

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CP-02155

JOSEPH DAVIS, JR.

PLAINTIFF/APPELLANT

VS.

BILOXI PUBLIC SCHOOL DISTRICT, et al.

DEFENDANTS/APPELLEES

On Appeal from the Circuit Court of
Harrison County, Mississippi, Second Judicial District
Civil Action No. A2402-07-00036

**BRIEF OF APPELLEES, BILOXI PUBLIC SCHOOL DISTRICT AND THE BOARD
OF TRUSTEES OF THE BILOXI PUBLIC SCHOOL DISTRICT,
AND
REQUEST FOR DAMAGES AND COSTS PURSUANT TO MISS. R. APP. P. 38**

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PARTIES

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

Joseph Davis, Jr., Appellant

Biloxi Public School District, Appellee

Board of Trustees of the Biloxi Public School, Appellee

Silas W. McCharen, Esq., Edward F. Donovan, Attorneys for Appellees

Honorable Roger T. Clark, Harrison County Circuit Court Judge

This, the 13th day of November 2008.



SILAS W. McCHAREN, Attorney for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellees, Biloxi Public School District and the Board of Trustees of the Biloxi Public School District (sometimes referred herein as the "School District"), submit that pursuant to MISS. R. APP. P. 34, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the appellate record. Accordingly, this Court's decisional process will not be aided by oral argument.

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I. STATEMENT OF THE ISSUES

In the "Statement of the Issues" section of his Brief, Appellant provides a laundry list of 10 "issues"¹ on appeal. Appellees, however, do not accept any of the issues provided by Appellant. Pursuant to MISS. R. APP. P. 28(b), Appellees will provide a separate statement of issues. The only to issues relevant to this appeal are as follows:

- 1) Whether the Trial Court below² was correct in dismissing Appellant's claims in their entirety as they were all barred under the doctrines of collateral estoppel or *res judicata*, and/or barred by the expiration of the applicable Mississippi statutes of limitation (MISS. CODE ANN. §15-1-49 and § 11-46-1)?
- 2) Whether, under MISS. R. APP. P. 38, Appellees are entitled to damages and costs based on Appellant's frivolous appeal.

¹ As will be shown herein, none of Appellant's "issues" are relevant or pertinent to this appeal. Appellant's lengthy list of "issues" appears to be nothing more than his attempt to *over comply* with MISS. R. APP. P. 28(a)(3). See *Joseph Davis, Jr. v. J. C. Penney Co.*, 881 So. 2d 969, 970 (Miss. Ct. App. 2004) (The Mississippi Court of Appeals dismissed a separate appeal filed by Davis for his failure to provide the Court with "clearly identified issues" as required by Rule 28(a)(3)).

² The only trial court judgment at issue in this appeal is the Judgment of Dismissal executed by Judge Roger T. Clark on November 15, 2007 in the civil action below. The civil action below is the second of three actions Appellant, Joseph Davis, has filed against the School District. Appellees will refer to the civil action below (the only action subject to appellate review) as *Davis II*. *Davis II* was filed in January 2007, bearing Civil Cause No. A2402-07-00036.

Appellant attempts to muddy the waters of the instant appeal by making reference, and in fact assigning error, to the first lawsuit he filed against the School District in 2004. Appellees will refer to Davis' first lawsuit (Civil Cause No. A2402-04-00011) as *Davis I*. At page 5 of his Brief, Appellant assigns as an "error and issue" the failure of the trial court in *Davis I* (which was presided over by a different judge, Judge Robert H. Walker) to rule on a Rule 60(a)&(b) post trial motion. Appellant's attempt to seek what is essentially mandamus relief in a case which the Court of Appeals issued a mandate two years ago is improper and should be denied and stricken.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellant appeals from the Trial Court's order below (*Davis II*) dismissing his claims as a matter of law . [R. 293-95].

B. DISPOSITION IN THE COURT BELOW

On February 28, 2007, Appellant filed the underlying action (*Davis II*) in the Circuit Court of Harrison County, Mississippi, Second Judicial District. [R. 15-18]. Appellant's four page Complaint asserted several theories of recovery, all of which revolved around his September 4, 2003 termination from the Biloxi Public School District. [R. 15-18]. The litany of "claims" referenced in the *Davis II* Complaint specifically included the following:

- (1) wrongful termination;
- (2) obstruction of justice;
- (3) intimidation;
- (4) retaliation;
- (5) libel;
- (6) slander;
- (7) violation of Title 42 U.S.C. § 1983;
- (8) deprivation of rights under the First (1st) Amendment of the U.S. Constitution;
- (9) deprivation of rights under the Fourth (4th) Amendment of the U.S. Constitution;
- (10) deprivation of rights under the Fifth (5th) Amendment of the U.S. Constitution;
- (11) deprivation of rights under the Sixth (6th) Amendment of the U.S. Constitution;
- (12) deprivation of rights under the Seventh (7th) Amendment of the U.S. Constitution;
- (13) deprivation of rights under the Ninth (9th) Amendment of the U.S. Constitution;
- (14) deprivation of rights under the fourteenth (14th) Amendment of the U.S. Constitution; and
- (15) violation of Title VII of the Civil Rights Act of 1991.

[R.15]. Although not specifically pled as a claim for damages in the *Davis II*, Appellant did allege in the *Davis II* Complaint that his termination was the product of "negligence" and "intentional actions" of the Appellees. [R.17].

The *Davis II* Complaint was silent with regard to a claim of involuntary servitude under the Thirteenth (13th) Amendment of the U.S. Constitution. It was also silent with regard to Davis' termination being the product of retaliation for the reporting an illegal act of the School District.

On October 19, 2007, Appellees moved the Trial Court for dismissal or in the alternative for summary judgment, asserting that all of Appellant's claims were barred by the doctrines of collateral estoppel or *res judicata* and/or by the expiration of the applicable statute of limitations. [R.32-35]. On November 15, 2007, the very day Appellees' motion was to be heard³, Appellant filed with the Trial Court a 209 page "response" (consisting of Appellant's own three page affidavit and 202 pages of exhibits). Not one page of his 200+ page response addressed the legal issues raised in Appellees' motion. [R. 84-292].

³ The Trial Court specifically commented on Mr. Davis' obligations to the court whether represented by counsel or not:

THE COURT: All right. I just received this response for summary judgment. If you're going to represent yourself before the Court, you have to follow the rules of court. The rules of Circuit Court require that a response to a motion for summary judgment be filed within ten days after the motion is filed. Your response is considerably overdue, but I'm going to go ahead and hear the argument this morning on the merits of the matter, but I just want to you know, if you're going to practice in court and represent yourself, your going to have to follow the rules.

[Tr. 3].

After entertaining oral arguments, the Trial Court entered its written JUDGMENT OF DISMISSAL granting Appellees' motion in its entirety. [R. 293-295]. Examining and analyzing the facts and the applicable law, the Trial Court specifically found as follows:

[C]onsidering the undisputed facts and a review of the applicable law, this Court finds and determines that the Plaintiff, Joseph Davis, Jr., was a teacher aide for the Biloxi Public School District [and] discharged from that employment by the Biloxi Public School District on or about September 4, 2003. It is clear from the facts that the Plaintiff was an "at will" employee who could be terminated without cause. The court finds that the Plaintiff was not any employee cloaked with the protections provided school district employees such as certified teachers under the Education Employment Procedures Law (Mississippi Code § 37-9-101 *et seq.*)

The Court notes that most of the legal claims raised in the pending Complaint . . . are essentially the same legal claims . . . raised by the Plaintiff in his first legal initiative brought against the Biloxi Public School District The Plaintiff's first case . . . was dismissed . . . [on] April 19, 2004. The Plaintiff's appeals . . . to the Mississippi Supreme Court, the Mississippi Court of Appeals all the way through the United States Supreme Court were unsuccessful.

