No. 18-67

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 Court Of Appeals Of Kentucky

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court grant certiorari to determine whether the Kentucky Court of Appeals correctly held that Respondents City of Burgin and City of Burgin Chief of Police James Caldwell were entitled to summary judgment on Petitioner's negligence and 42 U.S.C. §1983 claims when Petitioner has failed to articulate any compelling reason which would warrant review of this case?

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioner James Thomas Hurst, II (hereinafter "Hurst" or "Petitioner") filed a Complaint in Mercer Circuit Court in Mercer County, Kentucky on November 28, 2008. Hurst alleged that he was subjected to a wrongful shooting by Officer Jason Eldridge (hereinafter "Officer Eldridge") of the Harrodsburg Police Department on the evening of November 30, 2007. Prior to the shooting incident, Beverly Nickels (hereinafter "Ms. Nickels") called 911 emergency in the City of Harrodsburg. (TR 97; 911 emergency dispatch transcript at p. 5 and attached hereto in Appendix). Ms. Nickels was calling on behalf of her son, Aaron Nickels (hereinafter "Mr. Nickels") who complained to his mother that Hurst had shown up at his house in Burgin, Kentucky and threatened him with a gun. *Id*. at p. 2-5. Ms. Nickels reported that she wanted dispatch to contact Chief Caldwell to respond to Mr. Nickels' home in Burgin and that Chief Caldwell had been to Mr. Nickels' house before. *Id*. at p. 2-4. Ms. Nickels stated that her son told her that Hurst was driving a white Toyota 4-Runner and was parked outside Mr. Nickels' home. Ms. Nickels also reported to dispatch that Hurst had been to Mr. Nickels' home on a previous occasion and had a gun. *Id*. at p. 5. Ms. Nickels then stated that her son was not sure if Hurst had a gun. *Id*. Dispatch reported to Ms. Nickels that Chief Caldwell was en route to Mr. Nickels' residence. *Id*. at p. 7. The dialogue on the 911 recording indicated that Hurst

might have a weapon, though it had not been observed. *Id*. at 8.

Soon thereafter, the City of Burgin Chief of Police James Caldwell (hereinafter "Chief Caldwell") arrived at Mr. Nickels' residence. Mr. Nickels told him that Hurst had pulled up in front of his house, remained in his vehicle but made a comment like "I've got something for you, big boy," and kept pointing towards his waist. Mr. Nickels told Chief Caldwell that he thought Hurst was indicating that he had a firearm and that Hurst had brandished a firearm, a small silver pistol, to him a few weeks earlier. (TR 118; Caldwell Depo. at p. 16-18). Chief Caldwell reported back to dispatch that:

> I'm pretty sure he's a convicted felon. They **did *not* see a weapon on this occasion** but the subject gestured down his crotch like he had a weapon and has brandished a weapon out here in the past.

(Appendix; TR 97, 911 emergency dispatch transcript at p. 9-10). At this time, Chief Caldwell believed a discussion occurred between the officers that Hurst had outstanding warrants (TR 118; Caldwell Depo. at p. 18) and, in fact, the 911 recording revealed that dispatch reported that there were "two active 1029's on James T. Hurst, II."[1] (Appendix; TR 97, 911 emergency dispatch transcript at p. 9). As stated above, it is

[1] A "1029" is a warrant for arrest.

significant that Chief Caldwell reported that Mr. Nickels ***did not see a weapon*** on Hurst at this time.

Numerous individuals have testified that Hurst has a bad reputation, is well-known in the community for getting into trouble and considered a "dangerous man." For example, Kentucky State Police Detective Mark Young (hereinafter "Detective Young"), who assisted Detective Monte Owens with an investigation of the shooting incident, is familiar with Hurst's reputation. Detective Young went to high school with Hurst and testified that Hurst liked to drink, liked to fight and was "a regular customer" at the police department. (TR 130; Young Depo. at p. 6, 45-46). Detective Young concurred that Hurst has a reputation as a "very dangerous man" and would be surprised if, on the occasions that Hurst had been arrested, if he did not have a weapon on his person. *Id*. at p. 50-51. Others also testified regarding Hurst's reputation and background as a dangerous man and well-known criminal.

Officer Eldridge explained that, over the years, he had received several complaints of Hurst driving recklessly, possibly under the influence of alcohol, leaving the scene of domestics, calling and threatening people, things of that nature. (TR 742; Eldridge Depo. at p. 83). Officer Eldridge believed Hurst was charged with domestic violence. *Id*. Deputy Parks, who has previously arrested Hurst, stated that some people in the community would consider Hurst to be a dangerous man which is based on Hurst's arrests over the years and some of the people with whom Hurst runs. (TR 137; Parks Depo. at p. 13, 65-67). Hurst admitted that he

had various criminal charges against him over the years, including but not limited to, a DUI felony charge in Jefferson County in 2004; a charge for theft in Mercer County; several DUI charges and driving on a suspended license in Anderson County; and various charges relating to cold checks. (TR 125; Hurst Depo. at p. 49-52). Hurst also served time in jail on several occasions and in various counties. *Id*. at p. 7, 13.

Moreover, Chief Caldwell had previous encounters with Hurst wherein Hurst was combative and subsequently arrested. In 2002, Chief Caldwell responded to a call from Hurst's sister when Hurst was very intoxicated and had gotten into a physical confrontation with members of the household. (TR 118; Caldwell Depo. at p. 45). Hurst had broken fixtures in the household, damaged the cabinets and smashed the glass out of the stove. Chief Caldwell also explained that there have been many reports of Hurst being in fights over the years and that his criminal history involves numerous charges for thefts, child support and various felony warrants. *Id*. at p. 49-50, 55.

