THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2014-CP-40-5563
Appellate Case No. 2016-002168

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SC Court of Appeals

Renee Hale Shelley,
as Personal Representative
of the Estate of Michael Mann Lindler ... Appellant/Respondent,

v.

South Carolina Highway Patrol .... Respondent/Appellant.

INITIAL REPLY BRIEF OF APPELLANT/RESPONDENT

C. Carter Elliott, Jr. # 12954
Lauren V. Knight # 101280
Andrew W. Kunz # 78261
ELLIOTT & PHELAN
P.O. Box 1405
Georgetown, SC 29442
(843) 546-0650
(843) 546-1920 (facsimile)
carter@elliottphelanlaw.com
lauren@elliottphelanlaw.com
andrew@elliottphelanlaw.com

Blake A. Hewitt # 73674
John S. Nichols # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant/Respondent

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ARGUMENT

The reason sovereign immunity was abrogated is that immunity offends our sense of justice. When we say we value equal justice and evenhandedness, we are also saying we reject the ideas that the power to make the rules is the power to break them and that anyone is above the law. That is why the Supreme Court abrogated sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). We know this because the Supreme Court expressed those principles in the opinions criticizing sovereign immunity, opinions the court cited in *McCall*. See *id.* at 245, 329 S.E.2d at 742.

The Highway Patrol's appellate brief does not accept these values. Listen to what the brief says: it says officers have the freedom to violate policy standards with impunity, it says the Highway Patrol is immune for anything that can be characterized as "police protection," and it says the Highway Patrol gets to control whether a plaintiff can sue for gross negligence by deciding which sections of the Tort Claims Act to raise in its answer. That vision reflects a worldview embracing might makes right, not equal justice under law. Thankfully, it is fundamentally at odds with anything but a partisan reading of precedent.

The Tort Claims Act gives the government protection, but that protection is not absolute. The Act preserves immunity for discretionary and policy decisions where there are no clear answers—it is critical for the judicial system to respect the policy decisions made by other branches of government. But the Act does not grant police officers the right to be reckless. The Act does not countenance "do as I say, not as I do."

The circuit court erred in failing to recognize and apply these principles. The Highway Patrol's arguments repeat that same error. This Court should reverse.

A. The circuit court's decision reflects an erroneous view of the Tort Claims Act and of precedent. The jury might ultimately find immunity applies, but it is the jury's decision to make.

Under the circuit court's and the Highway Patrol's reasoning, immunity will apply whenever a government agency claims a government worker was violating a policy, whenever a police officer's conduct qualifies as "police protection," and whenever a government agency omits any of the "gross negligence" parts of the Tort Claims Act from its pleadings. These views are inconsistent with the Act itself and with precedent.

i. The Tort Claims Act does not immunize the government from liability when government actors violate internal policies or independent standards of care.

The circuit court held Appellant's claims relied on violations of the Highway Patrol's internal policies and that the Tort Claims Act immunizes the Highway Patrol from liability for such violations. (7/19/16 Or.pp.10-13) (referencing S.C. Code Ann. § 15-78-60(4) (Supp. ____). We know this reasoning is wrong.

It is wrong because it fails to distinguish between conduct that *does nothing more than* violate a policy and conduct that violates an independent standard of care *as well as a* policy. This Court articulated precisely this distinction in *Clark v. Department of Public Safety*, 353 S.C. 291, 307-08, 578 S.E.2d 16, 24 (Ct. App. 2002).

The Highway Patrol says Appellant's argument is not preserved for appellate review, yet the record contains testimony an officer has a general duty to help someone who is disturbed, sick, or injured, (Tr.p.378, lines 1-8), and Appellant argued this was common sense. (Id.p.190, line 24 - p.191, line 3). At least one of the Highway Patrol's witnesses agreed when discussing the Highway Patrol's policies in general. (Id.p.964, line 23-24).

Appellant also argued the patrolman voluntarily undertook a duty to adequately assist Lindler. (Id.p.1053, line 15 - p.1054, line 23). That does not rely on any policy.

