IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2015-CA-00923

VANESSA J. JONES — APPELLANT

VS.

CITY OF HATTIESBURG, MISSISSIPPI — APPELLEE

BRIEF OF APPELLEE, CITY OF HATTIESBURG, MISSISSIPPI

ON APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY

ORAL ARGUMENT REQUESTED

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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 Judges of the Court of Appeals and/or Justices of the Supreme Court may evaluate possible disqualifications or recusal.

Vanessa J. Jones, Esq. Attorney at Law Post Office Box 1554 Hattiesburg, MS 39403-1554	PLAINTIFF/APPELLANT
Kim T. Chaze, Esq. Attorney at Law 7 Surrey Ln. Durham, NH 03824	ATTORNEY FOR APPELLANT
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City of Hattiesburg Post Office Box 1898 Hattiesburg, MS 39403-1898	DEFENDANT/APPELLEE
Honorable Michael H. Ward	SPECIAL APPOINTED PRESIDING TRIAL COURT JUDGE FORREST COUNTY CIRCUIT COURT

/s/ Clark Hicks
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STATEMENT REGARDING ORAL ARGUMENT

The doctrine of employment at-will and the attendant protections afforded to employers are foundational principles of Mississippi jurisprudence. The City of Hattiesburg requests oral argument in this case to affirm the authority of a city mayor to terminate at-will employees pursuant to Mississippi Code Ann. § 21-3-5.

STATEMENT OF THE ISSUES

1. Whether the trial court properly dismissed Plaintiff's breach of employment contract claim because she was an at-will, mayoral appointed municipal judge.

2. Whether the trial court properly dismissed Plaintiff's defamation claims due to her failure to specify and substantiate her claims pursuant to *Chalk v. Bertholf*, 907 So.2d 290 (Miss. App. 2008).

STATEMENT OF THE CASE AND FACTS

Vanessa Jones worked as a part-time appointed municipal court judge in Hattiesburg, Mississippi, where she served at the will, pleasure and discretion of Mayor Johnny Dupree. She served with two other part-time judges, George Schmidt and Jolly Matthews. After receiving reports of misconduct within the municipal court system, the City of Hattiesburg conducted an internal investigation. After the conclusion of the investigation, Mayor Dupree determined the City would be better served by one full time city judge in lieu of three part-time judges. He eliminated the three judge system and appointed Jerry Evans as the full-time judge. Evans has served in that capacity to this day.

After eliminating the part-time judge positions, Jones retained attorney Kim Chaze, who filed a Complaint in this matter on September 6, 2013. [R. at 7]. Hattiesburg answered the suit on November 5, 2013, and included therein as a defense that Jones' claim was barred due to her

statutory at-will employment status, as well as the protections, rights and immunities under the Mississippi Tort Claims Act, Mississippi Code Ann. § 11-46-1 *et seq.* [R. at 12].

Hattiesburg filed its motion for summary judgment on January 21, 2014, requesting that the Court dismiss Jones' claim for breach of an employment contract and related claims due to her common law at-will employment status. Additionally, her termination was further authorized and protected by Mississippi Code Ann. § 21-3-5, which provides that "any employee may be discharged by such governing authorities at any time, either with or without cause." Hattiesburg moved to dismiss Jones' remaining claim for defamation because she failed to identify the person who allegedly communicated defamatory statements, when such statements were made, or the context of those statements, pursuant to *Chalk v. Bertholf,* 987 So.2d 290 (Miss. App. 2008). Jones also failed to offer any evidence of malice, which is a required element of a claim for defamation of a public official. [R. at 19; Transc. at 8].

Jones responded to the motion for summary judgment and relied exclusively on the City of Hattiesburg's employment handbook in an effort to argue that the manual established a contractual right of employment. However, the handbook states on page 1 that "nothing in this handbook implies or ensures employment or creates an employment contract." [R. at 65]. Jones further relied upon the handbook to argue that Hattiesburg failed to follow its grievance procedure. The handbook does not support this contention either because reorganization is not a grievable issue under the handbook and it states that "the City reserves the right to bypass any of the normal process should circumstances warrant." [R. at 70].

