

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-40-5663
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.

AMENDED RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

Plaintiff,

vs.

South Carolina Highway Patrol

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 2014-CP-40-05663

ORDER

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

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

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.

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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.

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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. Lindler 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. and
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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 concern 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

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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

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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 than 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.

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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.

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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

and
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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

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

and
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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.

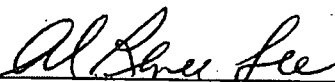
The Court explained that "[i]t would make no sense to say [the defendant] may be found grossly negligent in a licensing decision, yet allow [the defendant] to escape liability" under the inspection powers exception or the discretionary acts exception. *Id.* at 398, 520 S.E.2d at 155. Accordingly, the 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.

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.

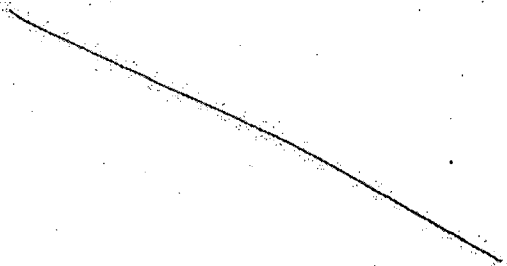
ORDER

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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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

Plaintiff,

vs.

South Carolina Highway Patrol

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 2014-CP-40-05663

ORDER AMENDING JUDGMENT

RICHLAND COUNTY
FILED
2016 SEP 23 PM 2:26
JEANETTE W. HARRIS
C.C.P. & G.S.

This matter comes before the Court on Plaintiff's, Rene Shelley, individually and as personal representative of the Estate of Michael Lindler, ("Plaintiff") Motion to Reconsider, in the Alternative, Alter or Amend Judgment pursuant to Rule 59(e), SCRCF. This matter came before the Court as a jury trial on March 14 – 18, 2016. By Order dated July 19, 2016, this Court granted a Motion for Directed Verdict on behalf of Defendant, South Carolina Highway Patrol, ("Defendant"), finding that certain sections of the Tort Claims Act barred Plaintiff's claims. Plaintiff filed the Motion to Reconsider on August 2, 2016. It was not served on the Court as required by Rule 59, SCRCF.

Plaintiff states two arguments were raised during trial by Plaintiff's counsel that the Court failed to address in the Order, and as a result, the omissions justify reconsideration. First, Plaintiff states the Order omitted arguments regarding Defendant's liability under the "voluntary undertaking" doctrine. Plaintiff cites the ruling in *Russell v. Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991) to support its argument. However, this Court ruled at the hearing that *Russell* did not control the present case since it was prior to the enactment of the S.C. Tort Claims Act, codified at S.C. Code Ann. § 15-78-10 et seq., and none of the immunities provided for in the Tort Claims Act were considered by the Supreme Court in *Russell*.

Second, Plaintiff states that the arguments relating to Defendant's duty of care based on the exceptions to the "public duty" rule were omitted from the Order. During the trial, Plaintiff cited *Edwards v. Lexington County Sheriff's Dept.*, 386 S.C. 285, 688 S.E.2d 125 (2010) to support its argument that Defendant's officer, by his conduct, created a special relationship with Plaintiff,

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which is one of five exceptions to the "public duty" rule. This Court ruled that the issues relating to the duty of the Defendant was a jury question; however, Plaintiff's claims were barred by the immunities under the Tort Claims Act. These issues were specifically raised and ruled upon during the trial as reflected in the transcript of the hearing on Defendant's motion for a directed verdict.

Accordingly, after careful consideration of the motion made and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Plaintiff's Motion to Reconsider is **DENIED**; however, Plaintiff's Motion to Alter or Amend Judgment is **GRANTED** to include Plaintiff's additional arguments and this Court's ruling on those respective arguments as stated in the Transcript of Record. Pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

September 23, 2016
Columbia, South Carolina


#2

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

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

Plaintiffs,

vs.

South Carolina Highway Patrol

Defendants.

FILED

2014 JUL 11 P 2:18

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2014-CP-

ORIGINAL

COMPLAINT

(Jury Trial Requested)

2014CP3202557

The Plaintiff above-named, complaining of the Defendants herein, would respectfully show unto this Honorable Court and allege as follows:

PARTIES

1. The Plaintiff, Rene Hale Shelley, is a citizen and resident of the County of Lexington, State of South Carolina. Additionally, Rene Hale Shelley is the duly appointed Personal Representative of the Estate of her natural son Michael Mann Lindler, having been so appointed by the Lexington County Probate Court on 24th day of September 2013, under Case No. 2013ES3200125-2.

2. Defendant, South Carolina Highway Patrol, is a governmental agency and/or political subdivision of the State of South Carolina, existing under the laws of the State of South Carolina (as defined by Section 15-78-10 of the Code of Laws of South Carolina) and has facilities located in the County of Lexington, State of South Carolina. At all times hereinafter mentioned in this Complaint, Defendant South Carolina County Highway Patrol carried on its business by and through its agents, servants, and/or employees to include L/Cpl. T. Blackwelder.

Additionally, during the time period set out in the Complaint, these employees were operating within the scope of their officially assigned and/or compensated duties.

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

FACTS

3. On the afternoon of December 17, 2012, nineteen (19) year old Michael Lindler and a friend were driving on US Interstate 20, west bound near the 80 mile marker, when the decedent's truck broke down in the middle of the road. During this time, this area of Interstate 20 was considered a construction zone. The Plaintiff is informed and believes that the decedent had just picked up his sick friend from the Lexington Medical Center prior to experiencing difficulty with his truck.

4. At approximately 5:00pm, South Carolina Highway Trooper L/Cpl. T. Blackwelder was dispatched to assist the Decedent in getting his vehicle off the road. The Plaintiff is informed and believes that the Decedent was outside of his vehicle when Blackwelder first arrived. At all times during the Decedent's interaction with Blackwelder, he was significantly intoxicated and clearly impaired. As such, the decedent exhibited visibly impaired behavior to include slurred speech, difficulty standing, difficulty walking, and speaking incoherently. Additionally, it was obvious that the decedent's friend was in no condition to drive the vehicle.

5. After Blackwelder assisted the decedent in getting his vehicle off the roadway, he asked the Decedent for his license and registration, as well as whether he was under the influence of any drugs or alcohol. At this time, the decedent did not have his registration or proof of insurance which are violations of South Carolina law. While the Decedent denied being under the influence of any drugs or alcohol, he did admit to taking flu medications.

6. Based on the above, the Plaintiff is informed and believes that it should have been obvious that the decedent was a danger to himself and others. Therefore, the decedent should have been taken to the closest hospital or at a minimum to the police department until a responsible party could pick him up. Instead, Blackwelder proceeded to conduct a field sobriety test (alphabet test) on the Decedent that resulted in an unsatisfactory performance. As a result, Blackwelder continued to question the Decedent's sobriety, specifically noticing that the decedent could not stand on his own. Blackwelder told the decedent that he did not think he would pass a drug test if given one. Incredibly, Blackwelder did not conduct any further field sobriety/drug tests at this time. It was crystal clear that the decedent was a threat to injure himself or others. Therefore, EMS should have been called to the scene or Blackwelder should have taken the decedent directly to the hospital. At a minimum, Blackwelder should have stayed with the decedent until such time that a responsible party picked him up. Based on the above, it was grossly negligent for Blackwelder to not ensure that EMS was called and that the decedent was taken to the nearest hospital.

7. The Plaintiff is informed and believes that the decedent was under the control, custody, and care of the SC Highway Patrol by and through L/Cpl. Blackwelder as soon as Blackwelder chose to perform a field sobriety test on the Decedent (considering the Decedent would have been arrested had he refused the test or attempted to flee the scene). As such, Blackwelder owed a special duty to the teenaged decedent while in his custody to prevent him from injuring himself or others. Therefore, the gross failure of Blackwelder to perform more than one sobriety field test on the noticeably intoxicated (high) decedent was a gross deviation from the acceptable standard of police conduct. Additionally, the failure of Blackwelder to recognize that the decedent needed immediate and emergent medical attention and to transfer

him to the nearest medical facility was a gross deviation from the acceptable standard of care. At a minimum, Blackwelder's failure to take the visibly impaired decedent to the nearest police station until he sobered up, or was picked up by a responsible party, was a gross deviation from the acceptable standard of police conduct.

8. Before leaving the noticeably impaired decedent and his friend on the shoulder of a busy highway (under construction), Blackwelder warned the decedent multiple times to quit wandering into the roadway. Eventually, Blackwelder instructed the impaired decedent to let his friend drive them home without confirming the friend's own sobriety or ability to drive. Considering the decedent's overall physical condition and the fact that he was wandering in and out of the roadway, it was a gross deviation in the acceptable standard of police conduct to simply drive away from the scene.

9. Thereafter, Blackwelder knowingly, consciously, and deliberately left a visibly impaired (high) teenager standing on the side of a highway without securing any aide or assistance. This was a gross deviation from the acceptable standard of police conduct. The Plaintiff is informed and believes that minutes later the decedent wandered into the road and was killed by an oncoming vehicle.

10. At approximately 6:09 pm, SC Highway patrol investigating Officer S. M. Groubert was dispatched to the scene of the accident. Upon arrival, Columbia Firefighters and Richland County EMS were giving the decedent CPR and preparing to transfer him to Palmetto Health Richland. The decedent's death certificate lists his presumed time of death at approximately 6:38 pm, and his toxicology results were positive for extremely high amounts of Methadone and Xanax. At the scene of the accident, Blackwelder expressed guilt for leaving the

teenage decedent on the side of the road knowing the intoxicated state that he was in (as confirmed by video footage).

11. As a direct result of the incident, an investigation was performed by the SO₂ 18
Highway Patrol. The investigation resulted in the production of numerous written reports that
included a statement describing the field sobriety test conducted by Blackwelder on the
obviously impaired decedent as, "to his satisfaction." This report is completely at odds with the
video footage that depicts Blackwelder telling the decedent that he didn't believe he could not
pass a drug test if given one; that he could barely stand up straight; and that he needed to let his
friend drive them home because of his impaired condition. At no point did Blackwelder attempt
to escort the decedent and his friend to a safe location to be picked up by a responsible party to
include but not limited to a medical facility (hospital), detention center, or police station. The
fact that Blackwelder repeatedly questioned the decedent's sobriety confirms that he knowingly,
consciously, and deliberately left the teenager on the side of the road impaired enough to walk
into the street and be killed.

12. The Plaintiff is informed and believes that her son's death was foreseeable and
that he was in a class of persons to whom Defendant Blackwelder owed a special and/or specific
duty to protect. As a direct result of these violations, the decedent was tragically killed.
Consequently, the Plaintiff has endured substantial psychological trauma, mental anguish, mental
distress, apprehension, anxiety, emotional injury, psychological injury, pain and suffering, and
loss of enjoyment of life. Furthermore, the Plaintiff is informed and believes that the decedent
consciously suffered both mentally and physically prior to his death.

FOR A FIRST CAUSE OF ACTION AGAINST THE DEFENDANT
(GROSS NEGLIGENCE-SURVIVAL)

13. Plaintiff reiterates each and every allegation stated hereinabove as if repeated verbatim herein.

14. The above set forth incidents and the Plaintiffs' resulting injuries were proximately caused by the negligent, grossly negligent, reckless, willful, and wanton acts of Defendant SC Highway Patrol, by and through their agents, servants, and/or employee L/Cpl. Blackwelder in one, more, or all of the following particulars:

- (a) In consciously failing to have appropriate policies regarding hiring, training, supervision, and monitoring of their employees;
- (b) If such policies do exist, in consciously failing to implement such policies;
- (c) In consciously failing to take reasonable steps/actions which would have prevented the accident in question;
- (d) In consciously failing to follow applicable Federal, State and local policies and procedures;
- (e) In consciously failing to protect the decedent;
- (f) In consciously failing to recognize an open and obvious, dangerous situation. And then, failing to take such actions as to prevent the foreseeable harm;
- (g) In consciously failing to train, monitor, and/or supervise its employees (to include L/Cpl. Blackwelder);
- (h) In consciously failing to recognize the fact that L./Cpl. Blackwelder did not have the proper training to conduct routine traffic stops involving broken down vehicles;
- (i) In consciously failing to train, monitor and/or supervise its employees to include L./Cpl. Blackwelder with regard to an open and obvious dangerous situation;

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LEXINGTON, NC

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CLERK OF COURT
LEXINGTON, KY
- (k) In consciously consciously failing to train, monitor and supervise its employees (to include L./Cpl. Blackwelder) with regard to when to initiate an arrest;
 - (l) In consciously failing to conduct a proper search of a person and/or vehicle once that person is in their custody and control;
 - (m) In consciously failing to conduct a proper search of a vehicle once they have probable cause to believe a crime or violation of the law has been committed;
 - (n) In consciously consciously failing to train, supervise or monitor its officers to prevent the release of intoxicated drivers;
 - (o) In consciously consciously failing to train, supervise or monitor its officers to recognize dangerous situations;
 - (p) In consciously engaging in a pattern and practice of failing to train its officers/employees;
 - (q) In consciously failing to take the appropriate action after seeing and/or recognizing that a crime or violation of the law has been committed;
 - (r) In consciously failing to arrest the decedent;
 - (s) In consciously failing to request or obtain information from the witness(es) in order to take into custody, arrest or prosecute the obviously impaired subject;
 - (t) In consciously failing to conduct a proper field sobriety test on the decedent;
 - (u) In consciously failing to take the appropriate action to safeguard the decedent;
 - (v) In consciously failing to place the decedent into protective custody;
 - (w) In consciously failing to recognize the decedent was in need of immediate and emergent care;

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CLERK OF COURT
LEWIS & CLARK COUNTY
WINSTON-SALEM, NC
- x) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) with regard to when to initiate an arrest;
 - y) In consciously failing to recognize the fact that L./Cpl. Blackwelder did not have the proper training to conduct routine traffic stops on finding impaired/intoxicated drivers;
 - z) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) to recognize immediate and emergent medical situations that requires EMS assistance;
 - aa) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) to recognize immediate and emergent medical situations that requires a direct transport to the hospital;
 - bb) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) when to transfer an impaired driver to a secure location until proper aide and assistance arrives (to include but not limited to the subject's house, police station or hospital).
 - cc) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) on how to respond to drivers without proof of insurance (to include placing drivers in custody);
 - dd) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) on how to respond to drivers without proof of registration in their possession (to include placing drivers in custody);
 - ee) In consciously failing to question the passenger driver about her own sobriety when there was probable cause to believe the driver was impaired.
 - ff) In consciously failing to search the vehicle in question;
 - gg) In consciously failing to search the impaired driver upon probable cause to do so;
 - hh) In consciously failing to search the passenger driver upon probable cause to do so.

- ii) In consciously failing to protect the decedent from harm;
- jj) In consciously failing to take reasonable steps/actions which would have prevented the decedent's suffering and death;

15. As a direct and proximate result of the aforementioned acts on behalf of the Defendants, the decedent unjustifiably and consciously suffered (both mentally and physically) and later died. Further, as a direct result the Plaintiff has suffered ACTUAL, CONSEQUENTIAL, and PUNITIVE DAMAGES.

FOR A SECOND CAUSE OF ACTION
(WRONGFUL DEATH)

16. The Plaintiffs reiterates each and every previous allegation as if repeated verbatim herein.

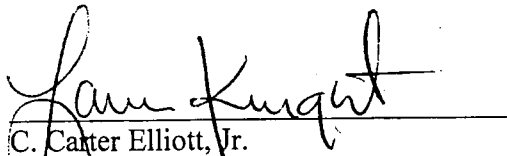
17. This wrongful death action is brought pursuant to the provisions of §15-51-10 et seq., of the Code of Laws of South Carolina (1976, as amended), on behalf of Rene Shelley and the heirs of the Estate of Michael Mann Lindler.

18. As a direct and proximate cause of the grossly negligent acts, omissions, willful and wanton conduct of the Defendants as described above, the deceased's heirs have been damaged and suffered as follows:

- a) Extreme mental shock and suffering;
- b) Extreme wounded feelings;
- c) Tremendous grief and sorrow;
- d) Loss of a son and relative;
- e) Deprivation of the use and comfort of the decedent's society, experience, knowledge and judgment.

