

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Aug 17 2023**

APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Frank Addy, Circuit Court Judge

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Supreme Court Case No. 2022-000740  
Court of Appeals Case No. 2019-000637

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Tony Young.....Petitioner,

v.

Greenwood County Detention Center and the Greenwood County Sheriff's Office, Defendants,

of Which the Greenwood County Sheriff's Office is.....Respondent.

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**REPLY BRIEF OF PETITIONER**

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## REPLY

### I. The Respondent's brief ignores *Curtis v. Loether*, 415 U.S. 189 (1974).

The United States Supreme Court has unambiguously ruled that the applicability of the constitutional right to a jury trial in actions enforcing statutory rights (such as Tort Claims Act cases) is “too obvious to be doubted.” *Curtis v. Loether*, 415 U.S. 189 (1974) quoting *Parsons v. Bedford*, 3 Pet. 433 (1830). South Carolina removed the sovereign immunity roadblock to the constitutionally guaranteed jury trial by waiving sovereign immunity with the Tort Claims Act. Tony therefore had a right to a fair jury trial that is “too obvious to be doubted. *Curtis*, 415 U.S. 189 (1974).

The Respondent tries to get around the clear language in *Curtis* by citing *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) and arguing that Tony's right to a jury trial is governed by South Carolina's Constitution, rather than the United States Constitution.<sup>1</sup> The problem with this argument is that the language in the South Carolina Constitution guaranteeing the right to a jury trial is stronger, not weaker, than the United States Constitution. The South Carolina reads: “The right of trial by jury shall be preserved **inviolable**...” S.C. Const. art. I, §14. (Emphasis added.) This mirrors the language of the Seventh Amendment up to “inviolable.” That language goes a step further and adds teeth to the already clear language of the Seventh Amendment. The Respondent's argument seems to be that Tony's right was not guaranteed by the Seventh Amendment and, therefore, that Tony was not entitled to a fair trial with an impartial

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<sup>1</sup> Relying on *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978), the Respondent argues there is no Seventh Amendment right to a South Carolina Tort Claims Act trial. It cannot seriously be argued that the framers did not intend such a right to be guaranteed by the Constitution. If this Court determines that incorporation of the Seventh Amendment is needed, the Petitioner invites the Court to incorporate the right, which is so fundamentally important to our Republic and to our State.

judge. That argument is in direct conflict with *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994) (A “trial judge must act with absolute impartiality in the performance of judicial duties.”).

The Respondent also cites to a Ninth Circuit Court of Appeals case, *RJ Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005), which addressed tobacco advertisement and free speech. While the Ninth Circuit case has no precedential value for this Court, it does contain language of import for this case: “Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences.” *Id.* at 924 quoting *Smith v. Phillips*, 455 U.S. 209 (1982). The trial court’s commentary on Tony’s evidence in this case were the epitome of “prejudicial occurrences.”

## **II. The Tort Claims Act removed the sovereign immunity roadblock to jury trials for the government’s gross negligence.**

At common law, a claim for negligence existed for tortious conduct, including the type of conduct giving rise to this action. Sovereign immunity prevented those negligence claims against the government until the South Carolina Tort Claim Act again freed the path for what existed at common law. Because a claim for negligence existed at common law, the Respondent’s reliance on *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) is misplaced.

On page 7 of its brief, the Respondent seems to imply that the relief guaranteed by the Tort Claims Act does not include the right to a jury trial. S.C. Code 15-78-40 states that governmental entities like the Greenwood Sheriff’s Office shall be “liable for their torts in the same manner and to the same extent as a private individual under the circumstances. . .” Of course, S.C. Const. art. I, §14 guarantees the right to a jury trial against “a private individual under like circumstances,” inviolate. SCRCF 38(a) states “The right of trial by jury as declared by the Constitution **or as given by statute of South Carolina shall be preserved inviolate.**” (Emphasis added.)

A trial may not be conducted in an unfair or one-sided manner simply because the right to the trial arises from or is revived by statute. Any trial court's comments on any party's evidence may "not be one-sided[,]" and "deductions and theories not warranted by the evidence should be avoided." *Quercia v. United States*, 289 U.S. 466 (1933). When the trial court, visibly irritated, stated that Tony's counsel was "pumping a dry well" because testimony was elicited that showed the Sheriff's Office violated the policy that required Tony to be assessed by a doctor, it did exactly what *Quercia* addresses and forbids.

### **III. Tony has shown more than ample evidence of a patently unfair trial.**

The Respondent admits, as it must, that a "trial judge must act with absolute impartiality in the performance of judicial duties." *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186, 187 (1994). It is obvious from any reading of the trial transcript that the trial judge in Tony's case acted antithetically to "absolute impartiality" and made such incredibly prejudicial comments on *uncontroverted* evidence that fundamental unfairness was indelibly branded onto the entire proceeding. Comments on *uncontroverted* evidence such as, "you're pumping a dry well here" and, "let's stop chasing rabbits" cannot genuinely be described as merely rendering a trial "imperfect," as the Respondent asserts on p. 9 of its brief. Comments like these are sufficiently prejudicial to render a trial unfair. Worse still, the trial judge stopped the inquiry altogether and interrupted counsel in the middle of asking questions about the mandatory physician clearance policy which everyone, including the Sheriff's Office, agrees that the Sheriff's Office violated.