The trial court conducted an extensive hearing on June 4, 2014, with counsel for the Plaintiff and Defendant appearing and offering argument for and against the motion for summary judgment. [See Transc.].

On May 19, 2015, the trial court entered a written order finding for the Defendant by granting the motion for summary judgment. [R. at 168]. Plaintiff timely appealed.

SUMMARY OF THE ARGUMENT

I. The trial court properly dismissed Plaintiff's breach of employment contract claim because she was an at-will, mayoral appointed municipal judge.

Jones worked as an appointed, part-time, at-will employee of the City of Hattiesburg who served at the discretion of the Mayor. The elimination of her position did not give rise to any cognizable cause of action under the at-will doctrine. Under this doctrine, an employer may have a "good reason, wrong reason or no reason for terminating the employment." *Kelly v. Mississippi Valley Gas Co.,* 397 So.2d 874-875 (Miss. 1981). Additionally, Miss. Code Ann. § 21-3-5 provides that a municipal employee "may be discharged by such governing authorities at any time, either with or without cause." The mayor, who has the authority to hire and fire city judges, may do so at his will. There was no employment contract in this case, and the City handbook expressly disclaims any contractual rights.

II. The Court properly dismissed Plaintiff's defamation claims due to her failure to specify and substantiate her claims pursuant to *Chalk v. Bertholf*, 907 So.2d 290 (Miss. App. 2008).

Jones failed to plead or offer any evidence concerning the person that allegedly communicated defamatory statements, when they were made, to whom, or the context of those statements. Additionally, Jones failed to offer any evidence, let alone clear and convincing evidence, that a defamatory statement was uttered with actual malice, a required showing for defamation against a public official. *Stegall v. WTWV, Inc.,* 609 So.2d 348 (Miss. 1992); See also *Meridian Star, Inc. v. Williams*, 549 So.2d 1332, 1337 (Miss. 1989)(defining an appointed official as a public official)(overruled on other grounds). Additionally, Hattiesburg is the only

named Defendant in this case, and it cannot be vicariously liable for defamation. Miss. Code Ann. § 11-46-5(2) and § 11-46-7.

In addition to the common law doctrine of at-will employment, Jones' termination was further authorized by Miss. Code. Ann. § 21-3-5, which provides:

> From and after the expiration of the terms of office of present municipal officers, the mayor and board of aldermen of all municipalities operating under this chapter shall have the power and authority to appoint a street commissioner, and such other officers and employees as may be necessary, and to prescribe the duties and fix the compensation of all such officers and employees. **All officers and employees so appointed shall hold office at the pleasure of the governing authorities and may be discharged by such governing authorities at any time, either with or without cause...**

STANDARD OF REVIEW

Summary judgment is reviewed *de novo*. *Burleson v. Lathem,* 968 So.2d 930, 932 (Miss. 2007); *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss. 1993). A defendant may, at any time, move with or without affidavits to support summary judgment. MRCP 56(b). A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue of material of fact, and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c). Once the moving party makes such a showing, the non-movant must present significant probative evidence demonstrating the existence of a genuine issue of material fact and that the moving party is not entitled to judgment as a matter of law. *Prescott v. Leaf River Forest Products, Inc.*, 740 So.2d 301, 309 (Miss. 1999); *Brown v. Credit Ctr, Inc.*, 444 So.2d 358, 364 (Miss. 1983). A mere scintilla of evidence is insufficient to meet the non-movant's burden and the non-movant is not entitled to rely on general allegations or denials. *Prescott*, 740 So.2d; *Strantz v. Binion*, 652 So.2d 738, 741 (Miss. 1995). Furthermore, a court "may not rely upon

unsupported, conclusory allegation to defeat a motion for summary judgment where there is no issue of material fact." *Jacox v. Circus Circus Miss, Inc.*, 908 So.2d 181, 184 (Miss. App. 2005). Similarly, "self-serving statements cannot form the basis of summary judgment evidence." *Quay v. Crawford*, 788 So.3d 76, 81 (Miss. App. 2001).

ARGUMENT

I. The trial court properly dismissed Plaintiff's breach of employment contract claim because she was an at-will, mayoral appointed municipal judge.

Jones, as a part-time appointed municipal judge with the City of Hattiesburg, worked at the will of the mayor, subject to the common law doctrine of at-will employment.

