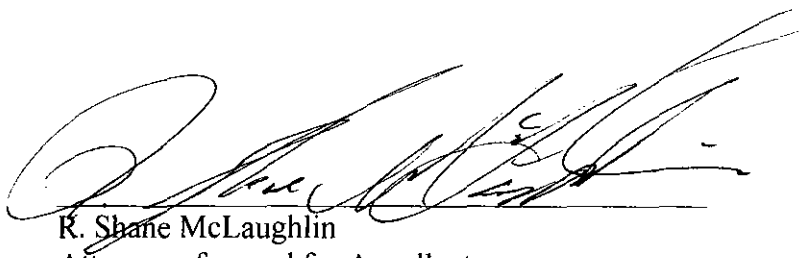
2008-CA-01406 T

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 Byars and Amanda Urbanek, counsel for Appellee Elijah Wilson
5. Scott Hollis and Robert Jolly, counsel for Appellee Wal-Mart Stores, Inc.
6. R. Shane McLaughlin and Nicole H. McLaughlin, counsel for Appellant
7. Jim Waide, counsel for Appellant



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STATEMENT REGARDING ORAL ARGUMENT

This case involves a complex set of facts with regard to Appellant's claims against Wal-Mart Stores, Inc. and Elijah Wilson. Moreover, this case presents important issues regarding malicious prosecution under Mississippi law, and when such claims should be tried to a jury. In this case the record evidence established that Wal-Mart Stores, Inc., with the assistance of Elijah Wilson, commenced a criminal prosecution against Appellant merely because a Wal-Mart cashier gave Appellant too much change following a transaction. There was ample evidence from which a jury could, or could not, have found that both Appellees acted maliciously and engaged in a tacit conspiracy to prosecute Perkins. The Trial Court's grant of summary judgment effectively eviscerates such claims under Mississippi law.

Accordingly, oral argument would be helpful to discuss these issues.

STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in granting summary judgment as to Perkins' malicious prosecution claim, where Perkins submitted evidence from which a reasonable jury could find that Wal-Mart instituted the criminal charges against him based on a wholly insufficient investigation, with malice and without probable cause.
2. Whether the Trial Court erred in granting summary judgment as to Perkins' civil conspiracy claim where a jury could infer a tacit agreement to maliciously prosecute Perkins between Wal-Mart and Elijah Wilson.
3. Whether the Trial Court erred in granting summary judgment as to Perkins' claim against Elijah Wilson for malicious interference with employment, when a jury could find that Wilson acted with malice against Perkins because of a running personal feud between the two police officers.
4. Whether the Trial Court erred in granting summary judgment as to Perkins' claim for intentional infliction of emotional distress, since a jury could determine that both Defendants' conduct was extreme and outrageous.

STATEMENT OF THE CASE

Michael Perkins filed his Complaint against Wal-Mart Stores, Inc. and Elijah Wilson on December 14, 2006. (R. Vol. 1, p. 7). Perkins, a Holly Springs, Mississippi Police Officer, made claims against Defendants for malicious prosecution, tortious interference with his employment, civil conspiracy and intentional infliction of emotional distress. (R. Vol. 1, p. 5-6). An Agreed Scheduling Order was entered on March 19, 2007. (R. Vol. 1, p. 34-35).

Defendant Wal-Mart Stores, Inc. moved for partial summary judgment on September 14, 2007, based on an alleged deficiency in service of process. (R. Vol. 1, p. 62). The Trial Court denied Wal-Mart's Motion for Partial Summary Judgment. (R. Vol. 5, p. 668).

Wal-Mart subsequently moved for summary judgment again on March 26, 2008. (R. Vol. 4, p. 517-22). Defendant Wilson moved for summary judgment on January 30, 2007. (R. Vol. 2, p. 228-31).

The Trial Court entered separate Opinions and Orders granting both Defendants' Motions for Summary Judgment on July 11, 2008. (R. Vol. 5, p. 670-76; 677-82). Perkins timely perfected this appeal from the Trial Court's rulings. (R. Vol. 5, p. 683).

STATEMENT OF FACTS

Michael Perkins is a Holly Springs, Mississippi Police Officer. (R. Vol. 3, p. 339). On December 18, 2005, Perkins went to the Wal-Mart store in Holly Springs, Mississippi with his son while he was off-duty. (R. Vol. 3, p. 340). After selecting several items from the store Perkins went through a check-out line to pay for his purchases. (R. Vol. 3, p. 342). Perkins had selected one or two cans of tuna fish, two drinks and an ink jet printer cartridge. (R. Vol. 3, p. 341).

The Wal-Mart cashier, Alicia Jackson, was a casual acquaintance of Perkins. (R. Vol. 3, p. 342). Perkins placed all of the items he had selected for purchase on the conveyor belt. (R. Vol. 3, p. 342). Unbeknownst to Perkins, Alicia Jackson had recently begun experimenting with "under-ringing" merchandise, a scheme whereby she would not charge customers for all of their merchandise. (R. Vol. 4, p. 423). Around December 2005 Jackson had done this for several of her friends and other Wal-Mart employees who were involved in the "under-ringing" scheme together. (See R. Vol. 4, p. 426).

Perkins, however, was not involved in the under-ringing scheme and knew nothing of the scheme. (R. Vol. 3, p. 342). Alicia Jackson scanned all of the merchandise Perkins had placed on the conveyor belt, but then voided an ink jet cartridge from the purchase. (R. Vol. 4, p. 423). Alicia Jackson did this on her own accord. (R. Vol. 4, p. 437). Perkins did not request that Jackson under-ring his transaction. (R. Vol. 3, p. 342-343; R. Vol. 4, p. 437). Perkins did not know that Jackson had voided the ink cartridge from the transaction. (R. Vol. 3, p. 342). Perkins thought he was paying for everything he had placed on the conveyor belt. (*Id.*).

