

**IN THE SUPREME COURT OF MISSISSIPPI**

**JULIAN ROSE, M.D.**

**APPELLANT**

**VERSUS**

**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 this Court may evaluate possible disqualification or recusal.

1. Julian Rose, M.D.;
2. Eugene Tullos, Esq.;
3. Drew M. Martin, attorney for Dr. Rose;
4. G. David Garner, attorney for Mr. Tullos.
5. Isadore W. Patrick, Circuit Court Judge

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**DREW M. MARTIN**

**RT**

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## **I. SUMMARY OF THE ARGUMENT**

The Brief of Appellee is most notable for what it does not argue. Appellee makes no argument that Dr. Rose has failed to properly plead the elements of the torts of malicious prosecution and civil abuse of process. Appellee makes no argument concerning the merits of the underlying civil lawsuit which was terminated in Dr. Rose's favor. Appellee appears to concede that if Dr. Rose can establish proof of the allegations in his Complaint, that he should be entitled to judgment.

### **A. DR. ROSE DOES NOT NEED TO PROVE A DUTY OR BREACH THEREOF TO ESTABLISH CLAIMS OF MALICIOUS PROSECUTION OR CIVIL ABUSE OF PROCESS**

In an effort to prevent Dr. Rose from advancing his lawsuit through discovery attempting to prove his claims, Appellee argues that Dr. Rose cannot maintain a cause of action for malicious prosecution or civil abuse of process because Appellee owed no duty to Dr. Rose. Appellee's argument must fail, because neither the elements of malicious prosecution nor of civil abuse of process include a duty by Appellee to Dr. Rose.

### **B. LEGAL AUTHORITIES EXPRESSLY PERMIT CLAIMS OF MALICIOUS PROSECUTION AND ABUSE OF PROCESS TO BE BROUGHT AGAINST ATTORNEYS. NO LEGAL AUTHORITY HOLDS TO THE CONTRARY.**

Appellee next argues that Dr. Rose cannot maintain a cause of action for malicious prosecution or civil abuse of process because Appellee was an attorney representing a client in the underlying civil lawsuit brought against Dr. Rose and terminated in Dr. Rose's favor. Appellee argues that a cause of action for malicious

prosecution or civil abuse of process can only lie against a client, not an attorney representing that client. Appellee's argument must fail, because his contention is not supported by any legal authority. Instead, the authorities are clear that a cause of action for malicious prosecution or civil abuse of process may lie against an attorney under certain circumstances. Dr. Rose has alleged the existence of those circumstances, and he must be permitted to pursue his claims in court.

**C. THE LITIGATION ACCOUNTABILITY ACT DOES NOT PROHIBIT AN INDEPENDENT CAUSE OF ACTION. EVEN IF IT DOES, *RANDOLPH V. LAMBERT*, 926 So. 2d 941 (Miss. App. 2006), SHOULD NOT BE APPLIED RETROACTIVELY.**

Finally, Appellee argues that the decision of the Mississippi Court of Appeals in *Randolph* interpreting the Litigation Accountability Act of 1988 to not provide for an independent cause of action must stand and must be applied retroactively. Appellee's argument must fail, because the Court's interpretation is contrary to the plain language of the statute, and because the factors for applying the decision retroactively have not been met in this case.

**II. ARGUMENT**

Appellee spends the bulk of his Brief arguing two primary points: (1) that the underlying lawsuit of which Dr. Rose complains was brought and prosecuted by Appellee's client, Ms. Jones, rather than by Appellee himself; and (2) that Appellee owed no duty to Dr. Rose. Even accepting these arguments as true (which Dr. Rose does not do), this Court must overturn the circuit court's order dismissing Dr. Rose's complaint.

**A. APPELLEE'S FOCUS ON "DUTY" IS IRRELEVANT AND IMMATERIAL TO DR. ROSE'S CLAIMS.**

Dr. Rose has not asserted at any time that Appellee owed a legal duty to Dr. Rose. Dr. Rose has no need to establish such a duty, because he has not brought a claim of negligence or breach of fiduciary duty against Appellee. Rather, Dr. Rose has asserted claims for malicious prosecution, civil abuse of process, and violation of the Litigation Accountability Act of 1988 ("the Act"). Dr. Rose has cited the elements of proof necessary to establish his claims, and he has pled facts which, if proved, would give rise to a judgment against Appellee for those claims.

