

IN THE SUPREME COURT OF MISSISSIPPI

2014-CA-01453

MARK ROBERTS

PLAINTIFF-APPELLANT

v.

**BOOTS SMITH OILFIELD SERVICES, LLC,
BILL JENKINS, AND JASON SMITH**

DEFENDANTS-APPELLEES

Appeal from Circuit Court of the Second Judicial District of Jones County

BRIEF OF APPELLEE BILL JENKINS

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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 or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Mark Roberts, appellant;
2. Boots Smith Oilfield Services, LLC, appellee;
3. Bill Jenkins, appellee;
4. Jason Smith, appellee;
5. Warrior Energy Services Corporation, trial court defendant;
6. McHard & Associates, PLLC, counsel for appellant;
7. Hortman Harlow Bassi Robinson & McDaniel, PLLC, counsel for appellees Jason Smith & Boots Smith Oilfield Services, LLC;
8. Ungarino & Eckert, LLC, counsel for appellee Bill Jenkins;
9. Butler, Snow, PLLC, counsel for defendant Warrior Energy Services Corporation;
10. Gholson, Burson, Entrekin, & Orr, P.A, counsel for defendant Warrior Energy Services Corporation;
11. Superior Energy Services, LLC, parent corporation of Warrior Energy Services Corporation;
12. Watkins & Eager PLLC, Jackson, MS, counsel for appellee Bill Jenkins.

Respectfully submitted,

/s/ J. Collins Wohner Jr.

J. Collins Wohner Jr.

TABLE OF CONTENTS

Certificate of Interested Persons. ii

Table of Authorities. iv

Statement of Issues. 1

Statement Regarding Oral Argument. 1

Statement of the Case. 2

Summary Argument. 5

Argument. 6

I. There Can be No Abuse of Discretion in Refusing a Rule 56(f) Continuance After
15 Months Where No Amount of Discovery Can Cure the Defects in Plaintiff’s
Case. 6

II. Defendants Are Entitled to Summary Judgment – Judge Landrum Was Right That
Plaintiff Has No Claim. 9

Conclusion. 17

Certificate of Service. 18

TABLE OF AUTHORITIES

CASES

Buchanan v. Ameristar Casino, 852 So.2d 25, 26 (Miss. 2003). 14

Community Care Center v. Barrentine, 160 So.3d 216 (Miss. 2015). 14

DeCarlo v. Bonus Stores, 989 So.2d 351 (Miss. 2008). 13, 14

Gibson v. Estes, 2007 WL 405043 (N.D. Miss. 2007). 14

Harold’s Auto Parts v. Mangialardi, 889 So. 2d 493 (Miss. 2004). 6

Homoki v. Conversion Servs., 717 F.3d 388 (5th Cir. 2013). 16

Levens v. Campbell, 733 So.2d 753 (Miss. 1999). 11, 14

McArn v. Allied Bruce-Terminix Co., 626 So.2d 603 (Miss. 1993). 14

Montgomery v. Hughes, 716 F. Supp. 261 (S.D. Miss. 1988). 16

Morrison v. Mississippi Enter for Tech., 798 So.2d 567 (Miss. App. 2001). 14, 15

Palsgraf v. Long Island R. Co., 248 N.Y. 339, 341, 162 N.E. 99 (1928). 13

Scruggs, Millette v. Merkel & Cocke, 910 So.2d 1093 (Miss. 2005). 11

Vaughn v. Miss. Baptist Med. Ctr., 20 So.3d 645 (Miss. 2009). 1, 6

Vestal v. Oden, 500 So.2d 954 (Miss. 1986). 11, 12, 14

Washington v. Allstate Ins. Co., 901 F.2d 1281 (5th Cir. 1990). 7

RULES

Miss.R.Civ.P. 56(f). 6, 7, 9

Miss.R.Civ.P. 56(b) 6, 8

Rule 4.04(a) of Uniform Rules of Circuit and County Court Practice. 8

OTHER

14A C.J.S. Conspiracy § 4. 16

PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984) §130 15

RESTATEMENT (SECOND) OF TORTS § 768 (1979). 15

RESTATEMENT (SECOND) OF TORTS § 770 (1979). 12

STATEMENT OF ISSUES

1. Whether Judge Landrum abused discretion by concluding that 15 months for discovery was enough in this baseless case, and that a Rule 56(f) continuance was not warranted, where the undisputed facts make it impossible for plaintiff to recover under his only identifiable theory (retaliation), and where plaintiff failed to specify facts or law to justify further discovery on any claim?

