THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner Steve Loftis certifies that his Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on March 1, 2019.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in relying on its authority pursuant to Rule 220(c), SCACR, to reverse an unappealed final ruling by the Circuit Court?

II. Did the Court of Appeals err in failing to reverse the Circuit Court on the juror concealment issues including the erroneous requirement of "proof of disqualification" and the denial of an evidentiary hearing to determine whether the juror intentionally concealed pertinent information during voir dire?

III. Did the Court of Appeals err in affirming the denial of directed verdict and JNOV motions on the causation defense where there was no evidence presented to demonstrate causation in fact?

STATEMENT OF THE CASE

This is an action brought pursuant to the South Carolina Tort Claims Act for an alleged failure to arrest. The Respondent Madel C. Rivero, as the Personal Representative of the Estate of Lilia Lorena Blandin ("Rivero"), filed this action alleging gross negligence against the Petitioner Steve Loftis, in his capacity as Greenville County Sheriff.

This action arises out of the murder of Lilia Blandin by her husband, Avery Blandin, which occurred on December 10, 2011, while she was employed by Woodforest National Bank at a branch located within a Wal-Mart store on White Horse Road in Greenville, South Carolina. On the previous day, December 9, 2011, Lilia Blandin called Greenville County 911 and spoke with Patricia Sullivan, a 911 operator. As a result of that call, two Greenville County deputy sheriffs, David Picone and Kevin Tyner, were dispatched to the Blandin residence at 1025 North Orchard Farms Avenue in Simpsonville, South Carolina. Deputies Picone and Tyner spoke with both Lilia and Avery Blandin. No arrests were made. The deputies did ensure that Lilia Blandin was able to leave the premises.

In its Complaint, Rivero has pled that Sheriff Loftis, acting through the deputies and Patricia Sullivan, failed to follow department protocols and were grossly negligent in failing to place Avery Blandin under arrest. Rivero alleges that probable cause existed for his arrest and that the arrest was mandated under Section 16-25-70 of the South Carolina Code.

After the completion of discovery and settlements by a number of other Defendants who were sued, the case went to trial on September 28, 2015, with Sheriff Loftis as the sole remaining Defendant. The case was tried before Circuit Court Judge Robin H. Stilwell and jury. At the close of Rivero's case-in-chief and again at the close of all evidence, Sheriff Loftis made

directed verdict motions which were denied by Judge Stilwell. After several days of trial, the jury returned a verdict in favor of Rivero. The jury awarded $750,000 in actual damages on the survival action and $500,000 in actual damages on the wrongful death action. (R. 1-2).

Sheriff Loftis filed a number of post-trial motions including a motion to reduce the verdicts to the monetary caps under the Tort Claims Act. That motion was granted by Judge Stilwell and a judgment totaling $600,000 was entered. (R. 15). Sheriff Loftis also filed motions for judgment notwithstanding the verdict and new trial absolute on various grounds. Those motions were denied. (R. 9-15).

It was also learned post-trial that Robin Burns, the foreperson of the jury, had personally called 911 on June 23, 2011, three months prior to jury selection, requesting law enforcement assistance because her husband had twisted her arm and ripped a telephone from her hand during the course of a domestic dispute. During voir dire which took place on September 28, 2015, Judge Stilwell had asked the venire the following question: "Is there anyone among you who has been a victim of criminal domestic violence?" (R. 229). Juror Burns did not respond. She was subsequently selected for the jury, and later was made the foreperson. (R. 2, 798). Juror Burns during the course of the trial even interrupted at one point and attempted to ask her own questions of the witness. (R. 704).

In light of the information learned, counsel for Sheriff Loftis obtained the 911 call for Juror Burns' request for law enforcement assistance on June 23, 2015. He also obtained the incident report and affidavits from the responding officers. This information was received into evidence by Judge Stilwell with respect to a motion for new trial that was filed by Sheriff Loftis alleging juror concealment during voir dire. (R. 16). A request was made for an evidentiary hearing. During a motion hearing held on December 17, 2015, Judge Stilwell stated his

intentions to schedule an evidentiary hearing to question Juror Burns (and potentially others with relevant information). (R. 243-247).

