THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Tenth Judicial Circuit
Cordell J. Maddox, Jr., Circuit Court Judge

Civil Action No.: 2014-CP-04-01469
Appellate Case No.: 2017-002612

Fayetta Sherida Davenport, individually and
on behalf of the Estate of James Davenport.....Appellant

v.

Town of Iva, S.C.....Respondent

FINAL BRIEF OF APPELLANT

James M. Griffin
GRIFFIN DAVIS
PO Box 999
Columbia, SC 29202
(803) 744-0800
jgriffin@griffindavislaw.com

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Tenth Judicial Circuit
Cordell J. Maddox, Jr., Circuit Court Judge

Civil Action No.: 2014-CP-04-01469
Appellate Case No.: 2017-002612

Fayetta Sherida Davenport, individually and
on behalf of the Estate of James Davenport.....Appellant

v.

Town of Iva, S.C.....Respondent

FINAL BRIEF OF APPELLANT

James M. Griffin
GRIFFIN DAVIS
PO Box 999
Columbia, SC 29202
(803) 744-0800
jgriffin@griffindavislaw.com

Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Statement of the Issues 1

Statement of the Facts 2

Argument

I. THE COURT ERRED BY RULING AS A MATTER OF LAW THAT RESPONDENT DID NOT OWE A DUTY OF DUE CARE RESULTING FROM RESPONDENT'S AFFIRMATIVE DECISION TO ACT TO PROTECT THE SAFETY OF JAMES AND FAYE DAVENPORT 6

A. THERE IS SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD CONCLUDE THAT RESPONDENT VOLUNTARILY ASSUMED DUTY TO PROTECT THE DAVENPORTS AND FAILED TO EXERCISE REASONABLE CARE AND JAMES AND FAYE DAVENPORT WERE HARMED AS A RESULT OF THEIR RELIANCE UPON THE OFFICER'S INSTRUCTIONS 10

B. THERE WERE SPECIAL CIRCUMSTANCES GIVING RISE TO A DUTY OF DUE CARE 11

C. THERE WAS EVIDENCE FROM WHICH A JURY COULD FIND THE TOWN OF IVA'S EMPLOYEES NEGLIGENT AND GROSSLY NEGLIGENT 12

Conclusion 14

TABLE OF AUTHORITIES

Cases

Arthurs ex rel. Est. of Munn v. Aiken County, 551 S.E.2d 579 (S.C. 2001) 6, 7

Ashburn v. Anne Arundel County, 510 A.2d 1078 (Md. 198 6) 8, 9

Chambers-Castanes v. King County, 100 Wash.2d 275, 669 P.2d 451 (1983) 9

Donevant v. Town of Surfside Beach, 778 S.E.2d 320 (S.C. App. 2015), aff'd, 811 S.E.2d 744 (S.C. 2018) 6

Edwards v. Lexington Cnty. Sheriff's Dept., 386 S.C. 285, 688 S.E.2d 125 (2010) 9, 10, 11, 12

Faile v. S. Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002) 12

Florence v. Goldberg, 44 N.Y.2d 189, 404 N.Y.S.2d 583, 375 N.E.2d 763 (1978) 9

Johnson v. Jackson, 735 S.E.2d 664 (S.C. App. 2012) 10

Johnson v. Robert E. Lee Acad., Inc., 737 S.E.2d 512 (S.C. App. 2012) 7, 11

Morgan v. District of Columbia, supra, 468 A.2d at 1313 9

Morris v. Muser, supra, 478 A.2d at 940 9

Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991) 7, 11

Russell v. City of Columbia, 406 S.E.2d 338 (S.C. 1991) 7, 8

Trousdell v. Cannon, 572 S.E.2d 264 (S.C. 2002) 7

Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006) 10

Williams v. Mayor & City Council of Baltimore, 753 A.2d 41 (Md. 2000) 8

Williams v. State, 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137 (1983) 9

Other

Restatement (Second) of Torts § 315(b) 7, 9

South Carolina Tort Claims Act ("Tort Claims Act"). 346 S.C. 97, 551 S.E.2d 579 (2001) 6, 7

STATEMENT OF THE CASE

On July 7, 2014 Appellant Fay Davenport (Davenport) commenced this action by filing a Summons and Complaint individually and as personal representative of the Estate of James Davenport, her deceased husband, against the Respondent Town of Iva. (R. pp. 1-37). The Town of Iva filed an Answer to the Complaint on August 18, 2014 and an Amended Answer on September 9, 2014. (R. pp. 38-46; R. pp. 47-55).

