THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2023-000009
Case No. 2017-CP-02-1413

Otis Owens, ... Respondent,

v.

Michael Hunt, in his Official Capacity as Sheriff
of Aiken County, Aiken County Sheriff's Office,
Aiken County Detention Center, and Aiken County, ... Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an appeal from an action brought pursuant to the South Carolina Tort Claims Act. On June 20, 2017, the Respondent Otis Owens filed a Complaint against the Appellants Sheriff Michael Hunt, the Aiken County Sheriff's Office, Aiken County Detention Center, and Aiken County. The Complaint includes causes of action for gross negligence and grossly negligent hiring and supervision. (Complaint). Owens alleges that on January 27, 2017, Deputy Matthew Gibson, who was a corrections officer, committed a sexual assault or an act of sexual misconduct upon Owens during a pat down search at the Aiken County Detention Center. Specifically, in his Complaint, the Owens makes the following factual allegations as the basis for his claims:

> On or about January 27, 2017, when the plaintiff was going in from the recreation yard, an Aiken County Detention Center corrections guard, "in searching the plaintiff, probed the plaintiff's belly button, ran his hands up the inside of the plaintiff's legs, and grabbed and squeezed the plaintiff's testicles. The guard maliciously and aggressively assaulted the plaintiff, going beyond anything necessary to search the plaintiff.

See, Complaint, ¶ 9. (R. ___). The guard referred to is Deputy Gibson. There are no additional allegations in the Complaint as to the factual basis of the claims.

The evidence at trial revealed that Owens, who was a pretrial detainee, was implicated with other inmates of using paper dice in the recreational area which was against Detention Center policy. The dice, as an implement for gambling, was contraband. As a result, a number of inmates, Owen included, were patted down by Deputy Gibson after returning from the recreational area as part of a search for the dice. As pled in the Complaint, Owens alleges that Deputy Gibson improperly conducted the pat down search, and in doing so, Gibson grabbed and squeezed one of his testicles. Owens alleges that he sustained an injury to his groin as a result.

After the completion of discovery, the case proceeded to trial on October 31, 2022, before Circuit Court Judge Courtney Clyburn Pope and an Aiken County jury. The Appellants moved for a directed verdict at the close of Owens' case-in-chief and at the close of the evidence. Those motions were denied. On November 4, 2022, the jury returned a verdict in favor of Owens and awarded actual damages in the amount of $150,000. (Verdict Form).

The Appellants thereafter filed post trial motions including for judgment notwithstanding the verdict (JNOV), or alternatively, a new trial absolute. The trial court did not hold a hearing on the post-trial motions. Instead, the trial court issued a Form Order filed December 2, 2022, granting in part and denying in part the JNOV motion. The trial court granted a JNOV only as to the Appellant Aiken County. The motion for new trial absolute was also denied.

The Appellants then filed a Rule 59(e) motion. Without holding a hearing, the trial court issued an order which is titled "Order Granting Defendants' Motion to Amend Order" as filed on February 21, 2023. With that Order, the trial court granted the Appellants' request that the court issue a ruling on each ground raised in the post-trial motions in order to properly present those issues for appellate review. The trial court further amended the Form Order and provided the bases for the court's rulings on the grounds raised in the post trial motions.

The Appellants thereafter filed a timely appeal to this Court.

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*.

"In an action at law, on appeal of a case tried by a jury, [appellate courts] may only correct errors of law. The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 142 (2010).

"Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law." *Austin*, 691 S.E.2d at 149.

ARGUMENTS

I. Directed Verdict and Judgment Notwithstanding the Verdict (JNOV) Motions

In his Complaint, the Respondent Otis Owens pleads two causes of action, one for gross negligence in various particulars and a second for gross negligence in hiring and supervision. (Complaint). The trial court committed several reversible errors in denying the Appellants' directed verdict and JNOV motions and submitting the gross negligence claims to the jury. Specifically, the trial court erred in allowing Owens to present a never pled claim for assault and battery as a converted gross negligence claim. Second, the trial court erred in failing to charge the jury as to the duty of care owed by the Appellants and left that issue of law for the jury to determine. Third, the trial court erred in denying the Appellants' motions for directed verdict and JNOV based on S.C. Code Ann. § 15-78-60(17) of the Tort Claims Act. Fourth, the trial court erred in ruling that there was sufficient evidence of gross negligence to deny the motions for directed verdict and JNOV on the grossly negligent hiring and supervision claim. Finally, the trial court erred in denying the motions for directed verdict and JNOV on the failure to provide medical care claim. Each of these issues will be addressed in turn.

A. The trial court erred in allowing the Respondent to present a never pled claim for assault and battery as a converted gross negligence claim.

It is undisputed that Otis Owens never pled a cause of action for assault and battery; his only causes of action as pled are for gross negligence. (Tr. 62) ("We have a claim for gross negligence and negligent hiring and supervision and that's it"). The trial court, nonetheless, erred in allowing Owens to present a cause of action for assault and battery that was never pled by

treating such a claim as one for gross negligence. In addressing that issue, the trial court provided the following explanation: "It does not appear from arguments in the Plaintiff's filing or evidence presented at trial that the Plaintiff intended to bring a cause of action for assault." (Order II, p. 4). Consequently, it appears that the trial court denied that Owens' claim that he attempted to litigate was actually one for assault and battery. That is contrary to South Carolina law.