However, Judge Stilwell instead issued two orders in early February without ever holding the evidentiary hearing. The first order filed February 10, 2016 denied the motion for new trial based on juror concealment. That order also found that "no additional evidentiary hearing in this matter is required." (R. 7). Judge Stilwell also issued a second order that reduced the judgment to $300,000 on the survival claim and $300,000 on the wrongful death claim. That order also denied the remaining JNOV motions and motions for new trial. (R. 9-15).

Sheriff Loftis filed an additional motion pursuant to Rule 59(e), SCRCP, with a request that two issues be addressed. That motion was denied by an order filed March 24, 2016. (R. 112-113).

Sheriff Loftis thereupon filed an appeal to the South Carolina Court of Appeals. No cross-appeal was filed. On July 25, 2018, the Court of Appeals issued a unanimous unpublished opinion affirming the judgment in favor of Rivero. The Court of Appeals affirmed denial of Sheriff Loftis' motions for directed verdict and/or JNOV as well as the Sheriff's motion for a new trial absolute.

Sheriff Loftis thereafter petitioned for rehearing, and that petition was denied by order entered on March 1, 2019, by a split vote of the three-judge panel. Judges Huff and McDonald voted to deny the petition for rehearing while Judge Geathers voted in favor of a rehearing. (App. 10). Sheriff Loftis now seeks review in the Supreme Court by way of a petition for writ of certiorari.

ARGUMENTS

I. The Court of Appeals erred in relying on its authority pursuant to Rule 220(c), SCACR, to reverse an unappealed final ruling by the Circuit Court.

The Petitioner 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, the Court of Appeals actually *reversed* a critical ruling made by the trial judge that was unappealed. Judge Stilwell ruled that "[t]he question the court posed in *voir dire* was clear and unambiguous." (R. 6). Despite that unappealed final ruling, the Court of Appeals concluded that the voir dire question at issue was ambiguous, and as a result, "Burns' concealment was unintentional." (App. 4). The Court of Appeals 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." (App. 5). The Court of Appeals justified its *reversal* of that unappealed final 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 of Appeals' adjudication of the juror misconduct issue raises several issues, all of which separately support the request for a writ of certiorari be granted, but in tandem, should make a writ of certiorari a prerogative.

A. Court of Appeals disregarded the standard of review.

The critical ruling by Judge Stilwell that the voir dire question was "clear and unambiguous" is arguably a finding of fact. In responding to the petition for rehearing in the Court of Appeals, Rivero argued that the issue of ambiguity of a voir dire question is one of law and not fact. Sheriff Loftis agrees that the issue appears unsettled, which warrants consideration on certiorari. At any rate, the issue of ambiguity of a voir dire question is clearly one 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.

Moreover, in the leading case of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), this 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 Court of Appeals. This 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 or the application of the discovery rule in the adjudication of a statute of limitations defense which is likewise determined 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, the Court of Appeals did not even address whether Judge Stilwell's finding was supported by any evidence. Instead, the Court of Appeals 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. There is no precedent for appellate courts to use Rule 220(c), SCACR, to reverse a finding of the Circuit Court.

In addition, the Court of Appeals improperly relied on Rule 220(c), SCACR, to provide the basis for *reversing* the unappealed final ruling by Judge Stilwell. The Court of Appeals suggested that it was simply affirming based on a ground appearing in the record; however, that it not the case. The Court of Appeals 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 the Court of Appeals to have relied 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), the Court of Appeals 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, the *Sims* 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 Petitioner'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.[1] That unprecedented and erroneous use of Rule 220(c) warrants the issuance of a writ of certiorari.

C. The Court of Appeals was not ruling on an additional sustaining ground raised by the Respondent but rather raised an issue *sua sponte*.

