SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS of the STATE OF MISSISSIPPI
Cause # 2009-CA-01332

DRUCILLA McCOOL — APPELLANT

VS

COAHOMA OPPORTUNITIES INCORPORATED, MAYO WILSON, JIMMIE SELLERS, and KATHY MCDOUGAL — APPELLEES

****

ON APPEAL FROM THE CIRCUIT COURT
OF COAHOMA COUNTY, MISSISSIPPI

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APPELLANT'S REPLY BRIEF

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RUBY WHITE, MSB [redacted]
NORTH MS RURAL LEGAL SERVICES
POST OFFICE BOX 767
OXFORD, MS 38655
662-234-8731 EXT 2109
ATTORNEY FOR APPELLANT

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The facts in this case are straightforward however, they are very much disputed. This case is factually unique and distinguishable from all reported cases and therefore defies application of the cookie cutter approach submitted by Appellees. Accordingly, oral arguments are warranted.

REPLY TO STATEMENT OF CASE

The statement of facts submitted by Appellees regarding the failure to submit funds to vendors and other creditors warrants reversal of the Summary Judgement on the issue of Conversion. Appellee does not contest the essential elements or acts of the conversion.

REPLY TO SUMMARY OF THE ARGUMENT

Contrary to Appellees assertion reversal of the Summary Judgment in this case does not call for a significant expansion or any expansion of the employment at will doctrine or overruling of a long line of precedents. It will require an objective application of both. Entry of Summary Judgement was only warranted if Appellees were entitled to a judgement as a matter of law and there were no genuine issues of facts for the trier of fact to resolve. This was not such a case and Summary Judgment should not have been entered.

Appellant claims as set forth in the Complaint are based on breach of contract, tortuous interference with contract, conversion of funds, and infliction of emotional distress. They do not include a federal claim and the defense of Judicial Estoppel should not have been allowed.

The employment at will doctrine must be considered in the context of the existing facts. Appellee COI stands in a unique position as an employer. Similarly, Appellant stands in a unique position as an employee. Because of its unique standing, Appellee COI has established and implemented a written personnel manual which it presented to Appellant and other employees as establishing the rights and obligation between employer and employee. Because of this unique position, Appellee COI established certain due process and contractual obligations that contradict

any claim of strict employment at will. In essence, Appellee COI has created the "something" referred to in Bobbit t v Orchard, Ltd., 603 So. 2d 356 (Miss. 1992) that defeats a claim of employment at will. Interwoven with the creation of this "something" is the execution of a personnel action form setting forth very specific terms of employment regarding job title, place of assignment, rate of pay and pay per pay period. An added element is Appellee COI's emphasis on the importance of the Manual and these procedures by requiring staff to expend time and energy learning about and reviewing these provisions. Contrary to Appellee assertion, this is not a strict employment-at will relationship.

Amazingly, Appellee COI simply argues it did not have funds to pay Appellant, or the other 158 similarly employed individuals, and therefore it could not have converted the sums reflected in check stubs. Yet each pay period COI churned out 158 check stubs reflecting withholdings for taxes, child support, credit unions, insurance and bankruptcies. The uncontradicted testimony is that Appellee COI devised a scheme in the Summer of 2003 to not remit money deducted for these withholdings. This plan was implemented in September 2003 . At a minimum the trier of fact should have decided if COI had presented a valid defense or a mere sham. Accordingly, the Summary Judgment Order should not have been entered.

RESPONSE TO ARGUMENT I

ARGUMENT

I. Standard of Review .

Entry of Summary Judgment goes not only to the pleadings but to all accompanying

evidence. Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment is proper where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When considering a Motion for Summary Judgment, the deciding court must view all evidence in a light most favorable to the nonmoving party. Busby v Mazzeo, 929 So.2d 369, 372. The court can not try issues of fact on a Motion for Summary Judgement. It may determine only whether there are issues to be tried. The Order of Summary Judgement is not supported by applicable law and should accordingly be reversed.

