

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Supreme Court

WCC File No 0916088

Brandon T Bentley, Employee,

Appellant,

v

Spartanburg County, and S C Association
of Counties SIF,

Respondents

REPLY TO BRIEF OF AMICUS CURIAE
IN SUPPORT OF RESPONDENTS SPARTANBURG COUNTY AND
SOUTH CAROLINA COUNTIES SIF

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STATEMENT OF ISSUE ON APPEAL

IS KILLING A SUSPECT AN EXTRAORDINARY AND UNUSUAL EVENT FOR A SPARTANBURG COUNTY SHERIFF'S DEPUTY?

ARGUMENT

I THE CASE LAW CITED FROM PENNSYLVANIA AND WISCONSIN IN THE AMICUS CURIAE BRIEF FILED BY THE MUNICIPAL ASSOCIATION OF SOUTH CAROLINA IS DISTINGUISHABLE FROM THIS CASE

The amicus curiae brief filed by the Municipal Association of South Carolina ("the MASC brief") reiterates much of what has already been argued by Respondents, and adds discussions of several decisions from two other states Pennsylvania and Wisconsin Regarding the Pennsylvania and Wisconsin cases, it is important to understand those courts were dealing entirely with common law, as there is no statute in Pennsylvania or Wisconsin specifically addressing the issue of mental-mental work injuries as those issues are addressed in S C Code Ann § 42-1-160 Additionally, these cases reference no statistical data regarding whether the circumstances involved were actually unusual compared to the normal conditions of the particular employment Therefore, these cases should have no bearing on this Court's consideration of the issue before it in this matter

A There is no statute in Pennsylvania or Wisconsin specifically addressing the issue of mental-mental work injuries as those issues are addressed in S C Code Ann § 42-1-160, and consequently, the courts from those states utilize a different, common law standard

The Pennsylvania Workers' Compensation Act does not contain a statute addressing the issue of mental-mental injuries Thus, this is a matter of common law for the Pennsylvania courts, freeing them from having to interpret, and be bound by, a statute While Appellant concedes the Pennsylvania courts in Young v W C A B (New Sewickley Fire Department), 737 A 2d 317 (Pa Commw Ct 1999), Rydzewski v W C A B (City of Philadelphia), 767 A 2d 13

(Pa Commw Ct 2001), and Payes v W C A B (Commw of PA/State Police), 5 A 3d 855 (Pa Commw Ct 2010), all found that the circumstances in which the respective law enforcement officers were involved did not constitute compensable mental injuries, the decisions in Young and Payes both are based on the notion that law enforcement officers have an “expectation” that they might someday be in a dangerous or traumatic situation, while the decision in Rydzewski simply declared that an officer seeing two seriously wounded fellow officers was not ‘particularly abnormal for a person in his line of work ’ Rydzewski, 767 A 2d at 16

In Young, the police officer encountered an armed man when serving a warrant, who actually pointed a gun at the officer. Ultimately, the officer was able to subdue the gunman and took him into custody. Following the incident, the officer experienced psychological problems related to the incident. The court found that this evidence was insufficient to prove an “abnormal working condition for a police officer, where certain stressful and even life-threatening events and occurrences are *expected and anticipated* due to the nature of the employment ” Young, 737 A 2d at 322 (emphasis added)

In Payes, the state trooper struck and killed a woman who ran in front of his patrol car. The court found that this event did not represent “an actual extraordinary event ’ In explaining its reasoning behind this conclusion, the court noted “Claimant, who works ‘in the line of employment’ of a police officer, can be *expected* to be witness to horrible tragedy ’ Payes, 5 A 3d at 861 (emphasis added)

Both Young and Payes cite to the Supreme Court of Pennsylvania’s decision in City of Philadelphia v W C A B (Brasten II), 556 Pa 400, 728 A 2d 938 (1999). Brasten II involved a police officer who shot and killed a suspect who was in a barricaded position, and thereafter the officer had to endure legal and publicity problems resulting from this event. In that case,

