THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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SC Court of Appeals

Case No. 2013-CP-23-06522
Appellate Case No. 2016-000548

Madel C. Rivero, as Personal Representative
for the Estate of Lilia Lorena Blandin, ... Respondent,

v.

Sheriff Steve Loftis, in his capacity as
Sheriff of Greenville County . . . . . Appellant.

INITIAL BRIEF OF RESPONDENT

John S. Nichols, # 4210
Blake A. Hewitt, # 73674
Bluestein, Nichols,
Thompson & Delgado, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

Daniel W. Luginbill, # 68525
J. Christopher Wilson, # 6987
Wilson & Luginbill, LLC
PO Box 1150
Bamberg, SC 29003
(803) 245-7799

Daniel Joseph Farnsworth, Jr., #6922
Farnsworth Law Offices, LLC
PO Box 8719
Greenville, SC 29604
(864) 250-9119

Attorneys for Respondent

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COUNTER-STATEMENT OF THE CASE

On December 9, 2013, Madel C. Rivero (Respondent), as personal representative of the Estate of Lilia Lorena Blandin (Decedent), brought an action against Sheriff Steve Loftis, in his capacity as Sheriff of Greenville County (Appellant), and several others. Respondent brought claims for wrongful death and survival arising out of Decedent's death on December 10, 2011.

Following discovery the case proceeded solely against Appellant. The case was tried to a jury on September 28, 2015 through October 1, 2015. The jury returned a verdict on special interrogatories, finding Appellant grossly negligent and that the Appellant's gross negligence was a proximate cause of Decedent's injuries. The jury also found Decedent was negligent but found Decedent's negligence was not a proximate cause of her injuries. The jury returned verdicts of $750,000 for survival and $500,000 for wrongful death.

Appellant made several post-verdict motions, including one seeking a new trial on the ground that a juror concealed a relevant fact during voir dire. The trial judge granted a reduction of each verdict to $300,000 but denied the remainder of the motions. Regarding the motion directed to the juror, the trial judge held a hearing but denied that motion as well.

This appeal follows.

FACTS

The basic facts are not in dispute. On December 9, 2011, Decedent called Greenville County 9-1-1 to report criminal domestic violence by her husband, Avery Blandin. Two Greenville County deputies responded to the call and spoke only with Mr. Blandin and Decedent. Neither officer interviewed the parties' children who had witnessed the attack. They did not arrest Mr. Blandin. The next day, December 10, 2011, Mr. Blandin stabbed Decedent to death at her job at a bank inside Wal-Mart on Whitehorse Road. (Tr. p. 6, ll. 3-5)

Mr. Blandin was out on bond for a prior charge of CDV at the time of the call on December 9, 2011. (Tr. p. 406, l. 21 - p. 407, l. 13). Respondent contended that the Sheriff's Department employees failed to follow departmental procedures regarding CDV cases and were grossly negligent in failing to arrest Mr. Blandin on December 9, 2011. The jury found the officers had probable cause to arrest Mr. Blandin and that their failure to do so amounted to gross negligence which resulted in Decedent's death.

The issues on appeal largely do not challenge the existence of evidence to support the basic facts. Rather, Appellant contends the trial judge committed legal error in: (A) not granting Appellant a new trial or at least an evidentiary hearing with regard to alleged juror misconduct; (B) not directing a verdict or JNOV for Appellant on the ground that there was no evidence of causation in fact; and (C) not directing a verdict or JNOV on the ground that Appellant enjoyed absolute immunity because he did not plead any exceptions to the waiver of sovereign immunity that contained a gross negligence exception.

ARGUMENTS

The trial judge appropriately exercised his discretion in denying Appellant's post-trial motions. First, the judge's ruling that Juror Burns did not intentionally conceal facts in response to voir dire sufficiently met the requirements of South Carolina law. Furthermore, the judge properly denied Appellant's motion for judgment notwithstanding the verdict based upon (a) Appellant's argument that there was no evidence of proximate cause (cause in fact) and (b) Appellant's claim for absolute immunity under the South Carolina Tort Claims Act. This Court should affirm.

I. THE CIRCUIT JUDGE DID NOT ABUSE HIS DISCRETION IN FAILING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF JUROR MISCONDUCT

Appellant asserts the trial judge was *required* to hold an evidentiary hearing into whether Juror Burns deliberately concealed relevant information during voir dire and failed to do so. (App. Br. pp. 8-9, 12-15). Appellant contends he "is entitled, at the very least, to a remand for an evidentiary hearing to be held." (App. Br. p. 15). However, he adds that "given the passage of time...the proper result is most likely to grant a new trial." (App. Br. p. 15). This Court should not be persuaded by these arguments.

Appellant first claims the "well established" law of South Carolina contains a "requirement of an evidentiary hearing." (App. Br. p. 7). Appellant also asserts "the threshold and most critical error committed by [the trial judge] was his denial of an evidentiary hearing" which Appellant characterizes as "an error of law." (App. Br. p. 12).

Neither of these statements correctly reflect South Carolina law.

In *McCoy v. State*, the Supreme Court explained the standard for granting a new trial due to alleged juror misconduct:

> [A] new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. See *State v. Woods*, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001) (finding that a juror's intentional failure to disclose a relationship gives rise to an inference of bias and rejecting the State's argument that a new trial should be warranted only where an individual shows he was prejudiced by the juror's failure to disclose information); *State v. Kelly*, 331 S.C. 132, 145-46, 502 S.E.2d 99, 106-07 (1998) (recognizing that trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information and finding that the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed information during voir dire). Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing. *See State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("Whether a juror's failure to respond [during voir dire] is intentional is a fact intensive determination that must be made on a case-by-case basis.").

