THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Frank Addy, Circuit Court Judge

Appellate Case No. 2019-000637

Tony Young,.....Appellant,

v.

Greenwood County Detention Center and the Greenwood County Sheriff's Office, Defendants,

Of Which The Greenwood County Sheriff's Office is.....Respondent.

REPLY BRIEF OF APPELLANT

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The Sheriff's Office's brief is factually inaccurate in a number of important ways. For instance, on page 5 of its brief, the Sheriff's Office says that Tony's neck brace (which was given to him by medical providers to stabilize fractures in his neck) was only taken momentarily to take pictures. 1) That shouldn't have been done at all, 2) the brace wasn't given back to him after the picture was taken, and, most importantly, 3) the respondent acknowledges the jury heard evidence that a guard – not a physician – took a neck brace away from a man with a broken neck. Deprivation of a neck brace from a person with a broken neck for *any* amount of time is gross negligence, but more importantly, the jury heard that evidence.

On the same page, the Sheriff's Office acknowledges that the jury heard evidence that the Sheriff's Office has a policy that denies inmates access to mediation prescribed by a physician. In the case the jury heard, Tony was prescribed narcotic pain medication because he had multiple fractures in his neck, arm, and other parts of his body when he was admitted to the detention center in violation of the General Orders that require an inmate to be cleared for detention by a physician before admission. Not only did the Sheriff's Office ignore the policy that requires physician clearance, it then denied Tony access to mediation a doctor determined was necessary. Most importantly, for the purposes of this appeal, the Sheriff's Office does not contest the fact that the jury heard all this.

Voir Dire

Tony has set out reasons why the Court irreversibly tainted the jury pool during *voir dire*. Perhaps most telling is the fact that the Court acknowledged its error to the parties. After the Court disclosed details related to Tony's arrest, the Court told the parties that if it had seen the plaintiff's *voir dire* before the process began, the Court would have conducted *voir dire* differently. As set

out in Tony's brief, at that point the damage was done, and there was no way to make any objection because the trial had not yet begun.

The Sheriff's Office cites Rule 609 SCRE, and admits in the citation that in order for the Court to allow disclosure of an unrelated crime to a jury, it must determine whether the probative value of the disclosure outweighs the prejudicial effect of the disclosure. At trial, no determination was made at all. Obviously, there is extreme prejudice that comes with disclosure of a crime, especially for the party the bear s the burden of proof. More importantly, though, there is no probative value in Tony's case at all. Disclosure of Tony's DUI is in no way related to the Sheriff's Office's repeated policy violations related to medical treatment, of which the jury heard uncontroverted evidence.

The Sheriff's Office then makes the argument that the Court's error was justified because the conviction was admissible for impeachment purposes. Obviously, Tony's DUI conviction is in no way related to honesty or the claims for gross negligence against the Sheriff's Office. This is underscored by the Court's acknowledgement that the better course of action was to avoid dissemination of information about Tony's DUI. This information had no probative value, and was unfairly prejudicial in obvious ways.

Introduction of Evidence

On page 10 of its brief, the respondent attempts to distinguish *Turner v. Wilson*, 86 S.E.2d 867, basically on the grounds that *Turner* is not a Tort Claims Act case. First, that distinction is immaterial to the issue for which it is cited and second, the fact that Tony's case requires a showing of gross negligence means the suppression of the evidence at issue was even more prejudicial in this case than it was in *Wilson*. The respondent tried to distinguish *Gantt v. Columbia Coca-Cola Bottling Co.*, 193 S.C. 51 (1940) in a similar way, but its argument supports Tony's appeal. The

fact that Tony was required to show gross negligence is even more reason why the Court should have allowed the jury to hear the proffered evidence.

It is hard to imagine how the Sheriff's Office can seriously contend that the "appellant erroneously argues that the physician clearance policy was violated." The policy at issue was violated no matter how one views it. The unambiguous policy requires that a physician clear a visibly injured inmate for admission. That did not happen. Everyone – defense witnesses and plaintiff's witnesses alike – testified that Tony was visibly injured.

The respondent then makes an attempt either to blame Southern Health Partners for its policy violations or pretend the uncontested violations were not actually violations. Plainly and simply, the policies and procedures presented at trial were violated by the Sheriff's Office repeatedly, and everyone at trial agreed that they were violated. The admitted violations of policy were bad enough, but the Court's express approval of the policy violations improperly weighed them for the jury:

> We've been down this road before, okay? We've been down the road before. I think you're pumping a dry well here. He was released from the hospital in Greenville. It's what I said [in a side bar away from the jury] earlier this morning. He cannot be boomeranged back between doctors. We need to move on from this of questioning and focus on what your complaint is, and that is the six days without the neck brace, okay? So go (TT 321).

The Sheriff's Office urges this Court to accept that prejudicial statement and this one, too:

> [Tony's prescribed medication] is not medication. Medication is penicillin if you have pneumonia, it is insulin if you have diabetes, it is a chemical that treats and cures a disease. The narcotic **medicine** that was prescribed to [Tony], no jail in South Carolina, no prison in South Carolina would permit that **medication** through the door for a very, very, very good reason. (Emphasis added.)

