THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
NOV 21 2018
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Cordell J. Maddox, Jr., Circuit Court Judge

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

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

v.

Town of Iva, South Carolina, ... Respondent.

FINAL BRIEF OF RESPONDENT

Mary C. McCormac
Attorney at Law, LLC
Post Office Box 1535
Clemson, South Carolina 29633-1535
(864) 654-9942
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other authorities

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly direct a verdict when, taking the facts and all reasonable inferences in the light most favorable to Appellant, it found that Appellant had not established either a voluntary undertaking or a special relationship creating a duty of care beyond that owed to the general public?

2. Even had Appellant established a duty of care beyond that owed to the general public, was the Town shielded from liability by the exceptions to the waiver of sovereign immunity contained in the Tort Claims Act?

STATEMENT OF THE CASE

After Appellant's son murdered his stepfather and attacked Appellant, Appellant filed suit against the Town of Iva, alleging negligence and gross negligence (R. pp. 5-10). In response to her Complaint, the Town filed a motion to dismiss/motion for summary judgment on July 30, 2015, which was denied by the circuit court on September 22, 2015. Subsequently, Appellant's son was convicted of murder, attempted murder, and several other related charges in August 2016. The parties participated in and completed discovery, and the present case came to trial beginning November 27, 2017. At the close of Appellant's case, the trial court directed a verdict. Appellant filed a Notice of Appeal on December 27, 2017.

STANDARD OF REVIEW

When reviewing a directed verdict, the evidence and all reasonable inferences are to be reviewed in the light most favorable to the nonmoving party. Hurd v. Williamsburg Cty., 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005). An appellate court should reverse a trial court's decision to direct a verdict only if there is no evidence to support the ruling or when the ruling is controlled by an error of law. Repko v. County of Georgetown, S.C. Op. No. 27837 (S.C. Sup. Ct. filed August 29, 2018) (Davis Adv. Sh. No. 35); Law

v. S.C. Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006); McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006).

FACTS

Appellant's adult son has a long history of drug abuse, violence, and criminal conduct (R. p. 291, lines 1-3), and has made numerous threats of violence to family members and friends over many decades (R. p. 276, lines 1-16; p. 275, lines 12-21). In 1981, the son slapped Appellant with an open hand (R. p. 275, line 25 – p. 277, line 1), and burned down her house (R. p. 244, lines 17-22); he also burned down his brother's house (R. p. 275, lines 6-7); and, in 2001, he stabbed Appellant's husband (R. p. 246, lines 17-25; p. 154, lines 1-2). However, despite continued threats, the son had not been physically violent toward Appellant since at least 1981 (R. p. 276, lines 17-25 – p. 277, lines 1-2). And, he had not been physically violent toward Appellant's husband since 2001 (R. p. 277, lines 5-10).

On and about July 15, 2012, Appellant's son called and left numerous telephone messages (R. p. 253, lines 4-8). At least some of the messages threatened violence and implied that the son was going to kill someone in Iva (R. p. 200, lines 3-14; p. 254, line 25 – p. 255, lines 1-7). Because the son's threats seemed angrier than usual, Appellant called 911 (R. p. 254, lines 6-8). An Iva police officer responded (R. p. 254, lines 21-22). He talked with Appellant and her husband, and listened to Appellant's concerns (R. p. 279, lines 10-12). The officer also listened to the phone messages (R. p. 279, lines 13-14). Appellant and her husband did not ask that her son be charged or prosecuted, but asked that the officer do whatever would keep the son from coming to Iva. The officer then called Appellant's son (R. p. 279, lines 15-16), identified himself as a police officer

(R. p. 279, lines 20-21), and told the son that a warrant would be issued against him for harassing phone calls should he continue calling (R. p. 279, lines 23-25 – p. 280, lines 1-6). The officer told the son not to call Appellant again and not to come to her house (R. p. 280, lines 9-14). Finally, he told the son that if he came to Iva, he would be "locked up" (R. p. 280, lines 15-17).

