

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00359

NORMA SPRINGFIELD

PLAINTIFF-APPELLANT

versus

MEMBERS 1ST COMMUNITY FEDERAL CREDIT UNION

DEFENDANT-APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI

BRIEF OF MEMBERS 1ST COMMUNITY FEDERAL CREDIT UNION, APPELLEE

ORAL ARGUMENT NOT REQUESTED

TIMOTHY M. PEEPLES - BAR # [REDACTED]
DANIEL, COKER, HORTON & BELL, P.A.
OXFORD SQUARE NORTH
265 NORTH LAMAR BOULEVARD
SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00359

NORMA SPRINGFIELD

PLAINTIFF-APPELLANT

versus

MEMBERS 1ST COMMUNITY FEDERAL CREDIT UNION

DEFENDANT-APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI

BRIEF OF MEMBERS 1ST COMMUNITY FEDERAL CREDIT UNION, APPELLEE

ORAL ARGUMENT NOT REQUESTED

TIMOTHY M. PEEPLES - BAR # [REDACTED]
DANIEL, COKER, HORTON & BELL, P.A.
OXFORD SQUARE NORTH
265 SOUTH LAMAR BOULEVARD
SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

IN THE SUPREME COURT OF MISSISSIPPI

NORMA SPRINGFIELD

APPELLANT

VS.

NO. 2010-CA-00359

MEMBERS 1ST COMMUNITY FEDERAL
CREDIT UNION

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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 disqualification or recusal:

1. Norma Springfield - Plaintiff/Appellant.
2. Luanne Thompson, Esq., Post Office Box 360, Amory, Mississippi 38821, and T. Kilpatrick, Esq., 1124 N. Lamar Blvd., Oxford, Mississippi 38655 - Counsel for Plaintiff/Appellant.
3. Timothy M. Peebles, Esq., Daniel Coker Horton & Bell, P.A., 265 North Lamar Boulevard, Post Office Box 1396, Oxford, Mississippi 38655 - Counsel for Defendant/Appellee.
4. Honorable Jim S. Pounds, Circuit Court Judge, Post Office Drawer 1100, Tupelo, Mississippi 38802 - Circuit Court Judge on this case.
5. Members 1st Community Federal Credit Union - Defendant/Appellee.
6. Pollan & Associates - Former Defendant (Plaintiff/Appellant has not appealed the dismissal of Pollan & Associates).
7. Chris Pollan - Former Defendant (Plaintiff/Appellant has not appealed the dismissal of Chris Pollan).

8. Mitchell Springfield - Defendant (Mr. Springfield did not join in or participate in the Motion to Dismiss that is the subject of this appeal).

THIS the 29th day of October, 2010.

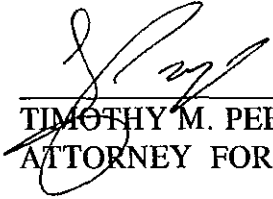

TIMOTHY M. PEEPLES
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

PAGE:

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES	1
A. The trial court properly applied Mississippi law and dismissed the Plaintiff/Appellant's claims under M.R.C.P. 12(b)(6).	
B. The trial court properly applied Mississippi law by holding that the Plaintiff/Appellant could not meet her burden of proof as to the element of "probable cause."	
C. The Plaintiff/Appellant submitted the Appellant's Brief in an untimely manner, and her appeal must be dismissed.	
II. STATEMENT OF THE CASE	1
A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS	1
B. STATEMENT OF FACTS	1
III. SUMMARY OF THE ARGUMENT	2
IV. ARGUMENT	3
V. CONCLUSION	12
VI. CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

