THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Commons Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2019-CP-40-01299
Appellate Case No. 2022-000447

Christopher Shimeld,

Appellant,

v.

Richland County Sheriff's Office,

Respondent.

REPLY BRIEF OF APPELLANT

Joshua Snow Kendrick (SC Bar 70453)
Christopher S. Leonard (SC Bar 80166)
KENDRICK & LEONARD, P.C.
506 Pettigru Street (29601)
P.O. Box 6938
Greenville, SC 29606
Tel: (864) 760-4000
Josh@KendrickLeonard.com

COUNSEL FOR APPELLANTS

RECEIVED
MAY 04 2023
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case law

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT ERRED IN GRANTING ABSOLUTE IMMUNITY TO THE RICHLAND COUNTY SHERIFF'S OFFICE.

II. THE CIRCUIT COURT ERRED IN FINDING PROBABLE CAUSE EXISTED AS A MATTER OF LAW.

III. THE CIRCUIT COURT ERRED IN FINDING THE RICHLAND COUNTY SHERIFF'S OFFICE DID NOT NEGLIGENTLY SUPERVISE ITS INVESTIGATOR.

REPLY ARGUMENTS

I. THE CIRCUIT COURT ERRED IN GRANTING ABSOLUTE IMMUNITY TO THE RICHLAND COUNTY SHERIFF'S OFFICE.

This Court was clear in *Carter v. Bryant*: "a person proximately harmed by being arrested on a facially valid warrant that transpires to lack probable cause may have several remedies, including a §1983 action based on an unlawful seizure ... or an action for malicious prosecution." *Carter v. Bryant*, 429 S.C, 298, 308 (Ct. App. 2020). This Court recognized the proper cause of action under these circumstances and stated it was an available remedy for the facts alleged by Appellant in this case.

While the Court did not reach the specific issue of immunity because the *Carter* opinion turned on a different issue, the availability of malicious prosecution was integral to the opinion, and it is proper for a plaintiff to rely on the holding in bringing this cause of action.

Contrary to the Respondent's argument, this issue is preserved for appeal. It was raised in the Respondent's motion for summary judgment, albeit in a boilerplate manner. Without the benefit of a legal argument in support of that argument prior to the summary judgment hearing, Appellant responded with the *Carter* opinion.

At the summary judgment hearing, Respondent revealed the basis of his immunity argument by citing the federal district court cases it continues to argue on appeal. (R. 250, l.4 – R. 252, l.10). Appellant responded by arguing the district court opinions were not binding authority even on the very court that issues the opinion. (R. 256, l.24 – R, 257, l.9). The trial court disagreed with that argument in its order, finding that the Respondent had absolute immunity from a malicious prosecution action. (R. 276).

The issue raised below was whether the Respondent could use absolute immunity to avoid liability for a malicious prosecution. Both parties argued their positions and the judge ruled on the issue. The Respondent's argument cuts too fine – there is no requirement that every single possible argument be made in front of the trial court. An

issue must have been raised and ruled upon by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 (1998).

A Rule 59 motion is only necessary for issues that were raised to the trial court but not ruled upon. *Id.* at 77. The Respondent raised the issue of absolute immunity in its motion for summary judgment and at the argument. Appellant disagreed, arguing there was no authority for that proposition. The trial court ruled in favor of the Respondent. The issue is whether the Respondent can assert absolute immunity and that issue is properly before this Court.

Appellant is not raising a new issue. He is simply arguing the same issue that was raised to the trial court and ruled upon at the summary judgment stage. It was properly preserved and is properly before this Court.

None of the federal cases cited by the Respondent should sway this Court from its position in *Carter* that malicious prosecution is the proper action for a case brought over an arrest pursuant to a facially valid warrant but that ultimately was not supported by probable cause. Initially, those cases are not binding on even the court issuing it, much less this Court. At the same time, this Court should only find them persuasive authority when it is comfortable the logical underpinnings of the opinions make them persuasive.

None of the cases engage in any real analysis of the issue, so none of them should be found persuasive. The *McCoy* case, cited by the Respondent, addresses malicious prosecution in a footnote referring to the Report and Recommendation in that case. *McCoy v. City of Columbia*, 929 F.Supp.2d 541, 567 n.10 (D.S.C. 2013). The Report simply states the cause of action falls under the exception in S.C. Code Ann. § 15-78-60(23). *McCoy v. City of Columbia*, 2013 U.S. Dist. LEXIS 58574, *81 (D.S.C. Jan. 16, 2013). There is no discussion of immunity and its application or scope.

The Respondent also cites Judge Currie's opinion in *Thompson v. City of Columbia & Columbia*. 2005 U.S. Dist. LEXIS 54828 (D.S.C. July 21, 2005). The opinion notes the plaintiff in that case made no argument against the assertion of immunity. *Id.* at *8. *Thompson* also states: "[u]nless the actions giving rise to the malicious prosecution cause

of action were without actual malice, the City is immune from liability for 'institution or prosecution of any judicial or administrative proceedings." *Id.* at *9. The order then goes on to state a malicious prosecution cause of action cannot be brought in the absence of malice. *Id.*

South Carolina law does not require actual malice to maintain an action for malicious prosecution. *McBride v. Sch. Dist. of Greenville County*, 389 S.C. 546, 566 (Ct. App. 2010). Malice can be implied when evidence reveals an actor disregarded the consequences of an injurious act. *Id.* To the extent the Respondent relies on Judge Currie's order, the order clearly states Appellant's argument is correct. The City in *Thompson*, under the ruling from the district court, would have been liable for malicious prosecution based on the *McBride* opinion. Of course, *McBride* was decided five years after *Thompson*, so the *Thompson* order is of little value in this proceeding.

Each of the remaining federal cases cited in the Respondent's brief engages in no meaningful way with any South Carolina law, other than purporting to interpret the statute. They all rely on the barebones analysis in *McCoy*, except for one.

The *Palmer* case at least cites *Williams v. Condon*, though it does not actually follow the direction of that case. *Palmer v. Santanna*, 2018 U.S. Dist. LEXIS 50714, *44 (D.S.C. January 30, 2018). Though none of the federal cases discuss *Williams* in any detail, that case would inform the outcome of each of those opinions. The opinion clearly states that "[a] strong presumption also exists that the General Assembly does not intend to supplant common law principles when enacting legislation." *Williams v. Condon*, 347 S.C. 227, 247 (Ct. App. 2001). The common law immunity principles were not affected by the South Carolina Tort Claims Act and the analysis in *Williams*, which supports Appellant's position, should dictate the outcome of this case.

South Carolina courts have never held that there is no cause of action for malicious prosecution against the Government. In fact, *Williams* and *Carter* suggest that is not the case. As Appellant argued in his opening brief, the federal district court rulings are of little to no use to this Court. None of those opinions are precedential, because district court

opinions are not binding precedent in another judicial district, the same judicial district, or even on the same judge in a different case. *Camreta v. Greene,* 563 U.S. 692, 709 n.7 (2011); *Booker v. S.C. Dep't of Corr.,* 855 F.3d 533, 538 n.1 (4th Cir. 2017). A district court opinion is not even persuasive to South Carolina courts unless its reasoning is logical and its conclusion persuasive. *Lyons v. Fid. Nat'l Title Ins. Co.,* 415 S.C. 115, 131-32 (Ct. App. 2015).

The Court should reverse the grant of summary judgement on this ground and send this matter back to the trial court for a jury trial.

II. THE CIRCUIT ERRED IN FINDING PROBABLE CAUSE EXISTED AS A MATTER OF LAW.

The Respondent relies on a number of cases for the theory that it is okay for a police officer to make a mistake in an investigation or decision to arrest someone. That is not the argument Appellant makes in this case. Instead, he asserts the Respondent was not as careful as the law requires in seeking a warrant. That is an issue for a jury.

As counsel pointed out in his opening brief, the South Carolina Supreme Court has set the parameters of a probable cause determination. *Jones v. Columbia* held that probable cause is a "good faith belief that a person is guilty of a crime when this belief rests on such grounds that would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." 301 S.C. 62, 65 (1990). The "prudent and cautious" language precludes summary judgement in this case.

Appellant has asserted facts that support the argument Respondent's investigator in this case did not proceed in a prudent and cautious manner. The main evidence she used to support her probable cause would have given a prudent or cautious police officer reason to hesitate before seeking an arrest warrant. The fingerprint card she reviewed clearly showed employment at an alarm company, which explained why Appellant's fingerprints were found on an alarm.

Appellant does not seek to hold the officer in this case to a standard of perfection. Rather, he wants a jury to determine whether she was a "prudent and cautious" officer as

mandated by the South Carolina Supreme Court. That is not a matter of law. It is a matter for a jury to decide.

III. THE CIRCUIT COURT ERRED IN FINDING THE SHERIFF'S OFFICE DID NOT NEGLIGENTLY SUPERVISE ITS INVESTIGATOR.

As previously stated, this Court should reverse the grant of summary judgment when there is a genuine dispute over a material fact.

The Respondent initially argues this matter is waived because it was argued "in a short, conclusory manner with no supporting authorities cited." That is incorrect. The issue was raised on the simple grounds that the elements of a negligent supervision cause of action are met in this case.

As stated in the opening brief, Appellant argued negligent supervision cases turn on two elements: knowledge of the employer and foreseeability of harm to third parties. *Doe v. ATC,* 367 S.C. 199, 206 (Ct. App. 2005). That case was cited by the Respondent, so it appears both parties agree that the elements from that case govern this issue. There are two: (1) knowledge, and (2) foreseeability.

Respondent argues this case turns on foreseeability. The difference between this case and the *Doe* opinion is the timing of the knowledge. Respondent knew at the time Rains told her supervisors what she was doing. She clearly testified she brought the case to her supervisors, and they agreed with her decision to pursue the arrest of Appellant.

Appellant argues the same factual dispute over probable cause applies to this cause of action. Because Rains lacked probable cause, but her supervisors approved her actions, they had knowledge of her actions and should have foreseen that the failure to use caution in acting would lead to a result like Appellant's wrongful arrest.

Respondent obviously disagrees with the underlying premise of this argument, but that is a trial issue. At this stage, Appellant does not need to win his case, he needs to prove a factual dispute that warrants a trial. The dispute over the facts warrants a trial.

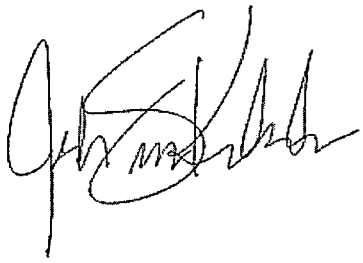
The issue was not raised in the opening brief in a conclusory fashion, it was raised succinctly. An employer who is told of the very actions that form the basis for the cause of

action has both knowledge and foreseeability. Nothing else is required. The elements of this cause of action are met and the Court should reverse the grant of summary judgment.

CONCLUSION

The circuit erred in granting summary judgment. There is a genuine dispute over material facts in this case. Additionally, the circuit court's grant of absolute immunity to law enforcement officers was a legal error. For these reasons, the grant of summary judgment should be reversed, and the case remanded to the circuit court for trial.

Respectfully submitted,



Joshua Snow Kendrick (SC ID 70453)
Christopher S. Leonard (SC ID 80166)
KENDRICK & LEONARD, P.C.
P.O. Box 6938
Greenville, SC 29606
(864) 760-4000

May 3, 2023
Greenville, South Carolina