MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2010-CA-01529

LINDA W. LOCHRIDGE — APPELLANT

VS.

PIONEER HEALTH SERVICES
OF MONROE COUNTY, INC. — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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FACTS

This is a case about how Pioneer Health Services of Monroe County, Inc. (hereinafter "Pioneer") turned a civil dispute over the ownership of personal property into a criminal case. Linda Lochridge's evidence has established that the items of personal property in question are all items which Lochridge herself purchased. (R: 115). According to Ollie Burroughs, Pioneer's employee, the things Lochridge took were her property; not Pioneer's property. (R: 1969, 1971, 1984).

Pioneer's chief witnesses, Susan Grimes and Steve Fontaine, disagree about whose idea it was to call the police to have Lochridge arrested. (R: 61, 79, 1946). Regardless of who made the decision to involve the police, Grimes left Lochridge a telephone message saying the police would be called if the items were not returned, (R: 21), thus establishing that Pioneer was using the criminal process to resolve a civil dispute over the property. Lochridge returned the items with the expectation that their return would end the possibility of her being charged with a crime. (R: 122-123). Nevertheless, two days after Lochridge returned the property, on May 9, 2007, Pioneer's agent, Susan Grimes, signed the "Facts and Circumstances," which formed the basis for the criminal affidavit by Investigator Quinnell Shumpert of the Aberdeen Police Department. (R: 66, 141-142, 166).

Pioneer never told the Aberdeen Police Department that Lochridge had paid for the property and had claimed ownership. Pioneer brought criminal charges despite Lochridge's telling Pioneer that "I've returned it [the property] even though it wasn't yours." (R: 63).

No authorities support the circuit court judge's decision to dismiss this case.

REPLY ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO PRESENT A JURY ISSUE OF PROBABLE CAUSE AND MALICE.

The cases cited do not support Pioneer's position. In *Perkins v. Wal-Mart Stores, Inc.*, 46 So.3d 839 (Miss. App. 2010), Wal-Mart prosecuted a customer for being involved in an "under-ringing scheme" with one of its cashiers. Wal-Mart's prosecution was based upon advice of police officers, that the evidence was sufficient to support such a charge. In the words of the Court: "Detective Wilson told Ferguson that there was enough evidence to prosecute Perkins. Ferguson [defendant's agent] relied upon Jackson's [the dishonest employee] statements, ... and the surveillance videotape to file his affidavit." *Perkins*, 46 So.3d at 846. *Perkins* is dissimilar to this case since no impartial officer advised that Lochridge be prosecuted. Instead, Pioneer withheld from the police the crucial fact that it knew Lochridge was claiming the property belonged to her. In the criminal discovery, Lochridge furnished receipts proving her ownership of the property, (R: 1227-76), and the district attorney first nolle prossed the suit, and then, when Lochridge complained about the nolle prosse, (R: 170-71), the district attorney dismissed the case. (R: 175).

Likewise, *Richard v. Supervalu, Inc.*, 974 So.2d 944 (Miss. App. 2008) does not help Pioneer. In *Richard*, a trucking company found its merchandise in plaintiff's truck. *Id.* at 949. A witness (Morgan) told police that he and another person had loaded the merchandise onto the plaintiff's truck. *Id.* The police chief, who took the incriminating statements, recommended the prosecution. *Richard*, 974 So.2d at 949. As with *Perkins*, the difference between *Richard* and the case at bar is that no police officer recommended or urged the prosecution of Lochridge.

George v. W.W.D. Automobiles, Inc., 937 So.2d 958 (Miss. App. 2006), involved a dispute over possession rights to an automobile. The seller had criminally prosecuted the buyer when the

buyer refused to return the vehicle which he could not get financed. The Mississippi Court of Appeals held that there was a good-faith dispute as to the entitlement to the car. *George* relied upon Miss. Code Ann. § 97-17-61 (rev. 2000), noting that that criminal larceny statute does not apply to **"anyone who takes such property believing, in good faith, that he has a right to it."** *George*, 937 So.2d at 963 (emphasis in original).