Based on a review of the case as pled and as presented to the jury, there is no denying that the crux of Owens' allegations against the Appellants is a sexual assault committed by Deputy Matthew Gibson upon Owens during a pat down search at the Aiken County Detention Center.[1] Specifically, in his Complaint, the Owens makes the following factual allegations as the basis for his claims:

> On or about January 27, 2017, when the plaintiff was going in from the recreation yard, an Aiken County Detention Center corrections guard, "in searching the plaintiff, probed the plaintiff's belly button, ran his hands up the inside of the plaintiff's legs, and grabbed and squeezed the plaintiff's testicles. The guard maliciously and aggressively assaulted the plaintiff, going beyond anything necessary to search the plaintiff.

See, Complaint, ¶ 9. (R. ___). The guard referred to is Deputy Gibson. There are no additional allegations in the Complaint as to the *factual basis* of the claims.

Under South Carolina law, there is no question that a sexual assault is actionable as an intentional tort, namely as an assault and battery claim, and not as a negligence or gross negligence claim. As this Court has held, "[a]ssault and battery is generally classified as an intentional tort, as

[1] As discussed in more detail below, the trial court allowed Owens' counsel, over objection, to present extensive testimony on the application of the Prison Rape Elimination Act, 34 U.S.C. § 30301 ("PREA"), which by law applies only to allegations of "rape" as defined by the Act. *See,* 42 U.S.C. § 30309(9) (defining "rape"). Owens should be estopped from denying that his claim was for a sexual assault.

contrasted with a tort based on negligence." *Longshore v. Saber Security Services, Inc.*, 365 S.C. 554, 619 S.E.2d 5, 9-10 (Ct. App. 2005). In *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011), the Supreme Court applied that very holding from *Longshore* in describing "assault" and "battery" as intentional torts not subject to comparative fault rules. 709 S.E.2d at 615, n.3. *See also*, *Prior v. South Carolina Medical Malpractice Liability Ins. Joint Underwriting Asso.*, 305 S.C. 247, 407 S.E.2d 655, 657 (Ct. App. 1991) (finding that sexual assault is an intentional tort "despite the use of the terms negligence and recklessness"); *Douglass v. Florence General Hospital*, 273 S.C. 716, 259 S.E.2d 117 (1979) (describing assault and battery as an intentional tort); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455, 459 (Ct. App. 1997) (describing civil assault and battery as an "intentional tort theory").

In effect, gross negligence does not *per se* include intentional conduct. South Carolina law recognizes that intentional torts may not be committed in a negligent manner. In other words, negligence and battery are mutually exclusive; there is no such cause of action for a negligent assault and battery or a grossly negligent assault and battery. *See*, *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 137 (Ct. App. 2000) (recognizing that "an intentional tort … by definition cannot be committed in a negligent manner"); *Restatement (Second) of Torts*, § 262, cmt. d ("The definition of negligence given in this Section includes only such conduct as creates liability for the reason that it involves a risk and not a certainty of invading the interest of another. It therefore excludes conduct which creates liability because of the actor's intention to invade a legally protected interest of the person injured or of a third person"). Moreover, in *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999), this Court recognized that "[f]alse imprisonment is an intentional tort;

negligence is not an element." 521 S.E.2d at 167. Accordingly, this Court concluded that "the gross negligence standard is not applicable" to claims for intentional torts. *Id*.[2]

Additionally, and of particular significance to this discussion, South Carolina jurisprudence does not allow for an intentional tort to be converted into a negligence claim. In a related context, the South Carolina Supreme Court has ruled that a defamation claim may not be converted into a negligence claim. Instead, any allegation that a statement is false or otherwise defamatory must be brought as a defamation cause of action. In *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006), the Supreme Court affirmed the Rule 12(b)(6) dismissal of a negligence claim that was based on the same factual allegations as a defamation claim. The Supreme Court explained that "[a] claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common law and constitutional law." 629 S.E.2d at 674. *See also*, *McGlothlin v. Henneley*, 370 F.Supp.3d 603, 620 (D.S.C. 2019) (citing *Erickson* in dismissing negligence claim for defamation). The same is true in the case at bar. As the Supreme Court instructs in *Erickson*, Owens cannot re-allege or convert his assault and battery claim into a negligence or gross negligence cause of action – yet that is just what he has attempted presumably in an attempt to circumvent the bar of sovereign immunity under the Tort Claims Act.

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[2] In the related context of force used to effect an arrest, South Carolina law holds an excessive use of force is actionable as an assault and battery. In *Moody v. Ferguson*, 732 F.Supp. 627 (D.S.C. 1989), the district court, applying South Carolina law, explained: "Although a law enforcement officer is privileged to use lawful force, he is nevertheless liable for assault if he uses force greater than is reasonably necessary under the circumstances." 732 F.Supp. at 632. Having found that "the force employed by the defendant in shooting at the plaintiff's car was unreasonable under the circumstances," the district court in *Moody* entered judgment in favor of the plaintiff on the state law assault claim. *Id*. *See also*, *Roberts v. City of Forest Acres*, 902 F.Supp. 662, 671 (1995) ("if a police officer uses excessive force, or 'force greater than is reasonably necessary under the circumstances,' he may be liable for assault or battery").

Moreover, the trial court's insistence that Owens did not intend to bring what should have been an assault and battery claim instead of a gross negligence claim is defied by simple reference to Owens' Complaint. In listing his particulars of "gross negligence, Owens alleges that the Appellants were grossly negligent "(a) by assaulting the plaintiff, (b) by battering the plaintiff, and (c) by using excessive force." *See*, Complaint, ¶ 21. (R. ___). There can be no reasonable dispute that Owens improperly brought a gross negligence claim for what is only actionable as an assault and battery.

