

The State of South Carolina
In The Court of Appeals

71609

APPEAL FROM THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
The Honorable Alison R. Lee, Circuit Judge

Docket No. 2010-CP-40-3299

Tynaysha HortonAppellant,

v.

The City of ColumbiaRespondent.

PETITION FOR REHEARING

The Appellant Tynaysha Horton, respectfully petitions the Court for a rehearing of its Opinion No. 5200 pursuant to Rule 221(a), SCACR. This petition is made in accordance with Rule 221 (c), SCAR inasmuch as the actions of the Appellate Court have the effect of dismissing or finally deciding Ms. Horton's appeal. In affirming the Order of the Circuit Court this Court has overlooked or misapprehended the facts that provide the basis for the Opinion as well as the following points.

The Court's Opinion affirming the Circuit Court's granting of Respondent's Motion for Summary Judgment is based on the two-issue rule. The Court finds that Appellant failed to attack the Circuit Court's finding that her claims are barred by the Tort Claims Act, S.C. Code §15-78-60(5). However, Appellant's attack of the applicability of the Tort Claims Act is inherent in her argument attacking the arrest warrant and the issue of probable cause. The Court's finding as to the applicability of the Tort Claims Act rests on the Circuit Court's finding that probable cause existed as a matter of law. If a reasonable finder of fact determines that probable cause did not exist, the immunity claimed under the Tort Claims Act does not apply.

Appellant has attacked this finding as the sole basis of her appeal. Appellant contends that the Circuit Court erred in finding the arresting Officer's affidavit provided probable cause for her arrest because the Officer made material omissions with a reckless disregard for the truth of the information contained in the affidavit. The issue of probable cause is as central to the Tort Claims Act analysis as it is to the issue of Respondent's liability for the underlying common law torts.

Appellant argues that the Circuit Court abused its discretion in deciding that probable cause existed as a matter of law. Appellant maintains that the law of this State holds that probable cause is a question of fact to be determined by a jury and that a facially valid warrant only establishes a rebuttable presumption of probable cause. *See, Law v. South Carolina Dep't of Corr.*, 368 S.C. 42, 629 SE2d 642 (2006), *Jones v. City of Columbia*, 301 S.C. 62, 389 SE2d 662 (1990). Appellant challenges the existence of probable cause based upon the officer's reckless disregard for the truth in omitting material information from the affidavit, raising a factual issue as to the validity of the arrest warrant but the Circuit Court improperly denied Appellant the opportunity to allow a jury to make the factual inquiry as to the existence of probable cause as envisioned by *Law* and *Jones*.¹ Appellant appeals this abuse of discretion by the Circuit Court which is central to both the Tort Claims Act defenses asserted by Respondent as well as Appellant's burden of proof for each of the underlying torts. If Appellant is correct (and Appellant contends that she is), then the SC Tort Claims Act is not applicable and necessarily falls out of the case.

Although Appellant could have presented this issue in a different way, Appellant's failure to do so should not be fatal to her appeal. As Chief Justice Toal explained in her dissent in *Atlantic Coast Builders and Contractors, LLC v. Lewis*:

¹ The Court of Appeals notes in its Opinion that the 4th Circuit has not addressed how it would evaluate omissions under the reckless disregard prong of *Franks*. However, the 8th Circuit has addressed this issue and has found that omissions are made with a reckless disregard for the truth when an officer omits facts that "any reasonable person would have known the judge would wish to have brought to his attention." *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993).

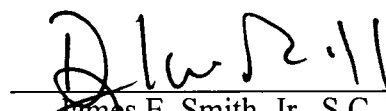
In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. To be clear, I do not discount the importance of our issue preservation rules. As an appellate court, we sit to review decisions of lower courts for error. As such, "it is axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). However, I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests. In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.

398 S.C. 323, 332-333, 730 S.E.2d 282, 287 (2012) (Toal, CJ, dissenting).

CONCLUSION

For the reasons set forth herein, Ms. Horton respectfully requests that the Opinion of the Court be withdrawn and that the Final Order and Decision of the Circuit Court be reversed as to the granting of Summary Judgment in favor of Defendant/Respondents.

Respectfully submitted,


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17 March, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 2012-CP-10-3737

Appellate Case No. 2012-211168

Tynaysha Horton,.....Appellant,

v.

The City of Columbia, Respondent.

PROOF OF SERVICE

I, Laura Diaz, employee of James E. Smith, Jr., P.A., do hereby certify that I have this date served (1) copy of the Petition for Rehearing upon the following parties by first class US Mail to the addresses as follows:

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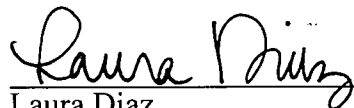
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MAR 18 2014

SC Court of Appeals



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March 18, 2014
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