In The

Supreme Court of Virginia

RECORD NO. 091941

JAMES P. O'CONNOR, *et al.*,

Appellants,

v.

JAMES C. TICE,

Appellee.

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR.

A. The circuit court erred in failing to strike the plaintiff's evidence and entering judgment on the jury's verdict in favor of James Tice ("Tice"), against James O'Connor, Vickie O'Connor (collectively, "the O'Connors"), and Viocon, LLC, because the evidence was insufficient as a matter of law for the jury to find that probable cause to believe that Tice committed construction fraud did not exist at the time the warrant was issued.

B. The circuit court erred in entering judgment on the jury's verdict in favor of the plaintiff, James Tice, against the defendants James O'Connor, Vickie O'Connor, and Viocon, LLC because the evidence was insufficient as a matter of law for the jury to find that the defendants James O'Connor, Vickie O'Connor, and Viocon, LLC initiated the prosecution of Tice.

II. QUESTIONS PRESENTED.

A. When a magistrate, the Commonwealth's Attorney, and the Assistant Commonwealth's Attorney of Northumberland County made independent determinations that probable cause existed to bring and prosecute a case of construction fraud against Tice, then did probable cause exist to bring a construction fraud case against Tice at the time the warrant was issued? Assignment of Error I(A).

B. When the record evidence showed only that the O'Connors merely assisted and cooperated with the public authorities in Tice's prosecution, is that evidence insufficient as a matter of law to support a finding that the O'Connor's instituted the prosecution? Assignment of Error I(B).

III. NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS IN THE TRIAL COURT.

Tice sued the O'Connors and their closely-held limited liability company (Viocon, LLC) in the Northumberland County Circuit Court for malicious prosecution.

Tice is a painter whom the O'Connors had hired to paint a commercial building that the O'Connors owned in Lottsburg in

Northumberland County. As will be set forth in more detail *infra*, a dispute between the O'Connors and Tice ultimately resulted in a Northumberland County Sheriff's Deputy (Anthony Darby) presenting to a magistrate evidence of construction fraud that Tice allegedly committed; the magistrate then issued a warrant for Tice's arrest for construction fraud. After the General District Court dismissed the criminal charge against Tice at Tice's preliminary hearing, Tice sued Darby, the O'Connors, and Viocon for malicious prosecution.

Darby settled with Tice before trial, and the case proceeded to trial against the remaining defendants. The case was heard over two days (May 6-7, 2009) before a jury in the Northumberland Circuit Court. The circuit court overruled the O'Connors' and Viocon's motions to strike the plaintiff's evidence (both at the close of Tice's evidence and at the close of all the evidence). The jury then returned a verdict against the O'Connors and Viocon for $200,000 in compensatory damages. The jury did not return a verdict for punitive damages against any defendant.

Post-trial, the O'Connors and Viocon moved the circuit court to enter judgment in their favor notwithstanding the jury's verdict, arguing that as a matter of law: (a) probable cause existed to charge Tice with construction fraud when the magistrate issued the warrant; and (b) the O'Connors, who merely assisted and cooperated with the public authorities in prosecuting Tice, could not be held liable for malicious prosecution as a matter of law. The O'Connors and Viocon also moved the circuit court to order a remittitur. Finally, post-trial, the O'Connors and Viocon also moved the circuit court to reduce the jury's verdict by $15,000 pursuant to Va. Code § 8.01-35.1 (the contribution statute)(the co-defendant, Darby, had settled with Tice for a consideration of $15,000 prior to trial).

The O'Connors' and Viocon's post-trial motions came on for a hearing before the circuit court on June 15, 2009. The circuit court, from the bench, denied the O'Connors' and Viocon's motions for judgment notwithstanding the verdict; denied the O'Connors' and Viocon's motions for remittitur; and granted the O'Connors' and Viocon's motions to reduce the verdict pursuant

to Va. Code § 8.01-35.1. Pursuant to those rulings, the circuit court entered judgment in favor of Tice and against the O'Connors and Viocon for $185,000.

The O'Connor's and Viocon's timely notice of appeal now brings the case before this Court. JA 868-869.

IV. STATEMENT OF FACTS.

The O'Connors hired Tice to paint a commercial building that Viocon owned in Lottsburg in Northumberland County. The agreement was that Tice would paint the building for a total of $6,872. The O'Connors paid Tice one-third up-front ($2,290.67), and Tice began work.

