

Related Background Information:

This document is part of a series in which gross misconduct by Judge Donald L. Graham and Magistrate Frank Lynch Jr. is documented at <http://secretlaw.com>, <http://donaldlgraham.blogspot.com>, and <http://geocities.com/mcneilmason>. These websites allege and **document** gross misconduct which would otherwise be incredulous and beyond belief. These websites demonstrate that federal judges will lie to protect themselves and each other and conceal their misconduct through the use of unpublished decisions. Please refer members of the legal community to the websites <http://secretlaw.com>, <http://donaldlgraham.blogspot.com>, and <http://geocities.com/mcneilmason>. I contend here that the Eleventh Circuit and Judge Graham are abusing the IFP statutes in order to conceal Judge Graham's misconduct.

United States Court of Appeals for the Eleventh Circuit.

CASE NO. 01-13664-A
L.T. No. 99-14027-CIV-GRAHAM

MARCELLUS M. MASON, JR.,

Plaintiff/Appellant/Petitioner

v.

HIGHLANDS COUNTY BOARD OF COUNTY
COMMISSIONERS, et.al.



Defendant/Appellees/Respondent

CASE NO. 01-13664-A
L.T. No. 99-14027-CIV-GRAHAM

APPELLANT'S REPLY BRIEF

United States District Court
Southern District of Florida
Donald L. Graham, Judge
Frank Lynch, Magistrate Judge

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APPELLEES RESPONSIBILITY

Generally courts require the appellees to respond to appellant's issues on appeal. Moreover courts will generally reverse a trial court when the appellees refuse to respond to the appellant's issues on appeal where the appellant states a prima facie case for reversal. Lakes Of Emerald Hills v. Silverman, 558 So.2d 442, 443 (Fla.App.4 Dist. 1990)("[w]e wish to point out that the Appellee has the responsibility to support the trial court's ruling or concede error and to assist the appellate court through the medium of a responsive brief."); State v. Costas, 552 N.E.2d 459, 461 (Ind. 1990). "When an appellant raises debatable issues, the failure to file an answering brief generally constitutes a confession of reversible error in civil cases." State v. Greenlee County Justice Court, 157 Ariz. 270, 271 (App.1988).

Firstly, the Appellees have refused to reply to Mason's jurisdictional challenges in Mason's *Initial Brief*, or *Appellant's Motion To Determine Jurisdiction*, or *Appellant's Motion To Determine Subject Matter Jurisdiction and Standing*. Appellees lack of response concedes error in that the lower court lacked jurisdiction to issue the orders of June 19, 2000 and July 25, 2000. (Doc. 201);(Doc. 246).

Secondly, Appellees made no response at all to the Appellant's issues raised in his *Initial Brief* with respect to the following: (1)The district failed to allow leave to amend, *Initial Brief*, pgs. 25, 26; (2) Mason presented direct evidence of retaliation, pgs. 27, 28; (3) the District Court failed to properly manage this case, pgs. 28-30; (4)The District Court allowed the Defendants to obstruct discovery by denying the Plaintiff the opportunity to authenticate critical evidence on videotape, pgs. 33-36.

Finally, Mason has moved to strike the Appellees' Answer Brief because of the following: (1) The "statement of facts", or "statement of the case" contains argumentative matter; (2)The argument section does not contain appropriate references to the record; (3)Issues are argued that are beyond the scope of this appeal. See *Appellant's Motion To Strike Appellees' Answer Brief*. At pages 10-

11, *Answer Brief*, counsel for Appellees tell the lie that Mason failed to respond to their *First Request for Admission*, and further that Mason failed to respond to the order of court, (Doc. 680), directing that Mason respond to Defendants' *First Request for Admission*. Mason responded to the Defendants' *First Request for Admission*. See (Doc. 661, Exhibit B). Additionally, Mason also objected the Defendants' *First Request for Admission* because they were irrelevant and the magistrate had previously agreed. (Doc. 662)(Doc. 469). In compliance with the order of the court, (Doc. 680), Mason filed a response with the Defendants. (Doc. 708, Exhibit 1). Under Rule 36, Fed.R.Civ.P, a district court can not dismiss a lawsuit under Rule 41(b), Fed.R.Civ.P, nor make Mason admit to the genuineness of irrelevant documents. Touchstone v G.B.Q. Corp., 596 F Supp 805. (ED La 1984) Mason also appealed the order of the Magistrate, (Doc. 680), to the district judge. (Doc. 694);(Doc. 728). At page 17, *Answer Brief*, Appellees use the denial Mason's motion for class action status to support a dismissal of this case, (Doc 324, pg.1). Appellees cannot justify a dismissal of this action based upon a mere denial of motion for class action status.

I. THE DISTRICT COURT IMPROPERLY DISMISSED THIS ACTION

The Appellees *Answer Brief* uses the slick technique of making sweeping generalization and is scrupulously careful to avoid detail and specifics¹. For example, the Appellees continuously state that Mason violated the court's "discovery orders," while being extremely careful not to specify what the orders are.