19. As a direct and proximate result of the aforementioned acts on behalf of the Defendants, the decedent unjustifiably suffered and died, and further, the Plaintiff has suffered ACTUAL, CONSEQUENTIAL, and PUNITIVE DAMAGES.

20. WHEREFORE, the Plaintiff prays judgment against the Defendants both jointly and severally for ACTUAL, CONSEQUENTIAL, and PUNITIVE DAMAGES, together with the costs of this action, and for such other and further relief as this Court may deem fit, just, and proper.



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July 3, 2014
Georgetown, South Carolina

Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

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

Plaintiffs,

vs.

South Carolina Highway Patrol

Defendants.

FILED

2014 JUL 30

BETH A. CARRIGG
CLERK OF COURT

THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
P 12-16 2014-CP-32-02557

AMENDED COMPLAINT
(Jury Trial Requested)

COPY

The Plaintiff above-named, complaining of the Defendants herein, would respectfully show unto this Honorable Court and allege as follows:

PARTIES

1. The Plaintiff, Rene Hale Shelley, is a citizen and resident of the County of Lexington, State of South Carolina. Additionally, Rene Hale Shelley is the duly appointed Personal Representative of the Estate of her natural son Michael Mann Lindler, having been so appointed by the Lexington County Probate Court on 24th day of September 2013, under Case No. 2013ES3200125-2.

2. Defendant, South Carolina Highway Patrol is a governmental agency and/or political subdivision of the State of South Carolina, existing under the laws of the State of South Carolina (as defined by Section 15-78-10 of the Code of Laws of South Carolina) and is headquartered in the County of Richland, State of South Carolina. At all times hereinafter mentioned in this Complaint, Defendant South Carolina County Highway Patrol carried on its business by and through its agents, servants, and/or employees to include L/Cpl. T. Blackwelder.

Additionally, during the time period set out in the Complaint, these employees were operating within the scope of their officially assigned and/or compensated duties.

FACTS

3. On the afternoon of December 17, 2012, nineteen (19) year old Michael Lindler and a friend were driving on US Interstate 20, west bound near the 80 mile marker in Richland County, when the decedent's truck broke down in the middle of the road. During this time, this area of Interstate 20 was considered a construction zone. The Plaintiff is informed and believes that the decedent had just picked up his sick friend from the Lexington Medical Center prior to experiencing difficulty with his truck.

4. At approximately 5:00pm, South Carolina Highway Trooper L/Cpl. T. Blackwelder was dispatched to assist the Decedent in getting his vehicle off the road. The Plaintiff is informed and believes that the Decedent was outside of his vehicle when Blackwelder first arrived. At all times during the Decedent's interaction with Blackwelder, he was significantly intoxicated and clearly impaired. As such, the decedent exhibited visibly impaired behavior to include slurred speech, difficulty standing, difficulty walking, and speaking incoherently. Additionally, it was obvious that the decedent's friend was in no condition to drive the vehicle.

5. After Blackwelder assisted the decedent in getting his vehicle off the roadway, he asked the Decedent for his license and registration, as well as whether he was under the influence of any drugs or alcohol. At this time, the decedent did not have his registration or proof of insurance which are violations of South Carolina law. While the Decedent denied being under the influence of any drugs or alcohol, he did admit to taking flu medications.

6. Based on the above, the Plaintiff is informed and believes that it should have been obvious that the decedent was a danger to himself and others. Therefore, the decedent should have been taken to the closest hospital or at a minimum to the police department until a responsible party could pick him up. Instead, Blackwelder proceeded to conduct a field sobriety test (alphabet test) on the Decedent that resulted in an unsatisfactory performance. As a result, Blackwelder continued to question the Decedent's sobriety, specifically noticing that the decedent could not stand on his own. Blackwelder told the decedent that he did not think he would pass a drug test if given one. Incredibly, Blackwelder did not conduct any further field sobriety/drug tests at this time. It was crystal clear that the decedent was a threat to injure himself or others. Therefore, EMS should have been called to the scene or Blackwelder should have taken the decedent directly to the hospital. At a minimum, Blackwelder should have stayed with the decedent until such time that a responsible party picked him up. Based on the above, it was grossly negligent for Blackwelder to not ensure that EMS was called and that the decedent was taken to the nearest hospital.

7. The Plaintiff is informed and believes that the decedent was under the control, custody, and care of the SC Highway Patrol by and through L/Cpl. Blackwelder as soon as Blackwelder chose to perform a field sobriety test on the Decedent (considering the Decedent would have been arrested had he refused the test or attempted to flee the scene). As such, Blackwelder owed a special duty to the teenaged decedent while in his custody to prevent him from injuring himself or others. Therefore, the gross failure of Blackwelder to perform more than one sobriety field test on the noticeably intoxicated (high) decedent was a gross deviation from the acceptable standard of police conduct. Additionally, the failure of Blackwelder to recognize that the decedent needed immediate and emergent medical attention and to transfer

him to the nearest medical facility was a gross deviation from the acceptable standard of care. At a minimum, Blackwelder's failure to take the visibly impaired decedent to the nearest police station until he sobered up, or was picked up by a responsible party, was a gross deviation from the acceptable standard of police conduct.

8. Before leaving the noticeably impaired decedent and his friend on the shoulder of a busy highway (under construction), Blackwelder warned the decedent multiple times to quit wandering into the roadway. Eventually, Blackwelder instructed the impaired decedent to let his friend drive them home without confirming the friend's own sobriety or ability to drive. Considering the decedent's overall physical condition and the fact that he was wandering in and out of the roadway, it was a gross deviation in the acceptable standard of police conduct to simply drive away from the scene.

9. Thereafter, Blackwelder knowingly, consciously, and deliberately left a visibly impaired (high) teenager standing on the side of a highway without securing any aide or assistance. This was a gross deviation from the acceptable standard of police conduct. The Plaintiff is informed and believes that minutes later the decedent wandered into the road and was killed by an oncoming vehicle.

10. At approximately 6:09 pm, SC Highway patrol investigating Officer S. M. Groubert was dispatched to the scene of the accident. Upon arrival, Columbia Firefighters and Richland County EMS were giving the decedent CPR and preparing to transfer him to Palmetto Health Richland. The decedent's death certificate lists his presumed time of death at approximately 6:38 pm, and his toxicology results were positive for extremely high amounts of Methadone and Xanax. At the scene of the accident, Blackwelder expressed guilt for leaving the

teenage decedent on the side of the road knowing the intoxicated state that he was in (as confirmed by video footage).

11. As a direct result of the incident, an investigation was performed by the SC Highway Patrol. The investigation resulted in the production of numerous written reports that included a statement describing the field sobriety test conducted by Blackwelder on the obviously impaired decedent as, "to his satisfaction." This report is completely at odds with the video footage that depicts Blackwelder telling the decedent that he didn't believe he could not pass a drug test if given one; that he could barely stand up straight; and that he needed to let his friend drive them home because of his impaired condition. At no point did Blackwelder attempt to escort the decedent and his friend to a safe location to be picked up by a responsible party to include but not limited to a medical facility (hospital), detention center, or police station. The fact that Blackwelder repeatedly questioned the decedent's sobriety confirms that he knowingly, consciously, and deliberately left the teenager on the side of the road impaired enough to walk into the street and be killed.

12. The Plaintiff is informed and believes that her son's death was foreseeable and that he was in a class of persons to whom Defendant Blackwelder owed a special and/or specific duty to protect. As a direct result of these violations, the decedent was tragically killed. Consequently, the Plaintiff has endured substantial psychological trauma, mental anguish, mental distress, apprehension, anxiety, emotional injury, psychological injury, pain and suffering, and loss of enjoyment of life. Furthermore, the Plaintiff is informed and believes that the decedent consciously suffered both mentally and physically prior to his death.

FOR A FIRST CAUSE OF ACTION AGAINST THE DEFENDANT
(GROSS NEGLIGENCE-SURVIVAL)

13. Plaintiff reiterates each and every allegation stated hereinabove as if repeated verbatim herein.

14. The above set forth incidents and the Plaintiffs' resulting injuries were proximately caused by the negligent, grossly negligent, reckless, willful, and wanton acts of Defendant SC Highway Patrol, by and through their agents, servants, and/or employee L/Cpl. Blackwelder in one, more, or all of the following particulars:

- (a) In consciously failing to have appropriate policies regarding hiring, training, supervision, and monitoring of their employees;
- (b) If such policies do exist, in consciously failing to implement such policies;
- (c) In consciously failing to take reasonable steps/actions which would have prevented the accident in question;
- (d) In consciously failing to follow applicable Federal, State and local policies and procedures;
- (e) In consciously failing to protect the decedent;
- (f) In consciously failing to recognize an open and obvious, dangerous situation. And then, failing to take such actions as to prevent the foreseeable harm;
- (g) In consciously failing to train, monitor, and/or supervise its employees (to include L/Cpl. Blackwelder);
- (h) In consciously failing to recognize the fact that L./Cpl. Blackwelder did not have the proper training to conduct routine traffic stops involving broken down vehicles;
- (i) In consciously failing to train, monitor, and/or supervise its employees to include L/Cpl. Blackwelder with regard to an open and obvious dangerous situation;

- (k) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) with regard to when to initiate an arrest;
- (l) In consciously failing to conduct a proper search of a person and/or vehicle once that person is in their custody and control;
- (m) In consciously failing to conduct a proper search of a vehicle once they have probable cause to believe a crime or violation of the law has been committed;
- (n) In consciously failing to train, supervise or monitor its officers to prevent the release of intoxicated drivers;
- (o) In consciously failing to train, supervise or monitor its officers to recognize dangerous situations;
- (p) In consciously engaging in a pattern and practice of failing to train its officers/employees;
- (q) In consciously failing to take the appropriate action after seeing and/or recognizing that a crime or violation of the law has been committed;
- (r) In consciously failing to arrest the decedent;
- (s) In consciously failing to request or obtain information from the witness(es) in order to take into custody, arrest or prosecute the obviously impaired subject;
- (t) In consciously failing to conduct a proper field sobriety test on the decedent;
- (u) In consciously failing to take the appropriate action to safeguard the decedent;
- (v) In consciously failing to place the decedent into protective custody;
- (w) In consciously failing to recognize the decedent was in need of immediate and emergent care;

- x) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) with regard to when to initiate an arrest;
- y) In consciously failing to recognize the fact that L./Cpl. Blackwelder did not have the proper training to conduct routine traffic stops involving impaired/intoxicated drivers;
- z) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) to recognize immediate and emergent medical situations that requires EMS assistance;
- aa) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) to recognize immediate and emergent medical situations that requires a direct transport to the hospital;
- bb) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) when to transfer an impaired driver to a secure location until proper aide and assistance arrives (to include but not limited to the subject's house, police station or hospital);
- cc) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) on how to respond to drivers without proof of insurance (to include placing drivers in custody);
- dd) In consciously failing to train, monitor and/or supervise its employees (to include L./Cpl. Blackwelder) on how to respond to drivers without proof of registration in their possession (to include placing drivers in custody);
- ee) In consciously failing to question the passenger driver about her own sobriety when there was probable cause to believe the driver was impaired;
- ff) In consciously failing to search the vehicle in question;
- gg) In consciously failing to search the impaired driver upon probable cause to do so;
- hh) In consciously failing to search the passenger driver upon probable cause to do so;

- ii) In consciously failing to protect the decedent from harm;
- jj) In consciously failing to take reasonable steps/actions which would have prevented the decedent's suffering and death;

15. As a direct and proximate result of the aforementioned acts on behalf of the Defendants, the decedent unjustifiably and consciously suffered (both mentally and physically) and later died. Further, as a direct result the Plaintiff has suffered ACTUAL, CONSEQUENTIAL, and PUNITIVE DAMAGES.

FOR A SECOND CAUSE OF ACTION
(WRONGFUL DEATH)

16. The Plaintiffs reiterates each and every previous allegation as if repeated verbatim herein.

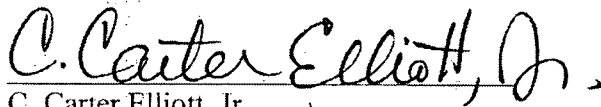
17. This wrongful death action is brought pursuant to the provisions of §15-51-10 et seq., of the Code of Laws of South Carolina (1976, as amended), on behalf of Rene Shelley and the heirs of the Estate of Michael Mann Lindler.

18. As a direct and proximate cause of the grossly negligent acts, omissions, willful and wanton conduct of the Defendants as described above, the deceased's heirs have been damaged and suffered as follows:

- a) Extreme mental shock and suffering;
- b) Extreme wounded feelings;
- c) Tremendous grief and sorrow;
- d) Loss of a son and relative;
- e) Deprivation of the use and comfort of the decedent's society, experience, knowledge and judgment.

19. As a direct and proximate result of the aforementioned acts on behalf of the Defendants, the decedent unjustifiably suffered and died, and further, the Plaintiff has suffered ACTUAL, CONSEQUENTIAL, and PUNITIVE DAMAGES.

20. WHEREFORE, the Plaintiff prays judgment against the Defendants, both jointly and severally for ACTUAL, CONSEQUENTIAL, and PUNITIVE DAMAGES, together with the costs of this action, and for such other and further relief as this Court may deem fit, just, and proper.



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July 30, 2014
Georgetown, South Carolina

Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 14-CP-40-5663

Plaintiff,

ANSWER ON BEHALF OF DEFENDANT

(Jury Trial Demanded)

v.

South Carolina Highway Patrol,

Defendant.

The Defendant answers the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The Summons and Complaint fails to state facts sufficient to state a cause of action.

FOR A SECOND DEFENSE

2. The Defendant denies each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained.

3. That as to paragraph 1, the Defendant would admit same upon information and belief.

4. That as to paragraph 2, the Defendant would admit that it is a governmental agency of the State of South Carolina headquartered in Richland County. The Defendant would further admit that at all times Lance Corporal T. Blackwelder was acting in the course and scope of his employment as a Trooper with the South Carolina Department of Public Safety.



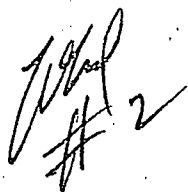
5. That as to paragraph 3, the Defendant would admit that on or about December 17, 2012, the deceased and a friend were broken down in the deceased's truck in the middle of US Interstate 20. The Defendant would further admit that at this time the area of Interstate 20 where the deceased's vehicle came to a stop was located in a construction zone. That as to the remaining paragraph the Defendant lacks sufficient information upon which to form a belief as to the truth and veracity of same, and therefore denies same and demands strict proof thereof.

6. That as to paragraph 4, the Defendant would admit that Trooper Blackwelder was dispatched to the location of the deceased's vehicle as a result of a report that the deceased's vehicle was blocking a portion of the interstate. That as to the remaining allegations, the Defendant would deny same as stated and demand strict proof thereof.

7. That as to paragraph 5, the Defendant would admit that Trooper Blackwelder, assisted the deceased in removing his vehicle off the roadway on to the shoulder. The Defendant would further admit that Trooper Blackwelder inquired as to the deceased's license, registration and other matters and was advised by the deceased that he was not under the influence of any drugs or alcohol but had had flu like symptoms. During this time Trooper Blackwelder inquired as to whether or not someone was available who could bring the deceased and his friend gasoline to start the vehicle, he further cautioned the deceased and his friend to stay out of the roadway.

8. That as to paragraph 6, the Defendant would deny same as stated and demand strict proof thereof. By way of explanation, the Defendant would allege that Trooper Blackwelder, in assisting the deceased and his passenger, evaluated the situation appropriately and was advised by the deceased and his passenger to have someone bring them gasoline.

9. That as to paragraph 7, the Defendant would deny same and demand strict proof thereof.

Handwritten signature and initials, possibly "J. Black" and "#2".

10. That as to paragraph 8, the Defendant would admit that Trooper Blackwelder advised the decedent to stay out of the roadway, but as to the remaining allegations the Defendant would deny same and demand strict proof thereof.

