STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Upon Writ of Certiorari to the Court of Appeals

Appeal from Richland County
Court of Common Pleas
Roger M. Young, Circuit Court Judge

Case No. 2004-CP-40-1185
Case No. 2004-CP-40-1186

WILLIE JONES, Personal Representative
of the Estate of Chad Jones,

Appellant,

v.

LEON LOTT, LINN PITTS, GILBERT GALLEGOS
and CLARK FRADY, individually and in their official
capacities with the Richland County Sheriff's Department,

Respondents.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the lower court's ruling under Section 15-78-60(6) was not raised as an issue for appeal?

2. Did the Court of Appeals err in finding that Respondent was entitled to immunity under Section 15-78-60(21) as an additional sustaining ground?

3. Did the trial court err in finding the use of deadly force by the Richland County deputies was objectively reasonable, as a matter of law, and that the officers were not negligent, as a matter of law?

4. Did the trial court err in finding that the Richland County deputies had no duty to the decedent with respect to the manner in which they confined and secured him upon his being taken into custody?

5. Did the trial court err in finding, as a matter of law, that the decedent's attempt to escape outweighed any negligence on the part of the Richland County deputies in failing to secure the decedent?

STATEMENT OF THE CASE

Petitioner is the personal representative of Chad Jones, who was shot in the back of the head – while his hands were cuffed behind his back – and killed by a deputy of the Richland County Sheriff's Department. Petitioner brought this action in the Richland County Court of Common Pleas against the officers involved in the shooting and against Sheriff Leon Lott in his official capacity. Judge Alison Renee Lee granted summary judgment with respect to the individual officers but allowed the case against the Sheriff in his official capacity to proceed to trial on the claims of gross negligence and use of excessive force. App. pp. 1-11. In a jury trial that began May 30, 2006, Judge Roger M. Young granted a directed verdict for the Defendant. App. pp. 504-510. Thereafter, Judge Young denied the Plaintiff's motion to alter or amend the judgment. App. pp. 12, 109-110. Petitioner appealed from these rulings.

In the Court of Appeals, Petitioner raised three claims of error with respect to the lower court's granting of the directed verdict: (1) the court erred in ruling that the officers owed Chad no duty of care; (2) the court erred in ruling that the Sheriff was entitled to immunity because the officers were not negligent and did not use excessive force as a matter of law; and, (3) the court erred in ruling that, if there was negligence, Chad's own negligence outweighed the officers' negligence as a matter of law. App. p. 522 (Final Brief of Appellant, Statement of Issues on Appeal). The Court of Appeals did not reach the merits of any of these issues. Instead, the Court of Appeals decided that the trial court's ruling under Section 15-78-60(6) of the South Carolina Code was not appealed, and the directed verdict was affirmed based on that ruling. App. pp. 573-74. The Court of Appeals also ruled that the order granting the directed verdict should be affirmed on additional sustaining grounds under Section 15-78-60(21) of the Code. App. pp. 574-75.

Petitioner sought rehearing in the Court of Appeals, which was denied. App. pp. 599-600. Petitioner sought a *writ of certiorari*, which this Court granted by order dated July 9, 2009.

STATEMENT OF FACTS

Shortly after 8:00 a.m. on November 26, 2002, Corporal Linn Pitts saw the decedent, Chad, commit a traffic violation while operating a motor vehicle. App. p. 171,

lines 8-9; p. 220, lines 11-22. Pitts ran the license tag and learned the vehicle was stolen. App. p. 171, line 10; p. 221, lines 2-3. Pitts was in a patrol car behind the vehicle driven by Chad, and another deputy, Gilbert Gallegos, was in a second patrol car behind Pitts. App. p. 171, lines 12-13; p. 221, line 4. Both Pitts and Gallegos activated their lights and sirens, but Chad did not stop, and a chase ensued. App. p. 171, lines 23-25; p. 172, lines 5-11; p. 221, lines 5-12. Eventually, Chad wrecked his vehicle near the Waverly Apartments and ran. App. p. 221, lines 6-12. The officers chased him on foot. App. p. 221, line 13 - p. 222, line 5. Pitts testified he saw Chad reach into his waistband and presumed he was reaching for a firearm. App. p. 222, lines 5-13. Gallegos said Chad pulled out a gun and dropped it. App. p. 193, line 15 - p. 194, line 5. Pitts pulled his gun and ordered Chad to stop, but Chad continued to flee. App. p. 222, lines 14-20. Pitts put his gun away, continued after Chad, and located him in the laundry room of a nearby house. App. p. 172, lines 12-22; p. 222, line 21 - p. 223, line 8. After a physical struggle, Pitts and Gallegos subdued and handcuffed Chad. App. p. 172, lines 23-25; p. 223, lines 9-23. Pitts and Gallegos escorted Chad to Pitts' patrol car. App. p. 173, lines 1-3; p. 224, lines 6-14; p. 226, lines 17-20. Both patrol cars were moved into the parking lot of the apartment complex. App. p. 174, lines 18-22; p. 176, lines 2-9; p. 225, line 20 - p. 227, line 1. With his hands cuffed behind his back, Chad was placed into the back seat of the patrol car, seat-belted, and left there while the deputies worked on arrest warrants and worksheets. App. p. 173, lines 17-23; p. 224, line 15 - p. 225, line 9; p. 294, lines 13-17.

