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, ... Respondents.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Appellant moves the Court for Rehearing and/or to Alter its Unpublished Opinion number 2015-UP-333 of July 1, 2015, which affirms the trial court's grant of summary judgment to Respondents, Sheriff Wayne Dewitt and Berkeley County Sheriff's Office. Appellant also petitions and suggests the desirability of rehearing by the Court *en banc* because this case involves questions of exceptional importance as it relates to individuals detained in South Carolina's jails and prisons.

First, the opinion misconstrues Appellant's arguments regarding the application of gross negligence. Appellant asserted gross negligence based on the facts and the law that

Respondents are liable for gross negligence.[1] Under the South Carolina Tort Claims Act, Respondents are liable for any "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any . . . prisoner, [or] inmate" when the responsibility or duty is exercised in a grossly negligent manner. S.C. Code Ann. § 15-78-60(25). In their Answer, Respondents denied they were grossly negligent. (R. 20, ¶ 1). At the hearing, Respondents' counsel argued that "there's no gross negligence . . . ." (R. p. 42, ll. 14-16). The Court in its statements at the hearing specifically noted: "Now, whether or not they were grossly negligence (sic) in allowing him to escape, maybe there is an issue there." (R. p. 62, ll. 15-17). Appellant also presented Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999), at the hearing. (R. p. 64).

If Respondents are grossly negligent, then they are liable. The Record before the Court is replete with evidence of gross negligence, including the discipline and demotion of Sheriff's Office personnel for their inactions in allowing Mr. Sanders to escape. Respondents' own Investigation Report highlights inactions 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.

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[1] The Complaint alleges: "The employees of the Berkeley County Sheriff's Office were grossly negligent and proximately caused the plaintiff's injuries . . . ." (R. p. 14, ¶ 15).

"By reason of the grossly negligent conduct of the defendants . . ." (R. p. 14, ¶ 16).

(R. p. 129).

The Court's opinion should be altered and/or amended to address whether Respondents were entitled to summary judgment given the evidence of gross negligence.

Next, the opinion misapprehends the interpolation of a gross negligence standard on all applicable exceptions to the waiver of immunity under the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60. Steinke requires 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." 336 S.C. 373, 395, 520 S.E.2d 142, 153. 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. By not applying the law presented, the trial court and this Court are doing exactly what the Supreme Court warned against in Steinke, where Respondents are able to avoid liability on provisions of § 15-78-60 but would be liable if exercised in a grossly negligent manner.

Third, because Respondents are liable if the responsibility or duty related to a prisoner or inmate is exercised in a grossly negligent manner, the Court incorrectly affirms the trial court pursuant to S.C. Code Ann. § 15-78-60(21). By granting summary judgment on one provision of § 15-78-60 and choosing one subsection over another, the Court is doing what the Supreme Court warned against in Steinke. Respondents are able to avoid liability based on § 15-78-60(21) but would be liable under § 15-78-60(25) for exercising gross negligence. Irrespective of whether Sanders escaped or was released,

Respondents are liable if a responsibility or duty related to a prison or inmate is exercised in a grossly negligent manner. Although Appellant contends that subsection (21) should be read with a gross negligence standard, as required by Steinke, the Court does not have to decide that issue because subsection (25) provides liability when the responsibility or duty is exercised in a grossly negligent manner. Even if the Court does not interpolate gross negligence into subsection (21), summary judgment is still inappropriate because the Record before the Court contains evidence of gross negligence that warrants reversal of the trial court's grant of summary judgment.

Finally, the opinion misapplies the two-issue rule and incorrectly states that "Bowzard does not challenge th[e] determination of proximate cause on appeal." The claim regarding Mr. Sanders' phone calls and letters to Ms. Bowzard as a proximate cause of her injuries was challenged in Appellant's Brief. (Appellant's Br. pp. 28-29). Within the argument captioned, "Sanders Calls and Letters to Bowzard While Incarcerated Proximately Caused Her Damages," the facts and causal chain leading to Ms. Bowzard's injuries are explicitly detailed. Additionally, Appellant's challenge of proximate cause is also stated in her second issue on appeal.[2] (Appellant's Br. p. 1). Thus, the issue has properly been brought before the appellate court. See Jinks v. Richland Cnty., 355 S.C. 341, 344, 585 S.E.2d 281, 283 n.3 (2003) (finding that issues on appeal must be argued in the body of a brief).

