v Irby*, 618 F. 2d 352, 356 (5th Cir 1980), citing *Fredrick*, stated when a sovereign sues, it waives immunity to a recoupment defense. As shown by *Irby*, a recoupment

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[11] "For example, the consent of the government to be sued given by the Federal Tort Claims Act is a consent to the defendant's asserting his tort claim as a counterclaim. 3 Moore, Federal Practice, para 13. 29 (2d ed. 1966, Supp. 1965); *United States v Harms*, 96 F. Supp. 1022 (D. Colo., 1951*); United States v Rosati*, 97 F. Supp. 747 (D.N.J., 1951)" Id 489

defense is viable. As a result, there was absolutely no basis for sanctions in the case *sub judice* which was sought by Collections and its attorney, Westbrook.

United States v Amtreco, Inc., 790 F. Supp. 1576 (M.D. Ga 1992), held failure to file an administrative claim does not defeat a recoupment defense under the Federal Tort Claims Act. *Ruppenthal v. State, Ruppenthal v. State, acting by and through the Economic Development and Stabilization Board., 849 P. 2d 1316 (Wyo. 1993).*, 849 P. 2d 1316 (Wyo. 1993) held that a defense of recoupment under Wyoming's Governmental Claims Act was allowed even though the statute of limitations would have otherwise barred the claim. The court noted "this rule" has received broad acceptance in both federal and state courts *Id.* 1321 The courts in *Ruppenthal, Amtreco,* and *Irby* all cited *Fredrick v U.S.* Most importantly, the Supreme Court in *Bull v U.S.*, 295 U.S. 247, 555 Ct. 695, 79 L. Ed 2d 1421 (1935) stated a recoupment defense "is **never barred** by the statute of limitations." (emphasis added)

It would be unequitable to allow a plaintiff, such as Memorial, to wait for the statute of limitations to run on a person who was treated negligently in its' hospital, then sue to collect for the negligent treatment or for treatment that was not even rendered but billed for and then claim the defendant cannot assert a recoupment defense because the statute has run. Since the statute of limitations never runs against the sovereign all it would have to do is wait long enough to defeat the defense. Malpractice claims are expensive to pursue and, with liability limited by statute, impractical if there is little or no permanent injury and the major dispute is over the medical bill for the negligent treatment, as in the case *sub judice*. For this reason, among others, recoupment was and still should be recognized as a vital defense upon which the statute of limitations can ever run. Brown's claim of recoupment was never and still is clearly not frivolous, based upon the comments of the trial court and the cases cited.

Collections erroneously claimed the Mississippi Tort Claims Act is Brown's exclusive remedy and its notice provisions were not followed. Brown concedes this would be true if his claim was not a defensive claim of recoupment. Clearly a counterclaim and/or a set-off used for offensive purposes to collect an excess judgment against Memorial and/or its agent would be prohibited and the notice provisions of the MTCA would apply. Since sovereign immunity does not prevent a claim of recoupment against the sovereign as is shown by *Raymond*, *Fredrick*, *Irby*, *Bull*, and the other authorities cited by Brown above, then sovereign immunity and the notice provisions of the Mississippi Tort Claims Act could not and do not apply to prevent a defensive claim of recoupment. Upon a *de novo* review, Brown's recoupment defense must be allowed.

II.

THE TRIAL COURT ERRED BY FAILING TO ALLOW BROWN TO EXPLORE THE REASONABLENESS AND NECESSITY OF MEDICAL SERVICES AND MEDICAL BILLS BY HOLDING SUCH INQUIRY WAS TIME BARRED BY THE MISSISSIPPI STATE TORT CLAIMS ACT AND THAT BROWN LACKED STANDING TO CONTEST THE MEDICAL BILLS OF MEMORIAL.

As previously argued, Brown's recoupment defense is not time barred and thus discovery relating to the issue should be allowed. It is clear that the legislative intent behind the Mississippi Tort Claims Act's notice provisions was to give the State the opportunity to prepare and/or defend against a claim which could result in a considerable judgment against the state coffers. There is no such policy, rational or requirement for pre-suit notice for a recoupment defense.