Such prejudicial commentary is exactly what SCRE 611(a)(1) seeks to prevent. The Rule requires that the trial court ensure "...the interrogation and presentation effective for the ascertainment of the truth." Making comments on the evidence which limit ascertainment of the truth and imply that uncontested policy violations do not matter surely is not "effective for the

ascertainment of the truth.” The trial court’s comments also violate the plain language of SCRE 611(b): “A witness may be cross-examined on any matter relevant to any issue in the case...”<sup>2</sup>

Instead of allowing the questioning and testimony directly related to the central issue in the case and allowing the jury to weigh that evidence themselves, the trial court stopped the testimony and emphatically stated that Tony “cannot be boomeranged back between doctors. We need to move on from this line of questioning and focus on what your complaint is, and that is the six days without the neck brace, okay? So go.” The trial judge’s statements were “made with all the persuasiveness of judicial utterance...[and] was not withdrawn,” warranting a new trial. *Quercia v. United States*, 289 U.S. 466 (1933). Such one-sided and antagonistic comments “reveal[ed] such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Liteky v. United States*, 510 U.S. 540 (1994). Beyond that, the Petitioner’s damages were not simply six days without his neck brace, and the trial judge’s statement incorrectly and erroneously defined the scope of damages for the jury.

#### **IV. All issues before this Court have been preserved.**

The Sheriff’s Office has raised the issue of issue preservation for the first time in its Supreme Court brief. The Respondent never raised the issue in post-trial motions, its appellate brief, or its response to the Appellant’s Supreme Court petition. Beyond the obvious problems and irony surrounding the fact that the Respondent has never raised issue preservation, the Respondent’s theory is wholly untenable. On page 13 of its brief, Respondent argues that counsel was essentially required to argue with the trial judge when the trial judge stated that the evidence at issue did not have any importance and instructed that counsel “move on.” Respondent seems to suggest that, after the trial judge stopped counsel’s questioning and told counsel to move on,

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<sup>2</sup> The prejudicial comments by the trial court were made during direct examination, but with adverse witness employed by the Sheriff’s Office, and are governed by SCRE 611(b).

counsel should have said “I object to your instructions,” or something of the sort. Not only is that ridiculous, but it would have added prejudice to an already extremely prejudicial commentary by the trial court on highly relevant and central evidence.

On page 12 of its brief, the Respondent states that Tony “argues in an exaggerated and sensational manner that the trial court ‘criticized and berated uncontroverted evidence.’” The author of Respondent’s Brief was not present at trial and was not able to observe the palpable irritation accompanying the prejudicial statements like the jurors and the undersigned were. Respondent has failed to articulate a meaningful rebuttal to the Petitioner’s showing that the comments constituted a clear departure from a trial judge’s duty to “...act with absolute impartiality in the performance of judicial duties.” *See, State v. Pace*, 316 S.C. 71, 447 S.E.2d 186, 187 (1994). It cannot be denied by any reading of the trial transcript that the trial court made fatally prejudicial statements in front of the jury “with all the persuasiveness of judicial utterance.” *Quercia v. United States*, 289 U.S. 466 (1933).

**V. The trial court essentially made objections for the respondent and sustained them.**

“Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one out not to do.” *Proctor v. Dept. of Health*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). The Minimum Standards made it “incumbent upon” the Sheriff’s Office to have Tony cleared by a physician before his entry into the Detention Center. The Sheriff’s Office willfully violated that policy, and that violation was uncontested.<sup>3</sup> Violation of a policy is evidence of gross negligence, and the Sheriff’s Office’s policy violation was uncontested by the Respondent. In fact, the violation was only challenged by

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<sup>3</sup> In *Proctor v. Dept. of Health*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006), our Court of Appeals determined that DHEC’s violation of 25 S.C. Code Ann. Regs. 61-72.205(A) constituted evidence of gross negligence sufficient to support the jury’s verdict at trial

the trial judge's wholly prejudicial comments and insinuation that the policy violation did not matter.

The Respondent claims that the trial transcript "...suggest[s] that an objection was made and perhaps not transcribed." *See* Respondent's brief, p. 15. That is simply not true. Opposing counsel at trial did not object, and the trial judge stated "Sustained," as if he had. Again, counsel for the Respondent was not present at trial, and such speculation does nothing to assist in this Court's evaluation of issues for appeal. After uttering "sustained" in response to no objection, the trial court stated, "[t]his suit was filed years later, okay? The tapes get written over. Lets [*sic*] focus on what is truly an issue here and stop chasing rabbits, please, okay?" *See*, Respondent's Brief, p. 15. Commentary on the destruction of evidence is antithetical to a trial judge's responsibility to preside over a trial with "absolute impartiality in the performance of judicial duties." *See, State v. Pace*, 447 S.E.2d at 187 (1994). The Respondent again suggests that Petitioner's counsel should have argued with the trial judge in the presence of the jury. Such argument is, of course, improper.

#### **VI. Improper jury instructions added to the fundamental unfairness of Tony's trial.**

Tony Young was in the custody and care of the Sheriff's Office at the Detention Center after the Sheriff's Office failed to have a doctor clear him for entry. At all times, the Sheriff's Office controlled whether Tony received medical care and what medical care he received. It is impossible, by anyone's standard, for Tony to have caused any of the damages he alleged were caused by the Sheriff's Office, and a comparative negligence instruction should not have been given.

The trial court also erred by not explicitly charging the jury that the Sheriff's Office had the burden of proving Tony caused his own injuries. "[I]t is reversible error to charge the jury on comparative negligence without also charging the jury that the defendant bears the burden of proof on the affirmative defense." *Ross v. Paddy* 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000). While

the trial court instructed the jury that “Defendant must prove by a preponderance...that the plaintiff...proximately caused the plaintiff’s injuries,” it did not instruct the jury that the Sheriff’s Office had “the burden” of proving comparative negligence and that, if the Sheriff’s Office failed the meet their burden, the defense must fail.

### **CONCLUSION**

For the foregoing reasons, the Petitioner respectfully requests that the Supreme Court reverse the Court of Appeals and remand this matter for trial.

Respectfully submitted,

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