IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01406

MICHAEL PERKINS — APPELLANT

VS.

WAL-MART STORES, INC. AND
ELIJAH WILSON — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY MISSISSIPPI

BRIEF OF APPELLEE WAL-MART STORES, INC.

Scott Burnham Hollis (MSB No. [redacted]
Laura L. Hill (MSB No. [redacted]
Robert T. Jolly (MSB No. [redacted]
WATKINS LUDLAM WINTER & STENNIS, P.A.
6897 Crumpler Blvd., Suite 100
P.O. Box 1456
Olive Branch, MS 38654
Telephone: 662-890-6245
Facsimile: 662-890-6230

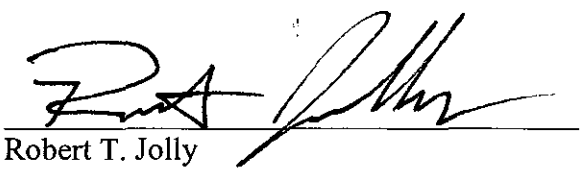
ATTORNEYS FOR APPELLEE
WAL-MART STORES, INC.

ORAL ARGUMENT NOT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Michael Perkins, Appellant
2. Wal-Mart Stores, Inc., Appellee
3. Elijah Wilson, Appellee
4. Wilton V. Byers, III and Amanda Urbanek, counsel for Elijah Wilson
5. Scott Hollis, Laura Hill and Robert Jolly, counsel for Wal-Mart
6. R. Shane McLaughlin and Nicole McLaughlin, counsel for Michael Perkins
7. Jim Waide, counsel for Michael Perkins



Robert T. Jolly
Attorney of Record for Wal-Mart Stores, Inc.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT REGARDING ORAL ARGUMENT.....1

STATEMENT OF THE ISSUES.....2

STATEMENT OF THE FACTS.....3

SUMMARY OF THE ARGUMENT.....6

ARGUMENT.....8

I. STANDARD OF REVIEW.....8

II. THE TRIAL COURT DID NOT ERR IN GRANTING WAL-MART'S MOTION FOR SUMMARY JUDGMENT AS TO PERKINS' MALICIOUS PROSECUTION CLAIM.....9

A. PROBABLE CAUSE.....9

B. MALICE.....14

III. THE TRIAL COURT DID NOT ERR IN GRANTING WAL-MART'S MOTION FOR SUMMARY JUDGMENT AS TO PERKINS' CIVIL CONSPIRACY CLAIM.....17

IV. THE TRIAL COURT DID NOT ERR IN GRANTING WAL-MART'S MOTION FOR SUMMARY JUDGMENT AS TO PERKINS' INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM....21

CONCLUSION.....24

CERTIFICATE OF SERVICE.....26

CERTIFICATE OF FILING.....27

TABLE OF AUTHORITIES

CASES

Alpha Gulf Coast, Inc. v. Jackson, 801 So.2d 709 (Miss. 2001).....9,10

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....8,24

Bankston v. Pass Road Tire Center, Inc., 611 So.2d 998 (Miss. 1992).....9,15

Brown v. State, 796 So.2d 223 (Miss. 2001).....19

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).....8,24

Clark v. Luvel Dairy Prods., Inc., 821 So.2d 827 (Miss. Ct. App. 2001).....21

Croft v. Grand Casino Tunica, Inc., 910 So.2d 66 (Miss. App. 2005).....10,13,14,21,23

Delta Chemical and Petrol., Inc. v. Citizens Bank of Byhalia, Miss., 790 So.2d 862 (Miss. App. Ct. 2001).....18

Downtown Grill, Inc. v. Connell, 721 So.2d 1113 (Miss. 1998).....9,15

Drummond v. Buckley, 627 So.2d 264 (Miss. 1993).....6,8

Gallagher Bassett Servs., Inc. v. Jeffcoat, 887 So.2d 777 (Miss. 2004).....17

Gramenos v. Jewel Cos., 797 F. 2d 432 (7th Cir. 1986).....20

Harris. v. Mississippi Valley State Univ., 873 So.2d 970 (Miss. 2004).....20

Hudson v. Courtesy Motors, Inc., 794 So.2d 999 (Miss.2001).....8

Hudson v. Palmer, 977 So.2d 369 (Miss 2007).....10

J.C. Penney Co., Inc. v. Bush, 356 So.2d 590 (Miss. 1978).....6

Jenkins v. City of Grenada, 813 F. Supp. 443 (N.D. Miss. 1993).....21

Levens v. Campbell, 733 So.2d 753 (Miss. 1999).....17

Lewallen v. Slawson, 822 So.2d 236 (Miss.2002).....8

Lindsey v. Sears, Roebuck and Company, 16 F.3d 616 (5th Cir. 1994).....8,24

McClinton v. Delta Pride Catfish Inc., 792 So.2d 968 (Miss. 2001).....10

Mississippi Bar v. Attorney ST, 621 So.2d 229 (Miss. 1993).....6

Mississippi Gaming Comm'n v. Baker, 755 So.2d 1129 (Miss. App. 1999).....9

Mitchell v. Random House, Inc., 865 F.2d 644 (5th Cir. 1989).....21

Montgomery v. Hughes, 716 F. Supp. 261 (S.D. Miss. 1988).....20,21

Northern Elec. Co. v. Phillips, 660 So.2d 1278 (Miss.1995).....8

Smith v. Magnolia Lady, Inc., 925 So.2d 898 (Miss. Ct. App. 2006).....10

Van v. Grand Casinos, Inc., 724 So.2d 889 (Miss. 1998).....15

Van v. Grand Casinos, Inc., 767 So.2d 1014 (Miss. 2000).....15

Woolfolk v. Tucker, 485 So.2d 1039 (Miss. 1986).....10

RULES

Miss. R. Civ. P. 56(c).....6,8

OTHER

Restatement (Second) of Torts § 46, Comment (d) (1965).....21,22

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would needlessly consume judicial and private resources. Based upon the undisputed evidence and the controlling authority, the Trial Court properly granted summary judgment because, no genuine issue of material fact exists as to Perkins' claims regarding malicious prosecution, civil conspiracy and intentional infliction of emotional distress.