Another deputy, Clark Frady, arrived in the Sheriff's Department's transport van (paddy wagon), but Chad was not moved to it. App. p. 178, lines 23-25; p. 190, lines 18-21; p. 228, lines 22-24; p. 290, line 16 - p. 294, line 12. Instead, Frady joined Pitts and Gallegos to assist with their paperwork. App. p.178, lines 20-22; p. 179, lines 1-6; p. 230, lines 18-24; p. 298, line 11 - p. 299, line 9. The officers were standing at the front of the patrol car, using the hood of the car as a makeshift desk while they completed various forms. App. p. 178, lines 12-17; p. 179, lines 7-10; p. 236, line 19 - p. 237, line 10; p. 300, line 21 - p. 302, line 5. At some point, Columbia police officers arrived at the scene. One of the city officers recognized and identified Chad, who had given the deputies a fictitious name, and indicated the city had outstanding warrants against Chad. App. p. 177, lines 9-10; p. 181, lines 17-21; p. 203, lines 6-16. The city officers left to obtain those warrants, returned to serve them on Chad, then, left again. App. p. 203, line 25 - p. 204, line 10; p. 208, lines 23-24; p. 300, lines 7-20. Thereafter, the three (3) deputies continued to complete the arrest and warrant forms on the hood of the patrol car. App. p. 206, lines 20-22; p. 300, line 21 - p. 302, line 5.

While the officers were working on their paperwork, Chad remained in the back seat of the car. App. p. 178, lines 20-25; p. 302, lines 13-20. The keys were in the ignition and the engine was running. App. p. 182, lines 18-23; p. 232, lines 4-9. A plexiglas panel separated the front seat from the back seat, and a sliding window in the panel was left unlocked and open. App. p. 174, lines 4-17; p. 227, line 8 - p. 228, line 8. They left the window open so air conditioning could reach the back seat. App. p. 182, lines 7-17; p. 232, lines 7-9. They said they did so for Chad's comfort, because it was a warm day, but the evidence showed that Chad was wearing two jackets, which the

officers did not remove for his comfort. App. p. 182, lines 7-9; p. 231, lines 13-17; p. 410, lines 15-20.

Initially, the outside windows of the car were also open. App. p. 181, lines 21-23; p. 231, lines 3-5. However, because Chad was yelling out the window to passersby, one of the officers went back to the car and rolled up those windows. App. p. 181, line 23 - p. 182, line 8; p. 231, line 3 - p. 232, line 3; p. 302, line 19 - p. 303, line 1; p. 306, lines 8-11. At some point while doing their paperwork, the officers observed that Chad kept moving around in the vehicle. App. p. 183, lines 1-4; p. 205, lines 10-12; p. 231, lines 1-3; p. 232, lines 10-21; p. 303, lines 4-6. They removed him, searched him, and searched the back seat for weapons or contraband. App. p. 183, lines 4-7; p. 205, lines 13-19; p. 232, lines 22-24; p. 303, lines 10-13; p. 305, lines 14-19; p. 307, lines 2-13. Finding nothing, they re-secured his handcuffs behind his back and returned him to the back seat of the vehicle. App. p. 185, lines 1-7; p. 205, lines 20-25; p. 233, lines 3-17; p. 304, lines 9-12. One of the officers testified that when they removed Chad from the vehicle, he had managed to move his hands, in handcuffs, from behind his back to his front. App. p. 233, lines 4-10; p. 257, lines 11-16. Nonetheless, when they returned him to the vehicle, they took no additional steps to secure him, instead, merely cuffing his hands behind his back and placing the seatbelt on him, as they had before. App. p. 184, lines 6-16; p. 233, lines 11-20; p. 257, lines 16-18; p. 307, lines 7-24. As before, they left the plexiglas window open and left the car running. App. p. 307, line 21 - p. 308, line 6.

The deputies resumed their paperwork at the hood of the car, during which at least one of them observed that Chad continued to move and fidget in the car, as he had before they removed him and searched him. App. p. 185, lines 2-7; p. 207, line 22 - p. 208, line 9. Notwithstanding his continued constant movement in the back seat, they took no additional security measures, but simply went on with their paperwork. App. p. 229, lines 1-9; p. 321, lines 8-15. At some point, Gallegos looked up and saw Chad crawling through the window from the back seat to the front seat. App. p. 185, lines 5-7; p. 208, line 4-6. He yelled, and the other officers looked up to see that Chad had gotten into the front seat and under the wheel of the vehicle. App. p. 185, lines 5-7; p. 236, lines 10-18; p. 241, line 10 - p. 242, line 3; p. 321, lines 15-18.

