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REPLY

The continued reliance of Members 1st on criminal cases for explanations of probable cause in this case is misplaced. Probable cause in the context of a criminal case (whether for an arrest or the handing down of an indictment) is fundamentally different than its use in a civil case as illustrated by Members 1st in its citation to the Fifth Circuit case of *Robb v. U.S.F.&G,* 798 F.2d 788, 790 (5th Cir. 1986), a case in which the issue was whether there was probable cause to file a subrogation claim and for which there is no or little application to this case except to say that there is a difference in the phrase "probable cause" depending on its application.

"Want of probable cause for the proceeding" is an element of a malicious prosecution claim. *Benjamin v. Hooper Electronic Supply,* 568 So.2d 1182, 1188 (Miss.1990). The mere wording of this element suggests that it is a matter for litigation, a matter that turns on the development of facts. If an arrest requires probable cause and if an indictment requires probable cause, under what scenario could a citizen possibly utilize the malicious prosecution claim if all prosecutions begin with a determination of probable cause? Would a citizen seek redress through the court systems if he or she had not been arrested or not been indicted? Where is the maliciousness involved in a prosecution if there is no prosecution? If

a finding of probable cause in the criminal context nullifies the existence of a malicious prosecution action, then why isn't there an element to the claim which bars its applicability to criminal prosecutions?

Members 1st cites to the case of *Rogers v. State,* 881 So.2d 936, 940 (Miss. Ct. App. 2004) for the proposition that "[B]ecause 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." Again, the cite to a criminal case is misplaced. In *Rogers*, the Appellant had been convicted of the crime of grand larceny and appealed that conviction based upon his not being afforded a preliminary hearing. Preliminary hearings, along with arrests and indictments, are probable cause determinations. Preliminary hearings occur at the pre-indictment stage in criminal proceedings. Due to the fact that Rogers had been indicted (based upon probable cause), this Court found that the issue of whether Rogers had been afforded a preliminary hearing, a probable cause determination, was rendered moot by his subsequent indictment. *Rogers* was not a civil case nor was it a case in which probable cause was an element of the claim.

Members 1st cites to two United States District Court decisions to support its argument. This Court must take notice of the fact that both cases, *Porter v. Farris,*

1:06CV293-SA-JAD 2008 U.S. Dist. LEXIS 63449 (N.D. Miss. Aug. 13, 2008), and *Sullivan v. Boyd Tunica*, 2:06CV016-B-A, 2007 U.S. Dist. LEXIS 11499, (N.D. Miss. Feb. 16, 2007), were decided on summary judgment motions–after the opportunity to develop facts in the cases. The case at bar is the result of a 12(b)(6) dismissal where there was no opportunity to develop the facts. Norma should be allowed the opportunity to develop her facts since, as the complaint alleges, the basis of the suit is that the grand jury proceeding was tainted and that the process amounted to a misuse and abuse of the integrity of grand jury proceedings.

With regard to the argument that the brief was not timely filed and should be dismissed, Members 1st states incorrectly that this office sought three extensions of time. In fact, only two extensions were sought. The Motion for Extension of Time dated July 21, 2010 was inadvertently both mailed *and* faxed to the Clerk's office. Due to this inadvertence, the Clerk's office received the same Motion for Extension of Time on both July 21, 2010 by fax and July 26, 2010 by U.S. Mail. As a result, the Clerk's office issued notices on both July 21, 2010 and July 26, 2010 granting extensions. Upon receipt of the notice dated July 26, 2010 granting an extension until September 21, 2010, this office was advised to use the September 21, 2010 date. When the second Motion for Extension of Time was sought, the Clerk's office issued a notice with a deadline date of October 1, 2010.

Undersigned serves as one of the public defenders for Monroe County Circuit Court and, additionally, has a steady practice, heavily concentrated in Chancery Court. Co-counsel also has an active practice and, additionally, teaches part-time at the University of Mississippi Law School. As a result, both counsel for Norma have full schedules in their respective solo practices. Requests for extensions of time were not sought for dilatory or unreasonable purposes.

The primary work conducted on the brief and record excerpts were conducted out of undersigned's office in Amory which is equipped in similar fashion to other solo practitioners in rural Mississippi whose clientele consists primarily of individual clients with small town problems. In particular, undersigned does not have a postal meter and cannot weigh and postmark her mail in-house and, therefore, must present mail personally at the U.S. Post Office to be properly weighed and stamped. Unfortunately, most solo practitioners cannot afford to maintain their offices in the same manner as their brethren in law firms. If undersigned had the proper equipment, a postal meter, she could have easily printed a postmarked label on October 1, 2010 and dropped the brief and record excerpts in the outdoor mail boxes at the post office for delivery.

Instead, and in spite of the fact that the brief and the record excerpts were finished on Friday, October 1, 2010, undersigned could not avail herself of the

curbside drop off at the post office in Amory. Undersigned made the decision to send the documents on the next business day, which was Monday, October 4, 2010. Because Express Mail through the U.S. Postal Service would have resulted in a two-day delay, undersigned resorted to the use of UPS overnight. Therefore, the brief and record excerpts were received on Tuesday, October 5, 2010 as the documents would have been received had undersigned had the benefit of a postal meter. Interestingly enough, Members 1st also mailed its brief on a Friday and it was received on a Tuesday by this office. The disadvantage of not having a postal meter and practicing in a rural area resulted in the decision to utilize UPS. The documents were completed on a Friday and received on a Tuesday. Undersigned respectfully apologizes to both the Court and opposing counsel.

Alternatively, undersigned would respectfully request a third extension of time to be applied retroactively should such be required for timely filing. Undersigned files simultaneously with this Reply Brief, her Motion for Retroactive Extension of Time.

CERTIFICATE OF SERVICE

I, Luanne Stark Thompson, certify that today, December 15, 2010, a copy of the Reply Brief for the Appellant was served upon the following by U.S. Mail, postage prepaid:

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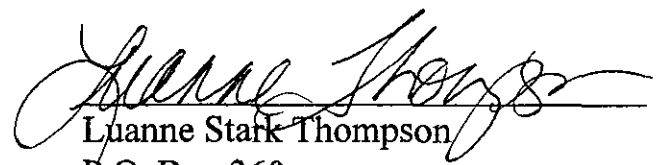

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CERTIFICATE OF FILING

I, Norma Springfield, certify that today, December 15, 2010, I have mailed the following documents to the Clerk of this Court by U.S. Mail, postage prepaid:

1. 1 original and 3 copies of the Reply Brief of Appellant;

2. 1 electronic disk containing the Reply Brief of Appellant; labeled with the style and the number of the case; and formatted in Word Perfect 12.

Norma Springfield
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