

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 66,999

DCA CASE NO. AZ-83

JAMES R. BURNS,
Petitioner,

vs.

GCC BEVERAGES, INC., a Florida
corporation, d/b/a PEPSI-COLA
BOTTLERS OF JACKSONVILLE,
Respondent.

FILED
CLERK OF THE SUPREME COURT
JACKSONVILLE, FLORIDA
4
ph

INITIAL BRIEF OF PETITIONER

GERALD S. BETTMAN
JACK W. BETTMAN
1027 Blackstone Building
Jacksonville, Florida 32202
Telephone: (904) 354-5262

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Authorities	ii
Preliminary Statement	1
Statement of the Case and Facts	2 - 8
Argument	
1. THE LOWER COURT ERRED BY REQUIRING THE PETITIONER TO <u>PROVE</u> FRAUD OR OTHER CORRUPT MEANS IN RESPONSE TO A MOTION FOR SUMMARY JUDGMENT.	9 -13
2. IN A SUIT FOR MALICIOUS PROSECUTION, DOES A PRESUMPTION OF THE EXISTENCE OF PROBABLE CAUSE ARISE FROM A MAGISTRATE'S FINDING OF PROBABLE CAUSE FOR AN ARREST WARRANT, THAT PRESUMPTION BEING CONCLUSIVE ABSENT PROOF OF FRAUD OR OTHER CORRUPT MEANS EMPLOYED BY THE PERSON INITIATING THE PROSECUTION?	14
Conclusion	15
Certificate of Service	18

AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Arias v. State Farm Fire and Casualty Co.,</u> 426 So. 2d 1136 (Fla. 1st DCA 1983)	13
<u>Connell v. Sledge,</u> 306 So. 2d 194 (Fla. 1st DCA 1975)	9
<u>Gallucci v. Milavic,</u> 100 So. 2d 375 (Fla. 1958)	2, 9, 10
<u>Holl v. Talcott,</u> 191 So.2d 40 (Fla. 1966)	9, 13
<u>Johnson v. City of Pompano Beach,</u> 406 So. 2d 1257(Fla. 4th DCA 1981)	13
<u>Kelly v. Millers of Orlando, Inc.</u> 294 So. 2d 704 (Fla. 4th DCA 1974)	11, 12
<u>Liabos v. Harman,</u> 215 So. 2d 487, 488-89 (Fla. 2nd DCA 1968)	12, 13
<u>Pinkerton v. Edwards,</u> 425 So. 2d 147 (Fla. 1st DCA 1983)	10
<u>Priest v. Groover,</u> 289 So. 2d 767 (Fla. 2nd DCA 1974)	12
<u>Rodgers v. W. T. Grant Company,</u> 341 So. 2d 511 (Fla. 1976)	10, 11
<u>Wills v. Sears, Roebuck and Co.,</u> 351 So. 2d 29 (Fla. 1977)	13

OTHER AUTHORITIES

Rule 3.380, Florida Rules of Criminal Procedure	10
---	----

PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to as follows: Petitioner, James R. Burns, as James R. Burns, or Petitioner; Respondent, GCC Beverages, Inc., as GCC Beverages, Pepsi-Cola, Pepsi, or Respondent throughout the brief.

STATEMENT OF THE CASE AND FACTS

The Petitioner, James R. Burns, was denied a trial by jury when the trial judge summarily ordered that he failed to overcome a presumption by proof of fraud or other corrupt means employed by the person initiating the prosecution pursuant to **Gallucci v. Milavic**, 100 So. 2d 375 (Fla. 1958).

The First District Court of Appeal certified the following question, pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(v), as being one of great public importance:

In a suit for malicious prosecution, does a presumption of the existence of probable cause arise from a magistrate's finding of probable cause for an arrest warrant, that presumption being conclusive absent proof of fraud or other corrupt means employed by the person initiating the prosecution?

On January 17, 1984, Respondent filed its motion for summary judgment based on the deposition of James R. Burns and a certified copy of the arrest warrant (R-14). On February 24, 1984, Respondent filed its memorandum of law in support of its motion for summary judgment (R-16).

On March 5, 1984, the trial court denied Respondent's motion for summary judgment on both the malicious prosecution and false imprisonment counts (R-72).

On March 30, 1984, Respondent again filed an additional motion for summary judgment. The Respondent's second motion was substantially the same as its previously denied motion. In the second motion for summary judgment, Respondent requested that the trial court consider the depositions of David Beckham and Marie

Smith (R-73-74). The depositions of David Beckham and Marie Smith were not transcribed until April 17, 1984, and were subsequently filed.

Five days before the scheduled trial in this cause, the trial court entered an order granting Respondent's motion for summary judgment on the malicious prosecution count only (R-91-92). The trial judge left intact the second count charging the Respondent with false imprisonment.

In the trial court's Order granting summary judgment, the court ruled that there is no genuine issue of material fact relating to the issue of probable cause for the criminal proceedings against the Petitioner. The trial court found that Petitioner's arrest warrant (R-11-12) "raised a presumption of the existence of probable cause which could only be overcome by proof of fraud or other improper means in securing the committal."

Prior to the commencement of this law suit, James R. Burns was employed as a route salesman and delivery driver for Respondent, GCC Beverages, doing business as Pepsi-Cola Bottlers of Jacksonville. Mr. Burns' duties in the course of his employment were to provide carbonated beverages to Pepsi-Cola's customers. Pepsi-Cola's customers were either on a cash basis or on a charge basis (deposition of Marie Smith, at 50-51). In servicing these accounts, James R. Burns would receive a daily computerized route slip prepared by the Respondent for each customer. These computerized documents indicated whether the customer was on a cash or charge basis. One of these customers, known as Pit Stop Service Station, which was a gas station-convenience store, was

on a charge basis (R-35-42,50,52,62).

When Pit Stop became more than sixty days delinquent in its charge account, Pepsi-Cola called Pit Stop to request payment. Pit Stop's controller told Pepsi-Cola that it could expect Pit Stop's check by the end of the week. When more than one week passed and Pepsi-Cola had not received payment from Pit Stop, Pepsi-Cola called Pit Stop again and found out that Pit Stop had a new controller. At that time, Pit Stop's new controller told Pepsi-Cola that he would try to get Pit Stop's "check out next week." (R-48-49). When several more weeks passed and Pepsi-Cola still had not received payment from Pit Stop, Pepsi-Cola called Pit Stop's new controller again. This time Pit Stop's new controller told Pepsi that Pit Stop did not owe Pepsi the money because Pit Stop had been paying James R. Burns cash for its soft drink deliveries all along (R-49). After accusing James R. Burns of taking cash from Pit Stop and not turning the cash over to Pepsi-Cola, Pepsi-Cola's management terminated Petitioner effective October 21, 1982 (R-95).

Respondent's reason for terminating J. R. Burns was allegedly for having an altercation with a supervisor and for writing unspecified worthless checks (deposition of David Harley Beckham, at 16, 17).

David Beckham fired the Petitioner allegedly for the above stated reasons. Additionally, he requested that Marie Smith call the Jacksonville Sheriff's Office and make the report that J. R. Burns stole cash from the company.

It is interesting to note the many inconsistencies of David

Beckham's testimony.

"Pit Stop had originally been a credit account in early 1982 as a temporary charge because of the enlarged volume of products used in its grand opening. (Depo. of Beckham at 11-13)."

Respondent's customer's application for credit, which is Plaintiff's Exhibit 2 to the deposition of Marie Smith, shows a credit limit of \$500.00 was approved by David Beckham on January 13, 1982. This directly contradicts David Beckham's testimony that the customer was only a cash customer. In addition, contrary to the \$500.00 credit limit and David Beckham's representation that the account was a temporary restricted charge, Respondent received a check dated April 30, 1982, in the amount of \$3,070.20. This check represents payment for at least four invoices which were charged pursuant to credit extended to Respondent's customer (R-52; Plaintiff's Exhibit 1, attached to the deposition of Marie Smith).

After Petitioner's arrest and before his trial for theft, Respondent received only \$63.10 on a cash basis from Pit Stop before service to Pit Stop was discontinued (R-80).

Marie Smith testified prior to James R. Burns' criminal trial that the customer had a charge account and still owed Pepsi-Cola "the money" (R-51, 59).

On or about October 25, 1982, Marie Smith, assistant controller of Pepsi, telephoned the Jacksonville Sheriff's Office and reported to Officer W. J. Stevenson that Petitioner took cash from Respondent, specifically:

"[a] former employee of Pepsi-Cola, a white male approximately 6'3" and weighing 135 lbs.

with sandy blonde hair and blue eyes whose name is James Robert Burns did accept cash payment for the delivery of soda drinks and did not turn in said payment to his employer, Pepsi-Cola Bottlers' Inc...."(R-11).

Marie Smith provided the above information to Officer Stevenson even though each and every computerized route slip representing deliveries to Pit Stop indicated "charge." Marie Smith also realized that Pit Stop was delinquent in paying its charge account. Furthermore, nothing in Pepsi-Cola's records showed that James R. Burns had taken money that belonged to GCC Beverages from Pit Stop (deposition of Marie Smith, at 10, 16).

Marie Smith never told any State Attorney or any member of the Jacksonville Sheriff's Office that she had no evidence proving that James R. Burns took money belonging to GCC Beverages from Pit Stop (deposition of Marie Smith, at 39-40).

The information which Marie Smith provided to Officer Stevenson led to James R. Burns' arrest and criminal prosecution involving eight counts of grand theft. The charges against Mr. Burns were not resolved until March 11, 1983, when he was found not guilty of all charges by a jury in the Circuit Court of Jacksonville, Duval County, Florida (R-11-12, 93). While these charges against James R. Burns were still pending, Pepsi-Cola believed that Pit Stop was responsible for its delinquent account and attempted to get Pit Stop to pay its debt.

Marie Smith wrote Pit Stop's new controller on December 14, 1982, in an effort to reach an agreement on Pit Stop's delinquent account. In that letter, Pepsi's assistant controller stated: "(w)e have no proof that our ex-salesman did not take the

money." At her deposition, Marie Smith admitted that when she wrote the above sentence, she inadvertently put in a double negative and actually meant to say, "We have no proof that our ex-salesman took the money." (Deposition of Marie Smith, at 50-51 and Plaintiff's Exhibit 3 for identification). Marie Smith wrote this letter requesting payment from Pit Stop since she believed that Pit Stop owed Pepsi-Cola on its delinquent account (R59).

In this civil action, Appellant filed a two-count complaint alleging malicious prosecution and false imprisonment. In Count I, the malicious prosecution count, Appellant alleged:

"During October 1982, the Defendant, through its agents and servants, were responsible for and did instigate, commence and continue an original criminal proceeding against the Plaintiff on or about October 25, 1982, charging him with eight counts of grand theft prosecuted by the State Attorney's Office in and for Duval County, Jacksonville, Florida. The charges included eight counts of grand theft or larceny, claiming that the Plaintiff while employed as a route salesman and delivery driver received cash from a customer of the Defendant and further charged that the Plaintiff did convert and steal the said cash from a customer known as Pit Stop, allegedly not reporting it to the Defendant..... The Defendant, GCC, through its agents and servants, did not act in good faith in instigating and continuing the aforesaid criminal proceedings without probable cause and without any reasonable or honest belief that the Plaintiff was guilty. Furthermore, the Defendant, GCC, had actual knowledge and proof that said charges were groundless and false and still continued to foster the prosecution of the Plaintiff for the sole hope of insulating itself from civil liability."(R-1-2).

James R. Burns testified at his deposition in this case that Pepsi changed the date on one of Pit Stop's invoices in an attempt to match the information on the invoice with what the

State had filed in Petitioner's criminal case (deposition of
Petitioner, James R. Burns, at 48-50).

POINT I

THE LOWER COURT ERRED BY REQUIRING
THE PETITIONER TO PROVE FRAUD OR OTHER
CORRUPT MEANS IN RESPONSE TO A MOTION FOR
SUMMARY JUDGMENT

The lower courts have misapplied the standard set forth in **Gallucci v. Milavic**, 100 So. 2d 375 (Fla. 1958), which was based on a directed verdict ruling. By applying **Gallucci v. Milavic**, the lower courts have shifted the burden of proof to the Petitioner. The burden of proof which the trial court and the First District Court of Appeal have established for Petitioner is too harsh for the summary judgment stage. A summary judgment proceeding is not intended to be a "trial by affidavit or deposition." **Connell v. Sledge**, 306 So. 2d 194 (Fla. 1st DCA 1975). Because the granting of a summary judgment is "in derogation of the constitutionally protected right to trial," the party moving for summary judgment must conclusively show the "non-existence of a genuine issue of material fact." **Holl v. Talcott**, 191 So. 2d 40 (Fla. 1966).

In **Gallucci** the Plaintiff charged the Defendant with:

"having instigated the prosecutions without probable cause and with reckless disregard of Appellant's rights under circumstances demonstrating oppression and wantonness, all of which so it was alleged, caused the Appellant financial loss, bodily distress and humiliation."
100 So. 2d 375, 377.

After the Plaintiff's testimony in **Gallucci**, the trial judge directed a verdict against the Plaintiff. On appeal, the Supreme Court stated "that once a Plaintiff fails to prove absence of probable cause, he loses his case..." There is no authority that

this rule applies to summary judgment proceedings.

In the case at bar, the First District Court of Appeal stated in its En Banc opinion:

"Appellant argues that the **Gallucci** rule does not apply, and for that contention relies on our decision in **Pinkerton v. Edwards**, 425 So. 2d 147 (Fla. 1st DCA 1983).

In **Pinkerton** the First District Court of Appeal found that the denial of an entry of a motion for judgment of acquittal in accordance with Florida Rule of Criminal Procedure 3.380 was not sufficient to create a "presumption of probable cause so as to bar a later action for malicious prosecution." The summary judgment entered against Pinkerton was then reversed and remanded.

In **Rodgers v. W. T. Grant Company**, 341 So. 2d 511 (Fla. 1976), the trial court entered a summary final judgment in favor of W. T. Grant Company. The First District Court of Appeal affirmed the trial court's order, relying upon the **Gallucci v. Malavic** rule. In **Rodgers**, the First District Court of Appeal certified the following question as one of great public importance to this court:

"Does the committal order of a magistrate import probable cause to prosecute and thus bar a subsequent malicious prosecution action, notwithstanding that the motive for its entry was to bar that action?"

The Florida Supreme Court refused to reconsider the **Gallucci** rule in **Rodgers v. W. T. Grant Company** because the facts in the latter case did "not fit within the standard **Gallucci** situation...". The Florida Supreme Court reversed the trial court's

summary judgment ruling in **Rodgers** since the magistrate's committal order did not bar the subsequent malicious prosecution action.

There are many instances in the record wherein the Petitioner showed that Marie Smith did not simply lay out to Officer Stevenson all the facts that were available to her. She concealed information from Officer Stevenson that would have led the officer to investigate Pepsi's customer. According to Officer Stevenson's affidavit, Marie Smith reported to him that Mr. Burns took the money. Yet on December 14, 1982, approximately three months before James Burns was acquitted of all charges, Marie Smith was trying to collect this money from Pepsi's customer.

The Petitioner alleged in his complaint that Pepsi also changed the date on one of its invoices prior to his criminal trial in an effort to match the information on that invoice and secure his conviction (deposition of James R. Burns at 48-50). The Respondent has yet to contradict these allegations. These allegations have nothing to do with a probable cause hearing. One of the elements for the bringing of a malicious prosecution action is a commencement or continuance of an original civil or criminal judicial proceeding. **Kelly v. Millers of Orlando, Inc.**, 294 So. 2d 704, 706 (Fla. 4th DCA 1974).

There is record evidence relied on by Petitioner to show a genuine issue of material fact which may or may not overcome the **Gallucci** presumption of probable cause. The question of whether Respondent initiating and continuing Petitioner's criminal prosecution without probable cause must be for the jury to

determine. "Probable cause" in this context has been defined as:

"A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." **Liabos v. Harman**, 215 So. 2d 487, 488 (Fla. 2nd DCA 1968); **Kelly v. Millers of Orlando, Inc.**, 294 So. 2d 704, 706 (Fla. 4th DCA 1974).

In further delineating the probable cause concept, the Florida courts have stated:

"....[f]or probable cause to exist the countenance of the situation must be such that a prudent man would set in motion the forces of a criminal proceeding. And where it would appear to a 'caution man' that further investigation is justified before instituting that proceeding, then liability may attach for the failure to do so." **Liabos v. Harman**, 215 So. 2d 487, 488-89 (Fla. 2nd DCA 1968).

Respondent has contended that its agents contacted the State Attorney and later the Sheriff's Office to report that its customer had complained of James R. Burns' taking cash. James R. Burns has relied on record evidence to show that the customer was on a charge basis. Pepsi had reason to believe that the customer was delinquent in paying its account. The customer made several misstatements of fact to Pepsi's agents about the status of this account. Pepsi's records indicated no evidence that James R. Burns was guilty of misappropriating its revenues, but Pepsi reported to the police that James R. Burns took the cash. Since the facts on the probable cause issue are in dispute, a jury must determine whether Pepsi acted without probable cause. **Priest v. Groover**, 289 So. 2d 767 (Fla. 2nd DCA

1974); **Liabos v. Harman**, 215 So. 2d 487 (Fla. 2nd DCA 1968).

In **Johnson v. City of Pompano Beach**, 406 So. 2d 1257 (Fla. 4th DCA 1981), another malicious prosecution case, the record presented "two distinct versions of the facts surrounding Defendant's arrest and prosecution." In that case, one version clearly supported probable cause, but the Appellant's factual version was "directly contrary and does not support probable cause." 406 So. 2d 1257, 1259. Under those circumstances, the Appellate Court held that an issue of fact was presented and the trial court had erred in deciding the issue of probable cause as a matter of law. Because the facts in **Johnson** pertaining to probable cause were in controversy, the trial court erred in entering summary judgment as to the malicious prosecution count. The same situation applies in the instant case.

James R. Burns cites the well settled rule that the burden of proof on the party moving for summary judgment is to show the absence of any genuine issue of material fact, and all doubts and inferences must be resolved against the movant. **Holl v. Talcott**, 191 So. 2d 40 (Fla. 1966); **Wills v. Sears, Roebuck and Co.**, 351 So. 2d 29, 32 (Fla. 1977); **Arias v. State Farm Fire and Casualty Co.**, 426 So. 2d 1136 (Fla. 1st DCA 1983). In the instant case, James R. Burns has cited record evidence raising at least a reasonable inference of disputed material facts, thereby warranting the reversal of the summary judgment entered against him by the trial court.

The burden should have always been upon the Respondent and never should have shifted to the Petitioner prior to the trial.

POINT II

IN A SUIT FOR MALICIOUS PROSECUTION, DOES A PRESUMPTION OF THE EXISTENCE OF PROBABLE CAUSE ARISE FROM A MAGISTRATE'S FINDING OF PROBABLE CAUSE FOR AN ARREST WARRANT, THAT PRESUMPTION BEING CONCLUSIVE ABSENT PROOF OF FRAUD OR OTHER CORRUPT MEANS EMPLOYED BY THE PERSON INITIATING THE PROSECUTION?

The answer to the above certified question should be answered in the negative when applied to a summary judgment proceeding. Otherwise, the requirement of proof at the pre-trial level would shift the burden from the movant to the non-moving party.

The answer to the above certified question can be answered in the affirmative when applied to a directed verdict ruling. At that stage the Plaintiff has had the opportunity to present evidence of proof of fraud or other corrupt means employed by the person initiating the prosecution.

CONCLUSION

The certified question raised by the First District Court of Appeal should be answered in the negative when applied to a motion for summary judgment. The First District Court of Appeal's opinion should be quashed and the order for summary judgment by the trial court should be dismissed. This cause should be remanded to the trial court for further proceedings.

SUMMARY OF ARGUMENT

The lower courts have misapplied the standard set forth in Gallucci v. Milavic, 100 So. 2d 375 (Fla. 1958). Gallucci formulated the rule that once a person is before a magistrate for a criminal offense and the magistrate finds probable cause to incarcerate him, then a presumption arises which must be rebutted with proof of fraud or other corrupt means employed by the person initiating the prosecution.

The Gallucci standard is appropriate when dealing with a directed verdict. This rule, however, is too harsh a burden to be applied in a summary judgment proceeding against a non-moving party.

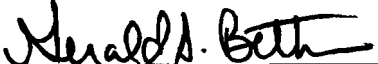
The Petitioner was falsely accused of a crime that he did not commit. The Respondent fired him for arguing with his supervisor and allegedly writing some worthless checks. Five days after Petitioner was fired, the Respondent realized that it could not collect from the customer which actually owed the money. The Respondent thereupon made a false police report accusing the Petitioner of accepting cash and not turning it in to the Respondent. This accusation was made with full knowledge of its inaccuracies. Subsequently, the Petitioner was tried on eight counts of grand theft and acquitted on each and every count.

In this case, the Petitioner's version is distinctly different from the version of Respondent regarding the issue of probable

cause in initiating and continuing Petitioner's prosecution. Therefore a genuine issue of material fact was presented, and the lower courts have erred in ruling against the Petitioner on the summary judgment issue.

The question which the First District Court of Appeal certified to this Honorable Court is inappropriate when applied to a summary judgment proceeding.

Respectfully submitted,


GERALD S. BETTMAN, ESQUIRE
JACK W. BETTMAN, ESQUIRE
1027 Blackstone Building
Jacksonville, Florida 32202
904/354-5262
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Floyd L. Matthews, Jr., Esquire, and Jerry J. Waxman, Esquire, 1500 American Heritage Life Building, Jacksonville, Florida 32202, by U.S. Mail this 29th day of May, 1985.



Attorney