The officers testified they yelled at Chad to stop and to unlock the doors. App. p. 185, lines 7-8; p. 243, lines 8-9. Gallegos went toward the car and tried to break a window with a metal baton. App. p. 185, lines 8-17; p. 309, line 21 - p. 310, line 2. Pitts moved to the passenger side and attempted to open the door with the spare key he had on his person. App. p. 242, line 21 - p. 243, line 6; p. 310, lines 5-8. When he was not successful, he went around to the driver's door to try to open it with the key. App. p. 243, lines 3-8; p. 244, lines 18-20; p. 311, lines 2-9. Frady, who initially was at the front of the vehicle, moved toward the passenger side. App. p. 311, line 11-23. Gallegos ran to the other patrol car, expecting to have to chase Chad in Pitts' car. App. p. 192, lines 4-12. He never drew his gun. App. p. 212, lines 2-3.

Once Chad was in the driver's seat, he backed the car away from the officers, but the layout of the apartments prevented escape in that direction. App. p. 244, lines 4-9; p. 309, lines 10-21; p. 322, lines 1-10. He came to a stop, then, proceeded

forward. App. p. 244, line 14 - p. 245, line 5; p. 348, lines 3-9. As the car moved forward, Pitts, who was then at the rear panel on the driver's side, pulled his weapon, fired, and struck the rear hubcap. App. p. 244, line 14 - p. 248, line 25; p. 263, lines 15-20.

When Chad began moving the vehicle forward, Frady was in front of the vehicle, but toward the passenger side. App. p. 248, lines 5-14. He stepped out of the way of the vehicle toward the passenger side, and fired his weapon into the vehicle from the side. App. p. 315, lines 2-3, 18-20; p. 329, lines 1-5; p. 353, lines 10-15. He fired twice, with one shot entering through the front passenger-side window and the other through the rear window. App. p. 252, lines 4-18; p. 316, lines 7-8; p. 353, lines 5-15. One of these shots struck Chad in the back of the head. App. p. 128, lines 12-13; p. 131, lines 16-19; p. 136, lines 11-14; p. 252, lines 19-21; p. 315, lines 7-9.

According to the 911 dispatcher, the initial call concerning Chad's traffic stop came in at 8:02 a.m. App. p. 139, lines 18-23; p. 141, lines 2-4. Another call, made at 8:14 a.m., reported that the subject was in custody. App. p. 142, lines 7-16. More than two hours later, at 10:27 a.m., the dispatcher received a call that Chad had been shot at the scene. App. p. 142, lines 18-20; p. 143, lines 4-7; p. 145, lines 4-18. Although the transport van (paddy wagon) had arrived at the scene shortly after Chad was in custody, the officers never moved him into that van (paddy wagon), instead, keeping him in the patrol car with the engine running and the plexiglas window open. App. p. 190, lines 18-21; p. 286, lines 12-15; p. 292, line 24 - p. 294, line 12. They testified it was the policy of the Sheriff's Department that a subject could not be placed in the transport vehicle until all of the paperwork was complete and that he could not be transported to the detention center without the paperwork, because the detention center would not accept the subject without it. App. p. 239, line 7 - p. 240, line 21; p. 283, line 2 - p. 284, line 11; p. 295, line 14 - p. 297, line 9. That alleged policy, however, was verbal only and was not contained in the department's policy manual. App. p. 357, lines 2-15; p. 361, lines 1-15.

The director of the Alvin S. Glenn Detention Center testified concerning the policies and procedures there. App. p. 478, lines 1-9. He stated that, when a warrant worksheet, arrest report, or warrant has not been completed at the time the subject is brought to the detention center, the procedure is to ask the officer to complete the paperwork there. App. p. 479, lines 12-16. The detention center takes custody of the subject after it finishes asking all the medical questions. App. p. 479, lines 17-25. The director verified that sometimes officers do not have the paperwork when they bring a subject to the detention center. App. p. 480, lines 3-7. When that occurs, a form is used for the arresting officer to set out what the charges will be. App. p. 481, lines 20-25. If the transport officer was not involved in the arrest, the detention center gets the arresting officer or someone who knows the charges to come in to fill out the paperwork. App. p. 482, lines 5-11. The detention center director identified the form that can be used when the officer does not have the paperwork. App. p. 483, lines 10-13.