Chief Caldwell's statement to dispatch that he was "pretty sure" that Hurst was a convicted felon was based on his sincere belief that Hurst was a convicted felon. Chief Caldwell explained that this belief was based on personal observation of numerous felony warrants for Hurst over the years. (TR 118; Caldwell Depo. at p. 54-55). Hurst admitted that at the time of the incident he had at least two active warrants, one of which was an outstanding felony warrant. (TR 125; Hurst Depo. at p. 43-44). However, Chief Caldwell's

statement regarding Hurst's felony status was not definitive since he did not state that Hurst "is" or "was" a convicted felon, only that he ***thought*** he was, which was made in good faith. Hurst was also charged with a felony for fleeing and evading the police related to this incident. (TR 125; Hurst Depo. at p. 44).

Following Chief Caldwell's communications with dispatch, Officer Eldridge spotted Hurst's vehicle parked near the Cricketeer Building in Harrodsburg. (TR 742; Eldridge Depo. at p. 33-34).[2] Hurst was inside the home of Ricky Goodlett when Officer Eldridge spotted Hurst's parked vehicle. When Hurst exited the house onto the front porch, Officer Eldridge told Hurst to "stop right there" and that he was "under arrest." *Id*. at p. 34. Hurst immediately ran back into the house and exited out the back door on foot. *Id*. While Officer Eldridge was securing Hurst's vehicle, ***he observed bullets in Hurst's console*** and then radioed Hurst's position to the other officers. *Id*. at p. 35-38.

Officer Eldridge then drove a short distance and spotted Hurst running through a field near the Cricketeer Building. *Id*. at p. 39. This was during the nighttime hours and the field was dark. Deputy Paul Parks (hereinafter "Deputy Parks") and Officer Jason Elder (hereinafter "Officer Elder") also arrived at the scene. *Id*. at p. 45. Officer Eldridge had his flashlight

[2] Although relevant portions of Officer Eldridge's deposition testimony were attached to Defendants' Motion for Summary Judgment, his deposition is found in its entirety in Volume 5 of the record beginning at TR 742 and citations to Officer Eldridge's deposition herein are to the full transcript found in Volume 5.

out and told Hurst to get down on the ground and that he was under arrest. *Id*. at p. 46. Hurst refused and ran towards Officer Eldridge. Faced with this immediate threat, Officer Eldridge drew his firearm and ordered him again to get on the ground. *Id*. As Hurst ran towards Officer Eldridge, Officer Eldridge started backing up. Hurst finally slowed his pace to a walk but continued to approach Officer Eldridge. Hurst pointed towards his own chest and said "shoot me" and "let's fucking end this." *Id*. Hurst then placed his hand into his jeans pocket and said "let's end this, I'm tired, tell my family I love them" all the while walking towards Officer Eldridge, with Officer Eldridge walking backwards. *Id*.

Officer Eldridge repeatedly ordered Hurst to get down on the ground and that he was under arrest. Deputy Parks also commanded Hurst to get down on the ground. Hurst again said "let's end this; I'm tired of living, I don't want to do this no more, tell my family I love them," pointed towards his chest and said "put it here, right here." *Id*. at 47-48. Officer Eldridge continued to walk backwards until he realized that he was walking uphill and was becoming unsteady on his feet. At that point, he told Hurst that he was not backing up anymore and to get down on the ground. *Id*. Hurst again said "let's end this" and quickly ran his hands through his coat pocket, prompting Officer Eldridge to fire one round, hitting Hurst in the stomach. *Id*. at 50.

Chief Caldwell arrived on the scene ***after*** the shooting. Hurst was treated at the scene by EMS. Chief Caldwell complied with EMS's request to accompany

Hurst in the ambulance to the helipad. (TR 118; Caldwell Depo. at p. 32, 40). It should be noted that on the night of the shooting incident, Chief Caldwell did not have ***any contact or communication with Hurst*** until after the shooting occurred, when Chief Caldwell arrived at the scene and was asked to accompany Hurst to the helipad. Chief Caldwell did not shoot Hurst, did not tell anyone to shoot Hurst and was not present when Hurst was shot by Officer Eldridge. Chief Caldwell was not even in the same zip code when the shooting occurred. The entire crux of Hurst's claims against Chief Caldwell and the City of Burgin relate to Chief Caldwell's communications with 911 dispatch, which are wholly insufficient to support any claim of negligence.

II. PROCEDURAL HISTORY

Defendants' Motion for Summary Judgment

On November 1, 2010, Chief Caldwell and the City of Burgin[3] filed a Motion for Summary Judgment seeking dismissal of all claims. On April 4, 2011, the Mercer Circuit Court granted Summary Judgment to these Defendants on all claims asserted by Hurst. The court found that due to a lack of a "special relationship" between the parties and the existence of a superseding cause of Hurst's injuries, Defendants were entitled to

[3] Chief Caldwell and the City of Burgin were Defendants in the original action and may be referred to as Defendants or Respondents throughout this pleading.

summary judgment. (TR 409; Order entered April 4, 2011 at p. 10).

Plaintiff's Motion to Alter, Amend or Vacate

On April 14, 2011, Hurst filed a Motion to Alter, Amend, Vacate and/or Clarify Summary Judgment by attaching his own self-serving affidavit sworn on April 14, 2011, ten (10) days after entry of summary judgment, in an attempt to cure his deposition testimony deficiencies. Hurst's affidavit qualified as a sham affidavit and should have been disregarded by the court. ***Hurst admitted in his deposition testimony that he was asked by the Officers on at least <u>three</u> occasions to comply with the orders to get down on the ground.*** (TR 444; Hurst Depo. at p. 27). Hurst's affidavit at paragraph 5 states that "On the night in question, I did not resist, but simply asked the officers to explain why they were so aggressive and hostile." (TR 431; Tommy Hurst affidavit). However, Hurst's deposition testimony unequivocally shows that Hurst resisted the Officers' commands by having to be asked at least three times to get down on the ground. Hurst's affidavit did not explain the prior inconsistencies and was nothing more than a self-serving statement attempting to create an issue of fact. Under these circumstances, it was error for the Mercer Circuit Court to consider Hurst's sham affidavit, which was the catalyst for reversing summary judgment. The Mercer Circuit Court found that:

> The parties disagree on several facts significant to this case. It is unclear whether Caldwell transmitted his dispatch message in good faith or whether he knew it was erroneous. Further, the parties dispute whether Plaintiff advanced toward Officer Eldridge during their confrontation, causing him to shoot, or whether Plaintiff merely ignored orders to get on the ground. If Caldwell negligently transmitted an erroneous message, the confrontation between Plaintiff and Eldridge cannot supersede foreseeability as a matter of law.

