STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF MARLBORO)
) Civil Action Number: 2012-CP-34-00046
)
Ricky Edmond Blue, Jr.,)
)
Plaintiff,)
)
v.) ORDER
)
City of Bennettsville, Larry McNeill,)
and Walter Covington,)
)
Defendants.)

This matter is before the Court on a motion for summary judgment filed on behalf of the Defendants. A hearing was held in this matter before the undersigned on December 17, 2014, at the Marlboro County Courthouse in Bennettsville, South Carolina. The Plaintiff was represented by Melanie C. Nicholson, Esquire, at the hearing, and Michael B. Wren, Esquire, was present and presented arguments on behalf of the Defendants. After carefully considering the arguments made and the entirety of the matters on file in this case, the Court finds that summary judgment should be granted in favor of the Defendants and dismisses the Plaintiff's Complaint with prejudice.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. It is well established that the Court, in considering a motion for summary judgment, must view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *See, e.g., Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d

505, 509 (2006). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Gauld v. O'Shaugnessy Realty Co.,* 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). However, once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Moore v. Weinberg,* 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007). Instead, the nonmoving party must present specific facts showing a genuine issue for trial. *Id.*

BACKGROUND

Taking the facts in the light most favorable to the Plaintiff, the record before the Court shows that on February 26, 2010, the Plaintiff was stopped at a traffic checkpoint in the City of Bennettsville. During the course of the stop, officers observed a .44 caliber handgun laying on one of the seats in the vehicle. As a result, the Plaintiff was placed under arrest and charged with unlawful carrying of a handgun. Defendant Covington completed an affidavit for an arrest warrant against the Plaintiff, which was presented to and signed by Magistrate Judge Robert A. Stanton, Jr., on February 27, 2010. On May 6, 2010, the Marlboro County Grand Jury convened to consider the charge that had been made against the Plaintiff, and returned a true billed indictment against the Plaintiff. However, after the indictment had been returned, the Fourth Circuit Solicitor's Office *nolle prossed* the charge against the Plaintiff on May 10, 2010.

The Plaintiff's Amended Complaint alleges causes of action for violations of the South Carolina Constitution, False Arrest, and Malicious Prosecution against the City of Bennettsville, City of Bennettsville Police Chief Larry McNeil, and City of Bennettsville Police Officer Corporal Walter Covington. On September 11, 2013, the Defendants moved for summary judgment on the Plaintiff's claims.

DISCUSSION

I. Defendants McNeil And Covington Are Entitled To Absolute Employee Immunity Pursuant To The South Carolina Tort Claims Act

As an initial matter, this Court finds as a matter of law that the individually named Defendants are entitled to absolute employee immunity under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq*. The Tort Claims Act makes clear that it "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a). Pursuant to S.C. Code Ann. § 15-78-70(c), a plaintiff "shall name as a party defendant only the agency or political subdivision for which the employee was acting." Therefore, an employee of a governmental entity is immune from liability for tortious acts committed within the scope of his or her official duties. *See Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003).

The Plaintiff admits in his Amended Complaint that Defendants McNeil and Covington were at all times employees of the City of Bennettsville during any involvement they may have had with the Plaintiff. Similarly, both Defendants McNeil and Covington have testified by way of affidavits that they are employees of the City of Bennettsville working for the City's Police Department. The law is clear that "[t]he 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15-78-200. The Plaintiff has not alleged that any actions of the individual Defendants constituted "actual fraud, actual malice, intent to harm, or a crime involving moral turpitude" such as to take their actions outside the scope of the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-70(b). Therefore, Defendants McNeil and Covington must be dismissed as a matter of law.