In this case, Lochridge bought and paid for the property. One who bought and paid for property is not subject to criminal prosecution for stealing because a criminal act requires a criminal intent. See *Lee v. State*, 146 So.2d 736, 738 (Miss. 1962); *Collins v. City of Hazlehurst,* 709 So.2d 408, 413 (Miss. 1998).

Strong v. Nicholson, 580 So.2d 1288, 1290-92 (Miss. 1991) held that a prosecuting party's admission that his intent in filing a criminal charge was to "get [his] stuff back" created an issue of fact as to whether there was malice in bringing the charge. The case at bar is similar since Pioneer told Lochridge that it would "get the police involved" if Lochridge did not return Pioneer's property. (R: 21). This is the same type of "improper purpose" that was held to create a jury issue on malice in *Strong*.

Pioneer is wrong to argue that proof of a purpose other than bringing an offender to justice, Appellee's brief, pp. 11-12, is the exclusive method of proving malice. While showing that the criminal process was used to resolve a civil dispute is one method of proving malice, *Harvill v. Tabor*, 128 So.2d 863, 865 (Miss. 1961), this is not the only method. Additionally, "[t]he inference of malice, may be drawn from the want of probable cause..." *Royal Oil Company, Inc. v. Wells*, 500 So.2d 439, 443 (Miss. 1986); *Hammack v. Czaja*, 769 So.2d 847, 854 (Miss. App. 2000); *Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d 709, 721 (Miss. 2001); *Junior Food Stores v. Rice*, 671 So.2d 67,

73 (Miss. 1996); *Van v. Grand Casinos of Mississippi, Inc.*, 724 So.2d 889, 893 (Miss. 1998).

According to *Owens v. Kroger Co.*, 430 So.2d 843 (Miss. 1983):

> In *Brown v. Watkins, supra,*[1] we held upon disputed facts that the issue of probable cause was for the jury. We also held that the existence of malice was a jury question. We stated:
>
> Unlike probable cause, the question of malice is to be determined by the jury unless only one conclusion may reasonably be drawn from the evidence. The defendant's improper purpose usually is proved by circumstantial evidence. And lack of probable cause for the initiation of the criminal proceedings is evidence of an improper purpose.
>
> 213 Miss. at 373, 56 So.2d at 891 (citation omitted).

Owens, 430 So.2d at 847-48; *accord, Harmon v. Regions Bank*, 961 So.2d 693, 699 (Miss. 2007) (malice does not require proof of ill-will but only of an intentional wrongful act, without justification or excuse, and is an issue for the jury); *Stephens v. Kemco Foods, Inc.*, 928 So.2d 226, 234 (Miss. App. 2006) (existence of malice was fact question for jury where plaintiff had claimed he inadvertently wrote check on closed account); *Moon v. Condere Corp.*, 690 So.2d 1191, 1196 (Miss. 1997) (summary judgment was improper where reasonable jury could conclude that Condere could not have "reasonably believed" all elements for bringing a civil case were present); *C & C Trucking Co. v. Smith*, 612 So.2d 1092, 1100 (Miss. 1992) (fact question was presented as to whether there were "reasonable grounds" for initiating suit against plaintiff); *Nassar v. Concordia Rod and Gun Club, Inc.*, 682 So.2d 1035, 1045 (Miss. 1996) (jury could infer lack of probable cause and malice from failure of the defendant to conduct an adequate investigation before charging plaintiff with a crime); *Benjamin v. Hooper Electronic Supply Co., Inc.*, 568 So.2d 1182, 1184 (Miss. 1990) (whether there was probable cause and malice was questions for the jury, where plaintiff had been

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[1] *Brown v. Watkins,* 56 So.2d 888 (1952).

prosecuted for receiving stolen property based upon nothing more than defendant's claim that plaintiff had stated that he paid a "low price" for the property); *Royal Oil Company, Inc. v. Wells*, 500 So.2d 439, 443 (Miss. 1986) (whether there was probable cause to criminally prosecute a cashier for embezzlement merely because the cashier had failed to ring up $1.53 sale presented a jury question).