(TR 454; Order entered July 15, 2011 at p. 3). The Mercer Circuit Court granted in part the Motion to Alter, Amend or Vacate, finding that Chief Caldwell and Burgin were entitled to summary judgment on Plaintiff's §1983 claims, to the extent they were plead, but denied summary judgment with respect to Hurst's state tort claims. *Id*. at p. 4.

Defendants' Motion to Alter, Amend or Vacate

As a result of the Mercer Circuit Court error, on July 25, 2011, Defendants Chief Caldwell and the City of Burgin filed a Motion to Alter, Amend or Vacate the Court's Order entered July 15, 2011. Although Defendants were perplexed at the court's reinstatement of Hurst's state tort claim, it appeared that the Mercer Circuit Court's reasoning was based solely on acceptance of Hurst's own unchallenged, self-serving affidavit that was executed ***after*** summary judgment

was entered which contradicted his deposition testimony in an attempt to create a disputed material fact.

The Mercer Circuit Court stated that "If Caldwell negligently transmitted an erroneous message, the confrontation between Plaintiff and Eldridge cannot supersede foreseeability as a matter of law." (TR 454; Order entered July 15, 2011 at p. 3). However, there was no evidence that Chief Caldwell negligently transmitted an erroneous message to dispatch. Chief Caldwell's statement to dispatch that he was "pretty sure" that Hurst was a convicted felon was based on his sincere belief that Hurst was a convicted felon. Chief Caldwell explained that this belief was based on personal observation of numerous felony warrants for Hurst over the years. (TR 118; Caldwell Depo. at p. 54-55). At the time of this incident, Hurst had at least two active warrants, one of which was an outstanding felony warrant. (TR 125; Hurst Depo. at p. 43-44). Chief Caldwell did not report that Hurst had a weapon, he reported ***specifically*** that they "did ***not*** see a weapon on this occasion." (Appendix; TR 97, 911 emergency dispatch transcript at p. 9-10). Also, this is precisely what Ms. Nickels reported to dispatch that her son had told her (that Hurst had shown up at his home, threatened him and implied that he had a gun) when she called 911.

In an effort to further demonstrate Chief Caldwell's innocuous statement to dispatch, Defendants attached a CD containing the 911 audio recording itself. (TR 458; Defendants' Motion to Alter, Amend or Vacate). For the convenience of the Kentucky Court of

Appeals, a CD containing the audio recording of the 911 call was attached to Appellees' Brief as Tab 2.

On December 21, 2011, the Mercer Circuit Court granted Defendants' Motion to Alter, Amend or Vacate and vacated the July 15, 2011 Order. It reinstated its previous Order of April 4, 2011 granting summary judgment to these Defendants on all claims. The Mercer Circuit Court explained that, "***After listening to the recording***, the Court determines that Caldwell did not transmit a message that Plaintiff was armed. To the contrary, the message indicated that no one had seen a weapon on Plaintiff . . . As such, Caldwell truthfully reported that no one had seen a gun on Plaintiff. . . ." (TR 584; Order entered December 21, 2011 at p. 2-4) (emphasis added).

Plaintiff's Motion to Vacate Summary Judgment

On August 22, 2014, nearly three (3) years after Chief Caldwell and the City of Burgin were granted summary judgment, Hurst filed a Motion to Vacate Summary Judgment a few months before trial was set to begin with the remaining Defendants City of Harrodsburg and Officer Jason Eldridge. As the basis for his Motion, Hurst claimed that Aaron Nickels' deposition testimony contradicted his affidavit. As set forth in more detail herein, the Mercer Circuit Court properly found that, "Nickels' deposition fails to change any of the Court's conclusions in its December 21, 2011 Order" and the Motion to Vacate Summary Judgment was properly denied. (TR 981; Order entered January 21, 2015 at p. 1).

The Mercer Circuit Court's Order entered January 21, 2015 did not include the language that the Order was "final and appealable" and Defendants Chief Caldwell and Burgin filed a Motion to Clarify the Court's Order. The Mercer Circuit Court granted the Motion to Clarify its Order and held that the Order was "final and appealable." (TR 1017; Order entered April 27, 2015). On or about March 20, 2015, Defendants Harrodsburg and Eldridge filed a Motion for Leave to File a Third Party Complaint against dismissed parties Chief Caldwell and Burgin for purposes of indemnification and/or apportionment. (TR 989). The Motion for Leave to File a Third Party Complaint was denied by the Mercer Circuit Court by Order entered April 27, 2015. (TR 1020).

On May 5, 2015, Hurst filed an appeal with the Kentucky Court of Appeals. On January 13, 2017, the Kentucky Court of Appeals rendered a unanimous Opinion Affirming the Mercer Circuit Court's Order granting summary judgment in favor of Chief Caldwell and the City of Burgin on all of Hurst's claims. (Appendix; Kentucky Court of Appeals Opinion Affirming at p. 12). On February 3, 2017, Hurst filed a Petition for Rehearing which was denied by the Kentucky Court of Appeals on August 16, 2017. On September 15, 2017, Hurst filed a Motion for Discretionary Review with the Supreme Court of Kentucky. On February 7, 2018, the Supreme Court of Kentucky denied discretionary review.

