IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES PLAINTIFF

v. CIVIL ACTION NO. 22-286

MISSISSIPPI COMMUNITY EDUCATION CENTER, INC. ET AL. DEFENDANTS

PAUL VICTOR LACOSTE AND VICTORY SPORTS' REPLY IN SUPPORT OF MOTION TO DISMISS

COME NOW, Defendants Paul Victor Lacoste ("Lacoste") and Victory Sports Foundation, Inc., ("Victory"), through counsel, and present their Reply in Support of their Motion to Dismiss, as follows:

Lacoste and Victory seek dismissal from all claims under Mississippi Code Annotated Section 43-1-27. As set forth within its response in opposition, MDHS has confessed that Victory/Lacoste are not liable under Section 43-1-27, entitled "Right to Recover Wrongful Payments." *See* Doc. 79 at 15 ("MDHS hereby affirms specifically that it does not allege any violation of that statute against either of those two Defendants.").

Regarding the contract claim against Lacoste and Victory, as MDHS would have it, this Court should disregard basic contract principles and allow MDHS to pursue an enforcement action through a common law breach of contract claim based on implied federal and state regulations. MDHS has not and cannot cite a single case to this Court where a state agency pursues a breach of contract claim based on a governmental regulation allegedly implied into a contract. The cases cited by MDHS are wholly distinguishable. Under Mississippi law, this Court cannot add to or subtract from the Contract between MCEC and Victory. MDHS therefore has failed to state a claim for breach of contract.[1]

[1] MDHS's introductory remarks ring hollow as well. MDHS has a potential remedy against MCEC - the party with whom MDHS freely and voluntarily contracted.

The remaining claims against these Defendants should be dismissed as well. The Complaint asserts negligence based on alleged contractual duties and purported nonfeasance. This Court must dismiss MDHS's negligence claim under blackletter Mississippi law. *See Clausell v. Bourque*, 158 So. 3d 384, 391 (citing *Hazell Mach. Co. v. Shahan*, 161 So. 2d 618, 623 (Miss. 1964) (where a claim arises from a defendant's purported failure in carrying out alleged duties under a contract (nonfeasance), the claim sounds in contract and not in tort, and the purported tort claim is subsumed by the breach of contract claim). MDHS's tortious interference claim likewise fails because, as the Complaint alleges, the official decision to breach the contract between MDHS and MCEC occurred two years before the Contract between MCEC and Victory ever existed. Under these allegations, MDHS has failed to plead but/for causation as required under Mississippi law in order to state a claim for interference with contract.

Finally, because all of the claims against these Defendants fail, the claim for civil conspiracy must be dismissed as well.

I. DEFENDANTS DID NOT BREACH ANY PROVISIONS OF THE CONTRACT.

As this Court is well aware, Mississippi law requires a breach as an essential element of any contract claim. MDHS admits it cannot cite this Court to a single provision of the Contract that these Defendants allegedly breached, instead attempting to salvage its failed breach of contract claim by string citing this Court to two distinguishable cases.

In *McKnight v. Mound Bayou Pub. Sch. Dist.*, 879 So. 2d 493, 495–96 (Miss. Ct. App. 2004), the plaintiff served in the capacity as athletic director for the Mound Bayou Public School District ("District") and also served as assistant principal/head basketball coach at John F. Kennedy High School. At a meeting on March 7, 2001, the Mound Bayou School Board offered the plaintiff a contract for the same duties and pay during the 2001–2002 year. *Id*.

The District, however, was suffering financial problems such that a statutorily appointed financial adviser subsequently recommended the assistant principal position be abolished. The plaintiff requested a hearing, during which proof of the District's financial condition was introduced. *Id*. The school board ultimately upheld the financial adviser's decision to eliminate the assistant principal position. *Id*.

