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Nov 16 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Frank Addy, Circuit Court Judge

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

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.

PETITION FOR REHEARING

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Tony Young respectfully petitions this Court for rehearing for Memorandum Opinion No. 2023-MO-015, heard October 24, 2023, and filed November 8, 2023, pursuant to Rule 221(a) SCACR. Tony asks that the Court reconsider whether he was deprived of his constitutional right to a fair trial. Tony respectfully submits that the Court's dismissal of the writ as improvidently granted is at odds with the constitutional requirement that a litigant receive a fair trial and the prohibition on biased judicial conduct and judicial advocacy for one side over the other at trial. Tony beseeches the Court to issue an opinion and grant a new trial.

ARGUMENTS

I. Dismissal of the writ allows constitutional violations to go unchecked.

a. Due Process

It cannot be denied that Tony's trial was not merely imperfect, it was patently unfair. "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 and to determine the effect of such occurrences when they happen." *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). During oral argument, the panel was right to have questions about the judge's conduct and comments during Tony's trial.

During oral argument, the two most flagrant comments in the presence of the jury were primarily discussed:

> We've been down this road before, okay? We've been down the road before. I think you're pumping a dry well here. He was released from the hospital in Greenville. It's what I said [in a side bar away from the jury] earlier this morning. He cannot be boomeranged back between doctors. We need to move on from this of questioning and focus on what your complaint is, and that is the six days without the neck brace, okay? So go . . . (App. p. 382).

> [t]his suit was filed years later, okay? The tapes get written over. Let's focus on what is truly an issue here and stop chasing rabbits, please, okay? (App. p. 391).

Certainly, these comments violate Due Process and warrant a new trial, especially in light of the fact that the trial judge essentially objected for the other side immediately before the second comment. These wildly prejudicial comments were not isolated, though. A review of the Record on Appeal shows that the trial judge made repeated prejudicial comments in the presence of the jury. The trial judge told the entire courtroom, including the jury, that Tony's delay in filing suit excused the Sheriff's Office's failure to provide subpoenaed footage. (App. 433-446). The trial judge interrupted questioning during Sharon Middleton's testimony when counsel asked Middleton whether anyone from the Sheriff's Office contacted a physician as required by the mandatory physician clearance policy and Middleton began to confirm that the Sheriff's Office violated the policy stating "I don't have any evidence that a doctor---" before opposing counsel objected and the trial judge responded, in the presence of the jury, "[l]et's move along, please. I think we've covered this ground several, several times. So ask her a different question involving a different issue, please." (App. p. 456). The trial judge repeatedly stopped questioning about uncontested policy violations and repeatedly communicated to the jury that the violation did not matter, a conclusion which was not warranted by the evidence. There was no valid reason for the trial judge to tell the jury that central, uncontested policy violations were unimportant, and there was also no reason to tell the jury "[w]e know that somebody called the Highway Patrol to come and bring him from the hospital" (App. p. 561). That comment was not supported by any evidence and suggested that the Sheriff's Office's willful, uncontested violation of the physician clearance policy was acceptable.

The Court's dismissal of the writ is not consistent with the rule that a trial judge's comments on the evidence may "not be one-sided" and that "deductions and theories not warranted by the evidence should be avoided." *Quercia v. United States,* 289 U.S. 466 (1933). When the trial judge told the jury that plain policy violations did not matter and incorrectly defined and limited Tony's

damages, he made "one-sided" comments and "deductions and theories not warranted by the evidence" in front of the jury. *Id*. As Justice Few noted, the trial judge essentially granted directed verdict on part of Tony's damages. Tony's damages were not limited to "six days without the neck brace" as the trial judge erroneously told the courtroom.