CASES	PAGE
<i>Benjamin v. Hooper Electronic Supply Co.</i> , 568 So. 2d 1182 (Miss. 1990)	10
<i>Bodne v. King</i> , 835 So. 2d 52 (Miss. 2003)	8
<i>Condere Corp. v. Moon</i> , 690 So. 2d 1191 (Miss. 1997)	8
<i>Croft v. Grand Casino Tunica, Inc.</i> , 910 So. 2d 66 (Miss. Ct. App. 2005)	7-8
<i>Esparaza v. State</i> , 595 So. 2d 418 (Miss. 1992)	8
<i>Farris v. State</i> , 764 So. 2d 411 (Miss. 2000)	8
<i>Funderburk v. Johnson</i> , 935 So. 2d 1084 (Miss. Ct. App. 2006)	7
<i>George v. W.W.D. Automobile, Inc.</i> , 937 So. 2d 958 (Miss. Ct. App. 2006)	9-10
<i>J.B. Hunt Transp. v. Forrest Gen. Hosp.</i> , 34 So. 3d 1171 (Miss. 2010)	4, 6
<i>McClinton v. Delta Pride Catfish, Inc.</i> , 792 So. 2d 968 (Miss. 2001)	8
<i>McGuffie v. Herrington</i> , 966 So. 2d 1274 (Miss. Ct. App. 2007)	10
<i>Meadows v. Blake</i> , 36 So. 3d 1225 (Miss. 2010)	3
<i>Overstreet v. Merlos</i> , 570 So. 2d 1196 (Miss. 1990)	10
<i>Owens v. Kroger</i> , 430 So. 2d 843 (Miss. 1983)	10
<i>Poindexter v. Southern United Fire Ins. Co.</i> , 838 So. 2d 964 (Miss. 2003)	6-7
<i>Porter v. Farris</i> , Civil Action No. 1:06CV293-SA-JAD, 2008 U.S. Dist. LEXIS 63449 (N.D. Miss. Aug. 13, 2008)	8-9
<i>Robb v. United States Fid. & Guar. Co.</i> , 798 F. 2d 788 (5 th Cir. 1986)	8, 11
<i>Rogers v. State</i> , 881 So. 2d 936 (Miss. Ct. App. 2004)	5, 8
<i>Stuckey v. Provident Bank</i> , 912 So. 2d 859 (Miss. 2005)	6
<i>Sullivan v. Boyd Tunica, Inc.</i> , Civil Action No. 2:06CV016-B-A, 2007	

U.S. Dist. LEXIS 11499 (N.D. Miss. Feb. 16, 2007)	9
<i>Truax v. City of Gulfport</i> , 931 So. 2d 592 (Miss. Ct. App. 2005)	11
<i>U.S. v. Harris</i> , 458 F. 2d 670 (5th Cir. 1972)	8
<i>Young v. North Miss. Med. Ctr.</i> , 783 So. 2d 661 (Miss. 2001)	4

OTHER SOURCES

M.R.A.P. 25(a)	11-12
M.R.A.P. 31(d)	11
M.R.C.P. 12(b)(6)	2, 3-4
M.R.C.P. 12, <i>cmt.</i>	4, 6

I. STATEMENT OF THE ISSUES

A. The trial court properly applied Mississippi law and dismissed the Plaintiff/Appellant's claims under M.R.C.P. 12(b)(6).

B. The trial court properly applied Mississippi law by holding that the Plaintiff/Appellant could not meet her burden of proof as to the element of "probable cause."

C. The Plaintiff/Appellant submitted the Appellant's Brief in an untimely manner, and her appeal must be dismissed.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

Plaintiff/Appellant, Norma Springfield, filed suit in the Circuit Court of Monroe County, Mississippi, against Defendant/Appellee Members 1st Community Federal Credit Union ("Members 1st"), under a malicious prosecution theory. (Clerk Papers ("C.P."), pp. 9-12). Shortly thereafter, Pollan & Associates and Chris Pollan, two of the original defendants, filed various Motions to Dismiss, including one which asserted that Ms. Springfield could not satisfy the element of "want of probable cause" under her malicious prosecution claim. (C.P., pp. 36-39). Members 1st joined in that Motion to Dismiss (C.P., pp. 47-50), and the trial court granted Members 1st's Motion to Dismiss on January 26, 2010. (C.P., pp. 126-27). The Order of Dismissal was filed with the clerk's office on February 1, 2010. (C.P., pp. 126-27). Ms. Springfield filed her Notice of Appeal on February 26, 2010. (C.P., pp. 131-32).

