IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00456

GENE JONES, ASHLEY CRAFT
RALPH SCOTT, HARDY GORDON,
JAMES WILLIAMS AND REGGIE WILLIAMS — PLAINTIFFS/APPELLANTS

VERSUS

FLUOR DANIEL SERVICES CORPORATION — DEFENDANTS/APPELLEE

Appeal from the Circuit Court of Jasper County,
Mississippi - First Judicial District
Civil Action No. 13-0036

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

THOMAS Q. BRAME, JR.
Attorney and Counselor at Law
Post Office Box 301
Bay Springs, Mississippi 39422
Telephone: (601) 764-4355
Facsimile: (601) 764-4356
Mississippi State Bar Numbe[redacted]

ATTORNEY FOR PLAINTIFFS/APPELLANTS

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Come now the Plaintiffs/Appellants, GENE JONES, et al, and respectfully file this their Reply Brief, responding to key erroneous and misleading matters contained in the *Brief of Appellee.*

I. THE LOWER COURT ERRED IN NOT FINDING THAT FLUOR DANIEL WAIVED ANY STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE

Defendant/Appellee, Fluor Daniel Services Corporation, utilizes a great portion of its brief arguing to the Honorable Supreme Court that a claim of intentional infliction of emotional distress was first at issue or "in play" after the Supreme Court ruled and issued its mandate in the summer of 2007. Fluor Daniel represents to this Court, in its brief, that in August, 2007, "For the first time, a claim of intentional infliction of emotional distress was in play" (Appellant's Brief, page 10, line 1).

The Appellant didn't stop there, but repeatedly asserted this argument throughout it's brief:

> **"June 21, 2007:** . . . for the first time, intentional infliction of emotional distress emerges as a claim in the lawsuit" (Brief of Appellee, Page 15).
>
> ". . . intentional infliction of emotional distress only became an issue on remand . . ." (Brief of Appellee, Page 18, Line 20).

However, that is simply not the case. While it is true that the Second Amended Complaint originally filed by Plaintiffs cited negligent infliction of emotional distress, that same pleading also plainly recited that "said wrongful acts of the defendants were malicious, evidencing **intent**..." R.).

What is abundantly clear is that both sides of this lawsuit handled this case from early on as an *intentional* infliction of emotional distress matter. The documents supporting this were included in the first appeal of this case, Cause No. 2005-CA-00825. Consider the following:

a) At the Motion Hearing conducted December 10, 2004, in this case, some four and one-half years ago, it was argued that the law relative to *intentional* infliction of emotional distress on the job cite showed Plaintiffs' claims to be viable. (Transcript from Cause No. 2005-CA-00825, Page 5, Line 17); [A copy is attached hereto as Exhibit "A"];

b) The law cited and the arguments of Plaintiff in the first appeal of this case, 2005-CA-00825, address *intentional* infliction of emotional distress (Brief of Appellant filed in Cause No. 2005-CA-00825, Pages 16 - 17) [A copy of which is attached hereto as Exhibit "B"];

c) Defendant Fluor Daniels throughout its brief written in Cause No. 2005-CA-00825, referenced this matter as litigating *intentional* infliction of emotional distress. Consider the following excerpts therefrom:

> "**Statement of the Issues**. . . 3. Whether the Circuit Court properly granted
> FDSC Summary Judgment on Plaintiff's Claims for **Intentional** Infliction of Emotional Distress"; (Brief of Defendant/Appellee Fluor Daniel Services Corporation, Page 2).
>
> "The Circuit Court properly granted FDSC Summary Judgment on the Plaintiffs' **intentional** infliction of emotional distress claims . . ." (Brief of Defendant/Appellee Fluor Daniel Services Corporation, Page 8).

"3. The Circuit Court Properly Dismissed the Plaintiffs' I.I.E.D. Claims" (Brief of Defendant/Appellee Fluor Daniel Services Corporation, Page 16).

