IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARIA L. BROWN **PLAINTIFF**

vs. **CIVIL ACTION NO. 3:07cv727HTW-LRA**

DAVID NUTT, P.A., et al. **DEFENDANTS**

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO AMEND COMPLAINT

Defendants David Nutt, P.A., David Nutt & Associates, P.C., Nutt & McAlister, PLLC, David H. Nutt, Mary E. McAlister and William S. Jones (collectively, "Defendants") respectfully submit this Memorandum in Opposition to Plaintiff's Motion to Amend her First Amended Complaint to add Christopher A. Shapley, individually, ("Shapley") and the law firm of Brunini, Grantham, Grower & Hewes, PLLC ("Brunini") as party Defendants.

Defendants respectfully submit that Plaintiff's proposed Second Amended Complaint fails to assert any viable claims against either Shapley or Brunini, and that granting leave to Plaintiff to amend her operative complaint to add Shapley and Brunini as party Defendants would be futile.

Further, Defendants respectfully submit that leave to amend should be denied because Plaintiff's attempt to add Shapley and Brunini as party Defendants is in bad faith. As outlined below, both Plaintiff and her Counsel, Louis H. Watson, have filed frivolous complaints with the Mississippi Bar against Shapley. Additionally, Plaintiff's Counsel accompanied his client to the EEOC's Jackson, Mississippi, office where Plaintiff falsely represented to the EEOC that both Shapley and Brunini were her former "employers". Relying on these patently false representations by Plaintiff, the EEOC issued to Plaintiff Right to Sue letters against Shapley and

Brunini. Such actions clearly evidence bad faith on the part of Plaintiff and her Counsel and constitute a sufficient legal basis to deny Plaintiff's Motion to Amend.

Accordingly, Defendants request that the Court deny Plaintiff's Motion to Amend her First Amended Complaint to add Shapley and Brunini as party Defendants.

I. INTRODUCTION

This is a sex-based discrimination case. Plaintiff has asserted a number of Federal and common law claims under State law against her former employers, as well as an entity and a number of persons who were not her former employers. Defendants in this matter, with the exception of Ernie Coward, are represented by Shapley and Brunini.

On March 12, 2008, Plaintiff filed the instant Motion to Amend to add Shapley and Brunini as party Defendants. Specifically, Plaintiff has sought leave of Court to allege the following claims against Shapley and Brunini: (1) retaliation under Title VII; (2) conspiracy to deprive Plaintiff of equal protection and of equal privileges and immunities, in violation of 42 U.S.C. § 1985(3); (3) defamation; (4) intentional/negligent infliction of emotional distress; (5) negligence; and (6) negligent supervision. Each of Plaintiff's proposed claims against Shapley and Brunini fail as a matter of law.

Turning first to Plaintiff's Federal claims:

- Plaintiff cannot state an actionable claim against either Shapley or Brunini under Title VII because no employer/employee relationship has ever existed between Plaintiff and Shapley or Brunini. Additionally, Plaintiff cannot state an actionable claim against Shapley under Title VII because Shapley does not meet the statutory definition of an "employer."

- Plaintiff cannot state an actionable claim against either Shapley or Brunini under 42 U.S.C. § 1985(3), because the challenged acts of Shapley and Brunini could not even

theoretically violate any federally recognized or protected right, privilege or immunity. Further, to the extent that the challenged acts are alleged to run afoul of any right protected by Title VII, such claims are preempted by Title VII and will not support a claim under Section 1985(3). Thus, Defendants respectfully submit that Plaintiff has failed to assert in her proposed Second Amended Complaint any viable Federal claims against Shapley or Brunini, and the Court should deny leave to amend to add these claims. Further, Defendants submit that the Court should decline to exercise supplemental jurisdiction over Plaintiff's proposed State law claim.

However, should the Court decide to exercise supplemental jurisdiction over Plaintiff's proposed State law claims, for the reasons discussed below, each of these claims also fails as a matter of law. Accordingly, Defendants respectfully request that the Court enter an order denying Plaintiff's Motion to Amend.

II. BACKGROUND FACTS

Plaintiff Maria Brown was employed as a paralegal by Defendant David Nutt & Associates, P.C., from July 2004 through March 31, 2007. She was employed by Defendant Nutt & McAlister, PLLC, from April 1, 2007 until her employment was terminated on July 27, 2007. On December 12, 2007, Brown filed a sex-based discrimination case against her former employers David Nutt & Associates, P.C., and Nutt & McAlister, PLLC. She also named as Defendants David Nutt, P.A., David H. Nutt, Mary E. McAlister, Ernie Coward and William S. Jones. Each of the Defendants, with the exception of Ernie Coward, are represented in the matter by Christopher A. Shapley, a member of the law firm of Brunini, Grantham, Grower & Hewes, PLLC.

