THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Tenth Judicial Circuit
Cordell J. Maddox, Jr., Circuit Court Judge

Civil Action No.: 2014-CP-04-01469
Appellate Case No.: 2017-002612

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SC Court of Appeals

Fayetta Sherida Davenport, individually and
on behalf of the Estate of James Davenport..Appellant

v.

Town of Iva, S.C...Respondent

INITIAL REPLY BRIEF OF APPELLANT

James M. Griffin
GRIFFIN DAVIS
PO Box 999
Columbia, SC 29202
(803) 744-0800
jgriffin@griffindavislaw.com

Attorney for Appellant

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I. <u>There Is Sufficient Evidence from Which A Reasonable Jury Could Conclude That Respondent Voluntarily Assumed a Duty to Protect the Davenports and Failed to Exercise Reasonable Care and James and Faye Davenport Were Harmed as A Result of Their Reliance Upon the Officer's Instructions</u>

The parties to this appeal agree that the voluntary assumed duty rule governs this case. Under this common law rule, a person is liable for injury resulting if his failure to exercise reasonable care increases the risk of harm or if the harm is suffered because of the other's reliance upon the undertaking. Respondent's Brief, p. 6; *Johnson v. Robert E. Lee Acad., Inc.,* 737 S.E.2d 512, 513–14 (S.C. App. 2012); *Russell v. City of Columbia,* 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). The parties however disagree as to whether the actions of the Town of Iva police officers increased the risk of harm to James and Faye Davenport and whether James or Faye Davenport were injured as a result of their reliance on the officer's actions.

There is sufficient evidence of reliance to create a jury question. Faye Davenport testified that she did just as Officer Richey instructed. Faye and James stayed in their home and locked the doors. Tr. 201:20-23 She was asked, "Did Officer Richey instruct you to do something you did not do?" Faye responded "No." Tr. 202:4-8. Faye Davenport also testified that she understood that the police officers planned to keep a watch out for Robert. Tr. 201:16-19 The Davenports were satisfied that they would be safe staying in their home with the doors locked as instructed by Officer Richey, while the patrolmen were on the look-out for Robert. So, that is exactly what they did. James Davenport went to lie down in the bedroom to rest, as did Faye Davenport. Tr. 165:19-25; 166:1-11; 192:20-25; 197:1-16; 201:10-25; 202:1-9.

With regard to increased risk, Respondent asserts that there is no evidence that the police officer's actions increased the risk that the Davenport's son Robert would travel to Iva and attack James and Faye. Respondent's argument misses the point. Robert planned to come to Iva and harm

James and Faye all along. The pertinent question is whether Officer's Richey's instructions to James and Faye to stay in their home increased the risk of injury to James and Faye.

A reasonable jury could conclude that Officer Richey's instruction for Faye and James Davenport to stay in their residence while the police officers made frequent patrols of their residence actually increased their risk of injury because the planned patrols were never implemented. Here, Officer Richey admitted that the prudent course of action was to increase security patrols around the Davenport residence. Although Officer Richey claims that he instructed Lt. Vaughn to do just that, the jury could reasonably conclude that this was not done.

Lt. Vaughn was unable to testify that he passed by the Davenport residence more than once, just before receiving the 911 dispatch call. Faye Davenport testified that she never heard or saw a patrol car pass by her residence after Officer Richey responded to her initial call. She further testified that had a patrol car driven by her home, she would have noticed. Tr. 166: 12-25. Furthermore, Lt. Vaughn simply rode in front of the Davenport residence and did not turn onto the side street where he could have inspected the Davenport's side door and rear of their property. A jury could reasonably conclude that Lt. Vaughn never conducted a safety patrol of the Davenport's residence and that this failure increased the risk of harm to Faye and James, who followed Officer Richey's instructions and stayed in their residence.

