IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00824-COA

JOSEPH W. BLACKSTON, M.D., J.D. **APPELLANT**

v.

CHRISTOPHER B. EPPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, KENTRELL M. LIDDELL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, AND MISSISSIPPI DEPARTMENT OF CORRECTIONS **APPELLEES**

DATE OF JUDGMENT:	11/13/2008
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	ROBERT NICHOLAS NORRIS LOUIS H. WATSON JR.
ATTORNEYS FOR APPELLEES:	JAMES T. METZ MICHAEL EDWIN D'ANTONIO JR.
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT/APPELLEE, THE MISSISSIPPI DEPARTMENT OF CORRECTIONS
DISPOSITION:	AFFIRMED - 06/28/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, C.J., FOR THE COURT:

PROCEDURAL HISTORY

¶1. Dr. Joseph W. Blackston filed a complaint in the Hinds County Circuit Court against Christopher Epps, Dr. Kentrell M. Liddell, and the Mississippi Department of Corrections

(collectively the MDOC). The complaint alleged tortious interference with business and/or contractual relations, intentional and/or negligent infliction of emotional distress, and defamation. The MDOC filed a motion to dismiss and/or summary judgment arguing that the MDOC was not liable pursuant to the Mississippi Tort Claims Act (MTCA). *See* Miss. Code Ann. §§ 11-46-1 to 11-46-23 (Rev. 2002).

¶2. After hearing arguments, the trial court granted summary judgment in favor of the MDOC on the contractual and emotional-distress claims. The trial court noted that Dr. Blackston had conceded the defamation claim and proceeded to dismiss that particular claim with prejudice. Dr. Blackston now appeals, asserting that summary judgment was improperly granted.

FACTS

¶3. Dr. Blackston began working with the MDOC in July 2003 as Director of Medical Compliance overseeing a contract between the MDOC and Correctional Medical Services, Inc. (CMS). In the summer of 2004, CMS offered Dr. Blackston a job. Dr. Blackston contends that he informed Epps of this job offer. However, Dr. Liddell was ultimately offered the job with CMS. After several weeks working for CMS, Dr. Liddell was offered and accepted Dr. Blackston's job with the MDOC. On September 1, 2004, Dr. Blackston became the medical director at Central Mississippi Correctional Facility (CMCF).

¶4. In early 2006, the MDOC contracted with another company, Wexford, rather than CMS to provide medical services. Much of the current MDOC staff became concerned about retaining their jobs. Around this time, Dr. Blackston states that he had a scheduling conflict with an upcoming trial. Dr. Blackston contends that Dr. Liddell ordered him to cooperate

"or else." Shortly thereafter, Dr. Blackston states that he was informed that Wexford had declined to offer him a position. According to Dr. Blackston, a representative from Wexford informed him that Dr. Liddell had instructed Wexford to hire a minority physician for the position. Dr. Blackston is a white male. In August 2006, Dr. Blackston began working for Central Mississippi Medical Center in the emergency room.

¶5. Dr. Blackston's complaint details his problems with how Epps and Dr. Liddell purportedly mismanaged the prison health system. Dr. Blackston contends that he has received numerous complaints from nursing and other staff about the mistreatment they had received from Epps and Dr. Liddell. However, most of these complaints have no direct bearing on Dr. Blackston's claim other than to portray Epps and Liddell in a negative light.

STANDARD OF REVIEW

¶6. In reviewing a trial court's grant of summary judgment, this Court employs a de novo standard of review. *Anglado v. Leaf River Forest Prods., Inc.*, 716 So. 2d 543, 547 (¶13) (Miss. 1998). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). This Court will consider all of the evidence before the lower court in the light most favorable to the non-moving party. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995). The party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." M.R.C.P. 56(e).

DISCUSSION

¶7. In his only issue on appeal, Dr. Blackston argues that the trial court erred in granting summary judgment in favor of the MDOC. Specifically, Dr. Blackston contends that Dr. Liddell tortiously interfered with his business relationship with Wexford by requiring Wexford to hire a minority physician for the position of medical director.

