

IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-CA-02088

JAY BEARDEN

Appellant

vs.

**BELLSOUTH TELECOMMUNICATIONS, INC.
D/B/A AT&T MISSISSIPPI**

Appellee

**Appeal of the Final Judgment of the Hinds County Circuit Court, Second Judicial District,
Honorable William F. Coleman, Senior Circuit Judge, in Cause No. 2006-46**

**BRIEF OF APPELLEE BELLSOUTH TELECOMMUNICATIONS, INC.
D/B/A AT&T MISSISSIPPI AND GLORIA ROBISON**

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for BellSouth Telecommunications, Inc. and Gloria Robison 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 disqualification or recusal.

1. Jay Bearden – Appellant
2. BellSouth Telecommunications, Inc. d/b/a AT&T Mississippi - Appellee
3. Gloria Robison - Interested Party
4. Kenneth W. Barton - Counsel for BellSouth Telecommunications, Inc. d/b/a AT&T Mississippi and Gloria Robison
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8. Thomas W. Prewitt - Counsel for Jay Bearden
9. Charles W. Wright - Counsel for Jay Bearden
10. Ronald E. Stutzman, Jr. - Counsel for Jay Bearden
11. Honorable William F. Coleman, Senior Circuit Judge

THIS the 7th day of July, 2009.



KENNETH W. BARTON
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AT&T MISSISSIPPI AND GLORIA ROBISON

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STATEMENT OF ISSUES

I. Should the dismissal of the underlying criminal charge against Jay Bearden for lack of jurisdiction, which bears no relationship to the merits of the charge, constitute a termination in favor of Bearden to support a malicious prosecution claim?

II. Should Gloria Robison be dismissed from these proceedings because Jay Bearden did not appeal the summary judgment granted in her favor?

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff/Appellant Jay Bearden ("Bearden") operates a business installing utility conduits. (R. 4-7.) During the installation of water pipe in Lauderdale County, Mississippi, Bearden and his employees and subcontractors repeatedly cut telephone lines belonging to Defendant/Appellee BellSouth Telecommunications, Inc. (now doing business as AT&T Mississippi, but referred to herein as "BellSouth").¹ (R. 55-89.) Once the telephone lines had been cut at least 11 times and Bearden had ignored repeated warnings to stop, BellSouth employee Gloria Robison ("Robison") reported his conduct to the Lauderdale County Sheriff's Department. (R. 42-50, 53-89.) Bearden was arrested and eventually charged with interfering with a licensed telecommunications system in violation of Miss. Code Ann. § 97-7-31. (R. 90-91.)

Through a series of legal maneuvers, and without any notice to BellSouth or Robison, Bearden requested the charge be reduced from a felony to a misdemeanor and transferred to Lauderdale County Justice Court. (R. 99-103.) Once in Justice Court (where he asked to go), and again without any notice to BellSouth or Robison, Bearden then convinced that court that it had no jurisdiction. (R. 104-06.) Then he filed the present lawsuit against BellSouth and Robison alleging malicious prosecution. (R. 4-7.)

BellSouth and Robison moved for summary judgment on the basis that the dismissal of the criminal charge for lack of jurisdiction does not constitute a termination in favor of Bearden - a necessary element of a malicious prosecution claim. (R. 30-106.) On November 14, 2008,

¹ Bearden's brief denies that he personally cut any telephone lines (App. Br. 2-3); however, he cites only his unsworn Response to BellSouth's Motion for Summary Judgment for that contention.

the trial court granted BellSouth and Robison's motion and entered a Final Judgment in favor of BellSouth and Robison. (R. 138-43.) Specifically, the Trial Court held:

Both law and public policy require that in order to maintain a civil action for malicious prosecution, the dismissal of the criminal charge must bear some relationship to the merits. Here, there is none. The Court hereby adopts the authority cited by Defendants and holds that the dismissal for lack of jurisdiction does not constitute a termination of the criminal charge in favor of Bearden. For this reason, Bearden's malicious prosecution claim fails as a matter of law.

(R. 142.)

Although Bearden filed a timely notice of appeal on December 12, 2008 as to BellSouth, he did not appeal the summary judgment entered in favor of Robison. (R. 144.)

B. Statement of Facts Relevant to Issues Presented for Review.

1. Bearden Repeatedly Cut BellSouth's Telephone Lines and Was Properly Arrested and Indicted for His Conduct.

The allegations in Bearden's Complaint are centered upon the prosecution of Bearden for damaging and/or destroying BellSouth equipment in violation of state law. (R. 4-7.) Bearden operates a business installing various utility conduits, and in the course of installing water lines for the North Lauderdale Water Association ("NLWA"), BellSouth telephone lines were repeatedly cut, resulting in disruption to BellSouth telephone service and substantial repair expense to BellSouth. (R. 55-91.) Not only did these damaged lines serve the local community, but they also provided vital communication links with the Meridian Naval Air Station. (R. 61.)

In order to get Bearden to comply with Mississippi's dig laws² and to prevent him from further damaging BellSouth's cables, Gloria Robison, a Security Claims Investigator for BellSouth, traveled to the NLWA job-site, met several times with Bearden, gave him a copy of

² Miss. Code Ann. § 77-13-1 through § 77-13-17 sets forth the requirements of persons or entities who intend to excavate and requires that they have all underground utilities located before digging and that they exercise care in excavating around the marks designating the location of the utilities. These regulations are commonly known as the "dig laws."

