THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Doyet A. Early, Circuit Court Judge

Case No. 2014-CP-40-6297

Do Yeon Kim, ... Appellant,

v.

County of Richland, Richland County Sheriff's Department, and Leon Lott in his Official Capacity as Sheriff of Richland County.. Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This appeal arises out of a motor vehicle accident that occurred on or about April 24, 2014, at the intersection of Alpine Road and Windsor Lake Boulevard in Richland County, South Carolina. The accident occurred between vehicles driven by the Appellant Do Yeon Kim and Deputy Kenneth Proffitt of the Respondent Richland County Sheriff's Department. Deputy Proffitt was operating under a code three in response to a call from Deputy Kristin Boyles, who had requested back-up to assist with a suspicious vehicle she had pulled with two large male occupants. (R. 138, 261-263). Deputy Proffitt was running with lights and sirens when he approached the intersection on a red light. (R. 263-264). Proffitt slowed and entered the intersection. The Appellant Kim disregarded the sheriff's vehicle and entered the intersection on a green light, resulting in a minor collision between the two vehicles. Kim denies that Deputy Proffitt had his emergency equipment activated.

In October 2014, the Appellant Kim filed his Complaint alleging a negligence claim against the Respondents Richland County and Richland County Sheriff's Department pursuant to the South Carolina Tort Claims Act. On January 6, 2015, the Respondents filed their Answer which included a counterclaim for property damage brought by Richland County. Later, by Consent Order filed March 8, 2016, the Respondent Leon Lott, in his official capacity as Richland

County Sheriff, was substituted for the Richland County Sheriff's Department, which was then dismissed with prejudice as an improper party. (R. 2-4).[1]

The case was tried by Circuit Court Judge Doyet A. Early and a jury on January 20-21, 2016. At the commencement of the trial, the Respondents made a motion in limine seeking to exclude Sunny Fain as a witness and seeking to exclude two medical bills from evidence. Judge Early granted those motions. (R. 105). During the course of the trial, Judge Early denied the parties' directed verdict motions including a motion by Kim solely on the issue of liability. (R. 386-389). Both Kim's claim and the County's counterclaim were submitted to the jury on a special verdict form agreed to by the parties. The jury thereupon returned a verdict finding both Kim and the Respondents each fifty percent at fault. The jury awarded Kim $1,500.00 in damages and awarded the County zero dollars. (R. 517-518). None of the parties challenged the verdict prior to the jury's dismissal. (R. 458).

Thereafter, the parties filed a series of post-trial motions. The Appellant Kim filed a post-trial motion that was styled as a "Motion for New Trial Nisi Additur or in the Alternative Judgment Notwithstanding the Verdict or In the Alternative a New Trial." (R. 54-60). In addition, the County filed a Conditional

[1] As indicated, the Respondent Richland County Sheriff's Department was dismissed as a party-defendant by a Consent Order that has not been appealed. The Richland County Sheriff's Department, therefore, is improperly named as a Respondent in this appeal.

Motion for New Trial Nisi Additur. (R. 63-64). Those motions were heard by Judge Early on March 1, 2016. At that hearing, Kim's counsel presented only arguments on the motion for new trial nisi additur, and that motion was granted from the bench. As memorialized by the Form Order filed March 7, 2016, Kim was granted an additur of $4,730.13. (R. 5-6). None of Kim's alternative motions for JNOV or a new trial absolute were argued at that hearing. (R. 461-474). Moreover, the Form Orders issued by Judge Early did not address those alternative motions. (R. 5-8).

The parties filed no Rule 59(e) motions. Instead, the Appellant Kim proceeded with filing an appeal to this Court. The Respondents filed no appeal and accepted the final disposition as determined by Judge Early including the additur that he awarded.

ARGUMENTS

I. The issues presented by the Appellant on appeal are not properly preserved for appellate review. In addition, the Appellant's issues were waived or otherwise abandoned in the trial court.

