THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2020-000550
Case No. 2018-CP-10-1224

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SC Court of Appeals

Kevin L. Paul, ... Appellant,

v.

Richland County Sheriff's Office, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from the dismissal of a malicious prosecution, defamation, and gross negligence action brought by the Appellant Kevin L. Paul against the Respondent Richland County Sheriff's Office ("RCSO").

On March 29, 2017, Deputy Melvin Brown with the RCSO was dispatched to the Wal-Mart located on Two Notch Road in Columbia, South Carolina to respond to a report from Wal-Mart of a suspected shoplifter. The shoplifter had been detained by Wal-Mart employees. Upon his arrival, Deputy Brown questioned the suspect who gave his name as Kevin Paul. The shoplifter also provided a date of birth. Deputy Brown made an inquiry through the National Crime Information Center (NCIC) and learned additional identifying information about Kevin Paul. Deputy Brown shared that information with a loss prevention employee for Wal-Mart. The shoplifter was placed under arrest and transported to the Alvin S. Glenn Detention Center. An arrest warrant was obtained, and the shoplifter was booked under the name of Kevin Paul.

Later, it was determined that the person arrested had given a false name and date of birth to Deputy Brown. The shoplifter was actually Mack Paul, who is the Appellant's brother. Upon learning that the shoplifter gave a false name, a request was made to the Pontiac Magistrate's Court to continue a May 2, 2017 court appearance. The email from Deputy Cris Truluck states: "The real Kevin Paul has a brother named Mack Paul who was using his name. The continuance is needed to clear this issue up when the arresting deputy comes back from vacation." (Ex. A). Deputy Brown also contacted the court for a continuance to allow for the warrant to be corrected to reflect Mack Brown as the arrestee. (Ex. B). Ultimately, the arrest warrant bearing the Appellant's name was dismissed in June 2017. The Appellant's arrest records were expunged.

On March 2, 2018, the Appellant filed a civil action against both the RCSO and Wal-Mart. The Complaint includes causes of action for malicious prosecution, defamation, and gross negligence against the RCSO. On November 22, 2019, the RCSO filed a motion for summary judgment citing numerous grounds. (Motion). A hearing was held on January 30, 2020, before Circuit Court Judge L. Casey Manning. On February 24, 2020, Judge Manning entered an order granting summary judgment to RCSO on all cause of action. (Order I). The Appellant subsequently filed a Rule 59(e) motion to alter or amend. Judge Manning entered an order on March 24, 2020, denying the Appellant's motion. (Order II).

The Appellant subsequently filed a timely appeal to this Court.

STANDARD OF REVIEW

"A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40, 41 (2008). "An appellate court reviews the grant of summary judgment under the same standard applied by the trial court." *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct. App. 2009). "The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id*.

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Id*. "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders Firstsource - Southeast Group*, 413 S.C. 630, 776 S.E.2d 434, 437 (Ct. App. 2015).

ARGUMENTS

I. The trial court was correct in granting summary judgment on the Appellant's causes of action for malicious prosecution and gross negligence based on prosecutorial or quasi-judicial immunity as codified in Section 15-78-60(1) and (2).

The Appellant's focus on appeal is the argument that the Richland County Sheriff's Office was slow to dismiss the shoplifting charge after learning that the criminal conduct was committed by the Appellant's brother and that the issuance of an arrest warrant in the Appellant's name was the result of a mistaken identity. The Appellant's causes of action for malicious prosecution and gross negligence are not premised on the lack of probable cause to make the arrest or obtain the arrest warrant but rather on the *continuation* of the criminal prosecution after the RCSO learned the true identity of the shoplifter on April 28, 2017. The Appellant contends that there was no good faith belief for continuing the prosecution until the dismissal was entered on June 26, 2017. He argues that the criminal acts of his brother had no causative effect on the continuation of the prosecution after April 28, 2017. The Appellant thus suggests that the delay after that date in dismissing the shoplifting warrant is not subject to immunity under the Tort Claims Act, as the trial court had ruled. He is incorrect.