"They have generated no evidentiary basis to support a conclusion that respondiat superior liability would attach to this alleged **intentional** tort of *of Amaro* . . . (Brief of Defendant/Appellee, Fluor Daniel Services Corporation, Page 17).

d) The whole argument of the Defendant/Appellee, Fluor Daniels, in the first appeal of this case, insofar as it relates to infliction of emotional distress, was based solely on *intentional* infliction of emotional distress. The Court's attention is respectfully drawn to Fluor Daniel's 2006 brief subpart styled "B. *The Conduct Challenged by the Plaintiffs Does Not Rise to the I.I.E.D. Threshold*, at Pages 17 - 19, and finally it's *Conclusion* on page 20 thereof. [A copy of these relevant parts of the *Brief of Defendant/Appellee, Fluor Daniel Services Corporation,* filed in the first appeal of this case, Cause No. 2005-CA-00825, is attached hereto as Exhibit "C"].

It is obvious that this case was litigated *at least* from 2004, both in the Lower Court and before this Honorable Supreme Court, on a theory of *intentional* infliction of emotional distress. Plaintiff argued it, the Defendant argued it before the Lower Court, it was extensively briefed and argued on that theory in the first incarnation of this appeal, and for that reason this Honorable Supreme Court ruled on that theory in Cause No. 2005-CA-00825.

It is simply disingenuous for Fluor Daniel to now, several years later, take the position that I.I.E.D. only was born in this case with the Supreme Court's pronouncements in the Summer of 2007. If the Second Amended Complaint did not set forth same plainly enough, nonetheless it was litigated by consent of the parties on that issue. Fluor Daniel can simply not now be heard to say that I.I.E.D was only "born" or only was first in play, in the

Summer of 2007. The parties have litigated this matter for years, on the theory of intentional infliction of emotional distress.

Application of the cases cited in Plaintiffs' Brief demonstrate that waiver of this claimed affirmative defense occurred. Why let the parties litigate this matter for years, expending vast resources, both financial and of time, only to raise the issue a few days before trial? That is exactly why this Court has recently handed down it's several pronouncements that *any affirmative defense*, including statutes of limitations, can be waived.

Defendant argues that a one-year statute of limitations makes the matter "dead on arrival" and argues that this can be first pursued at any time. That is simply inconsistent with caselaw of Mississippi, cited in our Brief, established since the earliest days of our jurisprudence that statutes of limitation can be waived. Once waived they should not be revived after the parties have litigated for years.

In one of the cases cited by the Defendant, *Theunissen v. GSI Group*, 109 F. Supp. 2d 505 (Northern District of Mississippi, 2000), that federal Court recognized that timeliness is required in asserting this affirmative defense, as the Court stated that "the Defendant does not waive an affirmative defense if he raised the issue **at a pragmatically sufficient time**. . ." Here, Defendant did not raise this issue at a pragmatically sufficient time. Rather it was only raised after years and years of litigation.

The pronouncements of the several cases cited by Plaintiff in its brief that any affirmative defense can be waived if not promptly pled and pursued should control. Clearly here even if arguendo this defense had been properly pled by averring that some unspecified claim of Plaintiffs "may be barred" by an unspecified statute of limitations, still it was not

properly *pursued.*

This Court should find that Defendant Fluor Daniel waived the defense of statute of limitations, if any it had, by litigating this matter on the theory of intentional infliction of emotional distress for years without raising it, and reverse and remand for trial on the merits.

II. THE LOWER COURT ERRED IN APPLYING A ONE YEAR STATUTE OF LIMITATIONS TO THE I.I.E.D. CLAIMS

In footnote 21, Defendant cites the Plaintiffs' argument against the legal logic supporting pronouncements of a one year statute of limitations for I.I.E.D. as "laborious" and on that the parties agree. The portrayal of just *how* we got to this precedent was of necessity laborious because a detailed history of how we got to this erroneous pronouncement is required to understand the flaw inherent in it. Plaintiffs' urge this court to look at this history and consider these line of cases and agree that they are not well founded.

This writer is reminded of the story wherein the little girl watches mom cook a ham and asks "mom, why did you cut off the end of the ham before you put it in the pan?" And the answer was "because my mother did". They call mom and ask why she cut off the end of the ham and she also answered "because my mom did". Finally they called the aged great-grandmother and put the same question to her, and her reply was "I cut off the end of the ham because my pan wasn't big enough to cook the whole ham".

No matter how many times you follow bad logic, not founded on sound reasoning (whether it be legal reasoning or culinary reasoning) its still bad logic. That's what we have concerning the application of a one year statute of limitations to I.I.E.D. Its founded on bad logic and many courts have recognized this, and wrestled with the problem. It simply doesn't

fit, because it is not listed in M.C.A.§15-1-35, and it is not of "like kind" as "menace" nor any other of the torts listed therein. A three year Statute is the only appropriate one to apply to I.I.E.D. claims.

