

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

REPLY BRIEF OF PETITIONER

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INTRODUCTORY STATEMENT

In the Petition for Writ of Certiorari, James Thomas Hurst, II presented two questions to this Court:

QUESTION 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?

QUESTION 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?

Interestingly, Respondents, James Caldwell and City of Burgin, Kentucky did not actually respond to these questions in the context of federal civil rights claims pursuant to 42 U.S.C. § 1983. Instead, they spend much of the Response addressing the applicability of the special relationship doctrine and the state created danger doctrine to the claims that arise solely under Kentucky state law. While Petitioner disagrees with the rulings of the Kentucky courts on the claims arising solely under state law,¹ Petitioner is

¹ Under Kentucky law, “as a general rule, an actor whose own conduct has not created a risk of harm has no duty to control the conduct of a third person to prevent him from causing harm

not of the belief that this Court will address issues that solely apply to Kentucky law and therefore will not address them in this Reply.

Respondents spend the vast majority of the of their opposition brief setting out their alternative facts, this Reply will focus on those issues.



REPLY SUPPORTING PETITIONER'S STATEMENT OF THE CASE

In their Response to the Petition for Certiorari Respondents Caldwell and City of Burgin regale the Court with a tale worthy of J.K. Rowling. However, this version of events is completely contradicted by Mr. Hurst's testimony, the recorded statements the officers and witnesses gave to the Kentucky State Police investigators on the night of the shooting and the deposition testimony!

to another. This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. The reason for this common law distinction is that misfeasance creates a new risk of harm to the plaintiff, whereas nonfeasance does not make the plaintiff's situation any worse, although it fails to benefit him." *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 849 (Ky., 2005) (emphasis added, citation and quotations omitted). Petitioner's position is this statement of Kentucky law applied to a government actor is essentially the state created danger doctrine.

A. THE ALLEGED VICTIM OF TOMMY HURST'S INITIAL THREATS DENIED TOMMY THREATENED HIM THAT NIGHT AND DENIED THAT HE OBSERVED TOMMY INDICATE HE HAD A GUN

Contrary to Caldwell's sworn testimony and the argument of Respondents' counsel, Aaron Nickles denied to Detective Owens of the Kentucky State Police that Tommy Hurst threatened him on the night in question. *Transcript of the interview with Aaron Nickles*. Beginning at page 5 of Mr. Nickles' statement he made it clear that he only saw Tommy's car that night when Tommy was revving the engine because the car would not start. Nickles, pp. 5. According to Nickles, Tommy left the scene so quickly that Aaron did not see him and he wasn't even going to call the police. Nickles p. 9. It is important to note that Tommy was in the vicinity of Nickles' trailer because it was located within feet of Tommy's parents' home, which was well known to Caldwell. *Tommy Hurst Deposition*, pp. 37-38; *Nickles Statement*, p. 6. *James Caldwell Deposition* p. 61. Given these facts, it is obvious that Tommy could not have said "I've got something for you big boy," or gestured to his waist band as if he had a weapon as alleged by Caldwell.

During his deposition, Mr. Nickles reaffirmed what he told the Kentucky State Police on the night Tommy Hurst was shot—that he never saw Tommy and only got a glimpse of his truck that night when he heard the engine revving. Depo. Aaron Nickles, July 9, 2014, (Pages 5:15 to 5:25; 7:2 to 7:24; 13:5 to 13:16):

[p.5]

Q. Let me ask you this and just in general terms, what do you generally recall about

what happened just really about Tommy that night. And I know from the interview you talked about a lot of other things, but Tommy that night.

A. That night, I didn't really—the night he got shot?

Q. Right.

A. I didn't really—I don't really remember seeing him. I seen his vehicle, heard it, and that—you know, that was about it . . .

[. . . p.7]

Q. . . . But from what I understood from what you said to the officer that night was once you heard the—you heard the engine, saw who it was, lock your door—

A. Yeah.

Q. —you never look back out again and saw the truck.

A. No, until the truck, it was gone.

Q. The next time you looked out—

A. I remember it being gone. Yes, it was gone and then Jim pulled up.

Q. Sure. When you went out there and-well, not went out there. When you looked out the window, were you looking at it for ten minutes? How long did you look at it?

A. No, just a glimpse.

Q. Just seconds?

A. From what I remember. From what I remember, yeah.

Q. Right. And that's not inconsistent with what you told the state police that night. Right? It was just a glimpse?

A. Yeah.

[. . . p.13]

Q. All right. What—and I know you got interviewed that night by the state police. And is there—you've given us little things like that, you said you think Tommy might have been up—his vehicle might have been up by The Barn. Right?