The elements of malicious prosecution are

- (1) the institution or continuation of original judicial proceedings, either criminal or civil;
- (2) by, or at the insistence of the defendants;
- (3) the termination of such proceeding in plaintiff's favor;
- (4) malice in instituting the proceedings;
- (5) want of probable cause for the proceedings; and
- (6) the suffering of damages as a result of the action or prosecution complained of.

*Junior Food Stores, Inc. v. Rice*, 671 So.2d 67, 73 (Miss. 1996).

The elements of civil abuse of process are "(1) that the defendant made an illegal and improper perverted use of the process, a use neither warranted nor authorized by the process; (2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of process; and (3) that damage resulted to the plaintiff from the irregularity." *Moon v. Condere Corp.*, 690 So. 2d at 1197 (Miss. 1997) (citations and internal quotation marks omitted).



Neither tort includes the element of a duty owed by Appellee to Dr. Rose, nor the breach of a duty. Dr. Rose does not seek to prove the existence of a duty, nor the breach of a duty. Dr. Rose is not pursuing a cause of action against Appellee that requires proof of the existence of a duty or the breach of a duty. Accordingly, any focus on duties owed in this case is irrelevant. The lack of a duty does not support the dismissal of Dr. Rose's claims. The order of dismissal should be reversed.

**1. *Rousel* is inapplicable to Dr. Rose's case because it does not involve claims of malicious prosecution or civil abuse of process brought against an attorney-defendant.**

Explaining that Mississippi law does not recognize a legal duty by an attorney against an adverse party, Appellee cites two cases, neither of which involves a malicious prosecution or civil abuse of process lawsuit against an attorney-defendant. In *Rousel*, an attorney was sued for the alleged tort of "the use of falsehood to persuade the court to decide against (a party)". *Roussel v. Robbins*, 688 So.2d 714, 725 (Miss. 1996). The plaintiff alleged that the attorney-defendant had caused a fraudulent pleading to have been filed against him in an underlying suit. *Id.* The attorney-defendant defended the suit based on his lack of duty to an adverse party. *Id.* The only claim of malicious prosecution was brought by the attorney-defendant in the form of a counterclaim. *Id.*

This Court upheld a summary judgment granted in favor of the attorney-defendant, in large part because the alleged tort did not exist. *Roussel*, 688 So. 2d at 726. The Court's statement that an attorney has no duty to an opposing party was made in the context of evaluating the plaintiff's unrecognized tort against the attorney-defendant.

While true, neither the statement nor the decision is applicable to Dr. Rose's claims of malicious prosecution and civil abuse of process against Appellee.

**2. *Thelma James* is inapplicable to Dr. Rose's case because it does not involve claims of malicious prosecution or civil abuse of process brought against an attorney-defendant.**

Similarly, the *Thelma James* decision did not involve a claim of malicious prosecution or civil abuse of process against an attorney-defendant. *See James v. Chase Manhattan Bank*, 173 F. Supp. 2d 544 (N.D. Miss. 2001). Instead, the plaintiff alleged that the attorney-defendant's services had been used in an underlying suit to "further effectuate [the] wrongful actions and conduct the eviction." *James*, 173 F. Supp. 2d at 548. It was in this context that the court held that the attorney-defendant "as counsel for Chase Manhattan, owed no duty to the plaintiff, the adverse party. Consequently, neither a breach of fiduciary duty, nor a negligence claim can be maintained against him." *James*, 173 F. Supp. 2d at 551.

