

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
John C. Hayes, III, Circuit Court Judge

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Appellate Case No. 2016-002556  
Case No. 2014-CP-46-1307

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**RECEIVED**

JUN 26 2017

SC Court of Appeals

Russell Shane Carter, ..... Respondent-Appellant,

v.

Bruce Bryant, as Representative for the Office of the  
York County Sheriff, ..... Appellant-Respondent.

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**INITIAL APPELLANT'S BRIEF OF APPELLANT-RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in denying Sheriff Bryant absolute sovereign immunity pursuant to Section 15-78-60(23) of the South Carolina Tort Claims Act?
- II. Did the trial court err in denying Sheriff Bryant's directed verdict and JNOV motions with respect to the malicious prosecution claim where Russell Carter did not show a lack of probable cause for the issuance of the arrest warrant?
- III. Did the trial court commit reversible error in refusing to charge the proposed jury instruction requested by Sheriff Bryant so as to explain the degree of proof that is required to establish probable cause?
- IV. Did the trial court abuse its discretion in allowing Russell Carter to claim as damages criminal defense attorney's fees in the amount of \$17,500 when the amount that was disclosed during discovery was \$5,000?

## STATEMENT OF THE CASE

This appeal involves a malicious prosecution action brought by the Respondent-Appellant Russell Shane Carter against the Appellant-Respondent Bruce Bryant in his official capacity as Sheriff of York County. In his complaint, Carter asserted causes of action for false arrest and malicious prosecution arising out of his arrest for Assault and Battery of a High and Aggravated Nature ("ABHAN") on April 26, 2012.

The causes of action proceeded to trial on November 7, 2016, before Circuit Judge John C. Hayes, III and a jury. At the close of Carter's case and again at the close of the evidence, Sheriff Bryant moved for a directed verdict on multiple grounds. Judge Hayes granted a directed verdict on the false arrest claim because the arrest was made based upon a facially valid warrant issued by a York County Magistrate Judge. (Tr. 316). The malicious prosecution claim, however, was submitted to the jury, which returned a verdict in favor of Russell Carter. The jury awarded actual damages of \$150,000. (Verdict Form).

After the verdict was returned, Sheriff Bryant filed a motion for a judgment notwithstanding the verdict (JNOV). In the alternative, Sheriff Bryant also moved for a new trial absolute. Judge Hayes denied each of those motions. (Order).

Sheriff Bryant thereupon filed a timely appeal to this Court.

## STATEMENT OF FACTS

On Wednesday, April 25, 2012, at about 10:20 p.m., former York County Sheriff Deputy Kevin Gwinn was dispatched to 3001 Lesslie Highway in York County, South Carolina in response to a disorderly situation at a residence. Upon arrival, Deputy Gwinn heard someone yelling for an individual to get off their property. Deputy Gwinn saw Russell Carter on the porch with an aluminum baseball bat in his hand. There was also a pregnant woman standing nearby. Proceeding onto the porch, Deputy Gwinn saw an individual named Michael Faile laying on the porch covered in blood and bleeding from his head. Deputy Gwinn advised dispatch that he needed EMS for a head injury.

Deputy Gwinn retrieved the bat from Carter and asked what had happened. Carter provided an oral account. Gwinn then advised Carter and his wife (Dawn Oaskasy) to go inside, and he would come inside and obtain their statements. Carter refused to comply, returning outside with his camera phone and attempted to take pictures of Faile. Deputy Gwinn then placed Carter in investigatory detention and placed him in his patrol vehicle. He also noted that Faile was lying on his stomach wedged against the side of the house and the porch. EMS arrived and transported Faile to Piedmont Medical Center. Deputy Gwinn took statements from Carter and his wife.

Later that evening Deputy Gwinn went to the hospital and obtained Faile's account. He noted that Faile's head was swollen in some parts, and sunken in other areas. He had bruises all over his body.

On Thursday, April 26, 2012, Deputy Gwinn had an in-person meeting with York County Magistrate Judge Leon Yard at the Moss Justice Center in York, South Carolina. During the course of the meeting, Judge Yard was advised of the events of the previous day at Carter's residence, the full narrative within Deputy Gwynn's police report, the written statements of Russell Carter and Dawn Oaskasy, and the nature and extent of Faile's injuries. At the time of his meeting with Judge Yard, Deputy Gwinn had not made any arrests. Moreover, he had not expressed an opinion or formulated any conclusions as to which of the subjects were legally culpable as he had solely compiled the aforementioned documentation and presented that information to Judge Yard. Deputy Gwinn intended to solely rely upon Judge Yard's findings as to the lawfulness of their conduct.

