IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2012-CP-08-1283

Jennifer D. Bowzard, ... Appellant,

-v-

Sheriff Wayne Dewitt and
Berkeley County Sheriff's Office, ... Respondent.

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This negligence action arises out of the actions of the Berkeley County Sheriff's Office ("Sheriff's Office") which led to James A. Sanders, Jr. ("Sanders") walking out of the Berkeley County jail (the Hill-Finklea Detention Center) even though there were pending charges which required Sanders' detention and the Sheriff's Office knew he was not to be released. Sanders was incarcerated for criminal domestic violence of a high and aggravated nature (CDVHAN) involving his former girlfriend, Jennifer Bowzard ("Bowzard"). During his incarceration Sanders frequently called, wrote, harassed, and threatened Bowzard, despite a family court restraining order in place and Bowzard's several reports to the Sheriff's Office complaining about the repeated contact. Upon learning of Sanders leaving the Berkeley County jail, Bowzard required medical care to cope with this fear because of the extensive history of domestic abuse she previously sustained from Sanders. Bowzard filed a complaint against Berkeley County Sheriff Wayne Dewitt and the Berkeley County Sheriff's Office on April 30, 2012 in the Berkeley County Court of Common Pleas. (R. pp. 12-15). Bowzard's negligence action alleges that the employees of the Sheriff's Office were grossly negligent which proximately caused Bowzard's injuries and damages. (R. p. 14, ¶¶ 15-16). Specifically, the Complaint alleges the Respondents were grossly negligent in the following nine particulars:

a) In allowing James Sanders to contact Ms. Bowzard from jail in violation of the court's order;

b) In failing to prevent James Sanders from contacting Ms. Bowzard from jail after notice of the harassment;

c) In releasing James Sanders from confinement when the file on James Sanders clearly showed he was not eligible to be released;

d) In failing to follow the policies and established procedures for the release of detainees at the Detention Center;

e) In failing to read the file on James Sanders before releasing him;

f) In failing to timely act on the notification that he was not to be released;

g) In allowing Mr. Sanders to leave the detention center through the wrong door;

h) In violating § 23-15-50, South Carolina Code (1976); and

i) In violating § 23-17-70, South Carolina Code (1976).

(R. p. 14, ¶ 15). The Complaint seeks damages for Bowzard's serious and severe mental anguish, medical expenses, and lost income from her employment. (R. p. 14, ¶ 16).

Respondents' Answer dated September 21, 2012 asserts seven affirmative defenses, including the exceptions to the waiver of immunity under the South Carolina Tort Claims Act." (R. p. 18, ¶ 21).

Respondents moved for summary judgment on February 20, 2013, contending seven different bases as reasons summary judgment was appropriate. (R. pp. 20-21). The trial court held a hearing on Respondents' motion for summary judgment on April 16, 2013 at the Berkeley County Courthouse. (R. p. 38). After hearing oral argument from counsel and reviewing the parties' submissions, the trial court granted Respondents' motion in an order filed June 13, 2013. (R. pp. 5-10). The trial court found Respondents immune from liability based on several statutory provisions of the Tort Claims Act – S.C. Code Ann. §§ 15-78-60(3), (4), (5), (6), (20), and (21). The trial court also found the phone calls from Hill-Finklea could not have been a proximate cause of Bowzard's damages, and found Respondents are not liable for Bowzard's injuries arising out of

violations of S.C. Code Ann. § 23-15-50 and S.C. Code Ann. § 23-17-70. (R. pp. 7-9). Upon receipt of the trial court's order, Bowzard filed the Notice of Appeal with this Court on July 2, 2013 (R. pp. 393-394), and contends the trial court erred in granting summary judgment in favor of the Respondents. For the reasons set forth below, the granting of summary judgment should be reversed.

FACTS

I. THE SHERIFF'S OFFICE KNOWLEDGE OF SANDERS' CRIMINAL DOMESTIC VIOLENCE HISTORY TOWARD BOWZARD

Bowzard and Sanders previously had a romantic relationship and around June 2010, Sanders moved into Bowzard's residence located in Ridgeville ("Bowzard residence"). (R. pp. 77-78). Sanders vacated the residence in April 2011. (R. pp. 77-78). On May 14, 2011, law enforcement responded to the Bowzard residence for a report of criminal domestic violence. (R. pp. 77-78). Bowzard informed the officers that she wished to seek a restraining order against Sanders for her protection. (R. pp. 77-78). On July 2, 2011, at approximately 3:23 a.m. officers returned to the Bowzard residence in response to another report of criminal domestic violence. (R. pp. 82-86). Bowzard reported to the officers that Sanders had been assaulting and controlling her for a while. (R. pp. 82-86). She did not call for help because she feared for her life and was terrified of Sanders. (R. pp. 82-86). She appeared skittish and shaky. (R. pp. 82-86). One deputy observed bruising under and around Bowzard's left eye, red marks on both arms in around the inner-biceps. (R. pp. 82-86). There also appeared to be red marks on Bowzard's neck. (R. pp. 82-86). The bruising to Bowzard's eye occurred a week earlier during a verbal argument with Sanders. (R. pp. 82-86).

Bowzard also reported that earlier that day Sanders started an argument about Bowzard's cell phone ringing. (R. pp. 82-86). She left to go to a friend's house down the road at which time Sanders began chasing her in his vehicle. (R. pp. 82-86). Upon Bowzard arriving at her friend's house, Sanders came to her vehicle, grabbed her by the arms, and drug her out of the vehicle in an attempt to take her cell phone. (R. pp. 82-86).

Later on July 2, 2011 at approximately 12:54 p.m., officers again responded to the Bowzard residence in regards to a complaint of criminal domestic violence. (R. pp. 82-86). At that time, the Sheriff's Office arrested Sanders for criminal domestic violence. (R. pp. 82-86).

On July 18, 2011, after Sanders posted bond on the July 2, 2011 arrest, the Sheriff's Office again responded to the Bowzard residence for a domestic dispute involving Sanders. (R. pp. 87-89). Sanders fled the scene before officers arrived. (R. pp. 87-89). Bowzard attempted to work things out with Sanders but after leaving, Sanders called Bowzard to tell her that she ruined his life and that he was going to kill her. (R. pp. 87-89). Bowzard collected her belongings and went to stay with a friend due to the fear of Sanders returning. (R. pp. 87-89).