2. Whether Judge Landrum erred in concluding that plaintiff had not stated a viable claim under any theory and that plaintiff's theories (including retaliation) were factually baseless, mandating summary judgment?

STATEMENT REGARDING ORAL ARGUMENT

In response to plaintiff's lengthy statement regarding oral argument, defendant states: oral argument is not needed for this Court to see that plaintiff has offered "only vague assertions that [further] discovery will produce needed, but unspecified, facts" and therefore has no case.¹ It is apparent from the briefing that plaintiff has never specified facts to support a claim, or to justify a Rule 56(f) continuance, despite ample opportunity to do so. At the summary judgment hearing, Judge Landrum instructed plaintiff, "if you have any specifics about ... [defendants'] culpability here, please point that out." R 9:31. All the judge got in response were vague assertions argued at length, just as in plaintiff's brief on appeal. R 9:31-43.

Plaintiff has never specified facts to explain how further discovery could produce evidence of a valid claim. He cannot do so. His theories are legally and factually baseless. Judge Landrum was right that, on a record like this, 15 months for discovery is enough. Oral argument is not needed to see that summary judgment should be affirmed forthwith.

¹ *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So.3d 645, 656 (¶ 35) (Miss. 2009).

STATEMENT OF THE CASE

This ill-pled and insupportable case is based on the termination of plaintiff's at-will employment with Warrior Energy Services Corporation. Plaintiff was terminated after Warrior learned that plaintiff had purchased pipeline construction equipment with the intention of going into business for himself. Warrior President Sam Hardy concluded that plaintiff's outside activities were inconsistent with his responsibilities as a salaried full-time salesman for Warrior. R 3:401 (SRE tab 3).²

Plaintiff sued alleging retaliatory discharge. Against the current appellees (Warrior is the appellee in a subsequent appeal),³ plaintiff vaguely alleged interference and conspiracy – all said to be connected somehow to the alleged retaliatory discharge by Warrior.

Plaintiff's retaliation theory depended on the contention that plaintiff had reported suspected misuse of Warrior assets by others to his supervisor – his friend and former business partner Vernon Tew. R 3:310. Legal defects aside, this retaliation theory collapsed factually when Tew testified that he never discussed plaintiff's reported suspicions with anyone else, at Warrior or otherwise. R 6:755.⁴ It has never been contended that Tew himself had any role in the decision to terminate plaintiff, and the record is clear that he did not. It is therefore

² Record citations to the record volume and page (vol:pg). Parallel citations are to the Supplemental Record Excerpts (SRE tab __) and to plaintiff's Record Excerpts (RE tab __).

³ This is an appeal from a Rule 54(b) summary judgment in favor of defendant-appellees Bill Jenkins, Jason Smith and Boots Smith Oilfield Services, LLC. A later summary judgment in favor of the remaining defendant, Warrior Energy Services Corporation, is the subject of a subsequent appeal, which is before this Court as *Roberts v. Warrior Energy Services Corporation*, No. 2015-CA-00143.

⁴ Tew 127-28 (“Q. And did you do any reports to anyone about that? What he told you? A. No”). *See also* R 4:552-53 (Roberts Depo. (Volume I) pp. 187-91 (Roberts has no knowledge of Tew passing the report along to anyone)); R 5:599, 635-36 (Roberts Depo. (Volume II) pp. 266-67, 412-13 (same)). *See also* R 3:338-94 (Roberts Depo. excerpts).

impossible for plaintiff to link his alleged reports to Tew to any injury of any type, legally cognizable or otherwise.