11. That as to paragraph 9, the Defendant would deny same and demand strict proof thereof.

10. That as to paragraph 10, the Defendant would admit that Trooper S.M. Groubert was dispatched to Interstate 20 at approximately 6:00 p.m. at which time he found that the deceased had been struck by another vehicle. As to the remaining allegations, the Defendant would deny same as stated and demand strict proof thereof.

11. That as to paragraph 11, the Defendant would admit that an investigation was conducted concerning the automobile accident involving the vehicle and the deceased. As to the remaining allegations the Defendant would allege that Trooper Blackwelder acted appropriately at the scene and would deny any liability and demand strict proof thereof.

12. That as to paragraph 12, the Defendant would deny same and demand strict proof thereof.

13. That as to paragraph 13, the Defendant would reiterate and reallege each and every paragraph and affirmative defense as if set forth herein verbatim.

14. That as to paragraph 14, the Defendant would deny same and demand strict proof thereof.

15. That as to paragraph 15, the Defendant would deny same and demand strict proof thereof.

16. That as to paragraph 16, the Defendant would reiterate and reallege each and every paragraph and affirmative defense as if set forth herein verbatim.

John #3

17. That as to paragraphs 17, 18, 19, and 20 the Defendant would deny same and demand strict proof thereof.

FOR A THIRD DEFENSE

18. The Defendant would allege that at all times herein its employees were acting in the course and scope of their employment within their discretion and therefore enjoys discretionary immunity.

FOR A FOURTH DEFENSE

19. The Defendant, upon information and belief, alleges that any injuries or damages allegedly suffered by the Plaintiff, without admitting same to be true, were due to and caused entirely by the negligence of the Plaintiff or the Plaintiff's negligence which is more than the Defendant's negligence, and that such is a complete bar to the Plaintiff's recovery herein. Further, the Defendant, upon information and belief, alleges that if the Plaintiff's negligence was less than the Defendant's negligence, that such negligence should be compared to that negligence of the Defendant, so as to apportion the relative fault as to each party.

FOR A FIFTH DEFENSE

20. The Defendant is immune from suit pursuant to the terms, conditions, and limitations of the South Carolina Tort Claims Act § 15-78-10 et seq. of the Code of Laws of the State of South Carolina, 1976 as amended including but not limited to § 15-78-60 (4)(5)(6) and (20).

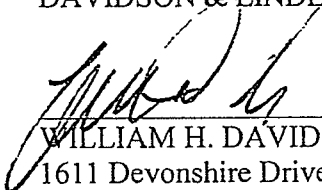
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FOR A SIXTH DEFENSE

21. The Defendant would allege that any and all claims for punitive damages are barred by the common law and the statutory law of the State of South Carolina including § 15-78-10 et seq. of the Code of Laws of the State of South Carolina, 1976 as amended.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant prays that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.

BY: 

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DEPARTMENT OF PUBLIC SAFETY

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 16, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

vs.

South Carolina Highway Patrol

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-40-05663

**NOTICE OF MOTION AND MOTION TO
RECONSIDER OR, IN THE
ALTERNATIVE, ALTER OR AMEND THE
JUDGEMENT ON BEHALF OF PLAINTIFF**

RICHLAND COUNTY
FILED
AUG -2 AM 10:15
JANETTE M. MCBRIDE
C.C.P. & G.S.

TO: THE ABOVE NAMED DEFENDANT:

PLEASE TAKE NOTICE, that the Plaintiff, by and through her undersigned counsel will move before this Honorable Court for Richland County on the Tenth day after service hereof, or at such other time and place as is convenient for Court and Counsel, for an Order pursuant to rule 59(e), SCRCPP, granting Plaintiff's Motion to Reconsider, or in the alternative, alter or amend its Order of July 19, 2016 granting Defendant's Motion for a Directed Verdict which was argued before the Court on March 18, 2016 after both parties presented and rested their cases at trial. Plaintiff received a copy of the Court's filed Order on July 25, 2016 and hereby submits her Motion to Reconsider as to the matters outlined below in accordance with SCRCPP 59(e).

The Plaintiff believes there were two arguments raised at trial by Plaintiff's Counsel that were omitted in the Court's Order that need to be addressed. At trial, Plaintiff argued extensively that Defendant should be liable under the "voluntary undertaking" doctrine as articulated in *Russell v. Columbia*, 305 S.C. 86; 406 S.E.2d 338 (1991). In *Russell*, the Supreme Court, in a case that arose prior to the adoption of the South Carolina Tort Claims Act, held, "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he

should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking." *Id.* at 89. This Court ruled that though *Russell* was decided after the adoption of the Tort Claims Act, the case arose prior to its adoption. Therefore, the Court held that because the *Russell* Court did not consider any of the immunities provided for in the Tort Claims Act, it does not control the present action.

Plaintiff further argued that under South Carolina common law while, "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger," *Rogers v. South Carolina Dep't of Parole & Cmty Corr.*, 320 S.C. 253, 464 S.E.2d 330 (1995), there are exceptions:

- 1) where the defendant has a special relationship to the victim;
- 2) where the defendant has a special relationship to the injurer;
- 3) where the defendant voluntarily undertakes a duty;
- 4) where the defendant negligently or intentionally creates the risk; and,
- 5) where a statute imposes a duty on the defendant.

Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (S.C. 2002). Plaintiff argued that because Defendant's officer undertook to render aid to Decedent he assumed the duty to exercise due care in how he rendered aid, or, at minimum, had a duty to not make the dangerous situation worse for the Decedent. Plaintiff cited *Edwards v. Lexington County Sheriff's Dep't*, 386 S.C. 285, 688 S.E.2d 125 (2010) in support of her contention that Defendant's officer had created a special relationship and, thus, the issue should be presented to the jury. Having heard the testimony over five days of trial, this Court concluded that whether Defendant made a special undertaking and had a special relationship with Plaintiff's Decedent is

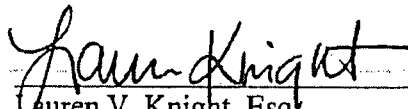
indeed a question of fact for the jury; however, the Court found that Plaintiff's theory of recovery was specifically barred by S.C. Code Ann. §§ 15-78-60 (4) & (6).

The Plaintiff believes the omission of this information would justify reconsideration.

This Motion is filed pursuant to Rule 59 of the South Carolina Rules of Civil Procedure.

Plaintiff does so move.

Respectfully submitted,



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COUNSEL FOR PLAINTIFF

August 1, 2016
Georgetown, South Carolina

1 State of South Carolina Court of Common Pleas
 2 County of Richland Fifth Judicial Circuit
 3
 4 Rene Hale Shelley, Individually) Transcript of Record
 and as Personal Representative of)
 5 the Estate of Michael Mann Lindler,) 2014-CP-40-5663
)
 6 Plaintiff,)
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 7 vs.)
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 8 South Carolina Highway Patrol,)
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 9 Defendant.)

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March 14th - 18th, 2016
 Columbia, South Carolina

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B E F O R E:

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The Honorable Alison R. Lee, Judge

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A P P E A R A N C E S:

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 Lauren V. Knight, Esquire
 Andrew William Kunz, Esquire
 Attorneys for the Plaintiff

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Joel S. Hughes, Esquire
 Todd R. Flippin, Esquire
 Attorneys for the Defendant

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STACY S. JOHNSON
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2				
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18	D-1	CAD Report 12/17/12	714	716
19	C-1	Blackwelder Video Deposition (Unaltered)	335	
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21				
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1 He knew how to recognize folks that were impaired and
2 you'll hear him testify by and through his deposition in
3 a minute that we plan on showing.

4 Again, his job is to work in construction zones.
5 They're fundamentally hazardous. His primary duty is to
6 protect folks from harm, especially foreseeable danger and
7 especially folks that are impaired. He had an absolute
8 duty to protect Michael Lindler from foreseeable harm
9 based on his knowledge and training and everything else
10 and just really common sense. When you're out there on
11 that roadway, you've got to take this main obligation
12 extremely serious because that's what you're out there
13 to do is to protect folks from the foreseeable harm,
14 protecting them when you know you're in a construction
15 zone, all of these things are going on, it's hazardous
16 conditions out there.

17 And where did this duty come from to protect Michael
18 from harm? Well, it comes from your training. It comes
19 from the policies and procedures that they learn. We're
20 gonna talk about some of those during the course of this
21 trial. You've got policies and procedures out there that
22 tell you what to do when you have a stranded vehicle and
23 you have a person out there that's by his self or with
24 another person. They have policies; here's what you do
25 in these situations. But, quite frankly, a lot of it,

1 once you get out there and you see someone that's stranded,
2 what I'm gonna show you in a minute, is it's just common
3 sense as a person. I don't even think you almost need to
4 have all the training, but he did, he had it. But most
5 of us would have done the same thing anyway, would have
6 helped him, would have done the things that you should do.

7 What are you gonna see in this trial is -- one of
8 the main things, the main piece of evidence, I think, is
9 the dash cam video, and lucky for us we have the dash cam
10 video and we have the audio as well. So not only can you
11 see what's going on from Officer Blackwelder's car when
12 he pulls up to the location and you see the hazardous
13 condition, you see the construction going on, you see what
14 time of day it is. You don't have to take my word for it,
15 you can see it. And you also have the audio. They have
16 a piece of equipment on so you hear the audio when he's
17 talking with Michael Lindler on the scene, you can hear
18 what they're saying, most of it. Some of it's a little
19 hard, but most of it you can hear. These fine attorneys
20 -- and whoever they want, any witness, any attorney, can
21 tell you whatever they want to. But guess what? You
22 can't run from a video.

23 **MR. HUGHES:** Objection, Your Honor. Argumentative.

24 **MR. ELLIOTT:** It is -- it is what it is.

25 **THE COURT:** I'll just remind you just to make sure

1 Ladies and gentlemen, one thing that we have raised
2 in this case is the doctrine of comparative negligence.
3 It's a tough thing to say that a young 19-year old is
4 dead and it's his fault, but we find ourselves in a
5 courtroom sitting in front of twelve people that have to
6 decide this case, and unfortunately we've got to put that
7 burden on you guys.

8 Comparative negligence as a matter of law means that
9 Michael Lindler is more negligent than the South Carolina
10 Highway Patrol. Is grossly negligent. Let me be clear
11 though. The South Carolina Highway Patrol was not
12 negligent in any way in this matter. South Carolina
13 Highway Patrol Trooper Travis Blackwelder did everything
14 that the law allows him to do. He did everything that
15 the highway patrol policies required of him and he did
16 everything that every trooper is gonna get in front of
17 you today or this week and tell you they would do. This
18 is a tragedy, but it's a tragedy without a villain. Thank
19 you.

20 **THE COURT:** Counsel, about how long is your first
21 witness?

22 **MR. ELLIOTT:** Judge, that's the video deposition
23 we're gonna publish and maybe we could go to lunch and
24 then do it after we come back?

25 **THE COURT:** We can. I was just trying to figure

1 leaving the Aiken County Sheriff's Department in 2005?

2 A. To go to the highway patrol.

3 Q. Okay. Just better money, better benefits, things like
4 that?

5 A. No.

6 Q. No. What's the -- what was it, just wanted a change?

7 A. I just wanted to go to the highway patrol.

8 Q. Any particular reason?

9 A. Yeah, I wanted to go to the highway patrol. That was
10 my reason.

11 Q. Well, how did you -- I'm just trying to understand
12 how you concentrated just on trying to find and weed out
13 drunk drivers. How does somebody concentrate on that?

14 A. Well, when you come to work you look for signs of
15 impairment in motor vehicles and make traffic stops.

16 Q. All right. After you do the traffic stop, you try
17 to assess the degree of impairment?

18 A. Yes.

19 Q. Okay. And based on that assessment, you figure out
20 whether you're going to charge them with something or not?

21 A. Yes.

22 Q. Okay. All right. Same with the drug detection, I
23 don't -- can you explain that a little bit more, just
24 trying to figure out whether you think someone's consuming
25 drugs?

1 A. We did receive training on how to detect impaired
2 drivers.

3 Q. Okay. And, again, based on what you've already told
4 me, it seemed like you had a ton of experience with that
5 because you actually trained people to do that at the
6 sheriff's department here for three or four years?

7 A. Yes.

8 Q. And that was one of your primary things that you
9 did --

10 A. Yes.

11 Q. -- on that task force?

12 A. Yes.

13 Q. Okay. Was one of the ways that you attempt to
14 determine the extent of somebody's impairment that -- that
15 field sobriety?

16 A. Yes.

17 Q. Okay. Is another way just -- generally in just
18 talking to them and the way they communicate with you?

19 A. Yes.

20 Q. Is it in the way that they're walking and whether
21 they're stable on their feet, things like that?

22 A. Yes.

23 Q. And, again, I -- what I'm asking you is, I assume
24 this would be the same for if anybody you happen to run
25 into as a highway patrolman, whether it be a pedestrian,

1 hospital and had the flu and felt like he probably
2 shouldn't drive if he was that tired.

3 Q. Well, as we talked about earlier, regardless of what
4 causes the impairment, I mean, you still have to worry
5 about the safety. I don't care what's causing it, right?
6 You still thought he was too impaired to drive?

7 A. I thought he was too sleepy to drive.

8 Q. So now we're -- you're saying sleepy. He wasn't
9 impaired? He was too sleepy? That's not an impairment?

10 A. It's not an impairment that's against the law..

11 Q. So you can't be so impaired, regardless of what's
12 causing it, that you have -- that you have a duty to stay
13 there and make sure he's got transportation before you
14 left? Regardless of what's causing it?

15 A. I mean, it's not illegal to be sleepy.

16 Q. I didn't ask you about arresting him.

17 A. Someone being sleepy is not a reason to wait on the
18 side of the road, no.

19 Q. On a proper person to get there to make sure that
20 he's got safe transportation?

21 A. I did confirm that he had proper, safe transportation
22 out of there.

23 Q. How did you do that?

24 A. The girlfriend was on the phone with his mother who
25 stated that she was just a couple of miles away. I

1 relayed to the girlfriend exactly what her location was.
2 And if I recall, the mother said she'll be there shortly.

3 Q. But it wasn't one of those deals as we talked about
4 earlier with your trainer that you felt like you had to
5 -- why didn't you just stay there till she got there?

6 A. I didn't feel like it was a situation that would
7 require me to stay there. No one was under the influence
8 that I felt. They had help on the way. They were out of
9 roadway flow of traffic.

10 Q. Why did you tell him you didn't think he would pass
11 a drug test?

12 A. That is an, I don't know, interrogation technique,
13 I guess, to try to intimidate someone to admit something
14 that they may have been trying to hide --

15 Q. Did you think he was --

16 A. -- to let -- to make -- to try to make him think I
17 knew.

18 Q. Sure. And I -- I would assume that if that's what
19 -- that's your tactic, you thought he was doing drugs? I
20 mean, why else would you do that?

21 A. That's not necessarily true.

22 Q. So you just -- wait. So you just use tactics like
23 that on people that you don't think are doing drugs? Why
24 would you do that?

25 A. Well, that particular incident that you're talking

1 is during all of this conversation and before our final
2 conversation that finally convinced me that he was not
3 under the influence.

4 (Whereupon, a portion of the video was played.)

5 Q. Okay. So now everything has happened. He's sitting
6 right there in front of you and he can't even stand up
7 and you tell him that twice. And you're telling me --
8 you're telling me your testimony is that you don't think
9 he's impaired to the point where you needed to -- you
10 needed to stay there and make sure he's safe?

11 A. I'm telling you at the end of my interaction with
12 him that I did not feel that he was impaired.

13 Q. And you've got a man standing in front of you right
14 there that can't stand up?

15 A. I have a man standing in front of me right there who
16 has expressed to me that he had worked all night, had
17 still been up all day, not went to bed, had been at the
18 hospital ER all day, had the flu, was standing on a
19 hillside in almost dark, drizzling rain, slippery
20 conditions. I think at the very end, as previously
21 stated, that my totality of the circumstances, my
22 assessment, my final assessment, not during the assessment
23 but my final assessment, was, no, he was not impaired.