This case was dismissed based upon the Defendants' motions for sanctions in the form of dismissal and the sole basis for the dismissal of this action was Mason's alleged violations of court orders, (Doc. 201);(Doc. 246). See (Doc. 511);(Doc. 646);(Doc. 766);(Doc. 791). The Appellees fail to argue the legality of the court orders that led to the dismissal of this case, (Doc. 201);(Doc. 246). These orders, (Doc. 201);(Doc. 246), stated:

"Plaintiff shall be prohibited from contacting any of the Defendants, including their supervisory employees and/or the individual Defendants, regarding any matter related to this case." (DE #201).

¹ For more examples of this technique, see *Appellant's Motion To Strike Appellees' Answer Brief*.

“Plaintiff shall correspond only with Defendants' counsel including any requests for public records.” (DE #246).

“Plaintiff shall be prohibited from contacting any of the Defendants, including their supervisory employees and/or the individual Defendants, regarding any matter related to this case” Case No. 99-14027-CIV-Graham, (DE #246).

There is an unlimited amount of courts throughout the United States who have considered the very issues raised by these illegal orders, (Doc. 201);(Doc. 246) and each “disagrees” with the district court and the Appellees. See American Canoe Ass’n Inc. v. City of St. Albans, 18 F.Supp. 2d 620 (S.D.W.Va. 1998); Camden v. State Of Md., 910 F. Supp. 1115, 1118 n.8 (D. Md. 1996); E.E.O.C. v. McDonnell Douglas Corp., 948 F.Supp. 54, 55 (E.D.Mo.1996); Frey v. Dept. of Health & Human Services, 106 F.R.D. 32, 37 (E.D.N.Y. 1985). Holdren v. General Motors Corp., 13 F. Supp. 2d 1192 (D.Kan. 1998); In Re Discipline Of Schaefer, 117 Nev. Adv. Op. No. 44, 36173 (Nev. 2001); In Re Hurley, Case No. No. 97-6058 SI, (8th Cir. 1997); Jones v. Scientific Colors, Inc., Case Nos. 99 C 1959/00 C 171 (N.D.Ill. 2001); Loatman v. Summit Bank, 174 F.R.D. 592 (D.N.J. 1997); Miano v. AC & R Advertising, Inc, 148 F.R.D. 68, 75 (S.D.N.Y.1993); Pinsky v. Statewide Grievance Committee, 578 A.2d 1075,1079 (Conn. 1990); Restatement of the Law (Third) The Law Governing Lawyers, §99. Cmt. K., pg. 76. Reynoso v. Greynolds Park Manor, Inc, 659 So.2d 1156, 1160 (Fla.App. 3 Dist. 1995). State v. Miller, 600 N.W.2d 457; 1999 Minn. LEXIS 592 (Minnesota Supreme Court 1999); Stone v. City Of Kiowa, 263 Kan. 502; 950 P.2d 1305; 1997 Kan. LEXIS 177, *34 (Kansas Supreme Ct. 1997); Terra Intern. v. Miss. Chemical Corp., 913 F. Supp. 1306 (N.D.Iowa 1996) Tucker v. Norfolk & Western Ry. Co., 849 F.Supp.1096, 1097-1098 (E.D.Pa.1994); U.S. v. Heinz, 983 F.2d 609 (5th Cir. 1993); U.S. v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993); U.S. v. Ward, 895 F.Supp. 1000, (N.D. Ill. 1995); Vega v. Bloomsburgh, 427 F. Supp. 593, 595 (D. Mass. 1977). There has been no other competent court of jurisdiction in the entire history of the United States to direct a non-lawyer to seek the permission of a private for profit lawfirm in order to communicate with his government.

At page 24, *Answer Brief*, the Appellees cite Phipps v. Blakeney, 8 F.3d 788 (11th Cir. 1993), in support of the proposition that “The facts of the present case are closely analogous.”

Notwithstanding the fact that the Appellees don’t state what these facts are, or support its assertion

with appropriate references to the record, Phipps is easily distinguishable from the instant case. In Phipps, the Plaintiff failed to appear for his deposition by the Defendants and was warned and ordered by the Court on at three occasions to appear for his deposition. In the matter at bar, the Plaintiff has not refused to disclose any discovery requested by the Defendant that he was ordered to do so by the Court, nor have the Defendants even made this assertion. In fact, Mason was deposed on two separate occasions for six hours each time (Doc. 771), with the Defendants seeking a third deposition of six hours. (Doc. 233); (Doc. 240); (Doc. 242); (Doc. 253); (Doc. 257); (Doc. 271); (Doc. 287). (Doc. 571).

