

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

Alison R. Lee, Circuit Court Judge

Case No. 2010-CP-40-03299
Appellate Case No. 2014-001070

Tynaysha Horton, Petitioner,

v.

The City of Columbia Police Department, Respondent.

REPLY BRIEF

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

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

Attorneys for Petitioner

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ARGUMENT

I. THE TRIAL COURT APPROPRIATELY CONSIDERED THE LETTER FROM AGENT SMITH

Respondent describes Petitioner's recitation of the facts as "largely sufficient" for purposes of this Court's review. (Resp. Br. p. 1). Respondent adds what it describes as "additions and clarifications." (Resp. Br. p. 1). These consist primarily of Respondent's assertion that Ms. Horton's counsel produced the July 26, 2010 letter from Agent Albert Smith "for the first time" at the hearing on Respondent's motion for summary judgment. (Resp. Br. p. 1). Respondent also notes that the "unsworn statement was in letter form, without addressee, and not in compliance with Rule 56, SCRC.P." (Resp. Br. p. 1). Respondent complains that Mr. Smith's letter was not in affidavit form and asserts any "representation otherwise, as 'fact' or evidence, is simply not supported by the record." (Resp. Br. p. 1). The implication of this argument is that the Court should not consider Mr. Smith's letter when deciding whether summary judgment was appropriate.

In fact, Respondent's counsel received the statement in responses to discovery. (R. p. 43, ll. 6-8; p. 76, ll. 7-11). Furthermore, the trial judge noted that "the probation agent expressed some concerns and reservations about whether or not she could have been at the site because of what he knew about her personality...." (R. p. 55, ll. 17-21). The judge also noted that at the time the officers sought the warrant, "the information that was reasonably available to the police officers or law enforcement it -- and I'm grouping all the investigation, everybody that contacted the scene was that the information contained in this warrant plus the phone call with a probation agent who expressed -- said, you

know, I'm not so sure she could have done it.” (R. p. 59, l. 23 - p. 60, l. 4). Respondent’s counsel responded, “yes, ma’am.” (R. p. 60, l. 6).

Petitioner’s counsel outlined the information the investigating officer had prior to obtaining the warrant – this included information that Petitioner lived in Bennettsville, had no transportation, had an 8 month old infant and two other children under 10 years old, and had met with her probation agent the day of the burglary and later she volunteered to submit DNA and fingerprint evidence. (R. p. 76, l. 24 - p. 78, l. 4). Counsel noted that Officer Tyler, who obtained the arrest warrant, spoke to Agent Smith and knew Petitioner lived in Bennettsville, had an infant and two other children under 10 years old, did not have a car and could not even get across town to meet with her probation officer. (R. p. 86, ll. 12-22).

Finally, Petitioner’s counsel pointed to Rule 56(f) as authority for the Court to consider Mr. Smith’s letter. (R. p. 105, ll. 15-17). That section provides:

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had *or may make such order as is just.*

Rule 56(f), SCRPC (Emphasis added). *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 n. 4, 410 S.E.2d 537, 544 n. 4 (1991) (noting that although the plaintiff did not file an affidavit invoking Rule 56(f), other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where the need for further discovery is otherwise made known to the trial court). *See also Lanham v. Blue Cross and Blue Shield*

of *South Carolina, Inc.*, 349 S.C. 356, 363 n. 1, 563 S.E.2d 331, 334 n. 1 (2002) (finding counsel's representations to the court that plaintiff was in need of further discovery was sufficient even though no affidavit was filed pursuant to Rule 56(f)).

Agent Smith's letter is in the record. (R. p. 210). Discovery responses by Respondent demonstrate Petitioner provided Respondent with a copy of Mr. Smith's letter. (R. p. 216, ¶ (h); p. 222, ¶ 1). Also, in its motion for summary judgment, Respondent admitted Officer Tyler contacted Agent Smith to advise him that Tyler had a warrant for Ms. Horton's arrest. (R. p. 270). In the memorandum in opposition to Respondent's motion, Petitioner outlined the contents of Agent Smith's conversation with Officer Tyler. (R. p. 283).

Accordingly, this Court should not be persuaded to disregard Agent Smith's letter based upon Respondent's implication that the letter does not sufficiently meet Respondent's assertions in support of its motion for summary judgment.

II. LOMBARDI DOES NOT REQUIRE PROOF THAT OMITTED INFORMATION ACTUALLY MISLED THE ISSUING JUDGE

Contrary to Respondents' argument, the *Lombardi* Court did not adopt a standard that includes proof that the omission actually misled. *Lombardi v. City of El Cajon*, 117 F.3d 1117 (9th Cir. 1997). Instead, the Ninth Circuit has described the test as follows:

To survive summary judgment on a claim of judicial deception, a § 1983 plaintiff need not establish specific intent to deceive the issuing court. Rather, the plaintiff must (1) establish that the warrant affidavit contained misrepresentations or omissions material to the finding of probable cause, and (2) make a "substantial showing" that the

misrepresentations or omissions were made intentionally or with reckless disregard for the truth. If these two requirements are met, the matter must go to trial.

Bravo v. City of Santa Maria, 665 F.3d 1076, 1083 (9th Cir. 2011) (citations omitted).

This test from the Ninth Circuit has been applied in both the Fifth and Seventh Circuits. *Jones v. City of Grand Prairie, Texas*, 209 F.3d 719 (Table) (5th Cir. 2000) (David, Garza and Dennis, JJ) (following *Lombardi*, and adding that recklessness in an omission may be inferred when the officer's omission was "clearly critical" to a finding of probable cause; court held that a reasonable jury could find the omitted evidence was "clearly critical"); *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1016 n. 5 (7th Cir. 2006) (Ripple, J, joined by Posner and Rovner, JJ) (noting that in cases where an officer omits facts in a warrant affidavit, the officer will be held to have knowingly violated plaintiff's fourth amendment rights if those officers, in the course of obtaining a warrant, "failed to inform the judicial officer of facts they knew would negate probable cause").


The Court should not be persuaded by Respondent's contention that "*Lombardi* simply merges materiality into intent." (Resp. Br. p. 4). Instead, the Court should hold that a jury could find the failure to include the information provided by Agent Smith was "clearly critical" to the finding of probable cause in this case.

CONCLUSION

The Court should reverse the decision of the Court of Appeals and remand the matter to the Court of Appeals with instructions to address the merits of the issues argued by the parties on appeal.

December 1, 2014

Respectfully submitted,



John S. Nichols, SC Bar No. 4210

Blake A. Hewitt

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

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Alison R. Lee, Circuit Court Judge

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

Tynaysha Horton, Petitioner,

v.

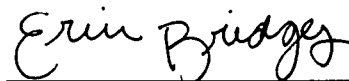
The City of Columbia Police Department, Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Dana M. Thye, Esquire
Office of the City Attorney
P.O. Box 667
Columbia, SC 29202

December 1, 2014



Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

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S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Tynaysha Horton v. The City of Columbia Police Department
Case Tracking No.: 2014-001070

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of the Reply Brief in reference to the above matter. I have also enclosed a proof of service of the Reply Brief on counsel for the Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

/emb

Enclosures

cc: Dylan W. Goff, Esquire
Dana M. Thye, Esquire