THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Courtney Clyburn Pope

Appellate Case No. 2023-000009
Trial Court Case No. 2017-CP-201413

Otis Owens .....Respondent,

v.

Sheriff Michael Hunt, the Aiken County Sheriff's Office, Aiken County Detention Center and Aiken County .....Appellants.

Respondent's Final Brief

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Counterstatement of Issues on Appeal

I. Whether the trial court properly denied Appellants' motions when there is evidence in the record to support the jury's verdict.

II. Whether the trial court properly denied Appellants' motion for a new trial.

Statement of the Case

This appeal arises from an admitted improper frisk of Respondent Otis Owens, a pre-trial detainee, at the Aiken County Detention Center ("the Detention Center"), and Appellants' failure to exercise slight care. (R.19). Owens filed a complaint against Appellants Sheriff Michael Hunt, the Aiken County Sheriff's Office, the Detention Center, and Aiken County alleging gross negligence and negligent hiring and supervision. *Id.*

The matter was tried before the Honorable Courtney Clyburn Pope, and a verdict was rendered in Owens's favor in the amount of $150,000 for gross negligence. (R.1). Appellants filed post-trial motions, including judgment notwithstanding the verdict. (R.28-48). The Court granted JNOV as to Aiken County but otherwise denied the motions. Appellants later sought clarification of the Court's rulings through a Rule 59(e), SCRCP motion. (R.45, 2-18). This appeal followed.

Statement of Facts

On the afternoon of January 25, 2017, Owens was a pre-trial detainee in the Detention Center in the Delta pod and walking around the recreation yard. (R. 577-78, 741). There were eleven men in the yard—four men playing cards at a table under a window and seven men, including Owens, walking laps. *Id.* At the time, Deputy Matthew Gibson was on duty and serving as the relief officer for Deputy Erikson in the Delta pod.[1] (R. 295-96, 303, 741). In surveying the

[1] A relief officer floats between the units and substitutes in for the officer on duty in the unit so that officer take a fifteen-minute break. (R. 295).

outdoor area, Deputy Gibson believed he saw inmates playing with dice—prohibited contraband. (R. 112, 198, 199, 298, 832). Deputy Gibson approached the four men playing cards and explained there would be no consequences, but they needed to hand over the dice. (R. 314-15, 741). The men repeatedly denied having dice as Owens and the other men continued walking around the yard. (R. 741-42).

In response, Deputy Gibson sealed off the entrance to the pod from the yard and waited for Deputy Erickson to return to perform a search of the inmates and the recreation yard. (R. 299, 741-42). With Deputy Erickson present, Deputy Gibson began his search.

Deputy Gibson instructed the men to line up—searching Owens first. He directed Owens to place his two hands up against a window in direct sight of the pod's camera with Owens "leaning slightly forward, legs spread a little—shoulder length apart." (R. 304, 319-20). Owens explained that as he was facing towards the inside of the pod against the window Deputy Gibson "starts on my ears and comes down checking underneath my arms, does around my waist. Sticks his finger in my bellybutton. When he sticks his finger in my bellybutton, I look to my left and I say Erickson, do you see this guy 'cause he was being really-really rough." (R.741); (R. 834). To which Erickson responds by "put[ting] his hands up." (R. 741). Then Deputy Gibson proceeded to Owens's feet and moved up. *Id.* Owens explained, "[w]hen he come up, he shock me in my testicles, grabbed two hand full [with one hand], and squeezed." (R. 742). Deputy Gibson later testified that he used the prohibited "blade method" to perform the frisk. (R. 813); (R. 176) (Deputy Gibson agreeing the Detention Center prohibits the blade method used on Owens). No dice were ever found. (R. 198-99, 316).

Owens immediately jumped away from Deputy Gibson in reaction to the squeezing. (R. 744). He was outraged and in excruciating pain. (R. 795). Deputy Erickson approached Owens

to calm him down. Specifically, Deputy Erickson told Owens that he saw everything and that there was an avenue to address issues with a guard. (R. 583-84) (Deputy Erickson testifying that he told Owens to follow the grievance protocol); (R. 744) (Owens testifying as to the same). Practically, Deputy Erickson was attempting to defuse the situation and provide proper channels to address the incident.

In response to the physical pain, Owens became nauseated, his eyes watered, and he bent over. (R.743, 795, 809). He explained "[r]ight then I was nauseated. It hurt. I mean it constantly hurt after that. But I mean I stayed nauseated for about 45 minutes afterwards, excruciating pain from the get-go." (R. 746). In total, the excruciating pain lasted for two hours straight following the frisk. (R. 746). The next day, Owens's swelling and pain worsened. (R. 746-47). In total, the pain lasted for seven to ten days straight before temporarily subsiding. (R. 746-47, 838). But the pain and swelling came back at least twice before finally healing more than a month later. (R. 746, 748, 783).

Turning back to that day, immediately following the frisk, Owens made his way inside the pod and took a seat in a chair located right inside the doorway. (R. 753). Owens explained, "I was in pain. I just sat inside and just kept my head down waiting on the lieutenant to come in." (R.809-10). While Owens waited, other inmates, who appeared to be in similar pain, sat down in the chairs around him. (R. 810). When Deputy Erickson came inside, Owens asked him to contact the lieutenant on duty to report the incident. (R. 744, 786).

Later that day, Lieutenant Hettich and a sergeant came to the Delta pod's dayroom—located in front of the officer's desk—for Owens and two other inmates to write statements about the event. (R. 390, 744, 758, 806). On notebook paper, Owens detailed the improper frisk and excessive force leading to an assault on his person. (R. 749). In his statement, Owens explained

what occurred during the search, including Deputy Gibson grabbing his testicles and that he felt "sexually violated." (R. 751-52). In addition to his statement, Owens signed an affidavit. (R. 758). Lieutenant Hettich took Owens's handwritten statement and the affidavit that night—materials that neither Owens (nor his counsel) would ever see again. (R. 753, 758, 806). Significantly, there is no documentation or video evidence of this exchange. (R.392-93).

