THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

Case No. 2020-000589

Bridgett Taylor,……Respondent,

v.

Richland County Sheriff's Department, ……..….Appellant.

RESPONDENT'S PETITION FOR REHEARING

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ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Respondent Bridgett Taylor (hereinafter, "Taylor" or "Respondent") petitions this Court for rehearing of the Court's decision in *Bridgett Taylor v. Richland County Sherrif's Department.*, 2020-000589 (S.C. Ct. App. Filed January 24, 2024). Taylor respectfully submits that the Court misapprehended the law or overlooked the evidence when it reversed the trial court's order granting Respondent's motion for new trial, and reversing its grant of directed verdict in favor of the Appellant, Richland County Sherriff's Department (the "Department" or "Appellant"). Respondent respectfully requests the Court reconsider its decision for the reasons stated in its briefs, and including the following reasons:

I. THE APPELLATE COURT FAILED TO CORRECTLY ANALYZE AND APPLY EACH ELEMENT OF COLLATERAL ESTOPPEL

In the instant case, this Court erroneously found that collateral estoppel precluded Taylor from litigating a negligence claim, in light of a previous § 1983 claim arising under the Fourth Amendment. More specifically, this Court failed to recognize the elements of a claim under § 1983, and the fact that such a claim specifically requires something more than negligence (the claim at issue here). Simply stated, a claim under § 1983 alleging excessive force in violation of the Fourth Amendment does not implicate the same elements of a gross negligence standard. As such, the issue of "gross negligence" was never "actually litigated" and was certainly not "necessary" to support the federal court judgment.

"Under South Carolina law, collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *See Kunst v. Loree*, 404 S.C. 649, 746 S.E. 2d 360 (S.C. Ct. App. 2013). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined

in the prior action; and (3) necessary to support the prior judgment." *Id.* at 653. What is more, this Court has held that "the doctrine of collateral estoppel should not be rigidly or mechanically applied. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *See Carolina Renewal, Inc. v. S.C. DOT*, 385 S.C. 550, 684 S.E. 2d 779 (S.C. Ct. App. 2009); *State v. Hewins*, 409 S.C. 93, 760 S.E. 2d 814 (S.C. 2014).

With respect to the first element, it is without question that an issue must have "actually be determined to preclude its subsequent relitigating." *See Arnold v. Arnold*, 285 S.C. 296, 328 S.E. 2d 924 (S.C. Ct. App. 1985). An issue is "actually litigated" only if the party "has had a full and fair opportunity to litigate the issue in the first action and there are no other circumstances which justify affording him a second opportunity to retry the issue." *See McPherson v. S.C. Dept. of Highway & Public Transp.*, 297 S.C. 303, 376 S.E. 2d 780 (S.C. Ct. App. 1989).

An excessive force claim, at its essence requires the plaintiff to prove (1) "that force was applied 'maliciously and sadistically for the very purpose of causing harm"; and (2) "that he suffered more than de minimis pain or injury." *See Smith v. Ozmint*, 578 F. 3d 246 (4th Cir. 2009). In that regard, a claim for excessive force necessarily involves intentional rather than negligent conduct. *See e.g., Smith v. Clark*, No. 2:20-cv-47, 2023 U.S. Dist. LEXIS 106536 (N.D. W. Va. Jun. 20, 2023). In fact, in *Morrill v. Prince George's County*, the Fourth Circuit Court of Appeal addressed this precise issue. No. 95-2309, 1996 U.S. App. LEXIS 31090 (4th Cir. Dec. 4, 1996). In *Morrill*, a § 1983 plaintiff challenged the validity of a jury instruction which "instructed the jury that [Plaintiff] was required to show that the Officer's actions were intentional or reckless, not merely negligent." *Id.* at *6. In affirming the instruction, the Fourth Circuit quoted the United States Supreme Court in holding that "unintended consequences of government action could not

form the basis of a Fourth Amendment violation." *Id.* (citing *Brower v. Country of Inyo*, 489 U.S. 593 (1989)). In the same case, the Supreme Court summarized its position, indicating: "[in] sum, the Fourth Amendment addresses 'misuse of power', not the *accidental effects* of otherwise lawful government conduct." *Id. See also Ansley v. Heinrich*, 925 F. 2d 1339, 1344 (11th Cir. 1991) (finding no error in a jury instruction which stated "negligence, standing alone, is not a constitutional violation" in connection to a § 1983 claim).

