Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

MAXICARE PCIB CIGNA HEALTHCARE (now MAXICARE HEALTHCARE CORPORATION), ERIC S. NUBLA, JR. M.D. and RUTH A. ASIS, M.D., Petitioners,	**G.R. No. 194352**
	Present:
	VELASCO, JR., *J., Chairperson,* PERALTA, ABAD, MENDOZA, and LEONEN, *JJ.*
- versus -	
MARIAN BRIGITTE A. CONTRERAS, M.D., Respondent.	Promulgated: **January 30, 2013**

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DECISION

MENDOZA, *J.*:

Challenged in this petition are the January 28, 2010 Decision[1] of the Court of Appeals *(CA)* and its October 27, 2010 Resolution,[2] in CA-G.R. SP No. 101066, which affirmed the March 16, 2007 Decision[3] and June 29, 2007 Resolution[4] of the National Labor Relations Commission *(NLRC)*, reversing the decision[5] of the Labor Arbiter *(LA)* in this illegal dismissal case, entitled *"Marian Brigitte Contreras v. MaxiCare PCIB CIGNA Health Care, et. al."*

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[1] *Rollo*, pp. 45-53 (Penned by Associate Justice Michael P. Elbinias and concurred in by Associate Justice Juan Q. Enriquez, Jr. and Associate Justice Marilyn P. Punzalan-Castillo).
[2] Id. at 54-55
[3] Id. at 74-79 (Penned by Commissioner Angelita A. Gacutan).
[4] Id. at 81-82.
[5] Id. at 64-72.

The Facts

Sometime in March 2003, Maxicare Healthcare Corporation *(Maxicare)* hired Dr. Marian Brigitte A. Contreras *(Dr. Contreras)* as a retainer doctor at the Philippine National Bank *(PNB)* Head Office, Macapagal Avenue, Roxas Boulevard, Manila. Under their verbal agreement, Dr. Contreras would render medical services for one year at ₱250.00 per hour. Her retainer fee would be paid every 15th and 30th of each month based on her work schedule which was every Tuesday, Thursday and Friday from 6:00 o'clock in the morning to 5:00 o'clock in the afternoon.[6]

The controversy started when, on July 3, 2003, Dr. Ruth A. Asis, Maxicare's medical specialist on Corporate Accounts, informed Dr. Contreras that she was going to be transferred to another account after a month. On August 4, 2003, the Service Agreement between Dr. Contreras and Dr. Eric S. Nubla, Maxicare's Vice-President for Medical Services, was executed, effecting the transfer of the former to Maybank Philippines *(Maybank)* for a period of four (4) months, from August 5, 2003 to November 29, 2003, with a retainer fee of ₱168.00 per hour.

Dr. Contreras reported to Maybank for one (1) day only. On August 8, 2003, she filed a complaint before the LA claiming that she was constructively dismissed. Maxicare, on the other hand, insisted that there was no constructive dismissal.

Ruling of the Labor Arbiter

On November 29, 2005, the LA rendered a decision dismissing the complaint of Dr. Contreras for lack of merit. The pertinent portions of the LA's ruling read:

> If indeed complainant was forced to sign the contract of August 4, 2003, she could not have reported to that assignment under it in the first place. In reporting so, she not only ratified the contract of service she signed but also waived all her rights under their previous agreement she is supposed to be entitled to enforce. It may be that there present under the circumstance of a breach of contractual obligation under the previous undertaking which partakes the nature of constructive dismissal based on evidence at hand. At that then, complainant should have at such point ventilated the matter before this forum. She did not. Instead, she proceeded to sign or execute the questioned Service Agreement with the respondent under the terms and conditions therein stated. To a professional like her, a Doctor, complainant should have refused as she is at liberty, in refusing to sign even if what she

[6] See Court of Appeals Decision, id. at 46; and NLRC Decision, id. at 75.

> claimed there appears a threat of dismissal. In this case, she even confirmed what she signed by reporting to duty thereafter. And only after examining what she signed that she realized she thought of initiating the present complaint. In this regard, absent any showing that she was forced to execute the disputed service agreement of August 4, 2003, complainant's complaint for constructive dismissal can hardly be sustained by a later change of heart.
>
> Finding substantial basis to support the validity of the Service Agreement of August 4, 2003 entered into by the parties, the present complaint for constructive dismissal must necessarily fail. Consequent claim as relief therefor has no basis.[7]

Ruling of the NLRC

On March 16, 2007, upon appeal, the NLRC rendered a decision[8] *reversing* and *setting aside* the LA's decision. It declared that Dr. Contreras was illegally dismissed and ordered her reinstatement to her former or substantially equivalent position and the payment of her backwages.