II. Even If Defendants McNeil And Covington Were Proper Parties To This Case, The Plaintiff's Claims Against Them Are Barred By The Statute Of Limitations

Even if Defendants McNeil and Covington were not entitled to employee immunity in this case, the Plaintiff's claims against those Defendants would still be subject to summary dismissal due to the expiration of the applicable statute of limitations. The South Carolina Tort Claims Act provides that "any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered...." S.C. Code Ann. § 15-78-110. In this case, the date of the Plaintiff's arrest was February 26, 2010, and the charges against him were *nolle pross ed* by the Fourth Circuit Solicitor's Office on May 10, 2010. Accordingly, any claims against Defendants McNeil and Covington would have had to have been brought no later than May 10, 2012. In this case, the Plaintiff's Amended Complaint naming Defendants McNeil and Covington as Defendants was not filed until July 25, 2012. Accordingly, the Plaintiff's claims against Defendants McNeil and Covington, even if proper under the terms and conditions of the South Carolina Tort Claims Act, are time barred by the applicable statute of limitations and should be dismissed.[1]

[1] The Plaintiff has asserted that his claims against Defendants McNeil and Covington relate back to the filing of his original Complaint pursuant to Rule 15(c), SCRCP. While Rule 15 of the South Carolina Rules of Civil Procedure does allow for relation back under certain circumstances, the South Carolina Court of Appeals has specifically held that the language of Rule 15(c) speaks to a *change* in party, rather than the *addition* of a defendant to an already existing defendant. *See* Jackson v. Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000). In this case, the Plaintiff's Amended Complaint added Defendants McNeil and Covington as party defendants in addition to the Defendant City of Bennettsville. Under these circumstances, relation back does not apply and cannot save the Plaintiff's claims against Defendants McNeil and Covington.

III. The Plaintiff's Claims Based Upon Alleged Violations Of The South Carolina Constitution Fail, As There Exists No Enabling Statute Allowing For A Private Right Of Action For Money Damages For Such Claims

The Plaintiff's cause of action premised upon alleged violations of the South Carolina Constitution must fail, as there exists no private right of action for money damages for any alleged violation of the South Carolina Constitution. The South Carolina Court of Appeals recognized this point in the unpublished decision of *Gibbs v. South Carolina Department of Probation, Parole, and Pardon Services*, Op. No. 2002-UP-363 (S.C. Ct. App. 2002), *cert. denied.* There, the Court of Appeals recognized that:

> Although section 1983 provides a method for obtaining monetary damages for violations of civil rights protected by the federal constitution, there is not a similar provision in South Carolina which enables a citizen to bring a private right of action for civil damages under the state constitution.

Gibbs, *supra.* The Court of Appeals consequently held that "no viable cause of action exists where, as here, the state Constitution does not provide for a private right of action for civil rights violations and the legislature has not enacted a statute enabling this type of action." *Id.* Significantly, the South Carolina Supreme Court denied a petition for writ of certiorari and declined to review the Court of Appeals' decision in *Gibbs*. While the Court recognizes that unpublished opinions of the appellate courts have no precedential value, the concept discussed by the Court of Appeals can be looked to as persuasive authority. As such, the Court agrees that in the absence of any enabling legislation, there exists no private right of action for monetary damages arising from any alleged violations of the South Carolina Constitution, and the Plaintiff's claim for such must fail as a matter of law.

Additionally, the Court finds that the Defendants are also entitled to sovereign immunity for alleged violations of the South Carolina Constitution. Prior to the decision of the South

Carolina Supreme Court in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), governmental entities and their employees were protected by sovereign immunity. In *McCall*, the Supreme Court abolished sovereign immunity. However, the South Carolina General Assembly enacted the South Carolina Tort Claims Act the following year "which reinstated sovereign immunity for the State and its political subdivisions with certain exceptions." *Jinks v. Richland County*, 349 S.C. 298, 563 S.E.2d 104, 108 (2002), *reversed on other grounds*, 538 U.S. 456 (2003). "The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions." *Id.* The Tort Claims Act "removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act." *Doyle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736, 739 (Ct. App. 2001).

In the Tort Claims Act, the General Assembly affirmatively states that it "intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, *only to the extent provided herein.*" S.C. Code Ann. § 15-78-20(b) (emphasis added). "All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved." *Id.* Thus, it is well settled that in reaction to *McCall*, the General Assembly reinstated sovereign immunity subject *only* to the limited waiver specifically provided in the Tort Claims Act. The Act does not include a waiver of sovereign immunity for violations of the South Carolina Constitution. Therefore, sovereign immunity remains a bar to claims for money damages for violations of the South Carolina Constitution, and the Plaintiff's claims for such must be dismissed.