401 S.C. 363, 371-372, 737 S.E.2d 623, 627-628 (2013). *See also Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007), *citing State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101–02 (Ct. App.2004) ("Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.'").

Appellant contends the "case-by-case" determination of juror concealment "cannot be accomplished without an evidentiary hearing where the juror, at a minimum, is subject to questioning." (App. Br. p. 13). Appellant argues testimony from the juror is the only way to conduct the inquiry in this case. (App. Br. pp. 13-14). The Supreme Court

in *McCoy*, however, did not mandate the type of evidentiary hearing Appellant contends the trial judge was required to conduct. In fact, *McCoy* does not mandate *any* hearing, but holds a hearing may be the appropriate means for accomplishing the case-by-case inquiry.

To begin with, contrary to Appellant's claim, the trial judge *did* conduct an evidentiary hearing. The judge permitted memoranda and argument as well as "affidavits of the Simpsonville Police Officers, the affidavit of a 9-1-1 operator, the 9-1-1 tape itself, a certified transcript of the 9-1-1 tape, and defense counsel's several affidavits." (Order, p. 1, n. 1). It was after that hearing that the judge determined that no *additional* hearing was required to evaluate whether Juror Burns intentionally failed to respond to the specific voir dire question about criminal domestic violence. The hearing the trial judge held satisfied *McCoy*.

Appellant points to other cases where trial judges examined jurors to determine whether they had deliberately failed to disclose something during voir dire, contending the fact that such hearings were held means the appellate courts require that level of inquiry. (App. Br. pp. 12-13). Appellant's conclusion does not follow logically from the premise. Simply because the trial courts in those cases chose to examine jurors does not mean the appellate courts require that level of scrutiny. And *McCoy*, which post-dates every one of those decisions, clarified that the determination is a fact-specific inquiry that should follow a hearing (not necessarily an "evidentiary" hearing) only when a hearing is the "most appropriate" means for making the inquiry.

Furthermore, although the Court in *McCoy* stated the case-by-case "fact intensive determination" is "most appropriately conducted after a hearing," nothing in *McCoy* (or

any other case Appellant cites) *requires* an evidentiary hearing *at all* if the trial judge can make the determination regarding the merits of a juror misconduct claim without holding a hearing. Although such a hearing might be required only if the inquiry is "most appropriately conducted" through a hearing, whether a hearing is the appropriate means to conduct the inquiry is a matter for the trial judge's discretion.

Appellant states "[i]t is also worth pointing out that the Supreme Court has stressed the *necessity* for an evidentiary hearing to properly address other types of juror misconduct allegations in order to ensure the fundamental fairness of a trial," citing *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999). (App. Br. p. 13)(emphasis added). This argument overstates the holding of *Adret*. The rule set forth in *Aldret* "is limited solely to circumstances where the jury engages in premature deliberations." *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 574, 538 S.E.2d 5, 12 (Ct. App. 2000). No allegation or proof of premature deliberation exists in this case. *Aldret* does not apply here.

Furthermore, the Court in *Aldret* did not "stress the *necessity* of an evidentiary hearing" to address juror misconduct, even where the allegation involves premature deliberations. Instead, the Court stated:

> [W]e hold the burden is on the party alleging premature deliberations to establish prejudice. Further, to assist the trial courts of this state, we set forth the following *suggested* procedure to follow in cases in which an allegation of premature deliberations arises.
>
> If such an allegation arises **during trial**, the trial court *should* conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court *may* voir dire the jurors and, if practicable, "tailor a cautionary instruction to correct the ascertained damage." [citation omitted] If the trial court determines the deliberations were prejudicial,

such findings should be set forth on the record, and a new trial ordered.

> If, on the other hand, the fact of the premature deliberations does not become apparent until **after the jury's verdict**, we hold the trial court *may* consider affidavits as set forth in Issue 1 [*i.e.*, juror affidavits]. If the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing *should* be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court *may*, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations. If the court determines the misconduct did not occur, or that it was not prejudicial, adequate findings *should* be made so that the determination may be reviewed. [citation omitted]. If the court is convinced premature deliberations did, in fact, occur, but finds it impossible to conduct an adequate post-trial inquiry due to the passage of time, a new trial *may* be ordered. [citation omitted].

Aldret, at 315-316, 509 S.E.2d at 815 (bold by the Court; italics supplied). Thus, the Court suggested the procedure a trial court "should" use, but did not hold this procedure was a "necessity." Furthermore, the trial court "may" conduct voir dire during trial, or "may" reassemble the jury after trial, as part of the hearing to determine if premature deliberations occurred. And even upon a finding that premature deliberations did occur, the trial court "may" order a new trial. These are words of suggestion, permission and discretion and are not words of "necessity." *Aldret* does not stand for the broad mandatory rule Appellant asserts.

Lastly, while *Aldret* may permit juror affidavits regarding the fact of premature deliberations, nothing in *Aldret* requires, or even permits, the kind of evidence Appellant contends the trial court was required to examine. That is, *Aldret* does nothing to alter the mandate of Rule 606(b), SCRE.

The trial judge addressed Appellant's accusation of concealment during voir dire

in a manner that is consistent with *McCoy*. The law required nothing further. This Court should therefore reject Appellant's argument that the trial judge erred as a matter of law in failing to conduct an examination under oath of Juror Burns before denying Appellant's claim for a new trial based upon alleged juror concealment.

II. THE CIRCUIT JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED UPON ALLEGED JUROR MISCONDUCT

Appellant contends Juror Burns concealed the fact that she had "been a victim of criminal domestic violence" during voir dire and that Appellant is therefore entitled to a new trial. The Court should not be persuaded to reverse based upon Appellant's erroneous claim and characterization of the record.

