STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Rene Hale Shelley, Individually and as Personal Representative of the Estate of Michael Mann Lindler

Plaintiff,

vs.

South Carolina Highway Patrol

Defendant.

CASE NO. 2014-CP-40-05663

RICHLAND COUNTY
FILED
2016 JUL 19 PM 2:30
JEANETTE W. McBRIDE
C.C.P. & G.S.

ORDER

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OCT 24 2016
SC Court of Appeals

This matter is before the Court on Defendant South Carolina Highway Patrol's, ("Defendant") Motion for Directed Verdict. This case came before the Court as a jury trial on March 14-18, 2016. After both Rene Hale Shelley, Individually and as Personal Representative of the Estate of Michael Mann Lindler, ("Plaintiff") and Defendant presented and rested their cases, Defendant made a renewed Motion for Directed Verdict arguing that the South Carolina Tort Claims Act ("TCA"), codified at S.C. Code Ann. §§ 15-78-10 to -220, barred Plaintiff's causes of action against Defendant. On the Record, the Court granted Defendant's Motion for Directed Verdict finding that certain sections of the TCA barred Plaintiff's claims. The Court informed Plaintiff and Defendant that an order to supplement its in-court ruling would follow. The Court explained that the supplemental order would relate specifically to the relevant sections of the TCA and the respective immunities. After considering the testimony presented at trial, the arguments of counsel, and the relevant case and statutory law, Defendant's Motion for Directed Verdict is **GRANTED**.

PROCEDURAL BACKGROUND

On September 16, 2014, Plaintiff filed a cause of action for survival and wrongful death alleging Defendant, by and through the actions of its employee, South Carolina Highway Patrol Trooper Travis Blackwelder ("Blackwelder"), was grossly negligent and breached its duty to protect Michael Mann Lindler ("Lindler") from foreseeable harm. Plaintiff asserted that Blackwelder suspected Lindler to be impaired by drug use and assessed this impairment over the course of his interaction with Lindler, who was a disabled motorist on Interstate-20 West. Plaintiff further alleged Blackwelder was grossly negligent in leaving Lindler with Lindler's

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girlfriend while Blackwelder responded to an accident at another location. Finally, Plaintiff alleged that Lindler's injuries were a foreseeable result of Blackwelder's decision to leave Lindler. Defendant denied all of Plaintiff's claims and asserted defenses, including immunity under the Tort Claims Act. The entirety of the interaction between Blackwelder and Lindler was captured by the dashcam video of Blackwelder's patrol vehicle.[1]

A jury was selected on March 14, 2016. During Plaintiff's case, Plaintiff presented testimony from Blackwelder through a videotaped deposition of Blackwelder taken December 14, 2015; George Kirkham, Ph.D., an expert in criminology and police conduct; Paul Genecin, MD, an expert in internal medicine; Jay Sirmon, a witness to the incident; James Tucker, a witness to the incident; Plaintiff, Lindler's mother; and JoAnn Tucker, a witness to the incident. At the close of Plaintiff's case, Defendant moved for directed verdict which was taken under advisement. Defendant then presented the testimony of Blackwelder; Brian Batterton, an expert in police procedure; Sargent Darrell Smith, a supervisor of the Safety Improvement Team ("SIT") for Defendant; and Captain Edward Talbot, Jr., the chief training officer of the South Carolina Highway Patrol Academy. At the close of all of the evidence, Defendant again moved for directed verdict.

SUMMARY OF EVIDENCE PRESENTED

On December 17, 2012, Blackwelder was dispatched to assist Lindler whose vehicle had become disabled within a construction zone on I-20 West at mile marker 81 in Richland County. After arriving at the subject location, the dashcam video of the incident reveals the following: Blackwelder communicated with a driver of a vehicle that had stopped behind Lindler and attempted to provide assistance. Blackwelder asked the other driver whether Lindler was drunk. It is not apparent, based upon the video, why Blackwelder asked the third party driver whether Lindler was drunk. In Blackwelder's deposition video that was introduced at trial, Blackwelder explained that he probably asked that question based on something that the third party driver had said but that he could not recall exactly. The third party's response, if any, to Blackwelder's inquiry was inaudible. Thereafter, the third party driver left the location.

Upon approaching Lindler, Lindler informed Blackwelder that his vehicle "just shut down" after entering the interstate. Blackwelder and Lindler then began to assess the vehicle's battery and determined that one of the battery cables had become detached. Lindler then went to the driver's side of his truck to get some tools. After getting back to the front of the truck,

[1] The dashcam video was admitted into evidence as Plaintiff's Exhibit Number 1.

