2010-CA-01529 T

CERTIFICATE OF INTERESTED PARTIES

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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Linda W. Lochridge, Appellant;

2. Jim Waide, Attorney for Appellant;

3. Waide & Associates, P.A., Attorneys for Appellant;

4. Pioneer Health Services of Monroe County, Inc., Appellee;

5. J. Tucker Mitchell, Attorney for Appellee; and

6. Keely R. McNulty, Attorney for Appellee.

This the 4th day of May, 2011.

JIM WAIDE

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STATEMENT OF THE ISSUES

1. Whether the lower court erred in granting summary judgment in favor of Pioneer Health Services of Monroe County, Inc. when there were genuine issues of material fact.

STATEMENT OF THE CASE

On November 19, 2008, Linda W. Lochridge sued Pioneer Health Services of Monroe County, Inc. (hereinafter "Pioneer") to recover actual and punitive damages for malicious prosecution and abuse of process. (R. 13-17). The abuse of process claim was dismissed by the lower court. (R. 2084). On March 31, 2010, Pioneer filed a Motion for Summary Judgment as to Lochridge's claim for malicious prosecution. (R. 28-1738). On August 31, 2010, the lower court granted Pioneer's Motion for Summary Judgment. (R. 2089-2093). On September 17, 2010, the lower court entered its Final Judgment of Dismissal. (R. 2094-2095). On September 21, 2010, Lochridge timely filed her Notice of Appeal. (R. 2096-2097).

STATEMENT OF THE FACTS

Linda Lochridge was employed for over five (5) years as a registered nurse in the Garden Suites Assisted Living Facility, which is a part of Pioneer's hospital facility in Aberdeen, Mississippi. (R. 105, 54). In approximately 2005, Pioneer's administrator, Steve Fontaine, named Lochridge supervisor of the assisted living unit. (R. 1940-1941, 108). According to Susan Grimes, Director of Assisted Living for Pioneer, Lochridge had "exemplary work standards. . ." and was a "great employee." (R. 56-57). Lochridge cared about her patients, advocated for the patients and their families, and worked without pay when necessary. (R. 56-57). Lochridge even did housekeeping, sometimes vacuuming and mopping. (R. 80). The undisputed facts in the case demonstrate that Lochridge cared deeply about the facility's patients and families and would do "whatever needed doing" around the facility. (R. 1953, 1964, 1995, 2005, 77).

The person who was employed as director of the assisted living facility prior to Susan Grimes informed Lochridge "that there was no extra money for assisted living." (R. 120). Lochridge was told that Pioneer did not have money for some items which Lochridge thought the residents and

employees should have, and because the administration would not buy those items or reimburse her for them, she simply bought the items herself and brought them to the facility. (R. 120). Grimes, the nurses, and the residents all knew that Lochridge bought numerous items, some quite expensive, for the facility, staff, and residents. Lochridge's purchases included everything from snacks and meals for patients who were not satisfied with provided meals, to cleaning supplies, chairs, a fax machine, a laptop computer, a metal and cloth gazebo, an electric piano, a refrigerator, patio furniture, lawn figurines, decorations for parties and holidays, a barbeque grill, assorted furniture, and many other items and supplies. (R. 80, 2013-2014, 1964, 1968-1970, 1972-1973, 2002, 2005-2006, 1987, 1992, 2028). Cindy Beasley, who was employed at the facility as a licensed practical nurse, testified, "You know, if things was needed and, like, she might request administration or whatever, and then if it was denied and we needed it, she would usually purchase it." (R. 2013-2014). Beasley went on to say that there was "no way I can remember it all, but it was a constant." (R. 2013).

On May 4, 2007, Lochridge was informed that she was being "laid off" due to restructuring at the company.[1] (R. 109).

After she was terminated, Eddie Ridings and Donny Stacy escorted Lochridge back to the assisted living facility, and they helped Lochridge load some of her belongings in her car. (R. 57, 110). Lochridge left behind numerous personal possessions, including bulletin boards, a refrigerator, a gazebo, patio furniture, end tables, a table fan, an electric piano, yard figurines, arts and crafts, letter racks, holiday decorations, an ornamental table, a barbeque grill, a bookcase, furniture, clocks, books, and other things. (R. 110-111).

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[1] By the time of her termination, Lochridge had been supervisor of the assisted living unit for about two (2) years. (R. 108).

