THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Kay F. Paschal, ... Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner Leon Lott certifies that his Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on April 26, 2018.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in failing to consider or address whether the trial court correctly interpreted and applied Section 22-5-110?

II. Did the Court of Appeals err in failing to determine that the deputy sheriffs had developed sufficient evidence to lead an objectively reasonable law enforcement officer to believe that probable cause existed for both charged offenses?

III. Did the Court of Appeals err in failing to determine that the Respondent did not prove that the dismissal of the two arrest warrants at the preliminary hearing was based upon her innocence which she was required to prove?

IV. Did the Court of Appeals err in affirming the denial of the directed verdict and JNOV motions with respect to the abuse of process claim where the evidence does not support either element of that tort?

STATEMENT OF THE CASE

This appeal involves a malicious prosecution and abuse of process action brought by the Respondent Kay F. Paschal against the Petitioner Leon Lott in his official capacity as Sheriff of Richland County. In her complaint, Paschal asserted causes of action for false arrest, malicious prosecution, abuse of process, negligence and civil conspiracy. Prior to trial, the Defendants Heidi Scott,[1] Elizabeth Wallace and Jeffrey Wallace were dismissed. In addition, the civil conspiracy claim was dismissed.

The causes of action proceeded to trial on July 21, 2014, before Circuit Judge William P. Keesley and a jury. At the close of Paschal's case and again at the close of the evidence, Sheriff Lott moved for a directed verdict on multiple grounds. Judge Keesley granted a directed verdict on the false arrest claim, and Paschal withdrew the negligence claim. (R. 870). The malicious prosecution and abuse of process claims were submitted to the jury, which returned a verdict in favor of Kay Paschal on both claims. The jury also awarded actual damages of $1.61 million. (R. 14).

After the verdict was returned, Sheriff Lott filed a motion for a judgment notwithstanding the verdict (JNOV). In the alternative, Sheriff Lott also moved for a new trial absolute and a new trial nisi remittitur. Judge Keesley denied each of those motions. (R. 1-11). He did, however, reduce the verdict to $300,000 consistent with the monetary caps under the South Carolina Tort Claims Act. (R. 11).

Kay Paschal filed a Rule 59(e) motion which was denied by Judge Keesley by order filed April 30, 2015. (R. 12-13).

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[1] Lt. Heidi Scott is now known as Heidi Jackson. She has been referred to by both names in the record including the trial transcript. For ease of discussion, she will be referred to as Heidi Scott or Lt. Scott throughout this petition.

Sheriff Lott filed an appeal to the South Carolina Court of Appeals. Paschal also cross-appealed. On February 7, 2018, the Court of Appeals affirmed by issuance of an unpublished 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 thereafter petitioned for rehearing, and that petition was summarily denied. No substitute opinion was issued. Sheriff Lott now seeks review in the Supreme Court by way of a petition for writ of certiorari.

STATEMENT OF FACTS

In early 2011, the Forest Acres Police Department contacted the Richland County Sheriff's Department ("RCSD"), requesting that the RCSD take over a case due to a possible conflict of interest. Since the subject location was 205 Spring Lake Road in Forest Acres and within the confines of Richland County, RCSD agreed to investigate the allegations. In particular, the investigation involved a recent report from family members of a suspected neglect and possible financial exploitation of an 88-year-old alleged crime victim, David Wallace, who had died on February 20, 2011.

At that time, Lt. Heidi Scott was employed by RCSD working with Victim's Assistance Services, and specifically as a Vulnerable Adult Investigator. Lt. Scott was directed by Captain Lancy Weeks to open an investigation. (R. 290).

Lt. Scott's Initial Meeting with the Wallace Children

On March 1, 2011 and nine days following David Wallace's death, Lt. Scott set up and conducted an in-person meeting with his two adult children, Elizabeth and Jeffrey Wallace, family friend Ellen Schorr, and Captain Weeks.[2] (R. 291). Elizabeth and Jeffrey Wallace were in their late

[2] Lt. Scott had not previously met or otherwise had any personal or professional dealings with Kay Paschal or the Wallace children. (R. 297-298).

40s or early 50s and had resided out-of-state. (R. 307-308). They furnished Lt. Scott with factual background information as well as their concerns regarding their father. (R. 292).

Lt. Scott learned that on April 20, 2010, David Wallace suffered a major stroke following carotid artery surgery. Following the stroke, Wallace developed paralysis and difficulty speaking, conditions which confined him to a bed. Consequently, he was left in a mental and physical state in which he was fully dependent on others for his care and considered a vulnerable adult. After this April 20, 2010 debilitating stroke, David Wallace was hospitalized and incapacitated for an extended period of time. Following this hospital course, he was admitted to HealthSouth, an inpatient rehabilitation and treatment center in Columbia.

At that initial meeting, additional background was provided by Elizabeth and Jeffrey Wallace regarding Kay Paschal and her relationship with David Wallace. Paschal had been Wallace's attorney and a close friend. (R. 291-292).

During this meeting with Lt. Scott, Elizabeth and Jeffrey Wallace addressed several concerns with respect to their late father. For instance, following David Wallace's stroke, Kay Paschal, who resided with him, was limiting their contact with their father as well as contact from his friends. (R. 292).

In addition, they expressed concerns with David Wallace's Power of Attorney. The children understood that a Power of Attorney existed since 2002, and appointed Elizabeth Wallace as the attorney. The children had not been told anything different. (R. 292). Yet, on April 23, 2010, three days after Wallace's stroke, Paschal had recorded a Power of Attorney for David Wallace which empowered her to act on his behalf. In particular, this new document identified Paschal as power of attorney and Elizabeth Wallace as "standby attorney," thus altering the 2002 Power of Attorney authorizing Elizabeth Wallace to act in such capacity. (R. 292).

The Wallace children also expressed concerns relating to Paschal's role in their father's physical care during the last months of his life, including such conditions as bed sores and malnutrition. (R. 292-294). At that time, Jeffrey Wallace filed the initial report with Forest Acres Police Department and notified DSS Adult Protective Services, thus triggering mandatory reporting protocols. (R. 293-294).

RCSD Investigation

The nature of the allegations were viewed as very serious and RCSD officials anticipated that the investigation would involve complex issues. (R. 303). Sgt. Kevin Isenhoward was asked to assist Lt. Scott with the investigation. (R. 303). At the early stage, investigatory duties were allocated between Sgt. Isenhoward (allegations as to medical neglect and pursuing a search warrant) and Lt. Scott (allegations as to financial exploitation). (R. 304).

Proceeding with her investigation as to allegations of financial exploitation, Lt. Scott arranged for the Power of Attorney instruments to undergo forensic examinations. On April 25, 2011, Forensic Document Examiner Marvin H. Dawson, Jr. analyzed two Powers of Attorney and two separate front pages of Powers of Attorney in which Elizabeth Williams was named as power of attorney. (R. 311-318). Separately, Gail Heath, a SLED forensic scientist examined the Powers of Attorney and two separate front pages. (R. 325-326). The results of these respective examinations were consistent.

The examination results yielded that the first page of the recorded Powers of Attorney had been added at a later date, and therefore they were not the original first pages. (Significantly, the first page of each document is the only page that lists who is to serve as power of attorney). Additionally, the initials on the first pages of the recorded Powers of Attorney were examined and determined not to be those of David Wallace, while the other pages did contain Wallace's initials on them. Finally, there were numerous other indicators demonstrating that the pages naming

Elizabeth Williams as power attorney were the original pages that had been attached to the document at one time.[3] (R. 1027-1037).

Lt. Scott also learned that on June 18, 2010, Kay Paschal met with Tim Peterson of Carolina Mobility Sales located at 2546 Leaphart Road in Lexington County. On that date, Paschal presented the questionable Power of Attorney to authorize a trade of a 2002 Cadillac DeVille owned by David Wallace in order to obtain a trade-in allowance of $5,000. This $5,000 allowance was used towards the purchase of a 2010 Toyota Sienna van for a total price of $63,317.51. Paschal presented a check of $58,317.51 to Peterson from Wallace's Ameritrade account to pay for the remaining balance. Paschal's name was placed on the title of the vehicle, along with Wallace's name. (R. 208-213, 996-997).

Advice from Prosecutors

Since the circumstances involving the van purchase occurred in Lexington County, Lt. Scott conferred with her RCSD supervisors concerning the protocol to continue the pending Richland County-based investigation into Lexington County. On July 26, 2011, Lt. Scott met with Joanna McDuffie, Assistant Solicitor from the Fifth Judicial Circuit regarding the appropriate manner in which to proceed. (R. 328-329). During this meeting, McDuffie reviewed a voluminous amount of information relating to the RCSD investigation and Kay Paschal's conduct with respect to David Wallace, including but not limited to the Lexington County-based van purchase. As a result, McDuffie conveyed to Lt. Scott her professional opinion that probable cause existed for Paschal's arrest on several different criminal charges. (R. 808-809).

