IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2010-TS-01015

MIGNON WILLIS — APPELLANT

V.

REHAB SOLUTIONS, PLLC — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI
No. CV08-054(R)L

BRIEF OF APPELLEE

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ATTORNEYS FOR APPELLEE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. The Defendant and Appellant Mignon Willis;
2. The Plaintiff and Appellant Rehab Solutions, PLLC;
3. Chad Willis, Member of Appellee Rehab Solutions, PLLC;
4. Renee Willis, Member of Appellee Rehab Solutions, PLLC;
5. L. Bradley Dillard, counsel for Appellee;
6. R. Shane McLaughlin, appellate counsel for Appellant;
7. Nicole H. McLaughlin, appellate counsel for Appellee.
8. Sam Griffie, trial counsel for Appellee.
9. Circuit Judge James Roberts, trial judge.

Respectfully submitted,

L. Bradley Dillard
Attorney of record for Appelle

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STATEMENT OF POSITION REGARDING ORAL ARGUMENT

Appellee Rehab Solutions, PLLC ("Rehab" or "Appellee") agrees that this case involves an issue of first impression, involving application of existing law to the issue of whether an employer may recover paid but unearned wages under an unjust enrichment theory from an intentionally deceitful and manipulative former employee who concealed her wrongdoing. Accordingly, Rehab agrees that oral argument is proper.

STATEMENT OF ISSUES

1. Whether Rehab is entitled to recover paid but unearned wages from the Appellant, a former employee, under a theory of unjust enrichment where the Appellant intentionally failed to perform critical aspects of her job which were under her exclusive control, and concealed such failure from her employer.

2. Whether the record supports recovery under an unjust enrichment theory in this case.

3. Whether the jury's compensatory damages award complies with Mississippi law.

4. Whether the discovery rule applies in this case to toll the applicable statute of limitations.

5. Whether the agreed upon jury instruction C-14 concerning an implied duty of good faith and fair dealing constitutes reversible error.

6. Whether the $50,000.00 punitive damages award is supported by sufficient evidence.

STATEMENT OF THE CASE

(A) Procedural History

On April 8, 2008, Rehab Solutions, PLLC ("Rehab" or "Appellee") filed its Complaint against Mignon Willis ("Appellant" or "Willis") in the Circuit Court of Lee County, Mississippi. (Record, "R." pp. 00003 - 00007). Upon completion of discovery, the trial of this case began on May 17, 2010, before the Honorable James L. Roberts, Jr., Circuit Court Judge. (R. p. 00058; T. p. 2). After Rehab and Appellant announced ready, a jury consisting of twelve (12) persons and two (2) alternates was qualified and seated and heard the evidence presented on behalf of Rehab and the Appellant. (T. pp. 56 – 58). On May 20, 2010, after all evidence was heard, instructions of law were given to the jury and counsel made closing arguments, the jury retired to consider its verdict and ultimately returned with a verdict in favor of Rehab in the amount of $133,543,17 in compensatory damages.[1] (T. p. 657). After being further instructed on the issue of punitive damages, the jury again retired and quickly returned with a verdict in favor of Rehab in the amount of $50,000.00 punitive damages. (T. pp. 669 - 674).[2] Thereafter, on May 24, 2010, the trial court entered a final judgment in favor of Rehab and against Appellant in the total amount of $183,543.17. (R. pp. 00211 - 00212). After Appellant's post trial motions (R. 660, 677; R. pp. 209 - 210) were denied by the trial court (R. pp. 209 - 210), Appellant filed her notice of appeal on June 21, 2010. (R. pp. 00213 - 00214).

[1] Prior to the case being submitted to the jury, trial judge James Roberts directed a verdict in favor of Rehab in the amount of $13,371.21, said amount constituting penalties and interest incurred and paid by Rehab due to Appellant's intentional and tortuous acts. (T. pp. 586-87).

[2] Interestingly, while the compensatory verdict was 11-1 in favor of Rehab, the jury returned a 12-0 verdict in favor of Rehab on the issue of punitive damages. (T. pp. 657-659; 674 – 675).

(B) Facts

Appellant was hired by Rehab in January 20 2003, to serve as an in-house accountant. (Transcript, "T", p. 97). Prior to working for Rehab, Appellant had worked in Florida as a certified public accountant, partially self employed, for a number of years. (T. pp. 98 – 99, 302-03). By the end of 2003, Appellant's job duties and responsibilities included, *inter alia*, preparation of all requisite tax returns, preparation and payment of unemployment taxes, reporting of social security information, payment of vendors, reconciliation of bank accounts/statements, and picking up and handling of business mail. (T. pp. 100 – 101, 301-02). By virtue of her education, training and experience in the field of accounting, Appellant was absolutely capable of performing these assigned duties without the need for assistance. (T. pp. 101-103, 303-04). It is uncontradicted that the members of Rehab, siblings Chad Willis and Renee Willis, reasonably placed absolute trust in Appellant based both on her qualifications, and her relationship with them as a first cousin. (T. pp. 101-103, 303-05, 490).