During voir dire, the trial judge explained to the venire that Ms. Blandin was stabbed to death by her husband. (Tr. p. 6, ll. 3-12) The judge then stated:

> [T]he reason I read to you [those] very basic allegations one to the other, is so that you can answer this question intelligently. Is there anyone among you who has any prior knowledge, any prior opinion, any prior disposition regarding the allegations or the parties in this lawsuit? There was no response.

(Tr. p. 6, ll. 13-20). The judge later asked the following question:

> Is there anyone among you who has been a victim of criminal domestic violence?

(Tr. p. 17, ll. 13-14). Juror number 40, Heidi Letterman, stated "my first marriage of eight years was a criminal domestic relationship" and stated she could "not likely" be fair or impartial. (Tr. p. 17, ll. 16-23). Another juror responding to a different question stated his

brother "had a CDV charge against him" that "wasn't his fault." (Tr. p. 20, ll. 6-9). No other jurors responded.

The judge also asked the jurors the following question:

> All right, ladies and gentlemen, is there anyone among you who for whatever reason feels as though you could not be a fair and impartial juror in the trial of this case and render a verdict in accordance with the law as I give it to you?

(Tr. p. 21, ll. 13-17). Only one juror responded who had "already stated that clearly...." (Tr. p. 21, ll. 18-19). The parties requested no further voir dire and the judge dismissed Juror Letterman. (Tr. p. 23, ll. 12-15). After the jury was selected the judge charged the jurors about their role as triers of the facts, including the limitation that they were to decide the matter based on the evidence presented at trial. (Tr. p. 35, l. 23 - p. 45, l. 25).

Appellant contends that after trial "it was learned that Juror Burns had called 911 and *reported a domestic violence* incident involving her and her husband." (App. Br. p. 6) (emphasis added). That characterization is not correct. The 9-1-1 call did not establish Juror Burns "reported a domestic violence incident" or even facts that rose to the level of criminal domestic violence. Further, the facts contained in the 9-1-1 call would not have required any response from Juror Burns to the voir dire question posed.

In the order denying a new trial, the trial judge stated:

> The court reviewed the 9-1-1 incident report, the 9-1-1 tape, and the affidavits of the officers who responded to the call from Ms. Burns' home. All of this evidence indicates that Juror Burns was not a victim of Criminal Domestic Violence. The question the court posed in *voir dire* was clear and unambiguous, and there is no evidence that Ms. Burns, *either objectively or subjectively*, concealed information. Simply put, the record in this case, and the public record in general, clearly indicate that Ms. Burns was not the victim of Criminal Domestic Violence.

(Order, p. 4) (emphasis added). Appellant attacks this finding, stating, without citation of authority, that the trial judge made the finding "without taking the *required* step of taking testimony from Juror Burns." (App. Br. p. 7) (emphasis added). As stated in Part I above, there is no "required step" of taking juror testimony; instead, all that is required is an inquiry into the allegation in which a hearing may be the appropriate way to conduct that fact-intensive inquiry. *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

Appellant also attacks the trial judge's determination that Appellant did not establish "the fact of disqualification," arguing this was error "as a matter of law" and that there is no such requirement placed upon Appellant. (App. Br. p. 8). Supreme Court jurisprudence holds otherwise.

A party seeking a new trial based upon the disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict. *Gray v. Bryant*, 298 S.C. 285, 288, 379 S.E.2d 894, 896 (1989), *citing Thompson v. O'Rourke*, 288 S.C. 13, 339 S.E.2d 505 (1986). *Accord State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) (under *Gray* the first question is whether the juror intentionally concealed information during voir dire); *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000) (applying the *Gray* factors). Thus, the first thing Appellant had to show to disqualify Juror Burns under *Gray* was "the fact of disqualification." That means establishing that Juror Burns was "a victim of criminal domestic violence" and concealed that fact during voir dire.

Intentional concealment occurs "when the question presented to the jury on voir

dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001). "Concealment is considered unintentional where the voir dire question posed is ambiguous or incomprehensible to the average juror or where 'the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.'" *Lynch v. Carolina Self Storage Centers*, 409 S.C. 146, 155, 760 S.E.2d 111, 116 (Ct. App. 2014) (quoting *Woods).*

The question Appellant claims resulted in Juror Burns' alleged intentional concealment was specific, asking if any member of the venire "had been a victim of criminal domestic violence." As noted above, in finding Juror Burns did not engage in deliberate concealment of a relevant fact, the trial judge looked at the 9-1-1 incident report, the 9-1-1 tape and transcript, and the affidavits of Officers Edwards and Tedrow. (Order, p. 4). A review of that same evidence submitted at the hearing is helpful.

A. 9-1-1 Incident Report.

The 9-1-1 Incident Report describes something different than Criminal Domestic Violence. The document classifies the incident type as "90F – Family Offenses, Nonviolent." While Ms. Burns is listed as both the Complainant and Victim, this is more a function of the pre-printed form. The narrative setting out the specifics of the call labels the incident "Family Offenses, Nonviolent." The narrative section then directs the reader to the Supplemental Report filed with the Incident Report.

The Supplemental Report does not refer to Ms. Burns as a "victim." The report

describes the investigation as follows:

> DETAILED STATEMENT OF INVESTIGATION: On 06/23/2015 at approximately 10:28 hours, I, PFC David Tedrow, was dispatched to [redacted] in reference *to a domestic issue*. When I arrived, along with K9 OFC J. Edwards, I met with the complainant, Robin Burns.
>
> She stated that her and her husband, John Burns, had an argument over John sitting on the sun porch all day playing games on his phone. Robin was on the phone talking with her sister in Mauldin and John grabbed the phone away from her because he said she was lying about what happened.
>
> K9 OFC Edwards talked with John concerning his anger. Both parties agreed to try and be more understanding to each [other's] needs. Robin stated that she would probably go stay at her [sister's] house for the night just to let things calm down.