"Mississippi follows the common law rule that a contract for an employment for an indefinite term may be terminated at-will at the will of either party. The employee can quit at any time; the employer can terminate at will. This means either the employer or the employee may have a good reason, wrong reason, or no reason for terminating the employment contract." *Kelly v. Mississippi Valley Co.,* 397 So.2d 874 (Miss. 1981). The Mississippi Supreme Court set forth the policy implications of the employment at-will doctrine in *Rape v. Mobile and O.R.R. Co.*, 100 So. 585 (Miss. 1924):

> Under the doctrine of employment at-will, termination does not give rise to any cause of action. *Perry v. Sears Roebuck & Co.*, 508 So.2d 1086, 1088 (Miss. 1987); *Crawford v. Bannum Place of Tupelo*, 213 W.L. 104963 (N.D. Miss. 2013). As a result, Jones' count to for infliction of emotional distress and breach of contract claims, to the extent they are stated within the Complaint, fail as a matter of law. The inconvenience, disruption and heartache is a natural consequence of the event, and our Courts have routinely held that losing at-will employment does not give rise to tort claims.

Plaintiff claims in Section V of her brief that the Hattiesburg handbook creates certain contractual rights. However, Jones has failed to cite or quote any section of the handbook she

claims forms a contractual right. The handbook neither assures employment nor contractually guarantees any particular process with regard to termination.

With regard to employment, page 1 of the handbook states as follows:

> This handbook has been designed to give you a brief description of the administrative policy and procedures effecting your employment with the City. It should help you more fully understand some of the benefits and responsibilities as a City employee although it will answer many of your questions, it is not the final authority. Detailed information about the policies and procedures discussed in this handbook are available for review by contacting your manager, director/chief, or the Human Resources division at extension 4571. **The full policy-procedure is the ultimate guideline for handling personnel information; therefore, nothing in this handbook implies or ensures employment or creates an employment contract.** This handbook replaces all previous employment handbooks effective with its adoption by the City counsel.

[R. at 65]. With regard to termination and discipline procedures, the handbook provides as follows:

> Discipline procedures. The City is committed to a disciplinary procedure that is more corrective and constructive than punitive. Disciplinary actions may arise when an employment violates any rules, regulations, or policies/procedures governing his/her employment, when an employee is guilty of offenses or misconduct which violate general rules of civil behavior, or the offenses against the City.
> Normally, the disciplinary procedure to be followed is progressive in nature, as outlined below. **However, each situation is considered individually, and the City reserves the right to bypass any of the normal process should circumstances warrant.**
>
> ***
>
> 4. Termination. When infractions or acts of misconduct are repeated or where a single infraction or misconduct is severe, an employee may be terminated from City employment. Terminations will be effective immediately with the employee being advised of his/her grievance/appeal rights.

Jones makes a passing reference in her brief that she was somehow retaliated against as a result of reporting inappropriate behavior. However, this unspecified allegation is not

substantiated by record evidence, pled in the Complaint, or supported in fact. Jones does not fall within any exception to the at-will employment doctrine. Hattiesburg owed her no duty, and she had no assurance of employment that gives rise to a cause of action. Courts have specifically found that termination of an at-will employee does not give rise to a claim for negligent or intentional infliction of emotional distress. *Pegues v. Emerson Electronic Co.,* 913 F. Supp. 976 (N.D. Miss. 2002)(Stating, "Although the tort is recognized in Mississippi, the Court finds it at odds with the notion of at-will employment."); *Brown v. Inter-City Federal Bank for Sav.,* 738 So.2d 626 (Miss. Ct. App. 1999). With regard to her complaint regarding reorganization to a full-time city judge position, the handbook referenced by Jones plainly states that reductions in force may occur due to reorganization when a position is deemed unnecessary, and in these circumstances, the loss of employment is not a grieveable issue. [R. at 70].

The trial court properly dismissed Jones' employment contract claims arising out of her termination because she was an at-will employee.

II. The Court properly dismissed Plaintiff's defamation claims due to her failure to specify and substantiate her claims pursuant to *Chalk v. Bertholf*, 907 So.2d 290 (Miss. App. 2008).