On July 30, 2015 the Town of Iva filed a "Motion to Dismiss and Alternatively Motion for Summary Judgment," arguing in part that the Town of Iva did not owe a duty to Davenport under the "public duty" rule. (R. pp. 56-59; R. pp. 60-86). On September 22, 2015, and after a hearing, the Honorable Scott R. Spouse denied the Respondent's motion. (Form 4 Order)

On November 27, 2017 the case was tried in the Anderson County Court of Common Pleas before the Honorable Cordell J. Maddox, Jr. Judge Maddox directed verdict against Davenport and for the Town of Iva after the close of Davenport's case-in-chief on November 29, 2018. Judge Maddox, contrary to Judge Sprouse's early ruling, and after staying awake overnight "agonizing," held that the Town of Iva did not owe a duty to Davenport. (R. p. 334 ¶ 20-25, R. p. 335 ¶ 1-23). Davenport timely filed and served a Notice of Appeal from the trial court's order directing verdict on December 27, 2017. (Notice of Appeal)

STATEMENT OF ISSUES

I. Did the Lower Court Err By Ruling as a Matter of Law That Respondent Did Not Owe a Duty of Due Care Resulting From Respondent's Affirmative Decision to Protect the Safety of James and Faye Davenport Which Was Relied Upon By James and Faye To Their Detriment

STATEMENT OF FACTS

Appellant Davenport lived in the Town of Iva with her husband James. Davenport has a son, Robert Frost (Robert), from a prior marriage. Robert was addicted to drugs and suffered from a disabling mental illness. (R. p. 242 ¶ 19-25, R. pp. 243-244 ¶ 1-13; R. p. 249 ¶ 19-25; R. p. 250 ¶ 1). Robert murdered James on July 15, 2012 at the Davenport residence after leaving telephone messages threatening to kill both Davenport and her husband earlier in the day. Davenport reported these threats to a police officer with the Town of Iva, who listened to the messages and then spoke to Robert telling him not to come to Iva. The police officer then told Davenport and her husband if Robert came to their house, they should hide and call 911.

At the time of the murder, Robert had a documented history of violent behavior. In 1981, Robert burned down his mother's home. In 1991, Robert burned down his brother's house. Finally, in 2001, Robert attempted to kill James by slashing him in the throat with a knife after Davenport told Robert he could not continue to live in their home if he did not stop using illicit drugs. (R. p. 244 ¶ 14-25; R. pp. 245-247; R. p. 248 ¶ 18-25; R. p. 249 ¶ 1).

The Town of Iva's Police Chief, Thomas Miller knew of Robert's violent behavior. Specifically he was aware that Robert burned down the Davenports' home and previously attempted to kill James. (R. p. 165 ¶ 4-25). In fact, Chief Miller anticipated that there would be a life threatening altercation between Robert and James at some point in time. (R. p. 166 ¶ 4-25; R. p. 167 ¶ 1-15). Chief Miller also knew that James was a convicted felon and was not permitted to possess a gun even for self-defense. (R. p. 166 ¶ 21-25; R. p. 167 ¶ 1-15).

In May 2012, Robert, who lived in Anderson, traveled to Iva to demand money from the Davenports. Davenport, being fearful of her violent, drug-addicted son, provided Robert her debit card and then called the police. Chief Miller and Officer Hawkins responded to the call and located

Robert who was attempting use Davenport's ATM card. Chief Miller and Officer Hawkins retrieved the ATM card from Robert and put him on a no trespass notice for James and Faye Davenport's home. In addition, Chief Miller instructed Mr. and Mrs. Davenport to be careful, because Chief Miller was afraid that Robert would hurt them. (R. p. 167 ¶ 23-25; R. pp. 168-169 ¶ 1-6; R. p. 250 ¶ 12-25; R. p.251).

