THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge



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Case No. 2014-CP-46-1307

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Russell Shane Carter ..... Respondent/Appellant,

v.

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

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# BRIEF OF RESPONDENT FOR RESPONDENT-APPELLANT

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III. Did the trial court commit reversible error in refusing to charge Defendant's request to charge as to the degree of proof required to establish probable cause?

IV. Did the trial court abuse its discretion in allowing Plaintiff to claim $17,500 in attorney's fees as a portion of his damages where Plaintiff had paid only $5,000 as of the trial?

## COUNTER-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 Plaintiff's false arrest claim 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 responds only to Defendant's 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). Later that night 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 anymore. 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).

Outside the jury's presence Plaintiff proffered the testimony of an expert, Jay Phillips, to testify in support of Plaintiff's claims of false arrest. (R. p. 235, l. 1 - p. 294, l. 2). The court excluded Mr. Phillips' testimony. (R. p. 294, l. 11 - p. 295, l. 8; p. 310, ll. 17-22). Plaintiff has challenged that ruling by a cross-appeal.

The court then dismissed Plaintiff's claim for false arrest, holding the arrest warrant was not invalid on its face. (R. p. 294, l. 25 - p. 295, l. 1; p. 394, l. 1 - p. 396, l. 10). Plaintiff has challenged that ruling as well in his cross-appeal. The court, however, denied Defendant's motion for a directed verdict aimed at the malicious prosecution claim. (R. p. 310, ll. 12-23). Defendant then presented his case.

Deputy Gwinn was on duty on April 25, 2012 and was dispatched on the call to Plaintiff's home. (R. p. 315, ll. 3-19). When he arrived he saw two people on the porch yelling and one of them had a baseball bat. (R. p. 318, ll. 10-23). As he approached the porch he saw the other man lying on the floor of the porch. (R. p. 319, ll. 4-14). The man on the floor was covered in blood. (R. p. 320, ll. 14-17). Deputy Gwinn took the bat from Plaintiff and asked the other person if he needed EMS. (R. p. 320, ll. 5-7).

Deputy Gwinn asked everyone, including Plaintiff, what happened. (R. p. 320, l. 21 - p. 321, l. 4). Deputy Gwinn found out that Plaintiff lived at the residence and obtained Plaintiff's version of the events. (R. p. 321, ll. 5-12). Plaintiff stated "the neighbor came over and was banging on the door because they didn't have water and [Plaintiff] asked them to leave." (R. p. 321, ll. 16-18). Deputy Gwinn asked Plaintiff to step inside the house so that Deputy Gwinn could clear the scene

and "further figure out what was going on." (R. p. 322, ll. 2-8). Plaintiff came back outside and was taking photographs with his camera phone. (R. p. 322, ll. 12-23). Deputy Gwinn felt Plaintiff was "interfering with the investigation" so Deputy Gwinn detained him and placed him in the patrol car. (R. p. 323, ll. 4-10).

Deputy Gwinn obtained Plaintiff's wife's version of events, stating "the majority of it was the same but it was some inconsistencies with what originally happened when the assault took place." (R. p. 323, ll. 14-23; p. 342, ll. 15-18). Specifically, "[Plaintiff] said that he came outside and she said the other gentleman came inside." (R. p. 324, ll. 1-2; p. 344, l. 21 - p. 345, l. 2). Deputy Gwinn understood that Plaintiff was taking the position that he was defending his home. (R. p. 325, ll. 6-10).

EMS arrived and took the other man, Mr. Faile, to Piedmont Medical Center, where Deputy Gwinn interviewed him. (R. p. 324, l. 14 - p. 325, l. 23). Mr. Faile stated he went to Plaintiff's home because the neighbor did not have water and as he was walking off of the porch Plaintiff struck him in the back of the head. (R. p. 326, ll. 5-12). Mr. Faile stated a fight ensued. (R. p. 326, ll. 13-14). Deputy Gwinn observed that Mr. Faile's head appeared "swollen in some parts and sunken in in others." (R. p. 326, ll. 15-20). Mr. Faile also had bruises all over his body. (R. p. 326, ll. 21-23). Deputy Gwinn took photographs of Mr. Faile. (R. p. 326, ll. 1-3; p. 328, l. 16 - p. 332, l. 15; pp. 586-633). Deputy Gwinn also took a photograph of Plaintiff that demonstrated he had "lacerations on ... his left eye" and "a bruise on his back." (R. p. 332, l. 21 - p. 333, l. 8; pp. 637, 639).

Deputy Gwinn drafted a narrative for his report and took it to Magistrate Yard. (R. p. 333, ll. 14-22; p. 334, ll. 3-8; p. 335, ll. 4-18; p. 338, l. 14 - p. 339, l. 5). Deputy Gwinn could not recall if he took the photographs with him. (R. p. 335, ll. 19-22).

