THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Maite D. Murphy, Circuit Court Judge

Circuit Court Case No. 2014-CP-38-672
Appellate Case No.: 2014-001492

Supreme Court No. 2016-002080

Meredith Huffman. .....Respondent,

v.

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

BRIEF OF RESPONDENT

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Columbia, South Carolina
December 7, 2016

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INTRODUCTION

The Court of Appeals properly reversed the circuit court's grant of summary judgment and remanded this case for a jury trial on Huffman's malicious prosecution and false imprisonment claims against Petitioners Sunshine Recycling, LLC and Aiken Electric Cooperative, Inc. In a well-reasoned and thorough opinion, the Court of Appeals properly applied well-settled law to the facts of this case and concluded that Huffman presented at least a mere scintilla of evidence to substantiate her claims and thus was entitled to a trial on the merits. The Court of Appeals' decision was appropriate and consistent with longstanding precedent because disputed issues of material fact exist regarding the extent of Petitioners' involvement in instigating, procuring, and securing Huffman's arrest.

Given the procedural posture of Huffman's case, the Court of Appeals—and this Honorable Court—is bound by law to review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to Huffman, as the non-moving party, when determining whether summary judgment was proper. As more fully discussed below, Huffman presented genuine factual issues that were material to the lawfulness of her arrest and to the involvement of Petitioners in securing her arrest. Accordingly, Huffman is entitled to present this evidence to a jury and respectfully requests this Court to affirm the Court of Appeals' decision to reverse the circuit court's order and remand for a trial on the merits of Huffman's false imprisonment and malicious prosecution claims.

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

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II. Did the Court of Appeals impose new duties on witnesses by concluding a jury question existed as to whether Petitioners acted reasonably and with due care in participating in and securing Huffman's arrest?

III. Did the Court of Appeals properly decline to address Aiken Electric's argument that its actions were protected by Article 1, Section 24, of the Victims Bill of Rights under the South Carolina Constitution and Section 16-3-1505 of the South Carolina Code (2003) when its decision that summary judgment was inappropriate negated the requirement to address this issue on appeal?

IV. Did the Court of Appeals properly consider admissible evidence in rendering its decision to reverse the circuit court's grant of summary judgment?

STATEMENT OF THE CASE

Respondent Meredith Huffman ("Huffman") instituted this civil suit against Sunshine Recycling, LLC ("Sunshine Recycling") on May 9, 2012, asserting claims for negligence, false imprisonment, and malicious prosecution. (App. at 14-22). In her complaint, Huffman alleged she was wrongfully arrested and imprisoned based upon Sunshine Recycling's false accusations to law enforcement. (App. at 14-22). After the parties engaged in preliminary discovery, Huffman filed an Amended Complaint on May 24, 2013, adding Aiken Electric Cooperative, Inc. ("Aiken Electric") as a defendant, and reasserting the same causes of action. (App. at 23-29).

Sunshine Recycling and Aiken Electric (collectively, "Petitioners") subsequently moved for summary judgment. (App. at 36-37; 49-61). The circuit court heard the parties' motions on March 10, 2014. (App. at 4). On April 9, 2014, the circuit court entered an order granting summary judgment on all causes of action against Huffman. (App. at 4-12). Huffman timely filed a motion to reconsider, alter, or amend the order granting summary judgment pursuant to Rule 59(e), SCRCP. (App. at 281-92). On June 19, 2014, the circuit court summarily denied Huffman's motion. (App. at 13).

Huffman timely filed a notice of appeal on July 11, 2014. In an opinion dated June 22, 2016, the Court of Appeals reversed the circuit court's decision and held Huffman presented genuine issues of material fact as to whether Petitioners caused, instigated, or procured Huffman's wrongful arrest and the extent of Petitioners' involvement in law enforcement charging Huffman with receiving stolen goods in violation of section 16-13-180(C)(1) of the South Carolina Code (2015). *Huffman v. Sunshine Recycling, LLC & Aiken Elec. Coop., Inc.*, 417 S.C. 514, 518, 790 S.E.2d 401, 404 (Ct. App. 2016). (App. at 978-993). Viewing the evidence in the light most

favorable to Huffman, the Court of Appeals determined at least a scintilla of evidence existed from which a reasonable juror could conclude the Orangeburg County Sheriff's Department's ("Sheriff's Department") belief in Huffman's guilt was based on unreasonable grounds. *Id.* at 524, 790 S.E.2d at 407. Because a reasonable juror could have concluded that an arrest warrant was executed without probable cause, the Court of Appeals determined the issue of whether Huffman was falsely imprisoned was one for the jury, and not the court, to decide. *Id.* at 525, 790 S.E.2d at 407. Because Huffman presented at least a mere scintilla of evidence that Petitioners—as private parties—induced the Sheriff's Department to execute an unlawful arrest, a jury question existed as to whether Petitioners could also be liable for false imprisonment and malicious prosecution for causing, instigating, or procuring Huffman's unlawful arrest. *Id.* at 530, 531–532, 790 S.E.2d at 410, 411. The Court determined it was error to grant summary judgment after "[v]iew[ing] all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to Huffman." *Id.* at 532, 790 S.E.2d at 411. Therefore, the Court of Appeals reversed the circuit court's order and remanded for a trial on the merits of Huffman's false imprisonment and malicious prosecution claims. *Id.*

