

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CARLOS E. MOORE

PLAINTIFF

versus

Civil Action No.: 3:17-cv-408-DPJ-FKB

REPRESENTATIVE KARL OLIVER;
REPRESENTATIVE JOHN READ;
REPRESENTATIVE DOUG McLEOD;
and TONY DUNN

DEFENDANTS

**AFFIRMATIVE DEFENSES AND ANSWER TO
FIRST AMENDED COMPLAINT BY
DEFENDANT, KARL OLIVER**

Defendant Karl Oliver (hereinafter “Defendant” or “Oliver”) hereby files and submits his
Affirmative Defenses and Answer to the First Amended Complaint, as follows:

AFFIRMATIVE DEFENSES

First Defense

The Court lacks subject matter jurisdiction over this action.

Second Defense

Oliver did not act under color of law with regard to the acts and conduct alleged in
plaintiff’s First Amended Complaint, and thus, any equal protection or other constitutional claim
by plaintiff must be dismissed.

Third Defense

Even if acting under color of law, Oliver’s use of language in a Facebook post which
plaintiff interpreted as offensive is legally insufficient to support a claim for violation of equal
protection or any other constitutional violation.

Fourth Defense

Plaintiff has not suffered any treatment different or disparate from any other persons who are similarly situated, and thus, any claim for violation of equal protection must be dismissed.

Fifth Defense

To the extent that plaintiff alleges Oliver acted in an official capacity as an officer of the State of Mississippi, plaintiff has failed to join the State of Mississippi as an indispensable party whose joinder is required under Rule 19 of the Federal Rules of Civil Procedure.

Sixth Defense

If the Court finds that Oliver acted in his official capacity as an officer of the State of Mississippi, although Oliver denies such allegation, this action is barred by the Eleventh Amendment to the United States Constitution since Oliver has not consented to being subject to suit in federal court.

Seventh Defense

Plaintiff has failed to assert a claim upon which relief can be granted.

Eighth Defense

Plaintiff lacks standing to maintain this suit under Article III of the United States Constitution, and hence, this action must be dismissed. *U.S. Const. art. 3, § 2, cl. 1.*

Ninth Defense

Plaintiff lacks prudential standing to maintain this action which asserts a generalized grievance shared in substantially equal measure by all or a larger class of citizens, and hence, this action must be dismissed.

Tenth Defense

Oliver's Facebook post, even though it understandably offended or outraged others, addressed a matter of public concern and constituted protected speech under the First Amendment to the United States Constitution. *U.S.C.A. Const. Amend. 1*. This action seeks to punish Oliver for exercise of his constitutional right to free speech, and hence, it must be dismissed.

Eleventh Defense

Although liability is denied, Oliver enjoys absolute immunity and/or qualified immunity for the acts and conduct alleged by plaintiff, and hence, this action must be dismissed.

Twelfth Defense

If the Court finds that Oliver acted in his capacity as an officer or employee of the State of Mississippi, although Oliver denies such allegation, then Oliver is immune under the Mississippi Tort Claims Act for any state-law claims asserted by plaintiff in this action.

Thirteenth Defense

If the Court finds that Oliver acted in is capacity as an officer or employee of the State of Mississippi, although Oliver denies such allegation, then plaintiff's state-law claims against Oliver are barred under the Mississippi Tort Claims Act due to plaintiff's failure to provide the statutorily required written notice prior to filing suit.

Fourteenth Defense

Oliver enjoys the exemptions to governmental liability set forth in *Miss. Code Ann. § 11-46-9* of the Mississippi Tort Claims Act, and he is therefore immune from suit for the state-law claims asserted by plaintiff.

Fifteenth Defense

Plaintiff's claim of conspiracy is pleaded in a conclusory fashion, and plaintiff has failed to plead the same with the particularity required by law. Hence, such claims must be dismissed.

Sixteenth Defense

Oliver's alleged acts and conduct did not violate any federal right held by the plaintiff nor deprive plaintiff of the exercise of any federal right.

Seventeenth Defense

The federal statutes on which plaintiff relies for his claims to relief do not afford any private right of action to plaintiff.

Eighteenth Defense

Plaintiff has failed to state a cognizable claim for violation of the federal and/or state statutes and/or laws asserted by plaintiff in the First Amended Complaint.

Nineteenth Defense

Plaintiff has not specifically stated his special damages, if any, as required by Federal Rule of Civil Procedure 9(g). Accordingly, plaintiff is barred from recovering any such damages.

