THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2016-CP-40-00910
Appellate Case No. 2017-001750

RECEIVED
JUN 12 2019
SC Court of Appeals

Darris Hassell, ... Respondent,

v.

The City of Columbia, ... Appellant.

REPLY BRIEF

Teresa A. Knox # 64212
W. Michael Hemlepp, Jr. # 64264
OFFICE OF THE CITY ATTORNEY
P.O. Box 667
(803) 737-4242
taknox@columbiasc.net
wmhemlepp@columbiasc.net

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 Appellant

TABLE OF CONTENTS

Table of Authorities ii

Arguments 1

A. Parties are entitled to rely on receiving accurate information during voir dire. There is no serious argument the City was negligent 2

B. It is difficult to see how this verdict can possibly stand in light of precedent defining intentional concealment and explaining prejudice is presumed in a case of intentional concealment 4

C. It is hard to understand the respondent's argument that there is no "evidence" of intentional concealment or of the City's diligence 5

D. With the utmost respect for the respondent, $200,000 is an unreasonable and grossly excessive award when compared to the nature and character of his injuries 7

Conclusion 9

TABLE OF AUTHORITIES

Caldwell v. K-Mart Corp.,
306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991) 8

Long v. Norris & Assocs.,
342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000) 2, 3, 5

Lynch v. Carolina Self Storage Ctrs.,
409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) 3

McCoy v. State,
401 S.C. 363, 737 S.E.2d 623 (2013) 4

Morris v. Jensen,
309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992) 3

Spencer v. Kirby,
234 S.C. 59, 106 S.E.2d 883 (1959) 5

State v. Coaxum,
410 S.C. 320, 764 S.E.2d 242 (2014) 4

State v. Guillebeaux,
362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004) 4

State v. Gulledge,
277 S.C. 368, 287 S.E.2d 488 (1982) 2, 5

State v. Kelly,
331 S.C. 132, 502 S.E.2d 99 (1998) 2

State v. Woods,
345 S.C. 583, 550 S.E.2d 282 (2001) 4, 5

Toyota of Florence v. Lynch,
314 S.C. 257, 442 S.E.2d 611 (1994) 7

Westbrook v. Hutchison,
195 S.C. 101, 10 S.E.2d 145 (1940) 8

ARGUMENT

The circumstances of this case are difficult but the key to the case is simple: The trial court directly asked potential jurors whether they had ever been arrested by a City of Columbia police officer. (R.p.127, lines 2-5). The court asked this *twice*. *Id.* The eventual jury foreman did not respond even though he *had* been arrested by a City of Columbia police officer almost a year before the trial began. The question was simple and straightforward. It would plainly be unreasonable for a normal juror with a prior arrest to remain silent.

Precedent requires a new trial, yet, the order below overlooked the test for "intentional concealment" and accused the City of failing to present "evidence" of its diligence in discovering the arrest. These errors require reversal.

First, nothing suggests a party is negligent if it chooses to rely on specific questions from voir dire for information that party deems relevant in jury selection. That is what happened here. There is no serious claim the City was negligent or irresponsible.

Second, it is telling that the trial court *never cited* the test for intentional concealment. That may be because it is hard to see how this verdict can stand in light of that standard.

Third, it is hard to understand the trial court's reasoning that there is supposedly a lack of "evidence." Nobody disputed the foreman failed to disclose his arrest. If the court doubted when and how the City learned of the arrest all the court had to do was ask.

This Court need not go further, but it bears mentioning that nobody contests the experience of being arrested, of spending a night in jail, of having to disclose the arrest to family and colleagues, and of having to make two trips to court were unjustly humiliating. Still, $200,000 is wildly disproportionate to that injury. This Court should reverse.

A. Parties are entitled to rely on receiving accurate information during voir dire. There is no serious argument the City was negligent.

The trial court repeatedly suggested the City did not diligently review or research the jury prior to the verdict. (R.pp.20-24). At one point, the court reasoned the City *must* not have diligently researched the jury because records showing the foreman's arrest were available before the verdict. (R.p.20).

This reasoning misses the point that parties often use voir dire to get the information they deem relevant for jury selection and that parties are entitled to honest answers during voir dire. Consider *State v. Gulledge*, a decision this Court has called the "leading case" on the right to truthful answers during voir dire. *Long v. Norris & Assocs.*, 342 S.C. 561, 569, 538 S.E.2d 5, 9 (Ct. App. 2000). *Gulledge* says:

> 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.

277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982) (internal quotation marks omitted).

The Supreme Court repeated these sentiments in *State v. Kelly*, explaining "trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998). Then, *Kelly* quoted the language from *Gulledge* that said:

> 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 which might tend to disqualify them from sitting on the case for any reason. It therefore becomes imperative that the answers be truthful and complete.

