STATE OF SOUTH CAROLINA **COUNTY OF AIKEN**	**IN THE COURT OF COMMON PLEAS** **SECOND JUDICIAL CIRCUIT**
Otis Owens, Plaintiff, v. Sheriff Michael Hunt, the Aiken County Sheriff's Office, Aiken County Detention Center, and Aiken County, Defendants.	Case No.: 2017-CP-0201413 **ORDER GRANTING DEFENDANTS' MOTION TO AMEND ORDER**

This matter came before the Court pursuant to a Motion to Amend Order under SCRCP Rule 59(e), filed on December 13, 2022 by the above-referenced defendants ("the Defendants"), excluding Aiken County which has been dismissed as a party. A trial was conducted in the above-referenced case during the October 31st Term of Court. The jury returned a verdict in favor of the above-referenced plaintiff ("the Plaintiff"). The Defendants moved for judgement not withstanding the verdict ("JNOV") or, alternatively, moved for a new trial or new trial nisi remittitur. The court issued a Form 4 Order denying the Defendants' motions for nisi remittitur and a new trial, and granted and denied in part the Defendants' motion for JNOV. The court granted the Defendants' JNOV motion to dismiss Aiken County as a party-defendant and denied all other motions related to JNOV. The Defendants' filed a Motion to Amend Order, requesting the court issue a ruling on each ground raised in their post-trial motions to preserve the issues for appellate review. I hereby grant the Defendants' motion and amend the electronic Form 4 Order entered by the court on December 2, 2022.

LEGAL STANDARD

Under Rule 59(e), a party may move to alter or amend a judgment. SCRCP 59(e). The losing party must present his issues and arguments to the lower court and obtain a ruling; if the lower court fails to rule upon the arguments, the losing party must file a motion to alter or amend to preserve the issue for appellate review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). It is "beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order…" *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014).

ANALYSIS

Because the court issued its ruling in a Form 4 Order and did not hear oral arguments on the Defendants' post-trial motions, this Court finds that it is beneficial for the court to articulate its findings and conclusions of law in denying the Defendants' post-trial motions to preserve a record for appellate review. I hereby amend the previous Form 4 Order issued and now enter an Order to articulate the court's findings, conclusions of law, and rulings on the Defendants' post-trial motions:

I. Defendants' Motion for Judgement Notwithstanding the Verdict (JNOV)

A. The Defendants' motion to dismiss Aiken County as a party-defendant is GRANTED.

The Defendant's motion to dismiss Aiken County as a party-defendant is granted. South Carolina Law provides the sheriff "shall have custody of the jail in his county and, if he appoint[s] a jailer to keep it, the Sheriff shall be liable for [the] jailer and the sheriff or jailer shall receive and safely keep in prison any person committed to either of them […]" S.C. Code Ann. § 24-5-10. The South Carolina Supreme Court has held that county detention centers are "jails within the meaning of Section 24-5-10. *Roton v. Sparks*, 270 S.C. 637, 244 S.E.2d 214 (1978). South Carolina Sheriffs and counties are treated as separate entities: "sheriffs and their deputies

are state, not county, officials." *Cone v. Nettles*, 308 S.C. 109, 112, 417 S.E.2d 523, 525 (1992) (citing *Gulledge v. Smart*, 691 F.Supp. 947 (D.C.S.C.1988), *aff'd* 878 F.2d 379 (4th Cir.1989)). Under the South Carolina Tort Claims Act ("SCTCA"), which governs this action, a plaintiff must name as a party defendant only the agency or political subdivision *for which the employee was acting*. S.C. Code Ann. § 15-78-70(c) (emphasis added). Only the entity employing the employee whose act gives rise to the action may be sued. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 329-30, 566 S.E.2d 536, 543 (2002).

Deputy Gibson ("the officer"), the officer involved in the search of the Plaintiff, is an employee of the Aiken County Detention Center ("ACDC"). ACDC is operated by the Aiken County Sheriff's Office, and employees of ACDC are employed by the Sheriff's Office, not the county. Because the Sheriff and county are separate entities, actions by ACDC officers are attributive to the Sheriff's Office, not the county. I find Aiken County is not liable and cannot be held liable under the South Carolina Torts Claims Act for any grossly negligent act or omission by an employee working at ACDC. This Court does not find that the inclusion of Aiken County on the verdict form resulted in prejudice to all Defendants warranting the grant of JNOV for all defendants. Thus, the Defendants' motion for JNOV is granted in part, and Aiken County is hereby dismissed as a party-defendant as a matter of law. The verdict and judgment rendered against Aiken County in this action is hereby vacated.

