2014 WL 10049118 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

COMMUNITY CARE CENTER OF ABERDEEN, Appellant,
v.
Mary BARRENTINE, Appellee.

No. 2014-IA-00436.
October 8, 2014.

On Interlocutory Appeal from the Circuit Court of Monroe County, Mississippi
Oral Argument Requested

Brief of Appellee

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*1 STATEMENT OF THE ISSUE

1. Whether an action in tort for wrongful termination in violation of Mississippi's public policy exception to the employment at-will doctrine is governed by a one-year statute of limitations or a three-year statute of limitations.

*2 STATEMENT OF THE CASE

On November 15, 2012, Plaintiff/Appellee Mary Arnetta Barrentine ("Barrentine") filed her Complaint in the Circuit Court of Monroe County, Mississippi, against Defendant/Appellant Community Care Center of Aberdeen ("CCC") seeking actual and punitive damages for discharge in violation of Mississippi's public policy. [R:9]. On February 6, 2013, Barrentine filed her First Amended Complaint. [R:12].

On March 13, 2014, the Circuit Court denied CCC's motion for summary judgment finding there were genuine issues of material fact to be determined by a jury, and holding that the statute of limitations for wrongful termination in violation of Mississippi's public policy is three (3) years. [R:263].

On May 5, 2014, this Court granted CCC's Petition for Permission to File Interlocutory Appeal. [R:264]

STATEMENT OF THE FACTS

On June 24, 2010, Barrentine was hired by CCC as a part-time charge nurse. [R:112]. Barrentine was subsequently promoted to full-time charge nurse, and later moved to the position of supervising nurse. *Id.* Barrentine' s immediate supervisor was Mattie Keely ("Keely"), who was the Director of Nursing the entire time Barrentine worked for CCC. [R:113]. Ricky Foster ("Foster") was the administrator for CCC. [R:118].

On Friday, April 29, 2011, Barrentine received an x-ray report for a patient who had suffered a broken arm. [R:131]. The patient was complaining to his nurse about pain in his arm. *Id.* Nurse Erin Kennedy ("Kennedy"), with Barrentine present, called Lisa Cooper ("Cooper"), who is a nurse practitioner. Cooper instructed Kennedy to put the patient's arm in a sling and to file an incident ***3** report. [R:131-32]. Once Barrentine became aware that the patient had a broken arm, her primary responsibility was to notify Keely of the injury, and Barrentine did so. *Id.* Keely told Barrentine that the patient's arm had been broken previously. *Id.*

Barrentine suspected there might be **abuse**, but she did not know who might have committed the **abuse**. [R:133-34]. Barrentine asked the other nurses whether Janet Stewart was working the hallway, where the patient was located, though she did not believe Stewart had worked in that area. *Id.* Barrentine did hear from those other nurses that there had been skin tears reported after Stewart worked with their patients. [R:134].

Barrentine did not draft an incident report at that time because she did not have enough information about the injury to complete an incident report. [R:132]. Barrentine discussed this issue with Kennedy, and the two determined that since Keely was out of town, they needed to discuss the situation with Keely on Monday, May 2, 2011, when she returned, before writing an incident report. *Id.* Barrentine did not want to make any false accusations. [R:138].

On Monday, May 2, 2011, Barrentine planned that she and Kennedy would arrive at work early to talk with Keely. [R:134]. Instead, Keely demanded that Barrentine come to the facility immediately. *Id.* Barrentine told Keely that she could not come to the facility at that moment. *Id.* Barrentine asked Keely whether she and Kennedy could come to the facility at a later time to discuss the injury to the patient and the incident report, and Keely responded, "If you can't come now don't bother coming this afternoon." [R:135].

After the conversation with Keely, Barrentine called both the state Ombudsman Pat Henry and Defendant's corporate compliance number and talked to Randi Belton. [R:136]. Barrentine told the state Ombudsman about a nurse who was too rough handling the residents, and explained that ***4** she had some concerns. *Id.* Barrentine also called the corporate compliance officer of Defendant and reported the **abuse**. *Id.*

Later that same day, Foster asked Barrentine to come to his office to discuss these issues. [R:136]. After the meeting, Foster suspended Barrentine. [R:139]. On May 4, 2011, Foster called Barrentine and told her she was being fired for failing to follow policies and procedures. *Id.*

Barrentine filed her First Amended Complaint claiming she was wrongfully terminated in violation of Mississippi's public policy because she reported a criminal act - the **abuse** of a patient. [R:112]. CCC filed its motion for summary judgment, arguing, *inter alia*, that the one-year statute of limitation of MISS. CODE ANN. § 15-1-29 applies and, thus, the claim is time barred. [R:25]. After fully briefing the issue and conducting oral arguments before the Circuit Court of Monroe County, that court determined that the three-year statute of limitations was applicable and denied CCC's motion. [R:264].

