THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

92157

C.A. No.: 2013-CP-04-1700
Appellate Case No. 2018-000289

Mario Escalante, Appellant,

v.

David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart, Respondents.

PETITION FOR REHEARING

Pursuant to SCACR Rule 22 (a) and SCACR Rule 240(i) Appellant Mario Escalante respectfully petitions this Court for a Rehearing of Opinion 2020-UP-021, filed January 29, 2020. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001).

SUMMARY OF ARGUMENTS

The Honorable Court of Appeals affirmed the dismissal of Appellant's case, finding that res judicata applies to herein case. This Court rationalized its Opinion by finding that the state and federal actions involved the same parties, arose from the same occurrence, and the federal court granted summary judgment in the federal action. This Court further held that res judicata barred Appellant's negligence claim because he should have brought the same in the federal action.

Appellant believes that this Honorable Court misappreciated the application of the

doctrine of res judicata and overlooked some facts that would distinguish the present case from the federal action.

Appellant believes that the elements of res judicata are not present in this case. Appellant will show that there is no identity of parties nor subject matter between the State and Federal actions. Neither did the two suits arose from the same transaction or occurrence. Furthermore, Appellant did not have a decision on the merits.

In the alternative, assuming arguendo that this Court finds that the requirements for res judicata have been met, this case falls within the exceptions. Appellant maintains that he has been deprived of his right to full adjudication of his case by a series of actions and conduct of Respondents.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This State Action is for damages sustained by Appellant as a result of Respondents' and its employees' negligent actions. As the main question is whether the issues raised in the State action have been adjudicated in a Federal action subsequently filed by Appellant, it will be necessary to state briefly the proceedings in the two cases.

This suit is brought pursuant to the arrest of Appellant for allegedly shoplifting a case of beer from Respondents' retail establishment on Sunday, May 5, 2013. Respondent said that Appellant stole a case of beer. Appellant said he did not steal a case of beer. There was a genuine issue of material fact.

Appellant came to Anderson County from El Paso, Texas to work a concession stand at the annual Anderson County Fair. Appellant had spent the morning breaking down the concession stand he had been working and during a break, went to purchase a case of beer to enjoy in celebration of a co-worker's birthday, later that evening. Since Appellant is not a

resident of this county, he was unaware of the prohibition of the sale of alcohol on a Sunday. Appellant selected Respondents' retail establishment to make his purchase based on the close proximity of the store to the fair grounds.

After entering the store and making his way to the back of the building where the beer is located, Appellant picked up one case and proceeded to the register to make his purchase. When the transaction was complete, the clerk gave Appellant a receipt for his beer purchase and he exited the store. Upon getting into his truck, Appellant thought one case would not suffice based on the potential number of people that he thought may partake in the festivities. Appellant entered the store for a second time and made his way back to the "beer cave" for a second case.

When Appellant approached the clerk this time, she realized the mistake she had made by selling alcohol on a Sunday; and, informed Appellant she would not be able to sell him the second case. Appellant returned the case to where he had found it, left the store and returned to the fair grounds to finish tearing down the stand.

Respondent David Rodgers claimed in his depositions, one of the clerks in his store called him on his cell phone, informed him that Appellant stole a case of beer, ran out of the store and drove off. He stated that upon arriving at the store, he reviewed the video camera footage, which revealed a red pick-up truck with a Texas license plate, that exited the store parking lot to the left. He also recognized that the San Antonian was "noticeably wet" and, from these facts deduced that Appellant was a fair worker.

It should be noted he could not recall who called him. Depositions taken of three (3) employees from Defendants' store did not disclose the individual. Moreover, none of

them corroborated the story offered by Respondent. This version of the facts related to the happenings of May 5, 2013, was not the only account offered by Mr. Rodgers

However, his testimony was contradicted by his 911 call following the alleged incident. In actuality, Respondent Rodgers was at the store when Appellant left the store, because he followed him back to the fairgrounds. This claim was supported by the exchange between Rodgers and the 911 operator which was memorialized by the State. (Exhibit 1, CAD Report, Motion to Stricken Answer, or in the Alternative, Motion for Adverse Inference due to Spoliation, December 29, 2017). Respondent Rodgers informed the 911 operator that he was behind Appellant's truck. He kept Appellant in his sight from the time that he left his store until he had been cuffed and placed on the back of the police car.

The case of beer that was confiscated by police was Busch beer. Appellant's receipt and associated purchase evidence on his bank statement (his bank in San Antonio, Texas), for the month of May 2013, was a $14.30 case of Busch as well. (Exhibit 2, Bank Statement, May 1-31, 2013) (Exhibit 3, Beer Receipt, May 5, 2013). Rodgers has claimed that Mario bought the first case; and, he stole the second case. He has never presented anything tangible to support the claim. The woman who sold him the case said that she never saw a second case leave the store. (Deposition, Amanda Nicole Brown, 9/5/2014, p. 19, 10.11). Only one case of beer was found in Appellant's truck when he was arrested at the fairgrounds-a case of Busch. A charge was brought against Appellant for taking the beer, but it was later dismissed when Rodgers and law enforcement failed to appear at court, bringing with it a dismissal for the failure to prosecute.

When he was released from jail, Appellant returned to the area where he had been apprehended. He managed to locate the receipt from the purchase of the beer. He returned to Whitehall Express Mart to confront Rodgers about the charge brought against him. Rodgers told him that he had him on film based on the fact that he had thirty-two (32) or thirty-three (33) cameras. No video was ever produced.

On July 23, 2013, Appellant filed a suit for false imprisonment, invasion of privacy, defamation, false arrest, outrage, malicious prosecution, conversion, fraud, negligence, negligent hiring, training, supervision or monitoring. The action was filed with the Anderson Common Pleas Court, and named David Rogers and Janice Rodgers, d/b/a Whitehall Express Mart as defendants.

On or about December 14, 2014, Defendants brought a Notice of Motion and Motion for Summary Judgment. The matter was heard by the Honorable Robin B. Stilwell on February 9, 2015. On or about March 18, 2015, Judge Stilwell's Order based on the hearing granted Defendants' motion as to the conspiracy and fraud causes of action. However, he denied the motion with regard to false imprisonment, invasion of privacy, defamation, negligence, false arrest, outrage, malicious prosecution and conversion. (Exhibit 4, Order SMJ, 3/18/2015).

Trial was set in this matter for a date certain on February 16, 2016. On February 11, 2016, defense counsel, Phillip Reeves, Esquire, moved for a continuance because his "daughter was having a birthday". (Exhibit 5, Order for Continuance, 6/03/2016). Nicholas Farr was the only individual who appeared for hearings and depositions. Reeves' participation was minimal at best. The date certain trial was set in the summer of 2015.

In the meantime, Appellant prepared for the trial of his State action. As he lived out of state, he had to purchase a ticket to attend trial. Unfortunately, the trial was continued. On

February 11, 2016, counsel for Respondents, Phillip Reeves, Esquire moved for a continuance because "his daughter was having a birthday". (Order of Continuance, June 3, 2016). Appellant believed that this continuance was a dilatory action on the part of the Respondents. The trial was set six (6) months prior. Respondent Counsel agreed to that scheduled date. Ironically, on February 11, 2016, Reeves also filed for protection in the Federal action for two additional time periods under docket entry 77.

> (02/11/2016) 77 NOTICE of Request for Protection from Court Appearance by Phillip Earl Reeves for February 29,2016 through March 4, 2016 and May 4, 2016 through May 17,2016 (Reeves, Phillip) (Main Document 77 replaced on 2/11/2016) (gpre,). (Entered: 2/11/2016)

Mr. Reeves was well aware of what is necessary for protection. It was unnecessary in State Court.

On January 13, 2015, Plaintiff filed a federal suit against the Anderson's County Sheriff's Department, Sheriff John Skipper, Sergeant Andrew Hyslop, Deputy Brandon Surratt, the City of Anderson Police department, James Stewart and the defendants found herein, alleging that their conduct created the following causes of action: Section 1983, False Imprisonment, Assault and Battery, Intentional Infliction of Emotional Distress, Invasion of Privacy, Defamation and Slander, Civil Conspiracy, Abuse of Process and Conversion.

