

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01406

MICHAEL PERKINS

APPELLANT

V.

**WAL-MART STORES, INC. AND
ELIJAH WILSON**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI
CAUSE NO. M2006-523**

BRIEF OF APPELLEE ELIJAH WILSON

ORAL ARGUMENT NOT REQUESTED

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ELIJAH WILSON**

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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 disqualification or recusal.

1. Michael Perkins, Appellant;
2. Wal-Mart Stores, Inc., Appellee
3. Elijah Wilson, Appellee;
4. R. Shane McLaughlin, Esq., Attorney for Appellant Michael Perkins ;
5. Nicole McLaughlin, Esq., Attorney for Appellant Michael Perkins;
6. Jim Waide, Esq., Attorney for Appellant Michael Perkins;
7. Wilton V. Byars, III, Esq., Attorney for Appellee Elijah Wilson;
8. Amanda M. Urbanek, Esq., Attorney for Appellee Elijah Wilson;
9. Scott Hollis, Esq., Attorney for Appellee Wal-Mart Stores, Inc.; and
10. Robert Jolly, Esq., Attorney for Appellee Wal-Mart Stores, Inc.;
11. Honorable Robert W. Elliott, Trial Court Judge.


OF COUNSEL

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I. STATEMENT OF THE ISSUES

- A. Whether the Circuit Court correctly dismissed the claims against Elijah Wilson upon finding that he was acting within the course and scope of his employment pursuant to the Mississippi Tort Claims Act.

II. STATEMENT OF THE CASE

A. Nature of the case and the course of the proceedings and its disposition in the court below.

Michael Perkins ("Perkins") filed his Complaint against Defendants Wal-Mart Stores, Inc., and Elijah Wilson on December 14, 2006. (R. 7). Perkins, a Holly Springs, Mississippi, police officer alleged that Wal-Mart Stores, Inc. (hereinafter "Wal-Mart") conspired with Elijah Wilson, another Holly Springs, Mississippi, police officer to maliciously prosecute him and then did maliciously prosecute him. Perkins also claimed that Wal-Mart committed intentional infliction of emotional distress against him. In addition to the civil conspiracy claim, Perkins also claimed that Elijah Wilson tortiously interfered with Perkins' employment, and also committed intentional infliction of emotional distress. (R. 5-6).

Wal-Mart moved for partial summary judgment based on deficient service of process which was denied. Wal-Mart and Elijah Wilson separately moved for summary judgment on the merits of Perkins' claims. Both motions for summary judgment were granted by orders dated July 11, 2008 and entered on July 18, 2008. In granting Elijah Wilson's motion for summary judgment, the trial court found that Perkins failed to show the existence of malice on the part of Elijah Wilson which would take the claims against him outside of the protections of the Mississippi Tort Claims Act and subject him to individual liability. Thus Perkins' claims were dismissed. Perkins then perfected this appeal.

In granting Elijah Wilson's motion for summary judgment, the trial court stated that, "[t]here is no genuine issue of material fact that Wilson was acting within the course and scope of his employment without malice and with justifiable cause. Consequently, Defendant [Wilson] is entitled to summary judgment as a matter of law."

B. Statement of the facts relevant to the issues presented for review.

Perkins' allegations against Elijah Wilson stem directly from a perceived conflict between Perkins and Patricia Selman who was, at all relevant times, the Interim Chief of Police for the Holly Springs, Mississippi, Police Department. Perkins chose, for unknown reasons, to assert his claims against Elijah Wilson, individually, instead. At all relevant times, Perkins was a police officer with the Holly Springs Police Department. Elijah Wilson was, at all relevant times, a sergeant and Chief of Detectives with the Holly Springs Police Department. All of Perkins' allegations are based on Perkins' speculation that Elijah Wilson believed that Perkins had accused him of theft and then engaged in a series of incidents designed to interfere with Perkins' employment relationship. (R. 1-7). Perkins, however, bases this allegation entirely upon police department gossip and has absolutely no facts with which to support his allegations. (R.E. 1; R. 253). In support of his convoluted claims against Elijah Wilson, Perkins describes five separate incidents that followed the incident wherein Perkins' accused Elijah Wilson of theft. For background purposes only, the theft incident that serves as a supposed foundation for Perkins' claims against Elijah Wilson involved missing evidence from the evidence locker to which only Elijah Wilson and Perkins had keys. (R.E. 1; R. 389). Perkins requested an inventory of the locker and denied having misplaced or taken the missing evidence. (R.E. 1; R. 391). No inventory was ever completed and Perkins subsequently resigned his position with regard to the evidence locker. (R.E. 1; R. 391). Based on office gossip, Perkins asserts that after the above-described "evidence locker" incident, Elijah Wilson set on a course to "retaliate" against Perkins. Perkins' support for this perceived "retaliation" is summarized by five incidents described below.