On December 20, 2007, Shapley was contacted by Marsha Thompson, a reporter with Jackson, Mississippi, based WLBT, who was seeking a response from Shapley, on behalf of his

clients, to the allegations that Plaintiff was fired because of "whistleblowing" on Defendants' alleged unlawful conduct. Prior to receiving this solicitation from Thompson, Shapley had discussed with his clients the merits of Plaintiff's claims, as well as the available legal defenses, and had reviewed a number of documents relevant to the reasons why Plaintiff's employment had been terminated. Based on these privileged discussions with his clients and a review of relevant documents, Shapley responded to Thompson's inquiry by stating that Plaintiff had been "discharged for inappropriate conduct on the job." See Exhibit A.

On December 27, 2007, Plaintiff filed her First Amended Complaint. See Docket No. 5.

In late December 2007, Defendants learned that Plaintiff was served with a deposition subpoena issued by E.A. Renfroe & Company, the plaintiff in an action captioned E. A. Renfroe & Company v. Moran, et al., Civil Action No. 2:06cv1752-WMA, pending in the United States District Court for the Northern District of Alabama. Upon learning of the issuance of the subpoena and the nature of the factual allegations and legal claims pending in the Renfroe action,[1] Defendants, in consultation with Shapley, came to the conclusion that E. A. Renfroe's counsel might attempt to question Plaintiff regarding the legal services provided by David Nutt & Associates, P.C., and Nutt & McAlister, PLLC, to its clients in connection with the Katrina litigation. Accordingly, Defendants, in consultation with Shapley, decided that the appropriate course of action to prevent the possible breach of client confidences (relating to David Nutt & Associates, P.C.'s, and Nutt & McAlister, PLLC's representation of clients in connection with the Katrina litigation) was to write a letter to Plaintiff reminding her of her ethical and contractual obligations to preserve all confidences learned while employed by David Nutt &

[1] The Renfroe action was filed by an adjusting company, E. A. Renfroe & Company, against two of its former employees, Kerrie Rigsby and Cori Rigsby, alleging claims under the Alabama Trade Secrets Act. In a nutshell, Renfroe alleges that the Rigsby Sisters stole proprietary documents from Renfroe and provided those documents to Richard Scruggs. It has been alleged that some of these stolen documents were utilized by the Scruggs Katrina Group in connection with civil litigation filed in Mississippi in the wake of Hurricane Katrina.

Associates, P.C., and Nutt & McAlister, PLLC. Thus, on January 3, 2008, Shapley prepared and transmitted to Plaintiff such a letter. (A copy of the letter is attached as Exhibit B.) The letter provided a neutral and concise summary of the relevant law governing a paralegal's ethical duties to protect client confidences, as well as a statement of the internal policies of Plaintiff's former employers which were adopted to protect client confidences and her contractual obligation to comply with those internal policies. The letter concluded by advising Plaintiff that she should discuss her ethical and contractual obligations to protect client confidence with her counsel.

On February 8, 2008, Plaintiff filed with the EEOC separate Charges of Discrimination against Shapley and Brunini. (Copies are attached, collectively, as Exhibit C.) In each Charge, Plaintiff falsely represented to the EEOC that Shapley and Brunini was her "employer." Plaintiff alleges in support of her Charges that Shapley and Brunini "retaliated against me, a protected person who filed a claim for sexual harassment and retaliation" by (1) writing the January 3, 2008, letter regarding her deposition testimony and (2) making the statement to WLBT's Marsha Thompson.

On February 21, 2008, without the benefit of conducting any factual investigation of Plaintiff's Charges, the EEOC issued to Plaintiff a Notice of Right to Sue Shapley and Brunini. (Copies are attached, collectively, as Exhibit D.) Upon learning of the issuance of these Notices of Right to Sue, Shapley and Brunini wrote letters to the EEOC stating that they have never been Plaintiff's "employer" and requesting that the EEOC revoke the Notices of Right to Sue. By letter dated February 27, 2008, Wilma Scott, Area Director of the EEOC, revoked the Notice of Right to Sue against Shapley and dismissed the Charge of Discrimination against Shapley based on a finding of **"No Employee/Employer Relationship."** (Copies of the letter and dismissal are

attached, collectively, as Exhibit E.) To date, the EEOC has not acted on Brunini's request to revoke the Notice of Right to Sue issued to Plaintiff with respect to Brunini.

On March 12, 2008, Plaintiff filed the instant Motion to Amend to add Shapley and Brunini as party Defendants. Plaintiff's proposed Second Amended Complaint asserts against Shapley and Brunini Federal claims under Title VII (retaliation) and 42 U.S.C. § 1985. (A copy of the proposed Second Amended Complaint is attached as Exhibit F.) Additionally, Plaintiff's proposed Second Amended Complaint asserts against Shapley and Brunini common law claims under State law for defamation, intentional and/or negligent infliction of emotional distress, negligence for breaching an alleged duty not to defame Plaintiff, and negligent supervision. Each of Plaintiff's proposed causes of action against Shapley and Brunini solely are predicated on (1) the December 20, 2007, statement to WLBT's Marsha Thompson and (2) the transmittal of the January 3, 2008, letter to Brown regarding her deposition testimony in the Renfroe case.