¶8. Pursuant to the MTCA, governmental entities and their employees acting within the course and scope of their duties enjoy certain exemptions and protections. An employee is not liable personally as long as their conduct falls within the course and scope of employment and does not otherwise constitute fraud, malice, libel, slander, defamation, or a crime. Miss. Code Ann. § 11-46-7(2) (Rev. 2002). The MTCA also provides immunity for a claim based on the exercise or performance of a discretionary function, "whether or not the discretion be abused." Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2010). Furthermore, Mississippi Code Annotated section 11-46-9(1)(g) (Supp. 2010) considers the hiring of personnel a discretionary function.

¶9. Although Dr. Blackston contends that Dr. Liddell required Wexford to hire a minority physician, he has failed to produce any probative evidence through affidavits or otherwise to support his allegations. Unsubstantiated allegations are not enough to create a genuine issue of material fact. *Progressive Gulf Ins. Co. v. Dickerson and Bowen, Inc.*, 965 So. 2d 1050, 1053 (¶8) (Miss. 2007). This issue is without merit.

¶10. **THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

IRVING, P.J., AND ISHEE, J., CONCUR. CARLTON, J., DISSENTS WITH

SEPARATE WRITTEN OPINION JOINED BY BARNES, J., AND JOINED IN PART BY ROBERTS, J. GRIFFIS, P.J., MYERS, MAXWELL AND RUSSELL, JJ., NOT PARTICIPATING.

CARLTON, J., DISSENTING:

¶11. I respectfully dissent from the majority's opinion. The majority provides that this case deals with a state employee's discretionary function of hiring personnel. This case also addresses, however, the potential personal liability of state employees, Christopher Epps and Dr. Kentrell M. Liddell, for the claims against them individually for alleged tortious acts outside the scope of their employment. I disagree with the trial court's findings, and I respectfully submit that Dr. Joseph W. Blackston's complaint raised a question of material fact regarding whether the named state employees, Epps and Dr. Liddell, acted outside the course and scope of their employment thereby subjecting themselves to personal liability for the claims against them individually for the alleged tortious act of interfering with Dr. Blackston's employment with a private contractor.

¶12. An official does not have immunity for actions outside his or her authority, *see* 63C Am. Jur. 2d *Public Officers and Employees* § 301 (2009) (citations omitted), or if acting outside and beyond the scope of his or her duties. *Id.* (citing *Jones v. Kearns,* 462 S.E.2d 245 (1995)). "In this regard, when a public official goes entirely beyond the scope of the official's authority and does an act that is not permitted at all by official duty, the official is not acting in an official capacity and has no more immunity than a private citizen. Such an officer may thereby become amenable to personal liability in a civil suit." *Id.* (internal citations omitted). As such, an employee can be held liable for tortious interference with a contract.

¶13. Therefore, in my view, summary judgment was improperly granted as to the claims against Epps and Dr. Liddell, individually, for alleged tortious interference with Dr. Blackston's private employment. With respect to the alternative motion not addressed by the trial court, I submit that Dr. Blackston states a claim upon which relief could be granted sufficient to survive a Mississippi Rule of Civil Procedure 12(b)(6) challenge. *See* M.R.C.P. 8(e).

¶14. A review of the record shows that Dr. Blackston filed a complaint on May 25, 2007, naming Epps, Dr. Liddell, and the Mississippi Department of Corrections (collectively the MDOC) as the defendants in the action.[1] The record shows that the MDOC then filed a motion, entitled "Motion to Dismiss and/or for Summary Judgment," on November 19, 2007, without any exhibits or evidentiary matters attached to consider therewith. The record further reveals that a year later, on November 13, 2008, the trial judge[2] issued an opinion stating that he utilized the standard of review applicable for summary-judgment motions in evaluating the dismissal of the case and provided that he considered the motion as one for summary judgment since evidentiary matters outside the pleadings were considered.[3]

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[1] We pause to note that Epps and Dr. Liddell were sued individually and in their official capacities.