Less than six weeks later, on Sunday, July 15, 2012 Robert began making threatening telephone calls to Davenport. Robert left a voice mail message telling Davenport that "blood would flow in Iva." Davenport called 911 to report these threatening calls. At approximately 3:20 pm Officer Richey responded to the complaint and listened to voice mail recording of these threats. (R. p. 197 ¶ 4-23). Davenport explained to Officer Richey about Robert's threats and dialed the number for Officer Richey that Robert used to make the threatening phone calls. Davenport informed Officer Richey that this number was Robert's neighbor's land-line, located in Anderson. Robert answered the telephone and claimed he was not Robert, but rather "Jack." Jack is Robert's deceased brother. Officer Richey told "Jack" to relay a message to Robert that "he better not come to Iva" or Robert would be arrested. Officer Richey further instructed "Jack" to tell Robert not to go to the Davenport residence. (R. pp. 198-199; R. p. 252 ¶ 5-25; R. pp. 253-256 ¶ 1-14).

Once Officer Richey ended his telephone call with Robert, Davenport pleaded with Officer Richey to take whatever steps were necessary to keep Robert from coming to Iva. Officer Richey instructed the Davenports to stay in their home with the doors locked and call 911 if Robert came to the house. (R. p.256 ¶ 16-24). Officer Richey decided to increase safety patrols at the Davenport residence. (R. p. 210 ¶ 15-20; R. p. 224 ¶ 15-25; R. p. 225 ¶ 1-16). Mr. and Mrs. Davenport followed Officer Richey's instruction and stayed in their home, locked the doors and rested. (R. p. 257 ¶ 7-24).

Officer Richey did not make any attempts to obtain an arrest warrant for Robert, even though he admitted to having sufficient information to present a warrant to a magistrate. (R. p. 205 ¶ 22-25; R. p. 206 ¶ 1-3; R. pp. 148-150). Richey however testified that he informed the oncoming officer Lt. Vaughn of Robert's threats and instructed him to make frequent safety patrols of the Davenport house. Officer Richey also admitted that implementing safety patrols for the Davenports was the prudent course of action. (R. p. 210 ¶ 15-20; R. p. 224 ¶ 15-25; R. p. 225 ¶ 1-16).

However, there is nothing documented in Officer Richey's incident report that he ordered increased patrols of the Davenport residence. (R. p. 188 ¶ 2-8; R. p. 202 ¶ 12-26; R. p. 203 ¶ 1-14; R. pp. 151-157). Officer Richey also omitted this assertion in an affidavit prepared for summary judgment in this lawsuit where he identified the choices he had and the course of action he took. (R. pp. 148-150).

In addition, the on-coming officer, Lt. Vaughn did not patrol pass the Davenport residence until approximately 8 pm, more than three (3) hours after his shift began. (R. p. 235 ¶ 22-25; R. p. 259 ¶ 12-25; R. p. 182 ¶ 25; R. p. 183 ¶ 1-3). Even then, Lt. Vaughn did not turn on the side street adjacent to the Davenport's residence where he could observe their side door and back yard. Lt. Vaughn was not busy responding to other calls that prevented him from conducting security patrols at the Davenport's residence. Rather, Vaughn testified that he had an uneventful evening up until he responded to the 911 call. The Davenport residence was only four and one-half blocks from the police station.

Lt. Vaughn happened to pass by the Davenport residence and was just two blocks away when he received a 911 call of a burglary in process at the Davenport residence. (R. p. 227 ¶ 14-

25). Lt. Vaughn estimated that he received the 911 dispatch call between 40 to 48 seconds after passing the residence. (R. p. 228 ¶ 20-25).

Lt. Vaughn however travelled past the residence on Front Street and did not turn onto East Lake Drive. The Davenport residence is situated at the corner of Front Street and East Lake. The Davenport's back door where Robert entered is not visible to someone traveling on Front Street in the direction that Lt. Vaughn travelled. Also, the neighbor who called 911 to report a burglary in progress had just pulled into her driveway on East Lake. The neighbor could clearly see Robert breaking into the side door from her vantage point on East Lake Drive. (R. p. 217 ¶ 7-25; R. pp. 218-220). If Lt. Vaughn had turned onto East Lake Drive he too would have observed Robert's motorcycle in the rear of the Davenport residence and likely would have seen Robert either breaking into the rear door, or seen damage to the door from Robert's break-in. (R. 170 ¶ 11-25; R. p. 171 ¶ 1-17; R. p. 228 ¶ 9-19; R. p. 229; R. p. 230 ¶ 1-20).