REASONS FOR DENYING THE WRIT

After nearly a decade of exhaustive and expensive litigation, we have now arrived at the Supreme Court of the United States where Hurst has filed a Petition for a Writ of Certiorari. This is Hurst's final attempt to breathe life into a case that has failed at every turn. This case has been reviewed at length by five (5) different judges[4] who have all found that Hurst's claims against Chief Caldwell and the City of Burgin lack merit. Similarly, the Supreme Court of Kentucky denied discretionary review of the case by Order signed by John D. Minton, Jr., Chief Justice of the Supreme Court of Kentucky. Hurst's last-ditch effort before this honorable Court is futile. There are no unique issues of law presented and no issues of first impression. The claims and issues forming the basis of Hurst's Complaint were disposed of using well-established and unambiguous case law. Additionally, there are no disputed issues of fact which would alter the outcome of this case and no "compelling reason" which would warrant the granting of Hurst's Petition for Writ of Certiorari. In sum, this is a "run of the mill" case governed by adequate, well-articulated case law and clear facts. There is nothing special about this case in any

[4] This case was decided by Judge Robert G. Johnson, Special Judge, for the Mercer Circuit Court. At the Kentucky Court of Appeals, Judge James H. Lambert, Judge Sara Walter Combs and Judge Laurence B. VanMeter reviewed the appeal. Following the departure of Judge Laurence B. VanMeter to the Supreme Court of Kentucky, the Petition for Rehearing at the Kentucky Court of Appeals was decided by Judge Sara Walter Combs, Judge James H. Lambert and Judge Janet L. Stumbo.

respect, including its handling by the courts below. Therefore, the Petition for Writ of Certiorari should be denied.

I. THE KENTUCKY COURT OF APPEALS CORRECTLY HELD THAT CHIEF CALDWELL AND THE CITY OF BURGIN WERE ENTITLED TO SUMMARY JUDGMENT ON HURST'S NEGLIGENCE AND 42 U.S.C. §1983 CLAIMS

"In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff." *Lewis v. B&R Corp*., 56 S.W.3d 432 (Ky. App. 2001).

A. A "Special Relationship" Between Chief Caldwell And Hurst Must Be Present In Order For A Duty To Exist.

The question in any negligence action is whether the defendant owes a legal duty to the plaintiff. The particular circumstances of the case must be considered in order to ascertain whether a duty is owed. To establish a negligence claim against a public official, the complaint must allege a violation of a special duty owed to a specific identifiable person and not merely the breach of a general duty owed to the public at large. *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986) citing *Fryman v. Harrison*, 96 S.W.2d 908, 910 (Ky. 1995).

In the case of *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387 (Ky. 2001), the Supreme Court of Kentucky examined a wrongful death negligence action against police officers and their employer, the City of Florence. The Supreme Court of Kentucky held that, ***in order for a negligence claim to be actionable, there must be the existence of a duty and unless a "special relationship" was present, there is no duty*** owing from any of the police officers to protect the victim from crime or accident. *Id*. at 392. The *Chipman* court cited *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995), for the two requirements of a "special relationship": (1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred and (2) the violence or other offensive conduct must have been committed by a state actor. Further, the court noted that it is a question of law whether the victim was in custody so as to establish a special relationship. *Id*.

B. The *DeShaney* Case Is Not Relevant To The Case At Bar.

Hurst argues that the "special relationship" rule should not preclude liability under 42 U.S.C. §1983 and that the Kentucky Court of Appeals' interpretation of the special relationship rule "turns constitutional jurisprudence on its head." (Petition for Writ of Certiorari at p. 9). Hurst cites the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998 (1989) which he alleges even supports the notion 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.'" (Petition for Writ of Certiorari at p. 10). Hurst's reliance upon *DeShaney* is misplaced and immaterial to the case at bar.

In *DeShaney*, this Court examined deeply tragic circumstances wherein a father subjected his infant child to a series of beatings which led to permanent brain damage in the infant child. The infant child's mother filed suit against social workers and local officials who received complaints that the minor child was being abused by his father. The mother alleged that the respondents' failure to act deprived the minor child of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This Court held that the respondents did not violate any due process rights of the minor child. In rendering its decision, the Court explained that:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State

> to ensure that those interests do not come to harm through other means.

Id. at p. 195. The Court further held that, "As a general rule, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id*. at p. 197.

However, this Court recognized that some "special relationships" may "give rise to affirmative duties to act under the common law of tort" but that the claim in *DeShaney* was based on the Due Process Clause of the Fourteenth Amendment, which, "as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." *Id*. at p. 202. "A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment.'" *Daniels v. Williams*, 474 U.S. 327, 335 (1986). *Id*. In its conclusion, the Court determined that "Because, as explained above, the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so – though calamitous in hindsight – simply does not constitute a violation of the Due Process Clause." *Id*. at p. 202.

DeShaney is not relevant to the case at bar because there is no violation of due process when the State does not protect an individual from private harm. Further, the Kentucky Court of Appeals' interpretation

of the "special relationship" test does not turn "constitutional jurisprudence on its head" as alleged by Hurst nor does he explain any such contention. Hurst may not like the "special relationship" test established under Kentucky law but it is the law in Kentucky and the facts of this case simply do not give rise to a violation of any due process rights. Hurst has set forth no compelling reason for the Court to grant review of the "special relationship" test and his citation to *DeShaney* is inapplicable herein.

C. The Kentucky Court Of Appeals Correctly Held That There Was No "Special Relationship" Between Chief Caldwell And Hurst.

In reviewing Hurst's appeal, the Kentucky Court of Appeals properly determined that a special relationship between Chief Caldwell and Hurst must be present in order for a duty to exist. The Kentucky Court of Appeals explained that:

> In order to establish an affirmative legal duty on public officials in the performance of their official duties, there must exist a special relationship between the victim and the public officials. *Ashby v. Louisville*, 841 S.W.2d 184 (Ky. App. 1992). **Such a requirement relates not only to actions pursuant to 42 U.S.C. §1983, but to an ordinary tort case as this one.** *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995).

