

2011-CA-01164 T

CERTIFICATE OF INTERESTED PARTIES

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/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Jimmy Earl Daniels, Appellant;
2. Jim Waide, Attorney for Appellant;
3. Rachel M. Pierce, Attorney for Appellant;
4. Waide & Associates, P.A., Attorneys for Appellant;
5. Parker and Associates, Inc., Appellee;
6. The Liberty Group, Inc., Appellee;
7. Dalvin Kendall Parker, Appellee;
8. Greg Snowden, Attorney for Appellees;
9. Phillip A. Gunn, Attorney for Appellees; and
10. Wells, Marble & Hurst, PLLC; Attorneys for Appellees.

THIS, the 3rd day of January, 2012.


RACHEL M. PIERCE

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STATEMENT OF THE ISSUES

1. Whether the lower court erred in granting summary judgment in favor of Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker when there were genuine issues of material fact as to whether Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker breached their duty of good faith and fair dealing.

STATEMENT OF THE CASE

On November 19, 2008, Jimmy Earl Daniels sued Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker to recover actual and punitive damages. [R:2-6]. On March 21, 2011, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker filed a Motion for Summary Judgment. [R:59-174]. On July 18, 2011, the lower court granted Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker's Motion for Summary Judgment. [R:428-436]. On August 10, 2011, Jimmy Earl Daniels timely filed his Notice of Appeal. [R:437-438].

STATEMENT OF THE FACTS

Parker and Associates, Inc. sells insurance products. [R:428]. The Liberty Group, Inc. is a subsidiary of Parker and Associates, Inc., and Dalvin Kendall Parker is a shareholder of Parker. [*Id.*]

In November 2005, Jimmy Earl Daniels began selling insurance products for Parker and Associates, Inc. [*Id.*] As part of his agreement to sell insurance products for Parker and Associates, Inc., Jimmy Earl Daniels entered into a contract entitled "Agreement to Work Leads." [R:109]. That agreement provides, in pertinent part:

IN CONSIDERATION THAT I MAY WORK THE PARKER AND ASSOCIATED POLICY HOLDER LIST OF THE KEN PARKER AGENCY, I AGREE TO REPRESENT SOLELY PARKER AND ASSOCIATED WHEN SOLICITING THESE LEADS. I WILL IN NO WAY INDUCE A POLICY HOLDER TO LEAVE PARKER AND ASSOCIATES OR PURCHASE A PRODUCT THAT WOULD REPLACE HIS OR HER EXISTING PARKER AND ASSOCIATES POLICY. I WILL RETURN ALL POLICYHOLDER LISTS AND NAMES WITH COPIES OR DUPLICATIONS OF ANY MANNER.

[*Id.*]

Beyond signing the agreement which required that he represent "solely Parker and Associates" when pursuing leads from the policy holder list, Jimmy Earl Daniels was also told by Michael Hosch, executive vice president of Parker and Associates, Inc., that if he did not work for Parker, he "wasn't going to work." [R:210]. Additionally, when asked directly about Jimmy Earl Daniels, "So he was contracted with Parker and Associates, Inc.; is that correct?", Michael Hosch responded, "Sure. Sure." [R:311].

During the time when he sold products for Parker and Associates, Inc., Jimmy Earl Daniels was paid a set fee for each insurance application he submitted. [R:428]. If the policy owner cancelled that policy within a certain time frame or if the application were rejected by the insurer, Jimmy Earl Daniels would not be entitled to the fee on that particular application. [R:428-429]. In other words, if the policy were cancelled or not accepted, Jimmy Earl Daniels would repay the money he had previously earned on that application to Parker and Associates, Inc. [R:429]. To facilitate this system of paying and repaying, Parker and Associates, Inc. established an escrow account, which held a percentage of fees and commissions due to Jimmy Earl Daniels. [*Id.*] In addition to paying Parker and Associates, Inc. for any commissions on policies which were ultimately not written, Jimmy Earl Daniels also paid Parker and Associates, Inc. for other expenses, such as postage and shipping. [R:107].