That evening, Lochridge went out to eat with several nurses employed at the assisted living facility. (R. 112). Because Lochridge had left items she owned at the facility, some of the employees who were at dinner with her offered to go with her to retrieve the rest of her belongings. (R. 2024, 113, 2029). Lochridge called Grimes' cell phone and left a message that she was picking up the rest of her things. (R. 124). Lochridge had never been told that she was not allowed back in the building. (R. 74, 114). Lochridge and four or five other employees went to the assisted living facility about 9:00 p.m. (R. 110, 1967-1968).

The facility is locked all of the time, although family members and staff have keys. Lochridge's only key was to the main entrance, and she had turned in that key, along with her key to the nurses' office, at the time she was terminated. (R. 111). Ollie Burroughs and Pauline Rowe were the nurses on duty that night. (R. 1967, 1997).

Lochridge went to the back patio door and knocked. Rowe answered the knock and opened the door for Lochridge. (R. 1988-1989, 1982). After Rowe let Lochridge and her friends into the building, Lochridge informed Rowe and Burroughs that they had come to retrieve the rest of Lochridge's things. (R. 111, 1968, 1990). The nursing office inside the facility where some of Ms. Lochridge's belongings were stored was sometimes locked. Another nurse, Cindy Beasley, loaned Lochridge her key to the nursing office so that Lochridge could get her belongings from that office. (R. 120, 2018-2019, 2025).

All of the items Lochridge took were paid for by her. None were paid for by any donation she had solicited, and none of the items were anything for which she had been reimbursed by Pioneer. (R. 115).

One of the items Lochridge took from the facility was her laptop computer. Even Grimes admits that the laptop belonged to Lochridge. (R. 75). Lochridge brought her laptop from home,

and the nursing staff used programs and forms created by Lochridge's son. (R. 2015, 2020-2021, 1981).

The gazebo, which had been purchased by Lochridge, but which the hospital would not erect until shortly before her termination, was placed in Diane Staten's truck. (R. 72, 113, 116, 2030-2031). Lochridge's vehicle was loaded, and some of the other employees were given items to take, as well. (R. 116-117).

Lochridge took many of the items because she thought that Pioneer might sell them or put them in other facilities. (R. 117). Pioneer had already talked about selling some of the furniture Lochridge had bought for resident use. (R. 118).

Grimes admitted she received a voice mail from Lochridge at 11:30 p.m. in which Lochridge stated, "I just wanted to let you know I went back and got my things." (R. 61). Grimes claims that when she got the message, she immediately called Garden Suites and talked to Ollie Burroughs. Grimes claimed that Burroughs told her that Lochridge "came and got the stuff." Grimes recalls that she asked which items Lochridge removed, and also recalls that Burroughs mentioned some of the specific items which Lochridge took, including the piano, gazebo, and patio furniture. According to Grimes, Burroughs said that Lochridge took "some of everything." (R. 61).

Burroughs' version of the conversation, however, contradicts Grimes' version and raises issues of fact about a malicious intent by Grimes. Burroughs testified that Grimes called her and asked if Lochridge was still at the facility. Grimes told Burroughs that Lochridge had left a message on her answering machine that she was coming to get her stuff. Grimes asked Burroughs if Lochridge collected her things, and Burroughs responded, "Yea." (R. 1973-1974); however, there was no mention of any specific items. (R. 1982). Approximately thirty minutes later, Grimes called

Burroughs back and instructed her to post a note that staff members were to call 911 if Lochridge came to the facility. (R. 1974, 1976).

Grimes claims that Fontaine instructed her to call Lochridge and demand the items be returned and to "call the police" if they were not returned. (R. 61). Fontaine, on the other hand, swore that Grimes told him that Lochridge had gone to the hospital and taken hospital property. (R. 1944). Fontaine denied telling Grimes to call the police. (R. 1945).

Grimes testified that after talking to Fontaine, she called Lochridge and left a message for Lochridge to return whatever she had taken. (R. 61). Grimes went on to say that she did not initiate the plan to call the police, but had been "instructed" to call the police if the items were not returned. (R. 61). According to Grimes, she received a second message from Lochridge about thirty minutes later in which Lochridge stated, "Oh, yeah, by the way, and I took my fax machine." (R. 62). Grimes denies that Lochridge stated that she would return any items, and denies that Lochridge stated that the items she took were hers. (R. 62).