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

A. MS. MCCOOL BREACH OF CONTRACT CLAIM IS BARRED BY THE STATUTE OF LIMITATION.

The issue of breach of contract should have been reserved for the trier of facts to decide. The Appellees reliance on Sloan v. Taylor Machinery, 501 So. 2d 409 (Miss 1987) is misplaced. In Sloan the court was dealing with parol evidence to show a contractual relationship. The court noted if the written agreement furnishes some objective standards by which its terms may be made definite, the contract is written. The question of whether a personnel manual can constitute a contract of employment has been definitively and affirmatively answered by the court and rational in Bobbitt v. The Orchard. Sloan preceded Bobbitt v Orchard and set forth distinctions between writings which need parol evidence to establish the essence of the agreement and those where the writing establishes the essence of the agreement but needs parol evidence to supply missing details such as rate of pay. In the present case ,there exists a written 180 page personnel manual and a written Personnel Action Form that provided all the necessary terms of an employment contract. Therefore, Sloan is not applicable.

The more analogous cases is Levens v. Campbell, 733 So.2d 753 (Miss 1999). In Levens the court considered an instance in which the Employee Policy Guide stated that the employee's application was not an employment contract and that employment and compensation could be terminated with or without notice. After the application was submitted, the employer wrote in the starting date of employment, job title, department and pay rate. The Mississippi Supreme Court ruled that while that writing did not dis-affirm the employment at will status it contained sufficient information to constitute a writing for purpose of the statute of limitation. The Court ruled the 1 year Statute of Limitation of MCA 15-1-29 and 15-1-35 was not applicable but the 3 year statute of limitation of 15-1-49 controlled.

Appellee misstates Appellant's position regarding the personnel action form. The Personnel Action Form 15 is discussed as it relates to the courts' finding that there was no written contract of employment. The Court was presented more than adequate documentation and deposition testimony to support existence of a written contract of employment. It is the totality of the evidence that supports existence of a contract. The personnel action form which Appellees now seek to dismiss as not being advanced as part of the written contract is specifically required by the personnel manual (TR-82). Appellant and Appellee signed a personnel action form (TR-337). Appellant testified regarding the Personnel Action Form in her deposition (TR-115). This was provided to the court and presumably considered by the Court in making its decision.

As in Levens, the combination of writings is sufficient to establish existence of a written employment contract. The issue was sufficiently presented to the trial court. The existence of the manual with personnel action form and deposition testimony created issue of fact for the trier of facts to decide and therefore a Summary Judgement should not have been entered.

B. COI'S MANUAL CONTAINS AN UNAMBIGUOUS DISCLAIMER PREVENTING FORMATION OF A CONTRACT.

Contrary to Appellees position, the provision is not unambiguous when viewed in the context of the full document and actions of Appellee. The Manual specifically provides for conflicting provisions to be superseded by Funders' Regulations. The Manual then sets forth rights of the employees and responsibilities of employer. The importance and weight of these

provisions are further demonstrated by the the time and resources expended in assuring staff was aware of and followed the document. Finally, the due process steps were included as part of the attempted termination letter. This factual basis raises this case to the "something" other than purely at will status despite the attempted disclaimer. Finally, the parties specifically signed a Personnel Action Forms which contains all the necessary elements of a contract. Arguably, it created a conflict requiring the trier of fact to resolve. However, it did not warrant a decision for Appellees as a matter of law.