The action was brought because Defendant Rodgers was not arrested for selling beer on Sunday, which violated the law, and was undisputable. The action was brought because the Hispanic U. S. citizen from El Paso was arrested for purchasing a case of beer. The action was brought because not one of the defendants listed in the federal action showed up to Court to prosecute the non-case. Mr. Escalante was forced to take a day off from fair work in Tennessee, and forfeit the $50.00 associated with that day's work, to come to Anderson to have his face

rubbed in the fact that he went to jail for nothing.

The Court found that probable cause existed and, therefore, granted Summary Judgment on all of the actions brought in Federal Court. The Federal Court action dealt with the relationships between the State actors and Defendants' Rodgers upon Appellant before he left the store. The State action dealt with the relationship between Defendants' Rodgers and their employees prior to leaving the store.

The basis for the granting of Summary Judgment came from the Report and Recommendation of the federal magistrate. The magistrate based her arguments on the fact that probable cause existed at the time of the arrest. In fact, the following was stated, "the Court declines to address...any of the Rodgers Defendants' arguments regarding personal involvement in the specific state law claims." (Report and Recommendation, 7/29/2016, p. 18).

The District Court adopted the Report and Recommendation of the Magistrate. This ruling was ultimately affirmed by the 4th Circuit Court of Appeals on November 3, 2017.

Armed with judgment from the Federal Court, Respondents moved for summary judgment of the State action, based on res judicata. The lower court granted the summary judgment, which on appeal, was affirmed by this Court on January 29, 2020. Thus, this Petition for Rehearing.

ARGUMENTS

I.

THE STATE ACTION IS NOT BARRED BY RES JUDICATA.

In its Order affirming the circuit court ruling granting summary judgment in favor of Respondent David L. Rodgers and Janice W. Rodgers, this Court held that res judicata applied to Appellant's claims. This Court states that since the action brought in the State court and the

Federal court involved the same parties and arose from the same occurrence, then Appellant's claims in the State action were barred by res judicata. The Court further held that res judicata barred Appellant's cause of action for negligence in the State action because he should have brought it in the Federal action.

Appellant believes that this Court misappreciated the facts and the laws applied in this case. Appellant reiterates that none of the elements of res judicata are present in this case.

Well settled is the principle that "res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, Op. No. 26987 (S.C. Sup. Ct. filed June 20, 2011) (Shearouse Adv. Sh. No. 20 at 14, 24) (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). If res judicata applies, a litigant is barred from raising any issues which were or might have been adjudicated in the former suit. *Id.*

Res judicata requires proof of three elements: (1) a final judgment entered on the merits of the first suit; (2) the parties to both suits are the same; and, (3) the subsequent action involves matters properly included in the first action. Plott v. Justin Ent. 374 S.C. 504, 511, 649 S.E.2d 92, 95 as cited in Judy v. Judy, Op. No. 4528, April 8, 2009.

Appellant submits that res judicata does not apply in this case because the claims in both actions do no not meet the requirements of res judicata.

The claims did not arise from same occurrence.

Appellant reiterates his position that the two actions arose from different occurrences. While the State actions are confined to facts that transpired within the store premises, the Federal action was primarily concerned with facts that occurred outside the store premise.

There is no identity of subject matter.

Appellant asserts that the issues raised in the two actions are different. In the case of Plum Creek Dev. Co. v. City of Conway, the Court laid down the criteria for comparing two causes of action.

> The test utilized by this court for comparing two causes of action is to determine whether the primary right and duty and the delict or wrong are the same in both actions.

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999).

In the State action, Appellant raised claims of negligence and/or gross negligence on the part of the Respondents in failing to train, supervise or monitor their employees. Appellant believed and asserted that this negligence reflected in the way Respondents and/or their employees conducted their business which led them to falsely and unfairly accuse Appellant of stealing or shoplifting. Appellant asserted in his State action that Respondents' baseless accusations defamed his reputation and invaded his privacy. This State action was focused solely on Appellant and his interaction with Respondents and/or their employee(s).

On the other hand, Appellant's federal action was to address the deprivation of his constitutional rights by the named defendants. The Federal action arose from the unconstitutional conduct of the law enforcement officers.

Appellant submits that the primary right held by the Appellant in the State Court are his right as a consumer to avail of a good customer service; and, the primary wrong committed by the Respondents is the false and baseless accusation of shoplifting. In the Federal action, the primary wrongs committed by the defendants were the unlawful deprivation of his liberty; the failure by the State to treat the Hispanic visitor to South Carolina the same as the resident white business owner in applying the laws associated with the case; and, the failure by the State to provide Plaintiff

with the opportunity to be heard so he could prove his innocence. Appellant's Constitutional rights of liberty, equal protection and due process were apparently left on the county line when he entered Anderson County.

The deprivation of liberty occurred when law enforcement arrested Appellant for a theft which would have been disproved conclusively had they taken the time to ascertain the video collected by Respondents. The withholding of the Equal Protection of the laws occurred when the State chose to ignore undeniable proof that Respondents illegally sold beer on Sunday, while arresting appellant for a crime for which they had no evidence-from the same man who had the evidence Plaintiff purchased the beer he was accused of stealing. The denial of Due Process occurred when Plaintiff was unable to have his criminal case heard by a jury of his peers to prove his *innocence*.

In sum, the nature of the subjects of the two actions are not identical, nor are the parties.

Res Judicata does not apply to issues not raised nor adjudged in a suit.

Appellant insists that the cause of action for negligence and negligent hiring, supervision or monitoring in the State action must subsist as they were not raised, nor can they be raised, in the Federal action. In fact, Federal court did not address the issue of Respondents' negligence, and Judge Stilwell expressly stated that there was genuine issue of material fact as it relates to negligence, Appellant is entitled to have this matter adjudicated.

Appellant further avers that Respondent have waived their right to raise res judicata in the State action. Respondents stated all along that the Federal Court should abstain from taking jurisdiction in that case due to the pending state action. In fact, Respondents moved the Federal Court to abstain from taking jurisdiction over them due to the pending case in the State Court, moving for a dismissal based on the Colorado River abstention doctrine Judge Lewis opined:

> Neither party has adequately addressed the fact that Plaintiff's state court case is against only the Rodgers while this federal action is against the Rodgers, seven additional named defendants, and twenty John Does. Further, the federal action raises additional causes of action against the defendants. The Court requires additional briefing on these issues before it can determine whether Colorado River abstention is appropriate. Accordingly, by August 21, 2015, the Rodgers shall refile their motion to dismiss.

(8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 30).

The Court required Respondents to refile their motion, with additional briefing on the issues listed above to determine whether Colorado River abstention is appropriate. The Federal court said the Respondents shall refile their motion to dismiss. However, Respondents never filed such a brief. Appellant believes that by failing to refile their motion to dismiss as required by the Federal Court, Respondents waived their right to be tried in one court, and/or to raise res judicata as a defense.

In sum, res judicata cannot operate to bar the claims of damages and negligence in the State action because the: (1) it is the "prior action" that is referred to in the doctrine; and, (2) the claims in the State action has not been adjudicated even in the subsequent action in the Federal court; and, (3) failure by Respondents to refile their motion for dismissal was tantamount to waiver of the defense of res judicata.

There is no identity of subject matter.

Appellant asserts that the issues raised in the two actions are different. In the case of Plum Creek Dev. Co. v. City of Conway, the Court laid down the criteria for comparing two causes of action.

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In the State action, Appellant raised claims of negligence and/or gross negligence on the part of the Respondents in failing to train, supervise or monitor their employees. Appellant believed and asserted that this negligence reflected in the way Respondents and/or their employees conducted their business which led them to falsely and unfairly accuse Appellant of stealing or shoplifting. Appellant asserted in his State action that Respondents' baseless accusations defamed his reputation and invaded his privacy. This State action was focused solely on Appellant and his interaction with Respondents and/or their employees.