Perkins tendered a $100 bill to Jackson, which would have been sufficient to pay for all of the items, and then left the store with his purchases. (R. Vol. 3, p. 343). Perkins did not count

the change which Jackson returned to him. (R. Vol. 3, p. 343). Perkins did not see Jackson count the change to herself before she gave it to him. (*Id.*). Perkins did not notice how much change Jackson had given him back. (R. Vol. 3, p. 343-344). Perkins had no idea that he had not paid for all of the merchandise when he left the Wal-Mart store with his son. (*Id.*).

Upon learning of the under-ringing, Wal-Mart initially called the Holly Springs Police Department to report Perkins for petty larceny.[1] (R. Vol. 4, p. 456). Wal-Mart loss-prevention employee Gary Ferguson worked closely with Detective Elijah Wilson of the Holly Springs Police Department regarding the incident. (*Id.*). Three days after Perkins' visit to Wal-Mart, Wal-Mart Stores, Inc. instituted criminal charges against Perkins. (R. Vol. 4, p. 442). Wal-Mart employee Gary Ferguson signed an affidavit swearing that Perkins did "take, steal and carry away a black ink jet cartridge the personal property of Wal-Mart having a value of $19.83." (*Id.*). Perkins was subsequently arrested and prosecuted for the crime of petty larceny. (R. Vol. 4, p. 442).

Perkins and Detective Elijah Wilson had worked together at the Holly Springs Police Department for about four years and were personally acquainted. (R. Vol. 4, p. 448). Perkins had a running feud with Wilson and claims that Wilson seized upon the opportunity that the Wal-Mart incident presented to see that he was baselessly prosecuted and harassed by Wal-Mart. (*See, e.g.,* R. Vol. 3, p. 371-72).

The genesis of Wilson's dispute with Perkins occurred a few months earlier when both Perkins and Wilson were responsible for the "evidence locker" at the Holly Springs Police Department. (*Id.*). Only Perkins and Wilson had access to the evidence locker. (R. Vol. 3, p. 371-372; R. Vol. 4, p. 449). In October 2005, several items were discovered to be missing from

[1] Since Perkins was, and remains, a Holly Springs, Mississippi Police Officer, the investigation was later transferred to the Marshall County Sheriff's Department. (*See* R. Vol. 4, p. 457).

the evidence locker. (R. Vol. 3, p. 371). A quantity of illegal drugs, some cash and a pistol were missing from the locker. (R. Vol. 3, p. 372). Perkins requested an investigation into the missing items and an inventory of the evidence locker. (R. Vol. 3, p. 371-372). However, no investigation or inventory was ever conducted. (*Id.*).

Perkins testified that he "let it be known" throughout the Police Department that the items were missing from the evidence locker, that only he and Wilson had access to the locker, and that he wanted an inventory to be done of the locker. (*Id.*). Wilson knew that Perkins was requesting an inventory. (R. Vol. 4, p. 451). As only Wilson and Perkins had access to the evidence, Wilson understood that Perkins was implicitly accusing him of taking the items. (R. Vol. 4, p. 452). However, Wilson testified that he was not offended at the allegation, but merely "laughed at it." (*Id.*) Later in his deposition, Elijah Wilson admitted that he likely cursed Perkins upon hearing the allegation. (R. Vol. 4, p. 462) (testifying that he probably said "F the MF" regarding Perkins). Wilson testified that it is known in the Department that if someone says something about him he will "send something back to you." (R. Vol. 4, p. 469).

Perkins resigned as an evidence locker officer after no inventory was allowed. (R. Vol. 3, p. 371; R. Vol. 4, p. 472). Following Perkins' implicit accusation of Wilson, Perkins testified that "you could tell when things have changed." (R. Vol. 3, p. 372). First, Perkins' patrol car assignment changed. (*Id.*). Perkins was a supervisor, and had been driving a "slick car" reserved for supervisors. (*Id.*). However, shortly after the evidence locker fiasco, Wilson informed Perkins that he was being assigned to share a patrol car with another officer, and his supervisor's car was being assigned to a non-certified officer. (*Id.*). Similarly, Wilson later made the decision to put Perkins into "Car 15" – a vehicle with severe mechanical problems. (R. Vol. 3, p.

373). Further, Perkins was later relieved of his supervisory position with the Department only six (6) days after he was charged with petit larceny. (R. Vol. 4, p. 473).

Wilson had extensive involvement in investigating the under-ringing scheme that lead to Perkins' criminal prosecution before the investigation was transferred to the Sheriff's Department. (R. Vol. 4, p. 456). Wilson dealt extensively with Gary Ferguson, the Wal-Mart loss prevention employee regarding the incident. (*Id.*). Wilson admitted in his deposition that he advised Ferguson on several occasions that Wal-Mart "had enough" evidence to commence a prosecution against Perkins. (R. Vol. 4, p. 457) (testifying that Wilson told Ferguson that "you had enough [evidence] when you called me this morning.").

