

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 07 2019

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2016-CP-26-1614

Robert Palmer Appellant

vs.

State of South Carolina, Horry County and David Weaver..... Defendants

Of which State of South Carolina is the..... Respondent

RECORD ON APPEAL

Andrew F. Lindemann
Davidson & Lindemann, P.A.
P. O. Box 8568
Columbia, SC 29202
(803) 806-8222

Lisa A. Thomas
Thompson & Henry, P.A.
P. O. Box 1740
Conway, SC 29528
(843) 248-5741

Alan Wilson, Attorney General
Robert D. Cook, Solicitor General
J. Emory Smith, Jr., Deputy Solicitor General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211
(803) 734-3680

Attorneys for Respondent

Gene M. Connell, Jr.
(S.C. Bar No. 1358)
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648
gconnell@classactlaw.net

Roger Dale Johnson
(S.C. Bar No. 71987)
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
attorneyrogerjohnson@gmail.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2016-CP-26-1614

Robert Palmer Appellant

vs.

State of South Carolina, Horry County and David Weaver..... Defendants

Of which State of South Carolina is the..... Respondent

RECORD ON APPEAL

Andrew F. Lindemann
Davidson & Lindemann, P.A.
P. O. Box 8568
Columbia, SC 29202
(803) 806-8222

Lisa A. Thomas
Thompson & Henry, P.A.
P. O. Box 1740
Conway, SC 29528
(843) 248-5741

Alan Wilson, Attorney General
Robert D. Cook, Solicitor General
J. Emory Smith, Jr., Deputy Solicitor General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211
(803) 734-3680

Attorneys for Respondent

Gene M. Connell, Jr.
(S.C. Bar No. 1358)
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648
gconnell@classactlaw.net

Roger Dale Johnson
(S.C. Bar No. 71987)
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
attorneyrogerjohnson@gmail.com

Attorneys for Appellant

INDEX

Order (Form 4) Denying Plaintiff’s Motion for Reconsideration issued by
The Honorable Benjamin H. Culbertson February 15, 2017 1

Order of Dismissal as to the State of South Carolina of The Honorable
Benjamin H. Culbertson dated November 10, 2016, filed November 17, 2016 3

South Carolina Supreme Court Opinion No. 27552 filed July 29, 2015
(Appellate Case No. 2014-001008; *The State v. Robert Palmer*)..... 10

Summons and Complaint filed March 7, 2016 22

Defendant State of South Carolina’s Motion to Dismiss and
Memorandum of Law in Support April 28, 2016 34

Plaintiff’s Response to Defendant’s Motion to Dismiss June 13, 2016 37

Plaintiff’s Motion for Reconsideration November 22, 2016 46

Plaintiff’s Memorandum of Law in Support of Motion for Reconsideration
February 1, 2017 49

Defendant’s Response in Opposition to Plaintiff’s Motion/Memorandum
for Reconsideration February 8, 2017 62

Transcript of Record June 14, 2016 70

Certificate of Counsel 82

Robert Palmer
 PLAINTIFF(S)

State of South Carolina, et al.
 DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion for Reconsideration dated 11/22/2016 is DENIED.
 (This motion is decided without oral arguments.)

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Benjamin H. Culbertson
 Benjamin H. Culbertson, Circuit Court Judge

2148
 Judge Code

Feb. 15, 2017
 Date

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Robert Palmer,)
)
 Plaintiff,)
)
 vs.)
)
 State of South Carolina, Horry)
 County, and David Weaver,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 C/A NO.: 2016-CP-26-01614

HORRY COUNTY
 2016 NOV 17 PM 3:12
 MET CLERK OF COURT

ORDER OF DISMISSAL
 AS TO
 THE STATE OF SOUTH CAROLINA

THIS MATTER CAME BEFORE the Court on June 14, 2016 pursuant to the Defendant State of South Carolina's Notice of Motion and Motion to Dismiss. The State of South Carolina, and all named Defendants, were represented by Lisa A. Thomas, Esquire, of the law firm of Thompson & Henry, P.A. The Plaintiff was represented by Gene M. Connell, Jr., Esquire, of the law firm of Kelaher, Connell & Connor, P.C.

This matter arose after Plaintiff was charged, tried by a jury, and convicted of homicide by child abuse. He appealed to the South Carolina Supreme Court who vacated his conviction, *State v. Palmer*, 413 SC 410 (2015). The Supreme Court opinion stated there was no evidence Palmer was present when the victim was injured or alone with the victim later and aware of the victim's injuries. Plaintiff contends he was wrongly convicted and held for four years.

He brings this suit as to the State of South Carolina alleging that the prosecutor in his criminal trial charged and prosecuted him with no evidence he had committed the crimes. He contends there was no probable cause to charge him because the prosecutor proceeded under a theory that they did not know which of the two Defendants was the principal and which aided

¹
 MAC

and abetted after witnessing the injuries to the child, and failed to seek help.

Plaintiff brings this action for false imprisonment, negligence, malicious prosecution, false arrest, and a violation of his civil rights under 42 U.S.C.A. § 1983. Further, he seeks a declaratory judgment that the State of South Carolina and United States Constitutions provide remedies for wrongful conviction including damages, even though South Carolina has no statutory scheme for wrongful conviction.

DEFENDANT'S ARGUMENT

The State of South Carolina argued it is entitled to dismissal pursuant to the South Carolina Rules of Civil Procedure, Rule 12(b)(6) for several reasons. This action is based on the decisions of a prosecutor in charging and trying a defendant.

The Tort Claims Act is the exclusive remedy in a suit against the state for the actions of an employee, S.C. Code Ann § 15-78-70. The exclusions from the waiver of immunity enumerated in the Tort Claims Act state in part, the governmental entity is not liable for a loss resulting from legislative, judicial, or quasi-judicial action or inaction, S.C. Code § 15-78-60(1). Furthermore, "a prosecutor's typical duties are 'judicial' or 'quasi-judicial' in nature." *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001). The solicitor is entitled to common law prosecutorial immunity as well. The Plaintiff has not alleged that any employees of the State of South Carolina committed any wrongdoing or acted outside the course and scope of their employment. The prosecutor's decision making occurred as a quasi-judicial function.

In addition, the State asserted this matter should be dismissed due to common law

2
/one

prosecutorial immunity. The Tort Claims Act states that all other immunities applicable to a governmental entity, its employees, and agents are expressly preserved, S.C. Code Ann. § 15-78-20(b).

The State argued the 42 U.S.C.A. § 1983 cause of action must be dismissed as no "person" as defined by the statute was named.

Finally, the South Carolina Court of Appeals has definitively ruled on all these issues in *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (SC App. 2001). The Court noted that S.C. Code § 15-78-20(b) expressly preserves common law judicial immunity (Id. at 247). The Court of Appeals recognized that the United States Supreme Court concluded that state prosecutors are clothed with immunity and they enjoy absolute immunity (Id at 241).

The Court of Appeals concluded a prosecutor in the employ of the state is immune from personal liability under § 1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant while acting as an advocate (Id at 250).

The Court of Appeals further concluded a prosecutor could not be sued in his or her official capacity under either § 1983 or the South Carolina Tort Claims Act for money damages when their actions were judicial or quasi-judicial in nature (Id at 250).

The State argued the declaratory judgment action should be dismissed because Plaintiff's attempt to have the judiciary construct a law for wrongful conviction, when he admits the state does not have such a statutory scheme, under the guise of a declaratory judgment action, is clearly outside the scope of the Declaratory Judgment Act (S.C. Code Ann § 15-53-10) and authority of the judiciary. Plaintiff invites the judiciary to invade the province of the legislature with no precedent nor statutory authority.

3
/

PLAINTIFF'S ARGUMENT

The Plaintiff, Robert Palmer, argued that this case presented novel issues and novel issues should never be decided on a 12(b)(6) motion. He cited *Chestnut v. AVX Corporation*, 413 S.C. 224, 776 S.E.2d 82 (2015) wherein he claims the South Carolina Supreme Court held that when novel issues are raised they should never be resolved by the trial court on a motion to dismiss for failure to state facts sufficient to constitute a cause of action.

Plaintiff argues the State of South Carolina should not be dismissed as a named Defendant because Plaintiff is making a constitutional claim and the tort claims act does not limit the constitution. He also cites numerous cases allowing suits against municipalities.

Plaintiff contends in *Connick v. Thompson*, 131 S.Ct. 1350, 1356 (2011) the United States Supreme Court allowed suit for malicious prosecution and § 1983 for failure to train a prosecutor. He interprets the case to state a pattern of violations by untrained employees is necessary to demonstrate deliberate indifference for purposes of failure to train. Plaintiff asserts the Prosecutor's decision to charge under an erroneous theory of the law amounts to a policy subjecting the state to liability and demonstrates a failure to train.

Plaintiff argues that Article I, Section 3 of the South Carolina Constitution protects Plaintiff's right to a remedy in this case and that Article 1, Section 10 provides Plaintiff a remedy for wrongful conviction.

4
/MPK

Likewise, Plaintiff contends the US Constitution provides a remedy under the Fifth Amendment. He asserts that if just compensation is required for taking property for public use, that there should be compensation for depriving a person of his liberty, especially since no state law provides it. He also analogizes it to a *Bivens* action under the Fourth Amendment insisting there is an implied cause of action for a violation of a person's right to be free from an unreasonable search and seizure, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 455 F.2d 1339 (1972).

DEFENDANT'S RESPONSE

Defendant State of South Carolina asserts this action does not present novel issues and was definitively decided as to both state and federal causes of action by *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001).

The cases cited in Plaintiff's memorandum for the proposition of not dismissing the State, all pertain to municipalities. It has long been settled law that municipalities may be subject to § 1983 suits under the circumstances set forth in case law. Plaintiff cites no cases extending authority for such suits to states.

Plaintiff's reliance on *Connick v. Thompson*, 131 S.Ct. 1350, 1356 (2011) is misplaced. In *Connick*, the prosecutor was sued individually, not the state. Also, a one time decision by a prosecutor regarding the handling and charging in his case does not evidence a pattern of misinterpreting the law or failure to properly train.

Both state and federal legislatures have not crafted any remedy for wrongful conviction. The fact that Plaintiff's conviction was vacated does not entitle him to damages from any state or federal law or common law. The fact that some states may have statutory remedies has no

5
/mk

precedential value in South Carolina.

Plaintiff received due process. His conviction was vacated and he was released. He received all the due process available in South Carolina. Furthermore, South Carolina was not silent on the issue. Prosecutorial immunity is preserved in both sections 15-78-60(1) and 15-78-20(b) of the Tort Claims Act.

Plaintiff's analogies to the State and US Constitutions lack statutory or case law support. The South Carolina Court of Appeals explicitly declined to extend it as to the Tort Claims Act and 42 U.S.C.A. § 1983 in *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001).

CONCLUSIONS

1. The State is immune from suit under the Tort Claims Act. S.C. Code Ann. §§ 15-78-20(b) and 15-78-70(c).
2. Suit against the State is barred by prosecutorial immunity. *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001) and § 15-78-60(1) (no liability for judicial or quasi-judicial action).
3. The State is not a person subject to suit under 42 U.S.C.A. § 1983, and sovereign immunity bars this suit.
4. Plaintiff has failed to state any claim upon which relief may be granted as to the Defendant State of South Carolina.

ORDER

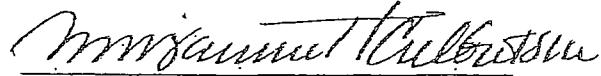
Based on the Complaint presented and arguments of counsel, it is hereby

ORDERED that Defendant The State of South Carolina is hereby dismissed with

6
mk

prejudice from the above-captioned matter pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure*, and that the declaratory judgment action is dismissed.

IT IS SO ORDERED.



Benjamin H. Culbertson
Judge for the Fifteenth Judicial Circuit

Nov. 10, 2016
Geoway, South Carolina
(Georgetown)

7/

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

Robert Palmer, Petitioner/Respondent.

Appellate Case No. 2014-000954

and

The State, Petitioner/Respondent,

v.

Julia Gorman, Respondent/Petitioner.

Appellate Case No. 2014-001008

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27552
Heard June 17, 2015 – Filed July 29, 2015

AFFIRMED IN PART; REVERSED IN PART

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Petitioner/Respondent.

Appellate Defender Robert M. Pachak, of Columbia, for Respondent/Petitioner, Robert Palmer.

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent/Petitioner, Julia Gorman.

JUSTICE PLEICONES: Petitioners Julia Gorman and Robert Palmer were tried jointly for the death of Gorman's seventeen month-old grandson (victim). Palmer and Gorman, who lived together but were not married, were each convicted of homicide by child abuse (homicide), aiding and abetting homicide by child abuse (aiding and abetting), and unlawful conduct towards a child (unlawful conduct). On direct appeal, the Court of Appeals reversed both Palmer's and Gorman's aiding and abetting convictions, and a majority affirmed both petitioners' homicide and unlawful conduct convictions. *State v. Palmer*, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014). Judge Pieper dissented, and would have reversed all of the petitioners' convictions on the ground "the State did not present any direct or circumstantial evidence to reasonably prove which codefendant harmed the child." We granted both petitioners' and the State's petitions for writs of certiorari to review the directed verdict issues.¹ We affirm the Court of Appeals' reversal of both aiding and abetting convictions, and affirm the decision to uphold the denial of Gorman's homicide and unlawful conduct directed verdict motions. We reverse the Court of Appeals' affirmance of Palmer's convictions for homicide and unlawful conduct finding he was entitled to a directed verdict on both charges.