Grimes claims that she then called Fontaine back and told him about leaving a message for Lochridge. She testified that Fontaine told her to call the Monroe County Sheriff's Department because the facility was county-owned and to call the Aberdeen Police Department "to make them aware of the incident." (R. 62). According to Grimes, it was Fontaine's decision to involve the police. "I took my directions from Mr. Fontaine." (R. 79). Fontaine, on the other hand, denies involving law enforcement at all, and says there was only one call from Grimes. (R. 1946).

Grimes noted that she called the Aberdeen Police Department around midnight and talked to Mike Griffin. She admitted she told Officer Griffin that Lochridge went into the facility without permission and removed several items. She claims that she told him she did not know what items were taken, but she did name some of the items that Burroughs had allegedly identified. (R. 62-63).

Officer Griffin's testimony, however, was that even in the first phone call on the night of May 4, 2007, Grimes said that Lochridge had taken hospital property. (R. 53, 142).

After talking to the Aberdeen Police Department, Grimes stated that she called Lochridge again and told her that she still wanted the items returned, but that she had already called the Aberdeen Police Department. (R. 63). According to Grimes, she then called Fontaine back and reported to him what she had done. (R. 63).

Lochridge testified that when she received the first call from Grimes, she had already returned home and partially unloaded her vehicle. (R. 123-124). The message Grimes left on Lochridge's telephone was that if Lochridge did not return everything, she would have "papers made on me." (R. 121). Lochridge decided to return the items still in her vehicle because she had been threatened with "filing papers, which meant you're going to be arrested." She decided to take back what she could to try to get the matter settled. (R. 122-123). Sometime in the early morning, Lochridge called the nurse's station at the facility, told them that she would leave some items outside, and asked the nurses to bring the items indoors. (R. 122).

Grimes claimed that she later called the facility and Diane Randall answered the telephone. Grimes asked if anything had been returned and, if so, where it was. According to Grimes, Randall told her, "There's stuff thrown all over the parking lot." According to Grimes, Randall "insinuated" that papers and office supplies were strewn everywhere on the lot. (R. 64). Grimes testified that she told Randall to gather it all up and put it in the building. (R. 64).

Diane Randall's testimony about the conversation is quite different. According to Randall, there was nothing unusual about the parking lot when she arrived. (R. 2000). Grimes called Randall on the phone and told Randall that Lochridge was going to bring some items back to the facility and that she wanted Randall to go outside, pick up the items, tag them, and bring them inside. (R. 2000-

2001). When Randall went outside, Lochridge had arrived and was removing items from her vehicle and loading them on a cart. There was no mess of any kind. (R. 2001). Randall helped Lochridge finish unloading and moved the items into the facility. (R. 2001-2002).

After returning the items, Lochridge called Grimes, again getting her answering machine, and informed her that she had returned some of the items, even though they belonged to her. (R. 124). Grimes claims that the message she received at 7:00 a.m. on Saturday, May 5, 2007, from Lochridge stated, "I've returned all y'all's stuff even though it wasn't all yours." (R. 63).

On the morning of Monday, May 7, 2007, Grimes called Mike Griffin at the Aberdeen Police Department and asked what steps she needed to take next. Griffin told her to come to the station, and she did. (R. 64). Griffin took her statement and asked her for a list of the items allegedly taken. Grimes told him that she would need to go to the facility, prepare a list, and return when she was done. (R. 64).

According to Griffin, as a patrolman, his standard procedure was to take an initial report from the complaining party. He would then turn the case over to the investigator and be done with it. (R. 2055-2056).

A statement taken from Grimes was produced by the Aberdeen Police Department. Although Grimes does not agree with the exact wording, she states that Exhibit 6 to her deposition, "Statement as given by Susan Grimes," appears to be a typed version of her original oral statement. (R. 75, 98). "[B]ut, yes, it is – it – it's basically the same statement, yes." (R. 75). In that statement, Grimes admits that Lochridge informed her that she had only removed her "personal belongings." Grimes states that she called the hospital to ask what had been taken by Lochridge, and "I was told by the staff that most of the things that were taken by Ms. Lochridge did not belong to her." (R. 98). As noted above, Burroughs denied ever discussing what specifically was taken and, rather, told Grimes

that Lochridge had taken only her personal items. In fact, in her deposition, Burroughs was adamant on the subject. Burroughs stated, "All of the things that I know she took out was things that she brought there." (R. 1969). "Everything that I saw, that I saw, was things that I think Linda brought in herself." (R. 1972). "I don't believe none of the things that she took out of there that night was Pioneer's." (R. 1984).

