

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

CLYDE L. BENNETT)	
)	
Plaintiff,)	
)	CASE NO. 3:08CV498
v.)	
)	
R&L CARRIERS, INC. et al.)	
)	
Defendants.)	
)	

PLAINTIFF’S RESPONSE
TO
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

Plaintiff, Clyde L. Bennett, by counsel, respectfully submits this Response to Defendants’ Motion for Summary Judgment filed on September 23, 2009.

I. INTRODUCTION AND CERTAIN FACTS

At the time of the events in issue, Plaintiff was a 50 year old man with no prior criminal record. Complaint, par. 1; Bennett Affidavit, (3.16.09) PX-8. Bennett, a night shift supervisor, was charged with one count of felony embezzlement in connection with the theft of three HP computer towers from the R&L Carriers Terminal in Colonial Height, Virginia, (Terminal or Facility) on March 17, 2006. The charge was *nolle prossed* on May 2, 2007 after Bennett’s accuser and alleged co-conspirator, David Lowrey, failed to appear for trial.

The R&L Carriers organization of which the entity Defendants are a part is a large, sophisticated organization. R&L Website, PX-1.

The three persons who purportedly implicated Plaintiff, Lowery, Spangler and

Mitchell, have all fled. Bennett has steadfastly maintained his innocence and participated in the judicial process.

Investigator McGuiness' April 17, 2006 Case Investigation Report, DX-8, (Investigation Report, Report or IR) states that Lowrey lied to him, that Spangler lied to him and that Mitchell lied to him, i.e.: the only persons who allegedly implicated Bennett were believed by McGinnis to be liars. IR. 6-7. Additionally, Lowrey had confessed to purchasing stolen property at the time he allegedly implicated Bennett, and McGinnis believed that Spangler and Mitchell had stolen 13 laptop computers. IR 7, 11.

Plainly, there is a dispute as to the material fact of whether a reasonable person would consider the alleged informants to be reliable witnesses. A reasonable jury could, and probably would, conclude that the alleged informants were not reliable witnesses.

At his deposition, McGinnis stated that his Investigative Report was accurate except for the dates of the investigation which are substantially wrong in the report. McGinnis Dep. 57-58, PX-11.

McGinnis' Investigative Report states Spangler told him that Spangler and Mitchell saw Bennett take the computers out the front door, "He [Bennett] and David Lowrey were seen by Spangler and Mitchell...David Lowrey went out to the guard building and distracted the guard on duty while Clyde Bennett took three of the computers out the front door in the dark". IR 6. McGinnis' Investigative Report states that later, after Bennett was arrested, McGinnis met Mitchell at the Pilot Station and Mitchell "basically stated exactly what Conan Spangler had informed me of". IR. 9. Thus, according to Mitchell, Spangler and he saw the theft take place.

Directly contradicting McGinnis' Investigative Report as to what Spangler and

Mitchell said is an unsigned handwritten statement by Spangler. That statement does not state that Spangler and Mitchell saw Bennett take the computers, but merely that Lowrey told Spangler that Bennett and Lowery conducted the theft together. “David Lowrey has told me that he goes to the guard shack and distracts the guard while Clyde takes stuff out the front door.” Spangler Handwritten Statement, PX-4.

Furthermore, Spangler was not even at work the night of the alleged incident that McGinnis states Spangler said he witnessed. The Company’s Weekly hours Report shows Conan Spangler worked no hours on March 17, 2006 the night the theft occurred. PX-3., and Bennett’s affidavit also states Spangler was not at work that night; and Bennett’s affidavit (4.3.09) states Spangler was not at work that night. PX-9. Thus, there is a dispute as to the material facts of whether Spangler was at work the night of the incident, what Spangler and Mitchell said to McGinnis and whether McGinnis fabricated his report in material aspects.

Defendants produced McGinnis’ Investigative Report to Plaintiff a few days before the settlement conference held in late October, 2008 stating that it was the entire investigative file. Beginning shortly thereafter, Plaintiff, by counsel, repeatedly told Defendants that there had to be some witness statements, Defendants repeatedly said there were none. At 4:13 p.m. on March 13, 2009, the day Plaintiff’s response to Defendants’ motion for summary judgment was due, Defendants produced the Spangler statement claiming it had previously been provided.

Defendants refused to produce the patently relevant records of who worked the night of the alleged theft, and produced them only in response to a motion to compel, and did not actually producer them until the depositions on August 24 or 25, 2009.

At deposition, McGinnis admitted that he threw away his notes of the investigation. McGinnis Dep. 37.

McGinnis did not act as one who actually believed Bennett had taken the computers would have. When he recovered one stolen computer from Lowrey's home, he made no attempt to recover the other two from Bennett either by way of request as he had done with Lowrey or by requesting the police to issue a search warrant. Why would someone not pursue recovery of thousands of dollars worth of valuable company property? The only reasonable explanation for this bizarre behavior is that McGinnis believed that Bennett was innocent and knew that trying to recover the computers from Bennett would be a waste of time and effort.

Instead of trying to recover valuable company property, McGinnis rushed to have the police called and to have Bennett arrested, and immediately afterward, Bullard, Finley and McGinnis held a dock meeting to announce the arrest. IR 8.

