

**IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI
2009-CA-00838-COA**

MICHAEL GRAZIOSI

APPELLANT

V.

CITY OF JACKSON, MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

In its *Appellee's Brief*, the City of Jackson (sometimes referred to as "City") contends that it acted in good faith when it terminated the Appellant, Michael Graziosi ("Graziosi"). As an initial matter, the City concedes that it was contractually obligated to exercise good faith in the imposition of discipline upon Graziosi. (*See Appellee's Brief* at 3). After this concession, however, the City's argument veers into misapplications of law and fact.

Prior to responding to the City's argument, it is necessary to address a misconception of fact, which the City seems intent on perpetuating. Contrary to the City's version of events, Graziosi did *not* assault Travis Frazier. The irrefutable fact is that Graziosi was acquitted of this charge in the Hinds County Justice Court after testimony from all four witnesses to the alleged incident. The City, however, insists on having this Court believe that Frazier was assaulted. (*See Appellee's Brief* at 4, 7 and 12). He was not, and any argument otherwise is simply false.

I. THE TERMINATION OF GRAZIOSI'S EMPLOYMENT COULD ONLY BE CONTROLLED BY CONTRACT LAW

The City contends that the Chancellor's finding that Graziosi was an at-will employee was "of no consequence," because the Chancellor found that the City acted in good faith. This argument ignores the distinction between an at-will employee and a contract employee. The distinction is relevant because the Chancellor evaluated the City's conduct by applying the wider and lower standard of at-will employment law rather than the narrow and higher standard of contract law. Specifically, the Chancellor applied an "arbitrary and capricious" standard as opposed to the standard of good faith adherence to a contracting party's justified expectation.

Although the City concedes that it was contractually obligated to exercise good faith in the imposition of discipline upon Graziosi, that is only one part of its good faith obligation found within the Settlement Agreement. The second part, albeit implied, is the City's inherent duty to

ensure the fulfillment of all the terms of the contract, one of which was Graziosi's expectation of employment.

Under Mississippi law, parties to a contract must not only refrain from preventing the fulfillment of the contract, but they must also take affirmative steps to ensure the expectations of the other party. *See Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992). "Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party." *Cenac*, 609 So.2d at 1272 *citing* Restatement (Second) of Contracts § 205, 100 (1979). To fulfill its inherent duty of good faith, the City was required to remain faithful to Graziosi's expectation of employment, and to take reasonable and necessary steps to ensure this expectation. In other words, Graziosi bargained for the City's obligation to remain faithful to his expectation of employment specifically because he was concerned the City would re-employ him and then terminate him as an at-will employee with no good faith basis.

The City argues that *Cenac* holds that a party "may be" required to take affirmative steps to ensure the other party's expectations, and that Graziosi has not shown why the City was required to take such affirmative steps. (*See Appellee's Brief* at 18). This argument ignores one of the intended purposes of the Settlement Agreement, which was to re-employ Graziosi thereby placing his employment paramount in the contractual relationship between the parties.¹ The City was thus required to take affirmative steps to ensure Graziosi's employment because it was a bargained-for purpose of the contract between the parties.

The City asserts that Graziosi "appears to argue that he could only be subject to the discipline that he chooses." (*See Appellee's Brief* at 19). This argument encapsulates the City's misunderstanding of its contractual obligations in this case. Contrary to the City's argument,

¹ The reciprocal benefit for the City was that Graziosi would not seek the full amount of his judgment and would otherwise cease his litigation against the City.

Graziosi does not argue that he should be able to choose the discipline he receives. Instead, Graziosi asserts the following position: The City breached its contractual obligations to remain faithful to Graziosi's expectation of employment and to exercise good faith in the imposition of discipline against Graziosi by terminating him prior to the resolution of the assault charge filed against him. The result was that the City's contractual obligations were subverted by its acceptance of Frazier's unsupported (and inconsistent) allegations; allegations that ultimately proved untrue when Graziosi was acquitted.² Framed within the standards of contract law, the City's conduct did not rise to the level of good faith. Instead, the City acted in haste by terminating Graziosi when it had available other, less-drastic remedies, such as suspending Graziosi pending the outcome of the assault charge, that would have remained faithful to the intent of the Settlement Agreement.