Prior to telling Wal-Mart that it had sufficient evidence to prosecute Perkins, Wilson had watched a video of the transaction several times. (*Id.*) Wilson later admitted that he did not observe anything on the video that indicated that Perkins had either asked for an under-ringing, or that he knew he had not paid for the ink cartridge. (*Id.*). Incredibly, Wilson testified that he was not even looking for evidence as to whether Perkins knew he had received the under-ringing or not. (*Id.*). Wilson testified that he did not even consider that Perkins might have never known he had received the under-ringing. (*Id.*). Wilson testified that he and Wal-Mart employee Gary Ferguson spoke on the telephone many times before Wal-Mart initiated a prosecution against Perkins, and that Wilson had told Ferguson "sure, I think you have enough" to prosecute Perkins. (*Id.*). Andy Duncan, Ferguson's boss and a Wal-Mart asset protection manager, similarly testified that Wilson related to Wal-Mart that it had "a good case" against Perkins. (R. Vol. 4, p. 485). Wal-Mart knew that several other Wal-Mart employees and customers were involved in the under-ringing scheme, but Perkins was the only customer charged. (R. Vol. 4, p. 498).

As part of the investigation into Perkins, Wilson interviewed cashier Alicia Jackson regarding the under-ringing scheme. (*Id.*). Wilson's recorded interview was as follows:

December 20, 2005

Alicia M. Jackson
DOB: 10/26/84

You know we are talking about the incident with the Police Officer. I don't want to know about the other people just tell me what happened with the incident with the Police Officer taking the ink cartridge at Wal-Mart.

Alicia: Ok. I was on the register, he came through my line. He had an ink cartridge and two drinks. I rang the two drinks and the ink cartridge, but I voided the ink cartridge and still put it in the bag. Totaled him out to $5.33.

Ok. Now is that it?

Alicia: That's it.

How much did the ink cartridge cost?

Alicia: It was about $20.00

The ink cartridge was $20.00. He did see you put it in the bag?

Alicia: Yes.

Ok. Did he ever at any time ask you to let him have it or anything?

Alicia: No, he never asked me anything like that.

Ok. What was the conversation, I just knew him, I worked with him at (inaudible) at (inaudible). He is pretty cool. I took it upon myself to give him the ink cartridge.

Ok. He did know that he didn't pay for it. Right?

Alicia: Yeah.

This is your statement. Do you have some other stuff that... Do you have anything else?

Alicia: No, I don't have anything else.

This is the statement of Alicia Jackson

Alicia, give me your address

Alicia: 300 East Valley Street, Holly Spring, MS 38625

You are 21 years of age?

Alicia: I am.

[Tape ends]

(R. Vol. 4, p. 493-494).

Alicia Jackson testified that Wilson repeatedly turned the tape recorder off after she told him that Perkins did not know of the under-ringing. (R. Vol. 4, p. 423). Jackson testified that:

> He asked me did Perkins know – was he aware that I had given him that merchandise. And I told him, I mean – "I can't say that he knew." That's what I told him. So he said, "In other words, you're saying no." I said "Yeah, that's what I'm saying." The first time he stopped the tape recorder, and he went to telling me that if I didn't tell him the truth, the I would go to jail for X amount of time or I would have to pay X amount of money. So he say, "you need to tell me the truth." Cut the tape recorder back on. He asked me the same questions again. I repeated the exact story that I just told you, and if I'm not mistaken, he stopped it [the tape recorder] again. And what he was basically – I'm assuming what he was basically trying to – was trying to do was just to get me to say, "Yes Michael Perkins knew what I was doing. He was aware and you know, he knew." But I couldn't – if I said that man knew what I had done, I would be lying because I – I don't know what he knew, you know, that – what I was doing – he was aware of what I was doing.

(*Id.*).

Jackson testified that she told Wilson the truth twice (that Perkins had no involvement in the scheme or knowledge that she had voided the item) and Wilson just kept "cutting the tape off and, you know, threatening me." (R. Vol. 4, p. 438). Jackson understood that Wilson wanted her to implicate Perkins. (*Id.*). During one of the stoppages of the recording, Wilson told Jackson that she could lose her college financial aid. (*Id.*). Of course, oddly, Jackson had already implicated herself when Wilson made these various threats and implicitly admonished

her to change her answer and implicate Perkins. (*See id*). Immediately after she responded affirmatively to Wilson's third question as to whether Perkins "knew" he had received the under-ringing, Wilson told Jackson she was free to leave. (R. Vol. 4, p. 439). Jackson however maintained that Perkins never asked for her to under-ring his transaction. (*Id.*).

Of course, Jackson never explained, and neither Wilson nor anyone from Wal-Mart ever even inquired, exactly how Perkins might have known that he had not paid for the merchandise, since he had tendered enough cash to pay for all of his items. (*See id.*). Jackson told Wilson that Perkins had not asked for the under-ringing and Jackson presumably could not read Perkins' mind to ascertain whether he knew she had voided the cartridge. (R. Vol. 3, p. 343-344). Thus, as of the time the prosecution was commenced there was simply no evidence that Perkins knew he had received too much change from Jackson and no reason to believe that Perkins had committed a crime.

Wilson admits that he did not question how Jackson could have possibly known what Perkins did or did not know at the time of the transaction. (R. Vol. 4, p. 460). Wilson could not offer any explanation as to why he did not ask Jackson how she could possibly know what Perkins knew. (*Id.*). Wilson admitted that he did not ask Jackson how she could have known whether Perkins knew he had not paid for the cartridge because he was only concerned with getting Jackson to implicate Perkins. (*Id.*). Wilson testified as follows:

> Q. Well, my question is -- see if I can word this clear enough. How did Alicia Jackson know what Michael Perkins knew?
>
> MS. URBANEK: Object to the form.
>
> Q. (Mr. McLaughlin) Do you know?
>
> A. No, I don't.

Q. Why didn't you ask her?

A. I just didn't. I didn't think to ask her.

Q. Because you had gotten the answer you were looking for, right?

MS. URBANEK: Object to the form.

