THE STATE OF SOUTH CAROLINA
In The Court of Appeals



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APPEAL FROM LEE COUNTY

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

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Case No. 2014-CP-31-00100

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Levi Bing, ..... Appellant,

v.

The South Carolina Department of Corrections, ..... Respondent.

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# FINAL BRIEF OF RESPONDENT

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G. Murrell Smith, Jr.
SC Bar No. 66263
LEE, ERTER, WILSON, HOLLER & SMITH, L.L.C.
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
(803) 778-1643 (facsimile)
murrell@leeandmoise.com
Attorney for Respondent

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(803) 778-2471
(803) 778-1643 (facsimile)
murrell@leeandmoise.com
Attorney for Respondent

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## STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT TO RESPONDENT DEPARTMENT WHERE THERE ARE NO MATERIAL QUESTIONS OF FACT SUPPORTING APPELLANT'S CLAIMS OF GROSS NEGLIGENCE?**

## STATEMENT OF THE CASE

This appeal arises from the trial court's grant of summary judgment to Respondent Department of Corrections in an inmate negligence case. Appellant filed suit against Respondent Department under the South Carolina Tort Claims Act alleging causes of action for gross negligence arising out from its alleged failure to protect Appellant from an assault perpetrated by a fellow inmate. (ROA p.27-30). Appellant's original complaint was filed on September 29, 2011 under Case No. 2011-CP-03-00216. That case was struck from the trial docket pursuant to Rule 40(j), SCRCP on March 22, 2013 and restored on March 22, 2014 under Case No. 2014-CP-03-100. Respondent Department filed its Motion for Summary Judgment on March 18, 2015, (ROA pp. 38-39), and parties proceeded with discovery. Both parties submitted memoranda of law with supporting testimony from the record and the affidavits and testimony of their expert witnesses. The Honorable George M. McFaddin, Jr., heard Respondent's motion on June 8, 2018 and his order granting Respondent's Summary Judgment Motion was filed on August 22, 2018. This appeal follows.

## FACTS

At all times relevant to this action, Appellant was an inmate at Lee Correctional Institute serving a forty-year sentence for murder, grand larceny and possession of a weapon during a violent crime. According to the Complaint, Appellant was transferred to his first-floor cell in the South Darlington Unit of Lee Correctional Institution for medical reasons. (ROA p. 28).

Approximately one month before the incident at issue here, Inmate Willis Dorsey joined Appellant as his roommate. According to the Complaint, Appellant requested a transfer out of the room and away from Willis Dorsey because Willis Dorsey was in possession of contraband and threatening to Plaintiff. (ROA p. 28). Appellant testified that he had not received any threats from Dorsey nor had there been any incidents between them. (ROA pp. 75-76) Instead, Appellant was concerned that because Dorsey was not a model inmate, he could cause trouble for Appellant as well. (*Id.*) Appellant did not express any concerns of violence being directed at him by Dorsey to SCDC's personnel. (*Id.*)

According to his deposition, it was Appellant's understanding that an officer smelled marijuana while Appellant was outside his room and told Appellant about his suspicions. Appellant was worried he would also get into trouble for rules violations committed by Dorsey. Despite his concern, he never placed his specific concerns in writing. (ROA p. 75). Appellant eventually approached one of the lieutenants to request a room change because his roommate, Dorsey, had a disciplinary history and he did not want to lose his classification. (ROA p. 76). He gave the Lieutenant no other reason for his transfer request. (*Id.*) The Lieutenant then contacted the Appellant's Caseworker, Brenda Scott Hickman who stated that, pursuant to SCDC policy, Appellant was not eligible for a change of cellmates at that point. (ROA pp. 131-135). Appellant was aware of the Caseworker's decision and yet made no further requests for transfer and failed to allege any other bases for transfer such as fear for his safety or alleged threats. (ROA p. 76). Appellant also did not tell Dorsey about his request for transfer, and there were no altercations between Appellant and Dorsey. (ROA p. 73). The two inmates never even shared cross words before the incident. (ROA p. 73 ). In fact, the two cellmates shared a hot pot used to warm coffee

which had apparently been purchased by Appellant. (ROA pp. 160-164).

