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
Appellate Case No.: 2013-001482

Jennifer Bowzard, ...Appellant

v.

Berkeley County Sheriff's Office
and Sheriff Wayne DeWitt, ...Respondents

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT WHEN RESPONDENTS ARE ENTITLED TO IMMUNITY PURSUANT TO THE PLAIN LANGUAGE OF THE SOUTH CAROLINA TORT CLAIMS ACT?**

II. **DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT ON THE ADDITIONAL GROUND THAT PLAINTIFF'S ALLEGED DAMAGES COULD NOT HAVE BEEN PROXIMATELY CAUSED BY SANDERS' TELEPHONE CALLS TO HER PRIOR TO HIS ESCAPE?**

III. **DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT SINCE S.C. CODE §23-15-50 AND §23-17-70 ARE INAPPLICABLE WHERE NO CIVIL DETAINER IS IN PLACE?**

STATEMENT OF THE CASE

On April 30, 2012, Plaintiff-Appellant filed this action alleging gross negligence against Sheriff Wayne DeWitt and the Berkeley County Sheriff's Office. Respondents filed their Answer, denying the allegations of gross negligence and asserting as affirmative defenses various provisions of the South Carolina Tort Claims Act, on September 21, 2012.

Respondents moved for summary judgment on February 20, 2013. On April 16, 2013, the Honorable R. Markley Dennis, Jr., heard the summary judgment arguments. By Order dated June 13, 2013, Judge Dennis granted Defendants' Motion for Summary Judgment. (R. p. 5-10). Appellant filed her Notice of Appeal on July 2, 2013. (R. p. 393-394).

STATEMENT OF THE FACTS

On July 26, 2011, James Sanders was arrested for Criminal Domestic Violence of a High and Aggravated Nature after assaulting Jennifer Bowzard (hereinafter "Plaintiff"). (R. p. 100). Sanders was placed in the Hill-Finklea Detention Center (hereinafter "Detention Center"), which is operated by and under the jurisdiction of the Defendants, Sheriff Wayne DeWitt and the Berkeley County Sheriff's Office.

On July 30, 2011, Mr. Sanders was released from the Detention Center under a $40,000.00 surety bond. (R. p. 305). The conditions of the bond included requirements for Mr. Sanders to be on good behavior, to wear an ankle bracelet, and to be on house arrest.(R. p. 302, 304). However, after his release on bond, he continued to have contact with the Appellant. (R. p. 109).

On August 2, 2011, the Berkeley County Family Court issued a restraining order, proscribing Mr. Sanders from having any contact with Appellant. (R. p. 104). On August 19, 2011, Mr. Sanders was arrested for violating the August 2nd court order, and he was returned to the Detention Center. (R. p. 150 ¶2). There, he continued to violate the restraining order by contacting Appellant by telephone. Though he was not permitted to contact the Appellant and her number was blocked for his inmate ID, he used other inmates to contact her. (R. p. 113). Appellant did not seek to block her phone number or to restrict access to it by callers from the Detention Center in general. (R. Telephone calls). She did, however, report some of these contacts to the Berkeley County Sheriff's Office. She further accepted the "other inmate" calls and spoke to Sanders for the maximum time permitted for inmate phone calls on several occasions. (R. Telephone calls).

On October 13, 2011, the bond on Mr. Sanders was revoked. On January 26, 2012, Mr. Sanders went before the Family Court and the court sentenced him to time served for violating the Family Court order. (R. p. 150 ¶¶3-4). If that had been the only reason for his imprisonment, Sanders would have been released on January 26, 2012. (R. p. 150 ¶¶5-6). However, because the criminal bond had been revoked, Sanders was not eligible for release. (R. p. 150 ¶¶6-7). Upon his return from court on the 26th, as his pending criminal charges were being checked, Sanders managed to slip his hand out of the handcuff holding him to the bench in the booking area. (R. p.150 ¶¶8-9). He hid the hand until an employee opened a door to the outside. Sanders then jumped up, followed the employee outside, and escaped custody. (R. p. 150 ¶9). Appellant was immediately notified of his escape and was promptly taken into protective custody. (R. p. 387, 388-9). She was reimbursed for missed work while

remaining in protective custody. (R. p. 387, 390). She was never contacted or harmed by Mr. Sanders during the time she was in protective custody, nor was she contacted or harmed by Mr. Sanders after she declined further protective custody.

