THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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.

BRIEF OF APPELLANT FOR RESPONDENT-APPELLANT

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II. Did the circuit court err in directing a verdict for defendant on Plaintiff's cause of action for false arrest on the grounds that (A) Plaintiff's arrest was not based on a facially invalid warrant even though the officer who obtained the warrant withheld information from the magistrate that would have precluded a finding of probable cause and (B) the conclusion that the warrant was valid as a matter of law?

STATEMENT OF THE CASE

On April 24, 2014, Plaintiff Russell Shane Carter brought suit against Defendant Bruce Bryant, as representative for the York County Sheriff's Department, alleging false arrest and malicious prosecution. On August 1, 2014, Defendant answered, generally denying the allegations and asserting immunity under the South Carolina Tort Claims Act, the common law doctrine of sovereign immunity, and various other general defenses.

On April 23, 2015, the court entered a scheduling order. On July 20, 2015, Defendant moved for summary judgment as to all claims and on November 25, 2015, the circuit court denied the motion. Defendant moved the court to alter or amend the judgment, asserting among other things that, in support of his false arrest claim, Plaintiff erroneously relied upon the Court of Appeals' decision in *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999), which Defendant contended was wrongly decided. Plaintiff filed a return to the motion and on January 27, 2016, the circuit court denied the motion.

The matter was tried on November 7 through 9, 2016. At the close of Plaintiff's case, the circuit court directed a verdict in favor of Defendant on the false arrest cause of action, holding the arrest was not based on a facially invalid warrant. The court permitted the malicious prosecution claim to proceed. The jury returned a verdict for Plaintiff for $150,000.00.

On November 18, 2016, Defendant moved for a judgment notwithstanding the verdict or, alternatively, a new trial absolute. On December 5, 2016, the trial court entered an order denying Defendant's post-trial motions.

On December 29, 2016, Defendant filed and served a notice of appeal. Plaintiff filed a served a notice of cross-appeal on January 3, 2017. This brief addresses only Plaintiff's cross-appeal.

FACTS

The incident giving rise to Plaintiff's arrest occurred April 25, 2012. (R. p. 64, ll. 2-5, 13-15). Plaintiff lived in the home he rented with his wife, his children and his grandmother, who was 87-years old at the time. (R. p. 57, l. 11 - p. 58, l. 4; p. 124, l. 24 - p. 125, l. 1; p. 176, l. 24 - p. 177, l. 5; p. 182, ll. 7-8). Plaintiff's wife, Dawn Carter, was eight months pregnant at the time. (R. p. 52, ll. 9-14; p. 182, ll. 8-9).

The Carters lived in a brick home surrounded by three mobile homes. (R. p. 177, l. 3 - p. 178, l. 11). At the time the only person living in a trailer on the property was Steve Blackwelder "and whoever was staying with him at the time." (R. p. 178, ll. 14-15). A new owner was in the process of having Blackwelder removed from the property. (R. p. 179, ll. 16-24). Eventually Plaintiff called the police and had Blackwelder arrested for threatening Plaintiff and his family. (R. p. 180, ll. 2-16).

Plaintiff was responsible for taking care of the grounds and collecting rent from any of the occupants of the mobile homes. (R. p. 178, ll. 22-25). Plaintiff also had the right to evict tenants. (R. p. 179, ll. 5-15). Water for the property was provided by a well. (R. p. 180, ll. 17-21). Plaintiff maintained the well, which had constant problems. (R. p. 180, l. 23 - p. 181, l. 10). The well was experiencing problems on April 25, 2012. (R. p. 181, ll. 11-24).

On the day of the incident Plaintiff had worked all day and after dinner he laid down in his boxers with his then five-year-old daughter. (R. p. 65, ll. 1-23; p. 181, l. 25 - p. 182, l. 3, 8-10). Around 11:00 p.m. Plaintiff heard banging on his front door. (R. p. 65, l. 25 - p. 66, l. 9; p. 182, ll. 10-12). The knocking was so loud Plaintiff thought it was the police. (R. p. 66, ll. 11-21; p. 124, ll. 6-11). Plaintiff went to the door and asked the person to identify himself but heard no response. (R. p. 67, ll. 2-3; p. 183, ll. 3-6). Plaintiff then went to the large picture window to see who was on the

front porch but the person was too close to the door. (R. p. 67, ll. 5-10; p. 133, l. 2; p. 183, ll. 18-21). Plaintiff tried to look through the peephole in the door but the porch light was out. (R. p. 67, ll. 12-21). Plaintiff's wife had gotten up and was standing behind Plaintiff. (R. p. 71, ll. 3-12; p. 182, ll. 18-20; p. 183, ll. 7-9; p. 186, ll. 6-16).

