THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Presiding Judge

Case No. 2013-001909

William R. Ferrara .... Plaintiff/Appellant,

v.

Michael E. Hunt, Sheriff of Aiken County; Aiken County Sheriff's Department;
Charles Cain in his individual capacity as Deputy Sheriff;
and Aiken County Sheriff's Department .... Defendants/Respondents.

Of whom Charles Cain in his individual capacity as Deputy Sheriff is the Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

A. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT CAIN AND THE AIKEN COUNTY SHERIFF'S DEPARTMENT SUMMARY JUDGEMENT AS TO APPELLANTS CLAIM FOR MALICIOUS PROSECUTION ON THE GROUNDS OF RES JUDICATA/COLLATERAL ESTOPPEL?

B. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT CAIN AND THE AIKEN COUNTY SHERIFF'S DEPARTMENT SUMMARY JUDGEMENT AS TO APPELLANT'S CLAIMS FOR MALICIOUS PROSECUTION ON THE GROUNDS THAT APPELLANT FAILED TO PROVE LACK OF PROBABLE CAUSE AS A MATTER OF LAW?

B. DID THE TRIAL COURT ERR IN RULING THAT RESPONDENT CAIN WAS PROTECTED FROM LIABILITY BY THE SOUTH CAROLINA TORT CLAIMS ACT?

STATEMENT OF THE CASE

This is an appeal from an Order of the Honorable Doyet A. Early, III, Presiding Judge of the Second (2nd) Judicial Circuit dated May 16, 2003. Appellant's counsel did not receive written notice of the Order until August 20, 2013. Judge Early's Order granted Respondent Charles Cain in his individual capacity as Deputy Sheriff and the Aiken County Sheriff's Department ("Respondents") Summary Judgment as to Appellant's causes of action for Malicious Prosecution. (Order of Doyet A. Early, III; R. ______).

Appellant commenced this action *Pro Se* against Michael E. Hunt, Sheriff of Aiken County and Respondents Cain and the Aiken County Sheriff's Department in the Aiken County Court of Common Pleas. Appellant's Complaint sought actual and punitive damages. (Complaint; R. _____) (Appellant's Complaint was subsequently amended) (Amended Complaint; R. ____). Sherriff Hunt and Respondent Cain and the Aiken County Sheriff's Department filed their Answers and subsequently removed this case to the United States District Court for the District of South Carolina, on or about August 10, 2009 (Answer and Notice of Removal of Respondents; R. ____). Subsequently the parties entered into written and deposition discovery.

Sheriff Hunt and Respondents moved for Summary Judgment in the Federal Court case. (Respondent's Motion for Summary Judgment; R. ____). This matter was subsequently referred to the United States Magistrate, who issued her Report and Recommendations on March 19, 2012, recommending that the Court grant in part and deny in part Respondent's Motion for Summary Judgment and that the remaining State Law causes of action be set for a trial before a jury as demanded by Appellant. (Report and Recommendation dated March 19, 2012; R. ____) After hearing argument of counsel, Judge Gergel issued his Order on or about March 28, 2012

granting Summary Judgment as to certain causes of action and with consent of the Parties, remanded the remaining State Law Causes of Action back to State Court (Order of the Honorable Richard Gergel, dated March 28, 2012; R. _____).

Sherriff Hunt and Respondents herein subsequently moved for Summary Judgment as to all remaining State Court Causes of Action. (Motions for Summary Judgment; R. ____). Judge Early heard oral arguments. (Transcript of Hearing; R. ____). Judge Early entered his Order granting Sheriff Hunt Summary Judgment on or about April 3, 2013. (Order of Judge Early dated April 3, 2013; R. ______). Appellant timely appealed that Order. (Notice of Appeal dated _______; R. ______). Judge Early entered a subsequent Order granting Summary Judgment to Respondents Cain and the Sheriff's Department on or about May 16, 2013. However, Appellant's counsel was never furnished with a copy of the actual Order entered by Judge Early and did not receive notice of the actual Order until August 20, 2013. This appeal followed.

