CASE NO. 2008-TS-02088

IN THE
SUPREME COURT
For The State of Mississippi

JAY BEARDEN
Appellant

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.
AND GLORIA ROBISON
Appellees

BRIEF OF APPELLANT - JAY BEARDEN

On Appeal from the Second Judicial District Court of Hinds County, Mississippi

ORAL ARGUMENT REQUESTED

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May 6, 2009

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CERTIFICATE OF INTERESTED PERSONS

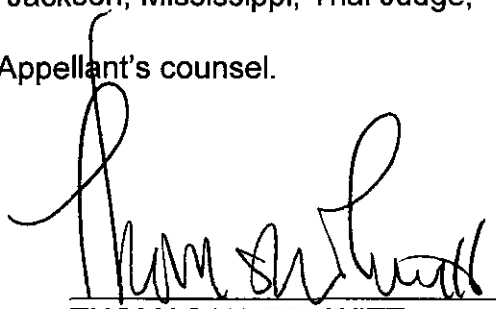
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Jay Bearden, Plaintiff/Appellant;
2. Bellsouth Telecommunications, Inc., Defendant/Appellee;
3. Gloria Robison, Defendant/Appellee;
4. Kenneth W. Barton,Defendant/Appellee's counsel;
5. Thomas B. Alexander;
6. Mark F. McIntosh;

7. Charles W. Wright, Jr., Appellant's counsel;

9. Honorable William Coleman, Jackson, Mississippi, Trial Judge;

10. Thomas W. Prewitt, Plaintiff/Appellant's counsel.



THOMAS W. PREWITT

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I. STATEMENT OF ISSUES

1. The issue presented for review is:

Whether the Circuit Court erred in granting summary judgment concerning Mr. Bearden's claims and dismissing those claims with prejudice.

Sub-issues presented within the main issue include:

A. Does dismissal for jurisdictional reasons constitute a favorable termination for malicious prosecution purposes?

B. Whether the admitted facts demonstrate as a matter of law that the Telephone Company/MS. Robison/Prosecuting authorities constitute an abandonment of the prosecution as a matter of law? If not, did a fact issue exist which should have been resolved by a jury.

C. Since the Defendants had the right to re-file the charging affidavit but didn't, can they now successfully argue that the underlying proceeding they initiated was not terminated in Mr. Bearden's favor?

II. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

This is an appeal from a Summary Judgment granted BellSouth TeleCommunications, Inc. ("the Telephone Company") and Gloria Robison (Ms. Robison") the Telephone Company's admitted agent acting within the course of her employment (Tab. 8, R.E. 139-143). Mr. Bearden sued them in the Circuit Court of the 2nd Judicial District of Hinds County asserting a claim for malicious prosecution (Tab. 2,R.E. 4). The Motion for Summary Judgment raised the issue of whether the underlying criminal action had ended favorably for Mr. Bearden. The Trial Court concluded that it had not and therefor granted the motion and from that decision, this appeal springs (Tab 8,R.E. 139-143; R. 144).

Mr. Bearden is President of Bearden Construction Company which had a project in Lauderdale County installing a new water line system in a 35-mile stretch in the northern part of that county (Tab. 6, R.E. 107 ¶ 1). During the course of construction, employees of the construction company and some of its subcontractors unintentionally cut some of the Telephone Company's buried utility lines (Tab. 6, R.E. 107). Notwithstanding that there was no proof that he personally cut any lines, the Telephone company had Ms. Robison swear out an affidavit charging him with the felony identified in § 97-7-31, Miss. Code Ann.(1972) which is identified as feloniously interfering with a telephone system (Tab. 2, R.E. 5).

Mr. Bearden was arrested and put in jail in Lauderdale County (Tab.2, R.E. 5).