Melvin Tucker was qualified and testified as an expert witness on the use of force by police officers. App. p. 390, lines 4-5. He explained the Supreme Court standards on deadly force and other force under the decisions of *Tennessee v. Garner*, 471 U.S. 1

(1985), and *Graham v. Connor*, 490 U.S. 386 (1989). App. p. 395, line 2 - p. 401, line 9. He had examined the Richland County Sheriff's Department's manual, had reviewed the statements and depositions of Pitts, Gallegos, and Frady concerning the shooting and the events preceding it, and had heard their trial testimony. App. p. 401, line 21 - p. 402, line 25; p. 408, lines 10-15. It was his opinion that Pitts had demonstrated reckless disregard and negligence by not insuring that the window in the plexiglas panel was closed. App. p. 404, line 23 - p. 405, line 12. It was also his opinion that, at the time Pitts and Frady fired at the vehicle, deadly force was not justified because they were not, then, in imminent jeopardy with no alternative. App. p. 405, lines 8-20. The physical evidence established that the shots of Frady struck the side windows, indicating that the threat to Frady from a moving vehicle had passed before he fired. App. p. 406, lines 3-15; p. 411, lines 5-13. The deputies' testimony established that Chad was not attempting to use the vehicle as a weapon but, instead, as a means of escape. App. p. 411, lines 14-17. If using it as a weapon, he would have gone forward from the outset rather than backing away from the officers in a direction where there was no place to go. App. p. 411, lines 22-25. Gallegos' conduct showed he did not perceive the use of the vehicle as a weapon but as a means of escape, since he did not stay and draw his weapon but, instead, ran to the other patrol car to prepare to pursue Chad. App. p. 192, lines 7-8; p. 212, lines 2-3; p. 426, line 23 - p. 427, line 5. It was the expert's opinion the officers should have placed Chad in the transport vehicle (paddy wagon), which had no window in its plexiglas and was more secure than the patrol car. App. p. 351, line 8 - p. 352, line 3; p. 431, line 12 - p. 432, line 9; p. 432, line 20 - p. 433, line 1. He also noted they failed to follow the department's policy to maintain constant observation of the person in custody when he was in the patrol car. App. p. 412, lines 16-25.

The patrol car was equipped with a safety lock device (anti-theft) which would have prevented the patrol car from being placed in gear. The court precluded Petitioner from any discussions of this device or from presenting evidence relative to the deputies' failure to use the device or the fact the device was not operative. App. pp. 7-8; pp. 108-B - 108-E; p. 112, line 15 - p. 115, line 16; p. 251, lines 12-17; p. 252, lines 1-12.

ARGUMENT

At the close of Petitioner's case, the trial court granted a directed verdict in favor of the defense. App. p. 504, line 1 - p. 510, line 25. The court first considered whether the deputies had a duty of care with respect to the manner in which they secured and confined Chad, a person in their custody, and the court held they owed him no duty. App. p. 504, line 1 - p. 505, line 23; p. 510, lines 15-23. The court, then, addressed their use of deadly force and found it to be objectively reasonable as a matter of law.

App. p. 506, line 8 - p. 510, line 10. Finally, the court addressed the defense of comparative negligence and held that, if there **were** negligence on the part of the deputies, such negligence was outweighed by the negligence of Chad, as a matter of law. App. p. 505, line 23 - p. 506, line 7; p. 510, lines 10-12.

Petitioner challenged each of these rulings, but the Court of Appeals did not address the merits of any of Petitioner's arguments. Instead, the Court of Appeals held Petitioner failed to challenge the lower court's ruling that the Sheriff was entitled to immunity under S.C. Code Ann. § 16-78-60(6). The Court of Appeals further found the Sheriff was also entitled to immunity under S.C. Code Ann. § 15-78-60(21), as additional sustaining grounds. Both of these findings of the Court of Appeals were subsumed in the central issue of the appeal, which addressed the ruling of the lower court that the officers were not negligent or grossly negligent as a matter of law. App. p. 522. For the reasons set forth below, the Court of Appeals erred in affirming this case on these grounds, and the trial court erred in granting the defense motion for a directed verdict. This Court should reverse and remand for a new trial.

I. THE COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS, AND THE COURT SHOULD FIND THAT RESPONDENT WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE BASIS OF EITHER SECTION 15-78-60(6) OR SECTION 15-78-60(21) OF THE SOUTH CAROLINA TORT CLAIMS ACT (Questions Presented, Questions 1, 2, and 3).

At trial, Respondent claimed immunity under multiple provisions of the Tort Claims Act. Following the Court's granting of the directed verdict, Petitioner filed an amended motion to alter or amend the judgment, one ground of which took exception to

the court's order "that the case falls within an exception under the Tort Claims Act." App. pp. 109-10, ¶ 10. This statement was all-inclusive with respect to the multiple claims of immunity. In the Court of Appeals, in the argument of Issue 2, Petitioner noted that where multiple exceptions to the waiver of immunity are invoked and at least one of those exceptions contains a gross negligence standard, the courts must interpolate the gross negligence standard into the other exceptions. ***See*** App. p. 534 (Final Brief of Appellant), *citing Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 333, 566 S.E.2d 536, 545 (2002); *Steinke v. South Carolina Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999); *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006). Here, as was argued in the Final Brief of Appellant under Issue 2, the gross negligence standard of Section 15-78-60(25) applies to *all claims of immunity* raised by the Sheriff, including those under Sections 15-78-60(6) and 15-78-60(21).