Oral argument would not be helpful to the court under the standards of Mississippi Rules of Appellate Procedure 34(a)(2) and 34(a)(3) because the dispositive issues have already been authoritatively decided, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In fact, the record contains the sixty (60) page transcript of the arguments offered by counsel to the trial court at the hearing on the Appellees' respective motions for summary judgment. (R. Vol. 6, pp.1-60).

STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in granting Wal-Mart's Motion for Summary Judgment as to Perkins' malicious prosecution claim.

2. Whether the Trial Court erred in granting Wal-Mart's Motion for Summary Judgment as to Perkins' civil conspiracy claim.

3. Whether the Trial Court erred in granting Wal-Mart's Motion for Summary Judgment as to Perkins' intentional infliction of emotional distress claim.

STATEMENT OF THE FACTS

On or about December 18, 2005, Wal-Mart became aware that some associates of its Holly Springs, Mississippi store, including Alicia Jackson, were involved in an under-ringing[1] scheme among themselves and other individuals. (R. Vol. 4, pp. 534-535). As part of its internal investigation of the under-ringing scheme, Wal-Mart representatives Gary Ferguson and Andrew Duncan reviewed video footage of each associate's cashiering operations. (R. Vol. 4, p. 535). Thereafter, Andrew Duncan sat down and interviewed the cashiers, specifically including Alicia Jackson, regarding their involvement in the under-ringing scheme. (R. Vol. 4, p. 535).

During Alicia Jackson's interview with Andrew Duncan, she admitted her role in the under-ringing scheme and identified "Jennifer Thomas, Allene Frayzer, Rakia Jackson, Markita Thomas, and a police officer whom [she knows]" as other individuals involved in the scheme. (R. Vol. 4, p. 542). Wal-Mart's review of the video footage of Alicia Jackson's cashier line indicated that the police officer identified by Jackson in her interview was in fact appellant Michael Perkins. (R. Vol. 4, pp. 546, 567).

During Perkins' transaction with Alicia Jackson, Perkins placed several small items, including a can of tuna, some beverages, and an ink-jet printer cartridge, valued at approximately $20.00, on Jackson's cashier belt for purchase. (R. Vol. 4, p. 566-568). Jackson scanned each of

---

[1] During his deposition, Wal-Mart employee Andrew Duncan provided the following definition of an under-ringing scheme:

> Q. First of all, explain to me what under-ringing is.
> A. Under-ringing is when you have an employee who works for Wal-Mart as a cashier who either does not ring up all the merchandise for a customer, or they ring the merchandise up and then void it off. There are several different methods they can utilize with the cash register: Voiding it off; sometimes they just act like they're ringing it up and they don't and they bag it up and the customer leaves with it.
> Q. Any of a variety of mechanisms whereby they give some merchandise to someone without charging them; is that right?
> A. That's correct.

See Dep. of Andrew Duncan at 10-11 (R. Vol. 4, p. 532).

the items, and then voided the value of the ink cartridge off of Perkins' total purchase (R. Vol. 4, pp. 566-568). Perkins then paid for the merchandise using a one-hundred dollar ($100) bill. (R. Vol. 4, p. 567). After Perkins tendered the one-hundred dollar ($100) bill to Jackson, she placed the bill in the till. (R. Vol. 4, p. 548). Jackson then counted the change back in her own hand before counting the change back to Perkins in his hand. *Id.* Perkins spread the money out and looked at it before placing it in his pocket. *Id.* After this exchange, Perkins left the Wal-Mart premises with his merchandise and $94.67 in change. (R. Vol. 4, pp. 566-568).

Pursuant to Wal-Mart policy and practice, Andrew Duncan thereafter presented the documentation and other evidence related to his investigation of the under-ringing scheme to his supervisor Gary Ferguson, who in turn contacted the Holly Springs police for a second review. (R. Vol. 4, pp. 536-537). Pursuant to Wal-Mart policy and practice, Mr. Duncan specifically instructed Ferguson to present the case to the authorities and take their advice upon their decision as to who would be prosecuted, as well as to verify that Wal-Mart had a sufficient case for prosecution. (R. Vol. 4, p. 537).

During the Holly Springs Police Department's investigation of the evidence presented by Wal-Mart, detective Elijah Wilson conducted a separate interview of Alicia Jackson. (R. Vol. 5, p. 601). During the interview, Detective Wilson asked Jackson about Perkins' knowledge of his under payment by asking the question, "He did know that he didn't pay for it. Right?," to which Jackson responded, "Yeah." (R. Vol. 4, p. 543). Detective Wilson then informed Gary Ferguson of Jackson's statement regarding Perkins' knowledge of his under payment. (R. Vol. 4, p. 551). Gary Ferguson thereafter listened to the recorded interview at the sheriff's department before signing an affidavit seeking to press charges against Michael Perkins for petit larceny. (R. Vol. 4, pp. 552-553).