There was a dispute at trial over exactly what work Tice did after receiving the O'Connor's $2,290.67 advance. *Cf*. JA 337-338 (containing a chronology of Tice's work that Vickie O'Connor prepared) and JA 390-393 (Tice's testimony of the work he and his painters did on the O'Connor job). Regardless, at the jobsite, a dispute arose between the O'Connors and Tice regarding the progress of Tice's work and damage to the building's roof that the O'Connor's blamed on Tice. Tice stopped work; Tice and

O'Connor agreed that they spoke on the phone subsequent to Tice's stopping work, but they disagreed on the terms of Tice's termination. *Cf.* JA 404 (Tice's testimony that he proposed to O'Connor that they both consider the job one-third done and that Tice keep the $2290.67 advance) and JA 203 (James O'Connor's testimony that Tice quit on the job and that Tice told him that Tice was "keeping my deposit.").

After Tice stopped work, O'Connor tried to sue Tice in the Lancaster County General District Court ("GDC") to recover his deposit and to recover for damage that O'Connor claimed that Tice's workers had done to his roof. [1] O'Connor's civil case in Lancaster was dismissed for no service on Tice; the GDC judge

[1] Even though Tice's receiving a jury verdict requires that conflicting evidence on appeal be viewed in the light most favorable to Tice, the party who received the verdict, in this case Tice, called both the O'Connors to testify *ore tenus* during his case-in-chief. JA 140 (plaintiff's counsel stating to the court, at least as to Ms. O'Connor, that he was calling Ms. O'Connor as "an adverse witness"). Thus, the O'Connors' testimony, to the extent that it was uncontradicted by other evidence, became binding on Tice. *See Horn, Adm'r. v. Milgram*, 226 Va. 133, 138, 306 S.E.2d 893, 896 (1983), *citing Cook v. Basnight*, 207 Va. 491, 151 S.E.2d 408 (1966). The facts in this paragraph and the next come from the testimony of James O'Connor and Vickie O'Connor in Tice's case-in-chief and are essentially uncontradicted by any evidence of the plaintiff.

recommended to O'Connor that he go to the Lancaster County Sheriff's Office ("LCSO") to obtain Tice's address. JA 206-208. (James O'Connor's testimony).

When the O'Connors went to the LCSO, they were told that, because the address of the building that Tice was painting was in Northumberland County, he should go to the Northumberland County Sheriff's Office ("NCSO") to obtain Tice's address. JA 208 (James O'Connor's testimony). The O'Connors went to the NCSO, where they "said that [they] needed to speak to someone about serving a warrant in debt or getting an address." JA 163. (Vickie O'Connor's testimony). It was then that the O'Connors were introduced to Deputy Anthony Darby. JA 163-164.

Darby looked through the information that the O'Connors had brought and said he would try to get Tice's address. Darby then said: "This looks like it could be construction fraud." JA 164 (Vickie O'Connor's testimony). Darby told the O'Connors to write the "15-day letter" required by the construction fraud statute. JA 165-166 (Vickie O'Connor's testimony).

After Darby received the O'Connors' information and the return receipt for the 15-day letter, he called R. Michael McKenney, then the Commonwealth's Attorney for Northumberland County. He asked McKenney if "this [the information provided by the O'Connors] [was] enough to go and speak with the magistrate." JA 536-537 (Darby's testimony). McKinney made the determination that the information Darby related to him constituted probable cause to believe that Tice had committed construction fraud, and he authorized Darby to go to the magistrate to seek a warrant against Tice for construction fraud. JA 635-637 (McKenney's testimony – by deposition).[2] From the information that Darby had received from the O'Connors, Darby felt as though he had enough information to

[2] R. Michael McKenney was the Commonwealth's Attorney of Northumberland County during this time; his office prosecuted Tice. Subsequently, Mr. McKenney was elected a judge of the Juvenile and Domestic Relations District Court for the 15th Judicial Circuit; so Judge McKenney testified in this case by deposition. McKenney testified that he did not remember exactly "what the facts were" that Darby related to him to make the probable cause determination, but that because McKenney had authorized Darby to get a warrant charging Tice with construction fraud, the facts that Darby related to McKenney "absolutely" had risen to the level of probable cause. JA 635-637.

make a probable cause presentation to the magistrate. JA 547 (Darby's testimony). Darby went to the magistrate and provided the magistrate the information that he received from the O'Connors (JA 594-596 for Mr. O'Connor's testimony of what the O'Connors initially provided Darby; JA 165 for Ms. O'Connor's testimony of what the O'Connor's initially provided Darby); the magistrate issued the warrant. *See* JA 750-751 (the arrest warrant); JA 541 (Darby's testimony about the magistrate issuing the warrant).

