

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01054

COOPER L. "PETE" MISSKELLEY

APPELLANT

VS.

**CARROLL COUNTY, MISSISSIPPI and
CARROLL/MONTGOMERY REGIONAL
CORRECTIONAL FACILITY**

DEFENDANT/APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF CARROLL COUNTY, MISSISSIPPI**

**BRIEF OF APPELLANT,
COOPER L. "PETE" MISSKELLEY**

ORAL ARGUMENT NOT REQUESTED

**WEBB FRANKLIN, MB [REDACTED]
LOTT, FRANKLIN & FONDA, PLLC
202 WEST MARKET STREET
P. O. BOX 1176
GREENWOOD, MS 38935
TELEPHONE: (662) 453-6576**

ATTORNEY FOR PLAINTIFF/APPELLANT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01054

COOPER L. "PETE" MISSELLEY

APPELLANT

VS.

**CARROLL COUNTY, MISSISSIPPI and
CARROLL/MONTGOMERY REGIONAL
CORRECTIONAL FACILITY**

DEFENDANT/APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Honorable Clarence E. Morgan, III, Circuit Court Judge
P. O. Box 721, Kosciusko, Mississippi 39090
2. Webb Franklin, LOTT, FRANKLIN & FONDA, PLLC, P. O. Box 1176,
Greenwood, Mississippi 38935-1176, Attorney for Plaintiff Appellant;
3. Silas W. McCharen, Esq., DANIEL, COKER, HORTON & BELL, P.A.
P. O. Box 1084, Jackson, Mississippi 39215-1084, Attorney for Defendants Carroll
County, Mississippi and Carroll/Montgomery Regional Correctional Facility;
4. Alan D. Lancaster, Esq. , LISTON & LANCASTER, P. O. Box 645, Winona,
Mississippi 38967, Attorney for Defendants Carroll County, Mississippi and
Carroll/Montgomery Regional Correctional Facility;
5. Carroll County, Mississippi; and

6. Carroll/Montgomery Regional Correctional Facility.

THIS the 3rd day of November, 2009

A handwritten signature in cursive script, appearing to read "Webb Franklin", written above a horizontal line.

WEBB FRANKLIN

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW	2
II. STATEMENT OF RELEVANT FACTS	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON MISSKELLEY’S CLAIM THAT HIS EMPLOYMENT CONTRACT WAS BREACHED	
II. MISSKELLEY HAD A RIGHT TO RELY ON THE CATASTROPHIC LEAVE PROVISIONS OF CARROLL COUNTY’S PERSONNEL POLICY AND CARROLL COUNTY HAD A DUTY TO FOLLOW THE POLICY IT ESTABLISHED TO BENEFIT ITS EMPLOYEES	
III. MISSKELLEY’S EMPLOYMENT WITH CARROLL COUNTY WAS NEVER TERMINATED BY CARROLL COUNTY	
IV. THE LOWER COURT ERRED IN INTERPRETING CARROLL COUNTY’S CATASTROPHIC LEAVE POLICY	
CONCLUSION	14
CERTIFICATE OF SERVICE	15
CERTIFICATE OF FILING	16

TABLE OF AUTHORITIES

STATE CASES

- Aetna Casualty and Surety Co., v. Berry*
669 So. 2d 56 (Miss. 1996)
- Bobbitt v. The Orchard, Ltd.*
603 So. 2d 356 (Miss. 1992)
- Northern Electric Co. v. Phillips*
660 So. 2d 1278 - 1281 (Miss. 1995)
- Russell v. Orr*
700 So. 2d 619 (Miss. 1997)
- Southwest Mississippi Regional Medical Center v. Lawrence*
684 So. 2d 1257 (Miss. 1996)
- Thompson v. Jones County Community Hospital*
353 So. 2d 795, 796 (Miss. 1977)
- Townsend v. Estate of Gilbert*
616 So.2d 333, 335 (Miss. 1993)
- Tucker v. Hinds County*
558 So. 2d 869, 872 (Miss. 1990)

STATE STATUTES

Miss. Code Ann. § 11-46-11

STATEMENT OF THE ISSUES

- I. WHETHER THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON MISSKELLEY'S CLAIM THAT HIS EMPLOYMENT CONTRACT WAS BREACHED**
- II. WHETHER MISSKELLEY HAD A RIGHT TO RELY ON THE CATASTROPHIC LEAVE PROVISIONS OF CARROLL COUNTY'S PERSONNEL POLICY; AND WHETHER CARROLL COUNTY HAD A DUTY TO FOLLOW THE POLICY IT ESTABLISHED TO BENEFIT ITS EMPLOYEES**
- III. WHETHER MISSKELLEY'S EMPLOYMENT WITH CARROLL COUNTY WAS EVER TERMINATED BY CARROLL COUNTY**
- IV. WHETHER THE LOWER COURT ERRED IN INTERPRETING CARROLL COUNTY'S CATASTROPHIC LEAVE POLICY**