Further evidencing McGinnis' belief in Bennett's innocence, McGinnis did not seek to have fingerprints taken of the computer recovered from Lowrey, which supposedly had been taken by Bennett and sold to Lowrey (IR 7-8) nor did McGinnis afford Bennett the opportunity to take a lie detector test as he did to the other suspects who claimed to be innocent, Spangler and Mitchell. IR 10 and generally.

McGuinness was dishonest and deceptive with Lowrey, telling him that "unless" he cooperated he would be arrested and prosecuted, and then proceeding to prosecute Lowrey after he cooperated. IR. 7.

McGuinness was dishonest and deceptive in stating in his report that he could not prosecute Spangler and Mitchell because they were no longer employees. IR. 11.

McGuinness had Bennett arrested and made a big announcement to the employees of Bennett's arrest before supposedly obtaining accusatory information from Mitchell. IR 8. The clear inference is that Defendants were not seeking justice, but were bent on having an arrest, prosecution and example of Bennett whether or not Bennett was innocent.

McGinnis', Bullard and Finley worked on the investigation as a team, meeting frequently and coordinating closely. IR 4, 6, 7, 8, 11; PX-11, McGinnis Dep. 29, 30, 33, 34 (interview of Spangler by McGinnis, Finley and possibly Bullard) 35, 43 (McGinnis, Finley and Bullard meet with Spangler), 44 (McGinnis and Bullard go to Lowrey's house with Finley staying behind to contact the police, 45 (Finley, Bullard and McGinnis meet with the police and explain the information they have), 47 (McGinnis and Finley present at police interview of Bennett), 48 (Finley, Bullard and McGinnis hold dock meeting immediately following Bennett's arrest). Defendants' behavior is hardly the stuff of a good faith, honest, reasonable investigation and prosecution. And the facts get worse.

Spangler's written statement given to McGinnis states, "The reason I didn't come forward was because I didn't want it pinned on me because of my past..." PX- 2. Quite obviously the "past" was a criminal record. Indeed, Spangler's personnel file shows a prior conviction for petty larceny. PX-5. According to his Report and testimony, Investigator McGinnis did not seek, find or report that information. IR generally, PX-11, McGinnis Dep. 64.

Prior to the incident involved in this case, Lowery had been convicted of two felonies: (a) possession of cocaine and (b) issuing bad checks. The attested conviction

and sentencing order is attached as PX -6.. According to his Report and testimony, Investigator McGuinness did not seek, find or report that information. IR generally, PX-11 McGinnis Dep. 69.

The conviction and sentencing order is public information, easily found by doing a simple internet check of Virginia Courts Case Information and following up with a visit to the courthouse.

Furthermore, the Company Human Resources Department does criminal background checks on all new employees. Bullard Dep. 34, PX-12.. All McGinnis had to do was to call the HR Department and have a criminal background checks done.

Furthermore, Vice President and Regional Manager Bullard testified that criminal background checks are done in connection with Company investigations as a matter of standard policy and it “Seems like Dave [McGinnis] does that whenever he does an investigation”. Bullard Dep. 34. PX-12. Why not here?

Wayne Spratley was employed at the Terminal as a dockworker generally working on the night shift in the time frame when the incident occurred. Spratley is currently employed at the Terminal. Spratley was never interviewed concerning the thefts. Spratley Affidavit, PX-4. Spratley further states that at a time prior to the theft, Lowery, a co-worker, told him that he, Lowery, “was going to take some computers and that he would just take them out the front door because Clyde was usually the last one around and Clyde had a lot to do and would not be watching the front door.” Investigator McGuinness apparently did not look very hard for the truth. There were only about 20 employees other than truck drivers on each shift. Bennett Affidavit, PX-9 (4.3.09).

At deposition, Spratley testified that Lowrey told him that Lowery was going to

steal computers, that he was never interviewed by the Company, and to a somewhat different recollection of some of the details, remembering that Lowrey said he would take the computers on a Friday when Bennett would not be at work. The essential elements of his recollection, that Lowrey told him he was going to steal the computers, that Lowrey said he had ways of avoiding observation by Bennett and that the Company never interviewed Spratley during the investigation were completely consistent.

Lowrey's story is inherently suspect to any reasonable person. No explanation is given for the amazing tale that Lowrey, an alleged accomplice, paid \$250 for what he was involved in stealing. IR. 7.

Lowrey's tale becomes even more bizarre and suspect when he claims that his role was to distract the guard at the guard station while Bennett took the computers out the front door (IR. 7), and so too is Spangler's alleged tale to the same effect. IR. 6. Bennett's Affidavit, PX-8 (3.16.09) has an attached drawing showing clearly that the front door is not visible from the guard shack which is beside set back a good distance from the front of the building. McGuinness went to the Facility site and spent a number of days there, so he undoubtedly was familiar with the location of the guard shack. IR. 3, 9.

Bullard, Finley and McGuinness did not arrange for the search of Bennett's home after obtaining one of the three stolen HP computer towers from Lowrey. Did Bullard Finley and McGinnis not care about valuable company property? Quite obviously, they believed nothing would be found because they believed Bennett was innocent.