Q. (Mr. McLaughlin) ***Isn't that a fact?***

A. Yes.

(*Id.*) (emphasis added). Wilson testified that he was trained in the use of such leading questions as an interrogation technique. (R. Vol. 4, p. 460-61). Wilson testified that, by his question he suggested to Jackson to respond that Perkins knew he was being under-rung, and that the reason he did this was to get her to respond affirmatively. (R. Vol. 4, p. 461). After receiving the answer he was looking for from Jackson – a response implicating Perkins – Wilson immediately related the information to Gary Ferguson, the Wal-Mart loss prevention employee. (R. Vol. 4, p. 505). Wilson immediately relayed to Wal-Mart that he "had a taped statement of Alicia Jackson saying that Officer Perkins knew that he did not pay for the cartridge." (*Id.*). Wilson told Gary Ferguson that Wal-Mart "had a case" against Perkins. (R. Vol. 4, p. 510).

Wal-Mart contends that Perkins must have known that he received the under-ringing simply because he received too much change from Jackson after he paid for his purchases. (R. Vol. 4, p. 499; R. Vol. 4, p. 479). Gary Ferguson, the employee who instituted charges against Perkins, admitted in his deposition that he did not know of any evidence to suggest that Perkins was complicit in the scheme or that he had asked for the under-ringing. (R. Vol. 4, p. 499). Ferguson testified that:

> Q. And we both agree that at no time anyone has ever indicated that [Alicia Jackson] told him she didn't charge him intentionally or that he had asked her not to, right?

A. Right.

(R. Vol. 4, p. 506). Similarly, Perkins has testified that he did not count his change and did not know that he had received the under-ringing. (R. Vol. 3, p. 343). Thus, the record evidence in this case shows that Perkins 1) did not know he had not paid for the ink cartridge; and 2) had not asked for Jackson to under-ring the cartridge.

No Wal-Mart employee, or anyone else, even interviewed Perkins regarding the incident before commencing criminal charges against him. (R. Vol. 5, p. 637; R. Vol. 4, p. 509). Perkins was tried on the criminal charge in the Justice Court of Marshall County, Mississippi on January 23, 2006. (*See* R. Vol. 5, p. 628). The Justice Court trial testimony standing alone shows compelling evidence of every essential element of the tort of malicious prosecution against Wal-Mart. At the Justice Court trial, Wal-Mart employee Gary Ferguson, who had just weeks earlier signed the affidavit against Perkins, testified as follows:

Q: You can not swear under oath here today that Michael Perkins knew that he received an under-ringing of merchandise, can you?

A: No, sir.

Q: You could not swear under oath that Michael Perkins knew he received an under-ringing of merchandise when you signed this affidavit on December 21st, 2005, could you?

A: No.

Q: Yet you swore that Affidavit out, correct?

A: Yes, sir.

Q: You knew then you couldn't meet your burden of proof, didn't you?

A: No, sir.

Q: Well you know it today, don't you?

A: Not yet.

Q: Okay. You can't swear under oath that Michael Perkins knew he received an under-ringing of the merchandise, can you?

A: No, sir.

Q: Okay. You couldn't do it then, could you, when you signed the affidavit on December the 21st, 2005

A: No, sir.

Q: You can't do it today, January 23rd, 2006 at 4 o'clock p.m. here today?

A: That's correct.

(R. Vol. 5, p. 643).

Of course, it is undisputed that Perkins never asked for the under-ringing. Alicia Jackson even told Holly Springs Detective Elijah Wilson the following during her interrogation:

Ok. Did he ever at any time ask you to let him have it or anything?

Alicia: No, he never asked me anything like that.

Ok. What was the conversation, I just knew him, I worked with him at (inaudible) at (inaudible). ***He is pretty cool. I took it upon myself to give him the ink cartridge.***

(R. Vol. 4, p. 493-494) (emphasis added).

At the conclusion of the Justice Court trial Perkins was acquitted of the charge with the Court noting that there was ***no evidence*** which established that he had committed a crime. (*See* R. Vol. 5, p. 665). Perkins subsequently brought this action against Wal-Mart and Elijah Wilson.

Despite this evidence, the Trial Court granted Wilson and Wal-Mart summary judgment on all of Perkins' claims. The crux of the Trial Court's reasoning was an erroneous conclusion that Perkins could not establish that Wal-Mart instituted the proceedings with malice and without

probable cause, or that Wilson had acted with malice in bringing about the unfounded prosecution.

As discussed below, there were clear-cut genuine issues of material fact which should have been resolved by a jury. Perkins presented evidence of each necessary element of his claims.

Accordingly, the Trial Court's decision should be reversed, and this case should be remanded for a trial on the merits.

STANDARD OF REVIEW

A Trial Court's grant of summary judgment is reviewed *de novo* by this Court. *See e.g. Nygaard v. Getty Oil Co.*, 918 So. 2d 1237, 1240 (Miss. 2005); *Leffler v. Sharp*, 891 So. 2d 152, 156 (Miss. 2004). The familiar standard for summary judgment provides that summary judgment is appropriate only where there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." MISS. R. CIV. P. 56(c). The party seeking summary judgment bears the burden of demonstrating that no genuine issues of material fact exist. *Anderson v. Lavere*, 895 So. 2d 828, 832 (Miss. 2004). The evidence must be viewed in the light most favorable to the non-movant and all doubts as to whether a genuine issue of material fact exists should be resolved in favor of the non-movant. *Malone v. Capital Correctional Res., Inc.* 808 So. 2d 963, 965 (Miss. 2002). A motion for summary judgment is not a substitute for a trial on disputed factual issues. *Anderson*, 895 So. 2d at 832.