B. STATEMENT OF FACTS

Norma Springfield is a former Members 1st employee who was accused of embezzlement from Members 1st. (C.P., p. 10). A Lowndes County, Mississippi, grand jury indicted Ms.

Springfield for embezzlement in January 2006. (C.P., p. 10). On May 19, 2008, the Circuit Court of Lowndes County, Mississippi, entered an Order of Nolle Prosequi on the charge of embezzlement. (C.P., p. 11).

Ms. Springfield subsequently filed suit on May 18, 2009, against Members 1st, Pollan & Associates, Chris Pollan and Mitchell Springfield, alleging that the defendants were liable for the tort of malicious prosecution. (C.P., pp. 9-12). Shortly thereafter, Pollan & Associates and Chris Pollan filed their Second Motion to Dismiss Plaintiff's Complaint, asserting that Ms. Springfield's action should be dismissed under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. (C.P., pp. 36-39). Members 1st joined in that Motion to Dismiss. (C.P., pp. 47-50).

The trial court heard oral argument on the Motion to Dismiss on December 9, 2009, and orally granted the Motion. (T., pp. 1-34). The trial judge held that Ms. Springfield could not, as a matter of law, satisfy her burden of proof on the element of "want of probable cause" because she had been indicted by a grand jury using a probable cause standard. (T, pp. 30-32). A formal Order dismissing Ms. Springfield's suit was entered on February 1, 2010. (C.P., pp. 116-27).

III. SUMMARY OF THE ARGUMENT

Rule 12(b)(6) of the Mississippi Rules of Civil Procedure provides for dismissal of claims on which the plaintiff cannot establish a factual or legal basis for a claim. Contrary to Ms. Springfield's position, the trial court properly applied M.R.C.P. 12(b)(6) and dismissed Ms. Springfield's lawsuit because, as a matter of law, she could not prove the element of "want of probable cause." In rendering this decision, the trial court relied solely on the information asserted in Ms. Springfield's Complaint and did not convert the Motion to Dismiss into a Motion for Summary Judgment. The trial judge's ruling was proper since, as a matter of law, Ms.

Springfield could not establish a lack of probable cause given the fact that she was indicted by a Lowndes County, Mississippi, grand jury, a fact that is undisputed.

In the alternative, Ms. Springfield's appeal must be dismissed as she failed to file the Appellant's Brief in a timely manner under the Mississippi Rules of Appellate Procedure.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Appellant seeks review of the trial court's grant of Members 1st's Motion to Dismiss on the issue of probable cause. As the Mississippi Supreme Court has observed, a Motion to Dismiss is reviewed "de novo." *Meadows v. Blake*, 36 So. 3d 1225, 1229 (Miss. 2010). When the appellate court "consider[s] a motion to dismiss, the allegations in the complaint must be taken as true," and the court should grant the motion when "it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Id.*

B. THE TRIAL COURT PROPERLY APPLIED MISSISSIPPI LAW AND DISMISSED THE PLAINTIFF/APPELLANT'S CLAIMS UNDER M.R.C.P. 12(b)(6).

Although the Appellant's Brief contains only one assignment of error, her argument is essentially two-fold. Ms. Springfield's first contention - that the trial court improperly converted the Motion to Dismiss into a Motion for Summary Judgment and denied her the right to present evidence in defense of the Motion for Summary Judgment - will be addressed in this Section of Members 1st's Brief. Ms. Springfield's argument that the trial court erred in dismissing her claim for malicious prosecution will be addressed in Section "C" of Members 1st's Brief.

