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 REPLY BRIEF OF APPELLANTS

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S.C. Code Ann. § 15-78-60(17).

34 U.S.C. § 30301.

ARGUMENTS

In their opening brief, the Appellants Sheriff Michael Hunt, the Aiken County Sheriff's Office, Aiken County Detention Center, and Aiken County explained that the trial court committed reversible error 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 the Respondent Otis 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.

In addressing these multiple bases of trial court error, Owens cherry picks what he was willing to discuss and to attempt to justify. Notably, he did not address each of these issues, and more importantly, in trying to justify the trial court's rulings (or in some instances inconsistent rulings), Owens himself presents numerous inconsistencies. Owens further misstates the standard of review by erroneously insisting that the reversal of rulings on the directed verdict and JNOV motions requires that "Appellants must show there is no evidence to support the jury's finding on the gross negligence claim" and "[y]et, Appellants' brief does not discuss the testimony." *See*, Respondent's Brief, p. 10. In actuality, "in reviewing a circuit court's grant or denial of a motion for directed verdict or JNOV, this court reverses only when there is no evidence to support the ruling *or when the ruling is governed by an error of law*. *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501, 505 (Ct. App. 2012). (Emphasis added). As the italicized language makes clear, directed verdict and JNOV motions are not dependent necessarily on an

evidentiary analysis but rather may be granted where meritorious issues of law are presented. In other words, where a trial court's rulings are erroneous as a matter of law, the judgment should be reversed. That is precisely what the Appellants have argued and shown on appeal.

In fact, on one key issue, Owens has admitted that the trial court erred in denying the Appellants' JNOV motion. In a footnote, Owens admits that a JNOV should have been granted on the grossly negligent hiring and supervision claim. Owens writes: "As to the negligent hiring and supervision cause of action, Owens agrees the trial court should have granted Appellants' motion for JNOV since the cause of action was not placed on the jury verdict form." *See*, Respondent's Brief, p. 10, n.2. Differentiating a JNOV, Owens declines to address whether a directed verdict should have been granted on the grossly negligent hiring and supervision claim and erroneously characterizes such an analysis as a "futile act." *Id*. That analysis is only "futile" because the Appellants' unchallenged position is a correct one. As discussed at length in the Appellants' opening brief, Owens failed to present any evidence to support the elements of that claim, and the claim should never have been presented or charged to the jury. Owens makes no attempt to show otherwise. Just as the admittedly erroneous inclusion of Aiken County on the verdict form creates reversible error, so too does the trial court's charge on the grossly negligent hiring and supervision claim for which there was no evidence.

As to the other grounds for a directed verdict and JNOV, Owens obfuscates and deflects – often making arguments that actually support the Appellants' position. Case in point is the Appellants' argument that the trial court 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. Instead of actually addressing the issue and attempting to rebut the substantial case law cited by the Appellants, Owens refers to this issue as "legal gymnastics" and "shapeshifting tactics best reserved for literature." Such name-calling is not particularly constructive to the analysis. The

reality is that the law recognizes that there are causes of action that exist in tort, some are intentional torts and others are unintentional torts, each with a specific set of elements to be proven. South Carolina law, like that of other jurisdictions, recognizes that causes of action are not interchangeable. By way of example, the law does not recognize a claim for negligent defamation. *See*, *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) (dismissing negligence claim that was based on the same factual allegations as a defamation claim). Similarly, this Court recognized that "[f]alse imprisonment is an intentional tort; negligence is not an element." *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163, 167 (Ct. App. 1999). The same is true in the context of an assault and battery which may not be brought as a negligence claim. *See*, *Longshore v. Saber Security Services, Inc.*, 365 S.C. 554, 619 S.E.2d 5, 9-10 (Ct. App. 2005) "[a]ssault and battery is generally classified as an intentional tort, as contrasted with a tort based on negligence").

Yet, that is precisely what occurred in this case. Owens brought what is distinctly and exclusively an assault and battery claim under the guise of a gross negligence claim. That was challenged in the trial court to no avail. (Tr. 919-921). It is challenged again on appeal. In the trial court, Owens' counsel argued that the causes of action are interchangeable. (Tr. 920) ("Of course a sexual assault is grossly negligent"). On appeal, Owens has taken a different approach – obviously in recognition that the arguments at the trial level were mistaken and not sustainable. On appeal, Owens calls it "legal gymnastics" and "shapeshifting tactics" and then refuses to engage in any meaningful discussion. Ironically, the only engagement on this issue is a single sentence that actually makes the Appellants' point. Owens writes: The Appellants' brief "attempts to transform Owens's basic pleadings for gross negligence into claims for assault, battery, and a medical claim – never reconciling that those theories contradict themselves." *See*, Respondent's Brief, p. 10. Exactly. Those causes of action *contradict themselves* -- meaning

they are *not interchangeable*. There is no question that Owens intended to and did improperly bring an assault and battery claim as a gross negligence claim. In his Complaint, 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. ___). As our appellate courts have made clear, an intentional tort cannot be converted into a negligence claim for any reason – whether it is for ease of proof or to circumvent a shorter statute of limitations or to avoid an immunity defense such as under S.C. Code Ann. § 15-78-60(17). Consequently, a sexual assault (or for that matter any assault) is not actionable as a gross negligence claim. That is an issue of law on which the trial court erred, and the judgment should be reversed.

