

**IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2010-CA-2005**

JOHN MOLLAGHAN and JOHN VINCENT

APPELLANTS

VS.

**SONYA VARNELL, INDIVIDUALLY AND OFFICIALLY,
ESTATE OF DR. HORACE FLEMING, RICHARD GIANNINI,
INDIVIDUALLY AND OFFICIALLY, AND
UNIVERSITY OF SOUTHERN MISSISSIPPI**

APPELLEES

**BRIEF OF APPELLEES, UNIVERSITY OF SOUTHERN MISSISSIPPI
AND THE ESTATE OF DR. HORACE FLEMING, DECEASED**

**On appeal from the Circuit Court of Forrest County, Mississippi
Consolidated Civil Actions No.: CI00-263 and CI01-0024**

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CERTIFICATE OF INTERESTED PERSONS

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

1. John Vincent
2. John Mollaghan
3. Ged O'Conner
4. Estate of Horace Fleming, Deceased
5. Richard Giannini
6. Sonya Varnell
7. The Board of Trustees of State Institutions of Higher Learning
8. Honorable Robert B. Helfrich – Forrest County Circuit Judge
9. Kim T. Chaze – Attorney for Appellant
10. Alexander Ignatiev – Attorney for Appellant
11. William E Whitfield, III – Attorney for Sonya Varnell
12. Matthew D. Miller – Attorney for Sonya Varnell
13. Nicholas K. Thompson – Attorney for Sonya Varnell
14. Mark Morrison – Attorney for Richard Giannini
15. Herman M. Hollensed, Jr. – Attorney for University of Southern Mississippi and the Estate of Horace Fleming

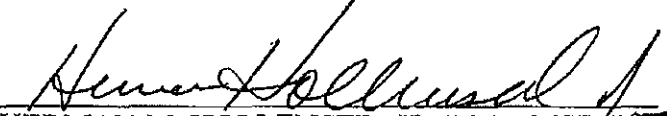

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STATEMENT OF THE ISSUE

- I. WHETHER THE TRIAL COURT CORRECTLY GRANTED DEFENDANT, DR. HORACE FLEMING'S, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IN REGARD TO VINCENT'S CLAIMS THAT FLEMING DENIED VINCENT CONSTITUTIONALLY PROTECTED DUE PROCESS RIGHTS BY DENYING VINCENT A GRIEVANCE HEARING UNDER THE PROVISIONS OF THE USM EMPLOYEE HANDBOOK**

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings and Disposition in the Court Below

Plaintiffs, John Vincent and John Mollaghan, filed separate Complaints against Dr. Horace Fleming ("Fleming"), Richard Giannini ("Giannini"), and Sonya Varnell ("Varnell"), officially and individually, and the University of Southern Mississippi ("USM") in relation to the plaintiffs' employment as soccer coaches at USM. (RE 1 and 2; CP 0035-0038, 0275-0279). In their Complaints, the plaintiffs alleged that the defendants violated their rights under federal law, 42 U.S.C. §1983, and the *Mississippi Tort Claims Act* ("MTCA").

All of the defendants filed a joint motion for summary judgment on all of the plaintiffs' claims. On June 12, 2008, the trial court entered an Order granting in part and denying in part the joint motion for summary judgment. (RE 3; CP 1088-1097). That Order granted judgment as a matter of law in favor of USM on all of the plaintiffs' claims, and also granted judgment as a matter of law in favor of Fleming on all of the plaintiffs' claims, except for Vincent's claims against Fleming in his individual capacity under 42 U.S.C. §1983 for 1) gender discrimination, 2) retaliation for Vincent reporting to Giannini that Ged O'Conner, a graduate assistant, had alleged he had been sexually harassed by Varnell, and 3) depriving Vincent of allegedly constitutionally protected procedural due process rights by denying him a grievance hearing in accordance with provisions contained in the USM employee handbook.

Vincent's claims against Fleming, in his individual capacity, which were not disposed of in the Order granting in part and denying in part the motion for summary judgment went to trial. Those claims were consolidated with Vincent and Mollaghan's claims against Giannini and Varnell in their individual capacities for §1983 liability and tried together. The jury returned a verdict in favor of Vincent with special interrogatories finding that Fleming, Giannini, and Varnell had intentionally deprived Vincent of his constitutional procedural due process rights by

denying him a grievance hearing as provided in the USM employee handbook. (RE 4; CP 1140-1141). The jury also found that Giannini and Varnell discriminated against Vincent because of his gender, and retaliated against him for reporting to Giannini that O'Conner had alleged that he was sexually harassed by Varnell. The jury also returned verdicts in favor of Mollaghan against Giannini and Varnell in their individual capacities on Mollaghan's §1983 claims. (RE 25; CP 1142-1143).

The trials of Vincent and Mollaghan's claims were also consolidated with the §1983 claims contained in a separate Complaint filed by O'Conner against Giannini and Varnell in their individual capacities. The jury also returned a verdict for O'Conner against Giannini and Varnell.

