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**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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APPEAL FROM BERKELEY COUNTY  
COURT OF COMMON PLEAS  
THE HONORABLE EDGAR W. DICKSON  
CIRCUIT COURT JUDGE

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APPELLATE CASE NO. 2021-001173  
CIVIL ACTION NO. 2020-CP-08-00773

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Stephanie Michelle Gardner,

**APPELLANT,**

versus

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

**RESPONDENTS.**

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**INITIAL BRIEF OF RESPONDENT TOWN OF MONCKS CORNER**

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**ATTORNEYS FOR RESPONDENT  
TOWN OF MONCKS CORNER**

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## COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Appellant Gardner's claims against the Respondent Town for false arrest and malicious prosecution fail as a matter of law because her arrest for trafficking and possession of illegal drugs was supported by probable cause.
- II. Appellant Gardner's argument on appeal that she was falsely arrested because the warrants were issued after her arrest is abandoned on appeal, not preserved for appeal, and further erroneous because a claim for false arrest does not exist even if the arrest is made without a prior warrant if there is probable cause to support the arrest.
- III. The Trial Court also properly granted summary judgment to the Respondent Town on Appellant Gardner's claims for false arrest and malicious prosecution because the Town is immune from liability pursuant to the exceptions to the waiver of immunity under the South Carolina Tort Claims Act providing that a governmental entity is not liable for loss resulting from (1) the enforcement of any law; and (2) discretionary acts.
- IV. As an additional sustaining ground, the Respondent Town is entitled to immunity for Appellant Gardner's malicious prosecution claim under the South Carolina Tort Claims Act for loss arising out of the institution or prosecution of any judicial or administrative proceeding.
- V. Appellant Gardner failed to appeal all necessary rulings made by the Trial Court with respect to her claim for malicious prosecution; therefore, the Trial Court's grant of the Respondent Town's motion for summary judgment on the malicious prosecution claim should be further affirmed under the two issue rule.

## COUNTERSTATEMENT OF THE CASE

This action arises out of Appellant Stephanie Michelle Gardner's allegations that she was falsely arrested on April 27, 2018 without probable cause for trafficking cocaine and methamphetamine and possession of heroin and methamphetamine when she was located on the premises where such illegal drugs were discovered by law enforcement.

After initially filing a complaint in the United States District Court for the District of South Carolina against the Respondents in this appeal, the Town of Moncks Corner (the "Town") and the Berkeley County Sheriff's Office (the "Sheriff's Office"), and then dismissing those claims in the District Court, Gardner filed a Complaint against the Town and the Sheriff's Office in the Court of Common Pleas for Berkeley County on March 20, 2020. [R.pp. \_\_\_; Compl.] Gardner alleged false arrest and malicious prosecution claims against the Town and the Sheriff's Office, as well as a defamation claim against the Sheriff's Office, and sought actual damages on each cause of action. [Id.]

The Town answered the Complaint on March 24, 2020, denying its material allegations and asserting as an affirmative defense, among others, the immunities and limitations of South Carolina's Tort Claims Act, S.C. CODE ANN. §§ 15-78-10, *et. seq.* [R.pp. \_\_\_; Town Answer.] The Sheriff's Office also filed an Answer and Amended Answer to the Complaint on March 25, 2020 and November 19, 2020 respectively. [R.pp. \_\_\_; Sheriff's Office Answers.]

Thereafter, both the Town and the Sheriff's Office moved for summary judgment on all causes of action in Gardner's Complaint. [R.pp. \_\_\_; \_\_\_; \_\_\_; \_\_\_; Town Mtn. for Summary Judgment; Town Memo. and Exs.; Sheriff's Office Mtn. for Summary Judgment; Sheriff's Office Memo. and Exs.]

The Town argued it was entitled to the protections afforded by the Tort Claims Act, in particular immunity for loss resulting from any enforcement of the law or for any loss resulting from the performance of any act or service which is in the discretion or judgment of a governmental employee. See S.C. CODE ANN. §§ 15-78-60(4), (5). [R.pp. \_\_\_; Town Memo., pp. 3-4.] The Town further argued that Gardner’s arrest was supported by probable cause which defeated her claims for false arrest and malicious prosecution. [R.pp. \_\_\_; Town Memo., pp. 4-7, 8-11.] The Town additionally asserted that Gardner had no evidence proving malice or ulterior motives on the part of the Town for her arrest and had not proven damages on the malicious prosecution claim. [R.pp. \_\_\_; Id. at pp. 8-11.] Finally, the Town argued that Gardner could not recover monetary damages for any purported violation of the South Carolina Constitution. [R.p. \_\_\_; Id. at p. 11.]

Gardner responded to the motions for summary judgment. [R.pp. \_\_\_; Memo. in Opp.] A hearing on the motions for summary judgment was held on April 5, 2021 before The Honorable Edgar W. Dickson. [R.pp. \_\_\_; Hearing Tr.]