¹ While we also granted Palmer's petition to review a proffer issue, Palmer did not brief the proffer issue on certiorari and it is therefore deemed abandoned. See Rule 208(b)(1)(D), SCACR; see also *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

FACTS

The only contested issues here are the identity of the individual who harmed the victim and whether the other individual was aware of the abuse. Since this matter involves directed verdict questions, we begin with a review of the evidence in the light most favorable to the State. *E.g. State v. Buckmon*, 347 S.C. 316, 555 S.E.2d 402 (2001). In our review we rely solely on evidence from the State's case-in-chief in order to avoid any of the directed verdict issues that can arise when jointly tried codefendants blame each other in their defense cases. *See State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) (waiver rule bars consideration of codefendant's testimony in reviewing denial of mid-trial directed verdict motion). Here, Gorman testified in her own defense and stated that Palmer was alone with the victim during the time when the fatal injury must have been inflicted. We do not rely on her trial testimony because it cannot be used against Palmer, and because no evidence adduced in the defense cases are necessary to a determination whether Gorman's directed verdict motions were properly denied.

The evidence shows Gorman's eighteen year-old daughter Cesalee traveled by bus to South Carolina with her child, the victim, in late June 2008. Cesalee and her mother had a difficult relationship and had long been estranged. On July 2, Cesalee flew back to her home in Arizona, leaving the victim in the petitioners' care. While there was overwhelming evidence that Gorman agreed to keep the victim while Cesalee packed her family's belongings for a move to the East Coast, Gorman told several people after the victim's injuries that Cesalee had abandoned the victim to her.

On July 1, the victim was taken to the doctor's office by Cesalee and Gorman, suffering from ant bites and allergies. He was prescribed a cream for the bites and a liquid antihistamine (Xyzal) for his allergies. The prescribed dosage for the Xyzal, which has a sedative effect, was 0.5 teaspoon per day. An appointment was set for July 8 so that he could receive immunizations. On July 7, after Cesalee had returned to Arizona, Gorman took the victim to the emergency room reporting he was suffering from projectile vomiting. The victim was observed, given a Pedialyte popsicle, and released.

When Gorman brought the victim back to the family practitioner on July 8, the office was aware of the emergency room visit the night before. The family practitioner examined the victim, determined he had recovered from the bites, the allergies, and the nausea, and administered the vaccinations. She testified that she had examined the victim's head as part of the check-up and had no concerns, and

also that while the victim was small for his age he was not malnourished. The doctor also testified she had no concerns about child abuse when she saw the victim in July.

Gorman repeatedly told medical personnel the victim was lethargic, and Palmer's statements also indicated the victim was not an energetic toddler. There was evidence from which a jury could find the victim's lethargy after July 1, when he was prescribed the sedating Xyzal, was attributable to Gorman's overdosing. At the emergency room visit on July 7, Gorman told medical personnel the victim was being given 1.5 teaspoons of Xyzal per day rather than the 0.5 teaspoons he had been prescribed. After the victim was fatally injured on July 14, Gorman told an emergency room (ER) nurse that the victim had been on Xyzal, and that she had been administering a dose of 2.5 teaspoons, five times the prescribed amount. In this statement, Gorman said the last dose had been given at 9:00 pm on July 11. On the other hand, while en route to the hospital on the 14th, Gorman told the EMT she had given the victim Xyzal on the 14th. The family doctor testified that when she saw the victim on July 8, he was no longer in need of this antihistamine.

On July 14, Gorman went to work, arriving at about 6:00 am, leaving Palmer alone with the sleeping victim. There was evidence that the victim was tired all day, and somewhat whiney. He ate breakfast and lunch, but according to Palmer, having been awakened at about 9:30 am, the victim did not fall asleep again until about 3-3:30 pm. Gorman arrived home around 4:00 pm. Gorman stated she went straight into the victim's room to check on him as she normally did when she first got home, and saw him sleeping soundly and breathing normally. Later she and Palmer checked on him from the doorway. Palmer agreed that they had checked on the sleeping victim from the doorway after Gorman arrived home, and that no one checked on him again until after they had eaten dinner around 6:00 pm. Both petitioners maintained that after dinner Gorman returned to the bedroom alone, and she told officers she found the victim "slack," making "really strange noises," and with saliva at his mouth. She picked him up, and brought him to Palmer. Palmer said the victim was limp but seizing intermittently, with his fists balled up. Gorman agreed the victim was fine until she alone checked on him around 6:00 pm.

Horry County Fire and Rescue were dispatched at 6:07 pm following a 9-1-1 call made by Gorman, and arrived at the home at 6:13 pm. When they arrived, Palmer was holding the victim who was actively seizing and whose "pretty grave" condition was immediately apparent. Petitioners told the responder the victim had

not been sick and had been found in this condition during a nap. The responder started an I.V. and gave oxygen, noting the victim was making unusual breathing sounds. EMS paramedics took over at 6:20 pm when the first responder brought the victim to their ambulance as it arrived. The victim was still seizing and 'posturing,' an involuntary movement where the limbs extend and retract that only occurs in intracranial injury cases. He also exhibited a "right side gaze," with his eyes pointing towards the injured side of the brain. His pupils were dilated but responded sluggishly and the seizures stopped as Valium was administered.

The EMS medic testified Gorman rode in the front of the ambulance to the hospital. Gorman said the victim had not been sick recently and had not fallen, but that she had given him a dose of Xyzal that day. Gorman told her about the ant bites and stated the victim had been whiney and lethargic since then. She also made a statement which the medic paraphrased as "She's raised several children in her lifetime and never seen such a bad one." When the ambulance arrived at the hospital at about 7:00 pm, the victim was still posturing, his right-side gaze had not changed, his pupils were more dilated, he was still breathing very rapidly, and his heart rate was elevated.

The ER nurse testified that on arrival the victim was unresponsive, posturing, seizing, and had dilated pupils. Gorman responded to the nurse's questions. She said the victim had not fallen or hit his head on anything before the seizures started. She also told the ER nurse that he was on Xyzal, but she had not given him any since administering 2.5 teaspoon on July 11. The nurse observed Palmer was very concerned and wanted to talk to and touch the seizing victim, in contrast to Gorman's behavior.

The ER nurse testified that upon the victim's arrival at the Conway Hospital at 7:02 pm another nurse had scored the victim at a 5 on the Glasgow Coma Score. At 8:30 pm his score had dropped to a 3. The scale runs from 15 to 3, and anything below a 9 is "gravely concerning." The victim's breathing was labored and grunting, and the nurse testified that human life cannot be maintained at that level of effort. His heart rate never dropped below 142, when a normal rate would have been 110 to 115. The ER nurse watched as the C.A.T. scan was performed, immediately saw the skull fractures, and some bleeding at the back of the brain, and called the ER doctor. She testified the fractures and bleeding were consistent with violent trauma, and she also observed some abnormal bruising on the victim's body. Palmer reported the victim had been dragging his foot earlier in the day. Gorman told the nurse the victim's mother was a drug addict who dropped the

victim off and whose whereabouts were unknown. The victim, who was very thin, remained at the Conway Hospital from 6:58 pm until he was helicoptered to the Medical University of South Carolina (MUSC) in Charleston at 10:33 pm.

The Conway ER doctor testified the victim arrived "in extremis [sic] immediately evident" "showing signs of a severe neurological injury." The victim appeared to be breathing on his own but was posturing. He was immediately intubated to maintain breathing. The C.A.T. scan showed severe trauma to the skull and brain such that "impending death is what it [sic] was concerned." The brain had hemorrhages and edema and there was a loss of gray-white matter distinction indicating the death of brain tissue.

The victim's father arrived in Charleston from Virginia on Monday, July 15, after Gorman called him during the evening of July 14 to say the victim was being airlifted to MUSC. After this conversation, the father called to speak to the doctor at the Conway Hospital, and based on that conversation, the father filed a police report. The father called Cesalee in Arizona but neither Palmer nor Gorman had tried to reach her. Cesalee flew to Charleston, and after consulting with the doctors who told them only machines were keeping the victim alive, the parents had him baptized and then donated his organs. The victim was removed from life support on July 16.

A MUSC neuro-radiologist testified as an expert witness, having examined the medical reports and C.T. scans performed at Conway Hospital on July 14 and at MUSC on July 15. Those scans showed the victim suffered comminuted fractures,² severe swelling of the brain, blood around the brain, and the loss of gray-white differentiation which indicates brain tissue has died. The victim's skull fractures were the result of severe traumatic force of a type most commonly seen following an automobile accident. The victim had no chance for a meaningful recovery. The bleeding was acute and the fractures showed no signs of healing.

The neuro-radiologist testified a person suffering the type of injury inflicted upon the victim would be immediately severely symptomatic, exhibiting:

- (1) alteration or loss of consciousness;
- (2) alteration in breathing;

² In a comminuted fracture the bone is broken into multiple pieces.

- (3) likely seizures;
- (4) inability to walk, move, or eat;
- (5) possible foaming at the mouth; and
- (6) no purposeful movement.

The expert testified the severity of the fractures were of a type caused either by an automobile accident, by having been dropped from a two-story building, or from intentionally applied force. While she could not give an exact time, the onset of symptoms would have been very soon after the injury, if not immediate.

The forensic pathologist autopsied the victim's body on July 19, 2008. She found the head injuries were caused either by a single hit or compression, or possibly by one hit on each side of the victim's head. She testified the injury occurred between July 11 and July 14.³

Finally, a MUSC doctor who serves as director of the Violence Intervention and Prevention Division in the pediatric department testified. She observed the victim on July 15, finding him very thin, on a respirator, and totally unconscious with fixed and dilated pupils. In addition to the skull fractures, she found a number of unexplained/atypical bruises on the victim: one on his upper right thigh close to his buttocks; one close to his waist; and one on the inside of his leg. The bruises could have been inflicted contemporaneously with the head injuries. The head injuries had to have been inflicted on July 14, and it would have taken less than a minute to fracture the victim's skull. Finally, this doctor opined that the injury must have been inflicted on the 14th as the victim would have died very soon after if not placed on a respirator. She estimated the injuries were inflicted within three hours of his arrival at the Conway Hospital ER at 6:58 pm on July 14.

ISSUE

Whether the Court of Appeals erred in failing to reverse petitioners' convictions for homicide by child abuse and

³ The State amended the indictments before trial to specify the fatal injury occurred on July 14.

unlawful conduct towards a child, and in reversing the petitioners' convictions for aiding and abetting homicide by child abuse?

ANALYSIS

In this case we are primarily concerned with whether the State presented any evidence of identity to support the submission of the three charges to the jury. Since the issues all involve a directed verdict, we review the evidence in the light most favorable to the State. *State v. Buckmon, supra*. We begin with the homicide by child abuse charges.

A. Homicide by Child Abuse.

The application of the directed verdict standard in a circumstantial evidence case where one of two persons must have killed a child is set forth in *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013):

Homicide by child abuse cases are difficult to prove because often the only witnesses are the perpetrators of the crime. What separates this case from a case like *Smith*⁴ is that every piece of the State's evidence establishes (1) Appellant was asleep at the time the victim sustained her injuries, (2) Appellant was only awoken after Lewis retrieved the unresponsive victim from her crib, and (3) the victim appeared to be acting normally until after Appellant put the victim to sleep and went to sleep herself. As in *Smith*, medical testimony adduced at trial indicated that the victim would not have appeared "normal" within a short period of time after her injuries were inflicted due to the nature and extent of her neurological injuries. However, there is no evidence that Appellant herself was aware of the victim's injuries, let alone caused them. Thus, we find this case distinguishable from *Smith*.

In *Smith*, the mother and her boyfriend were jointly tried for the death of the mother's young daughter. Both defendants were convicted of homicide by child abuse and aiding and abetting that offense. On appeal, the boyfriend argued he

⁴ *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004).

was entitled to a directed verdict on both counts as the evidence showed, at most, his mere presence at the crime scene. The Court of Appeals disagreed, finding the evidence showed the two defendants were together with the child for the entire period during which the child was shaken with sufficient force to kill her, and suffered more than one blow to the head inflicted with sufficient force to fracture her skull. Further, the evidence showed that her impairment would have been obvious. In addition, there was "evidence of a probable cover-up."

Here, the State's evidence narrowed the window of opportunity during which the fatal injury must have been inflicted to between 4:00 pm and 6:05 pm on Sunday, July 14. The State's evidence placed both petitioners at the home during this period. Just as the only evidence in *Hepburn* was that the appellant was asleep at all critical times, the only evidence here was that the child was sleeping and breathing normally until Gorman found him in distress shortly after 6:00 pm. Further, the present cases are distinguishable from *Smith* in that petitioners were not together at all relevant times, and unlike *Smith*, where the only evidence was the child's injuries would have been immediately apparent, here there was evidence that a layperson might not be able to distinguish between a sleeping child and an unconscious one. Finally, unlike *Smith*, the State presented no "evidence of a probable cover-up."

We hold there is sufficient evidence to uphold the Court of Appeals' ruling that the motion for a directed verdict on homicide by child abuse charge was properly denied as to Gorman, but hold there is no evidence to support the denial of Palmer's motion. The State's evidence places Gorman alone with the victim at 4:00 pm when she first returned home and again at 6:00 pm when the victim was found in grave distress. The medical evidence would support a finding that Gorman inflicted the fatal blow when she first returned home and that when she and Palmer checked on the child from the doorway at 4:15 pm, the victim's injuries may not have been apparent to a layperson. Alternatively, there was evidence that the blow(s) must have been inflicted immediately preceding the expression of symptoms, which is evidence from which a jury could conclude that Gorman injured the child when she went alone to check on him at 6:00 pm. Further, Gorman admitted mistreating the victim by shaking, spanking, and overdosing him, and numerous witnesses testified to her unusual affect and statements following the child's injury.

There was sufficient circumstantial evidence that Gorman committed homicide by child abuse, but there is no evidence in the case-in-chief that Palmer was alone

with the victim after around 3:30 pm, when the victim fell asleep. Thus, as in *Hepburn*, the State produced no evidence that Palmer "was aware of the victim's injuries, let alone caused them." *Hepburn*, 406 S.C. at 442, 753 S.E.2d at 416.