[2] The record reflects that Judge Tomie Green initially presided over this case but recused herself on March 3, 2008, and the case was reassigned to Judge Bobby Delaughter. On November 13, 2008, Judge William Coleman entered the order granting summary judgment in favor of the MDOC; however, the record fails to show the date on which this case was reassigned from Judge Delaughter to Judge Coleman.

[3] *Compare Sullivan v. Tullos,* 19 So. 3d 1271, 1273 (¶7) (Miss. 2009) ("Pursuant to Rule 56 of the Mississippi Rules of Civil Procedure, summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

However, no evidentiary matters outside the pleadings were contained in the record. I submit that the trial judge erred by treating the MDOC's motion as one for summary judgment because the Mississippi Supreme Court has held that the respondents to a converted summary-judgment motion must be given ten days' proper notice once a motion to dismiss is converted to a motion for summary judgment, and the MDOC was not provided such notice. *See Delta MK, LLC v. Miss. Transp. Comm'n,* No. 2009-CA-02021-SCT, 2011 WL 1313956 (Miss. April 7, 2011); *State v. Bayer Corp.,* 32 So. 3d 496, 503-04 (¶¶24-25) (Miss. 2010); *Sullivan v. Tullos,* 19 So. 3d 1271, 1274-1276 (¶¶14-19) (Miss. 2009). Moreover, since the record contains no evidentiary matters outside the pleadings, no notice was provided by the trial court as to what matters outside the record were considered by the trial judge.

¶15. As stated, our review of the case reflects that neither the trial judge's opinion nor the record show that any evidentiary matters outside the pleadings were submitted to or considered by the trial court in ruling upon the MDOC's motion. With respect to the standard of review applied by the trial judge, I, therefore, concur with Dr. Blackston's contention that the trial judge erred in treating the MDOC's motion as one for summary judgment, and I submit that the trial judge should have treated the motion as a motion to

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and that the moving party is entitled to a judgment as a matter of law.'"), *and Moorman v. Crocker,* 38 So. 3d 662, 665 (¶9) (Miss. Ct. App. 2010) ("Rule 12(b)(6) tests the legal sufficiency of a complaint, and provides that dismissal shall be granted to the moving party where the plaintiff has failed to state a claim upon which relief can be granted. In applying this rule[,] a motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim.") (citing *Chalk v. Bertholf,* 980 So. 2d 290, 293 (¶4) (Miss. Ct. App. 2007)).

dismiss pursuant to Mississippi Rule of Civil Procedure 12(b)(6).

¶16. Moreover, I note that in the trial judge's opinion, he finds Epps and Dr. Liddell were immune from personal liability after finding that their actions fell within the course and scope of their employment. However, the record reveals that no evidentiary matters were presented by either party upon which such fact could be determined by the trial judge, and a review of the pleadings fail to support such a finding.[4] As such, I again find that the pleadings reflect a genuine issue of material fact regarding the issue of whether Epps and Dr. Liddell acted outside the scope of employment in tortiously interfering with a private contractor's employment decisions by imposing a race requirement.

¶17. With respect to an application of a summary-judgment standard of review to the pleadings in this case, the record fails to refute Dr. Blackston's allegations as to the tortious interference of his employment with Wexford, a private contractor, and the record fails to show agreement as to the facts relevant to Dr. Blackston's claim of tortious interference with his employment with Wexford. Nothing in the record shows that Epps or Dr. Liddell possessed the authority, by contract or otherwise, to direct a private contractor as to which employees to hire to fulfill the requirements of the medical-services contract, and nothing in the record shows Epps and Dr. Liddell possessed the authority to direct a private contractor to hire medical providers possessing demographic prerequisites to fulfill the requirements of the contract. Certainly, the MDOC possessed the authority to engage in personnel decisions