In December 2007, Jimmy Earl Daniels stopped writing business through Parker and Associates, Inc. [R:70]. In connection with his attempt to obtain other employment selling insurance products for Penn Life, Jimmy Earl Daniels sought a release from the exclusive "Agreement to Work Leads" into which he had entered with Parker and Associates, Inc. [R:109]. Accepting Jimmy Earl Daniels' (non-movant's) evidence as true, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker have not, to this very day, provided Jimmy Earl

Daniels with a release from his exclusive contract. [R:435]. Instead, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker refused to grant such a release until Jimmy Earl Daniels pays \$24,000.00, a sum they now admit is not due. [R:82-106, 227]. Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker refused to release Jimmy Earl Daniels unless he signed a promissory note to pay an amount of money they conceded in their Motion for Summary Judgment or, in the Alternative, Motion for Partial Summary Judgment is excessive by about \$22,000.00. [R:82-106]. Dalvin Kendall Parker confirmed that “if an agent has a debt, we will try to stop any release, regardless, until the debt is paid.” [R:320]. In the case of Jimmy Earl Daniels, Dalvin Kendall Parker did just that. In fact, Dalvin Kendall Parker and his companies even filed a counterclaim against Jimmy Earl Daniels for money they now admit Jimmy Earl Daniels did not owe. [R:7-13]. Similarly, Michael Hosch, executive vice president of Parker and Associates, Inc., sent an email asking that Jimmy Earl Daniels be made “unhirable.” [R:335-336]. Jimmy Earl Daniels had a job offer from Sutter Smith for a managerial position. [R:228-229]. Because he was unable to get a release from his exclusive contract, Jimmy Earl Daniels was unable to obtain that other employment.

STANDARD OF REVIEW

In deciding a motion for summary judgment, the trial court must make a finding that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Miss. R. Civ. P. 56; *Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 864 (Miss. 1995). In determining whether genuine issues of material fact exist, the trial court must review the evidence in a means most favorable to a non-movant. *Westbrook v. City of Jackson*, 665 So. 2d 833, 836 (Miss. 1995). The burden of showing that no genuine issue of material fact exists lies with the moving party and with the benefit of every reasonable doubt given to the party against whom the summary judgment

is sought. *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990); *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198-99 (Miss. 1988).

Issues of material fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says to the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of any doubt.

Harris v. Mississippi Valley State Univ., 873 So. 2d 970, 979 (Miss. 2004) (citing *Heigle v. Heigle*, 771 So. 2d 341, 345 (Miss. 2000)).

Consequently, summary judgment should be granted only when it is shown, beyond a reasonable doubt, that the non-movant would be unable to prove any facts to support his claim. *Downs v. Choo*, 656 So. 2d 84, 85-86 (Miss. 1995).

This Court reviews *de novo* the action of a trial court in sustaining motions for summary judgment, without giving any deference to the action of the trial court. *Doe v. Stegall*, 757 So. 2d 201, 204 (Miss. 2000); *Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So. 2d 1244, 1246 (Miss. 2002); *McArthur v. Ingalls Shipbuilding Inc.*, 879 So. 2d 500, 502 (Miss. App. 2004).

SUMMARY OF THE ARGUMENT

The lower court erred in granting summary judgment as to Jimmy Earl Daniels' claim that Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker breached the implied duty of good faith and fair dealing in refusing to release him from their exclusive contract and in trying to extort \$24,000.00 from him which they now admit he did not owe. Whether Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker's behavior constituted a breach of that duty is a question of fact, for a jury to decide. The lower court mistakenly usurped the authority of the jury in granting summary judgment as to that claim.

This Court should reverse the lower court's grant of summary judgment and remand this case for trial on the merits.

ARGUMENT

1. **There Is a Genuine Issue of Material Fact as to Whether Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker Breached Their Duty of Good Faith and Fair Dealing by Failing to Provide Jimmy Earl Daniels the Requested Release So as to Notify Potential Employers That Jimmy Earl Daniels Could Lawfully Be Hired.**

All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement. *Morris v. Macione*, 546 So. 2d 969, 971 (Miss.1989). Good faith has been defined as “the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party.” *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss.1992). Bad faith has been defined as requiring “a showing of more than bad judgment or negligence; rather, ‘bad faith’ implies some conscious wrongdoing ‘because of dishonest purpose or moral obliquity.’” *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 170-71 (Miss. 2004) (quoting *Bailey v. Bailey*, 724 So. 2d 335, 338 (Miss. 1998)). *See also Empiregas, Inc. v. Bain*, 599 So. 2d 971 (Miss. 1992) (holding that implied duty of good faith in at-will employment relationship prohibits enforcement of non-compete agreement when employee was terminated in bad faith).

