THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-000973

Dr. Gregg Battersby, Appellant,

v.

Sheriff John Skipper, in his official capacity, Respondent.

INITIAL BRIEF OF APPELLANT

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Pro se, Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes

STATEMENT OF ISSUES ON APPEAL

1) DID THE TRIAL COURT ERR IN OPINING THAT APPELLANT WAS ARRESTED WITH PROBABLE CAUSE?
2) DID THE TRIAL COURT ERR IN OPINING THAT RESPONDENT'S ACTS DID NOT CONSTITUTE AN ABUSE OF PROCESS?
3) DID THE TRIAL COURT ERR IN OPINING THAT THE RESPONDENT HAS IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT?

STATEMENT OF THE CASE

Appellant filed this Complaint against Respondent under the South Carolina Tort Claims Act on May 1, 2015. The causes of action are malicious prosecution, false arrest/imprisonment, and abuse of process. Respondent arrested Appellant without probable cause, withheld exculpatory evidence, and tampered with official documents. Respondent filed a Motion for Summary Judgment. On January 25, 2016, a hearing was held on the motion. The judge stated that he hadn't read Appellant's 28 page brief in opposition to the summary judgment. (Transcript p. 20, ll. 16-18). The hearing roster showed the judge having hearings the remainder of the day and until 11:00 A.M. the following day. On January 26, 2016, the judge granted Respondent's motion. Appellant feels his position was not given any consideration by the judge. A formal Order Granting Defendant's Motion For Summary Judgment was filed on April 8, 2016. Appellant had to go to the clerk of court and obtain a copy of the formal order on April 19, 2016. Appellant served this appeal on Respondent on May 5, 2016.

FACTS

On or about August 2, 2013, Respondent arrested Appellant without probable cause and spent 12 hours in jail. The unlawful arrest was based on uncorroborated allegations by two patients, Jan Morton and Carrie Neal. Appellant is a chiropractor operating out of part of his private residence. The case numbers associated with this arrest are *2013A0410900191* and *2013A0410100898.* Respondent alleged that the Appellant had exposed himself to the patients at his place of business. Morton filed an incident report on July 8, 2013. This was five weeks after the alleged incident occurring on June 2, 2013. In the supplemental to the incident report, Morton alleged the Appellant answered the door wearing only a "men's robe" and during her treatment, he "dropped his robe to the floor" and was completely nude with a "fully erect penis." Morton claimed that the Appellant did not, "attempt any sexual contact." Ten days later, on July 18, 2013, Detectives Stan Ashley and Michelle Hendrix obtained a recorded statement from Morton. The audio statement of Morton alleged Appellant "came to the door. He had a towel on." Detective Ashley responded "He had a towel on?"

> Page 57:
>
> 18 didn't come to the door. He came to the door.
> 19 He had a towel on.
> 20 MR. ASHLEY: He had a towel on?

This showed Ashley was questioning the difference with the incident report. Morton went on to say "I'm thinking this man's rubbing his stuff on me." Morton even changed the number of treatment tables she was on during the visit. She stated in her incident report that she was on 2 treatment tables and in the audio statement she was on 3 treatment tables. Morton's two stories

read like two separate events. Detective Hendrix told Morton to get another patient to file an incident report, "Encourage her that the two (2) together would be strong." Detective Ashley also encouraged Morton to get another patient to file by saying, "stronger than just one." Detective Ashley told Morton, "we'll see about going after his license".

Page 66:

22 MS. HENDRICKS: Encourage her that the two together
23 would be strong.
24 MR. ASHLEY: Stronger than just one. Because without
25 I might could something with this, and we'll
1 see about going after his license.

Detectives Ashley and Hendrix never contacted Appellant to get his statement even though they indicated in the audio statement that they were going to do it. On July 29, 2013, Respondent sought an arrest warrant against Appellant.

On the insistence of Detectives, Ashley and Hendrix, Morton got her good friend Carrie Neal to file a criminal complaint against Appellant. She made similar assertions as Morton. Neal had motive in making the false allegations because Appellant treated her for an automobile accident and owed Appellant $12,100.00 for her care. She spoke to her lawyer, Atty. Tom Dunaway, who was handling her personal injury claim and told him her concocted story. He told her that Appellant's outstanding bill would not be paid. As a result, she would be able to keep that money. On July 25, 2013, Neal went to Detectives, Ashley and Hendrix, and filed the criminal complaint, 8 weeks after the alleged incident. An audio statement was taken at that time. In the statement, Neal claimed that on May, 23, 2013 Appellant indecently exposed himself to her. This was weeks after Appellant had discharged her from his care on May 8, 2013. She claimed that the incident occurred in the laundry room of Appellant's residence. Neal also

made no mention of seeing Appellant's genitalia. In later testimony, ***Neal specifically denied seeing Appellant's genitalia***.

> Page 63:
>
> 11 Q. Could you tell -- forgive me for asking
> 12 the question, but could you see his penis at any
> 13 point?
> 14 A. No. No.

Detective Ashley wrote in his incident report that the incident occurred in Appellant's "office/therapy area" and that Appellant exposed his genitalia to her. This was done in order to meet the elements of the charge of indecent exposure.

> SC Code Ann. § 16-15-130 (A)(1), (2013): It is unlawful for a person to willfully, maliciously, and ***indecently expose his person in a public place***, on property of others, or to the view of any person on a street or highway.

Detectives could not meet the elements of the crime if they used the story relayed by Neal so they changed her story to fit the elements. Detectives needed Neal to file charges in order to arrest Appellant so they falsified her incident report. Detective Ashley filed no supplemental report or made any reference to the existence of Neal's audio statement in the incident report effectively hiding its existence from everyone until March 26, 2014. Ashley filed the supplemental report after he left the sheriff's office on March 6, 2014 for employment at the Anderson County Fire Department. Ashley was no longer employed by the sheriff's office yet he somehow gained access to the records room. Ashley wanted to cover-up his withholding the audio tapes from the solicitor. Detective Ashley was so sloppy in creating Neal's supplemental report that he mixed in the facts that Morton had alleged. When Neal told Detective Ashley that her lawyer was not going to pay Appellant's outstanding bill, he responded, "good, hurt him".

Detective Ashley's judgment was clouded for some unknown reason.

In the federal court case filed against Detective Ashley and Hendrix, those defendants admitted that the alleged incidents occurred in Appellant's home. Respondent also admitted that the alleged incidents happened in Appellant's home in their Memorandum in Support of Motion for Summary Judgment. Appellant's home is not a public place under South Carolina law.

