THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis Jr., Circuit Court Judge

Case No.: 2013-CP-10-3669
Appellate Case No.: 2014-001977

Eugene Magwood, ...Appellant

v.

J. Al Cannon, Jr. in his official capacity as
Sheriff of Charleston County, Inspector
Anderson, Inspector Antonio, Charles Ghent,
and South Carolina Law Enforcement Division, ...Respondents

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RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE CASE

On June 20, 2013, Plaintiff-Appellant filed this action alleging defamation and defamation per se, abuse of process, and civil conspiracy to commit fraud against Charleston County Sheriff's Office Inspector Antonio, Charleston County Sheriff's Office Inspector Anderson, and South Carolina Law Enforcement Division Agent Ghent. The plaintiff alleges negligence and malicious prosecution against Antonio, Anderson, Ghent, the South Carolina Law Enforcement Division ("SLED"), and J. Al Cannon as the Sheriff of Charleston County. Respondents filed their Answer on August 19, 2013, denying all allegations and asserting as affirmative defenses various provisions of the South Carolina Tort Claims Act.

Respondents moved for summary judgment on April 15, 2014. (R. 36-62). On July 30, 2014, the Honorable R. Markley Dennis, Jr., heard the summary judgment arguments. By Order dated August 14, 2014, Judge Dennis granted Defendants' Motion for Summary Judgment. (R. 3-16). Appellant filed his Notice of Appeal on September 8, 2014.

STATEMENT OF THE FACTS

In 2006, Appellant, then a detective with the Charleston County Sheriff's Office, was assigned to investigate an allegation of rape by Catherine Boney. During the investigation, Appellant developed a suspect, Maurice Prioleau, who admitted sexual relations with Boney, but claimed they were consensual. Based upon a report supplement dated September 21, 2008, Appellant went to the home of Boney and showed her photos. (R. 901). It is disputed whether he showed her a single photo first, or a 6-pack lineup. For purposes of summary judgment and this appeal, Respondents will use Appellant's version that he showed her the

6-pack lineup. (R. 903).

Later, during the time the assistant solicitor assigned to the case, Greg Voigt, was preparing the case for trial, he and his investigator, Ryan Kelly, met with Ms. Boney on several occasions. (R. 825-828). During one meeting, Ms. Boney mentioned being shown a photo of the suspect. (R. 825-828). When asked, she said she was certain she had only been shown a single photo. (R. 825-828). In order to refresh her memory, she was shown the six photo lineup. (R. 825-828). Ms. Boney advised that the writing on the lineup was not hers and that she had never been shown the lineup by Appellant. (R. 825-828). Ms. Boney even provided a handwriting sample. (R. 914-922).

Mr. Voigt and Mr. Kelly then met with Appellant about trial. They specifically asked Appellant about the photo lineup. (R. 825-828). Appellant told them Boney had circled, initialed, timed, and dated the photo. When Voigt and Kelly told Appellant that Boney denied doing so, he said she was incorrect. (R. 825-828). Voigt showed Appellant the writing on the lineup and the writing he wrote on Maurice Prioleau's statement. When Voigt questioned him about the similarities, Appellant again said the victim had signed the lineup and was mistaken. (R. 827-828). After the meeting, Kelly walked Appellant out and asked him for clarification, pointing out that if there is not a logical explanation, he would risk being called a liar on the stand. Appellant insisted that none of it was his handwriting and the victim was wrong. (R. 825-826).

Based on their concerns about the lineup, Assistant Solicitor Voigt went to the Sheriff's Office to report his suspicions that Appellant had put the victim's initials and date on the lineup and may not have even shown her the lineup. (R. 827-828). The Sheriff's

Office, so as to avoid an appearance of impropriety, asked SLED to investigate the allegations against Appellant. (R. 885). SLED received the request and assigned the investigation to Agent Charles Ghent. Inspector Michael Anderson was to be his liaison with the Sheriff's Office. Agent Ghent reviewed all of the documentation, interviewed every person who it was reported to him to have information, and prepared a report. His report is a compilation of the memoranda of interviews and documents collected. It does not make any conclusions or determinations of wrongdoing. (R. 843-846). Ghent submitted his report to his supervisors for approval and then it was provided to the Solicitor's Office for a determination of criminal wrongdoing on or about December 9, 2008. The Solicitor's Office determined that they had a conflict as the underlying complaint had come from their office, so they referred the matter to the Attorney General's Office for a determination about whether Appellant should be prosecuted.