(Kentucky Court of Appeals Opinion Affirming at p. 9-10) (emphasis added). The Kentucky Court of Appeals also noted the special relationship test set forth in *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387 (Ky. 2001) and its applicability herein. In applying the "special relationship" test to the case at bar, there is ***no*** evidence that: (1) Hurst was in Chief Caldwell or the City of Burgin's custody or otherwise restrained by them at the time the injury producing act (the shooting) occurred and no evidence that (2) the violence or other offensive conduct (the shooting) was committed by Chief Caldwell. *Fryman*, *supra*. Therefore, because there was no "special relationship" between Chief Caldwell and Hurst, Chief Caldwell owed no duty to Hurst and his negligence claims fail. The Kentucky Court of Appeals correctly held that:

> Hurst failed to establish the threshold requirement that he was in state custody when Caldwell transmitted his dispatch call so as to establish a special relationship between Caldwell and Hurst. Accordingly, the trial court properly granted summary judgment in favor of Caldwell and the City of Burgin as a matter of law since no special relationship and resulting duty existed.

(Kentucky Court of Appeals Opinion Affirming at p. 10). The Kentucky Court of Appeals properly held that there was no special relationship between Chief Caldwell and Hurst and therefore no duty. Because there was no duty, Hurst's negligence claim failed as a matter of law.

D. Even If It Were Determined That A "Special Relationship" Somehow Existed Between Chief Caldwell And Hurst, And Thus A Duty Owed, Hurst Cannot Satisfy The Remaining Elements Of His Negligence Claims.

Assuming *arguendo*, even if it were determined that a "special relationship" somehow existed between Chief Caldwell and Hurst, thereby establishing a duty, Hurst's claims for negligence still fail because he cannot satisfy the remaining elements of his negligence claim – a breach of that duty and a causal connection between the breach of the duty and an injury he suffered. *Lewis v. B&R Corp*., 56 S.W.3d 432, 436-37 (Ky. App. 2001).

1. There Is No Evidence That Chief Caldwell Reported A False Criminal History Regarding Hurst.

Hurst alleged that Chief Caldwell negligently reported a false criminal history about him to dispatch, yet there is no evidence of such false criminal history. (TR 1; Complaint at Paragraph 6 and Petition for Writ of Certiorari at p. 2). Hurst testified that this alleged false criminal history is based on Chief Caldwell specifically reporting to dispatch that he was a convicted felon. (TR 125; Hurst Depo. at p. 40-41). Chief Caldwell stated to dispatch:

> I'm pretty sure he's a convicted felon. They did not see a weapon on this occasion but the subject gestured down his crotch like he had a weapon and has brandished a weapon out here in the past.

(Appendix; TR 97; 911 emergency dispatch transcript at p. 9-10). Chief Caldwell's words indicated that he *thought* that Hurst was a convicted felon. No definitive language was used. Chief Caldwell's statement was based on the fact that Hurst had an outstanding felony warrant at the time of the incident and Hurst had been charged repeatedly with felony charges in the past. (TR 118; Caldwell Depo. at p. 54-55). Further, the 911 recording revealed that dispatch reported that there were "two active 1029's on James T. Hurst, II." (Appendix; TR 97; 911 emergency dispatch tape transcript at p. 9).

Hurst attempts to characterize any statements by Chief Caldwell as being tainted by alleged "bad blood" between Chief Caldwell and Hurst's family. (Petition for Writ of Certiorari at p. 4). Hurst contends that there may be "bad blood" due to "unpaid debts related to that business transaction." *Id*. However, Chief Caldwell never indicated that there was any unpaid debt and it is unclear to what specifically Hurst is referring. Nevertheless, for purposes of summary judgment, this is not a material fact. "An issue of nonmaterial fact will not preclude the granting of a summary judgment." *Isaacs v. Smith*, 5 S.W.3d 500, 503 (Ky. 1999). Simply put, there is no dispute regarding what Chief Caldwell said over the dispatch line. All of the statements that he made were factually accurate and relevant to the officers responding to the situation. As such, Hurst's

proffered conjecture simply goes to nonmaterial facts regarding the alleged historical relationship between Chief Caldwell and Hurst's family. The Mercer Circuit Court reviewed Chief Caldwell's statement to dispatch and found:

> First and foremost, the Court notes that Officer Caldwell's statement was not 'misconduct.' He stated that he was 'pretty sure' that Plaintiff was a convicted felon. He based this belief on Plaintiff's numerous violations of the law, as well as a preexisting warrant for Plaintiff's arrest for flagrant non-support. **It is quite reasonable any officer would pass along such information to fellow law enforcement officials who may be involved in apprehending a suspect.** 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.

(TR 584; Order entered December 21, 2011 at p. 2-4) (emphasis added). There is ***no*** evidence that Chief Caldwell's words regarding Hurst's criminal history were used recklessly, maliciously or in bad faith and summary judgment was properly affirmed by the Kentucky Court of Appeals.

2. There Is No Evidence That Chief Caldwell's Communications With Dispatch Constituted A Direct And Proximate Cause Of Officer Eldridge Shooting Hurst.