In order to escape summary judgment, the plaintiff must have brought forward evidence sufficient for a reasonable jury to find in favor of plaintiff as to the claim. S*ee Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1274 (Miss. 2007). The *Glover* Court explained as follows:

> If one is to faithfully apply the Rule's requirements to a particular case, the inescapable conclusion follows that the court must grant summary judgment

> unless - as to each material issue of disputed fact raised by the moving party - the record demonstrates at least the minimum quantum of evidence sufficient to justify a determination in favor of the non-moving party by a reasonable juror.

Glover, 968 So. 2d at 1274 (internal footnotes omitted).

Courts "must be sensitive to the notion that summary judgment may never be granted in derogation of a party's constitutional right to trial by jury." *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 360 (Miss. 1983). Importantly to this case, summary judgment is inappropriate where differing but reasonable inferences may be drawn from the facts. *Delahoussaye v. Mary Mahoney's, Inc.*, 696 So. 2d 689, 691 (Miss. 1997). As summary judgment is such a drastic remedy, any error should be made in favor of allowing the case to proceed to a full trial on the merits. *Id.* at 363.

SUMMARY OF THE ARGUMENTS

Perkins presented sufficient evidence to have his claims tried to a jury, rather than decided summarily by the Trial Court. As for Perkins' malicious prosecution claim, the Trial Court found that Perkins had not presented evidence that Wal-Mart had malice in instituting the unfounded criminal charges or that it lacked probable cause. However, the Trial Court overlooked the following evidence from which a jury could have found both elements: 1) There was not one shred of evidence at the time of the prosecution that Perkins knew he had not been charged for the ink cartridge and intended to steal it, a necessary element of the crime; 2) Wal-Mart commenced the criminal prosecution of Perkins shortly after the incident with inadequate investigation, indeed without ever bothering to attempt contact with Perkins; 3) Perkins, a career police officer, was the only customer Wal-Mart prosecuted, while Wal-Mart did not prosecute one of its own employees who was actually involved in the scheme; 4) Wal-Mart's loss prevention employee who commenced the prosecution admitted in Perkins' Justice Court trial

that he could not claim that Perkins was involved in the under-ringing scheme or that he even knew he had not paid for the ink cartridge. Wal-Mart prosecuted Perkins anyway.

Importantly, Wal-Mart could not have subjectively or objectively believed that Perkins was guilty of petty larceny, since it conceded there was no evidence to believe he was involved in the scheme or even knew about Jackson's actions. This is quintessential malicious prosecution. A jury could have found that Wal-Mart's premature prosecution lacked probable cause and was malicious. Thus, summary judgment was inappropriate.

Similarly, the Trial Court erred in concluding that Perkins had no evidence that Elijah Wilson acted maliciously and joined a tacit civil conspiracy with Wal-Mart. Mississippi law provides that agreements for conspiracy purposes are generally proven by circumstantial evidence. Perkins presented overwhelming circumstantial evidence that Wilson had every motivation to seize upon the opportunity presented by the incident of December 18, 2005, to work with Wal-Mart to harm Perkins. At the time of the incident and Perkins' prosecution, Perkins and Wilson were in a long-running feud. Wilson had already used his position in the police department to interfere with Perkins. In investigating the larceny charge, Wilson repeatedly told Wal-Mart what a strong case it had against Perkins, and actively encouraged his prosecution, despite the lack of any evidence that Perkins had committed a crime.

Thus, since Perkins presented sufficient evidence that Wilson acted with malice, and engaged in a conspiracy with Wal-Mart to effect Perkins' prosecution, these claims should have likewise been tried to a jury.

Accordingly, as discussed fully below, the Trial Court erred in granting summary judgment. This Court should reverse and remand for trial.

ARGUMENT I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PERKINS' CLAIM FOR MALICIOUS PROSECUTION.

1. The elements of a malicious prosecution claim.

Under Mississippi law, the elements of the tort of malicious prosecution are as follows:

1) The institution of criminal proceedings;

2) By, or at the insistence of defendant;

3) The termination of such proceedings in plaintiff's favor;

4) Malice in instituting the proceedings;

5) Lack of probable cause for the proceedings and

6) Damages sustained by plaintiff.

McClinton v. Delta Pride Catfish, Inc., 792 So. 2d 968, 973 (Miss. 2001). The Trial Court found all elements of the claim were satisfied other than "malice in instituting the proceedings" and "lack of probable cause." (R. Vol. 5, p. 680). The Trial Court granted summary judgment based on these elements. (*Id.*).

However, the Record contains sufficient evidence for a jury to find both malice and lack of probable cause. Thus, the Trial Court erred in granting summary judgment. Each of the contested elements is discussed in turn below.

2. Malice in instituting the proceedings

This Court has defined the term "malice" as it relates to malicious prosecution as a term "signifying that the prosecution was commenced primarily for a purpose other than that of bringing the accused to justice." *Alpha Gulf Coast, Inc. v. Jackson*, 801 So. 2d 709, 721 (Miss. 2001). Malice is generally established by circumstantial evidence. *Royal Oil Co. v. Wells*, 500 So. 2d 439, 444 (Miss. 1987).

The element of "malice" is tied to the determination of whether probable cause existed to prosecute the crime. *See Junior Food Stores v. Rice*, 671 So. 2d 67, 73 (Miss. 1996). In *Rice*, the Supreme Court held that in determining whether malice was present a fact-finder must look to the defendant's subjective state of mind. *Rice*, 671 So. 2d at 73. The Court held that the absence of probable cause gives rise to an inference of malice. *Id.* Notably, the *Rice* Court held that "malice is a question of fact to be determined by the jury unless only one conclusion may reasonably be drawn from the evidence." *Id.* Thus, whether a plaintiff was maliciously prosecuted is a question of fact properly decided by the jury, not the trial judge. *Van v. Grand Casinos, Inc.*, 724 So. 2d 889, 893 (Miss. 1998).

