

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JULIAN ROSE, M.D.

APPELLANT

VS.

No. 2007-CA-01028

EUGENE TULLOS

APPELLEE

**BRIEF OF THE APPELLEE
EUGENE TULLOS**

ORAL ARGUMENT IS NOT REQUIRED

G. DAVID GARNER, MSB# [REDACTED]
Attorney at Law
P.O. Box 789
Raleigh, MS 39153
Telephone No. 601-782-9090
ATTORNEY FOR THE APPELLEE

IN THE SUPREME COURT OF MISSISSIPPI

JULIAN ROSE, M. D.

APPELLANT

VS.

CAUSE NO. 2007-CA-01028

EUGENE TULLOS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and /or judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Julian Rose, M. D., Appellant.
2. Drew Martin, Esquire, Attorney for Appellant.
3. Eugene C. Tulllos, Esquire, Appellee.
4. G. David Garner, Esquire, Attorney for Appellee.
5. Isadore W. Patrick, Circuit Court Judge.

Respectfully submitted,



G. David Garner
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUE	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
CONCLUSION	9
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES

<i>Albert v. Allied Glove Corp.</i> , 944 So.2d 1 (Miss. 2006).....	5
<i>AmSouth Bank v. Quimby</i> , 963 So.2d 1145, 1155 (Miss. 2007).....	5,6
<i>Buckner v. Toro</i> , 116 F.3d 450 (11 th Cir. 1997).....	9
<i>Linda Kay Randolph v. Laurence L. Lambert, LLC Properties, Inc., BP Properties, Inc. and Frank P. Whitman, III</i> , 926 So.2d 941, 945 (Miss. Ct. App. 2006).....	3,5
<i>Mary Scaggs v. GPCH-GP, Inc.</i> , 931 So.2d 1274, 1275 (Miss. 2006).....	3
<i>Roussel v. Robbins</i> , 688 So.2d 714, 725 (Miss. 1996).....	3,6
<i>Thelma James v. The Chase Manhattan Bank, Arnold Weiss, and Guy M. Rogers, Jr.</i> , 173 F. Supp. 2d 544, 550 (N. D. Miss. 2001).....	6,7,8
<i>Wyatt v. Cole</i> , 504 U. S. 158 (1992).....	9

STATUTES

Section 11-55-5 (1).....	4
--------------------------	---

OTHER AUTHORITIES

Restatement (second) Torts Section 674, cmt. d.	7
------------------------------------------------------	---

IN THE SUPREME COURT OF MISSISSIPPI

JULIAN ROSE, M. D.

APPELLANT

VS.

CAUSE NO. 2007-CA-01028

EUGENE TULLOS

APPELLEE

BRIEF OF APPELLEE

STATEMENT OF THE ISSUE

Did the trial court err in granting Tullos' motion to dismiss lawsuit where Rose sought to recover damages alleging an independent cause of action under the provisions of the Litigation Accountability Act and alleging claims for malicious prosecution and abuse of process against the attorney (Tullos), not the party who instituted the action, (Jones).

STATEMENT OF THE CASE AND FACTS

Julian Rose, M. D., (Rose) Appellant, filed this lawsuit against Eugene Tullos (Tullos) Appellee, seeking to recover damages under the following causes of action: 1) violation of the Litigation Accountability Act of 1988; 2) malicious prosecution; 3) abuse of process; 4) damage to reputation; 5) and defamation. Tullos responded to the Complaint by filing his 12 (b)(6) motion to dismiss this action for Rose's failure to state a claim upon which relief may be granted. In his *Response* to the trial court, Rose confessed Tullos' motion for dismissal as to the claims

for defamation and damage to reputation.