The . . . subject lawsuit was filed almost three years and six months after the termination of [Plaintiff's] position as a teacher aide with the Biloxi Public School District. This Court finds that all claims of the Plaintiff regarding his termination and the ancillary claims asserting libel, slander and other intentional acts should have been raised either within the one year statute of limitations applicable under the Mississippi Tort Claims Act, the one year statute of limitations applicable for intentional torts in Mississippi or the three year statute of limitations applicable by Mississippi Code § 15-1-49. Given that state law determines the limitation periods for claims premised on violations of 42 U.S.C. § 1983 - such claims are prescribed by Mississippi's general three year statute of limitations which appears in Mississippi Code § 15-1-49.

Accordingly, all claims asserted in the Plaintiff's Complaint not otherwise barred by the doctrines of collateral estoppel and/or *res judicata* are, in fact, barred by the applicable status of limitation.

[R.294-295].

The Trial Court clearly recognized that Davis was trying to re-litigate issues that were or should have been made in the *Davis I* litigation and which were ultimately held to be without

merit. This conclusion was reached not only by the *Davis I* trial court (Judge Walker), but also by the three appellate courts: the Mississippi Court of Appeals, the Mississippi Supreme Court and the United States Supreme Court⁴.

The Trial Court below further recognized that should any of Appellant's claims not be barred by the doctrines of collateral estoppel or *res judicata*, they still failed as they were barred by the expiration of the applicable statutes of limitation.

It is from the JUDGMENT OF DISMISSAL entered by the *Davis II* Trial Court which Appellant now seeks review in this Court.

As previously noted in footnote 2 *supra*, Appellant also seeks mandamus relief from this Court regarding an alleged failure of the trial court in *Davis I* (via Judge Walker) to rule on a motion for Rule 60(a)&(b) relief he allegedly filed therein. A request for mandamus relief in a *Davis I* against a separate judge, however, is improper in the current *Davis II* appeal and should be denied⁵.

⁴ Mississippi Court of Appeals - No. 2004-CP-00900-COA
 - *Davis v. Biloxi Pub. Sch. Dist.*, 937 So. 2d 459 (Miss. Ct. App. 2005) (affirming trial court's dismissal)
 - *Davis v. Biloxi Pub. Sch. Dist.*, 2006 Miss. App. LEXIS 354 (Miss. Ct. App. May 2, 2006) (*reh'g denied*)
 Mississippi Supreme Court - No. 2004-CT-00900-SCT
 - *Davis v. Biloxi Pub. Sch. Dist.*, 937 So. 2d 450 (Miss. 2006) (*cert. denied*)
 United States Supreme Court - No. 06-8333
 - *Davis v. Biloxi Pub. Sch. Dist.*, 127 S. Ct. 1289 (U.S. 2007) (*cert. denied*)

⁵ Davis should have requested mandamus relief in *Davis I*, if appropriate, four years ago.

C. STATEMENT OF THE FACTS

1. Termination of Joseph Davis, Jr. from the Biloxi Public School District

As a result of Appellant Davis' "repeated acts of unprofessional and disrespectful conduct," the School District decided to terminate Davis from his position as a teacher's aide. *Joseph Davis, Jr. v. Biloxi Public School District, et al.*, 937 So. 2d 459, 461 (Miss. Ct. App. 2005) (hereinafter *Davis I*). The School District thereafter, on September 4, 2003, notified Davis of his termination. *Id.* Although not entitled to a hearing before the School District's Board of Trustees (hereinafter "the Board"), the School District complied with Davis' request to have the Board conduct a hearing to determine whether his termination should be upheld. After conducting a hearing, the Board upheld the School District's decision to terminate Appellant. *Id.*

2. *Davis I* Litigation

a. Trial Court Proceedings

Rather than filing suit against the School District to challenge the constitutionality of his termination, Davis appealed the School District's termination, and the Board's decision to uphold the termination, to the Harrison County Circuit Court. *Id.* Mississippi's Education Employment Procedures Law of 2001 (hereinafter "EEPL"), MISS. CODE ANN. § 37-9-113, sets forth the manner and the grounds upon which a decision of a school board may be judicially reviewed. Section 37-9-113 of the EEPL expressly allows a reviewing court to consider if a school board's actions violated any constitutional rights of a terminated employee. After oral argument, the Harrison County Circuit Court held that Davis was an at-will employee not within the purview of protections under the EEPL, and thus not entitled to judicial review of the Board's decision regarding his termination. *Davis*, 937 So. 2d at 461. Davis' appeal was thereafter dismissed. *Id.*

[R. 78-79]. Aggrieved by the dismissal of his appeal by the Harrison County Circuit Court, Davis filed a notice of appeal to this Court.

b. Appeal to the Mississippi Court of Appeals

Pursuant to MISS. R. APP. P. 16, this Court assigned Davis' appeal to the Mississippi Court of Appeals for disposition. On November 22, 2005, the court of appeals affirmed the judgment rendered by the *Davis I* trial court. *Davis I*, 937 So. 2d 459. The court specifically found that Appellant, a teacher's aide, was not an "employee" entitled to the due process protections of the EEPL and therefore affirmed the circuit court's judgment and dismissal. *Id.* at 462.

Examining the specific types of employees protected under the EEPL the court of appeals stated the following:

Public school employees who are required to have a valid license issued by the State Department of Education are vested with tenure protections crafted into the Mississippi Education Employment Procedures Law. Miss. Code Ann. §§ 37-9-101-113 (Rev. 2001). A public school employee is defined as:

"Any teacher, principal, superintendent or other professional personnel employed by the local school district for a continuous period of two (2) years with that district and required to have a valid license issued by the State Department of Education as a prerequisite of employment." Miss. Code Ann. § 37-9-103 (Rev. 2001).

As a teacher's aide, Davis is a non-certified employee and not required to have a license issued by the State Department of Education as a prerequisite of employment.

Id. at 462. Since teachers' aides are not required to hold licenses in order to work in the Mississippi public school system, Davis was not entitled to due process protection under the EEPL as he held no property interest in his employment position.

In reaching this conclusion, the Court of Appeals relied upon the Mississippi Supreme Court's decision in *Harrison County School Board v. Morrelle*, 538 So. 2d 1196 (Miss. 1989). Like Davis, Morrelle was a teacher's aide whose employment was terminated by her school district employer. On appeal to the Harrison County Chancery Court, Morrelle argued that the school board hearing lacked adequate due process protection. *Id.* at 1199. The Harrison County Chancery Court reversed the school board's decision to terminate her and found that she had been denied due process. *Id.* The school district appealed. *Id.*

On appeal this Court found that Morrelle's status as a "teacher's aide" did not entitle her to the protections of the EEPL, since she was not required to have a teacher's certificate or license in order to work in the public schools. *Id.* at 1200. Moreover, this Court held that Morrelle had no property interest in her continued employment with the school district. *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972)). As the U.S. Supreme Court held in *Roth*, state law determines the existence of "property rights" with regard to continued employment with public entities. 408 U.S. at 577; *see also Morrelle*, 538 So. 2d at 1200. Since Morrelle had no constitutionally protected property interest in her job under Mississippi law, this Court found that she was an employee at-will who could be fired for any reason. *Morrelle*, 538 So. 2d at 1200.