B. The Defendant's motion for JNOV on grounds the Plaintiff failed to prove a claim for gross negligence is DENIED.

The Defendants' motion for JNOV on ground that Plaintiff failed to prove a claim for gross negligence is denied. When pleading a claim, a party must state a short and plain statement of facts showing the party is entitled to relief. SCRCP 8(a). A party may set forth two or more statements of a cause of action…either in one count…or in separate counts. SCRCP 8(e)(2).

When a verdict is reached, the finding of the jury will not be disturbed unless the record fails to disclose any evidence which reasonably supports the jury's verdict. *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 556, 314 S.E.2d 19, 22 (Ct. App. 1984).

The Defendant argued the Plaintiff claimed he was "assaulted," but did not plead a claim for assault and battery, which the Defendant argued was the proper cause of action for an unreasonable search by a correctional officer, not gross negligence. Def.'s Mot. Jnov. 4 (citing *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 11, 530 S.E.2d 132, 137 (Ct. App. 2000) (recognizing negligence and intentional torts are mutually exclusive causes of action). The Defendants further argue the Plaintiff intended to bring an intentional tort for sexual assault and failed to prove his claim for gross negligence. Def.'s Mot. Jnov. 5.

The Plaintiff's first cause of action was for gross negligence. Compl. ¶ 22. The Plaintiff brought his claim for gross negligence under the SCTCA and gave a short and plain statement of facts, which included an assault allegation, to support the gross negligence claim. Compl. ¶¶ 21-24. In his pre-trial brief, the Plaintiff further articulated his claim for gross negligence under the SCTCA by arguing his cause of action arose under the Act from the Defendants' gross negligence in the control or confinement of the Plaintiff, an inmate. Pl.'s Pre-Tr. Br. 6-7 (citing S.C. Code Ann. § 15-78-60(25)) [1]. It does not appear from arguments in the Plaintiff's filings or evidence presented at trial that the Plaintiff intended to bring a cause of action for assault.

Furthermore, the verdict form presented to the jury asked the jury to consider whether the Plaintiff proved by a preponderance of the evidence that the Defendants were "grossly negligent in their supervision, and confinement of [the Plaintiff]." Verdict Form. The jury understood the

[1] Subsection 25 provides an exception to governmental immunity for exercising the duty of control, supervision, or confinement of a prisoner in a grossly negligent manner. S.C. Code Ann. § 15-78-60(25).

issue of the case to be gross negligence in supervision and confinement, not assault. Regarding that issue, the jury returned a verdict for the Plaintiff, and this Court will not disturb the finding of the jury absent a showing the record fails to disclose any evidence which reasonably supports the jury's finding. This Court finds that the Plaintiff intended to plead a cause of action for gross negligence and mentioned the allegation of assault merely to support the gross negligence claim regarding the Defendants' confinement and supervision of the Plaintiff. Thus, the Defendant's motion on this ground is denied.

C. The Defendants' motion for JNOV on grounds the Defendants are entitled to absolute sovereign immunity under the South Carolina Torts Claim Act is DENIED.

The Defendants' motion for JNOV on grounds the Defendants are entitled to sovereign immunity under the SCTCA is denied. The Defendants argue they are entitled to immunity under the SCTCA because the Plaintiff alleged the officer assaulted the inmate, which is an intentional tort not actionable under the Act. Def. Mot. Jnov. 5. A government entity is not liable for loss resulting from…employee conduct…which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-60(17). The SCTCA provides an exception to government immunity for gross negligence in the control, confinement, or supervision of an inmate. S.C. Code Ann. § 15-78-60(25). In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006). When a verdict is reached, the finding of the jury will not be disturbed unless the record fails to disclose any evidence which reasonably supports the jury's verdict. *Hutson*, 280 S.C. at 556.

The Defendants based their reasoning for the motion on an assertion the Plaintiffs allege a cause of action for assault, not gross negligence. Based on analysis above, this Court has decided that the Plaintiff's cause of action was for gross negligence in the confinement and

supervision of the Plaintiff, not assault. The issue of gross negligence is a question best determined by a jury, and the jury found the Defendants were grossly negligent in the exercise of their duties in confinement and supervision of the Plaintiff. This Court will not disturb the jury's finding absent a showing the record fails to disclose any evidence which reasonably supports the jury's finding. Thus, the Defendants are not entitled to sovereign immunity under the SCTCA, and the Defendants' motion on this ground is denied.