On the other hand, Appellant's federal action was to address the deprivation of his constitutional rights by the named defendants. The Federal action arose from the unconstitutional conduct and behavior of the law enforcement officers.

Appellant submits that the standards to be applied are different in each case and, therefore, the cases are not parallel. The Federal court went out of its way to hold that the fact Sergeant Hyslop made a constitutional arrest based on probable cause. Respondents were sued as having color of law. With the finding of probable cause, the Federal court has, in essence, ruled that Respondents were not State actors. Despite this finding, the Federal Court applied all the defenses available for the State actors to herein Respondents.

Plaintiff believed that Defendant David Rodgers had been responsible for his arrest; and, he sued him for working with the police to have him arrested. This conclusion was reached upon reviewing the evidence before him. Rodgers called law enforcement and offered that Plaintiff had stolen a case of beer. Rodgers followed Plaintiff back to the fairgrounds. Rodgers met with the police and offered them alleged still images from his surveillance equipment. Therefore, Plaintiff believed Rodgers was essentially acting as a member of law enforcement; or, acting under color of law.

In order to find that a private entity was acting under the color of law, there has to be a state action that has caused damage to a plaintiff. Additionally, the nexus between the State and complained of action must be so close that it appears that the private actor's actions could be attributed to those of the State. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

> State action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State responsible," and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

As stated in *Lugar,* there has to be an illegal deprivation of a constitutional right in order for there to be state action. Plaintiff alleged that the illegal deprivation was his arrest for the stealing the beer, which he believed that Rodgers had manufactured. However, in order for there to be an illegal deprivation in relation to an arrest, it must have been done without probable cause, which the Court found in this matter. "Here, the Court finds there was probable cause to arrest Plaintiff." (8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 92 Page 9 of 18).

The Federal Court recognized Plaintiff had brought the Federal claim due to his arrest. "...all causes of action in this case stem from Plaintiff's arrest and Defendants' behavior surrounding Plaintiff's arrest." (8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 92 Page 9 of 18). The Court's finding of probable cause meant Plaintiff was not a "State actor". Unfortunately for Plaintiff, despite the Court finding that he was not a State actor, it applied the State's defenses to all the causes of action in the Amended Complaint that related to Rodgers.

> Based on the facts known to Hyslop at the time of the arrest, it was reasonable for him to believe that Plaintiff had shoplifted a case of beer. Accordingly, the Court finds probable cause existed to arrest Plaintiff, and the motions for summary judgment should be granted with respect to Plaintiff's § 1983 claim.

(8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 92 Pages 9 and 10 of 18).

> Because, as discussed above, Hyslop had probable cause to arrest Plaintiff for shoplifting, Plaintiff is unable to satisfy the elements of a false imprisonment claim. Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's false imprisonment claims.

(8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 92 Page 11 of 18).

> However, as stated, the arrest was supported by probable cause; thus, no Defendants conduct can be characterized as so extreme and outrageous as to exceed all possible bounds of decency and atrocious and utterly intolerable in a civilized community. Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's claim for intentional infliction of emotional distress.

(8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 92 Pages 13 and 14 of 18).

> As stated, he was arrested based on probable cause. Accordingly, the motions for summary judgment should be granted with respect to Plaintiffs invasion of privacy claim.

(8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 92 Page 15 of 18).

> Here, as discussed above, Plaintiffs arrest was lawful because it was supported by probable cause. Accordingly, the motions for summary judgment should be granted with respect to Plaintiffs conversion claim.

(8:15-cv-00177-MGL Date Filed 07/29/16 Entry Number 92 Page 17 and 18 of 18).

The finding of probable cause eliminated Respondents as defendants in the Federal Court when they moved for summary judgment. In the State case, however, the Supreme Court has held that only a mere scintilla is necessary to defeat summary judgment.

> Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of

evidence to withstand a motion for summary judgment.[3]

Hancock v. Mid-South Management Co., Inc. Op. No. 26587, (S.C.: Sup. Ct., 2009).

II.

THE STATE ACTION IS AN EXCEPTION TO THE PRECLUSION BY REASON OF RES JUDICATA.

In the alternative, even assuming that an issue is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, litigation of the issues in a subsequent action between the parties is not precluded where "it will contravene other public policies; the court must weigh the competing public policies." Johns v. Johns, 309 S.C. 203, 420 S.E.2d 856, 859 (Ct. App, 1992) as cited in Nelson v. Coker, No. 3626, (Ct. App. 2003). In balancing the public policies, which in this case, public policy of finality of judgment against the basic human rights to liberty, privacy, due process and equal protection of law, the court should give deference to the overriding right granted by the United States Constitution.

The Court in Pye v. Ack presented exceptions for the application of res judicata. Pye v. Ack, 325 S.C. 426. One such exception is that of a clear and convincing need for a determination of the issue because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Id.*

Appellant maintains that the combination of circumstances that occurred in the lower court deprived him of a full adjudication of his case: (1) when the Respondents did not show up to a court date; (2) when Respondent's counsel unfairly and unceremoniously moved for a continuance of a trial due to a "child's birthday party"; (3) failure by Respondents to preserve the store's security camera despite their knowledge and anticipation of litigation on the alleged

incident; (4) lower court failure to rule on Appellant's motion for adverse inference due to spoliation; and, (5) the court's refusal to acknowledge the evidence (receipt, bank statement, etc.) submitted by Appellant as exhibits to establish his case.

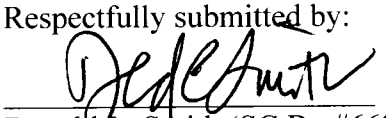
The State action had been set for trial for a date certain. Appellant lived in another state and had to travel for the trial only for the Court to Order a continuance, for purely dilatory purpose--- a birthday party. Respondents failed to refile their motion to dismiss and to submit an explanation for the issue of Colorado abstention despite the Court's order. Appellant firmly believed that this is tantamount to a waiver of their right to raise the defense of res judicata.,

Due to the foregoing, Appellant was deprived of a full adjudication of his case. Thus, even assuming the court found the elements of res judicata to apply in this case, this will not prevent Appellant from pursuing the State's action on negligence under these exceptions.

CONCLUSION

For the above and foregoing reasons, Appellant respectfully requests this Honorable Court reconsider its Order affirming the lower court's ruling in dismissing the State action and remand the same for further proceedings in the trial court.

Respectfully submitted by:



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Anderson, South Carolina
Date: February 13, 2020

FORM 16
CERTIFICATE OF COUNSEL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

C.A. No.: 2013-CP-04-1700
Appellate Case No. 2018-000289

Mario Escalante, Appellant,

v.

David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Petition for Rehearing complies with Rule 240 in relation to Rule 267, SCACR.

Respectfully submitted by:

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Anderson, South Carolina
Date: February 13, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Mario Escalante,

Plaintiff,

vs.

Anderson County Sheriff's Department; Sheriff John Skipper, in his official and individual capacities; Sergeant Andrew R. Hyslop, in his official and individual capacities; Deputy Brandon Surratt, in his official and individual capacities; City of Anderson Police Department; James S. Stewart, Chief of Police, in his official and individual capacities; David L. Rodgers and Janice W. Rodgers, d/b/a Whitehall Express Mart; and John Does 1-20.

Defendants.

DEFENDANTS DAVID L. RODGERS AND JANICE W. RODGERS D/B/A WHITEHALL EXPRESS MART'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

C.A. No. 8:15-cv-00177-MGL-JDA

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the defendants David L. Rodgers and Janice W. Rodgers d/b/a Whitehall Express Mart (hereinafter referred to as "Mr. and Mrs. Rodgers") file this memorandum of law in support of their motion to dismiss in the above-referenced matter. For the reasons set forth below, Mr. and Mrs. Rodgers move and respectfully request that this Court dismiss the plaintiff's complaint pursuant to the *Colorado River* abstention doctrine or, in the alternative stay the proceedings.