Despite Davenport's efforts to bar the door, Robert was successful in charging into the home, brandishing a knife at his mother's neck, and demanding money. Davenport gave Robert approximately $70. Robert subsequently removed the knife from his mother's neck but then stated, "I'm gonna kill that son of a bitch." Robert went to the bedroom, finding James Davenport holding a baseball bat for self-defense. Robert indicated that he wanted to talk and moved into the living room while the Davenports locked themselves in the bedroom and tried to call 911 on Davenport's cell phone. However, Robert kicked in the bedroom door and stabbed James Davenport to death, as James attempted to fight Robert off with a baseball bat. (R. pp. 260-263).

Robert then turned to his mother, who had attempted to flee the scene to find assistance, and told her he was going to kill her too. At that moment, a police car arrived at the Davenports' residence and Robert dropped the deadly weapon. He was placed under arrest. (R. p. 230 ¶ 8-22;

R. p. 264). In the aftermath of the murder, Chief Miller came to the scene. Chief Miller met with Faye Davenport and told her the Iva Police Department let her down. (R. pp. 265-266 ¶ 1-24; R. p. 298 ¶ 13-25; R. p. 300 ¶ 1-9).

ARGUMENT

Standard of Review

In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt. When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury. *Donevant v. Town of Surfside Beach*, 778 S.E.2d 320, 326 (S.C. App. 2015), aff'd, 811 S.E.2d 744 (S.C. 2018)

I. The Court Erred By Ruling as a Matter of Law That Respondent Did Not Owe a Duty of Due Care Resulting From Respondent's Affirmative Decision to Act to Protect the Safety of James and Faye Davenport

The public duty rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the general welfare and safety of the public. Such statutes create no duty of care towards individual members of the general public. *Arthurs ex rel. Est. of Munn v. Aiken County,* 551 S.E.2d 579, 582 (S.C. 2001). In *Arthurs v. Aiken County*, the Court considered the public duty rule and its interplay with the South Carolina Tort Claims Act ("Tort

Claims Act"). 346 S.C. 97, 551 S.E.2d 579 (2001). *Arthurs* confirmed the continuing viability of the public duty rule and its compatibility with the Tort Claims Act. However, the Court recognized that the public duty rule only applies when the Appellant relies upon a statute for the creation of a duty. Where the Appellant relies upon a duty created by common law, under the Tort Claims Act the analysis is as it would be if the Defendant was a private citizen. *Id.*, *Trousdell v. Cannon*, 572 S.E.2d 264, 266–67 (S.C. 2002).

Here, Appellant does not rely upon any statute for the creation of a duty to support her claims. Rather, Appellant relies upon the common law, and under the Tort Claims Act, Respondent is to be treated as a private citizen for purposes of determining whether a duty exists. Under the common law, even where there is no duty to act, when an act is voluntarily undertaken, the actor assumes the duty to use due care. *Russell v. City of Columbia,* 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). This is sometimes called the voluntary assumed duty doctrine.

In *Johnson v. Robert E. Lee Acad., Inc.,* 737 S.E.2d 512, 513–14 (S.C. App. 2012) the Court discussed the underpinnings of the voluntarily assumed duty doctrine:

> The recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in the Restatement of Torts, which states:
>
> > One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:
> >
> > (a) his failure to exercise such care increases the risk of such harm, or
> >
> > (b) the harm is suffered because of the other's reliance upon the undertaking.
> >
> > Restatement (Second) of Torts § 323.