If the respondent wanted to challenge whether the medicine Tony's doctor prescribed was actually medicine, it could have done that by having a doctor give expert testimony. The respondent chose not to do that. It was inappropriate for the Court to stop trial and offer what

amounts to expert testimony in the presence of the jury. This effectively robbed the jury of any chance it had to objectively weigh the evidence. The respondent has stated that "the Court did not abuse it's discretion when clarifying for the jury," but the Court's comments went far beyond mere clarification, and robbed Tony of his Constitutional right to a fair trial.

This was not the only instance in which the Court intervened to weigh the evidence for the jury. When Tony's counsel asked Lonnie Smith whether he had made any effort to gather footage of Tony in the booking area pursuant to a subpoena that Tony's counsel had sent, the Court interrupted the examination of the witness. Without defense counsel making an objection, the Court stated, "All right. Sustained." After defense counsel thanked the Court, the Court continued, "[t]his suit was filed years later, okay? The tapes get written over. Let's focus on what is truly an issue here and stop chasing rabbits, please, okay?" (TT 329). The Court also commented on Sheriff's Office's failure to provide subpoenaed footage during Sharon Middleton's testimony. The Court essentially suggested, in the presence of the jury, that Tony's "years" of delay in filing excused the Sheriff's Office's failure to produce the footage. (TT 382-385). The Court's statements in the presence of the jury deprived the jury of the ability to weigh the importance of the Sheriff's Office's spoliation of subpoenaed evidence that would show Tony at the time of booking and directly address one of the primary issues in the case. By commenting on the evidence and strongly implying that the Sheriff's Office's failure to bring important and subpoenaed evidence to trial was meaningless, the Court deprived Tony of his right to a fair trial.

Statements by the Court

The Sheriff's Office did not have any physician clear Tony as required, and never called an on-duty physician. That is definitive of failure to exercise even slight care. See *Steinke v. SC Dept. of Labor, Licensing*, 520 S.E.2d 142 (1999). The Court interfered with testimony about the

violations and gross negligence, though. On page 13 of its brief, the respondent refers to a sustained objection, but the Court's commentary was much more. When Tony's counsel asked Middleton whether anyone from the Sheriff's Office contacted the on-call physician when Tony arrived at the detention center as required, Middleton began to answer the question, stating, "I don't have any evidence that a doctor---," before counsel for the Sheriff's Office objected. The Court then stated, in the presence of the jury, "[l]et's move along, please. I think we've covered this ground several, several times. So ask her a different question involving a different issue, please." (TT 395).

On page 14 of its brief, the respondent acknowledges that the Court informed the jury that a highway patrolman picked up Tony from the hospital, a fact that is found nowhere in any evidence or testimony. Importantly, documents in evidence show that Tony was "discharged to home" when he left the hospital and that he left with a "friend." Tony may very well have left with a highway patrolman before the Sheriff's Office violated multiple policies and procedures at the detention center, but that is not in any evidence considered by the jury.

New Trial Absolute

The Sheriff's Office's statement that "The findings of the jury and the trial judge are completely supported by the evidence" might be humorous if it were not so seriously concerning. The respondent rightly pointed out that a new trial is appropriate where a jury's findings are "wholly unsupported by the evidence or the conclusion reached are controlled by error of law." *Umhoefer v. Bollinger*, 298 S.C. 221 (Ct. App. 1989). Unfortunately, both are true in this case. For the reasons stated above, the Court made at least one error of law when it refused to allow Tony to present evidence of prior gross negligence to the jury.

Perhaps more concerning, though, is the fact that the outcome was whole unsupported by the evidence. Without the Court's intervention and exclusion of relevant and material evidence, the evidence of gross negligence was overwhelming, and the evidence related to the Sheriff's Office refusal to even call on on-call physician before admission (failure to exercise even slight care) literally mirrors the language used by the Court in *Steinke v. SC Dept. of Labor, Licensing*, 520 S.E.2d 142 (1999) when it described what gross negligence is. The jury's findings in the presence of so much uncontroverted evidence (that Tony was visibly injured, that the Sheriff's office violated the policy requiring physician clearance, that Tony was denied prescribed medication, etc.) can only be the result of the Court's commentary on the evidence (that Tony's medication was not medication, that policy violations do not matter, etc.)

The respondent's statement on page 18 of its brief that Tony did not "present[] uncontroverted evidence" of gross negligence is confusing. The Sheriff's Office is fully aware that everyone that testified on the issue acknowledge that the Sheriff's Office violated the policy that requires physician clearance and refused to exercise even slight care by calling an on-call physician. Likewise, the Sheriff's Office is fully aware that it deprived Tony of medicine prescribed by a physician, even though the Court told the jury that Tony's medicine was not actually medicine. The Sheriff's Office then goes on to say that statements related to the uncontroverted evidence are "not true" on page 19, without offering any support or documentation. Indeed no documentation can be offered because the trial transcript clearly shows that the statements are true.

