THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Roger M. Young, Circuit Court Judge

Op. No. 4405
(S.C. Ct. App. filed May 28, 2008)

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, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is a wrongful death and survival action. The Petitioner, Willie L. Jones, as Personal Representative of the Estate of Chad Jones, brought these actions against Sheriff Leon Lott of Richland County and three Richland County Deputy Sheriffs as a result of the arrest, escape, and death of Chad Jones on November 26, 2002. (R. 13-22).

Initially, Jones asserted causes of action for negligence and civil conspiracy. After discovery was completed, the Respondents moved for summary judgment which was heard by Judge Alison Renee Lee. By order filed March 13, 2006, Judge Lee granted the motion with respect to the civil conspiracy claim. (R. 8-10). She also dismissed the three deputies -- Linn Pitts, Gilbert Gallegos and Clark Frady -- on the basis of employee immunity under Section 15-78-70(a) of the South Carolina Tort Claims Act. (R. 10).

The case proceeded to trial on Jones' negligence cause of action. Jones maintained that the deputies were negligent in failing to take certain steps to prevent his son, Chad Jones, from commandeering a patrol vehicle and attempting to escape. He further alleged that the deputies were negligent in using deadly force to stop the escape and to protect the deputies and the public. The case was tried beginning on May 30, 2006, before Judge Roger M. Young and a jury. At the

close of Jones' case-in-chief, Judge Young granted Sheriff's Lott's motion for a directed verdict. (R. 504-510; Supp. R. 1-2).

Thereafter, Jones filed a Rule 59(e) motion to alter or amend judgment and then an amended motion. Judge Young denied that motion by form order filed July 18, 2006. (R. 12).

Jones subsequently filed a Notice of Appeal. He did not appeal from any rulings by Judge Alison Lee in her order filed March 13, 2006. (R. 511). As a result, the dismissal of the Respondents Pitts, Gallegos and Frady became a final judgment and was not reviewable on appeal.

On May 28, 2006, the Court of Appeals issued a published decision in favor of Sheriff Lott. The Court of Appeals concluded that Jones failed to appeal the trial court's grant of a directed verdict on the issue of Sheriff Lott's immunity under Section 15-78-60(6). The Court ruled that the directed verdict based on Section 15-78-60(6) immunity is the law of the case. The Court further determined that Sheriff Lott is entitled to immunity under Section 15-78-60(21) "which provides Lott immunity from the loss resulting from the escape attempt of Jones, who, having already been arrested, was in custody and a prisoner." (App. 575).

Jones filed a petition for rehearing, which was subsequently denied by the Court of Appeals. (App. 599). This Court later granted a petition for writ of certiorari.

STATEMENT OF FACTS

On November 26, 2002, at about 8:00 a.m., Richland County Sheriff's Department Corporal Linn Pitts and Deputy Gilbert Gallegos attempted to stop 19 year-old Chad Jones. Jones thereafter failed to stop and a pursuit was initiated. (R. 170-172, 220-221).

The pursuit ended when the Jeep which Jones was driving struck an air conditioning unit at the Waverly Street Apartments. Jones then attempted to flee on foot, and Pitts and Gallegos gave chase. During this foot pursuit, the deputies observed Jones throw a .22 caliber revolver as he attempted to cross a fence. Jones was later observed running behind a house and was ultimately found in a laundry room located at the back of the house. A struggle ensued between Jones and the deputies, and Jones was ultimately apprehended. (R. 172-173, 198-202, 221-223).

In the area of the laundry room where Jones was discovered, the deputies also found a clear plastic container of what appeared to be crack cocaine. Afterwards, Jones was placed in handcuffs and placed in the rear of Pitts' patrol car. At that time, the deputies began preparing their paperwork. (R. 172-173, 224-225).

Jones was arrested by Corporal Linn Pitts for ten criminal and traffic offenses. (R. 237).[1] At the time of his arrest, Jones identified himself as "Lavaris Richardson," but this claim was soon dispelled by a Columbia Police Department officer on the scene, who recognized him on a criminal intelligence flyer as one who was armed, dangerous, and a flight risk. At that time, it was also learned that the Columbia Police Department had outstanding arrest warrants against Jones for Attempted Burglary, Assault with Intent to Kill, and Assault and Battery with Intent to Kill. One of the Columbia Police Department officers left the scene to retrieve these warrants and returned to serve them upon Jones. (R. 202-204, 225).