Plaintiff has never stated any coherent alternative theory for a claim. Plaintiff's interference allegations are incoherent and fail to state a claim. It remains unclear how plaintiff's interference allegations are meant to be connected to his retaliation theory, but regardless, the contentions are legally and factually deficient to support a case. Among other things, plaintiff admitted he had no evidence of any injury he could claim as a result of defendants' alleged animosity toward, or alleged desire to interfere with, his pipeline business. R 3:319-20, 364-66.

The appellees moved for summary judgment in light of the foregoing. In response, plaintiff sought a Rule 56(f) continuance without specifying any facts that he might reasonably expect to discover that would give rise to a claim. R 4:430.

At the summary judgment hearing, Judge Landrum cautioned plaintiff at the outset: "if you have any specifics about ... culpability here, please point that out." R 9:31. Plaintiff ignored Judge Landrum's advice. Specifics about culpability were never pointed out.

Instead of pointing out specifics, plaintiff made excuses and argued for delay. R 9:31-43. But plaintiff's lengthy argument for delay never explained how the burdensome additional discovery he wants could cure the defects in his case.

By the time of the summary judgment hearing, the complaint had been filed for over 15 months. Defendants had responded to interrogatories and produced thousands of pages of documents. R 6:789; R 9:43 (SRE tab 2) (estimating 4000 pages produced). Plaintiff had been in possession of substantial responses for nearly a year. R 6:789. The record belied plaintiff's argument that others were to blame for delaying additional depositions. For example, plaintiff's emails requesting deposition dates were sent a full year (less one day) after the filing of the

complaint. R 4:445 (June 11, 2014 email attached as exhibit to plaintiff's Rule 56(f) motion). Plaintiff then proffered defendants only two narrow date options months away. *Id.* (“We currently have August 18-August 20 available as well as September 3-5”).

After allowing plaintiff to be fully heard, Judge Landrum correctly observed, “you’ve had plenty of time to take all the depositions you want to take.” R 9:43 (SRE tab 2).

Thereafter, Judge Landrum correctly concluded, that appellees were entitled summary judgment due to plaintiff's failure to establish any basis for claim. R 9:51 (SRE tab 2) (“[O]n behalf of all these parties, Bill Jenkins, Jason Smith, Boots Smith Trucking Company, I find that I should enter a summary judgment today. The Court must find that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law”). At the request of appellants, the judge agreed that there was no just reason for delay as to the these appellees and that the decision should be final under Rule 54(b), MISS.R.CIV.P.

Judge Landrum incorporated the ruling in a written order entered the next day. R 6:792 (RE tab 2, SRE tab 1) (“SJ Order”).

In support of summary judgment, Judge Landrum's Order finds, among other things, that “Plaintiff has no information or evidence that supports any manner in which Jason Smith, Boots Smith Oilfield Services, LLC or Bill Jenkins interfered with Plaintiff's business relations. Plaintiff further admitted in his deposition that he had no evidence or any facts to support that Plaintiff has been damaged by Jason Smith, Boots Smith Oilfield Services or Bill Jenkins in relation to Count II of the Complaint.” SJ Order ¶ 3.

The Order finds further: “Plaintiff has presented no evidence that a conspiracy between the Defendants ever existed as to Plaintiffs termination with Warrior nor of a conspiracy to subvert Plaintiff's business” (¶ 4); “Plaintiff admitted in his deposition that he could not identify

any factual information to support his claim that Bill Jenkins, Jason Smith or Boots Smith Oilfield Services, LLC had any involvement with his separation from Warrior” (§ 5); and “there is no evidence that Vern Tew made the decision to terminate Plaintiff. Further, Plaintiff failed to present any evidence that Vern Tew told anyone or provided any information about Plaintiff’s concerns about BHI (‘Better Half Industries’) to anyone, and as such, no factual basis to conclude that any report by Plaintiff concerning BHI had anything to do with his termination” (§ 5).

