IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01332

DRUSILLA MCCOOL — APPELLANT

V.

COAHOMA OPPORTUNITIES, INC.;
KATHY McDOUGAL, HEADSTART DIRECTOR;
JOHNNY McGLOWN, BOARD CHAIR;
MAYO WILSON, EXECUTIVE DIRECTOR; and
JIMMIE ANN SELLERS, PERSONNEL DIRECTOR — APPELLEES

BRIEF OF APPELLEES

APPEAL FROM THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI
THE HONORABLE ALBERT B. SMITH, III, PRESIDING

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for the Appellees, Coahoma Opportunities, Inc., Kathy McDougal, Johnny McGlown, Mayo Wilson, and Jimmie Ann Sellers, do hereby certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Drusilla McCool, Appellant
2. Ruby White, attorney for Appellant
3. Minnie P. Howard, attorney for Appellant
4. North Mississippi Rural Legal Services, attorneys for Appellant
5. Coahoma Opportunities Inc., Appellee
6. Kathy McDougal, Appellee
7. Johnny McGlown, Appellee
8. Mayo Wilson, Appellee
9. Jimmie Ann Sellers, Appellee
10. Alison Tasma Vance, attorney for Appellees
11. Paula Graves Ardelean, attorney for Appellees

12. Butler, Snow, O'Mara, Stevens & Cannada, PLLC, attorneys for Appellees

13. William O. Luckett, Jr., attorney for Appellees

14. Luckett Tyner Law Firm, P.A., attorneys for Appellees

15. The Honorable Albert B. Smith, III, Coahoma County Circuit Court Judge

Alison Vance

Paula Graves Ardelean
Alison Tasma Vance
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Attorneys for Appellees Coahoma Opportunities, Inc., Kathy McDougal, Johnny McGlown, Mayo Wilson, and Jimmie Ann Sellers

STATEMENT REGARDING ORAL ARGUMENT

The law applicable in this case is well settled; the facts in this case are straightforward and undisputed. Because this case does not present a novel legal or factual issue, Appellees do not believe that oral argument would be helpful to the Justices of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

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STATEMENT OF THE ISSUES

I. Whether the trial court correctly held that Ms. McCool's breach of contract claim is barred by the one year state of limitations applicable to an unwritten contract of employment when her claim is based on a Personnel Manual in which she was not named and parole evidence is necessary to show the existence of the purported contractual relationship.

II. Whether the trial court correctly held that Ms. McCool's breach of contract claim based on COI's Personnel Manual is barred as a result of the unambiguous disclaimers in that Manual preventing formation of a contract.

III. Whether the trial court correctly dismissed Ms. McCool's conversion claim in light of the undisputed fact that COI did not have funds available to convert and in light of the undisputed fact that Ms. McCool was not harmed as a result of the late payments for her bankruptcy plan and insurance premiums.

IV. Whether the trial court correctly held that Ms. McCool's negligence claim arising out of her employment is barred by the Mississippi Workers' Compensation Act's exclusivity provisions.

V. Whether the trial court correctly held that Ms. McCool's intentional infliction of emotional distress claim based on the termination of her employment is barred by the one year statute of limitations.

VI. Whether the trial court correctly held that Ms. McCool's intentional infliction of emotional distress claim fails as a matter of law because the conduct upon which she bases that claim (the termination of her employment) does not rise to the level of extreme and outrageous as required to state a claim.

STATEMENT OF THE CASE

Coahoma Opportunities, Inc. ("COI") is a private, non-profit corporation that provides social services to lower income families in Coahoma County. 1 R. 52. Among other programs, COI operates the Head Start program in Coahoma County. 1 R. 52-53. During the relevant time period, Mayo Wilson was COI's Executive Director, Johnny McGlown was the Chair of COI's Board of Directors, Jimmie Sellers was COI's Personnel Director and Kathy McDougal was the Head Start Director. 1 R. 110-11.

Ms. McCool was employed at-will by COI from 1984 through 2004 (with the exception of a brief break in 1990-1991). 1 R. 101, 133. Ms. McCool held various positions with COI, including the position of Head Start teacher. 1 R. 101-09.

In late 2003, COI's Head Start program experienced some financial difficulties. 1 R. 120; 3 R. 445-46. In essence, the program spent the funds allocated for the 2003 fiscal year before the year ended. 1 R. 6; 1 R. 120; 3 R. 438-39. During that time period, COI prioritized its bills and met its obligations as it could. 1 R. 120; 3 R. 446-48. COI paid its employees their net take home pay. 3 R. 445-46. However, it did not immediately remit certain payments for garnishments, bankruptcy withholdings and other obligations that it normally withheld from employees' pay. 3 R. 446-48. Put simply, there was no money available to withhold or remit. 3 R. 438-39, 442-48; 1 R. 120-21.