The first notice that either Chad or Renee had of a potential problem, or the failure of Appellant to perform her assigned duties, was on January 7, 2008 when Rehab was notified by Phil Poe, their loan officer at BancorpSouth in Tupelo, that a problem had developed with their mortgage loan refinancing because tax liens were in place on the building and real property; BancorpSouth could not refinance the existing mortgage until such time as the liens were lifted. (T. pp. 115-118; 121; 289). When confronted with the issue of unpaid unemployment taxes and the liens, Appellant adamantly argued that it was a mistake, as she had filed all required returns and paid the owed taxes. (T. p. 118). On January 11, 2008, Rehab retained Linda Crawford and Amanda Angle of Nail McKinney Accounting Firm to assist in determining the true financial status of the business. (T. pp. 120-122, 319). On January 14, 2008, as the Nail McKinney

accountants entered the Rehab business premises, Appellant fled out of the back door, and refused to return to Rehab thereafter despite repeated requests that she do so. (T. pp. 123-126, 325-26, 346-48).

Upon delving into the Rehab books and records, Ms. Crawford and Ms. Angle[3] determined that Appellant had wholly failed to perform numerous key aspects of her job, such as (1). failing to reconcile the Rehab bank accounts and statements since approximately June of 2004; (2). failing to file corporate tax returns for 4 years; (3). failing to pay multiple quarters of unemployment taxes resulting in liens being placed on the Rehab property, (4). failing to open and address mail, including mail from the Internal Revenue Service and Mississippi Unemployment Security Commission[4], and (5). failing to pay vendors. (T. pp. 395-408, 450-51). Both Ms. Angle and Ms. Crawford opined that the errors and omissions of Appellant were so egregious that they were intentional in nature and not mere negligence, and that Appellant had concealed her actions from Chad and Renee for many years. (T. pp. 410-412; 462-463).[5]

At trial, although Appellant initially denied any wrongdoing or mistakes under cross-examination by counsel for Rehab (T. pp. 303, 327), after hearing the testimony of Rehab's fact and expert witnesses, Appellant changed her testimony to concede that she had made some mistakes, and that $13,371.21 in penalties and interest were incurred by Rehab due to her errors.[6]

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[3] Both Ms. Crawford and Ms. Angle were accepted by the trial court as experts in the field of general accounting and/or Quickbooks with no objection by counsel for Appellant. (T. pp. 392, 442-43).

[4] Appellant's failure to even open mail was made more egregious in light of her deposition and trial testimony wherein she admitted that bright orange envelopes such as those received by Rehab, many of which were marked as "Urgent" or with a similar designation, should immediately be addressed. (T. p.298). The record contains a box of such unopened and/or unattended to mail for the Court's review. (Trial Exhibit "T.E.", "P-28").

[5] Appellant's efforts to conceal her activity included having vendors and others contact her directly on financial matters, and receiving and hiding unopened mail in her office drawers. (T. p. 487).

[6] Trial judge James Roberts granted a directed verdict in favor of Rehab as to these elements of damages. (T. pp. 586-87).

STANDARD OF REVIEW

This honorable Court will review issues of law *de novo*. Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601, 609 (Miss. 2009). The standard of review for a jury verdict, as in the case at hand, is whether based on the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found. Sivira v. Midtwon Rest. Corp., 753 So. 2d 492, 494 (Miss. Ct. App. 1999). A jury verdict will only be reversed on appeal where "it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of the credible evidence". Garris v. Smith's G&G, LLC, 941 So. 2d 228, 231 (Miss. Ct. App. 2006).

SUMMARY OF THE ARGUMENT

The trial court properly allowed the jury to consider Rehab's unjust enrichment claim given the facts of this case, wherein an employee intentionally failed to perform key aspects of her job duties, and concealed that failure from her employer. Unjust enrichment is a long recognized cause of action in the state of Mississippi, the elements of which fit squarely within the facts of this case. Mississippi public policy does not prohibit an award of damages as determined by the trier of fact after a four day trial; indeed, public policy dictates that a person, such as Appellant, cannot be unjustly enriched for her intentional and deceitful actions.

