

IN THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI

MERKEL & COCKE, P.A. and
CHARLES M. MERKEL, JR.

V.

CIVIL ACTION NO. 14 CI-06-0109

RICHARD F. SCRUGGS, SCRUGGS LEGAL, P.A.,
SAMUEL MILLETTE, STEVE BOZEMAN, and
HAYDEN DENT

ORDER AND OPINION

THIS MATTER is before the Court on Plaintiffs' Motion for Partial Summary Judgment on the Statute of Limitations; Defendants' Motion to Dismiss; and Defendants' Counter Motion for Partial Summary Judgment on the Statute of Limitations. The Court having considered the motions, the briefs submitted, the arguments of counsel, and being otherwise advised finds specifically as follows:

The present case arises out of the dismissal of a civil action over an attorney's fee dispute. A trial was conducted and the underlying civil action (*Scruggs, et al v. Wilson, Luckey, and Merkel & Cocke et al* CI97-2573) was dismissed by the Jackson County Chancery Court on March 21, 2003. Reconsideration was subsequently denied by the trial court on May 19, 2003. Scruggs filed Notice of Appeal on June 17, 2003. The Supreme Court of Mississippi affirmed the trial court's dismissal on September 15, 2005. The subject malicious prosecution action was filed on September 13, 2006 in Coahoma County.

A motion to dismiss under M.R.C.P. 12(b)(6) raises an issue of law. *Tucker v. Hinds County*, 558 So. 2d 869 (Miss.1990); *Lester Engineering Co. v. Richland Water and Sewer District*, 504 So. 2d 1185, 1187 (Miss.1987). This Court having considered matters outside the pleadings, finds that the subject motion should be treated as a Rule 56 motion for summary judgment. *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-1177 (Miss. 2002). There are no

genuine issues of material fact concerning whether the applicable statute of limitations expired before Plaintiffs filed their Complaint. Both parties, therefore, seek summary judgment on the statute of limitations issue.

The sole issue before this Court is when the claims in the subject action accrued and whether the malicious prosecution action was filed outside of the one year statute of limitations as prescribed in *Miss. Code Ann. §15-1-35 (1972)*, as amended. Thus, the accrual of the statute of limitations is determinative. Plaintiff argues that the statute of limitations did not begin to run until the Supreme Court's mandate issued on October 6, 2005 or at the earliest, September 15, 2005, the date of the Mississippi Supreme Court's affirming opinion. Defendants, on the other hand, argue that the statute of limitations began to run on March 21, 2003, the date the Chancellor dismissed their claims, or at the latest, May 19, 2003 when the trial court denied reconsideration.

The elements of malicious prosecution are: (1) the institution or continuation of original judicial proceedings, either criminal or civil; (2) by, or at the insistence of the defendants; (3) *the termination of such proceedings in plaintiff's favor*; (4) malice in instituting the proceeding; (5) want of probable cause for the proceedings; and (6) the suffering of damages as a result of the action or prosecution. *Page v. Wiggins*, 595 So. 2d 1291, 1293 (Miss. 1992).

After the "termination" of the proceedings, the plaintiff has one year in which to bring a malicious prosecution claim. *City of Mound Bayou v. Johnson*, 562 So. 2d 1212 (Miss. 1990). The statute of limitations begins to run as soon as there is a cause of action, and the cause of action accrues when it comes into existence as an enforceable claim. *Joiner Insurance Agency v. Principal Casualty Insurance Co.*, 684 So. 2d 1242 (Miss. 1996). Although there must be a termination of proceedings, a final termination is not required. *Id.*

Defendants rely on the Mississippi Supreme Court's opinion in *Joiner* as definitive authority on the issue at bar. However, the Court notes that the facts and circumstances in *Joiner*, are clearly distinguishable. The facts and legal analysis in *Joiner* focus specifically on the question of whether the allegedly malicious claim was abandoned, thereby terminating the prosecution before final judgment was entered almost one year later. In *Joiner*, the trial court found that the underlying third-party action was dismissed pursuant to *M.R.C.P* 12(b)(6) because the Plaintiff lacked standing. Dismissal on the basis of standing ended the third-party Plaintiff's claim against *Joiner* for all practical purposes. Additionally, undisputed communication between the attorneys verified that Plaintiff intended to dismiss its claim, even if counsel took a long time to do so. Therefore, the trial court found that the original third-party claim was abandoned. *Id.* at 1245.