A reasonable jury in this case could clearly find malice on the part of Wal-Mart. First, and most obviously in this case, a jury can infer malice because of Wal-Mart's grossly premature prosecution of Perkins without the slightest hint of probable cause. As discussed fully below, Wal-Mart admittedly prosecuted Perkins without any evidence whatsoever that Perkins was involved in the under-ringing scheme, and without even speaking to Perkins about the transaction. Wal-Mart concedes that there was no evidence that Perkins was involved in the scheme or asked for the under-ringing. Wal-Mart admits that the only evidence it had was that Perkins received too much change back from the cashier. Of course, as discussed below, this is no crime. Wal-Mart obviously lacked any reasonable belief that Perkins had committed a crime. Pursuant to Mississippi law, as explained in *Rice*, the absence of probable cause creates a jury question as to malice as well.

Next, a jury could infer malice based on the fact that Perkins was the only customer prosecuted by Wal-Mart. Gary Ferguson admitted that Wal-Mart knew that several other customers came through the lines of cashiers involved in the under-ringing scheme. (R. Vol. 4,

p. 512). Wal-Mart did not make serious efforts to identify the customers, and prosecuted only Perkins. (*Id.*). Similarly, Wal-Mart did not press charges against one of its own employees involved in the scheme. (R. Vol. 4, p. 500). Wal-Mart claims that the employee, Markita Thomas, simply never returned to work so it did not prosecute her. (*Id.*).

Next, Wal-Mart has policies in effect that are designed to deter theft. (R. Vol. 4, p. 508). A reasonable jury could infer that Wal-Mart prosecuted Perkins, a respected Holly Springs Police Officer, for the purpose of making an example of him to deter perceived theft. This, of course, amounts to an improper purpose and is likewise evidence of malice by Wal-Mart.

There is ample evidence from which a jury could have inferred that Wal-Mart acted with malice in instituting the criminal proceedings against Perkins. Simply put, jurors could reasonably draw differing legitimate inferences from the facts. A jury could either find, or not find, that Wal-Mart acted with malice. Since Perkins presented the Trial Court with sufficient circumstantial evidence of malice by Wal-Mart, the Trial Court erred in concluding that there was no genuine issue of material fact as to this element.

3. Lack of Probable Cause

Similarly, there are issues of fact as to probable cause in this case. In order to meet the probable cause requirement for instituting a criminal proceeding the initiating party must have both 1) an honest subjective belief of the guilt of the person accused; ***and*** 2) reasonable objective grounds for such belief. *See Jackson*, 801 So. 2d at 722. Importantly to this case, a plaintiff in a malicious prosecution case need only prove lack of probable cause as to any one element of the crime with which he is charged. *Moon v. Condere Corp.*, 690 So. 2d 1191, 1194 (Miss. 1997). The Court in *Moon* set out when probable cause is an issue of law, for the Court to determine, and when it is a question of fact, for the jury, as follows:

> When the facts are undisputed, it is the function of the court to determine whether or not probable cause existed. If the facts are in dispute, however, it is a jury question, based upon proper instructions, to determine whether probable cause existed.

Moon, 690 So. 25 at 1195 (citing *Owens v. Kroger Co.*, 430 So. 2d 843, 846 (Miss. 1983)).

Further, the Mississippi Supreme Court has explained that "where a reasonable person would investigate further before instigating a proceeding, the failure to do so is an absence of probable cause." *Benjamin v. Hooper Electronic Supply Co.*, 568 So. 2d 1182, 1191 (Miss. 1990).

Pursuant to the Affidavit signed on behalf of Wal-Mart by Gary Ferguson, Perkins was charged with the crime of petit larceny, in violation of Miss. Code Ann. § 97-17-43(1). Of course, a person must have the *intent to steal* to be guilty of a crime of larceny. *See Slay v. State*, 241 So. 2d 362, 364 (Miss. 1970) (holding that "[t]he specific intent to deprive the owner of his property is a necessary ingredient of larceny. There must be criminal intent wholly and permanently to deprive the owner of his property."). It is beyond dispute that intent to steal is an element of the crime of petit larceny. *See id.*

In this case, Wal-Mart, by its own admissions, did not have had either an honest subjective belief or a reasonable objective belief that Perkins was guilty of the crime of petit larceny when it commenced charges against him. The only evidence Wal-Mart had when it commenced the charges was that Perkins had received too much change back from its cashier after the transaction. Wal-Mart had no evidence that Perkins actually knew he had been under-rung much less that Perkins had the intent to steal any merchandise. Accordingly, Wal-Mart lacked a subjective belief, or reasonable objective grounds, for the belief that Perkins had the intent to steal the ink cartridge.

Rather, the undisputed facts show that Perkins had put all of his items on the conveyor belt, and tendered a $100 bill to the cashier which would have been sufficient to pay for all of the purchases, and still receive change back. Further, Wal-Mart admits that it did not have evidence that Perkins ever counted his change. Perkins explained that he did not count his change following the transaction and did not know he had received too much change back.

There was absolutely no evidence that Perkins had the intent to steal the ink cartridge. Wal-Mart admits, as it must, that it had no evidence that Perkins was a part of the under-ringing scheme, or asked to be under-rung. Obviously, Wal-Mart could not have probable cause, either objectively or subjectively, under such facts. Otherwise, there would be probable cause to arrest any customer who was inadvertently given too much change by a Wal-Mart cashier. Such a holding would effectively eviscerate the tort of malicious prosecution in this State.