After the SLED report was complete, the Sheriff's Office conducted an internal affairs ("IA") investigation, starting in April 2009. Inspector Anderson was assigned to perform the investigation and Inspector Antonio was assigned to assist. (R. 745, lines 16-25). Appellant was interviewed on May 27, 2009. Though he had previously said that Catherine Boney had initialed, dated, and put the time on the lineup, Appellant changed his story and told Anderson and Antonio that he had, in fact, put the date and time on the lineup, but that Boney had initialed it. Appellant also told investigators that he had shown Boney a single photo only after the lineup, which contradicted what Boney had told the IA investigators, the Assistant Solicitor, and Agent Ghent. This also contradicted what Lt. Watson and Sgt. Zimmer said Appellant told them. (R. 829-832). Additionally, Appellant

stated that the date and time on the lineup were accurate based on his watch at the time. This contradicted the computer print-out of the lineup photos, which was done at the detention center. The computer print-out is dated, 11/7/07, 3:45 p.m., which is five hours and five minutes after the time written on the lineup, 11/7/07, 10:40 a.m. (R. 883). Appellant had no explanation for this. Finally, though Appellant had told Anderson and Antonio that he put the date and time on the lineup, his report clearly states that the witness did so. (R. 901).

The IA investigation also requested a handwriting analysis. The outcome of the analysis was that Boney did not write the initials, time, or date. (R. 903). The analysis determined that Appellant wrote the date and time and indicated that Appellant likely also wrote the initials. (R. 903).

Based on the interviews and the handwriting analysis, the Office of Professional Standards concluded that the complaint against Appellant was sustained. It also concluded that Appellant violated the policies and procedures of the Sheriff's Office, specifically Procedure 1-09(III)(A)(34), "Truthfulness" and Procedure 1-09(III)(A)(10), "Unsatisfactory Performance."

The Internal Affairs investigation, however, is not important in this matter, because the Internal Affairs investigation was completed after the SLED investigation, and was only used for internal disciplinary purposes, for which Appellant has not made any claims. Although the appellant mentions being terminated several times throughout his brief, he has not alleged wrongful termination in this lawsuit, and there are no claims of wrongful termination. (R. 20-28).

The Attorney General's Office made the independent decision to prosecute Appellant.

On May 7, 2009, Appellant was charged with Misconduct in Office. Neither SLED nor the Charleston County Sheriff's Office was consulted or participated in this decision. (R. 686, lines 6-19; R. 705, line16 - p. 706, line 2; R. 791, lines 13-24; R.493, lines 2-8). While preparing for the prosecution, the Attorney General's Office requested a handwriting analysis be performed. Because the Internal Affairs investigation was performed pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967), no information gathered directly from Appellant in the Internal Affairs investigation was shared with SLED, the Solicitor's Office, or the Attorney General's Office. (R. 763, line 20 - p. 764, line 7). Therefore, the Attorney General's Office had to obtain their own handwriting analysis. Both Boney and Appellant's handwriting samples were analyzed. The analysis procured by the Attorney General's Office also showed that Catherine Boney did not write any of the writing on the photo lineup. (R. 905). Appellant was determined to have likely written the date and time on the lineup, and there was no conclusion as to whether he was the writer of the initials.

Appellant was prosecuted. During his trial, Catherine Boney changed her testimony and claimed that she was very upset and could not remember whether she had signed the lineup or not. Appellant was not convicted.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is

proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); *Jackson v. Bermuda Sands, Inc.* 383 S.C. 11, 14 n. 2, 677 S.E.2d 612, 614 n. 2 (Ct. App. 2009). A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723; *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AFTER DETERMINING THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Appellant has alleged malicious prosecution, abuse of process, false arrest, civil conspiracy, and defamation, but has provided no evidence to support any of the causes of action. To the contrary, the evidence shows that the three named officers from the two named agencies were assigned to perform investigations, and that they did so. Once the investigations were complete, they were turned over to others not named in this suit who made determinations about prosecution and termination. Based on the evidence in this case, summary judgment was proper on all causes of action and should be affirmed.

A. THERE IS NO EVIDENCE OF MALICIOUS PROSECUTION BY ANY RESPONDENT.

In order to recover in an action for malicious prosecution, a plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) termination of such proceeding in the plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Ruff v. Eckerds Drugs, Inc.,* 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975). An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause. *Law v. S.C. Dep't of Corr.,* 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006).

