

814

STATE OF ALABAMA, X  
BALDWIN COUNTY. X

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon the Town of Foley, Alabama, a Municipal Corporation, to appear within thirty days from the service of this writ in the Circuit Court, to be held for said county at the place of holding the same, then and there to answer the complaint of Gustav Nass.

WITNESS my hand this 3rd day of May, 1943.

Rodney  
Clerk of the Circuit Court.

: : : : : : : : : : :

GUSTAV NASS,

Plaintiff,

VS.

THE TOWN OF FOLEY, ALABAMA,  
a Municipal Corporation, and  
ROY BEESLEY,

Defendants.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA.

AT LAW. NO. \_\_\_\_\_.

1. The plaintiff claims of the defendant, the Town of Foley, Alabama, a Municipal Corporation, the sum of Ten Thousand Dollars as damages for injury done to, and wrong suffered by plaintiff, proximately caused by the defendant corporation, its agent, officer or employee, for that; heretofore on, to-wit, the 4th day of November, 1942 the defendant was engaged, by its agents, officers and employees in furnishing water to its citizens in and around the said Town of Foley, said defendant had, as its employee in connection with the said work, one Roy Beesley, and at such time and place the said Roy Beesley, while acting in the line of his duty as said employee of the said defendant, willfully and wantonly committed an assault and battery on the person of the plaintiff by striking him many times with his fist or some weapon, and brutally beating and

abusing plaintiff, by reason of which, and as a proximate consequence thereof, plaintiff's nose was broken, his face disfigured, his face, head and body were bruised, he was permanently injured and was rendered for a long time less able to work and earn money, was caused to suffer great physical pain and mental anguish and caused to spend a large amount of money for medicine, medical treatment and hospital expenses, all of which was proximately caused by the wrongful, willful and wanton injury committed by the said defendant, its agent, servant or employee, while acting within the line and scope of his authority. Plaintiff further alleges that the said willful and wanton acts of its said agent, servant or employee were subsequently approved and ratified by the said defendant corporation; hence this suit.

J. B. Blackburn  
Attorney for Plaintiff.

Plaintiff demands a trial of  
said cause by jury.

J. B. Blackburn  
Attorney for Plaintiff.

Executed May 3 1943  
by serving copy of within Summons and  
Complaint on

Thom J. Foley, Attorney  
Municipal Corp. by serving  
a copy with W. S. Breckley  
as its Mayor

By W. R. Stuart Sheriff  
Deputy Sheriff

Received in Sheriff's Office  
this 25 day of August, 1944  
W. R. STUART, Sheriff

Returned August 28th  
1944 W. R. Stuart

Executed August  
28th 1944 by Sheriff  
copy of the within  
on Roy Breckley  
W. R. Stuart  
My return to Davis  
W. S.

814  
Original

SUMMONS AND COMPLAINT

GUSTAV NASS,

Plaintiff,

VS.

THE TOWN OF FOLEY, ALABAMA,  
a Municipal Corporation,

Defendant.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA.  
AT LAW. NO. 814.

Sum on Roy Breckley

Filed May 3rd 1943  
W. R. Stuart  
W. S.

J. B. BLACKBURN  
ATTORNEY AT LAW  
BAY MINETTE, ALABAMA

GUSTAV NASS,

PLAINTIFF

VS

THE TOWN OF FOLEY, A  
MUNICIPAL CORPORATION,

DEFENDANT)

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
AT LAW

BRIEF OF DEFENDANT

ON

DEMURRERS TO THE COMPLAINT

Lloyd A. Magney  
Attorney For Defendant

The demurrer points out the omission from the complaint of an averment of compliance with the requirements of Section 504, Title 37, Code of Alabama, 1940, which reads as follows:

#504 (2031) (1275) Statements, claims, or demands for injury filed. No recovery shall be had against any city or town, on a claim for personal injury received, unless a sworn statement be filed with the clerk, by the party injured, or his personal representative, in case of his death, stating substantially the manner in which the injury was received, and the day and time, and the place where the accident occurred, and the damages claimed. Title 37, #504. Code 1940.

