1 question of fact in the process that led all the way
2 to Mr. Tice's criminal charge being dismissed.
3 THE COURT: Okay. Counsel, I respect the
4 arguments that have been made not only today but
5 throughout the course of this trial. They are I would
6 not consider frivolous arguments. They are no need
7 arguments. They are, I think, valid from the
8 perspective of each side of the case. And I have
9 considered all of the arguments, I think, and have
10 read your briefs. And I am mindful of the policy
11 expressed by our court that malicious prosection
12 actions are not favored in Virginia, that the
13 requirements for maintaining the actions are certainly
14 more strict than you might say that are applicable in
15 other tort claims. I'm also mindful of the remarks
16 that I made concerning whether a private citizen who
17 has been grieved could not give information without
18 the fear of suffering dire consequences of that
19 information. And that goes to the other reason why
20 the actions are not favored, and that is that people
21 should not be discouraged from bringing such actions
22 for fear of such prosections against them.
23 I admit that the key to my understanding
24 of this case and the issues that are involved and
25 understanding whether Edwards applies or Lee applies

1 is the comment that the court made in Edwards saying
2 that under these facts and circumstances we believe
3 that it was reasonable for Edwards to infer that Carey
4 had knowingly used in his racing car parts belonging
5 to the company which he did not intend to pay for. It
6 was reasonable for the defendant in the malicious
7 prosecution case to reasonably infer that fact. And
8 to that extent the evidence was not conflicted. In
9 this case, however, the evidence was conflicting.
10 There -- it was not conflicting with respect to the
11 reason why the contract was terminated or the work
12 terminated. Whether there was an agreement or not, it
13 was clear that both sides agreed that a dispute arose
14 over the roof damage and the claim by the owner that
15 the plaintiff caused the damage and the denial on the
16 part of the plaintiff that he caused the damage. That
17 was really the basis for the termination of the work.
18 And both parties, I think, did agree that it should be
19 terminated. Well, the terms were they were still
20 being disputed. But the jury could find -- reasonable
21 people could find under the evidence that was
22 presented by the plaintiff that the defendants in this
23 case unmistakably and plainly knew that the plaintiff
24 had not committed construction fraud. The evidence
25 was conflicting; and if the jury decided that the

1 defendant wrongfully contrived the evidence and the
2 information and that should know or should have known
3 that the plaintiff had performed work equal to the
4 amount of compensated that had already been paid for
5 or had performed more work, the jury -- and the jury
6 did apparently conclude that. And they were not
7 forbidden from concluding that. And once those
8 findings are made by the jury, then the question turns
9 on the issue of whether or not the defendant set afoot
10 the criminal prosecution.
11 I think that would more or less come under
12 the instruction dealing with instigation. I think
13 that the jury could conclude from the facts presented
14 that this -- that this criminal prosecution would not
15 have gone forward under any circumstances had it not
16 been for the acts committed by this defendant,
17 including the fifteen day letter, which he was fully
18 aware of this purpose. Talking to the Commonwealth's
19 attorney may not have been in and of itself sufficient
20 and certainly as a witness may not have been in and of
21 itself, but when you consider the totality of the
22 involvement the jury concluded under those facts that
23 he cooperated to the extent of instigating the
24 criminal prosecution.
25 In short, it's the opinion of this court

1 that those facts with respect to probable cause were
2 in dispute and that the issue is one of fact to be
3 resolved by the triers of fact and that the jury found
4 in favor of the plaintiff and therefore the evidence
5 must be considered in the light most favorable to the
6 plaintiff. And when you believe the plaintiff's
7 evidence, you are drawn to conclude that defendant did
8 have not have a basis to reasonably infer or believe
9 that fraud had been committed. The court therefore
10 would deny the defendant's motion to set aside the
11 jury verdict with respect to the issues of probable
12 cause and instigating the criminal prosecution.
13 Counsel, I would like to take just a
14 couple of minutes break and we'll then proceed on the
15 motion for remitter.
16 (The hearing recessed at 12:04 p.m. At
17 12:11 p.m. the haring continued as follows:)
18 THE COURT: All right. Mr. Donner.
19 MR. DONNER: Yes, sir. Your Honor, the
20 second motion I noticed for today is a motion -- is a
21 motion for remitter. The court, not having set the
22 jury verdict aside, the defendants move to remit the
23 plaintiff's award for the following reasons. The
24 legal test for remitter is set out in the Shepherd
25 versus Capital Boundary of Virginia, Incorporated case