SUMMARY ARGUMENT

Judge Landrum is right that 15 months for discovery was enough in this case. There is no reason for further pointless discovery. Plaintiff has offered only vague assertions that discovery will produce needed, but unspecified, facts, and that is insufficient, especially here, where additional discovery cannot cure the defects in plaintiff’s case. Rule 56(f) decisions are reviewed for abuse of discretion, and an abuse of discretion cannot be found here. No amount of additional discovery can be expected to alter the fact that Tew never discussed plaintiff’s reported suspicions with anyone else.

Judge Landrum was right that defendants are entitled to summary judgment. Plaintiff has never even stated a plausible case, much less established one to survive summary judgment.

ARGUMENT

I. There Can be No Abuse of Discretion in Refusing a Rule 56(f) Continuance After 15 Months Where No Amount of Discovery Can Cure the Defects in Plaintiff's Case.

Judge Landrum cannot reasonably be found in error for refusing a Rule 56(f) continuance on this record, where plaintiff failed even to fairly address, much less to satisfy, the established prerequisites for obtaining a Rule 56(f) delay, and where discovery cannot reasonably be expected to cure the defects in plaintiff's case, no matter how much additional discovery were allowed. Rule 56(f) decisions are reviewed for abuse of discretion. *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So.3d 645, 656 (¶ 35) (Miss. 2009). An abuse of discretion cannot be found here. Judge Landrum was right to conclude that 15 months for discovery was enough and that further burdensome discovery was not justified. There is no reason to believe that any further discovery could cure the defects in plaintiff's case.

A plaintiff is not entitled to discovery where no reason for it exists. *Harold's Auto Parts v. Mangialardi*, 889 So. 2d 493, 494 (Miss. 2004) ("Complaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action"). Accordingly, a defendant may move for summary judgment "*at any time, ... with or without supporting affidavits.*" MISS.R.CIV.P. 56(b) (emphasis added).

A plaintiff who seeks to delay summary judgment for further discovery or investigation must "*specifically demonstrate* 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing.'" *Vaughn*, 20 So.3d at 656 (¶ 35)

(emphasis added) (quoting prior cases, citations omitted).⁵ “Vague assertions that discovery will produce needed, but unspecified, facts” are not enough, “particularly where there was ample time and opportunity for discovery.” *Id.* When the record shows that the requested discovery “is *not likely to produce the facts* needed by the plaintiff to withstand a motion for summary judgment,” further discovery should not be allowed. *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990) (emphasis added).

Here, plaintiff gave Judge Landrum no reason to believe that additional discovery could save his claim. Plaintiff argued “vague assertions” at length, but no *specifics* giving rise to a claim that he could expect to support. Moreover, the record establishes defects in plaintiff’s case that further discovery cannot be expected to cure, no matter how much additional discovery were allowed. Vernon Tew is plaintiff’s friend and former business partner. Plaintiff admitted that he believed Tew was truthful. R 3:312, 389. Tew testified that he never discussed plaintiff’s reported suspicions with anyone else, at Warrior or otherwise. R 6:755.⁶ No amount of additional discovery can be expected to alter or evade that fact. With respect to the interference claim, even months into the litigation, plaintiff could not describe any injury he could claim as a result of the alleged interference.

⁵ Rule 56(f) requires *proof of specifics* for summary judgment to be delayed. MISS.R.CIV.P. 56(f) (“Should it appear from the *affidavits* of a party opposing the motion that he cannot *for reasons stated* present by affidavit facts essential to justify his opposition, the court *may* refuse the application for judgment or *may* order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or *may* make such order as is just”) (emphasis added).

⁶ Tew 127-28 (“Q. And did you do any reports to anyone about that? What he told you? A. No”). *See also* R 4:552-53 (Roberts Depo. (Volume I) pp. 187-91 (Roberts has no knowledge of Tew passing the report along to anyone)); R 5:599, 635-36 (Roberts Depo. (Volume II) pp. 266-67, 412-13 (same)). *See also* R 3:338-94 (Roberts Depo. excerpts).

