IN THE SUPREME COURT OF MISSISSIPPI

JULIAN ROSE, M.D. — APPELLANT

VERSUS — NO. 2007-CA-01028

EUGENE TULLOS — APPELLEE

BRIEF OF APPELLANT JULIAN ROSE, M.D., IN SUPPORT OF HIS APPEAL FROM AN ORDER BY THE CIRCUIT COURT OF SMITH COUNTY, MISSISSIPPI, GRANTING DEFENDANT'S 12(B)(6) MOTION TO DISMISS

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ORAL ARGUMENT REQUESTED

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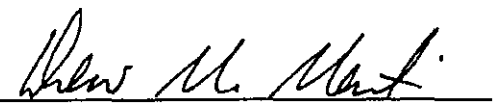
CERTIFICATE OF INTERESTED PERSONS

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.**



DREW M. MARTIN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules—Brief Pages

Caselaw

STATEMENT OF THE ISSUES

1. Is an attorney **immune** from civil liability for malicious prosecution where the attorney filed a civil action which was eventually dismissed, and where the attorney filed the action with malice, with knowledge that the action had no hope of success, and where such actions were the proximate cause of damages to the aggrieved party against whom the suit was filed?

2. Is an attorney **immune** from civil liability for abuse of process where the attorney made an improper or illegal use of civil process with an ulterior motive or purpose, as by prosecuting a civil action and pursuing judgment or a money settlement of an action of which the attorney had knowledge that the action had no hope of success, where such actions were the proximate cause of damages to the aggrieved party against whom the suit was prosecuted?

3. Does the Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1, *et seq.*, permit an independent cause of action, despite the holding of the Mississippi Court of Appeals in *Randolph v. Lambert*, 926 So. 2d 941 (Miss. App. 2006)?

4. If the Litigation Accountability Act does not permit an independent cause of action, can the holding in *Randolph* be applied retroactively to dismiss an independent claim under the Litigation Accountability Act stated in a complaint filed subsequent to the *Randolph* decision?

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEEDINGS

Julian Rose, M.D. ("Dr. Rose") filed suit against Euguene Tullos, Esq. ("Mr. Tullos"), seeking damages that Dr. Rose asserts were caused by actions taken by Mr. Tullos. *See* First Amended Complaint at C.P. 53-58; R.E. 2-7. Dr. Rose asserts that Mr. Tullos, through his client Alma Jones ("Ms. Jones"), caused a lawsuit to be filed against Dr. Rose. *See* First Amended Complaint ¶ 4 at C.P. 53; R.E. 2. Dr. Rose further asserts that Mr. Tullos caused the continuation and prosecution of that lawsuit, and sought money damages in the form of a judgment or settlement, while knowing of facts that precluded any recovery by Ms. Jones against Dr. Rose. *See* First Amended Complaint ¶ 14 at C.P. 55; R.E. 4. Dr. Rose's First Amended Complaint stated claims for malicious prosecution, civil abuse of process, and for violations of the Litigation Accountability Act.[1] *See* First Amended Complaint ¶¶ 12-19 at C.P. 55-56; R.E. 4-5.

Mr. Tullos filed a Motion to Dismiss for failure to state a claim upon which relief may be granted in circuit court, pursuant to rule 12(b)(6) of the Mississippi Rules of Civil Procedure. *See* Defendant's Motion to Dismiss at C.P. 6-7. The circuit court granted the motion. *See* Order at C.P. 83-85; R.E. 18-20. In pertinent part, the circuit court held that:

> 1) Mississippi law does not permit an attorney to be held liable for malicious prosecution because the attorney is merely "the vehicle used to institute said lawsuit in [the client's name]. The right to sue was always that of [the client], and not her attorney" (*See* Order ¶ 6 at C.P. 84; R.E. 19);

2) Mississippi law does not permit an attorney to be held liable for civil abuse of process because the attorney is merely "the vehicle used to institute said lawsuit in [the client's name]. The right to sue was always that of [the client], and not her attorney" (*See* Order ¶ 6 at C.P. 84; R.E. 19); and

3) The Litigation Accountability Act "does not give rise to an independent action separate from the original action filed by the offending attorney." In order to bring claim under the Litigation Accountability Act, the claim must be brought as part of the underlying suit about which the claim complains. *See* Order ¶ 7 at C.P. 84; R.E. 19.