The Highway Patrol says the voluntary undertaking argument is a clear loser, but the Highway Patrol cannot escape the fact that *some* evidence supports the view that the patrolman left Lindler in a worse position when he abandoned him and his passenger on the side of the road. Was Lindler better off when he was out of the roadway as opposed to in it? Of course he was. Was he better off without another vehicle making a safety barrier and without an able-bodied person to help him? Arguably, he was not.

More fundamentally, neither the Highway Department nor the circuit court explain how their interpretation squares with the text of the relevant subsection. The Tort Claims Act grants government actors the discretion *to enforce* laws and policies, not the discretion for officers to violate laws and policies. See S.C. Code Ann. § 15-78-60(4) (Supp. ____). The suggestion that the law codifies immunity for such a double-standard is offensive.

The circuit court's order acknowledges that this patrolman was eventually fired "for routine violations of department policy." (7/19/16 Or.p.9). One wonders why policy violations would justify being fired if policy violations pose no risk of liability.

"Policy immunity" does not bar Appellant's claims. The circuit court erred in holding otherwise.

ii. The Tort Claims Act does not provide the government with immunity when there is evidence a police officer violated generally-applicable standards of care during police activities.

The Texas Supreme Court articulated the clearest reason "police protection immunity" does not apply. This statute—section 15-78-60(6)—is designed to avoid judicial

review of the policy decisions involving how much police or fire protection to provide a community. *State v. Terrell*, 588 S.W.2d 784, 788 (Tex. 1979). The text of the Texas statute is virtually identical to the text of the South Carolina statute. Our Supreme Court recognized this in *Wells v. City of Lynchburg*, 331 S.C. 296, 303-304, 501 S.E.2d 746, 750 (Ct. App. 1998). It is rather remarkable for the Highway Patrol to claim strikingly similar language means one thing in Texas and something else in South Carolina.

The Highway Patrol insists its interpretation (and the circuit court's interpretation) of the law would not immunize police officers for virtually everything they do. How? Its interpretation of the statute plainly calls into question the continued vitality of cases like *Clark v. Department of Public Safety*, 353 S.C. at 291, 578 S.E.2d at 16 and *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010). Those cases involve activities easily characterized as "police protection."

The Highway Patrol accuses Appellant's argument of being irrational. Respectfully, the Texas Supreme Court voiced the same concern—that police protection is everything police do. *Terrell*, 588 S.W.2d at 786. This Court expressed a similar concern in *Clark*. 353 S.C. at 305, 578 S.E.2d at 23. If Appellant is irrational, at least she is in good company.

The hardest case for Appellant is *Huggins v. Metts*, a case where a police officer shot and killed someone and the suit was deemed barred by "police protection immunity." 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006). This Court reached that issue on its own—the circuit court decided the case on a preclusion issue. The case is admittedly difficult to distinguish, but the cases's view of immunity is also difficult to reconcile with cases like *Clark* and *Edwards*, suggesting it may be appropriate to revisit this precedent.

As with policy immunity, the Highway Patrol insists this argument is not preserved for review. But here again, as with policy immunity, the record shows Appellant argued police officers are not immune for everything they do and are not immune when they violate standards of care. (Tr.p.1033, line 19 - p.1034, line 10). Appellant argued existing case law shows why police protection immunity cannot be as broad as the Highway Patrol argues. (Id.p.1096, line 1 - p.1100, line 4). Appellant will readily admit citing cases that were not cited below, but the point is the same point Appellant argued below. Police protection immunity is not as broad as the Highway Patrol suggests and it does not bar this suit.

iii. Though the Court need not reach the issue and though there is no colorable claim for "custodial liability," the circuit court's construction of *Jones v. Lott* renders the Tort Claims Act a sham.

The Court need not reach this issue once it determines Appellant's suit is not barred by "policy immunity" or "police protection immunity." Those provisions were the basis of the directed verdict. The circuit court rejected the Highway Patrol's argument on "discretionary immunity" and Appellant has filed a separate brief explaining that discretionary immunity—the right to be wrong—does not encompass the right to be reckless.

Also, there is no longer a colorable claim for "custodial liability" here. Federal cases explain there is no custodial duty under federal law unless:

> the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs-e.g., food, clothing, shelter, medical care, and reasonable safety.

