2009-CA-00825-R+

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

SUMMARY OF THE ARGUMENT

The major thrust of the Appellees' argument is that Peeples has waived most of her arguments on appeal by not responding to their Motion for Summary Judgment on the issues raised in that motion. This position is not correct. This Court has held that this fact "does not necessarily mean that a party is entitled to summary judgment by default where the nonmoving party files no response. We have pointed out that "even in the absence of a response the court may enter judgment only 'if appropriate,' i.e., if no genuine issue of

material fact exists." *Foster v. Noel*, 715 So.2d 174, 180 (Miss. 1998). *Price v. Purdue Pharma Co.*, 920 So.2d 479, 485-486 (Miss. 2006). Therefore all of Appellees' arguments throughout its brief that Peeples waived "most of her claims and arguments" are not well taken. Moreover, even if Peeples had forfeited a claim by not raising it all in the lower court, this Court nevertheless could review that claim for "plain error" affecting a substantial right. *Kirk v. Pope*, 973 So.2d 981, 987 (Miss. 2007). This Court has held that a monetary interest is a substantial right. *Id.*

ARGUMENT

I. THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ONE OF MORE OF HER CLAIMS AS SHOWN IN THE FOLLOWING ASSIGNMENTS OF ERROR.

A. *Standard of Review:*

As Peeples pointed out in her Summary of the Argument, *supra,* she did not forfeit her right to *de* novo review of the issues by failing to file a response to Appellees' motion for summary judgment on those issues. *Price v. Purdue Pharma Co.*, 920 So.2d at 485-486. Moreover, she was not required to present evidence to the circuit court, but instead could rely on the failure of the evidence presented by Appellees' in support of summary judgment—namely the portions of her deposition attached to their motion. *Id.*

B. *The Merits:*

The Appellees' next argue that this Court should affirm the grant of summary judgment because their memorandum was "lengthy"; whereas, Peeples' filed only a six page response which had only "one citation." The notion that a party should prevail because their memorandum is longer has no support in law.

Appellees then argue that she should not have the benefit of the exceptions to the employee at will doctrine because she did not mention them in her response and therefore waived them. Peeples, however, pointed out in her initial brief that the evidence of Robot Coupe's own handbook establishes that Robot Coupe specifically agreed to do certain things in return for an employee's acceptance of employment.

Specifically, and most importantly, Robot Coupe promised to protect her from harassment from other employees. Peeples Br. At 2-5, 11. Although it is true that the handbook states Robot Coupe does not guarantee "that a particular policy or procedure will be followed in **every case,"** the use of the phrase "every case" at least implies that the company is guaranteeing that they will be followed in some cases. Moreover, the company set up specific grievance procedures that Peeples followed in complaining about the harassing and bullying behavior of the defendants.

There can be no doubt that workplace bullying and harassment, particularly sexual harassment, has a serious negative impact on the workplace. Furthermore, juries are quite capable of determining when the sort of negative, unwarranted criticism leveled by Peeples' supervisors crossed the line from what Appellees characterize as "petty slights and minor annoyances" into the more egregious realm of harassment and bullying. Appellee's Brief, p. 20. No one can seriously argue that Peeples did not follow the grievance procedures designed to alleviate such conditions; however, the company's president totally failed to follow the handbook's procedures for protecting her. This Court should find that Peeples' claim falls within the public policy exception.

a. THE TRIAL COURT ERRED IN HOLDING THAT PEEPLES'S STATUS AS AN AT-WILL EMPLOYEE PRECLUDED HER FROM RECOVERING FOR BREACH OF CONTRACT AND TORTUOUS BREACH OF CONTRACT.

1. Public Policy Exception:

As Peeples pointed out in her initial brief, Mississippi has established an exception to the employee at-will doctrines based on public policy. in *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So.2d 603 (Miss. 1993). Although Appellees are quite correct that *McArn* dealt only with the issue of whether an employee could claim retaliatory discharge where the employee had refused to participate in illegal activity, the mere fact that *McArn* did not expand the doctrine beyond the facts of the particular case does not mean that the Court could not do so.

Although this Court has not yet addressed the specific situation here, certainly public policy prohibits bullying and harassing behavior of one employee to another and can punish an employer who has explicitly promised to protect against such bullying for failing to follow through on that promise. In fact, the *McArn* Court specifically noted that there might be other exceptions to the employee at-will doctrine it would later identify. *Id.* at 607.