STANDARD OF REVIEW

For an interlocutory appeal from a summary judgment ruling based on a question of law, the standard of review is *de novo.* *Mississippi Dept. of Transp. v. Allred*, 928 So. 2d 152, 154 (Miss. 2006); *Cooper v. Crabb*, 587 So.2d 236, 239 (Miss. 1991).

SUMMARY OF THE ARGUMENT

CCC claims that the statute of limitations for a wrongful termination claim is one year, instead of the general three-year statute of limitations in Mississippi, because Barrentine' s employment is based on an unwritten contract of employment. The problem with CCC's argument is that Barrentine' s action sounds in tort, not contract. All of the authorities cited by CCC deal with actions for breach of unwritten contracts, not torts.

***5** MISSISSIPPI CODE ANNOTATED § 15-1-49 mandates a three-year statute of limitations for "[a]ll actions for which no other period of limitation is prescribed." There is "no other period of limitation" prescribed for termination in violation of Mississippi's public policy. MISS. CODE ANN. § 15-1-35. Therefore, that cause of action is governed by the three-year statute of limitation of MISS. CODE ANN. § 15-1-49(1). *Wertz v. Ingalls Shipbuilding, Inc.,* 790 So.2d 841 (Miss.App. 2000), held that pursuant to MISS. CODE ANN. § 15-1-49, the statute of limitation for claims of intentional interference with contract and wrongful discharge in violation of Mississippi's public policy is a three-year statute of limitations.

Subsequent federal decisions have followed Wertz in reaffirming that this type of claim sounds in tort. *Wertz* remains sound law and should not be overruled.

The policy concerns for a shortened statute of limitations for unwritten contracts - "the imperfect memory of the contracting parties" - do not apply to actions based on an employer's having required an employee to engage in illegal activity or to an employee's reporting illegal activity, the subject of the *McArn v. Allied Bruce-Terminix Co., Inc.,* 626 So.2d 603, 607 (Miss. 1993) exception to employment at-will. These are the types of actions which one would well remember. Thus, both the applicable statutes' plain language and sound public policy support a three-year statute of limitations.

*6 ARGUMENT I.

BARRENTINE'S CLAIMS STEM FROM HER WRONGFUL TERMINATION IN VIOLATION OF MISSISSIPPI'S PUBLIC POLICY, WHICH IS A TORT, AND NOT A BREACH OF CONTRACT ACTION.

Petitioner CCC claims that the statute of limitations for a wrongful termination claim is one year, instead of the general three-year statute of limitations in Mississippi, because Barrentine's employment is based on an unwritten contract of employment. The problem with CCC's argument is that Barrentine's action sounds in tort, not contract, and all of CCC's authorities deal with actions for breach of unwritten contracts, not torts. *McArn v. Allied Bruce-Terminix Co., Inc.,* 626 So.2d 603, 607 (Miss. 1993), held that an action for reporting illegal activity "... is not barred by the employment at will doctrine from bringing ***action in tort*** for damages against his employer." (Emphasis added).

MISSISSIPPI CODE ANNOTATED § 15-1-49 establishes a three-year statute of limitations for "[a]ll actions for which no other period of limitation is prescribed." There is no "other period of limitation" provided for the tort of wrongful discharge in violation of Mississippi public policy. This tort is not listed among those torts enumerated as having a one-year statute of limitations by MISS. CODE. ANN. § 15-1-35, which provides:

> All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

Nor is such an action based on an unwritten contract addressed by MISS. CODE ANN. § 15-1-29, which is entitled **"actions on accounts and unwritten contracts,"** (emphasis added), and which states:

> ***7** Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied,

> shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

This action is not based on an "unwritten contract" of employment. Rather, it is based upon the allegation that CCC fired Barrentine because she reported a criminal act - the **abuse** of a patient. [R.112]. The *McArn v. Allied Bruce-Terminix Co., Inc.,* 626 So.2d 603, 607 (Miss. 1993), holding that such an action is "an action in tort," has been routinely followed by all decisions which have ever addressed the issue. See, for example, *Willard v. Paracelsus Health Care Corp.,* 681 So.2d 539, 543 (Miss. 1996) ("such conduct, if found, is an independent tort giving rise to punitive damages"); *Kyle v. Circus Circus Mississippi, Inc.,* 430 Fed.Appx. 247, 250 (Miss. 2011) ("Regardless of whether a written contract governs an employment relationship, '(1) an employee who refuses to participate in an illegal act as in *Laws [v. Aetna Finance Co.,* 667 F.Supp. 342 (N.D. Miss. 1987)], shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer."' *Kyle,* citing *McArn,* 626 So.2d at 607); *Howell v. Operations Management Intern., Inc.,* 77 Fed.Appx. 248, 251 (5th Cir. 2003) ("The exception creates a tort action in favor of an at-will employee who is discharged for 'refus[ing] to participate in an illegal act' or for 'reporting illegal acts of his employer"'); *Zeigler v. University of Mississippi Medical Center,* 877 F.Supp.2d 454,464 (S.D. Miss. 2012) (employment at-will doctrine does not prohibit employee at-will from "from bringing an action in tort for damages against his employer," under circumstances described in McArn); *Hammonds v. Fleetwood Homes* ***8** *of Mississippi, Inc.,* 907 So.2d 357, 360 (Miss.App. 2004) ("'an employee who is discharged for reporting illegal acts of his employer' may bring an action in tort against the employer"); *McGrath v. Empire Inv. Holdings, LLC,* 2013 WL 85205, *4 (N.D. Miss. 2013) (McArn established that "an employee who refuses to participate in an illegal act... shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer").

Courts have repeatedly held that a *McArn* action is an action "in tort." Thus, CCC's argument that the action is one based on an unwritten contract is unsupportable. Certainly, the cases cited by CCC do not support such an argument. For example, *McCool v. Coahoma Opportunities, Inc.,* 45 So. 3d 711, 714 (Miss. App. 2010), held:

> McCool argues that COI breached its employment contract with her when her employment was terminated. The trial court found that McCool's claim was barred by the one-year statute of limitations because no written employment agreement existed.

Id.; see also, *Garrett-Greer v. Key Staff Source, Inc.,* 2009 WL 1044589, *4 (N.D. Miss. 2009) (employment application did not constitute a written contract of employment); *Sloan v. Taylor Mach. Co.,* 501 So. 2d 409, 410 (Miss. 1987) (employee handbook did not constitute written contract) [1] ; *Michael S. Fawer v. Evans,* 627 So.2d 829,830 (Miss. 1993) (action to recover attorneys' fees is an action on open accounts subject to three-year statute of limitations).

***9** *Davis v. Bank of America Corp.,* 2013 WL 666903, *2 (S.D. Miss. 2013) was an action for wrongful garnishment on a credit card account. *Davis* does not involve the Mississippi law tort of discharge in violation of public policy. In pure dictum, the court stated that actions for wrongful termination would be subject to a one-year limitations period, but cited MISS. CODE ANN. § 15-1-29, which deals with actions on unwritten contracts. In this case, Barrentine does not bring any action based on an unwritten contract. Therefore, this action does not call for an interpretation of MISS. CODE ANN. § 15-1-29, which, by its terms, applies to "[l]imitations applicable to actions on accounts and unwritten contracts."

CCC fails to cite a single Mississippi appellate case where an action in tort for wrongful termination in violation of public policy is held to have a one-year statute of limitations. On the other hand, *Wertz v. Ingalls Shipbuilding, Inc.*, 790 So.2d 841 (Miss.App. 2000) holds that the general three-year statute applies. In *Wertz*, the plaintiff filed a claim for wrongful discharge in violation of Mississippi public policy and filed a tortious interference with employment claim. The Mississippi Court of Appeals held:

> Pursuant to section 15-1-49, the statute of limitation for claims of intentional interference with contract and wrongful discharge, Wertz had three years within which to file his claims. *See Nichols v. Tri-State Brick and Tile*, 608 So.2d 324, 332-33 (Miss. 1992).

Wertz, at 845.

***10** Subsequent federal decisions have followed the *Wertz* rationale in applying a three-year statute of limitations. *Buntyn v. JP Morgan Chase Bank, N.A.*, 2014 WL 652946 (S.D. Miss. 2014) held:

Plaintiffs claim for intentional infliction of emotional distress is governed by a one-year statute of limitations, Mississippi Code § 15-1-35. *Jones v. Fluor Daniel Services Corp.*, 32 So.3d 417,422-23 (Miss. 2010). Plaintiffs remaining claims are governed by Mississippi's residual statute of limitations, which is three years. See Miss. Code Ann. § 15-1-49 ("All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after."). Specifically, the Mississippi Supreme Court has held that Mississippi Code § 15-1-49 applies to actions for wrongful or fraudulent foreclosures. See *Tennessee Properties, Inc. v. Gillentine*, 66 So.3d 695, 698 (Miss.App.2011) (citing *S. Land & Res. Co. v. Dobbs*, 467 So.2d 652,655 (Miss. 1985)).