The petit larceny charges against Michael Perkins were ultimately brought before the Justice Court of Marshall County, Mississippi on January 23, 2006. After a full trial on the merits, the Justice Court Judge found Perkins not guilty and all charges against him were dropped. Perkins commenced the present action on December 14, 2006. (R. Vol. 1, p.7). In his Complaint, Perkins asserts claims against Wal-Mart for malicious prosecution, conspiracy to maliciously prosecute, and intentional and negligent infliction of emotional distress. (R. Vol. 1, pp. 1-7). Each of these claims arise from the December 18, 2005 incident at the Holly Springs Wal-Mart store. *Id.*

SUMMARY OF THE ARGUMENT

To defeat Wal-Mart's Motion for Summary Judgment, Perkins is required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories or admissions on file and designate specific facts showing that there was a genuine issue for trial. Miss. R. Civ. P. 56(c). Perkins provided nothing more to the trial court than his bare assertions to support his claims of malicious prosecution, civil conspiracy and intentional infliction of emotional distress. In his Brief, Perkins again fails to provide anything more than bare allegations and unsubstantiated assertions. Such however, are simply insufficient to defeat Wal-Mart's motion for summary judgment. *Drummond v. Buckley*, 627 So.2d 264, 267 (Miss. 1993). Accordingly, the trial court did not err in granting summary judgment to Wal-Mart.

Regarding malice and probable cause, rather than identifying sufficient probative evidence as to these essential elements of a malicious prosecution claim, Perkins' Brief distorts the true issue before the Court. The issue is whether, based on a totality of circumstances, Wal-Mart acted reasonably and without malice. *See J.C. Penney Co., Inc. v. Blush*, 356 So.2d 590, 593 (Miss. 1978) ("The issue was not whether the prosecution ultimately resulted in a verdict of acquittal in the criminal case but whether there had been probable cause for the action taken by [defendants]. Probable cause merely means reasonable cause.") (disagreed with on other grounds, *Mississippi Bar v. Attorney ST*, 621 So.2d 229 (Miss. 1993)). Perkins failed to produce sufficient, probative evidence below which demonstrated that he was maliciously prosecuted, and Wal-Mart was thusly entitled to summary judgment as a matter of law.

Regarding Perkins' civil conspiracy claim, Perkins presented no evidence of any agreement between Wal-Mart and Elijah Wilson nor did he produce any evidence to contradict defendants' sworn testimony that there was no agreement. The allegedly "conspiratorial"

conduct in this case consisted of Wal-Mart following routine procedures to detect unlawful activity, conducting an investigation into that activity, and only then pressing criminal charges against Perkins after receiving advice from police that there was ample evidence to do so. Accordingly, Perkins' civil conspiracy claim was properly disposed of by summary judgment.

While Perkins continues to speculate that a reasonable jury could determine that Wal-Mart's conduct was "extreme and outrageous," speculation, without supporting evidence, is not enough to create a triable issue of fact. Wal-Mart's act of pressing petit larceny charges against Perkins was not so outrageous as to offend all traditional notions of human decency, thereby rising to the level of intentional infliction of emotional distress. Perkins has produced no evidence, other than mere speculation, to indicate that Wal-Mart's actions were intentionally aimed at harming him. To the contrary, at his deposition Perkins described Wal-Mart's conduct as nothing more than negligent. (R. Vol. 3, p. 354). Furthermore, since Wal-Mart had probable cause to commence proceedings against Perkins, his subsequent arrest was not extreme and outrageous as a matter of law.

Summary judgment on Perkins' claims by the trial court was proper and this Court should affirm the trial court's decision.

ARGUMENT

I. STANDARD OF REVIEW

Mississippi Appellate Courts apply a de novo standard of review to a grant of summary judgment by the trial court. *Hudson v. Courtesy Motors, Inc.*, 794 So.2d 999, 1002 (Miss.2001). Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. M.R.C.P. 56(c). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Northern Elec. Co. v. Phillips,* 660 So.2d 1278, 1281 (Miss.1995).

The burden of demonstrating that no genuine issue of fact exists is on the moving party. *Lewallen v. Slawson,* 822 So.2d 236, 238 (Miss.2002) (citation omitted). Where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party may not defeat a motion for summary judgment with mere general allegations or unsupported denials of material fact. *Drummond v. Buckley*, 627 So.2d 264, 267 (Miss. 1993).

Only when there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party is a full trial on the merits warranted. *Lindsey v. Sears, Roebuck and Company*, 16 F.3d 616, 618 (5th Cir. 1994)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. *Id.* The existence of a hundred contested issues of fact will not thwart

summary judgment where there is no genuine dispute regarding the material issues of fact. *Id.* (citation omitted).

II. THE TRIAL COURT DID NOT ERR IN GRANTING WAL-MART'S MOTION FOR SUMMARY JUDGMENT AS TO PERKINS' MALICIOUS PROSECUTION CLAIM.

To establish a valid claim of malicious prosecution under Mississippi law, Perkins was required to prove the following six elements: (1) the institution of a proceeding; (2) by, or at the insistence of the defendant; (3) the termination of such proceedings in the plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and (6) the suffering of injury or damage as a result of the prosecution. *See Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d 709, 721 (Miss. 2001); *Mississippi Gaming Comm'n v. Baker*, 755 So.2d 1129, 1133 (Miss. App. 1999). Mississippi law is clear, however, that "the law allows wide latitude for *honest* action on the part of a citizen who purports to assist public officials in their task of law enforcement." *Bankston v. Pass Road Tire Center, Inc.*, 611 So.2d 998, 1005 (Miss. 1992) (emphasis in original). Thus, "actions for malicious prosecution are regarded by law with jealously and they ought not to be favored but managed with great caution." *Downtown Grill, Inc. v. Connell*, 721 So.2d 1113, 1119 (Miss. 1998).