As for Ms. McCool, COI typically withheld bankruptcy payments and certain insurance premiums from her payroll. 1 R. 6-7. In the latter part of 2003, there was no money available to withhold and remit to the bankruptcy trustee or insurance companies. 3 R. 438-39, 442-48; 1 R. 102-21. As soon as the money was available, COI remitted all funds that were owed to the bankruptcy court and insurance companies. 1 R. 130-32. It is undisputed that Ms. McCool suffered no damages as a result of the late payments. 1 R. 130-33.

In July 2004, COI terminated Ms. McCool's employment. 1 R. 133. Nearly two years later, Ms. McCool filed the instant suit against COI and Ms. McDougal, Mr. McGlown, Mr. Wilson and Ms. Sellers ("Individual Defendants"). Ms. McCool asserts a variety of claims related to her employment and discharge.

SUMMARY OF THE ARGUMENT

This is a case in which a former at-will employee asks this Court to significantly expand a very limited exception to Mississippi's firmly-embedded employment-at-will rule and to overrule a long line of precedent in the process. Ms. McCool contends that COI's Personnel Manual vests her with certain contractual rights regarding the procedure for terminating her employment and that COI's purported breach of that contract results in a wrongful discharge claim.

Ms. McCool does not dispute that COI's Manual and the Verification Of Receipt of that Manual both contain unambiguous disclaimers preventing formation of a contract and preserving the at-will nature of her employment. Nor does Ms. McCool dispute that a long line of precedent from this Court holds such a disclaimer absolutely bars a breach of contract claim. Rather, she asks the Court to simply ignore those two unambiguous disclaimers and analyze her claim as though they did not exist. According to Ms. McCool, the Code of Federal Regulations implementing the Head Start Act requires COI to establish certain personnel policies and procedures. Ms. McCool argues that COI should be contractually bound to follow those policies and procedures, despite the express language in its Manual that says otherwise.

The Federal Regulations upon which Ms. McCool relies do not provide for a private right of action. Thus, Ms. McCool is attempting to do indirectly what she cannot do directly. In essence, Ms. McCool asks the Court to disregard its long line of precedent so she can back-door

an unrecognized federal claim through a state law contract action. The trial court correctly rejected this attempt to make an end-run around Mississippi's employment-at-will rule.

To begin with, Ms. McCool's breach of contract claim is barred by the statute of limitations. The Manual she contends vests her with certain contractual rights does not name Ms. McCool personally; rather, parole evidence is necessary to show the existence of the purported contractual relationship. Accordingly, the one year statute of limitations applicable to an unwritten contract of employment bars her claim, which was filed nearly two years after the termination of her employment.

Moreover, Ms. McCool is judicially estopped from asking the Court to construe her breach of contract claim by referencing the Code of Federal Regulations. In a motion to remand this case to state court, Ms. McCool expressly represented to the federal district court that she did not intend to rely on federal law to prove her claims. The federal district court remanded the case. Ms. McCool cannot change her position now.

Finally, there is no valid reason to reject well-developed case law upholding disclaimers in handbooks. In fact, the Federal Regulations and the disclaimer in COI's Manual do not conflict. The Federal Regulations do not grant Head Start employees any contractual rights and do not require agencies such as COI to do so. The Federal Regulations do not prohibit disclaimers in Personnel Manuals preventing formation of a contract and do not prohibit agencies such as COI from maintaining the at-will status of its employees.

Ms. McCool also asserts a conversion claim based on COI's late remittance of certain bankruptcy garnishments and insurance premiums on Ms. McCool's behalf. Ms. McCool's conversion claim is nothing more than a contractual claim for unpaid wages (which were all eventually paid). Courts routinely reject such claims and hold that an action for unpaid wages does not sound in conversion.

The trial court correctly held that Ms. McCool failed to make out the elements of a conversion claim. As Ms. McCool admits, COI simply did not have enough money to meet all of its obligations; it prioritized and paid its bills as it could. Ms. McCool does not contend that COI or the Individual Defendants used the funds it had available for some improper purpose. There is not a scintilla of evidence to show that COI or the Individual Defendants did some wrongful, tortious act with the intent to appropriate the funds for itself or themselves. It is also undisputed that all of the bankruptcy and insurance premiums were ultimately remitted to the proper payees and that Ms. McCool was not damaged as a result of the late payments.

The trial court correctly held that Ms. McCool's negligence claim arising from her employment is barred by the Mississippi Workers' Compensation Act's exclusivity provisions. Ms. McCool also asserts an intentional infliction of emotional distress claim arising from the termination of her employment. The trial court correctly held that the claim was barred by the statute of limitations and, even if it was not barred, her allegations are insufficient to show extreme and outrageous conduct as required to establish an intentional infliction of emotional distress claim.

