IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-00825

JANICE ELLINE PEEPLES

PLAINTIFF-APPELLANT

VS.

ROBOT COUPE USA, INC., FRANKIE DEEL AND C. R. REDDING

DEFENDANTS-APPELLEES

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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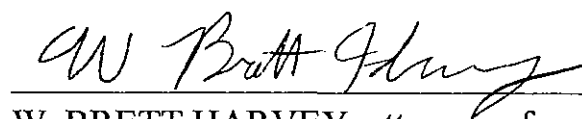
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Janice Elline Peeples, Plaintiff-Appellant
2. Robot Coupe USA, Inc., Frankie Deel and C.R. Redding, Defendants-Appellees
3. E. Michael Marks and Julie Ann Epps, counsel for Plaintiff-Appellant
4. Gary E. Friedman, W. Brett Harvey, and Tori L. Winfield, counsel for Defendants-Appellants
5. Honorable Samac S. Richardson, Circuit Court Judge, Madison County

So certified, this the 23rd day of December, 2009.



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STATEMENT REGARDING ORAL ARGUMENT

The Appellees agree with the Appellant that the issues in this appeal are adequately presented in the parties' briefs and record. The court's decisional process would not be significantly aided by oral argument.

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STATEMENT OF THE ISSUES

1. May an appellant rely on arguments and evidence never advanced before the trial court as grounds for reversal on appeal?

2. May an employee bring contractual or quasi-contractual claims based on an employee handbook, where a disclaimer in said handbook, which was signed by the employee, states that the employee has "no contract of employment" and is "terminable at will"?

3. Can and/or should the Mississippi Supreme Court create a new common law rule under which courts will police workplace conduct to ensure no unfriendly behavior occurs?

4. Can a tortious interference claim that was never pled in a plaintiff's complaint form the basis for reversal of summary judgment? If so, can a party tortiously interfere with its own contract?

5. Can a plaintiff obtain reversal of summary judgment on an emotional distress claim where the record contains absolutely no evidence of outrageous conduct or the requisite intent?

6. Did the circuit court err in holding that the exclusivity provision of the Mississippi Workers' Compensation Act bars all work-related claims based on negligence or gross negligence theories?

STATEMENT OF FACTS

Plaintiff Janice Peeples was hired by Robot Coupe in April 2001 to serve as an assistant to the company's credit manager. R. 1:85-86.[1] Her supervisor was defendant Frankie Deel. R. 1:86. Peeples' duties included setting credit levels, contacting past-due customers, and preparing monthly reports. R. 1:87.

Peeples acknowledged that she was an at-will employee. R. 1:88-89. She signed a disclaimer in her Employee Handbook specifically stating that she had "no contract of employment" and that her employment was "terminable at will." R. 1:121. The Handbook further stated that its provisions "should not be construed as a guarantee of continued employment, or that a particular policy or procedure will be followed in every case." R. 1:142.

The essence of Peeples' lawsuit is an assertion that she did not get along with certain co-workers. Unfortunately, her Complaint is almost entirely devoid of specific events, dates or other objective facts. Instead, Peeples offered a vague narrative in which, for example, "untenable circumstances began to develop" and ultimately led "to a totally unsatisfactory working environment." R. 1:5.

During Plaintiff's deposition, counsel for Robot Coupe tried to ascertain the factual bases for her conclusory assertions. Robot Coupe submitted excerpts from this deposition and other documents as exhibits to its Motion for Summary

[1] Citations to the record will follow this format: R. [volume number]:[page number].

Judgment.[2] Peeples' response was a six-page memorandum, with no exhibits or citation to evidence of any kind. R. 1:194-200 In short, as demonstrated below, Peeples waived most of her arguments by failing to make her summary judgment record before the circuit court.

I. Plaintiff's Interpersonal Disagreements.

Peeples' deposition testimony revealed that her claims against Robot Coupe are based exclusively on minor personal disagreements and perceived slights. Peeples testified that, shortly after she was hired, Frankie Deel became "very hostile" toward her, ostensibly because Peeples "did not brown-nose." R. 1:90. Peeples later became upset that Deel developed a friendship with another employee, Cathy Byne. R. 1:91. At some point thereafter, Peeples says, Deel began criticizing Plaintiff's work and allegedly talked about her "behind [her] back." R. 1:92.

In some instances, Deel allegedly would give Peeples instructions while Peeples was talking on the phone. R. 1:96. Peeples acknowledges that "it wasn't just [her]," and that "Deel treated other people wrong, too." R. 1:93. Indeed, Peeples testified that Deel would gossip about various other employees in the office. R. 1:93. Despite all this, Peeples admitted that at "[s]ome points [Deel] was very nice to me, and we'd sit down and talk." R. 1:96.