In his argument to the Court at the June 28, 2012 hearing, Mr. Frazier, counsel for Collections, did state Brown could always challenge the reasonableness and necessity of the bills. (County Court, 24Cl1:13-cv-00249-CLS, Doc. 11-5, Tr. June 28, 2012, p.44) Frazier attempted at the October 4, 2012 court hearing to recant this statement. (County Court, 24Cl1:13-cv-00249-CLS, Doc. 11-5, Tr. October 4, 2012, p.97-98) However, there was no

recanting of the statement in Collections' brief and there is no controlling authority cited which would deny Brown's right to question the accuracy of the medical bills for which he is being sued. To deny him this right would deny him his constitutional right to due process of law and be against public policy.

As shown in *Pearl River County Board of Supervisors v Southeast Collection Agency, Inc.*, 459 So. 2d 783, 785 (Miss. 1984) cited by Collections, Brown may challenge whether the charges were reasonable and customary. The question then becomes to what extent the Court will allow such testimony. Is it reasonable to charge a patient for improper care or for tests that were not performed or performed incorrectly or rendered no results? It would seem unreasonable to allow such charges and unjustly enrich the health care provider. Also if Collections is allowed to refuse discovery on the issue, how can Brown defend against unreasonable and unnecessary charges? He is being denied due process of law. As shown by the cases of *Raymond, Feld, Sisters of Mary, Irby, Amtreco, Inc., Ruppenthal* and *Fredrick.*, these inquiries are neither time barred nor barred by the doctrine of sovereign immunity or procedural prerequisites.

Collections cited *Herring v Poirrier*, 797 So. 2d 797, 809 (Miss. 2000) for the premise that the medical bills in question are prima facie evidence that they were reasonable and necessary. However, *Herring* clearly states: "An opposing party may rebut the necessity and reasonableness of the bills, and the ultimate question is for the jury to determine." *Id* at 809

Collections has also suggested that the statute which allowed Memorial to set certain charges for care and treatment, somehow establishes an irrebuttable presumption that their charges are fair, reasonable and/or were actually incurred. This is not the case, particularly in a case where a recoupment defense for medical malpractice and improper billing is pled. If it were time barred, it would create constitutional issues. Brown believes Memorial has had untold

dollars in medical charged denied by Medicare, Medicaid, and/or insurance companies for the reason that they were not reasonable, necessary and/or customary or that they were never incurred in the first place. It is further believed there is a disparity in charges to patients who are insured versus those who are not versus those whose bills are placed in collections. Arbitrary and capacious charges should not be allowed as a matter of public policy, particularly from a county or state owed hospital. At the very least, Brown should be able to explore these factual issues in discovery to determine if he if being denied equal protection under the law in relation to the way Memorial charges and bills different patients. Summary Judgment on the issue would be premature before discovery is allowed.

There is no justifiable reason which would prohibit Brown from delving into the reasonableness and necessity of the charges levied against him. Whether he contested the issue with his own insurance company, as argued by Collections is completely irrelevant. Collections argued since Brown did not question the billing through Blue Cross, he is somehow barred from addressing the issue directly with Memorial. Brown's insurance is a contract between Brown and Blue Cross relating to the actions of Blue Cross and not Brown and the Hospital. The inquiry should include how those medical charges and fees were established and whether or not there is a difference between what patients are charged who have insurance versus those put into collections. Just because a government subdivision proclaims a charge is reasonable or necessary, does not make the charge irrebuttable in the action where recoupment is set up as a defense or defeat an inquiry under the equal protection provisions of the Constitution. There is no credible authority to prohibit Brown's inquiry as under the rules of discovery as it is calculated to lead to the discovery of admissible evidence.