Hurst attempts to show that Officer Eldridge relied on allegedly false statements made by Chief Caldwell in deciding how to approach Hurst on the night in question. (Petition for Writ of Certiorari at p. 3). Hurst testified that Chief Caldwell's expression of a belief that Hurst may have been a convicted felon somehow "heightens a situation" and contributed to or caused his injuries. (TR 125; Hurst Depo. at p. 45-46). Hurst makes an inflammatory, egregious misrepresentation of fact by arguing that because of Chief Caldwell's statement, Officer Eldridge "was on high alert, and exited his vehicle with his weapon drawn." (Petition for Writ of Certiorari at p. 3). Hurst does not cite to the record for this statement (and does not cite to the record in support of ***any*** of his alleged "facts") and this characterization that Officer Eldridge exited his vehicle with his weapon drawn because of Chief Caldwell's radio call is utterly disingenuous and sanctionable. This mischaracterization is a desperate attempt to incite the Court. Hurst knows this statement is untrue based upon Officer Eldridge's deposition testimony and proffered the same argument to the lower courts. Hurst did not testify that he saw Officer Eldridge when he exited his vehicle and the other officers had not yet arrived on the scene. Thus, Officer Eldridge arrived first and is the only person with knowledge as to

whether he exited his vehicle with his weapon drawn. ***Officer Eldridge testified that he did <u>not</u> have his weapon drawn when he first existed his vehicle*** as set forth in his testimony below. Further, there is absolutely no evidence that Chief Caldwell's words contributed to and/or caused Officer Eldridge to shoot Hurst. Officer Eldridge testified that:

> Q. Do you disagree that the – Mr. Hurst's "reputation" was an integral part of your decision?
>
> A. I will agree that it will heighten how I respond to the complaint, what I'm looking for. I will agree that it's going to increase my threat level, but I'm not going to agree that it was a huge factor in my decision-making. ***His actions alone are what made me make the choice I did.*** There was a threat. He was ordered numerous times to stop and lie face down on the ground. When he stops and he runs his hands into his bulky jacket pocket and says, "Fuck it, let's end this," I'm not going to – I'm not going to take the chance.
>
> Q. Do you disagree with the statement that "Eldridge had his weapon drawn due to the nature of the complaint." Do you disagree with that?
>
> A. Yes. ***I'll only admit to drawing my weapon after he wouldn't comply with my orders based on the complaint. My weapon was never drawn when I first exited the vehicle.***
>
> Q. But your orders were based on the complaint?

A. My orders was to place him under arrest.

Q. But you – what were your orders to him?

A. My orders were originally when I run up the hill and yelled at Tommy to stop, as I began to turn the corner of that trailer that was there, Tommy was coming back running towards me. I took several steps back, had my flashlight on him. Told Tommy to stop, "you're under arrest, get down on the ground." He kept coming. I put my hand on my weapon. I said, "Tommy, you need to stop. You're under arrest. Lie face down on the ground." He continued to charge at me. That's when I drew my weapon.

Q. So not in response to the nature of the complaint?

A. Based upon the nature of the complaint, but no. ***Based upon his actions.***

(TR 742; Eldridge Depo. at p. 178-179) (emphasis added).

Based upon Officer Eldridge's testimony, ***it is clear that Officer Eldridge only drew his weapon after Hurst failed to comply with his orders***. Also, Officer Eldridge's testimony makes clear that ***the decision to shoot Hurst was based upon Hurst's actions alone*** towards him and not related to Chief Caldwell's expression that Hurst may be a convicted felon.

Hurst makes much of Officer Eldridge's interview with Detective Monte Owens (hereinafter "Detective Owens") following the shooting. (Petition for Writ of

Certiorari at p. 3). Although this interview constitutes an unsworn statement allegedly recorded by Detective Owens and transcribed by an unknown source,[5] the statements set forth therein support Officer Eldridge's deposition testimony. Officer Eldridge stated to Detective Owens that he heard Chief Caldwell say that the caller did ***not*** actually see a weapon but that the caller also stated that Hurst previously brandished a weapon on a different date. (Transcript of Interview with Officer Eldridge at p. 2 attached to Appellant's Brief, Kentucky Court of Appeals, at Tab 7).

In addition to Hurst inaccurately claiming that Officer Eldridge had his weapon drawn when he exited his vehicle due to Chief Caldwell's statements, he also incorrectly contends that "all of the officers testified that the situation was tense due to the nature of the call by Caldwell." (Petition for Writ of Certiorari at p. 3). This was ***not*** the testimony of the officers and Hurst does not identify which officers allegedly testified that the situation was tense due to Chief Caldwell's statements. Hurst also fails to offer any citation in the record to support such contention. If anything, the fact that Hurst admittedly refused to follow repeated demands to get down on the ground, his repeated refusal to take his hands out of his pockets, his continued walking towards the officers, his verbal expressions

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[5] The unsworn statement cannot be used to overcome sworn testimony and a motion for summary judgment, because, as a hearsay statement which is not subject to an exception to the hearsay rule, it is inadmissible as evidence. *James v. Wilson*, 95 S.W.3d 875, 898 (Ky. App. 2002).

that he wanted his life to end and to tell his family he loved them, his sudden movement by running his hand through his coat pocket, Officer Eldridge's observation of bullets in the console of Hurst's vehicle prior to locating him in the field, coupled with the darkness of the field during the nighttime hours, all seem reasonable to lead to a stressful situation which would have been caused by ***Hurst's own actions***. Regardless of Chief Caldwell's communications with dispatch, Officer Eldridge unequivocally testified regarding the reason he shot Hurst: ***"His [Hurst's] actions alone are what made me make the choice I did."*** (TR 742; Eldridge Depo. at p. 178-179). Accordingly, Chief Caldwell and Burgin were entitled to summary judgment because Hurst cannot satisfy a *prima facie* claim of negligence.

E. The Mercer Circuit Court Properly Disregarded Aaron Nickels' Deposition Testimony.

Hurst argues that summary judgment should have been set aside based on the deposition testimony of Aaron Nickels. (Petition for Writ of Certiorari at p. 8). On August 22, 2014, three (3) years after Chief Caldwell and the City of Burgin had been dismissed from the case, Hurst attempted to bring them back into the case by arguing that Mr. Nickels' sworn testimony had changed. (TR 797; Motion to Vacate Summary Judgment at p. 2). Hurst argued that Mr. Nickels did not see him on the night of the shooting and therefore, Chief Caldwell communicated a false message to

dispatch. *Id*. at p. 6. Mr. Nickels' deposition testimony on this point is irrelevant and does not change the lower court's basis for granting summary judgment.