Later that evening, Owens also filed an inmate grievance through the kiosk in the Delta pod. Generally, this is the avenue available to inmates to address issues. (R.1039). Owens's grievance stated Deputy Gibson "violated me as a man and embarrassed me by grabbing me excessively in my crotch area. Deputy Erickson witnessed the whole thing." *Id.* The officer on duty instructed Owens to resubmit the request on January 27, 2017—two days later—when Lieutenant Butts would return to work. *Id.*

The next day, without making a kiosk request, Owens was taken to medical. (R. 787). At medical, Owens was signed in and evaluated. (R. 787-88). Owens was told he would need to be taken to the Department of Corrections in Columbia to get an ultrasound. (R. 789, 840). In the meantime, he was prescribed 800-milligram ibuprofen, which did not help with the pain or the swelling. (R. 788).

A Prison Rape Elimination Act (PREA) investigation was conducted because Owens sustained injuries to his testicles. The Detention Center's investigation lasted one hour—at most. (R. 460) (PREA coordinator testifying the investigation lasted about an hour). Owens was not interviewed as part of the investigation nor were any of the other witnesses. (R.450) (explaining no assessment of any witness credibility occurred during the investigation); *Id.* at 460 (testifying that no interviews were recorded and no video evidence preserved). Nor was the video recording of the frisk saved from the camera—in direct violation of the PREA policy. (R. 330-32) (agreeing

that a video with evidentiary value was not preserved in violation of policy); *Id.* at 359 (admitting no effort was made to preserve the video after the investigation or after Owens's ultrasound determined he sustained an injury to the groin). Two days later, and as instructed in response to his grievance, Owens followed up with a second grievance. (R. 805); (R. 1045).

Around the same time, Lieutenant Bowman took Owens and his roommate, who was also frisked and sustained injuries, to the sallyport where he informed the two men "that his investigation was closed and he didn't want to hear nothing else about it." (R. 750, 760). In response to this news, Owens asked several questions that went unanswered. In sum, none of the eleven inmates were interviewed. (R. 761). Notably, Owens was being told the investigation was closed while his testicles remained untreated, continually swollen, and in pain. (R. 760-61).

In the days that followed, Owens made multiple requests for copies of the grievance report and affidavit. (R. 1040—Plaintiff's Exhibit C—February 5, 2017 Grievance; February 6, 20217 Grievance; February 10, 2017 Grievance). Additionally, he made several verbal requests to the nurse from medical, who administered his ibuprofen, about getting his ultrasound. (R. 790).

Twenty-six days later, on February 24, 2020, Owens was taken to the Department of Corrections to get an ultrasound of his left and right testicles. (R. 339, 388, 748, 782, 840). The ultrasound showed Owens had sustained an injury around the groin. (R. 781). At that time, Owens's right testicle was much larger than the left, and the area was tender to the touch. (R. 783). Owens explained he had a sensation of fluid on his right testicle while the left testicle felt "numb." (Tr. 782-83). Owens was prescribed 800-miligram ibuprofen for the pain and antibiotics to address fluid gathering in the sac around the testicles—known as hydrocele. (R.762). A week after receiving antibiotics, Owens's symptoms cleared up. (R. 791).

Because Owens's attempts to address the improper frisk were futile, he filed a lawsuit for gross negligence and grossly negligent hiring and supervision. (R. 797); (R.19). In the years that have followed, Owens has felt retaliated against by Deputy Gibson.

At trial, Owens's counsel called fourteen witnesses with four of the witnesses' depositions being read into the record. Five of the witnesses were law enforcement officers, including Deputy Gibson, Lieutenant Bowman, and Deputy Erickson, along with Aiken Sheriff Michael Hunt and Deputy Gallam. (R. 161, 327, 460, 557). Beyond testifying that he saw men allegedly playing with dice in the recreation yard, Deputy Gibson admitted he violated the frisk policy by using the "blade method" on Owens. (R. 177-78, 294). He agreed the policy prohibiting the blade method is in place for an inmate's safety. (R. 177-178). As to the investigation following Owens's immediate request to speak to someone about the incident, Deputy Gibson testified that he does not remember anyone ever meeting with him for the purpose of an investigation or directly asking him if he grabbed Owens's testicles. (R. 215-16).

Deputy Gallam admitted the Detention Center was supposed to preserve evidence, including videos, and record interviews from witnesses. (R. 333). None of which occurred. He also admitted the one-hour investigation did not consider Owens' medical issues arising from the frisk. Despite Appellants knowing that Ownes immediately complained of pain. Deputy Gallam explained the one-hour investigation was closed prior to Owens ever receiving an ultrasound—a month later. (R.336). Despite these failures, Deputy Gallam testified that Owens's injuries could have been from excessive force. (R. 341). Moreover, he agreed that a "guard grabbing and squeezing a man's genitals" is enough for an allegation of sexual assault. (R. 347).

Lieutenant Bowman, who met with Owens after he requested to speak to an officer, testified by way of deposition. Lieutenant Bowman explained that following the frisk he met with

Owens in his capacity as the PREA coordinator. (R.449). He testified Owens was visibly upset but told him the incident was not sexual in nature so that ended his inquiry. (R.449). He testified that, while he had the ability to preserve the video, he did not. (R.449-50). Nor did he record his interviews with Owens, another inmate, or Deputy Gibson. (R. 460). In under an hour, Lieutenant Bowman ended his investigation by concluding this was a pat-down search that was simply more thorough than normal. (R.459-60).

Sheriff Michael Hunt, who oversees the Detention Center, testified that an injury caused by a pat-down search is a policy violation. (R. 462). He also testified that "if we know at the time of the allegation" that footage may be related to any sexual assault allegation or a PREA violation, the video file should be saved. (R. 464); *see also* R. 467 (testifying that it is important for a jury to be able to see footage related to an event that causes a party to bring a lawsuit).

Deputy Erikson was present for Owens's search and saw Deputy Gibson's "hand-in between [Owens's] legs performing the pat." Deputy Erickson explained that Deputy Gibson's hand and the method he used would not have been visible to him based on where he was standing. (R. 570, 576). He further explained that Owens immediately expressed his frustration with the search. (R. 577). He described Owens as visibly upset. (R.582). Additionally, he testified that Owens was not known to fabricate stories, cause problems, or get in fights. (R. 586-87).

Five inmates provided testimony to the jury—through live testimony and depositions. Jeremy Ard, through his deposition, testified that he observed the frisk and that Deputy Gibson was "real rough" with Owens. (R. 532). Willie Franklin, Owens's roommate at the Detention Center, testified that after the lawsuit Deputy Gibson went out of his way to single out Owens and treat him differently. (R. 645-46). This included Deputy Gibson directing Owens to remove drawings on cell walls—ones that were made by others –or he would lose his recreational

privileges. He also testified that Deputy Gibson went out of his way to come to Owens's room to smirk, make faces, or stare at him. (R. 645-46, 648, 649).