The court of appeals in *Davis I* concluded that *Morrelle* was dispositive of the issues presented in Davis' claims against the School District and therefore affirmed the Harrison County Circuit Court's judgment of dismissal. *Davis I*, 937 So. 2d at 462.

Davis thereafter moved for, but was denied, a rehearing by the court of appeals. *Joseph Davis, Jr. v. Biloxi Public School District*, 2006 Miss. App. LEXIS 354 (Miss. Ct. App. May 2, 2006). [R. 51].

c. Petition for Writ of Certiorari to the Mississippi Supreme Court

After the court of appeals denied Davis' motion for rehearing, he filed a petition for *writ of certiorari* to this Court. Finding that Davis' request was not well taken, this Court denied his petition for *writ of certiorari* review. *Joseph Davis, Jr. v. Biloxi Public School District*, 937 So. 2d 450 (Miss. 2006). [R. 52].

d. Petition for Writ of Certiorari to the United States Supreme Court

After his defeat in the Mississippi Supreme Court and Court of Appeals, Davis then filed a petition for *writ of certiorari* to the U.S. Supreme Court. On February 20, 2007, the U.S. Supreme Court denied Davis' petition. *Davis*, 127 S. Ct. 1289 (U.S. 2007). [R. 54].

3. ***Davis II* Litigation**

Eight days after the U.S. Supreme Court's denial of his petition for *writ of certiorari*, Davis filed the underlying action, *Davis II*, in the Circuit Court of Harrison County. *Davis II* was ultimately dismissed by the Trial Court below.

III. SUMMARY OF THE ARGUMENT

The instant appeal revolves entirely around Appellant Davis' 2003 termination from the Biloxi Public School District. The validity of Appellant's termination was fully litigated and adjudicated by the trial court in *Davis I* on April 19, 2004. The trial court's decision in *Davis I* was specifically analyzed and affirmed by the Mississippi Court of Appeals. Both the Mississippi Supreme Court and the U.S. Supreme Court denied Davis' request for additional appellate relief in *Davis I*.

All of Appellant's claims in the underlying *Davis II* action are barred by the doctrines of collateral estoppel and/or *res judicata* and the Trial Court below was correct in dismissing *Davis*

II as a matter of law in that regard. Notwithstanding the collateral estoppel and/or *res judicata* bar, the fact that all of Appellant's claims in *Davis II* concerned his 2003 termination, they were also barred by the applicable statutes of limitation. As such, the Trial Court was also correct in dismissing *Davis II* as being barred by the statutes of limitation.

The instant appeal is just another example of Appellant's litigious behavior:

- (1) In *Davis I* he litigated and appealed the validity of his termination all the way up to the U.S. Supreme Court.
- (2) By filing the underlying action, *Davis II*, Appellant is attempting to re-litigate the validity of his termination from the School District.
- (3) Davis has filed a *third* action (*Davis III*) against the School District in the County Court of Harrison County. In its order dismissing *Davis III*, the County Court recognized that Davis was seeking to have a "third bite from the proverbial apple" against the School District. [Addendum #1 at p. 5]. It comes as no surprise that Davis appealed the County Court's dismissal in *Davis III* to the Harrison County Circuit Court. The *Davis III* appeal is currently pending.

Appellant's perpetual litigious conduct should not be tolerated. The Appellees have been forced to expend thousands upon thousands of dollars in attorneys' fees and expenses to defend three separate lawsuits and multiple appeals all involving the same issue - Davis' 2003 termination.

Other than the costs he incurred in filing the three lawsuits and the costs he incurred in appealing⁶ *Davis I* and in appealing the instant case, Appellant must undoubtedly believe he has nothing to loose in his never ending vengeful pursuit of the School District. The type of litigious

⁶ Mr. Davis did not incur any fees with regard to his petition for *writ of certiorari* to the U.S. Supreme Court as he filed a MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS. [R. 54].

conduct Davis has demonstrated with regard to his termination, and litigious nature in general, should not be condoned by this Court. This current appeal is frivolous and Davis should be sanctioned pursuant to MISS. R. APP. P. 38.

This Court should AFFIRM the Trial Court's order dismissing Davis' Complaint. This Court should also sanction for filing this frivolous appeal AWARD just damages and double costs to the Appellees in having to defend the same.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court applies a *de novo* standard of review to all questions of law, including motions to dismiss and motions for summary judgment. *Leanora v. Steven G. Clark*, 2008 Miss. LEXIS 515 (Miss. Oct. 16, 2008) (citing *City of Jackson v. Perry*, 764 So. 2d 373, 375 (Miss. 2000)). The standard by which this Court reviews an appeal of summary judgment is the same standard employed by the trial court under MISS. R. CIV. P. 56 (c). *Cossitt v. Alfa Ins. Corp.*, 726 So. 2d 132, 136 (Miss. 1998).

Pursuant to MISS. R. CIV. P. 56 (c), summary judgment is appropriate, "if the pleadings, depositions and answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law." The presence of a hundred contested issues of fact will not prevent summary judgment where there is no genuine dispute regarding material issues of fact. *Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss. 1985). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* A fact is "material" if it "tends to resolve any of the issues properly raised by the parties," *Morgan v. City of Ruleville*, 627 So.2d 275, 277 (Miss. 1993), and a dispute over a

material fact is “genuine” only if the evidence is such that “reasonable minds in a jury could differ on such an issue.” *Strantz v. Pinion*, 652 So.2d 738, 741 (Miss. 1995).

If the moving party's evidence satisfies the initial burden, the adverse party must produce “significant probative evidence showing that there are indeed genuine issues for trial.” *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 485 (Miss. 2006) (emphasis added). The party opposing the motion must be diligent and may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing there are genuine issues for trial. *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997). If the nonmoving party fails to set forth specific facts to rebut the showing that no genuine issues of material fact exist, summary judgment should be entered in the moving party's favor. *Coleman Powermate, Inc. v. Rheem Mfg. Co.*, 880 So.2d 329 (Miss. 2004).

B. WAIVED ISSUES

It is well settled law that “an appellant is not entitled to raise new issues on appeal since to do so denies the trial court the opportunity to address the matter.” *Albert v. Allied Glove Corp.*, 944 So. 2d 1, 7 (Miss. 2006) (citing *Crowe v. Smith*, 603 So. 2d 301 (Miss. 1992)). “Precedent mandates that this Court not entertain arguments made for the first time on appeal as the case must be decided on the facts contained in the record and not on assertions in the briefs.” *Chantey Music Publ., Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1060 (Miss. 2005).

At pp. 2 & 13 of his Brief, Appellant claims a violation of the Thirteenth Amendment of the U.S. Constitution which prohibits involuntary servitude. Such a claim is not only without

merit⁷ but preposterous in the context of wrongful termination claim. Notwithstanding the absurdity of his 13th Amendment claim, Appellant did not assert a 13th Amendment claim in the *Davis II* Complaint.⁸ Since Appellant did not raise this issue at the trial court level, he is barred from raising this issue on appeal.