Mr. Sanders was captured on March 1, 2012, in Myrtle Beach, South Carolina. On April 26, 2012, Plaintiff filed this lawsuit.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the nonmoving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Curiel v. Hampton County E.M.S.*, 401 S.C. 646, 649, 737 S.E.2d 854, 855 (Ct. App. 2012)(*internal citations and quotations omitted*).

A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526

S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723; *see also* Rule 220(c), SCACR (" The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE RESPONDENTS ARE ENTITLED TO IMMUNITY PURSUANT TO THE PLAIN LANGUAGE OF THE SOUTH CAROLINA TORT CLAIMS ACT.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Kerr v. Richland Memorial Hosp.*, 678 S.E.2d 809, 811, 383 S.C. 146, 149 (S.C. 2009); *citing Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (*citation omitted*). The General Assembly has stated its intent in the Tort Claims Act by through §15-78-200, which provides:

> Notwithstanding any provision of law, this chapter, the "South Carolina Tort Claims Act", is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.

S.C. Code §15-78-200.

A. WHEN NOT PLED, THE GROSS NEGLIGENCE STANDARD IS NOT TO BE INTERPOLATED INTO THOSE TORT CLAIMS ACT EXCEPTIONS NOT CONTAINING SUCH A STANDARD.

"Immunity is an affirmative defense which must be pleaded and can be waived." *Rayfield v. S.C. Dep't of Corrs.*, 297 S.C. 95, 105, 374 S.E.2d 910, 916 (Ct. App. 1988). As Appellant correctly points out, "[t]he 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). Here, it is the Defendants' burden to assert the affirmative defenses that they choose to assert. "When a governmental entity asserts multiple exceptions to the waiver of immunity," only when at least one of the exceptions contains a gross negligence standard, must the court interpolate the gross negligence standard into the other exceptions. *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006).

Here, though Appellant has asserted that the gross negligence standard should be interpolated into the exceptions asserted by the Respondents, the Appellant failed to preserve this issue for review. The Respondents did not claim as a defense any Tort Claims Act exception containing a "gross negligence" standard in their Answer, summary judgment motion, memorandum of law, or during argument. Further, Appellant did not submit a memorandum of law opposing the summary judgment motion, only exhibits. At no time during the arguments, did Appellant argue that the gross negligence standard should be applied where Respondents did not plead it, nor did Appellant argue that it should be interpolated into the exceptions claimed by the Respondents.

In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (Ct. App. 2010), this Court stated that the "contention that section 15-78-60(25)'s gross negligence standard should be interpolated into the other pleaded exceptions is misplaced." When the Respondent did not raise an affirmative defense that contained a gross negligence standard, the gross negligence standard is not to be interpolated into §15-78-60(3), (4), (5), (6), (20), or (21).[1] None of these subsections contains the gross negligence standard. Therefore, the gross negligence standard should not be interpolated into the exceptions, and the grant of summary judgment should be affirmed.

B. S.C. CODE §§15-78-60 (3), (20) AND (21) ARE APPLICABLE TO THE FACTS OF THIS CASE AND ENTITLE THE DEFENDANTS TO SUMMARY JUDGMENT .