Plaintiffs urge this Honorable Court to carefully and thoughtfully review this matter from its inception and correct this error, pronouncing that a three year statute of limitations is appropriately applied to I.I.E.D claims.

CONCLUSION

Plaintiffs cannot imagine a more compelling set of facts upon which to apply waiver of any affirmative defense, in this case statute of limitations. Defendant participated in this litigation for years and never pursued any affirmative defense of statute of limitations. By the plain application of the cases cited by Plaintiffs in their brief in chief, and for the reasons cited therein (not the least of which is judicial economy), this Honorable Court should adjudicate that the Defendant waived its statute of limitations argument, if any it had.

Furthermore, the statute of limitations for I.I.E.D. claims should be three years as I.I.E.D is clearly not listed in MCA §15-1-35, and is not the legal equivalent of any of those enumerated torts.

Plaintiffs urge this Court to find that the Honorable Lower Court erred in granting Summary Judgment; should reverse and remand, adjudicating that the statute of limitations affirmative defense, if any the Defendant had, was waived by not timely raising and pursuing same; should adjudicate that in any event a three year statute of limitations is appropriately applied to the tort of I.I.E.D, overruling any prior inconsistent pronouncements; and send this

case back to the lower court for jury trial. These six African-American Plaintiffs deserve their day in Court.

Respectfully submitted,

GENE JONES, ASHLEY CRAFT,
RALPH SCOTT, HARDY GORDON,
JAMES WILLIAMS, and
REGGIE WILLIAMS

By:_____
THOMAS Q. BRAME, JR.,
Their Attorney

CERTIFICATE OF SERVICE

I, Thomas Q. Brame, Jr., Attorney for Plaintiffs/Appellants, do hereby certify that I have this day deposited in the United States Mail, postage prepaid, a true and correct copy of the above foregoing instrument to Honorable Steven J. Allen at P.O. Box 580, Flat Rock, North Carolina 28731, and to Honorable Gary Friedman, a true and correct copy of the above foregoing instrument by telephone facsimile machine to 1-601-360-9777, and have this day deposited in the United States Mail, postage prepaid, a true and correct copy of same addressed to said attorney at Phelps, Dunbar, LLP, P.O. Box 23066, Jackson, Mississippi 39225-3066, and to Honorable Robert G. Evans, Circuit Court Judge, a true and correct copy of the above foregoing instrument by telephone facsimile machine to 1-601-782-4630, and

have this day deposited in the United States Mail, postage prepaid, a true and correct copy of same addressed to said Judge at P.O. Box 545, Raleigh, Mississippi 39153, all on this the 27th day of May, A.D., 2009.

THOMAS Q. BRAME, JR.

FOR THE PLAINTIFFS/APPELLANTS:

THOMAS Q. BRAME, JR.
The Brame Law Firm
2781 Highway 15
Post Office Box 301
Bay Springs, Mississippi 39422
Telephone: (601) 764-4355
Facsimile: (601) 764-4356
Mississippi State Bar Numbe[redacted]

IN THE SUPREME COURT OF MISSISSIPPI

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EXHIBIT_____

ELECTRONIC DISK_____

Case #2005-CA-00825

COURT APPEALED FROM : Circuit Court

COUNTY : Jasper

TRIAL JUDGE : Robert G. Evans

Gene Jones, Ashley Craft, Ralph Scott, Hardy Gordon, James Williams and Reggie Williams v. Fluor Daniel Services Corporation

Betty W. Sephton, Clerk

TRIAL COURT # : 13-0036

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
JASPER COUNTY, MISSISSIPPI

GENE JONES — PLAINTIFF

VS. — CAUSE NO. 13-0036

FLUOR DANIEL SERVICES CORPORATION, ET AL. — DEFENDANTS

****

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE HEARING ON MOTION OF THE ABOVE STYLED AND NUMBERED CAUSE BEFORE **THE HONORABLE ROBERT G. EVANS, CIRCUIT COURT JUDGE OF THE THIRTEENTH DISTRICT OF MISSISSIPPI**, ON DECEMBER 10, 2004.

