THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Sep 14 2020
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2020-000589

Bridgett Taylor,..... Respondent,

v.

Richland County Sheriff's Department,.....Appellant.

INITIAL BRIEF OF RESPONDENT

Andrew W. Kunz, SC Bar No. 78261
Lauren K. Slocum, SC Bar No. 101280
ELLIOTT, PHELAN & KUNZ, LLC
Post Office Box 1405
Georgetown, South Carolina 29442
(843) 546-0650
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

COUNTER STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

FACTS 2

STANDARD OF REVIEW 9

ARGUMENT 10

I. The lower court correctly denied the directed verdict motion as to collateral estoppel 10

II. The lower court correctly denied the directed verdict motion as to sovereign immunity 14

III. The lower court correctly denied the directed verdict motion and ordered a new trial based on its review of the evidence presented at trial, consideration of another circuit court judge's order, and the applicable law. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Belton v. State, 313 S.C. 549, 443 S.E.2d 554 (1994) 19

Boschele v. Rainwater, 2016 WL 528836 (D.S.C. Feb. 10, 2016) 15

Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997) 18

Catawba Indian Nation v. State, 407 S.C. 526, 756 S.E.2d 900 (2014) 11, 12

Creech v. S.C. Wildlife & Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) 10

Curiel v. Hampton Cnty. E.M.S., 401 S.C. 646, 737 S.E.2d 854 (Ct. App. 2012) 15

Dorrell v. S.C. Dep't of Transp., 361 S.C. 312, 605 S.E.2d 12 (2004) 18

Graham v. Connor, 490 U.S. 386 (1989) 13, 17

Hollins v. Richland Cnty. Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1992) 13

Huggins v. Metts, 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006) 15

Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997) 12

Murphy v. Fields, 2018 WL 1430957 (D.S.C. March 21, 2018) 16

Murphy v. Fields, 2019 U.S. Dist. LEXIS 184280 (D.S.C. Aug. 29, 2019) 16

PPG Indus., Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1998) 19

Repko v. Cnty. of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018) 8, 16

Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988) 13

Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008) 18

Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) 14

Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) 15

Wingate v. Byrd, 2017 WL 10518177 (D.S.C. Jan. 20, 2017) 16

Statutes

42 U.S.C. § 1983 3

S.C. Code Ann. § 15-78-60 ..... passim

Other Authorities

RE: Issuance of No-knock Search Warrants by Circuit and Summary Court Judges, Order 2020-07-10-01 (July 10, 2020) 3

Rules

Rule 40(j), SCRCP 3

Rule 43(l), SCRCP 19

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court correctly denied the directed verdict motion as to collateral estoppel?

II. Whether the lower court correctly denied the directed verdict motion as to sovereign immunity?

III. Whether the lower court correctly denied the directed verdict motion and ordered a new trial based on its review of the evidence presented at trial, consideration of another circuit court judge's order, and the applicable law?

STATEMENT OF THE CASE

This appeal arises out of the December 19, 2013 detonation of an explosive device to open the front door of Respondent Bridgett Taylor's ("Taylor") home during a no-knock execution of a search warrant related to her adult son's criminal drug activity. Taylor was behind the door when the explosion occurred, and she suffered significant permanent injuries. Her son was not in the home.

On November 3, 2014, Taylor filed a complaint against the Appellant Richland County Sheriff's Department ("RCSD") asserting a gross negligence cause of action. (Cmplt.).

On December 6, 2016, Taylor filed a complaint in the federal District Court of South Carolina asserting violations of the Fourth, Eighth, and Fourteenth Amendments against individual defendants. (Order denying Mot. for Summ. J. p. 3). On July 20, 2018, the Magistrate Judge filed a report and recommendation recommending the Court grant the defendants' motion for summary judgment. (R&R). The District Court adopted the report and recommendation, and Taylor did not appeal. (Order of Dist. Ct.).

On September 18, 2018, RCSD filed a motion for summary judgment in this action arguing sovereign immunity under the South Carolina Tort Claims Act and that the District Court's decision operated as collateral estoppel and barred this state court action. (Mot.). The Honorable Casey L. Manning denied the motion. (Order).

RCSD filed a motion *in limine* again arguing collateral estoppel. (Mot. *in limine*). The lower court denied the motion in part, and the case proceeded to trial from March 13-14, 2019. (Email order). At the conclusion of Taylor's case, the lower court granted RCSD's motion for a directed verdict. (Tr. pp. 542-43). Taylor filed a motion to reconsider, and the lower court granted the motion and ordered a new trial. (Mot.; Order).