Rule 12(b)(6) of the Mississippi Rules of Civil Procedure provides a mechanism for challenging the merits of a plaintiff's claims, allowing a defendant to move for dismissal when the

plaintiff has “[f]ail[ed] to state a claim upon which relief can be granted.” As Ms. Springfield notes in her Brief, a Motion to Dismiss brought under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure “raises an issue of law.” *Young v. North Miss. Med. Ctr.*, 783 So. 2d 661, 663 (Miss. 2001). A Motion to Dismiss under M.R.C.P. 12(b)(6) “challenges the legal sufficiency of the complaint.” *J.B. Hunt Transp. v. Forrest Gen. Hosp.*, 34 So. 3d 1171, 1173 (Miss. 2010). When faced with a Rule 12(b)(6) Motion to Dismiss, the trial court should take the allegations in the complaint as “true,” but the court must grant the Motion when “there [are] no set of facts that would allow the plaintiff to prevail.” *Id.* Ms. Springfield’s Brief correctly cites the Comment to M.R.C.P. 12, which provides that “[t]he purpose of Rule 12 is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases.”

Ms. Springfield argues in her Brief that the trial court “did not follow the law in reaching his decision,” first, by purportedly not accepting the allegations in the Complaint as true and, second, by allegedly “convert[ing] the motion to dismiss under 12(b)(6) to a summary judgment ruling pursuant to Rule 56.” First, the trial judge *did* accept as true all allegations from Ms. Springfield’s Complaint that were pertinent to the issues raised in Members 1st’s Motion to Dismiss. The only pertinent inquiry, which is discussed in more detail in Section “C” below, was whether Ms. Springfield was indicted. Members 1st’s contention was, and remains, that the return of an indictment is the equivalent of a finding of probable cause and precludes a plaintiff from recovering under a theory of malicious prosecution. Ms. Springfield’s Complaint averred that she was charged with embezzlement and indicted by a Lowndes County grand jury. (C.P., p. 10). Any other inquiries, such as the number of attempts made to secure the indictment, whether the district attorney was involved in the grand jury procedure or what role Ms. Springfield’s ex-

husband, Mitchell Springfield, played in the grand jury process, simply have no bearing on Members 1st's Motion to Dismiss.

Ms. Springfield's argument reflects her fundamental misunderstanding of the nature of Members 1st's Motion. Members 1st contended in its Motion and in oral argument before the trial court that, as a matter of law, Ms. Springfield could not proceed on her malicious prosecution claim because she had been indicted by a Lowndes County grand jury. (C.P., pp. 47-50; T., pp. 1-34). Because the return of an indictment against her was the equivalent of a finding of "probable cause," she could not, as a matter of law, establish one of the elements necessary to recover under her malicious prosecution theory - namely, the absence of probable cause. *Rogers v. State*, 881 So. 2d 936, 940 (Miss. Ct. App. 2004). The Court did not, as Ms. Springfield suggests, without support, simply accept the information in Members 1st's Answer and its oral argument as true. Rather, the trial judge explicitly found that "grand juries base their decisions on probable cause." (C.P., p. 126). With that finding, the trial court held that "it is the ruling of the Court the second motion to dismiss will be granted . . . due to the failure to meet the element of probable cause." (C.P., p. 127). The trial court did not reject any assertions made in the Complaint as untrue but, instead, accepted as true the lone fact with any pertinence to the trial court's inquiry in the Motion to Dismiss - Ms. Springfield was indicted. No other facts needed to be considered to make the decision here, and Ms. Springfield's first position has no merit.