Kelly, 331 S.C. at 145-46, 502 S.E.2d at 106.

This Court has emphasized voir dire's importance and the necessity for parties to request precise voir dire questions if they desire specific information for jury selection. In *Lynch v. Carolina Self Storage Centers*, this Court did not question whether certain information would have been relevant to jury selection but explained "the responsibility for obtaining such information falls on the attorneys to request precise voir dire questions that are reasonably comprehensible to the average juror." 409 S.C. 146, 156, 760 S.E.2d 111, 117 (Ct. App. 2014). *Morris v. Jensen* is similar. There, this Court distinguished a prior intentional concealment case and observed that the complaining party "could have requested the judge to examine the venire [on certain information] if she felt it affected their qualification as jurors." 309 S.C. 153, 156, 420 S.E.2d 710, 711 (Ct. App. 1992).

The City is not aware of any authority suggesting it is negligent or irresponsible for a party to rely on receiving accurate information during voir dire. And no authority supports the trial court's reasoning that the City should have discovered the foreman's arrest before the verdict since the City was able to discover the information after the verdict.

The respondent seems to endorse a requirement that parties check public information before jury selection. The pool of potential jurors is often quite large, as this Court noted in *Long*. 342 S.C. at 571, 538 S.E.2d at 11. Also, it is unclear what counts as a "diligent" search of "public" information and whether this means searching the public index, using an internet search engine, or both of those things plus others. Surely no evidence is needed to show that it would be a substantial burden if litigants were required to do background searches of potential jurors or search the jury after they are selected. That requirement would also be inefficient since it is much easier to gather many types of information—including

whether someone has been arrested—with direct questions. Of course, direct questions are of no use whatsoever unless potential jurors respond accurately.

B. It is difficult to see how this verdict can possibly stand in light of precedent defining intentional concealment and explaining prejudice is presumed in a case of intentional concealment.

"Intentional concealment" occurs when a voir dire question is reasonably comprehensible to the average juror and when the subject matter of the question is so significant that a normal juror's failure to respond would be *un*reasonable. The Supreme Court adopted this definition in *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001).

Several times since *Woods*, this Court and the Supreme Court have said a new trial is required if a juror intentionally conceals information that would have supported a challenge for cause or been a material factor in the use of the party's peremptory challenges. *State v. Coaxum*, 410 S.C. 320, 328, 764 S.E.2d 242, 245 (2014); *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013); *State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004). These cases do not mention an additional requirement that the complaining party prove it was not negligent. This omission makes sense when one considers that parties are entitled to rely on getting accurate answers during voir dire.

The order below never discussed intentional concealment at all. It never cited *Woods*; the leading case defining and giving the test for intentional concealment. Instead, the order found the foreman's arrest did not automatically disqualify him from jury service and that the City could have learned of the foreman's arrest by searching public information. The City is not aware of any authority supporting that approach as the proper analysis.

This Court will certainly judge for itself, but it is very difficult to see how this verdict can possibly stand in light of other intentional concealment cases. In *Gulledge*, the concealed information was that one of the jurors was related by marriage to one of the investigating officers. In *Long*, a case arising out of a car repossession, a juror concealed he had previously been involved in a repossession. In *Woods*, the juror concealed she had worked as a volunteer victim's advocate in the solicitor's office. New trials were required in all of these cases. Here, prospective jurors were directly asked whether they had been arrested. The foreman did not disclose the truth. The City is not aware of any case with remotely similar facts where a new trial has not been ordered.

The respondent says this case is like *Spencer v. Kirby*, a wrongful death case where the defendant sought a new trial on the basis that one of the jurors had been a member of the grand jury that declined to criminally charge the defendant in the underlying wreck. 234 S.C. 59, 106 S.E.2d 883 (1959). The opinion in *Spencer* discloses a key distinction of this case from that one—the opinion specifically mentions voir dire and that no specific voir dire was requested by counsel. *Id.* at 64, 106 S.E.2d at 885. Here, however, there was specific voir dire about the information in question. The key fact in this case is the concealment.

C. It is hard to understand the respondent's argument that there is no "evidence" of intentional concealment or of the City's diligence.

The City's motion for a new trial was signed by a deputy city attorney and offered a general explanation of when and how the City discovered the foreman's prior arrest. (R.p.71). The first exhibit to that motion included an e-mail message from one deputy city attorney to the other dated four days before the motion was filed. (R.p.76). That e-mail

included the booking information from the foreman's arrest. *Id.* The date on the booking information shows it was accessed the same day the e-mail was sent. *Id.* This was June 26, 2017; a little over a month after the May 18 jury verdict.

The City's explanation of when and how it discovered this information went unchallenged for over a year. The motion for a new trial was filed June 30, 2017. It was not heard until June 27, 2018.