Jones, who had been handcuffed with his hands behind his back and placed into Pitts' patrol car, was held in that position while the requisite paperwork was completed. Gallegos was present with Pitts on the scene, and Deputy Clark Frady arrived with the paddy wagon for transport of the prisoner. At some point, Jones was seen fidgeting and moving around in the backseat. Gallegos and Frady briefly removed Jones and conducted a pat down search and secured him once again in the back seat by handcuffing him behind his back and fastening him in with the seat belt. (R. 205-206). Because it was an unusually warm day and because Jones and

[1] The charges included Failure to Use a Turn Signal, Leaving the Scene of an Accident, Failure to Stop for Blue Lights and Siren, Driving Without a Driver's License, Possession of a Stolen Vehicle, Possession with Intent to Distribute Crack Cocaine, Unlawful Carrying of a Pistol, Possession of a Pistol under the Age of 21, Resisting Arrest, and Possession with Intent to Distribute Crack Cocaine within a Half Mile of School.

the deputies had been involved in a foot pursuit and then a struggle, Pitts left the engine running in his patrol vehicle so that the compressor to the air conditioning would be operating. (R. 231-232).

In due course, Columbia Police Department officers and other deputies left the area, leaving only Pitts, Frady, and Gallegos at the scene. (R. 208-209). The three deputies were completing their paperwork on the hood of Pitts' vehicle, which included an incident report, tickets for traffic violations, and warrant worksheets for the more substantial charges. (R. 206-207).

At this time, Jones maneuvered his body in such a manner that enabled his hands, still handcuffed, to be in front of him. He then squeezed through the Plexiglas window of the patrol car and climbed into the driver's seat of the vehicle. A sound was heard as if the car's ignition was being activated while the car was already on. Jones also activated the door locks. At noticing Jones moving into the driver's seat, the deputies yelled for Jones to stop and unlock the doors. Gallegos attempted to break the front driver's door window by striking the glass with a baton, but was unsuccessful and then retreated to his own vehicle with the expectation that he would be in another vehicle pursuit. (R. 185-187, 214-215, 233-237, 241-243, 308-309).

Meanwhile, Corporal Pitts was trying to gain entry by using his spare key to unlock the passenger side door, but was unable to do so because of the car moving

in reverse. (R. 242-243). Deputy Frady was located at the front passenger corner of the patrol vehicle when he drew a weapon and shouted instructions for Jones to stop and turn off the ignition after he had backed the vehicle. (R. 311-312). Pitts had moved to the front of the vehicle with his weapon drawn giving similar commands for Jones to stop. (R. 243). Despite these open and explicit warnings, Jones put his hands up above the steering wheel, slumped down in the driver's seat, stepped on the accelerator, and the vehicle moved forward. The vehicle at first moved toward Pitts who was able to get out of the way and then accelerated directly at Frady. Frady fired his weapon as he jumped out of the way of the vehicle. Pitts fired one shot and Frady shot two shots, one of which was the fatal shot. (R. 243-250, 311-317).

Jones was subsequently transported from the scene by Richland County EMS and was taken to Palmetto Richland Memorial Hospital, where he was pronounced dead.

ARGUMENTS

I. The Court of Appeals ruled correctly that the Petitioner did not appeal from the trial judge's grant of a directed verdict on Sheriff Lott's immunity defense under Section 15-78-60(6).

The Court of Appeals ruled that "Jones failed to appeal the circuit court's grant of a directed verdict on the issue of Lott's immunity under section 15-78-60(6)." (App. 573). Jones contends that the Court of Appeals was wrong and that he did raise this issue in his second issue on appeal. Jones is clearly incorrect.

