

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION**

WILLIAM CODY CHILDRESS, a minor,)	
by and through John Childress, Natural Father;)	Civil Action No.: 2:10-CV-24-P-A
)	
Plaintiff)	
)	
v.)	
)	
TATE COUNTY SCHOOL DISTRICT, <i>et al</i>,)	
)	
Defendants.)	

PLAINTIFF'S REPOSENSE TO DEFENDANTS' MOTION TO DISMISS

COMES NOW, the Plaintiff, by and through counsel, and files this his Response to the Defendant's Motion to Dismiss, and would show unto the Court the following:

I.

Plaintiff moves, pursuant to Local Rule 7.2 (F)(1), for a hearing and/or oral argument concerning the merits of Defendant's motion at a date to be determined by the court. The issues presented by Defendant's motion, coupled with the nature of Plaintiff's case, suggest a hearing/oral argument would be beneficial to the Court.

II.

Individual Defendants Gary Walker and Corey Blaylock have filed a Motion to Dismiss claiming his discriminatory actions, as detailed in Plaintiff's Verified Complaint, were protected by the qualified immunity doctrine. Defendants Walker and Blaylock filed their motion pursuant to Uniform Local Rule 16.1 (B)(4). Additionally, all Defendants have raised immunity issues pursuant to Mississippi state law and are seeking a dismissal on the basis Plaintiff did not give notice pursuant

to Miss. Code. Ann. § 11-46-11 (1). Defendants have also asked for a dismissal of Plaintiff's punitive damages claims.

III.

The burden of pleading and proving a qualified immunity defense rests exclusively with the Defendant. *Gomez v. Toledo*, 446 U.S. 635, 640, 64 L.Ed2d 572, 100 S.Ct. 1920 (1980); *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). Qualified immunity is only afforded to those “government officials performing discretionary functions” only “insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *Harlow*, 457 U.S. at 818-19. In deciding a whether a right is clearly established, the court assumes the Defendant knew the applicable law. *Elder v. Holloway*, 510 U.S. 510, 127 L.Ed.2d 344, 114 S/Ct 1019 (1994). Defendants Walker and Blaylock may wish to plead ignorance, but their actions, as detailed in Plaintiff's Verified Complaint and supporting memorandum of law, speak for themselves. Thus, the doctrine of qualified immunity no more fits Defendants than good judgment fits Joe Biden.

IV.

In filing his lawsuit against Defendants Plaintiff alleged a denial of civil liberties, as protected by the relevant constitutional and statutory state and federal laws. Plaintiff was denied these rights because of his gender. Plaintiff, in great detail, alleged, in his Verified Complaint, Defendants violated the Eighth Amendment's “cruel and unusual punishment” clause, as well as the Fourteenth Amendment's due process guarantees. Plaintiff also alleged violation of other state statutory rights.

V.

Defendants Walker and Blaylock have failed to show that they, as an individual Defendants, are entitled to an affirmative defense of qualified immunity.

VI.

Defendants also claim official immunity under Mississippi state law. It is wholly improper to dismiss Plaintiff's state law tort claims at this time. Miss. Code Ann. § 11-46-9 requires a minimum standard of ordinary care be exercised by the government actor in order to raise the statutory shield. Miss. Code Ann. § 11-46-9(1)(b). *See also L.W. v. McComb Separate Municipal School District*, 754 So.2d 1136, 1142 (Miss. 1999). "The issue of ordinary care is a fact question." *Id.*

Even more concerning, Defendants, in seeking to shield their actions from liability, are attempting to misconstrue the judicial system to hold Plaintiff, a civil litigant, is in privity with the State of Mississippi. It is settled law a victim in a criminal action, such as Plaintiff, is not prevented from bringing a civil suit against his victim if the State fails, or succeeds, in prosecuting Defendant's criminal wrongs. *See Stone v. United States*, 167 U.S. 178, 188 (1897) and *Murphy v. United States*, 272 U.S. 630, 631-632 (1926). As such, Defendants are not entitled to absolute immunity under Mississippi state law.

VII.

Defendants Walker and Blaylock also argue they are entitled to qualified immunity under Mississippi state law. Under Mississippi common law, government actors enjoy only a limited immunity from tort liability. *Evans v. Trader*, 614 So.2d 955, 957 (Miss. 1993). It is Plaintiff's position that allegation that the Defendants acted out of "malice" are not covered by the Mississippi Tort Claim Act and immunity does not attach.

VIII.

Additionally, Defendant argue Plaintiff's state law claims must be dismissed because Plaintiff did not give proper notice under Miss. Code. Ann. § 11-46-11 (1). This argument is without merit, as Plaintiff is not required to exhaust state administrative remedies in bring a lawsuit under § 42 U.S.C. 1983. *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982)

IX.

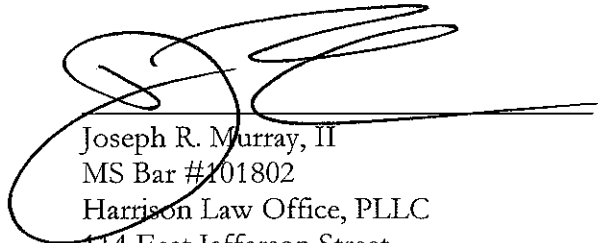
Finally, Defendants Walker and Blaylock ask the court to dismiss Plaintiff's claims of punitive damages against them in their individual capacity. Defendants' motion is without merit as Plaintiff is able to seek punitive damages when the Defendant is a government official sued in his individual capacity. *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others").

X.

A brief in opposition to Defendants' Motion to Dismiss is being filed simultaneously herewith.

WHEREFORE, in light of the above-stated reasons, Plaintiff prays that the Defendant's Motion to Dismiss be denied and the stay on discovery lifted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I have filed the forgoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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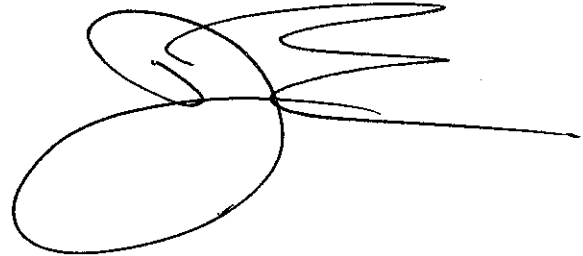
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A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.