Foy v. City of Berea, 58 F.3d 227, 231 (6th Cir. 1995). Given the District Court's decision, Appellant concedes there is no path forward on this theory of liability.

Having said the Court not reach this issue and that this theory is not viable, it nevertheless bears mentioning that Appellant pled facts establishing a custodial relationship. Were it not for the U.S. District Court's finding there was no custodial relationship, the circuit court would be required to apply the applicable subsection of the Tort Claims Act so long as there was some evidence supporting that subsection's application. *Jones v. Lott* is distinguishable. The case was decided based on the two-issue rule. 387 S.C. 339, 348, 692 S.E.2d 900, 904-05 (2010). The dicta in that case supporting the Highway Patrol's argument is not binding and is wrong.

The Highway Patrol makes no effort to fit *Jones* into the rest of South Carolina's appellate jurisprudence, ignoring the fact that cases like *Plyler v. Burns*, 373 S.C. 637, 651-652, 647 S.E.2d 188, 196 (2007) and *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 319-320, 743 S.E.2d 109, 115 (Ct. App. 2013) would come out differently under its rule giving the government absolute control over what "immunities" are in play.

This Court can discern for itself whether the Highway Patrol's argument reconciles with *Steinke v. Department of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999) and *Jackson v. Department of Corrections*, 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989). It is unfortunate the Court need not reach the issue here. The government has made no bones in admitting this is its litigation strategy. (Tr.p.698, line 9 - p.700, line 11).

B. This Court should reject the Highway Patrol's alternative sustaining ground. There is evidence of both parties' negligence, precluding a directed verdict.

The Highway Patrol asks the Court to affirm because the Highway Patrol believes Lindler was more negligent in causing his death as a matter of law.

First, the Supreme Court's decision in *Kennedy v. Custom Ice Equipment Co.* explains:

> If the facts in controversy and the inferences deducible therefrom are doubtful, or if they tend to show both parties guilty of negligence or willfulness, and there may be a fair difference of opinion as to whose act or whose acts produced or contributed to the injury complained of as a direct and proximate cause, questions of negligence, proximate cause and contributory negligence should be submitted to the jury.

271 S.C. 171, 175, 246 S.E.2d 176, 178 (1978). The Court articulated this standard *before* South Carolina adopted modified comparative negligence in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991); thus, even under contributory negligence—when any contributory fault barred recovery—a case was required to go to the jury when there was any evidence (even doubtful evidence) both parties may have been negligent.

The Highway Patrol's argument also does not square with *Russell v. City of Columbia*, a case where police took control of an intoxicated person who was thrown out of a bar. 305 S.C. 86, 406 S.E.2d 338 (1991). The Highway Patrol points out that this suit was not governed by the Tort Claims Act because of the Act's effective date, but that point cuts against the Highway Patrol because *McCall v. Batson* only abrogated sovereign immunity to the extent of the sovereign's liability coverage. *Brabham v. City of Columbia* suggests the City of Columbia did not have liability insurance coverage at the time of the events in *Russell*. See *Brabham*, 293 S.C. 266, 267, 360 S.E.2d 144, 144 (1987). The case for Russell's application would be stronger—not weaker.

The Highway Patrol's public policy argument involves the Highway Patrol assuming the jury's role of weighing the evidence and deciding who bears the majority of comparative

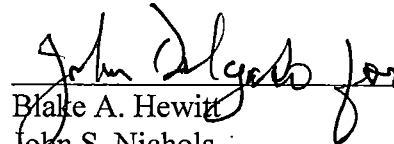
fault. The Supreme Court has repeatedly rejected attempts by various litigants to assume this role. *Roddey v. Wal-Mart*, 415 S.C. 580, 592, 784 S.E.2d 670, 676-677 (2016); *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 32-33, 491 S.E.2d 571, 575 (1997). Moreover, if voluntary intoxication was fatal to Appellant's claim, no claim would have been viable in *Russell.*

CONCLUSION

This Court should reverse the circuit court's directed verdict and remand this case for a new trial.

Respectfully submitted,

August 3, 2017



Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellant/Respondent