The trial court found that Perkins proved elements (1) (2) and (3) listed above and that a genuine issue of material fact existed as to element (6). (R. Vol. 5, p. 680). However, the trial court found that no genuine issue of material fact existed as to elements (4) and (5). (R. Vol. 5, pp. 680-681). Thus, the trial court rightfully held that Perkins failed to prove a prima facie case for malicious prosecution and that Wal-Mart was entitled to judgment as a matter of law. *Id.*

A. PROBABLE CAUSE

Wal-Mart will address the elements of malice and probable cause in reverse order for the sake of clarity. Perkins failed to produce sufficient evidence to create any genuine issue of material fact regarding probable cause. Probable cause in the context of a malicious prosecution claim requires "(1) an honest belief on the guilt of the person accused, and (2) reasonable grounds for such belief." *Alpha Gulf Coast Inc.*, 801 So.2d at 722 (citing *Woolfolk v. Tucker*, 485 So.2d 1039, 1043 (Miss. 1986)). Thus, the probable cause determination consists of both a subjective and an objective element, and "the court will determine whether upon the appearances presented to the defendant, a reasonable person would have instituted the proceeding." *Bankston*, 611 So.2d at 1007. It is Perkins' burden "to show circumstances from which absence of probable cause may be inferred." *Id.* at 1006. As Mississippi courts have made clear:

> The existence of probable cause, which involves only the conduct of a reasonable man under the circumstances, and does not differ essentially from the determination of negligence, usually is taken out of the hands of the jury, and held to be a matter of decision by the Court. That is to say, ***the court will determine whether upon the circumstances presented to a defendant, a reasonable person would have instituted the proceeding***.

Croft v. Grand Casino Tunica, Inc., 910 So.2d 66, 74 (Miss. App. 2005) (emphasis added). Applying these principles to the facts of the instant matter, Perkins' claim for malicious prosecution regarding the element of probable cause is without merit, and no arguable *prima facie* claim may be said to exist as to this essential element.

Perkins first contends, without citation to the record, that Wal-Mart lacked an honest subjective belief that Perkins was guilty of petit larceny. Perkins interestingly makes this argument despite Gary Ferguson's testimony wherein he stated repeatedly that he **did believe Perkins was guilty**. Gary Ferguson testified during his deposition that he did in fact have a subjective belief that Michael Perkins was knowingly involved in the subject under-ringing scheme, stating specifically as follows:

Q. In that video that we watched, from your perspective, did you see anything that indicated that Mr. Perkins knew that he was receiving an under-ringing?

A. Yes.

Q. Tell me what.

A. When he paid the cashier she put his $100 bill in the till, she counted the change back to her own hand, she turned around and counted the change back to Officer Perkins' hand and then Officer Perkins spread the money out and looked at it before he put it in his pocket. You know, obviously, the change had been counted back three times.

Q. How was it three times?

A. She counted it once to herself, once to him into his hand and then when he spread it out and looked at it.

. . . .

Q. Well, tell me all of the reasons that you think that he knew he had received an under-ringing?

A. If you – if you go to Wal-Mart right now and you buy one item or you buy 100 items, and you get – and the cahier gets done ringing up your items, they're going to tell you how much you owe. There's a prompter there that tells you how much you owe. And then if you count your change back, you should have the correct amount of change coming back. If you buy a can of tuna and two drinks that's $4.00 and a $20 ink cartridge and you wind up with four $20's back out of $100, you don't have to be Einstein to figure that something's not paid for.

Q. And specifically you're talking about Michael Perkins, those are the items he bought, right?

A. Correct.

Q. So am I understanding you correctly that the reason you think he should have known is because he got too much change back for what he had purchased?

A. Correct.

(R. Vol. 4, pp. 547-548, 549-550).

In addition to reviewing the video footage just described and discussed, Gary Ferguson: (1) reviewed the first statement Alicia Jackson provided to Andrew Duncan; (2) reviewed

Jackson's second statement to Detective Wilson in which she testified that Perkins was aware of the under-ringing; and (3) received further advice from the Holly Springs Police Department that Wal-Mart had sufficient evidence to press charges against Perkins. (R. Vol. 4, pp. 552-553, 554-556).

Indeed, during his deposition, Elijah Wilson described his advice to Gary Ferguson as follows:

Q. ... Mr. Wilson, you said when you talked with Mr. Ferguson on the phone and you told him, you said that you have enough. Do you remember saying that earlier?

A. Yes. I said I think you have enough.

Q. Okay.

A. And I said, you know that.

Q. All right. What did you mean by you have enough?

A. Because he kept – he called me twice asking could he come sign an affidavit. And I told him that he wasn't signing it here, the SO was going to do it.

Q. Okay. **But when you say enough, what does that mean?**

A. **I said he had enough. Just like I mean, he had enough – he knew he had enough to sign an affidavit.**

Q. **Enough evidence, is that what you mean?**

A. **Right. Enough evidence.**

Q. All right. **Is that the same thing as probable cause?**

MR. McLAUGHLIN: Objection to form.

A. **Yes.**

(R. Vol. 5 pp. 602-603) (emphasis added).

The totality of these circumstances clearly provided a reasonable basis for Gary Ferguson and Wal-Mart to believe that Michael Perkins knew of his involvement in the under-ringing scheme and therefore was guilty of the crime of petit larceny with respect to the $20 ink cartridge. Furthermore, Perkins has produced no evidence whatsoever to suggest that Wal-Mart pressed charges against Perkins for any purpose other than that of bringing an offender to justice. Both Andrew Duncan and Gary Ferguson testified that they had no grudges or ill will against Perkins. (R. Vol. 4, p. 539-540, 558-560).

