

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

APPEAL FROM LAURENS COUNTY
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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SC Court of Appeals

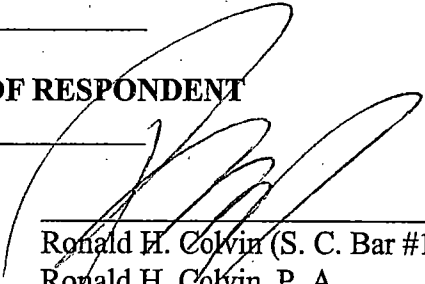
Case No. 2016-001618

Rodrick Tucker and Shakeyra Gilbert.....Appellants,

v.

South Carolina Department of Social Services.....Respondent.

INITIAL BRIEF OF RESPONDENT



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STATEMENT OF ISSUES

1. CAN PLAINTIFFS PROVE THE ELEMENTS FOR MALICIOUS PROSECUTION?
2. CAN PLAINTIFFS PROVE THE ELEMENTS FOR ABUSE OF PROCESS?
3. CAN PLAINTIFFS PROVE THE ELEMENTS FOR DEFAMATION?
4. CAN PLAINTIFFS PROVE THE ELEMENTS FOR (GROSS) NEGLIGENCE?

STATEMENT OF THE CASE

Even in the light most favorable to the Plaintiffs, summary judgment was proper in this matter and should be affirmed. As set forth in the Statement of Facts, Plaintiffs sued the South Carolina Department of Social Services (DSS) in a collateral attack on not one, but two, Family Court Orders finding probable cause to remove Plaintiffs' four (4) week old minor child from their custody and place the child in emergency protective custody. Neither order was appealed. Rather, Plaintiffs filed the instant suit in the Laurens County Court of Common Pleas alleging, through their original Complaint and then an Amended Complaint, claims of malicious prosecution, abuse of process, defamation of character – slander, and gross negligence against DSS and two of its employees. The DSS employees were dismissed when the Circuit Court granted the DSS employees' Motion to Dismiss. Plaintiffs did not appeal that ruling. DSS then filed a Motion for Summary Judgment on the grounds that the Plaintiffs could not meet the burden of proof required by the causes of action they alleged. DSS's motion was granted and Plaintiffs filed the current appeal. The Circuit Court's ruling is sound and this Court should affirm the Order.

STATEMENT OF THE FACTS

Based on its investigation into the living conditions surrounding minor Kyndal Gilbert (KAG), DSS filed an action against Shakeyra Gilbert and Rodrick Tucker in the Laurens County

Family Court seeking an Ex Parte Order for emergency protective custody of the minor. The Ex Parte Order was granted on August 18, 2015. See Ex Parte Order (J. Smithdeal; filed August 19, 2015.) A probable cause hearing was conducted the next day on this matter before The Honorable Joseph C. Smithdeal who found DSS presented probable cause for DSS to place the minor child in its physical and legal custody. See Order of the Court (J. Smithdeal; filed December 15, 2015). Prior to the final hearing in DSS v. Gilbert & Tucker, Ms. Gilbert alleviated DSS's concern that the child was in imminent and substantial danger and, as such, DSS dismissed the case. See Second Affidavit of Mindy Miyares, (filed April 26, 2016). Nevertheless, Plaintiffs requested a reconsideration by Judge Smithdeal of his ruling which was denied by his Order dated April 2, 2016. See Order Denying Reconsideration (J. Smithdeal; filed April 12, 2016.)

Tucker and Gilbert, Defendants in the prior Family Court matter, filed suit against DSS and former individual Defendants, DSS employees Mindy Miyares and Deniece Shelman. Defendants Miyares and Shelman were dismissed by Order of the Court on February 19, 2016. See Order Granting Motion to Dismiss (J. Addy, Jr.; filed February 24, 2016.) DSS filed its Motion for Summary Judgment on March 7, 2016 and filed memoranda supporting its position. See Defendant's Memorandum in Support of Motion for Summary Judgment. Plaintiffs Tucker and Gilbert provided their Memorandum in Opposition at the hearing, as well as the Affidavits of Rodrick Tucker and Linder Dandy. Defendant's Motion for Summary Judgment was granted on June 24, 2016, wherein the trial court ruled that the Plaintiffs failed to meet their burden of proof establishing any evidence to support their claim, and that it did not have jurisdiction to rule on the issues presented by the Plaintiffs. See Order Granting Summary Judgment (J. Griffith; filed July 1, 2016). This appeal followed.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Carter v. Standard Fire Ins. Co., 406 S.C. 609, 753 S.E.2d 515 (2014). In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. “[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). One may not, however, avoid summary judgment *by asserting that a jury may disbelieve uncontradicted evidence*. This argument, if accepted, would render summary judgment obsolete, and it is in any event at odds with Rule 56, SCRCp, and our summary judgment jurisprudence:

[R]ule 56(e), SCRCp, requires that when a motion for summary judgment is made and supported as provided by the rule, *an adverse party may not rest upon the mere allegations or denials of his pleadings. The adverse party's response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial.*

Hoard v. Roper Hosp. Inc., 387 S.C. 539, 694 S.E.2d 1 (2010) (emphasis added).

ARGUMENT

The prior rulings and orders of the Family Court clearly state DSS made its “prima facia showing as required by S.C. Code § 63-7-710 that probable cause did exist for the Court to take the minor child into emergency protective custody” and place the child with DSS. DSS was bound by

these rulings until or unless they were modified by a subsequent written order.¹ Plaintiffs'/former Defendants' requested a reconsideration by Judge Smithdeal, which was denied, but did not pursue an appeal of his ruling. Judge Smithdeal's Order contains the law of the case applicable both in the Family Court proceeding and in the instant case.² When the law of the case in this matter is viewed through the lens of the allegations pled in Plaintiffs Amended Complaint, it is clear that, even in the light most favorable to the Plaintiffs, there is no genuine issue of material fact and Judge Griffith's Order granting summary judgment should be affirmed.

I: PLAINTIFFS CANNOT PROVE THEIR CAUSES OF ACTION

A: MALICIOUS PROSECUTION

Probable cause to act in the underlying action is a defense to a subsequent malicious prosecution action. This element of the cause of action does not hinge on Plaintiffs' actual guilt or innocence. Deaton v. Leath, 279 S.C. 82, 302 S.E.2d 335 (1983). Rather, when reviewing the issue of probable cause, the Court must review the facts of the underlying action from the point of view of the prosecuting party, here DSS. The question is not what the actual facts were, but what the prosecuting party honestly believed them to be. Deaton v. Leath, 279 S.C. 82, 302 S.E.2d 335 (1983), see also Lynch v. Toys "R" Us-Delaware, Inc., 375 S.C. 604, 654 S.E.2d 541, (Ct. App., 2007) (vacated on other grounds). Further, malice is defined as "the deliberate intentional doing of

¹ "A trial court has the discretion to change its mind and amend its oral ruling. Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. The written order is the trial judge's final order and as such constitutes the final judgment of the court." Ford v. State Ethics Com'n, 344 S.C. 642, 545 S.E.2d 821 (S.C., 2001) (citing First Union Nat. Bank v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct.App.1991), *aff'd*, 308 S.C. 421, 418 S.E.2d 545 (1992)).

² "An unappealed ruling is the law of the case and requires affirmance." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013). "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015) (citing United States v. U.S. Smelting Ref. & Mining Co., 339 U.S. 186, 70 S.Ct. 537, 94 L.Ed. 750 (1950)).

an act without just cause or excuse." In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006).

Although the question of whether probable cause exists is ordinarily a jury question, in an action for malicious prosecution, it may be decided as a matter of law when the evidence yields but one conclusion. Deaton v. Leath, 279 S.C. 82, 302 S.E.2d 335 (1983). In the instant matter, there is but one conclusion – that DSS had the probable cause to remove baby KAG from Plaintiffs' residence. This is borne out not only by the *Ex Parte* Order signed on August 18, 2015 (filed August 19, 2015) but also in the Order Finding Probable Cause and the Order Denying Reconsideration. Further, Plaintiffs cannot prove DSS acted with malice as shown below. Accordingly, DSS' actions were done under color of law, judicial directive, and, particularly relevant to this case, based on probable cause without malice. While Plaintiffs presented affidavits to the Court in opposition to DSS's Motion for Summary Judgment, those affidavits neither change the law of the case in this matter nor create a genuine issue of material fact.^[1] Plaintiffs cannot prove the essential elements of their malicious prosecution cause of action and summary judgment should be affirmed.

B: ABUSE OF PROCESS

Abuse of process is designed to provide a remedy to someone damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. Its essential elements are 1.) an ulterior purpose and 2.) a willful act in the use of the process not proper in the conduct of the proceeding. The improper purpose usually takes the form of coercion to obtain a collateral

^[1] DSS notes that only the affidavits of Plaintiff Tucker and Linder Dandy are included as part of the Record on Appeal.

advantage, not properly involved in the proceeding itself. Regardless, "there is no liability when the process has been carried to its authorized conclusion, *even though with bad intentions*." Guider v. Churpeyes, Inc., 370 S.C. 424, 635 S.E.2d 562 (Ct. App., 2006) (emphasis added).

In Guider, a former employee wrongfully withheld funds from her former employer for a period of eight (8) days but then returned them via depositing them in her former employer's bank account. The employer obtained a warrant for Guider's arrest but the charge was dismissed when the employer failed to show up for Guider's hearing after her arrest. She then filed suit against her former employer for malicious prosecution and abuse of process. While the trial court denied the former employer's motions for directed verdict as to malicious prosecution and abuse of process, the Court of Appeals reversed. Specifically related to Guider's claim for abuse of process, the Court held

"[v]iewing the facts in the light most favorable to Guider, we find the record devoid of evidence that [former employer] misused the legal process or operated with an illegitimate purpose. Instead, the evidence shows [former employer] used the legal process with the objective of seeking redress against a former employee who admittedly took and retained company funds. Moreover, when Guider returned the funds, [former employer] stopped pursuing the criminal charges against her. This is clearly a legitimate use, not a perversion, of the legal process." Id.

Assuming for arguments sake the Tucker and Dandy affidavit show a bad intention, that does not create a genuine issue of material fact when this Court is faced with not one, but two, Family Court Orders finding DSS had probable cause to remove minor KAG from Plaintiffs' residence and custody. The law of the case shows DSS's actions were a proper use of the legal process to ensure

the safety of the minor child until certain situations were remedied. Those actions were not only justified in the eyes of the Family Court but *specifically required by it* by its two separate Orders compelling DSS to act as it did. The Family Court process was carried to its authorized conclusion and there is no genuine issue of material fact in that regard. Summary Judgment should be affirmed.

C: DEFAMATION OF CHARACTER – SLANDER

Truth is an absolute defense to defamation and, as shown above, there are two Family Court Orders finding in favor of DSS' presentation of evidence in the underlying Family Court matters. Under the South Carolina Tort Claims Act ("SCTCA"), a governmental entity is not liable for a loss that results from "employee conduct . . . which constitutes actual fraud, *actual malice*, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. §15-78-60 (17) (2015) (emphasis added). The only Defendant in this case is DSS, a state agency. Plaintiffs assert they "must prove the defendant acted with actual malice." See Plaintiffs' Amended Complaint, ¶ 71. The SCTCA clearly excludes a governmental entity's liability for an individual's loss stemming from a state employee's conduct that constitutes actual malice. See Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App., 1994) (slander claim against Myrtle Beach Police Department dismissed by Court because Plaintiff would have to prove actual malice to support claim and SCTCA excludes governmental liability for actual malice). The Tucker and Dandy affidavits do not create an issue of fact as to this cause of action and summary judgment should be affirmed.

D: GROSS NEGLIGENCE

In order to establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the

plaintiff's injury; and (4) plaintiff suffered an injury or damages. First, the court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, the defendant is entitled to a judgment as a matter of law.

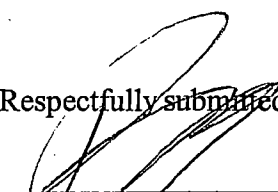
Doe v. Wal-Mart Stores Inc., 393 S.C. 240, 711 S.E.2d 908 (2011).

Plaintiffs have not even alleged a duty owed by DSS to them, much less a breach of that duty, proximate causation, or damages. The Tucker and Dandy affidavits similarly do not provide evidence of the elements of negligence. Plaintiffs' claim for negligence must fail. Assuming that Plaintiffs' Amended Complaint or the Tucker and Dandy affidavits did allege such things, Plaintiffs cannot *prove* such a duty or any breach. DSS' actions were reviewed by the Family Court on two separate occasions, and were justified by it in both of its Orders finding probable cause for DSS to remove minor KAG from Plaintiffs' custody and residence. The duty of care of DSS was to the minor child, and it fulfilled its duty as made abundantly clear in the underlying Family Court proceedings. Plaintiffs' alleged cause of action for gross negligence cannot stand and summary judgment should be affirmed.

CONCLUSION

Plaintiffs are bound by their allegations, their affidavits, and the Orders of the Family Court, which they did not appeal. When all of these are viewed together, even in the light most favorable to Plaintiffs, there is no genuine issue of material fact that a Court or jury needs to consider. Judicial economy and the very jurisprudence of our court system show that summary judgment was appropriate and must be affirmed in this matter.

Respectfully submitted,



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August 29, 2016

Spartanburg, South Carolina

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AFFIDAVIT OF SERVICE

I, Belinda H. Byers, an employee of Ronald H. Colvin, P. A., attorney for the Respondent, do hereby certify that I have on this date served via U.S. Mail a true and correct copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal upon the following:

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August 29th, 2016

Spartanburg, SC

SWORN TO BEFORE ME THIS 29th DAY
OF August, 2016

Denise (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 02/23/21

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August 29, 2016

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SC Court of Appeals

Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
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Re: Rodrick Tucker and Shakeyra Gilbert vs. South Carolina Department of Social
Services
Appellate Case No.: 2016-001618

Dear Ms. Kitchings:

I am hereby enclosing the original and one copy of the Initial Brief of Respondent in the matter referenced above, along with our Affidavit of Service.

I would appreciate you filing the original, clocking the copy and returning the copy to me in the envelope provided. I appreciate your assistance in this matter.

Very truly yours,

Ronald H. Colvin

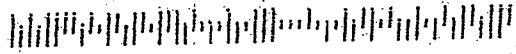
RHC/bb

Enclosures

cc: Roderick Tucker
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