

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL NO. 2007-CP-01075

JIMMY D. GILES

APPELLANT

VS.

KENNETH I. STOKES

APPELLEE

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED BY APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications, or issues for recusal.

1. Jimmy D. Giles, Plaintiff/Appellant;
2. Victor I. Fleitas, Esq. Attorney for Jimmy D. Giles;
3. Kenneth I Stokes, Defendant/Appellee, individually and in his representative capacity as a member of the City Counsel in and for the City of Jackson, Mississippi;
4. Pieter J. Teeuwissen, Esq. Attorney for Kenneth I. Stokes;
5. J. Richard Davis, Esq. Attorney for Kenneth I. Stokes;
6. Sarah O'Reilly Evans, Esq. City Attorney, City of Jackson.

Respectfully submitted this the 7th day of December, 2007.


J. Richard Davis, MSB # 8994

Deputy City Attorney, City of Jackson, MS

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STATEMENT OF THE ISSUES

1. The trial court did not err in denying the Motion to File First Amended Complaint as the proposed Amended Complaint still failed to establish a claim upon which relief could be granted, and further, attempted to assert new causes of action under 28 U.S.C. §1983 which were not properly pleaded, well after the Statute of Limitations had expired, and which could not possibly relate back to the original pleadings.

STATEMENT OF THE CASE

I. Statement of Facts:

On March 6, 2001, the Appellant, Jimmy Giles, a self-proclaimed white supremacist, political activist, commentator, and congressional candidate,¹ and a resident of Rankin County, Mississippi, appeared at a City of Jackson City Council meeting. Mr. Giles requested and was granted permission to speak. However, Mr. Giles apparently had his own agenda planned, and launched into loud verbal personal assaults directed primarily at Councilman Kenneth I. Stokes. Such conduct is prohibited by § 2-71 (e) and (f) of the City of Jackson Code of Ordinances. It wasn't long before a shouting match ensued which resulted in the closing of the meeting for a recess. Mr. Giles was then physically escorted out of City Hall.

On March 8, 2001, Mr. Giles instigated the ensuing legal battle by filing an affidavit with the Municipal Court of the City of Jackson alleging that Councilman Stokes "disturbed the public peace or peace of others by the use of violent, loud, or offensive conduct or language, by preventing Jimmy Giles from speaking at a city council meeting by repeatedly interrupting (sic) his speech."

On March 22, 2001, in response to the March 8, 2001 affidavit filed by Mr. Giles,

¹Please see Mr. Giles' website at www.rebelarmy.com.

Councilman Stokes, acting within the scope of his authority and elected/representative capacity of the Jackson City Council, filed an affidavit with the Municipal Court of the City of Jackson, Mississippi reporting the unlawful acts of Mr. Giles and charging him with breach of the peace and disruption of a public meeting.

On April 4, 2001, the Jackson Municipal court case (Case Number 2001-12819), per the Affidavit filed by Councilman Stokes, was transferred to Hinds County Justice Court. This was one day after Mr. Giles dropped his complaint against Councilman Stokes. On June 8, 2001, the Hinds County Justice Court dismissed the case.

II. Procedural History:

On May 20, 2002, more than one year after he was charged and arrested, but less than one year after the charge was dismissed, Mr. Giles filed his *pro se* complaint against Mr. Stokes apparently attempting to allege a number of torts including false arrest, slander, libel, and malicious prosecution and seeking unspecified damages.² (RE 3-4) Mr. Stokes, through the office of the City Attorney for the City of Jackson, responded with an answer and numerous affirmative defenses as well as a Motion to Dismiss asserting failure to state a claim upon which relief could be granted under MRCP 12(b)(6); Mr. Stokes' qualified immunity; and Mr. Giles failure to join the City as a necessary party. (RE 8-13). Mr. Giles responded to the Motion to Dismiss on June 26, 2002. (R.E. 14-17). Nothing further occurred in the litigation until November 11, 2004 when the City Attorney's office filed an amended Motion to Dismiss, adding failure to prosecute the case to the original Motion to Dismiss. (R.E. 18-26).

