In the

Supreme Court of Virginia

At Richmond

Record No. 091941

JAMES P. O'CONNOR, et al.,

Appellants,

– v. –

JAMES C. TICE,

Appellee.

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

1. Was the Trial Court correct in denying the O'Connors' Motion to Strike the Plaintiff's Evidence because the facts relating to the question of probable cause in this malicious prosecution action were in dispute, so the issue of probable cause was one of fact to be resolved by the jury?

2. Was the Trial Court correct in denying the O'Connors' Motion to Strike the Plaintiff's Evidence as to the question of probable cause in this malicious prosecution action because the evidence shows that the O'Connors did not make full disclosure of the facts to the Sheriff's Deputy who obtained the warrant for Tice's arrest or to the Assistant Commonwealth's attorney who prosecuted the action?

3. Was the Trial Court correct in entering judgment on the jury's verdict for Tice because the evidence in this malicious prosecution action showed that the O'Connors instituted the prosecution or cooperated in the institution of the prosecution against Tice?

STATEMENT OF THE CASE

On January 23, 2008, the Plaintiff James C. Tice filed a suit for malicious prosecution in the Circuit Court of Northumberland County against the Defendants James P. O'Connor ("Mr. O'Connor"), Vickie L. O'Connor ("Mrs. O'Connor"), and their closely-held limited liability company

Viocon, L.L.C., (sometimes collectively referred to as “the O’Connors”), and against Northumberland County Sheriff’s Deputy Anthony Darby. Darby settled with Tice prior to trial and was dismissed from the case.

A jury trial as to Tice’s claims against the O’Connors was held in the Circuit Court for Northumberland County over two days from May 6, 2009 to May 7, 2009. The O’Connors moved to strike Tice’s evidence at the close of his case-in-chief and again at the end of all evidence, claiming, in pertinent part, that they had probable cause to prosecute Tice for construction fraud. The Trial Court denied the motions and stated that there was sufficient evidence for the jury to find that the O’Connors omitted material facts in relating their claims to Darby who acquired the warrant for Tice’s arrest based on the O’Connors’ incomplete disclosure of the facts (JA 522-23).

The jury returned a verdict for Tice in the amount of $200,000 in compensatory damages. The O’Connors made a post-trial motion for judgment notwithstanding the jury’s verdict on the grounds that the O’Connors had probable cause to prosecute Tice for construction fraud, that there was a lack of evidence the O’Connors initiated or instituted the prosecution against Tice, and that the jury verdict was subject to a

remittitur.

The Trial Court denied the O'Connors' motion for judgment notwithstanding the verdict because the facts at trial regarding the O'Connors' allegation against Tice for construction fraud were in dispute, and the question of whether they had probable cause to prosecute him was a question of fact for the jury (JA 838-39). The Trial Court also concluded that the jury could find from the facts presented at trial that the criminal prosecution of Tice would not have gone forward under any circumstances if not for the O'Connors' acts or their cooperation with the prosecuting authorities (JA 839).

The O'Connors also made a post-trial motion under Va. Code Ann. § 8.01-35.1 for the court to reduce the jury's verdict in the amount of $15,000 which was the figure for which Darby settled with Tice before trial. The Trial Court granted this motion and entered judgment against the O'Connors in the amount of $185,000.

STATEMENT OF FACTS[1]

In 2006 the O'Connors bought a commercial building, titled in the name of Viocon and located at 2816 Northumberland Highway in Lottsburg, Virginia, 22511. The O'Connors sought to renovate the property in anticipation of opening a restaurant and housing Mr. O'Connor's surveying business. The O'Connors had already gone through three painters in attempting to have the building painted to their satisfaction (JA 115-17), when Mrs. O'Connor saw a sign advertising Tice's solely-owned painting business, T & N Painting, which he had operated since 1996.

Mrs. O'Connor called Tice on the advertised phone number, and Tice came to the building to give an estimate of the cost to paint the exterior. Tice estimated that it would cost $6,872.00 to "strip paint on lower front to chimney, sand remaining siding, caulk and putty as needed, remove storm windows and glaze as needed, 1 coat oil-based primer, 2 coats finish on all siding and trim, includes all labor and materials" (JA 335). According to the

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[1]The O'Connors' claim that because Tice called them as adverse witnesses in his case-in-chief, he is bound by their testimony, but, as the O'Connors admit (*see* Appellant's Brief at 6, at n.1), a plaintiff who calls the defendant as an adverse witness "is not bound by so much of the defendant's testimony as is in conflict with the plaintiff's other evidence, but is bound only by testimony which is clear, reasonable, and uncontradicted." *Horne v. Milgrim*, 226 Va. 133, 139, 306 S.E.2d 893, 896 (1983).

estimate, a one-third down-payment was due, with another one-third payable upon completion of prep work and the remaining one third payable upon completion of the job.

Mrs. O'Connor calculated one-third of $6,872.00 and mailed a check to Tice for $2,290.67 on May 26, 2006. Tice agreed to start work on Monday, June 5, 2006. It rained that day, so Tice and four other painters showed up for work in the morning of June 6, 2006. Tice told the O'Connors that the job would take two weeks, but from time-to-time during that period the weather was rainy or the O'Connors had contractors working on the roof, which prevented Tice and his crew from painting (JA 281-83, 357, 389-93).