As correctly found by Lee County Circuit Court Judge James Roberts, the discovery rule tolled the normal three (3) year statute of limitations found at Miss. Code Ann. section 15-1-49. Ample evidence existed at trial that Appellant controlled the business mail and exclusively handled the business finances and tax obligations. The trust imposed on her, and the responsibility she readily accepted, was based on her family relationship with Chad Willis and Renee Willis, her education and years of employment as an accountant in Florida, and her

representations to Chad and Renee Willis that she could, and would, faithfully handle these responsibilities. Further, Appellant's intentional deceit and concealment of her, at times, utter failure to perform the key aspects of her employment render the discovery rule especially applicable in this cause.

Assuming Appellant correctly stated the law on an implied duty of good faith and fair dealing in the context of an employee at will, Appellant has waived any objection as the instruction at issue was submitted by agreement of counsel. It is well settled that any objection to an instruction is waived if not made prior to submission of the instruction. Here, all counsel agreed that the instruction was proper. Further, the instructions as a whole accurately stated the law, and a viable cause of action against the Appellant. The jury simply returned a general verdict for compensatory damages against the Appellant; there were no jury interrogatories submitted and no way to determine whether the jury even considered this instruction in their deliberations. As ample basis existed for a verdict in favor of Rehab in this cause, any error was merely harmless and thus did not justify reversal.

Lastly, the proof at trial demonstrated that the Appellant willfully and intentionally took actions which caused harm to Rehab, and further concealed her malfeasance for many years. Appellant repeatedly assured the owners of Rehab that "she did not make mistakes" and that she was in fact performing the duties entrusted to her. The award of $50,000.00 in punitive damages was not excessive given the large compensatory award and was supported by the evidence introduced at trial.

ARGUMENT

I. THE COMPENSATORY DAMAGES AWARDED TO REHAB UNDER ANY THEORY WERE SUPPORTED BY THE EVIDENCE AND APPLICABLE LAW

Appellant attacks the compensatory damages awarded by the Lee County, Mississippi jury in the amount of $133,543.17 on a number of grounds.[7] First, Appellant argues that Rehab could not recover paid but unearned wages from Appellant under a theory of unjust enrichment.[8] Unjust enrichment is defined as:

> An . . .action based on a promise, which is implied in law, that one will pay a person what he is entitled to according to "equity and good conscience." Thus, the action is based on the equitable principle "that a person shall not be allowed to enrich himself unjustly at the expense of another." It is an obligation created by law in the absence of any agreement; therefore, it is an implied in law contract.

1704 21st Avenue, Ltd. v. City of Gulfport, 988 So. 2d 412, 416 (Miss. Ct. App. 2009); see also Joel v. Joel, 43 So. 3d 424, 432 (Miss. 2010). As an initial matter, Appellant did not object to the unjust enrichment instruction, marked as C-12, being proffered to the jury. Absent a contemporaneous objection to the instruction, it is well settled that this issue is waived on appeal. "In order to preserve a jury instruction issue on appeal, a party must make a specific objection to the proposed instruction in order to allow the lower court to consider the issue". Coleman v. Ford Motor Co., 2011 WL 71473 *9 (Miss. Ct. App. 2011) (quoting Crawford v. State, 787 So. 2d 1236, 1244-45 (Miss. 2001)). Here, not only was no objection made, but counsel specifically agreed upon the instructions to be submitted to the jury. (T. pp. 590-91). In the absence of a

[7] For convenience sake, Appellant's issues I., II. and III. are addressed collectively in Argument I. of Rehab's brief.
[8] Rehab agrees with Appellant that this issue appears to be one of first impression in the State of Mississippi.

timely objection, and in light of Appellant's consent to Instruction C-12 on the unjust enrichment issue, this issue simply has not been preserved for appeal and cannot be considered by this honorable court.

Nonetheless, should the court deign to consider this issue the facts of the instant case fall squarely within the unjust enrichment doctrine as pronounced by the Mississippi appellate courts. At trial, evidence was produced from Chad Willis and Renee Willis, and more importantly from the Appellant, that Appellant was paid $30 per hour, and approximately $255,000.00 over a five-year period, to perform accounting and related functions. (T. pp. 102; 302; 356). Crucial aspects of her job included preparation and submission of various tax documents and returns, calculation and payment of various state and federal taxes, preparation of social security documentation, payment of vendors and reconciliation of bank statements. (T. pp. 300-301). Appellant testified that she was capable of performing these tasks and was indeed well qualified to do so. (T. p. 303-04). These key matters were exclusively within the Appellant's purview and were critical components of her employment with Rehab.[9] (T. pp. 300-04).