FACTS[1]

Around 6:30 a.m. on December 19, 2013, RCSD detonated an explosive device to breach the front door to Taylor's home during a no-knock execution of a narcotics search warrant for her son, Terrance Taylor. Taylor was awake and preparing to go work when she saw the police car blue lights outside of her house. (Tr. pp. 255-56, 291). She walked to the front door to open it, and the explosive device[2] detonated. (Tr. pp. 255-56, 291). Numerous pieces of shrapnel lodged in various places on her body including her right breast, throat, and eye. (Tr. pp. 291, 296-97; Exh. 12). Taylor underwent surgery to remove the shrapnel and has permanent scarring. (Tr. p. 294).

RCSD suspected Terrance Taylor was involved in a homicide and connected him to a blue Impala seen leaving the scene. (Tr. p. 402). They then sent an informant to Taylor's house, where he bought drugs. (Tr. pp. 402-03). Using the informant's evidence, RCSD got the search warrant for narcotics at Taylor's home. (Tr. p. 403). RCSD filled out a risk assessment form for executing the search warrant that included things such as additional persons (besides Terrance Taylor) present, a vicious dog, a combative suspect, a homicide suspect, firearms and guns, gang

[1] RCSD's brief recites facts taken from a federal court opinion in a separate action rather than from the trial of this case. The lower court denied RCSD's request to have the federal court action findings of fact established as the facts of this case. (Email; Tr. pp. 179-80). Taylor recites the evidence presented at trial.

[2] RCSD used a sheet of plastic explosive that is put underneath a device with a detonator. It is designed to cut through and open the door. (Tr. pp. 418-19).

association, and numerous prior calls to law enforcement. (Tr. pp. 429-31). The assessment showed the highest-level risk. (Tr. p. 443).

From approximately 3:00-5:00 a.m. on the morning of December 19, RCSD conducted surveillance on Taylor's house. (Tr. p. 403). RCSD decided that it would do a no-knock[3] entry and use an explosive breach if the blue Impala was in Taylor's driveway. (Tr. pp. 403-04, 414). Taylor, not her son, owned the Impala. (Tr. pp. 385). Taylor's son did not live with her. (Tr. p. 278). RCSD had no confirmation Terrance Taylor was in the home when it detonated the explosive device. (Tr. pp. 414-15).

Police executed search warrants at Taylor's house on two prior occasions—once when she let them into her house and another when they used a battering ram on the back door. (Tr. pp. 284-85).

Taylor filed this action on November 3, 2014, alleging RCSD committed gross negligence in using an explosive device and the manner in which it conducted a no-knock execution of the search warrant.[4] (Cmplt.).

Federal Court action

Taylor filed a complaint in the federal District Court of South Carolina under 42 U.S.C. § 1983 against individuals Leon Lott, Ricky Ezzell, and David Linfert. (Cmplt.). Significantly, Taylor did not name RCSD, or anyone else in an official capacity, as a defendant in the federal court action.

---

[3] The Supreme Court of South Carolina recently placed "a moratorium on the issuance of no-knock warrants" in part due to the "recognition of the dangers that the execution of no-knock warrants present to law enforcement and members of the public." *RE: Issuance of No-knock Search Warrants by Circuit and Summary Court Judges*, Order 2020-07-10-01 (July 10, 2020).

[4] The original case was dismissed under Rule 40(j), SCRCP, and restored on May 24, 2017. (Order denying Mot. to Recon. n.2).

On July 20, 2018, the Magistrate Judge filed a report and recommendation recommending the District Court grant the defendants' motion for summary judgment. (R&R). The Magistrate addressed two alleged violations of the Fourth Amendment—(1) whether using a no-knock entry as an exception to the knock-and-announce requirement was justified and (2) whether using an explosive detonator constituted excessive force. (R&R pp. 3-14). The Magistrate found reasonable suspicion existed to justify a no-knock entry and the explosive entry was not excessive force.

As to the no-knock entry (which is not at issue in this case), the Magistrate held Taylor could not show the "defendant's failure to knock on her door before entering her home to execute the search warrant rendered the search unreasonable" because the evidence showed reasonable suspicion that occupants of the house could present a danger to law enforcement or inhibit their investigation. (R&R pp. 11, 3-4).

As to the explosive entry, the Magistrate held "no reasonable jury could find that using the detonator to unlock the door was unconstitutionally excessive." (R&R p. 14).

Taylor did not file objections to the report and recommendation. On August 14, 2018, the District Court adopted the report and recommendation, resulting in a dismissal with prejudice of the constitutional claims against those individual defendants. (Order).

Summary Judgment Motion

On September 18, 2018, RCSD filed, in this state court action, a motion for summary judgment on the bases that, *inter alia*, the District Court's decision bars Taylor from pursuing the state court action and it is entitled to sovereign immunity under the Tort Claims Act.[5] (Mot.).

