

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APR 01 2019

APPEAL FROM GREENVILLE COUNTY S.C. SUPREME COURT  
Robin B. Stillwell, Circuit Court Judge

Op. No. 2018-UP-340  
(S.C. Ct. App. filed July 25, 2018)

Madel C. Rivero, as Personal Representative for the  
Estate of Lilia Lorena Blandin, ..... Respondent,

v.

Sheriff Steve Loftis, in his capacity as  
Sheriff of Greenville County, ..... Petitioner.

APPENDIX

Andrew F. Lindemann  
LINDEMANN, DAVIS & HUGHES, P.A.  
5 Calendar Court, Suite 202  
Post Office Box 6923  
Columbia, South Carolina 292060  
(803) 881-8924

Blake A. Hewitt  
BLUESTEIN THOMPSON SULLIVAN, LLC  
1614 Taylor Street  
Post Office Box 7965  
Columbia, South Carolina 29202  
(803) 779-7599

*Counsel for Petitioner*

*Counsel for Respondent*

Russell W. Harter, Jr.  
Carly H. Davis  
CHAPMAN, HARTER & HARTER, P.A.  
14 Lavinia Avenue  
Post Office Box 10224  
Greenville, South Carolina 29603  
(864) 233-4500

*Counsel for Petitioner*

Daniel J. Farnsworth, Jr.  
FARNSWORTH LAW OFFICES, LLC  
2 Williams Street  
Post Office Box 8719  
Greenville, South Carolina 29604  
(864) 250-9119

Daniel W. Luginbill  
J. Christopher Wilson  
WILSON & LUGINBILL, LLC  
Post Office Box 1150  
Bamberg, South Carolina 29003  
(803) 245-7799

*Counsel for Respondent*

**INDEX**

<i>Rivero v. Loftis</i> , Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018) .....	1
Order Denying Petition for Rehearing .....	10
Petition for Rehearing .....	12
Memorandum in Support of Petition for Rehearing .....	14
Respondent's Return to Appellant's Petition for Rehearing .....	33
Reply to Respondent's Return to Appellant's Petition for Rehearing .....	39

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Madel C. Rivero, as Personal Representative for the  
Estate of Lilia Lorena Blandin, Respondent,

v.

Sheriff Steve Loftis, in his capacity as Sheriff of  
Greenville County, Appellant.\*

Appellate Case No. 2016-000548

---

Appeal From Greenville County  
Robin B. Stilwell, Circuit Court Judge

---

Unpublished Opinion No. 2018-UP-340  
Heard May 17, 2018 – Filed July 25, 2018

---

**AFFIRMED**

---

Russell W. Harter, Jr. and Carly H. Davis, both of  
Chapman, Harter & Harter, P.A., of Greenville, and  
Andrew F. Lindemann, of Lindemann, Davis & Hughes,  
PA, of Columbia, for Appellant.

Daniel Joseph Farnsworth, Jr., of Farnsworth Law  
Offices, LLC, of Greenville, J. Christopher Wilson and  
Daniel W. Luginbill, both of Wilson & Luginbill, LLC,  
of Bamberg, and Blake A. Hewitt, of Bluestein  
Thompson Sullivan, LLC, of Columbia, for Respondent.

---

**PER CURIAM:** In this wrongful death action, Appellant Sheriff Steve Loftis (Sheriff Loftis) challenges the denial of his motion for a new trial and the denial of his motion for a judgment notwithstanding the verdict (JNOV). Sheriff Loftis asserts the circuit court erred by denying his request for an evidentiary hearing to address a juror's intentional concealment of an incident involving her husband twisting her wrist when presented with a voir dire question intended to screen out victims of criminal domestic violence (CDV). Sheriff Loftis argues the concealed information would have been a material factor in the use of his peremptory challenges had it been disclosed. Sheriff Loftis also argues the circuit court erred by denying his directed verdict and JNOV motions because (1) there was no evidence of causation in fact, and (2) he was entitled to absolute sovereign immunity under the South Carolina Tort Claims Act, sections 15-78-10 to -220 of the South Carolina Code (2005 & Supp. 2017).<sup>1</sup> We affirm.

### **I. Juror Misconduct**

Sheriff Loftis argues the circuit court erred by (1) failing to conduct an evidentiary hearing concerning a juror's concealment of an incident involving her husband twisting her wrist, and (2) concluding Sheriff Loftis did not show the concealment was intentional.

"Under South Carolina law, litigants are guaranteed the right to an impartial jury." *Alston v. Black River Elec. Co-op.*, 345 S.C. 323, 326, 548 S.E.2d 858, 859 (2001) (citing S.C. Code Ann. § 14-7-1050 (Supp. 2000)); *see* § 14-7-1050 (2017) ("[I]n all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury."). Our supreme court "has recognized trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." *State v. Kelly*, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998).

Necessarily it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters [that] might tend to disqualify them from sitting on the case for any reason. It therefore becomes imperative that the answers be truthful and complete. False or misleading answers

---

<sup>1</sup> Specifically, section 15-78-60 of the South Carolina Code (2005).

may result in the seating of a juror who might have been discharged by the [c]ourt, challenged for cause by counsel[,] or stricken through the exercise of peremptory challenge.

*Id.* at 145–46, 502 S.E.2d at 106 (quoting *State v. Gulledge*, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982)). "Through the judge, parties have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge." *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (quoting *Gulledge*, 277 S.C. at 370, 287 S.E.2d at 490).

When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information[] and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

*Id.*

"[I]ntentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Id.* at 588, 550 S.E.2d at 284. "Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Id.* "Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." *Id.* Twelve years after issuing the *Woods* opinion, the court continued to rely on *Woods* for its analysis: "[J]uror concealment claims are governed by the analysis set forth in *Woods*, and such case-by-case determinations are most appropriately made after a hearing, which allows the factual circumstances to be more fully developed." *McCoy v. State*, 401 S.C. 363, 372, 737 S.E.2d 623, 628 (2013).