Following the jury's verdict, the Appellant Do Yeon Kim filed a post-trial motion that was styled as a "Motion for New Trial Nisi Additur or in the Alternative Judgment Notwithstanding the Verdict or In the Alternative a New Trial." (R. 54-60). On March 1, 2016, Circuit Court Judge Doyet A. Early held a hearing on these motions. At that hearing, counsel for Kim only presented arguments on the motion for new trial nisi additur, which was granted from the bench. As memorialized by the Form Order filed March 7, 2016, Kim was granted an additur of $4,730.13. (R. 5-6). None of Kim's alternative motions for JNOV or a new trial absolute were argued at that hearing. (R. 461-474). Moreover, the Form Orders issued by Judge Early did not address those alternative motions. (R. 5-8).

The Supreme Court has repeatedly stressed "the long-established preservation requirement that the [appealing] party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004). (Emphasis in original).

Here, Judge Early granted the motion for new trial nisi additur, but with the agreement of the parties, he did so by form order. (R. 473).[2] Neither party filed a Rule 59(e) motion requesting that Judge Early address any of the alternative motions. As indicated, Kim's counsel presented no arguments on those motions.

In short, the JNOV motion and the motion for new trial absolute, which were identified as "alternative" motions in the motion itself, were abandoned by Kim and cannot now be resurrected on appeal. In *Bridgers v. South Carolina State Highway Dept.*, 197 S.C. 125, 14 S.E.2d 632 (1941), the Supreme Court explained the abandonment of a motion as follows: "Where the moving party, before the determination of the motion, proceeds in the action in a manner inconsistent with the object of the motion, the latter is waived." 14 S.E.2d at 633. In the case at bar, Kim's counsel never presented arguments on the JNOV motion and the motion for new trial absolute, which is certainly evidence of abandonment. Moreover, when Judge Early ruled only on the additur motion, which was in Kim's favor, his

[2] The transcript of the motion hearing erroneously identifies Todd Flippin as speaking during the hearing. Mr. Flippin was co-counsel for the Respondents with Robert Garfield, who addressed the Court with the Respondents' arguments. The mistaken references to Mr. Flippin in the transcript should be corrected to reflect those of Kim's co-counsel, Thomas Dougall.

counsel never sought a ruling on the other two "alternative" motions. Consequently, the relief sought in those motions, namely a JNOV on liability and a new trial absolute, was waived.

Likewise, at the very least, this Court should find that the JNOV motion and the motion for new trial absolute are not preserved for appellate review. It is well settled that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731, 733 (1998). Because Judge Early never ruled on those motions, the issues raised by those motions are not preserved for appeal.

Moreover, having requested and received the additur, the party seeking the additur is deemed satisfied with the result and thus may have no basis for an appeal. This Court has explained that "the import of a new trial *nisi additur* or *nisi remittitur* is a suggestion on the part of the trial court of a settlement figure." *Estes v. Grav*, 319 S.C. 551, 462 S.E.2d 561, 562 (Ct. App. 1995). "If the party opposing the motion for a new trial *nisi additur* later agrees to pay the amount suggested by the trial court, the opposing party cannot thereafter complain. Having asked for the relief and having received it, the moving party is likewise bound." *Id. See*, *Stroud v. Stroud*, 299 S.C. 394, 385 S.E.2d 205 (Ct. App. 1989); *Kalchthaler v. Workman*, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994). *See also*, *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906, 911 (Ct. App. 2000) ("[t]he prevailing party having asked for the relief must likewise be content with the determination"). In the case at bar, Kim requested an additur, and Judge Early granted an additur. The Respondents have not opposed that additur as granted, requested a new trial nor appealed that order. Moreover, Kim did not condition his motion on an additur of any particular sum. *See*, *Estes*, 462 S.E.2d at 562 ("Estes did not ask the trial court to condition the grant of a new trial on Grav's refusal to pay any particular sum over and above the jury's verdict"). Because Judge Early granted an additur and no further relief was sought from the court, Kim, as the prevailing party on the additur motion, cannot complain and must be bound by that result.

In sum, given the procedural posture of this case in the lower court and given the specific relief sought in his post-trial motions, the Appellant Kim has waived its right to present the grounds raised in this appeal.