B. Unlawful Conduct Towards a Child.

The Court of Appeals upheld the trial court's denial of both petitioners' motions for directed verdicts on the charges of unlawful conduct towards a child in violation of S.C. Code Ann. § 63-5-70 (2010).⁵ This statute provides:

(A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:

- (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
- (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
- (3) willfully abandon the child.

We find there is no evidence in this record that Palmer either harmed the victim or was aware Gorman was harming him. In fact, the State does not contest Palmer's entitlement to a directed verdict on this charge in its respondent's brief on certiorari. On the other hand, Gorman told at least two people that she was continuing to give the victim Xyzal, which has a sedative effect, after it was no longer medically indicated, and in amounts three to five times the recommended dosage. This alone is some evidence she placed the victim at an unreasonable risk of harm. Further, she admitted lacking patience, smacking the victim on his hands and his diapered behind, and shaking him, but not hard. From this evidence, a jury could find Gorman acted maliciously in causing bodily harm, as reflected in the unusual bruises found on the victim's body on July 14.

⁵ At the time of the petitioners' indictment this statute was codified as § 20-7-50.

We affirm the Court of Appeals' decision to affirm the trial court's denial of Gorman's directed verdict motion on the charge of unlawful conduct towards a child, but reverse its decision as to Palmer's motion.

C. Aiding and Abetting Homicide by Child Abuse.

The Court of Appeals reversed both petitioners' convictions for aiding and abetting homicide by child abuse, stating simply "we find the State presented no direct evidence and insubstantial circumstantial evidence that either Palmer or Gorman knowingly undertook any action to aid or abet that abuse." *State v. Palmer*, 408 S.C. at 234, 758 S.E.2d at 205. The State contends the Court of Appeals erred in reversing these convictions. We disagree.

A person aids and abets homicide by child abuse under S.C. Code Ann. § 16-3-85(A)(2) (2003) when he "knowingly aids and abets another person to commit child abuse or neglect [which] results in the death of a child under the age of eleven." The State would have the Court speculate, despite the absence of any evidence, that both petitioners actually entered the victim's bedroom around 4:30 pm where one abused him in the presence of the other, who thus aided and abetted the perpetrator by failing to seek medical help for an hour and a half. Compare *Smith, supra*. There is no evidence other than rank speculation that such an incident occurred. Moreover, while "omission which causes harm" can constitute aiding and abetting child abuse or neglect (§ 16-3-85(B)(1)), there is no evidence that more prompt treatment would have mitigated the victim's injuries and thus we do not perceive potential liability for the non-abuser even if he or she were aware of the abuse. For this reason, even were there evidence that Palmer had hurt the victim during the day while alone, there is no evidence that any delay in seeking medical attention by Gorman caused the victim harm beyond that inflicted by the perpetrator. Finally, *State v. Lewis*, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013) *cert. dismissed as improvidently granted* 411 S.C. 647, 770 S.E.2d 398 (2015), establishes that neither knowledge of another's intent to commit a crime nor failure to act to stop abuse are sufficient to deny a directed verdict on a charge of aiding and abetting homicide by child abuse. *Lewis*, 403 S.C. at 356, 743 S.E.2d at 129-130.

We therefore affirm the Court of Appeals' decision to reverse the trial court's denial of each petitioner's motion for a directed verdict on the charge of aiding and abetting homicide by child abuse.

CONCLUSION

We affirm the Court of Appeals' ruling on the aiding and abetting homicide by child abuse convictions. We affirm the Court of Appeals' decision to the extent it upholds the denial of Gorman's directed verdict motions on the charges of homicide by child abuse and unlawful conduct towards a child, but reverse its decisions as to Palmer. For these reasons, the decision of the Court of Appeals is

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2016-CP-26 - 1614

Robert Palmer,)
)
) Plaintiff,)
)
) vs.)
)
) State of South Carolina, Horry County,)
) and David Weaver,)
)
) Defendants.)
)

SUMMONS

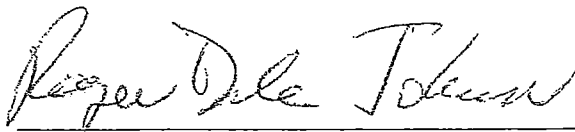


TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHER, CONNELL & CONNOR, P.C.

Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



Roger Dale Johnson
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
(843) 488-9934
attorneyrogerjohnson@gmail.com

February 16, 2016

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2016-CP-26- 1614

Robert Palmer,)
)
 Plaintiff,)
)
 vs.)
)
 State of South Carolina, Horry County,)
 and David Weaver,)
)
 Defendants.)

COMPLAINT
(Malicious Prosecution/
False Arrest/Negligence)
JURY TRIAL DEMANDED

The Plaintiff, complaining of the Defendants above named, would respectfully state as follows:

1. The Plaintiff, Robert Palmer, is a citizen and resident of Horry County, South Carolina.
2. The Defendant, State of South Carolina, is a political entity charged with enforcing the laws of the State.
3. The Defendant, Horry County, is a political entity whose employees prosecuted the Plaintiff.
4. The Defendant, David Weaver, is a citizen and resident of Horry County, South Carolina and an employee of the Defendant Horry County who was the lead criminal investigator in this case.

BACKGROUND FACTS

5. The Plaintiff Robert Palmer, a citizen and resident of South Carolina, was tried and convicted of homicide by child abuse and was sentenced to a lengthy prison sentence.
6. The Plaintiff Robert Palmer appealed his sentence to the South Carolina Supreme Court which found that there was no evidence by which the Plaintiff should have been convicted

and as a result reversed and vacated his conviction. (A copy of Opinion of the South Carolina Supreme Court is attached hereto as Exhibit A.)

7. The Plaintiff was incarcerated and wrongly convicted and was not released until September 2015 (almost four years).

8. The Plaintiff brings all causes of action listed in this Complaint for damages as a result of Plaintiff's significant injuries which include wrongful detention, deprivation of liberty, deprivation of his freedom, restriction of his movement, confinement without process of law probable cause, and because South Carolina has no remedy for wrongful conviction by statute but the United States and South Carolina Constitutions require a remedy as a matter of law.

9. That the Defendant David Weaver was active in the investigation and prosecution of the Plaintiff.

10. That Candice Lively, as Assistant Prosecutor, told the Court during the trial:

There were some changes in a timeline and that is the reason why I am indicted them both for homicide by child abuse and aiding and abetting because I have two individuals who are the only two people who could have had access and contact with this child and the child ends up dead, that's it so it could have been either one of them and that's where we are. (Transcript of Record, p. 23, lines 22-24).

That's correct. Your Honor, the case law of the South Carolina Supreme Court clearly allows us to proceed under the theory that we not know which one was necessarily the principal aiding and abetting, that's why I charged them with both. They both had access to the child and said that no one else was around, gave no accidental reasons for this child's injuries, therefore, I'm proceeding that either one of them had access and could have afflicted the blow that killed the child, there you go. (Transcript of Record, p. 25, liens 9-18).

11. That Defendant Weaver decided to charge Plaintiff Palmer despite the fact that there was no evidence nor did he have probable cause to believe that Palmer had caused the death of the minor child. Further, Candice Lively admitted that neither she nor Defendant

Weaver (an Horry County Police Investigator) had any evidence that Plaintiff Palmer had committed these crimes.

12. Thus, Defendant Weaver made a policy decision and indicted Plaintiff Palmer despite the fact there was no evidence and thus a lack of probable cause for the prosecution of Palmer as decided by the South Carolina Supreme Court in its Opinion filed July 29, 2015 in which it held:

The State would have the Court speculate, despite the absence of any evidence, that both Petitioners actually entered the victim's bedroom around 4:30 p.m. where one abused him in the presence of the other, thus aided and abetted the perpetrator by failing to seek medical help for an hour and a half There is no evidence of other than rank speculation that such an incident occurred For this reason, even were there evidence that Palmer had hurt the victim during the day while alone, there is no evidence that in any delay in seeking medical attention by Gorman caused the victim harm beyond that inflicted by the perpetrator.

13. The Court further stated in its Opinion:

...there is no evidence in the case-in-chief that Palmer was alone with the victim after around 3:30 p.m. when the victim fell asleep. Thus, as in *Hepburn*, the State produced no evidence that Palmer, "was aware of the victim's injuries, let alone caused them." *Hepburn*, 406 S.C. 442, 753 S.E.2d at 416.

14. Accordingly, Defendants did not have probable cause to charge the Plaintiff as is noted in the transcript above and violated the Fourth Amendment and the Fourteenth Amendment.

15. The State of South Carolina and Horry County and its officers, agents and/or employees had a policy of prosecuting people such as the Plaintiff with other Defendants when there was no evidence as to who the perpetrator of the crime might be. This is brought out by Candice Lively's statement to the Court in which she said:

Your Honor, the case law of the South Carolina Supreme Court clearly allows us to proceed under the theory that we not know which one was necessarily the principal aiding and abetting, that's why I charged them with both. They both had access to the child and said that no one else was

around, gave no accidental reasons for this child's injuries, therefore, I'm proceeding that either one of them had access and could have afflicted the blow that killed the child, there you go. (Transcript of Record, p. 25, lines 9-18).

16. That Plaintiff further submits that such constitute a policy by Defendants of charging individuals with crimes when Defendants do not know who may be the perpetrator.

FOR A FIRST CAUSE OF ACTION

(False Imprisonment)

17. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

18. That the Defendant above named did falsely imprison the Plaintiff in a South Carolina Correctional facility and did so without Plaintiff's consent.

19. That the false imprisonment was without force or effect of law and Defendant in fact had no evidence of Plaintiff's guilt.

20. That the unlawful confinement resulted in the Plaintiff being wrongfully held in a prison in South Carolina for years until the South Carolina Supreme Court overturned the conviction.

21. That Plaintiff brings this cause of action for false imprisonment and requests actual damages announced above damages the cost of this action against all Defendants who were involved in the prosecution and detention of the Plaintiff.

FOR A SECOND CAUSE OF ACTION

(Negligence)

22. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

23. That the Defendants above named and their officers, agents and/or employees were negligent, reckless, willful in one or more of the following particulars:

- a. In wrongfully convicting the Plaintiff;
- b. In failing to use proper methods to investigate;
- c. In failing to find and/or turn over appropriate evidence to the Plaintiff regarding his innocence;
- d. In charging Plaintiff when there was no evidence of his guilt;
- e. In imprisoning him without due process;
- f. In failing to take that degree of skill and care which a reasonable person would have done under the same or similar circumstances.
- g. In failing to provide evidence of Plaintiff's innocence;
- h. In withholding evidence of Plaintiff's innocence; and
- i. In failing to use proper police procedures in this case.

24. That as a direct and proximate, Plaintiff suffered severe and disabling injuries in that Plaintiff was incarcerated against his will in a State correctional facility for years; Plaintiff was left without access to his family and his children; Plaintiff lost his job; Plaintiff suffered mental anguish and emotional distress; Plaintiff continues to have nightmares about what Plaintiff had to go through in prison and continues to be in need of psychological and/or psychiatric services including counseling for these injuries.

25. That Plaintiff asks for judgment against the Defendants for actual damages, punitive damages, and the costs of this action.

FOR A THIRD CAUSE OF ACTION

(Malicious Prosecution)

26. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

27. The Plaintiff brings this cause of action for malicious prosecution in that Plaintiff was prosecuted and there was no probable cause as per the South Carolina Supreme Court's decision in this matter.

28. That as a result of the malicious prosecution, Plaintiff was confined to a South Carolina correctional institution after conviction against his will.

29. That further as a result of Plaintiff's conviction, an appeal was undertaken and the South Carolina Supreme Court overturned Plaintiff's conviction such that the proceedings were terminated in Plaintiff's favor.

30. That Plaintiff brings this cause of action for malicious prosecution for the wrongful detention of the Plaintiff in the South Carolina Department of Corrections.

31. The Plaintiff asks for judgment against the Defendants for actual damages, for punitive damages and the costs of this action.

FOR A FOURTH CAUSE OF ACTION

(42 U.S.C. §1983)

32. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

33. The Plaintiff brings this cause of action under 42 U.S.C. §1983 which provides in pertinent part that Plaintiff may bring a cause of action against Defendants for deprivation of federal civil rights by state and local governmental officials.

34. That Plaintiff's wrongful and unconstitutional imprisonment ended in September 2015 by Order of the South Carolina Supreme Court.

35. That Plaintiff was wrongfully imprisoned in violation of the Fifth and Fourth Amendments of the United States Constitution and that the South Carolina Supreme Court found that there was no evidence that Plaintiff was guilty of the aforementioned crime. (See copy of Opinion of the South Carolina Supreme Court attached hereto as Exhibit A.)

36. That the State of South Carolina does not have an effective remedy for unconstitutional convictions and that Plaintiff's remedy is 42 U.S.C. §1983 for wrongful conviction in this matter.

37. That further Plaintiff's damages are all related to his incarceration as a result of shoddy investigation by agents/officers of the Defendants which set in motion the prosecution that wrongfully led to Plaintiff's conviction and/or incarceration.

38. That Plaintiff further brings this cause of action pursuant to *Heck v. Hemingway* which gives the Plaintiff the right to bring a §1983 damages action for unlawful conviction or imprisonment after the Plaintiff proves or the Court rules that his conviction or sentence has been reversed declared invalid.

39. That as a result of Defendants' violations of 42 U.S.C. §1983 Plaintiff suffered damages as a result therein including unlawful conviction which confined Plaintiff in the South Carolina Department of Corrections when no evidence existed for such a conviction.

40. That Plaintiff brings this cause of action for loss of enjoyment of life, mental anguish, pain and suffering, emotional distress, deprivation of liberty, deprivation of his right to free movement and association and for the inability to see his parents and children during the period of his incarceration.