The trial court granted summary judgment based on several subsections of Section 15-78-60 of the Tort Claims Act, including Section 15-78-60(1) which provides immunity for "a loss resulting from legislative, judicial, or quasi-judicial action or inaction." S.C. Code Ann. § 15-78-60(1). Additionally, the trial court relied on Section 15-78-60(2), which provides immunity for "a loss resulting from administrative action or inaction of a legislative, judicial, or quasi-judicial nature." S.C. Code Ann. § 15-78-60(2). The trial court explained that "assuming *arguendo* that there had been a delay by either law enforcement or judicial authorities in correcting or curing

the errors, the nature and timing of RCSD employees' actions simply constitute immune functions under the SCTCA." (Order II, p. 2). The trial court then ruled that "any such administrative actions -- or even inactions -- on the part of this Defendant's employees were of a judicial or quasi-judicial nature and as a result, the Defendant RCSD is entitled to absolute sovereign immunity pursuant to S.C. Code Ann. § 15-78-60(1)." (Order II, p. 2). While the trial court cites subsection (1), it is clear that the court is also relying on subsection (2) which addresses "administrative actions or inactions."[1]

Subsections (1) and (2) provide absolute sovereign immunity that disposes of the Appellant's causes of action against the RCSO. The leading case in South Carolina on those immunity provisions is *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Citing Subsections (1) and (2), this Court in *Williams* held that "[t]he duties of a prosecutor fall into the exceptions enumerated by *McCall* and § 15-78-60." 553 S.E.2d at 508. This Court further explained:

> The case law cited throughout this opinion clearly supports the proposition that a prosecutor's typical duties are "judicial" or "quasi-judicial" in nature. Accordingly, this Court finds a prosecutor, in his official capacity, is immune from a Tort Claims Act suit involving "judicial" or "quasi-judicial" acts, provided a defendant prosecutor raises the affirmative defense of sovereign immunity in his return.

Id. Thus, as this Court stated, prosecutorial immunity was codified in subsections (1) and (2) of Section 15-78-60.

As indicated, the Appellant's theory of liability is not premised on the initiation of the shoplifting charge but rather the continuation of the prosecution after April 28, 2017. Under

[1] The RCSO did raise both subsections (1) and (2) in its motion for summary judgment. (Motion).

South Carolina law, it is the prosecutorial authority that has the right to discontinue a prosecution. Thus, the decision to dismiss the shoplifting warrant was for the RCSO deputies charged by law with the duty to prosecute the charge. Ultimately, that is what occurred -- the warrant was dismissed, and that decision and any perceived delays in carrying that out fall within the scope of prosecutorial conduct. *See*, *Williams*, 553 S.E.2d at 505 (recognizing the decision whether to dismiss a charge or indictment falls within the scope of prosecutorial immunity).

The Appellant argues that the RCSO deputies responsible for the prosecution are not entitled to judicial or quasi-judicial immunity. In making that argument, the Appellant relies only on the case of *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002), in which the South Carolina Supreme Court ruled that a juvenile probation officer was not entitled to quasi-judicial immunity for a juvenile placement decision. The Supreme Court noted that "[j]ust as police officers are not granted absolute immunity when they apply for arrest warrants, probation officers generally are not immune in performing their enforcement duties." 566 S.E.2d at 542. But, *Faile* is inapposite. Here, the Appellant is not alleging that the RCSO deputies sought a warrant and arrested him without probable cause. In fact, the Appellant was never arrested or detained; his brother was. Instead, he is suing because the deputies, acting as the prosecutorial authority, did not dismiss the warrant earlier and thus "continued" the prosecution after learning that the Appellant's brother had used his name. In *Faile*, the Supreme Court never adjudged whether the party seeking immunity was acting within the scope of prosecutorial immunity, which is a different form of "quasi-judicial" immunity than what is at issue in that case. *See*, *Williams*, 553 S.E.2d at 508 ("The case law cited throughout this opinion clearly supports the proposition that a prosecutor's typical duties are 'judicial' or 'quasi-judicial' in nature").