Second, contrary to Ms. Springfield's general, unsupported assertion, the trial court did not convert Members 1st's Motion to Dismiss into a Motion for Summary Judgment. Ms. Springfield refers to nothing in the Record to bolster her position and only refers this Court to four

sentences from the Court's oral ruling from the bench. The trial judge's ruling does not "obviously" reflect, as Ms. Springfield suggests, that the court considered evidence outside the pleadings in rendering its decision. Instead, the oral ruling clearly reflects Judge Pounds' determination that Ms. Springfield was indicted, that grand juries return indictments based upon a probable cause standard and, as such, Ms. Springfield could not establish the element of "want of probable cause," thus rendering her malicious prosecution claim legally insufficient and one under which she could not succeed as a matter of law. Ms. Springfield provides extensive argument to suggest that she had certain rights under Rule 56, but the bottom line is that she has failed to establish that the trial court at any point converted Members 1st's Motion to Dismiss into a Motion for Summary Judgment. The trial court simply did not consider (nor did it need to consider) any evidence beyond what was set out in Ms. Springfield's Complaint regarding her indictment, and Ms. Springfield did not have a right to any of the "procedural safeguards" to which she claims she was entitled.

Ms. Springfield further suggests to this Court that a trial judge may not dismiss a case on its merits under M.R.C.P. 12(b)(6). As this Court has repeatedly held, "a Rule 12(b)(6) motion tests [the] legal sufficiency" of the plaintiff's Complaint, and like Rule 56, Rule 12(b)(6) "provide[s] for dismissal of actions." *Stuckey v. Provident Bank*, 912 So. 2d 859, 865 (Miss. 2005). Mississippi's appellate courts in countless decisions have upheld dismissal of cases by trial judges on Rule 12(b)(6) motions. *See, e.g., J.B. Hunt*, 34 So. 3d at 1173-75. If the defendant is awarded dismissal under M.R.C.P. 12(b)(6), the unsuccessful plaintiff may request the right to amend the plaintiff's Complaint under M.R.C.P. 15. *See M.R.C.P. 12 cmt.* However, leave to amend "is left to the trial judge's sound discretion and . . . may be denied where it appears certain

that plaintiff cannot state a claim showing that he is entitled to relief or that any amendment would be futile.” *Poindexter v. Southern United Fire Ins. Co.*, 838 So. 2d 964, 969 (Miss. 2003). In the case at bar, as is explained in Section “C” below, the trial court found Ms. Springfield could not satisfy one of the elements of her malicious prosecution claim and properly dismissed the case under Rule 12(b)(6). Ms. Springfield did not seek an opportunity to revise her Complaint, but had she done so, the trial court would have acted appropriately if it had denied the motion to amend as futile since it is undisputed that Ms. Springfield was indicted. The plaintiff has failed to show how the trial court converted Members 1st’s Motion to Dismiss into a Summary Judgment Motion, and it is abundantly clear that the trial court had the authority under Rule 12(b)(6) to dismiss Ms. Springfield’s claims.

C. THE TRIAL COURT PROPERLY APPLIED MISSISSIPPI LAW BY HOLDING THAT THE PLAINTIFF/APPELLANT COULD NOT MEET HER BURDEN OF PROOF AS TO THE ELEMENT OF “PROBABLE CAUSE.”

Mississippi’s appellate courts have consistently held that “malicious prosecution suits are not favored [under Mississippi law] but must be managed with great caution.” *Croft v. Grand Casino Tunica, Inc.*, 910 So. 2d 66, 72 (Miss. Ct. App. 2005). The Courts maintain that position as:

these suits have a tendency to discourage prosecution of crime as they expose the prosecutor to civil suits, and the love of justice may not always be strong enough to induce individuals to commence prosecution when if they fail, they may be subjected to the expenses of litigation even though they are found not liable for damages. . . . In other words, the threat of a malicious prosecution suit may deter citizens from attempting to bring wrongdoers to justice, necessitating a cautious approach to these suits.

Funderburk v. Johnson, 935 So. 2d 1084, 1097 (Miss. Ct. App. 2006).

To establish a claim for malicious prosecution, the plaintiff must prove, by a

preponderance of the evidence, six elements, with the fifth element being “want of probable cause for [instituting] the [criminal] proceedings” against the plaintiff. *Condere Corp. v. Moon*, 690 So. 2d 1191, 1194 (Miss. 1997); *Croft*, 910 So. 2d at 72. The plaintiff bears the “burden of proving want of probable cause.” *McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 973 (Miss. 2001).