Following the hearing, the Trial Court granted summary judgment to both the Town and the Sheriff’s Office on April 27, 2021. [R.pp. \_\_\_; Orders Granting Summary Judgment.] The Trial Court agreed with all arguments of the Town and granted summary judgment on each ground raised by the Town in its motion for summary judgment. [R.pp. \_\_\_; Order.]

On May 6, 2021, Gardner filed a motion to reconsider the grants of summary judgment to the Town and the Sheriff’s Office, to which both the Town and the Sheriff’s Office responded on May 12, 2021. [R.pp. \_\_\_; \_\_\_; \_\_\_; Mtn. to Reconsider; Town

Response; Sheriff's Office Response.] The Trial Court denied the motion to reconsider on September 13, 2021. [R.pp. \_\_\_\_; Order.]

Gardner has now appealed the grants of summary judgment to the Town and the Sheriff's Office. The Town hereby responds to the appeal as set forth below.

### **COUNTERSTATEMENT OF FACTS**

At the time of the incident at issue, Stephanie Gardner had been working as a dancer at the Trophy Club in Florence, South Carolina. [R.pp. \_\_\_\_; Gardner Dep., pp. 17, ll. 19-22; 18, l. 19 – 19, l. 8.] On April 26, 2018, the night before the incident at issue, Gardner was dropped off at the Trophy Club for work by someone named Chris whom she met on Facebook and had been friends with for a couple of months. [R.p. \_\_\_\_; Id. at p. 108, ll. 3-22.] During the ride, Gardner purportedly left her money bag and ID in Chris's car. [R.pp. \_\_\_\_; \_\_\_\_; Id. at pp. 36, ll. 12-15; 109, ll. 4-24.]

Gardner worked that night at the Trophy Club in Florence, and after finishing her shift around 2:00 or 3:00 a.m., she decided to ride to North Charleston with a man named Joey whom she claims was the manager of the Trophy Club as well as another club in North Charleston. [R.pp. \_\_\_\_; \_\_\_\_; \_\_\_\_; Id. at pp. 19, ll. 6-22; 32, l. 23 – 33, l. 4; 109, l. 25 – 110, 7.] Gardner had only known Joey for two days, but she decided to accept a ride with him because she believed she had a chance to make more money than she had been making at the Trophy Club. [R.p. \_\_\_\_; Id. at p. 110, ll. 8-24.]

Gardner arrived to the North Charleston area with Joey around 6:00 a.m. on April 27, 2018. [R.p. \_\_\_\_; Id. at p. 33, ll. 3-5.] While she expected to be able to work at the North Charleston club, she could not do so because she did not have her ID which she

purportedly left in Chris's car when she caught a ride to the Florence club. [R.pp. \_\_\_; Id. at pp. 36, l. 5 – 37, l. 12.]

Because she could not work at the North Charleston club, Gardner first took a nap at Joey's house and then went to Joey's girlfriend's house to get a change of clothes. [R.pp. \_\_\_; Id. at pp. 38, l. 18 – 39, l. 22.] After that, Gardner decided to look up a friend named Samantha Eason whom she said she had not seen for three years but knew lived in the area. Gardner was able to contact Samantha's father on Facebook who had Samantha call Gardner. Gardner asked Samantha if she could come sit at her house for the day. Samantha was initially hesitant to allow Gardner to come over as Samantha was being evicted that day and had no power or running water but agreed to allow Gardner to come over if she could help Samantha move while she was there. [R.pp. \_\_\_; \_\_\_; Id. at pp. 31, ll. 12-13; 39, l. 23 – 40, l. 23.] Gardner also testified that she knew Samantha had smoked marijuana in the past. [R.p. \_\_\_; Id. at p. 111, ll. 16-30.]

Joey's girlfriend brought Gardner to Samantha's home located at 112 Lodestone Court, Moncks Corner, and while she was not sure of the time she was dropped off, Gardner testified that it was still daylight when she arrived at Samantha's place.<sup>1</sup> [R.pp. \_\_\_; \_\_\_; Id. at pp. 40, l. 24 – 41, l. 17; Incident Report, p. 1.] Gardner testified that there were a couple of guys in the yard when she arrived, including a child. Samantha and Gardner changed into dresses and then were driven to a gas station by one of the guys named Corey Gethers to buy some snacks and beers. Corey Gethers was apparently at the house to help Michael Molyneaux, Samantha's boyfriend, work on a car or have Corey's car fixed. When Gardner, Samantha, and Corey arrived back from the store about ten to

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<sup>1</sup> According to [www.sunrise-and-sunset.com](http://www.sunrise-and-sunset.com), sunset on April 17, 2018 was at 7:59 p.m.

fifteen minutes later, the child was no longer there. [R.pp. \_\_\_; \_\_\_; \_\_\_; Gardner Dep., pp. 31, l. 14 – 32, l. 3; 41, l. 18 – 44, l. 20; 45, ll. 7-11; 113, ll. 1-8.]