PROCEDURAL BACKGROUND

This case arises out of an incident which occurred on May 5, 2013, at the Whitehall Express Mart (hereinafter referred to as "Whitehall") owned by David and Janice Rodgers and located 704 Whitehall Road in Anderson, South Carolina. The plaintiff alleges that on that date

he was wrongfully arrested and charged with shoplifting a case of beer from Whitehall. On July 22, 2013, the plaintiff filed suit in the Anderson County Court of Common Pleas against Mr. and Mrs. Rodgers, arising out of the incident (hereinafter referred to as "the State Action"). The case is captioned, "*Marion Escalante v. David L. Rodgers and Janice W. Rodgers d/b/a Whitehall Express Mart*," C.A. No. 2013-CP-04-01700. The complaint in that action contains false imprisonment, invasion of privacy, defamation, negligence, false arrest, outrage, malicious prosecution, conspiracy, conversion, and fraud causes of action against Mr. and Mrs. Rodgers. (*See* Plaintiff's Complaint attached hereto as Exhibit A). On August 19, 2013, Whitehall filed an answer to the complaint, in which it denied liability. Thereafter, discovery, including depositions taken from the plaintiff, the arresting officers, David Rodgers, and several Whitehall employees were completed. The State Action is currently pending,

On January 13, 2015, the plaintiff commenced this action by filing a summons and complaint against Mr. and Mrs. Rodgers, the Anderson's County Sheriff's Department, Sheriff John Skipper, Sergeant Andrew Hyslop, Deputy Brandon Surratt, the City of Anderson Police Department, and James S. Stewart (hereinafter referred to as "the Federal Action"). The complaint in this action contains nearly identical allegations as the State Action and asserts the same causes of action against Mr. and Mrs. Rodgers. In addition, the complaint in the Federal Action asserts assault, battery, civil rights, and abuse of process claims against the police defendants.

In other words, although the State Court is postured to provide the determinations and relief under South Carolina law that the plaintiff has also sought in this case, the plaintiff would apparently prefer that this Court decide those issues as well. The plaintiff's forum manipulation justifies abstention.

ARGUMENT

I. This Court Should Abstain from Exercising Jurisdiction Pursuant to the *Colorado River* Doctrine.

Abstention is appropriate in this case in light of the plaintiff pursuing parallel, duplicative proceedings. Under the *Colorado River* abstention doctrine, a district court may abstain from exercising jurisdiction "in the exceptional circumstances where a federal case duplicates contemporaneous state proceedings, and wise judicial administration, giving regard to conservation of judicial resources, and comprehensive disposition of litigation clearly favors abstention." *Vulcan Chem. Techs., Inc. v. Barker,* 297 F.3d 332, 340-41 (4th Cir. 2002) (internal citation and quotation marks omitted) (citing *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976)). To date, the Supreme Court has "declined to prescribe a hard and fast rule" for determining whether *Colorado River* abstention is appropriate. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 15 (1983). As an initial matter, however, the court must determine "whether there are parallel federal and state suits." *Great Am. Ins. Co. v. Gross,* 468 F.3d 199, 207 (4th Cir. 2006). "Suits are parallel if substantially the same parties litigate substantially the same issues in different forums." *Chase Brexton Health Servs., Inc. v. Maryland,* 411 F.3d 457, 464 (4th Cir. 2005).

Here, it is clear that the State Action and the Federal Action constitute parallel proceedings. Both actions arise out of the same incident, and the allegations contained in the complaints in the two actions are virtually identical. Most of the causes of action asserted against Mr. and Mrs. Rodgers in the State Action are duplicative of those asserted against them in the Federal Action. Although the plaintiff asserts additional claims against "the defendants," each of those claims arise out of the same facts and circumstances as the State Action and could

have been asserted therein. As such, the State Action and the Federal Action constitute parallel proceedings.

If parallel suits exist, the court "must carefully balance" six factors: (1) whether the subject matter of the litigation involves property where the first court may assume jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state law or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights. *Vulcan Chemical Technologies, Inc. v. Barker,* 297 F.3d 332, 341 (4th Cir. 2002). "No one factor is necessarily determinative," and the court's decision must not "rest on a mechanical checklist." *Colo. River Water Conservation Dist.,* 424 U.S. at 818–19. Instead, the court applies the factors in "a pragmatic, flexible manner with a view to the realities of the case at hand," *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 13, taking into account "both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise," *Colo. River Water Conservation Dist.,* 424 U.S. at 818.

In this case, the above factors resoundingly favor abstention. The State Action was initiated first, and numerous depositions, discovery, and motions have already taken place. Moreover, the state court can determine the ultimate issue in this case, thus avoiding piecemeal litigation. Findings of fact must be made by both courts and those findings could be inconsistent and determined at differing points in time. This kind of piece meal litigation could ultimately cause each issue to be litigated twice - especially if a state court precedential ruling occurs subsequent to a federal court ruling on the same issue. Finally, there is no doubt that the state court can adequately protect Plaintiffs' rights; as another judge of this Court recently observed

when considering abstention, "[t]here is no indication or allegation that normal hearing, trial, or appeal processes available in this pending state-court proceeding are unavailable to vindicate Plaintiff's concerns." *Stanfield v. Wigger*, No. 2:14-CV-00839-PMD, 2015 WL 58077, at *10 (D.S.C. Jan. 5, 2015). For all of these reasons, the state court is the proper forum, and *Colorado River* favors this Court's abstention.

In the alternative, if this Court elects not to dismiss the plaintiff's complaint, the Federal Action should be stayed until the State Action has been completed.

CONCLUSION

For the reasons stated herein, the Court should dismiss the plaintiff's claims against Mr. and Mrs. Rodgers and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Phillip E. Reeves
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Greenville, South Carolina
February 12, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Mario Escalante, Plaintiff, vs. Anderson County Sheriff's Department; Sheriff John Skipper, in his official and individual capacities; Sergeant Andrew R. Hyslop, in his official and individual capacities; Deputy Brandon Surratt, in his official and individual capacities; City of Anderson Police Department; James S. Stewart, Chief of Police, in his official and individual capacities; David L. Rodgers and Janice W. Rodgers, d/b/a Whitehall Express Mart; and John Does 1-20. Defendants.	**DEFENDANTS DAVID L. RODGERS AND JANICE W. RODGERS D/B/A WHITEHALL EXPRESS MART'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS** C.A. No. 8:15-cv-00177-MGL-JDA

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the defendants David L. Rodgers and Janice W. Rodgers d/b/a Whitehall Express Mart (hereinafter referred to as "Mr. and Mrs. Rodgers") file this memorandum of law in support of their motion to dismiss in the above-referenced matter. For the reasons set forth below, Mr. and Mrs. Rodgers move and respectfully request that this Court dismiss the plaintiff's complaint pursuant to the *Colorado River* abstention doctrine or, in the alternative stay the proceedings.

PROCEDURAL BACKGROUND

This case arises out of an incident which occurred on May 5, 2013, at the Whitehall Express Mart (hereinafter referred to as "Whitehall") owned by David and Janice Rodgers and located 704 Whitehall Road in Anderson, South Carolina. The plaintiff alleges that on that date

he was wrongfully arrested and charged with shoplifting a case of beer from Whitehall. On July 22, 2013, the plaintiff filed suit in the Anderson County Court of Common Pleas against Mr. and Mrs. Rodgers, arising out of the incident (hereinafter referred to as "the State Action"). The case is captioned, "*Marion Escalante v. David L. Rodgers and Janice W. Rodgers d/b/a Whitehall Express Mart*," C.A. No. 2013-CP-04-01700. The complaint in that action contains false imprisonment, invasion of privacy, defamation, negligence, false arrest, outrage, malicious prosecution, conspiracy, conversion, and fraud causes of action against Mr. and Mrs. Rodgers. (*See* Plaintiff's Complaint attached hereto as Exhibit A). On August 19, 2013, Whitehall filed an answer to the complaint, in which it denied liability. Thereafter, discovery, including depositions taken from the plaintiff, the arresting officers, David Rodgers, and several Whitehall employees were completed. The State Action is currently pending,

On January 13, 2015, the plaintiff commenced this action by filing a summons and complaint against Mr. and Mrs. Rodgers, the Anderson's County Sheriff's Department, Sheriff John Skipper, Sergeant Andrew Hyslop, Deputy Brandon Surratt, the City of Anderson Police Department, and James S. Stewart (hereinafter referred to as "the Federal Action"). The complaint in this action contains nearly identical allegations as the State Action and asserts the same causes of action against Mr. and Mrs. Rodgers. In addition, the complaint in the Federal Action asserts assault, battery, civil rights, and abuse of process claims against the police defendants.