I
the dig laws, and asked him to refrain from cutting any more lines. (R. 42-50.) Another BellSouth employee, Todd Purvis, even visited the job-site accompanied by a Deputy Sheriff to ask Bearden to comply with the law. (R. 49-50.) Unfortunately, BellSouth's efforts were completely futile.

Because Bearden continued repeatedly to violate Mississippi law, including Miss. Code Ann. § 97-7-31 which prohibits interference with a licensed communications system, BellSouth, through its employee, Ms. Robison, reported Bearden's criminal conduct to the Lauderdale County Sheriff's Department. (R. 53.) On June 21, 2004, the Sheriff's Department prepared an affidavit stating that Bearden violated Miss. Code Ann. § 97-7-31 and requested Ms. Robison to sign it. She complied with that request. (R. 53.) At that time Bearden and his employees and subcontractors had cut BellSouth's cables at least 11 times. (R. 54, 55-89.) Bearden was arrested and released on bond that day. (R. 51-52.) Thereafter, on November 12, 2004, a Lauderdale County Grand Jury found probable cause to indict Bearden under Miss. Code Ann. § 97-7-31, and found that Bearden committed this offense "by ignoring the 'dig law' and injuring, destroying, severing or . . . damaging the telephone cable[s] or other equipment belonging to BellSouth Telecommunications." (R. 90-91.)

Even Bearden's arrest did not deter his conduct. BellSouth's cables and equipment continued to be damaged; so on June 30, 2004, BellSouth obtained a Temporary Restraining Order from the Chancery Court of Lauderdale County, Mississippi prohibiting Bearden and his company, Jay Bearden Construction, Inc., from cutting any BellSouth telephone lines. (R. 92-93.)

Despite this injunction Bearden and his employees and contractors continued to damage BellSouth's cables, and on August 25, 2004, Bearden stipulated to the entry of another injunction which prohibited him, his employees, and his contractors from using mechanized equipment to

dig within 24 inches of a BellSouth line (which expanded the 18 inch requirement contained in Mississippi's dig laws). (R. 94-98.) Bearden repeatedly and flagrantly ignored this second injunction, and BellSouth's telephone cables were cut at least 11 more times while Bearden worked on the NLWA project. (R. 54, 55-89.) The first of those additional cuts occurred, remarkably, within a few hours following the August 25 injunction against Bearden and his company. (R. 54, 94-98.) Bearden has admitted that his company was responsible for cutting BellSouth's lines at least 22 times on the NLWA project. (R. 55-89.)

2. Bearden Misrepresented the Contents of the Indictment and Mississippi Law In Convincing the Circuit Court to Reduce the Felony Charge to a Misdemeanor and Transfer the Proceedings to Justice Court.

On August 19, 2005, Bearden filed a motion to dismiss the criminal charge and represented to the Lauderdale County Circuit Court that because Miss. Code Ann. § 97-7-31 (a felony) and § 97-7-53 (a misdemeanor) supposedly have the same elements, "[d]efendant is entitled to be tried and sentenced, if convicted, under the statute providing for the lesser penalty." (R. 99-102.) In support of this argument, Bearden cited *Beckham v. State*, 556 So. 2d 342, 343 (Miss. 1999), *Martin v. State*, 732 So. 2d 847 (Miss. 1998), and *Torrey v. State*, 816 So. 2d 452 (Miss. 2002). (R. 99-102.) Contrary to Bearden's representations, however, *none* of these cases stand for this proposition. Furthermore, Bearden conveniently omitted the point that there must be *ambiguity in the indictment* for the lesser charge to apply.

For example, in *Beckham*, the Court held that the State "is under no obligation to prosecute under the statute with the lesser penalty. It may choose to prosecute under either, and so long as the choice is clear and unequivocal the defendant has no right to complain." 556 So. 2d at 343 (quoting *Grillis v. State*, 17 So. 2d 525, 527 (Miss. 1944)). Instead, only if "the indictment is ambiguous [can] the accused . . . be punished under the statute with the lesser penalty." *Id.* Similarly, in *Martin* and *Torrey*, the other two cases Bearden cited, the Court held

that prosecution under the lesser statute could only be required where the indictment was ambiguous as to which statute was charged. *See Martin*, 732 So. 2d at 855 ("where two or more statutory provisions could apply to the defendant's conduct, and the indictment itself is ambiguous as to which statute is being charged, a defendant may be sentenced only under the provision providing the lesser penalty."); *Torrey*, 816 So. 2d at 454 (same).

Here, there was no ambiguity, and contrary to what Bearden argued to the Lauderdale County Circuit Court, the indictment (R. 90) could not be any clearer that Bearden was charged under the *felony* statute, Miss. Code Ann. § 97-7-31:

INDICTMENT
INTERFERING WITH LICENSED COMMUNICATIONS SYSTEM
MCA § 97-7-31

THE STATE OF MISSISSIPPI
LAUDERDALE COUNTY

CIRCUIT COURT
NOVEMBER TERM A.D. 2004

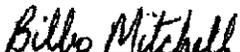
The Grand Jury for the State of Mississippi, taken from the body of good and lawful men and women of Lauderdale County in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said county, in the State aforesaid, in the name and by the authority of the State of Mississippi upon their oaths present that