It will be observed that there is no time limit for filing the statement fixed by this section, but the Supreme Court holds that it is to be considered with Section 476 which does fix a limit of six months for tort claims.

"While Code, Par. 2031 deals specifically with claims for personal injury and death, requiring a more strict compliance as to filing of claim, it fixed no limitation; and that, therefore, the limitation fixed in section 1907 is read into section 2029 and section 2031. These statutes are construed in pari materia." Howell v. City of Dothan. 174 So. 628.

The Section 1907 referred to in the opinion is the same as Section 476 of Title 37 of the 1940 Code.

This presents, then, the precise question which is:

Is the complaint vulnerable to demurrer because of its lack of averment of compliance with the Code?

The Supreme Court has so held. In the case of Grambs vs. The City of Birmingham 80 So. 876-202 Alabama 490 the Court said:

Finally, it is urged that the statement to be filed with the city clerk may be waived, and, therefore, that the complaint was not demurrable for its failure to allege the filing of a statement in compliance with the statute in all respects, or, in any event, that the facts alleged in some of the counts sufficiently showed a waiver. Technical accuracy in the statement is not required. (McKinnon v. Birmingham, 196 Ala. 56, 71 South. 463); but statutory prescriptions of this character are generally construed as being mandatory, and as enacting conditions precedent to the bringing of actions against municipal corporations for the causes to which they relate; so that, in order to maintain such an action, the filing of the claim in substantial compliance with the statute must be averred and proved. 5 Thomp. Neg. Par. 6321; 4 Dill. ubi supra. So far as concerns allegation, it is a familiar rule of pleading that the omission to allege performance of a condition precedent--or an excuse for nonperformance in case an excuse may be allowed--is fatal on demurrer. 13 C. J. p. 724, Par. 847. This was the ruling, though very briefly stated and without reference to the authorities, in Barrett v. City of Mobile, supra. At the time of that decision section 1275 of the Code of 1907 was in force, reading:

"No recovery shall be had against any city or town on a claim for personal injury unless a sworn statement be filed," etc.

Again, in the more recent case of Maise vs. City of Gadsden 166 So. 796, the Court said:

"This Court has held that no suit shall be brought or maintained nor recovery had unless a sworn statement is filed, and such filing must be averred in the complaint, since it is an expressed condition precedent to the bringing of the suit. Grambs v. City of Birmingham, 202 Ala. 490, 80 So. 874; Bland v. City of Mobile, 142 Ala. 142, 37 So. 843, Barret v. City of Mobile, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54; Perrine v. Southern Bitulithic Co. 190 Ala. 96, 99, 66 So. 705, 706.

These authorities are decisive. The complaint is fatally defective for lack of averment. The time within which the necessary statement may be filed has long since elapsed and the demurrer should be sustained and the cause dismissed.

Respectfully submitted,

  
Attorney For Defendant

GUSTAV NASS,

Plaintiff

vs.

THE TOWN OF FOLEY, ALABAMA,  
a Municipal Corporation,


Defendant

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
AT LAW No. 814

DEMURRER

Comes now the Town of Foley, Alabama, the above named Defendant and demurs to the Complaint and as ground for such demur says:

It does not appear from said Complaint that the Plaintiff filed with the Town Clerk of the Defendant Town, within six months from the accrual of his claim, a sworn statement stating substantially the manner in which his injury was received and the day, and the time, and the place, and the damages claimed.

  
Attorney For Defendant



IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
AT LAW No. 814

GUSTAV NASS,

Plaintiff

vs.

THE TOWN OF FOLEY, ALABAMA,  
A Municipal Corporation,

Defendant.

DEMURRER

2nd Sept 30 1943  
Baldwin County

LLOYD A. MAGNEY  
Attorney  
Foley, Alabama.

GUSTAV NASS,

Plaintiff,

vs.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
AT LAW No. 814

DEMURRER

THE TOWN OF FOLEY, ALABAMA,  
a Municipal Corporation,

Defendant.