In other words, although the State Court is postured to provide the determinations and relief under South Carolina law that the plaintiff has also sought in this case, the plaintiff would apparently prefer that this Court decide those issues as well. The plaintiff's forum manipulation justifies abstention.

ARGUMENT

I. This Court Should Abstain from Exercising Jurisdiction Pursuant to the *Colorado River* Doctrine.

Abstention is appropriate in this case in light of the plaintiff pursuing parallel, duplicative proceedings. Under the *Colorado River* abstention doctrine, a district court may abstain from exercising jurisdiction "in the exceptional circumstances where a federal case duplicates contemporaneous state proceedings, and wise judicial administration, giving regard to conservation of judicial resources, and comprehensive disposition of litigation clearly favors abstention." *Vulcan Chem. Techs., Inc. v. Barker,* 297 F.3d 332, 340-41 (4th Cir. 2002) (internal citation and quotation marks omitted) (citing *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976)). To date, the Supreme Court has "declined to prescribe a hard and fast rule" for determining whether *Colorado River* abstention is appropriate. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 15 (1983). As an initial matter, however, the court must determine "whether there are parallel federal and state suits." *Great Am. Ins. Co. v. Gross,* 468 F.3d 199, 207 (4th Cir. 2006). "Suits are parallel if substantially the same parties litigate substantially the same issues in different forums." *Chase Brexton Health Servs., Inc. v. Maryland,* 411 F.3d 457, 464 (4th Cir. 2005).

Here, it is clear that the State Action and the Federal Action constitute parallel proceedings. Both actions arise out of the same incident, and the allegations contained in the complaints in the two actions are virtually identical. Most of the causes of action asserted against Mr. and Mrs. Rodgers in the State Action are duplicative of those asserted against them in the Federal Action. Although the plaintiff asserts additional claims against "the defendants," each of those claims arise out of the same facts and circumstances as the State Action and could

have been asserted therein. As such, the State Action and the Federal Action constitute parallel proceedings.

If parallel suits exist, the court "must carefully balance" six factors: (1) whether the subject matter of the litigation involves property where the first court may assume jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state law or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights. *Vulcan Chemical Technologies, Inc. v. Barker,* 297 F.3d 332, 341 (4th Cir. 2002). "No one factor is necessarily determinative," and the court's decision must not "rest on a mechanical checklist." *Colo. River Water Conservation Dist.,* 424 U.S. at 818–19. Instead, the court applies the factors in "a pragmatic, flexible manner with a view to the realities of the case at hand," *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 13, taking into account "both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise," *Colo. River Water Conservation Dist.,* 424 U.S. at 818.

In this case, the above factors resoundingly favor abstention. The State Action was initiated first, and numerous depositions, discovery, and motions have already taken place. Moreover, the state court can determine the ultimate issue in this case, thus avoiding piecemeal litigation. Findings of fact must be made by both courts and those findings could be inconsistent and determined at differing points in time. This kind of piece meal litigation could ultimately cause each issue to be litigated twice - especially if a state court precedential ruling occurs subsequent to a federal court ruling on the same issue. Finally, there is no doubt that the state court can adequately protect Plaintiffs' rights; as another judge of this Court recently observed

when considering abstention, "[t]here is no indication or allegation that normal hearing, trial, or appeal processes available in this pending state-court proceeding are unavailable to vindicate Plaintiff's concerns." *Stanfield v. Wigger*, No. 2:14-CV-00839-PMD, 2015 WL 58077, at *10 (D.S.C. Jan. 5, 2015). For all of these reasons, the state court is the proper forum, and *Colorado River* favors this Court's abstention.

In the alternative, if this Court elects not to dismiss the plaintiff's complaint, the Federal Action should be stayed until the State Action has been completed.

CONCLUSION

For the reasons stated herein, the Court should dismiss the plaintiff's claims against Mr. and Mrs. Rodgers and grant such other and further relief as the Court may deem just and proper.

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February 12, 2015

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Activity in Case 8:15-cv-00177-MGL-JDA Escalante v. Anderson County Sheriff's Department et al Order on Motion to Dismiss

1 message

SCDEfilingstat@scd.uscourts.gov <SCDEfilingstat@scd.uscourts.gov> Fri, Jul 31, 2015 at 10:07 AM
To: scd_ecf_nef@scd.uscourts.gov

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U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 7/31/2015 at 10:07 AM EDT and filed on 7/31/2015
Case Name: Escalante v. Anderson County Sheriff's Department et al
Case Number: 8:15-cv-00177-MGL-JDA
Filer:
Document Number: 30(No document attached)

Docket Text:
TEXT ORDER dismissing [12] Motion to dismiss without prejudice with leave to refile. Defendants David L. Rodgers and Janice W. Rodgers d/b/a Whitehall Express Mart ("the Rodgers") have moved to dismiss Plaintiff's Complaint pursuant to the Colorado River abstention doctrine or, in the alternative, to stay the proceedings. [Doc. 12.] The threshold question in deciding whether Colorado River abstention is appropriate is whether there are parallel federal and state suits. Great Am. Ins. Co. v. Gross, 468 F.3d 199, 207 (4th Cir. 2006). "Suits are parallel if substantially the same parties litigate substantially the same issues in different forums." McLaughlin v. United Va. Bank, 955 F.2d 930, 934 (4th Cir. 1992). Neither party has adequately addressed the fact that Plaintiff's state court case is against only the Rodgers while this federal action is against the Rodgers, seven additional named defendants, and twenty John Does. Further, the federal action raises additional causes of action against the defendants. The Court requires additional briefing on these issues before it can determine whether Colorado River abstention is appropriate. Accordingly, by August 21, 2015, the Rodgers shall refile their motion to dismiss, addressing more thoroughly whether the suits have substantially the same parties and substantially the same issues. Additionally, the Rodgers should clarify in their subsequent motion to dismiss whether they seek to have the Court apply the Colorado River abstention doctrine to dismiss only the Rodgers, and whether such an application is appropriate, or to abstain from the entire suit. Signed by Honorable Mary G Lewis on 7/31/2015.(gpre,)

8:15-cv-00177-MGL-JDA Notice has been electronically mailed to:

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8:15-cv-00177-MGL-JDA Notice will not be electronically mailed to:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Mario Escalante, Plaintiff, v. Anderson County Sheriff's Department; Sheriff John Skipper; Sergeant Andrew R. Hyslop; Deputy Brandon Surratt; David L. Rodgers d/b/a Whitehall Express Mart; Janice W. Rodgers d/b/a Whitehall Express Mart, Defendants.[1]	Case No. 8:15-cv-00177-MGL-JDA **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This matter is before the Court on a motion for summary judgment filed by Defendants Anderson County Sheriff's Department ("the Sheriff's Department"), Sergeant Andrew R. Hyslop ("Hyslop"), Sheriff John Skipper ("Skipper"), and Deputy Brandon Surratt ("Surratt") (collectively, "the Sheriff's Department Defendants") [Doc. 45] and a motion for summary judgment filed by Defendants David L. Rodgers ("David Rodgers") and Janice W. Rodgers, both d/b/a Whitehall Express Mart (collectively, "the Rodgers Defendants") [Doc. 47]. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d), D.S.C., this magistrate judge is authorized to review all pretrial matters in cases filed under § 1983 and to submit findings and recommendations to the District Court.