II. The Appellant is not entitled to a new trial absolute or a directed verdict even if those issues are properly preserved and presented for appellate review.

Even though the Respondents take the position that the Appellant Kim has waived or abandoned the issues on appeal, as discussed above, the Respondents will nonetheless briefly address those issues on the merits in the event this Court finds that those issues are not waived and have been timely preserved and presented for review.

A. The trial court ruled correctly in excluding Sunny Fain as a witness.

As an initial ground, the Appellant Kim contends that Judge Early erred in excluding a witness named Sunny Fain from testifying. Kim argues that Judge Early was without discretion to exclude Fain as a witness because her name had been disclosed prior to trial and that Judge Early otherwise failed to apply the appropriate factors in making his ruling.

Pursuant to Rule 33(b), SCRCP, there is a continuing duty on the part of a party from whom information is sought to answer standard interrogatories, including one requesting the party to identify "persons known to the parties or counsel to be witnesses concerning the facts of the case." *See*, Rule 33(b)(1), SCRCP. This requirement of disclosure of information before trial is established to avoid surprise and to promote decisions on the merits after a full and fair hearing. *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128, 132-133 (2003). When a violation of Rule 33 occurs, the trial court has discretion to impose a sanction upon the violating party, such as the exclusion of a witness, if warranted. *Id.* In *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001), this Court addressed the authority of a trial court to exclude the testimony of an expert.

This Court explained that the trial court is required to consider and evaluate the following factors before imposing the sanction of exclusion of a witness:

> (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party.

558 S.E.2d at 152.

The record reflects that this action was filed on October 14, 2014. The Appellant Kim answered standard interrogatories on April 6, 2015, and those responses did not identify Sunny Fain as an eyewitness to the accident. (R. 477-478). Kim's deposition was taken on December 30, 2015. The scheduling of that deposition was delayed because of the need for a Korean interpreter. At that deposition, Kim for the first time revealed that an individual named "Sunny" whom he knew was following behind him at the time of the accident. On January 6, 2016, just two weeks before trial, Kim supplemented discovery responses to provide the name of Sunny Fain and a telephone number but no address. (R. 513). Kim's counsel argues that he was unaware of Fain prior to his client's deposition, but that is not the appropriate inquiry under Rule 33(b). Instead, the Appellant Kim – and not just his lawyer --had an obligation to timely identify witnesses. Kim provided no viable explanation or excuse for not disclosing Fain's identity as an eyewitness earlier than January 6, 2016. Presumably, since he knew Fain and was aware she was following behind him, Kim knew prior to suit – even if his counsel did not -- that she was a potential witness, but that information was not disclosed until two weeks before trial.

Judge Early engaged in a lengthy colloquy with counsel to assess the motion made by the Respondents to exclude Fain as a witness. A review of that colloquy reflects that Judge Early inquired of counsel information responsive to the five *Jumper* factors. He focused on the lateness of disclosure, particularly given the fact that Kim clearly was aware that Fain was a potential witness and yet never revealed that information – perhaps not even to his own counsel. (R. 101). If indeed he had not disclosed Fain to his own counsel is immaterial; Rule 33(b)(1) places the burden on the "parties" (and not just counsel) to disclose potential witnesses. Judge Early also considered the language problems involved, including that Fain spoke "broken English" and that the services of an interpreter were needed to obtain meaningful information from the witness. (R. 102-103, 105).

Kim argues that Fain was identified as a witness as quickly as his *counsel* learned of her existence. However, that is a key distinction that should not be overlooked. Under Rule 33(b)(1), SCRCP, the *party* has an equal, if not greater, obligation as his counsel to identify potential witnesses when they are known. Judge Early did not exclude Sunny Fain because his counsel was "lax" at learning of the witness. He excluded the witness because it was clear that Kim knew of the witness and had not timely disclosed that information.