A. Yeah. Yeah.

Q. Let me ask you this. Did you actually ever see, physically see Tommy or see just his truck?

A. Just his truck. Yes, sir.

Q. And so you—well, I guess that's an obvious question. He didn't talk to you?

A. No, not that night.

And, since he never saw Tommy nor spoke to Nickles, Depo. Aaron Nickles, July 9, 2014, (Pages 13:14 to 13:16), ("I guess that's an obvious question. He [Tommy Hurst] didn't talk to you?" Nickles—"No, not that night.") Obviously, if Aaron Nickles didn't see Tommy Hurst, nor speak with him, Tommy could not have threatened Mr. Nickles on the night Chief Caldwell started the manhunt that ultimately resulted in Tommy Hurst being shot.

**B. CALDWELL’S ALLEGED BELIEF THAT TOMMY WAS A
“CONVICTED FELON” IS NOT TO BE BELIEVED**

The Court should disregard Caldwell’s self-serving statements that he thought Tommy was a convicted felon, as the jury could simply choose to disbelieve him. Additionally, the jury could infer from the circumstantial evidence that Caldwell knew that Tommy Hurst was not a convicted felon.

Chief Caldwell has known Tommy Hurst, and his family for years. He lived on Hurst’s parents’ property, within feet of the Hurst home and the trailer occupied by Aaron Nickles. *Tommy Hurst Deposition*, pp. 37-38. *James Caldwell Deposition* pp. 61. He testified that some time before the night in question he had reviewed Tommy Hurst record and was aware there were “warrants” because he told Nickles this in the context that he should just call the next time Tommy came around and Caldwell would arrest him. *Caldwell Depo.* pp. 66-67.

**C. THERE IS BAD BLOOD BETWEEN CALDWELL AND
HURST’S FAMILY**

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. *Tommy Hurst Depo.*, p. 40; and *Affidavit of Tommy Hurst, Senior*. This alone could convince a jury not to rely on Caldwell’s statement of subjective belief. 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.²

D. CALDWELL’S FALSE STATEMENTS WERE CLEARLY A SIGNIFICANT CONTRIBUTING FACTOR IN THE SHOOTING OF TOMMY HURST

The Officer, who shot Tommy Hurst, Jason Eldridge, also gave a recorded statement to the Kentucky State Police on the night of the shooting, which contradicted his deposition testimony. *Transcript of the interview with Jason Eldridge*. On the night in question Eldridge told the KSP that he recalled Caldwell’s false statement over dispatch that Tommy Hurst had threatened someone with a weapon. *Id.* pp. 2. He also stated that even before he was approached by Tommy “I had already drawn my weapon, had a flashlight on him due to the fact of the complaint that you know he had threatened these people with a weapon over in Burgin.” *Id.* pp. 6. His mental state is even clearer as he responds to the questions of the KSP Detective, Monte Owens:

MONTE OWENS: Okay, Jason were you, from Mr. Hurst actions tonight, you were concerned that he was armed when he had his hands in there so I’m assuming from your actions you were afraid for your life, is that correct?

JASON ELDERIDGE: Yes sir.

MONTE OWENS: And from the call you had tonight you had every reason in your mind to suspect that this could happen.

² Depo. Aaron Nickles, July 9, 2014, (Pages 5:15 to 5:25; 7:2 to 7:24; 13:5 to 13:16)

JASON ELDERIDGE: Yes sir.

Id. pp. 9.

Office Eldridge and his employer the City of Harrodsburg moved the trial court for leave to file a Third-Party Complaint against Caldwell and his employer Burgin because Caldwell's false statements set the events in motion. Reply.App.5a.

E. TOMMY HURST DID NOT PROMPT THE SHOOTING, IT WAS DUE TO THE OVERHEATED SITUATION CREATED BY CALDWELL

On the night in question Tommy Hurst was getting ready to leave town to restart the job he had lost 6 months before. *Tommy Hurst Depo.*, p. 19. He had just learned that his ex-wife had filed a non-support complaint against him that was unfounded, and he had contacted the Sheriff directly to try to avoid being arrested so he would not lose the job again. *Id.*³ It was in this context, that Mr. Hurst went out the back door of his cousin's house to walk home when he saw a police cruiser. *Id.* 19-20. As he was walking across the darkened field near his cousin's he heard a police officer call out and he stopped. *Id.* 20-21. Officer Eldridge then drove his car up to Tommy. What happened next needs to be seen literally, beginning at pages 24 and 25 of Tommy's deposition:

³ His ex-wife was already trying to retract the complaint and the charges that the outstanding warrants was based upon were later dropped.

