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Dec 15 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2025-002354
Case No. 2017-CP-02-1413

Otis Owens, ... Respondent,

v.

Michael Hunt, in his Official Capacity as Sheriff
of Aiken County, Aiken County Sheriff's Office,
Aiken County Detention Center, and Aiken County, ... Petitioners.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I. The Court of Appeals erred in affirming the trial court which erred in allowing the Respondent to present an unpled claim for assault and battery as a converted gross negligence claim. Based thereon, the Court of Appeals further erred in affirming the denial of the Petitioners' motions for directed verdict and JNOV based on S.C. Code Ann. § 15-78-60(17) of the Tort Claims Act.

The Petitioners contend that the trial court, as affirmed by the South Carolina Court of Appeals, erred in allowing the Respondent Otis Owens to present an unpled claim for assault and battery as a converted gross negligence claim. Additionally, the trial court erred, as also affirmed by the Court of Appeals, in denying the Petitioners' motions for directed verdict and JNOV based on Section 15-78-60(17) of the Tort Claims Act.

In his return, as he did in the Court of Appeals, the Respondent Owens disavows that this action was brought or should have been brought as an assault and battery claim. He even claims that he did not allege any intentional conduct on the part of Deputy Matthew Gibson, who conducted the frisk search at issue. Those assertions ring hollow. Owens is deliberately ignoring his very own Complaint. As a reminder, the *only* factual allegations pled as the basis for his claims are as follows:

> On or about January 27, 2017, when the plaintiff was going in from the recreation yard, an Aiken County Detention Center corrections guard, in searching the plaintiff, probed the plaintiff's belly button, ran his hands up the inside of the plaintiff's legs, and grabbed and squeezed the plaintiff's testicles. The guard maliciously and aggressively assaulted the plaintiff, going beyond anything necessary to search the plaintiff.

See, Complaint, ¶ 9. (R. 19-20). There are no additional allegations in the Complaint as to the *factual basis* of the claims. Thus, it is simply incorrect to suggest that Owens did not allege an assault. He used that very word. In fact, in listing his particulars of "gross negligence," Owens

alleges that the Petitioners were grossly negligent "(a) by assaulting the plaintiff, (b) by battering the plaintiff, and (c) by using excessive force." *See*, Complaint, ¶ 21. (R. 20-21). It is equally incorrect to allege that he did not allege an intent to harm. He alleged that Gibson "maliciously and aggressively assaulted the plaintiff." (R. 20). In his return, Owens argues that the references in his Complaint to an "assault" were "descriptive allegations" but are not "assertions of an intentional tort."

What is clear and should not have been disregarded by this Court is that Owens brought what is distinctly and exclusively an assault and battery claim under the guise of a gross negligence claim, and that such "creative pleading" violates this Court's decision in *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006), holding that an intentional tort *cannot be converted into a negligence claim*. Owens' tactics were challenged in the trial court to no avail. (R. 918-920).[1] They are challenged again on appeal. In the trial court, Owens' counsel argued that the causes of action are interchangeable. (R. 919) ("Of course a sexual assault is grossly negligent"). On appeal, Owens has now taken a different approach – obviously in recognition that the arguments at the trial level were mistaken and not sustainable. On appeal, Owens now claims that he never argued a sexual assault, which is untenable (and quite frankly disingenuous) when Owens relied on and made an issue of Prison Rape Elimination Act (PREA) regulations which are only applicable where a detainee alleges a "rape" as defined by the Act. *See,* 42 U.S.C. § 30309(9) (defining "rape"). In his closing argument, Owens' counsel even argued to the jury that "[t]he Prison Rape Elimination Act exists to eliminate *sexual assault* in

[1] In his return, Owens tries to give the impression that the Petitioners have challenged the nature of the cause of the cause of action "post hoc," meaning for the first time after the judgment was entered. That is not the case. The issue was raised at trial as part of the directed verdict motion. (R. 918-920).

jail by inmates or guards and it's extremely important." (R. 979). (Emphasis added). Thus, this Court should not buy what Owens is claiming – he very much tried this case as a sexual assault case but claims it is a "gross negligence" action solely to circumvent Section 15-78-60(17) immunity.

The Court should also note that in his return Owens attempts to justify the verdict on the basis of "gross negligence in supervision" allegations. Yet, the Court of Appeals ruled that the Petitioners were entitled to a JNOV on the negligent supervision claim and reversed the trial court on that basis. (Slip Op. at 5, 9). The "supervision" claim has therefore been dismissed, and all that is left if the "gross negligence" claim related to the alleged sexual assault by Deputy Gibson.

