

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Opinion No. 2018-UP-080
(S.C. Ct. App. filed February 7, 2018)

Kay F. Paschal, Respondent,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, Petitioner.

APPENDIX

ANDREW F. LINDEMANN
LINDEMANN, DAVIS
& HUGHES, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

S. JAHUE MOORE
JOHN C. BRADLEY, JR.
MOORE TAYLOR LAW FIRM, P.A.
1700 Sunset Boulevard
Post Office Box 5709
West Columbia, South Carolina 29171
(803) 796-9160

Counsel for Petitioner Leon Lott

Counsel for Respondent

PATRICK J. FRAWLEY
DAVIS FRAWLEY, LLC
140 East Main Street
Post Office Box 489
Lexington, South Carolina 29071
(803) 359-2512

Counsel for Petitioner Leon Lott

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kay F. Paschal, Respondent/Appellant,

v.

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

Appellate Case No. 2015-001153

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 2018-UP-080

Heard November 7, 2017 – Filed February 7, 2018

AFFIRMED

Andrew F. Lindemann, of Lindemann, Davis & Hughes,
PA, of Columbia, and Patrick John Frawley, of Davis
Frawley, LLC, of Lexington, for Appellant/Respondent.

S. Jahue Moore, Stanley Lamont Myers, and John Calvin
Bradley, Jr., of Moore Taylor Law Firm, P.A., of West
Columbia, for Respondent/Appellant.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Sheriff Lott's argument he was entitled to a directed verdict or JNOV on Paschal's malicious prosecution cause of action based on Paschal's failure to show a lack of probable cause: *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) ("In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."); *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003) ("[An appellate court] will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law."); *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) (listing the elements of a malicious prosecution cause of action); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 436, 629 S.E.2d 642, 649 (2006) ("Probable cause means 'the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered.'" (quoting *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965))); *id.* ("Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion.").

2. As to Sheriff Lott's argument he was entitled to a directed verdict or JNOV on Paschal's malicious prosecution cause of action based on Paschal's failure to show termination of the proceedings in her favor: *Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."); *Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[An appellate court] will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law."); *McBride*, 389 S.C. at 565, 698 S.E.2d at 855 (listing the elements of a malicious prosecution cause of action); Rule 2(a), SCRCrimP ("Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing solely to determine whether

sufficient evidence exists to warrant the defendant's detention and trial."); Rule 2(c), SCRCrimP ("If probable cause be found by the magistrate, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the defendant shall be discharged; but his discharge shall not prevent the State from instituting another prosecution for the same offense."); *Harrelson v. Johnson*, 119 S.C. 59, 63, 111 S.E. 882, 883 (1922) (highlighting the distinction between a magistrate's order dismissing charges, which terminates the prosecution, and a solicitor's entry of a nolle prosequi, which can be recalled), *overruled on other grounds by McKenney v. Jack Eckerd Co.*, 304 S.C. 21, 22, 402 S.E.2d 887, 888 (1991); *State v. Gaskins*, 263 S.C. 343, 347, 210 S.E.2d 590, 592 (1974) ("A [n]olle prosequi is a formal entry on the record by the prosecuting officer by which he declares he will not prosecute the case further."); *State v. Ridge*, 269 S.C. 61, 64, 236 S.E.2d 401, 402 (1977) ("[T]he entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a [nolle prosequi] at that time."); *Ruff v. Eckerd's Drugs, Inc.*, 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975) (holding a magistrate's dismissal of a disorderly conduct charge was a termination of the proceedings in favor of the plaintiff in a malicious prosecution action); *Mack v. Riley*, 282 S.C. 100, 102, 316 S.E.2d 731, 732 (Ct. App. 1984) ("[T]he discharge of the accused by a magistrate on a preliminary investigation is a sufficient termination as will sustain [a malicious prosecution action]."), *overruled on other grounds by McKenney*, 304 S.C. at 22, 402 S.E.2d at 888; *Jennings v. Clearwater Mfg. Co.*, 171 S.C. 498, 505-06, 172 S.E. 870, 873 (1934) ("[T]he remedy accorded a citizen of damages for a malicious prosecution is intended to prevent and redress the malicious abuse of the process of the law, and . . . when the particular proceeding instituted in malice ha[s] been legally terminated, the remedy of the injured party has matured; he is not required to await an acquittal, an adjudication of his innocence, which may never come[] and may be purposely prevented." (quoting *Harrelson*, 119 S. C. at 61, 111 S. E. at 882, *overruled on other grounds by McKenney*, 304 S.C. at 22, 402 S.E.2d at 888)).