On July 26, 2011, at approximately 6:45 p.m., Sheriff's Office deputies responded to the Trident Medical Center Emergency Room after Sanders had again assaulted Bowzard. (R. pp. 90-93). On that day, Sanders had tried to call Bowzard but she did not answer because she was on the phone. (R. pp. 87-89). After being unable to reach Bowzard by phone, Sanders went to the Bowzard residence. (R. pp. 87-89). He was irate. (R. pp. 87-89). Bowzard ran outside and Sanders struck her with a paint roller extension pole. (R. pp. 87-89). Only after the neighbors yelled at him to stop attacking her did he

flee in his truck. (R. pp. 87-89). The Sheriff's Office arrested Sanders for criminal domestic violence of a high and aggravated nature as a result of his physically assaulting Bowzard. Bowzard's eye socket was fractured and her nose was broken, requiring stiches. (R. pp. 87-89; p. 12, ¶ 3; p. 94; pp. 95-96). Sanders' attack also injured Bowzard's foot. (R. p. 12, ¶ 3). During this attack, Sanders threatened to kill Bowzard, telling her "You are going to die." (R. p. 12, ¶ 3).

On July 30, 2011, Sanders was released from the Hill-Finklea Detention Center ("Hill-Finklea"), which is operated by Sheriff Dewitt and the Berkeley County Sheriff's Office, on a $40,000.00 surety bond. (R. pp. 12-13, ¶¶ 3-4; p. 100). As one of the conditions of his bond, Sanders was required to be on good behavior, wear an ankle bracelet, and was placed on house arrest. (R. pp. 12-13, ¶ 4). Despite these conditions and after being released from Hill-Finklea, Sanders continued to threaten Bowzard. (R. pp. 12-13, ¶ 4).

On August 2, 2011, the Berkeley County Family Court, finding that Sanders presented a credible threat to Bowzard, issued an order restraining Sanders from having any contact with Bowzard. (R. p. 13, ¶ 5). Bowzard contacted the Sheriff's Office on August 5, 2011 to report that Sanders had attempted six times to contact her by telephone after the family court order. (R. p. 109).

Ten days later on August 15, 2011, Bowzard made a statement to the Sheriff's Office regarding Sanders' threats since the August 2, 2011 order. (R. p. 110). Despite the family court order, Sanders continued to tell Bowzard he was going to abuse and/or kill her, and even threatened to burn her house down. (R. p. 110).

II. SANDERS CONTINUED COMMUNICATIONS FROM HILL-FINKLEA IN VIOLATION OF THE FAMILY COURT ORDER

On August 19, 2011, Sanders was arrested for violating the family court's August 2, 2011, restraining order. (R. pp. 104-107; p. 13, ¶ 6). The Berkeley County Sheriff's Office once again detained Sanders at Hill-Finklea. (R. p. 13, ¶ 6). Once incarcerated, the Sheriff's Office employees at Hill-Finklea allowed Sanders to continue calling and writing Bowzard, in violation the August 2, 2011 order. (R. p. 13, ¶ 8). Sanders continued to threaten Bowzard and specifically repeated his threats to kill her. (R. p. 13, ¶ 7).

On October 13, 2011, the bond on the charges against Sanders for criminal domestic violence of a high and aggravated nature was revoked. (R. p. 13, ¶ 9).

Bowzard filed a petition on October 31, 2011 with the Berkeley County Family Court alleging Sanders was in contempt of court for his repeated communications despite his incarceration. (R. pp. 113-115). The Verification to the Petition stated: "James Sanders has called my work from the jail over & over and also still writing me letter over & over[.] I have called many times & talked w/ Jenny to have this stopped[.]" (R. pp. 113-115). Jenny Smith was Bowzard's victim advocate. In addition to talking with Jenny, Bowzard also put in the petition that she called the Captain at the jail on October 31, 2011 and talked with him about the repeated communications from Sanders in violation of the court order. (R. pp. 113-115).

III. THE NUMEROUS VIOLATIONS OF SHERIFF'S OFFICE POLICIES THAT ALLOWED SANDERS TO WALK OUT OF THE HILL-FINKLEA JAIL

On January 26, 2012, the Sheriff's Office employees at Hill-Finklea allowed Sanders to walk out of the jail through an improper door, even though there were pending charges which required his detention. The Sheriff's Office knew Sanders was not to be

released. (R. p. 13, ¶ 10). Sanders exit from the Hill-Finklea jail was captured by video cameras. (R. p. 149).[1]

The review of Sanders' file on the day he walked out involved numerous employees who were confused about his status. Following the above described events, the Sheriff's Office compiled an Internal Affairs Administrative Investigation Report which detailed the events of January 26, 2012. (R. pp. 124-129). Lieutenant Tony Riley, Sergeant Rosemary Sanders, Sergeant Patricia Diane Collins, and Tyler McWethy were all Sheriff's Office employees who were involved in allowing Sanders to walk out of the jail. (R. pp. 124-129). On January 26, 2012, Sanders went to court for a hearing on the charge for contempt that he violated the family court order. (R. p. 150, ¶ 3). The family court sentenced Sanders to time served. (R. p. 150. ¶ 4). Upon returning from court after receiving the sentence for time served, Lt. Riley went through Sanders' file and it appeared to him that all charges had been resolved. (R. p. 126). Sanders was not placed in a holding cell but was instead left unsupervised and handcuffed to a bench in middle booking. (R. p. 120). Lt. Riley then gave Sanders' file to Sgt. Collins for her to review and to coordinate Sanders' release with the Victim's Advocate, Jenny Smith. (R. p. 126). When Sgt. Sanders received the file, she was told to "kick the man out of the jail." (R. p. 124). Sanders was handcuffed to the bench for approximately thirty minutes when a problem with his paperwork became apparent, after Jenny Smith contacted Bowzard to let her know that Sanders was scheduled to be released later in that afternoon. (R. p. 124; p. 127). Bowzard advised Smith that there was still a pending charge against Sanders and

[1] The video of Sanders walking out the door to the jail are submitted to the Court and included with the Record on Appeal.

that he should not be released. (R. p. 124). Smith advised Bowzard that she would look into the situation. (R. p. 127). Smith contacted Lt. Riley to see what was going on while she and Sgt. Collins kept looking through the file. (R. p. 127).