ARGUMENT

I. STANDARD OF REVIEW.

"This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it . . . ." *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26 (Miss. 2003). "Summary judgment in Mississippi is governed by Rule 56 of the Mississippi Rules of Civil Procedure, which clearly and unambiguously provides that summary judgment '*shall* be rendered forthwith . . . [if] there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a

matter of law." *Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1274 (Miss. 2007) (emphasis in original).

II. MS. MCCOOL'S CLAIM FOR BREACH OF CONTRACT UNDER COI'S WRITTEN POLICIES AND PROCEDURES FAILS AS A MATTER OF LAW.

Ms. McCool contends that COI's Policy and Procedures Manual vests her with certain contractual rights. According to Ms. McCool, COI's purported failure to follow certain policies and procedures contained in that Manual when terminating her employment gives rise to a claim for breach of contract resulting in wrongful discharge.

A. Ms. McCool's Breach Of Contract Claim Is Barred By The Statute Of Limitations.

Ms. McCool's breach of contract claim is barred by the statute of limitations. Miss. Code Ann. §15-1-29 provides that "an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after." The trial court correctly held that the purported contract upon which Ms. McCool relies to establish her claim is unwritten as far as she is concerned and, accordingly, her claim is barred by the one year statute of limitations. 4 R. 537; R.E. 6.

In *Sloan v. Taylor Machinery Co.*, 501 So. 2d 409 (Miss. 1987), a former employee claimed that an employment manual constituted a written contract of employment. The Court explained that "[w]here a person is not named in the written contract and parol evidence is necessary to show the existence of the contractual relationship, the contract is unwritten insofar as that person is concerned and the limitations statute relating to written contracts is not applicable." *Sloan*, 501 So. 2d at 410. Because the plaintiff was not named in the employment manual upon which he relied to establish his claim, the Court held that the contract claim was barred by the one-year statute of limitations set out in Miss. Code Ann. §15-1-29. *Id.*

Here, it is undisputed that Ms. McCool is not named in the Manual that she contends vested her with certain contractual rights. Rather, parole evidence is necessary to show the existence of the alleged contractual relationship. Accordingly, the one year statute of limitations applies. Ms. McCool's employment was terminated on July 28, 2004; she filed this lawsuit on March 23, 2006, nearly two years later. Her claim is barred.

Ms. McCool now contends that she signed a "Personnel Action Form" sufficient to meet the definition of a written contract. (Appellee's Brief at 18). Ms. McCool did not advance this issue in the trial court and, as such, she is procedurally barred from advancing it on appeal. It is well settled that "[q]uestions will not be decided on appeal that were not presented to the trial court." *Jones v. State*, 915 So. 2d 511, 513 (Miss. Ct. App. 2005).

In any event, her argument glosses over the fact that she does not rely on the "Personnel Action Form" as the contract she alleges was breached. The cases cited by Ms. McCool in support of her argument are distinguishable on this point. That is, the documents that the court found sufficient to establish a written contract were the very contracts the plaintiff alleged were breached. *See, e.g., Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958, 962 (S.D. Miss. 1990) (holding that the one-year statute of limitations applicable to unwritten contract of employment did not apply because the plaintiff "bases his [breach of contract] claim against Coastal upon the *written* Employment Agreement he executed with Coastal") (emphasis in original).

Here, Ms. McCool does not contend that COI breached the "Personnel Action Form." Rather, she advances the Manual to support her breach of contract claim. It is undisputed that she is not named in that Manual.

B. COI's Manual Contains An Unambiguous Disclaimer Preventing Formation Of A Contract.

Ms. McCool's breach of contract claim fails for an additional reason – the Manual upon which she bases that claim contains an unambiguous disclaimer preventing formation of a contract. As a matter of well-established law, this disclaimer prevents formation of a contract and requires dismissal of Ms. McCool's breach of contract claim.

It is undisputed that on the first page of COI's Personnel Policies and Procedures Manual, in bold print, is the following disclaimer:

> **"The within-contained policies and procedures do not constitute a contract of employment, nor should any portion hereof be construed to grant to an employee the expectation of employment for a definite period of time, or any employment other than strict "at will" employment."**

1 R. 61; R.E. 12.

Moreover, it is undisputed that the Verification of Receipt of Personnel Policies and Procedures Manual expressly states: "this manual is not an employment contract, either for initial or continued employment, nor does this manual create any express or implied contractual obligations," and "I understand that no statement contained in this Manual creates any guarantee of continued employment." 1 R. 59.

