

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CP-01464-SCT

GEORGE DUNBAR PREWITT

APPELLANT

VS.

P. SCOTT PHILLIPS

APPELLEE

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

P. Scott Phillips, *Pro Se*
Mississippi Bar No. [REDACTED]
CAMPBELL DeLONG, LLP
923 Washington Avenue
Post Office Box 1856
Greenville, Mississippi 38702-1856
Telephone: (662) 335-6011
Facsimile: (662) 334-6407

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CERTIFICATE OF INTERESTED PERSONS

The undersigned 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 Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. George Dunbar Prewitt
2. P. Scott Phillips
Campbell DeLong, LLP
923 Washington Avenue
Post Office Box 1856
Greenville, MS 38702-1856
Counsel for Respondent/Plaintiff
3. Honorable Margaret Carey-McCray
Circuit Court Judge
P. O. 1775
Greenville, MS 38702-1775

Certified, this the 5th day of December, 2008.


P. SCOTT PHILLIPS

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STATEMENT OF THE ISSUES

Because Appellant's Statement of the Issues unnecessarily includes irrelevant and inappropriate issues to be considered, the Appellee asserts that the following issues more accurately reflect the matters to be decided:

(1) Whether the trial court erred in finding that the Complaint failed to state a cause of action.

STATEMENT OF THE CASE

What is a very simple issue has been turned into a confusing quagmire of legal issues by Appellant ("Prewitt")¹. This will be an attempt to crystalize into a simple statement what this case is about. On August 1, 2007, Prewitt filed his Amended Complaint alleging to have been defamed by statements made by Appellee ("Phillips"), an attorney licensed in the State of Mississippi, in the course of Phillips' defense of Dr. David Lee in the civil action *George Dunbar Prewitt v. David Howell Lee*, pending in the Circuit Court of Washington County, Mississippi, civil action no. 2003-233.² Specifically, Prewitt claims to have been defamed as a result of Phillips publishing docket sheets from civil actions in the United States District Court for the Northern District of Mississippi wherein Prewitt was assessed certain sanctions and attorney's fees against him.³ These docket sheets were attached in support of Dr. Lee's Cross-Motion for Summary Judgment, praying that Prewitt's

¹Prewitt, an attorney licensed in Mississippi, filed his original Complaint on or about April 4, 2007, but filed and served Phillips with the Amended Complaint.

²The trial judge in the *Prewitt v. Lee* litigation was Honorable Margaret Carey-McCray, the same trial judge in the litigation from which this appeal is taken.

³These docket sheets can be found on PACER in the U.S. District Court, Northern District of Mississippi, Case Nos. 4:96-mc-00001-MPM (Dk. #1, 27), 4:94-cv-00094-NBB (Dk. # 82), and 4:94-cv-00010-NBB (Dk. #34)

complaint be dismissed on the grounds that Prewitt violated Miss. R. Civ. P. 11 and the Lawyer's Creed.⁴ In the underlying action, Phillips filed a Motion to Dismiss pursuant to Miss. R. Civ. P. 12(b)(6). By Opinion and Final Order dated June 30, 2008, the trial court dismissed the underlying action. It is from this Opinion and Final Order that Prewitt appeals.

SUMMARY OF THE ARGUMENT

The argument is very straightforward. The statements by Phillips which are alleged to be defamatory are (1) cloaked with immunity because they were made in a judicial proceedings, or (2) not defamatory because the statements are (a) true and/or (b) opinions.

ARGUMENT

This Court should review the trial court's grant of the Rule 12(b)(6) motion to dismiss with a *de novo* standard of review. If there are no set of facts affording Prewitt relief, then this Court should affirm the grant of the motion. *Durham v. University of Mississippi*, 966 So.2d 832, 835 (Miss. App. 2007), citing *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893(¶ 4) (Miss.2006)

The majority of Prewitt's argument seems to be hinged on the premise that the trial judge erred by not adjudicating the orders from the federal judiciary as "void" and by not ruling that Phillips' use of these "void" judgments was defamatory. Prewitt also seems to claim that because

⁴In the Cross -Motion for Summary Judgment filed in *Prewitt v. Lee*, Phillips asserted that Prewitt's allegations and pleadings went beyond the bounds of fundamental decency. Prewitt claimed that Dr. Lee was guilty of "conversion, grand larceny, fraud, and other civil and criminal offenses." Prewitt asserted that Dr. Lee's conduct "may permit Lee to be arrested and tried" as if Lee committed some criminal act. Finally, Prewitt claimed that Dr. Lee and his attorney (me) made "extortionate demands" on him. Phillips asserted then (and asserts now) that these comments violate Rule 11 and the Lawyer's Creed requiring an attorney's conduct be governed by standards of "fundamental decency," rather than "antagonistic or obnoxious behavior". *Mississippi Farm Bureau Mutual Insurance Company v. Parker*, 921 So.2d 260 (Miss. 2006), citing *In Re: Kelly*, 912 So.2d 823 (Miss. 2005). The docket sheets were attached for the purpose of providing the trial court with examples of how other courts have dealt with Prewitt.

he made a charge that the “void” judgments were the result of some “conspiracy” within the judiciary, this alone rendered the judicial privilege inapplicable. The very basis for this statement is erroneous and Prewitt cites no relevant legal authority for this proposition, except for the proposition that there is precedent which establishes that re-litigation of these matters is not permitted. *See* Brief of Appellant, pg. 12, citing *Global Oceanic Enterprises, Inc. v. Hynum*, 857 So.2d 659 (Miss. 2003) for the proposition the doctrine of *res judicata* bars this claim. Prewitt’s arguments relative to the alleged “void” judgments and an alleged “conspiracy” within the judiciary are without merit.