Kim cites to the case of *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1995), for the proposition that the Supreme Court has held that a witness should not be excluded "when the identity of the witness was not known to counsel even though the trial court accused the attorney [of] 'lax efforts' in discovering the witness' identity." *See*, Appellant's Brief, p. 12. That explanation of the *Orlando* decision is blatantly inaccurate. In *Orlando*, a medical malpractice plaintiff failed to timely make his previously-identified expert witness available for a deposition in accordance with a scheduling deadline set by the court. The expert witness was excluded, which ultimately resulted in the dismissal of the malpractice case on a summary judgment motion. The expert had been identified at least eight months before the deadline for the taking of the deposition. In effect, the case has nothing to do with the failure to timely identify a witness, and the Supreme Court focused on the fact that a sanction of dismissal (which was the ultimate result of excluding the expert) was too severe under those circumstances.

In sum, a review of the record demonstrates that Judge Early considered the five *Jumper* factors. It is also clear that he appropriately exercised his discretion in excluding a witness whose disclosure had been withheld for an inordinate period of time without any valid basis or excuse. He also properly factored in the language issues that would make it difficult to fashion any immediate corrective action.

Furthermore, in evaluating the exclusion of any evidence, it is critical to assess the prejudice to the complaining party. Kim has the burden of showing prejudice. Yet, in this instance, Kim never made a proffer of Fain's testimony. Instead, he represents that Fain was "expected to testify that Deputy Proffitt did not have his lights and siren on at the time he ran a red traffic light." *See*, Appellant's Brief, p. 10. However, the jury did find fault with Deputy Proffitt, and as a result, it is likely that the jury found that Deputy Proffitt did not have lights and siren activated. Based on the jury verdict form, which was agreed to, the exact basis for finding liability for both parties is unknown. As a result, Kim is unable to necessarily demonstrate prejudice from the exclusion of Sunny Fain's purported testimony.

B. The trial court ruled correctly in allowing Sheriff Leon Lott to testify in his own defense.

The Appellant Kim also complains that Judge Early erred in allowing Sheriff Leon Lott, a named party to the lawsuit, to testify. At a certain point in the trial, the Respondents' counsel advised Judge Early that he had two remaining witnesses, one of which was Sheriff Lott. Kim's counsel then stated: "Your Honor, Sheriff Lott has not been named in discovery as a witness." (R. 333). Upon recognizing that Sheriff Lott was a named defendant, Judge Early responded: "I don't think he has to be named. He's a party. He certainly can testify in his own defense." (R. 334). That was the extent of the colloquy on that issue. There is no indication that Kim was making an actual motion to exclude Sheriff Lott as a party. After Judge

Early's response, Kim's counsel made no motion nor provided any analysis of the *Jumper* factors, and when Sheriff Lott was later called, there was no attempt made to assert a motion to exclude him at that point. (R. 370-371).

In short, this is a non-issue. Sheriff Lott was a named party to the case. There should not be any surprise that a party actually may testify at trial as a witness. Furthermore, Sheriff Lott was presented as a rebuttal witness to address issues that Kim's counsel had previously raised including the absence of a dash cam video and the three codes used to differentiate among emergent calls. *See*, *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984) (addressing that rebuttal witness who replies to issues pursued by opposing party may testify where not identified in responses to interrogatories).

Finally, to the extent that Kim's intention was to move to exclude Sheriff Lott, it was incumbent on his counsel to make that intention clear and to present argument to support the five *Jumper* factors. The absence of any such presentation by Kim's counsel demonstrates that Kim failed to make an appropriate showing to warrant the exclusion of Sheriff Lott as a witness in his own defense. In his brief, Kim makes a detailed argument as to why Sheriff Lott should have been named as a witness in interrogatory responses in order to testify. A review of the record, however, reflects that none of that argument or analysis was actually made to Judge Early; instead, it is asserted for the first time on appeal. It is axiomatic that "[t]he same ground argued on appeal must have been argued to the trial judge."

McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67, 75 (Ct. App. 1996). *See also*, *State v. Wimbush*, 347 S.C. 513, 556 S.E.2d 413, 417 (Ct. App. 2001) (evidentiary issue not preserved for appellate review because defendant "did not articulate the grounds for objection that he now argues on appeal"). Clearly, there was no abuse of discretion in allowing Sheriff Lott to testify.