In sum, Owens did not plead a claim for assault and battery, which would be the proper cause of action under state law for a sexual assault committed by a correctional officer. In other words, the gross negligence standard is not applicable to the intentional tort of assault and battery or any vicarious liability claim based on a sexual assault or sexual misconduct allegedly committed by Deputy Gibson. If Owens intended to bring a tort claim for a sexual assault or sexual misconduct alleged against Deputy Gibson, as is clearly his intent, the only proper cause of action would be for assault and battery – not for gross negligence. Owens alleges what is clearly considered to be intentional conduct; yet, intentional conduct is not actionable under the law as gross negligence. The Appellants were therefore entitled to a directed verdict and JNOV on the gross negligence claim as alleged in the First Cause of Action. At the very least, a new trial absolute should be ordered so that the case may be tried as an assault and battery claim, and jury may be properly instructed on the law applicable to an assault and battery claim as opposed to treating the claim as one for gross negligence.

B. The trial court erred in failing to charge the jury as to the duty of care owed by the Appellants and left that issue of law for the jury to determine.

In addition to allowing the case to be presented to the jury as a gross negligence claim when it should have been pled and presented as an assault and battery claim, the trial court compounded that error by failing to even charge the jury as to the legal duty of care owed by the Appellants and left that issue of law for the jury to determine. It is well settled under South Carolina law that the determination of the existence of a duty is solely the responsibility of the trial court and not a decision for the jury. *Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47, 49 (1996). *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3, 5 (1997) ("[w]hether the law recognizes a particular duty is an issue of law to be decided by the court"). In the case at bar, the trial court never charged the jury as to the applicable duty of care for his First Cause of Action for gross negligence. In its jury instructions, the trial court correctly charged the jury as to the four elements required to prove a gross negligence claim. As to the first prong -- the duty of law owed -- the trial court instructed that "the plaintiff must show, number one, the defendant, Aiken County Sheriff, owed the plaintiff a legal duty of care." (Tr. 1016).[3] However, the trial court erred because it *never* found a duty of care actually owed by any of the Appellants, and the court *never* articulated any such duty of care to the jury. The trial court later in its charge instructs that "[t]he plaintiff must prove, by the greater weight of the evidence, that the defendant did something wrong and contrary to the accepted standard and practices in the field of corrections before the plaintiff will be entitled to recover." (Tr. 1018). The trial court, however, never

[3] Notably, the trial court made no mention of the other Appellants which was likely confusing to the jury. (Tr. 1016).

instructed the jury what "accepted standard and practices in the field of corrections" established a legal duty of care.

Instead, the trial court left it to the jury's whim or speculation as to what the duty of care was. As to the second prong – the breach of a legal duty -- the trial court stated:

> You may consider relevant standards of care from various sources in determining whether the defendant breached its duty – breached duties owed to an injured person in a negligence case. The standard of care in a given case is established and defined by the common law statutes, administrative regulations, and industry standards.

(Tr. 1017). But as to the first prong, the trial court never instructed the jury on the legal duty owed by each of the Appellants. Curiously, in its order on post-trial motions, the trial court opines that "[t]he jury understood the issue of the case to be gross negligence in supervision and confinement, not assault." (Order II, pp. 4-5). But, to reiterate, the trial court never fulfilled its duty as the arbiter of the law to actually instruct the jury as to what legal duty of care was owed by each of the Appellants.

Moreover, like Owens' counsel, the trial court appears to have confused the concepts of "legal duty of care" which is a question of law for the court and "standard of care" which can be developed through expert testimony or other admissible evidence as to recognized standards with respect to consideration as to whether a breach occurred. As the Supreme Court has explained, internal policies or guidelines do not establish a legal duty of care, although once a "legal duty" is established as a matter of law, internal policies or guidelines may be treated as evidence to assess the applicable "standard of care." *See*, *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011). In *Doe*, the Supreme Court held that [i]t follows that, if no duty has been established, evidence as to the standard of care is irrelevant. Only when there is a duty would a standard of care need to be established." 711 S.E.2d at 912. In short, there is a significant

difference between a "legal duty of care" and a "standard of care," and accordingly, internal policies or guidelines cannot be admitted as evidence to establish a legal duty of care. That needs to be determined as a matter of law by the trial court, and most importantly, that needs to be articulated to the jury. It is not the jury's role to determine issues of law; yet, that is precisely what occurred in this case. Thus, as the record clearly reflects, the trial court erred in treating Owens' claim for a sexual assault during a pat down search as a gross negligence claim and by failing to instruct the jury on the legal duty of care owed.[4]

C. The trial court erred in denying the Appellants' motions for directed verdict and JNOV based on S.C. Code Ann. § 15-78-60(17) of the Tort Claims Act.

In addition, as indicated, Owens alleged that Deputy Gibson acted maliciously and with the intent to cause harm. *See*, Complaint, ¶ 9. (R. ___).[5] Importantly, South Carolina law recognizes that "an intent to harm will be inferred as a matter of law when a person sexually

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[4] Notably, as to the Second Cause of Action for the grossly negligent hiring and supervision claim, the trial court did provide some brief instruction on the legal duty although it was not described as such. The trial court instructed as follows: "In circumstances where an employer knew or should have known that his employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself grossly negligent in hiring, supervising, or training an employee or that the employer acted grossly negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public." (Tr. 1017). However, this claim was abandoned because the jury was not given the opportunity on the verdict form to address the grossly negligent hiring and supervision claim. (Verdict Form).