On June 20, 2008, three separate Final Judgments were entered based upon the jury verdicts in favor of Vincent, Mollaghan, and O'Conner. (RE 6, 7 and 8; CP 1146-1147, 1332-1333, and 1328-1329).

On July 1, 2008, Varnell, Giannini, and Fleming filed a Joint Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial as to the Separate Plaintiff, John Vincent. (RE 9; CP 1152-1166). The same date Varnell and Giannini filed a Joint Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial as to the Separate Plaintiffs, John Mollaghan and Ged O'Conner.

On April 12, 2010, the trial court entered an Opinion and Order granting Fleming's, Giannini's and Varnell's Motion for Judgment Notwithstanding the Verdict with respect to Vincent and Mollaghan's claims.¹ (RE 10; CP 1346-1357).

¹ The Opinion and Order entered by the trial court also granted Giannini and Varnell's Motion for Judgment Notwithstanding the Verdict with respect to O'Conner's claims against them that went to trial, except for O'Conner's §1983 sex harassment claim against Varnell which the trial court allowed to stand. All of O'Conner's other claims were dismissed by prior orders. O'Conner has not appealed from any of the trial court's orders and judgments.

On April 22, 2010, Vincent and Mollaghan filed a Motion for Reconsideration of the Opinion and Order entered on April 12, 2010. (RE 11; CP 1358-1383). On November 8, 2010, the trial court entered an Order on plaintiffs' Motion for Reconsideration denying that motion. (RE 12; CP 1436-1440).

On December 2, 2010, Vincent filed his Notice of Appeal of the Order entered on April 12, 2010, which had granted the judgments notwithstanding the verdict in favor of Fleming, Giannini, and Varnell, and the Order entered on November 8, 2010, denying his motion for reconsideration of that order. (RE 13; CP 1441-1442). The same date Mollaghan filed a Notice of Appeal of the same Orders entered on April 12, 2010, and November 8, 2010. (RE 14; CP 1444-1445).

B. Statement of the Facts

Varnell and Giannini have filed briefs in this appeal setting forth statements of fact which are adopted by USM and Fleming and incorporated herein by reference. For the sake of brevity and in the interest of judicial economy and resources, they will not be repeated herein.

SUMMARY OF THE ARGUMENT

The plaintiffs have not appealed from the trial courts order granting summary judgment for USM on all claims against USM. Nor have the plaintiffs appealed from the order granting partial summary judgment for Fleming. Instead, with respect to USM and Fleming, the plaintiffs have only appealed from the Order granting a judgment notwithstanding the verdict for Fleming on Vincent's §1983 claim.

The jury determined that Fleming denied Vincent a grievance hearing in accordance with the provisions of the USM employee handbook, which the trial court initially found to be a violation of a constitutionally protected procedural due process right. The jury exonerated Fleming on all of Vincent's other claims against him. Consequently, with respect to USM and Fleming, the only issue before this court is whether the trial court correctly granted Fleming's motion for JNOV on Vincent's claim that Fleming intentionally deprived Vincent of a constitutionally protected procedural due process right by denying him a hearing in accordance with the grievance procedures of the USM employee handbook.

Vincent's due process claim is without merit since he failed to establish that he had any constitutionally protected property right that he was deprived of by Fleming or any of the other Defendants. Vincent had an employment contract for a period of one year. That contract gave USM the right to reassign or transfer Vincent during the term of his contract. Vincent does not claim that the terms of his employment contract were breached, but instead claims that the grievance procedures in the employee handbook granted him constitutionally protected procedural due process rights which he contends were breached. The USM employee handbook explicitly states that it did not give rise to any contractual rights. Furthermore, the handbook provided that any comments or statements made by any USM employee could not alter the terms and conditions of Vincent's employment. Thus, Vincent had no constitutionally

protected property right in anything contained in the employee handbook, including but not limited to the grievance procedures. Therefore, the trial court correctly granted a judgment notwithstanding the verdict in favor of Fleming on Vincent's procedural due process claim.

ARGUMENT

I. STANDARD OF REVIEW

This Court's standard of review for a trial court's grant of a motion for judgment notwithstanding the verdict is *de novo*. *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006). "The motion for [JNOV] tests the legal sufficiency of the evidence supporting the verdict. It asks the Court to hold, as a matter of law, that the verdict may not stand." *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 150-151 (Miss. 2008). (quoting *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 713 (Miss. 1984). (Robertson, J., specially concurring)). When a JNOV has been entered by the trial court, the appellate Court is required to review the evidence in the light most favorable to the appellant. *Stewart v. Gulf Guar. Life Ins. Co.*, 846 So. 2d 192, 200 (Miss. 2002). When the evidence is considered in a light most favorable to Vincent, the trial court properly found the evidence was legally insufficient to support the verdict for Vincent against Fleming. Consequently, the trial court correctly granted Fleming's motion for judgment notwithstanding the verdict.