Aside from McDuffie's prosecutorial opinion that criminal charges were indeed warranted -- given that the van purchase had taken place in Lexington County -- McDuffie suggested that Lt. Scott

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[3] Further suspicions raised during the forensic evaluation process were the discrepancies in font and paper stock within the recorded documents. (R. 321-326).

consult with the Lexington Solicitor's Office before pursuing warrants so as to seek further advice on how to proceed. (R. 808-810).[4]

On October 14, 2011, Lt. Scott furnished the Lexington-based information to Detective Steve Baumgardner with the Lexington County Sheriff's Department. (R. 330-332). Detective Baumgardner subsequently advised Lt. Scott that he was shortly beginning medical leave as he was going to have surgery. On November 4, 2011, Lt. Scott retrieved the file from Baumgardner. (R. 330-332).

At that point, Lt. Scott's supervisor, Major Stan Smith suggested that she contact Eleventh Circuit Deputy Solicitor Dayton Riddle to ascertain his preferences as to how she might proceed with the charges in Lexington County. On November 14, 2011, Lt. Scott held a teleconference with Deputy Solicitor Riddle. (Def. Ex. 8). During this conversation, Riddle assented to Lt. Scott pursuing a warrant in Lexington County, but he suggested that a Lexington County magistrate would ultimately need to make such a determination. (R. 1039-1058).

Arrest of Kay Paschal for Forgery and Breach of Trust

Acting upon Riddle's suggestion, on November 15, 2011, Lt. Scott met with Lexington County Magistrate Judge Scott D. Whittle. (R. 343-344, 348-350). Lt. Scott identified herself to the magistrate as a RCSD investigator. (R. 348-349). Magistrate Whittle heard the facts of the investigation as set forth by Lt. Scott verbally. He then reduced these facts to a written affidavit which Lt. Scott signed.

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[4] McDuffie testified that it was not uncommon that "cross over" criminal cases exist in which a subject commits crimes in both Richland and Lexington Counties resulting in potential dual or contemporaneous prosecutions in both the Fifth and Eleventh Judicial Circuits. (R. 809-810). McDuffie further explained that, by way of example, since the City of Columbia is situated in both Richland and Lexington Counties, the Solicitor's Offices must oftentimes address these "cross over" instances. (R. 809-810). Accordingly, McDuffie advised Lt. Scott that such a dialogue with a Lexington County prosecutor might avert such a predicament. (R. 812-813).

After considering the testimony and evidence before him, Judge Whittle issued arrest warrants for forgery (No. J-830942) and breach of trust (No. J-830943) against Kay Paschal. (R. 1059-1060). Lt. Scott telephoned Paschal and advised that there were two arrest warrants at the Lexington County Sheriff's Department and provided information as to how she might appear at the detention center for service of said warrants. (R. 644-646). On November 16, 2011, Paschal appeared voluntarily at the Lexington County Detention Center, and these warrants were served upon her by a Lexington County deputy, and she was taken into custody. (R. 644-646). She was later released on a PR bond.

Preliminary Hearing

On January 20, 2012, a preliminary hearing was held in Lexington County at which time Paschal's attorney argued that the warrants should be dismissed for lack of probable cause and on jurisdictional grounds. Magistrate Gary Morgan ultimately dismissed the charges without stating the grounds for dismissal. There is no evidence in the record that states the basis for Magistrate Morgan's decision.

ARGUMENTS

I. The Court of Appeals erred in failing to consider or address whether the trial court correctly interpreted and applied Section 22-5-110.

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 of Appeals essentially disregarded this critical issue of novel impression. There is no discussion of this issue in the memorandum opinion. At most, the Court of Appeals addressed whether Lt. Heidi Scott's "compliance" with Section 22-5-110 properly presented a jury question, which it did not.

The Court of Appeals, however, never addressed whether Judge 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. The Court of Appeals never addressed 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, 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 admitted 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.

Yet, in its memorandum opinion, the Court of Appeals provided 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. Section 22-5-110 has never been interpreted by this Court or the Court of Appeals, and hence, a writ of certiorari is warranted on that issue of law alone. In fact, the law governing the issuance of a courtesy summons rather than an arrest warrant has never been addressed by an appellate court.

Quite clearly, the Court of Appeals failed to consider or address the correct meaning and impact of Section 22-5-110 and the existing 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 the Court of Appeals in its memorandum opinion. 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.[5] 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 affiant on a warrant to be executed in another jurisdiction. In *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411 (1978), this 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. This 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

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[5] In *Flateau v. Harrison*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003), the Court of Appeals 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.

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 the Court of Appeals' memorandum opinion, which is further support for the issuance of a writ of certiorari in this case.

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. This Court is respectfully requested to issue a writ of certiorari 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.

II. The Court of Appeals erred in failing to determine that the deputy sheriffs had developed sufficient evidence to lead an objectively reasonable law enforcement officer to believe that probable cause existed for both charged offenses.

The Court of Appeals 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 of Appeals 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. In actuality, 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.

As a matter of law, 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:[6]

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

(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

[6] 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.

> 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.[7]

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

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[7] 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.

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. *See*, S.C. Code Ann. § 16-13-260. 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. "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." *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.[8] The Court of Appeals included no discussion of the evidence on the issue of probable cause and what an objectively reasonable police officer could conclude about the evidence discovered.[9] This failure by the Court of Appeals warrants a review by this Court and

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[8] This conclusion is further supported by the fact that Lt. Scott consulted with solicitors in both Richland County and Lexington County. 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).

[9] The Court of Appeals also 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

the issuance of a writ of certiorari.

III. The Court of Appeals erred in failing to determine that the Respondent did not prove that the dismissal of the two arrest warrants at the preliminary hearing was based upon her innocence which she was required to prove.

The Court of Appeals also failed to recognize that Judge Keesley erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the malicious prosecution claim where 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), this 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.

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

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cause. *See, Paschal v. Lott*, 2017 WL 1828995 (4th Cir. 2017), and *Paschal v. Lott*, 2016 WL 5402861 (D.S.C. 2016).

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.[10] 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. 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).

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[10] It is well settled 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).

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 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. Accordingly, this Court is urged to issue a writ of certiorari to consider this portion of the record and Judge Keesley's candid comments regarding the absence of such evidence. This Court is asked to specifically address whether Pascal met her burden of proof to show that the charges were dismissed for reasons which imply or are consistent with innocence.

IV. The Court of Appeals erred in affirming the denial of the 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 of Appeals also failed to conclude 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 of Appeals' 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).

Moreover, this 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 has been exempted 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, the Court of Appeals did not consider or address this exemption nor even 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, there can be no liability for abuse of process. The Court of Appeals 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, the Court of Appeals 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 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 of Appeals overlooked or misapprehended these issues that are critical to a proper consideration of the abuse of process claim. Accordingly, the issuance of a writ of certiorari is well warranted.

CONCLUSION

Based on the foregoing discussion, the Petitioner Leon Lott respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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BY: _____

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May 29, 2018

THE STATE OF SOUTH CAROLINA
In The 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.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., attorneys for the Petitioner, does hereby certify that service of the **Petition for Writ of Certiorari** was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record as well as a copy of the **Appendix** being made upon all counsel of record (minus the briefs and Record filed with the Court of Appeals) by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 29th day of May 2018 addressed as follows:

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

Via U.S. Mail
S. Jahue Moore, Esquire
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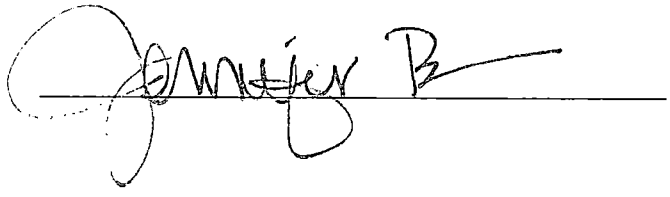

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May 29, 2018

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

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

Dear Ms. Kitchings:

Please find enclosed for filing two copies of the **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has been filed with the South Carolina Supreme Court. Please provide me with a clocked-in copies of each document by way of my courier.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: S. Jahue Moore, Esquire *(w/ Enclosures)*
John C. Bradley, Jr., Esquire *(w/ Enclosures)*
Patrick J. Frawley, Esquire *(w/ Enclosures)*