There were several references during the hearing to the absence of the City's lead counsel from trial. Immediately after the hearing, the City wrote the trial court and offered to provide affidavits if the trial court had any doubts about the factual information discussed during the hearing or describing in more detail how the city attorney's office came to learn of the prior arrest. (R.p.410). The respondent wrote a letter opposing any further investigation. (R.p.411).

At least three parts of this do not make sense. First, it is hard to reconcile the emphasis the trial court placed on the absence of "evidence" with the fact that the City immediately offered to provide affidavits once the assertions in its motion were challenged. Second, it is unclear why affidavits would matter—the motion was signed by the same deputy city attorney who received the information from another deputy city attorney. The affidavits would, to a certain extent, do nothing more than duplicate what had already been filed. Finally, this whole discussion is irrelevant to the real reason the trial court ruled against the City and the real reason the respondent asks this Court to affirm. The core argument on the other side is that parties are required to check the public index and public records. Affidavits and evidence do not have anything to do with that.

If the trial court doubted when the City learned of the foreman's prior arrest it would have been easy to ask. The City would readily have supplemented the information contained in its motion. Again, however, the key facts do not appear to be in dispute. Nobody contests that the jury was asked about prior arrests and that the foreman failed to disclose his prior arrest.

D. With the utmost respect for the respondent, $200,000 is an unreasonable and grossly excessive award when compared to the nature and character of his injuries.

This Court need not go further to resolve this case, but a couple points related to the size of this verdict bear quick mention.

First, the reason the City mentioned in its lead brief that there is no colorable claim for negligent entrustment is because it is impossible to evaluate whether the damages are excessive without taking stock of the types of damages that are appropriate. The negligent entrustment claim made no sense. The City was liable for the actions of its police officer because the officer was their employee. The trial court did not give any damages charge related to negligent entrustment. (R.p.350, lines 6-21).

Second, the City is not alleging the respondent's closing argument implicates the rule articulated in *Toyota of Florence v. Lynch* that a vicious and inflammatory closing argument resulting in clear prejudice will warrant a new trial even when there is no contemporaneous objection. 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994). The City's argument is that the verdict is not reasonably proportional to the respondent's injuries and damages. In evaluating whether that argument is correct, it makes sense to note that part of the respondent's closing argument invited the jury to deliver a verdict that included

considerations above or in excess of the respondent's damages. Deterrence and retribution are not elements of compensatory damages.

The respondent says the better comparison cases for this case are *Caldwell v. K-Mart Corp.* and *Westbrook v. Hutchison.*

The damages in *Caldwell* appear to be more substantial, not less. There, the plaintiff was awarded $75,000 in compensatory damages and $100,000 in punitive damages. The encounter was shorter—the plaintiff was detained for fifteen minutes as a suspected shoplifter—but the testimony suggested she was upset to the point she still experienced discomfort going into stores at the time of trial and that the incident was so upsetting it caused her to move. 306 S.C. 27, 32, 410 S.E.2d 21, 24 (Ct. App. 1991). There is nothing like that here.

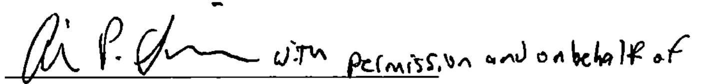
Westbrook is a 1940 case involving an 11-year old boy wrongfully detained for about an hour and a half as a suspect in a theft. 195 S.C. 101, 10 S.E.2d 145 (1940). From an award of $3,000 in actual damages, the respondent extrapolates an hourly rate of damages, adjusts that rate to present-day dollars, and reasons that the jury's award in this case falls well short of that measure.

This is not like that. The City will readily concede, as it did below, that a damages award was entirely appropriate if the jury determined the officer did not have probable cause to arrest the respondent. (R.p.326, lines 19-25; p.334, lines 18-23). Still, the City remains convinced that $200,000 is disproportionate and grossly excessive when compared to the damages caused by a night in jail, the understandable embarrassment of being wrongly arrested, and the disruption of making two trips to court before the charges were dismissed.

CONCLUSION

For the foregoing reasons this Court should reverse and remand for a new trial.

Respectfully submitted,



June 11, 2019

Teresa A. Knox # 64212
OFFICE OF THE CITY ATTORNEY
P.O. Box 667
(803) 737-4242
(803) 737-4250 (facsimile)
taknox@columbiasc.net

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 Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

RECEIVED
JUN 12 2019
SC Court of Appeals

Case No. 2016-CP-40-00910
Appellate Case No. 2017-001750

Darris Hassell, ... Respondent,

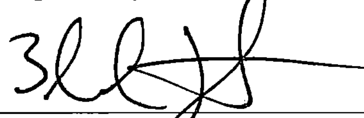
v.

The City of Columbia, ... Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,



Blake A. Hewitt # 73674
BLUESTEIN THOMPSON SULLIVAN, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

June 12, 2019

Attorney for Appellant