STATEMENT OF THE FACTS

The Plaintiff, William Ferrara, is a citizen and resident of the County of Aiken, State of South Carolina. He is a graduate of the United States Military Academy, West Point, New York and an honorably discharged decorated officer and veteran of the United States Army (Deposition of William R. Ferrara, Page 23, Lines 21-23; R. _____). He does not have a criminal record. He is a post graduate from the Massachusetts Institute of Technology (M.I.T.), and worked at the Savannah River Site as a nuclear engineer employed by the prime contractor for the United States Department of Energy (USDOE). (Complaint; R. ______)(Deposition of William R. Ferrara; Pages 11-13: R. _____) (Deposition of Williams R. Ferrara, Page 17, Lines 21 – Page 18, Line 14: R. _____). Appellant has served on numerous volunteer community service boards, committee and organizations in Aiken County to including, but not limited to; Aiken County Council, Aiken County Council Public Safety

and Judicial Committee, Aiken County United Way (Budget & Evaluation Review Board), South Carolina Boys State, Aiken Sunrise Rotary Club, Aiken Tax Review Board, CSRA Science & Engineering Fair Director and Chairman, CSRA Engineering College Night 1st Year Chairman, Boy Scout Unit Commissioner (Unit Commissioner of the Year), Aiken Toastmasters, Leadership Aiken County and SRP Credit Union Board of Directors. He is a former candidate for both the Aiken County School Board and South Carolina House of Representatives. (Complaint; R. ____); Deposition of William R. Ferrara; Pages 24-37; R. _____).

Appellant owns Whiskey South, Inc., a South Carolina Corporation in the business of leasing residential real estate. (Complaint; R. ____); (Deposition of William R. Ferrara, Page 51, Line 17 – Page 52, Line 1; R. ______). Through Whiskey South, Appellant manages numerous properties in the Aiken area which are leased by residential tenants. (Complaint; R. _____)(Deposition of William R. Ferrara, Page 50, Line 25 – Page 51, Line 9; R. ____). One of these properties owned by Whiskey South was a 12 unit apartment complex on Banks Mill Road in Aiken. (Complaint, R. ____); (Deposition of William R. Ferrara, Page 50, Lines 4-8: R. ____).

On or about April 17, 2006 an individual named Kari Driggers moved into apartment 2860-B Banks Mill Road and signed a lease with Appellant. Less than a month later Ms. Driggers summoned Aiken County Law Enforcement because of a domestic dispute involving her and another individual named Chad Black, a registered sexual offender. Aiken County Law Enforcement also responded to domestic violence calls made by Ms. Driggers (and directed against Mr. Black) on May 31, 2006 and June 3, 2006. On June 20, 2006 Aiken County Law Enforcement personnel responded to a call alleging Mr. Black was disturbing three other female residents of Appellant's apartment facility. At the instruction of law enforcement, Appellant obtained a trespassing notice against Mr. Black on June 22, 2006 and instituted eviction proceedings against Mr. Driggers on June 23, 2006. The following day

Mr. Black was arrested for breaking into the apartment of a female resident of Appellant's property (he subsequently received a twelve (12) year sentence after being convicted for burglary arising out of this incident). (Complaint; R. ______) (Attachments to Affidavits of William R. Ferrara; R. _____).

On June 28, 2006 Ms. Driggers was personally served with a Court notice of an eviction hearing scheduled for July 18, 2006. On July 12, 2006, six days prior to her scheduled eviction action, Aiken County Sheriff's Deputy Stuart Johnson once again responded to 2860-B Banks Mill Road and took a complaint from Kari Driggers; however, this time against the Appellant for alleged incidents that occurred sometime during the course of more than three months (from April 1, 2006 to July 12, 2006) (Exhibit 2 to Memorandum in Opposition to Defendants' Motions for Summary Judgment dated February 3, 2012; R. ____) (Complaint; R. _____). Deputy Johnson did not observe any marks, injuries, cuts, or bruises on Ms. Driggers and did not advise her to seek any medical attention whatsoever (Complaint; R. ____) In addition, he did not receive any information whatsoever from her associated with anyone attempting to or intending to inflict serious bodily injury upon her body. He stated to Appellant and/or his two painters that he could not understand anything she was saying only that she was upset because she was being evicted. The incident report is 06-037313 (Complaint; R. ______) (Exhibit 2 to Memorandum in Opposition to Defendants' Motions for Summary Judgment dated February 3, 2012; R. ______). Deputy Johnson made a report to his superiors and took no further action.