The Circuit Court of Lauderdale County upon Mr. Bearden's motion (R. 99) reduced the charge to a misdemeanor (R. 135) and sent the case to the Justice Court for resolution. The State did not appeal this Order. The Justice Court dismissed the case apparently because the affidavit required by § 99-33-2(1), Miss.Code Ann. (1972) had not been filed (R.106; R. 110). Instead of simply filing the affidavit again, neither the prosecuting authorities nor the Telephone Company or its complaining witness, Ms. Robison, re-filed the affidavit. After the statute of limitations had run, Mr. Bearden filed his complaint against the Telephone Company and Ms. Robison in the 2nd Judicial District of Hinds County identifying a claim for malicious prosecution (Tab.2, R.E. 4).

The Telephone Company filed its Motion for Summary Judgment arguing that a dismissal for lack of jurisdiction did not amount to a successful termination of the underlying criminal proceeding as a required element of a successful malicious prosecution claim. The Learned Trial Court agreed and granted the Motion for Summary Judgment (Tab. 8, R.E. 139).

This appeal was properly and timely lodged (R. 144).

B. Mr. Bearden's Statement of the Facts

Mr. Bearden, is President of Bearden Construction Company ("the Contractor"), which had a project in Lauderdale County installing a new water line covering over 35 miles in North Lauderdale County ("the Project") (Tab.2, R.E. 4-7; R.E. 107). Because of loop backs and the like, the actual project covered many more miles. While performing its work, some of its employees and subcontractors unintentionally cut some buried telephone lines (Tab. 6, R.E.107; Tab. 8 R.E. 140).

There is no evidence that Mr. Bearden himself cut any telephone line (Tab. 6, R.E. 108).

Nonetheless, the defendant, Ms. Robison, admittedly an employee of the Telephone Company while within the scope of her employment, on June 21, 2004, swore out an affidavit alleging that Mr. Bearden had violated § 97-7-31 of the Mississippi Code Annotated (Tab. 6, R.E. 119). Mr. Bearden was then arrested by an officer of the State of Mississippi on June 22, 2004, and incarcerated in the Lauderdale County jail where he remained until he was able to post bond (Tab.2, R.E. 5-6).

On November 12, 2004, an indictment was secured on the charge identified in Ms. Robison's affidavit (R. 90-91). On November 30, Mr. Bearden waived arraignment and entered his not guilty plea. Days later, December 6, 2004, Mr. Bearden filed a Motion for Discovery and a Motion to Dismiss (Tab.5, R.E. 99-102). That Motion to Dismiss was supported by Mr. Bearden's brief on August 16, 2005 (Tab. 5, R.E. 99-102).

Three days later, Honorable Robert W. Bailey, Circuit Judge, dismissed the charge because Ms. Robinson chose to use the felony statute (§ 97-7-31) when the necessary

elements of that statute would constitute the misdemeanor offense of violating § 97-7-53, Mississippi Code Annotated; accordingly, Judge Bailey ruled that: "where two or more statutes ['] provisions apply to Defendant's alleged conduct, the Defendant is entitled to be tried and sentenced under the provisions of the lesser penalty" (Tab.5, R.E. 103).

Having determined that the alleged conduct would be properly charged as a misdemeanor under § 97-25-53, Judge Bailey then transferred the case to the Lauderdale County Justice Court (Tab. 6, R.E. 132).

Once there, since the Prosecuting authorities, the Telephone Company and Ms. Robison neglected or refused to re-file an affidavit in his Justice Court, Honorable William B. Gunn, Justice Court Judge, determined that the Justice Court did not have jurisdiction and dismissed the case on April 11, 2006 (R. 106). His ruling was apparently based upon § 99-33-2(1) which provides that: "[a]nyone bringing a criminal matter in the justice court shall lodge the affidavit with the judge or clerk of the justice court."

By April 11, 2007, all possible statutes of limitation for the alleged wrongful conduct occurring prior to and June 21, 2004 had run. Mr. Bearden filed his Complaint in this proceeding on September 11, 2006 (Tab. 2, R.E. 4). The gravamen of his Complaint was the malicious prosecution to which he had been subjected.