The Appellees cite Day v. Allstate Ins. Co., 788 F.2d 1110 (5th Cir. 1986) for the proposition that this lawsuit was properly dismissed. *Answer Brief*, pg. 28. Appellees make much hay of the fact that Allstate moved for a protective order that was granted by the District Court. Appellees then equate the “protective order” issued in Day to the “pretrial discovery issue and not an injunction per issue per se,” (Doc. 201), (Doc. 246) rendered in the instant case, however this analogy or comparison fails for several reasons. Firstly, a “protective order” and an injunction are legally different. In the instant case there is no mention of a protective order either by the District Court or by the Defendants, this issue is only raised for the very time on appeal. If the court orders, (Doc. 201)((Doc. 246), are now being construed to be protective orders, then these new “protective orders” are improper in that Defendants never met the procedural requirements of Rule 26(c), Fed.R.Civ.P². These new “protective orders” are not protective orders by definition because no discovery was being sought. Under similar circumstances, the court in In Re Rafferty, 864 F.2d 151 (D.C. Cir. 1988) ruled that a protective order was improper because the information and documents at issue were obtained outside of the “discovery process.” Secondly, in Day, the legality of issuing the protective order was not contested on appeal. Thirdly, the true nature of the protective order is not specifically spelled out. Fourthly, in Day, the Defendants were private parties, unlike the instant case, where the Defendants are the Plaintiff’s own government or their agents. Mason has both

² For full text of this provision see Addendum.

constitutional rights and statutory rights to communicate with his government. A label of “protective order”, or “a pretrial discovery issue and not an injunction issue per se” can not be used to undermine substantive rights secured by the Constitution or statutes. “Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result “would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.” Thomas v. Arn, 474 U.S. 140, 148 (1985). “[A] State cannot foreclose the exercise of constitutional rights by mere labels.” Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 6 (1964). “In giving federal courts ‘cognizance’ of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.” Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

Day is not a “virtually identical factual scenario” as claimed by the Appellees, in addition to the foregoing, and the real reason why Day was dismissed is because Day failed to comply with multiple discovery orders of the district court. In Day, the Plaintiff failed to comply with multiple discovery requests under Rules 33 and 34, Fed.R.Civ.P. and the district court gave Day multiple opportunities to comply with the discovery. Day is distinct from the instant case, in that Mason has not failed to comply with any discovery request, nor have the Appellants identified the discovery request that Mason failed to comply with. Lastly, and equally important, in Day the court ruled that the lawsuit lacked merit and had no sufficient legal or factual basis. However, unlike Day, in the instant case it cannot be argued that Mason’s lawsuit lacked merit because neither Plaintiff’s motion for summary judgment or the Defendants’ motion for summary judgment was ever acted upon by the district court. (Doc. 507); (Doc. 667); (Doc. 668); (Doc. 706); (Doc. 797);(Doc. 769);(Doc. 770).

At page 25, the Appellees assert, “the present case raises issues similar to those confronted by this Court in Adolph Coors Co. v. Movement Against Racism, 777 F.2d 1538 (11th Cir. 1985).” Notwithstanding the fact that the Appellees have refused to disclose or identify those “similar issues,” and cite the record to support its assertions, Adolph Coors Co is easily distinguishable from the instant case. In Adolph Coors Co, the Court entered a default judgment for the Plaintiff’s

because the Defendants refused, on a couple of occasions, to make court ordered discovery disclosures. In the instant case, Mason has not refused any order of the Court to make any discovery disclosures, nor have the Appellees cited any instance of a refusal to make court ordered disclosures.

At page 26, the Appellees make the argument that Mason took the law in his own hands in comparing Mason's questioning of Court orders, (Doc. 201);(Doc.246), to the Movement's behavior in Adolph Coors Co. However, this analogy fails because this Plaintiff attempted to vindicate his rights under the First Amendment³, U.S. Constitution, Florida Statutory Right, § 119.01⁴, et.seq., and Florida Constitutional Right, Article 1, Section 24⁵, to communicate with his government and seek public records under Florida Law, and filed a Petition for Writ of Mandamus in this case. See Eleventh Circuit Case No. 01-11305. In an order dated April 26, 2001, this court stated: "Mason has an alternative remedy. He may either comply with the district's discovery order and challenge it on appeal from the final judgment, or refuse to comply with the order and challenge its validity if cited for contempt." This order was signed "/s/ Ed Carnes." This Court has previously stated: *"It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction."* Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983). "Fragile First Amendment rights are often lost or prejudiced by delay." Bernard v. Gulf-Oil Co., 619 F.2d 459, 470 (5th Cir. 1980). The U.S. Supreme Court has also stated the State must allow a stay where procedural safeguards, including immediate appellate review, are not provided. National Socialist Party v. Skokie, 432 U.S. 43, 44 (1977). This Court, by not considering Mason's petition for mandamus, and indeed even advising the Plaintiff to be cited for contempt, forced Mason to choose between his First Amendment right, U.S. Constitution, Florida Statutory Right, § 119.01, et.seq., and Florida Constitutional Right, Article 1, Section 24, to communicate with his government and seek public records under Florida Law and his right to

³ For full text of this provision see Addendum.

⁴ For full text of this provision see Addendum.

⁵ For full text of this provision see Addendum.

maintain a meritorious lawsuit. This is a choice Mason should not have been forced to make. Where does Mason go to vindicate his rights under the First Amendment, Article 1, Section 24, Florida Constitution, Section 119.01, Fla.Stat.?