II. STATEMENT OF FACTS

A. The Chain of Events According to the Investigation Report

David McGinnis, R&L's Southeast Regional Security Investigator, was

assigned to conduct an investigation as to missing computers on “3/22/06”. IR. 1.

Miraculously, two days before being contacted, he “arrived at the Terminal on 3/20/06 and began a preliminary ‘fact finding’ examination of the facts”. IR. 3.

The first shipment of computers arrived on March 3, 2006 from R&L’s Newark, New Jersey Terminal. The first shipment was scheduled to contain thirteen (13) Dell Laptop Computers. (IR.1, 4) Conan Spangler and Joseph Mitchell were the two Richmond Terminal dockworkers responsible for unloading the first shipment inbound from the Newark Terminal (Id. 4). Spangler recorded the inbound shipment as “No Freight,” meaning he did not find the thirteen laptops on the trailer. (Id.) However, Mitchell’s entries showed the thirteen laptops arrived in Richmond, and Mitchell had *personally loaded the thirteen laptops on the outbound trailer to the Miami terminal.* (Id.) When the trailer stopped at the Jacksonville Terminal en route to Miami, Jacksonville dockworkers recorded the thirteen laptops were not on the trailer. (Id.)

The second shipment of computers arrived on March 16, 2006, consisting of five skids containing 97 computers. (Id. 1) When the second shipment was delivered to its destination the consignee found six (6) HP Computers damaged and refused delivery. (Id. 1, 5) On March 17, 2006, City P&D driver R. Peck returned the six computers to the Richmond Terminal. (Id. 5) Richmond Dockworker Eldridge Robinson unloaded the six damaged rejected computers and placed them in the OS&D section of the dock after Richmond Terminal. Weights and Measures employee Robert Fisher inspected the six computers and found them damaged. (Id. 5)

The following Sunday night, R&L Richmond’s OS&D Clerk, Andre Royal inspected the dock section and found that three (3) computers were missing. (Id.) The

following morning, Royal notified Customer Service agent Allan Cooper of the missing computers. (Id.) Cooper also searched the dock for the missing computers but could not find them. (Id.) Cooper did not inform Richmond Terminal Manager Frank Finley until later that afternoon, when it was obvious the items were missing. (Id.)

On March 20, 2006, McGinnis arrived at the Richmond Terminal to gather facts and interview employees. (Id. 1) McGinnis first met with Jay Bullard and Terminal Manager Finley who suggested that McGinnis should suspect three employees based on their computer knowledge, activities, and the fact that two of the individuals had direct contact with one of the missing shipments. (Id. 4)

McGinnis interviewed Mitchell regarding Mitchell's record entry that he loaded the first shipment 13 Laptops on the outbound Miami trailer, despite Spangler's report that the 13 Laptops never arrived in Richmond from Newark. (Id. 4-5) Mitchell said he made a mistake and denied any involvement with the missing freight. (Id. 5) However, McGinnis wrote in his report:

I felt **Mitchell was being deceptive** in his answers, and I questioned him more intensely, however, he would not change his story nor could he explain his actions in an acceptable manner. (Emphasis added) (Id. 4)

On March 20, 2006, McGinnis interviewed some employees of the Richmond Terminal including Clyde Bennett (Supervisor), David Lowrey (Dockworker), Joseph Mitchell (Dockworker), Robert Fisher (Weights and Measures), Eldridge Robinson (Dockworker), Andrew J. Royal (OS&D Clerk), Frank Finley (Terminal Manager), R. Peck (City P&D Driver) (Id. 4) and "all denied any involvement." (Emphasis added) (Id. 5)

The next day, March 21, 2006, Conan Spangler reported for work and was

questioned concerning his contact with the freight shipments. (Id. 6) McGinnis wrote in his report:

Spangler stated that the 13 Laptop Computers...were not on the trailer when he loaded it, and he listed the No Freight indication on the manifest. When questioned as to why Mitchell listed the freight as being re-loaded on the Miami trailer, Spangler could not offer an explanation. His demeanor was arrogant and **definitely deceptive**, and he too, denied any involvement with the missing freight items. Based on Spangler's demeanor, I advised him that I felt he WAS involved, and further, I intended to pursue the matter until I could prove his involvement and have him arrested and placed in jail. I then advised him that when that happened, he would most certainly ask for consideration from me, which I would NOT offer him. I ended the interview at that time. (Id. 6)

On March 22, 2006, Spangler's wife called McGinnis to notify him that Spangler knew who had stolen the 3 missing computers from the second shipment. (Id. 6)

Spangler's wife told McGinnis that **Spangler lied to McGinnis** in the initial interview because Spangler was "upset that [McGinnis] was going to have [Spangler] arrested."