The Assistant Commonwealth's Attorney, Elizabeth Trible, was the prosecutor who tried the criminal case against Tice. Ms. Trible met with the O'Connors on December 28, 2006, to prepare for the trial. The O'Connors provided Ms. Trible all the information in their possession regarding the criminal case against Tice. Based on her independent review of the evidence, Ms. Trible made an "independent determination" that there was "criminal liability present" in Tice's actions. JA 564 (Trible's testimony).

Notwithstanding the fact that the magistrate, the Commonwealth's Attorney, and the Assistant Commonwealth's attorney had all made independent determinations that probable cause existed against Tice to proceed with the construction fraud case, the General District Court judge disagreed; at Tice's preliminary hearing, he dismissed the charge against Tice. JA 750-751. This suit followed.

V. THE PRINCIPLES OF LAW, THE ARGUMENT, AND THE AUTHORITIES RELATED TO THE ASSIGNMENTS OF ERROR.

A. Assignment of Error I(A).

1. Summary of the Argument.

The evidence in this case shows that the O'Connor's, at most, reported suspected wrongdoing by Tice to the NCSO. The Commonwealth's Attorney (McKenney) to whom Darby turned for advice on issuing a warrant, the magistrate who issued the arrest warrant, and the Assistant Commonwealth's Attorney (Trible) who prosecuted the case all made independent judgments that probable cause to believe Tice committed construction fraud existed. Under those facts and circumstances, a long line of case

law, chief among them *Bill Edwards Oldsmobile, Inc. v. Carey*, 219 Va. 90, 244 S.E.2d 767 (1978), compels the conclusion as a matter of law that probable cause to believe that Tice committed construction fraud existed at the time the warrant was issued.

2. As a matter of law, probable cause existed to believe that Tice had committed construction fraud at the time the magistrate issued the warrant.

Actions for malicious prosecution arising from criminal prosecutions are not favored in Virginia. *Ayyildiz v. Kidd*, 220 Va. 1080, 1082, 266 S.E.2d 108, 110 (1980). There is a strong public policy reason for this: citizens are encouraged to bring potential wrongdoing to the attention of the authorities without worrying about getting sued, because criminal prosecutions are essential to maintaining an orderly society. *Id.* at 103, 266 S.E.2d at 111, *citing Lee v. Southland Corporation*, 219 Va. 23, 26, 244 S.E.2d 756, 758 (1978). The tort of malicious prosecution is designed to deter "frivolous or vengeful" criminal proceedings. *Ayyildiz*, 220 Va. at 103, 266 S.E.2d at 111.

How is this public policy operationalized in the situation where a citizen brings a potential crime to the attention of the

police, and the police, using the information provided by the citizen-informant and acting on the advice of the Commonwealth's Attorney, swear out a criminal arrest warrant that later is dismissed? In *Bill Edwards Oldsmobile, Inc. v. Carey*, 219 Va. 90, 244 S.E.2d 767 (1978), this Court clearly answered this question. Operating under a set of facts almost directly on point with the case at bar, *Bill Edwards Oldsmobile* set aside a jury verdict finding that Bill Edwards had maliciously prosecuted Walter Carey. In setting the jury verdict aside, this Court focused on the fact that the police and the Commonwealth's Attorney, and not Bill Edwards, were the parties who decided to proceed with prosecuting Mr. Carey.

Carey had been an employee at Edwards' dealership. *Bill Edwards Oldsmobile, Inc.*, 219 Va. at 92, 244 S.E.2d at 769. Carey had made a deal with Edwards where Cary would build a race car on the dealership's premises; charge the parts used for building the car on a dealership account; and pay the dealership back by payroll deductions. *Id.*, at 93, 244 S.E.2d at 769. With the car almost built (except for some welding remaining), Carey

had an outstanding balance with the dealership of approximately $2300. *Id.*, at 95, 244 S.E.2d at 771. Edwards told Carey that Carey needed to repay the $2300 immediately. In response to that ultimatum, Carey parked the racecar at a friend's house, quit his job at Bill Edwards Oldsmobile, and left town to start work at a dealership in Fairfax County. *Id.*, at 94-95, 244 S.E.2d at 770-71.

Bill Edwards was able to recover the car; however, he felt that Carey still owed him the $2300. Edwards talked with his lawyer (a Leigh Middleditch); and after that discussion between Edwards and Middleditch, Edwards called the Charlottesville police and spoke to a Detective Hughes. Edwards (along with his father, the president of Bill Edwards Oldsmobile) went over "the entire Carey file" with Hughes. While Hughes testified that he "did not believe that each item was discussed in detail" with Edwards and his father, Hughes understood the "gist" of Edwards' complaint was that "Edwards felt he was out a great deal of money." Edwards was out this money, Hughes testified, because "Carey had charged approximately $2313.33 worth of equipment"

to the dealership and had not paid the dealership back. *Id.*, at 95-96, 244 S.E.2d at 771.