Brown's argument, particularly as it relates to discovery, was in large part specifically related to the reasonableness and necessity of the medical care and billing of Memorial. This inquiry is separate and apart from the recoupment defense which related to the medical negligence claim arising out of the negligent care and treatment for which he was being billing. Brown must be allowed to question whether or not a charge is accurate or was reasonable and necessary.

Therefore, any presumption afforded to Collections and Memorial, as to the reasonableness and necessity of these medical bills, is and should be rebuttable. More importantly, the trial court erred and abused its discretion in excluding this issue and the discovery related thereto. As can be seen from a review of the court transcripts, Judge Midcalf never ruled regarding Brown's standing to challenge the medical bills. Further, the Court's finding that *UHS- Qualicare, Inc. v Gulf Coast Comm. Hosp. Inc*., 525 So. 2d. 746, 755 (Miss 1987), *City of Picayune v South Reg'l Corp*. 916, So. 2d 510, 526 (Miss 205) and *Am. Book Co. v Vandive*, 181 Miss. 518, 178 So. 598, (1938) is authority for its ruling is misplaced and not factually or legally on point with the case *sub judice*. Certainly Brown has standing and has relevant reason to delve into the appropriateness of the bill submitted to him by Memorial as a patient and for which **he** is being sued.

The Court erred by apparently ruling Brown had no standing to question the bill of Memorial. If anyone had standing, it would seem Brown would because he is being sued over a bill. The defense regarding the bills related solely to the statute of limitations. Westbrook added mention of the lack of standing to the Memorandum Opinion that he prepared for the Court. It was clearly not addressed by the Court but inserted surreptitiously into the Opinion. The Court clearly erred by finding Brown's recoupment claim was time barred, barred by the doctrine of

sovereign immunity and the Mississippi State Tort Claims Act and in denying Brown's ability to challenge the reasonableness and necessity of the medical bills.

III.

THE TRIAL COURT ERRED IN FAILING TO ALLOW DISCOVERY OF THROUGH COLLECTIONS AS AGENT AND/OR ASSIGNEE OF MEMORIAL HOSPITAL OR IN THE ALTERNATIVE ADD MEMORIAL AS A THIRD PARTY DEFENDANT OR REAL PARTY IN INTEREST.

As argued above, the issue of the Statute of Limitations, sovereign immunity and the State Tort Claims Act do not preclude discovery on these legitimate issues. M.R.C.P. 26 allows discovery of matters relevant to the issues which are reasonably calculated to lead to discovery of admissible evidence. Since the recoupment claim is a valid defense, discovery of the issues should be allowed relating to Mr. Brown's treatment, billing and recoupment defense. If the discovery proves Collections is the authorized agent and representative of Memorial Hospital at Gulfport, as has been plead in every document filed by Collections, then Brown should be allowed the discovery through Collections, as it stands in the shoes of Memorial. It is highly prejudicial and should be against public policy to thwart Brown's legitimate recoupment claim by inserting Collections as Memorial's agent and then denying Brown's discovery request concerning his treatment and billing by asserting Collections does not have the requested information. As Memorial's agent, they should have the authority to get the discovery held by Memorial.

An agent is generally defined by Black's Law Dictionary as follows: "2. One who is authorized to act for or in place of another; a representative…" Black's Law Dictionary 72 (Deluxe 9th ed. 2009). An agency is generally defined by Black's Law Dictionary as follows: "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principle) and bind that other party by words or

actions." Black's Law Dictionary 70 (Deluxe 9th ed. 2009). There can be little doubt Collections is the agent of Memorial, particularly since the pleadings state that it is.

In the alternative, Brown should be allowed to add Memorial Hospital at Gulfport under M.R.C.P. 19 as a party needed for just adjudication, a third party defendant under M.R.C.P. 14 (a) and/or a real party interest for the purposes of discovery and/or trial, since the Statute of Limitations has not run on the recoupment defense, as argued. Brown has requested an itemized statement of billing, which was denied by Collections in its' response to Brown's discovery. Such request is certainly calculated to lead to the discovery of admissible evidence and goes to the fairness, necessity and reasonableness of the charges. It is outrageous for Collections to sue Brown for a medical bill and not immediately provide him with an itemization of the billing and explain the basis for it. This violates Brown's right to due process of law, the ability to defend himself and establishes his recoupment defense since information regarding his medical treatment and the treating doctors and their relationship with Memorial is not readily provided.