To boil it down, Prewitt claims that he was defamed because Phillips attached the docket sheets and asserted that Prewitt was assessed sanctions and attorney’s fees by the federal court “for his behavior.” *See* Amended Complaint, ¶ 1. Prewitt further claims that statements made by Phillips in a court filing which opposed Prewitt’s motion for leave to amend his complaint in the *Prewitt v. Lee* litigation (to add Phillips as a defendant for asserting the above) serve as a basis for defamation. In that filing, Phillips asserted Prewitt was “less than candid” with the court when he claimed that Dr. Lee failed to appear at a deposition after being given proper notice.⁵ *Id.*, ¶ 2. In that same document, Phillips asserted that portions of Prewitt’s motion were “incoherent”, “nonsensical and incomprehensible.” *Id.* Prewitt claims these statements are defamatory. Rightfully so, the trial judge concluded that the reference to the events noted on the docket sheets of the federal courts was made in the context of a motion for sanctions and was relevant to the subject matter and, thus,

⁵Prewitt faxed a Notice of Deposition on July 10, 2006, setting a deposition of Dr. Lee for July 14, 2006. No attempt had been made to schedule the deposition. In fact, Phillips was out of state both when the notice was served and when the deposition was set to be taken. On July 11, 2006, Prewitt was advised of Phillips’ unavailability, yet asserted to the trial judge that Lee failed to appear. Phillips stands by his characterization of Prewitt’s assertion that Lee failed to appear.

privileged. *See* Opinion and Final Order. As to the other statements, the Court rightfully found that the statements were made during zealous argument and also privileged. *Id.* The trial court was correct and the decision should be affirmed.

A. The Statements are Privileged.

That the statements by Phillips, made as counsel for a party in the course of other litigation, are privileged is one of the oldest tenets of our common law. In 1854, in addressing the privilege in an action for slander, this Court stated that “[i]n all judicial proceedings ... the parties are permitted to speak freely; and if they should ever make use of harsh expressions, they will not be liable to an action although the same words spoken on another occasion would be actionable.” *Lewis v. Black*, 27 Miss. 425 (1854) citing *Kean v. M’Laughlin*, 2 Serg. & Rawle 469 (Penn.1816). “Statements made in connection with judicial proceedings, including pleadings, are, if in any way relevant to the subject matter of the action, absolutely privileged and immune from attack as defamation, even if such statements are made maliciously and with knowledge of their falsehood.” *McCorkle v. McCorkle*, 811 So.2d 258 (Miss. Ct. App. 2001), citing *Gunter v. Reeves*, 198 Miss. 31, 38, 21 So.2d 468, 470 (1945) and *Hardtner v. Salloum*, 148 Miss. 346, 114 So. 621, 623-24 (1927). Clearly, the statements made were made in the context of a judicial proceedings and were, therefore, absolutely privileged.

B. Even if the Statements are Not Privileged, they are not Defamatory.

It should be noted herein that nothing Phillips stated or published in his court filings is untrue. “It should be noted that truth is an absolute defense to a defamation claim.” *Fulton v. Miss. Publishers Corp.*, 498 So.2d 1215, 1217 (Miss.1986). Even if untrue, the statements are not defamatory. Phillips merely produced a copy of the docket sheets which clearly show Prewitt was

assessed sanctions and attorney's fees against him, among other sanctions. These matters are public record, free for any citizen's inspection. Additionally, the statements made by Phillips constitute opinions which are not defamatory unless they can be reasonably understood as declaring or implying a provable assertion of fact. If not, which clearly in this case the opinions cannot, the statements are not defamatory. *Roussel v. Robbins*, 688 So.2d 714 (Miss. 1996).

Under no set of facts could the inclusion of the docket sheets (which are public record) be considered defamatory. The remaining statements are merely opinions which are not defamatory.

CONCLUSION

This Court should bear in mind that the trial judge in the underlying matter was also the trial judge in *Prewitt v. Lee*. The trial judge heard and granted dispositive motions in both actions. Twice, the trial court read and considered all of the statements which Prewitt claims to have defamed him. Her ruling should stand and her dismissal of this matter should be affirmed.

Respectfully submitted,



P. SCOTT PHILLIPS, *Pro Se*
MSB No. [REDACTED]

P. Scott Phillips
Mississippi Bar No. [REDACTED]
CAMPBELL DeLONG, LLP
923 Washington Avenue
Post Office Box 1856
Greenville, Mississippi 38702-1856
Telephone: (662) 335-6011
Facsimile: (662) 334-6407

CERTIFICATE OF SERVICE

I, P. Scott Phillips, *pro se*, certify that I have this day mailed via U. S. Postal Service, postage prepaid, a true and correct copy of the foregoing to:

George Dunbar Prewitt, Jr.
P. O. Box 1226
Greenville, MS 38702-1226

Honorable Margaret Carey-McCray
Circuit Court Judge
P. O. 1775
Greenville, MS 38702-1775

THIS, the 5th day of December, 2008.


P. SCOTT PHILLIPS