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 REPLY BRIEF

---

Counsel for the Appellant:

Marion C. Fairey, Jr.
The Fairey Law Firm, LLC
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444
bfairey@faireylaw.com

Clyde C. Dean, Jr.
THE DEAN LAW FIRM
146 Centre Street
Post Office Box 1405
Orangeburg, South Carolina 29115
(803) 534-5091
Clydedean5019@gmail.com

March 22, 2019
Hampton, South Carolina

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

## ARGUMENT

### I. EVIDENCE THAT THE DEPARTMENT OF CORRECTIONS FAILED TO EXERCISE SLIGHT CARE

The trial court was presented with evidence that the assault on Mr. Bing was both foreseeable and preventable with the exercise of slight care. Because there is a question of fact as to the foreseeability of the assault and whether the South Carolina Department of Corrections (hereinafter "the Department") exercised slight care to prevent it, the grant of summary judgment by the trial court was error.

Nevertheless, the Department argues that without evidence that Mr. Bing's attacker was "prone to assaulting other inmates" or that the Department had "prior notice of Dorsey's propensity to harm other inmates," the assault on Mr. Bing was not foreseeable. [Respondent's Initial Brief, p. 8]. Such specific notice, however, has never been required to establish foreseeability. *Parks v. Characters Night Club,* 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct.App.2001) ("It is not necessary to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone."), *citing, Greenville Memorial Auditorium v. Martin,* 301, S.C. 242, 391 S.E.2d 546 (1990); *see also, Bass v. Gopal, Inc.,* 395 S.C. 129, 136, 716 S.E.2d 901, 914 (2011) ("we do not believe evidence of prior criminal incidents should be the *sine qua non* of determining the foreseeability required to establish a duty").

In this case, there is evidence that the assault on Mr. Bing was a foreseeable consequence of the Department's failure to take slight care. The appellant's expert, Mr. Aiken, testified that when an inmate provides information to the Department about another inmate, he is seen as a "rat" or a "snitch" and "for him to share that information with authority automatically endangers

and puts him in a level of vulnerability that can cost him his life." [Aiken Deposition, pp. 69-70].

The record reflects that (1) Department personnel advised Mr. Bing that his new cellmate was smoking marijuana in his cell [Bing Deposition, p. 40-41]; (2) the same Department personnel advised Mr. Bing to request a roommate change [Bing Deposition, p. 41]; (3) Mr. Bing followed this advice and openly requested a roommate change from Lieutenant Goodman on the basis that his roommate was a "hot boy" who was involved in contraband [Goodman Deposition, p. 40]; (4) despite the fact that Mr. Bing had now reported his cellmate for contraband, Lieutenant Goodman did nothing to determine if Mr. Bing was unsafe in the cell with Dorsey [Goodman Deposition, p. 37], did not even look at Dorsey's administrative record at Lee Correctional [Goodman Deposition, p. 41], did not investigate Dorsey to see if he was "hot" [Goodman Deposition, p. 41], did not alert the contraband team to search Dorsey's cell [Goodman Deposition, p. 41], did not review any inmate classification materials on Mr. Bing or Dorsey [Goodman Deposition, pp. 31-32, 42-43], did not inspect the cell or review property inventories to determine if there might be a potential weapon in the cell [Goodman Deposition, p. 45] [1]and failed to warn Mr. Bing that as a "snitch," he might now be a target [Goodman Deposition, pp. 36-37]. In sum, Lieutenant Goodman testified that he **did nothing** to look into

[1]Despite the characterizations by the Department, Mr. Bing nor his expert have alleged that a hot pot should have been banned *per se.* [Respondent's Brief, pp. 10-12]. When asked at his deposition whether it was his opinion that it is gross negligence to allow the use, sale, distribution of some instrument to heat up liquid, Mr. Aiken testified, "I'm not saying that. I'm saying [a hot pot] is introduced [into the prison] without proper protocols, supervision, and protective and precursor evaluation and – procedures in place and operational, then you've got a problem." [Aiken Deposition, pp. 83-84]. He further explained his opinion that it was the lax supervision and security of the use of "hot pots" coupled with their capability to inflict serious injury that violated the standard of care. [Aiken Deposition, pp. 84-85].

or make any determination about whether Mr. Bing was safe or not. [Goodman Deposition, p. 37] (emphasis supplied).

"Gross negligence is a relative term and means the absence of care that is necessary under the circumstances." *Doe v. Greenville County School District,* 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007). "It has been defined as the intentional, conscious failure to do something which is incumbent upon one to do." *Id.* Apart from the list of failures outlined by Mr. Bing's expert, the admission by the Department's employee that he did nothing to keep Mr. Bing safe is evidence of the Department's failure to act or exercise slight care. Summary judgment should have been denied.

## II. THE DEPARTMENT HAS PRESENTED NO EVIDENCE THAT IT CONDUCTED A DILIBERTIVE PROCESS OR MADE A DISCRETINONARY DECISION

As an additional sustaining ground, the Department now claims that it is immune from liability under the South Carolina Tort Claims Act because the decision not to move Mr. Bing from his cell was discretionary and, as such, within the immunity of the Tort Claims Act. S.C. Code Anno. §15-78-60(5). No argument or evidence was presented to the trial court on this issue.

As a threshold matter, Mr. Bing recognizes that the Department, as the winner at the trial court level, may raise on appeal "any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mount Pleasant,* 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). "However, the failure to present an additional sustaining ground to the lower court reduces the likelihood an appellate court will rely on it to affirm a judgment." *Id.,* 338 S.C. at n. 11, 526 S.E.2d at n. 11. This is especially where there is little or no evidence in the record

regarding the issue raised. *Protestant Episcopal Church in the Diocese of South Carolina v. Episcopal Church,* 421 S.C. 211, 242, 806 S.E.2d 82, 99 (2017).

The burden of proving any exception to the general waiver of immunity under the South Carolina Tort Claims Act rests with the governmental entity asserting the waiver. *Clark v. South Carolina Department of Public Safety,* 353 S.C. 291, 304, 578 S.E.2d 16, 22 (Ct.App.2002). To prove discretionary immunity, the Department must prove that its employees, when faced with alternatives, actually weighed competing considerations and made a conscious choice based upon accepted professional standards appropriate to the agency. *Stephens v. CSX Transportation,* 415 S.C. 182, 200, 781 S.E.2d 534, 543 (2015); *Clark v. South Carolina Department of Public Safety, supra.* The mere fact that there was room for discretion on the part of the governmental entity is not sufficient to invoke the affirmative defense under the Tort Claims Act. *Sabb v. South Carolina State University,* 350 S.C. 416, 567 S.E.2d 231 (2002).

The Department claims that there is evidence that its officers "considered Appellant's request to move and denied it based upon the information and facts they had." [Respondent's Brief, p. 13]. First, this is factually incorrect. Ms. Hickman's, the prison's classification officer, submitted an affidavit. Her affidavit does not indicate that she ever considered Mr. Bing's request to transfer Dorsey out of his cell, not does it identify any facts that she weighed or professional standards that she used in reaching a deliberative decision. [Hickman Affidavit, ¶4]. Rather, it simply states according to the policy, "inmate Bing was not eligible for a cell transfer." [Id.] Similarly, Lieutenant Goodman's affidavit provides that he was advised by Ms. Hickman that in order to obtain a transfer, Mr. Bing would have to first fill out a request form, but that Mr. Bing would "not be eligible per SCDC Policy for a cell transfer since he had not been assigned a cell for at least six (6) months." [Goodman Affidavit, ¶3]. When asked about this in his

deposition, Lieutenant Goodman testified that when he informed Mr. Bing that the person complaining about his cell mate would be the one to move out of the cell, Mr. Bing decided to drop it. [Goodman Depo., p. 35]. There is no evidence that anyone from the Department investigated Mr. Bing's request, reviewed prisoner classification documents,[2] the compatibility of the two inmates, the fact that Mr. Bing was making the request based upon information that his cellmate was engaged in illicit activity. [Goodman Depositions, pp. 36-45].