After arriving back from the store, Gardner needed a phone charger. Because the house had no power, Michael connected a phone charger to the car battery so Gardner plugged her phone up to the charger which was located on a back porch area of the house. [R.pp. \_\_\_; Id. at pp. 48, l. 20 – 49, l. 6.] While Gardner called this area the back porch, it was in fact a covered and enclosed addition with windows which was connected to the home with open access to the living room and only separated from the living room by a blanket or something similar to a blanket held up with clothespins. [R.pp. \_\_\_; \_\_\_; \_\_\_; Id. at pp. 50, l. 24 – 51, l. 3; 113, l. 22 – 114, l. 17; Barlow Dep., p. 17, ll. 3-14.] Michael went back outside, while Samantha went to put the beers in the fridge, even though it had no power, to keep the beers cold. Gardner stayed on the enclosed back addition to charge her phone. [R.pp. \_\_\_; Gardner Dep., pp. 49, l. 4 – 50, l. 2.]

According to Gardner, Michael then ran through the front of the house, yelling “Cops got us surrounded.” [R.pp. \_\_\_; Id. at pp. 49, ll. 20-21; 50, ll. 10 – 23.] Michael slammed the door and ran to the bathroom. Corey scattered. Samantha followed Michael. Another individual named Nathan woke up from sleeping and popped up from the couch located in the enclosed back addition when officers ran into the house. [R.p. \_\_\_; Id. at p. 32, ll. 4 – 19.] Gardner was still in the enclosed back addition of the home, standing next to the couch where Nathan had been sleeping. Gardner believed that three officers entered the house at first. One officer spoke with Samantha and informed her there was a warrant out for Michael’s arrest for failure to pay child support. [R.pp. \_\_\_; \_\_\_; Id. at pp. 53, l. 4 – 56, l. 15; 115, l. 7 – 116, l. 25.]

Samantha had a bowl of marijuana in her hand, and other marijuana paraphernalia was located about the house in plain sight; therefore, an officer asked for Samantha's consent to search the premises to which she agreed. [R.pp. \_\_\_; \_\_\_; Id. at pp. 56, l. 16-57, l. 18; 118, ll. 17-20.] The officers placed Michael in the police car and had Gardner, Samantha, and Nathan sit on the couch in the enclosed back addition while the officers searched the premises. According to Gardner, Corey was with officers in the front of the house. [R.pp. \_\_\_; Id. at pp. 57, l. 17 – 58, l. 13.]

Officer Brooks Barlow, employed with the Town's police department at the time of the incident, also testified about the arrest of Michael and the search of the premises. [R.p. \_\_\_; Barlow Dep., p. 7, ll. 12-15.] On April 27, 2018, Officer Barlow was assigned to a team for a warrant sweep. [R.p. \_\_\_; Id. at p. 9, ll. 3-14.] As a part of that warrant sweep, Officer Barlow had information that Michael Molyneaux could be located at 112 Lodestone Court. Michael had a warrant out for his arrest from the family court. Therefore, Officer Barlow went to 112 Lodestone Court to look for Michael and was the first on the scene. [R.pp. \_\_\_; \_\_\_; Id. at pp. 10, l. 21 – 12, l. 5; Incident Report, p. 1.]

Once he arrived to 112 Lodestone Court at approximately 9:44 p.m. in the evening, Officer Barlow observed a white male matching Michael's description run on the front porch of the residence and enter through the front door. [R.pp. \_\_\_; \_\_\_; Barlow Dep., p. 13, ll. 7-13; Incident Report, p. 1.] Officer Barlow entered the premises through the enclosed back addition. [R.pp. \_\_\_; Barlow Dep., pp. 18, l. 11 – 19, l. 1; 19, ll. 6-8.] When he entered through the enclosed back addition, he observed several individuals inside, later identified as Gardner, Samantha Eason, Nathan Parker Pesek, and Cory Gethers. He asked if Michael was inside the residence, and Samantha answered

that he was in their bedroom. [R.pp. \_\_\_; \_\_\_; Id. at p. 19, ll. 19-23; Incident Report, p.1.]

Officer Barlow went to the bedroom but did not see Michael. He knocked on the bathroom door, and Michael said he was in there using the bathroom. Officer Barlow opened up the bathroom door immediately and handcuffed Michael. Michael was escorted out of the residence. [R.pp. \_\_\_; \_\_\_; Barlow Dep., p. 20, ll. 1-7; Incident Report, p. 2.]

While Officer Barlow was entering bedroom, he observed a “hand-rolled cigarette containing a green plant-like material” on the nightstand and dresser located in the bedroom. He asked Samantha about what he observed and she admitted it was marijuana. Officer Barlow asked for Samantha’s consent to search the residence. She gave both verbal and written consent. [R.pp. \_\_\_; \_\_\_; \_\_\_; Barlow Dep., pp. 21, ll. 3 – 16; 44, ll. 11-20; Incident Report, p. 2.]