Jones' second issue on appeal reads as follows: "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?" That statement of the issues on appeal does not mention Section 15-78-60(6) specifically nor does it mention Tort Claims Act immunities or sovereign immunity even generally. Indeed, this second issue on appeal does not even make mention of "gross negligence," let alone a gross negligence exception to any Tort Claims Act immunity provision. Under Rule 208(b)(1)(B), SCACR, the statement of issues on appeal are required to be "concise and direct." "Broad general statements may be disregarded by the appellate court." *See*, Rule 208(b)(1)(B), SCACR. In *Sullivan Co., Inc. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993), this Court affirmed an order granting summary judgment holding that

"[b]road general statement of issues made by an Petitioner may be disregarded by this Court." 437 S.E.2d at 31. (applying current Appellate Court Rules). Similarly, in *Forest Dunes Associates v. Club Carib, Inc.*, 301 S.C. 87, 390 S.E.2d 368 (Ct. App. 1990), the Court of Appeals explained that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." 390 S.E.2d at 370. Quite clearly and as the Court of Appeals concluded, Jones' second issue on appeal did not seek review of Judge Young's ruling on Section 15-78-60(6) immunity.[2]

It is quite telling that not only does Jones' statement of the issues on appeal not mention Section 15-78-60(6) specifically, that statute is not cited *even one time* in Jones' appellate brief filed in the Court of Appeals. Moreover, after Sheriff Lott raised the fact that Jones did not appeal the grant of immunity under Section 15-78-60(6) in his brief, Jones did not even file a reply brief to attempt to refute that fact.

[2] By arguing in that second issue on appeal that the trial judge erred in finding that the officers "were not negligent as a matter of law," Jones does not implicate an immunity defense, which by definition is a conditional admission of negligence or fault. *See, Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916 (1988) ("One who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability").

Clearly, the Court of Appeals ruled correctly in concluding that a challenge to Section 15-78-60(6) immunity was not raised on appeal, and as a result, the directed verdict on that basis is the law of the case and was properly affirmed.[3]

II. The Court of Appeals did not abuse its discretion in ruling on Sheriff Lott's Section 15-78-60(21) immunity defense as an additional sustaining ground.

Jones also contends that the Court of Appeals erred in considering Sheriff Lott's additional sustaining ground based on Section 15-78-60(21) immunity. Section 15-78-60(21) states: "The governmental entity is not liable for a loss resulting from ... (21) the decision to or implementation of release, discharge,

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[3] Although not raised as a separate question presented on certiorari, Jones does argue that the Court of Appeals misapplied the "two-issue" rule. Jones suggests that the "two-issue" rule applies only to cases involving multiple causes of action rather than, as here, multiple defenses. Jones has completely disregarded this Court's footnote in *Anderson v. South Carolina Department of Highways & Public Transportation*, 322 S.C. 417, 472 S.E.2d 253 (1996), which was quoted by the Court of Appeals. This Court had explained in *Anderson* as follows:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

472 S.E.2d at 255, n.1. Thus, this Court approved the application of the "two-issue" rule for precisely the scenario presented here – where the trial court granted a directed verdict on several alternative bases, not all of which were then appealed.

parole, or furlough of *any persons in the custody of any governmental entity*, including but not limited to a prisoner, inmate, juvenile, patient, or client or *the escape of these persons*." S.C. Code Ann. § 15-78-60(21). (Emphasis added). Consequently, the Tort Claims Act specifically exempts law enforcement for any liability resulting from the escape of a person in custody. Thus, as the Court of Appeals correctly ruled, any loss experienced by Jones resulting from his escape from custody, including his death, is barred by operation of Section 15-78-60(21).

In *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id*. *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record").

Sheriff Lott submits that the Court of Appeals did not abuse its discretion in considering the additional sustaining ground. As the Court of Appeals correctly recognized, Sheriff Lott did raise Section 15-78-60(21) immunity as an additional ground in his directed verdict motion. (R. 497). Accordingly, the issue was raised

and could be entertained as an additional sustaining ground. However, it is quite telling that Jones' counsel never responded to that ground at trial. (R. 499-502). Moreover, he never responded to that ground on appeal. After Sheriff Lott raised Section 15-78-60(21) immunity as an additional sustaining ground in his Court of Appeals brief, Jones never filed a reply brief to respond to that nor any other argument. Jones therefore had a full and fair opportunity to refute that defense at trial and on appeal, but he failed to do so. It was not unfair for the Court of Appeals to consider and rule on that dispositive issue as an additional sustaining ground.