During voir dire in the present case, the circuit court asked the prospective jurors, "Is there anyone among you who has been a victim of [CDV]?" The juror in question, Robin Burns, remained silent despite a recent incident involving her

husband twisting her wrist. Burns called 911 to report the incident, and police officers arrived at her home to investigate but made no arrests. When Sheriff Loftis learned of the nondisclosure, he filed a new trial motion.

Subsequently, the circuit court reviewed the incident report from Burns' 911 call as well as the tape, transcript, and responding officers' affidavits. Based on this review, the circuit court concluded Burns was not a CDV victim and, thus, Sheriff Loftis had "failed to establish the 'fact of disqualification' so as to obtain a new trial based upon disqualification of a juror." The circuit court also concluded, "The question the court posed in *voir dire* was clear and unambiguous, and there [was] no evidence that [Burns], either objectively or subjectively, concealed information." The court then stated that it was unnecessary to conduct an additional hearing for the purpose of examining Burns under oath.

Sheriff Loftis contends the circuit court erred in concluding that he had to establish the fact of disqualification because juror disqualification is not an absolute requirement under the *Woods* test. We acknowledge the merit to this argument. *See Woods*, 345 S.C. at 590, 550 S.E.2d at 285 ("No motion to disqualify Juror B was made, thus there is no discretionary ruling by the trial judge for this [c]ourt to review. However, we need not decide whether [Juror B's] relationship with the solicitor's office would support a challenge for cause because we find her failure to disclose the relationship prevented the respondent's intelligent exercise of his peremptory challenges."). Nonetheless, we conclude that the question, "Is there anyone among you who has been a victim of [CDV]?" was ambiguous. Including the term "criminal" in the question could cause a potential juror to believe any experience she or he had with domestic violence had to result in an arrest at the very least. Therefore, Burns' concealment was unintentional. *See Woods*, 345 S.C. at 588, 550 S.E.2d at 284 ("Unintentional concealment . . . occurs where the question posed is ambiguous . . .").<sup>2</sup>

---

<sup>2</sup> At oral argument, Sheriff Loftis asserted that the question of ambiguity was not before this court on appeal because Rivero did not appeal the circuit court's statement that the question was "clear and unambiguous," and therefore, this statement became the law of the case. *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." (citing 5 C.J.S. *Appeal & Error* § 991 (2007))). The circuit court's statement is not binding on this court. *See* Rule 220(c), SCACR. ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.");

Rivero correctly maintains that *Woods* and *McCoy* do not require an examination of Burns under oath, although the key language in *Woods* and *McCoy* certainly encourage this type of evidentiary hearing. In any event, given the ambiguity of the question posed to the prospective jurors in the present case, the circumstances do not merit an evidentiary hearing. Therefore, we affirm the circuit court's denial of the motion for an evidentiary hearing or new trial.

## II. JNOV/Causation in Fact

Sheriff Loftis asserts the circuit court erred by submitting the question of causation in fact to the jury rather than concluding there was no causation in fact as a matter of law. We disagree.

"Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009) (quoting *Hanselmann v. McCardle*, 275 S.C. 46, 48–49, 267 S.E.2d 531, 533 (1980)). "Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries." *Id.* "Proximate cause requires proof of (1) causation in fact and (2) legal cause." *Id.* (quoting *Bramlette v. Charter–Medical–Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990)). "Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence, while legal cause is proved by establishing foreseeability." *Id.* at 386–87, 684 S.E.2d at 569.

"Ordinarily, proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court." *Id.* at 387, 684 S.E.2d at 569. "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury." *Hurd v. Williamsburg Cty.*, 353 S.C. 596, 613–

---

*I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding the appellate court may rely on a respondent's additional sustaining grounds "or any other reason appearing in the record to affirm the lower court's judgment"); *id.* at 421, 526 S.E.2d at 723 ("An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies.").

14, 579 S.E.2d 136, 145 (Ct. App. 2003) (citations omitted), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005).

Here, in its order denying a JNOV, the circuit court stated, "There was evidence that had Avery been arrested on December 9, 2011, he would likely have still been in jail on December 10, 2011[,] when he killed Lilia." Sheriff Loftis argues this reasoning is speculative and also insufficient to establish causation in fact because it relies on merely a possibility rather than a probability. To illustrate this point, Sheriff Loftis cites this court's opinion in *Thomas v. South Carolina Department of Highways & Public Transportation*, which involved an uninsured vehicle hitting and injuring a pedestrian. 320 S.C. 400, 401, 465 S.E.2d 578, 579 (Ct. App. 1995). The pedestrian filed a negligence action against the highway department, alleging it was negligent in failing to recover the motorist's license plates and motor vehicle registration after the motorist's insurance had been cancelled. *Id.* at 401–02, 465 S.E.2d 578, 579–80. In affirming a directed verdict in the highway department's favor, this court explained the pedestrian's failure to show causation in fact:

To establish causation in fact, Thomas was required to present evidence that showed the accident would not have occurred had the Department complied with the statute in question. He failed to do this. There is no evidence at all that even if the Department had taken Green's license tag and car registration, Green, who had a valid driver's license, would not have been negligently operating either the uninsured vehicle or some other vehicle at the time he ran over Thomas. We can only speculate about what he would or would not have done had the Department recovered his license tag and car registration.

*Id.* at 402, 465 S.E.2d at 580 (citation omitted). While the reasoning of *Thomas* is persuasive, the present case is distinguishable. If Avery had been in jail all day on December 10, he certainly would not have had the opportunity to kill Lilia on that day.