A review of South Carolina statutory and case law confirms that the RCSO is being sued for conduct carried out as the prosecutor of the shoplifting charge. The Appellant's name was on a warrant for a misdemeanor charge of shoplifting which was triable in magistrate's court. *See*, S.C. Code Ann. § 16-13-110. In *State v. Messervy*, 258 S.C. 110, 187 S.E.2d 524 (1972), the South Carolina Supreme Court approved the process whereby an arresting officer may serve as the prosecutor of traffic offenses in magistrate's court. The Court acknowledged that "[i]t has long been the practice in the magistrate's courts of this State for the arresting patrolman to prosecute the cases which he has made." 187 S.E.2d at 525. That principle has been reaffirmed in numerous cases. *See e.g.*, *State v. Sossamon*, 298 S.C. 72, 378 S.E.2d 259 (1989); *State v. Rainwater*, 376 S.C. 256, 657 S.E.2d 449 (2008); *In the Matter of Richland County Magistrate's Court*, 389 S.C. 408, 699 S.E.2d 161 (2010). Later, in 1992, the Supreme Court extended that prosecutorial authority to licensed security guards to prosecute a misdemeanor shoplifting charge. Citing *Messervy*, the Supreme Court acknowledged existing approval of "the practice of allowing law enforcement officers to prosecute misdemeanor cases in magistrate's and municipal courts." *Easley v. Cartee*, 309 S.C. 491, 492 (1992). The Court then extended that holding and ruled "that licensed security officers may prosecute misdemeanor cases in magistrate's or municipal court." *Id*. The Court further explained that "[i]n our view, the prosecutorial authority granted to law enforcement officials and licensed security guards applies with equal force to non-traffic misdemeanors within the jurisdiction of a magistrate's or municipal court." *Id*., n.2.

In sum, the South Carolina appellate courts have recognized that law enforcement officers are granted prosecutorial authority once misdemeanor charges are brought and are then prosecuted by the officers in magistrate's or municipal court. Like a solicitor, that function includes the decision as to when and why charges may be dismissed or nolle prossed. That

function is indisputably prosecutorial in nature and thus falls within the scope of prosecutorial or quasi-judicial immunity under subsections (1) and (2) of Section 15-78-60. Certainly, if South Carolina law requires law enforcement to prosecute criminal cases in magistrate's and municipal court, then the law should also provide the same prosecutorial immunity that solicitors enjoy. *See*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 276 (1993) ("When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same").

Additionally, to the extent that the Appellant attempts to carve out an exception to immunity for "administrative" acts, that is a distinction without a difference. The prosecutorial immunity provided under the Tort Claims Act is broadly defined to include "administrative action or inaction" under subsection (2). That provision was not at issue in *Faile*. Therefore, to the extent that the Appellant complains that the RCSO did not act with greater haste in dismissing the warrant after April 28, 2017, that would fall, at the very least, within the scope of "administrative inaction," which, consistent with the trial court's ruling, is entitled to immunity under the Tort Claims Act.

Accordingly, the trial court was correct in granting summary judgment on the Appellant's causes of action, including the malicious prosecution claim and any allegations of gross negligence.[2]

[2] The trial court also relied on Section 15-78-60(20), which provides immunity for "a loss resulting from an act or omission of a person other than an employee including but not limited to the criminal acts of third persons." S.C. Code Ann. § 15-78-60(20). The court concluded that "any damages sustained in this matter arose as a result of the criminal activities of his brother [Mack Paul]." (Order I, p. 2). The Appellant does not dispute the application of Section 15-78-60(20) as to the events that occurred until the RCSO deputies learned on April 28, 2017, that the person arrested for shoplifting was apparently Mack Paul rather than Kevin Paul. The Appellant seems to contend that by April 28, 2017, the criminal conduct of his brother did not have any causative effect on causing any harm to him. The RCSO disagrees. The criminal conduct of the brother set in motion the entire series of events. Without the brother giving a

II. The trial court was correct in granting summary judgment on the Appellant's cause of action for malicious prosecution based on immunity pursuant to Section 15-78-60(23), which is an alternative basis for summary judgment that the Appellant has not challenged on appeal.

In addition, the trial court ruled that the Appellant's malicious prosecution claim is barred by Section 15-78-60(23) of the Tort Claims Act. (Order I, p. 7). Paul did not appeal that ruling. There is no discussion of Section 15-78-60(23) in the Appellant's opening brief -- either in the statement of issues on appeal or in the arguments. As a result, this implicates the two-issue rule as a basis for affirmance. In applying the "two-issue" rule, the Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a trial court that is not excepted to constitutes a basis for affirming the trial court and is not reviewable on appeal." 348 S.E.2d at 845.

