

In the
Supreme Court of the United States

JAMES THOMAS HURST, II,

Petitioner,

v.

JAMES CALDWELL and
CITY OF BURGIN, KENTUCKY,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

ANDREW J. HORNE

COUNSEL FOR PETITIONER

HORNE LAW OFFICE

6510 GLENRIDGE PARK PLACE, SUITE 1

LOUISVILLE, KY 40202

(502) 637-1222

ANDREW@HORNELAWKY.COM

JULY 9, 2017

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

On the night of November 30, 2007, James Thomas Hurst, II was grievously injured when he was shot by a police officer of the Harrodsburg, Kentucky Police Department. The shooter, Officer Eldridge, was acting pursuant to false information that was provided by Chief Caldwell of the Burgin, Kentucky Police Department, which erroneously described threatening conduct (including intimation of a firearm) and threatening communication by Hurst to an alleged victim A. Nickles. In truth, Nickles had not even seen Hurst that night. There is significant evidence of bad blood between Caldwell and Hurst.

The Kentucky courts interpreted the Civil Rights Act of 1871, 42 U.S.C. § 1983, as not being applicable to Caldwell’s conduct because there was no special relationship between Caldwell and Hurst at the time of the shooting and therefore Caldwell had no duty to Hurst. Additionally, the courts held that the “state created danger doctrine” derived from this Court’s holding in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), did not apply because the shooter, Eldridge, was not a private citizen but another government actor.

QUESTIONS PRESENTED

1. Does the special relationship rule articulated by this Court in *DeShaney*, *supra*, apply to shield a state actor from liability under 42 U.S.C. § 1983, when the challenged conduct by that actor specifically targets an individual by name and directly puts them in danger?

2. If the special relationship rule is applicable to state action that specifically targets a particular individual, does the state-created danger doctrine that originated from the lower federal court's interpretation of this Court's holding in *DeShaney, supra*, apply even if the increased danger is from the potential acts of other state actors instead of private actors?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	1
STATEMENT OF THE CASE.....	2
A. The Trial Court Proceedings	4
B. The Trial Court’s Rationale	6
C. The Kentucky Court of Appeals’ Opinion	9
REASONS FOR GRANTING THE PETITION.....	9
I. THE HOLDING OF THE KENTUCKY COURTS TURNS CONSTITUTIONAL JURISPRUDENCE ON ITS HEAD.	9
II. THERE IS A DIVISION IN THE LOWER COURTS THAT HAVE DIRECTLY CONSIDERED THE STATE-CREATED DANGER DOCTRINE IN THE CONTEXT OF THIRD PARTY STATE ACTORS.	10
CONCLUSION AND REQUEST FOR RELIEF.....	12

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

Order of the Supreme Court of Kentucky Denying Discretionary Review (February 7, 2018).....	1a
Opinion of the Kentucky Court of Appeals Affirming (January 13, 2017).....	2a
Order of the Commonwealth of Kentucky Mercer Circuit Court (April 27, 2015).....	15a
Order on Plaintiff’s Motion to Vacate Summary Judgment for Defendants Caldwell and Burgin (January 21, 2015).....	17a
Order on Defendant’s Elderidge and City of Harrodsburg’s Motion for Summary Judgment (January 21, 2015).....	19a
Order of the of the Commonwealth of Kentucky Mercer Circuit Court (December 21, 2011)	23a
Order of the of the Commonwealth of Kentucky Mercer Circuit Court (July 15, 2011)	28a
Order of the of the Commonwealth of Kentucky Mercer Circuit Court (April 4, 2011)	32a
Order of the Kentucky Court of Appeals Denying Petition for Rehearing (August 16, 2017).....	45a

TABLE OF AUTHORITIES

Page

CASES

<i>DeShaney v. Winnebago County Department of Social Services</i> , 489 U.S. 189 (1989).....	i, ii, 10
<i>Fryman v. Harrison</i> , 896 S.W.2d 908 (Ky. 1995)	9
<i>Rivas v. City of Passaic</i> , 365 F.3d 181 (3rd Cir. 2004)	11