Deputy Gwinn identified the arrest warrant for Plaintiff for ABHAN. (R. p. 336, ll. 12-19). Deputy Gwinn was the affiant on the warrant. (R. p. 336, ll. 20-21). He took Judge Yard "everything he had," including statements from the victim, the suspect and the witness. (R. p. 337, ll. 3-5). Deputy Gwinn listed both Plaintiff and Mr. Faile as "victim/suspect." (R. p. 340, ll. 5-13). He did not type up a "warrant worksheet" or warrant request form because Judge Yard did not require it. (R. p. 340, ll. 14-22; p. 357, l. 24 - p. 358, l. 1). Deputy Gwinn swore under oath as to the existence of the facts in support of the warrant. (R. p. 337, ll. 20-22; 338, ll. 4-13). Judge Yard typed up the following narrative:

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

(R. p. 337, ll. 8-19). Deputy Gwinn contacted Plaintiff to advise him of the warrant for Plaintiff's arrest. (R. p. 341, ll. 11-14).

On cross-examination, Deputy Gwinn read Plaintiff's wife's version as follows: "We were about to go to sleep with half of the house already asleep when some man that I guess is staying with the next-door people came over beating on our door threatening us." (R. p. 343, ll. 3-6). Plaintiff's statement, given separately, stated, "I was stirred from my bed at 9:41 Wednesday night by loud banging and consistent (sic) knocking. Upon reaching the door I was met by a stranger demanding to know what was the problem with the water." (R. p. 343, l. 19 - p. 344, l. 5; p. 344, ll. 12-17). Deputy Gwinn agreed the statements were similar. (R. p. 344, ll. 18-20).

Plaintiff's wife also stated, "And he grabbed the screen door, and he wouldn't let go.... Shane

told him to take his hands off the door and he refused. More words exchanged and the guy pushed Shane [through the door]. And Shane had the bat beside the door and grabbed it." (R. p. 345, ll. 3-18). Plaintiff's statement contained the following: "I instructed Dawn to call the police. That's when ... he held my screen door open. I took a step with my right foot and was blind-sided by a right hook to the brow area." (R. p. 345, l. 19 - p. 346, l. 3). When asked if he thought these two statements were inconsistent, Deputy Gwinn stated "I was referring to our actual conversation, not the actual statement." (R. p. 346, ll. 4-13).

Deputy Gwinn had the incident report written out before going to see Judge Yard. (R. p. 360, ll. 3-9). Deputy Gwinn did not recall his conversation with Judge Yard. (R. p. 347, ll. 3-6). He was not under oath during any conversations with Judge Yard and his statement was not recorded. (R. p. 347, ll. 11-14; p. 358, ll. 15-19). He agreed his affidavit contained "a brief summary" but he did not put "the whole narrative in the report in the warrant." (R. p. 348, l. 12 - p. 349, l. 13). He also agreed that he would need to write everything down that amounted to probable cause so it could be checked at a later time. (R. p. 358, ll. 5-14). Deputy Gwinn could not recall whether he borrowed a camera to take photographs at the scene, or whether anyone came to the hospital with him. (R. p. 358, l. 25 - p. 360, l. 1).

Deputy Gwinn wrote at the end of his report that the investigation was "pending," but he could not recall doing anything between the time of writing that statement and going to see Judge Yard. (R. p. 361, ll. 2-19). If he had done anything there would be documentation to support it. (R. p. 361, ll. 20-23). He had not seen anything to support any further investigation. (R. p. 361, l. 24 - p. 362, l. 10).

Deputy Gwinn agreed departmental policy required him to get a written statement from Mr.

Faile but he failed to do so. (R. p. 362, l. 24 - p. 364, l. 2). Departmental policy No. 900.02 also required him to check a suspect's criminal history which he did not do. (R. p. 364, l. 3 - p. 365, l. 1; p. 372, ll. 21-23; p. 378, ll. 18-19). There was a potential for Mr. Faile to be charged with ABHAN, trespass and burglary (first), all serious crimes. (R. p. 365, ll. 4-25). The policy required that he refer serious crimes to an investigator for follow-up investigation to discovery additional information. (R. p. 366, l. 1 - p. 367, l. 21).

Deputy Gwinn could have reviewed dash cam video (R. p. 368, l. 7 - p. 369, l. 20), listened to the 9-1-1 call (R. p. 369, l. 21 - p. 370, l. 7), or turned the case over to another investigator. (R. p. 370, ll. 8-10). Deputy Gwinn had not listened to the 9-1-1 tape as of the trial date (R. p. 370, ll. 11-13) and agreed that if it had corroborated that Mr. Faile struck Plaintiff first that would have made a difference. (R. p. 370, l. 14 - p. 371, l. 24).