(Id. 6) McGinnis told Spangler's wife to have Spangler meet McGinnis at the Pilot Station. (Id. 6) McGinnis wrote about this second meeting with Spangler in his Report:

When we met, I asked [Spangler] to tell me what he knew and he related the following; Clyde Bennett, the night supervisor, was the last employee to leave the terminal on Friday night, 03/17/06. He and David Lowrey were seen by Spangler and Mitchell down at the OS&D section as they were leaving the terminal. According to Spangler, David Lowrey went out to the guard building and distracted the guard on duty while Clyde Bennett took three of the computers out the front door in the dark. Bennett then allegedly locked the door and left, with the three computers. David Lowrey then left also. Spangler stated that both he and Mitchell knew what was going on. I then asked about the missing 13 Laptop Computers that he and Mitchell had direct contact with and he once again denied any knowledge of that shipment. I told him to have Mitchell call me the next day. (Id. 6)

After meeting Spangler, McGinnis returned to Richmond Terminal to confront Lowrey for the second time. McGinnis wrote in his Report:

Lowrey began by denying any knowledge or involvement as he did during the first interview. At that point, I directly accused him of the theft of the three

computers missing from the OS&D section, and notified him that I knew Clyde Bennett was involved with him. The interview became intense and heated and I **advised Lowrey that he WAS going to be arrested unless he cooperated with me.** Lowrey then told me what had transpired. He stated that Clyde Bennett told him that he had to ‘get something’ shortly before leaving the terminal. Lowrey stated that he had seen the computers in the OS&D section, but he didn’t know those were what Bennett was going to take. (**Lowrey was lying about this to take the heat off of him**). [Lowrey] said he went out to talk to the guard and when he was leaving, he spoke to Bennett and asked if he had got what he needed and Bennett replied that he had. According to Lowrey, they both left at that point. [Lowrey] said that the following day (Saturday, 3/18/06, Bennett met him that morning at a 7-11 store and sold him one of the stolen computers for \$250.00. Once again Lowrey stated he did not know they were stolen (**this was another lie**). I asked him where the other two computers were and Lowrey stated he did not know (**another lie**). At that point, I asked where the computer was he supposedly bought from Bennett and he replied that it was at his house, still in the box. I then told Lowrey we were going to his house to obtain the computer and requested that Jay Bullard accompany myself and Lowrey to Lowrey’s home. Once at his home, Lowrey would not allow myself or Jay Bullard to go inside, but rather went in and retrieved the computer and brought it back out. I asked Lowrey if there was anything else that belonged to R&L carriers inside and he replied there wasn’t. We then returned to the terminal. (I had notified Frank Finley prior to leaving the terminal to contact the Colonial Heights Police [“Police”] after we left and **advise them of the theft and request their presence on our return when I would press formal charges.** [Emphasis added] (Id. 6-7)

McGinnis returned to the Richmond Terminal and the Chesterfield Police were there.

...I discussed the entire situation with the officer. I explained what had transpired **and notified the officer we wanted to press formal charges** against both Lowrey AND Bennett. Id. 8.

McGinnis wrote in his Report “I advised [the Property Detective] that I had not, at that point, brought Bennett in for a second interview and to confront him with my new evidence [from Spangler and Lowrey] implicating him as the primary suspect in the theft of the missing computers.” (Id.) Subsequently, Lowrey and the Detective went to Lowrey’s home where he consented to a warrantless search.

Bennett was then brought in before McGinnis and the Police.

Bennett was then brought into the terminal manager's office where he was immediately notified that information was obtained that he had stolen the three Laptop Computers, which had been placed in the OS&D section of the dock. Bennett was then notified that we KNEW how he had taken the items out of the terminal and further that we knew he had sold one of the computers to Lowrey, which we had confiscated from Lowrey. Bennett became belligerent and arrogant and denied everything. He then began to challenge the police advising he was leaving. The officers advised him he was being arrested on Grand Larceny charges. At that point, he was placed in handcuffs and led out to the patrol car, in full view of the dock employees. Id. 8.

Next, McGinnis, Bullard, and Finley immediately held a dock meeting where they told the remaining employees that "theft would not be tolerated and we would prosecute anyone found stealing or harboring information about a thief." (Emphasis added) (Id. 9)

The next day, the day after Bennett was arrested, **Mitchell called McGinnis and they met at the Pilot Station.** McGinnis reported:

When we met, I asked [Mitchell] why he had not come forward with the information he had when I asked for it during our interview. Mitchell stated that he had spoken with his parents and they advised him to stay out of the matter. I then asked him what he knew and he basically stated exactly what Conan Spangler had informed me of. At that point, I advised him to go to work and I would contact him later. This information, coupled with that from the informant [Lowrey] and Conan Spangler, solidified evidence against Bennett and Lowrey. However, the matter of the thirteen Laptops [first shipment] was still open. (Id.)