In due course, Ms. Robison and the Telephone Company filed their Motion for Summary Judgment asserting that Mr. Bearden could not make a case of malicious prosecution because, the necessary element that the underlying proceeding be resolved in favor of the party prosecuted was missing since dismissal by the Justice Court for lack of jurisdiction did not constitute a favorable termination. They argued that a dismissal on technical grounds did not satisfy the "favorable termination" requirement (Tab.5, R.E. 30).

The learned trial judge, Honorable William Coleman, agreed and granted the motion and entered the judgment from which this appeal is taken (Tab. 7,R.E. 138). The Trial Court erred when it failed to determine that the case had been favorably terminated because the prosecuting authorities and the complaining witness abandoned the prosecution.

Those are the facts relevant to the issues presented for review as contemplated by Rule 28(a)(4) M.R.A.P.; however, the Telephone Company and Ms. Robison will apparently try to influence the Court by referencing alleged "facts" concerning the alleged basis of Ms. Robison's affidavit and his arrest and incarceration, many of which are vigorously denied by Mr. Bearden and none of which concern whether or not the underlying case was terminated in Mr. Bearden's favor. One wonders if the facts were actually as the Telephone Company presents, why it bailed out of the prosecution when all it had to do was to re-file the affidavit it initially instructed Ms. Robison to file?

Mr. Bearden is more than ready to address those "alleged" facts before the trier of facts; however, notwithstanding all of that, there is no evidence that Mr. Bearden himself cut any telephone lines or instructed any of his employees or subcontractors to cut lines. In this *mens rea* "crime," neither the prosecuting authorities nor the Defendants could provide that critical element or presented evidence of it and refused to follow thru when it became clear that Mr. Bearden would fight.

III. SUMMARY OF THE ARGUMENT

Mississippi jurisprudence is not devoid of strong suggestions of Mississippi's public policy when considering whether a dismissal on jurisdictional grounds is a "favorable" determination within the requirement that the malicious prosecution claimant have a

"favorable" outcome in the underlying criminal proceeding.

In two cases, particularly, *Stewart v. Southeast Foods, Inc.,* 688 So. 2d 733 (Miss. 1996)[1] and *Van v. Grand Casinos of Mississippi, Inc.*, 724 So. 2d 889 (Miss.1998), the Supreme Court made clear that certain criteria must be satisfied if the party initiating criminal proceedings is not responsible to answer for that in a subsequent civil proceeding.

In *Stewart,* the Court applied the logic of the Restatement Second of Torts, § 660 to determine whether the criteria had been satisfied and in that case concluded that it had; however, applying Stewart's logic to the facts here makes clear that the same criteria has not been satisfied. § 660, although not specifically adopted by the Court, provides that four exceptions are available to the general rule that termination itself satisfies the requirement of "favorable" termination in the malicious prosecution that follows.

Nowhere does the Restatement make an exception to a termination for lack of jurisdiction.

As both the majority and dissent understood, the harm to the accused is serious and needs to be redressed absent the application of an exception to that rule.

In *Van, supra,* a termination for lack of prosecution, provided the required favorable termination in the subsequent malicious prosecution action.

The prosecuting authorities and the Telephone Company and its complaining witness had the opportunity (a year) to simply re-file the initiating affidavit and thereby satisfy the Justice Court's need for a jurisdictional affidavit. But none did that simple act. They all watched the charges be reduced and sent to the Justice Court. They all watched the

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[1] Cited throughout this brief as "*Stewart*"

Justice Court dismiss the charges because it needed an initiating affidavit. They did nothing. Obviously they abandoned the charges and having done so, must stand in the dock in the subsequent malicious prosecution action.

They started this entire process-accused Mr. Bearden of a felony, had him arrested and put in jail and took away his freedom. He was harmed as a result. If truth was in the affidavit, all they had to do was to re-file it. They did nothing! How can a conclusion be reached that this was not an abandonment? Since it was, the necessary "favorable" outcome had been provided.