[5] Owens is judicially bound by the allegations in his Complaint. In *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322 (Ct. App. 1992), this Court held that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." 418 S.E.2d at 323. "The allegations, statements or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." *Id*. *See also*, *Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 700 (2015); *Kitchen Planner, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

assaults, harasses, or otherwise engages in sexual misconduct towards an adult." *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 136 (Ct. App. 2000). That is black letter South Carolina law. Because Owens has alleged that Deputy Gibson committed an act of sexual assault or sexual misconduct upon him, the Appellants are entitled to absolute sovereign immunity under S.C. Code Ann. § 15-78-60(17) of the Tort Claims Act, which provides: "The governmental entity is not liable for a 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 law infers an intent to harm from Deputy Gibson's conduct as alleged, and thus, the Appellants are entitled to a directed verdict and JNOV based on sovereign immunity. The trial court rejected the Appellants' claim for sovereign immunity under S.C. Code Ann. § 15-78-60(17) by again treating Owens' claim as one for gross negligence rather than what it was – a claim for assault and battery. (Order, pp. 5-6). That constitutes reversible error.

D. The trial court erred in ruling that there was sufficient evidence of gross negligence to deny the motions for directed verdict and JNOV on the grossly negligent hiring and supervision claim.

The trial court erred in ruling that there was sufficient evidence of gross negligence to deny the Appellants' motions for directed verdict and JNOV on the grossly negligent hiring and supervision claim. In his Second Cause of Action, Owens alleged that the Appellants were grossly negligent in the hiring and supervision of Deputy Gibson. In the leading case of *Doe v. ATC, Inc.,* 367 S.C. 199, 624 S.E.2d 447 (Ct. App. 2005), this Court held as follows:

> Our review of negligent hiring and retention cases from other jurisdictions leads us to conclude that such cases generally turn on two fundamental elements -- knowledge of the employer and

> foreseeability of harm to third parties. These elements, from a factual perspective, are not necessarily mutually exclusive, as a fact bearing on one element may also impact resolution of the other element. From a practical standpoint, these elements are analyzed in terms of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused. Such factual considerations -- especially questions related to proximate cause inherent in the concept of foreseeability -- will ordinarily be determined by the factfinder, and not as a matter of law. Nevertheless, the court should dispose of the matter on a dispositive motion when no reasonable factfinder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard.

624 S.E.2d at 450. This Court further explained that the applicable standard is "whether the employer knew the offending employee was in the habit of misconducting himself in a manner dangerous to others." 624 S.E.2d at 450-451. Thus, it is necessary that the plaintiff "demonstrate some propensity, proclivity, or course of conduct sufficient to put the employer on notice of the possible danger to third parties." 624 S.E.2d at 451.

Here, Owens did not meet his burden of proof. He presented *no evidence* of any misconduct by Deputy Gibson occurring prior to January 27, 2017, nor any evidence that the Appellants knew or should have known of any prior misconduct by Deputy Gibson. In short, there is no evidence that Deputy Gibson had the propensity for improper behavior or had engaged in such a course of conduct in the past sufficient to have put the Appellants on notice of any possible danger to third parties, including Otis Owens. As a result, Owens' claims for negligent hiring and retention should have been dismissed at the directed verdict stage and not presented to the jury. At the very least, a JNOV should have been granted post-trial.

Moreover, the negligent supervision claim fails for the same reasons stated above – a lack of evidence of foreseeability. *See*, *Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992). In the absence of evidence that the Appellants knew or should have known of the

necessity to exercise control over its employee, there can be no liability for negligent supervision. *See*, *Brockington v. Pee Dee Mental Health Center*, 315 S.C. 214, 433 S.E.2d 16 (Ct. App. 1993). *See also*, *Moore by Moore v. Berkeley County School District*, 326 S.C. 584, 486 S.E.2d 9, 13 (Ct. App. 1997) ("[a]bsent some evidence indicating notice to the District of [employee's] inappropriate sexual proclivities, there is no basis to conclude the District knew or should have known of the necessity for supervising her conduct outside the classroom"); *Bank of New York v. Sumter County*, 387 S.C. 147, 691 S.E.2d 473, 478 (2010) (affirming summary judgment where there was no evidence that the South Carolina Judicial Department knew or should have known employees posed an "undue risk of harm to the public").

In denying the directed verdict motions on this basis, the trial court never provided any analysis or reasoning for the denial. In adjudicating the JNOV motion, the trial writes:

> 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.

(Order II, p. 6). As to the first part of that ruling, evidence of any deviations from "policies set by federal law" (presumably a reference to the PREA regulations from the Code of Federal Regulation) or ACDC policies, such evidence is not relevant or material to the grossly negligent hiring and supervision claims. There is no evidence of any violations of policy by Deputy Gibson prior to January 27, 2017, known to his superiors. Likewise, there is no evidence that

Deputy Gibson had the propensity for improper behavior or had engaged in such a course of conduct in the past sufficient to have put the Appellants on notice of any possible danger to third parties. The trial court next refers to the existence of "testimony evidence regarding the officer's general reputation and history." (Order II, p. 6). The trial court provides no reference to the record, nor even identifies the testifying witness nor gives a summary of what was said. In actuality, there is no such evidence in the record, nor would general character evidence had been admissible under Rule 404.

The reality is that Owens all but abandoned this claim during his case-in-chief. He never presented evidence to satisfy the elements of the claim. During the directed verdict argument, Owens' counsel was unable to identify any evidence that met those elements, including evidence of some propensity, proclivity, or course of conduct sufficient to put the Appellants on notice of the possible danger by Deputy Gibson (or any other employee) to third parties prior to January 27, 2017. Owens' counsel argued only as follows:

> There was a lot of evidence about -- so negligent retention, hiring, training, supervision all goes into one cause of action and we've heard a lot of evidence about -- you know, I asked questions are you suppose to do PREA training.
>
> * * *
>
> As far as when Mr. Gibson was hired, we put up a good bit of evidence that they didn't do anything except take an online application and get one interview.