At pp. 3-4, 6, 9-11, & 14 of his Brief, Appellant, for the first time, asserts that his termination from the School District was the result of his reporting an illegal act of the School District⁹. Since Appellant did not raise this issue at the trial court level, he is barred from raising this issue on appeal.

C. IRRELEVANT ISSUES

Appellant's Brief cites at least 8 other "issues" on appeal. As previously stated, not one of Appellant's "issues" are relevant to this appeal. The only issues relevant herein are (1) whether the Trial Court erred in dismissing Appellant's Complaint and holding all of his claims barred by collateral estoppel, *res judicata* and/or the applicable statutes of limitation and (2) whether Appellees are entitled to damages and double costs under MISS. R. APP. P. 38.

⁷ The Biloxi Public School District has never forced any of its employees to work involuntarily and Appellees take offense at Davis' inclusion of a 13th Amendment violation in this appeal.

⁸ Other than making two references to the 13th Amendment at the November 15, 2007 hearing [Tr. 15], Davis made no argument before the Trial Court he was asserting a 13th Amendment claim or that the School District ever acted in violation of the same.

⁹ Appellant claims that he reported to the Mississippi State Auditor the "unlawful garnishment of [his] wages by . . . [the] Biloxi Public School District." The exceptions to the employment at will doctrine under *McArn* are limited in scope. *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603, 607 (Miss. 1993). "Illegal acts" under *McArn* must warrant the imposition of criminal penalties, as opposed to mere civil penalties. *Hammons v. Fleetwood Homes of Miss., Inc.*, 907 So. 2d 357, 360 (Miss. Ct. App. 2004). Appellees deny that the garnishment of Appellant's wages was "unlawful" much less was it an "illegal act" within the *McArn* employment at will exceptions..

Not once in his Brief does Appellant address the specific finding made in the Trial Court's Order that the merits of his termination had previously been litigated and affirmed on appeal in *Davis I*. Appellant's Brief further failed to address the Trial Court's additional finding that any claims not previously litigated or which should have been litigated in *Davis I* were barred by the applicable statute of limitations. Instead of addressing whether his claims were due to be dismissed on the grounds ruled upon by the Trial Court, Appellant has gone on a tangent, making statements and claims irrelevant, improper and inapplicable to his appeal. Appellees will briefly address these improper topics.

Contrary to Appellant's belief and repeated references that he was a "tenured" employee, Mississippi law clearly holds that a teachers' aides (like Davis) are NOT tenured employees entitled to continued employment, but are employees at will. *Davis*, 937 So. 2d at 461. Further, Appellees have found no law supporting Appellant's claim that the accrual of retirement benefits can change an employees status from at-will to tenured. [See Tr. 18 - Davis claims that because he is "retirement eligible" he has a "property interest" in his employment].

At p. 7 of his Brief, Appellant references one of his previous appeals to this Court, *Joseph Davis, Jr. v. Nationwide Recovery Service, Inc.*, 797 So.2d 929 (Miss. 2001). Appellant claims that his case against Nationwide is "joined at the hip" with the case *sub judice*. Appellees are not parties to the Nationwide collection action against Appellant and are not privy to any matters involved in that action. The Nationwide action has absolutely nothing to do with the case *sub judice* and Appellants reference to the same is improper in this appeal.

At pp. 5, 11-12, 15 of his Brief, Appellant essentially requests mandamus relief in regard to what he claims was a failure of Judge Walker, in *Davis I*, to rule on a Motion for Rule 60

relief¹⁰. As stated above, request for mandamus relief in a separate lawsuit against a separate judge is improper in the current appeal and should be denied.

Just as the Mississippi Court of Appeals in *Boone v. Hercules, Inc.*, 872 So. 2d 730, 731 (Miss. App. Ct. 2004) disregarded the "numerous and varied issues appealed by Boone in his *pro se* brief," this Court should likewise disregard the improper and irrelevant issues appealed by Davis in his Brief and consider only the issues raised by Appellees.

D. THE TRIAL COURT DID NOT ERR IN DISMISSING DAVIS' CLAIMS AS A MATTER OF LAW

1. Appellant's Claims in *Davis II* are Barred Under the Doctrine of Collateral Estoppel

The primary allegations in the *Davis II* Complaint arise under 42 U.S.C § 1983¹¹. The doctrine of collateral estoppel is fully applicable to § 1983 actions. *Allen v. McCurry*, 449 U.S. 90, 104 (1980). "There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court" *Id.*

The preclusive effect of a school employee's prior state court judgement is well established. Under Mississippi law, collateral estoppel applies when "(1) the plaintiff is seeking to relitigate a specific issue; (2) the issue was already litigated in a prior action; (3) the issue was actually determined in the prior action; and (4) the determination of the issue was essential to the judgment in the prior action." *Raju v. Rhodes*, 809 F. Supp. 1229, 1236 (S. D. Miss. 1992); *Garraway v.*

¹⁰ Other than stating that Judge Walker failed to rule on Davis' Rule 60 motion, Appellant fails to offer evidence of such a motion.

¹¹ Davis' rambling Complaint also alleged other violations of law but all such claims are predicated on the same facts that underlie his § 1983 allegations.

Retail Credit Company, 141 So. 2d 727, 730 (Miss. 1962) (“When a question of fact essential to a judgment is actually litigated and determined by a valid and final judgment, that determination is conclusive . . . in a subsequent suit on a different cause of action.”).

In *Raju*, a professor of surgery at the University of Mississippi Medical Center sued his supervisor for violation of § 1983. The district court granted summary judgment on the grounds that plaintiff’s claims were barred by litigation at the administrative level during the grievance procedure at the University. The Fifth Circuit affirmed. *Raju v. Rhodes*, 7 F.3d 1210 (5th Cir. 1993). The Fifth Circuit observed that “collateral estoppel conserves judicial resources, protects parties from multiple lawsuits, and promotes confidence in judgments and comity between state and federal courts.” *Raju*, 7 F.3d at 1214. The court determined that the administrative process utilized by the University satisfied the minimum procedural due process requirements necessary for application of collateral estoppel. *Id.*

Gates v. Walker, 865 F. Supp. 1222, 1237 (S.D. Miss. 1994) is directly on point and dispositive on the issue of collateral estoppel. Gates, a former teacher with the Hattiesburg Municipal School District, brought a § 1983 action against the school district and various other school district employees, regarding the non-renewal of her employment contract. Gates claimed that the school district’s non-renewal decision was based upon her alleged exercise of free speech, in violation of the First Amendment. *Id.* The district court, however, held that Gates’ claims were barred by collateral estoppel and *res judicata* because the issues regarding her non-renewal were litigated and decided during her EEPL hearing which was ultimately affirmed by this Court in *Board of Trustees of the Hattiesburg Mun. Separate School District v. Gates*, 461 So. 2d 730 (Miss. 1984).

The district court in *Gates* specifically rejected Gates' contention that, because § 1983 encompassed broader remedies than those available on the administrative and appellate levels, collateral estoppel should not apply. Instead, the district court found that both the rights she alleged to have been infringed upon and the underlying factual circumstances therein were considered and ruled on by the chancery court and the Mississippi Supreme Court, regardless of the nature of the exact remedy sought in each proceeding. *Id.* at 1240. In concluding that Gates' claims were barred by collateral estoppel, the district court specifically stated:

The plaintiff in this case had her case reviewed by the Chancery Court on appeal from the decision of the school board and later by the Mississippi State Supreme Court. At these points, the plaintiff entered the judicial realm where issue preclusion principles are readily acknowledged. Plaintiff's core claim has been thoroughly litigated and decided against her. This court is not persuaded by any of plaintiff's arguments that another court should hear claims already previously litigated to finality in two state courts.