What is it if not an abandonment? There should be no question but that an abandonment by the prosecuting authorities and/or the complaining witness happened here and that is sufficient to provide the platform of a "favorable" result. *Van, supra,* and other cases teach that truth.

Finally, if the Court concludes that those actions *might* be something else, that "something else" should be the subject of proof to a jury of peers. There are no genuine issues of material facts, but if abandonment is a fact issue requiring an intent, then the case should be sent to the jury to let them decide that fact issue.

IV. ARGUMENT

A. The Applicable Standard of Review

This Court conducts a *de novo* review of the Trial Court's grant or denial of summary judgment. *Saucier, ex rel., Saucier v. Biloxi Reg'l Med. Ctr.,* 708 So. 2d 1351, 1354 (Miss. 1998).

The same *de novo* standard is applicable when passing on questions of law. *Smith v. Estate of Brents,* 923 So. 2d 235, 236 (Miss. Ct. App. 2006); *Aladdin Const. Co., Inc.* v.

John Hancock Life Ins. Co., 914 So. 2d 169, 174 (¶ 8) (Miss.2005). This includes the learned trial judges' incorrect application of a correct legal standard as well as the failure to apply the correct legal standard. *Joiner v. Haley*, 777 So. 2d 50, 52 (Miss. Ct. App. 2001).

Legal conclusions are likewise reviewed by the *de novo* standard. *Andrew Jackson Life Insurance Co. v. Williams,* 566 So. 2d 1172,1183-1184 (Miss. 1990).

Thus, whether the trial judge properly concluded that the case against Mr. Bearden was not terminated in his favor, gets a fresh look here not burdened by deference to the learned trial judge's hands on opportunity to first consider the issue.

If, however, the Court concludes that the issue of abandonment argued by Mr. Bearden is a question of fact resting on the "intent" of the prosecuting authorities or complaining witness, then the existence of the issue of their intent precludes summary judgment. *McLeod v. Allstate Ins. Co.*, 789 So. 2d 806 (Miss. 2001); *Webb v. Jackson*, 583 So. 2d 946, (Miss. 1991); *Jordan v. Wilson*, ----S0. 2d----, 2008 WL 2894366 (Miss. App. 2008).

B. Introduction to Argument

The Trial Court erred when it concluded that the dismissal for lack of jurisdiction did not constitute a termination in Mr. Bearden's favor which satisfied the required element in his malicious prosecution claim that the underlying proceeding was terminated in his favor. Not only has the Mississippi Court pointed to the opposite conclusion but good law from other jurisdictions points there.

Although Mississippi has not specifically adopted § 660 of the Restatement Second of Torts, in *Stewart* the majority nonetheless evaluated its teaching and applied an

exception to the general rule that any path to the victory constituted a termination in the accused's favor and while doing so dropped crumbs on the path to the opposite result of the Trial Court. Here, since dismissal for lack of jurisdiction is not one of the exceptions to the general rule, the further application of § 660 teaches that Mr. Bearden's history provided the necessary favorable termination.

In addition, a strong dissent noted that it was simply not right that a party could reek havoc in the life of someone else and then escape because the Court it used as a weapon, didn't have jurisdiction. It rightly reasoned that the accused was put in jeopardy and summarized "the fact that a case has been dismissed rather than terminated by judgment or acquittal does not defeat the element of termination in plaintiff's favor" citing the cases the trial court attempted to distinguish. *Stewart*, *infra*, p. 740.

The Court erred by doing no more than attempting to distinguish the cases rather than properly evaluating the rule identified in the opinion and applying it to the case at bar. No good public policy argument can be made to support a rule that when a case is obviously abandoned, whether by the prosecution or the complaining, that case has terminated in the favor of the plaintiff brining a claim for malicious prosecution.