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[2] For the sake of brevity, the Defendants-Appellants are referred to collectively herein as "Robot Coupe," except in the few instances where the distinction between the company and the two individual defendants, Redding and Deel, is material.

Peeples also was upset that her co-worker, Melissa Myers, was "rude and cold and callous" and accused Plaintiff of making mistakes. R. 1:94. Peeples says that, at times, she would overhear Deel, Byne, and Myers talking about her. R. 1:95. She could not make out entire conversations, but allegedly heard statements like "I'm mad at her," or "Janice makes me so mad." R. 1:99. Peeples further alleges that these three co-workers would sometimes fail to complete their work, meaning that Peeples would have to complete it. R. 1:99.

Peeples also alleges that Vice President of Finance C. R. Redding would occasionally "walk by and stand there and look at" her. R. 1:97. At one point, Redding allegedly asked whether Peeples had "been drinking that cheap whiskey again." R. 1:98. Redding apparently was making an attempt at a joke, but Peeples says that she was offended. R. 1:98. Peeples also testified that Redding would "say ugly things to some of the women—about their dress, their . . . skirt slit being way up to—and stuff like that." R. 1:110. Peeples called these comments "sexual harassment," *id.*, but later acknowledged that she had not brought a harassment claim, and could not identify any harassing remarks Redding made to her. R. 1:111-12.

II. Plaintiff's Depression and Requests for Leave.

In 2006, Peeples experienced depression due to a number of non-work-related events, including several deaths in her family and her daughter's mental health problems. R. 1:101-02. In July 2006, Peeples requested a month of leave to

recuperate. R. 1:103-06. Peeples acknowledged that company policy provides that the "maximum number of days" an employee may take for illness in one calendar year is ten days. R. 1:107.

Peeples was informed by Redding that medical leave was unavailable. R. 1:106.[3] Soon thereafter, Peeples requested up to six weeks of medical leave, which was denied for the same reason. R. 1:108-09. In August 2006, Peeples filed a benefits claim with the Social Security Administration, claiming that she was unable to work due to various health problems, including "degenerative eye disease," "ruptured discs," "osteoarthritis," "high blood pressure," "high cholesterol," "panic disorder," "obsessive compulsive disorder," and "migraines." R. 1:122-31.

III. Plaintiff's Termination.

On December 12, 2006, Peeples checked into a psychiatric hospital for in-patient treatment and stopped coming to work. R. 1:115-16, 120. Robot Coupe received a letter from her physician saying that she was medically unfit to return to work. R. 1:132. In January 2007, the company received another notice indicating that Peeples would not be able to return to work until at least February 15, 2007. R. R. 1:133. In fact, Peeples did not return to work in December 2006 or January 2007. R. 1:118.

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[3] Peeples acknowledged that, because it has fewer than fifty employees within a seventy-five mile radius, Robot Coupe is not subject to the Family and Medical Leave Act (FMLA). R. 1:105-06.

Peeples was terminated effective January 10, 2007 due to her prolonged absence from work. She acknowledged that she had only three days of vacation time accumulated when she checked in for treatment. R. 1:117, 134. Robot Coupe's employee handbook reserves the right to terminate without cause, but additionally provides the following warning: "Your employment with Robot Coupe U.S.A., Inc. will be terminated for all purposes when you . . . are absent beyond the period for which leave of absence has been granted." R. 2:157.

Peeples contends that employees were given the option of taking up to seven days of unpaid leave for the Christmas holiday. R. 1:119. Assuming that is true, Plaintiff could have had a maximum total of ten days on which she was not required to be at work. There were twenty weekdays between Peeples' departure on December 12th and her termination on January 10, 2007. Thus, at absolute minimum, Peeples had been absent without leave for ten work days when she was terminated.

STATEMENT OF THE CASE

The Appellees concur with the statement of the case contained in the section of Appellant's brief labeled "Course of Proceedings and Disposition in the Court Below."

SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Janice Peeples effectively conceded summary judgment in the court below. She filed a six page memorandum of law that briefly addressed

a few tangential issues. R. 1:194-2000. It left untouched virtually all the major arguments raised by Defendant-Appellee Robot Coupe. It contained exactly one citation to evidence and was not accompanied by any affidavits, deposition excerpts or other exhibits.

Most of the arguments in Peeples' appellate brief are brand new. For example, before the trial court, Peeples never challenged Robot Coupe's correct assertion that her Employee Handbook's explicit disclaimer barred her contractual claims. Nor did she attempt to defend her claims for negligence, gross negligence, or infliction of emotional distress. These issues were never raised below and are therefore waived.