Deputy Gwinn read the following statements from the department's policy on warrants: "It is not constitutionally permitted for the deputy to make the arrest and then investigate further hoping to establish probable cause. The inclusion of other evidence favorable to the accused must be considered before the arrest is made." (R. p. 378, l. 22 - p. 379, l. 8). The policy added that magistrates may issue arrest warrants "as a result of sworn testimony given to them by the affidavit of law enforcement officer or citizen." (R. p. 379, ll. 11-16). He agreed that a magistrate may issue a warrant only based on sworn testimony. (R. p. 379, ll. 17-25).

Deputy Gwinn could not recall if Mr. Faile said he struck Plaintiff first. (R. p. 382, ll. 17-19). After listening to the dash cam videotape Deputy Gwinn agreed Mr. Faile said he struck Plaintiff because Plaintiff had a bat in his hand. (R. p. 383, ll. 8-23).

Sergeant Lee Wright testified he was working on April 25, 2012. (R. p. 400, ll. 1-5). He

responded to the call at Plaintiff's home regarding "a disorderly in progress." (R. p. 400, l. 24 - p. 401, l. 4). He described the scene as chaotic and testified regarding what they saw. (R. p. 401, l. 7 - p. 402, l. 15; p. 404, ll. 1-23; p. 405, ll. 8-15). The officers began to try to find out what happened after they ensured Mr. Faile's medical condition and the safety of the officers. (R. p. 405, ll. 19-25). Officer Gwinn was the case officer because he was the first one on the scene. (R. p. 406, ll. 1-11). Deputy Reed also arrived at the scene. (R. p. 406, ll. 12-16).

Sergeant Wright had an opportunity to speak with Plaintiff and Mr. Faile at the scene. (R. p. 407, ll. 4-8). Written statements were taken from Plaintiff and from Plaintiff's wife. (R. p. 407, ll. 11-12; p. 408, ll. 10-14). Mr. Faile did not give a written statement because he was unable to do so. (R. p. 408, ll. 15-19). Mr. Faile stated he came over to find out why the water was turned off and felt like he was assaulted. (R. p. 408, l. 23 - p. 409, l. 2).

Sergeant Wright agreed that Deputy Reed stated at the scene that he may have done the same thing Plaintiff did to protect his own family. (R. p. 410, ll. 19-20; p. 411, ll. 2-10). He agreed that had Mr. Faile gone inside the residence then Plaintiff had the right to defend himself. (R. p. 411, l. 25 - p. 412, l. 2). Although Deputy Gwinn indicated Mr. Faile was going to claim Plaintiff came out with a bat and hit him, to Sergeant Wright's knowledge Mr. Faile never made that statement. (R. p. 413, ll. 7-19). Mr. Faile also told the EMS employee that his neck was fine and that he could walk. (R. p. 436, l. 22 - p. 437, l. 6). Mr. Faile went on and on about the water. (R. p. 437, ll. 7-12).

Sergeant Wright agreed he "misquoted the law" regarding the Castle Doctrine on the recording. (R. p. 414, l. 12 - p. 415, l. 14; p. 426, ll. 15-20; p. 457, l. 13). He did tell Plaintiff's wife that they had the right to defend their home and themselves. (R. p. 415, ll. 6-10; p. 457, ll. 13-16; p. 458, ll. 4-10). He also agreed that under the Protection of Persons and Properties Act, Mr. Faile was

in Plaintiff's dwelling at the time Mr. Faile was on the porch. (R. p. 420, l. 14 - p. 421, l. 10; p. 422, ll. 19-20). Sergeant Wright also agreed that once Mr. Faile was asked to leave he committed trespassing if he remained, and trespassing is a crime. (R. p. 421, ll. 15-25).

Sergeant Wright agreed that on the 9-1-1 call, Plaintiff's wife said Mr. Faile was "getting physical with my husband." (R. p. 428, ll. 14-16). Mr. Faile's version was that as he turned to leave Plaintiff hit him in the back of the head. (R. p. 428, l. 21 - p. 429, l. 1). Sergeant Wright agreed he could have gotten and listened to the 9-1-1 tape which revealed Mr. Faile had initiated the aggression against Plaintiff. (R. p. 430, ll. 18-20; pp. 580-585).

Plaintiff's wife told Sergeant Wright "about how they had been harassed by those crack addicts from the trailer next door." (R. p. 438, ll. 9-14). Sergeant Wright agreed he was heard on the tape saying Plaintiff "went to town" on Mr. Faile with the bat, and this statement was based upon Sergeant Wright's observations of Mr. Faile. (R. p. 439, l. 21 - p. 440, l. 5). He agreed Plaintiff had an injury to his eye and had described how he was hit, how they grasped and tangled, and how Mr. Faile was fighting with Plaintiff. (R. p. 440, l. 9 - p. 441, l. 7; p. 467, ll. 2-6).