Although the Trial considered the abandonment issue, it incorrectly evaluated the situation and, as the result, incorrectly concluded that abandonment had not occurred here.

The prosecuting attorney saw his case reduced to a misdemeanor and sent elsewhere and the county prosecutor who picked it up, likewise saw his case disappear because neither he nor the complaining witness had filed or would file the necessary affidavit to get it going in the Justice Court.

Neither did anything to follow through, to get this case disposed of on the merits. When the ball was in their court, what else could it be but an abandonment when all that was required to get to the merits was to re-file the affidavit which got everything started in the first place. Filing the affidavit in the Justice Court was not a big deal. If the truth were in the affidavit, file it!

Our Court should align itself with its precedent and if new precedent needs to be identified, it should align itself with the need to hold parties accountable for their actions! Since each wrong should have a remedy, the Court should make clear that having someone arrested and jailed is not the end of responsibility, but the beginning. Harm someone at your own peril - have the fortitude to pursue what you start but if you don't, stand ready to defend your actions on the merits.

The Trial Court committed reversible error. The Summary Judgment should be reversed and the case returned to the lower court for regular proceedings.

C. Body of Argument

1. The underlying criminal charge and its place here.

The Trial Court correctly concluded that "a claim of malicious prosecution requires that the criminal charge be terminated in the plaintiff's favor" (citing *George v. W.W.D. Automobiles, Inc.*, 937 So. 2d 958, 961 (Miss. 2006) (Tab. 8, R.E. 141) and the consideration of whether the dismissal of the charges by the Justice Court constituted a termination in Mr. Bearden's favor was the only issue raised by the Motion.

2. *Stewart* provides compelling precedent favoring Mr. Bearden.

The Trial Court adopted the following from *Stewart*, *supra*, "not all dismissals in this State constitute terminations in favor of the accused for the purposes of malicious

prosecution actions" but jumped straight from there to its conclusion that dismissal of the charges against Mr. Bearden did not meet the "favorable" termination criterial (Tab. 8, R.E. 142). In fact, other than the quote used by the Trial Court, *Stewart*, doesn't help the Telephone Company.

The *Stewart* Court was considering whether an unusual factual situation fit an exception to the general rule that dismissals do in fact constitute "favorable" terminations. The question was did the fact that a municipal judge believed the accused was guilty but dismissed the charge anyway because he "was trying to give her a break...", *Stewart*, p. 735 constitute a "mercy" dismissal which is one of the exceptions to the general rule? The Court answered "yes" but the facts there are so far from the facts presented in this case that *Stewart* doesn't really provide precedent favoring the Telephone Company while it does for Mr. Bearden.

The interesting evaluation of whether the trial court should have considered the municipal judge's affidavit somewhat overrode the impact on readers of what happened by considering the affidavit and how the Court got there. The *Stewart* Court commenting that there were no Mississippi cases on point noted that the "logic behind the ... Restatement is obvious" *Stewart*, p. 73. That same logic applies to Mr. Bearden's case by following it, the Trial Court should have concluded that the dismissal of Mr. Bearden's case, was as "favorable" termination.

The *Stewart* Court quoted the following from the *Restatement Second of Torts*, § 660:

> 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:**

> majority's contention that the dismissal granted in the case at bar is insufficient to sustain a malicious prosecution action is unacceptable. The record clearly indicates that the trial court dismissed all charges against Stewart, discharged her and terminated the proceedings. There is nothing relevant to the criminal proceeding to indicate that the dismissal was inconsistent with a termination in Stewart's favor.
>
> *Stewart*, p. 741

We also note that the *Stewart* dissent analyzing some of the same cases the Court below distinguished, wrote "the fact that a case has been dismissed rather than terminated by judgment of acquittal does not defeat the element of termination in plaintiff's favor." *Stewart*, *supra*, p. 740-741. While all of the conclusion is relevant, of particular relevance is the comment that "There is noting relevant to the criminal proceeding to indicate that the dismissal was inconsistent with a termination in Stewart's favor." There is in fact nothing to indicate that Mr. Bearden's dismissal was inconsistent with a favorable termination.