41. The Plaintiff requests damages under 42 U.S.C. §1983 for actual damages, punitive damages, attorney's fees and costs.

FOR A FIFTH CAUSE OF ACTION

(False Arrest)

42. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

43. That the Plaintiff was arrested and charged with homicide by child abuse.

44. That the arrest was without probable cause.

45. That no probable cause existed at the time of the arrest sufficient to have a reasonable person believe that the Plaintiff committed a crime

46. The Plaintiff is informed and believes that the false arrest and the lack of probable cause resulted in the Plaintiff being convicted and that Plaintiff has damages as outlined in the other cause of action.

47. That Plaintiff asks for damages for actual damages, for punitive damages and for the costs of this action for false arrest.

FOR A SIXTH CAUSE OF ACTION

(Declaratory Judgment)

48. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

49. That South Carolina has no statutory scheme for wrongful conviction like other states.

50. That Plaintiff believes both the South Carolina and United States Constitutions provide remedies for wrongful conviction including a claim for damages.

51. That Plaintiff brings this cause of action as a declaratory judgment and for damages.

52. That Plaintiff requests the Court find that a remedy for wrongful conviction is available under both the United States and South Carolina Constitutions including the due process clause.

53. That Plaintiff requests an Order of this Court finding a Constitutional right for damages for wrongful conviction to include damages as listed in the other causes of action.

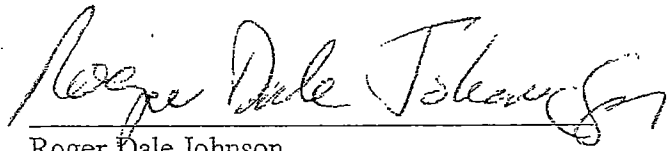
WHEREFORE, Plaintiff prays for judgment as follows:

- A. On the First Cause of Action for actual and punitive damages.
- B. On the Second Cause of Action for actual and punitive damages.
- C. On the Third Cause of Action for actual damages, punitive damages, attorney's fees and costs.
- D. On the Fourth Cause of Action for actual damages, punitive damages.
- E. On the Fifth Cause of Action for actual damages, punitive damages and attorney's fees and costs.
- F. On the Sixth Cause of Action for a judgment that the United States and South Constitutions both require a monetary remedy for wrongful conviction and for actual and punitive damages.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



Roger Dale Johnson
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
(843) 488-9934
attorneyrogerjohnson@gmail.com

February 16, 2016

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)
)
COUNTY OF Horry)

Robert Palmer,)
)
Plaintiff,)
)
vs.)
)
State of South Carolina, Horry)
County, and David Weaver,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2016-CP-26-1614

**DEFENDANT STATE OF SOUTH
CAROLINA'S NOTICE OF MOTION
AND MOTION TO DISMISS**

YOU WILL PLEASE TAKE NOTICE that the undersigned, attorney for the Defendant State of South Carolina, will move before the Presiding Judge of the Fifteenth Judicial Circuit, in the Court of Common Pleas, Conway, South Carolina, on the tenth (10th) day after service hereof or as soon thereafter as counsel may be heard, pursuant to South Carolina Rules of Civil Procedure 12(b)(6), for an Order dismissing the above-captioned case with prejudice as to the Defendant State of South Carolina.

All of which is respectfully submitted.

Lisa A. Thomas, SC Bar #66458
*Attorneys for the Defendants State of South Carolina,
Horry County and David Weaver*



THOMPSON & HENRY, P.A.
1300 Second Avenue, Third Floor (29526)
P. O. Box 1740
Conway, South Carolina 29528
(843) 248-5741 - voice
(843) 248-5112 - fax
lthomas@thompsonlaw.com

April 28, 2016
Conway, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	C/A NO.: 2016-CP-26-1614
Robert Palmer,)	
)	
Plaintiff,)	
)	DEFENDANT STATE OF SOUTH
vs.)	CAROLINA'S MOTION TO DISMISS
)	AND MEMORANDUM OF LAW IN
State of South Carolina, Horry)	SUPPORT OF ITS MOTION TO DISMISS
County, and David Weaver,)	
)	
Defendants.)	
)	

The Plaintiff has brought this lawsuit with causes of action for false imprisonment, negligence, malicious prosecution, violation of 42 U.S.C. 1983, and false arrest as well as a declaratory judgment action following the trial and conviction of the Plaintiff Robert Palmer for homicide by child abuse. The Plaintiff's conviction was later vacated by the Supreme Court of South Carolina. The State of South Carolina should be dismissed as a party to this lawsuit pursuant to the statutes and case law discussed below.

LAW AND ANALYSIS

1. “[A] person, when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually.....” S.C. Code Ann. §15-78-70.

2. “The governmental entity is not liable for a loss resulting from: (1) legislative, judicial, or quasi-judicial action or inaction” S.C. Code §15-78-60. Furthermore, “a prosecutor’s typical duties are ‘judicial’ or ‘quasi-judicial’ in nature.” Williams v. Condon, 347 S.C. 227, 249 (2001). The solicitor is entitled to common law prosecutorial immunity as well. The Plaintiff has not alleged that any employees of the State of South Carolina committed any wrongdoing.

3. This matter is barred by the doctrine of sovereign immunity which the State of South Carolina expressly declines to waive in S.C. Code Ann § 15-78-20(b).

4. The State of South Carolina is not a "person" subject to suit as defined in 42 U.S.C.A. § 1983.

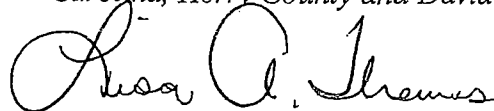
5. Additionally, the State is "not liable for a loss resulting from: (1) legislative, judicial, or quasi-judicial action or inaction" S.C. Code §15-78-60. The prosecution of the Plaintiff was judicial in nature, and therefore, the State or any governmental entity cannot be liable for prosecuting the Plaintiff.

6. Finally, Plaintiff's attempt to have the judiciary construct a law for wrongful conviction, when he admits the state does not have such a statutory scheme, under the guise of a declaratory judgment action, is clearly outside the scope of the Declaratory Judgment Act (S.C. Code Ann § 15-53-10) and authority of the judiciary. Plaintiff invites the judiciary to invade the province of the legislature with no precedent nor statutory authority.

CONCLUSION

Therefore, the State of South Carolina should be dismissed as a party to this lawsuit and declaratory judgment action pursuant to South Carolina Code Sections 15-78-10 et seq., 15-53-10 et seq., 15-78-20(b), 15-78-60, and 42 U.S.C.A. § 1983.

Lisa A. Thomas, SC Bar #66458
*Attorneys for the Defendants State of South
Carolina, Horry County and David Weaver*



THOMPSON & HENRY, P.A.
1300 Second Avenue, Third Floor (29526)
P. O. Box 1740
Conway, South Carolina 29528
(843) 248-5741 - voice
(843) 248-5112 - fax
lthomas@thompsonlaw.com

April 28, 2016
Conway, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2016-CP-26-1614

Robert Palmer,)
)
 Plaintiff,)
)
 vs.)
)
 State of South Carolina, Horry County,)
 and David Weaver,)
)
 Defendants.)

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

BACKGROUND FACTS

The Plaintiff has brought this lawsuit against the Defendants for false imprisonment, malicious prosecution, negligence, declaratory judgment and 42 U.S.C. § 1983. Briefly stated, the Plaintiff was convicted of homicide by child abuse in this Court and sentenced to a lengthy prison sentence. Plaintiff's conviction was appealed to the South Carolina Supreme Court which reversed and vacated his conviction. (See Opinion No. 27552 filed July 29, 2015 attached as Exhibit A). Plaintiff had been incarcerated and wrongly convicted and had been in prison almost four years prior to the reversal of the conviction. The Supreme Court in its Opinion stated as follows:

We find there is no evidence in this record that Palmer either harmed the victim or was aware Gorman was harming him.

The Supreme Court further held:

There is no evidence other than rank speculation that such an incident occurred....there is no evidence that more prompt treatment would have mitigated the victim's injuries and thus we do not perceive potential liability for the non-abuser even if he or she were aware of the abuse. For this reason, even were there evidence that Palmer had hurt the victim during the day while alone, there is no evidence that any delay in seeking medical attention by Gorman cause the victim harm beyond that inflicted by the perpetrator.

The Court thus reversed the conviction of Palmer and set him free.

The evidence in the case will show that Defendant Weaver was active in the investigation and prosecution of the Plaintiff as a Horry County Police Detective and that Candice Lively, the Assistant Prosecutor in the case, proceeded under a false premise of law in trying to convict the Plaintiff. During the course of the trial she stated as follows:

Your Honor, the case law of the South Carolina Supreme Court clearly allows us to proceed under the theory that we not know which one was necessarily the principal aiding and abetting, that's why I charged them with both. They both had access to the child and said that no one else was around, gave no accidental reasons for this child's injuries, therefore, I'm proceeding that either one of them had access and could have afflicted the blow that killed the child, there you go. (Transcript of Record, p. 25, lines 9-18).

The record will further show that Defendant Weaver and Prosecutor Lively were both aware that there was no probable cause to believe that Palmer had caused the death of the minor child and despite this information continued to prosecute Palmer.

The Defendants at the outset of this litigation have moved to dismiss this case pursuant to South Carolina Rule of Civil Procedure 12(b)(6). While the Defendants do not seek to dismiss the entire case, they seek to dismiss the State of South Carolina and the cause of action for 42 U.S.C. § 1983. For the reasons set forth below the Defendant's Motion must be denied.

I. NOVEL ISSUES MUST NOT BE DECIDED ON A SCRPC 12(B)(6) MOTION.

It is well settled in South Carolina that novel issues should never be decided on a 12(b)(6) motion. In *Chestnut v. AVX Corporation*, 413 S.C. 224, 776 S.E.2d 82 (2015), the Supreme Court of South Carolina held when novel issues are raised they should never be resolved by the trial court on a motion to dismiss for failure to state facts sufficient to constitute a cause of action.

In this case, Plaintiff seeks a declaratory judgment of this court that the United States and South Carolina Constitutions provide a remedy for the wrongly convicted in this state. Plaintiff points to the due process clause in both the South Carolina and United States Constitutions and

that language in the Constitution which provides that “no person shall be deprived of life, liberty and the pursuit of happiness without due process of law.” Plaintiff argues to the court that the due process clause provides a remedy for someone who has been wrongfully convicted and due process requires that in this case the plaintiff would have a constitutional remedy for being wrongfully convicted and for being held in prison against his will. This of course is a novel issue and one which cannot be decided on a motion to dismiss. Further, the facts must be more clearly developed and the facts can only be more clearly developed after depositions and testimony of witnesses regarding the conviction of the plaintiff.

The Constitution of the United States and of South Carolina clearly raises novel issues in regard to this Plaintiff’s right to a remedy and recovery. See *Keiger v. Citco Coastal Products*, 326 S.C. 369, 482 S.E.2d 792 (1997) (novel issue regarding public policy exception in employment at will contract should not be decided on motion to dismiss).

II. THE STATE OF SOUTH CAROLINA SHOULD NOT BE DISMISSED AS A NAMED DEFENDANT.

The Plaintiff points to S.C. Code § 15-78-20(b) which holds the State liable in this case.

In that section entitled “Legislative Intent, Declaration of Public Policy” it states as follows:

The General Assembly additionally intends to provide for liability on the part of the State, its political subdivision and employees while acting within the scope of official duties....

Further, the Tort Claims Act does not limit the reach of the South Carolina Constitution. Plaintiff has made a constitutional claim that a wrongful conviction and a remedy for a wrongful conviction is protected by the South Carolina Constitution and thus not subject to the Tort Claims Act. It should also be noted that the Solicitor is a constitutional officer and is an employee of the State of South Carolina. The Solicitor does not work for a political entity, but is

a direct employee of the State (having been elected by the voters). Thus the State of South Carolina is the proper Defendant in this case.¹

Plaintiff also brings to the Court's attention, *Moore v. City of Columbia*, 284 S.C. 278, 326 S.E.2d 157 (1985). In *Moore*, the Supreme Court held that a city may be liable for violating another's federally protected rights. The *Moore* Court cited *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978). The *Moore* Court noted that a governmental entity could be liable for a custom or usage if it deprives a person of a constitutionally protected right. Plaintiff asserts that a custom of usage such as an erroneous version of case law would leave the State of Carolina liable.

Both *Moore* and *Monell* found that the policy need not be one officially adopted and promulgated by the municipality's officials. It may be one that is visited pursuant to governmental custom even though such custom has not received formal approval through the body's official decision making channel. *Monnell*, 436 U.S. at 691, 98 S.Ct. at 2036. In other words, a municipality may be subjected to liability on the basis of its de facto policies as well as de jure policies. *Lenard v. Argento*, 699 F.2d 874, 886 (7th Cir. 1983), cert. denied, 104 S.Ct. 69, 78 L.Ed. 2d 84 (1983).

In sum, 42 U.S.C. § 1983 allows a civil action to recover damages for deprivation of a constitutionally protected right such as wrongful conviction. In any § 1983 action, a plaintiff must prove an official policy or custom that causes the plaintiff to be subjected to a denial of a constitutional right. Here, the prosecutor's policy of proceeding on an erroneous version of the law and her belief that she could proceed under the theory that we "do not know which one was necessarily the principal aiding and abetting, that's why I charged them with both." Plaintiff

¹ Malicious prosecution claims are excluded from immunity provided by the South Carolina Tort Claims Act. See *Pritchett v. Alford*, 766 F.Supp. 442, 973 F.2d 307 (1992).

believes that this custom by the prosecutor's office leaves the State of South Carolina liable for its action.