A review of Petitioner's argument of Issue 2 and the trial court's ruling makes clear that the directed verdict on the claim of immunity under Section 15-78-60(6) (the Sheriff's method of providing police protection) was granted on the basis of the court's ruling that there was no negligence on the part of the officers as a matter of law. ***See*** App. p. 510. This issue is clearly preserved by the statement of the issue on appeal (Issue 2) and the argument section of the Final Brief of Appellant under that issue, which addressed *all* claims of immunity under the applicable gross negligence standard. ***See*** App. p. 534, middle paragraph. The Court of Appeals' determination that Petitioner

failed to appeal the ruling of the lower court with respect to Section 15-78-60(6) overlooks this aspect of Issue 2 and the argument thereon in the Final Brief of Appellant. The Court of Appeals misapplied the two-issue rule and the law-of-the-case doctrine of *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 472 S.E.2d 253 (1996), *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996), and *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998), because the finding of immunity under Section 15-78-60(6) was challenged as part of Issue 2.

Respondent has argued that the statement of the second issue on appeal is not concise and direct, as required by Rule 206(b)(1)(B) of the South Carolina Appellate Court Rules. That statement – "Did the trial court err in finding the use of deadly force by the Richland County deputies was objectively reasonable, as a matter of law, and that the officers were not negligent, as a matter of law?" – could not have been more concise or direct. That statement, stated in question form as allowed by the rule, was not a broad general statement. Rather, it squarely addressed the two rulings of the trial court which served as the underpinning of the court's decision to direct a verdict in favor of the defense. Contrary to Respondent's assertion, that question did not leave the appellate court to "grope in the dark" concerning the point at issue. The point on appeal was the very point at issue in the court below, and the argument of that issue addressed *all* the claims of immunity under the gross negligence standard applicable to all of those claims. The trial court's findings of immunity under both Section 15-78-60(6) and

Section 15-78-60(21) of the Tort Claims Act was part and **parcel** of the issue raised as Issue 2 in the Court of Appeals (Question Presented 3 of this Brief), and the Court of Appeals should have reached and decided the issue.

"[W]here an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from the appellant's arguments." *See* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* (2d ed. 2002), at 75, *citing Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001), and *South Welding Works, Inc. v. K&S Constr. Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985). Here, the argument clearly addressed all the claims of immunity raised by Respondent, and all those claims were subsumed in the broad statement of the issue. ***See*** App. p. 522 (Statement of Issues on Appeal, Issue 2). The Court of Appeals' determination that Petitioner waived a portion of this issue is unfounded, and this Court should address the merits of this issue, which is applicable to all the claims of immunity.

The Court of Appeals also misapplied *Anderson v. S.C. Dep't of Highways and Pub. Transp.*, which states that the reviewing court will affirm unless the appellant appeals all causes of action. *See Anderson*, 322 S.C. at 420, 472 S.E.2d 253. The immunity section of the Tort Claims Act is not a cause of action but a defense, and *Anderson* is simply inapplicable.

The Court of Appeals' decision affirming the directed verdict based on a finding of immunity under Section 15-78-60(21), as additional sustaining grounds, is flawed in

the same respect, because the gross negligence standard also applies to that immunity provision, and the evidence created a jury issue with respect to the gross negligence of the officers and the objective unreasonableness of their use of deadly force. In *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court cautioned that a reviewing court should affirm on any ground appearing in the record *only* "if convinced it is proper and fair to do so" and should *not* do so "when the court believes it would be unwise or unjust to do so in a particular case." In this case, it would be unwise and unjust to allow the directed verdict to stand on the basis of Section 15-78-60(21) without addressing the merits of Issue 2 of the Final Brief of Appellant, since that issue encompassed *all* claims of immunity raised by the Sheriff under the gross negligence standard of Section 15-78-60(25).

In the Court of Appeals, Respondent contended that the gross negligence standard of the Tort Claims Act was not raised or ruled on by the trial court. A reading of the record, however, shows that this argument is without merit. The entire case turned on whether the evidence created a jury question with respect to the gross negligence of the officers. At the summary judgment stage, gross negligence was the issue on which the court denied summary judgment and allowed the case to proceed to trial. App. pp. 2-7, 11. At trial, it was the question on which the motion for a directed verdict turned. App. pp. 484-510. Indeed, counsel for Respondent specifically addressed the standard of negligence under the Tort Claims Act. App. p. 485, lines 22-25. The court's ruling clearly was premised on its finding that, as a matter of law, the

officers were not negligent. App. pp. 504-510. Moreover, the court specifically noted that the claim of immunity under Section 15-78-60(6) was tied to the question of the officers' negligence. App. p. 510, lines 13-20. Regardless of what was or was not contained in the pleadings, this case was clearly tried, argued, and ruled upon on the question of gross negligence. On this record, it simply cannot be maintained that the gross negligence standard was not the issue before the court. That issue should be considered on the merits, in its entirety, and with respect to every claim of immunity. *See Strickland v. Strickland*, 375 S.C. 76, 86, 650 S.E.2d 465, 471 (2007); *Anderson v. Buonforte*, 365 S.C. 482, 489, 617 S.E.2d 750, 754 (Ct. App. 2005), both quoting Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Substantively, because the claims of immunity based on Section 15-78-60(6) and Section 15-78-60(21) are both governed by the gross negligence standard applicable in this case under Section 15-78-60(25), if the trial court erred in granting a directed verdict on the issue of negligence (Issue 2 of the Final Brief of Appellant), that error implicates each and every claim of immunity. In this case, the evidence before the court (set forth in detail in the Statement of Facts with citations to the supporting testimony) clearly established a jury issue on the claim that the officers were negligent and that their use of deadly force was not objectively reasonable.

Chad was under arrest and in custody by 8:14 a.m. The officers kept him at the scene for more than two (2) full hours before he attempted to escape. At 10:27 a.m., they reported having shot him – a fatal shot to the back of the head.

During this period of more than two (2) hours, Chad was in the back seat of the car with his hands cuffed behind his back, the keys were in the ignition, and the engine was running. The sliding window of the plexiglas panel between the front and back seats was unlocked and open. The officers saw Chad moving around in the vehicle in a manner that made them suspicious. They removed him, searched him, and searched the back seat for weapons or contraband. Finding nothing, they re-secured his handcuffs behind his back and returned him to the back seat. Even though he had managed to move his hands, in handcuffs, from behind his back to his front before they removed him from the vehicle, they took no additional steps to secure him. They simply re-cuffed his hands behind his back, placed the seatbelt back on him, and left the window open and the car running as they had before. Although there were three (3) officers present, they did not assign one (1) of the officers to keep constant watch of him, as Department procedures required. They did not move him to the more secure paddy wagon. When one (1) of the officers saw Chad resume the same kind of movement that made them suspicious before they, still, did nothing further.

It is undisputed that once Chad got into the driver's seat of the patrol car he, first, backed away from the officers before starting forward. When he began to move forward to drive away, the officers were able to get out of the car's path. Pitts, who fired his

weapon at the car, was at the rear panel on the driver's side. Frady, who fired the shot to the back of Chad's head and killed him, was out of harm's way on the passenger side of the car. He fired two shots through the side windows as the car moved past him. He fired through the *rear* window as the car drove forward, striking Chad in the back of the head. Gallegos did not draw his weapon at all. Instead, he ran to the other patrol car in order to pursue Chad in chase.

Petitioner's expert on the use of force by police officers testified concerning the officers' reckless disregard and negligence. He noted they did not secure the plexiglas window. They left the keys in the car, the engine running, and the plexiglas open. They did not better secure Chad or place him in the paddy wagon, which was more secure, even after Chad behaved suspiciously. In the expert's opinion, when Pitts and Frady fired, deadly force was not justified because they were not, then, in imminent jeopardy with no alternative. Frady's shots struck the side windows, demonstrating that any threat to him from a moving vehicle had passed. Chad was not attempting to use the vehicle as a weapon but as a means of escape. If using it as a weapon, he would have gone forward from the outset rather than backing up. Gallegos did not perceive the use of the vehicle as a weapon but as a means of escape, since he ran to the other car to pursue Chad. The officers failed to follow the Department's policy to maintain constant observation of Chad when he was in the patrol car.

Viewing the evidence in the light most favorable to Petitioner, Plaintiff in the court below, the trial court committed reversible error in granting Respondent's motion for

directed verdict. 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 the failure to exercise slight care. It is a relative term and means the absence of care that is necessary under the circumstances. *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). The directed verdict standard turns on whether the evidence lends itself to more than one inference. Here, the evidence established the officers did not follow the Department's procedures by keeping Chad under constant watch. They did not secure him in the most secure vehicle on the scene, even after he had already demonstrated an ability to maneuver his cuffed hands to his front and his body out of his seatbelt. They left the window open and left the car running. They did nothing different than they had before. They saw him continue with the same kind of movements he had done before. There was expert opinion testimony that the actions of the officers amounted to recklessness and negligence. There clearly was more than one inference that could be drawn from the evidence, and the Court's determination that there was no negligence as a matter of law is reversible error.