737 S.E.2d 512, 513–14 (S.C. App. 2012)

In *Russell v. City of Columbia,* 406 S.E.2d 338, 338–40 (S.C. 1991) the Supreme Court applied the voluntary assumed duty doctrine to official police conduct. There, two officers

responded to a call and found an individual named Wood who was highly intoxicated and had been injured. When the officer's arrived, there were other people on the scene rendering aid to Wood. The officers asserted their authority and took control of the situation away from the individuals trying to render aid.

The officers determined that some disorderly conduct had occurred before they arrived, but neither Wood nor the other parties wished to file charges. The officers did not offer Wood assistance in connection with his injuries and did not otherwise detain him. After concluding their investigation, the officers "insisted" that Wood leave the premises. Wood walked alone unassisted from the scene in the general direction of a nearby railroad trestle. Wood's body was later found in a creek beneath the trestle, from which he had fallen, approximately 100 feet from the scene of the police investigation.

Wood's estate representative filed a wrongful death action, alleging negligence on the part of the officers. The Circuit Court dismissed the action, finding that there was an absence of any legal duty to Wood by the officers. The Court of Appeals affirmed, holding that petitioner did not assert, that any statute, contract, relationship or property interest created a duty on the part of the respondents toward petitioner's decedent. Moreover, the Court of Appeals determined that there is no other basis for finding a duty owed to Wood under general principles of negligence law. The Supreme Court reversed, concluding that because the officers had undertaken an affirmative act, they therefore assumed the duty to use due care. *Russell v. City of Columbia*, 406 S.E.2d 338, 338–40 (S.C. 1991).

Courts from other jurisdictions have applied the voluntary assumed duty doctrine in circumstances where officers respond to domestic abuse calls. *See, Williams v. Mayor & City Council of Baltimore,* 753 A.2d 41, 67–68 (Md. 2000), *Ashburn v. Anne Arundel County*, 510 A.2d

1078, 1085 (Md. 198 6),*Williams v. State,* 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137, 140 (1983); *Morgan v. District of Columbia, supra,* 468 A.2d at 1313–15; *Florence v. Goldberg,* 44 N.Y.2d 189, 196–97, 404 N.Y.S.2d 583, 587, 375 N.E.2d 763, 767 (1978); *Morris v. Muser, supra,* 478 A.2d at 940; *Chambers-Castanes v. King County,* 100 Wash.2d 275, 669 P.2d 451,458 (1983).

The Maryland Supreme Court explained in *Ashburn v. Anne Arundel County*, 510 A.2d 1078, 1085 (Md. 1986) that Appellant may maintain an action for negligence if there are sufficient facts to show that the defendant policeman created a "special relationship" with him, citing the *Restatement (Second) of Torts* § 315(b). The Court explained,

> This "special duty rule," as it has been termed by the courts, is nothing more than a modified application of the principle that although generally there is no duty in negligence terms to act for the benefit of any particular person, when one does indeed act for the benefit of another, he must act in a reasonable manner... In order for a special relationship between police officer and victim to be found, it must be shown that the local government or the police officer affirmatively acted to protect the specific victim or a specific group of individuals like the victim, thereby inducing the victim's specific reliance upon the police protection.
>
> 510 A.2d 1078, 1085 (Md. 1986)

Our Supreme Court in *Edwards v. Lexington Cnty. Sheriff's Dept.*, 386 S.C. 285, 293-94, 688 S.E.2d 125, 129-30 (2010) also held that a duty to act may arise due to special circumstances existing between the police and the victim. In *Edwards* the victim called the Sheriff's Department to report harassment on numerous occasions, leading the Department to be "well aware of [the attacker's] unrelenting violent tendencies toward [the victim]." *Id.* After one incident with her attacker, the Department took the additional step of placing the victim in a hotel room for the night. *Id.* Later, at a bond hearing set up by the Department, victim was again attacked, giving rise to liability on the part of the Department. *Id.* The Court ultimately held that "given [the Department's]

knowledge of [the attacker's] demonstrated threats against [the victim], [the Department] owed her a duty." *Id.*

a. There Is Sufficient Evidence From Which A Reasonable Jury Could Conclude That Respondent Voluntarily Assumed Duty to Protect the Davenports and Failed To Exercise Reasonable Care and James and Faye Davenport Were Harmed As A Result of Their Reliance Upon the Officer's Instructions

The question of whether a duty to act arises in a given case may depend on the existence of particular facts. *Vaughan v. Town of Lyman,* 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006). When there are factual issues regarding whether the defendant voluntarily undertakes a duty, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder. *Id.* at 446–47, 635 S.E.2d at 637, *Johnson v. Jackson,* 735 S.E.2d 664, 668 (S.C. App. 2012). At a minimum, there was a jury question regarding whether Faye and James Davenport relied upon Officer Richey's voluntary actions taken to protect them from Robert's threat of harm.