In review of Mr. Nickels' deposition, there are numerous reasons why it was unreliable and should have been disregarded. Those reasons are set forth at length in Chief Caldwell and City of Burgin's Response to Motion to Vacate Summary Judgment (TR 824) and Sur-Reply to Reply of Plaintiff (TR 924). Significantly, Mr. Nickels' deposition testimony made it very clear that he did not remember what he told Chief Caldwell on the night of the shooting. (TR 811; Aaron Nickels Depo. at p. 18, 24). Moreover, it appeared that Hurst tampered with this witness because Mr. Nickels testified in his deposition that after he executed an affidavit that Hurst called him at work and told him that he [Nickels] had gone back on his word. *Id*. at p. 39-40. Regardless whether Mr. Nickels felt threatened by Hurst on the night in question or whether it was communicated to Chief Caldwell is immaterial to summary judgment.

The lower court has already reviewed this matter at length and correctly determined that Chief Caldwell conveyed a ***truthful*** message to dispatch wherein he stated that ***no*** weapon was seen on the night in question and he cannot be held liable for that statement. (TR 584; Order entered December 21, 2011 at p. 1-2). No agglomeration of words or theories can change this documented fact. This statement is truthful and has been corroborated by every single witness, including Chief Caldwell, Mr. Nickels, his mother, Beverly

Nickels (set forth herein),[6] Officer Eldridge and Hurst himself, to name a few. The Mercer Circuit Court acknowledged that Chief Caldwell did not transmit a message that was false and truthfully reported that no one had seen a gun on Hurst on this occasion. (TR 584; Order entered December 21, 2011 at p. 1-2).

Incredibly, Hurst presents another blatant misrepresentation of fact to this Court. Hurst contends that Defendants Officer Eldridge and the City of Harrodsburg moved the Mercer Circuit Court "for leave to file a Third-Party Complaint against Caldwell and Burgin, for Caldwell's false statements." (Petition for Writ of Certiorari at p. 8). This allegation is simply not true. Although Defendants Officer Eldridge and the City of Harrodsburg did move for leave to file a Third Party Complaint against Chief Caldwell and the City of Burgin (which was denied), the Motion for Leave was for the sole purpose of indemnification and/or apportionment and was not related to Chief Caldwell's alleged "false statements." (TR 989).

Notwithstanding Mr. Nickels' irrelevant deposition testimony, the Kentucky Court of Appeals properly found that there was no special relationship between Chief Caldwell and Hurst, and thus no duty existed. Without a duty, the claim for negligence fails as a matter of law. Moreover, the Mercer Circuit Court properly held that Hurst's actions towards Officer

[6] Ms. Nickels reported to dispatch that her son told her that Hurst had shown up at his home, threatened him and implied that he had a gun. This dialogue is found in the 911 transcript of record. (TR 97).

Eldridge were a superseding cause of his injuries. In denying the Motion to Vacate Summary Judgment, the Mercer Circuit Court correctly held:

> Plaintiff now requests that the Court reconsider that Order after Aaron Nickels, the alleged victim of Plaintiff's threats, gave a contradictory deposition on July 9, 2014, in which he states that an affidavit he swore to on July 22, 2011 about the events on November 30, 2007 was incorrect. The Court finds that Aaron Nickels' deposition fails to change any of the Court's conclusions in its December 21, 2011 Order.
>
> The Court concluded in its December 21, 2011 Order that 1) there was no special relationship between Plaintiff and Chief Caldwell, 2) Plaintiff's actions on the night of the shooting were a superseding cause and 3) Caldwell did not transmit a message to dispatch on the night of the shooting that Plaintiff was armed. The Court will not rehash its reasons for those findings as they are clearly set out in the December 21, 2011 Order. Aaron Nickels' deposition testimony does not alter any of the facts that support those rulings. Therefore, there is no reason for the Court to set aside that Order.

(TR 981; Order entered January 21, 2015 at p. 1-2). Hurst has set forth no reason why the Mercer Circuit Court's decision was reached in error or should be reversed by this Court.

F. The Kentucky Court of Appeals Correctly Held That The State-Created Danger Theory Does Not Apply Under Kentucky Law.

Hurst attempts to circumvent the special relationship requirement by improperly relying on the state-created danger theory of liability which is inapplicable under Kentucky law. (Petition for Writ of Certiorari at p. 10-11). The Mercer Circuit Court explained that "It is important to note that Kentucky has not adopted the state-created danger theory of liability for state tort claims." (TR 409; Order entered April 4, 2011 at p. 8). The Mercer Circuit Court explained:

> In *Kallstrom v. City of Columbus, Ohio*, 136 F.3d 1055 (6th Cir. 1998), the Sixth Circuit Court of Appeals adopted the state-created danger theory of liability and explained the test as follows:
>
> Liability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to ***private acts of violence***. (citations omitted). [B]ecause many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a ***constitutional tort under §1983*** to show a 'special danger' in the absence of a special relationship between the state and either the victim or the private tortfeasor. The victim faces 'special danger' where the state's actions place the victim specifically at risk, as distinguished

> from a risk that affects the public at large. (citations omitted). The state must have known or clearly should have known that its actions specifically endangered an individual. (citation omitted). *Id*. at 1066 (emphasis added).

(TR 409; Order entered April 4, 2011 at p. 8). In *Kallstrom*, the Sixth Circuit found the state liable under §1983 for private acts of violence where the state increased an individual's risk of danger, even in the absence of a special relationship. *Kallstrom*, 136 F.3d at 1066. It is clear that *Kallstrom* only talks in terms of the ***state*** increasing risk of harm from ***private*** acts of violence.

In reviewing the state-created danger theory, the Mercer Circuit Court held that it "does not render public actors liable for subjecting individuals to harm from other public actors." (TR 409; Order entered April 4, 2011 at p. 9). The theory simply applies to state actors increasing risk of harm from private individuals. The Mercer Circuit Court found that, "Had the federal courts intended the doctrine to apply to both public and private acts of violence, they would have indicated so." (TR 454; Order entered July 15, 2011 at p. 1-2). Accordingly, in order for the state-created danger theory to apply, Chief Caldwell must have "acted in a way that ultimately led, or could have led, to Plaintiff being injured by a private individual . . . " (TR 409; Order entered April 11, 2011 at p. 9). The act of Officer Eldridge shooting Plaintiff was a ***public*** act, not private. *Id*.