Under Mississippi law, the existence of an indictment establishes probable cause as a matter of law. *Rogers*, 881 So. 2d at 940. The Mississippi Supreme Court has explained that “[a]n indictment is a determination by a grand jury that probable cause exists to hold the person indicted for trial.” *Bodne v. King*, 835 So. 2d 52, 59 (Miss. 2003); *see also Farris v. State*, 764 So. 2d 411, 422 (Miss. 2000) (noting that grand juries in Mississippi apply a “probable cause standard of proof” to return indictments); *Esparaza v. State*, 595 So. 2d 418, *7 (Miss. 1992) (same). Even the United States Court of Appeals for the Fifth Circuit has agreed that “[t]he indictment returned by a grand jury is sufficient to establish probable cause for trial.” *U.S. v. Harris*, 458 F. 2d 670, 677-78 (5th Cir. 1972). The Fifth Circuit has also expressly commented that “the probable cause standard is more lenient when the underlying action is civil rather than criminal.” *Robb v. United States Fid. & Guar. Co.*, 798 F. 2d 788, 790 (5th Cir. 1986). As such, the probable cause standard employed by grand juries in deciding whether to indict is much more stringent than the standard needed to establish probable cause in the civil context.

The interplay of indictments and malicious prosecution claims has only been addressed in a handful of cases, but in those cases, the Courts have ruled in the same manner as the trial court in this case did. In 2008, United States District Court Judge Sharion Aycock ruled identically to the trial court in the instant matter. *Porter v. Farris*, Civil Action No. 1:06CV293-SA-JAD, 2008

U.S. Dist. LEXIS 63449, *14 (N.D. Miss. Aug. 13, 2008). Judge Aycock held that “[u]nder Mississippi law, the existence of an indictment establishes probable cause as a matter of law.” *Id.* The Court went on to find that because the indictment “conclusively establish[ed] the existence of probable cause,” the plaintiff “failed, as a matter of law, to establish the requisite elements for a malicious prosecution claim.” *Id.* Senior U.S. District Judge Neal Biggers, Jr., reached the same conclusion, dismissing a plaintiff’s Fourth Amendment, false arrest and malicious prosecution claims, all because of the return of an indictment against the plaintiff. *Sullivan v. Boyd Tunica, Inc.*, Civil Action No. 2:06CV016-B-A, 2007 U.S. Dist. LEXIS 11499, *16 (N.D. Miss. Feb. 16, 2007). In both *Porter* and *Sullivan*, the Courts held that the plaintiffs could not, as a matter of law, pursue malicious prosecution claims solely because they had been indicted by Mississippi grand juries.

By failing to dispute Members 1st’s position (and that adopted and followed by the trial court below), Ms. Springfield implicitly concedes that grand juries return indictments based upon a probable cause standard. Rather than attempting to argue that point, Ms. Springfield suggests that if the trial judge ruled correctly, there would be no cause of action for malicious prosecution. Ms. Springfield’s Brief cites not a single authority for that declaration, and not a single authority that directly contradicts the trial court’s ruling in this case. Ms. Springfield has offered five cases for the proposition that the trial judge should have allowed the case to proceed to a jury, but none of those cases apply here. Rather than setting “precedent” as Ms. Springfield declares, these cases are distinguishable from the case at bar. First, in *George v. W.W.D. Automobiles, Inc.*, 937 So. 2d 958 (Miss. Ct. App. 2006), the plaintiff was not indicted, as Ms. Springfield was, and the issue raised in Members 1st’s Motion to Dismiss was not raised by the litigants or addressed by the

Court of Appeals. Similarly, in *McGuffie v. Herrington*, 966 So. 2d 1274 (Miss. Ct. App. 2007), *Owens v. Kroger*, 430 So. 2d 843 (Miss. 1983) and *Benjamin v. Hooper Electronic Supply Company, Inc.*, 568 So. 2d 1182 (Miss. 1996), the appellate courts were never asked to consider the effect of an indictment on a subsequently filed malicious prosecution civil suit. None of those decisions even mention the indictment of the plaintiff, and none of the litigants appear to have raised the defense asserted by Members 1st here. These decisions are silent as to the discrete issue involved in the instant matter and certainly do not set the “precedent” claimed by Ms. Springfield. The fifth and final decision offered in this section of Ms. Springfield’s Brief is *Overstreet v. Merlos*, 570 So. 2d 1196 (Miss. 1990), which has no relevance to the question of whether an indictment precludes recovery under a theory of malicious prosecution.

While Ms. Springfield suggests that this matter should simply be left to a jury to decide, this Court has stressed that “[w]hen the facts are undisputed, it is the function of the court to determine whether probable cause existed.” *Benjamin*, 568 So. 2d at 1190. The plaintiff bears the burden “to show circumstances from which the absence of probable cause may be inferred.” *Id.* The only authorities that address the precise defense raised by Members 1st reveal that grand juries indict using a probable cause standard. Several Federal court decisions have applied that basic concept to support dismissal of malicious prosecution claims. Ms. Springfield has offered no cases that are precedential and/or preclude a finding in Members 1st’s favor. Judge Pounds properly applied Mississippi law to the case in rendering his ruling, and it must be affirmed. There are simply no unresolved questions of fact, and, taking Ms. Springfield’s allegations as true in her Complaint, it is clear that she cannot establish the fifth element required to recover in a malicious prosecution case. A Lowndes County grand jury indicted her and, in doing so,

established that there was, in fact, probable cause for charges to be filed against her. As the Fifth Circuit previously noted, the probable cause standard employed by grand juries in deciding whether to indict is much more stringent than the standard needed to establish probable cause in the civil context. *Robb*, 798 F. 2d at 790. As a matter of law, Ms. Springfield's malicious prosecution claim fails, and suit was properly dismissed with prejudice by the trial court.

D. THE PLAINTIFF/APPELLANT SUBMITTED THE APPELLANT'S BRIEF IN AN UNTIMELY MANNER, AND HER APPEAL MUST BE DISMISSED.

The trial court's Order granting Members 1st's Motion to Dismiss was filed with the office of the Circuit Court of Monroe County, Mississippi, on February 1, 2010 (C.P., pp. 126-27), and Ms. Springfield filed her Notice of Appeal on February 26, 2010. (C.P. 131-32). After preparation of the Record was completed, this Court served on counsel a Notice of Briefing Schedule, which gave Ms. Springfield forty days from June 22, 2010, to submit the Appellant's Brief and Record Excerpts. (R.E. 1). Ms. Springfield sought, and was granted by this Court, three extensions of time to serve the Appellant's Brief, with an ultimate due date of October 1, 2010. (R.E. 2, 3 and 4). The Notice granting the third and final extension specifically declared that "[n]o further extension will be granted, and any further requests for an extension of time may be subject to sanctions." (R.E. 4). Additionally, Rule 31(d) of the Mississippi Rules of Appellate Procedure plainly warns appellants that "[i]f an appellant fails to file the appellant's brief within the time provided by this rule or within the time as extended, the appeal may be dismissed." Dismissal for failure to file a timely brief "has been recognized as proper in [Mississippi's] jurisprudence." *Truax v. City of Gulfport*, 931 So. 2d 592, 596 (Miss. Ct. App. 2005).

M.R.A.P. 25(a) provides that "[f]iling may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time

fixed for filing.” The exception to this general rule is that “briefs and record excerpts shall be deemed filed on the day of mailing” if “accompanied by a certificate signed by the person who will actually mail the brief or record excerpt.” M.R.A.P. 25(a). Ms. Springfield’s deadline for submitting the Appellant’s Brief and Record Excerpts was October 1, 2010. (R.E. 4). Her Brief purports to have been sent to the Court on that date, per the Certificate of Filing completed by Jeremy Herndon, Legal Intern, by way of U.S. Mail. The Certificate of Service signed by counsel for Ms. Springfield also states that the Appellant’s Brief was served upon Members 1st by U.S. Mail on October 1, 2010. The Appellant’s Brief was not received by Members 1st until October 5, 2010, and it was delivered, contrary to the Certificate of Service, by way of UPS Next Day Air delivery. (R.E. 5 and 6). The UPS tracking information reflects that the Brief was not shipped until October 4, 2010, three days after the October 1, 2010, deadline for service. (R.E. 6).

While Members 1st does not know the manner of transmittal of the Appellant’s Brief to the Court, the documents attached as Record Excerpts 5 and 6 reflect that the Brief was not served upon Members 1st on October 1, 2010, by U.S. Mail, as is asserted in the Brief’s Certificate of Service. The Brief was not “shipped” to Members 1st until October 4, 2010, three days after it was required to be served on the Appellee and filed with the Court. To the extent the Appellant’s Brief was sent to the Court in that same manner, the Brief was untimely. This Court has long recognized that dismissal is the appropriate sanction for the filing of an untimely Brief, and Ms. Springfield’s appeal must be dismissed pursuant to the clear terms of M.R.A.P. 31(d).

V. CONCLUSION

Judge Pounds correctly applied M.R.C.P. 12(b)(6) and Mississippi law in granting Members 1st’s Motion to Dismiss. As a matter of law, Ms. Springfield has no claim for malicious

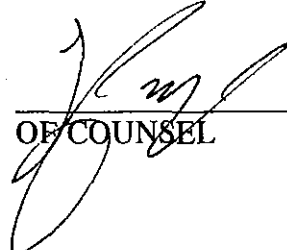
prosecution. When the Lowndes County grand jury indicted her, it did so using a probable cause standard. Ms. Springfield has failed to overcome that fact in her Brief, and it was proper for the trial court to dismiss her cause of action since, as a matter of law, she could not establish the fifth element of her malicious prosecution claim – want of probable cause. The trial judge committed no reversible error and correctly applied longstanding Mississippi law to this case. The award of dismissal in Members 1st's favor must be affirmed.

In the alternative, Ms. Springfield's Brief was not submitted in accordance with this Court's instructions and/or the Mississippi Rules of Appellate Procedure. As such, her appeal should be dismissed with prejudice.

Respectfully submitted,

MEMBERS 1ST COMMUNITY FEDERAL
CREDIT UNION

BY:


OF COUNSEL

TIMOTHY M. PEEPLES - BAR # [REDACTED]
DANIEL COKER HORTON & BELL, P.A.
OXFORD SQUARE NORTH
265 NORTH LAMAR BOULEVARD, SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

CERTIFICATE

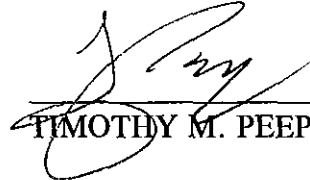
I, Timothy M. Peeples, of counsel for the Appellee, pursuant to M.R.A.P. 25, do hereby certify that I have this day mailed, by first class mail, postage prepaid, the original and three (3) copies of the above Appellee's Brief, to the Clerk of the Mississippi Supreme Court and have mailed a true and correct copy of same to the following:

Honorable Jim S. Pounds
First Circuit Court District of Mississippi
P. O. Drawer 1100
Tupelo, Mississippi 38802

Luanne Stark Thompson, Esq.
P.O. Box 360
Amory, Mississippi 38821

T. Kilpatrick, Esq.
1124 N. Lamar Blvd
Oxford, Mississippi 38655

THIS, the 29th day of October, 2010.



TIMOTHY M. PEEPLES