The Court of Appeals' reliance on Rule 220(c) in this instance to *reverse* a ruling by the Circuit Court is further problematic in that, unlike in such cases like *Sims*, the 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

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[1] In the recent case of *Stoneledge at Lake Keowee Owners Asso. v. IMK Development Co., LLC*, 425 S.C. 268, 821 S.E.2d 504 (Ct. App. 2018), the Court of Appeals wrote: "Accordingly, pursuant to Rule 220(c), SCACR, we reverse the trial court's set-off order and remand for entry of judgment consistent with our decision in *Stoneledge I*." 821 S.E.2d at 505-506. In reality, the Court of Appeals' reference to Rule 220(c) is mistaken. The Court did not actually rely on Rule 220(c) to reverse but rather merely relied by reference on a different opinion issued on the same date in the same litigation because, as the Court explained, "[o]ur opinion in *Stoneledge I* adequately addresses the second and third issues Bostic raises in this appeal." 821 S.E.2d at 505. This quote does perhaps demonstrate an erroneous belief by the Court of Appeals that Rule 220(c) does provide authority to reverse which is directly at odds with the plain language of the rule. Notably, two of the Court of Appeals judges on the *Stoneledge* opinion -- Judges Huff and McDonald -- are the two judges in the present case that

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 the Court of Appeals, 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 the Court of Appeals' unprecedented reliance on Rule 220(c) to *reverse* an unappealed ruling by the lower court also strongly supports the issuance of a writ of certiorari in this case.

D. The Court of Appeals' reliance on Rule 220(c), SCACR, is inconsistent with the law of the case doctrine and years of Supreme Court and other appellate precedent applying that doctrine.

Last, but certainly not least, the Court of Appeals' 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, including many Supreme Court cases. In footnote two, the Court of Appeals rejected the law of the case argument made by Sheriff Loftis' counsel when this new issue was first raised *sua sponte* during oral argument. (App. 4-5). 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."

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denied the Sheriff's petition for rehearing on this very issue. Judge Geathers, who was not involved in *Stoneledge*, voted to grant the rehearing.

The Court of Appeals 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 this Court did not limit the doctrine's application to issues or claims decided on a prior appeal. Indeed, this 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); *Skyways I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 814 S.E.2d 643 (Ct. App. 2018); *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 of Appeals' 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, this 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), this 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 have been reconsidered and *reversed* by the Court of Appeals. Rule 220(c) simply does not give and cannot be construed to give an appellate court the power to override or disregard the law of the case doctrine – just as it does not give an appellate court the authority to *reverse* an unappealed ruling. Contrary to footnote two, the unappealed ruling *was binding* on the Court of Appeals.

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"). This Court is respectfully requested to issue a writ of certiorari to give full effect to the unappealed ruling by Judge Stilwell that the voir dire question was "clear and unambiguous." (R. 6).

In conclusion, it is important to point out that neither the Court of Appeals nor Rivero has cited a single case where this Court or the Court of Appeals 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 of Appeals has done in this case is unprecedented and warrants reversal on certiorari.

II. The Court of Appeals erred in failing to reverse the Circuit Court on the juror concealment issues including the erroneous requirement of "proof of disqualification" and the denial of an evidentiary hearing to determine whether the juror intentionally concealed pertinent information during voir dire.

As discussed above, the Court of Appeals 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 of Appeals to decide this issue, the actual issues briefed and argued by the parties still need to be fully considered and adjudicated.

Specifically, 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, the Court of Appeals "acknowledge[d] the merit of this argument." (App. 3). Yet, instead of merely acknowledging the merit, the Court of Appeals should have found reversible error. As the Sheriff argued, 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," this Court has required 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 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).

Moreover, this Court is also requested to issue a writ of certiorari to review 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), this 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), this 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, 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 this 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 this 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 a writ of certiorari. At a minimum, this Court needs to provide guidance to

the bar and bench as to when an evidentiary hearing needs to be conducted when issues of juror concealment arise.

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), this 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").

