THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr., Judge
Lee County Court of Common Pleas

Case No. 2014-CP-31-00100

Levy Bing, ... Appellant,

v.

South Carolina Department of Corrections, ... Respondent.

APPELANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN FINDING THERE WAS NO DUTY FOR THE DEPARTMENT OF CORRECTIONS TO PROTECT AN INMATE FROM A VIOLENT ASSAULT BY ANOTHER INMATE?

II. DID THE TRIAL COURT ERR IN FINDING THERE WAS NO SCINTILLA OF EVIDENCE THAT THE DEPARTMENT WAS GROSSLY NEGLIGENT?

III. DID THE TRIAL COURT ERR IN DISCOUNTING THE OPINIONS OF THE PLAINTIFF'S EXPERT AS CONCLUSORY?

STATEMENT OF THE CASE

This is a case under the South Carolina Tort Claims Act alleging that the South Carolina Department of Corrections (the "Department") was negligent and grossly negligent when it failed to protect an inmate, Levi Bing, from an assault that was perpetrated upon him by his temporary cellmate, Willis Dorsey. The original complaint case was filed on behalf of Mr. Bing against the Department and individual defendants in the Lee County Court of Common Pleas on September 29, 2011. The issues were joined on October 29, 2011 by the Department's answer and the individual defendants were dismissed by consent Order entered by the Honorable W. Jeffery Young on December 20, 2011. The original caption was Bing v. The South Carolina Department of Corrections, 2011-CP-03-00216. The case was stricken from the trial docket pursuant to Rule 40(j), SCRCP by Order of the Honorable George C. James, Jr. on March 22, 2013.

On March 22, 2014, the Honorable W. Jeffery Young entered an Order restoring the case to the active trial roster as Bing v. The South Carolina Department of Corrections, 2014-CP-03-00100. The Department filed a Motion for Summary Judgment on March 18, 2015. Shortly thereafter, the case was mediated to an impasse. The Department filed the Affidavit of its Expert Witness, Emmitt Sparkman, in support of its Motion for Summary Judgment on October 24, 2017.

Mr. Bing filed his Memorandum in Opposition to Summary Judgment and the Affdavit of its Expert Witness, James E. Aiken, on June 7, 2018. The Department's Memorandum in Support was filed the day of the hearing on June 8, 2018. The Department's motion was heard on June 8, 2018 by the Honorable George McFaddin. Judge McFaddin's Order granting

summary judgement to the Department on the basis that there was no material question of fact was filed on August 22, 2018.

Mr. Bing filed his Notice of Appeal on September 12, 2018.

STATEMENT OF FACTS

The Plaintiff brought this action for personal injury suffered by him while in the care and custody of the South Carolina Department of Corrections (hereinafter, "the Department"). The Plaintiff was injured during an assault that occurred inside of his cell and perpetrated by his temporary roommate, Willis Dorsey. The Plaintiff alleges that the Department was negligent and grossly negligent in failing to prevent the attack.

A. The Assault

In 2010, the Plaintiff, Levi Bing, was incarcerated at the Lee County Correctional Facility. The Lee County facility is operated by the South Carolina Department of Corrections.

On June 7, 2010, Mr. Bing was assaulted inside his locked cell by his temporary roommate, Willis Dorsey. [Bing p. 56]. Willis Dorsey began the assault by taking a hot pot that he had bought at the prison canteen, filling it with water and plugging it into an electrical outlet and heating the water to near boiling and flinging it onto the Plaintiff's face and upper body, all inside of a locked cell during a prisoner count. [Bing p. 58]. After stunning the Plaintiff with scalding water, Willis Dorsey then attacked the Plaintiff with a homemade shank inside the locked cell. [Bing p. 58-59].

After the attack had commenced, a guard outside of the cell ran to the door of the cell to investigate the commotion. [Bing p. 59]. Upon opening the door, the guard saw the Plaintiff inside the cell with skin peeled off his torso and neck. [Bing p. 59]. The guards secured Willis Dorsey and then instructed the Plaintiff to leave his cell and "jog to medical." [Bing p. 60].

Once at medical, the Plaintiff was briefly treated by the Lee County EMS. [Bing 60-61]. He was then moved to the parking lot of the prison where he was air lifted to the Stills Burn Center in Augusta, Georgia. [Bing p. 61]. There, he was surgically treated for partial thickness

burn wound that covered 22% of his total body surface and a burn in the cornea of his eye. [Ex. 1 – Discharge Summary]. He was released from the hospital on June 11, 2010 and returned to the Department of Corrections medical facility at Kirkland in Columbia. [Id.] As a result of the burns suffered by the Plaintiff, his skin and eye have been permanently damaged and scarred. [Bing pp. 23-24, 98].