Perkins distorts the facts by contending that, "the only evidence Wal-Mart had when it commenced the charges was that Perkins had received too much change." *See* Appellant's Brief p. 20. Even accepting, for the sake of argument, that Perkins did not actually know he received too much change, the totality of the circumstances presented to Wal-Mart in its investigation of the under-ringing scheme were still sufficient to support a reasonable belief that Perkins was guilty of petit larceny. As stated in detail *supra*, the decision to press charges against Perkins was made after reviewing video footage and two separate statements provided by Alicia Jackson, and only after seeking independent advice from the Holly Springs Police Department. Whether or not Perkins counted his change has no independent bearing on any of these factors.

Perkins' allegation that Wal-Mart failed to conduct an adequate investigation prior to pressing charges has no basis in fact. Perkins attempts to create a *per se* rule of what constitutes an adequate investigation without any legal or factual support. The sufficiency of an investigation depends upon the underlying circumstances of each case. The Mississippi Court of Appeals has held that an internal investigation similar to Wal-Mart's investigation was sufficient to satisfy the probable cause requirement:

> Following an ***investigation which included reviewing videotape and interviewing witnesses***, the Casino security investigator concluded that an embezzlement had occurred.

> The investigation was not begun as an effort to single out Croft for prosecution, but was begun because security personnel detected his suspicious actions involving the taking of a $100 token.

Croft v. Grand Casino Tunica, Inc., 910 So.2d 66, 74 (Miss. App. 2005) (emphasis added). Based on the information derived from this investigation, the *Croft* Court determined that "there was more than sufficient evidence of probable cause for [the casino] to initiate criminal charges against Croft." *Id.* at 74-75.[2]

Perkins fails to produce any evidence to support his allegation that Wal-Mart's investigation was inadequate, or that Wal-Mart acted without probable cause. In fact, all the evidence indicates that Wal-Mart followed its ordinary procedures for investigating under-ringing charges by presenting the results of its investigation to local authorities and seeking their advice as to whether it had a prosecutable case. (R. Vol. 4 p. 538). For these reasons, Perkins has wholly failed to produce any evidence of the lack of probable cause on the part of Wal-Mart. Accordingly, Perkins cannot, as a matter of law, create a prima facie case of malicious prosecution against Wal-Mart, and this claim was properly dismissed on summary judgment by the trial court. Thus, the decision of the trial court that Perkins failed to create a genuine issue of material fact regarding probable cause should be affirmed.

B. MALICE

Similarly, Perkins simply failed to establish any genuine issue of material fact regarding the required element of malice and the trial court correctly granted Wal-Mart's motion for

---

[2] Wal-Mart concedes that the casino defendant in *Croft* was able to interview the Plaintiff during its investigation; however, unlike Perkins, Croft was a casino employee and was subject to the casino's control during the investigation. Wal-Mart, on the other hand, had no employment connection with or control over Perkins. Moreover, Andrew Duncan stated during his deposition that it was not Wal-Mart's practice to interview suspected patrons during its internal investigation process. (R. Vol. pp. 535-537). Perkins cannot reasonably contend that all of these other patron investigations and prosecutions are insufficient and lacking in probable cause. Furthermore, it surely cannot be a prerequisite that that the victim must confront the suspect and first obtain a confession or denial prior to pressing charges.

summary judgment as to Perkins' malicious prosecution claim. To determine whether a defendant acted with "malice" under Mississippi law, "we must look to their subjective state of mind." *Bankston*, 611 So.2d at 1006. Then, the focus of the inquiry is whether the prosecution was "instituted primarily for a purpose other than that of bringing an offender to justice." *Id.* Malice is not present where participation in a prosecution is motivated by a **legitimate interest in assisting authorities with their investigation**. *See Downtown Grill*, 721 So.2d at 1124 (emphasis added).

In his brief, Perkins argues that sufficient evidence exists for a jury to find both malice and lack of probable cause. *See* Appellant's Brief p. 17. Perkins' arguments regarding the issue of malice are legally insufficient to defeat Wal-Mart's Motion for Summary Judgment. First, Plaintiff contends that the existence of malice is a question of fact properly determined by the jury, not the trial judge[3]. *See* Appellant's Brief p. 18. Perkins' argument is flawed. An issue only becomes a question of fact for the jury once a plaintiff presents sufficient probative evidence indicating that a disputed question of fact actually exists. Perkins has failed to produce **any** evidence indicating that Wal-Mart pressed charges against him for an improper reason. Accordingly this question is properly within the province of the Court to decide.[4]

---

[3] In support of this argument, Perkins cites to *Van v. Grand Casinos, Inc.*, 724 So.2d 889, 893 (Miss. 1998). The *Van* decision; however, dealt with whether a dismissal of criminal charges on speedy trial grounds was a "favorable termination" that would support a subsequent civil action for malicious prosecution. The case was remanded to the trial court regarding the issue of favorable termination. On remand, the trial court granted defendant's motion for summary judgment as to the malicious prosecution claim. Plaintiffs again appealed. The Mississippi Supreme Court affirmed the trial court's grant of summary judgment as to Plaintiff's malicious prosecution claim. *See Van v. Grand Casinos, Inc.*, 767 So.2d 1014 (Miss. 2000). Thus, Perkins' reliance on this case is misguided.

