

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

R. Markley Dennis Jr., Circuit Court Judge

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Case No.: 2015-002274

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**RECEIVED**

DEC 08 2015

**S.C. SUPREME COURT**

Jennifer Bowzard, ..... Petitioner

v.

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

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT BASED ON IMMUNITY PURSUANT TO THE PLAIN LANGUAGE OF THE SOUTH CAROLINA TORT CLAIMS ACT?
  
- II. WHETHER THE COURT OF APPEALS PROPERLY HELD THAT RESPONDENTS ARE ENTITLED TO IMMUNITY UNDER S.C. CODE ANN. §15-78-60 (21) BECAUSE THE GROSS NEGLIGENCE STANDARD IS NOT TO BE INTERPOLATED INTO THIS SECTION WHEN S.C. CODE ANN. §15-78-60 (25) WAS PROPERLY NOT PLED.
  
- III. WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON THE ALTERNATE GROUND THAT PETITIONER'S ALLEGED DAMAGES WERE NOT PROXIMATELY CAUSED BY SANDERS' TELEPHONE CALLS BASED ON HER OWN COMPLAINT?

## STATEMENT OF THE CASE

On April 30, 2012, Petitioner filed this action alleging negligence against Sheriff Wayne DeWitt and the Berkeley County Sheriff's Office. Respondents filed their Answer, denying the allegations 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). Petitioner filed her Notice of Appeal on July 2, 2013. (R. p. 393-394). The Court of Appeals heard oral argument on March 4, 2015 and affirmed the grant of summary judgment on July 1, 2015. Petitioner filed a Petition for Rehearing on July 16, 2015, which was denied by the Court of Appeals on October 8, 2015.

## 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).<sup>1</sup> 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.

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<sup>1</sup>

Petitioner sets forth a lengthy history between James Sanders and Jennifer Bowzard, but there is no evidence that anyone at the Hill-Finklea Detention Center had any specific information about their prior encounters. Further, Respondents assert that the history between the Petitioner and Sanders is not relevant to the claims against them.

On August 19, 2011, Mr. Sanders was arrested for violating a restraining order that had been issued against him on August 2nd, and he was held at the Detention Center. (R. p. 150 ¶2). There, Sanders continued to violate the restraining order by contacting Petitioner by telephone. Though Sanders was not permitted to contact the Petitioner and her number was blocked for his inmate ID, Sanders used other inmates to contact her. (R. p. 113-15). Petitioner 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 collect calls from other inmates. These collect calls began with a recording identifying the call as being from an inmate at the Hill-Finklea Detention Center, and giving her time to hang up before having any direct contact with the inmate. When she accepted these calls, she 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 26<sup>th</sup>, 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). Petitioner 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 in anyway by Mr. Sanders during the time she was in protective custody, nor was she contacted in anyway 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.

### **ARGUMENT**

While this Court has the discretion to grant review in general, the Petitioner's basis for the petition in this matter does not assert any of the character of reasons set forth in Rule 242(b), SCAR. There is no novel question of law, as the issues put forth by the Petitioner have previously been decided by this court. There is also no dissent, and no decision that conflicts with a prior ruling of this Court. The Petitioner has not made any constitutional claims, and there is no federal question in this matter. Therefore, this is not a case with the type of special or important reasons contemplated by Rule 242(b), SCAR, and the petition should be denied.

#### **I. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT BASED ON 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 BY THE DEFENDANT, 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 Petitioner 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 those 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).

On Appeal, Petitioner has asserted that the gross negligence standard should be interpolated into the exceptions asserted by the Respondents. However, the Petitioner 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, Petitioner did not submit a memorandum of law opposing the summary judgment motion, only exhibits. At no time during the arguments, did Petitioner argue that the gross negligence standard should be applied where Respondents did not plead it, nor did Petitioner argue that it should be interpolated into the exceptions claimed by the Respondents.

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). *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (Ct. App. 2010) (“contention that section 15-78-60(25)’s gross negligence standard should be interpolated into the other pleaded exceptions is misplaced.”) 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. THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT BASED ON S.C. CODE §15-78-60 (21) WAS CORRECTLY AFFIRMED BY THE COURT OF APPEALS.**

In her Petition, Petitioner incorrectly argues that S.C. Code §15-78-60(21) should be read with a gross negligence standard, which in turn would require a denial of summary

judgment. Based on the arguments in the preceding section, Plaintiff has no basis for asserting that the gross negligence standard should be interpolated into S.C. Code §15-78-60 (21). Therefore, based on the evidence in the record and on existing case law, the Trial Court correctly held, and the Court of Appeals correctly affirmed, that Respondents are entitled to summary judgment based on this subsection.