² The statute of limitations would therefore have run on any other alleged intentional torts other than malicious prosecution which would not have begun to run until after the charges were dismissed.

On November 15, 2004, Mr. Giles filed a purported response to the Amended Motion to Dismiss, but responding only to the allegations of failure to prosecute the claim and seeking additional time to retain counsel in a separate motion. (R.E. 27-31). Following a hearing, and on November 23, 2004, the trial court entered an order and granted Mr. Giles Motion for additional time to properly respond to the Motion to Dismiss and to retain counsel, granting him thirty (30) days. The Defendant's Motion to Dismiss was taken under advisement. (R.E. 33).

On December 15, 2004, counsel for Mr. Giles filed an entry of appearance and concurrently filed a Motion to File First Amended Complaint. No proper response to the Defendant's Amended Motion to Dismiss was ever filed. (R.E. 34-42). A hearing on the matter was held on January 24, 2005. A full transcript of the hearing is included in the Appellee's Record Excerpts. On December 12, 2005, the trial court entered an order denying Mr. Giles' Motion to File First Amended Complaint. (R.E. 44). Inexplicably, a duplicate order was entered on January 17, 2007 along with another separate order granting the Defendant Stokes' Motion to Dismiss, specifically finding that the complaint fails to state a claim upon which relief can be granted, and that Councilman Stokes was entitled to qualified immunity. (R.E. 45-46). The *pro se* notice of Appeal was filed by Mr. Giles on February 14, 2007. The only issue raised on appeal by the Appellant is whether the trial court erred in denying his Motion to File the First Amended Complaint.

ARGUMENT

Before delving into the sole issue raised by the Appellant, it is necessary to look at underlying issues in context. First, the Appellee timely and properly asserted both his original Motion to Dismiss and his Amended Motion to Dismiss. The motion based on Mississippi Rule of Civil

Procedure 12(b)(6) asserted that the Complaint failed to assert a claim upon which relief could be granted, based also in part on the Appellee's qualified immunity and the Appellant's failure to join a necessary party, the City of Jackson. The amended Motion to Dismiss further asserted a Motion to Dismiss for failure to prosecute under Mississippi Rule of Civil Procedure 41(d). The trial court ruled that the Complaint failed to state a claim upon which relief could be granted and that Appellee was entitled to qualified immunity and dismissed the action.

The Court recently stated in *Children's Medical Group v. Phillips*, 940 So.2d 941 (Miss. 2006) that

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim. *Stuckey v. Provident Bank*, 912 So.2d 859, 865 (Miss.2005) . . . '[I]t must be such that no set of facts would entitle the opposing party to relief.' *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893 (Miss.2006)." A dismissal under Rule 12(b)(6) raises an issue of law, that of legal sufficiency of the complaint, and is reviewed *de novo*. *Lester Eng'g Co. v. Richland Water & Sewer Dist.*, 504 So.2d 1185, 1187 (Miss.1987); citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 at 593 (1969)). *UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc.*, 525 So.2d 746, 754 (Miss.1987).

Here, the original complaint is deficient in a number of areas. For a plaintiff to prevail on a malicious prosecution claim, he must prove by the preponderance of the evidence the following elements: (1) institution of a proceeding; (2) by, or at the insistence of the defendant; (3) termination of the proceeding in the plaintiff's favor; (4) malice in instituting the proceedings; (5) lack of probable cause for the proceedings; and (6) injury or damage resulting from the prosecution. *Condere Corp. v. Moon*, 880 So.2d 1038, 1042(¶ 13) (Miss.2004). The original *pro se* complaint simply fails to plead or establish the elements of malice or lack of probable cause. The same is true of the allegations of abuse of process, false arrest, libel and slander referenced only in paragraph 6 of the complaint, that is, they are bare allegations with no supporting information or factual

allegations to support said charges. Further complicating the issue, is the fact that paragraph 5 of the complaint appears to be an allegation against the Jackson Police Department, a department of the City of Jackson which was never noticed of any such claim, or joined as a named defendant. (R.E. page 4).³