Plaintiff, proceeding with the assistance of counsel, filed this action on January 13, 2015, alleging Defendants violated his constitutional rights by arresting and prosecuting

[1]Defendant Chief of Police James S. Stewart was terminated from this action when his motion for judgment on the pleadings was granted on November 10, 2015. [Doc. 37.] Defendants City of Anderson Police Department and John Does 1–20 were terminated from this action pursuant to a stipulation of dismissal filed on December 18, 2015. [Doc. 59.]

Plaintiff without probable cause as well as alleging state law causes of action. [Doc. 1.] On March 4, 2015, Plaintiff filed an Amended Complaint. [Doc. 16.] On November 23, 2015, the Sheriff's Department Defendants filed a motion for summary judgment. [Doc. 45.] Plaintiff filed a response in opposition on December 17, 2015 [Doc. 56], and the Sheriff's Department Defendants filed a reply on January 22, 2016 [Doc. 68]. On November 24, 2015, the Rodgers Defendants filed a motion for summary judgment. [Doc. 47.] Plaintiff filed a response in opposition on December 17, 2015 [Doc. 57], and the Rodgers Defendants filed a reply on January 25, 2016 [Doc. 69]. Accordingly, the motions are ripe for review.[2]

BACKGROUND[3]

Plaintiff alleges that on May 5, 2013, he purchased a case of beer from the Rodgers Defendants' store in Anderson, South Carolina. [Doc. 16 ¶ 13.] Plaintiff alleges that he later attempted to purchase a second case of beer for a friend but was denied due to the prohibition of Sunday alcohol sales in the County. [*Id.* ¶ 14.] David Rodgers contacted the

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[2]The Court notes that, in his response in opposition to the Rodgers Defendants' motion for summary judgment, Plaintiff contends that, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, he is submitting "a declaration that Plaintiff is unable to properly prosecute his case due to Defendants' failure to provide discovery related to the telephones in use by said Defendants at the time of the underlying incident." [Doc. 57 at 1.] However, Plaintiff's response in opposition does not include any such declaration. Moreover, on February 2, 2016, this Court granted a motion for protective order filed by Hyslop and Surratt, finding "there is no evidence or testimony that conversations were held between the defendants involving the personal cell phones of Defendants Surratt and Hyslop and no basis to find that the production of these phone logs will lead to the discovery of relevant evidence." [Doc. 72.]

[3]The facts included in this Background section are taken directly from Plaintiff's Amended Complaint.

Sheriff's Department and advised that he had video evidence that Plaintiff had stolen beer from the store. [*Id.* ¶ 16.]

Several sheriff's deputies and city police officers converged on Plaintiff at the Anderson County Fair, where he was working, and arrested him for shoplifting. [*Id.* ¶ 22.] Plaintiff informed the officers that he had purchased the case of beer.[4] [*Id.* ¶ 23.] Plaintiff was cuffed and led through the fairgrounds to a patrol car. [*Id.* ¶ 24.] When Plaintiff returned to Anderson, South Carolina, from Texas for criminal proceedings related to the alleged theft, David Rodgers informed Plaintiff he would not be pressing charges. [*Id.* ¶ 31.]

Plaintiff alleges the following causes of action: violation of constitutional rights under 42 U.S.C. § 1983; false imprisonment; assault; battery; intentional infliction of emotional distress; invasion of privacy; defamation; slander; civil conspiracy; abuse of process; and conversion. [Doc. 16.] He seeks actual and punitive damages; attorneys fees, costs, and interest; and any other relief the Court deems just and proper. [*Id.*]

APPLICABLE LAW

Requirements for a Cause of Action Under § 1983

Section 1983 provides a private cause of action for plaintiffs alleging constitutional violations by persons acting under color of state law. Section 1983 provides, in relevant part,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or

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[4]Plaintiff contends that David Rodgers has been cited for alcohol violations in the past and that David Rodgers alleged Plaintiff had stolen the beer in an effort to protect himself from prosecution for violating the Sunday alcohol ordinance. [Doc. 16 ¶¶ 26–27.]

> causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must prove two elements: (1) that the defendant "deprived [him] of a right secured by the Constitution and laws of the United States" and (2) that the defendant "deprived [him] of this constitutional right under color of [State] statute, ordinance, regulation, custom, or usage." *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (citation and internal quotation marks omitted).

The under-color-of-state-law element, which is equivalent to the "state action" requirement under the Fourteenth Amendment,

> reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments. This fundamental limitation on the scope of constitutional guarantees preserves an area of individual freedom by limiting the reach of federal law and avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.

Id. at 310 (quoting *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 658 (4th Cir. 1998)) (internal citations and quotation marks omitted). Nevertheless, "the deed of an ostensibly private organization or individual" may at times be treated "as if a State has caused it to be performed." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Specifically, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). State action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the

State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). A determination of whether a private party's allegedly unconstitutional conduct is fairly attributable to the State requires the court to "begin[ ] by identifying 'the specific conduct of which the plaintiff complains.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982)).

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the

allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Further, Rule 56 provides in pertinent part:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> >
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, he must produce existence of a factual dispute on every element essential to his action that he bears the burden of adducing at a trial on the merits.

DISCUSSION

As stated, Plaintiff contends David Rodgers alleged Plaintiff had stolen beer in an effort to protect himself from prosecution for violating the Sunday alcohol ordinance. [Doc. 16 ¶ 26–27; *see also* Doc. 57 at 3–4 ("In essence, Mario was arrested because he unknowingly participated in the illegal sale of beer on Sunday by the Rodgers, or Whitehall Express Mart.").] Indeed, all of his claims rely in part on this assertion. However, as discussed in more detail below, Plaintiff has failed to direct the Court to any evidence tending to establish that David Rodgers falsely accused Plaintiff of shoplifting.[5] Instead, this argument is based on speculation and Plaintiff's conclusory allegations, which are insufficient to preclude granting summary judgment. *See Ross*, 759 F.2d at 365. The Court addresses each of Plaintiff's claims in turn.

Section 1983 Claim

Section 1983 actions premised on alleged false arrest and/or false imprisonment claims are analyzed as unreasonable seizures under the Fourth Amendment. *See, e. g., Brown v. Gilmore*, 278 F.3d 362, 367–68 (4th Cir. 2002) (recognizing that a plaintiff alleging

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[5]Although Plaintiff subsequently produced a copy of a receipt for the purchase of a case of beer on May 5, 2013, Plaintiff did not produce a copy of the receipt on the date of the arrest [Doc. 45-2 at 16:14–17], and all causes of action in this case stem from Plaintiff's arrest and Defendants' behavior surrounding Plaintiff's arrest. Moreover, in the Amended Complaint, Plaintiff alleges he purchased one case of beer but was prevented from purchasing a second case. [Doc. 16 ¶¶ 13–14.] David Rodgers contends Plaintiff stole the second case of beer after the store clerk, presumably realizing it was Sunday, refused to sell it to Plaintiff. [Doc. 47-2 at 6:14–7:11.] Thus, Plaintiff's receipt for the purchase of one case of beer fails to establish that he purchased the second case of beer, and Plaintiff has failed to direct the Court to any evidence in the record tending to establish that David Rodgers did not believe Plaintiff had stolen a case of beer when he notified the police about the incident or that David Rodgers had some other motive for reporting the stolen case of beer.

a § 1983 false arrest claim needs to show that the officer decided to arrest him without probable cause to establish an unreasonable seizure under the Fourth Amendment); *Rogers v. Pendleton*, 249 F.3d 279, 294 (4th Cir. 2001) (stating claims of false arrest and false imprisonment "are essentially claims alleging a seizure of the person in violation of the Fourth Amendment"). The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[A] claim for false arrest may be considered only when no arrest warrant has been obtained." *Porterfield v. Lott*, 156 F.3d 563, 568 (4th Cir. 1998); *see also Brooks v. City of Winston-Salem*, 85 F.3d 178, 181–82 (4th Cir. 1996) (determining that when the arresting official makes the arrest with a facially valid warrant, it is not false arrest).