3. As to Sheriff Lott's argument he was entitled to a directed verdict or JNOV on Paschal's abuse of process cause of action: *Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."); *Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[An appellate court] will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law."); *Pallares v.*

Seinar, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014) ("The tort of abuse of process is intended to compensate a party for harm resulting from another party's misuse of the legal system."); *Swicegood v. Lott*, 379 S.C. 346, 351–52, 665 S.E.2d 211, 213 (Ct. App. 2008) (holding an abuse of process cause of action "consists of two elements: an ulterior purpose, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding"); *Pallares*, 407 S.C. at 370–71, 756 S.E.2d at 133 (holding the ulterior or improper purpose element "exists if the process is used to secure an objective that is 'not legitimate in the use of the process.'" (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012))); *Swicegood*, 379 S.C. at 353, 665 S.E.2d at 214 ("[T]he isolated statement in *Guider v. Churpeyes, Inc.* that '[r]egardless, there is no liability when the process has been carried out to its authorized conclusion, even though with bad intentions[]' . . . should not be interpreted to mean that no liability may ever arise [when] the process is carried to its authorized conclusion." (first alteration and emphasis by court) (quoting *Guider*, 370 S.C. 424, 432, 635 S.E.2d 562, 566 (Ct. App. 2006))); *id.* ("[T]he essence of the tort of abuse of process centers on events occurring outside of the process . . ."); *id.* at 353–54, 665 S.E.2d at 215 ("The 'willful act' element of the abuse of process tort has been interpreted by this court to consist of three different components: 1) an act that is either willful or overt; 2) in the use of the process; 3) that is ultimately reprehensible because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.").

4. As to Sheriff Lott's argument the trial court erred by submitting to the jury the question of whether Sheriff Lott's employee complied with the procedure in section 22-5-110 of the South Carolina Code (Supp. 2017) when she obtained warrants for Paschal's arrest: § 22-5-110(B)(1) ("An arrest warrant may not be issued for the arrest of a person unless sought by a law enforcement officer acting in their official capacity."); *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." (quoting *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992))); *Kennedy v. Griffin*, 358 S.C. 122, 130, 595 S.E.2d 248, 252 (Ct. App. 2004) ("[When] there is evidence from which the jury can reasonably infer one is in violation of a statute, that evidence will support a charge of that statute." (quoting *Jefferson v. Synergy Gas, Inc.*, 303 S.C. 479, 481, 401 S.E.2d 427, 428 (Ct. App. 1991))); *id.* ("A trial judge's decisions on jury instructions will not be reversed on appeal absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))); *Swicegood*, 379 S.C. at 353–54, 665 S.E.2d at 215 ("The 'willful act'

element of the abuse of process tort has been interpreted by this court to consist of three different components: 1) an act that is either willful or overt; 2) in the use of the process; 3) that is ultimately reprehensible because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective."); *Wade v. Berkeley Cty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998) (indicating the South Carolina Tort Claims Act, particularly section 15-78-30(i) of the South Carolina Code (2005), provides its own definition of whether a government employee is acting within the scope of her official duty).

5. As to Paschal's argument the damages cap imposed by the Tort Claims Act does not apply to intentional torts: S.C. Code Ann. § 15-78-120(a) (2005) (imposing limits on liability "[f]or any action or claim for damages brought under the provisions of this chapter"); S.C. Code Ann. § 15-78-140(B) (Supp. 2017) ("For any claim filed under this chapter, the remedy provided in [s]ection 15-78-120 is exclusive."); S.C. Code Ann. § 15-78-30(b) (2005) ("'Claim' means any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty."); S.C. Code Ann. § 15-78-20(b) (2005) ("The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter."); *id.* ("The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein."); *id.* ("The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in [section] 15-78-70(b)."); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) ("The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature."); *id.* at 522, 377 S.E.2d at 570 ("In ascertaining this intent, statutes [that] are part of the same Act must be read together.").

6. As to Paschal's argument that even if the damages cap applies to her case, her award should have been reduced to \$600,000 rather than \$300,000: § 15-78-120(a)(1) (limiting a person to \$300,000 in the damages she may recover from the State for a single "occurrence," rather than cause of action); § 15-78-120(a)(2) (addressing the limit on the total amount the State must pay out for a single occurrence, rather than cause of action); *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007) ("When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of

statutory interpretation are not needed, and this court has no right to impose another meaning.").