(Incident Report, p. 2) (emphasis added). The report therefore describes an argument that culminated in Mr. Burns allegedly grabbing the phone out of Juror Burns' hand while Juror Burns was talking with her sister. The report does not indicate Mr. Burns harmed Juror Burns in any way.

B. The 9-1-1 Tape and Transcript.

The transcript of the 9-1-1 call reveals that on December 14, 2015, Juror Burns called "Simpsonville 911" and stated "[a]ctually my husband and I got in an argument and he... I was calling my sister and he ripped the phone out of my hand and twisted my wrist." (9-1-1 Tr. p. 2). When asked if she was injured or needed an ambulance, she stated "I'm...No, I'm not injured. I don't think. No." (*Id.*) The operator stated "[y]ou said that he ripped the phone out of your hand?" and she responded "[a]nd twisted my wrist to get the phone out of my hand." (9-1-1 Tr. pp. 2-3). The operator then asked his name and advised her that an officer would be on the way to her. (9-1-1 Tr. p. 3). Juror Burns was calm and

did not seem upset. The Court is invited to listen to the recording of the brief call, a copy of which will be filed with the Clerk.

C. The Skipper Affidavit.

Ms. Skipper is the dispatcher for the Simpsonville Police Department. Her affidavit was offered as custodian of the 9-1-1 recordings to lay a foundation for the recording.

D. The Responding Officers' Affidavits.

The two officers who responded to the 9-1-1 call provided affidavits of the encounter and Appellant provided those affidavits to the trial judge, who considered them.

1. Edwards Affidavit. Officer Edwards' affidavit was as follows:

> On 06/23/2015 at approximately 1928 hrs, I, PFC Edwards, along with PFC Tedrow, arrived at the Burn's residence in reference to a disturbance. Upon our arrival, PFC Tedrow spoke with Mrs. Robin Burns (complainant) separately, while I spoke with Mr. John Burns in the outdoor sun room area. Both of the Burns had been drinking alcohol. While speaking with Burns, he stated that his wife called because she got mad that he took her phone away from her. When asked to explain, he stated that he had been purchasing games on his phone and playing them (*i.e.* Poker) He stated that she got mad at him for playing on his phone all the time. From what I can recall, Mr. Burns had knocked or snatched a phone out of Mrs. Burns hand while she was on the phone with her sister. I believe that he stated he snatched it out, according to him, so that he could talk to her sister and explain what was going on (very limited recollection). I believe this was the reason why Mrs. Burns called.
>
> I do recall that *she did not seem threatened in any way* as she kept coming into the sunroom area. Mr. Burns, however, was very adamant about telling his side of the story and putting the blame on Mrs. Burns. He wanted to explain things that happened months and years ago to which we advised him to explain what happened that day. *We stayed on scene for way longer than what we should have for this incident*, making sure that

the Burns were on the same page as to how to handle the situation and Mrs. Burns was comfortable prior to our leaving.

There was no evidence of any Domestic Violence and no one was charged.

Mr. Burns arrived at the police department after this incident to speak with PFC Tedrow and have him to change what he wrote. He was advised multiple times that the report would not be changed, due to this being our account of the incident and the fact that no one was charged *and this was not a domestic issue*. Mr. Burns was very unpleased with the fact that the report did not state everything he wanted it to.

These are the only facts that I can remember. I did not speak with Mrs. Burns. I did advise Mr. Burns that they may need to have marriage counseling if they are having so many problems.

End of Statement

(Edwards affidavit) (emphasis added).

2. **Tedrow Affidavit.** Officer Tedrow's affidavit was as follows:

On June 24, 2015 at approximately 1928 hours I was dispatched to 516 Springpoint Ct. in reference to a *possible domestic issue*. Myself and K-9 Officer Edwards both arrived on scene at the same time. As I approached the house I could hear nothing coming from the house that would signify any argument possibly occurring at that time.

I made contact with the complainant, Robin Burns, she stated that she and her husband, John burns, had an argument over him sitting on the sun porch all day and playing games on his cellphone. She stated that she called her sister in Mauldin and John grabbed the phone away from her and stated that she was lying about what had happened. I continued to talk with Robin in the living room and Ofc Edwards went to talk with John on the sun porch.

Robin stated the she and John have had arguments in the past and that she was getting tired of always fighting. *I asked her if there was any physical violence today and she stated that there was only arguing.* She stated that her husband spent a lot of time sitting on the sun porch and she felt she was working more than him. She stated that he was also under the care of a doctor for mental issues. She than (sic) stated that she was worried as John kept weapons in the house and this worried her. I asked her what she

wanted me to do while I was here today. She wanted me to take the guns. I explained that *I could not take his property unless they were an immediate danger*. I had Robin stay in the living room and went to the sun porch to see what John had to say.

John pretty much stated the same thing as Robin did about them always arguing but he placed the blame on Robin. He also stated that Robin and (sic) mental issues and was also seeing a doctor. John kept insisting that he wanted to tell us his story as he felt she was hurting his reputation by calling the police. I told John that we were only here to ensure that they were both safe and no one was hurt. Every time myself and Ofc Edwards would attempt to end the call and leave John would state he had more to tell us, most of which had nothing to do with this call

Robin had agreed she would leave for now and go stay with her sister in Mauldin and John agreed to have a family member take the guns so they were not in the house.