The officers then conducted a search of the residence. Gardner, Samantha, and Nathan were all sitting on the couch in the back enclosed addition during the search, while Corey was standing in a doorway. [R.p. \_\_\_; Barlow Dep., p. 22, ll. 2-12.]

During the search, the officers discovered items believed to be drugs, and were later confirmed to be drugs, hidden in the couch cushions of the couch located in the living room of the home. [R.pp. \_\_\_; \_\_\_; \_\_\_; Id. at pp. 23, l. 1 – 24, l. 3; 28, ll. 3-7; Incident Report, p. 3.] The drugs discovered field tested presumptive for heroin, cocaine base, and methamphetamine. [R.p. \_\_\_; Incident Report, p. 5.]

Officer Barlow then identified the individuals at the scene and also spoke with each individual and questioned them each as to whom the drugs belonged. [R.pp. \_\_\_;

\_\_\_; Barlow Dep., pp. 24, ll. 11-18; 45, ll. 19-22.] While Samantha acknowledged that the marijuana found belonged to her, none of the individuals claimed the drugs discovered in the couch. All the individuals were only ten to twelve feet away from the drugs and easily had access to the drugs. [R.pp. \_\_\_; \_\_\_; \_\_\_; Id. at pp. 27, ll. 1 – 15; 28, ll. 8 – 12; 45, ll. 23-25; Incident Report, p. 6.]

Gardner herself acknowledged she was standing only about a car lengths away from where the drugs were located. [R.p. \_\_\_; Gardner Dep., p. 118, ll. 1-8.] She also conceded to walking throughout the house where the drugs were discovered, including the bedroom to initially change clothes, and then back through the living room to reach the enclosed back addition. [R.p. \_\_\_; Id. at p. 113, ll. 9-20.] She agreed she was in the home where the drugs were found, including the enclosed addition connected to the home. [R.p. \_\_\_; Id. at p. 121, ll. 8-13.] Gardner further agreed that it was certainly possible for someone to quickly hide drugs in their possession in a home in a matter of minutes no matter how long such person had actually been inside the home. [R.p. \_\_\_; Id. at p. 122, ll. 14-18.]

Officer Barlow arrested each of the individuals in the home, including Gardner, Samantha, Corey, and Nathan, for possession and trafficking of the drugs. [R.pp. \_\_\_; \_\_\_; Barlow Dep., pp. 28, l. 24 – 29, l. 2; Incident Report, p. 7.] The arrest warrants were issued and delivered to Gardner the next day on April 28, 2018 after Officer Barlow appeared in front of a local magistrate judge and swore that all of the information in his arrest warrant affidavits, including the fact that the individuals were located inside a home where drugs were found under a living room couch cushion in violation of South Carolina’s laws prohibiting illegal drug possession, was correct. [R.pp. \_\_\_; Barlow

Dep., pp. 29, ll. 21-25; 30, ll. 23-24.] Gardner agreed that a judge signed the warrants and determined that there was probable cause for her arrest. [R.p. \_\_\_; Gardner Dep., p. 131 ll. 6-9.]

Gardner was charged with (1) trafficking in cocaine, 10 grams or more but less than 28 grams, in violation of S.C. CODE ANN. § 44-53-370(e)(2)(a)(1); (2) trafficking in methamphetamine or cocaine base, 10 grams or more but less than 28 grams, in violation of S.C. CODE ANN. § 44-53-375(C)(1)(a); (3) possession of less than one gram of cocaine base in violation of S.C. CODE ANN. § 44-53-375(A); and (4) possession of heroin in violation of S.C. CODE ANN. § 44-53-370(b)(1). [R.pp. \_\_\_; Arrest Warrants.]

Gardner was kept in custody at the Berkeley County Detention Center. Her bond was initially set at \$210,000.00 on April 29, 2018, and eventually she received a reduced bond of \$38,000.00 for which she was able to put \$500.00 down to be released from custody on June 11, 2018. [R.pp. \_\_\_; \_\_\_; Gardner Dep., pp. 65, ll. 8-10; 70, ll. 11 – 71, l. 23.] Gardner also testified that she heard she could get paid for each day she stayed in jail and would make more money the longer she stayed in jail. [R.pp. \_\_\_; \_\_\_; *Id.* at pp. 100, ll. 4-25; 127, ll. 4-15.]

On October 24, 2018, the Solicitor for the Ninth Judicial Circuit dismissed all charges against Gardner based upon the belief that it would be unable to prove the charges beyond a reasonable doubt based upon the evidence available. [R.pp. \_\_\_; Dismissals.]

## STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). Rule 56(c) provides a motion for summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). “In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” Id. at 42, 747 S.E.2d at 181-82; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). The party seeking summary judgment under Rule 56(c) has the initial burden of demonstrating the absence of a genuine issue of material fact. Ellis, 358 S.C. at 518, 595 S.E.2d at 822. “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Id. at 518-19, 595 S.E.2d at 822. “[W]hen

plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Id. at 518, 595 S.E.2d at 822.