In considering probable cause, Judge Yard reviewed the versions of events by the various participants including information that had been obtained orally from Michael Faile by Deputy Gwinn at the hospital. Judge Yard reached the conclusion that probable cause did exist to arrest Russell Carter for ABHAN resulting from Carter having struck Faile with an aluminum bat multiple times, which in turn caused significant bodily injury to Faile. After such a finding, Judge

Yard prepared and issued Arrest Warrant M-604594 for Carter on the ABHAN charge.

Carter was subsequently arrested and posted \$1,000 bond the following day. Ultimately, on June 5, 2012, Eli Springs, who was the Assistant Solicitor assigned to the case, made a determination to nolle pros the ABHAN charge. Springs had determined that there was probable cause for the arrest, but he also determined that Carter could present what he believed to be a credible immunity defense based on the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et seq.*

## ARGUMENTS

### **I. The trial court erred in denying Sheriff Bryant absolute sovereign immunity pursuant to Section 15-78-60(23) of the South Carolina Tort Claims Act.**

The Respondent-Appellant Russell Carter alleged a cause of action for malicious prosecution arising from his arrest on a facially valid warrant for ABHAN. Sheriff Bryant moved for a directed verdict and later a JNOV on that cause of action on several bases. First and foremost, Sheriff Bryant asserted absolute sovereign immunity in accordance with Section 15-78-60(23) of the South Carolina Tort Claims Act. Judge Hayes denied all motions asserting this defense. In a conclusory manner, he ruled that Section 15-78-60(23) "did not bar Plaintiff's cause of action for malicious prosecution" and that the subsection "do[es] not apply under the facts here present." (Order, p. 2). Those rulings were in error.

It is well settled that the elements of malicious prosecution under state law are: "(1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867, 870-71 (Ct. App. 2012). Thus, one of the six elements that Carter needs to prove is "the institution or continuation of original

judicial proceedings." In virtually identical language, Section 15-78-60(23) provides absolute immunity for the "institution or prosecution of any judicial or administrative proceeding." S.C. Code Ann. § 15-78-60(23). Therefore, because an element of a malicious prosecution cause of action falls squarely within an immunity provision, authority from the Supreme Court and this Court dictate that a governmental entity enjoys absolute immunity for that cause of action.

This issue has often arisen in the context of Section 15-78-60(17), by which a governmental entity enjoys absolute sovereign immunity for "conduct ... which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). In applying this immunity exception, the Supreme Court and this Court have looked strictly at the elements of the cause of action to determine if sovereign immunity attaches. In the seminal case of *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 642 S.E.2d 726 (2007), the Supreme Court determined that "[n]one of the elements required for either cause of action ... include 'intent to harm.' Although it is true that harm may result from an intentional interference with existing or prospective contractual relations, it is not necessary that the interfering party intend such harm." 642 S.E.2d at 732. Consequently, where "intent to harm" is not an element of the cause of action, the Supreme Court concluded that the immunity exception is inapplicable. Citing *Eldeco*, this Court applied the same analysis in *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008), with respect to an abuse of

process claim. In that case, this Court observed that "the tort of abuse of process contains neither an element of intent to harm, nor actual malice." 665 S.E.2d at 214. Because neither "intent to harm" nor "actual malice" is an element of the abuse of process claim, this Court concluded that such a claim could proceed against the entity.

In the present case, unlike in *Eldeco* and *Swicegood*, a requisite element of a malicious prosecution claim – the institution and prosecution of a judicial proceeding – does constitute immune conduct under the Tort Claims Act. As a result, Sheriff Bryant is entitled to absolute sovereign immunity on Carter's malicious prosecution claim.

This very issue was adjudicated in the case of *McCoy v. City of Columbia*, 929 F.Supp.2d 541 (D.S.C. 2013), where the United States District Court correctly ruled that a malicious prosecution claim against a municipality was barred by Section 15-78-60(23). Judge Joseph F. Anderson Jr. wrote as follows:

The City also contends that it is immune from liability for McCoy's malicious prosecution claim under the SCTCA's immunity relating to "the institution or prosecution of a judicial proceeding." S.C. Code Ann. § 15-78-60(23). The Magistrate Judge recommended that the court grant the City's motion for summary judgment on this issue because McCoy's cause of action for malicious prosecution plainly falls within this express exception. The court agrees.