****

APPEARANCES:

Present and Representing the Plaintiff:

HONORABLE THOMAS Q. BRAME, JR.
Brame Law Office
Post Office Box 301
Bay Springs, Mississippi 39422

Present and Representing the Defendant:

HONORABLE STEVEN J. ALLEN
Brunini Grantham Grower & Hewes
Post Office Box 119
Jackson, Mississippi 39205-0119

REPORTED BY: Kim Garner-Ulmer, CSR No. 1376

ORIGINAL

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DECEMBER 10, 2004

SIMPSON COUNTY COURTHOUSE

MENDENHALL, MISSISSIPPI

(The proceedings were held in the courtroom as follows:)

THE CLERK: The next case is a Jasper County First District case, 13-0036, Gene Jones, et al. vs. Fluor Daniel Services Corporation, et al.

THE COURT: Good morning, Mr. Allen. Good to see you again.

MR. ALLEN: Good to see you, Your Honor.

THE COURT: Y'all want a record on this?

MR. ALLEN: Yes, please.

THE COURT: Five minutes to state your position. Ten to respond. Five to rebut. And we are dealing with a summary judgment motion. I will deal with your motion to compel if no response at all has been made.

Proceed at your pleasure, and go over and use the microphone, please.

MR. ALLEN: Your Honor, the motion Fluor Daniel Services Corporation brings here is about as close to an old fashion demurrer as we can get. The six plaintiffs in this case were African-American employees of Fluor Daniel on a project in Enterprise, Mississippi. They made allegations in their

complaint that Fluor Daniel Services supervisor, a guy named Rudy Morrow, who is an unserved defendant in the case, basically harassed them over a period of time while they were working under him by making racial slurs, allowing others to make racial slurs, giving them undesirable work assignments and things of that nature.

One of the plaintiffs was terminated shortly after he says he complained about this conduct to the man who was above Morrow. The other five plaintiffs -- I think four of the five remaining -- five didn't complain to anyone except perhaps to Morrow. They just objected to what he was doing. But all of them were laid off and subsequently rehired at some point by Fluor Daniel, which is the nature of what it does.

It will run a project, hire local people and then lay them off because the project is done, and then subsequently they will be rehired on other projects. So, all of these people were subsequently rehired and -- excuse me -- all of them have admitted in their depositions, which we attached to our motion, that when they were ultimately laid off or ultimately terminated, they did not think or have any evidence that the reason they did so, you know, had anything to do

with the prior conduct.

The nature of the motion is simply that to put it more basically is it should have been brought as a Title 7 case and not a case under Mississippi law. Mississippi law does not provide relief for any of these claims even if they are true. The motion for summary judgment says, you know, we grant the plaintiffs everything, you know, assuming what they are saying is true as to every fact they allege and everything brought up in their deposition. It simply doesn't hold under Mississippi law.

It's undisputed that they were at will employees. It's undisputed if they complained at all, they were not complaining about criminal misconduct on the part of Fluor Daniel or its supervisor, and it's undisputed that we could terminate them if they were terminated for any reason we wanted to under Mississippi law.

If this had been brought as a Title 7 case, that would be another matter. We would be talking about racial harassment and that sort of thing, but for whatever reason it was not brought as a Title 7 case, and the nature of our motion and the reason I say it's like an old fashion demurrer is we are basically saying on these pleadings there is no claim

under Mississippi law for the relief he seeks. Now, he also includes the claim for infliction of emotional distress, but as I point out in my memorandum, Mississippi Supreme Court has never in an employee context found a set of circumstances egregious enough to constitute the sort of outrage that's necessary to make out that tort. And if Your Honor will read the facts as relates here, they certainly don't amount to that level of outrage. And that is the basis of our motion.

THE COURT: Thank you. Mr. Brame.

MR. BRAME: Thank you, Your Honor.

As I'm sure Your Honor is well aware, at this juncture of the proceeding on the issue of summary judgment, any dispute would be resolved and any doubt would be resolved in favor of the plaintiff. I point that out to you simply because that's a ground rule, not because we are trying to squeak by on that technicality.

The plaintiffs indeed are African-American, and they do indeed show a long laundry list of this treatment time and time and time again.

I made a brief notation in my response on about Page 4 or 5, and I call Your Honor's attention to it, of some of the things that

occurred there over a period of time. When complaints were made, two of them at that moment were summarily fired. I say at that moment. They complained one week while the main culprit, Mr. Morrow was away on vacation. When he got back the following week and found out, they were discharged.