Similarly, under the standards for use of deadly force articulated in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Conner*, 490 U.S. 386 (1989), the evidence presented at trial also created more than one (1) inference on the question of the objective reasonableness of Frady in shooting Chad in the back of the head. In *Tennessee v. Garner*, the Court held that use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. *See*

Garner, 471 U.S. at 11. The Court stated, "It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* Further refining the test of reasonableness in *Graham v. Conner*, the Court held that the standard by which the use of force is judged is "objective reasonableness" involving a determination made from the perspective of a reasonable officer on the scene. *See Graham*, 490 U.S. at 396-99.

While Frady's own subjective belief may have been one factor to consider under the totality of the circumstances, the other evidence – both the officers' accounts and the expert's opinion – created an issue of fact on this question. Pitts and Frady were out of the path of the car when they fired their weapons. Gallegos' actions showed he did not perceive a threat but an escape attempt. Upon this evidence, the court could not conclude as a matter of law that the officers were in imminent jeopardy with no alternative. An expert believed otherwise. Even the judge who ruled at the summary judgment stage – based on the same evidence – found the issue was one for the jury. ***See*** App. p. 7. The trial court erred in directing a verdict based on a finding, as a matter of law, that Frady's use of deadly force was objectively reasonable.

The Court of Appeals failed to recognize that all the immunity claims were governed by the gross negligence standard. This Court should reverse the decision of the Court of Appeals which affirmed the directed verdict on the basis of Sections 15-78-60(6) and 15-78-60(21) of the Tort Claims Act and find the lower court erred in directing

a verdict for Respondent because of the evidence in the record supporting Petitioner's claims that the officers were grossly negligent and acted objectively unreasonable in using deadly force.

II. THE COURT SHOULD REVERSE THE TRIAL COURT'S FINDING THAT THE RICHLAND COUNTY DEPUTIES DID NOT OWE A DUTY OF CARE TO THE DECEDENT WITH RESPECT TO THE MANNER IN WHICH THEY SECURED HIM AFTER TAKING HIM INTO CUSTODY (Questions Presented, Question 4).

In addition to its other rulings at the directed verdict stage, the trial court determined the deputies had no duty of care with respect to the manner in which they secured and confined Chad. App. p. 504, line 1 – p. 505, line 23; p. 510, lines 15-23. Petitioner challenged this ruling on appeal, ***see*** App. p. 522 (Issue 1, Final Brief of Appellant), but the Court of Appeals did not address this argument. This Court should grant certiorari and reverse the lower court's finding that the officers owed no duty to Chad.

Under the common law of this state, there is no general duty to control the conduct of another, but our courts recognize five (5) exceptions to the general rule, finding such a duty exists: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and, (5) where a statute imposes a duty on the defendant. *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006); *Faile*, 350 S.C. at 334, 566 S.E.2d at 546. Based on the evidence viewed in the

light most favorable to Petitioner, the circumstances of this case fall within two (2) exceptions to the general rule and give rise to a duty of care by the deputies to control a person in custody, Chad, and to take reasonable precautions for his safety.

A. Special relationship to the victim.

The first exception noted above is applicable here. There was a special relationship by virtue of the officers' having placed Chad under arrest and taken him into their custody. Our courts have long recognized the duty of police, jail officials, or prison officials to exercise due care for the safety and welfare of arrestees, detainees, persons in custody or prisoners. *See*, *e.g.*, *Jinks*, 355 S.C. at 345-49, 585 S.E.2d at 283-85 (recognizing duty of county correctional officers to monitor a detainee's medical condition after being advised by a paramedic to conduct medical observations). The duty to exercise due care for Chad's safety was clearly applicable once the officers took Chad into custody. Our courts have also recognized the duty of officers to control a dangerous person in their custody. *See*, *e.g.*, *Faile*, 350 S.C. at 335-39, 566 S.E.2d at 546-48 (finding DJJ had a duty to control a known dangerous individual in its custody, where there was an established authority relationship and a substantial risk of serious harm), *applying* Restatement (Second) of Torts §§ 315(a), 319 (1965); *Jackson v. South Carolina Dep't of Corrections*, 301 S.C. 125, 126-28, 390 S.E.2d 467, 469 (Ct. App. 1989) (recognizing duty of Department of Corrections to control, confine, and maintain custody of inmate, and finding evidence sufficient to sustain jury verdict on question of gross negligence in manner by which officers transferred an inmate with a known

history of psychopathic patterns, unpredictability, and tendency to violent outbursts), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990).

In this case, viewing the evidence in the light most favorable to Petitioner, a special relationship existed in both of these respects: the officers owed Chad a duty of care with regard to his personal safety while in their custody and control, and they owed a duty to control and secure him in light of what they knew or, based on their observations of his conduct, should have known about his propensities.