Similarly, Emmanual O'Neal, an inmate, testified that Deputy Gibson's general attitude toward Owens is "real caddy," and he makes Owens's life miserable every chance he gets. (R. 654-55). As to the lawsuit, O'Neal testified he heard Deputy Gibson tell Owens "It's not gonna work. I'm not worrying about that. It never happened. . . ." (R. 652). On another occasion, O'Neal heard Deputy Gibson say "he's suppose to be such a big tough guy. Why he worrying about a little nut shot." (R. 652-53).

Additionally, Owens's parents testified regarding their phone calls with Owens before and after the event. (R. 604, 614). They both explained Owens was depressed, upset, and humiliated after the search. (R. 607, 614). Finally, Owens testified to the events prior to the search, the search itself, his pain and suffering, and his experiences during the days that followed—much of which is relied on in setting forth the facts of this brief.

Following Owens's case-in-chief, Appellants moved for a directed verdict which was denied. Appellants did not present any witnesses or evidence. Notably, a review of the trial transcript highlights that Appellants' counsel objected roughly two hundred times during the trial—with more than one hundred and thirty of those times being in front of the jury. These objections included: twice during opening, twice during closing, and seeking a mistrial. (R. 111, 113, 240-42, 970, 995, 996).

Standard of Review

Appellants now seek a reversal based on JNOV and a new trial absolute. A JNOV motion must be denied "where the evidence yields more than one inference" on the challenged issue. *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). The Court must

view the evidence and resulting inferences in the light most favorable to the non-moving party and may grant a motion for JNOV when the evidence supports only one inference. *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct. App. 2009). In considering a JNOV motion, a court is concerned with the existence of evidence, not its weight. A court considering a JNOV does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). Finally, a motion for JNOV is the renewal of a directed verdict motion and cannot raise grounds beyond those stated in the earlier motion. *Roland v. Palmetto Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992). In sum, "[t]he jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274.

A motion for new trial absolute based on the amount of a jury verdict may be granted only if the verdict amount is "so grossly . . . excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, corruption, or some other improper motives." *Brinkley v. S.C. Dep't of Corrections*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

Arguments

This is a case about Appellants' failure to exercise slight care while performing a pat down on Owens and, in turn, the investigation that stemmed from the improper search. The primary inquiry for this Court is whether there is evidence in the record to support the jury's verdict finding Appellants were grossly negligent; the answer to which is: yes.

Appellants invite this Court to engage in an unnecessary and contorted legal analysis by repeatedly refashioning the complaint's basic gross negligence cause of action into a myriad of claims to create the appearance of legal error. Such efforts are perplexing and unsupported by the

case's procedural history and evidence presented at trial. Such shapeshifting tactics are best reserved for literature and do not belong in the appellate courts.

Beyond contorting claims, three of Appellant's arguments are unpreserved for this Court's review. Neither gymnastics nor a creative pen can erode evidence in the record supporting the jury's verdict in this matter.[2]

I. The record supports the jury's verdict for an award for gross negligence.

The trial court properly denied Appellants' directed verdict motion and allowed the jury to determine whether Appellants were grossly negligent. Further, a review of the record shows the trial court properly denied Appellants' motions for JNOV and new trial absolute.

A motion for directed verdict is not a means for a party to keep a genuinely disputed issue from the jury, and JNOV is not a tool for non-prevailing parties to overturn a verdict with which they disagree. Appellants must show there is no evidence to support the jury's finding on the gross negligence claim. *Rogers*, 356 S.C. at 92, 588 S.E.2d at 90. Yet, Appellants' brief does not discuss the testimony. Instead, the 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. Additionally, Appellants take issue with a jury charge that they did not object to, which is therefore unpreserved for appellate review.

Turning first to the evidence, the record demonstrates Appellants failed to exercise slight care towards Owens. *Proctor v. S.C. Dep't of Health & Envtl. Control*, 368 S.C. 279, 297, 628 S.E.2d 496, 506 (Ct. App. 2006) (finding jury question on gross negligence where state agency's

[2] 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. While Owens believes denying the directed verdict motion was proper given the procedural posture and the evidence presented at the time the ruling was made, undergoing such analysis at this juncture would be a futile act since the JNOV should have been granted.

conduct was against what "was its policy to do"); *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 384-85, 608 S.E.2d 573 (2005) (holding that trial court properly submitted gross negligence to jury based in part on an expert description of department policy). The absence of such care transcended this event from the improper frisk to the investigation to the administrative oversight in the weeks that followed.

This is evidenced by the undisputed fact that Deputy Gibson violated the Detention Center's policy when he utilized an unsanctioned search method—the blade method, instead of the open palm. (R.172, 176-77, 294). An admission readily acknowledged by Deputy Gibson and others. In so admitting, witnesses also testified that their policies and procedures are put in place to protect all involved—including Owens—and that it is important to follow the rules because "of situations like this." (R. 166, 168, 177, 198, 462).[3] In testifying, Sheriff Hunt agreed that if an injury is caused during a pat-down search when there is no resistance to the search, that would amount to the violation of the Detention Center's polices. *Id.* 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 the allegation. (R.464). He also agreed saving this type of video footage if allegations were made, a search or an alleged assault, was important so a jury could see it. (R. 467). While these admissions do not equate to gross negligence per se, they are without question evidence to be considered, along with all other circumstances, by the jury. *Cooper by Cooper v. Cnty. of Florence*, 306 S.C. 408, 414, 412 S.E.2d 417, 420 (1991).

Beyond these admissions, the record contains firsthand accounts of the incident and investigation. This included Ard describing the frisk on Owens as "real rough" and Deputy

[3] He also agreed the policy requiring that a search of an inmate be conducted with dignity is violated if an inmate's testicles are grabbed in the process. (R.196-97). He further agreed that would be true for the search he performed on Owens. (R. 198).