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

This appeal comes before the Court from the Circuit Court of the First Judicial District of Carroll County, Mississippi. On May 28, 2009 Honorable C. E. Morgan, III, issued his Order Granting Defendant's Motion for Summary Judgment (R. 209-213). Misskelley timely filed his Notice of Appeal on June 23, 2009. (R. 214).

II. STATEMENT OF RELEVANT FACTS

Misskelley was a long time employee of Carroll County, Mississippi, and on January 20, 2004, the Carroll County Board of Supervisors elevated him to the position of Warden of the Carroll/Montgomery Regional Correctional Facility under a written contract of employment spread upon the minutes of the County. The initial term of the contract was for a period of one year automatically renewing for regular periods of one year unless one of the parties should submit a written notice of termination sixty days prior to the original or renewed termination date. (R. 10-17).

In addition to the terms of his contract, Misskelley (and all employees of the Correctional Facility) was entitled to receive the benefits of the County's written personnel policy including its provisions for "Catastrophic Leave" which provided:

The Facility shall allow thirty (30) days per year (20 hours per month) for catastrophic injury or illness for employees and appointed officials. A catastrophic injury or illness means a severe condition or combination of conditions affecting the mental or physical health of an employee or member of an employee's immediate family that requires the services of a licensed physician for an extended period of time and that forces the employee to exhaust all personal and sick leave that cannot be carried over into the next calendar year. Unused catastrophic leave shall be carried over into subsequent calendar years and any unused leave shall be counted as creditable service for the purposes of the retirement

system upon termination of employment. Catastrophic leave can only be used by employees or appointed officials upon approval of the Sheriff of Carroll County and the Board of Supervisors of Carroll County. Catastrophic leave shall be retroactive to all current covered employees in the retirement system beginning at their date of employment with Carroll County. (R. 18).

Misskelley actively served as Warden of the Correctional Facility from the initial date of his employment in 2004 until November 9, 2007. In October, 2007, because of various medical conditions, Misskelley became unable to fulfill his duties. On October 26, 2007, Dr. Susan Jenay Neely, Misskelley's personal physician, certified that he was physically disabled to the extent that he could not perform his duties as Warden. (R. 23, 180). On the advice of his doctor, Misskelley approached the Sheriff and asked to be placed on "Catastrophic Leave" under the provisions of the personnel policy. The Sheriff then had his staff prepare a report which reflected that Misskelley had earned a total of 2,200 hours or 275 days leave under the County's Catastrophic Leave Policy. (R. 19-21). Based on the report Sheriff Don Gray, by letter dated November 5, 2007, formally requested the Board of Supervisors to place Misskelley on Catastrophic Leave to be effective as of November 9, 2007. (R. 22).

At its regular meeting on November 5, 2007, the Board of Supervisors took the following action:

A motion was made by Supervisor Ashmore, duly seconded by Supervisor Cobbins and unanimously approved the request of Sheriff Don Gray for Catastrophic Leave for Warden Cooper L. Misskelley, pending *determination of an ending date* (Emphasis added). (R. 24).

One day after the Board approved Catastrophic Leave for Misskelley, elections were held in Carroll County. The incumbent Sheriff was defeated and a new Sheriff elected. The newly elected Sheriff thereafter announced his intentions to hire a new Warden for the Correctional

Facility when he would take office in January, 2008. (R. 154; T. 44-46).

Two weeks later on November 16, 2007, the Board of Supervisors met and revisited the question of Catastrophic Leave for Misskelley. The following entry is contained in the minutes of that Board meeting:

Next up for discussion was the Catastrophic Leave for Warden Misskelley. A motion was made by Supervisor Ashmore, duly seconded by Supervisor Cobbins and unanimously approved Catastrophic Leave for Warden Misskelley to be November 9, 2007 - December 31, 2007, *pending termination date*. (Emphasis added). (R. 27).