S.C. Code Ann. §15-78-60(20) provides that a 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. . . .". Section 5-78-60(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**. . . .". (*Emphasis added*). These two subsections interplay, and are of primary importance in this matter as Mr. Sanders escaped from the Berkeley County Detention Center, and that escape was, by its very nature, a criminal action of a third

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[1] S.C. Code §15-78-60 (3),(20) and (21) were pled in the Answer of this case; in addition, subsections (4), (5) and (6) were argued in the memorandum in support of summary judgment.

party. Additionally, §15-78-60(3), which provides that the governmental entity is not liable for a loss resulting from "execution, enforcement, or implementation of the orders of any court," is applicable and intertwined with subsections (20) and (21) as the violation of the General Sessions Court's Bond Revocation Order, after implementation by the detention center, was a criminal act by Mr. Sanders.

1. TELEPHONE CALLS

Sanders was under a restraining order not to have any contact with Ms. Bowzard when he was booked into the Berkeley County Detention Center. The Detention Center was aware of this order and took action to restrict his telephone ID number. All numbers provided by Bowzard were restricted - Sanders' inmate code would not allow him to call her. Sanders chose to violate the court order, a criminal act, when he used other inmates to contact the Appellant. The detention center had no knowledge that this was being done until Appellant reported it. Even then, Sanders found inmates to assist him. Therefore, because Sanders committed a criminal act, in violation of the restraining order and despite the limitations put on his own calling ID, the Respondents cannot be held responsible for his actions, particularly when Respondents took steps to prevent Sanders' attempts to illegally contact the plaintiff. (R. Telephone calls).

In order to establish that the Detention Center is responsible to the plaintiff *other than* due to the criminal actions of the third party, Appellant must show that the basis upon which the Respondents are claimed to have been negligent created a reasonably foreseeable risk of his contacting her. *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990). Additionally, S.C. Code §15-78-60(3) states that a governmental entity is not liable

for any loss resulting from "execution, enforcement, or implementation of the orders of any court." Here, the Appellant cannot demonstrate such a foreseeable risk. To the contrary, Sanders received a specific, individualized telephone code that allowed him to make telephone calls from the facility. This code restricted him from calling any of Bowzard's registered telephone numbers. Mr. Sanders found a way around this, by having a different inmate use a different code, to call the Appellant. Further, all telephone calls coming from the detention center begin with a recording and the person must accept the call. It was not reasonably foreseeable that Ms. Bowzard, after having asserted her fear of Mr. Sanders and complained about his calls, would still continuously accept his calls, and continuously speak with him for the full allotted time for inmate calls. While Appellant argues that there is no evidence that Bowzard accepted all of Sanders' calls, the only evidence is that she accepted the calls that were identified by the Sheriff's Office. A recording at the beginning of any inmate call gives the call recipient time to hang up without having to speak with the caller. Ms. Bowzard repeatedly took such phone calls, although there is no evidence that she was communicating with any other inmates at the detention center.

Additionally, the Appellant has put forth no evidence that she was damaged in any way by the telephone calls which she chose to accept. Bowzard was assured by the recording at the beginning of the call that Mr. Sanders was contained in the Berkeley County Detention Center. Further, she continually accepted the calls. Additionally, the recordings of the telephone calls between Bowzard and Sanders do not show that he made any threats toward her.

There can be no liability for the phone calls made by Sanders, because (1) he was

committing a criminal act by violating the court order; (2) the detention center enforced the court order by restricting his inmate telephone code; and (3) it was not reasonably foreseeable that Sanders would use another inmate's telephone code to contact Bowzard *and* that she would repeatedly accept his calls and converse with him for the maximum allowed call time.

2. ESCAPE

In order to show that the Detention Center is responsible to the plaintiff *other than* due to the criminal actions of a third party, Appellant must establish that the basis upon which the Respondent is claimed to have been negligent created a reasonably foreseeable risk of Sanders' escape. *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990). Here, the Appellant has not shown the same. To the contrary, Sanders was cuffed to a bench in the booking area while staff worked to confirm his detention status. The Berkeley County Detention Center had never had an escape from the booking area of the jail in the past, and staff had no reason to suspect that Mr. Sanders would try to escape.