Most important as it relates to the case at bar, Hughes' report of his conversation with Edwards was that "Edwards wanted full restitution in lieu of placing charges" against Cary. Clearly, Edwards' motivation in contacting the police was to force Carey to pay Edwards the money that Edwards said that Carey owed him. *Id.*, at 95, 244 S.E.2d at 771.

After meeting with Edwards, Hughes consulted Charlottesville's Commonwealth's Attorney. The Commonwealth's Attorney reviewed the file and advised Hughes to obtain a warrant against Carey. *Id.*, at 96, 244 S.E.2d at 771. Hughes swore out the required affidavit and obtained the warrant. *Id.*

After Edwards' initial meeting with Hughes, Edwards found out from Carey's new Fairfax employer where Cary was located. Edwards reported this information to the police. Armed with the warrant, the Charlottesville police had the Fairfax County police arrest Carey and hold him until they arrived to return him to Charlottesville. *Id.*, at 96, 244 S.E.2d at 771.

It is not exactly clear what happened when Carey's case went to trial; however, it is clear that the trial court entered "an order of *nolle prosequi* and the criminal case against Carey came to an end. *Id.*, at 96, 244 S.E.2d at 771.

Review what happened in *Bill Edwards Oldsmobile*. A business owner (Edwards), thinking he had been defrauded by an ex-employee (Carey), went to the police complaining about the ex-employee's conduct. Edwards made it clear to the police that he wanted restitution; in other words, his motivation in coming to the police was to get the money back from Carey that he thought Carey had stolen from him. The Commonwealth's Attorney, acting on the information that Detective Hughes provided him (which information, in turn, came exclusively from Edwards), advised Hughes to get a warrant; and Hughes did so. After Hughes obtained the warrant, Edwards continued to be active in the prosecution, finding out where Carey was located and directing the Charlottesville police to that location.

The table below sets out the parallel facts of this case:

Facts in *Bill Edwards Oldsmobile*	Facts in *Tice v. O'Connor*
1. Acting on the advice of counsel, Bill Edwards, along with his father, contacted the Charlottesville police about potential criminal charges against Mr. Carey.	1. Attempting to discover Tice's address to serve a civil warrant, Jim and Vickie O'Connor went first to the Lancaster County Sheriff's Office, then to the Northumberland County Sheriff's Office.
2. Edwards and his father met with Detective Hughes of the Charlottesville police specifically to discuss the potential criminal case against Carey.	2. Mr. and Ms. O'Connor met with Deputy Darby of the NCSO. They have no intent at this time to discuss any criminal charges against Tice; they were simply looking for Tice's address. JA 163-164. (Testimony of Vickie O'Connor about when she first met Darby).
3. Edwards and his father went over "Carey's entire file" with Detective Hughes.	3. Jim and Vickie O'Connor gave Darby their "whole packet" of information that they had on Tice: their pictures of the finished job; copies of the warrant in debt they had filed; the O'Connor's chronology of events they had filled out; pictures that Mr. O'Connor had done showing percentage of the painting job completed. They also gave Darby Tice's card with Tice's phone number on it. JA 164-165. (Testimony of Vickie O'Connor).

4. Edwards made no charges against Carey in his discussions with Hughes, and made no recommendation to Hughes about any police action. Edwards told Hughes that Edwards wanted full restitution from Carey of the money Carey owed Edwards' dealership. This restitution was "in lieu of placing [criminal] charges against Carey."	4. Neither Jim or Vickie O'Connor made any mention of wanting any criminal charges pressed against Tice at this initial meeting with Darby. It was ***Darby***, after reviewing the O'Connor's file on Tice, who first mentioned the possibility of criminal action. Darby said to the O'Connors: "This looks like it could be construction fraud." JA 164 (Testimony of Vickie O'Connor).
5. No analogous action by Edwards.	5. Darby told the O'Connors that they had to send a "15-day letter" in order for Darby to make out a case of construction fraud. JA 165-166. (Testimony of Vickie O'Connor). Jim O'Connor wrote the letter, JA 167 (Testimony of Vickie O'Connor), and it went out to Tice over Vickie O'Connor's signature. The letter stated that it was being written on the advice of the NCSO. This 15-day letter was dated October 19, 2006. JA 166 (Testimony of Vickie O'Connor). The O'Connors provided Darby the return receipt from the 15 day letter, and Darby told them that he (Darby) "would handle it and that [the O'Connors] would hear from him." JA 170 (Testimony of Vickie O'Connor).