## ARGUMENT

### **I. Appellant Gardner’s claims against the Respondent Town for false arrest and malicious prosecution fail as a matter of law because her arrest for trafficking and possession of illegal drugs was supported by probable cause.**

The Trial Court properly granted summary judgment to the Town on Gardner’s claims for false arrest and malicious prosecution because the arrest of Gardner was supported by probable cause. To succeed on either a cause of action for false arrest or malicious prosecution, a plaintiff must show a lack of probable cause. Otherwise such claims fail as a matter of law.

False arrest in South Carolina is also known as false imprisonment, and the elements of the tort are the “intentional restraint of another without lawful justification.” Carter v. Bryant, 429 S.C. 298, 306, 838 S.E.2d 523, 527 (Ct. App. 2020), *reh'g denied* (Feb. 20, 2020), *cert. denied* (Oct. 19, 2020). False arrest requires the plaintiff to show a lack of probable cause. Jackson v. City of Abbeville, 366 S.C. 662, 665, 623 S.E.2d 656, 658 (Ct. App. 2005).

To maintain a claim for malicious prosecution, “a plaintiff must establish: (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.” Law v. S.C. Dep’t of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (internal citation omitted). In an action for malicious prosecution, the malice element may be inferred from a lack of probable cause to institute the prosecution. Id. at 437, 629

S.E.2d at 649. A malicious prosecution claim will fail as a matter of law if the plaintiff cannot prove a lack of probable cause. Id. at 435, 629 S.E.2d at 648; see also Jackson, 366 S.C. at 665, 623 S.E.2d at 658.

Gardner was arrested for trafficking and possession of illegal drugs discovered in the cushions of the couch only feet away from where Gardner was located. To prove trafficking (when based on possession) or simple possession, “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” and “the defendant must have knowledge of the drugs and the intent to control their disposition or use.” State v. Stewart, 433 S.C. 382, 858 S.E.2d 808, 810 (2021). These are the elements the prosecution must prove at trial beyond a reasonable doubt to secure a conviction for trafficking and possession. See State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004) (observing State is required to prove every element of a criminal offense beyond a reasonable doubt). Beyond a reasonable doubt is the highest standard of proof in the law. See Alukonis v. Smith, 431 S.C. 41, 56 n.3, 846 S.E.2d 600, 608 n.3 (Ct. App. 2020), *reh'g denied* (Aug. 17, 2020), *cert. denied* (Feb. 4, 2021).

In this case, however, the standard at issue is not the “beyond a reasonable doubt” burden of proof, but rather the much lower standard of probable cause for an arrest. See State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991) (recognizing beyond a reasonable doubt is a standard much higher than probable cause). “Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime.” Jackson, 366 S.C. at 666, 623 S.E.2d at 658.

In determining whether probable cause existed to support an arrest, the court should “view things as they appeared to the officers arriving at [the] scene.” Carter, 429 S.C. at 315, 838 S.E.2d at 532. As this Court has explained, “[i]t is an inquiry guided by common sense, and one that acknowledges human conflict is messy and tense encounters can produce differing perspectives on what happened. Recognizing that lack of clarity, at the warrant stage the law does not demand certainty, clear and convincing proof, proof beyond a reasonable doubt, or even proof by the greater weight of the evidence. Instead, the law insists on something less, but something more than reasonable suspicion: it demands a “fair probability.” Id. (internal citation omitted).

“Probable cause’ is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise.” Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). It “is determined as of the time of the arrest, based on facts and circumstances—objectively measured—known to the arresting officer,” and “[t]he determination of probable cause is not an academic exercise in hindsight.” Jackson, 366 S.C. at 667, 623 S.E.2d at 659.

As noted by the Supreme Court of the United States in Brinegar v. United States, 338 U.S. 160, 176 (1949), the probable cause standard “seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,” while at the same time giving “fair leeway for enforcing the law in the community’s protection.” “Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.” Id.

Gardner has the burden of demonstrating lack of probable cause for her arrest. Jackson, 366 S.C. at 666, 623 S.E.2d at 658. The evidence here, however, yields only one conclusion—that there was probable cause to arrest Gardner for trafficking and possession. Officer Barlow only needed a good faith belief that Gardner constructively possessed the drugs under the circumstances he observed prior to her arrest.

Gardner was positioned a mere ten to twelve feet, or as Gardner claimed, a car lengths, away from the location where significant amounts of cocaine, methamphetamine, and heroin were recovered. None of the individuals present in the home claimed ownership of the drugs. [R.pp. \_\_\_; \_\_\_; \_\_\_; \_\_\_; Barlow Dep., pp. 27, ll. 1 – 15; 28, ll. 8 – 12; 45, ll. 23-25; Gardner Dep., p. 118, ll. 1-8 Incident Report, p. 6.] Gardner arrived at the house before sunset, and except for a trip to the gas station with Samantha and Corey, had been at the house until the officers arrived at 9:44 p.m. [R.pp. \_\_\_; \_\_\_; \_\_\_; Gardner Dep., p. 41, l. 15 – 44, l. 20; 45, ll. 7-11; 113, ll. 1-8; Incident Report, p. 1.] She admitted to walking throughout the house, including the living room where the couch with the hidden drugs was located, prior to law enforcement’s arrival. [R.p. \_\_\_; Gardner Dep., p. 113, ll. 13-19.]

Gardner further acknowledged that it was possible for someone to quickly hide drugs in a matter of minutes no matter how long such person had actually been inside the home. [R.p. \_\_\_; Id. at p. 122, ll. 14-18.] Finally, she agreed that a judge determined that there was probable cause for her arrest. [R.p. \_\_\_; Id. at p. 131 ll. 6-9.] The above circumstances are sufficient to support Officer Barlow’s good faith belief that probable cause existed to arrest Gardner based on her constructive possession of the illegal substances.

Gardner does not address the standard of probable cause in her appellant's brief. Instead, she relies upon the Supreme Court's recent opinion in State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021) which held that a jury may not be instructed that it may infer a defendant's knowledge or possession of drugs found on property under defendant's control. However, this is an instruction that is not to be given to a jury deciding a criminal case based upon a beyond a reasonable doubt standard. The Court further explained that such an inference is still a valid one for the jury to draw, and the trial attorneys may argue to the jury whether the inference should be drawn, but that the jury instruction explaining the inference is not proper. Id. at 813.

The Supreme Court in Stewart did not address the probable cause standard for the constructive possession of illegal drugs. The fact that prosecutors may determine after further investigation that the evidence is not sufficient to bring the charges to trial does not negate the existence of probable cause at the time of the arrest. While the prosecutors here may have determined that the State could not prove Gardner's right or power to exercise control over the drugs and knowledge of the drugs and the intent to control their disposition or use, this determination after further investigation does not mean that Officer Barlow did not have a good faith belief that Gardner was in constructive possession of the illegal drugs.<sup>2</sup>

Accordingly, the Trial Court properly granted summary judgment to the Town as a matter of law on Gardner's claims for false arrest and malicious prosecution because

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<sup>2</sup> Gardner also cites State v. Ballenger, 454 S.C. 355, 317 S.E.2d 364 (Ct. App. 1995) to support her argument, reciting the fact that the court found that the State could not prove actual possession by a defendant of crack cocaine found in a bag on the ground near the defendant. This case, however, was reversed by the Supreme Court in State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) which found that the evidence was sufficient to support a jury's finding of actual possession.

her arrest was supported by probable cause. See Pallares v. Seinar, 407 S.C. 359, 367, 756 S.E.2d 128, 132 (2014) (“Whether probable cause exists . . . may be decided as a matter of law when the evidence yields only one conclusion.”).

**II. Appellant Gardner’s argument on appeal that she was falsely arrested because the warrants were issued after her arrest is abandoned on appeal, not preserved for appeal, and further erroneous because a claim for false arrest does not exist even if the arrest is made without a prior warrant if there is probable cause to support the arrest.**

Gardner’s second issue on appeal appears to contend that Gardner was falsely arrested because the warrants were issued after her arrest. This argument, however, has been abandoned on appeal because Gardner’s argument is conclusory and otherwise vague. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) (“An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory.”).

Second, this argument is not preserved for appellate review because Gardner did not raise this argument to the Trial Court below. “An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.” In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004).

Third, the fact that the warrant was issued after the arrest does not create a claim for false arrest. There is no claim for false arrest even if the arrest is made without a prior warrant if there is probable cause to support the arrest. See Jackson v. City of Abbeville, 366 S.C. 662, 664-65, n. 4, 623 S.E.2d 656, 657-58, n.4 (Ct. App. 2005). As shown herein, probable cause existed for Gardner’s arrest. This Court should reject Gardner’s second issue on appeal.

**III. The Trial Court also properly granted summary judgment to the Respondent Town on Appellant Gardner’s claims for false arrest and malicious prosecution because the Town is immune from liability pursuant to the exceptions to the waiver of immunity under the South Carolina Tort Claims Act providing that a governmental entity is not liable for loss resulting from (1) the enforcement of any law; and (2) discretionary acts.**

As an additional ground for affirmance, the Trial Court also properly granted summary judgment to the Town on Gardner’s claims for false arrest and malicious prosecution pursuant to the immunity provisions of the South Carolina Tort Claims Act. The Trial Court found that the arrest of Gardner arose from the enforcement of any law as well as from the performance of an act which was in the discretion or judgment of a governmental employee for which a governmental entity is not liable under S.C. CODE ANN. § 15-78-60(4) and (5).

The Tort Claims Act governs all tort claims in South Carolina against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. See Murphy v. Richland Mem'l Hosp., 317 S.C. 560, 562, 455 S.E.2d 688, 689 (1995); Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998); S.C. CODE ANN. § 15-78-20(b) (“The remedy provided by [the Tort Claims Act] is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b).”); S.C. CODE ANN. § 15-78-70(a) (“[The Tort Claims Act] constitutes the exclusive remedy for any tort committed by an employee of a governmental entity.”). “The provisions of [the Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be *liberally construed* in favor of limiting the liability of the State.” S.C. CODE ANN. § 15-78-20(f) (emphasis added).