II. THE CHANCELLOR INCORRECTLY APPLIED AN "ARBITRARY AND CAPRICIOUS" STANDARD IN PLACE OF GOOD FAITH

The *Opinion Denying Petition to Enforce Settlement* confused the appropriate standards of review for the City's conduct. As a result, the Chancellor incorrectly applied an "arbitrary and capricious" standard of review instead of the *Cenac* standard of faithfulness to the purpose of a contract. In particular, the Chancellor's reliance on *Miss. Bureau of Narcotics v. Stacy*, 817 So.2d 523, 526 (Miss. 2002), to hold that "[w]hen a 'decision is supported by substantial evidence, then it is not arbitrary or capricious'" was an erroneous application of law to fact. (R. 37). The "arbitrary and capricious" standard as used in that case applied only to reviewing an administrative agency's findings with regard to the termination of an employee. The *Stacy*

² In the event Graziosi was convicted of assault, then the City would have had an independent and good faith basis to terminate him. Under the City's proposed standard, however, a false affidavit filed against a co-worker and that has not been tried in a court of law would constitute a sufficient basis to terminate an employee. At most, such a set of circumstances would warrant a suspension pending the disposition of the allegation.

decision did not extend the “arbitrary and capricious” standard to reviewing a contracting party’s actions to determine whether those actions were exercised in good faith.

In its *Appellee’s Brief*, the City does not address the Chancellor’s use of the *Stacy* decision other than to state that the Chancellor did not provide that she was applying an arbitrary and capricious standard of review. This cursory statement, however, does not address the Chancellor’s erroneous incorporation of the *Stacy* standard with her finding that Graziosi was an at-will employee who could be terminated at any time. The Chancellor’s findings that the City did not act arbitrarily or capriciously and that Graziosi could be terminated at any time did not address whether the City acted with faithfulness to Graziosi’s justified expectation of employment.

III. THE CHANCELLOR ABUSED HER DISCRETION IN FINDING THAT THE CITY OF JACKSON ACTED IN GOOD FAITH

The Chancellor provided only three factors to support her conclusion the City acted in good faith when it terminated Graziosi prior to the trial on the charge against him: “1) the conclusion of the Internal Affairs Investigation; 2) medical records of the alleged victim from the November 13, 2007, incident; and 3) a police report following the alleged incident on November 13, 2007.” (R. 36). These reasons do not support a finding of good faith. As previously shown, the Internal Affairs Investigation and police report were inconclusive and the City did *not* have any medical records from Frazier when it terminated Graziosi.

The City contends that it was not required to perform an Internal Affairs investigation and that Graziosi could have been terminated without such an investigation. This argument sidesteps the point at issue, which is that the City was contractually obligated to have a good faith basis to impose discipline on Graziosi. Absent an investigation, the only “evidence” was Frazier’s uncorroborated statement in the police report, which did *not* include any statements

from Falcon, Armon, or Graziosi, the witnesses to the alleged incident. The City itself even acknowledges this lack of evidence and admits that it conducted the Internal Affairs investigation “to determine more information on the alleged assault.” (*See Appellee’s Brief* at 16).

A. The Internal Affairs Investigation was Inconclusive

The City asserts that the Internal Affairs investigation yielded sufficient evidence with which to terminate Graziosi. In support of this assertion, the City points to Frazier’s and Graziosi’s statements given to Internal Affairs, and, rather circuitously, the police report, and Frazier’s affidavit.³ It is strange the City would include the police report and Frazier’s affidavit as “sufficient evidence” collected in the investigation when it was the lack of evidence in these documents that prompted the City to conduct the investigation in the first place. Regardless, the investigation did not provide any sufficient basis with which to terminate Graziosi. At most, the investigation revealed that Frazier gave inconsistent statements about the alleged incident.

The police report contained only one statement from one witness to the alleged incident -- Frazier, the complaining witness. (R.E. 13-14). This report reflects that Frazier told the responding officer that Graziosi hit him on the *left* side of his head. (R.E. 14). Notably absent from the report was any statement from Graziosi, Falcon, or Armon. Regarding Frazier’s affidavit, that document is a form affidavit that provides only Frazier’s unsubstantiated allegation. It was simply Frazier’s formal allegation, which Graziosi formally denied when he entered a not guilty plea.

³ The City also states that Chief Travis “had knowledge of Lt. Frazier’s medical records,” although this statement is meaningless. “Having knowledge” of medical records is not the same as having reviewed the records and understanding their content. Indeed, neither Travis nor the City had any medical records from Frazier with which to evaluate his allegations. (R.E. 12). Travis testified that he did not review any medical records in the course of his investigation. (T. 118).