After the incident, Dorsey was charged and found guilty before the Disciplinary Hearing Officer at Lee Correctional with Striking an Inmate With or Without a Weapon. [SCDC Investigative Report, February 1, 2011].

B. Lee County Correctional Facility

The Plaintiff was assigned to Lee Correctional Facility in 2005. [Bing p. 27]. Although he had numerous roommates through his time at Lee Correctional, he did not know inmate Willis Dorsey until they were placed into the same cell in May of 2010. [Bing pp. 38-41]. The Plaintiff was placed into this specific cell, which was on the bottom floor of the Darlington Unit, because he had recently had hernia surgery and was medically restricted from climbing stairs. [Bing pp. 43, 53]. Although the Plaintiff did not know why Willis Dorsey was placed in the same cell [Bing p. 41], Dorsey had been placed into the bottom floor cell for medical reasons as well. [Goodman p. 31-32].

The Plaintiff did not know Willis Dorsey and had no prior history with him. [Bing pp. 38-41]. Bing worked during the day, and was out of his cell and had little to no interaction with Willis Dorsey. [Bing, p. 40]. After Bing and Dorsey had been housed together for a short while, one of the corrections officers, Officer Santimaw, approached Bing to warn him about Dorsey. Officer Santimaw told Bing that he had smelled marijuana behind his cell door at a time when he knew Bing was working. [Bing, p. 40]. Officer Santimaw then advised Bing to request a

roommate change so Bing would not get in trouble if his room was raided and drugs were found. [Bing, p. 41].

Bing then requested a roommate change from Lieutenant Goodman shortly thereafter on the basis that his roommate was a "hot boy." [Goodman, p. 40]. A "hot boy" is an inmate who is involved in illegal activity or who was trouble. [Goodman, p. 40-41]. Bing's meeting with Lieutenant Goodman occurred in Lieutenant Goodman's office. [Goodman, p. 39]. The office had glass walls which afforded a view into the office from Dorsey's cell, making it obvious to Dorsey that Bing and Goodman were talking. [Goodman, p. 40].

Based upon the warning of Officer Santimaw, Bing did not want to be charged if his roommate was caught with something illegal.[1] [Bing, p. 42; Goodman Affidavit]. Bing was advised that his request was denied by SCDC (by Ms. Hickmon). She advised that Bing was not eligible to switch cellmates. [Bing, p. 44; Hickmon Affidavit].

Lieutenant Goodman testified that at this point he advised Bing that he could sign up for protective custody, but that Bing refused. [Goodman, p. 35]. When an inmate goes into protective custody, he is placed in lockup, in a cell by himself to protect him from exposure to the other inmates. [Goodman, p. 36]. However, in spite of allegedly offering protective custody to Bing, Goodman testified that he did not feel that Bing was unsafe after reporting Dorsey [Goodman, p. 36]. Goodman testified that he did nothing to independently look into whether Bing was unsafe in the cell with Dorsey [Goodman, p. 37]; that he did not look into Dorsey's administrative record in prison [Goodman, p. 41]; that he did not investigate why Dorsey might be "hot" [Id.]; that he did not alert the contraband team to search Dorsey's cell [Id.]; he did not review any classification materials regarding Bing or Dorsey (who had just recently been placed

[1]In a prison setting, if contraband is found inside of a cell and neither inmate admits ownership, then both inmates are charged with its possession. [Aiken, p. 60].

in the same cell for medical reasons) [Goodman, p. 31-32, 42-43]; he did not inspect Dorsey's cell himself or review his property inventory to determine if there might be a potential weapon in the cell [Goodman, p. 45]; and even if he did offer Bing the option of applying for protective custody (an assertion which Bing denies) [Bing, p. 74], Lieutenant Goodman failed to present the appropriate paperwork to document the offer and Bing's refusal. Instead, Lieutenant Goodman allowed an untrained inmate to determine if he thought he was safe or not. It is also fairly inferable that Lieutenant Goodman failed to communicate with his own fellow officers about the reason Dorsey was "hot" because it was Officer Santimaw who originally alerted Bing that he had smelled marijuana in Dorsey's cell.

About a week after Bing requested a cellmate change, during a routine count during the day, Bing and Dorsey were locked into their cell together when the assault occurred. [Bing p. 59-60].

C. SCDS's Gross Negligence

Regardless of the prison setting, SCDC owes a duty to those in its custody to maintain a safe environment. [Aiken, p. 63].

According to the Plaintiff's expert, Mr. James Aiken,[2] this assault on Mr. Bing was both foreseeable and with the exercise of even slight care, preventable. [Aiken Affidavit, ¶6]. First, Mr. Aiken opined that it was gross negligence on the part of the Department of Corrections to have issued Dorsey a hot pot that is capable of heating water to near scalding temperatures, to allow Dorsey to keep that hot pot inside of his cell and use it unsupervised where it could cause such an injury to Bing in a high security area at a high security prison like Lee Correctional.