JAY Q. BEARDEN

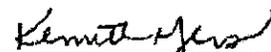
in said County and State, between the 3rd day of March, A.D., 2004, and the 21st day of June, A.D., 2004, did intentionally destroy, impair, injure, or tamper or interfere with real or personal property used or useful in the maintenance, repair or operation of telephone system which is subject to regulation or licensing by any agency of the United States of America or of the State of Mississippi, with reasonable grounds to believe that such act will hinder, delay or interfere with the maintenance, repair or operation of such telephone system, by ignoring the "dig law" and injuring, destroying, severing or any way damaging the telephone cable or other equipment belonging to BELLSOUTH TELECOMMUNICATIONS,

in violation of Section 97-7-31, Mississippi Code of 1972, and contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

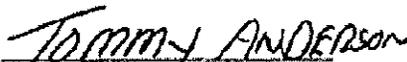
A TRUE BILL:



BILBO MITCHELL
DISTRICT ATTORNEY



GRAND JURY FOREPERSON



WITNESS' NAME

AGENCY NAME:

Court No. 752-04

CHARGE: INTERFERING WITH LICENSED COMMUNICATIONS SYSTEM

(R. 90-91.)

Relying on Bearden's misleading representations, however, the Lauderdale County Circuit Court reduced the charge to a misdemeanor and transferred the case to Justice Court for prosecution. (R. 103.)

3. Bearden Secured Dismissal of the Charge in Justice Court on the False Premise that the Justice Court Lacked Jurisdiction.

After the charge was reduced to a misdemeanor and transferred to Justice Court, just as Bearden requested, he filed a motion to dismiss in that court and alleged that the Justice Court had no jurisdiction. (R. 104-05.) Bearden's motion is one sentence long and states only that "the Lauderdale County Justice Court does not have jurisdiction." (R. 104-05.) The motion provides no reason or argument for lack of jurisdiction. Now, in this appeal, Bearden argues that Miss. Code Ann. § 99-23-2(1) requires that "[a]nyone bringing a criminal matter in the justice court shall lodge the affidavit with the judge or clerk of the justice court," and BellSouth and Robison "neglected or refused to re-file an affidavit [with the] Justice Court." (App. Br. 4.) There is, however, nothing in the record to show that such an argument was even presented to the Justice Court; and in any event, that belated argument is without merit for two other crucial reasons: (1) Robison had already filed an affidavit in the correct Justice Court charging Bearden with cutting BellSouth's cables (R. 53) and there is no requirement under Mississippi law that a new affidavit be filed; and (2) even if there were a requirement for a new affidavit, there is absolutely nothing in the record to suggest that either BellSouth or Robison knew about Bearden's motion or the putative need to file another affidavit. In any event, after having been led down the garden path by Bearden and without any notice to BellSouth or Robison, on April 11, 2006, the Justice Court Judge signed an "order" finding lack of jurisdiction, but gave no reason whatsoever for doing so. Furthermore, this document even failed to declare that the criminal charge was actually being

dismissed. (R. 106.) Then, on September 11, 2006, Bearden filed this present malicious prosecution action against BellSouth and Robison. (R. 4-7.)

SUMMARY OF THE ARGUMENT

As set forth above, Bearden improperly convinced the Circuit Court to reduce the felony charge to a misdemeanor and transfer it to Justice Court where he then convinced the Justice Court that it had no jurisdiction. The vast majority of jurisdictions that have considered whether a dismissal for lack of jurisdiction constitutes a termination in favor of the accused have held that it does not because the "merits of the allegations . . . were never considered by the court and were unrelated to the basis for the dismissal of the action. Therefore, it cannot be said that the dismissal reflected on the innocence of [defendants in the underlying lawsuit]." *Parrish v. Marquis*, 172 S.W.3d 526, 532 (Tenn. 2005) (internal quotation marks omitted; alterations in original). Based on this well-reasoned authority, the Trial Court here correctly held that "[b]oth law and public policy require that in order to maintain a civil action for malicious prosecution, the dismissal of the criminal charge must bear some relationship to the merits." (R. 142.)

Nowhere in his brief does Bearden even attempt to deal with the authority relied upon by the Trial Court. Instead, as set forth below, he cites three cases from other jurisdictions that are either distinguishable or, at best, represent a flawed minority view. Additionally, Bearden attempts to argue that the numerous courts that have considered this issue have somehow gotten it wrong because such a holding is inconsistent with Restatement (Second) of Torts § 660. Nothing in the Restatement, however, is inconsistent with the holding of these numerous courts. In fact, their reasoning as well as that of the Trial Court is completely consistent with the purpose behind this provision of the Restatement -- to make sure that the underlying dismissal bears some relationship to the merits of the criminal charge.

Bearden also attempts to save his malicious prosecution with the false assertion that BellSouth somehow abandoned the prosecution by "failing" to file a second affidavit in Justice Court to support the criminal charge against Bearden. However, BellSouth did not abandon anything. It did everything that was required of it to bring Bearden's illegal conduct to the attention of the Lauderdale County Sheriff's Department and to cooperate in the prosecution. This fact notwithstanding, Bearden has failed to put *anything* in the record demonstrating that BellSouth or Robison were even aware of his scheme to have the charge dismissed. The prosecution was being handled by the district attorney. In fact, everything that is in the record clearly demonstrates that neither BellSouth nor Robison had any knowledge that Bearden had requested dismissal of the charges. Neither, for example, were sent a copy of Bearden's motion to dismiss. (R. 104-05.) Moreover, Bearden has failed to tell this Court that the affidavit originally filed by Robison *was filed in the correct Justice Court*, and there is no provision of Mississippi law that would require that a new affidavit be filed.

Following the law of most jurisdictions and rejecting Bearden's flawed argument, the Trial Court entered summary judgment in favor of both BellSouth and Robison; however, Bearden appealed only the summary judgment against BellSouth. Accordingly, pursuant to Miss. R. App. P. 3(c), Robison must be dismissed from these proceedings.