Peeples also failed to present competent summary judgment evidence. Her memorandum contained exactly two citation-free paragraphs of factual background. In lieu of evidence, Peeples relied on unsupported factual assertions in her memorandum. Put simply, there was no evidentiary basis upon which to deny summary judgment. The circuit court's decision was indisputably correct.

Even if they were not waived, Peeples substantive arguments are meritless and border on being frivolous. Peeples' contractual and quasi-contractual claims fail under settled Mississippi law because she signed a disclaimer acknowledging she had "no contract of employment" and that her employment was "terminable at will." R. 1:121. Her argument for the wholesale creation of a new law against

workplace "bullying" is simply frivolous. It would eviscerate the longstanding rule of employment at will.

Peeples' tortious interference "claim" is no claim at all, as it was never raised in her complaint. Even if it had been, an employer cannot tortiously interfere with its own contract, as Peeples alleges here. Her emotional distress claim fails for lack of outrageous conduct or intent. Finally, all her claims based on negligence or gross negligence are barred by the exclusivity provisions of the Mississippi Workers' Compensation Act.

ARGUMENT

I. Peeples Has Waived Most of Her Claims and Arguments.

As a preliminary matter, this Court need not reach the substance of Peeples' arguments on appeal. Peeples conceded summary judgment as to the vast majority of her claims when she failed to respond to Robot Coupe's arguments below. She also failed to present ***any*** evidence to the circuit court. Her belated appellate arguments are therefore waived.

A. Peeples did not contest summary judgment on most of her claims.

Robot Coupe's Motion for Summary Judgment was accompanied by a lengthy memorandum addressing each claim in Peeples' complaint, and by numerous exhibits. R. 1:61-2:190. Peeples' summary judgment response, by contrast, consisted of a six page memorandum. R. 1:194-200. It addressed exactly three issues: (1) a claim for "tortious interference" that never appeared in her

complaint; (2) the exclusivity provision of the Mississippi Workers' Compensation Act; and (3) the question of vicarious liability. All her remaining claims were abandoned.

It is settled law in Mississippi that arguments not raised before lower courts are waived on appeal. *See, e.g., Cooper Tire & Rubber Co. v. Striplin by and through Striplin*, 652 So.2d 1102, 1104-05 (Miss. 1995), citing *Natural Father v. United Methodist Children's Home*, 418 So.2d 807, 809 (Miss. 1982) ("[Q]uestions not raised at the trial level will not be considered here as grounds for reversal.").

With the exception of the three peripheral issues listed above, Peeples did not contest summary judgment as to any of her claims. R. 194-200. She has therefore waived any objection to dismissal of her claims for breach of contract, tortious breach of contract, breach of an implied contract of good faith, negligence, gross negligence, and intentional or negligent infliction of emotional distress.

B. Peeples failed to present evidence sufficient to avoid summary judgment.

Peeples' new appellate arguments fail for an additional reason. They are not supported by evidence in the summary judgment record.

Once the party moving for summary judgment "has shown an absence of a genuine issue of material fact, the burden of rebuttal falls upon the [nonmoving] party" to "produce specific facts showing that there is a genuine material issue for

trial." *Lott v. Purvis*, 2 So.3d 789, 792 (Miss. Ct. App. 2009), quoting *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1213 (Miss. 1996). The non-movant must proffer "more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Id.*

To be sure, at the summary judgment stage, a court must view the evidence in the light most favorable to the non-movant. *Estate of Johnson v. Chatelain*, 943 So.2d 684, 686 (Miss. 2006). But where a plaintiff fails to provide actual evidence to support an element of her claim, summary judgment is proper. *See, e.g., Watson Quality Ford, Inc. v. Casanova*, 999 So.2d 830, 835 (Miss. 2008). Further, a plaintiff may not rely on "unsworn allegations in the pleadings, or arguments and assertions in briefs" to resist summary judgment. *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1356 (Miss. 1990).

Before the trial court, Robot Coupe's indisputably met its initial summary judgment burden. Peeples simply failed to provide any evidence in response. Her six page summary judgment memorandum contained exactly ***one*** citation to evidence. It was accompanied by no deposition excerpts, affidavits, or other evidence of any kind. To the extent facts were mentioned, they were simply "unsworn allegations" in briefs. Consequently, the circuit court had no alternative but to grant summary judgment.

On appeal, Peeples recognized the fatal lack of evidence in her circuit court memorandum. She tries to evade it by citing record evidence presented by Robot

Coupe and spinning the facts therein with vague characterizations like "bullying" and "hypercritical." This Court should simply ignore any statement in Peeples' brief that is not followed by a citation, and should carefully read the pages she cites to determine whether they say what she claims.