Blackwelder asked Lindler whether he was okay and why he was stumbling around, to which Lindler responded that he just had a long day. Blackwelder then asked Lindler whether he had been drinking. Lindler responded, "No, sir." Blackwelder then asked Lindler whether he had been doing any drugs. Lindler responded "No," and explained that he was in a Pre-Trial Intervention Program ("PTI") for a shoplifting charge. At trial, Blackwelder testified that Lindler voluntarily informed Blackwelder that he was in PTI, which indicated that he was providing honest responses to Blackwelder's questions.[2]

While trying to reconnect the battery, Blackwelder again asked Lindler, "What are you stumbling for?" Lindler responded that he was sorry and that his girlfriend, who was a passenger in the vehicle, just got out of the emergency room an hour earlier. Blackwelder then asked Lindler to provide his driver's license and vehicle registration card. Lindler explained that he did not have his registration card because it was sent to the wrong address. Since Blackwelder and Lindler are, at this time, standing in front of Lindler's vehicle with the hood up, it is unclear, based on the dashcam video, whether Lindler provided his license to Blackwelder at this time. During trial, however, Blackwelder testified that he did receive Lindler's license and ran his license plate and driver's license to check for outstanding warrants. Blackwelder also testified that he used the information from Lindler's license to issue Lindler a Public Contact Form. Blackwelder testified that since he was in a construction zone, he had to document, on Public Contact Forms, any contact with the public. Blackwelder testified that while he was checking whether Lindler had any outstanding warrants, Lindler was free to leave. Blackwelder explained that Lindler was free to leave because he had not stopped and pulled over Lindler in his vehicle, but instead, had merely stopped to assist Lindler.

After the battery wires were reconnected, Blackwelder instructed Lindler to try and see if the vehicle would start. After a couple of unsuccessful attempts of trying to start the vehicle, Blackwelder asked Lindler whether the vehicle had gas in it. Lindler responded yes, but his girlfriend told Blackwelder that it did not have gas. Lindler then explained that he had run out of gas after entering the interstate.

Thereafter, Blackwelder informed Lindler that he was going to push him with his patrol vehicle and wanted Lindler to direct his vehicle to the right and off the road beyond the guardrail. Before getting back to his patrol vehicle, however, Blackwelder told Lindler to put his

[2] The remaining references to Blackwelder's testimony are from his in-court testimony and are not references to the videotaped deposition.

ml #3

vehicle in neutral and see whether his truck would roll forward and off the interstate on its own. Lindler was able to briefly start and direct his vehicle off the road. Thereafter, Blackwelder got into his patrol vehicle and informed dispatch that he was able to get Lindler's vehicle started "for just a second" and get him off the road. Blackwelder then pulled behind Lindler's vehicle on the right side off the interstate and positioned his patrol vehicle so that the front driver's side of his vehicle was slanted into the far right lane of the interstate. At trial, Dr. Kirkham testified that this created a safety margin wherein Blackwelder could safely determine what was going on with Lindler and his disabled vehicle. With Blackwelder still in his patrol vehicle, Lindler opened his driver's side door and stood in its doorway with the door ajar. Lindler then proceeded to smoke a cigarette while standing in the doorway of his vehicle. Blackwelder instructed Lindler to shut his door and to get out of the roadway. Blackwelder testified at trial that he instructed Lindler to get out of the roadway using his Public Address ("PA") system. Blackwelder also testified that he did not think Lindler could hear him on the PA system because after being told to get out of the roadway, Lindler proceeded to walk toward the driver's side of Blackwelder's patrol vehicle. As Lindler got to Blackwelder's door, Blackwelder again instructed Lindler to get out of the road. Lindler responded, "oh okay, I'm sorry," and walked to the right off the road.

Next, the video shows that Blackwelder got out of his patrol vehicle, approached Lindler, and asked Lindler to recite the alphabet. Lindler recited the alphabet from A to Z. During trial, Blackwelder explained that he chose the alphabet test because it is a good test to determine whether someone is under the influence of drugs. Blackwelder testified that if someone is under the influence of drugs, their ability to speak properly is diminished. Blackwelder also testified that Lindler correctly recited his alphabet. After Lindler finished reciting the alphabet, Blackwelder asked Lindler what kind of pills he was taking. During trial, Blackwelder testified that he asked Lindler about the pills in an attempt to continue to gauge and determine Lindler's current situation. According to Blackwelder, Lindler did not smell like alcohol so Blackwelder was trying to determine whether Lindler was under the influence of something else. Lindler had just come back from the hospital, and he responded that he had not been taking any pills; however, Lindler explained that he had taken a muscle relaxer about four hours earlier. When Blackwelder asked Lindler whether he had a prescription for the muscle relaxer, Lindler explained that he had taken Theraflu. Blackwelder explained to Lindler that Theraflu was not a muscle relaxer but was a mucus eliminator. Linder responded that he had the flu.