The NLRC explained that the "[e]xecution of a Service Agreement for another retainership with lower salary does not negate constructive dismissal arising from the termination of complainant's PNB retainership without either just or authorized cause but simply is anchored on alleged complaints which even Dr. Eric Nubla recognize to be fictitious."[9] Dr. Contreras signed the Service Agreement on August 4, 2003, and later repudiated it with a notice to Maxicare that she could not go on serving under such a disadvantageous situation. The disadvantage she was referring to was the disparity in remuneration between the PNB retainership with ₱250.00 per hour and that of Maybank with ₱168.00 per hour. The clear economic prejudice validated her claim of having reservation on the Service Agreement prior to her signature. She signed the new agreement because it, being a contract of adhesion, gave her no realistic chance to haggle for her job. Thus, the NLRC disposed:

> **WHEREFORE**, premises considered, the Decision appealed from is hereby **REVERSED** and **SET ASIDE** and a new one entered declaring complainant was illegally dismissed. Accordingly, respondents are hereby ordered to reinstate complainant to her former or substantially equivalent position and to pay her backwages from the time her PNB retainership was terminated until the finality of this Decision.
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> **SO ORDERED**.[10]

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[7] *Rollo*, pp. 71-72.
[8] Id. at 74-79.
[9] Id. at 77.
[10] Id. at 78-79.

Ruling of the Court of Appeals

On January 28, 2010, the CA affirmed the conclusions reached by the NLRC.

On the issue regarding the existence or non-existence of an employer-employee relationship, the CA ruled that Maxicare could not raise the said issue for the first time on appeal. Nonetheless, the CA ruled that the records showed that there existed an employer-employee relationship between Maxicare and Dr. Contreras for the following reasons: 1] Maxicare exercised significant control in her hiring and the conduct of her work; 2] Maxicare was the one who engaged her services; 3] Maxicare determined and prepared her work assignments, like attending to PNB members needing medical consultation and performing such other duties as may be assigned by Maxicare to her from time to time; 4] Maxicare determined her specific work schedules, which was for her to render services from 1:00 to 5:00 o'clock in the afternoon "every Tuesday and Thursday;"[11] and 5] Maxicare prescribed the conditions of work for her, which were a) that she had to abide by the company rules and regulations, b) that she would keep inviolate all company records, documents, and properties and from disclosing or reproducing these records and documents to anyone without proper authority, c) that she had to surrender upon request for, or upon termination of her services, such records, documents, and properties to Maxicare; d) that Maxicare, through its Customer Care coordinator, Ms. Cecile Samonte, would monitor her work; and e) that she was compensated not according to the result of her efforts, but according to the amount of time she spent at the PNB clinic.[12]

The CA added that Maxicare impliedly admitted that an employer-employee relationship existed between both parties by arguing that she was not constructively dismissed. Hence, Maxicare was estopped from questioning her status as its employee.[13]

On the issue of whether or not Dr. Contreras was constructively dismissed, the CA ruled that her transfer to Maybank, which resulted in a diminution of her salary, was prejudicial to her interest and amounted to a constructive dismissal. It stated that Maxicare, as employer, had the burden of proving that not only was her transfer made for valid or legitimate grounds, such as genuine business necessity, but also that such transfer was not unreasonable, inconvenient, or prejudicial to her.[14]

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[11] See Court of Appeals Decision, id. at 48.
[12] *Rollo*, pp. 48-49.
[13] Id. at 47-48.
[14] Id. at 51.

Maxicare filed a motion for reconsideration but it was denied by the CA in its Resolution,[15] dated October 27, 2010.

Not in conformity with the adverse decision, Maxicare filed this petition anchored on the following

GROUNDS

I

THE COURT OF APPEALS, IN RENDERING THE ASSAILED DECISION, ERRONEOUSLY SET ASIDE, EVEN CONTRADICTED, A PLETHORA OF JURISPRUDENCE THAT LACK OR ABSENCE OF JURISDICTION MAY BE RAISED FOR THE FIRST TIME EVEN ON APPEAL.