Here, Parker and Associates, Inc.; The Liberty Group, Inc.; Dalvin Kendall Parker; and Jimmy Earl Daniels agreed on an exclusive agency arrangement. Then they agreed to cancel that arrangement. There was never any evidence that Parker and Associates, Inc.; The Liberty Group, Inc.; Dalvin Kendall Parker disagreed with Jimmy Earl Daniels’ plan to stop selling products for them. Obviously, however, other employers desiring to hire Jimmy Earl Daniels would be concerned about their liability if they hired him, absent formal acknowledgment that the exclusive agency arrangement with Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker

had been cancelled. Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker, however, refused to provide a notification or “release” indicating that the exclusive agency had been cancelled so that Jimmy Earl Daniels could seek employment elsewhere. Despite their argument to the contrary, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker’s own documents, specifically the “Agreement to Work Leads” and the “Broker or Brokerage Agreement,” demonstrate the exclusive agency arrangement and manifestly demonstrate that once that exclusive agency agreement is terminated, any “good faith” would require Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker to acknowledge that termination by notifying other potential employers that Jimmy Earl Daniels was no longer exclusively obligated to work for Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker.

Accordingly, Jimmy Earl Daniels made a formal request for a release from the exclusive contract in October 2008. [R:138-139]. In response to that simple request, which the obligation of “good faith” would require, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker used this opportunity to try to extort \$24,000.00 from Jimmy Earl Daniels. A fact-finder could reasonably find Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker acted in “bad faith,” when they took steps which would keep Jimmy Earl Daniels from obtaining other employment unless he paid a huge debt which is actually unowed. [R:149-150].

Nearly two (2) years later, and after much discovery in this case, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker finally admitted that Jimmy Earl Daniels did not

owe them approximately \$24,000.00, but claimed the real indebtedness was only \$1,624.52.¹ Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker's agents at deposition could not even explain how that amount was calculated. For example, Johnny Travis Satcher testified that he was Plaintiff's "boss," but when asked what debt Jimmy Earl Daniels owed to the company, he responded that he did not know. [R:330, 333]. Similarly, Dalvin Kendall Parker testified that he did not know what Jimmy Earl Daniels owed. [R:320].

Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker had a legally-imposed duty to act in good faith, rather than to keep Jimmy Earl Daniels from being able to obtain gainful employment by refusing to acknowledge that he did not have an exclusive obligation to work for them. Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker falsely claimed that Jimmy Earl Daniels owed them money and would not sign documents permitting Jimmy Earl Daniels to seek employment elsewhere unless he paid amounts he did not owe. This behavior is the epitome of extortion.²

The lower court erred in granting summary judgment as to Jimmy Earl Daniels' breach of contract claim. Whether Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall

¹ After the Court's ruling below, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker actually admitted that they owed Jimmy Earl Daniels money and forwarded him a check in the amount of \$441.00.

² In the face of the ever-moving target of Jimmy Earl Daniel's debt, Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker argued that summary judgment should be granted as to Jimmy Earl Daniels' claim that Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker owed him money. In fact, the issues surrounding who owes money to whom are so complex that Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker themselves do not have the answers. The lower court's grant of summary judgment as to Jimmy Earl Daniels' claims that Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker owed him money is inappropriate, as the amount "owed" by Jimmy Earl Daniels continues to change and ultimately resulted in Parker and Associates, Inc.; The Liberty Group, Inc.; and Dalvin Kendall Parker paying funds they owed to Jimmy Earl Daniels.

Parker breached their duty of good faith and fair dealing in refusing to allow Jimmy Earl Daniels to be released for other employment and by attempting to extort \$24,000.00, which he did not owe, from him is a question of fact for a jury. Thus, summary judgment was improperly granted.

CONCLUSION

This case contains multiple issues of material fact. The lower court's grant of summary judgment should be reversed.

RESPECTFULLY SUBMITTED, this the 3rd day of January, 2012.

JIMMY EARL DANIELS, Appellant

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CERTIFICATE OF SERVICE

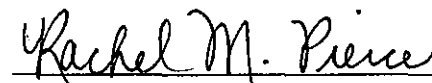
This will certify that undersigned counsel for Appellant has this day served a true and correct copy of the above and foregoing **Brief of Appellant**, via First-Class U.S. Mail, postage-prepaid, to the following:

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THIS, the 3rd day of January, 2012.



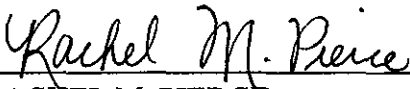
RACHEL M. PIERCE

CERTIFICATE OF FILING

This will certify that undersigned counsel for Appellant, pursuant to Miss. R. App. P. 25(a) and 32(m), has this day filed the **Brief of Appellant** by mailing the original and three (3) copies of said document, along with an electronically formatted copy thereof in Adobe Portable Document Format (PDF) on CD-ROM, via prepaid Federal Express next-day delivery, to the following:

**Kathy Gillis, Clerk
Court of Appeals of the State of Mississippi
450 High Street
Jackson, MS 39201**

THIS, the 3rd day of January, 2012.



RACHEL M. PIERCE