3. There is other compelling Mississippi precedent supporting Mr. Bearden's "favorable" termination.

That Mississippi precedent points to a contrary conclusion from that the Trial Court adopted below, is established in *Van, supra,* where the Court reasoned "how can we allow the prosecution to delay the proceedings long enough to cause the case to be dismissed and then prevent a person wrongly accused from bringing a subsequent suit fo malicious prosecution?" *Id.* at 893. Although that case is not directly in point, as precedent, it stands for the proposition that when one of the four exceptions of the Restatement doesn't apply, whatever the path to dismissal, dismissal is enough to constitute a favorable termination.

The same general question fits the Bearden situation; i.e.: How can the Court allow the prosecution and complaining witness to initiate the proceeding; have Bearden arrested as a felon; watch their case get reduced and transferred and then dismissed; and then

refuse to perform a simple act to bring it to a resolution on the merits and then prevent Mr. Bearden from bringing his case to attempt to redress the wrongs done him?

"It would seem only reasonable that a person would undergo considerable emotional distress when faced with a felony charge," *Junior Food Stores, v. Rice*, 671 So. 2d 67, 77 (Miss.1996). Mr. Bearden has been damaged-he was charged with a felony and pled that he experienced "emotional distress."

There is nothing in this record which supports a view that the dismissal for lack of jurisdiction was inconsistent with a favorable termination. The Trial Court should not have established a new exception! Public policy points to a contrary result.

4. <u>That some dismissal are matters of form makes no difference</u>

The Telephone Company complains because the result, the dismissal, was a matter of form only and did not relate to the merits. We address the "merit" issue later in this brief.

The Telephone Company could have re-filed the affidavit and the merits would have been reached, but refiling was entirely within the power of the prosecuting authorities or the complaining witness/Telephone Company and not Mr. Bearden.

The Trial Court cited good general law for the proposition that some dismissals are a "matter of form," *Deposit Guaranty National Bank v.* Roberts, 483 So. 2d 348, (Miss 1986) (R.E.142) and no one would argue with that generalization but it surely can't be precedent in an entirely distinct and different factual situation. In *Deposit Guaranty*, *supra*, the Court was addressing the dismissal of a stale case vis a vis the tolling statute and not the issue subsequently presented and disposed of in *Van*, *supra*, where the Court concluded that dismissal of a stale case provided the requisite favorable termination.

5. Precedent from other jurisdictions is not all favorable to the Telephone Company.

Law from other jurisdictions is not all pointed toward the Trial Court's conclusion. For instance, see In *Hammond Lead Products, Inc. v. American Cyanamid Co.*, 570 F.2d 668 (1977, CA7 Ind.) (applying New Jersey Law), the court held that dismissal for lack of venue of a suit brought in New Jersey by a Maine corporation against an Indiana corporation and an Indiana resident constituted a termination in favor of the Indiana defendants. The court noted that trial court had found that the claim was asserted merely to harass a competitor and that it had been brought in a distant forum in the hope that the cost of defense away from homes and offices would lead to settlement of the groundless claim. Termination of the prior litigation was required, the court said, in order to promote judicial economy and permit the original claim to proceed without the intrusion of a malicious prosecution action. Until the first court has decided the merits, or has ruled that it will not decide the case for want of jurisdiction or improper venue, the court said, a malicious prosecution action is premature. After dismissal, even on the basis of an inappropriate choice of forum, the court said, there can no longer be a duplication of judicial forums and therefore the defendant cannot be deprived, by doctrines of estoppel or otherwise, of his day in court to pursue relief for malicious prosecution.