In this matter, Appellant cannot prove at least four of the elements. Appellant alleged malicious prosecution against all Respondents. In actuality, there are two separate and

distinct groups in this matter: (1) SLED and its agent, Ghent; and (2) the Charleston County Sheriff and his deputies Anderson and Antonio. They should be considered separately.

1. SLED and Agent Ghent

SLED did not know anything about this matter until October 8, 2008, when Assistant Sheriff Andrene Coury-Smith sent Chief Lloyd a letter (through local Captain Roger Heaton) making an official request for an investigation. (R. 885). Agent Charles Ghent was assigned the matter for investigation in October 2008. Until that point, Charles Ghent had never met and knew nothing about Appellant. (R. 493, lines 13-18).

Charles Ghent reviewed documents, interviewed witnesses, and gathered evidence as part of his investigation. When he was finished, he compiled all of the information into a report with a number of documentary attachments and he provided that report to his supervisor who then provided it to the Ninth Circuit Solicitor. (R. 843-846). The purpose of a SLED investigation is to have an outside agency collect evidence and interview witnesses. SLED agents do not make recommendations, decisions, or conclusions about wrongdoings. Such is left to the prosecuting agency. Once the report was turned over to the Solicitor's Office, SLED had no further involvement other than to obtain the warrant at their request. (R. 493, lines 2-6).

Because of the very nature of their investigation, SLED does not institute or continue judicial proceedings. (R. 492, lines 16-20). There is no evidence that, in this case, Agent Ghent or any member of SLED insisted that proceedings be instituted or continued. There is no evidence that Agent Ghent or any member of SLED had any malice toward Appellant.

(R. 493, lines 16-18). Finally, though the SLED report and investigation does not draw the conclusion that there was probable cause, although there clearly was, and Ghent believed there was when he applied for the warrant. (R. 493, line 19 -p. 494, line 2).

Probable cause is a defense to an action for malicious prosecution and has been defined as "the existence of such facts or circumstances as would excite the belief of a reasonable mind, acting on facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Eckerds Drugs,* 265 S.C. at 568, 220 S.E.2d at 652. The plaintiff has the burden of demonstrating lack of probable cause. *Parrott v. Plowden Motor Co.,* 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965). Therefore, for the determination of probable cause, the facts must be considered from the point of view of the prosecuting party; the question is not what the actual facts were, but what the prosecuting party honestly believed them to be. *Law,* 368 S.C. at 436, 629 S.E.2d at 649. "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." *Id.*; *see also Pallares v. Seinar*, 407 S.C. 359, 368, 756 S.E.2d 128, 132 (2014) (upholding circuit court's granting of summary judgment on malicious prosecution because the record demonstrated there was probable cause). While a true bill of indictment is prima facie evidence of probable cause, a not guilty verdict is not evidence of a lack of probable cause. *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (Ct. App.1990). "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." *McBride v. Sch. Dist. Of Greenville Cnty.*, 389 S.C. 546, 566–67, 698 S.E.2d 845, 856 (Ct. App. 2010) (quoting *Law*, 368 S.C. at 436, 629

S.E.2d at 649); *see also Pallares*, 407 S.C. at 368, 756 S.E.2d at 132.

Here, not only is there an affidavit that contains sufficient underlying facts and information to allow a magistrate to make an independent determination of probable cause, Appellant was actually indicted by the Charleston County Grand Jury which is prima facie evidence of probable cause in a malicious prosecution claim. *Law,* 368 S.C. at 436, 629 S.E.2d at 649. Because there is clear evidence of probable cause, there can be no malicious prosecution and the grant of summary judgment should be affirmed as to SLED and Agent Ghent.

2. Charleston County Sheriff J. Al Cannon, Inspector Anderson, and Inspector Antonio

Appellant also cannot show that Sheriff Cannon, Inspector Anderson, or Inspector Antonio had any involvement with his prosecution other than Inspector Anderson's being subpoenaed to testify at the trial. The investigation performed by Anderson and Antonio was separate and distinct from that performed by SLED. It was an internal investigation prepared solely to determine if Appellant had violated any of the policies and procedures of the Charleston County Sheriff's Office. (R. 833-842). Sheriff Cannon had no personal involvement in the investigation. The internal affairs investigation was even performed pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967), such that Appellant's statements to the internal affairs Inspectors could not be and were not held against him in his prosecution. Inspector Anderson only testified at trial because he was served with a subpoena and was required to do so. No member of the Sheriff's Office had any involvement in the decision-making process regarding whether Appellant would be prosecuted. (R. 705, line 16-p. 706,

line 2; R. 791, lines 20-24). The Attorney General's Office made the decision to prosecute Appellant. There is no evidence that any member of the Sheriff's Office ever spoke with the Attorney General's Office to insist that judicial proceedings be instituted or continued. (R. 705 line 25-p. 706 line 2; R. 791, lines 20-24). The investigation performed by the Sheriff's Office resulted in Appellant's termination, which he has not made a part of his complaint.