As one court noted, "public policy" "is the principles under which freedom of contract or private dealing is restricted by law for the good of the community. Another statement, sometimes referred to as a definition, is that whatever contravenes good morals or any established interests of society is against public policy." *Petermann v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* Local 396 174 Cal.App.2d 184, 188-189, 344 P.2d 25, 27 (Cal.App.1959).

Ms. Peeples testified in her deposition that more than once Redding made sexually inappropriate remarks to her and other women employees and that she would catch him looking at her like a stalker. R.I/97-98, 110-12. She was criticized unfairly and made to feel that her work was worthless. Specifically, Defendants Deel and Redding spoke negatively and lied about Peeples to other employees, were hypercritical and interfered with her ability to do her work, harassed her sexually and otherwise—all in violation of numerous rules and regulations promulgated by Robot-Coupe enacted to protect employees from such bullying. R.I/90, 97-98, 110. Peeples in her initial brief set forth the numerous regulations in the Handbook which explicitly guaranteed to prevent such behavior and set up a grievance procedure which Robot-Coupe then totally ignored in Peeples' case. In short, the Handbook lured Peeples to work at the company under totally false pretenses that she would not be subjected to precisely the sort of bullying she was in fact forced to endure because the company refused to take any remedial action when she complained.

Robot-Coupe now seeks to shield itself from liability by claiming Peeples was fired because she missed too much work without leave.

2. Implied Contract Exception:

The implied contract exception to the employment at-will doctrine similarly applies in this case. In fact, the two are related in the sense that no employer should be permitted to lure an employee to work with illusory "Handbook" promises about the fairness of the company and then be allowed to dispense with what is essentially an implied contract when it does not suit the company to fulfill the promises. Mississippi has created a second exception to the employment at-will doctrine in *Bobbit v. The Orchard,*

Ltd., 603 So.2d 603, 607 (Miss. 1993).

In *Bobbit,* the Court held that where an employer publishes an employee manual setting forth the procedures for disciplinary action or termination in the event of an employee rule's violation, then the employer must abide by those published procedures even if the employment relationship is at-will.

Robot-Couple allowed 10 days of paid sick leave a year and 10 days of paid vacation. R.II/161. Also, Robot-Coupe also gave employees seven days of leave at Christmas. R.I/117. Furthermore, Robot-Couple policy expressly provided that an employee could apply for unpaid leave for an extended illness. R.II/161.

As of January 1st of 2007, Ms. Peeples had not exceeded her allowable leave for that year. In addition, Even Robot-Coupe concedes she was eligible to receive 20 days of paid sick leave and vacation for the year of 2007 when it vested in April. Appellee's Brief, n. 6, p. 14. Thus, when she was terminated on January 10th, Ms. Peeples not only had an application for disability leave pending, she may not even have exceeded her allowable leave time as the company claimed.

Firing Peeples without notice while her application for unpaid leave was pending is yet another example of Robot-Coupe's complete disregard of its express policies. While Robot-Coupe may have placed a disclaimer of sorts in its Handbook that it might not follow its policies in some cases, conspicuously absent from the disclaimer is a notice that it would not follow policy in **any** case. A reasonable juror could find that that firing was designed to retaliate against Peeples for her complaints about Redding and Deel to the CEO of the company.

Moreover, in not taking action to ensure that Ms. Peeples had a safe workplace free from the sort of harassment Robot-Coupe had expressly promised to prohibit, Robot-Coupe and its agents, Frankie Deel and C.R. Redding, breached their obligations under the implied contract created by the handbook. In any event, it is well settled that "an employer may be held liable for intentional acts of its employees if [. . .] the act was committed within the scope of employment." *Thatcher v. Brennen,* 637 F.Supp. 6, 8 (S.D. Miss. 1996) citing *Horton v. Joes,* 44 So.2d 397 (Miss. 1950).

b. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT ON PEEPLES'S CLAIM OF TORTIOUS INTERFERENCE.

Appellees again claim that Peeples has waived a claim—this time her claim of tortious interference because the complaint does not contain such a claim. Mississippi, however, is a "notice pleadings" state. See Miss. R. Civ. P. 8 and Comment which requires only that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief" and a demand for relief. *Upchurch Plumbing, Inc. v. Greenwood Utilities Com'n,* 964 So.2d 1100, 1117 (Miss. 2007).

In her complaint, Peeples, although she labeled it "TORTUOUS BREACH OF CONTRACT AND TORUOUS BREACH OF CONTRACT", stated a claim for tortious breach of contract against Robot-Coupe and tortuous interference with her contract by Deel and Redding.