Ms. McCool cites *Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356 (Miss. 1992), for the proposition that "when an employer publishes and disseminates to its employees a manual setting forth the proceedings which will be followed in event of an employee's infraction of rules, *and there is nothing in an employment contract to the contrary*, then the employer will be required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual." *Id.* at 357 (emphasis added). Ms. McCool admits, however, *that there is language "to the contrary" in COI's Manual.*

Courts interpreting *Bobbitt* have consistently held that when an employee handbook or manual includes language stating that it does not constitute a contract, there can be no valid contract claim. For example, in *Lee v. Golden Triangle Planning & Development District, Inc.*, 797 So. 2d 845, 848 (Miss. 2001), the Court held that the *Bobbitt* exception to employment-at-will is strictly limited and when "there is 'something' in the employee handbook disclaiming a contract of employment," the exception does not apply.

Ms. McCool acknowledges that COI's Manual contains an express statement disclaiming a contract of employment. Ms. McCool also acknowledges the long line of cases that hold the disclaimer absolutely bars her breach of contract claim. She argues, however, that the Court should simply disregard that disclaimer.

Ms. McCool asks this Court to disregard the state's firmly-embedded employment-at-will rule and to significantly expand the limited exception developed in *Bobbitt.* "As correctly noted recently by the Court of Appeals, '[t]he supreme court was reaffirming in *Bobbitt* the proposition that disclaimers in employees' manuals having their purpose of preserving the employment at-will relationship **cannot be ignored**.'" *Lee v. Golden Triangle Planning & Dev. Dist., Inc.*, 797 So. 2d 845, 848 (Miss. 2001) (emphasis added) (citing *McCrory v. Wal Mart Stores, Inc.*, 755 So. 2d 1141, 1144-45 (Miss. Ct. App.1999)).

This case does not present a compelling reason for the Court to discount the substantial precedent that exists in this State regarding employment-at-will or to significantly expand the limited exception created in *Bobbitt*. Put simply, this case does not present a compelling reason for the Court to reverse its well established position that "disclaimers in employees' manuals having their purpose of preserving the employment at-will relationship **cannot be ignored**." *Lee*, 797 So. 2d at 848 (emphasis added).

Ms. McCool argues that the Court should ignore the express disclaimer contained in COI's Manual because of the Code of Federal Regulations ("Federal Regulations") governing Head Start programs.[1] According to Ms. McCool, those Federal Regulations require that COI establish certain policies and procedures for termination of employment and, in light of that requirement, COI should not be able to disclaim formation of a contract.

1. Ms. McCool Is Judicially Estopped From Relying On Federal Regulations To Support Her Breach Of Contract Claim.

The trial court correctly held that Ms. McCool's attempt to rely on Federal Regulations to establish her breach of contract claim is barred by the doctrine of judicial estoppel. Ms. McCool did not address the issue of judicial estoppel in her appellate brief. "It is settled precedent that issues on which a party fails to expend any discussion or citation of authority are not reviewed by this Court." *AmSouth Bank v. Gupta*, 838 So. 2d 205, 210 (Miss. 2002). The trial court's dismissal of Ms. McCool's breach of contract claim may be affirmed based solely on its holding that Ms. McCool's attempt to rely on Federal Regulations to establish that claim is barred by the doctrine of judicial estoppel.

In response to the Defendants' removal of this case to federal court, Ms. McCool filed a motion to remand. In that motion to remand, Ms. McCool stated: "The Plaintiff's claims against the Defendants are grounded solely in Mississippi common law or negligence, breach of contract, contract, conversion, as well as intentional tort claims." 3 R. 382. Ms. McCool went on to state: "Because Plaintiff has **expressly waived** any claim based on federal constitutional, statutory or common law grounds, and because no diversity jurisdiction exists, there is no federal

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[1] COI operates a Head Start program in Coahoma County through a grant from the United States Department of Health and Human Services authorized by the Head Start Act, 42 U.S.C. § 9801 *et seq.* The Department of Health and Human Services promulgates certain regulations and performance standards that are published in the Code of Federal Regulations, 45 C.F.R. §§1303-1311. It is those Regulations on which Ms. McCool attempts to rely to support her breach of contract claim.

jurisdiction." 3 R. 383 (emphasis in original). The federal district court relied on McCool's representation and remanded the case to state court. 3 R. 388-91.

Now, in direct contradiction to her express waiver of any federal claim, Ms. McCool argues that this case is controlled by Federal Regulations. That argument is barred by the doctrine of judicial estoppel, which "precludes a party from asserting a position, benefiting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *In re Estate of Richardson*, 903 So. 2d 51, 56 (Miss. 2005).