II. Peeples' At Will Employment Status Bars Her Contractual Claims.

Peeples signed a disclaimer in her Employee Handbook stating that she had "no contract of employment" and that her employment was "terminable at will." R. 1:121. Robot Coupe raised this point before the circuit court, R. 1:69, but Peeples never addressed it. With the issue thus undisputed, the circuit court correctly held that "Plaintiff's claims of breach of contract and tortious breach of contract fail as a matter of law." R. 2:210.

On appeal, Peeples argues for the first time that the disclaimer in her Employee Handbook is not sufficiently "unambiguous" to bar her contractual claims. As explained above, that argument is waived. But even if it were not, the argument is flatly wrong.

It is black letter law in Mississippi that an employee manual's express disclaimer of any contractual relationship bars an employee's contractual claims based on provisions of the manual. *See, e.g., Byrd v. Imperial Palace of Mississippi*, 807 So.2d 433, 435-37 (Miss. 2001). The rule has been crystal clear since *Byrd* was decided: employees' claims survive summary judgment only where there is "***no express disclaimer*** or contractual provision that the manual did

not affect the employer's right to terminate the employee at-will." *Byrd*, 807 So.2d at 436, quoting *Bobbi v. Orchard, Ltd.*, 603 So.2d 356, 362 (Miss. 1992) (emphasis added).

In literally every Mississippi case where a disclaimer informs the employee that her employment is purely at will, claims for breach of contract and wrongful termination have failed as a matter of law. For example, in *Smith v. Magnolia Lady, Inc.*, 925 So.2d 898, 902-03 (Miss. Ct. App. 2006), the Court of Appeals affirmed dismissal where the handbook stated that employment "is at will, and that nothing in this application or any other company document shall be deemed to create any contract." Likewise, in *Stephens v. Carlisle Corp.*, 853 So.2d 871, 872-73 (Miss. Ct. App. 2003), the court affirmed summary judgment where the disclaimer read, simply, "[s]ince employment at the Carlisle Corporation is based on mutual consent, either the employee or the employer is privileged to terminate the employee."[4]

Peeples tries to confuse the issue by quoting provisions of Robot Coupe's Employee Handbook, which she contends create a "right to infer that the company would . . . protect her from . . . harassment." Peeples Br. at 2-5, 11. The

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[4] *See also, e.g., Senseney v. Miss. Power Co.*, 914 So.2d 1225, 1229 (Miss. Ct. App. 2005) (affirming dismissal where disclaimer "placed [plaintiff] on notice that nothing in the corporate guidelines or in any employee handbook was intended to create an employment contract"); *Favre v. Wal-Mart Stores, Inc.*, 820 So.2d 771, 774 (Miss. Ct. App. 2002) (affirming dismissal where employee "signed an acknowledgment that stated in pertinent part that nothing in the employee handbook destroyed the at-will status of his employment").

Mississippi Supreme Court and Court of Appeals consistently have rejected this argument, as shown above. The rule is straightforward: "[I]f the document setting out special procedures still makes clear that the employee-at-will status remains in effect, then an employee may be terminated without following the procedures." *Morrison v. Mississippi Enterprise for Technology, Inc.*, 798 So.2d 567, 572 (Miss. Ct. App. 2001), citing *Hartle v. Packard Elec., a Div. of General Motors Corp.*, 626 So.2d 106, 109 (Miss. 1993).[5]

Lest there be any doubt, Robot Coupe's Handbook explicitly states that "the policies and procedures contained in this handbook are to be used as guidelines for employees and should not be construed as a guarantee of continued employment, or that a particular policy or procedure will be followed in every case." R. 1:142.

Further, if Peeples contends the Handbook is a contract, she must follow the relevant rules of construction. The Supreme Court has long held that courts must "read the contract as a whole, so that we give effect to all of its clauses." *Facilities, Inc. v. Rogers-Usry Chevrolet*, Inc., 908 So.2d 107, 111 (Miss. 2005); *see also McMurphy v. Three Rivers Planning and Development Dist., Inc.*, 966 So.2d 192, 195 (Miss. Ct. App. 2007). Where a document explicitly states that it

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[5] Peeples cites a federal case, *Aiello v. United Air Lines, Inc.*, in support of her waiver argument. 818 F.2d 1196 (5th Cir. 1987). The case is wholly inapposite. First, it applies Texas law, not Mississippi law. Second, the employee handbook in *Aiello* explicitly stated that "employees would be discharged only for good cause." *Id.* at 1198. Third, in *Aiello*, the employer ***stipulated*** that it could not terminate employees without good cause. *Id.* By contrast, Robot Coupe's Employee Handbook expressly reserves the right to terminate employees without cause, R. 1:121,142, and the company has never stipulated to the contrary.

does not guarantee a given policy will be followed, it simply cannot be read as a contractual guarantee that said policy will be followed.[6]

Finally, Peeples contends that the disclaimer in Robot Coupe's Handbook "is a far cry from the unambiguous declaration found in *Byrd*." Peeples Br. at 11. This argument is meritless for two reasons.