Plaintiff's long list of topics for the additional discovery he desires shows that plaintiff has the creativity and the intention to make the any further discovery long, costly and burdensome. But it does *not* show that further discovery has any likelihood of producing evidence to sustain a claim. The topics in his long list are as non-specific as his argument and as completely lacking in specificity with respect to the defects in his claim.

The record before Judge Landrum also belied plaintiff's argument that others were to blame his inability to support a claim after 15 months of litigation.⁷ The record shows that defendants responded to interrogatories and produced thousands of pages of documents early in the case. R 6:789. It shows that plaintiff had not sought dates for the additional depositions he now claims to have needed until the case had been pending for a year.⁸ Plaintiff then demanded dates by offering defendants a limited choice of two dates months away. Under Rule 4.04(a) of Uniform Rules of Circuit and County Court Practice, discovery is ordinarily to be completed within 90 day after the complaint is answered. Plaintiff offered no explanation for his apparent disregard for the trial court's standard rule.

Finally, plaintiff's heavy reliance on alleged party "agreement" as an excuse for further discovery must be recognized for the pernicious ploy that it is. Plaintiff implies that by cooperating in selecting mutually available dates for depositions, defendants waived other objections, including their right to move for summary judgment "at any time." MISS.R.CIV.P. 56(b). Plaintiff's argument is not supported by any law and runs counter to basic fairness, to the spirit of the rules and to common sense. It would set a terrible precedent for this

⁷ The complaint was filed in early June 2013. R 1:3. By the time of the summary judgment hearing in September 2014 (R 9:21), plaintiff's case had been pending over 15 months.

⁸ As exhibits to his Rule 56(f) motion, plaintiff relied on emails sent a full year (less one day) after the filing of the complaint requesting deposition dates. R 4:445 (June 11, 2014 email).

Court to suggest that by cooperating in scheduling a party waives basic rights, including the right to oppose baseless discovery. Judge Landrum wisely ignored the ploy. This Court should likewise reject it out of hand.

The requirements of Rule 56(f) are not difficult, except for a party who has no claim. A party with good grounds for a claim and a valid basis for conducting discovery can meet the requirements without difficulty. Plaintiff's failure to meet the standard can be blamed on his lack of a claim and nothing else.

Judge Landrum was correct to deny plaintiff's Rule 56(f) motion. The record comes nowhere near providing grounds for finding an abuse of discretion.

II. Defendants Are Entitled to Summary Judgment – Judge Landrum Was Right That Plaintiff Has No Claim.

Judge Landrum was right that defendants are entitled to summary judgment. Plaintiff has no case. Defendants were entitled to summary judgment based on the record before Judge Landrum, and they remain entitled to summary judgment today. Plaintiff has never even stated a plausible case, much less established one to survive summary judgment.

On appeal, plaintiff has abandoned the contention that any there was any tortious interference with his new pipeline business. *See, e.g.*, Pf. Brief at 23. Plaintiff's abandonment of that contention, raised in conclusory fashion in Count II of the Complaint, is tacit acknowledgment of the insurmountable obstacle created by plaintiff's admission at his deposition that he could not identify any injury to his business. R 3:319-20, 364-66. *See also* SJ Order ¶ 3 (RE tab 2, SRE tab 1) ("Plaintiff further admitted in his deposition that he had no evidence or any facts to support that Plaintiff has been damaged by Jason Smith, Boots Smith Oilfield Services or Bill Jenkins in relation to Count II of the Complaint").

Before this Court, plaintiff argues instead only that these appellees somehow interfered with his employment with Warrior. Plaintiff now argues only that alleged resentment of his separate pipeline business was the motive for appellees' alleged interference with his Warrior employment. Plaintiff argues this alleged competitive resentment as a motive as if an alleged motive were sufficient on its own to establish a claim, regardless of other elements (which are never discussed).