D. The Defendants' motion for JNOV on grounds the Plaintiff failed to prove a claim for gross negligence in the Defendants' hiring and supervision of employees is DENIED.

The Defendants moved for JNOV on grounds the Plaintiff failed to prove a claim for gross negligence in the hiring and supervision of employees. The elements of negligent hiring and retention are (1) whether the employer had knowledge of the employee's propensity, and (2) the foreseeability of harm to third parties. *Doe v. ATC, Inc.*, 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005). The Defendants argue the Plaintiff presented no evidence of prior misconduct by the officer, no evidence of whether the Defendants knew or should have known of the officer's propensity to misconduct, and no evidence of foreseeability. Def. Mot. Jnov. 7. At trial, the Plaintiff presented evidence of ACDC policies, Aiken County Sheriff's Office policies, and witness testimony regarding whether employees were aware of and following such policies. The Plaintiff presented evidence of employee deviations from the policies set by federal law, the Sheriff's Office, and ACDC. The Plaintiff also presented testimony evidence regarding the officer's general reputation and history to prove the point of whether the Defendant had knowledge of the officer and the foreseeability of harm. The jury found this evidence was sufficient for the Plaintiff to prove beyond a preponderance of the evidence that the Defendants were grossly negligent in their hiring and supervision of the officer. This Court will not disturb

the jury's finding absent a showing the record fails to disclose any evidence which reasonably supports the jury's finding. Thus, the Defendants' motion on this ground is denied.

E. The Defendants' motion for JNOV on grounds the Plaintiff failed to prove a claim for failure to provide medical care is DENIED.

The Defendants' motion for JNOV on grounds the Plaintiff failed to prove a claim for failure to provide medical care is denied. The Plaintiff alleged in is complaint that the Defendants failed to provide medical care to support its claim that the Defendants were grossly negligent in the confinement and supervision of the Plaintiff. Compl. ¶ 21. The Defendants argue the Plaintiff did not present expert medical testimony to prove a deviation from a standard of care and proximate cause. Def. Mot. Jnov. 8. At trial, the Plaintiff testified that he was not seen by a doctor until days after the incident. The Plaintiff presented calendar dates on the incident report of the search and on medical reports to show the Plaintiff had not been seen by a doctor until days after the incident. The jury found this testimony sufficient to find the Defendants grossly negligent in their supervision and confinement of the Plaintiff by failing to provide immediate medical care. This Court will not disturb the jury's finding absent a showing the record fails to disclose any evidence which reasonably supports the jury's finding. Thus, the Defendants' motion on this ground is denied.

F. The Defendants' motion for JNOV on grounds the Plaintiff should not have been allowed to proceed with claims related to a PREA investigation is DENIED.

The Defendants' motion for JNOV on grounds the Plaintiff should not have been allowed to proceed with any claims or allegations related to the investigation conducted by ACDC personnel under the Prison Rape Elimination Act ("PREA") is denied. The Defendants argue the Plaintiff's PREA allegations are not actionable because PREA does not create a private right of action. Def. Mot. Jnov. 8. However, the Defendants are mistaken regarding the Plaintiff's intent

for offering evidence of allegations related to PREA. As the record reflects, the Plaintiff presented evidence of an a PREA investigation to support its claim the Defendants were grossly negligent in its confinement and supervision of the Plaintiff by showing a deviation from federal guidelines regarding sexual assault allegations. The Plaintiff did not present such evidence to proceed with a cause of action under PREA. Thus, the Defendants' motion on this ground is denied.

II. Defendants' Motion for a New Trial Absolute or New Trial Nisi Remittitur

A. The Defendants' motion for a new trial absolute or new trial nisi remittitur on grounds the damages award is unsupported by evidence and grossly excessive is DENIED.

The Defendants' motion for a new trial on grounds the trial record does not support the jury's $150,000 damages verdict is denied. When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial nisi but must have a compelling reason to do so. *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). To determine whether a verdict award is inadequate or excessive, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice. *Id*. at 257. The trial judge must grant a new trial only when the award is "so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality…or some other improper motives" *Id*. The grant or denial of a motion for a new trial nisi is left to the discretion of the trial judge, and the decision will not be disturbed on appeal absent an abuse of discretion. *Id*. at 256.

