CERTIFICATE OF INTERESTED PERSONS

NORMA SPRINGFIELD
Plaintiff-Appellant

v. NO. 2010-CA-00359

MEMBERS 1ST COMMUNITY FEDERAL CREDIT UNION
Defendant-Appellee

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 judges of this Court may evaluate possible disqualification or recusal.

1. Honorable Jim S. Pounds, Circuit Court Judge
   First Judicial District, Monroe County

2. Timothy M. Peeples
   Attorney for the Defendant-Appellee

3. Luanne Thompson
   Attorney for the Plaintiff-Appellant

4. T. Kilpatrick
   Attorney for the Plaintiff-Appellant

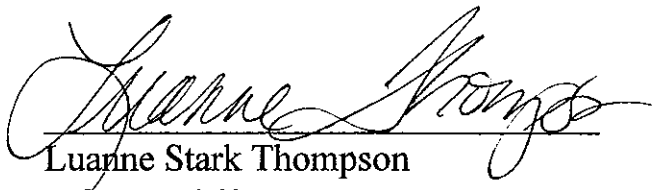
5. Norma Springfield, Appellant

6. Chris Pollan
   Pollan & Associates, Defendant

7. Joseph McNamara
   Attorney for Chris Pollan and Pollan & Associates

8. Stephanie C. Edgar
   Attorney for Chris Pollan and Pollan & Associates

9. Mitchell Springfield, Defendant



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STATEMENT OF THE CASE

Norma Springfield suffered embarrassment and humiliation when falsely accused and charged with the crime of embezzlement by her former employer, Members 1st Credit Union. Ultimately, an order of *nolle prosequi* was entered by the Lowndes County District Attorney, but only after Norma hired a criminal defense attorney and was subjected to having her photograph published in a local newspaper as having been charged with the crime.

Norma filed her complaint on May 18, 2009 in the Monroe County Circuit Court seeking damages for malicious prosecution. Defendants Chris Pollan and Pollan and Associates[1] filed a Second Motion to Dismiss on October 16, 2009 which was subsequently joined in by Defendant Members 1st on November 13, 2009.

On December 9, 2009, a hearing was held on the Second Motion to Dismiss. Although there were no witnesses called for the 12(b)(6) motion hearing and although there had been no discovery in the case as of the date of the hearing on the motion to dismiss, Judge Pounds granted the motion to dismiss based upon his ability to discern "the intent of the defendants at the time of the initiation of the

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[1]Defendants Chris Pollan and Pollan and Associates are no longer parties to the action. Chris Pollan was voluntarily dismissed from the action by Norma. Norma chose not to proceed with the appeal as against Pollan and Associates.

proceedings" and his awareness of grand jury proceedings in that indictments are based upon probable cause. Judge Pounds found that Norma failed to meet the element of want of probable cause for malicious prosecution. The judge made his finding in spite of the fact that Norma had not yet had an opportunity to meet, much less develop, the element of want of probable cause. It is the decision of the judge in dismissing her complaint before even affording her an opportunity to be heard that Norma is aggrieved and frustrated, and, therefore, appeals. The order granting the Second Motion to Dismiss was entered on February 1, 2010. Norma timely filed her appeal on February 26, 2010.

SUMMARY OF THE ARGUMENT

Following the hearing on the motion to dismiss for failure to state a claim, Judge Pounds erred in granting the motion. Judge Pounds did not take as true the allegations in the complaint as he was required. Instead, he considered the intent of the defendants in a favorable manner for the defendants even though he was not to consider anything other than the pleadings and in spite of the fact there was no evidence from which to consider the intent of the defendants.

Judge Pounds, in effect, converted the 12(b)(6) motion into a summary judgment ruling and committed reversible error for his failure to follow the rules by providing a ten day notice to the parties.

The issue of probable cause, a mixed question of law and fact, was not ripe for the court's consideration nor was it proper for consideration on a 12(b)(6) motion. Even if probable cause had been ripe for consideration, Judge Pounds erred by finding that because Norma had been indicted, probable cause existed preventing her from establishing want of probable cause, an element of malicious prosecution.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN GRANTING THE 12(b)(6) MOTION TO DISMISS

This Court applies a de novo standard of review when examining a trial court's grant of a motion to dismiss. *Saul v. South Cent. Medical,* 25 So.3d 1037, 1039 (Miss.2010) (citing *Burleson v. Lathem,* 968 So.2d 930, 932 (Miss.2007); *Scaggs v. GPCH-GP, Inc.,* 931 So.2d 1274, 1275 (Miss.2006); *Park on Lakeland Drive, Inc. v. Spence,* 941 So.2d 203, 206 (Miss.2006); *McLendon v. State,* 945 So.2d 372, 382 (Miss.2006); *Monsanto Co. v. Hall,* 912 So.2d 134, 136 (Miss.2005)).