Twentieth Defense

Oliver is entitled to an allocation of fault, if applicable, pursuant to *Miss. Code Ann. § 85-5-7*.

Twenty-First Defense

Oliver invokes all rights afforded under Mississippi's 1993, 2002, and 2004 Tort Reform Acts, including without limitation, *Miss. Code Ann. § 11-1-65*.

Twenty-Second Defense

An award of punitive damages would violate Oliver's rights under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and under the Mississippi State Constitution.

Twenty-Third Defense

Plaintiff's action was filed without substantial justification, and Oliver is entitled to an award of his reasonable attorney's fees and costs pursuant to the Mississippi Litigation Accountability Act. *Miss. Code Ann. § 11-55-5*.

Twenty-Fourth Defense

Oliver reserves the right to assert any additional defenses which may arise as discovery progresses or otherwise in the course of this litigation, including but not limited to, any defenses provided under Federal Rule of Civil Procedure 12(b).

ANSWER

And now, having pleaded the aforesaid Affirmative Defenses, Oliver answers the separate and specific allegations of the First Amended Complaint, paragraph by paragraph, as follows:

1. To the extent that the allegations of paragraph one require a legal conclusion, a response is not required; however, to the extent that Oliver is mistaken in this regard, Oliver denies that plaintiff is entitled to relief under any federal and/or state statute and/or law cited by plaintiff in paragraph one. Further, Oliver denies that acted in any official capacity as an officer of the State of Mississippi with regard to any matters alleged in the First Amended Complaint; denies that he conspired with any other person to commit any act in violation of law or to commit

any legal act in an unlawful manner; denies that he forced, intimidated, or threatened any party or witness in any court of the United States in any manner, or that he attempted to do so; and denies that he has violated in any matter the plaintiff's right to free speech, the Plaintiff's right to petition the government for a redress of grievances, or the plaintiff's rights under the First Amendment to the United States Constitution. Finally, Oliver denies that this Court has jurisdiction of this matter.

2. Oliver is without sufficient knowledge or information to either admit or deny the allegations in paragraph 2, and therefore, denies the same. Further, Oliver avers that he lacks personal knowledge of the allegations in paragraph two; avers that his only knowledge of the *Moore v. Bryant* litigation referenced in paragraph two is his random receipt *via* an internet news feed of a press headline concerning the same; avers that he has not engaged in any inquiry or study of the allegations, facts or developments of the *Moore v. Bryant* litigation; and avers that he had no knowledge of the existence or identity of Carlos E. Moore until after the filing of this lawsuit by Carlos E. Moore against Oliver.

3. Oliver admits the allegations of paragraph three.

4. Notwithstanding that the allegations of paragraph four are not directed to Oliver that Oliver is not required to respond to the same, Oliver admits that Defendant John Read is an elected member of the Mississippi House of Representatives but denies knowledge of the residency of such defendant.

5. Notwithstanding that the allegations of paragraph five are not directed to Oliver that Oliver is not required to respond to the same, Oliver admits that Defendant Doug Macleod is an elected member of the Mississippi House of Representatives but denies knowledge of the

residency of such defendant.

6. Notwithstanding that the allegations of paragraph six are not directed to Oliver that Oliver is not required to respond to the same, Oliver admits upon information and belief that Defendant Tony Dunn is an employee of the Mississippi Highway Patrol but denies knowledge of the residency of such defendant.

7. Oliver denies the allegations of paragraph seven as phrased. Regarding the message or post identified in paragraph seven, Oliver avers that he did not write or type the message or post; avers that his personal Face book page received the message through a Face book feed from what he appeared to be a media outlet; avers that he presumed the message or post was publicly and widely disseminated to millions of Face book users, including Oliver; avers that he merely clicked the “share” button on the link which accompanied the message or post to share the message or post on his personal Face book page; and avers that plaintiff has misrepresented the content of the message or post by including the words “[i.e. Mr. Moore’s]” in plaintiff’s quotation of the same in paragraph seven. Further, Oliver avers that he frequently shares on his Face book page internet news feeds on a broad range of subjects of public interest and avers that he did not “celebrate” any decision of the Fifth Circuit Court of Appeals by clicking “share” on a message or post originated by a media outlet and received through an internet news feed.