929 F.Supp.2d at 567, n. 10.

In the present case, Carter argued at trial that a malicious prosecution claim against a governmental entity must be actionable because otherwise a person unlawfully arrested by warrant would have "no remedy" and that "flies in the face" of "the law." (Tr. 312). That argument is meritless. In essence, Carter appears to suggest that there would be no deterrent or compensation in cases where a person is unlawfully arrested pursuant to a warrant in the absence of probable cause. That is absolutely not true. The Fourth Amendment and causes of action brought under 42 U.S.C. § 1983 provide a sufficient deterrent as well as compensation for victims of unlawful arrests by warrant. There does not need to be concurrent state law liability and dual methods of compensation under state and federal law for police misconduct to be discouraged. Instead, it is entirely permissible and sound public policy for the General Assembly to have placed reasonable limits on law enforcement's liability under state law where police often work under the most difficult and trying of circumstances. In fact, prior to the abrogation of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), there was no state law liability for malicious prosecution against a governmental entity. Thereafter, when enacting the Tort Claims Act in 1986, the General Assembly, as a policy decision, continued to provide for sovereign immunity for malicious prosecution as well as other causes of action arising from the "institution or prosecution of any judicial or administrative proceeding." *See*, S.C. Code Ann. § 15-78-60(23). This is no different than the

similar policy decision made by the General Assembly in 1986 to preserve and continue, by way of example, with absolute sovereign immunity for claims alleging nuisance or actual fraud. *See*, S.C. Code Ann. §§ 15-78-60(7) and (17).

Post trial, in response to the Sheriff's JNOV motion, Carter abandoned the argument made at trial and instead strangely suggested that the element of the cause of action -- "the institution or continuation of original judicial proceedings" is somehow different from the "institution or prosecution of any judicial or administrative proceeding" which is the language in Section 15-78-60(23). *See*, Plaintiff's Memorandum, p. 5. Clearly, there is no real difference in the language used. Carter also strangely argued that "[j]udicial and administrative hearing is not the same as criminal proceeding." *See*, Plaintiff's Memorandum, p. 5. Of course, the word "hearing" was added by Carter and does not appear in the statute or in the elements of a malicious prosecution claim. Moreover, it cannot be logically argued that a "criminal proceeding" is not a type of "judicial proceeding."<sup>1</sup>

Nonetheless, it is well settled that provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." *See*, S.C. Code Ann. § 15-78-20(f). This rule of statutory construction was expressly adopted by the General Assembly and has likewise been applied by the appellate courts in

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<sup>1</sup> In his jury instructions, Judge Hayes charged the jury, without objection, that the first element of a malicious prosecution cause of action requires proof that "civil or criminal judicial proceedings against him were begun or continued." (Tr. 580). Thus, the law of this case holds that a "judicial proceeding" may be criminal in nature.

construing the Tort Claims Act. *See, Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 540 (2002) ("[p]rovisions establishing limitations on liability must be liberally construed in the State's favor"). *See also, Baker v. Sanders*, 301 S.C. 170, 391 S.E.2d 229 (1990); *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Therefore, to the extent the Court finds any ambiguity in the statute, as Carter may suggest and which the Sheriff denies, such ambiguity must be resolved in favor of limiting the liability of the State.

In sum, Judge Hayes erred in denying the Sheriff absolute sovereign immunity for the institution and prosecution of a criminal proceeding as required by the literal language of Section 15-78-60(23). Quite simply, under the Tort Claims Act, there is no state law remedy for malicious prosecution against a governmental entity. Sheriff Bryant, therefore, is entitled to a directed verdict and JNOV on the malicious prosecution claim.