(Tr. 918).[6] That is not evidence sufficient to state – let alone prove – a cause of action for grossly negligent hiring and supervision.

[6] Importantly, it should be noted that the Second Cause of Action was limited to negligent hiring and supervision. (Complaint). Additionally, the jury instructions were limited to gross negligence in "hiring and supervision of its employees." (Tr. 1017). Therefore the

In its order on post-trial motions, the trial court also states that "[t]he 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." (Order II, p. 6). It is unclear on what the trial court bases that ruling. The Verdict Form never directly addresses the Second Cause of Action. In fact, Owens' counsel approved of the Verdict Form and never even requested that the Verdict Form include a special interrogatory to address his claim for grossly negligent hiring and supervision. As indicated, that claim was ostensibly abandoned – no evidence was presented as to the elements and it was left off the Verdict Form. In short, the trial court erred in denying the directed verdict and JNOV motions on the grossly negligent hiring and supervision claim.

E. The trial court erred in denying the motions for directed verdict and JNOV on the failure to provide medical care claim.

The trial court also erred in denying the motions for directed verdict and JNOV on Owens' failure to provide medical care claim. In addressing this issue, the trial court found that "[a]t 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." (Order II, p. 7).[7]

Second Cause of Action as pled and then presented to the jury does not include claims for gross negligence as to training.

[7] The trial court is mistaken in its belief that medical records for Owens were admitted into evidence. Moreover, to the extent Owens' counsel kept attempting to publish the contents of medical records, including the diagnosis of a hydrocele, without the records first being admitted and the diagnosis established by a medical expert, there were repeated objections and even a motion for mistrial which was denied but for which a curative instruction was given. (Tr. 234-259). That was a tactic that tried repeatedly throughout the trial which the trial court

However, as the trial court overlooked, Owens never presented any medical records into evidence nor any competent medical testimony demonstrating that he required medical care sooner than he received it from Southern Health Partners, which was the medical contractor at the Detention Center.

South Carolina law requires a plaintiff in a medical negligence case to present: "(1) evidence of the generally recognized practice and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances; and (2) evidence that the defendant doctor departed from the recognized and generally accepted standards, practices, and procedures in the manner alleged by the plaintiff." *Gooding v. St. Francis Xavier Hospital*, 326, S.C. 248, 487 S.E.2d 596, 599 (1997). In addition, "the plaintiff must show that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2 1, 4 (2006).

In the present case, Owens claims he developed a medical condition called a hydrocele as a result of the pat down search by Deputy Gibson. However, Owens presented no expert medical testimony regarding a hydrocele – how a hydrocele develops, what it is, what are the causes, how it is treated, and most importantly, that Owens developed a hydrocele that was proximately caused by

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did not effectively enforce. The trial court's rulings were also inconsistently applied. At times the objections were overruled, and at other instances they were sustained. (Tr. 227, 228-230, 231-232, 235,259, 340-341, 763-764, 779-780, 781-783, 816, 843-844). In fact, there were instances where the trial court allowed Owens' counsel himself and Owens to discuss that medical diagnosis without proper foundation – not just for Owens but for other inmates who are not parties to the litigation. In its post-trial order, the trial court writes: "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." (Order II, p. 9). Thus, the trial court concedes that it was not consistent in its evidentiary rulings on these issues; however, the court denied the request for a new trial absolute nonetheless.

Deputy Gibson's actions. Importantly, "[w]here a medical causal issue is not one within the common knowledge of the layman, proximate cause cannot be determined without expert medical testimony." *In re Bausch & Lomb Contact Lens Solution Products Liability Litigation*, 693 F.Supp.2d 515, 518 (D.S.C. 2010). The federal district court, applying South Carolina law, further explained that "[e]xpert testimony is *required* where the claimant is attempting to establish causation of a medically complex condition." *Jones v. Danes Medical, Inc.*, 1999 WL 1133272, *4 (D.S.C. 1999). (Emphasis in original). Similarly in *Smith v. Michelin Tire Co.*, 320 S.C. 296, 465 S.E.2d 96 (Ct. App. 1995), this Court held that "[i]f a [plaintiff] is attempting to establish causation of a medically complex condition, … expert medical testimony is required." 465 S.E.2d at 97. By way of example, in *Smith*, this Court explained that "the exacerbation of Smith's recurrent major depression was a medically and scientifically complex condition and this required expert testimony of causation." *Id*. Without question, the development of a hydrocele, the treatment of the condition, and even the timing of that treatment are medically complex issues not within the realm of a layperson's common knowledge, and as a result, such issues require expert medical evidence. No such evidence, however, was presented by Owens, and as a result, a directed verdict and later a JNOV should have been granted on any claims related to Owens' medical care, including the timing of that medical care.