Appellant cannot prove four of the necessary elements of his malicious prosecution claim (1, 2, 4, and 5), and therefore the grant of summary judgment should be affirmed as to Sheriff Cannon, Anderson, and Antonio on the Malicious Prosecution cause of action.

B. THERE WAS NO ABUSE OF PROCESS OR FALSE ARREST BY GHENT, ANDERSON, OR ANTONIO.

1. Appellant cannot meet his burden of proof regarding his claim for Abuse of Process.

"The essential elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Pallares*, 407 S.C. at 370, 756 S.E.2d at 133 (citing *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 697 S.E.2d 551 (2010); *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988)).

The first element, an "ulterior purpose," exists if the process is used to secure an objective that is "not legitimate in the use of the process." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012), *aff'd in part as modified, vacated in part on other grounds*, 410 S.C. 319, 764 S.E.2d 701 (2014) (citation omitted).

"One who uses a legal process, whether criminal or civil, against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability for harm caused by the abuse of process." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 75, 567 S.E.2d 251, 255–56 (Ct. App. 2002) (quoting Restatement (Second) of Torts § 682 (1977)). The collateral objective must be the "sole or paramount reason for acting." *Id.* at 75, 567 S.E.2d at 256. An allegation that a party had a "bad motive" or an "ulterior purpose" in bringing an action, standing alone, is insufficient to sustain an abuse of process claim. *D.R. Horton*, 398 S.C. at 551, 730 S.E.2d at 352 (citing *Food Lion*, 351 S.C. at 74, 567 S.E.2d at 255). Moreover, no action lies where a person has an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process. *Food Lion*, 351 S.C. at 74–75, 567 S.E.2d at 255–56. In the present case, Appellant has sued Ghent, Anderson, and Antonio for Abuse of Process. In his complaint, Appellant alleged that these Respondents' actions "were carried out for ulterior purposes," (R. 25, ¶31), and that they "willfully used the legal process espoused above solely for such ulterior purposes." (R. 25, ¶32). Appellant has not stated what the ulterior purposes were, which is insufficient. *See D.R. Horton*, 398 S.C. at 551, 730 S.E.2d at 352.

Abuse of process focuses on events occurring outside the process; the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. *D.R. Horton*, 398 S.C. at 551, 730 S.E.2d at 352; *see also Hainer*, 328 S.C. at 136, 492 S.E.2d at 107 (stating the improper purpose usually takes the form of coercion to obtain a collateral advantage); *accord Swicegood v.*

Lott, 379 S.C. 346, 65 S.E.2d 211 (Ct. App. 2008); *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 635 S.E.2d 562 (Ct. App. 2006). Here, there is no evidence that Anderson, Antonio, or Ghent were trying to coerce Appellant to do or surrender anything. Agent Ghent had never even met Appellant before he was asked to investigate this matter. (R. 493, lines 13-15). Anderson and Antonio were internal affairs officers for the Sheriff's Office, and but for their positions, they would never have been involved in this investigation. (R. 708, lines 21-24). There is no evidence that either Anderson or Antonio ever had any improper purpose with regard to their investigation of Appellant. (R. 706, line 6-p. 707, line 9).

Additionally, with regard to the "process" itself, these individual Respondents only performed investigations and wrote reports. Agent Ghent's actions were all taken as part of his official duties for SLED. (R. 494, lines 4-7). Agent Ghent did nothing outside the realm of his normal investigative activities and he followed all of SLED's policies and procedures. (R. 494, line 8- p. 495, line 1). Ghent's SLED report was compiled and turned over to the Solicitor's Office for a determination of wrongdoing. (R. 463, lines11-17). Appellant has not made any claims against Anderson or Antonio arising out of his termination and Anderson and Antonio had no involvement in the SLED investigation beyond providing documentation and access to witnesses. (R. 791, line 23-p. 791, line 6).