A couple of hours later John Bums called me at the police department and stated that Robin had not gone to her sister's house and he wanted me to make her leave. I explained to him that I could not force either of them to leave and that if she changed her mind that was up to her. He then started to ask if charges had been filed against him. *I explained no charges had been filed and that I was required to file a report only*. He started to ask me what Robin had said about him as he was worried that he was in trouble. I told John that he could obtain a copy of the report if he wanted to see it.

Approximately two weeks later, John Davis (sic) contacted me by coming to the police department. He stated that he wanted everything he had told us about his wife put into the report. I tried to explain to him that the information he had given us was not relevant to the reason I had been called to their home. He stated that he felt I was taking her side. He kept insisting that it was important that his side of the story be told. That was the last contact I had with John Burns.

(Tedrow Affidavit) (emphasis added).

Neither of these affidavits describe violence, much less criminal domestic violence. The couple had been drinking, they argued, he grabbed the telephone from her, she called the police, and the police saw the situation was calm and advised them to get

marital counseling. The police saw no evidence of criminal domestic violence or any reason there was any danger to either person. Nothing in these affidavits would have caused Juror Burns to reasonably believe she had been a "victim of criminal domestic violence."

The term "criminal domestic violence" was not defined for the jurors during voir dire, and Appellant did not ask for a more specific or nuanced definition or voir dire question. Criminal domestic violence has a specific definition in the law. S.C. Code Ann. § 16-25-20 (Supp. 2016) (making it unlawful to "(1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril."). The issue is whether Juror Burns would have understood that because of the 9-1-1 call she made on June 23, 2015 over her argument with her husband which, in her words to the police officer "was only arguing" (Tedrow Affidavit), she would have thought to respond to the specific question she was asked about criminal domestic violence. The trial judge reviewed the evidence submitted at the hearing and concluded Juror Burns did not wilfully conceal any relevant fact during voir dire. Thus, the trial judge properly denied Appellant's motion for new trial based upon the judge's finding that Ms. Burns' silence during voir dire was appropriate and reasonable.

Appellant also contends that a fellow juror, Michael Cornish, reported that Juror Burns "discussed the incident during jury deliberations." (App. Br. p. 6). This description of Mr. Cornish's "report" is inappropriate in this appeal. Respondent objected to any

evidence from Mr. Cornish under Rule 606(b), SCRE, and controlling case law. The trial judge ruled:

> Mr. Cornish's proffered statement under oath is not admissible under Rule 606(b). The statement references only conversations that purportedly arose during the course of deliberations, and Mr. Cornish's individualized interpretations of those purported conversations. These statements are purely intrinsic to the deliberation process and the proffered evidence is, therefore, inadmissible pursuant to Rule 606(b).

(Order, pp. 3-4; see also p. 1, n. 1). Appellant did not appeal that ruling, nor did he argue the trial judge erred in excluding that evidence. It is therefore highly inappropriate for Appellant to discuss Mr. Cornish's statements at all in the brief, and this Court should disregard the statements and the discussion.

The Court should affirm the trial judge's finding that Appellant failed to establish Juror Burns intentionally concealed a relevant fact during voir dire, and should affirm the judge's discretionary decision to deny Appellant's motion for a new trial on this basis.

III. THERE IS EVIDENCE TO SUPPORT THE CIRCUIT COURT JUDGE'S DENIAL OF APPELLANT'S MOTION FOR DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO CAUSATION IN FACT

Appellant contends there was no evidence of proximate cause between the officers' failure to arrest Mr. Blandin on December 9, 2011 and Mr. Blandin's murder of Mrs. Blandin the following day, December 10, 2011. (App. Br. p. 15). Appellant asserts specifically that there was no evidence of "cause in fact" to support the jury's verdict, that is, no evidence Mrs. Blandin would not have been murdered anyway had Mr. Blandin been arrested for CDV on December 9, 2011. (App. Br. p. 16). Appellant argues the

Estate "needed to present evidence that Avery Blandin would never have been released on bond or otherwise would no longer have had the motive and opportunity to murder his wife." (App. Br. p. 16; see also p. 18). Appellant claims "this is why failure to arrest claims are inherently flawed" or "inherently problematic." (App. Br. pp 16-17, 19). Appellant's argument is tantamount to a contention that law enforcement may *never* be held liable for failing to arrest. The Court should reject this argument.

As this Court recently stated in *Hurd v. Williamsburg County*:

> Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. The particular facts and circumstances of each case determine whether the question of proximate cause should be decided by the court or by the jury.

353 S.C. 596, 613-614, 579 S.E.2d 136, 145 (Ct. App. 2003) (citations omitted). *See also Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994) (plaintiff need only establish that defendant's negligence was at least one of the proximate, concurring causes of his injury; foreseeability is a question of fact for the jury unless the evidence is susceptible of only one inference); *Hill v. York County Sheriff's Dept.*, 313 S.C. 303, 437 S.E.2d 179 (Ct. App. 1993) (plaintiff need not prove the actor should have contemplated the particular event which occurred, and the defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence).

Several witnesses, including both parties' experts and Deputy Picone and Deputy

Tyner, testified about the cycle of domestic violence. (Tr. p. 376, ll. 16-25; p. 418, ll. 19-20). There was evidence that Avery Blandin only became violent when intoxicated. (Tr. p. 258, ll. 16-24; p. 274, ll. 9-16; p. 278, l. 1 - p. 279, l. 3; p. 257, ll. 16-22). There was also evidence that had Mr. Blandin been arrested on December 9, 2011, he would likely have still been in jail on December 10, 2011 when he killed Decedent. (Tr. p. 282, ll. 3-10; p. 376, ll. 6-25; p. 418, ll. 16-20; p. 579, l. 22 - p. 582, l. 18) The jury could have found Mr. Blandin could not have killed Decedent on December 10th if he was still jail. As the trial court noted, "[p]roximate causation does not have to be shown with exact certainty." (Order of Feb. 9, 2016, p. 6).