First, the specific comparison to *Byrd* is irrelevant. Mississippi law does not require that handbook disclaimers track the language in *Byrd*, or otherwise contain any set of "magic words." As the cases cited above show, all sorts of different phrasings are sufficient to bar contractual liability. So long as a disclaimer conveys that employment remains at will and that the handbook does not create contractual rights, contract claims fail. Robot Coupe's handbook disclaimer indisputably does this, and thus forecloses Peeples' contractual claims.

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[6] Even if Peeples had some contractual right to return to employment after taking accrued leave, the undisputed fact is that she exhausted all leave available to her long before she was terminated on January 10, 2007. First, Peeples' statement in her appellate brief that she had "ten days of sick leave" remaining is false. She admitted in her deposition that, when she left work on December 12, 2006, she had only three days of leave remaining in 2006, not ten. R. 1:117, 134. Second, Peeples' assertion that she would accrue "another ten days of vacation in January of 2007" also is false. Robot Coupe's Employee Handbook expressly states that additional leave accrues "only on [the] anniversary date" of employment. R. 2:161. Peeples admits that her anniversary date is in April, meaning she would not accrue additional days in January of 2007.

Consequently, as explained on in Robot Coupe's summary judgment memorandum, R. 1:64-65, Peeples had only three days accrued leave. She contends that employees were given the option of taking seven days leave for Christmas, R. 1:119, for a total of ten days. Twenty week days elapsed between Peeples' departure on December 12, 2006 and her termination on January 10, 2007. Thus, at absolute minimum, Peeples had been absent without leave for ten work days when she was fired.

Second, even if the disclaimer in *Byrd* had special significance, Robot Coupe's disclaimer is materially identical to it. The handbook disclaimer in *Byrd* read as follows:

> This handbook is not and should not be construed as a contract for employment, as you have the right to terminate the employment relationship at the Imperial Palace of Mississippi for any reason, with or without cause. Therefore, the Imperial Palace of Mississippi reserves the same right. ... All employees of the Imperial Palace of Mississippi are at-will employees ... This Employee Handbook is not an express or implied contract of employment, but rather an overview of working rules and benefits at our company.

Id. at 434. Robot Coupe's handbook disclaimer reads:

> I have received and understand the contents of the Robot Coupe USA, Inc. Company Handbook. I understand that the policies, rules and benefits described in it are subject to change at the sole discretion of Robot Coupe USA, Inc. at any time. ... I further understand that my employment is terminable at will, either by me or by Robot Coupe USA, Inc., regardless of the length of my employment or the granting of benefits of any kind. ... I understand that no contract of employment other than "at will" has been expressed or implied, and that no circumstances arising out of my employment will alter my "at will" employment relationship unless expressed in writing with the understanding specifically set forth and signed by me and the President of Robot Coupe USA, Inc.
>
> ***
>
> The policies and procedures contained in this handbook are to be used as guidelines for employees and should not be construed as a guarantee of continued employment, or that a particular policy or procedure will be followed in every case.

R. 1:121, 142. If anything, Robot Coupe's disclaimer is more robust than that in *Byrd.* It states that no employment contract exists, but then goes further by explicitly providing that nothing can change Peeples' at will status except an agreement signed by the company president. R. 1:121.

Respectfully, this is not a close question. Peeples' contractual arguments are waived. But even if they were not, they fail under settled Mississippi law. Put simply, where an employee handbook says no contract exists, no contract exists.

III. Peeples' Proposed Expansion of Mississippi's Public Policy Exception Cannot Save Her Claims.

In a strange passage, Peeples argues for the first time that her "breach of contract and tortious breach of contract" claims are somehow saved from dismissal by a new argument that she was wrongfully terminated under the public policy exception set forth in *McArn v. Allied Bruce Terminix Co., Inc.*, 626 So.2d 603 (Miss. 1993). *See* Peeples Br. at 7-10. This new argument is a *non sequitur*, as shown below.

A. Peeples' new *McArn* argument is waived.

First, Peeples' *McArn* argument is waived. Peeples never even hinted to the circuit court that *McArn* specifically, or public policy considerations generally, or alleged retaliation, might provide a basis for denying summary judgment as to any claim in this lawsuit. The Mississippi Supreme Court has squarely held that a retaliatory discharge argument under *McArn* may not be raised for the first time on

appeal. *See Young v. North Mississippi Medical Ctr.*, 783 So.2d 661, 664 (Miss. 2001). Peeples' new retaliation argument is therefore waived.