THE COURT: Well, Mr. Allen says, so what? That's what I want to hear you respond to. He says, so what? That's not a violation in Mississippi. It's a Title 7 issue.

MR. BRAME: It probably is a Title 7 issue, but it's not exclusively a Title 7 issue.

THE COURT: Why not?

MR. BRAME: The State of Mississippi law is that intentional infliction of emotional distress at the job site is a viable claim, and we cite some case law in our response that I call Your Honor's attention to.

If the jury finds that this rises to that level. It has to be outrageous. That certainly is the test, but that's a jury question as to whether or not this stuff is outrageous or not. I suggest to you that some of the things that they clearly are outrageous. They are a pattern of outrageous

behavior over time, and that triggers the infliction of emotional distress test.

Secondly, they were discharged, or at least for our purposes today, is there a material question of fact here as to whether or not they were discharged for reporting illegal activity. We suggest to the Court and we also put in our brief that these things that they did, especially that Rudy or Morrow did to them were illegal activity. At the very least, they were prong to incite disturbance. They were the kind of things that would enrage people and cause disturbance. They could be classified as public profanity. They could be classified as disorderly conduct to incite people.

We think we are over those hurdles, and we suggest to the Court that there should be a continuation of this case. It should not be dismissed. Thank you.

THE COURT: All right. I'm going to take the matter under advisement, which I don't like to do, but y'all just gave me this stuff this morning, so I will read it.

Now, the motion to compel discovery looks like I'm going to have to go over individual interrogatories, is that right?

MR. BRAME: I think we can streamline and reduce that to a great extent. You can

table that for the time being, and we'll call it back up. That will save your case load a little bit, Your Honor.

THE COURT: All right. Yeah, you have been here before. All right. Y'all do that.

(Conclusion of hearing)

CERTIFICATE OF COURT REPORTER

STATE OF MISSISSIPPI

COUNTY OF JASPER

I, Kim Garner-Ulmer, Official Court Reporter for the Thirteenth Circuit Court District of the State of Mississippi, do hereby certify that to the best of my skill and ability I have reported the proceedings had and done in the hearing on motions of Gene Jones vs. Fluor Daniel Services Corporation, et al., being Cause No. 13-0036 on the docket of the Circuit Court of the First Judicial District of Jasper County, Mississippi, and that the above and foregoing pages contain a true, full, and correct transcript of my stenographic notes and tape taken in said proceedings on December 10, 2004.

This is to further certify that I have this date filed the original and one copy of said transcript, along with one 3.5" electronic disk in Wordperfect language with the Clerk of the Circuit Court of Jasper County, Mississippi, and have notified the attorneys of record, the Circuit Clerk and the Supreme Court Clerk of my actions herein.

I do further certify that my certificate annexed hereto applies only to the original and certified transcript. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

This the 21st day of December, 2005.

KIM GARNER-ULMER

CSR NO. 1376

COURT REPORTER'S FEE: $ 26.40

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STATEMENT OF THE ISSUES

1. Whether the circuit court properly granted FDSC summary judgment on the plaintiffs' wrongful discharge claims;

2. Whether the plaintiffs may pursue claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., having failed to exhaust administrative remedies; and

3. Whether the circuit court properly granted FDSC summary judgment on the plaintiffs' claims for intentional infliction of emotional distress.

SUMMARY OF THE ARGUMENT

The circuit court properly granted FDSC judgment on the plaintiffs' wrongful discharge claims 1) because the plaintiffs have no evidence tending to establish that FDSC was motivated to terminate them (or, in Craft's and Reginald Williams's cases, lay them off) as a result of someone's complaining about Amaro, and 2) because they have offered no persuasive basis for the Court's expansion of the McArn exception to Mississippi's employment at-will rule. The circuit court properly rejected the plaintiffs' effort to raise Title VII claims because they failed to exhaust administrative remedies. The circuit court properly granted FDSC summary judgment on the plaintiffs' intentional infliction of emotional distress claims 1) because the plaintiffs offered no evidentiary basis for FDSC's respondeat superior liability, and 2) because Amaro's conduct, even if it occurred, simply did not attain the necessary threshold of egregiousness for this tort.

and, because he withdrew it without obtaining a notice of right to sue, ineffectually) or received notices of rights to sue. This simple failure, and nothing else, dooms their Title VII "claims."