The second aspect required is a "willful act." A willful act has been described as "[s]ome definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process." *Hainer*, 328 S.C. at 136, 492 S.E.2d at 107. The "willful act" element consists of three components: (1) "a 'willful' or overt act"; (2) "in the use of the process"; (3) "that is improper because it is either (a) unauthorized or (b) aimed

at an illegitimate collateral objective." *Food Lion, Inc.*, 351 S.C. at 71, 567 S.E.2d at 254 (citations omitted). There is no evidence of such in this case. There is no evidence of any improper willful act or any illegitimate collateral objective by the individual defendants. (R. 792, lines 7-10). These were law enforcement officers who were asked to perform an investigation into a complaint of wrongdoing. They performed their investigations and turned over their findings to other people who then made the decision on what would be done. (R. 490, line 24-p. 491, line 5; R. 793, lines 16-25).

There is no evidence to support the cause of action for Abuse of Process against Ghent, Anderson, or Antonio, and therefore summary judgment should be affirmed.

2. <u>There is No Evidence that Appellant was Falsely Arrested.</u>

To prevail on a cause of action for false arrest, a plaintiff must establish: "(1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Yarborough v. Montgomery*, 554 F. Supp. 2d 611, 620 (D.S.C. 2008) (quoting *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 440, 629 S.E.2d 642, 651 (2006)). In this case, Appellant was intentionally restrained by officers at the time of his arrest. The only determination for the court is whether the restraint was unlawful. "The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest." *Law*, 368 S.C. at 440, 629 S.E.2d at 651. In this case, the South Carolina Attorney General's Office made the determination to pursue prosecution. The Attorney General's Office requested Agent Ghent apply for a warrant for Appellant's arrest, and Ghent complied. The warrant was signed by Associate Chief Magistrate James B. Gosnell on May 7, 2009, and Appellant was then arrested pursuant to the facially valid warrant. (R. 911-912).

As stated in Section I.A.1., *supra*, South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause. *Law*, 368 S.C. at436, 629 S.E.2d at 649; *McBride v. School Dist. of Greenville Cty*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010). Although whether probable cause exists is ordinarily a question for the jury, it may be decided as a matter of law when the evidence yields but one conclusion. *McBride* (citing *Law*, 368 S.C. at 436, 629 S.E.2d at 649). Appellant was indicted by the grand jury in this matter. The grand jury's true bill indictment against Appellant is prima facie evidence of probable cause to arrest Appellant, and thus Appellant cannot show an unlawful restraint by Respondents. Therefore, Respondents' summary judgment should be affirmed as to Appellant's False Arrest claim.

C. THERE WAS NO CIVIL CONSPIRACY BY THE INDIVIDUAL RESPONDENTS TO CAUSE HARM TO APPELLANT.

Appellant has alleged that Respondents Anderson, Antonio, and Ghent came together in a conspiracy for the purpose of injuring Appellant by fraud. (R. 27, ¶42). Respondents Anderson and Antonio are both employees of the Charleston County Sheriff's Office. Therefore, the Intracorporate Conspiracy Doctrine applies in this matter as to the two of them. "[N]o conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006).

Respondents Anderson and Antonio in this case fall squarely within the intracorporate conspiracy doctrine. First, Appellant has failed to allege that any officer was

acting outside of his normal duties or that he was not acting in the course and scope of his employment. There is no allegation of any independent stake in achieving the objective of the alleged conspiracy and no evidence of any personal animus or ulterior purpose by Anderson or Antonio. *See Liverett v. Island Breeze Intern. Inc.*, No. 2:12-cv-1285-PMD, 2012 WL 3264563 (D.S.C. August 9, 2012) (dismissing civil conspiracy claim based on intracorporate conspiracy doctrine for plaintiff's failing to allege facts that defendants acted outside normal corporate duties or had any independent stake in achieving objective of alleged conspiracy). Further, Appellant has failed to allege any special damages.

The allegation that Anderson and/or Antonio conspired with Ghent is also not supported by any evidence. Ghent testified that he never spoke with or met with Inspector Antonio. (R. 495, lines 23-25). Agent Ghent also never spoke with Inspector Anderson about the content of his investigation. (R. 496, lines1-4). Although Agent Ghent was aware that the Charleston County Sheriff's Office was performing an investigation, he was not privy to the information they gathered. (R. 496, lines 5-21). For all intents and purposes, the two investigations were parallel in that they had two different purposes, and the information obtained in the Sheriff's Office investigation was never shared with Agent Ghent or SLED. (R. 496, line 22-p. 497, line 12). Agent Ghent never spoke to nor acted jointly with Inspectors Anderson and Antonio to cause Appellant damage to his reputation. (R. 497, line17-p. 498, line 12; R. 792, lines 17-20; R. 706, lines 15-21). Therefore, this court should affirm the grant of summary judgment on conspiracy.