The first incident involves car assignments in which Perkins alleges that Elijah Wilson assigned the “slick” car that was typically assigned to Perkins to an “uncertified” police officer. (R.E. 1; R. 254-255). “Uncertified” means that the police officer had not completed police academy training. (R.E. 1; R. 254-255). A “slick” car is one to which supervisors within the police department are normally assigned. (R.E. 1; R. 256). Perkins asked Elijah Wilson about the assignment to which, according to Perkins’ testimony, Elijah Wilson responded that he was given instructions to make the assignment by Chief Selman. (R.E. 1; R. 257). Perkins testified that he understood at that time that Elijah Wilson was acting in his official capacity with the Holly Springs Police Department and not in his individual capacity. (R.E. 1; R. 257).

The second alleged incident occurred shortly after December 18, 2005. Alicia Jackson, at that time a cashier at Wal-mart, was arrested for petit larceny. (R.E. 2; R. 294, 298). She had been engaged in an under-ringing scheme in which she would either ring up and void items for certain customers who went through her line or completely fail to ring up items, which actions resulted in customers failing to pay for items. (R.E. 2; R. 299-301). On December 18, 2005, Perkins was a customer in Alicia Jackson’s line. (R.E. 2; R. 302-316). Ms. Jackson rang up an ink cartridge and voided it; thus, Perkins left Wal-mart with an ink cartridge for which he paid nothing. (R.E. 2; R. 302-316). Ms. Jackson was arrested shortly after the incident involving plaintiff. (R.E. 2; R. 294, 298). While she was in police custody, Elijah Wilson was instructed to question Ms. Jackson as to Perkins’ involvement in the matter. (R.E. 3; R. 320-323). It is alleged by Perkins and Ms. Jackson that Elijah Wilson repeatedly asked Ms. Jackson whether Perkins knew that he received free merchandise. (R.E. 1; R. 241-243; R.E. 2; R. 295-297). Ms. Jackson testified that she responded “no” two times, then changed her response to “yes” which

was a lie. (R.E. 2; R. 295-297). Ms. Jackson, under oath, testified in her deposition that Elijah Wilson never told her what to say, never indicated that he wanted a specific response, and never told her or indicated to her that he believed that Perkins knew that he received free merchandise. (R.E. 2; R. 317). In fact, she specifically testified that Elijah Wilson did not make it plain to her that he wanted her to implicate Perkins. (R.E. 2; R. 438). Immediately thereafter, Perkins' attorney asked Ms. Jackson if Elijah Wilson made her understand that [Wilson wanted her to implicate Perkins] to which she also responded "[n]o." (R.E. 2; 438). In addition, Ms. Jackson testified later in her deposition that at the time of the interview with Elijah Wilson, she did not know what Elijah Wilson wanted to hear. (R.E. 2; R. 439-440). She testified further that Wilson never told her that he wanted to "get" plaintiff or that he was "after" plaintiff. (R.E. 2; R. 440).

Elijah Wilson then turned his interview of Alicia Jackson over to Chief Selman for further handling and had no other involvement in the charges against Alicia Jackson or Perkins. (R.E. 3; R. 459). With respect to the under-ringing scheme and criminal charges against Perkins, Perkins' personnel file contains a letter from Chief Selman to the Mayor of Holly Springs, Mr. A. Deberry, stating that Perkins had been found not guilty in a Justice Court proceeding and that the Holly Springs Police Department had taken no action against Perkins with respect to the incident at Walmart. (R.E. 4; R. 273).