1. MCCOOL JUDICIARY ESTOPPED FROM RELYING ON FEDERAL REGULATION TO SUPPORT HER BREACH OF CONTRACT CLAIM.

The Court committed plain error and this court should consider and reverse this issue. While the failure to cite any authority can be treated as a procedural bar, and this Court is under no obligation to consider the assignments. R.C. Petroleum, Inc. v. Hernandez,555 So.2d 1017, 1023 (Miss.1990); Brown v. State, 534 So.2d 1019, 1023 (Miss.1988); Shive v. State, 507 So.2d 898 (Miss.1987); Read v. Southern Pine Elec. Power Ass'n, 515 So.2d 916 (Miss.1987); Devereaux v. Devereaux, 493 So.2d 1310 (Miss.1986); Pate v. State, 419 So.2d 1324 (Miss.1982). The court can and should address the issue.

The claims asserted by Appellant are based on state law. Appellant has not asserted any claim based on federal law. The allegation and finding of collateral estoppel is erroneous and misplaced. The case of Rankins vs American General Finance Inc. 912 So. 2d 725 (Miss. 2005) cited by Appellees would not support the conclusion argued by Appellee. In Rankins the court remanded the case based on Plaintiff s repeated assertions in their complaint and memorandum in

support of remand they would not assert TILA claims. The court remanded based on these repeated assertions. In the instant case, the case was removed to Federal Court by Appellee pursuant to 28 U.S.C. 1334 and 1452. The sole basis for the removal was Appellant filing a Chapter 13 Bankruptcy, a tactical move often used by Defendants in Appellee's position. The court remanded this case to state court stating as the **case is merely related to a bankruptcy case** the court is required to abstain and remand the case. 28 U.S.C. 1334(c)(2). The court struck Appellant's memorandum in support of remand and remanded the case based on the Bankruptcy connection. (Tr 388-390).

Interestingly, two additional cases filed against Appellee at the same time in the same Circuit Court were not removed to Federal Court by Appellees. Appellees did not attempt to Remove either to Federal Court.

2. THE REGULATION UPON WHICH MCCOOL RELIES DO NOT PROVIDE A PRIVATE RIGHT OF ACTION.

Contrary to Appellee's argument, Appellant does not assert a claim under federal regulations. Appellant has not and does not assert an independent claim of action under the Head Start Act. Appellant's cause of action is supported by language in the Manual. Due to Appellee COI special standing the provisions of the Head Start Act are relevant as it explains COI's position. This case is distinguishable from Holocheck v. Luzerne, 285 F. Supp. 2d 491 (M.D. Pa. 2005) cited by Appellees. In Holocheck the claimant attempted to bring an action under 42 U.S.C. 1983 , a Federal Cause of Action. Appellant has not filed a 1983 action or any other federal cause of action. In this instance, appellant has basic garden variety state. The manual adopted by COI creates procedural steps required by COI in terminating employees. It does not

prevent COI from terminating an employee. However, it does establish the procedures required to terminate an employee. Because of these requirements, Appellee COI is not comparable to other private employees.

3. MS. MCCOOL THIRD PARTY BENEFICIARY CLAIM FAILS AS A MATTER OF LAW.

Appellee erroneously argue COI contemplated no benefits for its employees. Head Start Regulation contains a number of provisions. There are a number of beneficiaries of the Regulations including the employees. The Regulation required COI to implement written personnel policies regarding termination of head start employees. To say that the personnel manual provision were not for the benefit of the employees is unfathomable.

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

The issue of conversion was properly a matter for the trier of fact to resolve. Appellees argues there was no money to convert. The testimony establishes that during the summer of 2003 COI established a plan to use deduction from the employees paycheck to pay agency expenses. The proof indicates this plan was put in place as early as September 2003. Appellee continued this plan through December 2003. As of the time of the deposition Appellee COI still owed a couple hundred thousand dollars withheld for FICA and federal taxes. Appellee COI does not contest it still owes FICA and Federal Taxes for 2003. This represents wages that were earned by Appellant and 158 similarly employed staff. Unbelievably, Appellee argues Appellant must prove part of the couple hundred thousand dollars is hers. Appellant's check stubs provided sufficient proof to establish she is within the pool of employees for whom Appellee COI did not forward money (TR 515-517). The records says the deduction were in fact made. Appellee can

not contradict their own records by claiming there was no money. In either event, it establishes a question of facts for the trier of fact to resolve. Community Bank of Ellisville v. Courtney, 884 so. 2d 767 defines conversion as wrongful possession or exercise of a dominion in exclusion or defiance of the owner's rights, or of an unauthorized and injurious use, or a wrongful detention after demand. Appellee action by definition constitutes conversion.