Rankin v. American General Finance, Inc., 912 So. 2d 725 (Miss. 2005), is instructive. In *Rankin*, the plaintiffs represented to the federal district court in a motion to remand that they had no intention of relying on federal law to prosecute their claims. *Rankin*, 912 So. 2d at 729. The district court relied on that assertion and remanded the case to state court. *Id.* As a result, the Court held that the plaintiffs were judicially estopped from asking the state court to construe the state usury statute in accordance with federal Truth in Lending Act. *Id.*

Here, Ms. McCool represented to the federal district court that she had no intention of relying on federal law. As a result, she is judicially estopped from asking the Court to construe her breach of contract claim in accordance with the Federal Regulations implementing the Head Start Act.

2. *The Regulations Upon Which McCool Relies Do Not Provide A Private Right Of Action.*

Ms. McCool's breach of contract claim is really an attempt to assert a claim under the Federal Regulations implementing the Head Start Act. However, those Federal Regulations do not provide for a private right of action. *See, e.g., Holocheck v. Luzerne County Head Start, Inc.*, 385 F. Supp. 2d 491, 501 (M.D. Pa. 2005) (holding that federal regulation requiring local Head Start agencies to establish and implement written personnel policies for staff did not create

right that was enforceable through 42 U.S.C. § 1983); *Hodder v. Schoharie County Child Dev. Council, Inc.*, No. 95-CV-557, 1995 WL 760832, at *5 (N.D.N.Y. Nov.14, 1995) (rejecting the former employee's attempt to rely on the Regulations implementing the Head Start Act because it "found no indication that Congress intended the Act or its interpretive regulations to create a private right of action for employees who are terminated from Head Start agencies in a manner allegedly inconsistent with those rules").

Ms. McCool is attempting to back-door a claim she cannot bring directly by asking this Court to ignore its own precedent and significantly expand the limited exception to the employment-at-will rule developed in *Bobbitt*. The trial court correctly rejected Ms. McCool's attempt to do indirectly what she cannot do directly (and her attempt to expand Mississippi law in the process).

Even if the Court were to consider the impact of the Federal Regulations in this case, Ms. McCool's circular logic fails. According to Ms. McCool, COI's Manual provides that the policies contained therein shall in no way supersede or conflict with directives of funding agencies and, to the extent they do conflict, directives of the funding agencies will take precedence. Thus, Ms. McCool contends that "[i]n accordance with the plain wording of the manual, the federal directive requiring establishment and implementation of a written personnel manual . . . is binding on COI." (Appellant's Brief at p. 20) However, the disclaimer within the very Manual upon which she relies defeats Ms. McCool's argument. The language in the Manual, including language regarding directives of funding agencies, "**do[es] not constitute a contract of employment"** and does not "create any express or implied contractual obligations." Accordingly, Ms. McCool cannot rely on any language in the Manual, including language regarding the Federal Regulations, to create a contract between herself and COI.

Even if the Federal Regulations had any legal consequence in this case – which they do not – the trial court correctly held that there is no actual conflict between the Regulations and the disclaimer preventing formation of a contract. 4 R. 538; R.E. 7. Ms. McCool came forward with no evidence that the Regulations prohibit an employment-at-will relationship or language in a Personnel Manual disclaiming the creation of a contract. Ms. McCool failed to point to any Federal Regulation which gives Head Start employees a legally enforceable contractual right to enforce those Regulations.

Ms. McCool's claim that the disclaimer preventing formation of a contract in COI's Manual should be stricken as "illegal" is easily disposed of by reference to well-established precedent that consistently upholds an employer's right to rely on such disclaimers. There is nothing "illegal" about an employer inserting and relying on a disclaimer in an employee handbook or personnel manual that expressly disclaims creation of any contractual obligations.

Ms. McCool's reliance on *Hodgins v. Philadelphia Public School District*, 966 So. 2d 1279 (Miss. Ct. App. 2007), is misplaced. *Hodgins* involved an employee of a public school district; as the Court pointed out in that case, since the plaintiff's employment was governed by the Education Employment Procedures Law of 2001 ("EEPL"), her case was distinguishable from *Bobbitt*. The EEPL specifically provides an aggrieved employee the right to file a civil action seeking review of an adverse employment decision. Miss. Code Ann. §37-9-113. Ms. McCool, on the other hand, was employed by a private corporation. The Federal Regulations upon which she relies to establish a breach of contract claim *do not provide for a private right of action.*

C. Ms. McCool's Third Party Beneficiary Claim Fails As A Matter Of Law.

In an effort to salvage her breach of contract claim, Ms. McCool argues that COI breached a contract it entered with the Department of Health and Human Services ("DHHS") and

that she should be able to recover for that breach as a third-party beneficiary. To begin with, McCool did not enter that contract into the record before the lower court or otherwise present any evidence regarding its existence or terms. *The court cannot construe a contract that is not before it.*

In any event, Ms. McCool is clearly not a third-party beneficiary of any contract between DHHS and COI. To be considered a third party beneficiary to a contract, "the contracts between the original parties must have been entered into for [the plaintiff's] benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms." *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 918 (Miss. Ct. App. 2007) (internal citations and quotations omitted).

