

IN THE SUPREME COURT OF MISSISSIPPI

2010-TS-01314

MARIAN ALLEN
FELIX FENDERSON

APPELLANTS

VS.

CITY OF LAUREL, AND MARY ANN HESS

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CAUSE NUMBER 207-cv-34

BRIEF OF APPELLEES, THE CITY OF LAUREL, AND MARY ANN HESS

NO ORAL ARGUMENT REQUIRED

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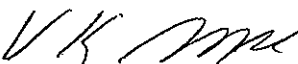
CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel 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.

<u>Person or Other Entities</u>	<u>Connection and Interest</u>
1. City of Laurel	Appellee
2. Mary Ann Hess	Appellee
3. Mississippi Municipal Liability Company	Appellee
4. Felix Fenderson	Appellant
5. Marian Allen	Appellant

RESPECTFULLY SUBMITTED THIS, the 22nd day of July, 2011.

THE CITY OF LAUREL AND MARY ANN HESS,
Defendants/Appellees



BY: V. K. Smith, III (MSB # [REDACTED])

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I. **Facts**

The Plaintiffs filed their Complaint in this matter on December 29, 2006. This Complaint alleged that various defendants conspired to remove a qualified candidate's name from a ballot. (R 3). Presumably, the election, which is the subject of this Complaint, was to occur on May 3, 2005. (See Exhibits "J" and "K" to the Complaint, R 30 and 31).

The initial Complaint named a number of defendants. The case was then removed by the United States Department of Justice. In due course, the federal claims were dismissed and the state law claims against The City of Laurel and Mary Ann Hess were remanded to state court. (R 114-145).

II. Summary of Argument

The Plaintiff's Complaint fails for several reasons. The first is that a claim for monetary damages does not state a claim for relief as a result of an election. The proper remedy is an election contest. Secondly, the Plaintiffs have failed to comply with the requirements of the Mississippi Tort Claim Act, and even if they have, the City has not waived its immunity and is still immune pursuant to the Mississippi Tort Claim Act. Finally, the claim is barred by the statute of limitations.

The Complaint itself does not identify which candidates were left off of the ballot. Based upon Exhibit "J" and Exhibit "L" to the Complaint, the people who were left off were presumably the Appellants here.

III. Argument

A. Failure to State a Claim

At the outset, it is fairly clear that the Plaintiffs' complaints for damages do not state a cause of action. The Plaintiffs have sued a number of people. The only remaining Defendants are the City of Laurel and Mary Ann Hess, the City Clerk. Apparently, the Plaintiffs' complaint is that the Laurel Municipal Democratic Executive Committee removed them from the Committee. Additionally, they were apparently disqualified as candidates for the May 3 election. This is a decision made by the Democratic Executive Committee. (See Exhibit "J" and "K" to Complaint). The letters which make up these Exhibits tell the Appellants how to contest this decision. There is no showing that the contest was ever made.

The Plaintiffs have now filed this lawsuit against the City and City Clerk in an attempt to collect monetary damages. Appellees have been unable to find any Mississippi cases recognizing causes of action for damages as a result of an election. A similar issue was addressed, however, in *Hutchinson v. Miller*, 797 F.2d 1279 (4th Cir. 1986).

In *Hutchinson*, the plaintiffs were three unsuccessful candidates for public office. The defendants included various governmental officials as well as certain private citizens. The Complaint was filed pursuant to 42 U.S.C. §1983, 18 U.S.C. §1964 (Racketeering Influenced and Corrupt Organizations Act – "RICO") and West Virginia common law. The Fourth Circuit noted that equitable relief may occasionally be appropriate, but held that federal courts "do not sit to award post-election damages to defeated candidates." Similar reasons should apply here. The state election code provides the Plaintiffs with a remedy to either attempt to have their names included on the ballot or to contest the results after the election. The Plaintiffs chose not to do so. To allow the

Plaintiffs to sue for damages would put a trial judge or possibly a jury in a position to award damages and essentially overrule the will of the people conceivably, without ever setting aside the results of the election.

Mississippi simply does not recognize a cause of action for monetary damages under the facts as alleged by the Plaintiffs.

If a cause of action exists, it is barred by the Mississippi Tort Claim Act.

Section 11-46-3 of the Mississippi Code affirms the longstanding doctrine that the State and its municipalities are immune from tort claims unless otherwise waived. Section 11-46-5 of the Mississippi Code waives that immunity subject to certain limitations. Section 11-46-9 of the Mississippi Code then goes on to provide certain exemptions. The first of these exemptions is set forth in §11-46-9(1)(a) of the Mississippi Code. This subsection recognizes that a governmental entity is not liable for any claim "arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;" it does not define a legislative or judicial action. Subsection (d) provides immunity for employees exercising a discretionary function. Just as significantly as these immunities, is the fact that the initial decision regarding candidates is made by the Laurel Municipal Democratic Executive Committee. This is the organization which initially qualifies candidates and forwards information to the City Clerk. Nowhere in the Plaintiffs' Complaint or any supporting documents is it shown that these Plaintiffs were the candidates certified by the local committee. If, for some reason, the City Clerk was faced with conflicting information regarding who the candidates were, then this clearly falls under a discretionary function.

Finally, the Plaintiffs' Complaint was not filed within the time required by the Tort Claim Act and is accordingly barred by the statute of limitations. The election was on May 3, 2005. The

5.

Conclusion

The Plaintiffs chose not to go to court prior to the election to have their names added to the ballot. They have also failed to file a proper election contest. It would be poor public policy to allow them to ignore the available remedies but instead pursue this suit for monetary damages. Accordingly, the trial court should be affirmed.

Respectfully submitted,

Appellees, The City of Laurel and Mary Ann Hess



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CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Appellees, The City of Laurel and Mary Ann Hess, do hereby certify that I have this date sent via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Marian Allen, *pro se*
2216 Center Avenue
Laurel, MS 39440

Felix Fenderson, *pro se*
30D Johnson Circle
Laurel, MS 39440

This the 22nd day of July, 2011.



V. K. Smith, III (MSB [REDACTED])