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,

v.

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

Respondents.

REPLY BRIEF OF PETITIONER

Hemphill P. Pride II
LAW OFFICE OF HEMPHILL P. PRIDE II, LLC
Post Office Box 4529
Columbia, South Carolina 29240
(803) 256-8015

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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?

ARGUMENT IN REPLY

Procedurally, Respondent continues to assert, as he has throughout this appeal, that the issues raised by Petitioner were not raised in the court below and ruled upon by the trial judge. Those arguments are addressed with specificity in the Brief of Petitioner and are not revisited in this Reply Brief, except to direct the Court's attention to the directed verdict argument and rulings, in which the parties and the trial court addressed with specificity all of the issues raised in this appeal. *See* App. pp. 484-510, and in particular p. 485, lines 22-25, p. 494, lines 22-25, and p. 504, line 1-p. 510, line 25. The issues before the Court are preserved for review, and the Court should address each issue on its merits.

Substantively, the court committed reversible error in finding there was no duty of care owed to Chad Jones under the circumstances of this case, and the evidence created a jury issue as to the officers' gross negligence, the reasonableness of their use of deadly force, and the comparative negligence between the officers and the decedent.

I. THE EVIDENCE CREATED A JURY QUESTION ON THE ISSUES OF GROSS NEGLIGENCE AND THE OBJECTIVE REASONABLENESS OF THE OFFICERS' USE OF DEADLY FORCE.

Chad was under arrest and in custody by 8:14 a.m. Before he was apprehended, he had fled the attempted traffic stop first, in the vehicle he was driving, then, on foot. Once he was under arrest and secured in the back seat of the patrol car, he behaved suspiciously and managed to maneuver his cuffed hands from his back to his front. Notwithstanding their knowledge of this prior behavior, the officers did nothing differently than they had before. They left the plexiglas window open and the car running, as they had before. They continued to pay Chad no heed until they noticed him in the front seat of the vehicle--putting it into motion, over two (2) hours after he was apprehended. Rather than disabling the vehicle by shooting the tires or other means, they fired directly at Chad through the windows of the car and killed him–with a shot to the back of the head.

Respondent contends the evidence establishes the officers were not grossly negligent and that their actions were objectively reasonable as a matter of law, arguing this case is no different than *Heyward v. Christmas*, 357 S.C. 202, 593 S.E.2d 141 (2004). To the contrary, *Heyward* is strikingly different from the facts of this case. *Heyward* involved a situation in which shots had been fired from a car during a police pursuit. The car was eventually stopped at a roadblock and the driver and passenger were ordered to exit the vehicle with their hands up. The driver did so and did not have a weapon. The passenger remained in the car and did not raise his hands as directed. A trooper, who could not see the passenger's hands because they were tucked under his thighs, entered the car with his gun in

hand to extract the passenger. In so doing, the passenger's weight shifted, causing the trooper to stumble, and the trooper instinctively re-gripped his weapon and accidentally pulled the trigger, shooting the passenger in the thigh. The trooper testified that he would have holstered his gun had there not been a known weapon in the car. The Court held that the trooper's entering the car with his gun drawn was objectively reasonable in view of all the facts and circumstances, and the entry of a directed verdict was upheld.

The facts of the *Heyward* case are a far cry from the facts surrounding the fatal shooting of Chad Jones. The officers knew Chad was unarmed. They were out of the path of the vehicle by the time the fatal shot was fired. Officer Pitts was at the rear panel of the vehicle. Officer Frady had stepped to the passenger side and fired directly through the front passenger-side window at Chad, then, again through the rear window, firing into the back of his head. Under these circumstances and 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), it cannot be said that their actions were objectively reasonable as a matter of law.

The evidence also presents a jury issue on the question of their gross negligence. They did not secure the plexiglas window. They left the keys in the

car and left it running. Even after Chad's suspicious behavior, they did nothing different. They did not assign one officer to be in constant watch while the others finished their paperwork. They simply were not paying attention, as they should have been. Their omissions created the situation that led to the officers' use of deadly force. Even then, they were not in immediate danger when the shots were fired. Chad was not using the vehicle as a weapon but was driving away from them

in an attempt to escape. An expert on the use of deadly force testified they did not follow the Sheriff's Department's procedures and that their actions, under the circumstances of this case, amounted to recklessness and negligence. More than one inference could be drawn from the evidence and the issue of gross negligence was therefore one for the jury. *Cf. Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003).

II. THE DEPUTIES OWED A DUTY OF CARE TO THE DECEDENT WITH RESPECT TO THE MANNER IN WHICH THEY SECURED HIM AFTER TAKING HIM INTO CUSTODY.