Lastly, a reasonable jury could find that the police officers were negligent by instructing the Davenports to stay in their residence without conducting safety patrols as planned by Officer Richey. Respondent asserts that the applicable standard of care is gross negligence, not simply negligence. However, the South Carolina Tort Claims Act provides that the "State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances..." S.C. Code 15-78-40. The

standard of care applicable to private individuals who are liable for a voluntary undertaking is reasonable care, not gross negligence. *Johnson v. Robert E. Lee Acad., Inc.*, 737 S.E.2d 512, 513–14 (S.C. App. 2012); *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Moreover, there is sufficient evidence to support a finding of a gross negligence under these circumstances. See, *Jinks v. Richland County*, 585 S.E.2d 281, 283 (S.C. 2003)(Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do... It is the failure to exercise slight care...Gross negligence has also been defined as a relative term and means the absence of care that is necessary under the circumstances)

II. The Town of Iva Is Not Immune from Liability for the Negligence and Gross Negligence of Its Police Officers

Respondent argues that four (4) exceptions to the waiver of sovereign immunity shield it from liability, S.C. Code 15-78-60(4), (5), (20) and (25). None of these exceptions apply.

S.C. Code 15-78-60(4)

Section (4) provides that the governmental entity is not liable for the enforcement or failure to enforce any law. Faye Davenport's claim is not premised upon the enforcement or failure to enforce any law. Rather, her claim is based upon the common law duty that arises when someone affirmatively undertakes to act as recognized in *Russell v. City of Columbia.*

S.C. Code 15-78-60(5)

Section (5) is the discretionary immunity exception. To sustain immunity under this exception, the governmental entity must show that when faced with alternatives, it weighed competing considerations and made a conscious choice, and that it used acceptable professional standards to make that choice. Id. This standard is inherently factual. *Clark v. South Carolina Dept. of Public Safety*, 353 S.C. 291, 304, 578 S.E.2d 16, 22 (Ct. App. 2002). Mere room for discretion

on the part of the entity is not sufficient to invoke the discretionary immunity provision. *Sabb v. South Carolina State University,* 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002).

In *Clark*, the Court of Appeals upheld the trial court's refusal to grant a directed verdict on the basis of S.C. Code Ann. § 15-78-60(5). 353 S.C. at 306, 578 S.E.2d at 23. A motorist was struck and killed by a suspect fleeing from a high-speed police pursuit. Id at 296, 578 S.E.2d at 18. The personal representative of the deceased motorist's estate brought suit against the city on the theory that the city's employees failed to properly supervise the pursuit and terminate it before the fatal accident. *Id.* At trial, plaintiff presented expert testimony that the officers involved in the chase did not "properly balance the competing considerations of capturing a fleeing suspect versus maintaining the public's safety and that they disregarded appropriate standards in failing to terminate the pursuit." Id at 305, 578 S.E.2d at 23. The government attempted to refute this evidence with an officer's testimony that he did weigh the competing concerns. *Id.* This created a question of fact that could not be resolved by the trial court and, as such, the trial court properly denied the government's motion for judgment as a matter of law based on discretionary immunity. *Id.* The Court also questioned whether discretionary immunity was applicable to the case at all. The Court explained that "[s]ome jurisdictions determine whether an act is discretionary by considering if it can best be described as planning or operational" and that "carrying out a general pursuit policy is operational in nature and not the type of discretionary act contemplated in the Tort Claims Act." Id. The Court held that "the fact that the employees had to make decisions or exercise some judgment in their activities is not determinative" and that to "read the exception that broadly would encompass virtually all traffic stops made by the Department's employees, as they all involve some degree of decision-making, but they are not the type of discretionary act envisioned under the Tort Claims Act." *Id.*

Here, Officer Richey's decision to instruct Faye and James Davenport to stay in their home and to implement safety patrols is not the type of discretionary act envisioned by the Tort Claims Act. Furthermore, a reasonable jury could conclude that Lt. Vaughn did not conduct any safety patrols of the Davenport residence. There was no evidence presented by Respondent that Lt. Vaughn weighed any alternative options and made a professional decision not to conduct such patrols.

S.C. Code 15-78-60(20)

Section (20) exempts a governmental entity from liability for an act or omission of a person other an employee including but not limited to the criminal actions of third persons. This section however does not "operate to exonerate [a governmental entity] of liability for its own conduct." *Padgett v. Colleton County*, 383 S.C. 431, 439, 679 S.E.2d 533, 538 (Ct. App. 2009) (quoting *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 247, 391 S.E.2d 546, 548 (1990)).

In *Martin*, an individual attending a concert at the Greenville Memorial Auditorium was injured when a third party threw a glass bottle from the balcony of the Auditorium. 301 S.C. at 243, 391 S.E.2d at 547. The Auditorium appealed the case to the Supreme Court of South Carolina, arguing that the trial judge erred in failing to dismiss the action under § 15-78-60(20) "because there was no evidence [the Auditorium's] employees caused respondent's injuries and because such injuries were caused by the criminal acts of a third person." *Id* at 246, 391 S.E.2d at 548. The Court upheld the trial court's refusal to dismiss the action, holding that the "complaint alleged [the Auditorium] and its employees were negligent in adequately securing and maintaining the premises during the concert and this negligence created a reasonably foreseeable risk of such third party conduct." *Id.* Further, because the "complaint did not allege [the Auditorium] was liable

because of the criminal act of a third party," it would follow that "[s]ection 15-78-60(20) would not operate to exonerate [the Auditorium] for its own conduct." *Id.*

As in *Martin*, Appellant does not allege that the Respondent is liable because of the criminal act of a third party. Rather, Appellant's claim is premised upon the negligent acts of the Respondent's employees upon which James and Fay Davenport relied and which increased the risk of harm to them. S.C. Code Ann. § 15-78-60(25)

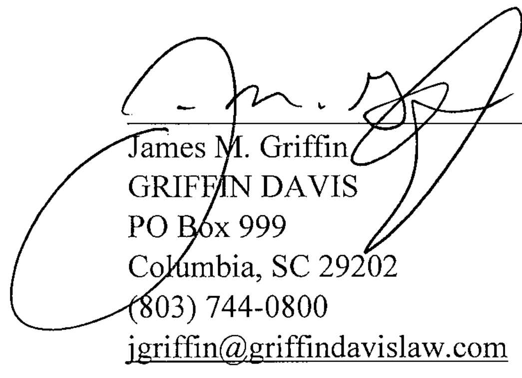
S.C. Code 15-78-60 (25)

Lastly, subsection (25) provides that a governmental entity is not liable for "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." This provision simply does not apply to the facts of the case at bar. Neither Appellant, her husband, nor her attacker can be defined as "students, patients, prisoners, inmates, or clients of any governmental entity" at the time of the events giving rise to the cause of action. As such, § 15-78-60(25) should not bar Appellant's action.

CONCLUSION

For the reasons set forth above, Appellant Faye Davenport respectfully requests that this Court reverse the ruling of the lower court directing a verdict against her and for the Town of Ivan and remand this case for a new trial.

Respectfully Submitted.



James M. Griffin
GRIFFIN DAVIS
PO Box 999
Columbia, SC 29202
(803) 744-0800
jgriffin@griffindavislaw.com

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v.

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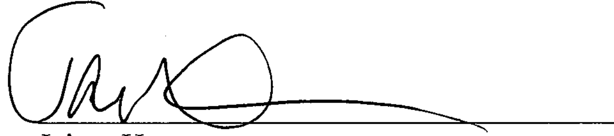
PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Griffin Davis LLC, attorneys for the Appellant, do hereby certify that I have served a copy of the foregoing **Initial Reply Brief of Appellant and Designation of Matter**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Mary C. McCormac
P.O. Box 1535
Clemson, SC 29633



Jaime Harmon

Columbia, South Carolina
October___/___, 2018

GRIFFIN DAVIS

JAIME HARMON

1116 Blanding Street / PO Box 999 (29202)
Columbia, SC 29201

jharmon@griffindavislaw.com
803 744 0800 o | 803 744 0805 F

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<u>VIA HAND DELIVERY</u>
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Fayetta Sherida Davenport, individually and on behalf of the Estate of James Davenport v. Town of Iva, S.C***
Case No.: 2014-CP-04-01469
Appellant Case No.: 2017-002612

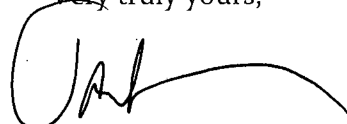
Dear Ms. Abbott Kitchings:

Enclosed please find the original and one copy of the Initial Reply Brief of Appellant. Please file these documents and return the clocked in copy to the courier.

If you have any questions, please do not hesitate to contact this office.

With best regards, I am

Very truly yours,



Jaime Harmon
Assistant to James M. Griffin

cc: Mary C. McCormac (Via Electronic and U.S. Mail)