Appellant contends that "[t]his Court's decision in *Thomas v. South Carolina Dept. of Highways and Public Transp.*, 320 S.C. 400, 465 S.E.2d 578 (Ct. App. 1995) is dispositive" and requires reversal. (App. Br. pp. 17-18). The Court should reject this argument.

In *Thomas*, a motorist whose motor vehicle registration had been suspended ran over Thomas, severely injuring him. Thomas sued the Department of Transportation, claiming the Department's failure to recover the motorist's license plates and motor vehicle registration was a proximate cause of Thomas's injuries. The trial court directed a verdict for the Department and Thomas appealed.

This Court affirmed. The Court noted that a plaintiff suing in negligence must prove, among other things, causation in fact. The Court added "[c]ausation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Id.*, at 402, 465 S.E.2d at 580. The Court held:

> To establish causation in fact, Thomas was required to present evidence that showed the accident would not have occurred had the Department complied with the statute in question. [citation omitted]. He failed to do this. There is no evidence at all that even if the Department had taken Green's license tag and car registration, Green, who had a valid driver's license, would not have been negligently operating either the uninsured vehicle or some other vehicle at the time he ran over Thomas. We can only speculate about what he would or would not have done had the Department recovered his license tag and car registration.

Id.

Thomas is distinct from this case in very meaningful ways. In *Thomas*, if the government had taken all the measures the government could have taken, those actions would not have changed the motorist's ability to commit the act he committed (driving a vehicle and running off the roadway) which injured Thomas. Here, there is evidence from which the jury could have concluded that had the officers carried out their duty to arrest and jail Mr. Blandin, then Mr. Blandin would have been incarcerated, he would not have been intoxicated, and he would not have been able to kill Mrs. Blandin on December 10, 2011. The jurors might have agreed with Appellant, but they did not.

The trial judge correctly deferred to the jury's finding of proximate cause. This Court should do the same.

IV. THE CIRCUIT COURT JUDGE CORRECTLY DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT UNDER THE SOUTH CAROLINA TORT CLAIMS ACT

Appellant contends the trial judge should have granted him a directed verdict or judgment notwithstanding the verdict under S.C. Code Ann. §§ 15-78-60(4) and 15-78-60(6) (the Tort Claims Act) because neither of those sections "includes a gross negligence exception." (App. Br. p. 19). Appellant argues that because he did not assert immunity under any section that contains a gross negligence exception, then under *Jones v. Lott* the trial judge was precluded from charging gross negligence as an exception to absolute immunity and Respondent is foreclosed from advocating the same. (App. Br. pp. 22-23). The Court should reject Appellant's argument.

To begin with, Appellant conceded at trial that a gross negligence standard applied to every subsection under which Appellant claimed immunity under the South Carolina Tort Claims Act. This argument is therefore not preserved for review.

At the close of Plaintiff's case, Appellant moved for a directed verdict. (Tr. p. 473, l. 21 - p. 479, l. 5). Appellant pointed to Section 15-78-60(6) (Tr. p. 476, l. 15 - 477, l. 2), adding "[w]e also submit that the other subsections as well as ... five and four and three and two and one apply." (Tr. p. 477, ll. 3-6). Appellant pointed further to Section 15-78-60(20). (Tr. p. 477, ll. 7-9). Appellant stated, "[w]e respectfully submit that based on all of those exceptions to liability, all of them, or at least some of them, apply to make the sheriff's office immune from liability in this case." (Tr. p. 477, ll. 9-13). Appellant stated that insofar as Respondent relied upon the CDV statute as a basis for liability, "we

contend and would submit that there can be no liability for any law enforcement officer or agency under the criminal domestic violence statute unless the act or omission constitutes gross negligence, recklessness, willfulness and/or wantonness." (Tr. p. 477, ll. 14-21). Appellant then argued that the actions in this case did not rise to the level of gross negligence. (Tr. p. 477, l. 21 - 478, l. 13).

Respondent argued that *Steinke*[1] and *Proctor*[2] "indicate that whenever you are looking at those exceptions, when any of those exceptions contain a gross negligent standard, they're all to be read in conjunction with each other. And so, you read these exceptions with a gross negligence standard. And that's a factor for the jury to consider, Your Honor." (Tr. p. 481, ll. 7-21; see also p. 481, l. 22 - p. 482, l. 19).

The trial judge asked defense counsel if he had any response and he stated, "no, sir." (Tr. p. 485, ll. 5-7). The judge mentioned charging "the gross negligence standard" (Tr. p. 487, ll. 1-8) and the following exchange took place:

> Mr. Harter: And I will tell you the *Steinke* case, I agree with what the *Steinke* case says if you put - - I mean, I don't agree with it.
>
> The Court: Yeah, I understand.
>
> Mr. Harter: It doesn't make any sense, you know. I'm going to tell you it doesn't make any - - it stinks, it doesn't make any sense. But I understand where the state of - - the erroneous state of the law - - but gross negligence is still - -
>
> The Court: Right.

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[1] Steinke v. Department of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

[2] Proctor v. Dept. of Health and Environmental Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006).

Mr. Harter: Yeah.

The Court: So, that would suggest to us that it's a gross negligence standard.

Mr. Harter: Yeah.

The Court: Even if we disagree with that jurisprudence, right?

Mr. Harter: Yeah.

(Tr. p. 487, l. 11 - p. 488, l. 2).