In this case, Gardner’s claims against the Town invoke the provisions and immunities of the South Carolina Tort Claims Act. The Town is a governmental entity as defined in the Tort Claims Act. See S.C. CODE ANN. § 15-78-30(d) (“Governmental entity” means “the State and its political subdivisions.”); §15-78-30(h) (“Political subdivision” includes municipalities).

While the Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are “liable for their own torts in the same manner and to the same extent as a private individual under like circumstances,” the Act also provides certain limitations and exceptions to liability. S.C. CODE ANN. §§ 15-78-40, -60. In particular, governmental entities are not liable for loss resulting from:

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies; [and]

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.

S.C. CODE ANN. §§ 15-78-60(4) and (5).

Both of these provisions provide immunity to the Town for Officer Barlow’s arrest of Gardner. In arresting Gardner, Officer Barlow was enforcing S.C. CODE Ann. Sections 44-53-370 and 44-53-375 which make the possession, including constructive possession, of the drugs found in the home where Gardner was present illegal. The Town is therefore immune from Gardner’s claims for false arrest and malicious prosecution

because her claims arise out of Officer Barlow's enforcement of South Carolina's criminal laws making it illegal to constructively possess drugs.

In addition, in arresting Gardner, Officer Barlow exercised discretion or judgment in performing this act. "To establish discretionary immunity, the governmental entity must prove its employees, faced with alternatives, actually weighed competing considerations and made a conscious choice" while utilizing "accepted professional standards appropriate to resolve the issues before them." Stephens v. CSX Transp., Inc., 415 S.C. 182, 200, 781 S.E.2d 534, 543-44 (2015) (internal citations omitted).

Officer Barlow, faced with the choice of which occupant to charge for the illegal drugs, used his discretion to enforce the law and arrest all occupants, including Gardner. He testified: "I could easily argue that it could have been anybody in that house. Nobody claimed it." [R.p. \_\_\_; Barlow Dep., p. 27, ll. 7-8.] See Brown v. Brown, 360 S.C. 7, 11-12, 598 S.E.2d 728, 731 (Ct. App. 2004) (holding town was immune from motorist's claim under the Tort Claims Act that town failed to properly train and supervise its police officers after officer allowed motorist to drive away from scene of traffic stop as replacement driver for driver who had been drinking alcohol, where officer's decision in selecting motorist to be replacement driver met requirements to establish discretionary immunity under tort claims act.). Based on the protections afforded under the Tort Claims Act for discretionary immunity, the Trial Court properly ruled the Town cannot be held liable for Gardner's arrest.

Gardner argues the Tort Claims Act does not bar her claims, citing Gist v. Berkeley Cty. Sheriff's Dep't, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999). Gist, however, did not analyze the exceptions to liability under S.C. CODE ANN. §§ 15-78-

60(4) and (5) for the enforcement of the law and discretionary acts. Instead, the Gist opinion analyzed whether a sheriff's department could be immune for securing an arrest warrant from a magistrate without providing facts to the magistrate showing probable cause. The sheriff's office argued it was immune under Section (3) of S.C. CODE ANN. 15-78-60 which provides immunity for a loss resulting from the "execution, enforcement, or implementation of the orders of any court or execution, enforcement or lawful implementation of any process..." Gist, 336 S.C. at 617-18, 521 S.E.2d at 166-67. This Court held that the sheriff's department's liability did not arise from the "execution, enforcement, or implementation" of the magistrate's order but rather arose from allegedly securing the warrant without probable cause. Thus, this section of the Tort Claims Act did not shield the sheriff's department from liability.

Gist concerns a different exception to immunity and further arises not from an arrest with probable cause, but from the securing of a warrant without providing any factual basis for the magistrate to issue the warrant. The Town has relied upon the exceptions to immunity found in S.C. CODE ANN. §§ 15-78-60(4) and (5) for the enforcement of the law and discretionary acts, and Gist does not address these exceptions or hold that these exceptions cannot provide immunity to the Town for Gardner's arrest.

Gardner's reliance upon Wortman v. Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (1992) is also misplaced. In Wortman, the plaintiff alleged that he was unlawfully arrested by the City of Spartanburg for the possession of Florida lottery tickets. The City moved for summary judgment and the trial judge found that the City was exempt from liability under sections 15-78-60(3) and (4) of the South Carolina Tort Claims Act for the execution of any process or enforcement of any law. Id. at 1-3, 425 S.E.2d at 18-20.

The Supreme Court reversed, finding Section 15-78-60(3) did not apply because the actions of the police did not occur during the execution or enforcement of the order of any court or during the lawful implementation of any process, as contemplated by section 15-78-60(3). As to section 15-78-60(4), the Supreme Court held the City could not claim that the plaintiff's possession of lottery tickets resulted from its attempt to enforce a law absent a showing that a law exists that prohibits the possession of lottery tickets. Wortman, 310 S.C. at 3, 425 S.E.2d at 20.