Dr. Rose appeals from the order of the circuit court dismissing his complaint in his entirety.

B. FACTUAL BACKGROUND AND STANDARD OF REVIEW

This appeal is taken from an order of dismissal pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure for the failure of the Appellant to state a cause of action. *See* Order at C.P. 83-85; R.E. 18-20. "When reviewing a trial court's grant or denial of a motion to dismiss or a motion for summary judgment, this Court applies a *de novo* standard of review. 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 doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Burleson v. Lathem*, 968 So. 2d 930, 932 (Miss. 2007) (internal citations and quotation marks omitted).

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[1] The Amended Complaint also stated additional causes of action. Dr. Rose voluntarily dismissed those additional causes of action voluntarily in his Response to the Motion to

Accordingly, the only relevant facts to this appeal are the allegations which appear in the First Amended Complaint filed by Dr. Rose, which must be taken as true for purposes of this appeal. *See* First Amended Complaint at C.P. 53-58; R.E. 2-7. This appeal should be granted if there is any possibility that Dr. Rose will be able to prove any set of facts in support of his claim.

Consistent with notice pleading requirements, Dr. Rose has pled facts which, if proven, would support his claims of malicious prosecution, civil abuse of process, and violation of the Litigation Accountability Act.[2] The relevant facts from the First Amended Complaint are as follows:

1) Mr. Tullos served as the attorney for Ms. Jones in the lawsuit *Alma Jones v. Mississippi Baptist Center, Julian Rose, MD., Olympus American, Inc., ABC, DEF, GHI*, Cause No. 2002-589, in the Circuit Court of Smith County, Mississippi (the "underlying suit", or "*Jones v. Rose*"). *See* First Amended Complaint ¶ 4 at C.P. 53; R.E. 2.

2) The underlying lawsuit alleged that Alma Jones contracted pseudomonas and sustained serious injury due to, *inter alia*, the negligent use of a bronchoscope by Dr. Rose on Ms. Jones. The underlying lawsuit alleged, *inter alia*, that Dr. Rose was guilty of negligence and professional malpractice in his treatment of Ms. Jones. *See* First Amended Complaint ¶ 5 at C.P. 54; R.E. 3.

Dismiss filed in the circuit court.

[2] The court also reviews questions of law with a de novo standard. *Nelson v. Baptist Memorial Hospital – North Mississippi, Inc.*, 972 So. 2d 667, 670 (Miss. App. 2007).

3) On September 28, 2004, the Smith County Circuit Court entered an Order granting Defendants' Motion for Summary Judgment and dismissing the underlying lawsuit. *See* First Amended Complaint ¶ 11 at C.P. 55; R.E. 4.

4) When Mr. Tullos caused the complaint in the underlying lawsuit to be filed, he knew or should have known that no condition or injury suffered by Jones was caused or could have been caused by any act or omission of Dr. Rose. *See* First Amended Complaint ¶¶ 14, 16 at C.P. 55-56; R.E. 4-5.

5) During the underlying lawsuit, Dr. Rose caused information to be sent to Mr. Tullos proving that no injury or condition sustained by Jones was caused or could have been caused by any act or omission committed by Dr. Rose. After receiving this information, Mr. Tullos continued to prosecute the case against Dr. Rose. *See* First Amended Complaint ¶ 7 at C.P. 54; R.E. 3.

6) Mr. Tullos' prosecution of the underlying lawsuit against Dr. Rose was frivolous, without basis in fact, willful, and malicious. *See* First Amended Complaint ¶ 8 at C.P. 54; R.E. 3.

