THE STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 27 2017
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

Orangeburg County C/A# 2012-CP-38-00672

Appellate Case No. 2016-002080

Meredith Huffman ..... Respondent

vs.

Sunshine Recycling, LLC and
Aiken Electric Cooperative, Inc..... Petitioners

BRIEF OF PETITIONER SUNSHINE RECYCLING, LLC

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INTRODUCTION

The Court of Appeals improperly reversed the circuit court's grant of summary judgment in favor of Petitioner Sunshine Recycling ("Sunshine" or "Petitioner"). As such, this Court should reverse the decision of the Court of Appeals and reinstate the circuit court's grant of summary judgment, as the Court of Appeals' decision imposes a non-existent duty on a witness to investigate a crime before speaking to police, and further, improperly reviewed the evidence and summary judgment standard. Simply put, Respondent Meredith Huffman ("Respondent" or "Huffman") failed to present any evidence creating a genuine issue of material fact with respect to the claims asserted in conjunction with the appropriate duties imposed related thereto.

This case arises out of stolen property and an unfortunate arrest of an innocent person. On May 16, 2010, copper was stolen from the premises of Aiken Electric. The next day, Aiken Electric's Loss Control and Safety Coordinator, Mark Goss, went to Sunshine's facility with a list of the items stolen to inquire if anyone brought the items in to sell. Goss observed copper and aluminum matching what was stolen from Aiken Electric in a pile on the floor. A Hispanic employee informed the owner of Sunshine, Joseph Rich, that he observed Huffman dropping off the metal Goss observed. The Orangeburg County Sherriff's Department was then called to Sunshine and upon an officer's arrival, Goss showed the officer samples of the metal from Aiken Electric that matched the metal at Sunshine. The officer then reviewed Sunshine's surveillance video and observed Huffman at the payment window. He was also provided a supporting receipt from Sunshine for Huffman's transaction. Another officer returned to Sunshine

the next day after receiving a telephone call from Goss, photographed the metal, and returned the items to Goss.

Several days later, a warrant was obtained by the Sherriff's Department for Huffman's arrest in connection with the stolen metal. Huffman turned herself in approximately two weeks later, and informed the arresting officer that although she did sell metal to Sunshine, the metal she sold was not stolen. Huffman was then released on bond. Subsequent to her release, an officer viewed the surveillance video of the day in question and observed Huffman selling a different type of wire to Sunshine than that which was stolen from Aiken Electric. The charges were dismissed against Huffman.

Huffman filed this lawsuit against Sunshine, Aiken Electric, and the Sherriff's Department[1], alleging negligence, false imprisonment / false arrest, and malicious prosecution. However, Huffman has failed to present a scintilla of evidence that would create a genuine issue of material fact with respect to these claims against Sunshine. Huffman alleges that because she was misidentified, Sunshine, who is not the victim or the police, falsely imprisoned and arrested her and maliciously prosecuted her. In short, Huffman seeks to hold Sunshine liable for its good faith cooperation and assistance with the police with a criminal investigation.

[1] The Sherriff's Department is no longer a party to this action.

STATEMENT OF THE CASE

This lawsuit was originally filed on May 9, 2012. An Amended Complaint was filed on May 23, 2013, against Sunshine, Aiken Electric, and the Sherriff's Department, alleging negligence, false imprisonment / false arrest, and malicious prosecution. Both Sunshine and Aiken Electric moved for summary judgment. Both Sunshine and Aiken Electric filed motions for summary judgment in the circuit court. In its motion, Sunshine asserted Huffman failed to produce any evidence that would even tend to prove Sunshine was negligent or careless in the case, in failing to conduct a proper investigation, and for any other acts or omissions. Sunshine also asserted Huffman failed to produce any evidence tending to prove that Sunshine maliciously instituted and continued criminal proceedings against Huffman or that criminal proceedings were instituted and continued at the request of Huffman.

