THE STATE OF SOUTH CAROLINA
In The Court of Appeals



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APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

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Case No. 2012-CP-32-0342

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Kay F. Paschal, ..... Respondent/Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, ..... Appellant/Respondent.

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# REPLY BRIEF OF APPELLANT-RESPONDENT

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**I. The trial court erred in its interpretation and application of Section 22-5-110, which resulted in the denial of directed verdict and JNOV motions and also caused Sheriff Lott to receive an unfair trial.**

The Appellant-Respondent Leon Lott ("Sheriff Lott") contends that Circuit Court Judge William P. Keesley committed reversible error in how he handled the legal issues surrounding Section 22-5-110 that warrants, at a minimum, a new trial absolute. In ruling on post-trial motions, Judge Keesley acknowledged his "angst" with regard to the interpretation and application of Section 22-5-110. (R. 7). Ultimately, he denied post-trial motions on the following basis:

> Viewing the totality of the circumstances, the court finds that sufficient evidence was presented to enable the jury to determine that the conduct of the Defendant in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the procedure provided in S.C. Code Ann. § 22-5-110, that the Defendant was put on notice by the 11th Circuit Solicitor's office of the applicability of that statute, that there was mention to the Richland County Lieutenant about Magistrates having to issue a courtesy summons in some situations, [and] that the Richland County Deputy failed to alert the Magistrate about the information she obtained related to a courtesy summons.

(R. 7). In sum, Judge Keesley concluded that the issues involving the application of Section 22-5-110 were a significant part of Kay Paschal's case and theory of liability.

Not surprisingly, in her response brief, Paschal now attempts to change the theory of her case and distance herself from any reliance on Section 22-5-110. Although conceding that Section 22-5-110 was raised "on multiple occasions" during the trial, she now contends that Lt. Scott's alleged violation of Section 22-5-110 was not the focus of her case and was only one example of the misconduct. Of course, it is well settled that a party "cannot present and try his case on one theory and then change his theory on appeal." *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995). The record clearly reflected – as confirmed by Judge Keesley's order on post-trial motions – that the application of Section 22-5-110 was a key issue in this case.[1]

It is quite telling that Kay Paschal in her brief never engages in any legal analysis to show that Judge Keesley's rulings with respect to Section 22-5-110 were correct. In his opening brief, Sheriff Lott includes a detailed discussion of Section 22-5-110 and demonstrates clearly that the statute had no application to this case. Specifically, a courtesy summons – rather than an arrest warrant – is to be used only where (1) the affiant is not a law enforcement personnel, and (2) where the individual is charged with a misdemeanor offense. Here, the affiant (Lt. Scott) was a law enforcement officer, and both warrants were issued for felonies.

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[1] It is disingenuous for Paschal to now claim that Section 22-5-110 was not a focus of her case. The record reflects that Paschal's counsel, in fact, made the statute itself a trial exhibit. (R. 1012).

If Magistrate Scott Whittle had issued a courtesy summons as the charging document, he would have done so in error. Therefore, Paschal's reliance on Section 22-5-110 to show procedural impropriety on the part of Lt. Scott was entirely in error. Judge Keesley not only erred in failing to correctly interpret Section 22-5-110 and determine that it had no applicability, but he further erred by making the application of Section 22-5-110 a jury question as opposed to what it truly was – a legal issue to be determined by the Court – as Sheriff Lott's counsel requested repeatedly.

Again, in her brief, Kay Paschal does not even attempt to argue that Sheriff Lott's interpretation of Section 22-5-110 is in error. Instead, in a purely conclusory manner, Paschal argues only that the "use of 22-5-110 by the Trial Court was proper and did not constitute an error of law." *See*, Paschal's Respondent's Brief, p. 20. Paschal never explains why.[2] Instead, she only cites to Judge Keesley's post-trial order. But that order *does not even attempt* to give an interpretation of Section 22-5-110. Importantly, Judge Keesley states that there was "sufficient evidence ... to enable the jury to determine that the conduct of the Defendant in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the

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[2] It is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). By analogy, the same consequence should result where a respondent attempts to justify the lower court's ruling by making "a short, conclusory statement without supporting authority."

procedure provided in S.C. Code Ann. § 22-5-110." (R. 7). But Judge Keesley still did not provide an interpretation of Section 22-5-110 or explain how or why Lt. Scott's conduct was in violation of Section 22-5-110.

In fact, as Sheriff Lott pointed out in his opening brief, Judge Keesley never made a legal ruling *even during the trial* about what Section 22-5-110 means or how it should have been applied by Magistrate Whittle (or for that matter by Lt. Scott). He continuously deferred such a ruling, and finally concluded in response to the final directed verdict motion that "they're jury issues." (R. 862, 869). Thereafter, he charged the jury with two subsections of Section 22-5-110, but he gave *absolutely no explanation* of their meaning or application, leaving that to the whim of the jury. (R. 937). That constitutes clear reversible error, and Paschal on appeal has not shown otherwise.