Inexplicably, Appellant intentionally refused to perform a significant number of these "life or death" duties, and purposefully concealed same from the owners of Rehab. Specifically, Appellant did (or failed to do) the following:

(1). Appellant failed to reconcile the Rehab bank accounts and statements since approximately June of 2004.

(2). Appellant failed to file corporate tax returns for 4 years.

[9] As testified to by Rehab's owners, Appellant was hired so that these matters could be brought "in house" rather than being handled by an outside accountant. (T. p. 97). To that end, Appellant was provided with her own private office and computer, and was very well paid, to perform these tasks. (T. pp. 99-100, 129, 136-38).

(3). Appellant failed to pay multiple quarters of unemployment taxes resulting in liens being placed on the Rehab property.

(4). Appellant failed to open and address mail, including mail from the Internal Revenue Service and Mississippi Unemployment Security Commission.

(5). Appellant failed to pay vendors, resulting in damage to Rehab's business reputation. (T. pp. 300-01).

As conceded by Appellant, these duties were ones for which she was hired, and which she was expected to complete. (Id.). Appellant also acknowledged just how important these matters were to Rehab. (T. p. 566). Despite this, it is indisputable that Appellant did not simply fail, but intentionally refused to perform these duties, duties for which she was paid the sum of approximately $255,000.00. (T. pp. 102, 356). In light of the facts of this case, a claim of unjust enrichment is squarely on point. As held in 1704 21st Avenue, Ltd., supra, in "equity and good conscience", the Appellant should not "be allowed to enrich [herself] unjustly at the expense of [Rehab]." Unquestionably, Appellant would be unjustly enriched if allowed to retain hundreds of thousands of dollars she was paid to perform the above described tasks; this is especially true in light of expert Amanda Angle's testimony that "there was less done than done" regarding Appellant's job duties. (T. p. 489) (emphasis added). Although counsel for Appellant argues that such a result is against public policy[10], no Mississippi case has held this.

Recognizing the absence of controlling or even persuasive law on this point in either Mississippi state or federal courts, Appellant relies exclusively on a 1978 opinion from New York and a 1961 opinion from New Jersey. Even these authorities, however, recognize that an employee may be required to disgorge wages paid to them where fraud, mistake, duress, or

[10] No one would argue that, for instance, an individual who was paid to paint a house, and who intentionally failed to do so, should not be required to refund at least a portion of his or her pay. Further, no logical person would argue that an attorney hired to perform a task(s) would be unjustly enriched if he or she retained a fee yet failed to perform the services for which the attorney was hired. No distinction of merit exists between those scenarios, and Appellant's employment at Rehab.

implied or express agreement exist, or if similar facts are present. Nutrition Foundation, Inc. v. Gitzen, 62 A.2d 943 (N.Y. App. Ct. 1978) in fact merely held that "an employer may not recover wages paid to or other compensation received by an employee during a period of completed employment upon allegations of negligence in the performance of his duties....". As is evident from the record, many claims aside from negligence were advanced by Rehab. (R. pp. 00003 – 00007).[11]

Similarly, the second case relied upon by Appellant, being Toker, Inc. v. Cohen, 169 A.2d 838 (N.J. Sup. 1961), concerned advances made to a commissioned salesman which the employer sought recovery of post employment. Although that Court announced a general rule that "in the absence of fraud, duress, mistake or express or implied agreement" an employee would not normally be required to repay wages, the Court expounded on the ruling by holding that "a showing that he accepted [payment] in bad faith with no intention of making sales for the employer might amount to fraud sufficient to enable the employer to recover the advances". Toker, Inc., 169 A.2d at 844. In the case at hand, the facts presented to the jury demonstrate that Appellant's actions went far beyond mere negligence, and rose to a willful and intentional refusal to perform her assigned job duties. Further, proof was presented to the jury that Appellant intentionally and fraudulently concealed her wrongdoing so that it would not be discovered by the owners of Rehab, going so far as to hide mail, instruct vendors and others to talk only to her, and lying to the owners of Rehab by assuring them that all of her duties were in fact properly performed. (T. pp. 444-463). Appellant's deceit continued even during initial cross-examination by counsel for Rehab when she continued to deny any wrongdoing at all, or any failure to perform her duties. (T. p. 327). Only after accountants Angle and Crawford

[11] In addition to negligence, the trial court instructed the jury on the following causes of action: intentional misrepresentation, negligent misrepresentation, unjust enrichment, duty of good faith, detrimental reliance, gross negligence and breach of contract. (T. pp. 603-606).

testified at length regarding Appellant's actions and omissions did she admit to any failure to perform her job duties. (T. pp. 510-12, 557, 566).