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Blackwelder asked Lindler whether his truck cut off again when he pulled it off the interstate, Lindler indicated that it had. Blackwelder asked Lindler whether his help was on the way, Lindler responded affirmatively. Blackwelder informed Lindler that when his help came with the gas that they needed to get all the way off the road. Blackwelder instructed Lindler that if his help was on the left side of the white boundary line of the interstate, "they [were] wrong."

While they were standing on the shoulder of the roadway by the side of Lindler's vehicle away from traffic, Blackwelder said to Lindler that he could "not even stand up," and asked "What's going on with you?" Blackwelder again repeated, "You can't even stand up; What's going on with you?" Lindler explained that it was just the way the hill was (that he was standing on). Blackwelder responded that he was standing on the hill too but that he was not having problems standing up. Lindler told Blackwelder that he could "field test" him if he wanted to and that he would pass it. Blackwelder responded that "I don't think you would." Blackwelder continued, "You can't even stand still; what makes you think you can stand on one foot right now?" Lindler responded that he was nervous. At trial, Blackwelder testified that he was "bluffing" when he told Lindler that he would not pass a field test hoping that if Lindler were under the influence of something, that he would admit it.

Thereafter, Blackwelder asked Lindler whether his girlfriend had a driver's license, to which Lindler responded, "Yes." Blackwelder then instructed Lindler that "You need to let her drive out when y'all leave out of here; Can she drive a stick?" Lindler explained that he was taking her to the Lexington Medical Center because she had bad flu symptoms. During trial, however, a video interview of Lindler's girlfriend was introduced at trial and she explained that they had recently left the hospital and were headed home. Lindler also had informed Blackwelder earlier that he and his girlfriend were headed home. Blackwelder then explained to Lindler's girlfriend that they were at Mile 81 Westbound on I-20.[3] After an inaudible conversation between Lindler and Blackwelder, Lindler informed Blackwelder that he was on weed and Xanax. Blackwelder then asked Lindler "right now?" to which Lindler responded, "No, sir." Blackwelder asked Lindler if he searched Lindler's vehicle whether he would "find any of that," to which Lindler responded, "No." Blackwelder then asked Lindler whether he would find anything on Lindler's person or on his girlfriend's person, to which Lindler responded, "No." Blackwelder then walked back to his patrol vehicle.

ml #5

[3] Although unclear on the video, it appears Lindler's girlfriend asked Blackwelder where they were.

After getting in his patrol vehicle, Blackwelder asked the dispatcher whether there were any "10-50s" pending. Blackwelder then left the incident location to respond to an accident on Clemson Road, in Richland County. At trial, Blackwelder testified that he was aware of the accident on Clemson Road before arriving to assist Lindler because it had been broadcast on his radio before arriving at Lindler's location. Blackwelder testified that since accidents "breed" other accidents, he was constantly assessing whether the accident or Lindler's situation required more urgent attention. Once Lindler was off the road and help was on the way, Blackwelder determined that the accident was a greater priority.

Blackwelder interacted with Lindler and his girlfriend for about thirteen minutes before leaving the location. Blackwelder testified that he left Lindler's location around 5:07 p.m. Around 5:49 p.m., dispatch received a call that Lindler had been fatally struck by at least one vehicle on I-20.[4] One of the witnesses to the incident, Jay Sirmon ("Sirmon"), testified that as he was passing Lindler on the side of the interstate, Lindler was standing near the hood of his truck using his cellphone. As Sirmon passed Lindler, Sirmon saw, in his rearview mirror, Lindler walk into traffic. Sirmon testified that Lindler made it across one lane of traffic and then was "clipped" by a side mirror on a car.

James Tucker ("James"), another witness to the incident, testified that as he was driving on the interstate, he noticed Lindler in the center of the highway and swerved to miss him. Looking into his rearview mirror, James saw Lindler get struck by a van. James' wife, JoAnn Tucker, who was a passenger in James' car during the incident, testified that it appeared Lindler was "darting in and out of traffic" before he was hit.

Following Lindler's death, toxicology tests were performed evidencing that Lindler had Methadone and Alprazolam (Xanax) in his body at the time of his death. Dr. Genecin reviewed Lindler's toxicology reports, the chain of custody documents related to Lindler's blood specimen, Lindler's hospital records, the EMS records, the collision investigation report, the coroner's report, and the dashcam video, and opined that Lindler was impaired at the time of his interaction with Blackwelder.