There is nothing in this record that could be fairly construed as a deliberative process conducted in accordance with applicable professional standards. Accordingly, there is no evidence in the record that would support the Department's claim of discretionary immunity.

**Conclusion**

The trial court erred when it disregarded evidence that the assault on Mr. Bing was foreseeable and that the Department's failed to exercise slight care to protect Mr. Bing from the attack. Additionally, the Department has failed to meet its burden of proof in establishing discretionary immunity, and even if it had offered some evidence that it undertook a deliberative

---

[2]The Department claims that its expert, Mr. Sparkman. is the only expert that actually reviewed the relevant classification records of Mr. Bing and Dorsey. [Respondent's Brief, p. 13]. This is also inaccurate. Mr. Aiken, who is a former warden with over forty years experience in prison operations [Aiken Deposition, pp. 15-30], reviewed every document provided by the Department in discovery in this matter. [Aiken Affidavit, ¶5]. With respect to prisoner classification, Mr. Aiken testified about his criticism of the Department's conduct in this case, Mr. Aiken testified that he saw no evidence of a proper process in which these two inmates were classified and selected to be housed together. [Aiken Depo., p. 39]. He explained

> Prisoners don't necessarily get along with each other, and you've got to go through checklists and checkpoints to see the enemies, medical, mental health, contraband, or a number – or gang intelligence, a number of areas you've got to check before that inmate is moved from point A to point B, and I did not receive materials showing the process in which those two inmates got together on the perpetrator's perspective as well as the victim's perspective.

[Aiken Deposition, p. 45-47].

process in accordance with accepted professional standards, it would not be fair or wise to conclude on this record that the Department is shielded by discretionary immunity.

Respectfully submitted,

Marion C. Fairey, Jr.
The Fairey Law Firm, LLC
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444
bfairey@faireylaw.com

Clyde C. Dean, Jr.
THE DEAN LAW FIRM
146 Centre Street
Post Office Box 1405
Orangeburg, South Carolina 29115
(803) 534-5091
Clydedean5019@gmail.com

March 22, 2019
Hampton, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

RECEIVED
MAR 25 2019
SC 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 March 22, 2019, I have served a copy of the following documents:

- Appellant's Initial Reply Brief
- Appellant's Additional Designation of Matters to Be Included in the Record on Appeal
- Certification of Counsel

by United States Mail, postage prepaid, addressed to:

G. Murrell Smith, Jr.
LEE, ERTER, WILSON, HOLLER
& SMITH, LLC
126 North Main Street
Post Office Box 580
Sumter, South Carolina 29151

The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
1220 Senate Street
P. O. Box 11629
Columbia, SC 29211

*<signature page to follow>*

Jill S. Jones (Legal Assistant)
The Fairey Law Firm, LLC
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444
jjones@faireylaw.com

March 22, 2019
Hampton, South Carolina

**The Fairey Law Firm, LLC**
4985 Savannah Hwy
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444
(803) 943-5517 (fax)

MARION C. FAIREY, JR. bfairey@faireylaw.com

March 22, 2019



**Via U.S. Mail and Facsimile (803-734-1839)**
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
P. O. Box 11629
Columbia, SC 29211

**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 ***Appellant's Reply to Initial Brief, Appellant's Additional Designation of Matters to Be Included in the Record on Appeal, Certification of Counsel,*** and the accompanying ***Proof of Service*** for this case. Please file the originals and return the stamped copies to me in the enclosed envelope. By copy of this letter, I am today serving all counsel of record with a copy of the same.

With kindest regards, I am,

Sincerely,

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

Enclosure
cc: G. Murrell Smith
Clyde C. Dean, Jr. (via email)

The Fairey Law Firm
P. O. Box 661
Hampton, SC 29924



The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
1220 Senate Street
P. O. Box 11629
Columbia, SC 29211