Owens is also mistaken in his argument that Section 15-78-60(17) is not applicable because it should be read as having a gross negligence exception interpolated therein. Of note, neither Owens nor the Court of Appeals cited any South Carolina appellate decision that "interpolates" the gross negligence exception of Section 15-78-60(25) into Section 15-78-60(17). Frankly, the reason for that is such an interpolation is both illogical and unworkable. Section 15-78-60(17) is designed to provide immunity to the government for conduct constituting the intent to harm, crimes of moral turpitude, acts of actual malice, and acts of actual fraud. Those constitute intentional conduct by a governmental employee, and the General Assembly has determined that the government (i.e., the taxpayers) may not be held liable for such intentional conduct. From a logical and legal standpoint, intentional conduct may not be committed in a grossly negligent manner. The Petitioners have cited numerous cases in their petition clearly stating that negligence and intentional torts are mutually exclusive. In other words, an intentional tort may not be committed negligently, and accordingly, there is no such thing as a

negligent assault and battery in our jurisprudence. Thus, it defies logic as well as the legislative intent and public policy underlying Section 15-78-60(17) immunity to conclude that Section 15-78-60(17), which provides immunity from liability for an employee's intentional conduct, should be read as bearing a gross negligence exception. As indicated, there is no precedent whatsoever for reading and applying Section 15-78-60(17) as having a gross negligence exception *under any scenario*.[2] In short, Owens' misguided argument and the Court of Appeals' refusal to apply Section 15-78-60(17) immunity present a significant reason for this Court to grant a writ of certiorari in this case.

Additionally, to that point, it should further be observed that Owens incorrectly cites *Steinke v. South Carolina Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), as holding that "the custodial supervision exception (§ 15-78-60(25)) imposes an affirmative statutory duty on detention officials to supervise and protect detainees." *See*, Owens' Return, p. 7. That is incorrect on several levels. First, *Steinke* includes no such "holding." As noted above, *Steinke* is not a custodial case; the decedents in *Steinke* were not prisoners or detainees – rather they were riders of a bungee ride. *Steinke* does not even include a citation to Section 15-78-60(25). Second, the exceptions in Section 15-78-60 do not create legal duties. In *Arthurs v. Aiken County*, 346 S.C. 97, 551 S.E.2d 579 (2001), this Court held that "[t]he TCA does not

[2] Owens references this Court's decision in *Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018), as "foreclose[ing] reliance on section 15-78-60(17) where the custodial supervision exception applies." *See*, Owens' Return, p. 7. However, that is not accurate. *Repko* does not involve a custodial relationship, but rather it is a land use case. Section 15-78-60(17) is not cited, let alone addressed, in *Repko*. The same is true for the Court of Appeals' decision in *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013). *Chakrabarti* does not involve a custodial relationship, and Section 15-78-60(17) is not cited, let alone addressed, in the case. Lastly, the same is true for *Steinke v. South Carolina Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), which is not a custodial case and does not even include a citation to Section 15-78-60(25) or Section 15-78-60(17) for that matter.

create causes of action, but only removes the common law bar of sovereign immunity in certain circumstances." 551 S.E.2d at 583. *Accord*, *Summers v. Harrison Construction*, 298 S.C. 451, 381 S.E.2d 493, 495 (Ct. App. 1989) ("[t]he South Carolina Tort Claims Act does not create causes of action"). Thus, the Tort Claims Act, which does not create causes of action, likewise does not create nor establish any legal duty of care actionable under South Carolina law. The language in Section 15-78-60(25), where it refers to "supervision, protection, control, confinement, or custody," was not intended by the General Assembly to establish any particular legal duty owed by the Sheriff's Office or its employees operating the Detention Center. In fact, the very language in Section 15-78-60(25) does not specify any particular legal duty of care.

Finally, Owens futilely attempts to distinguish or limit the holding in *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000), by stating that it is an "insurance case." He suggests that the meaning of "intent to harm" is somehow different under the law for an insurance case vis-a-vis a Tort Claims Act case. Not surprisingly, no authority is cited for that "distinction without a difference" proposition. South Carolina law recognizes that "an intent to harm will be inferred as a matter of law when a person sexually assaults, harasses, or otherwise engages in sexual misconduct towards an adult." *Barrett*, 530 S.E.2d at 136. That holding is binding precedent and is just as applicable in construing the term "intent to harm" in Section 15-78-60(17) as it is in an "insurance case." As case in point, in a *per curiam* opinion from Judges Williams, Geathers, and Hill in the case of *Farr v. Lott*, 2019 WL 2051300 (S.C. Ct. App. 2019), the Court of Appeals – including two of three judges on the panel in the case at bar as well as a current Justice of this Court – cited *Barrett* in a Tort Claims Act case applying Section 15-78-60(17) immunity. That further demonstrates that the intent to harm inference from *Barrett* is obviously part of the substantive law of this State and applicable to this case, as it

should be.[3] South Carolina law does not recognize a principle of law to be applicable only in determining insurance coverage for a claim but then not the ultimate merits of that very claim. That simply defies logic and has no foundation in our jurisprudence. Clearly, this case warrants the issuance of a writ of certiorari.

[3] The federal district court has also cited *Barrett* and its intent to harm inference as part of the substantive law of South Carolina (and not limited to "insurance cases"). *See e.g.*, *Lee v. Dorcey*, 2023 WL 3020208, *5 (D.S.C. 2023); *Webb v. Lott*, 2020 WL 11613552, *11, n. 21 (D.S.C. 2020).

CONCLUSION

Based on the foregoing discussion, the Petitioners respectfully renew their request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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