Mississippi Civil Procedure Rule 12(b), which is partially entitled "Motion for Judgment on the Pleadings," explains the presentation of defenses and allows a party to present certain enumerated defenses by motion. Included among these enumerated defenses is "[F]ailure to state a claim upon which relief can be granted." M.R.C.P. 12(b)(6). Hence, a motion to dismiss under 12(b)(6) raises an issue of law. *Young v. North Miss. Medical,* 783 So.2d 661, 663 (Miss.2001); *Mississippi Transp. Comm'n v. Jenkins,* 699 So.2d 597, 598 (Miss.1997); *T.M. v. Noblitt,* 650 So.2d 1340, 1342 (Miss.1995); *Tucker v. Hinds County,* 558 So.2d 869, 872 (Miss.1990); *Lester Eng'g Co. v. Richland Water & Sewer Dist.,* 504 So.2d 1185, 1187 (Miss.1987). By joinder, Members 1st sought relief by motion

pursuant to Rule 12(b)(6), failure to state a claim upon which relief can be granted, raising an issue of law. Because the motion is one for "judgment on the pleadings," the allegations in the complaint must be taken as true. *Saul v. South Cent. Medical,* 25 So.3d 1037, 1039; *Scaggs v. GPCH-GP, Inc.,* 931 So.2d 1274, 1275. As stated repeatedly:

> Accordingly, a Rule 12(b)(6) motion tests legal sufficiency, and in applying this rule "a motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim."

Stuckey v. Provident Bank, 912 So.2d 859, 865 (Miss.2005); *Missala Marine Services, Inc. v. Odom,* 861 So.2d 290, 294 (Miss.2003).

Consideration of a 12(b)(6) motion requires the Court to make a decision on the face of the pleadings only. *Huff-Cook v. Dale,* 913 So.2d 988, 990 (Miss.2005)(citing *Hartford Cas. Ins. v. Halliburton,* 826 So.2d 1206, 1210 (Miss.2001)). "The purpose of Rule 12 is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases." M.R.C.P. 12 cmt. This is contrasted with the relief sought through a motion for summary judgment pursuant to Mississippi Civil Procedure Rule 56 which allows the Court to dismiss an action where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits show there is no genuine issue as

to any material fact entitling the moving party to judgment as a matter of law. M.R.C.P. 56(c). "Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried." M.R.C.P. 56 cmt. In the case at bar, no discovery has been conducted and, by extension, the facts have not been developed which would allow the trial court judge to make any determination as to a material fact, much less, determine whether there was a genuine issue of material fact.

Unfortunately, Judge Pounds did not follow the law in reaching his decision. At the outset, Judge Pounds was required to consider the allegations of the complaint as true. If he had, he would have accepted as true that Members 1st twice attempted to secure an indictment against Norma. He would have additionally noticed the absence in the complaint of mention of involvement on the part of the district attorney or law enforcement in the pre-indictment stages. Furthermore, Judge Pounds would have known as true that the indictment was secured only after enlistment of Norma's ex-husband in supplying an affidavit alleging criminal conduct against him during the marriage.[1] Instead, and from all

[1]It would have been a reasonable inference for the judge to consider that, perhaps, the ex-husband had an ulterior motive in his assistance in the character assassination of Norma due to a divorce proceeding.

appearances, Judge Pounds accepted the Separate Answer and Defenses of Members 1st as well as the argument present in the Second Motion to Dismiss as true. The judge considered matters inappropriate for a 12(b)(6) motion to dismiss. In delivery of his oral ruling, Judge Pounds stated:

> The Court must look at the intent of the defendants at the time of the initiation of the prosecution and not in hindsight or how it might come out, but what existed back at the time. The Court is aware of jury proceedings, and it is hard to get around the fact that grand juries base their decisions on probable cause.
>
> It is therefore the ruling of the Court the motion to dismiss will be granted as to both Members 1st and as to Pollan & Associates due to failure to meet the element of probable cause. The Court finds that probable cause did exist and especially in light of the indictment in Lowndes County along with criminal charges.