At approximately 2:30 p.m. on January 26, 2012, Victim Advocate Carole Grunsky received a call from Bowzard regarding Sanders' impending release. (R. pp. 127-128). Grunsky called the jail and asked to speak with Lt. Riley or Jenny Smith. (R. p. 128). Smith advised Ms. Grunsky that Lt. Riley was looking at the paperwork and telling her that Sanders' bond had been met. (R. p. 128). Grunsky advised Smith that was not accurate and they should not let Sanders out of the jail. (R. p. 128). After Grunsky advised Smith, Smith agreed to get the situation resolved. (R. p. 128).

In response to the concerns raised by Grunsky and Smith, Lt. Riley looked at Sanders' file again and concluded the dates did not match. (R. p. 126). He checked with the Clerk of Court, got Sanders paperwork, and noticed the CDVHAN charge was still pending due to bond revocation. (R. p. 126).

Pfc. McWethy and Sgt. Collins both worked in middle booking at Hill-Finklea on the day of Sanders was permitted to walk out. (R. p. 124). Lt. Riley gave Pfc. McWethy, Sanders' file and said Sanders had just come back from court and was ready to be released. (R. p. 124). Pfc. McWethy gave Sanders' file to Sgt. Collins and told her Lt. Riley had reviewed it and dropped it off. (R. p. 124). During the time the Sheriff's Office was reviewing the file, Sanders told Pfc. McWethy his handcuffs were tight and Pfc. McWethy loosened them. (R. p. 124; p. 149).

Once the handcuffs were loosened on Sanders right hand, he was able to slide his hand out as shown on the video surveillance. (R. p. 149). After remaining on the bench

for a short period of time, Sanders got up and walked to a door that leads outside but was locked electronically. (R. p. 149; p. 125). At that time, Sgt. Sanders was going to pick up the car wash crew. (R. p. 125). She walked past Sanders but was not at first able to exit because the door had to be opened electronically by the front desk. (R. p. 149; p. 125). Once the door was opened she exited, with Sanders immediately following her. (R. p. 149; p. 125). Once outside, she asked Sanders about his wrist band that inmates at Hill-Finklea wear. (R. p. 125). Sanders came back gave Sgt. Sanders the wrist band. He was then allowed to walk away. (R. p. 125). By the time Pfc. McWethy came outside and asked about James Sanders, Sgt. Sanders was already in her vehicle. (R. p. 125).

About thirty minutes after their last conversation, Jenny Smith called Victim Advocate Grunsky and told her that Sanders had been allowed to walk out of Hill-Finklea. (R. p. 128). Grunsky called Bowzard to tell her that Sanders was no longer in custody at Hill-Finklea. (R. p. 128). Upon learning this, Bowzard drove herself to the Sheriff's Office for protection. (R. p. 128). The Sheriff's Office determined the situation was extremely dangerous and took Bowzard into protective custody for fear of her life. (R. p. 14, ¶ 12). In addition to the repeated harassment by Sanders while he was incarcerated, Bowzard suffered extreme fear and mental anguish due to Sanders no longer being in custody. Bowzard sought and received medical care to cope with the fear and mental anguish she continued to suffer, and was diagnosed with post-traumatic stress disorder. (R. p. 14, ¶ 12; pp. 143-147).

On January 26, 2012 prior to Sanders being allowed to walk away, Jenny Smith argued with Lt. Riley and asked him to keep Sanders incarcerated due to a perceived mistake in the paperwork that needed to be investigated. (R. p. 128). Smith confirmed

that she had to use "persuasion" with Sgt. Collins to get her to look further into Sanders release. Sgt. Collins initially told her "We have the discharge paper, we can't keep him here forever, it is what it is." (R. p. 128).

The Investigation Report highlights the following regarding the actions of Lt. Riley, Sgt. Collins, Sgt. Sanders, and Pfc. McWethy on January 26, 2012:

> Lt. Riley ordered the release of inmate Sanders without sufficiently checking the file, there was paperwork already in the file showing inmate Sanders was not eligible for release. Sgt. Collins at first took it at face value that inmate Sanders was to be released without checking the file thoroughly, and put up some resistance with the Victims Advocate when she was trying to point out a problem. Sgt. Sanders didn't question inmate Sanders about being released out the wrong door and let him leave without further checking. Pfc. McWethy failed to handcuff inmate Sanders properly.

(R. p. 129).

Following the internal investigation, Sheriff Wayne Dewitt terminated Sgt. Collins on February 1, 2012 because as a supervisor she "should have read James Sanders' complete file prior to his release." (R. p. 120). Sheriff Dewitt demoted Lt. Riley to the rank of Sergeant based on his "failure to read the complete file. . . ." (R. p. 121). Sgt. Sanders and Pfc. McWethy were each suspended one week without pay for policy violations. (R. pp. 122-123).

In opposition to Respondents' summary judgment motion, Appellant submitted the Affidavit of Richard Thomas Dixon. (R. pp. 118-119). Dixon served in the U.S. Army Military Police from 1982-1985. (R. p. 118, ¶ 2). During this time he "was trained in the proper use and procedures to handcuff a prisoner and to maintain custody of prisoners." (R. p. 118, ¶ 2). Following his service in the Army, Dixon was employed by the South Carolina Highway Patrol from 1985-2011. (R. p. 118, ¶ 3). He started his

career as a Trooper and retired in 2011 as a Lieutenant. (R. p. 118, ¶ 3). While employed by the South Carolina Highway Patrol, he had additional training "in the use and proper procedures to handcuff and maintain custody of prisoners." (R. p. 118, ¶ 3). Dixon testified that "[t]he officer of the Berkeley County Sheriff's Office who handcuffed Mr. Sanders to a bench failed to follow established handcuffing procedures for handcuffing a prisoner and in handcuffing Mr. Sanders to a bench." (R. p. 118, ¶ 5). Additionally, "[t]he officer who loosened the handcuffs in the video also failed to follow established and recognized procedures in loosening handcuffs so that Sanders could easily and without difficulty slip his hand out of the handcuff." (R. pp. 18-119, ¶ 7).