The statement from the Aberdeen Police Department goes on to say that Lochridge had called Grimes at 7:00 a.m. the following morning and stated to Grimes that she "had brought everything that did not belong to her back. My staff went out and evaluated the returned items finding them to be damaged and not completely intact." (R. 98). This certainly conflicts with Grimes' deposition testimony, that Lochridge supposedly told her that she had brought back all "y'all's" stuff, even stuff that did not belong to the hospital. The statement that Grimes' staff supposedly evaluated the items, finding them to be damaged and not intact, is also disputed by Diane Randall, the person who actually helped bring the items inside the facility. Further, this statement does not mention the new allegation, that items and papers were supposedly strewn all over the parking lot.

Grimes' statement is capped with the sentence "It is my belief that the property was purposely taken and maliciously destroyed upon its return." (R. 98). That statement alone could lead a reasonable jury to find that Susan Grimes lied to the police for malicious reasons to convince them to prosecute Lochridge.

Exhibit 1 to Griffin's deposition is the "Offense/Incident Report," which Griffin completed after speaking with Grimes. (R. 85-89). Griffin would have accurately reported what Grimes told him in the report. In that report, Griffin records that Grimes called the police station and advised him that Lochridge had taken hospital property. *Id.*

Exhibit 2 to Grimes' deposition is a statement of "Facts and Circumstances" which was handwritten by Grimes and given to Investigator Quinnell Shumpert of the Aberdeen Police Department. (R. 66, 141-142). In that statement, Grimes admits that Lochridge's first communication was that she had removed "her" property. Grimes then stated that her first communication with Lochridge was when she "placed a courtesy call to subject to inform her of pending charges." (R. 98). This statement is disputed by Grimes' own deposition testimony. This statement also contains this sentence: "I instructed staff [Diane Randall] to pick up property. Approx (2) 100 gal. bags of property was thrown into yard." (R. 98). Diane Randall disputes that accusation. Again, these inconsistencies could lead a reasonable jury to find that Grimes was lying to the police and manufacturing evidence.

On Wednesday, May 9, 2007, Grimes returned to the police station with a list of items which she claimed Lochridge had stolen and made her written report. (R. 2057, 64, 67, 91). Grimes claims to have compiled the list herself by just looking around. (R. 67). The list admittedly includes some items that were returned. (R. 67). According to Grimes, she was not providing a list of items that belonged to Pioneer Hospital that were taken. "I provided them a list, as they indicated for me to do, of anything that was taken from the property. An abbreviated – they asked me to provide an abbreviated list of items that were visibly taken from the property." (R. 67). The police officers involved dispute Grimes' version of events. Officer Griffin said that he told Grimes to make an inventory. He would have asked Grimes to list everything that was taken and would never have told her to make an "abbreviated" list. (R. 2053, 2054, 2055). Grimes was asked to make a list of only items that belonged to the hospital and were taken by Lochridge. (R. 143).

Fontaine practically admitted a lack of investigation in determining whether the items belonged to the hospital or if they, in fact, belonged to Lochridge. (R. 1947). The only

"investigation" of which Fontaine was aware was that Grimes made a list of items taken. (R. 1946). Grimes testified that she did not designate on the list which items belonged to Lochridge and which belonged to the hospital. (R. 71). In fact, Grimes testified that she had no knowledge of whether anything on the list she created was actually paid for by the hospital. (R. 77). Grimes admitted that she did not know which of the items belonged to Lochridge. (R. 71). When asked what steps she had taken to ascertain if any of these items actually belonged to the hospital or not, Grimes avoided the question by saying, "I knew some of the items were purchased with donated funds. There was no way it was all her property." (R. 67).

Grimes admitted that Lochridge had told her that she bought the gazebo and that Lochridge had come to her a number of times trying to get maintenance to erect it on the property. (R. 72). Grimes also claims, however, that the gazebo, patio set, and piano were bought with donated money. (R. 71). There was no evidence, however, that the items listed were on the donated property list. There was a file in which Lochridge kept track items that had been donated, as well as a file with copies of reimbursement forms and receipts for items which Lochridge purchased and for which she was reimbursed. Lochridge did not take those files. (R. 119). Grimes claims that the files are missing. (R. 71). However, Grimes also was unable to recall whether or not she had removed from Lochridge's office a file containing copies of reimbursement forms and receipts. (R. 74-75).