To state a claim for malicious prosecution under § 1983, "a plaintiff must allege that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Evans v. Chalmers*, 703 F.3d 646, 647 (4th Cir. 2012) (citing *Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012)). The test to determine whether probable cause existed for a seizure is an objective one, based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983); *see also Mazuz v. Maryland*, 442 F.3d 217, 224 (4th Cir. 2006) (citing *Maryland v. Macon*, 472 U.S. 463, 470–71 (1985)) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken.") (abrogated on other grounds by *Pearson v. Callahan*, 555 U.S. 223, 235 (2009)). Specifically, the totality of the

circumstances includes "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information," *Beck v. Ohio*, 379 U.S. 89, 96 (1964), and such facts and circumstances constitute probable cause if they are "sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense," *id.*

Here, the Court finds there was probable cause to arrest Plaintiff. Hyslop testified that he was notified by dispatch that there was a shoplifting incident that occurred at the Whitehall Express and that the suspect had left in a vehicle and was at the Anderson County Civic Center ("the Civic Center"). [Doc. 45-3 at 3:10–15.] The dispatcher gave a description of the vehicle the suspect left in as a red vehicle with a Texas tag. [Doc. 45-6 at 4:9–14.] When Hyslop got to the Civic Center, David Rodgers was there and stated that the suspect had shoplifted a case of beer from his store, and David Rodgers had a still shot of the suspect on his camera. [Doc. 45-3 at 4:2–6.] At that time, Surratt arrived, and there were also two Anderson City units at the scene. [*Id.* at 7–10.] They located the red vehicle, and Hyslop looked in and saw a case of beer in the front passenger seat. [Doc. 45-6 at 4:15–24.] Subsequently, the suspect was located and indicated the red vehicle was his. [*Id.* at 5:12–14.] After looking at the picture of the suspect leaving the store; David Rodgers' saying that the suspect had shoplifted a case of beer; the vehicle matching the description given by the dispatcher; Plaintiff matching the photo on David Rodgers' camera: and a case of beer found in the car, Hyslop determined there was probable cause to make an arrest for shoplifting based on the information known to him at that time. [*Id.* at 5:18–24.] Based on a totality of the circumstances, the facts and circumstances known by Hyslop at the time of the arrest were "sufficient to warrant a prudent man in believing that

[Plaintiff] had committed . . . an offense." *Beck*, 379 U.S. at 96. The Court finds unpersuasive Plaintiff's argument, unsupported by any legal authority, that the officers should have further investigated; based on the facts known to Hyslop at the time of the arrest,[6] it was reasonable for him to believe that Plaintiff had shoplifted a case of beer. Accordingly, the Court finds probable cause existed to arrest Plaintiff, and the motions for summary judgment should be granted with respect to Plaintiff's § 1983 claim.[7]

Moreover, the Sheriff's Department Defendants are entitled to qualified immunity. Qualified immunity protects government officials performing discretionary functions from civil damage suits as long as the conduct in question does not "violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, qualified immunity does not protect an official who violates a constitutional or statutory right of a plaintiff that was clearly established at the time of the alleged violation such that an objectively reasonable official in the official's position would have known of the right. *Id.* Further, qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

To determine whether qualified immunity applies, a court must determine "'whether the plaintiff has alleged the deprivation of an actual constitutional right at all[ ] and . . . whether that right was clearly established at the time of the alleged violation.'" *Wilson v.*

---

[6]As previously stated, Plaintiff did not produce a copy of the receipt on the date of the arrest. [Doc. 45-2 at 16:14–17.]

[7]Because the Court has determined probable cause existed to arrest Plaintiff, the Court declines to address the Sheriff's Department Defendants' argument that the Sheriff's Department and Skipper are entitled to summary judgment because a municipality is not liable under § 1983 [Doc. 45-1 at 2] or the Rodgers Defendants' argument that they are entitled to summary judgment because they are private actors [Doc. 47-1 at 7].

Layne, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action[,] assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow*, 457 U.S. at 819). For purposes of this analysis, a right is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

Here, the Court has determined there was no constitutional violation. Accordingly, the Sheriff's Department Defendants are entitled to qualified immunity.

State Law Claims

False Imprisonment

Under South Carolina law, to prevail on a claim for false arrest or imprisonment, Plaintiff must prove both that he was deprived of his liberty and that the deprivation was done without lawful justification. *Jones v. City of Columbia*, 389 S.E.2d 662 (S.C.1990). Stated differently, a plaintiff must show that "(1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Law v. S.C. Dep't of Corrs.*, 629 S.E.2d 642, 651 (S.C. 2006).

Because, as discussed above, Hyslop had probable cause to arrest Plaintiff for shoplifting, Plaintiff is unable to satisfy the elements of a false imprisonment claim. Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's false imprisonment claims.

Assault and Battery

Under South Carolina law, "an assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the defendant, and a battery is the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of degree." *Jones v. Winn-Dixie Greenville, Inc.*, 456 S.E.2d 429, 432 (S.C. Ct. App.1995). "A police officer who uses reasonable force in effectuating a lawful arrest is not liable for assault or battery." *Roberts v. City of Forest Acres*, 902 F.Supp. 662, 671–72 (D.S.C. 1995) (footnote omitted). It is well settled that "[a]lthough a law enforcement officer is privileged to use lawful force, he is nevertheless liable for assault if he uses force greater than is reasonably necessary under the circumstances." *Moody v. Ferguson*, 732 F.Supp. 627, 632 (D.S.C. 1989); *see also Roberts*, 902 F.Supp. at 671 n.2.

Here, as discussed above, Plaintiff's arrest was lawful because it was supported by probable cause. Plaintiff has failed to direct the Court to any evidence to support a claim for assault or battery stemming from his arrest. The only evidence in the record that Plaintiff relies on in his discussion of this claim is that he "was swarmed by law enforcement officials from multiple agencies, at his place of work." [Docs. 56 at 7–8 (citing Surratt's deposition); 57 at 7–8 (citing same).] However, he has provided no evidentiary support to establish that he feared he would suffer bodily harm. Further, he fails to allege the officers used greater force than was necessary to effectuate the arrest. Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's claims for assault and battery.

Intentional Infliction of Emotional Distress

Under South Carolina law, to recover for intentional infliction of emotional distress, a plaintiff must establish that:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
>
> (2) the conduct was so extreme and outrageous so as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community;
>
> (3) the actions of the defendant caused plaintiff's emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was severe such that no reasonable man could be expected to endure it.

Hansson v. Scalise Builders of S.C., 650 S.E.2d 68, 70–71 (S.C. 2007) (quoting *Ford v. Hutson*, 276 S.E.2d 776, 778 (S.C. 1981) (internal quotation marks omitted)). Whether a defendant's conduct may be reasonably regarded as so extreme and outrageous to permit recovery is initially one for a court, and only where reasonable persons might differ is it a question or a jury. *Hawkins v. Greene*, 427 S.E.2d 692, 693 (S.C. Ct. App. 1993). "Where evidence is undisputed that the defendant acted in good faith and in a reasonable manner, his conduct cannot be characterized as so extreme and outrageous as to exceed all possible bounds of decency and atrocious and utterly intolerable in a civilized community." *Id.*

Plaintiff has failed to direct the Court to any evidence to support a claim for intentional infliction of emotional distress. [Docs. 56 at 8–9 (citing no record evidence); 57 at 8–9 (citing no record evidence).] Instead, he conclusorily alleges that Defendants' conduct was extreme and outrageous and that Plaintiff suffered emotional distress. However, as stated, the arrest was supported by probable cause; thus, no Defendants

conduct can be characterized as so extreme and outrageous as to exceed all possible bounds of decency and atrocious and utterly intolerable in a civilized community. Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's claim for intentional infliction of emotional distress.