LAW AND ARGUMENT

A. Standard of Review.

This Court "employ[s] the *de novo* standard in reviewing a trial court's grant of summary judgment." *Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co.*, 858 So. 2d 129, 130 (Miss. 2003), citing *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869, 872 (Miss. 2001). In conducting a *de novo* review, the Court looks "at all evidentiary matters before [it], including admissions in pleadings, answers to interrogatories, depositions, and affidavits." *Brown*, 858 So. 2d at 130

(citations omitted); see *Newell v. Hinton*, 556 So. 2d 1037, 1041 (Miss. 1990), citing *Dennis v. Searle*, 457 So. 2d 941, 944 (Miss. 1984).

B. The Trial Court Properly Determined that the Dismissal of the Underlying Criminal Charge for Lack of Jurisdiction Cannot Support a Malicious Prosecution Claim as a Matter of Law.

1. The Vast Majority of Jurisdictions Have Held that Termination for Lack of Jurisdiction is Not a Favorable Termination.

A claim of malicious prosecution requires that the criminal charge be terminated in the plaintiff's favor. See *George v. W.W.D. Automobiles, Inc.*, 937 So. 2d 958, 961 (Miss. Ct. App. 2006). As detailed above, Bearden maneuvered his criminal prosecution so that it was subsequently dismissed for lack of jurisdiction by the Justice Court without any consideration of the merits of the charge – in fact, without any explanation at all. Especially in this case, this is not a termination in Bearden's favor that can support a malicious prosecution claim. In fact, Mississippi courts have long recognized that "not all dismissals in this State constitute terminations in favor of the accused for purposes of malicious prosecution actions." *Stewart v. Southeast Foods, Inc.*, 688 So. 2d 733, 737 n.2 (Miss. 1996).

Although the Mississippi Supreme Court has never expressly considered whether a dismissal for *lack of jurisdiction* constitutes a termination in the plaintiff's favor, numerous courts around the country have held that such a dismissal cannot support a malicious prosecution claim. See *Hudis v. Crawford*, 125 Cal. App. 4th 1586, 1592 (Cal. Dist. Ct. App. 2005) ("[A] dismissal for lack of jurisdiction does not involve the merits and cannot constitute a favorable termination.") (alteration in original); *Parrish v. Marquis*, 172 S.W.3d 526, 532 (Tenn. 2005) ("a favorable termination is not present for a malicious prosecution claim where the underlying

proceeding was resolved on matters of standing and jurisdiction"),³ *Hatch v. Davis*, 102 P.3d 774, 780 (Utah 2004) ("because Plaintiff's claim was dismissed for lack of jurisdiction and not on the merits, Defendant's claim that the underlying action was terminated in his favor fails."); *Savoie v. Rubin*, 820 So. 2d 486, 489 (La. 2002) ("Quite simply, the district court's dismissal [of the underlying case] based on an exception of improper venue cannot be equated to a 'bona fide termination' of the underlying litigation in [the plaintiff's] favor."); *Rowen v. Holiday Pines Property Owners' Assoc., Inc.*, 759 So. 2d 13, 16 (Fla. Dist. Ct. App. 2000) ("a dismissal for lack of subject matter jurisdiction is not . . . a bona fide termination, because 'there must first be jurisdiction in the court in which the proceeding terminates.'"); *In re Sav-A-Stop*, 98 B.R. 83, 86 (M.D. Fla. 1989) (dismissal of underlying proceeding for lack of jurisdiction was insufficient to constitute a termination in the defendant's favor); *Terminal Grain Corp. v. Freeman*, 270 N.W.2d 806, 809 (S.D. 1978) (affirming dismissal of malicious prosecution claim where underlying action was dismissed for lack of jurisdiction); *Stix & Co., Inc. v. First Missouri Bank & Trust Co. of Creve Coeur*, 564 S.W.2d 67, 70 (Mo. Ct. App. 1978) ("a cause dismissed for lack of subject matter jurisdiction has not been terminated in favor of the party bringing an action for malicious prosecution based on that dismissal."); *Lackner v. LaCroix*, 602 P.2d 393, 394 (Cal. 1980) ("If (the termination) is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons . . . it does not constitute a favorable termination.") (alterations in original; quotation marks omitted).

³ "We are persuaded by our examination of the decisions of other states and other authority that the almost universal rule is that a dismissal of a complaint on procedural grounds that do not reflect on the merits is not a 'favorable termination' for a malicious prosecution cause of action." *Parrish*, 172 S.W.3d at 532.

The reasoning behind this rule is that the "merits of the allegations . . . were never considered by the court and were unrelated to the basis for the dismissal of the action. Therefore, it cannot be said that the dismissal reflected on the innocence of [defendants in the underlying lawsuit]." *Parrish*, 172 S.W.2d at 532 (internal quotation marks omitted; alterations in original). Indeed, as the Supreme Court of Maine has held:

To insure that the guilty person is not awarded a bonus there is a requirement in the malicious prosecution action that the proceeding has terminated favorably to the plaintiff, and that the favorable termination be on the merits, or at least reflect on the merits, of the action Society does not want litigants who committed the acts of which they are accused, but who were able to escape liability on a "technicality" or procedural device, to turn around and collect damages against their accuser. This reason justifies a requirement that the favorable termination of the underlying proceeding be on the merits or, in some way, reflect on the merits.