[2] Mr. Aiken is a former warden at CCI [Aiken, p. 3] who has worked in corrections in South Carolina, Indiana and the United States Bureau of Prisons for more than thirty years who now serves as a consultant to the United States Department of Justice. He has trained and evaluated prison staff to just about every jurisdiction in the United States. [Aiken, pp. 15-30 for summary of his experience].

[Aiken, pp. 40-41, 53-54] [Aiken Affidavit, ¶17]. Mr. Aiken observed that based upon the record in this case, the hot pot that was used as a weapon and caused the injury was issued by the Department. [Aiken, pp 55-56] [Aiken Affidavit, ¶17]. The hot pot, which was capable of heating water to a sufficient temperature to cause second and third degree burns to a person, was allowed by the Department in Dorsey's cell where he would be locked in with Bing at certain parts of the day. [Aiken, p. 83, 90] [Aiken Affidavit, ¶20]. "[F]or this instrument to get in that cell with the lax of – lax of supervision, security, as well as the capability to inflict that type of injuries – injury, rather, is gross negligence." [Aiken, p. 85].

Second, as Mr. Aiken observed, an attack on Bing was foreseeable because of Bing's prior request for a roommate change due to Dorsey's smoking marijuana in the cell. [Aiken, p. 60] [Aiken Affidavit, ¶13]. Mr. Aiken testified that inside the prison system, when one inmate is perceived by others as complaining to the guards or reporting illegal behavior, they can become targets for abuse at the hands of other inmates. [Aiken, p. 61][Aiken Affidavit, ¶19 and n. 1]. When an inmate such as Bing asks to move cells because his roommate is engaged in illegal activity, "it's just not an inconvenience of smoking marijuana. It's a life and death situation." [Aiken, p. 61]. In such life and death situations, the prison staff (1) must be trained to recognize the danger to the reporting inmate and (2) must take steps to protect the inmate from danger, whether the reporting inmate recognizes the danger himself or not,[3] and (3) must investigate the report to ascertain its truth.

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[3]The Department has produced the affidavit of Lt. Goodman in which he avers that after Bing requested the roommate change, he offered Bing protective custody and Bing declined. Even assuming this assertion is true, in the prison setting, an offer of protective custody does not satisfy the prison's duty to protect an inmate who is at risk. Doing so relinquishes the authority and duty of the presumably trained prison and its staff and places it in the hands of an inmate who may or may not be aware that he is in danger or in need of protection. [Aiken, p. 68] [Aiken Affidavit, ¶19 and n. 1]. In the prison setting, it should not be the inmate's choice whether or not he is protected. [Aiken, pp. 63, 73] [Aiken Affidavit, ¶19].

When asked by counsel for the Department what steps should be taken to comply with the standard of care when an inmate reports that his roommate is engaging in contraband activity, Mr. Aiken testified as follows:

> The standard of care is, number one, to protect the inmate providing that information. That inmate is providing information that is normally called – it's rat information. That person is a snitch now. You have to assume that person is a snitch, and you have to assume other people will know about it.
>
> Now, what are you doing to protect that particular inmate? Moving that inmate to another housing assignment, moving them to another institution, putting them on lock-up, plus offering protective custody. The point is just because you offered that inmate protective custody doesn't relinquish your responsibility to protect that inmate . . . after you know the specific information that this inmate is saying this person is involved with contraband dope, and for him to share that information with authority automatically endangers and puts him in a level of vulnerability that can cost his life . . . and [SCDC is] responsible to protect that person.

[Aiken, pp. 69-70]. In this instance, when Mr. Bing complained about his roommate being involved in contraband, the Department was under an obligation to "proactively investigate" and to "segregate and protect an inmate." [Aiken, p. 70]. Because the Department took no steps to do either, it failed to exercise even slight care to protect Mr. Bing. [Aiken Affidavit, ¶22].

STANDARD OF REVIEW

This is an appeal of a grant of summary judgment to the Defendant by the trial court. In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court. *Town of Summerville v. City of North Charleston,* 378 S.C. 107 109-10, 662 S.E.2d 40, 41 (2008). A grant of summary judgment is proper only when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Town of Summerville,* 378 S.C. at 109-110, 662 S.E.2d at 41 (citations omitted). In determining whether there is a genuine issue of fact, the evidence and all inferences which may be reasonably drawn must be liberally construed in the light most favorable to the non-moving party. *Bennett v. Carter,* 421 S.C. 374, 379–80, 807 S.E.2d 197, 200 (2017); *Bates v. City of Columbia,* 301 S.C. 320, 321, 391 S.E.2d 733 (Ct.App.1990). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant." *Staubes v. City of Folly Beach,* 331 S.C. 192, 197, 500 S.E.2d 160, 163 (1998) (citations omitted). In cases where the burden of proof is by a preponderance of the evidence, the non-moving party need only submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In this case, the trial court found that the Department's liability under the Tort Claims Act can only lie upon a showing of gross negligence. S.C. Code Anno. §15-78-60(25). Gross negligence is ordinarily a mixed question of law and fact. *Proctor v. Dep't of Health & Envtl. Control,* 368 S.C. 279, 294-95, 628 S.E.2d 496, 504-05 (Ct. App. 2006)(citations omitted). In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. *Id.* "Gross negligence is a mixed question of law and fact and should be presented