In preparation for and during the work, Tice's employee Gregory Wynkroop bought painting materials for the job at Lamberth Building Materials in White Stone on Tice's account, including ten gallons of Peel-Away paint remover, 5 gallons of oil-based primer, one gallon of paint thinner, and ten sanding pads, with the charges totaling $407.77 (JA 279-80, 353-56, 373-74).

Tice and his employees used Peel-Away to strip the lower front of the building, they sanded the left side of the building, they sanded the entire

back of the building all the way to the top of the windows, they sanded the upper part of the building over the flat roof on the right side, and they primed that area and finish-coated it twice by spraying and back-brushing it (JA 151, 276, 336, 342-46, 377-82, 657). In total from June 6 through June 19, Tice's men worked 106 man hours at $18 per hour for a total cost of labor to Tice of $1,908.00 (JA 301-02, 357, 389-93, 402, 405-07). The O'Connors claimed that Tice and his men spent considerably less time working on the building and finished only 5% of the total job (JA 152, 176-77, 348-49).

Overall, due to weather and roof-repair delays, Tice and his employees were able to work on the building for five days in the two-week span (JA 504). During the period in which Tice was working on the building, the flat roof on the right side sustained storm damage. The O'Connors had a carpenter replace the roof decking and a contractor install a flame-down roof, which prevented Tice from working for a couple of days (JA 337, 282-83, 384, 392, 604-05). When painting on the roof resumed, Tice's employees placed walk board and drop cloths or tarps on the roof and wore soft-soled tennis shoes in doing the job (JA 276-77, 279, 302-03, 380-81, 385). Tice and his employee saw other contractors

working at the building at that time, and the roof was in “perfect shape” the last time they left the job (JA 276-77, 386).

Nonetheless, on Monday, June 19, Mrs. O’Connor noticed boot-print damage to the flat roof and called Mr. O’Connor. Mr. O’Connor called Tice on the morning of June 20 and left a message for Tice to stop work and do not come back to the job because he had damaged the roof (JA 157, 187, 202, 387).

After some phone tag, about two days later Tice and Mr. O’Connor talked on the phone, and Mr. O’Connor angrily told Tice that he had damaged his roof and not to come back to work (JA 388). Tice contended that he had not damaged the roof, and he and Mr. O’Connor argued about it to the point that Tice said that the two were obviously not going to agree, and I have done more than one-third of the work and you have paid me only one-third of the money, so why don’t you find someone else to finish the project and we are even for the work I’ve done (JA 388, 404). O’Connor, according to Tice, replied that this was fine (JA 389). O’Connor testified that Tice had simply stated he had completed more than 30 percent of the work, that he was keeping the deposit, and that he was “quitting the job” (JA 203).

Tice estimates that at the time of the parties' dispute he was done with 75% of the prep work, which was the hardest part of the job, and was done with 60-65% of the entire job (JA 481, 504). Tice testified that he could have finished the contract for the estimated cost of $6,872.00 (JA 494). In any event, by the time Mr. O'Connor ordered him to stop work, Tice had expended $2,315.77 for labor and materials, meaning that he had gained no profit from the $2,290.67 he had received as a deposit (JA 402-03).

While the O'Connors spent over $400,000 to renovate their building (JA 193), and went through five painters to finish the job (JA 158-59, 194-97), and had a dispute with every contractor that worked on the renovation (JA 206), more than five months later and acting pro se the O'Connors filed a warrant in debt on September 29, 2006 against Tice in Lancaster County General District Court for the $2,290 deposit, $1,000 for repair costs for the roof, and $55 in costs, for a total of $3,345.67. Mr. O'Connor got Tice's address for the warrant in debt from the website of the Department of Professional and Occupational Regulation ("DPOR") which incorrectly listed Tice's address as 5636 Riverview Court in Kilmarnock, when that address was located in White Stone.

When service of the warrant in debt on Mr. Tice had failed by the stated court date, the General District Court Judge in Lancaster County suggested to the O'Connors that they go to the Lancaster County Sheriff's Office to see if they could help get a correct address for Tice. When inquiring at the Lancaster County Sheriff's Office, a deputy informed him that the address the O'Connors had for Tice did not exist in Lancaster and suggested that they check with the Sheriff's Office in Northumberland County, where the building was located.

At the Northumberland County Sheriff's Office, the O'Connors met Darby and gave him their "whole packet" including the estimate, pictures of the work done, the warrant in debt, a typed copy of their recollection of the chronology or order of events, and Tice's business card (JA 164, 536, 539). When presenting their story to Darby, the O'Connors never discussed with him that Tice had completed a portion of the job or that Tice claimed that the work done was more than one-third of the job (JA 548). Darby stated that the facts as presented to him indicated that Tice may have committed construction fraud.

Darby told the O'Connors that he would find Tice's correct address and that if they wished to pursue the construction fraud prosecution in

accordance with the statute (*see* Va. Code Ann. § 18.2-200.1) they would have to send a certified letter to Tice demanding a return of the deposit within 15 days of receipt (JA 214, 550, 598, 615). At his deposition, Mr. O'Connor stated that he assumed a construction fraud prosecution would get his money back from Tice (JA 232). Mrs. O'Connor assumed that construction fraud was a criminal offense but admitted that she never looked at the statute (JA 167, 169).