The circuit court granted summary judgment to Sunshine and Aiken Electric on April 9, 2014. (App. pp. 4-12). In its Order, the circuit court granted Sunshine and Aiken Electric's motions for summary judgment, holding that (1) a crime witness or victim cannot be sued in negligence for reporting ultimately mistaken information to law enforcement; (2) Huffman failed to present any genuine issues of material fact regarding the elements of false imprisonment; and (3) Huffman failed to present any evidence that the proceedings against her were maliciously initiated by Sunshine or Aiken Electric without probable cause.

More specifically, the circuit court held that imposition of a duty of care on Sunshine and Aiken Electric would be inconsistent to the rights and duties of crime witnesses and victims. It further held that law enforcement, not the victims or witnesses

of a crime, have a duty to investigate a crime and determine whether and when to seek a warrant. The circuit court stated that "if a crime victim or a witness to a crime can be sued in negligence for reporting to law enforcement whatever information the victim or a witness to a crime had, such would discourage them from discharging their civil and moral duty which is to cooperate with law enforcement." (App. p. 9). Additionally, the circuit court held summary judgment was proper with respect to the false imprisonment claim, finding that Huffman failed to produce any evidence that Sunshine and Aiken Electric deprived her of her liberty in any way.

Finally, the circuit court held that Huffman's malicious prosecution claim failed because there is no evidence that the proceedings against her were initiated by Sunshine or Aiken Electric maliciously and without probable cause. The circuit court noted that Sunshine and Aiken Electric merely assisted and cooperated with an investigation, and neither instituted the investigation or prosecution, nor did they assist with malice. The circuit court observed that citizens are encouraged, if not obligated, to assist in investigations of potential crimes and Sunshine and Aiken Electric cooperated with law enforcement and discharged their civic and moral duty to cooperate fully and voluntarily with law enforcement. (App. p. 12).

The circuit court denied Huffman's motion to alter or amend the Order granting summary judgment on June 16, 2014, finding the motion did not raise any novel issues for the court's consideration. (App. p. 13). Thereafter, on July 11, 2014, Huffman filed a Notice of Appeal. The Court of Appeals reversed the circuit court's order in an opinion dated June 22, 2016. The Court of Appeals denied Sunshine's motion for

reconsideration on September 15, 2016. However, this Court granted Sunshine's Petition for Writ of Certiorari.

STATEMENT OF FACTS

As this Court knows, this case arises out of an incident involving trespass and stolen property at Aiken Electric's facility in North, South Carolina, on May 16, 2010. Mark Goss, Aiken Electric's Loss Control and Safety Coordinator, testified that this facility has more thefts than any other of Aiken Electric's locations because of its proximity to two recycling centers in the area, Orangeburg Recycling and Petitioner Sunshine Recycling. (App. pp. 65-66). On or about May 16, 2010, Goss received a call from Aiken Electric's dispatch informing him that someone was under a shed stealing copper on the premises. (App. p. 66).

Charles Rushton, the manager of the North facility, also received the call from dispatch and both men headed to the facility from their respective houses. Rushton reported the trespass to the Orangeburg County Sheriff's Department and Officer Huggins responded to the report. Goss testified that by the time he arrived at the facility, the thief was already gone and Officer Huggins was on the scene. (App. pp. 66-67). Goss and Rushton were unable to determine what, if anything, had been taken from the facility and had to wait until the following morning for the linemen to arrive to make the determination. On May 17, 2010, Goss supplemented the incident report to Huggins, informing him that Aiken Electric was able to determine that approximately $330.00 of copper and wire aluminum was stolen from its facility and that a white Ford F-150 was seen on the security camera. (App. pp.45; 68-71).

According to Goss, he went to Sunshine the same morning with the list of stolen items to inquire if anyone tried to sell the items matching those on the list. Goss met with Joseph Rich, the owner of Sunshine, and Rich led Goss to the metal drop-off area and the

location of the surveillance video. Goss testified that he observed copper and aluminum matching what was stolen from Aiken Electric in a pile on the floor. (App. pp. 70; 72). According to Goss, Rich spoke to a Hispanic Sunshine employee in Spanish and translated that the employee said "a lady dropped off the metal." (App. p. 74). Goss testified that he informed Rich that the person in Aiken Electric's surveillance video was a black male in a white Ford pick-up truck. (App. p. 73).