During trial, Dr. Kirkham provided testimony regarding the interaction between Blackwelder and Lindler. Dr. Kirkham explained that Lindler was on I-20 West in the evening, it was getting darker outside, it was rainy, and Lindler's vehicle was in a construction zone. Dr.

[4] There was conflicting evidence presented at trial as to whether Lindler was struck by one or two vehicles.

Kirkham also testified that the dashcam video shows that Blackwelder suspected something was wrong with Lindler immediately when Blackwelder encountered Lindler. Dr. Kirkham explained that it took a while for Lindler to figure out he had run out of gas, further indicating that something was wrong with Lindler. Dr. Kirkham testified that Blackwelder understood that Lindler's girlfriend's mother was coming with gas and that she would have to stand over the boundary line of the interstate to put gas into Lindler's vehicle. This plan, according to Dr. Kirkham, involved grave danger. Dr. Kirkham also testified that police officers possess a general duty to protect the public from harm. More specifically, Dr. Kirkham testified that once Blackwelder pulled over and received information from Lindler that he may be on weed and Xanax, a relationship developed requiring Blackwelder to ensure Lindler remained safe. Dr. Kirkham testified that Blackwelder should have taken Lindler and his girlfriend to where they were headed or to a nearby gas station. Moreover, according to Dr. Kirkham, Blackwelder could have stayed at the scene and continued the existence of the safety barrier until Lindler's help arrived or could have pushed Lindler's vehicle further off the road, and/or could have had Lindler activate the hazard lights on his vehicle.

Dr. Kirkham further testified that Blackwelder had adequate training but violated certain policies promulgated by Defendant. Dr. Kirkham also testified that Blackwelder had a history of violating policies and Defendant should have taken immediate action when Blackwelder violated those policies. Dr. Kirkham also testified that no reasonable officer would have had probable cause to arrest Lindler because the incident evolved out of a disabled vehicle encounter and was not a traffic stop. Dr. Kirkham, however, testified that no reasonable officer would have left Lindler in his current condition. Dr. Kirkham also testified that there was not another dire situation requiring Blackwelder to leave Lindler at the incident location. Ultimately, according to Dr. Kirkham, Blackwelder's inaction was the proximate cause of Lindler losing his life.

During trial, Blackwelder testified that he had been assigned to work on the Safety Improvement Team ("SIT") about a week prior to the incident. Prior to working on SIT, Blackwelder worked in drug interdiction. As part of drug interdiction, Blackwelder actively sought out and located drugs in vehicles. Blackwelder testified that he had made about 500 Driving Under the Influence ("DUI") stops throughout his law enforcement career. Upon approaching the incident location, Blackwelder's main concerning was to get Lindler and Lindler's vehicle off the roadway. Blackwelder explained that he would not have allowed Lindler to pull his truck off the roadway if he thought Lindler was impaired. Blackwelder also

testified that he was driving a Chevrolet Tahoe retrofitted for "K9" duty, and the entire back seat was a dog cage. Accordingly, Blackwelder explained that if he did arrest Lindler, he would have had to situate Lindler in his front passenger seat. Blackwelder further testified that he was continuously gauging Lindler during their interaction. According to Blackwelder, fatigued drivers can exhibit the same traits as impaired drivers. Blackwelder explained that under the totality of the circumstances, he did not believe Lindler was impaired, and thus, Lindler was never in his custody and was always free to go. Blackwelder also testified that it was important to him that Lindler's girlfriend was at the incident location and that Lindler and his girlfriend had a cellphone. Blackwelder also testified that the girlfriend's mother informed him that she was a couple exits away and was headed to the incident location. Blackwelder testified that if Lindler and his girlfriend had asked for a ride, he would have been obligated to transport them. However, Blackwelder explained that he would have had to make two separate trips because of the K9 cage. Blackwelder testified that when he left the incident location, he never thought Lindler would have walked onto I-20. Blackwelder testified that although he was sympathetic about what happened to Lindler, he would not have done anything differently.