AFFIRMED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

The South Carolina Court of Appeals

Kay F. Paschal, Respondent/Appellant,

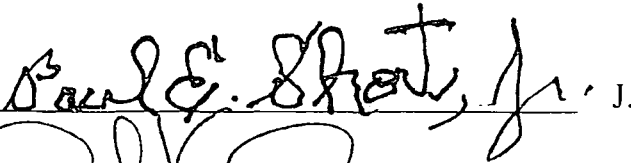
v.

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

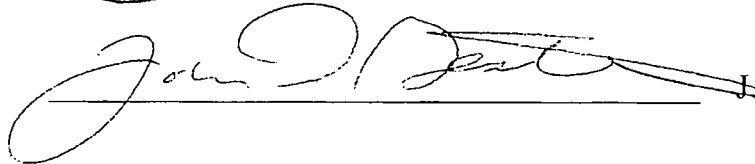
Appellate Case No. 2015-001153

ORDER

After careful consideration of the petition for rehearing, this court has found no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Andrew F. Lindemann, Esquire
Patrick John Frawley, Esquire
S. Jahue Moore, Esquire
Stanley Lamont Myers, Sr., Esquire
John Calvin Bradley, Jr., Esquire
The Honorable William P. Keesley

FILED

April 26, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
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SC Court of Appeals

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

Kay F. Paschal, Respondent-Appellant,

v.

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

PETITION FOR REHEARING

The Appellant-Respondent Leon Lott petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Paschal v. Lott.*, Op. No. 2018-UP-080 (S.C. Ct. App. filed February 7, 2018).

The grounds for the Appellant-Respondent's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant-Respondent's petition for rehearing is based on the Court's decision in *Paschal v. Lott*, Op. No. 2018-UP-080 (S.C. Ct. App. filed February 7, 2018); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

LINDEMANN, DAVIS & HUGHES, P.A.

BY:  _____

ANDREW F. LINDEMANN
202 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

-AND-

PATRICK J. FRAWLEY
DAVIS FRAWLEY, LLC
Post Office Box 489
Lexington, South Carolina 29071
(803) 359-2512

*Counsel for Appellant-Respondent
Leon Lott*

Columbia, South Carolina

February 22, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
FEB 22 2018
SC Court of Appeals

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

Kay F. Paschal, Respondent-Appellant,

v.

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

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

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

I.

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Only offenses within the jurisdiction of magistrate and municipal court (currently \$500, 30 days, or both) may be written on a courtesy summons. General Sessions charges must be written on an arrest warrant.
3. Affiant must provide sworn statement establishing probable cause that the alleged crime was committed by the defendant. Summary court judge undergoes same analysis as if determining whether to issue an arrest warrant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

The record contains sufficient evidence that would lead an objectively

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

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

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

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

- (2) Page 1 of the recorded Power of Attorney showing Kay Paschal as attorney was a different paper stock than pages 2-6.
- (3) Page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney was the same paper stock as pages 2-6.
- (4) There were font defects on page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney and pages 2-6, but no font defects on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney.
- (5) The "DW" initials on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney were not made by David Wallace.
- (6) The staple holes on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney were fewer than the staple holes on pages 2-6. The staple holes on page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney matched the staple holes on pages 2-6.

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

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

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

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

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

In sum, both the forgery and the breach of trust charges were based upon the transaction that resulted from Kay Paschal using the forged Power of Attorney to acquire the Toyota Sienna van and to gain an interest in that van. An objectively reasonable law enforcement officer knowing that information would believe that probable cause existed for these crimes under South Carolina law. This Court has previously explained that "[a]lthough the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion." *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 660 (Ct. App. 2005). Here, as it did in *Jackson*, the evidence yields one conclusion -- that probable cause exists as a matter of law for the forgery and breach of trust offenses which this Court overlooked or misapprehended in issuing its memorandum opinion.

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

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

³ In *McKinney v. Richland County Sheriff's Dept.*, 431 F.3d 415 (4th Cir. 2005), the Fourth Circuit recognized that "[b]oth a prosecutor and a neutral and detached magistrate independently reviewed the evidence and concluded that there was probable cause." 431 F.3d at 419. The Fourth Circuit then explained that "[a] reasonable officer would not second-guess these determinations unless probable cause was plainly lacking, which it was not." *Id.* See also *Melton v. Williams*, 281 S.C. 182, 314 S.E.2d 612, 615 (Ct. App. 1984) ("Good faith reliance upon advice of fully informed counsel may establish probable cause").

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

IV.

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

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

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

dismissal imply or are consistent with innocence.

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

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

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

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

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

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

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

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

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

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

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

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

V.

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

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

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

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

(R. 5).

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

ANDREW F. LINDEMANN
202 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

-and-

PATRICK J. FRAWLEY
DAVIS FRAWLEY, LLC
Post Office Box 489
Lexington, South Carolina 29071
(803) 359-2512

*Counsel for Appellant-Respondent
Leon Lott*

Columbia, South Carolina

February 22, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Common Pleas Court

William P. Keesley, Circuit Court Judge

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

Kay F. PaschalRespondent-Appellant,

v.

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

**RESPONDENT-APPELLANT'S RETURN TO APPELLANT-RESPONDENT'S
PETITION FOR REHEARING**

The Respondent-Appellant Kay F. Paschal, respectfully submits this Return to Appellant-Respondent Leon Lott's Petition for Rehearing with respect to the Court's rulings in Opinion No. 2018-UP-080. The decision of the Court is sound. For the reasons set forth below and for the reasons stated in the Respondent-Appellant's Brief and the Opinion, this Court's decision should stand.

Appellant-Respondent Lott asserts that the well-reasoned Opinion of this Court is insufficient, fails to address all of the issues raised on appeal, and fails to provide the litigants with the bases for the Court's decision to affirm the Lower Court. (Memorandum of Appellant-Respondent, Page 2). Appellant-Respondent Lott further asserts that the

issuance of a memorandum opinion has not provided Sheriff Lott with “meaningful Appellant review as warranted by an important case involving a multi-day jury trial resulting in a verdict of 1.6 million and involving issues of novel statutory interpretation and significant public importance.” The Respondent-Appellant Paschal does not agree. The opinion of this Court was well reasoned, and correct. There is nothing to support the argument that the parties to this appeal did not receive meaningful Appellant review. The Petition for Rehearing should be denied by this Court.

I. THERE WAS AMPLE EVIDENCE TO SUPPORT RESPONDENT-APPELLANT’S MALICIOUS PROSECUTION CLAIM

Appellant-Respondent Sheriff Lott argues that the Court’s decision erroneously affirmed the denial of his directed verdict and JNOV motions as to Respondent-Appellant Paschal’s cause of action for malicious prosecution. The Respondent-Appellant Paschal asserts that there was ample evidence in this case to support her claim for Malicious Prosecution and the Trial Court’s ruling and the Opinion of this Court are correct.

As he did in his Briefs and argument before the Court, Sheriff Lott focuses his argument by alleging that Respondent-Appellant failed to prove two essential elements of her malicious prosecution cause of action, probable cause and termination of the underlying proceedings in her favor. See, *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C.466, 736 S.E.2d 867 (Ct. App. 2012).

Contrary to the assertions and arguments of Sheriff Lott, the jury heard ample evidence as to both of these elements and the Opinion of this Court correctly affirmed the Lower Court’s denial of Appellant-Respondent Sheriff Lott’s directed verdict and post-trial motions with respect to malicious prosecution.

The jury heard ample evidence from which it could have concluded that facts within the knowledge of Lt. Jackson would have lead a reasonable person to believe the individual arrested was not guilty of a crime. *Jackson v. City of Abbeville*, 366 S.C.662, 623 S.E. 2d. 656 (Ct. App. 2005). The jury heard conflicting testimony as to Lt. Jackson's investigation, or lack thereof prior to obtaining her arrest warrants. The jury heard conflicting testimony regarding Lt. Jackson's contact with Tim Peterson, the employee with Carolina Mobility who handled the sale of the van. The jury heard evidence as to her "version" of sale of the van. The jury also heard testimony and evidence regarding the Lexington County Sheriff Department's own investigation of the same transaction. The jury heard testimony that these same charges had previously been investigated in Lexington County by Lexington County authorities. (R. p. 203, ll. 6-23). Steve Baumgartner, an 18 year employee of the Lexington County Sherriff's Department, had thoroughly investigated the matter involving the use of the POA to purchase the handicap accessible van and determined that there was no probable cause to charge Ms. Paschal with any wrongdoing or to arrest her. (R. p. 206, l. 18 – p. 207, l. 7; p. 21, l. 8 – p. 221, l. 11; p. 360, l. 23 – p. 361, l. 10; p. 365; p. 979).

Appellant-Respondent Lott relies upon Lt. Jackson's conversations with various law enforcement personnel as justification of her actions with respect to the arrest warrants. However, as brought out by Ms. Paschal's counsel in his cross examination of these witnesses, these contacts were fatally flawed in that Lt. Jackson did not present any of these individuals with a full set of facts prior to eliciting their opinions and were therefore designed to bolster her own flawed prosecution of the case, as opposed to obtaining objective opinions regarding the status of her investigation. (R. p. 260, l. 2 – p. 261, l. 16). The Trial Court properly considered this argument and rejected it, recognizing, "there is a

dispute as to whether there was a full and complete disclosure of all the material facts, and whether Defendant acted and relied upon such advice in good faith before seeking the arrest warrants in Lexington County.”

Unlike the *Jackson* case, once again relied upon by Appellant-Respondent Lott, the facts of this case with respect to probable cause certainly do not yield “but one conclusion” making this issue a question of law and not fact. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion. *Law v. South Carolina Department of Corrections*, 368 S.C. at 436, 629 S.E.2d 642 (2006) (citing *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 323, 143 S.E.2d 607, 609 (1965)). This is certainly not an instance where the evidence presented regarding probable cause yields only one conclusion. The Trial Court properly submitted the question of probable cause to the jury and did not err in denying Appellant-Respondent Lott’s post-trial motions with respect to this issue and this Court’s Opinion affirming the same is correct.

Appellant-Respondent Lott argues that Ms. Paschal failed to present evidence from which a jury could have determined that the judicial proceedings (in this case the arrest warrants and subsequent criminal charges terminated in her favor). See, *McKenney v. Jack Eckerd Company*, 304 S.C. 21, 402 S.E.2d 887 (1991). However, as recognized by Judge Keesley, and by this Court, there was ample evidence presented for the jury to conclude that the proceedings terminated in Kay’s favor. The jury heard ample evidence that the charges brought against Kay by Lt. Jackson were ultimately dismissed for lack of probable cause in January of 2012. (R. p. 175, ll. 19-24; p. 576, ll. 16-21; p. 579, ll. 7-23; p. 835, ll. 20-24; p. 836, ll. 3-10). Based on the lack of evidence and the lack of jurisdiction, the

Honorable Gary Morgan, Magistrate for Lexington County, dismissed the criminal warrants in Lexington County. (R. p. 115, ll. 7-10; p. 381, ll. 1-2; p. 383, ll. 1-3).

In denying Appellant-Respondent Lott's post-trial motions, the Court disagreed with Sheriff Lott's argument "...that there is a lack of evidence that the Richland County Sheriff's Department acted with malice in instituting or continuing the proceedings, and a lack of evidence about the Defendant instituting or continuing an action that lacked probable cause." (R. p. 1). To the contrary, the Court concluded that, ".....there is sufficient evidence to allow the jury to draw those conclusions." (R. p. 1). The Court's Opinion, affirming the Trial Court's Order is supported by the evidence presented to the jury in this case and the Petition for Rehearing should be denied.

II. THERE IS AMPLE EVIDENCE TO SUPPORT RESPONDENT-APPELLANT'S ABUSE OF PROCESS CLAIM

Appellant-Respondent Sheriff Lott argues that the Court erred in affirming the Lower Court's denial of his Directed Verdict and JNOV motions as to Respondent-Appellant's abuse of process claim. The Court's Opinion is correct. The tort of abuse of process is intended to compensate a party for harm resulting from another party's misuse of the legal system. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 74 n. 5, 567 S.E.2d 251, 255 n. 5 (Ct. App. 2002). To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. With respect to the cause of action for abuse of process, the issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process. *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967).

The jury heard ample evidence from which it could have concluded that Lt. Jackson completely perverted the legal process in this case, resulting in humiliation, embarrassment and damages to Kay. The jury heard evidence that the Appellant-Respondent's officers, particularly Lt. Jackson, single-mindedly and doggedly pursued its investigation oblivious to the actual facts of this case. The jury heard ample testimony that this was done, in part, to assist the Wallace children in pursuing a vendetta (both in and out of Probate Court) against Respondent-Appellant Paschal. As the jury correctly determined, the Defendant knew very well the potential consequences of her actions and proceeded without just cause despite the consequences. The Trial Court correctly determined and ruled that the jury heard ample testimony on which it could have returned a verdict for abuse of process under South Carolina Law. This Court's Opinion correctly affirmed the Trial Court's Order.

III. THE TRIAL COURT PROPERLY SUBMITTED SOUTH CAROLINA CODE SECTION 22-5-110 (SUPP.2017) TO THE JURY

Appellant-Respondent Sheriff Lott argues the this Court erred by affirming the Lower Courts use of South Carolina Code Section 22-5-110 (Supp. 2017) to evaluate the actions of Sheriff Lott's employee, Lt. Jackson with respect to her appearance before the Lexington Magistrate, Judge Whittle, and the arrest warrants that she obtained in Lexington County. Appellant-Respondent Sheriff Lott again asserts, as he did in the Lower Court and at Oral Argument that the Trial Court's use of this statute at trial resulted in denial of Appellant-Respondent Sheriff Lott's directed verdict motions, as well as his post-trial JNOV Motions. Appellant-Respondent Sheriff Lott finally asserts that this resulted in him receiving an unfair trial. Once again, this assertion lacks merit and the Opinion of this Court affirming the Lower Court's submission is correct.

Although this Statute came up on multiple occasions during the Trial, it was not, contrary to the arguments of Appellant-Respondent, “the centerpiece or focus of her (Respondent-Appellant Paschal’s) case.” Rather, reference to this statute was only one instance or example of Lt. Jackson’s improper conduct and activities in Lexington County and interaction with the Lexington County Magistrate that were presented to the jury. Further, the Court’s use of 22-5-110 by the Trial Court was proper and did not constitute an error of law. As correctly recognized by the Trial Court, the Appellant-Respondent’s conduct with respect to this statute was only one example of the “...overzealous, ill-willed, and improper prosecution...conducted by the Defendant (Appellant-Respondent) with respect to the Lexington County charges.” (R. p. 6).

In evaluating and ultimately denying Sheriff Lott’s Post-Trial Motions, Judge Keesley recognized that “...whether the court applied the law properly...has been the cause of some angst in evaluating the post-trial motions.” (R. p. 7)) Judge Keesley recognized that, “some of this relates to the proper interpretation of S.C. Code Ann. 22-5-110 and its applicability to the actions of the Defendant’s Deputy.” (R. p. 7). The Lower Court rejected Appellant-Respondent’s argument that this statute had no applicability to the actions of Lt. Jackson, concluding:

Viewing the totality of the circumstances, the court finds that sufficient evidence was presented to enable the jury to determine that the conduct of the Defendant (Respondent) in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the procedure provided in S.C. Code Ann 22-5-110, that the Defendant (Respondent) was put on notice by the 11th Circuit Solicitor’s office of the applicability of that statute, that there was mention to the Richland County Lieutenant about Magistrates having to issue a courtesy summons in some situations, that the Richland County failed to alert the Magistrate about the information she obtained related to a courtesy summons, and that she withheld from the Magistrate the fact that the Lexington County Sheriff’s Office investigation did not conclude that charges were warranted.

The Trial Court's analysis and conclusions were correct and supported by the evidence presented at Trial. The jury heard ample evidence of Lt. Jackson's participation in the preparation and procurement of two arrest warrants in Lexington County for Respondent-Appellant's arrest. (R. p. 104, ll. 21 - p. 105, l. 6). These were done in the course and scope of her employment by the Richland County Sheriff's Department. These charges had previously been investigated in Lexington County by Lexington County authorities. Steve Baumgartner, an 18 year employee of the Lexington County Sheriff's Department, had thoroughly investigated the matter involving the use of the POA to purchase the handicap accessible van and determined that there was no probable cause to charge Respondent-Appellant with any wrongdoing or to arrest her. (R. p. 206, l. 18 - p. 207, l. 7; p. 218, l. 8 - p. 221, l. 11; p. 360, l. 23 - p. 361, l. 10; p. 365; p. 979).

