**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 92-7729

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RODERICK J. GRABOWSKI,

Plaintiff-Appellant,

VERSUS

LT. BRUCE CARVER, ET AL.,
HARRISON COUNTY, MISSISSIPPI, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
For the Southern District of Mississippi

(CA-S90-0472(BR))

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(October 5, 1994)

Before REAVLEY, JONES and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:[*]

This appeal is taken from the dismissal of a civil rights action brought under 42 U.S.C. § 1983. Among other things, appellant complains of the district court's striking of certain pleadings and responses; its failure to grant his motion for

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

default judgment; and its failure to consider his state law claims. We affirm in part, vacate in part, and remand.

Appellant, a pro se prisoner, filed suit under section 1983, alleging that he was subjected to filthy and overcrowded conditions while incarcerated as a pretrial detainee in a Mississippi jail; that he was hit by a guard after protesting his placement in a disciplinary "hole;" and that items of jewelry were not returned to him when he was transferred from the facility.

**Jurisdiction**

We first examine the basis of our jurisdiction. See Mosely v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Generally, an appellate court's jurisdiction is limited to "final judgments," namely those disposing of all issues and all parties. The district court quashed service of process on the Harrison County Sheriff's Department because it was not a legal entity; consequently, the "final judgment" does not dispose of the Department. We must determine whether a further order dismissing the Department is necessary to obtain a final judgment disposing of all parties.

In Federal Sav. & Loan Ins. Corp. v. Tullos-Pierremont, 894 F.2d 1469, 1476 (5th Cir. 1990), this Court held that unserved defendants are not parties to the action and, therefore, need not be disposed of for a judgment dismissing all other defendants to be final. On this basis, we perceive no impediment to our exercise of jurisdiction.

Appellant filed a notice of appeal from the district court's November 5, 1992, order dismissing all defendants except the

Harrison County Sheriff's Department. He subsequently filed a Rule 59(e) motion for reconsideration. Because that motion was denied on November 16, 1992, the issue next addressed is whether the motion for reconsideration voided appellant's earlier-filed notice of appeal. Fed. R. Civ. P. 4(a)(4) provides, inter alia, that a notice of appeal filed prior to the disposition of a Rule 59(e) motion is ineffective to appeal from the judgment or order until the date of the entry of the order disposing of the Rule 59(e) motion. This new amendment to Rule 4(a)(4) became effective December 1, 1993, which was after the notice of appeal and motion for reconsideration was filed in the instant case. This Court recently held that Rule 4(a)(4) applies retroactively to a notice of appeal filed before December 1, 1993, if such application will not operate as an unfair surprise or otherwise work a manifest injustice. See Burt v. Ware, 14 F.3d 256 (5th Cir. 1994). In Burt, the Court held that the appellees would not be prejudiced by employment of the new rule because they would simply lose a potential "windfall" of having the appeal dismissed. Id. at 260. Further, in that case, if the rule was not applied retroactively, the appellant would have his appeal dismissed and would be forced to file renewed motions and briefs in a timely manner or risk losing his right to appeal. Id. We find Burt virtually indistinguishable from the case at bar; consequently, we apply the amended Rule 4(a)(4) to this case which operates to make appellant's notice of appeal effective to confer jurisdiction.

**Dismissal of Officer Favre**

The original petition named Bruce Carver, Harrison County Jail, and Harrison County as defendants. By amended complaint, appellant added defendants Harrison County Board of Supervisors, and Officer John Favre. Appellant contends that the district court erred by dismissing his amended complaint naming Officer Favre as a defendant. Before appellant filed this amended complaint, the defendants had filed motions to quash service of process and had also filed a motion for additional time in which to file responsive pleadings. Appellant's amended complaint against Officer Favre was struck from the record with no explanation.

A party may amend their pleading once, as a matter of course, at any time before a responsive pleading is served. Fed. R. Civ. P. 15(a). A responsive pleading is a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, and pursuant to a court order, a reply to an answer or third-party answer. Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 910 (5th Cir. 1993). Motions have not been construed as pleadings which deprive a party of one amendment as a matter of course. Id. at 910-11. The district court abused its discretion in striking appellant's first amended complaint against Officer Favre before responsive pleadings were filed by the defendants. We must remand for consideration of the amended complaint against Officer Favre.