On Appeal, the Supreme Court opined that the requirement of termination may be satisfied by showing that the civil suit upon which the malicious prosecution claim is based was abandoned. *Joiner*, 684 So. 2d at 1244 citing 52 Am. Jur. 2d, *Malicious Prosecution*, § 42 (1970). The Court subjected the trial court's factual findings to the Restatement of Torts (Second) analysis of the termination element. It determined that said abandonment constituted an end of proceedings at which time the statute of limitations began to run on the malicious prosecution claim. *Id.* citing, *Abbott v. United Venture Capital, Inc.*, 718 F.Supp. 828 (D Nev. 1989). This is consistent with long-standing Mississippi law holding that "a cause of action for malicious prosecution accrues after there is a termination of the prosecution complained of." *Joiner* at 1245; citing, *City of Mound Bayou v. Johnson*, 562 So. 2d 1212 (Miss. 1990); *Priest v. Avent*, 236 Miss. 202, 109 So. 2d 643 (1959).

However, the case currently before this Court does not involve abandonment. Defendants' prosecution of the underlying civil action terminated only after the Mississippi Supreme Court affirmed the Chancellor's dismissal of their claims. The facts and circumstances of this case evidence Defendants' clear and continuous intention to prosecute and actual prosecution of their claims through appeal. Therefore, the question of whether the Defendant's appeal was a continuation of the prosecution complained of must be answered affirmatively. *Joiner* is simply inapposite here.

The Mississippi Supreme Court has a long history of looking and relying upon the Restatement of Torts on issues involving malicious prosecution, which includes *Joiner*. See, also *Van v. Grand Casinos of Mississippi*, 724 So 2d 889 (Miss. 1998); *Stewart v. Southeast Foods, Inc.* 688 So 2d 733 (Miss 1996); *Owens v. The Kroger Co.*, 430 So 2d 843 (Miss 1983); *Brown v. Watkins*, 56 So 2d 888 (Miss 1952); and *Brooks v. Super Service, Inc.*, 183 So. 202 (Miss. 1938). Similarly, this Court finds it appropriate to accept the Restatement's principles on termination of a malicious prosecution claim in a civil lawsuit. The Restatement of Torts (Second) provides:

Civil proceedings may be terminated in favor of the person against whom they are brought . . . by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them. A favorable adjudication may be by a judgment rendered by a court after trial, or upon demurrer or its equivalent. In either case the adjudication is a sufficient termination of the proceedings, *unless an appeal is taken. If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail.*

§674 Comment J, *Restatement 2d Torts* (Emphasis added). The Restatement recognizes that wrongful proceedings are not terminated until the conclusion of any appeal, if taken. The Restatement also recognizes that malicious prosecution can be a continuing tort. *Id.* at Comment

C. Accord, *Parisi v. Michigan Townships Association*, 332 N. W. 2d 587 (Mich.App. 1982). (holding termination element does not occur until resolution of any appeal and that evidence of malicious intent may come to light and additional damage may accrue from prosecution of an appeal).

The Restatement offers a sound, practical approach that promotes fairness and judicial economy in cases where no indicia of withdrawal or abandonment of the original prosecution is at issue. This is consistent with *Joiner*. Furthermore, absent direct Mississippi case law on whether a malicious prosecution claim accrues at the trial court's decision, or, if appealed, at the time of the final decision of the appellate court, this Court finds the analysis as set forth in the Restatement of Torts to be persuasive authority.

The proceedings in the present underlying action terminated on September 15, 2005 when the Mississippi Supreme Court entered its opinion affirming the Jackson County Chancery Court. The Plaintiff timely filed the instant Complaint in Coahoma County on September 13, 2006, within the one (1) year statute of limitations. It is therefore,

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss and Defendants' Counter Motion for Partial Summary Judgment on the Statute of Limitations are hereby DENIED; and Plaintiffs' Motion for Partial Summary Judgment on the Statute of Limitations is hereby GRANTED.

SO ORDERED this the 8th day of April 2008.

CHARLES A. DAKES
CIRCUIT CLERK
Charles A. Dakes

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Margaret Carey-McCray
MARGARET CAREY-McCRAY
CIRCUIT JUDGE