While we have found no South Carolina appellate opinions with comparable facts, we find instructive the opinion of the Appellate Court of Connecticut in *Alexander v. Town of Vernon*, 923 A.2d 748 (Conn. App. 2007). *Alexander* involved a wrongful death action brought by a murder victim's estate against the town of Vernon and seven members of the town's police department. *Id.* at 750. The trial

court granted summary judgment to the town and the officers, concluding that the officers' inaction did not cause the victim's death. *Id.*

The *Alexander* court affirmed the superior court's award of summary judgment to the town and the police officers, concluding the victim's estate could not show causation. *Id.* at 757. The court's language provides an enlightening contrast to the facts in the present case:

Here, to establish causation the plaintiff must demonstrate, *without resort to conjecture*, that the murder would not have occurred but for the defendants' alleged negligence or recklessness. Under these facts, we are persuaded that the plaintiff cannot satisfy that burden. One can only *speculate* as to whether an attempt on the part of the defendants to "try and find" Caldwell would have succeeded. Furthermore, even if the defendants had found and arrested Caldwell, it is quite possible that he would have been released from custody on Monday morning. *The plaintiff has not presented evidence suggesting that, more likely than not, Caldwell would not have been released at his arraignment on Monday morning. Without any assurance that Caldwell would have remained incarcerated on Monday, there is no way to know whether his arrest would actually have prevented the murder.*

*Id.* at 755 (emphases added). The court added,

[T]here are too many variables involved to state with any degree of certainty that the victim's murder would not have occurred in the absence of the officers' alleged negligence or recklessness. To reach the opposite conclusion, a jury would first have to suppose that the officers could have found Caldwell in the time preceding the murder. The jury would then have to further assume that, once arrested, Caldwell would not have been released from custody before Monday afternoon. *Because there is no evidence in the record on which to make either of those critical inferences, the jury would be forced to resort to sheer speculation.* Yet, a determination of causation on the basis

of conjecture or speculation is precisely what we cannot permit.

*Id.* at 756–57 (emphasis added).

Here, unlike the presentation of evidence in *Alexander*, Rivero presented the following evidence, which we view in the light most favorable to Rivero: Avery's behavior prompting Lilia to call 911 on December 9 was a violation of the no-contact condition of his bond for his prior CDV arrest.<sup>3</sup> Therefore, the law enforcement expert for Sheriff Loftis admitted on cross-examination that had Avery been arrested and jailed on December 9, his prior CDV arrest and resulting bond violation would make it unlikely that he would have been released on another bond the following morning. Rather, the second bond would likely have been set at a higher amount and he would have had to wait longer for his release. This evidence goes beyond mere speculation as it shows more than a mere possibility but rather a probability, i.e., more likely than not, Avery would have been in jail on December 10 rather than stabbing Lilia had he been arrested on December 9.

Based on the foregoing, there was more than one reasonable inference to be drawn by the jury as to causation in fact, and thus, the question was properly submitted to the jury. *See McKnight*, 385 S.C. at 387, 684 S.E.2d at 569 ("Ordinarily, proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court.").

### III. JNOV/Tort Claims Act

Pursuant to Rule 220(b), SCACR, and the following authorities, we affirm the circuit court's conclusion that a gross negligence standard applies to those exceptions to the State's waiver of sovereign immunity asserted by Sheriff Loftis: *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (brackets omitted) (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71,

---

<sup>3</sup> The record does not indicate the ultimate outcome of that CDV charge or whether the December 5 hearing on that charge occurred as scheduled. Therefore, there is a question as to the continuing viability of the bond conditions after December 5. Nonetheless, this court must view the evidence in the light most favorable to Rivero; thus, we are assuming the no-contact condition of the October 31 bond was still in place.

76, 497 S.E.2d 731, 733 (1998)); *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."); *Clark v. S.C. Dep't of Pub. Safety*, 362 S.C. 377, 386, 608 S.E.2d 573, 578 (2005) ("The burden of establishing an exception to the waiver of immunity is on the governmental entity asserting the defense."); S.C. Code Ann. § 16-25-70(I) (2015) ("In addition to the protections granted to the law enforcement officer and law enforcement agency under the South Carolina Tort Claims Act, a law enforcement officer is not liable for an act, omission, or exercise of discretion under this section *unless the act, omission, or exercise of discretion constitutes gross negligence, recklessness, wilfulness, or wantonness.*" (emphasis added)); S.C. Code Ann. § 15-78-60(25) (2005) (setting forth as an exception to the State's waiver of sovereign immunity, "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*" (emphasis added)).

**AFFIRMED.**

**HUFF, GEATHERS, and MCDONALD, JJ., concur.**

# The South Carolina Court of Appeals

Madel C. Rivero, as Personal Representative for the  
Estate of Lilia Lorena Blandin, Respondent,

v.

Sheriff Steve Loftis, in his capacity as Sheriff of  
Greenville County, Appellant.

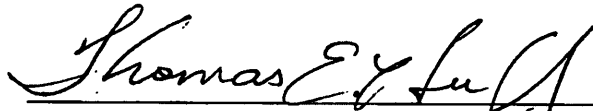
Appellate Case No. 2016-000548


---

## ORDER

---

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_ J.

  
\_\_\_\_\_ J.

I would grant rehearing.

  
\_\_\_\_\_ J.

Columbia, South Carolina

cc:  
Andrew F. Lindemann, Esquire  
Russell W. Harter, Jr., Esquire

**FILED**

March 1, 2019

Carly H Davis, Esquire  
Daniel Joseph Farnsworth, Jr., Esquire  
Daniel W. Luginbill, Esquire  
Blake A. Hewitt, Esquire  
J. Christopher Wilson, Esquire  
The Honorable Robin B. Stilwell

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

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

---

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

---

**RECEIVED**  
AUG 09 2018  
SC Court of Appeals

Madel C. Rivero, as Personal Representative for the  
Estate of Lilia Lorena Blandin, ..... Respondent,

v.