The plaintiffs devote several pages of their brief to the unremarkable proposition that state courts may litigate Title VII claims. So they may. The point here, however, is that *these* plaintiffs may not litigate Title VII claims against FDSC *in Mississippi or any other courts* because they failed to exhaust their administrative remedies.

The circuit court properly ignored the plaintiffs' blunderbuss attempt to press Title VII claims under their ham-fisted, "every theory of law applicable to the facts" pleading strategy. This Court, too, may ignore the plaintiffs' Title VII argument.

III. The Circuit Court Properly Dismissed the Plaintiffs' I.I.E.D. Claims

A. *The Plaintiffs Have Offered No Evidentiary Basis for FDSC's Vicarious Liability*

The more fatal weakness of the plaintiffs' emotional distress claims is that FDSC is the only defendant they served, yet they can direct the Court's attention to no evidence upon which to base a respondeat superior conclusion linking FDSC to Amaro's alleged misconduct. Pretermitting whether an employee *ever* may be held to have been working within the course and scope of his employment when he engaged in behavior described in Section 46, comment d, of the Restatement (there is no such authority in Mississippi, and, logically, the proposition makes no sense at all), these plaintiffs have not marshaled any admissible evidence that Amaro's alleged misconduct carried or was even remotely related to FDSC's business. They have no *admissible* evidence that FDSC directed or encouraged Amaro to behave as they say he behaved,[9] that FDSC suspected that Amaro might so behave (they did not sue for negligent

[9] Again, the only evidence they have is Amaro's hearsay that someone in "the big office" told him, Amaro, to make the "monkey" comment.

hiring or negligent supervision), or, as stated earlier, that FDSC terminated them upon learning of their complaints about Amaro. They have generated no evidentiary basis to support a conclusion that respondeat superior liability would attach to this alleged intentional tort *of Amaro* even if it did occur.

B. *The Conduct Challenged by the Plaintiffs Does Not Rise to the I.I.E.D. Threshold*

As of the circuit court's issuance of its final judgment in this case, no Mississippi court ever had found the elements of an intentional infliction of emotional distress claim in the context of an employment dispute. That state of affairs has not changed between then and FDSC's submission of this brief. The plaintiffs have no case authority to support their position on appeal. FDSC, on the other hand, could cite a familiar list of cases sufficient to fill an entire page for the proposition that employment-related misbehavior, no matter how inappropriate, simply will not sustain recovery under this tort theory.

Comment d to Section 46 of Restatement (Second) of Torts states the familiar standard that Mississippi and other courts have adopted for evaluating intentional infliction of emotional distress claims:

> Extreme and outrageous conduct: The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. *It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.* Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go *beyond all possible bounds of decency*, and to be regarded as *atrocious*, and *utterly intolerable in a civilized community*. Generally, the case is one which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim "Outrageous!"
>
> The liability clearly does not extend to mere insults indignities, threats, annoyances, petty oppression, or other trivialities. The rough edges of our society are still in

> need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

Restatement (Second) of Torts, § 46, cmt. d (italics added for emphasis), quoted in Wong v. Stripling, 700 So. 2d 296, 306 ¶ 46 (Miss. App. 1997).[10] In contrast to this clear and restrictive standard, the plaintiffs here are asking the Court to find that *misdemeanor* breach of the peace - conduct that, under Mississippi law, might warrant a fine of far less than what it costs to buy a mid-sized, mid-brand flat-panel television at Best Buy® - is "beyond all possible bounds of decency," "atrocious," and "utterly intolerable in civilized society." Obviously, the State of Mississippi disagrees with the plaintiffs' assessment of Amaro's alleged misconduct. Too, the plaintiffs have ignored the Restatement's clearly required demonstration of something *more* than merely criminal, merely tortious misbehavior to recover for intentional infliction of emotional distress.

Perhaps their brief does not misrepresent the record, but it does depict Amaro's behavior as far more pervasive and race-based than their deposition testimony. Compare R.15-16 and Brief of Appellants at 10 and 17 with R.21-33, 52-56, 78-82, 110-116, 128-44, and 150-57.[11]

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[10] Wong is significant because the court of appeals in that case approached the threshold of finding for the plaintiff, save for his having failed to prove injury of any significance. Id. at 307, ¶ 51. The plaintiffs here have offered virtually no evidence of injury, and what evidence they have offered consists of the typically generalized "anguish" that Mississippi courts have dismissed for years as insufficient to constitute a separately compensable element of damages.

