

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2016-001618

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OCT 24 2016

SC Court of Appeals

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

v.

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

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues	1
Statement of the Case.....	1
Statement of the Facts.....	1, 2
Standard of Review.....	2, 3
Argument.....	3, 4
I. Appellants Cannot Prove Their Causes of Action	
A. Malicious Prosecution.....	4, 5
B. Abuse of Process.....	6, 7
C. Defamation of Character - Slander.....	7
D. Gross Negligence.....	7, 8
Conclusion.....	9

TABLE OF AUTHORITIES

CASES

<u>Carter v. Standard Fire Ins. Co.</u> , 406 S.C. 609, 753 S.E.2d 515 (2014).....	3
<u>Town of Hollywood v. Floyd</u> , 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).....	3
<u>Hoard v. Roper Hosp. Inc.</u> , 387 .C. 539, 694 S.E.2d 1 (2010).....	3
<u>Deaton v. Leath</u> , 279 S.C. 82, 302 S.E.2d 335 (1983).....	4
<u>Lynch v. Toys “R” Us-Delaware, Inc.</u> , 654 S.E.2d 541, 375 S.C. 604 (Ct. App., 2007).4, 5	
<u>Law v. South Carolina Dept. of Corrections</u> , 629 S.E.2d 642, 368 S.C. 424 (2006).....	5
<u>Guider v. Churpeyes, Inc.</u> , 635 S.E.2d 562, 370 S.C. 424 (Ct. App., 2006).....	5, 6
<u>Gause v. Doe</u> , 317 S.C. 39, 451 S.E.2d 408 (Ct. App., 1994).....	7
<u>Doe v. Wal-Mart Stores, Inc.</u> , 393 S.C. 240, 711 S.E.2d 908 (2011).....	8

STATUTES

S. C. Code § 63-7-710.....	3
S. C. Code Ann. § 15-78-60 (17) (2015).....	7

RULES

Rule 56 (e), SCRCP.....	3
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STATEMENT OF ISSUES

1. APPELLANTS CANNOT PROVE THE ELEMENTS FOR MALICIOUS PROSECUTION.
2. APPELLANTS CANNOT PROVE THE ELEMENTS FOR ABUSE OF PROCESS.
3. APPELLANTS CANNOT PROVE THE ELEMENTS FOR DEFAMATION.
4. APPELLANTS CANNOT PROVE THE ELEMENTS FOR (GROSS) NEGLIGENCE.

STATEMENT OF THE CASE

Even in the light most favorable to the Appellants, summary judgment was proper in this matter and should be affirmed. As set forth in the Statement of Facts, Appellants sued the Respondent in a collateral attack on not one, but two, Family Court Orders finding probable cause to remove Appellants' four (4) week old minor child from their custody and place the child in emergency protective custody. Neither order was appealed. Rather, Appellants 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 Respondent and two of its employees. The Respondent's employees were dismissed when the Circuit Court granted the Respondent's Motion to Dismiss. Appellants did not appeal that ruling. Respondent then filed a Motion for Summary Judgment on the grounds that the Appellants could not meet the burden of proof required by the causes of action they alleged. Respondent's motion was granted and Appellants 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), Respondent filed an action against Appellants 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. (R. pp. 6-8) A probable cause hearing was conducted the next day on this matter before The Honorable Joseph C. Smithdeal who found Respondent presented probable cause for Respondent to place the minor child in its physical and legal custody. (R. pp. 9-12) Prior to the final hearing in DSS v. Gilbert & Tucker, Appellant Gilbert alleviated Respondent's concern that the child was in imminent and substantial danger and, as such, Respondent dismissed the case. (R. pp. 146-149) Nevertheless, Appellants requested a reconsideration by Judge Smithdeal of his ruling which was denied by his Order dated April 2, 2016. (R. pp. 13-14)

Appellants, in the prior Family Court matter, filed suit against Respondent and individual Respondent's employees Mindy Miyares and Deniece Shelman. Defendants Miyares and Shelman were dismissed by Order of the Court on February 19, 2016. (R. pp. 15-17) Respondent filed its Motion for Summary Judgment on March 7, 2016 and filed memoranda supporting its position. (R. pp. 85-124) Appellants provided their Memorandum in Opposition at the hearing, as well as the Affidavits of Rodrick Tucker and Linder Dandy. Respondent's Motion for Summary Judgment was granted on June 24, 2016, wherein the trial court ruled that the Appellants 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 Appellants. (R. pp. 1-5) 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, SCRPC, and our summary judgment jurisprudence:

[R]ule 56(e), SCRPC, 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 Respondent 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 Respondent. Respondent was bound by these rulings until or unless they were modified by a subsequent written order.¹ Appellants 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

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)).

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 Appellants Amended Complaint, it is clear that, even in the light most favorable to the Appellants, there is no genuine issue of material fact and Judge Griffith's Order granting summary judgment should be affirmed.

I: APPELLANTS 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 Appellants' 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 Respondent. 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 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

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)).

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 Respondent had the probable cause to remove baby KAG from Appellants' residence. This is borne out not only by the *Ex Parte* Order, R. pp.6-8, signed on August 18, 2015 (filed August 19, 2015), but also in the Order Finding Probable Cause, R. pp. 9-12, and the Order Denying Reconsideration, R. pp. 13-14. Further, Appellants cannot prove Respondent acted with malice as shown below. Accordingly, Respondent's actions were done under color of law, judicial directive, and, particularly relevant to this case, based on probable cause without malice. While Appellants presented affidavits to the Court in opposition to Respondent'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. Appellants 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 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 argument sake, the Appellant's affidavits 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 Respondent had probable cause to remove minor KAG from Appellants' residence and custody. The law of the case shows Respondent'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, R. pp. 7, 9, 11, 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 Respondent's 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 Respondent, a state agency. Appellants assert they "must prove the defendant acted with actual malice." See Appellants' 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 Appellant would have to prove actual malice to support claim and SCTCA excludes governmental liability for actual malice). The Appellants' 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.

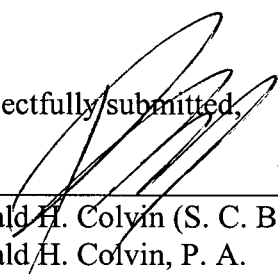
Doe v. Wal-Mart Stores Inc., 393 S.C. 240, 711 S.E.2d 908 (2011).

Appellants have not even alleged a duty owed by Respondent to them, much less a breach of that duty, proximate causation, or damages. The Appellants' Affidavits similarly do not provide evidence of the elements of negligence. Appellants' claim for negligence must fail. Assuming that Appellants' Amended Complaint or the Appellants' Affidavits did allege such things, Appellants cannot prove such a duty or any breach. Respondent's 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 Respondent to remove minor KAG from Appellants' custody and residence. The duty of care of Respondent was to the minor child, and it fulfilled its duty as made abundantly clear in the underlying Family Court proceedings. Appellants' alleged cause of action for gross negligence cannot stand and summary judgment should be affirmed.

CONCLUSION

Appellants 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 Appellants, 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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October 19, 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 Final Brief of Respondent and Certification upon the following:

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October 19, 2016

Spartanburg, SC

SWORN TO BEFORE ME THIS 19th DAY
OF October, 2016

[Signature] (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 02/23/21

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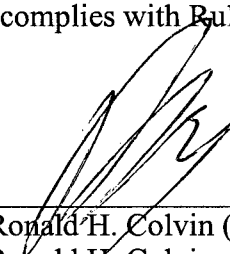
v.

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CERTIFICATE

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 15, 2016



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