Erikson acknowledging Owens immediately expressed concern and pain. (R. 532). Owens testified he was in excruciating pain—causing his eyes to water and bringing on nausea, as well as swelling in his testicles. (R.745, 795, 809). He also testified to the timeline of his recovery—that spanned more than thirty days. (R.746)(explaining the most severe pain lasted around two hours and the swelling worsened the following day); (R.746-48, 783) (detailing the first seven to ten days when his testicles remained swollen, along with subsequent swelling that remained until he was treated with antibiotics.). While Appellants attempted to weave a narrative that Owens' condition was caused by another source and the frisk had no role—seeming to imply Owens fabricated the allegations, no evidence was presented that Owens had any role in the events that led to the frisk or had some plan of fabrication. Rather, evidence was presented that Owens was not involved in a card game and during the frisk he alerted Deputy Erikson of the immediate pain. Additionally, there was no dispute that Appellants' medics believed an ultrasound was needed to address Owens' condition following the frisk.

In addition to the physical symptoms, Owens testified to his embarrassment. This was mirrored in the grievance he filed the night of the incident, and supported by his parents' testimony that Owens became depressed, upset, and humiliated after the search. (R.607, 614); (R. 1039).

As to Appellants' subsequent actions, evidence overwhelmingly suggests the investigation was in name only. No one disputed the investigation lasted less than hour, and no video footage existed. (R. 460). Strikingly, both Deputy Gibson and Owens testified neither were interviewed about the events. In fact, Deputy Gibson testified he was never asked if he squeezed Owens's testicles. While Owens did speak to an officer that day, it was made at his request not pursuant to the Detention Center's policy. Certainly, this exchange could arguably overlap with the formal investigation, but in this case the evidence suggests otherwise. Owens's exchange with the officer

centered on him writing an account of the incident on notebook paper and signing an affidavit. Yet, there is no record of this exchange—in documentation by way of a report, video, or even the original statement and affidavit. The jury, however, was presented with evidence of Owens's repeated requests for copies of his statement and affidavit, which were never provided. (R.392, 93); (R. 1040, 1045). Raising serious questions about the legitimacy of the investigation for the jury to consider. When taken as a whole, the evidence in the record supports the verdict. The trial court properly denied Appellants' motions for JNOV and a new trial.

Appellants' contention that this case should have been pled as causes of action for assault and battery and then later as a medical malpractice claim are misplaced. These arguments are Appellants' attempt to contort the complaint—leading to unnecessary legal gymnastics.

Turning first to arguments regarding assault and battery, a review of the complaint reveals Owens alleged thirteen separate factual allegations to support a finding of gross negligence. (Complaint at 1-2). Any one of these allegations is sufficient for the jury to make a finding of gross negligence. It is not within Appellants' nor this Court's purview to second guess the jury when there are corresponding allegations and sufficient evidence in the record. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995).

Moreover, part of Owens's theory of the case is Deputy Gibson failed to exercise slight care when performing the frisk on him. As a result, Owens alleged his body was assaulted and battered. While these words can have a legal definition, here they are used in a more generic sense to describe Owens' bodily injury. Appellants' case discussion on assault and battery being intentional torts are irrelevant. A review of those cases demonstrates distinct issues regarding inconsistent verdicts, comparative negligence, and the well-settled principle that there is no gross negligence per se. None of which Owens has asserted nor do they apply to this circumstance. Such

a review would only be relevant if Owens had pled both assault and battery as causes of action, along with gross negligence, and the verdict failed to distinguish the causes of the action.

Additionally, there is no merit in Appellants' claim that Owens has alleged a medical claim. 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. Not a medical malpractice claim.[4] Owens did not assert at trial that he received improper medical care from the Detention Center's medic or the Department of Corrections. Had he done so, then he would have been required to file a medical malpractice case and comply with those statutory requirements.[5] Instead, Owens's cause of action and the evidence presented to the jury went directly to ordinary gross negligence by the Sheriff's Office/the Detention Center. (R.19). Therefore, Owens was not subject to the medical malpractice standards.

Moreover, Owens may testify to his own physical injuries, which includes when the injury started, how the injury worsened, the symptoms he suffered, and the name of the condition. Rules 601 & 602, SCRE. This is allowed because these are injuries that were sustained by Owens and are typically observable by an ordinary person.[6]

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[4] Even in a medical setting, our Supreme Court has acknowledged that when a person who receives negligent routine or administrative care is not required to have an expert opinion. *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 177–78, 758 S.E.2d 501, 504 (2014). Here, the facts of this case are even more removed because the claim is not connected to the medical treatment Owens received.

[5] Tellingly, Appellants did not raise this as a defense in their Answer or seek to dismiss Owens's complaint because it failed to comport with notice of intent requirements for medical malpractice. (R.24); *see* Aiken County's Common Pleas Docket for this case (accessed Sept. 25, 2023); Rule 201(f), SCRE (explaining a Court may take judicial notice at any stage).

[6] Appellant would have this Court believe all testimony based on personal knowledge, including someone's own medical condition, is subject to expert testimony or else the claim is an improper attempt to invoke the doctrine of res ipsa loquitur. Such a position is nonsensical. A party may testify in a motor vehicle case that they broke a leg or in a premises case that they tore their ACL

Under Rule 602, SCRE, a witness may testify to any matter if evidence is introduced to support a finding that they have personal knowledge of the matter. Rule 602, SCRE. "Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." *Id.*

Furthermore, the injury itself is not complicated. The evidence as to whether someone used too much force when frisking a testicle is plainly discernable to the average person. *See State v. Mealor*, 425 S.C. 625, 647, 825 S.E.2d 53, 65 (Ct. App. 2019). It is not a matter "beyond the scope of the jury's good judgment and common knowledge." *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997); *See Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153-54, 747 S.E.2d 468, 481 (2013) (stating expert testimony is not required to establish the standard of care for the operation of a landfill "where a lay person can comprehend and determine an issue without the assistance of an expert" and noting trial courts should assess "the complexity and technical nature of the evidence" when determining whether a particular subject requires expert testimony). "Even when a subject matter is at the periphery of ordinary knowledge, expert testimony is not required when a witness can give an explanation of the concept that a reasonable juror can grasp instantly." *State v. Gibbs*, 438 S.C. 542, 552–53, 885 S.E.2d 378, 383–84 (2023).