As mentioned, Jones never addressed the Section 15-78-60(21) immunity defense at trial or on appeal until he filed his petition for rehearing after the Court of Appeals issued its decision. At that juncture, it was simply too late. Both this Court and the Court of Appeals have previously rejected attempts to raise new issues or arguments in a petition for rehearing. In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), this Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322. *See also, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not

preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same). Consequently, Jones should not be permitted to pursue on certiorari an issue that he addressed for the first time on rehearing.

III. The Petitioner's argument that a gross negligence exception should be read into Sections 15-78-60(6) and 15-78-60(21) should be rejected because that argument was never raised at trial and because Sheriff Lott never asserted an immunity defense containing a gross negligence exception.

Although his arguments on appeal are somewhat disjointed, the Petitioner Jones appears to focus specifically on his claim that the immunity defenses should not have been considered by the Court of Appeals because a gross negligence exception should be read into Sections 15-78-60(6) and 15-78-60(21).[4] Even if this Court were to consider the merits of that argument, Jones' position should be rejected on both procedural and substantive bases.

First, it is very clear that Jones raised this issue for the first time on appeal. Jones never argued at trial that a gross negligence exception should have been read into both Section 15-78-60(6) and Section 15-78-60(21), given the gross negligence exception in Section 15-78-60(25). This argument, while meritless,

[4] Jones makes no other argument on appeal challenging the application of Section 15-78-60(6) or Section 15-78-60(21). More importantly, as discussed below, when these immunity defenses were raised at the directed verdict stage, Jones' counsel made no mention of either of the immunity defenses and offered no argument against or rebuttal of those defenses at that time. (R. 499-502). Quite simply, Jones' counsel never argued in the lower court that Sheriff Lott was not entitled to immunity under the Tort Claims Act on any basis.

was never raised to nor ruled on by Judge Young. Importantly, in response to the direct verdict motion at trial, Jones' counsel made absolutely no argument on any of the Tort Claims Act immunity defenses and certainly made no argument or even a suggestion that a gross negligence exception was applicable to Lott's immunity defenses. (R. 499-502).

It is elementary that Jones cannot raise an issue on appeal or on certiorari that was not first raised to the trial judge when he was considering the directed verdict motion at trial. In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), this Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original).

Because this argument attaching a gross negligence exception to Section 15-78-60(6) and Section 15-78-60(21) was never raised nor ruled on below, this issue is not preserved for appellate review. Nonetheless, even if the Court were to reach

the merits of the issue, Jones cannot prevail. Sheriff Lott never pled nor relied on Section 15-78-60(25) nor any other immunity provision within Section 15-78-60 containing a gross negligence exception. Section 15-78-60(25) immunity was never asserted as a defense in Sheriff Lott's directed verdict motion nor at any other time during the trial.

Despite the fact that Sheriff Lott did not plead nor rely on Section 15-78-60(25), Jones insists that the Court should *sua sponte* raise that affirmative defense for Lott and then apply a gross negligence exception to other immunity defenses that were raised.[5] Clearly, there is no basis for Jones' position. In fact, the principal case cited, *Steinke v. South Carolina Department of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), holds that a governmental defendant may select which immunity provisions to plead, and if no gross negligence exception is included, then there is no basis for limiting the immunity to acts of simple negligence. The *Steinke* Court explained "the better practice is to allow *the government to assert all relevant exceptions*, and apply the gross negligence standard to all when it is contained in one applicable exception." 520

[5] *See, Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916 (1988) ("Immunity is an affirmative defense which must be pleaded and can be waived"). Because immunity is an affirmative defense that may be waived, neither the plaintiff nor the Court may compel a defendant to assert a particular immunity defense, such as Section 15-78-60(25) immunity, that the defendant does not believe is applicable or otherwise does not wish to assert.

S.E.2d at 154. (Emphasis added).[6] Because Sheriff Lott did not plead nor rely on Section 15-78-60(25), there is no basis for reading a gross negligence exception into Section 15-78-60(6) or Section 15-78-60(21). In short, neither Jones nor this Court may raise an affirmative defense not raised by Sheriff Lott in order to create potential liability for Lott where none otherwise exists.