It is inconceivable that Appellees COI can contend its behavior with regard to the employees wages was not wrongful and not for its benefits. By not remitting funds withheld, COI was able to obtain services of its employees at less than minimum wages, use funds belonging to employees interest free to pay creditors and maintain its operations. The facts that the funds were used for valid programs purposes did not give it the legal right to use money, it led its employees into believing it had been disbursed to the employees creditors. As stated in First Investor Corp v Rayner, 728 So. 2d 228, intent to do wrong is not needed.

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

Contrary to Appellant's assertions Appellee negligence claim is not barred by the exclusivity provision of the Mississippi Workers' Compensation Act. The court has set out elements to avoid the exclusivity of the act. In Griffin v Futorian Corp, 533 So. 2d 461 the court stated the injury must be caused by the wilful act of the employer or another employee acting in the course of employment or furtherance of the employer's business and the injury must be one that is not compensable under the act. The injuries suffered by Appellant did not result from accidental injury. Appellant requested declaratory relief ordering Appellant afford her an administrative hearing, actual, compensatory and incidental relief due to damages to her

professional reputation, loss of employment opportunities and earning potential, reinstatement to position as a teacher, back pay compensatory damages for reduced wages and punitive damages (TR12-13). This is not compensable under the workers compensation.

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

Appellant claim for Intentional Infliction of emotional distress is based on a continuing course of action by Appellee. The Statute of Limitation is not an issue. It is undisputed that Appellee McDougal did not have the authority to terminate Appellant. Appellee Wilson testified the letter of July 28, 2004 was not a termination letter. The issue of if Appellant had been terminated, and if so when, remains a point of contention. Contrary to Appellee's contention, Appellant's claim is not an ordinary employment dispute. The action of COI is in the nature of a continuing tort. Under COI Manual, until the proper procedure is followed to terminate an employees the termination is not final. The letter sent July 28th was not the date of termination. According to Appellee Wilson, The termination was not final. According to Wilson there were attempts to resolve the matter through the time they obtained notice from the court. The court in this case based it's decision on a conclusion that the behavior was a mere employment dispute and did not rise to a level of extreme and outrageous. The course of conduct by Appellee is despicable enough for submission to the trier of fact for resolution.

As stated in Senseney v. Mississippi Power Co. 914 So. 2d 1225 (Miss Ct. App 2005) the totality of the circumstances must be viewed in determining if the action is extreme and outrageous and beyond the bounds of decency. Accordingly summary judgment should not have been entered

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

Appellees misstates Appellant's statement in her brief. Specifically the brief recounts the language from the initial complaint which includes the allegation of tortuous conduct by Appellee (TR11).

CONCLUSION

The Court entry of Summary Judgment constitutes reversible error and should accordingly be reversed and remanded.

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CERTIFICATE OF SERVICE

I, Ruby White, Counsel for Appellant, Drucilla McCool, do hereby certify that I have this day mailed by U.S. mail, postage prepaid the original and three copies of Appellant's Brief to Supreme Court Clerk, at her regular mailing address of Post Office Box 249, Jackson, Mississippi 39205-0249 and a true and correct copy of same to Honorable Paula Ardelean at Post Office Box 22567, Jackson, Mississippi 39225-2567, Honorable William O. Luckett, Post Office Drawer 1000, Clarksdale, Mississippi 38614-1000, and Honorable Albert Smith at Post Office Box 478, Cleveland, Mississippi 38732-0478.

This the 5th day of May 2010.

Ruby White