As to the fax machine, Grimes admits that Lochridge told her that she bought the fax machine when the previous director would not buy one. (R. 71). In fact, Lochridge did purchase the fax on her own. (R. 2011). One of the many memos by which Lochridge kept Grimes informed of what was going on at the facility specifically mentions that the old fax machine could not be fixed, that it was replaced with an old one that did not work and that, because the facility needed one, Lochridge eventually bought one herself, which was the one in use at the time of Lochridge's termination. (R.

77, 100-101). Grimes never admitted to the police or to Fontaine that she knew at least one of the items of property she identified as being stolen by Lochridge was actually owed by Lochridge. (R. 1947).

Lochridge did not take a policy and procedure manual from the office. (R. 117, 123). She did take some medical books that belonged to her. She did not take a medical dictionary. (R. 123). She did take her rolodex and fax machine. She did not take any patient medication. (R. 123).

Taken in the light most favorable to the non-movant, everyone involved knew that all of the items Lochridge took belonged to her. None of the employees, even Burroughs and Rowe, who had worked the night the items were taken, were ever asked any questions about what had been taken, or whether or not those items had been paid for by Lochridge. Neither Grimes nor anyone else from the hospital, or even the police, ever talked to any of the employees of the facility to discover the truth of the matter. (R. 2009, 1987-1988, 1991, 1972, 1977-1978, 2002-2003, 2032-2033, 1954-1956). Nevertheless, Grimes informed Major Shumpert that Lochridge had come into the facility in the middle of the night and stolen hospital property in excess of $3,000.00. (R. 68). According to Grimes, the hospital had documentation to support that statement. (R. 68). "We have purchase requisitions over the course of the Garden Suites opening. We have checks and receipts, reimbursements for any – any receipts that Ms. Lochridge would have turned in. There was a paper trail for purchases that are authorized." (R. 69). If Pioneer had actually reimbursed Lochridge for any of these items, the hospital would have a well-documented paper trail, including the original receipts. (R. 78). At no point during the almost ten (10) months of ongoing criminal prosecution or during the pendency of this civil case, however, has Pioneer ever produced any such documentation related to any of the items which Grimes claimed that Lochridge took from Pioneer.

Linda Lochridge was charged with burglary under Miss. Code Ann. § 97-17-33. The general affidavit, signed by Officer Shumpert, states that Linda Lochridge:

> . . .did willfully, unlawfully and feloniously and burglariously break and enter the Garden Suits [sic] of Pioneer Community Hospital where good [sic] were being kept for use with intent to steal therin [sic] at the Pioneer Community Hospital. To wit: take, steal and carry away goods valued in excess of $3,000.00.

(R. 166).

This general affidavit was based upon the information from Grimes, and Shumpert discussed with Grimes what the charge would be. (R. 147-148, 162-163). Grimes apparently told Shumpert no one knew how Lochridge got into the building. According to Grimes, she asked the staff members who were working that night, Burroughs and Rowe, how Lochridge got inside the building, and neither of them knew. (R. 78). According to Rowe, who actually let Lochridge and her friends into the building, Grimes never asked her how Lochridge gained entrance to the building. (R. 1988-1989).

When the case against Lochridge first went to municipal court in July 2007 to determine whether it would be bound over, Shumpert asked Grimes what documentation Pioneer had to prove that it owned the items Lochridge took. Grimes told him that she would make that documentation available to Shumpert. (R. 69). Grimes claims that Shumpert then said that he would let her know when they reached the point of needing that documentation. (R. 69). Grimes denies that Shumpert ever attempted to reach her to obtain the documentation in the meantime. (R. 69). Shumpert, on the other hand, states that Grimes told him she would obtain the documentation from the corporate office and give it to him, but he never received it. (R. 145). Shumpert attempted to contact Grimes. (R. 156). He would leave messages in which he would identify himself, say that the grand jury was coming up, and inform her that he needed the documentation that she had promised. (R. 156).

Although he would leave these messages, Shumpert says Grimes never returned his calls. (R. 146-147). Shumpert even tried to reach Grimes on one occasion when Lochridge was present in his office, but with no success. (R. 156).

Officer Shumpert states that he told Grimes that Lochridge had receipts for the items, and suggested that maybe the items did belong to Lochridge. (R. 145). According to Shumpert, Grimes replied that Lochridge may have bought several items, but was reimbursed by the hospital. (R. 145). Grimes' comment was simply another baseless statement about Lochridge. As noted above, Grimes did not know whether Lochridge had been reimbursed by Pioneer for such items and actually had knowledge that Lochridge had not been reimbursed for at least some of the items. Fontaine testified that he had never seen any such documentation of ownership of the items by the hospital. (R. 1949).