Any contract between DHHS and COI would serve to implement the Head Start Act and its stated purposes. According to the express terms of the Act, the intended beneficiaries of the Head Start Act are low-income children and their families: "It is the purpose of this subchapter to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development . . . ." 42 U.S.C. §9831. *See, e.g, Holocheck v. Luzerne County Head Start, Inc.*, 385 F. Supp. 2d 491 (M.D. Penn. 2005) (holding that the Head Start Act and its implementing regulations were enacted to benefit the low-income children and families that it served and that a Head Start teacher was "not a member of the class of the legislation's intended beneficiaries").

Moreover, based on the express disclaimer preserving the at-will nature of its employment relationships in COI's Personnel Manual, COI clearly did not enter into a contract with DHHS for the benefit its employees or contemplate any benefit to its employees. Any benefit COI's employees may have received was indirect and incidental. "A mere incidental, collateral, or consequential benefit which may accrue to a third person by reason of the

performance of the contract, or the mere fact that he has been injured by the breach thereof, is not sufficient to enable him to maintain an action on the contract." *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006).

Ms. McCool cites *Roddy v. Urban League of Madison County*, No. IP 02-413-C-H/K, 2002 WL 1398534 (S.D. Ind. June 25, 2002), in support of her third-party beneficiary argument. That court did not hold that the plaintiff had a valid third-party beneficiary claim. Rather, it only held that the claim did not invoke federal jurisdiction. It is clear from the very text of the Head Start Act that any contract between DHHS and COI serves to benefit low-income children and their families, not COI's employees. Ms. McCool's third party beneficiary claim fails as a matter of law.

D. Ms. McCool Does Not Dispute That She Had No Contract With The Individual Defendants.

Ms. McCool also asserts a breach of contract claim against the Individual Defendants. While Ms. McCool's notice of appeal was directed towards all defendants, she does not contend in her appellate brief that the trial court erred in dismissing her breach of contract claim against the Individual Defendants. Accordingly, the trial court's ruling should be affirmed.

III. MCCOOL'S CONVERSION CLAIM FAILS BECAUSE THERE WAS NO MONEY AVAILABLE TO CONVERT.

Ms. McCool contends that "[u]nder the terms of [her] employment contract with COI, she was to receive $1085.41 bi-weekly. Instead she received approximately $385.00 bi-weekly." (Appellant's Brief at pp. 26-27). This argument exemplifies the fact that Ms. McCool is actually asserting a contractual claim for unpaid wages (even though all of her wages were ultimately paid). Other courts have held that similar claims for unpaid wages do not sound in conversion. *See, e.g., Anderson v. Sara Lee Corp.*, 508 F.3d 181, 190 (4th Cir. 2007) ("[T]he Supreme Court of North Carolina has not recognized causes of action for conversion . . . in employer-employee

disputes over unpaid wages such as this one, and there is no basis for concluding that it would do so if given the opportunity . . . ."); *Rehbein v. St. Louis Sw. Ry. Co.*, 740 S.W.2d 181 (Mo. Ct. App. 1987) (employer's withholding of funds from paychecks of employee did not constitute conversion because if employer owed employee money, it was for work and labor already performed which gave rise to a claim for unpaid wages, a general debt, and general debt claims may not sound in conversion).

The trial court correctly held that Ms. McCool failed to establish the elements of a conversion claim. "It is well settled that the acts alleged to constitute a conversion must be positive and tortious." *Cmty. Bank, Ellisville, Miss. v. Courtney*, 884 So. 2d 767, 773 (Miss. 2004). "To make out a conversion, there must be proof of a wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand." *Cmty. Bank*, 884 So. 2d at 773.

Ms. McCool misses the mark when she argues that COI deducted money from her paycheck to pay the agency's debts. In fact, there was no money available to deduct. 1 R. 120-21; 3 R. 438-39, 442-48. Ms. McCool admitted that COI simply did not have sufficient funds to cover all of its obligations for a short period of time. 1 R. 120-22. COI did not "convert" or "wrongfully possess" funds; it simply prioritized and paid bills as it could.

"Action of tort . . . cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself, or to deprive the rightful owner of it, or destroyed the property." *Cmty. Bank*, 884 So. 2d at 773. Ms. McCool presents no evidence to support a claim that COI or the Individual Defendants engaged in a "wrongful act with the intention to appropriate the property to [itself], or to deprive the rightful owner of it, or destroyed the property." Rather, she admits that COI and the Individual

Defendants used whatever funds were available for valid program purposes and that neither COI nor the Individual Defendants used funds for any improper or personal purpose. 1 R. 120-22.

