IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

H.B. MAXEY, Jr.
(a.k.a. "Bud" Maxey)

v. **Civil Action No. 1:93CV122-D-D**

ROBERT A. SMITH,
Individually and as
Alderman/Vice Mayor, City of Starkville,
EMMETT SMITHERMAN, JR., Individually
and as Alderman, City of Starkville,
ED BUCKNER, Individually and as Alderman,
City of Starkville,
HAROLD E. WILLIAMS, Individually and as Alderman,
City of Starkville,
MELVIN RHODES, Individually and as Alderman,
City of Starkville and
BEN HILBUN, JR., Individually and as City Attorney for the
City of Starkville, and the
CITY OF STARKVILLE

MEMORANDUM OPINION

This matter is before the undersigned on the motion of the defendants to alter or amend a judgement of this court dated September 23, 1994. Finding that the motion is not well taken, said motion will be denied.

The defendants assert three grounds in support of their motion. Two of these grounds are that the defendants are protected by absolute legislative immunity, and that all claims against the defendants in their official capacities have been waived by the plaintiff. The defendants have offered no significant additions to these same arguments which were addressed by this court in the challenged order of September 23, 1994. As such, they warrant no further discussion. However, this court is compelled to address the remaining contentions of merit which have been asserted. The

defendants charge that this court committed error by granting summary judgment on the issue of qualified immunity. The defendants contend that the matter was decided sua sponte by this court without proper notice of the issue to the parties. Also, the defendants argue that the court's decision was in error because of the partial reliance upon testimony given before it at the preliminary injunction hearing.

I. THE COURT'S DECISION AS A SUA SPONTE GRANT OF SUMMARY JUDGMENT

The defendants claim that this court made its ruling on the issue of qualified immunity sua sponte and without motion by the defendants on that issue. It is correct that in the initial Motion for Partial Summary Judgment made by the defendants, the issue of qualified immunity was not raised by name. In reply to the plaintiff's opposition to that motion, however, it became apparent to this court that qualified immunity was a relevant and contended issue in the minds of the defendants. The defendants offered a discussion of qualified immunity and asserted that "the Aldermen of the City of Starkville and the City Attorney are entitled to qualified immunity which would bar Maxey's claims." The defendants assert that this discussion, which constituted one and one half pages of their five page response, was offered merely to "reaffirm their belief as to their entitlement to such defense and to distinguish it from the defense of absolute legislative immunity." This intention was not apparent from the face of the

pleadings, and the authorities and argument presented to this court clearly established that the defendants relied upon qualified immunity principles in support of their motion. There was a substantial amount of confusion among the parties concerning the separate natures of legislative and qualified immunity, and the plaintiff was not the sole outlet of this lack of understanding. Both parties were guilty of failing to properly distinguish between the doctrines, evidenced by the defendants' jumbled discussion of immunities. In the defendants' reply, "Qualified Immunity" was categorized as a sub-section of "Legislative Immunity." At one point, the defendants even stated that Maxey was precluded from recovery by "qualified legislative immunity," a hybrid defense unheard of by this court. This court sought to clarify the distinction between these doctrines in its opinion. Likewise, this court ruled separately on both legislative and qualified immunity, in that it was apparent from the pleadings that both issues were in contention under this motion. In that the issue was raised and discussed by the defendants in this matter, the court's ruling on qualified immunity was proper.

II. THE COURT'S CONSIDERATION OF TESTIMONY FROM THE PRELIMINARY INJUNCTION HEARING

In reaching its decision, this court relied in part on testimony given during a preliminary injunction hearing in this cause which occurred on June 4, 1993. Testimony given in such a hearing is not conclusively binding upon the parties in later

decisions of the court. 11 C. Wright & A. Miller, Federal Practice and Procedure § 2950 (Supp. 1994). This court did not automatically adopt testimony from the preliminary injunction hearing as conclusively binding upon the parties. However, even though the testimony given was not binding, the defendants submitted nothing to persuade this court that such testimony was factually incorrect or to present new facts to this court. The defendants have stated that "since the preliminary injunction hearing, there has been extensive discovery conducted in this case." This may be true, but this court cannot consider discovered information which has not been presented to it. The defendants had ample opportunity to submit any new and relevant matters to this court via affidavits, deposition excerpts, and other means. They chose not to do so at the time, or even to do so in support of the motion presently before this court. Therefore, it was not improper for this court to consider the uncontradicted testimony given at the preliminary injunction hearing in making its rulings.

The defendants' contentions in this motion are unpersuasive. In that this court is convinced that it acted properly in ruling in this matter, the defendants' motion will be denied.

A separate order in accordance with this opinion shall issue this day.

THIS _____ day of October, 1994.

United States District Judge

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ORDER DENYING DEFENDANT'S MOTION
TO ALTER OR AMEND JUDGMENT

This matter is before the undersigned on the motion of the defendants to Alter or Amend Judgment rendered by this court in this cause on September 23, 1994. Despite arguments by the defendants, this court is unconvinced that it should alter or amend its prior judgment in this matter. Therefore, pursuant to a memorandum opinion issued this day, it is hereby ORDERED, ADJUDGED and DECREED:

1) The defendants' motion to Alter or Amend Judgment is hereby DENIED.

All memoranda, depositions, affidavits and other matters considered by this court in granting this motion to remand are

hereby incorporated by reference and made a part of the record in this cause.

SO ORDERED this the _____ day of October, 1994.

_____
United States District Judge