Pennsylvania's Supreme Court split on the issue of whether the lower court's determination that the legal and publicity issues constituted an "abnormal working condition." However, the opinion in favor of reversal reasoned that while killing an unarmed person compounded the stress of the officer's job, the officer's psychological injury constituted "a subjective reaction to *quite foreseeable* circumstances of the job." Brasten II, 556 Pa. at 407, 728 A.2d at 942 (emphasis added)

As is true with Pennsylvania, Wisconsin also does not have any statute specifically addressing the issue of mental-mental injuries. The MASC brief cites to Bretl v Labor & Indus. Review Comm'n, 204 Wis.2d 93, 553 N.W.2d 550 (Ct. App. 1996), as an example of another decision where an officer-involved shooting was not deemed to be unusual compared to "the day to day emotional strain and tensions experienced by police officers." 204 Wis.2d at 106, 553 N.W.2d at 555. However, the decision in Bretl was based upon School Dist. No. 1 Brown Deer v. DILHR, 62 Wis.2d 370, 215 N.W.2d 373 (1974), which held "[O]nly if the 'fortuitous event *unexpected and unforeseen*' can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability be found." 62 Wis.2d at 377-78, 215 N.W.2d at 377 (emphasis added).¹

Thus, Young, Payes, Brasten II, and Bretl all consider whether the events at issue were *expected, anticipated* and/or *foreseeable*. Such considerations are not appropriate in this instance.

¹ Additionally, the facts of Bretl are drastically different from the case *sub judice*. The most obvious difference between this case and Bretl is that the victim in Bretl only suffered a flesh wound, whereas the victim in the case died. Further, the claimant in Bretl was an officer who was a member of the SWAT team, and the police chief testified the shooting that took place was not unusual. In this case, Appellant was a regular patrol deputy who had only drawn his gun three times in his ten-year career and had never before fired it, and Sheriff Wright testified that most deputies make it through their entire careers without ever having to kill another human being in the line of duty (R. p. 42, lines 18-24). When asked if he believes one of his deputies shooting and killing another human being is a rare and unusual event, Sheriff Wright testified, "It doesn't happen everyday. So I guess in its definition, yeah." (R. p. 46, lines 6-11). Further, the claimant in Bretl could not establish that his psychological injury was causally related to the shooting incident, whereas that issue has been conceded by Respondents in this case.

because our courts and legislature rejected the concept of “expectation” in setting the standard under § 42-1-160(B)(1). The heart attack standard, upon which the mental injury statute is based, is two-pronged: one prong dealing with “expectation,” and the other dealing with whether the circumstances were “extraordinary and unusual” in nature. The legislature and the courts have not carried over the “expectation” standard to pure mental injury cases, opting instead for the extraordinary and unusual standard alone. See § 42-1-160(B)(1), Shealy v Aiken County, 341 S C 448, 535 S E 2d 438, 444 (2000).

If South Carolina followed the reasoning and standards applied by the courts in Pennsylvania and Wisconsin, the findings reached in Shealy (that the circumstances endured by the claimant were extraordinary and unusual) would not have been possible. In Shealy, this Court noted

The Sheriff's Department hires deep cover agents to go to known drug locations, typically bars and nightclubs, to befriend drug dealers and other criminals in order to gain information, intelligence, and make drug buys, which are handed over to the police as evidence. The goal is for the deep cover agent to buy as much drugs as he can from the dealers and then slowly disappear. Deep cover work is extremely stressful and differs from regular police undercover work because the agent does not wear a wire, is not operating under police surveillance, does not have access to police back up, and does not carry police identification. According to Shealy, the stress involved with deep cover work was "extraordinary, it was more than I ever could imagine."

Shealy, 341 S C at 452, 535 S E 2d at 440. Given the above, a deep cover narcotics agent surely has an “expectation” that he will be immersed in unsavory and/or dangerous situations for an extended period of time, can “anticipate” that he will encounter bad people, and it is “foreseeable” these bad people will be doing bad things, perhaps even involving him. However, there is no discussion in Shealy as to whether those circumstances were expected, anticipated or foreseeable. Rather, this Court focused only on whether these circumstances were extraordinary

and unusual pursuant to § 42-1-160. It is impossible to know whether Pennsylvania and Wisconsin courts would find differently in Young, Payes, Brasten II, and Bretl if they were precluded from considering “expectation” as part of their analysis by a statute such as § 42-1-160, and therefore the decisions in those cases provide little, if any, guidance to this Court.

B The cases from Pennsylvania and Wisconsin reference no statistical data regarding whether the circumstances involved were unusual compared to the normal conditions of the particular employment, and this data was improperly ignored by the Commission

Of the extraterritorial cases referenced herein, Brasten II is the only one that involves an officer-involved shooting resulting in a fatality. It is also worth noting that there was no actual evidence referenced in Brasten II regarding whether such an incident was “abnormal.” In fact, none of these cases reference any statistical data to determine whether the respective occurrences are objectively “abnormal” or “unusual.” Conversely, in this case, there is actual data available to make a determination on this point. This Court need not engage in broad proclamations or stereotypes about what is usual for a Spartanburg County Sheriff’s Deputy, as the evidence establishes officer-involved shootings that result in fatalities have occurred **6 times out of 1,971 days** (as of the date of the hearing before the Single Commissioner) (R pp 165-166). While the MASC brief and Respondents argue such statistical data should not impact the analysis of whether an event such as the one at issue is unusual, Appellant would submit that if the data established such events occurred with great regularity, both the MASC and Respondents would tout that data as proof-positive the event could not possibly be considered unusual – a position with which Appellant would have to agree.

The issue of statistical data was also mishandled by the South Carolina Workers’ Compensation Commission (“the Commission”). In the Decision & Order in this case by the Appellate Panel, the Commission affirmed the Single Commissioner’s finding that “[i]t is

immaterial the frequency of the number of fatalities when deadly force is used, the issue is whether or not this is a **standard or necessary** part of an officer's job " (R pp 5-6) (emphasis added) There is no statutory or case law directing that facts such as these be analyzed on the basis of whether the events were "standard or necessary " Rather, § 42-1-160(B)(1) clearly provides that the standard is whether "the conditions causing stress, mental injury or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment " Appellant agrees that his shooting of the suspect became an unfortunate necessity on October 21, 2009 However, that this shooting, which resulted in the taking of human life, became a necessary part of his job at that moment does not somehow render its occurrence ordinary or usual The Commission failed to apply the proper standard, and compounded this error by discarding data that speaks directly to the actual standard to be utilized in this case

II THE COURT OF APPEALS' DECISION IN MARTINEZ IS FACTUALLY DISTINGUISHABLE FROM THE CASE SUB JUDICE

The MASC brief also discusses the recent decision by our Court of Appeals in Martinez v Spartanburg County, 394 S C 224, 715 S E 2d 339 (Ct App 2011) Martinez involves a 28-year veteran forensic investigator with the Spartanburg County Sheriff's Office, whose job involved reporting to crime scenes, collecting evidence and taking pictures that at times required contact with deceased bodies, attending autopsies, etc The claimant worked one particular accident involving the death of a two-year old little girl who was killed when her father, a former Spartanburg County Sheriff's Deputy and current Greenville County Sheriff's Deputy, accidentally backed over her in his driveway with his patrol car The claimant contended that "working the death of a child who was run over by a fellow police officer was unusual and extraordinary " Martinez, 394 S C at 233, 715 S E 2d at 344 However, she acknowledged that everything she did at the scene was part of her ordinary job, and that she had worked

approximately 150 death cases and investigated 24 suspicious death/homicide cases in her career²

The circumstances in Martinez are different than those in this case. Here (as mentioned above in Footnote 1), Appellant testified that during his ten years in law enforcement prior to October 21, 2009, not only had he never even fired his weapon at a suspect, he only took it out of the holster three times when confronting a suspect (R p 70, lines 3-17)³. Additionally, Sheriff Wright further testified that most deputies make it through their entire careers without ever having to kill another human being in the line of duty (R p 42, lines 18-24). Thus, unlike the claimant in Martinez, the evidence establishes that Appellant shooting and killing another human being was far from what he had ever before experienced in his usual job duties, and from what most deputies ever have to face in their entire careers⁴.