D. THERE WAS NO DEFAMATION OR SLANDER BY ANY OF THE INDIVIDUAL RESPONDENTS.

"The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). To recover for defamation, a plaintiff must establish by a preponderance of the evidence, that there was (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998) (Toal, J., concurring); *see also Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006); *Fleming*, 350 S.C. at 494, 567 S.E.2d at 860.

Agent Ghent never made any statements about Appellant outside the course and scope of his investigation. (R. 495, lines 14-17). Ghent never made any statements that he knew or believed to be false. (R. 495, lines 18-21). Inspectors Anderson and Antonio also never made any statements about Appellant outside the course of their investigation. (R. 792, line 21-p. 793, line 7; R. 706, lines 11-21; R. 497, line 17-p. 498, line 12). They never made any statements they knew or believed to be false or untrue. (R. 706, lines 6-17; R. 792, lines11-13).

Because Anderson, Antonio, and Ghent were at all times relevant to this matter acting in the course and scope of their employment as law enforcement officers officially investigating another officer's wrongdoing, any communications they may have made

regarding Appellant are privileged and no cause of action may arise out of such communications. *See* S.C. Code Ann. § 23-23-90. "An oral or written report, document, statement, or other communication that is written, made, or delivered concerning the requirements or administration of [Chapter 23 of Title 23 of the S.C. Code] must not be the subject of or basis for an action at law or in equity in any court of the State if the communication is between: (1) law enforcement agencies, their agents, employees, or representatives[.]" S.C. Code Ann. § 23-23-90. Chapter 23 of Title 23 of the South Carolina Code sets standards for law enforcement and criminal justice service, S.C. Code Ann. § 23-23-10(c), and provides for the suspension, revocation, or restriction of a law enforcement officer's credentials, S.C. Code Ann. § 23-23-80. Thus, the communications arising out of the investigation into Appellant's wrongdoing concern Chapter 23 of Title 23 of the South Carolina Code, and therefore such communications are privileged and cannot be the basis for any action at law, including this defamation action. Therefore, the entry of summary judgment should be affirmed in favor of Anderson, Antonio, and Ghent.

Additionally, when the arrest warrant was obtained, Agent Ghent did not wait until Appellant was out in public somewhere to arrest him and make a spectacle of him that could appear in the newspaper or on the television news. To the contrary, Appellant's attorney was contacted and arrangements were made for Appellant to turn himself in. Special arrangements were even made at the jail for his security and to get him a bond in timely order so he would not have to spend as much time in the jail. With no evidence of defamation, the lower court's ruling granting summary judgment should be affirmed.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE ALL RESPONDENTS ARE ENTITLED TO IMMUNITY PURSUANT TO THE PLAIN LANGUAGE OF THE SOUTH CAROLINA TORT CLAIMS ACT.

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et. seq.* (Supp. 1997), which provides the exclusive remedy in tort against Respondents, is a limited waiver of governmental immunity. *Moore v. Florence Sch. Dist. No.1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994); s*ee also* S.C. Code Ann. § 15-78-20(b) (Supp. 1997) (providing that the State, its political subdivisions and employees are immune from liability and suit for any tort committed while acting within the scope of official duty except as waived by the Tort Claims Act); S.C. Code Ann. § 15-78-40 (Supp. 1997).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citing *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). The General Assembly has stated its intent in the Tort Claims Act through §15-78-200, which provides:

> Notwithstanding any provision of law, this chapter, the "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. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and **must be liberally construed in favor of limiting the liability of the governmental entity**.

S.C. Code §15-78-200 (*emphasis added*).

All Respondents are entitled to the immunities set forth below. There is no evidence that Sheriff Cannon, Agent Ghent, Inspector Anderson or Inspector Antonio acted with actual

fraud, actual malice, or intent to harm the appellant. To the contrary, the evidence in this case points to repeated efforts to clarify facts, verify changes made to Magwood's version of events, and get the full picture regarding what happened at Ms. Boney's home with the photos.

First, the appellant told competing versions of events. His incident report supplement clearly states that Ms. Boney "initialed, timed and dated" the line up. (R. 901). It is also asserted as fact in the Complaint in this matter. (R. 22, ¶12). During a meeting to prepare for the criminal trial, Appellant told solicitor Voigt that Boney circled, initialed, timed and dated the photo. (R. 825-828). Upon additional questioning by an investigator for the solicitor's office, Magwood insisted that none of it was his handwriting and the victim (Boney) was wrong. (R. 825-826). Later, during the internal affairs investigation, Appellant gave a written statement that he had only dated the line up, but verbally admitted to Anderson and Antonio that in fact, he, had written the time and date on the photo. (R. 768, line 9-p. 769, line 3).