Mr. O'Connor wrote a letter which Mrs. O'Connor signed and sent by certified mail on October 19, 2006 to Tice's post office box, in which the O'Connors stated they had attempted to serve a warrant in debt at Tice's registered DPOR address, but such an address does not exist and demanded Tice return the $2,290.67 deposit and pay them $1,000 for roof damage and $55 for cost for a total of $3,345.67.[2] The letter then stated that "If we do not receive the debt of $3,345.67 within 15 days of this letter <u>we will file a criminal complaint for construction fraud</u> in Northumberland County" (JA 340) (emphasis added).

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[2]The $1,000 in alleged roof damage should not even have been included in the certified letter sent pursuant to Va. Code Ann. § 18.2-200.1, since any such damage was not part of or related to the deposit or "advance" Tice received from the O'Connors.

On the same date, Mr. O'Connor filled out and sent to the DPOR a complaint form in which he stated that Tice had taken the deposit, finished only 5% of the work, damaged the roof, and quit the job (JA 349). Mr. O'Connor checked the "yes" box to the question of whether he would be willing to be involved in the criminal justice process in the event the case were deemed worthy of criminal prosecution. Mr. O'Connor understood by filing the DPOR complaint that it could lead to his involvement in a criminal prosecution (JA 226).

Near that time, Darby called Tice on the cell phone number on Tice's business card and left a message. Chris Stamm, Tice's attorney, called Darby back and told him Tice's correct address for service of civil process and also told Darby that he'd accept civil process at his office, as well (JA 241-42, 549). Also, Stamm called Mr. O'Connor and told him he had received the letter, told him Tice's correct address, and told him Tice could be served with the civil warrant in debt at his address or at Stamm's office (JA 171-72, 219, 246). Mr. O'Connor told Stamm they wanted their money back from Tice, and Stamm responded that he would be glad to receive service of the warrant in debt and then we can deal with it (JA 248).

Tice received the October 19 certified letter and took it to Stamm.

On November 3, 2006, within the 15-day period from the receipt of the certified letter, Stamm sent a letter back to the O'Connors in which he stated that Tice had given him a copy of the October 19 certified letter and that Tice's correct address was 335 Waverly Avenue, Lancaster County, Kilmarnock, Virginia. Stamm further wrote that a warrant in debt could be served at that address or served on Tice c/o Stamm at his office and stated that "[i]t appears to me that this is a civil matter and not a criminal matter" (JA 243-44, 341).

The O'Connors, though, turned over the October 19 certified letter, the mail receipt, and their materials to Darby at the end of the 15-day period to start a criminal prosecution of Tice, without telling Darby of Mr. O'Connor's phone conversations with Stamm (JA 174, 222, 227). The O'Connors also never told Darby about Stamm's letter dated November 3 and never gave him a copy (JA 172-73, 222-23, 227). Darby told them that he would take the O'Connors' information to the Commonwealth's Attorney and would speak to the magistrate to see if there was enough information to obtain a warrant.

Darby had no evidence that Tice had a criminal intent to defraud the O'Connors when he received the deposit check, had no evidence that Tice

had failed to substantially complete one-third of the job other than the evidence the O'Connors provided him, and could not answer how Tice had actually failed to do one-third of the job (JA 556-57). Mr. O'Connor testified that he did not think that Tice had the intent to defraud the O'Connors when Tice took the deposit check (JA 209). Darby has stated that if the O'Connors had not called him back after the 15-day letter and told him they wanted to pursue criminal charges he would not have pursued a criminal prosecution of Tice on his own (JA 554). The then-Commonwealth's Attorney R. Michael McKenney has stated that Darby would not have pursued criminal charges if the O'Connors had not raised their complaint (JA 649).

Stamm called Mr. O'Connor after November 3 and asked if he had received Stamm's letter, but Mr. O'Connor responded that the matter was "out of my hands" and was in the hands of the Northumberland County authorities (JA 221, 617). At that time Mr. O'Connor assumed that the Northumberland authorities were going to bring criminal charges against Tice and understood that he would have to be a witness in any such criminal prosecution (JA 223-24, 227).

Darby, having received the return receipt for the 15-day letter from

the O'Connors and their complaint that Tice had not repaid them within the statutory time period, went to McKenney and presented the O'Connors' information. McKenney told Darby that it was sufficient for a warrant "based upon what was represented to me" (JA 537, 635). Darby then went to the magistrate to seek a warrant for Tice's arrest for construction fraud under Va. Code Ann. § 18.2-200.1. Darby presented to the magistrate the information that the O'Connors had given him, but did not undertake his own investigation by interviewing Tice or his employees and did not go to the building site to see the work that was done (JA 537-40, 551).

In response to Darby's presentation, the magistrate wrote out the warrant for Tice's arrest charging him with unlawfully and feloniously obtaining from the O'Connors "an advance of money, merchandise, or other thing valued at $200 or more with fraudulent intent upon a promise to perform construction, removal, repair, or improvement of a building . . . and fail[ing] to perform such promise and also fail[ing] to substantially make good such advance" in violation of Va. Code Ann. § 18.2-200.1 (JA 19, 541).