Id. at 1241.

Like the claims of Gates, Appellant's core claims herein have been thoroughly litigated and decided against him. And like the district court in *Gates*, this Court should refuse to entertain an appeal on claims which were litigated to finality in three Mississippi State Courts and the U.S. Supreme Court.

2. *Davis II* is Barred under the Doctrine of *Res Judicata*

The doctrine of *res judicata* likewise applies in the instant case since Appellant actually raised, litigated and lost before the Board, the Circuit Court, the Court of Appeals, the Mississippi Supreme Court, and the U.S. Supreme Court.

Four identities are required in order to establish *res judicata*: (1) identity of the subject matter; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality

of character of persons against whom the claim is made. *Riley v. Moreland*, 537 So. 2d 1348, 1354 (Miss. 1989). (quoting *Dunnaway v. W. Harper & Assc., Inc.* 422 So. 2d 749, 751 (Miss. 1982)).

The *Gates* opinion, *supra*, is also dispositive on *res judicata* claim preclusion. Applying the four identities established by this Court in *Riley, supra*, the district court also concluded that *Gates'* action as a whole was precluded under the doctrine of *res judicata*:

[T]he court finds that the doctrine of *res judicata* applies here. The essential claims raised in this federal action were raised in the Chancery Court and Mississippi Supreme Court. Plaintiff's argument that the matters involve variant remedies misses the mark. Remedies are predicated on findings of liability. Here, the Mississippi Supreme Court applied the applicable, relevant law to the facts and found that the plaintiff's claim lacked substance. Plaintiff presented her side of the facts. Defendants submitted theirs. The Mississippi Supreme Court examined all of this and made its finding of facts. This finding settled the First Amendment issue before the court. Therefore, all defendants are entitled to summary judgment because the instant suit is barred by principles of *res judicata*.

Gates, 865 F. Supp. at 1240.

All of the claims raised by Appellant in *Davis II* below were raised or should have been raised in the hearing before the board or in his later court proceedings in *Davis I*. All questions regarding Davis' termination and the manner in which he was terminated were resolved against him in *Davis I*. It is well-established Mississippi law that a final judgment on the merits of an action by a Court of proper jurisdiction precludes parties and their privies from re-litigating claims that were or could have been raised in that action. *Walton v. Bourgeois*, 512 So. 2d 698, 700 (Miss. 1987).

All of the issues asserted in *Davis II* below were essential to Judge Walker's judgment in *Davis I* and the decision of the Mississippi Court of Appeals affirming the same. Under

Mississippi law, a court review of whether a school board's decision was lawful is based on three criteria: (1) whether it was supported by substantial evidence, (2) whether it was arbitrary or capricious, or (3) whether the decision violated a statutory or constitutional right of the employee. MISS. CODE ANN. § 39-9-113. These factual and legal issues were fully litigated and decided against Appellant in *Davis I*.

3. Appellant's Claims Are Barred by the Applicable Statutes of Limitation

Appellant received notice of his termination on **September 4, 2003**. Appellant did not file his Complaint in *Davis II*, until three and a half years later on **February 28, 2007**. As noted above, the *Davis II* Complaint appeared to assert several theories of recovery, all of which arose out of his termination from the School District. Appellant specifically alleged violations of 42 U.S.C. § 1983, and generally contended that he was deprived of his constitutional rights and that the District committed a number of state law torts against him. All of Appellant's claims, however, required dismissal as they were barred by the applicable statutes of limitation.

a. MISS. CODE ANN. § 15-1-49

The U.S. Supreme Court has held that the forum state's personal-injury statute of limitations should be applied to all 42 U.S.C. § 1983 claims. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985). Therefore, Mississippi's general three-year statute of limitations, § 15-1-49, is applicable to the § 1983 claims herein. *Hubbard v. Miss. Conf. of the United Methodist Church*, 138 F. Supp. 2d 780, 782 (S.D. Miss. 2001) (citing *Thomas v. City of New Albany*, 901 F.2d 476, 476 (5th Cir. 1990)). MISS. CODE ANN. § 15-1-49 provides the following:

§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for

(1) 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.

While state law determines the limitations period for § 1983 claims, federal law determines when a § 1983 cause of action accrues. *See Hitt v. Connell*, 301 F.3d 240, 246 (5th Cir. 2002); *Piotrowski v. City of Houston*, 237 F.3d 567, 580 (5th Cir.), *cert. denied*, 534 U.S. 820, 122 S. Ct. 53, 151 L. Ed. 2d 23 (2001); *Burns v. Harris County Bail Bond Bd.*, 139 F.3d 513, 518 (5th Cir. 1998); *Price v. Jefferson County*, 470 F. Supp. 2d 665, 681 (E.D. Tex. 2006). The U.S. Supreme Court, in *Chardon v. Fernandez*, 454 U.S. 6, 7-8 (1981), held that under § 1983, a plaintiff's cause of action accrues when he/she receives notice of termination, not when the employment actually terminates.

According to federal law, the statute of limitations for Appellant's § 1983 claim accrued/began to run on September 4, 2003 when he received notice of his termination. Applying Mississippi's three year limitation statute, the time within which to file his § 1983 claim expired on or about **September 4, 2006**, three years from the termination notice. Appellant, however, waited until **February 28, 2007**, almost **six months** after the expiration of the statute to file the instant § 1983 action. Since Appellant's § 1983 and constitutional claims were untimely, the Trial Court was correct when it dismissed the same as a matter of law.

b. MISS. CODE ANN. § 11-46-11

In addition to his claims for relief under § 1983, Appellant alleged various Mississippi state law tort claims. As such, all of Appellant's state claims were controlled under, and required strict compliance with, the MTCA. MISS. CODE ANN. § 11-46-1 *et seq.*

The MTCA provides that "all actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after . . ." ¹² MISS. CODE ANN. § 11-46-11(3). A cause of action has been held to accrue when the alleged tortious conduct causing the injury occurs. *Black v. Ansah*, 876 So. 2d 395, 398 (Miss. Ct. App. 2003) (applying MISS. CODE ANN. § 11-46-11(3) in a wrongful termination action). In *Black*, the Mississippi Court of Appeals held that the plaintiff, who was provided notice of non-renewal of her contract for employment one year before her employment was to terminate, accrued at the time of the notice, not at the time of termination. *Id.* at 400 ¹³.

Appellant's state tort claims under the MTCA accrued on September 4, 2003 when he received notice of his termination. Pursuant to MISS. CODE ANN. § 11-46-11, the statute of limitation expired on or about **September 4, 2004**; i.e., one year from his notice of termination. Appellant, however, waited until **February 28, 2007**, almost **two and a half years** after the

¹² The 90 day notice requirement described in § 11-46-11(1) will toll the one year limitations period for 95 days. The application of this section is of no consequence to this action given that plaintiff's lawsuit was filed over 170 days after the running of the one-year statute. Furthermore, plaintiff herein did not comply with said 90 day notice provision to warrant any tolling.