This present action relates to a previous lawsuit brought by Alma Jones (Jones) against Rose and other defendants in the Circuit Court of Smith County, Mississippi (the underlying action) styled: *Alma Jones v. Mississippi Baptist Medical Center, Julian Rose, M. D., Olympus American, Inc., ABC, DEF, GHI*, Cause No. 2002-589. Tullos represented Jones as her attorney. On or about September 28, 2004, the Circuit Court of Smith County dismissed the underlying action against Rose and others. [Tullos R. E. 1]

Rose waited over ten (10) months after the final judgment dismissing the underlying action was entered to bring this separate lawsuit, not against Alma Jones, but against Jones' attorney, Eugene Tullos. [Tullos R. E. 7]

After hearing the arguments of counsel for the parties and considering the briefs submitted by the parties, the trial court granted Tullos' motion to dismiss Rose's lawsuit holding that (1) Rose has no cause of action against Tullos for malicious prosecution or abuse of process because Tullos was merely the vehicle used to institute the underlying lawsuit and the right to sue was that of Alma Jones, not Tullos, and that the claim, if any, would have been against Jones, not her attorney; and (2) Rose failed to raise his claims under the Litigation Accountability Act in the underlying action and, thus, he is now precluded from bringing a separate action independent from the underlying action. [Tullos R. E. 9]

Feeling aggrieved Rose appealed the trial court's ruling.

SUMMARY OF THE ARGUMENT

The Litigation Accountability Act of 1988 (The Act) does not create a separate,

independent cause of action for which Rose may now seek to recover damages from Tullos when the final judgment has already been entered in the underlying action. *Linda Kay Randolph v. Laurence L. Lambert, LLC Properties, Inc., BP Properties, Inc. and Frank P. Whittman, III*, 926 So. 2d 941, 945 (Miss. Ct. App. 2006).

Rose likewise cannot maintain a cause of action against Tullos for malicious prosecution or abuse of process when Tullos was representing his client, Jones, in her suit for medical malpractice against Rose. Jones, not Tullos, brought the medical malpractice claim against Rose. Tullos, as the attorney for Jones, owed no duty to Rose, the adverse party. *Roussel v. Robbins* 688 So.2d 714, 725 (Miss. 1996).

ARGUMENT

When considering a motion to dismiss the Court's standard of review is de novo. *Mary Scaggs v. GPCH-GP, Inc. d/b/a Garden Park Medical Center*, 931 So.2d 1274, 1275 (Miss. 2006). The Court went on to state in Scaggs:

When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim. *Lang v. Bay St. Louis/Waveland School District*, 764 So.2d 1234 (Miss. 1999) (citing *T. M. V. Noblitt*, 650 So.2d 1340, 1342 (Miss.1995)). This Court will not disturb the findings of the trial court unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Bell v. City of Bay St. Louis*, 467 So.2d 657, 661 (Miss. 1985).

Id. 1275

The trial court ruling was based on the appropriate legal standard and was without error;

accordingly, its ruling should not be disturbed.

Tullos satisfied the high standard and his motion to dismiss was granted because:

I. The Litigation Accountability Act of 1988 does not create an independent cause of action.

Rose cannot make a claim against Tullos under the Litigation Accountability Act of 1988 because the governing statute provides that relief must be sought in motion form, not as a separate cause of action, in the case for which relief is being sought. Section 11-55-5 (1) Miss. Code Ann. states in part:

Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, **as part of its judgment** and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, **upon the motion of any party or on its own motion**, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

(emphasis added).

In addressing this very issue the Mississippi Court of Appeals in 2006 held:

The clear language of the statute shows that the legislature intended for the Litigation Accountability Act to be brought in motion form and not as a cause of action. *Mississippi Code Annotated Section 11-55-5 (1)* states "the court shall award, as part of its judgement and in addition to any other costs assessed, reasonable attorney's fees...." This language support's the trial court's ruling that the award of any costs under the act would be awarded "as part" of the judgment and "in addition to any other costs assessed" from the judgment. This indicates that the award

would be part of the original action, assessed with other costs involved in the original action, not an independent judgment in and of itself.

Additionally, the language of the statute specifically states that the claim is to be brought “upon motion of any party or on its own motion.” This Court is bound by the clear language of the statute which makes clear the legislature intended the claim to be brought on motion and not as an independent cause of action. Based upon the plain reading of the statute, the Litigation Accountability Act is not an independent cause of action.

Linda Kay Randolph v. Laurence L. Lambert, LLC Properties, Inc., BP Properties, Inc. and Frank P. Whittman, III, 926 So. 2d 941, 945 (Miss. Ct. App. 2006).