24 Q. So you watched him right there and you said to him
25 twice you can't stand up. I think right after this you

1 A. Yes.

2 Q. And did you have a conversation ever with the
3 girlfriend?

4 A. I told her where she was at. She was on the phone
5 with the help that was coming.

6 Q. Okay.

7 A. They just said that they were just up the road.

8 Q. Okay. On the later videos that we have -- and I
9 could find it, but I'm just trying to speed it up, and
10 I'll -- I'll -- if you want me to play it, I don't have
11 any problem with it. But in the later videos it said --
12 you said that -- that you felt guilty for leaving him
13 there. Do you remember saying that?

14 A. That sounds like something I would probably have
15 said.

16 Q. Okay. Do you remember who you told that to?

17 A. No.

18 Q. That you felt guilty leaving him there in that
19 condition?

20 A. No, I don't recall saying that.

21 Q. Did you have an understanding when you got back that
22 he had been struck in the roadway, that he -- you know,
23 he had walked out in the roadway and he had been struck
24 in the roadway?

25 A. Yes. I had an understanding that he had walked out

1 into the roadway and turned and faced traffic and was
2 struck by a vehicle.

3 Q. Where did you hear he had turned and faced traffic?

4 A. I overheard the person that actually struck him.

5 Q. Okay. And going back through and listening to this
6 like we did in -- in so much detail and stopping and
7 starting it, did you not think that most -- if not most of
8 his answers or a lot of them, were inconsistent? I mean,
9 were answers like Xanax -- I'm doing muscle relaxers but
10 it's cough medicine? I mean, didn't he tell you a lot of
11 things that didn't make sense and they were inconsistent
12 with what you know to be true?

13 A. He did give some inconsistent statements; but, you
14 know, at the same time people just aren't as -- that
15 smart in the world. Maybe he doesn't know. Maybe he
16 didn't know what he was taking. I mean, I -- I can't --
17 I don't know what to -- I don't know his level of
18 education. I didn't know his level of fatigue. That's
19 what everything -- I mean, I -- I don't know.

20 Q. Do you recall -- did you know that the investigation
21 revealed that they really -- they weren't really far away
22 from home but were lost, they didn't know where they were
23 going? Did you know that?

24 A. No, I didn't know that.

25 Q. Well, I mean, do you think if you would have just

1 said that a car hits you on the interstate kills you just
2 like a car hits you in front of a gas station:

3 Q. I know. But what I'm trying to differentiate is to
4 where is the biggest danger you think, located in the
5 parking lot of a gas station --

6 A. I would say --

7 Q. -- or on that interstate that night?

8 A. I would say on the side of the interstate would have
9 been a bigger danger.

10 Q. But you didn't think he was when you were there with
11 him and certainly had no reason to believe that?

12 A. Not with my interaction, no.

13 Q. You didn't think he was ever in any danger?

14 A. Initially when he was stopped in the middle of the
15 road, yeah, he was in danger there.

16 Q. But never on the outside you thought he was in any
17 danger?

18 A. I didn't think he would be in any danger sitting on
19 the side of the road not in the flow of traffic. I didn't
20 think he was in danger.

21 Q. But you do agree with me, if you thought he was in
22 danger you couldn't leave?

23 A. If I thought he was in danger, yes, it would
24 probably -- I would agree with you that it would be my
25 duty to stay there.

1 Q. And you're saying if he would have asked you for a
2 ride you would have given him one?

3 A. If he would have conveyed to me that he wanted a
4 ride to the next exit, yes, I would have given him one.

5 Q. But you didn't think he needed a ride with you?

6 A. I didn't think he needed a ride because his help,
7 from my understanding, was just up the road, not too far
8 away, would be there any minute and he said he was waiting
9 on them.

10 Q. And you testified earlier, you said impairment by
11 pills is harder to detect, is that what you said, than
12 alcohol?

13 A. Sure.

14 Q. But you've got -- I mean, and all you did for three
15 to four years is do nothing but focus your task and your
16 task force and your -- your officers on figuring out or
17 pulling over people that were impaired whether they were
18 from drugs or alcohol, correct?

19 A. Most of my DUI arrests or were alcohol based. I
20 would say probably 95 percent were alcohol based.

21 Q. But you certainly have given people DUIs or been
22 able to tell based on your experience and training when
23 people were impaired from doing drugs?

24 A. I have made some arrests of people who were under
25 the influence of drugs and they were DUI, yes.

1 Q. Okay. And do you consider yourself a police expert
2 or criminologist both or are they one and the same?

3 A. I'm a criminologist who specializes in police
4 standards and procedures. The law enforcement profession
5 has standards just as you have in accounting and law and
6 medicine and so on.

7 Q. You talked about being a professor of criminology or
8 a professor emeritus. How many of those have there ever
9 been in the history of FSU?

10 A. Well, in the 65-year history of our school, there
11 have only been six professors emeriti and I believe most
12 of them have been deans or chairmen. I think that
13 Dr. Gordan Waldo and I are the only two living professor
14 emeriti right now.

15 Q. Tell the jury exactly what is a criminologist. It
16 specializes in what standards and procedures.

17 A. Yeah, a criminologist is a -- sometimes confused
18 with criminalists who are the laboratory people you see
19 on CSI. A criminologist is a scientist who's involved
20 in studying in the causes of crime and delinquency,
21 terrorism, antiterrorism, things like that. We're also
22 involved in the study of our criminal justice system and
23 its three component parts; courts, corrections and law
24 enforcement. So a criminologist is pretty much like a
25 doctor who might specialize in obstetrics and neurology,

1 surrounding this accident?

2 A. Basically that this -- this situation revolved
3 around a -- what I characterize as a DAV, a disabled
4 vehicle, involving Mr. Lindler, and the circumstances
5 were that it was on I-20 west, starting at about -- it
6 was about 5:00 in the evening in December 2012, I believe
7 it was, and dark, getting darker, and rainy conditions
8 and in a construction zone where the emergency lane had
9 been blocked off with barrels and cones and so forth, so
10 it was a difficult kind of environment. And I was aware
11 that Trooper Blackwelder had specialized experience. I
12 think for some time he had worked construction zones. A
13 lot of agencies deploy officers to zones like that.

14 So on that date in question, he was -- I believe he
15 was dispatched to this location for this disabled vehicle
16 and it was there that he encountered Mr. Lindler and --
17 and, you know, to start off with it's important -- most
18 people don't realize, they watch TV and they think that
19 bullets kill police officers primarily; no, it's cars
20 that kill police officers and cars are very, very
21 dangerous. We all need to be aware of that. We put on
22 our seatbelts and we try to drive carefully, but when
23 you're -- when you're handling the traffic situations it
24 becomes very, very dangerous in the sense that highway
25 patrol people are in a lot more traffic encounters than

1 when you -- when you stop in a traffic situation, pulling
2 somebody over for speed or whatever or you've got a
3 disabled vehicle off the road, whatever, or on the
4 road in this case, sitting in a road, which becomes very
5 hazardous, you'll notice, I think, probably from the video
6 that the officer, as his training, creates a safety
7 corridor, he activates his emergency lights, you see
8 those flash -- or reflecting off the back of the truck,
9 and he creates a safety margin where his car is offset so
10 that he can walk up safely to see what's going on with
11 the motorist or the disabled vehicle, what's happened
12 there, and so he does -- he does that.

13 And this trooper's training and experience, which
14 would be far superior to that of a city police officer in
15 terms of -- in terms of like DUI detection. We arrest
16 DUI people as well, but the thing that really very, very
17 -- much more training in this area of substance abuse
18 detection and so on, so right away when he -- he walks
19 up there and there's a good Samaritan who's apparently
20 stopped in a little red truck and because the disabled
21 truck has no -- no flashers on it, they're all the good
22 Samaritan's that's sitting there in his little red truck
23 with his flashers going. And you can't quite hear it,
24 there's an exchange of something, he says something. I
25 can't tell what it is, I've listened to it a lot of times,

1 that Mr. Lindler says -- something's not quite right about
2 him, he's not -- and these guys are -- these troopers are
3 very, very attune in terms of their training to detect
4 DUI. I mean, police officers generally are, but they're
5 watching for any -- you know, any smell of alcohol, any,
6 you know, slurred speech, blurry vision. He's not picking
7 up on -- there's nothing like that that he's seeing, but
8 other things that are -- he's seeing that could cause him
9 -- cause him some concern, and that is that Mr. Lindler
10 seems to be unsteady on his feet, stumbling, you know,
11 not able to stand straight, and -- and there are other
12 things. He is -- he's not -- he seems to be heedless to
13 the fact that he's in an extremely dangerous place. You
14 can see on the video at one point where he -- he opens
15 the door of his truck and he's standing there, you know,
16 right where -- the door is open over the -- over the white
17 line, very close to traffic, and you'll notice that the
18 traffic -- this is one of the functions of the police
19 vehicle being there.

20 When people see police vehicles, what do they do?
21 They -- they slow down straightaway. And you can see
22 cars on the south side, they're vectoring over to the
23 inside lane going slow as they go by, so it's just a nice
24 protective resource of a police vehicle so he can do his
25 investigation. They've got those -- those bright lights

1 oscillating constantly and we've got that safety corridor
2 that he's created with the presence of his cruiser.

3 So he's starting to talk to this young man about
4 what's going on with you, what's wrong with you, why can't
5 you stand up straight, and at one point he -- he uses a
6 test which police commonly use, I've used it, other
7 officers use it all the time, it's a very simple ABC test
8 usually used to detect alcohol impairment. And while it's
9 not part of the standardized -- there's a standardized
10 battery of national highway safety tests that are used,
11 it's a handy little device. You can start anywhere in the
12 alphabet to see if the person is able to focus on what
13 you're having them do and generally observe whether or not
14 they're able to coherently without slurred speech and so
15 forth recite the alphabet.

16 This young man does that without any -- any problem,
17 but Trooper Blackwelder is -- he's -- there's something
18 not right and he's doing what he should be doing there.
19 He keeps making inquiries. He is like a dog with a bone
20 during the entire fifteen minutes of that encounter.
21 He's asking him questions about -- right after the ABCs,
22 what -- what pills are you on, what pills are you taking,
23 and trying to -- trying to elicit some information there.
24 Why can't you stand up straight? Well, I'm on a -- I'm
25 standing on an incline here. Well, he says I'm standing

1 on the same incline, I'm not -- I'm standing straight.
2 At one point Lindler says well, you know, I can pass --
3 I can pass any test you give me or something to that
4 effect and he says listen, you can't even stand on --
5 you're having trouble standing even on two feet, you're
6 stumbling, and he keeps pursuing, asking questions, trying
7 to find out what's -- what's wrong with this guy, what's
8 -- what's going on here.

9 At one point he asked him, you know, have you taken
10 anything and he -- one of the responses is yeah, I've had
11 -- I've taken Xanax, and these guys know -- troopers know
12 a lot about -- you know, it might not be everything in
13 the Physician's Desk Reference, but they are very
14 knowledgeable about drugs and their effects, what they
15 do, what they don't do. So that's an important piece of
16 information. He said I've taken Xanax, I've been smoking
17 some weed, okay? He keeps -- then he -- and, again, I'm
18 kind of jumping around here a little bit, but he really
19 doesn't focus on what -- you know, what are you trying to
20 do. I know you need help, but what's the plan to get
21 this vehicle up and running. He early on determines that
22 this person should not be driving. Now Mr. Lindler says,
23 well, you know, I'm tired, I've had the flu, I was up all
24 night, you know, I've been sick and, you know, we've all
25 -- you know, I was in the hospital, and we've all had

1 those kinds of experiences, but the -- he's doing things,
2 like twice he walks beyond this white line and he may not
3 hear the trooper initially when he calls out to him, but
4 he -- the fact is he's not attentive to where he is.
5 He's looking over his -- he's standing with his door open
6 on his truck smoking a cigarette with these cars coming
7 by, you know, in the rain, in the dark.

8 And there's some other things, too, that the
9 trooper does not seem to pick up on that are, I think,
10 significant. He doesn't seem to be very well orientated
11 to where he is. He only lives like ten or fifteen minutes
12 away, but he doesn't seem to really know quite where he
13 -- where he is. He also -- you know, most of us has had
14 the experience at some time or another running out of
15 gas, you misread the gauge or something, but he doesn't
16 seem to -- it took a little while for him to realize that
17 he's run out of gas. So he seems to be -- you know, he
18 seems somewhat spaced out and not able to really take
19 good care of himself.

20 And so the trooper says well, you know, what -- how
21 are you gonna -- in essence, what's going to happen
22 where, and he's told that the -- that Mr. Lindler's
23 mother is on her way to help. Now that would presume
24 that she's gonna be bringing some gas because now we
25 know it's a gas problem, but the problem there is, and

1 this becomes very, very important in my analysis of it,
2 the trooper -- Trooper Blackwelder says to him very
3 explicitly because he stepped out in the roadway twice,
4 he says you are not -- do not cross that white line.
5 Remember right now he's got that police car sitting there
6 as a protective barrier. But do not cross that white
7 line and tell anybody who comes out here to help you that
8 if they cross this line they're wrong, he says they're
9 wrong, you can't do that. Here's the problem. The gas
10 tank on that -- on that pickup is on the traffic side and
11 you'll see in the -- I'm sorry -- you'll see in the video
12 that the vehicle, the truck, is very, very close to the
13 -- maybe twelve inches, fifteen inches away from the white
14 line, very close. The point of it is if that police car
15 leaves, you lose the protection of the corridor that the
16 officer has got there and all those flashing lights that
17 slow people down and get them to move over to the other
18 side is gone and now if you -- if you assume that the
19 plan was, as the trooper understood it, that his mom's
20 was gonna come out there presumably with some gas to help
21 him get the vehicle started, but that is an extremely
22 dangerous situation. If the trooper leaves before she
23 gets there -- he's got a number of things he can do
24 safely, but if he leaves you're gonna have one or maybe
25 two people if the girlfriend's helping or the mom's

1 helping standing necessarily over that line. You can't
2 put gas in there without being on the other side of that
3 white line. You're gonna be standing in total darkness.
4 The only -- the only --

5 **MR. HUGHES:** Objection, Your Honor. Relevance.
6 None of this actually transpired, so it doesn't matter.

7 **MR. ELLIOTT:** What?

8 **THE COURT:** No, sir.

9 **MR. HUGHES:** There's no testimony that anybody put
10 gas in the vehicle.

11 **MR. ELLIOTT:** There's testimony that somebody went
12 to -- or was coming with the gas, I think, Your Honor.

13 **MR. HUGHES:** I think that -- I can't really --

14 **THE COURT:** I'm going to overrule the objection.

15 **THE WITNESS:** The point -- the reason -- I
16 understand that, Mr. Hughes, but the importance of it is
17 that an experienced trooper, this guy has got like five
18 hundred DUI arrests, eight years' experience, a lot of
19 training, a lot of training, you would have -- a rookie
20 would foresee, with all due respect, that if the plan --
21 this plan involved great danger, we could have a double
22 vehicular death out there, a homicide-type thing. In
23 order to -- in order to -- they cannot -- I can't see a
24 way how you could possibly put gas in that vehicle that's
25 deadlined out there without stepping out into the roadway

1 and the only lights you're gonna have is if you've got a
2 little Rayovac flashlight with you. I don't know if mom
3 has that or not, but the only light you're gonna have is
4 the headlights of oncoming cars and you're just gonna be
5 a dark blob off there on the side and it would be very,
6 very easy for -- for somebody to hit you.

7 So what I'm saying is that's an un -- that should
8 have -- with all due respect, you know, every cop makes
9 mistakes, I've made mistakes, plenty of them, but this is
10 a really -- if this was a plane, you would be crashing it
11 or if it was a patient in the OR, they'd bleed to death.
12 this is a really serious thing to say well, wait a minute,
13 I've got a -- my job is to protect and serve, protect
14 human life.. That's the highest priority that any officer's
15 got out there on the street or in the field, on the
16 highway, and this plan that they've got, we -- you know,
17 I don't know when mom's gonna get here and if she's gonna
18 have a gas can or she's gonna have maybe a flashlight,
19 but I can't -- I can't leave these people here like this,
20 it's not safe.

21 So what are my alternatives? Well, one thing that
22 -- and they have a lot of excellent policies that speak
23 to officers getting to -- getting people to safe haven
24 if they're broken down and they need help, they're good
25 policies and all, and that's what he should have been

1 that's whipping by there, take a push bar and push it way
2 off the road, and they seemed to have solved the problem
3 -- I thought they solved the problem of the cables, the
4 battery. There's no flashers on. You would really want
5 to have those -- those little flashers going, too.