Specifically, she alleged a contract of employment between her and Robot-Coupe, that she had satisfied her obligations and that Robot-Coupe had breached it. Morreover, she alleged that Defendants had willfully and intentionally caused a breach and caused

her damages. This was plainly sufficient to state a claim of tortious interference against Redding and Deel.

Even at-will employees may sue for tortious interference with their employment agreements. Levins v. Campbell, 733 So.2d 753, 760 (Miss. 1999). In order to establish such a claim, a plaintiff must show:

(1) the acts were intentional and willful;

(2) they were calculated to cause damages to the plaintiff in her lawful business;

(3) they were done with the unlawful purpose of causing damage and loss without right or justifiable cause by the defendants; and

(4) actual loss occurred.

Id. at 761.

Peeples' allegations were sufficient to allege a claim for tortuous interference.

c. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT DEFENDANTS DID NOT OWE MS. PEEPLES A "DUTY AND OBLIGATION OF FOOD FAITH AND FAIR DEALING."

Because the trial court found that Ms. Peeples was an employee at-will, the trial court found that the Defendants were entitled to summary judgment because, according to the Court:

> under Mississippi law, 'at-will employment relationships are not governed by a covenant of good faith and fair dealing' *Young v. North Miss. Med. Ctr.*, 783 So.2d 661, 663-64 (Miss. 2001). Since Plaintiff was an at-will employee, the Defendants owed her no duty of good faith and fair dealing.

RE 12.

In the preceding assignment of error, however, Ms. Peeples has demonstrated that the employee handbook guaranteed not only a general covenant of good faith and fair

dealing, but guaranteed certain specific rights as well. Specifically, Robot-Coupe guaranteed the right to a harassment free workplace and the right to be free from retaliatory firing.

Accordingly, Peeples presented sufficient evidence to show a contract and that that contract was breached.

d. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MS. PEEPLES'S CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Appellees argue that their actions fall short of intentional infliction of emotional distress. However, Ms. Peeples testified to numerous incidents of harassing and bullying behavior by Ms. Deel, her immediate supervisor, and C.R. Redding, from 2002 until she was hospitalized for stress in December of 2006. In addition, she also testified that Mr. Redding "stalked" her and made numerous sexually inappropriate remarks to her and other female employees. R.I/90, 97-98, 101. Not only would a person of ordinary sensibility realize that such actions were likely to inflict distress, particularly in someone already under extreme stress, in addition, all of the actions were specifically prohibited by company policy and are grounds for immediate termination from employment at Robot-Coupe. *See,* discussion in the Statement of Facts, in Peeples initial brief.

In addition, Robot-Coupe failed to follow its own grievance procedures for complaints for such violations and also reneged on its promise to protect them for retaliatory actions for making a complaint about prohibited behavior. *Id.*

Instead, when Ms. Peeples brought her complaints to the CEO, Jay Williams, he not only failed to investigate as required by the Handbook, he mocked her, told her she was imagining things, and she should quit. R.I/100. There can be no doubt that Ms. Deel

and Mr. Redding were agents of Robot-Coupe and that Robot-Coupe is vicariously liable. *Horton v. Jones,* 44 So.2d 397 (Miss. 1950).

In short, it cannot be doubted that both Ms. Deel and Mr. Redding were aware that bullying and harassing other employees, sexually or otherwise, was strictly prohibited by company policy. Moreover, they knew that Ms. Peeples was stressed by other life events so that their behavior in harassing her was particularly malicious. Since one is presumed to intend the natural consequences of one's actions, a jury might well find that Defendants' actions were intended to inflict emotional distress on Ms. Peeples. *See e.g., Morris Newspaper Corporation v. Allen,* 932 So.2d 810 (Miss. App. 2006) [to recover mental anguish damages in breach of contract case, employee need prove that anguish was a foreseeable consequence of breach of implied covenants in employment contract].Therefore, a jury could conclude that the actions of Ms. Deel and Mr. Redding in continuing to bully and harass Ms. Peeples were intentionally done for no reason other than to inflict emotional distress upon her.

Furthermore, the company's failure to investigate Peeples' claims was intentional and violated express company policy *Id.* Moreover, Ms. Peeples can show that she suffered greatly as a result of the actions of the company and its employees. That she would was something that these people must have been aware would result from their behavior and is particularly malicious.