The third incident involved another police car issue. Perkins was reassigned to car number fifteen by Elijah Wilson. (R.E. 1; R. 260). Car fifteen's engine "knocked" and eventually "went out." (R.E. 1; R. 261). Perkins asked Elijah Wilson why he was assigned to car fifteen to which Elijah Wilson responded that the other officer sharing the previous car with Perkins complained

about Perkins leaving the vehicle in an unkempt and dirty state; thus Perkins was assigned a different vehicle. (R.E. 1; R. 261-262).

The fourth so-called incident involving Perkins and Elijah Wilson involved drivers' licenses. Perkins confiscated what appeared to be an altered drivers' license. (R.E. 1; R. 262). Perkins was later told that the man from whom he confiscated the license had contacted the police department and asked for his license to be returned. (R.E. 1; R. 263). Perkins did not have the driver's license, nor could he find it. (R.E. 1; R. 263). Chief Selman placed a series of memoranda in Perkins' personnel file documenting the events with regard to the missing drivers' licence. (R.E. 5; R. 274-291). According to Perkins, Chief Selman recommended to the Holly Springs Board of Aldermen that he be suspended for two days for losing the drivers' license. (R.E. 1; R. 264). Perkins requested an appeal before the Board of Aldermen. Id. Perkins then appeared before the Board of Aldermen with a stack of drivers' licenses and stated that they were found in patrol cars and that he should not be suspended for losing one license. (R.E. 1; R. 264-266). According to Perkins, both Chief Selman and Elijah Wilson investigated the matter further and insisted that the licenses that Perkins presented at the Board of Aldermen meeting were taken from a basket on the desk clerk's desk. (R.E. 1; R. 267). Perkins, on recommendation from Chief Selman, was suspended for an additional 10 days for his actions with regard to the drivers' licenses at the Board of Aldermen meeting. (R.E. 1; R. 267; R.E. 5; R. 274-291). How this incident supports any claims against Elijah Wilson is a mystery.

Fifth, Perkins alleges that Elijah Wilson interfered with his employment relationship such that plaintiff was relieved of his supervisory position with the police department. (R.E. 1; R. 268). Perkins received a letter from Chief Selman dated December 27, 2005, relieving him of his

position. (R.E. 6; R. 292). Perkins does not, however, have any factual basis for his assumption that Elijah Wilson was involved in his removal as a supervisor. None. There is no evidence that Elijah Wilson recommended Perkins be removed from his supervisory position, wrote the memorandum regarding Perkins' removal, or played any role whatsoever in having Perkins removed from his supervisory position.

Perkins alleges that because of this series of events he has suffered the loss of a supervisory position, sleeplessness, and damage to his reputation. (R.E. 1; R. 244-252). Perkins claims that Elijah Wilson is responsible for interfering in his employment relationship to his detriment; however, by all accounts Perkins, himself, has caused whatever problems he may be having with his employer, Holly Springs Police Department. In addition to the twelve day suspension for the drivers' licenses incident, Perkins was suspended for ten days in 2007 after being caught on tape riding a handicapped cart around Wal-mart at 2:00 a.m. while on duty. (R.E. 7; R. 327-328). There is no dispute that Elijah Wilson had no involvement whatsoever in that incident, either. (R.E. 7; R. 327; R.E. 1; 271).

As to Perkins' claim of conspiracy, Perkins testified in his deposition that he has no evidence that Elijah Wilson and Wal-mart had an agreement or plan or understanding to press charges against plaintiff. (R.E. 1; R. 258-259). Perkins relies on what he characterizes as purely circumstantial evidence to support his claim of civil conspiracy. What Perkins suggests is evidence of a conspiracy to prosecute him, however, is simply a victim of a crime (Wal-mart) asking for reassurance from the Holly Springs Police Department that evidence existed to pursue prosecution of Alicia Jackson and Perkins.

Perkins also claims that Elijah Wilson intentionally caused him to suffer emotional distress. As with his other claims, Perkins fails to present any evidence of outrageous or extreme conduct on the part of Elijah Wilson to support his claim. All of Perkins' claims against Elijah Wilson are baseless, as he cannot support any of his allegations with facts, much less show a genuine issue of material fact exists as to an element of his claims. The trial court was correct in its grant of summary judgment in favor of Elijah Wilson and its ruling should be affirmed.

