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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Thomas W. McGee, III, Circuit Court Judge

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Case No. 2021-CP-40-05620
Appellate Case No. 2025-000902

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Sherman Green, . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Respondent,

v.

City of Columbia and George Simpson, . . . . . . . . . . . . . . . . . . . . . . . Defendants

of whom
George Simpson is . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Appellant.

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# INITIAL REPLY BRIEF

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## ARGUMENTS

### I. THIS APPEAL IS PROPERLY BEFORE THIS COURT

Respondent argues that under *Johnson v. Fankell*, 520 U.S. 911 (1997), "[d]efendants in a state-court [42 U.S.C.] § 1983 action do not have a federal right to an interlocutory appeal from a denial of qualified immunity." (Resp. Br. p. 16). Respondent contends that this case is controlled by *Ballenger v Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994) and its progeny holding the denial of summary judgment is never subject to appellate review. (Resp. Br. p. 16-17). Respondent requests that the Court therefore dismiss this appeal. The Court should not be persuaded by this argument.

#### A. The Order is Immediately Appealable Under Section 14-3-330

The order in this case is, in fact, an immediately appealable order pursuant to S.C. Code Ann. § 14-3-330 (2017), which provides that an immediate appeal may be taken in a law case from:

> (1) *Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas* and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order *affecting a substantial right* made in an action when such order (a) *in effect determines the action and prevents a judgment from which an appeal might be taken* or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> * * *
>
> (4) An interlocutory order or decree *in a court of common pleas* granting, continuing, modifying, or *refusing an injunction* or granting, continuing,

modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (emphasis added). The order on appeal fits squarely within subparts (1), (2) and (4) of Section 14-3-330 and is, therefore, immediately appealable.

The Court of Common Pleas denied Appellant's assertion of qualified immunity as a defense to Respondent's claim for unlawful arrest pursuant to § 1983. *See, e.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 305-306 (1996) (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985) that a trial court's rejection of a defendant's qualified-immunity defense is a "final decision" subject to immediate appeal under 28 U.S.C. § 1291)). The United States Supreme Court described the scope of protection afforded by qualified immunity:

> * * * *Harlow[v. Fitgerald*, 457 U.S. 800 (1982)] and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid "standing trial," but also to avoid the burdens of "such *pretrial* matters as discovery ..., as '[i]nquiries of this kind can be peculiarly disruptive of effective government. *Mitchell, supra*, at 526, 105 S.Ct. at 2815 (emphasis added) (quoting from *Harlow, supra*, at 817, 102 S.Ct. at 2738). Whether or not a later summary judgment motion is granted, denial of a motion to dismiss is conclusive as to this right. We would have thought that these and other statements from *Mitchell* and *Harlow* had settled the point, questioned by Justice BREYER [in dissent], see *post*, at 844, that this right is important enough to support an immediate appeal. If it were not, however, the consequence would be, not that only one pretrial appeal could be had in a given case, as Justice BREYER proposes, but rather, that there could be no immediate appeal from denial of a motion to dismiss but only from denial of summary judgment. That conclusion is foreclosed by *Mitchell*, which unmistakably envisioned immediate appeal of "[t]he denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity." 472 U.S., at 527, 105 S.Ct., at 2816.

*Behrens*, 516 U.S. at 308. *See also Mitchell*, 472 U.S. at 526 (the immunity is entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal immunity question; the denial of a claim of qualified immunity, insofar as it turns on an issue of law, is an appealable "final decision" within the meaning of § 1291 notwithstanding the

absence of a final judgment). Section 14-3-330(1), therefore, permits an immediate appeal from an interlocutory ruling denying summary judgment on the legal issue of qualified immunity. The order involves the merits since it "finally determine[s] some substantial matter forming the whole or a part of some ... defense." *Mid-State Distr., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

Additionally, Section 14-3-330(2) permits immediate appeal of the order denying summary judgment under a qualified-immunity defense. The order affects a substantial right to avoid the burdens of litigation, including discovery and other pre-trial matters, *Behrens*, and effectively determines the defense by removing the benefits of that defense, rendering moot any effective appeal at the end of the case.