II

THE COURT OF APPEALS MISAPPLIED THE 4-TIERED TEST TO DETERMINE THE EXISTENCE OF EMPLOYER-EMPLOYEE RELATIONSHIP WITHOUT CONCRETE BASIS.[16]

Maxicare's position

Maxicare argues that questions on jurisdiction "may be raised at any stage of the proceedings, even on appeal, and the right to do so is not lost by waiver or by estoppel." Maxicare likewise asserts that "if the issue on jurisdiction may be resolved by an appellate tribunal *motu propio* when the same has not been raised in the courts below, with more reason that the same should be allowed to be considered and decided upon by the appellate court when, as in the present petition, the said issue has been raised in the pleadings before the appellate court."[17]

Considering that Dr. Contreras submitted evidence to support not only her claim of constructive dismissal but also the existence of an employer-employee relationship, its act of raising said issue should be sufficient ground for the CA to consider and rule on the issue of jurisdiction.[18]

Maxicare claims that there could have been no employer-employee relationship arising from the oral medical retainership agreement between the parties. It contends that it could not have effectively exercised control over the means and method adopted by Dr. Contreras in accomplishing her work as a medical retainer; that it did not determine the manner in which she conducted physical examination, immunized, diagnosed, or treated her

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[15] Id. at 54-55.
[16] Id. at 27.
[17] Id. at 28-29.
[18] Id. at 29.

patients; that Dr. Contreras confirmed that it paid her retainer fees and deducted only 10% "withholding tax payable-expanded;" that she was not in the list of Maxicare's payroll; and that Maxicare did not deduct SSS contributions from the retainer fees that Dr. Contreras received. Hence, the above circumstances disprove the presence of employer-employee relationship. On the contrary, they strongly indicate a case of an independent contractor.[19]

Maxicare went on further by stating that Dr. Contreras was an independent contractor because she rendered services for a few hours a week, giving her free time to pursue her private practice as a physician and that upon the terms of their agreement, either party could terminate the arrangement upon one month's advance notice.[20]

Finally, Maxicare contends that Dr. Contreras is a highly educated person who freely, willingly and voluntarily signed the new Medical Retainership Agreement.[21] Therefore, there is no truth to her claim that she was forced to sign said agreement.[22]

Dr. Contreras's position

On the other hand, Dr. Contreras basically counters that Maxicare did not raise the issue of the existence of an employer-employee relationship before the LA. It also did not question such point in the NLRC. Maxicare brought up the matter for the first time only in the CA.

The Court's Ruling

The petition has no merit at all.

As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court, will not be permitted to change theory on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it could have done had it been aware of it at the time of the hearing before the trial court. To permit Maxicare in this case to change its theory on appeal would thus be unfair to Dr. Contreras, and would offend the basic rules of fair play, justice and due process.

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[19] Id. at 32-33.
[20] Id. at 34.
[21] Id. at 36-37.
[22] Id. at 38.

Indeed, Maxicare is already estopped from belatedly raising the issue of lack of jurisdiction considering that it has actively participated in the proceedings before the LA and the NLRC. The Court has consistently held that "while jurisdiction may be assailed at any stage, a party's active participation in the proceedings before a court without jurisdiction will estop such party from assailing the lack of it." It is an undesirable practice of a party to participate in the proceedings, submit his case for decision and then accept the judgment, if favorable, but attack it for lack of jurisdiction, when adverse.[23]

In the case at bench, it may be recalled that Dr. Contreras filed a complaint for illegal dismissal against Maxicare before the LA. Maxicare was given the chance to defend its case before the LA. In fact, the LA decision favored Maxicare when it ruled that there was no illegal dismissal. On appeal, however, the NLRC reversed and set aside the LA's decision and ordered Dr. Contreras's reinstatement with payment of backwages. Upon the denial of its motion for reconsideration, Maxicare elevated its case to the CA raising the issue of jurisdiction for the first time.

Undeniably, Maxicare never questioned the LA's jurisdiction from the very beginning and never raised the issue of employer-employee relationship throughout the LA proceedings. Surely, Maxicare is not unaware of Article 217 of the Labor Code which enumerates the cases where the LA has exclusive and original jurisdiction. Maxicare definitely knows the basic rule that the LA can exercise jurisdiction over cases only when there is an employer-employee relationship between the parties in dispute.

If Maxicare was of the position that there was no employer-employee relationship existing between Maxicare and Dr. Contreras, it should have questioned the jurisdiction of the LA right away. Surprisingly, it never did. Instead, it actively participated in the LA proceedings without bringing to the LA's attention the issue of employer-employee relationship.

On appeal before the NLRC, the subject issue was never raised either. Maxicare only raised the subject issue for the first time when it filed a petition in the CA challenging the adverse decision of the NLRC. It is, therefore, estopped from assailing the jurisdiction of the LA and the NLRC.

It is true that questions of jurisdiction may be raised at any stage. It is also true, however, that in the interest of fairness, questions challenging the jurisdiction of courts will not be tolerated if the party questioning such jurisdiction actively participates in the court proceedings and allows the

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[23] *Philippine Veterans Bank v. NLRC*, G.R. No. 188882, March 30, 2010, 617 SCRA 204, 211.

court to pass judgment on the case, and then questions the propriety of said judgment after getting an unfavorable decision. It must be noted that Maxicare had two (2) chances of raising the issue of jurisdiction: first, in the LA level and second, in the NLRC level. Unfortunately, it remained silent on the issue of jurisdiction while actively participating in both tribunals. It was definitely too late for Maxicare to open up the issue of jurisdiction in the CA.