After being allowed to walk out of the Hill-Finklea jail, local newspapers and television stations picked up the story. Security cameras spotted Sanders at MUSC after law enforcement received a tip that Sanders was picked up and taken to MUSC after walking out of the jail. *Timeline of James Sanders' escape and capture*, available at http://berkeleycounty.live5news.com/news/news/66493-timeline-james-sanders-escape-and-capture. On February 29, 2012, representatives from America's Most Wanted talked with the Berkeley County Sheriff's Office and U.S. Marshall's Office regarding a segment of the show it planned to run on Sanders. Finally, on March 1, 2012, Myrtle Beach Police arrested Sanders when he allegedly stole a woman's wallet. Sanders had been posing as the brother of a comatose patient at a Myrtle Beach hospital.

STANDARD OF REVIEW

The standard governing summary judgment is well established, and appellate courts apply the same standard as the trial court. Summary judgment is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled

to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

GROSS NEGLIGENCE AND THE SOUTH CAROLINA TORT CLAIMS ACT

In this negligence action, the plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." Id. at 136, 638 S.E.2d at 656-57.

The South Carolina Tort Claims Act governs tort claims against governmental entities. S.C. Code Ann. § 15-78-10, *et seq.* Section 15-78-40 provides: "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and

damages, contained herein." S.C. Code Ann. § 15-78-40. In other words, if a private individual would be liable under like circumstances then the governmental entity is also liable, subject to the limitations and exemptions to liability afforded to the governmental entity by the Tort Claims Act. The trial court's order filed June 13, 2013 does not hold that the Respondents did not owe a duty to Bowzard, or that the Respondents did not breach that duty. Instead, the trial court's order finds that the Respondents are immune from liability based on several statutory provisions of the Tort Claims Act – S.C. Code Ann. §§ 15-78-60(3), (4), (5), (6), (20), and (21), and its findings that the phone calls from Hill-Finklea could not have been a proximate cause of Bowzard's damages. The trial court further found Respondents are not liable for Bowzard's injuries arising out of violations of S.C. Code Ann. § 23-15-50 and S.C. Code Ann. § 23-17-70.

ARGUMENT

I. THE IMMUNITY PROVISIONS OF THE TORT CLAIMS ACT DO NOT AFFORD RESPONDENTS COMPLETE IMMUNITY AS THE EVIDENCE PRESENTS A QUESTION OF FACT REGARDING GROSS NEGLIGENCE

In the order filed June 13, 2013, the trial court holds the Respondents are immune from liability pursuant to several provisions of the South Carolina Torts Claims Act – specifically S.C. Code Ann. §§ 15-78-60(3), (4), (5), (6), (20), and (21). (R. pp. 7-9). "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). "Where the statute's language is

plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. What the legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Id.

The Tort Claims Act contains multiple layers as it involves the waiver of sovereign immunity by governmental entities. First, the South Carolina Tort Claims Act waives sovereign immunity. S.C. Code Ann. § 15-78-20. Second, the Tort Claims Act contains forty exceptions to the waiver of immunity. S.C. Code Ann. § 15-78-60. Third, and finally, there are exceptions to the exceptions to the waiver of immunity. Some of the exceptions to the waiver of immunity provide that the exception does not apply when a governmental entity is deemed to be grossly negligent. Others contain no exception for gross negligence. Under this scenario, a governmental entity could argue it is immune from liability based on exceptions contained in § 15-78-60, but would be liable if the jury found the governmental entity acted in a grossly negligent manner. A conflict arises within § 15-78-60 when under the facts of a case an action would be barred by an exception which would be applicable while another applicable exception provides that the exception does not apply if the governmental entity acted in a grossly negligent manner.

The Supreme Court in Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999) resolved this dilemma when it noted that "when a governmental entity asserts various exceptions to the waiver of immunity, [the court] is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard." According to the Supreme Court "[i]t would

make no sense to say Department may be found grossly negligent in a licensing decision, yet allow Department to escape liability because the inspection powers exception does not contain a gross negligence standard." Id. at 396, 520 S.E.2d at 154.

One of the clearest applicable subsections to the facts of this case is S.C. Code Ann. § 15-78-60(25) which provides that the governmental entity is not liable for a loss resulting from "***responsibility or duty including*** but not limited to supervision, protection, control, confinement, or custody of any student, patient, ***prisoner***, ***inmate***, or client of any governmental entity, ***except when the responsibility or duty is exercised in a grossly negligent manner*** . . . ." (emphasis added). Subsection (25) would afford the governmental entity immunity related to a responsibility or duty related to the custody or confinement of a prisoner except when it is found to have acted in a grossly negligent manner.

Although subsection (25) is clearly applicable to the facts of this case because the allegations in the complaint and evidence pertain to the custody of a prisoner, the Respondents did not assert it was immune from liability based on subsection (25). Subsection (25) would provide liability in this case if the jury found the Respondents acted in a grossly negligent manner. Respondents attempt to avoid the intent of the Tort Claims Act by only asserting exceptions of § 15-78-60 that do not contain a gross negligence exception should be to no avail. Appellant contends the Court should "interpolate" a gross negligence exception into all of Respondents' asserted defenses, as mandated by Steinke. It is illogical to permit a governmental entity to omit a particular applicable subsection even though it is applicable to the facts of the case because it may be liable if the jury finds it is grossly negligent. See Steinke, 336 S.C. 373, 397, 520

S.E.2d 142, 154 ("we conclude the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception"). Moreover, the exceptions to the waiver of immunity – contained in S.C. Code Ann. § 15-78-60 – which is the affirmative defense must be read as a whole. Liberty Mut. Ins. Co. v. S.C Second Injury Fund, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005) ("Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction."). Since subsection (25) is applicable to the facts of this case and Respondents may be liable if found to be grossly negligent related to the custody and care of a prisoner, Appellants contend all other subsections of the Tort Claims Act relied upon by the Respondents must also be read with a gross negligence exception.