CONSTITUTIONAL PROVISIONS

U.S. Const., amd. XIV	1
-----------------------------	---

STATUTES

28 U.S.C. § 1257(a)	1
42 U.S.C. § 1983.....	passim

JUDICIAL RULES

Fed. R. Civ. Proc. 6(a)	1
-------------------------------	---



OPINIONS BELOW

The opinion of the Kentucky Court of Appeals was issued as *Hurst v. Caldwell*, Jan. 13, 2017. (App.2a). Review was denied by the Supreme Court of Kentucky on February 7, 2018, The Mercer County Kentucky Circuit Court opinions at issue were made final on April 27, 2015 and included in the Appendix. (App.15a-33a). The opinions are unpublished.



JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the Kentucky Court of Appeals for which petitioner seeks review was issued on January 13, 2017 and review was denied by the Supreme Court of Kentucky on February 07, 2018. This petition is filed pursuant to Fed. R. Civ. Proc. 6(a) and this Court's grant of an extension of time to file a Petition for Writ of Certiorari.



CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Amendment XIV provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .



STATEMENT OF THE CASE

On the night of November 30, 2007, James (Tommy) Hurst, was nearly fatally shot by Officer Jason Eldridge of the Harrodsburg, Kentucky police department; however, Officer Eldridge was operating under false and inflammatory information provided by James Caldwell, the Chief of Police for the City of Burgin, Kentucky. Specifically, Chief Caldwell broadcast to all who could hear that Tommy Hurst had pulled in-front of Aaron Nickles' home in Burgin, Kentucky. According to Caldwell, Hurst had allegedly remained in the car and speaking in a threatening tone had made the comment to Nickles "I've got something for you" as he pointed towards his waist indicating that he had a firearm on his person. Caldwell then falsely broadcast that Mr. Hurst was a convicted felon and had fled the scene. Finally, it was alleged that Hurst had "brandished a weapon" in the past. This

false and inflammatory “information” broadcast by Caldwell started a manhunt for Tommy Hurst and greatly increased the tension of the officers hearing the call. The statements Caldwell made over the radio dispatch are not disputed, these statements were blatantly false and were refuted by the alleged victim, Aaron Nickles, who also testified that Caldwell had always been out to get Mr. Hurst, which was one of several possible motives for Caldwell’s actions.

Contrary to the statements of Caldwell over the radio dispatch on the night of the shooting and his deposition testimony years later, Mr. Nickles never even saw Tommy Hurst on November 30, 2007. Immediately after the shooting Nickles gave a recorded statement to the Kentucky State Police, which confirms this information. Nickles had only briefly seen Tommy Hurst’s pick-up truck through his trailer window.

Responding to Caldwell’s call of an apparent altercation involving an armed, fleeing felon, Officer Eldridge observed Tommy Hurst’s vehicle parked in nearby Harrodsburg. Because of the nature of the radio call by Caldwell, Eldridge was on high alert, and exited his vehicle with his weapon drawn. Also, responding to Caldwell’s call, two other officers flanked Hurst with weapons drawn, J. Elder of Harrodsburg, and D. Parks of the Mercer County Sheriff’s Office. All of the officers testified that the situation was tense due to the nature of the call by Caldwell. From Hurst’s testimony, the actions of the officers were very confusing, and he did not understand what was going on. Eldridge claims Hurst made a movement near his waist and Eldridge, fearing the firearm intimidated by Caldwell, shot Hurst in the abdomen with his Glock 40. Mr.

Hurst was seriously injured and is still receiving medical treatment. He was recently advised that he will require a colostomy.