To summarize, the Court of Appeals ruled correctly in addressing the Section 15-78-60(6) and Section 15-78-60(21) immunities. Jones never raised any gross negligence exception at trial, and hence, this is not a proper issue for appeal. Nonetheless, on the merits, there is no basis for reading a gross negligence exception into Sheriff Lott's Section 15-78-60(6) and Section 15-78-60(21) immunity defenses. He clearly did not assert any other immunity defense which includes a gross negligence exception.

[6] *See also, Proctor v. Dept. of Health and Environmental Control,* 368 S.C. 279, 628 S.E.2d 496, 513 (Ct. App. 2006) ("*When a governmental entity asserts multiple exceptions to the waiver of immunity* and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions"). (Emphasis added). *Proctor* also recognizes that the governmental entity controls which immunity defenses it chooses to assert, which is consistent with the rule from *Rayfield* that immunity defenses are affirmative defenses.

IV. The trial judge ruled correctly that the deputies' use of force was objectively reasonable as a matter of law.

In the event this Court agrees that the Section 15-78-60(6) and Section 15-78-60(21) immunity defenses are subject to a gross negligence exception, Jones argues that Judge Young erred in ruling as a matter of law that the deputies' use of force was objectively reasonable.[7] Judge Young applied the "objective reasonableness" standard found applicable to assessing excessive force claims under the Fourth Amendment. Jones does not challenge that ruling and indeed has agreed that his negligence claim is appropriately construed under an objective reasonableness standard.[8]

The seminal case on the "objective reasonableness" standard is *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* held all claims that law enforcement

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[7] Jones did not appeal from the order granting partial summary judgment and cannot prevail on this issue in part based upon the law of the case. *See*, *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986). In his Notice of Appeal, Jones appeals only from the order issued by Judge Roger Young dated July 10, 2006, denying the Jones' Rule 59(e) motion. No appeal was filed from the order of Judge Alison Renee Lee filed March 13, 2006. (R. 511). In that order, Judge Lee ruled that "the deputies' use of force was objectively reasonable under the totality of the circumstances, and as such, this use of force was authorized." (R. 4). That ruling is the law of the case. Having not been appealed, Jones is bound by that finding by Judge Lee. Because the deputies' use of force was objectively reasonable, then it cannot be shown that the deputies and Sheriff Lott failed to exercise slight care or due care. Thus, Jones is precluded from even arguing that the deputies or Sheriff Lott were grossly negligent in any respect.

[8] Objective reasonableness is the equivalent of the reasonable man standard which governs the deputies' conduct. *See*, S.C. Code Ann. § 15-78-20(a) ("Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.")

officers used excessive force in the course of an arrest, investigatory stop, or other seizure should be analyzed under the Fourth Amendment reasonableness standard. The United States Supreme Court explained the standard as follows:

> Determining 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. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is resisting arrest or attempting to evade arrest by flight.
>
> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396-97. (Citations omitted). *See also, Heyward v.*

Christmas, 357 S.C. 202, 593 S.E.2d 141 (2004); *Quesinberry v. Rouppasong*, 331 S.C. 589, 503 S.E.2d 717 (1998).

On the issue of deadly force, the United States Supreme Court has held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). "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*. The Supreme Court further explained:

> [The use of deadly force] is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. at 11-12.

In applying these rules of law to the facts of the present case, while taking the evidence in a light most favorable to Jones, Judge Young was correct in finding that the use of deadly force was objectively reasonable. The evidence reflects that Chad Jones was a wanted felon. This was not a mere traffic stop. In fact, it was determined that Jones had outstanding warrants for assault with intent to kill,

assault and battery with intent to kill, and attempted burglary. (R. 181). He had also just refused to stop for a blue light and had led the officers on a police pursuit earlier. Jones was attempting to escape in a high performance patrol vehicle, and it was objectively reasonable for officers to believe that he would have driven that vehicle at high speeds and recklessly to avoid apprehension, thereby placing innocent pedestrians and motorists at grave danger. In addition, Jones began moving that vehicle mere feet from the officers thereby jeopardizing their safety and leading them to believe he was trying to run down one or more of the deputies on the scene. The deputies were required to make split second decisions to protect themselves and the public from harm. In short, the three factors specifically identified in *Graham* were present here: (1) Jones' crimes were serious; (2) he was an imminent threat to the officers at the scene and to the public if allowed to escape in the patrol vehicle; and (3) he was attempting to evade arrest by flight. Consequently, in judging the circumstances using the perspective of a reasonable officer on the scene with no time for reflection, Judge Young was correct in concluding that the evidence gives rise to only one reasonable conclusion -- that the use of deadly force to prevent Jones' escape was warranted and objectively reasonable.