Dismissal of the writ is also not consistent with the rule 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 (1994). See also, *Butler v. State,* 302 S.C. 466, 397 S.E.2d 87 (1990; *State v. Pierce*, 289 S.C. 430, 346 S.E. (2d) 707 (1986), and *State v. Cooper*, 291 S.C. 332, 353 S.E. (2d) 441 (1986). Advocating for the defense, making excuses for the defense, communicating that the defense's policy violations were not grossly negligent, and communicating that Tony's counsel was inept and ineffective to the jury is undeniably forbidden by *Pace*, and Tony respectfully requests a written opinion to that end granting a new trial.

b. The Seventh Amendment

The right to a jury trial is so important that it should be scrutinized with utmost care. *Dimick* v. *Schiedt*, 293 U. S. 474, 486, (1935). Although the analysis of whether a litigant received a fair trial is a Due Process analysis, a jury trial guarantee meant to apply to all United States citizens is contained in the Seventh Amendment. The Sheriff's Office stated repeatedly in its brief that the Seventh Amendment has not been incorporated as to the states, and that is true. However, the Seventh Amendment's jury trial guarantee applies to all "Suits at common law, where the value in controversy shall exceed twenty dollars," and is not limited to suits in federal court, which can only be brought in limited circumstances. Most suits cannot be brought in federal court. It cannot

seriously be argued that the framers included the jury trial guarantee in the body of the Constitution and the Bill of Rights[1] if they did not intend for it to be, in fact, a guarantee.

Currently, respondents like the Sheriff's Office can argue that the Seventh Amendment does not guarantee a jury trial in state court[2], which is the exact opposite of what the United States Constitution says. The framers might describe it as outrageous. When the Seventh Amendment was enacted, most claims exceeding twenty dollars could not be brought by common citizens because federal district courts were not created until 1789, two years after the Constitution was ratified. The Seventh Amendment does not contain an exception or language limiting the right to cases litigated in federal court. Alexander Hamilton noted in 1788 that both "friends and adversaries of the plan of the constitutional convention" all agreed on the fundamental importance of the right to trial by jury. Tony respectfully requests that the Court issue a written opinion establishing that the Seventh Amendment of the United States Constitution guarantees a jury trial in "Suits at common law," regardless of where those suits are litigated.

c. The South Carolina Constitution

The Court should also issue a written opinion because the Sheriff's Office has argued that Article I, § 14 does not guarantee a jury trial for common law negligence claims; this is simply not the law. The Sheriff's office seems to argue that because Tony's common law negligence claim was brought pursuant to the Tort Claims Act, the Article I, § 14 guarantee for common law negligence claim somehow disappeared. Article I, § 14 requires that a jury trial be preserved, "inviolate," for common law causes of action like negligence claims. That right was violated by

[1] See *Neder v. United States*, 527 U.S. 1, 30, 119 S.Ct. 1827, 1844 (1999), which acknowledges that the right to a jury trial is so important that it is the only right to appear in both places in the Constitution.

[2] This also leads to the result of a jury trial being guaranteed by the U.S. Constitution when a negligence claim is litigated in federal court, say, in a diversity car wreck case, but not if the same case is litigated between two South Carolina residents.

the trial judge's conduct. *S.C. Code* § 15-78-40 provides that "governmental entit[ies] are liable for their torts in the same manner and to the same extent as…private individual[s] under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." (*Arthurs v. Aiken County*, 551 S.E.2d 579 (Supp. Ct. 2001)). Review and an opinion are needed on this issue so that it is settled in this case and in other cases that the South Carolina Constitution guarantees the right to a jury trial for common law causes of action like Tony's negligence claim, even if those claims are subject to the Tort Claims Act.

II. To the extent the Court considered waiver in dismissing the writ, it should have applied to the Sheriff's Office and not Tony.

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). As this 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). "We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

If the Sheriff's Office's waiver argument contributed in any way to the dismissal of the writ, the Court should never have reached the issue of whether Tony waived anything because the Sheriff's Office *waived* any waiver arguments. Much of the Sheriff's Office's argument focused on issue preservation during oral argument, and the panel inquired about issue preservation. However, the Sheriff's Office never raised that argument in its response to post-trial motions, in

its Appellate Court brief, or in its response to Tony's Petition for Certiorari. Simply put, if issue preservation is to be applied strictly in this case, then the Sheriff's Office's waived any issue preservation arguments long ago, raising them for the first time in its Supreme Court Brief. Because the right to a fair trial is so important and because doubt should be resolved in favor of preservation, Tony respectfully submits that the constitutional violations that occurred during his trial should not go unaddressed due to waiver. (See *Singleton v. Wulff*, 428 U.S. 106 (1976), stating whether to review an issue arguably unpreserved is in the discretion of the reviewing court.)