There was no weapon and Hurst denies ever reaching for his waist and denies ever threatening Nickles. The two-other officer's testimony concerning Tommy Hurst's actions, conflicts with that of Eldridge. Based on these genuine issues of material fact, the Mercer Circuit Court denied Eldridge's and Harrodsburg's motions for summary judgment. (App.19a).

Caldwell had motive to fabricate the incident. There is bad blood between Caldwell and Hurst, which may have motivated Caldwell to fabricate the incident. Chief Caldwell was formerly a tenant of Tommy Hurst's family and there is bad blood due to unpaid debts related to that business transaction. Furthermore, Nickles has known Tommy Hurst and Caldwell for years and confirmed in his deposition that there was bad blood between Caldwell and Hurst and that Caldwell "always wanted to get" Tommy Hurst. These facts alone could convince a jury not to rely on Caldwell's statement of subjective belief.

A. The Trial Court Proceedings

On November 26, 2008, Tommy Hurst filed the Complaint herein for deprivation of his federal constitutional rights under the color of state law pursuant to 42 U.S.C. § 1983 as well as state law claims alternatively for battery and intentional, negligent, grossly negligent, wanton, willful and or outrageous conduct that resulted in his grievous injuries. He asserted deficient supervision, training and vicarious liability claims against the municipal parties.

After the depositions of Tommy Hurst and the officers involved, Chief James Caldwell and the City of Burgin filed a Motion for Summary Judgment, which the circuit court granted, in effect holding that as to the state law claims Tommy Hurst could not prevail against Caldwell or Burgin under any circumstances and that Caldwell's actions did not present federal civil constitutional rights violations under 42 U.S.C. § 1983. *See* Order of April 4, 2011. (App.32a). Tommy Hurst moved the court to alter or amend the judgement because of the serious discrepancies between Nickles' statements to the KSP on the night of the shooting and Caldwell's broadcast, the circuit court vacated the dismissal of the state law claims recognizing there were disputed issues of fact but upheld the dismissal of the federal claims. *See* Order of July 15, 2011. (App.28a). On Caldwell/Burgin's Motion, and the submission of an affidavit from Aaron Nickles negating his statement to the Kentucky State Police, the circuit court reinstated its earlier dismissal. *See* Order of December 21, 2011. (App.33a). After a trial date was set in the remaining claims, Mr. Nickles was located, his deposition was taken, and he claimed the affidavit was false. As a result, Hurst moved the court to set aside its Order dismissing Caldwell and Burgin, which was denied. *See* Order on Plaintiff's Motion to Vacate Summary Judgment for Defendants Caldwell and Burgin of January 21, 2015. (App.17a). This and all previous Orders were made final and appealable on Tommy Hurst's and Caldwell's and Burgin's Joint Motions. *See* Order of April 27, 2015. (App.15a). The Appeal was filed on May 20, 2015.

B. The Trial Court's Rationale

Order of April 4, 2011: The Circuit Court granted Caldwell and Burgin's motion for summary judgment on the federal civil rights claims under 42 U.S.C. § 1983 as well as the state law claims, relying on three rationale: 1) Because Tommy Hurst was not in custody there was no special relationship between Caldwell/Burgin and Hurst; 2) There was no liability under 42 U.S.C. § 1983, because the court held that the state created danger "doctrine does not render public actors liable for subjecting individuals to harm from other public actors"; and 3) The encounter between Eldridge and Hurst was a superseding intervening cause, which relieved Caldwell of responsibility, because Hurst's "encounter with Officer Eldridge . . . was independently capable of bringing about his injuries." (App.32a).

Order of July 15, 2011: On April 14, 2011, Tommy Hurst moved the circuit court to Alter, Amend, Vacate and/or Clarify the Order of April 4, 2011. On July 15, 2011, the circuit court partially reversed its prior dismissal, holding that genuine issues of material fact precluded summary judgment as to Caldwell's bad faith in broadcasting the false message and that the factual dispute regarding Hurst's confrontation with Officer Eldridge defeated Caldwell's argument that Hurst's action were a superseding cause. Order of July 15, 2011. (App.30a).