During trial, Brian Batterton ("Batterton"), an expert in police procedure, testified concerning Blackwelder's conduct and interaction with Lindler. Batterton explained that although he was provided various documents and materials in evaluating whether Blackwelder acted appropriately, the most important piece of information to Batterton was Blackwelder's dashcam video. According to Batterton, the dashcam video was most important because in evaluating whether Blackwelder acted appropriately at the incident location, he was only allowed to consider the information that was available to Blackwelder at the incident location. Batterton testified that Blackwelder was thorough and careful in conducting his evaluation of Lindler at the scene. According to Batterton, Lindler was able to walk, was not slurring his speech, was able to communicate the problems with his vehicle, and was able to work with Blackwelder in addressing the battery issue. Batterton also testified that Lindler recited his alphabet normally. Batterton testified that if Lindler were impaired, he would not have been able to do these things. Batterton also explained that when Blackwelder inquired about any pills Lindler was taking he was being very thorough in his investigation. Batterton further testified that since Blackwelder already knew about the accident on Clemson Road, he had to prioritize the accident and Lindler's situation. According to Batterton, Blackwelder acted appropriately and in line with proper police procedure. Moreover, Batterton testified that it was within Blackwelder's

discretion to leave Lindler at the incident location so that someone could come help Lindler and put gas into his truck. Batterton also explained that there was no reason for Blackwelder to request additional transportation since Lindler already had help on the way. According to Batterton, Lindler was struck because he did not do what Blackwelder instructed him to do. Batterton also testified that Blackwelder and Lindler were not in a "custodial" relationship because a reasonable person would have felt that he could leave. Batterton explained that even if Blackwelder suspected that Lindler was impaired, it would have been fine for Blackwelder to leave Lindler on the side of the road because officers are only required to act reasonably. Ultimately, Batterton testified that Blackwelder did not violate generally accepted police procedures and did not violate any of Defendant's policies.

Sargent Darrell Smith ("Sargent Smith"), a supervisor of SIT for Defendant, also testified at trial. Sargent Smith testified that once he became a supervisor, he had to review dashcam videos to spot and address potential problems, discuss safety issues with his officers, and perform other administrative matters. Sargent Smith testified that he reviewed Blackwelder's dashcam video and concluded that Blackwelder did everything correctly. Sargent Smith also testified that Blackwelder had no basis to arrest Lindler.

During trial, Captain Edward Talbot, Jr., ("Captain Talbot"), the chief training officer for the South Carolina Highway Patrol Academy, provided testimony concerning Blackwelder's training. Captain Talbot testified that his duty was to ensure that his officers were trained well and were well-acquainted with the Academy's policies and procedures. Captain Talbot explained that Blackwelder did not commit any policy violations during his interaction with Lindler. Captain Talbot also testified that it is more difficult to determine whether someone is impaired by drugs then by alcohol; to properly determine whether someone is impaired by drugs, the subject must be taken to a controlled facility. Generally, according to Captain Talbot, an officer cannot determine whether someone is impaired by drugs on the side of the road. Captain Talbot also testified that people oftentimes walk on the white boundary line of the interstate when approaching an officer's patrol vehicle. Moreover, Captain Talbot testified that dispatch had informed Blackwelder that there were five wrecks pending during the time Blackwelder was assisting Lindler. Ultimately, according to Captain Talbot, Blackwelder did not do anything wrong. Captain Talbot did testify, however, that Blackwelder eventually was terminated for routine violations of departmental policy.

Plaintiff also provided testimony at trial. Plaintiff generally testified about Lindler's, childhood, personality, and interests. Plaintiff did not provide any information concerning the incident, except that she asked to see the toxicology report the night of Lindler's death because she thought that something had to be wrong with Lindler for him to be in the middle of the interstate.

LEGAL STANDARD

"In ruling on a motion for directed verdict, the trial court is required to view [all] the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt." *Estate of Carr ex rel. Bolton v. Circle S. Enterprises, Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (2008). "In essence, [the Court] must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in [her] favor." *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981).

DISCUSSION

Defendant made its Motion for Directed Verdict arguing that S.C. Code Ann. § 15-78-60(4), (5), and (6), of the TCA provided Defendant immunity from suit, and thus, precluded Plaintiff from bringing a cause of action against Defendant. Plaintiff argued that regardless of these immunity sections, Defendant nevertheless was liable under S.C. Code Ann. § 15-78-60(25).

I. 15-78-60(4): Policies

Section 15-78-60(4) provides that governmental entities are not liable for losses resulting from "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." *Id.* During trial, Plaintiff alleged that Defendant enacted certain written policies which governed the conduct of its officers, including Blackwelder. Specifically, Plaintiff alleged that Blackwelder violated Policy 300.14, Section 11, entitled "Highway Assistance" ("Policy 300.14"). A copy of Policy 300.14 was admitted into evidence as Plaintiff's Exhibit Number 5. Policy 300.14 provided the following:

> A. Department of Public Safety officers will provide general assistance and information to the motoring public upon request.

> B. Officers will stop to assist disabled motorists, not necessarily to repair the automobile, but to help the motorist to contact someone for mechanical assistance or towing. The owner/operator may request a towing service of choice. If not, one shall be summoned from the rotation list through the communications center, according to department policy.
>
> C. Officers shall ensure the protection of stranded persons on the highways by directing them away from traffic. Officers should be prepared to provide first aid, extinguish small fires and call for medical and/or fire assistance, if necessary.
>
> D. At the request of any stranded or disabled motorist, the officer will ensure that the motorist does not remain in a hazardous location or environment, even if it means transporting the motorist to a suitable public location.

Plaintiff's Exhibit Number 5 at 7–8, ¶ XI. (Internal Cross-References Omitted).

Plaintiff argued that Blackwelder failed to follow Policy 300.14 by failing to properly ensure that Lindler remained safe at the incident location and by failing to ensure Lindler had adequate transportation. During trial, Dr. Kirkham explained that Blackwelder initially properly created a safety corridor/margin during his interaction with Lindler by positioning his patrol vehicle so that the front of it was slanted slightly to the left and somewhat into the far right lane of the interstate. This, according to Dr. Kirkham, helped to ensure that any vehicles that were to come into contact with Lindler, or his vehicle, would have to first strike Blackwelder's patrol vehicle. Dr. Kirkham also explained that when vehicles approach a stopped patrol vehicle with its blue lights on, they naturally slow down, thereby strengthening the safety barrier. Dr. Kirkham explained that when Blackwelder left the incident location, this safety barrier was removed. According to Dr. Kirkham, although Blackwelder informed Lindler to ensure that any parties who were to come later to help did not cross the white boundary line, Blackwelder knew those persons would have to cross the boundary line to put gas in the vehicle since the gas tank was on the driver's side. Dr. Kirkham emphasized that gas would have to be put in the truck while standing over the white line, all without the shield of the safety barrier. Dr. Kirkham then provided alternative approaches Blackwelder could have, and should have, taken.

Essentially, according to Dr. Kirkham, Blackwelder should have ensured that Lindler and his girlfriend got to a "safe haven." Dr. Kirkham testified that Blackwelder should have found out where Lindler and his girlfriend were trying to get to and get them to that destination. More specifically, Dr. Kirkham testified that Blackwelder should have spoken with Lindler's

girlfriend's mom, with whom Lindler's girlfriend was speaking on the phone while Blackwelder was at the scene, to determine where Lindler and his girlfriend were headed and whether she was headed to the incident location to assist them. In the alternative, according to Dr. Kirkham, Blackwelder could have taken Lindler and his girlfriend to a nearby gas station, which would have provided a safer environment than the interstate. Moreover, according to Dr. Kirkham, Blackwelder could have stayed at the scene and continued the existence of the safety barrier until Lindler's help arrived. Dr. Kirkham explained that Blackwelder also could have pushed Lindler's vehicle further off the road, and/or could have had Lindler activate the hazard lights on his vehicle. According to Dr. Kirkham, no objectively reasonable officer would have left Lindler on the side of the road in his "condition." Blackwelder's failure, according to Dr. Kirkham, to ensure the safety and protection of Lindler and to ensure Lindler had adequate transportation violated Policy 300.14.

Plaintiff also argued that Defendant failed to previously terminate Blackwelder after he violated certain other policies and procedures that were delineated in an employment letter ("Employment Letter"), dated June 28, 2013, that had been issued to Blackwelder. During trial, Plaintiff admitted into evidence, as Plaintiff's Exhibit Number 7, the Employment Letter issued several months after this incident, which evidenced that Blackwelder had committed multiple violations of rules and regulations and generally had engaged in improper conduct, none of which arose out of this incident. The portion of the Employment Letter that was admitted into evidence read as follows:

> First, a supervisor's review of the video recordings of some of your 2012 traffic stops revealed multiple violations of rules, regulations, policy or procedure and improper conduct. Among these violations were instances in which you mocked a violator's speech; engaged in argumentative conversation with a motorist; and attempted to search a vehicle for counterfeit items based solely on you observing that it contained boxes on which Chinese writing appeared. You also sat violators in your vehicle while conducting interviews and pulled along the side of vehicles prior to activating your blue lights and siren. Your handling of the aforementioned traffic stops contradicts the way you were trained in interdiction techniques. When questioned about your behavior and techniques, you repeatedly told your supervisors that you had been successful with the way you conducted your enforcement efforts in the past and perceived no issue with the way you interacted with the public. As noted by your supervisor, 'In his own words L/Cpl. Blackwelder stated that he was not going to change the way he does business because he has been successful for 15 years conducting business the way he always has.' Despite your extensive training, it is apparent that you failed to follow established interdiction guidelines, refused to take direction

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from supervisors, and conducted yourself in a manner that was improper and reflected negatively on SCDPS.

Plaintiff's Exhibit Number 7.