Buntyn, 2014 WL 652946 at *3 (footnote omitted).

McKlemurry v. Thomas, 2011 WL 3625188 (S.D. Miss. 2011), held:

> Mississippi law recognizes a claim for unlawful interference with employment, even for "at will" employees, and treats this as a claim for tortious interference with contract. *See Levens v. Campbell*, 733 So.2d 753 (Miss 1999)... This type of action carries a statute of limitations of three years. *Wertz v. Ingalls Shipbuilding, Inc.*, 790 So.2d 841, 845 (Miss.App.2001).

McKlemurry, 2011 WL 3625188 at *7.

ARGUMENT II.

STATUTORY INTERPRETATION SUPPORTS THE APPLICATION OF THE THREE-YEAR STATUTE OF LIMITATIONS FOR A CAUSE OF ACTION BASED ON DISCHARGE IN VIOLATION OF PUBLIC POLICY.

CCC claims that statutory interpretation supports the application of the one-year statute of limitations of MISS. CODE ANN. § 15-1-29. Actually, "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language actually expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality* ***11** *Management Dist.*, 541 U.S. 246,253 (2004). "[W]hen a statute is plain and unambiguous,... there is no occasion to resort to rules of statutory interpretation." *Mississippi Dept. of Revenue v. Mississippi Power Co.*, 144 So.3d 155, 158 (Miss. 2014). The language here employed by the legislature is that "[a]ll actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." MISS. CODE ANN. § 15-1-49(1). There is nothing that the legislature has written to govern the limitations period for an action brought by an employee alleging that he has been discharged in violation of public policy. According to *McArn*, such an action is "an action in tort," 626 So.2d at 607, and therefore, is not an action for which "any other period of limitation is prescribed." MISS. CODE ANN. § 15-1-49(1).

This action is not "on an open account or an account not acknowledged in writing" or "on any unwritten contract," and is, therefore, not governed by MISS. CODE ANN. § 15-1-29. It is not for one of the torts enumerated in MISS. CODE ANN. § 15-1-35 and is, therefore, not governed by MISS. CODE ANN. § 15-1-35. Rather, the action is based on a discharge in violation of Mississippi public policy. Because such a claim is not addressed by any other statute of limitations, it is governed by the three-year statute. MISS. CODE ANN. § 15-1-49(1).

***12 ARGUMENT III.**

PUBLIC POLICY SUPPORTS A THREE-YEAR STATUTE OF LIMITATIONS FOR A WRONGFUL TERMINATION IN VIOLATION OF MISSISSIPPI'S PUBLIC POLICY CLAIM.

The policy reasons for a one-year statute limitations for an "unwritten contract of employment" are clear. Ascertaining the terms of a contract becomes more difficult over time when the agreement has not been reduced to writing.

Similar concerns apply to the Statute of Frauds:

> The principal purpose of the Statute of Frauds is to require the contracting parties to reduce to writing the specific terms of their contract,... and thus to avoid dependence on the imperfect memory of the contracting parties, after the passage of time, as to what they actually agreed to some time in the past.

MISS. CODE ANN. § 15-3-1 (1972). *Hall v. Dillard,* 739 So. 2d 383,388 (Miss. App. 1999); *See also Walters v. Patterson,* 531 So.2d 581, 584 (Miss. 1988); *Sharpsburg Farms, Inc. v. Williams,* 363 So.2d 1350, 1354 (Miss. 1978). In a wrongful termination in violation of Mississippi's public policy, there are no specific contract terms to remember, so the concern about remembering the terms of the unwritten employment contract are not relevant. The policy concerns for unwritten contracts- "the imperfect memory of the contracting parties" - do not apply to actions based on an employer's having required an employee to engage in illegal activity or an employee's having reported illegal activity. Indeed, these are the types of actions which one would well remember, and the details of which one would be hard-pressed to forget. Mississippi's general policy providing for a three-year statute of limitations therefore governs.

***13 CONCLUSION**

The circuit court correctly applied the general three-year statute of MISS. CODE ANN. § 15-1-49. That decision should be affirmed.

Footnotes

1 *Bobbitt v. Orchard, Ltd.,* 603 So.2d 356, 361 (Miss. 1992), recognized that a personnel handbook disseminated to all employees becomes a part of the employment contract, which does "create an obligation on the part of (the employer) to follow its provisions in reprimanding, suspending or discharging an employee for infractions specifically covered therein." Whether *Sloan* remains good law after *Bobbitt* is an issue which need be decided on this appeal.

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