But as alleged proof of intent or motive, the competitive resentment argument is nonsense. As a matter of fact and elementary logic, alleged resentment for plaintiff's separate new business makes no sense as an alleged motive for interfering with plaintiff's employment with Warrior. Plaintiff has not suggested (much less offered proof of) any competitive benefit that could possibly have accrued to competitors of his pipeline business from the termination of his conflicting employment with Warrior. If anything, the ending of plaintiff's full-time sales position with Warrior freed plaintiff to devote his full time and attention to the allegedly resented pipeline business. This nonsensical argument is a failed attempt to contrive a claim out of the unrelated pieces of two defective claims. The argument makes no more sense on appeal than it did at the summary judgment hearing. After hearing it suggested, Judge Landrum was correct to conclude that he had never gotten a credible response to his instruction to point out facts indicating "culpability." R 9:31

In any event, much more than speculation about competitive resentment toward a separate business venture is required to sustain a claim of tortious interference with at-will employment such as plaintiff's employment with Warrior. Plaintiff has not even attempted explain how his competitive resentment speculation could be deemed to satisfy other elements of a tortious

interference claim. Plaintiff has not even stated a plausible claim, much less established an issue of fact for trial on one.

To begin with, tortious interference requires proof of “but for” cause. The plaintiff must come forward with proof sufficient to show that “the contract would have been performed *but for* the alleged interference.” *Scruggs, Millette v. Merkel & Cocke*, 910 So.2d 1093, 1099 (¶ 26) (Miss. 2005) (emphasis added). Plaintiff has been silent on this point, and the record is completely devoid of evidence to support it. The uncontested record to the contrary is overwhelming. Warrior’s documented reasons for terminating plaintiff are legitimate and reasonable, especially including the undisputed fact that plaintiff had entered the pipeline construction business, an undertaking that was obviously incompatible with his obligations as a salaried full-time salesman for Warrior.

In a related vein, this Court has observed that “where there has been no breach of contract, conceptualizing a tortious interference fails as a matter of elementary legal logic.” *Vestal v. Oden*, 500 So.2d 954, 955 (Miss. 1986). The elementary logic of this point remains in force. It is acknowledged that in theory the Court retreated somewhat from *Vestal* in *Levens v. Campbell*, 733 So.2d 753 (Miss. 1999), when it accepted in concept the notion that interference with an at-will employment contract might be actionable in some cases. But other requirements of the tort remain fully in force. On this record, plaintiff can establish neither a breach of his at-will contract, nor any reasonable expectation of continuing employment that could sustain an interference claim.

Plaintiff must also prove that defendant committed “a wrongful act without legal or social justification that he was certain or substantially certain would result in interference with the contract.” *Scruggs, Millette*, 910 So.2d at 1099 (¶ 29). Plaintiff thus has the affirmative burden

of establishing the *lack* of “legal or social justification” for any alleged interference. *Id.* This requirement is an aspect of plaintiff’s burden of proving that the allegedly interfering acts “were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which acts constitute malice).” *Id.* at 1098 (¶ 23).

A plaintiff faces a high burden to establish the requisite “lack of *legal* or *social* justification” against “one occupying a position of responsibility on behalf of another,” such as an employee or agent. *Vestal*, 500 So.2d at 955 (emphasis added, citing RESTATEMENT (SECOND) OF TORTS § 770, comment b, illustration 3 (1979)). Employees and agents are “privileged, within the scope of that responsibility and absent bad faith, to interfere with [their] principal’s contractual relationship with a third person.” *Id.* “Bad faith” in this formulation does not mean anything so trivial as bad feelings, anger or resentment. It requires independently “wrongful” means and a conflict with the interests of the principal. RESTATEMENT § 770 (one “charged with responsibility” for other “does not interfere improperly with the other’s relation if the actor (a) does not employ wrongful means and (b) acts to protect the welfare” of the other).

Bill Jenkins was an employee of Warrior. Any communication he had with Warrior is therefore privileged against plaintiff’s interference claim. *Id.* Plaintiff has not even alleged, much less created an issue for trial on, facts sufficient to overcome Jenkins’s privilege as an employee to express to Warrior any views he may have had about plaintiff. Alleging “unhappiness” about plaintiff’s admitted purchase of pipeline company assets comes nowhere near meeting the test.