On June 22, 2016, Petitioners timely filed a Rule 59(e), SCRCP, motion to reconsider. (App. at 994-999; 1003-1013), which the Court of Appeals denied by order dated September 15, 2016. (App. 1002). Petitioners filed a petition for writ of certiorari to this Court on December 7, 2016, which this Court granted by order dated September 29, 2017. (App. at 1022-1054).

STATEMENT OF THE FACTS

On May 16, 2010, a break-in occurred at Aiken Electric's Orangeburg facility. (App. at 67). The next morning, Mark Goss ("Goss"), Aiken Electric's Loss Control and Safety Coordinator, reviewed the surveillance video from the facility, which showed an unidentified black male stealing copper and aluminum wiring and a white Ford F-150 pickup truck leaving the parking lot shortly thereafter. (App. at 68). Goss reported the incident to the Sheriff's Department, and he valued the stolen goods—*new* copper and *new* aluminum wiring—at approximately $330.00 and described them to law enforcement as "(1) 60 ft copper [wire], (2) #6 copper [wire], [and] (1) roll of alumi[num] [wire]." (App. at 45, 663).

The following day, May 17, 2010, Huffman lawfully brought in scrap metal to Sunshine Recycling, a local metal recycling business. (App. at 756-758). Huffman obtained the metal—*old* aluminum sheeting and *old* electrical wiring—from an abandoned mobile home located on her property. (App. at 756-758). Sunshine Recycling paid Huffman $53.00 and issued her a receipt. (App. at 756-758).

That same day, Goss contacted Joseph Rich ("Rich"), the owner of Sunshine Recycling. Goss told Rich that a black male in a white pickup truck had stolen metal from Aiken Electric the previous night. (App. at 73). Goss went to Sunshine Recycling to inspect the metal that Sunshine Recycling had purchased that morning, and Goss positively identified the metal as the same metal stolen from Aiken Electric. (App. at 70, 72, 666). According to Goss and Rich, they spoke with an unnamed Spanish-speaking employee who worked in the metal drop-off area, and the employee allegedly told Rich that a white woman was the first person to drop off metal that morning. (App. at 667). Rich did not mention to the employee that Goss was looking for a black male, nor did he ask who else dropped off metal that day. (App. at 858).

After Goss went to Sunshine Recycling and identified the stolen metal, Officer Ashley Aldridge of the Sheriff's Department arrived at Sunshine Recycling to investigate the matter. (App. at 344-45; 657). Goss and Rich played the video[1] of Huffman waiting to receive payment at Sunshine Recycling and showed Officer Aldridge a copy of her receipt. (App. at 46; 347-49; 494-495; 504-05; 859). After playing the video, Goss and Rich identified Huffman as the person that sold the stolen metal to Sunshine Recycling. (*Id.*).

Subsequently, Goss spoke with Officer James Ethridge at the Sheriff's Department. According to Officer Ethridge, Goss told police he "actually spoke and carried on a conversation with Huffman while she was waiting to get paid for the items that she had just brought in. . . . [and] viewed the items after she left and identified them as being [from Aiken Electric.]" (App. at 507). However, when questioned during his deposition about any interactions he had with Huffman, Goss denied he ever interacted with her. (App. at 668). Goss also identified the stolen metal to Officer Ethridge. (App. 408). Regrettably, Goss did *not* mention to Officer Ethridge or to Rich that he noticed a distinction between some of the copper and aluminum and that he observed some items that were *not stolen* from Aiken Electric in the same pile as the stolen material. Additionally, while Gosh and Rich highlighted the Spanish-speaking employee's identification of a white female to law enforcement, neither Goss nor Rich admitted to asking this same employee whether a black male in a white Ford pickup truck dropped off metal immediately after Huffman, despite having

[1] Two Sunshine Recycling video surveillance footage tapes are involved in this case. One surveillance video records the front area where Sunshine Recycling pays customers for the metal and customers receive a receipt. (App. at 365). All parties had access to and viewed this footage. The other surveillance video records the back area of Sunshine Recycling where vehicles drive through, the customers' metal is weighed, and the metal is then left for processing. (App. at 362). This "back area" footage was not available to law enforcement until after Huffman was arrested and was material for purposes of determining Huffman's innocence. (App. at 362-364).

seen surveillance that would indicate a black male in a white Ford pickup truck was the perpetrator. (App. at 667, 855).