On August 22, 2013, Appellant's counsel received copies of the incident reports and supplemental reports from the Anderson County Sheriff's Office (ACSO). The last entry on the supplemental report for Morton was July 9, 2013. No reference was made of the audio statement being taken from Morton on July 18, 2013. This information would have been denied to the magistrate in obtaining the arrest warrant. In January of 2014, Appellant received discovery from the Solicitor's Office. Morton's supplemental report contained the missing entries after the July 9, 2013 entry that weren't posted on the supplemental report received on August 22, 2013. Detectives created an entirely new supplemental report. This was evidenced by spelling errors in the July 9, 2013 entry that weren't there in the January document. At some point in time, Detectives created an entirely new supplemental report with the missing information so as to make it not look suspicious. Detectives were tampering with official documents. This information was also withheld from the magistrate at the preliminary hearing.

On August 30, 2013, the preliminary hearing was held. Detective Ashley testified. He did not produce the audio statements for the magistrate to hear the conflicting stories. After the hearing, Sarah Drawdy, Appellant's criminal attorney, asked Detective Ashley if there were any audio statements. He told her there were no audio statements from Neal and Morton. This was an intentional act to deny Appellant the ability to defend himself against the false allegations.

Appellant made multiple requests for the Sheriff's Office and the Solicitor's Office to produce the audio recording. The Solicitor's Office sent Detective Ashley emails on August 16, 2013, September 10, 2013, January 3, 2014, and February 27, 2014 requesting a copy of the case files. Detective Ashley refused to provide the requested case files. When the detectives eventually gave the case file of Morton to the Solicitor's Office it didn't contain the audio statement. On February 10, 2014, Appellant was told by the Solicitor's Office that there was no audio statement in the case file provided by the detectives. Appellant's counsel filed a Motion to Compel the production of the audio statements on February 28, 2014. It wasn't until March 21, 2014 that the Solicitor's Office received the audio statement of Morton. The Sheriff's Office still hadn't given the case file with audio statement for Neal to the Solicitor's Office. The only reason the detectives turned over the audio statements was that the criminal charges would be dismissed if they weren't provided. Appellant was provided a copy of the audio statements. Upon listening to the audio statements, it was obvious there were glaring discrepancies with the incident reports. Appellant contacted Assistant Solicitor Reeves to have her listen to the audio statements. Shortly thereafter, the Solicitor's Office dismissed the criminal charges against the Appellant. The dismissal was on April 24, 2014. Solicitor Chrissy Adams indicated that the reason the charges were dismissed was that there were "substantial issues with the facts" as relayed by Neal and Morton. The only facts in the possession of the detectives and the solicitor were the incident reports and the audio statements. Those "substantial issues" were only discovered when the detectives turned over the audio statements to the Solicitor's Office. No evidence was ever obtained by the detectives to corroborate Morton and Neal's stories. Solicitor Adam's never would have gone to the Grand Jury if she had the exculpatory audio statements.

On August 1, 2014, Deputy Marter gave a deposition. Appellant showed Deputy Marter the transcript of Morton's audio statement. Appellant showed Deputy Marter that Morton had originally claimed the Appellant had been wearing a "men's robe" and the transcript said he had been wearing a towel.

Marter testimony Page 12:

1 A If this was a deposition that she gave,
2 and this is my report that she gave at the time,
3 that's definitely a contradiction because she told
4 me that he had a robe on when he come to the door.
5 And that states that he had a towel on,
6 so that is different.

Marter testimony Page 10:

5 Q So based on your responsibilities as a
6 deputy, this page 3 is what she told you.
7 A Yes, yes. This is, for the most part,
8 exactly what she told me went on.

Deputy Marter wrote in the incident report what Morton told him. She told him that Appellant was wearing a men's robe and denied any sexual contact.

Deputy Marter went on to testify on Page 14 that citing the contradictory statements by Morton there was no probable cause.

2 Q If the only evidence -- if that's the
3 word you used -- is the statement of the victim, if
4 a victim has two contradictory statements, do you
5 have probable cause?
6 MR. MATTHEWS: Object to the form.
7 THE WITNESS: Not in my opinion, no. You
8 don't because you need -- you're going to have
9 to have a little more than just a belief
10 that's going on.
11 You have to have some substantial proof
12 that you believe that person committed the

13 crime.

Deputy Marter testified that the only evidence in the case file against Appellant was the incident report and the follow-up investigation showing Detectives, Ashley and Hendrix, took an audio statement from Morton. Ashley testified that the only evidence against Appellant were Morton's audio statements.

Ashley testimony Page 46:

8 Q So other than what they told you, do you
9 have anything else?
10 A Uh-uh.
11 Q That would be no?
12 A No. Excuse me.

No other corroborating evidence was in Morton's case file. Detectives ignored discrepancies in the alleged victim's statements used in obtaining the arrest warrants. Detective Ashley went to the magistrates with just the incident report and supplemental report minus any reference to the audio statements being taken. Detective Ashley withheld the audio statement from the magistrate. Detective Ashley did this knowing he couldn't get arrest warrants with the contradictory statements. The solicitor made multiple requests for the entire case file in the months after Appellant's arrest. Detectives ignored the requests. Detectives withheld the exculpatory audio statement from the magistrate, solicitor and Appellant. Detectives lacked probable cause to obtain the arrest warrant. Detectives acted with malice.

At the hearing before the South Carolina Board of Chiropractic Examiners (Board) on October 30, 2013, Appellant's counsel stated that there was probable cause to arrest Appellant on the incident report of each woman. Appellant had not received the conflicting audio tapes until March of 2014. Appellant had no idea that there were conflicting statements made by Morton

and Neal, in addition to the fabrication of Neal's incident report. If the audio tapes had been timely turned over to Appellant in his initial discovery request in August of 2013, Appellant's counsel never would have made such a statement. This statement was made without the full knowledge of the facts that were in the possession of Respondent before the arrest warrants were sought. This is the same reason the solicitor sought indictments and the magistrate signed the arrest warrants. Deputy Marter, intake officer for Morton's incident report, found that there was no probable cause with Morton's conflicting statements. Everyone lacked all the evidence in the possession of the Respondent. Detective Ashley admitted in testimony that there was no evidence to corroborate the allegations of Neal and Morton.