The decision reached by Judge Young is no different than the conclusion that this Court reached in *Heyward v. Christmas*, 357 S.C. 202, 593 S.E.2d 141

(2004). This Court applied the same objective reasonableness standard and affirmed a directed verdict for Trooper Christmas. While the plaintiff presented expert testimony that challenged the reasonableness of the officer's actions, this Court in *Heyward* concluded that the evidence was only susceptible to the inference that the seizure of the plaintiff was reasonable. This Court strictly applied the *Graham* standard, thereby emphasizing the fact that the officer was faced with making a split-second decision. This Court further rejected all attempts to use hindsight to second guess the officer's decisions under the circumstances.

Judge Young clearly applied the same approach as this Court in *Heyward* and granted a directed verdict for Sheriff Lott. As Judge Young stated, "I believe as a matter of law that their actions were objectively reasonable under the circumstances of this case." (R. 510). To the extent this Court reaches that ruling, it should be affirmed.

V. To the extent that the Court finds it necessary to address these issues on the merits, the trial court correctly ruled that the deputies owed no duty of care to Chad Jones to prevent him from escaping and that the Petitioner's recovery is likewise barred by comparative negligence.

On certiorari, Jones has also asked this Court to rule on certain issues raised to the Court of Appeals but which were not reached by that Court in light of its dispositive decision on the immunity defenses. Sheriff Lott submits that this Court

should affirm on the immunity defenses, but in the event this Court reaches these additional appeal grounds, Lott offers the following discussion.

A. The trial judge was correct in ruling that the deputies owed no duty of care to Chad Jones to prevent him from escaping.

As one basis for granting a directed verdict for Sheriff Lott, Judge Young ruled that the deputies did not owe a duty of care to Chad Jones in the manner by which he was secured in the patrol vehicle. Judge Young stated: "I do not believe that [Pitts] owed a duty to Chad Jones under those circumstances to secure him in the back of that car in such a way that it was impossible for him to escape." (R. 505).

In challenging that ruling on appeal, Jones argues that there was a special relationship between Jones and the deputies such that they owed him a duty of care to provide for his safety. Alternatively, Jones argues that the deputies' conduct created the risk of harm and, on that basis, a duty of care was created. Jones' position on this issue lacks merit for both procedural and substantive reasons.

First, the arguments made by Jones were not raised to nor ruled upon by Judge Young, and as a result, those arguments are not preserved for appellate review. *See, Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004) (as discussed *supra*). A review of Jones' arguments in

opposition to the directed verdict motion do not reflect any claim that a duty of care arose as a result of any special relationship nor the creation of the risk of harm by the deputies. (R. 499-502).

In *Elam*, *supra*, this Court also addressed at length when a Rule 59(e) motion is required under South Carolina appellate procedure. In clear, concise, and *mandatory* terms, the Court explained that "[a] party *must* file a [Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam*, 602 S.E.2d at 780. (Emphasis in original). Here, Jones did file a Rule 59(e) motion, but again the basis for his challenge on appeal was not raised in that motion. Consequently, this special relationship issue is not preserved for appellate review.

In the event the Court reaches the merits on this issue, Sheriff Lott submits that Judge Young's ruling is correct and should be affirmed. With the exception of arguing generally that a special duty exists, Jones failed to present any authority from this jurisdiction or other jurisdictions holding that law enforcement owes a duty to an arrestee to prevent that individual from escaping. The reason for that failure to cite any authority is obvious -- there is none. In the case of *Hermann v. Cook*, 240 F. Supp. 2d 626 (W.D. Ky. 2003), as in the present case, an arrestee escaped from custody and died during the course of the escape. The plaintiff brought a negligence claim alleging that the police owed a duty "to impose greater

restraint to prevent his escape." In rejecting the existence of such a duty, the federal district court ruled that "it can hardly be said that officers having a prisoner in their custody owe him the duty of preventing his escape." 240 F. Supp. 2d at 632. The same is true in the present case.