¹³ *Black*, like the instant case, involved a claim for tort, not breach of contract. Given that plaintiff herein was an at-will employee, he has no claim for breach of contract against the District. However, even if a breach of contract claim existed, his claim would still be barred by the one year statute of limitations. The Court of Appeals in *Black*, along with analyzing when a tort cause of action accrues, also analyzed when a cause of action for breach of contract accrues. The *Black* court stated:

[w]ere this a breach of contract suit instead of a tort action, such early notice of a contracting party's refusal to perform would be called an anticipatory breach. A cause of action for that breach occurs when the notice was received, "regardless of the time when the damages from the breach occurred. We find such reasoning equally applicable to this tort suit." *Id.* at 399.

MTCA statute of limitation expired, to file the underlying *Davis II* action. Accordingly, all of Appellant's state claims were barred by the MTCA's one year statute of limitation and required dismissal as a matter of law.

c. Neither Statute of Limitation Was Tolloed During the Pendency of *Davis I*

Instead of filing a lawsuit against the School District, Davis chose to litigate and appeal the validity of his termination all the way to the United States Supreme Court. It was not until after the Supreme Court denied his petition for *writ of certiorari* in *Davis I* that Appellant initiated *Davis II*, i.e., three years and 178 days after he received notice of his termination. Throughout these three and a half years of appeals, Davis did absolutely nothing to pursue any type damage claim against the School District arising from his termination.

The U.S. Supreme Court has specifically stated that § 1983 actions are not subject to federal equitable tolling while a litigant is pursuing state judicial remedies. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 491 (U.S. 1980). Section 1983 actions are subject to the forum state's applicable tolling provisions. *Id.* at 483. Therefore all of Appellant's claims in *Davis II*, § 1983 and state law claims, were subject only to Mississippi's tolling statutes, if applicable.

MISS. CODE ANN. § 15-1-69, generally referred to as Mississippi's Saving Statute, provides:

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or

administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

(Emphasis added). This Court has held that "[t]he savings statute cannot save a complaint from the expiration of the applicable statute(s) of limitations. To allow otherwise would circumvent the effect and purpose of the statutes of limitation." *Owens v. Mai*, 891 So.2d 220, 223-24 (Miss.2005).

In the case *sub judice*, the validity of the School District's termination of Davis was addressed and upheld the School Board. At the instance of Davis, the Board's decision to uphold Davis' termination was reviewed and affirmed in *Davis II* by the Harrison County Circuit Court and the Mississippi Court of Appeals. The procedural and judicial reviews/appeals in *Davis I* concluded with a final decision on the merits. The Mississippi Court of Appeals specifically held the following:

Davis was not a licensed teacher, he had no contract for his employment, and he enjoyed no statutory protections. Davis was an at-will employee, and the Biloxi Public School District had the discretion to terminate him for any reason.

Davis I, 937 So.2d at 462.

Mississippi's tolling statute, § 15-1-69, however makes no provision for tolling the time for filing a cause of action during the time which a litigant pursues separate action. The U.S. Supreme Court decision in *Bd. of Regents v. Tomanio*, *supra*, offers guidance in a situation such as this. The Supreme Court in *Tomanio*, addressed with a factual scenario strikingly similar to the instant case, specifically held that a cause of action **would not be tolled** while the litigant was pursuing a separate but related action, judicially or administratively.

Aggrieved with an administrative decision¹⁴, Tomanio, like Davis herein, brought a § 1983 action. 446 U.S. at 482. Before she pursued her § 1983 action, Tomanio timely and diligently pursued her New York State remedies, consisting of administrative and judicial appeals, which ultimately proved unsuccessful. *Id.* at 483. Tomanio, however, did not initiate her § 1983 action until after the applicable limitations period expired. *Id.* Since New York state's tolling rules made no provision for tolling the time for filing a cause of action during the period in which a litigant pursued a related, but independent cause of action, the district court and the Second Circuit Court of Appeals, applied equitable tolling. *Id.* at 483.

The Supreme Court, however, disagreed and reversed, holding that Tomanio's cause of action was barred by the New York statute of limitations. It was of no consequence to the Supreme Court that Tomanio's efforts in the state courts were timely and diligent. The Supreme Court held Tomanio's § 1983 action to be "separate and independent" from the state judicial remedy pursued in state court, and if she wanted to pursue her § 1983 action she should have pursued it during her state judicial remedy pursuits. *Id.* at 491.

The U.S. Supreme Court, Mississippi state and federal courts, as well as other jurisdictions, have continually denied tolling statutes of limitation wherein the litigants have chosen to pursue an administrative remedy first. *See Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-61 (1975); *Black*, 876 So. 2d at 399 (holding that the time for filing state court claims stemming from an employment termination continues running whether or not an administrative remedy is pursued);

¹⁴ The administrative decision in *Tomanio* concerned whether or not Tomanio was entitled to a waiver of certain professional licensing requirements.

Bullock v. AIU Ins. Co., 2006 U.S. Dist. LEXIS 28764 (S.D. Miss. 2006) (concluding that Mississippi state statutes of limitation are not tolled during administrative processes); *Creppel v. United States*, 41 F.3d 627, 633 (Fed. Cir. 1994); *Beasley v. Alabama State Univ.*, 3 F. Supp. 2d 1325 (M.D. Ala. 1998).

In *Johnson*, the U.S. Supreme Court denied equitable tolling to a civil rights complainant who allowed the filing deadline under 42 U.S.C. § 1981 to lapse while he pursued administrative proceedings under Title VII before the EEOC. Even though the Supreme Court recognized that refusing to toll would have the effect of pressing civil rights complainants into premature and expensive litigation which could destroy opportunities for administrative conciliation, the Court nevertheless found "no policy reason that excuses [a plaintiff's] failure to take the **minimal steps necessary** to preserve each claim independently." *Johnson*, 421 U.S. at 456 (emphasis added). Because the plaintiff in *Johnson* faced no barriers to filing his § 1981 action at any time after his cause of action accrued, the Supreme Court noted that "in a very real sense, [the plaintiff] has **slept on his § 1981 rights**" by not filing during the pendency of the EEOC proceedings. *Id.* (Emphasis added).

All of the claims in the underlying *Davis II* action, § 1983 and Mississippi state claims, arise out of or relate to Davis' 2003 termination from the School District. From the date Davis was provided notice of his termination (September 4, 2003), he, like the plaintiff in *Johnson*, "faced no barriers" and had every opportunity to file his § 1983 claims and state tort claims against the School District. Instead, Davis chose to file one appeal after the other which ultimately concluded, to his detriment, three and a half years after his termination. Davis was not required to pursue judicial review under §37-9-113 as it is discretionary and not a mandatory administrative

remedy.¹⁵ Like the plaintiff in *Johnson*, Davis "slept on his rights" to file his § 1983 and state tort claims.

Appellees do not deny that Davis actively and diligently challenged, all the way to the U.S. Supreme Court no less, the School District's decision to terminate him. During his diligent pursuit, however, Davis did not take the "minimal steps" necessary to preserve the claims he now asserts in *Davis II*. Like the diligent efforts of the plaintiff in *Tomanio* could not save her untimely claims, Appellant's efforts in *Davis I* could not save his is untimely claims in *Davis II*.

Based on the applicable and controlling federal and Mississippi state law, the Trial Court was correct in ruling that claims not barred by collateral estoppel and/or *res judicata* were, however, barred by the applicable statutes of limitation and required dismissal as a matter of law.