In addition, the "reasonableness" being evaluated in a § 1983 claim is the reasonableness of the "force used to carry out a particular arrest." *See Gagliani v. Lexington Cnty Sherrif's Dept.*, No. 3:20-3737-JMC-SVH, 2022 U.S. Dist. LEXIS 159355 (D. S.C. Feb. 18, 2022). In that regard, the court evaluates the officers intentional conduct, while "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion." *Id.* at *20. In evaluating "reasonableness" of the officer's intentional conduct, the court considers a variety of factors including "whether the suspect poses an immediate threat to the safety of the officers or others" and "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

As noted by this Court in its opinion, gross negligence is the "failure to exercise slight care in contrast to ordinary negligence which is the failure to exercise due care." S*ee Hilber v. City of Columbia*, No.3:19-73-JMC-PJG, 2020 U.S. Dist. LEXIS 108340 (D. S.C. Jun. 19, 2020). In other words, "gross negligence is a relative term and means the absence of care that is necessary under the circumstances." *Id.* at *13. By its very definition then, gross negligence concerns a breach of the duty of care, which is the result of a failure to do something "which it is incumbent upon one to do." *Id.* at *13-14.

Given the foregoing, and the legal standards applicable to a constitutional excessive force claim, and a gross negligence claim, Taylor first submits that collateral estoppel could not apply to her gross negligence claim because it was not "actually litigated" in the § 1983 claim. As noted above, negligent or "unintended" and "accidental" effects of government action are wholly irrelevant in connection to the determination of a § 1983 claim. For that reason, it would have been meaningless for Taylor to litigate the issue of negligence in her § 1983 claim. In fact, as indicated above the jury is rightly instructed in a § 1983 excessive force claim that the plaintiff must establish more than negligence to prevail. *See Heinrich*, 925 F. 2d at 1344. Under a collateral estoppel analysis, then, the "issues" in a § 1983 action, while assessing the reasonableness of an officer's conduct simply do not encompass any negligence related inquiries. Even though the officer may have *used force* in a reasonable manner, this does not equate to a finding that the "accidental effects of otherwise lawful government conduct" were reasonable.

For the same reasons, this court erred in finding that the issue of gross negligence was "directly determined". Although the court found that the officers in the § 1983 case acted "reasonably", reasonableness in the § 1983 context is not equivalent to any applicable standard of care. Instead, in the § 1983 context, "reasonableness" evaluates whether the degree of a constitutional intrusion was justified by the government's interest in effectuating that intrusion. More specifically, whether based on the degree of danger posed to the officers and the severity of the suspected conduct, the force used was a permissible intrusion on the Fourth Amendment. In a gross negligence analysis, the court analysis did not determine whether the *force* was reasonable, but whether the officer exercised even slight care for the safety of persons (including those other than the suspect) in the vicinity. The court "directly determined" whether the constitutional

intrusion was reasonable in the § 1983; it did not directly determine whether the officers exercised slight care.

In addition, and regardless of whether the doctrine of collateral estoppel can be applied here, this court erred in failing to consider public policy rationales for refusing to apply the doctrine in this case. As noted above there are certain exceptions to applications of the collateral estoppel doctrine. These exceptions include: (a) "the potential adverse impact of the determination on public interest or the interest of persons not themselves parties in the initial action"; and (b) "because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action" and (c) "because the party sought to be preclude, as a result of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." *See State v. Bacote*, 331 S.C. 328 (S.C. 1998).