The two warrants were sworn to by Lt. Jackson. (R. pp. 978-979; p. 104, ll. 21-23). They were issued solely on information supplied to the issuing Judge (Judge Whittle) by Lt. Jackson. (R. p. 105, ll. 1-10). The jury heard evidence that Lt. Jackson did not know the meaning of foundational words that she used in the affidavit to obtain the arrest warrant. These warrants resulted in Ms. Paschal turning herself in and being arrested (R. p. 1). There was no proof Ms. Paschal did anything wrong and the jury heard testimony that Lt. Jackson withheld information from the Lexington County Magistrate when she got the warrant. She did not tell the Lexington County Magistrate that Lexington County had already investigated these charges and found no probable cause. In securing the warrants, Lt. Jackson did tell the Magistrate that she had spoken with Dayton Riddle, the assistant solicitor in Lexington County who had raised concerns about Lt. Jackson swearing out a warrant in Lexington County. (R. p. 267; p. 268; p. 831; p. 832; p. 1). As correctly

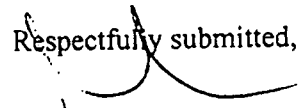
recognized by Judge Keesley in his Order, Solicitor Riddle pointed out the statute and its possible application to Lt. Jackson obtaining warrants to arrest Kay. However, at no time did Lt. Jackson convey these concerns to the Magistrate in her haste to obtain arrest warrants against Respondent-Appellant Paschal. (R. p. 267, ll. 4-20).

The Appellant-Respondent Lott argues that the Trial Court's alleged misinterpretation and misapplication of this code section resulted in the denial of a directed verdict and JNOV motions and also caused Sheriff Lott to receive an unfair trial. This argument is not supported by the facts that were presented to the jury. As set forth by Judge Keesley on numerous occasions during Trial and in his Order, the jury heard ample evidence to support Respondent-Appellant Paschal's causes of action. There is simply nothing to support the Appellant-Respondent's assertions that the Trial Court's handling of this statute resulted in either the denial of Appellant-Respondent's directed verdict or JNOV motions or resulted in an unfair trial.

CONCLUSION

For these reasons and the reasons discussed in the Respondent-Appellant's Brief, this Court should deny the petition for rehearing.

Respectfully submitted,



S. Jahue Moore, SC Bar No. 4063
John C. Bradley, Jr., SC Bar No. 7869
Post Office Box 5709
West Columbia, South Carolina 29171
(803) 796-9160
Attorney for Respondent-Appellant
Kay F. Paschal

West Columbia, South Carolina
March 15, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

RECEIVED

MAR 26 2018
SC Court of Appeals

Kay F. Paschal, Respondent-Appellant,

v.

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

**APPELLANT-RESPONDENT LOTT'S REPLY
TO RESPONDENT-APPELLANT'S RETURN
TO PETITION FOR REHEARING**

The Appellant-Respondent Leon Lott has petitioned this Court for a rehearing of the recent decision in *Paschal v. Lott*, Op. No. 2018-UP-080 (S.C. Ct. App. filed February 7, 2018). The Respondent-Appellant Kay F. Paschal has now filed a return to which a brief reply is warranted.

I.

In his petition for rehearing, Sheriff Lott expressed his dismay that the Court adjudicated this appeal with a memorandum opinion pursuant to Rule 220(b), SCACR, that sets forth only a string of citations rather than providing legal analysis of the issues to be decided by the Court. Sheriff Lott describes this case as an “important case involving a multi-day jury trial resulting in a verdict of \$1.61 million and involving issues of novel statutory interpretation and significant public importance.” In so doing, Sheriff Lott seeks only to impress upon the Court that this is not an appropriate case for a summary disposition under Rule 220(b) and that rehearing should be granted, if for no other reason, to allow for a reasoned opinion that addresses issues of novel statutory interpretation and significant public importance.

Paschal not surprisingly disagrees, but that is a bit disingenuous. This case focused on the interpretation and application of Section 22-5-110 -- a statute that has never been addressed by an appellate court (and still has not after this Court’s decision). Paschal tries to suggest that Section 22-5-110 was not key to this case, but the record shows that Paschal thought that statute was so critical to the jury’s decision that she made it a Plaintiff’s exhibit at trial so that the jury had a copy available during jury deliberations. (R. 1020). There is no question that Section 22-5-110 was a key aspect of this case, and its interpretation and application present novel issues.

There is, in fact, no case that addresses when it is appropriate for a courtesy summons to be issued instead of an arrest warrant. Yet, according to Paschal in her return to the Petition for Rehearing, Sheriff Lott was held liable for a misuse of process because a magistrate issued arrest warrants for two felonies rather than courtesy summonses and was not “advised” about Section 22-5-110 by the law enforcement officer seeking the warrants. It seems that this case should include a detailed discussion as to the meaning of Section 22-5-110, which would clearly show that Magistrate Whittle was correct in issuing arrest warrants rather than courtesy summonses and that Lt. Scott did nothing to violate Section 22-5-110, which was something that the trial court should have determined itself rather than leaving it to the whim of the jury.

It is unclear whether Paschal also disputes that the case is one of significant public importance and interest. However, the trial and post-trial decisions received significant media attention as did Paschal’s subsequent disciplinary decision by the Supreme Court. In fact, the article in *The State* newspaper on Paschal’s disciplinary sanction described the “widely publicized lawsuit and trial last year” against Sheriff Lott, and her attorney was quoted as linking the case and the disciplinary matter. See, *The State*, May 13, 2015 edition (last accessed on March 22, 2018 at www.thestate.com/news/local/crime/article20912523.html).

In short, Sheriff Lott submits this is a case of significant importance and interest – one that this panel believed was significant enough to warrant oral argument – and should not be decided pursuant to Rule 220(b) with only string citations of “black letter” law but no legal analysis applying that law to the important issues presented.

II.

Notably, on the issue of Section 22-5-110, Paschal never addresses in her return whether the trial judge correctly interpreted the statute. In fact, as in her appellate brief to this Court, Paschal never offers her explanation or interpretation of the statute. She also does not dispute the detailed analysis of the statute proffered by Sheriff Lott in his briefs and in his Petition for Rehearing.

Instead, Paschal just baldly proclaims that the statute was properly submitted to the jury and demurs on whether its application and interpretation played any part in the adverse verdict against Sheriff Lott. At most, she says that “reference to this statute was one instance or example of Lt. [Scott’s] improper conduct and activities in Lexington County and interaction with the Lexington County Magistrate that were presented to the jury.” Yet, she never states how Section 22-5-110 gives rise to “improper conduct and activities” or even how Section 22-5-110 was violated by Lt. Scott. The reality is that Magistrate Whittle correctly applied the statute and issued arrest warrants instead of courtesy summonses. The reality is that Lt. Scott was

within her right to seek the arrest warrants from Magistrate Whittle and that Paschal was lawfully arrested with those warrants.¹ The reality is that Sheriff Lott did not receive a fair trial because the trial judge denied his directed verdict motion on the Section 22-5-110 issue and allowed the jury to interpret the statute as it wished – all of which led to Judge Keesley candidly admitting post-trial to have felt “some angst.” (R. 7). This is clearly a case that is deserving of a new trial at a minimum.

III.

Lastly, with respect to the abuse of process claim, Sheriff Lott pointed out in his Petition for Rehearing as follows: “In her brief and at oral argument, Paschal was unable to point to any evidence that Sheriff Lott or his deputies committed a willful act in the use of the process not proper in the conduct of the proceeding.” It is worth pointing out that Paschal still has not done so.

CONCLUSION

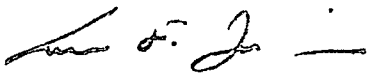
Based on the foregoing discussion, the Appellant-Respondent Leon Lott respectfully renews his request that the Court rehear its decision in this case.

¹ It is also notable that Paschal completely changes her position from trial and now concedes (as she must) that Lt. Scott’s procurement of the arrest warrants “were done in the course and scope of her employment by the Richland County Sheriff’s Department.” She still avoids – albeit slightly -- the “official capacity” language from Section 22-5-110(B)(1), but she obviously recognizes that Sheriff Lott is correct in arguing that conduct by Lt. Scott outside the scope of her official duties is not actionable under the Tort Claims Act.

Sheriff Lott renews his request that this Court reverse the jury's verdict and the order of Judge William P. Keesley filed December 11, 2014, and remand for entry of judgment in Sheriff Lott's favor. In the alternative, Sheriff Lott requests that the Court remand for a new trial absolute.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

ANDREW F. LINDEMANN
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

-AND-

PATRICK J. FRAWLEY
DAVIS FRAWLEY, LLC
Post Office Box 489
Lexington, South Carolina 29071
(803) 359-2512

*Counsel for Appellant-Respondent
Leon Lott*

Columbia, South Carolina

March 22, 2018