Sheriff Steve Loftis, in his capacity as  
Sheriff of Greenville County, ..... Appellant.

---

**PETITION FOR REHEARING**

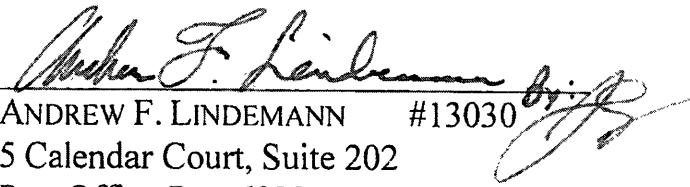
---

The Appellant Steve Loftis petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Rivero v. Loftis*, Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *Rivero v. Loftis*, Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

LINDEMANN, DAVIS & HUGHES, P.A.

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

-and-

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

*Counsel for Appellant  
Sheriff Steve Loftis*

August 9, 2018

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

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

---

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

---

**RECEIVED**  
AUG 09 2018  
SC Court of Appeals

Madel C. Rivero, as Personal Representative for the  
Estate of Lilia Lorena Blandin, ..... Respondent,

v.

Sheriff Steve Loftis, in his capacity as  
Sheriff of Greenville County, ..... Appellant.

---

**MEMORANDUM IN SUPPORT OF  
PETITION FOR REHEARING**

---

The Appellant Sheriff Steve Loftis has petitioned this Court for a rehearing of the recent decision in *Rivero v. Loftis*, Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018). Sheriff Loftis respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

The Appellant Sheriff Steve Loftis seeks a new trial absolute on the basis of intentional juror concealment during voir dire that was conducted prior to jury selection. In presenting the juror concealment issue, the Sheriff argued the necessity of an evidentiary hearing to determine whether Juror Robin Burns had intentionally concealed pertinent information in response to the voir dire question.

In adjudicating this issue on appeal, this Court actually *reversed* a critical finding of fact made by the trial judge. Judge Stilwell ruled that "[t]he question the court posed in *voir dire* was clear and unambiguous." (R. 6). Despite that unappealed ruling which was subject to an abuse of discretion standard like any other factual finding, this Court concluded that the voir dire question at issue was ambiguous, and as a result, "Burns' concealment was unintentional." (Slip Op. at 4). The Court then found it unnecessary to rule on any other issues and disposed of that argument by stating: "given the ambiguity of the question posed to the prospective jurors in the present case, the circumstances do not merit an evidentiary hearing." (Slip Op. at 5). The Court justified its *reversal* of that unappealed ruling by the trial judge under its Rule 220(c) authority which provides that "[t]he appellate court may *affirm* any ruling, order, decision or judgment upon

any ground(s) appearing in the Record on Appeal." *See*, Rule 220(c), SCACR. (Emphasis added).

The Court's adjudication of the juror misconduct issue raises several issues, all of which separately support the requested rehearing, but in tandem, should make a rehearing a prerogative.

**A.**

The critical finding of fact by Judge Stilwell that the voir dire question was "clear and unambiguous" was just that – a finding of fact. In the leading case of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the Supreme Court held that "whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." 550 S.E.2d at 284. The "fact intensive" nature of the inquiry has been restated many times by this Court and the Supreme Court. The Court in *Woods* explained that the question presented to the jury on voir dire must be "comprehensible to the average juror" and that "[u]nintentional concealment occurs where the question posed is ambiguous or incomprehensible to the average juror." *Id.* Despite being an objective standard given this language, the issue is still one for the factfinder such as other objective or reasonable man inquiries, including probable cause which is a question of fact to be decided by the factfinder. In this case, the factfinder – Judge Stilwell – made his finding that "[t]he question the court posed in *voir dire* was clear and

unambiguous." (R. 6). That finding of fact should be subjected to the proper standard of review. In an action at law, trial judge's findings will be upheld unless lacking in evidentiary support. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). However, in this case, this Court did not even address whether Judge Stilwell's finding was supported by any evidence. Instead, this Court improperly found facts in accordance with its own view of the evidence. In short, if the proper standard of review had been applied, Judge Stilwell's finding that the voir dire question was clear and unambiguous would not have been *reversed*. That finding is supported by the evidence.

#### B.

In addition, the Court improperly relied on Rule 220(c), SCACR, to provide the basis for *reversing* the unappealed ruling by Judge Stilwell. The Court suggests that it was simply affirming based on a ground appearing in the record; however, that it not the case. The Court actually *reversed* the ruling from the Court below. This is a misapplication of the Court's authority under Rule 220(c) which only allows appellate courts to *affirm* a lower court ruling on any alternative basis appearing in the Record on Appeal. There is absolutely no support in our jurisprudence for this Court to rely on its Rule 220(c) authority to actually reverse a ruling that was made *with finality* by a lower court.

In *Sims v. Amisub of South Carolina, Inc.*, 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014), this Court used its Rule 220(c) authority to enter judgment based on a statute of limitations defense even though the lower court had denied the motion for summary judgment on that defense. But, this Court in its analysis was quick to point out that the denial of summary judgment was not a final decision by the lower court because "the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." 758 S.E.2d at 194. (Emphasis in original). The Appellant's counsel is unaware of any case where an appellate court has used its Rule 220(c) authority to actually reverse a *final* ruling by the lower court. This case appears to be establishing a new precedent and one that this Court should be guarded to make.