Respondent contends the law does not recognize a duty to protect a person who is escaping. That argument misses the point. The law places on the officers a duty not to create a situation that invites an escape attempt and, then, shoot the escapee in the back of the head. To accept the argument of Respondent would eviscerate the Constitution's protection of an arrestee from the unreasonable use of deadly force to prevent an escape. *See Garner*, 471

U.S. at 11; *Graham*, 490 U.S. at 396-99. Moreover, this Court has recognized the special relationship of officers to arrestees or persons in custody. The officers in *Jinks* had a duty to monitor a detainee's medical condition after they were on notice that medical observation was needed. *See Jinks*, 355 S.C. at 345-49, 585 S.E.2d at 283-85. In *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 333, 566 S.E.2d 536, 545 (2002), the Court recognized the duty of the Department of Juvenile Justice to control a known dangerous individual in its custody where there was an established authority relationship and a substantial risk of serious harm. In *Jackson v. South Carolina Department of Corrections*, 301 S.C. 125, 126-28, 390 S.E.2d 467, 469 (Ct. App. 1989), the appellate court also recognized the duty of the Department of Corrections with respect to the manner in which officers

transferred an inmate with a known history of psychopathic patterns, unpredictability, and tendency to have violent outbursts. Similarly, these officers, aware of Chad's propensity to flee and aware of his additional suspicious behavior in the back of the patrol car, had a duty to control and secure him based on what they knew concerning his propensity to flee.

In addition to the exception which gives rise to a duty of care where a special relationship exists, there is an additional exception giving rise to a duty where there has been a negligent or intentional creation of risk. *See 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. Respondent does not address this exception which is, clearly, supported by the evidence in this case. Chad had fled the traffic stop and a high speed chase ensued. After wrecking the vehicle he was driving Chad, again, fled on foot. Once he was apprehended, he behaved suspiciously and actually succeeded in maneuvering his cuffed hands from behind his back. The officers had knowledge of his propensities but left him in a situation in which he was prone to attempt an escape. Under these circumstances, a duty existed to take additional precautions to prevent his escape.

The authority from a Kentucky federal court on which Respondent relies, *Hermann v. Cook*, 240 F.Supp.2d 626 (W.D. Ky. 2003), is not controlling. There, an arrestee escaped from custody, dove into the Ohio River, and drowned. He was not shot in the back of the head while attempting to escape after officers were on notice of such a propensity. The court noted both the "special relationship"

exception that applies when the state restrains an individual in a way that exposes the individual to harm; and, the similar exception that applies when, through some

affirmative conduct, the state places the individual in a position of danger. But, the court held such circumstances did not exist in that case.

Here, the officers were on notice of Chad's propensity toward flight but they did not take additional precautions to prevent an escape attempt and, instead, created a situation inviting such an attempt, then, killed him. These circumstances are, clearly, in line with the circumstances of the South Carolina authorities that recognize a duty, where known propensities exist, not to create the risk of an escape attempt but to secure and control the person in custody.

III. THE EVIDENCE CREATED A JURY ISSUE ON COMPARATIVE NEGLIGENCE.

Respondent argues the sole reasonable inference that could be drawn from the evidence was that Chad's negligence exceeded fifty percent, relying on *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000), *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996), and other cases. These cases are all factually distinguishable and do not control the resolution of the comparative negligence issue in this case. Respondent does not address the most compelling case, *King v. Daniel International Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982), which instructs that the plaintiff's negligence cannot be determined to preclude recovery as a matter of law except where "ordinary minds could not differ in deciding [those actions] to be both negligent or reckless and the proximate cause of the injury." Nor, does Respondent address *King*'s recognition that such a determination should not be made as a matter of law unless there is 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). In this case, there was no evidence Chad was aware that, if he fled, he would be shot in the back of

the head. Rather the evidence, in fact, leads to the opposite inference–since he had previously fled without being shot, he had no reason to believe he was at such risk in his later attempt to escape. 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.

CONCLUSION

For these reasons and those additional reasons set out in the Brief of Petitioner, 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,

Law Office
of
HEMPHILL P. PRIDE II, LLC

Hemphill P. Pride II
Post Office Box 4529
Columbia, South Carolina 29240-4529
Telephone: (803) 256-8015
e-mail hppride@bellsouth.net

ATTORNEY FOR PETITIONER

November 6, 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 Reply Brief of Appellant in the above-captioned matter was served on counsel for Respondents on November 6, 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:

Andrew F. Lindemann, Esq.
William H, Davidson, Esq.
Robert D. Garfield, Esq.
DAVIDSON & LINDEMANN, P.A.
Post Office Box 8568
Columbia, South Carolina 29202-8568

Charlene R. Sims

Columbia, South Carolina
November 6, 2009