Misskelley was never informed by the Board of Supervisors, Sheriff Don Gray, or the newly elected Sheriff, Jerry Carver, that his employment had been terminated or that he would not receive pay for all of his 275 days of earned leave. When Misskelley read in the newspaper he had been terminated, he went to the courthouse and was informed by the County payroll clerk that he would not receive any additional pay after December 31, 2007. (R. 75). Feeling aggrieved by the Board's decision to pay him for only 52 days of his earned 275 days of leave, Misskelley requested to appear and did appear before the next scheduled meeting of the Board of Supervisors in Vaiden, Mississippi. (R. 74). At that meeting, Misskelley made a personal plea to be continued in his leave status until he recovered or until he had used all 275 days of his accrued leave. His plea is adequately summarized in his sworn testimony before the lower court:

BY MR. FRANKLIN:

Q. Mr. Misskelley, were you disabled to perform your job from on and after November when it was approved until today?

A. Yes, sir.

Q. And will your medical providers substantiate that?

A. Yes, sir.

Q. And you are still disabled?

A. I am.

Q. All right. Now as the warden of the facility, were you responsible for hiring and firing employees?

A. Yes, I was.

Q. And did you have a policy as the warden to review with all new employees the personnel policy of the facility?

A. I did. I did, sir. I reviewed the personnel policy along with the personnel handbook and all the guidelines that went along with it on a one on one basis with a new hire, which amounted to discussing about the catastrophic leave to the point that it was a real good thing, and it was. It was a wonderful thing for the new people, something that a lot of other folks didn't have. And I pointed that out to them, and I'm sure a lot of them accepted the position with the catastrophic leave being in mind, and that is one of the reasons I accepted my position. I thought it was provided for, told us we was going to have it, and we accrued so many days a year, and I accrued those days. It belonged to me. I earned that time as from year to year to year to year, and when I applied for my catastrophic leave, Mr. Webb, I didn't ask nobody to give me no money. I just applied for leave time that belonged to me. It was mine. I earned it. (T. 29-30).

No questions were asked by any Board member and no comments were made by any Board member concerning Misskelley's plea and request that his leave be extended to include the entire 275 days earned under the Board's personnel handbook and policy. The minutes of the meeting at which Misskelley appeared are silent as to any appearance by him and are also silent concerning any action taken by the Board on his request.¹ (R. 74).

In compliance with Mississippi's Tort Claims Act, Miss. Code Ann. §11-46-11, Misskelley noticed both defendants of his claim and of his intention to file suit should it not be resolved. (R. 126). The requisite time under this statute expired without resolution of the claim and on June 18, 2008, Misskelley filed this suit. (R. 2). Carroll County and the Correctional Facility filed answers to the complaint on August 20, 2009 (R. 33) and filed a Motion to Dismiss

¹The Board of Supervisors, by unanimous vote amended the Catastrophic Leave provision of the personnel policy by deleting the last sentence which made the accrued leave retroactive to all current covered employees in the retirement system beginning at their date of employment with Carroll County.

and/or Motion for Summary Judgment on January 14, 2009. (R. 88). Misskelley responded to the Motion (R. 151); and the lower court heard the motion on April 14, 2009. (T. 1-54). On May 29, 2009, the lower court issued its final Order and Opinion Granting Defendant's Motions. (R. 209-213) (RE. 3-7). It is from that final order that Misskelley has promulgated this appeal.

SUMMARY OF THE ARGUMENT

I. Misskelley was employed by Carroll County under and by virtue of a written contract of employment; therefore, he was not an "at will" employee. Carroll County also had adopted a written personnel policy which offered all employees of the Correctional Facility certain benefits including Catastrophic Leave accumulating with longevity of employment. The County's failure to pay him for his accrued leave is a breach of his contract of employment. The question of whether or not the personnel policy became a part of the contract of employment when adopted and whether the County breached that contract are all fact specific inquiries. Thus, summary judgment was improperly granted to the defendant on this claim.

II. Misskelley had a right to and did rely on the Catastrophic Leave provisions of the County's personnel policy. This is not a termination of employment case, although his employment was terminated by the County's failure to pay him. Misskelley seeks to recover the benefit of his earned Catastrophic Leave as provided by the written policy of the County. Where an employer promulgates an employee's personnel policy, the employer is duty bound to follow its provisions. Misskelley could not have done anything wrong to cause his termination because he was on leave. Whether or not the County failed to follow the provisions of its own personnel policy is also a fact specific inquiry. Thus, summary judgment was improperly granted to the defendants.

III. Misskelley's employment was never terminated by the County and on the record that

exists he is entitled to be paid for 223 days of unused Catastrophic Leave.