However, even with no evidence that Perkins knew he had been under-rung, much less evidence that he had intended to steal the ink cartridge, Wal-Mart nevertheless commenced a prosecution. Wal-Mart did not conduct an adequate investigation before commencing the charges. Wal-Mart never even attempted to ask Perkins about the transaction, in an effort to determine whether he had mistakenly received the ink cartridge, or whether he intended to steal it. Wal-Mart employee Gary Ferguson testified as follows regarding the lack of contact with Perkins prior to the prosecution:

> Q. To your knowledge, had anyone interviewed [Perkins] as of the moment you signed [the affidavit]?
>
> A. To my knowledge, no.
>
> Q. You didn't think it would be a good idea to ask him about it before you filed this affidavit?
>
> MR. HOLLIS: Object to the form.

A. I didn't think it was necessary.

(R. Vol. 4, p. 509). Similarly, Wal-Mart employee Andy Duncan testified as follows:

> Q. Is there a policy against interviewing a customer?
>
> A. I don't know that there's -- there possibly is but I can't quote it, you know. In our investigation process and training, we've never whatsoever interviewed customers. Now, we've taken statements from customers who came to us with information. We've had them write statements before. But we've never actually interviewed customers, month [sic].
>
> Q. Do you ever -- I guess that means that you've never asked a customer about an incident before you prosecute a customer?
>
> A. No, we don't.

(R. Vol. 4, p. 484).

A reasonable jury could manifestly determine that Wal-Mart lacked both a subjective belief and reasonable objective grounds for a belief that Perkins intended to steal the cartridge. Further, a reasonable jury could find that Wal-Mart's failure to investigate the facts before commencing the prosecution likewise amounts to a lack of probable cause under Mississippi law. Since there are disputed issues of fact in this regard, this claim should have been resolved by a jury.

Again, the jury could have found that Wal-Mart instituted the prosecution without probable cause and with a woefully inadequate investigation. There was a clear-cut issue of material fact as to this element of the tort.

Since Perkins presented evidence sufficient for a jury to find that each element of the tort of malicious prosecution was satisfied, the Trial Court necessarily erred in granting summary judgment as to this claim. This Court should reverse on this basis and remand this claim for a jury trial.

ARGUMENT II.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PERKINS' CIVIL CONSPIRACY CLAIM.

Next, there were likewise triable issues of material fact as to Perkins' claim against Wal-Mart and Wilson for civil conspiracy to maliciously prosecute him. The elements of a civil conspiracy are 1) a conspiracy; 2) an overt act of fraud in furtherance of the conspiracy; and 3) damages to the plaintiff. *Delta Chemical and Petroleum, Inc. v. Citizens Bank of Byhalia, Mississippi*, 790 So. 2d 862, 877 (Miss. 2001). The conspiracy element is satisfied by evidence showing a "combination of person[s] for the purpose of accomplishing an unlawful act or a lawful purpose unlawfully." *Croft v. Grand Casino Tunica, Inc.*, 910 So. 2d 66 (Miss. Ct. App. 2005).

While an agreement is an essential element of a civil conspiracy, the fact of the agreement is generally established by inferences or circumstantial evidence, since there is rarely direct evidence of an agreement to conspire. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 980 (Miss. 2004). Such an agreement may be found based on "inferences that may fairly be drawn from the behavior of the alleged conspirators." *Harris*, 873 So. 2d at 980.

First of all, a reasonable jury could find from the evidence that Wal-Mart and Wilson agreed to effect the malicious prosecution of Perkins based on evidence of each of the Defendant's behavior. 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. Wilson repeatedly told Wal-Mart employees that Wal-Mart had a "good case" against Perkins. Wilson admitted that he attempted to get Alicia Jackson to implicate Perkins, despite her twice denying that he had any involvement, and then ceased questioning her when

she gave him the answer he wanted. After Wilson informed Wal-Mart employees of what he had elicited from Jackson, Perkins was immediately prosecuted.

A reasonable jury could determine that Wal-Mart and Perkins acted together to cause the malicious prosecution. There were, without question, several overt actions in furtherance of the conspiracy. Indeed, Perkins was fully prosecuted, tried and acquitted. Finally, it is beyond dispute that Perkins was damaged by the conspiracy. Perkins' reputation as a law enforcement member in the community was destroyed, and Perkins suffered severe mental anguish and emotional distress as a result of the conspiracy and his prosecution.

As Perkins presented sufficient evidence to establish each of the elements of a civil conspiracy, this claim should have been tried on the merits. The Trial Court's grant of summary judgment should be reversed and this claim remanded for trial.

ARGUMENT III.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PERKINS' CLAIM AGAINST WILSON FOR MALICIOUS INTERFERENCE WITH EMPLOYMENT.

Mississippi law recognizes a cause of action against an individual who, for reasons unrelated to any legitimate work requirement, maliciously interferes with the employment rights of another. *See, e.g., Levens v. Campbell*, 733 So. 2d 753, 759-60 (Miss. 1999). An at-will employee may maintain a cause of action for malicious interference with employment. *Levens*, 733 So. 2d at 760. The elements of a claim for malicious interference are:

1) The acts were intentional and willful
2) The acts were calculated to cause damages to Plaintiff in his lawful business
3) The acts were done with unlawful purpose of causing damage and loss, without right or justifiable cause; and

4) Actual loss.