Lancaster County Sheriff's Deputies served the warrant and arrested Tice on November 22, 2006 while he was eating breakfast at a crowded

Kilmarnock restaurant (JA 412-15). Tice was arraigned on November 27, 2006. On November 30, 2006, the news of Tice's arrest was on the front page of the local newspaper (JA 352, 430).

The Assistant Commonwealth's Attorney Elizabeth Trible sent a letter to the O'Connors or called them asking for an appointment to discuss Tice's prosecution. On December 28, 2006, the O'Connors met with Trible and presented her with the letter from Stamm, a copy of the canceled check, a timeline of dates, and pictures concerning the painting of the building and the damage to the roof.

The O'Connors never told her that Tice had purchased materials for the job, and Trible was of the belief that Tice had never purchased any materials (JA 571-573). Mr. O'Connor told her that Tice had returned his initial call regarding stopping work and had told O'Connor that he was not responsible for any damages, was one third of the way done with the job, and was "keeping the deposit and quitting the job" (JA 578). Trible was then of the impression that Tice had "just quit" on June 22, 2006 (JA 575).

Based solely on the information the O'Connors gave her, Trible concluded there was sufficient evidence to prosecute Tice for construction fraud under Va. Code Ann. § 18.2-200.1, and the O'Connors understood at

that time that they would be participating in a criminal prosecution (JA 564, 568, 581, 586). Trible also told the O'Connors that if they wanted to seek restitution they would have to file a separate civil case (JA 569).

On January 22, 2007 the preliminary hearing on the criminal charges against Tice occurred in the Northumberland County General District Court. Trible called on Mr. O'Connor and Mrs. O'Connor to testify and at the end of the prosecution's case-in-chief, Tice's defense attorney moved to strike, and the judge dismissed the case for a lack of probable cause.

Meanwhile, on January 10, 2007 the O'Connors had again, pro se, filed a warrant in debt against Tice seeking to recover $3,290.67 and $60 in court costs. On May 14, 2007 at the trial on this second warrant in debt against Tice, Mrs. O'Connor testified, and then, within five minutes into Darby's testimony, Mr. O'Connor threw up his hands and said to the judge "I see where this is going, let's just end it. I want to withdraw my complaint" (JA 237, 428, 621).

As a result of his criminal prosecution and the publicity surrounding it, Tice suffered a major blow to his previously good reputation and large losses in income from his painting and repossession businesses, as well as experiencing serious emotional distress and physical and psychological

ailments due to the stress (JA 369, 428-40, 502-07, 759-60).

ARGUMENT

I. THE MATERIAL FACTS CONCERNING PROBABLE CAUSE WERE IN DISPUTE AT TRIAL, AND IT WAS A QUESTION OF FACT FOR THE JURY TO DETERMINE IF THE O'CONNORS HAD PROBABLE CAUSE TO PROSECUTE TICE FOR CONSTRUCTION FRAUD.

In an action for malicious prosecution, the plaintiff has the burden of proving by a preponderance of the evidence that the prosecution was (1) malicious; (2) instituted by, or with the cooperation of, the defendant; (3) without probable cause; and (4) terminated in a manner not unfavorable to the plaintiff. *Stanley v. Webber*, 260 Va. 90, 531 S.E.2d 311 (2000). Probable cause is defined as knowledge of such facts and circumstances to raise the belief in a reasonable mind, acting on those facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected. *Id.*

The O'Connors have appealed the Trial Court's judgment mostly on the notion that the evidence showed that they had probable cause to seek the criminal prosecution of Tice for construction fraud. The O'Connors base this argument on the decisions of Darby that there was evidence of construction fraud and of McKenney, the magistrate, and Trible that there

was probable cause.

First, the Trial Court instructed the jury without objection that it "shall consider the facts and circumstances as they appeared to the defendants at the time the criminal proceedings were instituted by the issuance of the criminal warrant" (JA 678) (emphasis added) (*see also* Appellant's Brief at 11, Heading 2; "[a]s a matter of law, probable cause existed to believe that Tice had committed construction fraud at the time the magistrate issued the warrant") (emphasis added). So, only the magistrate's participation would even be possibly relevant to whether the O'Connors had probable cause to believe that Tice had committed construction fraud.

Second, the jury heard Mr. O'Connor admit on the stand that he did not believe Tice had the intention to defraud the O'Connors when he accepted the deposit check (JA 209). Fraudulent intent in the context of construction fraud under Va. Code Ann. § 18.2-200.1 is examined at the time the defendant procured the advance from the purchasers. *McCary v. Commonwealth*, 42 Va. App. 119, 590 S.E.2d 110 (2003).

Third, as discussed in more detail later, the magistrate, et al., based their decisions on the incomplete and misleading disclosure of facts the O'Connors made to the authorities.

Moreover, the jury heard all of the evidence in dispute and came to the conclusion that there was no probable cause. A judgment entered must be viewed by the reviewing court in the light most favorable to the prevailing party, and such a judgment cannot be set aside unless the verdict is plainly wrong or without evidence to support it. *Worley Brothers Co. v. Marus Marble & Tile Co.*, 209 Va. 136, 161 S.E.2d 796 (1968); *see also* Va. Code Ann. § 8.01-680. A jury's verdict which rests in part on the evidence heard in open court cannot be disturbed even if there is a conflict, unless the verdict is plainly wrong or without evidence to support it. *Sutton v. Menges*, 186 Va. 805, 44 S.E.2d 414 (1947).

