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Nov 08 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Judge

Case No. 2020-CP-08-00773
Appellate Case No. 2021-001173

Stephanie Michelle GardnerAppellant,

vs.

Berkeley County Sheriff's Office and
Town of Moncks Corner, Respondents,

APPELLANT'S INITIAL BRIEF

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INDEX

Table of Authorities ii

Questions Presented iii

Statement of Case 1

Statement of Facts 2

Argument 4

 Question One. DID THE COURT ERR IN RULING ON SUMMARY JUDGMENT THAT THE ARREST AND PROSECUTION OF GARDNER WAS SUPPORTED BY PROBABLE CAUSE. 4

 Question Two DID THE COURT ERR IN RULING ON SUMMARY JUDGEMENT THAT GARDNER WAS NOT FALSLY ARRESTED BECAURE THAT WARRANT WAS ISSUED AFTER THE ARRESTED..... 7

 Question Three DID THE COURT ERR IN RULING ON SUMMARY JUDGEMENT THAT THE BERKELEY COUNTY SHERIFF’S OFFICE DID NOT ARREST AND PROSECUTE GARDNER RELYING ON AN AGREEMENT BETWEEN THE SHERIFF’S OFFICE AND THE TOWN OF MONCKS CORNER. 8

 Question Four DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGEMENT THAT THE TORT CLAIMS ACT PROVIDS IMMUNIITY FOR FALSE ARREST AND MALICIOUS PROSECUTION FOR ARREST AND PROSUCUTION WITHOUT PROBABLE CAUSE. 9

 Question Five DID THE TRIAL COURT ERR IN RULING ON SUMMARY JUDGEMENT THAT THE BERKELEY COUNTY SHERIFF’S OFFICE WAS PRIVLEDGED TO PUBLIC A LIBELOUS ACCUSATION TO THE PUBLIC AT LARGE ON FACEBOOK WHEN THE SHERIFF’ OFFICE HAD KNOWLEDGE THAT THE ARREST WAS WITHOUT PROBABLE CAUSE 10

 Question Six DID COURT ERR IN RULLING THAT THE THERE NOT A GENUINE ISSUE OF MATERIAL FACT AS TO MALICE..... 12

Conclusion 12

TABLE OF AUTHORITIES

CASES

Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (S.C. 1986)11

Carter v. Bryant, 429 S.C. 298, 838 S.E.2d 523 (S.C. App. 2020)7,9

Davis v. Niederhof, 143 S.E.2d 367, 246 S.C. 192 (S.C. 1965)11

Gist v. Berkeley County Sheriff’s Dept., 336 S.C. 611, 521 S.E.2d 163 (S.C. App. 1999)9

Hassell v. City of Columbia, 430 S.C. 620, 846 S.E.2d 373 (S.C. App. 2020)9

Kunst v. Loree, 424 S.C. 24, 817 S.E.2d 295 (S.C. App. 2018)11

Pallares v. Seinar, 407 S.C. 359, 756 S.E.2d 128 (S.C. 2014)12

Richardson v. STATE-RECORD COMPANY, INC., 330 S.C. 562, 499 S.E.2d 822 (S.C. App. 1998)10

State v. Ballenger, 454 S.E.2d 355, 317 S.C. 364 (S.C. App. 1995)5

State v. Ellis , 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974)4,4

State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773,(1981)3,5

State v. Lane , 271 S.C. 68, 245 S.E.2d 1145

State v. Stewart, 858 S.E.2d 808 (S.C. 2021)4,5

Wortman v. Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (S.C. 1992)9

OTHER AUTHORTIES

Constitution of South Carolina Article 1, Section 109

QUESTIONS PRESENTED

1. DID THE COURT ERR IN RULING ON SUMMARY JUDGMENT THAT THE ARREST AND PROSECUTION OF GARDNER WAS SUPPORTED BY PROBABLE CAUSE.4

2. DID THE COURT ERR IN RULING ON SUMMARY JUDGEMENT THAT GARDNER WAS NOT FALSLY ARRESTED BECAURE THAT WARRANT WAS ISSUED AFTER THE ARRESTED.....7