In *Gamble ex rel. Gamble v. Dollar General Corp.,* 852 So.2d 5, 11 (Miss. 2003), this Court held:

> Where there is no physical injury, recovery for mental anguish can be appropriate under certain circumstances when the defendant's conduct evokes outrage or revulsion. [citation omitted]. Furthermore, expert testimony showing actual harm or proof of physical or mental injury is not

> always required. Where there are claims involving only sleeplessness, mental anguish, and humiliation, compensatory damages can be awarded based "on the nature of the incident from which the damages flow." *Whitten v. Cox*, 799 So.2d 1, 10-11 (Miss.2000). In cases in which there is evidence of **willful, wanton, malicious, outrageous *or* intentional wrongs, and where mental or emotional stress is a foreseeable result of the conduct of the defendant, a court can assess damages for mental and emotional distress.** *Adams v. U.S. Homecrafters, Inc.* 744 So.2d 736, 743 (Miss.1999) (a claim of mental anguish based on simple negligence did not require evidence of physical manifestation). See also *American Bankers' Ins. Co. v. Wells*, 819 So.2d 1196, 1208-09 (Miss.2001); *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So.2d 139, 148 (Miss.1998); *Means*, 680 So.2d at 806; Devers, 405 So.2d at 902; *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 149, 150 So.2d 154, 158 (1963). "If there is outrageous conduct, no injury is required for the recovery of infliction of emotional distress or mental anguish." Means, 680 So.2d at 806 (citing *Leaf River Prods. Inc. v. Ferguson*, 662 So.2d 648, 659 (Miss.1995)). The plaintiff does not have to present further proof of injury. The nature of the act itself, rather than the seriousness of the consequences, can justify an award for compensatory damages. *Devers*, 405 So.2d at 902. [emphasis added].

In this case, a jury could find that the conduct of one or more of the Defendants was unethical, violated company policy and was unnecessary to any legitimate business purpose. Moreover, it was unnecessarily vicious and mean. In such cases, the Mississippi courts have approved the award of damages for infliction of emotional distress. *See, discussion in Gamble, supra at 11-12 for cases allowing awards. See also, Dean v. Ford Motor Co., supra.* The trial court, therefore, incorrectly granted Defendants' motion for summary judgment on Ms. Peeples' claims of intentional infliction of emotional distress.

e. THE TRIAL COURT ERRED IN HOLDING THAT MS. PEEPLES'S CLAIMS OF NEGLIGENCE, GROSS NEGLIGENCE AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS WERE BARRED BY MISSISSIPPI'S WORKERS' COMPENSATION ACT.

The trial court erroneously held that Ms. Peeples's claims of negligence, gross negligence and negligent infliction of emotional distress were barred by Mississippi's

Worker's Compensation Act. RE 11. The exclusivity provision of the Mississippi Workers' Compensation Act found at Miss. Code Ann. §71-3-9 preempts an employee from suing an employer for negligent acts. Mississippi's exclusivity statute, however, does not prohibit employee suits based on negligent acts. Rather it prohibits suits based on negligent "injuries." Specifically, the statute, as it relates to this case, states that

> [t]he liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such **injury** [emphasis added].

§71-3-9, Miss. Code Ann.

As it applies to this case, Miss. Code Ann. §71-3-3(b) defines an "injury" as follows:

> "Injury" means **accidental injury** or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results [emphasis added].

In short then, the exclusivity provision excludes suits only where the injury was the result of an accident, rather than those which result from intentional acts. An accidental injury, as defined by the courts,

> is said to be that which happens without design or expectation. *Williams v. United States Mutual Acc. Ass'n*, 60 Hun 580, mem., 14 N.Y.S. 728, 730, opinion in full, reversed on other grounds 133 N.Y. 366, 31 N.E. 222.
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> In *Burkhard v. Travelers' Insurance Co.*, 102 Pa. 262, 268, 48 Am.Rep. 205, accident is said to be an event proceeding from an unknown cause, or happening without the design of the agent, where the injury was not designed nor the danger known. In *Moyer v. Union Boiler Mfg. Co.*, 151 Pa.Super. 477, 30 A.2d 165, 166, it is held that an accident within the Workmen's Compensation Act, 77 P.S. § 1 et seq., involves an undesigned occurrence.

2. Hon. Samac S. Richardson, Circuit Court Judge, PO Box 1662, Canton, Mississippi 39046.

This, the 10th day of February, 2010.

ATTORNEY FOR APPELLANT

Julie Ann Epps, MSB#5234
504 E. Peace Street
Canton, Mississippi 39046
Telephone: 601-407-1410
Facsimile: 601-407-1435

E. Michael Marks; MSB#1869
Suite 730, The Plaza Building
120 North Congress Street
Jackson, MS 39201
Telephone: 601-969-6711
Facsimile: 601-969-6713

ATTORNEYS FOR APPELLANT