THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Case No. 2012-CP-32-0342
Appellate Case No. 2015-001153

Kay F. Paschal, ... Respondent-Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, ... Appellant-Respondent.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant-Respondent Leon Lott has petitioned this Court for a rehearing of the recent decision in *Paschal v. Lott.*, Op. No. 2018-UP-080 (S.C. Ct. App. filed February 7, 2018). Sheriff Lott respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

This Court issued an unpublished opinion pursuant to Rule 220(b), SCACR, although the Court does not specify which provision of Rule 220(b)(1) that it found applicable to the issues raised on appeal. More importantly, the string citations included as the supporting authorities for the unpublished opinion are not dispositive of the issues on appeal raised by Sheriff Lott and fail to provide the litigants with the bases for the Court's decision to affirm the court below. With all due respect, the issuance of a memorandum opinion has not provided Sheriff Lott with meaningful appellate review as warranted by this important case involving a multi-day jury trial resulting in a verdict of $1.61 million and involving issues of novel statutory interpretation and significant public importance.

II.

As his first issue on appeal, Sheriff Lott raised the following: "Did the trial court err in its interpretation and application of Section 22-5-110, which resulted in the denial of directed verdict and JNOV motions and also caused Sheriff Lott to receive an unfair trial?" The Court overlooked this issue. There is no discussion of this issue in the memorandum opinion. At most, the Court addressed whether Lt. Heidi Scott's "compliance" with Section 22-5-110 properly presented a jury question, which it did not.

The Court, however, never addresses whether Circuit Court Judge William Keesley properly interpreted Section 22-5-110 in the first place. Sheriff Lott

contends that he did not, and that this issue of law permeated the trial and resulted in an incorrect, unjust and unfair verdict against Sheriff Lott. This Court, however, never addresses in its memorandum opinion whether Sheriff Lott received a fair trial and, more particularly, whether Judge Keesley erred in denying his motion for a new trial absolute on this basis.

As the record makes abundantly clear, the Respondent-Appellant Kay Paschal made Section 22-5-110 the center piece or focus of her case. She argued that that statute prohibited Lt. Heidi Scott from obtaining the two arrest warrants from Magistrate Scott Whittle in Lexington County. Further, she argued that Magistrate Whittle was required to issue courtesy summonses rather than arrest warrants. Paschal is incorrect on both counts.

Paschal relies on Section 22-5-110(B)(1) which states: "An arrest warrant may not be issued for the arrest of a person unless sought by a law enforcement officer acting in their official capacity." S.C. Code Ann. § 22-5-110(B)(1). In addition, she relies on Section 22-5-110(B)(2) which states: "If an arrest warrant is sought by someone other than a law enforcement officer, the court must issue a courtesy summons." S.C. Code Ann. § 22-5-110(B)(2).

To his credit, Judge Keesley candidly admits that he struggled with the proper interpretation and application of Section 22-5-110 throughout the trial, and the record bears that out. At the directed verdict stage, Judge Keesley stated his belief that Section 22-5-110 had not been complied with, when taking the evidence in a light

most favorable to Paschal. (R. 767). He indicated that he could not rule that the arrest warrants were properly issued "at this stage." (R. 768). Later, when the issue was renewed on the directed verdict motion made at the close of the evidence, Judge Keesley simply denied the motion and erroneously concluded that "they're jury issues." (R. 862, 869). Thereafter, he charged the jury with the two subsections mentioned above but gave no explanation of their meaning or application, leaving that to the whim of the jury. (R. 937).

In ruling on post-trial motions, Judge Keesley described his "angst" in the interpretation and application of Section 22-5-110:

> As to whether the court applied the law properly, that has been the cause of some angst in evaluating the post-trial motions. Some of this relates to the proper interpretation of S.C. Code Ann. § 22-5-110 and its applicability to the evaluation of the actions of the Defendant's deputy.

(R. 7). Judge Keesley noted that the parties' differing interpretations of Section 22-5-110 were "strenuously argued during trial." (R. 7). He further explained that Sheriff Lott "argues that § 22-5-110 is not jurisdictional and applies to magistrates issuing warrants, not to the law enforcement officers seeking them." (R. 7). Nonetheless, Judge Keesley concluded: "Viewing the totality of the circumstances, the court finds that sufficient evidence was presented to enable the jury to determine that the conduct of the Defendant in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the procedure provided in S.C. Code Ann. § 22-5-110." (R. 7).

The error committed by the trial court in how it handled the legal issues surrounding Section 22-5-110 -- including allowing the jury to determine that Lt. Scott violated those procedures -- is reversible error that warrants, at a minimum, a new trial absolute, that is, if Sheriff Lott is not entitled to judgment as a matter of law for the reasons discussed below.

In its memorandum opinion, the Court provides no analysis of Section 22-5-110 nor any citations to authorities addressing the statute. The Court only cites to the statute itself. No explanation is given to its meaning and impact on this litigation. In effect, this Court overlooked or misapprehended the meaning and impact of Section 22-5-110 and the law on the issuance of a courtesy summons. The South Carolina Bench Book for Summary Court Judges describes a "courtesy summons" as follows:

> A private citizen may swear out an affidavit concerning criminal charges against another without the assistance of law enforcement. When a private citizen serves as the affiant for a criminal offense at the summary court level, a courtesy summons should be issued, in lieu of an arrest warrant, pursuant to S.C. Code Section 22-5-115. (See Memorandum in Benchbook, dated July 7, 2008). The courtesy summons is criminal process and must be served on the defendant personally by law enforcement.

See, South Carolina Bench Book for Summary Court Judges. The memorandum referenced therein includes a list of items under the heading "Courtesy Summons Procedure." The first three items are as follows:

> 1. Courtesy summons (SCCA 519), authorized by Code § 22-5-115, is issued in lieu of arrest warrant when affiant is not a law enforcement officer

investigating the case. If law enforcement officer serves as affiant, arrest warrant must be used.

2. Only offenses within the jurisdiction of magistrate and municipal court (currently $500, 30 days, or both) may be written on a courtesy summons. General Sessions charges must be written on an arrest warrant.

3. Affiant must provide sworn statement establishing probable cause that the alleged crime was committed by the defendant. Summary court judge undergoes same analysis as if determining whether to issue an arrest warrant.

See, South Carolina Bench Book for Summary Court Judges, Memorandum Re: Courtesy Summons, dated July 7, 2008.

These very same points have been made by the South Carolina Attorney General in opinions issued on the use of a courtesy summons. For instance, in an opinion dated September 25, 2012, the Attorney General cited the relevant sections of Section 22-5-110 and wrote as follows:

> A courtesy summons is issued by a summary court judge based upon the sworn statement of an affiant "who is not a law enforcement officer" or is issued to "nonlaw enforcement personnel." *See Ops. S.C. Atty. Gen.*, May 2, 2012; May 25, 2011; December 16, 2008. We have previously stated that a courtesy summons is to be utilized where an individual is charged with a misdemeanor offense and the affiant is nonlaw enforcement personnel. *See Op. S.C. Atty. Gen.*, August 7, 2008 ["... a courtesy summons must be used for summary level crimes involving victims charging a misdemeanor offense when the affiant is non-law enforcement personnel"]. In an opinion of this Office dated September 25, 2008, we concluded that a school

> resource officer is a law enforcement officer and would not be considered "nonlaw enforcement personnel" for purposes of §§ 22-5-110 or 22-5-115 regarding the issuance of a courtesy summons. *See Op. Atty. Gen.*, August 18, 2008 ["...a courtesy summons would be applicable in shoplifting and fraudulent check cases involving misdemeanor offenses where the warrant is signed by nonlaw enforcement personnel..."). Therefore, consistent with such, ***a courtesy summons is to be utilized where an individual is charged with a misdemeanor offense and the affiant is nonlaw enforcement personnel.***

See, Op. Atty. Gen., September 25, 2012, 2012 WL 4711427. (Emphasis added).

To repeat, both the South Carolina Bench Book for Summary Court Judges and the South Carolina Attorney General have stated that a courtesy summons is to be used only where (1) the affiant is not a law enforcement personnel, and (2) where the individual is charged with a misdemeanor offense. Importantly, neither of those elements is present here. The affiant was Lt. Heidi Scott who was the investigating officer. In addition, both warrants were for felonies. The first warrant was for a forgery of $10,000 or more, which pursuant to Section 16-13-10(B)(1), is a felony. The second warrant was for breach of trust of over $2,000 and under $10,000, which pursuant to Section 16-13-260, is a felony. These were not magistrate-level offenses, and as a result, Magistrate Whittle acted consistently with South Carolina law in issuing arrest warrants rather than courtesy summonses.

Judge Keesley admittedly struggled with the language in Section 22-5-110(B)(1) which states: "An arrest warrant may not be issued for the arrest of a

person unless sought by a law enforcement officer acting in their official capacity." S.C. Code Ann. § 22-5-110(B)(1). Paschal focused on the "in their official capacity" language to argue that Lt. Scott had no authority to seek an arrest warrant in Lexington County, and as a result, she was not acting "in her official capacity." Instead, Paschal insists Lt. Scott was acting as a private citizen, and therefore, a law enforcement officer was not the affiant and a courtesy summons should have been issued instead of the arrest warrants.

There are several major flaws in that reasoning, none of which was addressed by this Court in its memorandum opinion. Thus, it appears that these points have been overlooked or misapprehended. First, even if Lt. Scott sought the warrant as a non-law enforcement officer, a courtesy summons could not have been used by Magistrate Whittle because both offenses are felonies and non-magistrate-level offenses. Thus, the capacity of the affiant is immaterial to the discussion. A warrant, rather than a courtesy summons, had to be used. Second, if Lt. Scott was acting as a private citizen in seeking the arrest warrants and was not acting in her official capacity, then Sheriff Lott cannot be held liable under the Tort Claims Act.[1] Therefore, Paschal's position is inconsistent with her claim that Sheriff Lott is liable under the Tort Claims Act for the conduct of Lt. Scott in seeking her arrest. And third, South Carolina law recognizes that a law enforcement officer may be the

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[1] In *Flateau v. Harrison*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003), this Court ruled that the Tort Claims Act "is intended to cover those actions committed by an employee within the scope of the employee's official duty." 584 S.E.2d at 416.

affiant on a warrant to be executed in another jurisdiction. In *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411 (1978), the South Carolina Supreme Court addressed the validity of a search warrant that was sought by a municipal law enforcement officer for the search of premises that were located outside of his jurisdiction. The Supreme Court ruled "that the fact the place to be searched was outside of Officer Parsons' jurisdiction did not, in and of itself, render the search warrant invalid." 242 S.E.2d at 413. This principle of law from *Hammond* was later applied by the federal district court in the case of *United States v. Hardy*, 2006 WL 208865 (D.S.C. 2006), wherein Judge Henry Herlong upheld the validity of a search warrant alleged to have been obtained by officers from the Cherokee County Sheriff's Office for execution on premises located in Spartanburg County. Judge Herlong wrote:

> [U]nder South Carolina law "the fact that the place to be searched" is outside of the warrant applicant's jurisdiction does not "in and of itself, render the search warrant invalid." *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411, 413 (S.C. 1978). As such, even if an officer from Cherokee County signed the search warrant, the warrant is not invalid.

2006 WL 208865, *2. Although *Hammond* and *Hardy* both involve search warrants, there is no reason that an arrest warrant should be treated any differently. In other words, if a law enforcement officer may be the affiant on a search warrant to be executed in another jurisdiction, the same should be true for an arrest warrant as well. It is noted that neither *Hammond* nor *Hardy* was even cited, let alone refuted, in this Court's memorandum opinion.

In short, Lt. Scott was acting in her official capacity as a law enforcement officer when she signed the arrest warrants as the affiant. Importantly, the arrest warrants were not served by Lt. Scott or any Richland County deputy. Instead, they were served by a Lexington County deputy after Paschal turned herself in at the Lexington County Detention Center. The arrest itself therefore was effected by a law enforcement officer from Lexington County, which renders the arrest valid and consistent with applicable South Carolina law.

To summarize, reversible error was committed by Judge Keesley in his handling of the legal issues pertaining to Section 22-5-110. As Sheriff Lott argued, Section 22-5-110 is not a jurisdictional statute, and it was not up to Lt. Scott to determine whether an arrest warrant or a courtesy summons should have been issued. The arrest warrants were not invalid per the procedure that was followed by Lt. Scott. Moreover, the proper application of Section 22-5-110, as discussed herein, demonstrates that Judge Whittle did not err in issuing the arrest warrants. The warrants were sought by a law enforcement officer investigating the case and were for two felony offenses. Accordingly, a courtesy summons could not have been utilized in lieu of an arrest warrant. Both Lt. Scott and Magistrate Whittle complied with proper procedure under Section 22-5-110. Judge Keesley erred in failing to so rule and erred even more so in allowing the jury to make that legal determination. At the very least, a new trial absolute is warranted on this basis. The Court is respectfully asked on rehearing to address the proper interpretation of Section 22-5-

110 and assess whether Sheriff Lott was entitled to a directed verdict, or at a minimum, to a new trial based on the errors committed.

III.

The Court also overlooked and misapprehended that Judge Keesley erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the malicious prosecution claim where Kay Pascal did not show a lack of probable cause for the arrest warrants. In its memorandum opinion, the Court includes a string citation but fails to address the evidence presented on the issue of probable cause and whether that was sufficient to withstand the directed verdict and JNOV motions.

Paschal alleged a cause of action for malicious prosecution arising from her arrest on the forgery and breach of trust charges. The record reflects that Lt. Scott had probable cause for both charges.

The offense of forgery "consists of the fraudulent making or altering of a writing by one intending to defraud, prejudice, or damage another person." *State v. Lee-Grigg*, 374 S.C. 388, 649 S.E.2d 41, 47 (Ct. App. 2007). "It has been defined as a false making of an instrument, on its face purporting to be good and valid, with a design to defraud, prejudice, or damage another." *Id.* "The crime of forgery involves: (1) a false making or material alteration of some written instrument; (2) that is the apparent foundation of some legal liability; and (3) that is uttered or published with the intent to defraud or prejudice another." 649 S.E.2d at 48.

The record contains sufficient evidence that would lead an objectively

reasonable law enforcement officer to believe that probable cause existed for the forgery offense. As Lt. Scott explained during her testimony, she obtained in her investigation a Power of Attorney for David Wallace, which was allegedly executed on May 20, 2002, but then not recorded until almost eight years later on April 23, 2010, which was three days after Wallace suffered a debilitating stroke. That version of the Power of Attorney appointed Kay Paschal as the attorney and Elizabeth G. Wallace as the "standby attorney." Lt. Scott's investigation also turned up the first two pages of another version of the Power of Attorney for David Wallace. That version is nearly identical except that it appoints Elizabeth G. Wallace as the attorney and Kay Paschal as the "standby attorney." Both versions include the date of "05/17/02" at the bottom right-hand corner of each page next to the initials "DW." The "DW" initials, however, appear different on the first two pages of the two versions. (R. 311-320, 952-965).

The two versions of the Power of Attorney were examined by two forensic documents examiners. The record includes reports from Marvin H. Dawson, Jr., a private examiner, and from Gaile Heath, who was employed by the South Carolina Law Enforcement Division (SLED). The Dawson report makes several key findings as follows:[2]

(1) Dawson found a different paper stock was used for page 1 of each version.

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[2] It is important to note that the Power of Attorney was prepared front and back. Therefore, the twelve sides of the document made up a six-page document.

(2) Page 1 of the recorded Power of Attorney showing Kay Paschal as attorney was a different paper stock than pages 2-6.

(3) Page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney was the same paper stock as pages 2-6.

(4) There were font defects on page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney and pages 2-6, but no font defects on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney.

(5) The "DW" initials on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney were not made by David Wallace.

(6) The staple holes on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney were fewer than the staple holes on pages 2-6. The staple holes on page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney matched the staple holes on pages 2-6.

(R. 1027-1031). The SLED report made similar findings, except the SLED examiner stated only that "there was a strong probability that David Wallace did not write the "DW" initials appearing on [page 1 of the recorded Power of Attorney showing Kay Paschal as attorney]," as opposed to making the definitive finding like Dawson that Wallace did not write the initials. (R. 1035). Therefore, based on those reports, Lt. Scott had substantial evidence that pages 1-2 of the recorded Power of Attorney had been altered, and there was circumstantial evidence that Kay Paschal had committed that offense because she had prepared the documents and the one change was to grant her the power of attorney in place of Elizabeth Wallace. In addition, the Power of Attorney was not recorded until almost eight

years after it was executed but three days after David Wallace had suffered a debilitating stroke.

That Power of Attorney was then used on June 18, 2010, to purchase a Toyota Sienna handicapped van from Carolina Mobility Sales located in West Columbia, South Carolina. A 2002 Cadillac Deville owned by David Wallace was traded in as part of that transaction. After accounting for the $5,000 allowance from the trade-in, the purchase price was $58,317.51. Paschal made payment in that amount using a check from David Wallace's account and signed his name to the check. The van was titled in both the names of David Wallace and Kay Paschal, whereby she was able to obtain a right of title to that vehicle. Prior to swearing the arrest warrants, Lt. Scott had also spoken with Tim Peterson, the employee with Carolina Mobility Sales that handled the sale of the van. She initially spoke with him by phone and later memorialized that conversation with a written statement. (R. 212-213, 996-997). Peterson informed Lt. Scott that David Wallace was not with Kay Paschal when the van was purchased, and in fact, no one else was present during the transaction. Peterson also advised that Paschal signed Wallace's name to the paperwork and presented a Power of Attorney to him. (R. 463-465, 996). Based upon these facts as gathered as part of her investigation, Lt. Scott had probable cause to support the forgery charge.

Probable cause also exists for the breach of trust charge. S.C. Code Ann. § 16-13-260 provides that "[a] person who falsely and deceitfully obtains or gets into

his hands or possession any money, goods, chattels, jewels, or other things of another person by color and means of any false token or counterfeit letter made in another person's name is guilty of a felony ... if the value of the property is more than two thousand dollars but less than ten thousand dollars." S.C. Code Ann. § 16-13-260(2). The same facts as discussed above provided probable cause for this charge as well. The evidence known to Lt. Scott was that Kay Paschal used a false or fraudulent Power of Attorney to obtain a share of the title to the Toyota Sienna van which was inclusive of the $5,000 received as a trade-in for David Wallace's Cadillac.

In sum, both the forgery and the breach of trust charges were based upon the transaction that resulted from Kay Paschal using the forged Power of Attorney to acquire the Toyota Sienna van and to gain an interest in that van. An objectively reasonable law enforcement officer knowing that information would believe that probable cause existed for these crimes under South Carolina law. 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 exists as a matter of law for the forgery and breach of trust offenses which this Court overlooked or misapprehended in issuing its memorandum opinion.

This conclusion is further supported by the fact that Lt. Scott consulted with solicitors in both Richland County and Lexington County.[3] Joanna McDuffie, a Fifth Circuit Assistant Solicitor, testified that she had reviewed the investigation conducted by Lt. Scott and that she had offered Lt. Scott her legal opinion that "there was probable cause to proceed in pursuing that charge and told her that, in my opinion, there were multiple charges that could be made, different charges. And I probably listed off four or six that I believed that she had probable cause to pursue." (R. 808-809). At McDuffie's suggestion, Lt. Scott also consulted with Dayton Riddle, an Eleventh Circuit Deputy Solicitor. Riddle did not testify at trial, but a transcript of his telephone conversation with Lt. Scott was admitted into evidence. In that telephone conversation, Riddle discussed the evidence with Lt. Scott and offered suggestions as to the charges that she could pursue. (R. 1039-1058).

In short, this Court overlooked or misapprehended the failure by Paschal to show an absence of probable cause for one or both charges. The Court includes no discussion of the evidence on the issue of probable cause and what an objectively

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[3] In *McKinney v. Richland County Sheriff's Dept.*, 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. See also, Melton v. Williams*, 281 S.C. 182, 314 S.E.2d 612, 615 (Ct. App. 1984) ("Good faith reliance upon advice of fully informed counsel may establish probable cause").

reasonable police officer could conclude about the evidence discovered.[4] The Court further erred in affirming the denial of Sheriff Lott's directed verdict and JNOV motions and in deciding that the lack of probable cause element of the malicious prosecution claim was a jury question.

IV.

The Court also overlooked and misapprehended that Judge Keesley erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the malicious prosecution claim where Kay Pascal did not prove a termination of the judicial proceedings in plaintiff's favor that implied or were consistent with her innocence. In *McKenney v. Jack Eckerd Company,* 304 S.C. 21, 402 S.E.2d 887 (1991), the South Carolina Supreme Court adopted the majority rule that an action for malicious prosecution may be maintained only when the accused establishes "that the charges were dismissed for reasons which imply or are consistent with innocence." 402 S.E.2d at 888.

In the case at bar, this Court overlooked or failed to consider that Paschal did not prove that the dismissal of the two arrest warrants at the preliminary hearing was based upon her innocence. The Court's string citation does not even mention or acknowledge that a plaintiff is required to prove that the reasons for the

[4] The Court also overlooked and failed to consider or discuss the decision of the United States District Court, as affirmed by the Fourth Circuit, and its impact on the issue of probable cause. *See*, *Paschal v. Lott*, 2017 WL 1828995 (4th Cir. 2017), and *Paschal v. Lott*, 2016 WL 5402861 (D.S.C. 2016).

dismissal imply or are consistent with innocence.

In this case, Paschal has only shown that the two warrants were dismissed by Magistrate Gary Morgan following a preliminary hearing, but no evidence was presented as to the basis for that decision and even Judge Keesley admitted that he had no idea what the basis was for that ruling. As the record clearly reflects, no order was entered into evidence as to the ruling made by Magistrate Morgan. No portion of the transcript from the preliminary hearing setting forth Magistrate Morgan's oral rulings was placed in evidence. Paschal had the burden of proof on this issue and failed to satisfy it.

Rule 2(d), SCRCrimP, provides that "[a]fter concluding the [preliminary] hearing the magistrate shall transmit forthwith to the Clerk of the Court his findings together with all papers in the hearing." Rule 2(d), SCRCrimP. Consequently, a magistrate is required to issue his written ruling following the preliminary hearing. That written ruling is the appropriate evidence to submit to show the magistrate's decision and, in this case, the basis for the dismissal of the charges. Paschal never introduced any such evidence.

Instead, Paschal's counsel was allowed to question witnesses to confirm that the charges had been dismissed at the preliminary hearing, but he never elicited testimony that provided the magistrate's basis for the dismissal. Nor could he do so. No witness is competent to testify as to the legal basis of the magistrate's

ruling.[5] Instead, Paschal argued at the directed verdict stage that a finding of no probable cause was the only basis for a dismissal at a preliminary hearing. Sheriff Lott disputes that. In fact, Rule 2(a), SCRCrimP, does not limit a preliminary hearing to issues of probable cause, and in fact, a magistrate may dismiss for lack of jurisdiction at that stage or any stage of the proceedings. *See*, *State v. Guthrie*, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002).

In a pre-trial colloquy with Judge Keesley, counsel addressed whether the transcript of the preliminary hearing would be admitted into evidence. Counsel for Sheriff Lott indicated that he would be objecting to "the introduction of any portion of that transcript other the very last portion where Mr. Moore, Ms. Paschal's attorney at that hearing, makes his motion for a dismissal initially for lack of probable cause and the judge rules on that, and then Mr. Moore argues another ground and then the judge ultimately dismisses it without really saying why he has dismissed it." (R. 84). However, despite an agreement to introduce the magistrate's oral rulings, Paschal never introduced that portion of the transcript.

Later, during the discussion of the directed verdict motions, Judge Keesley asked Paschal's counsel, "what did [the magistrate] say in the transcript?" Paschal's counsel responded: "He basically listened to the argument and listened to

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[5] This Court has held that "[a]n oral order of the court is not final and binding until reduced to writing, signed by the judge, and delivered for recordation." *Brailsford v. Brailsford*, 380 S.C. 443, 669 S.E.2d 342, 346 (Ct. App. 2008).

everything, and in the end, he basically said, I'm dismissing it. The words were, I'm dismissing it." (R. 740). That recitation is not entirely consistent with what was offered by Sheriff Lott's counsel, but it is an acknowledgement from Paschal's counsel that there is no definitive evidence in the record as to the basis for the magistrate's ruling.

Nonetheless, most telling are Judge Keesley's comments during the discussion of directed verdict motions at the close of all evidence. When Paschal's counsel again argued that the charges were "dismissed by virtue of a finding of no probable cause," Judge Keesley responded: "Well, that's your statement." (R. 856). Judge Keesley then elaborated as follows:

> And I've heard you tell me that the only way the magistrate can dismiss it under Rule 2 is for lack of probable cause. And I've heard Mr. Frawley tell me that if you read the transcript of that proceeding, you'll see that when the motion was made to dismiss it for lack of probable cause, it was denied. And I've heard him tell me that you made a motion then to dismiss for jurisdiction -- lack of jurisdiction and it was -- and he -- and the judge said, I'm going to dismiss it. *There is no clear indication to me as to what ground the judge dismissed it on.* And if the judge was wrong, he was wrong. *But that doesn't change the fact that he may have dismissed it for some other reason in his mind.* Whether he had the authority to dismiss it on jurisdiction, which I -- again, that will take a lot of research -- is neither here nor there.

(R. 856-857). (Emphasis added). As the highlighted lines demonstrate, Judge Keesley acknowledged that given the record at the close of all evidence he did not

know on what basis the magistrate dismissed the charges. If Judge Keesley did not have knowledge of the magistrate's ruling, neither did the jury. It is that simple. Moreover, the record bears that out. Paschal never presented any evidence that the magistrate made a finding of no probable cause in dismissing the warrants. Without any evidence as to the magistrate's ruling, Paschal has not satisfied her burden of proof to show that the charges were dismissed for reasons which imply or are consistent with innocence. On rehearing, this Court is respectfully requested to consider this portion of the record and Judge Keesley's candid comments regarding the absence of such evidence. The Court is asked to specifically address whether Pascal met her burden of proof to show that the charges were dismissed for reasons which imply or are consistent with innocence.

V.

The Court also overlooked and misapprehended that Judge Keesley erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the abuse of process claim where the evidence does not support either element of that tort. The Court's memorandum opinion does not address any evidence in the record that supports either element.

Quite simply, there is no evidence in the record that would support a finding that Sheriff Lott or his deputies had an ulterior purpose by seeking the issuance of the two arrest warrants. There is no evidence of any collateral advantage -- such as the payment of money or surrender of property -- that Sheriff Lott sought by use of

the arrest warrants. To the extent that Paschal argues that the collateral advantage is tied to the Probate Court proceedings involving Paschal and the Wallace children, Judge Keesley has rejected that claim and, as an unappealed ruling, it is the law of the case. In his post-trial order, Judge Keesley stated as follows:

> The court does have serious concerns with the repeated focus by the Plaintiff on aspects that dealt with missing Probate Court hearings and her loss of a claim related to the estate. In the court's view, these claims were largely unproven to the extent that there was not sufficient competent evidence on that subject for the jury to consider them as being proximately caused by any wrongdoing on the part of the Defendant.

(R. 5).

The Supreme Court has explained that the abuse of process is "a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693, 694 (1967). There is, however, no evidence of any "negotiation" between Paschal and the sheriff deputies. The Sheriff's Department received a report of potential criminal activity, conducted an investigation and sought arrest warrants after consultation with two different solicitor's offices. There was no extortion; there was no attempt to gain any type of collateral advantage. Instead, the facts of this case are in line with "the normal police investigative procedure" which this Court was careful to exempt from the tort of abuse of process in *Swicegood v. Lott*, 379 S.C. 346, 665

S.E.2d 211, 215 (Ct. App. 2008). In its memorandum opinion, however, this Court did not address this issue or cite to that portion of the *Swicegood* opinion.

In addition, the evidence in the record is undisputed that the arrest warrants issued by Magistrate Whittle were carried to their authorized conclusion. The warrants were served on Paschal by a Lexington County deputy. She thereafter requested and received a preliminary hearing at which she was represented by counsel. The two charges were then dismissed by the magistrate. Consequently, the process, i.e., the arrest warrants, were carried to their authorized conclusion, and hence, under the authority of *Guider*, *Rycroft*, and *First Union*, there can be no liability for abuse of process. This Court did not address this issue.

Likewise, there is no evidence in the record that would support a finding that Sheriff Lott or his deputies committed a willful act in the use of the process not proper in the conduct of the proceeding. In her brief and at oral argument, Paschal was unable to point to any evidence that Sheriff Lott or his deputies committed a willful act in the use of the process not proper in the conduct of the proceeding. Most telling, Paschal offered absolutely no explanation of this element of the cause of action. Yet, this Court summarily upheld the verdict on this cause of action.

It bears repeating that any reliance on Section 22-5-110 for proof of this element is misplaced. As already discussed at length above, neither Sheriff Lott, Lt. Scott or anyone with the Sheriff's Department caused Magistrate Whittle to issue arrest warrants in lieu of a courtesy summons. More importantly, existing

authority consisting of the South Carolina Bench Book for Summary Court Judges and opinions issued by the South Carolina Attorney General have stated that a courtesy summons is to be used only where (1) the affiant is not a law enforcement personnel, and (2) where the individual is charged with a misdemeanor offense. Yet, neither of those elements is present here. Under existing law, the use of courtesy summons was not an option. In addition, there is no evidence that Lt. Scott had any control over what type of charging document the magistrate would choose to issue. In its memorandum opinion, the Court overlooked or misapprehended these issues that are critical to a proper consideration of the abuse of process claim.

CONCLUSION

Based on the foregoing discussion, the Appellant-Respondent Leon Lott respectfully requests that the Court rehear its decision in this case. Sheriff Lott renews his request that this Court reverse the jury's verdict and the order of Judge William P. Keesley filed December 11, 2014, and remand for entry of judgment in Sheriff Lott's favor. In the alternative, Sheriff Lott requests that the Court remand for a new trial absolute.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

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Counsel for Appellant-Respondent Leon Lott

Columbia, South Carolina

February 22, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Case No. 2012-CP-32-0342
Appellate Case No. 2015-001153

Kay F. Paschal, ... Respondent-Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, ... Appellant-Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant-Respondent Leon Lott, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** 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 22nd day of February 2018:

S. Jahue Moore, Esquire
John C. Bradley, Jr., Esquire
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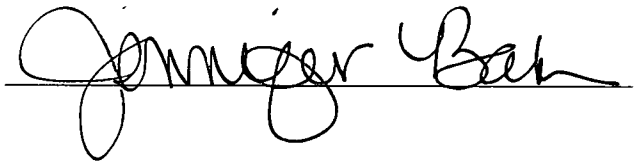

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February 22, 2018

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Kay Paschal Wallace v. Leon Lott, the Duly Elected Sheriff of Richland County, South Carolina
Appellate Case Number: 2015-001153
Civil Action Number: 2012-CP-32-0342
Our File Number: 314.9502

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's $25.00 check for the filing fee.

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

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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