III. SUMMARY OF THE ARGUMENT

Perkins' deposition testimony establishes that his allegations of tortious interference with his employment relationship, civil conspiracy, and intentional infliction of emotional distress against Elijah Wilson are based on nothing more than Perkins' feelings, office gossip, and an unknown controversy with then Interim Chief Selman. As a police officer with the Holly Springs Police Department, the actions of Elijah Wilson fall within the scope of the Mississippi Tort Claims Act. Miss. Code Ann. § 11-46-7(1); *City of Tupelo v. Martin*, 747 So. 2d 822, 826 (¶13) (Miss. 1996). Despite the fact that all of Perkins' claims are based on actions by Elijah Wilson that occurred at the police station, during working hours, and in furtherance of Holly Springs Police Department business, Perkins chose to pursue his claims against Elijah Wilson individually. Employees of governmental entities are presumed to have acted within the course and scope of their employment, if the actions took place within the time and at the place of employment. Miss. Code Ann. § 11-46-5(3). Therefore, pursuant to the Mississippi Tort Claims Act, in order for Elijah Wilson to be subjected to individual liability, Elijah Wilson must have acted outside the course and scope of his employment. Miss. Code Ann. §§ 11-46-5(2), 11-46-7(2). In order to overcome the presumption that an employee is acting within the course and scope of employment

when acting within the time and at the place of employment, a plaintiff must show that the employee acted with fraud, malice, libel, slander, defamation or other criminal offenses. Miss. Code Ann. § 11-46-5(2).

Perkins argues that Elijah Wilson was acting with malice toward Perkins during the incidents described by Perkins as the basis for his claims. Perkins has, however, absolutely no evidence that Elijah Wilson ever acted with malice toward Perkins or that Elijah Wilson ever acted of his own accord in an attempt to further a malicious intent toward Perkins. The facts simply do not support Perkins' assertions. All evidence presented by Perkins proves that Elijah Wilson's actions were performed as a Holly Springs police officer at the instruction of his supervisor, Chief Selmen; thus, all of Elijah Wilson's actions were performed within the course and scope of his employment and without malice.

To demonstrate the lack of individual liability on the part of Elijah Wilson, this brief will also address Perkins' claims for tortious interference with an employment relationship, civil conspiracy, and intentional infliction of emotional distress. Perkins cannot show facts in support of each of the elements of his claims. Accordingly, the trial court's dismissal of Perkins' claims with prejudice should be affirmed.

IV. ARGUMENT

A. Standard of Review

"The standard of review by which an appellate court reviews the grant or denial of a motion for summary judgment under Rule 56(c) of the Mississippi Rules of Civil Procedure is de novo." *Grammar v. Dollar*, 911 So.2d 619, 621-22 (¶ 4) (Miss.Ct.App. 2005) (citing *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-77 (¶ 9) (Miss. 2002)). In determining whether a motion

for summary judgment was properly granted, [the appellate court] must view the evidence “in the light most favorable to the party against whom the motion has been made.” *Weatherly v. Union Planters Bank, N.A.*, 914 So. 2d 1222, 1224 (¶ 9) (Miss.Ct.App. 2005) (citation omitted). “This Court will only reverse a trial court’s decision to grant summary judgment if triable issues of fact exist.” *Johnston v. Palmer*, 963 So.2d 586, 592 (¶ 11) (Miss.Ct.App. 2007) (citing *Bowie v. Montfort Jones Mem’l Hosp.*, 861 So. 2d 1037, 1041 (¶ 8) (Miss. 2003)). “If, in this view, there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law, summary judgment should forthwith be entered for the movant.” *Bullock v. Life Ins. Co. of Miss.*, 872 So. 2d 658, 660 (¶ 6) (Miss. 2004) (citing *Hurdle v. Holloway*, 848 So. 2d 183, 185 (¶ 4) (Miss. 2003)).