6. Hughes took the information that Edwards provided him and contacted the Charlottesville Commonwealth's Attorney to get advice on whether to obtain a warrant against Carey. The CA advised Hughes to swear out a warrant based on the information that Edwards had provided him. Hughes did so, and a warrant for Carey's arrest was issued.	6. Darby took the information that the O'Connors provided, along with the return receipt showing the mailing of the 15-day letter, and contacted R. Michael McKenney, the Commonwealth's attorney of Northumberland County, to get advice on whether to obtain a warrant against Tice. McKenney advised Darby to swear out the warrant against Tice for construction fraud. Darby did so, and the magistrate issued the warrant.
7. Edwards found out where Carey had moved, and he contacted the Charlottesville police about where they could serve the warrant on Carey.	7. No analogous action by the O'Connors.
8. The Charlottesville Commonwealth's attorney elected not to call Edwards at the trial of the matter.	8. The O'Connors met with Elizabeth Trible, the Assistant Commonwealth's Attorney for Northumberland County, on or about December 28, 2007, in order to prepare for the January 22, 2008 preliminary hearing against Tice. Ms. Trible explained to the O'Connors about the difference between a civil action to recover damages and restitution under a criminal statute. JA 567 (Trible's testimony). Ms. Trible made an independent determination that

	probable cause existed to go forward with the construction fraud case against Tice. JA 564 (Trible's testimony).
9. The criminal case against Carey was *nol prossed*.	9. The criminal case against Tice was dismissed at his preliminary hearing.

If anything, the facts in this case show that the O'Connor's actions were more blameless than those of Edwards in *Bill Edwards Oldsmobile*. Edwards went to the police and, while not specifically mentioning that Edwards wanted criminal charges pressed against Carey, indicated to Detective Hughes that "in lieu of placing charges against Carey," Edwards wanted restitution from Carey of the money that Carey took. There was clearly an offer in *Bill Edwards Oldsmobile* of "make restitution, no criminal charges." Here, the O'Connors first went to the NCSO simply to find an address to serve civil process on Mr. Tice, not to press criminal charges at all. It was Deputy Darby who first raised the specter of "construction fraud," and it was Darby who advised the O'Connor's to write the 15-day letter. Once the O'Connors delivered the 15-day letter return receipt to Darby, Darby took control of the criminal prosecution. It was Darby who contacted

Michael McKenney, the Northumberland County Commonwealth's Attorney; and it was Darby, acting on Mr. McKenney's advice, who offered the sworn statement to the magistrate resulting in the warrant issuing against Tice.

In this case (as was NOT present in *Bill Edwards Oldsmobile*) there was an additional law enforcement agency attorney who reviewed the case against Tice and made an independent evaluation that probable cause existed to proceed against Tice: Elizabeth Trible, the Northumberland County Assistant Commonwealth's Attorney.

3. As a matter of law, there was probable cause to believe that Tice had committed the crime of construction fraud.

Looking at the information that the O'Connors provided Deputy Darby, ***three separate law enforcement officials independently concluded that there was probable cause to bring a criminal case against Tice***: (a) Michael McKenney, the Northumberland County Commonwealth's Attorney; (b) the issuing magistrate; and (c) Elizabeth Trible, the Northumberland County Assistant Commonwealth's Attorney who actually

prosecuted the case. It is not difficult to understand why. Tice took an advance of money from the O'Connors (one-third of the contract price) to begin painting their building. Within a couple of weeks of work, Tice stopped work. Look at the pictures of the O'Connors' building after Tice had left the job. Trial Exhibits 4-8 (JA 342-346). Does it look like one-third of the painting has been done on that building? Given that Tice was a Class C contractor, subjected to a limited bidding ceiling, and that the painter before Tice gave a bid of $16,000 (JA 196), which was over the Class C bid limit, is it a reasonable inference that Tice had to have known that his bid was way too low to be able to complete the job for that amount?

Construction fraud can "occur despite the fact that a . . . contractor begins to perform on the contract." *Holsapple v. Commonwealth*, 266 Va. 593, 587 S.E.2d 561, 566 (2003). Given the facts present in this case, and given that 3 separate law enforcement officials (comprised of two Commonwealth's Attorneys and a magistrate) made a determination of probable

cause, could one reasonably infer that Tice committed construction fraud?