With all due respect, Judge Keesley was correct in feeling "angst" as to how he addressed Section 22-5-110 throughout the trial. Yet, he took no corrective action to ensure a fair trial. That "angst" should have convinced him that the issue was not handled correctly and warranted a new trial. Certainly, there has been no showing – by either Judge Keesley during trial or in his post-trial order nor by Paschal in her brief – that Magistrate Whittle misapplied Section 22-5-110 by issuing two arrest warrants for two felony offenses sworn to by a law enforcement officer. If Magistrate Whittle correctly applied Section 22-5-110, as has been shown, then Lt.

Scott did not commit any wrongdoing associated with Section 22-5-110, including any alleged failure to call Magistrate Whittle's attention to the statute.[3]

The application of Section 22-5-110 was a fundamental legal issue in the case. If there remains any doubt, the Court is urged to review closing arguments by Paschal's counsel. Judge Keesley's handling of that fundamental legal issue – including leaving it to the jury's whim to interpret and apply the statute without assistance – warrants, at a minimum, a new trial absolute.

## II. The trial court erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the malicious prosecution claim where the plaintiff did not show a lack of probable cause for the arrest warrants or the termination of the judicial proceedings in plaintiff's favor.

With respect to the malicious prosecution claim, Sheriff Lott has shown that Kay Paschal failed to present proof of (1) a lack of probable cause, and (2) the termination of the charges in her favor. In her response brief, Paschal does not

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[3] Paschal argued – and Judge Keesley agreed – that Lt. Scott was "put on notice" of Section 22-5-110 by Deputy Solicitor Dayton Riddle and that she thus had a duty to call that statute's attention to Magistrate Whittle, presumably so that he would issue a courtesy summons rather than an arrest warrant. The Court is urged to review the transcript of the Riddle conversation with Lt. Scott, where he stated: "I don't really have any problem with you -- with you being the affiant on it as long as the magistrate doesn't care. There -- you know, they have that statute out there, and I have not looked at that thing in a long time, but it -- they one that says that you have to give a courtesy summons unless there's a police investigation." (R. 1046). That is the extent of the "notice" that Lt. Scott received about Section 22-5-110 from Deputy Solicitor Riddle. That is hardly notice. But at any rate, as Sheriff Lott has shown, Magistrate Whittle was prohibited from issuing a courtesy summons rather than an arrest warrant for the two felony charges. So, in short, Paschal and Judge Keesley are contending that Lt. Scott erred in failing to advise Magistrate Whittle about a statute that does not even apply. There is no logic to that.

refute Sheriff Lott's position that he was entitled to a directed verdict and JNOV on that claim.

### A. Lack of Probable Cause

As for the probable cause issue, Paschal in her response brief addresses generalities only. She fails to specifically address the evidence that was actually known by the arresting officer, namely Lt. Scott. It is well settled that "[p]robable cause is determined as of the time of the arrest, based on facts and circumstances -- objectively measured -- *known to the arresting officer.*" *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 659 (Ct. App. 2005). (Emphasis added). *See also*, *Mack v. Lott*, 415 S.C. 22, 780 S.E.2d 761, 761 (2015) ("the proper standard for determining probable cause is an objective standard; that is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause").

Instead of focusing on what was known to Lt. Scott, which is the operative standard, Paschal focuses on what was known by Steve Baumgardner, a detective with the Lexington County Sheriff's Office who conducted a brief investigation of his own. While Paschal characterizes Detective Baumgardner's investigation as "thorough," that was clearly not the case and contrary to Baumgardner's own

explanation.[4] Baumgardner had the investigation for about three weeks before he closed the file upon taking a personal leave of absence from the Sheriff's Office. Baumgardner testified at the time he closed his brief investigation he had not acquired evidence that in his judgment met the probable cause standard. (R. 398-399). However, he fully conceded that his investigation was brief and that additional information could have been acquired to support probable cause. (R. 398-400).

Importantly, the reliance on Baumgardner's investigation is misplaced. What Baumgardner knew or did not know is not the issue – because quite simply he was not the arresting officer. What is the issue is what information was known to Lt. Scott, who *was* the arresting officer. That information is not addressed by Paschal in her response brief. She makes no mention of the conclusions reached by the two forensic document examiners who examined the two versions of the Power of Attorney. She makes no mention of the information known to Lt. Scott about Kay Paschal's involvement in drafting the Power of Attorney or what Lt.

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[4] Detective Baumgardner testified as follows:

> Q. -- in that little over three-week period, you did not have sufficient time to perform a complete and thorough investigation to your own standards?
>
> A. I did not, sir. I had other cases. And, quite frankly, this was just one of many that I was investigating.

(R. 399).