III. ARGUMENT & AUTHORITY

A. The Rule 15(a) Standard.

Rule 15(a) provides that, following the filing of a responsive pleading, the plaintiff may amend her Complaint "only by leave of Court." Fed. R. Civ. Pro. 15(a). "As outlined by the Supreme Court, this Circuit examines five considerations to determine whether to grant a party leave to amend a complaint: 1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendment, 4) undue prejudice to the opposing party, and 5) futility of the amendment." Smith v. EMC Corp., 393 F.3d 590, 595 (5th Cir. 2004) (citing Rosenzweig v. Azurix Corp., 332 F.3d 854, 864 (5th Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). The Fifth Circuit has defined "futility" in the context of a motion to amend "to mean that the amended complaint would fail to state a claim upon with relief could be granted."

J.R. Stripling v. Jordan Prod. Co., 234 F.3d 863, 873 (5th Cir. 2000) (citations omitted). Thus, in evaluating a futility argument, the court should "apply the same standard of legal sufficiency as applied under Rule 12(b)(6).'" Id. (citations omitted).

In Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007), the Supreme Court addressed the standard for evaluating a Motion to Dismiss under Fed. R. Civ. Pro. 12(b)(6):

> Federal Rule of Civil Procedure 8(a)(2) requires only 'a short plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' While a complaint attacked by a 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . . .

Id. at 1964-65 (citations omitted). The Court went on to reason that "[w]ithout factual allegations in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. at 1965, n. 3 (citations omitted). Accordingly, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 1968. In conclusion, the Court stated that in order to survive a Rule 12(b)(6) motion to dismiss, a complaint must state "enough facts to state a claim to relief that is plausible on its face." Id. at 1974 (emphasis added). When the factual allegations contained in a complaint fail to "nudge [plaintiff's] claims across the line from conceivable to plausible, [plaintiff's] complaint must be dismissed." Id.[2]

[2] The Twombly standard was recognized by the Southern District in Taylor v. City of Jackson, 2007 WL 3407681, *1 (S.D. Miss. 2007): "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact).'" This statement of the Rule 12(b)(6) standard echoes the standard that the Court previously announced in Addison v. Allstate Ins. Co., 58 F.Supp.2d 729, 732 (S.D. Miss. 1999): "'Where the plaintiff's complaint is devoid of any factual allegations suggesting a basis for recovery against a particular defendant, there can be no ground for concluding that a claim has been stated.'" (citations omitted); see also Guidry v. Bank of LaPlace, 954 F.2d 278, 281

FEDERAL CLAIMS

B. Plaintiff cannot state a viable claim against either Shapley or Brunini under Title VII.

1. The Statutory Requirements for a Retaliation Claim Under Title VII.

It is well-established that, "[a]s Title VII prohibits discrimination in the employment context, generally only employers may be liable under Title VII." Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007) (citing Oden v. Oktibbeha County, Miss., 246 F.3d 458, 462 (5th Cir. 2001)). In order to state an actionable retaliation claim under Title VII, Plaintiff must plead and prove: "(1) the **employee** has engaged in activity protected by Title VII; (2) the **employer** took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment action." Hernandez v. Crawford Bldg. Materials Co., 321 F.3d 528, 531 (5th Cir. 2003) (emphasis added) (citations omitted). The Fifth Circuit has promulgated a two part test to determine if a defendant is an "employer" under Title VII:

> First, the court must determine whether the defendant falls within Title VII's statutory definition of an "employer." Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees. . . , and any agent of such a person. . . ." If the defendant meets this definition, the court must analyze whether an employment relationship exists between the plaintiff and the defendants.
>
> To determine whether an employment relationship exists within the meaning of Title VII, "we apply a hybrid economic realities/common law test." The most important component of this test is "[t]he right to control [the] employee's conduct." "When examining the control component, we have focused on whether the alleged employer has the right" to hire, fire, supervise, and set the work schedule of the employee. . . . . The economic realities component of the test focuses on "whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment."

(5th Cir. 1992) ("[I]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations. . . . and conclusory allegations and unwarranted deductions of fact are not admitted as true by a motion to dismiss.") (internal quotations and citations omitted).

Muhammad v. Dallas County Cmty. Supervision and Corr. Dept., 479 F.3d 377, 380 (5th Cir. 2007) (citations omitted).

2. Shapley does not meet the statutory definition of an "employer" under Title VII.

Plaintiff cannot state an actionable claim against Shapley under Title VII, because Shapley does not meet the statutory definition of "employer." See 42 U.S.C. § 2000e(b). Specifically, Shapley does not employ the requisite fifteen employees to meet the definition of a statutory "employer" under Title VII, and Plaintiff has made no such allegation in her proposed Second Amended Complaint. Accordingly, for this reason alone, Plaintiff's proposed Title VII claim against Shapley fails as a matter of law, and leave to amend to add this claim against Shapley should be denied. See, e.g., Greenlees v. Eidenmuller Enter., Inc., 32 F.3d 197, 198 (5th Cir. 1994) (affirming the district court's dismissal of plaintiff's Title VII claims because defendant "employed fewer than fifteen employees").