None of the six subsections of § 15-78-60 that form the basis of the order granting summary judgment are applicable when the evidence is viewed in a light most favorable to Bowzard as the non-moving party. Section 15-78-60(3) cannot be a basis for summary judgment as Appellant is not seeking to hold Respondents liable for the execution, enforcement, or implementation of a court order or other lawful process. Subsection (4) is not applicable because violations of internal policies do not afford the governmental entity immunity under S.C. Code Ann. § 15-78-60(4). Subsection (5) – discretionary immunity – is not applicable because there is no evidence that the Respondents weighed competing considerations and utilized accepted professional standards before loosening Sanders' handcuffs or allowing Sanders to walk away after asking for his wrist band. Subsection (6) is not applicable because Appellant does not contend she was injured by

Respondents' failure to provide police protection. Subsection (20) is not applicable because the governmental entity is still liable for its own negligence although it cannot be liable for the criminal acts of third parties. Subsection (21) is not applicable because Sanders was not released or escaped from the Respondents' custody but was instead allowed to walk out of the jail.

The only subsection that may be applicable is subsection (25) which was not raised as a defense because it contained a gross negligence standard even though it relates to the custody, confinement, and control of prisoners and inmates. Appellant contends Sanders did not escape from the Hill-Finklea Detention Center but was instead allowed to walk out a door he could not otherwise walk out of. However, Should the Court deem Sanders escaped from Hill-Finklea on January 26, 2013, Respondents would still be liable pursuant to S.C. Code Ann. § 23-17-70 because the evidence supports an inference that Sanders was still being detained on a civil charge as he had not been released from custody.

A. *Section 15-78-60(3) Cannot Be a Basis for Summary Judgment Because Appellant's Action is Not Based on the Execution, Enforcement or Implementation of a Court Order*

Respondents argued and the trial court held that the Respondents are immune from liability pursuant to S.C. Code Ann. § 15-78-60(3). Subsection (3) provides that the governmental entity is not liable for a loss resulting from "execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process . . . ." In her Complaint, Appellant alleged Respondents were negligent in nine specific allegations. (R. p. 14, ¶ 15). Viewing the allegations and evidence presented in a light most favorable to the Appellant, § 15-78-60(3) cannot be a

basis for summary judgment as Appellant is not seeking to hold Respondents liable for the execution, enforcement, or implementation of a court order or other lawful process. At the hearing on Respondents motion for summary judgment, counsel for Appellant argued that the provisions of subsection (3) are not applicable to this action. (R. p. 67, lines 17-19).

Even viewing the nine specific allegations of negligence in a light most favorable to Respondents – which is contrary to the summary judgment standard – only one could plausibly be related to an alleged violation of a court order. Paragraph fifteen subparagraph (A) alleges that the Respondents were negligent "[i]n allowing James Sanders to contact Ms. Bowzard from jail in violation of the court's order . . . ." (R. p. 14, ¶ 15(A)). This specific allegation, however, contends that the Respondents were negligent in allowing Sanders to contact Bowzard from jail in violation of the court's order, and not based on the execution, enforcement, or implementation of a court order or other lawful process.

Based on the plain language of § 15-78-60(3), Appellant contends the legislature intended to provide a defense to a governmental entity when it was executing, enforcing, or implementing a court order or other lawful process. Basically, one could not assert the government entity was negligent when it was following the directive of a court order or other lawful process. Even when the governmental entity is following lawful process, however, § 15-78-60(3) may not apply. In Gist v. Berkeley County Sheriff's Dept., 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999), the Court of Appeals addressed a governmental entity's liability even while following a magistrate's court order. In that case, Anthony Gist sued the Berkeley County Sheriff's Department alleging false arrest

and imprisonment. Id. at 613, 521 S.E.2d at 164. The Sheriff's Department moved for summary judgment and the trial court ruled that the Sheriff's Department "could not be held liable for damages because there was a neutral and detached magistrate's determination of probable cause." Id. at 614, 521 S.E.2d at 165. In reversing the summary judgment, this Court ruled that "the Sheriff's Department's liability does not arise from the 'execution, enforcement, or implementation' of the magistrate's court order. It arises from allegedly securing the warrant without probable cause." Id. at 166-67, 521 S.E.2d at 617.

In the instant case, § 15-78-60(3) cannot be a basis for summary judgment because Appellant's allegations are not based on the execution, enforcement, or implementation of any court order or lawful process the Respondents were instructed to follow.

B. *Section 15-78-60(4) Cannot Be a Basis for Summary Judgment Because The Evidence Supports an Inference that Respondents were Negligent in Allowing Sanders to Walk Out of the Jail*

As another ground for summary judgment, the trial court held that Respondents were immune from liability based on S.C. Code Ann. § 15-78-60(4). (R. p. 7). Subsection (4) provides that the governmental entity is not liable for a loss resulting from "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies . . . .". Reasonably construing the statute's plain language, subsection (4) only affords a defense when the action is based on the governmental entity adopting, enforcing, or complying with any law, or where the allegations seek liability for the government failing to adopt or enforce a law.

The nine specific allegations of negligence pled in the Complaint do not seek to hold Respondents liable because they complied with a law. Instead, several of the allegations assert that Respondents were negligent in failing to act reasonably and in violating their own internal policies and procedures. The violation of internal policies does not afford the governmental entity immunity under S.C. Code Ann. § 15-78-60(4). Clark v. S.C. Dept. of Public Safety, 353 S.C. 291, 307, 578 S.E.2d 16, 24 (Ct. App. 2002) aff'd, 362 S.C. 377, 608 S.E.2d 573 (2005) ("As noted by Clark, the Pursuit Policy was merely a statement of generally accepted law enforcement guidelines. This broad provision is not the kind of written policy that should be afforded the protection of absolute immunity under the Tort Claims Act.").

The violations of policies and procedures in this case were confirmed by the Respondents own Internal Investigation which resulted in Respondents disciplining several employees. (R. p. 129). As a result, subsection (4) should not be a basis for summary judgment since the policies at issue here do not fall under the gambit of subsection (4).

C. *Section 15-78-60(5) Cannot Be a Basis for Summary Judgment Because There Is No Evidence That Supports an Inference Respondents Weighed Competing Considerations Using Professional Standards*

The trial court held Respondents were immune from liability, at the summary judgment stage, pursuant to S.C. Code Ann. § 15-78-60(5). Subsection (5) provides that the governmental entity is not liable for a loss resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee. . . ." To establish discretionary immunity, the governmental entity

must "prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." Pike v. S.C. Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). "The governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. Id.