In an action for malicious prosecution, *Turman v. Schneider Bailey, Inc.*, (1988, Mo.App.) 768 S.W.2d, 108, the court dismissed the underlying replevin action for lack of jurisdiction without prejudice and three months passed before plaintiff filed suit for malicious prosecution. The Missouri Court of Appeals held that the defendant achieved favorable results in the underlying action and would be permitted to bring suit for

malicious prosecution.

The *Turman* case is similar in circumstances to Bearden's. In *Turman*, the initial replevin action which was dismissed for lack of jurisdiction because the amount in controversy exceeded its jurisdictional limits. The defendant in the replevin action (Bearden in our case) expended funds to hire an attorney to represent him in the replevin action, and was personally and professionally embarrassed by having been sued.

Three months later, the defendant filed an action for malicious prosecution in which the jury returned a verdict awarding him actual and punitive damages against the original plaintiff of the replevin action from which the replevin plaintiffs appealed. The Missouri Court of Appeals upheld the malicious prosecution award and addressing the "favorable termination" requirement, the Court of Appeals pointed out that "a favorable termination arises from adjudication in the defendant's favor, withdrawal of the action by the plaintiff, or dismissal of the action because of the failure to prosecute." *Id.* at 113. The Court concluded that because the original replevin plaintiffs had not re-filed suit in the three months between its dismissal on jurisdiction grounds and the initiation of the malicious prosecution action, "the plaintiffs (in the malicious prosecution action) had no reason to believe that [the defendants] would pursue the action further. *Id.* Further, "because no real possibility existed that [the defendants] would re-file the replevin action in a proper court," the court concluded that the defendant had abandoned it's suit. *Id.*

In *Sandlin v. Anders*, 187 Ala.473, 65 So. 376, (Ala. 1914) where the magistrate misunderstood what was going on and sent the case to the court for disposition instead of to the grand jury, the resulting technical dismissal of that case was "an end of the prosecution" and amounted to a favorable termination. *Id.* 377. The Alabama Court

noted that "otherwise plaintiff might have been without a remedy for a great violation of his personal rights not to be contemplated as possible under the law which 'professes to furnish as remedy for every wrong.'" *Id.* 377.

6. The Prosecuting authorities and the Complaining witness abandoned the case and that resulted in "favorable" termination.

The Trial Court incorrectly addressed the "abandonment" argument presented by Mr. Bearden (Tab.8, R.E. 143). Instead of really evaluating the abandonment question, the trial court only attempted to distinguish some of the cases supporting Mr. Bearden and consequently did not really apprehend the status of a prosecution which had been abandoned (Tab. 8, R.E. 142). When either the prosecuting attorney or complaining witness abandons the action, that abandonment provides a sufficient basis to conclude that the action was favorably terminated. As the Court has concluded "the termination requirement is met when the action is either abandoned by the prosecuting attorney or by the complaining witness" *George, supra,* p. 961 citing *Strong v. Nicholson*, 580 So.2d, 1288,1293 (Miss. 1991).

It was not proper to conclude , as did the Trial Court, that the prosecution and/or the complaining witness had not abandoned the prosecution. They clearly had. The charges had been dismissed but all that was required was to re-file the charging affidavit. That failure was indeed a favorable termination. Mississippi does not necessarily require the underlying disposition to "bear some relationship to the merits" (Tab.8, R.E. 142) but even if it did, abandonment does bear that relationship.

None of the four exceptions to the general rule that are identified in the Restatement "bear some relationship to the merits." In three out of the listed four

exceptions, the accused had an active part in stopping the prosecution and, in the fourth, the prosecution hadn't really been terminated or stopped at all. In exception (a) the accused "cut a deal"; in (b) the accused prevented the prosecution; in (c) the accused begged for mercy; and in (d) the accused was still being prosecuted!

Thus, none of the exceptions had to do with the merits except that the case was over with the exception of exception (d) and there the case was still going forward!