IV

SANCTIONS SHOULD HAVE BEEN AWARDED TO BROWN FOR COLLECTIONS FRIVOLOUS REQUEST FOR SANCTIONS AGAINST BROWN FOR ASSERTING THE RECOUPMENT DEFENSE.

Collections sought sanctions in the Circuit Court appeal against Brown and his attorney for some $36, 819.95 in attorney fees. This Motion itself is clearly frivolous and sanctionable, thus entitling Brown to an award of attorney fees to defend himself against it. In return, Brown sought sanctions against Collections in his response to Collections' Inc., Motion to Alter or Amend Judgement to Include Sanctions Award to Plaintiff Appellee. (Circuit Court No: 24Cl1:13-cv-00249-CLS, R332-340)

Collections did not seek sanctions before the County Court for the Motion to Amend or Motion to Compel Discovery nor did it make sanctions an issue on Brown's M. R. Civ. P. 54 (b) appeal of Judge Midcalf's Order at the trial court level. Collections threatened Brown by way of letter but never brought the issue before the Court.

Failure to raise this issue at the trial court constitutes a wavier on appeal. *Koestler v Koestler*, 976 So. 2d 372 (Miss. Ct. App. 2008); *Hudson v Palmer*, 977 So. 2d 369, (Miss. Ct. App 2007) cert denied, 977 So. 2d 343 (Miss. 2008); *Stephens v Miller*, 970 So. 2d 225 (Miss. Ct. App 2007); and *Schonewitz v Pack*, 913 So. 2d 416 (Miss. Ct. App. 2005).

Miss. Code Ann. Section 11-55-5 and M. R. C. P. 11 (b) both deal with sanctions and frivolous pleadings. A frivolous pleadings is one "without substantial justification" and has been repeatedly defined as one "without hope of success." *Tricon Metals & Services, Inc. v Topp*, 537 So. 2d 1331, 1335 (Miss. 1989). An award for sanctions under Rule 11 or the Mississippi Litigations Accountability Act must be the result of egregious conduct. *Illinois Central R.R. v Broussard*, 19 So. 3d 821, 824 (Miss. Ct. App. 2009) Just because Brown has so far failed in his argument to assert his recoupment defense is not proof it had no hope of success. On the other hand, Collections Motions for Sanctions was clearly frivolous, with no hope or success and a calculated attempt to intimidate Brown.

A review of the county court's thought process and opinion regarding the merits of the Motion to Amend as well as attorney Westbrook's own thoughts on the merits and advisability of an Interlocutory and/or a Rule 54 (b) certification for appeal are more than enlightening and are as follows:

Brown referenced Judge Midcalf's December 18, 2012 County Court Memorandum Opinion (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-4, p. 43-58), upon which this appeal was based as it relates to granting this appeal: Judge Midcalf's stated:

> "This is a situation where more than one claim for relief was presented in this action, specifically Mr. Browns proposed defense or counterclaim based on allegations sounding in tort or medical malpractice against representatives of Memorial. The Court directs the entry of a final judgment denying Mr. Browns Motion for Leave to a counterclaim asserting these claims and further dismisses with prejudice, any defense discussed in this opinion based on the same or similar theories on the grounds that such claims are time barred under notice of claim provision and substantive statues of limitations of the MTCA and MMRA. **The court further finds are expressly determined that there is no just reason for delay and that a final partial appealable judgment on these issues should be and hereby is entered, so that Mr. Brown may seek review and modification of this ruling by the Mississippi Court of Appeals or Supreme Court, if he so chooses**." (emphasis added) (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-4, p. 52)

The County Court entered its' Partial Final Judgment Denying Defendants' Motion to Reconsider [#31] and Containing Rule 54 (b) Certification. (County Court No. D2401-10-2209, Doc. 56, p. 1-3) This M.R.C.P. 54 (b) language came as a result of discussions before the court and acknowledged the necessity for the Supreme Court to resolve this particular issue of first impression.