On May 18, 2010, Officer Ethridge went to Sunshine Recycling to photograph the metal that Goss alleged Huffman had stolen from Aiken Electric. (App. at 513). While he was there, Rich informed Officer Ethridge that he would contact Palmetto Security Cameras to request a copy of the video surveillance showing customers dropping off metal in the back of Sunshine Recycling from the previous day. (App. at 513). After Petitioners accused Huffman, Aiken Electric continued to strongly urge the Sheriff's Department to arrest Huffman, calling Officer Ethridge several times over the course of the three days prior to her arrest. (App. at 516-17). According to Officer Aldridge, Petitioners expressed a "sense of urgency" when inquiring about Huffman's arrest. (App. at 368-69). Despite Petitioners' urgency to secure an arrest, Petitioners never relinquished the "back area" video surveillance to the Sheriff's Department prior to Huffman's arrest, although Officer Ethridge called Rich several times to request the footage. (App. 980). Neither party contests on appeal this surveillance video (1) clearly showed a black male, not a white female, brought in metal that fit the description of what was stolen; (2) ultimately exonerated Huffman; and (3) eventually led law enforcement to arrest, and convict, the black male in the video of stealing the metal from Aiken Electric. (App. 248).

In response to Petitioners' efforts to secure an arrest, Officer Ethridge obtained a warrant for Huffman's arrest on May 21, 2010. (App. 521). Once Huffman became aware of the outstanding arrest warrant, she immediately contacted the Sheriff's Department and told Officer Ethridge that the metal she sold to Sunshine Recycling was in fact not stolen but was instead salvaged from a mobile home on property owned by Huffman and her husband. (App. at 755-56). Officer Ethridge instructed Huffman to meet him at the Sheriff's Department the following

morning, June 2, 2010, to submit a written statement. (App. at 755-56). Upon arriving at the Sheriff's Department, Huffman gave the same statement to Officer Ethridge as she had the previous night. Without any additional incriminating evidence linking her to the theft, she was arrested and booked as an inmate at the Orangeburg-Calhoun Regional Detention Center. (App. at 761-763; 798-801). Officer Ethridge placed Huffman in handcuffs. (App. at 755). A female corrections officer then escorted Huffman into a back room where she was forced to remove her bra[2] and change into a prison jumpsuit. (App. 755, 762). While Huffman was imprisoned and waiting for her bond hearing, she was not given anything to drink or allowed to call home to check on her children, despite telling law enforcement they were not being supervised by an adult. (App. at 763-64). When she finally appeared at the bond hearing, Huffman appeared before the magistrate judge without a bra, in a prison jumpsuit, and with handcuffs on her wrists and shackles on her ankles. (App. 763). Huffman eventually obtained a personal recognizance bond and was released from jail at 5:00 p.m. (App. 758-59).

Despite Petitioners' possession of exculpatory proof, when Officer Ethridge arrested Huffman on May 21, 2010, law enforcement *still* did *not* have a copy of the surveillance video from Sunshine Recycling. (App. at 363). The Sheriff's Department finally obtained a copy of the video only *after* Huffman had been arrested. (R. 119). Officer Ethridge admitted he did not view the video prior to Huffman's arrest but supported his decision to secure an arrest warrant based on Rich's representation to him that the video would show Huffman dropping off stolen metal. (App.at 504-05; 525-28). When questioned however, Rich admitted that neither he nor anyone at

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[2] The corrections officer instructed Huffman she was not permitted to wear an underwire bra and would either have to remove the wire or her bra. Huffman stated at that point she began to cry and asked the officer if she had something that Huffman could use to split the stitch and remove the underwire, to which the office replied, "Use your teeth." (App. at 762). Huffman promptly removed her bra and gave it to the officer. (App. at 762).

Sunshine Recycling ever viewed the footage of Huffman dropping off the metal. (App. at 855). Even after Officer Ethridge told Rich the video showed Huffman with a different type of metal than what was stolen, Rich maintained his employees observed Huffman with the stolen items and asserted that he would "come and testify [against Huffman] in court." (App. 119, 409; 526).

When law enforcement finally viewed the video, the footage clearly revealed the items Huffman sold—namely the aluminum *sheeting*—did not match the description of the stolen items as all of the stolen metal was *wiring*. (App. at 119). It also depicted a black male in a white Ford pickup truck dropping off metal matching the description of the stolen metal immediately after Huffman. (App. at 119).

At this point, Officer Ethridge dismissed the charges against Huffman because of the lack of evidence to support the case. (App. at 409). In addition to the video footage, the values for the stolen metal and Huffman's metal were vastly incongruent. Specifically, the black male's receipt totaled $350.00, which very closely resembled Aiken Electric's estimated value of $330.00 for its stolen metal. (App. at 433). Huffman's receipt, however, totaled only $53.00. (App. at 120, 454, 512). Officer Ethridge's report stated, "*At this time I am not comfortable with this case due to the witnesses g[iving] me false information the first time*." (App. at 118, 410; 529). (emphasis added).