With regard to the Appellant's attempt to muddy the waters about whether James Sanders was released, escaped or "walked out" of the jail, the evidence is clear. James Sanders was charged with and pled guilty to felony escape charges after he was found and returned to jail. No matter what terms Appellant seeks to use, Mr. Sanders was not free to leave the jail when he did, and no employee knowingly allowed him to leave with pending charges. In this respect, this matter is like the *Jones* case as well. Here, as in *Jones*, an inmate was attempting to escape the custody of a governmental entity.

In support of her argument, Appellant relies on *Allen v. Marion Sch. Dist. One*, 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992); however, *Allen* has no applicability here. *Allen*,

involved an assault of one student by another, and plaintiff's claim against the school related to the supervision of both the victim and the assailant. Here, there was no assault; in fact, during the time of his escape, it is undisputed that Sanders *never* attempted to contact Ms. Bowzard.

The actions of Sanders place the Berkeley County Sheriff's Office and the Sheriff squarely within the provisions of §§15-78-60(20) and (21). These provisions contain no "gross negligence" provision and such a provision may not be interpolated into these subsections where it has not otherwise been pled. Thus, the trial court properly granted summary judgment.

C. RESPONDENTS ARE ALSO ENTITLED TO IMMUNITY UNDER SUBSECTIONS 15-78-60 (4), (5) AND (6).

The respondents have asserted S.C. Code §§15-78-60(4), (5) and (6) as affirmative defenses, and take the position that they, too, provide absolute immunity not subject to the unasserted "gross negligence" provision of §15-78-60(25).

1. THE FAILURE TO PROVIDE OR METHOD OF PROVIDING POLICE PROTECTION

S.C. Code Ann. §15-78-60(6) provides that a governmental entity is not liable for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide (sic) the method of providing police or fire protection. . . ." Appellant argues that she does not seek to hold respondents liable for failure to provide police protection, but that if she does, then the court should give the Respondents an affirmative defense that they did not assert and

interpolate subsection (25) into subsection (6). This is not proper under *Jones v. Lott,* 387 S.C. 339, 348 692 S.E.2d 900 (S.C. 2010), which specifically holds that the gross negligence standard is not interpolated into subsection (6). *Id* at 348.

Because the gross negligence standard is not to be interpolated into this subsection, the Sheriff and Sheriff's Office are immune from liability as Appellant's claims arise from the method of or failure to provide police protection. This subsection is applicable as it directly concerns officers at the detention center as well as street officers. In this case, while Bowzard admits that Sanders never contacted her while he was at large, she asserts that the officers are responsible to her for their alleged failures in providing police protection that would have kept Sanders in jail.

2. AS THERE IS EVIDENCE OF THE WEIGHING OF COMPETING CONSIDERATIONS, THE "DISCRETIONARY IMMUNITY" PROVISION ALSO APPLIES.

S.C. Code Ann. §15-78-60(5) provides that a 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. . ." In this matter, Appellant specifically argues that there was no evidence that Respondents, "when 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). However, the facts establish that they did just that.

First, there was the consideration of the pending release of Mr. Sanders. The detention center staff was in the process of evaluating whether Sanders should be released when they

received information from the victim's advocate about the pending criminal charges. Staff was reviewing his file and confirming the remaining charges pending against Sanders when he slipped his cuff and escaped from custody. There were at least three employees involved in this process. Phone calls were made and received, records were reviewed and discussions were held. Clearly, in determining Sanders' custody status and confirming whether to release or hold him, the detention center employees weighed competing considerations.