3. No employer/employee relationship has ever existed between Plaintiff and Shapley or Brunini.

Plaintiff cannot state an actionable claim against Shapley or Brunini under Title VII, because neither Shapley nor Brunini has ever been Plaintiff's "employer." Plaintiff fails to allege anywhere in her proposed Second Amended Complaint that either Shapley or Brunini was her "employer." Further, the EEOC already has determined that "No Employee/Employer Relationship" existed between Plaintiff and Shapley. See Exhibit E. Additionally, Plaintiff has failed to plead any facts in her proposed Second Amended Complaint to meet the Fifth Circuit's "hybrid economic realities/common law test" to demonstrate that either Shapley or Brunini may be considered Plaintiff's "employer" for purposes of Title VII. See Muhmmad, 479 F.3d at 380. Accordingly, since neither Shapley, nor Brunini have ever been Plaintiff's "employer," Plaintiff

cannot state an actionable claim against them under Title VII, and leave to amend to add this claim against Shapley and Brunini should be denied. See, e.g., Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994) (concluding that "[T]itle VII does not permit the imposition of liability upon individuals unless they meet [T]itle VII's definition of 'employer'"); Smith v. Rothe Dev., Inc., 2001 WL 1704143, *3 (N.D. Miss. 2001) (concluding that defendant was entitled to judgment as a matter of law on plaintiff's Title VII claims because he was not plaintiff's "employer").

C. Plaintiff cannot state a viable claim against either Shapley or Brunini under 42 U.S.C. § 1985.

1. The Elements of a Claim Under 42 U.S.C. § 1985(3).

In addition to seeking leave to assert Federal claims against Shapley and Brunini under Title VII, Plaintiff also seeks leave to assert claims against Shapley and Brunini under 42 U.S.C. § 1985. Section 1985(3) grants a private right of action against persons who "conspire" to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . ." 42 U.S.C. § 1985(3). This statute was enacted "to prevent deprivation of equal protection of the laws and equal privileges and immunities, not to serve as a general federal tort law. . . ." Jackson v. Cox, 540 F.2d 209, 210 (5th Cir. 1976). In order to state an actionable claim under Section 1985, the plaintiff must demonstrate "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." Id.

It is well-established that "Title VII is the exclusive remedy for violations of rights created by Title VII itself," and "Title VII preempts § 1985 actions alleging violations of Title VII rights." Lakoski v. James, 66 F.3d 751, 755 (5th Cir. 1995) (citing Great Am. Fed. Sav. &

Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979) ("[W]e conclude that § 1985(3) may not be invoked to redress violations of Title VII.")); see also Jackson v. City of Atlanta, Tx., 73 F.3d 60, 63 (5th Cir. 1996) ("Congress intended for Title VII - with its own substantive requirements, procedural rules, and remedies - to be the exclusive means by which an employee may pursue a discrimination claim."). Thus, to the extent that a plaintiff's Section 1985 claims stem from an alleged violation of Title VII, a plaintiff "may not use § 1985(3) as a remedy." Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 270 (5th Cir. 2001).

2. Plaintiff cannot state an actionable claim against either Shapley or Brunini under 42 U.S.C. § 1985(3).

Defendants are unaware of any federally recognized or protected right, privilege or immunity that could even theoretically be violated by either (1) the December 20, 2007, statement by Shapley to WLBT's Marsha Thompson or (2) the transmittal of the January 3, 2008, letter to Brown regarding her deposition testimony. Further, to the extent that Brown's proposed Section 1985 claims against Shapley and Brunini are predicated on an alleged violation of the anti-retaliatory provisions of Title VII, such claims are preempted by Title VII and will not support a claim under Section 1985(3). See Lakoski, 66 F.3d at 755 (citing Great Am., 442 U.S. at 378.)). Thus, because the alleged improper acts of Shapley and Brunini on which Plaintiff bases her proposed claims under Section 1985(c) did not violate any federally recognized or protected right, privilege or immunity, Plaintiff cannot state a viable claim against Shapley or Brunini under Section 1985(3). Accordingly, leave to amend to add these claims against Shapley and Brunini should be denied.

D. If the Court Concludes that Brown's Proposed Second Amended Complaint Fails to State an Actionable Federal Claim Against Shapley and Brunini Under Title VII or Section 1985, the Court Should Decline to Exercise Supplemental Jurisdiction Over Brown's State Law Claims.

In civil actions in which a federal court has original jurisdiction, it "shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). It is well-settled, however, that the district court may decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction" 28 U.S.C. § 1367(c)(3). Indeed, "the Fifth Circuit has announced . . . [a] 'general rule' . . . that courts should decline supplemental jurisdiction when all federal claims are dismissed or otherwise eliminated from the case." Realty Trust Group, Inc. v. Ace Am. Ins. Co., 2007 WL 4365352 at *6 (S.D. Miss. 2007) (quoting Certain Underwriters at Lloyds, London v. Warrantech Corp., 461 F.3d 568, 578 (5th Cir. 2006)). In accordance with this "general rule," Defendants respectfully request that, upon a finding by the Court that Plaintiff has failed to allege in her proposed Second Amended Complaint any actionable claims against either Shapley or Brunini under Title VII or Section 1985(c), the Court should decline to exercise supplemental jurisdiction over Plaintiff's proposed State law claims against Shapley and Brunini.