Judge Yard testified that as a magistrate he issues arrest warrants. (R. p. 475, ll. 12-13). Deputy Gwinn called him on April 25, 2013 to let him know he "was on the scene of a pretty serious situation and he needed to speak to me in reference to obtaining a warrant." (R. p. 476, ll. 6-17; p. 491, l. 20 - p. 492, l. 4). Deputy Gwinn then came to the office and explained to Judge Yard what happened. (R. p. 479, ll. 6-13). Judge Yard stated Deputy Gwinn indicated to him "that he had a situation where he had a physical altercation between two people. There were other people on the scene. One of the people involved had been hurt seriously enough to have to be transported to Piedmont Medical for treatment." (R. p. 479, ll. 17-22). Judge Yard reviewed written statements

from Plaintiff and his wife. (R. p. 479, l. 23 - p. 480, l. 4). He did not have a version of events from Mr. Faile. (R. p. 480, ll. 11-18).

Judge Yard stated that he would verify facts with the officer and "would proceed into the warrant once they determined what charge they were asking for if I agreed to that." (R. p. 484, ll. 6-10; p. 484, l. 25 - p. 485, l. 4). Deputy Gwinn requested a warrant for ABHAN against Plaintiff and Judge Yard agreed. (R. p. 486, ll. 1-11; p. 487, l. 4; p. 494, ll. 17-21). Deputy Gwinn never asked for a warrant against Mr. Faile. (R. p. 495, ll. 4-6).

Judge Yard issued the warrant on April 26, 2012. (R. p. 488, ll. 21-23; p. 557). Judge Yard stated "the probable cause was based on police investigation meaning that [Deputy Gwinn] had presented it to me what he found when he was there." (R. p. 489, ll. 21-23). The warrant states "probable cause based on police investigation." (R. p. 490, ll. 7-8).

Judge Yard did not know of any other occupants at the home other than Plaintiff and his wife. (R. p. 481, ll. 3-6). He also did not know if this was Plaintiff's house. (R. p. 481, ll. 9-10). Judge Yard did not look up the Defense of Habitation Act or the Castle Doctrine. (R. p. 498, ll. 9-14).

E.B. Springs was the assistant solicitor assigned to Plaintiff's case. (R. p. 500, ll. 1-2; p. 502, ll. 8-10; p. 505, ll. 2-6). He reviewed the file and concluded Plaintiff acted within his rights under the Castle Doctrine and was defending his home. (R. p. 506, l. 2 - p. 507, l. 6; p. 508, l. 1 -p. 509, l. 15). Mr. Springs "*nolle prossed*" the case stating "Defendant's actions were within the law." (R. p. 510, ll. 10-19; p. 511, l. 24 - p. 512, l. 13). Mr. Springs stated as much in an email to Plaintiff's criminal defense lawyer, noting he heard the 9-1-1 recording as well as the recordings from the officers' dash cameras. (R. p. 513, l. 11 - p. 514, l. 3). He dismissed the case before there was a preliminary hearing in the matter. (R. p. 514, ll. 7-22).

Defendant then rested his case and renewed his motion for directed verdict aimed at the malicious prosecution claim. (R. p. 519, l. 11 - p. 526, l. 22). The trial court denied the motion. (R. p. 528, ll. 5-18).

The court submitted the matter to the jury on the malicious prosecution claim, and the jury returned a verdict for Plaintiff. Defendant moved for JNOV or, alternatively, a new trial on several grounds. On December 5, 2016, the trial court entered an order denying those motions.

Defendant appealed that verdict, and Plaintiff cross-appealed the exclusion of Mr. Phillips' testimony as well as the directed verdict on Plaintiff's false arrest claim.

## ARGUMENTS

The trial court appropriately permitted the jury to decide this case. Defendants have not raised any issue that compels this Court to reverse the trial court's denial of Defendant's motions for JNOV or, alternatively, a new trial absolute. This Court should affirm.

### 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); *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). Viewed in that manner the trial court's rulings are correct and this Court should affirm.

## I. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTIONS FOR DISMISSAL, DIRECTED VERDICT AND JNOV UNDER SOUTH CAROLINA CODE ANN. § 15-78-60(23)

Defendant contends that as a matter of law *all* governmental entities enjoy absolute sovereign immunity under Section 15-78-60(23) of the South Carolina Tort Claims Act from the cause of action for malicious prosecution. (App. Br. pp. 7-11). Defendant argues that comparing the elements of malicious prosecution to language of subpart (23), the General Assembly intended to fully immunize governmental entities from *any* claim for malicious prosecution. This Court should not be persuaded by this argument.