### C.

The Court's reliance on Rule 220(c) in this instance to *reverse* a ruling by Judge Stilwell is further problematic in that, unlike in such cases like *Sims*, this Court was not presented with an additional sustaining ground by Rivero to rule as it has. When an issue is at least raised as an additional sustaining ground, the opposing litigant is on notice of the issue and can present arguments and authority to contest the issue. That, at the very least, satisfies the basic tenets of due process including notice and the opportunity to be heard. Rule 220(c), when applied as it

has been by this Court, is fundamentally unfair and denies due process. Sheriff Loftis never had a fair and meaningful opportunity to argue that Judge Stilwell's ruling was correct, is supported by an evidentiary basis, and should be affirmed. Having the issue raised for the first time *sua sponte* in a ten-minute oral argument does not constitute proper or adequate notice or a meaningful opportunity to be heard. The due process concerns that are implicated by this Court's unprecedented reliance on Rule 220(c) to *reverse* an unappealed ruling by the lower court militates the need for a rehearing in this case.

**D.**

Last, but certainly not least, this Court's application of its Rule 220(c) authority is entirely at odds with years of precedent in this State applying the law of the case doctrine. In footnote two, this Court rejects the law of the case argument made by Sheriff Loftis' counsel when this new issue was first raised *sua sponte* during oral argument. Sheriff Loftis argued that the issue of ambiguity of the voir dire question was not properly before this Court because Rivero did that appeal Judge Stilwell's factual finding that the voir dire question was "clear and unambiguous."

This Court applied a very limited and incorrect interpretation of the law of the case doctrine, and one that is inconsistent with literally dozens of prior cases. The Court appears to rule that the law of the case doctrine applies *only* to matters

decided in a *prior appeal*. The case cited, *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009), did involve the application to the law of the case doctrine to a prior appeal (an appeal to circuit court from magistrate's court), but the Supreme Court did not limit the doctrine's application to issues or claims decided on a prior appeal. Indeed, the Supreme Court reiterated that "an unappealed ruling is the law of the case." 674 S.E.2d at 458. There are, as this Court well knows, literally dozens of cases where the law of the case doctrine is applied to an unappealed ruling regardless of whether there was a prior appeal or not. *See e.g., Normandy Corp. v. South Carolina Dept. of Transportation*, 386 S.C. 393, 688 S.E.2d 136, 149 (Ct. App. 2009) (unappealed ruling "is the law of the case regardless of its correctness"); *Campbell v. Jordan*, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); *Floyd v. CB. Askins & Co. Contractors*, 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009); *King v. James*, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010); *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("[w]hile [the master's] calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case"). That has been the proper interpretation for decades. *See, Buckner v. Preferred Mut. Inc. Co.*, 255 S.C. 159, 177 S.E.2d 544 (1970). In short, contrary to the Court's footnote in its opinion, to become the law of the case, a ruling need not have been the subject of a prior appeal.

To the contrary, the Supreme Court has spoken to this precise issue, and in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), the Supreme Court explained that an "unappealed ruling is the law of the case," and the unappealed ruling "should not have been reconsidered by the Court of Appeals." 489 S.E.2d at 472.

The same is true in this case. The ruling by Judge Stilwell that the voir dire question was "clear and unambiguous" – which was a final ruling on which a final judgment was entered – was unappealed. As a result, right or wrong, it establishes the law of the case and should not be reconsidered and *reversed* by this Court. Rule 220(c) simply does not give and cannot be construed to give this Court the power to override or disregard the law of the case doctrine – just as it does not give this Court the authority to *reverse* an unappealed ruling. Contrary to footnote two, the unappealed ruling *is binding* on this Court.

In short, the law of the case doctrine is applicable to issues decided or raised in a prior appeal, but that is not its *only* application. The doctrine is also applicable where, as in this case, there is a final ruling that is unappealed. *See also, Shirley's Iron Works v. City of Union*, 402 S.C. 560, 743 S.E.2d 778 (2013) ("[t]he doctrine of law of the case applies to an order or ruling which finally determines a substantial right"). The Court is respectfully requested to rehear this case and to

give full effect to the unappealed ruling by Judge Stilwell that the voir dire question was "clear and unambiguous." (R. 6).

## II.

As discussed above, the Court ultimately decided the issue regarding Juror Burns' concealment during voir dire by reversing Judge Stilwell's unappealed ruling and substituting its own view of the evidence. Because that should not have been a basis for the Court to decide this issue, the Court is respectfully requested to fully consider and rule upon the actual issues briefed and argued by the parties. On Judge Stilwell's error in requiring Sheriff Loftis to prove the "fact of disqualification" which is not a required showing under the *Woods* test, this Court "acknowledge[d] the merit of this argument." (Slip Op. at 3). Instead of acknowledging the merit, the Court is requested to rule for the Sheriff on this issue and find reversible error.

To reiterate, the "fact of disqualification" is an element of the test where a party seeks a new trial because the trial court failed to disqualify a juror for cause. That is not the issue here; no request was made to strike Juror Burns for cause. The "fact of disqualification" inquiry is therefore not a necessary element under the test for juror concealment, which is the issue in this case. In other words, juror disqualification is not an absolute requirement under the *Woods* test. To the contrary, using the word "or," the Supreme Court requires a showing "that the information concealed would have supported a challenge for cause *or would have*

*been a material factor in the use of the party's peremptory challenges."* *Woods*, 550 S.E.2d at 284. (Emphasis added). And in this case, that prong of the *Woods* test was clearly satisfied. Indeed, Judge Stilwell has readily "agree[d] that had the Defendant known of Juror Burns' experience with the police concerning an argument with her husband, the Defendant would surely have used a peremptory challenge to strike Ms. Burns." (R. 7).

### III.

The Court is also respectfully requested to rehear the core issue on appeal – that Judge Stilwell should have conducted an evidentiary hearing to determine whether Juror Burns had intentionally concealed pertinent information in response to the voir dire question. Judge Stilwell ruled that "Defendant has failed to show Juror Burns' failure to respond during *voir dire* was untruthful or deceitful so as to rise to the level of an intentional concealment of information." (R. 7). He further ruled that "there is no evidence that Ms. Burns, either objectively or subjectively, concealed information." (R. 6). Yet, the absence of this evidence is the result of the judge's refusal to hold an evidentiary hearing. By denying the means to develop the evidence to meet the burden of proof, Judge Stilwell deprived Sheriff Loftis of due process.