At the close of all of the evidence Appellant renewed his motion for a directed verdict, stating: "I would renew the same motions that we made earlier since we have the same grounds, same arguments." (Tr. p. 599, ll. 1-3). Appellant added, "Also, with regard to the issue of Tort Claims Act, I submit that there's no liability, no showing of negligence, gross negligence or conscious failure to exercise due care or failure to exercise even slight care." (Tr. p. 599, l. 24 - p. 600, l. 3). The trial judge denied the motion, stating:

> Also, with respect to the state Tort Claims Act, I think you - - I think you agreed that *Steinke*, however you pronounce it, pretty much cuts your feet out from under you. And that argument suggest[s] that the standard is gross negligence for all the enumerated exceptions. And I think that's clearly set forth in that case.

(Tr. p. 601, ll. 19-25). Appellant offered no further argument on that point. (Tr. p. 602, ll. 6-9).

The following day the judge asked the parties to discuss the verdict form, stating "just to make certain, the standard is a gross negligence standard, obviously, for the Plaintiff under the statute, but the simple comparative negligence." (Tr. p. 607, ll. 12-15).

Appellant's counsel agreed, noting the verdict form was "fine." (Tr. p. 607, ll. 21-24). The trial judge noted the standard Respondent had to meet was the "gross negligence standard," and Appellant's counsel agreed. (Tr. p. 607, ll. 12-24).

The trial judge then instructed the jury and told them that Plaintiff alleged that she suffered damages as a proximate cause of the Defendant's gross negligence. (Tr. p. 667, ll. 5-6; p. 674, ll. 1-3, ll. 20-24). The judge also defined "gross negligence" for the jury. (Tr. p. 674, l. 5 - p. 675, l. 6).

The judge defined criminal domestic violence as follows: "It is unlawful to cause physical harm or injury to a person's own household member with the apparent present ability under circumstances reasonably creating fear of imminent peril." (Tr. p. 675, ll. 19-25). The judge then read the relevant portion of the CDV statute. (Tr. p. 676, l. 1 - p. 679, l. 2).

The judge gave the jury the following charge under the Tort Claims Act:

> Ladies and gentlemen, under the law in the State of South Carolina, generally speaking, a government enjoys immunity from suits. However, in this case, the State of South Carolina has determined that immunity may not apply. And there are exceptions to immunity.
>
> Now, under the relevant statute, the legislature sets out potential exemptions that the State may have. I will read for you those potential exemptions under the law. *Except where the Plaintiff proves gross negligence*, 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 policy.
>
> The governmental entity is not liable for a loss resulting from *except in the case of gross negligence* 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. *Except where the Plaintiff proves gross negligence*, the governmental entity is not liable for loss resulting from civil disobedience, riot, insurrection or rebellion or the failure to provide the method of providing police or fire protection.
>
> Finally, *except where the Plaintiff proves gross negligence*, the governmental entity is not liable for the loss resulting from an act or omission of a person other than employee, including but not limited to the criminal actions of third persons.

(Tr. p. 679, l. 3 - p. 680, l. 10) (emphasis added). Thus, the trial judge read a gross negligence exception into every subpart of Section 15-78-60 the judge read to the jury. Following the instructions, Appellant stated he had no exceptions to the charge, adding "we're fine." (Tr. p. 692, ll. 4-11).

In his motion for judgment notwithstanding the verdict, Appellant contended "Regardless of any alleged negligence that arguably could exist on behalf of the defendant, the defendant is entitled to immunity as a matter of law." Appellant set forth the sections he contended granted him immunity and stated, "Even if these provisions are read in light of a gross negligence standard, the facts of this case are not such as to preclude application of the immunities preserved by S.C. Code Ann. § 15-78-60." (Motion for JNOV filed October 12, 2015 at 3:24 p.m., pp. 7-8).

At all times Appellant conceded the exceptions to the waiver of sovereign immunity he argued were subject to an exception for gross negligence. At *no* time did Appellant make the argument he is making on appeal, that is, because he limited himself to only certain subsections that do not contain a gross negligence standard, the trial court should not have submitted the case to the jury under instructions that permitted the jury to read a gross negligence exception to the subsections of Section 15-78-60 that provide

exceptions to the waiver of sovereign immunity. The Court should hold Appellant to the arguments he made during the directed verdict motions. *See RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 732 S.E.2d 166 (2012) (only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion; a motion for a JNOV is merely a renewal of the directed verdict motion); *First South Bank v. South Causeway, LLC*, 414 S.C. 434, 778 S.E.2d 493 (Ct. App. 2015) (a motion for judgment notwithstanding the verdict under Rule 50(b), SCRCP is a renewal of a directed verdict motion). Therefore, Appellant's arguments on this matter are not preserved for appeal. *E.g., Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 713 S.E.2d 267 (2011) (a matter may not be presented for the first time on appeal; rather, it must have been both raised to and ruled upon by the court below).

Even so, Appellant's argument on this point is wrong. In *Plyler v. Burns*, the Supreme Court scrutinized how the factual allegations related to the various parts of Section 15-78-60 with potential application. The defendant had asserted several exceptions, the plaintiff asked the trial court to consider other exceptions, and the trial court obliged. *See* 373 S.C. 637, 651-652, 647 S.E.2d 188, 196 (2007). The Court stated, "When a governmental entity asserts an exception to the waiver of immunity and *any other applicable exception* contains a gross negligence standard, the Court must read the gross negligence standard into all of the exceptions under which the entity seeks immunity." *Id.* at 651, 647 S.E.2d at 196 (emphasis added).

This Court followed the same approach in *Chakrabarti v. City of Orangeburg*, applying the licensing provision in Section 15-78-60 even though it was not pled. *See*

403 S.C. 308, 319-320, 743 S.E.2d 109, 115 (Ct. App. 2013) ("When an exception that contains the gross negligence standard applies to a case, the gross negligence standard is read into any of the other applicable exceptions."). Courts do this to keep the Tort Claims Act from being a nullity. If a government defendant could plead its way around gross negligence, the Act's waiver of sovereign immunity would be a sham.