[4] Dr. Blackston alleges in his complaint that the contract between the State and Wexford, the private contractor, required that all clinical positions be maintained for a minimum of six months, and he claimed that Dr. Liddell instructed Wexford to hire only minority physicians. The MDOC denied these allegations in their answer.

concerning the state employment to fill state MDOC positions under their authority within their agency and discretionary state government immunity would apply thereto; however, such authority fails to extend outside the scope of state employment to directing private contractors regarding who to hire to meet the contract requirements unless the contract specifies that such authority exists. As to this issue, I, therefore, submit that the trial judge erred in dismissing the claims of alleged discriminatory tortious interference with the private employment of Dr. Blackston utilizing summary judgment since a question of material fact clearly existed as to whether the conduct occurred and, also, whether such conduct fell outside the scope of employment and thereby lacked the immunity enjoyed by discretionary decisions within the scope of state employment. *See Anderson v. Alps Auto., Inc.,* 51 So. 3d 929, 931 (¶11) (Miss. 2010) ("A motion for summary judgment is to be granted 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (citing M.R.C.P. 56(c)).

¶18. Furthermore, I find that the trial court should have reviewed the MDOC's motion to dismiss and/or for summary judgment as a motion to dismiss pursuant to Mississippi Rule of Civil Procedure 12(b)(6).[5] I further find that, after applying the Rule 12(b)(6) standard,

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[5] The Mississippi Supreme Court has stated the standard of review applicable to a motion to dismiss pursuant to Mississippi Rule of Civil Procedure 12(b)(6) is as follows:

> A motion to dismiss under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure raises an issue of law, which is reviewed under a de novo standard. *Cook v. Brown,* 909 So. 2d 1075, 1077-78 (Miss. 2005). A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Id.* at 1078 (citing *Little v. Miss. Dep't of Human Servs.,* 835 So.

the pleadings were sufficient to move forward in the proceedings. *See* M.R.C.P. 8(d) (Averments in the complaint, requiring a responsive pleading, are admitted when not denied in the responsive pleading.). The majority contends that Dr. Blackston failed to produce any probative evidence through affidavits or otherwise to support his allegations. However, Rule 8(e)(1) recognizes that Mississippi is a notice pleading jurisdiction, and no technical forms of pleading are required. *See Bluewater Logistics, LLC v. Williford,* 55 So. 3d 148, 158 (¶35) (Miss. 2011) (finding that Mississippi has been a "notice pleading" state since January 1, 1982, and under Rule 8, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]"). Further, Rule 8(e)(2) recognizes that a party may state as many separate claims as he has, regardless of consistency. Therefore, the assertions of various claims by Dr. Blackston, and any lack of consistency or technical forms therein, are of no consequence since Dr. Blackston stated a claim upon which relief could be granted against Epps and Dr. Liddell for alleged tortious acts falling outside their scope of state employment in their personal capacities. *See* M.R.C.P. 12(b)(6).

BARNES, J., JOINS THIS OPINION. ROBERTS, J., JOINS THIS OPINION IN PART.

> 2d 9, 11 (Miss. 2002)). The allegations in the complaint must be taken as true, and there must be no set of facts that would allow the plaintiff to prevail. *Ralph Walker, Inc. v. Gallagher,* 926 So. 2d 890, 893 (Miss. 2006). This Court [is] "not [required to] defer to the trial court's [judgment or] ruling." *Id.* (citing *Roberts v. New Albany Separate Sch. Dist.,* 813 So. 2d 729, 730-31 (Miss. 2002)). This Court must find that there is no set of facts that would entitle a defendant to relief under the law in order to affirm an order granting the dismissal of a claim on a Rule 12(b)(6) motion. *Id.* (citing *Lowe v. Lowndes County Bldg. Inspection Dep't,* 760 So. 2d 711, 713 (Miss. 2000)).

Campbell v. Davis, 8 So. 3d 909, 911 (¶13) (Miss. Ct. App. 2009).