Plaintiff then yelled "who is it?" and "what do you want?" but could not understand the response. (R. p. 68, ll. 2-6; p. 125, ll. 2-6). He asked the person to back up so that he could see who it was, and then told the person to get off his porch. (R. p. 68, ll. 7-9; p. 133, l. 3; p. 183, ll. 19-21). At that point the person came into view so Plaintiff went to the door and cracked it open just enough to see what the person wanted. (R. p. 68, l. 10 - p. 69, l. 4; p. 183, ll. 21-24). Plaintiff then saw the silhouette of the person and asked again for the person to identify himself. (R. p. 69, l. 25 - p. 70, l. 3).

The person then said "I want my water." (R. p. 70, l. 4; p. 135, ll. 15-18; p. 183, ll. 14-16; p. 184, ll. 4-6). Plaintiff ultimately realized the person was asking about well water, and Plaintiff told him "I'm not your landlord... I don't have a lease agreement with you." (R. p. 70, ll. 13-14). Plaintiff then told the person he was trespassing and to "get out of here." (R. p. 70, ll. 15-17; p. 137, ll. 9-11). The person insisted he wanted water and Plaintiff again told him to leave. (R. p. 70, ll. 18-20; p. 184, ll. 6-11).

At that point Plaintiff detected an odor of alcohol and decided the person would not listen, so Plaintiff agreed to come check on the water. (R. p. 70, ll. 21-25; p. 95, ll. 12-13; p. 137, ll. 15-21; p. 138, ll. 13-15). Plaintiff advised the person that Plaintiff would get the water on by the next day. (R. p. 71, ll. 18-20; p. 96). The person insisted he check right then, at 11:00 at night, and Plaintiff once again told him "you are trespassing" and "what you need to do is go home." (R. p. 71, ll. 21-25;

p. 141, ll 4-15). Plaintiff advised the person to call the Sheriff's Department if he had a problem. (R. p. 71, l. 25 - p. 72, l. 2).

Plaintiff then turned and told his wife to call the Sheriff's Department. (R. p. 72, ll. 5-8; p. 95, ll. 19-20; p. 130, l. 6; p. 138, ll. 21-23; p. 139, l. 25 - p. 140, l. 2; p. 142, ll. 7-15; p. 184, ll. 11-12; p. 185, ll. 10-11; p. 186, l. 4). Plaintiff's wife called 9-1-1 and told the operator that Plaintiff had asked an unknown person to leave but a dispute had occurred. (R. p. 187, ll. 1-5; p. 199, ll. 20-23). She hoped the person would leave once the person knew she was calling the police. (R. p. 187, ll. 5-8).

When Plaintiff turned back around the person had moved forward up onto the porch and placed his hands on the screen door. (R. p. 72, ll. 10-14; p. 73, ll. 16-18; p. 140, ll. 2-9; p. 163, ll. 8-20; p. 185, ll. 12-15). Plaintiff's wife retrieved a baseball bat they kept near the door and handed it to Plaintiff. (R. p. 73, ll. 21-25; p. 131, l. 20; p. 184, l. 16 - p. 185, l. 5). Plaintiff stood in the doorway in a way so as to hide the bat. (R. p. 74, ll. 1-2). Even though the person knew the Sheriff's Department was on its way he would not get off of Plaintiff's property. (R. p. 74, ll. 5-7). Plaintiff told the person to get off the porch. (R. p. 186, l. 5).

The person then asked Plaintiff if he had a gun, and Plaintiff once again told him to get off of the property. (R p. 74, ll. 9-24; p. 139, ll. 11-18; p. 187, ll. 9-15). Plaintiff's wife was standing behind him and Plaintiff did not know if the person had a gun. (R. p. 75, ll. 4-7). Plaintiff reached to close the screen door but the person placed his hand inside the door and was holding the door. (R. p. 75, ll. 10-22; p. 76, l. 21 - p. 77, l. 7). At that moment the person hit Plaintiff in the side of the head with the person's right hand (described as a "sucker punch", R. 144, l. 5). (R. p. 77, l. 12 - p. 78, l. 4; p. 87, ll. 6-12; p. 143, ll. 3-5; p. 152, ll. 10-14; p. 187, ll. 15-21; p. 572).

Plaintiff then forced them both out onto the porch and the person "bear hugged" Plaintiff and pushed Plaintiff up against the bannister. (R. p. 78, ll. 15-22; p. 79, l. 23 - p. 80, l. 2; p. 187, l. 23 - p. 188, l. 1; p. 190, ll. 20-25). The person hit Plaintiff two more times in the head and Plaintiff held onto the bat to prevent the person from taking it from him. (R. p. 78, l. 25 - p. 79, l. 4; p. 143, ll. 9-18). The person kept "bamming" on Plaintiff so Plaintiff hit the person in the head with the bat. (R. p. 84, ll. 11-15; p. 191, ll. 6-11). The person began kicking Plaintiff and Plaintiff continued to hit the person in the legs "until he gave up." (R. p. 79, ll. 15-19; p. 80, ll. 3-5; p. 80, l. 11 - p. 84, l. 14; p. 149, ll. 9-14; p. 191, ll. 19-25). Plaintiff then stood over the person and made the person lie flat on his stomach while waiting for the police. (R. p. 84, l. 12 - p. 85, l. 3). Plaintiff was in the same position when the police arrived. (R. p. 85, ll. 4-8; p. 86, ll. 8-10; p. 149, l. 15 - p. 150, l. 1; p. 192, ll. 1-2).

Deputy Kevin Gwinn was the first officer to arrive. (R. p. 87, l. 21 - p. 88, l. 1; p. 192, ll. 9-11). Deputy Gwinn checked the person, who was motionless, then took the bat from Plaintiff and ordered Plaintiff into the home. (R. p. 88, ll. 4-20; p. 192, ll. 9-11). Plaintiff complied. (R. p. 86, l. 21 - p. 89, l. 1; p. 194, l. 23). Plaintiff's wife checked his injuries to his eye. (R. p. 194, ll. 23-25). Plaintiff then took his cell phone back outside to photograph the person, but Deputy Gwinn became upset and ordered Plaintiff to go back inside. (R. p. 89, ll. 11-23; p. 156, ll. 14-16). He then placed Plaintiff in handcuffs and put him into the back of the patrol car. (R. p. 89, l. 23 - p. 90, l. 2; p. 155, l. 23 - p. 156, l. 1; p. 156, l. 24 - p. 157, l. 2).

At that point Blackwelder came up and said "What did you do to him, Shane?" (R. p. 90, l. 14 - p. 91, l. 1; p. 192, ll. 13-16). Plaintiff had previously had Mr. Blackwelder arrested for threatening Plaintiff and Plaintiff's family and the men had a history of problems. (R. p. 91, ll. 5-14;

p. 193, ll. 3-6).

Plaintiff told the deputies that the person was trespassing and the details of how the altercation took place. (R. p. 91, ll. 18-22; p. 92, ll. 1-13). Plaintiff also told the deputies who Blackwelder was. (R. p. 91, ll. 23-25). Plaintiff then asked if he was protected under the South Carolina Persons and Property Act. (R. p. 92, ll. 21-23; p. 93, ll. 6-7). One deputy responded "that law might be down in Florida but that ain't up here." (R. p. 93, ll. 9-14; p. 558). Plaintiff was not arrested that night. (R. p. 93, ll. 15-18).

The investigating officers asked Plaintiff's wife what happened. (R. p. 200, ll. 2-10). Plaintiff's wife told a deputy the stranger had been "beating on our door" and also about the problems with Blackwelder. (R. p. 194, ll. 3-15). The officers told her that they did not know if they would charge Plaintiff. (R. p. 201, ll. 21-24). The officers told her they would tell the magistrate the facts and let the magistrate decide whether anyone was charged. (R. p. 201, l. 25 - p. 202, l. 6). She provided a written statement of the occurrence. (R. p. 194, ll. 16-20; p. 200, ll. 11-15).

Plaintiff asked the officers what he should have done and they said he should have gone back inside his home and waited for the deputies. (R. p. 94, ll. 2-5). Plaintiff explained to them that he could not do so. (R. p. 94, ll. 6-15). The deputy told Plaintiff he would contact him the next day. (R. p. 93, ll. 20-21).

Plaintiff identified a written statement he gave to the police indicating the person had struck him three times. (R. p. 145, ll. 1-6). Plaintiff read the statement aloud to the jury. (R. p. 145, l. 12 - p. 146, l. 11). Plaintiff stated he was told to give only a brief description of what occurred when he provided the statement. (R. p. 164, ll. 5-14).

Around 4:30-5:00 p.m. the next day Deputy Gwinn called Plaintiff and asked him to turn

himself in. (R. p. 96, l. 23 - p 97, l. 2; p. 197, ll. 1-3). Deputy Gwinn told Plaintiff he was being charged with assault and battery of a high and aggravated nature (ABHAN). (R. p. 97, ll. 2-4; p. 104, ll. 10-11). Plaintiff called his wife and told her he would be turning himself in, and he proceeded to the Moss Justice Center to do so. (R. p. 97, l. 14 - p. 102, l. 6; p. 197, ll. 4-5).

Plaintiff identified the affidavit that supported the warrant. (R. p. 103, ll. 6-18; p. 557). The affidavit stated:

> On April 25, 2012, in the County of York, one Russell Shane Carter did willfully and unlawfully violate South Carolina laws by striking Michael Robin Faile about the head and body with an aluminum baseball bat, causing physical injuries that required medical attention. The victim was transported to Piedmont Medical Center in Rock Hill by EMS. Probable cause based on police investigation. Report Number 2012-00013457.

(R. p. 104, ll. 2-9; p. 557). The warrant was served upon Plaintiff when he was booked on April 27, 2012. (R. p. 122, ll. 5-9). The charges against Plaintiff were ultimately *nolle prossed.* (R. p. 116, l. 10 - p. 117, l. 2; p. 560). The dismissal sheet the assistant solicitor signed notes in handwriting: "nol pros, defendant's actions were within the law." (R. p. 560).

The in-car videos of the incident were then played for the jury. (R. p. 168, ll. 1-14; p. 558).

Deputy Jonathan Reed was one of the responding officers that night. (R. p. 204, ll. 2-15). When the officers arrived Deputy Gwinn went to the house to speak with Plaintiff and Plaintiff's wife. (R. p. 212, ll. 4-6). Blackwelder was being disruptive so Deputy Reed handcuffed Blackwelder and placed him in a car. (R. p. 212, l. 20 - p. 213, l. 1; p. 214, l. 22 - p. 215, l. 2). Plaintiff told Deputy Reed that Blackwelder needed to get off Plaintiff's property, which meant Blackwelder could be trespassing. (R. p. 215, l. 6 - p. 216, l. 10). Blackwelder told Deputy Reed that Blackwelder did not witness the incident.

Plaintiff's wife gave Deputy Reed a statement. (R. p. 218, ll. 18-21). Deputy Reed stated that Plaintiff told him that the trespasser punched him "and that's when he grabbed the bat and started hitting him...." (R. p. 219, ll. 11-18).

Deputy Reed agreed that where Plaintiff lived is considered a home and a dwelling under South Carolina law, and that would include the front porch. (R. p. 220, ll. 11-18). The assailant, Mr. Faile, did not live in the area and had no connection with the property. (R. p. 221, ll. 5-12). Deputy Reed agreed that if Plaintiff asked Mr. Faile to leave but Mr. Faile did not do so, then Mr. Faile would be trespassing. (R. p. 221, ll. 5-12). Furthermore, if Plaintiff opened the door and someone threw a punch at him, that would be assault. (R. p. 221, l. 25 - p. 222, l. 3). Deputy Reed also agreed that Faile's behavior would amount to first degree burglary. (R. p. 223, ll. 6-23).

Deputy Reed agreed that under the "Castle Doctrine" there is no duty to retreat in a person's own home. (R. p. 222, ll. 4-9; p. 224, ll. 5-7; see also p. 230, ll. 2-18). He also agreed that Plaintiff would have the right to defend himself if someone had thrown a punch and was trying to come into the home. (R. p. 224, ll. 8-16). Deputy Reed agreed that Blackwelder told him Blackwelder did not see what happened. (R. p. 225, ll. 11-16).

Deputy Reed agreed that on the audio of the incident one of the officers said "let's just take it to the magistrate," but another said "no, we can't do that any more. We're not supposed to do that anymore." (R. p. 226, ll. 14-22). He stated:

> That was in reference to what we -- in reference to we did receive direct -- we were not supposed to be calling to get -- to get an opinion, or a side-opinion, without presenting -- having all the facts and presenting probable cause to the magistrate without going through the formal steps of obtaining a warrant.

(R. p. 226, l. 22 - p. 227, l. 3). He added, "we present the factors of the case as we know them, and

[the magistrate] decides whether there is probable cause to issue a warrant at that point." (R. p. 228, ll. 7-9).

The court refused to permit Plaintiff to present an expert, Jay Phillips, to testify in support of Plaintiff's claims of false arrest. The court then held the arrest warrant was valid on its face. (R. p. 294, l. 25 - p. 295, l. 1). Plaintiff asserted that under *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006), the affidavit was conclusory. (R. p. 296, ll. 14-19; p. 307, ll. 15-20). Plaintiff also asserted the officers ignored crucial facts that were favorable to him when they obtained the warrant. (R. p. 309, l. 5 - p. 310, l. 4). The court still dismissed the claim.

The matter was submitted to the jury on the malicious prosecution claim, and the jury returned a verdict for Plaintiff. Defendant appealed that verdict, and Plaintiff has filed this cross-appeal of the exclusion of Mr. Phillips' testimony as well as the directed verdict on the false arrest claim.

ARGUMENTS

The trial court directed a verdict for Defendant on the ground that there was no evidence the arrest in this case "was not based on a facially invalid warrant." The court rejected Plaintiff's argument that the officer who obtained the warrant withheld crucial information from the magistrate issuing the warrant, and under those circumstances a cause of action for wrongful arrest is viable. The court also rejected Plaintiff's contention that the warrant was conclusory and therefore insufficient. This Court should reverse.

SCOPE OF REVIEW

When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury. *Roddey v. Wal-Mart Stores East*, 415 S.C. 580, 784 S.E.2d 670 (2016); *South Carolina Federal Credit Union v. Higgins*, 394 S.C. 189, 714 S.E.2d 550 (2011); *Unlimited Servs., Inc., v. Macklen Enters., Inc.*, 303 S.C. 384, 386, 401 S.E.2d 153, 154 (1991); *South Carolina Federal Credit Union v. Higgins* (citing *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965)). The trial court should be "concerned only with the existence or nonexistence of evidence," not its credibility or weight. *South Carolina Federal Credit Union v. Higgins* (citing *Jones v. General Elec. Co.*, 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998)).

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331-332, 732 S.E.2d 166, 171 (2012).

I. THE CIRCUIT COURT ERRONEOUSLY EXCLUDED THE TESTIMONY OF PLAINTIFF'S EXPERT

Plaintiff proffered Jay Phillips as an expert in investigations and Mr. Phillips testified outside the jury's presence. (R. p. 238, ll. 5-20). He was familiar with the process of applying for warrants in South Carolina. (R. p. 254, l. 20 - p. 256, l. 11). He looked at the warrant leading to Plaintiff's arrest (R. p. 256, ll. 12-14) and felt it was deficient for not containing facts giving rise to the charge. (R. p. 257, ll. 4-25). Mr. Phillips also read the York County policy on obtaining warrants, which requires the inclusion of evidence favorable to the accused. (R. p. 259, l. 3 - p. 260, l. 8). Mr. Phillips agreed York County deputies are told they must give sworn testimony to the magistrate and should include "all things that are favorable to the accused in determining" probable cause. (R. p. 262, ll. 17-22).

Mr. Phillips stated the forensic evidence supported Plaintiff's version of what happened that night, and the evidence did not support Mr. Faile's version of events. (R. p. 260, ll. 9-17; p. 272, ll. 4-6). Mr. Phillips saw nothing in the warrant affidavit regarding Plaintiff being in his home or being hit first. (R. p. 262, l. 23 - p. 263, l. 1). The affidavit gave only one side of the story. (R. p. 263, ll. 2-3; p. 278, l. 21 - p. 279, l. 25; p. 290, ll. 9-21; p. 291, ll. 1-18). There was also no indication the officers supplemented the affidavit with sworn testimony. (R. p. 293, ll. 2-15).

Mr. Phillips stated the facts supported numerous charges against Mr. Failes. (R. p. 263, l. 9 - p. 264, l. 20; p. 288, ll. 2-16). Mr. Phillips did not think there was probable cause to arrest Plaintiff for ABHAN. (R. p. 264, l. 21 - p. 265, l. 9). Mr. Phillips opined that the officers did not have enough information upon arriving on the scene to make an arrest. (R. p. 285, l. 6 - p. 286, l. 11; p. 287, ll. 1-15; p. 289, ll. 24). The warrant affidavit "on its face" did not describe probable cause to arrest. (R.

p. 290, ll. 15-21; p. 291, ll. 3-18).

On cross examination Mr. Phillips stated he reviewed one incident report written by the officer. (R. p. 266, ll. 12-20; p. 281, l. 17). He also reviewed the statements by Plaintiff and Plaintiff's wife, and listened to the audio of the lapel microphones of the officers at the scene. (R. p. 266, ll. 20-23; p. 281, l. 19; p. 282, ll. 2-3). He also had the depositions of the officer and the magistrate (R. p. 266, l. 25), although he did not read the magistrate's deposition. (R. p. 281, ll. 1-4). He reviewed the warrant issued in the case as well as the case file summary, which was the same as the investigative report. (R. p. 267, ll. 1-4). Mr. Phillips also reviewed the physical evidence. (R. p. 281, l. 21).

Mr. Phillips was also familiar with York County's policies and procedures. (R. p. 268, l. 23 - p. 270, l. 12; p. 271, l. 16 - p. 272, l.). When Mr. Phillips worked for Lexington County he assisted in drafting or reviewing policy and procedure guidelines before they were promulgated. (R. p. 270, ll. 13-17).

Mr. Phillips stated he was familiar with the Castle Doctrine although he had never read South Carolina's Protection of Persons statute. (R. p. 267, ll. 15-23; see also p. 292, l. 12 - p. 293, l. 1). He was familiar with the baseball bat Plaintiff used to protect himself although he had never seen it. (R. p. 278, ll. 4-16). Mr. Phillips also stated he did not know if Deputy Gwinn told the magistrate anything other than the information reflected in the warrant affidavit. (R. p. 278, l. 17 - p. 280, l. 25; p. 289, l. 25 - p. 290, l. 8). He did not review the magistrate's deposition or affidavit or the affidavit of Mr. Springs, the prosecutor in the criminal case. (R. p. 282, ll. 4-11).

On redirect, Mr. Phillips stated that any information the magistrate considered outside the face of the warrant would have had to have been under oath. (R. p. 293, ll. 2-15).

Defendant objected to Mr. Phillips testimony (R. p. 294, l. 9). The circuit court excluded Mr. Phillips' testimony on the ground that it "lacked foundation." (R. p. 294, ll. 13-14). The court was concerned that Mr. Phillips criticized "the officers who made the arrest for not doing a thorough investigation, and then hadn't even done a complete investigation of what he bases his opinions on. Didn't read all the material." (R. p. 294, ll. 16-20). The court stated:

> Well, I don't need to go -- I've been taking some notes and listening very carefully and I'm not going to allow this witness to testify. I find that his testimony lacks foundation. I don't find that he's not credible. I find he's an honest man. But I find that his testimony lacks credibility. It's ironic that he is criticizing the officers who made the arrest for not doing a thorough investigation, and then hadn't even done a complete investigation of what he bases his opinion on. Didn't read all the material. Didn't -- just came to these conclusions without full investigation. Just what he says the other officers did not do.
>
> The scope of the investigation really is not an issue in this case. The issue is whether or not probable cause existed at the issuance of the warrant. As a matter of law I find the arrest warrant is facially valid. A probable cause issue is one of fact for the jury. As to the Castle Doctrine I find that the code section 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. And the burden of proving the Castle Doctrine is on the defendant, so, I'm not going to allow him to testify. Thank you.

(R. p. 294, l. 11 - p. 295, l. 8). Plaintiff argued these matters went to the weight of Mr. Phillips' testimony, not its admissibility. (R. p. 295, ll. 11-18). The trial court did not reverse its position.

The admission of expert testimony is governed by the Rule 702 of the South Carolina Rules of Evidence, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (requiring as a foundation for the admission of expert testimony (1) the witness is qualified, (2) the

testimony will assist the trier of fact, and (3) the method by which the witness reached the opinion is reliable). Mr. Phillips was qualified, the testimony would have assisted the jury, and Mr. Phillips' methodology was reliable.

If an expert is qualified, the sufficiency of the foundation for his opinion is ordinarily a question of weight for the jury, not a basis for excluding the evidence. *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (Ct. App. 1993). *See, e.g., Bass v. South Carolina Dept. of Social Services*, 414 S.C. 558, 780 S.E.2d 252 (2015) (an expert is given wide latitude in determining the basis of his testimony); *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 697 S.E.2d 558 (2010) (finding expert properly admitted where evidence provided a reasonable basis to support testimony). *Cf. Small v. Pioneer Machinery, Inc.*, 316 S.C. 479, 450 S.E.2d 609 (Ct. App. 1994) (an expert has wide latitude in determining the basis of his testimony; whether the foundation is sufficient can be tested by cross-examination and thereafter accepted or rejected by the jury).

Here, Defendant did not question Mr. Phillips' qualifications to testify. Rather, the trial court ruled as a matter of law that Mr. Phillips' testimony lacked a sufficient foundation, but that matter was for the jury to decide after appropriate cross-examination or the presentation of contrary evidence. The trial court imposed too strict of a standard on the foundation required for the admission of the proffered testimony. Mr. Phillips described the materials he reviewed and set forth a sufficient basis to allow his testimony.

The trial court erred in excluding the testimony. This Court should reverse and remand for further proceedings.

II. THE CIRCUIT COURT ERRED IN DIRECTING A VERDICT FOR DEFENDANT ON PLAINTIFF'S CAUSE OF ACTION FOR FALSE ARREST

The circuit court directed a verdict regarding the false arrest claim, reasoning "the arrest was not based on a facially invalid warrant" as a matter of law. (R. p. 310, ll. 17-23). This was error for several reasons. First, the officer who presented the affidavit to the magistrate in support of the arrest warrant omitted facts material to the determination of probable cause, and viewed most favorably for Plaintiff, obviated probable cause and therefore invalidated the warrant under *Franks v. Delaware*. Second, the affidavit itself was conclusory and failed to provide a sufficient factual basis to support a finding of probable cause under *State v. Baccus*. Third, the law does not require that the warrant demonstrate "facial invalidity" to support finding a lack of probable cause to arrest; such can be found based upon the omission of relevant and pertinent facts. Therefore, the circuit court should have permitted Plaintiff to proceed on his claim for false arrest.

A. OMISSION OF MATERIAL FACTS IN THE AFFIDAVIT TO OBTAIN THE WARRANT

In *Franks v. Delaware*, 438 U.S. 154 (1978), the U.S. Supreme Court held that in certain narrowly defined circumstances a defendant can attack a facially sufficient affidavit used to obtain a warrant. The Court recognized a strong "presumption of validity with respect to the affidavit supporting the search warrant," 438 U.S. at 171, and thus created a rule of "limited scope," *id.* at 167. The rule requires a dual showing incorporating both a subjective and an objective threshold component.

In order to obtain an evidentiary hearing on the affidavit's integrity, the party attacking the affidavit must first make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant

affidavit." *Id.* at 155–56. This showing "must be more than conclusory" and must be accompanied by a detailed offer of proof. *Id.* at 171. In addition, the false information must be essential to the probable cause determination. If, "when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." *Id.* at 171–72.

If a *Franks* hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant "must be voided." *Franks* at 156. A warrant that violates *Franks* is not subject to the good-faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984). Entitlement to a *Franks* hearing is a matter of law subject to *de novo* review. *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008).

The *Franks* test also applies, however, when an affiant *omits* material facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading. *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999); *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir.1986). *Accord United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir. 1995); *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991); *Madiwale v. Savaiko*, 117 F.3d 1321 (11th Cir. 1997). *See also State v. Robinson*, 408 S.C. 268, 758 S.E.2d 725 (Ct. App. 2014) (analyzing a *Franks* violation due to officer's omission of key information necessary for issuing judge to determine existence of probable cause), *affirmed as modified State v. Robinson*, 415 S.C. 600, 785 S.E.2d 355 (2016) (under the Fourth and Fourteenth Amendments to the United States Constitution, a defendant has the right to challenge false statements in a search-warrant affidavit). *See also State v. Mann*, 367 N.W.2d 209, 213 (Wis. 1985) (noting "no real difference in effect between a false statement made knowingly and intentionally or with reckless disregard for the truth and a critical omission" and holding *Franks*

inquiry permitted "where there has been an omission of critical material where inclusion is necessary for an impartial judge to fairly determine probable cause").

Franks "protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). Specific intent to deceive the issuing court is not an element (in addition to a substantial showing of deliberate or reckless falsehood or omission that is material to the probable cause determination) that the plaintiff must show in order to proceed on a claim of qualified immunity in a civil rights action seeking damages for a *Franks* violation. *Lombardi v. City of El Cajon*, 117 F.3d 1117 (9th Cir. 1997).

Following *Lombardi*, the Ninth Circuit has held:

> To survive summary judgment on a claim of judicial deception, a § 1983 plaintiff need not establish specific intent to deceive the issuing court. Rather, the plaintiff must (1) establish that the warrant affidavit contained misrepresentations *or omissions material to the finding of probable cause*, and (2) make a "substantial showing" that the misrepresentations *or omissions* were made intentionally or with reckless disregard for the truth. If these two requirements are met, the matter must go to trial.

Bravo v. City of Santa Maria, 665 F.3d 1076, 1083 (9th Cir. 2011) (citations omitted) (emphasis added). The proper approach is to insert the omitted truths and, after correcting material omissions, decide whether there remains a residue of independent and lawful information sufficient to support a finding of probable cause. *United States v. Rajaratnam*, 719 F.3d 139 (2nd Cir. 2013). That is, the fact finder is required to determine whether if the omitted material had been included in the affidavit the affidavit would still establish probable cause; if it would not the warrant would be void. *Id. See also State v. Missouri*, 337 S.C. at 554, 524 S.E.2d at 397 (to be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question

was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge; there will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause).

In this case, viewed in a light most favorable to Plaintiff, the evidence established the warrant affidavit contained abundant omissions material to the finding of probable cause. The affidavit provided:

> On April 25, 2012, in the County of York, one Russell Shane Carter did willfully and unlawfully violate South Carolina laws by striking Michael Robin Faile about the head and body with an aluminum baseball bat, causing physical injuries that required medical attention. The victim was transported to Piedmont Medical Center in Rock Hill by EMS. Probable cause based on police investigation. Report Number 2012-00013457.

(R. p. 104, ll. 2-9; p. 557). Deputy Gwinn omitted numerous facts material to the finding of probable cause. Instead of telling the whole story, he presented the facts in such a way to make it appear that Plaintiff beat Faile without any provocation or excuse. Deputy Gwinn failed to include crucial facts known to him at the time he sought the warrant, including: (1) that the incident occurred in the dwelling of Plaintiff's home (the enclosed front porch); (2) that it was 10:00 p.m. to 11:00 p.m.; (3) that Plaintiff told Faile repeatedly to leave the premises; (4) that Faile grabbed onto the screen door and would not let go; (5) that Plaintiff's pregnant wife, his children, and his grandmother were also in the home; (6) that Plaintiff instructed his wife to call 9-1-1 when Faile became unruly, appeared to be intoxicated, and refused to leave; (7) that Plaintiff's wife called 9-1-1; (8) that Faile struck Plaintiff first with a "sucker punch" (as corroborated by the 9-1-1 tape in evidence at the time); (9) that Faile struck Plaintiff two more times before Plaintiff responded with blows from the baseball bat; (10) that Plaintiff did not strike Faile once Faile stopped kicking Plaintiff; and (11) that Plaintiff

held Faile on the ground until officers arrived. The evidence viewed most favorably for Plaintiff supports each of these factual assertions and that Deputy Gwinn had all of this information prior to his appearance before the magistrate to obtain the arrest warrant. Therefore, viewed most favorably for Plaintiff this evidence supports a substantial showing that the omissions were made either intentionally or with reckless disregard of the truth. Accordingly, this cause of action must go to trial. *Compare Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991) (noting omission of material information from an arrest affidavit raises a genuine factual issue regarding whether probable cause to arrest existed).

The inquiry here involves the intentional or reckless *omission* of critical facts. Intent or recklessness may be inferred from the fact of omission itself if the omitted material was "clearly critical" to the finding of probable cause. *United States v. Martin*, 615 F.2d 318, 328 (5th Cir.1980). *See also Madiwale v. Savaiko*, 117 F.3d at 1326-1327 (" party need not show by direct evidence that the affiant makes an omission recklessly. Rather, it 'is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself,'" citing *Martin*). Therefore the trial court erred as a matter of law in directing a verdict against Plaintiff on his false arrest cause of action on the basis that there was no "facially invalid warrant" as a matter of law.

This Court should reverse that ruling and remand the case for further proceedings consistent with the Court's decision.

B. THE AFFIDAVIT WAS INSUFFICIENT

The trial court ruled that, as a matter of law, the arrest warrant was "facially valid." (R. p. 294, l. 25 - p. 295, l. 1). Under *Franks*, however, the affidavit presented to the magistrate must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006). Plaintiff argued this point to the trial court but the court rejected it. (R. p. 296, ll. 14-21).

As noted above, the affidavit in this case provided in totality:

> On April 25, 2012, in the County of York, one Russell Shane Carter did willfully and unlawfully violate South Carolina laws by striking Michael Robin Faile about the head and body with an aluminum baseball bat, causing physical injuries that required medical attention. The victim was transported to Piedmont Medical Center in Rock Hill by EMS. Probable cause based on police investigation. Report Number 2012-00013457.

(R. p. 104, ll. 2-9; p. 557). Thus, the affidavit asserts Plaintiff "violate[d] South Carolina laws" adding "probable cause based on police investigation." Although the affidavit adds that Plaintiff struck Faile about the head and body with an aluminum baseball bat, those recitations alone without the additional information are too conclusory to support issuance of an arrest warrant for assault and battery of a high and aggravated nature (ABHAN).

The common law offense of ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation. *State v. Fennell*, 340 S.C. 266, 272, 531 S.E.2d 512, 516-517 (2000). Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. *Id.*

A warrant affidavit that fails to state the facts upon which probable cause is based is not sufficient to establish probable cause. *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999). As the Supreme Court has instructed:

> An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. *State v. Viard*, 276 S.C. 147, 276 S.E.2d 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. "[H]is action cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L. Ed.2d 527, 549 (1983).

State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). See also *State v. Kinloch*, 410 S.C. 612, 616, 767 S.E.2d 153, 155 (2014) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination (citing *State v. Bellamy*, 336 S.C. 140, 143-45, 519 S.E.2d 347, 348-49 (1999))); *State v. Tench*, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003) (asserting the magistrate must make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched (citation omitted)); *State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) ("Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause." (citation omitted)); *State v. Owen*, 275 S.C. 586, 588, 274 S.E.2d 510, 511 (1981) ("[I]n passing upon the validity of the warrant, a reviewing court may consider only the information brought to the magistrate's attention.").

Here, the affidavit simply says "probable cause based on police investigation" and conclusory statements that Plaintiff violated the law when, in fact, he did not. Although the affidavit omits crucial evidence as set forth in part (A), above, even as stated the affidavit provided the magistrate

nothing more than the legal conclusions of Deputy Gwinn. It was at least a jury question whether the affidavit provided the magistrate with a sufficient basis to find probable cause to arrest Plaintiff. See *Gist*, 336 S.C. at 616, 521 S.E.2d at 165 ("The issue of probable cause is a question of fact and ordinarily one for the jury.").

It also does not matter whether Deputy Gwinn had any conversations with the magistrate apart from the conclusory affidavit because it is undisputed that any such conversation was not under oath. A warrant affidavit that is "insufficient in itself to establish probable cause may be supplemented before a magistrate by sworn oral testimony." *State v. Crane*, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988). However, a warrant issued upon a statement of facts not sworn to is unconstitutional. *Gist. Accord State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004); *State v. Wimbush*, 9 S.C. 309 (1878).

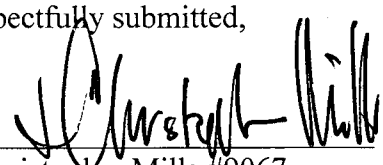
The affidavit does not set forth circumstances of aggravation sufficient to support issuance of a warrant for ABHAN. Hence, even without the omitted facts the warrant itself is too conclusory to support the arrest warrant. In the least the trial court should not have summarily dismissed this claim at the directed verdict stage but should have permitted the jury to determine these matters.

The Court should reverse the trial court's decision and remand the matter for further proceedings.

CONCLUSION

For the reasons stated the Court should reverse the trial court's rulings and remand the matter for a new trial on Plaintiff's claim for false arrest.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Brief of Respondent of Respondent-Appellant* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

March 12, 2018

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