**II. The trial court erred in denying Sheriff Bryant's directed verdict and JNOV motions with respect to the malicious prosecution claim where Russell Carter did not show a lack of probable cause for the issuance of the arrest warrant.**

In addition to absolute sovereign immunity under Section 15-78-60(23), Sheriff Bryant was entitled to a directed verdict and JNOV on the basis that probable cause existed as a matter of law for Russell Carter's arrest. Judge Hayes

initially ruled that "[a] probable cause issue is one of fact for the jury." (Tr. 301). But he also concluded that the Protection of Persons and Property Act "codifies the Castle Doctrine and that the Castle Doctrine is an affirmative defense. It is not a bar to an arrest; it is a bar to prosecution." (Tr. 301). Ultimately, Judge Hayes did not correctly apply this latter ruling which precludes Carter's recovery as a matter of law.

As the Supreme Court recently explained, "the proper standard for determining probable cause is an objective standard; that is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Mack v. Lott*, 415 S.C. 22, 780 S.E.2d 761, 761 (2015). In *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005), this Court explained that "[p]robable 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." 623 S.E.2d at 658, *citing State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996). "Probable cause is determined as of the time of the arrest, based on facts and circumstances -- objectively measured -- known to the arresting officer." *Jackson*, 623 S.E.2d at 659. Importantly, "[t]he determination of probable cause is not an academic exercise in hindsight." *Id.*

"The term 'probable cause' does not import absolute certainty." *Lapp v. South Carolina Department of Motor Vehicles*, 387 S.C. 500, 692 S.E.2d 565, 568

(Ct. App. 2010). In fact, "[a] finding of probable cause may be based upon less evidence than would be necessary to support a conviction." *Id.* Thus, it is well settled that probable cause does not turn on an individual's actual guilt or innocence." *State v. Manning*, 400 S.C. 257, 734 S.E.2d 314, 319 (Ct. App. 2012).

This Court has previously explained that "[a]lthough the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion." *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 660 (Ct. App. 2005). Here, as it did in *Jackson*, the evidence yields one conclusion – that probable cause existed as a matter of law for Carter's arrest on the ABHAN charge.

Under South Carolina law, "ABHAN is an unlawful act of violent injury accompanied by circumstances of aggravation." *State v. Geiger*, 370 S.C. 600, 635 S.E.2d 669, 672 (Ct. App. 2006). "As an element of ABHAN, circumstances of aggravation include, *inter alia*, the use of a deadly weapon, intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, difference in gender, taking indecent liberties or familiarities with a female, purposeful infliction of shame and disgrace, and resistance to lawful authority." *Id.*

The operative facts available to Deputy Gwinn fully support a finding of probable cause that Russell Carter committed the offense of ABHAN. Carter does not dispute that on April 25, 2012, he used an aluminum bat to repeatedly strike

Michael Faile about his head and torso. Carter admitted that he continued to strike Faile even once Faile was on the ground and that he only stopped once Faile rolled over on his stomach. Carter described numerous strikes with the aluminum bat which he held in his hand as Deputy Gwinn arrived on the scene. In fact, the audiotape of the initial minutes after the officer arrives reflects that Carter told Gwinn that "I beat him as bad as I could" and "I told him if he moved again, I would crack his f\*cking head open." (Video/Pl. Ex. 2). In addition, it is undisputed that Carter's action resulted in serious bodily injuries to Faile. Deputy Gwinn, in fact, met with Faile at the hospital and took photographs of his injuries. Gwinn observed Faile's head as "swollen in some parts and sunken in in others." (Tr. 332). He also observed "bruises all over his body." (Tr. 332).

Deputy Gwinn did not, however, make a warrantless arrest on April 25, 2012. Instead, on the following day, he met with York County Magistrate Judge Leon Yard who testified at trial that he reviewed the facts of the case as contained in Deputy Gwinn's incident report as well as the witness statements. Judge Yard, as a neutral and detached magistrate, reached the conclusion that probable cause existed for the arrest of Carter on the ABHAN charge. (Tr. 491-493). Judge Yard himself prepared the arrest warrant. (Tr. 494, Pl. Ex. 1). He agreed that probable cause existed based on the evidence contained in the statements. (Tr. 496). On cross-examination, Judge Yard referenced Carter's statement specifically and indicated that "[m]y whole problem with the whole situation is the I will continue

beating until you stop moving portion [of the statement]." (Tr. 504). Judge Yard observed from the evidence that "[o]ne man's laying on the ground; one man's standing above him." (Tr. 505).

The assistant solicitor assigned to the case, Eli Springs, also testified that there was probable cause for the arrest. He testified as follows:

Was the arrest good? I found the arrest to be good. I actually found the police appeared to have done a very thorough and a very thoughtful analysis and arrest process. Then I started looking at the specific facts and circumstances and how much evidence there was, what sort of witnesses we had, and if there were defenses to the charge.