B. No public policy exception applies here.

Further, Peeples concedes—as she must—that the public policy exception created in *McArn* does not apply here. *See* Peeples Br. at 8-9. Mississippi courts consistently have held that the *McArn* exception to termination at will is "narrow," *see, e.g., Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 987 (Miss. 2004), and have applied the exception only in those instances where an employee reports, or refuses to participate in, some criminal conduct by her employer. *See, e.g., DeCarlo v. Bonus Stores, Inc.*, 989 So.2d 351, 353 (Miss. 2008). Peeples admits that did not happen here.

Peeples argues instead that this Court should expand *McArn* and "adopt a public policy against workplace bullying." *See* Peeples Br. at 9-10. Even if the *McArn* argument were not waived, there are many reasons to reject this request.

1. The Court has never expanded *McArn* beyond its protection of whistleblowers.

As a preliminary matter, the Supreme Court has never expanded *McArn* beyond its narrow prohibition on retaliation on whistleblowing, despite multiple requests to do so. *See Young*, 783 So.2d at 664, 666 (declining invitation to expand rule to protect employees "complying with statutory provisions to promote the public good"). The reason is straightforward. Employment at will was the rule

in Mississippi long before *McArn*, and remains the rule afterward. *See, e.g., Senseney v. Mississippi Power Co.*, 914 So.2d 1225, 1228 (Miss. Ct. App. 2005). In short, where the Legislature has not given a clear mandate, the Court is rightly reluctant to craft new laws regulating employment.

2. No public policy against "workplace bullying" exists.

Peeples' argument on this point is confusing. First, she argues that Mississippi has some pre-existing policy "prohibit[ing] harassment and bullying of employees." Peeples Br. at 9. That is simply false. She contends this policy is "expressed in numerous state and federal statutes." *Id.* But she fails to identify the state statutes in question, because they do not exist.[7]

Peeples then abruptly changes her request, and asks the Court—not to ***recognize*** an existing policy—but to "***adopt*** a public policy against workplace bullying." *Id.* (emphasis added). With utmost respect, the Supreme Court has never simply announced the public policy of the State of Mississippi by fiat. In *McArn*, the Supreme Court did not ***create*** the public policy at issue. 626 So.2d at 607. The policy in *McArn* came from criminal statutes and pest control

[7] Federal statutes like Title VII provide their own procedures and remedies, and thereby uphold their own public policies against workplace harassment and discrimination. Consequently, as numerous courts have recognized, such statutes do not provide a basis for the adoption of state common law public policy exceptions. *See, e.g., Rosamond v. Pennaco Hosiery, Inc.*, 942 F. Supp. 279, 286-87 (N.D. Miss. 1996). Indeed, it would intrude upon the purview of the legislature if a court were to craft redundant common law remedies for problems Congress already has addressed through a detailed statutory and regulatory scheme. *See, e.g., Sebesta v. Kent Electronics Corp.* 886 S.W.2d 459, 463 (Tex. Ct. App. 1994) ("To permit the possibility of common-law damages for the act of termination . . . impermissibly enlarges the remedy beyond the limits set by the legislature.").

regulations, which are specifically cited in the opinion. *Id.* at 606. The Court crafted a "narrow . . . exception to the doctrine of employment at will" to uphold these pre-existing legislative mandates. *Id.* at 607.

Peeples' request that this Court "adopt a public policy" for the State of Mississippi finds no precedent in *McArn* or anywhere else. Respectfully, it is the province of the Legislature to weigh the competing costs and determine how, if at all, to address so-called "bullying" in the workplace.

3. The policy exception Peeples' requests would eviscerate employment at will.

Finally, the new public policy exception Peeples advocates would constitute an unprecedented and harmful intrusion into private employment. It is not the government's job to referee every break room argument and snubbed lunch invitation. Indeed, as the United States Supreme Court recognized, even where the legislature elects to prohibit workplace harassment—and Mississippi has not—the courts simply cannot regulate "petty slights, minor annoyances, and simple lack of good manners." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

Peeples' applies the label "bullying" for dramatic effect, and to give the appearance that the rule she requests is limited in scope. But a limited rule would have no application in this case. The undisputed facts show Peeples' claims are

based on nothing but petty slights and minor annoyances. In truth, she is asking this Court to regulate such slights and annoyances.