To reiterate, in *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the Supreme Court emphasized that "[n]ecessarily, whether a juror's failure to respond

is intentional is a fact intensive determination which must be made on a case by case basis." 550 S.E.2d at 284. Later, in *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013), the Supreme Court further elaborated that "such case-by-case determinations *are most appropriately made after a hearing, which allows the factual circumstances to be more fully developed.*" 737 S.E.2d at 371. (Emphasis added). If that language does not "mandate" an evidentiary hearing, as Rivero insists it does not and this Court seems to agree, it nonetheless strongly urges courts to hold an evidentiary hearing in such circumstances. At the very least, common sense dictates no less. Whether conduct by a juror is intentional or unintentional is inherently subjective. Hence, a "fact intensive determination" of the juror's subjective intent in failing to respond to a voir dire inquiry necessarily requires the questioning of that juror.

The fallacy of Rivero's position on this issue is demonstrated by Judge Stilwell's rulings. He deprived Sheriff Loftis of the ability to obtain testimony from Juror Burns, but he then finds that the Sheriff failed to show her conduct was "untruthful or deceitful" or that she deliberately concealed information. Such a conclusion about Juror Burns' subjective intent to conceal cannot be determined with any fairness or certainty in the absence of taking the juror's testimony.

The existing case law also makes this very point. Appellate case law in South Carolina includes numerous cases where juror concealment during voir dire

was alleged. In each of those cases, an evidentiary hearing was held where the juror at issue was questioned by the court to ascertain whether pertinent information was concealed during voir dire and whether that concealment was deliberate or intentional. *See e.g., State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001); *State v. Sparkman*, 358 S.C. 491, 595 S.E.2d 375 (2004); *State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007). Regardless of whether the Supreme Court "mandates" the holding of an evidentiary hearing, the necessity in cases such as this one should be patently clear.

As discussed, Sheriff Loftis was denied access to the critical and dispositive evidence needed to fully flesh out the proper application of the *Woods* test in this case. Despite initially indicating that an evidentiary hearing would be scheduled, Judge Stilwell ultimately denied the opportunity for Sheriff Loftis to "more fully develop" the factual circumstances by the very means that the Supreme Court termed the "most appropriate" method of determining the truth. Then, he ruled against Sheriff Loftis for failing to show an intentional concealment. That is a classic denial of due process – such a denial that warrants a reversal and a new trial absolute or, at a minimum, a remand for such an evidentiary hearing to be held. This is an issue that the Court needs to address on rehearing.

It bears repeating that the evidence did not include the testimony of Juror Burns, and "willful concealment" under these circumstances cannot be determined without the testimony of the juror. More specifically, it may not be determined what Juror Burns may or may not have understood during voir dire when she has not been asked such questions. Similarly, it may not be determined why Juror Burns did not respond to a voir dire inquiry when she has not been asked that question.

In *State v. Coaxum*, 410 S.C. 320, 764 S.E.2d 242 (2014), the Supreme Court recognized that "trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." 764 S.E.2d at 245. That duty cannot likewise be fulfilled post-trial in light of an allegation of juror concealment where the court and litigants lack accurate information or the ability to obtain such information. Such information must be obtained by way of an evidentiary hearing.

In sum, Sheriff Loftis is entitled, at the very least, to a remand for an evidentiary hearing to be held. However, given the passage of time since the September 2015 trial, the proper result is most likely to grant a new trial. *See, State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811, 815 (1999) (if the court "finds it impossible to conduct an adequate post-trial inquiry due to the passage of time, a new trial may be ordered").

#### IV.

This Court is also respectfully requested to rehear Sheriff Loftis' lack of causation in fact argument. This Court concluded that there was sufficient evidence to make the issue of causation in fact a jury question. With all due respect, the Court is mistaken.

In so ruling, the Court focused on evidence that suggested – albeit in a speculative way – that Avery Rivero, if arrested on December 9, 2011, would not have bonded out of jail by December 10, 2011 and could not have killed the decedent *on that date*. The speculative nature of this "evidence" is inherent in the Court's own language: "the second bond would likely have been set at a higher amount and he would have had to wait longer for his release." (Slip Op. at 8). The financial status of Avery and his ability to make even a higher bail is purely a guess. No evidence was presented as to Avery's financial ability.

In addition, in footnote three, the Court notes that "[t]he record does not indicate the ultimate outcome of the CDV charge or whether the December 5 hearing on the charge occurred as scheduled. Therefore, there is a question as to the continuing viability of the bond conditions after December 5." (Slip Op. at 8). That is a valid point, and Rivero has the burden of proof. Yet, after making that observation, the Court inexplicably "assum[es] the no-contact condition of the October 31 bond was still in place." (Slip Op. at 8). In the absence of evidence,

however, the Court (or the jury) simply cannot make such an assumption. An assumption is not substitute for evidence.

Yet, the most glaring error in the Court's analysis is this focus on December 10, 2011. There is this suggestion that Avery could only have murdered his wife on the 10th, and if he was released after that date, the murder would never have happened. Of course, that is a complete fallacy. As Sheriff Loftis argued and this Court did not consider or address, Rivero needed to present evidence that Avery Blandin would never have been released on bond or otherwise would no longer have had the motive and opportunity to murder his wife. There is no such evidence presented. It is very likely that Avery would have been released on bond – if not on December 10th, then some time shortly thereafter. He would have then had the same motive and capacity to kill his wife. As Sheriff Loftis explained, this is why failure to arrest claims are inherently flawed. Unless it can be shown within a reasonable level of probability that the arrest would prohibit any further opportunity to commit the crime, then there is not sufficient evidence of causation in fact. *See, Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993) (causation based upon a possibility rather than a probability is not sufficient for a plaintiff to recover in tort).