[4] *See McClinton v. Delta Pride Catfish Inc.*, 792 So.2d 968 (Miss. 2001) (affirming trial court's grant of defendant's motion for summary judgment regarding plaintiff's malicious prosecution claim); *see also Hudson v. Palmer*, 977 So.2d 369 (Miss 2007) (affirming trial court's grant of defendant's motion for summary judgment regarding plaintiff's malicious prosecution claim); *see also Smith v. Magnolia Lady, Inc.*, 925 So.2d 898 (Miss. Ct. App. 2006) (affirming trial court's grant of defendant's motion for summary judgment regarding plaintiff's malicious prosecution claim); *see also Van v. Grand Casinos, Inc.*, 767 So.2d 1014 (Miss. 2000) (affirming trial court's grant of defendant's motion for summary judgment regarding plaintiff's malicious prosecution claim).

Perkins next alleges that malice can be inferred from "Wal-Mart's grossly premature prosecution of Perkins without the slightest hint of probable cause." *See* Appellant's Brief p. 18. Not only is this conclusory, unsupported allegation insufficient to create a genuine issue of material fact, it is based on erroneous assertions and blatant misstatements of fact. For instance, Perkins' representation that "Wal-Mart admittedly prosecuted Perkins without any evidence whatsoever that Perkins was involved in the under-ringing scheme"[5] is simply untrue. As discussed in detail above, this argument blatantly ignores, and does not even attempt to negate the significant evidence contained in the record underlying Wal-Mart's decision to press charges against Perkins. Although the absence of probable cause may create a jury question as to the existence of malice, as discussed *supra*, Perkins produces **no evidence** to indicate that Wal-Mart acted without probable cause. Therefore, Perkins' argument is without merit.

Third, Perkins contends that "a jury could infer malice based on the fact that Perkins was the only customer prosecuted by Wal-Mart." *See* Appellant's Brief p. 18. Again, Plaintiff twists the facts of this case, intentionally omitting reference to Gary Ferguson's un-contradicted, sworn testimony that Perkins was the only customer prosecuted because he was the only party who could be identified and located. (R. Vol. 4, p. 499). It should not be lost on the Court that Wal-Mart pressed charges against cashiers Alicia Jackson and Rakia Jackson and both were subsequently convicted for their participation in the under-ringing scheme. (R. Vol. 1, p. 3 and R. Vol. 1, p. 97). Perkins' broad allegation that "Wal-Mart did not make serious efforts to identify the customers," is based on nothing more than pure speculation and conjecture and has no foundation in the record. Moreover, this argument has no bearing on the fundamental question at issue. The fact that Perkins was the only customer prosecuted is not probative of

[5] *Id.*

whether Wal-Mart pressed charges against him for a purpose other than to bring an offender to justice, nor does it contradict the testimony of Andrew Duncan that Wal-Mart's investigation of Perkins followed ordinary procedures for investigating under-ringing charges. (R. Vol. 4, pp. 531-540). Such procedures undeniably are aimed at seeking justice. There simply are no disputed facts in the record which show any malicious action on the part of Wal-Mart.

Finally, Perkins alleges that the jury could infer that Wal-Mart pressed charges against him "for the purpose of making an example of him to deter perceived theft," *See* Appellant's Brief p. 19. Nothing in the record provides a reasonable basis for such an inference. Indeed, this conclusory allegation stems from nothing but Perkins' own imagination, which cannot defeat the following testimony from Wal-Mart employee Gary Ferguson:

Q. ***Did you prosecute Michael Perkins to make an example out of him***?

A. ***No.***

(R. Vol. 4, p. 560. (emphasis added). Moreover, to the extent Wal-Mart has policies designed to deter theft, such policies are consistent with the valid purpose of bringing criminal offenders to justice. For these reasons, Perkins failed to produce sufficient, probative evidence demonstrating that Wal-Mart instituted the proceedings maliciously. Thus, the trial court's decision granting Wal-Mart's motion for summary judgment should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN GRANTING WAL-MART'S MOTION FOR SUMMARY JUDGMENT AS TO PERKINS' CIVIL CONSPIRACY CLAIM.

Mississippi law defines a "conspiracy" as "a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So.2d 777, 786 (Miss. 2004) (citing *Levens v. Campbell*, 733 So.2d 753, 761 (Miss. 1999)). In order to set forth a prima facie case for this claim, Perkins must prove: (1) the

existence of an agreement among two or more persons; (2) an agreement among those persons to accomplish an illegal objective, or a legal objective by use of illegal means; (3) an overt act by the defendant in furtherance of the conspiracy; and (4) resulting injury to the Plaintiff. *Delta Chemical and Petrol., Inc. v. Citizens Bank of Byhalia, Miss.*, 790 So.2d 862, 877 (Miss. App. 2001). Mere speculation and conjecture as to the existence of a conspiracy, however, is insufficient for a plaintiff to recover under this claim. *Id.* at 877-78.

Perkins failed to establish any of these elements to the court below and summary judgment as to Perkins' civil conspiracy claim was properly granted and should be affirmed. There is no evidence to suggest any collusive or conspiratorial agreement between Wal-Mart and Elijah Wilson, nor is there evidence of any agreement between these parties to accomplish illegal objectives or utilize illegal means. In fact, Perkins admitted outright during his deposition that he has no evidence whatsoever indicating that Wal-Mart and Elijah Wilson reached any agreement with respect to Perkins' prosecution for petit larceny:

Q. Do you have any evidence, as you sit here today, that Elijah Wilson spoke to or had any conversation or communication with Wal-Mart prior to the 20th or 21st of December?

A. No.

Q. You have no evidence that in those two or three days Elijah Wilson spoke to Wal-Mart?

A. No.

Q. Okay. So tell me, do you have any evidence that Wal-Mart and Elijah Wilson had an agreement or a plan or an understanding to press charges against you?