to the jury unless the evidence supports only one reasonable inference." *Staubes v. City of Folly Beach,* 331 S.C. 192, 205, 500 S.E.2d 160, 168 (Ct.App.1998), *aff'd,* 339 S.C. 406, 529 S.E.2d 543 (2000).

ARGUMENT

DID THE TRIAL COURT ERR IN FINDING THERE WAS NO DUTY FOR THE DEPARTMENT OF CORRECTIONS TO PROTECT AN INMATE FROM A VIOLENT ASSAULT BY ANOTHER INMATE?

In its grant of summary judgment to the Department, the trial court found that there was no duty to protect an inmate from a violent assault by another inmate, "especially when there is no foreseeability to such an attack." [Order, p. 22]. This was error.

As an initial matter, the trial court's reasoning conflates the separate principles of "duty" and "foreseeability" under negligence law.. To prove any negligence, a plaintiff must show, "(1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission;[4] (3) the defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages." *Doe 2 v. The Citadel,* 421 S.C. 140, 145-46, 805 S.E.2d 578, 581 (2017). The question of whether or not a duty of care exists is a threshold question of law for the court that can be defined by statute, regulation, industry practice or the relationship or actions of the parties. *Faile v. South Carolina Department of Juvenile Justice,* 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). Foreseeability is a question of fact for the jury that relates to proximate cause: whether the injury in a particular case is the natural and probable consequence of a defendant's actions. *Wallace v. Owens-Illinois, Inc.,* 300 S.C. 518, 521, 389 S.E.2d 155, 156 (Ct.App.1989). Whether a legal duty of care exists has nothing to do with whether there is a scintilla of evidence that it was foreseeable that the specific acts or omissions of a defendant would cause the injury to a plaintiff. By

[4] In the case of gross negligence the act or omission must amount to a "conscious failure to do something which one ought to do or the doing of something one ought not to do." *Staubes v. City of Folly Beach,* 331 S.C. 192, 204, 500 S.E.2d 160, 167 (1998) (citations omitted). "Gross negligence is a relative term which means the absence of care that is necessary under the circumstances." 331 S.C. at 204-205, 500 S.E.2d at 167. (Citations omitted).

grafting the concept of duty and foreseeability together, however, the trial court used its own interpretation of the evidence to evaluate the threshold legal issue of the existence of a duty which is typically a matter of law for the court. In doing so, the trial court erroneously neglected to view the evidence and all inferences in the light most favorable to the non-moving party. *Staubes v. City of Folly Beach,* 331 S.C. at 197, 500 S.E.2d at 163. (Citations omitted).

Nevertheless, the existence of a duty of care is the threshold issue in any negligence or gross negligence analysis. In this case, Mr. Bing, who was an inmate under the control of the Department, has alleged that the Department owed him a duty of care to protect him from a violent attack by another inmate who was under the control of the Department.

The duty of the Department of Corrections to protect inmates under their control from assaults by third parties was first discussed in *McKenzie v. Leeke,* 292 S.C. 568, 357 S.E.2d 721 (Ct.App.1987). McKenzie was an inmate who, because of his classification, had the ability to see registered visitors in their cars in the parking lot of the Midlands Reception and Evaluation Center of the Department of Corrections. 292 S.C. at 569, 357 S.E.2d at 721. It was the policy of the Department to have a correctional officer spot check the vehicles every 45 minutes during such visits. 292 S.C. at 570, 375 S.E.2d at 721. During one such visit in the parking lot, McKenzie was attacked and shot by the former boyfriend of the registered visitor whom he was visiting. 292 S.C. at 570, 375 S.E.2d at 722. At the time of the attack, no one from the Department had spot checked vehicles in the parking lot where McKenzie was shot. *Id.* While the grant of summary judgment was upheld on other grounds, the appellate court "assumed without deciding . . . that [the Department] owned McKenzie a duty to protect him from an assault by a third party." *Id.*

A couple of years later, a panel on the Court of Appeals heard another case against the Department involving inmate on inmate violence. In *Jackson v. South Carolina Department of Corrections,* 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct.App.1989) a jury rendered a verdict in favor of the estate of an inmate who was violently killed by another inmate. *Id.* After the verdict, the Department made a motion for judgment notwithstanding the verdict which was granted by the trial court. *Id.* In reversing the trial court's grant of j.n.o.v. the appellate court considered the evidence submitted to the jury in the light most favorable to the estate and determined that "the jury reasonably could have determined that [the murderer's] transfer exhibited a conscious indifference to the threat he posed to the safety of other inmates at [the prison]." 301 S.C. at 127, 390 S.E.2d at 468. While making no specific finding on the existence of the legal duty of the Department to protect inmates under its control from violence from other inmates, the court cited §15-78-60(25) in its discussion of duty:

> The governmental entity is not liable for a loss resulting from responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any . . ., inmate, . . . except when the responsibility or duty is exercised in a grossly negligent manner. Therefore, if the Department was grossly negligent in its duty to control, confine, or maintain custody of [the murderer] and this negligence proximately caused [the victim's] death, its immunity from liability under the Act is waived.

310 S.C. at 126, 300 S.E.2d at 468. The appellate court then went on to evaluate the evidence presented and reverse the trial court's grant of j.n.o.v. and remand the case for entry of the jury verdict for the estate. 310 S.C. at 128, 300 S.E.2d at 469. Implicitly, the jury verdict could not have been sustained if there were no general duty to control, confine or maintain custody of an inmate. However, the issue was not specifically addressed by the appellate court at that time.

It was not until *Faile v. South Carolina Department of Juvenille Justice,* 350 S.C 315, 566 S.E.2d 536 (2002) that the Supreme Court addressed the existence of a legal duty to protect people from violent assaults from inmates under their control. In *Faile,* a twelve year old minor

who had been committed to the care of Department of Juvenile Justice violently assaulted the nine year old son of the Plaintiffs. 350 S.C. at 321, 566 S.E.2d at 539. The assault occurred while the twelve year old minor had been administratively placed by the Department with his biological mother, which was contrary to a prior Family Court placement Order. *Id.* The trial court granted summary judgment to the Department on the grounds that it was entitled to quasi-judicial immunity under S.C. Code Anno. §15-78-60(1). 350 S.C. at 322, 566 S.E.2d at 540. The court of appeals reversed the trial court, finding that there was a question of fact as to whether the family court had ratified the administrative act of the Department sufficient to invoke quasi-judicial immunity. *Id.*

After granting a writ of certiorari, the Supreme Court affirmed the Court of Appeals. *Id.* However, in doing so, it considered a number of other issues raised by the Department as additional sustaining grounds. 350 S.C. at 323, 566 S.E.2d at 540. One of those issues was whether the Department owed any legal duty of care to the victim of the assault from someone under its control. The Supreme Court concluded that where the assault was carried out by someone under the custody and control of the Department, a duty of care exists. 350 S.C. at 339, 566 S.E.2d at 548.

> While recognizing that under South Carolina law, general duty to control the conduct of a another or to warn a third person or potential victim of danger . . . [w]e recognize five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; or 5) where a statute imposes a duty on the defendant.

350 S.C. at 334, 566 S.E.2d at 546. The Supreme Court reviewed Restatement (Second) of Torts §319, *Jackson*, and *Rayfield v. South Carolina Department of Corrections,* 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), *cert. den'd,* 298 S.C. 204, 379 S.E.2d 133 (1989) to conclude that the

Department of Juvenile Justice had an independent duty to control and supervise the twelve year old delinquent "as long as it retained custody of him." 350 S.C. at 339, 566 S.E.2d at 548.

In this case, the assault against Mr. Bing was carried out by an inmate under the control and supervision of the Department. Mr. Bing was also an inmate under the control and supervision of the Department. Both relationships are exceptions to the rule that there is generally no legal duty to control the conduct of another or to protect third persons from danger. Under the reasoning of *Faile*, South Carolina recognizes a legal duty of care imposed upon the Department which exists, at the very least, by virtue of its control over the injurer. *Id.* It was error for the trial court to hold that no such duty exists.

DID THE TRIAL COURT ERR IN FINDING THERE WAS NO SCINTILLA OF EVIDENCE THAT THE DEPARTMENT WAS GROSSLY NEGLIGENT?

The trial court determined that there was no evidence in the record demonstrating the gross negligence of the Department. [Order, p. 12]. It reasoned that without evidence of gross negligence, the Department was immune from Mr. Bing's suit by virtue of S.C. Code Anno. §15-78-60(25) (waiving immunity from suit for breach of any duty of "supervision, protection, control, confinement or custody of any, . . . inmate . . .except when the responsibility or duty is exercised in a grossly negligent manner"). The trial court further found that there was no evidence that the attack on Mr. Bing was foreseeable to the Department. [Order, p. 15].

Where there is a legal duty of care, a defendant is liable for any breach of duty that is the proximate cause of the plaintiff's injury. In the context of gross negligence, a breach of duty occurs when a defendant fails to exercise slight care to meet the applicable standard of care. Further, the breach must be the proximate cause of the plaintiff's injury. Foreseeability is the test for proximate cause. "For an act to be a proximate cause of the injury, the injury must be a foreseeable consequence of the act." *Wallace v. Owens-Illinios, Inc.,* 300 S.C. 518, 521, 389

S.E.2d 155, 156 (Ct.App.1989). Unlike the analysis of whether a legal duty exists as a matter of law, the issue of proximate cause is typically a question of fact left for the jury. *Hurd v. Williamsburg County,* 353 S.C. 596, 614, 579 S.E.2d 136, 145 (Ct.App.2003). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." *Id* (citations omitted).

In this case, the record reflects that there is at least a scintilla of evidence that the Department failed to exercise slight care and that this attack was a foreseeable consequence of the Department's failure to act. It was error for the trial court to disregard this evidence. The testimony of both Mr. Bing and Lt. Goodman reflects that Bing reported that Dorsey was involved in illegal activity in his cell. Specifically, Mr. Bing testified that prior to Willis Dorsey being placed as his cellmate, he did not know Mr. Dorsey and had no prior history with him. [Bing Deposition, pp. 38-41]. Bing worked during the day, and as a result, was out of his cell and had little to no interaction with Willis Dorsey. [Bing Deposition, p. 40]. After Bing and Dorsey had been housed together for a short while, one of the corrections officers, Officer Santimaw, approached Bing to warn him about Dorsey. [Bing Deposition, p. 40]. Officer Santimaw told Bing that he had smelled marijuana behind his cell door at a time when he knew Bing was working. [Bing Deposition, p. 40]. Officer Santimaw then advised Bing to request a roommate change so Bing would not get in trouble if his room was raided and drugs were found. [Bing Deposition, p. 41].

This evidence supports the premise that the attack was foreseeable because the Department should have recognized that this report by Bing of "hot" or illegal activity would have marked Bing as a snitch who was a target for violence from his cellmate. [Aiken Deposition, pp. 69-70] [Aiken Affidavit, ¶16]. Moreover, the meeting between Bing and Lt.

Goodman occurred in Goodman's office which had glass walls with a direct view into Dorsey's cell. [Goodman Deposition, p. 40]. When asked about the standard of care for a corrections officer when an inmate reports cellmate contraband activity, the Plaintiff's expert, Mr. James Aiken[5] explained

> Q. what steps should be undertaken by the South Carolina Department of Corrections to comply with the standard of care in corrections and supervision of inmates?
>
> Aiken: the standard of care is, number one, to protect the inmates providing the information. That inmate is providing information that is normally called – its rat information. That person is a snitch now. You have to assume that person is a snitch, and you have to assume other people will know about it.
>
> Now what are you doing to protect this particulary inmate. Moving that inmate to another housing assignment, moving them to another institution, putting them on lock-up, plus offering protective custody. The point is is just because offered that inmate protective custody doesn't relinquish your responsibility to protect the inmate –
>
> Q. All right.
>
> Aiken: -- after you know the specific information that this inmate is saying this person is involved in contraband dope, and for him to share that information with authority automatically endangers and puts him in a level of vulnerability that can cost his life –
>
> Q. So. –
>
> Aiken: -- and you are responsible to protect that person.
>
> Q. So its your opinion that every time an inmate walks up and says my roommate is engaging in contraband then there's an obligation on a prison system to proactively investigate, to segregate or protect an inmate?
>
> Aiken: Both.

[Aiken Deposition, pp. 69-70], see also [Aiken Affidavit, ¶16]. So as explained by Mr. Aiken, when Mr. Bing requested that his cellmate be removed for engaging in contraband, the standard

[5] Mr. Aiken has worked in correctional institution administration, correctional facility operations and management, and correctional facility inspection and assessment for more than forty-five years. He has served as the Direct of the Bureau of Corrections in the U. S. Virgin Islands, the Commissioner of the Indiana Department of Correction, Deputy Regional Administrator for the Midlands Correction Region for the South Carolina Bureau of Prisons, Warden of Central Correctional Institution (formerly CCI) and numerous other correctional facilities in the State of South Carolina. [Aiken Deposition, pp. 15-30].

of care required that the facility actively investigate the allegation and take steps to protect Mr. Bing, whether he wanted protection or not. [Aiken Depo. pp. 61, 69-70]. In other words, because Mr. Bing put himself in the position of being a snitch, the standard of care required protection from the very type of foreseeable retaliation that occurred in this case. Leaving him locked in a cell with the inmate he has snitched on and a "hot pot" that was capable of heating water to scalding temperatures breached the standard of care.[6] The trial court's failure to acknowledge this evidence of foreseeability was error.