As the trial court ruled, the RCSO enjoys sovereign immunity under Section 15-78-60(23) for the Appellant's malicious prosecution claim. It is well settled that the elements of malicious prosecution under state law are: "(1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867, 870-71 (Ct. App. 2012). Thus, one of the six elements that the Appellant

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false identity, the Appellant would never have been implicated nor had his name placed on an arrest warrant.

needs to prove is "the institution or continuation of original judicial proceedings." In virtually identical language, Section 15-78-60(23) provides absolute immunity for the "institution or prosecution of any judicial or administrative proceeding." S.C. Code Ann. § 15-78-60(23). Therefore, because an element of a malicious prosecution cause of action falls squarely within an immunity provision, authority from this Court and the Supreme Court dictates that a governmental entity enjoys absolute immunity for that cause of action.

This issue has often arisen in the context of Section 15-78-60(17), by which a governmental entity enjoys absolute sovereign immunity for "conduct ... which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). In applying this immunity exception, the appellate courts have looked strictly at the elements of the cause of action to determine if sovereign immunity attaches. In the seminal case of *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 642 S.E.2d 726 (2007), the Supreme Court determined that "[n]one of the elements required for either cause of action ... include 'intent to harm.' Although it is true that harm may result from an intentional interference with existing or prospective contractual relations, it is not necessary that the interfering party intend such harm." 642 S.E.2d at 732. Consequently, where "intent to harm" is not an element of the cause of action, the Court concluded that the immunity exception is inapplicable. Citing *Eldeco*, this Court later applied the same analysis in *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008), with respect to an abuse of process claim. In that case, this Court observed that "the tort of abuse of process contains neither an element of intent to harm, nor actual malice." 665 S.E.2d at 214. Because neither "intent to harm" nor "actual malice" is an element of the abuse of process claim, this Court concluded that such a claim could proceed against the entity.

In the present case, unlike in *Eldeco* and *Swicegood*, a requisite element of a malicious prosecution claim -- the institution and prosecution of a judicial proceeding -- does constitute immune conduct under the Tort Claims Act. As a result, the RCSO is entitled to absolute sovereign immunity on the Appellant's malicious prosecution claim on this additional basis.

This very issue was adjudicated in the case of *McCoy v. City of Columbia*, 929 F.Supp.2d 541 (D.S.C. 2013), where the United States District Court correctly ruled that a malicious prosecution claim against a municipality was barred by Section 15-78-60(23). Judge Joseph F. Anderson Jr. wrote as follows:

> The City also contends that it is immune from liability for McCoy's malicious prosecution claim under the SCTCA's immunity relating to "the institution or prosecution of a judicial proceeding." S.C. Code Ann. § 15-78-60(23). The Magistrate Judge recommended that the court grant the City's motion for summary judgment on this issue because McCoy's cause of action for malicious prosecution plainly falls within this express exception. The court agrees.

929 F.Supp.2d at 567, n. 10. Similarly, in *Thompson v. City of Columbia*, 2005 WL 8164911 (D.S.C. 2005), Judge Cameron M. Currie ruled: "It is fairly clear from the plain language of the statute, particularly § 15-78-60(23), that the legislature intended to exclude claims for malicious prosecution from the waiver of immunity for governmental entities in the Tort Claims Act." 2005 WL 8164911, *4. (Emphasis in original). Judge Currie recognized that "[u]nder South Carolina law, the first element of a claim for malicious prosecution is 'institution or continuation of original judicial proceedings, either civil or criminal.'" 2005 WL 8164911, *3. She thus concluded that "there is no set of facts alleged in the complaint or that could be proved to support Plaintiff's claim of malicious prosecution against City, a governmental entity." 2005 WL 8164911, *4. Other federal judges have also dismissed claims for malicious prosecution as

barred by Section 15-78-60(23) immunity. *See*, *Palmer v. Santanna*, 2018 WL 1477600 (D.S.C. 2018); *Terrell v. City of Spartanburg*, 2018 WL 4782334 (D.S.C. 2018).

In sum, the trial court correctly ruled that the RCSO is entitled to absolute sovereign immunity for the institution and prosecution of a criminal proceeding as required by the literal language of Section 15-78-60(23). Quite simply, under the Tort Claims Act, there is no state law remedy for malicious prosecution against a governmental entity. The Court should affirm on the basis of the "two-issue" rule because the Appellant did not appeal that ruling, and whether correct or not, that ruling is the law of the case.