Neither the *Roussel* nor the *Thelma James* case suggest that Dr. Rose must establish a duty on the part of Appellee in order to recover against him for malicious prosecution or civil abuse of process. Rather, the *James* case itself explains why Dr. Rose's case is different, and why it must be permitted to go forward:

[plaintiff's] allegations against [attorney-defendant] might be construed to be something akin to malicious prosecution. One of the elements of malicious prosecution in Mississippi, however, is the requirement that the proceeding terminate in the plaintiff's favor. *Roussel*, 688 So.2d at 721; *Benjamin v. Hooper Electronic Supply Co.*, 568 So.2d 1182, 1188 (Miss.1990). Thus, even assuming such a claim could be brought against [attorney-defendant], or against Chase and imputed to [attorney-defendant],

it would invariably fail on these facts because the eviction proceeding did not terminate in the plaintiff's favor.

*James*, 173 F. Supp. 2d at 552.

The underlying proceeding terminated in Dr. Rose's favor. Dr. Rose has properly pled causes of action against Appellee for malicious prosecution and civil abuse of process. The circuit court's order of dismissal must be reversed.

**B. APPELLEE CITES NO AUTHORITY SUPPORTING HIS CONTENTION THAT CLAIMS FOR MALICIOUS PROSECUTION AND CIVIL ABUSE OF PROCESS CANNOT LIE AGAINST AN ATTORNEY.**

Dr. Rose seeks a judgment finding Appellee liable for his actions in initiating and prosecuting a civil lawsuit against Dr. Rose with malice and without probable cause. Appellee seeks to avoid liability by shifting blame for the lawsuit to his client, Ms. Jones. Appellee has ignored authorities which clearly support Dr. Rose's claims as to Appellee. In his own brief, Appellee cites to the Restatement (Second) of Torts:

**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 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 his chances.

Brief of the Appellee, pp. 7-8, quoting *James v. Chase Manhattan Bank*, 173 F. Supp. 2d 544, 551 (N.D. Miss. 2001) (quoting Restatement (Second) of Torts § 674, cmt. d) (emphasis added by Appellee).

The Restatement position is consistent with the relief sought by Dr. Rose and with the allegations of Dr. Rose. Dr. Rose has pled that Appellee had no probable cause for his action, that he did not act primarily for the purpose of aiding his client in obtaining proper adjudication, and that he was (or during the proceedings became) aware that his client had no chance of success.

1. **The authorities cited by Appellee permit attorneys to be held liable for the torts of malicious prosecution and civil abuse of process.**

Even the portion of comment d to § 674 of the Restatement (Second) quoted by Appellee supports reversing the order of dismissal which Dr. Rose has appealed. The portion of comment d immediately following the portion quoted by Appellee further clarifies the circumstances under which an attorney may be held liable for his actions in initiating or prosecuting a civil suit:

**If, however, the attorney acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person.**

There is one situation that sometimes arises in civil proceedings but does not occur in criminal proceedings. An attorney who initiates civil proceedings on a contingent-fee basis with his client is not for that reason to be charged with an improper motive or purpose, since the contingent fee is a legitimate arrangement and the interest of the attorney in receiving it is merely the ordinary interest of a professional man in being paid for his services.

But by obtaining the authority of the client to bring the action he procures its initiation; and **if he does so without probable cause and for an improper purpose other than the fee, he is subject to liability** under the rule stated in this Section. **An attorney may also be subject to liability if he takes an active part in**

**continuing a civil proceeding properly begun, for an improper purpose and without probable cause.**

Restatement (Second) of Torts § 674 cmt. d (emphasis added).

The Restatement position is consistent with responsibilities recognized by this Court. This Court has criticized attorneys for filing lawsuits without knowledge of basic core information and disclosures. *See Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004). Attorneys should learn such information prior to filing suit. *See id.* The *Mangialardi* decision makes clear that a good faith investigation of a client's potential lawsuit is necessary to establish probable cause for the merits of a client's case.

The Restatement position confirms that an attorney who files suit without probable cause and with an improper purpose may be held liable just as any other person. The causes of action of malicious prosecution and civil abuse of process are not limited to only clients. Attorneys are not insulated from such lawsuits under the circumstances discussed in the Restatement. As with any defendant, Appellee may defend the action with evidence of probable cause, good faith, and proper purpose. Such potential defenses, however, do not support a dismissal, especially at this stage. Dr. Rose has alleged facts which, if proven, support his claims for malicious prosecution and civil abuse of process. The circuit court's order of dismissal must be reversed.

**C. THE CIRCUIT COURT ORDER (AND APPELLEE'S CURRENT ARGUMENTS) GRANT ALL ATTORNEYS IMMUNITY FROM CLAIMS OF MALICIOUS PROSECUTION AND CIVIL ABUSE OF PROCESS, EVEN WHERE A PLAINTIFF PROVIDES PROOF AS TO EVERY ELEMENT.**

Appellee states in his Brief that “[f]or 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 [Appellee], and the trial court certainly did not grant any immunity, qualified or otherwise, to [Appellee]. Immunity implies that there has been some wrongdoing and that without said immunity there would be liability. Rose clearly misses the point.” Brief of Appellee, p. 8.

Dr. Rose respectfully disagrees with Appellee’s characterization. Dr. Rose agrees that neither he, nor Appellee, nor the circuit court ever used any form of the word “immunity” in the circuit court proceedings that ended with the dismissal of Dr. Rose’s claims. However, the substance of Appellee’s arguments and of the circuit court’s order is to grant immunity to **all** attorneys for **all** claims of malicious prosecution and civil abuse of process.

Neither Appellee nor the circuit court has asserted that Dr. Rose has failed to plead an essential element of the tort. Rather, Appellee asserts repeatedly that “[i]f Rose has a claim for malicious prosecution and abuse of process ... then at best his claims are properly brought against Jones, who instituted the underlying action, and not Tullos, the attorney who represented her.” Brief of Appellee, p. 8. *See also* Brief of Appellant, pp. 8-9, quoting from the circuit court order of dismissal (holding that Mississippi law does not permit claims of malicious prosecution or civil abuse of process against an attorney, because an attorney is merely “the vehicle used to institute said lawsuit in [the client’s name].” By any name, these statements insulate attorneys from ever being held liable for claims of malicious prosecution or civil abuse of process. By any name, such insulation is an argument for immunity.

1.     **The United States Supreme Court has found that attorneys have never enjoyed liability from the torts of malicious prosecution and civil abuse of process.**

Despite Appellee's characterization of his position as something other than immunity, he attempts to distinguish the applicability of the statements of the United States Supreme Court by quoting the narrow holding in *Wyatt*. See *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992). Dr. Rose acknowledges the narrow holding of *Wyatt*.

Dr. Rose's Brief explained the relevance of the *Wyatt* decision to this case. The relevance is not the holding *per se*; it is the detailed explanation of how the Court arrived at that holding. In an exhaustive review of the common law of the torts of malicious prosecution and civil abuse of process, the Court found that private attorneys had never been granted immunity from such suits, but instead had been subject to such suits in the same manner as other individuals. Brief of Appellant, pp. 19-21. Referring to the common law of malicious prosecution and civil abuse of process, the Court found that "[a]t common law the action lay because the essence of the wrong was an injury caused by a suit or prosecution commenced without probable cause or with knowledge that it was baseless." *Wyatt*, 504 U.S. at 172-73 (concur, Kennedy and Scalia). A defense to such a suit is that the defendant acted with subjective good faith. *Id.* at 173. Proof of subjective good faith would preclude the plaintiff from establishing an essential element of the torts and would result in an end result of dismissal. *Id.* Proof of the defendant's good faith or lack thereof hinges in large part on a defendant's belief, which "was almost always [a question] for a jury." *Id.*

Here, Dr. Rose has alleged that he has been wronged by the initiation and prosecution of a civil lawsuit by Appellee, without probable cause or with knowledge that it was baseless. Appellee argues to this Court that any such wrong may only be redressed through the torts of malicious prosecution and civil abuse of process in a suit by Dr. Rose against Appellee's former client, Ms. Jones, but not against Appellee himself. Appellee would have this Court adopt a rule of law immunizing attorneys from such suits. Such a rule would be unprecedented in the history of the jurisprudence of the United States, as is apparent not only from the caselaw cited in the Brief of Appellant (*see, e.g.*, p. 15, n.3), but also in the Restatement (Second) cited by Appellee, and also from the survey of the caselaw conducted by the United States Supreme Court in *Wyatt*. Dr. Rose requests that this Court reject such a rule, and that the Court reverse the circuit court order dismissing this case.