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when they fell. *See generally*, *Christmas v. City of Chicago*, 691 F. Supp. 2d 811, 821 (N.D. Ill. 2010) (allowing plaintiffs to testify about the alleged physical and psychological damages they suffered as a result of a purportedly illegal search and seizure); *Macon v. City of Fort Wayne*, No. 1:11-CV-119, 2012 WL 3745375, at *8 (N.D. Ind. Aug. 28, 2012) (collecting cases holding that a plaintiff in an excessive force can testify about his own symptoms); *Cooper v. Dailey*, No. 07 C 2144, 2012 WL 1748150, at *7 (N.D. Ill. May 16, 2012) (holding that plaintiffs they "may relate to the jury their condition following the incident based on their recollections and subject to cross-examination"). Both are conditions about which a party has personal knowledge. To argue otherwise is to suggest Rule 602 is always subject to expert opinion requirements of Rule 703, SCRE, which is simply not the rule.

Courts in other jurisdictions have specifically found that a party may testify to certain conditions and diagnoses when they are obvious—thereby aligning with South Carolina's jurisprudence on the need for causation expert testimony that accounts for complexity and common knowledge. *See Hardyman v. Norfolk & Western Railway, Co.*, 243 F.3d 255 (6th Cir. 2001) (noting in dicta that general causation testimony is enough to send the case to a jury for carpal tunnel syndrome); *Smith v. Weber*, 70 S.D. 322, 16 N.W. 2d 537 (1944) (finding a party may testify that he was treated for a throat infection); *Kinner v. Boyd*, 139 Iowa 14, 116 N.W. 1044 (1908) (holding a party may testify that he suffered from a broken bone). The Seventh Circuit Court of Appeals has explained expert testimony is not necessary when a layperson can understand the cause of the injury. *Myers v. Illinois Cent. R. Co.*, 629 F.3d 639, 643 (7th Cir. 2010) (citing *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir.1987)). The Court explained, "when a plaintiff suffers from a broken leg or a gash when hit by a vehicle, he doesn't need to produce expert testimony." *Id.* The Court noted that it is only "when there is no obvious origin to the injury" that expert testimony would be needed. *Id.*; *see also*, *Denton v. Ne. Ill. Reg'l Commuter R.R. Corp.*, No. 02 C 2220, 2005 WL 1459203, at *5 (N.D. Ill. June 16, 2005) ("[e]xpert testimony is generally required to establish a causal connection between an accident and an injury unless the connection is a kind that would be obvious to laymen, such as a broken leg from being struck by an automobile").

Certainly, Appellants could have attempted to create a factual issue for the jury by asserting an alternate theory for the cause of Owens's injury or using medical records to impeach Owens's testimony if they believed reference to the diagnosis was inaccurate. In fact, Appellants' counsel utilized such an approach, which the jury effectively disregarded given the verdict. *See* R. 261 (setting forth Appellants' theory that the injury to the testicles occurred due to excessive

masturbation or STDs); R. 842 (Appellants' counsel suggesting testicles could swell due to masturbation with communal soap to which Owens denied using communal soap). In sum, "so long as the jury, by virtue of common experience, is capable of resolving a factual issue, it will *not* be prevented from doing so because of the absence of expert testimony." *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986).

Notably, Appellants have contorted references to hydrocele as an attempt by Owens to establish causation. That is not the case. Rather, these references were intended to provide the jury a detailed account of the event: Owens's symptoms in intervals, including immediately, the next day, ten days later, and more than a month later; and an admission by Deputy Gallam that Owens's injuries could have resulted from the search. Similarly, the jury heard testimony from Deputy Gibson that no frisk method could have caused the injury and Owens's denial of using communal soap or having STDs. Therefore, the question of causation was properly submitted to the jury because it was well within the common knowledge of the jury to make such a determination.[7]

Finally, Appellants incorrectly argue their motions for directed verdict and JNOV should have been granted because they are immune from suit for intentional acts. Our courts have previously held that broad attempts at immunity undermine the very purpose of the Tort Claims Act and are nonsensical. *See Morning v. Dillon Cnty.*, Civil Action No. 4:15-cv-03349-RBH (D.S.C. Sept. 27, 2017)(holding the SCTCA generally is not intended to protect state employees from liability for intentional torts"; §15-78-60(17)'s reference to "actual fraud, actual malice, intent to harm, or a crime involving moral turpitude" "cannot be fairly construed to encompass every instance of any intentional tort") (citing *McBride v. Sch. Dist. of Greenville Cnty.*, 389 S.C.

[7] By way of reference, Appellants made no objection when Deputy Gibson addressed causation by testifying that none of the frisk methods would have caused injury to Owens. (R.178-79, 183).

546, 563-66, 698 S.E.2d 845, 854-55 (Ct. App. 2010) (finding various intentional torts are not barred by statute simply because their elements require intentional acts); *see also Newkirk v. Enzor*, 240 F. Supp. 3d 426, 436 (D.S.C. 2017) (noting various intentional torts including battery "could be committed without actual malice or intent to harm").

For these reasons, the trial court properly denied the directed verdict and JNOV motions.[8]

II. The trial court properly denied Appellants' motion for a new trial.

A. The jury's $ 150,000 award for gross negligence was not excessive given the evidence in the record regarding Owens's pain and suffering, thereby, undermining Appellants' assertion that themes of retaliation improperly influenced the verdict.

Sifting through four days of testimony, including vivid descriptions of Owens's pain, suffering, and embarrassment, the jury awarded Owens $150,000. Appellants argue this award is excessive, and thus a new trial should be granted. However, this argument underestimates both the legal standard to obtain a new trial and the deference appellate courts must offer the jury's determination and trial court's post-verdict review. In short, the gross negligence award is supported by the evidence, consistent with awards in other cases, and shows no signs of improper passion or prejudice.

Appellants must meet a high standard to push aside a jury's damage award for a new trial. Since Appellants pursued only a motion for new trial absolute rather than new trial nisi, they cannot prevail by arguing the verdict was "merely . . . excessive" but must instead demonstrate the verdict was "grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556

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[8] As to Appellants' argument that the trial court failed in charging the jury as to the duty of care, such argument is unpreserved for review. This argument was never raised to the trial court. *State v. Avery*, 333 S.C. 284, 509 S.E.2d 476 (1999) (explaining "When an instruction as given is inadequate, a party must request further instructions or object at the completion of the instructions in order to preserve the issue for review").

(1993); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004) (requiring courts to distinguish between verdict that is "unduly liberal" and one "actuated by passion, caprice, or prejudice"). A verdict is not excessive if it "may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained." *Kunst v. Loree*, 424 S.C. 24, 46-47, 817 S.E.2d 295, 306 (Ct. App. 2018).