In denying Defendant's motion for directed verdict, the trial court ruled "this is a criminal proceeding and I find that it falls outside the immunity" under Section 15-78-60(23). (R. p. 528, ll. 17-18). Defendant moved for JNOV on several grounds, including "as an exception to the waiver of immunity pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(23), a governmental entity is not liable for a loss resulting from the institution or prosecution of any judicial proceeding." (R. p. 20, ¶ 6). Defendant essentially argued that this provision of the Tort Claims Act precludes *any* action against a law enforcement officer for bringing *any* judicial proceeding. (R. p. 20, ¶ 6). In denying the JNOV motion under this ground the circuit court ruled "the undersigned continues to believe the exceptions do not apply under the facts here present." (R. pp. 1-2). The court's ruling is correct and this Court should affirm.

To maintain an action for malicious prosecution, a plaintiff must establish (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in the plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Pallares v. Seinar*, 407 S.C. 359, 756

S.E.2d 128 (2014); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). Thus, Plaintiff must establish that Defendant or someone at his instance instituted or continued original judicial proceedings against Plaintiff.

The Tort Claims Act provides exceptions to the waiver of sovereign immunity under Section 15-78-60, including "(23) institution or prosecution of any judicial or administrative proceeding...." This provision has not been construed by any South Carolina appellate court for the argument Defendant makes here. However, provisions similar to this one are generally viewed as protecting attorneys, such as prosecutors, who institute or prosecute cases. *See Immunity of prosecuting officer from action for malicious prosecution*, Annot., 118 A.L.R. 1450 (1939 & Supp. 2016) (collecting cases under similar provisions and noting their application to prosecutors and personnel involved with district attorneys in pursuing criminal cases or administrative actions).

The only South Carolina appellate case to discuss the provision did not construe it in the manner Defendant advocates in this case. In *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013), this Court held the gross negligence exception to the waiver of sovereign immunity applied under subsection (23) where another applicable exception under Section 15-78-60 contained gross negligence exception. The holding in *Chakrabarti* makes no sense if the Defendant's argument in this case is correct. That is, this Court would have held it made no difference whether a gross negligence standard applied since subsection (23) provides absolute sovereign immunity regardless of the level of fault in pursuing the case. If malicious prosecution is not actionable at all then certainly the lesser standard of gross negligence would support absolute immunity under Subsection (23). But that was not how this Court decided *Chakrabarti*, nor is it how that case should have been decided. *See also Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d

656 (Ct. App. 2005) (affirming the grant of summary judgment for City of Abbeville on plaintiff's claim for malicious prosecution because under "the exacting summary judgment standard" the only view of the evidence was that police officer had probable cause to arrest plaintiff for trespass after notice, an uncharged offense; Court could have used Section 15-78-60(23) as a reason to affirm as absolute immunity but did not do so).

The tort of malicious prosecution protects the personal interest of freedom from unjustifiable litigation. *Broughton v. State*, 335 N.E.2d 310 (N.Y. 1975) (citing *Prosser on Torts*, § 119 (4th ed. 1970) and *False imprisonment; liability of private citizen for false arrest by officer*, Annot., 21 A.L.R.2d 643 (1952 & Supp. 2016)). The tort vindicates the right to be free from the institution or continuation of judicial proceedings, either civil or criminal, where the proponent acts with legal malice and a lack of probable cause. *Cf. Jordan v. Deese*, 317 S.C. 260, 452 S.E.2d 838 (1995) (setting forth elements of the tort). The General Assembly did not indicate it intended to protect all State actors from facing liability where those actors institute or continue judicial proceedings while lacking probable cause or while instituting the proceedings without just cause or excuse.

The only case Defendant asserts in support of his position is a federal district court case, *McCoy v. City of Columbia*, 929 F.Supp.2d 541 (D.S.C. 2013). (App. Br. p. 8). The narrow holding of the district court's order, however, is that there was probable cause as a matter of law to support the warrantless arrest of plaintiff so that plaintiff's claims under 42 U.S.C. § 1983 failed as a matter of law. In a footnote, the District Court stated it agreed with the Magistrate Judge's recommendation that the City was immune from liability for malicious prosecution under Section 15-78-60(23), but there is no discussion of the Magistrate Judge's analysis nor is there any reason given in the District Court's order. That is, the District Court did not hold that the malicious prosecution claim failed as

a matter of law regardless of the facts established in the case, just that "McCoy's cause of action for malicious prosecution plainly falls within this express exception." *McCoy*, 567 at n. 10. This discussion is therefore not helpful and may have been based on the view that probable cause existed as a matter of law to arrest McCoy. Furthermore, the District Court stated the City and the Officer Defendants would be entitled to summary judgment on McCoy's state law claims at least because McCoy's arrest was supported by probable cause (*i.e.*, no evidence of a lack of probable cause as a matter of law). Thus, the discussion of 15-78-60(23) was not necessary to the disposition and is dictum in the case. Finally, *McCoy* involves the federal court attempting to predict how state law may be applied and is not binding authority on this Court.

The trial court correctly denied Defendant's motions for judgment as a matter of law under Section 15-78-60(23). This Court should affirm.