Huffman appeared in court on the date the charges against her were to be heard. (App. at 532). The court dismissed the charges against Huffman on grounds consistent with her innocence. (App. at 532-33). On June 21, 2010, the Sheriff's Department arrested the black male shown on the video and charged him with the same crime for which Huffman had previously been charged based on the same video surveillance in Petitioners' possession. (App. at 461).

STANDARD OF REVIEW

The summary judgment standard in South Carolina is clear. When reviewing the grant of a summary judgment motion, this Court applies the same standard as the circuit court applies pursuant to Rule 56(c), SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Rule 56(c), SCRCP, provides summary judgment shall be granted when "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."

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 329-30, 673 S.E.2d at 802. Further, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment should not be granted even when no dispute exists as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Williams v. Chesterfield Lumber Co.,* 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

ARGUMENT

I. The Court of Appeals Correctly Applied Well-Established South Carolina Law to the Facts When it Reversed the Circuit Court's Grant of Summary Judgment on Huffman's False Imprisonment and Malicious Prosecution Claims.

In this case, the Court of Appeals reviewed the elements of false imprisonment and malicious prosecution, and, considering the facts in the light most favorable to Huffman, found at least a scintilla of evidence that those elements were met as against Petitioners. Huffman does not, at this stage, have to prove these elements by a preponderance of the evidence; all the law requires is for Huffman to present a "mere scintilla of evidence" to withstand summary judgment. *Id.* at 330, 673 S.E.2d at 803. As discussed *supra*, the Court of Appeals correctly applied the proper standard in the context of the well-established elements that constitute the relevant causes of action and reversed the circuit court's order.

1. False Imprisonment

"In order to recover under a theory of false imprisonment, the complainant must establish (1) the defendant restrained him; (2) the restraint was intentional; and (3) the restraint was unlawful." *Jones v. Winn-Dixie Greenville*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995) "The tort of false imprisonment does not require an actual injurious touching. False imprisonment may be committed by words alone, or by acts alone or by both, and by merely operating on the will of the individual, or by personal violence, or by both." *Id.* The fundamental issue in determining the lawfulness of an arrest in a false imprisonment claim is whether probable cause exists, or in other words, whether there is evidence that "would induce an ordinarily prudent and cautious man" to believe the arrested person is guilty of a crime. *McBride v Sch. Dist. Of Greenville Cty.*, 389 SC. 546, 567, 698 S.E.2d 845, 856 (Ct. App. 2010).

The Court of Appeals correctly held that an ordinarily prudent and cautious person who reviewed the evidence before him would not have concluded that Huffman committed theft, and thus, the circuit court's grant of summary judgment on Huffman's false imprisonment claim was improper. In support of its decision, the Court of Appeals first held Huffman presented at least a mere scintilla of evidence that law enforcement did not possess the requisite *probable cause* to arrest Huffman, thus rendering her arrest unlawful. Without probable cause, Huffman's claim for false imprisonment against Petitioners hinged on whether she submitted a mere scintilla of evidence that Petitioners requested, directed, or commanded law enforcement to unlawfully arrest Huffman by causing, instigating, or procuring her arrest. The Court of Appeals correctly concluded Huffman presented sufficient evidence on both of these grounds to withstand summary judgment on her false imprisonment claim.

a) Probable Cause

The Court of Appeals properly made its decision regarding probable cause based on the information provided to law enforcement by Sunshine Recycling and Aiken Electric. The evidence is overwhelming that Huffman was unlawfully arrested—without probable cause—because of the words and conduct of Sunshine Recycling and Aiken Electric. Petitioners identified and accused Huffman of committing a crime, urged the Sheriff's Department to arrest Huffman, and intended to testify against her in the criminal proceeding. Specifically, Officer Aldridge's report stated Rich and Goss both affirmed Huffman brought stolen metal to Sunshine Recycling. Goss, among other things, identified the metal at Sunshine Recycling as matching the products stolen from Aiken Electric but failed to mention to police that it was intermingled with items that had not been stolen from Aiken Electric. Goss also told Officer Ethridge that he spoke with Huffman while she waiting to be paid for the metal she dropped off and that he viewed the stolen

metal after she left and identified it as belonging to Aiken Electric. Once these charges were dropped, Goss conveniently denied speaking to Huffman when questioned during his deposition. Further, Rich, who spoke and understood Spanish, told Officer Ethridge that an unidentified Spanish-speaking employee affirmed a "white woman" dropped off metal similar to that from Aiken Electric. These representations undoubtedly formed the basis of law enforcement's decision to arrest Huffman. Rich and Goss also presented Huffman's $53 receipt to Officer Ethridge, which was inconsistent with Goss's $330 valuation to police. A jury could reasonably conclude that the discrepancy between the $330 estimated value of the stolen goods and the $53 Huffman received for her metal would preclude an ordinarily prudent and cautious man from believing Huffman was unlawfully selling metal stolen from Aiken Electric. Thus, probable cause cannot be found as a matter of law in this case, and the Court of Appeals properly determined this question must go to the jury. *See McBride*, 389 S.C. at 567, 698 S.E.2d at 856 (stating probable cause may be decided as a matter of law only "when the evidence yields but one conclusion").