The trial judge was obviously cognizant that the complaint failed to state a claim upon which any relief could be granted. Furthermore, the Appellant never filed a proper response to the Amended Motion to Dismiss, electing instead to rely only on a Motion to Amend effectively admitting that the original pleadings were deficient. His counsel even admitted such in the hearing on the motions (R.E. 53 and 55-56) However, instead of filing a motion to amend the pleadings to conform with or support the original allegations of the original complaint, the Appellant's proffered amended complaint attached to his motion to amend attempted to set out an entirely new cause of action – that of a deprivation of rights under 28 U.S.C. 1983, nearly a year after the statute of limitations for such a claim would have expired.⁴

The question then becomes, could the new allegations in the proffered amended complaint “relate back” to the filing of the original complaint. Rule 15 (c) of the Mississippi Rules of Civil Procedure states in relevant part that “[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in

³As the Appellant has not contested or raised the issue of the propriety of the trial court's findings of qualified immunity or rulings granting the motions to dismiss under Rule 12(b)(6) in this appeal, Appellee assumes that those issues are waived and/or procedurally barred and will not delve further into them.

⁴The allegations giving rise to the cause of action in the amended complaint occurred in March, 2001. (R.E. 39-42). The Motion for Leave to File First Amended Complaint was filed December 15, 2004.

the original pleading, the amendment relates back to the date of the original pleading.”

Faced with a similar question in *Parker v. Mississippi Game and Fish Commission*, 555 So. 2d 725

(Miss. 1989) the Mississippi Supreme found that :

[T]he standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test; although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading." *Wright & Miller, Federal Practice and Procedure: Civil* § 1497 at 495 (1971). In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150, 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196, 201, fn. 1 (1984), it appears that the U.S. Supreme Court has adopted this notice criteria:

... The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitation were intended to provide. 3 J. Moore, *Moore's Federal Practice* ¶ 15.15[3], p. 15-194 (1984) ...

In *Parker*, the Plaintiffs filed a complaint alleging false arrest and false imprisonment. The defendants filed a motion for summary judgment based on the failure of the complaint to state a claim upon which relief could be granted, and at the hearing thereon, purported attempted to amend the pleadings to assert a claim for malicious prosecution. The Court went on to find that:

It appears that the Parkers' amendment fails the identity of transaction test as well as the notice criteria. The "conduct, transaction, or occurrence" which gave rise to the Parkers' original complaint was their arrest. The "conduct, transaction, or occurrence" which gave rise to their proposed amendment was their prosecution. These occurrences are separate and distinct events. As such, there is no identity between these transactions and applying the first test, the proposed amendment should not relate back to the original complaint.

Secondly, applying the notice criteria, since the original complaint failed to inform defendants of litigation concerning a "particular occurrence" (i.e. the criminal prosecution), the defendants were not given "all the notice that statutes of limitation were intended to provide." The amended claim cannot be rehabilitated through the "relation back" doctrine of Rule 15(c).

Here, as in *Parker*, the claims attempted to be asserted in the proffered Amended Complaint

fails the identity of transaction test as well as the notice criteria. Paragraph 7 of the original Complaint alleges that "the willful intentional acts of Defendant constitute malicious prosecution, abuse of process, false arrest, intentional infliction of emotional distress and libel and slander...." (R.E. 4) The purported amended complaint attempts to assert only a claim for deprivation of rights under 28 U.S.C. 1983. Specifically, the proffered amended complaint alleges a denial of his right of free speech by interruptions by Mr. Stokes at the meeting, as well as denial of his civil rights as a result of false arrest and malicious prosecution. (R.E.39-42). Obviously, here, there is no commonality of transaction. The allegations of the proffered amended complaint overlap into a whole different transaction, that of the events of the meeting itself, not just the actions of Mr. Stokes several days later in signing the affidavit and the subsequent prosecution thereof. Also, the Court must look to the prejudice to the defendant in allowing such an amendment. In examining that question in *Parker* the Court said that

In *Red Enterprises, Inc. v. Peashooter, Inc.*, 455 So.2d 793 (Miss.1984), quoting from *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962), this Court said:

... Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded ... if the underlying facts or circumstances relied upon by the plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason---such as ... undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.---the leave should, as the rules require, be "freely given." (Emphasis Added). 455 So.2d at 795.