[11] The Court will not need to study the record too carefully to see how the plaintiffs' recitation of "evidence" conflates vague and generalized testimony, or mixes and matches what one plaintiff knows with what another heard with what happened to a third and so forth, to paint a hazily textured mural of "race-based misconduct" beneath which is a handful of incidents common to all of the plaintiffs and occurring in a very short period of time around the dismissals of Gene Jones and James Williams (who, as it turns out, was hired back in another state). But this "conflation" goes too far, for example, when the plaintiffs attempt to suggest that a "KKK"

Closer to the truth is that, taking the plaintiffs at their word, Amaro was annoying, unpleasant, and offensive to them, but their brief's proposition "that it would be hard to imagine a more egregious set of facts in [sic] those advanced by the Plaintiffs in this case," Brief of Appellants at 17, is an exaggeration.

* * *

Because the plaintiffs directed the circuit court's attention to no evidence in support of FDSC's vicarious liability for Amaro's alleged i.i.e.d., and because the conduct itself simply did not amount to an i.i.e.d., the circuit court properly granted summary judgment to FDSC on this claim, and this Court should affirm.

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incident that occurred in South Carolina occurred during their tenures under Amaro in Mississippi. See Brief of Appellants at 10 and R. 47-48 and 155-56.

CONCLUSION

This is a typical case where summary judgment is the appropriate disposition. The plaintiffs have failed both to identify lawful claims that former at-will Mississippi employees might have and to adduce any admissible evidence in support of those claims. Whether they would have survived summary judgment if they had prosecuted this case properly under Title VII is a question this Court need not reach. At bottom, this is a Mississippi wrongful discharge and intentional infliction of emotional distress case as to which the plaintiffs suffer from a complete failure of admissible proof. Summary judgment in FDSC's favor was appropriate, and FDSC Corporation respectfully requests a judgment affirming the circuit court's decision and dismissing this appeal with prejudice, costs to be taxed to the plaintiffs.

This the 9th day of September, 2006.

Respectfully submitted,

FLUOR DANIEL SERVICES CORPORATION,
Appellee.

By: 

Steven J. Allen, Esq., MSB No. 8910
Prince, Youngblood & Massagee, PLLC
240 Third Avenue West
Hendersonville, NC 28739
828/692-2595

enforce them. It is also clear that Plaintiffs have stated abundant facts to withstand Summary Judgment on this point. Plaintiffs therefore respectfully submit that the Honorable Circuit Court erred in granting summary judgment in dismissing Plaintiffs' action.

POINT THREE: THE HONORABLE CIRCUIT COURT ERRED IN DISMISSING, ON SUMMARY JUDGMENT, PLAINTIFFS' CLAIMS OF INFLICTION EMOTIONAL DISTRESS

As has been previously demonstrated in this brief, and in the pleadings and papers in this record, Plaintiffs have amply demonstrated an on-going pattern of deliberate, repeated harassment of them, by Defendant, over a period of time.

The Honorable Lower Court apparently ruled that as a matter of law, Plaintiffs did not state a claim justifying relief under a theory of infliction of emotional distress, as the Court state "the facts offered by Plaintiffs in this case, accepted entirely as they have portrayed them, do not rise to the level of this tort." (R-160)

The law concerning this point has been stated as follows:

> "A claim for intentional infliction of emotional distress will not ordinarily lie for mere employment disputes. *Pegues v. Emerson Elec. Co.*, 913 F.Supp. 976, 982 (N.D.Miss.1996) (citing *Jenkins v. City of Grenada*, 813 F.Supp. 443, 447 (N.D.Miss.1993)); *Brown v. Inter-City Fed. Bank*, 738 So.2d 262, 265 (Miss.Ct.App.1999). "**Recognition of a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time.**" *Pegues*, 913 F.Supp. at 982-83 (citing *White v. Monsanto Co.*, 585 So.2d 1205, 1210 (La.1991)). "**[I]t is the nature of the act itself-[not] the seriousness of [its] consequences-[that] gives impetus to legal redress.**" *852 *Glasgow v. Sherwin-Williams Co.*, 901 F.Supp. 1185, 1191 (N.D.Miss.1995) (citing *Sears, Roebuck & Co. v. Devers*, 405 So.2d 898, 902 (Miss.1981)), aff'd mem.,146 F.3d 867 (5th Cir.1998)." [emphasis added] *Lee v. Golden Triangle Planning & Development District, Inc.*, 797 So.2d 845, at 851-852. [emphasis added]