Officer Aldridge of the Sheriff's Department responded to a call at Sunshine. Upon Aldridge's arrival, Goss showed him samples of the metal from Aiken Electric that matched the metal at Sunshine. Aldridge then reviewed Sunshine's surveillance video, on which he observed Huffman at the payment window. He was also provided a supporting receipt from Sunshine of Huffman's transaction. (App. pp 75-76). Aldridge testified Rich advised him that he would provide the Sheriff's Department with a copy of the surveillance video. (App. p. 76).

On May 18, 2010, Officer Ethridge of the Sheriff's Department was contacted by Goss, who informed Ethridge that he was at Sunshine at the time Huffman brought the metal in and that he actually spoke with Huffman and identified the stolen metal after Huffman left Sunshine. Thereafter, Officer Ethridge went to Sunshine and met with Goss and Rich. He was given the invoice and receipt of Huffman's transaction. (App. pp. 201-203). He testified he photographed the metal and returned it to Goss. Officer Ethridge admitted that he did not observe the surveillance video of the back area of Sunshine. Ethridge testified he wanted to view the video before making a determination in the case, but the video player was malfunctioning. (App. pp. 209-210; 213). Additionally, Ethridge testified Goss called him several times inquiring what he was

doing to further the case along. (App. pp. 212-213). Ethridge testified that Goss's employer, Aiken Electric, was the victim in this case. (App. p. 229).

Thereafter, on May 21, 2010, Officer Ethridge obtained a warrant for Huffman's arrest in connection with the stolen metal. Huffman was unaware of the warrant for several days, but turned herself in on June 2, 2010. Huffman informed Officer Ethridge that she did sell metal to Sunshine, but that the metal she sold was not stolen. Huffman provided Ethridge with samples of the metal and pictures of a trailer owned by her family where she obtained the metal. She was released on bond on the very same day. (App. pp. 216-221).

After Huffman's arrest, Officer Ethridge met with a representative of Sunshine's outside vendor, Palmetto Security Cameras, to review the video of the day in question. According to Ethridge's report, he observed Huffman on the video selling copper similar to the copper that was taken from Aiken Electric, but that Huffman's aluminum was sheeting while the aluminum stolen from Aiken Electric was aluminum wire. (App. p. 221). Officer Ethridge later dismissed the charges against Huffman. (App. p. 224). Ethridge has admitted that he did not observe this video until after Huffman was arrested and that had he viewed the video prior to the arrest, he would never have arrested Huffman. (App. pp. 220-221; 224).

Ethridge was later contacted by Goss and Sunshine, who informed him that they reviewed the surveillance video again and observed an unidentified black male in a white pick-up truck at Sunshine's property at the same time as Huffman. (App. p. 248). The male was later identified by Officers Ethridge and Aldridge as Eugene James with SC Tag Number 6****M. (App. p. 259). Officer Aldridge met with Goss on June 11, 2010,

at Sunshine, at which time Goss provided him with a photograph of Eugene James. Officer Aldridge obtained the surveillance video from Sunshine at that time, but testified he did not view the video. (App. pp. 260-261).

Goss testified that, in his opinion, Sunshine did not do anything wrong in this case. He confirmed that he was the one who identified the stolen metal in the back at Sunshine, and that Rich only relayed the Hispanic employee's identification of "a lady" as dropping off the metal. (App.. p. 79). He also testified that it was normal practice for Sunshine to permit Aiken Electric or investigating officers to view or copy its surveillance videos. (App.. p. 80). Goss testified that the false arrest would not have occurred if the investigating officers would have reviewed the surveillance tape prior to arresting Huffman. (App. pp. 77-78). Likewise, Officer Ethridge testified that Sunshine was not the victim in this case and never pushed for Huffman's arrest or prosecution. Rather, he believed Sunshine cooperated fully and was pleasant to deal with throughout the investigation. In fact, Officer Ethridge testified that he did not recall speaking to Rich after his initial visit of May 18. (App.. p. 227; 229).