The following day, another deputy in the Aiken County Sherriff's Department, Respondent Charles Cain was assigned to the case as lead investigator. He contacted Ms. Driggers regarding these allegations that same day. (Deposition of Charles Cain Page 8, Lines 11-12, attached as Exhibit 3 to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment dated February 3, 2012; R. ____). Respondent Cain presented Ms. Driggers who is hearing impaired with fourteen

(14) written questions regarding her charges against Appellant that he touched her and solicited sex from her. (Exhibit 4 to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment dated February 3, 2012; R. ____). This "statement" was written by Respondent. (Exhibit 3 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment; R. _____; Cain Deposition, Page 8, Lines 11-12; R. _____). Ms. Driggers signed this document as an unsworn voluntary statement. Respondent Cain did not observe any marks, injuries, cuts or bruises on the body of Ms. Driggers nor did he advise her to seek any medical attention whatsoever (Compliant; R. _____)

Respondent Cain returned later that day with additional handwritten questions for Ms. Driggers. The second statement included allegations similar to the original statement but added a claim that Appellant showed Ms. Driggers pictures of his penis on a cell phone. Ms. Driggers signed this unsworn document which again, had been prepared by Respondent Cain. (Exhibit 5 to Plaintiffs' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment dated February 3, 2012 ("Memorandum in Opposition"); R. ____). Again he did not observe any marks, injuries, cuts or bruises on her body and once again he did not advise her to seek medical attention.

On the same day, Respondent Cain took a statement from Ms. Driggers' boyfriend, Billy Cook. (Exhibit 6 to the Plaintiff's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment dated February 3, 2012; R. ____). The two sentence statement simply claims the Appellant was "looking for" Ms. Driggers at some point. Respondent Cain admitted in his discovery deposition that Mr. Cook's statement failed to corroborate anything Ms. Driggers alleged and fails to corroborate the allegation that any crime actually occurred. (Cain Deposition, Page 9, Lines 14; 16; R.___) (Cain Deposition Page16, Lines 12-14; R. ____)(Cain Deposition Page 51, Line 14; Page 55; Line 12; R. ____).

That same afternoon Respondent Cain appeared before Magistrate Patrick Dorn Sullivan for the purpose of obtaining arrest and search warrants against Appellant. In the process of obtaining these warrants, Deputy Cain mislead and withheld pertinent information from the Court as to the facts and circumstances regarding the ongoing eviction notice against Ms. Driggers. (Complaint; R. ____).

In all, Respondent Cain gathered three written statements regarding the allegations against Appellant. Two of these statements came from the alleged victim who was in the process of being evicted by Appellant. The third statement reveals essentially nothing of any relevance and has no substantive corroborative value to anything, much less evidence of a crim. Despite the incredibly serious nature of these allegations, Respondent Cain's "investigation" lasted less then three hours.

Aside from the three written statements taken by Respondent Cain, no other investigation was made regarding Ms. Driggers' allegations whatsoever. (Cain Deposition Page 10, Line 14; R. ___)(Cain Deposition Page 14, Line 23; R. ____)(Cain Deposition Page 16, Line 12; R. ___)(Cain Deposition Page 51, Line 14; R. ____)(Cain Deposition Page 55. Line 12; R. ____) (Complaint; R. ____). . Respondent Cain did not speak to anyone who had any corroborating evidence with respect to anything Ms. Driggers said in her statements (which were prepared by Respondent Cain). (Cain Deposition, Page 10, Lines 14-17; R. ____)(Cain Deposition Page 14, Line 23; R. ____)(Cain Deposition Paget 16, Line 12; R. ___)(Cain Deposition Page 51, Line 14; R. ____)(Cain Deposition Page 55, Line 12; R. ____). Respondent Cain also admits that he had no evidence whatsoever that Ms. Driggers was truthful, honest or reliable in any way. (Cain Deposition Page 10, Lines 20-24; R. ____)(Cain Deposition Page 24, Lines 20-Page 25, Line 5; R. _____)(Cain Deposition Page 43, Lines 7-9; R. ____)(Cain Deposition Page 44; Lines 4-10; R. ____). Aside from these unsworn statements, Respondent Cain did no further investigation into Ms. Driggers allegations against Appellant. (Cain Deposition Page 51, Lines 11-16; R. ____)(Complaint; R. ____).

On the afternoon of July 13, 2006, as the result of an investigation that lasted less than three hours Respondent Cain obtained five arrest warrants for the Appellant and a search warrant for his residence at 109 Fox Lea Trail, Aiken, South Carolina. (Exhibit 7 to Plaintiff's Memorandum of Law in Opposition to Summary Judgment dated February 3, 2012; R. ___). The arrest warrants were for assault and battery of a high and aggravated nature, indecent two counts of exposure, solicitation of prostitution and disseminating obscenities (Arrest Warrants, Exhibit 7 to Memorandum in Opposition; R. ______) (Complaint; R. _____).

Once the arrest warrants were issued, Respondent Cain contacted Appellant and told him to turn himself in. Appellant cooperated and turned himself into the police later that day. (Deposition of Charles Cain, Page 59, Lines 19-21; R. _____) (Complaint; R. ____).

Over the course of the next two years, all of the charges against Appellant were either dismissed or *nolle prossed.* (Exhibit N to Plaintiff's Response to Answer; R. ____). In the mean time, Appellant was confined to house arrest, was unable to manage his personal or business affairs, and was subject to public ridicule because of the false claims of sexual deviance. (Deposition of William R. Ferrara, Page 52, Lines 14 through Page 53, Line 15; Page 306, Lines 15-17; R. ____).

STANDARD OF REVIEW

The Appellate Court's standard of review in evaluating a summary judgment motion is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn there from. *Lattie v. SHS Enterprises, Inc.,* 390 S.C. 417, 389 S.E.2d. 300 (Ct. App. 1990); *Gilmore v. Ivey,* 290 S.C.53, 348 S.E.2d. 180 (Ct. App. 1986). Summary Judgment is proper only when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c),

SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

ARGUMENT

I. JUDGE EARLY REILED ON THE ORDER ISSUED BY FEDERAL JUDGE GERGEL, WHICH CONTAINS INCONSISTENCIES IN FINDINGS.

If a verdict contains inconsistent findings as to a controlling fact, no judgment can be entered. *Dunn v. United States,* 284 U.S. 390, 400, 52 S. Ct. 189, 193, 76 L. Ed. 356 (1932). "The verdict on a material point finds for each party, and against each party; being, in effect, equivalent to disagreement of the jury. The answer assumes to cut a single and indivisible truth in two. No judgment can rest on such a verdict, and no court should receive it." *Id.* (internal citations omitted).

Judge Early found and ruled as a matter of law that Respondents were entitled to Summary Judgment based upon the fact that the question of probable cause was decided and ruled upon by Judge Gergel and that Appellant's cause of action for malicious prosecution failed as a matter of law. (Order of Judge Early, p. 4). This ruling ignores the plain and clear language of Judge Gergel's Order. The Federal Court made no ruling in regard to State Court claims for either Malicious Prosecution or Defamation. As stated by the Federal Court in its Order:

> Plaintiff has further asserted state tort claims for malicious prosecution against Defendants Hunt and Cain (Second Cause of Action) and defamation against Defendant Hunt (Twentieth Cause of Action). . . . Prior to addressing these state law issues, the Court finds it necessary to resolve the question of whether the Court will exercise its supplemental jurisdiction once it has dismissed the pending federal claims. . . .

(Order of Judge Gergel, R. _____). Subsequent to Judge Gergel's Order, all parties requested that the Court remand the case to state court should only state claims remain (Dkt. No. 160 at 3;

Dkt. No. 161, Defendant Hunt's Memorandum in Support of Remand at 2-3; R. _____). Sherriff Hunt, in particular, noted the presence of various unsettled state law issues that will necessarily arise under Appellant's South Carolina Tort Claims Act causes of action. (Dkt. No. 161, Defendant Hunt's Memorandum in Support of Remand at 2-3; R. ________). Judge Gergel's Order concluded:

> Therefore, the Court denies to adopt that portion of the R & R which references any of the state causes of action and makes no ruling on Defendants' motions for summary judgment regarding the Plaintiff's Second and Twentieth Causes of Action. The Court hereby declines to exercise its supplemental jurisdiction pursuant to 28 U.S.C § 1367(c) (3) and remands the case to the Aiken County Court of Common Pleas.

(*District Court Order,* p. 9-10; R. ______).

The federal court did not rule on any state court issue. Rather, it remanded the state claims. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 357 (1988) ("[A] district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate"). The federal order also states a finding inconsistent with the order of remand.

One of the elements of Mr. Ferrara's state claim of Malicious Prosecution is a want of probable cause. *Law v. S. Carolina Dept. of Corr.,* 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). The order states that "Deputy Cain had probable cause for the arrest of Plaintiff." The order also states that the "Magistrate Judge recommends granting summary judgment on the malicious prosecution claim," due to the lack of probable cause. However, the federal court did not grant summary judgment on this claim. Instead, it remanded this claim to the state court, stating: "the Court declines to adopt that portion of the R & R which references any of the state

causes of action and *makes no ruling on Defendants' motions for summary judgment* regarding the Plaintiff's [state law] claims." *District Court Order*, p. 8-10 (emphasis added).

In one paragraph, Judge Gergel stated that there was no action for malicious prosecution because of sufficient probable cause. However, in a subsequent paragraph, he states that he makes *no ruling* on the state claims and remands them to state court. These statements are inconsistent, and therefore, should be resolved by a trial in the state court, as Judge Gergel clearly intended in his Order.

The Court erred in concluding as a matter of law that Judge Gergel's Order contained any finding with respect to Probable Cause and therefore should be reversed by this Court.

II. SUMMARY JUDGMENT WAS INAPPROPRIATE IN THIS INSTANCE BECAUSE THERE IS A QUESTION OF FIRST IMPRESSION FOR THE COURT.

This issue, concerning inconsistencies in a federal order and whether the principal of res judicata applies, is a question of first impression for the court. "As a general rule, important questions of novel impression should not be decided on a summary judgment . . . . . Instead, a novel issue is best decided in light of the testimony to be adduced at trial." *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980). "In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C.Code Ann. § 14-3-320 and -330 (1976 & Supp. 2003), and S.C.Code Ann § 14-8-200 (Supp. 2003)); *Osprey, Inc. v. Cabana Ltd. Partnership,* 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); *Clark v. Cantrell,* 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 320 S.C. 143, 153, 463 S.E.2d 618, 624 (Ct.App.1995) (stating that although all issues of novel impression do

not require a trial, summary judgment is inappropriate where further inquiry into the facts is desirable to clarify application of the law).

A thorough search of South Carolina case law has yielded no case directly on point. No case has been found in which a remand order contains inconsistent findings or results. However, an axiom in the law of contract is that contract is ambiguous "only when it may fairly and reasonably be understood in more ways than one." *Hansen v. United Servs. Auto. Assoc.*, 350 S.C. 62, 565 S.E.2d 114, 117 (S.C.Ct.App.2002). If that occurs, the contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity. *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); *see also Columbia East Assocs. v. Bi–Lo, Inc.*, 299 S.C. 515, 519–20, 386 S.E.2d 259, 261–62 (Ct.App.1989) ("Where the contract is susceptible of more than one interpretation, the ambiguity will be resolved against the party who prepared the contract."). In applying the Uniform Commercial Code to inconsistencies, the general rule is that if there are conflicting terms in a contract, they "knock-out" each other and the conflicting terms do not become a part of the contract. S.C. Code Ann. § 36-2-207 (2013).

However, there seems to be no source that defines the result of an inconsistency in a remand order. Therefore, because this is a point of first impression, summary judgment was inappropriate, and the case should be remanded to the Aiken County Circuit Court to be tried on the merits.

III. THE TRIAL COURT ERRED IN RELYING ON THE ALLEGED FINDINGS OF THE AIKEN COUNTY MAGISTRATES

The Trial Court relied on the probable cause determination of two non-lawyer Aiken Magistrates. This reliance is misplaced. The traditional standard of review for magistrate's determination of probable cause is whether the magistrate had a "substantial basis" for his

probable cause conclusion. *Illinois v. Gates, supra.,* at 236, 103 S. Ct. 2331. "The task of the issuing magistrate is simply to make a practical, common sense decision, whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability (of finding evidence of a crime)." *Id.* at 238, 103 S. Ct. at 2332. "In order to assure that such an abdication of the magistrate's duty does not occur, court must continue to conscientiously review the sufficiency of the affidavits upon which warrants are issued." *Id.* Here the magistrates made a probable cause determination based on an affidavit based upon hearsay which they did not know was based on uncorroborated testimony and a complete lack of investigation on the part of the Aiken County Sheriff's Department, specifically Respondent Cain (see below).. In short, the magistrates were mislead by Respondent and the Aiken County Sheriff's Department. The probable cause determinations by the Aiken Magistrates is not controlling as to the issues before the Court.

IV. SUMMARY JUDGMENT WAS INAPPROPIATE AS THERE IS AMPLE TO SUPPORT APPELLANT'S CLAIM FOR MALACIOUS PROSECUTION

The Trial Court erroneously found and ruled that the Appellant's Cause of Action for Malicious Prosecution failed as a matter of law. Judge Early specifically ruled that Appellant not only failed to meet his burden of proof as to a lack of probable cause, but in fact, "could not" do so. (Order of Judge Early, R. ___). *See, McBride v. School District of Greenville County,* 389 S.C. 546, 698 S.E.2d. 845 (S. C. App. 2010). However, there is ample evidence in the record to support the Appellant's causes of action for malicious prosecution against Respondent. There is more than sufficient evidence in the record to support the Appellant's contention that Respondent Cain lacked probable cause. The Lower Court's Order is clearly erroneous and should be reversed by this Court.

"It is basic that an arrest with or without a warrant must stand upon firmer ground that a mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict." *Wong Sun v. U.S.*, 371 U.S.471, 83 S. Ct. 407 (1963) (internal citations omitted). "The quantum of information which constitutes probable cause – evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed – must be measured by the facts of a particular case." *Id.* "The history of use and not infrequent abuse of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.*

Appellant was arrested pursuant to a warrant using information obtained entirely from a single informant, Ms. Driggers. (Cain Deposition, Page 51, Lines 11-16; R. ___). All of the allegations was based upon Respondent Cain's "information and belief." Because Respondent Cain did not rely on his own personal knowledge when swearing to the arrest warrant, his warrants were based upon hearsay. Hearsay warrants are treated with heightened scrutiny when determining matters of proximate cause. The warrant is a hearsay warrant but does not say on its face that it is. The magistrate who issued the warrant was misled when he was not informed that it was a hearsay warrant. (Exhibit 7 to Memorandum in Opposition; R. ___).

In *Illinois v. Gates,* the United States Supreme Court addressed the issue of warrants based on hearsay information. *Illinois v. Gates,* 462 U.S.213, 103 S. Ct. 2317 (1983). At the outset the Court recognized that "an informant's 'veracity,' 'reliability' and 'basis for knowledge' are all highly relevant in determining the value of his report." *Id.* at 230, 103 S. Ct. at 2328. The issues of informant reliability and corroboration factored heavily into the *Illinois v. Gates* decision.

In *Gates* an anonymous informant wrote a letter to authorities accusing the Defendant in that case of drug trafficking. In the letter the accuser described the Defendant and predicted his drug trafficking activities. The letter alone was insufficient as a basis of finding probable cause. The Court reasoned:

> The letter provides virtually nothing from which one might conclude its author is either honest or his information reliable; likewise the letter gives absolutely no indication of the basis of the writers predictions regarding the (Defendant's) criminal activities. Something more was required, then before a magistrate could conclude there was probable cause to believe (the evidence of a crime would be found).

Illinois v. Gates, 462 U.S. at 227, 103 S. Ct. at 2326. This "something more" required by the Supreme Court came in the form of a follow-up investigation by the police department.

Hearsay affidavits, like the affidavit used in Appellant's case, require special scrutiny in a probable cause analysis. "(A)n affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a *substantial basis* for crediting the hearsay is presented." *Id.* at 241-242, 103 S. Ct. 2334. The Court's decisions when applying the totality of the circumstances test have "consistently recognized the value of corroboration of detailed of an informant's tip by independent police work." *Id.*

In short, before an officer seeks an arrest warrant based on hearsay information, he or she must do some further investigation into: (a) whether there is evidence to corroborate the hearsay information; or (b) whether there is a substantial basis to give credit to the hearsay presented. The officer must present evidence the hearsay information is truthful or reliable. If there is no indication to the reliability or veracity of the information, the officer must present evidence of corroboration before the hearsay may be relied upon for proximate cause. Without evidence of either veracity or corroboration, there is simply no probable cause to act on hearsay.

A. THE APPELLANT ARRESTED APPELLANT WITHOUT PROBABLE CAUSE BECAUSE DEPUTY CAIN DID NOT INVESTIGAGE HIS INFORMANT'S RELIABILITY OR VERACITY.

By Respondent's own admission, he had no evidence of veracity or corroboration before he swore out a warrant for Appellant's arrest. (Deposition of Charles Cain; Page 10, Line 20 -24; Page 24, Line 20 through Page 25, Line 5; Page 43, Lines 7-9; Page 44, Lines 4-10; Page 10, Line 22; Page 26, Line 10; page 50, Line 8; Page 50, Line 23; R. _____). Here Respondent Cain acted solely on hearsay. He had no probable cause because he did not investigate the allegations as required, yet he swore out an affidavit claiming he did have probable cause.

Respondent Cain admits he had no evidence whatsoever to prove his informant, Ms. Driggers, was providing truthful, honest or reliable information. He simply did not investigate anything about her in this regard. He did not investigate whether or not she might have an ulterior motive for making criminal allegations against Appellant. He did not investigate whether she had previously made unfounded allegations to the Aiken County Sheriff's Department. He did not ask her to swear to her own statement under threat of perjury before proceeding with the arrest of Appellant. (Deposition of Charles Cain; Page 10, Line 20 -24; Page 24, Line 20 through Page 25, Line 5; Page 43, Lines 7-9; Page 44, Lines 4-10; Page 10, Line 22; Page 26, Line 10; page 50, Line 8; Page 50, Line 23; R. _____). There is ample evidence in the record that Respondent arrested Appellant without probable cause and Summary Judgment in this case is improper.

B. RESPONDENT ARRESTED APPELLANT WITHOUT PROBABLE CAUSE BECAUSE RESPONDENT CAIN FAILED TO CORROBORATE HIS INFORMANT'S ALLEGATIONS

Just as Respondent failed to investigate his informant's reliability, he also failed to investigate whether there was any evidence to corroborate her allegations. To this day he and the

Sheriff's Department have failed to produce any evidence to corroborate anything that Ms. Driggers said. (Deposition of Charles Cain, Page 51, Line 16; R. ____). It is not for lack of clues: Ms. Driggers gave Respondent numerous lines of potential investigation which may have corroborated her testimony had Respondent conducted any investigation. For example, Ms. Driggers told Respondent certain incidents occurred in a vacant – yet furnished – brick house. (Exhibit 4 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment; R. ____). Respondent Cain made no investigation into this house before seeking an arrest warrant (or at any time thereafter for that matter). Ms. Driggers also claimed that Appellant used a blue Verizon cell phone. (Exhibit 5 to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment; R. ___). To this day no cell phone has ever been found. During his deposition, Deputy Cain admitted he did no investigation to corroborate Ms. Driggers. (Deposition of Charles Cain, Page 51, Lines 11-16; Page 10, Line 14, Page 16, Line 12, Page 55, Line 12). In fact, he admitted more than five (5) times in his deposition that he did nothing whatsoever to corroborate the accusations if his informant. Because he did not investigate the information provided by Ms. Driggers, either for truthfulness, reliability or corroboration, the hearsay warrants he swore out are insufficient and fail to state probable cause.

In the affidavit supporting the arrest warrant, Respondent Cain, relying on nothing more than uncorroborated testimony, swore he had proximate cause to arrest Appellant. (Exhibit 7 to Memorandum in Opposition; R. ___). Looking at these affidavits in the light most favorable to Appellant, these warrants are false. At best they were made with reckless disregard for the truth. To allow such a flagrant violation of due process would, "leave law-abiding citizens at the mercy of the officer's whim and caprice." *Wong Sun v. U.S., supra* at p. 479, 83 S. Ct. 413. Because

Respondent Cain perjured himself to obtain an arrest warrant against Appellant, this amounts to a prima facie evidence of malicious prosecution.

Respondent was not given the due process right of a follow up investigation by Respondent prior to his arrest. Respondent was required to gather "something more" before he applied for a warrant in this case. See, *Illinois v. Gates, supra.* Respondent was acting entirely on the statements of a witness whom he admitted he did not know; did not conclude whether or not she was honest or dishonest; did not inquire whether she was honest or dishonest; and who gave absolutely no indication of the basis for her assertions. (Exhibit 3 to the Plaintiff's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment; R. ___). Further, Respondent Cain admitted no fewer than five times in his deposition that he had no evidence whatsoever to corroborate the statements of his informant.

C. APPELLANT'S ARREST WARRANTS ARE BASED UPON THE PERJURED TESTIMONY OF DEPUTY CAIN AND FAIL TO STATE PROBABLE CAUSE

In *Illinois v. Gates,* the Supreme Court warned against what it pejoratively referred to as a "bare bones" affidavit. A "bare bones" affidavit is an officer's affidavit containing a "mere conclusionary statement Sufficient information must be presented to the Magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others, *id.* For instance, an officer's sworn statement that "he has cause to suspect and does believe that a crime has been committed "simply will not do." *Id.* (referring to *Nathanson,* 290 U.S. 41). "An officer's statement that 'affiants have received reliable information from a credible person and believe' (a crime has been committed) is likewise inadequate. *Id.,* referring to *Aguilar v. Texas,* 378 U.S.108).

When compared to the "bare bones" affidavits provided by the Supreme Court's opinion in *Illinois v. Gates,* the insufficiency of Respondent Cain's affidavit is immediately apparent. For every crime Respondent Cain charged Mr. Ferrara with, each affidavit essentially reads, "I have probable cause to believe the defendant committed the crime based on the following facts: "Upon information and belief (the Appellant committed the crime in Aiken)." In other words, Respondent Cain swore that Appellant committed a crime because Respondent Cain believed Appellant committed a crime. This is essentially the definition of a conclusory affidavit and the warrant is the definition of an invalid and insufficient "bare bones" affidavit. See, *Town of Mayesville v. Clamp,* 149 S.C.346, 147 S.E.455 (1929); *State v. York,* 250 S.C.30, 156 S.E.2d. 326 (1967).

Respondent Cain did not reveal to the magistrate his belief was based solely on uncorroborated testimony. Thus, the magistrate had no way to judge probable cause because of the nature of the information concealed by Respondent Cain. Respondent Cain essentially swore that he had probable cause when by definition he did not.

As a result of his nonexistent investigation, Respondent Cain swore out an arrest warrant based on nothing more than his personal belief that Appellant had committed a crime. He did not base his affidavits on any facts. Respondent Cain based his probable cause entirely on his own meritless and uncorroborated believe that Appellant committed a crime. As a matter of law Respondent did not have probable cause to arrest Respondent and Summary Judgment is not proper in this case.

V. RESPONDENT CAIN IS NOT PROTECTED BY THE TORT CLAIMS ACT

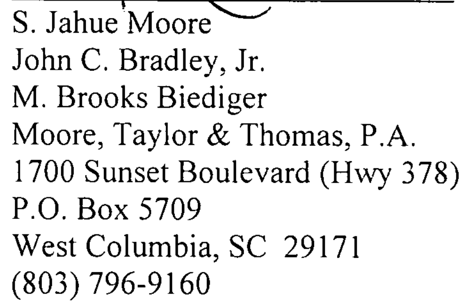
The Trial Court erred in holding that the actions of Respondent Cain were protected from liability under the South Carolina Tort Claims Act as a matter of law. Respondent bears the

burden of establishing the Tort Claims Act as a defense to his actions in this case. *Summer v. Carpenter,* 328 S.C.36, 492 S.E.2d. 55 (S.C. App. 1997). The Trial Court erred in finding and ruling that the there was no evidence actual fraud, actual malice or an intent to harm. Malicious actions and activities are specifically excluded from the immunity provided by the South Carolina Code Section 15-78-70. Section 15-78-70(b) provides that, "Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employees conduct...constituted actual fraud, actual malice, intent to harm, or a crime of moral turpitude." It is well settled that one of the elements of malicious prosecution is malice in instituting the proceedings. See, *Ruff v. Eckerd Drugs, Inc.,* 265 S.C.563, 220 S.E.2d. 649 (1975). As set forth above there are ample facts in the record that support a finding of actual malice on the part of Respondent Cain. Therefore any finding as a matter of law to the contrary is premature and erroneous and the South Carolina Tort Claim Act does not protect the Respondent from immunity from individual liability. See, *Pritchett v. Lanier,* 766 F. Supp. 442 (D.S.C. 1991).

CONCLUSION

Based on the foregoing, this court should reverse the May 16, 2013 Order of Judge Early granting summary judgment to the Respondents and remand this case to be heard by a jury in the Aiken County court of Common Pleas.

Respectfully submitted,



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