6 So there's a whole lot of things that you can do,
7 but the one thing you can't do, and I understand that,
8 you know, there's a load of other -- other things that
9 are going on, other -- other stalled vehicles and
10 accidents and so on, but you've got to prioritize safety
11 and life, and you have now entered into a special
12 relationship with this -- this person.

13 **MR. HUGHES:** Objection, Your Honor. Can we approach
14 on that, please?

15 **THE COURT:** Yes, please.

16 (Proceedings held at the bench; not reported.)

17 **MR. HUGHES:** Your Honor, understanding the Court's
18 ruling, we would note an objection to this testimony.

19 **THE COURT:** Yes, sir.

20 BY MR. ELLIOTT:

21 Q. Okay. Dr. Kirkham, you were talking about and you
22 were beginning to testify about what you consider to be
23 the relationship between Blackwelder and Mr. Michael
24 Lindler at the time?

25 A. Yeah. You know, I mean, my whole tact that, you

1 know, the police don't have any duty to protect specific
2 people in general. I mean, you know, we've got seven
3 hundred thousand police and we've three hundred and thirty
4 million people, but when you -- when you encounter a
5 situation like -- it could be anything. It could be an
6 emotionally disturbed person, it could be somebody that's
7 sick and injured, it could be a lot of different things,
8 but you enter into a -- into a duty to help that person,
9 and that's consistent with the law enforcement code of
10 ethics and I think it's consistent with their policies,
11 which I've said are very good.

12 300.14, I think. That, you know, you need to
13 convey someone if a person requests it and says -- I'm
14 paraphrasing here -- convey them to a safe harbor
15 basically, get them to a safe place. Well, implicit in
16 that I think is the expectation what a reasonable officer
17 is going to; if they don't request it, but there's
18 obviously a need for it, that you're going to get them
19 to a safe place, do the best you can to get them to a
20 safe place or secure their safety, and that's -- that's
21 what doesn't happen here and --

22 Q. When did that relationship --

23 **THE COURT:** Well, at this particular time I think
24 it's a good time to take a break for the evening based
25 upon the time.

1 can and he said you can't stand over the white line, but
2 they would have had to stand over the white line in
3 darkness, in an active traffic lane, and that is a
4 fatality waiting to happen. A new trooper could -- a new
5 officer could see that quite readily.

6 Q. You heard Trooper Blackwelder yesterday in his
7 testimony say well, I thought they were pretty close.
8 How fast does it take to get out in that traffic and get
9 killed?

10 A. Well, that's the whole point. He said well, I knew
11 they were coming, I thought they were coming pretty
12 close. You could be talking about a second. He could
13 leave there and ten seconds after he pulls out there's
14 no longer any emergency police lights, there's no longer
15 any protective corridor from the patrol car offsetting,
16 you know, the stalled vehicle. And, again, there are no
17 flashers on it. It's sitting -- it's sitting so close
18 that you can't do what he knew they planned to do safely
19 without standing out in the roadway. So he should have
20 -- you know, he had a number of options. He could have
21 stayed there, he could have taken them home. They lived
22 ten, fifteen minutes away. Had he asked, he would have
23 learned that. He could have taken them up to the next
24 stop if he felt he had too many other things he needed
25 to do or wanted to do, but not just leave them there.

1 he knows -- he knows that there's a danger, he knows
2 there's a special problem here and a relationship quickly
3 develops.

4 Q. And how long did it last?

5 A. It lasted for fifteen minutes.

6 Q. So you're saying it lasted throughout the entire
7 time until he left?

8 A. As we can hear and see on the -- on the video and
9 the more -- the more questions he asked, the more
10 persuaded a reasonable officer would be that this is --
11 this is dangerous. You can't even stand up, why are you
12 stumbling around, what are you on? He knows something.
13 He's too experienced, too trained not to know, but it's
14 one thing to know and another thing to just blow it off
15 and say well, I'm gonna take a 10-8 and get back in
16 service.

17 Q. And when he got there, these -- these things started,
18 that's what kicked in his responsibility and duty to do
19 the things we talked about?

20 A. Right. And that duty and responsibility was elicited
21 by the things that he learned. You know, it would be one
22 thing for him if he'd just pulled up and hadn't asked any
23 questions at all, just ignored the guy, but he's -- he's
24 eliciting all this information and it is causing him a lot
25 of concern obviously.

1 Q. Let me ask you this. Whenever a trooper is asking
2 you questions and asking you to get your license and
3 registration and all that kind of stuff out of your
4 pocket, things of that nature, are people -- normal
5 people allowed to just walk off and leave?

6 A. No. No, he's -- I mean, you know, he's -- he is
7 involved in essentially a kind of investigative detention,
8 he's trying to find out what's going on and particularly
9 it early on becomes clear that this man is not able to
10 care for himself. And I don't -- I'm not conversant in
11 South Carolina law, but my experience in all of the
12 states if you encounter someone who -- and we never got
13 to this point here, where he says I don't want you --
14 you know, you ask him can I help you, can I get you
15 somewhere, where's home, I'll take you up to the next gas
16 station, and he said I don't want your help, I'm walking
17 off down the roadway, you're not gonna let them do that.
18 Not in this kind of condition.

19 Q. Right.

20 A. And I'm sure that there's a law that would enable
21 you to protect that person.

22 Q. As you talked about, most states have that kind of
23 thing?

24 A. I'm sorry?

25 Q. Did you testify that most states have that kind

1 understands. You've got a heavy traffic situation,
2 darkness, rain, and you've got a guy who's already -- he
3 doesn't understand, there's something not cognitively,
4 mentally, going right with this guy. Remember how he's
5 standing with the door open, lighting a cigarette, and
6 traffic is just whipping by and the trooper has to call
7 out hey, get out of the road, get out of the road, and he
8 comes -- he comes back. Well, he can't hear perhaps.
9 Initially the trooper is calling out to him, he goes back
10 to find out, but he doesn't realize how dangerous that is
11 and that -- and stumbling around a roadway, it's just --
12 it's gasoline and matches. It's too dangerous a
13 situation. There's no reason to leave someone in a
14 situation like that where now the course is set. I
15 mean, the Titanic is sailing here. The course is set
16 now for someone, mom, to come out there with some
17 gasoline and, as I said, they're gonna now have to stand
18 out in darkness, they've got to get on the other side of
19 that white line that the trooper says don't -- if you
20 cross that, you're wrong. Well, you're gonna have to
21 cross it, you're gonna have to stand out there in the
22 dark, maybe with a little flashlight if you've got one,
23 and trying to pour gas into a -- into a truck in a lane
24 of traffic where all you've got is the lights of oncoming
25 cars. I mean, it is a very, very dangerous situation;

1 will you hold the funnel, please, while I pour or whatever.
2 You could have two people or three people killed in a
3 situation like that.

4 Q. Let me play the last two clips I want to. This is,
5 again, from the dash cam video of Trooper Blackwelder
6 that's been admitted into evidence.

7 (Whereupon, a video clip was played.)

8 Q. And the next one.

9 (Whereupon, a video clip was played.)

10 Q. Do you recall hearing Trooper Blackwelder say when
11 he got back to the scene or just after that he felt
12 responsible?

13 A. I do.

14 Q. What significance do you put on that?

15 A. Well, there's a lot of significance to it. It --
16 you know, you see people die, you see people terribly
17 injured in this work. It's very rare in my years of
18 experience to see -- hear an officer say something like
19 that. I remember doing CPR on a man, getting there ahead
20 of fire rescue, did everything I could to keep him alive,
21 they weren't able to save him even with a defibrillator
22 and I felt sad that he was gone, but I knew I'd done
23 everything I could to save his life. This officer feels
24 guilty, he feels -- he knows he didn't do what he should
25 have done and that's something he has to live with and

1 I'm sorry for that, but that's what happened.

2 Q. Did you hear him say in the deposition testimony
3 yesterday a number of times I just didn't think he was
4 impaired?

5 A. I'm sorry?

6 Q. Did you hear Trooper Blackwelder say yesterday a
7 number of times in that deposition that we read -- the
8 testimony that was played, that he just didn't think he
9 was impaired?

10 A. Yeah. See, I -- with all due respect, I think
11 that's contradicted by his own statements and, again, no
12 objectively reasonable officer with this very high level
13 training and very high level of experience encountering
14 impaired people -- this guy has a lot more sophistication
15 in drugs and recognition of problems than I had as an
16 officer or most officers I know. Do you remember he says
17 well -- he said -- Mr. Lindler said I've been at the
18 hospital, I've been up all night, I've been sick, what
19 have you been taking, he says well, I was taking a muscle
20 relaxant, yeah, what kind of muscle relaxant, he says
21 Theraflu and the officer says well, wait a minute, that's
22 an antimucosal agent, that's not a muscle relaxant. I
23 mean, he's -- he's pressing, pressing. Nobody who had
24 gathered the information he did, who saw the things that
25 he saw, no reasonable police officer in my professional

1 judgment could or would have left this person and other
2 people in a position of harm's way, but they would have
3 followed this very good regulation, these several
4 regulations here that say -- it's consistent with you
5 seek to serve and protect. That's what it's all about.
6 And there's no mission more important than the protection
7 of human life. I've been -- you know, as an officer
8 there are other calls, it's a busy night, you want to get
9 up the road to backup or handle something else, another
10 accident, but this is as big a priority as you get, You
11 know. Now if something had happened where we had an
12 overturned trailer with a family in it, it could have
13 caught fire and there was no -- there's no nearer unit,
14 you could break away and try to get someone to come cover
15 this, but we didn't have that kind of situation here.

16 Q. Can you go back over about -- before I finish,
17 Dr. Kirkham, the three things you talked about yesterday,
18 the three alternatives? What should he have done?

19 A. Well, he had a range of things. First, you know,
20 in the case of an experienced officer particularly, he
21 should have -- he should have asked -- though he asked
22 these questions to find out what this person's condition
23 was, but he should have also -- some very simple things
24 about where are you folks trying to go. Well, you know,
25 it's not like they lived three counties away. They

1 lived ten or fifteen minutes away and that's interesting
2 because the guy is disoriented, he doesn't know where he
3 is and he's that close to home, things like that, and then
4 offered -- I think it's implicit in the regulations that
5 if they ask you, you should ask them, too, you know, if
6 -- where are you trying to go to, okay, can I give you a
7 lift, I'll give you a lift home. Most people in the
8 situation would readily accept that; or in the alternative
9 there's -- up at the next -- I think it's the Clemson exit
10 or whatever, there's a gas station, let me take you up
11 there. Any -- someplace away from this very, very
12 dangerous spot. And there is a great deal of difference
13 between a gas station. Yes, something could happen to
14 you at a gas station, but being out in the middle of --
15 you know, of Highway 20 West, so that -- they could have
16 done those things. Other things he could have done too
17 would have been -- he's created this safety presence with
18 this patrol car, there's flashing lights, the corridor,
19 the people you see on the video, cars and semis are
20 slowing down and going around the other side, and that's
21 what they do. People slow down when they see police.
22 Keep that presence there. Get on the -- you know, if
23 you're concerned about the time, let me talk to mom for
24 a minute, let me get on the phone with her, we're at
25 mile 81 marker, I-20 westbound, where are you, where are --

1 you know, do you have gasoline with you, and so forth,
2 stand by there until she gets there, use your safety
3 corridor, your vehicle with its lights on to keep those
4 people safe while they -- while they get their car started
5 and make certain the lady was able to drive. She didn't
6 have a license it turns out. Another thing -- a simple
7 thing that you would want to do, too, would be to, as I
8 said yesterday, use your push bar to get that vehicle way
9 off the -- way away from that white line because you know
10 you're gonna have to be adding gas and you don't want him
11 standing in the roadway in darkness and see if those --
12 since they've already got the battery cables going, get
13 those flashers going if they'll work. There are a number
14 of things you could have done, none of which he did do.

15 Q. Do you have a problem with the fact that when he
16 drove off from Mr. Lindler's truck that he didn't ensure
17 or make sure that his flashers were working or flashers
18 were on?

19 A. No, he should have -- he should have ascertained
20 that because there's no other warning, there's no other
21 illumination out there at all. You know, once he's gone,
22 those people are just out there in the dark.

23 Q. In looking at the videos from the death investigation
24 scene that you've seen -- I mean, by the time this thing
25 occurred it was pretty much pitch black dark, wasn't it?

1 -- if I can invade your space for just a second, this is
2 the blue truck broke down in the roadway, so we'd agree
3 that's Michael Lindler, 12-17-2012?

4 A. Right. Right. Uh-huh. Right.

5 Q. And down here there's a time that says closed. Do
6 you see that?

7 A. Right.

8 Q. And what time is that if you'd tell the jury?

9 A. It's 17:05:28.

10 Q. 17:05:28. So let me do my --

11 A. Military time, yeah.

12 Q. 5:05?

13 A. Right.

14 Q. So if he leaves Michael Lindler on the side of the
15 road at 5:05 and he goes just up the road, would it make
16 sense to you that he arrives at the accident at 5:11?

17 A. He could have arrived at that short of time. The --
18 one issue here is we know from the dash cam that that's,
19 what, about thirteen minutes or something. We know he's
20 at the scene all that period of time. That's what's most
21 important.

22 Q. That's what's most important in analyzing what the
23 interaction was with Mr. Lindler?

24 A. Right. And what the situation was there at the
25 scene, the rain, the darkness, how are we gonna -- you

1 know, mom's coming with a gas can, all these other things
2 that are -- that are in play here.

3 Q. I can't remember if you were here during my opening
4 statement.

5 A. I was, yeah.

6 Q. And I said that there was a 45-minute gap between
7 when Trooper Blackwelder leaves and when this accident,
8 the actual incident where Mr. Lindler is hit, is
9 dispatched by EMS. Do you recall that?

10 A. I don't remember the exact time, but I remember you
11 saying something to that effect.

12 Q. Did you recall Mr. Elliott referring to it as a
13 twenty-five to thirty minute window?

14 A. He may very well have said twenty-five to thirty
15 minutes.

16 Q. And when we took your deposition back in Florida in
17 February, a couple of weeks ago, you were operating under
18 a twenty-five to thirty minute window; is that correct?

19 A. I think so. Probably based around the totality of
20 the time at the scene.

21 Q. I've got a second CAD report. This is as it says
22 right here -- and, again, just to streamline it a little
23 bit, it says unknown vehicle versus pedestrian. Do you
24 see that?

25 A. Okay.

1 Q. What's the time on that call?

2 A. This is 17:49 and ten seconds.

3 Q. 17:49 and ten seconds is the initiation of the CAD
4 report for a vehicle versus pedestrian accident?

5 A. This would be an injury accident, yes.

6 Q. Okay. And that's -- is it December 17, 2012?

7 A. It is.

8 Q. Okay. Dr. Kirkham, would you agree with me that
9 it appears that the time interval between Blackwelder
10 leaving Mr. Lindler on the side of the road to the point
11 in which the dispatch comes is approximate 17:05 to 17:49,
12 forty-four minutes?

13 A. Sounds right.

14 Q. Okay. I've got to grab more stuff. Sorry. You
15 were asked about policies, Dr. Kirkham.

16 A. Right.

17 Q. A number of policies. And we took a look at -- well,
18 let's go ahead and clear up one thing. Exhibit Number 7,
19 do you have that in front of you?

20 A. I do.

21 Q. You talked about some of the -- some of the dangers
22 that are expressed in here in this exhibit, dangers of
23 mocking a violator's speech, the dangers of argumentative
24 conversation, dangers of searching a vehicle for
25 counterfeit items.

1 to talk about that in a minute. Let's talk in a vacuum
2 first, the use of discretion. An everyday job function
3 of a law enforcement officer?

4 A. Sure.

5 Q. Okay. Now things -- in a vacuum again, things like
6 whether or not somebody fails or passes a sobriety test,
7 is that a discretionary decision?

8 A. It's a discretionary perception of a trained officer
9 who knows, unlike a lay person, what -- you know, can pick
10 up on nuisances of slurred speech or cognitive confusion,
11 ability to do two things at once, yeah.