II. THE TRIAL COURT CORRECTLY GRANTED FLEMING'S MOTION FOR JNOV ON VINCENT'S PROCEDURAL DUE PROCESS CLAIM, SINCE VINCENT HAD NO CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO ANYTHING CONTAINED IN USM'S EMPLOYEE HANDBOOK, INCLUDING THE GRIEVANCE AND HEARING PROCEDURES

Mississippi Rule of Appellate Procedure 4(a) requires that a notice of appeal be filed with the Clerk of the trial court within thirty (30) days after the date of the entry of the judgment or order appealed from. If any party files a timely motion under Mississippi Rule of Civil Procedure 50(b) for judgment notwithstanding the verdict, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding.

The time for appealing from any orders or judgments entered by the trial court in these cases began to run when the trial court's Order was entered on April 12, 2010, on the defendants' motions for judgment notwithstanding the verdict, or no later than when the trial court's Order was entered on November 8, 2010, denying the plaintiffs' motion for reconsideration of the Order granting the motions for judgment notwithstanding the verdict.

Vincent and Mollaghan have failed to appeal from the order granting summary judgment in favor of USM, and partial summary judgment for Fleming on all claims except Vincent's claims against Fleming in this individual capacity for §1983 liability. Vincent has appealed only from the Order granting judgment notwithstanding the verdict with respect to his claims that went to trial against Fleming, Giannini, and Varnell in their individual capacities. As to USM and Fleming, that Order only pertains to Vincent's claims against Fleming individually on Vincent's claim that Fleming denied him a constitutionally protected procedural due process right to a grievance hearing which he contends he was entitled to under the provisions of the USM employee handbook. As a consequence, Vincent's claim against Fleming that was the subject of the jury's verdict and the order granting judgment notwithstanding that verdict, is the only claim before this court on appeal with respect to USM and Fleming.

Vincent's appeal of the JNOV granted in favor of Fleming hinges on whether Vincent had a constitutionally protected procedural due process right to a grievance hearing under the provisions of the USM employee handbook. Since Vincent had no such right, the trial court properly granted Vincent's motion for judgment notwithstanding the verdict.

Varnell and Giannini have filed briefs in this appeal setting forth why the USM employee handbook did not grant or create a constitutionally protected right to a grievance hearing. The arguments on that issue in those briefs also apply to Vincent's claim against Fleming, and they are adopted herein by reference in their entirety, and summarized below.

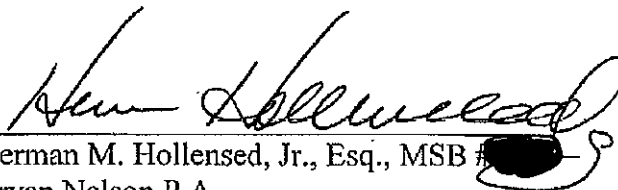
For Vincent to prevail on his claim that he was denied a constitutionally protected procedural due process right, he must establish that the USM employee handbook created a constitutionally protected property right. *Esco v. Blackmon*, 692 So.2d 74, 78 (Miss. 1997). In determining whether he did so, the court needs only to look at the language contained in the handbook. Because the express language in the handbook did not grant or create any constitutionally protected right to a grievance hearing, Vincent did not and could not prove that the handbook created a constitutionally protected property interest to a grievance hearing.

The USM employee handbook expressly stated that "these policies are intended only to be guidelines for employment at USM, and they do not give rise to any contractual rights." (Employee Handbook, Trial Exhibit No. 41 at P.2). The handbook also provided that employment was "at-will" and that nothing in the handbook or other statements by administrators could change that. (Trial Exhibit No. 41 at P.2). USM's employee handbook clearly and unambiguously stated that its policies do not give rise to any contractual rights. Thus, Vincent had no constitutionally protected property interest in the grievance procedures contained in the handbook. As a consequence, the proof was legally insufficient to support the jury's verdict for Vincent against Fleming, and the trial court correctly granted Fleming's motion for judgment notwithstanding the verdict.

CONCLUSION

The only issue before the court on appeal with respect to USM and Fleming is whether the trial court properly granted Vincent's motion for judgment notwithstanding the verdict. For the reasons set forth herein the trial court's order granting judgment notwithstanding the verdict for Fleming was proper and correct. Thus, this court should affirm the trial court's order granting Fleming's motion for judgment notwithstanding the verdict.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, being the attorney of record for Appellees, The University of Southern Mississippi and The Estate of Horace Fleming, Deceased, in Docket No. 2010-TS-2005 in the Supreme Court of Mississippi, do hereby certify that I have, pursuant to Mississippi Rules of Appellate Procedure 25 and 31, this day delivered a copy of the foregoing brief of Appellees The University of Southern Mississippi and The Estate of Horace Fleming, Deceased to:

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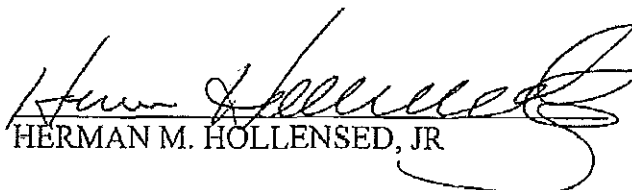
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via electronic mail and U.S. mail, first class and postage prepaid.

THIS, the 12th day of March, 2012.


HERMAN M. HOLLENSED, JR