As in the present case, once the moving party has, by pleading, affidavit, or admissions, established the absence of a genuine fact, the burden shifts to the non-movant to designate specific facts showing there is a genuine issue for trial. *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986). That burden is not discharged by “mere allegations or denials,” pursuant to Rule 56(e). *Id.* Simply showing “[t]he presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense The existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact.” *Leffler v. Sharp*, 891 So.2d 152, 156 (¶9) (Miss. 2004). Rule 56(c) mandates the entry of summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

B. Perkins's claims against Elijah Wilson were correctly dismissed with prejudice because Elijah Wilson cannot be individually liable to Perkins pursuant to Mississippi Tort Claims Act.

As to each of five "incidents" relied upon by the plaintiff, Elijah Wilson's actions took place at the police station and involved police personnel, evidence, vehicles, and/or equipment. There is dispute about this. Pursuant to Mississippi Code Annotated § 11-46-7(1), the Mississippi Tort Claims Act [hereinafter "the Act"] is the exclusive remedy for a plaintiff in a civil action against a governmental entity or its employee. *Southern v. Miss. State Hosp.*, 853 So. 2d 1212, 1215 (¶¶ 10-11) (Miss. 2003); *Pickens v. Donaldson, M.D.*, 748 So.2d 684, 687 (¶12) (Miss.1999); *City of Tupelo*, 747 So.2d at 826 (¶13) (Miss.1996). The Act provides that employees [of governmental entities] who are acting within the time and at the place of employment are presumed to be acting within the course and scope of their employment. Miss. Code Ann. § 11-46-5(3). To overcome this strong presumption, plaintiff must prove that the employee's conduct constitutes fraud, malice, libel, slander, defamation or other criminal offenses. Miss. Code Ann. § 11-46-5(2). Pursuant to the provisions of the Mississippi Tort Claims Act, employees of the governmental entity "may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties." Miss. Code Ann. § 11-46-7(2).

Although this is an unusual case involving suit by one police officer against another, the Mississippi Court of Appeals opinion in *Pearl River Valley Water Supply Dist. v. Bridges*, 878 So.2d 1013, 1019 (¶26) (Miss. Ct. App. 2004) is helpful in determining whether malice can be found based on past actions. As in most cases involving police officers and the Mississippi Tort

Claims Act, the *Bridges* case involved claims against a police officer by a person not affiliated with the department, here the arrest of Bridges by a security officer, Harold Gray. *Id.* at 1014 (¶¶1-3). Officer Gray arrested Bridges for several violations of the law including public drunkenness and resisting arrest. *Id.* at 1015 (¶6). Bridges sustained injuries during the arrest and sued the Pearl River Valley Water Supply District and Officer Gray for damages related to those injuries, alleging as to Officer Gray that he acted with malice toward Bridges because of several past incidents including the past arrest of Bridges for simple assault. *Id.* (¶¶6, 8). The trial court eventually found that the Pearl River Valley Water Supply District and Officer Gray were liable to Bridges. *Id.* This Court reversed and remanded the trial court's decision. *Id.* at 1014 (¶1). As to the lower court's finding of malice on the part of Officer Gray, this Court stated that,

Whatever might have been Gray's thoughts, there is nothing in his actions to create liability. **In essence, the claim for liability here is that the officer did not prove that he had banished all possible ill feelings towards the person being arrested that may have arisen from earlier incidents.** Indeed, the same potential for liability for an officer's malice would arise simply from actions by an accused contemporaneous with the arrest – after an encounter by an officer for lawful reasons, the suspect may assault the officer or use abusive language. That conduct may then be followed by an arrest for the crime that caused the officer to confront the lawbreaker in the first place. We are not saying that malice can never be shown in such circumstances. We are saying that it is not shown when the only evidence is the fact of the prior encounters between the officer and the law-breaker and that they may have created bad relations between the officer and the citizen.