On rehearing, this Court is requested to give full consideration to the Court's decision in *Thomas v. South Carolina Department of Highways and Public*

*Transportation*, 320 S.C. 400, 465 S.E.2d 578 (Ct. App. 1995). The Court found that decision to be "persuasive" but "distinguishable." (Slip Op. at 6). Sheriff Loftis submits that it is actually *controlling*. In *Thomas*, this Court held that speculation about the criminal actions of a third-party tortfeasor in relation to the enforcement of a statute was insufficient to establish causation for a plaintiff's injuries. The same issue is present in this case. It is entirely impossible to know what would have occurred if Avery Blandin had been arrested on December 9, 2011. There is certainly no evidence that, had he been arrested on that date, Avery would have been precluded from having any further opportunity to commit the murder of his wife. He would clearly have been bonded out of jail, if not by December 10th, then on some later date and would have had the same motive and opportunity to murder Lilia. As a result, the question as to whether Lilia's death could have and/or would have been prevented by his arrest on December 9th is simply a matter of speculation. Like this Court ruled in *Thomas*, there was no jury question presented by the evidence on causation in fact. Rivero was unable to establish at any requisite level of probability that Avery Blandin would not have committed the murder of his wife had he been arrested for criminal domestic violence on December 9th. In fact, he had previously been arrested, and that certainly had not prevented him from committing further offenses against his wife. This situation was no different based on the evidence (or lack thereof) presented.

In short, the Court has erred in focusing on whether Avery could have killed his wife on the 10th, and that is not the issue.<sup>1</sup>

To reiterate, Rivero was required to prove that Avery Blundin's arrest on December 9, 2011 would have resulted in his long-term detention and separation from his wife, thereby eliminating the threat. Plain and simple, an arrest for criminal domestic violence does not satisfy that burden of proof. Sheriff Loftis is entitled to a directed verdict and JNOV on the causation in fact issue.

---

<sup>1</sup> The Court's citation to *Alexander v. Town of Vernon*, 101 Conn. App. 477, 923 A.2d 748 (2007), is helpful to a degree in that the court in that case makes many of the same points Sheriff Loftis has asserted about the sheer speculation that arises in failure to arrest cases. The court, however, made the same error as this Court in focusing only on the husband's ability to commit murder on one particular day which fails to account for the obvious ability of the husband to commit murder whenever he bonded out of jail, even if it was two or more days later.

CONCLUSION

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

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: *Andrew F. Lindemann* By: 

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

-and-

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

*Counsel for Appellant  
Sheriff Steve Loftis*

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

---

Case No. 2013-CP-23-06522  
Appellate Case No. 2016-000548

---

Madel C. Rivero, as Personal Representative  
for the Estate of Lilia Lorena Blandin, ..... Respondent,

v.

Sheriff Steve Loftis, in his capacity as  
Sheriff of Greenville County ..... Appellant.

---

**RETURN**

---

This return is filed pursuant to the Court's request. Respectfully, the petition for rehearing should be denied.

**1. The rehearing petition mis-states Respondent's argument about the voir dire question.**

Asking prospective jurors about whether they have been victims of criminal domestic violence is not the same thing as asking prospective jurors whether they have ever called the police on a spouse. The questions are objectively different.

The rehearing petition says the circuit court made a factual finding that the voir dire question was unambiguous and that such a finding binds this Court.

It is difficult to understand this argument. Categorizing a voir dire question as ambiguous or straightforward is not a finding of fact. The language of a voir dire question is printed verbatim in the transcript and not subject to *any* factual dispute. The reason trial judges get deference on factual issues is because factual issues involve determining witness credibility. *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998). There is no credibility or fact-finding involved in looking at a voir dire question's verbiage. The existence of ambiguity is uniformly a question of law. Cf. *Bordeaux v. State*, 410 S.C. 495, 765 S.E.2d 143 (2014) (scrutiny of sentencing transcript or sentencing sheet); *Harleysville Group Ins. v. Heritage Communities*, 420 S.C. 321, 803 S.E.2d 288 (2017) (examining contract language); *Penza v. Pendleton Station*, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013) (examining a deed).

Here, the key question is whether there was intentional concealment of information that would have disqualified the juror or been material to the complaining party's use of peremptory strikes. Both this Court and the circuit court gave correct answers to this question.

The circuit court correctly found the evidence in this record and in the public record demonstrated the juror in question was not a victim of criminal domestic violence. (R.p.6). This Court's opinion is equally sound because, as noted above, asking prospective jurors about whether they have been victims of criminal domestic violence is not the same as asking prospective jurors whether they have ever called the police on a spouse.

It is worth emphasizing that the circuit court made essentially the same point as this Court. The circuit court favorably cited *State v. Kelly* for the proposition that the question propounded to the venire would not have elicited the information the complaining party believed was intentionally concealed. (R.p.7). Thus, regardless of whether someone describes this voir

dire question as the circuit court described it or as this Court described it, the answer is the same. The juror in question was not a victim of criminal domestic violence and Appellant should have requested a different question on voir dire if the desired information was whether any member of the venire had ever called the police on his or her spouse. The record does not show any intentional concealment. This Court was right to affirm.

**2. The rehearing petition incorrectly posits that this Court has reversed the circuit court.**

Respondent does not follow the argument that this Court has reversed the circuit court. This Court affirmed the circuit court's judgment against Appellant. The Court's use of Rule 220 was plainly proper.

Respondent also does not follow the argument that she should have appealed the circuit court's decision. The circuit court entered a judgment of monetary damages in Respondent's favor. Then, the circuit court denied Appellant's motion to set that judgment aside. Respondent was not aggrieved by either decision. Multiple authorities confirm only an aggrieved party can appeal. S.C. Code Ann. § 18-1-30; Rule 201(b), SCACR.