The jury heard abundant testimony, and reviewed numerous exhibits, which supported a finding that Appellant's actions went far beyond mere negligence. It has been held by both Mississippi appellate courts, that findings by the trier of fact "will be respected when they are supported by reasonable evidence in the record and are not manifestly wrong". Cox v. Cox, 2011 WL 208312 (Miss. Ct. App. 2011); Allied Steel Corp. v. Cooper, 607 So. 2d 113 (Miss. 1992). In the case at hand, more than reasonable evidence existed in the record to support a claim for unjust enrichment[12] under Mississippi law based on Appellant's undisputed acts and omissions. Accordingly, there is no basis for reversal of any portion of the jury's compensatory damages award.

In addition to a claim for repayment or disgorgement of a portion of Appellant's unearned wages, in its Complaint Rehab also asserted a claim for damages to its business reputation. (R. pp. 00003-00007). This claim was supported by the testimony of Rehab's owners, and the testimony of vendors Carolyn Fondren and Barry Drury. Ms. Fondren testified that her employer sells primarily t-shirts and similar items, and has been a supplier to Rehab for many years. (T. p. 277). Prior to the employment of Appellant, Ms. Fondren's employer had no trouble being paid in a timely manner, and in fact typically received a check for payment in full by return mail. (T. p. 277). Following the hire of Appellant, however, payments were made significantly slower, if at all. (T. pp.278-279). The non-payment issue became so severe and pervasive that Ms. Fondren's business began requiring pre-payment from Rehab, a practice which it only utilized for poor or risky customers. (T. p. 280).

[12] Although Appellant argues that a claim of unjust enrichment is improper because "employment at will" is a contract, Appellant ignores the fact that a breach of contract claim did in fact go to the jury for consideration, and provides a basis upon which the verdict could have been returned. T. pp. 606-07).

Vendor Barry Drury of Duratech also testified at trial; like Ms. Fondren, Mr. Drury had a long relationship with Rehab and knew the owners personally.[13] (T. p. 429). Like Ms. Fondren, Mr. Drury had received prompt payment on invoices from Rehab until Appellant was hired; after that time payments were past due when made at all. (T. pp. 429-430). Indeed, Mr. Drury testified that his employer refused to do business with Rehab due to inability to receive payment. (T. pp. 431-432). Based on the testimony of Ms. Fondren and Mr. Drury, clearly a reasonable basis existed for the jury to award damages to the business reputation of Rehab.[14]

> Damages are deemed speculative only when the cause is uncertain, not when the amount is uncertain. Parker Tractor & Implement Co. v. Johnson, 819 So.2d 1234, 1239 (Miss. 2002). "Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages." Cain v. Mid-South Pump Co., 458 So. 2d 1048, 1050 (Miss. 1984). When loss is realized, but "the extent of the injury and the amount of damage are not capable of exact and accurate proof," damages may be awarded if the evidence lays "a foundation which will enable the trier of fact *to make a fair and reasonable estimate* of the amount of damage." Id. at 1050.

Warren v. Derivaux, 996 So.2d 729, 737 (Miss. 2008). Based on the proof developed by Rehab at trial, the jury certainly had a basis to award damages in an amount which, in its determination, would compensate Rehab. These damages could have been in either the form of a portion of the wages paid to Appellant, for damage to the business reputation of Rehab, or a combination of the two.[15] When viewed as a whole, the record supports the jury's verdict under

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[13] Both Ms. Fondren and Mr. Drury testified that because of their relationships with Chad Willis and Renee Willis, and because Appellant advised them to only deal with her on payment issues, they did not contact Chad or Renee to discuss non-payment issues. (T. pp. 431; 437-438).

[14] Although Appellant may dispute the testimony regarding damages to Rehab's business reputation, "it is well-settled law that the jury determines the credibility of witnesses and resolves conflicts in the evidence". Sullivan v State, 2011 WL 1366441, (Miss. Ct. App. April 12, 2011).

[15] Based on the approximately $255,000.00 paid to Appellant in wages during her employment, and Rehab's estimate that she performed approximately one half of her assigned duties, the jury was asked to award damages to Rehab in the amount of $127,500.00 in disgorgement of unearned wages, and an unspecified amount for damage to Rehab's business reputation. (T. p. 646).

an unjust enrichment theory of otherwise, and fully supports the compensatory verdict awarded by the jury. No basis exists to reverse the Lee County, Mississippi's verdict in favor of Rehab in any fashion.