12 Q. And you talked about the extensive training, the
13 specialized training that Trooper Blackwelder had,
14 correct?

15 A. Right.

16 Q. And you yourself -- to be fair to Trooper
17 Blackwelder, you yourself testified that there is nothing
18 wrong with the way Michael Lindler performed the ABC test,
19 correct?

20 A. That's correct, and that's the --

21 Q. In fact, in the notes that you had that were
22 provided to me before the deposition, you had used the
23 word "flawlessly", passes it flawlessly.

24 A. Yeah, I don't know if that was my word or somebody
25 else's word, but he -- there was nothing -- I mean, it

1 was -- it was well-done. He --

2 Q. So the --

3 **MR. ELLIOTT:** Could you please let him finish.

4 Sorry.

5 A. That enabled to him to exclude alcohol impairment
6 pretty much.

7 Q. So the ABC test is only alcohol impairment?

8 A. Well, it's predominantly alcohol impairment and
9 you're looking for slurred speech, cognitive confusion
10 and the other tests, the standard field sobriety tests
11 that were not used here, and I'm not saying that they
12 should have been used here, but the nystagmus gaze and
13 the heel to toe and all other things are intended to give
14 you a more definitive indication of that, but he -- I
15 think you've got to go with the trooper here. He says
16 look, I don't smell alcohol, you know, and he does the
17 ABCs, but then he jumps like a duck on a June bug, he
18 jumps right away to what kind of pills are you on, you
19 know, so now he's on that track.

20 Q. Okay. Getting back on track, that's an exercise of
21 discretion whether or not the individual passed. That's
22 a pretty easy yes, correct?

23 A. Right.

24 Q. Okay. Now what about the decision whether or not
25 the accident that an officer responds to -- well, let me

1 rephrase. I'm sorry. I'm being confusing. You've got
2 a disabled motorist off the road and you know of an
3 accident that is pending or potentially a series of
4 accidents that are pending, in a vacuum before we talk
5 about this specific incident, is the decision whether or
6 not to respond to the pending accidents and leave the
7 disabled motorist now that he's off the road, is that a
8 discretionary act?

9 A. It is discretionary, Counsel, in your -- in the
10 abstract way you phrased it because we're not taking into
11 consideration in your hypothetical there whether --
12 roadway, darkness, rain, position of the vehicle,
13 condition of the occupant of the vehicle, so it is
14 discretionary, yeah.

15 Q. Okay. So two distinct acts of discretion in the
16 vacuum are in play here. In other words, whether or not
17 someone fails or passes a drug test and whether or not --
18 or basically weighing the priority level of two cars?

19 A. Now, again, though, with all due respect, you're
20 taking one item we can agree on, he passed the ABC test,
21 but there's a whole lot of other problems going on there
22 and, see, what you're doing here really is -- it's like
23 triage in an emergency room. You're trying to prioritize
24 the most serious cases first and that point is well-taken,
25 I understand that --

1 Q. Sure.

2 A. -- but you can't -- I don't think you can take these
3 out of context. You can't say well, heck, he passed the
4 field sobriety test, yeah, but he doesn't know where he
5 is, he doesn't even realize he's run out of gas, he's
6 stumbling, and in the trooper's own words he can't even
7 stand on -- he can't even stand his own two feet, and
8 you've got all these other things that are big concerns.

9 Q. And, Dr. Kirkham, I promise you we're gonna talk
10 about Lindler, but all I'm trying to establish is in this
11 scenario we have two acts of discretion and we'll talk
12 about whether they were appropriately exercised or not.

13 A. Okay.

14 Q. You would agree with that?

15 A. Yes, you have two acts of discretion, that's correct.

16 Q. Okay. Now -- bear with me, please.

17 A. Sure.

18 Q. We talked a little bit yesterday about a paper you
19 wrote, a Professor's Street Lessons, correct?

20 A. Right.

21 Q. And this was written after your six months with
22 the Jacksonville -- I said it wrong yesterday, the
23 Jacksonville Police Office?

24 A. The Jacksonville Sheriff's Office, the Jacksonville
25 Police, yeah, one agency, right. The FBI contacted me

1 and asked me if I would write that for -- one of their
2 agents contacted me if I would write that for the FBI
3 Bulletin.

4 Q. Okay. And I'm just pulling some language that you
5 wrote. You write as a police officer, however, I found
6 myself forced to make the most critical choices in a
7 timeframe of seconds rather than days; to shoot or not
8 to shoot, to arrest or not to arrest, to give chase or
9 let go, always with the nagging certainty that others,
10 those with great amounts of time to analyze and think,
11 stood ready to judge and condemn me for whatever action
12 I might take or fail to take.

13 A. Right. Exactly. I've had my finger on the trigger
14 of a firearm three times pointed at another human being,
15 one of them an armed and escaped fugitive I knew would be
16 armed, in a split second trying to make the decision of
17 whether I need to pull that trigger or not, and that --
18 with all due respect, I mean, I -- it gave me a profound
19 appreciation of the things that can happen in the police
20 world. Now we're talking about -- that's an apple, this
21 is an orange now. We're not in that kind of situation.

22 Q. So that applies to you, but not to Trooper
23 Blackwelder; is that what you're saying?

24 A. If Trooper Blackwelder were in a -- I don't know
25 if he'd ever been in a shoot, don't shoot decision

1 situation. It would apply to any officer in that
2 situation. You know, there's no way that we can train
3 officers for terror. People wonder why -- why police
4 only hit seventeen percent of the people that they're
5 shooting at. There's no way to train for terror when
6 you're -- and I've been there, so that's -- but what I'm
7 saying, with all due respect, that's a different thing
8 than our -- our traffic situation here.

9 Q. Okay. So when someone comes here after reviewing
10 tons of videos and speaking with lawyers and talking
11 through depositions and preparing testimony and they're
12 talking about it's a 13-minute, you know, start to stop
13 incident, it's probably not a big deal that you have a
14 great amount of time to analyze and think, you stand
15 ready to judge and condemn an officer for whatever action
16 he might take or fail to take? Is the difference because
17 in the shooting it's a split second, but in this it's a
18 whole thirteen minutes?

19 A. It's a good point. You've got a lot more time in
20 this situation. This is not what's called an exigent or
21 emergency situation where you've got to, I mean, like
22 right now in this split second pull the trigger or not
23 or make some other critical incident decision, but you've
24 got -- you've got -- here I am, okay? Here I am. I'm
25 checking -- I'm checking with my dispatch to see what

1 calls that are holding and they've got several wrecks
2 down the road here, and that's one thing on one side of
3 the scale. The other side of the scale is I've got --
4 I've got what I've got here, things I reasonably see and
5 know about that are -- that add up in the mind of a
6 reasonable police officer I'm telling you to a very
7 dangerous situation. I can't leave these folks out here
8 just -- I mean, look at the plan, look at what the plan
9 was. The plan is somebody's gonna come with gas and
10 they've got a vehicle -- a darkened vehicle that's
11 sitting, what, ten to twelve inches off the white line.
12 There's no way you're gonna put gas in that without
13 exposing your body out on the roadway. So, you know,
14 it's a reckless mindset.

15 Q. Okay. Well, let's talk about some things that we do
16 agree about for a while --

17 A. Okay.

18 Q. -- and we'll come back to some things we're gonna
19 disagree about. Do you agree with me officers don't have
20 crystal balls?

21 A. They do not have crystal balls.

22 Q. Let me ask you a very specific question. Do you
23 agree with me that there was nothing in that video to
24 suggest that Michael Lindler would walk all the way across
25 a lane of traffic, turn and face oncoming traffic and be

1 A. Well, he said -- he said now. He says I've taken
2 it. Now? He said no, not now, but, I mean, like how
3 recently -- and the trooper -- the Xanax is gonna be a
4 whole lot more meaningful to him than it is -- I'd have
5 to go get a PDR, a Physician's Desk Reference, and look
6 up the effects and side effects of Xanax, but he knows.

7 Q. And actually you and I have talked a little bit
8 about the effects and the side effects of Xanax and one
9 of them was slurred speech, wasn't it?

10 A. That could be one of them. Some others that were
11 mentioned I see in the PDR were -- were confusion and
12 erratic behavior. There are a number of things that would
13 fit our scenario here.

14 Q. Well, actually in your deposition we talked about
15 erratic behavior and I don't think you told me too much
16 about erratic behavior. What was erratic about Michael
17 Lindler in this situation?

18 A. Well, you know, not knowing where he is. Most of us
19 who've ever run out of gas know that we're running out of
20 gas and he -- he's thinking there's something else wrong
21 with the thing. He doesn't know quite where he is though
22 he's close to home. He's stumbling around and can't stand
23 on both feet. There's a whole bunch of things here that
24 don't -- don't add up to someone who's able to be in that
25 very dangerous environment safely.

1 this, but tell me how are these rendered, these toxicology
2 reports?

3 A. Well, you have a laboratory analysis of the -- the
4 blood and specimens taken from the person's body and
5 there's no way that -- like, for example, you'll see
6 someone -- I've had people who are flipped out take off
7 all their clothes, they're under the influence of what
8 used to be a horse tranquilizer, PCP or phencyclidine,
9 you'd say well, I think it might be PCP, but it could be
10 coke, cocaine, you know, it could be any number of things,
11 but you can't know that as an officer, you know.

12 Q. Sure.

13 A. And even -- even though a trooper will have more
14 knowledge of a drug's action than most people, he can't
15 be held to that kind of standard. He doesn't know what's
16 in the person's body or how much of it there is.

17 Q. So the -- the only thing that we can judge of Travis
18 Blackwelder's actions is his 13-ish minute assessment of
19 Michael Lindler on the scene?

20 A. That's fair.

21 Q. Okay. We talked a little bit in your deposition
22 about what danger Michael Lindler faced. Do you recall
23 that?

24 A. Yeah, I don't recall the specific Q and A, but if
25 you'll refresh my recollection.

1 that they haven't been able to make other arrangements
2 for, so we'll need to be through by 5:00.

3 Anything else we need to take up?

4 **MR. HUGHES:** No, ma'am.

5 **MR. ELLIOTT:** No, Your Honor.

6 **THE COURT:** You may ask the jury to come, in please.

7 (Whereupon, the jury returns to the courtroom at
8 11:16 AM.)

9 **BAILIFF:** Your Honor, the jury is here and all are
10 present.

11 **THE COURT:** Thank you. You may continue on,
12 Mr. Hughes.

13 **MR. HUGHES:** Thank you, Your Honor. May it please
14 the Court?

15 BY MR. HUGHES:

16 Q. Dr. Kirkham, we were going through some things we
17 were going to agree upon. You'd agree with me that
18 Travis Blackwelder didn't keep anybody from rendering aid
19 to Michael Lindler, correct?

20 A. That's true.

21 Q. Okay. And you'd agree with me that it's reasonable
22 for Travis Blackwelder to actually trust that help was on
23 the way?

24 A. To trust that help was on the way, we expect that as
25 a legitimate expectation, but, again, I want to emphasize

1 that the -- even slight amounts of time without his
2 presence there, the protected presence of the police
3 vehicle with its emergency lights on if we're talking
4 about two minutes, three minutes. If help were five,
5 ten minutes away, it would be too long in terms of this
6 man being hit by a car.

7 Q. Would you at least agree with me that Blackwelder
8 confirming that there is help on the way is exercising
9 some care in the situation?

10 A. Sure. Sure, it is. It would be better obviously to
11 get on the phone with the person and find out, you know,
12 what is your ETA, your estimated time of arrival, and
13 what are you -- are you bringing a gas can, do you got a
14 funnel with it, do you have a flashlight, you know, so
15 you get some idea of is this gonna work out and then can
16 this young lady drive, see if she's got a license, so how
17 are we gonna get this vehicle out of here and then plan to
18 stay there until it's done.

19 Q. And when Blackwelder confirms that -- or he doesn't
20 confirm, Blackwelder says tell her I-20 westbound, Mile
21 Marker 81, that's also him exercising care in the
22 situation?

23 A. It is.

24 Q. Okay. You were asked a number of questions about
25 the first policy we started to talk about, but didn't,

1 A. If -- counsel, if -- if you put in the caveat that
2 an -- if you assume hypothetically, and I don't think
3 it's a reasonable hypothetical, if you assume that a
4 reasonably competent, properly trained -- these folks are
5 well-trained -- a reasonably competent, properly trained
6 officer reached the conclusion -- reasonably reached the
7 conclusion that, you know, there's nothing wrong with
8 this person, regardless of what -- what I've seen, hey,
9 it must be due to something else, you know, he's tired
10 or got the flu or whatever, if that were a reasonable
11 conclusion, which I'm telling you it's not, then, indeed,
12 you could go back in service.

13 Q. So really we can break down your entire testimony
14 and simplify it and say Trooper Blackwelder got it wrong
15 by determining he was impaired?

16 A. Trooper Blackwelder got it wrong by seeing certain
17 things which should have had special significance to him
18 as a highly trained, highly experienced highway safety
19 officer. By disattending or ignoring those things and
20 going back in service and leaving him, this person who is
21 stumbling, staggering, can't stand on his own two feet,
22 thereby in an extremely -- it's a toxic environment. I
23 mean, it's like matches and gasoline to leave the two of
24 them there in that manner in my judgment.

25 Q. You have no evidence that after Trooper Blackwelder

1 left the scene that the conditions changed? In other
2 words, it got more rainy or a little bit darker?

3 A. Well, it would get darker, they're gonna get darker,
4 and that's an important point because, you know, when you
5 -- this is the plan. Remember the plan to put gas in the
6 -- in the vehicle? When that plan goes to be executed,
7 they're gonna have no lights out there at all, no
8 emergency vehicles, just the lights of oncoming cars, and
9 that's extremely dangerous.

10 Q. Would the car that they come in have lights?

11 A. The car -- the car -- yeah, the person that -- the
12 person that's coming has lights, yeah. Again, we're
13 assuming that nothing happens to him in the interim. We
14 know, in fact, that the mother was not able to find the
15 place for whatever reason, but, in the rain --

16 Q. Again, Travis Blackwelder wouldn't have known that,
17 right?

18 A. In fairness, he wouldn't have known that, but what
19 I'm saying is time is of the essence here, time is
20 critical. A guy in this condition -- and, again, I think
21 I said this before, but let me reiterate it in case I
22 haven't been clear on it, I'm not faulting Trooper
23 Blackwelder for not knowing exactly what's wrong with the
24 guy, if it's a medical condition, if it's -- you know, if
25 it's something related to the ingestion of Xanax and other

1 substances, that's not his job. He can't -- there's no
2 way he can get in his bloodstream and tell, but he knows
3 that this person is not safe to leave beside the roadway
4 in these conditions. That's what I'm saying.

5 Q. Dr. Kirkham, I know in your two years or year and a
6 half as an -- as a police officer you didn't focus
7 primarily on traffic enforcement, but you did some,
8 correct?

9 A. Right, worked accidents and -- yes, that's correct,
10 disabled vehicles.

11 Q. And -- and I believe you testified that you've done
12 a lot of training for highway patrols and state troopers.
13 These are the traffic enforcement-type officers, correct?

14 A. Well, to be clear, when I told you -- told the jury
15 yesterday I for seven years -- I think it was seven years
16 I trained -- I went up -- every year they had me up to
17 train over a period of about a week all new Virginia state
18 troopers. That's a heavily traffic agency. They do
19 enforcement work, too, but I was training them in things
20 like crisis intervention, stress management, dealing with
21 mentally ill people, including suicidal individuals,
22 schizophrenics and so forth. That's what I was doing.
23 I wasn't training them on highway -- highway safety
24 conditions. I want to be real clear on that.

25 Q. So you haven't done any training on highway safety

1 A. That's correct, out of which comes my overhead in
2 terms of assistants and, you know, people that do work
3 for me.

4 Q. Sure. Sure. How much money have you made providing
5 expert consultation services for Carter Elliott?

6 A. Gosh. You know, I've known Mr. Elliott
7 twenty-five years, I guess, back when he was with the
8 Bell firm as well, and I couldn't honestly tell you. You
9 know, my rates were lower back, you know, when we first
10 started working together. And, like I say, sometimes
11 these guys will come with a case and I can help them,
12 sometimes I can't, but I don't -- I'd have to guess
13 because it's been so many years that we've been, you
14 know, in contact with each other.