Of course, "[m]alice ... is a mental state." *Stephens v. Kemco Foods, Inc.*, 928 So.2d 226, 234 (Miss. App. 2006), citing *Owens v. Kroger Co.*, 430 So.2d 843, 846 (Miss. 1983), and "the state of a man's mind is as much a fact as the state of his digestion." *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716-17 (1983).

Pioneer does not deny Lochridge paid for that gazebo, but says that since it was secured to the floor, it was a fixture, making it belong to Pioneer. Appellee's brief, pp. 14-15. However, *Check Cashers Exp., Inc. v. Crowell*, 950 So.2d 1035 (Miss. App. 2007), certainly does not hold that the mere fact that personal property is attached to a floor means that it is a fixture. Instead, *Check Cashers Exp., Inc.* listed several circumstances that must be considered to determine the question of whether there was an "intention to make it a temporary attachment or a permanent accession to the realty...." *Check Cashers Exp., Inc.*, 950 So.2d at 1040-41, citing *Weathersby v. Sleeper,* 42 Miss. 732, 741-42 (Miss. Err. App. 1869).

Of course, even if Pioneer were correct on this point of civil law, this would not justify a criminal prosecution.

Appellee's brief, pp. 5-6, also argues that Lochridge took a large amount of its business documents when she left the premises. Taking business documents is not the crime charged either in the affidavit (R: 166) or the indictment (R: 168-69). Furthermore, Lochridge explained in her affidavit, (R: 2072-73), that the business documents she took was what she believed to be completed

paperwork which she had done for "residents at no charge as a service to these residents;" further, that all of these business documents are contained on her computer, which she had specific permission to take. *Id.* Lochridge's affidavit states that she did not "intend to steal any paperwork, any employee records, or any other property from the Defendant." *Id.* This affidavit creates an issue of material fact as to whether Defendant had probable cause to prosecute Lochridge for theft of business records.

Pioneer claims that the fact that Lochridge was indicted by a grand jury establishes probable cause. Since no authorities are cited, this argument should be disregarded. *King v. State*, 857 So.2d 702, 725 (Miss. 2003); *Pate v. State*, 419 So.2d 1325, 1326 (Miss. 1982).

While Mississippi has not addressed this issue, persuasive authorities from other jurisdictions indicate a grand jury indictment is not conclusive of . See *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 504-06 (5th Cir. 1992) (issues of material fact as to probable cause even though a grand jury had issued an indictment); *Malley v. Briggs*, 475 U.S. 335 (1986) (judge's issuing a warrant based on his findings of probable cause does not exonerate an officer for arrest without probable cause); *Freides v. Sani-Mode Mfg. Co.*, 211 N.E.2d 286, 296 (Ill. 1965) (where an indictment is conclusive proof of probable cause, there would be an impossible burden of proof since there is no record of occurrences before a grand jury); *National Sec. Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983); *Lumpkin v. Cofield*, 536 So.2d 62 (Ala. 1988).

CONCLUSION

The circuit court's grant of summary judgment should be reversed, and the case should be remanded for trial on the merits.

RESPECTFULLY SUBMITTED, this the 2nd day of August, 2011.

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By: _____

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CERTIFICATE OF SERVICE

This will certify that undersigned counsel for Appellant has this day served a true and correct copy of the above and foregoing **Reply Brief of Appellant**, via First-Class U.S. Mail, postage-prepaid, to the following:

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THIS, the 29th day of August, 2011.

JIM WAIDE

CERTIFICATE OF FILING

This will certify that undersigned counsel for Appellant, pursuant to Miss. R. App. P. 25(a) and 32(m), has this day filed the **Brief of Appellant** by mailing the original and three (3) copies of said document, along with an electronically formatted copy thereof in Adobe Portable Document Format (PDF) on CD-ROM, via First-Class U.S. Mail, postage-prepaid, to the following:

Kathy Gillis, Clerk
Court of Appeals of the State of Mississippi
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THIS, the 2nd day of August, 2011.

Jim Waide

JIM WAIDE