IV. The lower court erred in its interpretation of Carroll County's Catastrophic Leave policy resulting in the court's unsupported grant of summary judgment to Carroll County and the Carroll/Montgomery Correctional Facility.

ARGUMENT

On the issue of summary judgment, the standard of review is well settled "...the standard for reviewing the granting or denying of summary judgment is the same standard as is employed by the trial court under Rule 56(c). This court conducts de nova review of orders granting or denying summary judgment and looks at all the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. Aetna Cas. and Sur. Co. v. Berry, 669 So. 2d 56 (Miss. 1996). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. Russell v. Orr, 700 So. 2d 619 (Miss. 1997); Northern Electric Co. V. Phillips, 660 So. 2d 1278 - 1281 (Miss. 1995). The burden of showing that no genuine issued of material fact exists lies with the moving parting, and we give the benefit of every reasonable doubt to the party against whom summary judgment is sought. Tucker v. Hinds County, 558 So. 2d 869, 872 (Miss. 1990). We do not try issues. Rather, we only determine whether there are issues to be tried. Townsend v. Estate of Gilbert, 616 So. 2d 333,335 (Miss. 1993). Furthermore, it is well settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err of the side of denying the motion. Aetna Cas. And Sun. Co. V. Berry, 669 So. 2d, 70.

In the case at bar the lower courts decision to grant the defendant's motion is tantamount to dismissal of Misskelley's lawsuit based on the pleadings alone. Carroll County and the Correctional Facility uncovered nothing in discovery which was not covered or contrary to his

allegations in the complaint and they produced no affidavits or evidence at the hearing on the motion. The only evidence at the hearing was the sworn testimony of Misskelley which simply restated his allegations contained in his complaint.

I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON MISSELLEY'S CLAIM THAT HIS EMPLOYMENT CONTRACT WAS BREACHED.

Under Section 5 of Misskelley's written contract of employment, he could only be terminated during the initial term or any extended term of the contract for the reasons stated therein. (R. 14). There is no mention in the contract that the Warden serve at the pleasure of the Board of Supervisors or at the pleasure of the Sheriff of the County. It is submitted that good reasons exist for the Warden to be hired to run the Correctional Facility outside the influence of political change which could occur in the County. Misskelley's contract clearly removed the position of Warden from County politics. (T. 19). The contract further provided that it would automatically renew unless either the County or Misskelley submitted a notice of termination prior to sixty (60) days of the initial expiration date or any subsequent renewal expiration date. (R. 12-13). In other words, Misskelley was bound under the contract to serve as Warden during its stated term and the County was bound to honor its obligations to Misskelley during the stated term of the employment contract.

Did the County's written personnel policy offering all of the employees of the Correctional Facility the benefit of Catastrophic Leave become a part of and incorporated in Misskelley's employment contract? In a similar case where a public entity provided its employees the equivalent of worker's compensation benefits, this court held: "...a personnel manual can create contractual obligations, even in the absence of a written contract." Southwest Mississippi Regional Medical Center v. Lawrence, 684 So. 2d 1257 (Miss. 1996). In that case the hospital

elected to opt out of worker's compensation insurance and become self insured. In its employee handbook the hospital had provided that employees would be covered for what would in effect be compensable injury under the Worker's Compensation Act. The hospital contended that the employee handbook, by its own terms, was clearly not a contract and that the employee had no guarantee or contractual right therein. It further contended that a unilaterally promulgated employee hand book did not by itself constitute a contract between the employer and employee. This court relying on the decision in Bobbitt v. The Orchard, Ltd., 603 So.2d 356 (Miss. 1992) stated:

...the lower court granted summary judgment to the employer because the court found that there was an employment contract terminable at will. The Employee Manual had outlined the mutual responsibilities of the employer and the employees. An employee was fired for what was characterized by the employer as insubordination. It was the employee's first infraction, and the Employee Manual had provided that an employee should receive counseling and a formal written warning upon the first infraction. The Court held that because the employer gave the manual to all employees, it became a part of the employment contract. The Court found that it did not give tenure, nor create a right to employment for a definite length of time, but that the employer had an obligation to follow the provisions covered within the manual. *Id.* at 361. The Court did not note that the lack of any express disclaimer or contractual provisions in the manual did not affect the employer's right to terminate the employee at will. *Id.* at 362. This Court stated further, "that a personnel manual 'can create contractual obligations, even in the absence of a written agreement.'" *Id.* at 361.