ARGUMENT

I. Standard of Review.

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860.

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 a judgment as a matter of law." Rule 56(c), SCRCP (emphasis added). On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party. E.g., Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994); Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (citing Bankers Trust of S.C. v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976)). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose *as a matter of law.*" Main v. Corley, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (emphasis

added); see also Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (standard for summary judgment "mirrors" standard for directed verdict).

II. The Court of Appeals Erred in Imposing an Unprecedented Duty on Witnesses in Criminal Investigations.

The Court of Appeals' opinion reversing summary judgment essentially holds that a witness to a criminal investigation can be found civilly liable for providing inaccurate information to law enforcement. In so doing, the Court of Appeals has now imposed an affirmative duty on witnesses in criminal investigations which as heretofore never been recognized by this State. The Court of Appeals' analysis essentially imposes a duty on a witness to independently investigate potential evidence prior to providing the same to law enforcement, the entity charged with the duty of investigating criminal activity. In holding that a juror could reasonably conclude that Sunshine, via Joe Rich, "cause[d], instigate[d] or procure[d]" or "induce[d]" the arresting officer by "request, direction or command," of Huffman's arrest, the Court of Appeals stated:

> Further, Rich admitted he did not bother to ask his Spanish-speaking employee to identify the second or third person who had dropped off metal on the morning in questions. He stated, 'That's what the cameras are for.' Yet, Rich never bothered to view the video himself despite the fact that he could have obtained a copy of the video before Huffman's arrest.
>
> Moreover, in explaining why he did not view the video of Huffman dropping off her metal before arresting Huffman, Officer Ethridge indicated that he called Alan Price, with Palmetto Security Cameras, several times. The following exchange then occurred:
>
> > So either – you didn't personally see the video or watch the video at Sunshine. You were told by Sunshine that it showed [Huffman] –
> >
> > Correct.
> > --With the –
> > She – yes, yes.

> A juror could reasonably infer from this testimony that Rich, who never bothered to view the video himself, represented to Officer Ethridge that the video would show Huffman dropping off the $330 worth of metal stolen from Aiken. Based on the foregoing circumstances, a reasonable juror could conclude that Rich's representation to Officer Ethridge was not 'supported by circumstances sufficiently strong to warrant a cautious man in the belief that [Huffman was] guilty of the offense charged.'

(App. pp. 989-990).

However, whether a *witness* to a crime can be liable reporting inaccurate information to law enforcement is a novel issue in South Carolina. While the Court of Appeals relied on Wingate v. Postal Tel. & Cable Co., 204 S.C. 520, 528, 30 S.E.2d 307, 311 (1944) in reversing summary judgment, it is important to note that Wingate involved an agent of the *victim* who demanded an arrest from an incident the night before. The facts of the case are distinguishable from those involving Sunshine, a mere witness and/or scene of a crime. As such, the law cited in Wingate is inapplicable to the case *sub judice*, as Sunshine, as a matter of law, did not and could not cause, instigate or procure Huffman's arrest.

Beyond the distinction of Wingate, the Court of Appeals' decision inexplicably imposes a duty on witnesses to investigate and analyze evidence in the same manner law enforcement is obligated to, and essentially relieves law enforcement of any obligation to conduct a criminal investigation. This opinion essentially absolves law enforcement of its most important duty.[2] With its opinion, the Court of Appeals essentially mandates that

[2] Certainly, information provided by victims and witnesses is part of a criminal investigation; however, law enforcement cannot rely solely on such information, fail to do any independent investigation, and then point the finger at the cooperating witnesses who provide information. Here, should this opinion stand, Sunshine, as a mere witness, is now being subject to civil liability because the officers failed to perform their job properly—this is wholly at odds with the public policy behind witness cooperation and the factual circumstances in the case at bar.