## II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND JNOV AS TO THE MALICIOUS PROSECUTION CLAIM

Defendant contends the record supports but one conclusion, that is, that the deputies had probable cause to arrest Plaintiff during the incident involving Mr. Faile. (App. Br. pp. 11-19). Defendant asserts that even though the facts may support Plaintiff's immunity under the Protection of Persons and Property Act or the Castle Doctrine, such does not preclude judgment as a matter of law for Defendant on the claim for malicious prosecution. The upshot of Defendant's argument here is that "the evidence yields one conclusion – that probable cause existed as a matter of law for [Plaintiff's] arrest on the ABHAN charge." (App. Br. p. 13). The Court should not be persuaded by this argument.

To maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in the plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (2014); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause. *Pallares*; *Law*.

Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. *Jones v. City of Columbia*, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). The determination of whether probable cause exists is ordinarily a jury question; however, it may be decided as a matter of law when the evidence yields but one conclusion. *Law*, 368 S.C. at 441, 629 S.E.2d at 651.

"Malice" is defined as "the deliberate, intentional doing of an act without just cause or excuse." *Pallares*; *Law* at 437, 629 S.E.2d at 649 (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982)). Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice. *Pallares*. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. *Id.*

Here, the jury heard testimony from Plaintiff and his wife, listened to the 9-1-1 tape, saw the dash-cam videos from the incident, and had all the exhibits, including the dismissal sheet, to weigh the issue of probable cause to arrest Plaintiff. Despite Defendant's contention to the contrary, the

issue of probable cause was a matter for the jury to determine. *See Jones v. City of Columbia* (South Carolina follows the minority rule that the issue of probable cause is a question of fact and ordinarily one for the jury).

Defendant also contends that there was no evidence of "termination of such proceedings in the plaintiff's favor." (App. Br. pp. 15-16). The Court should reject this argument.

The charges in this case were *nolle prossed* by Mr. Springs, the solicitor. The entry of a *nolle prosse* is sufficient to support a claim for malicious prosecution in South Carolina, provided the *nolle prosse* is entered "under circumstances which imply or are consistent with innocence of the accused." *McKenney v. Jack Eckerd Co.*, 304 S.C. 21, 22, 402 S.E.2d 887, 888 (1991). The reason Mr. Springs gave for the *nolle prosse* was that after he reviewed the file he concluded Plaintiff acted within his rights under the Castle Doctrine and was defending his home. (R. p. 506, l. 2 - p. 507, l. 6; p. 508, l. 1 -p. 509, l. 15). Mr. Springs opined that "Defendant's actions were within the law." (R. p. 510, ll. 10-19; p. 511, l. 24 - p. 512, l. 13). Mr. Springs stated as much in an email to Plaintiff's criminal defense lawyer, noting he heard the 9-1-1 recording as well as the recordings from the officers' dash cameras. (R. p. 513, l. 11 - p. 514, l. 3). He dismissed the case before there was a preliminary hearing in the matter. (R. p. 514, ll. 7-22).

The trial court instructed the jury on this point. (R. p. 538, ll. 18-21). The evidence at least implies Plaintiff's innocence and is evidence from which the jury could conclude was consistent with Plaintiff's innocence. *See, e.g., State v. Jones*, 416 S.C. 283, 786 S.E.2d 132 (2016) (discussing both the "Protection of Persons and Property Act" and pre-Act Castle Doctrine which provide immunity from prosecution under applicable circumstances). That is all that is required under *McKenney*.

Accordingly, this Court should affirm the denial of Defendant's motion for JNOV.

## III. THE TRIAL COURT DID NOT ERR IN REFUSING TO CHARGE DEFENDANT'S REQUEST TO CHARGE AS TO THE DEGREE OF PROOF REQUIRED TO ESTABLISH PROBABLE CAUSE

Defendant contends the trial court committed reversible error in failing to give the following charge:

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

(App. Br. pp. 19-20). Defendant had requested this charge prior to the instructions. (R. p. 517, ll. 18-24). Following the instructions, Defendant argued in confusing fashion that the court should have charged probable cause differently. (R. p. 546, l. 7 - p. 548, l. 10). The trial court pointed out that the request would require the jury to think up something else, stating "I would have to go into all of the possible charges that ... may have arisen from what they found." (R. p. 549, ll. 6-7). The court added "had there been some other evidence in the case that said - - that would give this jury something to hang their hat on that perhaps he didn't commit - - that they overcharged him so to speak." (R. p. 550, ll. 3-6). The court did not rule further, nor did counsel request any additional charge.

On appeal, Defendant asserts reversible error in failing to give the charge under *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005) (probable cause to arrest for an uncharged offense will support summary judgment for city police department on plaintiff's claim for malicious prosecution). The Court should reject this argument.

A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal. *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 781 S.E.2d 534 (2015). The *Stephens* Court added:

> When an appellate court reviews an alleged error in a jury charge, it "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (citations omitted). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* "This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.'" *Ardis v. Sessions*, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009) (quoting *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App.1997)).

*Stephens*, at 197-198, 781 S.E.2d at 542. *Accord Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 778 S.E.2d 902 (2015) (in reviewing jury charges for error, appellate court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial).

The trial court gave the following instructions:

> In determining whether probable cause existed, you should focus on whether the defendant -- and again, when I use the word defendant, I'm talking about the Sheriff's Office -- you should focus on whether the defendant had reasonable cause to believe that Mr. Carter committed the act about which the complaint was made, and *not whether Mr. Carter as actually guilty or innocent. Whether the plaintiff, Mr. Carter, was or was not guilty of the charge set forth in the warrant is of no importance.*

(R. p. 537, ll. 6-14) (emphasis added). Defendant contends this charge was incomplete and resulted in reversible error. (App. Br. p. 21). The Court should not be persuaded by this argument.

The trial court added the following to the jury instructions:

> Probable cause is determined by the facts and circumstances present in the mind of the defendant or his agents, here the deputies, at the time of the institution or continuation of the proceedings, not by any later events. If the facts and circumstances would lead a person of ordinary intelligence, caution, and prudence acting conscientiously, fairly, and without prejudice to believe that a plaintiff was guilty, that would be probable cause. Probable cause is something more than mere suspicion.
>
> Probable cause is a commonsense, non-technical conception that deals with the factual and practical consideration of everyday life on which reasonable and

prudent men, and not on legal technicalities -- I'm sorry. Let me say that again.

> Probable cause is a commonsense, non-technical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *The proper standard for determining probable cause is an objective standard. That is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amounted to probable cause. The probable cause analysis that you must go through includes a realistic assessment of the situation from the law enforcement officers' perspective.*

(R. p. 537, l. 15 - p. 538, l. 15) (emphasis added).

When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 781 S.E.2d 548 (2015). A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial. *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011).

The trial court's instructions correctly charged the jury on the law of probable cause in light of the issues raised in the pleadings and developed by the evidence in support of those issues. Defendant did not elicit any testimony of any other charge for which the police officers could have arrested Plaintiff, or for which they could have obtained an arrest warrant. As the trial court stated, the jury would have been left to speculate about other possible charges and the trial court would have had to think up all possible charges or lesser included offenses to the ABHAN charge, none of which Defendant suggested or presented evidence regarding. In light of Plaintiff's right to immunity under the Castle Doctrine and the Protection of Persons and Property Act, there were no "uncharged offenses" apparent from the record.

The Court should reject Defendant's contention here and affirm the trial court's decision to deny Defendant's new trial motion on this ground.

## IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING PLAINTIFF TO CLAIM $17,500 IN ATTORNEY'S FEES AS A PORTION OF HIS DAMAGES

Prior to Plaintiff's testimony, Defendant's counsel brought up the fact that Plaintiff had reported paying only $5,000 of his attorney's fees in responses to discovery. (R. p. 107, ll. 7-18). Plaintiff's counsel explained that Plaintiff had paid the $5,000 retainer but still owed $12,500 on the fee. (R. p. 108, ll. 4-20). When the court asked if Defendant would object, counsel stated "we're taking the position that ... the criminal defense damages, the invoice was Five Thousand Dollars...and he still owed him Twelve Thousand, Five Hundred Dollars." (R. p. 108, l. 23 - p. 109, l. 3). Ultimately, the court ruled that Plaintiff could testify regarding the agreed upon and paid fees and Defendant could cross-examine him. (R. p. 110, l. 25 - p. 111, l. 3).

Plaintiff testified counsel told him the normal fee was $20,000 but he would give him a discount at $17,500 and allow him to pay $5,000 up front. (R. p. 113, ll. 17-23). On cross-examination, Plaintiff stated he paid $5,000 and when asked "that's how much that's come out-of-pocket so far?" he stated "yes, sir." (R. p. 157, ll. 10-15; p. 158, ll. 4-7). On redirect, Plaintiff said he planned and hoped to pay the $12,500 balance to his lawyer some day. (R. p. 159, l. 15 - p. 160, l. 5). Defendant did not re-cross examine him. (R. p. 165, ll. 18-21).

In closing argument, Plaintiff's counsel told the jury that Plaintiff agreed to pay his criminal defense counsel $17,500 and "that he hasn't paid it all back yet." Counsel also stated that Plaintiff was "out Seventeen thousand dollars." Defendant's counsel did not mention the fee in his closing.

In the instructions to the jury, the court stated "Damages may also include expenses such as the amount of attorney fees paid in defending the prosecution." (R. p. 539, ll. 9-11). The court added, "you are not required to award the amount of damages requested. Instead you should award those damages you find the evidence has shown [Plaintiff] has suffered or will suffer as a proximate result of the defendant's conduct." (R. p. 539, ll. 12-15). Finally, the court charged:

> Actual damages are damages which are meant to compensate one for their injuries or losses and to put them, as near as possible, in the same position they were in before the incident occurred. In other words, the actual damages would be the actual losses and expenses which [Plaintiff] has suffered because of the Defendant's actions.

(R. p. 542, ll. 18-24). There was no objection to any instruction related to damages.

In the post-trial motion, Defendant contended he was entitled to a new trial because the trial court permitted Plaintiff to testify and introduce evidence that he had incurred or was responsible for $17,500 in criminal defense attorney fees. (R. pp. 23-24, ¶ 14). The trial court denied the motion on this ground. (R. p. 2).

On appeal, Defendant contends the trial court abused its discretion in permitting Plaintiff to claim $17,500 in fees instead of $5,000. (App. Br. p. 22). Defendant argues he sought exclusion of any amount over the $5,000 (App. Br. p. 22) and asserts two reasons: (1) the $12,500 unpaid balance was never disclosed in discovery (App. Br. p. 23), and (2) Defendant was precluded from challenging the legitimacy of the arrangement because the criminal defense lawyer was the same lawyer performing the direct examination of Plaintiff. (App. Br. p. 23). The Court should not be persuaded by these arguments.

First, Defendant misstates what happened at trial. The issue was taken up *in limine* as described above, and the trial court ruled Defendant could cross-examine Plaintiff about the

arrangement (which Defendant did do). There was no further objection to the claimed amount. See, e.g., *Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002) (motion *in limine* is not final and party must renew objection when evidence is presented).

Second, it was within the trial court's discretion to permit the evidence. Plaintiff testified in support of the criminal defense fee arrangement, and Defendant was permitted to thoroughly explore the arrangement through cross-examination. Defendant also had the opportunity to address the issue in closing, and the trial court's instructions permitted the jury to accept or reject any portion of the claimed amount.

As the Supreme Court stated recently:

> The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005); *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991). To warrant reversal based on the admission or exclusion of evidence, the Defendant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence. *Conner*, 363 S.C. at 467, 611 S.E.2d at 908; *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997).

*Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Defendant has not explained how the trial court's ruling was based on an error of law or involved a factual conclusion without evidentiary support. Further, Defendant has not explained how he was prejudiced even if there had been error. This Court should not be persuaded to reverse on this ground.

Third, the jury returned a general verdict without explaining whether it accepted or rejected Plaintiff's evidence on the unpaid fees. Defendant did not request any interrogatories be submitted

or a specific verdict form. There is therefore no way to know what allowances the jury made in reaching its verdict. *Compare Pearson v. Bridges*, 344 S.C. 366, 372 n. 5, 544 S.E.2d 617, 619 n. 5 (2001) (Supreme Court affirmed general verdict noting there was no way to know whether jury made allowances for certain claimed damages).

Fourth, Defendant's argument is conclusory and contains no citation to authority. Other than two paragraphs outlining the facts and declaring the scenario "fundamentally unfair," (App. Br. pp. 22-23), the entire argument in the brief is as follows:

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

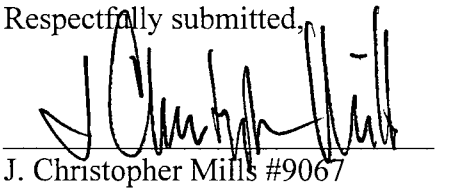
(App. Br. p. 23). The Court should therefore deem this argument abandoned. *See, e.g., Smith v. Tiffany*, 419 S.C. 548, 558 n. 3, 799 S.E.2d 479, 484 n. 3 (2017) (declining to address due process argument where Defendants' brief included only conclusory references to "due process considerations of fairness and equity" and set forth no substantive legal argument or supporting citations to authority); *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014)(refusing to consider an argument in the Defendant's brief that was "conclusory" and "not supported by any authority"); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)(noting a claim is deemed abandoned when the Defendant fails to support it with arguments or citations to authority).

The Court should affirm the denial of Defendant's motion for new trial on this ground.

## CONCLUSION

For the reasons stated the Court should affirm the trial court's decision to deny Defendant's motion for directed verdict and JNOV as to the malicious prosecution claim and the Defendant's motion for new trial. The Court should affirm the jury's verdict.

Respectfully submitted,



March 9, 2018

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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Case No. 2014-CP-46-1307

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Russell Shane Carter. . . . . Respondent/Appellant,

v.

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

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**CERTIFICATE OF COMPLIANCE**

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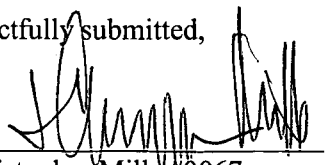
Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Brief of Respondent of Respondent-Appellant* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,



March 12, 2018

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