On appeal, the plaintiff argued that once his employment contract had been executed, the District could not later withdraw it. *Id*. The Mississippi Court of Appeals affirmed the school board's withdrawal of the plaintiff's contract, finding that "it was subject to statutes that would apply to the school district should a financial adviser be named." *Id*. at 498. Reviewing the statutory scheme, the Appeals Court determined that "even though a statute provides for early notice to school employees of contract renewal, that right is subordinate to a school district's need once placed under the oversight of a financial adviser to address effectively the crisis at hand." *Id*. at 498.

McKnight is about whether an executed employment contract can be withdrawn by a school district and the statutory scheme that provides a legal basis for it to be withdrawn. *McKnight* does not stand for the proposition that MDHS can pursue a common law breach of contract action against Victory based on *implied* federal and state regulations. *McKnight* instead simply stands for the proposition that the School District possessed express statutory authority to withdraw the employment contract. The Mississippi Court of Appeals never incorporated (nor could it under Mississippi law) supposedly implied terms into a contract such that the School District could affirmatively allege a breach of the contract and seek monetary damages.

In *Transcontinental Gas Pipeline Corporation v. State Oil & Gas Board of Mississippi*, 457 So. 2d 1298 (Miss. 1984), the Mississippi Supreme Court did not address the issue of whether

Defendant Transco had breached a contract. The petitioner, Coastal, did not have a contract with Defendant Transco. The State Oil & Gas Board obviously did not allege anything whatsoever (much less a breach of contract based on a violation of a regulation implied into a contract), as its capacity was overseeing the administrative hearing at issue. The Mississippi Supreme Court simply affirmed the ruling of the State Oil & Gas Board, holding that Transco, an interstate pipeline, "had to comply with Statewide Rule 48 of the State Oil and Gas Board of Mississippi in its purchases of gas … and … ratably take and purchase gas without discrimination…" *Id*. at 1311.

Rejecting Transco's argument under the Commerce Clause that Rule 48 burdened interstate commerce, the Mississippi Supreme Court noted that any burden to Transco was the result of a contract it freely entered that conflicted with Rule 48 (i.e., under which Transco did not ratably take without discrimination…"). While noting in dicta without citation that "[t]he parties contract against the backdrop of regulation and ought generally be held to an implied incorporation of applicable regulations into the contract[,]" the Court did not imply a regulation into a private contract to find that a party had breached any contract with the state agency. *Id*. at 1322. There was no finding of any affirmative liability against Transco, much less a legal claim, for the alleged violation of Rule 48 implied as part of a contract. This was not an issue before the *Transcontinental* Court.

In the present case, MDHS seeks to impose liability on Victory by harnessing and incorporating, by implication, state and federal regulations into a private contract for fitness camps that do not apply to fitness camps. In *McKnight,* the contract at issue was a public school board contract with a coach/principal that would obviously be governed by the state law governing school board contracts. In *Transcontinental*, the contract dealt with the oil and gas industry and would certainly implicate Oil and Gas Board regulations.

MDHS then seeks monetary damages for an alleged violation of these regulations as part of a contract action. Here, Victory did not enter a contract with the government; it entered a contract with MCEC, a private corporation. MCEC had contracted with MDHS since at least 2016 to ensure MDHS goal and directive compliance in its subcontracts. Under the Contract at issue in this case, MCEC agreed and expressly undertook to Victory and Lacoste the contractual duty of ensuring compliance with MDHS's goals and directives. MDHS is now asking this Court to rewrite the Contract by disregarding that MCEC undertook this compliance obligation. They then seek an affirmative remedy where no duty or remedy exists under Mississippi law.

The Contract at issue in this case explicitly states that Victory will provide fitness and nutrition camps, and it is undisputed that this is exactly what Victory did. The Contract was fully performed by Victory, and MDHS cannot superimpose regulations into a fully performed contract and claim a breach/remedy against Victory and Lacoste where none exists. This claim should be dismissed because it fails to state a claim for which relief may be granted.