Dr. Kirkham testified that since there was a history of Blackwelder repeatedly not properly following procedure, as evidenced by the Employment Letter, Defendant should have taken immediate action. Dr. Kirkham explained that Blackwelder seemed to possess a "cavalier" attitude and was going to do everything his way. Ultimately, Dr. Kirkham testified that if Blackwelder would have been terminated before the incident involving Lindler, Lindler would not have been struck and killed.

As provided above, Section 15-78-60(4) generally provides that governmental entities are not liable for their failure to enforce or comply with written policies. Plaintiff's claims that Blackwelder failed to properly follow policy and that Defendant failed to terminate Blackwelder are failures to enforce Defendant's own policies, and thus, would be barred by Section 15-78-60(4). Accordingly, Defendant is immune from liability under Section 15-78-60(4).

II. 15-78-60(5): Discretionary Acts

Section 15-78-60(5) provides that governmental entities are not liable for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." *Id.* In *McCall v. Batson*, 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985), *superseded by statute as stated in Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 440, 633 S.E.2d 143, 146 (2006), the South Carolina Supreme Court held that "discretionary activities cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by public officials." Section 15-78-60(5), however, requires "[p]roof that governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice[.]" *Foster v. S.C. Dep't of Highways and Public Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992).

During trial, Blackwelder testified concerning two alleged exercises of discretion. First, Blackwelder asserted that he exercised discretion while using his skills, training, and experience in his assessment of the impairment of Lindler, and ultimately, making the decision that Lindler was not impaired. Second, Blackwelder asserted that he exercised discretion in using his skills, training, and experience in deciding whether to: (a) remain with Lindler at the scene; (b) transport Lindler somewhere off the interstate; or (c) leave Lindler with his vehicle at the subject

location. In choosing to leave Lindler at the subject location so that he could respond to another accident, Blackwelder made a conscious determination that Lindler was not impaired and that the other accident had priority. Both Dr. Kirkham and Batterton testified that this decision was a discretionary act. Although the experts agreed Blackwelder performed a discretionary act, a question of fact existed for the jury to determine whether Blackwelder, in fact, weighed the above alternatives prior to making his decision. *See, e.g., Pike v. SCDOT*, 343 S.C. 224, 230, 540 S.E.2d 87, 91 (2000) ("To establish discretionary immunity, the governmental entity must prove that the governmental employee[], faced with alternatives, actually weighed competing considerations and made a conscious choice.").[5]

III. 15-78-60(6): Police Protection

Section 15-78-60(6) provides that governmental entities are not liable for losses resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection." *Id.* When discussing Defendant's motion during trial, this Court reviewed the decision in *Wells v. City of Lynchburg*, 331 S.C. 296, 304, 501 S.E.2d 746, 750 (Ct. App. 1998), where the Court of Appeals recognized that a scrivener's error resulted in the omission of the word "or" from the statute. After reviewing the relevant legislative history, the *Wells* court concluded that sovereign immunity under Section 15-78-60(6) extends to "the failure to provide *or* the method of providing police or fire protection." *Id.* (Emphasis added). Reviewing the evidence presented in the light most favorable to Plaintiff, Plaintiff's claims, collectively, essentially is a "failure to protect" claim. Plaintiff's claims are derivative of the notion that Blackwelder should have protected Lindler from harm. To the extent that Plaintiff asserts Blackwelder used improper police tactics, failed to adhere to his prior training, or simply made an improper or grossly negligent decision to leave Lindler at the scene, Section 15-78-60(6) similarly bars claims regarding the *method* of protection. Dr. Kirkham testified that Blackwelder mitigated the risk of harm to Lindler by getting him out of the roadway. Moreover, in the dashcam video Blackwelder instructed Lindler to get out of the roadway and to remain to

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[5] While a jury question existed as to whether Blackwelder actually weighed the above alternatives, when viewing all the facts in the light most favorable to Plaintiff, Plaintiff's claims arose out of allegations of improper police protection and failures to enforce policies and procedures. Regardless of whether a jury could find that Blackwelder did not actually weigh the competing alternatives, Blackwelder's conduct inextricably relates to Plaintiff's allegations that Blackwelder did not adequately provide police protection to Lindler and that Blackwelder did not properly follow policy and procedure as discussed in Section III, *infra*. Therefore, notwithstanding this jury question, Defendant is entitled to immunity.

the right of the white boundary line on the road. Since these are methods of protection, Section 15-78-60(6) proscribes the execution of these methods as forming the basis of liability against Defendant.