More specifically, despite the O'Connors' argument that public officials found probable cause existed, the existence of probable cause in a malicious prosecution action is a question of fact <u>for the jury</u> when the evidence is in dispute. *Stanley*; *Lee v. Southland Corp*., 219 Va. 23, 244 S.E.2d 756 (1978); *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 152 S.E.2d 271 (1967); *Brodie v. Huck*, 187 Va. 485, 47 S.E.2d 310 (1948); *Virginia Electric & Power Co. v. Wynne*, 149 Va. 882, 141 S.E. 829 (1928).

In the present case, the parties put on some evidence that was undisputed: (1) the O'Connors hired Tice to paint the exterior of the

building for $6,872.00, (2) Mrs. O'Connor wrote a one-third deposit check for $2,290.67, (3) Tice and his employees showed up on June 6, 2006 to start the job, and (4) within the week the flat roof on the right side of the building suffered storm damage delaying work, and a new roof was put down.

However, the parties contentiously disagreed about and disputed just about everything else regarding Tice's work on the building: (1) the number of days and the amount of hours Tice worked, (2) whether Tice bought painting supplies and materials and brought them to the job, (3) the amount and quality of the work Tice did, with Tice saying he had completed more than one-third or even up to 65% of the job and the O'Connors believing that Tice had finished only 5% of the work, (4) whether Tice's employees damaged the roof with a boot print, (5) and if Tice quit the job and kept the deposit upon Mr. O'Connor stopping work or whether Tice and O'Connor agreed that Tice could keep the deposit, and O'Connor would find somebody else to finish the job.

Such disputes were not rare for the O'Connors who went through five painters and had a dispute with every single contractor that worked on their $400,000 renovation of the building. For some reason, though, they

latched onto the idea that Tice had defrauded them of their deposit and sought to sue to recover $3,345.67 from Tice and ultimately to initiate a criminal prosecution against him.

Furthermore, there was a dispute as to whether the O'Connors provided Darby and Assistant Commonwealth's Attorney Trible with all of the relevant evidence on Tice's work and on whether he had completed more than one-third of the job. The Trial Court expressly acknowledged that there was sufficient evidence for the jury to find that the O'Connors did not make full disclosure of these facts to law enforcement and the prosecuting authorities (JA 522-23).

These disputed facts resolved by the jury are an important consideration because, again, the existence of probable cause in a malicious prosecution action is a question of fact for the jury when the evidence is in dispute. *Stanley*; *Lee*; *Giant*; *Brodie*; *Virginia Electric & Power Co.*

The O'Connors rely heavily on this Court's opinion in *Bill Edwards Oldsmobile, Inc. v. Carey*, 219 Va. 90, 244 S.E.2d 767 (1978). In that case, an employee (Carey) of a car dealership began to build a racing car on the company premises after working hours, with the knowledge and

consent of the owner (Edwards). Edwards understood that Carey would use the car to advertise the company. Carey testified that he had an agreement with Edwards that he could order parts for the car through the company and pay for them through weekly payroll deductions.

Carey failed to make payment on the outstanding charges and upon being confronted left the workplace, ostensibly to get financial assistance from his mother. Instead, Carey left the car with a friend and fled the jurisdiction and got a new job in another county. The owner recovered the car but felt he was "out of a lot of money" and conferred with an attorney and then called the police.

The Court in *Bill Edwards* summarized the specific evidence regarding probable cause, *see* 219 Va. at 98-99, 244 S.E.2d at 772-73, and then pointedly noted that "[u]nlike the case presented in *Lee v. Southland Corporation*, Record No. 761670, also decided this day, <u>there is no conflict in the evidence as to these facts</u>." 219 Va. at 99, 244 S.E.2d at 773 (emphasis added). The court held that because the facts related to probable cause were undisputed, it could determine as a "matter of law" that such probable cause existed and that the jury's verdict for Carey in the malicious prosecution action must be overturned. *Id.*

In *Lee*, by contrast, the evidence regarding probable cause was disputed, and the court held that it was a question for the jury. The plaintiff in *Lee* was a customer at a convenience store and had both hands full as he left the establishment, so he kicked at the exit door to open it and broke the door. A district manager of the defendant company accused the plaintiff of purposely breaking the glass. When the plaintiff continued to maintain that he did not purposely break the glass and that he did not think he was responsible for it, the district directed the store clerk to obtain a warrant against the plaintiff.

After the criminal case was dismissed, the plaintiff sued the company for malicious prosecution, and the jury entered a verdict of $3,000 against the company. The trial court set aside the verdict on the grounds that there was probable cause as a matter of law for issuing the warrant for the plaintiff's arrest. The plaintiff appealed, and this Court reversed the trial court's setting aside of the verdict because the disputed questions of fact were for the jury:

> Only where the facts relating to probable cause are not in dispute in a malicious prosecution action does the issue become a question of law for the court; and when such facts are in dispute, the issue is one of fact to be resolved by the triers of fact.