Plaintiff also points to a recently decided case by the United States Court of Appeals, Second Circuit entitled *Morse v. Fusto*, Opinion No. 13-4074 (decided September 11, 2015 U.S. Court of Appeals for the Second Circuit). In *Morse*, the Second Circuit allowed the jury to decide whether material omissions can if knowingly made constitute falsification of evidence even if the evidence otherwise is facially accurate. In the process, the Second Circuit noted that its ruling provided some response to the question famously posed by Secretary of Labor, Raymond Donovan, after his acquittal: "Which office do I go to to get my reputation back? Who will reimburse my company for the economic jail it has been in for two and a half years?"

III. THE COURT'S DECISION IN *CONNICK V. THOMPSON*, 131 S.CT. 1350, 1356 (2011).

In the *Connick* matter, the United States Supreme Court held that a claim for malicious prosecution and/or a claim under 42 U.S.C. § 1983 could succeed if the plaintiff could prove a pattern of violations that would indicate a failure to train a prosecutor. See *Connick*, 131 S.Ct. at 1357. Consistent with this precedent, the opinion stated that "A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate the deliberate indifference for purposes of failure to train. *Connick*, 131 S.Ct. at 1360-61.

The Court further cited *Canton v. Harris*, 489 U.S. 378, 390 (1989) in which specific legal training was so clearly needed that the failure to give employees that training would necessarily lead to a constitutional violation.

The argument in this case being that the Solicitor's Office attempted to prove a criminal violation by the Plaintiff based on their erroneous version of the case law of the Supreme Court of South Carolina. In the transcript of record in Palmer's criminal case, the prosecutor stated:

Your Honor, the case law of the Supreme Court of South Carolina clearly allows us to proceed under that theory that we not know which one was necessarily the principal aiding and abetting, that's why I charged them with both. They both had access to the child and said that no one else was around, gave no accidental reasons for this child's injuries, therefore, I'm proceeding that either one of them had access and could have afflicted the blow that killed the child, there you go. (Tr. of Record, p. 10, lines 9-18).

The Plaintiff believes that this testimony from the transcript and the *Connick* case which Plaintiff intends to show a pattern of violations would amount to a constitutional violation.

IV. SOUTH CAROLINA CONSTITUTION PROTECTS PLAINTIFF'S RIGHT TO A REMEDY IN THIS CASE.

Plaintiff believes that Article I, Section 3 of the South Carolina Constitution gives Plaintiff the constitutional right to a remedy for a wrongful conviction. Article I, Section 3 states as follows:

The privileges and immunities of citizens of this State of the United States under this Constitution shall not be a bridge, nor shall any person be deprived of life, liberty or property without due process of law nor shall any person be denied the equal protection of the laws.
(See S.C. Constitution Article I, Section 3.)

Plaintiff asserts that due process of law incorporates in it the right of Plaintiff to have a remedy for a wrongful conviction despite the fact that no statute exists which provides Plaintiff that right. It is without question that Plaintiff's liberty (i.e. his incarceration) was at stake and that there was no due process in his case other than rank hearsay. This is more particularly described in the Court's Opinion filed July 29, 2015 in this case in which the Court noted;

The State would have the Court speculate, despite the absence of any evidence, that both Petitioners actually entered the victim's bedroom around 4:30 p.m. where one abused him in the presence of the other, who thus aided and abetted the perpetrator by failing to seek medical help for an hour and a half There is no evidence of other than rank speculation that such an incident occurred

(See *Palmer* Opinion No. 27552 filed July 29, 2015 attached hereto)

It goes without saying that if due process protects a person's property rights, then surely it protects his liberty and offers a remedy. See *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (college professor had property interest in continued employment which is safeguarded by due process.) See also *State v. Binnarr*, 400 S.C. 156, 733 S.E.2d 890 (2012) (A claim of denial of due process must be analyzed with a two part inquiry. Number one whether the interest involved can be defined as "liberty" or "property" within the meaning of the due process clause and if so what process is due in the circumstances. Due process requirements in a particular case depend on the importance of the interests involved and the circumstances under which the deprivation of liberty or property may occur.)

In sum, Plaintiff argues that if the due process clause protects property rights it certainly protects the Plaintiff's liberty right and as a result the Plaintiff's right to a remedy for a wrongful conviction.

V. **PLAINTIFF ALSO ASSERTS THAT ARTICLE I, SECTION 10 IS APPLICABLE TO THIS CASE.**

Article I, Section 10 of the South Carolina Constitution is applicable to this case. It provides as follows

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated and no warrant shall be issued but upon probable cause supported by oath or affirmation....

Plaintiff believes that Article I, Section 10 also provides Plaintiff a remedy for his wrongful conviction. Based on the opinions of the South Carolina Supreme Court previously cited, there was no probable cause to issue any warrant. If there was no probable cause to issue any warrant, then Plaintiff is entitled to damages. See *State v. Bennett*, 256 S.C. 234, 182 S.E.2d 8 (1971) (probable cause in each case turns and stands on its own facts)

VI. THE UNITED STATES CONSTITUTION ALSO PROTECTS PLAINTIFF'S RIGHT TO A REMEDY IN THIS CASE.

Plaintiff asserts that the Fifth Amendment to the United States Constitution also protects Plaintiff's right to a remedy for a wrongful conviction in this case. The Fifth Amendment states in pertinent part: "Nor be deprived of life, liberty or property without due process of law."²

Plaintiff asserts in this case a wrongful conviction violates the Fifth Amendment especially when there are no state law remedies available to him. The Fifth Amendment has long been held to require just compensation for taking property for public use. It follows logically that if there is just compensation for taking property for public use then there should be just compensation for depriving a person of his liberty based on a wrongful conviction. See *Harden v. S.C. Dept. of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (S.C. 2007) (Fifth Amendment's taking clause applies to the actions of the state government with regard to the due process clause of the Fourteenth Amendment.) See also *Carter v. Lynch*, 429 F.2d 134 (1970) (4th Circuit).³

Plaintiff also claims an implied cause of action and remedy based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the United States Supreme Court ruled an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizure had been violated by federal agents. Plaintiffs claim that same right for a wrongful conviction. (See also subsequent history *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 455 F.2d 1339 (1972) (We hold defendants have no immunity to protect them from damage suits charging violations of constitutional rights).

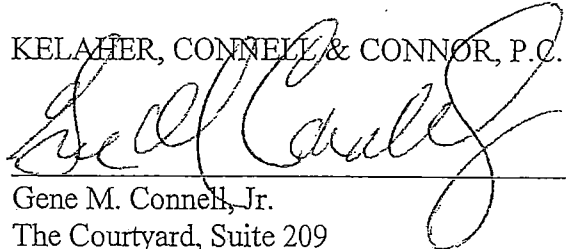
² The Fourth Amendment protects against unreasonable searches and seizures which is an issue in this case.

³ It is an open question whether petitioners claim would succeed under the fourth amendment since it has not been presented. *Albright v. Oliver*, 510 U.S. 266, 275 (1994).

In summary, for the above reasons Plaintiff requests that Defendant's motion to dismiss be denied based on the novel issues, the constitutional issues and the issues regarding 42 U.S.C. § 1983.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



Roger Dale Johnson
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
(843) 488-9934
attorneyrogerjohnson@gmail.com

June 13, 2016

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2016-CP-26-1614

Robert Palmer,)
)
Plaintiff,)
)
vs.)
)
State of South Carolina, Horry County,)
and David Weaver,)
)
Defendants.)

PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
RECONSIDERATION

2016 NOV 28 PM 2:51
COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
HORRY COUNTY

TO: LISA A. THOMAS, ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Plaintiffs, will, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, move this Court for an Order reconsidering the Order of the Honorable Benjamin H. Culbertson granting the Motion to Dismiss by the Defendant State of South Carolina. The basis of this motion is as follows:

1. Plaintiff sought a declaratory judgment of this court that the United States and South Carolina Constitutions provide a constitutional remedy for the wrongfully convicted in this State. The Court has not addressed the Plaintiff's arguments that the United States and South Carolina Constitutions both explicitly and implicitly provide for a remedy for those wrongfully convicted.

2. Plaintiff argued that the issues in this case including the remedy available for the wrongfully convicted was a novel issue and could not be decided on a motion to dismiss. Plaintiff respectfully submitted that this Court has not addressed that issue.

3. Plaintiff cited *Moore v. City of Columbia*, 284 S.C. 278, 326 S.E.2d 157 (1985) for the proposition that a Plaintiff may bring an action against a City or State for violating another's federally protected constitutional rights. It is respectfully submitted that the Court has not addressed this issue.

4. Plaintiff argued during the hearing that a motion to dismiss was not appropriate if the Plaintiff could prove an official policy or custom of a defendant which causes the plaintiff to be subjected to a denial of a constitutional right. This Court does not address that issue in its order.

5. Plaintiff asserts error in the Court finding that a declaratory judgment action should be dismissed on a 12(b)(6) motion since it is the duty of this court to determine the law only after the facts are fully developed.

6. Plaintiff submits that the Court erred in holding that malicious prosecution claims were excluded from tort immunity under the South Carolina Tort Claims Act.

7. Plaintiff submits that the Court erred in failing to allow additional discovery prior to ruling on this matter.

8. Plaintiff submits that the Court did not address the Supreme Court's decision of *Connick v. Thompson*, 131 S.Ct. 1350, 1356 (2011) in deciding this matter.

9. Plaintiff submits that the Court erred in not considering Article I, Section 3 of the South Carolina Constitution and in holding that there was a constitutional remedy in South Carolina for a wrongful conviction.

10. Plaintiff submits that the due process clause of both the United States and South Carolina Constitutions protect a person's liberty just like it does a person's property rights and thus mandated. Plaintiff submits the Court erred in not addressing this issue.

11. Plaintiff submits Article I, Section 10 of the South Carolina Constitution gives the wrongfully convicted a civil remedy. Plaintiff submits the Court erred in not ruling on this issue.

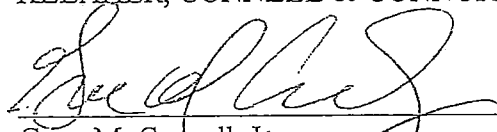
12. Plaintiff submits that the United States Constitution, specifically the Fifth Amendment, provides a constitutional remedy for the wrongfully convicted. Plaintiff submits the Court erred in not ruling on that issue.

13. Plaintiff submits that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) mandates a remedy for the wrongfully convicted including an implied cause of action against the State of South Carolina.

14. Plaintiff submits the Court erred in granting a SCRCP 12(b)(6) motion on Plaintiff's claim for a declaratory judgment since this is a novel issue and discovery would help this Court and the Court of Appeals to rule on this matter.

WHEREFORE, Plaintiff requests the Court reconsider its Order and for such other and further relief as the Court may deem just, necessary and proper.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Cornell, Jr.

The Courtyard, Suite 209

1500 U.S. Highway 17 North

Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

(843) 238-5648 (phone)

(843) 238-5050 (facsimile)

gconnell@classactlaw.net

Roger Dale Johnson

Law Office of Roger Johnson

607 Main Street

Conway, SC 29526

(843) 488-9933

(843) 488-9934

attorneyrogerjohnson@gmail.com

November 22, 2016

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2016-CP-26-1614

2017 FEB -1 PM 12:50
CLERK OF COURT
HORRY COUNTY, SC

Robert Palmer,)
)
Plaintiff,)
)
vs.)
)
State of South Carolina, Horry County,)
and David Weaver,)
)
Defendants.)

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S
MOTION FOR RECONSIDERATION

BACKGROUND FACTS

The Plaintiff has brought this lawsuit against the Defendants for false imprisonment, malicious prosecution, negligence, declaratory judgment and 42 U.S.C. § 1983. Briefly stated, the Plaintiff was convicted of homicide by child abuse in this Court and sentenced to a lengthy prison sentence. Plaintiff's conviction was appealed to the South Carolina Supreme Court which reversed and vacated his conviction. (See Opinion No. 27552 filed July 29, 2015 attached as Exhibit A). Plaintiff had been incarcerated and wrongly convicted and had been in prison almost four years prior to the reversal of the conviction. The Supreme Court in its Opinion stated as follows:

We find there is no evidence in this record that Palmer either harmed the victim or was aware Gorman was harming him.

The Supreme Court further held:

There is no evidence other than rank speculation that such an incident occurred...there is no evidence that more prompt treatment would have mitigated the victim's injuries and thus we do not perceive potential liability for the non-abuser even if he or she were aware of the abuse. For this reason, even were there evidence that Palmer had hurt the victim during the day while alone, there is no evidence that any delay in seeking medical attention by Gorman cause the victim harm beyond that inflicted by the perpetrator.

The Court thus reversed the conviction of Palmer and set him free.

The evidence in the case will show that Defendant Weaver was active in the investigation and prosecution of the Plaintiff as a Horry County Police Detective and that Candice Lively, the Assistant Prosecutor in the case, proceeded under a false premise of law in trying to convict the Plaintiff. During the course of the trial she stated as follows:

Your Honor, the case law of the South Carolina Supreme Court clearly allows us to proceed under the theory that we not know which one was necessarily the principal aiding and abetting, that's why I charged them with both. They both had access to the child and said that no one else was around, gave no accidental reasons for this child's injuries, therefore, I'm proceeding that either one of them had access and could have afflicted the blow that killed the child, there you go. (Transcript of Record, p. 25, lines 9-18).

The record will further show that Defendant Weaver and Prosecutor Lively were both aware that there was no probable cause to believe that Palmer had caused the death of the minor child and despite this information continued to prosecute Palmer.

The Defendants at the outset of this litigation have moved to dismiss this case pursuant to South Carolina Rule of Civil Procedure 12(b)(6). While the Defendants do not seek to dismiss the entire case, they seek to dismiss the State of South Carolina and the cause of action for 42 U.S.C. § 1983. For the reasons set forth below the Court should vacate its Order.