Judge Midcalf stated at the October 11, 2012 County Court hearing:

> "And these are very important issues. Very important to your client, Mr. Breard. Extremely important and so I want you to know I am not treating it lightly."
>
> Which is why I am giving Mr. Breard…**I am allowing him and granting his motion to reconsider. Now if you had asked me on October 4, or whenever you all were previously here, I didn't think he had a chance in wherever of convincing this court differently. But he made some pretty good arguments**.

> And I don't mind telling you, Mr. Westbrook, that even taking into account all these cases that you cited and you are very…I guess what I'm saying is, I really want to hear the argument. Because **I don't mind telling you that you are coming from behind with this argument. I cannot wrap my head around …even with all the authority that you cited, Mr. Breard has made some very good points and arguments**." (emphasis added) (County Court, 24Cl1:13-cv-00249-CLS, Tr. October 11, 2013, p. 113)

The Court went further during the October 11, 2012 County Court hearing wherein it was stated:

> "In order for….I believe in order for you to take an interlocutory appeal, Mr. Breard, it has to be a final ruling on that issue. And **that was my intent to give you a final ruling on that issue so you could take that appeal. I think that it's certainly important enough and compelling enough that they would want to review that issue. Especially if we don't have enough controlling authority out there. And neither one of you could find a lot of controlling authority on point in Mississippi**." (emphasis added) (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-6, Tr. October 11, 2012, p. 203)

Even Mr. Westbrook acknowledged we needed a decision from the Supreme Court when he told the Court at the October 11, 2012 hearing:

> "54 (b) is on all the issues of the case, and that clearly fits.
>
> See, otherwise he's got to take an interlocutory appeal, which is discretionary. And they may or may not grant that so we may not get the answer. I believe if you certify it under Rule 54(b) that gives the court an additional basis…..
>
> "Well 54 is the certification process that can be alternate basis for the Court to address it besides an interlocutory appeal." *Id* Tr. 204

Mr. Westbrook further stated:

> "What I'm getting at is we need to put the certification that the rule describes in the ruling that I'm going to draft for the court if we want to have the additional basis for the Supreme Court to assume jurisdiction…."

> If you didn't certify it the Supreme Court has discretion to take or not take the appeal. If you want to make sure they consider it, I think you certify it under Rule 54 (b) and they still have discretion not to take it, but **54 (b) is you asking the Supreme Court to answer the question that I've attempted to answer. And I think that's what you want** and I just want to make sure that's clear…" (emphasis added) *Id* Tr. 205 (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-6, Tr. October 11, 2012, p. 204-205)

Counsel for Brown acknowledged this was somewhat uncharted ground in Mississippi specifically as it relates to the recoupment defense for negligent medical treatment and the State Tort Claims Act.

The trial court noted at the October 11, 2012 hearing:

> "I found the Raymond case, as old as it, what, 1877, and also you alluded to it in your response, Mr. Westbrook, **there are really no cases on point. That's why you went to the federal rules of civil procedure**. With respect to --and I'm only talking about recoupment. You agree with me that the Raymond case clearly takes recoupment out of the fact that if a state has given you the right to sue, if you can sue the state, you still have to follow the statutes that the state has set forth, correct? (emphasis added)
>
> Mr. Westbrook: I agree generally with that, and also, Judge, I think you have to remember that the Raymond case has to be read in the context of absolute sovereign immunity which existed at that time.
>
> THE COURT: Correct, I agree. And I'm simply giving you-all my condensed version, and then I'm going to allow you-all to argue respectively, and respectfully. I just want to make sure that you understand and the record is clear where we are and where the Court is…" (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-5, Tr. October 11, 2012, p. 204-205)

The court further noted:

> "**Because if recoupment is -- if it comes under that claim, that defense, if it comes under the Mississippi tort claims acts, who wins? You do. Pure and simple. If it doesn't, in my**

> **opinion he gets to file that as a defense and we get to proceed, right? That's it, pure and simple**. (emphasis added)
>
> Am I smart enough to make that decision? I'm going to be today, when you-all finish. Or we can get an interlocutory appeal. I'm just going to tell you where I am.
>
> **So, I'm just letting you know, Mr. Westbrook, you're going to have to put your best foot forward here** with respect to your – and I know you can do it. Just like I know Mr. Breard can. I'm looking at it open-minded. So, I'm admitting that. **And I've done that a few times since I've been on the bench in my 14 years where I have been convinced to revisit something. So, I'll just have to say Mr. Breard will now be added to the few times that someone has been able to do that**." (emphasis added) (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-5, Tr. October 11, 2013, p. 114)

There is undeniable evidence that Brown attempt to amend his complaint to more clearly assert a recoupment defense was **not** frivolous. Brown has cited solid federal and state authority for his position that neither the State Tort Claims Act nor the statute of limitations prohibited the assertion of a recoupment defense. The Court clearly acknowledged the absence of state authority for either side's position. It was for that reason other state and federal cases were cited by Brown, many directly or almost directly on point. The court discounted that authority at the urging of Westbrook because much was not from Mississippi. Yet, it is without doubt appropriate to seek the guidance from other jurisdictions, both state and federal, to help determine an issue seemingly of first impression. The argument of Collections and Westbrook that the actions of Brown and undersigned counsel are sanactionable is patently ridiculous and frivolous within the meaning and spirit of Rule 11 and Section 11-55-5. It was meant solely to threatened and intimidated Brown and his counsel with $36,819.95 in attorney fees and sanctions.

Since Westbrook admitted that Mississippi Tort Claims Act is similar to and modeled on the Federal Tort Claims Act (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-5, Tr. October

11, 2013, p. 138), it is relevant what the federal courts have done on the recoupment defense in Tort Claims Act cases. As shown by *United States of America v Irby*, 618 F. 2d 352, 356 (5th Cir 1980) in citing *Fredrick v U.S.* 386 F. 2d 488:

> " Our conclusion is that when the sovereign sues it waives its immunity as to claims of the defendant which assert matters in recoupment rising out of the same transaction or occurrence which is the subject of the governments suit, and to the extent of defeating the government's claim but not to the extent of judgment against the (United States)which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the governments claims."

As shown by *Irby*, there was absolutely no basis for seeking sanctions in this case.

As shown in *United States v. Amtreco, Inc.,* 790 F. Supp. 1576 (M.D. Ga 1992), which was produced to the court, failure to file an administrative claim does not defeat a recoupment defense under the Federal Tort Claims Act. Likewise, the state court case of *Ruppenthal v State of Wyoming, acting by and through the Economic Development and Stabilizations Board*, 849 P. 2d 1316 (Wgo. 1993), also produced to the court found a defense of recoupment under Wyoming's Governmental Claims Act was allowed even though the statute of limitations would have otherwise barred the claim. The court noted "this" rule has received board acceptance in both federal and state courts *Id.* 1321 The courts in *Ruppenthal, Amtreco,* and *Irby* all cited *Fredrick v U.S.*

The attempt by Collections and its counsel to reargue their theory against allowing the recoupment defense did nothing to support a claim for sanctions in this case and Brown and his counsel will stand on their arguments and authority. As the Supreme Court in *Bull v U.S*. 295 U.S. 247, 55 S. Ct. 695, 79 L. Ed. 2d 1421 (1935) stated regarding recoupment "such a defense is never barred by the statute of limitations. There can be no question Collections request for

$36,819.95 in sanctions was patently frivolous with no hope of success and meant solely to maliciously and wrongfully intimidate and threaten Brown and his counsel.