Furthermore, the issue was also preserved by raising it before the trial court. See Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 269 (2002) ("In order to preserve an issue

[2] "DID THE TRIAL COURT ERR IN HOLDING SANDERS' CALLS, LETTERS, AND THREATS FROM THE BERKELEY COUNTY JAIL IN VIOLATION OF A COURT ORDER COULD NOT BE A PROXIMATE CAUSE OF BOWZARD'S DAMAGES?" (Appellant's Br. p. 1).

for appellate review, the issue must be (1) raised to and ruled upon by the lower court, (2) by the appellant, (3) in a timely manner, and (4) with sufficient specificity."). The complaint alleges that Ms. Bowzard notified the Berkeley County Sheriff's Office that Mr. Sanders was continuing to contact and threaten her while he was incarcerated at the Hill-Finklea Detention Center, and the threats and harassment caused Ms. Bowzard to fear for her life. These are the specific allegations:

> 7. Even though the Court ordered Mr. Sanders to not have any contact with Ms. Bowzard, Mr. Sanders continued to threaten her and he told her he was going to kill her. Ms. Bowzard reported these threats to the Berkeley County Sheriff's Office. ***She told the Berkeley County Sheriff's Office that she feared for her life.***
>
> 8. After August 19, 2011, Mr. Sanders was allowed by the employees of Hill-Finklea to continue to contact Ms. Bowzard in violation of the court's order. Ms. Bowzard ***notified the Sheriff's Office of the continued harassment, but the harassment by Mr. Sanders from inside the jail continued.***

(Compl. ¶¶ 7-8) (emphasis added). The Court omitted these allegations from its opinion in holding that the calls, threats, and harassment from jail could not be a proximate cause. Instead, the Court quoted allegations related to Sanders escape. The complaint also alleges that the employees of the Berkeley County Sheriff's Office proximately caused Ms. Bowzard's injuries by allowing Mr. Sanders to contact Ms. Bowzard from jail in violation of the court's order. (Compl. ¶¶ 15(a-b)). As there are two different allegations of gross negligence – one before Sanders escape and one after – they cannot be two independent bases for summary judgment on the same issue as they are two different issues. Therefore, the two-issue rule is not implicated. Since the issue has been properly brought before the trial court, as well as within Appellant's Brief and Issues on Appeal,

the two-issue rule would not be applicable as a ground for affirming the trial court's decision.

CONCLUSION

This Opinion misconstrues Appellant's arguments regarding gross negligence. Under the South Carolina Tort Claims Act, a governmental entity is liable if a responsibility or duty related to a prisoner or inmate is exercised in a grossly negligent manner. Additionally, the two-issue rule is misapplied and Appellant challenged proximate cause in her brief and issues on appeal. For these and all other reasons previously put forth by Appellant, the Court should rehear and/or rehear this case *en banc*.

Respectfully submitted,

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July 15, 2015
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IN THE STATE OF SOUTH CAROLINA
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Case No.: 2012-CP-08-1283

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Sheriff Wayne Dewitt and
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PROOF 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 Petition for Rehearing and Suggestion for Rehearing EN BANC*** to:

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Re: ***Jennifer Bowzard v. Sheriff DeWitt, et al.***
Civil Action No.: 2012-CP-08-1283
Appellate Case No. 2013-001482

Dear Ms. Kitchings:

Please find enclosed an original and two copies of Appellant's Petition for Rehearing and Suggestion for Rehearing *EN BANC* and Proof of Service in the above-referenced matter. Please file the original and return clocked copies of same in the self-addressed stamped envelope provided. Also enclosed is our firm check in the amount of $25.00 for the filing fee.

By copy of this letter, Appellant's Petition for Rehearing is being served on all counsel of record.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: Sandra J. Senn, Esquire/Robin L. Jackson, Esquire
Lawrence C. Kobrovsky, Esquire