THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2018-CP-04-01127

Appellate Case No. 2020-000818

Lisa Styles,

Respondent-Appellant,

v.

Southeastern Grocers, LLC
And BI-LO, LLC.

Appellants-Respondents.

RESPONSE BRIEF OF APPELLANTS-RESPONDENTS TO CROSS-APPEAL

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III. STATEMENT OF ISSUE ON CROSS-APPEAL

Whether the Trial Court properly granted a directed verdict in favor of Defendants on Plaintiff's claim for malicious prosecution.

IV. STATEMENT OF THE CASE

Defendants Southeastern Grocers, LLC ("SEG") and its subsidiary, Bi-Lo, LLC, ("Bi-Lo") (collectively referred to herein as "Defendants") rely upon and incorporate by reference herein the Statement of the Case set forth in its Initial Brief of Appellants-Respondents filed with this Court on October 21, 2020. The only additional facts Defendants highlight here in response to Plaintiff's cross-appeal are that Plaintiff was never arrested for taking merchandise without authorization from Defendants' store, nor was a warrant issued for her arrest. (Tr. 378:2-8 (Styles); Tr.410: 8-13 (Burdette)).

The Trial Court relied upon this unrefuted evidence in granting Defendants' Motion for Directed Verdict on Plaintiff's malicious prosecution claim and concluded that, as a matter of law, no "process" was ever commenced against Plaintiff, which is an essential element of the claim. (Tr. 806:3-6). Indeed, the Trial Court specifically noted that a warrant was never issued for Plaintiff's arrest, a criminal case number was never issued, and a dismissal was not entered because a criminal case was never instituted. (Tr. 806:13-16). The record is unrefuted on these points.

V. STANDARD OF REVIEW

When reviewing a trial court's order on a motion for directed verdict, an appellate court must employ the same standard as the trial court. *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). That standard mandates that when deciding whether to grant or deny a directed verdict motion, the trial court is only concerned with the existence or non-existence of evidence. *Sims v. Giles,* 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001). While the court must review the evidence and all reasonable inferences in the light most favorable to the non-moving party, if the evidence as a whole is susceptible to only one reasonable inference, no jury

issue is created and a directed verdict motion is properly granted. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); *see also Lucas v. Rawl Family Ltd. Partnership,* 359 S.C. 505, 512, 598 S.E.2d 712, 715 (2004).

Moreover, a trial court's ruling on a directed verdict motion will only be reversed by the appellate court if no evidence supports the ruling below. *Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 412–13, 831 S.E.2d 152, 154 (Ct. App. 2019), reh'g denied (Aug. 22, 2019) (citing *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016)). Notably, the granting of a directed verdict will be affirmed by an appellate court where a party fails to produce evidence on any one element of its alleged cause of action. *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020), reh'g denied (Aug. 13, 2020) (citing *Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 462, 702 S.E.2d 372, 374 (Ct. App. 2010) ("On review, an appellate court will affirm the granting of a directed verdict in favor of the defendant when there is no evidence on any one element of the alleged cause of action.")) (citations omitted).

VI. ARGUMENT

The Trial Court properly granted a directed verdict on Plaintiff's malicious prosecution claim because she failed to prove the element of "process" which is essential to a claim for malicious prosecution under South Carolina law.

Under South Carolina law, a plaintiff in a malicious prosecution action must show (1) institution or continuation of original proceedings, either civil or criminal; (2) by, or at the insistence of, the defendant; (3) termination of such proceeding in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage. *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 430, 635 S.E.2d 562, 565 (Ct. App. 2006) (citing *Parrott v. Plowden Motor Co.,* 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965)). In directing a verdict against Plaintiff on this claim, the Trial Court specifically found that Plaintiff failed to establish

the very first element of this cause of action; i.e., the institution or continuation of original proceedings, either civil or criminal, i.e., process.

The record clearly shows that, even though Defendants called the police to report Plaintiff's shoplifting, Plaintiff was never arrested, an arrest warrant for her was never issued, and she was not otherwise subject to any judicial proceeding as a result of Defendants' actions. (Tr. 378:2-8 (Styles); Tr.410: 8-13 (Burdette)). Nonetheless, in her cross-appeal, Plaintiff repeatedly attempts to circumvent these critical facts and distort South Carolina case law to support her tenuous position that the mere decision by Defendants to call the police was all that was necessary to establish sufficient "process" for her malicious prosecution claim. This argument is not only incorrect, it is directly contradicted by the very authorities Plaintiff cites in her cross-appeal.

First, Plaintiff cites to F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts*, 496 (4th ed. 2011). Plaintiff's quote from this treatise, however, is misleading because it is presented out of context. While the treatise explains that a shopkeeper may be liable for malicious prosecution for calling the police, it does not state that there is liability without an arrest, a warrant or some other proceeding being instituted as Plaintiff implies. *Id.* In fact, the case cited by the treatise for this proposition makes clear that the opposite is true:

> **In order to sustain an action for malicious prosecution, one must first be charged with the commission of a crime** and exonerated, Segusky v. Williams, 89 S.C. 414, 71 S.E. 971, 36 L.R.A.,N.S., 230; Aiken v. Lancaster Cotton Mills, 85 S.C. 180, 67 S.E. 166; Whaley v. Lawton, 57 S.C. 256, 35 S.E. 558; Frierson v. Hewitt, 2 Hill 499; Keels v. City of Sumter, 95 S.C. 203, 78 S.E. 893; see also, Annotations, 36 A.L.R.2d 786.

