THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2016-000548
Case No. 2013-CP-23-6522

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.

REPLY BRIEF OF APPELLANT

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I. The trial court erred in failing to hold an evidentiary hearing and in concluding based on the limited evidence available that there was no intentional concealment by Juror Burns of events that necessitated her call to 911 just three months prior to jury selection.

As a threshold issue on appeal, the Appellant Sheriff Steve Loftis raises the necessity of an evidentiary hearing to determine whether Juror Burns had intentionally concealed pertinent information in response to the voir dire question. Circuit Court Judge Robin Stilwell ruled that "Defendant has failed to show Juror Burns' failure to respond during *voir dire* was untruthful or deceitful so as to rise to the level of an intentional concealment of information." (R. 7). He further ruled that "there is no evidence that Ms. Burns, either objectively or subjectively, concealed information." (R. 6). Yet, the absence of this evidence is the result of the judge's refusal to hold an evidentiary hearing. In essence, by denying the means to develop the evidence to meet the burden of proof, Judge Stilwell deprived Sheriff Loftis of due process.

In response, the Respondent Madel C. Rivero, as the Personal Representative of the Estate of Lilia Lorena Blandin ("Estate"), attempts to excuse Judge Stilwell's denial of an evidentiary hearing by suggesting that some form of a "hearing" was actually held and that was sufficient. The Estate also insists that

there is no "mandate" under existing case law for an evidentiary hearing to be held. The flaws in the logic employed are quite evident.

The hearing that was held by Judge Stilwell was by no means an evidentiary hearing as is typically held in juror concealment cases. In the leading case of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the Supreme Court emphasized that "[n]ecessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." 550 S.E.2d at 284. Later, in *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013), the Supreme Court further elaborated that "such case-by-case determinations *are most appropriately made after a hearing, which allows the factual circumstances to be more fully developed.*" 737 S.E.2d at 371. (Emphasis added). If that language does not "mandate" an evidentiary hearing, as the Estate insists it does not, it nonetheless strongly urges courts to hold an evidentiary hearing in such circumstances. In fact, common sense dictates no less. Whether conduct by a juror is intentional or unintentional is inherently subjective. Hence, a "fact intensive determination" of the juror's subjective intent in failing to respond to a voir dire inquiry necessarily requires the questioning of that juror.

The fallacy of the Estate's position on this issue is demonstrated by Judge Stilwell's rulings. He deprived Sheriff Loftis of the ability to obtain testimony from Juror Burns, but he then finds that Sheriff Loftis failed to show her conduct was "untruthful or deceitful" or that she deliberately concealed information. Such

a conclusion about Juror Burns' subjective intent to conceal cannot be determined with any fairness or certainty in the absence of taking the juror's testimony.

The existing case law makes this very point. Appellate case law in South Carolina includes numerous cases where juror concealment during voir dire was alleged. In each of those cases, an evidentiary hearing was held where the juror at issue was questioned by the court to ascertain whether pertinent information was concealed during voir dire and whether that concealment was deliberate or intentional. *See e.g.*, *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001); *State v. Sparkman*, 358 S.C. 491, 595 S.E.2d 375 (2004); *State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004). In contrast, the Estate has not cited a single case where the juror was not questioned in some post-verdict evidentiary hearing. The Estate did actually identify an additional case, *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007), where the juror at issue was questioned about why he failed to respond to a voir dire question. Significantly, the Supreme Court ruled as follows: "*Based on Juror Walling's testimony at the hearing*, we believe that Walling did not intentionally conceal the existence of his prior relationship with Petitioner." 654 S.E.2d at 530. (Emphasis added). Clearly, the critical and dispositive evidence was the juror's testimony.

Yet, in sharp contrast, in the present case, Sheriff Loftis was denied access to that critical and dispositive evidence. Despite initially indicating that an evidentiary hearing would be scheduled, Judge Stilwell ultimately denied the

opportunity for Sheriff Loftis to "more fully develop" the factual circumstances by the very means that the Supreme Court termed the "most appropriate" method of determining the truth. Then, he ruled against Sheriff Loftis for failing to show an intentional concealment. That is a classic denial of due process – such a denial that warrants a reversal and a new trial absolute or, at a minimum, a remand for such an evidentiary hearing to be held.

Moreover, in applying the first prong of the *Woods* test, the Estate does not attempt to argue that the voir dire question posed was ambiguous or incomprehensible to an average juror, or that 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. That is the very definition of unintentional concealment under the *Woods* test. *Woods*, 550 S.E.2d at 284.

Instead, the Estate states the dispositive issue as being "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 ... she would have thought to respond to the specific question she was asked about criminal domestic violence." *See*, Respondent's Brief, p. 17. The Estate then insists that "[t]he trial judge reviewed the evidence submitted at the hearing and concluded Juror Burns did not willfully conceal any relevant fact during voir dire." *See*, Respondent's Brief, p. 17.

It bears repeating that the evidence did not include the testimony of Juror Burns, and "willful concealment" under these circumstances cannot be determined

without the testimony of the juror. More specifically, it may not be determined what Juror Burns may nor may not have understood during voir dire when she has not been asked such questions. Similarly, it may not be determined why Juror Burns did not respond to a voir dire inquiry when she has not been asked that question.

At any rate, the evidence that was presented does sufficiently meet the definition of criminal domestic violence so as to have warranted further inquiry by the court. Specifically, the 911 call demonstrates that Juror Burns requested police assistance for an incident where she alleged that her husband twisted her wrist and ripped a telephone from her hand during an argument. (R. 109). She obviously had some fear in that she summoned law enforcement. When the officers were present, she expressed concerns about guns in the house, stated that that worried her, and wanted the guns removed. (R. 103). She also indicated a desire to leave the marital home to stay with her sister. (R. 103). Further, she expressed to the officers a prior history of domestic disputes, which in itself invites further questioning that was not allowed. (R. 103).

With that background information, there was no basis for Judge Stilwell to have not inquired further of Juror Burns to determine if there were incidents of criminal domestic violence that she intentionally concealed during voir dire.

II. The trial court erred in denying relief to Sheriff Loftis because he failed to prove the "fact of disqualification" of Juror Burns, which was not a required showing.

In his opening brief, Sheriff Loftis also challenged Judge Stilwell's ruling that Sheriff Loftis needed "to establish the 'fact of disqualification' of Juror Burns" and then concluded that the "fact of disqualification" was not demonstrated. (R. 6). Yet, in response, the Estate insists that "Supreme Court jurisprudence holds otherwise." *See*, Respondent's Brief, p. 11.

The Estate, however, is absolutely mistaken. The "fact of disqualification" is an element of the test where a party seeks a new trial because the trial court failed to disqualify a juror for cause. That is not the issue here; no request was made to strike Juror Burns for cause. The "fact of disqualification" inquiry is therefore not a necessary element under the test for juror concealment, which is the issue in this case. In other words, juror disqualification is not an absolute requirement under the *Woods* test. To the contrary, using the word "or," the Supreme Court requires a showing "that 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*." *Woods*, 550 S.E.2d at 284. (Emphasis added). And in this case, that prong of the *Woods* test was clearly satisfied. Indeed, Judge Stilwell has readily "agree[d] that had the Defendant known of Juror Burns' experience with the police concerning an argument with her husband, the

Defendant would surely have used a peremptory challenge to strike Ms. Burns." (R. 7).

In short, the trial court erred in denying relief to Sheriff Loftis because he failed to prove the "fact of disqualification" of Juror Burns, which was not a required showing.

III. The trial court erred in denying Sheriff Loftis' motions for directed verdict and judgment notwithstanding the verdict given the absence of evidence of causation in fact.

Sheriff Loftis also argues that he is entitled to a directed verdict and JNOV based upon the absence of evidence of causation in fact. The Estate's arguments in response are unavailing.

Sheriff Loftis pointed out that there is no evidence that establishes that Lilia Blandin would not have been murdered by her husband if he had been arrested by the deputies for criminal domestic violence on December 9, 2011. Judge Stilwell cites only "evidence" that Avery Blandin may have been in jail and not released on bond as yet when the murder occurred on December 10, 2011. In its response brief, the Estate points only to the same such speculative "evidence" that Avery Blandin would likely have still been in jail on December 10, 2011, when the murder was committed. But, as Sheriff Loftis points out and the Estate does not appear to directly challenge or refute, such "evidence" is insufficient to establish

causation in fact under the facts of a failure to arrest case such as this. 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. There is no such evidence presented.

The Estate responds instead by insisting that "Appellant's argument is tantamount to a contention that law enforcement may *never* be held liable for failing to arrest," and that such an argument should be "rejected." *See*, Respondent's Brief, p. 19. Sheriff Loftis did not argue, however, that law enforcement can never be held liable for failing to arrest. Instead, he clearly pointed out that causation requires proof "within a reasonable level of probability that the arrest would prohibit any further opportunity to commit the crime." *See*, Appellant's Brief, p., 17. Sheriff Loftis proceeded to explain that "[u]nless that government action removes the opportunity and motive to commit the criminal act, there is no causation in fact." *See*, Appellant's Brief, p. 19.

The Estate disregarded this reasonable and pragmatic approach to causation in failure to arrest cases. It did so because quite clearly such evidence is missing in this record. The Estate was required to prove that Avery Blundin's arrest on December 9, 2011 would have resulted in his long term detention and separation from his wife, thereby eliminating the threat. Plain and simple, an arrest for criminal domestic violence does not satisfy that burden of proof. The Estate recognizes that, and falls back to the precept that causation is a jury question. But,

even a jury needs a basis in fact for its decision, and pure speculation and conjecture will not support a finding of causation in fact in a failure to arrest case. Sheriff Loftis is entitled to a directed verdict and JNOV on this issue.

IV. The trial court erred in denying a directed verdict and JNOV to Sheriff Loftis based upon Tort Claims Act immunities, specifically Sections 15-78-60(4) and 15-78-60(6), neither of which includes a gross negligence exception.

As a final issue on appeal, Sheriff Loftis argued that he is entitled to a directed verdict and JNOV based upon Tort Claims Act immunities, specifically Sections 15-78-60(4) and 15-78-60(6), neither of which includes a gross negligence exception. In response, the Estate never addresses or disputes the applicability of Sections 15-78-60(4) and 15-78-60(6) to the facts of this case. Instead, the Estate misapplies existing Supreme Court case law that demonstrates that a gross negligence exception should not be applied or "interpolated" to Sections 15-78-60(4) and (6).

The key decision is the Supreme Court's case of *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), which the Estate attempts to discount as mere "dictum." The critical language in *Jones* is as follows:

> Petitioner's contention that section 15-78-60(25)'s gross negligence standard should be interpolated into the other pleaded exceptions is misplaced. Respondent never raised an affirmative defense that contained a gross negligence standard. Thus, under this Court's holding in

> *Steinke* the gross negligence standard is not interpolated into either section 15-78-60(6) or (21). Also, Respondent raised section 15-78-60(21) as an additional ground in his directed verdict motion. Petitioner's central objection to section 15-78-60(21) is that the gross negligence standard applies to that section. However, as noted above the gross negligence standard does not apply because Respondent did not plead a section containing a gross negligence standard. Thus, the court of appeals correctly held that section 15-78-60(21) was an additional sustaining ground.

692 S.E.2d at 904-905. That is not dictum; that is the Supreme Court affirming the immunity defense based on Section 15-78-60(21).

Moreover, the Estate urges this Court to disregard *Jones* which is the latest and the dispositive appellate decision on the issue. Instead, the Estate asks this Court to apply the decision in *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013), where this Court overlooked the Supreme Court's decision in *Jones*. Clearly, a decision of this Court does not taken precedence over a Supreme Court decision. *See*, S.C. Const. art. V, § 9 ("[t]he decisions of the Supreme Court shall bind the Court of Appeals as precedents"); *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611, 618 (Ct. App. 2012) (recognizing the Court of Appeals is bound by the decisions of the Supreme Court). In *Chakrabarti*, this Court erred in relying on Section 15-78-60(12) even though that immunity section was never asserted by the defendant. That ruling was directly at odds with *Jones*.

Likewise, the Estate's reliance on *Plyler v. Burns* 373 S.C. 637, 647 S.E.2d 188 (2007), is misplaced. *Plyler* is not the latest decision from the Supreme Court

on the issue, and frankly, in *Plyler*, the Court overlooked the pertinent language from the *Steinke* decision which states: "the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception." *Steinke v. South Carolina Department of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142, 154 (1999). Therefore, the focus is on the immunity sections that the defendant *asserts* and not the immunity sections that the plaintiff wishes would be asserted. As the Supreme Court made clear in *Jones*, "[w]hen a governmental entity *asserts* multiple exceptions to the waiver of immunity and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions." *Jones*, 692 S.E.2d at 904. (Emphasis added). The Supreme Court in *Steinke* and *Jones* thus recognizes that the defendant controls its defense and cannot be made to assert affirmative defenses it chooses not to assert.

In the present case, Sheriff Loftis asserted absolute sovereign immunity under Sections 15-78-60(1), (2), (3), (4), (5), (6), and (20) at the directed verdict stage. (R. 676-677). None of those immunity provisions within Section 15-78-60 contain a gross negligence exception. No other immunity sections under Section 15-78-60 were asserted at trial. Consequently, Sheriff Loftis is entitled to absolute sovereign immunity under Sections 15-78-60(4) and 15-78-60(6) without consideration of whether there is evidence rising to the level of gross negligence.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Steve Loftis, in his official capacity as Greenville County Sheriff, respectfully renews his request that this Court reverse the Orders of the trial court and remand for entry of a directed verdict and/or judgment as a matter of law in favor of Sheriff Loftis. In the alternative, Sheriff Loftis respectfully requests that the Court remand for a new trial absolute or, at a minimum, remand for an evidentiary hearing to be held on the issue of juror concealment by Juror Burns.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant Steve Loftis, in his official capacity as Greenville County Sheriff, certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

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The undersigned counsel for the Appellant Steve Loftis, in his official capacity as Greenville County Sheriff, certifies that the Final Reply Brief of Appellant 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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