While the Court did not dismiss the entire case (for instance it was left open as to David Weaver and Horry County), the Court did find that there was no cause of action against the State of South Carolina. The Court's Order of Dismissal as to the State of South Carolina is attached to Plaintiff's Motion for Reconsideration. The Plaintiff's claims outlined in his Motion for Reconsideration can best be summarized as follows:

- The United States and South Carolina Constitutions provide a constitutional remedy for the wrongful conviction in South Carolina.
- The issue of whether there is a remedy for someone wrongfully convicted is a novel issue and cannot be decided on a motion to dismiss.

- The Court has not considered *Moore v. City of Columbia*, 284 S.C. 278, 326 S.E.2d 157 (1985) in deciding this case.
- A motion to dismiss is not appropriate if Plaintiff can prove an official policy or custom of a defendant which causes the plaintiff to be subjected to a denial of a constitutional right.
- This Court erred in holding that malicious prosecution claims were excluded from tort immunity under the South Carolina Tort Claims Act.
- This Court erred in failing to allow discovery of the facts prior to ruling on this matter (the novel issue rule).
- This Court erred in ruling that the United States Supreme Court's decision in *Connick v. Thompson*, 131 S. Ct. 1350, 1356 (2011) does not apply here. The error being additional facts are required to make that ruling.
- This Court erred in not considering Article I, Section 3 of the South Carolina in determining whether a wrongful conviction had a constitutional remedy in this State.
- This Court erred in failing to hold that the United States and South Carolina Constitutions protect a person's "liberty" under the due process clause just like those same Constitutions protect a person's property rights in an eminent domain case.
- This Court erred failing to hold that Article I, Section 10 of the South Carolina Constitution provides a civil remedy for the wrongfully convicted.
- This Court erred in failing to hold that the United States Constitution, specifically the Fifth Amendment, provides a constitutional remedy for the wrongfully convicted.
- This Court erred in failing to hold that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) mandates a remedy for the wrongfully convicted.

I. THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS BOTH EXPLICITLY AND IMPLICITLY PROVIDE A REMEDY FOR THOSE WRONGFULLY CONVICTED.

A. South Carolina Constitution protects Plaintiff's right to a remedy in this case.

Plaintiff believes that Article I, Section 3 of the South Carolina Constitution gives Plaintiff the constitutional right to a remedy for a wrongful conviction. Article I., Section 3 states as follows:

The privileges and immunities of citizens of this State of the United States under this Constitution shall not be a bridge, nor shall any person be deprived of life, liberty or property without due process of law nor shall any person be denied the equal protection of the laws.
(See S.C. Constitution Article I, Section 3.)

Plaintiff asserts that due process of law incorporates in it the right of Plaintiff to have a remedy for a wrongful conviction despite the fact that no statute exists which provides Plaintiff that right. It is without question that Plaintiff's liberty (i.e. his incarceration) was at stake and that there was no due process in his case. This is more particularly described in the Court's Opinion filed July 29, 2015 in this case in which the Court noted;

The State would have the Court speculate, despite the absence of any evidence, that both Petitioners actually entered the victim's bedroom around 4:30 p.m. where one abused him in the presence of the other, who thus aided and abetted the perpetrator by failing to seek medical help for an hour and a half There is no evidence of other than rank speculation that such an incident occurred

(See *Palmer* Opinion No. 27552 filed July 29, 2015 attached hereto)

It goes without saying that if due process protects a person's property rights, then surely it protects his liberty and offers a remedy. See *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (college professor had property interest in continued employment which is safeguarded by due process.) See also *State v. Binnarr*, 400 S.C. 156, 733 S.E.2d 890 (2012) (A claim of denial of due process must be analyzed by a two part inquiry.

First, is whether the interest involved can be defined as “liberty” or “property” within the meaning of the due process clause and if so what process is due under the circumstances. Due process requirements in a particular case depend on the importance of the interests involved and the circumstances under which the deprivation of liberty or property may occur.)

Plaintiff argues that if the due process clause (of both the United States and South Carolina Constitutions) protects property rights, it certainly protects the Plaintiff’s liberty rights and as a result the Plaintiff’s right to a remedy for a wrongful conviction. In summary, Plaintiff argues his liberty was taken by a wrongful conviction just like when a state takes a person’s land for a highway.

B. Plaintiff also asserts that Article I, Section 10 is applicable to this case.

Article I, Section 10 of the South Carolina Constitution is applicable to this case. It provides as follows:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated and no warrant shall be issued but upon probable cause supported by oath or affirmation....

Plaintiff asserts that Article I, Section 10 provides Plaintiff a remedy for his wrongful conviction. Based on the opinions of the South Carolina Supreme Court previously cited, there was no probable cause to issue any warrant. If there was no probable cause to issue any warrant, then Plaintiff is entitled to damages. See *State v. Bennett*, 256 S.C. 234, 182 S.E.2d 8 (1971) (probable cause in each case turns and stands on its own facts)

C. The United States Constitution provides Plaintiff’s right to a remedy in this case.

Plaintiff asserts that the Fifth Amendment to the United States Constitution also protects Plaintiff’s right to a remedy for a wrongful conviction in this case. The Fifth Amendment states in pertinent part: “Nor be deprived of life, liberty or property without due process of law.”

Plaintiff asserts in this case a wrongful conviction violates the Fifth Amendment especially when there are no state law remedies available to him. The Fifth Amendment has long been held to require just compensation for taking property for public use. It follows logically that if there is just compensation for taking property for public use then there should be just compensation for depriving a person of his liberty based on a wrongful conviction. See *Harden v. S.C. Dept. of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (S.C. 2007) (Fifth Amendment's taking clause applies to the actions of the state government with regard to the due process clause of the Fourteenth Amendment.) See also *Carter v. Lynch*, 429 F.2d 134 (1970) (4th Circuit).

Plaintiff also claims an implied case of action and remedy based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the United States Supreme Court ruled an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizure had been violated by federal agents. Plaintiff claims that same right exists for a wrongful conviction. (See also subsequent history *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 455 F.2d 1339 (1972) (We hold defendants have no immunity to protect them from damage suits charging violations of constitutional rights).

The Plaintiff in his previous argument to this Court stated that *Bivens* applied and that the United States Supreme Court held an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizure had been violated by federal agents. This Court has not addressed that issue. Plaintiff respectfully requests that the Court address the issue as to whether Defendant State of South Carolina is protected from damage suits charging violations of constitutional rights. The Defendant State of South Carolina has no such immunity under the Fourth Amendment to the United States Constitution. While the Court does

mention *Bivens* on page 5 of its Order, it does not make a ruling or decision as to whether *Bivens* applies and as to whether there is an implied cause of action under the Fourth Amendment for violating a person's right to be free from unreasonable search and seizures, i.e., imprisonment. Plaintiff requests that the Court make a ruling on this issue.

II. NOVEL ISSUES SHOULD NOT BE DECIDED ON A MOTION TO DISMISS.

It is well settled in South Carolina that novel issues should never be decided on a 12(b)(6) motion. In *Chestnut v. AVX Corporation*, 413 S.C. 224, 776 S.E.2d 82 (2015), the Supreme Court of South Carolina held when novel issues are raised they should never be resolved by the trial court on a motion to dismiss for failure to state facts sufficient to constitute a cause of action.

Here, Plaintiff seeks a declaratory judgment of this court that the United States and South Carolina Constitutions provide a remedy for the wrongly convicted in this state. Plaintiff points to the due process clause in both the South Carolina and United States Constitutions and that language in the Constitution which provides that "no person shall be deprived of life, liberty and the pursuit of happiness without due process of law." Plaintiff argues to the Court that the due process clause provides a remedy for someone who has been wrongfully convicted. Due process requires that in this case the Plaintiff would have a constitutional remedy for being wrongfully convicted and for being held in prison against his will for four years. This of course is a novel issue and one which should not be decided on a motion to dismiss. Further, the facts must be more clearly developed and the facts can only be developed after depositions and testimony of witnesses regarding the wrongful conviction of the Plaintiff.

The Constitution of the United States and of South Carolina raises novel issues in regard to this Plaintiff's right to a remedy and recovery. See *Keiger v. Citco Coastal Products*, 326 S.C.

369, 482 S.E.2d 792 (1997) (novel issue regarding public policy exception in employment at will contract should not be decided on motion to dismiss).

III. THIS COURT DOES NOT RULE ON WHETHER MOORE V. CITY OF COLUMBIA, 284 S.C. 278, 326 S.E.2D 157 (1985) APPLIES.

This Court does not cite nor discuss *Moore v. City of Columbia*, 284 S.C. 278, 326 S.E.2D 157 (1985) which stands for the proposition that a plaintiff may bring an action against a City or State for violating another's federally protected constitutional rights. In fact, this Court in its ruling holds that the South Carolina Tort Claims Act applies to this case and declines to review Plaintiff's arguments that the South Carolina and United States Constitutions are supreme over the South Carolina Tort Claims Act. Plaintiff requests a ruling of the Court that *Moore* applies in this case.

IV. A MOTION TO DISMISS IS NOT APPROPRIATE AND DISCOVERY MIGHT AID THE COURT IN MAKING A DETERMINATION.

It is well settled in South Carolina that novel issues should not be decided on a motion to dismiss. Here, Plaintiff believes that there may be evidence of an official policy or custom of the Defendants which caused the Plaintiff to be wrongfully convicted. Plaintiff asserts that discovery is necessary to decide this issue. See *Chestnut v. AVX Corporation*, 413 S.C. 224, 776 S.E.2d 82 (2015), (Supreme Court of South Carolina holds when novel issues are raised they should never be resolved by the trial court on a motion to dismiss). Accordingly, Plaintiff believes the motion to dismiss should be denied and the court should reverse its decision granting the motion to dismiss.

V. THIS COURT ERRED IN HOLDING THAT MALICIOUS PROSECUTION CLAIMS ARE EXCLUDED FROM TORT IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT.

As has been stated above, both the South Carolina and United States Constitutions provide for a constitutional remedy for wrongful conviction. Accordingly, this Court's Order

discussing the South Carolina Tort Claims Act is not applicable and malicious prosecution claims based on constitutional principals clearly override the South Carolina Tort Claims Act. (See Article I, Section 3 and Article I, Section 10 of the South Carolina Constitution and the Fifth Amendment of the United States Constitution.)

VI. THE COURT DID NOT ADDRESS THE SUPREME COURT'S DECISION OF CONNICK V. THOMPSON, 131 S.CT. 1350, 1356 (2011) IN DECIDING THIS CASE.

While the Court did cite *Connick v. Thompson*, 131 S.Ct. 1350, 1356 (2011) in ruling on this case, the Court's decision holding that "a one-time decision by a prosecutor regarding the handling and charging in his case does not evidence a pattern of misinterpreting the law or failure to properly train." Plaintiff argues that such a finding on a motion to dismiss without any discovery is not appropriate and accordingly the Court should not apply *Connick v. Thompson*.

VII. THE COURT HAS NOT ADDRESSED PLAINTIFF'S CONSTITUTIONAL CLAIMS INCLUDING ARTICLE 1, SECTION 10 OF THE SOUTH CAROLINA CONSTITUTION, ARTICLE 1, SECTION 3 OF THE SOUTH CAROLINA CONSTITUTION AND THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Court in its Order does not address Plaintiff's constitutional claims other than simply saying: "Plaintiff's analogies to the State and US Constitutions lack statutory or case law support." (Order, p. 6). Plaintiff submits that this is a novel issue and one which this Court should decide after additional discovery. There are many examples of parties bringing actions pursuant to the South Carolina and United States Constitutions which had no statutory or case law support at the time they were brought. This case is just such an example. Accordingly, if the Court is going to decide this matter on a motion to dismiss, it should clearly address Plaintiff's claims that the South Carolina and United States Constitutions apply to Plaintiff's wrongful conviction. Plaintiff asks for rulings as to those issues in its Order on Reconsideration.

VIII. THE COURT ERRED IN NOT DECIDING WHETHER THE UNITED STATES CONSTITUTION, SPECIFICALLY THE FIFTH AMENDMENT, PROVIDES A CONSTITUTIONAL REMEDY FOR THE WRONGFULLY CONVICTED.

As has been cited above, Plaintiff requested a ruling on whether the United States Constitution, specifically the Fifth Amendment, allowed for a remedy for a wrongful conviction. This Court made no ruling on that issue and Plaintiff requests the Court make a ruling on that issue. See *Carter v. Lynch*, 429 F.2d 134 (1970) (4th Circuit) (the Fifth Amendment's taking clause applies to the actions of state government with regard to the due process clause of the Fourteenth Amendment).

The Court's Order does not discuss Plaintiff's constitutional claims under either the State or Federal Constitutions. Plaintiff's claims under those Constitutions cannot be trumped by the Tort Claims Act or sovereign immunity. Constitutional claims are direct actions against state or local governmental entities and officials and are analogous to Bivens' actions under the Federal Constitution. The just compensation clause under the state and federal constitutions are available for matters of wrongful conviction as a matter of constitutional law. The argument that the State of South Carolina is not a person and thus not amenable to be sued does not apply to claims brought under federal and state constitutions. Suits against states under the just compensation clause for harm resulting from wrongful convictions are available under the Fifth Amendment's self-executing just compensation clause. See *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (The right to just compensation is guaranteed by the Constitution. A promise is implied because the duty to pay is imposed by the Fifth Amendment.) See *Manning v. New Mexico Energy Minerals and Natural Resources Dept.*, 144 P.3d 87, 96 (N.M. 2006) authorizing direct action against the state under federal constitution"¹

¹ No State Supreme Court decision as of yet has addressed whether wrongful convictions and their remedies fall under the United States or State Constitutions. Plaintiff requests such a ruling from this Court.