STATE LAW CLAIMS

Alternatively, should the Court decide to exercise supplemental jurisdiction over Plaintiff's proposed State law claims against Shapley and Brunini, each of Plaintiff's proposed State law claims is legally deficient and leave to amend should be denied.

E. Plaintiff cannot state an actionable defamation claim against Shapley or Brunini based on the December 20, 2007, statement by Shapley to WLBT's Marsha Thompson.

1. Elements of a Defamation Claim.

Under Mississippi law, "a claim of defamation requires that the following elements be established: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." McCullough v. Cook, 679 So.2d 627, 630 (Miss. 1996) (citations omitted). For a statement to be actionable, "the defamation must be clear and unmistakable from the words themselves and not the product of innuendo, speculation, or conjecture." Id. at 631 (citing Fulton, 498 So.2d 1215, 1217 (Miss. 1986)); see also Gales v. CBS Broad., Inc., 269 F.Supp.2d 772, 777 (S.D. Miss. 2003) (same). "Under Mississippi law, 'the trial court in a defamation case must make the threshold determination of whether the language in question is actionable.'" Gales, 269 F.Supp.2d at 778 (quoting Mitchell v. Random House, Inc., 703 F.Supp. 1250, 1256 (S.D. Miss. 1988)). "Dismissal of defamation suits for failure of the complaint to state a cause of action or to state a claim upon which relief may be granted occurs with relative frequency." Id. at 780.

Further, for a limited-purpose public figure to state an actionable defamation claim, she must establish that the defamatory statement was made with actual malice. See Staheli v. Smith, 548 So.2d 1299, 1304 (Miss. 1989). To meet this burden, the limited-purpose public figure must demonstrate that the challenged statement was made with "knowledge of falsity or reckless disregard of truth or falsity." Id. "Limited-purpose public figures achieve their status by 'thrust[ing] themselves to the forefront of particular public controversies in order to influence the

resolution of the issues involved,' or because they 'voluntarily inject [themselves] or [are] drawn into a public controversy.'" Trotter v. Jack Anderson Enter., 818 F.2d 431, 433 (5th Cir. 1987) (citations omitted.). The Fifth Circuit has adopted a three-part test to determine if a person, through her actions, has achieve limited-purpose public figure status: "(1) The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy." Id. at 433-34. The determination of "[w]hether an individual is a public figure is a matter of law for the court to decide." Id. at 433.

Finally, Mississippi has recognized the common law litigation privilege: "Statements made in connection with judicial proceedings, including in pleadings, are, if in any way relevant to the subject matter of the action, absolutely privileged and immune from attack as defamation, even if such statements are made maliciously and with knowledge of their falsehood." McCorkle v. McCorkle, 811 So.2d 258, 266 (Miss. Ct. App. 2001) (citing Gunter v. Reeves, 21 So.2d 468, 470 (Miss. 1945); Hardtner v. Salloum, 114 So. 621, 623-24 (Miss. 1927)).

2. Shapley's statement to WLBT's Marsha Thompson is not clearly and unmistakably defamatory on its face.

Paragraph 42 of Plaintiff's proposed Second Amended Complaint identifies the alleged defamatory statement: "Defendant Shapley stated to Marsha Thompson, reporter for WLBT Channel 3, a statewide television news organization, that **'the paralegal [Plaintiff] was discharged for inappropriate conduct on the job.**'" See Exhibit F. The challenged statement does not provide any detail, elaboration or specifics regarding the nature of the "inappropriate conduct on the job" that led to termination of Brown's employment with Nutt & McAlister,

PLLC. Further, this innocuous statement was not made in the context of other statements from which the meaning of "inappropriate conduct" could be inferred. Simply stated, a generic statement that an employee was terminated for "inappropriate conduct" is not clearly and unmistakably defamatory on its face, and such a statement is insufficient to support a defamation claim.

3. The Common Law Litigation Privilege Shields Shapley and Brunini from Liability for Defamation Based Upon the Republication to the Media of the Positions of Their Clients Contained in Court Pleadings.

Further, as noted above, Mississippi has long recognized the litigation privilege: "Statements made in connection with judicial proceedings, including in pleadings, are, if in any way relevant to the subject matter of the action, absolutely privileged and immune from attack as defamation, even if such statements are made maliciously and with knowledge of their falsehood." McCorkle, 811 So.2d at 266 (citations omitted). While the Mississippi Supreme Court has not squarely addressed the issue of whether the litigation privilege extends to the republication to the media of allegations and defenses contained in court filings, the United States District Court for the Northern District of California has addressed this issue and concluded that the privilege does extend to such statements. See Welsh v. City and County of San Francisco, 1995 WL 714350 (N.D. Cal. 1995).