Nonetheless, Owens' counsel attempted to argue in the trial court that the medical records or at least the medical diagnosis were admissible as "circumstantial evidence." (Tr. 908-910). That is another way of arguing that a diagnosis and medical causation may be established based on the doctrine of *res ipsa loquitor,* which is not recognized under South Carolina law. In *Fletcher v. Medical University of South Carolina*, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010), the plaintiff sued a physician who performed a subclavian bypass, alleging that the injuries to her

phrenic nerve and thoracic duct were the result of the physician's negligence. The plaintiff's expert testified that the physician was negligent, but then proceeded to say that he could not point to any technique in the procedure that was deficient. Instead, the plaintiff "asks us to conclude that the occurrence of a complication is itself evidence of negligence." 702 S.E.2d at 374. In rejecting that argument, this Court relied on the fact that South Carolina law does not recognize the doctrine of *res ipsa loquitur*. In affirming a directed verdict for the physician, this Court held that the plaintiff was responsible for showing precisely how the physician deviated from the standard of care, and that the occurrence of a complication is not evidence of negligence. These principles of law were reiterated by the Supreme Court in *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), *supra*, where the Court explained that a plaintiff "may not rely solely on the fact that an accident occurred to prove … their case under a negligence theory since South Carolina does not follows the doctrine of *res ipsa loquitor*." *Watson*, 699 S.E.2d at 179. Owens cannot rely on *res ipsa loquitor* as a substitute for expert medical testimony. It is elementary that the occurrence of an injury alone does not prove a breach of care or medical causation.

In sum, Owens never provided any admissible or competent medical evidence that he was diagnosed with a hydrocele or that the hydrocele was proximately caused by Deputy Gibson's pat down search. In absence of such evidence, the Appellants were entitled to a directed verdict and subsequently a JNOV on Owens' allegations of any medical negligence or gross negligence either with respect to the type of care provided or the timing of any such care. Those claims required expert medical evidence, and there was none presented.

II. New Trial Absolute Motion

A. The trial court erred in denying the Appellants' Motion for New Trial Absolute on the basis that the verdict is unsupported by the evidence and is grossly excessive.

In the alternative to the arguments addressed above, the Appellants are entitled to a new trial absolute because the trial record is devoid of evidence supporting the jury's $150,000 verdict in actual damages against the Appellants.

Otis Owens testified that during the search, Deputy Gibson squeezed his testicle. He testified that he had "excruciating pain" for a "couple of hours and then it subsided. (Tr. 747). He then experienced some additional pain in the testicle for about seven to ten days, and had no pain thereafter. (Tr. 747). Owens presented no evidence of medical specials, including any medical bills or out-of-pocket expenses. He also presented no evidence of any permanent impairment nor any evidence of future medical expenses. That is the extent of the properly admissible evidence of damages and does not support an award of $150,000.

As discussed above, the trial court erred in allowing Owens – through his own testimony and questions by his counsel -- to present lay testimony that he developed a hydrocele that was proximately caused by Deputy Gibson's search on January 27, 2017. In the absence of that impermissible lay testimony, there is clearly not sufficient evidence of Owens' injuries, medical causation, and damages to support a verdict of $150,000 in actual damages. Nonetheless, even with that evidence, there is still an insufficient record to support a verdict of $150,000, and a new trial absolute should have been granted.

The Appellants also requested that the trial court grant a new trial absolute because the verdict of $150,000, in addition to being unsupported by the evidence, is shockingly

disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence.

As the Supreme Court has explained, "[w]hen a party moved for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557, 558 (1993). "[W]hen the verdict is so grossly excessive … that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge … to set aside the verdict absolutely." *Id*., *citing Easler v. Hejaz Temple,* 285 S.C. 348, 329 S.E.2d 753, 758 (1985).

As discussed above, the verdict of $150,000 was not supported by the evidence presented. That demonstrates that the verdict is grossly excessive. In addition, the size of the jury's verdict demonstrates that the jury's verdict must have been the result of bias, prejudice, or other improper considerations, including an attempt to punish the Appellants, which an award of actual damages cannot do. The trial court abused its discretion in failing to set aside that verdict against the Appellants and grant a new trial absolute.

B. The trial court erred in allowing the Respondent to present lay testimony that he developed a hydrocele that was proximately caused by Deputy Gibson's pat down search on January 27, 2017.

The trial court erred in allowing Owens to present lay testimony that he developed a hydrocele that was proximately caused by Deputy Gibson's pat down search on January 27, 2017, and that error requires, at the very least, the granting of a new trial absolute. As discussed

at length above, Owens presented no expert medical testimony regarding the hydrocele – how a hydrocele develops, what it is, what are the causes, how it is treated, and most importantly, that Owens developed a hydrocele that was proximately caused by Deputy Gibson's actions. Instead, the trial court improperly allowed Owens to testify and his counsel to argue that he developed a hydrocele,[8] the diagnosis of the hydrocele, how it was treated, and that it was proximately related to Gibson's conduct. The jury should not have been permitted to even consider the evidence that Owens was diagnosed with a hydrocele or that the condition was proximately caused by Deputy Gibson in the absence of competent medical expert testimony.

In its post-trial order, the trial court writes: "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." (Order II, p. 9). Thus, the trial court concedes that it was not consistent in its evidentiary rulings on these issues; however, the court denied the request for a new trial absolute nonetheless. The record reflects that Owens and his counsel repeatedly made attempts to publish the contents of medical records, including the diagnosis of a hydrocele, throughout the trial of the case. Owens and his counsel ignored rulings that sustained objects to the medical evidence being presented without the records first being admitted and the diagnosis established by a medical expert. The Appellants' counsel was placed in a position to repeatedly object to the same tactics. (Tr. 227, 228-230, 231-232, 235, 259, 340-341, 763-764, 779-780, 781-783, 816, 843-844). At one point, counsel made a motion for mistrial which was

[8] Owens' counsel raised the issue of the hydrocele in his opening statement despite having no expert medical testimony to support Owens' claim that he developed a hydrocele which was proximately caused by Deputy Gibson's conduct. The trial court overruled the Appellants' objection on that part of the opening argument in error. (Tr. 80-85).

denied but for which a curative instruction was given. (Tr. 234-259). Unfortunately, the trial court took no action to enforce its rulings on these evidentiary matters, and on occasion overruled the objections thereby creating inconsistencies on the record. Specifically, there were instances where the trial court allowed Owens' counsel himself and Owens to discuss that medical diagnosis without proper foundation – not just for Owens but for other inmates who are not parties to the litigation. Given the importance of these issues, the absence of expert medical testimony, and the repeated attempts by Owens and his counsel to disregard earlier rulings, a new trial absolute is warranted.

