THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Opinion No. 5200 (S.C. Ct. App. filed February 26, 2014)

Tynaysha Horton, ... Petitioner,

v.

The City of Columbia Police Department, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

John S. Nichols, SC Bar # 4210
Blake A. Hewitt, SC Bar # 73674
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Dylan W. Goff, Esquire
James E. Smith, Jr., Esquire
JAMES E. SMITH JR. PA
1422 Laurel St.
Columbia, SC 29201-2516
(803) 933-9800

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina

Other Jurisdictions

Statutes

Rules

RULE 226 (d)(1), SCACR, CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on March 17, 2014 (App. p. 9) and denied by the Court of Appeals on April 23, 2014. (App. p. 12). On May 21, 2014, this Court issued an order extending the deadline for this Petition to June 25, 2014.

INTRODUCTION

This Petition presents to the Court an opportunity to clarify the "two issue" rule as it has developed in South Carolina, and to further explain when it is appropriate for an appellate court to apply the doctrine. The Court of Appeals affirmed the trial court's grant of summary judgment as to most of Ms. Horton's causes of action against the City of Columbia Police Department largely on a misapplication of the "two issue" rule even though the circuit court misapplied the law. The Court of Appeals also affirmed the grant of summary judgment as to Ms. Horton's cause of action for assault and battery despite the existence of a factual issue as to whether there was a wilful omission of facts in obtaining a warrant for her arrest.

This Court should grant this Petition, permit briefing, reverse the decision of the Court of Appeals, and remand the matter to the circuit court for further proceedings.

QUESTIONS PRESENTED

I. Did the Court of Appeals Improperly Affirm the Trial Court's Grant of Summary Judgment on Petitioner's Claims for False Arrest, False Imprisonment, and Malicious Prosecution in Favor of the City of Columbia under the "Two-Issue" Rule?

II. Did the Court of Appeals Improperly Affirm the Trial Court's Grant of Summary Judgment on Petitioner's Cause of Action for Assault and Battery based upon the holding that the lawfulness of the arrest must be judged without considering Officer Smith's affidavit regarding "omission" of critical information in obtaining the warrant?

STATEMENT OF THE CASE

Petitioner Tynaysha Horton filed an action on May 28, 2010, against the City of Columbia asserting causes of action for negligence, malicious prosecution, false arrest, false imprisonment, assault and battery. (R. 19-29). These claims arose out of Ms. Horton's wrongful arrest and detention for a crime that occurred in Columbia.

On June 9, 2010, the City filed its answer. (R. 30-37). The answer included the affirmative defense that the action was barred generally by the South Carolina Tort Claims Act and listed eleven (11) separate sections of the Act. (R. p. 35, ¶¶ 45-47).

Following discovery the City moved for summary judgment on April 29, 2011, asserting it could not be held liable as a matter of law because Ms. Horton was arrested on a facially valid warrant. (R. 259-281). Ms. Horton filed a response to the motion on June 30, 2011. (R. 282-300).

On September 29, 2011, the trial court granted summary judgment for the City on all causes of action. (R. 4-15). Ms. Horton moved the court to reconsider its decision but the court denied that motion. (R. 2).

Ms. Horton filed and served a notice of appeal. (R. 313). The Court of Appeals heard oral arguments on October 16, 2013 and on February 26, 2014, the Court issued its opinion affirming the trial court's order. *Horton v. City of Columbia*, 408 S.C. 27, 757 S.E.2d 537 (Ct. App. 2014). Ms. Horton petitioned the Court for rehearing which the Court denied.

This Petition follows.

FACTS

The following background is taken primarily from the trial court's order, which took the facts in the light most favorable to Ms. Horton. (Tr. pp. 4-5; See also Plaintiff's Memorandum in Opposition to Summary Judgment, pp. 282-284). This recitation of the facts suffices for purposes of the narrow issue addressed in this Petition.

On September 9, 2009, someone threw a cinder block through a glass door in order to break into the "Roly Poly" restaurant in Columbia, South Carolina. Crime Scene Officer Pete Currie of the Columbia Police Department (CPD) lifted a partial fingerprint from the door where the glass had been pushed up to gain entry. Officer Currie processed the print through SLED's Automatic Fingerprint Identification System (AFIS). The AFIS returned 20 possible matches, identifying Ms. Horton's print as "the most probable match." Officer Currie then conducted a review and independently determined that Ms. Horton's print matched the latent print taken from the crime scene.

Officer Roberta Tyler of the CPD was assigned to investigate the crime. Officer Currie informed Officer Tyler that he had matched the fingerprint of the robber and identified Ms. Horton as the person who broke into the restaurant.

On September 15, 2009, Officer Tyler called Ms. Horton's probation officer, Agent Albert Smith, in Bennettsville, South Carolina, and informed Agent Smith that CPD was seeking a warrant for Ms. Horton's arrest based on fingerprints lifted from the crime scene. Agent Smith informed Officer Tyler of his personal reservations regarding the likelihood that Ms. Horton could have committed the crime based upon his personal

knowledge of her lack of transportation and the recent birth of her third child.

Nevertheless, on September 17, 2009, Officer Tyler appeared before a ministerial recorder of the City of Columbia and made a partial disclosure of relevant facts known to the CPD at the time. Officer Tyler did not disclose any information that Agent Smith related to her, nor did she disclose any other possibly exculpatory information. Based upon the incomplete information Officer Tyler provided, the ministerial recorder issued warrants for Ms. Horton's arrest for burglary (second degree) and petit larceny.

Agent Smith assisted in having Ms. Horton surrender herself to Marlboro County law enforcement officers on September 17, 2009. CPD transported Ms. Horton to Columbia, and on September 18, 2009, took Ms. Horton to the detention center. Ms. Horton was not fingerprinted at the time of her arrest or at any time prior to September 21, 2009, despite multiple requests by her that the officers do so.

On September 21, 2009, Officer Currie took fresh fingerprints from Ms. Horton. That same date Ms. Horton was released from custody after a SLED review of her fingerprints revealed that they were not a match for the latent print lifted from the crime scene. Officers then drove Ms. Horton home that same day.

Ms. Horton brought an action against the CPD for false arrest, false imprisonment, malicious prosecution, negligence and assault and battery. The City moved for summary judgment as to all causes of action.

Following a hearing the trial court granted the motion. The court first held that the warrant was facially valid, and that Ms. Horton's claims for false arrest and false

imprisonment therefore fail as a matter of law. (Tr. pp. 6-9). The court also ruled that the claim for malicious prosecution failed because Ms. Horton failed to show lack of probable cause to pursue the charges against her. (Tr. pp. 9-10). The court next dismissed the assault and battery claims upon the finding that the arrest was based upon "facially valid arrest warrants." (Tr. p. 10).

The court then addressed the negligence and gross negligence claims. First, the court held there was no such cause of action for "wrongful arrest." (Tr. pp. 10-11). The court then held that even if such a cause of action existed, there was no evidence any City employee was negligent. (Tr. pp. 11-12).

Finally, in general terms, the court ruled that the Tort Claims Act prevented recovery on Ms. Horton's claims. The court specifically pointed to Section 15-78-60(5), "which precludes liability by a governmental entity for a loss resulting from the exercise of discretion or judgment by a governmental employee, or the performance or failure to perform any act or service which is in the discretion or judgment of the employee." (Tr. p. 12-13). The court stated the comparison of the fingerprints and determination of whether they matched "clearly involves judgment and discretion. Officer Currie exercised his professional judgment based upon his training and experience." (Tr. p. 13). The court added "[t]he City is also entitled to summary judgment on the claims for false arrest, false imprisonment, malicious prosecution and negligence based upon this provision of the South Carolina Tort Claims Act." (Tr. p. 13).

Ms. Horton requested reconsideration of the trial court's order. (R. p. 290-300).

Ms. Horton pointed out, among other things, that the trial court's ruling on the Tort Claims Act was erroneous as a matter of law. (Tr. p. 299). The trial court summarily denied the motion. (Tr. p. 2).

In her brief to the Court of Appeals, Ms. Horton stated the issue on appeal as follows:

> The Order issued by the Court of Common Pleas granting Respondent's Motion for Summary Judgment constitutes a clearly arbitrary and capricious abuse of discretion as there were genuine issues of material fact in dispute and the Order should be reversed.

(App. p. 17). In her argument, Ms. Horton contended the trial court erred because there were factual disputes over the existence of probable cause to issue the warrant, and lack of probable cause supported her claims for malicious prosecution, false arrest and false imprisonment. (App. p. 23-24). Ms. Horton also argued she challenged the validity of the warrant and that the existence of a "facially valid warrant" merely established a rebuttable presumption of the existence of probable cause. (App. p. 24). These arguments supported her assertion that the trial court's ruling was controlled by an error of law. *See, e.g.*, *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85–86 (2008) ("An abuse of discretion occurs when the trial court's decision *is based upon an error of law* or upon factual findings that are without evidentiary support.") (emphasis added). *Accord Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

Ms. Horton then set forth facts that she asserted "would tend to lead a reasonable person to believe it was improbable if not impossible that she had committed the crime."

(App. p. 24-25). She then outlined facts asserted from Officer Currie's affidavit in which he admitted he took the fingerprints to SLED for re-evaluation after Ms. Horton "'related facts that would have negated her ability to have committed the crime' but that he still believed the prints were a match." (App. p. 25). However, in his deposition, Officer Currie stated that the only words he exchanged with Ms. Horton was to ask "hey, how are you," when he fingerprinted her. (App. p. 25).

Ms. Horton pointed out that Officer Currie also stated it was CPD's procedure "to fingerprint an individual in custody and to confirm the match as soon as possible." (App. pp. 25-26). When asked at his deposition to compare the latent print with Ms. Horton's prints, Officer Currie stated "the print is completely different....it doesn't add up...." (App. p. 26). Ms. Horton stated, "[t]here was no rational basis for the conclusion made below regarding the existence of probable cause." (App. p. 26). She added:

> Indeed, the argument made by [the City] and ultimately adopted by the Court in its Order is viciously circular. It amounts to a belief that wherever a warrant is issued, there must have been probable cause for the issuance simply because a warrant may only be issued on probable cause. By the Court's granting of Summary Judgment, [Ms. Horton] was denied her right to present to the jury, as the proper finder of fact, any facts or evidence tending to negate the existence of probable cause... Were this Court to adopt the standard articulated by the Court below the effect would be to foreclose any citizen's ability to bring any action against the government for these torts.

(App. p. 26).

Although the City made an argument regarding the "two issue rule" in its brief, that argument appears in one paragraph of its 21-page brief. (App. p. 41). There was no forceful assertion that Ms. Horton did not intend to challenge the dismissal of her case on

all arguments.

The Court of Appeals held, however, that the circuit court's decision was based on more than one ground, and Ms. Horton did not appeal all grounds – the unappealed ground then became the "law of the case" and thus the "two-issue" rule required affirmance. This was so even though the Court noted "the circuit court spent the bulk of its time considering the probable cause issue in deciding to grant summary judgment." (App. p. 4). This was also so even though the Court of Appeals noted "this ruling by the circuit court [dismissing the claims for false arrest, false imprisonment, malicious prosecution and negligence based on the Act] may be erroneous as to the false arrest, false imprisonment and malicious prosecution claims...." Instead, the Court noted that Ms. Horton did not mention Section 15-78-60(5) in her brief, and the Court refused to "conclude that an attack on the Tort Claims Act ruling is inherent in [Ms.] Horton's argument as to lack of probable cause." (App. p. 4). The Court found Ms. Horton's statement of the issue on appeal was too broad and "did not provide any direction as to why the application of the Tort Claims Act was erroneous." (App. p. 4, n. 3).

The Court then addressed the merits of Ms. Horton's cause of action for assault and battery. The Court disagreed "in some respects" with the trial court's rationale (App. p. 4), but affirmed under *US v. Colkley*, 899 F.2d 297 (4th Cir. 1990), *Franks v. Delaware*, 438 U.S. 154 (1978) and *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999), despite evidence the officer who obtained the arrest warrant omitted crucial information from Agent Smith regarding Ms. Horton's transportation and family issues

(*i.e.*, that it was highly unlikely she was the perpetrator of the crime). The Court of Appeals followed the Fourth Circuit *Colkley* case in holding there is a "very high standard for establishing entitlement to a *Franks* hearing." (App. pp. 7-8). The Court reviewed Officer Tyler's affidavit without reference to the omitted statements by Agent Smith and found they provided probable cause for Ms. Horton's arrest. The Court concluded that since the arrest was lawful, Ms. Horton's cause of action for assault and battery failed as a matter of law.

Ms. Horton petitioned the Court to rehear and reconsider its rulings. (App. pp. 9-11). The Court summarily denied the petition. (App. p. 12).

ARGUMENT

I. The Court of Appeals Improperly Affirmed the Circuit Court's Grant of Summary Judgment on Petitioner's Claims for False Arrest, False Imprisonment, and Malicious Prosecution in Favor of the City of Columbia under the "Two-Issue" Rule

The Court of Appeals affirmed the circuit court's grant of the CPD's motion for summary judgment as to most of Ms. Horton's claims under the "two issue" rule. This Court should grant this Petition and review that decision.

The "two issue" rule applies where the appellate court reviewing an error is faced with a separate, independent basis for a jury's verdict that is supported by the record – hence, reversal on the erroneous ruling would provide the appellant no relief since the other ground supports affirmance. This occurs where there is a general verdict returned on several theories that were presented – the fact that one was erroneous does not require

reversal if another has support in the record.

The source for the rule is believed to be *Harry L. Hussmann Refrigerator Supply Co. v. Cash & Carry Grocer, Inc.*, 134 S.C. 191, 132 S.E. 173 (1926). *See Cole v. Raut*, 365 S.C. 434, 617 S.E.2d 740 (Ct. App. 2005) (*Cole I*)(Kittredge, J, *dissenting*), *rev'd* 378 S.C. 398, 663 S.E.2d 30 (2008) (*Cole II*). In *Hussman*, the plaintiff filed an action in claim and delivery for possession of a refrigerator. The defendants answered with a general denial and a counterclaim. The jury rendered the following verdict: "We find for the plaintiff possession of the goods." *Id.* at 194, 132 S.E. at 173. The defendants moved for a new trial on "the ground that it did not appear from the verdict that the jury had passed upon [the counterclaim]." *Id.* The trial court granted the new trial motion. This Court reversed and reinstated the jury verdict, relying on the principle that later became identified as the "two issue" rule:

> [W]hen there are several issues in the case submitted to a jury under full instructions, a general verdict in favor of one or the other of the parties, in the absence of objection to the verdict not having passed upon the several issues separately, will be held to have concluded all the issues.

Id. at 196, 132 S.E. at 174. The Court further noted that "[t]he defendants had no right to remain silent under the apprehension that the irregularity might be corrected against their interest and afterwards complain of it." *Id.* at 194, 132 S.E. at 174.

Thus, where there is a verdict involving two or more issues, and the verdict is supported as to at least one of those issues, the verdict will not be reversed even though the other issue contains error that would ordinarily require reversal. *Anderson v. West*, 270 S.C. 184, 241 S.E.2d 551 (1978). *See also Cole II* (holding general verdict for Dr.

Raut may be sustained because it was independently supported by the negligence claim which was properly submitted to the jury, citing *Dropkin v. Beachwalk Villas Condominium Assn.*, 373 S.C. 360, 644 S.E.2d 808 (Ct. App.2007) (affirming a general defense verdict under the two-issue rule where plaintiff alleged error in the trial court's denial of a directed verdict on the issue of negligence, but where the record contained evidence supporting a defense verdict on the issue of proximate cause); *Bryant v. Waste Management, Inc.*, 342 S.C. 159, 536 S.E.2d 380 (Ct. App.2000) (applying the two-issue rule to determine that an erroneous instruction on negligence *per se* was not prejudicial to the defendant where there existed other theories of liability supported by ample evidence in the record upon which the jury could have based its verdict for the plaintiff); *Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169 (Ct. App.1991) (applying the two-issue rule to affirm a general jury verdict for the plaintiff where the trial court erred in submitting the issue of abuse of process to the jury but the defendant alleged no error in submitting the plaintiff's remaining claim to the jury)). *See also Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 315 S.E.2d 116 (1984) (court held record contained ample evidence of negligence to support the jury's verdict and therefore found it unnecessary under the "two issue rule" to address appellant's claim that there was insufficient evidence of breach of warranty to support the jury's verdict); *City of North Myrtle Beach v. East Cherry Grove Realty Co., LLC*, 397 S.C. 497, 500 n. 1, 725 S.E.2d 676, 677 n. 1 (2012) ("Under the two-issue rule, we need not reach the questions whether the other two theories were properly submitted to the jury," citing *Smoak*).

The "two issue" rule is not without its limits. *Compare Blackburn & Co. v. Dudley*, 289 S.C. 415, 338 S.E.2d 151 (1985) (court held plaintiff may not have benefit of the "two issue" rule where an issue submitted to the jury was not included in the pleadings and plaintiff did not move to amend to conform to proof; the charge on the issue resulted in a fatal defect to the verdict). The *Anderson* Court explained three reasons why it rejected the rule in that case:

> Initially, the rule is utilized by courts on appeal, not trial courts. Secondly, the rule is a procedural tool for upholding, not reversing, decisions. Thirdly, the practical effects of the Court of Appeals' application of the "two issue" rule are undesirable. Such an application would discourage trial courts from correcting errors. Because the jury's general verdict could potentially be upheld anytime it was susceptible of two or more constructions, there would be no incentive for trial courts to correct errors, such as through the direction of a post-trial verdict.

Anderson, 322 S.C. at 421, 472 S.E.2d at 255. There is also a concern over the lack of prejudice to an appellant from a trial error because there is no way to demonstrate the jury's decision is based on *that* issue. *See Cole I* (Kittredge, J, *dissenting*) (the touchstone of the "two issue" rule is its concern with prejudice).

The circuit court and the Court of Appeals based their decisions largely on this Court's decision in *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). *Jones*, however, does not mandate affirmance. The concern in *Jones* was that the arguments in the brief left the Court of Appeals to "grope in the dark" to ascertain the precise point at issue in the case. The issue on appeal stated "[d]id the trial court err in finding the use of deadly force by the Richland County deputies was objectively reasonable, as a matter of law, and that the officers were not negligent, as a matter of law?" 387 S.C. at 348, 692 S.E.2d at

904. The Court found that the appellant did not appeal the court's ruling that the officers were immune under Section 15-78-60(6) of the Code (the method of providing police protection). There was simply no argument in the brief that the trial court erred in granting a directed verdict on that basis, and the broad statement of the issue did not raise this point. Interestingly, the Court went further, however, to hold that even if the issues were preserved for review, because the plaintiff in that case was injured while trying to escape, the defendant deputies in that case would still be immune from suit pursuant to Section 15-78-60(21) of the Code.

Here, there was no doubt what Ms. Horton was appealing, and she challenged the finding that the officers exercised discretion in deciding not to fingerprint her upon arrest or within a reasonable time thereafter. While she might have argued the point more directly, there was no need to "grope in the dark" to determine what she was appealing. *Cf.* Rule 208(b)(1)(B), SCACR (the statement of the issue "shall be concise and direct as to each issue"). Furthermore, the use of the phrase "two issue rule" in *Jones* is a misnomer, for the Court was not ruling that the record supported one ground such that reversal on another ground would serve no purpose.

Finally, as Chief Justice Toal stated in her dissent in *Atlantic Coast Builders and Contractors, LLC v. Lewis*:

> 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. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.

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

The Court should grant this Petition and permit the parties to brief whether the Court of Appeals appropriately applied the "two issue" rule here. The Court should reverse that ruling and remand the matter for further proceedings.

II. The Court of Appeals Improperly Affirmed the Trial Court's Grant of Summary Judgment on Petitioner's Cause of Action for Assault and Battery Based upon the Holding That the Lawfulness of the Arrest must Be Judged Without Considering Officer Smith's Affidavit Regarding "Omission" of Critical Information in Obtaining the Warrant

The Court of Appeals addressed the merits of Ms. Horton's cause of action for assault and battery. As noted above, the Court disagreed "in some respects" with the trial court's rationale (App. p. 4), but affirmed under *US v. Colkley*, 899 F.2d 297 (4th Cir. 1990), *Franks v. Delaware*, 438 U.S. 154 (1978) and *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999), despite evidence the officer obtaining the arrest warrant omitted

crucial information from Agent Smith regarding Ms. Horton's transportation and family issues (i.e., that it was highly unlikely she was the perpetrator of the crime). The Court of Appeals followed the Fourth Circuit *Colkley* case in holding there is a "very high standard for establishing entitlement to a *Franks* hearing." (App. pp. 7-8). The Court reviewed Officer Tyler's affidavit without reference to the omitted statements by Agent Smith and found they provided probable cause for Ms. Horton's arrest. The Court concluded that since the arrest was lawful, Ms. Horton's cause of action for assault and battery failed as a matter of law. This Court should grant this petition to review this issue.

In *Franks*, the Supreme Court held that in certain narrowly defined circumstances a defendant can attack a facially sufficient affidavit. The Court recognized a strong "presumption of validity with respect to the affidavit supporting the search warrant," 438 U.S. at 171, and thus created a rule of "limited scope," *id.* at 167. The rule requires that a dual showing be made which incorporates both a subjective and an objective threshold component. In order even to obtain an evidentiary hearing on the affidavit's integrity, a the party attacking the affidavit must first make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Id.* at 155–56. This showing "must be more than conclusory" and must be accompanied by a detailed offer of proof. *Id.* at 171. In addition, the false information must be essential to the probable cause determination: "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of

probable cause, no hearing is required." *Id.* at 171–72. The *Franks* test also applies when affiants omit material facts "with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading." *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir.1986).

If a *Franks* hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant "must be voided" and evidence or testimony gathered pursuant to it must be excluded. *Franks* at 156. A warrant that violates *Franks* is not subject to the good-faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984).

The Court of Appeals applied a Fourth Circuit case arising from Maryland (*Colkley*) to hold Ms. Horton's claim for assault and battery failed as a matter of law. In *Colkley*, the Fourth Circuit held *Franks* protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate. This view is not, however, universally shared. *See Lombardi v. City of El Cajon*, 117 F.3d 1117 (9th Cir. 1997) (holding that specific intent to deceive the issuing court is not an element (in addition to a substantial showing of deliberate or reckless falsehood or omission that is material to the probable cause determination) that the plaintiff must show in order to survive summary judgment on a claim of qualified immunity in a civil rights action seeking damages for a *Franks* violation). Because of this split in authority, this Court should be heard on the merits of this issue. Ms. Horton asserts the *Lombardi* view is the better view, since proof of a specific intent to deceive

through an omission is difficult, if not impossible, to obtain.

The Court of Appeals erred in affirming the trial court's dismissal of Ms. Horton's assault and battery claim. This Court should grant this Petition, permit the parties to brief this issue, reverse the Court of Appeals and remand the matter for further proceedings.

CONCLUSION

The Court should grant this Petition and issue a writ of certiorari to the Court of Appeals to review its decision. The Court should then reverse the decision and remand the matter to the Court of Appeals with instructions to address the merits of the issues argued by the parties on appeal.

Respectfully submitted,

June 25, 2014

John S. Nichols, SC Bar # 4210
Blake A. Hewitt, SC Bar # 73674
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com
bhewitt@bntdlaw.com

Dylan W. Goff, Esquire
James E. Smith, Jr., Esquire
JAMES E. SMITH JR. PA
1422 Laurel St.
Columbia, SC 29201-2516
(803) 933-9800

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Opinion No. 5200 (S.C. Ct. App. filed February 26, 2014)

Tynaysha Horton, ... Petitioner,

v.

The City of Columbia Police Department, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for the Respondent with a copy of the *Petition for Writ of Certiorari* and *Appendix* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

David A. Fernandez, Esquire
Jeanne J. Brooker, Esquire
City Attorney's Office, Columbia
P.O. Box 667
Columbia, SC 29202

June 25, 2014

John Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC