THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No.: 2017-001930

Norris Earl. White, Jr., ...Appellant

v.

City of North Charleston, ...Respondent

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

On December 4, 2015, Plaintiff-Appellant Norris Earl White Jr. ("White") filed this action. Defendant-Respondent City of North Charleston (the "City") removed the case to Federal District Court based on the federal causes of action. On February 9, 2016,White amended his complaint to remove the federal causes of action, and the case was remanded to state court. The Amended Complaint alleged Assault and Battery, Negligence/Gross Negligence, Negligent Hiring/Training/Supervision, Malicious Prosecution, Intentional Infliction of Emotional Distress/Outrage, Violation of S.C. Code of Laws § 16-5-60, and claims brought pursuant to the South Carolina Constitution for Wrongful Detainment/False Arrest, False Imprisonment, and Unlawful Search and Seizure. On February 24, 2016, the City filed its Answer denying the allegations and asserting as affirmative defenses various provisions of the South Carolina Tort Claims Act.

The City moved for summary judgment on December 9, 2016. On May 17, 2017, the Honorable Kristi L. Harrington heard the summary judgment arguments. At the hearing, White voluntarily dismissed, with prejudice, the causes of action for Intentional Infliction of Emotional Distress/Outrage (R. p. 1) and Malicious Prosecution (R. p. 31, lines 7-10). Counsel for White also stipulated that S.C. Code Ann. § 16-5-60 is not applicable, as it was impliedly repealed by the Tort Claims Act. (R. pp. 240-241). By Order dated June 8, 2017, Judge Harrington granted the City's Motion for Summary Judgment. (R. p. 1) . White filed a Motion to Reconsider on June 19, 2017. In his Memorandum in Support of the Motion to Reconsider, White voluntarily withdrew his claims for Negligent Hiring/Training/Supervision, Wrongful Detainment, and Unlawful Search and Seizure. (R. p. 284). Further, White's requests for relief in his motion to reconsider and his memorandum

of law were inconsistent. In the memorandum of law, White argued about his mistaken understanding that the court imposed a gross negligence standard on the Tort Claims Act exceptions to liability. He made no other argument on gross negligence. In the conclusion to his memorandum of law for reconsideration, White only asked for reconsideration of the grant of summary judgment on the causes of action for "unlawful arrest, excessive force, and false imprisonment." (R. p. 297).

Additionally, in his initial brief on appeal, the only discussion of gross negligence has to do with the Tort Claims Act exceptions to liability. Therefore, the grant of summary judgment on negligence/gross negligence are the law of this case. The motion to reconsider was considered by Judge Harrington and denied on August 18, 2017. (R. p. 3). Appellant filed his Notice of Appeal on September 18, 2017.

STATEMENT OF THE FACTS

On December 27, 2013, White and his friend Jamal Omar went out clubbing. They went to at least two clubs and met up with two females. (R. p. 103 - 29:4-5; 30:12-13). They were also drinking alcohol. (R. p. 117). Afterwards, the four of them arrived at the Waffle House on Ashley Phosphate Road. Officer Arroyo was working at the Waffle House in an off-duty capacity, sitting with his wife in a booth. Arroyo was done with his shift, but was waiting to get paid, when White became loud and was using profanities. (R. p. 134 - 54:5, p. 135 - 59:2-12, p. 136 - 63:5-7; R. p. 212 ¶ 5; R. p. 227 ¶ 5).White got up from the table more than once, while yelling and waving his arms. (R. p. 134 - 56:6-16; R. p. 227 ¶ 5). Customers and employees looked to Officer Arroyo indicating that they wanted him to do something about White's boisterous behavior, which was their normal mode of communication. (R. p. 135 - 59:8-60:6). White and his friends were using the words

"fuck," "mother fucker," and "nigger" repeatedly and loudly. (R. p. 136 - 61:2-9; R. p. 218 - 9:3). Officer Arroyo approached White and asked him to quiet down or leave. (R. p. 104 - 33:9-10; R. p. 218 - 9:3-4; R. p. 227, ¶ 7). White became argumentative and asked Officer Arroyo why he was bothering them. (R. p. 137 - 65:20-23; R. p. 212, ¶¶ 7-8). Officer Arroyo then asked the waitress for the check and told White to leave, but White refused saying he was not leaving until he had eaten his meal. (R. p.104 - 33:11-12; R. p.212, ¶ 8; R. pp. 227-228, ¶¶ 8-9). During the encounter, White stood up to let one of the females out of the booth, sat back down, stood up again, and then sat back down again. (R. p. 105 - 37:23-25). Officer Arroyo then grabbed White's arm and told him that he has to leave the restaurant. (R. p. 138 - 69:15-18). White started yelling and using profanity toward Officer Arroyo. (R. p. 138 - 69:20-21). Officer Arroyo then made the decision to arrest White and told White to put his hands behind his back (R. p. 106 - 42:21-22; R. p. 138 - 70:17-21), but White kept resisting by turning away. (R. p. 138 - 72:11-15; R. p. 213, ¶ 10). While Officer Arroyo was struggling to handcuff White, White was making racially charged accusations to his friend, Jamal Omar, about Arroyo (R. p. 105 - 38:20-39:2), and continued to physically resist the officer. Jamal Omar approached Officer Arroyo and the officer told him to step back. (R. p. 106 - 41:6-7). White was also telling Omar not to do anything. (R. p. 106 - 41:6-10). Officer Arroyo and White eventually moved toward the other end of the restaurant which was empty of customers. Officer Arroyo was at White's back, still trying to handcuff him, when White tried to turn around to face the officer in that close proximity. Officer Arroyo advised White not to turn around and to put his hands behind his back, but instead, White made an effort to turn his body and put himself in the officer's inside position. (R. p. 140 - 78:1-14). Due to the potential for extreme danger to the officer of having a struggling suspect close enough to grab at his weapons, Officer Arroyo took White to the ground in

a controlled maneuver. (R. p. 141 - 82:5-17, 84:4-23). Once on the ground, White continued to struggle and physically resist being handcuffed until a second officer arrived to assist. (R. p. 143 - 89:3-4). White claims a white female officer arrived, but the video clearly shows that it was a black male officer who arrived and assisted Officer Arroyo. (R. p. 106 - 43:5-23). The two officers stood White up and tried to walk him outside, but White began walking quickly, yanking and pulling at the officers. (R. p. 143 - 90:15-23; R. p. 169 - 74:9-24). As they approached the exit, White continued to lean forward. (R. p. 172 - 85:7-9, 15-17). As they reached the door, White lunged forward and hit his head on the door. (R. p. 172 - 85:5-19). White says the officers slammed his head into the door, but claims he does not recall what part of his head hit the door. (R. p. 107 - 45:13-15).

White claims his head was rammed into the second door as well, but at his deposition, he did not recall anything about it. (R. p. 107 - 46:21-47:1). However, on the video, it can be seen that Officer King reached out and opened the door before White got to it. (R. p. 174 - 95:3-11). Outside, White was placed in the back of a police car and was seen slamming his head against the bars in the car. (R. p. 180). EMS arrived and transported White to the hospital. White claims he was bleeding, however, the EMS Run Report does not mention any bleeding. (R. pp. 116-118). At the hospital, White made no mention of his head being run into the doors. He only mentioned striking his face on the ground. (R. p. 182). White denied loss of consciousness, laceration, confusion, or disorientation. R. p. 182). The hospital performed a CT scan which was negative for fractures. (R. pp. 183-184). After being evaluated, he was released from the hospital less than two hours later diagnosed with a bruise. (R. p. 185). White was then transported and booked in to jail. He was released the next day.

On January 24, 2014, White filed a complaint against Officer Arroyo with the North

Charleston Police Department. (R. p. 187). Sgt. Allen was assigned to investigate the case. (R. pp. 189-192). He interviewed White, pulled the Dispatch log (R. pp. 200-204) and viewed in-car camera footage from Sgt. Evans' patrol unit. (R. p. 206). He then spoke with the manager of the Waffle House, obtained the case history for Mr. White, and went to the Waffle House to watch the video of the incident on February 7, 2014. (R. p. 206). The video was in fact reviewed before the final report was written, despite White's allegation to the contrary. He also reviewed the incident report and the Inter-departmental Report. Once he had done these things, Sgt. Allen prepared a report on the incident and presented it to Chief Driggers. Chief Driggers reviewed the matter with command staff and determined that Officer Arroyo had followed the Use of Force Policy, and had not violated any NCPD policies. A letter was sent to Mr. White advising him of such on February 11, 2014. In April, 2014, without consulting the officer or anyone at the Police Department, the charges were *nol prossed* by the prosecutor. (R. pp. 209-210, ¶¶ 5, 9). White had the charge expunged and then filed the present lawsuit.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the nonmoving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light

most favorable to the non-moving party. Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Curiel v. Hampton County E.M.S.*, 401 S.C. 646, 649, 737 S.E.2d 854, 855 (Ct. App. 2012)(*internal citations and quotations omitted*).

A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723; *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

ARGUMENT

I. THE SOUTH CAROLINA CONSTITUTION CONFERS NO PRIVATE RIGHT OF ACTION AND THEREFORE THE COURT'S ORDER SHOULD BE AFFIRMED.

White filed his initial complaint on December 4, 2015. In that Complaint, he alleged "Wrongful detainment and false arrest" pursuant to the United States Constitution and the Constitution of South Carolina, "in particular, Plaintiff's right to be free from unreasonable searches and seizures under the Fourth Amendment of the South Carolina Constitution." (R. p. 11, ¶31).[1] Based on this, the City removed the case to Federal Court. In response, White amended his

[1] Appellant voluntarily withdrew the cause of action for wrongful detainment in his motion to reconsider. (R. p. 284).

Complaint to remove all references to the United States Constitution, but kept the references to the South Carolina Constitution. (R. p. 23, ¶40). He further alleged two other constitutional violations -- False Imprisonment (R. p. 24, ¶44) and Unlawful Search and Seizure (R. p. 25, ¶49).[2] However, also in the Amended Complaint, where Plaintiff alleged Assault and Battery, (R. p. 23, ¶35) he specifically alleged liability pursuant to the South Carolina Tort Claims Act. Even in his brief to this court, he asserts that the claims are pursuant to the South Carolina Constitution. (Init. Br. of Appellant at 11, ¶1).

The False Arrest and False Imprisonment causes of action alleged under the South Carolina Constitution should be dismissed because South Carolina has no statutory equivalent to 42 U.S.C. § 1983 which gives rise to a private cause of action for money damages.[3] There is no procedural mechanism for a private right of action for money damages for a state constitutional deprivation. Although there is almost no law on this topic, defendants refer the court to its own decision - *Gibbs v. South Carolina Department of Probation, Parole and Pardon Services*, Op. No. 2002-UP-363 (S.C. Ct. App. 2002). While unpublished and having no precedential value, it is instructive. This Court concluded that "[a]lthough section 1983 provides a method for obtaining monetary damages for violations of civil rights protected by the federal constitution, there is not a similar provision in South Carolina which enables a citizen to bring a private right of action for civil damages under the state constitution." This Court held that "no viable cause of action exists where, as here, the state

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[2] White's claim for search and seizure violations was voluntarily dismissed in his motion to reconsider. (R. p. 284).

[3] In his brief, at page 11, White includes under subsection (a) that the negligence cause of action was dismissed due to there being no private right of action, but this is not correct. Only False Arrest, False Imprisonment and the now withdrawn Unlawful Search and Seizure causes of action were dismissed on this basis. (R. p. 1).

Constitution does not provide for a private right of action for civil rights violations and the legislature has not enacted a statute enabling this type of action." *Id.* The Supreme Court declined to review this decision as well. In his brief, White argues that this position is not supported by case law, but provides no law in support of his own position. There is simply no statutory scheme in South Carolina which enables a citizen to bring a private right of action for civil damages under the state constitution.

Additionally, White argues that he brings these allegations pursuant to the Tort Claims Act, but his Complaint only sets out that the Assault and Battery cause of action is pursuant to the Tort Claims Act. He does not make the same allegation on these causes of action. To the contrary, Appellant alleges False Arrest and False Imprisonment as a violation of his "constitutionally protected rights."

The City asserts the state constitutional claims are also barred by sovereign immunity. Prior to the Supreme Court's decision in *McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985), governmental entities and their employees were protected by sovereign immunity. *McCall* abolished sovereign immunity, but the following year, the South Carolina Tort Claims Act was enacted by the General Assembly, and "reinstat[ed] sovereign immunity for the State and its political subdivisions with certain exceptions." *Jinks v. Richland Cnty.*, 349 S.C. 298, 306, 563 S.E.2d 104, 108 (2002), *rev'd on other grounds*, 538 U.S. 456 (2003). The Act "removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 121, 542 S.C. 2d 736, 739 (Ct. App. 2001). The General Assembly plainly states that it "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.*" S.C. Code Ann. § 15-78-20(b) (emphasis added). "All other immunities applicable to a governmental

entity, its employees, and agents are expressly preserved." *Id.*

It is clearly established that in response to the *McCall* decision, the General Assembly reinstated sovereign immunity, subject only to a limited waiver provided in the Tort Claims Act. The Act does not include a waiver of sovereign immunity for violations of the South Carolina Constitution. Therefore, sovereign immunity is a bar to a claim for money damages, including those made by White in this case. The City asks this court to follow its prior decision and affirm the trial court's grant of summary judgment on the allegations of state constitutional violations through false arrest and false imprisonment.

II. THERE IS CLEAR PROBABLE CAUSE IN THIS MATTER AND THEREFORE NO EVIDENCE OF FALSE ARREST OR FALSE IMPRISONMENT.

If this court declines to follow its decision in *Gibbs*, the grant of summary judgment was still proper as there is clear evidence of probable cause and White failed to produce a scintilla of evidence in opposition to summary judgment. White has alleged both False Arrest and False Imprisonment. To prevail on a cause of action for false arrest, White must establish: "(1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Law v. S.C. Dep't of Corrs.*, 368 S.C. 424, 440, 629 S.E.2d 642, 651 (2006). Similarly, the tort of false imprisonment is simply "a deprivation of a person's liberty without justification." *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 30, 410 S.E.2d 21, 23 (Ct. App. 1991), *cert. denied*, 306 S.C. 27 (1992). False Imprisonment requires the same elements as false arrest. *See id.* (citing *Andrews v. Piedmont Air Lines,* 297 S.C. 367, 377 S.E.2d 127 (Ct. App. 1989)).

Generally, a police officer who arrests an individual will not be liable for false arrest or false imprisonment if the arrest was supported by probable cause. *See Jones v. City of Columbia,* 301 S.C.

62, 64, 389 S.E.2d 662, 663 (1990). In this case, White claims that Officer Arroyo lacked probable cause to arrest him for a violation of S.C. Code Ann. §16-17-530 (Public disorderly conduct), and therefore, the restraint was unlawful. White has the burden of proving lack of probable cause. *Jackson v. City of Abbeville*, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005)(citing *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965)). In discussing issues related to probable cause, the court in *Jackson* explained:

> Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise. Probable cause is determined as of the time of the arrest, based on facts and circumstances-objectively measured-known to the arresting officer. The determination of probable cause is not an academic exercise in hindsight.

Jackson, 366 S.C. at 666-67, 623 S.E.2d at 658-59 (internal quotations and citations omitted). "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." *McBride v. Sch. Dist. Of Greenville Cnty.*, 389 S.C. 546, 567, 698 S.E.2d 845, 855–56 (Ct. App. 2010) (quoting *Law,* 368 S.C. at 436, 629 S.E.2d at 649).

Appellant White argues, incorrectly, that there is an "issue of material fact" as to whether White violated S.C. Code Ann. §16-17-530. White asserts that because none of his conduct rose to the level of "fighting words" there is no probable cause for the arrest for Disorderly Conduct.[4]

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[4] The principle that the State may not punish a person for disorderly conduct unless they use "fighting words" is limited to situations where a person is addressing a police officer, not to all instances of Disorderly Conduct. *See, e.g., State v., Bailey*, 368 S.C. 39, 626 S.E.2d 898 (Ct. App. 2006). Here, White's actions prior to his interaction with Officer Arroyo constituted Disorderly Conduct as to the public.

White's argument is fatally flawed because it is based on the wrong statute. White was never charged with Disorderly Conduct pursuant to S.C. Code §16-17-530. Officer Arroyo charged White with Disorderly Conduct under the North Charleston City Ordinance §13-36 - Disturbing the Peace. (R.46, ll. 19-25, R. 47, ll.1-7). Specifically, he was charged with subsection (b)(13), which states in pertinent part:

> (b) A person shall be guilty of disorderly conduct, which is hereby prohibited, if . . . .his conduct is likely to cause . . . .nuisance, he willfully does any of the following acts in a public place:
>
> > (13) Makes or causes to be made any loud, boisterous or unreasonable noise or disturbance to the annoyance of any other persons nearby.....

In this case, Officer Arroyo testified that he sat in a booth and listened to and observed White's behavior for thirty minutes before approaching him. (R. p. 178). During those thirty minutes, White can be seen jumping up from his table twice, walking around the restaurant while still talking to his friends at the table, pounding a chair, waving his arms, high-fiving his friend, and spending time at the table talking boisterously. (R. p. 178). Officer Arroyo testified that around 5:00 a.m., the conversation at White's table increased in volume and profanity. This is supported by two affidavits of employees. (R. p. 212, ¶¶5-6; R. p. 227, ¶¶ 5, 7; R. p. 264, ¶ 7; R. p. 135 - 58:16-24). White disputes that he was using fighting words, racial slurs, or curse words, however the North Charleston Ordinance does not require any of these.

Additionally, once Officer Arroyo told White to leave and White refused, he was thereafter trespassing after notice. The Waffle House had hired the North Charleston Police Department to provide security and therefore gave them jurisdiction over the property to make arrests when necessary. This court, in *Jackson v. City of Abbeville*, clearly stated "that the determination of 'probable cause to arrest' for the purpose of [plaintiff's] tort claims may properly include

consideration of an uncharged offense." *Jackson*, 366 S.C. at 666, 623 S.E.2d at 658. "Statutory criminal trespass involves ... the failure to leave a .... place of business... after having been requested to leave." *Id.* (citing *State v. Cross,* 323 S.C. 41, 43, 448 S.E. 2d 569, 570 (Ct. App. 1994)). A police officer may arrest a person who commits trespass after notice in the officer's presence. S.C. Code Ann. § 17-13-30; *State v. Mims*, 263 S.C. 45, 208 S.E.2d 288 (1974).

Officer Arroyo's own observations and interactions with White leading up to his arrest constitute probable cause and White's actions as seen on the video support this. The "facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." *Jackson,* 366 S.C. at 666, 623 S.E.2d at 658. White' crimes included Trespass after Notice and Disorderly Conduct under the North Charleston Ordinance. Officer Arroyo witnessed the acts himself. Because Officer Arroyo personally witnessed the "loud, boisterous or unreasonable noise or disturbance" that violated the North Charleston Ordinance under which White was charged, and this can be seen on the video, probable cause existed for White's arrest. Further, because White failed to leave the place of business after having been requested to leave, probable cause also existed for White's arrest on the uncharged offense Trespass after Notice. Therefore, the restraint by the officer was not illegal. Therefore, the City asks this court to affirm the decision of the trial court with regard to false arrest and false imprisonment.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE RESPONDENT IS ENTITLED TO IMMUNITY PURSUANT TO THE PLAIN LANGUAGE OF THE SOUTH CAROLINA TORT CLAIMS ACT.

The trial court granted the City immunity pursuant to S.C. Code §15-78-60, on the basis of (5) discretionary acts and (17) the intent to harm exception. While the intent to harm exception only applies to the Assault and Battery cause of action, the discretionary immunity applies to all other

causes of action. White argues that the court improperly imputed a gross negligence standard to his causes of action, but it is clear that such was not done, as the court granted the City full immunity for discretionary acts – without imputing the gross negligence standard that is contained in S.C. Code §15-78-60(25). Subsection (25) was never argued or mentioned in the court's order.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citing *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). The General Assembly has stated its intent in the Tort Claims Act through S.C. Code Ann. §15-78-200, which provides:

> Notwithstanding any provision of law, this chapter, the "South Carolina Tort Claims Act", is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and **must be liberally construed in favor of limiting the liability of the governmental entity.**

S.C. Code §15-78-200 (emphasis added). It is clear from the plain language of the statute that the Tort Claims Act is to be read in favor of limiting liability. Based on this, the trial court correctly and properly granted summary judgment based on discretionary immunity and the intent to harm exceptions. White also asserts that the Tort Claims Act is an affirmative defense that must be pled. The City asserts that it was, in fact, pled in the Answer to the Amended Complaint. (R. p. 35, ¶77).

A. AS THERE IS EVIDENCE OF THE WEIGHING OF COMPETING CONSIDERATIONS, THE "DISCRETIONARY IMMUNITY" PROVISION APPLIES.

"The governmental entity is not liable for a loss ... resulting from the exercise of discretionary judgment by a governmental employee or the failure to perform any act or service which is in the discretion or judgment of the employee." S.C. Code Ann. § 15-78-60 (5). To establish "discretionary

immunity," the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice; furthermore, the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. *Stephens v. CSX Transp., Inc.,* 415 S.C. 182, 200, 781 S.E.2d 534, 543-34 (2015); *Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 392, 520 S.E.2d 142, 154 (1999); *Clark v. S.C. Dep't of Pub. Safety,* 353 S.C. 291, 304, 578 S.E.2d 16, 22 (Ct. App. 2002), *affirmed*, 362 S.C. 377, 608 S.E.2d 573 (2005). A governmental entity is not liable for losses resulting from an exercise of discretion by its employees. *Faile v. S.C. Dep't of Juvenile Justice,* 350 S.C. 315, 330, 566 S.E.2d 536, 544 (2002).

In *Brown v. Brown*, 360 S.C. 7, 598 S.E.2d 728 (Ct. App. 2004), the officer was "faced with the choice of issuing a DUI citation, requiring the passengers to find another way home and have the car towed, or selecting another driver after determining whether that individual was fit to drive. He chose [passenger] to drive after he volunteered and satisfactorily completed field sobriety tests." *Id.* at 12, 598 S.E.2d at 731. The Court of Appeals there "determined that the officer's decision met the requirements to establish discretionary immunity under the tort claims act." *Id.* This is analogous to what happened in this case. When Officer Arroyo first approached White's table, he had three options: (1) he could arrest White for Disorderly Conduct under the North Charleston ordinance, (2) he could simply cite White and then leave as his shift was over, or (3) he could go over and ask White and his friends to quiet down. Police officers in South Carolina are not required to make an arrest, except in limited circumstances, such as criminal domestic violence. The evidence shows that Officer Arroyo chose option 3. Officer Arroyo testified that he did not want to make an arrest. (R. p. 209, ¶ 7). He asked White and his companions to quiet down and calm down, and then was

planning to get his payment and leave. When White became belligerent and argumentative, Officer Arroyo then still had his first two options and a new fourth option which was to tell White to leave. Arroyo was still trying to end the encounter without an arrest. When White refused to leave after multiple requests, Officer Arroyo then made the considered, discretionary judgment to place White under arrest.

While attempting to make the arrest, White continuously pulled his arms away from the officer and failed to put them behind his back as instructed. The officer was also confronted by White's friend while trying to handcuff White. Officer Arroyo weighed his options and moved away from White's friend so he could focus on getting White handcuffed. Once they moved to the other end of the restaurant, Officer Arroyo continued to attempt to handcuff White, but White began to turn toward him placing Arroyo in a very dangerous position. Again, the officer weighed his options: take White to the floor or risk White grabbing something on his equipment belt. Based on his training, Arroyo used a maneuver he had been taught and took White to the floor where Arroyo hoped he would finally be able to get White handcuffed.

As to White's argument that discretionary immunity is not available to police officers, and is only to be used for decisions involving "local and state planning", the appellant is incorrect. The *Brown* case cited and discussed above is clear evidence of this. While it may be true that not every decision made by a law enforcement officer would be subject to such immunity, officers are highly trained and are specifically vested with the discretion used by Officer Arroyo in this situation.