The Board held an evidentiary hearing on July 28, 2015. After hearing the evidence they dismissed Neal and Morton's allegations ***with prejudice***. The Board uses a preponderance of evidence standard in making its decision. This means that the Board felt that the allegations did not prove to be at least 51% believable. This is not much higher than the probable cause bar.

In Appellant's suit against Allstate and Attorney Kirk Moorhead, Appellant was establishing a cause of action for the conspiracy to commit fraud by Attorney Moorhead and Morton by filing the incident report on July 8, 2013. It had nothing to do with Respondent's involvement with Neal. Even if this Court finds judicial estoppel, it only pertains to the causes of action involving Morton. The causes of action involving Neal are not affected. The entire case cannot be dismissed on these grounds. Appellant was showing the intent by those defendants to deceive the ACSO into arresting Appellant by filing the incident report on July 8, 2013. Respondent took Appellant's pleading out of context. Morton and Moorhead intended the allegations to be believed by the ACSO thus establishing an element of the cause of action.

Appellant's pleading was in regards to the filing of the initial incident report and not the subsequent audio statement given by Morton. Respondent had every right to believe Morton's first statement. Respondent, however, should not have believed her after her second statement. Appellant has withdrawn that pleading. It was up to the detectives to use their professional abilities to recognize Moorhead and Morton's deception when Morton made the conflicting statement on July 18, 2013. Respondent failed to do so and went even further by withholding evidence and falsifying official documents. The motivation was to take down a doctor. Equal consideration must be given to the testimony of Deputy Marter, intake officer for Morton's incident report, who found that there was no probable cause with Morton's conflicting statements. No other evidence was ever discovered to prove Morton's allegations. This supports Appellant's claim that there are genuine issues of material fact remaining.

THE TRIAL COURT ERRED IN OPINING THAT PROBABLE CAUSE EXISTED TO ARREST APPELLANT ON THE ALLEGATIONS OF NEAL AND MORTON.

The circuit court should have left the determination of whether probable cause existed up to the jury. "In South Carolina, the issue of probable cause is a question of fact and ordinarily one for the jury. Jones, 301 S.C. at 65, 389 S.E.2d at 663. Accordingly, because the existence or non-existence of probable cause is a question of fact material to the lawfulness of Wortman's arrest, we hold that it was improper for the trial judge to grant summary judgment." See Wortman v. Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (S.C., 1992).

Probable cause rests on whether the law enforcement officer had reason to believe that a suspect committed a crime. It does not rest on what Appellant may have said or whether the solicitor sought an indictment or a magistrate signed an arrest warrant. "In assessing the

existence of probable cause, courts examine the totality of the circumstances known to the officer at the time of the arrest. United States v. Al-Talib, 55 F.3d 923, 931 (4th Cir.1995). Probable cause exists when the facts and circumstances known to the officer "would warrant the belief of a prudent person that the arrestee had committed or was committing an offense." United States v. Garcia, 848 F.2d 58, 59-60 (4th Cir.), cert. denied, 488 U.S. 957, 109 S.Ct. 395, 102 L.Ed.2d 384 (1988)". See Taylor v. Waters, 81 F.3d 429 (4th Cir. 1996). The only evidence that Appellant committed a crime was two contradictory statements by Morton and a statement by Neal that did not satisfy the elements of indecent exposure, nothing else. Respondent has presented no one but Detective Ashley that felt that probable cause existed when all the evidence was produced. Appellant, however, presented statements from Deputy Marter, intake officer for Morton's incident report, and Solicitor Adams that said "there were substantial issues with the facts" relayed by Neal and Morton. These two people were involved in the cases.

In order for an arrest to be lawful there must be probable cause. The arresting officer must have more than a mere suspicion that a person committed a crime. Some evidence must support the officer's belief. It is obvious that the Detectives knew they did not have evidence that would support probable cause so they manufactured and withheld evidence. "Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983). "`Probable cause' is defined as a good faith belief that a person is guilty of a crime when this belief

rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990)." See Jackson v. City of Abbeville, 623 S.E.2d 656 (SC, 2005). "The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Wortman v. City of Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (1992). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." Id. at 4, 425 S.E.2d at 20. Probable cause may be found somewhere between suspicion and sufficient evidence to convict. Thompson v. Smith, 289 S.C. 334, 336-37, 345 S.E.2d 500, 502 (Ct.App.1986), overruled in part on other grounds by Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990). In determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable, prudent and cautious men, not legal technicians, act. Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 521 S.E.2d 163 (Ct. App.1999)." See State v. Brannon, 666 S.E.2d 272, 379 S.C. 487 (S.C. App., 2008). When looking at the evidence known to the detectives in Morton you find two contradictory statements and nothing else. When looking at the evidence known to the detectives in Neal you find her statement not satisfying the elements of the indecent exposure charge.

In Neal, Respondent made false statements in the arrest warrant affidavit that mislead the

magistrate into signing the warrant. (Respondent's Memo in Support of Summary Judgment Exhibit F). Respondent stated that Appellant maliciously exposed his private parts to Neal. Neal never made any such allegation. In fact, Neal testified that she never saw Appellant's penis. (Appellant's Memo in Opposition Exhibit 3, p. 63).

Page 63:

11 Q. Could you tell -- forgive me for asking
12 the question, but could you see his penis at any
13 point?
14 A. No. No.

Respondent further stated that the alleged incident occurred at Appellant's "residence and a chiropractic business open to the public". Neal specifically stated that the alleged incident occurred in Appellant's laundry room, a part of Appellant's private residence. Neal stated this in the audio statement obtained by Respondent on July 25, 2013. A private residence is not a public place. Respondent failed to satisfy two elements of indecent exposure, a public place and exposing his person. "S.C. Code Ann. § 16-15-130(A) (2003 & Supp. 2009) ("It is unlawful for a person to willfully, maliciously, and indecently expose his person in a public place, on public property, or to the view of any person on a street or highway.") (emphasis added); *** State v. Williams, 280 S.C. 305, 306-07, 312 S.E.2d 555, 556 (1984) (citing with favor the ***definition of "public place" appearing in the fourth edition of Black's Law Dictionary and noting that it was "common knowledge" that the particular locations at issue were not private residences***)." See State v. Nations, Opinion No. 2010-UP-071 (S.C. App. 2/1/2010) (S.C. App., 2010). Respondent admitted in their Memorandum in Support for Motion for Summary Judgment that the alleged incident occurred in Appellant's home. The detectives in the federal case against

them also admitted the alleged incidents occurred in Appellant's home. (Appellant's Memo in Opposition Exhibit 15, p. 2). Respondent withheld this audio statement from the magistrate, Grand Jury, solicitor, and Appellant for nine months.