C. The trial court did not abuse its discretion in disallowing two medical bills.

The Appellant Kim also complains that Judge Early excluded two medical bills from evidence. (R. 103-105). As part of their motion in limine, the Respondents objected to the admission of two medical bills that were not disclosed until two weeks before trial, which was also after Kim had been deposed. Thus, until immediately before trial, the Respondents had no knowledge of the extent of Kim's medical care other than what has been earlier produced in April 2015.

Under South Carolina law, "[t]he admissibility of evidence lies within the sound discretion of the trial court whose decision will not be overturned on appeal absent a clear abuse of that discretion." *Watson v. Chapman*, 343 S.C. 471, 540 S.E.2d 484, 487 (Ct. App. 2000). Given the lateness of disclosure of the two medical bills, Judge Early's decision to exclude those two bills had a valid basis and does not rise to the level of an abuse of discretion. Moreover, Kim was not limited in any respect in his presentation of medical evidence, including the pain and suffering he claimed after the accident up through the time of trial. (R. 138-146). Kim was allowed to describe his injuries and the treatment he received. In addition, Kim was not precluded from presenting medical witnesses including any health care providers -- although ultimately no such witness was presented.

In sum, the exclusion of two medical bills from evidence does not constitute reversible error.

D. The trial court did not abuse its discretion in disallowing the accident report prepared by the South Carolina Highway Patrol as evidence of the Respondents' negligence or fault for the accident.

The Appellant Kim contends that Judge Early erred in not allowing into evidence an accident report prepared by the investigating officer of the South Carolina Highway Patrol. The actual report was never proffered and thus is not in the appellate record.[3] That report, however, was purportedly prepared under the auspices of Section 56-5-765, which provides in pertinent part as follows:

> When a motor vehicle or motorcycle of a law enforcement agency, except a motor vehicle or motorcycle of the Department of Public Safety, is involved in a traffic collision that: (1) results in an injury or a death, or (2) involves a privately-owned motor

[3] Appellate courts generally find that absent a proffer, it is impossible to determine the effect of excluded evidence. *Baber v. Greenville County*, 327 S.C. 31, 488 S.E.2d 314, 319 (1997). With respect to the accident report, the Appellant Kim did proffer testimony from Deputy Proffitt, who was not the investigating officer, as to a certain conclusion drawn in the report. But the report itself is not in the record.

> vehicle or motorcycle, regardless of whether another motor vehicle or motorcycle is involved, the State Highway Patrol must investigate the collision and must file a report with findings on whether the agency motor vehicle or motorcycle was operated properly within the guidelines of appropriate statutes and regulations.

S.C. Code Ann. § 56-5-765(A). Section 56-5-765, however, is silent as to the admissibility of such a report in a lawsuit alleging the negligence of a law enforcement officer or entity.

After hearing arguments from counsel, Judge Early made the following ruling:

> And 1290 excludes those that are generated pursuant to 1270. And there are a whole line of cases, a host of cases. It says in any event a long line of South Carolina decisions has excluded the opinions of the investigating officers of automobile accident case. ...
>
> And I am of the opinion that 1290 does exclude the report which was required by 1270. And even though 765 is not mentioned in the exclusion, it's still the same type of report. It's required by the statute that is included. This just simply -- this is the law that has been passed to ensure that this objective review of the accident, not by the same agency where the same officers are derived, so I'm going to disallow it.

(R. 292-293). He based his reasoning in part on Section 56-5-1290, which provides that "[n]one of the reports required by Sections 56-5-1260 to 56-5-1280 may be evidence of the negligence or due care of either party at the trial of any action at law to recover damages." S.C. Code Ann. § 56-5-1290. Kim argues that Section 56-5-1290 has no applicability because a report generated pursuant to

Section 56-5-765 is not explicitly mentioned in Section 56-5-1290. Nonetheless, Judge Early relied on the public policy that underlies Section 56-5-1290, which he ruled would be equally applicable to a report generated pursuant to Section 56-5-765. He concluded that such a report is not intended to be admissible as evidence in a negligence action against one of the parties to the accident.