On June 7, 2010, right after cell count, the two inmates were in their cell. Dorsey was heating water and Appellant assumed he was about to make coffee. (ROA p 77). As Appellant was lying on his bed, Dorsey threw the hot water on him without warning. Appellant said he jumped up and Dorsey pulled out a knife and stated "you know what I want." (*Id.* ROA pp. 77-78) Appellant began to tussle with Dorsey, and, at the same time, he started kicking the cell which alerted the officers. (*Id.* ROA pp. 77-78) The officers opened the door and broke up the altercation. *Id.*

At his deposition, Appellant admitted that prior to the attack on him by Dorsey, he had not told anyone he was afraid of Dorsey or that he feared for his life. (ROA p. 79). Appellant also admitted that neither he nor any member of the SCDC staff had been aware that the hot pot in the cell could heat water to temperature sufficiently high to burn someone that badly prior to the incident. (ROA p. 80). Nevertheless, Appellant and his expert witness, James Evans Aiken, are of the opinion that Respondent Department was grossly negligent because a) hot pot should never be allowed in a Correctional Facility; and, b) that Dorsey should never have been assigned to room with Appellant. Aiken also opined that Respondent should have conducted a contraband investigation after Appellant requested a room changed and/or should have placed Appellant in protective custody as a "snitch." (ROA pp. 155-159; ROA pp. 82-123).

Respondent's expert witness, Emmitt L. Sparkman, who actually reviewed the classification records relevant to this matter, opined that officers at the Lee Correctional Institution complied with the Policies and Procedures of cell assignment and that there was no indication that

Appellant was not compatible with Dorsey prior to the incident. (ROA pp. 137-138). Sparkman further opined that hotpots are available just microwaves are throughout prisons in both South Carolina and across the country and that such items are not inherently dangerous. (ROA p. 140), and that further, there was nothing additional Respondent Department could have done to prevent the attack by Dorsey on Appellant. (ROA pp. 140-141)

## ARGUMENT

South Carolina's appellate courts apply the same standard under Rule 56(c), SCRCP as the trial courts when reviewing a grant of summary judgment. *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id. citing Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id. citing Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Helms Realty, Inc. v. Gibson–Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005); *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis*

*v. Wu*, 362 S.C. 146, 607 S.E.2d 63 (2004).

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004).

## I. THE TRIAL COURT CORRECTLY GRANTIED SUMMARY JUDGMENT TO RESPONDENT DEPARTMENT BECAUSE THERE ARE NO MATERIAL QUESTIONS OF FACT SUPPORTING APPELLANT'S CLAIMS FOR GROSS NEGLIGENCE.

### A. Absent a showing of the failure to exercise even slight care, Respondent Department is immune from suit for allegedly failing to protect the Appellant inmate from assault by a fellow inmate.

Under the South Carolina Tort Claims Act ("SCTCA") as a governmental entity, Respondent Department enjoys immunity from liability for claims arising out of a variety of factual scenarios. S.C. Code Ann. §§ 15-78-10 *et seq*. The purpose of the SCTCA was set forth in section 15-78-20: "[W]hile total immunity from liability on the part of the government is not desirable ... neither should the government be subject to unlimited or unqualified liability for its actions." S.C. Code Ann. §§ 15-78-20(a). In subsection (b) of that section, the legislative intent behind the SCTCA is expressed: "The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. S.C. Code Ann. §§ 15-78-20(b). In section 15-78-40, it is further provided that "The State, an agency, a political subdivision and a governmental entity are liable for their torts in the same manner and to the same extent as a

private individual under like circumstances, ***subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein***." S.C. Code Ann. §§ 15-78-40 (emphasis added).