If the answer to the above question is "yes, then what this Court said in setting Carey's jury verdict aside is ***exactly applicable*** to the defendants' motion here to set the jury's verdict aside:

> Edwards could reasonably infer that Carey had committed a crime, and we consider it immaterial that he did not identify the crime to the detective or directly charge Carey with the commission of any crime. ***It is not our purpose to discourage citizens, regardless of their motives, from reporting to law enforcement authorities information that would cause a reasonable man to believe that a crime had been committed.***

Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 99-100, 244 S.E.2d 767, 773 (1978)(emphasis added).

Interestingly enough, the trial court in ***this*** case focused on exactly the same point. At the very beginning of the trial of this case, before the jury was even selected, this Court articulated the exact concern that animated the holding in *Bill Edwards Oldsmobile*:

> The thought that comes to my mind is the question of whether a private citizen, who feels grieved, brings a report to a law enforcement official, why he could not depend upon and rely upon the law enforcement agencies making the right decision to go forward or not[.] [A]nd if he cannot, then I think we really have to explore what kind of consequences we would all experience as a result of it. That is the concern I have with respect to the plaintiff's argument in this case.

JA 42 (Grissom, Circuit Court Judge).

The circuit court put its finger on exactly the public policy issue discussed in *Bill Edwards Oldsmobile* and raised by this case: given that the Commonwealth's Attorney was the one who decided to prosecute, "what kind of consequences would we all experience as a result of" holding the O'Connors liable for malicious prosecution.

The Circuit Court here found that the facts related to the actual existence of construction fraud were in dispute; that the jury resolved those facts in Tice's favor, and that "reasonable people could find under the evidence . . . that the [O'Connors] . . . unmistakably and plainly knew that [Tice] had not committed construction fraud." JA at 838 (the trial court's ruling on post-

trial motions from the bench). However, that reasoning does not take into account fully Virginia law's effect on the ***Commonwealth's Attorney*** here being the individual who made the decision to prosecute Tice, both in his initial determination of the existence of probable cause (when Darby called him to ask if Darby should get a warrant) and in the decision (through his assistant, Ms. Trible) to proceed with Tice's preliminary hearing.

It has long been the law in Virginia that a prosecutor's decision to prosecute a criminal case immunizes the citizen who made the underlying initial criminal complaint from liability for malicious prosecution. *American Railway Express Company v. Stephens*, 148 Va. 1, 138 S.E. 496 (1927) illustrates this point.

In *American Railway*, an express car of the Express Company was robbed in December of 1923. *American Railway Express Company,* 148 Va. at 3. Stephens, an employee of American Railway, was indicted for taking part in the robbery after an investigation by the police and the Commonwealth's Attorney. The Express Company even paid to hire an assistant to the Commonwealth's Attorney to help prosecute the case. *Id.*

Stephens was acquitted of the charge. *Id.* He later sued the Express Company for malicious prosecution. He won a jury verdict at the trial court; this Court set the verdict aside and entered judgment for the express company, focusing exclusively on the fact that when the evidence showed that it was Commonwealth's Attorney who undertook the prosecution, then "the question of probable cause becomes one for the court." *Id.*, at 16. This Court stated:

> We do not have to consider the question of probable cause as if it had been presented upon a conflict of the evidence, nor do we have to consider the question as to whether advice of counsel was sought with an honest purpose of being informed as to the law or whether the attorneys engaged in the prosecution of all four of the parties against whom indictments were found, were given all the material facts in possession of the officers of the express company (although this fully appears) ***because the Commonwealth's attorney personally conducted the investigation of the case from the very beginning and he states that he prosecuted all the parties indicted because of the knowledge thus acquired.*** He conferred with Captain Jefferson of the police department of the city of Petersburg as well as the agents of the express company; he questioned [a company employee] carefully and checked up his

> statements so as to test their truthfulness after he had decided to make a clean breast of the whole matter, and had arrived at the decision, after weighing all the proof, that it was not a case of highway robbery but of grand larceny. ***The defendants were not even consulted as to this conclusion but it was simply announced to them by the attorney for the Commonwealth.*** . . . . When Mr. Owens, an officer of the express company, stated that he wished to avoid the likelihood of damage suits, ***he was told by the Commonwealth's attorney that the decision to prosecute for conspiracy to commit larceny and not for highway robbery was for him, the Commonwealth's attorney, to decide; that that was the business of the Commonwealth and that Mr. Owens had nothing to do with it.*** The conclusion of the Commonwealth's attorney was the result of his own investigation and of numerous interviews with the officers of the express company and the special agents of the police department of the city of Petersburg.

American Railway Express Company v. Stephens, 148 Va. at 18 (emphasis added).