Two different grand juries came and went without presentation of this case because of the hospital's failure to provide the documentation, and it was not presented until the third grand jury after the incident. (R. 147). The information given by Shumpert to the grand jury in support of the charge came from Grimes. (R. 150, 167).

In January 2008, a grand jury in Monroe County, Mississippi, indicted Lochridge. (R. 168-169). The indictment stated as follows:

> That
>
> LINDA W. LOCHRIDGE
>
> in said County and State on or about the 4th day of May, A.D., 2007, did wilfully, feloniously and burglariously break and enter a certain building owned and occupied by Pioneer Community Hospital with the felonious and burglarious intent to take, steal and carry away the goods, chattels and personal property of the said Pioneer Community Hospital, in said building being kept for use, sale or storage, and did then and there wilfully, feloniously and burglariously take, steal and carry away lawn furniture, patient files and a fax machine, of a value of $500.00 or more, good and lawful money of the United States, the

> personal property of Pioneer Community Hospital, in said building being kept for use, sale or storage, in violation of Mississippi Code, Annotated, Section 97-17-23;
>
> contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Mississippi.

The only documentation ever produced by the hospital to substantiate Grimes' charge is a three-page "vendor detail report," which was printed at the hospital. (R. 70, 92-94). The report itself is vague, but the items listed appear to have nothing to do with the items which Pioneer claims Lochridge stole. None of the requisition forms, receipts, reimbursement documents, or any other document related to any item which Lochridge took (or that Pioneer claims Lochridge took) have ever been produced.

According to Grimes, after her initial conversation with Shumpert in which Shumpert allegedly told her to not worry about the documentation, the very next contact she had was from Assistant District Attorney Larry Baker, who, on the eve of the Circuit Court trial, demanded the documentation within forty-eight hours. (R. 69).

According to Grimes, shortly before trial, ADA Baker told her that, "My options were, at that time, to show up for the jury trial to determine whether there was anyway to dismiss the charges or to retire to the file." (R. 69). According to Grimes, Baker told her that if the case were retired to the file, Pioneer would have additional time and could prosecute the case at any time over the next ten years. (R. 69). Grimes told Baker that she had to talk "to the people that have the authority to do that." (R. 69). Grimes stated that she called Fontaine, the corporate human resources director, and the corporate attorney. (R. 69). Grimes claims Fontaine made the decision that he would retire the case to the file. (R. 69). According to Grimes, this decision was made to allow Pioneer more time to pursue criminal charges. (R. 69).

Fontaine denies Grimes' testimony that he made the recommendation to write the letter declining to prosecute. (R. 1950). Fontaine stated that the letter was written because Grimes told him that she had consulted with the ADA and was told to write the letter with that phrasing, drop the case, or go to trial immediately. (R. 1948-1949). Fontaine did not recall why Grimes recommended writing the letter to decline to prosecute. (R. 1949). Although Fontaine signed the letter, he did not draft it. Grimes was responsible for the wording of the letter. (R. 1948, 1951).

The letter, dated February 27, 2008, signed by Steve Fontaine as Administrator of the hospital, and addressed to the District Attorney's office in Tupelo, Mississippi, states: "To Whom It May Concern: We do not wish to pursue criminal charges against Linda Lochridge at this time." (R. 1951). On March 4, 2008, counsel for Lochridge filed a Motion to Dismiss with Prejudice or, Alternatively, Set Case for Trial. (R. 172-174). That Motion stated as follows:

> I.
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> On or about February 29, 2008, Plaintiff, State of Mississippi, filed a Motion to Retire Cause to the Files, but did not serve a copy on defense counsel.
>
> II.
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> On the same date, February 29, 2008, the Court entered an Order to Retire Cause to the Files.
>
> III.
>
> An Order to retire the case to the files is not a final dismissal of the charges pending against Defendant.
>
> IV.
>
> The charges against Defendant are baseless and Defendant wishes to pursue her civil remedy against those persons responsible for her wrongful indictment. She cannot pursue this civil remedy with a mere Order retiring the case to the files.

V.