The Court cannot tolerate this kind of procedural strategy on Maxicare's part because it would be unfair to Dr. Contreras who would no longer be able to present further evidence material to the new issue raised on appeal. Maxicare's lapse in procedure has proved fatal to its cause and therefore, it should suffer the consequences. The Court has been consistent in its ruling in a long line of cases**,** the latest of which is *Duty Free Philippines Services, Inc., v. Manolito Q. Tria,*[24] where it was written:

> It was only in petitioner's Petition for *Certiorari* before the CA did it impute liability on DFP as respondent's direct employer and as the entity who conducted the investigation and initiated respondent's termination proceedings. Obviously, petitioner **changed its theory** when it elevated the NLRC decision to the CA. The appellate court, therefore, aptly refused to consider the new theory offered by petitioner in its petition. As the object of the pleadings is to draw the lines of battle, so to speak, between the litigants, and to indicate fairly the nature of the claims or defenses of both parties, a party cannot subsequently take a position contrary to, or inconsistent, with its pleadings. It is a matter of law that when a party adopts a particular theory and the case is tried and decided upon that theory in the court below, he will not be permitted to change his theory on appeal. The case will be reviewed and decided on that theory and not approached and resolved from a different point of view.
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> The review of labor cases is confined to questions of jurisdiction or grave abuse of discretion. **The alleged absence of employer-employee relationship cannot be raised for the first time on appeal.** The resolution of this issue requires the admission and calibration of evidence and the LA and the NLRC did not pass upon it in their decisions. We cannot permit petitioner to change its theory on appeal. It would be unfair to the adverse party who would have no more opportunity to present further evidence, material to the new theory, which it could have done had it been aware earlier of the new theory before the LA and the NLRC. More so in this case as the supposed employer of respondent which is DFP was not and is not a party to the present case.
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> In *Pamplona Plantation Company v. Acosta,* petitioner therein raised for the first time in its appeal to the NLRC that respondents therein were not its employees but of another company. In brushing aside this defense, the Court held:

[24] G.R. No. 174809, June 27, 2012.

x x x Petitioner is estopped from denying that respondents worked for it. In the first place, it never raised this defense in the proceedings before the Labor Arbiter. Notably, the defense it raised pertained to the nature of respondents' employment, i.e., whether they are seasonal employees, contractors, or worked under the pakyaw system. Thus, in its Position Paper, petitioner alleged that some of the respondents are coconut filers and copra hookers or sakadors; some are seasonal employees who worked as scoopers or lugiteros; some are contractors; and some worked under the pakyaw system. In support of these allegations, petitioner even presented the company's payroll which will allegedly prove its allegations.

By setting forth these defenses, petitioner, in effect, admitted that respondents worked for it, albeit in different capacities. Such allegations are negative pregnant – denials pregnant with the admission of the substantial facts in the pleading responded to which are not squarely denied, and amounts to an acknowledgment that respondents were indeed employed by petitioner.

Also in *Telephone Engineering & Service Co., Inc. v. WCC, et al.*, the Court held that the lack of employer-employee relationship is a matter of defense that the employer should properly raise in the proceedings below. The determination of this relationship involves a finding of fact, which is conclusive and binding and not subject to review by this Court.

In this case, petitioner insisted that respondent was dismissed from employment for cause and after the observance of the proper procedure for termination. Consequently, petitioner cannot now deny that respondent is its employee. While indeed, jurisdiction cannot be conferred by acts or omission of the parties, petitioner's belated denial that it is the employer of respondent is obviously an afterthought, a devise to defeat the law and evade its obligations.

It is a fundamental rule of procedure that higher courts are precluded from entertaining matters neither alleged in the pleadings nor raised during the proceedings below, but ventilated for the first time only in a motion for reconsideration or on appeal. Petitioner is bound by its submissions that respondent is its employee and it should not be permitted to change its theory. Such change of theory cannot be tolerated on appeal, not due to the strict application of procedural rules, but as a matter of fairness. [Emphases supplied]

WHEREFORE, the petition is **DENIED**.

SO ORDERED.

JOSE CATRAL MENDOZA
Associate Justice

WE CONCUR:

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

DIOSDADO M. PERALTA
Associate Justice

ROBERTO A. ABAD
Associate Justice

MARVIC MARIO VICTOR F. LEONEN
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson, Third Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice