

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

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Op. No. 5200 (S.C. Ct. App. filed Feb. 26, 2014)

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Tynaysha Horton, ..... Petitioner,

v.

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

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**APPENDIX**

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John S. Nichols  
Blake A. Hewitt  
BLUESTEIN, NICHOLS,  
THOMPSON & DELGADO  
P.O. Box 7965  
Columbia, SC 29202  
(803) 779-7599

James E. Smith, Jr.  
Dylan W. Goff  
JAMES E. SMITH, P.A.  
1422 Laurel St.  
Columbia, SC 29201  
(803) 933-9800

David A. Fernandez  
Jeanne J. Brooker  
City Attorney's Office  
P.O. Box 667  
Columbia, SC 29202  
(803) 734-2737

Attorneys for Respondent

Attorneys for Petitioner

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**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Tynaysha Horton, Appellant,

v.

City of Columbia, Respondent.

Appellate Case No. 2012-211168

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Appeal From Richland County  
Alison Renee Lee, Circuit Court Judge.

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Opinion No. 5200  
Heard October 16, 2013 – Filed February 26, 2014

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**AFFIRMED**

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James Emerson Smith, Jr. and Dylan Ward Goff, both of  
James E. Smith Jr., PA, of Columbia, for Appellant.

Jeanne J. Brooker and David Amado Fernandez, both of  
Columbia, for Respondent.

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**KONDUROS, J.:** Tynaysha Horton appeals the circuit court's grant of summary judgment in favor of the City of Columbia regarding her claims for false arrest, false imprisonment, malicious prosecution, negligence, and assault and battery. We affirm.

**FACTS/PROCEDURAL HISTORY**

On September 9, 2009, a cinder block was thrown through a glass door to break into the Roly Poly restaurant in Columbia. Officer Peter Currie of the City of Columbia Police Department lifted a partial latent fingerprint from the door where the glass had been pushed up to gain entry. Officer Currie ran the print through the Automatic Fingerprint Identification System (AFIS) of the South Carolina Law Enforcement Division (SLED). AFIS returned twenty possible matches, with the fingerprint of Horton identified as the most probable match. Officer Currie then conducted a review of Horton's AFIS print and determined it matched the partial print taken from the crime scene.<sup>1</sup> Officer Currie informed Officer Roberta Tyler, the detective assigned to investigate the robbery, that he had matched the fingerprint of the robber and identified Horton as the person who broke into the restaurant.

On September 15, 2009, Officer Tyler called Horton's probation officer, Albert Smith, in Bennettsville, South Carolina, and informed Agent Smith her department was seeking a warrant for Horton's arrest based on fingerprints lifted from a crime scene in Columbia. Agent Smith informed Officer Tyler of his personal reservations regarding the possibility that Horton committed the crime based upon her lack of transportation and the recent birth of her third child. On September 17, 2009, Officer Tyler appeared before a ministerial recorder of the City of Columbia and disclosed relevant facts about the crime. Officer Tyler did not disclose any information relayed to her by Agent Smith. The ministerial recorder issued warrants for Horton's arrest for second-degree burglary and petit larceny. Agent Smith assisted in having Horton surrender herself to Marlboro County law enforcement officers later that day. Officer Tyler transported Horton to Columbia and took her to the detention center on September 18, 2009. Horton was not fingerprinted at the time of her arrest. After three days in detention and several requests to be fingerprinted, Horton was fingerprinted by Officer Currie on September 21, 2009. After examining the prints and sending them to SLED for further review, the authorities could not confirm a match for the prints taken from the crime scene. Horton was immediately released from custody and police officials drove her to Bishopville to meet her mother and return home.

Horton filed suit alleging causes of action for false arrest, false imprisonment, malicious prosecution, negligence, and assault and battery. The City moved for summary judgment as to all claims and the circuit court granted the City's motion. This appeal followed.

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<sup>1</sup> This review included analysis of the fingerprint by two other officers.

## LAW/ANALYSIS

### I. The Two-Issue Rule

The City argues this court should affirm the circuit court's grant of summary judgment based on the two-issue rule. We agree in part.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010); see also *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

In *Jones*, Jones's estate sued the Richland County sheriff and other officers for wrongful death after Jones was shot attempting to escape police custody. 387 S.C. at 344, 692 S.E.2d at 902. At trial, Jones asserted the sheriff was grossly negligent.<sup>2</sup> *Id.* The trial court granted a directed verdict in the defendant's favor finding he was not grossly negligent under the circumstances, and because he had immunity under subsection 15-78-60(6) of the South Carolina Code (2005) (the Tort Claims Act). *Id.* On appeal, Jones stated his issue as follows: "Did 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?" *Id.* at 347-48, 692 S.E.2d at 904. In determining whether the two-issue rule procedurally barred Jones's appeal, the supreme court stated:

There was no mention of [sub]section 15-78-60(6) or Tort Claims Act immunity [in Jones's issues on appeal]. . . . The issue raised by [Jones] was not concise and direct, but rather a broad general statement that ought to be disregarded by this court. Hence, because [Jones] failed to preserve the issue for review, it became the law of the case under the two issue rule.

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<sup>2</sup> The circuit court granted summary judgment in favor of the other defendants but allowed the case to proceed as to Jones's claim of gross negligence against the sheriff in his official capacity.

*Id.* at 348, 692 S.E.2d at 904.

In this case, the circuit court spent the bulk of its time considering the probable cause issue in deciding to grant summary judgment. However, in section E of the final order, the circuit court addressed the City's Tort Claims Immunity argument as an additional sustaining ground. Subsection 15-78-60(5) of the South Carolina Code (2005) 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 that is in the discretion or judgment of the employee. The final order and the City's argument clearly focused on this section as it applied to Officer Currie's erroneous identification of Horton's fingerprints, suggesting the only cause of action at issue is Horton's negligence claim. However, the order states, "The 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." While this ruling by the circuit court may be erroneous as to the false arrest, false imprisonment, and malicious prosecution claims, Horton makes no mention of subsection 15-78-60(5) or the Tort Claims Act in her appellate brief. We cannot conclude that an attack on the Tort Claims Act ruling is inherent in Horton's argument as to lack of probable cause.<sup>3</sup> Therefore, the circuit court's grant of summary judgment to the City with respect to negligence, false arrest/imprisonment, and malicious prosecution is affirmed based on the two-issue rule.

## II. Claims on the Merits

Horton's only remaining cause of action is for assault and battery. She maintains the circuit court erred in finding that because her arrest was based on a facially valid warrant and she did not allege the use of excessive force, the claim failed as a matter of law. We disagree in some respects with the circuit court's rationale but affirm its granting of summary judgment to the City.

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<sup>3</sup> Horton's issue on appeal is broad and does not provide any direction as to why the application of the Tort Claims Act was erroneous. It states: "Did the order issued by the circuit court granting the City's motion for summary judgment constitute a clearly arbitrary and capricious abuse of discretion as there were genuine issues of material fact in dispute?"

In *Roberts v. City of Forest Acres*, 902 F. Supp. 662, 671-72 (D.S.C. 1995), the court concluded as a matter of law that no assault and battery occurred when an officer lawfully arrested Roberts based on probable cause and the use of excessive force was not alleged. The court found Roberts's arrest "was lawful because it was supported by probable cause. Therefore, [the officer's] action in arresting [him] did not constitute assault or battery. . . ." *Id.* at 672. The court further provided Roberts "does not allege [the arresting officer] used excessive force. . . . [His] actions are insufficient, as a matter of law, to support a claim of assault or battery, given this court's conclusion that [Roberts's] arrest was based on probable cause." *Id.* at 672 n.2. In addressing assault and battery claims against police authority the Supreme Court of South Carolina has stated:

An unlawful arrest, or an attempt to make an unlawful arrest, stands upon the same footing as any other nonfelonious assault, or as a common assault and battery. The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault, or he in turn becomes a wrongdoer . . . .