Order of December 21, 2011: On July 25, 2011, Chief Caldwell and the City of Burgin moved the circuit court to Alter, Amend or Vacate the Order of July 15, 2011. These pleadings did not present any new legal arguments but did provide two additional pieces

of alleged evidence; the purported “Affidavit of Aaron Nickles” [sic] and, an excerpt of Jason Eldridge’s deposition. These were presented to contradict the statements each of these individuals gave to the KSP Detective Montel Owens hours after Tommy Hurst was shot. Additionally, oral argument was held on September 14, 2011 and the overwhelming focus of Caldwell’s argument for reinstatement of the dismissal was the Nickles’ Affidavit and the excerpt from Eldridge’s deposition. Apparently on the basis of the contradicting statements the circuit court reinstated the complete dismissal of Caldwell and Burgin on December 21, 2011. However, the text of the Order indicates that the court relied heavily on a limited understanding of the message Caldwell broadcast:

Officer Caldwell’s message stated only that he was “pretty sure” Plaintiff was a convicted felon and that no one had seen a weapon on Plaintiff’s person during the incident in question. Based on Plaintiff’s criminal history and the active warrant, Caldwell had a reasonable basis to believe that Plaintiff was a felon. The Court finds as a matter of law that events which occurred at the arrest scene were unforeseeable to Caldwell and Burgin.

Order of December 21, 2011. (App.26a). Completely omitted from the circuit court’s quotation is the undisputed fact that Caldwell broadcast over the radio in his squad car that Tommy Hurst had threatened Nickles and implied that he had a firearm by gesturing to his waist-band. (App.23a-27a).

Order of January 21, 2015: On August 22, 2014, Hurst moved again to vacate the Summary Judgment of Caldwell and Burgin. After a trial date was set in the matter between Hurst and Eldridge and Harrodsburg, Mr. Nickles was located, and his deposition was taken. During that deposition, Mr. Nickles completely refuted the statements contained in the affidavit and stated that the information contained in the affidavit was untrue—“I feel like I’ve been lied on right here just to Jim (Caldwell) free [sic] off this case.” Mr. Nickles adopted the audio recording of his interview with the KSP and confirmed that it accurately described the events of the night Tommy Hurst was shot; to the effect that he never saw or heard Tommy Hurst and did not make the allegations asserted by Caldwell. Nickles also confirmed in his deposition that there was bad blood between Caldwell and Hurst and it was his belief that Caldwell “always wanted to get” Tommy Hurst.

On the basis of Nickles’ deposition and the apparent fraudulent affidavit, Tommy Hurst moved the Court to set aside its Order dismissing Caldwell and Burgin, which was denied. The court held that the change in the testimony did not alter the reasons for the dismissal. *See* Order on Plaintiff’s Motion to Vacate Summary Judgment for Defendants Caldwell and Burgin of January 21, 2015. (App.18a). The court rejected Hurst’s motion to set aside the dismissal even though Appellees, Officer Eldridge and the City of Harrodsburg, moved the court for leave to file a Third-Party Complaint against Caldwell and Burgin, for Caldwell’s false statements.

Order of April 27, 2015: All previous Orders were made final and appealable on Tommy Hurst’s and Caldwell’s and Burgin’s Joint Motions. (App.15a).

C. The Kentucky Court of Appeals’ Opinion

As a central tenant of its Opinion the Court of Appeals conceived the claims against Caldwell to be based in negligence and ignored the specific allegations in the Complaint and in the proof that Caldwell acted with deliberate indifference and in reckless disregard for Hurst’s safety. (App.7a, 9a-10a). As a result of this decision the Court of Appeals analyzed the federal constitutional claims under 42 U.S.C. § 1983 and the Kentucky tort claims under the “special relationship test” set forth by the Kentucky Court’s in *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995) and failed to even mention the federal court’s analysis of the special relationship doctrine. (App.11a).