> In the present case, there was a conflict in the evidence as to whether the plaintiff wilfully kicked and broke the glass door or whether the breaking of the glass was unintentional and accidental. Thus, the issue of existence or non-existence of probable cause for the issuance of the warrant was a factual question for the jury and not a question of law for the court's determination. *Cf. Bill Edwards Oldsmobile, Inc. v. Carey*, Va., 244 S.E.2d 767.

219 Va. at 27, 244 S.E.2d at 759.

Also, in the more recent case of *Stanley*, the court held that the evidence was in dispute as to whether the defendant had probable cause to seek a warrant for the plaintiff's arrest for grand larceny of a commercial oven. The court stated that disputed questions of fact regarding probable cause were for a jury and that there was sufficient evidence to support the jury's verdict for the plaintiff:

> The evidence in the present case was disputed on the issue whether the defendants had probable cause to initiate the criminal charges against the Webbers. Todd Webber testified that he and Stanley agreed that he would provide the parts and labor to repair the oven and that, in return, Steak & Ale would allow him to take the oven as payment for his services when Stanley received her new oven in '30 days or so, whatever.' Donald Webber's testimony essentially corroborated Todd Webber's statement concerning the terms of the oral agreement.
>
> The jury could reasonably infer from this testimony that under the parties' agreement, the oven belonged to the Webbers once they repaired it, although they agreed to allow Stanley to retain possession of it for a brief period thereafter. Alternatively,

> the jury could infer from the testimony that the parties' agreement transferred ownership of the oven to the Webbers about 30 days after they repaired it. Either conclusion also was supported by the receipt signed by Stanley, which indicated that the oven constituted payment for the June 1995 invoice, and that this payment was supposed to have been made around August 1995.
>
> Under either of these views of the evidence, the defendants lacked probable cause to initiate the grand larceny charges because the Webbers did not intend to permanently deprive Steak & Ale of any property owned by it, and Stanley knew this fact when she initiated the criminal charge.

260 Va. at 97, 531 S.E.2d at 315.

Likewise, in the present case, the parties were in sharp dispute concerning almost every material aspect of Tice's performance of the contract to paint the O'Connors' building. The parties also contested whether the O'Connors had fully disclosed the pertinent facts to Darby and Trible before the magistrate and Trible determined there was probable cause. The jury heard all of the evidence of the substantial amount of work that Tice and his employees completed on the job and of the lack of full disclosure of the facts by the O'Connors to law enforcement and the prosecuting authorities and held that there was no probable cause for Tice's arrest. The jury's findings concerning these disputed facts are supported by substantial evidence and should not be overturned on

appeal.

II. THE O'CONNORS MAY NOT RELY ON ANY ONE OF THE PROSECUTING AUTHORITIES' DETERMINATIONS OF PROBABLE CAUSE BECAUSE SUCH A DECISION OR THE ADVICE OF COUNSEL IS NO DEFENSE TO THIS MALICIOUS PROSECUTION ACTION WHERE THE O'CONNORS FAILED TO MAKE FULL DISCLOSURE OF THE FACTS.

The gist of the O'Connors' appeal is that public officials found that there was probable cause of construction fraud. As noted above (*see* p. 17, *infra*), the Trial Court instructed the jury without objection that they should consider whether probable cause existed at the time of the magistrate's issuance of the warrant (JA 678), so the opinions of McKenney and Trible are irrelevant.

Nonetheless, the O'Connors contend that Sheriff's Deputy Darby found that there was evidence of construction fraud, and he told Commonwealth's Attorney McKenney who concluded that there was probable cause, and Darby told the magistrate who agreed and issued the warrant, and Assistant Commonwealth's Attorney Trible later decided there was sufficient evidence to proceed to trial.

Generally, a defendant who acts in good faith upon the advice of reputable counsel, after a full disclosure of the facts, has a complete

defense to an action for malicious prosecution, it being considered he has probable cause although the advice he received may be wrong. *Bain v. Phillips*, 217 Va. 387, 394, 228 S.E.2d 576, 581 (1976). Where full disclosure is not made, though, advice of counsel or of a prosecuting authority is no defense in an action for malicious prosecution. *See*, *e.g.*, *Bill Edwards*; *Evans v. Michaelson*, 146 Va. 64, 135 S.E. 683 (Va. 1926).

In *Bill Edwards*, the court held that the defendant Edwards was not entitled to the advice of counsel defense because Edwards did not tell the attorney about the "understanding" the parties had about the deducting payments from the plaintiff Carey's payroll checks:

> Plaintiff's position is that he 'was under the impression' that he and Edwards had an 'understanding' whereby Carey bought parts for his racing car in the Company's name and on its credit, and agreed to pay the Company $50 per week or more through payroll deductions and that Edwards did not disclose the arrangement to Detective Hughes. From Hughes's testimony it is a reasonable inference that no such 'understanding' was disclosed to him by Edwards. Middleditch [the attorney] did not testify, and it may therefore be presumed that his testimony, if given, would have been no more helpful to defendants than was Hughes's, since Edwards testified that he gave Middleditch and Hughes the same information. <u>Advice of counsel would be effective only within the limitations of the information communicated by the client, Edwards. The jury, having been instructed on the issue, accepted the evidence favorable to Carey and in effect found, by its verdict, that Edwards had failed to make a full disclosure of all material facts to Middleditch and to Hughes so that the advice of counsel was</u>

based upon incorrect or incomplete information.