[5] RCSD also filed a motion to amend its Answer to assert collateral estoppel as a defense, but the lower court never ruled on it. (Mot. to Amend). Therefore, the operative Answer does not assert collateral estoppel. (Ans.).

On January 29, 2019, the Honorable Casey L. Manning entered an order denying RCSD's motion for summary judgment. (Order). He held collateral estoppel does not apply to these circumstances because the federal court determined constitutionality and not whether RCSD exercised slight care. (Order pp. 5-8). Judge Manning also denied the motion on the basis of sovereign immunity because the gross negligence standard is read into the Tort Claims Act immunity provisions cited by RCSD, and Taylor presented evidence of gross negligence. (Order pp. 8-9). RCSD filed a motion to reconsider, which Judge Manning denied. (Mot. to Recon; Order).

Pre-Trial

After losing the motion for summary judgment, RCSD raised the same collateral estoppel argument in a different form—a motion *in limine*. (Mot. & Memo.). It moved *in limine* to preclude Taylor from disputing factual and legal conclusions allegedly made by the District Court. (Memo.). On March 11, 2019, the lower court—the Honorable Jocelyn Newman—held a pre-trial hearing on the motion and other matters. (Tr. pp. 31-145). The lower court stated it would email the parties a ruling on the collateral estoppel argument the following day. (Tr. p. 145).

On March 12, 2019, the lower court made the following ruling:

> Based on the Order and accompanying Report and Recommendation in the related federal action (Bridgett Taylor v. Leon Lott, 3:16-3823-JFA-PJG), Plaintiff is collaterally estopped from arguing in this case that Defendant (through his agents) lacked reasonable suspicion and/or justification for a "no-knock entry" or that Defendant's failure to knock before entering the home was per se unreasonable. However, I do not believe that dispenses with Plaintiff's case entirely. ***While Defendant may have had justification to obtain and execute such a warrant, that is not conclusive as to whether RCSD failed to exercise slight care during the execution.*** It may seem like splitting hairs, but I believe there's a distinction to be made. In addition, ***while the District Court concluded that the use of the detonator did not amount to excessive force, that determination was made within a 4th Amendment context, which is not exactly like the gross negligence standard.*** Again, we may be splitting hairs, but the hairs need to be split here.

(Email) (emphasis added); (Tr. pp. 172-73). The following day, RCSD asked for "clarification" on the ruling. (Tr. pp. 172-73). The lower court explained that it denied the part of the motion asking for preclusive effect of the findings of fact and arguing them as the law of the case because (1) the court could not tell which factual findings were "necessary to the Federal court's determination" and (2) the court did not "believe we're talking about the law of the case" because this is a "different case" with "a different cause of action." (Tr. pp. 179-80). After much back-and-forth discussion about what legal issues remained after the ruling on the motion *in limine*, the lower court and the parties understood Taylor's theory of gross negligence to be that, while RCSD could employ a no-knock entry, its use of the explosive device during the execution was a grossly negligent manner in which to conduct the no-knock entry. (Tr. pp. 200-01).

Trial

Taylor called three witnesses: (1) Tameka Barczak, an EMS paramedic that treated Taylor's injuries, (2) Taylor, and (3) Chief Roy Taylor, plaintiff's expert in law enforcement and police administration and supervision. Relevant to the appeal, Chief Taylor testified to his opinion that RCSD acted in a grossly negligent manner by using an explosive breach to execute the search warrant rather than a less dangerous mode of entry. (Tr. pp. 413-16). Chief Taylor testified RCSD did not have confirmation that the subject of the warrant—Terrance Taylor—was even in the home, RCSD used the explosive breach in the morning while Taylor was awake and moving about the home to prepare to go to work, and there was no urgency to execute the narcotics search warrant that morning. (Tr. pp. 414, 427-28, 470). RCSD conducted surveillance on the house for only a few hours before deciding to use the explosive device and, in that time, received no confirmation that Terrance Taylor was in the house. (Tr. pp. 414-15). They only knew an Impala he sometimes drove but did not own was in the driveway. (Tr. pp. 414-15).

Chief Taylor testified that, even assuming the worst-case scenario used in RCSD's risk assessment, he would not use an explosive breach to execute this narcotics search warrant. (Tr. pp. 429-33). He explained: "Most of these [risk assessment] factors are things that we face on every one of our search warrants and we're actually gonna take more precautions when we know these factors than when we don't. . . . [RCSD] knew what the layout of the home was. They knew the people they were gonna be dealing with, so they're gonna be prepared. They're gonna have ballistic shields, they're gonna have ballistic – Kevlar vests on, helmets on, eye protection." (Tr. p. 433). Chief Taylor does "not agree with using explosive entry in a residential neighborhood unless there's danger to life." (Tr. p. 478). He would have executed the search warrant as a no-knock entry using a hydraulic wedge to open the door. (Tr. pp. 452-57; 487).