Second, appellant argues that there was no discretion used with respect to the loosening of the handcuffs. However the only evidence about the loosening of the handcuffs comes from the officer who performed the task. His statement, contained in the Berkeley County Internal Affairs Administration Investigation Report, is that Mr. Sanders complained about the handcuffs (R. p. 159). When this happened, the officer did not automatically loosen the cuffs. Instead, he checked them out. He made his own determination that they were too tight, and he used his own judgment to loosen them. (R. p. 159). This is the very definition of discretion. Officer McWethy weighed the competing considerations of how tight the cuffs were and applied his training and understanding that handcuffs applied are too tightly can cause injury. *See e.g.*, *Quesinberry v. Rouppasong*, 331 S.C. 589, 503 S.E.2d 717 (1998)(excessive force case involving allegations of handcuffs applied too tightly). Appellant submitted the affidavit of Richard Dixon, but this affidavit is not applicable to the situation in this case. Mr. Dixon was a highway patrol officer; a street officer. Street officers are trained not to handcuff prisoners to stationary objects. That is different training than jail officers receive. Mr. Dixon does not provide any evidence that he has ever worked in a detention facility or that he has any detention officer training. Therefore, though he asserts that

the detention officer failed to follow established procedures, he has not referenced any procedures of the Berkeley County Detention Center, or the standards applicable to inmates in a detention setting.

Because the evidence is clear that Officer McWethy used his discretion in making the decision to loosen the handcuffs, the respondents assert that they are entitled to immunity under subjection (5) as well.

3. The Failure to Enforce Rules, Regulations or Written Policies is Included in The Subsection (4) Immunities to which the Respondents are Entitled.

S.C. Code Ann. §15-78-60(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. . . ." The Appellant specifically asserts in her brief that she has not brought an action pursuant to subsection (4), because she has not sought to hold the Respondents liable for compliance with a law. (R.p. 11-15; Appellant's Final Brief, P. 21). However, Appellant does allege violation of policy in support of her claim, and Subsection (4) affords immunity for such. (*See e.g.*, Appellant's brief at page 22, asserting that "[t]he violations of policies and procedures in this case were confirmed by the Respondents own Internal Investigation...").

Unlike the general pursuit policy referenced in *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 572 (2005), the policies for the evaluation and release of prisoners are specific to the Berkeley

County Detention Center. The policies are not merely "a statement of generally accepted law enforcement guidelines." *Id.* Therefore, respondents assert that subsection (4) is applicable, and respondents are entitled to immunity pursuant to this subsection.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE ADDITIONAL GROUND THAT PLAINTIFF'S ALLEGED DAMAGES COULD NOT HAVE BEEN PROXIMATELY CAUSED BY SANDERS' TELEPHONE CALLS TO HER PRIOR TO HIS ESCAPE FROM THE DETENTION CENTER.

As discussed, *supra*, Sanders was under a restraining order not to have any contact with Bowzard when he entered the Berkeley County Detention Center. The Detention Center was aware of this order and took action to restrict his telephone ID number. Sanders chose to violate the court order, devising a way around the restrictions placed on his own outgoing calls by having a different inmate use a different code to call the appellant. Significantly, all telephone calls coming from the detention center begin with a recording and the person must choose whether to accept the call. As the trial court cogently noted, "Plaintiff had the option to refuse or to block [the jail] calls. She did neither. To the contrary, she talked to Sanders multiple times for the full 15 minutes that inmate calls were permitted..." (R. p. 8). While Appellant argues that there is no evidence that Bowzard accepted all of Sanders' calls, there is evidence that she accepted the calls that were identified by the Sheriff's Office. (*See telephone recordings*). The recording at the beginning of an inmate call gives the call recipient time to hang up without having to speak with the caller. Ms. Bowzard repeatedly took such phone calls, and there is no evidence that she was communicating with any other

inmates at the detention center.