At page 27, Appellees cite Glatter v. Mroz, 65 F.3d 1567 (11th Cir. 1995)(citing Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)) for the proposition that “the District Court possesses the authority to regulate the conduct of the litigants before it.” The Appellees use this theory to support their idea that a federal judge has the power to tell a nonlawyer litigant not to communicate with his government directly about public records, and to seek the permission of a private for profit attorney. *Answer Brief*, pgs. 30-31. This general proposition of awesome power is problematic in the instant case for several reasons. Firstly, Glatter states that: “These inherent powers, which are incidental to a federal court, include the power to control and discipline attorneys appearing before it.” Mason is not an attorney, nor was Mason “before” the court when it issued its orders of June 19, 2000 and July 25, 2000, (DE #201);(DE # 246). “It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for “[t]hese courts were created by act of Congress.” Chambers v. NASCO at 501 U.S. 47. “What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” Rutan v. Republican Party Of Illinois, 497 U.S. 62, 77-78 (1990). Congress did not give the federal courts jurisdiction over litigants’ private right to communicate with their state government about public records. Congress was precluded from doing so by the Tenth Amendment. “Courts created by statute only have such jurisdiction as the statute confers. The rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases...” Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 820 (1988). “Courts cannot judicially create any exceptions, or exclusions to Florida’s Public Records Act.” Board of County Commissioners of Palm Beach County v. D.B., 784 So. 2d 585, 591 (Fla. 4th DCA 2001). See also Wait v. Florida Power and Light Company, 372 So. 2d 420, 425 (Fla. 1979) (holding that a litigant engaging in litigation before a federal forum, does not give up its independent statutory rights to review public records

under chapter 119). Secondly, and just as important, if nor more so, under the First Amendment, U.S. Constitution, Mason has an absolute right to communicate with his government about any subject he so desires. "If the questions posed by the trial court treaded even arguably on protected speech or association rights then appellants would clearly have met their burden and we would not hesitate to reverse. But in order to assert this privilege effectively, the appellants must first demonstrate at least an "arguable First Amendment infringement." Adolph Coors Co. v. Movement Against Racism, 777 F.2d 1538 (11th Cir. 1985)(citing Gooding v. Wilson, 405 U.S. 518, 521-22, 92 S.Ct. 1103, 1105-06, 31 L.Ed.2d 408 (1972)). The state of Florida exercised its prerogative to strengthen the First Amendment right to communicate with state government by subjecting state governmental institutions to the Public Records Act. "[T]he State of Florida has the right to extend to its citizenry greater protections than those afforded by the federal constitution." Adams v. State, 448 So.2d 1201, 1203 n.1 (Fla.App. 3 Dist. 1984)(citing Sambrine v. State, 386 So.2d 546, 548 (Fla. 1980)). "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. If so, the broader state protections would define the actual substantive rights possessed by a person living within that State." Mills v. Rogers, 457 U.S. 291, 300 (1982). Thirdly, under the Florida Constitution, and pursuant to Section 119.01, Fla.Stat., plaintiff has absolute right to request public records from his state government without seeking the permission of private for profit attorneys. See § 119.01, et.seq., Fla.Stat., Article 1, Section 24, Fla. Const. "Government remains the servant of the people, even when citizens are litigating against it." American Canoe Ass'n Inc. v. City of St. Albans, 18 F.Supp. 2d 620, 621. See also Camden v. State of MD. 910 F.Supp 1115 (D.Md. 1996). "[C]ongress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law." Ortiz, supra. "[C]ourts "are not at liberty to create an exception where Congress has declined to do so." Freytag v. Commissioner, 501 U.S. 868, 874 (1991). "It is not the place of the judiciary to disregard the guidelines set by Congress." Traficanti v. U.S., 227 F.3d 170, 175 (4th Cir. 2000). See also Kahn v. Shevin, 416 U.S. 351, 356 (1974)("courts do not substitute

their social and economic beliefs for the judgment of legislative bodies, [which] are elected to pass laws.”). Finally, in Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980) (*en banc*),⁶ affirmed Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), this Court declared an injunction that is similar to injunctions issues in this case, (Doc. 201);(Doc. 246), to be unconstitutional. Like a “bull in a china shop,” the district court just went crashing through and destroying the First Amendment and Tenth Amendment, U.S. Const., Article I, Section 24, Florida Constitution, and § 119.01, Fla.Stat. with reckless abandon. “The limits placed by the First Amendment on the Government extend to its judicial as well as legislative branch.” Equal Emp. Opp. Comm. v. The Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996)(citing Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America, 363 U.S. 190, 191 (1960)).

In order to gain a dismissal under Rule 41(b), Fed.R.Civ.P, the party seeking dismissal must prove some sort of prejudice. See World Thrust Films v. International Family Entertainment, 41 F. 3d 1454 (11th Cir. 1995); Steward v. City Of Jackson, Tennessee, 2001 U.S. App. LEXIS 4406,**4 (6th Cir. 2001); Nita v. Connecticut Dep't of Env'tl. Protection, 16 F.3d 482, 485 (2d Cir. 1994). The Appellees have not told this Court what prejudice they suffered, but they did tell the trial court the following; “Defendants remain prejudiced by Plaintiff’s actions. His refusal to obey this Court’s Orders preclude Defendants the opportunity to properly object to Plaintiff’s discovery and public record requests. It also prevents Defendants from properly protecting potential witnesses form Plaintiff’s calculated undue influence.” (Doc. 511, pg. 8);(Doc. 646, pg. 7). Assuming for the moment that all of the Defendants’ hyperbole and alleged statements of prejudice are true, then the Defendants did not suffer any prejudice as a matter of law because Mason has both constitutional and statutory rights to communicate with his government. Accordingly, Defendants’ statements of prejudice are absurd on their face.