Subsequently, McGinnis requested Spangler and Mitchell submit to a Polygraph Examination concerning their denial of any involvement with the missing 13 Laptop Computers. (Id. 10) Spangler and Mitchell told McGinnis they would submit to the Polygraph Examination, and McGinnis told the two employees he would send the paperwork to the Richmond Terminal for their signature. (Id.) On April 7, 2006, Finley contacted McGinnis and told him that Spangler and Mitchell refused to sign the documents relating to the Polygraph Examination and refused to take the test. (Id. 11)

McGinnis wrote in his Report: **“At that point, it appeared obvious that both Spangler and Mitchell were involved in the theft of the missing 13 Laptop Computers.”**

(Emphasis added) (Id. 11) Next, Spangler and Mitchell failed to report for work and were terminated. (Id.11)

McGinnis made the following conclusions in his “Investigative Findings:”

Concerning the theft of THREE HP Computers [second shipment], evidence was uncovered that dock supervisor Clyde Bennett and dockworker David Lowrey was the individuals responsible for the theft. Both men were arrested by the Colonial Heights Police Department and charged accordingly. **One HP Computer was recovered in good condition.** (Emphasis added) (Id. 11)

Concerning the 13 Laptop Dell Computers [first shipment], circumstantial evidence supports the fact that Conan Spangler and Joseph Mitchell were more than likely the individuals responsible for the theft. Their actions leave little doubt that they committed the theft of these items. It seems that because my investigation was zeroing in on them as thieves, they decided to avoid reporting for work, thereby forcing the [terminal manager] to terminate their employment. **Because they are no longer employed with R&L Carriers, there is little else I can do at this level to prosecute them.** (Emphasis added) (Id. 11)

B. Other Facts

McGinnis’s Investigation Report states that Conan Spangler stated to McGinnis that Spangler and Mitchell actually saw Bennett take the three computers out the front door the night of the alleged theft. Id. 6. The Report states that the day after the arrest of Bennett, McGinnis met with Mitchell who “basically stated exactly what Conan Spangler had informed me of”. Id. 9.

However, as shown by the Company’s records (Weekly Hours Report, PX-3) and by Bennett’s affidavit (4.3.09,PX-9), Conan Spangler was not at work on the night of the alleged theft.

Spangler gave McGinnis a handwritten statement. PX-2. This is not mentioned in McGinnis’ Report. Spangler’s handwritten statement directly contradicts the Report, the

handwritten statement making no mention of having seen Bennett do anything, but merely stating that Lowrey told Spangler that Bennett had taken the computers while Lowrey distracted the guard.

McGinnis recovered one stolen computer from Lowrey, but made no attempt to recover the other computers from Bennett who allegedly had taken all three computers. IR 7-11,

McGinnis made no attempt to have fingerprints taken of the stolen computer recovered from Lowrey which Bennett allegedly had sold to Lowrey. Id. 7-11, McGinnis Dep. 73.

McGinnis discarded his investigation notes into the garbage. McGinnis Dep. 37, 57.

McGinnis made no attempt to check on whether Spangler worked the night of the theft and could have done so by having the Terminal Manager give him the time records. McGinnis Dep. 73

Bennett alleged in his original complaint filed June 11, 2008 and in his affidavit (4.3.09, PX-9) that he had been racially discriminated against by receiving several disciplinary letters for failing to completely fill out all four blocks (1/4, 1/2, 3/4, Full) on trailer loading sheets while whites had not been similarly disciplined. . He alleged and supported by affidavit (PX-9) that he complained he was being discriminated against by virtue of whites being treated differently, was told that the situation would be corrected, but this was never done.

When Defendants eventually produced loading sheets for inspection in September 2009, all those prior to October 2008 had been destroyed (10.7.09 Bennett Aff., PX-13 ,

Paralegal Sampling Summary, PX-10) despite the pendency of the litigation, the clear identification of the issue in the original complaint, the size and sophistication of the Company and the fact that it even has its own inside general counsel.

Bennett described the loading sheet review process in his affidavit of 10.7.09, PX-13:

During September 2009, I and a paralegal from Mr. Donohue's office, inspected loading sheets produced by Defendants at the R&L Terminal in Colonial Heights, Virginia. The earliest were from October 2008 and they were in folders covering two week periods. We tabbed for copying the first 10 and last 10 in each folder for the period October through December, 2008. Attached are true copies of the relevant portions of the loading sheets copies as provided by Defendants. Only a very few have all four Load Capacity parts checked, a large number have only one part checked and a large number have none checked.

For the Court's convenience, the Paralegal's Summary Sheet is attached as PX-10.

Lowrey, white, admitted guilt. Spangler and Mitchell, whites, denied guilt and were offered the opportunity to take lie detector tests. IR 10. Bennett, black, denied guild, but was not afforded the opportunity to take a lie detector test. IR 10-11. Despite the fact that the Company believed that Spangler and Mitchell, whites, had stolen 13 laptop computers, their termination records state "voluntary resignation". McGinnis Dep. 55. Bennett, black, who equally proclaimed his innocence was terminated for theft.

C. Prosecutions

Spangler and Mitchell were never arrested or prosecuted.

McGinnis' Report states:

I discussed the entire situation with the officer. I explained what had transpired and notified the officer we wanted to press formal charges against both Lowrey AND Bennett. IR. 8. (Emphasis added)

McGinnis and Finley supported the prosecution by testifying at the probable cause hearing as witnesses for the prosecutor. 10.7.09 Bennett Aff. PX- 13..

Plaintiff was charged with one count of embezzlement in Commonwealth v. Bennett, Case No. CR07F00001-01. The charge against Bennett was *nolle prossed* on May 2, 2007 after Lowrey failed to appear as a witness. Lowery had been charged with receipt of stolen property.

II. ARGUMENT

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” When considering a motion for summary judgment, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970). Finally, “summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248.

B. The Substantive Law of Malicious Prosecution

Summary judgment should be denied because, at the very least, there are genuine issues of material fact in dispute. “[T]he substantive law will identify which facts are material.” Anderson, 477 U.S. at 248. Under Virginia law, malicious prosecution is: (1) malicious; (2) instituted by, or with the cooperation of, the defendant; (3) without

probable cause; and (4) terminated in a manner not unfavorable to the plaintiff.” Hudson v. Lanier, 497 S.E.2d 471, 473 (Va. 1998). Causing or carrying through the criminal prosecution by cooperating actively in the prosecution after the charge is brought may amount to malicious prosecution, if done maliciously, and without probable cause. Clinchfield Coal Corp. v Redd, 123 Va. 420, 431, 436-437, 96 S.E. 836, 839, 842 (1918).

In a malicious prosecution claim, malice and probable cause are closely related and are thus analyzed together. Malice may be proven directly, circumstantially or inferred from the lack of probable cause. **“In Virginia, malice may be inferred from the absence of probable cause,”** and “may be inferred from facts and circumstances but is never presumed by law.” Caldwell v. Green, 451 F.Supp.2d 811, 818; citing Oxenham v. Johnson, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991)(Emphasis added).

Under Virginia law, “In the context of a malicious prosecution action, malice is defined as any controlling motive other than a good faith desire to further the ends of justice, enforce obedience to the criminal laws, suppress crime, or see that the guilty are punished.” Hudson v. Lanier, 255 Va. 330, 333, 497 S.E.2d 471, 473; citing Freezer v. Miller, 163 Va. 180, 206, 176 S.E. 159, 169 (1934). Ultimately, “the existence of malice is generally a question to be resolved by the fact finder from all the circumstances in the case.” Hudson, 255 Va. at 333, 497 S.E.2d at 473.

Probable cause is “knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff was guilty of the crime of which he was suspected.” Gresham v. American Ry. Express Co., 147 Va. 395, 399, 137 S.E. 471, 472 (1927). The Supreme Court of Virginia has also stated::

...where the defendants in an action for malicious prosecution, being men of **ordinary prudence**, believed in **good faith** from **their own knowledge** and understanding of the facts and circumstances, **or from information*521 received from reliable sources**, that the judicial proceedings instituted by them were necessary and justifiable, they cannot be held liable...

Southern Ry. Co. v. Mosby, 112 Va. 169, 180, 70 S.E. 517, 520 (Va. 1911); citing Porter v. Mack, 50 W. Va. 581, 40 S. E. 459, (W. Va. 1901) Emphasis and underlining added).

Thus, when prosecution of an individual is based on an informant's accusation, Virginia courts will find probable cause only if the informant is reliable and trustworthy. The Supreme Court of Virginia has stated "[I]nformation received from an accomplice is sufficient to create probable cause, **if there is no reason to doubt its truth.**" [Emphasis added] Southern Ry. Co. v. Mosby, 112 Va. 169, 70 S.E. 517, 519 (1911). More recently, the Caldwell Court echoed "**If there is no reason to doubt the truthfulness of the accomplice** when the prosecution was initiated, there is...probable cause." (Emphasis added) Caldwell, 451 F.Supp.2d 811, 818.

C. Basic Malicious Prosecution Analysis

The alleged informants, Lowrey, Spangler and Mitchell, clearly do not pass the reliability requirement, and a reasonable jury could, and most probably would, find the reliability requirement not met. McGuinness himself deemed each one a liar and a thief. Their stories are a transparent fairy tale to try to get themselves off the hook for their own wrongdoing. And they all have fled.

Spangler's handwritten statement is more than sufficient evidence for a reasonable jury to conclude that McGinnis fabricated the claim that Spangler and Mitchell told him that they had witnessed Bennett take the HP computers out the front door.

Also, the alleged informants' stories make no sense: an accomplice buying

computer equipment he helped steal, distracting a guard who cannot see the front door, etc. A reasonable jury certainly can readily conclude that this demonstrates unreliability, lack of probable cause and bad faith.

Reasonable jurors will be stunned and flabbergasted by Defendants' claims that they supposedly believed Bennett stole three valuable computers, but made no attempt to recover the remaining two from Bennett after recovering one from Lowrey. Reasonable jurors can, and are virtually certain, to conclude the prosecution of Bennett was without probable cause and in bad faith.

Reasonable jurors can, and most likely will, conclude that McGuiness' so-called "investigation" makes the Keystone Cops look like all- stars:

- No criminal background check of multi-felony Lowrey,
- No check into the criminal background of Spangler,
- No signed or sworn statements by informants, except for an unsigned handwritten statement by Spangler, (Exhibit P-5), and a handwritten statement signed by the OS&D Clerk, Andre Royal (Exhibit P-6),
- Destruction of McGinnis' investigation notes,
- No fingerprinting of stolen computer or box,
- No search of Bennett's residence for stolen property,
- Lying to Lowrey: I will prosecute you unless you cooperate, then prosecuting him after he cooperated,
- Not probing the obvious problems with the statements of the informants,
- Having Bennett arrested and calling a meeting to announce it before meeting with Mitchell about what Spangler had said, and

- Falsely stating that Spangler and Mitchell could not be prosecuted because they were no longer employed by R&L.

Reasonable jurors can, and most probably will, conclude that McGinnis' actions are a disgrace, lack probable cause and reek of malice.

Reasonable jurors, can, and most probably will, conclude that Defendants' instituted criminal proceedings by bringing the criminal charge or cooperating actively in bringing the criminal charge.

D. Post-Arrest Events are Relevant

Virginia Model Jury Instruction No. 41.030, Malice Inferred From Failure to Disclose, provides:

Even if a person acted without malice in instituting a criminal proceeding, a person may be found to have acted with malice, if he later learned additional facts that cast doubt on the plaintiff's guilt, and if he allowed the prosecution to continue without disclosing the new information.

See *Clark v. Montgomery Ward & Co.*, 298 F.2d 346, 348 (4th Cir. 1962).

These authorities bear on the relevancy of the post-arrest refusal of Spangler and Mitchell to take lie detector tests and their flight.

E. Credibility Issues as to McGuiness Preclude Summary Judgment

There are huge credibility issues regarding McGuiness; and if he is not believed, the defense fails. The U.S. Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) that summary judgment proceedings are not trials by affidavit without regard to credibility considerations.

...[S]ummary judgment motions [do] ... not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions,

not those of a judge, whether he is ruling on a motion for summary judgment or a directed verdict.

Moore's Federal Practice 3d, Sec. 56.31[2] states that summary judgment will not be granted unless:

Issues of a witness's credibility, motive or state of mind are absent from the case, relatively unimportant to the case, or resolved by reference to objective or overpowering evidence that resolves the issue.

The right to trial by jury, with the right of cross examination before the jury where the jury may observe the demeanor of a witness, is a fundamental right guaranteed by the Seventh Amendment to the U.S. Constitution. Grant of summary judgment also would infringe that fundamental right (a) in any situation where disbelief of a witness could have an important effect on a case, and (b) particularly in the case at bar where McGuinness' is the central figure and his credibility is at the very least highly suspect for concrete reasons.

F. The Prosecution was Terminated in a Manner Not Unfavorable to Plaintiff

When the embezzlement charge against Plaintiff was *nolle prossed* on May 2, 2007, the prosecution was terminated in a manner not unfavorable to Plaintiff. The Supreme Court of Virginia has stated:

[U]pon entry of the Nolle prosequi order, evidencing the unwillingness of the Commonwealth to proceed, the prosecution terminated in a manner not unfavorable to plaintiff for purposes of instituting a malicious prosecution action. Niese v. Klos, 222 Va. 701, 703-704, 222 S.E.2d 798, 800; See also Graves v. Scott, 104 Va. 372, 51 S.E. 821 (1905); Keaton v. Balser, 340 F.Supp. 329 (W.D.Va.1972).

Federal district courts have honored and followed the Virginia Supreme Court in applying Virginia law. "Entry of an order of nolle prosequi constitutes termination 'in a manner not unfavorable to the plaintiff.'" Lewis v. McDorman, 820 F.Supp. 1001, 1006

(W.D.Va. 1992); citing Niese, 216 Va. at 703-704, 222 S.E.2d 798.

On April 23, 2007, multi-felony Lowrey failed for the second time to appear as a witness for the Commonwealth against Plaintiff. The Commonwealth then proceeded to *nolle pross* the embezzlement charge against Plaintiff. Under Virginia law, *nolle prossing* the embezzlement charge terminated the prosecution in a manner not unfavorable to Plaintiff.

The Virginia Supreme Court has recognized a limited exception to the general principle where the defendant shows that the plaintiff entered into a voluntary compromise indicating guilt. See e.g.: *Ordnorf v. Bond*, 39 S.E. 2d (Va. 1946). That certainly is not the situation at hand.

Being dead ducks under Virginia law with respect to the terminated not unfavorably requirement, Defendants ask this Court to predict that the Virginia Supreme Court would reverse its current position set forth above and adopt South Carolina law to add a new element to a malicious prosecution causes of action in Virginia that the plaintiff prove that the *nolle prosequi* occurred under circumstances which imply or are consistent with innocence of the accused.

There is no reasonable likelihood the Virginia Supreme Court would do any such thing. Virginia law with respect to *nolle prosse* situations is ancient and clear with a limited exception where the defendant proves a voluntary compromise indicating guilt. The principle of *stare decisis* is alive, well and strong in Virginia.

Moreover, Plaintiff clearly meets any novel “consistent with innocence” requirement. The flight of a false accuser is clearly consistent with innocence. The flight of multiple false accusers more so. The improbability of Lowrey’s fairy tale and

Spangler's fairy tale is consistent with innocence. The absence of fingerprint evidence which was readily available is consistent with innocence. Bennett's 50 year clean record is consistent with innocence. Bennett's willingness to proceed within the judicial system is consistent with innocence. The fact that no stolen computers were recovered from Bennett is consistent with innocence. The fact that no one thought enough of his supposed guilt to search his house for the missing computers is consistent with innocence. And the entire absurd fact pattern of the investigation is consistent with Bennett's innocence.

The prosecutor's affidavit is objectionable and inadmissible and should not be considered in connection with probable cause or inconsistency with innocence. Those are questions for the jury alone. The prosecutor's affidavit should be considered only for the purpose of establishing that the case was *nolle prossed* because of the failure of Lowrey to appear.

F. The Liability of Various Parties

McGinnis', Bullard and Finley worked on the investigation as a team, meeting frequently and coordinating closely. DX-8, IR 4, 6, 7, 8, 11; PX-11, McGinnis Dep. 29, 30, 33, 34 (interview of Spangler by McGinnis, Finley and possibly Bullard) 35, 43 (McGinnis, Finley and Bullard meet with Spangler), 44 (McGinnis and Bullard go to Lowrey's house with Finley staying behind to contact the police, 45 (Finley, Bullard and McGinnis meet with the police and explain the information they have), 47 (McGinnis and Finley present at police interview of Bennett), 48 (Finley, Bullard and McGinnis hold dock meeting immediately following Bennett's arrest).

Bullard, the Regional Manager, ordered the investigation, was regularly kept

informed of developments by McGinnis. Bullard was aware that no fingerprints had been taken and that no attempt had been made to seek the return of the stolen computers from Bennett. Bullard had the authority to require that “additional investigation be conducted before any arrest” and “to tell McGinnis that he shouldn’t have the arrest take place”.

Bullard Dep. 36. PX-12.

Finley, the Terminal Manager, similarly was regularly kept informed of developments by McGinnis and placed the telephone call to summon the police. Finley testified at the probable cause hearing. Finley was aware that no fingerprints had been taken and that no attempt had been made to seek the return of the two remaining stolen computers from Bennett.

G. Racial Discrimination

Plaintiff had no written contract of employment, thus he was employed under an at-will contract. Plaintiff asserts that Defendants’ actions and his termination violated 42 U.S.C. Sec. 1981 by reason of racial discrimination. . Plaintiff asserts a reasonable jury may find discrimination under both (a) a McDonald Douglass analysis and (b) a direct and circumstantial mixed-motive analysis.

Spangler and Mitchell are white, Bennett is black. 4.3.09, Bennett Affidavit), PX-9. All three proclaimed their innocence. The whites were afforded the opportunity to show their innocence by taking a lie detector test. IR. 10-11. The black was not. Report as a whole; 4.3.09, Bennett Affidavit, PX-9.

Lowery is white, Bennett is black. 4.3.09, Bennett Affidavit, PX-9. Lowrey confessed his guilt, Bennett proclaimed his innocence. Defendants immediately had the black who maintained his innocence arrested, and did not at that time arrest the white

who had confessed his guilt. Defendants were in such a hurry to arrest the black that they had him arrested before they allegedly obtained incriminating information from Mitchell.

IR. 6-9.

Furthermore, Spangler and Mitchell were afforded termination based on voluntary resignation while Bennett's termination reason was stated to be for theft.

These acts did not occur in isolation. Previously, Bennett, the only black shift supervisor, had received a number of write-ups for not filling out each block on loading sheets (1/4, 1/2, 1/4, Full); but white shift supervisors were not written up although they did the same thing. Bennett complained to Finley the Facility Manager who agreed that was happening and said he would make sure the white supervisors were similarly treated; but the white supervisors continued their practice without consequence. Bennett continued to complain but nothing changed. Bennett Affidavit, 4.3.09, PX-9.

In September, 2009, Bennett and a paralegal from his counsel's office inspected the loading sheets at the Terminal. There were none prior to October 2008. A sample was flagged for copying of the first 10 and last 10 in each two-week folder for the October through December 2008 period. Only a few had all the blocks marked, many had only one or two blocks marked and many had none marked. Copies of the sampled loading sheets are attached to Bennett's affidavit. 10.7.09 Bennett Aff. and attachments, PX- 13.

The person who initially replaced Bennett after his termination was white, and he was shortly thereafter replaced by a black. _Finley Dep. 22-23. PX-14.

The continuing prior disciplinary racially disparate treatment of Bennett despite his protests and the multi-faceted racially disparate treatment in connection with the

investigation and resulting actions involving the computer thefts provide an ample basis for a jury to find racially disparate treatment and that any proffered legitimate reasons pretextual. Thus, McDonald Douglas standards are met. _____

The pretextual nature of the Company's explanations is

Additionally, apart from a McDonald Douglas framework, based on the foregoing factual analysis, a reasonable jury may find discrimination based direct and circumstantial evidence that Defendants were motivated at least in part by race. *Hill v. Lockheed Martin Logistics Mgmt*, 354 F.3d 277, 284 (4th Cir. 2004).

Plaintiff notes that a jury may reasonable conclude that he was racially targeted for a finding that he stole Company property and that finding under the Company's zero tolerance policy made termination inevitable. Thus, actionable discrimination occurred whether or not he was replaced by a white.

III. CONCLUSION

Plaintiff has established a plausible, fact and reasonable inference basis for his cause of actions. Defendants' motion for summary judgment is without merit and should be denied. Such other and further relief as is appropriate should be granted.

Respectfully submitted,

CLYDE L. BENNETT, PLAINTIFF

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system which will send a notification of such filing (NEF) to the following:

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