The trial court also properly dismissed Ms. McCool's conversion claim because it is undisputed that she suffered no damages as a result of the late payments. Ms. McCool's bankruptcy payments were all eventually remitted to the trustee and her bankruptcy case was not dismissed as a result of the late payments. 1 R. 130-33. Ms. McCool's insurance premiums were eventually paid and she admits that she did not lose insurance coverage as a result of the late payment. 1 R. 132-33.

While Ms. McCool generally argues that some FICA taxes remain unpaid, she fails to submit any evidence to show *her* FICA taxes remain unpaid, the amount of *her* FICA taxes she contends remain unpaid or anything other than speculation regarding what future effect the issue may have on her. Ms. McCool's claim with regard to damage arising from FICA taxes is too speculative to entertain.

McCool did not respond to the Individual Defendants' arguments regarding her conversion claim against them in the trial court. Moreover, she failed to make any argument regarding her conversion claim against the Individual Defendants in her appellate brief. Accordingly, summary judgment in favor of the Individual Defendants on McCool's conversion claim should be affirmed.

IV. MS. MCCOOL'S NEGLIGENCE CLAIM ARISING FROM HER EMPLOYMENT WITH COI IS BARRED BY THE MISSISSIPPI WORKERS' COMPENSATION ACT'S EXCLUSIVITY PROVISIONS.

Ms. McCool asserts a negligence claim against COI and the Individual Defendants based on her contention that COI and the Individual Defendants failed to implement sound accounting and financial practices during her employment with the agency. 1 R. 10-11, 55. The trial court

correctly held that Ms. McCool's negligence claim is barred by the Mississippi Workers' Compensation Act's ("Act") exclusive remedy provision. Miss. Code Ann. §71-3-9.

In *Campbell v. Jackson Business Forms Co.*, 841 F. Supp. 772 (S.D. Miss. 1994), the plaintiff asserted a negligent supervision claim against her former employer and individual manager. The Court held that the plaintiff's claim was barred by the Act's exclusive remedy provision: "Because [the plaintiff] alleges that her claim arose out of the employer-employee relationship between her and [her employer], and because the tort claim is clearly grounded in negligence, her negligent supervision claim . . . is barred by the Workers' Compensation Law." *Campbell*, 841 F. Supp. at 774. *See also Disney v. Horton*, No. 2:99-CV-0138, 2000 WL 490848, at *8 (N.D. Miss. Apr. 14, 2000) (granting summary judgment for defendant on negligent infliction of emotional distress claim because "Mississippi cases which have considered the viability of a negligence claim in the employer/employee context refused to allow such an action").

Ms. McCool attempts to avoid the Act's exclusivity provisions by arguing that the Defendants' actions were "deliberate" and "not accidental." However, Ms. McCool does not assert an intentional tort claim; she asserts a **general negligence** claim. According to the Court, "[w]e have held that a mere willful and malicious act is insufficient to give rise to the intentional tort exception to the exclusive remedy provisions of the Act. There must be a finding of an 'actual intent to injure.' Reckless 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).

Royal Oil Co. v. Wells, 500 So. 2d 439 (Miss. 1986), does not support Ms. McCool's argument. In *Royal*, 500 So. 2d at 442, the Court held that "[m]alicious prosecution is an intentional tort and is within those rights of action an employee may maintain against his employer consistent with the compensation act." (emphasis added). Here, Ms. McCool does not

assert an intentional tort claim – she asserts a negligence claim. McCool failed to cite a single case in which a court allowed a *general negligence* claim to proceed in an employment context.

Ms. McCool's negligence claim against the Individual Defendants is also barred by the Act's exclusivity provision. Ms. McCool does not contend that the Individual Defendants acted outside the course and scope of their employment; in fact, she admits that she has no reason to believe that the Individual Defendants held some personal vendetta against her. 1 R. 55-56. "[T]he exclusivity provision of the Mississippi Workers' Compensation Act prohibits an employee injured in the course and scope of his employment by the negligence of a co-employee from recovering from that co-employee." *Steen v. Met. Prop. & Cas. Ins. Co.*, 858 So. 2d 186, 188 (Miss. Ct. App. 2003). The trial court properly dismissed Ms. McCool's negligence claim against COI and the Individual Defendants.

