THE STATE OF SOUTH CAROLINA
In The Court of Appeals



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

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

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

v.

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

# INITIAL REPLY BRIEF OF APPELLANT-RESPONDENT

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### 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. The Appellant-Respondent Bruce Bryant in his official capacity as Sheriff of York County moved for a directed verdict on the basis of Section 15-78-60(23) of the South Carolina Tort Claims Act which provides absolute sovereign immunity for the "institution or prosecution of any judicial or administrative proceeding." S.C. Code Ann. § 15-78-60(23).

At trial, in response to the directed verdict motion, Carter argued 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). Later, 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.

Carter further argued that "[j]udicial and administrative hearing is not the same as criminal proceeding." *See*, Plaintiff's Memorandum, p. 5.

Now, on appeal, Carter retains one previous argument but also asserts an additional new different argument, which was never raised to the court below and thus is not preserved to be argued on appeal.[1] Thus, Carter's position is now hopelessly inconsistent and meritless. Specifically, Carter now argues, as he did in response to the JNOV motion, that Section 15-78-60(23) has no applicability to the institution of a criminal proceeding. However, to make that argument, Carter ignores the use of the words "any judicial or administrative proceeding," and somehow suggests without any explanation (because there is none) that the institution of a "criminal proceeding" is not the institution of a "judicial proceeding." Yet, as his new argument, Carter -- again without any case citation -- argues that "provisions similar to [Section 15-78-60(23)] are generally viewed as protecting attorneys, such as prosecutors, who institute or prosecute cases." *See*, Carter's Respondent's Brief, p. 21. Although he just argued that Section 15-78-60(23) has no applicability to the institution of criminal cases, he then flip-flopped and argued that Section 15-78-60(23) provides for prosecutorial immunity which, of course, is within the criminal context. There is no language in Section 15-78-60(23), however, limiting its applicability to prosecutors alone and not law

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[1] *See, Pikaart v. A&A Taxi, Inc.*, 393 S.C. 312, 713 S.E.2d S.E.2d 267, 273 (2011) ("[a] matter may not be presented for the first time on appeal; rather, it must have been both raised to and ruled upon by the court below").

enforcement officers who institute criminal actions by seeking arrest warrants from magistrates or municipal judges.[2]

Interestingly, in support of his premise that Section 15-78-60(23) provides only for prosecutorial immunity, he cites to no case law from South Carolina nor case law from any other jurisdiction. He cites only to an ALR article which is entitled "Immunity of Prosecuting Officer From Action for Malicious Prosecution." 118 A.L.R. 1450 (2017). Despite Carter's misleading (if not false) characterization that the article "collect[s] cases under similar provisions," the ALR article, in fact, does not address immunity provisions such as Section 15-78-60(23). The Court is urged to search that ALR article for any such cases. The only annotated case citing language similar to Section 15-78-60(23) is the case of *Kemmerer v. County of Fresno*, 200 Cal. App. 4th 652, 58 Cal. Rptr. 3d 609 (5th Dist. 1988), and the annotation reads as follows:

> Government Code provision immunizing public employees from liability for injuries caused by institution or prosecution of any judicial or administrative proceeding within scope of employee employment is not restricted to legally trained personnel but applies to all employees of public entity, nor is it limited to suits for malicious prosecution.

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[2] The Supreme Court has explained that "[w]here the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Brown v. South Carolina Department of Health and Environmental Control*, 348 S.C. 507, 560 S.E.2d 410, 414 (2002). "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." *Id.* A court has "no right to impose another meaning" to the statute. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693, 695 (2012).

118 A.L.R. 1450 (2017). That annotation cites to Section 821.6 of the California Government Code which provides as follows: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Cal. Gov. Code § 821.6. This immunity provision applies not only to actions by prosecutors but to actions by law enforcement officers as well. *See e.g.*, *Allison v. County of Ventura*, 68 Cal. App. 3d 689, 175 Cal. Rptr. 542, 546 (2d Dist. 1977) ("the tort of malicious prosecution is barred by Government Code section 821.6 from being asserted against public employees"); *Via v. City of Fairfield*, 833 F.Supp.2d 1189, 1199 (E.D. Cal. 2011) ("section 821.6 primarily immunizes public employees from malicious prosecution claims").

Carter's reliance on South Carolina case law is even more flawed. Remarkably, Carter cites to *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013) as controlling authority. However, this Court in *Chakrabarti* includes no substantive discussion of Section 15-78-60(23) nor even remotely discusses the statute's interpretation, scope or purpose. That case involved a condemnation of a fire-damaged house, not an arrest of the plaintiff or a claim of a malicious prosecution based on an arrest without probable cause. This Court simply noted that Section 15-78-60(23) was one of three Tort Claims Act immunity provisions pled by the municipal defendant and then ruled that Section

15-78-60(12) includes a gross negligence exception that should have been read into the other immunity provisions asserted.