The crux of Peeples' claim is that co-worker Frankie Deel was "very hostile" and allegedly talked about Peeples "behind her back". R. 1:92. Peeples complained that Deel "was not a friendly person" and could be "rude and cold and callous." R. 1:94. On one occasion, C. R. Redding allegedly made a joke about her drinking "cheap whiskey" and would "say ugly things to some of the women—about their dress, their . . . skirt slit being way up," but never made any harassing remarks to Peeples. R. 1:98.

To have any impact on Peeples' claims, a policy against "bullying" would have to reach far beyond things like genuine sexual harassment and infliction of emotional distress, which already are illegal. What Peeples really seeks is a judicially-imposed statewide workplace code of conduct mandating uniform "friendliness" to all co-workers, and imposing civil liability upon any employer who fails to enforce it.

The rule Peeples advocates would be the most intrusive employment law in American history. It would not be an "exception" to Mississippi's long-held employment at will rule; it would eviscerate that rule and replace it with government micromanagement of day-to-day workplace interaction. Her request for sweeping, judicially-imposed change to Mississippi's employment laws should be denied.

IV. Peeples' Never Pled a Tortious Interference Claim.

Peeples' complaint does not contain a claim of tortious interference. R. 1:4-11. Peeples raised the "claim"—although it is not a true "claim," but rather a post hoc argument—for the first time in her summary judgment response brief. R. 2:197. Robot Coupe had no notice of the claim, and thus, no opportunity to take discovery on it. *See generally Estate of Stevens v. Wetzel*, 762 So.2d 293, 295 (Miss. 2000) (a complaint must "provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought"). The circuit court correctly declined to address it.

Even if Peeples had raised a claim of tortious interference, it would fail as a matter of law. First, Robot Coupe cannot be liable for interfering with a purported contract of employment to which it was a party. As the name implies, tortious ***interference*** occurs when one person unlawfully ***interferes*** with another person's contract. Under settled law, a party cannot tortiously interfere with its own contract. *See, e.g., Harrison County Development Com'n v. Daniels Real Estate, Inc.*, 880 So.2d 272, 278 (Miss. 2004) ("[T]ortious interference with contract claim must be a third party to the contract, not a principal to the contract."); *see also Shaw v. Burchfield*, 481 So.2d 247, 254-55 (Miss. 1985).

Second, a tortious interference claim against individual defendants Deel and Redding would likewise fail. Peeples proffered no evidence to establish that any conduct by Deel or Redding satisfied any of the four elements of tortious

interference. *See generally Levins v. Campbell*, 733 So.2d 753, 760 (Miss. 1999). This argument was set forth at length in Robot Coupe's reply memorandum, *see* R. 2:203-05, but ultimately was rendered moot by the circuit court's correct decision not to address claims absent from the complaint.

In the unlikely event this Court elects to consider the merits of this un-pled claim, Robot Coupe would respectfully refer it to pages 203 through 205 of the record, which explain in depth Peeples' failure to proffer evidence supporting a tortious interference claim against Deel or Redding.

V. Peeples At Will Employment Is Not Governed by Any Implied Covenant.

Peeples alleged that Robot Coupe breached a "duty and obligation of good faith and fair dealing." R. 1:08. She admits, as she must, that under Mississippi law, "at-will employment relationships are not governed by a covenant of good faith and fair dealing." *See* Peeples Br. 15, quoting *Young v. North Miss. Med. Ctr.*, 783 So.2d 661, 663-64 (Miss. 2001).

Peeples argues that the rule above does not apply to her because Robot Coupe's Employee Handbook functioned as a contract, thereby removing her "at will" employment status. *See* Peeples Br. at 10-14. Here again, the argument is waived. Further, it is thoroughly refuted above in Part II, and fails here for all the same reasons.

Robot Coupe's handbook disclaimer cuts off any contractual claim based on the Employee Handbook. It unambiguously states that Peeples' employment was "at will." In Mississippi, the validity of terminations of at-will employees "are not to be viewed through a good faith lens. Otherwise, the language that an employer may validly fire for a good, bad, or no reason becomes a nullity." *Miranda v. Wesley Health Sys., LLC*, 949 So.2d 63, 68 (Miss. Ct. App. 2006). Just as Peeples cannot nullify the express disclaimer by claiming specific contractual rights, she cannot nullify it by claiming a general implied duty of good faith. Put another way, when two parties expressly agree that either may terminate employment "at will," it is absurd to argue that one party has acted in bad faith by doing exactly what the agreement says.

VI. Peeples' Emotional Distress Claims Fail As A Matter Of Law.

The Circuit Court dismissed Peeples' emotional distress claim, finding that "the conduct which forms the basis of the Plaintiff's intentional infliction claim does not approach the extraordinarily high threshold for a common law emotional distress claim under Mississippi law." R. 2:210-11. This indisputably was correct.