**E. APPELLEES ARE ENTITLED TO DAMAGES AND DOUBLE COSTS
PURSUANT TO MISS. R. APP. P. 38**

Rule 38 of the Mississippi Rules of Appellate Procedure provides, "[i]n a civil case if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee." Since the instant appeal concerns Davis' improper attempts to re-litigate issues already ruled upon by multiple courts, and his efforts to inappropriately burden the court system with non-meritorious litigation, his litigious propensities as a whole are relevant.

¹⁵ Section 37-9-113 (1) provides that "[a]ny employee aggrieved by a final decision of the school board is entitled to judicial review thereof . . ." (Emphasis added). Section 37-9-113(2) provides that [a]n appeal may be taken . . ." (Emphasis added).

Joseph Davis can best be described as a "professional litigant." Not including *Davis I*, *Davis II* (the instant appeal) and *Davis III* (which is currently on appeal in the Circuit Court of Harrison County), Appellees are aware of at least four other appeals Davis has filed with this Court.

(1) In 2000 Davis filed an appeal in the matter of *Joseph Davis, Jr. v. Nationwide Recovery Service, Inc.*, No. 2000-CP-00036-SCT. Said appeal was decided by this Court in 2001 and reported at 797 So.2d 929 (Miss. 2001).

(2) In 2000 Davis filed another appeal in the matter of *Joseph Davis, Jr. v. City of Biloxi*, No. 2000-KM-00696-COA. Said appeal was decided by this Court in 2001 and reported at 797 So.2d 1036 (Miss. 2001).

(3) In 2002 Davis, along with his wife Gilda, filed an appeal in the matter of *Gilda Davis and Joseph Davis, Jr. v. Mary Patricia Seymour and Jimmie Dal Ziegler*, No. 2002-CP-01647-COA. Said appeal was decided by the Mississippi Court of Appeals in 2004 and reported at 868 So.2d 1061 (Miss. 2004).

(4) In 2003 Davis filed an appeal in the matter of *Joseph Davis, Jr. v. J.C. Penney Company, Inc.*, No. 2003-CP-00381-COA. Said appeal was decided by the Mississippi Court of Appeals in 2004 and reported at 881 So.2d 969 (Miss. Ct. App. 2004).

The underlying facts for which this appeal revolves - the Davis' 2003 termination - were fully litigated and ruled upon in *Davis I* by the Harrison County Circuit Court and the Mississippi Court of Appeals. The court of appeals refused re-hearing on these issues and this Court and the U.S. Supreme Court refused to entertain Davis' request for permissive appeal. Therefore, before

initiating the underlying *Davis II* action, Davis had challenged his termination five times and failed five times. Davis' sixth challenge failed in the Trial Court below.

This Court has equated a Rule 38 frivolous appeal to that of a frivolous motion under Miss. R. Civ. P. 11. *Harris v. Harris*, 988 So. 2d 376, 380 (Miss. 2008) (citing *Roussel v. Hutton*, 638 So. 2d 1305, 1318 (Miss. 1994)). The question therefore is whether a reasonable person would have any hope for success. Given that Davis is 0-6 in challenging his termination by the School District, it is clear no reasonable person would believe there could be any hope of success on appeal.

The Appellees have been forced to expend thousands of dollars in attorneys' fees and expenses to defend *Davis I* (and the multiple appeals therefrom), *Davis II* (and this appeal), and *Davis III* (and the circuit court appeal therein). As stated previously, Davis undoubtedly believes he has nothing to lose by filing multiple lawsuits and appeals against the School District. Appellant's perpetual litigious conduct, however, should not be tolerated, but sanctioned.

Pursuant to Miss. R. App. P. 38, the Appellees request this Court grant them damages and double costs in defending this appeal.

V. CONCLUSION

Based on the record evidence and the above and foregoing law, Appellees respectfully request the following:

- (1) AFFIRM the Trial Court's order dismissing all of Appellant's claims as a matter of law; and

(2) AWARD Appellees costs and damages pursuant to Miss. R. App. P. 38.

Respectfully submitted,

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and BILOXI PUBLIC SCHOOL DISTRICT
BOARD OF TRUSTEES

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CERTIFICATE

I, Silas W. McCharen, of counsel for Biloxi Public School District and Biloxi Public School District Board of Trustees, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing pleading to:

Joseph Davis, Jr., Plaintiff, *Pro Se*
346 Franks Drive
Biloxi, Mississippi 39531

THIS, the 13th day of November 2008.


SILAS W. McCHAREN

**IN THE COUNTY COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

GILDA H. DAVIS AND JOSEPH DAVIS, JR.

PLAINTIFFS

V.

CAUSE NO. D2402-07-0342

**BILOXI PUBLIC SCHOOL DISTRICT, BILOXI PUBLIC
SCHOOL BOARD, BOARD OF TRUSTEES, AND
DR. PAUL A. TISDALE, SUPERINTENDENT, BILOXI PUBLIC
SCHOOL DISTRICT, DR. ROBERT W. BOWLES, DEPUTY
SUPERINTENDENT, BILOXI PUBLIC SCHOOL DISTRICT,
DR. LARRY DRAWDY, (PAST SUPERINTENDENT)
BILOXI PUBLIC SCHOOL DISTRICT, BILOXI PUBLIC
SCHOOL DISTRICT, LAWYER GERALD BLESSEY
(PAST BILOXI PUBLIC SCHOOL BOARD ATTORNEY),
BILOXI PUBLIC SCHOOL DISTRICT, BONNIE GRANGER,
COMPTROLLER/DIRECTOR OF BUSINESS MANAGEMENT
AND SUSAN BRAND, PRINCIPAL, BEAUVOIR ELEMENTARY
SCHOOL, BILOXI PUBLIC SCHOOL DISTRICT,
INDIVIDUALLY, AND JOHN DOE, & JOHN DOE,
INDIVIDUALS**

DEFENDANTS

JUDGMENT OF DISMISSAL

The claims of Gilda H. Davis and Joseph Davis, Jr. against the Biloxi Public School District and the Board of Trustees of the Biloxi Public School District came to the Court's consideration on July 3, 2008 on the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment as well as the Motion submitted by the Plaintiffs styled Motion for Summary Judgment or, in the Alternative, Trial by Jury. This Court has jurisdiction over the subject matter and over the parties who appeared for hearing on the subject Motions. The Court does note that a number of persons are listed as Defendants in the style of the Plaintiffs' original Complaint. However, the court file does not

disclose where the Defendants were lawfully served with process. An Answer and Defenses to Plaintiffs' Complaint with Claim for Damages and Sanctions was filed on behalf of the Biloxi Public School District and the Board of Trustees for the Biloxi Public School District. This case was originally assigned to Judge Robin Midcalf who subsequently recused herself. The undersigned Judge likewise drew a Motion for Recusal from the Plaintiffs but that Motion was considered and overruled. The Motion of the Defendants for a dismissal of the Plaintiffs' claims is found to be fully supported by material facts not in dispute and properly supported by applicable law. Accordingly, the Defendants' Motion to dismiss the claims of the separate Plaintiffs is granted for the reasons separately reviewed below. The Plaintiffs' Motion for Summary Judgment or, in the Alternative, Trial by Jury is overruled for the reasons expressed below. Given that the facts supporting the claims asserted by the separate Plaintiffs are different and the legal issues related to the Court's rulings different as well, the basis for the Court's rulings will be discussed separately.