Moreover, as Mr. Aiken explains, Bing's report that Dorsey was a "hot boy" should have triggered actions by the Department to (1) protect Bing from harm while the report was investigated and (2) to investigate the validity of the information that Dorsey was involved in illegal activity.[7] [Aiken Deposition, p. 75-76]. The record reveals that there is at least a scintilla of evidence that the Department failed to exercise slight care in protecting Bing from foreseeable harm and investigating Dorsey.

In summary, evidence shows that Bing learned that Dorsey was a "hot boy" from an officer in the Department. [Bing Deposition, p. 40-41]. Despite one of his officers passing this knowledge on to Bing, Lieutenant Goodman testified that he did nothing to independently investigate Dorsey. [Goodman Deposition, p. 37]. He did not advise the contraband team to search Dorsey's cell or take any action on the report that Dorsey had contraband. [Goodman Deposition, p. 41]. He did not look into Dorsey's administrative record to determine if he was violent. [Goodman Deposition, p. 41]. He did not review any classification documents to

[6] It is well known in correctional facilities that heated liquids can be used as a weapon, exactly like Dorsey did in this case. [Aiken Affidavit, ¶17].

[7] There is some testimony that the Department's personnel were aware of the illegal activity of Mr. Dorsey prior to the assault and did nothing to investigate it. [Bing, p. 40-42] [Goodman, p. 41].

evaluate the compatibility of Dorsey and Bing. [Goodman Deposition, pp. 31-32, 42-43]. He did not evaluate Dorsey's cell to see if he had anything that could be weaponized like the hot pot used to create the scalding water. [Goodman Deposition, p. 45]. The Department issued the hot pot to Dorsey and allowed him to keep it in his cell and use it without supervision. [Bing Deposition, p. 58].[8] Indeed, the Department has produced no internal policy to secure and supervise the use of the hot pot that generated the scalding water behind a locked cell door.

The one thing that the Department claims it did to protect Bing (the offer of protective custody) is not documented. [Bing Deposition, p. 74]. Moreover, there is an issue of fact as to whether Lieutenant Goodman actually made the offer of protective custody to Mr. Bing that he claimed. *Compare,* [Affidavit of John Goodman, ¶4 – "I asked Bing if he wanted protective custody."] and [Bing Deposition, pp. 74-76, -- describing meeting with Lt. Goodman and the fact that Goodman never brought up the issue of protective custody.]

Other than the affidavit of Lt. Goodman, the Department did not produce any internal documentation of the offer of protective custody to Mr. Bing and its rejection. Moreover, Bing testified that the offer never happened. [Bing Deposition, pp. 74-76]. Even if the Department's claim that it offered protective custody was true, by deferring the decision to Bing, the Department abdicated its responsibility and breached the standard of care. As Mr. Aiken explained,

> In a correctional setting, especially a maximum security setting, an untrained inmate is not the proper arbiter of whether he needs protection or not. A properly trained correctional officer is. The fact that the lieutenant deferred his responsibility for the Plaintiff's safety back to the Plaintiff is an indication not only of a lack of proper training

[8] Relying only upon several pages of prison canteen records that fail to show Dorsey had purchased a hot pot, the trial court stated that the "only evidence of possession of a hot pot was by the Plaintiff." [Order p. 18-19]. This is incorrect. There was other evidence in the record about Dorsey's possession of a hot pot. Indeed, Mr. Bing testified that Dorsey possessed a hot pot when Dorsey moved into the cell with him. [Bing Deposition, p. 58]. Matters of credibility should not be determined at the summary judgment stage. *Hiers by Hiers v. Mullens,* 310 S.C. 63, 68, 425 S.E.2d 57, 60 (Ct.App.1992). "All ambiguities, conclusions, and inferences arising in and from evidence must be construed most strongly against the movant for summary judgment." *Id.*

but an abdication of the Department of Correction's duty for the safety of the inmates under its control.

[Aiken Affidavit, ¶19]. The trial court considered none of this evidence in finding there was no genuine issue of material fact. This was error.

DID THE TRIAL COURT ERR IN DISCOUNTING THE OPINIONS OF THE PLAINTIFF'S EXPERT AS CONCLUSORY?

Mr. Bing produced the testimony and affidavit of Mr. James Aiken, an expert in correctional operation and management with 45 years in the industry to establish the applicable standard of care for correctional institutions. His testimony is based upon his own knowledge and experience within the South Carolina Department of Corrections and upon his review of the Department's records and investigation and of Mr. Bing's deposition. [Aiken Affidavit, ¶5]. His opinions were fully expressed in his deposition testimony and later summarized in an affidavit. [Aiken Deposition, pp. 3, 15-30, 40-41, 53-56, 60-63, 69-70, 75-76, 83, 85 and 90] [Aiken Affidavit].