On cross-examination, counsel for RCSD tried to get Chief Taylor to admit that the finding of constitutional objective reasonableness made by the federal court means that RCSD acted with slight care. (Tr. pp. 502-04). Chief Taylor denied that proposition and explained that constitutional objective reasonableness means "they're not violating someone's civil rights" and acted lawfully. (Tr. p. 503). That does not mean that they acted carefully. He gave this example:

> [W]e're allowed to exceed the speed limit and break motor vehicle laws when we're running lights and siren to an emergency. That doesn't mean that we may not cause injuries, but that [what] we were doing was lawful. . . . [S]o there can be things that are judged to be lawful, shootings, all those types of things, but that doesn't necessarily mean that the level of safety and precautions were taken that should have been.

(Tr. pp. 503-04). In Chief Taylor's opinion, RCSD acted recklessly and without slight care in how it conducted a no-knock execution of a search warrant using an explosive device. (Tr. pp. 414, 427-28).

RCSD made a motion for a directed verdict arguing immunity under the Tort Claims Act, S.C. Code Ann. §§ 15-78-60(3), (4), (6), and (17). (Tr. pp. 515-36). Specifically as to S.C. Code

Ann. § 15-78-60(17), which provides immunity when an employee's conduct constitutes "intent to harm," RCSD argued that Taylor testified she opened the door and looked at a police officer before RCSD detonated the explosive device, which is intent to harm for which RCSD is immune from liability. (Tr. p. 529).

In response, Taylor argued that, under *Repko v. Cnty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018), the gross negligence exception is read into all of the subsections cited by RCSD because their conduct falls within a subsection that has a gross negligence exception, specifically § 15-78-60(25) regarding the "protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity." (Tr. pp. 536-37). Taylor also argued that she testified she was behind the door, not standing in an open doorway, when the explosive device detonated, and pointed out that her injuries would have been far worse if she stood in an open doorway at the time of the explosion. (Tr. p. 540).

The lower court granted the motion for a directed verdict. It found RCSD immune from liability under §§ 15-78-60(3), (4), (6), and (17), and that § 15-78-60(25) does not apply to the facts of this case. (Tr. p. 543). It found that the evidence viewed most favorably to Taylor is that she was standing with the door open when RCSD detonated the explosive device, making it an intentional act. (Tr. pp. 542). The following day, the lower court entered a Form 4 Order stating it "orally granted Defendant's motion for directed verdict." (Form 4 Order).

Post-Trial

Taylor filed a motion to reconsider. She argued the lower court's ruling that § 15-78-60(25) did not apply overruled Judge Manning's prior order denying summary judgment in which he ruled that § 15-78-60(25) does apply to this case. (Mot.; Order pp. 8-11). Taylor argued the lower court violated the rule that one judge cannot overrule a decision of another judge from the

same court and that, regardless, the lower court incorrectly held § 15-78-60(25) does not apply to this case. (Mot.). Taylor argued the lower court failed to view the evidence in a light most favorable to her by impermissibly resolving a conflict in the evidence in a manner that directly resulted in the loss of her case. (Mot. pp. 4-5).

The lower court granted the motion to reconsider in a Form 4 Order. It ruled "this matter is re-opened and shall be scheduled for jury trial during the next appropriate term of court." (Form 4 Order). RCSD filed a motion for reconsideration, which the lower court denied. (Order). The lower court explained that its decision to order a new trial resulted from correcting its "own errors." (Order p. 2). First, the court improperly "weigh[ed] the evidence in ruling on a motion for directed verdict" when it found that Taylor's testimony about whether the door was open at the time of the explosion "amounted to an intentional wrongdoing." (Order p. 3). Second, the court "improperly overruled the decision of" Judge Manning "(to the extent that it did)" on the issues of sovereign immunity, res judicata, and collateral estoppel. (Order p. 3). Finally, the lower court found, "based on the evidence presented at the previous trial, that Defendant is not entitled to sovereign immunity and cannot claim the 'protections' of collateral estoppel or *res judicata*."[6] (Order p. 4).

STANDARD OF REVIEW

The standard of review in this appeal is an abuse of discretion. The lower court granted a motion to reconsider its prior order granting a directed verdict. Therefore, the effect of the lower court's order is to deny a motion for a directed verdict and grant a new trial.

> The Standard of review as regards the refusal to grant a directed verdict is well established: In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this Court when there is not evidence to support the ruling below.

[6] The lower court's ruling as to res judicata is not challenged on appeal. (Br. of App; Tr. p. 39).

Creech v. S.C. Wildlife & Marine Resources Dep't, 328 S.C. 24, 28-29, 491 S.E.2d 571, 573 (1997) (internal quotation marks omitted).