CLAIMS OF GILDA H. DAVIS

Gilda H. Davis's *pro se* Complaint was filed on May 30, 2007. Gilda H. Davis asserts that she was wrongfully and unlawfully terminated from her employment with the Biloxi Public School District on April 29, 2004. Gilda H. Davis asserts a variety of theories to premise her claims for relief which include violations of 42 USCA §1983, intentional wrongdoing of the Defendants, as well as claims of negligence. As asserted

by the Defendants, the claims of Gilda H. Davis are barred by the passage of time. The negligence and §1983 claims have a three year prescription. See Mississippi Code §15-1-49 and *Wilson v. Garcia*, 47 U.S. 261, 280 (1985). Gilda H. Davis acknowledges that she was informed that she would not be offered re-employment for the 2004-2005 school year by letter delivered to her by then Deputy Superintendent Robert W. Bowles dated April 29, 2004. With no dispute about the date upon which Gilda H. Davis received notice of termination, the United States Supreme Court case of *Chardon v. Fernandez*, 454 U.S. 6 (1981) directs that the April 29, 2004 court date is the date on which any right to assert a claim related to her asserted wrongful discharge would accrue. As noted above, the general negligence and 42 USCA §1983 claims have a three year prescription. It should further be noted that any claim for intentional acts or any claim under the Mississippi Tort Claim Act carry a one year statute of limitations (Mississippi Code §11-46-1). Even though offering lengthy oral argument in opposition to the Defendants' dispositive motion, Mrs. Davis did not adequately, if at all, respond to the affirmatively pled defenses asserted by the Defendants that all potential claims of Gilda H. Davis are barred by the passage of time. Simply put, Gilda's lawsuit, at best, was filed thirty-one days after the expiration of her right to file a claims premised on her assertedly wrongful termination from employment. Mrs. Davis's claims for relief are barred by applicable statutes of limitation and the same must be dismissed.

CLAIMS OF JOSEPH DAVIS, JR.

As to the claims of Joseph Davis, Jr., the Defendants assert that all such claims are barred by the doctrine of *res judicata*, collateral estoppel, and the passage of time. Joseph Davis, Jr. was terminated from this employment with Biloxi Schools on either September 4 or September 5 of 2003. The Court also notes that the overwhelming content of the Complaint filed by the Plaintiffs in this County Court action pertains to the Plaintiff, Gilda H. Davis. Very little reference is made to Joseph Davis, Jr. However, what portions of the subject Complaint filed by the Plaintiffs on May 30, 2007 which concern the Plaintiff, Joseph Davis, Jr., have already been decided favorably to the Biloxi Public School District and the Board of Trustees for the Biloxi Public School District on two prior occasions -- each of which have each yielded final judgments in favor of the Defendants. This subject case by Joseph Davis, Jr. is the third such attempt premised on his contentions that he was wrongfully discharged from his employment with the Biloxi Public School District as a teacher aide. The first was filed in 2004 in the Circuit Court for the Second Judicial District of Harrison County, Mississippi. That case which was heard by then Circuit Judge Robert H. Walker was dismissed by Judgment entered April 19, 2004. The Plaintiff, Joseph Davis, Jr. feeling aggrieved from the dismissal of his claims by the Circuit Judge Walker filed an appeal with the Mississippi Supreme Court. The Mississippi Supreme Court referred the case to the Court of Appeals of Mississippi which entered its opinion/decision on November 22, 2005 upholding the Judgment of the

Circuit Court of Harrison County finding that the Biloxi Public School District had the discretion to terminate Joseph Davis, Jr. for any reason in that he was an at will employee and not a licensed teacher or otherwise someone who had a contract for employment. See 937 So.2d 459. Feeling aggrieved by the determination of the Court of Appeals of Mississippi, Joseph Davis, Jr. sought rehearing by the Court of Appeals, applied for a writ of certiorari to the Mississippi Supreme Court and even petitioned to the United States Supreme Court for certiorari relief – all of which were denied.

Undeterred by his repeated losses in the various appellate courts, Joseph Davis, Jr. again filed a lawsuit against the Biloxi Public School District and its Board of Trustees in the Circuit Court for the Second Judicial District of Harrison County, Mississippi again premised on his asserted wrongful termination plus a variety of other claims which seem to be exactly the same claims raised in the subject case filed in County Court in May of 2007. On November 15, 2007, Circuit Judge Roger T. Clark dismissed the second Circuit Court lawsuit filed by Joseph Davis, Jr. premised on his termination as a teacher aide with the Biloxi Public School District. The claims were dismissed on the grounds of *res judicata*, collateral estoppel and applicable statute of limitations. See *Joseph Davis, Jr. v. Biloxi Public School District, et al*, Civil Action No. A2402-07-36, Circuit Court of the Second Judicial District of Harrison County, Mississippi.

This effort for a third bite from the proverbial apple by Joseph Davis, Jr. will not be permitted. The Complaint and all claims asserted by Joseph Davis, Jr. in his County

Court lawsuit filed May 30, 2007 will be dismissed on the doctrines of *res judicata*, collateral estoppel and applicable statutes of limitations.

SANCTIONS

In responding to this third lawsuit brought by Joseph Davis, Jr. premised on claims of wrongful termination as a teacher aide, the Biloxi Public School District and the Biloxi Public School District Board of Trustees have asserted a claim for sanctions and damages pursuant to Rule 11 of the Mississippi Rules of Civil Procedure as well as under the Litigation Accountability Act of 1998 (Mississippi Code §11-55-1 et. seq.)

While the Defendants do not appear to seek sanctions against Gilda H. Davis and this Court is not of a mind to find that Mrs. Davis should be sanctioned simply because she filed her lawsuit some thirty-one days too late, the request for sanctions against Joseph Davis, Jr. will be allowed. The Court notes that this is the third time that the Biloxi Public School District has been required to expend money for attorney's fees to defend the same claim from the same Plaintiff. While Joseph Davis, Jr. has an absolute right to represent himself and in this Court Mr. Davis enjoys the same rights as any individual or other entity represented by legal counsel – Joseph Davis, Jr. likewise has the same responsibilities. This lawsuit is frivolous and it has required the Defendants to expend time and money in defense of issues which have already been twice litigated and resolved in favor of the Defendants.

Although the Defendants' expenses may exceed what the Court has elected to allow in this case, the Court determines that Joseph Davis, Jr. should pay to the Biloxi Public School District the sum and amount of \$2,000.00 as reasonable expenses and attorney's fees. If the Defendants find this figure inadequate or if Joseph Davis, Jr. feels it is excessive, upon written notice within the lawful allotted time, the Court will conduct a hearing on the reasonableness of the award. Such hearing would be limited to the single issue of the quantity of dollars assessed as sanctions. It is therefore,

ORDERED AND ADJUDGED that all claims brought by Gilda H. Davis and Joseph Davis, Jr. as above styled are hereby dismissed with prejudice at the Plaintiffs' costs. It is further,

ORDERED AND ADJUDGED that sanctions in the amount of \$2,000.00 are hereby assessed against Joseph Davis, Jr. payable to the Biloxi Public School District together with all costs incurred in this behalf to include post-judgment interest at the legal rate of 8% per annum following entry of this final Judgment of Dismissal until paid, for all of which let execution and all other appropriate process issue.

SO ORDERED AND ADJUDGED this the 6th day of August 2008.


COUNTY COURT JUDGE