At pages 31, 32, the Appellees contend that the Magistrate did not violate 28 U.S.C. § 636(b)(1)(A) by issuing a proscribed injunction, (Doc. 201);(Doc. 246), because these orders were

⁶ Decisions by the former Fifth Circuit issued before October 1, 1981 are binding precedent in the

merely “discovery matter[s] and not as a matter[s] involving injunctive relief.” In addition to the argument that the Plaintiff set forth in his *Initial Brief* at pages 6,7, the district court can not take away the Plaintiff’s right under the First Amendment, U.S. Const., Article I, Section 24, Florida Constitution, and § 119.01, Fla.Stat. to petition the government for public records with a mere label. “[A] State cannot foreclose the exercise of constitutional rights by mere labels.” Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 6 (1964).

II. THE DISTRICT COURT IMPROPERLY DISMISSED THE INDIVIDUAL DEFENDANTS FROM MASON’S SECOND AMENDED COMPLAINT

There is absolutely no record support for any of the assertions that the Appellees make with respect to this issue. See *Answer Brief*, pgs. 32-35.

At Page 32, the Appellees contend: “Mason does not specifically the address the multitude of claims he initially asserted against the individuals.” This is a true statement to some degree; however the R&R, did not address each specific claim either, rather it dealt with them collectively. (Doc. 192). Appellees next misrepresent Mason’s position in stating “Mason simply takes issue with the fact that the District Court dismissed the various claims without “elducat[ing] for the Plaintiff what it takes to state a claim for each of the different counts that the Plaintiff has set forth.”” This is not an accurate characterization of Mason’s position in that Mason raised numerous arguments against dismissal. Apparently, Appellees’ position is that a district court should just be able to attack a complaint and merely say, “you failed to state a claim.” However, Mason’s principal argument, among other things, is that even if Mason did not state a claim against the individuals, Mason should have still been allowed leave to amend since this was the very first time that Mason’s *Complaint* had been passed upon the by court. *Initial Brief*, pgs. 10-12. Appellees have failed to address this argument, therefore it must be conceded. However at page 34, *Answer Brief*, the Appellees make the generalized claim: “Mason was given a multitude of opportunities to amend his Complaint, to

Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

cure defects and to properly state claims against appropriate parties.” Appellees do not cite any record support for their position. The bottom line is that the Magistrate Judge dismissed every single individual from Mason’s Second Amended Complaint on the very first time the court passed upon any Complaint. In order to support their position that the district court properly dismissed every single individual from every single claim, the Appellees use a tactic of referring to a ‘red herring’ or an issue that has been long since settled by stating that the district court properly dropped the individuals from Title VII and FRCA claims. *Answer Brief*, pg. 33. These claims with respect to the individual Defendants are not an issue

At Page 33, Appellees assert that it was proper to dismiss each and every individual from Mason’s intentional infliction of emotional distress claims. This argument is successfully debunked below.

In note 11 at page 34, the Appellees contend that they were told by the district court on February 28, 2000 that it was proper for their motions to dismiss to predate a subsequently filed amended complaint, however, Mason asserts that the District Court did not give the Defendants any such instructions, nor does the record support this claim. Even if the District court did tell the Defendants that they could take motions to dismiss that were directed towards and captioned for the Plaintiff’s First Amended Complaint and use them for Plaintiff’s Second Amended Complaint, such an instruction would still be improper.

III. THE DISTRICT COURT IMPROPERLY DISMISSED SEVERAL CLAIMS FROM MASON’S FOURTH AMENDED COMPLAINT

At Pages 35, 36, Apellees claim that the dismissal of Mason’s claims brought pursuant to 42 U.S.C. §§ 1981, 1983 were proper. Firstly, Mason will deal with the section 1983 claims. Appellees contend that Masons’ claims were not viable because Mason was simply “advised of a ‘no trespass’ warning to not into the public library where he previously was employed by the Defendants. Such allegations standing alone are insufficient to establish a Section 1983 claim premised upon an asserted abridgement of the right to freedom of expression, the right to petition for a redress of grievances, equal protection and due process, the purported bases upon which Mason