ARGUMENT

The lower court did not abuse its discretion in denying RCSD's motion for a directed verdict and, as a result, granting a new trial.

The lower court stated it should not have overruled Judge Manning's prior decision on sovereign immunity, res judicata, and collateral estoppel. (Order p. 3). It then ***independently*** found "based on the evidence presented at the previous trial, that Defendant is not entitled to sovereign immunity and cannot claim the 'protections' of collateral estoppel or *res judicata*." (Order p. 4). Because the lower court independently found, based on its *de novo* review of the evidence at trial, that it should not have granted a directed verdict as to sovereign immunity, collateral estoppel, or res judicata, its statement regarding Judge Manning's order is harmless. There is no issue on appeal because the lower court actually did what RCSD says it did not—consider *de novo* RCSD's defenses. (Order p. 4; Br. of App. p. 13).

This Court may affirm the order denying RCSD's directed verdict motion and granting a new trial by finding the lower court did not abuse its discretion in finding that collateral estoppel and sovereign immunity do not apply. Regardless, the lower court properly found it "inappropriate" to overrule Judge Manning's rulings as to collateral estoppel and sovereign immunity. (Order p. 3). For these reasons, this Court should affirm and remand for a new trial.

I. The lower court correctly denied the directed verdict motion as to collateral estoppel.

The evidence, viewed in a light most favorable to Taylor, and the law support the lower court's decision that "based on the evidence presented at trial, [] Defendant . . . cannot claim the 'protections' of collateral estoppel." (Order p. 4).

"Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action." *Catawba Indian Nation v. State*, 407 S.C. 526, 536, 756 S.E.2d 900, 906 (2014) (internal quotation marks omitted). It "bars the relitigation of only the *particular* issues that were actually litigated and decided in the prior suit." *Id.* at 537, 756 S.E.2d at 906 (emphasis added). "[T]he party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) *directly* determined in the prior action; and (3) necessary to support the prior judgment." *Id.* at 536-37, 756 S.E.2d at 906 (internal quotation marks omitted) (emphasis added). RCSD does not satisfy these elements.

It is first necessary to establish what was actually litigated and directly determined in the federal court action, as well as the issues presented in this state court action. In federal court, Taylor argued that the individual officers' "use of a detonator on the front door constituted an excessive use of force in violation of the Fourth Amendment." (R&R p. 12). The federal court disagreed and held "no reasonable jury could find that using the detonator to unlock the door was unconstitutionally excessive." (R&R p. 14).

In this state court action, Taylor alleged and presented evidence that there was no urgency for RCSD to execute the search warrant at that time when it knew or should have known that Taylor was awake and about the house preparing to go to work. (Tr. pp. 428-29, 470; Cmplt. p. 5). Taylor alleged and presented evidence that RCSD could and should have executed a no-knock entry using less dangerous means for a no-knock entry in general and because it had no confirmation that Terrance Taylor was in the home. (Tr. pp. 414-15; Cmplt. p. 5). The federal court addressed the issue of whether Terrance Taylor was in the home in the context of the

argument that there was no reasonable suspicion for a no-knock entry (R&R pp. 6-7) but did not address or rule on that issue as it relates to using less dangerous means for a no-knock entry.

As to the first and second elements of collateral estoppel, the issue of whether RCSD was grossly negligent in carrying out the explosive breach at the time it did and using the device it did was not actually litigated and determined by the federal court. *See Catawba Indian Nation*, 407 S.C. at 539, 756 S.E.2d at 907 ("Since the current issue was not actually litigated in the prior action, the State has not met its burden of demonstrating that collateral estoppel should be applied."). The issues raised in the state court action were not actually litigated or directly determined in the federal court action.

As to the third element of collateral estoppel, the level of care RCSD used in conducting the no-knock explosive entry was not a determination essential to the federal court's judgment. The federal court's judgment is based solely on the finding that the individual officers acted with objective reasonableness in using an explosive device for a no-knock entry into Taylor's house. (Order p. 14). It is not based on a determination as to when the officers (or RCSD) should have detonated the device, whether they should have known Terrance Taylor was in the house before detonating the device, or whether they should have used less dangerous means for a no-knock entry. The issues presented in this action were not made in, much less necessary to, the federal court's decision.

RCSD fails to satisfy the elements of collateral estoppel, and this Court should affirm the lower court's finding that it does not apply. *See Jones v. City of Folly Beach*, 326 S.C. 360, 367, 483 S.E.2d 770, 774 (Ct. App. 1997) ("[O]ur supreme court has declined to apply the bar of collateral estoppel to speculative comparisons of factual issues not litigated or directly determined in any final decision.").