The time for Rose to make a claim for relief under the Act was in the underlying Alma Jones action. He failed to do so, and he is now barred pursuant the clear language of the Act.

This Court’s application of the Randolph v. Lambert holding is not a prohibited retroactive application of the law as Rose asserts. The Act always required an aggrieved party to seek relief and damages in the ongoing litigation and not a “stand alone, independent” lawsuit. Rose cites no precedent prior to the Randolph ruling on which he may have relied that holds otherwise. In Albert v. Allied Glove Corp., 944 So.2d 1 (Miss. 2006), the Court stated, “this court has repeatedly held judicially enunciated rules are to be applied retroactively. Retroactive application is not limited to pending appeals...but also applies to cases awaiting trials.” Therefore, Rose’s arguments regarding any prejudice by retroactive application are without merit.

Rose further makes arguments regarding the legislative intent of the Act and that the Court should now overturn the Randolph holding. These arguments were not presented to the trial court. In the recent case of Amsouth Bank v. Quimby, 963 So.2d 1145, 1155 (Miss. 2007),

this court restated its long held position that it would only consider arguments on appeal which were put before the trial court. This Court stated:

[w]e accept without hesitation the ordinarily sound principle that this Court sits to review actions of trial courts and that we should undertake consideration of no matter which has not first been presented to and decided by the trial court. Educ. Placement Serv. v. Wilson, 487 So.2d 1316, 1320 (Miss.1986). We find no reason to depart from this practice now.

Quimby, at 1155.

Following this established principal, this Court should refuse to consider the arguments regarding legislative intent of the Act and to overturn Randolph because it was not presented to the trial court.

II. Rose cannot maintain a cause of action against Tullos for malicious prosecution or abuse of process because Tullos owed no duty to Rose.

Jones, not Tullos, brought suit against Rose. Jones, not Tullos, made allegations against Rose of medical malpractice. Tullos represented Jones in the underlying action as her attorney, and he owed Jones, his client, a duty of representation in the underlying action. Rose as Jones' adversary was not owed any duty by Tullos who at all times was counsel for Jones.

In the case of *Roussel v. Robbins* 688 So. 2d 714, 725 (Miss. 1996) the Mississippi Supreme Court held that "an attorney has no duty to an adverse party." It is thus clear in Mississippi jurisprudence that Tullos owed no duty to Rose; and in the absence of a duty, Rose cannot maintain a cause of action against Tullos.

The United States District Court for the Northern District of Mississippi in the case of *Thelma James v. The Chase Manhattan Bank, Arnold Weiss, and Guy M. Rogers, Jr.*, 173 F.

Supp. 2d 544, 550 (N. D. Miss. 2001) considered factual and legal issues closely related to those in this action. In this case, Chase Manhattan was the holder of a note from the plaintiff secured by a deed of trust on residential property owned by James. It is undisputed that James defaulted on the note. Upon default, Chase instituted foreclosure proceedings which resulted in a public sale of the plaintiff's property by Weiss as the Substituted Trustee. The public sale took place on December 8, 1999. Subsequently, Rogers was retained as an attorney to bring an action to evict James from the property. The eviction was commenced in Justice Court in Bolivar County which issued a decree in favor of Chase Manhattan on May 2, 2001, and ordered removal of James from the property. Thereafter, James brought suit against Rogers who represented Chase in the eviction action. *Id.* at 548.

In considering the claims asserted by plaintiff James, the Court stated:

This Court is unaware of any authority, however, not only in Mississippi, but anywhere in the country, which suggests that an attorney owes a duty, fiduciary or otherwise, to the adverse party in a case he is litigating. Indeed the Mississippi Supreme Court has expressly stated "an attorney has no duty to an adverse party." *Roussel v. Robbins*, 668 So.2d 714, 725 n4 (Miss. 1996). A contrary proposition would, for obvious reasons, be inimical to the America adversary system. n3Either way, these duties extend to the client, not the adversary. n4 Indeed, any duty which extends to the adversary, whether one of a fiduciary nature or one of ordinary reasonable care, creates a conflict of interest.

Id. at 550.