[p.27]

Q. Okay. Tell me what happened after that.

A. He gets out, has his weapon drawn.

THE DEPONENT: Can I say what he said?

MR. HORNE: Yeah.

A. Told me to get on the [f%\$king] ground or he was he was going to shoot me. I looked at him, like, what? I said, "Where's Chris Card at? He knows all about this warrant's going to be recalled." He said, "I told you get on the [f%\$king] ground or I'm going to shoot you." I said, "Man, what are you talking like that for?" I said, "Hell, if you want to shoot me, go on and shoot me." "Get on the ground or I'll shoot you." Pow.

Q. Okay. So that's how it happened?

A. That's exactly how it happened on everything.

Q. Why did you refuse the order to lay on the ground?

A. I never—I've had—I've been arrested in Harrodsburg numerous times. They don't even put handcuffs on me. "Get in the car, Tommy." Okay. "Let's go." I've never had—I didn't know what the hostility was. This is a child support warrant and I'm not . . .

Q. So, you don't know what Officer Eldridge is thinking is that—

A. I don't know what's wrong.

Q. You don't know what's going through his head?

A. Ain't got a clue.

Q. You don't know if he'd been told that you had a gun or not?

A. Did not know that.

Q. Where were your hands when this was going on?

A. At what point?

Q. Okay. When you first stopped, where were your hands?

A. I think in my jacket pocket.

Q. All right. Did he ask you to take your hands out of your pockets?

A. Yes, sir.

Q. Did you do that?

A. Yes, sir.

Q. Okay. When did you take your hands out?

A. Soon as he asked me to.

[. . . p.28]

Q. Did you ever put your hands back in—

A. No, sir.

Q. —your pockets—

A. No, sir.

Q. —at any time?

A. No, sir.

Q. Did you ever reach inside your jacket—

A. No, sir.

Q. —at any time?

A. No, sir.

THE COURT REPORTER: Can we just kind of stop the talking over each other?

Q. Did you ever advance toward Officer Eldridge?

A. No, sir.

Tommy Hurst Depo., pp. 24-25 and 28. Based in part on Tommy Hurst's deposition testimony the trial court denied Officer Eldridge's Motion for Summary Judgment. Reply.App.1a. Again Eldridge and Harrodsburg moved to assert claims against Respondents for Caldwell's actions Reply.App.5a.

**CONTRARY TO RESPONDENTS' POSTURING
THE COURT'S ANALYSIS IN *DESHANEY* IS
APPLICABLE TO THE MATTER *SUB JUDICE***

Petitioner stands by the position that *DeShaney* is the seminal case discussing the special relationship doctrine in the federal courts. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989). It sets out the parameters of the special relationship doctrine and possible exceptions. Analyzing *DeShaney* the Sixth Circuit has noted:

In *DeShaney v. Winnebago County Dep't of Social Servs.*, . . . The Court stated that, "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation,

nor did it do anything to render him any more vulnerable to them.” *Id.* at 201, 109 S.Ct. at 1006. Several courts of appeals have cited this statement as support for recognizing a constitutional violation under a state-created-danger theory of liability. . . . In other words, while the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts.

Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) (citations omitted, emphasis added, emphasis in original). The Sixth Circuit further elaborated:

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. As explained by the Seventh Circuit, “[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.”

Id. at 1067 (citations omitted, emphasis added).

Petitioner also affirms that *Rivas v. City of Pas-saic*, 365 F.3d 181 (3rd Cir. 2004) is directly pertinent to this matter. Respondents claim the four-part test in *Rivas* defeats Petitioner’s claims:

(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.

Response pp. 34-35. Petitioner can only say this posturing is nonsensical. It is undisputed that Caldwell broadcast over the radio dispatch that Tommy Hurst had threatened Nickles verbal and by intimation of a weapon, by gesturing to his waistband. Nickles testified under oath that this could not have happen because he did not see Tommy Hurst that night let alone speak to him. The fact scenario tracks so closely to the fact pattern in *Rivas* as to be virtually indistinguishable.

Based on the forgoing Petitioner requests the Court to grant the writ of certiorari.

Respectfully submitted,

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