II. THE TRIAL PROPERLY FOUND THAT NONE OF REHAB SOLUTIONS' CLAIMS WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

Appellant seeks reversal of a portion of the jury verdict in favor of Rehab based upon the three (3) year statute of limitations found at Miss. Code Ann. section 15-1-49, as to those damages arising or accruing prior to April 8, 2005. In doing so, Appellant argues that the well established "discovery rule" which can provide relief from the applicable statute of limitations is inapplicable. This doctrine provides that "a cause of action does not accrue until a plaintiff knows or reasonably should have known of his injury". Robertson v. Chateau Legrand, 2009 WL 3353453 *5 (Miss. Ct. App., Oct. 20, 2009).

> A latent injury is one where the plaintiff is "precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question ... [or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." "The term 'latent injury' while seemingly vague does have definitive boundaries .... [but][b]ecause there is no bright line rule, the specific facts of the case will determine whether the plaintiff knew or reasonable [sic] should have known that an injury existed." [internal citations omitted]

Robertson, 2009 WL 3353453 at *5; see also Stringer v Trapp, 30 So. 3d 339 (Miss. Ct. App. 2010). In the case at hand, Appellant carefully concealed her failure to perform her assumed job duties, and Rehab was unaware of her actions/omissions and resulting damages until approximately December of 2007 when it was informed by Phil Poe of Bancorpsouth that multiple tax liens had been placed on its business premises, and that Bancorpsouth would be unable to renew the existing loan so long as these liens existed. (T. p. 289). Rehab had no reason to suspect that Appellant failed to prepare and file tax documents and returns, failed to

reconcile bank statements, failed to pay vendors and allowed tax liens to be placed on the Rehab property until this time. The testimony of Chad and Renee Willis indicated that they had no reason to discover Appellant's intentional wrongdoing prior to December of 2007, given their complete trust in her (which she encouraged), and her assumption of these duties to the exclusion of all others (at her request). (T. pp. 104; 122-123).

Application of the discovery rule would therefore allow Rehab to file suit within three (3) years of discovering Appellant's wrongful acts; here, clearly suit was filed in a timely fashion as this case was commenced within six months of the discovery of her acts and resulting damages.

III. AGREED UPON INSTRUCTION C-14 DOES NOT REQUIRE REVERSAL

Instruction C-14 is attacked by the Appellant on the basis that no implied duty of good faith and fair dealing exists in the context of an employment-at-will contract. While Appellant is correct that generally no such duty is recognized, the cases addressing this issue appear to merely hold that an employee suing for wrongful termination may not rely upon this cause of action in seeking a recovery.

> While "[t]here are numerous Mississippi contract cases that state that all contracts contain an implied duty of good faith and fair dealing, [the Supreme Court] has never recognized a cause of action based on such a duty arising from an employment at-will relationship." Young v. North Miss. Med. Ctr., 783 So. 2d 661, 663-64 (Miss. 2001) (emphasis removed). "[A]t-will employment relationships are not governed by a covenant of good faith and fair dealing which gives rise to a cause of action for wrongful termination." Id.; see also Cothern v. Vickers, 759 So. 2d 1241, 1248 (Miss. 2000) ("there is no implied duty of good faith and fair dealing in employment contracts.") Thus, the validity of terminations under at-will contracts are not to be viewed through a good faith lens. Otherwise, the language that an employer may validly fire for a good, bad, or no reason becomes a nullity. Harris v. Mississippi Valley State Univ., 873 So. 2d 970, 986 (Miss. 2004).

Miranda v. Wesley Health Sys, LLC, 949 So. 2d 63, 68 (Miss. Ct. App. 2006). In the case at hand, the court is merely faced with a situation which does not implicate the employment-at-will rule, but which rather concerns a former employee's obligation to, in good faith, fulfill the terms

and conditions of her employment for which she was being well paid.[16] Appellant could obviously have sued her employer, Rehab, if she had in fact performed her job and was not paid for it; here, Rehab simply sought recovery of wages paid but not earned, due to Appellant's willful failure to perform the key duties assigned to her and which she willingly assumed, and her intentional concealment of this failure on her part. The cases relied upon by the Appellant are inapplicable to the facts of the case at hand, and do not justify reversal of the Lee County jury's verdict in favor of Rehab.

Even should the Court agree with Appellant's interpretation on this issue, any objection to Instruction C-14 was waived and was not preserved for trial. The trial court submitted instructions C-1 to C-26 upon agreement of counsel, and no objection was made to any instruction presented to the jury. After being asked whether counsel agreed to the instructions C-1 through C-26, both counsel expressly represented that they in fact agreed to these instructions and withdrew any previously tendered instructions. (T. pp. 590-91).