A. Peeples waived any argument regarding emotional distress.

Despite extensive briefing by Robot Coupe on the issue, Peeples' six page summary judgment memorandum did not mention her emotional distress claims. She failed to cite the circuit court to ***any evidence*** describing the conduct that

allegedly gave rise to these claims. Because the issue was not raised before the trial court, it is waived on appeal. *See, e.g., Cooper Tire & Rubber Co.*, 652 So.2d at 1104-05.

B. Peeples failed to identify extreme or outrageous conduct.

Under Mississippi law, "the standard for the tort of intentional infliction of emotional distress is very high, and focuses on the defendant's conduct rather than on the plaintiff's emotional condition." *Funderburk v. Johnson*, 935 So.2d 1084, 1099 (Miss. Ct. App. 2006), citing *Jenkins v. City of Grenada*, 813 F. Supp. 443, 446 (N.D. Miss. 1993). "[D]amages for intentional infliction of emotional distress are ***usually not recoverable in mere employment disputes***. Only in the most unusual cases does the conduct move out of the realm of an ordinary employment dispute into the classification of 'extreme and outrageous' as required for the tort of intentional infliction of emotional distress." *Diamondhead Country Club and Property Owners Ass'n., Inc. v. Montjoy*, 820 So.2d 676, 684 (Miss. Ct. App. 2001) (emphasis added; internal citation omitted); accord *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994).

In her appellate brief, Peeples fails to identify a single incident that crosses the threshold of "extreme or outrageous" conduct. The reason is simple: no such conduct ever occurred. As shown above, Peeples' complains of common workplace slights and minor annoyances. Peeples contends that she "suffered symptoms of stress and depression," but this does not matter. As previously noted,

Mississippi "focuses on the defendant's conduct rather than on the plaintiff's emotional condition." *Funderburk*, 935 So.2d at 1099.

In sum, the question is whether Peeples presented evidence of conduct going "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Speed v. Scott*, 787 So.2d 626, 630 (Miss. 2001). The circuit court correctly answered no.

VII. Workers' Compensation Exclusivity Bars All Claims Based on Negligence or Gross Negligence.

Finally, Peeples' claims of negligence, gross negligence, and negligent infliction of emotional distress are barred by the Mississippi Workers' Compensation Act. Yet again, her arguments to the contrary are waived for failure to raise them before the circuit court. The are also substantively meritless.

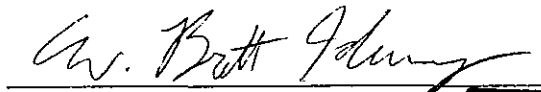
The Workers' Compensation Act provides the exclusive remedy for all "damages at common law or otherwise," unless caused by willful conduct of the employer. Miss. Code Ann. § 71-3-9, *see also Peaster v. David New Drilling Co.*, Inc., 642 So.2d 344, 346 (Miss. 1994). An employee whose injury occurs within the scope of her duties cannot seek to recover from her employer under a negligence theory. *See Medders v. U.S. Fidelity and Guar. Co.*, 623 So. 2d 979, 984 (Miss. 1993), citing *Sawyer v. Head*, 510 So.2d 472 (Miss. 1987). Even "[r]eckless or grossly negligent conduct is not enough to remove a claim from the exclusivity of the Act." *Blailock v. O'Bannon*, 795 So.2d 533, 535 (Miss. 2001).

All of the conduct described in the Complaint allegedly occurred while Peeples was engaged in her duties at Robot Coupe. R. 1:05-07. She was covered by workers' compensation during her employment with the company. Consequently, the circuit court correctly held that her negligence, gross negligence, and negligent infliction claims are barred by the exclusivity provisions of the Workers' Compensation Act.

In response, Peeples argues that "the exclusivity provision excludes suits only where the injury was the result of an accident, rather than those which result from intentional acts." Peeples' Br. at 19. This is a *non sequitur*. Robot Coupe never contended, and the circuit court never held, that the exclusivity provision of the Act bars claims alleging intentional acts. However, to the extent Peeples raises claims of "negligence" or "gross negligence," she is—by definition—asserting that her injuries were not intentional, but accidental, and therefore subject to the Act's exclusive remedy provision.

CONCLUSION

For the foregoing reasons, Appellees Robot Coupe USA, Inc., Frankie Deel and C.R. Redding respectfully request that this Court affirm the judgment of the Circuit Court in all respects, with all costs assessed to the Appellant.

BY: 

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Appellees hereby certifies that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following person at the address indicated:

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This the 23rd day of December, 2009.

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