II. MDHS's EXTRINSIC EVIDENCE ARGUMENT IS A RED HERRING.

MDHS attempts to rewrite the Contract between MCEC and Victory by arguing the Contract term "directives" is ambiguous. This is a red herring. Under the plain language of the Contract, Victory had no contractual obligation to even determine what MDHS's goals and directives were as to the Contract, much less to ensure the Contract was performed in accordance with MDHS's goals and directives. Whether the Contract spells out MDHS's goals and directives thus has no effect on whether Victory breached the Contract, as this was not Victory's duty. Instead, MCEC, the company which actually contracted with MDHS, maintained this obligation under the unequivocal written terms of the Contract. Victory is simply a provider of fitness and nutrition camps.

Again, MDHS is trying to rewrite the Contract in order to manufacture a claim against Victory where none exists. Grasping at straws and without any legal support whatsoever (because it has none), MDHS asks this Court, "Did Mississippi contract law allow Lacoste to 'bury his head in the sand' and 'wash his hands' of all such MDHS 'directives' just because they were not specified in the contract terms?" Doc. 79 at p. 7. Mississippi law allows parties freedom to contract. MCEC undertook an obligation to Victory that MCEC would ensure compliance with MDHS's goals and directives and had undertaken that responsibility with MDHS for years, as pleaded by MDHS.

III. THE NEGLIGENCE CLAIM IS SUBSUMED BY THE CONTRACT CLAIM.

MDHS argues that Victory owed a common law duty of care to MDHS but repeatedly alleges Victory failed to "exercise reasonable care **in the performance of … contractual obligations** to MCEC…"[2] MDHS also claims that Victory and/or Lacoste "committed the common law tort of negligence … by failing … to exercise reasonable or ordinary care in inquiring into and obeying statutory or regulatory obligations **which governed the performance of their contracts with MCEC and/or FRC** (and the terms of which were inherently implied into all such contracts)..."[3]

The negligence claim is not independent of the contractual claim and, therefore, must be dismissed. MDHS cannot state a claim for an action sounding in tort predicated on nonperformance of a contract:

> An action ex contractu only, **and not an action sounding in tort**, can be maintained for a mere failure to perform a contract.... [If the cause of complaint is an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, **will not give rise to any cause of action**, then the action is founded upon contract, and not upon tort.]

[2] *See* Complaint at p. 16 (emphasis added).
[3] *Id.* at p. 64 (emphasis added).

Clausell v. Bourque, 158 So. 3d 384, 391 (citing *Hazell Mach. Co. v. Shahan*, 161 So. 2d 618, 623 (Miss. 1964) (quoting 1 Am. Jur. 2d *Actions* §§ 8–9 (1962)) (emphasis added); *see also Savage v. Prudential Life Ins. Co. of Am.*, 121 So. 487, 489 (Miss. 1929). Victory never undertook the duty of ensuring that the Contract complied with MDHS's directives. Victory contracted with MCEC such that MCEC was to ensure that the Contract complied with MDHS's goals and directives. Indeed, this was a negotiated element of the Contract. And Victory furthermore even agreed within the express terms of the Contract that the Contract could be amended to conform to these goals and directives. No amendment ever occurred. Under controlling Mississippi law, there simply is no negligence claim applicable to Victory in this case, regardless of whether MDHS is a third-party beneficiary of the contract. This claim must be dismissed.

IV. MDHS HAS FAILED TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS.

MDHS ignores that the allegations in its Complaint that its Executive Director, John Davis, allegedly had an agreement with Nancy New not to follow TANF regulations:

> 62. **Beginning in 2016**, and continuing through 2019, then-MDHS Executive Director **John Davis and Nancy New agreed with one another that Davis would disregard all legal requirements pertaining to lawful TANF purposes** in order to facilitate and support transfers by New through MCEC of TANF funds to entities owned by New, to New family members, and to friends of New, in exchange of New's promise and willingness to disregard the same lawful TANF purposes in order to facilitate transfers by MCEC and FRC of TANF funds to family members and friends of John Davis.
>
> [….]
>
> 64. **That illegal *quid pro quo* agreement and conspiracy between Davis and New *resulted* in all of the transfers of TANF funds for non-TANF purposes**…[4]

[4] Doc. 1, Complaint.