b) <u>Petitioners' involvement in Huffman's Arrest</u>

A private individual can be liable for the tort of false arrest even if the police effectuated the arrest. "The charge of false imprisonment is not confined to the party who unlawfully seizes or restrains another, but it likewise extends to any person who may *cause, instigate or procure* an unlawful arrest." *Wingate v. Postal Tel. & Cable Co.*, 204 S.C. 520, 528, 30 S.E.2d 307, 311 (1944) (emphasis added). A person who may "cause, instigate, or procure an unlawful arrest" is liable for false imprisonment. *Id.*, 30 S.E.2d at 311. Communicating an accusation to the police is lawful only if the information communicated is "supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged." *Id.*

The Court of Appeals properly held that Huffman presented at least a mere scintilla of evidence that both Sunshine Recycling and Aiken Electric induced law enforcement "by request, direction, or command to unlawfully arrest" Huffman or "cause[d], instigate[d], or procure[d]" her arrest. *Wingate*, 204 S.C. at 528, 30 S.E.2d at 311.

As to Aiken Electric, Goss—as Aiken's agent—was in possession of an abundance of information that would lead a reasonably cautious man to conclude that Huffman was not responsible for the theft. First, Goss viewed the video from Aiken Electric, which clearly depicted a black male stealing metal; however, Rich relayed to Goss through an unidentified non-English speaking Hispanic employee that a white female was the first person to drop off metal the following day. Despite this obvious conflict in identity and Goss's knowledge that Sunshine Recycling had video surveillance of the drop-off area, Goss continued to pursue Huffman's arrest. Goss even admitted that he did not watch the relevant footage until *after* the police arrested Huffman. Second, Goss personally viewed the metal at Sunshine Recycling and was aware the stolen metal was comingled with metal that was rightfully there, yet he neglected to inform anyone—specifically law enforcement—of this discrepancy. This evidence clearly demonstrates that a reasonable juror could find Goss was not "supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged." *Id.* Further, Goss was not just complicit in Huffman's arrest, Goss instigated and pursued her arrest. Specifically, Goss called Officer Ethridge multiple times and urged him to arrest Huffman in the days that followed the theft. Office Aldridge also recounted that Goss expressed a "sense of urgency" in securing an arrest.

As to Sunshine Recycling, Rich represented to the police that his employee and his surveillance videos identified Huffman as the person who dropped off the stolen metal at Sunshine Recycling. Rich volunteered his employee's identification of Huffman to police, but Rich never questioned his Spanish-speaking employee as to whether anyone fitting the description of the black male also dropped off metal that day. When asked why he failed to do so, Rich responded, "That's what cameras are for." Rich admittedly had cameras of both the drop-off and payment areas at Sunshine Recycling, yet he never bothered to view the video prior to Huffman's arrest. Rich—like Goss—was also aware of the value of the stolen metal and the value of what Huffman dropped off at Sunshine Recycling, yet declined to mention this discrepancy to Officer Ethridge. This evidence, at the very least, passes the mere scintilla threshold and is evidence from which a reasonable juror could conclude Rich's representations to police were incongruent with what a cautious man under the same circumstances would believe regarding Huffman's guilt and Rich's representations "cause[d], instigate[d], or procure[d]" Huffman's arrest. *Id.*

In sum, given the clear and accessible information that was available to both Goss and Rich in the days leading up to Huffman's arrest, a jury could reasonably conclude that these men, as agents of Petitioners, were intentionally misleading the police or, at the very least, recklessly disregarding the obvious falsity of their representations. In other words, a jury could reasonably find the circumstances would neither lead a cautious man to believe that Huffman was guilty of this crime nor encourage a cautious man to request, direct, or command the arrest of Huffman. Because a genuine issue of fact remains for a jury to determine if Sunshine Recycling and Aiken Electric wrongfully caused, instigated, or procured Huffman's arrest, the Court of Appeals correctly reversed the grant of summary judgment.