Appellant contends *Jones v. Lott* holds that a government defendant may exert control over which subsections of section 15-78-60 are in play. *See* 387 S.C. 339, 348, 692 S.E.2d 900, 904-05 (2010). (App. Br. p. 22). That is, because Appellant chose not to assert any of the subsections under Section 15-78-60 that contain a gross negligence exception, then even if that section applies to the facts of the case, the government escapes liability for its tort. (App. Br. pp. 22-23). This Court should not be persuaded by this argument.

Respondent acknowledges that Appellant's argument is partially accurate: A defendant is free to place provisions of the Tort Claims Act in play by pleading them. And the Court in *Jones* did state that the gross negligence standard did not apply because the government "did not plead a section containing a gross negligence standard." *Jones*, at 348, 692 S.E.2d at 905.

Jones v. Lott was decided, however, on the two-issue rule. The petitioner lost because he failed to appeal the lower court's ruling that police protection applied. 387 S.C. at 348, 692 S.E.2d at 904. Further, this Court noted in its opinion in *Jones* that the government raised an additional subsection of the Act and held the presence of that argument in the record served as an additional sustaining ground, and the Supreme Court

agreed. *Jones* involves application of rules of error preservation and appellate practice so that any discussion of substantive law was not essential to the disposition of the appeal. Although admittedly *Jones* contains language that supports Appellant's argument, that language is dictum and is inconsistent with other decisions that are directly on-point and binding. Furthermore, *Jones* has never been cited for the restrictive rule mentioned in that dictum. Under *Plyler* and *Chakrabarti* this Court must affirm.

A defendant may not use strategic pleading to avoid sections of the Act implicated by the facts. That interpretation is inconsistent with this Court's decision in *Chakrabarti* as well as the Supreme Court's decision in *Plyler*. That interpretation is also inconsistent with the Supreme Court's decision in *Steinke v. Department of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999) and this Court's decision in *Jackson v. Department of Corrections*, 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989), *aff'd* 302 S.C. 519, 397 S.E.2d 377 (1990). These are the bellweather cases explaining why the Tort Claims Act's sections are to be read together and those sections that apply to the facts of the case cannot be excluded simply because the government refuses to plead them.

Finally, Appellant did, in fact, plead a section of the Tort Claims Act that contains a "gross negligence" exception. (Answer, p. 6, ¶ 11). Appellant plead and asserted several provisions of Section 15-78-60, including (25), which provides: "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). Appellant's argument is, therefore, based upon a false premise.

Finally, the Court should consider the provisions of Code Section 16-25-70, which governs arrest for criminal domestic violence. The statute provides:

> In addition to the protections granted to the law enforcement officer and law enforcement agency under the South Carolina Tort Claims Act, a law enforcement officer is not liable for an act, omission, or exercise of discretion under this section *unless the act, omission, or exercise of discretion constitutes gross negligence, recklessness, wilfulness, or wantonness*.

S.C. Code Ann. § 16-25-70(I) (Supp. 2016) (emphasis added). This section addresses more specifically the liability of law enforcement officers responding to a CDV call, and therefore controls over the more general provisions of the Tort Claims Act. *See Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.").

Accordingly, this Court should reject Appellant's invitation to adopt a rule permitting the government to manipulate which exceptions to the waiver of sovereign immunity apply to the facts of a particular case so as to enjoy complete immunity where the law would otherwise permit a jury to determine whether the government should be liable. Even if the Court adopted such a rule, Appellant pled a subsection of Section 15-78-60 that contains a "gross negligence" exception so that the dictum from *Jones v. Lott* would not apply. The Court should affirm the trial court's denial of Appellant's motion for judgment on this ground.

CONCLUSION

For the reasons stated this Court should affirm the trial judge's discretionary decisions denying Appellant's motions for new trial. The Court should also affirm the trial judge's denial of Appellant's motions for directed verdict and JNOV.

Respectfully submitted,

May 1, 2017

John S. Nichols, # 4210
Blake A. Hewitt, # 73674
Bluestein, Nichols,
Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Daniel W. Luginbill, # 68525
J. Christopher Wilson, # 6987
Wilson & Luginbill, LLC
PO Box 1150
Bamberg, SC 29003
(803) 245-7799

Daniel Joseph Farnsworth, Jr., #6922
Farnsworth Law Offices, LLC
PO Box 8719
Greenville, SC 29604
(864) 250-9119

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2013-CP-23-06522

Madel C. Rivero, as Personal Representative
for the Estate of Lilia Lorena Blandin, ... Respondent,

v.

Sheriff Steve Loftis, in his capacity as
Sheriff of Greenville County . . . . . Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Motion for the Court to Accept the Initial Brief of Respondent and Designation of Matter Out of Time* and the conditionally filed *Initial Brief of Respondent and Designation of Matter* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Russell W. Harter, Jr.
Chapman, Harter & Harter, P.A.
PO Box 10224
Greenville, SC 29603

Andrew F. Lindemann
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202-8568

Erin Bridges

May 1, 2017

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

May 1, 2017

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Madel Rivero v. Sheriff Steve Loftis
Case Tracking No. 2016-000548

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a Motion for the Court to Accept the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal Out of Time. Also, please find enclosed the conditionally filed original and one (1) copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal. I have also enclosed a proof of service upon counsel for the Appellant and a check in the amount of $25.00 for filing this motion. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Daniel W. Luginbill, Esquire

J. Christopher Wilson, Esquire
Russell W. Harter, Jr., Esquire
Carly H. Davis, Esquire
Andrew F. Lindemann, Esquire