IX. THE PLAINTIFF'S "LABOR" IS PROTECTED BY THE STATE AND FEDERAL CONSTITUTIONS.

Plaintiff notes that recent decisions holding "labor" is a form of property protected by eminent domain principles enable individuals who were wrongfully convicted to argue that the productive value of their labor was taken from them while they were in prison. There is precedent in Supreme Court determinations that compensation is constitutionally mandated for a temporary taking of property and should enable individuals to receive compensation for the period during which they were wrongfully confined by the State and incapable of laboring productively for themselves. See *United States v. Lewis*, 342 F.Supp. 833, 836 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973); *accord State v. Superior Court*, 40 P.3d 1239 (Alaska Ct.App. 2002) (relying on *Lewis* to conclude that Due Process principles require compensation when a fine is wrongfully collected); *Ex parte McCurley* 412 So.2d 1236 (Ala. 1982) (same) *People v. Nance*, 542 N.W.2d 358, 359 (Mich. Ct.App. 1995), *appeal denied*, 554 N.W.2d 899 (Mich. 1996) (same).

Plaintiff argues that the property that was "taken" within the meaning of state or federal takings clauses was the value of the productive labor that was appropriated by government during his imprisonment and either left to waste or used to provide services within prison for little or no compensation, because this legal doctrine has in many jurisdictions developed in a manner favorable to this type of claim. Other losses associated with wrongful conviction may be compensable under eminent domain or due process principles. See Compensation for Detention, 1978 Criminal Law Review 22-24-5 discussing other nations' practices of compensating individuals who were detained but not convicted as well as those who were wrongfully convicted.

Several states have explicitly held governmental appropriation of labor to be protected by state or federal takings clauses, absent a finding of a duty. Those states are Alaska: *DeLisio v.*

Alaska Super. Ct., 740 P.2d 437 (Alaska 1987); Arkansas: *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991); Indiana: *Sholes v. Sholes*, 760 N.E.2d 156, 163-164 (Ind. 2001); Kansas: *State ex rel. Stephan v. Smith*, 747 P.2d 816, 842 (Kan. 1987); Iowa: *McNabb v. Osmundson*, 315 N.W.2d 9, 16 (Iowa 1982); Missouri: *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985); Oklahoma: *Bias v. State*, 568 P.2d 1269, 1272 (Okla. 1977); Utah: *Bedford v. Salt Lake County*, 447 P.2d 193, 195 (Utah 1968).

Accordingly, eight states and the United States Court of Appeals for the District of Columbia Circuit have either explicitly held or strongly indicated in dicta that a government appropriation of labor can require just compensation under federal or state takings clauses. While South Carolina has not yet ruled on this matter, Plaintiff believes our courts would be inclined to do in a proper case.

A relatively recent takings claim by Japanese-Americans whose property was appropriated in the World War II-era forced relocation was held to be justified and was further held to state a claim for relief but was ultimately barred by the statute of limitations governing takings claims against the federal government.² See *Hohri v. United States*, 586 F.Supp. 769 (D.D.C. 1984), *aff'd* 847 F.2d 789 (Fed. Cir. 1988).

Several courts have also applied due process principles directly to claims brought by wrongfully convicted individuals in cases holding that wrongfully assessed fines must be returned by the government. One influential decision concluded as follows:

The Fifth Amendment prohibition against the taking of one's property without due process of law demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law. Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of the prosecution.

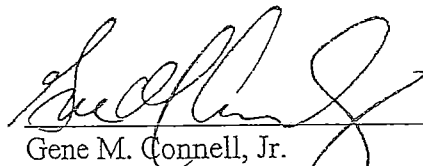
² The statute of limitations is not an issue in this case.

See *United States v. Lewis*, 342 F.Sup. 833, 836 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973); see also *State v. Superior Court*, 40 P.3d 1239 (Alaska Ct.App. 2002) (relying on *Lewis* to conclude that Due Process principles require compensation when a fine is illegally and wrongfully collected).

X. CONCLUSION

Finally, "Important questions of novel impression should not be decided on a 12(b)(6) motion to dismiss. Instead a novel issue is best decided in light of the testimony to be addressed at trial." *Evans v. State*, 344 S.C. 60, 68, 543, S.E.2d 547, 551(2001). If the Court decides to proceed with dismissal of the State, Plaintiff requests that the Court fully articulate all the grounds listed in Plaintiff's Motion for Reconsideration and incorporate those grounds and the Court's reasons into its Order on Reconsideration

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Roger Dale Johnson
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
(843) 488-9934
attorneyrogerjohnson@gmail.com

February 1, 2017

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2016-CP-26-01614

Robert Palmer,)
)
Plaintiff,)
)
vs.)
)
State of South Carolina, Horry)
County, and David Weaver,)
)
Defendants.)
_____)

**RESPONSE IN OPPOSITION TO
PLAINTIFF'S MEMORANDUM IN
SUPPORT OF HIS MOTION FOR
RECONSIDERATION**

This Defendant State of South Carolina opposes Plaintiff's Motion for Reconsideration and asserts that the Honorable Benjamin H. Culbertson ruled correctly as a matter of law in dismissing the State of South Carolina.

BACKGROUND

This matter arose after Plaintiff was charged, tried by a jury, and convicted of homicide by child abuse. He appealed to the South Carolina Supreme Court who vacated his conviction, *State v. Palmer*, 413 SC 410 (2015). The Supreme Court's opinion stated there was no evidence Palmer was present when the victim was injured or alone with the victim later and aware of the victim's injuries. Plaintiff contends he was wrongly convicted and held for four years.

He brought this suit as to the State of South Carolina alleging that the prosecutor in his criminal trial charged and prosecuted him with no evidence he had committed the crime. He contends there was no probable cause to charge him because the prosecutor proceeded under a theory that they did not know which of the two Defendants was the principal and which aided and abetted after witnessing the injuries to the child, and failed to seek help.

Plaintiff alleges false imprisonment, negligence, malicious prosecution, false arrest, and a violation of his civil rights under 42 U.S.C.A. § 1983. Further, he seeks a declaratory judgment that the State of South Carolina and United States Constitutions provide remedies for wrongful conviction including monetary damages, even though South Carolina has no statutory scheme for wrongful conviction.

This matter came before the Court on June 14, 2016 pursuant to the Defendant State of South Carolina's Notice of Motion and Motion to Dismiss, under South Carolina Rules of Civil Procedure, Rule 12(b)(6). The State of South Carolina, and all named Defendants, were represented by Lisa A. Thomas, Esquire, of the law firm of Thompson & Henry, P.A. The Plaintiff was represented by Gene M. Connell, Jr., Esquire, of the law firm of Kelaher, Connell & Connor, P.C.

The Honorable Benjamin H. Culbertson granted Defendant State of South Carolina's motion, dismissing Plaintiff's lawsuit by order dated November 10, 2016. Plaintiff filed a motion for reconsideration. The Defendant State of South Carolina opposes Plaintiff's motion and addresses Plaintiff's argument below.

I. THE COURT PROPERLY GRANTED DEFENDANT STATE OF SOUTH CAROLINA'S MOTION TO DISMISS

A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court, Rule 12(b)(6), SCRPC. The Court properly dismissed Plaintiff's claim against this Defendant, the State of South Carolina.

In *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (SC App 2001) the South Carolina Court of Appeals ruled specifically on the issues Plaintiff presents. The Court found that the South

Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et al., provides the exclusive remedy in a suit against the State for the actions of an employee, as here, the actions of a prosecutor. The exclusions from the waiver of immunity enumerated in the Tort Claims Act state in part that the governmental entity is not liable for a loss resulting from legislative, judicial, or quasi-judicial action or inaction, S.C. Code Ann. § 15-78-60(1). Furthermore, under *Williams v. Condon, Id.*, a prosecutor's typical duties are characterized as judicial or quasi-judicial in nature, fitting squarely within this exception.

A prosecutor is entitled to common law prosecutorial immunity as well. The Tort Claims Act specifically preserves this immunity under S.C. Code Ann. § 15-78-20(b) which states:

The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b).

The South Carolina Court of Appeals recognizes the preservation of this immunity under the Tort Claims Act in *Williams v. Condon, Id.*

In addition, Plaintiff has not properly pled a 42 U.S.C.A. § 1983 cause of action as no "person" as defined by the statute was named. Suits against a state are not permitted under the statute.

Since its decision in *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), the United States Supreme Court has consistently recognized that substantive doctrines of privilege and immunity may limit the relief available in § 1983 litigation. The Court of Appeals further recognized the United States Supreme Court's ruling that state prosecutors are clothed with

immunity and enjoy absolute immunity under § 1983 (*Williams v. Condon, Id.* quoting *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)).

The *Imbler* Court stated:

The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutors being called upon to respond in damages for his error or mistaken judgment.

Id. at 427-28, 96 S.Ct. at 993-94.

Far from presenting novel issues, Plaintiff fails to state a valid cause of action against this Defendant under both long standing state and federal case law and precedent. The Court appropriately dismissed his case against the State of South Carolina.

II. THE COURT ACKNOWLEDGED AND DECLINED TO ADOPT THE ARGUMENTS PROPOUNDED BY PLAINTIFF.

The Court specifically recited the arguments and case law relied upon by the Plaintiff and Defendant and delineated its basis for its ruling in the Conclusions section of the Order of Dismissal (Order of the Honorable Benjamin H. Culbertson, signed November 10, 2016, page 6). Nonetheless, Plaintiff's specific objections are addressed below.

No monetary damages remedy is available under the South Carolina Constitution. Assuming for the sake of argument, which is specifically denied, that Plaintiff was wrongfully convicted, Article I, Section 3 of the South Carolina Constitution guarantees due process of law and equal protection. Plaintiff contends this equates to a monetary damages remedy but cites no

authority for this proposition. This Defendant asserts Plaintiff has already received due process and equal protection under the law. He successfully appealed his criminal conviction, which was overturned and he was released from prison. The remedy offered in protection of his liberty is that release from prison. The South Carolina state legislature has declined to codify any other remedy. The appropriate venue to address Plaintiff's concern is the legislature and not the judiciary.

Plaintiff has received adequate remedy under Article I, Section 10 of the South Carolina Constitution. Plaintiff asserts that Article I, Section 10 of the South Carolina Constitution, which protects against unreasonable searches and seizures and invasions of privacy, also entitles him to monetary damages. Again, he provides no citation for this claim. He was adequately protected from unreasonable searches and seizures and invasion of his privacy when Plaintiff's criminal conviction was overturned and he was released from prison. To read anything more into the South Carolina Constitution requires the Judiciary to take on a legislative function and fashion a statutory remedy where none is contemplated. Plaintiff received relief from the consequences of any violation of this article through the criminal process.

Plaintiff has received the remedy guaranteed under the United States Constitution. Again assuming, for the sake of argument, that Plaintiff was wrongfully convicted, his appeal and success on that appeal provided his release from prison. Though Plaintiff cites *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 455 F.2d 1339 (1972), for the proposition that he should have a civil cause of action with a monetary damages remedy, it should be noted this case applies to Federal Agents violating a Plaintiff's Fourth Amendment rights and is not analogous to the facts at issue here.

Plaintiff compares his alleged wrongful conviction to a taking of property. Congress has not

extended this analogy to criminal convictions and fashioned any remedy outside of the due process afforded Plaintiff under criminal law and procedure. He asks the South Carolina state judiciary to undertake this task and craft this remedy under federal law.

Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (1985) is inapplicable to this action. The Court did not need to specifically distinguish *Moore v. City of Columbia*, *Id.* cited by the Plaintiff because it is inapplicable to this action. It has long been established and is cited in *Moore* that § 1983 actions may be brought against a municipality by reason of its statute/ordinance/regulation/custom or usage which deprives a person of constitutionally protected rights. In other words, a municipality may be held liable under § 1983 if the action complained of was taken pursuant to official policy.

Setting aside the arguments of prosecutorial immunity, this case deals with the sole discretionary decision by a prosecutor on charging a criminal defendant. As such, *Moore* is inapplicable for two reasons. First, this case does not involve a municipality but rather the State of South Carolina. Secondly, it does not deal with a law, statute, custom, or policy but rather the discretionary judgment of a state employee.

Plaintiff's reliance on *Connick v. Thompson*, 131 S. Ct. 1350 (2011) is similarly misplaced. In *Connick*, the prosecutor was sued individually, not the state. The United States Supreme Court ruled that a one time decision by a prosecutor regarding the handling and charging in his case does not evidence a pattern of misinterpreting the law or failure to properly train sufficient to bring suit under § 1983. Likewise, this case is distinguishable in that it involves a state employee and a discretionary decision in prosecuting a case and not a violation of any criminal procedure.

Discovery is not necessary before ruling on a motion to dismiss for failure to state a

cause of action. Contending that discovery is always essential before dismissing a case negates and dispenses with 12(b)(6) motions altogether and results in the expenditure of time and expense in cases warranting early dismissal. Plaintiff has the duty to diligently research his potential causes of action prior to filing suit rather than hoping to justify them in discovery. Likewise, if he discovers another cause of action or potentially liable party, he may always move to amend his complaint.

CONCLUSION

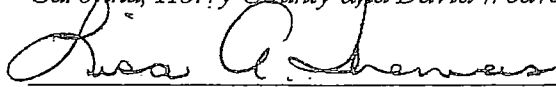
In conclusion, the South Carolina Court of Appeals has spoken definitively on all issues raised in Plaintiff's complaint and has determined as a matter of law that in the State of South Carolina there is prosecutorial immunity for both § 1983 lawsuits and Tort Claims Act lawsuits against prosecutors and against the State for the actions of prosecutors. The fact that South Carolina has no statutory monetary remedy for wrongful conviction and other states do, is of no precedential value in South Carolina state court. This court has wisely declined to invade the province of the state or federal legislature and craft such a remedy at the request of Plaintiff. As such, the Plaintiff has failed to state any viable cause of action and the court appropriately granted Defendant State of South Carolina's Motion to Dismiss. This Defendant asks this Court to deny Plaintiff's motion to reconsider.