Detective Ashley wrote in Neal's incident report that the alleged incident occurred in Appellant's office/therapy area and that he exposed his genitalia to her. (Appellant's Memo in Opposition Exhibit 4). Neal stated the alleged incident occurred in Appellant's laundry room and made no mention of seeing his genitalia. In fact, she specifically denied seeing Appellant's penis. This was falsifying official documents. This is proof of the intentional nature of Respondent's acts.

When Respondent made false statements in the arrest warrant and withheld the audio statements from the magistrate, Grand Jury, and solicitor, they deprived those individuals of critical information needed to establish probable cause. "A magistrate may issue a warrant only upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. A probable cause determination requires the magistrate to analyze the totality of the circumstances, meaning he should "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 103 S.Ct. 2317; see State v. Johnson, 302 S.C. 243, 247-48, 395 S.E.2d 167, 169 (1990) (adopting the Gates totality-of circumstances test); State v. Crane, 296 S.C. 336, 338-39, 372 S.E.2d 587, 588-89 (1988) (holding the magistrate should determine probable cause based on all the information available to him at the time the warrant is issued, including sworn oral testimony); State v. Adams, 291 S.C. 132, 133-34, 352 S.E.2d 483, 485 (1987) ("A determination of probable cause depends upon the totality of

the circumstances.")." See State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (S.C. App., 2003). Respondent deprived the magistrate of the Neal's audio statement that told a different story. This audio statement was the only evidence against Appellant. It should have been provided to the magistrate so he could give a fair determination of probable cause. Respondent did not file a supplemental report until eight months after the audio statement being taken. This was an intentional act to hide the audio statement's existence. Detective Ashley filed the supplemental report on March 26, 2014. (Appellant's Memo in Opposition Exhibit 5). This was three weeks after he quit the sheriff's office. It should be noted that Ashley left the sheriff's office one week after Appellant filed his Motion to Compel the production of the audio statements. This is not just a coincidence.

Respondent mislead the magistrate into signing the arrest warrant by stating Appellant exposed his private parts and that the alleged incident occurred in a public place. "We realize this case presents a close call on the probable cause determination. ***However, the combination of the police officer's deliberate falsehood and his omission of critical facts pollute the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant.*** There is no doubt that the officer intended to mislead the magistrate in obtaining the search warrant. We realize that police officers routinely leave out facts they believe are immaterial to the probable cause determination. ***Yet, when an omission is combined with an affirmative falsehood, it reveals that the affiant not only believed the omitted information was critical, but that a statement in the affidavit to the contrary was necessary for establishing probable cause.*** We recognize that under Franks our role is not to punish dishonest police officers but, rather, to ensure that a substantial basis exists to find probable cause. That said, the

depth of the prevarication perpetrated by the officer in this case undermines any remaining legitimacy the affidavit might possess. Under these circumstances, this Court is required by the Constitution to invalidate the search warrant where the facts create such a close call on the probable cause determination." See State v. Missouri, 524 S.E.2d 394, 337 S.C. 548 (S.C., 1999). Respondent's intentional acts invalidated the arrest warrant because no probable cause existed.

When you omit the false material from the affidavit, none of the elements of indecent exposure are met. You have no probable cause. "Second, if the deliberate falsehood or reckless disregard for the truth has been established, the court must consider the affidavit's remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause. ***If the court determines probable cause does not exist after the false material is omitted from the analysis, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.***" Franks, 438 U.S. at 155-56, 98 S.Ct. 2674; see Missouri, 337 S.C. at 553-54, 524 S.E.2d at 396-97 (adopting the two-prong Franks test)." See State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (S.C. App., 2003).

Respondent intentionally withheld the exculpatory audio statement from the magistrate and Grand Jury to hide evidence that Appellant did not commit indecent exposure. The solicitor went to the Grand Jury without Neal's statement. She did not have the statement that showed that Neal never said she saw Appellant's genitalia like the warrant affidavit stated. The solicitor never would have sought an indictment if all the facts were presented to her in the beginning. In dismissing the charges, the solicitor stated that "there were substantial issues with the facts" as

relayed by Neal "which legally prevented the case from going forward" when she was finally presented with the audio statement. The solicitor requested the case file and audio statement in August and September of 2013 and January and February of 2014. The case file still was not received as of March 21, 2014 when Respondent gave Morton's case file to the solicitor. (Appellant's Memo in Opposition Exhibit 10). "Although Franks addressed an instance in which false information had been included in the warrant affidavit, the Franks test also applies in an instance in which exculpatory material is left out of the warrant. Missouri, 337 S.C. at 554, 524 S.E.2d at 397. To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." See State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (S.C. App., 2003). "In Franks v. Delaware, the United States Supreme Court held that the Fourth and Fourteenth Amendments give an accused the right in certain circumstances to challenge the veracity of a search warrant affidavit after the warrant has been issued and executed. State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). ***This challenge may be based on false information being included in the search warrant affidavit or exculpatory material being omitted from the affidavit.*** Id. at 554, 524 S.E.2d at 397." See State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (S.C. App., 2014). "[T]he omission must be 'designed to mislead ' or must be made 'in reckless disregard of whether [it] would mislead.'" Id. at 455 (citation omitted) (emphasis removed) (second alteration in original). "The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that its inclusion in the affidavit would defeat probable cause." United States v. Shorter, 328 F.3d 167, 170 (4th Cir. 2003)." See State v.

Lynch (S.C. App., 2015). If the audio statement would have been turned over to the magistrate and Grand Jury in the beginning, no arrest warrant would have been issued thus no indictment would have been made. The audio statement clearly lacked the elements needed for the indecent exposure charge. Solicitor Adams dismissed the charges on April 24, 2014. (Appellant's Memo in Opposition Exhibit 11). She stated there were "substantial issues with the facts" as relayed by Neal and Morton "which legally prevented the case from going forward". (Appellant's Memo in Opposition Exhibit 12). The only statement by Neal was her audio statement taken on July 25, 2013 when she filed her incident report. Detective Ashley testified that the only evidence against Appellant was Neal's one audio statement. (Appellant's Memo in Opposition Exhibit 14, p. 46).