The record establishes that the Iva Police Department affirmatively acted to protect Davenport and her deceased husband James from the threat posed by Robert. Davenport called the emergency response number 911 and requested assistance. Officer Richey from the Iva Police Department responded to the Davenport residence. He listened to the threatening phone call from Robert where Robert stated in no uncertain terms that he was coming to Iva to kill the Davenports. Richey then spoke with Robert on the telephone in Davenport's presence and warned him not to come to Iva and told Robert he would be arrested if he did. Davenport understood this promise of arrest to mean that the Iva Police Department would actively patrol around her home looking out for Robert should he come to Iva. (R. p. 294 ¶ 16-19).

Officer Richey advised the Davenports to lock the doors of their home, hide and call 911 again if Robert appeared. Officer Richey then asked Mrs. Davenport if she was satisfied with this approach, clearly indicating that he was there to offer the services of the Iva Police Department

for their protection. Mrs. Davenport responded that she wished for the Police to do whatever it took to prevent Robert from coming to Iva.

Officer Richey then left and testified that he implemented a plan of increased patrol. The Davenports were satisfied that they would be safe staying in their home with the doors locked as instructed by Officer Richey, while the Police Department were on the look-out for Robert. So, that is exactly what they did. James Davenport went to lie down in the bedroom to rest, as did Faye Davenport. (R. p. 258 ¶ 19-25; R. p. 259 ¶ 1-11; R. p. 285 ¶ 20-25; R. p. 290 ¶ 1-16; R. p. 294 ¶ 10-25; R. p. 295 ¶ 1-9).

The Court refused to submit the question of whether Davenport and her deceased husband relied upon the affirmative actions taken by Officer Richey for their protection. Appellant submitted the following jury instruction:

> Where someone undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking. *Johnson v. Robert E. Lee Acad., Inc.*, 737 S.E.2d 512, 513–14 (S.C. App. 2012); *Russell v. City of Columbia,* 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

Supplemental Jury Instruction.

Instead, the lower court ruled as a matter of law that the Town of Iva did not owe a duty of care to Davenport and her deceased husband. The court erred.

b. <u>There were Special Circumstances giving rise to a Duty of Due Care</u>

In addition, there were special circumstances giving rise to a duty of care owed by the Iva police officers to Davenport and her deceased husband James. Like the Sheriff's Department in *Edwards*, the Iva Police Department was called numerous times and made aware of Robert's

harassment of Davenport and her husband. In May 2012, the police were notified that Robert had come to Davenport for money. Following this incident, and with knowledge of his violent tendencies, the Department placed Robert on trespass notice. On July 15, 2012 – the day of the attack on Davenport and her husband – Robert left Davenport a phone message telling her that there would be blood flowing in Iva. Like the officers in *Edwards*, Officer Richey of the Iva Police Department took the additional step of communicating with Robert on the telephone telling him that a warrant would be issued for his arrest should he continue his behavior. Later the same day, Robert attacked Davenport and killed her husband. Given the Department's knowledge of Robert's violent tendencies towards Davenport and her husband, the specific threat made against Davenport and her husband on July 15, 2012, and Officer Richey's communication with Robert just hours before the attack, the Department owed Davenport and her husband a duty of care due to special circumstances.

c. There Was Evidence from Which A Jury Could Find the Town of Iva's Employees Negligent and Grossly Negligent

Whether the Town of Iva's employees were negligent or grossly negligent in failing to perform the duty is a question of fact for the jury. See *Faile v. S. Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544-45 (2002)(gross negligence is a factually controlled concept whose determination best rests with the jury.). Here, Office Richey admitted that the prudent course of action was to increase security patrols around the Davenport residence. Although Officer Richey claims that he instructed Lt. Vaughn to do just that, the jury could reasonably conclude that this was not done. Lt. Vaughn was unable to testify that he passed by the Davenport residence more than once, just before receiving the 911 dispatch call.