8. Oliver lacks personal knowledge of specific facts related to any developments in the City of New Orleans, lacks personal knowledge of the factual matters alleged in paragraph eight, and therefore denies the allegations of paragraph eight in its entirety. Further, Oliver avers that his only knowledge of any occurrences or developments of any matters related to the

subjects referenced in paragraph eight is his casual reading of press “headlines” regarding the same. Oliver avers that he has not engaged in any in-depth study or analysis of any occurrences or developments in the City of New Orleans related to the subjects of paragraph eight.

9. Oliver admits that he posted a message on his Face book page on or about May 20, 2017, but denies the remainder of paragraph nine. Oliver avers that plaintiff has misrepresented the content of his Face book post in paragraph nine; avers that he did not type the words “[i.e. Mississippi]” in his post; avers that his post did not concern or reference the flag of the State of Mississippi nor express any position regarding the same; avers that he regrets certain language in his post, particularly his use of the word “lynched”, which he intended to be hyperbolic rather than offensive or incendiary; avers that he has publicly apologized for the language used in his post; avers that he has been politically punished for the language in his post, which punishment he has accepted in contrition; and avers that his sole intent in posting the message was to exercise his right of free speech in declaring his opposition to the destruction of historical monuments.

10. Oliver denies all allegations of paragraph ten. Oliver avers that he did not conspire with any person in posting the Face book message referenced in paragraph nine; avers that he acted unilaterally and did not consult with any person in connection with posting the Face book message referenced in paragraph nine; and avers that he did not threaten or attempt to threaten anyone by, through or in connection with the Face book message referenced in paragraph nine.

11. Oliver denies the allegations of paragraph eleven. Oliver avers that he typed the post referenced in paragraph nine on his personal Face book page; avers that he did not

actively transmit such Face book post to the plaintiff nor to any other individual; and avers that he did not intend that plaintiff, of whose existence and identity he was unaware, receive such Face book post.

12. Oliver denies the allegations of paragraph twelve. Oliver specifically denies that his Face book post was intended to communicate a “death threat” to anyone for any purpose; denies that the State Flag of Mississippi was the subject of his Face book post; denies that his Face book post was intended to incite violence by third parties; denies that his Face book post was directed to, transmitted to, or intended to be received by plaintiff; and denies that his Face book post can reasonably be interpreted to have the purpose and meaning which plaintiff ascribes to the post in paragraph twelve.

13. Oliver denies the allegations of paragraph thirteen. Oliver specifically denies that he was “keenly aware” of plaintiff’s lawsuit or that he “celebrated” its lack of success; denies any awareness of any request by the plaintiff to the Supreme Court; denies making any “intentional and specific death threat” directed at plaintiff or anyone else; denies intimidating or intending to intimidate plaintiff for taking any action in any regard; denies inciting violence by third parties or intending to incite violence by third parties for any purpose; and denies any acts or conduct on his part which labeled, or were intended to label, any class of persons as “second class citizens”.

14. Oliver denies the allegations of paragraph fourteen. Oliver specifically denies advocating violence against any person or inciting third party acts of violence against any person; denies any infliction or attempt to inflict emotional distress on plaintiff; denies any conduct on his part which could reasonably place plaintiff in fear for his safety, the safety of his family, or the safety of others. Oliver avers that he could not have inflicted emotional distress on a person

of whose existence and identity he was unaware and that plaintiff, despite his protestations, has not suffered any injury.

15. To the extent that paragraph fifteen constitutes statements of law, no response is required from Oliver. Oliver denies any act or conduct on his part which violated any federal and/or state statute and/or law cited by the plaintiff in paragraph 15.

16. Oliver avers that plaintiff's claims for relief set forth in paragraph sixteen should not be well-taken and denies that plaintiff is entitled to the relief sought in paragraph sixteen, or any other relief in the premises.

And now having fully answered the First Amended Complaint and asserted his defenses, Defendant Karl Oliver prays that the First Amended Complaint be dismissed with prejudice and that it recover its costs in defense of this action.

This the 23rd day of June, 2017.

On behalf of Defendant Karl Oliver:

/s/ William Liston III

William Liston III (MSB #8482)

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Attorney for Defendant, Karl Oliver

Certificate of Service

I, William Liston III, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following *via* CM/ECF., except as otherwise stated below:

Via First Class United States Mail and/or Electronic Delivery

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This the 23rd day of June, 2017.

/s/ William Liston III
William Liston III