asserts his Section 1983 claims.” It is rather silly for the Appellants to make the semantic tap dance that they simply “advised” Mason that he could not use the Sebring Public Library without risking being jailed. This is a similar logic that we had going in the Deep South that perpetuated Jim Crow and the use of public accommodations for more than 100 years. The bottom line is that the Defendants took Mason’s right to use the Sebring Public Library, a publicly owned facility. Assuming for the moment that the Appellees assertions are true⁷, then the section 1983 claims still should not have been dismissed because these were the very time these claims were passed upon by the Court. In the only other time, the Court tested the sufficiency of the Plaintiff’s claims, (Doc. 192), there is no mention of any defect in these claims. As a matter of fact, the Defendants even filed a motion for clarification with respect to these very claims and the Court said absolutely nothing about them. (Doc. 193);(Doc. 194)(“this Court believes that its Report and Recommendation is abundantly clear that all counts relating to public accommodations be dismissed with prejudice as set forth in page 7 of the Court’s Report and Recommendation and that this Court does not believe that it needs to specifically number those counts which it refers to.”). Here again the district court uses gotcha jurisprudence. See *Initial Brief*, pgs. 14, 15 for more discussion on Mason’s section 1983 claims. After having attacked most of Mason’s section 1983, (Counts 18, 20, 22, and 24), claims except Count 9, the district court then dismissed **all** of Mason’s section 1981 claims, (Counts 8, 18, 19, 21, 23, and 25). (Doc. 435, pg. 3). The district court claimed it based its decision to dismiss all of Mason’s section 1981 claims due to this Court’s decision in Butts v. County of Volusia, 222 F.3d 891 (11th Cir. 2000). “The Plaintiff’s response does not give sufficient reason why he is entitled to plead a § 1981 claim.” (Doc. 435, pg. 3). Butts does not stand for the proposition that a section 1981 claim can never be brought against a state actor. “Appellant could have sued under § 1983 for the alleged violation of § 1981...” Butts, supra. Count 8, a section 1981 claim was dismissed despite the fact that the Count 9, a section 1983 claim, provided the cause of action for Count 8. (Doc. 321, pg. 65).

⁷ Mason does not concede that he did not properly state section 1983 claims, in fact Mason insists that he

At Page 37, Appellees contend that Mason's intentional emotional distress claims were properly dismissed due to this Court's decision in Vance v. Southern Bell Tel. & Tel. Co., 983 F.2d 1573 (11th Cir. 1993). Appellees don't say what the facts are in Vance that are analogous to the instant case that would sustain a dismissal. At pages 33 and 38, Appellees rely on Vance for the proposition that under Florida law that a claim for intentional infliction of emotional distress cannot be stated in the employment context. Florida Law does not create an absolute bar to a claim of intentional infliction of emotional distress. Scelta v. Delicatessen Support Serv., Inc., 57 F. Supp.2d 1327 (M.D.Fla.1999). Moreover, Doe v. Board of County Com'rs, 815 F.Supp. 1448, 1450 (S.D. Fla. 1992) clearly dispels this errant notion. See also Moniz v. Reitano Enterprises, Inc., 709 So.2d 150, 152-54 (Fla.App. 4Dist. 1998); Dominguez, infra, (citing Holmes v. Oxford Chemicals, Inc., 510 F. Supp. 915 (M.D.Ala. 1981), aff'd, 672 F.2d 854 (11th Cir. 1982); Strader v. Union Hall, Inc., 486 F. Supp. 159 (N.D.Ill. 1980); Steadman v. South Central Bell Telephone Co., 362 So.2d 1144 (La. App. 1978)). What makes the instant case distinguishable from Vance and other similar cases where the courts have found that a claim for intentional infliction of emotional distress was not stated, is the fact that Mason has alleged that he was being treated for clinical depression and the Defendants knew this for a fact. (Complaint, Doc. 321, ¶¶90, 185-210, 230-258); (Doc. 321, ¶¶ 91-98, 112-114, 123-124, 132-134, 155-157, 212-214, 223-226). However, rather than exercise due care, the Defendants tried to exploit the fact that Mason was suffering from clinical depression. "In addition, another factor recognized as enhancing the outrageousness of a defendant's conduct is the defendant's knowledge that the plaintiff is especially sensitive, susceptible, or vulnerable to injury caused by mental distress." Dependable Life Ins. Co. v. Harris, 510 So.2d 985, 988 (Fla.App. 5 Dist. 1987)(citing Continental Casualty Co. v. Garrett, 173 Miss. 676, 682 (1935)(affirming a verdict where "the wrongdoer entered the home of a sick man, known to the offender to be sick, and then and there the intruder, who became such from the moment of his wrongful conduct, insulted the sick man in such a way that as a reasonably prudent person he should have known and anticipated that some

did state multiple section 1983 claims. See *Initial Brief*, pgs. 14, 15.

physical detriment would probably result.)). See also Dominguez v. Equitable Life Assur Soc., 438 So.2d 58, 61-64 (Fla.App. 3 Dist. 1983) approved Crawford And Co. v. Dominguez, 467 So.2d 281 (Fla. 1985) ; Conquest v. Auto-Owners Insurance Co., 773 So.2d 71, 74 (Fla.App. 2 Dist. 1998). See also *Initial Brief*, pg. 16 for more argument supporting this claim.