Plaintiff’s allegations of separate, unrelated misconduct (inflammatorily mischaracterized as “embezzlement” in plaintiff’s brief) by Jenkins are an effort to gloss over his lack of proof against Jenkins on his interference claim. Even without the factual dead-end of Tew’s testimony,

the red-herring misconduct contentions against Jenkins cannot be made to support his interference claim. They are not allegation of “wrongful means” used by Jenkins to interfere with plaintiff’s at-will employment. The alleged misconduct was not directed at plaintiff or his employment. Just as “proof of negligence in the air, so to speak, will not do,” allegations of misconduct in the air are not sufficient. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928).

In this context, plaintiff also implies, without support or explanation, that the misconduct allegations demonstrate a reason or motive for Jenkins to be hostile to plaintiff after plaintiff reported his suspicions to Tew. Pf. Brief at 23. Like plaintiff’s retaliation claim, however, this insinuation fails as a matter of law.

This retaliation insinuation fails as proof of motive (or anything else), first, because of the factual dead-end established by Tew’s testimony. There is no evidence that Jenkins even knew about the plaintiff’s discussions with Tew. Plaintiff has not even *alleged* Jenkins knew, much less offered evidence to create an issue of fact. There is therefore no factual support for the contention as an alleged motive.

Plaintiff’s misconduct allegations against Jenkins fail to state a claim as a matter of law for the additional reason that they are a transparent attempt to convert plaintiff’s retaliation claim against Warrior into a individual liability claim against Jenkins, a Warrior employee. This Court has firmly rejected allowing “the narrowly carved-out exceptions to our employment-at-will doctrine” for the tort of retaliatory discharge “to create individual liability” for a co-employee. *DeCarlo v. Bonus Stores*, 989 So.2d 351, 358 (¶ 21) (Miss. 2008) (discussing “*McArn*” exception

from *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 607 (Miss. 1993)).⁹ The Court reasoned, “limiting liability to the employer in the present case is consistent with the doctrine of respondeat superior as well as the concepts of principal and agency.” *Id.* These are the same concepts that give rise to the privilege of employees and agents with respect to their master’s contracts in interference law. *Vestal*, 500 So.2d at 955, *supra*. It is clear, therefore, that alleged retaliatory motives of the *McArn* type cannot support imputing individual liability to a co-employee for the termination of at-will employment.

Plaintiff has cited no case supporting a finding of liability on facts comparable to his allegations in this case. In fact, plaintiff has cited, and we have found, no case from this Court or the Court of Appeals that allowed a claim for tortious interference with at-will employment to proceed against anyone, must less against co-employee like Bill Jenkins.

Levens v. Campbell concluded only that at-will status should no longer be a *per se* bar to an interference claim in Mississippi, indicating that an actionable claim could possible on the right facts; but it did not find an actionable claim on the facts before it. 733 So.2d 753 (Miss. 1999). Subsequent published decisions from this Court and the Court of Appeals citing *Levens* for that point have done the same, including *Morrison v. Mississippi Enter for Tech.*, 798 So.2d 567, 574 (Miss. App. 2001), which plaintiff cites repeatedly.

Gibson v. Estes, heavily relied upon by plaintiff, provides no support for plaintiff’s case for many reasons, not least of which are vastly different facts and record. 2007 WL 405043 (N.D.

⁹ This Court has frequently stressed the “narrowly carved-out” nature of the *McArn* exception to at-will employment. *DeCarlo*, 989 So.2d at 358 (¶ 21). *See, e.g., Community Care Center v. Barrentine*, 160 So.3d 216, 218 (¶ 5) (Miss. 2015) (“Mississippi rigidly follows the common law employment-at-will principle, that is, ‘a contract for employment for an indefinite period may be terminated at the will of either party, whether the discharge is for any reason or no reason at all’”) (quoting *Buchanan v. Ameristar Casino*, 852 So.2d 25, 26 (Miss. 2003)).

Miss. 2007). To begin with, the case did not involve *private* at-will employment. It was a public corruption case that involved *public* municipal employment that required a vote of the city council. The plaintiff was a former acting police chief. There was substantial evidence of criminal misconduct by the defendants and of an effort to cover up corruption by municipal officers and to disrupt police investigation into that corruption and other criminal misconduct. That Judge Mills would decline to grant summary judgment for the defendants in the face of such evidence provides no authority at all for reversing summary judgment here.

Plaintiff's reliance on *Morrison* is misplaced because, as already noted, *Morrison* affirmed summary judgment for the defense. *Morrison*, 798 So.2d at 574. In so doing, moreover, *Morrison* rejected the facile contentions about motive that plaintiff seeks to rely upon here. *Morrison* rejected the suggestion that suspicions of subjective "bad faith" or motive can be sufficient to support claim, especially against a privileged defendant. *Id.* at 575 (¶ 28). So nothing about *Morrison* supports plaintiff's case, or any aspect of plaintiff's argument, which mischaracterizes *Morrison*'s analysis.

Plaintiff's effort to cast alleged competitive resentment, animosity or that like as evidence of actionable bad faith or motive is contrary to law for yet another reason: Competition is itself a privilege recognized by interference law. In fact, competition has been described as one of the most important privileges to be protected in interference law. PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984) §130 (*Interference with Prospective Advantage*) at 954 ("Chief among these is the privilege of competition. The policy of the common law has always been in favor of free competition, which proverbially is the life of trade") (emphasis added); RESTATEMENT (SECOND) OF TORTS § 768 ("One who intentionally causes a third person not to enter into a prospective contractual relation with [a] competitor or not to continue an existing contract

terminable at will does not interfere improperly ... if ... (b) the actor does not employ *wrongful means* and ... (d) his purpose is *at least in part to advance his interest* in competing with the other”) (emphasis added).

Mere feelings like “unhappiness,” “anger” and “frustration” (Pf. Brief at 23-24) cannot be substituted for evidence of “wrongful means” without destroying this established balance and undermining the “life of trade.” It is human nature that sentiments like “unhappiness,” “anger” and “frustration” can arise from even the fairest competition of any type. Allowing mere sentiment to substitute for real proof of “wrongful means” and for lack of any proper or privileged purpose would therefore not only just trivialize the tort; it would open the door to abuse of the tort as a retaliatory weapon for plaintiffs motivated by nothing more substantial than competitive anger and resentment of their own.

As a last resort, plaintiff cries conspiracy and hopes for the Court’s indulgence.¹⁰ Pf. Brief at 25. But plaintiff’s conspiracy argument fails for all the grounds already shown. Civil conspiracy is a derivative cause of action that depends on the existence of a viable underlying action, and plaintiff has none. 14A C.J.S. Conspiracy § 4 (“conspiracy is a derivative cause of action. The essence the claim is not the conspiracy itself but the actual damages resulting from the acts done in furtherance of the conspiracy”); *Homoki v. Conversion Servs.*, 717 F.3d 388, 402-03 (5th Cir. 2013) (“Civil conspiracy is a derivative tort; therefore, liability for a civil conspiracy depends on participation in an underlying tort”). As Judge Lee once explained, “[a] party may not cry ‘conspiracy’ and throw himself on the jury’s mercy.” *Montgomery v. Hughes*,

¹⁰ Plaintiff has not briefed, and therefore has abandoned, intentional infliction of emotion distress and any other theory. But those claims would also fail for lack of evidence or law to support them, as shown by the record.

716 F. Supp. 261, 264 (S.D. Miss. 1988) (citations omitted). Here, there is no underlying claim.

Plaintiff also admitted that he had no evidence of an agreement. R 3:321-23, 367-69.

Judge Landrum was correct to put an end to plaintiff's unjustified claims against these defendants. His judgment should be affirmed.

CONCLUSION

The judgment should affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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I hereby further certify that on this day I served a photocopy of the foregoing by postage-paid U.S. Mail to:

Hon. Dal Williamson
Circuit Court Judge, Jones County
P.O. Box 65
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This 17th day of August 2015.

/s/ J. Collins Wohner Jr.

J. Collins Wohner Jr.