Additionally, an appellate court reviews only a cold trial transcript while the jury and judge received first-hand the witnesses' descriptions of the size and scope of what Owens experienced. *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993) (citing *Daniel v. Sharpe Constr. Co.*, 270 S.C. 687, 244 S.E.2d 312 (1978) ("The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than" Supreme Court reviewing a cold trial transcript)). Accordingly, this Court affords substantial deference to both jury and the trial court. *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 865 S.E.2d 910 (Ct. App. 2021) (quoting *Burke v. AnMed Health*, 393 S.C. 48, 57, 710 S.E.2d 84, 89 (Ct. App. 2011) (noting "highly deferential" standard of review); *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000) (circuit court's decision to deny new trial based on verdict amount "will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law"). Deference must be especially high when reviewing an award for intangible damages like those at issue in a personal injury claim. *Mills*, 435 S.C. at 227, 865 S.E.2d at 917 (citing *Rush*, 310 S.C. at 381, 426 S.E.2d at 806).

The evidence presented at trial supports the award. The evidence showed Owens experienced immediate pain during the search, which then continued for several weeks until he received antibiotics. (R.743, 746-48, 795, 809, 838). Not only was this presented through Owens's testimony, but it was also supported by witnesses present during the search including

Deputy Erickson and other inmates. (R. 532, 577, 582). This was further corroborated by the grievances admitted into evidence. *See* R.1039. Additionally, Owens and his parents testified to Owens's humiliation, depression, and embarrassment, which is also supported by the grievance Owens filed the day of the incident. *See*, R. 604, 607, 614;(R.1039) (stating that Deputy Gibson "violated me as a man and embarrassed me by grabbing me excessively in my crotch area").

Appellants contend the verdict is excessive based on the absence of a perceived need for a causation expert, no medical records, and no lost wages. This position fails to account for the jury's unique role to directly hear the evidence and observe the witnesses. In *Cohen v. Allendale Coca-Cola Bottling Co.*, the court found a verdict was not excessive even though the damages awarded were one thousand times the plaintiff's medical expenses, there was no physical impairment or lost wages, no testimony from medical providers, and the plaintiff endured at most a few hours of nausea and diarrhea. 291 S.C. 35, 39, 351 S.E.2d 897, 899-900 (Ct. App. 1986).

In *Tortu v. Las Vegas Metropolitan Police Department*, the Ninth Circuit Court of Appeals upheld a $175,000 verdict in a case where the plaintiff's testicles were squeezed for ten seconds by a police officer while he was handcuffed and seated in a police car. 556 F.3d 1075, 1086 (9th Cir. 2009). While the plaintiff had no lost wages and did not have to return to the doctor, the Ninth Circuit found that the damages award did account for plaintiff's "personal humiliation and emotional suffering." *Id.* The plaintiff testified "the incident caused him excruciating pain, humiliated him, and caused him ongoing embarrassment." *Id.* at 1087; *see also*, *Spell v. McDaniel*, 606 F. Supp. 1416, 1421 (E.D.N.C. 1985) (upholding a $900,000 verdict for a pre-trial detainee who was kneed in the testicles by an officer and ultimately lost a testicle) (referencing *Spell v. McDaniel*, 591 F. Supp. 1090, 1096–97 (E.D.N.C. 1984) for the underlying factual history); *Jerra v. United States*, No. 212CV01907ODWAGRX, 2018 WL 1605563, at *10 (C.D. Cal. Mar. 29,

2018) (upholding a verdict for $470,000 in which a corrections officer previously squeezed an incarcerated plaintiff's testicles and during a second incident resorted to beating him after he requested a second correctional officer be present for the search in the prison library); *Graham v. City of New York*, 128 F.Supp.3d 681, 714–15 (E.D.N.Y. 2015) (upholding a jury award of $150,000 in compensatory damages for a false arrest in which the plaintiff's injuries included (1) approximately one hour of lost liberty, (2) some minor physical pain and injury, and (3) past and future emotional harm, including fear, panic and humiliation); *Gardner v. Federated Dep't Stores, Inc.*, 907 F.2d 1348 (2d Cir. 1990) (upholding the jury's award for $150,000 for pain and suffering where the plaintiff was detained for approximately eight hours and suffered physical and emotional injury from being punched and berated).

Additionally, Appellants argue in section D of their brief that the trial court erred in allowing testimony regarding alleged retaliation by Deputy Gibson. Appellants' Brief at 26. At the outset, this argument is abandoned because it is unsupported by legal authority. *In the Matter of the Care & Treatment of McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory). As to the merits, the crux of this argument rests on Appellants' assertion that the award was excessive. Brief at 26. Specifically, they argue "the purported retaliatory conduct was not relevant but was presented solely to inflame the jury which is accomplished as demonstrated by the grossly excessive verdict." *Id.* Such a position improperly requires both this Court and Appellants to unnecessarily second guess a jury's decision. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). Because evidence in the record demonstrates the verdict is not excessive and supported by evidence separate from any evidence related to retaliation, Appellants are unable to show prejudice.

In short, the trial court correctly refused to grant a new trial based on the amount of the award. The jury carefully considered the evidence in evaluating Owens's damages and the trial court exercised its discretion in finding the award was not grossly excessive. The award is in line with similar verdicts and there is nothing in the record to suggest the jury was motivated by passion or prejudice.

B. The trial court properly allowed reference to Owens's hydrocele; and if it was in error Appellants cannot demonstrate prejudice.

Appellants also seek a new trial on the grounds that hydrocele was referenced during the trial. As discussed in significant detail above, Owens is allowed to discuss his injury, symptoms, worsening of symptoms, and his condition because it is common knowledge that testicles will become swollen if injured.

At the outset, in claiming this error, Appellants direct this Court to consider the trial court's alleged confusion on rulings and the number of objections made by Appellants' trial counsel. Any confusion is the product of counsel's own making. A review of the trial transcript demonstrates an excessive and precarious number of objections throughout the course of a trial in which Appellants did not put up a case. No reasonable jurist, or even an outside reader, could follow the continual objections made by Appellants' counsel.