E 9.

Given the ruling of Judge Pounds, it is obvious that he, *sua sponte*, converted the motion to dismiss under 12(b)(6) to a summary judgment ruling pursuant to Rule 56. No discovery had been completed as of the date of the ruling nor had affidavits been submitted for the Court's consideration. While there was no evidence submitted to support the ruling as to intent of Members 1st, had the judge properly taken the complaint as true he would have gleaned a different level of intent on the part of Members 1st than his finding indicates. He would have easily inferred that Members 1st was not dissuaded from their attempt to secure an indictment against Norma even if it meant enlisting Norma's ex-husband in their

pursuit.

In this state, it is reversible error for the judge to, *sua sponte*, convert a 12(b)(6) motion into a ruling for summary judgment where (1) the defendant did not file for summary judgment, (2) the plaintiff did not receive notice of the trial court's intent to convert the defendant's motion for judgment on the pleadings to one for summary judgment, and (3) the trial judge did not adhere to the requirements of Rule 56 by giving the parties ten days' notice of his intent to conduct a summary judgment hearing. *Huff-Cook v. Dale,* 913 So.2d 988, 992 (citing *Palmer v. Biloxi Reg'l Med. Center,* 649 So.2d 179, 181-83 (Miss.1995)).

Rule 12 provides a procedural safeguard for litigants when a motion for judgment on the pleadings is converted into a motion for summary judgment. When a motion to dismiss is converted into a summary judgment motion, the Court is obligated to dispose of the matter in accordance with Rule 56. M.R.C.P. 12. More specifically, the judge is required to adhere to the ten day noticing requirement in order that the parties "be given reasonable opportunity to present all material made pertinent" to the motion. M.R.C.P. 12. (see *Sullivan v. Tullos,* 19 So.3d 1271 (Miss.2009) where the trial judge converted the motion to dismiss into a summary judgment motion and in reversing the decision of the trial judge, the Supreme Court stated, "it is premature to adjudicate the merits of the case on

summary judgment, because it could not be determined adequately whether there is a genuine issue of material fact.")

Dismissals under 12(b) are not judgments on the merits which is why the rule allows amendment of the complaint to correct the deficiencies complained of, ie., jurisdiction, venue, insufficiency of process, failure to join a party. M.R.C.P. 12; M.R.C.P. 56 cmt. A motion for dismissal under Rule 12(b)(6), and, subsequently the ruling, should not and does not challenge the actual existence of a meritorious claim and, instead, merely asserts that the pleading does not sufficiently state a claim for relief. M.R.C.P. 56 cmt. By contrast, a summary judgment motion challenges the merits of a claim through the use of evidence, including affidavits and depositions:

> The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law.

M.R.C.P. 56 cmt. Clearly, Judge Pounds spoke to the merits of the claim when he found that Norma failed to meet the element of probable cause for her malicious prosecution claim. His ruling amounted to a judgment on the merits as a matter of law.

Furthermore, probable cause in a malicious prosecution claim is a mixed question of law and fact. *Royal Oil v. Wells,* 500 So.2d 439, 444 (Miss.1986).

The judge was without the necessary tools to rule on whether the element of probable cause had been met. There had been no trial. There had been no discovery. The issue of want of probable cause simply was not ripe for the court's consideration and it was improper as well as reversible error for Judge Pounds to rule as he did.

Finally, Judge Pounds committed error by equating the element of want of probable cause in malicious prosecution claims with probable cause in a criminal case. He ruled that because there was an indictment in the underlying criminal case, Norma could not prove the element of want of probable cause for her malicious prosecution claim. In Mississippi, the elements of malicious prosecution are:

> (1) The institution [or continuation] of a criminal proceeding; (2) by, or at the insistence of, the defendant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; (6) the suffering of injury or damage as a result of the prosecution.

Benjamin v. Hooper Electronic Supply, 568 So.2d 1182, 1188 (Miss.1990). Obviously, it would be impossible to ever have a malicious prosecution claim arising out of a criminal proceeding if Judge Pounds is correct in his ruling since probable cause is required at the point of arrest onward and without arrest [or indictment] there would be no criminal proceeding. No citizen would ever have the opportunity to seek redress for the humiliation, indignation, expense , and fear

of incarceration after suffering through unwarranted criminal charges if Judge Pounds is correct. The Supreme Court recognized the importance of protecting private citizens subjected to the evil acts of those who take advantage of the criminal system by stating:

> Equally important is the second interest which protects individuals from being wrongly accused of criminal behavior which results in unjustifiable and oppressive litigation of criminal charges. Consequently, in our orderly society we allow those subjected to criminal proceedings cloaked with malice to recover compensation for their losses.

Benjamin v. Hooper Electronic, 568 So.2d 1182, 1188. Indeed, the Supreme Court specifically mentions "litigation." Even more importantly, the Appellate Courts in this state have issued favorable rulings for malicious prosecution claims where the plaintiffs were either arrested or indicted, both of which require probable cause.

In the case of *George v. W.W.D. Automobiles,* 937 So.2d 958 (Miss.Ct.App. 2006), this Court reversed and remanded where the trial court granted summary judgment on a malicious prosecution claim. This Court found that the element of probable cause in the malicious prosecution claim was a triable issue of fact for the jury. In 2007, this Court again reversed summary judgment on a claim for malicious prosecution involving underlying criminal charges in *McGuffie v.*

Herrington, 966 So.2d 1274 (Miss.Ct.App. 2007). In *Owens,* the Supreme Court reversed and remanded a malicious prosecution claim finding the elements of probable cause and malice to be jury issues. *Owens v. Kroger,* 430 So.2d 843 (Miss.1983). Owens was arrested which required probable cause. *Id.* at 845.

In a 1990 case where the Supreme Court found the underlying criminal case to have been "a senseless prosecution initiated . . . in a reckless manner," the Appellant was arrested *and* indicted. *Benjamin v. Hooper Electronic,* 568 So.2d 1182, 1192. The Supreme Court found the issue of probable cause was a triable issue for the jury. *Id.* at 1191.

Therefore, it is obvious that probable cause for an indictment or arrest in the underlying criminal case does not affect the survivability of a malicious prosecution claim. Judge Pounds, as a trial court judge, was bound to follow precedent rather than attempting to create new law. *Overstreet v. Merlos,* 570 So.2d 1196, 1198 (Miss.1990).

The verbiage utilized by Judge Pounds in his ruling expressly shows that he was rendering judgment on factual issues, albeit, the merits of the claim, specifically with the mention of "intent" of the defendants. Judge Pounds committed error by failing to give the parties ten days notice of his intention to conduct a summary judgment hearing. Judge Pounds continued to commit error

when he decided that a malicious prosecution claim should fail on the element of "want of probable cause" where there is probable cause in the underlying criminal action.

CONCLUSION

Judge Pounds ruled incorrectly on the 12(b)(6) motion and, as such, took away Norma's opportunity to develop and present her case. Judge Pounds erred by failing to follow the law in application of a 12(b)(6) motion and by ruling beyond sufficiency of the complaint. As such, he converted his ruling into one for summary judgment and, once again, failed to follow the requirements of the rules by failing to provide ten days notice to the parties of his intent. Incorrect also was the finding by the judge that Norma could not meet the element of want of probable cause since the indictment required probable cause.

Norma respectfully requests this Court reverse the erroneous rulings of Judge Pounds and remand the case to the lower court.

CERTIFICATE OF SERVICE

I, Luanne Stark Thompson, certify that today, October 1, 2010, a copy of the brief for the Appellant was served upon the following by U.S. Mail, postage prepaid:

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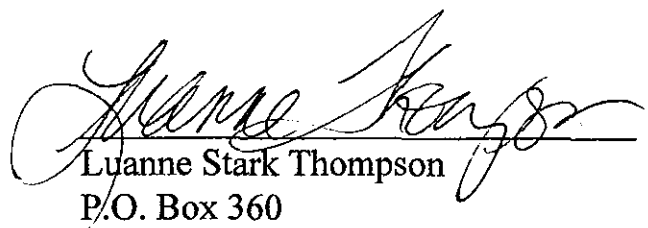

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CERTIFICATE OF FILING

I, Jeremy Herndon, certify that today, October 1, 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 Brief of Appellant;

2. 4 copies of the Record Excerpts of the Appellant;

3. 1 electronic disk containing the Brief of Appellant; labeled with the style and the number of the case; and formatted in Word Perfect 12.

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