It is uncontroverted that Misskelley's employment contract was in existence and enforceable when he became disabled in October of 2007. Since his contract must be interpreted to include the benefit of Catastrophic Leave contained in the County's personnel policy, it is also uncontroverted that he had earned under that leave policy a total of 275 days of Catastrophic Leave which was certified to the Board of Supervisors by the Sheriff of Carroll County. (R. 19,

22). The defendants only compensated Misskelley for 52 days of his earned leave. (R. 5.) The County's failure to continue Misskelley in leave status and compensate him until his leave time expired, is a blatant breach of Misskelley's employment contract. A genuine issue of material fact exists regarding the County's breach of the employment contract. For this reason, the lower court erred in granting summary judgment on the issue of breach of contract.

II. MISSKELLEY HAD A RIGHT TO AND DID RELY ON THE CATASTROPHIC LEAVE PROVISIONS OF CARROLL COUNTY'S PERSONNEL POLICY, AND CARROLL COUNTY HAD A DUTY TO FOLLOW THE POLICY IT ESTABLISHED TO BENEFIT ITS EMPLOYEES.

Misskelley submits that the case at bar is not a termination of employment case even though the County in effect terminated him by not continuing to allow him leave status after the new Sheriff assumed office.

Misskelley's claim was for benefits as provided in the County's personnel policy. In the case of Southwest Mississippi Regional Medical Center v. Lawrence, (Infra) where an employee claimed a benefit which was provided in the employee manual this court held that, "the employer had an obligation to follow the provisions covered within the manual". The court reached this conclusion after it had determined that the employee was an "at will" employee.

The defendants in the motion claimed that no employment contract existed between Misskelley and Carroll County, because of an alleged resignation of Misskelley. Defendants further claimed that even though he resumed his duties as Warden, that his contract of employment was vitiated and that Misskelley became an employee "at will" without the legal status of an employee under contract. (T. 89-90). Further alleging that as an "at will" employee he could be terminated at any time for any reason. (T. 140). This allegation was adamantly denied by Misskelley. (T. 20-27). At the motion hearing, defendants abandoned this allegation (T. 34-37). However, this issue is a genuine issue of material fact and in Appellant's view is

outcome determinative. Although the lower court found at the hearing that a resolution of this issue was unnecessary (T. 33-34) (R. 212) Misskelley disagrees and submits that the lower court erred in granting summary judgment to the defendants.

III. WAS MISSELLEY'S EMPLOYMENT TERMINATED BY CARROLL COUNTY?

The contract of employment provided that Misskelley could be terminated for cause or by written notice of non-renewal within 60 days of the expiration of the term of the contract.

Carroll County was bound by the terms of the employment contract when the County Board of Supervisors by resolution unanimously adopted it and spread it upon its minutes. (R. 9).

The law is legion in this State that "public boards speak only through their minutes and then actions are evidenced only by entries on these minutes". Thompson v. Jones County Community Hospital, 353 So. 2d 795, 796 (Miss. 1977). There are only two minute entries with reference to Misskelley's entitlement to the claimed Catastrophic Leave time. The first entry reflects that the board approved his leave on November 5, 2007, "pending determination of an ending date." (R. 24). The second entry appears on the Board's minutes of its November 16, 2007 meeting when it "approved Catastrophic Leave for Warden Misskelley to be November 9, 2007 - December 31, 2007, pending termination date." (R. 27). Misskelley submits that the County has never established by any action when Misskelley's Catastrophic Leave actually ended. Had the County terminated Misskelley's employment on December 31, 2007, it would have had to do so under the provisions of the employment contract by either providing him with the required notice or by alleging grounds for cause required by the contract. The issue of whether or not Misskelley's contract was ever terminated or when it was terminated is certainly a genuine issue of material fact which would be outcome determinative. Therefore, the lower court erred in awarding the defendants summary judgment.

IV. THE LOWER COURT ERRED IN ITS INTERPRETATION OF THE CATASTROPHIC LEAVE PROVISIONS OF CARROLL COUNTY'S PERSONNEL POLICY.

At the motion hearing the lower court found that the only issue necessary to be decided for the resolution of the issue of summary judgment was its interpretation of the Catastrophic Leave provisions of the personnel policy. (T. 34). A sentence by sentence review of the County's Catastrophic Leave Policy applying the facts in this case reveals the following:

- (a) **The facility shall allow 30 days per year, 20 hours per month for catastrophic injury or illness for employees and appointed officials.**

There is no dispute by the parties and the lower court found that Misskelley, because of his tenure with Carroll County, had earned 275 days of Catastrophic Leave.