3. DID THE COURT ERR IN RULING ON SUMMARY JUDGEMENT THAT THE BERKELEY COUNTY SHERIFF’S OFFICE DID NOT ARREST AND PROSECUTE GARDNER RELYING ON AN AGREEMENT BETWEEN THE SHERIFF’S OFFICE AND THE TOWN OF MONCKS CORNER.9

4. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGEMENT THAT THE TORT CLAIMS ACT PROVIDS IMMUNIITY FOR FALSE ARREST AND MALICIOUS PROSECUTION FOR ARREST AND PROSUCUTION WITHOUT PROBABLE CAUSE. ..10

5.DID THE TRIAL COURT ERR IN RULING ON SUMMARY JUDGEMENT THAT THE BERKELEY COUNTY SHERIFF’S OFFICE WAS PRIVLEDGED TO PUBLIC A LIBELOUS ACCUSATION TO THE PUBLIC AT LARGE ON FACEBOOK WHEN THE SHERIFF’ OFFICE HAD KNOWLEDGE THAT THE ARREST WAS WITHOUT PROBABLE CAUSE10

6. DID COURT ERR IN RULLING THAT THE THERE NOT A GENUINE ISSUE OF MATERIAL FACT AS TO MALICE.....12

STATEMENT OF THE CASE

This action for False Arrest, Malicious Prosecution, Abuse of Process and Defamation was brought by Stephanie Michele Gardner (Gardner) against Town of Moncks Corner (TOMC) and Berkeley County Sheriff's Office on March 20, 2020. TOMC filed an answer March 24, 2020 as a qualified general denial and defenses under the SC Tort Claims Act. BCSO filed an Answer on March 15, 2020 and an Amended Answer on November 19, 2020. The Answer is a qualified general denial and defenses under the SC Tort Claims Act. BCSO filed a motion for Summary Judgment on February 19, 2021. TOMC filed Summary Judgment Motion on March 1, 2021.

A hearing on the motion was held on April 5, 2021 before Judge Dickson. Judge Dickson granted Summary Judgment to both Defendant on April 27, 2021. Gardner filed a motion to Reconsider on May 6, 2021. The Motion to Reconsider was denied on September 13, 2021. Notice of Appeal was filed October 8, 2021

STATEMENT OF THE FACTS

Late on the evening of April 27, 2018, Stephanie Gardner went to the residence of her friend Samantha Eason on Loadstone Court in Moncks Corner because she needed a place to stay overnight. Eason was in the process of moving out and the residence had no electricity. Eason and Gardner left the residence shortly after Gardner arrived and went to a store to buy beer. Gardner and Eason returned to the residence and were trying to recharge a phone from a battery at the rear of the residence. Shortly after their return members of the Berkeley County Sheriff's Office Drug Enforcement Community Action Team including Brooks Barlow arrived to serve a family court bench warrant on Michael Molyneaux. When the Law Enforcement officers arrived Molyneaux was outside working on a motor vehicle. Molyneaux ran inside the residence through the front door and locked himself in a bathroom. Members of the task force including Barlow entered the residence in pursuit of Molyneaux. When Barlow entered the rear of the residence, he found Eason, Gardner, Cory Gethers, and Nathan Pesek around the battery being used to charge the phones. In response to a question by Barlow, Eason stated that the residence was her home. Eason later identified the bedroom as being shared by her and Molyneaux. Eason consented to a search of her home. There was marijuana found in the Eason bedroom and she told Barlow it belonged to her. No one was charged with possession of the marijuana belonging to Eason.

Lt. Ham discovered drugs hidden in a couch along with a phone belonging to Gethers. Barlow confronted Plaintiff, Eason, Gethers and Pesek regarding the drugs found in the couch and told them "since no one claimed ownership of the plastic bags containing the said substance they would all be arrested due to it being in a common area of the residence."

Gardner, Eason, Pesek, Gethers, and Molyneaux were then all arrested at the scene by Barlow and charged with possession with intent to distribute the drugs found in the couch. On

STATEMENT OF THE FACTS

Late on the evening of April 27, 2018, Stephanie Gardner went to the residence of her friend Samantha Eason on Loadstone Court in Moncks Corner because she needed a place to stay overnight. Eason was in the process of moving out and the residence had no electricity. Eason and Gardner left the residence shortly after Gardner arrived and went to a store to buy beer. Gardner and Eason returned to the residence and were trying to recharge a phone from a battery at the rear of the residence. Shortly after their return members of the Berkeley County Sheriff's Office Drug Enforcement Community Action Team including Brooks Barlow arrived to serve a family court bench warrant on Michael Molyneaux. When the Law Enforcement officers arrived Molyneaux was outside working on a motor vehicle. Molyneaux ran inside the residence through the front door and locked himself in a bathroom. Members of the task force including Barlow entered the residence in pursuit of Molyneaux. When Barlow entered the rear of the residence, he found Eason, Gardner, Cory Gethers, and Nathan Pesek around the battery being used to charge the phones. In response to a question by Barlow, Eason stated that the residence was her home. Eason later identified the bedroom as being shared by her and Molyneaux. Eason consented to a search of her home. There was marijuana found in the Eason bedroom and she told Barlow it belonged to her. No one was charged with possession of the marijuana belonging to Eason.

Lt. Ham discovered drugs hidden in a couch along with a phone belonging to Gethers. Barlow confronted Plaintiff, Eason, Gethers and Pesek regarding the drugs found in the couch and told them "since no one claimed ownership of the plastic bags containing the said substance they would all be arrested due to it being in a common area of the residence."

Gardner, Eason, Pesek, Gethers, and Molyneaux were then all arrested at the scene by Barlow and charged with possession with intent to distribute the drugs found in the couch. On

April 28, 2018, after the arrests identical warrants were obtained by the defendants for all those arrested. The warrants all used this identical language.

“On 4/27/2018, while located at 112 Lodestone Ct., Moncks Corner, Berkeley County, SC, the defendant, Stephanie Gardner, did violate Section 44-53-370 (b) (SC Code of Laws, PWID Heroin. While located on a consent search of the said residence, the defendant was an occupant, Law Enforcement Officers located 13 gg of presumptive Methamphetamine, 14.9 gg of presumptive cocaine, .4 gg of presumptive Heroin and .3 gg of presumptive Cocaine Base under a couch cushion in the living room of the residence. All of which was done against the peace, law, and dignity of the State of South Carolina.

Gardner’s bonds amounts were set at a total of \$210,000.00. She was jailed for 45 days until her bond was drastically reduced and it was 180 days from her arrest until the charges were dismissed.

Short after her arrest the Berkeley County Sheriff Office posted her name and the charges on Facebook accusing her of being a drug trafficker.

ARGUMENT

QUESTION ONE

THE COURT ERRED IN RULING ON SUMMARY JUDGMENT THAT THE ARREST AND PROSECUTION OF GARDNER WAS SUPPORTED BY PROBABLE CAUSE.

In *State v. Stewart*, 858 S.E.2d 808 (S.C. 2021) the South Carolina Supreme Court set for the elements of proof for possession crimes. In *Stewart*, a confidential informant made a controlled buy of heroin from Stewart. The Laurens Sheriff obtained a search warrant for Stewart's home where the drug buy occurred. The home was shared with Stewart's girlfriend. 23.83 grams of heroin in a large bag in a plastic basket on top of the refrigerator, fifty-six oxycodone tablets in a tinfoil wrapper in the same plastic basket, a digital scale with a powdery residue on it, and \$2,730 in cash were found in the home. At trial the jury was charged, "Constructive possession means that the defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found." This was found to be error. The Court also charged "The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control" this was also found to be error. In setting for the elements of possession the Court stated:

State must prove two elements. First—as we originally stated—the State must prove the defendant had either actual physical custody of the drugs, or the right or power to exercise control over the drugs. See *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981) ("Actual possession" requires "actual physical custody" of the drugs and "constructive possession" requires "the right to exercise dominion and control" of the drugs); *Ellis*, 263 S.C. at 22, 207 S.E.2d at 413 (similar, but stating the first element as "the power ... to control its disposition or use"). Second—as we originally stated—the State must prove the defendant had "knowledge of [the] presence" of the drugs. *State v.*

Brown , 267 S.C. 311, 315, 227 S.E.2d 674, 676 (1976) ; see also *Hudson* , 277 S.C. at 202, 284 S.E.2d at 774 (requiring proof of knowledge). In *State v. Lane* , 271 S.C. 68, 245 S.E.2d 114 (1978), discussing *Ellis* and *Brown* , we explained "knowledge" means "the accused must have an 'intent to control [the] disposition or use' " of the drugs. 271 S.C. at 73, 245 S.E.2d at 116. Under *Lane* , the second element is now stated as the defendant must have **knowledge of the drugs and the intent to control their disposition or use.** [emphasis added]

State v. Stewart 858 S.E.2d 818 at 810.

The Court also approved the statement: "that mere presence at the scene where the drugs were found is not enough to prove possession." *State v. Stewart* 858 S.E.2d 818 at 812.

In *State v. Ballenger*, 454 S.E.2d 355, 317 S.C. 364 (S.C. App. 1995) this court stated "The State did not prove actual possession by Ballenger. The State produced evidence that police found a bag containing crack cocaine on the ground near where Ballenger was apprehended;..." 454 S.E.2d 355at 357

This is how the arresting officer Barlow described his determination of probable cause.

Q. Did you ever see any drugs in the possession of any of the people there?

A. Only in constructive possession, sir.

Q. I'm sorry?

A. Only in constructive possession.

Q. Okay. And who did you believe had constructive possession of these drugs? Everybody was in constructive possession.

Q. And how did you come to that conclusion?

A. Well, state law allows us to do that, State vs.

Muhammad, if you have ability to have dominion and control over the substance.

And, I mean, they were only ten feet away.

I could easily argue that it could have been anybody in that house. Nobody claimed it.

Q. What were the facts that you relied on to determine that Stephanie Gardner had dominion or control of these drugs?

A. They were less than five — probably less than 12 feet away, I would say, from her. She could have easily had access to it, as well as everyone else in the That's all I needed, was probable cause, to make an arrest.

Q. These drugs were not visible to somebody walking by this couch?

A. No, sir.

Q. They weren't open?

A. They were placed there. They were hidden there.

Q. And you asked Ms. Gardner if those were her drugs and she said they were not hers?

A. As everyone else said, too, yes, sir. Everyone said they were not their drugs and they didn't know whose drugs they were.

Q. Did Ms. Gardner ever indicate to you that she had knowledge of those drugs?

A. No, sir, she never indicated she had knowledge of them.

Q. In fact, nobody there indicated that they had knowledge of the drugs?

A. No, sir.

Q. And you had no indication of anything to suggest that Ms. Gardner did have knowledge of those drugs, did you?

A. No, sir, not at that time

Barlow Deposition Page 26 l. 19 to p. 28 l. 23 .

In this case the investigating officer trained as a narcotics officer relied solely on the proximity of Gardner to the hidden drugs contrary to long established precedent.. Neither the warrant nor the incident report show that Gardner had possession or control of the home where the drugs were found. Nor do the warrants or the incident report show any facts from which it could be inferred that Gardner had knowledge of the drugs or any intent to possess them. The small amounts marijuana found in Eason's bedroom were in Eason's admitted possession, so there is no evidence that Gardner had possession of the marijuana.

Since proximity is not a crime, the arrest and prosecution are without probable cause and Gardner was not charged with a crime. If the constitutional prohibition on unreasonable seizures is to mean anything this Court should find that the Plaintiff has made requisite showing to avoid summary judgment on the issue of probable cause.