Additionally, the Appellant has put forth no evidence that she was damaged in any way by the telephone calls which she chose to accept. She was assured by the recording at the beginning of every call that Mr. Sanders was contained in the Berkeley County Detention Center, and the trial court recognized this, explaining that "these calls would have necessarily indicated that they were coming from an incarcerated person who therefore could not pose a physical threat." (R. p. 8). No threats were made during these telephone calls that Bowzard repeatedly accepted. Significantly, in her own Complaint, Appellant contends that her alleged "extreme fear and metal anguish" occurred **after** Mr. Sanders' escape. (R. p. 14). For these reasons, and for the reasons set forth in Section I., the trial court properly granted summary judgment with respect to the phone calls Mr. Sanders was able to make after circumventing the call blocks put in place by the detention center.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE S.C. CODE §23-15-50 AND §23-17-70 ARE INAPPLICABLE WHERE NO CIVIL DETAINER IS IN PLACE.

The Appellant further asserts that Respondents are responsible to her under S.C. Code §23-15-50 and §23-17-70, which relate to civil detainers. The facts of this case show that prior to his escape from custody, an order had been issued releasing Mr. Sanders from any civil detainer. Once such an order is issued, an inmate is returned to the jail for the sole purpose of processing his release paperwork. At the time of his escape, Sanders was being held only on the bond revocation relating to his criminal charges. The civil charges had been resolved by the Family Court, and only the General Sessions charges were pending. Mr. Sanders was

well aware of the fact that he had criminal charges pending, and he knew full well that he was not entitled to be released. Even taking the facts in the light most favorable to the Appellant, the evidence is that the Family Court had sentenced Sanders to time served. The Detention Center had no further authority to hold him on that matter.

The Supreme Court has held that S.C. Code § 23-17-70 does not create liability when the prisoner is being held on criminal charges. *See Washington v. Lexington County Jail*, 337 S.C. 400, 523 S.E.2d 204 (1999). "When read in conjunction with section 23-17-60, it is clear that recovery under section 23-17-70 is authorized for damages suffered when a prisoner escapes the sheriff's custody after the prisoner has been committed to the custody of the sheriff in a civil action and not in a criminal action." *Id.* at 407, 523 S.E.2d at 207. At the time of his escape, the only pending charges against Sanders were criminal. This is shown by Lt. Jacumin's affidavit, which the trial court properly considered.

The Appellant failed to make any objection to the affidavit of Lt. Jacumin before the lower court, and submitted her own untimely affidavit, which the trial court also exercised its discretion in considering. Respondents assert that this issue has not been preserved for review. However, even if it had, this court is permitted to review the affidavit under *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Additionally, Rule 220(c), SCACR states that "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." The Appellant has designated the affidavit of Jacumin as item 7 for the Record on Appeal, and has in fact relied on it in her own brief. (Appellant's Final Brief, p. 27).

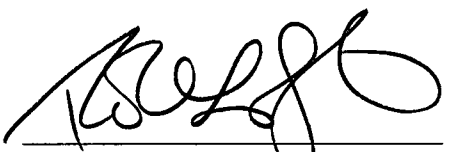
Simply put, S.C. Code §23-15-50 and §23-17-70 are not applicable because there was

no civil detainer in effect at the time of Sanders' escape. Therefore, the trial court properly granted Defendants' Motion for Summary Judgment.

CONCLUSION

For the reasons stated, Respondents respectfully request that this court affirm the trial court's grant of summary judgment to all Respondents and dismiss this action.

Respectfully submitted,



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March 25, 2014
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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

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SC Court of Appeals

Case No.: 2012-CP-08-1283
Appellate Case No.: 2013-001485

Jennifer Bowzard, ...Appellant

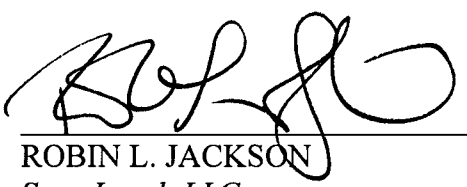
v.

Berkeley County Sheriff's Office
and Sheriff Wayne DeWitt, ...Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **RESPONDENTS' FINAL BRIEF** has been served upon all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 27th day of March, 2014, to the following:

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