- (b) **A catastrophic injury or illness means a severe condition or combination of conditions effecting the mental or physical health of an employee or an employee's immediate family that requires the services of a licensed physician for an extended period of time and that forces the employee to exhaust all personal and sick leave that cannot be carried over in the next calendar year.**

There is no dispute by the parties and the lower court found that Misskelley met the requirements of this sentence of the policy. All agree that Misskelley was physically disabled to perform his duties as Warden for the entire 275 days of his leave earned under paragraph (a) above.

- (c) **Unused Catastrophic Leave shall be carried over into subsequent calendar years and any unused leave shall be counted as creditable service for the purpose of the retirement system upon termination of employment.**

There is no dispute by the parties and the lower court found in its opinion that Misskelley had earned 275 days of Catastrophic Leave all carried over during the years of his employment up until the time he became disabled under the

meaning of paragraph (b) above.

The County claimed and the lower court found that the County complied with this provision of the policy by notifying PERS that upon Misskelley's termination of employment that he had accrued 223 days of unused leave to be counted as creditable service for retirement purposes. Misskelley respectfully submits that the court erred in its interpretation of this sentence of the Catastrophic Leave provisions of the personnel policy.

Misskelley submits that this provision of the policy clearly was clearly intended to apply to an employee who had earned Catastrophic Leave time and who had been fortunate enough not to have suffered a catastrophic injury or illness during his employment. For such an employee who had retired or who had been terminated, then the unused leave would be deemed creditable service for retirement purposes. In Misskelley's case he had suffered a catastrophic illness under the meaning of the policy and was placed on leave under the provisions of the policy. While on leave and still disabled, the County wrongfully terminated his employment by simply refusing to pay him for the remaining 223 days to which he was entitled under the policy. until his earned leave had been used.

- (d) **Catastrophic Leave can only be used by employees or appointed officials upon approval of the Sheriff of Carroll Count and the Board of Supervisors of Carroll County.**

It is undisputed by the parties, and the court found that the Sheriff approved 275 days of Catastrophic Leave for Misskelley and certified that fact in a letter to the Board of Supervisors. It is also undisputed by the parties and the court found that the Board of Supervisors, by formal resolution and minute entry,

approved Misskelley's Catastrophic Leave on two separate occasions.

At the motion hearing the County contended that this sentence of the policy conferred complete discretion on the board of Supervisors in not only deciding if Misskelley met the criteria for Catastrophic Leave, but also the complete discretion in determining the number of days they would pay an employee regardless of the number of days the employee had earned under this policy. (T. 34-35). Evidently the court agreed with the County when it found that the County did not fail to follow its own policy in the handling of Misskelley's Catastrophic Leave. Misskelley submits that the court erred in this finding and granting summary judgment to the defendants based on this flawed interpretation of the Catastrophic Leave Policy.

CONCLUSION

Misskelley is entitled to be paid for 223 days of earned and unused Catastrophic Leave. The lower courts granting of summary judgment was error. This court should remand this case to the lower court with instruction for trial on the merits.

CERTIFICATE OF SERVICE

I, Webb Franklin, attorney for Plaintiff/Appellant, Cooper L. "Pete" Misskelley, hereby
certify that I have this day served a copy of the foregoing **Brief of Appellant** on the following:

Silas W. McCharen, Esq.
DANIEL, COKER, HORTON & BELL, P.A.
P. O. Box 1084
Jackson, Mississippi 39215-1084

Alan D. Lancaster, Esq.
LISTON & LANCASTER
P. O. Box 645
Winona, Mississippi 38967

*Attorney for Appellees Carroll County, Mississippi and Carroll/Montgomery Regional
Correctional Facility*

Honorable Clarence E. Morgan, III
Circuit Court Judge
P. O. Box 721
Kosciusko, Mississippi 39090

SO CERTIFIED, this the 3rd day of November, 2009



WEBB FRANKLIN (MS # )

CERTIFICATE OF FILING

I, Webb Franklin, of counsel for Plaintiff/Appellant, Cooper L. "Pete" Misskelley, certify that I have this day served the Office of the Clerk, Supreme Court of Mississippi and counsel of record, via U. S. Mail, postage pre-paid, a copy of the foregoing Brief of Appellant.

THIS the 25th day of November, 2009.



WEBB FRANKLIN (MS # [REDACTED])

LOTT, FRANKLIN & FONDA, PLLC
202 West Market Street
P. O. Box 1176
Greenwood, MS 38935
Telephone: (662) 453-6576