Officer Arroyo was faced with alternatives throughout the encounter with White, and his testimony shows that he actually weighed competing considerations and made a conscious choice at each stage. Furthermore, Arroyo utilized accepted professional standards appropriate to try to resolve the matter, based on his police training. There is ample evidence of the use of discretion in

this matter by Officer Arroyo, and therefore, this court should affirm the grant of summary judgment to the City based on immunity.

B. THE DEFENDANT IS NOT LIABLE FOR A LOSS RESULTING FROM EMPLOYEE CONDUCT . . . .WHICH CONSTITUTES ....INTENT TO HARM.

In his Amended Complaint, White alleged Assault and Battery, which are intentional torts. Both Assault and Battery include intent to harm among the elements that must be proven. White's assertion in his brief that he is not alleging "intent to harm" flies in the face of his claim for Assault and Battery. The cause of action for Assault and Battery was specifically brought pursuant to the Tort Claims Act. (R. p. 23, ¶ 35). The Tort Claims Act specifically precludes liability on the agency for any act by an employee which constitutes intent to harm. S.C. Code Ann. § 15-78-60(17). As a "public employer, the City is immune from liability arising from any alleged personal injury due to intentional conduct by employees who may have 'desired' to cause [White] harm." *Cornelius v. City of Columbia*, 663 F. Supp. 2d 471, 480 (D.S.C. 2009), *aff'd sub nom*, 399 F. App'x 853 (4th Cir. 2010); *see also Moore by Moore v. Berkeley Cnty. Sch. Dist.*, 326 S.C. 584, 590-91, 486 S.E.2d 9, 13 (Ct. App. 1997). Additionally, the City asserts that, as discussed above, there is evidence of probable cause for the arrest on the North Charleston Ordinance, thereby making the arrest lawful and giving the officer the right to use the necessary amount of force to effectuate the arrest. *See Roberts v. City of Forest Acres*, 902 F. Supp. 662, 671-72 (D.S.C. 1995) ("A police officer who uses reasonable force in effectuating a lawful arrest is not liable for assault or battery.").

Because liability is precluded by statute, and further because there is evidence of probable cause, the City of North Charleston asks this court to affirm the judgment of the trial court granting summary judgment for Negligence/Gross Negligence and Assault and Battery.

IV. GROSS NEGLIGENCE WAS NOT PROPERLY PRESERVED FOR APPEAL.

Appellant specifically asked in his Memorandum in Support of his Motion for Reconsideration, for the "Court to reconsider the Order awarding summary judgment, ... and amend its Order to deny summary judgment as to Plaintiff's claim of unlawful arrest, excessive force and false imprisonment." (R. p. 297). White did not ask the court to reconsider the grant of summary judgment on the gross negligence cause of action. However, in his motion to reconsider and in his initial brief, White argues the court improperly held him to a gross negligence standard. Therefore the City provides this response to the argument, but asserts first and foremost that it is not properly preserved.

White incorrectly argues that the court held him to a gross negligence standard on his "claim for false arrest, and/or all other claims". The order clearly states, "Plaintiff's cause of action for gross negligence must fail, as evidence of "slight care" is present." (emphasis added). Plaintiff included a claim for Gross Negligence as the sixth cause of action in his Amended Complaint. It was his own cause of action, not a standard of care imputed by the court. The court granted summary judgment after finding evidence of slight care. There is nothing in the court's order to support White's assertion that gross negligence was considered in granting summary judgment to North Charleston on the False Arrest or False Imprisonment cause of action. To the contrary, the order dismissed the Gross Negligence cause of action due to evidence of slight care. The False Arrest and False Imprisonment causes of action were dismissed under a separate reasoning. The only argument that White makes in support of his gross negligence cause of action is a single sentence stating vaguely that "there are abundant facts that at least create an issue as to whether the Officer's acts were negligent or grossly negligent...." (Init. Br. of Appellant at 12). Even here, White only goes so far as to say that there are facts to support that Officer Arroyo was negligent or grossly

negligent and these two claims have very different standards.

As to gross negligence, the City asserts that the issue was not properly preserved for review and further that White has not made any valid argument to support overturning the trial court's ruling on gross negligence.