(Signature block on next page)

Respectfully submitted,

Lisa A. Thomas, SC Bar #66458

*Attorneys for the Defendants State of South
Carolina, Horry County and David Weaver*



THOMPSON & HENRY, P.A.

1300 Second Avenue, Third Floor (29526)

P. O. Box 1740

Conway, South Carolina 29528

(843) 248-5741 - voice

(843) 248-5112 - fax

lthomas@thompsonlaw.com

February 8, 2017

Conway, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2016-CP-26-01614

Robert Palmer,)
)
 Plaintiff,) Transcript of Record
)
 vs.) June 14, 2016
)
 State of South Carolina, et al.,)
)
 Defendants.)

B E F O R E:

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Gene M. Connell, Jr., Esquire
Attorney for Plaintiff

Lisa Arlene Thomas, Esquire
Attorney for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (On the record, June 14, 2016.)

2 THE COURT: All right. Next is 2016-CP-26-1614, Robert
3 Palmer versus State of South Carolina, Horry County and David
4 Weaver. According to my roster the matter is before the Court
5 on a motion to dismiss. Please give the court reporter your
6 names and who you represent.

7 MS. THOMAS: Lisa Thomas. I represent the Defendants.
8 The motion today is only on behalf of the State of South
9 Carolina.

10 THE COURT: All right.

11 MR. CONNELL: My name's Gene Connell. I represent the
12 Plaintiff, Mr. Palmer.

13 THE COURT: All right. Ms. Thomas, this is your motion?

14 MS. THOMAS: Thank you, Your Honor. A little bit of
15 background, Your Honor. The Plaintiff in this matter was
16 convicted of homicide by child abuse in a criminal proceeding.
17 He appealed that conviction, and the Supreme Court overturned
18 that conviction. Hence, he has filed this instant suit
19 bringing actions in both -- under both the Tort Claims Act and
20 under Civil Rights Section 1983 as well as a declaratory
21 judgment action against the three named Defendants.

22 The basis for our motion to dismiss is that the State of
23 South Carolina cannot be sued under any theory propounded by
24 the Plaintiff. Initially, under the Tort Claims Act, 15-78 --
25 -78-70(A), the State of South Carolina has not consented to

1 suit. If we look at 15-78-60(1), the actions for which he's
2 attempting to sue the State of South Carolina, which would be
3 the actions of the prosecutor, are specifically excluded under
4 the judicial, quasi-judicial exceptions to the waiver of
5 immunity, as well as to the common law prosecutorial
6 immunities, which the -- are specifically preserved under the
7 Tort Claims Act under 15-78-20, Subsection B.

8 In addition, Your Honor, there is a case specifically on
9 point to both of these issues, both the 1983 and the Tort
10 Claims Act, and that would be the case of Williams versus
11 Condon, which I can give you the cite, 347 S.C. 227, a 2001
12 case which specifically looks at both of these issues and
13 determines that, number one, prosecutorial immunity is not
14 subsumed by the Tort Claims Act, is specifically preserved.
15 It is excluded under one of the exceptions to the waivers of
16 immunity, and in addition, under 1983, there are several
17 reasons why the State of South Carolina cannot be sued. These
18 are also addressed in Williams versus Condon. Probably king
19 among these would be the 11th Amendment immunity that South
20 Carolina has not waived for suit under this federal statute.

21 As such, Your Honor, I received Mr. Connell's response at
22 4:30 yesterday afternoon, but would like to kind of
23 preemptively address some of the things that he brings up in
24 his response. He claims that this is a novel issue.
25 Specifically I think in the declaratory judgment section he

1 admits that there is no remedy for a wrongful conviction in
2 South Carolina. Several other states have statutes that
3 provide for almost a liquidated damages type of remedy. South
4 Carolina has no such remedy, and he asked the Court to fashion
5 such a remedy. We argue that this is not a proper use of the
6 declaratory judgment act. He's not asking for his rights to
7 be construed under a statute. He's asking for the Court to
8 fashion a cause of action where the legislature has declined
9 to do so, and so in that regard, we would suggest it is also
10 improper, and we would also propose this is not a novel issue.
11 The case of Williams versus Condon is directly on point and
12 says you cannot sue the State of South Carolina under any of
13 these theories, under the Tort Claims Act for the actions of a
14 prosecutor or under Section 1983 for the actions of a
15 prosecutor. The cases that Mr. Connell has cited in his
16 response deals with municipalities, and we know, Your Honor,
17 that municipalities are treated differently under a Section
18 1983 action and actions can be brought against municipalities.
19 This case deals solely with the State of South Carolina.

20 As stated earlier, Mr. Connell is asking this Court not
21 to delineate or enforce rights that are already in existence
22 but to create rights that the legislature has declined to
23 create. As such, Your Honor, we would assert that there is no
24 viable cause of action against the State of South Carolina for
25 the actions of a prosecutor under either state or federal law.

1 THE COURT: ... All right. Mr. Connell.

2 MR. CONNELL: Your Honor, did you get our brief?

3 THE COURT: Yes. I mean, I'm like her. I got it late.
4 I hadn't had a chance to really look over it.

5 MR. CONNELL: All right. Your Honor, Mr. Palmer was
6 convicted and sentenced. I think he got a 35-year sentence
7 for homicide by child abuse, and the Supreme Court in its
8 opinion wrote that he -- there was no evidence whatsoever to
9 show that he had done the crime, that -- other than, than rank
10 speculation, and that's what the opinion says, and that's part
11 of what the brief is, and Your Honor, our, our position about
12 this matter, this is a motion to dismiss, again, a novel issue
13 issue, and our position about this case is is that does the
14 constitution either of South Carolina or the United States
15 Constitution provide for a remedy for someone who's been
16 wrongfully convicted. Mr. Palmer spent almost four years in
17 prison. He had no prior record before that. So the question
18 before the Court in a declaratory judgment is is would the
19 constitution, would the U.S. Constitution, would that
20 recognize an implied cause of action and remedy for a wrongful
21 conviction, and there is case law and precedent for that.

22 The -- probably the most famous case is a case called
23 Bivens in which the United States Supreme Court indicated that
24 there was an implied cause of action for unreasonable search
25 and seizure, and the question in this case is is there an

1. implied cause of action for a wrongful conviction and for --
2. and a remedy. Now, I --

3. THE COURT: Yeah. But the constitution provides a
4. constitutional right against unreasonable search and seizure.

5. MR. CONNELL: Yes.

6. THE COURT: Where does it deal with wrongful convictions?

7. MR. CONNELL: Well, the question is whether or not a
8. wrongful conviction is an unreasonable seizure because
9. obviously he was in jail for four years. The Supreme Court
10. has said there was no evidence that would, that would -- he
11. should have been in jail to begin with. So that's the
12. question that has to be answered and that is a novel question.
13. That's not been answered by either the South Carolina Supreme
14. Court or the United States Supreme Court, and one of the cases
15. I cite to you is a case where that issue has actually been
16. left open. So, Your Honor, we argue that that issue in itself
17. is an issue that has to be decided in this case.

18. There, there are other issues that she's brought up I'd
19. like to talk to you a little bit about. Article One, Section
20. Three, of the -- both the U.S. and the South Carolina
21. Constitution talks about the liberty provision without due
22. process. The question is whether or not if you're wrongfully
23. convicted is that, and the Court says so, is that a denial of
24. due process to -- thus to preclude you -- to effect a liberty
25. interest. So that's an issue in the case. Then there's a --

1 ...there's Article 1, Section 10 and what that means and there's
2 the Fifth Amendment and what that means. All of those are
3 implied, we believe implied causes of action.

4 Now, I will admit that South Carolina does not have a
5 compensation statute that other states have. Georgia has one,
6 North Carolina has an innocence project. There are other,
7 other states around that have that, but those statutes don't
8 go to the issue of what the constitution provides and whether
9 or not there's a constitutionally protected interest, and, and
10 what the Defendants would have you do in this case, Your
11 Honor, is they would have you rule on that issue now and they
12 would have you dismiss a declaratory judgment before the case
13 gets started. I mean, certainly they would not argue to you
14 that the issues of the constitution should be decided on a
15 motion to dismiss. It may be after the facts are, are, are
16 well briefed that Your Honor could decide that on summary
17 judgment as an issue of law, but I mean, we're at the
18 beginning of the case and the question is is there even a
19 right to do that, and we think that the, the -- or I think
20 that that issue of a novel issue clearly precludes Your Honor
21 from doing that.

22 A couple of other things, the State of South Carolina is
23 sued. As Your Honor knows and the State of South Carolina is
24 sued because the solicitor's office, the solicitor is a State
25 employee and he's the only State employee in the solicitor's

1 . office under the constitution. So the State of South Carolina
2 is a proper Defendant and we cite to you that section of the
3 Tort Claims Act which, in our brief, which says that, that the
4 General Assembly intends to provide for liability on the part
5 of the State and its political subdivision. So the question
6 there is is the Solicitor himself, all the assistant
7 solicitors are county employees as Your Honor knows, but the
8 solicitor himself is a State employee and what does that
9 section of the, of the Tort Claims Act mean.

10 There also, Your Honor, I cited another case in the, in
11 the brief. I know you hadn't had a chance to look at it.
12 There's a most recent Supreme Court case called Connick versus
13 Thompson decided in 2012. It involves a situation where
14 someone was wrongfully convicted in Louisiana, an opinion, and
15 an opinion was written by the U.S. Supreme Court about that
16 issue, and in that opinion the U.S. Supreme Court says that if
17 you can prove a pattern, regarding how the conviction
18 occurred, if you can prove a pattern then there may be a cause
19 of action for malicious prosecution against the solicitor's
20 office or against the prosecuting agency, and in, in this
21 case, Your Honor, again, we're at the beginning of the case.
22 We haven't heard anything about how they did that other than,
23 Your Honor, I provided you in the brief a couple of pages from
24 the transcript where the prosecution was arguing that, "We
25 don't know who did this but he must have been one of the ones

1 and we'll let the jury decide," and that's exactly what the
2 Supreme Court said couldn't be done because of the issue of
3 speculation as to how it happened.

4 The other, other couple of issues that -- I've cited the
5 Moore case. Your Honor probably is familiar with that. She
6 talked about it a little bit. The Moore case involves a
7 situation involving when a governmental entity is liable for
8 acts of its agent. Of course, that again, is an issue -- this
9 is a motion to dismiss and we're at the beginning of the case,
10 and I mean, I can't think of a case that there would be more
11 novel issues than whether or not the State of South Carolina
12 is liable for wrongful conviction. So, Your Honor, the brief
13 is 10 or 15 pages. We'd ask you to consider that if you so
14 desire. Thank you, Your Honor.

15 THE COURT: All right. Anything in reply?

16 MS. THOMAS: Your Honor, if I could reply briefly. As to
17 the due process arguments, we would argue that the Plaintiff
18 has received his due process. He appealed his conviction and
19 his conviction was overturned, that he has received the remedy
20 available to him under South Carolina law. The Connick case
21 that Mr. Connell cited that was a case where the State was not
22 sued, the prosecutor was sued, and it was a different state.
23 So we would say that that is inapplicable, and again, Your
24 Honor, the Williams v. Condon case is directly on point. In
25 fact, in that case the South Carolina Court of Appeals

1 analyzes the U.S. Supreme Court cases in coming to its
2 conclusion and states that relying on the holdings of Griffith
3 versus Slinkard and Yaselli versus Goff the Court concluded
4 State prosecutors were clothed with immunity. They state that
5 this is the first case decided by the Supreme Court and that
6 an extensive analysis indicates that under 1983 the State
7 prosecutors enjoyed absolute immunity. So we would state
8 that, Your Honor, South Carolina law is exact on this point in
9 this particular case and in the statutes that we have cited as
10 well.

11 THE COURT: All right. All right. Well, I need to take
12 it under advisement because I'm -- I need to -- I want to look
13 at your brief and I need to read the Williams versus Condon
14 decision. I'll let you know. Okay?

15 MR. CONNELL: Thank you, Your Honor.

16 MS. THOMAS: Thank you, Your Honor.

17 THE COURT: Thank you.

18 (Adjourned.)

19

20

21

22

23

24

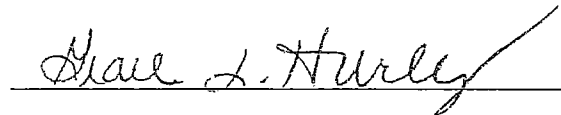
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Robert Palmer versus State of South Carolina, et al., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on June 14, 2016.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM-M

Official Reporter

March 20, 2017.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2016-CP-26-1614

Robert Palmer Appellant

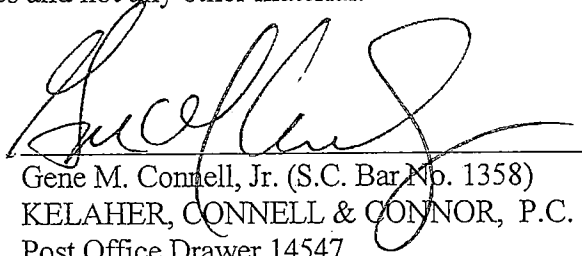
vs.

State of South Carolina, Horry County and David Weaver Defendants

Of which State of South Carolina is the Respondent

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.



Gene M. Connell, Jr. (S.C. Bar No. 1358)
KELAHER, CONNELL & CONNOR, P.C.
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
gconnell@classactlaw.net

Roger Dale Johnson (S.C. Bar No. 71987)
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
attorneyrogerjohnson@gmail.com

September 27, 2017

Attorneys for Appellant