This Honorable Appeal Court's attention is again drawn to a list of some of grievances expressed by Plaintiffs and some of the wrongs suffered by them as set forth in Point Two of this brief. Plaintiffs submit that these grievances go well beyond "mere employment disputes" (which admittedly do not support a claim for infliction of emotional distress in the employment context). Rather, this list of wrongs fall within that group of cases in which infliction of emotional distress can be prosecuted, because these facts demonstrate "a pattern of deliberate, repeated harassment over a period of time" which is the threshold test.

In the context of summary judgment, where the only issue is whether genuine issue of material facts exist, and where all doubt is to be resolved in favor of plaintiffs, we submit that dismissal of their claims, was error. A properly instructed jury should decide whether the facts meet the definition of this tort.

Only one case was cited by the lower court in it's opinion on this point, *Pegues v. Emerson Electric Co.*, 913 F.Sup. 976 (Northern District of MS, 1996), in *Pegues*, the Plaintiff, Mrs. Pegues, claimed intentional infliction of emotional distress merely because she was dismissed from work for failure to report, after she had undergone treatment for carpal tunnel syndrome and her doctor had released her to return to work, and she felt she was discharged for pursuing her workers compensation claim. The facts in *Pegues* are vastly different from the facts of the case now at bar.

Quite frankly, it would be hard to imagine a more egregious set of facts in those advanced by the Plaintiffs in this case. They squarely meet the definition of infliction of emotional distress in the work place, and Plaintiffs believe that the Honorable Lower Court erred in granting summary judgment on this point and dismissing Plaintiffs claim.

CONCLUSION

In Mississippi we have come far in addressing, and correcting, some obvious wrongs and glaring errors from our past. We have seen Byron De La Beckwith prosecuted, Edgar Ray Killen prosecuted, and other attempts made to atone for the sins of our past. Mississippi has simply come too far and can no longer tolerate racial injustices like those visited on the Plaintiffs in this case. This case needs to see the light of day. Let a jury decide if Plaintiffs claims have merit.

Plaintiffs amply demonstrate facts and matters sufficient to defeat summary judgment. They respectfully submit that the Honorable Lower Court erred in granting summary judgment and dismissing their case with full prejudice, and they ask this Court to reverse that ruling, remanding the case to the Circuit Court to proceed on the merits.

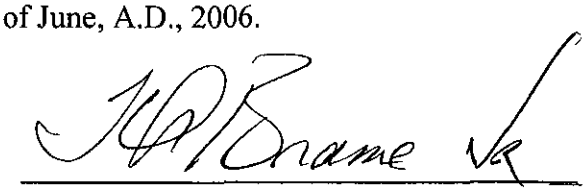
Respectfully submitted,

GENE JONES, ASHLEY CRAFT,
RALPH SCOTT, HARDY GORDON,
JAMES WILLIAMS, and
REGGIE WILLIAMS

By: _____
Their Attorney

CERTIFICATE OF SERVICE

I, Thomas Q. Brame, Jr., attorney for Appellants, do hereby certify that I have this day deposited in the United States Mails, postage prepaid, a true and correct copy of the above and foregoing instrument addressed unto Honorable Steven J. Allen, attorney for Appellee, at his stated address of Post Office Box 22587, Jackson, Mississippi 39205-2587; and unto Honorable Robert G. Evans, Circuit Court Judge, at his stated address of Post Office Box 545, Raleigh, Mississippi 39153-0545, all on this the 9th day of June, A.D., 2006.



THOMAS Q. BRAME, JR.

FOR THE PLAINTIFFS/APPELLANTS:

THOMAS Q. BRAME, JR.
Attorney and Counselor at Law
Post Office Box 301
Bay Springs, Mississippi 39422-0301
Telephone: (601) 764-4355
Facsimile: (601) 764-4356
Mississippi State Bar Number 4287