THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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SC Court of Appeals

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 TO RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

The Appellant Sheriff Steve Loftis has petitioned this Court for a rehearing of the recent decision in *Rivero v. Loftis*, Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018). In accordance with Rule 221(a), SCACR, the Court requested and received a return from the Respondent. Sheriff Loftis seeks to briefly reply to several points.

I.

Importantly, the Respondent Madel C. Rivero fails to demonstrate that this Court properly exercised its authority under Rule 220(c) to reverse the ruling made by Judge Robin Stilwell that "[t]he question the court posed in *voir dire* was clear and unambiguous." (R. 6). Rivero responds by first stating that whether a voir dire question is ambiguous or not is a question of law rather than a question of fact.[1] Whether Rivero is correct on that is immaterial. it does not justify this Court's use of Rule 220(c) to reverse a *ruling*. Rule 220(c) provides that "[t]he appellate court may affirm any *ruling*, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." *See*, Rule 220(c), SCACR. (Emphasis added). Thus, even if a Court's determination as to whether a voir dire question is ambiguous is a question of law, as Rivero argues, it is still a *ruling*. Rule 220(c) does not allow this Court to *reverse* an unappealed ruling of the lower court regardless of whether that ruling is on an issue of fact or on an issue of law. Instead, it is well settled that "an unappealed ruling, right or wrong, is the law of the case." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730

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[1] Sheriff Loftis submits that it may be fairly debatable whether the issue of ambiguity is one of fact or law. At any rate, it is clearly a question to be determined by the court. Factual determinations are often made by trial judges in the context of voir dire. *See*, *State v. Robertson*, 54 S.C. 147, 31 S.E. 868 (1899) (competency of juror is question of fact). Whether a voir dire question is ambiguous or not seems to be a factual determination. There is no application of statutory law or common law principles that is required. Instead, it is a factual determination made by the trial judge just as other factual issues as part of the voir dire process are made by the trial judge.

S.E.2d 282, 285 (2012). This Court cited that well settled principle as recently as May 2, 2018 in its decision in *Skyways I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 814 S.E.2d 643, 654 (Ct. App. 2018) -- a case incidentally that did not involve a prior appeal.

It is also quite telling that Rivero did not even discuss the "law of the case" issue and makes no attempt to demonstrate that this Court's use of Rule 220(c) is not at odds with the long established "law of the case" doctrine in our appellate jurisprudence. At best, Rivero cites two cases that *pre-date* the adoption of the South Carolina Rules of Appellate Procedure for the proposition that "a right decision based on a wrong ground will be affirmed." *Potomac Leasing Co. v. Otis Market*, 292 S.C. 603, 358 S.E.2d 154, 156 (Ct. App. 1987). Those cases include no discussion of the "law of the case" doctrine and do not stand for the proposition that an appellate court can affirm a decision by first reversing an unappealed ruling of the trial court. Instead, those cases simply point out that there may be an alternative ground for affirmance. In other words, where the trial court's reasoning is incorrect, the appellate court may rely on an alternative correct basis appearing in the record. But that alternative basis cannot be premised on the *reversal of an unappealed ruling* – that is the clear distinction that Rivero and this Court have overlooked.

Rivero also suggests that she was not an aggrieved party and thus was unable to appeal Judge Stilwell's ruling that "[t]he question the court posed in *voir dire* was clear and unambiguous." (R. 6). Sheriff Loftis disagrees in part. This Court has explained that "[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Shaw v. City of Charleston,* 351 S.C. 32, 567 S.E.2d 530, 532 (Ct. App. 2002). "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." *Id.* Thus, a party that is adversely impacted by a lower court ruling is aggrieved and may appeal that ruling; however, in this case, Rivero did not take the position that the voir dire question was ambiguous in the lower court. No contemporaneous objection was made by Rivero to that effect at the time of the voir dire. In addition, Rivero did not argue that the voir dire question was ambiguous in the lower court. Thus, she is not in a position to challenge Judge Stilwell's ruling, and that ruling certainly should not have been subject to *reversal* by this Court.

Finally, it is important to point out that Rivero has not cited a single case where the Supreme Court or this Court has in the past used its Rule 220(c) authority to actually reverse an unappealed final ruling of the circuit court and then use that reversal as the basis for then affirming the judgment entered below. The

reason for that is clear – what the Court has done in this case is unprecedented and, with all due respect, in error.

II.

As to the issue of proximate cause, it also quite telling that Rivero makes new arguments that were not previously made and cites new authorities that were not previously cited. It is well settled that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 322 (2001). *See also*, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same). Notions of fundamental fairness should dictate that this same standard should also apply to the party who is defending a petition for rehearing.

At any rate, Rivero now argues that criminal domestic violence statutes would be "useless" if plaintiffs were required to meet the same standard of causation that applies to every other case of negligence or gross negligence. In effect, Rivero is asking for a relaxed standard for assessing causation in fact in failure to arrest cases arising from a failure to arrest. There is absolutely no basis

in the law for a relaxed standard in failure to arrest cases – let alone a standard where the fact finder is permitted to engage in speculation in the absence of concrete admissible evidence. The proper approach, as Sheriff Loftis points out, is to require evidence showing to a reasonable level of probability that an arrest would prohibit any further opportunity to commit the crime. In this case, that required 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 was no such evidence, and Rivero still points to none.

In fact, Rivero now offers new theories although they are couched in purely speculative terms (note the use of the language "may have"). She now argues for the first time that "[t]he police officers' failure to arrest Mr. Blandin *may have* emboldened him." (Emphasis added) That suggests that, if the officers had not interceded at all, Blandin would not have killed his wife. That is absurd, is unsupported by the evidence, and certainly was not a theory on which the case was actually tried. *See*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal"). In addition, Rivero now argues that "getting locked up *may have* knocked sense into Mr. Blandin" (emphasis added), suggesting that, if arrested and released on bond, Blandin would have left his wife alone. Again, that is purely speculative. There is no evidence to support that new theory.

In sum, Rivero's discussion of causation in fact demonstrates that sufficient evidence was not presented to support the verdict. Rivero was required to prove that Blandin's arrest on December 9, 2011 would have resulted in his long-term detention and separation from his wife, thereby eliminating the threat. There is no such evidence in this record, and Sheriff Loftis is entitled to judgment as a matter of law.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

-and-

RUSSELL W. HARTER, JR. #2778
CARLY H. DAVIS #100112
CHAPMAN, HARTER
& HARTER, P.A.
Post Office Box 10224
Greenville, South Carolina 29603
(864) 233-4500

Counsel for Appellant
Sheriff Steve Loftis

September 5, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant Sheriff Steve Loftis, does hereby certify that service of the **Reply to Respondent's Return to Appellant's Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 5th day of September 2018:

Daniel J. Farnsworth, Jr., Esquire
Brann W.M. Fowler, Esquire
Farnsworth Law Offices, LLC
Post Office Box 8719
Greenville, South Carolina 29604

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Daniel W. Luginbill, Esquire
J. Christopher Wilson, Esquire
Wilson & Luginbill, LLC
Post Office Box 1150
Bamberg, South Carolina 29003

Blake A. Hewitt, Esquire
Bluestein Thompson Sullivan, LLC
Post Office Box 7965
Columbia, South Carolina 29202

Russell W. Harter, Jr., Esquire
Carly H. Davis, Esquire
Chapman, Harter & Harter, P.A.
Post Office Box 10224
Greenville, South Carolina 29603

LINDEMANN, DAVIS & HUGHES, P.A.

Attorneys at Law

Andrew F. Lindemann*
James M. Davis, Jr.†
Joel S. Hughes†

*Also admitted in North Carolina
†Certified Mediator

5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260

Telephone (803) 881-8920
Facsimile (803) 862-1181

Direct Dial (803) 881-8921
Email: andrew@ldh-law.com

September 5, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Madel C. Rivero, as Personal Representative for the Estate of Lilia Lorena Blandin v. Sheriff Steve Loftis, in his capacity as Sheriff of Greenville County
Appellate Case Number: 2016-000548
Civil Action Number: 2013-CP-23-6522
Claim Number: 03841
Our File Number: 104.9842

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Reply to Respondent's Return to Appellant's Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope. By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

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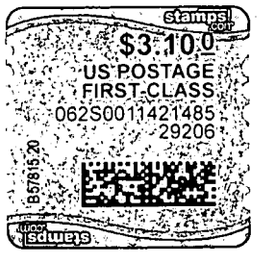
AFL/jmb
Enclosures

cc: Daniel J. Farnsworth, Jr., Esquire *(w/ Enclosure)*
Brann W.M. Fowler, Esquire *(w/ Enclosure)*
Daniel W. Luginbill, Esquire *(w/ Enclosure)*
J. Christopher Wilson, Esquire *(w/ Enclosure)*
Blake A. Hewitt, Esquire *(w/ Enclosure)*
Russell W. Harter, Jr., Esquire *(w/ Enclosure)*
Carly H. Davis, Esquire *(w/ Enclosure)*



Lindemann, Davis & Hughes, P.A.
Post Office Box 8568
Columbia, South Carolina 29260

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211