At Page 37, Appellees contend that Mason's defamation claims were properly dismissed to due to absolute immunity of all the Defendants. In support of this theory the Appellees cite Alfino v. Dep't of Health and Rehabilitative Services, 676 So. 2d 447 (Fla. 5th DCA 1996). Mason fully agrees with the proposition that Alfino and other related cases support the idea that public employers have absolute immunity in suits of defamation from their employees. However, Mason was an employee of Heartland Library Cooperative which means that Heartland Library Cooperative and its employees would have absolute immunity. Absolute immunity would not extend to Highlands County, Okeechobee County, DeSoto County, and Hardee County as they were not Mason's employers and had no duties with respect to Mason. Fully supporting this idea is Albritton v. Gandy, 531 So.2d 381, 387 (Fla.App. 1 Dist. 1988), in which the court held:

We agree with the trial court that Albritton is not immune from a suit based upon statements made and actions taken by him and that a county commissioner may be sued for tortious interference with county employee's employment under the facts of this case. To begin with, although statements made by government officials are protected by absolute immunity in certain situations, in order for immunity to attach, the statements must be made within the scope of the official's duties and powers. *Hauser v. Urchisin*, 231 So.2d 6 (Fla. 1970); *McNayr v. Kelly*, 184 So.2d 428 (Fla. 1966); *Johnsen v. Carhart*, 353 So.2d 874 (Fla. 3rd DCA 1977). These courts hold, based on the case of *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), that in actions against a government official for defamation, public officials are protected by absolute immunity no matter how false or malicious or badly motivated a statement may be as long as the statements or actions fall within the "scope of duty" of the public official.

IV. THE DISTRICT COURT IMPROPERLY DISMISSED MASON'S SECTION 1985 AND 1986 CLAIMS, AS WELL AS HIS WHISTLEBLOWER CLAIM

At page 38, the Appellees cite Paschal v. Florida Public Emp. Rel. Comm., 666 F.2d 1381 (11th Cir. 1982), though difficult to tell, for the proposition that Mason's motion for leave to amend because it was untimely or due to undue delay. "[T]he passage of time alone is usually not enough to deny leave to amend." *Moore's Fed Practice 3rd Edition*, § 15.15[2], pg. 15-44. The facts of

Paschal actually supports Mason position. In Paschal the following events had occurred which had not occurred in the instant case: (1) discovery had ended; (2) the district judge actually helped the Plaintiff; (3) A pretrial conference was held; (4) Plaintiff attempted to amend complaint just 10 days prior to trial; (5) Even though the Plaintiff was late, the district judge was still willing to allow the Plaintiff to amend, if he would make a written motion. In Wallace Hardware v. Abrams, 223 F.3d 382; 2000 U.S. App. LEXIS 18086; 2000 FED App. 0250P, **81 (6th Cir. 2000), Wallace Hardware sought leave to amend some twenty-one months after filing its initial complaint and the Court found that the District Court did not abuse its discretion under the circumstances. "The lengthy nature of litigation, without any other evidence of prejudice to the defendants or bad faith on the part of the plaintiffs, does not justify denying the plaintiffs the opportunity to amend their complaint." Bryant v. Dupree, 252 F.3d 1161; 2001 U.S. App. LEXIS 10490 (11th Cir. 2001). In Bryant, this Court found that the district court had abused its discretion in denying the plaintiffs leave to amend despite the fact that the litigation had been ongoing for over **three years** and the plaintiffs had not yet adequately pleaded their complaint. Mason had no obligation to bring his new claims until he found evidentiary support for his claims. See Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231 (11th Cir.1998)("Allegations in a complaint must have "evidentiary support" to the best of the party's "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." Fed.R.Civ.P. 11(b)(3) (filing a pleading warrants, among other things, that its "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery)"). There was no finding of prejudice to the Defendants in this matter. (Doc. 435). "[I]n most cases, a court will deny leave to amend only if the non-moving part is in fact prejudiced by the delay." *Moore's Fed Practice 3rd Edition*, § 15.15[2], pg. 15-44.

V. THE DISTRICT COURT'S DISCOVERY ORDERS IN THIS MATTER WERE IMPROPER

At pages 40-41, the appellees make only a mere token argument. There is not one single reference to the record, and only one measly citation of law to support their position. Under these circumstances, the Appellees have confessed error. The Appellees take one subject, an

extramarital affair between two principals in this case, Mary Myers, Mason's former supervisor, and Paul Ramponi, Mason's replacement, and attempt to use this as representative of the type of discovery that the Plaintiff sought in this action. Even this one bad example fails because this information was not sought for harassment, but Mason it clear that he needed this information to support his disparate treatment claims and for impeachment purposes. (Doc. 490, pgs. 5-18).

VI. THE DISTRICT JUDGE AND THE MAGISTRATE JUDGE SHOULD BE DISQUALIFIED IN THIS MATTER

At pages 41-42, only addressing one specific issue that Mason raises in his Initial Brief at pages 28-33, Appellees reduce the Plaintiff's issues to just a "mere disagreement," as if a disagreement can never be valid. The whole purpose of courts is to settle disagreements. The district court never addressed Mason's motion for a preliminary injunction. (Doc. 39). The district court had no right, legal, moral, ethical, or otherwise to deprive Mason of his hopes and dreams of an equitable remedy, a preliminary injunction (Doc. 39), by simply doing nothing. Plaintiff should not be condemned to have a judge that virtually says that I am not going to rule on your motion for a preliminary injunction and it aint a damn thing you can do about it because I have discretion. Is that the kind of Judge that Mason or any party should have? Mason waited and prayed 574 days, (Doc. 39, 11-24-99), (Doc. 791, 06-20-01), for a ruling on his motion, but got no answer⁸. However, the court only needed four days to usurp legal authority and trample Mason's first amendment rights by issuing "a pretrial discovery issue and not an injunction issue per se." (Doc. 199);(Doc. 201). Mason should not be condemned to have judges who violate clearly established law. (Doc. 199);(Doc. 201). Mason should not be condemned to have judges that intentionally lie and misrepresent the