The Parkers say that because the defendants were aware of the allegations of false arrest and false imprisonment contained in their original petition, and since a malicious prosecution action would require proving the conduct set forth in the original complaint, there would be no undue prejudice to the defendants if leave were granted. This reasoning totally ignores the fact that false arrest and malicious prosecution are separate and distinct causes of action which are comprised of entirely different elements. To allege one by no means implies the other. Allowing the

Parkers to circumvent the one year statute of limitations at the defendants' expense would be unduly prejudicial and justice does not require that leave be given in the current situation.

Id. at 731-732.

In this case, the Motion to File First Amended Complaint was brought well more than three years after the filing of the original complaint and well over four years after the alleged misconduct and obviously outside any statute of limitations. The prejudice to the defendant in this case is as obvious as it was to the Court in *Parker*. The elements of proof and the defenses to a § 1983 claim are far different from a complaint sounding in tort for malicious prosecution. Mr. Stokes had no prior notice of any claim of deprivation or violation of Mr. Giles' civil rights. Based on the foregoing, the claims asserted in the proffered amended complaint could not relate back to the original complaint as filed, and the claims made thereunder would have been outside any applicable statute of limitations.

Furthermore, even had the claims in the proffered amended complaint have related back or even been brought inside the applicable three year statute of limitations, the said proffered complaint is insufficient to establish the elements of a §1983 claim. "[V]ague or general assertions of constitutional rights will not suffice, and a §1983 plaintiff must state with specificity the constitutional right that has been allegedly violated." *Williams v. Lee County Sheriff's Dept.*, 744 So. 2d 286, 293 (Miss. 1999) citing *Sanchez v. Swyden*, 139 F.3d 464, 466-67 (5th Cir.1998).

Here, as in *Williams*, the proffered amended complaint only makes vague assertions of violations of various constitutional rights, but other than the alleged violation of Mr. Giles's rights

to free speech at the counsel meeting,⁵ fails to state with any specificity how Mr. Stokes violated the civil rights of the Appellant or deprived him of any constitutional rights. The complaint further fails to establish the necessary elements of any past practice or pattern of such conduct. The proffered amended complaint was therefore inadequate to support a § 1983 claim on its face. The trial court was therefore well within its discretion in denying the motion to allow Mr. Giles to file his amended complaint as proffered.

CONCLUSION


The trial court correctly found that the original complaint failed to state a claim upon which any relief could be granted and properly denied the Appellant's Motion to File First Amended Complaint. To grant the Appellant's motion to amend would have been an exercise in futility. The new claims asserted in the proffered Amended Complaint were outside any applicable statute of limitations and could not relate back to the original complaint as they do not pass the transactional commonality test. Furthermore, granting such a motion at that late date would unduly prejudice the defendant under established precedent. Finally, the proffered amended complaint itself was inadequate to establish any claim upon which relief could be granted.

Appellee respectfully requests that this Court enter its Opinion and Order sustaining the dismissal of the action and the denial of the Motion to File First Amended Complaint as the trial court has not abused its discretion and has properly ruled in the matter.

⁵Again, the allegation of any tortious conduct at the counsel meeting was never alleged in the original complaint.

Respectfully submitted this the 9th day of December, 2007.

THE CITY OF JACKSON, MISSISSIPPI
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CERTIFICATE OF SERVICE

The undersigned does certify that he has this date transmitted electronically and/or via United States mail a true and correct copy of the above and foregoing Appellees Brief and Record Excerpts to the following:

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So certified, this the 2th day of December, 2007.


J. RICHARD DAVIS, MSB #5994
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