After the jury found the Defendants were grossly negligent in the confinement and supervision of the Plaintiff, they awarded $150,000 in damages for the Plaintiff. The Defendants argue the damages award is supported by the evidence and disproportionate to the injury. Def.

Mot. Jnov. 9-11. The Plaintiff and other witnesses testified regarding his mental and emotional state after the incident, and the jury was allowed to consider such testimony and the alleged injury sustained. There is no evidence the jury's award was the result of passion, caprice, prejudice, or any other improper motive. As a result, it is within the discretion of the trial judge whether to grant a new trial absolute or new trial nisi remittitur. Absent a showing of passion, caprice, prejudice, improper motive by the jury, or any other compelling reason, this Court does not find it appropriate to grant a new trial absolute or reduce the amount awarded by the jury. Thus, the Defendants' motions are denied.

B. The Defendants' motion for a new trial absolute on grounds the court improperly allowed lay testimony regarding an alleged hydrocele injury and its causation is DENIED.

The Defendants' motion for a new trial absolute on ground the court erred in allowing the Plaintiff to present lay testimony regarding the hydrocele injury and its causation is denied. The Defendants argue the court improperly allowed the Plaintiff to testify regarding a hydrocele injury and its causes. Def. Mot. Jnov 9-10. However, as the record reflects, the court sustained several of the Defendants' objections to the Plaintiff's mentioning of the injury and its causation without laying a proper foundation or calling an expert witness. The court also made note of a running objection by the Defendant to the Plaintiff's testimony. The Defendants' objections and the court's rulings are noted on the record. Thus, the Defendants' motion is denied.

C. The Defendants' motion for a new trial on grounds the court improperly admitted evidence of the officer's prior bad acts towards other inmates is DENIED.

The Defendants' motion for a new trial on grounds the court erred by allowing the jury to hear testimony of the officer's bad acts towards other inmates is denied. Evidence of prior bad acts is inadmissible to prove a person's propensity or conformity with the character trait alleged; however, such evidence may be admissible to show motive, identity, the existence of a common

scheme or plan, the absence of mistake or accident, or intent. SCRE 404. "The law in civil cases […] permits proof of other acts other than the one charged which are so related in character, time and place of commission as to [...] tend to show the existence of a common plan or system." *Citizens Bank of Darlington v. McDonald*, 202 S.C. 244, 24 S.E.2d 369 (1943).

At trial, the Plaintiff offered evidence that the officer's frisk search of the Plaintiff and other inmates, using the same technique, caused similar injuries to the other inmates. The officer conducted a frisk search on the Plaintiff and other inmates on the same day, at the same time, using the same frisk technique, and the basis for the searches arose from the same incident in which the officer suspected the inmates searched had contraband. The other inmates suffered similar injuries as the Plaintiff resulting from the same search. The Plaintiff offered the evidence of the officer's prior acts of improper frisk technique used on other inmates to show the absence of mistake by the officer and a common scheme by the officer to conduct a frisk search in a manner that deviated from protocol resulting in similar injuries to the Plaintiff and others. The court ruled overruled the Defendants' objections, finding the evidence is admissible under Rule 404(b) because the searches were so related in character, time, and place as to show the common scheme of the officer to conduct the frisk searches in this manner and show the absence of mistake. I hereby affirm the ruling and deny the Defendants' motion on this ground.

D. The Defendants' motion for a new trial on grounds the court improperly allowed the jury to hear testimony regarding alleged retaliation by Deputy Gibson is DENIED.

The Defendants' motion for a new trial on grounds the court improperly allowed the Plaintiff to present testimony regarding retaliation against the Plaintiff is denied. Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable than without the evidence. SCRE 401. Irrelevant evidence is inadmissible. SCRE 402. Relevant evidence may be excluded if its probative value is substantially outweighed by unfair

prejudice or confusion of issues. SCRE 403. The Plaintiff presented testimony regarding retaliatory actions by the officer after the incident to support his claim that the Defendants were grossly negligent in the supervision and confinement of the Plaintiff and were grossly negligent in the supervision of employees. The court found this testimony to be relevant to both the issues, and did not find the probative value of the testimony was substantially outweighed by prejudice or confusion of issues. I hereby affirm the court's ruling and deny the Defendants' motion.