Applying *American Railway Express Company's* holding to this case compels the conclusion that this Court must set aside Tice's verdict against the O'Connors. Here, Darby made an initial determination that Tice's action could have constituted

construction fraud; Darby then consulted with the Northumberland County Commonwealth's Attorney, who advised Darby to get the warrant against Tice; the case was assigned to the Assistant Commonwealth's Attorney, who prosecuted the case. As in *American Railway Express Company*, the O'Connors were not even consulted by the Commonwealth as to whether or not to bring criminal charges; it was the Commonwealth's attorney who made the decision to prosecute. Under these undisputed facts, the O'Connors are entitled to a finding as a matter of law that probable cause existed to prosecute Tice for construction fraud.

Bill Edwards Oldsmobile and *American Railway Express Company* are but two examples of a longstanding principle of Virginia law: that when the police authorities, acting in concert with the Commonwealth's Attorney, make a decision to charge someone with a crime, that charging decision belongs to the Commonwealth alone, and anyone who merely participates in the investigation at the request of the police, as a matter of law, is not liable for malicious prosecution. Recent cases from this Court

have gone even further, setting aside jury verdicts when the police, without any input from the Commonwealth's Attorney's office, undertake the investigation that leads to the police procuring arrest warrants from the magistrate. *See*, *e.g.*, *Reilly v. Shepherd*, 273 Va. 728, 643 S.E.2d 216 (Va. 2007)(setting aside a jury verdict against a police officer for malicious prosecution where the evidence showed that the police investigated and procured a warrant from a magistrate); *see also Commissary Concepts v. Miziguir*, 267 Va. 586, 594 S.E.2d 915 (2004)(same).

4. Conclusion.

Virginia has a strong public policy of not discouraging citizens from going to the police to report crimes for fear of being sued. *Bill Edwards Oldsmobile* and *American Railway Express*, operationalized this policy by holding, in effect, that if the Commonwealth's Attorney makes the decision to prosecute, then, as a matter of law, for any resulting malicious prosecution action, probable cause existed to initiate the prosecution. In this case, the Commonwealth's Attorney reasonably inferred that Tice had

committed construction fraud by taking the advance from the O'Connors and directed the police to obtain a warrant charging Tice with that crime. Since the police, acting in concert with and under the advice of the Commonwealth's Attorney, made the decision to obtain a warrant, then, under *Bill Edwards Oldsmobile* and *American Railway Express*, ***as a matter of law*** this Court must find that probable cause to initiate the prosecution must have been present.

In this case, it is ***strikingly obvious*** that every government official that looked at the evidence provided by the O'Connors found probable cause to continue the criminal case against Tice. Just as Edwards and the American Railway Express Company were entitled ***as a matter of law*** to have this Court set aside a jury verdict against them aside and enter judgment in their favor, so too are the O'Connors and Viocon entitled here to the same relief.

B. Assignment of Error I(B).

1. Summary of the Argument.

The evidence in this case shows that the O'Connor's, at most, merely assisted and cooperated with law enforcement in Tice's prosecution for construction fraud. Under *Marsh v. Commercial and Savings Bank of Winchester, Virginia*, 265 F. Supp. 614 (W.D. Va. 1967) and *King v. Martin*, 150 Va. 122, 142 S.E. 358 (1928), mere cooperation with the authorities cannot, as a matter of law, constitute "initiating" a prosecution for the purposes of a malicious prosecution action.

2. The O'Connors did not initiate Tice's prosecution.

To support the jury's verdict in this case, the evidence must show that Tice's prosecution was "set on foot" by the O'Connors; *i.e.*, that the O'Connors instituted or procured Tice's prosecution. *Niese v. Klos*, 216 Va. 701, 222 S.E.2d 798 (1976).

Here, as shown in great detail by the factual recitation above, the O'Connors did nothing in this case but cooperate in the police's investigation of and the Commonwealth's prosecution of Tice's alleged construction fraud. "Once the police were

involved in the investigation, the [defendants] did nothing but cooperate in the investigation." *Marsh v. Commercial and Savings Bank of Winchester, Virginia*, 265 F. Supp. 614, 618 (W.D. Va. 1967). In *Marsh*, that conclusion resulted in a grant of summary judgment against the plaintiff. Likewise, a similar conclusion here mandates the conclusion that the O'Connors are entitled to judgment as a matter of law.

In *King v. Martin*, 150 Va. 122, 142 S.E. 358 (1928), the Supreme Court reversed a jury verdict for the plaintiff in a malicious prosecution action. The evidence there showed that King was the victim of a robbery; he described the robber to the police; and he aided the police by identifying Martin at a police station line-up and later at trial. *King*, 150 Va. at 125. Other than that cooperation, he "left the matter entirely in the hands of the police department of the city of Norfolk." *Id.* At no time did King ever request that the police charge Martin with a crime. *Id*. at 126. The police investigated and obtained a warrant against Martin, who was acquitted at trial. *Id.* Martin then sued King for malicious prosecution and obtained a jury verdict.