Here, there is no evidence that the Respondents weighed competing considerations and utilized accepted professional standards before loosening Sanders' handcuffs or allowing Sanders to walk away from the jail after asking for his wrist band. The governmental entity cannot satisfy its burden of discretionary immunity merely by saying a decision was made therefore its immune from all liability. Pike requires more: "It is not enough to say the defect was noted and a decision was made not to repair it." Id. at 224, 540 S.E.2d at 90-91.

Even if merely making a decision is sufficient, the evidence still presents a question of fact which warrants denial of summary judgment. The affidavit submitted of Richard Thomas Dixon supports an inference that Respondents did not exercise any discretion during these events. Dixon testified that "[t]he officer of the Berkeley County Sheriff's Office who handcuffed Mr. Sanders to a bench failed to follow established handcuffing procedures for handcuffing a prisoner and in handcuffing Mr. Sanders to a bench." (R. p. 118, ¶ 5). Additionally, "[t]he officer who loosened the handcuffs in the video also failed to follow established and recognized procedures in loosening handcuffs so that Sanders could easily and without difficulty slip his hand out of the handcuff." (R. pp. 118-119, ¶ 7).

In addition to Mr. Dixon's testimony, the Internal Investigation Report and subsequent discipline supports an inference that the Sheriff's Office employees did not weigh competing considerations or utilize accepted professional standards before allowing Sanders to walk out of the jail. This testimony presents a question of fact as to whether Respondents exercised discretion before allowing Sanders to walk out of the jail. As a result, summary judgment on subsection (5) is inappropriate and should be reversed.

D. *Section 15-78-60(6) Cannot Be a Basis for Summary Judgment Because Appellant's Action is Not Based on Failing to Provide Bowzard Police Protection*

Another subsection of the Tort Claims Act that the trial court found immunizes Respondents from liability is S.C. Code Ann. § 15-78-60(6). (R. p. 7). As Appellant's complaint does not seek to hold the Respondents liable for failing to provide police protection, subsection (6) cannot be a basis to hold Respondents are immune from liability. Subsection (6) provides that the governmental entity is not liable for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection. . . ." This action does not seek to hold Respondents liable for "civil disobedience, riot, insurrection, or rebellion" or the failure to provide police protection. The trial court notes in the Order that Respondents are immune from liability pursuant to subsection (6) because "they are not required to provide police protection to [Bowzard]." (R. p. 7).

Contrary to the order, Appellant's allegations of negligence and the evidence presented to the trial court do not contend Respondents are liable for failing to properly protect the Appellant from Sanders. The evidence when viewed in a light most favorable to the Appellant supports an inference that Respondents were negligent in failing to

follow department procedures that allowed Sanders to walk out of the Hill-Finklea jail that caused damages to Appellant. Reading subsection (6) to include anything related to police conduct and those that may be foreseeably be injured due to negligent conduct would eliminate any liability for law enforcement. Clark v. S.C. Dept. of Public Safety, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002) *aff'd* 362 S.C. 377, 608 S.E.2d 573 (2005) (noting law enforcement officer is not entitled to discretionary immunity for the decision on whether to begin or continue the immediate pursuit of a suspect). Appellants contend subsection (6) only pertains to allegations of failing to provide police protection, not for other acts of law enforcement negligence.

Another consideration related to the subsection (6) is its interplay with subsection (25). Subsection (6) may afford immunity for allegations related to police protection but subsection (25) provides liability related to the control, custody, and confinement of a prisoner or inmate if the police conduct is found to be grossly negligent. Several scenarios exist where subsection (6) would afford immunity if police protection was broadly construed but subsection (25) would provide liability if found to be grossly negligent. This conflict was addressed and resolved in Steinke. As a result, subsection (6) should also be read to contain a gross negligence standard, and based on the evidence before the Court it should be for the jury to determine whether the Respondents acted in a grossly negligent manner. A determination of gross negligence is a mixed question of law and fact whose determination best rests with the jury. Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002) ("In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury."). For these reasons, summary judgment on this ground should be reversed.

E. *Respondents Are Not Entitled to Complete Immunity for the Criminal Acts of Sanders and are Instead Liable for Their Own Negligence*

The trial court held that summary judgment was appropriate and Respondents were immune from liability based on S.C. Code Ann. § 15-78-60(20). (R. pp. 7-8). Subsection (20) provides that the governmental entity is not liable for a loss resulting from "an act or omission of a person other than an employee including but not limited to the criminal actions of third persons . . . ." The trial court held that "[b]y violating the court order prohibiting his harassing phone calls, Mr. Sanders was engaging in a criminal act." (R. p. 7). Also, "by failing to remain in the Detention Center as originally ordered, Mr. Sanders committed a criminal act" for which the Respondents are not liable. (R. p. 8). Based on the plain language of the statute and existing case law, subsection (20) only affords a defense when the governmental entity is alleged to be responsible for the acts or omissions of a person other than an employee – akin to the government entity being vicariously liable for a non-employee including non-employees committing criminal acts. The governmental entity is still liable for its own negligence committed by its employees, and is not immune from all liability because of criminal acts of a third party.

In Allen v. Marion Sch. Dist. One, 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992), the Court of Appeals stated that subsection (20) does not absolve all liability against a governmental entity merely because of the criminal act of a third party. Allen as guardian *ad litem* for Woodell, alleged that Woodell was assaulted at school by another student during school hours. Id. The complaint alleged the school district was grossly negligent in supervising both Woodell and her assailant. Id. The trial court granted the school district's motion to dismiss and held subsection (20) immunized the school district from liability for a loss caused by a third party's criminal action. In reversing the order

granting the motion to dismiss, the Court noted that subsection (20) does not completely immunize a government entity from liability merely because of the criminal acts of a third party: "Here, the complaint does not seek to pin liability on the school district because of the alleged criminal action of the other student; rather, as we noted above, it focuses on the school district's alleged gross negligence in supervising Woodell and the student who allegedly attacked Woodell." Id.

Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990) also holds that a governmental entity may be liable for its own negligence even if its negligence concurs with a criminal act of a third party to cause harm. In that case, Thomas Martin filed an action against Greenville Memorial Auditorium for injuries he received as a result of being struck by a glass bottle which was thrown by an unknown third party from the auditorium's balcony during a concert. Id. at 243, 391 S.E.2d at 547. The complaint alleged that the auditorium was negligent in securing the premises during the concert that created an unreasonable risk of harm that caused Martin's injuries. Id. After a jury verdict in favor of Martin, the auditorium contended the trial court erred in not dismissing the action pursuant to S.C. Code Ann. § 15-78-60(20) because Martin's injuries "were caused by the criminal acts of a third person." Id. at 246, 391 S.E.2d at 548. In affirming the trial court's decision not to dismiss the action pursuant to subsection (20), the Supreme Court noted that "Appellant cannot successfully defend that [Martin's] injuries were caused by the wrongful criminal act of a third party, where the very basis upon which appellant is claimed to be negligent created a reasonably foreseeable risk of such third party conduct." Id. at 247, 391 S.E.2d at 549.

Allen and Martin stand for the proposition that the governmental entity is liable for its own negligence but cannot be held liable for the actions of a non-employee, including the criminal acts of third parties. In this case, each of the nine specific allegations of negligence do not seek to hold the Respondents liable for the actions of Sanders, but instead for the Respondents own negligence. As a result, subsection (20) cannot be a basis for summary judgment in favor of Respondents.

F. *The Evidence Supports an Inference that Respondents Were Grossly Negligent Allowing Sanders to Walk Out of the Berkeley County Jail*

The trial court also held Respondents were immune from liability pursuant to S.C. Code Ann. § 15-78-60(21). Subsection (21) provides that the governmental entity is not liable for a loss resulting from "the decision to or implementation of release, discharge, parole, or furlough of any persons in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client or the escape of these persons . . . ." Subsection (21) is not applicable to the facts of this case because Sanders was not released nor did he escape from Respondents' custody. He was allowed to walk out of a door that was locked electronically and had to be unlocked by the front desk. He was asked and returned to Sgt. Sanders to return his wrist band, and was then allowed to walk away from Respondents' custody. The evidence is also conflicting as to whether Sanders was released on January 26, 2012. In Sheriff Wayne Dewitt's termination of Sgt. Collins on February 1, 2012 he wrote that as a supervisor she "should have read James Sanders' complete file prior to his release." (R. p. 120). Contrary to Sheriff Dewitt's termination memo to Sgt. Collins, Lt. Jacumin testified that "[a]t no time on January 26, 2012, was James Sanders 'released' by the jail. (R. p. 150, ¶ 10). Viewing

this evidence in a light most favorable to the Appellant, Sanders was not released nor did he escape because he was permitted to walk out of the jail.

As with subsection (6), subsection (21) also presents a conflict with subsection (25). While subsection (25) provides liability if the governmental entity acts in a grossly negligent manner, subsection (21) may take the liability away for grossly negligent conduct. Based on Steinke, subsection (21) should also be read with a gross negligence standard. The Internal Investigation Report and the affidavit of Mr. Dixon, among other evidence, present a question of fact as to whether Respondents acted in a grossly negligent manner. As a result, the trial court's grant of summary judgment on this ground should be reversed.

Additionally, should the Court deem Sanders escaped on January 26, 2012, subsection (21) conflicts with S.C. Code Ann. § 23-17-70 which provides liability because Sanders was still detained on a civil charge. The statute - § 23-17-70 – was passed by the Legislature to specifically create liability when an individual escapes would be eliminated if § 15-78-60(21) was read broadly. As § 15-78-60(21) is not applicable because the Respondents did not formally release Sanders nor did he escape, summary judgment on this ground should be reversed.

II. SANDERS CALLS AND LETTERS TO BOWZARD WHILE INCARCERATED PROXIMATELY CAUSED HER DAMAGES

The trial court held that Respondents are not liable for injury resulting from Sanders' phone calls from the jail to Plaintiff. (R. pp. 7-8). Despite being arrested on August 19, 2011 for violating the family court's August 2, 2011 Order, Sanders continued to frequently call and write Bowzard from within the jail. (R. pp. 104-107; p. 13, ¶ 6). The order notes that Bowzard had the option to refuse or block Sanders' calls.

Instead of doing so, "she talked to Sanders multiple times for the full 15 minutes that inmate calls were permitted and spoke with him every time he called her, in violation of her own restraining order." (R. p. 8). There is no evidence before the Court that Bowzard spoke to Sanders every time he called. Instead, Bowzard filed a petition for citation for contempt on October 31, 2011 in the Berkeley County Family Court against Sanders for the repeated communications despite his incarceration at Hill-Finklea and in violation of the family court order. (R. pp. 113-115). The Verification to the Petition stated: "James Sanders has called my work from the jail over & over and also still writing me letter over & over[.] I have called many times & talked w/ Jenny to have this stopped[.]" (R. pp. 113-115). In addition to talking with Ms. Smith, Bowzard also put in the petition that she called the Captain at the jail on October 31, 2011 and talked with him about the repeated communications from Sanders in violation of the court order. (R. p. 113-115).

At the time Sanders was incarcerated a restraining order was in place. Despite this order, Sanders was continually allowed to call, write, harass, and threaten Bowzard from Hill-Finklea. The Complaint alleges that the grossly negligent conduct of Respondents caused Bowzard to suffer serious and severe mental anguish. (R. p. 14, ¶ 16). After the events of January 26, 2012, Bowzard suffered extreme fear and mental anguish which required medical care for her condition. (R. p. 14, ¶ 12). The calls, letters, and threats prior to January 26th and Sanders walking out on January 26th caused Bowzard mental anguish. This evidence when viewed in a light most favorable to the Appellant warrants reversal of summary judgment on this ground.

III. THE RESPONDENTS ARE LIABLE FOR SANDERS BEING ALLOWED TO WALK OUT OF THE HILL-FINKLEA JAIL PURSUANT TO S.C. CODE ANN. §§ 23-15-50 AND 23-17-70 AS HE HAD NOT BEEN

DISCHARGED FROM CONFINEMENT AND WAS STILL BEING HELD ON A CIVIL CHARGE.

The Respondents are liable for Sanders being allowed to walk out of the Hill-Finklea jail pursuant to S.C. Code Ann. §§ 23-15-50 and 23-17-70 as he had not been discharged from confinement and was still being held on a civil charge. Section 23-15-50 provides:

> The sheriff or his deputy shall arrest all persons against whom process for that purpose shall issue from any competent authority commanding such person to be taken into custody or requiring him to give bond, with security. If the party so arrested, being entitled to bail, shall give it or shall give the bond with security required, such person shall be released; ***and if not, he shall be kept in custody until discharged from confinement according to law.***

S.C. Code Ann. § 23-15-50 (emphasis added).