**Striking of Appellant's "Amended Complaint and Response to Defendant's Motion to Dismiss and Objection to Abeyance"**

Appellant complains that the district court improperly struck this pleading. The document on its face appears to have several purposes: an amended complaint, an opposition to the defendant's motions to dismiss, and an objection to staying discovery. Appellant argues that the document was not intended as an amended complaint; thus, the issue of whether the district court abused its discretion under Fed. R. Civ. P. 15(a) in denying the amendment is not before this Court. With regard to the decision to strike the pleading, we review the district court's decision for an abuse of discretion. See Clark v. Tarrant County, 798 F.2d 736, 747 (5th Cir. 1986) (motion to strike deposition). A district court may strike from any pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Insofar as the pleading is construed as an opposition memorandum, appellant admitted that it was partially repetitive of other pleadings that he had filed with the court. Further, appellant was allowed to present his arguments on the issue at a status conference. Appellant also reiterated his arguments in subsequent pleadings. Moreover, appellant has neither shown that the district court abused its discretion in striking the pleading nor that he was prejudiced by this action. We find no abuse of discretion.

**Default Judgment and Discovery Claims**

Appellant contends that the district court should have granted his motion for entry of default judgment on the ground of the

defendants' failure to respond to his interrogatories. The district court granted Defendant Harrison County's motion to hold discovery in abeyance pending disposition of its motion to dismiss.

Generally, a party shall serve answers to interrogatories within thirty days of service of the interrogatories. See Fed. R. Civ. P. 33. However, a defendant may serve answers or objections within forty-five days after service of summons and complaint upon that defendant. Id. Service is perfected on receipt thereof. See Carimi v. Royal Caribbean Cruise Line, Inc., 959 F.2d 1344, 1346 (5th Cir. 1992). Defendant Harrison County's motion to hold discovery in abeyance was filed on February 6, 1991. This defendant was served on December 26, 1990. The motion to hold discovery in abeyance was filed prior to the deadline for filing responses to the interrogatories. Under the circumstances, the district court did not abuse its discretion by refusing to grant the default judgment.

Appellant argues that the district court erred by dismissing his action prior to allowing him to conduct discovery. The district court dismissed defendants Carver and Harrison County based on the failure to state a claim against them upon which relief can be granted. When a dismissal is based not on unresolved factual issues but, rather, on the failure to state a claim, a district court's refusal to order discovery is not error. Elliott v. Foufas, 867 F.2d 877, 882 (5th Cir. 1989).

As to Defendant Joe Price, the only viable amended complaint naming Price as a defendant contained no factual allegations

against him. The district court granted Defendant Price's motion for summary judgment; however, the court stated that the basis for its determination was that appellant's complaint did not allege any personal involvement on the part of Price. Evidently, the complaint against Price was properly dismissed for failure to state a claim. In any event, appellant did not demonstrate how discovery could have established his claim against Price. Appellant never disputed Price's statement that he did not become sheriff until several months after appellant was transferred, that is, after the alleged violations of section 1983. Consequently, even if there was error in staying discovery, appellant has not shown harm.

**Dismissal of the Claim Against the Assistant Warden**

Appellant complains that the district court erred in dismissing defendant Carver, the assistant warden. Appellant contends that he advised Carver, two days after the incident, that Officer Favre assaulted him. Appellant claims that Carver is liable because he allegedly took no action.

Supervisory officials are not liable under section 1983 for the actions of subordinates under any theory of vicarious liability. Thompkins v. Belt, 828 F.2d 298, 303-04 (5th Cir. 1987). A supervisor may be liable for the acts of a subordinate if the plaintiff shows that the supervisor was personally involved in the alleged constitutional deprivation or demonstrates a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. Id. at 304. A causal connection may be shown if the supervisory official implements a policy so deficient

that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation. Id. at 303-04. One incident of violence does not establish a policy. Id. at 305.

Appellant did not allege any personal involvement on the part of Carver. Appellant did not allege that Carver was aware of prior violent conduct of Officer Favre which would reflect a policy of intentional indifference to the constitutional rights of the inmates. Likewise, appellant does not allege that Carver had any personal involvement in the alleged loss of appellant's jewelry. There was no error.

**Pendent Jurisdiction**

Appellant contends that the district court erred in failing to grant his request to invoke pendent jurisdiction over his state law claims against Price and the Board of Supervisors. Appellant alleged violations of state law in his February 14, 1991, pleading which was struck by the district court. However, as described earlier, appellant argues on appeal that this pleading was not intended to be an amendment, and we have determined that such pleading was not improperly struck. Further, the district court dismissed any section 1983 claims against Price and the Board that provided it with original jurisdiction initially. The district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it had original jurisdiction. See 28 U.S.C. § 1367(c)(3). There was no error.

Finally, appellant claims that the district court erred by failing to rule on his request for a jury trial. When the district court dismissed the complaints, appellant's request for a jury trial became moot.

The order dismissing appellant's amended complaint against Officer Favre is VACATED, and this cause is REMANDED to the district court. In all other respects, the judgment is AFFIRMED.[1]

[1] Appellant's motion to supplement the record with an affidavit that was not submitted to the district court is denied. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1985).