witnesses act as amateur detectives, and that should they fail to do so, mistaken information relayed to the police can lead to civil liability. This is not the law of South Carolina and other states have categorically refuted such a standard on public policy grounds.[3] See, e.g., Davis v. Equibank, 603 A.2d 637, 641 (Pa. 1992) ("We further recognize that the potential of civil liability for the provision of mistaken information to law enforcement agents would have a chilling effect on citizen cooperation and the provision of valuable information by citizens to police."); Reaves v. Westinghouse Electric Corp., 683 F. Supp. 521, 523 (D.Md.1988) ("The tort of false arrest is predicated upon *knowing* misconduct . . . . Negligence or other mistake in providing incorrect information to lawful authorities does not give rise to liability."). See also Ramsden v. Western Union, 138 Cal.Rptr. 426, 431 (Ct. App. 1977) (no cause of action for negligently reporting a crime to the police); Campbell v. City of San Antonio, 43 F.3d 973, 981 (5th Cir.1995), overruled in part on other grounds by Swierkiewicz v. Sorema, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (1989) ("To hold ... that [defendant's] negligent misidentification of [plaintiff] is actionable would in substance convert the Texas tort of *malicious* prosecution into one of *negligent* prosecution. This we decline to do.") (emphasis in original)).[4]

Given this public policy and interest in favor of cooperation and assistance with law enforcement, it is clear that a negligent misidentification of a suspect should not—and cannot—lead to liability on the part of the witness, whether under false imprisonment, malicious prosecution, or any other theory of liability. The Court of

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[3] The Court of Appeals failed to address these other cases or the public policy arguments.
[4] In its order granting summary judgment, the circuit court stated: "Law enforcement, not the crime victim and witnesses to a crime, has the duty to investigate a crime and to decide whether and when to seek a warrant."

Appeals misapprehended and misapplied the law and the Court of Appeals' opinion should be reversed.

III. The Court of Appeals Erred in Misapprehending and/or Misconstruing the Record Evidence in Finding that Huffman Offered a Scintilla of Evidence to Withstand Summary Judgment on the False Imprisonment Claim Against Sunshine.

In addition to the Court of Appeals' error regarding witnesses' duties, the Court of Appeals also erred in concluding that the actual record evidence leads to a reasonable inference that Sunshine, as a mere witness with absolutely no incentive in the criminal investigation, caused, instigated or procured Huffman's arrest. Simply put, no genuine issue of material fact exists as to the false imprisonment / false arrest claim.[5] Having concluded otherwise, the Court of Appeals misconstrued the record evidence and misapplied the summary judgment standard: "It is not sufficient [to defeat a motion for summary judgment] that one create an inference which is not *reasonable* or an issue of fact that is not genuine." Shuler v Tuomey Reg'l Med. Ctr., 313 S C 225, 437 S E 2d 128, 129 (Ct. App. 1993) (emphasis added).

False imprisonment is the deprivation of one's liberty without justification. Argoe v. Three Rivers Behavioral Health, LLC, 392 S.C. 462, 710 S.E.2d 67 (2011). In order to establish a cause of action for false imprisonment, the evidence must prove: (1) that the defendant restrained the plaintiff; (2) that the restraint was intentional; and (3) that the restraint was unlawful. Id. False imprisonment is an intentional tort; negligence is not an element. Gist v. Berkeley Cnty. Sheriff's Dep't, 336 S.C. 611, 619, 521 S.E.2d 163, 166 (Ct. App. 1999). Although the tort of false imprisonment is not limited to

[5]Huffman does not appeal the circuit court's grant of summary judgment to Sunshine with respect to her negligence cause of action.

physical interference with a plaintiff's liberty, a plaintiff must demonstrate that she submitted to apprehension of force reasonably to be understood from the defendant's conduct, although no force is used and there is no threat of imminent use of force. See Zimbelman v. Savage, 745 F. Supp. 2d 664 (D.S.C. 2010); see also 8 S.C. Jur. False Imprisonment § 7.