7) Tullos' prosecution of the underlying lawsuit against Dr. Rose caused Dr. Rose to suffer damages, including the cost of defending the lawsuit (including attorney's fees, court costs, and other expenses), as well as damage to Dr. Rose's personal and professional reputation, mental anguish, anxiety, and discomfort. *See* First Amended Complaint ¶ 9 at C.P. 54; R.E. 3.

8) In his First Amended Complaint, Rose states the following causes of action: Violation of the Litigation Accountability Act of 1988; Malicious

Prosecution; and Abuse of Process. *See* First Amended Complaint ¶¶ 12-19 at C.P. 55-56; R.E. 4-5.

II. SUMMARY OF THE ARGUMENT

A. DR. ROSE HAS PROPERLY PLED FACTS WHICH, IF PROVED, SUPPORT HIS CLAIMS FOR MALICIOUS PROSECUTION AND CIVIL ABUSE OF PROCESS. MR TULLOS IS NOT ENTITLED TO IMMUNITY FROM SUIT ON THE BASIS OF HIS STATUS AS AN ATTORNEY OR FOR ANY OTHER REASON.

Dr. Rose's claims for malicious prosecution and civil abuse of process present this Court with a matter of first impression. No Mississippi cases appear to address the issue for or against Appellant's position.

The issue before the Court is simple: may an attorney be held liable under theories of malicious prosecution or civil abuse of process, where the attorney files a civil lawsuit and pursues judgment or a money settlement of that lawsuit despite having knowledge of facts which preclude any chance of recovery for his client? Phrased another way, are attorneys entitled to absolute immunity from suit for claims of malicious prosecution and abuse of process?

Though the issue is novel to this Court, a clear and substantial majority position across the country holds that an attorney may be held liable for malicious prosecution or abuse of process for instituting civil proceedings which he knows are without merit, or for causing civil proceedings to continue after learning that his client's claims are without merit. Appellant has found no jurisdiction that precludes suits against attorneys for malicious prosecution or abuse of process.

Holding otherwise grants to an attorney absolute immunity even where the attorney knows of, or learns of, facts which preclude his client from recovering, but continues to take actions designed to gain a judgment or money settlement in his client's favor. The order of the circuit court dismissing Dr. Rose's lawsuit recognizes such immunity.

Appellant has found no jurisdiction in the country recognizing such immunity for private attorneys. If this Court upholds the circuit court order dismissing Appellant's lawsuit, then the State of Mississippi will be the first jurisdiction in the nation to grant private attorneys immunity from suit for malicious prosecution and abuse of process.

B. THE MISSISSIPPI COURT OF APPEALS' DECISION IN *RANDOLPH V. LAMBERT*, SHOULD BE REVERSED AS AN OVERLY RESTRICTIVE INTERPRETATION OF THE LITIGATION ACCOUNTABILITY ACT.

The Mississippi Court of Appeals, in a case of first impression, held that the Litigation Accountability Act, Mississippi Code Annotated § 11-55-1, *et seq.*, does not create an independent cause of action. *See Randolph v. Lambert*, 926 So. 2d 941 (Miss. 2006). Appellant respectfully requests that this Court review the Act for the same issue.

No language in the Act so restricts the remedies expressly granted in the Act. The plain language of the statute read as a whole counsels against restricting the Act to motion practice application. Had the legislature intended for claims under the Litigation Accountability Act to be limited to motion practice, there would have been no need to pass the Act, as it would merely grant aggrieved litigants remedies already existing under Rule 11 of the Mississippi Rules of Civil Procedure.

C. THE MISSISSIPPI COURT OF APPEALS' DECISION IN *RANDOLPH V. LAMBERT* SHOULD NOT BE APPLIED RETROACTIVELY TO PRECLUDE DR. ROSE'S CLAIMS UNDER THE LITIGATION ACCOUNTABILITY ACT.