B. Negligent or intentional creation of risk.

The fourth exception to the general rule, which recognizes a duty where the defendant negligently or intentionally created the risk, is also applicable in this case, at least at the directed verdict stage. This case involved allegations that the deputies were grossly negligent in the manner in which they held Chad at the scene of his arrest for a period of over two (2) hours between his arrest and this shooting. The evidence with respect to the claim of gross negligence is set forth in the Statement of Facts and discussed in Argument Section I, *supra*. Just as the evidence presented at trial created a jury issue on the gross negligence claims, for the same reasons it created a jury issue with respect to the applicability of the exception recognizing a duty where the defendant negligently or intentionally created the risk.

The court committed reversible error in finding the officers had no duty to Chad, both in the court's failure to recognize the duty arising from their special relationship with Chad upon taking him into custody and in the court's failure to recognize the jury

issue with respect to the duty arising from the officers' negligent or intentional creation of the risk. This Court should reverse the lower court's ruling on this issue.

III. THE COURT SHOULD REVERSE THE TRIAL COURT'S FINDING, AS A MATTER OF LAW, THAT THE DECEDENT'S ATTEMPT TO ESCAPE OUTWEIGHED ANY NEGLIGENCE ON THE PART OF THE RICHLAND COUNTY DEPUTIES IN FAILING TO SECURE THE DECEDENT (Questions Presented, Question 5).

In connection with its rulings on objective reasonableness and negligence, the trial court also held, in the alternative, that the negligence of Chad outweighed any negligence on the part of the officers. App. p. 505, line 23 - p. 506, line 7; p. 510, lines 10-12. Petitioner challenged this ruling on appeal, ***see*** App. p. 522 (Issue 3, Final Brief of Appellant), but the Court of Appeals did not address this claim of error. This Court should reverse the comparative negligence finding.

The issue of comparative negligence is ordinarily a question of fact for the jury. *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000); *Brown v. Smalls*, 325 S.C. 547, 558-59, 481 S.E.2d 444, 450-51 (Ct. App. 1997). The trial court should enter judgment as a matter of law *only* if the sole reasonable inference from the evidence is that the plaintiff's negligence exceeded fifty percent. *Bloom*, 339 S.C. at 422, 529 S.E.2d at 713. For the court to make findings as to the plaintiff's negligence as a matter of law, the actions of the party must be such that "ordinary minds could not differ in deciding [those actions] to be both negligent or reckless and the proximate cause of the injury." *King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982).

In *King*, a contributory negligence case that predated this Court's adoption of comparative negligence in *Nelson v. Concrete Supply Co*. 303 S.C. 243, 399 S.E.2d 783 (1991), the Supreme Court considered the circumstances under which it becomes appropriate to allow the question of the plaintiff's negligence to become one of law for the trial court's determination. The Court recognized the importance in such cases of the existence of evidence that "the plaintiff was *aware* of the risk, yet exposed himself to the known danger." *See King*, 278 S.C. at 354, 296 S.E.2d at 337 (emphasis in original). Here, this standard is not met. There was no evidence Chad was aware that, if he fled, one (1) of these officers would shoot him in the back of the head. Indeed, the only reasonable inference is to the contrary, because Chad had fled by car when the officers first attempted the traffic stop and had continued to run on foot after wrecking his vehicle. Not only had the officers not shot him from behind during his earlier flight, they had not even fired their weapons. In light of their past method of pursuit and their prior actions toward him, Chad had no basis whatsoever to believe he was at risk of being shot in the head if he attempted to escape. Under these circumstances, viewed in the light most favorable to Petitioner, the evidence was sufficient to create a jury issue on the comparative negligence of the deputies and Chad. This issue, like the issues of gross negligence and use of excessive force, was one for the jury.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals, reverse the decision of the lower court, and remand this case for a new trial.

Respectfully submitted,

_____

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August ____, 2009.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Upon *Writ of Certiorari* to the Court of Appeals

Appeal from Richland County
Court of Common Pleas
Roger M. Young, Circuit Court Judge

Case no. 2004-CP-40-1185
Case no. 2004-CP-40-1186

WILLIE L. JONES, Personal Representative
of the Estate of Chad Jones,

Petitioner,

v.

LEON LOTT, LINN PITTS, GILBERT GALLEGOS
and CLARK FRADY, Individually and in their official
capacities with the Richland County Sheriff's Department,

Respondent

PROOF OF SERVICE

The undersigned, being an employee of the Law Office of Hemphill P. Pride II, LLC, certifies that three (3) copies of the foregoing Brief of Appellant in the case of *Willie L. Jones, Personal Representative of the Estate of Chad Jones v. Leon Lott, et al.* (Docket Nos. 04-CP-40-1185 and 04-CP-40-1186) was served on counsel for Respondents on August 10, 2009 by the undersigned depositing or causing the

deposit of a copy of said Brief on that date in the United States mail with sufficient postage affixed thereto and addressed as follows:

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August 10, 2009