Carter also cited to the case of *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005), suggesting that this Court "could have used Section 15-78-60(23) as a reason to affirm as absolute immunity but did not do so." *See*, Carter's Respondent's Brief, p. 22. A reading of *Jackson* shows that this Court decided that case based on the existence of probable cause to arrest on an uncharged offense. There is no indication in the opinion whether the defendant even raised Section 15-78-60(23) as an immunity defense although footnote 5 does state: "We need not address the City's alternative basis for disposing of the malicious prosecution claim." 623 S.E.2d at 661, n.5. So, it is possible Section 15-78-60(23) immunity was raised but not reached. At any rate, it is silly to argue that *Jackson* is somehow authority for rejecting Section 15-78-60(23) as a defense in a malicious prosecution case. This Court's silence on an issue cannot be construed as suggesting that the issue does not exist or is not meritorious. As Chief Judge Alex Sanders so aptly stated, "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811, 817 (Ct. App. 1991). If Section 15-78-60(23) was not raised or argued, one should not expect it to be addressed in an appellate decision.

Finally, Carter is equally inept at his attempt to discredit 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). First, Carter erroneously suggests that Judge Joseph F. Anderson Jr. addressed Section 15-78-60(23) immunity in the context of federal Section 1983 claims. While Judge Anderson earlier in his opinion addressed the Section 1983 claims, he was addressing state law tort claims when he relied on Section 15-78-60(23). Next, Carter tries to discredit Judge Anderson's ruling because he adopted a magistrate judge's recommendation but did not include the magistrate judge's analysis. That is incorrect as well. Judge Anderson explicitly adopted the magistrate judge's recommendation and "fully incorporated her discussion thereof into this order." 929 F.Supp.2d at 567, n. 10. The magistrate judge's analysis, as incorporated by Judge Anderson, reads as follows:

> As to the first element of Plaintiff's malicious prosecution claim, the City contends that it is entitled to summary judgment because it is immune from suit relating to "the institution or prosecution of a judicial proceeding" under the SCTCA, S.C. Code Ann. § 15-78-60(23). City's Mem. 37, ECF No. 202. Plaintiff argues that South Carolina courts have found that the SCTCA does not bar suits involving false arrest and that this same analysis is equally applicable to Plaintiff's malicious prosecution claim against the City. Pl.'s Opp'n 11, ECF No. 212 (citing *Gist v. Berkeley Cnty. Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (S.C. 1999)). In *Gist,* the court was considering the sheriff department's argument that

> section (3) of the SCTCA, S.C. Code Ann. § 15-78-60(3), provided it immunity from plaintiff's claim for false arrest. That section excepts liability for "loss resulting from ... execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process[.]" 521 S.E.2d at 166-67. The Court of Appeals held the exception did not apply because the false arrest claim concerned the sheriff department's allegedly "securing the [arrest] warrant without probable cause[,]" rather than from executing, enforcing, or implementing the arrest warrant that had been issued by a magistrate. *Id.*
>
> That analysis is inapposite here. For purposes of its Motion, the City admits that it instituted and prosecuted a claim against Plaintiff. City's Mem. 38, ECF No. 202; *see also* City's Answer to Am. Compl. ¶ 20, ECF No. 37. Plaintiff's cause of action for malicious prosecution plainly falls within this express exception. Without establishing that the City "instituted or prosecuted" a claim against Plaintiff, Plaintiff could not establish the first element of the malicious prosecution claim. Accordingly, the undersigned recommends that City be *granted* summary judgment on Plaintiff's malicious prosecution claim.

*McCoy v. City of Columbia*, 2013 WL 936607, *26-*27 (D.S.C. 2013) (Report and Recommendation of Magistrate Judge Kaymani D. West). (Emphasis in original). And finally, Carter attempts to relegate Judge Anderson's ruling on Section 15-78-60(23) to mere dictum because it is "not necessary to the disposition." *See*, Carter's Respondent's Brief, p. 23. Judge Anderson's ruling, however, is clearly not dictum but rather an alternative ruling in favor of the defendants. Indeed, according to the United States Supreme Court, it is well settled that "where a decision rests on two or more grounds, none can be relegated to the category of

obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

In sum, Carter has failed to demonstrate that Section 15-78-60(23) does not provide absolute immunity with respect to a malicious prosecution claim. Clearly, Sheriff Bryant is being sued for the institution of a judicial proceeding, which brings the malicious prosecution claim within the scope of Section 15-78-60(23). The institution of a criminal proceeding -- such as through the procurement of an arrest warrant -- is entitled to absolute sovereign immunity under the Tort Claims Act, and frankly, it makes sense that the General Assembly would provide law enforcement with such immunity for malicious prosecution claims and not false arrest claims. A false arrest claim, unlike a malicious prosecution claim, involves a warrantless arrest. But in contrast, a malicious prosecution claim involves an arrest pursuant to a facially valid warrant, which necessarily includes the procedural safeguard that probable cause was determined by a neutral and detached magistrate rather than the law enforcement officer, thereby justifying state law tort immunity in that context.[3]

Consequently, Judge Hayes erred in denying Sheriff Bryant absolute sovereign immunity for the institution and prosecution of a criminal proceeding as

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[3] In *Dorn v. Town of Prosperity*, 375 Fed. Appx. 284 (4th Cir. 2010), the Fourth Circuit addressed the differences between causes of action for false arrest and malicious prosecution under South Carolina law. The Fourth Circuit explained that "[t]he distinction between malicious prosecution and false arrest ... is whether the arrest was made pursuant to a warrant." The Court further explained that an arrest pursuant to a facially valid warrant, even if determined to be without probable cause, does not state a claim for false arrest but rather a claim for malicious prosecution.

required by the literal language of Section 15-78-60(23). There is absolutely no basis for reading criminal proceedings as beyond the scope of Section 15-78-60(23). 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.

Sheriff Bryant has also argued that he 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. In response, Carter provides this Court only with a conclusory statement that probable cause is an issue for the jury and there was sufficient evidence for the jury to conclude that probable cause was lacking. Carter surprisingly cites to no specific evidence in the record to support his position that the warrant for his arrest was not supported by probable cause.

It is particularly telling that Carter entirely disregards the focus of Sheriff Bryant's argument. In his opening brief, the Sheriff explained that the crux of Carter's case focuses on the application of the Protection of Persons and Property Act, but the Act provides for immunity from prosecution and not immunity from arrest -- a premise that Judge Hayes correctly recognized but then did not apply in his directed verdict and JNOV rulings. Stated in a different way, the Sheriff

maintains that the immunity under the Act does not and cannot negate the existence of probable cause. Carter never refutes (or even discusses) this argument.

Strangely, instead of addressing the issue actually raised by Sheriff Bryant, Carter spends much of his argument addressing an element of a malicious prosecution claim that the Sheriff *did not even raise or discuss on appeal.* Carter cites to the case of *McKenney v. Jack Eckerd Co.*, 304 S.C. 21, 402 S.E.2d 887 (1991), and includes several pinpoint cites to the record to argue that the criminal charge was nolle prossed under circumstances that implied or were consistent with innocence. The Sheriff did not raise that issue as a ground for his appeal.

At any rate, whether by oversight or as an outright attempt at obfuscation, Carter does not address the critical issue raised on appeal -- whether the immunity available under the Protection of Persons and Property Act should even be considered in an assessment of probable cause. The Sheriff submits 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.

## 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.

As with the probable cause ground for appeal, as discussed immediately above, Carter also changes the issue raised with respect to the jury charge. In his opening brief, Sheriff Bryant argued that Judge Hayes committed reversible error in failing to give the requested jury instruction which states, in part: "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." (Tr. 523-524; Court Ex. 3). (R. ___).

However, in his response brief, Carter spends his entire argument on the jury charge issue by justifying why Judge Hayes was correct in not charging the jury that probable cause existing for an uncharged offense will support a lawful arrest, specifically the holding from the case of *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005). That, however, is absolutely *not* the issue that was raised on appeal by the Sheriff. That is not what was included in the Sheriff's request to charge number eight. (Tr. 523-524).

It is absolutely bizarre and quite telling that once again Carter refuses to address the issue actually raised and rather for some reason addresses another issue entirely. Likely this is because Carter *cannot* justify the trial court's failure to charge the degree of proof that is required to establish probable cause and

recognizes that that failure is reversible error. As Sheriff Bryant points out in his opening brief, 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. 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. To reiterate, 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.

## CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Bruce Bryant respectfully renews his 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,

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November 29, 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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**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 Reply 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 29th day of Novmeber 2017:

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November 29, 2017

The Honorable Jenny Abbott Kitchings
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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



Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Reply 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

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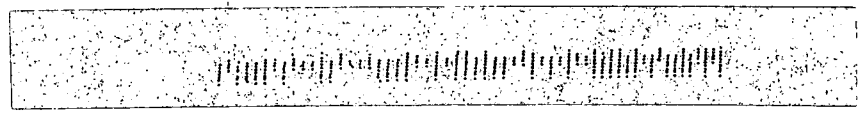

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