**D. THIS COURT MAY CONSIDER ALL ARGUMENTS THAT HAVE BEEN RAISED BY APPELLANT ON THIS APPEAL.**

Appellee's arguments concerning the Litigation Accountability Act of 1988 ("the Act") were addressed in the Brief of Appellant and require no additional argument.

However, Dr. Rose respectfully disagrees that this Court may not consider Appellant's arguments concerning the legislative intent of the Act. Dr. Rose argues that the express language of the statute does not limit its remedies to post-judgment motion practice—an issue that was before the circuit court and that is properly before this Court. Interpreting the Act with such limitations imputes the Legislature with an intent to debate and pass state law that is duplicative of existing state law; that is, Rule 11 of the Mississippi Rules of Civil Procedure. This Court may take judicial notice of this fact,



and it may certainly consider it in determining the proper interpretation of the limits and remedies afforded by the Act.

### **CONCLUSION**

Dr. Rose was a defendant in an underlying suit initiated and prosecuted by Appellee and his client. That underlying suit was terminated in favor of Dr. Rose after Dr. Rose brought to the attention of all parties and attorneys medical records of the client of Appellee which proved conclusively that the illness for which the client blamed Dr. Rose and others existed prior to her ever having received medical care from Dr. Rose or any other Defendant. The medical records of Appellee's client provided conclusive proof that the lawsuit being prosecuted against Dr. Rose had no hope of success.

Despite this evidence and express notification thereof, Appellee caused the initiation and prosecution of the civil suit to continue. The civil suit was eventually terminated in Dr. Rose's favor. Dr. Rose has alleged, and seeks to prove, that Appellee acted with malice in instituting the civil suit and that no probable cause existed for the initiation or prosecution of the civil suit. Dr. Rose has further alleged that Appellee made an improper or illegal use of civil process by continuing to prosecute the civil suit after learning that it had no hope of success, and that Appellee had an ulterior motive or purpose in exercising the improper use of civil process. Dr. Rose has further alleged that he has suffered damages as a result of Appellee's actions.

Dr. Rose has properly pled causes of action for malicious prosecution and civil abuse of process. Dr. Rose has properly alleged facts which, if proven, would support a judgment in his favor as to both torts.

Appellee has at no point disputed that Dr. Rose has properly pled his claims. Instead, Appellee argues that no such claims may lie against a private attorney. The reasons for Appellee's position appear to be twofold: (1) that Appellee owed no duty to Dr. Rose, and (2) that the responsibility for the initiation and prosecution civil lawsuits lies only with clients. The circuit court appears to have agreed with at least the second proposition of Appellee, comparing the attorney's role in initiating and prosecuting a lawsuit to that of a vehicle for the client.

Dr. Rose respectfully disagrees with Appellee's arguments and with the circuit court's conclusion. Any duty or duties Appellee owed were to his client, his profession, and to the court. Dr. Rose is not pursuing claims based on any possible breaches of those duties. Dr. Rose is pursuing claims for malicious prosecution and civil abuse of process, and for violating the Litigation Accountability Act. Dr. Rose has properly pled facts in support of each of those claims. As noted by Justice Kennedy, Dr. Rose should not be deprived of the opportunity to make his case. *See Wyatt*, 504 U.S. at 172-73 (concur, Kennedy and Scalia). This Court must not adopt a rule of law that would deny Dr. Rose or others that opportunity.

Dr. Rose asks this Court to reverse the circuit court's order of dismissal and permit him the opportunity to prove his case.

Respectfully submitted, this the 17<sup>th</sup> day of September, 2008.



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading has been served upon the following counsel, addressed as follows:

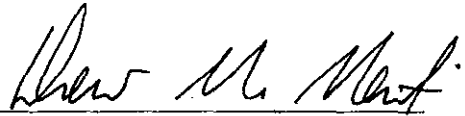
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THIS, the 17th day of September, 2008.

  
DREW M. MARTIN