South Carolina Code § 15-78-60(25) provides that a governmental entity is immune from suit for the manner in which it carries out its "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25).[1] Gross negligence is the intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. *Etheridge v. Richland School District 1*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (S.C. 2000). "Gross negligence, in the context of liability by a governmental entity, is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do; it is the failure to exercise slight care." *Jinks v. Richland County*, 355 S.C. 341, 345 (S.C. 2003). In *Moore by Moore v. Berkeley County Sch. Dist.*, 326 S.C. 584, 591, 486 S.E.2d 9, 13 (Ct. App. 1997), this Court cited S.C. Code Ann. § 15-78-60(25) and explained:

> ***Gross negligence means the failure to exercise a slight degree of care. Gross negligence involves an intentional, conscious failure to do something which it is incumbent upon one to do or the intentional doing of a thing one ought not to do.*** The term is relative and means the absence of care that is necessary under the circumstances. *Hollins v. Richland Cty. Sch. Dist. One*, 310 S.C. 486, 427 S.E.2d 654 (1993); *Clyburn v. Sumter Cty. Sch. Dist. 17*, 311 S.C. 521, 429 S.E.2d 862 (Ct.App.1993); *Grooms v. Marlboro Cty. Sch. Dist.*, 307 S.C. 310, 414 S.E.2d 802 (Ct.App.1992).

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[1] Appellant's reliance before the trial court on the body of federal case law related to the "deliberate indifference" standard was misplaced. Appellant has not alleged a 42 U,S.C. § 1983 claim and instead elected to file only a state law gross negligence claim.

*Id.* (emphasis added).

"Additionally, while gross negligence ordinarily is a mixed question of law and fact when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 245 (Ct. App. 2004) (*citing Etheredge*, 341 S.C. at 310). Appellant has the burden of proving gross negligence. *Stewart v. Richland Memorial Hospital*, 450 S.C. 589 (Ct. App. 2002) (Finding that while a governmental entity has the initial burden of establishing a limitation upon liability or an exception to the waiver of immunity, the plaintiff must still prove that the governmental entity has waived immunity)).

Here, there is absolutely no evidence in the record demonstrating that Respondent Department was grossly negligent. The *Pack* court determined that summary judgment was proper after finding that governmental employees acted with at least slight care. *Pack*, 362 S.C. at 245. Just as in *Pack*, while here Appellant and his expert argue that Respondent could have done more to protect him, "[t]he fact that more might have been done does not negate a finding that [defendant] employees exercised at least slight care." *Id.* (*citing Etheredge*, 341 S.C. at 311 – 12) (holding that where defendant had no knowledge of animosity between students, and principal and security monitored hallways, the fact that school district might have done more did not negate the fact it exercised slight care for purposes of determining whether gross negligence exception to Tort Claims Act was applicable)).

In one of the only cases where our courts have allowed an inmate on inmate assault case to go forward to a jury trial, the Department placed an 88-year-old inmate with an inmate who has been diagnosed as schizophrenic and sociopathic, and who a long history of violent behavior including attacks on inmates and correctional officers and the killing of another inmate. *Jackson v. S.C. Dep't of Corr.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989), *cert. granted,*

*decision aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990). Only on those extreme facts, did the Court determine the Department knew enough about the dangerous inmate that a jury could reasonably have determined that the placing of those inmates together exhibited a conscious indifference to the threat the dangerous inmate posed to the safety of other inmates.

This case is not *Jackson* by any stretch. First, neither Appellant nor his expert offered any evidence that Dorsey was prone to assaulting other inmates or that Respondent Department had any prior notice of Dorsey's propensity to harm other inmates. Moreover, Respondent's expert, Emmitt Sparkman of the Mississippi Department of Corrections, testified that the Department appropriately classified the inmates and performed all the appropriate cell assignment procedures. (ROA pp. 137-138). Mr. Sparkman further testified based on his review of the Classification Files, that Lee Correctional Institution complied with the policies and procedures of cell assignment. *Id.* Just as in *Moore*, *supra*, Appellant has no evidence that Respondent Department had any notice of Dorsey's propensity to violence against fellow inmates prior to the incident involving Appellant. There was no indication that Appellant was not compatible with his roommate at the time of the incident, and Appellant's own testimony revealed there was no problems between them prior to the incident. Again, Appellant's ***only*** complaint was that he understood that a correctional officer smelled marijuana outside the room. Appellant never alleged he saw Dorsey smoking marijuana, nor did he ever testify that he saw contraband with Dorsey. Appellant further admitted that Dorsey had never threatened him, and that they had never had an altercation or any disagreements prior to the incident.