A. Restate that.

Q. ***Do you have any evidence that Elijah Wilson had an agreement with or a plan or an understanding with Wal-Mart to press charges against you?***

A. ***No.***

(R. Vol. 5, p. 607) (emphasis added). Similarly, Elijah Wilson and Wal-Mart representative Gary Ferguson each testified during their respective depositions that no agreement existed between the parties regarding the prosecution of Michael Perkins for any unlawful purpose. Specifically, Elijah Wilson testified as follows:

Q. The Wal-Mart incident. Did you have an agreement with Gary Ferguson or anybody else associated or affiliated with Wal-Mart that they should prosecute Mr. Perkins?

A. No.

Q. ***Did you have any agreement with anybody associated with Wal-Mart in regards to Mr. Perkins at all?***

A. ***No.***

(R. Vol. 5, p. 92) (emphasis added).

Gary Ferguson provided the following corroborating testimony during his deposition:

Q. ***Did you have any sort of agreement with Detective Wilson that you or Wal-Mart would prosecute Michael Perkins?***

A. ***No, we did not.***

Q. Okay. Or any agreement at all concerning Mr. Perkins?

A. That's correct. ***No agreements at all.***

Q. Okay. And the same question with regard to Holly Springs Police Department, you didn't have any agreement with Holly Springs Police Department that you would do anything or take any action concerning Michael Perkins, right?

A. That's correct.

(R. Vol 4, p. 557) (emphasis added). Perkins is incapable of proving the existence of an agreement between Wal-Mart and Elijah Wilson regarding Perkins' lawful prosecution for petit larceny, much less an agreement to accomplish an illegal objective.

Perkins admits that an agreement is an essential element of a civil conspiracy claim, but contends that such an agreement may be inferred from defendants' behavior[6]. *See* Appellant's Brief p. 23. Perkins maintains that a jury could infer an agreement between Elijah Wilson and Wal-Mart in this case based on their respective behavior. *Id.* The only evidence of Wal-Mart's "behavior" cited by Perkins in support of his flawed argument consists of: (1) "Wilson admitted that he spoke to Wal-Mart loss prevention employee Gary Ferguson regarding a potential prosecution of Perkins several times before the prosecution was commenced;" (2) "Wilson repeatedly told Wal-Mart employees that Wal-Mart had a 'good case'" and (3) "After Wilson informed Wal-Mart employees of what he had elicited from Jackson, Perkins was immediately prosecuted." *See* Appellant's Brief pp. 23-24.

If anything, such "behavior" is indicative of Wal-Mart's prudent communication with the police department regarding their investigation and completely erodes Perkins' argument that Wal-Mart instituted the action with malice and without probable cause. Simply put, Perkins has presented no evidence of any requisite agreement between Wal-Mart and Elijah Wilson nor has Perkins produced any evidence to contradict defendants' sworn testimony that there was no agreement. While a jury could possibly infer an agreement between Wal-Mart and Elijah Wilson, that inference would be tenuous at best, and would rest upon nothing more than speculation and conjecture.[7] Likewise, Perkins' assertion that there were "several overt acts in furtherance of the

---

[6] While Wal-Mart agrees that inferences may be drawn from a defendant's behavior, "inferences favorable to the plaintiff must be within the range of reasonable probability and ***it is the duty of the court to withdraw the case from the jury if the necessary inference is so tenuous that it rests merely upon speculation and conjecture.***" *Harris. v. Mississippi Valley State Univ.*, 873 So.2d 970, 981 (Miss. 2004) (emphasis added); *See also Montgomery v. Hughes*, 716 F. Supp. 261, 266 (S.D. Miss. 1988) ("[O]ne could speculate that the defendants possibly reached an understanding ... but a mere possibility, based upon speculation, is insufficient to preclude the entry of summary judgment.").

[7] *See Montgomery*, 716 F. Supp. at 264 (refusing to find liability for conspiracy without evidence of agreement because, "even if the jury chose to disbelieve the defendants' denials of the conspiracy, the plaintiff would be left with no evidence to support a verdict in his favor.") (citing *Gramenos v. Jewel Cos.*, 797 F. 2d 432, 436 (7th Cir.

conspiracy" is baseless. Perkins offers no explanation as to what these alleged overt acts were or how they furthered the conspiracy.

Furthermore, the allegedly conspiratorial conduct in this case consisted of Wal-Mart following routine procedures to detect unlawful activity, conducting an investigation into that activity, and then pressing criminal charges against Perkins only after presenting the evidence to local law enforcement and being advised by them that there existed enough evidence to prosecute. As the Mississippi Court of Appeals has stated, "seeking criminal charges [is] not seeking to accomplish a lawful purpose unlawfully." *Croft*, 910 So.2d at 77. Accordingly, Perkins' civil conspiracy claim was properly disposed by summary judgment.

IV. THE TRIAL COURT DID NOT ERR IN GRANTING WAL-MART'S MOTION FOR SUMMARY JUDGMENT AS TO PERKINS' INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM.

Perkins' claim for intentional infliction of emotional distress was properly dismissed on summary judgment and should be affirmed by this Court. "Meeting the requisite elements of a claim for intentional infliction of emotional distress is a tall order in Mississippi." *Jenkins v. City of Grenada*, 813 F. Supp. 443, 446 (N.D. Miss. 1993). "To prevail, a plaintiff must put forth evidence that the conduct complained of evokes 'outrage or revulsion.'" *Mitchell v. Random House, Inc.*, 865 F.2d 644, 672 (5th Cir. 1989). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Clark v. Luvel Dairy Prods., Inc.*, 821 So.2d 827, 831 (Miss. Ct. App. 2001) (quoting Restatement

---

1986). Ultimately, the Plaintiff "may not [merely] cry 'conspiracy' and throw himself on the jury's mercy." *Id.* Such "proof" is insufficient to defeat summary judgment as a matter of law.