C. The trial court erred in allowing testimony from other inmates as to the conduct of Deputy Gibson in conducting pat searches on them as proof of a "common scheme or plan."

The trial court erred in allowing testimony from other inmates as to the conduct of Deputy Gibson in conducting pat searches on them and that they sustained injuries from a pat down. Owens presented that evidence as proof of a "common scheme or plan." (Tr. 142, 183). This evidentiary issue first arose during the opening statement by Owens' counsel and the trial court sustained the objection rejecting the argument of a "common scheme." (Tr. 136-142). Later, during the direct examination of Deputy Gibson, Owens' counsel asked, "do you have any idea why four men reported injuries after the search." (Tr. 180). During a colloquy on that evidentiary question, the trial court initially sustained the objection by stating: "I do believe that any alleged injury to any other individual is not admissible and the, the basis for that one is that I do not – obviously, it is not habit. Do not believe that it is admissible under Rule 404." (Tr. 190). After additional argument, the trial court ruled "that it does fall within 404(b), subsection B, that it is admissible to show the existence of a common scheme or plan." (Tr. 194). That

ruling and all subsequent rulings allowing evidence as to other non-party inmates and injuries they allegedly sustained (despite no proof) constitute reversible error.

"As a general rule, evidence of a person's prior bad acts is not admissible for the purpose of proving action in conformity therewith on a particular occasion." *Judy v. Judy*, 384 S.C. 634, 682 S.E.2d 836, 840 (Ct. App. 2009); Rule 404(a), SCRE. "However, evidence of other crimes, wrongs, or acts may be admissible to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the perpetrator." *Id*.; Rule 404(b), SCRE. "Where the other bad acts are not the subject of conviction, they must be proven by clear and convincing evidence." *Id*.

In the case at bar, the trial court made no findings based on clear and convincing evidence that the evidence presented by other inmates or about other inmates constitutes admissible and probative evidence of prior bad acts by Deputy Gibson such that he was engaged in a common scheme or plan. In addition to improperly allowing testimony as to the conduct by Deputy Gibson as to other inmates, the trial court also erred in allowing those inmates to also testify as to their own injuries or damages, which were not relevant to any issue before the jury and were presented solely to inflame the jury, which it accomplished as demonstrated by the grossly excessive verdict. The trial court erred in allowing an inmate named Jeremy Ard to testify, over objections (Tr. 486-498), that he was diagnosed with erectile dysfunction and to speculate that it was causally related to Deputy Gibson's conduct. (Tr. 880-881). Similarly, the trial court erred in allowing another inmate, Timothy Wilhite, to testify, over objections (Tr. 686-695), that he was injured by Deputy Gibson's conduct and what his medical condition was, including testimony that he had "surgery" as a result of Gibson's conduct. (R. 862-866). The

trial court also allowed Wilhite to testify that he had brought a federal lawsuit. (Tr. 865). Quite simply, Owens never established a "common scheme" under Rule 404(b), and certainly there was no finding of such by the trial court based on clear and convincing evidence. Moreover, even if the pat downs qualify as a "common scheme," that does not allow for the admission of the medical condition and purported treatment received by Ard or Wilhite. These erroneous evidentiary rulings warrant a new trial absolute.

D. The trial court erred in allowing testimony regarding alleged retaliation by Deputy Gipson.

The Court also improperly allowed Owens and the other inmates to present testimony that Deputy Gibson "retaliated" against them in several particulars. (Tr. 864-865). That testimony was not relevant nor probative to any issue raised in this litigation. Owens never pled any claim for retaliation as recognized by the trial court (Tr. 713), nor would such a claim, if pled, have been actionable against the Appellants based upon the bar of S.C. Code Ann. § 15-78-60(17). Additionally, the alleged acts of retaliation that the trial court allowed did not even occur in immediate temporal proximity to the January 27, 2017 pat down. (Tr. 629-632). Instead, the purported retaliatory conduct was not relevant but was presented solely to inflame the jury, which it accomplished as demonstrated by the grossly excessive verdict.

E. The trial court erred in allowing the Respondent to proceed with claims or allegations related to the investigation conducted by Detention Center personnel under the Prison Rape Elimination Act.

The trial court also erred in allowing Owens to proceed with claims or allegations related to the investigation conducted by Detention Center personnel under the Prison Rape Elimination Act, 34 U.S.C. § 30301 ("PREA"). In its order on post-trial motions, the trial court found that

"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 a PREA investigation to support its claim the Defendants were grossly negligent in its confine and supervision of the Plaintiff by showing a deviation from federal guidelines regarding sexual assault allegations." (Order II, pp. 7-8). The trial court committed several reversible orders.