The evidence cited above does not create a reasonable inference or a genuine issue of material fact regarding false imprisonment, especially in light of the novel issue of a witness's civil liability for providing law enforcement information. In addition to the citation above in section II, *supra*, the Court of Appeals relied on the following to support a reasonable inference: Officer Ethridge testified that when he visited Sunshine, "[t]hey were guaranteeing that the metal that [Huffman] brought in was the metal – [Goss] was saying this is 100 percent our metal from [Aiken] and the [receipt] showing the weights, everything, was – was co- -- everything was looking the same." (Op. p. 13). The Court of Appeals then morphs what is clearly a clarification by Ethridge that Goss was speaking the entire time to a genuine issue of material fact that a jury could reasonably infer that Rich made this representation. (Op. p. 13). This leap, which respectfully grasps at straws, is unsupported by the quoted testimony. Respectfully, the Court of Appeals recreated the record evidence to create an issue of fact that simply does not exist. In any event, even such misconstrued evidence does not create a *reasonable* inference to support Huffman's causes of action, and in ruling otherwise, the Court of Appeals misapplied the summary judgment standard.

In its opinion, the Court of Appeals concludes that there is a scintilla of evidence that Rich, on behalf of Sunshine, induced Officer Ethridge "by request, direction, or

command to unlawfully arrest" Huffman or "cause[d], instigate[d] or procure[d] the arrest." There is absolutely nothing in the record or law of the State to support a *reasonable* inference that Sunshine induced prosecution or demanded prosecution of Huffman, thereby failing to create a genuine issue of material fact as to probable cause as a matter of law.[6] Rather, as the circuit court properly found, the objective evidence leads to only one reasonable conclusion—that Sunshine cooperated with a law enforcement investigation and relayed information that it, in good faith, believed to be true. Furthermore, the Court of Appeals' opinion fails to appreciate that Sunshine was acting as a witness, providing unfiltered information to the officers. As discussed in section II, *supra*, it is a novel issue in South Carolina whether a mere witness can be held liable for inducing or demanding criminal prosecution, one that should be decided in the negative.

Despite the Court of Appeals' questionable reach, the simple truth of the matter is: Huffman has failed to produce any evidence that Sunshine deprived her liberty in any way without justification, as there has been no evidence presented that Sunshine physically restrained Huffman or, by its words or conduct, constructively restrained Huffman; any misidentification on the part of Sunshine was not intentional, as Sunshine and its employees merely relayed information and documentation which it believed, in good faith, to be relevant and helpful in assisting law enforcement in solving a crime.

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[6] In addition to these cited excerpts from the opinion, the Court of Appeals also seemingly faulted Sunshine for: Sunshine's "employee apparently not tell[ing] Rich that a black male in a white Ford pickup truck dropped off metal immediately after Huffman dropped off her metal[;]" "Rich never view[ing] the video[;]" for failing to thoroughly interview his employee, who was presumably available for interview to law enforcement; and for the difficulty Palmetto Security Cameras had in copying the video. (Op. pp. 3-4; 13). Respectfully, the Court of Appeals opinion misconstrues this evidence, and overlooks the abundant, objective record evidence that exists and that supports only one reasonable inference – that Sunshine cooperated with a police investigation and did not institute or demand the arrest or prosecution of Huffman.

At its worst, Sunshine's actions constituted misidentification and mistake. However, this will not support a cause of action for false imprisonment, despite the Court of Appeals' attempt to do so. See, e.g., Reaves v. Westinghouse Electric Corp., 683 F. Supp. 521, 523 (D.Md.1988) ("The tort of false arrest is predicated upon *knowing* misconduct . . . . Negligence or other mistake in providing incorrect information to lawful authorities does not give rise to liability."). Indeed, the evidence presented leads to only one reasonable inference – that Sunshine cooperated with a police investigation and relayed information that it, in good faith, believed to be true and relevant to the investigation. Thus, the Court of Appeals erred in reversing the grant of summary judgment to Sunshine on this claim and its opinion should be reversed.