Physician Clearance

The Sheriff's Office's refusal to comply with policy was so blatant at trial, that it shocks the conscious. The Sheriff's Office cites to its former employee's testimony "[Tony] had been

cleared to come to jail." The documents submitted at trial clearly show – and the respondent agrees – the Sheriff's Office never obtained required physician clearance before it admitted Tony, plane and simple. The policy (also in evidence) is unambiguous about the requirement, and a former employee's statement that something happened that is documented to have never happened is a reach to say the least. Not only did the Sheriff's office violate the policy, it never even attempted to follow the policy because it never even called the on-call physician.

Physician Clearance

The respondent appears to make the argument that Tony leaving the hospital fulfils General Order 2.5 which requires that a visibly injured inmate who arrives at the detention center by cleared by a physician. This argument is beyond comprehension since none of the employees of the hospital work at the detention center.

The jury heard testimony from Katie Gilmore, an employee of the Sheriff's Office, that the Minimum Standards in South Carolina require detention centers to have a physician examine an inmate who arrives at the detention center "severely injured" (TT 165). The witness went on to differentiate between a nurse and a "doctor" or "an MD" (TT 165). Gilmore further testified that an inmate must "be in good physical health" in order to be admitted to a detention center (TT 174). If an inmate is visibly injured upon arrival, then an officer is required to refuse the inmate. The "officer present will refuse the subject until the committing officer takes the subject to the hospital" (TT 175). When asked if there were any exceptions to these Minimum Standards, the witness could not offer any (TT 193). It is unclear whether the respondent is arguing that someone at the hospital cleared Tony for detention while at the same time discharging him to home and prescribing medication the detention would refuse to give him, but to the extent the respondent does make that argument, the flaws are obvious.

Thirteenth Juror Doctrine.

"South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions." *Norton v. Norfolk Southern Ry. Co.,* 567 SE 2d 851 (S.C. 2002). See also *Folkens v. Hunt,* 300 S.C. 251, 387 S.E.2d 265 (1990); *Sorin Equipment Co., Inc. v. The Firm, Inc.,* 323 S.C. 359, 474 S.E.2d 819 (Ct.App.1996). The thirteenth juror doctrine allows the trial judge to sit as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts." *Id.* at 254, 387 S.E.2d at 267 (citing *South Carolina State Highway Dep't v. Townsend,* 265 S.C. 253, 217 S.E.2d 778 (1975).

On page 22 of its brief, the Sheriff's Office argues, "a lot of evidence was submitted to establish that the detention center and its staff did not breach their duty to provide the appellant with reasonable access to medical care." But what the evidence showed is that the Sheriff's Office refused to give Tony medicine that a doctor determined was necessary. One cannot provide necessary medical care and at the same time refuse necessary medical care. No reasonable juror could hear evidence of an unapologetic refusal to obtain physician clearance, refusal to even call a doctor and refusal to administer necessary medicine as "reasonable" medical care. The only conclusion a reasonable and untainted juror could make is that the Sheriff's Office was grossly negligent.

The respondent seems to indicate that Tony changed his theory of liability at some point because Tony presented evidence at trial that even the inadequate (non-prescription) and wrong medication given to Tony instead of the medicine prescribed by a physician was given sporadically. Naturally, it is bad enough – and gross negligence – to refuse necessary medicine in the first place. It is worse that the wrong medicine is not given regularly to someone with multiple bone fractures.

Comparative Negligence

How can someone who is incarcerated negligently cause the Sheriff's Office to violate its own policies, deprive him of his neck brace, and refuse to give him his medicine? The Sheriff's Office bore the burden of proving at trial something that was impossible to occur. No such evidence could not have existed, did not exist, and it was error to charge the jury on comparative negligence. And even assuming it was proper generally to give an instruction, it was reversible error to omit from the instruction that the Defendant bore the burden of proof on the affirmative defense.

CONCLUSION

The appellant respectfully requests that the Court grant a new trial. In the alternative, the appellant requests that the Court remand this action with instructions for the trial court to award the appellant judgment as a matter of law and schedule a damages hearing.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the Reply Brief of Appellant on the following counsel of record for the Respondent and mailed the required copies to Court Administration, by depositing copies of it in the United States Mail, postage prepaid, on February 25, 2020, addressed to the following addresses:

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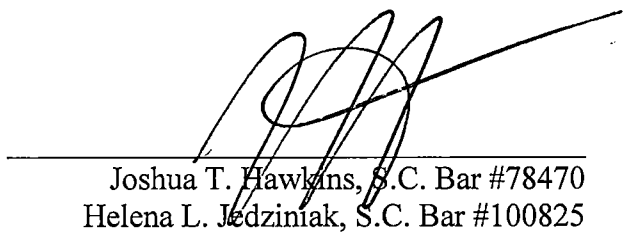

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Re: *Tony Young, Appellant v. Greenwood County Sheriff's Office, Respondent*
Appellate Case No. 2019-000637

Dear Ms. Kitchings:

Please find enclosed for filing the Reply Brief of Appellant in the case referenced above. By copy of this letter, we are serving counsel for the respondents.

Should you have any questions, please do not hesitate to contact our office.

Sincerely,

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Enclosures

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