Page 46:

8 Q So other than what they told you, do you
9 have anything else?
10 A Uh-uh.
11 Q That would be no?
12 A No. Excuse me.

If Respondent had turned the audio statement over to the solicitor on August 16, 2013 when the solicitor first requested the case file, the charge would have been dismissed and no preliminary hearing would have been held or Grand Jury convened. (Appellant's Memo in Opposition Exhibit 8).

In Morton, Respondent withheld the exculpatory audio statement from the magistrate, Grand Jury, and solicitor for nine months. Morton filed her incident report on July 8, 2013. (Appellant's Memo in Opposition Exhibit 1). She met with Deputy Patrick Marter on that date. She told Deputy Marter that Appellant was wearing a "men's robe" and denied any sexual contact. She further stated that she was on two treatment tables and that Appellant was calling

her in the three weeks prior to that date trying to get her to reschedule her missed appointment. Deputy Marter testified on Page 10 that that was exactly what she told him. (Appellant's Memo in Opposition Exhibit 13, p. 10).

Page 10:

5 Q So based on your responsibilities as a
6 deputy, this page 3 is what she told you.
7 A Yes, yes. This is, for the most part,
8 exactly what she told me went on.

Ten days later, on July 18, 2013, Detectives Stan Ashley and Michelle Hendrix obtained a recorded statement from Morton. The audio statement of Morton alleged Appellant "came to the door. He had a towel on." Detective Ashley responded "He had a towel on?" (Appellant's Memo in Opposition Exhibit 2, p.57, ll.18-20). This showed Ashley was questioning the difference with the incident report. Morton went on to say "I'm thinking this man's rubbing his stuff on me." (Appellant's Memo in Opposition Exhibit 2, p.63, ll.1-2). Morton even changed the number of treatment tables she was on during the visit. She stated in her incident report that she was on two treatment tables and in the audio statement she was on three treatment tables. She also made no mention of the alleged phone calls to her from Appellant. In fact, her phone records show no such calls being made by Appellant. Detective Ashley testified that he had no other information other than Morton's statements. (Appellant's Memo in Opposition Exhibit 14, p. 46).

8 Q So other than what they told you, do you
9 have anything else?
10 A Uh-uh.
11 Q That would be no?
12 A No. Excuse me.

Deputy Marter went on to testify that, citing the contradictory statements by Morton, there was no probable cause. (Appellant's Memo in Opposition Exhibit 13, p.14).

> 2 Q If the only evidence -- if that's the
> 3 word you used -- is the statement of the victim, if
> 4 a victim has two contradictory statements, do you
> 5 have probable cause?
> 6 MR. MATTHEWS: Object to the form.
> 7 THE WITNESS: Not in my opinion, no. You
> 8 don't because you need -- you're going to have
> 9 to have a little more than just a belief
> 10 that's going on.
> 11 You have to have some substantial proof
> 12 that you believe that person committed the
> 13 crime.

Detective Ashley testified that no other evidence was obtained. Deputy Marter was involved in the case from the beginning. He stated that there was no probable cause to arrest Appellant yet the trial court felt otherwise. The trial court ignored his professional opinion.

Respondent deprived the magistrate, Grand Jury, and solicitor of Morton's contradictory statements. Respondent knew he couldn't get the magistrate to sign the arrest warrant if Morton's contradictory statement was produced.

Victim's statements must by reasonably reliable. If a victim is telling two different stories, further investigation must be done. This is evidenced by Deputy Marter's testimony. Respondent failed to do any further investigation. Instead, Respondent just hid the exculpatory evidence. Respondent never even questioned Appellant prior to the arrest. "Whether [an] arrest was constitutionally valid depends ... upon whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances

within their knowledge and of which they had ***reasonably trustworthy information*** were sufficient to warrant a prudent man in believing that the [person arrested] had committed ... an offense. Id. at 91, 85 S.Ct. at 225; see also Michigan v. DeFillippo, 443 U.S. at 37, 99 S.Ct. at 2632. Thus, it is the "facts and circumstances within [the officers'] knowledge and of which they had ***reasonably trustworthy information***" at the time of arrest to which we turn." See Clay v. Conlee, 815 F.2d 1164 (C.A.8 (Ark.), 1987). "Law enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects. ***But such information does not, on its own, support a finding of probable cause if the information is not reasonably trustworthy or reliable.*** See Cortez v. McCauley, 478 F.3d 1108, 1116-22 (10th Cir.2007) (en banc); United States v. Shaw, 464 F.3d 615, 623-26 (6th Cir.2006); Clay v. Conlee, 815 F.2d 1164, 1168 (8th Cir.1987)." See Stoot v. City of Everett, 582 F.3d 910 (9th Cir., 2009). "Probable cause to arrest exists only when the facts and circumstances within the officers' knowledge, and of which they have ***reasonably trustworthy information***, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." United States v. Valenzuela, 365 F.3d 892, 896 (10th Cir. 2004)." See Cortez v. McCauley, 478 F.3d 1108, 2007 U.S. App. LEXIS 3678 (10th Cir. N.M. 2007). "The jury was presented with evidence that Raines decided to instruct Bickley to issue the warrants on the basis of two unsigned statements of an outside undercover investigator whose job was to inform on employees. ***There were inconsistencies between Chaney's statements and Chaney's field notes and Whirlpool did no independent investigation.*** The jury could have concluded that a reasonable person would not have found probable cause to arrest Barber on the basis of this information and would have done more investigation. Raines' professed cancellation of the

warrants after hearing Barber's side of the story at the noon meeting on June 28, 1990 also indicates that the smallest effort at further investigation would have shown the warrants unfounded. ***The jury therefore could have reasonably concluded that there was no probable cause for the warrants***. The jury may infer malice from this lack of probable cause." See Barber v. Whirlpool Corp., 34 F.3d 1268, 1994 U.S. App. LEXIS 23645, 128 Lab. Cas. (CCH) P57,754, 30 Fed. R. Serv. 3d (Callaghan) 103, 9 I.E.R. Cas. (BNA) 1492 (4th Cir. S.C. 1994). The information of Morton cannot be considered reasonably reliable. The fact that the Solicitor's Office dismissed the criminal charges after hearing the audio statements show that no probable cause existed. In addition, Deputy Marter testified that Morton's contradictory statements were not probable cause to arrest Appellant.