Second, during interviews with the solicitor in order to prepare for the criminal trial, Boney first told Voigt that she was only shown a single photo. (R. 827-828). She also looked at the photo line-up and advised Voigt that she had never seen it before, and that the initials on the page were not hers. (R. 827-828).

Third, appellant has always insisted that the date and time on the line up, 11/7/07, 10:40am, are correct. However, the date and time that the photo line-up was actually printed by the jail is five hours and five minutes after the handwritten date and time (11/7/07, 3:45pm). (R. 913). The appellant has never been able to explain this discrepancy.

Fourth, for purposes of trying to get a determination about who wrote what on the photo line up, a handwriting analysis was performed. Both Magwood and Boney provided handwriting samples that were analyzed. (R. 914-922; R. 923-929). The outcome of the analysis was that Boney was absolutely excluded as the writer of the date, time or initials. Magwood was determined to have written the date and time, and was considered the likely source of the initials. (R. 903-906).

Fifth, Ms. Boney was intoxicated during at least one interview, and confused and unsure of herself during the others. (R. 805-809). During the interview with the solicitor and his investigator, the most certain Ms. Boney ever was, resulted in her denying ever having seen the line up and stating that the writing on the photo was not hers. (R. 825-828).

Sixth, the investigation that resulted in the appellant's prosecution, was the SLED investigation. The SLED report, which is attached, makes no findings and no determinations of guilt or innocence. (R. 843-846). That determination is left to the prosecuting agency, which in this case, was the South Carolina Attorney General's Office.

Each of the above is evidence that these officers were not on a witch hunt. They were not looking to "pin" something on the appellant, and they did everything possible to gather every fact that might be relevant to the allegations. Nothing that was done in either the SLED or the Sheriff's Office investigation was done with actual fraud, actual malice or intent to harm and therefore, the respondents are entitled to the immunities set forth below.

A. RESPONDENTS ARE ENTITLED TO THE IMMUNITY SET FORTH IN S.C. CODE ANN. § 15-78-60 (25) AS THERE IS NO EVIDENCE OF GROSS NEGLIGENCE.

In order for a South Carolina Tort Claims Act plaintiff to recover, he must show that the governmental entity acted in a grossly negligent manner. S.C. Code Ann. § 15-78-60(25)

states that a governmental entity is not liable for a loss resulting from:

> responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised **in a grossly negligent manner.**

S.C. Code Ann. § 15-78-60(25) (Supp. 1997) (emphasis added).

South Carolina courts have defined gross negligence in a number of ways. "Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) (citing *Clyburn v. Sumter Cnty. Dist. Seventeen*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994); *Richardson v. Hambright*, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988)). Gross negligence is the failure to exercise slight care. *Id.* (citing *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887). Gross negligence is a relative term which means the absence of care that is necessary under the circumstances. *Id.* (citing *Hollins v. Richland Cnty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993)). Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence. *Hamilton v. Charleston Cnty. Sheriff's Dep't*, 399 S.C. 252, 255, 731 S.E.2d 727, 728 (Ct. App. 2012) (quoting *Jackson v. S.C. Dep't of Corr.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990)).

All of the evidence in this matter supports Respondents' position that Ghent, Antonio, and Anderson used at least slight care. The Plaintiff has presented no evidence that Sheriff Cannon had any involvement in the investigation of appellant. The investigations

were undertaken pursuant to each agency's policies and procedures, and there is no evidence that any officer took any actions outside the course and scope of his official duties. As set forth above, Agent Ghent met with witnesses and gathered evidence and compiled it all into a report that was turned over to the prosecutorial agency. The prosecutorial agency made the determination that Appellant would be arrested and charged, not Ghent. Ghent acted properly in performing his investigation, and as set forth above, there is no evidence that he did not use at least slight care in the course of performing the investigation. Therefore, summary judgment should be affirmed.