It is well settled in Mississippi jurisprudence that "[i]n order to preserve a jury instruction issue on appeal, a party must make a specific objection to the proposed instruction in order to allow the lower court to consider the issue". Coleman v. Ford Motor Co., 2011 WL 71473 *9 (Miss. Ct. App. 2011) (quoting Crawford v. State, 787 So. 2d 1236, 1244-45 (Miss. 2001)). This requirement of a contemporaneous objection is so rigidly enforced,. that a mere objection that an

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[16] The claim asserted by Rehab is akin to the duty of loyalty owed to employers by their employees under Mississippi law.

> In 2 Am. Jur. Agency section 252 (1936), it is said: 'It is well settled that an agent is a fiduciary with respect to the matters within the scope of his agency. The very relation implies that the principal has reposed some trust or confidence in the agent. Therefore, the agent or employee is bound to the exercise of the utmost good faith and loyalty toward his principal or employer. He is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto. His duty is to act solely for the benefit of the principal in all matters connected with his agency. This is a rule of common sense and honesty as well as of law.'

Laseter v. Sistrunk, 168 So.2d 652, 656 (Miss. 1964).

instruction is "prejudicial" will not suffice to preserve the issue for appeal. Irby v. State, 893 So. 2d 1042 (Miss. 2005). Here, not only was no objection made to Instruction C-14, but the parties via counsel agreed to the instruction being submitted to the jury. In light of the foregoing, this issue is simply not preserved for appeal, and thus cannot be considered by this Court.

Further, even if the instruction is deemed to be erroneous, jury instructions must be reviewed as a whole, and not in isolation. Salanki v. Ervin, 21 So. 3d 552 (Miss. 2009); Vaughn v. Ambrosino, 883 So. 2d 1167 (Miss. 2004); Rials v. Duckworth, 822 So. 2d 283 (Miss. 2002). If the instructions as a whole accurately state the applicable law, then the appellate court will not reverse a jury's verdict due to a single imperfect instruction. Mizell v. Cauthen, 169 So. 2d 814 (Miss. 1964); see also Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35 (Miss. 1989). Further, errors in jury instructions do not require reversal where the record contains no reasonable basis for a verdict different than that returned by the jury. Green v. Middleton, 171 So. 2d 500 (Miss. 1965). In the case at hand, the instructions as a whole accurately reflected the law applicable to this case, and based on the evidence and testimony submitted by the parties, the jury had no reasonable basis to find in favor of the Appellant. This fact is indeed confirmed by the trial court's grant of a partial directed verdict in favor of Rehab in the amount of $13,721.21 prior to the case being submitted to the jury, and which was premised upon Appellant's confession that these damages were in fact incurred due to her acts and/or omissions. (T. pp. 586-87). Regardless of the theory under which the jury traveled in reaching its verdict, therefore, the evidence and Appellant's admission required a verdict in favor of Rehab; consequently, for the foregoing reasons reversal of the jury's verdict in favor of Rehab is not required merely due to submission of Instruction C-14.

IV. THE FACTS PROVEN AT TRIAL SUPPORT THE JURY'S AWARD OF PUNITIVE DAMAGES

Appellant makes only a cursory argument on this point, contending that insufficient evidence was presented at trial to justify a punitive damages award. Mississippi Code Annotated section 11-1-65, which governs punitive damages awards, states in part that:

> (1) In any action in which punitive damages are sought:
>
> (a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

Miss. Code Ann. section 11-1-65(1)(a). "Gross negligence", which the jury was instructed on, is defined as that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid those consequences. (T. p. 606). Ezell v. Bellsouth Telecommunications, Inc., 961 F. Supp. 149, 152 (S.D. Miss 1997); Turner v. City of Ruleville, 735 So. 2d 226, 229 (Miss. 1999); Dame v. Estes, 101 So. 2d 644, 645 (Miss. 1958).[17] In assessing the amount of punitive damages, if any, which are appropriate in this cause, the jury may consider:

1. The financial condition and net worth of the defendant;
2. The nature and reprehensibility of the defendant's wrongdoing, for example, the impact on the plaintiff, or the relationship of the plaintiff and defendant;
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation for causing same;
4. The duration of the defendant's misconduct and whether the defendant attempted to conceal it;
5. Any other relevant factor shown by the evidence.

Miss. Code Ann. section 11-1-65(1)(e). Further, in evaluating whether a punitive award is excessive, the statute provides that courts may examine the following:

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[17] For purposes of "gross negligence", a combination of misconduct with a negative mens rea justifies punitive damages. Jowers v. BOC Group, Inc., 608 F.Supp.2d 724 (S.D. Miss. 2009).

> (f)(i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.
>
> (ii) In determining whether the award is excessive, the court shall take into consideration the following factors:
>
> 1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;
>
> 2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
>
> 3. The financial condition and net worth of the defendant; and
>
> 4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

Miss. Code Ann. section 11-1-65(f)(I, ii). Punitive damages are damages awarded for the social value in bringing a wrongful party to account for his/her/its actions and to discourage others from acting in a similar manner. Such damages are not based on the idea of benefitting an injured party, but are instead founded on the premise of punishing the wrongdoer. The paramount purpose in awarding punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendants and others. Gordon v. National States Ins. Co., 851 So. 2d 363 (Miss. 2003).

The evidence submitted at trial clearly provided a basis for a punitive damages award. Both Chad Willis and Renee Willis testified as to Appellant's actions, the damages caused to Rehab, Appellant's attempts to conceal her misdeeds, and her fleeing from the Rehab premises at the very time the accountants, Ms. Angle and Ms. Crawford, appeared. (T. pp. 91-180; 333-58). Further, both Ms. Angle and Ms. Crawford testified at length that Appellant's actions were intentional and reckless in nature, and that she took steps to conceal her wrongdoing from the

owners of Rehab. (T. pp. 410-412, 416-417, 462-63). According to Ms. Angle, Appellant's actions constituted a pattern of neglect and failure to perform her job duties. (T. p. 489). Indeed, Appellant continued to misrepresent even to Ms. Angle that these duties had been fulfilled, when they clearly had not. (T. pp. 448-49).

The factors contained in section 11-1-65 were fully complied with at trial,[18] and the award of $50,000.00 in punitive damages was reasonable, being less than one half of the compensatory damages awarded to Rehab by the jury. Based on the evidence presented at trial, punitive damages were certainly justified in this case, given the intentional and/or grossly negligent acts of Appellant, coupled with her deception, concealment and lies which continued even through her initial cross examination at trial. Accordingly, Appellant's argument on this point is therefore without merit, and the jury's punitive verdict should be affirmed.

CONCLUSION

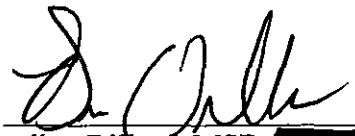
Appellant's mantra during her employment at Rehab was that "she did not make mistakes". (T. pp. 101, 123). Obviously this was correct, as her failure to perform the key aspects of her job with which she was exclusively entrusted was no mistake—it was intentional and willful in nature.

For the reasons set forth herein and at any oral argument, Appellee Rehab Solutions, PLLC respectfully requests the Court to deny Appellant Mignon Willis's appeal, instead affirming the total jury verdict rendered in favor of Rehab Solutions, PLLC in the amount of $183,543.17.

[18] Both parties waived the need for any additional evidence on punitive damages following the compensatory award, instead both sides agreed to rely upon the evidence previously considered by the jury and counsel by agreement each made a brief statement to the jury, commenting on such evidence. (T. pp. 662-69).

This, the 10th day of May, 2011.

REHAB SOLUTIONS, PLLC, Appellee



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CERTIFICATE OF SERVICE

I, L. Bradley Dillard, one of the attorneys for the Plaintiff, Rehab Solutions, PLLC do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellee's Brief, on the following by placing said copy in the United States Mail, postage prepaid, addressed as follows:

R. Shane McLaughlin, Esq.
Nichole H. McLaughlin, Esq.
McLaughlin Law Firm
P. O. Box 200
Tupelo, MS 38802

Hon. James L. Roberts, Jr.
Circuit Court Judge
P.O. Drawer 1100
Tupelo, MS 38802-1100

DATED, this the 10th day of May, 2011.

L. BRADLEY DILLARD

CERTIFICATE OF FILING

I, L. Bradley Dillard, one of the attorneys for the Plaintiff, Rehab Solutions, PLLC, do hereby certify, pursuant tot Miss. R. App. P. 25(a), that I have this day filed the Brief of Appellee by mailing the original and three (3) copies of said document, along with a CD-ROM containing a PDF version of same, via Federal Express, to the following:

Ms. Kathy Gillis
Supreme Court Clerk
450 High Street
Jackson, MS 39201.

This the 10th day of May, 2011.

L. BRADLEY DILLARD