RCSD's argument focuses exclusively on the federal court's conclusion that the individual officers acted with objective reasonableness in using an explosive detonator to unlock the door. It insists that a finding of objective reasonableness in a Fourth Amendment constitutional claim precludes a finding of gross negligence on any state law claim arising from the same incident. (Br. of App. pp. 20-23). In other words, RCSD argues that, if the individual officers' conduct did not violate the Fourth Amendment, then RCSD's conduct cannot, as a matter of law, be grossly negligent. This is incorrect.

"[C]laims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The determination of "whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks omitted).

"Gross negligence 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 a failure to exercise slight care." *Richardson v. Hambright*, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) (internal citation omitted). "[G]ross negligence is a relative term, and means the absence of care that is necessary under the circumstances." *Hollins v. Richland Cnty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1992) (internal quotation marks omitted).

The consideration of the intrusion of the explosive device on Taylor's individual Fourth Amendment interests versus the governmental interests at stake in the search is a separate analysis from whether RCSD failed to exercise slight care in carrying out the execution.

In ruling on RCSD's motion *in limine* on collateral estoppel, the lower court found that while RCSD "may have had *justification to obtain* and execute such a warrant, that is not conclusive as to whether RCSD failed to exercise slight care *during* the execution" and that the conclusion "that the use of the detonator did not amount to excessive force[] was made within a 4th Amendment context, which is not exactly like the gross negligence standard."[7] (Email) (emphasis added); (Tr. pp. 172-73). As Chief Taylor explained at trial, that conduct is legal and does not violate someone's civil rights does not necessarily mean that the conduct constituted slight care. (Tr. pp. 502-04).

This Court should affirm the lower court's conclusion that collateral estoppel does not apply in these circumstances and the resulting denial of RCSD's motion for a directed verdict.

II. The lower court correctly denied the directed verdict motion as to sovereign immunity.

The evidence, viewed in a light most favorable to Taylor, and the law support the lower court's ruling that RCSD "is not entitled to sovereign immunity." (Order p. 4). At trial, RCSD moved for a directed verdict on sovereign immunity based on S.C. Code Ann. §§ 15-78-60(3), (4), (6), and (17). (Tr. pp. 515-36). On appeal, RCSD challenges the lower court's denial of its motion for a directed verdict only as to § 15-78-60(6). (Br. of App. pp. 23-25). Therefore, the denial of the motion as to § 15-78-60(3), (4), and (17) is the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

Under § 15-78-60(6) the "governmental entity is not liable for a loss resulting from: . . . (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of

[7] In discussing the ruling with the court, RCSD acknowledged that, even if it won the motion, Taylor would still have a case to pursue against it in state court. (Tr. p. 173 (stating the "motion in limine was not presented or filed in the form of a dispositive motion")).

providing police or fire protection." § 15-78-60(6); *Wells v. City of Lynchburg*, 331 S.C. 296, 304, 501 S.E.2d 746, 750 (Ct. App. 1998). "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Curiel v. Hampton Cnty. E.M.S.*, 401 S.C. 646, 650, 737 S.E.2d 854, 856 (Ct. App. 2012). Subsection (6) does not apply to this case. Even if it did, a gross negligence exception applies, as explained below, and the issue of gross negligence is for a jury to decide.

RCSD relies solely on *Huggins v. Metts*, 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006), for its argument that § 15-78-60(6) applies in this case. (Br. of App. pp. 23-25). In *Huggins*, police responded to a call stating the plaintiff "was threatening to burn down several homes and to commit suicide." *Id.* at 622, 640 S.E.2d at 465. The plaintiff was uncooperative, "armed with two butcher knives," and continued to walk towards an officer while holding the knives after being told to stop and even after being shot at once. *Id.* at 623, 640 S.E.2 at 466. The Court held the officers were entitled to sovereign immunity for the fatal shooting of the plaintiff. *Id.* at 624-25, 640 S.E.2d at 466-67. The shooting "concern[ed] the manner in which the police chose to provide police protection" and § 15-78-60(6) "specifically exempts the Police from liability concerning the methods which they choose to utilize to provide police protection." *Id.* at 625, 640 S.E.2d at 467.

In contrast to *Huggins*, in which police responded to a call requesting protection and faced an immediate danger to themselves and the surrounding public, there was not immediate danger when RCSD detonated the explosive at Taylor's home. RCSD was not providing police protection to anyone. It voluntarily chose to execute a non-time emergent search warrant. *See Boschele v. Rainwater*, 2016 WL 528836, *15-16 (D.S.C. Feb. 10, 2016) (finding no immunity under § 15-78-60(6) because, unlike in *Huggins*, the plaintiff's "actions did not present sufficient danger to

require police protection—[the officer] was not responding to a call where [the plaintiff] was continuing to threaten harm to the public or himself").