There is no South Carolina case law addressing the existence of a duty owed to a person in custody to prevent his escape. However, in *Washington v. Lexington County Jail*, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999), the Court of Appeals ruled that those who maintain custody of prisoners are not liable to individuals for damages by an escaped inmate. 523 S.E.2d at 207. Likewise, this Court has held "that police officers owe a duty of care to the public at large and not to any one individual." *Id.*, *citing Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997). Consequently, if no duty of care is owed to persons harmed by an escaped inmate, certainly the law does not recognize a duty to protect the person who is escaping.

Moreover, in an analogous situation, this Court has rejected claims by adults injured by their own intoxication against parties who did not prevent the injured person from operating a motor vehicle in an altered state and thereby harming themselves. In *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), this Court held that South Carolina does not recognize a "first party" claim against a tavern owner by an intoxicated adult. Similarly, in *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), this Court refused to recognize a first party negligent

entrustment claim by an intoxicated adult. Thus, given this precedent, it logically follows that South Carolina does not recognize any duty of care owed to persons in custody to prevent them from escaping from custody and thereby harming themselves.

For each of the reasons stated, Judge Young ruled correctly as a matter of law in finding no duty of care was owed to Chad Jones to prevent him from escaping.

B. The trial judge ruled correctly that the Petitioner's negligence claim is barred by operation of the comparative negligence doctrine.

As an alternative ruling, Judge Young concluded that Jones' claim was barred by the defense of comparative negligence as a matter of law. (R. 505-506, 510). He ruled that, even if the deputies were negligent both in failing to prevent the escape and in their use of force, Chad Jones' negligence outweighed the deputies' negligence. (R. 505-506, 510).

Recognizing that the comparison of the plaintiff's negligence with that of the defendant is typically a question for the jury, this Court in *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000), explained that a circuit court may find a plaintiff's claim is barred as a matter of law "if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty

percent." 529 S.E.2d at 713. The *Bloom* Court ruled that the evidence even when viewed in a light favorable to the plaintiff demonstrated that the plaintiff was more than fifty percent negligent.

The *Bloom* Court also reaffirmed the decision in *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996), in which the Court of Appeals affirmed the trial court's grant of a directed verdict where the evidence demonstrated that the plaintiff's negligence was greater than any potential negligence of the defendant. *See also*, *Estate of Haley v. Brown*, 370 S.C. 240, 634 S.E.2d 62 (Ct. App. 2006); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008); *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009).

Like the *Bloom*, *Hopson*, and the additional cases cited, the present case is appropriate for a judicial determination as a matter of law that Chad Jones' degree of fault exceeded fifty percent. There can be no reasonable inference which may be drawn from the evidence in this record that Jones' fault was fifty percent or less when compared to the fault of the deputies. Clearly, Jones set in motion the events that led to his own death. Jones alone committed the acts that resulted in his commandeering of the patrol vehicle. Moreover, his attempt to escape in that vehicle resulted in the use of deadly force to prevent the escape and to prevent

harm to the officers and the public.[9]

Therefore, by commandeering the vehicle and then attempting to escape, Jones was obviously at fault. Furthermore, the evidence of his negligence was overwhelming and without dispute. No reasonable jury could conclude that Jones' degree of fault was fifty percent or less. As Judge Young found, the sole reasonable inference which may be drawn from the evidence is that Jones' negligence exceeded fifty percent. That ruling, which bars Jones' claims of negligence or gross negligence, should also be affirmed.

[9] Jones suggests that comparative negligence is a viable defense only upon a showing that Chad Jones was aware of the risk of injury that could result from his flight. While the defense of assumption of risk has now been subsumed in a comparative negligence defense, that does not necessarily mean that each of the elements of the assumption of risk defense must be established to prove comparative negligence. Nonetheless, even if Jones' awareness of the risk were material, based upon the evidence the only reasonable inference holds that one who is under arrest, then steals a patrol vehicle, is warned to stop by armed officers but still attempts to flee in that patrol vehicle understands that he is proceeding despite a risk of serious injury.

CONCLUSION

Based on the foregoing discussion, the Respondents respectfully request that this Court affirm the decision of the South Carolina Court of Appeals and the Orders of Judge Roger M. Young granting a directed verdict in favor of Sheriff Lott.

Respectfully submitted,

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