A. The defamation claim fails for lack of specificity and supporting evidence.

Jones' claim for defamation fails as a matter of law due to her failure to plead sufficient facts and substantiate her claims by record evidence. Jones alleges that some unknown person communicated an unidentified defamatory statement to some unknown person at an unknown time.

In *Chalk v. Bertholf,* the Court of Appeals affirmed the trial court is dismissal of a complaint where it "failed to specify which of the twelve Plaintiffs were slandered by which of the two Defendants." 980 So.2d 290 (Miss. App. 2008). The court in *Chalk* also determined that

the Complaint was insufficient because it failed to "set forth the statements, paraphrase or verbatim, that constituted slander," and "without setting forth any information in the complaint regarding the statements, to whom the statements were made, and how the statements were slanderous, the allegations that the appellees made 'slanderous statements' constitutes bare legal conclusion with no support in the complaint." *Id* at 298.

The Complaint in this case states the following without any specificity:

> 6. The Defendant and other unknown John and Jane Does A-Z made certain false, slanderous and defamatory statements to the media and the general public verbally, in writing and/or through or by unknown third persons.
> 7. Beginning in late September 2012 and continuing for months afterward Defendants stated for public consumption, words to the effect that the Plaintiff, Vanessa J. Jones was corrupt and took "bribes." Moreover, the Defendants allowed and perpetuated false statements to the effect that the Plaintiff signed blank court documents that could be misused in some fashion or words to that effect.

[R. at 8].

Plaintiff's sworn interrogatory responses did not add any clarity or specificity to the alleged defamatory statements. [R. at 32-35]. Despite multiple opportunities to assert the identity of the individual who made defamatory statements, the specific content of the statements, who they were communicated to or any other specifics, Jones failed to provide any record evidence to substantiate such a claim.

In such cases as this, "the court must decide whether a Complaint provides, 'allegations of sufficient particularities so as to give the Defendant or Defendants notice of the nature of the complained-of statements.'" *Chalk v. Bertholf*, 980 So.2d at 297. "The trial court in a defamation case must make the threshold determination of whether the language in question is actionable." *Hayne v. The Innocence Project*, 211 W.L. 198126 (U.S.D. Miss. 2011)(citing, *Mitchell v. Random House, Inc.*, 703 F.Supp. 1250, 1256 (S.D. Miss. 1988). Additionally, the

trial court is faced with a determination as a matter of law with the determining whether the offending words are defamatory prior to submission to the jury. *Lawrence v. Evans,* 573 So.2d 695, 697 (Miss. 1990)(citing *Fulton v. Mississippi Publisher Corp.*, 498 So.2d at 217).

In a defamation case, the plaintiff should be able to articulate who made a slanderous statement, what was said, to whom it was directed, and the circumstances surrounding the incident. The actionable words are what prompted a lawsuit, yet Jones never identified the accused, the date and circumstance of the offense, or other facts supporting an actionable claim of slander.

The trial court properly dismissed Jones' defamation claim by finding that it was not properly plead or supported by the evidence presented at the summary judgment hearing.

B. Defamation fails because Jones cannot prove malice, and Hattiesburg is not vicariously liable for defamation.

Jones' defamation claim fails because, as an appointed municipal judge, she is a public official, and defamation claims against public officials are required to be shown by clear and convincing evidence of malice. *Stegall v. WTWV, Inc.*, 609 So.2d 348 (Miss. 1992); See also *Meridian Star, Inc. v. Williams*, 549 So.2d 1332, 1337 (Miss. 1989). Jones failed to allege, plead and demonstrate through record evidence a mere scintilla of malice by anyone. Malice means that a defamatory statement was "made with knowledge of their falsity or in reckless disregard of whether they are true or false." *Ferguson v. Watkins,* 448 So.2d 271 (Miss. 1984).

Hattiesburg is the only named Defendant in this case, and it is not vicariously liable for a defamation claim. Pursuant to Miss. Code Ann. § 11-46-5(2) and § 11-46-7, claims for defamation are expressly excluded from the course and scope of municipal employment, causing municipalities to be shielded with immunity. See eg. *McBroome v. Payne,* No., 2010 WL

3942010, at *9 (S.D. Miss. 2010); and *Tyson v. Jones Cuty., MS*, 2008 WL 4602788, at *7-8 (S.D. Miss. 2008)(applying immunity for claims outside course and scope of employment).