IV. The Court of Appeals Erred in Reversing the Circuit Court's Grant of Summary Judgment to Sunshine with Respect to Huffman's Malicious Prosecution Claim.

The Court of Appeals erred as a matter of law in reversing the grant of summary judgment in favor of Sunshine as to the malicious prosecution claim. In its opinion, the Court of Appeals relies on its newly created and imposed duty on witnesses to crimes and its probable cause discussion in the false imprisonment section to also reverse the grant of summary judgment as to the malicious prosecution claim. As noted above, the opinion misapprehended the record facts and the applicable law in finding that there was a scintilla of evidence to support a finding of lack of probable cause on the part of Sunshine, a mere cooperating witness.

Furthermore, the Court of Appeals misapplied the law of malicious prosecution as it relates to other pertinent elements. The elements of malicious prosecution 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. McBride v. Sch. Dist. Of Greenville Cnty., 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2002). An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence. Law v. S.C. Dep't of Corrections, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). Malice is defined as "the deliberate intentional doing of an act without just cause or excuse." Id. at 437, 629 S.E.2d at 649. Malice can also be inferred from lack of probable cause. Id.

Our courts have stated that probable cause

> is meant the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered.

Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965). Thus, in an action for malicious prosecution, a defendant must be absolved from liability if the plaintiff fails to show the prosecution was instituted maliciously and without probable cause. Finally, "[i]t is in the interest of good order that criminals be brought to justice, and malicious prosecution actions are not encouraged." Elletson v. Dixie Home Stores, 231 S.C. 565, 571, 99 S.E.2d 384, 387 (1957).

The Fourth Circuit Court of Appeals opinion in Brice v. Nkaru, 220 F.3d 233 (4th Cir. 2000), is instructive, and demonstrates that the issue presents a novel question of law, which the Court of Appeals erroneously determined.[7] In Brice, the plaintiff filed suit

[7] Brice is also instructive in supporting Sunshine's arguments made earlier in this memorandum.

against a security guard for malicious prosecution based upon the security guard's misidentification of him as a suspect to a crime. The Fourth Circuit, interpreting Virginia law, stated "[w]e find no authority supporting [the] contention that a witness who provides the police with incorrect information during a criminal investigation ipso facto 'institutes' or 'procures' the prosecution if he provides that information unequivocally." Id. at 238. The court further stated:

> [W]e are aware of no authority supporting the novel proposition that a witness, by honestly providing information to a law enforcement official, may be held responsible for the official's execution of his independent duty to investigate. *See, e.g.,* Gramenos v. Jewel Cos., 797 F.2d 432, 434 (7th Cir.1986) ("Police often arrest suspects on the basis of oral reports from witnesses, and the state may prosecute against the wishes of all witnesses."); King v. Massarweh, 782 F.2d 825, 828–29 (9th Cir.1986) (injuries from arrest are not proximately caused by private party, absent some showing that private party "had some control" over state officials' decision). In this case, [the security guard] simply provided the police with information within his knowledge, and the police reasonably believed him. *See id.* at 439 (explaining that police have reasonable grounds to believe a guard at a supermarket, because there are inherent safeguards against the making of false charges in the institutional employment setting), *see also* 66 A.L.R.3d 10 Summary § 3 (1975) (normally a malicious prosecution plaintiff must show that defendant did more than merely give information that included an identification, *e.g.,* that he requested the initiation of proceedings, signed a complaint, or swore out an arrest warrant against plaintiff); 52 Am.Jur.2d *Malicious Prosecution* § 23 (1970) (plaintiff must show defendant was affirmatively active in instigating or participating in the prosecution); *id.* § 24 (no liability for mistaken, but reasonable and in good faith, misidentification of perpetrator of crime).

Id. at 238-39.

The Fourth Circuit Court of Appeals ultimately rejected the plaintiff's contention that there was sufficient evidence to support an inference that the security guard acted in bad faith in providing law enforcement with information, and concluded, as a matter of law, that the plaintiff could not maintain his claim for malicious prosecution. Id. at 241.