As a corollary of that point, the Appellants argued that 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. This is another issue of law on which Owens refuses to engage and at least attempt to support the trial court's actions. Instead, Owens states in a conclusory manner that this issue is not preserved for appellate review because it was not argued below. The Appellants disagree. As part of the colloquy in discussing the final directed verdict motion and the jury charge, the Appellants' counsel argued that Owens cannot state a viable claim for gross negligence because he is claiming a sexual assault and excessive force by Deputy Gibson, which presents a claim for assault and battery and not one sounding in negligence. (Tr. 919-921). At its essence, the Appellants have argued there is no legal duty of care that is actionable by way of a gross negligence claim. Ultimately, while the trial court allowed the claim to proceed to the jury as a gross negligence claim, the court never charged the jury as to the controlling legal duty of care. If the claim is properly actionable in negligence, then the first element is the existence of a legal duty of care which is a question of law for the

court to make,[1] and the trial court did not fulfill its duty to instruct the jury as to the duty of care. Consistent with the position taken at trial, the Appellants reiterate their position that there is no such duty of care because, once again, Owens' allegations are not actionable in negligence but rather as an assault and battery, a claim never pled nor tried.

As our appellate courts have stated, issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, S.E.2d 282, 285 (2012). The Supreme Court has explained: "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." 730 S.E.2d at 285. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part). Here, the error committed by the trial court in its charge on gross negligence is part and parcel of the overarching error that the trial court committed by allowing Owens to pursue an assault and battery claim under the guise of a gross negligence claim. Certainly, the Appellants preserved that issue, having raised it at different junctures of the trial.

Moreover, when Owens does engage by offering legal analysis in his response brief, he typically relies on contradictions. As one prominent example, Owens attempts to justify the verdict by pointing to the post-incident investigation – which was an investigation conducted under the Prison Rape Elimination Act, 34 U.S.C. § 30301 ("PREA") – and arguing that the Appellants were grossly negligent in conducting that investigation. *See*, Respondent's Brief, p. 14 ("This is a case about a correctional officer who performed an improper and forceful frisk and the failure to use slight care during the frisk *and corresponding investigation*.") (Emphasis

[1] *See*, *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").

added). Yet, when confronted with undisputed case law that PREA cannot serve as the basis for either a § 1983 federal statutory claim or a state law gross negligence claim, Owens pivots and argues that he did not bring a cause of action for a PREA violation. That is illogical. The argument that "I did not bring a gross negligence claim based on PREA violations" is no different than the argument that "the evidence of PREA violations is evidence of gross negligence." Moreover, Owens never even addresses the absence of proximate cause. The pat down by Deputy Gibson is what allegedly injured Owens, not the after-the-fact PREA investigation. Whether the PREA investigation was conducted correctly or not, there is no evidence of harm proximately caused to Owens by that investigation.

The same is true about the spoliation allegations. On appeal, the Appellant now attempts to support the verdict by arguing spoliation of evidence related to the security camera videos. *See e.g.*, Respondent's Brief, p. 11 ("In discussing surveillance and retention policies, Sheriff Hunt admitted the footage related to any assault allegation or PREA violation should be saved if Appellants are aware of the allegation"). Yet, South Carolina law has not recognized a cause of action for third-party spoliation of evidence or for failing to preserve evidence. *See*, *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 714 S.E.2d 537 (2011). Likewise, the trial court concluded that there was insufficient evidence to even give a spoliation charge. (Tr. 950-954). Despite those key points, Owens still tries to justify the verdict on the basis of spoliation of evidence. That is obviously improper and meritless.

Finally, as to the issue of sovereign immunity under S.C. Code Ann. § 15-78-60(17) of the Tort Claims Act, Owens makes the unsubstantiated claim that "broad attempts at immunity" are "nonsensical." *See*, Respondent's Brief, p. 17. Frankly, it is that conclusory argument that make no sense and is unsupported by any case law from our appellate courts. Instead, as the Appellants have pointed out, the black letter law of South Carolina holds that "an intent to harm

will be inferred as a matter of law when a person sexually 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). Owens has alleged a sexual assault. 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. ___). Owens repeatedly referred to the incident as a "sexual assault" during the trial, both to the jury and in legal arguments. (Tr. 268-269, 920, 998-999) Owens repeatedly referenced the PREA regulations and investigation throughout trial, and PREA pertains to an investigation of sexual assaults or harassment of inmates. (Tr. 968, 980).[2] Owens cannot walk back or distance himself from those allegations and that trial strategy at this point. In short, because Owens alleged and sought to recover for a sexual assault (even under the guise of gross negligence), 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.

In addition, it is critically important to recognize that provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." *See*, S.C. Code Ann. § 15-78-20(f). This rule of construction was expressly adopted by the General Assembly and has likewise been applied by the appellate courts in construing the Tort Claims Act. *See*, *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 540 (2002)

[2] In his closing argument, Owens' counsel argued that "[t]he Prison Rape Elimination Act exists to eliminate sexual assault in jail by inmates or guards and it's extremely important." (Tr. 980).

("[p]rovisions establishing limitations on liability must be liberally construed in the State's favor"). *See also*, *Baker v. Sanders*, 301 S.C. 170, 391 S.E.2d 229 (1990); *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Thus, Owens' contention that "broad attempts at immunity undermine the very purpose of the Tort Claims Act" has no basis in the very language of the Tort Claims Act. The federal district court cases cited by Owens do not support his argument in that none of those cases involve allegations of a sexual assault where an intent to harm is inferred as a matter of law. But at any rate, the Supreme Court has made clear that an appellate court is not bound to follow a federal court's interpretation or application of South Carolina law. *Hooper v. Ebenezer Senior Services & Rehabilitation Center*, 377 S.C. 217, 659 S.E.2d 213, 223 (Ct. App. 2008) *rev'd on other grounds*, 386 S.C. 108, 687 S.E.2d 29 (2009).

For each of these multiple reasons, the trial court erred in denying the Appellants' directed verdict and JNOV motions.

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 renew their 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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