(Tr. 511). In addressing the application of the Castle Doctrine and the Protection of Persons and Property Act,<sup>2</sup> Springs described the case as getting "messier." (Tr. 513). Springs elaborated on that impression:

It gets into a much more gray area because Mr. Carter beats Mr. Faile out on the porch, or the deck, beats him down to the ground to where he's prone the ground and continues to beat him as Mr. Faile evidently tries to rise. And Mr. Carter has told Mr. Faile leave, go away, but Mr. Faile is not allowed to get -- Mr. Faile at that point wanted to leave. He couldn't leave. He was being kept beat down on the deck. There's a problem here. Yeah, the deck or the porch is part of the dwelling but after you've beat somebody down after telling them leave, go away, but you won't let them get up and leave and go away, to continue to hit them repeatedly with the baseball

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<sup>2</sup> The Protection of Persons and Property Act was also referred to during the trial as the Defense of Habitation Act.

bat, that's getting into a very gray area, a very messy area.

(Tr. 513).

In *McKinney v. Richland County Sheriff's Department*, 431 F.3d 415 (4th Cir. 2005), the Fourth Circuit recognized that "[b]oth a prosecutor and a neutral and detached magistrate independently reviewed the evidence and concluded that there was probable cause." 431 F.3d at 419. The Fourth Circuit then explained that "[a] reasonable officer would not second-guess these determinations unless probable cause was plainly lacking, which it was not." *Id.* The same is obviously true in this case.

Nonetheless, the crux of Carter's case focuses on the application of the Protection of Persons and Property Act, which was enacted in 2006 "to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The Act provides for immunity from prosecution. Specifically, Section 16-11-450(A) provides that "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution ... for the use of deadly force." S.C. Code Ann. § 16-11-450(A). While no procedural framework was provided by the Act, the Supreme Court has ruled that "[a] claim of immunity under the Act requires a pretrial

determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263, 266 (2013), *citing State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). In *Duncan*, the Supreme Court described the immunity under the Act as a "bar to prosecution" that is raised by motion and must be decided prior to trial. *Duncan*, 709 S.E.2d at 665.

In the case at bar, Russell Carter takes that position that he should not have been arrested based upon application of the Protection of Persons and Property Act. He argues that the Act is an immunity from arrest, not an immunity from prosecution. Further, he maintains, in essence, that the immunity under the Act negated the existence of probable cause and thus rendered his arrest to be unlawful. (Tr. 313-315). Carter was critical that neither Deputy Gwinn nor Judge Yard applied the Act or the Castle Doctrine to determine that Carter should not be subject to arrest. (Tr. 504).

Carter's position, however, is at odds with Judge Hayes' rulings such as where he described the Castle Doctrine as an affirmative defense and stated: "It is not a bar to an arrest; it is a bar to prosecution." (Tr. 301). Later, he reiterated "[his] understanding that this is procedurally a prosecutorial immunity and not an arrest immunity." (Tr. 305). Carter's position is also at odds with case law from other jurisdictions that generally hold that an affirmative defense, such as self-defense or entrapment, does not negate probable cause. *See e.g., Yousefian v. City*

*of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015) ("[t]he mere existence of some evidence that could suggest self-defense does not negate probable cause"); *Humphrey v. Staszak*, 148 F.3d 719, 724 (7th Cir. 1998) ("[t]here is no legal basis for allowing an affirmative defense, which might have allowed the plaintiff to escape a conviction ... to interfere with the established § 1983 probable-cause-to-arrest analysis"). The United States District Court in *Gorman v. Bail*, 947 F.Supp.2d 509 (E.D. Pa. 2013), explained the rationale for this principle of law:

[T]he Court concludes that, as a matter of law, self-defense is not the type of affirmative defense that officers must consider or disclose in affidavits of probable cause. In reaching this conclusion, the Court notes that claims of self-defense to an assault necessarily admit involvement in a violent altercation. Thus, self-defense is inherently an issue that must be decided at trial, not by a police officer or a judge at a hearing to issue an arrest warrant.