Before leaving Appellant's home, the officer told her and her husband to lock the doors, and to hide and call 911 immediately if the son came to the house (R. p. 256, lines 21-22). The officer also told Appellant to call 911 if she had any further calls from her son (R. p. 158, Request for Admission No. 3). The officer asked Appellant if she was "okay" with his instructions, and Appellant indicated that she agreed (R. p. 159, Request for Admission Nos. 4, 5).

After the officer left, the son called again (R. p. 281, lines 16-25). In his message, the son was contrite, and made statements that Appellant interpreted to mean he was considering suicide (R. p. 282, lines 1-25 – p. 283, lines 1-15). However, Appellant did not call 911, despite having been instructed to do so by the police officer, because "[her son] said he was sorry" (R. p. 282, lines 3-5). After listening to the message, Appellant did not think her son was going to come to her house that night. She thought he had settled down and was not going to bother them anymore (R. p. 282, lines 13-18). Similarly, Appellant's husband did not believe that the suicide threat was serious – he believed the son was up to his usual tricks (R. p. 282, lines 19-25 – p. 283, lines 1-22).

Several hours later, in response to a call from a neighbor, 911 dispatched the Iva police to a possible burglary in progress at Appellant's house. An officer arrived at Appellant's home less than a minute after receiving the dispatch (R. p. 228, lines 22-25),

and found that the son had gone to the house, murdered Appellant's husband, and stabbed Appellant. However, the officer's arrival interrupted the crime, and he arrested the son in Appellant's yard before the son could kill his mother (R. p. 230, lines 16-18; p. 263, lines 14-25).

ARGUMENTS

A. THE EVIDENCE PRESENTED AT TRIAL DID NOT ESTABLISH A DUTY OF CARE TO APPELLANT OR HER HUSBAND BEYOND THAT OWED TO THE GENERAL PUBLIC.

In a negligence action, the trial court is tasked with determining whether a duty of care exists. Repko v. County of Georgetown, Op. No. 27837 (S.C. Sup. Ct. filed August 29, 2018) (Davis Adv. Sh. No. 35 at 4). Whether there was a duty of care is a question of law for the trial court to determine. Doe v. The Citadel, Op. No. 5504 (Ct. App. filed September 27, 2017) (Davis Adv. Sh. No. 37 at 4-5) (citing Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994)). "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." Repko v. County of Georgetown, Op. No. 27837 (S.C. Sup. Ct. filed August 29, 2018) (Davis Adv. Sh. No. 35 at 4) (quoting, Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999)).

A legal duty of care may be created by statute, contract, status, property interest, or other special circumstance. Arthurs ex rel. Munn v. Aiken County, 346 S.C. 97, 103, 551 S.E.2d 579 (2001). With respect to duties imposed by statutes, South Carolina's "public duty rule" provides that "a statute prescribing the duties of public office does not, without more, impose on the person holding that office a duty of care towards individual members of the public in the performance of those duties." Vaughan v. Town of Lyman,

370 S.C. 436, 441, 635 S.E.2d 631, 34 (2006); Arthurs ex rel. Munn v. Aiken County, 346 S.C. 97, 551 S.E.2d 579 (2001) (directed verdict affirmed). Thus, the public duty rule "insulates public officials, employees, and governmental entities from liability for the negligent performance of their duties by negating the existence of a duty towards" an individual. Arthurs, 346 S.C. at 104.

In the instant case, Appellant does not rely upon a statute for the creation of a duty (Appellant's Initial Brief, at 7). When a plaintiff does not ground duty of care claims in statutory law, but instead argues that there was a common law duty of care, the plaintiff must establish that there were "special circumstances" that created a duty beyond that owed to the general public. Edwards v. Lexington Cty. Sheriff Dept., 386 S.C. 285, 688 S.E.2d 125, 128 (2010); Arthurs, 551 S.E.2d at 585 (no evidence existed to show ex-girlfriend used as bait by deputies).

As a rule, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). The South Carolina Supreme Court has set forth five specific exceptions to this rule. *Id.*; see also, Edwards, 688 S.E.2d at 128. Appellant has attempted to assert two of the exceptions: voluntarily undertaking of a duty; and special relationship to the victim.

1. The Town Did Not Voluntarily Undertake a Duty of Care Beyond That Owed to the General Public.

Appellant argued to the trial court that the Town voluntarily undertook a duty of care "to provide protection to [Appellant and her husband] from the threat posed by [her son]" (R. p. 144). The "voluntary undertaking" alleged by Appellant concerned the "pass-along" request made at shift change by the responding officer asking that the next officer

"keep an eye" on Appellant's home via more frequent "ride-bys" (R. pp. 144-145). Appellant alleged that "the plan of increased patrols was not implemented." However, the uncontroverted evidence at trial indicated that at least one ride-by took place, thereby enabling the officer to respond to the second 911 call in approximately 48 seconds.

South Carolina appellate courts have ruled that the Restatement of Torts establishes the recognition of a voluntarily undertaken duty, but that liability for failure to exercise reasonable care may only result if the failure to exercise due care actually increases the risk of harm or if the harm is suffered because of the victim's reliance on the undertaking. Madison ex rel. Bryant v. Babcock Center, 371 S.C. 123, 638 S.E.2d 650, 657 (2006); Doe v. The Citadel, Op. No. 5504 (Ct. App. September 27, 2017) (Davis Adv. Sh. No. 37 at 5-6); Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting RESTATEMENT (SECOND) OF TORTS §323 (AM. LAW INST. 1965)).

a. No evidence indicates that the Town *increased* the risk of harm from Appellant's son.

Taking the evidence in the light most favorable to Appellant, neither the evidence, nor any reasonable inference that can be drawn from the evidence, established that an alleged failure to conduct increased patrols actually increased the risk that Appellant's son would come to Iva and hurt Appellant and her husband, or that it had any effect whatsoever on the son's actions. No evidence was presented that the son knew about any plan to increase patrols or anything about the frequency of such patrols. Basically, Appellant is arguing not that the pass-along and subsequent ride-bys or lack thereof increased the risk that the son might come to Iva and hurt Appellant and her husband, but that the police officer on duty did not detect and prevent the son from his intended course of action.

This is clearly not the same thing as increasing the risk of harm from the son. The only reasonable inference that can be drawn from the evidence is that whatever the police did do allowed an officer to respond within in 48 seconds to the dispatch of a 911 call reporting a possible burglary in progress at Appellant's home.

b. Appellant could not have relied on more frequent ride-bys, because she did not know about them.

In the present case, Appellant did not know about the "pass-along" request for increased patrols until after she filed her lawsuit; thus, she cannot show that she relied upon it. To try to rectify this problem, Appellant now argues that she and her husband relied on the officer's previous actions while he was at their home to conclude "that they would be safe staying in their home with the doors locked" as he instructed (Appellant's Initial Brief, at 11). However, the officer made no promise or guarantee that Appellant and her husband would be safe (R. p. 8, ¶ 15; p. 17; p. 21; p. 256, lines 16-24; p. 280, lines 1-16). Furthermore, reliance on the officer's instructions was not one of the reasons Appellant gave at trial for staying at home. Appellant testified that she and her husband chose to remain at their home instead of going elsewhere that night because they felt safer at their home than anywhere else and because they preferred to stay home (R. p. 285, lines 9-22; p. 293, lines 10-25 – p 294, lines 1-2) ("[W]e liked our house."; "[W]e're homebodies."; "Yeah, we preferred to stay home.") And, further contradicting Appellant's current argument, Appellant testified at trial that, after listening to the son's subsequent phone message, she and her husband did not think her son was going to come to their house that night, and thought he had settled down and was not going to bother them anymore (R. p. 282, lines 13-18; p. 283, lines 17-25). After the son's phone call, she and her husband then went about their normal activities – napping, fixing a sandwich,

looking at photos, watching TV, sweeping, and tending to the dog (R. p. 283, lines 17-25 – p. 284, lines 1-25). Appellant cannot manufacture a legitimate issue of fact by contradicting her own sworn testimony. And, in any event, Appellant should not be allowed to show reliance on the officer's instructions when she did not follow those instructions by calling 911 when her son called and left another phone message (R. p. 256, lines 21-22; R. pp. 158-160, Requests for Admission Nos. 3, 4, 9, 10, 11, 12).

2. No Special Relationship Existed between the Town and Appellant or her Husband.

Appellant also asserts that the Town had a "special relationship" with her and her husband. She claims that knowledge of her son's violent tendencies, the phone message threats, and Officer Richey's phone conversation with the son created a "duty of care due to special circumstances" (Appellant's Initial Brief, at 11-12). Appellant also notes that Defendant had previously filed a no-trespass notice against the son at her request, and had received the 911 call.

However, the cases on which Appellant relies do not support her conclusion. For example, in Edwards v. Lexington Cty Sheriff's Dept., the South Carolina Supreme Court found a "special relationship" where the respondents were aware of the defendant's violent tendencies, but also created the dangerous situation. 688 S.E.2d 125, 386 S.C. 285 (2010). Respondents controlled the premises (a small magistrate's office), and strongly encouraged the victim to attend the bond revocation hearing where the physically abusive ex-boyfriend would be present, but failed to provide any security. In the present case, the Town did not create the risk or control the premises. Appellant and her husband were located in their own home in an environment under their sole control, by virtue of their own choice. As Plaintiff testified, she and her husband chose to remain at their home

instead of accepting an offer to go to a relative's home that night because they felt safer at their home than anywhere else and because they preferred to stay home (R. p. 285, lines 9-22; p. 293, lines 10-25 – p. 294, lines 1-2). Appellant's reliance is similarly misplaced on the other cases she cites.

For example, in Williams v. Mayor & City Council of Baltimore, et al., the Court of Appeals of Maryland noted specifically that "absent a 'special relationship' between police and victim, liability for failure to protect an individual citizen against injury caused by another citizen does not lie against police officers." 753 A.2d 41, 64, 359 Md. 101 (2000). Because an officer took affirmative actions and made specific promises of protection that were reasonably relied upon by the victims, the court found that he might have created a special relationship. 753 A.2d at 47, 63. In contrast, the Town made no promises or guarantees of protection to Appellant or her husband.

In an earlier decision by the Court of Appeals of Maryland, that court found that there was no special relationship between a police officer who detected a drunk driver's intoxicated condition and a person injured later that night by the driver. Ashburn v. Anne Arundel County, 306 Md. 617, 510 A.2d 1085 (1985). The court noted that there had never been a common law duty owed to an individual with respect to the police officer's discretionary power to decide whether to make an arrest, which it recognized as "critical to a law enforcement officer's ability to carry out his duties..." 306 Md. At. 633 (citations omitted).

In Morgan v. District of Columbia, the District of Columbia Court of Appeals affirmed a judgment notwithstanding the verdict where an officer's wife had reported her husband's physical abuse to a police captain, stated that she was afraid her husband was

going to kill her, and asked the captain to "just make [her husband] stay away" from her. 468 A.2d 1306 (1983). She declined to file charges, and the captain brought in the officer and his supervisor for a talk. 468 A.2d at 1309. The supervisor stated that he had received several complaints from the wife, but she had denied that a gun was ever previously involved. After the talk, the husband moved out of the marital home; however, three months later, he went to the wife's home, choked her into unconsciousness, took their two children, and left, threatening to kill her if she objected. When he was located, the husband shot the wife, his son, a lieutenant, and another person. *Id.* In considering the case, the court cited United States Supreme Court cases ruling that "law enforcement officials, and consequently, state governments generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct." 468 A.2d at 1310 (string citation omitted). Further, the court noted that "a special relationship does not come into being simply because an individual requests assistance from the police." 468 A.2d at 1313 (citing, Hartzler v. City of San Jose, 46 Cal App.3d 6, 120 Cal. Rptr, 5 (1975) (no duty to protect victim who informs police of imminent danger and requests help)). "Otherwise, a police officer's general duty to the public would inevitably narrow to a special duty to protect each and every person" who makes a report and asks for help.

The other "special relationship" cases cited by Appellant also offer no support. See, e.g., Williams v. State, 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137 (1983) (the mere fact that a highway patrolman comes to the aid of an injured or stranded motorist does not create a special relationship with an affirmative duty to secure information or preserve evidence for civil litigation between the motorist and third parties); Morris v. Musser, 478 A.2d 937, 84 Pa.Cmwlth 170 (Pa.Commw. Ct. 1984) (special relationship exception

to general public duty limited to: (1) protection of persons imperiled because they have aided law enforcement as informers or witnesses; or, (2) situations where the police of expressly promised to protect specific people from precise harm); Chambers-Castanes v. King County, 100 Wash.2d 275, 669 P.2d 451, 458 (1983) ("special relationship" requires privity that sets the victim apart from the general public and must be accompanied by explicit assurances of protection that give rise to reliance on the part of the victim – dispatchers repeatedly assured victims help was on the way, but help was not actually sent until over an hour later).

The undisputed evidence showed that the Town had no special relationship with Appellant or her husband. The Town made no promises or guarantees of protection or safety, never promised any future action(s), never used them as informers or witnesses, never controlled the environment or premises in which the attack took place, and never had any type of custody of Appellant and her husband. In other words, even taken in the light most favorable to the Appellant, the evidence showed that the relationship between the Town and Appellant was exactly the same as that with every other member of the general public – if Appellant called 911, the Town would respond. The fact of the nature of this relationship was demonstrated by the officer's express instruction to Appellant to call 911 if the son called or contacted her again.

Taking Appellant's evidence in the light most favorable to her, the sole inference that can be drawn is that Appellant cannot and did not establish a duty of care beyond that owed to the public at large, either via voluntary undertaking or special relationship. The officer responded to a 911 call, did not find the son on site, applied his judgment and

training to the situation at hand, and returned to his patrol duties, without having made any promises or guarantees of personal protection.

B. THE TOWN WAS SHIELDED FROM LIABILITY BY THE EXCEPTIONS TO THE WAIVER OF SOVEREIGN IMMUNITY CONTAINED IN THE TORT CLAIMS ACT.

The South Carolina Torts Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. Park v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005); S.C. Code Ann. §15-78-20(a). When enacting the Tort Claims Act, the General Assembly preserved sovereign immunity in certain situations by listing specific exceptions, stating that governmental entities are not liable for losses resulting from, *inter alia,* the following affirmative defenses pled by the Town in its Answer/Amended Answer in this case:

> (4) 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 policies;
>
> (5) 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;
>
> (20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons; and,
>
> (25) 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;

S.C. Code Ann. §15-78-60. The listed exceptions under the Act are to be construed liberally in favor of limiting the liability of the State and its political subdivisions. S.C.

Code Ann. §15-78-20(f); Rice v. Sch. Dist. of Fairfield, 317 S.C. 87, 452 S.E.2d 352 (Ct. App. 1994).

1. The Town is Immune from Liability Under Subsections 15-78-60(4), (5), and (20) of the Tort Claims Act.

Subsection (4) sets forth an exception to the waiver of liability for actions related to the "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law." Appellant has repeated argued that the Town failed to stop her son from coming to Iva by obtaining a warrant for his arrest (See, e.g., R. p. 146). To obtain a warrant would require compliance with applicable law, and an arrest would constitute enforcement of the law.

Subsection (5) provides an exception for 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." "A finding of immunity under the Act 'is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice, using accepted professional standards." Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557 (Ct. App 2004) (quoting, Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999). Appellant herself introduced the affidavit and testimony of the officer, in which he specifically described the choices he considered based on his professional training (Richey Affidavit; Tr. 102: 7-25; 103: 1-25). See, Brown v. Brown, 360 S.C. 7, 598 S.E.2d 728 (Ct. App. 2004) (officer immune where he was faced with choice of using a DUI citation, having the car towed and requiring passengers to find a ride, or selecting another driver after determining whether that driver was fit to drive).

Subsection (20) provides an exception for "an act or omission of a person other than an employee including but not limited to the criminal actions of third persons." It cannot be denied that the son alone inflicted the harm upon Appellant and her husband (R. p. 262, lines 6-20; R. p. 263, lines 16-19).

The evidence and arguments advanced by Appellant bring the case squarely within these three exceptions to the Tort Claims Act's waiver of sovereign immunity. It appears clear that, although the Town pled (R. pp. 47-54) and argued immunity at the summary judgment motion hearing (R. pp. 77-80), the parties and perhaps the trial court were mistakenly operating under the assumption that existing case law provided that merely *pleading* an exception containing the gross negligence standard required application of that standard to all other exceptions asserted. However, the South Carolina Supreme Court has recently ruled that merely pleading an exception containing a gross negligence standard does not mean that the gross negligence standard should be read into all other applicable exceptions to the waiver of immunity. Instead, 'the immunity provision containing the gross negligence standard must actually apply to the case before it can be read into another immunity provision. Repko v. County of Georgetown, Op. No. 27837 (S.C. Sup. Ct. filed August 29, 2018) (Davis Adv. Sh. No. 35 at 8).

Subsection (25) provides an exception for the exercise of a "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." By its own terms, this subsection requires a showing of a "responsibility or duty." Appellant provided no evidence of any responsibility or duty that applied to the officers with which they did not

comply. Appellant has offered examples of things she feels that they could have done, but has provided no evidence of any actual responsibility, duty, policy, procedure, assigned task, or professional standard that applied to the Town's actions. Thus, the section should not be applied to the facts of this case.

2. Even Had Appellant Established a Duty of Care Beyond that Owed to the General Public and the Facts Established that a Gross Negligence Standard Applied, the Uncontroverted Evidence Showed the Town Was Not Grossly Negligent.

Once a governmental entity has asserted an exceptions or exceptions to the Tort Claims Act's waiver of immunity and at least one exception containing a gross negligence standard applies to the facts of the case, the Appellant must present evidence that the governmental entity waived its immunity via gross negligence. Repko v. County of Georgetown, Op. No. 27837 (S.C. Sup. Ct. filed August 29, 2018) (Davis Adv. Sh. No. 35 at 10-11); Stewart v. Richland Memorial Hosp., 350 S.C. 589, 595, 567 S.E.2d 510 (Ct. App. 2002). While gross negligence can involve issues of law and fact, when the evidence supports but one reasonable inference, the question is solely a matter of law to be decided by the court. Etheredge v. Richland County Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) (driver trampled on bus during fight, but summary judgment proper where district showed it exercised slight care).

A showing of gross negligence requires more than a showing of ordinary negligence. Gross negligence is the "intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 274 S.E.2d 296, 298 (1988). This connotes a failure to exercise even a slight degree of care. Wilson v. Etheredge, 214 S.C. 396, 400, 52 S.E.2d 812, 814 (1949). Conversely, there can be no gross negligence where slight care was exercised. Clyburn

v. Sumter County Sch. Dist. #12, 317 S.C. 50, 451 S.E.2d 885 (1994) (the only reasonable inference was that slight care was shown where district called students to office, admonished them for behavior, tried to reach parents by phone, and warned of potential criminal charges). See also, Kimsey v. City of Myrtle Beach, 109 F.3d 194 (1997) (summary judgment proper on gross negligence claim in slip and fall case, where City showed it exercised at least slight care by inspecting the stairs once a week).

In the current case, viewing the evidence and all reasonable inferences in the light most favorable to Appellant, the evidence presented at trial in the present case is replete with actions taken by Defendant, and is capable of only a single inference:

1. Defendant responded to every 911 call made by Appellant (R. p. 277, lines 19-21);

2. Defendant responded quickly to each 911 call from and/or regarding Appellant and her husband (R. p. 168, lines 12- 23; p. 197, lines 13-23; p. 228, lines 22-25);

3. Defendant charged and prosecuted Appellant's son whenever Appellant and/or her husband requested Defendant to do so (R. p. 277, lines 22-25 – p. 278, lines 1-5);

4. Defendant prepared and filed a no trespass notice against the son at Appellant's request (R. p. 251, lines 14-18; R. p. 278, lines 9-13);

5. Defendant also entered a "be on the lookout" (BOLO) for the son in the Anderson County system following a prior incident between Appellant and her son (R. p. 278, lines 14-20);

6. Defendant warned Appellant and her husband that her son was dangerous and that they should be careful (R. p. 251, lines 19-22);

7. On July 15, 2012, Defendant responded to a 911 call from Appellant (R. p. 254, lines 16-22);

8. The responding officer listened to Appellant's and her husband's concerns about threatening phone calls they had received from Appellant's son (R. p. 279, lines 10-12);