219 Va. at 97-98, 244 S.E.2d at 772 (emphasis added).

In *Evans*, a defendant employed a chauffeur and directed her caretaker to terminate the chauffeur and evict him from the property while the defendant was out of town. The chauffeur doubted the right of the caretaker to fire him, and the two discussed the matter with the local justice of the peace. The caretaker then informed the chauffeur if he did not leave he would be arrested. The chauffeur packed, and the caretaker took the trunk to the train station, while the chauffeur waited at the defendant's premises for several hours in anticipation of the next train. While the chauffeur waited for the train's scheduled time for departure, the caretaker came with a police officer to execute the warrant for trespassing that the caretaker had sworn out against the chauffeur before the justice of the peace, and the officer arrested the chauffeur.

After a jury verdict for the chauffeur in a malicious prosecution action, the defendant employer appealed arguing that her caretaker had gone before a justice of the peace in good faith and had accurately and fully stated the facts to him and requested his advice and acted upon this advice when he swore out the warrant. This Court, though, held that the

evidence showed that the caretaker did not make a full disclosure of the facts:

> It is the law that when a defendant acts in good faith upon the advice of reputable counsel, after full disclosure of the facts, he is considered to have probable cause, although the advice of counsel may be wrong, and he will not be liable in damages. But Giles did not make a full disclosure to the justice. When he swore out the warrant about six-thirty o'clock in the afternoon he did not tell McClintic that under his contract Michaelson was tenant by the month and had a right to occupy the room for the entire time for which his salary was paid, and that his discharge without cause did not make him a trespasser; nor did he tell him that Michaelson had his trunk packed and on the outside of the building from three o'clock in the afternoon waiting for Giles to take it to the Chesapeake and Ohio station, and that he had already taken it to the station; nor that Michaelson had told him on three occasions that afternoon that he was ready and was going to leave the property. Under the circumstances, the advice of the justice does not shield the defendant from liability.

146 Va. at 68, 135 S.E. at 684 (quotation marks and citations omitted).

Here, the Trial Court denied the O'Connors' motion to strike the evidence because the Judge found that there was evidence from which the jury could conclude that the O'Connors failed to make full disclosure of the facts to law enforcement and the prosecuting authorities (JA 838-39). Mr. O'Connor himself testified that he did not believe Tice had the intention to defraud the O'Connors when he accepted the deposit check (JA 209). Fraudulent intent in the context of construction fraud under Va. Code Ann.

§ 18.2-200.1 is examined at the time the defendant procured the advance from the purchasers. *McCary*.

In presenting their story to Darby, the O'Connors never discussed with him that Tice had completed a portion of the job or that Tice claimed that the work done was more than one-third of the job (JA 548). The O'Connors turned over the October 19, 2006 letter, the mail receipt, and their materials to Darby at the end of the 15-day period for criminal prosecution of Tice, without telling Darby of Mr. O'Connor's phone conversations with Stamm (JA 174, 222, 227). The O'Connors also never discussed with Darby the letter from Stamm dated November 3 and never gave him a copy (JA 172-73, 222-23, 227).

Darby admitted that after he spoke with the O'Connors he had no evidence that Tice had a criminal intent to defraud the O'Connors when he received the deposit check, had no evidence that Tice had failed to substantially complete one-third of the job other than the evidence the O'Connors provided him, and could not answer how Tice had actually failed to do one-third of the job (JA 556-57). Yet the O'Connors' incomplete evidence is what Darby presented, in turn, to McKenney and to the magistrate.

McKenney told Darby the evidence was sufficient for a warrant "based upon what was represented to me" (JA 537, 635). Also, the O'Connors never told Trible that Tice had purchased materials for the job, and Trible believed that Tice had never purchased any materials (JA 571-573). After the O'Connors' told Trible their side of the story, Trible was of the impression that Tice had "just quit" on June 22, 2006 (JA 575).

In *American Railway Express Co. v. Stephens*, 148 Va. 1, 138 S.E. 496 (1927), upon which the O'Connors so heavily rely in arguing that the imprimatur of the Commonwealth's Attorney, et al., absolves them of liability, the court there expressly noted that there was no question of disputed fact for the jury regarding probable cause because it was clear that the Commonwealth's Attorney in that case had received full disclosure of all of the pertinent information from the defendant:

> 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.

148 Va. at 17-18, 138 S.E. at 501; *cf*. *Reilly v. Shepherd*, 273 Va. 728, 643 S.E.2d 216 (2007) (this Court reversed a verdict against a police officer for malicious prosecution, but in that case the police officer conducted the robbery investigation himself and presented all pertinent information to the magistrate).[3]

In the present case, though, the O'Connors gathered all of the information, albeit incomplete, that the prosecuting authorities used in determining probable cause. Darby testified that he did no independent investigation, and Trible spoke only to the O'Connors before prosecuting the case.