2. Malicious Prosecution

In order to recover in an action for malicious prosecution, the plaintiff must show (1) the institution or continuation of the original judicial proceedings, either civil or criminal; (2) by, *or at the instance of*, the defendant; (3) termination of such proceeding in the plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Ruff v. Eckerds Drugs, Inc.*, 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975) (emphasis added). "All persons who participate in a malicious prosecution are jointly liable for the resulting injury, and joint liability for a malicious prosecution may exist without reference to the existence of any conspiracy" and the defendant "caused one to be maintained or had voluntarily aided or assisted." *See Gibson v. Brown*, 245 S.C. 547, 549, 141 S.E.2d 653, 654 (1965); *see also* 52 Am. Jur. 2d *Malicious Prosecution* § 88 ("One who advises and procures another to institute proceedings, or aids and assists another in carrying on the prosecution, may [be liable for malicious prosecution]. . . . Liability thus depends on whether the defendant was actively instrumental in causing the prosecution, and the presumption of prosecutorial independence can be overcome by showing that the defendant improperly exerted pressure on the prosecutor, knowingly provided misinformation to him or her, concealed exculpatory evidence, or otherwise engaged in wrongful or bad-faith conduct instrumental in the initiation of the prosecution.").

This Court has previously expounded on the element of malice in a malicious prosecution case:

> Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice. **Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice**

> **also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. *In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution.***

Law v. S.C. Dept. of Corrections, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (emphasis added). As with false imprisonment claims, "the issue of probable cause is a question of fact and ordinarily one for the jury." *Jones v. City of Columbia*, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). Furthermore, in a malicious prosecution claim, the "assessment of the credibility of witnesses is a question for the jury, not the court, and it is the jury that decides the weight to be afforded the testimony." *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614-15 (Ct. App. 1984).

Without dispute, Aiken Electric and Sunshine Recycling contacted the Sheriff's Department and affirmatively accused and identified Huffman as the person who brought in the stolen metal. (App. at 46; 344-347; 494-495; 501-05; 536-540; 657; 798). Sunshine Recycling and Aiken Electric made these allegations without any truthful or credible evidence. Any reasonable review of the evidence by Sunshine Recycling and Aiken Electric would have plainly revealed that Huffman was not a suspect or responsible in any manner for the stolen metal. Again, Huffman presented more than a mere scintilla of evidence that she was arrested at Petitioners' insistence and without probable cause. Petitioners either knowingly made false accusations or accused Huffman of a crime with a reckless disregard for the truth—a far cry from what an ordinarily prudent and cautious person would do. Based on this evidence, a jury could rightfully

conclude that a reasonable person, under the circumstances, would have never accused and arrested Huffman.[3]

In an apparent attempt to discredit the Court of Appeals' decision, Sunshine Recycling cites to *Brice v. Nkaru*, 220 F.3d 233 (4th Circ. 2000)—a Fourth Circuit Court case interpreting Virginia state law—in support of its position that it is not culpable for malicious prosecution as a matter of law. In *Brice*, the plaintiff sought to hold Nkaru and Safeway Inc. liable for malicious prosecution when Nkaru, the security guard at Safeway, erroneously identified Brice as the suspect in a forgery crime. *Id.* at 235. A jury found Nkaru and Safeway liable for malicious prosecution in the amount of $500,000, after which Brice accepted the remittitur of $100,000. *Id.* Nkaru and Safeway appealed, and the Fourth Circuit Court of Appeals reversed the judgment of the district court. *Id.* at 241.

Sunshine Recycling contends *Brice* should control the resolution of this issue because similar to the security guard in *Brice*, Rich did not act in bad faith and simply provided police with incorrect, but honest, information within his knowledge that the police then reasonably believed. *Id.* Huffman respectfully disagrees because *Brice* is factually distinct, and therefore, neither instructive nor controlling to the resolution of this issue. Unlike in *Brice*, the issue of probable cause in state court is a factual issue for the jury—not a legal issue for the court. *See Jones*, 301

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[3] As Huffman argued before the Court of Appeals, the circuit court's holding that probable cause existed in this case as a matter of law based solely on what an unidentified Hispanic employee was claimed to have said in Spanish to another person was a substantial legal error and sets a dangerous precedent. Specifically, that probable cause could be established in criminal cases based solely on an unsubstantiated identification made by an unidentified person. This results in an overwhelmingly low threshold to establish probable cause and renders its purpose functionally meaningless. In fact, this holding relegates the probable cause standard to something much lower than even "reasonable suspicion." *See State v. Rogers*, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch. However, it is less than the level required for probable cause.").