Randolph v. Lambert was decided on April 18, 2006. Dr. Rose first filed the present action in August, 2005. Because the opinion was issued subsequent to the filing of Dr. Rose's lawsuit, it should not be applied retroactively to serve as a basis of dismissing his claims. No prior decisions indicated that the Act would be restricted to prevent filing independent actions seeking the remedies granted by the Act. The purpose of the Act is expressly to create remedies for parties who have been exposed to frivolous actions. Applying *Randolph* retroactively will prejudice Dr. Rose by foreclosing the remedies offered by the Act. As a result, the Act should not be applied retroactively.

III. ARGUMENT

A. DR. ROSE HAS PROPERLY PLED TORT CLAIMS AGAINST MR. TULLOS FOR MALICIOUS PROSECUTION AND CIVIL ABUSE OF PROCESS. ACCORDINGLY, THE CASE CANNOT BE DISMISSED.

This appeal presents the Court with a matter of first impression—whether an attorney may be held liable for the torts of malicious prosecution or civil abuse of process. When faced with an issue of first impression, this Court has often looked to other jurisdictions in determining the matter. *Brendle v. City of Houston*, 759 So. 2d 1274, 1278 (Miss. App. 2000). The overwhelming majority of jurisdictions to have considered the issue have determined that an attorney may be held liable for malicious prosecution and civil abuse of process just as any other private individual may, so long as

the plaintiff proves the elements of the torts.[3] Appellant has not located any jurisdiction holding to the contrary—precluding suits for malicious prosecution or abuse of process against attorneys.

Mississippi law distinguishes between malicious prosecution and civil abuse of process, despite some overlap of the torts. "An action for abuse of process differs from an action for malicious prosecution in that the latter is concerned with maliciously causing process to issue, while the former is concerned with the improper use of process after it has been issued." *Moon* v. *Condere Corp.*, 690 So. 2d 1191, 1197 (Miss. 1997) (citations and internal quotation marks omitted).

1. Dr. Rose has properly pled his claim for malicious prosecution.

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[3] *See, e.g., Ferraris v. Levy*, 223 Cal.App.2d 408, 412 (Cal. App. 1963) ("the mere fact that the defendant's are the executor and attorney for the estate . . . does not, as a matter of law, preclude their liability from malicious prosecution"); *Robinson v. Fimbel Door Co.*, 306 A.2d 768, 771 (N.H. 1973) ("In some cases, the attorney acting on behalf of the private prosecutor may be liable as well"); *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1372 (10th Cir. 1991) *cert den* (US), 1128 S Ct 1160, 117 L Ed 2d 408 ("in prosecuting civil proceedings, if an attorney acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose . . . he is subject to the same liability as any other person"); *Deitrich Industries, Inc. v. Abrams*, 455 A.2d 119, 123 (Pa. Super. 1982) ("An attorney who knowingly prosecutes a groundless action to accomplish a malicious purpose may be held accountable in an action for malicious use of process"); *Stafford v Muster*, 582 SW 2d 670 (Mo. 1979); *Walker v Windom*, 612 So. 2d 1167 (Ala. 1992), *cert den*, 113 S Ct 3039, 125 L Ed 2d 726; *Prokop v. Cannon*, 583 NW 2d 51 (Neb. 1998); *Walker v Kyser*, 154 SE 2d 457 (Ga. 1967) (by implication); *Little v Sowers*, 204 P.2d 605 (Kan. 1949); *Lambert v Breton*, 144 A. 864 (Me. 1929); *Hoppe v Klapperich*, 28 NW 2d 780 (Minn. 1937); *Voytko v Ramada Inn of Atlantic City*, 445 F. Supp 315 (D.C. NJ 1978); *Board of Education v Farmingdale Classroom Teachers Assoc.*, 343 NE 2d 278 (N.Y. 1975); *Sachs v Levy*, 216 F. Supp 44 (E.D. Pa 1963); *File v Lee*, 521 P.2d 964 (1974).

To prevail on a claim of malicious prosecution under Mississippi law, a plaintiff must prove six elements by a preponderance of the evidence. 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).