Elletson v. Dixie Home Stores, 231 S.C. 565, 570–71, 99 S.E.2d 384, 386–87 (1957) (emphasis added). Plaintiff attempts to rely on the *Elletson* case as well, but again misrepresents the decision and contorts the court's language to support her spurious position that simply calling the police—without a resulting arrest, warrant or proceeding—constitutes sufficient "process" for a malicious

prosecution claim. To the contrary, the *Elletson* court specifically noted that the shopkeeper's actions in procuring the arrest were enough to hold the shopkeeper liable – but not without an arrest as Plaintiff contends:

> The unlawful arrest of respondent was the proximate result of its manager's instigation and conduct and it is liable therefor even though he did not make or sign the affidavit or warrant, Wingate v. Postal Tel. & Cable Co., 204 S.C. 520, 30 S.E.2d 307; see also, 54 C.J.S. Malicious Prosecution §§ 13-14, p. 966.

Elletson, 231 S.C. at 575. Indeed, the plaintiff in *Elletson* was not only arrested, but was booked on a charge of shoplifting, placed in a cell for a half hour and eventually tried by a jury for the charge. *Id.* 571. Plaintiff's reliance on *Barber v, Whirlpool Corp.,* 34 F.3d 1268, 1277 (4th Cir. 1994) is similarly misplaced because in *Barber*, even though the plaintiff was not arrested, two warrants were issued for his arrest.

Plaintiff also misses the mark with *Clemmons v. Nicholson*, 180 S.C. 54, 185 S.E. 34 (1936). In *Clemmons,* the plaintiff appealed a lower court's finding that no malicious prosecution arose because an arrest was never made. *Id.* at 35. Contrary to Plaintiff's assertions, the *Clemmons* court did not disregard the need for an arrest to sustain a claim for malicious prosecution. *Id.* In fact, in reversing the lower court's order, the *Clemmons* court concluded that because an affidavit had been submitted charging the plaintiff with the crimes of murder and arson, the magistrate had issued a warrant for the arrest of the plaintiff, the plaintiff voluntarily appeared and submitted himself to the jurisdiction of the court, and the court acted thereupon, there had actually been "at least a constructive arrest" which could sustain a malicious prosecution claim. *Id.* at 36.

Plaintiff further attempts to muddy this issue by conflating the requirements for an abuse of process claim and a malicious prosecution claim. For example, Plaintiff refers to *Huggins v. Winn Dixie Greenville, Inc.,* 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) for the proposition that malicious prosecution "merely requires 'employment of legal process' or 'judicial process'".

This is, however, a blatant mischaracterization of the *Huggins* decision. In *Huggins,* the court was highlighting the differences between a claim for malicious prosecution and a claim for abuse of process when it stated that "malicious prosecution consists of maliciously causing process to be issued." *Id.* (emphasis added) (internal citations omitted). The "employment of legal process" language cited by Plaintiff was actually used by the *Huggins* court to distinguish abuse of process as "the employment of legal process for some purpose other than that which it was intended by the law to effect." *Id.* (internal citations omitted). Similarly, Plaintiff relies on *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union,* 351 S.C. 65, 567 S.E.2d 251 (Ct.App. 2002) to argue that the term "process" should not be given a "narrow" interpretation. Notably, however, the *Food Lion* decision was predicated on an appeal of the dismissal of a claim for abuse of process and did not involve any claims for malicious prosecution. *Id.* Despite Plaintiff's assertions to the contrary, neither *Huggins* nor *Food Lion* support finding a sufficient "proceeding" exists for purposes of a malicious prosecution claim where, as here, it is unrefuted that Plaintiff was never arrested, a warrant was never issued and no proceedings (criminal or civil) were ever commenced against Plaintiff as a result of any action by Defendants. Indeed, *Huggins* and *Food Lion* do not expand the definition of process, even in the context of an abuse of process claim.

Throughout her cross-appeal, Plaintiff argues that an arrest was not necessary for Defendants to be liable for malicious prosecution. She urges this Court to find that Defendants' act of simply calling the police to report her shoplifting was sufficient—even without a resulting arrest, warrant or proceeding. This is simply not the law in South Carolina. Indeed, if this Court were to adopt Plaintiff's reasoning, then any person who calls in a complaint to the police which does not result in an arrest, the issuance of a warrant or the institution of a judicial proceeding would be subject to potential civil liability for malicious prosecution. This is clearly not a result

the law intends. Plaintiff's inability to establish this very first element of her malicious prosecution claim (the existence of which all the subsequent elements rely upon) supports this Court's entry of directed verdict.

VII. CONCLUSION

For all the reasons set forth above, Defendants' request this Court affirm the Trial Court's Directed Verdict in favor of Defendants on Plaintiff's malicious prosecution claim.

Respectfully submitted this 18th day of November, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via the Court's CM/ECF system this *18th* day of November 2020 to:

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