Id. at 1019 (¶26) [emphasis added]. Although the *Bridges* case involves the arrest of a suspect by a security officer and this case involves claims between co-workers, this Court's reasoning in the *Bridges* case is applicable to the facts in this matter. Perkins alleges that Elijah Wilson entered into a series of events intended to tortiously interfere with Perkins' employment relationship. Perkins

bases his claims on his belief that Elijah Wilson engaged in this series of actions because Elijah Wilson was mad at him for the "evidence locker" incident described above just as Bridges alleged Officer Gray acted with malice because he did not like Bridges due to their past involvement. Perkins has placed Elijah Wilson in essentially the same position as Officer Gray-having to prove that "he had banished all possible ill feelings toward the person..." to the extent that ill feelings existed. *Id.*

The series of events in which Perkins claims Elijah Wilson engaged to tortiously interfere with Perkins' employment relationship include two vehicle assignments, the investigation of missing drivers' licenses, the interview of a suspect/witness, and the loss of Perkins' supervisory position. Perkins has presented no evidence, nor is there any in existence, which would indicate that Elijah Wilson was not acting, at all times, without malice and in the course and scope of his employment as a Holly Springs police officer. In fact, Perkins specifically asked Elijah Wilson why he made the two vehicle assignments to which Elijah Wilson responded that his actions were at the direction of Chief Selman, his supervisor, and, as to the second assignment, that his actions were due to the complaints of another police officer. It is uncontested that Elijah Wilson was asked to assist Chief Selman in the investigation into the missing drivers' licenses, and that Chief Selman requested the two suspensions of Perkins in relation to that incident. It is also uncontested that while Alicia Jackson was in police custody, Elijah Wilson was instructed to interview Alicia Jackson as part of an internal investigation into Perkins' involvement in the incident, and that he immediately turned the results of the interview over to Chief Selman. Finally, as to the loss of Perkins' supervisory position, there is no evidence that Elijah Wilson played any role in that decision, suggested that Perkins be removed from his supervisory position, wrote the

memorandum advising Perkins of his removal, or had any knowledge that Perkins was removed from his supervisory position.

Perkins has not presented any evidence of malice, fraud, libel, slander, defamation or other criminal offenses which would indicate that Elijah Wilson was acting outside the course or scope of his employment. Perkins asks this Court to find malice in the actions of Elijah Wilson based upon Perkins' belief that Elijah Wilson felt ill will toward Perkins for a previous incident, without any supporting evidence. This Court should reject such an unsupported theory, as required by the standards for summary judgment cited above. Perkins has failed to show any facts which indicate that Elijah Wilson was acting in an individual capacity or outside the realm of his duties as a sergeant and Chief of Detectives for the Holly Springs Police Department. Therefore, the trial court correctly dismissed Perkins' claims against Elijah Wilson with prejudice because Elijah Wilson is afforded protection from individual liability by the Mississippi Tort Claims Act.

C. Perkins' claims against Elijah Wilson were properly dismissed because Perkins has wholly failed to provide facts and/or evidence establishing individual liability. Had the claims not been dismissed due to a complete lack of malice, they should have been dismissed because there is no genuine issue of material fact in existence.

1. Perkins failed to establish his claim of civil conspiracy; thus the allegation of civil conspiracy must be dismissed with prejudice.

There is no evidence which would support or tend to show that Elijah Wilson engaged in any type of conspiracy. Civil conspiracy requires a showing of "a combination of two or more persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So. 2d 777, 786 (¶37) (Miss. 2004) quoting *Levens v. Campbell*, 733 So. 2d 753, 761 (¶32) (Miss. 1991).

Perkins claims that Elijah Wilson and Wal-mart conspired to have Perkins charged with the crime of petit larceny and to maliciously prosecute Perkins and harm Perkins' reputation. To support his claim, Perkins relies on the fact that the Wal-mart loss prevention employee and Elijah Wilson had several conversations about potential prosecution before prosecution was commenced, that Elijah Wilson told Wal-mart employees that he thought Wal-mart had a "good case" against Perkins, and that Elijah Wilson told Wal-mart employees that Alicia Jackson had implicated Perkins. Conversations between investigating police officers and victims of crimes occur regularly prior to prosecution of the suspect. There is no evidence that the conversations between Elijah Wilson and Wal-mart employees were in contemplation of anything other than prosecution of a criminal suspect. Other than the fact that Perkins was prosecuted and found to be not guilty, Perkins has no other facts to support his claim of civil conspiracy.

Perkins admitted that he had no facts to support his allegation that Elijah Wilson and Wal-mart had any sort of agreement, plan or understanding to press charges against Perkins. He has not presented any evidence that Elijah Wilson and Wal-mart had any sort of agreement, plan or understanding which concerned Perkins in any way whatsoever. In fact, all sworn testimony is to the contrary. Thus Perkins' claim of civil conspiracy against Elijah Wilson should be dismissed with prejudice.