Finally, the order is in the nature of a Court of Common Pleas order denying injunctive relief, *i.e.*, refusing to prevent the Plaintiff/Respondent from moving forward with the suit against Appellant, who is the individual officer. Section 14-3-330(4), therefore, permits an immediate appeal from the order.[1]

Other jurisdictions agree that an order denying the defense of qualified immunity,

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[1] *Compare State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013) (holding an order in the Court of General Sessions denying immunity under S.C. Code Ann. § 16-11-410 to -450 (Supp. 2012) (the Protection of Persons or Property Act or "Stand Your Ground" law) is not an order involving the merits in that it does not finally determine a substantial cause of action or defense; it is also not an order under 14-3-330(4) since it emanates from the Court of General Sessions, not the Court of Common Pleas). Qualified immunity in the § 1983 realm is different from asserting an immunity defense under S.C. Code Ann. § 16-11-410 to -450 since a criminal defendant may not appeal until sentence is imposed, and further the order is not an order denying an injunction in the Court of Common Pleas. *See, also, Isaac* at 188, 747 S.E.2d at 682 (in a concurring opinion, Justice Pleicones viewed the order as from the circuit court in general without distinguishing between Common Pleas and General Sessions and was therefore immediately appealable; Justice Pleicones concurred in dismissal because the appellant in that case was not protected by the Act since the Act did not apply retroactively to his case).

whether by denying a motion to dismiss or denying summary judgment, is immediately appealable under state-court appellate procedures. *See, e.g.*, *Martinez v. Estate of Bleck*, 379 P.3d 315 (Colo. 2016) (Colorado's appealability statute permitted an immediate appeal of a ruling on qualified immunity regardless of how the issue is raised or the grounds of the decision); *City of Hialeah*, 661 So.2d 335 (Fla. 3rd Dist. Court of Appeal 1995) (citing *Mitchell v. Forsythe*, Florida Court of Appeals held denial of summary judgment based upon a claim of qualified immunity is subject to interlocutory review to the extent the order turns on an issue of law); *Harrod v. Caney*, 547 S.W.3d 536, 540 (Ky. 2018) (an order denying a claim of qualified immunity is immediately appealable); *Epps v. Duke Univ.*, 468 S.E.2d 846, 849 (N.C. App. 1996) (usually the denial of a motion for summary judgment is not immediately appealable; however, denial of a motion for summary judgment on the ground of qualified immunity is immediately appealable because the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action); *West Virginia State Police Dept. v. J.H.*, 856 S.E.2d 679, 688-689 (W.Va. 2021) (a circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the "collateral order" doctrine; the Court noted "one of the most salient benefits from qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive," 856 S.E.2d at 688, and "deferring a ruling on qualified immunity acts as an effective denial of such protections" 856 S.E.2d at 689); *Littles v. Commissioner*, 832 N.E.2d 651 (Mass. 2005) (noting the denial of summary judgment on qualified immunity grounds was immediately appealable and holding the failure to immediately appeal the ruling waived the issue requiring dismissal of a subsequent appeal); *Lucero v. Mathews*, 901 P.2d 1115 (Wyo. 1995)

(while it is generally true that a denial of summary judgment is not a final, appealable order, this is not the case in the context of qualified immunity).[2]

The Court should reject Respondent's contention that the order is not immediately appealable and deny Respondent's request to dismiss this appeal.

### B. *Johnson v. Fankell* Does Not Prevent Immediate Appeal in this Case

Respondent relies upon *Johnson v. Fankell* to bootstrap cases holding in general that the denial of summary judgment is never immediately appealable. *Johnson*, however, does not control the issue.

First, there is no case in South Carolina (and Respondent cited to none) that holds the Court of Common Pleas' denial of summary judgment on the basis of qualified immunity is not immediately appealable under South Carolina's state appealability law. Instead, cases hold that although a particular order may not ordinarily be immediately appealable, where the intermediate

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[2] Arguably, a defendant would be *required* to take an immediate appeal of the denial of qualified immunity or forever lose the issue. Qualified immunity is the right not to be subjected the time and expense of all aspects of litigation, including pretrial matters and discovery (including depositions). Failure to immediately appeal the ruling would render the right a nullity and preclude effective appellate review at the end of the case. The ruling is akin to the "mode of trial" interlocutory rulings that the Supreme Court of South Carolina has held not only *may* be appealed, but *must* be appealed immediately or the right is waived. *See, e.g., Neeltec Enterpises, Inc. v. Long*, 397 S.C. 563, 567, 725 S.E.2d 926, 928-929 (2012) (Supreme Court held pre-trial order of substitution of party fell within the purview of § 14-3-330(2)(a) and therefore must be immediately appealed if it is to be considered at all; Court stated there is no review available after final judgment, that is, "failure to take such immediate appeal would bar consideration of the order in an appeal from final judgment"); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (pre-trial order disqualifying party's chosen attorney is immediately appealable under § 14–3–330(2), and must be immediately appealed); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (order denying mode of trial to which appellant is entitled as a matter of right may be immediately appealed under § 14-3-330(2)(a), and the failure to take such an immediate appeal waives the issue).

order has the effect of finally determining a substantial matter forming an intended defense and effectively strikes that defense, it is immediately reviewable under Section 14-3-330. *See Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (explaining that an order involves the merits when it finally determines some substantial matter forming the whole or a part of some cause of action or defense); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability[.]"); *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) ("Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense'" and are immediately appealable (quoting *Mid-State Distribs., Inc.*, 310 S.C. at 335 n.4, 426 S.E.2d at 780 n.4)).[3] The order in this case finally determines a substantial matter (qualified immunity from the burdens of litigation, including pretrial proceedings, discovery and the trial itself) and effectively strikes the defense (Officer Simpson loses the benefits of the doctrine that adhere prior to final judgment).