On August 22, 2013, Appellant's counsel received copies of the incident reports and supplemental reports from the Anderson County Sheriff's Office (ACSO). The last entry on the supplemental report for Morton was July 9, 2013. (Appellant's Memo in Opposition Exhibit 6). No reference was made of the audio statement being taken from Morton on July 18, 2013. This information would have been denied to the magistrate in obtaining the arrest warrant. In January of 2014, Appellant received discovery from the Solicitor's Office. Morton's supplemental report contained the missing entries after the July 9, 2013 entry that weren't posted on the supplemental report received by Appellant on August 22, 2013. (Appellant's Memo in Opposition Exhibit 7). Detectives created an entirely new supplemental report. This was evidenced by spelling errors in the July 9, 2013 entry that weren't there in the January document. The second line says "IS LN ONGER IN SERVICE". The other supplemental report says "IS NO LONGER IN SERVICE". At some point in time, Detectives created an entirely new supplemental report with

the missing information so as to make it not look suspicious. Detectives were tampering with official documents. This information was also withheld from the magistrate in signing the arrest warrant, magistrate at the preliminary hearing, and the Grand Jury.

When Respondent finally turned over Morton's case file to the solicitor it was still missing the audio statement. (Appellant's Memo in Opposition Exhibit 9). This shows Respondent was still trying to hide its existence from the solicitor.

Detectives had no other evidence supporting the conflicting stories of Neal and Morton. "The unsupported assertion or belief of the officer does not satisfy the requirement of probable cause. Jones v. United States, 362 U.S. 257, 269, 80 S.Ct. 725, 735, 4 L.Ed.2d 697 (1960); Grau v. United States, 287 U.S. 124, 53 S.Ct. 38, 77 L.Ed. 212 (1932); Byars v. United States, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520 (1927)." See Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Detectives may not ignore exculpatory evidence when determining if probable cause exists. "As a corollary, moreover, of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." See Bigford v. Taylor, 834 F.2d 1213, 1988 U.S. App. LEXIS 49 (5th Cir. Tex. 1988). In this case, the only evidence was the contradictory statements of Neal and Morton. One must look at the totality of the evidence in determining if Appellant committed the criminal acts. Detectives obtained no corroborating evidence to support Neal and Morton's claims. "This totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific "tests" be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical

conception." Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302 1311, 93 L.Ed. 1879 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id., at 175, 69 S.Ct., at 1310. Our observation in United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), regarding "particularized suspicion," is also applicable to the probable cause standard: The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1982). The Anderson County Solicitor, Chrissy Adams, in dismissing the charges, stated that "there were substantial issues with the facts" as relayed by Morton and Neal after receiving the audio statements. If she had the audio statements at the beginning, she would never have gone to the Grand Jury or held a preliminary hearing. Respondent deprived her of exculpatory evidence. Detective Ashley testified that the only evidence he had against Appellant were the statements by Morton and Neal. Solicitor Adams, being a reasonable and prudent person, knew that there was no probable cause because Morton's stories conflicted and the statement of Neal did not satisfy the elements of the charge. In addition, Deputy Marter testified that there was no probable cause citing Morton's conflicting stories. He is a reasonable and prudent person. When a reasonable and prudent person looks at Morton's two stories they would come to one conclusion,

that there was no probable cause. Detectives not only ignored the exculpatory evidence but withheld it from the magistrate, Grand Jury, solicitor, and Appellant as well as tampered with official documents to hide their existence. A reasonable and prudent person would not fabricate an incident report and tamper with official documents in order to make an arrest.

Respondent intentionally withheld the exculpatory audio statement from the magistrate and Grand Jury to hide evidence that Appellant did not commit indecent exposure. The solicitor went to the Grand Jury without Morton's statement given 10 days later. She did not have the statement that showed that Morton was giving contradictory statements 10 days apart. The solicitor never would have sought an indictment if all the facts were presented to here in the beginning. In dismissing the charges, the solicitor stated that "there were substantial issues with the facts" as relayed by Morton "which legally prevented the case from going forward" when she was finally presented with the audio statement. The solicitor requested the case file and audio statement in August and September of 2013 and January and February of 2014. You lose probable cause when exculpatory evidence is omitted from the arrest warrant. See Davis, Id., Gore, Id. and Lynch, Id. If the audio statement would have been turned over to the magistrate and Grand Jury in the beginning, no arrest warrant would have been issued thus no indictment would have been made. Solicitor Adams dismissed the charges on April 24, 2014. (Appellant's Memo in Opposition Exhibit 11). She stated there were "substantial issues with the facts" as relayed by Neal and Morton "which prevented the case from going forward". (Appellant's Memo in Opposition Exhibit 12). The only evidence that Respondent had regarding Morton's allegations were two contradictory statements.

Respondent cannot hide behind a magistrate issuing the arrest warrant and Grand Jury

indictment when he deceived those entities by withholding exculpatory evidence, tampering with official documents, and falsifying the warrant affidavit. The solicitor never would have gone to the Grand Jury to seek indictments if she had all the evidence. This is evidenced by her statement after dismissing the charges that "there were substantial issues with the facts" as relayed by Neal and Morton. "As this recitation suggests, ***an arrest warrant issued by a magistrate or judge does not, in itself, shelter an officer from liability for false arrest.*** See Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997). Rather, a plaintiff may succeed in a S 1983 action for false arrest made pursuant to a warrant if the plaintiff shows, by a preponderance of the evidence: (1) that the police officer "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant;" and (2) that "such statements or omissions are material, or necessary, to the finding of probable cause." Id." See Wilson v. Russo, 212 F.3d 781 (3rd Cir., 1999). There was no supporting evidence to make anyone believe that Plaintiff committed the crime, just two contradictory statements from Morton and facts not consistent with the elements of indecent exposure from Neal. "***By parallel reasoning, a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial -- none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision***. It is true that at some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause (and after conviction to the Eighth Amendment's cruel and unusual punishments clause, but that is not relevant here). But the causal inquiry is unchanged. ***If police officers have been instrumental in the plaintiff's continued confinement***

or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him." See Goodwin v. Metts, 885 F.2d 157, 161-163, 1989 U.S. App. LEXIS 13728, 8-13 (4th Cir. S.C. 1989). When the detectives failed to tell the magistrate and the Grand Jury of the contradictory statements told by Morton they were not submitting a completely truthful affidavit. Detectives did not submit a truthful affidavit to the magistrate in Neal by claiming the alleged incident occurred in Plaintiff's office/therapy area and the Plaintiff exposed his genitalia. "***Several courts have gone even further and held that an officer who induces a magistrate to issue a warrant not supported by probable cause by submitting a completely truthful affidavit may be held liable under Sec. 1983 for a resulting Fourth Amendment violation, if he should have known, at the time he applied for the warrant, that the affidavit did not establish probable cause.*** See Briggs v. Malley, 748 F.2d 715 (1st Cir.1984), aff'd sub nom. Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); Garmon v. Lumpkin County, 878 F.2d 1406 (11th Cir.1989) (same). Accordingly, I would not reach the question whether a defense of qualified immunity might be available on these facts. But see DeLoach, 922 F.2d at 621-22 (affiant who makes deliberate or reckless misrepresentations in order to obtain an arrest warrant is not entitled to qualified immunity, because his conduct is per se objectively unreasonable); Olson, 771 F.2d at 281-82 (same); cf. Malley v. Briggs, 475 U.S. at 345, 106 S.Ct. at 1098 (when police officer applies for arrest warrant on the basis of an affidavit that a reasonable officer in his position would have known failed to establish probable cause, his application for the warrant is not objectively reasonable for purposes of qualified immunity analysis, because it "create[s] the unnecessary danger of an unlawful arrest")." See Wilkes v.

Young, 28 F.3d 1362 (4th Cir. 1994).

Respondent lacked probable cause to arrest Appellant. The trial court erred in claiming that probable cause existed.

RESPONDENT ABUSED LEGAL PROCESS BY ARRESTING APPELLANT WITHOUT PROBABLE CAUSE, WITHHOLDING AND TAMPERING WITH EVIDENCE.

The trial court erred in opining that the Respondent's actions did not amount to abuse of process. Charging an innocent person with a crime is not what the criminal justice system is designed for and not legitimate in the use of the process. "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) (citation omitted). *** However, "[o]ne 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." Id. at 75, 567 S.E.2d at 255–56 (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. The tort centers on events occurring outside the process *** The second element, 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)." See Pallares v. Seinar, 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014). Detective Ashley is running for Anderson

County Sheriff and a conviction of a high profile individual would help his campaign. Detective Ashley had the collateral objective to make the arrest to bolster his political aspirations. Detectives acted outside of the process by withholding the exculpatory audio statements from the magistrate, solicitor, and Appellant for nearly nine months. Detectives fabricated Neal's incident report to fit the elements of indecent exposure. They created a supplemental report for Neal eight months after her audio statement was given to hide its existence from the magistrate and solicitor. They created a new supplemental report for Morton months after the initial supplemental report was made entering the events left out of the first supplemental report. They sought arrest warrants without probable cause and are acts not authorized by the process. They acted willfully in withholding exculpatory evidence and tampering with official documents to secure the conviction of an innocent man. These acts are improper and unauthorized. Detectives are required by law to turn over evidence to the magistrate, solicitor and Appellant. Detectives charged Appellant with crimes they knew he didn't commit. They just wanted to arrest a doctor. Detectives had to hide evidence and manufacture statements in order for the magistrate to sign the arrest warrants. In addition, they withheld the exculpatory audio statements from the solicitor so she would go to the Grand Jury to seek an indictment. This is not proper in the regular course of the proceedings. The trial court erred in opining that Respondent's acts were not an abuse of process.

THE TRIAL COURT ERRED IN GRANTING IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT.

The South Carolina Tort Claims Act (SCTCA) is the exclusive remedy for wrongs committed by the State. It waives sovereign immunity. "The TCA does not create causes of

action, but removes the common law bar of sovereign immunity in certain circumstances. Summers v. Harrison Constr., supra." See Arthurs ex rel. Munn v. Aiken County, 346 S.C. 97, 551 S.E.2d 579 (S.C., 2001). "The common law doctrine of sovereign immunity was abolished by the South Carolina Supreme Court in McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). In 1986, the legislature enacted the South Carolina Tort Claims Act, S.C.Code Ann. §§ 15-78-10 to -200 (Supp.1997), which waives immunity while also providing specific, enumerated exceptions limiting the liability of the state and its political subdivisions in certain circumstances. The Tort Claims Act "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)."2 S.C.Code Ann. § 15-78-20(b) (Supp.1997)." See Wells v. City of Lynchburg, 501 S.E.2d 746, 331 S.C. 296 (S.C. App., 1998). "The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct.App.2005) (citing Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003); Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998)); Hawkins v. City of Greenville, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (Ct.App.2004). "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.***" S.C.Code Ann. § 15-78-200 (2005); see also Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (2001) (observing the Tort Claims Act is the exclusive remedy for tort claims against governmental entities), aff'd, 354 S.C. 161, 580 S.E.2d 440 (2003)." See Proctor v. Dept. of Health, 628 S.E.2d

496, 368 S.C. 279 (S.C. App., 2006). Respondent was acting within the scope of his official duties when he unlawfully arrested Appellant. Respondent is liable for his unlawful actions under state law. "The Act provides that, subject to limitation, a governmental entity is "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances." Id.; S.C.Code Ann. § 15-78-40 (Supp.1993)." See Steinke v. SC DEPT. OF LABOR, LICENSING, 336 S.C. 373, 520 S.E.2d 142 (S.C., 1999). Respondent arrested Appellant without probable cause on the allegations of Neal and Morton. Respondent is confused as to the interpretation of the SCTCA. The Act only provides for relief if the Respondent was acting within the scope of his official duties. If Respondent were not, he would be liable personally for his actions. That is why he is being sued in his "official capacity" as sheriff of Anderson County. The sheriff's deputies were acting within the scope of their official duties when investigating the allegations of Neal and Morton. They were also acting within the scope of their official duties when obtaining the arrest warrants.

South Carolina law creates vicarious liability on the sheriff for the misconduct or negligent acts of his deputies. SC Code Ann. § 23-13-10 (2013) states as follows:

> The sheriff may appoint one or more deputies to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall be evidenced by a certificate thereof, signed by the sheriff, and shall continue during his pleasure. *The sheriff shall in all cases be answerable for neglect of duty or misconduct in office of any deputy.*

The sheriff is responsible for the actions of his deputies "In addition, Appellants obtained a verdict against Sheriff Metts only due to a South Carolina statute making Sheriffs vicariously liable for the misconduct of their deputies. (J.A. at 313); see S.C.Code Ann. § 23-13-10 (Law.