2. Perkins' allegation of intentional interference with an employment relationship is not supported by facts nor is there a genuine issue of material fact which would preclude summary judgment on Perkins' claim.

Tortious interference with an employment relationship is comprised of four elements: "(1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiff in his lawful business; (3) that they were done with the unlawful purpose of causing

damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) that actual damage and loss resulted." *McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 976 (¶22) (Miss. 2001).

Perkins' claim fails, at a minimum, with respect to elements two, three and four. Assuming that Perkins' version of events is correct, Elijah Wilson intentionally assigned Perkins' slick car to another police officer, intentionally interviewed and interrogated Alicia Jackson, intentionally investigated, along with Chief Selman, the origin of the drivers' licenses that Perkins showed the Board of Aldermen at his appeal, and intentionally assigned Perkins to car fifteen. Setting aside the fact that each of these actions were done in the course and scope of Elijah Wilson's employment, Perkins cannot show any facts which would indicate that these intentional acts by Elijah Wilson were calculated to cause damage to Perkins' lawful business, that they were done with an unlawful purpose causing damage or loss and without right or justifiable cause, or that they caused actual damage and loss to Perkins.

There is no memorandum in Perkins' personnel file indicating that he was reprimanded in any way for being assigned to a vehicle other than his "slick" car or to car fifteen. There is, in fact, no indication that these car assignments affected Perkins in any way. There is simply no evidence that Elijah Wilson changed Perkins' assignments maliciously or that the changed car assignments injured Perkins in any way.

Further, Perkins has not provided any facts which would support his allegation that Elijah Wilson engaged in the interview of Alicia Jackson in a calculated manner to cause damage to Perkins' lawful business or with the unlawful purpose of causing damage or loss to Perkins without right or justifiable cause. Elijah Wilson was requested by Chief Selman to interview Alicia

Jackson. He did not tell her what to say or intimate that he wanted her to say that Perkins knew he received free merchandise. According to Alicia Jackson, of her own accord, she lied to Elijah Wilson telling him that Perkins did know that he received free merchandise. There is simply no evidence that Elijah Wilson, when engaged in a lawful and justifiable interview, engaged in the unlawful purpose of causing damage to Perkins.

Concerning the drivers' licenses incident about which Perkins complains, Perkins has not provided any evidence that Elijah Wilson did anything but engage in an investigation, along with Chief Selman, into the origin of the drivers' licenses that Perkins produced. The memoranda about the incident in Perkins' personnel file do not bear the signature of Elijah Wilson or his name, as it was Chief Selman who recommended Perkins be suspended for a total of twelve days.

Finally, as to the loss of his supervisory position, Perkins has absolutely no evidence that Elijah Wilson was involved in that decision at all. Perkins' personnel file is devoid of any documentation that would indicate that Elijah Wilson had anything to do with that decision whatsoever.

It is clear that Perkins' argument lies with decisions ultimately made by the interim chief of the Holly Springs Police Department—not Elijah Wilson. Elijah Wilson, in the course and scope of his employment as a sergeant, acted at the discretion, and under the direction, of Chief Selman. Perkins has presented no facts suggesting or supporting his assertion that he has suffered any loss as a result of any of the actions taken by Elijah Wilson. Perkins was suspended, but his suspension came as a result of either his own actions or decisions made by Chief Selman. The cause of any loss of a supervisory position or potential loss of a supervisory position lies with Perkins. He was suspended in 2006 for twelve days and he was suspended in 2007 for ten days because of an

incident in which Perkins admitted Elijah Wilson played absolutely no part. Additionally, no action was taken against Perkins by the Holly Springs Police Department as a result of his “involvement” or lack thereof in the incident at Walmart with Alicia Jackson. Perkins’ allegation of tortious interference with an employment relationship is completely unsupported by any facts and should be dismissed with prejudice.

3. Perkins’ claim of intentional infliction of emotional distress must be dismissed with prejudice as it is not supported by any facts.