QUESTION TWO

2. DID THE COURT ERR IN RULING ON SUMMARY JUDGEMENT THAT GARDNER WAS NOT FALSLY ARRESTED BECAURE THE WARRANT WAS ISSUED AFTER THE ARRESTED

As *Carter v. Bryant*, 429 S.C. 298, 838 S.E.2d 523 (S.C. App. 2020) acknowledges a warrantless arrest may support a claim of false imprisonment. Here the warrants were obtained after Gardner was arrested and jailed. Deposition of Gardner page 69 l. 2-12

QUESTON THREE

THE COURT ERRED IN RULING ON SUMMARY JUDGEMENT THAT THE BERKELEY COUNTY SHERIFF'S OFFICE DID NOT ARREST AND PROSECUTE GARDNER RELYING ON AN AGREEMENT BETWEEN THE SHERIFF'S OFFICE AND THE TOWN OF MONCKS CORNER.

The plaintiff took a Rule 20(b) deposition of BCSO. It designated Chief Baker to represent the Defendant in that Deposition. Chief Baker admitted that Gardner was arrested by the BCSO. Deposition of BCSO Chief Baker representing BCSO. Page p. 7 l. 17 The incident report also shows that Barlow was doing the work of the Sheriff's Office at the time of the arrest as her was there as a team serving Family Court Warrants. The service of bench warrants is the responsibly of the Sheriff. Barlow was the affiant on the warrants, and he gave his address as 223 N Live Oak Dr, Moncks Corner. That is the address of the BCSO. The address for TOMC Police is 118 Carolina Ave. Moncks Corner, SC. The incident report shows the Agency as SC0080000 which is the number of BCSO. Barlow prepared the incident report, and it was approved by Hurshel Tanner of BCSO.

The interagency agreement is not something Gardner is a party to. Gardner has provided enough information to show that there is genuine issue of material facts sufficient to preclude summary Judgment.

QUESTION FOUR

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT THAT THE TORT CLAIMS ACT PROVIDES IMMUNITY FOR FALSE ARREST AND MALICIOUS PROSECUTION FOR ARREST AND PROSECUTION WITHOUT PROBABLE CAUSE.

Article 1, Section 10 of the Constitution of South Carolina provides:

10. Searches and seizures; invasions of privacy.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and **no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized**, and the information to be obtained. [emphasis added]

Defendants claim the decision to arrest someone without probable cause is a discretionary decision protected by the Tort Claims Act and that an arrest and prosecution without probable cause is the execution or enforcement of the order of any court or during the lawful implementation of any process.

The South Carolina Supreme Court had a case where the Plaintiff was arrested for activity that was not a crime. The Court declined to extent the immunities of the Tort Claims Act to such acts. There is a proper balancing of the Constitutional rights of citizens with the protection of lawful law enforcement actions. Here Gardner was arrested for being in proximity to hidden drugs as this is not a crime the Tort Claims act does not bar this claim. In similar fashion this Court had before it *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (S.C. App. 1999) and allowed the case to proceed because of genuine issues of material fact as to the existence of probable cause citing *Wortman*. See also *Hassell v. City of Columbia*, 430 S.C. 620, 846 S.E.2d 373 (S.C. App. 2020) and *Carter v. Bryant*, 429 S.C. 298, 838 S.E.2d 523 (S.C. App. 2020)

QUESTION FIVE

THE TRIAL COURT ERRED IN RULING ON SUMMARY JUDGEMENT THAT THE BERKELEY COUNTY SHERIFF'S OFFICE WAS PRIVLEDGED TO PUBLISH A LIBELOUS ACCUSATION TO THE PUBLIC AT LARGE ON FACEBOOK WHEN THE SHERIFF' OFFICE HAD KNOWLEDGE THAT THE ARREST WAS WITHOUT PROBABLE CAUSE

The Sheriff's office published on Facebook that Gardner had been arrested by them for trafficking in drugs. The gist of this would be, to the public, a factual claim that Gardner was a drug trafficker and is defamatory.

The Defendant Sheriff's Office claims this is not libel because the statement that the Plaintiff had be arrested was true. The Sheriff's Office made the arrest and was not reporting on something a third party did. There is no fair reporting privilege for one's own statement. It is as if someone swore out a warrant against a neighbor then published to the other neighbors that the defamed party has been arrested for a crime. The neighbors would believe that the person bringing the warrant had special knowledge of the defamed party's guilt and a claim that it was true that the defamed party had been arrested would be unavailing as a defense.