Strictly construing the plain language of 23-15-50, an arrested party is deemed to be in custody until discharged from confinement. Section 23-17-70 provides that sheriffs are to be liable for the negligent escape of a prisoner: "The sheriff shall be liable for the negligent escape of any prisoner on mesne or final process to such damages as the plaintiff may have sustained." This Court in Washington v. Lexington County Jail, 337 S.C. 400, 523 S.E.2d 204 (1999) noted that liability pursuant to § 23-17-70 arises "when a prisoner escapes the sheriff's custody after the prisoner has been committed to custody of the sheriff in a civil action and not a criminal action." Id. at 407, 523 S.E.2d at 207.

In support of the summary judgment motion, Respondents submitted the Affidavit of Lt. Kris Jacumin who is a lieutenant with the Berkeley County Sheriff's Office working within the Hill-Finklea Detention Center. (R. p. 150, ¶ 1). Lt. Jacumin testified by affidavit that on January 26, 2012, "Sanders went to court for a hearing on the charge that he violated the family court order." (R. p. 150, ¶ 3). The family court sentenced

Sanders to time served. (R. p. 150, ¶ 4). Upon returning to the jail, Sanders was no longer held on the family court charge. (R. p. 150, ¶ 5). If Sanders' criminal domestic violence charge had not been outstanding, he would have been released that day. (R. p. 150, ¶ 6).

Lt. Jacumin's affidavit is dated Friday, April 12, 2013 and was produced prior the hearing held on Tuesday, April 16, 2013. Pursuant to Rule 6(d), SCRCP, affidavits that support a motion must be "served with the motion." Since Respondents did not serve Lt Jacumin's affidavit with the motion it should not be the basis for any evidence properly before the trial court on the summary judgment motion. As a result of receiving Lt. Jacumin's affidavit only a few days before the hearing, Appellant had to quickly obtain the affidavit of Mr. Dixon which is dated Monday, April 15, 2013. Also, Lt. Jacumin's affidavit does not comply with Rule 56(e), SCRCP because it does not state it is not based on personal knowledge, state his personal knowledge of the events of January 26, 2012, or that he was on duty on January 26, 2012 when these events occurred. Lt. Jacumin's name is not listed in the Internal Investigation Report as being someone with knowledge of these events.

Contrary to Lt. Jacumin's affidavit the evidence before the court presents a question of fact as to whether Sanders was still being held on a civil charge at the time he was allowed to walk out of the jail. Even though the family court sentenced him to time served on January 26, 2012, Sanders was still not "released" by the sheriff because he was still in custody. Assuming there were no other pending charges he would not have been released on the civil charge until he was free to leave the jail. The mere sentence of time served would not have ended the detention as he was still in custody. When these

events occurred, he was in middle booking being prepared for release on the civil charge and was still in custody by being handcuffed to the bench. Had he escaped at that point – while handcuffed to the bench and no other pending charges – he would still have been in the sheriff's custody on a civil charge.

This distinction is important because the evidence supports an inference that Respondents were still detaining Sanders on the civil charge and had not made a definitive determination Sanders was still being detained for other outstanding criminal charges. In Sheriff Wayne Dewitt's termination of Sgt. Collins on February 1, 2012 he wrote that as a supervisor she "should have read James Sanders' complete file prior to his release."[2] (R. p. 120). One inference to be drawn from that is that at that time he was still being detained on a civil charge because Sgt. Collins did not know there were other pending charges that required continued incarceration.

Victim Advocate, Jenny Smith had to use "persuasion" with Sgt. Collins to look further into Sanders' release, and that Sgt. Collins initially told her "We have the discharge paper, we can't keep him here forever, it is what it is." (R. p. 128). Pfc. McWethy gave Sanders' file to Sgt. Collins and told her Lt. Riley had reviewed it and dropped it off. (R. p. 124). At that time, it appeared Sanders was ready to be released. During this time, Sanders told Pfc. McWethy his handcuffs were tight so Pfc. McWethy loosened them. (R. p. 124).

This evidence in a light most favorable to Appellant supports an inference is that at the time Sanders slipped his hand out of the handcuffs and walked out of the jail, he

[2] Contrary to Sheriff Dewitt's termination memo to Sgt. Collins, Lt. Jacumin testified that "[a]t no time on January 26, 2012, was James Sanders 'released' by the jail. (R. p. 150, ¶ 10).

was still being held on a civil charge. There is no other evidence to support an inference that Sanders was released other than Lt. Jacumin's affidavit which states that when Sanders returned to the jail he was no longer being held on the civil charge. Lt. Jacumin's conclusion is without any evidentiary support and should not be given any weight by the Court. The officers present in middle booking intended to release Sanders later that day and were contacting Bowzard to let her know of his release. For these reasons, the evidence viewed in a light most favorable to Appellant, supports an inference that at the time Sanders managed to slip out of the handcuffs, he was still being held on a civil charge, which warrants the reversal of summary judgment based on S.C. Code Ann. §§ 23-15-50 and 23-17-70.

CONCLUSION

Based on the conflicting evidence and when viewed in a light most favorable to the Appellant, summary judgment is not warranted. Subsection (25) of the Tort Claims Act provides that the governmental entity may be liable if exercising gross negligence relating to the control, custody, and confinement of a prisoner or inmate. As a result of Steinke, all other subsections of the Tort Claims Act must also be read with a gross negligence exception. Additionally, there is conflicting evidence of whether Sanders was still being held on a civil charge at the time he left the prison, which may provide liability pursuant to S.C. Code Ann. §§ 23-15-50 and 23-17-70 if the jury so finds. For these reasons, the trial court's decision to grant summary judgment should be reversed.

[SIGNATURE PAGE TO FOLLOW]

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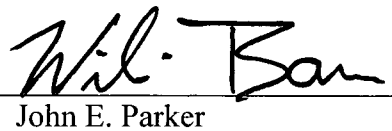
BY: 

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2012-CP-08-1283

Jennifer D. Bowzard, ... Appellant,

-v-

Sheriff Wayne Dewitt and
Berkeley County Sheriff's Office, ... Respondent.

CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within ***Appellant's Brief with Certificate of Service*** to:

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Megan C. Davis
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