Palmer Development Corp. v. Gordon, 723 A.2d 881, 884 (Me. 1999); *Uboh v. Reno*, 141 F.3d 1000, 1004 (11th Cir. 1998) ("Courts have . . . reasoned that 'only terminations that indicate that the accused is innocent ought to be considered favorable.'"); *Bordeau v. Metropolitan Transit Auth.*, 2008 WL 4455590, * 4 (E.D.N.Y. 2008) ("In order to satisfy the second element of a malicious prosecution claim, which requires a termination of the proceeding in plaintiff's favor, 'the plaintiff must show that the final disposition is indicative of innocence.'").

Consistent with this policy, the Mississippi Supreme Court has recognized that a dismissal for lack of jurisdiction is a "matter of form." *Deposit Guaranty Nat'l Bank v. Roberts*, 483 So. 2d 348, 353 (Miss. 1986). Citizens who attempt to bring a wrongdoer to justice or cooperate with law enforcement officials should not be subjected to a civil lawsuit when the prosecution falters on some procedural grounds – particularly where, as here, the prosecution faltered on the basis of misleading and erroneous arguments by the criminal defendant. Both law and public policy require that in order to maintain a civil action for malicious prosecution, the dismissal of the criminal charge must bear some relationship to the merits. Here, there is none.

Bearden requested that the criminal prosecution be reduced from a felony to a misdemeanor. Once the charge was reduced and the case reached Justice Court, Bearden then argued (without any basis in law or in fact) that the Justice Court did not have jurisdiction and achieved a dismissal on this basis. This is not a termination on the merits in Bearden's favor, and there certainly has been no determination that Bearden is not guilty of the offense for which he was charged. For this reason, Bearden's malicious prosecution claim fails as a matter of law and the holding of the Trial Court should be affirmed.

Nowhere in his brief does Bearden substantively address the holdings of the numerous cases cited above that have held that a dismissal for lack of jurisdiction does not constitute a termination in favor of the accused. Instead, Bearden cites three cases (cases that he did not cite to the Trial Court) that either are distinguishable or, at best, constitute a flawed minority view that should be rejected. For example, in *Turman v. Schneider Bailey, Inc.*, 768 S.W.2d 108, 113 (Mo. Ct. App. 1988), the plaintiff in the underlying lawsuit filed a \$15,000 replevin action in a trial court whose jurisdictional limit was \$4,000. Because of this mistake, the action was dismissed for lack of jurisdiction. In contrast, BellSouth had nothing to do with the dismissal that Bearden manufactured. More importantly, however, in *Turman* there is absolutely no discussion by the court of the policy reasons for having the dismissal reflect on the merits of the action, and the court's ruling seemed to be based on unique facts in the underlying replevin action that was the basis of the malicious prosecution action.

Bearden next cites *Sandlin v. Anders*, 65 So. 376 (Ala. 1914). Although it is difficult to tell precisely the holding of the *Sandlin* decision, it appears that the magistrate judge was confused and misapprehended the nature of a criminal charge and mistakenly sent it to the court rather than to the grand jury. The court then struck the cause of action from the docket, and this was determined to be "an end of the prosecution." *Id.* at 377. In addition to the fact that this

case arose well before the development of the law in this area, the court does not address the policy reasons for requiring that the dismissal reflect on the merits of the underlying case.

Finally, Bearden cites *Hammond Lead Products, Inc. v. American Cyanamid Co.*, 570 F.2d 668 (7th Cir. 1977). There, the plaintiff in the underlying case filed suit against the defendants in New Jersey; however, because the case had absolutely no connection to New Jersey, the case was dismissed for lack of venue. It was the underlying plaintiff's choice to file the case in New Jersey where it clearly did not belong. In the malicious prosecution action, the court held that the dismissal was a termination in favor of the underlying defendant because "any form of termination" satisfies the requirement. That court made a sweeping ruling that ignored completely any policy considerations and the fact that all dismissals are not the same. Also, unlike the defendant in that case, BellSouth had nothing to do with the chain of events that led to the dismissal for lack of jurisdiction here.

Bearden also cites *Van v. Grand Casinos of Mississippi, Inc.*, 724 So. 2d 889 (Miss. 1998), in which the court held that dismissal of criminal charges on speedy trial grounds is a "favorable termination" that would support a subsequent civil action for malicious prosecution. That case is easily distinguishable from this one, but its reasoning actually supports BellSouth's position. First, in *Van*, the dismissal was on constitutional grounds for a speedy trial violation. Part of the rationale for viewing a failure to prosecute in timely fashion as favorable to the accused is that the prosecution's failure to proceed to the merits compels an inference of such an unwillingness or inability to do so as to imply a lack of reasonable grounds for the prosecution. Citing cases from other states that have generally concluded that such dismissals on speedy trial grounds are favorable to the accused, the Mississippi Supreme Court adopted a similar view. In doing so, however, and consistent with BellSouth's argument here in this case, the Court noted how the dismissal in *Van* was distinguishable from the dismissal in *Rhodes v. Mabus*, 676 F.

Supp. 755 (S.D. Miss. 1987) in which the court held that the quashing of an indictment on procedural grounds is not sufficient to support a malicious prosecution action. *Van* at 892, n. 1. Quashing an indictment, like the dismissal on jurisdictional grounds here, cannot imply anything favorable to the accused about the merits of the criminal charge.

Accordingly, the cases relied upon by Bearden should have no bearing on this Court's determination. This Court should follow the reasoning of the vast majority of the jurisdictions that have considered this issue and hold that, as a matter of law, the dismissal for lack of jurisdiction under the facts of this case does not constitute a termination in favor of Bearden.