In *Richardson v. STATE-RECORD COMPANY, INC.*, 330 S.C. 562, 499 S.E.2d 822 (S.C. App. 1998), the State newspaper published a story about the death of a police officer a year after an automobile accident insinuating that Richardson killed the officer. Richardson claimed that the officer died of cancer unrelated to the accident. The State-Record went far beyond simply reporting the contents of the Traffic Collision Report. This Court held that for the defense of truth to apply the truth must be as broad as the defamatory imputation or 'sting' of the

statement. The Facebook post on Gardner's arrest had the sting of implying that BCSO, had reason to believe that Gardner was a drug trafficker, when in fact all they knew was that Gardner was in proximity to hidden drugs.

A claim for privilege does not survive unnecessary publication. *Kunst v. Loree*, 424 S.C. 24, 817 S.E.2d 295 (S.C. App. 2018)

In the deposition of BCSO its representative has asked if the publication had a law enforcement purpose:

Q. Okay. In this case, you -- the Berkeley County Sheriff's Office, published information that Stephanie Gardner was involved with trafficking narcotics?

A. That's what she was charged with.

Q. Okay. Did that have a law enforcement purpose?

A. Yes, sir. This is how we notify our citizens, and also for the media, what incidents occur.

Deposition of BCSO [Baker] p. 7 l. 3-12

That is not a law enforcement purpose and goes far beyond a publication to persons for which the conditional privilege would apply. A claim for privilege does not survive unnecessary publication. *Kunst v. Loree*, 424 S.C. 24, 817 S.E.2d 295 (S.C. App. 2018). In *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (S.C. 1986) the Court stated that a privilege exists only when the publication has occurred in a proper manner and to proper parties only. In that case the statement was published widely to persons not directly involved in the dispute. A similar result occurred in *Davis v. Niederhof*, 143 S.E.2d 367, 246 S.C. 192 (S.C. 1965) due to excessive publication.

There exists a dispute as to whether the publication to the billion or so Facebook subscribers exceed the scope of the law enforcement privilege due to excessive publication.

QUESTION SIX

THE COURT ERRED IN RULLING THAT THE THERE NOT A GENUINE ISSUE OF MATERIAL FACT AS TO MALICE

In ruling on lack of malice in the malicious prosecution claim the trial court *cited* *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (S.C. 2014) That case approved the principle that malice may be inferred from lack of probable cause. As stated in Argument one, there was no probable cause for this arrest and prosecution. A jury may infer malice from lack of probable cause.

CONCLUSION

Gardner has demonstrated that there are genuine issues of material fact as to all elements the claims for false arrest and malicious prosecution. She has demonstrated that the her arrest was without probable cause. She has demonstrated that an arrest and prosecution without probable cause is maintainable against both BCSO and TOMC. The summary judgment should be reversed and the case remanded for trial.

Respectfully Submitted

s/Louis D. Nettles

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

Edgar W. Dickson, Circuit Judge

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Stephanie Michelle GardnerAppellant,

vs.

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CERTIFICATE OF SERVICE

I certify that I have served Appellant's Initial Brief and Designation of Matters to be included in Record on Appeal on Respondents by depositing copies of the same in the United States Mail, postage prepaid, on November 8, 2021 addressed to their attorneys of record at the following addresses

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November 8, 2021

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SC Court of Appeals

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November 8, 2021

Hon. Jenny Abbott Kitchings
P.O. Box 11629
Columbia, SC 29211

Re: Gardner v. TOMC and BCSO, 2020-CP-08-00773
Appellate Case No. 2021-001173

Dear Ms. Kitchings:

Enclosed please find the Appellant's Initial Brief Court and Appellant's Designation of Matter to Be Included in Record on Appeal

I also enclose a Certificate of Service

With kind regards, I am

Yours very truly,



Louis D. Nettles

Cc: Robin L. Jackson, Esq.
Drew Hamilton Butler