947 F.Supp.2d at 523.

Thus, Judge Hayes was absolutely correct in characterizing the immunity afforded under the Protection of Persons and Property Act as a bar on prosecution rather than a bar on arrest. That immunity plays no role in negating the existence of probable cause. Instead, according to the State Supreme Court, the immunity is raised by the defendant by motion and is determined by the court in a pretrial hearing. *See, State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). The immunity is not to be determined prior to arrest by the arresting officer or prior to the issuance of a warrant by the magistrate judge. The lawfulness of an arrest turns

on the existence of probable cause, which is not negated by a claim of immunity under the Act nor any other affirmative defense.

Thus, while Judge Hayes correctly ruled that immunity as claimed by Carter under the Act is "prosecutorial immunity and not an arrest immunity," he failed to apply that ruling correctly in ruling on the Sheriff's directed verdict and JNOV motions. Judge Hayes should have ruled that the evidence available to Deputy Gwinn was sufficient to provide for probable cause to arrest Carter on the ABHAN charge, as also determined by the neutral and detached magistrate, and that the probable cause determination was unaffected by any assertion of an immunity from prosecution under the Protection of Persons and Property Act. The Court is, therefore, urged to reverse the denial of directed verdict and JNOV and to rule as a matter of law that probable cause existed for Carter's arrest, which thereby bars his malicious prosecution claim. *See, Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 665, n. 4 (Ct. App. 2005) ("a malicious prosecution action fails if the plaintiff cannot show malice and lack of probable cause").

**III. The trial court committed reversible error in refusing to charge the proposed jury instruction requested by Sheriff Bryant so as to explain the degree of proof that is required to establish probable cause.**

Sheriff Bryant contends that Judge Hayes committed reversible error in failing to give the following jury instruction:

I charge you that the pertinent question here was not whether the Plaintiff was guilty of a crime, but merely whether probable cause existed to arrest him. Evidence required to establish guilt is not necessary to authorize an arrest. In other words, a finding of probable cause may be based upon less evidence than would be necessary to support a conviction.

(Court Ex. 3). (R. \_\_\_\_).

In reviewing a jury charge for alleged error, it is clear that an appellate court must consider the charge in light of the evidence and issues presented at trial. *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30, 33 (2008). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341, 343 (Ct. App. 2000). "Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Fernanders v. Marks Construction of South Carolina, Inc.*, 330 S.C. 470, 473, 499 S.E.2d 509, 510 (Ct. App. 1998). In *Burns v. South Carolina Commission for Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994), this Court held:

If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.

448 S.E.2d at 591.

With respect to the Sheriff's request to charge number eight, Judge Hayes

did charge the concept contained in the first sentence of that charge. He charged the jury as follows: "[Y]ou should focus on whether the defendant had reasonable cause to believe that Mr. Carter committed the act about which the complaint was made, and not whether Mr. Carter was actually guilty or innocent. Whether the plaintiff, Mr. Carter, was or was not guilty of the charge set forth in the warrant is of no importance." (Tr. 581). But, Judge Hayes never charged the second portion of that requested charge which explains the degree of proof that is required to establish probable cause, which is a critical component of any probable cause analysis. The jury was never instructed that "evidence required to establish guilt is not necessary to authorize an arrest" nor that "a finding of probable cause may be based upon less evidence than would be necessary to support a conviction." (R. \_\_\_\_). That level of proof as set forth in the Sheriff's request to charge was never explained to the jury.

Without question, the requested charge states a sound principle of law. *See, Lapp v. South Carolina Department of Motor Vehicles*, 387 S.C. 500, 692 S.E.2d 565, 568 (Ct. App. 2010) ("[a] finding of probable cause may be based upon less evidence than would be necessary to support a conviction"). That sound principle of law is also clearly applicable as well as instrumental to this case where the entire case turns on the existence of probable cause to arrest. The jury could not make a proper and meaningful adjudication of the existence of probable cause without a full understanding of the standard of proof. This error is the equivalent of failing

to charge the "preponderance of the evidence" burden of proof in a civil trial or the "beyond a reasonable doubt" burden of proof in a criminal trial, both of which scenarios present reversible error. In sum, the jury in this case was denied any gauge by which to judge the legal sufficiency of the evidence on probable cause, and for that reason, a new trial absolute is warranted in the event the Court does not grant the Sheriff judgment as a matter of law.