In this case, (a) above is fully applicable. Courts have repeatedly held that "the public has a strong interest in exposing substantial allegations of police misconduct." *See Billioni v. Bryant*, 998 F. 3d 572 (4th Cir. 2021). Undoubtedly, issues revolving around the negligent use of explosives by law enforcement to gain access to residential dwellings fall within this "strong" interest. Along the same vein, it has been emphasized that "[for] a police force to be effective it must have the respect and support of the community as well as its officers." *See Cromer v. Brown*, 88 F. 3d 1315 (4th Cir. 1996). This interest, as well, is supported by permitting a full and fair litigation of claims involving police conduct, misconduct, and failure to exercise even slight in their dealings with the community.

By applying the collateral estoppel doctrine, this Court effectively foreclosed a citizen from exercising her rights against alleged police misconduct in every forum to which she is entitled.

Such action, particularly when repeated (which it undoubtedly will by the Appellant in subsequent cases, with this opinion as a polestar) will without question whittle away community trust in law enforcement, and a public morale that abuse by law enforcement can be fully and fairly resolved. These public policy concerns should be paramount, and this court erred in failing to consider these concerns when finding that collateral estoppel should have been applied.

In addition, and regardless, Taylor also asserts that the exception referenced in (b) above is fully applicable. More specifically, that collateral estoppel should not be applied because "it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action". As noted above, had Taylor attempted to argue a gross negligence or negligence theory to support her § 1983 claim, she likely would have been precluded on relevance grounds. Again, as emphasized above, allegations of breach of duty and negligence are "not sufficient" to establish a constitutional violation under the Fourth Amendment.

It seems contrary to reason that Taylor's assertion and proof of breach of duty (i.e., negligence) would have been deemed insufficient and even irrelevant in her § 1983 claim. Yet, at the same time, this court has held that she should have *foreseen* that these concepts would later be determined based on her § 1983 litigation. This is conclusion is more jarring when considering that Taylor specifically refrained from naming the Appellant as a party in the § 1983 claim, naming only certain law enforcement officers in an individual capacity. As stated in the initial brief, the parties who were sued were individuals Lott, Ezzell, and Linfert. This too adds to the notion that Taylor could not possibly have foreseen the need to litigate an irrelevant gross negligence theory in her § 1983 claim.

Ultimately, Taylor asserts that this Court erred in reversing the trial court's order granting a new trial because (1) negligence, proof of negligence, or an evaluation of the potential breach of

the applicable standard of care have been expressly held to be "irrelevant" to a § 1983 claim for excessive force in violation of the Fourth Amendment and as such, concepts of gross negligence simply cannot be said to have been "issues" that were determined, let alone "central" to the resolution of the action in the previous § 1983 claim; and/or (2) this court failed to consider that even if collateral estoppel is technically applicable public policy concerns should preclude its application; and/or (3) this court failed to consider that even if collateral estoppel is technically applicable Taylor could not have foreseen the need to prove gross negligence, or litigate that issue in her § 1983 claim, when proof of negligence was "insufficient" and completely irrelevant to prove her claim in the § 1983 case. For any or all these reasons, Taylor respectfully requests this Court to grant rehearing.

CONCLUSION

For the reasons set forth herein, in Respondent's Brief, and at oral argument, the Court should grant the petition for rehearing and reconsider its decision. Respondent requests the Court affirm the circuit court's order denying Appellants' motion to compel arbitration and remand the case to proceed in circuit court.

Respectfully submitted,

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February 8, 2024

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February 8, 2024

Via Electronic Mail Only (ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
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Re: *Bridgett Taylor v. Richland County Sheriff's Department*
Appellate Case No. 2020-000589
Civil Action Number: 2017-CP-40-3166

Dear Mrs. Kitchings:

Please find enclosed for filing by email only the **Petition for Rehearing** in the above referenced matter. Pursuant to Supreme Court Order 2020-05-29-02 *RE: Operation of the Appellate Courts During the Coronavirus Emergency*, Respondent does not enclose a motion filing fee, and files and serves this motion via e-mail. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (g)(3) of this same order.

If you have any questions, please do not hesitate to contact me.

With kind regards, I remain,

Sincerely,

Andrew W. Kunz

cc: Andrew F. Lindemann (*via email only*)
Robert D. Garfield (*via email only*)
Lauren K. Slocum (*via email only*)