V. THE TRIAL COURT DID NOT ERR WITH REGARD TO THE AFFIDAVITS SUBMITTED BY THE PARTIES.

The City produced four affidavits in a timely manner prior to the hearing on the motion for summary judgment in this case. The affidavits were obtained for impeachment purposes and for use with summary judgment and were provided accordingly. There is no evidence that the court improperly considered any of these affidavits or that the court considered the affidavits at all.

White asserts that the court should not have considered the affidavits and referred to them as sham affidavits. However, the case cited by White, *Rohrbough v. Wyeth Labs, Inc.*, 916 F.2d 970 (4th Cir. 1990), was a situation where a plaintiff submitted an affidavit directly contradicting an expert's prior sworn testimony for the purpose of creating a material issue of fact to overcome summary judgment. Here, the affidavits which contradict prior affidavits are not from the party or a representative of the party (like an expert). They are from independent witnesses who gave different information to different attorneys.

South Carolina courts have not established the standard for reviewing the circuit court's decision to exclude a sham affidavit, but have relied upon the abuse of discretion standard used by the federal appellate courts. Generally the consideration of whether to exclude an affidavit comes before the court when the party against whom a summary judgment motion is filed, submits an affidavit which creates a material fact which contradicts the evidence that came before. It has been

determined that a trial court may exclude an affidavit when it was submitted "to contradict that party's own prior sworn statement" in "an attempt to create a sham issue of material fact." *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014); *see also Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) ("find[ing] persuasive the reasoning of federal case law" in adopting the rule that a circuit court may exclude a sham affidavit which contradicts a party's own prior sworn statement). Here, none of the affidavits submitted by the City in support of its motion meet the definition of a sham affidavit. While some of the affidavits do contradict prior affidavits and some sworn testimony, counsel for the City had no control over what the affiants said at any given time. The affidavits were obtained for impeachment purposes after the witnesses provided contradictory information during interviews. The court in *McMaster* explained that a deponent "cannot create a conflict and resist summary judgment with an affidavit that ... does not give a satisfactory explanation of why the testimony is changed." *McMaster*, 411 S.C. at 149, 767 S.E.2d at 457 (quoting *Torres v. E.I. Dupont De Nemours & Co.,* 219 F.3d 13, 20 (1st Cir.2000) (citation omitted)). However, the court went on to say that it may be acceptable for a witness to correct misstatements made, *id.* (citing *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 705 (3d Cir.1988)), or to "elaborate [ ] upon or clarif[y] information already submitted," *id.* (quoting *Cole v. Homier Distrib. Co.,* 599 F.3d 856, 867 (8th Cir.2010)). The City asserts that this is what was done. Additionally, with regard to the affidavit of Sgt. Allen, White had alleged that the City was grossly negligent in its internal investigation of White's complaint. The affidavit was submitted to supplement and explain the notes that had previously been produced in discovery and to rebut White's false allegation that the video was not reviewed prior to the decision being rendered.

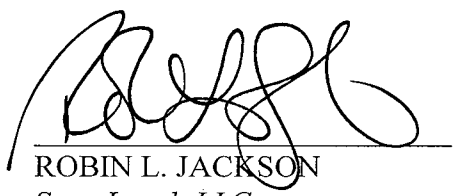
Finally, White has presented no evidence to support his allegation that the judge improperly relied on the affidavits or even considered them at all. Therefore, the City asks this court to affirm

the grant of summary judgment on all causes of action.

CONCLUSION

The only causes of action on appeal are False Arrest, False Imprisonment, Assault and Battery, and Negligence. For the reasons stated herein, the City respectfully requests that this court affirm the trial court's grant of summary judgment to the City as to False Arrest, False Imprisonment, Assault and Battery, and Negligence. Further, the City asks that this court rule that Gross Negligence was not properly preserved for appeal, or in the alternative affirm the trial court's grant of summary judgment on this cause of action.

Respectfully submitted,



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June 25, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No.: 2017-000___

Norris M. White, Jr., ...Appellant

v.

City of North Charleston, ...Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent complies with the August 13, 2007 Order of the South Carolina Supreme Court.

Respectfully submitted,

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