III. The trial court was correct in granting summary judgment on the gross negligence cause of action based on Tort Claim Act immunity defenses and lack of duty.

In his opening brief, the Appellant argues that the RCSO "voluntarily assumed" a duty "to clear the false charges against the Plaintiff." *See*, Appellant's Opening Brief, p. 14. No such "voluntary duty" was even pled in the Complaint. Nonetheless, the trial court disposed of the Appellant's gross negligence claim based on the Tort Claims Act immunity defenses as discussed above. A claim of gross negligence against a prosecutor with respect to the dismissal of a criminal charge falls within the scope of prosecutorial or "quasi-judicial" immunity under subsections (1) and (2) of Section 15-78-60. Therefore, even if a duty of care exists, it still gives rise to an immune function under the Tort Claims Act.

The trial court also dismissed the gross negligence cause of action on an additional basis citing *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997). In that case the Supreme Court ruled that a sheriff and his deputies were entitled to judgment as a matter of law on a negligence claim related to the attempted execution of an arrest warrant against the wrong individual -- a

similar mistaken identity scenario as in the case at bar. The Supreme Court explained that "the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them." 484 S.E.2d at 592. The Supreme Court further ruled that "the police owe a duty to the public at large and not to any individual." *Id*. Consequently, based on *Wyatt*, the trial court found no duty of care was owed to Paul.

On appeal, the Appellant has not challenged the trial court's decision based on *Wyatt*, and hence, his appeal on the gross negligence claim is barred by the "two-issue" rule. In fact, the Appellant makes no mention in his opening brief of the *Wyatt* decision or the trial court's ruling based thereon. Nonetheless, the trial court's reliance on *Wyatt* is sound and should be affirmed on its merits. As *Wyatt* holds, the RCSO did not owe a duty of care sounding in tort to proceed without error when it brings legal action. That would be equally applicable to a decision to dismiss a pending criminal charge. For these reasons, the summary judgment on the gross negligence claim should be affirmed.

IV. The trial court was correct in granting summary judgment on the defamation cause of action based on Section 15-78-60(23) immunity and a qualified privilege.

The Appellant also contends that the trial court erred in granting summary judgment on his defamation claim. In his opening brief, the Appellant argues that Deputy Melvin Brown defamed the Appellant when he provided identifying information to Jonathan Simons, an asset protection associate with Wal-Mart. It is undisputed, however, that the shoplifter (now known to be Mack Paul) had no identification on his person and verbally identified himself as Kevin Paul. The shoplifter also provided Kevin Paul's date of birth. With that information, Deputy Brown made an inquiry through the National Crime Information Center (NCIC) and learned additional

identifying information on the Appellant, which he shared with the Wal-Mart official. Thus, the defamation claim is premised on the argument that the RCSO deputy defamed the Appellant by conveying the mistaken identity of the shoplifter that had been communicated to him by the shoplifter, that being the Appellant's own brother.

"The tort of defamation permits a plaintiff to recover for injury to his reputation caused by the defendant's communication to others of a false message about plaintiff." *McBride v. School District. of Greenville County*, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010). "To prove defamation, the plaintiff must show: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Id*. "Under the law of defamation, however, certain communications give rise to qualified privileges, including the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability." *West v. Morehead*, 396 S.C. 1, 720 S.E.2d 495, 498 (Ct. App. 2011). *See*, *White v. Wilkerson*, 328 S.C. 179, 493 S.E.2d 345, 348 (1997) ("[t]he fair report privilege protects fair and accurate reports of judicial records and proceedings and other official acts, reports, and records"); *Padgett v. Sun News*, 278 S.C. 26, 31, 292 S.E.2d 30, 33 (1982) (fair and accurate reports based on public records were privileged). *See also, Yohe v. Nugent*, 321 F.3d 35, 43 (1st Cir. 2003) ("[t]he fair report privilege protects published reports of arrests by police").

It is well settled that "the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court." *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743, 749 (Ct. App. 2001). "It is the duty of the trial judge to determine if the statement is privileged." *Id*. In general terms, the law on qualified privilege provides that "one who

publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Murray*, 542 S.E.2d at 748. The Supreme Court has explained:

> In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

Id., *citing Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641, 643 (1946).