III REFERENCE TO AN ARTICLE APPEARING IN THE STATE NEWSPAPER PAPER IS NOT APPROPRIATE FOR CONSIDERATION IN THE ANALYSIS OF THE ISSUE OF WHETHER KILLING A SUSPECT IS AN EXTRAORDINARY AND UNUSUAL EVENT FOR A SPARTANBURG COUNTY SHERIFF'S DEPUTY

The MASC brief discusses an article by John Monk appearing in The State newspaper on February 12, 2012. While this article quotes the Chief of SLED, the Richland County Sheriff, the City of Columbia Police Chief and a Richland County Master Deputy regarding their thoughts on violent and/or dangerous situations law enforcement officers face, there is no

² Note that statistical data is utilized in Martinez in analyzing whether the subject events were a usual part of the claimant's job.

³ In Doe v S C Dept of Disabilities & Special Needs 377 S C 346 660 S E 2d 260 (2008) this Court found there were extraordinary and unusual circumstances present when a facility housing patients in various units was downsized which forced a nurse to change units from one with a passive population to one with a mix of passive and aggressive patients. Chief Justice Toal in a separate concurring opinion concluded that the Commission and the Court of Appeals failed to consider whether the changed conditions of Petitioner's employment were for her unusual or extraordinary and similarly failed to evaluate how the changed conditions affected Petitioner. Doe 377 S C at 353 (emphasis added). There can be no doubt that the killing of another human being was for Appellant unusual and extraordinary and that this event affected him directly and substantially.

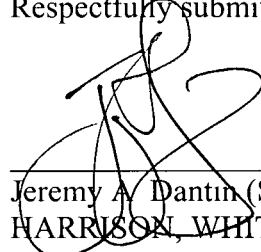
⁴ Appellant does not intend to lend support to the Court of Appeals' decision in Martinez. Appellant understands Martinez is on appeal to this Court and believes there is an excellent argument that these horrible and unique facts should also be considered extraordinary and unusual.

discussion of any particular situation analogous to the circumstances in this case. More importantly, this article does not in any way address or reference these perceived trends from the perspective of a Spartanburg County Sheriff's Deputy. § 42-1-160(B)(1) provides that the analysis of whether an event is extraordinary and unusual requires a comparison to "the normal conditions of the particular employment," and as such, what another law enforcement officer in another location may consider "usual" is not relevant. Moreover, an article such as this may not be considered evidence in this case, and for that reason alone is of no use to this Court.

CONCLUSION

The amicus curiae brief filed by the Municipal Association of South Carolina does not offer any new guidance to the issue in this case. Aside from calling attention to common law from other states that do not follow the same standard set forth in S.C. Code Ann. § 42-1-160, the MASC brief settles into the same arguments previously offered by Respondents. The Martinez case is factually distinguishable from this case, and MASC brief's focus on a newspaper article is misplaced. Appellant maintains that under § 42-1-160, he has suffered a mental injury as a result of an event which was extraordinary and unusual in comparison to the normal conditions of his work as a Spartanburg County Sheriff's Deputy. As such, the Decision and Order in this case should be reversed and a finding of compensability should be entered.

Respectfully submitted,



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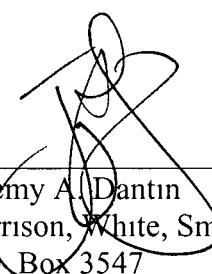
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CERTIFICATE OF COUNSEL

The undersigned certified that the Reply to Brief of Amicus Curiae in Support of Respondents Spartanburg County and South Carolina Counties SIF complies with Rule 211(b), SCACR

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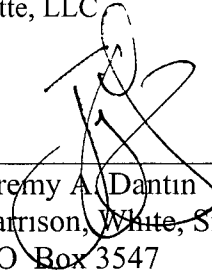
Respondents

PROOF OF SERVICE

I certify that I have served the Reply to Brief of Amicus Curiae in Support of Respondents Spartanburg County and South Carolina Counties SIF on the above-named Respondents, Spartanburg County and S C Association of Counties SIF, this 5th day of March 2012, by depositing the same in the United States Mail, first class postage prepaid, addressed to their attorney of record, as follows

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