S.C. at 95, 389 S.E.2d at 663 (stating "South Caroline follows the minority rule that the issue of probable cause is a question of fact and ordinarily one for the jury"). This is a significant distinction that cannot be overlooked. Also dissimilar to *Brice*, Rich had the video surveillance in his possession that clearly exonerated Huffman; however, he never turned this footage over to the police until *after* the police arrested Huffman. Further, Rich maintained throughout the proceedings that Huffman committed the theft and told police his employee could verify Huffman dropped off the stolen metal and that he would even "come and testify [against Huffman] in court." Rich presented these statements to police despite never having viewed the video surveillance of Huffman dropping off the metal. Rich also possessed Huffman's receipt for her metal and was aware the price Sunshine Recycling paid Huffman for her metal was almost five times less than what was alleged to have been stolen from Aiken Electric, yet never mentioned this discrepancy to Officer Ethridge. Instead, Rich maintained steadfastly that Huffman was responsible for stealing the metal from Aiken Electric. The inescapable conclusion is that Rich did more than "merely provide information to the police" and surely cannot be said to have left "the decision to bring charges to the sole discretion of the police" as his involvement was much greater than that of the security guard in *Brice.* (*See* Br. of Pet. Aiken Electric at 20, citing to 54 C.J.S. Malicious Prosecution § 17). For all of these reasons, the Court of Appeals was correct in determining that there are issues of material fact on Huffman's malicious prosecution claim that must be decided by a jury.

II. The Court of Appeals Did Not Impose New Duties on Witnesses by Concluding A Jury Question Existed as to Whether Petitioners Acted Reasonably and With Due Care in Participating in and Securing Huffman's Arrest.

Sunshine Recycling argues the Court of Appeals' opinion creates new law by placing an affirmative burden on witnesses to crimes to conduct an investigation prior to providing any

information to law enforcement. To the contrary, the opinion neither creates new law nor imposes such a duty. The Court of Appeals simply holds that, viewing the evidence in the light most favorable to Huffman, and considering the information available to Aiken Electric and Sunshine Recycling, a jury could reasonably conclude that Petitioners accused Huffman of a crime when a cautious man presented with the same circumstances would not have done the same. Under South Carolina common law, a person who undertakes to act has a duty to use due care. *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Likewise, a person providing information to the police must take care not to give misinformation or partial truths—whether intentionally or recklessly—that might hinder a police investigation. This duty to act reasonably has long been encompassed by the standard for probable cause; it is not new law. *See e.g., McBride v Sch. Dist. Of Greenville Cty.*, 389 SC. 546, 567, 698 S.E.2d 845, 856 (Ct. App. 2010).

In that vein, the Court of Appeals pointed to evidence that would support a finding that Goss and Rich intentionally or recklessly misled the investigating officers. For example, the Court's holding was based—in part—on evidence that Rich represented to police the surveillance video showed Huffman dropping off the stolen metal. Also, it was based—in part—on evidence that Goss identified some stolen metal intermingled with some additional metal but chose not to share this information. The Court's holding is also supported by Officer Ethridge's statement in his report that he was no longer comfortable pursuing the case because the "witnesses gave [him] false information." This statement alone is enough evidence to create a material fact as to whether Petitioners wrongfully caused Huffman's arrest. In applying the well-established probable cause standard to the facts of this case, the Court of Appeals correctly held that a jury must decide whether Petitioners acted as a cautious man would under these circumstances.

Sunshine Recycling attempts to discredit the Court of Appeals' reliance on *Wingate v. Postal Telephone & Cable Company*, 204 S.C. 520, 30 S.E.2d 307 (1944), by claiming that it was merely a witness and not a victim, thus the law espoused in *Wingate* is inapposite to this case. To the contrary, *Wingate* is directly on point. First, the holding in *Wingate* is not limited to crime victims or based on the fact that the defendant in that case was an agent of the crime victim. *Wingate*, 204 S.C. at 528, 30 S.E.2d at 311 (The charge of false imprisonment . . . "extends to *any* person who may cause, instigate or procure an unlawful arrest.") (emphasis added). Second, there is no South Carolina precedent for Sunshine Recycling's contention that a plaintiff must prove motive or provide an explanation as to why the defendant acted as they did to recover for false arrest or malicious prosecution. *See id.* In fact, malice is presumed when probable cause is lacking. *Id.* Thus, Petitioner's attempt to distinguish *Wingate* from this case and call this a novel issue of law is without merit.

III. The Court of Appeals Properly Declined to Address Aiken Electric's Argument That Its Actions Were Protected by Article 1, Section 24, of The Victims Bill of Rights Under The South Carolina Constitution And Section 16-3-1505 of the South Carolina Code (2003) When Its Decision That Summary Judgment Was Inappropriate Negated The Requirement to Address This Issue on Appeal.

In Aiken Electric's final brief, it attempts to create a constitutional issue where none exists. Aiken Electric argues that because Article 1, Section 24, of the South Carolina Constitution and section 16-3-1505 of the South Carolina Code (2003) grant crime victims the right to confer with law enforcement without threat of intimidation, harassment, or abuse, Aiken Electric should be absolved of liability for false arrest and malicious prosecution. The Court of Appeals properly declined to address this argument because its resolution of the summary judgment issue disposed of the necessity of addressing this argument on appeal. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion

whether to address any additional sustaining grounds." (footnote omitted)); *id.* at 421, 526 S.E.2d at 724 ("[T]he respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." (footnote omitted)).