III. The Court of Appeals erred in affirming the denial of directed verdict and JNOV motions on the proximate causation defense where there was no evidence presented to demonstrate causation in fact.

This Court should also grant a writ of certiorari to address Sheriff Loftis' lack of causation in fact defense. The Court of Appeals erred in concluding that there was sufficient evidence to make the issue of causation in fact a jury question.

In so ruling, the Court of Appeals focused on evidence that suggested – albeit in a speculative way – that Avery Blandin, 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 of Appeals' 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." (App. 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 of Appeals 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." (App. 8). That is a valid point, and Rivero has the burden of proof. Yet, after making that observation, the Court of Appeals inexplicably "assum[es] the no-contact condition of the October 31 bond was still in place." (App. 8). In the absence of evidence, however, the Court of Appeals (or the jury) simply cannot make such an assumption. An assumption is not a proper substitute for evidence.

Yet, the most glaring error in the Court of Appeals' analysis is its 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 the Court of Appeals 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).

The Court of Appeals also failed to give proper consideration to the 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 of Appeals found the *Thomas* decision to be "persuasive" but "distinguishable." (App. 6). Sheriff Loftis submits that it is actually *controlling*. In *Thomas*, the Court of Appeals 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 the Court of Appeals 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 of Appeals erred in focusing on whether Avery could have killed his wife on the 10th, and that is not the issue.[2]

To reiterate, Rivero was required to prove that Avery Blandin'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. The Sheriff's causation defense clearly warrants the issuance of a writ of certiorari for this Court to address this critical issue and to correctly apply the precedent established in *Thomas*.

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[2] The Court of Appeals' citation to the case of *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 Connecticut court, however, made the same error as the Court of Appeals did 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 Petitioner Sheriff Steve Loftis respectfully requests that this Court grant his petition for a writ of certiorari.

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
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(864) 233-4500

Counsel for Petitioner
Sheriff Steve Loftis

April 1, 2019

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., attorneys for the Petitioner, does hereby certify that service of the **Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record as well as a copy of the **Appendix** being made upon all counsel of record (minus the briefs and Record filed with the Court of Appeals) by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 1st day of April 2019 addressed as follows:

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Via U.S. Mail
Daniel J. Farnsworth, Jr., Esquire
Brann W.M. Fowler, Esquire
Farnsworth Law Offices, LLC
Post Office Box 8719
Greenville, South Carolina 29604

Via U.S. Mail
Daniel W. Luginbill, Esquire
J. Christopher Wilson, Esquire
Wilson & Luginbill, LLC
Post Office Box 1150
Bamberg, South Carolina 29003

Via U.S. Mail
Blake A. Hewitt, Esquire
Bluestein Thompson Sullivan, LLC
Post Office Box 7965
Columbia, South Carolina 29202

Via U.S. Mail

Russell W. Harter, Jr., Esquire
Carly H. Davis, Esquire
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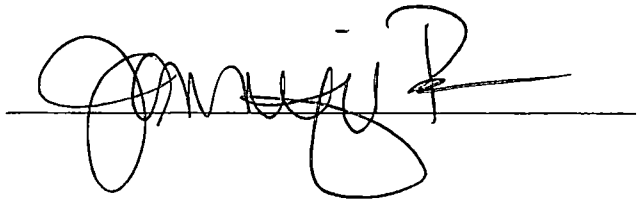

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**Also Admitted in North Carolina*
†Certified Mediator

April 1, 2019

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The Honorable Jenny Abbott Kitchings
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South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Madel C. Rivero, as Personal Representative for the Estate of Lilia Lorena Blandin v. Sheriff Steve Loftis, in his capacity as Sheriff of Greenville County
SCCA Appellate Case Number: 2016-000548
Civil Action Number: 2013-CP-23-6522
Claim Number: 03841
Our File Number: 104.9842

Dear Ms. Kitchings:

Please find enclosed for filing two copies of the **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has been filed with the South Carolina Supreme Court. Please provide me with a clocked-in copies of each document by way of my paralegal. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew Lindemann

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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