The Respondents submit that Judge Early's reasoning is correct and that he did not abuse his discretion in disallowing the report. In addition, Judge Early's ruling is further supported by Section 56-5-1340, which provides in pertinent part as follows: "All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the Department of Motor Vehicles, Department of Public Safety, or other State agencies having use for the records for accident prevention purposes." S.C. Code Ann. § 56-5-1340. This statute has previously been interpreted by this Court in the case of *Ellison v. Pope*, 290 S.C. 100, 348 S.E.2d 367 (Ct. App. 1986). This Court in *Ellison* construed the term "accident reports" to mean "the reports of an accident that the law requires a person to make." 348 S.E.2d at 371. This Court further explained that Section 56-5-1340 "make[s] confidential only statutorily required accident reports and nothing else." 348 S.E.2d at 371. The accident report generated pursuant to Section 56-5-765 fits that definition and thus should not be admissible under Section 56-5-1340.[4]

Perhaps most importantly, there is no basis for holding law enforcement defendants in automobile negligence cases to a different standard and particularly a heightened standard. In addition to creating potential equal protection issues, such an interpretation would be at direct odds with Section 15-78-40 of the Tort Claims Act, which mandates that "[t]he 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." S.C. Code Ann. § 15-78-40. Therefore, if an accident report is inadmissible to prove the negligence of a private defendant, it should likewise be inadmissible to prove the negligence of a governmental defendant.

E. The trial court ruled correctly in denying the Appellant's directed verdict motion and in deciding to charge the emergency vehicle statute.

As his final issue, the Appellant Kim contends that Judge Early erred in charging Section 56-5-760(A) which is the emergency vehicle statute. Kim further

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[4] The case of *State v. Sheldon*, 344 S.C. 340, 543 S.E.2d 585 (Ct. App. 2001), does not require a different result. *Sheldon* is a criminal case as opposed to a negligence action. Furthermore, the issue was not specifically the admissibility of the accident report itself that was generated under Section 56-5-765. Instead, the trial court had suppressed "any and all evidence gathered or prepared by MAIT." 543 S.E.2d at 585.

argues that Judge Early should have directed a verdict in his favor on liability and submitted only the issues of damages and causation to the jury.[5] Kim, in effect, argues that Deputy Proffitt was not faced with an emergency within the scope of Section 56-5-760, and thus it was not even relevant for the jury to determine the disputed question as to whether Deputy Proffitt had activated his lights and siren when he entered the intersection on a red light.

Judge Early correctly handled these issues. The record clearly contained sufficient evidence to support a finding that Deputy Proffitt had activated his lights and siren. Deputy Proffitt testified to this fact, as did another one of the responding deputies. (R. 224, 227, 263-264). Therefore, that presented a material issue of fact for the jury to determine. Furthermore, there was also sufficient evidence presented that Deputy Proffitt was responding to an emergency. Deputy Kristin Boyles had radioed for back-up to assist with a suspicious vehicle that she had stopped. Three deputies responded including Deputy Proffitt. (R. 138, 261-263). The Sheriff's Department uses a three-tiered code for response to calls or back-up. Code three was an emergent code that allows the responding deputy to use lights and siren. (R. 262). Deputy Proffitt was responding based on what he believed to be a Code three case, which was supported by the testimony of other

5 The Respondents reiterate their position that the Appellant Kim waived or abandoned this argument by failing to argue his JNOV motion and the fact that there was no ruling in the trial court on the JNOV motion.

deputies and Sheriff Lott. (R. 262-263, 277). Although there was some question raised about the necessity for that level of response and whether Deputy Boyles truly needed that level of response, the case presented a legitimate jury question as to whether there was an emergency within the scope of Section 56-5-760.

That was the focus of Judge Early's ruling in both charging Section 56-5-760 and in denying Kim's motion for a directed verdict on liability. (R. 387-388). That ruling was correct. The Appellant Kim quite simply is not entitled to a new trial and/or a directed verdict on liability, assuming those issues are even properly preserved for appellate review.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court affirm the Orders issued by Circuit Judge Doyet A. Early and the jury's verdict subject to the additur awarded.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Brief of Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 17th day of January 2017:

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