IV. Section 15-78-60(25): Gross Negligence

Plaintiff asserts that Section 15-78-60(25) of the TCA should be applied to the facts of this case. Section 15-78-60(25) provides that governmental entities are not liable for losses resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." *Id.* Plaintiff argued that since Blackwelder obtained and gathered information from Lindler's driver's license, required Lindler to recite his alphabet, provided Lindler a Public Contact Form, and informed Lindler that he could not drive, Lindler could not have believed that he was free to leave, and thus, was a prisoner and/or client under the control and custody of Defendant. Defendant never raised this Section as a basis for immunity in its pleadings or in its argument before the court. Plaintiff argued that because Blackwelder was exercising control over Lindler by confining him and restricting his activity, Section 15-78-60(25) applied to this case; and therefore, under *Steinke v. S.C. Dep't of LLR*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999), the gross negligence standard should be incorporated into all of the immunity defenses Defendant asserted.

In *Steinke*, the plaintiffs brought a wrongful death action against the defendant after the plaintiffs' sons were fatally injured when a "crawlevator" they were riding at a bungee jumping attraction collapsed. *Id.* at 383, 520 S.E.2d at 147. The plaintiffs alleged that the defendant should have "revoke[d] or suspende[d] the [operating] license [the defendant] had issued, or adequately inspect[ed] or investigate[d] the crawlevator, after receiving troubling reports." *Id.* at 384, 520 S.E.2d at 147. During trial, the defendant made a motion for directed verdict arguing that it was "immun[e] from suit under several exceptions to the waiver of sovereign immunity contained in [the Tort Claims Act]." *Id.* at 392, 520 S.E.2d at 152. Specifically, the defendant argued that it was immune from suit based upon the "licensing powers" exception, the "inspection powers" exception, the "discretionary acts" exception, the "failure to adopt or enforce" law or regulation exception, and the third party "act or omission" exception, all which are contained in Section 15-78-60. *See id.* at 393-97, 520 S.E.2d at 152-54. The trial court instructed the jury on all of the exceptions, except for the "failure to adopt or enforce" law or

regulation exception, and the third party "act or omission" exception. *See id.* at 397, 520 S.E.2d at 154.[6] Only the licensing power exception contained a gross negligence standard. *See id.* at 393, 520 S.E.2d at 152. Defendant argued that it was improper for the trial court to deny their motions for directed verdict, and charge the jury on the "inspection powers" exception and the "discretionary acts" exception when those exceptions did not contain the gross negligence standard. *See id.* The Court disagreed.

The Court explained that "[i]t would make no sense to say [the defendant] may be found grossly negligent in a licensing decision, yet allow [the defendant] to escape liability" under the inspection powers exception or the discretionary acts exception. *Id.* at 398, 520 S.E.2d at 155. Accordingly, the Court held that "the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception." *Id.* at 397, 520 S.E.2d at 154. This holding, according to the Court, "was faithful to the legislative intent to limit liability and allow ample defenses, while not allowing a governmental entity to eviscerate the impact of one exception by asserting another." *Id.* The Court, thus, upheld the trial court's denial of the defendant's motion for directed verdict. *See id.* However, *Jones v. Lott*, 387 S.C. 339, 348, 692 S.E.2d 900, 904 (2010), held that it was Defendant's prerogative to decide what immunities to plead. *See id.* ("Petitioner's contention that section 15-78-60(25)'s gross negligence standard should be interpolated into the other pleaded exceptions is misplaced. Respondent never raised an affirmative defense that contained a gross negligence standard. Thus, under this Court's holding in *Steinke*, the gross negligence standard is not interpolated into [Respondent's other claimed immunities].") Accordingly, since Defendant did not plead Section 15-78-60(25) as a defense, its gross negligence standard would not be interpolated into Defendant's other immunity defenses. Therefore, Plaintiff's argument against directed verdict on this ground is denied.

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[6] The trial court found these two exceptions inapplicable to the facts in that case. *See Steinke*, 336 S.C. at 397, 520 S.E.2d at 154.

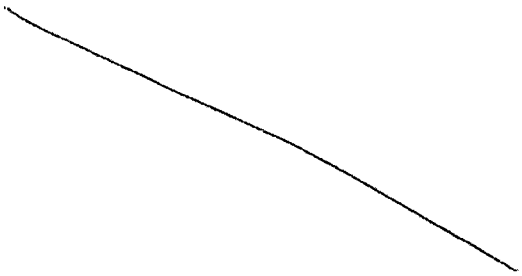
ORDER

For the reasons stated above, it is therefore **ORDERED** that Defendant's Motion for Directed Verdict is **GRANTED**. Defendant is immune from liability under S.C. Code Ann. 15-78-60(4) & (6).

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
July 19, 2016



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