Antonio and Anderson also used at least slight care in performing the internal affairs investigation for the Sheriff's Office. They also interviewed witnesses and obtained evidence. They additionally had the information provided by Appellant himself during his *Garrity* interviews. As part of their job, they evaluated the evidence that they were able to obtain and made a determination that Appellant had violated several policies and procedures of the Sheriff's Office. At that point, their investigation was turned over to higher authorities within the Sheriff's Office to determine discipline. Antonio and Anderson acted properly in performing their investigation, and as set forth above, there is no evidence that they did not use at least slight care in the course of performing the investigation. Therefore, summary judgment should be affirmed.

B. RESPONDENTS ARE ENTITLED TO DISCRETIONARY IMMUNITY SET FORTH IN S.C. CODE ANN. § 15-78-60(5) AS THERE IS EVIDENCE OF THE WEIGHING OF COMPETING CONSIDERATIONS.

A governmental entity is not liable for a loss resulting from "the exercise of

discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." S.C. Code Ann. § 15-78-60(5).

Agent Ghent was presented with an allegation of wrongdoing by a law enforcement officer and was instructed to investigate it. There is no cookie cutter method for investigating such a serious allegation. The evidence shows that Ghent requested and received information from the solicitor's office and the Sheriff's Office. He also contacted Appellant to give him the opportunity to both speak with Ghent and identify additional witnesses. Ghent then considered the witnesses, weighed the competing considerations of what information they might have, and made the decision to meet with each one. He included all witnesses and evidence in his report. Based on all of this, it is clear that Ghent is entitled to discretionary immunity.

Inspectors like Anderson and Antonio are well trained to use their judgment and discretion to determine which, if any, policy violation was committed. They used their discretion in determining which people to interview and what documents to review. They also evaluated the issue relating to the handwriting on the lineup and made the judgment call to get the handwriting analyzed. All of these decisions required the officers to weigh competing considerations between the information they received from the Appellant and that which they received from other witnesses. Because Appellant's alleged loss resulted from Respondents' exercise of discretion in their investigations, Respondents are immune from suit pursuant to S.C. Code Ann. § 15-78-60(5) and summary judgment should therefore be affirmed.

C. RESPONDENTS ARE ENTITLED TO THE IMMUNITY SET FORTH IN S.C. CODE ANN. § 15-78-60(3) AS THEY ACTED PURSUANT TO A FACIALLY VALID WARRANT.

S.C. Code Ann. § 15-78-60(3) states that there is no liability for a loss resulting from "execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process." Here, after a complete investigation was finished by SLED, the matter was turned over to the Attorney General's office. Then, Associate Chief Magistrate James B. Gosnell signed a warrant for Appellant's arrest. (R. 911-912). Appellant was arrested based on the facially valid warrant. Therefore, there can be no liability for the actions taken to execute the warrant. Appellant asserts that this immunity is eliminated because the Respondents acted with malice, fraud, and intent to harm, but there is no evidence of such. Respondent Ghent performed an investigation. He did not draw any conclusions. He submitted the evidence he gathered to a prosecutorial agency who made the decision to prosecute. Ghent only obtained the arrest warrant at the instruction of the prosecutorial agency. Therefore, there is no malice, fraud, or intent to harm on the part of Ghent or SLED.

There is also no malice, fraud, or intent to harm on the part of Antonio, Anderson or the Sheriff's Office. The investigation they performed was an internal affairs matter performed pursuant to *Garrity*. They did not share any information obtained from Appellant with any prosecutorial agency. Further, they resisted testifying against Appellant in the criminal matter due to the information they obtained pursuant to *Garrity*. Any objections the Appellant had relating to such testimony should have been a matter for motion or appeal in the criminal matter. Any action taken by the Sheriff's Office in response to the Internal

Affairs investigation is not the subject of any claims brought by Appellant. The Sheriff's Office had no involvement in Appellant's arrest or prosecution, and assert that he was arrested based on a facially valid warrant obtained by SLED. Therefore, they are entitled to immunity pursuant to S.C. Code Ann. § 15-78-60(3).

CONCLUSION

For the reasons stated herein, Respondents respectfully request that this court affirm the trial court's grant of summary judgment in favor of all Respondents and dismiss this action.

Respectfully submitted,

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March 25, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis Jr., Circuit Court Judge

Case No.: 2013-CP-10-3669
Appellate Case No.: 2014-001977

Eugene Magwood, ...Appellant

v.

J. Al Cannon, Jr. in his official capacity as
Sheriff of Charleston County, Inspector
Anderson, Inspector Antonio, Charles Ghent,
and South Carolina Law Enforcement Division, ...Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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March 25, 2015
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **RESPONDENTS' FINAL BRIEF** has been served upon all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 25th day of March, 2015, to the following:

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