2. The Restatement Is Consistent with the Trial Court's Ruling.

Bearden next contends because Restatement (Second) of Torts § 660 does not mention dismissal for lack of jurisdiction, such a dismissal must automatically constitute a termination in his favor. However, this statement has no support either in the Restatement or in Mississippi law. Specifically, § 660 provides:

A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if

(a) the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused; or

(b) the charge is withdrawn or the prosecution abandoned because of misconduct on the part of the accused or in his behalf for the purpose of preventing proper trial; or

(c) the charge is withdrawn or the proceeding abandoned out of mercy requested or accepted by the accused; or

(d) new proceedings for the same offense have been properly instituted and have not been terminated in favor of the accused.

Nothing about § 660 is intended to be exclusive. In fact, nothing in that section contemplates a situation where the dismissal is on procedural grounds, such as lack of

jurisdiction. In any event, however, it is preposterous to suggest that the Restatement contradicts what the vast majority of the Courts in the country have held concerning dismissal for lack of jurisdiction. Quite to the contrary, the purpose behind the Restatement is completely consistent with the fact that a termination for lack of jurisdiction does not reflect on the merits of the criminal charge. Although ignored by Bearden, the reasoning of the Restatement is summed up in the commentary:

a. Termination inconsistent with guilt. Proceedings are “terminated in favor of the accused,” as that phrase is used in § 653 and throughout this Topic, only when their final disposition is such as to indicate the innocence of the accused. Consequently a termination that is sufficiently favorable to the accused to prevent any further prosecution of the proceedings will not support a cause of action under the rules stated in § 653 if made under any of the circumstances stated in this Section.

Restatement (Second) Torts § 660 cmt. One federal court recently cited this comment in dismissing a malicious prosecution action where the underlying criminal charge was terminated on speedy trial grounds. *Bordeau v. Metropolitan Transit Authority*, 2008 WL 4455590 (E.D. N.Y. 2008).

The Restatement is very much concerned with whether the dismissal “indicate[s] the innocence of the accused.” In fact, in *Parrish, supra*, one of the leading cases on this point, in reaching its holding the Court relied on § 674 of the Restatement noting that “a court must examine the circumstances of the underlying proceeding.” 172 S.W.3d at 531. Because a dismissal for lack of jurisdiction does not reflect on the merits, the Trial Court's holding is completely consistent with the Restatement.⁴ Were this not the case, there would have been no

⁴ As Bearden acknowledges, the Mississippi Supreme Court has never adopted § 660 of the Restatement. (App. Br. 8.) Accordingly, to the extent that that Court might find that it is somehow inconsistent with the vast majority of cases from other jurisdictions that have addressed this issue, the Court is certainly not bound to follow the Restatement or be limited by it.

reason for the analysis by this Court in *Van, supra*, of whether a certain type of dismissal was favorable to the accused.

Bearden next relies on *Stewart v. Southeast Foods, Inc.*, 688 So. 2d 733 (Miss. 1996) to support his theory that the Restatement prohibits the Trial Court's finding. However, the portion of *Stewart* upon which Bearden relies has no bearing on the facts currently before the Court. There, the Court analyzed the third prong of § 660 of the Restatement that provides that if the dismissal is secured by an act of mercy, the dismissal does not constitute a favorable termination. Principally at issue was whether the Justice Court judge should have been allowed to provide an affidavit stating that he dismissed the criminal charge because the accused had no previous record and he decided to be lenient. According to the Court: "The relevance of Judge Solomon's affidavit with regard to the issue of whether the proceedings terminated in favor of Stewart arises from the fact that the law of malicious prosecution generally does not consider dismissals on grounds of mercy or leniency to constitute terminations of criminal proceedings entitling a defendant to maintain a malicious prosecution cause of action." *Id.* at 736. *Stewart* is completely consistent with the notion that the dismissal of the underlying criminal charge must bear some relationship to the merits of the charge against the accused.

C. The Trial Court Properly Ruled that No Abandonment Occurred.

Having failed to meaningfully address the authorities cited by the Trial Court that the criminal charge did not terminate in his favor, Bearden argues that because BellSouth did not seek to re-prosecute him, Defendants somehow "abandoned the prosecution." There is a certain irony in Bearden's argument. On one hand, his lawsuit is based on a prosecution that he contends was malicious and should not have occurred; on the other hand, he attempts to resurrect his civil suit by saying that BellSouth should have prosecuted him even more. This is a preposterous contradiction.

More importantly, however, is the fact that BellSouth did not abandon anything. It did everything that was required of it to bring Bearden's illegal conduct to the attention of the Lauderdale County Sheriff's Department and to cooperate in the prosecution. Once that was done, the fate of the prosecution rested with the prosecutor, not BellSouth or Robison. These facts notwithstanding, Bearden has failed to put *anything* in the record demonstrating that BellSouth or Robison were even aware of his scheme to have the charges dismissed. In fact, everything in the record clearly demonstrates that neither BellSouth nor Robison had any knowledge that the charges were dismissed.

Today Bearden's principal argument in support of his abandonment theory is that BellSouth "neglected or refused" to offer another affidavit in Justice Court once the case was transferred from Circuit Court. (App. Br. 4.) There is nothing in the record to show that this argument was ever made to the Justice Court. Nonetheless, the original affidavit signed by Robison on behalf of BellSouth was filed *in Justice Court*. Bearden has failed to offer any authority that a second affidavit was necessary. In fact, just the opposite is true. Contrary to Bearden's argument, the original affidavit offered in support of Bearden's indictment was more than sufficient. Just as important is the fact that the Justice Court gave no reason or explanation for its jurisdictional dismissal, so there is no basis whatsoever for Bearden to assume or argue to this Court that it was because BellSouth and Robison failed to file another affidavit.