Contrary to the trial court's description of his affidavit as "conclusory statements" and "generalities,"[9] Mr. Aiken's testimony is both competent and admissible and demonstrates some evidence of both the standard of care applicable to the South Carolina corrections facilities and the Department's failure to exercise slight care to protect Mr. Aiken from a foreseeable risk of harm from his cellmate. A review of Mr. Aiken's testimony demonstrates both the factual basis of his opinions and their applicability to the Department. [See Statement of Facts, pp. 6-8].

Further, the trial court's order only discusses Mr. Aiken's opinions in the context of his affidavit, which was admittedly filed one day late. However, the trial court does not appear to rely on or even acknowledge the deposition testimony elicited by the Department's counsel more

than three years prior to hearing on this motion for summary judgment. Excerpts from Mr. Aiken's deposition testimony, which is wholly consistent with his later filed affidavit, were submitted into the record before the trial court. [See, Aiken Deposition excerpts attached to Memorandum in Opposition of Defendant's Motion for Summary Judgment]. The dismissal of Mr. Aiken's affidavit as "conclusory" and based upon "generalities" without reference to the multiple pages of deposition testimony was error.

Finally, the trial court concluded that Mr. Aiken's "generalities fall woefully short of the Court's admissibility standards for experts in a gross negligence case." [Order, p. 18]. However, the trial court did not identify what standards or authority it was relying on in excluding Mr. Aiken's affidavit. Non-scientific expert testimony is clearly admissible in South Carolina. *State v. White,* 382 S.C. 265, 270, 676 S.E.2d 684, 686-87 (2009). While the admission or exclusion of expert testimony is within the discretion of the trial court, an abuse of discretion occurs when the trial court's "ruling is based on an error of law or factual conclusion that is without evidentiary support." *State v. Price,* 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In this case, there is no analysis by the trial court of Mr. Aiken's qualifications, no consideration of any method or quality of knowledge possessed by Mr. Aiken and no evidentiary support for the trial court's finding that Mr. Aiken's testimony falls "woefully short of the Court's admissibility standards." [Order, p. 18]. The trial court simply dismissed Mr. Aiken's testimony out of hand. This was error.

Conclusion

This case is not appropriate for summary judgment. South Carolina recognizes that a legal duty of care exists for an institution to protect third parties from acts of violence committed by inmates under its control and supervision. Moreover, if taken in the light most favorable to the Plaintiff, there is at least a scintilla of evidence in the record that the harm to Mr. Bing was foreseeable to the Department and that if failed to utilize slight care to protect Mr. Bing from the violence his cellmate administered to him. Finally, the trial court's disregard of the testimony of Mr. Bing's expert, Mr. James Aiken as "conclusory statements" and "woefully short of the Court's standards for experts in a gross negligence case was error. The order of the trial court granting summary judgment to the Department should be reversed. This matter should be remanded back to the trial court and placed on the trial roster.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr., Judge
Lee County Court of Common Pleas

Case No. 2014-CP-31-00100

Levy Bing, ... Appellant,

v.

South Carolina Department of Corrections, ... Respondent.

Proof of Service

I certify that on January 2, 2019, I have served a copy of the Initial Brief of Appellant by United States Mail, postage prepaid, addressed to:

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January 2, 2019

Via U.S. Mail
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Re: Levi Bing v. South Carolina Department of Corrections
Case No. 2014-CP-31-00100

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the following:

- Initial Brief of Appellant
- Proof of Service for the Initial Brief on Murrell Smith and Jenny A. Kitchings, Clerk of the South Carolina Court of Appeals
- Appellant's Designation of Matters to Be Included in the Record on Appeal
- Certification of Counsel that the Designation of Matters to Be Included in the Record on Appeal contains no material which is irrelevant to the Appeal
- Proof of Service for the Designation of Record on Appeal to Murrell Smith and Jenny A. Kitchings, Clerk of the South Carolina Court of Appeals
- Certification of Counsel that all documents were placed in the U. S. Mail on January 2, 2019

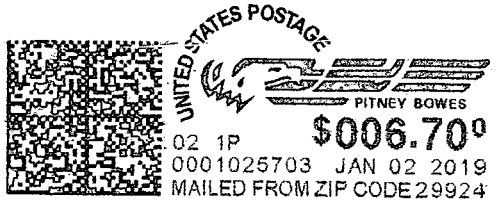
I would greatly appreciate it if you would file the originals and returned the stamped copies to me in the enclosed envelope.

Please accept my kindest regards.

Sincerely,

Jill S. Jones
Legal Assistant to Marion C. Fairey, Jr.

Enclosures (as stated)
cc: Murrell Smith
Clyde C. Dean, Jr.



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JAN 07 2019

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