C. Jones was not entitled to MRCP 56(f) relief.

Jones failed to direct the trial court to any evidence or discovery which she was otherwise unable to obtain material to the motion pending before the Court. The only thing Jones did in response to the motion was to assert that she needed "more time" to conduct "unspecified" discovery. [See Motion for 56(f) Relief, R. at 46].

Several courts have dealt with this situation. In *Jamison v. United States*, 2008 WL 4372648 (N.D. Miss 2008), the United States District Court for the Northern District of Mississippi held that, "[u]nder Rule 56(f), 'A party seeking additional time to conduct discovery must (1) request extended discovery prior to the court's ruling on summary judgment; (2) place the court on notice that further discovery is being sought; and (3) demonstrate to the court with reasonable specificity how the requested discovery pertains to the pending motion." (citing *Howell v. Ferguson Enters., Inc.*, 93 Fed. Appx. 12, 14 (5th Cir. 2004). Moreover, **"[t]he party seeking a continuance must show how the additional discovery will create a genuine issue as to a material fact and may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts."** *Hill v. Tahmekera*, 38 F.3d 568 (5th Cir. 1994). In *Prescott v. Leaf River Forest Prods., Inc.,* 740 So.2d 301, 307 (Miss. 1999), the Court stated that the "party resisting summary judgment must present specific facts why he cannot oppose the motion and 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 of the absence of a genuine issue of fact.'" As stated in *City of Jackson v. Shavers*, 97 So.3d 686, 691-92 (Miss. 2012), reh'g denied, (Sept. 27, 2012),

> The plaintiffs have failed to show how further discovery will allow them to defeat the City's motion for summary judgment, which is a prerequisite to obtaining the protections of Rule 56(f):
>
> > The party resisting summary judgment 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 of the absence of a genuine issue of fact.'
>
> *AAA Cooper Transp. Co. v. Parks,* 18 So.3d 909, 912 (Miss.Ct.App.2009) (quoting *United States v. Little Al,* 712 F.2d 133, 135 (5th Cir.1983)). **Summary judgment may be granted, in spite of a Rule 56(f) request for time for additional discovery, when the record contains all the necessary information for a ruling on the motion.**

In this case, Jones wholly failed to demonstrate how additional discovery pertaining to the pending motion would create a genuine issue of fact. Instead, she sought to conduct a fishing expedition based on nothing more than unsupported supposition. The Motion for 56(f) Relief states:

> Here, there is ample time for discovery. Here, the Plaintiff is entitled to ascertain, via discovery: what persons have discoverable knowledge? Plaintiff is entitled to depose at least some of those persons and cross examine them regarding information they possess. This includes all parties named herein. Plaintiff is entitled to know, if anyone, took action regarding her and who disagreed with Defendants and the course of action they adopted regarding Plaintiff. Plaintiff is entitled to depose the Defendants, via MRCP 30(b)(6), and ascertain who has information and knowledge regarding the Amended Complaint of Plaintiff.

[R. at 47-48]. The Court can see that Jones failed to identify the claims for which she sought discovery and the specific discovery she sought. Instead, she wanted to go fishing. Her request for additional discovery was properly denied by the trial court.

CONCLUSION

Jones was an at-will employee of the City of Hattiesburg and could be terminated for any reason. Jones failed to set forth any evidence creating a genuine dispute of material fact in this matter. Jones further failed to properly plead and support her defamation claim. Hattiesburg is

not liable for defamation, as defamation is outside the course and scope of employment, and Hattiesburg is immune from such claims under the MTCA.

RESPECTFULLY SUBMITTED, this the 24th day of March, 2016.

/s/ Clark Hicks
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date served a true and correct copy of the above **BRIEF OF APPELLEE, CITY OF HATTIESBURG** pursuant to M.R.A.P. 25 upon the individuals identified below and that 1 original and 1 copy of the same were mailed for filing with the Lamar County Circuit Clerk on the date below:

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This the 24th day of March, 2016.

/s/ Clark Hicks
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