Ostensibly only concerning to the federal civil rights claims, the Court of Appeals held that the “state created danger doctrine” as enunciated in the federal courts did not apply if the injury was caused by another third-party officer or official instead of a private citizen tortfeasor. (App.12a-13a).



REASONS FOR GRANTING THE PETITION

I. THE HOLDING OF THE KENTUCKY COURTS TURNS CONSTITUTIONAL JURISPRUDENCE ON ITS HEAD.

The Kentucky Court of Appeal’s interpretation of the special relationship doctrine turns constitutional jurisprudence on its head. The purpose of the

due process clause as enforced by the 42 U.S.C. § 1983 is “to protect the people from the state” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 1003 (1989). The principle holding in *DeShaney* was that “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual” unless there is a special relationship. *DeShaney*, 489 U.S. at 196 (emphasis added). And made clear that “the Due Process Clause affords protection against unwarranted government interference . . .” *Id.*, 196-97. The very intent of the due process clause is to prevent the affirmative abuse of power, *id.*, such as that of Caldwell in the matter before the Court. If the holding were to stand as is no one is safe from the affirmative abuses of state actors unless they have a special relationship with the state. Taken to its ultimate conclusion a state actor acting as a sniper could shoot and kill a specific individual and while they may be criminally culpable they would not face liability under 42 U.S.C. § 1983 unless they had a special relationship with the victim.

II. THERE IS A DIVISION IN THE LOWER COURTS THAT HAVE DIRECTLY CONSIDERED THE STATE-CREATED DANGER DOCTRINE IN THE CONTEXT OF THIRD PARTY STATE ACTORS.

The state-created danger doctrine originated from the lower federal court’s interpretation of this Court’s holding in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Nothing in *DeShaney*, limits the essential purpose of the due

process clause, which is “to protect the people from the State . . .” 489 U.S. at 196 (emphasis added). An interpretation that holds that the due process clause would have protected Tommy Hurst, if he had been shot by a private actor, but does not since he was shot by another state actor turns constitutional jurisprudence on its head. It is also contradicted by the federal courts that have squarely addressed the issue.

In a case remarkably similar to the matter *sub judice*, *Rivas v. City of Passaic*, 365 F.3d 181 (3rd Cir. 2004), the Third Circuit Court of Appeals, recognized the application of the state-created-danger doctrine. In *Rivas*, the Third Circuit found that where state-actors (emergency medical personnel) misrepresented to police that the plaintiff had assaulted them, “they placed him in greater danger by falsely accusing him of acting violently,” which led to how the police perceived the situation and how they acted, resulting in excessive force and injury. *Rivas*, 365 F.3d at 196. Significantly, the Third Circuit found that providing false information was an affirmative act which shocked the conscience. *Id.* In the present case, Caldwell did exactly that—provided false information, perhaps maliciously, rendering him liable for a state created danger.

The Court should grant this petition to resolve the conflict between the Third Circuit Court of Appeals and the courts of Kentucky.



CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Petitioner requests that this Court grant the petition for certiorari. The decision of the Kentucky Court of Appeals turns constitutional jurisprudence on its head and diminishes the protections granted every Kentuckian under the United States Constitution as enforced through the Civil Rights Act of 1871, 42 U.S.C. § 1983. Additionally, if this petition is granted Petitioner requests the Court to reverse the Mercer County Circuit Court's holding that the confrontation between Hurst and Officer Eldridge was a superseding intervening cause that shields Caldwell and Burgin from liability, even though this issue was not addressed by the Kentucky Court of Appeals.

Respectfully submitted,

ANDREW J. HORNE
COUNSEL FOR PETITIONER
HORNE LAW OFFICE
6510 GLENRIDGE PARK PLACE, SUITE 1
LOUISVILLE, KY 40202
(502) 637-1222
ANDREW@HORNELAWKY.COM

JULY 9, 2018