V. MS. MCCOOL'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM FAILS AS A MATTER OF LAW.

A. Ms. McCool's Intentional Infliction of Emotional Distress Claim Is Barred By The Statute of Limitations.

Ms. McCool failed to raise or argue the statute of limitations issue in her brief to this Court. As such, she waived any objection to the Circuit Court's ruling that her intentional infliction of emotional distress claim is barred by the one-year statute of limitations. *See, e.g., Ray v. State*, 828 So. 2d 827, 834 (Miss. Ct. App. 2002) ("Issues not properly briefed and supported by logical argument and, where appropriate, citation to relevant authority will not normally be considered.").

In any event, the trial court correctly held that Ms. McCool's intentional infliction of emotional distress claim is barred by the statute of limitations. Ms. McCool's claim for intentional infliction of emotional distress is based upon events that occurred during her employment and upon the termination of her employment. 1 R. 57-58, 134. Because Ms.

McCool's employment was terminated on July 28, 2004, and she filed this suit on March 23, 2006, her claim for intentional infliction of emotional distress is barred by the one year statute of limitations set forth in Miss. Code Ann. §15-1-35. *See Slaydon v. Hansford*, 830 So. 2d 686, 688 (Miss. Ct. App. 2002)(holding that the statute of limitations applicable to an intentional infliction of emotional distress claim is one year).

B. Ms. McCool's Intentional Infliction Of Emotional Distress Claim Fails Because It Involves An Ordinary Employment Dispute.

Even if McCool's intentional infliction of emotional distress claim was not barred by the statute of limitations, Ms. McCool failed to point to facts which establish the "extreme and outrageous" conduct required for an intentional infliction of emotional distress claim. *See, e.g., Brown v. Inter-City Fed. Bank for Sav.*, 738 So. 2d 262, 264-65 (Miss. Ct. App. 1999) (To state a claim for intentional infliction of emotional distress, a plaintiff must demonstrate conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.").

The basis for Ms. McCool's intentional infliction of emotional distress claim is the termination of her employment. (Appellant's Brief at pp. 29-33). Damages "for intentional infliction of emotional distress are usually not recoverable in mere employment disputes." *Brown*, 738 So. 2d at 265. In fact, "[o]nly 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." *Id.* (citations omitted).

Termination of employment will not support an intentional infliction of emotional distress claim. McCool admits that "[t]he basis for [her] intentional infliction of emotional distress is COI's wrongful and malicious attempted termination of [her employment]."

(Appellant's Brief at p. 32). Yet she fails to cite a single case in which termination of employment was held sufficient to support an intentional infliction of emotional distress claim. Accordingly, the trial court's dismissal of Ms. McCool's intentional infliction of emotional distress claim should be affirmed.

VI. MS. MCCOOL ASSERTS A TORTIOUS INTERFERENCE CLAIM AGAINST MCDOUGAL, WILSON AND SELLERS FOR THE FIRST TIME IN HER APPELLATE BRIEF.

In the Summary Of The Argument section of Ms. McCool's appellate brief, she contends that "[t]he court dismissed without comment the tortious interference claim against Appellee McDougal, Wilson and Sellers." (Appellant's Brief at p. 14). Aside from one paragraph in the Summary Of The Argument section, Ms. McCool does not mention this new claim again.

Ms. McCool did not assert a claim for tortious interference against Ms. McDougal, Mr. Wilson or Ms. Sellers – she did not assert such a claim in her complaint and she did not assert such a claim in response to Defendants' motion for summary judgment. This is Ms. McCool's first and only mention of a tortious interference claim.

Any attempt by Ms. McCool to assert a tortious interference claim is barred because: (i) Ms. McCool did not assert this claim in her complaint, (ii) Ms. McCool did not assert this claim in response to Defendants' motion for summary judgment or otherwise make any argument regarding this claim to the trial court, *see, e.g., Jones*, 915 So. 2d at 513 ("Questions will not be decided on appeal that were not presented in the trial court . . . ."); and (iii) Ms. McCool did not cite to any authority or make any substantive argument regarding this claim in her appellate brief, *see, e.g., Ray*, 828 So. 2d at 834 ("Issues [in appellate brief] not properly briefed and supported by logical argument and, where appropriate, citation to relevant authority will not normally be considered.").

CONCLUSION

The Circuit Court's ruling granting summary judgment in favor of the Defendants is manifestly correct and should be affirmed. Each of Ms. McCool's claims fail as a matter of well established law.

Respectfully submitted,

Appellees Coahoma Opportunities, Inc., Kathy McDougal, Johnny McGlown, Mayo Wilson, and Jimmie Ann Sellers

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellees, Coahoma Opportunities, Inc., Kathy McDougal, Johnny McGlown, Mayo Wilson, and Jimmie Ann Sellers, does hereby certify that the foregoing Brief of Appellees was served this day via United States mail, postage prepaid upon the following:

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SO CERTIFIED, this the 18th day of March, 2010.

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