Merely providing information to the police and leaving the decision to bring charges to the sole discretion of the police cannot constitute the initiation of criminal proceedings for purposes of a malicious prosecution claim. See 54 C.J.S. Malicious Prosecution § 17 (stating a "civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for malicious prosecution"). Thus, Brice makes clear that as a matter of law, malicious prosecution cannot lie in this instance against Sunshine as a witness. The Court of Appeals erred in this regard.

Secondly, as the law states, "[t]he burden is on the plaintiff to show that *the prosecuting person or entity* lacked probable cause to pursue a criminal or civil action against him." Parrott, 246 S.C. at 322, 143 S.E.2d at 609. Law v. S.C. Dep't of Corr., 368 S.C. 424, 436, 629 S.E.2d 642, 649 (2006). Huffman failed to meet this burden or produce a scintilla of evidence regarding institution of proceedings. Rather, the record evidence leads to only one *reasonable* inference -- Sunshine did not institute or have instituted the proceedings against Huffman at its instance, but rather was merely a cooperating witness.

Moreover, there is absolutely no evidence presented that indicates Sunshine—or its employees—acted with malice in reporting information and providing documentation to the police, and as discussed above, the Court of Appeals misapprehended the facts to conclude that there was an issue of material fact with respect to the lack of probable

cause.[8] Sunshine permitted Goss, at his request, to examine the metal and view the surveillance tape; Sunshine relayed information from an employee regarding Huffman's transaction at the yard; Sunshine permitted the officers to view the surveillance tape; and Sunshine indicated it would testify should the need arise. In essence, the Court of Appeals' opinion erroneously and inversely infers malice and a lack of probable cause on the part of Sunshine because Sunshine failed to investigate and filter information in its possession. Again, such a duty has never before been recognized by this State and it cannot be the law of malicious prosecution. Thus, the Court should reverse the Court of Appeals in this regard and reinstate the well-reasoned and factually supported order of the circuit court granting summary judgment to Sunshine.

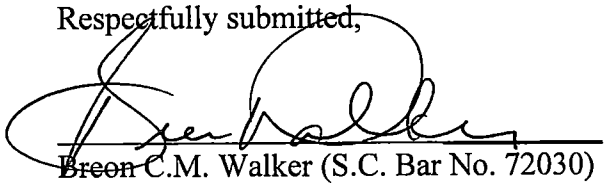
[8] Sunshine was not the victim in this matter, and therefore had absolutely no incentive to maliciously attempt to prosecute or have the Sherriff's Department prosecute Huffman for the copper wire, nor does the evidence support even an inference of such.

CONCLUSION

In its Opinion, the Court of Appeals created and imposed heretofore non-existent duties and liabilities on mere witnesses to criminal investigations, in addition to misapprehending the summary judgment standard and the record evidence. Based upon the actual law of South Carolina, in conjunction with public policy, and the actual record evidence in the case, the Court of Appeals' decision should be reversed and the grant of summary judgment in favor of Sunshine reinstated, as there is no evidence, viewed in the light most favorable to Huffman, to support a reasonable inference of liability on the part of Sunshine.

[Signature Page to Follow]

Respectfully submitted,



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October 27, 2017

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

Orangeburg County C/A# 2012-CP-38-00672
Court of Appeals Tracking #: 2014-001492
Supreme Court Tracking #: 2016-002080

Meredith Huffman .....Respondent

vs.

Sunshine Recycling, LLC and
Aiken Electric Cooperative, Inc..... Petitioners

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Brief of Petitioner Sunshine Recycling, LLC complies with Rule 208(b).

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PROOF OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the address(es) shown below.

DOCUMENT(S) SERVED

Joint Appendix on Writ of Certiorari – Volumes I, II and III

Petitioner Sunshine Recycling, LLC's Final Brief

Certificate of Counsel for Petitioner Sunshine Recycling, LLC

[Continued on Next Page]

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