(Second) of Torts § 46, Comment (d) (1965)). Thus, liability for this tort does not extend "to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. *Id.*

Perkins maintains that a jury could determine that his prosecution "simply because he was given too much change by a cashier is outrageous." *See* Appellant's Brief p. 27. While Perkins alleges that a reasonable jury could determine that Wal-Mart's conduct was outrageous, unsupported speculation is simply not enough to create a triable issue of fact. Perkins has not provided, nor does the record reflect, **any evidence** which indicates that Wal-Mart's actions were **intentionally** aimed at harming him. To the contrary, at his deposition Perkins described Wal-Mart's conduct as nothing more than negligent, **not intentional**. Specifically, Perkins stated:

> Q. Aren't you suing Wal-Mart because they pressed charges against you because of what Alicia Jackson said?
>
> MR. MCLAUGHLIN: Objection to form.
>
> BY MR. HOLLIS:
>
> Q. Isn't that what we're here about?
>
> A. Wal-Mart's done something that was **negligent**. . . .
>
> Q. Okay. Your beef with Wal-Mart is you think they were **negligent**?
>
> A. Very **negligent**.

(R. Vol. 3, p. 354). Perkins cannot escape this admission and create a jury question as to Wal-Mart's intent without some bit of corroborating evidence.

Wal-Mart conducted its own internal investigation by reviewing video footage and conducting interviews, and then relied upon the independent advice of local police authorities. These facts simply do not support a finding that Wal-Mart's conduct was outrageous or that it broke all possible bounds of decency. Furthermore, since Wal-Mart had probable cause to

commence proceedings against Perkins, his arrest was not "extreme and outrageous" as a matter of law. As the Mississippi Court of Appeals has recognized:

> The behavior of which [Plaintiff] claims caused an intentional infliction of emotional distress on him was the defendants having him arrested. ***After having found in the previous issue that the defendants had probable cause to file charges against [Plaintiff], we fail to find any outrageous, extreme, and utterly intolerable actions on the defendants' part in filing criminal charges.***

Croft, 910 So.2d at 75 (Miss. App. 2005) (emphasis added). Accordingly, Perkins' claim of intentional infliction of emotional distress must fail as a matter of Mississippi law. Thus, the trial court did not err in granting Wal-Mart summary judgment in regards to this claim and its decision should be affirmed.

CONCLUSION

Perkins' Brief accomplishes nothing more than merely alleging in a conclusory fashion that Wal-Mart falsely accused him of petit larceny and wrongfully conspired with Elijah Wilson to effectuate that goal. The record clearly reflects (1) that Wal-Mart acted reasonably, without malice and with probable cause in pressing charges against Perkins and (2) that no agreements existed between Wal-Mart and Elijah Wilson. Absent the establishment of malice, the lack of probable cause, an actual agreement, or some other outrageous conduct, there can be no liability for malicious prosecution, civil conspiracy or emotional distress.

The case law pertaining to Summary Judgment is clear. "Where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2553-54. Only where there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party is a full trial on the merits warranted. *Lindsey v. Sears, Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Wal-Mart has sufficiently demonstrated the absence of the following material elements Perkins bears the burden of proving at trial to survive summary judgment – malice, lack of probable cause, an agreement with Elijah Wilson to unlawfully prosecute Perkins, any egregious or outrageous conduct by Wal-Mart, or any intentional infliction of emotional distress. As discussed above, Perkins has not and cannot put forth competent proof that Wal-Mart maliciously prosecuted him, conspired to maliciously prosecute him, or intentionally inflicted him with emotional distress. As such, the trial court did not err in granting Wal-Mart's motion for summary judgment regarding Perkins' claims of malicious prosecution, civil conspiracy and

intentional infliction of emotional distress. Thus, Wal-Mart respectfully requests that the decision of the Marshall County Circuit Court be affirmed, with all costs of this appeal taxed to the Appellant. Further, Appellee requests any other relief to which it might be entitled in the premises.

THIS, the 20th day of May, 2009.

Respectfully submitted,

WAL-MART STORES, INC.

By Its Attorneys,
WATKINS LUDLAM WINTER & STENNIS, P.A.

By: _____
ROBERT T. JOLLY

Scott Burnham Hollis (MSB No. [redacted])
Laura L. Hill (MSB No. [redacted])
Robert T. Jolly (MSB No. [redacted])
WATKINS LUDLAM WINTER & STENNIS, P.A.
6897 Crumpler Blvd., Suite 100
P.O. Box 1456
Olive Branch, MS 38654
Telephone: 662-890-6245
Facsimile: 662-890-6230

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via United States mail, postage prepaid, a true and correct copy of the above Brief of Appellee Wal-Mart Stores Inc. to the following:

R. Shane McLaughlin, Esq.
Nicole H. McLaughlin, Esq.
McLaughlin Law Firm
P.O. Box 200
Tupelo, MS 38802

Waide & Associates, P.A.
Attorneys at Law
P.O. Box 1357
Tupelo, MS 38802

Wilton V. Byers III
Amanda M. Urbanek
Daniel Coker Horton & Bell, P.A.
Post Office Box 1396
Oxford, MS 38655-1396

THIS the 20th day of May, 2009.

ROBERT T. JOLLY

CERTIFICATE OF FILING

I, Robert T. Jolly, attorney for Appellee Wal-Mart Stores Inc., in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the Brief of Appellee Wal-Mart Stores Inc. by mailing the original of said document and three (3) copies thereof via Untied States Mail to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

THIS the 20th day of May, 2009.

ROBERT T. JOLLY