When a suit for malicious prosecution is based on a criminal proceeding, the criminal proceeding must terminate in favor of the Defendant before a Defendant has a cause of action for malicious prosecution. *Pugh v. Easterling*, 367 So. 2d 935, 937 (Miss. 1979). Retiring a case to the files is not a termination in favor of the Defendant. No claim for malicious prosecution can be based upon a mere retirement of a case to the files. *See, Childers v. Beaver Dam Plantation, Inc.*, 360 F.Supp. 331, 334 (N.D. Miss. 1973). Under Mississippi law, an Order retiring a criminal case to the files merely suspends the prosecution; the case is subject to recall and prosecution at any time thereafter at discretion of the Court.

VI.

Additionally, an Order retiring the case to the files would indicate that the case could still possibly be brought back up and tried at a later date. *See Rush v. State*, 182 So. 2d 214, 216 (Miss. 1966). ("The passing of an indictment to the files is not an acquittal or a nolle prosequi of the indictment. The district attorney may, at any future term of the Court, move to withdraw the indictment from the files, and the Court is at liberty to sustain the same. When the motion is sustained the indictment again becomes a part of the active cases subject to trial").

VII.

Defendant is prejudiced by an Order retiring the case to the files and respectfully request that this case be dismissed with prejudice. If Plaintiff is not willing to dismiss the case with prejudice, then the case should be tried in the first place setting on June 19, 2008.

On September 11, 2008, an Order Dismissing the cause was entered by the circuit court. (R. 175).

STANDARD OF REVIEW

In deciding a motion for summary judgment, the trial court must make a finding that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Miss. R. Civ. P. 56; *Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 864 (Miss. 1995). In determining

whether genuine issues of material fact exist, the trial court must review the evidence in a means most favorable to a non-movant. *Westbrook v. City of Jackson*, 665 So. 2d 833, 836 (Miss. 1995). The burden of showing that no genuine issue of material fact exists lies with the moving party and with the benefit of every reasonable doubt given to the party against whom the summary judgment is sought. *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990); *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198-99 (Miss. 1988).

> Issues of material fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says to the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of any doubt.

Harris v. Mississippi Valley State Univ., 873 So. 2d 970, 979 (Miss. 2004) (citing *Heigle v. Heigle*, 771 So. 2d 341, 345 (Miss. 2000).

Consequently, summary judgment should only be granted when it is shown, beyond a reasonable doubt, that the non-movant would be unable to prove any facts to support his claim. *Downs v. Choo*, 656 So. 2d 84, 85-86 (Miss. 1995).

This Court reviews *de novo* the action of a trial court in sustaining motions for summary judgment, without giving any deference to the action of the trial court. *Doe v. Stegall*, 757 So. 2d 201, 204 (Miss. 2000); *Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So. 2d 1244, 1246 (Miss. 2002); *McArthur v. Ingalls Shipbuilding Inc.*, 879 So. 2d 500, 502 (Miss. App. 2004).

SUMMARY OF THE ARGUMENT

The record in this case is filled with factual disputes. There is much evidence that Susan Grimes, Director of Assisted Living for Pioneer, maliciously made several false statements to the police about Linda Lochridge and was pursuing Lochridge's prosecution, knowing the items at issue

belonged to Lochridge. Those statements resulted in Lochridge's being indicted. Moreover, there is additional proof that Grimes had no probable cause for charging Lochridge with burglary. Multiple witnesses testified that Lochridge did not "break and enter" Pioneer's facility. In light of the differing versions of the witnesses, there are numerous issues of material fact in question that would allow a reasonable jury to find in favor of Lochridge. Thus, the lower court's grant of summary judgment in favor of Pioneer was improper and should be reversed.

ARGUMENT

1. There Are Genuine Issues of Material Fact Regarding Linda Lochridge's Claim for Malicious Prosecution. Thus, the Lower Court Should Not Have Dismissed the Claim.

The elements of a claim for malicious prosecution are: (1) the institution or continuation of original judicial proceedings, either criminal or civil; (2) by, or at the insistence of the defendant; (3) determination of such proceeding in plaintiff's favor; (4) malice in instituting the proceeding; (5) lack of probable cause for the proceeding; and (6) damages as a result of the action or prosecution complained of. *Bankston v. Pass Road Tire Center, Inc.*, 611 So. 2d 998, 1004 (Miss. 1992).

Finding that Lochridge met her burden as to the other elements, the lower court focused its ruling on (1) malice and (2) lack of probable cause. (R. 2089-2093).