In his First Amended Complaint, Dr. Rose alleged (1) that the underlying suit of *Jones v. Rose* was instituted; (2) by Mr. Tullos; (3) that *Jones v. Rose* was terminated in Dr. Rose's favor; (4) that *Jones v. Rose* was instituted by Mr. Tullos with malice; (5) that a want of probable cause existed for the proceedings; and (6) that Dr. Rose suffered damages. *See* First Amended Complaint ¶¶ 4-11 at C.P. 53-55; R.E. 2-4.

2. Dr. Rose has properly pled his claim for civil abuse of process.

To prevail on a claim of civil abuse of process under Mississippi law, the plaintiff must prove "(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).

In his First Amended Complaint, Dr. Rose alleged (1) that Mr. Tullos made an illegal or improper use of civil process by improperly causing *Jones v. Rose* to continue after learning that the case had no hope of success; (2) that Mr. Tullos had an ulterior motive or purpose in exercising the improper use of process, that being to achieve a money settlement and earn a fee despite his knowledge that the case had no hope of success; and (3) that Dr. Rose suffered damages as a result. *See* First Amended Complaint ¶¶ 13,14,19 at C.P. 55-56; R.E. 4-5.

3. The order of dismissal makes no reference to allegations raised by Dr. Rose.

Dr. Rose has properly pled claims of malicious prosecution and civil abuse of process. The circuit court's order of dismissal says nothing to the contrary. Accordingly, the order of dismissal should be reversed, and Dr. Rose should be permitted to prosecute his claims.

B. NO JURISDICTION GRANTS ATTORNEYS ABSOLUTE IMMUNITY FROM CLAIMS FOR MALICIOUS PROSECUTION OR CIVIL ABUSE OF PROCESS.

As previously noted, the circuit court's order of dismissal does not state that Dr. Rose failed to properly plead his claims. Rather, the dismissal found that as an attorney, Mr. Tullos was immune from claims for malicious prosecution and civil abuse of process. The circuit court found that Mississippi law does not permit an attorney to be held liable for malicious prosecution because the attorney is merely "the vehicle used to institute

said lawsuit in [the client's name]. The right to sue was always that of [the client], and not her attorney". *See* Order, ¶ 6 at C.P. 84; R.E. 19.

1. Other jurisdictions do not grant to attorneys immunity from suits for malicious prosecution or civil abuse of process

However, Appellant has been unable to locate authority granting a private attorney absolute immunity from suits for malicious prosecution or civil abuse of process. Instead, Appellant has located a number of authorities which have come to the opposite conclusion, expressly holding that attorneys do not enjoy absolute immunity from such suits: "We know of no rule which gives lawyers absolute immunity from liability for malicious prosecution." *Reeves v. Agee*, 769 P.2d 745, 755 (Ok. 1989); *see also Stafford v. Muster*, 582 S.W.2d 670, 679 (Mo. 1979) ("the law in Missouri has long been that attorneys have no immunity from suits for malicious prosecution"). *See also* footnote 3, *supra*.

2. The United States Supreme Court has found that private attorneys have never been granted immunity from civil suits for malicious prosecution and abuse of process.

The reasons were well explained by the United States Supreme Court in a case where the Court was evaluating claims of immunity raised by private attorneys and others who were defendants in a suit brought pursuant to 42 U.S.C. § 1983. *See Wyatt v. Cole*, 504 U.S. 158, 164 (1992). In *Wyatt*, a Mississippi resident (Cole) retained an attorney (Robbins) to file suit under the Mississippi replevin statutes against another Mississippi resident (Wyatt). Eventually, a state court order issued to Cole to return to Wyatt property he had seized pursuant to the replevin suit. When Cole refused to return the seized

property, Wyatt brought suit in Federal District Court under 42 U.S.C. § 1983 against various defendants, including attorney Robbins. *See Wyatt*, 504 U.S. at 159-60.

Robbins asserted a defense of qualified immunity. *Id.* at 160. The District Court found for Robbins, and the Fifth Circuit affirmed. *Id.* The issue before the Supreme Court was whether private parties, including attorneys representing those private parties, were entitled in § 1983 suits to immunity similar to that afforded to public officials. *Id.* at 168-69. The Supreme Court reversed the lower courts and held that private parties, including attorneys representing those private parties, were not entitled to immunity from such suits. *Id.*

In making its determination, the Court looked to the rationales for granting qualified immunity to public officials:

> we have accorded certain government officials either absolute or qualified immunity from suit if the tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine. If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871-§ 1 of which is codified at 42 U.S.C. § 1983-we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law.

Wyatt, 504 U.S. at 163-64 (internal quotation marks and citations omitted).

The Court continued:

> In determining whether there was an immunity at common law that Congress intended to incorporate in the Civil Rights Act, we look to the most closely analogous torts-in this case, ***malicious prosecution and abuse of process.*** At common law, these torts provided causes of action against private defendants for unjustified harm arising out of the misuse of governmental processes.

Wyatt, 504 U.S. at 164 (internal quotation marks and citations omitted) (emphasis added).

In reviewing the common law torts of malicious prosecution and abuse of process, the Court found that no immunity existed for private individuals who, like Cole and his attorney Robbins, "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-65. Examining the common law further, the Court found that the most Cole and Robbins could assert would be a good faith defense—evidence on their behalf to establish that they did not act with malice. *Wyatt* at 165-66. **Private defendants, including an attorney, to a malicious prosecution or civil abuse of process suit, cannot procure dismissal on the basis of an assertion of immunity**. *Id.*

The rationales to support qualified immunity exist to "safeguard government" and "are not transferable to private parties." *Wyatt*, 504 U.S. at 168. "[U]nlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Id.*

In concurring with the majority decision, Justices Kennedy and Scalia further clarified the law with regard to malicious prosecution and abuse of process: "At 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. To cast the issue in terms of immunity, however, is to imply that a wrong was committed but that it cannot be redressed." *Wyatt*, 504 U.S. at 172-73 (concur, Kennedy and Scalia).

Justice Kennedy stated that the Court should not adopt an automatic rule of immunity in suits against private persons. *Id.* at 173. Instead, the law should permit a

plaintiff to attempt to prove the elements of the tort, including subjective bad faith on the part of the defendant. *Id.* This was especially true because the torts hinge in large part on a defendant's belief, which "was almost always [a question] for a jury." *Id.* Justice Kennedy pointed out that part of the defense would be an effort to prove that the private defendant acted with subjective good faith, and that such proof would result in the same end result—dismissal. *Id.* The difference, however, is that permission of immunity ends the case before the inquiry can even be made. **A plaintiff should not be deprived of the opportunity to make his case.** *Id.* at 174.

The rationale explained by the Supreme Court in *Wyatt* has been implicitly approved or adopted by every jurisdiction to consider the subject. The common law does not provide immunity to private defendants, including attorneys, in suits for malicious prosecution and abuse of process. Appellees here seek protection not afforded anywhere in the United States. This Court should grant this appeal and reverse the circuit court's order of dismissal. Dr. Rose should not be deprived of the opportunity to make his case.

C. THE LITIGATION ACCOUNTABILITY ACT DOES NOT LIMIT ITS REMEDIES TO POST JUDGMENT MOTIONS. THE LITIGATION ACCOUNTABILITY ACT PERMITS AGGRIEVED LITIGANTS TO FILE SUIT IN PURSUIT OF REMEDIES.

In *Randolph v. Lambert*, 926 So. 2d 941 (Miss. App. 2006), the Mississippi Court of Appeals wrongly restricted the application of the Litigation Accountability Act, and this Court should revisit the rationale therein. The plain language of the Act permits claims to brought as an independent cause of action.

The Act expressly permits certain types of awards to be issued "in any civil action commenced or appealed in any court of record in this state." Miss. Code Ann. § 11-55-5(1). Thus, the statute expressly contemplates its use as a filed lawsuit.

In *Randolph*, the Court offered three reasons to support limiting the Act: (1) the legislative intent was to provide the courts with an additional mechanism Rule 11 of the Mississippi Rules of Civil Procedure, rather than to create a cause of action; (2) language in the statute indicating that attorney's fees shall be awarded "as part of its judgment and in addition to any other costs assessed" indicated to the Court "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"; and (3) language in the statute indicating that the claim is to be brought "upon motion of any party or on [the court's] motion" indicated to the Court that claims under the Act could be brought **only** by motion and not as an independent cause of action. *Randolph*, 926 So. 2d at 944-45 (emphasis added).

None of the Court's stated reasons support its final conclusion. For all of the reasons stated by the Court, a party to litigation clearly **may** pursue remedies under the Act by motion practice as part of the previously-filed and frivolous lawsuit. Notably, however, no language in the statute **restricts** the remedies under the Act to such practice.

Instead, a reasonable reading of the statute permits a party who has been subjected to an action, claim, or defense that was without substantial justification to commence a civil action in an appropriate court in Mississippi seeking any damages caused by the frivolous action, claim, or defense. On its own merits, and consistent with the express language of the statute, such party could seek a judgment for any compensatory damages proximately caused by the frivolous action, claim, or defense. Such damages could

include, for example, lost wages, business damages, damage to reputation, or any other compensable and provable damage proximately caused by the frivolous suit. Pursuant to the Act, the party could also seek an award of reasonable attorney's fees and costs. Miss. Code Ann. § 11-55-1.

The restrictions applied to the Act by the Court of Appeals reduce the Act to a mere restatement of Rule 11. Rather than provide an additional sanctioning mechanism, the Act would simply provide the identical remedies provided by Rule 11:

> If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorney's fees.

Miss. R. Civ. P. 11(b).

Under Rule 11, without the need for a motion by the court or a party, the court could sanction a party and his attorney for filing pleadings which were frivolous or interposed for delay or harassment. Such sanctions expressly include expenses and attorney's fees. After *Randolph*, the Litigation Accountability Act does not provide any additional sanctioning mechanism to Rule 11. Rather, the Act would require a motion where none was previously needed in order to receive the same remedy already available under Rule 11.

"The primary rule of statutory construction requires this Court to determine the intent of the Legislature from the statute as a whole and from the language used therein. If possible, this Court must read the entire statute in a manner that harmonizes all of its parts consistent with its scope and object. And, we will not impute an unjust or unwise

purpose to the legislature when any other reasonable construction can save it from such imputation." *COR Developments, LLC v. College Hill Heights Homeowners, LLC*, 973 So. 2d 273, 283 (Miss. App. 2008) (internal quotation marks and citations omitted).

The *Randolph* decision unreasonably limited the Litigation Accountability Act to use only in circumstances where Rule 11 provided an identical remedy. Such a restrictive interpretation of the statute imputes to the Legislature the intent to create legislation that merely codified a remedy already available under Mississippi law. A more reasonable construction of the Act would permit the remedies afforded by the Act to be available to a party bringing an independent cause of action, separate from the original frivolous suit.

D. THE MISSISSIPPI COURT OF APPEALS HELD THAT THE LITIGATION ACCOUNTABILITY ACT DID NOT GIVE RISE TO A PRIVATE CAUSE OF ACTION AFTER DR. ROSE INSTITUTED HIS SUIT AND SHOULD NOT BE APPLIED RETROACTIVELY.

Dr. Rose filed his Complaint in this action on August 12, 2005. *See* Complaint, C.P. 4. Not until April 18, 2006, did the Mississippi Court of Appeals limit the Litigation Accountability Act by holding that its remedies were not available as an independent cause of action. *Randolph v. Lambert*, 926 So. 2d 941, 944 (Miss. App. 2006). The Court found that the statute only provided an additional sanctioning mechanism to be brought by motion as part of the same case of which the aggrieved party complained. *Id.* at 945-46.