**IV. The trial abused its discretion in allowing Russell Carter to claim as damages criminal defense attorney's fees in the amount of \$17,500 when the amount that was disclosed during discovery was \$5,000.**

Sheriff Bryant further contends that Judge Hayes abused his discretion in allowing Russell Carter to claim as damages criminal defense attorney's fees in the amount of \$17,500 when the amount that was disclosed during discovery was \$5,000. Counsel for the Sheriff first learned that Carter was claiming the \$17,500 amount during the trial. Before that evidence was presented, the Sheriff raised an objection to the \$17,500 and requested that evidence of attorney's fees in excess of \$5,000 be excluded. During the ensuing colloquy, Judge Hayes twice described the situation as "very awkward" but ultimately ruled that Carter could "testify to whatever he testifies to." (Tr. 115-116).

The Sheriff contends that Judge Hayes abused his discretion with this ruling. The record clearly reflects that in answers to interrogatories, Carter identified only

\$5,000 in criminal defense attorney's fees. Moreover, at the time of trial, Carter had only paid \$5,000 in such fees. However, it was then claimed that he still owed \$12,500 in unpaid fees to his criminal defense attorney, Alex Postic, who so happens to also be one of his attorneys in this civil case. The Sheriff's objection was two-fold. First, as indicated, Carter was claiming \$12,500 in criminal defense attorney's fees that were never identified as damages during discovery and thus was an unfair surprise at trial. With the additional \$12,500, the total specials claimed were more than three times what was disclosed prior to trial. Second, the Sheriff was precluded from challenging the legitimacy of that undisclosed "arrangement" because the person owed – Alex Postic – was not subject to examination because he was counsel of record who was also conducting the direct examination of Carter at trial. Judge Hayes described the scenario as "very awkward," but it was more than that – it was fundamentally unfair.


It is, therefore, submitted that the trial court abused its discretion in allowing this previously undisclosed damages evidence, and that ruling clearly prejudiced the Sheriff as the verdict amount readily reflects. For this additional reason, a new trial absolute should be granted.

## CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Bruce Bryant respectfully requests that this Court reverse the Orders of the trial court and remand for entry of a directed verdict and/or judgment as a matter of law in his favor. In the alternative, Sheriff Bryant respectfully requests that the Court remand for a new trial absolute.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

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\_\_\_\_\_  
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*Counsel for Appellant-Respondent  
Bruce Bryant*

Columbia, South Carolina

June 21, 2017

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
John C. Hayes, III, Circuit Court Judge

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Appellate Case No. 2016-002556  
Case No. 2014-CP-46-1307

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**RECEIVED**

JUN 26 2017

**SC Court of Appeals**

Russell Shane Carter, ..... Respondent-Appellant,

v.

Bruce Bryant, as Representative for the Office of the  
York County Sheriff, ..... Appellant-Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant-Respondent, does hereby certify that service of the **Initial Appellant's Brief of Appellant-Respondent** and **Appellant-Respondent's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 21st day of June 2017:

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Alex T. Postic, Esquire  
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The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Russell Shane Carter v. Bruce Bryant, as Representative for the  
Office of the York County Sheriff  
Appellate Case Number: 2016-002556  
Civil Action Number: 2014-CP-46-1307  
Claim Number: 58922  
Our File Number: 103.9486

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JUN 26 2017

SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Appellant's Brief of Appellant-Respondent** and **Appellant-Respondent's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb  
Enclosures

The Honorable Jenny Abbott Kitchings  
June 21, 2017  
Page Two

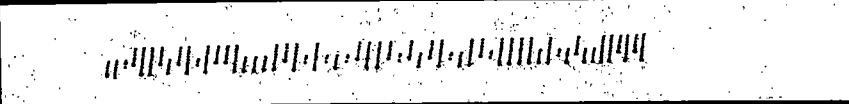
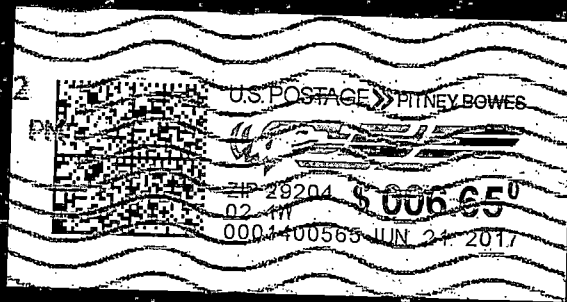
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cc: (w/ Enclosures)

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