Scott knew about the transaction where the Power of Attorney was used by Paschal to purchase the Toyota Sienna van which was then titled in both the names of David Wallace and Kay Paschal.

However, as Sheriff Lott has shown, the information known to Lt. Scott demonstrated that Kay Paschal used the forged Power of Attorney to acquire the Toyota Sienna van and to gain an interest in that van. An objectively reasonable law enforcement officer knowing that information would believe that probable cause existed for one or both charged crimes under South Carolina law. Hence, Sheriff Lott was entitled to a directed verdict and JNOV on the probable cause issue.

**B. Favorable Termination of Charges**

An additional element that Kay Paschal has the burden of proving is the termination of the judicial proceedings in plaintiff's favor and, more specifically, that the charges were dismissed for reasons which imply or are consistent with innocence. *See*, *McKenney v. Jack Eckerd Company,* 304 S.C. 21, 402 S.E.2d 887, 888 (1991). In her response brief, Kay Paschal argues that there is "ample evidence" that the charges were dismissed for lack of probable cause. *See*, Paschal's Respondent's Brief, p. 26. The Court is urged to look at Paschal's citations very closely. None of those citations to the record support the conclusion that Magistrate Gary Morgan dismissed the charges *for lack of probable cause.*

Those citations do confirm that the charges were dismissed, but there is no evidence that the charges were dismissed for lack of probable cause. In fact, as discussed by Sheriff Lott in his opening brief, Judge Keesley acknowledged that, given the record at the close of all evidence, he did not know on what basis the magistrate dismissed the charges. (R. 856-857). Quite pointedly, Judge Keesley stated: "There is no clear indication to me as to what ground the judge dismissed it on." (R. 856). Thus, if Judge Keesley did not have knowledge of the magistrate's ruling, neither did the jury. Sheriff Lott submits – and Paschal does not refute – that the record contains no evidence of the magistrate's basis for the dismissal of the charges. That burden of proof fell on Paschal. Her failure to meet that burden requires a directed verdict and JNOV in Sheriff Lott's favor on the malicious prosecution claim.

## III. The trial court erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the abuse of process claim where the evidence does not support either element of that tort.

It is well settled that a plaintiff alleging abuse of process must prove two essential elements: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. American Medical International, Inc.*, 328 S.C. 128, 492 S.E.2d 103, 107 (1997). Sheriff Lott argued in his opening brief that there is no evidence in the record that would support a

finding that Sheriff Lott or his deputies had an ulterior purpose by seeking the issuance of the two arrest warrants. In her response brief, Paschal counters by arguing that Lt. Scott sought the arrest warrants "to assist the Wallace children in pursuing a vendetta (both in and out of Probate Court)." *See*, Paschal's Respondent's Brief, p. 27. Paschal, however, cannot rely on such a claim of an ulterior purpose. Judge Keesley has already rejected that claim. In his post-trial order, Judge Keesley writes as follows:

> The court does have serious concerns with the repeated focus by the Plaintiff on aspects that dealt with missing Probate Court hearings and her loss of a claim related to the estate. In the court's view, these claims were largely unproven to the extent that there was not sufficient competent evidence on that subject for the jury to consider them as being proximately caused by any wrongdoing on the part of the Defendant.

(R. 5). That ruling was unappealed by Paschal, and thus constitutes the law of the case. *See*, *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997) (a lower court's unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct). Paschal has presented no alternative theory of an ulterior purpose. Thus, given the absence of an ulterior purpose, Sheriff Lott was entitled to a directed verdict and JNOV on the abuse of process claim.

In addition, in her brief, Paschal points to no evidence that Sheriff Lott or his deputies committed a willful act in the use of the process not proper in the conduct of the proceeding. Paschal offers absolutely no explanation of this element of the cause of action. In Sheriff Lott's opening brief, it was presumed that Paschal was relying on Section 22-5-110 for proof of this element, but for reasons discussed above, Paschal has distanced herself from any theory relying on Section 22-5-110. Yet, she has offered no "new" theory to allow for the verdict on the abuse of process claim to be upheld.

In sum, Sheriff Lott submits that Judge Keesley erred in denying his directed verdict and JNOV motions. The abuse of process claim should have been dismissed for lack of proof.

## CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Leon Lott respectfully requests that this Court reverse the jury's verdict and the order of Judge William P. Keesley filed December 11, 2014, and remand for entry of judgment in Sheriff Lott's favor. In the alternative, Sheriff Lott requests that the Court remand for a new trial absolute. However, should the Court reach the cross-claim brought by the Respondent-Appellant, the Court is asked to affirm the reduction of the verdict to $300,000.

Respectfully submitted,

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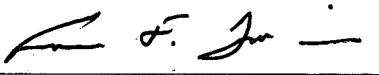
BY: 

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## CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Leon Lott certifies that the Final Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Leon Lott certifies that the Reply Brief of Appellant-Respondent complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

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