Invasion of Privacy

The Supreme Court of South Carolina has identified three separate acts which may give rise to a cause of action for invasion of the right of privacy:

(1) the unwarranted appropriation or exploitation of one's personality,

(2) the publicizing of one's private affairs with which the public has no legitimate concern, or

(3) the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

Meetze v. Associated Press, 95 S.E.2d 606, 608 (1956) (quoting 41 Am. Jur., Privacy, § 2; citing *Cont'l Optical Co. v. Reid*, 86 N.E.2d 306 (Ind. App. 1949) and *Smith v. Doss*, 37 So.2d 118 (Ala. 1948)). Here, Plaintiff asserts that his invasion of privacy cause of action is based upon the publicizing of one's private affairs with which the public has no legitimate concern. [Docs. 56 at 9; 57 at 9.] "The elements of this tort include (1) publicizing, (2) absent any waiver or privilege, (3) private matters in which the public has no legitimate concern, (4) so as to bring shame or humiliation to a person of ordinary sensibilities." *Swinton Creek Nursery v. Edisto Farm Credit*, 514 S.E.2d 126, 131 (S.C. 1999).

Here, Plaintiff has failed to direct the Court to any evidence to support a claim for invasion of privacy. [Docs. 56 at 9–10 (citing no record evidence); 57 at 9–10 (citing no

record evidence).] Moreover, Plaintiff is unable to establish a publication of a private matter in which the public has no legitimate concern. As stated, he was arrested based on probable cause. Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's invasion of privacy claim.

Defamation and Slander

Under South Carolina law, to state a cause of action for defamation, a plaintiff must show: "(1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Fleming v. Rose*, 567 S.E.2d 857, 860 (S.C. 2002). Slander is spoken defamation. *Swinton Creek Nursery*, 514 S.E.2d at 134. "[U]nder longstanding South Carolina case law, contents of governmental records-such as judicial proceedings, case reports, published cases, investigative reports, or arrest records-do not give rise to liability for slander or libel." *Williams v. S.C.*, No. 0:06-2590-CMC-BM, 2006 WL 3843608, at *6 (Dec. 22, 2006) (citing *Heyward v. Cuthbert*, 15 S.C.L. (4 McCord) 354, 356–59 (1827); *Padgett v. Sun News*, 292 S.E.2d 30, 32–33 (S.C. 1982)).

Here, as previously stated, Plaintiff is unable to establish a false statement was made. Plaintiff has failed to direct the Court to any evidence to support a claim for defamation or slander. [*See* Docs. 56 at 10 (citing no record evidence); 57 at 10–11 (citing no record evidence).] Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's defamation and slander claims.

Civil Conspiracy

To be successful on a claim for civil conspiracy in South Carolina, the plaintiff must show (1) a combination of two or more persons; (2) for the purposes of injuring the plaintiff; (3) causing the plaintiff special damages. *Vaught v. Waites*, 387 S.E.2d 91, 95 (S.C. Ct. App. 1989) (citing *Lee v. Chesterfield Gen. Hosp. Inc.*, 344 S.E.2d 379 (S.C. Ct. App. 1986)). "A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *Hackworth v. Greywood at Hammett, LLC*, 682 S.E.2d 871, 874 (S.C. 2009). Stated differently, the acts pled in furtherance of the conspiracy must be "separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Id.* at 875. "Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Id.* at 874. "If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of [his] civil conspiracy claim, the[] conspiracy claim should be dismissed." *Id.*

Here, Plaintiff has failed to identify concrete acts independent of any other alleged wrongdoing. [*See* Doc. 16 ¶ 66 (claim for civil conspiracy, alleging "[t]he aforementioned actions, conduct, and/or omissions of the defendants in their individual capacities, and/or by and through their agents, servants, and/or employees, who were acting within the course and scope of their agency and/or employment with the defendants, constitute a civil conspiracy to harm the plaintiff").] Additionally, Plaintiff has failed to allege Defendants joined together for the purpose of injuring Plaintiff. Finally, Plaintiff has not pled special damages as required for a civil conspiracy claim. [*Id.* ¶ 67 ("As a direct and proximate result of the defendants' conspiracy to harm the plaintiff, plaintiff has been damaged, for

which damages the defendants are liable.").] Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's civil conspiracy claim.

Abuse of Process

"The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols.*, 697 S.E.2d 551 (S.C. 2010). "Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required." *Hainer v. Am. Med. Int'l, Inc.*, 492 S.E.2d 103 (S.C. 1997).

Plaintiff has failed to direct the Court to any evidence to support a claim for abuse of process. [Docs. 56 at 11–12 (citing no record evidence); 57 at 14 (citing no record evidence).] Instead, he relies on conclusory allegations that are insufficient to overcome summary judgment. Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's abuse of process claim.

Conversion

"Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.'" *Green v. Waidner*, 324 S.E.2d 331, 333 (S.C. Ct. App. 1984) (quoting *Powell v. A.K. Brown Motor Co.*, 20 S.E.2d 636, 637 (S.C. 1942)).

Here, Plaintiff cannot establish Defendants assumed control of Plaintiff's property without authorization because, as discussed above, Plaintiff's arrest was supported by probable cause. Plaintiff has failed to direct the Court to any evidence to support a claim for conversion. [Docs. 56 at 12 (citing no record evidence); 57 at 14–15 (citing no record

evidence).] Accordingly, the motions for summary judgment should be granted with respect to Plaintiff's conversion claim.[8]

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that the Sheriff's Department Defendant's motion for summary judgment be GRANTED and that the Rodgers Defendants' motion for summary judgment be GRANTED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

July 29, 2016
Greenville, South Carolina

[8]Because the Court has determined Defendants are entitled to summary judgment on the merits of each of Plaintiff's state law claims, the Court declines to address the Sheriff's Department Defendants' argument that they are entitled to summary judgment pursuant to the South Carolina Tort Claims Act [Doc. 45-1 at 9–10] or any of the Rodgers Defendants' arguments regarding personal involvement in the specific state law claims [*see* Doc. 47-1].

FORM 7
PROOF OF SERVICE
PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

C.A. No.: 2013-CP-04-1700
Appellate Case No. 2018-000289

Mario Escalante, Appellant,

v.

David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart, Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Petition for Rehearing and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at 1231 Gervais Street Columbia SC 29201 by hand delivery and Respondents, by and through their counsels of record, Phillip Reeves, Esquire and Nicholas A. Farr, Esquire, at Gallivan White and Boyd , P.A., Post Office Box 10589, Greenville, SC 29603, by depositing a copy of it in the United States Mail, postage prepaid, on February 13, 2020.

Donald L. Smith,(SC Bar#6699)
Attorney for Appellant
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
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February 13, 2020.

ATTORNEY OFFICE OF DONALD SMITH

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February 13, 2020

92157

RECEIVED

FEB 13 2020

SC Court of Appeals

Phillip Reeves, Esquire
Nicholas A. Farr, Esquire
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 10589
Greenville, SC 29603

RE: Mario Escalante v. David L. Rodgers and Janice W. Rodgers, d/b/a Whitehall Express Mart
Appellate Case No. 2018-000289
C.A. No.: 2013-CP-04-1700

Dear Mr. Reeves and Mr. Farr:

Please find a copy of the Petition for Rehearing which I have filed in the above-referenced matter. Attached as well is Proof of Service of same.

If you have any questions or concerns regarding the enclosed materials, please do not hesitate to contact my office to discuss.

With highest regards, I remain
Very truly yours,

Donald L. Smith
DLS/aaf
Enclosures

cc: Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals

FORM 8
LETTER TO THE APPEALS COURT CLERK
FILING OF PETITION FOR REHEARING

92157

February 13, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

RE: Mario Escalante v. David L. Rodgers and Janice W. Rodgers, d/b/a Whitehall Express Mart
Appellate Case No. 2018-000289
C.A. No.: 2013-CP-04-1700

Dear Ms. Kitchings:

Please find enclosed the following materials for filing:

(1) Petition for Rehearing; and,

(2) Proof of Service for same.

.

Sincerely,

Donald L. Smith, (SC Bar#6699)
Attorney for Appellant
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

cc: Phillip Reeves, Esquire
Nicholas A. Farr, Esquire