"Courts have interpreted this exception [§ 15-78-60(6)] to apply only to the choice of methods by law enforcement officials to provide protection to the public, or the failure to provide protection, rather than to all acts by those officials in the scope of their police duties." *Murphy v. Fields*, 2019 U.S. Dist. LEXIS 184280 (D.S.C. Aug. 29, 2019)[8] (holding that the force used in an arrest of a student while in a classroom "did not constitute 'police protection,' nor can it be described as the 'choice' of a method for providing police protection") (citing *Wingate v. Byrd*, 2017 WL 10518177, *10 (D.S.C. Jan. 20, 2017) (ruling in a report and recommendation that officers were not entitled to immunity under § 15-78-60(6) for alleged negligence in executing a search warrant because it did not constitute police protection)). The execution of a search warrant is not "police protection" within the meaning of § 15-78-60(6), and evidence supports the lower court's ruling that RCSD is not entitled to sovereign immunity.

Further, even if § 15-78-60(6) applies to this case, the gross negligence exception applies because another subsection applicable to this case, § 15-78-60(25), contains a gross negligence exception. *See Repko v. Cnty. of Georgetown*, 424 S.C. 494, 507, 818 S.E.2d 743, 750 (2018) ("We reaffirm our holding in *Steinke* that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception." (internal quotation marks omitted)). RCSD contends that § 15-78-60(25) does not apply because Taylor was not "in custody." (Br. of App. p. 20 n.3). This is legally and factually incorrect, and the Court should find RCSD barred from contesting the applicability of subsection (25). Section § 15-78-60(25) is not

[8] The Honorable Cameron McGowan Currie adopted and incorporated the report and recommendation into her order. *Murphy v. Fields*, 2018 WL 1430957 (D.S.C. March 21, 2018).

limited to "custody" situations, which are generally relevant in an Eighth Amendment analysis. Instead, it applies to the "supervision, protection, control, confinement, *or* custody of any student, patient, prisoner, inmate, or client of any governmental entity." § 15-78-60(25) (emphasis added). RCSD maintains that the reasonableness standard announced in *Graham v. Connor*, 490 U.S. 386 (1989), applies to Taylor's claims. (Br. of App. pp. 17-18). *Graham* states that a "seizure" that triggers the Fourth Amendment's protections occurs when government actors "in some way restrained the liberty of a citizen." 490 U.S. at 395 n.10 (internal quotation marks omitted). By relying on the standard applicable to the restraint of Taylor's liberty, RCSD acknowledges that it controlled or confined her and, thus, the facts of this case fall within § 15-78-60(25). Further, Chief Taylor testified that Taylor was detained and not free to leave during the execution of the search warrant. (Tr. p. 413).

This Court should affirm the lower court's denial of RCSD's motion for a directed verdict on sovereign immunity.

III. The lower court correctly denied the directed verdict motion and ordered a new trial based on its review of the evidence presented at trial, consideration of another circuit court judge's order, and the applicable law.

The lower court independently found "based on the evidence presented at the previous trial, that Defendant is not entitled to sovereign immunity and cannot claim the 'protections' of collateral estoppel or *res judicata*." (Order p. 4). Therefore, its statement regarding Judge Manning's order is harmless and there is no issue on appeal because the lower court actually did what RCSD says it did not—consider *de novo* RCSD's defenses. (Order p. 4; Br. of App. p. 13).

Regardless, the lower court properly found it "inappropriate" to "overrule[] the decision of another Circuit Court judge" in this case as to collateral estoppel and sovereign immunity. (Order p. 3).

It is undisputed that "one circuit court judge may not overrule another." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). While the denial of summary judgment is not a final ruling, the "decision whether to reconsider a motion for summary judgment is within the trial judge's discretion." *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997); *see also Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) ("[I]f the first motion for summary judgment is unsuccessful the court has the power to ***permit*** a second motion for summary judgment prior to trial." (internal quotation marks omitted) (emphasis added)).

RCSD raises the issue of the relationship between the rule that one circuit court judge cannot overrule another circuit court judge with the principle that the denial of a motion for summary judgment is not immediately appealable because it does not finally determine the merits. These two concepts are not mutually exclusive, and RCSD cites no case to support that proposition. The lower court correctly applied these concepts to the particular circumstances of this case, and her discretionary decisions are supported by the record.

The lower court stated its decision contrary to that of Judge Manning was "inappropriate." (Order p. 3). It did not state it was "bound by" Judge Manning's decision (Br. of App. p. 13), evident by its independent review of the issues (Order pp. 3-4). An "inappropriate" decision is simply one that is not appropriate under the particular circumstances, rather than one that is legally impermissible.

A correct reading of the lower court's order is that, in these circumstances—addressing collateral estoppel (as to which no facts or law changed after Judge Manning's decision) and sovereign immunity (as to which the lower court independently found disputed facts)—it was appropriate to follow the rulings of Judge Manning. This is proven by the fact that the lower court

conducted its own review of the evidence and law as to these exact issues and came to the same conclusion as Judge Manning.

"A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree. The trial judge, under our procedure, is afforded many opportunities to change his mind." *PPG Indus., Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334-35 (Ct. App. 1998) (internal citations omitted). The lower court properly considered the prior ruling by Judge Manning and found, in this case, it was appropriate to follow it. That Judge Manning's decision is not final does not make it irrelevant to another judge's consideration of the same issues. The lower court did not misapply the two-judge rule or infringe on RCSD's ability to reassert the defenses at trial. It did reassert them, and the lower court considered them.

As to collateral estoppel, there are two additional reasons the Court should affirm the lower court's decision. First, Judge Manning's finding that collateral estoppel does not apply is a legal ruling. *See Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (holding a judge "was without authority to review" a prior judge's findings because "the question was purely a legal one"). Second, no facts relevant to that finding changed after he denied RCSD's motion for summary judgment. Under Rule 43(l), SCRCP, "[i]f any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action." RCSD made a motion for summary judgment based on collateral estoppel, and Judge Manning denied the motion. RCSD made a "subsequent motion upon the same state of facts" to the lower court in the form of a motion *in limine*. (Mot. *in limine*). That is prohibited by Rule 43(l). RCSD argues that there is a "different

set of facts" because Taylor called a different expert witness to testify at trial. (Br. of App. p. 14 n.1). To the extent that constitutes new facts, those facts do not relate to RCSD's basis for arguing collateral estoppel and, therefore, do not except these circumstances from the prohibition in Rule 43(l).

As to sovereign immunity, the Court should affirm for the additional reason that the lower court separately ruled that it erred in weighing the evidence on this issue at the directed verdict stage. (Order p. 3). This is an independent basis for the lower court's decision to deny the directed verdict and grant a new trial.

CONCLUSION

For these reasons, the Court should affirm the lower court's decision to deny RCSD's motion for a directed verdict and remand the case for a new trial.

September 14, 2020

Respectfully submitted,

Andrew W. Kunz, SC Bar No. 78261
Lauren K. Slocum, SC Bar No. 101280
ELLIOTT, PHELAN & KUNZ, LLC
Post Office Box 1405
Georgetown, South Carolina 29442
(843) 546-0650
Attorneys for Respondent

From:	Andrew Kunz
To:	"Andrew@LDH-Law.com"; "robert@crowelafave.com"
Cc:	Lauren K. Slocum (lauren@elliottphelanlaw.com); Jenica Young; "shelley@crowelafave.com"
Subject:	Bridgett Taylor v. Richland County Sheriffs Dept. - Brief of Respondent
Date:	Monday, September 14, 2020 3:41:00 PM
Attachments:	Initial Brief of Respondent.pdf Respondent"s Designation of Matter for the Record on Appeal.pdf

Please find attached for electronic service pursuant to Supreme Court Order 2020-05-29-02 Respondent's Initial Brief and Designation of Matter in the above referenced matter.

Thank you,

Andy

Andrew W. Kunz
Elliott, Phelan & Kunz, LLC
117 ½ - 119 ½ Screven St.
P.O. Box 1405
Georgetown, SC 29442
(843) 546-0650
(843) 546-1920 fax
Andrew@elliottphelanlaw.com

LAW OFFICES OF

ELLIOTT, PHELAN & KUNZ, LLC

117-119 SCREVEN STREET
POST OFFICE BOX 1405
GEORGETOWN, SC 29442

TELEPHONE (843) 546-0650
FAX (843) 546-1920

C. CARTER ELLIOTT, JR.
SEAN T. PHELAN*

carter@elliottphelanlaw.com
sean@elliottphelanlaw.com

*Also admitted to practice in NC & GA

LAUREN KNIGHT SLOCUM
ANDREW W. KUNZ

lauren@elliottphelanlaw.com
andrew@elliottphelanlaw.com

September 14, 2020

Via Electronic Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
ctappfilings@sccourts.org

Re: *Bridgett Taylor v. Richland County Sheriff's Department*
Appellate Case No. 2020-000589

Dear Ms. Kitchings:

Attached for electronic filing and service pursuant to section (c)(6) of Supreme Court Order 2020-05-29-02 *RE: Operation of the Appellate Courts During the Coronavirus Emergency, please find (1) Initial Brief of Respondent, (2) Respondent's Designation of Matter for the Record on Appeal and (3) Proof of Service.* Please file the documents and return one file-stamped copy to me via email. By electronic copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to contact me.

With kind regards, I am,

Andrew W. Kunz

cc: Lauren K. Slocum *(via email only)*
Robert Garfield *(via email only)*
Andrew Lindemann *(via email only)*