This point notwithstanding, Bearden chastises the Trial Court because it "only attempted to distinguish some of the cases supporting Mr. Bearden and consequently did not really apprehend the status of the prosecution which had been abandoned." (App. Br. 17.) In reality, the Trial Court read the only two cases cited by Bearden on this point and determined that they did not support Bearden at all. (R. 142-43.)

The first case cited by Bearden was *Strong v. Nicholson*, 580 So. 2d 1288, 1293 (Miss. 1991) which stands for the proposition that where a prosecution is abandoned by either the complaining witness or the prosecutor, the charges are deemed to have terminated in the criminal defendant's favor. In *Strong*, however, the charges were dismissed because *the complaining witnesses failed to appear* in Justice Court when the case was set for trial. The dismissal in *Strong* is a far cry from the maneuvering Bearden employed in convincing the Justice Court to dismiss the charges against him for a putative lack of jurisdiction.

In the other case cited by Bearden, *George v. W.W.D. Automobiles, Inc.*, 937 So. 2d 958, 961 (Miss. Ct. App. 2006), the case was dismissed *at the request of the complaining witness*. There, the Court held that the termination element "of the tort of malicious prosecution was established [when the complaining party] dismissed the case." In contrast, BellSouth never requested that the charges be dismissed against Bearden and, in fact, believed the charges were being pursued. Accordingly, unlike *Strong* and *George*, the dismissal for lack of jurisdiction here is not an abandonment of the prosecution because BellSouth had no role or responsibility in the dismissal.

Alternatively, even if the charges were somehow abandoned, Bearden's misconduct in securing dismissal of the charges negates this theory. In *Van v. Grand Casinos of Mississippi, Inc.*, 724 So. 2d 889 (Miss. 1998), the Mississippi Supreme Court held that "if the abandonment was the result of a compromise to which the accused agreed, or an act of mercy requested or accepted by the accused, *or misconduct by the accused*, it is not a termination in favor of the accused for purposes of a malicious prosecution claim." *Id.* at 892 (emphasis added).

The reasoning in *Van* is based on the Restatement Second of Torts that states that:

A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if . . . the charge is withdrawn or the prosecution

abandoned because of *misconduct on the part of the accused* or in his behalf for the purpose of preventing a proper trial

Restatement (Second) of Torts § 660 (emphasis added).

As detailed above, Bearden's misconduct in securing the dismissal of the charge against him is plain and simple. First, he convinced the Lauderdale County Circuit Court to reduce the charge to a misdemeanor and transfer the case to Justice Court even though there was no factual or legal basis to do so. Next, once the case reached Justice Court (where Bearden contended it should be), he then moved to dismiss the charge on the erroneous, unsupported, and unexplained contention that the Justice Court lacked jurisdiction.

In response to these points, Bearden argued to the Trial Court that the reduction of the charge from a felony to a misdemeanor was proper because where two or more statutes could apply to the same conduct, "the Defendant is entitled to be tried and sentenced under the provisions provid[ing] for the lesser penalty." (R.). In support of this argument, Plaintiff cited *Beckham v. State*, 556 So. 2d 342, 343 (Miss. 1999), *Martin v. State*, 732 So. 2d 847 (Miss. 1998), and *Torrey v. State*, 816 So. 2d 452 (Miss. 2002), the same decisions he cited to the Lauderdale County Circuit Court. Contrary to Bearden's representations, however, *none* of these cases stand for this proposition. The Trial Court, here, understood that.

For example, in *Beckham*, the Court held that the state "is under no obligation to prosecute under the statute with the lesser penalty. It may choose to prosecute under either, and so long as the choice is clear and unequivocal the defendant has no right to complain." 556 So. 2d at 343 (quoting *Grillis v. State*, 17 So. 2d 525, 527 (Miss. 1990)). Instead, only if "the indictment is *ambiguous* [can] the accused . . . be punished under the statute with the lesser penalty." *Id.* (emphasis added). Similarly, in *Martin* and *Torrey*, the Court held that prosecution under the lesser statute could only be required where the indictment was ambiguous as to which

statute was charged. *See Martin*, 732 So. 2d at 855 ("where two or more statutory provisions could apply to the defendant's conduct, and the indictment itself is ambiguous as to which statute is being charged, a defendant may be sentenced only under the provision providing the lesser penalty."); *Torrey*, 816 So. 2d at 454 (same).

What Bearden ignores is that the indictment (R. 90) could not be any clearer that he was charged under the felony statute, Miss. Code Ann. § 97-7-31. There was no ambiguity. Bearden misled the court. This conduct alone on the part of Bearden negates any claim of abandonment.