The only “new information” generated by the investigation was contained in the statements taken from Frazier, Graziosi, Falcon, and Armon. In his statement, Frazier contradicted his affidavit and the statement he gave to JPD by telling Internal Affairs investigators on *four* occasions that he was hit on the *right* side of his head. (R.E. 27, 28, 32). Although investigators pressed Frazier about this issue, he never stated that he was hit on the left side of his head. (R.E. 24-37). Graziosi emphatically testified that he did not hit Frazier. (R.E. 10, 20, 49). Falcon stated that he did not know of any assault incident that occurred outside or inside the union that night. (R.E. 20). Armon stated that he was not aware of an assault incident between Frazier and Graziosi. (R.E. 10). As a result, the “new information” that the Internal Affairs investigation revealed was that Frazier contradicted his own story.

The City argues that Frazier’s contradictions are “of no consequence,” and that they must be the result of a “scriveners (sic) error” in the transcription of his statement to Internal Affairs. The City’s attempt to distinguish Frazier’s inconsistencies is novel. Apparently, the City would have this Court believe that on not one, two, or even three, but four separate instances during his statement to Internal Affairs Frazier’s testimony was incorrectly transcribed. Novel arguments aside, the fact remains the investigation revealed that the complaining witness gave inconsistent statements. Yet, in spite of that new knowledge, the City chose to terminate Graziosi before he was able to defend himself against the charge in justice court. The more important question this issue raises is whether the City actually reviewed the new information gathered in its investigation before it terminated Graziosi.

B. The City Did Not Act in Good Faith

The City spends a considerable amount of time arguing that, because it followed proper procedure in terminating Graziosi, then it acted in good faith. This argument is a distraction. Whether the City followed its procedure in terminating Graziosi has nothing to do with whether

the City acted in good faith when it decided to terminate him. One is the procedure for actually effecting the termination and the other is the basis for initiating the procedure to terminate. This case has never been about whether the City followed its procedure for terminating an employee, rather, it is about whether the City acted in good faith and remained faithful to the Settlement Agreement when it decided to terminate Graziosi.

Next, the City veers into further distraction by arguing that Graziosi has expressed his opinions publicly about the imposition of discipline in the Jackson Fire Department. (*See Appellee's Brief* at 17). The purpose of this argument is not clear, however, it merits little attention. If the City and Graziosi both agree that a firefighter should be terminated for lying as conduct unbecoming, then one is left to wonder why the City would so vigorously defend Frazier's contradictory statements to law enforcement officers as mere scriveners' error. It cannot be overstated that throughout the entire investigation, Frazier, the complainant, was the only witness who changed his story.

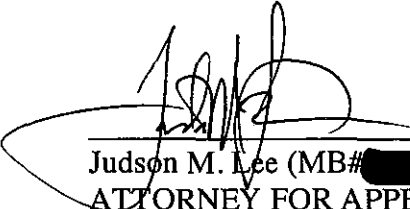
Finally, the City argues that because Graziosi voluntarily agreed to the terms of the Settlement Agreement, then he should have been aware that termination was a form of discipline that could be imposed against him. This argument offers nothing for this Court to consider. Graziosi has never contended that he could not have been terminated, as long as there was a good faith basis and the City remained faithful to the purpose of the Settlement Agreement. In this case, however, Frazier was an unreliable witness and the City, by terminating Graziosi prior to the trial on the assault charge, did not remain faithful to the purpose of the Settlement Agreement. The City could have remained faithful to the Settlement Agreement and its desire to maintain order within the Jackson Fire Department by suspending Graziosi pending the outcome of the assault charge in justice court. Inexplicably, it did not.

CONCLUSION

For the foregoing reasons, as well as the issues and arguments raised in his Appellant's Brief, the Appellant, Michael Graziosi, respectfully requests that this Court reverse the decision of the Hinds County Chancery Court and, further, to order the City of Jackson to reinstate Michael Graziosi to his pre-termination position and assignment with the full protections and safeguards of the City of Jackson Civil Service Commission. The Appellant additionally requests that this matter be remanded to the Chancery Court of Hinds County, Mississippi, First Judicial District, for a determination of the Appellant's damages and attorney's fees.

This the 28th day of December, 2009.

Respectfully submitted:



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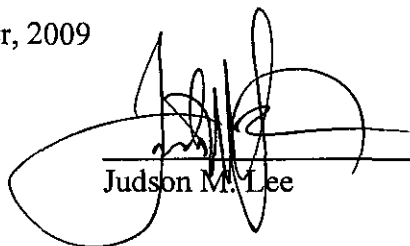
CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellant, have this day served a copy of the above and foregoing via United States Mail, postage pre-paid and addressed to the following:

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This the 28th day of December, 2009



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