BellSouth started all of this. BellSouth refused to carry it forward. All that was required was to file the affidavit in the Justice Court. The harm to Mr. Bearden had already been inflicted. As we noted earlier in this brief:

> It would seem only reasonable that a person would undergo considerable emotional distress when faced with a felony charge. Moreover, it is common for job applicants to be asked if they have ever been arrested and, if so, for what reason. Rice, if asked this question, would have to admit and explain his arrest.

Junior Food Stores, Inc. v. Rice, 671 So. 2d 67, 78 (Miss. 1996).

7. <u>Abandonment reflects on the merits</u>.

BellSouth's failure to file a new affidavit with the Lauderdale County Justice Court reflects on the merits of the case. As the Supreme Court noted, in determining that a dismissal for failure to prosecute constituted favorable termination, the natural assumption is that "one does not simply abandon a meritorious action once instituted" *Van, supra*. As the Court stated, "how can we allow the prosecution to delay the proceedings long enough to cause the case to be dismissed and then prevent a person wrongly accused from bringing a subsequent suit for malicious prosecution?" *Id.* at 893.

The Court went on to recognize the dilemma confronting someone like Mr.

Bearden:

> If we were to adopt a different logic which would effectively bar a subsequent malicious prosecution action, there would inevitably be some criminal defendants left with no remedy for a maliciously instituted suit. We believe this result should be avoided.

Van, supra, p. 893

What logic supports the institution of a criminal proceeding, the charging of a felony, incarceration as a result, the ultimate dismissal of the charges because the prosecuting authorities and /or the complaining witness had not done something correctly and then deny the wrongfully accused the opportunity to present a malicious prosecution case to a jury of his peers? The *Van* court spoke the truth that all of us know, i.e.: the natural assumption is that the failure to correct the defect by simply re-filing the charging affidavit, bespeaks of a conscious recognition that the charge isn't going to be successfully prosecuted.

8. <u>If this is a fact issue, then the jury must decide</u>

There is not much to say on this issue, if there be an issue. If abandonment is a "state of mind" question, then of course those issues must be sent to the jury. The Trail Court only considered the issue as one of law. Although it appears that many cases might require a jury's decision on the facts, the fact of the matter is that once the case was dismissed, a long time passed between then and the running of the statute of limitations (2 years for violations of § 97-7-31 and 97-7-53 and even adding an additional year for problems with an indictment, § 99-1-99, Miss. Code Ann) on April 11, 2007 or almost one year to the date that the Justice Court dismissed the case on April 11, 2006.

Mr. Bearden maintains his right to trial by jury if the facts here are not construed as an abandonment as a matter of law.

CONCLUSION

Public policy does not and should not provide the Telephone Company a place to hide. This dismissal does not fit the identified exceptions to the general rule provided in the Restatement Second of Torts. The cases support the decision that when the underlying case is dismissed when the prosecuting authority and/or the Complaining witness makes a technical mistake, there has been a favorable termination for the charged party. More particularly here, where all that was required to proceed was the simple act of re-filing the charging affidavit, justice simply won't support any result which permits the prosecutor or charging party to take advantage of its own mistake.

Mr. Bearden ought to have his chance to persuade a jury.

Accordingly, Mr. Bearden requests this Court to reverse the Judgment dismissing his case with prejudice and send this case back to the Circuit Court of the Second Judicial District of Hinds County for such discovery and the rules permit and a trial on the merits.

THIS the 6th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS W. PREWITT, do hereby certify that I have mailed, via United States Mail, postage fully prepaid thereon, a true and correct copy of the above and foregoing ***Brief of Appellant*** to:

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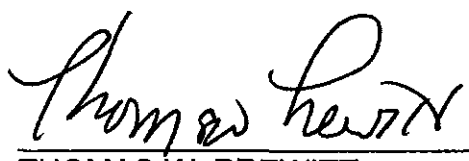
Jackson, MS 39201

THIS, the 6TH day of May, 2009.



THOMAS W. PREWITT