Wong v. Stripling, 700 So. 2d 296, 303 (Miss. 1997). The Court in *Morrison v. State Enter. for Tech., Inc.*, 798 So. 2d 567, 574 (Miss. Ct. App. 2001) noted that "one occupying a position of responsibility on behalf of another is privileged, within the scope of that responsibility and absent bad faith, to interfere with his principal's contractual relationship with a third person". The Court in *Morrison* stated that:

> We find that the "privilege" is merely a specific example of having "right or justifiable cause" to interfere with the relationship. Tortious interference is based on intermeddling - a tort occurs if without sufficient reason, one person intentionally interferes with another's contract even if the interference is by giving information that is completely accurate, when the purpose was to cause interference and injury results.

Morrison, 798 So. 2d at 575. Thus, the *Morrison* Court held that when a defendant acts intentionally to cause injury to the business of another without right or good cause, the element of malice is satisfied. *Id.* Whether a defendant's actions caused the interference with plaintiff's employment is a question of fact for the jury. *See Wertz v. Ingalls Shipbuilding, Inc.*, 790 So. 2d 841 (Miss. Ct. App. 2000); *see also Jones v. Robinson Property Group, L.P.*, 427 F.3d 987, 995 (5th Cir. 2005) (noting that proximity in time may establish causation).

In this case, Wilson intentionally, and of his own volition, set out to interfere with Perkins' employment after Perkins implicitly accused him of stealing the items from the evidence locker. Wilson has conceded that he understood that Perkins was making such accusations against him, and testified that he probably said "F the MF" after learning of the allegations. Following the allegations, Perkins' employment relationship with the Police Department began to suffer. Perkins was no longer allowed use of the supervisor's car and was later assigned to a car with myriad mechanical defects. The evidence clearly establishes that Perkins relationship with his superiors suffered. Subsequently, Perkins was suspended from his

job. Perkins was also relieved of his supervisory position. Wilson also, admittedly, played a role in Wal-Mart's prosecution of Perkins. Such prosecution, although it ended in an acquittal, manifestly affected Perkins' employment relationship as a Holly Springs Police Officer.

A reasonable jury could well determine that Wilson intentionally interfered with Perkins' employment relationship. Accordingly, this claim should have likewise been tried to a jury. The Trial Court's decision should be reversed.

ARGUMENT IV.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PERKINS' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Finally, the Trial Court likewise erred in granting summary judgment as to Perkins' claims for infliction of emotional distress. Under Mississippi law, in order to prevail on a claim of intentional infliction of emotional distress:

> the conduct must have been "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." *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 982 (N.D. Miss. 1996) (quoting Restatement (Second) of Torts § 46 cmt. d. (1965)). "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities." *Lawson v. Heidelberg E.*, 872 F. Supp. 335, 338 (N.D. Miss. 1995) (quoting Restatement (Second) of Torts § 46 cmt. d. (1965)). "It is the nature of the act itself-as opposed to the seriousness of the consequences-which gives impetus to legal redress." *Pegues*, 913 F. Supp. at 982 (quoting *Sears, Roebuck & Co. v. Devers*, 405 So. 2d 898, 902 (Miss. 1981)). Furthermore, damages for intentional infliction of emotional distress are usually not recoverable in mere employment disputes. *Pegues*, 913 F. Supp. at 982. "Only in the most unusual cases does the conduct move out of the 'realm of an ordinary employment dispute' into the classification of 'extreme and outrageous,' as required for the tort of intentional infliction of emotional distress." *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994).

Brown v. Inter-City Fed. Bank for Sav., 738 So. 2d 262, 265 (Miss. Ct. App. 1999). Simply put, where a reasonable juror could determine that the defendant's conduct was "extreme and

outrageous" the claim of intentional infliction of emotional distress should be submitted to the jury. *Brown*, 738 So. 2d at 265.

A reasonable jury could find that the conduct of Wal-Mart and Wilson was intentional, extreme and outrageous. A jury could well determine that the unfounded prosecution of a respected citizen, indeed an active police officer, simply because he was given too much change by a cashier is outrageous. Moreover, it is certainly the sort of conduct which could foreseeably result in mental anguish and emotional distress.

Accordingly, there were genuine issues of material fact which precluded summary judgment as to this claim. The Trial Court erred in granting summary judgment and this Court should reverse and remand for trial.

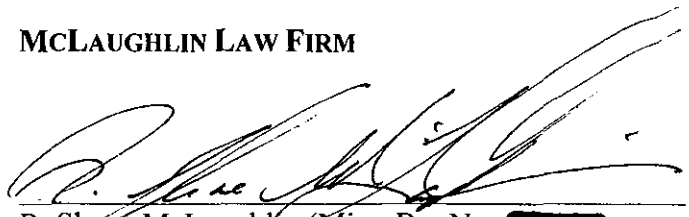
CONCLUSION

Michael Perkins presented clearly sufficient evidence to defeat Wal-Mart's and Wilson's Motions for Summary Judgment. Perkins presented evidence that Wal-Mart commenced the prosecution against him knowing, indeed admitting, that it did not have evidence of all the elements of the crime. Perkins likewise presented evidence that Wilson acted maliciously to conspire with Wal-Mart and to continue his pattern of interference with Perkins' career because of a personal vendetta.

Perkins was entitled to have his claims tried to a jury. Perkins requests this Court to reverse the Trial Court's grant of summary judgment and to remand this case for trial.

RESPECTFULLY SUBMITTED, this the 20th day of March, 2009.

MCLAUGHLIN LAW FIRM

By: 

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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Honorable Robert W. Elliott
Circuit Court Judge
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This the 20th day of March, 2009.

R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant 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 Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
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This, the 20th day of March, 2009.

R. Shane McLaughlin