9. The officer listened to recordings of the threatening phone calls (R. p. 254, lines 21-22; p. 279, lines 13-14);

10. The officer then called the son, and identified himself as a police officer (R. p. 199, lines 1-2; p. 279, lines 15-22);

11. Although the son pretended to be his own deceased brother, the officer asked him to tell the son to stop calling Appellant and her husband (R. p. 199, lines 2-4; p. 280, lines 9-11);

12. The officer told the son that if he did not stop calling, he would seek warrants on the son (R. p. 279, lines 23-25 – p. 280, lines 1-5);

13. The officer told the son not to come back to Appellant's house (R. p. 199, lines 4-6; p. 280, lines 12-14);

14. The officer told the son not to come to Iva or he would be "locked up" (R. p. 280, lines 15-17);

15. After speaking to the son, the officer asked Appellant and her husband to call 911 if the son came to their house or called again (R. p. 202, lines 6-19; p. 158, Request for Admission No. 3);

16. He cautioned them to lock their doors, hide, and call him or 911 if the son came to their house (R. p. 256, lines 21-22);

17. Before he left, the officer asked Appellant if she was "okay" with his actions, and she indicated her agreement (R. p. 159, Requests for Admission Nos. 4, 5);

18. Defendant responded to a subsequent 911 call later that day regarding Appellant and her husband in less than a minute (R. p. 155; p. 228, lines 22-25);

19. The responding officer arrested the son before the son could leave Appellant's yard (R. p. 230, lines 13-18); and,

20. The officer saved Appellant's life by interrupting the son at the scene of the crime (R. p. 263, lines 14-19, 23-25 – p. 264, lines 1-9).

The uncontroverted evidence also established that the officer prepared an incident report (R. p. 153) documenting the call and his actions, and that he made a "pass-along" to the next officer at shift change, in which he asked the officer to make more frequent "ride-bys" in order to keep an eye on Appellant's home (R. p. 178, lines 14-25 – p. 179, lines

1-2; p. 181, lines 18-25 – p. 182, lines 1-16; p. 203, lines 3-14; p. 224, lines 15-25 – p. 225, lines 1-4). Although Appellant presented no evidence other than Appellant's personal belief that these actions did not, in fact, take place, for purposes of the directed verdict motion, the Town did not include them in the list of actions constituting at least slight care (R. p. 318, lines 20-25 - p. 319, lines 1-10).

Finally, Appellant and one of her witnesses testified that Defendant's Police Chief came to her after the son was arrested and said to her something along the lines of, "Faye, we have let you down" or words to the effect that he had let her down (R. p. 265, lines 12-13; p. 300, lines 4-7). Taking this testimony as fact and viewing it in the light most favorable to Appellant, this statement does not negate that the Town did, in fact, take all of the actions listed above.

Ultimately, the sole inference that can be drawn from the evidence in the case is that the Defendant exercised at least "slight care" toward Appellant and her husband. The fact that more might have been done does not negate a finding that at least slight care was taken. Pack III v. Associated Marine Ins. Inc., 362 S.C. 239, 246, 608 S.E2d 134 (Ct. App. 2004). Similarly, a mistake alone is not sufficient evidence to conclude that a defendant failed to exercise slight care. See, Richland County v, Carolina Chloride, Inc., 394 S.C. 154, 714 S.E.2d 869 (2001) (directed verdict appropriate on gross negligence claim where employee gave out incorrect zoning information in error).

CONCLUSION

For the reasons stated above, the Town of Iva respectfully requests that the Court affirm the judgment of the circuit court.

Respectfully submitted,

November 20, 2018

Mary C. McCormac
Attorney at Law, LLC
S.C. Bar No. 11267
Post Office Box 1535
Clemson, South Carolina 29633-1535
(864) 654-9942
marycmcc@aol.com

RECEIVED
NOV 21 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Cordell J. Maddox, Jr., Circuit Court Judge

Case No. 2014-CP-04-01469

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

v.

Town of Iva, South Carolina, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated this the 20th day of November 2018.

Mary C. McCormac
Attorney at Law, LLC
Post Office Box 1535
Clemson, South Carolina 29633-1535
(864) 654-9942; (fax) (864) 654-9781
Attorney for Respondent