Comes now the Town of Foley, Alabama, the above named Defendant and demurs to the Complaint and as ground for such demur says:

That said Complaint fails to state a cause of action against the Defendant.



Attorney for Defendant

01  
IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
AT LAW NO. 814

GUSTAV NASS,

Plaintiff,

vs.

THE TOWN OF FOLEY, ALABAMA,  
a Municipal Corporation,

Defendant.

DEMANDER

FILED MAY 23 1943  
*Lloyd A. Magnien*  
LLOYD A. MAGNIEN  
Attorney  
Foley, Alabama.

GUST NASS  
Plaintiff

Vs.

ROY BEESLEY  
Defendant

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

AT LAW

No. 814

Comes the Defendant in the above styled cause and appearing specially, without entering a general appearance and files this motion to quash the Summons and Complaint and the Sheriff's return on him and as grounds therefore shows:

First: That the action in which he is summoned to appear is not an action against this Defendant.

Second: That the summons served on him is functus officio and was at the time of the service on him, in that it was issued more than six months prior to the service on him.

Third: That the summons served on him was issued on May 3, 1943, and after six months from such issuance should have been returned to the Circuit Clerk issuing the same with his endorsement thereon stating his reason for not executing the same; but that the sheriff, without legal authority therefor served such summons on this Defendant August 28, 1944; hence such service is null, void and of no effect.

Fourth: that there is no complaint against this Defendant pending in the Court issuing summons on which the same could issue.

Fifth: That this Defendant is not a party to the complaint served on him.

Sixth: That the complaint on which the summons is issued is not against this Defendant.

Seventh: That the attached paper writing is the paper served on this Defendant and not a copy of the summons and complaint filed in this cause.

Eighth: That the Complaint served on him is not signed by the Plaintiff or his attorney.

Ninth: That Defendant has not been served with a copy of the Summons and Complaint shown by the sheriff's return to have been served on him.

*Bucke Hall*  
*By J. C. Bucke*  
Attorneys for Defendant.

TO ANY SHERIFF OF THE STATE OF ALABAMA.

WITNESS my hand this 22 day of May, 1943.

[illegible]

AT LAW. NO. \_\_\_\_\_

1. The plaintiff claims of the defendant, the Town of Foley, Alabama, a Municipal Corporation, the sum of Ten Thousand Dollars as damages for injury done to, and wrong suffered by plaintiff, proximately caused by the defendant corporation, its agent, officer or employee, for that, heretofore on, to-wit, the 4th day of November, 1948 the defendant was engaged, by its agents, officers and employees in furnishing water to its citizens in and around the said Town of Foley, said defendant had, as its employee in connection with the said work, one Roy Beesley, and at such time and place the said Roy Beesley, while acting in the line of his duty as said employee of the said defendant, willfully and wantonly committed an assault and battery on the person of the plaintiff by striking him many times with his fist or some weapon, and brutally beating and

abusing plaintiff, by reason of which, and as a proximate consequence thereof, plaintiff's nose was broken, his face disfigured, his face, head and body were bruised, he was permanently injured and was rendered for a long time less able to work and earn money, this caused him to suffer great physical pain and mental anguish and caused him to spend a large amount of money for medicine, medical treatment and hospital expenses, all of which was proximately caused by the wrongful, willful and wanton injury committed by the said defendant, its agent, servant or employee, while acting within the line and scope of his authority. Plaintiff further alleges that the said willful and wanton acts of its said agent, servant or employee were subsequently approved and ratified by the said defendant corporation; hence this suit.

---

Attorney for Plaintiff.

Plaintiff demands a trial of said cause by jury.

---

Attorney for Plaintiff.

COPY

SUMMONS AND COMPLAINT,

GUSTAV NASS,

Plaintiff,

VS.

THE TOWN OF FOLEY, ALABAMA,  
a Municipal Corporation,

Defendant.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA.

NO. 1

AT LAW.

11/1/11  
D. W. NASS

Miss Mary

103

Ray Beasley

Marian To Quay

8/18

June 26, 1944

Robert  
C. Beasley

BEEBE & HALL  
LAWYERS  
BAY MINETTE, ALABAMA