Regardless, Aiken Electric's attempted public policy exception flies in the face of *Wingate*, 204 S.C. at 528, 30 S.E.2d at 311 (holding private citizens may be liable for false arrest) and *Gibson v. Brown*, 245 S.C. 547, 549, 141 S.E.2d 653, 654 (1965) (holding all participants in a malicious prosecution case were equally liable). A private citizen does not have a constitutional right to lie or mislead or offer false information to police. Clearly, this goes beyond exercising one's constitutional rights and rises to the level of infringing on the rights of others. The Court of Appeals' decision simply finds that there is at least a scintilla of evidence that Aiken Electric and Sunshine Recycling took actions not protected by, and in fact in violation of, South Carolina law. (App. at 990; 992-93). The decision to allow a jury to determine exactly what happened in this case in no way infringes on Petitioners' constitutional rights.

IV. The Court of Appeals Properly Considered Evidence That Would Be Admissible at Trial When Rendering its Decision.

Last, Aiken Electric argues the Court of Appeals improperly based its decision to reverse summary judgment on inadmissible evidence. More specifically, Aiken Electric avers Officer Aldridge's testimony that Goss "had a sense of urgency" in his communications with law enforcement is inadmissible opinion testimony from a lay witness. (App. 368-69). This argument is without merit.

Aiken Electric never objected to this evidence before the circuit court, nor was it addressed in Aiken Electric's brief in response to Huffman's appeal. Thus, no issue related to the lower courts' consideration of this testimony in the record can be properly considered by this Court. *See e.g., M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 474, 666 S.E.2d 262, 265 (Ct. App. 2008) (holding

that an argument was "not preserved for . . . review" when it was not properly raised at the summary judgment hearing); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

Furthermore, the Court of Appeals did not rely solely on this testimony in concluding there were issues of material fact that precluded granting summary judgment in this case. Second, this testimony clearly qualifies as admissible testimony. Rule 701 of the South Carolina Rules of Evidence allows for lay witnesses to give opinion testimony whenever it is (a) "rationally based on the perception of the witness"; (b) "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"; and (c) "do[es] not require special knowledge, skill, experience, or training." Rule 701, SCRE. "Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury." *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 468, 494 S.E.2d 835, 845 (1997).

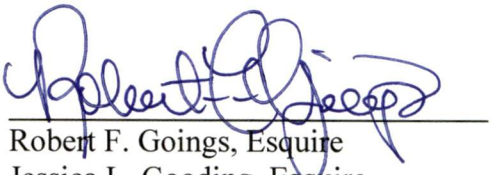
Officer Aldridge's testimony is reasonably based on his perceptions and would be helpful to the jury, and no special skill or training is required to determine whether a person is conveying a "sense of urgency." Thus, the Court of Appeals properly consider this statement. Ironically, on the next page of its brief, Aiken Electric relies on Officer Ethridge's testimony that Goss was behaving like "any other crime victim" to support its argument that Aiken Electric and/or Goss were exercising constitutional rights at all times relevant to this case. (Br. Pet. Aiken Electric at 12). This statement is no different in effect than the statement it argues is inadmissible. Not only are the arguments of Aiken Electric fundamentally flawed, they are internally inconsistent. As discussed above, Aiken Electric's assertion of constitutional rights is misplaced. Further, a simple statement that Officer Ethridge considered certain behavior to be typical of crime victims cannot

single-handedly absolve Aiken Electric of liability. Accordingly, this Court should affirm the Court of Appeals' decision to reverse the circuit court and remand this case for a trial on the merits.

CONCLUSION

The Court of Appeals properly reversed the circuit court's order granting summary judgment against Huffman. The summary judgment standard in this State is clear and well-settled in that an appellate court must review all evidence in the light most favorable to the non-moving party and find summary judgment inappropriate when the non-moving party submits a mere scintilla of evidence to prove that triable issues of fact are present. In this case, Huffman has presented more than a mere scintilla of evidence. As a result, Huffman is entitled to her day in court and to have a jury of her peers determine whether her arrest was made without probable cause and whether Petitioners' actions contributed to her unlawful arrest. Accordingly, the Court of Appeals' decision should be affirmed and Huffman's case should be remanded for a trial on the merits of her false imprisonment and malicious prosecution claims.

Respectfully submitted,



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December 7, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Maite D. Murphy, Circuit Court Judge

Circuit Court Case No. 2014-CP-38-672

Appellate Case No. 2014-001492

Supreme Court No. 2016-002080

Meredith Huffman .....Respondent,

v.

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

PROOF OF SERVICE

I, Leslie C. Clamp, of The Goings Law Firm, LLC, hereby certify that I have served a copy of the Brief of Respondent by hand-delivering a copy of same, , on December 8, 2017, to the following:

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