The fact that Appellant was worried his roommate may possibly be involved with prison contraband did not create any reasonable suspicion that Appellant was in danger of being harmed. Appellant discussed his request to move with the Lieutenant who contacted the caseworker who

determined there was no basis for a transfer. There was no appeal taken to this request and the Appellant did not request protective custody. (ROA p. 79). The actions by Department personnel certainly amount to more than "even slight care" and cannot form the basis of a gross negligence claim.

Furthermore, Appellant's complaints were a few weeks prior to the incident. Nothing occurred between the roommates that would indicate there was any attack that was imminent, and Appellant failed to establish that there was a foreseeable risk of harm to him based on Respondent's failure to grant the transfer request or that any alleged failures caused the harm sustained by Appellant. As in any negligence action, the plaintiff must prove proximate cause. *Rush v. Blarichard*, 310 S.C. 375, 426 S.E.2d 802 (1993). "Proximate cause requires proof of both causation in fact and legal cause." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1997). "Legal cause is proved by establishing foreseeability." *Id.* The test of foreseeability is whether the injury is the natural and probable consequence of the alleged negligent, act. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "Where the injury complained of is not reasonably foreseeable there is no liability." *Crolley v. Hutchins*, 300 S.C. 355, 357, 387 S.E.2d 716, 717 (Ct. App. 1989).

Again, here, Appellant's testimony was simply that he requested a transfer of cellmates which was denied. He never testified he thought he was in danger and he admitted he had had no altercations with Dorsey and that Dorsey had never threatened him. If Appellant himself did not perceive a risk of harm to himself, it is inconceivable that Respondent Department should have foreseen such a risk. Appellant offered zero evidence Appellant or anyone else ever complained to the Department about Dorsey's potential to harm other inmates such that the Department could have reasonably anticipated that Dorsey would engage in a violent assault against his roommate.

Appellant's argument concerning Respondent's alleged duty to protect him is misplaced in that the Tort Claims Act presupposes that there may some duty of care owed by the State to inmates in its custody; however, the State's sovereign immunity is waived *only* when the responsibility or duty is exercised in a grossly negligent manner. S.C. Code Ann. § 15-78-60(25).

Absent some evidence indicating notice to the Department of Dorsey's predisposition towards violence against his cellmate, there is no basis to conclude the Department knew or should have known of any actionable risk of harm to Appellant. *Moore*, at 591-92, 486 S.E.2d at 13. Without more, Appellant's allegations of gross negligence cannot stand, and summary judgment was properly entered in favor of the Defendant Department.

**B. The hotpot used to heat the water thrown on Appellant by his fellow inmate was not a "dangerous instrumentality" that should have been banned *per se* by Respondent Department.**

Appellant's expert opined that at no time should Respondent Department have permitted hotpots in inmate cells and that its failure to ban such items amounts to gross negligence. (ROA pp. 101-102; ROA pp. 106-107; ROA p. 122). First, there are no such blanket restrictions in any Department policy and the use of such hotpots are common throughout prisons both within and without the State of South Carolina. (ROA p. 140). Further, Aiken points to no such standards or restrictions from either South Carolina or anywhere else in the country. Moreover, case law from around the county mirrors South Carolina's standard which require there to be a foreseeable risk of harm from a particular inmate using a particular device as a weapon before any liability to the state can attached.

For example, in *Hayes v. State of Illinois*, 47 Ill. Ct. Ci. 389 (1994), the court found that the State is not an insurer as to the safety of an inmate in its custody and that it must be shown that the state's agents anticipated or should have anticipated third persons would commit criminal acts

against the particular inmate who was attacked. There, the Court found that even though hot water was thrown on another inmate, there was no evidence, as in this case, that the plaintiff warned the state's agent or that they otherwise knew of the danger of an attack. Thus, there, as here, summary judgment was appropriate.