Additionally, after the charge was reduced to a misdemeanor and transferred to Justice Court, Bearden filed a motion to dismiss for lack of jurisdiction, but gave no reason or basis to the Justice Court for that position. Bearden now claims that dismissal was warranted because Miss. Code Ann. § 99-33-2(1) requires that "[a]nyone bringing a criminal matter in the justice court shall lodge the affidavit with the judge or clerk of the justice court." According to Bearden, BellSouth "neglected or refused to re-file an affidavit [with the] Justice Court" (App. Br. 4). Incredibly, Bearden makes this claim despite the fact that Robison filed the following original affidavit *with the Justice Court*:

**GENERAL AFFIDAVIT
STATE OF MISSISSIPPI
LAUDERDALE COUNTY
JUSTICE COURT**

Case No. : 200409515

Personally appeared before me, Mrs. Robbie Robinson, of the LAUDERDALE COUNTY JUSTICE COURT, GLORIA ROBISON who makes oath on or about the 3 day of March, 2004 within the corporate limits of said county and in the jurisdiction of the Court. JAY BEARDEN was in violation of Section 97-7-31 of the MS CODE OF 1972, ANNOTATED.

Count : 1

JAY BEARDEN Did willingly, and feloniously, Whoever intentionally destroys, impairs, injures, or tampers or interferes with any real or personal property used or useful in the maintenance, repair or operation of any telephone or telegraph system or radio station which is subject to regulation or licensing by any agency of the United States of America or of the State of Miss. with reasonable grounds to believe that such act will hinder, delay or interfere with the maintenance, repair or operation of such telephone or telegraph system or radio station, on conviction shall be punished as prescribed in section 97-7-29.

This is in the LAUDERDALE COUNTY JUSTICE COURT in the State of MISSISSIPPI Against the peace and dignity of the State of MISSISSIPPI and contrary to the Ordinances of said county in such cases made and provided, and in the good order and peace thereof.

STATE OF MISSISSIPPI
COUNTY OF LAUDERDALE
A TRUE COPY, I HEREBY CERTIFY,
DALE EHL, M.A., Justice Court Clerk
Date August 10, 2004
By M. Robinson J. Clerk

Sworn and subscribed before me on this 21 Day of June, 2004

M. Robinson
Affiant

M. Robinson
Signed

Given the above document (R. 53), Bearden's contention that dismissal was proper because no affidavit was presented to the Justice Court is a complete falsehood.

Ultimately, the transfer from Circuit Court to Justice Court and the dismissal that Bearden secured from the Justice Court was based on nothing more than smoke and mirrors. He misled two different courts with erroneous arguments. Bearden manufactured this malicious prosecution claim and should not be allowed to profit from his cynical manipulation of the justice system. He cannot expect the protection of the courts because of that manipulation. He has forfeited any right that he might otherwise have. For this reason alone, Bearden's abandonment theory must fail.

D. Gloria Robison Should Be Dismissed from these Proceedings Due to Bearden's Failure to Appeal the Summary Judgment Entered in Her Favor.

Rule 3(c) of the Mississippi Rules of Appellate Procedure states that a notice of appeal

"shall specify the party or parties taking the appeal *and the party or parties against whom the appeal is taken*, and shall designate as a whole or in part the judgment or order appealed from."

Miss. R. App. P. 3(c) (emphasis added). Here, Bearden's Notice of Appeal names only BellSouth as the party against whom the appeal is taken:

NOTICE OF APPEAL

By this Notice, Jay Bearden appeals to the Supreme Court of Mississippi against Bellsouth Telecommunications, from the Circuit Court's Order Granting Defendants' Motion for Summary Judgment dated November 14, 2008.

THIS, the 12th day of December, 2008.

(R. 144.)

Accordingly, no appeal was taken from the summary judgment entered in favor of Robison, so she must be dismissed from these proceedings. *See Estate of Perry ex rel. Rayburn v. Mariner Health Care, Inc.*, 927 So. 2d 762, 765 (Miss. Ct. App. 2006) ("Mariner argues correctly that Rayburn failed to include Goode's name on her notice of appeal Pursuant to [Miss. R. App. P.] 3(c), our review is limited to those parties named in an appellant's notice of appeal.").⁵

CONCLUSION

This Court should not reward a party like Jay Bearden who has shown such a disregard for the rule of law and the courts: first, by repeatedly ignoring and violating Mississippi's "dig laws"; then, by ignoring and violating a temporary restraining order and a subsequent injunction; and finally, by presenting bogus arguments to two separate courts in his criminal case. On the other hand, citizens who legitimately report criminal conduct must not be subjected to a

⁵ To the extent that the Court would determine that Robison is somehow a proper party to this appeal she adopts and joins in the substantive arguments made by BellSouth.

malicious prosecution claim where, through no fault of their own, there is a dismissal that bears no relationship to the merits of the charge. Bearden simply should not benefit from the misleading and erroneous arguments that resulted in the dismissal of the criminal charge. For all the reasons set forth above, the Court should affirm the Trial Court's summary judgment in BellSouth's favor because a dismissal for lack of jurisdiction is not a termination in favor of Bearden as a matter of law under the undisputed facts of this case. Robison should also be dismissed from these proceedings because Bearden failed to appeal the summary judgment entered in her favor.

THIS the 7th day of July, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kenneth W. Barton, one of the attorneys for BellSouth Telecommunications, Inc. d/b/a AT&T Mississippi and Gloria Robison, hereby certify that I have this day served a true and correct copy of the above and foregoing to the following:

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ATTORNEYS FOR JAY BEARDEN

Honorable William F. Coleman
Hinds County Circuit Courthouse
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CIRCUIT JUDGE

THIS, the 7th day of July, 2009.


KENNETH W. BARTON

CERTIFICATE OF FILING

I, Kenneth W. Barton, certify that I have had hand-delivered the original and three copies of the Brief of Appellee BellSouth Telecommunications, Inc. d/b/a AT&T Mississippi and Gloria Robison and an electronic diskette containing same on July 7, 2009, addressed to Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



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