The *James* Court went on in its decision to quote from Restatement (second) of Torts Section 674, cmt. d:

An attorney who initiates a civil proceeding on behalf of his client or one who takes any steps in the proceeding is not liable if he has probable cause for his action (see s 675); and even if he has no

probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim. (See s 676). An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances.

Id. at 551.

In *James* the Court further stated with clarity and great relevance that:

Rogers was hired to bring an eviction action for his client, Chase, and was under a duty to zealously pursue the objectives of his client. There is no indication that he carried that duty out with anything less than good faith. Moreover, **an action for wrongful eviction is properly brought against the party who instituted the action, in this case Chase Manhattan, not the attorney who represented that party in the eviction proceeding. Nevertheless, it is apparent that even if Rogers, for some reason or another, thought the eviction action had no merit, no personal liability would attach.**

Id. (emphasis added)

If Rose has a claim for malicious prosecution and abuse of process, and Tullos contends that he does not, then at best his claims are properly brought against Jones, who instituted the underlying action, and not Tullos, the attorney who represented her.

For the first time in his brief to this Honorable Court, Rose contends that Tullos has asserted some form of immunity or qualified immunity as an attorney. Such argument has never been made by Tullos, and the trial court certainly did not grant any immunity, qualified or otherwise, to Tullos. Immunity implies that there has been some wrongdoing and that without said immunity there would be liability. Rose clearly misses the point. Rose's suit was dismissed by the trial court because Rose failed to state a claim or cause of action against Tullos upon

which relief may be granted, not because Tullos has immunity.

Rose seems to heavily rely on the Wyatt opinion in advancing his argument. Wyatt v. Cole, 504 U. S. 158 (1992). The Wyatt opinion is applicable only to § 1983 actions and, thus, has no bearing on the case at bar. This is not a § 1983 lawsuit. The Wyatt Court in rendering its decision stated:

The question on which we granted certiorari is a very narrow one: “[W]hether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials.” Pet. for Cert. I. The precise issue encompassed in this question, and the only issue decided by the lower courts, is whether qualified immunity, as enunciated in Harlow, is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute. That answer is no.

Id. at 168, 169. See also Buckner v. Toro, 116 F.3d 450 (11th Cir. 1997), footnote 1.

Rose’s arguments are without merit. Since the commencement of this action, Rose has argued what “he wants” the law to be without any regard for what the true state of the law in Mississippi. He has zealously pursued Tullos without any factual or legal basis to do so. The trial court halted his assault. Tullos now asks for this Honorable Court to do the same and affirm the trial court’s ruling.

CONCLUSION

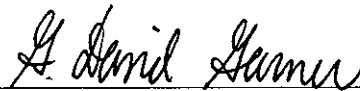
This Honorable Court should affirm the trial court’s dismissal of the lawsuit brought by Rose against Tullos because Rose cannot prove any facts that would make Tullos liable to Rose under the Litigation Accountability Act of 1988 since the Act does not create an independent cause of action upon which relief may be granted in this present action; and, further, Rose cannot

prove any facts that would make Tullos liable to Rose for the torts alleged since Tullos owed no duty to Rose in representing Jones in the underlying claim against Rose and no personal liability would attach to Tullos. Any cause of action Rose may have is against the party who instituted the underlying action and that was not Tullos.

Respectfully submitted,

EUGENE C. TULLOS, APPELLEE

By:



G. DAVID GARNER, MBN. [REDACTED]

Attorney for Appellee

G. DAVID GARNER, MBN. 9544

Attorney at Law

Post Office Box 789

Raleigh, Mississippi 39153

(601) 782-9090

CERTIFICATE OF SERVICE

The undersigned counsel of record for Defendant Eugene Tullos does hereby certify that I have this day mailed via first class mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to counsel for Plaintiff, Honorable Drew M. Martin at his usual mailing address of 1635 Lelia Drive, Ste. 201, Jackson, Mississippi 39216; and Honorable Isadore W. Patrick, Circuit Judge, at his usual mailing address of Post Office Box 351, Vicksburg, Mississippi 39181-0351.

This the 30th day of July, 2008.



G. DAVID GARNER