In Welsh, "Plaintiff Welsh is charged with defamation for communicating the alleged facts upon which her Title VII and FEHA claims are premised. Defendant Ribera, in turn, made statements denying the truth of plaintiff's allegations, which was, in turn, the basis for his defamation claim." Id. at *7. The Court began its analysis of the litigation privilege by stating that "the statements by both parties directly concerned the factual allegations at issue in Welsh's Title VII and FEHA claims. Accordingly, those statements are sufficiently connected to the

present judicial proceedings. . . ." Id. The Count next held that "both parties' statements had a logical relationship to the underlying sexual harassment actions—plaintiff's statements to the press recited the very allegations contained in her complaint, while defendant's statements mirrored the denials contained in his answer." Id. at * 8. In concluding that both statements were privileged and not subject to cross-defamation claims, the Court held:

> California's litigation privilege was enacted as a mechanism to prevent derivative suits based upon allegedly defamatory statements, the truth of which a factfinder must determine as part of an underlying suit. . . . [I]n this case, the statements to the press by both parties concern the very allegations which are being litigated in plaintiff's sexual harassment causes of action. This Court recognizes that statements to the media generally lie outside of the perimeter of protected "prelitigation" statements. However, in this case, applying the privilege to the parties' public statements to the press would prevent duplicitous litigation and further the underlying policies articulated by the California courts. Indeed, it would appear that a contrary result would add reciprocal defamation claims in ever California tort action where the core factual issue is disputed and the parties make public disclosures as to which side speaks the truth on these issues. Accordingly, applying the litigation privilege to bar both claims is appropriate.

Id. at * 9 (citations omitted).

Defendants submit that, for the same reasons supporting the court's decision in Welsh, Mississippi's common law litigation privilege should be extended to protect statements to the media that constitute the republication of the parties' respective positions in the litigation. Absent such an extension of the privilege, as recognized by the California court, any time the parties make public statements regarding their position in the litigation, reciprocal defamation claims would be ripe. In fact, should the Court decline to extend the litigation privilege to the subject statement of Shapley, Defendants will seek to amend their Answers to assert as counterclaims defamation claims against Louis Watson and the law firm of Louis H. Watson, Jr., P.A., based upon Mr. Watson's defamatory statements about Defendants made to Marsha Thompson prior to Shapley's statement. See Exhibit A. Accordingly, Defendants respectfully

submit that the litigation privilege shields Shapley and Brunini from a defamation claim based upon the republication to the media of the positions of their clients contained in court pleadings. Thus, Plaintiff's defamation claims against Shapley and Brunini fail as a matter of law.

4. Plaintiff Is a Limited-Purpose Public Figure, and Shapley Did Not Act Maliciously in Making the Challenged Statement.

Plaintiff alleges that she "blew the whistle" on Defendants by informing them "of illegal activity with regard to utilizing documents in ongoing litigation in violation of Judge Acker's Memorandum Opinion and Preliminary Injunction." Second Amended Complaint, attached as Exhibit F, at ¶ 52. Plaintiff's alleged "whistleblower" status renders her a limited-purpose public figure under the three-part Trotter test. See Trotter, 818 F.2d at 433. First, the issue of whether members of the former Scruggs Katrina Group utilized State Farm documents that were allegedly stolen for one of State Farm's outside adjustors, E. A. Renfroe & Company, is a matter of public importance and has received substantial media coverage. Second, Plaintiff has squarely inserted herself into this controversy by raising the above-referenced allegations, resulting in her deposition having been taken on January 12, 2008, in connection with the Renfroe case pending in Alabama Federal Court. See Deposition Subpoena, attached as Exhibit G. Thus, Plaintiff has played more than a trivial or tangential role in connection with the dispute at the center of the Renfroe case. Finally, Shapley's challenged statement was made to rebut Plaintiff's allegations in her Complaint, as well as the statements of her Counsel, that Plaintiff's employment was terminated because she "blew the whistle" on alleged "illegal act." Accordingly, the third element of the Trotter test has been satisfied.

As a limited-purpose public figure, Plaintiff must establish that Shapley acted with actual malice in making the challenged statement in order to state an actionable claim for defamation. See Staheli, 548 So.2d at 1304. Thus, Plaintiff must plead that Shapley made the challenged

statement with "knowledge of falsity or reckless disregard of truth or falsity." Id. Plaintiff's proposed Second Amended Complaint is bereft of any allegations that Shapley acted with malice in making the challenged statement to Marsha Thompson. Moreover, as demonstrated below, not only did Shapley not act maliciously in making the challenged statements, his actions were plainly reasonable, as the statement was made after confidential communications with his clients and knowledge of pornographic and other highly inappropriate and offensive e-mails. Accordingly, because Plaintiff has not plead, and plainly cannot prove, that Shapley acted with actual malice in making the challenged statement to Marsha Thompson, Plaintiff's defamation claims fail as a matter of law.