Despite these allegations, MDHS has alleged that Victory/Lacoste interfered with and caused MCEC not to perform or to breach the contract between MDHS and MCEC.[5] According to these allegations, MDHS and MCEC agreed in 2016 to breach the contract with which Victory/Lacoste allegedly interfered. It does not matter whether MDHS claims that John Davis acted out of the scope of his authority. The bottom line is that under the facts pleaded in the Complaint, Victory/Lacoste could not and did not cause the misconduct alleged by MDHS within its Complaint (i.e., the alleged agreement where Davis decided to disregard all legal requirements pertaining to lawful TANF purposes). The Complaint explicitly states that the alleged agreement between Davis and New "***resulted*** in all of the transfers…." According to MDHS's allegations, the contract was being breached two years before the Contract between Victory and MCEC in 2018. As a matter of law, Victory/Lacoste did not induce the alleged behavior of MDHS and MCEC, as alleged by MDHS. MDHS therefore has failed to state a claim for tortious interference with contractual relations.

V. THE TORT OF CIVIL CONSPIRACY REQUIRES AN UNDERLYING TORT.

To establish a civil conspiracy, the plaintiff must prove (1) an agreement between two or more persons, (2) to accomplish an unlawful purpose or a lawful purpose unlawfully, (3) an overt act in furtherance of the conspiracy, [and] (4) ... damages to the plaintiff as a proximate result." *Bradley v. Kelley Bros. Contractors*, 117 So.3d 331, 339 (¶ 32) (Miss. Ct. App. 2013) (citations omitted). MDHS has alleged that Victory/Lacoste breached a contract, committed negligence, and intentionally interfered with its contract with MCEC. It further alleges that Victory/Lacoste

[5] Throughout MDHS's Response, MDHS argues at great length that John Davis could not bind MDHS because Davis was acting outside of his legal authority. This argument has nothing to do with the issue before the Court: whether MDHS has stated claims against Victory/Lacoste under the common law causes of action asserted.

conspired to commit these wrongs. But as set forth above, MDHS cannot state claims for breach of contract, negligence, or intentional interference with contractual relations.

"[A] civil conspiracy claim cannot stand alone, but must be based on an underlying tort." *Fikes v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011) (citing *Aiken v. Rimkus Consulting Group, Inc.,* 333 Fed. Appx. 806, 812 (5th Cir. 2009) (citing *Wells v. Shelter Gen. Ins. Co.,* 217 F. Supp. 2d 744, 755 (S.D. Miss. 2002) (collecting cases))). Because these claims fail, the claim for civil conspiracy to commit these alleged wrongs fails as well.

CONCLUSION

For the foregoing reasons, Victory and Lacoste respectfully request that all claims against them be dismissed with prejudice. Victory and Lacoste further request any other relief the Court deems appropriate.

THIS, the 20th day of July, 2022.

Respectfully submitted,

/s/ Michael A. Heilman

Michael A. Heilman
PAUL V. LACOSTE AND VICTORY SPORTS FOUNDATION

OF COUNSEL:
Michael A. Heilman (MSB No. 2223)
John W. Nisbett (MSB No. 103120)
E. Taylor Polk (MSB No. 103653)
Daniel J. Hammett (MSB No. 105500)
HEILMAN LAW GROUP, P.A.
Meadowbrook Office Park
4266 I-55 North, Suite 106
Jackson, Mississippi 39211
Telephone: (601) 914-1025
Facsimile: (601) 944-2915
mheilman@heilmanlawgroup.com
jnisbett@heilmanlawgroup.com
tpolk@heilmanlawgroup.com
dhammett@heilmanlawgroup.com

CERTIFICATE OF SERVICE

I, Michael A. Heilman, hereby certify that I electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification to all counsel of record.

This the 20th day of July, 2022.

/s/ Michael A. Heilman
Michael A. Heilman