E. The Defendants' motion for a new trial on grounds the court improperly excluded the PREA Report prepared by Lieutenant Bowman is DENIED.

The Defendants move for a new trial on grounds the court erred by excluding evidence of a PREA investigation conducted by Lt. Bowman. Hearsay is an out of court statement, whether written or oral, offered to prove the truth of the matter asserted. SCRE 801. Hearsay is inadmissible unless an exception applies. SCRE 802. An exception to the hearsay rule is available where the declarant is unavailable for one or more of the reasons provided by the rule. SCRE 804(a). However, the declarant is not "unavailable" within the meaning of the party seeking to offer the declarant's statement procured the witness's absence. *Id*. An exception to the hearsay rule is also available for records kept within the ordinary course of business, at the time of the event, by a person with personal knowledge and a duty to report. SCRE 803.

Lt. Bowman prepared a writing which stated that an investigation was made regarding the Plaintiff's allegations and no wrongdoing was found on the part of the officer. The statement was about a paragraph long, was prepared on plain white paper without a letter head, and did not bear any indication that it was a formal report prepared in compliance with PREA. The statement itself is hearsay because it is an out of court statement offered to prove the truth of whether there was wrongdoing on behalf of the officer and whether the Defendants followed federal policies under PREA. Lt. Bowman was not present at trial because he was on vacation. Vacation is not a

reason upon which the rule makes Lt. Bowman an "unavailable" witness; thus, the 804(a) exception does not apply.

The court rejected the Defendants' argument regarding the statement's admissibility as a business record under Rule 803 due to the Defendant being unable to establish the document met the requirements of the rule. The court excluded the statement as inadmissible hearsay and the Defendants' objection is noted for the record. I hereby affirm the court's ruling and deny the Defendants' motion on this ground.

F. The Defendants' motion for a new trial on grounds the trial court erred by publishing to the jury a video deposition taken in federal court litigation is DENIED.

The Defendants move for a new trial on grounds the court erred by allowing the Plaintiff to publish a video deposition that was noticed and taken in federal court. Under Rule 32, a deposition may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice. Rule 32(a). A deposition of any witness, party or not, may be used by any party for any purpose if the court finds …the witness is unable to attend or testify because of…imprisonment. Rule 32(a)(3)(C).

The Defendant argued the deposition of Wilhite was improperly published to the jury because the deposition was noticed and taken in a federal action and Rule 32 does not permit the use of federal action, and if it does, the federal action must be a "later action" consistent with the federal rule. Def. Mot. Jnov. 15 (citing FRCP 32(a)(8)). South Carolina has not incorporated subsection 32(a)(8) in its Rules of Civil Procedure. The language of the South Carolina rule is broader than the federal rule and allows the use of *any* deposition. The SC Rule does make a distinction between depositions taken in state or federal court, as the federal rule does. Additionally, the SC Rule does not restrict the use of depositions only to those taken in a later action, unlike the federal rule. At trial, the court overruled the Defendants' objection, finding the

broad language of Rule 32 was does not exclude the use of a federal deposition in state court and does not limit the use of depositions to only those taken in a later action. Thus, I hereby affirm the court's ruling and deny the Defendants' motion on this ground.

G. The Defendant's motion for a new trial under the Thirteenth Juror Doctrine is DENIED.

The Defendants' motion for a new trial under the Thirteenth Juror Doctrine is denied. Under the Thirteenth Juror Doctrine, a trial judge possesses veto power and may grant a new trial when he finds the evidence does not justify the verdict. *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996). I hereby decline to exercise veto power to grant a new trial under this doctrine.

CONCLUSION

Based on forgoing reasons, the Defendants' Motion of Judgment Notwithstanding the Verdict is GRANTED in part and DENIED in part. Aiken County is hereby dismissed as a party-Defendant, and the verdict and judgment rendered against Aiken County in this action is hereby vacated. All other motions related to JNOV are DENIED. The Defendants' Motion for Nisi Remittitur is DENIED. The Defendants' Motion for a New Trial is DENIED.

IT IS SO ORDERED.

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Judge Courtney Clyburn Pope
South Carolina 2nd Judicial Circuit

February ___, 2023
Aiken, South Carolina

Aiken Common Pleas

Case Caption: Otis Owens VS County Of Aiken , defendant, et al

Case Number: 2017CP0201413

Type: Order/Leave to Amend

So Ordered

The Honorable Courtney Clyburn Pope