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*). In order to show that the Detention Center is responsible to the plaintiff *other than* due to the criminal actions of a third party, Petitioner 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 Petitioner 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 Petitioner’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 Petitioner 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. Here, as in *Jones*, an inmate was attempting to escape the custody of a governmental entity.

The actions of Sanders place the Berkeley County Sheriff's Office and the Sheriff squarely within the provisions of §15-78-60 (21). This provision contains no "gross negligence" provision and such a provision may not be interpolated into this subsection where it has not otherwise been pled. Thus, the Court of Appeal properly affirmed the trial court's grant of summary judgment.

**C. PETITIONER'S PETITION FAILED TO ADDRESS OR APPEAL THE AFFIRMED RULING THAT RESPONDENTS ARE ENTITLED TO IMMUNITY UNDER S.C. CODE §15-78-60 (3), (4), (5), (6), AND (20).**

Petitioner has failed to challenge the Court of Appeals Order which affirms summary judgment based on multiple exceptions to the waiver of immunity in the Tort Claims Act. The first paragraph of the Appellate Court's order affirming the grant of summary judgment states, "Bowzard appeals from an order of the trial court granting summary judgment in favor of Respondents, finding Respondents were immune from liability under South Carolina Code sections 15-78-60(3), (4), (5), (6), (20), and (21) (2005) of the South Carolina Tort Claims Act. We affirm." (R. p. 470). In her Petition, Petitioner contends that the Court of Appeals Order conflicts with precedent and presents novel issues in three areas: issue of gross negligence preserved for appeal, Subsection (21) should include a gross negligence standard, and issue of proximate cause preserved for appeal.

Importantly, Petitioner did not challenge the grant of immunity affirmed by the Court of Appeals based on §§15-78-60(3), (4), (5), (6) and (20). Therefore, the petition should be

denied as there is no appeal of the Court of Appeals ruling that the Respondents are immune under §§15-78-60(3), (4), (5), (6) and (20).

**II. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON THE ALTERNATE GROUND THAT PETITIONER'S ALLEGED DAMAGES WERE NOT PROXIMATELY CAUSED BY SANDERS' TELEPHONE CALLS BASED ON HER OWN COMPLAINT.**

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 Petitioner. Significantly, the record shows that Petitioner accepted most if not all telephone calls coming from the detention center, even though each call begins with a recording and the person must choose whether to accept the call. Petitioner attempts now to assert damages based on these pre-escape calls.

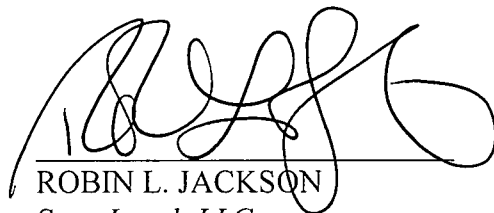
However, as the Court of Appeals aptly notes, the Petitioner failed to appeal the trial court's ruling that Bowzard only alleged damages after the escape. In her Complaint, Petitioner contends that her alleged "extreme fear and mental anguish" occurred after Mr. Sanders' escape. (R. p. 14, ¶ 12). She now tries to allege that the phone calls caused her to fear for her life, but this was not included in her appeal. In her brief, she specifically states that she suffered extreme fear and mental anguish "after the events of January 26, 2012." (R.p. 435). She does not argue any separate damages caused by the telephone calls

themselves. For these reasons, and for the reasons set forth in Section I., the court of appeals properly affirmed 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.

**CONCLUSION**

For the reasons stated, Respondents respectfully request that this court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,



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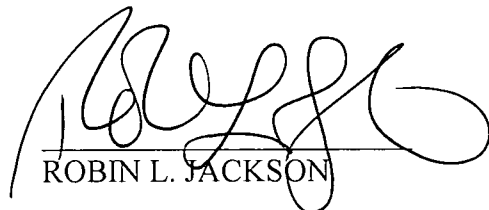
Berkeley County Sheriff's Office  
and Sheriff Wayne DeWitt, ..... Respondents

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the **RESPONDENTS' RETURN TO THE PETITION FOR WRIT OF CERTIORARI** has been served upon all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 4<sup>th</sup> day of December, 2015, to the following:

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