Co-op.1976)." See Goodwin v. Metts, 973 F.2d 378 (C.A.4 (S.C.), 1992). Goodwin is very similar to the case at hand. A deputy withheld exculpatory evidence from solicitor's office. The court found that Sheriff Metts was liable for the acts of his deputies. "The Supreme Court of South Carolina has expressly ruled that a sheriff's responsibility for the acts of his deputy is not dependent on the doctrine of respondeat superior. Instead, liability is based on the deputy's position as the sheriff's representative for whose official acts the law holds the sheriff strictly accountable. Rutledge v. Small, 192 S.C. 254, 6 S.E.2d 260, 262 (1939). The sheriff's liability is clearly defined in Teasdale v. Hart, 2 Bay 173, 175 (S. C.1798): "Every sheriff [is] liable for the acts of all his officers, and all persons acting under him in every subordinate capacity; and they on their parts, are bound to conduct themselves in the like manner as the sheriff himself ought to do, if he was present; and he is not to be let off, on account of the blunders, misconduct, or errors of any of his inferior agents." See Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973).

Appellant is suing the Respondent in his "official capacity" as sheriff of Anderson County under the SCTCA. The SCTCA was created to allow the citizens of South Carolina an ability to seek redress from the State for damages. "South Carolina Tort Claims Act: Finally, Gist argues the trial court erred in holding Gist must prove gross negligence on the part of the Sheriffs Department to prevail on his claim for false arrest. We agree. In order to prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful. Andrews v. Piedmont Air Lines, 297 S.C. 367, 377 S.E.2d 127 (Ct.App.1989). False imprisonment is an intentional tort; negligence is not an element. See Jeffcoat v. Caine, 261 S.C. 75, 198 S.E.2d 258 (1973). The Tort Claims Act provides: The State, an agency, a political subdivision, and a

governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exceptions from liability and damages contained therein." See Gist v. Berkeley County Sheriff's Dept., 336 S.C. 611, 521 S.E.2d 163 (S.C. App., 1999). There are enumerated exceptions to the waiver of immunity under SC Code Ann. 15-78-60 (2013). Respondent cited none of the exceptions from liability that would grant immunity. Respondent only claimed he was immune because he was acting within the scope of his official duties which clearly make him liable.

> SC Code Ann. § 15-78-60 (2013), Exceptions to waiver of immunity.
>
> (17) ***employee conduct outside the scope of his official duties*** or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude;

The sheriff is a state officer created by the South Carolina Constitution. "We affirm pursuant to Rule 220(b)(1), SCACR, in light of our settled law that the sheriff and the sheriff's deputies are state officers and not county employees. See S.C. Const. art. V, § 24 (establishing the sheriff as an elected office); S.C. Code Ann. § 23-13-10 (Supp. 2008) (granting the sheriff authority to hire deputies and holding the sheriff responsible for the neglect or misconduct of his deputies)." See Thompson v. Dorchester County, Opinion No. 2009-MO-059 (S.C. 11/9/2009) (S.C., 2009). It is clear that South Carolina law creates liability for the sheriff for the misconduct of his deputies.

The trial court erred in opining that the Respondent is entitled to immunity under the South Carolina Tort Claims Act.

CONCLUSION

The only question that needs to be answered is this. Did the detectives have evidence that would establish probable cause to arrest Appellant? The answer is no. Respondent gave false information to the magistrate, solicitor, and Grand Jury. In addition, Respondent withheld exculpatory evidence that proved Appellant was innocent. The solicitor never would have sought an indictment if she had the audio statements at the beginning when she first requested the case files on August 16, 2013. Respondent did this in two separate cases. If the detectives had told the magistrate that on July 8, 2013 Morton claimed Appellant was wearing a men's robe and that no sexual contact occurred, and on July 18, 2013 she claimed Appellant was wearing a towel and was rubbing his "stuff" on her back, the magistrate would not have issued an arrest warrant. The affidavit was lacking in any reference to the different versions of Morton's stories. The detectives also changed the incident report and warrant affidavit for Neal to reflect the elements of indecent exposure. Respondent has admitted that the alleged incidents occurred in Appellant's home, which is not a public place by law. Neal also denied seeing Appellant's private parts. This in and of itself destroys probable cause in that the essential elements of the indecent exposure charge are negated. The magistrate never would have issued the arrest warrant if given the unaltered facts relayed by Neal. The detectives created a supplemental report for Neal eight months after the events occurred. Detective Ashley stated that he needed Neal in order to get an arrest warrant. The detectives went further by hiding the exculpatory audio statements of Neal and Morton from the magistrate, solicitor, and Appellant for nine months. They tampered with official records to hide the existence of the exculpatory audio statements. ***A deputy involved in the investigation, Deputy Marter, testified that there was no probable cause for the arrest.***

These actions also constitute an abuse of process. Respondent is responsible for the actions of his deputies. The South Carolina Tort Claims Act does not protect the sheriff for his actions within the scope of his official duties. There are genuine issues of material fact remaining. The trial court erred in opining that there was probable cause to arrest Appellant, no abuse of process, and immunity under the South Carolina Tort Claims Act. Appellant requests this Court reverse the decision of the trial court dismissing this action.

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CERTIFICATE OF SERVICE

Appellant served this Initial Brief on Respondent's attorney by regular U.S. Mail on October 17, 2016.

Dr. Gregg N. Battersby

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-000973

Dr. Gregg Battersby, Appellant,

v.

Sheriff John Skipper, in his official capacity, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Initial Brief complies with Rule 208(b), SCACR, it contains no matter which is irrelevant to the appeal.

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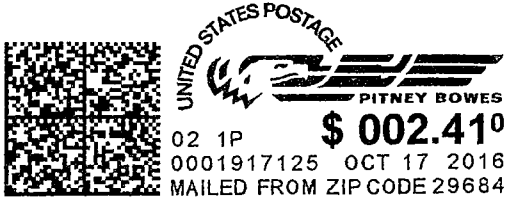

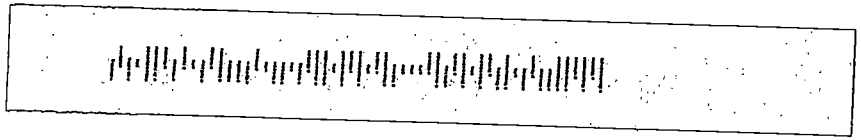

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