In case at bar, the trial court determined that the communication at issue is subject to a qualified privilege which is consistent with South Carolina law. Deputy Brown was providing information to the victim (Wal-Mart) regarding the identity of the person arrested for shoplifting. A mis-identity took place only because the shoplifter gave his own brother's name and date of birth, which Deputy Brown did not know to be untrue.[3] The Appellant has not shown nor argued any abuse of the privilege or that the communication was made with actual malice.[4]

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[3] In a similar context, the Supreme Court recently expressed the public policy implications that generally arise where mistaken information about the identity of a suspect is communicated in good faith as part of a law enforcement investigation. The Supreme Court found that "punishing an individual who mistakenly identifies a criminal suspect or unwittingly provides what is later discovered to be incorrect information in a criminal investigation serves no purpose." *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 826 S.E.2d 609, 616 (2019). That discussion clearly supports the recognition in the present case that a qualified privilege applies to an exchange of information in good faith between law enforcement and a crime victim within the context of a criminal investigation.

[4] *See, Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126, 134 (1999) ("[w]here the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded").

The trial court also concluded that the defamation claim is barred by Section 15-78-60(20) because the incorrect information conveyed by Deputy Brown to the Wal-Mart official resulted from the criminal conduct of the shoplifter, Mack Paul, when he provided a false identity to law enforcement. *See*, S.C. Code Ann. § 16-17-725 ("It is unlawful for a person to misrepresent his identification to a law enforcement officer during a traffic stop or for the purpose of avoiding arrest or criminal charges"). The trial court concluded that "'but for' Plaintiff's brother's shoplifting and then giving false [information] to the police, Plaintiff would not have suffered the damages as alleged in the Complaint." (Order I, p. 4).

In his brief, the Appellant does not take exception with the application of Section 15-78-60(20) immunity. He appears only to challenge the finding of a qualified privilege based upon an issue that was never pled nor raised in the court below -- that the RCSO had a duty "to correct that false, defamatory publication once they had notice of its falsity." *See*, Appellant's Opening Brief, p. 21. Because that argument was never made in the trial court, it cannot be made for the first time on appeal. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). Additionally, it should be noted that the Appellant offers no supporting authority and makes the argument merely in a brief, conclusory manner.[5]

Nonetheless, even if the Court considers the merits of that argument, there is no South Carolina authority holding that a publisher of a defamatory statement has a duty to make a

[5] "[A]n issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

retraction after learning that the statement may be incorrect. The courts addressing that issue have rejected any notion of a duty to retract. For instance, in *Lohrenz v. Donnelly*, 223 F.Supp.2d 25 (D.D.C. 2002), the federal district court ruled that "there is no duty to retract or correct a publication, even where grave doubt is cast upon the veracity of the publication after it has been released." 223 F.Supp.2d at 56. *See also*, *D.A.R.E. America v. Rolling Stone*, 101 F.Supp.2d 1270, 1287 (C.D. Cal. 2000) ("There is no authority to support Plaintiffs' argument that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication"); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 689 F.Supp. 483, 488 (E.D. Pa. 1988) ("Counsel have not been able to come up with any case in any American jurisdiction which recognizes a claim sounding in damages for failure to retract what is defamatory"). Thus, the Appellant cannot contest summary judgment on the defamation claim by now arguing for the first time on appeal that the RCSO had a duty to provide Wal-Mart with correct information after it was learned that the shoplifter had provided a false identity. Certainly, there is no support for denying a qualified privilege on that basis.

In sum, the trial court was correct in granting summary judgment to the RCSO on the Appellant's defamation claim.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Richland County Sheriff's Office respectfully requests that this Court affirm the trial court's orders granting summary judgment on all causes of action.

Respectfully submitted,

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July 1, 2020

THE STATE OF SOUTH CAROLINA
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Richland County Sheriff's Office, ... Respondent.

CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Amended Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only this the 1st day of July 2020:

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Robert D. Garfield, Esquire
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s/ Andrew F. Lindeman

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July 1, 2020

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Kevin L. Paul v. Richland County Sheriff's Office
Appellate Case Number: 2020-000550
Civil Action Number: 2018-CP-40-1224
Claim Number: Risk Management
Our File Number: 314.20300

RECEIVED
Jul 01 2020
SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed for filing the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (g)(3) of the Court's Amended Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020).

If you have any questions, please advise. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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