Perkins’ claim for intentional infliction of emotional distress must likewise be dismissed with prejudice because Perkins has failed to provide any evidence in support of his claim. Intentional infliction of emotional distress requires evidence of outrageous and extreme conduct in Mississippi. *Langston v. Bigelow*, 820 So.2d 752, 757 (¶11) (Miss. 2002); *Clark v. Luvel Dairy Products, Inc.*, 821 So.2d 827, 831 (¶9) (Miss. 2001); *Pegues v. Emerson Electric Co.*, 913 F.Supp. 976, 982 (N.D. Miss. 1996).

The District Court in *Pegues* notes that the Mississippi Supreme Court routinely cites the language from the Restatement (Second) of Torts when describing the conduct required to support a claim of intentional infliction of emotional distress as follows:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Pegues, 913 F.Supp. at 982, *quoting* Restatement (Second) of Torts § 46 cmt. d., 1965. The Mississippi Court of Appeals in *Clark*, cited above, stated that mere insults, indignities, threats, annoyances, petty oppression or other trivialities are not enough to support liability for intentional infliction of emotional damages. *Id.* In *Clark*, Luvel Dairy dismissed Henry Clark for stealing ice

cream and selling it for profit. *Id.* at 829 (¶2). Clark then filed suit against Luvel and its president James Briscoe for several claims including defamation and intentional infliction of emotional distress. *Id.* at 830 (¶4). The Mississippi Court of Appeals reviewed the case on appeal from a judgment notwithstanding the verdict. *Id.* The Court relied on *Pegues* and the Restatement (Second) of Torts to determine that the trial court was correct in dismissing Clark's claim of intentional infliction of emotional distress. *Id.* at 831 (¶9).

In this case, Perkins has not provided any evidence of extreme and outrageous conduct by Elijah Wilson. Elijah Wilson, acting as a sergeant and Chief of Detectives with the Holly Springs Police Department, assigned Perkins to vehicles that Perkins did not like, investigated-along with the Chief of Police-missing drivers' licenses which resulted in the Chief of Police recommending Perkins be suspended for a total of twelve days, and, at the request of Chief Selman, interviewed a witness/suspect. Not one of these events constitutes the extreme and outrageous behavior or conduct necessary to sustain a claim of intentional infliction of emotional distress. Perkins' claim should be dismissed with prejudice.

CONCLUSION


Perkins' claims against Elijah Wilson are based on nothing more than Perkins' belief that Elijah Wilson does not like him. His real issues seem to be with then Interim Chief Patricia Selman. Perkins asks this Court to infer, without any evidence to support his allegation, that Elijah Wilson acted with malice toward Perkins such that Elijah Wilson was acting outside the course and scope of his employment when Elijah Wilson made car assignments that Perkins did not like, investigated missing drivers' licences which resulted in Perkins' suspension as requested by Chief Selman, interviewed a witness/suspect, and Perkins' was relieved of his supervisory position by

Chief Selman. Perkins bases his allegations on his assertion that Elijah Wilson was upset over a prior incident involving the evidence locker. However, Perkins admitted that his only evidence of that was office gossip.

Gossip, rumor and innuendo are insufficient to rebut the presumption that Elijah Wilson was acting within the course and scope of his employment at all times relevant herein. Elijah Wilson cannot be held individually liable for his actions pursuant to the Mississippi Tort Claims Act absent a showing of malice. Perkins simply has no evidence that Elijah Wilson acted with malice toward Perkins. Further, each of Perkins' claims against Elijah Wilson would fail even if Elijah Wilson were capable of being individually liable to Perkins because Perkins cannot support the elements of his claims with any evidence whatsoever.

The trial court correctly held that there was no evidence of malice on the part of Elijah Wilson, and that Elijah Wilson cannot be held individually liable to Perkins. The summary judgment rendered in favor of Elijah Wilson should be affirmed.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Amanda M. Urbanek, one of the attorneys for Appellee Elijah Wilson, hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellee Elijah Wilson by placing said copy in the United States mail, postage prepaid, addressed to the following on this the 21st day of May, 2009.

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CERTIFICATE OF FILING

I hereby certify that I have served by First Class, United States Mail, postage prepaid, the original and three copies of the Brief of Appellee Elijah Wilson and an electronic diskette containing same on May 21, 2009 addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



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