> In an effort to define malice, this Court has said that the term "'malice' in the law of malicious prosecution is used in an artificial and legal sense and [is] applied to prosecution[s] instituted primarily for a purpose other than that of bringing an offender to justice." *Benjamin*, 568 So. 2d at 1191; *Royal Oil Co.*, 500 So. 2d at 444; *Owens*, 430 So. 2d at 847. Malice "refers to the defendant's objective, not his attitude." *Strong*, 580 So. 2d at 1293. Malice can be inferred from the fact that a defendant may have acted with reckless disregard for a plaintiff's rights.

Bankston, 611 So. 2d at 1006.

Demonstrating malice necessarily requires an examination of the motivation and intent of the person bringing charges. Questions of motivation and intent are factual questions for the jury. *Kralman v. Illinois Dept. of Veterans' Affairs*, 23 F.3d 150 (7th Cir. 1994); *Batey v. Stone*, 24 F.3d 1330 (11th Cir. 1994). As put in *Thornbrough v. Columbus and Greenville Ry. Co.*, 760 F.2d 633, 641 (5th Cir. 1985): "Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder." Accord, *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989); *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987); *Grisby v. Reynolds Metals Co.*, 821 F.2d 590 (11th Cir. 1987). "Malice may be and usually is shown by circumstantial evidence." *Funderburk v. Johnson*, 935 So. 2d 1084, 1097 (Miss. App. 2006).

In determining whether there is evidence of such "malice," all inferences must be drawn in favor the non-moving party. *Matagorda County v. Russell Law*, 19 F.3d 215, 217 (5th Cir. 1994). Where the facts are in dispute, whether there is a lack of probable cause, and therefore malice, is an issue for the jury. *Moon v. Condere Corp.*, 690 So. 2d 1191, 1195 (Miss.1997). "We have emphasized that since the question of malice is a question of fact, it is to be determined by the jury unless only one conclusion may be reasonably drawn from the evidence." *C&C Trucking Co. v. Smith*, 612 So. 2d 1092, 1100 (Miss. 1992).

Under Mississippi law, malice may be inferred from the lack of probable cause. *Brown v. Watkins*, 56 So. 2d 888, 891 (Miss. 1952); *Royal Oil Co., Inc. v. Wells*, 500 So. 2d 439, 444 (Miss. 1986). 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. *Alpha Gulf Coast, Inc. v. Jackson*, 801 So. 2d 709,

722 (Miss. 2001). 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. 2d 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 Elec. Supply Co.*, 568 So. 2d 1182, 1191 (Miss. 1990).

Whatever the motives of Susan Grimes and Pioneer were, the focus was not that of bringing an offender to "justice." A reasonable jury could determine that Grimes lied to the police and manufactured evidence so that Lochridge was charged with burglary under Miss. Code Ann. § 97-17-33, based upon Grimes' claim that she interviewed everyone on duty that night, and no one knew how Lochridge got into the building, which is disputed by multiple witnesses.

There was no absolutely no evidence for a charge of burglary. There was never any "breaking and entering," and there was no rational reason to believe there might have been. According to Lochridge's evidence, Pioneer, and especially its agent, Grimes, knew the property taken belonged to Lochridge. Grimes admitted that she has no reason to believe that Lochridge would steal or do anything to harm patients. (R. 79). A reasonable jury could have found that Grimes and Pioneer acted with malice.

The record makes it clear that prosecutors believed that they had no basis for the criminal charges against Linda Lochridge. The Assistant District Attorney was demanding some "documentation" for the charge forty-eight (48) hours before the case was to proceed to trial. With the trial approaching, the Assistant District Attorney told Lochridge that her options were to "dismiss or retire to the files." The prosecutor then retired the case to the files. When confronted with Lochridge's written demand for a trial so that her innocence could be firmly established, the prosecutor then agreed to the Order of Dismissal. (R. 69, 1948-1951). The District Attorney's refusal to proceed with the case and demands for "documentation" to support the charge when the case was about to go to trial, demonstrates his belief there was no basis for the charge.

CONCLUSION

This case contains issues of material fact as to whether Pioneer knowingly, or with reckless indifference, pursued a baseless criminal charge. The summary judgment should be reversed.

RESPECTFULLY SUBMITTED, this the 4th day of May, 2011.

LINDA W. LOCHRIDGE, Appellant

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 **Brief of Appellant**, via First-Class U.S. Mail, postage-prepaid, to the following:

Honorable Jim S. Pounds
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THIS, the 4th day of May, 2011.

JIM WADE

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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Jackson, MS 39205-0249

THIS, the 4th day of May, 2011.

JIM WAIDE