In setting aside a jury verdict against King, this Court held that mere cooperation with the police in investigating a criminal charge cannot, as a matter of law, constitute initiating or procuring a prosecution:

> ***The defendant's principal defense was that he neither instituted nor caused, nor had anything to do with, the prosecution upon which the action was based.*** This question is involved in both assignments of error. The second assignment presents the additional defense that the circumstances of the case fail to show a want of probable cause, and negative the existence of malice, but as we are of opinion that ***the evidence, in spite of the jury's verdict, as a matter of law, fails to show that the defendant instigated or caused or had anything to do with the prosecution except to appear as a witness when summoned,*** it is only necessary to consider the assignments of error as they relate to this defense.
>
> . . . . . .
>
> Here is a situation where a householder is held up at the point of a pistol and robbed and thereafter places himself entirely in the hands of the duly constituted authorities. Not one single active or voluntary step was taken by him at any stage of the proceedings. . . . When [King] arrived there he stated his honest belief, he did not request that Martin be held or that he be arrested or that he be

> jailed, but went on his way having performed simply the duty which any good citizen should. Summoned to appear before the grand jury, he repeated his belief there, and before the petit jury he did the same thing.
>
> If this conduct by a citizen who has been held up and robbed, and this identification of a suspect, are sufficient to support an action for malicious prosecution, it would be hard indeed to procure testimony with regard to identity in any case, where the fate of the witness from the standpoint of damages was ultimately dependent upon the verdict of a jury in a criminal prosecution, with all the safeguards with which one accused of crime is invested in such a trial.

King, 150 Va. at 126-28 (emphasis added).

It would serve no purpose to belabor this point. What did the evidence show in this case, other than that the O'Connors did nothing relating to Tice's prosecution other than cooperate in the NCSO's investigating Tice and appear as witnesses at Tice's preliminary hearing? They did not seek Tice's prosecution; they simply cooperated in the investigation of the crime initiated by the NCSO and the Northumberland Commonwealth's Attorney. Just as almost-exactly similar evidence mandated setting aside

Martin's verdict against Mr. King, so too does that evidence mandate setting aside Tice's verdict against the defendants here.

VI. CONCLUSION AND RELIEF SOUGHT.

The evidence in this case was insufficient, as a matter of law, to prove either that: (a) there was no probable cause to initiate Tice's prosecution; or (b) that the O'Connors instituted or procured Tice's prosecution. Each of those two failures of the evidence is an adequate and independent ground for setting Tice's verdict against the O'Connors aside and entering judgment as a matter of law in favor of James O'Connor; Vickie O'Connor; and Viocon, LLC.

Therefore, the appellants, James O'Connor, Vickie O'Connor, and Viocon, LLC move this Court to set aside the verdict and the judgment entered against them in the circuit court and enter final judgment here in their favor.

JAMES P. O'CONNOR
VICKIE L. O'CONNOR
VIOCON ENTERPRISES, LLC

By: _____
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VII. CERTIFICATE PURSUANT TO RULE 5:26(d).

1. The appellants are James P. O'Connor; Vickie O'Connor; and Viocon, LLC.

2. The appellee is James Tice.

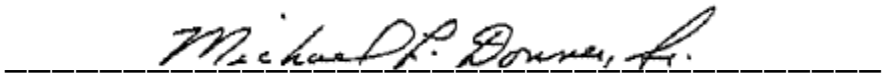
3. Counsel for the appellants is: Michael L. Donner, Sr., Esq., HUBBARD, TERRY & BRITT, P.C., 293 Steamboat Road, P.O. Box 340, Irvington, Virginia 22480, Telephone: (804) 438-5522 (voice), Facsimile: (804) 438-5003.

4. Counsel for the appellee is James B. Thorsen, Esq. James B. Thorsen, P.C. & Associates, 3810 Augusta Avenue, Richmond, Virginia. Telephone: (804) 359-3000 (voice), Facsimile (804) 359-3139.

5. On May 10, 2010, fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix were hand-filed with the Clerk of this Court, and three paper copies of the same were served, via U.S. Mail, postage prepaid, upon counsel for the appellee.

6. Counsel for the appellant desires to state orally in person to this Court the reasons why this Court should grant the appellants the relief they seek.

7. I certify that I have complied with Rule 5:26(d).



Michael L. Donner, Sr.