Further, Hurst cannot show that the state must have known or should have known that its actions

specifically endangered him. The party asserting the state-created danger rule must show that the state defendants ***knew or clearly should have known*** that their actions specifically endangered an individual. (TR 409; Order entered April 4, 2011 at p. 8; *Kallstrom*, 136 F.3d at 1067). In the case *sub judice*, there is absolutely no evidence that Chief Caldwell knew or should have known that his brief communications with dispatch would "specifically endanger" Hurst. There is no reason that Chief Caldwell should have known doing so would endanger Hurst because the information provided was factual and relevant to the officers. The Kentucky Court of Appeals examined the state-created danger theory and properly held that:

> In the case at bar, Hurst does not allege that any act on the part of Caldwell and the City of Burgin increased his individual risk of danger from a private act of violence committed by a private tortfeasor. Rather, Hurst's allegations stem from an act of violence (shooting) committed by another police officer, Eldridge. As a result, even if Kentucky had adopted the state-created danger theory of liability, Hurst's claims would not be actionable pursuant to it.

(Kentucky Court of Appeals Opinion Affirming at p. 12). Because the state-created danger theory is not applicable under Kentucky law, it is not relevant for purposes of Hurst's case and should be disregarded.

Examination of how the state-created danger theory ***could*** have applied to the facts of this case really

does not matter as "Kentucky has not adopted the state-created danger theory of liability for state tort claims." (TR 409; Order entered April 4, 2011 at p. 8). Regardless of its inapplicability, Hurst relies on the state-created danger theory considered by the Third Circuit case of *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004). (Petition for Writ of Certiorari at p. 11).

In *Rivas*, a §1983 action was brought against a group of police officers and emergency medical technicians who responded to an emergency in an apartment where a resident was experiencing a seizure. The court examined the state-created danger theory and considered the factors utilized in another case, *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996). In order to prove a claim under this theory, a plaintiff must show: (1) that the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state actor had acted in willful disregard for the plaintiff's safety; (3) there was some relationship between the state and the plaintiff; and (4) the state actor used his authority to create an opportunity for danger that otherwise would not have existed. *Id*. at 194. The *Rivas* court noted that recent decisions have refined the second element of the four-part test, most notably, in the context of a high-speed police chase resulting in death, that the plaintiffs must demonstrate that the police officer's conduct "shocked the conscience." *Id*. at 195.

In citing *Rivas*, Hurst incorrectly asserts that "Significantly, the Third Circuit found that providing false information was an affirmative act which shocked the conscience." (Petition for Writ of Certiorari

at p. 11). Contrary to Hurst's misrepresentation to this Court, the Third Circuit in *Rivas* rendered ***no*** such finding that the defendants "providing false information was an affirmative act which shocked the conscience." (Petition for Writ of Certiorari at p. 11). In fact, the court noted that, "If Garcia and Rodriguez misrepresented the assault, not only did they abdicate their duty to render medical assistance, but they placed Mr. Rivas in greater danger by falsely accusing him of acting violently. A jury could find depending on whose testimony it credits, that such conduct shocks the conscience." *Id*. at p. 196.

In the case at bar, to the extent that Hurst believes that the state-created danger theory set forth in *Rivas* applies to his case (which it does not), incredibly, he ***never*** bothered to apply the four-prong test set forth in *Rivas* to the facts of this case. Nevertheless, the facts of our case do not satisfy the four prongs as set forth in *Rivas*. Additionally, Hurst contends that, "In the present case, Caldwell did exactly that – provided false information, perhaps maliciously, rendering him liable for a state created danger." (Petition for Writ of Certiorari at p. 11). There is ***no*** evidence whatsoever that Chief Caldwell transmitted "false information" or that any information was given "maliciously." Chief Caldwell reported that no weapon was seen on this occasion which was true and he stated that he "thought" Hurst was a convicted felon based upon his sincere belief. As such, there is no false information contained within that statement.

Finally, Hurst requests that this Court grant his Petition "to resolve the conflict between the Third Circuit Court of Appeals and the courts of Kentucky" and that the result in this case "turns jurisprudence on its head." (Petition for Writ of Certiorari at p. 11). First, there is no conflict between the Third Circuit Court of Appeals and the courts of Kentucky. Kentucky law requires a special relationship to have existed between Chief Caldwell and Hurst before an affirmative duty would arise. Hurst's argument regarding the state-created danger theory is irrelevant since it is not applicable under Kentucky law and further, if applicable, would have required Hurst to be injured by a private individual not a public actor. In reality, Hurst's argument that the outcome of this case "turns constitutional jurisprudence on its head" is tantamount to uttering the words, "I do not like the result that the law dictates." While this case has not led to the result Hurst favors, the lower courts have simply followed controlling law. The Kentucky Court of Appeals properly held that Chief Caldwell and Burgin were entitled to summary judgment because Hurst failed to satisfy a *prima facie* claim of negligence.

CONCLUSION

The Kentucky Court of Appeals correctly determined that Hurst failed to establish a special relationship between himself and Chief Caldwell and the City of Burgin and, therefore, he has failed to prove the existence of a legal duty so as to allow his state

negligence claims and §1983 claims to survive summary judgment. (Kentucky Court of Appeals Opinion Affirming at p. 12-13). Further, the state-created danger theory of liability is inapplicable under Kentucky law. Hurst has presented no reversible error or raised any "compelling reason" which would warrant the granting of his Petition for Writ of Certiorari. The Kentucky Court of Appeals' unanimous Opinion Affirming summary judgment was properly rendered and after nearly a decade, at long last, this case must be put to rest.

Respectfully submitted,

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