The evidence is un-contradicted that he did not travel down East Lake Drive, which would have been the prudent course of action if he was in fact conducting a security check of the

Davenport residence. The neighbor who called 911 would have seen Lt. Vaughn had he traveled on East Lake Drive. More importantly, Lt. Vaughn would have seen Robert's motorcycle. He likely would have seen Robert, given the fact that he was 48 seconds past the Davenport residence when the 911 dispatch came through. Based upon the evidence in the record, the jury could have reasonably concluded that Lt. Vaughn did not conduct any security patrols at the Davenport residence and he just happened to be riding by when he received the 911 dispatch call.

Furthermore, the timing is such that had Lt. Vaughn simply turned onto East Lake when he passed by the Davenport's residence he too would have either observed Robert in the area or seen that the Davenport's side door was just busted open. Lt. Vaughn should have been and a position to prevent this horrendous crime.

Moreover, a jury could conclude that Officer Richey failed to exercise due care by simply instructing the Davenports to stay in their residence with the doors locked and to hide. Chief Miller was acutely aware that Robert posed a serious threat to the life and safety of the Davenports. He even acknowledged that he thought James Davenport and Robert would have a life ending encounter. Officer Richey also heard Robert state there would be blood on the streets in Iva.

There were a number of options available to Officer Richey other making "sitting ducks" out of the Davenports by telling them to simply stay in the house and call 911. First, Richey could have instructed the Davenports to leave their residence and go to a safe place. (Mrs. Davenport testified that they followed Officer Richey's instructions and there is no reason to believe they would not have followed an instruction to leave the residence). Second, Richey could have contacted dispatch and requested Anderson County Sheriff's Department to investigate Robert's threats, and temporarily detain him while Officer Richey obtained a warrant for making threatening phone calls. Richey knew exactly where Robert was when he spoke with him.

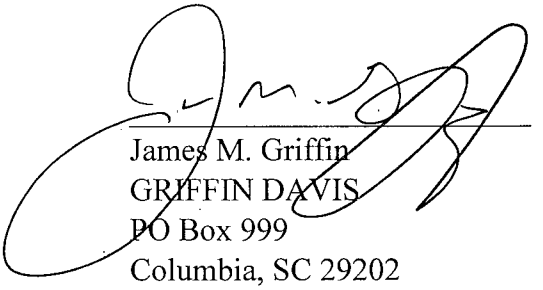
Richey's affidavit which was admitted into evidence establishes that he had sufficient grounds to obtain an arrest warrant for Robert. The fact that both former Chief Miller and Richey testified that this would have been done if Mrs. Davenport had told them that Robert threatened suicide is clear evidence that taking such action to protect the Davenports was reasonable and prudent. This testimony, in conjunction with Chief Miller's admission, is also clear evidence of gross negligence on behalf of the Iva Police Department.

A reasonable jury could conclude that had Officer Richey done either of the above, James Davenport's horrendous murder and the assault on Faye Davenport would have been prevented.

CONCLUSION

For the reasons set forth above, Appellant Faye Davenport respectfully requests that this Court reverse the ruling of the lower court directing a verdict against her and for the Town of Ivan and remand this case for a new trial.

Respectfully Submitted.



James M. Griffin
GRIFFIN DAVIS
PO Box 999
Columbia, SC 29202
(803) 744-0800
jgriffin@griffindavislaw.com

November 20, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Tenth Judicial Circuit
Cordell J. Maddox, Jr., Circuit Court Judge

Civil Action No.: 2014-CP-04-01469
Appellate Case No.: 2017-002612

Fayetta Sherida Davenport, individually and
on behalf of the Estate of James Davenport.....Appellant

v.

Town of Iva, S.C.....Respondent

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

James M. Griffin
GRIFFIN DAVIS
P.O. Box 999
Columbia, SC 29202
803-744-0800

Attorney for Appellant

November 20, 2018