Even if it were an error for Owens and his counsel to reference hydrocele there is no prejudice. The definition of hydrocele is the gathering of fluid in a body sac. *Merriam Webster,* merriam-webster.com, https://www.merriam-webster.com/dictionary/hydrocele (last visited Nov. 28, 2023). Owens testified "I found out that I had fluid on my testicles." (R. 788); *see also* R. 783 (explaining "I could tell there was a lot of fluid in my right side, and my left side, I really couldn't tell nothing"). Furthermore, in Appellants' counsel's cross examination of Owens regarding the antibiotics to treat the fluid buildup, counsel elicited the following testimony "Yes sir, when they

told me I had the hydrocele pocket, the fluid." (R. 843). The symptoms of fluid gathering around the testicle, swelling and pain are the paramount facts, not a name that summarizes those symptoms. If the jury is given any ounce of credit, such references would not have misled them. In sum, there is more than adequate and competent evidence—separate from any reference to hydrocele, to support the jury's verdict.[9]

C. The trial court properly admitted evidence pursuant to Rule 404(b), SCRE.

The trial court properly admitted evidence of a common scheme or plan pursuant to Rule 404(b), SCRE. Even if the trial court erred, it is harmless error because the evidence is otherwise admissible for the absence of mistake or accident.

Rule 404(b), SCRE, states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. **It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent**.

(emphasis added).

In considering admissibility through a Rule 404(b) lens, a court's primary concern is to ensure the evidence is not being used for the purpose of propensity. In the absence of such use, it is well-settled that evidence may be submitted to show the existence of a common scheme or

[9] It should not be lost on this Court that Appellants' counsel throughout litigation and trial asserted medical theories that masturbation and STDs cause fluid around testicles. Thereby, inviting the need for their own causation expert. Such notions go far beyond the common knowledge that testicles are extremely sensitive and any force can cause excessive pain. (R.842). Hence, the well-recognized need for protective cups for male athletes in any contact sport, starting as early as five-years-old for Little League baseball and Pee Wee football, along with a myriad of representations in pop culture. *See generally*, any Adam Sandler film.

plan.[10] Often, it has been said admission rests on whether the crime, acts, or wrongs are so related that "one tends to establish the other." *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (explaining to show a common scheme there must a be a connection between the two wrongs "as will make evidence of one logically tend to prove the other"); *see also Citizens Bank of Darlington v. McDonald*, 202 S.C. 244, 265, 24 S.E.2d 369, 377 (1943) (holding *Lyle* is also applicable in civil cases). Rule 404(b) jurisprudence is generally considered within the criminal context, and as such most of our case law frames this analysis on whether the State has proven a common scheme on whether two or more crimes are so related. Moreover, if there is no conviction in the prior crime, it must be demonstrated by clear and convincing evidence. Our courts have held this proof of evidence "will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

A review of *State v. Lyle*, however, demonstrates that in the civil context there is far more latitude. In *Lyle*, the Court cited *Ely v. Gray*, 125 Va. 708, 100 S.E. 660 (1919), in which a party claimed the other forged a promissory note the defendant was allowed to put into evidence that the plaintiff had forged other notes to establish his scheme; *see also Judy v. Judy*, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009).

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[10] *See, e.g., State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (holding testimony from victim's sisters admissible in trial for criminal sexual conduct with a minor where all three sisters were attacked by defendant beginning around their twelfth birthday, late at night, at which time defendant explained the Biblical verse that children are to "Honor thy Father").

In *State v. Perry*, our Supreme Court explained the logical connection must be something that connects the other acts to the present act. 430 S.C. 24, 41, 842 S.E.2d 654, 663 (2020) ("There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged."). Recently, in *State v. Hilary*, this Court found a chart of similarities between two crimes was insufficient when the similarities included: (1) occurred in South Carolina, (2) male victim, (3) defendants came from Georgia and used each other's cell phone, (4) victim's personal effects were found at defendant's location. No. 2019-001048, 2023 WL 5250223, at *9 (Ct. App. Aug. 16, 2023). In reaching this conclusion, this Court was careful to note "[w]e do not mean to suggest that the State needs to present a perfect match between two crimes to argue that they are part of a common scheme or plan." *Id.*

Here, the wrongful acts mirror one another. This includes: (1) excessive force used in the search of an inmate, (2) admitted improper method of searching, (3) the sustained injuries were to the same body part, and (4) related symptoms with varying degree of need of medical intervention. As to the clear and convincing standard, there was no dispute that another inmate reported these mirroring similarities. This is demonstrated by Deputy Gibson's testimony that he was aware both Wilhite and Owens alleged "trauma to the scrotum area" following his search, both required medical treatment, both brought lawsuits alleging the same issues. (R.225-26. 289, 317). This is further supported by Deputy Gallam's deposition testimony that he did not believe it was a coincidence that both suffered from the same injury—even though he later attempted to back away from his prior position. (R.340-41). Additionally, Deputy Erikson testified Wilhite and Owens both filed grievances following their search by Deputy Gibson. (R.578). He further testified they were both visibly upset and he gave them advice to address their concerns. (R.582-84)

Appellants will likely argue the fact that other inmates claimed to be injured does not establish Owens was injured and thus such evidence is inadmissible. (R.180). This position, however, ignores the basis of admission. The evidence is being admitted to show the connection between Deputy Gibson's actions, as well as the fact that others have identical experiences and claims. It remains with the jury to determine whether they agree with the testimony.

Even if it were error to admit the evidence under common scheme or plan, such error is harmless for two reasons. First, the evidence in the record supports the verdict without any testimony connected to the other inmates. This evidence includes the multiple admissions of violated policy, Owens's testimony of the incident and his symptoms, Deputy Gallam's testimony that Owens's injury could have been caused by the frisk, Deputy Erickson's testimony that Owens was immediately upset and sought to address the issue, Owens's parents' testimony regarding his depression and embarrassment, and copies of Owens's grievances. Second, the evidence is admissible under Rule 404(b)'s exception for absence of mistake. It is likely Appellants will again assert arguments on immunity for intentional acts. As previously cited, that does not absolve Appellants of liability. Brief at 17. For these reasons, the trial court properly denied Appellants' motion for a new trial.

D. The trial court properly allowed Owens to discuss the PREA investigation because it was intrinsically tied to the incident and its investigation.

Appellants mischaracterize the use of facts surrounding the PREA investigation throughout the trial. Appellants yet again attempt to refashion this case—a third time to be precise—as one in which Owens sought relief through an independent claim arising from PREA or a per se violation to establish gross negligence. A review of the record demonstrates neither are true.