IV. The Plaintiff's Claims For False Arrest And Malicious Prosecution Must Fail, As The Plaintiff Cannot Demonstrate The Requisite Lack Of Probable Cause To Establish Such Claims

The Plaintiff's causes of action for false arrest and malicious prosecution all fail due to the existence of probable cause for the arrest and prosecution. The lack of probable cause is an *essential* element for each of those causes of action. *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 665, n. 4 (Ct. App. 2005). In light of the true billed indictment returned by the Marlboro County Grand Jury against the Plaintiff, the Plaintiff cannot demonstrate the requisite lack of probable cause, and his claims for false arrest and malicious prosecution must necessarily fail.

As explained by the South Carolina Supreme Court, "South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution." *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d 642, 649 (2006); *see also Kinton v. Mobile Home Industries*, 274 S.C. 179, 262 S.E.2d 727 (1980) and *Whitner v. Duke Power Co.*, 277 S.C. 397, 288 S.E.2d 389 (1982). The United States District Court has similarly explained "[w]here the Grand Jury has returned a true bill upon the charge made, such finding amounts to a judicial recognition that probable cause does exist and infers prima facie probable cause for the prosecution." *White v. Coleman*, 277 F. Supp. 292, 297 (D.S.C. 1967). In the present case, the charge against the Plaintiff was presented to the Marlboro County Grand Jury and a true billed indictment was returned. Thus, the undisputed fact that the Plaintiff was indicted on the charge for which he was arrested is prima facie evidence that probable cause existed for his arrest and subsequent prosecution.

Additionally, the Plaintiff cannot demonstrate that the charge against him was terminated in such a way so as to imply that he was innocent of the alleged crime. The elements of malicious

prosecution under South Carolina law are: "(1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867, 870–71 (Ct. App. 2012). As has already been discussed, the Plaintiff cannot show a lack of probable cause for his arrest and prosecution. In addition, he cannot show that the termination of the criminal charge implied or was consistent with his innocence. In *McKenney v. Jack Eckerd Company,* 304 S.C. 21, 402 S.E.2d 887 (1991), the South Carolina Supreme Court adopted the majority rule that an action for malicious prosecution may be maintained only when the accused establishes "that the charges were dismissed for reasons which imply or are consistent with innocence." 402 S.E.2d at 888. Here, the Plaintiff has not made that showing, as there has been no evidence presented to indicate that the Solicitor *nolle prossed* the indictment because of any belief that the Plaintiff was innocent.

Additionally, the Defendant City of Bennettsville is entitled to immunity for the Plaintiff's malicious prosecution claim. The South Carolina Tort Claims Act provides absolute immunity for the "institution or prosecution of any judicial or administrative proceeding." S.C. Code Ann. § 15-78-60(23). In *McCoy v. City of Columbia*, 929 F.Supp.2d 541 (D.S.C. 2013), Judge Joseph F. Anderson, Jr., applying South Carolina law to a state law claim, ruled that a malicious prosecution claim was barred by Section 15-78-60(23). Accordingly, the Plaintiff's claim for malicious prosecution fails as a matter of law and should be dismissed.

CONCLUSION

The Court has considered the parties' written submissions as well as oral arguments in this matter. Based upon the evidence and all inferences that can be reasonably drawn from the

evidence viewed in the light most favorable to the Plaintiff, this Court finds that there is no dispute of facts and the inferences to be drawn from the evidence are susceptible to only one reasonable interpretation. Consequently, this Court finds that based upon the forgoing reasons and the laws of the State of South Carolina, the Defendants are entitled to summary judgment as a matter of law as to the Plaintiff's claims as set forth in his Complaint in this matter.

IT IS, THEREFORE, ORDERED that the Defendants' Motion for Summary Judgment be **GRANTED** and the above-entitled action is dismissed with prejudice.

IT IS SO ORDERED.

The Honorable Paul M. Burch
Circuit Court Judge, Fourth Judicial Circuit

February 5th, 2015
Charleston, South Carolina

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WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, S.C.

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