5. Shapley Did Not Act Negligently in Making the Challenged Statement to Marsha Thompson.

Finally, should the Court conclude that Plaintiff is not a limited-purpose public figure, Plaintiff's defamation claims is nonetheless futile because Shapley did not act negligently in making the challenged statement to Marsha Thompson. Prior to making this statement, Shapley had privileged communications with his clients to discuss the merits of Plaintiff's claims, as well as the multiple reasons why Plaintiff's employment with Nutt & McAlister, PLLC, was terminated. Further, Shapley was aware of the existence of a number of pornographic and other highly inappropriate and offensive e-mails that were sent from and received by Plaintiff at her workstation. (A sampling of pornographic and other highly inappropriate e-mails are attached, collectively, as Exhibit H.) **These emails include: (1) dialogue of a sexual nature between Plaintiff and a lawyer that was counsel opposite in a matter in which Plaintiff's former employer was counsel of record (see bates numbers DNM 59-60); (2) dialogue of a sexual nature between Plaintiff and a lawyer whose office has worked with Plaintiff's former employer on litigation matters (see bates numbers DNM 56); (3) pornographic and sexually**

explicit jokes and dialogue sent by Plaintiff from her workstation to third parties (see bates numbers BNM 61-64; DNM 16-31; DNM 118-122); and (4) pornographic and sexually explicit jokes and dialogue sent by Plaintiff from her workstation to co-employees (see bates numbers DNM 36-38; 41-55; 65-71; 73-75; 78-79; 1-6).[3]

In the light of these e-mails, and in reliance on the confidential communications that Shapley had with his clients, it is clear that Shapley acted reasonably in making the challenged statement to Marsha Thompson. Thus, for this additional reason, Plaintiff's defamation claims fail as a matter of law.

F. Plaintiff Cannot State an Actionable Claim for Intentional or Negligent Infliction of Emotional Distress Against Shapley or Brunini.

In order to state an actionable claim against Shapley or Brunini for intentional infliction of emotional distress, Plaintiff must establish that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Brown v. Inter-City Fed. Bank for Savings, 738 So.2d 262, 264-65 (Miss. Ct. App. 1999) (quoting Pegues v. Emerson Elec. Co., 913 F.Supp. 976, 982 (N. D. Miss. 1996)). Further, the court in Brown stated: "[D]amages for intentional infliction of emotional distress are usually not recoverable in mere employment disputes. Only in the most unusual cases does the court move out of the 'realm of an ordinary employment dispute' into the classification of 'extreme and outrageous' as required for the tort of intentional infliction of emotional distress.'" Id. (quoting Prunty v. Arkansas Freightways, Inc., 16 F.3d 649, 654 (5th Cir. 1994) (citations omitted)).

[3] Sexually explicit images, as well as the names of persons who are not either current or former employees of David Nutt & Associates, P.C., or Nutt & McAlister, PLLC, have been redacted. An unredacted copy of the attached e-mails will be provided to the assigned Judges for *in camera* review and to Counsel for Maria Brown.

Plaintiff has failed to plead any facts in her proposed Second Amended Complaint to demonstrate that the instant employment dispute is anything other than run-of-the-mill. Plaintiff alleges that she was terminated for reporting alleged sexual harassment and has been retaliated against for pursuing her sex-based discrimination claims, while Defendants contend that Plaintiff's employment was terminated, among a number of reasons, for inappropriate conduct on the job. Thus, the nature of this employment dispute will not, as a matter of law, support a claim for intentional infliction of emotional distress.

Further, the challenged actions of Shapley and Brunini that form the factual basis of Plaintiff's intentional infliction of emotional distress claim are (1) the December 20, 2007, statement by Shapley to WLBT's Marsha Thompson or (2) the transmittal of the January 3, 2008, letter to Brown regarding her deposition testimony. Such actions were justified and appropriate in connection with Shapley's and Brunini's representation of Defendants in this matter and plainly were not "so outrageous in character, and so extreme in degree, as to go beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Accordingly, for this additional reason, the challenged actions of Shapley and Brunini will not support a claim for intentional infliction of emotional distress.

Turning to Plaintiff's proposed negligent infliction of emotional distress claims against Shapley and Brunini, it is well-established that "Mississippi law does not recognize a cause of action for negligent infliction of emotional distress based on defamation." See Lane v. Strang Communications Co., 297 F.Supp.2d 897, 899, n. 1 (N.D. Miss. 2003) (citing Mitchell, 865 F.2d at 664; Mann v. City of Tupelo, 1995 WL 1945433 at *20 (N.D. Miss. 1995)). Accordingly, Shapley's statement to Marsha Thompson will not, as a matter of law, support a negligent infliction of emotional distress claim. Finally, Plaintiff has failed to allege in her proposed

Second Amended Complaint that she suffered any "physical manifestation of injury or demonstrable harm," as a result of receiving the January 3, 2008, letter; or that it was "reasonably foreseeable" that transmittal of this letter by Shapley and Brunini could have caused Plaintiff to suffer such a physical injury. See Randolph v. Lambert, 926 So.2d 941, 946 (Miss. Ct. App. 2006) (quoting American Bankers' Ins. Co. of Fla. v. Wells, 819 So.2d 1196, 1208 (Miss. 2001)). Thus, for these additional reasons, Plaintiff cannot state an actionable claim against Shapley or Brunini for negligent infliction of emotional distress based on the transmittal of this letter.[4]

In short, the Court should deny as futile Plaintiff's request to amend her complaint to add intentional and negligent infliction of emotional distress claims against Shapley and Brunini.