The failure of the Circuit Court to address Brown request for sanctions against Collections and its attorney Westbrook was clearly error and an abuse of discretion. The issues of sanctions should be addressed here or upon remand where a factual finding as to the amount of sanctions can be addressed.

CONCLUSION

Brown would show the trial court erred in denying his recoupment defense as being barred by the sovereign immunity granted by the State Tort Claims Act and Section 15-1-36 of the Mississippi Code Ann. 1972, relating to the Statute of Limitations In Suits Brought for Medical Malpractice. The cases cited herein clearly show recoupment is a viable defense in this case as the defense grew out of the same transaction, event and claim sued upon. It is viable, even against the sovereign, since Memorial waived immunity when it sued Brown. The defense does not place the government coffers at risk as no excess recovery was sought or can be obtained, only a reduction of the medical bills sought to be recovered by Memorial through its agent Collections.

With recoupment being a viable defense to the lawsuit filed against Brown for medical bills, he most certainly is entitled to discovery through, Memorial's agent, Collections, as these matters are relevant to the issues and calculated to lead to the discovery of admissible evidence. In the alternative, Memorial should be made a part of the litigation as a real party in interest a third party defendant and/or a party necessary for a just adjudication, in order for Brown to pursue his recoupment defense.

Brown should separately be allowed to investigate the reasonableness and necessity of the bills for which is he being sued. Otherwise, he is being denied due process of law and equal protection. The concern of Collections that others who are being sued over medical bills might also use a recoupment defense to every collection filed by Memorial creating a "slippery slope" is a baseless and irrelevant argument. (County Court, 24Cl1:13-cv-00249-CLS, Doc. # 11-5, Tr. October 11, 2013, p. 133-134) A person should not be denied a legitimate defense or their constitutional rights just because they or others might actually do the same. This is particularity true when, in this day and age, the court can take judicial notice of the serious problems in health care and medical billing errors. Malpractice suits are extremely expensive to pursue and difficult to win. The Courts are well aware of this fact. For this reason, many plaintiff patients do not or cannot pursue litigation. Regardless, they certainty should not be estopped from setting up lack of medical care or improper billing as a defense when the health care provider choses to sue them for the negligent services provided or bills that are not legitimate or accurate. Brown should be allowed to conduct discovery relating to the billing practice of memorial as it relates to insured, uninsured, and patients placed in collections to be sued. He is being deprived of equal protection under the law.

Finally the Circuit Court, sitting as an appellate court, erred and abused its discretion in not mentioning and/or granting the sanctions requested by Brown against Collections and its attorney, Westbrook. In failing to address Brown's request for sanctions, the Circuit Court abused its discretion. Brown should have been awarded sanctions against Collections and its attorney, Westbrook, in an amount to be determined upon remand.

Respectfully submitted on this the 15th day of June, 2015.

/s/ L. Christopher Breard
L. Christopher Breard
Attorney for Appellant

CERTIFICATE OF SERVICE

I, L. Christopher Breard of Breard Law Firm, Ltd., do hereby certify that I have this date, electronic filed using the MEC, the foregoing *Brief of Appellant* to the following:

David Frazier
Attorney for Appellee
Frazier Law Firm, PLLC
P.O. Drawer 1170
Pascagoula, MS 39568-1170

William V. Westbrook, III (MSB #7119)
Attorney for Appellee
Page, Mannino, Peresich & McDermott, PLLC
2408 14th Street
Gulfport, MS 39501

Courtesy Copy

Honorable Robin Alfred Midcalf
P.O. Box 1889
Gulfport, MS 39502
Telephone: 228-865-4109
Facsimile: 228-865-4485

Honorable Michael H. Ward
Retired County Court Judge
4806 Harrison Circle
Gulfport, MS 39507
228-867-6210
228-861-8731

So certified this the 15th day of June, 2015.

/s/ L. Christopher Breard
L. Christopher Breard
Attorney for Appellant

BREARD LAW FIRM, LTD.
1317 B 24TH Avenue
Gulfport, MS 39501
Telephone: 228-897-2222
Facsimile: 228-575-9218