*State v. McGowan*, 347 S.C. 618, 623, 557 S.E.2d 657, 660 (2001) (emphasis omitted) (quoting *State v. Francis*, 152 S.C. 17, 34-35, 149 S.E. 348, 355-56 (1929)).

South Carolina appears to be in the minority of jurisdictions where an unlawful arrest, even in the absence of excessive force, can support a claim for assault and battery.<sup>4</sup> In *Roberts*, the district court, applying South Carolina state law to the claim of assault and battery, rested its conclusion to dismiss the claim upon the fact that Roberts's arrest was lawful—based on probable cause. *Roberts*, 902 F. Supp. at 672 n.2. In *McGowan*, the court was concerned with whether McGowan had used excessive force in resisting arrest. *McGowan*, 347 S.C. at 624-26, 557 S.E.2d at 661-62. Although Horton did not resist arrest, the basic principle of law that an

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<sup>4</sup> "While, in some jurisdictions, a police officer who makes an unlawful arrest is liable for battery for touching the arrestee, it is usually held a battery does not occur in making an unlawful arrest absent the use of excessive force." 6 Am. Jur. 2d *Assault and Battery* § 98 (2008) (footnote omitted).

unlawful arrest may constitute a battery is still applicable. Furthermore, in *Francis*, upon which *McGowan* relies in part, the court recited a jury instruction that was not objected to on appeal. *Francis*, 152 S.C. at 32, 149 S.E. at 354. That charge supports the notion that police officers are not immune from assault and battery claims if they effect an unlawful arrest. The charge stated: "If an arrest is unlawful, the defendant had the right not only to resist it, but it made the person or officer attempting such arrest liable for assault and battery and false arrest." *Id.* Based on the foregoing cases, we conclude a police officer may be liable for assault and battery for making an unlawful arrest even in the absence of excessive force allegations.

The next question presented is whether Horton's arrest was lawful.

The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise.

*Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2008) (citation omitted).

The question of whether probable cause exists is ordinarily a jury question unless the evidence yields but one conclusion as a matter of law. *Id.* The party alleging a lack of probable cause bears the burden of proof on that point. *Jackson v. City of Abbeville*, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005).

Horton contends the circuit court erred in finding Officer Tyler's affidavit provided probable cause for her arrest, because Officer Tyler omitted any information from Agent Smith regarding Horton's transportation and family issues. We disagree.

"*Franks* [*v. Delaware*, 438 U.S. 154 (1978)] addressed an act of *commission* in which false information had been included in the warrant affidavit. However, the *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit." *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). "To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading

to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." *Id.* (footnote omitted). Entitlement to a *Franks* hearing is a matter of law subject to *de novo* review. *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008).

While omissions may not be *per se* immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit. The potential for endless rounds of *Franks* hearings to contest facially sufficient warrants is readily apparent.

*United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (citations omitted).

Inferring bad motives from an officer's omission of information "collapses into a single inquiry the two elements—'intentionality' and 'materiality'—which *Franks* states are independently necessary." *Id.* A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. *Tate*, 524 F.3d at 454. "[M]ere[ ] negligenc[e] in . . . recording the facts relevant to a probable-cause determination' is not enough." *Colkley*, 899 F.2d at 301 (quoting *Franks*, 438 U.S. at 170).

In this case, as the circuit court noted, Horton offered no evidence Officer Tyler omitted Smith's statements with the intent to mislead the ministerial recorder. *Colkley* makes clear the Fourth Circuit's disdain for the notion that bad motive can be inferred from the materiality of the omitted information. However, it is less clear how the Fourth Circuit would evaluate the omission under the reckless disregard prong of *Franks*.<sup>5</sup> If reckless disregard can only be established by affirmative proof, without reference to the nature of the omitted material, it is

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<sup>5</sup> Notably, *Colkley* was a direct response to the district court's finding that because the officer chose to omit certain information, as opposed to omitting it accidentally, the intentionality requirement for a *Franks* hearing was satisfied. *Colkley*, 899 F.2d at 300.

difficult to imagine how any party would ever be entitled to a *Franks* hearing on omitted information. Nevertheless, the Fourth Circuit has clearly set a very high standard for establishing entitlement to a *Franks* hearing. Therefore, we agree with the circuit court that Horton did not establish her entitlement to a *Franks* hearing. Officer Tyler's affidavit and the arrest warrants are therefore reviewed without the inclusion of Smith's statements and provide probable cause for Horton's arrest. Consequently, her arrest was lawful, and it follows that her claim for assault and battery fails as a matter of law and summary judgment was appropriate.

### CONCLUSION

We affirm summary judgment in favor of the City as to Horton's claims for false arrest/imprisonment, malicious prosecution, and negligence based on the two-issue rule. We affirm the grant of summary judgment in favor of the City on assault and battery based on Horton's failure to meet the high burden of proving the intentional or reckless omission of Agent Smith's statements from Officer Tyler's affidavit.

**AFFIRMED.**

**FEW, C.J., and PIEPER, J., concur.**

The State of South Carolina  
In The Court of Appeals

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

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Docket No. 2010-CP-40-3299

Tynaysha Horton .....Appellant,

v.

The City of Columbia .....Respondent.

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**PETITION FOR REHEARING**

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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*.<sup>1</sup> 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*:

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<sup>1</sup> 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).

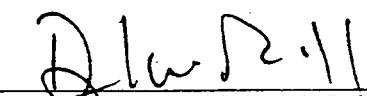
In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. To be clear, I do not discount the importance of our issue preservation 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,

  
James E. Smith, Jr., S.C. Bar No. 8733

[James@JamesSmithPA.com](mailto:James@JamesSmithPA.com)

Dylan W. Goff S.C. Bar No. 78416

[Dylan@JamesSmithPA.com](mailto:Dylan@JamesSmithPA.com)

JAMES E. SMITH, JR., P.A.  
1422 Laurel Street  
Columbia, South Carolina 29201  
(803) 933-9800  
Attorneys for Appellant

Columbia, South Carolina

~~17 March~~ 2014

# The South Carolina Court of Appeals

Tynaysha Horton, Appellant,

v.

City of Columbia, Respondent.

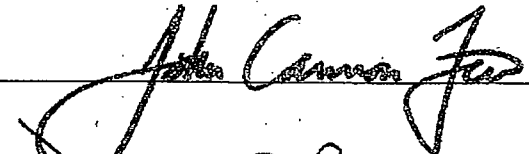
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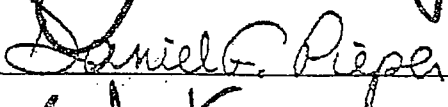
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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_  
C.J.

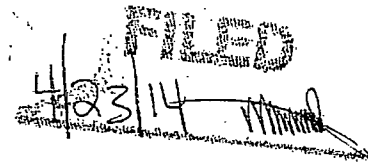
  
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J.

  
\_\_\_\_\_  
J.

Columbia, South Carolina

cc:

Dylan Ward Goff, Esquire  
James Emerson Smith, Jr., Esquire  
David Amado Fernandez, Esquire  
Jeanne J. Brooker, Esquire



The State of South Carolina  
In The Court of Appeals

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

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Docket No. 2010-CP-40-3299

Tynaysha Horton .....Appellant,

v.

The City of Columbia .....Respondent.

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**BRIEF FOR APPELLANT**

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SC COURT OF APPEALS

James E. Smith, Jr.  
Dylan W. Goff  
**James E. Smith Jr. P.A.**  
1422 Laurel St.  
Columbia, SC 29201  
803-933-9800  
[dylan@jamesmithpa.com](mailto:dylan@jamesmithpa.com)  
[james@jamesmithpa.com](mailto:james@jamesmithpa.com)  
Attorneys for Appellant

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I. THE ORDER OF THE CIRCUIT COURT GRANTING SUMMARY JUDGMENT CONSTITUTES A CLEARLY ARBITRARY AND CAPRICIOUS ABUSE OF DISCRETION AND SHOULD BE REVERSED.

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### **Statement of the Issues on Appeal**

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.

## STATEMENT OF THE CASE

This case comes before the Court on Appeal from an Order dated September 29 2011 granting Respondent's Motion for Summary Judgment following a hearing before the Honorable Alison Renee Lee. Appellant, Tynaysha Horton, commenced this action by the filing of a Summons and Complaint with the Richland County Court of Common Pleas on May 28, 2010 alleging, *inter alia*, negligence, malicious prosecution, false arrest, false imprisonment assault and battery in connection with Ms. Horton's wrongful arrest for a crime committed in Columbia, South Carolina in 2009. On June 9, 2010 Respondent answered Ms. Horton's Complaint. On April 29, 2011 Respondent moved for summary judgment asserting that it could not be held liable as a matter of law because Ms. Horton was arrested pursuant to a facially valid warrant. On June 30, 2011 Ms. Horton responded with a motion to deny Respondent's motion for summary judgment. On September 29, 2011 the trial court granted Respondent's motion for summary judgment, holding that no genuine issues of material fact existed in the matter. Ms. Horton timely filed a motion to reconsider the granting of Respondent's motion which was denied by the trial court. Ms. Horton now appeals that judgment and asks that the court allow the case to go to trial.

## STATEMENT OF THE FACTS

On September 9, 2009, a cinder block was thrown through the glass door to break into the “*Roly Poly*” restaurant in Columbia, South Carolina. (R.A. 211) Officer Peter Currie of the City of Columbia Police Department (“CPD”) lifted a partial latent fingerprint from the door where the glass had been pushed up to gain entry. (R.A. 255) Officer Currie ran the print through the Automatic Fingerprint Identification System (“AFIS”) of the South Carolina Law Enforcement Division (“SLED”). Id. AFIS returned twenty possible matches, with the fingerprint of Appellant identified as the most probable match. (R.A. 256) Officer Currie then conducted a review of that print and made the determination that it matched the latent print taken from the crime scene. Id.

Officer Roberta Tyler of also of the CPD was assigned to investigate this crime. Officer Currie informed her that he had matched the fingerprint of the robber and identified Appellant as the person who broke into the restaurant. Id. On September 15, 2009, Officer Tyler called Appellant’s Probation Officer, 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 a crime scene in Columbia, S.C. (R.A. 210) Agent Smith informed Officer Tyler of his personal reservations regarding the possibility and likelihood that Appellant could have committed the crime based upon his personal knowledge of her lack of transportation and the very recent birth of her third child. Id. 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 Department at that time. (R.A. 211) Officer Tyler did not disclose any information related to her by Agent Smith, or any other possibly exculpatory information. Id.

Based upon the incomplete information provided, the ministerial recorder issued warrants for Burglary 2nd and Petit Larceny. Id.

Agent Smith assisted in having Appellant surrender herself to Marlboro County law enforcement officers on September 17, 2009. (R.A. 210) CPD brought Ms. Horton to Columbia and then took her to the detention center on September 18, 2009. (R.A. 171) Ms. Horton was not fingerprinted at the time of her arrest nor at any time prior to September 21, 2009 despite multiple requests by her that officers do so. (R.A. 168)

On September 21, 2009, Officer Currie took fresh fingerprints from Plaintiff and realized they were not a match for the prints taken from the crime scene. (R.A. 173) Plaintiff was released from City of Columbia custody immediately after having spent three days in custody. (R.A. 174)

## ARGUMENT

### Jurisdiction and Standard of Review

This is an appeal from summary judgment as granted in the Circuit Court. An appellate court reviews the granting of summary judgment “under the same standard applied by the trial court pursuant to Rule 56 (c), SCRPC: Summary judgment is appropriate when there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law.” Peterson v. West American Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). “In determining whether any triable issues of fact exist, the evidence and any reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party.” Peterson, 336 S.C. at 95, 518 S.E.2d at 610-11.

### I. THE ORDER OF THE CIRCUIT COURT GRANTING SUMMARY JUDGMENT CONSTITUTES A CLEARLY ARBITRARY AND CAPRICIOUS ABUSE OF DISCRETION AND SHOULD BE REVERSED.

An “abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case.” *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006) (citing *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987)). A decision is arbitrary if “no rational basis for the conclusion exists, or when it is based on one’s will and not upon any course of reasoning and exercise of judgment...a decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards.” *Converse Power Corp v. S.C. Dep’t of Health and Env’tl. Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002). The Supreme Court has held that, “the term ‘abuse of

discretion' has no opprobrious implication and means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of the appellant, and, therefore, in the circumstances, amounted to an error of law." *South Carolina State Highway Dept. v. Sharpe*, 242 S.C. 397, 131 S.E.2d 257 (S.C. 1963). Indeed, this Court has further described abuse of discretion as being difficult to define, but easy to spot, "[i]t is not always easy to determine when and if a trial judge has abused his discretion. Overly simplified, abuse of discretion involves the extent of disagreement. When an appellate court is in agreement with a discretionary ruling or is only mildly in disagreement, it says that the trial judge did not abuse his discretion. On the other hand, when the appellate court is in substantial or violent disagreement, it says that there has been an abuse of discretion." *State v. Corey D.*, 339 S.C. 107, 529 S.E.2d 20 (S.C. 2000), (Citing, *Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct.App.1988)). In "reviewing a grant of summary judgment, the facts and all reasonable inferences must be viewed in a light most favorable to most favorable to the non-moving party ... (the judgment) may only be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Singletary v. Aetna Casualty & Surety Co.*, 316 S.C. 199, 200, 447 S.E.2d 869, 870 (Ct.App. 1994). Summary Judgment is only "proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Rule 56(c) SCRPC. It is "well settled that summary judgment is appropriate only where there is no issue of material fact." *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994). "When determining if any triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Summer v. Carpenter*, 328 S.C. 36.

There were multiple issues of material fact disputed by the parties to this matter. Indeed, much of Respondents' arguments in support of its Motion as adopted by the Court below in its Order revolve around Respondents' position that the existence of a facially valid arrest warrant issued upon probable cause preclude Appellants' actions as a matter of law. In actions for malicious prosecution, false imprisonment or unlawful arrest, the existence of probable cause may only be decided as a matter of law when the evidence yields but one conclusion. *Id.* Lack of probable cause is an essential element in claims for malicious prosecution, false arrest and false imprisonment. *Jackson v. City of Abbeville*, 366 S.C. 662, 623 SE2d 656 (Ct. App. 2005). The existence of probable cause is generally a matter of *fact* to be decided by a jury, not a matter of law. *Law v. South Carolina Dep't of Corr.*, 368 S.C. 42, 435, 629 SE2d 642, 648 (2006), *See, Jones v. City of Columbia*, 301 S.C. 62, 389 SE2d 662 (1990). In actions for malicious prosecution, false imprisonment or unlawful arrest, the existence of probable cause may only be decided as a matter of law when the evidence yields but one conclusion. *Id.* Probable Cause is "a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Gist v. Berkeley County Sheriff's Dep't*, 336 S.C. 611, 615, 521 SE2d 163,165 (Ct. App. 1999). The *Gist* Court clearly stated that facially valid arrests warrants do not shield governmental agencies from liability for these torts where the Plaintiff has shown that the warrant was secured without probable cause. *Id.* at 167, 618. The Supreme Court of this state has held that when an affidavit does not disclose anything which the issuing officer can consider in arriving at a determination of whether there is probable cause for the issuance of a warrant, this, in effect leaves the determination of probable cause to the judgment of the police officer and the warrant issued thereupon is invalid. *State v. Hill*, 254 S.C. 76, 138 SE2d 829 (1964). A

facially valid warrant is also invalid if Plaintiff shows that the government or its agents “omitted from the affidavit material facts with the intent to make, or with reckless disregard of whether they thereby made, the affidavit misleading.” *United States v. Colkley*, 899 F.2d 297, 300 (4<sup>th</sup> Cir. 1990), as cited in *Miller v. Prince George’s County*, 475 F.3d 621, 627 (4<sup>th</sup> Cir. 2007).

Respondents’ Motion for Summary Judgment was improper and should have been denied as there are genuine issues of material fact in dispute. Appellant competently challenged the validity of the warrant and the existence of probable cause for its issuance in her Complaint and at the hearing of Respondent’s Motion for Summary Judgment and has thereby raised factual issues that must be properly determined by a jury, rendering summary judgment wholly inappropriate. Respondent incorrectly asserted and the Court ultimately agreed that Appellant’s actions must be dismissed because Appellant’s arrest was made pursuant to a “facially valid arrest warrant.” (R.A. 65-66, 261) However, as discussed in *Law*, an arrest warrant which is “facially valid” or regular on its face merely establishes a rebuttable presumption of the existence of probable cause, an issue of fact for the proper consideration of a jury. In the present case, Appellant has challenged the existence of probable cause and raised a factual issue as to the validity of the arrest warrant based upon Officer Tyler’s failure to disclose any information known to her to the issuing authority beyond the alleged matching of the latent fingerprints evidencing a reckless disregard that the affidavit may be misleading to the issuing authority. (R.A. 284) At the time Officer Tyler sought the issuance of the warrant she had spoken with Agent Smith and was aware that Appellant lived almost two hours away in Bennettsville, South Carolina, that she did not own a car and had ongoing issues with securing reliable transportation, that she had been with her parole officer the day after the burglary, that she had three minor

children one of which was a newborn and that she had volunteered to submit to DNA and fingerprint testing. (R.A. 210)

All of these facts would tend to lead a reasonable person to believe it was improbable if not impossible that she had committed the crime. Appellant asserted a factual question whether Officer Tyler knew or should have known that providing this information would have negated a finding of probable cause by the magistrate and whether her omission of these facts evidenced a reckless disregard for the possibility that the affidavit upon which the warrant was issued was misleading. (R.A. 70) Despite these facts and the law to the contrary, the Court below improperly ruled on probable cause as a matter of law and granted Respondent's Motion.

Additional issues of material fact are in dispute, including facts recited in the Circuit Court's Order, arising from inconsistency in Respondents' witness statement and pleadings that are proper only for jury determination. These include facts asserted by Mr. Currie in his affidavit provided in support of Respondents' Motion for Summary Judgment. (R.A. 254) In the tenth paragraph of his affidavit, Mr. Currie states that he took Appellant's fingerprints to SLED for reevaluation "out of an abundance of caution after Appellant related facts that would have *negated her ability to have committed the crime*" but that he still believed the prints were a match. (R.A. 256-57) This statement directly conflicts with Mr. Currie's statements in his deposition testimony and to Respondents' responses to Appellant's Interrogatory 11. (R.A. 222) During Mr. Currie's deposition, when asked if he had ever spoken with Appellant, Mr. Currie stated that he had simply asked "hey how are you" when he fingerprinted Appellant and that he had apologized to Appellant after he discovered his mistake, he mentions nothing about the alleged conversation he discusses in his affidavit which he states gave rise to his desire to retake Appellant's fingerprints. (R.A. 138-39) During his deposition, Mr. Currie also testified that it

was the Departments' procedure to fingerprint the individual in custody and to confirm the match as soon as possible. (R.A. 137) When asked to compare the latent print from the scene with Plaintiff's print during his deposition, Mr. Currie responded "the print is completely different...it doesn't add up..." (R.A. 135) Further, Respondents, in response to Appellant's Interrogatory Eleven stated that "...the arresting agency does not ordinarily take fingerprints after a person has been booked into a detention facility. (R.A. 222) Appellant's own deposition testimony raises further factual disputes material to her cause of action regarding Mr. Currie's reaction to Appellant's fingerprints taken while in custody and Respondents' reason for taking those fingerprints. (R.A. 173) Each of these facts are disputed by the parties and are material to the ultimate issue of the existence of probable cause and therefore are material to Appellant's case in chief. There was no rational basis for the conclusion made below regarding the existence of probable cause. Indeed, the argument made by Respondent 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, Appellant 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. Granting summary judgment here, with facts existing that could support an inference of agency, would be in opposition to rule established by the Supreme Court in *Law*. 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.

**CONCLUSION**

Because genuine issues of material fact exist as to whether probable cause existed to support the issuance of a warrant and the arrest and detention of Appellant, summary judgment was improper in this case. For the reasons set forth above, the Appellant respectfully requests that the judgment of the Court below be reversed and judgment issued in favor of Appellant.

RESPECTFULLY SUBMITTED,

JAMES E. SMITH, JR., P.A.

By: 

James E. Smith, Jr.

Dylan W. Goff

James E. Smith, Jr., P.A.

1422 Laurel Street

Columbia, South Carolina 29201

803-933-9800

Attorneys for Appellant

Columbia, South Carolina

1 November 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Case No. 2010-CP-40-3299

RECEIVED  
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SC Court of Appeals

Tynyasha Horton.....Appellant,

v.

City of Columbia Police Department..... Respondent.

**BRIEF OF RESPONDENT**

Robert G. Cooper  
Office of the City Attorney  
Post Office Box 667  
Columbia, South Carolina 29202  
(803) 737-4242

Attorney for Respondent

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Robert G. Cooper  
Office of the City Attorney  
Post Office Box 667  
Columbia, South Carolina 29202  
(803) 737-4242

Attorney for Respondent

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### STATEMENT OF ISSUES ON APPEAL

- I. Should the appeal be dismissed because Appellant did not appeal the final order?
- II. Even if Appellant were permitted to substitute the final order in its notice of appeal, should the appeal still be dismissed since it was untimely?
- III. Should the appeal be dismissed as procedurally barred because all claims have been abandoned or are subject to the two issue rule?
- IV. Did the circuit court properly rule on the validity and effect of the arrest warrants?
  - A. Did the circuit court correctly rule that the arrest warrants were valid as a matter of law?
  - B. Did the circuit correctly rule that the arrest warrants barred Appellant's claims for false arrest and false imprisonment and were a proper factor to consider in determining whether there was probable cause as a matter of law on the malicious prosecution claim?
- V. Did the circuit court properly grant summary judgment to the City when Appellant has not shown any genuine issue of material fact that would have precluded that award?
- VI. Did the circuit court properly grant summary judgment on the false arrest, false imprisonment, and malicious prosecution claims because the City had probable cause to arrest Horton as a matter of law?

### STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment on all causes of action to the City of Columbia Police Department (City or CPD).

The City disagrees with Appellant's Statement of the Case, which contains misstated facts and alters the chronology of events.

This action was commenced by Appellant Horton (Horton) by the filing of a Summons and Complaint on May 19, 2010. Horton filed an Amended Complaint on May 28, 2010. (R. pp. 20-29). The action stems from Horton's arrest and the subsequent

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dismissal of those charges. The Amended Complaint asserted tort claims for negligence, malicious prosecution, false arrest, false imprisonment, assault and battery.

The City filed an Answer on June 9, 2010, in which it raised a number of factual and legal defenses, including common law defenses and defenses under the South Carolina Tort Claims Act. (R. pp. 30-37).

The City filed a motion for summary judgment on all claims on April 29, 2011. (R. pp. 260-262). A hearing on that motion was held on June 30, 2011. On August 26, 2011, the circuit court issued a Form 4 order finding that the City's motion for summary judgment should be granted as to all claims. (R. pp. 14-16). That order specifically provided that a formal order would follow. (R. p. 15). The Form 4 order was filed and mailed to counsel for the parties on August 30, 2011. (R. pp. 15-16).

On September 6, 2011, Horton filed a motion to reconsider the decision of the circuit court. (R. p. 291).

On September 29, 2011, the circuit court issued the final order granting summary judgment to the City on all causes of action. (R. pp. 3-13).

The circuit court issued an order dated March 28, 2012 that denied Horton's motion to reconsider. (R. p. 2).

On April 12, 2012, Horton filed a notice of appeal with the South Carolina Court of Appeals. (R. pp. 314-315). The notice appealed the Form 4 order dated August 26, 2011. (Id.). A copy of the Form 4 order was attached to the notice. (R. pp. 318-319).

Horton has not filed a motion to reconsider or a notice of appeal addressed to the final order dated September 29, 2011.

## STATEMENT OF FACTS

On September 9, 2009, a cinder block was thrown through the glass door to break into the Roly Poly restaurant in Columbia, South Carolina. (R. p. 255 ¶ 5). Crime Scene Officer Pete Currie of the City of Columbia Police Department (City or CPD) lifted a partial latent fingerprint from the door where the glass had been pushed up to gain entry. (Id.). Officer Currie ran the print through the Automatic Fingerprint Identification System (AFIS) of the South Carolina Law Enforcement Division (SLED). (Id. ¶ 6). AFIS returned twenty possible matches, with the fingerprint of Horton identified as the most probable match. (R. p. 131, l. 23-25, p. 132, l. 8-13; R. p. 256 ¶ 6). Officer Currie then conducted an extensive review of that print and determined that it matched the latent print taken from the crime scene. (R. p. 256 ¶ 7). Pursuant to standard operating procedure at CPD, Officer Currie showed the latent fingerprint to two other qualified crime scene officers and they verified that it matched the Horton fingerprint. (Id. ¶ 8).

Investigator Roberta Tyler of CPD was assigned to investigate this crime. (Horton Statement of the Facts). Officer Currie informed her that he had matched the fingerprint of the robber and identified Horton as the person who broke into the restaurant. (R. p. 256 ¶ 9). Investigator Tyler received authorization from an Assistant Solicitor to seek warrants. (R. p. 136, l. 7-12). On September 17, 2009, Investigator Tyler appeared before a ministerial recorder<sup>1</sup> of the City of Columbia and applied for warrants stemming from the robbery investigation. (Horton Statement of Facts; R. pp. 211-212). The ministerial recorder found probable cause to believe that Horton committed the crime and issued warrants for Burglary 2nd and Petit Larceny. (Id.).

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<sup>1</sup> Ministerial recorders are municipal officers with the power to issue arrest warrants. S.C. Code Ann. § 14-25-115.

Investigator Tyler sent copies of the warrants to Horton's probation officer in Bennettsville, South Carolina, where Horton resides. (R. p. 157, l. 17-p. 158, l. 1; p. 158, l. 24-p. 159, l. 9; p. 159, l. 18-23). The probation officer assisted in having Horton turn herself in to Marlboro County law enforcement officers on September 17, 2009. (Id.; Horton Statement of the Facts). Investigator Tyler picked Horton up, brought her to Columbia, and then took her to the detention center on September 18, 2009. (Horton Depo. p. 165, l. 19-p. 166, l. 6; p. 170, l. 24-p. 171, l. 5).

On Monday, September 21, 2009, Officer Currie became aware that Horton was incarcerated and took fresh fingerprints from her as was his custom. (R. p. 256 ¶ 10). It still appeared to him that her fingerprints matched that of the person who committed the robbery. (Id.). However, because of Horton's protests that she could not have committed the crime, he took the fingerprints to SLED for review. (R. p. 257 ¶ 10.). The SLED analyst indicated that the fingerprints were very close but that he could not confirm a match for certain. (Id.).

Given the lack of confirmation from the SLED analyst, the charges were dismissed and Horton was driven home that same day. (R. p. 257 ¶ 11).

## ARGUMENTS

### **I. THE APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT DID NOT APPEAL THE FINAL ORDER.**

In her Notice of Appeal, Horton appeals the order of the circuit court dated August 26, 2011, and the subsequent order denying her motion to reconsider dated March 28, 2012. (R. p. 314). The appeal should be dismissed because the order dated August 26, 2011, is not an appealable order.

On June 30, 2011, the circuit court heard arguments on the City's motion for summary judgment. On August 26, 2011, the circuit court issued a Form 4 order finding that the City's motion should be granted as to all claims. (R. pp. 14-15). That order specifically provided that a formal order would follow. (R. p. 15). On September 6, 2011, Horton filed a motion to reconsider addressed to the Form 4 order. (R. p. 291). On September 29, 2011, the circuit court issued its final order (Final Order) granting summary judgment to the City on all causes of action. (R. pp. 3-13). Horton has not filed a motion to reconsider or a notice of appeal addressed to the Final Order.

A judgment or order must be final before it can be appealed. See/Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996). Appeal may be taken from any final judgment, appealable order or decision. Rule 201(a), SCACR. Further guidance is provided by S.C. Code Ann. § 14-3-330(1), which creates appellate jurisdiction from a final order.<sup>2</sup> A Form 4 order is not a final order unless nothing else remains to be done after it is signed. Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009), citing Cheap-O's Truck Stop v. Cloyd, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct.App. 2002). In this

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<sup>2</sup> S.C. Code Ann. § 14-3-330 also provides for appellate jurisdiction from interlocutory orders involving the merits, affecting a substantial right, or involving the appointment of a receiver. None of these provisions are applicable in the case at hand.

case, the Form 4 order was not a final order since it clearly stated that a formal order would be issued later. Metts at 499, 682 S.E.2d at 817. Horton did not appeal the Final Order in this matter but instead appealed the interlocutory, unappealable Form 4 order.

Apparently realizing that she appealed the wrong order, Horton attempts to cure this problem by referring to the Final Order, rather than the Form 4 order from which she appealed, in her Designation of Matter to be Included in the Record on Appeal and in her Statement of the Case.<sup>3</sup> (R. p. 322; Appellant's Brief). This is a substantive change, not the correction of a mere clerical error, and should not be permitted. Her motion to reconsider the grant of summary judgment was addressed to the Form 4 order and was filed before the Final Order was even issued. In its Memorandum in Opposition to Plaintiff's Motion to Reconsider, the City argued that the Motion to Reconsider was premature. (R. p. 304). Despite this notice that her efforts were addressed to the wrong order, Horton appealed the Form 4 order and attached a copy of it to the notice of appeal. (R. pp. 314, 318-319). Horton should not now be allowed to unilaterally change the order that has been appealed.

Because Horton failed to appeal the Final Order in this matter and instead attempted to appeal an unappealable Form 4 order, this appeal should be dismissed.

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<sup>3</sup> Horton's Designation of Matter to be Included in the Record on Appeal does not include the Form 4 order from which she appealed. (R. p. 322). Her Statement of the Case does not mention the Form 4 order but only addresses the Final Order. (Appellant's Brief). In fact, the Statement of the Case is written in a way that suggests that Horton's motion to reconsider followed the Final Order, which is incorrect. The motion was filed on September 6, 2011, and the Final Order was not issued until September 29, 2011.

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**II. EVEN IF APPELLANT WERE PERMITTED TO SUBSTITUTE THE FINAL ORDER IN HER NOTICE OF APPEAL, THE APPEAL SHOULD STILL BE DISMISSED SINCE IT WAS UNTIMELY.**

As noted above, Appellant appealed the Form 4 order rather than the Final Order granting summary judgment in this matter. Even if the Court were to deem the designation of the Form 4 order in the notice of appeal as a mere clerical error and allow substitution of the Final Order, the appeal should still be dismissed as untimely.

In appeals from the court of common pleas, a notice of appeal must be served on respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR. The Final Order in this case, dated September 29, 2011, was enrolled on October 4, 2011 and mailed by the Richland County Clerk of Court to attorneys of record that same date. (R. pp. 3-13). To have been timely, the notice of appeal would have had to have been served by November 6, 2011 or shortly thereafter.<sup>4</sup> However, the notice of appeal was not served until April 12, 2012, over five months past the time permitted. (R. p. 316).

Horton may argue that the time in which to serve the notice of appeal was extended by the filing of her motion to reconsider. When a timely motion to alter or amend the judgment has been made, the time for appeal for all parties is stayed and runs from receipt of written notice of entry of the order granting or denying such motion. Rule 203(b)(1), SCACR. That rule is inapplicable in this case, however, because the motion to reconsider was addressed to the Form 4 order and was filed before the Final

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<sup>4</sup> Since Horton appealed from the wrong order, her notice of appeal does not disclose when she received the Final Order. It was received by counsel for the City on October 7, 2011.

Order was issued.<sup>5</sup> Horton never made a motion to reconsider the Final Order in this case and the time in which to appeal that order was not extended.

Service of the notice of appeal is a jurisdictional requirement and an appellate court has no authority to extend or expand the time in which the notice of intent to appeal must be served. USAA Property & Casualty Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008); Elam v. S.C. Dept. of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

Horton has never appealed the Final Order in this case. Even if she were permitted to amend the notice of appeal in this case to substitute the Final Order as the one from which the appeal is taken, the appeal is still untimely and should be dismissed.

**III. THE APPEAL SHOULD BE DISMISSED AS PROCEDURALLY BARRED BECAUSE ALL CLAIMS HAVE BEEN ABANDONED OR ARE SUBJECT TO THE TWO ISSUE RULE.**

It is unnecessary to reach the merits of Horton's argument since it is procedurally barred by issues that have been abandoned and by the two issue rule.

The causes of action for assault, battery, negligence and gross negligence have been abandoned on appeal. It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993); Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct.App. 1997). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. Id. The unchallenged ruling, right or

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<sup>5</sup> The order of the circuit court dated March 28, 2012, indicates that the court denied Horton's motion pursuant to Rule 59(e), SCRCP, to alter or amend the order dated September 29, 2011 (Final Order). (R. p. 2). This appears to be a clerical error since the motion was addressed to the Form 4 order and was filed before the Final Order was issued. That error should not be regarded as transforming Horton's motion into a motion to reconsider the Final Order. Horton had an opportunity to file such a motion and chose not to do so.

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wrong, is the law of the case and requires affirmance. Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 525 S.E.2d 869 (2000).

In this case, the circuit court found that the City was entitled to summary judgment on Horton's causes of action for assault, battery, negligence and gross negligence.<sup>6</sup> (R. pp. 10-12). Horton has not appealed these rulings and they therefore become the law of the case and must be affirmed on appeal.

The two issue rule procedurally bars consideration of the remaining causes of action. Under this rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). The circuit court ruled that Horton's causes of action for false arrest, false imprisonment, malicious prosecution and negligence were barred by S.C. Code Ann. § 15-78-60(5) of the South Carolina Tort Claims Act. (Final Order pp. 9-10). Horton has not appealed that ruling. Accordingly, the grant of summary judgment on these causes of action should be affirmed.

For these reasons, the appeal should be dismissed as procedurally barred.<sup>7</sup>

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<sup>6</sup> The circuit court found that, since Horton did not allege the use of excessive force, her cause of action for assault and battery failed because any touching by the police officers was lawful pursuant to a facially valid arrest warrant. (R. p. 10). As to the claim for negligence or gross negligence, the circuit court first found that the allegations failed to state facts sufficient to constitute a cause of action since a claim of this nature must be brought either as false arrest or malicious prosecution. (R. pp. 10-11). Secondly, even if such a cause of action existed, the circuit court found that there was no evidence in this case that a City employee was negligent or that the City has been negligent training its employees. (R. pp. 11-12). None of these rulings were appealed by Horton.

<sup>7</sup> Other instances of abandoned rulings or matters subject to the two issue rule are included in the discussion of the substantive arguments that follow.

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**IV. THE CIRCUIT COURT PROPERLY RULED ON THE VALIDITY AND EFFECT OF THE ARREST WARRANTS.**

Horton contends that there are genuine issues of material fact related to the validity and proper effect of the arrest warrants in this case and that summary judgment should not have been awarded. Her position is not supported by the record in this case or by applicable law.

**A. THE CIRCUIT COURT CORRECTLY RULED THAT THE ARREST WARRANTS WERE VALID AS A MATTER OF LAW.**

Horton maintains that the arrest warrants were invalid because Investigator Tyler failed to disclose material information that would have negated a finding of probable cause by the ministerial recorder. Specifically, Horton contends that Investigator Tyler should have told the ministerial recorder that she had spoken with Horton's probation officer and had been told that Horton lives almost two hours away from Columbia in Bennettsville, South Carolina, that she did not own a car and had ongoing issues with securing reliable transportation, that she had been with her parole officer the day after the burglary, that she had three minor children, one of which was a newborn, and that she had volunteered to submit to DNA and fingerprint testing.<sup>8</sup> She maintains that this omission created a factual question whether Investigator Tyler knew or should have

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<sup>8</sup> Horton does not cite to the record to establish these matters as disputed facts. The record does support the assertion that Horton volunteered to submit to DNA and fingerprint testing. (R. p. 168, l. 7-16). However, as Horton's counsel conceded at the hearing on the motion for summary judgment, Horton did not offer to submit to those tests until she was being arrested and that was not a factor in determining probable cause. (R. p. 77, l. 12-p. 78, l. 6). The remaining alleged omissions have no support in the record.

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known that providing this information would have negated a finding of probable cause by the ministerial recorder.

There is no competent factual basis for Horton's claim. Her position is based upon a written statement from Agent Albert R. Smith of the Department of Probation, Parole & Pardon Services, dated July 26, 2010, which Horton attempted to use at the summary judgment hearing. (R. p. 210). The statement is not in affidavit form and was not served on defense counsel two days before the summary judgment hearing as required by Rule 56, SCRCF. (R. p. 42, l. 18-p. 44, l. 6). The circuit court properly ruled that the statement could not be considered in the summary judgment hearing. (R. p. 7). That ruling has not been appealed and is the law of the case. There is therefore no factual basis for Horton's claim that Investigator Tyler withheld material information from the ministerial recorder.

Further, even if Agent Smith's statement were considered, the circuit court properly ruled that the failure to relate its contents to the ministerial recorder did not invalidate the warrants. (R. pp. 7-8). A facially valid arrest warrant can only be attacked if the party makes "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 . . .". Franks v. Delaware, 438 U.S. 154, 155-56 (1978); Miller v. Prince George's County, 475 F.3d 621, 627 (4th Cir. 2007). The showing must be more than conclusory and must be accompanied by a detailed offer of proof. Franks, 438 U.S. at 171. With regard to alleged omissions in the affidavit, a party must establish that the officer failed to inform the magistrate of facts the officer knew would negate a finding of probable cause. Miller, 475 F.3d at 627. Allegations of negligence or honest mistake are insufficient. Id. at 627-28. If a Franks hearing is required and an affiant's material

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perjury or recklessness is established by a preponderance of the evidence, and with the false material set aside the remaining content is insufficient to constitute probable cause, the warrant must be voided. Franks, 438 U.S. at 156.

The statement from Agent Smith says only that he informed Investigator Tyler that Horton was the mother of a newborn baby and that she recently had issues with transportation. (R. p. 210). It does not say that he contends that it was impossible or even improbable that Horton committed the robbery. At most, it would suggest only that Horton would have had to borrow a car and get a babysitter to do so. These are not material issues that would call into question Horton's ability to commit the crime. In fact, Horton would need to make these same arrangements in order work at a job. Further, there is no evidence in the record that Investigator Tyler believed that there was any question that Horton had committed the robbery. Based upon the facts as she knew them, an extremely well-trained and experienced crime scene investigator<sup>9</sup> had determined that Horton's fingerprint matched the latent print from the robbery location. The circuit court correctly found that there was no evidence that Investigator Tyler knowingly or recklessly omitted material information to obtain the warrants and there was therefore no basis to invalidate the arrest warrants. (R. p. 8).

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<sup>9</sup> Officer Currie worked in the Crime Scene Unit of the Columbia Police Department for approximately 14 years. (R. pp. 254-255 ¶ 3). He received extensive training as a crime scene analyst. (R. p. 255 ¶ 4). He successfully completed a one-week course of study entitled "Basic Fingerprints" at the South Carolina Criminal Justice Academy. (Id.). He also completed a two-week advanced fingerprint course taught by the FBI at the Criminal Justice Academy. (Id.). He took courses and received certification in the Automatic Fingerprint Identification System (AFIS) and was a member of the International Association for Identification. (Id.). He also received other training while on the job. (Id.). He has reviewed literally thousands of possible fingerprint matches and, as far as he knows, the Horton fingerprint is the only one that has ever been called into question. (R. p. 257 ¶ 12).

Finally, Horton suggests that the issue of the validity of the warrants is disputed and should have been submitted to the jury. That proposition finds no support in applicable law. The circuit court correctly found that the determination of the validity of a warrant is an issue of law to be determined by the court, citing Franks v. Delaware, 438 U.S. 154 (1978). (R. p. 7). That ruling has not been appealed and is now the law of the case.

The circuit court properly ruled that there were no material facts in dispute and that the arrest warrants are valid as a matter of law.

**B. THE CIRCUIT COURT CORRECTLY RULED THAT THE ARREST WARRANTS BARRED APPELLANT'S CLAIMS FOR FALSE ARREST AND FALSE IMPRISONMENT AND WERE A PROPER FACTOR TO CONSIDER IN DETERMINING WHETHER THERE WAS PROBABLE CAUSE AS A MATTER OF LAW ON THE MALICIOUS PROSECUTION CLAIM.**

Horton argues that the circuit court erred in finding that the arrest warrants conclusively preclude her claims for false arrest, false imprisonment and malicious prosecution.

The circuit court properly found that a facially valid arrest warrant issued by a neutral, detached ministerial recorder bars a cause of action for false arrest or false imprisonment.<sup>10</sup> (R. pp. 6-7). See Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006) (warrant supplemented by oral testimony bars false imprisonment claim); Watkins v. Mobil Oil Corp., 281 S.C. 79; 313 S.E.2d 641 (Ct.App. 1984); Dorn v. Town of Prosperity, 375 Fed.Appx. 284, 2010 WL 997175 (4th Cir. 2010); Wilkins v. Harley, 2011 WL 379747 (D.S.C. 2011); Hubbard & Felix, The South

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<sup>10</sup> False arrest and false imprisonment are not separate torts. False arrest is one way to commit false imprisonment. Since an arrest involves a restraint, it always involves imprisonment. 32 Am.Jur.2d, False Imprisonment § 2.

Carolina Law of Torts, 410 (2d ed. 1997) (if arrest is based on a proper warrant, no action for false imprisonment shall succeed).

Horton argues that a facially valid warrant does not shield a governmental entity from tort liability where a plaintiff has shown that the warrant was secured without probable cause, citing Gist v. Berkeley County Sheriff's Dept., 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct.App. 1999). In that case, Gist was arrested on a warrant for the robbery of a convenience store and the charges were later dismissed. Gist then sued the sheriff's department for false arrest and imprisonment. The trial court granted summary judgment to the sheriff's department because a detached magistrate had determined that there was probable cause. However, the warrant's affidavit did not contain any facts linking Gist to the robbery. On appeal, the sheriff's department conceded that the affidavit was insufficient to establish probable cause but argued that it had been supplemented by sworn oral testimony. The Court of Appeals found there was a disputed fact as to whether the affidavit was supplemented with adequate testimony to establish probable cause and reversed. The holding in Gist is inapplicable to the facts in this case. Here, there is no question that the affidavits, setting out that Horton's fingerprints matched the print from the robbery, are sufficient to establish probable cause.<sup>11</sup> Unlike Gist, they do not need to be supplemented orally. The warrants are valid on their face and therefore bar claims for false arrest and false imprisonment.

On the malicious prosecution claim, the circuit court correctly held that a warrant is not preclusive but is one of the factors that can be considered in determining whether

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<sup>11</sup> Appellant conceded that the warrants are facially valid in the summary judgment hearing on June 30, 2011 before the circuit court. (R. p. 90, l. 14-15). She also appears to concede that point in her Memorandum in Opposition to Defendant's Motion for Summary Judgment. (R. pp. 286-287).

there is probable cause as a matter of law. (R. pp. 8-10). See McBride v. School District of Greenville County, 389 S.C. 546, 698 S.E.2d 845 (Ct.App. 2010).

Horton argues that the holding of the circuit court was “viciously circular.” She characterizes it as “a belief that whenever a warrant is issued, there must have been probable cause for the issuance simply because a warrant may only be issued on probable cause.” She appears to misunderstand the court’s ruling. A warrant bars a claim for false imprisonment because it establishes that the arrest was lawful. It does not, however, bar a claim for malicious prosecution. Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (Ct.App. 1987) (If a lawful arrest has been improvidently procured without probable cause, the remedy is an action for malicious prosecution).

The circuit court correctly ruled that the arrest warrants bar Horton’s claims for false arrest and false imprisonment and are relevant to a determination of probable cause in the malicious prosecution claim.

**V. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE CITY SINCE APPELLANT HAS NOT SHOWN ANY GENUINE ISSUE OF MATERIAL FACT THAT WOULD HAVE PRECLUDED THAT AWARD.**

Horton alleges a factual issue based upon alleged discrepancies in the affidavit and deposition testimony of Crime Scene Officer Peter Currie and a discovery response made by the City. These items address Officer Currie’s reason for taking Horton’s fingerprints after her arrest and his reaction to a comparison of her AFIS print with the one taken from the robbery scene.

At the outset, it is not clear that this issue is preserved for review. The Final Order of the circuit court does not specifically address these contentions. Horton’s motion to reconsider only asked the court to amend the Form 4 order “to accurately

reflect the record.” (R. p. 291). Horton did not raise these issues until she filed her Memorandum in Support of Plaintiff’s Motion to Reconsider five months later. (R. pp. 293-300). In its Memorandum in Opposition to Plaintiff’s Motion to Reconsider, the City argued that the motion is defective for failing to state its grounds and does not preserve any issue for appeal. (R. pp. 304-306). The City therefore submits that this issue is not properly before the Court. Regardless, a review of those statements reveals that the alleged inconsistencies stem from misunderstandings of the facts and, in any event, they are not material to the outcome of this case.

Horton attempts to demonstrate a factual dispute between Officer Currie’s affidavit and his deposition testimony about his conversation with Horton on Monday, September 21, 2009. Officer Currie testified in his affidavit that, when he came to work that day, he became aware that Horton had been picked up and was incarcerated. (R. p. 256 ¶ 10). As was his custom, he took fresh fingerprints from her to compare to the fingerprint that was taken from the crime scene. (Id.). It appeared to him that they matched. (Id.). However, because Horton related facts which, if true, would have negated her ability to commit the crime, he took the fingerprints to experts at SLED for additional review. (R. p. 257 ¶ 10). Horton contrasts that to Officer Currie’s deposition testimony that, when he fingerprinted her, his conversation consisted of “[h]ey, how are you...”. (R. p. 138, l. 15-18). Horton apparently contends that these two statements are inconsistent. However, the deposition testimony is clearly very general while the affidavit is more specific. In fact, the deposition testimony indicates that Officer Currie had two conversations with Horton that day, totaling fifteen to twenty minutes. (R. p. 138 l. 17-22). Further, the statement in his affidavit that Horton related facts that caused him to seek a second opinion from SLED is not necessarily based upon a conversation

directly with Horton but could have been based on facts related to him by Investigator Tyler. There is no evidence of a factual discrepancy here. In any event, even if a discrepancy existed, it would not be material. There is no dispute that Officer Currie did take fresh fingerprints from Horton, that he took them to SLED and SLED representatives could not confirm a match with the latent print, and that Horton was therefore released from custody later that day. (R. pp. 256-257 ¶¶ 10, 11). The specifics of the conversation that led Officer Currie to seek that second opinion are not material.

Horton also alleges that Officer Currie gave deposition testimony that differs from the City's response to written discovery concerning the City's procedures for taking the fingerprints of a person after they are taken into custody. She cites the City's response to Plaintiff's Interrogatory 11 in which it stated that "...the arresting agency does not ordinarily take fingerprints after a person has been booked into a detention facility."<sup>12</sup> Horton contrasts that to Officer Currie's deposition testimony, which she says is that it is the "Departments' procedure to fingerprint the individual in custody and to confirm the match as soon as possible." Horton apparently misunderstands Officer Currie's testimony. The response to Interrogatory 11 is consistent with Officer Currie's testimony that there is no departmental practice to fingerprint in those circumstances but that it is left up to the individual crime scene officer. (R. p. 136, l. 13-p. 137, l. 12). It is his practice to take fingerprints of a person after apprehension so he can later testify that he

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<sup>12</sup> Interrogatory 11 asked "Please list any and all policies regarding Defendant's procedures once an individual is arrested and booked, including but not limited to, the number of hours a Defendant may be held prior to being fingerprinted. The City responded "The Defendant objects to this Interrogatory on the ground that it is too vague to permit an informed response. Subject to that objection, the arresting agency does not ordinarily take fingerprints after a person has been booked into a detention facility." (R. p. 222). This response is based on the fact that detention center personnel handle the fingerprinting of a person who is booked into their facility. It was not directed to the practice of individual police officers.

took fresh fingerprints and re-examined them to confirm a match. (Id.). He likes to do so as soon as possible, after taking into account his work schedule. (R. p. 137, l. 13-21). That is also consistent with his affidavit testimony which states that it is his custom to take fresh fingerprints. (R. p. 256 ¶ 10). Regardless, any perceived discrepancy is immaterial since there is no legal requirement that a suspect be fingerprinted after being brought to a detention center.

Horton also points to testimony from Officer Currie, in comparing a print from AFIS (which she contends was her print) to the latent print, that "...it is completely different than this one here.... It doesn't add up". (R. p. 135, l. 5-19). Although the argument is not made very clearly, Horton appears to call into question Officer Currie's affidavit testimony that it appeared to him that her AFIS print matched the latent print. (R. p. 256 ¶ 7). There is no contradiction. Officer Currie's deposition testimony cited by Horton does not involve a review of her fingerprints. Officer Currie testified that the AFIS system returned a list of twenty fingerprints similar to the one submitted. (R. p. 131; l. 12-24; R. p. 256 ¶ 6). Those prints are ranked in order from most likely to least likely to match.<sup>13</sup> (R. p. 256 ¶ 6). In his deposition, Officer Currie initially discussed the first print from AFIS and indicated that it was the only one of the twenty that came close to matching the crime scene print. (R. p. 132, l. 13-24). The first print from AFIS was Horton's. (R. p. 256 ¶ 6). In his deposition, Officer Currie was then asked to examine fingerprint number two (second most likely to match the latent print) from AFIS. (R. p. 135, l. 5-6). When asked why he found that print to be a less likely match, Officer Currie

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<sup>13</sup> AFIS does not match fingerprints found at a crime scene to fingerprints found in its computer database. AFIS only finds a number of fingerprints that most nearly have the characteristics marked by the requestor. It is up to the crime scene analyst to look at each of them to determine whether there is a match. (R. p. 256 ¶ 7).

pointed out the different characteristics between that print and the latent print. (R. p. 135, l. 12-19). It was this print, not Horton's print, that Officer Currie said was "completely different" and "doesn't add up." (*Id.*).

Finally, Horton asserts that "Appellant's own deposition testimony raises further factual disputes material to her cause of action regarding Mr. Currie's reaction to Appellant's fingerprints taken while in custody and Respondents' reason for taking those fingerprints." However, she does not demonstrate how any of that testimony creates a factual dispute or how it is material. Her general statement is insufficient to preserve any issue for review or to justify reversing the order of the circuit court.

Horton has not preserved the issue of alleged factual disputes regarding the fingerprints and, at any rate, has not demonstrated any disputed material fact that would have prevented the grant of summary judgment to the City.

**VI. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE FALSE ARREST, FALSE IMPRISONMENT, AND MALICIOUS PROSECUTION CLAIMS BECAUSE THE CITY HAD PROBABLE CAUSE TO ARREST HORTON AS A MATTER OF LAW.**

The circuit court correctly disposed of the claims for false arrest, false imprisonment, and malicious prosecution by finding that the City had probable cause as a matter of law to arrest Horton for the robbery at Roly Poly. (R. pp. 8-10).

An essential element in claims for false imprisonment and malicious prosecution is the lack of probable cause for the arrest. *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct.App. 2005). The party bringing the action has the burden of demonstrating the lack of probable cause. *Id.* Probable cause turns not on the individuals' actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty

of a crime. Id. Probable cause is determined as of the time of arrest based on facts and circumstances known to the arresting officer. Id. Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006). The appellate courts of this state have found probable cause as a matter of law in a number of recent decisions. See, e.g., Law v. South Carolina Dept. of Corrections, supra; McBride v. School District of Greenville County, 389 S.C. 546, 698 S.E.2d 845 (Ct.App. 2010); Jackson v. City of Abbeville, 366 S.C. 662, 623 S.E.2d 656 (Ct.App. 2005).

The circuit court properly found probable cause as a matter of law in this case. It found that Officer Currie conducted a thorough investigation that developed facts appearing to establish Horton's guilt; that an Assistant Solicitor authorized a warrant against Horton; and finally, that a ministerial recorder then found probable cause and issued warrants against her. (R. p. 8). Taken together, the court found that these facts established probable cause as a matter of law. (Id.). See McBride, supra (relying inter alia on evidence of a thorough investigation, testimony from an Assistant Solicitor, and the issuance of a warrant). Horton does not address this finding in her brief and it is now the law of the case.

As an alternative ground, the circuit court found that probable cause was established as a matter of law because both Investigator Tyler and Officer Currie had a reasonable belief that the fingerprint evidence was accurate and that Horton had

committed the crime. (R. pp. 8-9). That finding is fully supported by the record.<sup>14</sup>

Horton has not appealed that ruling and it has become the law of the case.

For the reasons above, the circuit court correctly found that the police officers in this case had probable cause as a matter of law to arrest Horton for crimes at the Roly Poly restaurant and that her claims for false arrest, false imprisonment and malicious prosecution are barred.

### CONCLUSION

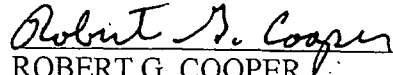
For the reasons stated, the Respondent respectfully requests that this Court dismiss the appeal or, in the alternative, affirm the judgment of the circuit court.

*[Signature on following page]*

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<sup>14</sup> Officer Currie is well trained in fingerprint analysis. (R. p. 255 ¶ 4). He was a seasoned veteran in the crime scene unit with approximately fourteen years of experience. (R. pp. 254-255 ¶ 3). He obtained a fingerprint from the crime scene that he believed was from the person who committed the break-in. (R. p. 255 ¶ 5). He ran the print through the AFIS system and Horton's fingerprint was found to be the most probable match out of all of the fingerprints in that database. (R. pp. 255-256 ¶ 6). Officer Currie then conducted an extensive comparison of the latent print from the crime scene and the print of Horton that was on file with SLED and determined that they matched. (R. p. 256 ¶ 7). He had two additional crime scene analysts review the prints and both agreed that they were a match. (R. p. 256 ¶ 8). In fourteen years of fingerprint analysis, involving literally thousands of fingerprint comparisons, the present case is the only one in which Officer Currie's conclusion has been called into question. (R. p. 257 ¶ 12). Officer Currie followed his training and the professional standards applicable to fingerprint analysis and believed in good faith that the fingerprints matched and constituted probable cause for the arrest of Horton. (R. pp. 257-258 ¶¶ 13, 14). Investigator Tyler acted upon that information to obtain arrest warrants against Horton. (R. p. 256 ¶ 9). Investigator Tyler justifiably relied upon Officer Currie's positive and unequivocal identification of Horton as a result of the fingerprint analysis.

Respectfully submitted,



ROBERT G. COOPER  
Office of the City Attorney  
Post Office Box 667  
Columbia, South Carolina 29202  
(803) 737-4242

Attorney for Respondent

Columbia, South Carolina

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