Similarly, in *Carter v. United States of America*, No. CV 14-4741(RMB), 2017 WL 3498938, (D.N.J. Aug. 15, 2017) a federal district court judge dismissed a § 1983 claim where an inmate splashed another inmate with a "super-heated homemade concoction of scalding hot coffee, oral and cleaning chemicals mixed together" and heated in a microwave made available by the prison's warden to the inmates. There, the Court stated that "due to the difficulty of prison management, Courts typically provide great deference to the decisions of prison administrators." *Id.*, *citing Thornburg v. Abbot*, 490 U.S. 401, 407-08 (1989). "The Judiciary is ill equipped to deal with the difficult and delicate problems of prison management." Therefore, Courts must "afford considerable deference to the determinations of prison administrators." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). ("Running a prison is an inordinarily difficult undertaking that requires expertise, planning and commitment of resources"). The Court concluded there was no foreseeability and that it was not reasonable to presume that because a microwave could be used to heat liquid, that, in and of itself, made it an instrument inherently dangerous.

Similarly, in *Anderson v. Wilkerson*, 440 Fed. Appx. 379 (2011), the Court was faced with a case where an inmate used a microwave to heat water which he then used to scald another inmate. The plaintiff in that case sued stating the prison was deliberately indifferent to the serious risk of hot water throwing attack when they made the microwave available to inmates during sleep times without regulation, monitoring, or having the oven secure. Again, that Court found that the evidence did not support a finding that the prison was aware of facts from which the inferences of

a substantial risk of serious harm existed by having a microwave that could heat water to a boil.

Here, Appellant has not produced any evidence that there were other boiling water incidences at the Lee Correctional Institution or that any facts existed which would have put the Lee Correctional Institution on notice that hot pots could be weaponized. Therefore, for the same reasons Appellant's claims of gross negligence fail, on these facts, this Court should affirm the trial court's grant of summary judgment on the issue of the dangerousness of the hotpot.

### C. As an alternate sustaining ground, this Court should affirm the trial court's grant of summary judgment because Respondent Department's choice not to move Appellant from his cell was a discretionary act for which Respondent is also entitled to immunity.

Subsection (5) of §15-78-60 exempts from the general waiver of sovereign immunity losses arising from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." Appellant's claims all essentially arise from Respondent Department's decision not to move him from his cell. Where government officials are obligated to make decisions and they weigh competing factors to make a decision, they are immunity from suit unless their decision making process was conducted in a grossly negligent manner. *Duncan v. Hampton County School Dist. # 2*, 335 S.C. 535, 517 S.E.2d 449 (1999). "[T]o prevail under the discretionary immunity provision, the governmental entity must show that when faced with alternatives, it actually weighed competing considerations and made a conscious decision to act or not to act, and that it used accepted professional standards appropriate to resolve the issue before it." *Steinke v. S. Carolina Dept. of Labor, Licensing & Regulation*, 336 S.C. 373, 397, 520 S.E.2d 142, 154 (1999) (*citing Strange v. South Carolina Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994); *Niver v. South Carolina Dep't of Highways & Pub. Transp.*, 302 S.C.

461, 395 S.E.2d 728 (Ct. App. 1990). Here, not only is there absolutely no evidence of gross negligence but there is actual evidence that the Department's officers considered Appellant's request to move and denied it based on the information and facts they had. (ROA pp. 131-135; ROA pp. 129-130). In fact, Mr. Sparkman, who is the only expert that actually reviewed the relevant classification records, testified that the two inmates were both classified and housed appropriately using the applicable cell assignment policies. (ROA pp. 139-140). All officers involved used the accepted professional standards appropriate to resolve the issue and exercised their discretion in responding. Again, because the record contains no evidence of gross negligence on the part of Respondent's officers, this Court should affirm the trial court's grant of summary judgment in all respects.

## CONCLUSION

For the reasons stated, Respondent requests that this Court affirm the judgment of the Trial Court in all respects.

Respectfully submitted,

G. Murrell Smith, Jr.
SC Bar No. 66263
LEE, ERTER, WILSON, HOLLER & SMITH, L.L.C.
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
(803) 778-1643 (facsimile)
murrell@leeandmoise.com
Attorney for Respondent