15 Q. Dr. Kirkham, would you agree with this statement.
16 As a police officer society demands too much of its
17 policemen. Not only are they expected to enforce the law,
18 but to be curbside psychiatrists, marriage counselors,
19 social workers and even ministers and doctors. Would you
20 agree with that statement?

21 A. I very much agree with it and that agreement is
22 largely based on my own experiences. Just as an example,
23 I gave an interview to a television station recently and
24 the question they were saying, well, why are we having
25 all these problems all over the country with these bad cops

1 and shootings and so on and I said you've got to remember
2 there are 800,000 or so, 700,000 police officers doing a
3 very difficult job. It's much more difficult today, more
4 dangerous than anything that I faced during my limited
5 experience and, unfortunately, you know, if it bleeds, it
6 leads. The press picks up on the worst instances. They
7 don't tell you the story of a cop who only had \$5 for his
8 own lunch and he gave it to somebody that had no money to
9 eat with, and they're all -- those things don't make the
10 press. And so, you know, it's a honorable profession,
11 it's a difficult job and I -- I don't pretend to -- to
12 have gotten into it to the degree of someone like the
13 captain sitting over there or the corporal, but I've
14 gotten as close to their world as I can. I like to
15 believe that at my stage of life that I've done something
16 to help make it -- make their work a little easier, a
17 little bit better, a little bit safer.

18 Q. I hoped you were gonna agree with it because you
19 wrote it.

20 A. I did write it.

21 Q. It's very good language, but sitting here today,
22 you have no problem in hindsight requiring Travis
23 Blackwelder to be perfect in his assessment of impairment,
24 requiring Travis Blackwelder to do more than the polices
25 require and requiring Blackwelder to do more than the

1 law requires?

2 A. No, sir. I -- that's kind of compound, but, you
3 know, I've never met a perfect police officer or a
4 perfect person for that matter. I think all -- my
5 expectation and the expectation of this great profession
6 we call law enforcement is that you do your best, you do
7 what a reasonably -- objectively reasonable officer would
8 do under a given set of circumstances and yet we are here
9 Monday morning quarterbacking Trooper Blackwelder, but,
10 you know, that's because we're the kind of country we
11 have. We are one of not too many places in the world
12 where people are not afraid of the police. We hold our
13 police under a rule of law to standards that are -- that
14 make us the country we are.

15 MR. HUGHES: I beg the Court's indulgence.

16 Dr. Kirkham, as always, I've enjoyed talking to you.
17 I know we'll do it again in the future. I hope you don't
18 think too badly of me.

19 THE WITNESS: No, I think nothing but good of you.

20 MR. HUGHES: Thank you.

21 THE COURT: Any redirect?

22 MR. ELLIOTT: Just a few things, Your Honor. May it
23 please the Court?

24 REDIRECT EXAMINATION

25 BY MR. ELLIOTT:

1 you don't want to be anywhere near that.

2 Q. If somebody's in their right mind, do you think you
3 need to tell them to stay behind that white line? Is
4 that usually something you'd tell somebody?

5 A. No, you -- you would not need to, but, again, I --
6 without beating a dead horse here, you really -- to have
7 a plan so that you can get out there and get back in
8 service, to have somebody coming out there where they're
9 gonna have to get out there to put gas in the truck in
10 the middle of a roadway at dark with whatever lights are
11 on the other vehicle that's coming up to help him, it's
12 just so dangerous.

13 Q. You were asked some questions about what happens
14 whenever he left eventually and you talked about some of
15 the things that -- Mr. Lindler had no flashers on his car
16 and those kind of things, you talked about that protective
17 barrier being gone. Whenever a police car finally does
18 leave a situation like that, those cars on that roadway,
19 what are they doing now?

20 A. Well, they're gonna -- they're gonna -- as you all
21 know, when the police car's gone, people will pick up
22 speed and traffic -- some people -- most people would be
23 driving 55, the speed limit, but some people would be
24 going faster than that, so things become very dangerous.
25 And, you know, we haven't even -- even, as I said,

1 Q. Okay. And have you treated patients who have been on
2 the specific combination of both Xanax and methadone?

3 A. Not that I personally prescribed. I tend to avoid
4 combining Xanax and methadone; however, I've certainly
5 encounter any number of intoxicated patients over the
6 years using Xanax, methadone or a combination or other
7 drugs of abuse.

8 Q. All right. And, Dr. Genecin, have you reviewed
9 certain materials in this case and are you prepared today
10 to give your opinions?

11 A. Yes.

12 Q. All right.

13 **MS. KNIGHT:** I'd like to offer Dr. Genecin as an
14 expert in the field of internal medicine at this time,
15 Judge.

16 **THE COURT:** Any voir dire?

17 **MR. HUGHES:** Not as to the field of internal medicine,
18 Your Honor.

19 **THE COURT:** Any objection?

20 **MR. HUGHES:** Yes, Your Honor.

21 **THE COURT:** To the qualifications?

22 **MR. HUGHES:** To internal medicine, no, Your Honor.

23 **THE COURT:** Then I'll find him qualified as a
24 physician in internal medicine.

25 **BY MS. KNIGHT:**

1 has been admitted and argued several times.

2 **THE COURT:** Counsel approach.

3 (Proceedings held at the bench; not reported.)

4 **MR. HUGHES:** Your Honor, we make a continued --
5 we've agreed with Plaintiff for a continuing objection
6 regarding this line of questioning.

7 **THE COURT:** And I'll allow that Exhibit Number 25 as
8 admitted.

9 (Plaintiff's Exhibit Number 25, NMS Laboratory Report,
10 was admitted into evidence.)

11 BY MS. KNIGHT:

12 Q. Dr. Genecin, can you please identify that record in
13 your hands for the jury, please.

14 A. Yes. This is the certificate of authenticity,
15 certified chain of custody, for the blood sample and the
16 process by which the blood specimen was handled by -- in
17 order to be sent to NMS and the NMS toxicology report, I
18 believe. Yes.

19 Q. All right. And based on the actual toxicology report
20 at the end of that packet, please identify the drugs that
21 are found in Mr. Lindler's system or were found in his
22 system at the time of his death.

23 A. Yes. Atropine, which was given in an effort to
24 resuscitate him. Cotinine and nicotine, which were
25 tobacco-related. Alprazolam and a metabolite of

1 alprazolam. Alprazolam is Xanax. And methadone. Those
2 were the substances that were found in Michael's blood.
3 And then there were levels given for alprazolam and
4 methadone, but the findings included a drug given to him
5 in order to resuscitate. Tobacco metabolites, Xanax
6 metabolites and methadone.

7 Q. So based on your reading of that record, are you
8 certain that Michael Lindler had Xanax and methadone in
9 his system at the time of his death?

10 A. Yes.

11 Q. Okay. Tell jury please what Xanax is prescribed to
12 treat.

13 A. Xanax is used for -- it's prescribed for the purpose
14 of treating anxiety. There are several different
15 preparations. One's more immediate, one's more
16 intermediate and one's more extended release. It's hard
17 to know which one this was, but general anxiety is the
18 main indication for the use of Xanax. It could be
19 short-term, for example, to help a patient to be calm
20 before a procedure or it could be long-term for someone
21 who had anxiety or panic disorder. It's a frequently
22 encountered drug in medicine. It's become widely used.
23 It's a drug of a class known as benzodiazepine or benzo
24 and those are drugs -- other ones are Valium, Librium,
25 Ativan. There are a lot of them. All of them are drugs

1 pot, then the next question is when did you use, how much
2 did you use, what else did you use, let's see if we can
3 figure out what that other pill is that you mentioned that
4 you took because it wasn't Theraflu.

5 Q. That's what you would do as a medical doctor?

6 A. Yes, exactly.

7 Q. Now a law enforcement officer may ask something like
8 are you on it now, right?

9 A. I have to -- I have to let people who are experts in
10 law enforcement speak to what a law enforcement officer
11 does. I'm a doctor.

12 Q. But a doctor should follow up with lots of
13 questions, but a law enforcement officer can say what he
14 actually said?

15 A. I would have to defer to people who are experts in
16 law enforcement. I can't say that I -- that a doctor can
17 knowledgeably hold a police officer to a medical standard
18 of care. That's not -- that would not be appropriate.

19 Q. So when somebody says I'm not on it now, you've got
20 to follow up and say when were you on it?

21 A. Well, if you see someone who's intoxicated and they
22 say well, I'm not on it now, he's saying well, yes, you
23 are on it; first of all, you can't stand up, second of
24 all, don't drive, right, you can't -- you don't know
25 enough not to stay out of traffic. I mean, this is not

1 a situation of someone who's sober and has no detectible
2 impairment where no one could possibly have know that he
3 was impaired. He was clearly impaired. Now that's not
4 -- I think that's something that was plainly visible to
5 him and something that he -- that Officer Blackwelder
6 described repeatedly in the video that involved him.

7 Q. By describing and asking questions?

8 A. There were -- the questions that he asked, there
9 were accusations that he made, allegations that he made,
10 instruction that he gave, all reflected the fact that
11 the -- that young man was impaired.

12 Q. I didn't mean to interrupt you. I don't want this
13 to reset because we don't have a fast-forward button, so.

14 (Whereupon, a portion of the video was played.)

15 Q. Dr. Genecin, having watched that video -- and I
16 believe you testified earlier, Ms. Pelenski and
17 Mr. Lindler had been together for hours in the truck as
18 far as we know?

19 A. Yes.

20 Q. And you heard her say to the investigating trooper
21 that he had been clean and wasn't on anything?

22 A. Yes, that's what she told the trooper.

23 Q. Okay. And the toxicology report says differently,
24 right?

25 A. Yes, the toxicology report says that Michael was

1 videos is something different. That's a Court's exhibit.

2 **MR. ELLIOTT:** Yeah, the video of the trooper.

3 **MR. HUGHES:** Right. Okay.

4 **THE COURT:** The video deposition is a Court's
5 exhibit, is that correct, Madam Court Reporter? It's the
6 deposition of Officer Blackwelder. Exhibit 40 are video
7 clips shown during Dr. Kirkham's testimony.

8 (Pause in the proceedings.)

9 **THE COURT:** Yes, sir.

10 **MR. HUGHES:** Your Honor, may it please the Court?

11 At this time in anticipation of Plaintiff resting
12 tomorrow morning, the Defendant would move for directed
13 verdict on all grounds and full dismissal by the Court's
14 finding of law for this matter. First, Your Honor, is it
15 okay if I argue from the bench as opposed to the lectern?

16 **THE COURT:** Oh, sure.

17 **MR. HUGHES:** Okay. Your Honor, I've done my best to
18 organize this in a manner that makes sense, so please bear
19 with me. The first argument the Defendant would raise is
20 the definition of gross negligence has not been met by the
21 Plaintiff. They have not carried their burden and the
22 matter should be dismissed. As Your Honor knows, *Wimberley*
23 *v. Winn-Dixie Greenville*, that's 252 S.C. 117, 1969, gross
24 negligence is not and may not be presumed and the happening
25 of an accident or an incident where someone gets injured or

1 dies does not establish gross negligence. It basically
2 says, Your Honor, that simply because an accident happened
3 there is no establishing gross negligence.

4 Gross negligence is defined as the failure to exercise
5 slight care. It is also defined as the intentional or
6 conscious doing of something that one ought not to do or
7 the intentional or conscious not doing of something that
8 one ought to do.

9 As Your Honor knows, gross negligence is a heightened
10 standard. The Plaintiff has brought an action and pled
11 gross negligence in this matter. The Defendant cannot
12 because of that be held liable for the failure to exercise
13 due care. The Defendant can only be held liable for
14 failing to exercise even a slight degree of care.

15 Your Honor, as a matter of law, Plaintiff's expert,
16 Dr. Kirkham, stood up in front of this jury, in front of
17 the Court, and testified as to several acts of care
18 exercised by Travis Blackwelder. The record also
19 establishes from Travis Blackwelder's own testimony what
20 his intentional acts were. I wanted to get him off the
21 road, I wanted to make sure that he understood to stay off
22 the road, and then I needed to move on to someone else that
23 needed my help.

24 Your Honor, just the mere video itself is a per se bar
25 of this claim under a gross negligence standard because

1 there are multiple, myriad, a lot of exercises of more than
2 slight care. There is certainly nothing intentional or
3 conscious done or not done that would rise to the level of
4 gross negligence in this matter.

5 The Plaintiff.-- the case that the Plaintiff has
6 brought before this Court, in this Court,, in front of the
7 jury, is boiled down into one thing. That Michael -- or
8 that Travis Blackwelder was wrong when he determined that
9 Michael Lindler was not impaired. It is undisputed that
10 Travis Blackwelder believed that Michael Lindler was not
11 impaired. The only testimony as to his belief was his own;
12 that I made a final assessment due to the totality of the
13 circumstances that Mr. Lindler was not impaired or a danger
14 to himself. Once Blackwelder makes that assessment using
15 training, skills and techniques that he's experienced and
16 trained to do, he is free to leave that scene, Your Honor.
17 It cannot be -- it cannot be gross negligence for him to
18 simply get it wrong. That's negligence.

19 Negligence is a mistake. Negligence is the failure
20 to exercise due care. Negligence is getting it wrong.
21 Gross negligence is doing it wrong on purpose, is doing it
22 wrong intentionally, is doing it wrong consciously. It is
23 the failure to exercise even slight care and the record is
24 replete with testimony, with videos, multiple videos, with
25 expert testimony saying he exercised care on that scene.

1 The expert testimony then says I don't agree with what he
2 did, but he does say he exercised care, and that is all the
3 Defendant has to show for a directed verdict.

4 Your Honor, moving on, to establish any negligent or
5 grossly negligent action there are four elements as Your
6 Honor knows. The case I pulled -- establishing a number of
7 cases. The one I pulled is Rice v. School District of
8 Fairfield. That's 317 S.C. 87, Court of Appeals, 1994.
9 And, Your Honor, I'm just pulling from my charges that we
10 submitted, but basically the case law states that in order
11 for the Plaintiff to prove a claim of gross negligence,
12 Plaintiff must show four things. One, that a duty was owed
13 by the highway patrol to Michael Lindler. Two, that there
14 was a breach of that duty by failing to exercise even a
15 slight degree of care. Three, that Mr. Lindler was
16 injured. And, four, that the Defendant's breach of that
17 duty was the proximate cause of the injury to which the
18 decedent complains. We'll take those one by one and we'll
19 skip injury because that's not disputed, Your Honor.

20 The Plaintiff cannot show a duty to Michael Lindler
21 in this matter, and as I had made argument previously to
22 the Court about why special relationship is so important,
23 the law is well-established there is no general duty for
24 one person to protect another and that applies in ample
25 case law to police. We've heard lots of evidence about

1 the duty of police is to protect and serve, but that duty
2 is a duty to the public and not the individual, Your Honor.
3 The public duty rule very clearly states, and that's
4 another charge that we've submitted to the Court, public
5 officials are generally not liable to individuals for their
6 negligence in discharge of public duties because the duty
7 is owed to the public at large rather than to any one
8 individual. Generally, police officers owe a duty of care
9 to the public at large and not to one individual.

10 There are five exceptions to the public duty rule.
11 They're listed in the Faile case, Your Honor. That's
12 Faile v. SCDJJ, 350 S.C. 315, a 2002 case. And the five
13 exceptions to this -- well, what the exceptions are to the
14 rule is there's no general duty to control the conduct of
15 another or to warn a third person or potential victim of
16 danger. So starting in the vacuum, there is no duty for
17 Blackwelder to warn or protect Michael Lindler at any point
18 in time. He can drive right on by, that's no problem,
19 okay?