As discussed during oral argument, any objection "would have been futile." *State v. Pace*, 447 S.E.2d 186 (Supp. Ct. 1994) citing *Cf. Dunn v. Charleston Coca-Cola Bottling,* ___ S.C. ___, 426 S.E.2d 756 (1993). See also *State v. Higgenbottom,* 344 S.C. 11, 542 S.E.2d 718 (2001) (employing futility doctrine). Our courts have recognized "that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." *State v. Passmore,* 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). Even in *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 406, 526 S.E.2d 716, 724 (2000), which noted that issue preservation rules are intended to "prevent[ ] a party from keeping an ace card up his sleeve," recognized that, in certain cases, it is futile to object. If any situation exists where objection is futile, it is this situation, where the trial judge admonishes counsel unnecessarily, incorrectly defines damages, excuses central and uncontested policy violations, and communicates conclusions to the jury that are not warranted by the evidence.

When the trial judge said in the jury's presence that Tony's counsel was "chasing rabbits," he communicated that Tony's counsel was incompetent, such commentary that this Court has forbidden. "[T]he tone and tenor of the trial judge's remarks…were such that any objection would have been futile." *Pace* at 187. Accordingly, the Court should find no waiver of this issue. The trial judge made at least four admonishing, prejudicial, unsupported comments made in the

presence of the jury, each one worse than the last. The last comment was so bad that the trial judge essentially objected for the Sheriff's Office and then communicated to the jury that the Sheriff's Office refusal to make any effort to bring subpoenaed materials to trial did not matter. Because the violation of Due Process in this case is a manifest injustice, Tony respectfully requests that the Court consider the substance of Tony's arguments, issue a written opinion confirming the Due Process violation, and remand this matter for trial.

III. Tony could not have been comparatively negligent for the Sheriff's Office's negligence in admitting and detaining him.

Justice Kittredge was right to inquire about the comparative negligence instruction during oral argument. Tony had no say in the Sheriff's Office admitting him in violation of the physician clearance policy, no say in the Sheriff's Office removing his C-spine collar, and no ability to affect in any way the Sheriff's Office's treatment of him. Not only was comparative negligence impossible in the context of Tony's case,[3] the Sheriff's Office's argument made no sense. The Sheriff's Office tried to get around the fact that it was impossible for Tony to be comparatively negligent in his own custody and care by claiming that he should have complained more about his pain *after* the Sheriff's Office admitted him against policy and took away his prescribed pain medication. That, of course, is absurd, especially since Tony had no control over the Sheriff's Office's violation of its policy or its admission of him against policy to a facility where it refused to allow him to have physician-prescribed medication. Review and an opinion is needed to confirm that an inmate or detainee cannot be comparatively negligent for a detention facility's policy violations, improper admission, and misconduct.

[3] Detention facilities have a non-delegable duty to provide medical care for inmates.

The trial cout never specifically instructed the jury that comparative negligence is an affirmative defense and that the defendant had the **burden** of proof. Instead, the trial court charged the jury that "Defendant must prove by a preponderance…of evidence that the plaintiff breached a duty of care which proximately caused the plaintiff's injuries…" (App. p. 700). This, of course, is different than the instruction given as to Tony, which specifically stated that Tony had "the burden" of proving his case. (App. pp. 697-698).

The trial judge acknowledged that had he read Tony's motions *in limine* (which included a motion to exclude any reference to Tony's DUI) before speaking with the jury panel and that it would have been better to "sh[y] away" from discussing the DUI. This comment, statements by Lonnie Smith during his testimony, and defense counsel's references to the DUI in closing argument communicated to the jury that Tony was somehow comparatively negligent. All of this, coupled with a comparative negligence instruction where comparative negligence was impossible, was confusing at best and robbed Tony of his Due Process right to a fair trial. Tony respectfully requests the Court issue a written opinion forbidding a comparative negligence instruction where comparative negligence is impossible and where the argument for it is advanced by prejudicial references to events wholly unrelated to the matters at issue at trial.

CONCLUSION

For the foregoing reasons, Tony respectfully requests that the Supreme Court reconsider the dismissal of the writ of certiorari, rehear this case, and issue a written opinion reversing the Court of Appeals' decision and remanding this matter for trial.

Respectfully submitted,

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