Here, criminal laws exist prohibiting the constructive possession of the drugs for which Gardner was arrested. See S.C. CODE Ann. §§ 44-53-370 and 44-53-375. The Wortman case also did not address the exception for discretionary immunity which the Town has shown applies. Accordingly, Gardner has not shown that the Trial Court erred in granting the Town immunity on her claims for false arrest and malicious prosecution under the Tort Claims Act.

**IV. As an additional sustaining ground, the Respondent Town is entitled to immunity for Appellant Gardner's malicious prosecution claim under the South Carolina Tort Claims Act for loss arising out of the institution or prosecution of any judicial or administrative proceeding.**

Gardner's malicious prosecution claim against the Town is also entitled to immunity under the Tort Claims Act for an additional reason.<sup>3</sup> The first element of this claim requires "the institution or continuation of original judicial proceedings." Law v. S.C. Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). However, the Tort

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<sup>3</sup> While the Trial Court did not rule upon this ground in granting the Town's motion for summary judgment on the malicious prosecution claim, "[t]he appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 527 S.E.2d 716, 723 (2000) (holding "respondent. . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

Claims Act explicitly provides that a “governmental entity is not liable for a loss resulting from” the “institution or prosecution of any judicial or administrative proceeding[.]” S.C. CODE ANN. § 15-78-60(23). The Town is also therefore immune from this claim under the Act.

**V. Appellant Gardner failed to appeal all necessary rulings made by the Trial Court with respect to her claim for malicious prosecution; therefore, the Trial Court’s grant of the Respondent Town’s motion for summary judgment on the malicious prosecution claim should be further affirmed under the two issue rule.**

The Trial Court also found that Gardner did not prove resulting injury or damage for a malicious prosecution claim because Gardner did not offer evidence of her damages and had rather expressed her intention to remain incarcerated because she was informed by multiple individuals that she would be paid if she remained in the detention center. [R.p. \_\_\_; Town Order on Summary Judgment, p. 8.] See Law v. S.C. Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (requiring resulting injury or damage for malicious prosecution claim).

Gardner did not appeal this ruling by the Trial Court. “It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.” Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997); see also Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Failure to challenge the ruling “is an abandonment of the issue and precludes consideration on appeal.” Biales, 315 S.C. at 168, 432 S.E.2d at 484. The unchallenged ruling, “right or wrong, is the law of [the] case and requires affirmance.” Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Gardner’s failure to challenge this ruling by the Trial Court on the malicious prosecution claim requires affirmance under the two issue rule. “Under the two issue rule, 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, 346, 692 S.E.2d 900, 903 (2010), *abrogated on other grounds by*, Repko v. Cty. of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018). “It should be noted that although cases generally have discussed the ‘two issue’ rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts.” Anderson v. S.C. Dep’t of Highways & Pub. Transp., 322 S.C. 417, 420 n. 1, 472 S.E.2d 253, 255 n. 1 (1996).

Gardner must prove all six elements of a malicious prosecution claim to maintain such an action. The Trial Court found that Gardner did not prove malice, lack of probable cause, and damages. Gardner did not challenge the damages ruling on appeal. Accordingly, pursuant to the two issue rule, this Court should further affirm the Trial Court’s grant of summary judgment on the malicious prosecution claim to the Town.

## CONCLUSION

For the reasons set forth herein, Respondent Town of Moncks Corner respectfully requests that this Court affirm the grant of summary judgment to the Town on all claims asserted against it by Appellant Stephanie Michelle Gardner.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT  
TOWN OF MONCK'S CORNER**

January 4, 2022.

**RECEIVED**

**Jan 04 2022**

**SC Court of Appeals**

**CERTIFICATE OF SERVICE**

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent, Town of Moncks Corner, do hereby certify that I have this date served the foregoing Initial Respondent's Brief, dated January 4, 2022, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated August 25, 2021, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent email is enclosed with this Certificate of Service.

/s Carmen V. Ganjehsani  
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Dated: January 4, 2022.


## Carmen Ganjehsani

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**Sent:** Tuesday, January 04, 2022 4:17 PM  
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**Cc:** Drew Butler; James Haarsgaard; Beth Tobul (BTobul@RichardsonPlowden.com); Hope Grate  
**Subject:** 2021-001173 Gardner v. Town of Moncks Corner et al  
**Attachments:** 2021-001173 Gardner v. Town of Moncks Corner et al, Designations.pdf; 2021-001173 Gardner v. Town of Moncks Corner et al, Initial Respondent's Brief.pdf

Pursuant to the Supreme Court's Order dated August 25, 2021, please find served upon you the Initial Respondent's Brief and Designation of Matter to be Included in the Record on Appeal on behalf of Respondent Town of Moncks Corner.

Thank you,  
Carmen Ganjehsani

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