Second, the Supreme Court of the United States in *Johnson* relied upon Idaho's Appellate Rule 11(a)(1), which provided at the time that "an appeal may be taken as a matter of right from a final judgment, order, or decree in a civil action." *Lines v. Idaho Forest Ind.*, 872 P.2d 725, 727 (Id. 1994) (describing the text of the rule as of 1994, when the *Johnson* case was before the Idaho

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[3] This recitation of authority is from *Coggeshall v. von Herrmann*, 2025-MO-029 (S.C. Sup. Ct. filed Feb. 19, 2025). Officer Simpson does not cite to the case for its substance. *See* Rule 268(d)(2), SCACR (memorandum opinions have no precedential value and should not be cited except in proceedings in which they are directly involved). Officer Simpson provides the cite here to give candid attribution to the *Coggeshall* Court's recitation of authority and analysis of appealability of interlocutory rulings.

Supreme Court). At the time, however, Idaho also had a specific rule on permissive appeal of otherwise unappealable orders.[4] *See Kindred v. Amalgamated Sugar Co.*, 795 P.2d 309 (Id. 1990) (noting that "[u]nder I.A.R. 12, a party may seek permission to appeal from an interlocutory order which is not otherwise appealable as a matter of right under I.A.R. 11(d)"; "Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation."). The appellants/petitioners in *Johnson*, however, did not invoke I.A.R. 12 (which would have required a finality analysis under I.R.C.P. 54(b) for appeal certification) but relied solely on I.A.R. 11(a). The procedures for permissive appeal under Idaho's rules do not apply in South Carolina. *Compare Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990) (reiterating that appealability in South Carolina is controlled by statute, such as S.C. Code Ann. § 14-3-330, and not by Rule; Rule 54(b), SCRCP, certification is therefore irrelevant to the issue of appealability under South Carolina state practice).

Third, even the Supreme Court in *Johnson* noted that whether a state court will follow the immediate appealability of a collateral order doctrine under *Mitchell v. Forsyth*, 472 U.S. 511 (1985) is a state-by-state call. *See Johnson v. Fankell*, 520 U.S. at 917 n. 6 (citing to *Richardson v. Chevrefils*, 131 N.H. 227, 231, 552 A.2d 89, 92 (1988) ("Although all of the court's rulings ... would normally be treated as interlocutory, ... [w]e have followed *Mitchell* in accepting the State defendants' appeal from the order denying their motion for summary judgment"); *Murray v. White*, 155 Vt. 621, 626, 587 A.2d 975, 977–978 (1991) ("In [*Mitchell*], the Supreme Court held

[4] Idaho still has this Rule of permissive appealability.

that a trial court's denial of a claim of qualified immunity met these [collateral order] requirements, and we agree with this determination"); *Park County v. Cooney*, 845 P.2d 346, 349 (Wyo.1992) ("We believe the state decisions which allow appeal, for the reasons detailed in *Mitchell* ..., are better reasoned; and we therefore hold that an order denying dismissal of a claim based on qualified immunity is an order appealable to this court")). The *Johnson* Court added that some jurisdictions permit immediate appellate review of a collateral order that disqualifies counsel. *Johnson v. Fankell*, 520 U.S. at 917 n. 7. *Compare Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (holding an interlocutory order granting a motion to disqualify counsel must be immediately appealed to avoid waiver of the issue).

The order in this case denying Officer Simpson's motion for summary judgment effects a final ruling on his claim to qualified immunity not only from civil liability but from all aspects of litigation, including discovery. Waiting until the final judgment in the case – no matter what it is – obliterates the very protections from pre-trial and trial that qualified immunity provides. The Court should hold the order is immediately appealable and deny Respondent's invitation to dismiss this appeal.

### C. The Appeal in this Case Involves Undisputed Material Facts

Respondent next contends that even if the federal rule of *Mitchell v. Forsyth* applies, the appeal in this case "concern[s] unappealable issue of fact and not Respondent's clearly established right(s) as a matter of law." (Resp. Br. pp. 17-19). Respondent alleges that where an appeal involves genuine issue of material fact or "evidentiary sufficiency," then the appeal "does not present a legal question in the sense in which the term was used in *Mitchell*...." (Resp. Br. pp.

18-19). Respondent points to the language of the trial court's order in contending the denial of summary judgment was based upon "genuine issues of fact" and not questions of law. (Resp. Br. p. 19). The Court should not be persuaded by Respondent's arguments.

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment 'if the [evidence before the court] show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (alterations in original) (quoting Rule 56(c), SCRCP). Disputed facts must therefore be "material" to the inquiry before the Court. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis by the Court). The *Anderson* Court added:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *See generally* 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2725, pp. 93–95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

*Anderson*, 477 U.S. at 248.

The material facts are those facts known to Officer Simpson at the time he obtained the arrest warrant. Officer Simpson laid those undisputed material facts out in his principle brief. (App. Br. pp. 18-19). Respondent, however, simply recites that "there are genuine issues of material fact regarding claims against Defendant Simpson" without adequately explaining what those disputes of *material* facts are. (Resp. Br. pp. 19, 22-27). Respondent asserts there was a dispute over the Victim's manner of death, but that dispute is not material - it post-dates the information Officer Simpson received prior to obtaining the warrant, including information at the scene the night of Victim's death, information obtained during the subsequent interviews of the witnesses, and information obtained through Officer Simpson's meetings with his supervisor and an assistant solicitor.

It does not matter that the Circuit Court described facts as in dispute – the key is whether a particular fact the circuit court described was actually a material fact that was also truly in dispute, not how the circuit court characterized it. *Cf. Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015) (an appellate court should look to the effect of an interlocutory order to determine its appealability, not how the order is styled).

The Court should hold that the order is, in fact, immediately appealable under South Carolina law and should address the merits of the appeal.

## II. RESPONDENT'S *EVANS V. CHALMERS* ARGUMENT IS IRRELEVANT TO THE INQUIRY BEFORE THIS COURT

Respondent argues that he stated a separate claim for recovery under *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012) and Officer Simpson's failure to rebut his argument acts as some kind of additional reason to affirm the denial of summary judgment based upon qualified immunity. (Resp. Br. pp. 20-21). The Court should not be persuaded by this argument.

Respondent's argument conflates the doctrine of qualified immunity with the tort concept of an intervening/superseding act which breaks the causal chain for tort purposes. It is true, as the Fourth Circuit described, that:

> [E]ven when, as here, a prosecutor retains all discretion to seek an indictment, police officers may be held to have caused the seizure and remain liable to a wrongfully indicted defendant under certain circumstances. In particular, officers may be liable when they have lied to or misled the prosecutor ...; failed to disclose exculpatory evidence to the prosecutor...; or unduly pressured the prosecutor to seek the indictment....Stated differently, a police officer is not liable for a plaintiff's unlawful seizure following indictment "in the absence of evidence that [the officer] misled or pressured the prosecution."

703 F.3d at 647-648 (citations omitted). The Fourth Circuit held its analysis was critical to the issue of whether "a prosecutor's independent decision to seek an indictment *breaks the causal chain* unless the officer has mislead or unduly pressured the prosecutor." *Evans v. Chalmers*, 703 F.3d at 649 (emphasis added). The Court reversed the district court's denial of the officer's motion to dismiss plaintiffs' § 1983 malicious prosecution claims against them on the basis of a break in the causal chain, not under a qualified immunity analysis.

Qualified immunity, however, relieves the officer of the burdens of litigation no matter the basis for Plaintiff's claims. It is not a proximate cause concept, but an absolute defense which accepts that the assertion that the officer's actions were the "but for" reason for the arrest, but

recognizes that, under the undisputed facts, the officer had probable cause to do what he did. Finding that the facts meet the *Evans v. Chalmers* test for keeping the causal chain intact does not advance the relevant inquiry as it does not impact an officer's ability to establish that, at the time he obtained the arrest warrant, the undisputed material facts supported probable cause for the arrest.

The Court should not be persuaded by Respondent's specious contention that Officer Simpson's failure to challenge Respondent's argument under *Evans v. Chalmers* somehow undermines Officer Simpson's ability to successfully establish the affirmative defense of qualified immunity. The Court should reject Respondent's claim that this argument serves as an additional reason to affirm the denial of Officer Simpson's assertion of qualified immunity.

## III. THE UNDISPUTED MATERIAL FACTS REQUIRE APPLICATION OF QUALIFIED IMMUNITY

Officer Simpson stands on his arguments in his opening brief that the undisputed material facts in this case require application of qualified immunity against Respondent's claims for malicious prosecution under 42 U.S.C. § 1983. Officer Simpson responds, however, to Respondent's claim that *Chiaverini v. City of Napoleon, Ohio*, 602 U.S. 556 (2024) precludes application of the "alternative charging doctrine" to federal malicious prosecution claims. (Resp. Br. pp 27-29). Respondent overstates the holding of *Chiaverini*. The Court should not be persuaded to do the same.

In *Chaiverini,* Justice Kagan described the issue before the Court as follows:

> The question presented here arises when the official brings multiple charges, only one of which lacks probable cause. Do the valid charges insulate the official from a Fourth Amendment malicious-prosecution claim relating to the

> invalid charge? The answer is no: The valid charges do not create a categorical bar. We leave for another day the follow-on question of how to determine in those circumstances whether the baseless charge caused the requisite seizure.

602 U.S. at 558-559. *Chiaverini* therefore involved an actual invalid charge (money laundering) that had no basis in material fact so as to support probable cause for the charge, and further a warrant that was issued based upon an established lie the officers told the magistrate.

This case involves one charge – murder – with the existence of possible alternative charges that even Respondent admitted were supported by the facts Officer Simpson knew at the time he obtained the warrant. (Exhibit A, Pl's Depo. p. 165, ll. 17-23). Respondent's assertion that "[Appellant] may not rely on the existence of probable cause for other offenses to defeat a federal malicious prosecution claim" (Resp. Br. p. 28) reads too much into *Chiaverini*.

Had Officer Simpson sought and obtained an additional warrant for an invalid charge – say, a drug charge he fabricated based upon the Respondent's admitted drug use – then the existence of that invalid charge would meet the holding of *Chiaverini.* That is, the fact that the existence of probable cause to charge Respondent with murder under facts known to Officer Simpson that would have met some lesser crime would not have categorically barred Respondent's Fourth Amendment malicious-prosecution claim *based on the fabricated charge*. That is the narrow holding of *Chiaverini*.

On the other hand, *Chiaverini* does not stand for the broad proposition that the "alternative charge doctrine" has been "rejected" in Fourth Amendment malicious-prosecution cases. (Resp. Br. p. 27). In fact, the Supreme Court did not modify or impact its precedent in *Devenpeck v. Alford*, in which the Court held that "the [officer's] subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."

543 U.S. 146, 153 (2004). The *Devenpeck* Court rejected the rule that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense the arresting officer identified at the time of the arrest.

Respondent also asserts a basis for liability based upon *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988). *Sevigny*, however, does not support Respondent's assertion that probable cause for the arrest warrant would not have existed had Officer Simpson "avail[ed] himself of readily available information...." (Resp. Br. p. 29). To understand *Sevigny* requires a thorough review of the facts of that case.

*Sevigny* involved a mother whose precocious 3 ½ year old cranked Ms. Sevigny's car and put it in gear, causing it to crash into a garage door. When Ms. Sevigny reported the accident Officer Dicksey arrived and investigated. He did not believe Ms. Sevigny's story, which her friend confirmed. Dicksey also did not interview neighbors who had witnessed the incident.

Dicksey placed Ms. Sevigny under arrest and permitted her to drive to the police station. Dicksey then applied for and obtained a warrant from a magistrate that charged Sevigny with misdemeanor child abuse – a charge based upon her version of the incident; and willful and wanton damage to real property – a charge based upon his belief that Sevigny herself had actually caused the damage. Dicksey also reported Sevigny to the State Department of Social Services, which resulted in an investigation of Sevigny by that agency to determine her fitness to retain custody of her children. Sevigny was released on bond two and one-half hours after she was brought to the station. Both charges were later dismissed by the state prosecutor.

Sevigny sued Dicksey under Section 1983 and pendent state tort claims for false imprisonment and unlawful arrest. The state claims were tried and the jury awarded Sevigny

$112,000.00 in compensatory and $21,000.00 in punitive damages, finding that Dicksey had arrested her without probable cause and had falsely imprisoned her. Dicksey moved for judgment n.o.v. on the basis of his claim of qualified immunity or, alternatively, for a new trial, primarily on the grounds that the jury's verdict was excessive. The district court denied both motions.

On appeal, the Fourth Circuit agreed with the district court that Dicksey was not entitled to qualified immunity as a matter of law. The Fourth Circuit stated:

> At its most general level, the test of qualified immunity for executive officers is one of "objective legal reasonableness" – whether an official acting under the circumstances at issue reasonably could have believed that his action did not violate the constitutional rights asserted. *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). At the more specific level here at issue – *a warrantless arrest by a police officer* – the test is whether a police officer acting under the circumstances at issue reasonably could have believed that he had probable cause to arrest, *i.e.*, to believe that the arrestee was committing or had committed a criminal offense. *See Anderson v. Creighton*, 483 U.S. ——, 107 S.Ct. 3034, 3038–39, 97 L.Ed.2d 523 (1987) (test as applied to warrantless searches and seizures); *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 861, 43 L.Ed.2d 54 (1975) (probable cause the sole fourth amendment standard for warrantless arrests).
>
> Though this test effectively allows police officers two levels of reasonable misapprehension of the constitutionality of their conduct in making arrests, we readily agree with the district court that the test was not met here. We conclude instead that *no police officer acting reasonably under the circumstances confronting Dicksey could have believed that he had probable cause to arrest Sevigny.*
>
> *We start with the fact, as found by the jury and not challenged on this appeal, that he did not have probable cause to make the arrest.* Under the *Anderson* test, that does not of course resolve the qualified immunity question. Dicksey might still be entitled to immunity if, on an objective assessment of the circumstances, an officer situated as was he reasonably could have believed that there was probable cause to arrest, *i.e.*, to believe that Sevigny had committed criminal offenses.

846 F.2d at 956 (emphasis added). Thus, the case involved an unchallenged finding that Officer

Dicksey did not have probable cause to arrest Ms. Sevigny. However, that admission did not end the qualified immunity inquiry. The Fourth Circuit continued its discussion:

> As to that, our inquiry is further narrowed by *Dicksey's concession on this appeal that there was no objectively reasonable basis for believing that Sevigny had committed the offense of willful and wanton damage to real property with which he alternatively charged her*. He contends, however, that even so he is entitled to immunity because there was an objectively reasonable basis for believing that probable cause existed to arrest her for the other offense of misdemeanor child abuse.

846 F.2d at 956 (emphasis added). Again, the case involved a concession by Officer Dicksey that there was no objectively reasonable basis for charging Ms. Sevigny for damaging the property.

The Fourth Circuit then stated:

> To make the appropriate objective inquiry at this level of concreteness, it is necessary to consider both the factual circumstances and the law involved in the probable cause equation *as they should have appeared to a police officer acting reasonably under the circumstances*. For the reasonableness of a belief that there was probable cause to arrest without a warrant necessarily involves the officer's perception both of the arrestee's conduct and of the offense that he considers may thereby have been committed.
>
> A warrantless arrest made either because of an unreasonable misapprehension of the arrestee's conduct or of the scope of the crime thought to have been committed, or certainly of both in combination, could not be one made on the basis of a reasonably held belief that the arrest was justified. But, by the same token, a reasonable belief entitling to immunity might obviously exist despite reasonable misapprehension of either conduct or law; *it is precisely the function of qualified immunity in this context to excuse reasonable mistakes in making the composite factual and legal judgments leading to the arrests*.

846 F.2d at 956 (emphasis added). Thus, *Sevigny* involved both trial and appellate courts analyzing whether a reasonable police officer would have acted as Officer Dicksey did in making a warrantless arrest of Ms. Sevigny, or whether Officer Dicksey's actions were the result of a reasonable mistake.

The Court continued:

> In considering the factual circumstances under which this particular arrest was made, we must therefore be concerned not with Sevigny's conduct as Dicksey may have perceived it, *but as a police officer acting reasonably under the circumstances should have perceived it.* And in assessing the objective reasonableness of any critical misapprehension or ignorance of fact, account must be taken of any practical exigencies that prevented fuller investigation of the facts before the arrest was made. In considering whether Sevigny's conduct as it should reasonably have been perceived could then reasonably have been believed to constitute a criminal offense, we must be concerned not with Dicksey's subjective understanding of the nature of the offense, but with the understanding that a reasonably informed police officer should have had of it. And in assessing the objective reasonableness of any legal misapprehension of the contours of the criminal offense thought committed, account must be taken of the degree to which the law's application was "apparent." *See Anderson*, 107 S.Ct. at 3039. By this means, proper protection is afforded the public interest reflected in the doctrine of qualified immunity – to insure vigorous performance of official duty freed from overpowering concerns for incurring personal liability for honest errors. *See Harlow*, 457 U.S. at 816–17, 102 S.Ct. at 2737–38.
>
> Assessing Dicksey's action in arresting Sevigny in light of these principles, we are satisfied that on the evidence adduced at trial, he was not entitled to good faith immunity. We think instead that Dicksey's action in arresting Sevigny fails to measure up to the standards of objective reasonableness both in his assessment of Sevigny's conduct and in his apparent understanding of the crime which he now asserts he had a reasonable basis for believing she had committed. We take these in order.
>
> When Dicksey arrested Sevigny, he was totally uncertain about what had happened. His recourse – which confirms his uncertainty – was later to charge her with two separate offenses – for whatever had occurred. Under the circumstances, these involved *mutually inconsistent factual theories*: that Sevigny herself had run the car into the building; that her child had done so. Both obviously could not have been proven, and *any officer acting reasonably would have realized that this made the existence of probable cause for both highly questionable, if not logically impossible*. Laying this possibility aside, there is the critical fact here that Dicksey did not avail himself of readily available information that would have clarified matters to the point that *one of the offenses would have been flatly ruled out as factually unsupportable*. It is evident that had Dicksey made even rudimentary inquiries of neighbors then on the scene, they would have verified Sevigny's assertion that her child, not she, had done the property damage. It is further evident that in his impatience and irritation with Sevigny, *Dicksey simply did not*

> *bother to do what any police officer acting reasonably in the circumstances would have done to clarify the factual situation.* There was no exigency which prevented his doing so, there being no apparent danger that were Sevigny not immediately arrested on some basis, she would somehow evade prosecution. *See* [*Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987)]. Had Dicksey learned what easily could have been learned, and in common prudence should have been, *there is reason to doubt that any arrest would have been made.* To the extent, therefore, that Dicksey made his arrest on a misapprehension of the facts confronting him, his misapprehension was not a reasonable one.

846 S.E.2d at 957-958 (emphasis added).

> Turning to the offense – misdemeanor child abuse – upon which Dicksey now solely relies in asserting his immunity, we think that his apparent understanding of that offense's application to Sevigny's conduct was as plainly not an objectively reasonable one. *In fairness, we must make that assessment on the basis of the facts as they should have been perceived by a police officer acting reasonably under the circumstances.* This means on the basis that, as Sevigny asserted, her child had indeed driven the car into the building. Though it is evident from the record that Dicksey did not believe Sevigny's account, the fact that he nevertheless charged her with an offense based upon it would not of itself negate either the existence of probable cause or the reasonableness of a belief that it existed. The inquiry is whether, under the circumstances confronted, probable cause to arrest for some offense existed, or appeared reasonably to exist, without regard to the arresting officer's subjective perceptions of either fact or law. *See supra* n. 5.

846 F.2d at 958. The Court analyzed the applicable statutes governing child abuse or neglect and continued:

> We agree with the district court that no police officer acting reasonably could have believed that Sevigny's conduct in failing to prevent the almost incredible, highly improbable, act by a four year old child might thereby have violated this child abuse statute. Even if the statute could reasonably be understood to reach culpably negligent as well as intentional conduct directly or indirectly inflicting injury upon, or threatening injury to, a child, there was no reasonable basis for seeing in this episode anything more than an instance of the kind of beleaguered, perhaps improvident, inattentiveness that is the occasional unhappy lot of all parents with active young children. *It simply cannot be accepted that any reasonable police officer could have understood that by this statute the state legislature intended to criminalize every parental lapse or misjudgment that creates so attenuated a risk of injury to children.*

> We therefore affirm the district court's rejection of Dicksey's plea of good faith immunity for the act of arresting Sevigny.

846 F.2d at 958-959.

At bottom, Respondent's one-phrase cite to *Sevigny* is misleading, and a thorough examination of the case demonstrates how it is meaningfully distinct from this case and actually supports Officer Simpson's argument that, under the facts known to him at the time, a reasonable police officer would have had probable cause to obtain a warrant for Respondent's arrest for some criminal act (including murder).

The Court should reject Respondent's invitation to misapply *Chiaverini* and ignore *Devenpeck,* and should hold the "alternative charging doctrine," as Respondent labels it, does, indeed, apply in this case. Further, the Court should reject Respondent's summary description of *Sevigny* and should find the case actually supports Officer Simpson's assertion of qualified immunity in this case.

## IV. APPELLANT HAS PRESERVED THE ISSUE REGARDING WHETHER OFFICERS OF REASONABLE COMPETENCE COULD DISAGREE ON WHETHER TO SEEK THE ARREST WARRANT FOR MURDER

Respondent asserts in conclusory fashion:

> [Officer Simpson] argues that where he observed that Ms. Prophet was "not in imminent danger" and that Respondent carried out his verbal threats against Decedent, "if officers of reasonable competence could disagree over whether a warrant should issue, then immunity should be recognized" citing *Malley v. Briggs*, 475 U.S. 335 (1986). Respondent respectfully submits that [Officer Simpson] recites this specific language from *Malley v. Briggs* for the first time on appeal such that his argument is not preserved.

(App. Br. p. 34). The Court should reject this assertion.

In his Memorandum in Support of Summary Judgment, Officer Simpson stated:

> "Probable cause requires more than 'bare suspicion,' but requires less than evidence necessary to convict." *Porterfield v. Lott*, 156 F.3d 563, 569 (4th Cir. 1998) (internal citations omitted). Reasonable law officers need not "resolve every doubt about a suspect's guilt before probable cause is established." [*Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991)]. "'Whether probable cause exists in a particular situation ... always turns on two factors in combination: the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct.'" *Rogers v. Pendleton*, 249 F.3d 279, 290 (4th Cir. 2001) (quoting *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992)).

(Memo, p. 15).

> [T]he Supreme Court held in *Anderson v. Creighton*, 483 U.S. 635 (1987), that a court must look for the "'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. ... [This] is to say that in the light of preexisting law the unlawfulness must be apparent." *Id.* at 640.

(Memo, p. 23).

> Defendant Simpson's consultation with his supervisor prior to arresting Plaintiff and the act of seeking arrest warrants from a neutral and detached magistrate are further evidence of objective reasonableness, solidifying Simpson's entitlement to qualified immunity. *See Torchinsky v. Siwinski*, 942 F.2d 257, 264-65 (4th Cir. 1991) (holding that an officer seeking the advice and judgment of his supervisor and obtaining warrants from a neutral and detached magistrate "satisfy the requirements of objective reasonableness on which qualified immunity rests."). *See also Gomez v. Atkins*, 296 F.3d 253, 264 (4th Cir. 2002).

(Memo, p. 24). These arguments sufficiently placed the objective reasonableness argument described in *Malley* before the trial court, which necessarily rejected the argument in its Form 4 order denying summary judgment and ruling "[t]hose pages support the analysis offered in plaintiff's briefing." (Form 4 order entered Jan. 16, 2025).

The Court should reject Respondent's contention that Officer Simpson's argument that

probable cause must be judged by an objective standard for purposes of qualified immunity is not preserved for this Court's review.

## V. Officer Simpson Has Not Abandoned His Arguments on Appeal

Finally, Respondent contends that Officer Simpson abandoned certain arguments by withdrawing his Motion to Reconsider pursuant to Rule 59, SCRCP. (Resp. Br. pp. 30-32). Respondent makes these contentions out of context. The Court should not be persuaded to hold Officer Simpson has abandoned anything.

It is true that Officer Simpson initially filed and served a motion for reconsideration of the trial court's order as permitted by *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004) (adopting the federal construction of Rule 59 that "a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented"). (Appellant's Rule 59 Motion). However, Officer Simpson failed to provide the trial judge with a copy of the motion as required by Rule 59(g), SCRCP.

Respondent indicated that this failure rendered the motion untimely (and later argued as much pursuant to *Smith v. Fedor*, 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017) (permitting, but not requiring, a trial judge to dismiss a motion as untimely solely for failure to comply with Rule 59(g)) (Response filed May 14, 2025)). Officer Simpson then filed and served a Notice of Appeal on May 8, 2025, which stated:

> George Simpson appeals the order denying his Motion for Summary Judgment on the issue of Qualified Immunity by the Honorable Thomas W. McGee, III, dated April 10, 2025. Appellant received written notice of the entry of the order on April 10, 2025, a copy of which is attached. A motion pursuant to Rule 59, SCRCP, to reconsider the decision is pending but counsel for Plaintiff

> may challenge the procedural aspects of the motion, and specifically compliance with Rule 59(g), though the undersigned asserts the argument to be inconsequential. Nevertheless, this appeal is filed out of an abundance of caution to protect George Simpson's right to appeal the order.

(Notice of Appeal).

Respondent then indicated he would seek dismissal of the appeal due to the pending Rule 59 motion while simultaneously requesting the trial court dismiss the motion as untimely by noncompliance with Rule 59(g). To avoid being whipsawed Officer Simpson elected to withdraw the Rule 59 motion so that this Court would not dismiss the appeal.

Officer Simpson made all of his arguments to the trial court judge, who rejected them. (Motion for Summary Judgment of May 3, 2024; Memorandum in Support filed Aug. 23, 2024; Letter of March 21, 2025). Officer Simpson's withdrawal of the motion for reconsideration did not abandon anything. The Court should not be persuaded by Respondent's contention and should address the merits of this appeal.

## CONCLUSION

This Court should reject Respondent's contention that the Court should dismiss this appeal. The Court should also reverse the circuit court's order and hold Appellant is entitled to protection under qualified immunity. Finally, the Court should remand the matter with instructions for the circuit court to dismiss the case against Officer Simpson.

Respectfully submitted,

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