An appellate court is free to affirm even though it disagrees with the circuit court's reasoning. In *Potomac Leasing Co. v. Otts Market*, this Court explained "a right decision based upon a wrong ground will be affirmed" and that the circuit court's reasoning is not binding on the appellate court "if the record discloses a correct result." 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987). The Supreme Court has said the very same things. *State v. Goodstein*, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982). This Court could completely disagree with the circuit court's analysis. As long as the record supports the judgment, the judgment would be affirmed.

**3. The petition continues to wrongly insist that a further hearing was required beyond the hearing the circuit court conducted for the purpose of assessing whether there had been any juror misconduct.**

Appellant has repeatedly argued the circuit court was required to hold an evidentiary hearing to assess whether the juror intentionally concealed that she had called the police after a dispute with her husband.

To be clear, the circuit court held a hearing on this. The circuit court explained in its order that it reviewed the police report, the tape of the 9-1-1 call, the transcript of the 9-1-1 call, and the affidavits from the responding police officers. (R.p.6). Later, the circuit court determined no *additional* evidentiary hearing was necessary after it reviewed “all of the materials submitted by both parties.” (R.p.7).

In an opinion issued this past April, this Court declined to adopt the approach that “the mere allegation of misconduct mandates a full-blown adversarial hearing.” *State v. Tucker*, 423 S.C. 403, 414, 815 S.E.2d 467, 472 (Ct. App. 2018). That decision is not an outlier; other cases have involved variations of this same argument. *Lynch v. Carolina Self Storage Centers*, 409 S.C. 146, 159 n.2, 760 S.E.2d 111, 119 n.2 (Ct. App. 2014); *Long v. Norris & Assocs.*, 342 S.C. 561, 574, 538 S.E.2d 5, 12 (Ct. App. 2000). As in those cases, Appellant cannot demonstrate the circuit court abused its discretion in conducting a hearing and declining Appellant’s request to haul the juror into court. The circuit court believed it was unnecessary to do so. That conclusion is sound.

**4. There is ample evidence of causation-in-fact.**

It is common sense and well-documented that domestic disputes quickly become violent and consistently escalate. This is precisely why South Carolina has a mandatory investigation

and arrest statute that specifically references a gross negligence standard for liability. See S.C. Code Ann. § 16-25-70(I). Avery Blandin threatened to kill his wife. He did it the next day.

There is no open-ended duty to protect victims of domestic violence, but when an abuser injures a family member soon after the police failed to arrest the abuser, Respondent believes a reasonable jury is justified in finding causation. Many legislatures enacted “mandatory arrest” statutes precisely because of the historical resistance to enforcing domestic violence laws. Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. Ill. L. Rev. 533 (1996). Courts in other jurisdictions have recognized that liability may be imposed on law enforcement for violating those laws. See *Calloway v. Kinkelaar*, 659 N.E.2d 1322, 1328 (Ill. 1995) (recognizing liability in Illinois and citing cases from New York and Pennsylvania). These statutes are useless if a plaintiff must definitively prove an arrest would have made it impossible for the abuser to kill the victim.

The police officers’ failure to arrest Mr. Blandin may have emboldened him. The record suggests it did precisely that. There was testimony at trial that he taunted his wife and her mother via a text message and phone calls as they were driving away from the encounter with the officers. (R.p.531, line 9 - p.532, line 13).

On the other hand, getting locked up may have knocked sense into Mr. Blandin. It almost certainly would have prevented him from murdering his wife at her place of employment the next day.

*This issue—causation-in-fact—is a factual issue. Appellant was entitled to argue causation to the jury, but the jury was not obligated to agree with Appellant’s argument.*

CONCLUSION

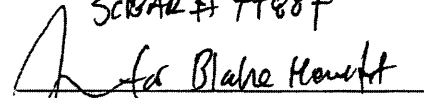
For the reasons stated here and in the prior briefing, the Court should deny the petition for rehearing.

August 29, 2018

Daniel W. Luginbill, # 68525  
J. Christopher Wilson, # 6987  
WILSON & LUGINBILL, LLC  
P.O. Box 1150  
Bamberg, SC 29003  
(803) 245-7799

Daniel Joseph Farnsworth, Jr., #6922  
FARNSWORTH LAW OFFICES, LLC  
P.O. Box 8719  
Greenville, SC 29604  
(864) 250-9119

Respectfully submitted,

SCBA2 # 77887  


Blake A. Hewitt, # 73674  
BLUESTEIN THOMPSON SULLIVAN LLC  
P.O. Box 7965  
Columbia, SC 29202  
(803) 779-7599  
(803) 779-8995 (facsimile)  
blake@bluesteinattorneys.com

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

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

---

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

---

**RECEIVED**  
SEP 07 2018  
SC Court of Appeals

Madel C. Rivero, as Personal Representative for the  
Estate of Lilia Lorena Blandin, ..... Respondent,

v.

Sheriff Steve Loftis, in his capacity as  
Sheriff of Greenville County, ..... Appellant.

---

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

---

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

## I.

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

---

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

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

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

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

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

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

## II.

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

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

in the law for a relaxed standard in failure to arrest cases – let alone a standard where the fact finder is permitted to engage in speculation in the absence of concrete admissible evidence. The proper approach, as Sheriff Loftis points out, is to require evidence showing to a reasonable level of probability that an arrest would prohibit any further opportunity to commit the crime. In this case, that required evidence that Avery Blandin would never have been released on bond or otherwise would no longer have had the motive and opportunity to murder his wife. There was no such evidence, and Rivero still points to none.

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

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

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

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

-and-

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

*Counsel for Appellant  
Sheriff Steve Loftis*

September 5, 2018