Owens's counsel utilized PREA policies and procedures, and references to the unpreserved video footage to demonstrate the absence of care. Significantly, Sheriff Hunt testified preservation

of such evidence was paramount when any alleged injury occurs, and timely notice is provided—as Owens did here. (R. 462, 464). This admission was not solely directed to PREA matters, but rather their own best practices when such injuries and allegations arise. (R. 464, 467). Thereby, providing a broader use of such material. This is further highlighted in Owens's counsel's closing where he details the different policy violations that occurred, including: (1) conducting a search with as much dignity as possible, (2) establishing reasonable suspicions, and (3) PREA. (R.963-68).

Further, a review of the complaint confirms Owens did not assert a private right of action. The cases cited by Appellants all involve circumstances in which a party is attempting to establish a per se violation based on the violation of the policy or asserting a separate cause of action arises from the statutory language. That did not occur here. While the violation of a policy is not per se negligent, it is evidence that may be considered by a jury. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 315, 594 S.E.2d 867, 875–76 (Ct. App. 2004).

In any event, Appellants cannot claim prejudice for such evidence because Sheriff Hunt's testimony serves as a separate admission that the video surveillance should have been preserved. Rule 801(d)(2), SCRE; *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 330, 696 S.E.2d 599, 606 (Ct. App. 2010).

Additionally, Appellants are only taking issue with references to the PREA investigation because their witness chose not to attend trial. (R.89). Had Lieutenant Bowman attended trial they could have potentially laid the foundation to have the PREA report admitted into evidence. This was not a trial by ambush on the part of Owens. In fact, Appellants did not even produce the PREA report until the Friday before trial during Lieutenant Bowman's deposition—even though

it was written five years earlier. (R.56, 84). Appellants' trial strategy decision cannot now serve as prejudice.

As to the PREA report itself, it is imperative this Court appreciate that the PREA report required an evidentiary foundation because the report was not signed or dated. (R.1047). Thereby, raising serious concerns about its authentication. Rule 901, SCRE; R. 85 ("Then they didn't produce the report, which I'm not sure existed five years ago, until just a few days ago."). Such consideration is critical when a report that had been properly requested mysteriously arrives five years into litigation on the last business day before trial. This is not a criminal case in which the State has more control over discovery, nor should it be allowed to be a gotcha game. Such tactics should not be condoned. This self-proclaimed prejudice could and should have been cured by timely producing the PREA report through discovery. Thereby, raising broader questions about spoliation, and trial counsel's strategy to not put up a case and continually object. Any perceived error or prejudice is a product of Appellants' own making and should not be rewarded on appeal.

E. Appellants' arguments concerning Owens's closing and the verdict form are unpreserved for this Court's review.

Appellants' arguments pertaining to Aiken County misconstrue Owens's counsel's statements made during closing and their own counsel's objection to the verdict form. A review of the trial transcript demonstrates that both assertions are fallacies and unpreserved.

Turning first to the Aiken County's budget reference, this argument is unpreserved for review. Counsel did not object to the budget reference at trial. (R. 977); *see also* Tr.970-71 (demonstrating Appellants' trial counsel did object to other portions of closing statements); R.995 (objecting for the first time to minimum wage calculations despite counsel having discussed this in first closing); R. 996 (objecting for a third time during closing, but not on the issue now being asserted as error on appeal). *S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295,

641S.E.2d 903 (2007) (noting an issue must be raised and ruled upon); *Ligon v. Norris*, 371 S.C. 625, 640 S.E.2d 467 (Ct. App. 2006) (holding when a party fails to make a timely objection to an improper closing argument, the issue is not preserved for appellate review).

If the Court reaches the merits, a review of the closing argument provides necessary context to counsel's reference to Aiken County's budget. Starting on page 976, counsel discussed the value of 2,000 days—the number of days since the incident. In so doing, he detailed the number of work hours (48,000) and the federal minimum wage ($7.25). He then told the jury that if they paid Owens under that rate it equates to $348,000 while if they give Owens $10 an hour, he would be entitled to$480,000. Neither of those figures were used by the jury in reaching its damage award. (R.1). Counsel then stated, "There's no minimum and they're no maximus. You can write 1 dollar or you can write a million dollars or you can write whatever you want, whatever you think holds the government fully responsible for what it did to [Owens]." Counsel then provided the daily budget for a day in 2017 as a general reference point to the value of money in Aiken at that time. Significantly, this statement is followed up with: "But it's been five years and some change for this man waiting on somebody to acknowledge that the Aiken County Sheriff's Department has not respected the rights of its citizens."

There is no question that the jury did not arrive at its value based on any of the calculation methods suggested by counsel. Moreover, counsel was not attempting to use Aiken County's operating budget as a method to calculate damages. This is evidenced by the fact that counsel instructed the jury they could put "whatever you want" and that he directed his liability arguments to the Aiken County Sheriff Department.

As to the verdict form, Appellants' counsel did not ask the trial court to list each defendant separately on the verdict form as now suggested by appellate counsel. Appellants' Br. At 30

(suggesting reversible error occurred because "***Appellants were named collectively rather than separately***.") (emphasis added). Instead, counsel objected to the verdict form because "the sheriff . . . is the only one who needs to be named as defendant." (R. 921-22). At no time did Appellants' trial counsel request the Court list the defendants separately. In fact, trial counsel did not object for the purpose of separating the verdict form when the trial court stated "I have no issue with changing the language to read the defendants . . ." (R. 954-55). Rather, trial counsel again renewed the objection that only the Sheriff should be listed. Not only is Appellants' characterization of these objections disingenuous, they are unpreserved for appellate review. *Gause v. Smithers*, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue related to the verdict form); *Hollis v. Armour & Co.*, 190 S.C. 170, 2 S.E.2d 681, 685 (1939) (finding objection that came for first time on motion for new trial "came too late and must be deemed to have been waived").

Conclusion

For these reasons, the trial court should be affirmed as to the gross negligence verdict.

Signature Page to Follow

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Courtney Clyburn Pope

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SC Court of Appeals

Appellate Case No. 2023-000009
Trial Court Case No. 2017-CP-201413

Otis Owens .....Respondent,

v.

Sheriff Michael Hunt, the Aiken County Sheriff's Office, Aiken County Detention Center and Aiken County .....Appellants.

Certificate of Compliance

I certify Respondent's brief complies with Rule 211 (b), SCAR.

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