The testimony showed that Darby and Trible (and those receiving the same information) concluded there was sufficient evidence of construction fraud because the O'Connors did not give them full disclosure of the facts. It was for the jury to decide if the O'Connors made full

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[3]The O'Connors also argue cite *Commissary Concepts Management Corp. v. Mziguir*, 267 Va. 586, 594 S.E.2d 915 (2004), to support the notion that a warrant obtained from a magistrate demonstrates probable cause, but in that case the plaintiff's corporate employer was the only defendant, and the court held that the undisputed facts would excite the belief in a reasonable mind that the plaintiff had embezzled the missing funds. 267 Va. at 590, 594 S.E.2d at 918. The court did not rely on a magistrate's determination of probable cause in reversing the verdict.

disclosure of the facts and if the conflicting evidence was sufficient to prove probable cause, *see*, *e.g.*, *Stanley*, *Lee*, *Giant Food*, and *Brodie*, and the jury's verdict should not be disturbed on appeal because there is ample evidence to support it. *Worley*; *Sutton*.

III. THE O'CONNORS INITIATED THE PROSECUTION OF TICE WHEN THEY EXECUTED THE 15-DAY LETTER WITH A CLEAR UNDERSTANDING THAT A CRIMINAL PROSECUTION WOULD ENSUE, THE AUTHORITIES WOULD NOT HAVE PROSECUTED TICE IF IT WERE NOT FOR THE O'CONNORS' COMPLAINTS, AND THE O'CONNORS COOPERATED THROUGHOUT THE REMAINING CRIMINAL PROSECUTION.

In order to be guilty of malicious prosecution, the defendant must have "set afoot" the criminal case. *Niese v. Klos*, 216 Va. 701, 222 S.E.2d 798 (1976). The court in *Clinchfield Coal Corporation v. Redd*, 123 Va. 420, 96 S.E. 836 (1918), explained in more detail what acts a defendant in a malicious prosecution must have committed to have "instigated" the prosecution:

> There can be no malicious prosecution without the machinery of the law, and it is therefore, of course, true that the officers of the law must be the final and effective actors. The question in every case is: Was the prosecution instigated or brought about by the cooperation of the defendant? Such instigation or co-operation may be chargeable to the defendant from original steps taken by him to incite the prosecution, or from

> subsequent adoption and ratification by him of steps which have already been taken or instigated by others.

96 S.E. at 839.

While Darby may have initially raised the specter of a criminal charge for construction fraud against Tice, the O'Connors still were the ones who took the "original steps" by gathering the information against Tice and writing and sending the certified 15-day letter to Tice pursuant to Va. Code Ann. § 18.2-200.1 stating that if Tice did not pay the O'Connors back within the 15 days "we will file a criminal complaint for construction fraud" (JA 340).

After the 15-day period had expired, the O'Connors, despite having talked talking to Tice's attorney Stamm concerning Tice's correct address and the service of a civil warrant in debt, decided instead to turn over their information to Darby with the understanding he would seek criminal charges against Tice. Darby testified at his deposition that he would not have sought criminal charges against Tice if the O'Connors had not come back to him after the 15-day period, and McKenney, when asked the same question at his deposition, concurred (JA 554, 649). The O'Connors also voluntarily met with Trible and told her the same incomplete story against Tice, causing her to conclude there was probable cause.

In contrast, the defendants in *King v. Martin*, 150 Va. 122, 142 S.E. 358 (1928), and *Marsh v. Commercial and Savings Bank of Winchester*, 265 F. Supp. 614 (W. D. Va. 1967), each gave eyewitness statements to the police after a robbery and identified the respective plaintiffs in line ups and testified at trial. In each of those cases the police completed the investigation, and the defendants were mere witnesses. Here, the O'Connors sent the 15-day letter with a threat of criminal prosecution, came back to Darby after the 15-day period to have him initiate criminal proceedings, and provided all of the evidence against Tice. Under those circumstances, it is clear that the O'Connors "set afoot" or took the "original steps" in the prosecution of Tice and then actively cooperated in it.

CONCLUSION

The jury heard and reviewed all of the evidence in this case including that which was in sharp conflict and held that the O'Connors did not have probable cause to believe that Tice had committed construction fraud, that the O'Connors did not make full disclosure of the facts to law enforcement and the prosecuting authorities, and that the O'Connors initiated or instituted the criminal prosecution against Tice. There is substantial evidence in the record supporting the jury's verdict in favor of Tice, and this

Court should uphold that verdict.

Respectfully Submitted,

/s/ James B. Thorsen
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CERTIFICATE

1. The full names of the Appellants are James P. O'Connor, Vickie L. O'Connor, and Viocon, L.L.C.

2. The full name of the Appellee is James C. Tice.

3. The retained counsel for the Appellants is Michael L. Donner, Sr., VSB No. 40958, Hubbard, Terry & Britt, P.C., 293 Steamboat Road, PO Box 340, Irvington, VA 22480, (804) 438-5522, Mdonner@irvingtonlaw.com.

4. The retained counsel for the Appellee is James B. Thorsen, Marchant, Thorsen, Honey & Baldwin, L.L.P., 5600 Grove Avenue, Richmond, VA 23226, (804) 285-3888, jim@mthblaw.com.

5. Counsel for the Appellee hereby certifies that pursuant to R. 5:26(d) he has filed fifteen (15) copies of this Brief and has filed an electronic copy of this Brief with the Clerk of this Court and has mailed or delivered three (3) true copies of this Brief to counsel for the Appellants, named herein, all on this 3rd day of June 2010.

/s/ James B. Thorsen
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Counsel for the Appellee