⁸ In the state of Florida, Mason could have filed a petition for writ of mandamus and forced the judge to rule on a motion that been pending for long a duration. Indeed, in Mason v. Cool, Case No. 2D01-1071 (Fla. 2nd DCA 2001), the Second District Court of Appeal granted Mason's mandamus petition and ordered the Circuit Judge to rule on Mason's Petition for Writ of Quo Warranto. Apparently, this Court does not have a similar remedy when a district court refuses to rule on a motion because on April 26, 2001, 11th Cir. Case No. 01-11305 because in reply to Mason's petition for mandamus this Court stated: "His mandamus petition, however, is frivolous because he has failed to establish that he is entitled to mandamus relief to compel the district court to rule on his motion for preliminary injunction."

law. See below. Mason should not be condemned to have judges who allow motions and filings to simply languish. See *Initial Brief*, pgs 28-30.

At Page 42, note 18, Appellees attempt to prove that Judge Graham did not lie by telling Mason that he could not state a claim against a state actor under 42 U.S.C. § 1981 while simultaneously allowing the Plaintiff in another case, St. Germain v. Highlands County, Case No. 00-14094-CV-DLG, to state a claim under 42 U.S.C. § 1981 against the very same state actor. Compare, 99-14027-CV-DLG, (Doc. 435);(Doc. 466), 00-14094-CV-DLG, (Doc. 58). The critical and crucial fact to bear in mind is that (Doc. 58), 00-14094-CV-DLG, was rendered on **August 24, 2001**. Butts v. County Of Volusia, 222 F.3d 891 (11th Cir. 2000) was decided on August 14, 2000. Defendants and their counsel became aware of Butts on no later than **September 29, 2000** when they filed their motion to dismiss. 99-14027-CV-DLG, (Doc. 342, pgs. 2, 5). The District Judge became aware of Butts on no later than **November 29, 2000** when Mason filed his objections to the R&R of the Magistrate. (Doc. 435);(Doc. 436). When the District Judge conducted his so-called “de novo” review on *February 13, 2001*, he was certainly aware of the Butts decision. Mason and this Court are asked to believe that from **September 29, 2000**, when the Defendants knew of the Butts decision that the Defendants and their counsel took no action in Case No. 14094-CV-DLG when they claimed they believe that Butts precludes a section 1981 claim against a state actor. We are further asked to believe that in Case No. 14094-CV-DLG, when the Defendants filed their motion for a dispositive summary judgment, (Doc. 18), with multiple section 1981 claims pending, on February 12, 2001 that both the District Judge and the Defendants’ counsel allowed section 1981 claims to proceed on the facts until a final Judgment was rendered on August 24, 2001. (Doc. 58). Essentially, we asked to believe that the District Judge and Defendants’ counsel allowed a case to proceed on the facts when both claimed that the Butts decision precluded claims against state actors under section 1981 and wasted valuable financial and judicial resources. This Court is not required to believe the implausible. It is quite clear that Graham and his Magistrate lied.

CONCLUSION

The handling of this case was dishonest and atrocious. This case involved attorneys using acts of artifice and chicanery to achieve their goals. This case involved judges who snubbed their noses at clearly established law in favor of making of their own law. Mason is owed an apology for the handling of this matter. Mason is deeply concerned that the Appellees and the Judges think that this Court will somehow find a way to sanction the kind of behavior exhibited in this case. It is time for this court to ask itself what would make the Appellees and the Judges think that this Court could approve of their behavior.

Respectfully Submitted:
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Dated this 15th day of April, 2002

CERTIFICATE OF COMPLIANCE

I, Marcellus M. Mason Jr., hereby declare that this brief is in compliance with the volume limitation as set forth in 32(a) (7)(B)(ii) and it uses it contains no more than 7,000 words. This brief as reported by the word count function of Microsoft Word 97 contains 6966 words, excluding the table of contents, table of authorities, and other items not countable towards the 7,000 word limit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via US Mail, postage prepaid, first class on April 15, 2002, to: Allen, Norton & Blue, 324 South Hyde Park Avenue, Suite 350, Tampa, Florida, 33606

ADDENDUM

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 119.01, Fla.Stat.:

119.01 General state policy on public records.-- (1) It is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person. (2) The Legislature finds that, given advancements in technology, providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible. If an agency provides access to public records by remote electronic means, then such access should be provided in the most cost-effective and efficient manner available to the agency providing the information. (3) The Legislature finds that providing access to public records is a duty of each agency and that automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must ensure reasonable access to records electronically maintained. (4) Each agency shall establish a program for the disposal of records that do not have sufficient legal, fiscal, administrative, or archival value in accordance with retention schedules established by the records and information management program of the Division of Library and Information Services of the Department of State.

Article I, Section 24, Florida Constitution

SECTION 24. Access to public records and meetings. (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution. (b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. (c) This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject. (d) All laws that are in effect on July 1, 1993 that limit public access to records or

meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

Rule 26(c), Fed.R.Civ.P.

“Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:”