G. Plaintiff Cannot State an Actionable Negligence Claim Predicated on the Same Facts that Support her Defamation Claim.

Plaintiff has alleged in Count X of her proposed Second Amended Complaint that Shapley and Brunini breached their "duty to not defame the Plaintiff . . . by representing to the media, as well as the general public, false information regarding the reason for the termination of Plaintiff's employments." See Exhibit F at ¶¶ 78-79. Plaintiff's negligence claim against Shapley and Brunini is nothing more than a rehashing of her defamation claim. Thus, as discussed above, because Plaintiff's defamation claims fail for a number of reasons as a matter of law, Plaintiff's negligence claim based upon these same allegations also fails as a matter of law. Further, as discussed above, Shapley and Brunini did not act negligently in making the December 20, 2007, statement to Marsha Thompson. Prior to making this statement, Shapley

[4] Finally, Plaintiff's attempt to state a claim for emotional distress stemming from "the same facts upon which she bases her claim for defamation" fails "as a matter of law." See Mitchell, 703 F.Supp. at 1260. Specifically, in Mitchell, the court held that plaintiff's "attempt to state a separate claim for emotional distress [based on the same facts that support her defamation claim] is superfluous." Id. Thus, for this additional reason, the Court should deny Plaintiff's request to amend her operative Complaint to add emotional distress claims against Shapley and Brunini based on the December 20, 2007, statement to Marsha Thompson.

had privileged communications with his clients to discuss the merits of Plaintiff's claims, as well as the reasons why Plaintiff's employment with Nutt & McAlister, PLLC, was terminated. Further, Shapley had knowledge of documents that indisputably support a conclusion that Plaintiff's conduct on the job was inappropriate. Thus, even if Plaintiff can state, as a matter of law, an actionable negligence claim against Shapley and Brunini based on the same facts that support her defamation claim, it is clear that Shapley acted reasonably in making the challenged statement to Marsha Thompson. Thus, leave to amend to add such a negligence claim would be futile.

H. Count IX of Plaintiff's Proposed Second Amended Complaint Does Not State a Legally Cognizable Claim Against Brunini.

It appears from the title/header of Count IX of the proposed Second Amended Complaint: "NEGLIGENT SUPERVISION-DEFENDANT BRUNINI", that Plaintiff has attempted to state a claim against Brunini, a Mississippi Professional Limited Liability Company, for failure to supervise the actions of one of its members, Shapley. Defendants' research has failed to reveal any statutory provision or case law establishing that a Mississippi Professional Limited Liability Company has a general duty to supervise the actions of its members. Accordingly, Count IX of Plaintiff's proposed Second Amended Complaint fails to state an actionable claim against Brunini.

I. Plaintiff's Motion to Amend Should be Denied Because It Was Filed in Bad Faith.

Finally, as an additional basis to deny Plaintiff's Motion to Amend, Defendants respectfully submit that Plaintiff's attempt to add Shapley and Brunini as party Defendants is being made in bad faith. As demonstrated above, each of Plaintiff's proposed claims against Shapley and Brunini plainly fail as a matter of law and border, at best, on frivolous. Defendants

submit that the true motive behind Plaintiff's attempt to add Shapley and Brunini as party Defendants is to both set-up a motion to disqualify Shapley and Brunini as counsel of record for Defendants in this matter, and harass and embarrass Shapley and Brunini. In addition to filing the instant Motion to Amend, Plaintiff's Counsel, Louis H. Watson, and Plaintiff each have filed a complaint with the Mississippi Bar regarding the transmittal of the January 3, 2008, letter from Shapley to Plaintiff. (Copies of the Bar complaints are attached, collectively, as Exhibit I.) Additionally, Shapley and Brunini have been informed by the EEOC that Plaintiff was **accompanied by her Counsel** when she went to the EEOC's Jackson, Mississippi, office and falsely represented in her Charges of Discrimination that both Shapley and Brunini were her "employers." See Exhibit C. These actions clearly evidence bad faith on the part of Plaintiff and her Counsel, and the Court should not condone such conduct by granting Plaintiff's Motion to Amend. Thus, Defendants respectfully request that the Court exercise its broad discretion and deny the instant Motion to Amend for this additional reason.

IV. CONCLUSION

For the reasons discussed above, Plaintiff's proposed Second Amended Complaint fails to state any legally sufficient claims against either Shapley or Brunini. Thus, it would be futile to grant to Plaintiff leave of court to file her proposed Second Amended Complaint. Further, Defendants respectfully submit that leave to amend should be denied because Plaintiff's attempt to add Shapley and Brunini as party Defendants has been made in bad faith. Accordingly, Defendants respectfully request that the Court deny Plaintiff's Motion for Leave to File Second Amended Complaint.

This the 24th day of March, 2008.

Respectfully submitted,

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DAVID NUTT & ASSOCIATES, P.C.,
NUTT & MCALISTER, PLLC,
DAVID H. NUTT, MARY E. MCALISTER, AND
WILLIAM S. JONES,
Defendants

By: s/ Christopher A. Shapley
One of Their Attorneys

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CERTIFICATE OF SERVICE

I, Christopher A. Shapley, hereby certify that I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: NONE.

This the 24th day of March, 2008.

s/ Christopher A. Shapley