First, based on undisputable authority, Owens' PREA-related allegations -- which permeated the trial -- are not actionable because PREA does not create a private right of action. *See*, *Taylor v. Worrick*, 2016 WL 11190496, *7 (D.S.C. 2016); *Moorman v. Herrington*, 2009 WL 2020669, *2 (W.D. Ky. 2009). That means that PREA cannot serve as the basis for neither a § 1983 federal statutory claim nor a state law gross negligence claim. As the federal district court held in *Ngono v. Geo Group, Inc.*, 2023 WL 2325573 (W.D. Pa. 2023), "[t]he PREA, however, does not create a cause of action, and thus Plaintiff cannot assert a negligence claim under it." 2023 WL 2325573, *4. "While the PREA was intended in part to increase the accountability of prison officials and to protect the Eighth Amendment rights of Federal, State, and local prisoners, nothing in the language of the statute establishes a private right of action." *Id*. "Likewise, as to Plaintiff's challenge to the sufficiency of the investigation into his rape and assault allegations under the PREA, Plaintiff has no freestanding constitutional right to such an investigation, let alone a cause of action to challenge the sufficiency of the investigation." *Id*. Similarly, in *Franklin v. Franklin County*, 2023 WL 1978907 (E.D. Ky. 2023), the federal district court explained:

> Ms. Franklin alleges that the Defendants are liable for negligence because they failed to enforce 'PREA rules through training and supervision.' She also plainly alleges that they 'had a ministerial duty to enforce PREA's requirements.' However, as the Defendants point out, PREA is not mandatory and does not create a private cause of action. Rather, PREA was enacted to study the

> problem of rape in prisons and provide funding and expertise to address it.

2023 WL 1978907, *10. *See also*, *Jena v. Geo Group, Inc.*, 2023 WL 114701 (N.D. Tex. 2023) ("Plaintiff states that Doss committed negligence per se by sexually assaulting him because the Prison Rape Elimination Act (PREA) is meant to provide inmates legal protection from rape. The PREA, however, does not create [or] provide a cause of action, and thus Plaintiff cannot assert a claim under it"). In short, the trial court erred in allowing alleged violations of PREA to serve as the bases for Owens' gross negligence claims which was in direct violation of controlling federal law.

Second, the trial judge allowed for Owens to pursue allegations related to a PREA investigation which occurred after the alleged pat down by Deputy Gibson, and Owens never demonstrated any injury that was proximately caused by the PREA investigation that was conducted or any acts or omissions under PREA – that is, assuming that such conduct would be actionable under state tort law, which it is not.

Third, the trial court erred in allowing Owens to repeatedly use sections of the PREA regulations, as published in the Code of Federal Regulations, to cross-examine various correctional witnesses, including Deputy Gibson, who are not trained in the law. In doing so, the trial court allowed Owens' counsel to essentially instruct the jury on issues of law rather than the trial judge who is the proper arbiter of the law. Owens never requested any instructions on PREA nor did the court charge the jury with any sections of PREA or the regulations adopted by the United States Department of Justice. Thus, it was clear error to allow the jury to be influenced by allegations involving PREA when such allegations are not actionable even under the guise of a state law negligence claim.

Moreover, while the Court did allow the Plaintiff to raise issues before the jury related to PREA and the PREA investigation conducted by Lieutenant Robert Bowman, the trial court erroneously limited the Appellants' ability to defend such improper claims by presenting the substance or results of the PREA investigation. The trial court both disallowed Lieutenant Bowman from testifying to as to the information contained within the report and by excluding the report itself. The Appellants were prejudiced by the trial court's ruling that the PREA investigative report constituted inadmissible hearsay without an exception. The report was admissible under Rule 803(8), which provides for the admissibility of "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible." Rule 803(8), SCRE.

In sum, the manner in which the trial court handled the PREA allegations as well as the trial court allowing such allegations to form a basis for Owen's gross negligence claim are contrary to controlling law. The Appellants are entitled to a new trial absolute on this issue as well.

F. The trial court erred in allowing the jury to return a verdict against Aiken County and by including Aiken County collectively with the other Defendants on the Verdict Form.

The Appellant Aiken County was an improper party-defendant and should have been dismissed at the directed verdict stage. The trial court eventually corrected that error in part by entering a JNOV in the County's favor. (Order II, pp. 2-3). The inclusion of Aiken County

beyond the directed verdict stage and on the Verdict Form, however, resulted in prejudice to all of the Appellants because Owens improperly referred to Aiken County's operating budget of $437,000 per day during closing arguments and incorrectly argued to the jury that Aiken County had liability to Owens, when clearly none exists as a matter of law. (Tr. 978).

The inclusion of Aiken County on the Verdict Form also creates reversible error because the Verdict Form, over objection, was written in such a way that the Appellants were named collectively rather than separately. The Appellants argued at several stages of the trial that the Aiken County Sheriff was the only proper party-defendant, but that was opposed by Owens' counsel and rejected by the trial court in error. (Tr. 922-923, 955). Due to that error which the trial court conceded in granting the JNOV to Aiken County, it is pure speculation to determine whether the jury was returning its verdict against one or more of the named Defendants. It is certainly possible that the jury found fault with Aiken County and not the other Defendants. That cannot be accurately gauged because of the manner in which the Verdict Form was prepared and presented to the jury. The fact that Aiken County was erroneously included on the Verdict Form therefore warrants a new trial absolute for all of the remaining Appellants.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Michael Hunt, in his Official Capacity as Sheriff of Aiken County, Aiken County Sheriff's Office, Aiken County Detention Center, and Aiken County respectfully request that the Court reverse the orders issued by Circuit Court Judge Courtney Clyburn Pope denying the Appellants' motions for directed verdict, JNOV, and new trial absolute and remand for entry of judgment as a matter of law in favor of the Appellants, or alternatively, for a new trial absolute.

Respectfully submitted,

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