Even if this Court does not overturn the *Randolph* decision, the ruling should not be applied retroactively to bar Dr. Rose's claims. Courts will generally not apply

decisions retroactively where the holding is one of first impression, especially where prior precedent existed on which a litigant may have relied. *See Flowers v. Dickens*, 741 F. Supp. 112, 113 (S.D. Miss. 1990) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 90, 106-07 (1971)). At the time Dr. Rose filed his original complaint, numerous cases had been prosecuted under the Act. None of those cases indicated in any way that the Act could only be brought by motion at the conclusion of a matter.

In determining whether court decision should be applied retroactively, courts also look to whether retroactive application furthers purpose and effect of the question. *Flowers*, 741 F. Supp. at 113 (citing *Chevron Oil*, 404 U.S. at 106-07). The purpose of the Litigation Accountability Act is to provide a remedy for a litigant who has been subjected to any action, claim, or defense "interposed for delay or harassment," or to "unnecessarily expanded" proceedings "by other improper conduct." Miss. Code Ann. § 11-55-5(1). The available remedies include "reasonable attorney's fees and costs against any party or attorney." *Id.* Dr. Rose seeks exactly the remedies permitted by the Act, and he alleges in his complaint actions by Mr. Tullos which, if proved, would support the imposition of those remedies.

A final consideration in determining whether to apply a court decision retroactively is whether any injustice will result from the retroactive application. *Flowers*, 741 F. Supp. at 113 (citing *Chevron Oil*, 404 U.S. at 106-07). "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Id.* If the *Randolph* decision is applied retroactively, Dr. Rose will be unable to avail himself of the remedies apparently offered by the Act.

Taken alone or together, the *Chevron* factors counsel that the *Randolph* decision should not be applied retroactively to require a dismissal of Dr. Rose's claims. Instead, he should be permitted to pursue proof of those claims at trial.

CONCLUSION

Granting this appeal will not resolve this lawsuit. Granting the appeal will permit Dr. Rose the opportunity to make his case, rather than depriving him of that opportunity. Granting the appeal will permit Dr. Rose to pursue discovery of the issues raised in his Complaint and Amended Complaint. Granting the appeal creates new law in Mississippi law that is fully consistent with every jurisdiction in the nation to have considered the issue by refusing to grant attorneys immunity from suits for malicious prosecution and abuse of process. Granting the appeal preserves Mr. Tullos's right to present any defense he may have to the claims, including evidence that he did not act frivolously, without basis in fact, willfully, or maliciously.

If this appeal is denied, and the order of dismissal from the circuit court is upheld, an attorney could with impunity file suit on behalf of a client who had no factual or legal basis supporting the client's recovery. Similarly, an attorney could file suit on behalf of a client who he believed had a factual and legal basis supporting the client's recovery, later learn with one hundred percent certainty that the facts precluded such recovery, but with impunity continue to pursue a settlement from a defendant. Consistent with the order of dismissal, an attorney would be immune from any civil liability for such actions, regardless of the damages such actions caused.

The circuit court's order effectively grants attorneys absolute immunity. Dr. Rose appeals that order, believing that justice requires that the law permit an aggrieved litigant

to hold an attorney accountable and liable for damages where that attorney causes damage to the litigant for maliciously prosecuting him, for abusing civil process, or for filing or prosecuting a civil lawsuit which violates the Litigation Accountability Act. Dr. Rose respectfully requests that this Court grant his appeal as to all issues and reverse the order of the circuit court so that he may pursue the opportunity to make his case in circuit court.

Respectfully submitted, this the 8th day of May, 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:

G. David Garner, Esq. — Via U.S. Mail
P.O. Box 789
Raleigh-MS 39 J 53

Honorable Isadore W. Patrick — Via U.S. Mail
Circuit Court Judge
P.O. Box 351
Vicksburg, Mississippi 39181-0351

THIS, the 8th day of May, 2008.

DREW M. MARTIN