20 There are five exceptions to that general rule. The
21 first is the Defendant has a special relationship to the
22 victim. We'll talk about that. The second is the
23 Defendant has a special relationship to the injurer. In
24 this case, technically the injurer would be Mr. Tribble
25 that hit Mr. Lindler. Certainly that's not arguable. The

1 third would be the Defendant voluntarily undertakes a duty.
2 We'll talk about that in a second. The fourth would be
3 where the Defendant negligently or intentionally creates
4 the risk. We'll also talk about that one. And, five,
5 where a statute imposes a duty on the Defendant. There is
6 no statute in South Carolina that imposes a duty to arrest
7 or to control the conduct of another.

8 We had some discussion about that in Dr. Kirkham's
9 deposition under the guise of when someone is so out of
10 their mind that you commit them, a voluntary -- basically
11 an involuntary commitment, and he said that's not the case
12 here and he's taken the stand and gotten off the stand and
13 not said a word about it, so we don't have to worry about
14 that one. So we're talking about one, three and four.

15 Now that the Defendant has a special relationship
16 to the victim, I think we need to hold for the latter
17 court because that's what we're gonna be talking about
18 with Dr. Kirkham's testimony, but the Defendant voluntarily
19 undertakes a duty, the duty would be to protect. They're
20 gonna argue that when Blackwelder stopped there he's got a
21 duty to protect. He does not have a duty to protect until
22 he exercises control or custody of Mr. Lindler, okay?

23 The fourth one is negligently or intentionally creates
24 the risk. And if Your Honor noticed in Dr. Kirkham's
25 deposition, that is exactly why we talked about what is

1 the danger in this case. The danger always was from before
2 Mr. Lindler got there -- or before Mr. Blackwelder got
3 there until well after he left getting struck by a car.
4 The Plaintiff does not want to specify it any more than
5 that because the danger that actually injured Mr. Lindler
6 was getting struck by a car in lane one, in the fast lane.
7 We need to parse out any idea that Mr. Lindler fell into
8 the road, that Mr. Lindler tripped, that Mr. Lindler was
9 hit anywhere near the white line. In this case, there
10 is no evidence of anything other than Mr. Lindler
11 intentionally walking all the way across lane two into
12 lane one and being hit by oncoming traffic. There is no
13 duty in any tort law to protect from harm that is not
14 foreseeable and it was not foreseeable, just as Dr. Kirkham
15 testified, that he would walk all the way over into that
16 side of the road.

17 Now we talked about what danger was present the whole
18 time. Dr. Kirkham also said the danger was at its highest
19 point when Michael Lindler was first -- when Travis
20 Blackwelder first gets on the scene because he's in the
21 road and when he gets him off the road the danger lessened
22 and when he left the scene the danger was less than it
23 was when he got there. He lessened the danger that Michael
24 Lindler faced. And that's important, Your Honor, because
25 in order to -- the Restatement Second of Torts says "One

1 whom being under no duty to do so, takes charge of another
2 who is helpless adequately to aid or protect himself is
3 subject to liability to the other for any bodily harm
4 caused to him by, A, the failure of the actor to exercise
5 reasonable care to secure the safety of the other while
6 within the actor's charge or, B, the actor's discontinuing
7 his aid or protection, if by so doing he leaves the other
8 in a worse position than when the actor took charge of him.

9 Now Dr. Kirkham testified Michael Lindler was never
10 under arrest. He testified he never could have been
11 under arrest. The only testimony about any sort of
12 restriction of freedom or custody or control was this idea
13 about issuing a ticket, which there's no evidence a ticket
14 was actually issued, but also the idea of Blackwelder's
15 testimony where he says at this point I would not let him
16 get in his car and drive off. He was asked a very specific
17 question. He said was he free to leave at this point and
18 he said I wouldn't let him get in the car at this point and
19 drive off.

20 Now here's the predicament the Plaintiff had with
21 that. That didn't happen. That changes the scenario so,
22 therefore, it is irrelevant. If on this video Michael
23 Lindler either says, you know, Blackwelder, I think I'm
24 gonna go to my car and drive off or he just gets in his
25 car and drives off and Mr. Blackwelder says no, you can't

1 do that, then we're -- maybe we're talking about something,
2 but it didn't happen. It did not happen. And it is not
3 the perception of the officer regardless. It is the
4 perception of the individual, whether the individual is
5 to feel like they are in the custody and control of the
6 officer. And I know that sounds a little tenuous, but the
7 case law is good for it, Your Honor. The case law says
8 until you start restricting freedom, until you start
9 maneuvering people, restricting their rights, seizing them,
10 arresting them, that's the exercise of custody or control.
11 Consensual encounters with pedestrians is not the exercise
12 of custody and control. Dr. Kirkman actually testified at
13 one point that this was akin to an investigatory detention,
14 but he quickly retracted that and we talked about what that
15 actually is. That's when there's a reasonable suspicion of
16 criminal activity afoot and he said there's certainly not
17 that in this case.

18 So going back to the restatement, what Dr. Kirkham
19 testified to is we left him in a better position than we
20 found him, so B is not met. And if B is not met, or -- or
21 A is what we've got to go to, and A is the failure of the
22 actor to exercise reasonable care to secure the safety of
23 the other while within the actor's charge. So, again,
24 we're denying he was ever in our charge, but Plaintiff's
25 own counsel stood right there and said you agree this --

1 this relationship existed and how long did it last? Well,
2 it lasted for the entire fifteen minutes. So his testimony
3 is this relationship began and ended on that video. This
4 cannot be argued to have occurred while within the actor's
5 charge. This injury did not happen in Blackwelder's
6 custody and that is undisputed, indisputable, and because
7 of that there is no special relationship under South
8 Carolina law and if there's no special relationship, there
9 is no duty, and if there is no duty, there is no gross
10 negligence.

11 Your Honor, even if they could prove a duty, the
12 second is that the breach of the duty was by the failure
13 to exercise even slight care as I covered earlier.

14 **THE COURT:** Are you -- are you gonna go back and talk
15 about the other relationships?

16 **MR. HUGHES:** I told you I'd do that, Your Honor. I'm
17 doing my best here. Number one is whether the Defendant
18 had a special relationship to the victim. That's really
19 what we just talked about. They've got to establish this
20 relationship through the restatement of torts. Number two
21 is not the case.

22 Number three is where the Defendant voluntarily
23 undertakes a duty. If at any point any duty was
24 voluntarily taken -- well, actually there's not a duty.
25 There's no general duty to protect. There is no duty. He

1 did not voluntarily undertake to protect him. What he
2 did was he got him off the road and then he severed any
3 -- any circuit or relationship or anything between them
4 to go help somebody else. And, Your Honor, the idea that
5 the Defendant negligently or intentionally created the
6 risk, the risk here is being struck by a car and it
7 existed before him, and as Dr. Kirkham testified the risk
8 decreased, the danger decreased, after he left. He
9 certainly couldn't have created it, but he certainly --
10 if anything, he made it a better situation, better
11 environment. And to the extent there is some sort of risk
12 because Mr. Lindler was impaired, going far enough -- you
13 know, giving him the benefit of the doubt, he did not
14 create the impairment.

15 And, Your Honor, I think that's a good point or a
16 good time for me to mention this isn't a summary judgment
17 argument. We're not talking about a scintilla of evidence
18 here. We're talking about the Court's view of the evidence
19 that is before Your Honor at this point.

20 **THE COURT:** It's still not a weight question, it's
21 the existence.

22 **MR. HUGHES:** The existence, that's correct. But
23 it's not the scintilla standard anymore, Your Honor. Your
24 Honor does not have to take a suggestion when the evidence
25 clearly shows otherwise. And I think I said this, but if

1 I didn't, Your Honor, there is no statute that creates a
2 duty in this situation and it has not been alleged.

3 **THE COURT:** Yes, sir.

4 **MR. HUGHES:** Again, I said we wouldn't talk about
5 injuries, that's inarguable. I think we should talk about
6 proximate cause, Your Honor. At the very least it is
7 clearly established that Michael Lindler's actions were a
8 proximate cause of his injuries. At the very he least,
9 that's clearly established; however, there are several
10 elements we need to talk about. First, there is the time
11 relationship that we have. Trooper Blackwelder is on the
12 scene thirteen minutes. Thirteen and a half minutes is
13 basically his interaction with Mr. Lindler and then he
14 leaves and approximately forty-five minutes pass and in
15 that forty-five minutes we know of a number of things that
16 are in evidence that happened. We know that he steals a
17 traffic barrel, puts it in the back of his truck. We know
18 that he gets into some sort of an argument with Gabby where
19 he gets mad. We know that he gets out of the truck, that
20 he punches the truck a number of times, that he goes and
21 kicks traffic cones. Things that we don't know, Your
22 Honor, is when he took these drugs that are in his system,
23 things that -- to argue -- for Plaintiff to argue that the
24 drugs were a proximate cause -- his impairment was in any
25 way a proximate cause, they carry of burden of showing that

1 impairment existed, and there's a very real question in the
2 evidence as to when these drugs were -- were consumed.

3 Now, Your Honor, proximate cause has an element of
4 foreseeability. You have to be able to foresee not that
5 any harm may occur, but that the harm will occur. We
6 don't need to talk, Your Honor, about filling up gas cans,
7 we don't need to talk about the fact that their help never
8 got there, we don't need to talk about anything other than
9 that video and there's nothing on that video that could be
10 perceived by Travis Blackwelder that would lead him to be
11 able to foresee that Michael Lindler would do what he did.

12 And, Your Honor, that's really the crux of every
13 argument that I have made in this case, pre-trial, through
14 trial and now, is that we shouldn't talk about anything
15 else but the thirteen minutes on that video. The
16 thirteen minutes on that video actually capture everything
17 that Travis Blackwelder did, could and should have known
18 in this situation.

19 Your Honor, I point the Court to a case called Scott
20 v. Harris, and this is the United States Supreme Court.
21 It is 550 U.S. 372, a 2007 case. And what this deals with
22 is when a plaintiff makes argument, tries to elicit facts
23 that are in direct conflict with a video, and it says the
24 videotape tells quite a different story. When opposing
25 parties tell two different stories, one of which is

1 blatantly contradicted by the record so that no reasonable
2 jury could believe it, the court should not adopt that
3 version of the facts for purposes of ruling on a summary
4 judgment. Respondent's version of events is so utterly
5 discredited by the video -- by the record that no
6 reasonable jury could have believed him. The Court of
7 Appeals should not have arrived on such visible fiction;
8 it should have viewed the facts in the light depicted by
9 the videotape.

10 Your Honor, the issue here is the Plaintiffs have
11 taken great care to prove a lot of things that, A, Travis
12 Blackwelder could not have known and, B, did not show up in
13 the video. They talk extensively about Michael Lindler's
14 behavior, about Michael Lindler stumbling, about Michael
15 Lindler slipping, about Michael Lindler not being able to
16 stand still, about Michael Lindler unable to stand on the
17 hill. Not any of that is shown on the video. They talk
18 about Michael Lindler entering the road on not one, but
19 two occasions, yet the video clearly shows that he stays
20 within the white line the entire time.

21 Your Honor, as a matter of law, the Court can view
22 the video and determine whether or not the Plaintiff's
23 allegations are sufficient to overrule the clearly visible
24 evidence in the video and we submit that it's not.
25 Dr. Kirkham actually testified no reasonable officer could

1 have foreseen the exact thing that Michael Lindler did.
2 Without foreseeability, Your Honor, there is no proximate
3 cause and without no proximate cause there is no gross
4 negligence.

5 Your Honor, do you -- do you feel that I've
6 sufficiently addressed the idea of breach of the duty
7 dealing with exercising slight care? I did that pretty
8 early on.

9 **THE COURT:** Yes, you talked about slight care.

10 **MR. HUGHES:** Okay. Thank you, Your Honor.

11 **THE COURT:** Gross negligence.

12 **MR. HUGHES:** Thank you, Your Honor.

13 Your Honor, in this matter, the highway patrol has
14 asserted an affirmative defense as comparative negligence.
15 As Your Honor knows, comparative negligence is the law in
16 South Carolina. The Plaintiff may only recover damages
17 if the Defendant's negligence is not greater than the
18 gross negligence of -- that the Plaintiff's negligence is
19 not greater than the gross negligence of the Defendant.
20 In a comparative negligence action, we, the Defendant,
21 only have to show that the Plaintiff was negligent despite
22 the fact that they have pled a gross negligence action
23 against us.

24 Your Honor, negligence has been established in this
25 case such that Defendant would request that the jury is

1 charged as a matter of law that the Plaintiff was
2 negligent. Dr. Kirkham testified as to three separate
3 statutes. 56-5-31 --

4 **THE COURT:** Okay. Well, you're getting past --

5 **MR. HUGHES:** Well, in order --

6 **THE COURT:** Okay. So you're -- you're finished with
7 the Plaintiff's case in chief and you're moving on to --
8 you're moving on to your defenses; is that right?

9 **MR. HUGHES:** Yes, Your Honor.

10 **THE COURT:** Okay.

11 **MR. HUGHES:** I think so.

12 **THE COURT:** Just trying to keep it straight.

13 **MR. HUGHES:** Your Honor --

14 **THE COURT:** Three statutes.

15 **MR. HUGHES:** -- three statutes, and I've got them in
16 here. The pedestrian statutes, 56-5-3130(b), no pedestrian
17 shall suddenly leave a curb or other place of safety and
18 walk or run into the path of a vehicle which is so close
19 as to constitute an immediate hazard; 56-5-3150(a), every
20 pedestrian crossing the roadway at any point other than
21 within a marked crosswalk shall yield the right-of-way to
22 all vehicles upon the roadway. Where a sidewalk is not
23 available -- I'm sorry, 56-5-3160(b), where a sidewalk is
24 not available, any pedestrian walking upon a highway shall
25 walk only on a shoulder as far as practicable from the edge

1 of the roadway.

2 Then, Your Honor, the case of Coleman v. Shaw,
3 negligence per se is negligence arising from the violation
4 of a statute. It is established as a matter of law, Your
5 Honor, that Michael Lindler was negligent on December 17,
6 2012. Impaired or not it is established as a matter of
7 law. An impaired individual is just as responsible for
8 violating traffic statutes, pedestrian statutes, as a
9 non-impaired individual. Dr. Kirkham also testified if
10 it wasn't negligence per se, that he failed to exercise
11 due care. That's his negligence. So having established
12 that the Plaintiff is, in fact, negligent the Court then,
13 as a matter of law, may weigh the negligence and find that
14 the Plaintiff's case did not carry its burden of proving
15 that it was more than fifty percent -- that the Defendant
16 was more than fifty percent negligent in this case in a
17 comparative negligence analysis.

18 **THE COURT:** What -- what case law tells me that?

19 **MR. HUGHES:** I'll show you, Your Honor. There it
20 is. Bloom v. Ravoir, R-A-V-O-R -- O-I-A-R -- I'm sorry.
21 I'm sorry, let me try that again. R-A-V-O-I-R-A. A 2000
22 case, 339 S.C. 417. Your Honor, I'm reading from page 422
23 at this time. In a comparative negligence case, the
24 trial court should only determine as a matter of law --
25 determine judgment as a matter of law if the sole

1 reasonable inference which may be drawn from the evidence
2 is that plaintiff's negligence exceeded fifty percent.
3 Continuing on, under South Carolina law a driver and a
4 pedestrian owe certain duties. Regarding pedestrian
5 duties, a pedestrian crossing the roadway at any point
6 other than in a marked crosswalk -- within an unmarked
7 crosswalk at an intersection shall yield the right-of-way
8 to all vehicles upon the roadway. One of the exact
9 statutes that Michael Lindler violated in this case. The
10 case goes on, on page 423, a court cannot ignore facts
11 on a -- unfavorable to the non-moving party and it must
12 determine whether a verdict for the party opposing the
13 motion would be reasonably possible under the facts.

14 In this case, Your Honor, Mr. Bloom, the plaintiff
15 -- it's in downtown Charleston, I believe it was on King
16 Street, and there's cars, you know, parked on the
17 cobblestone and he enters the roadway between two cars.
18 There's testimony elicited that he looks right, he looks
19 left -- or he looks left, then right, but doesn't look
20 left again when he enters the roadway and he's struck and
21 injured. This case, citing Hopson v. Clary -- I'll try
22 to find the cite for that, it's 321 S.C. 314, states that
23 where evidence of the plaintiff's greater negligence is
24 overwhelming, evidence of slight negligence on the part of
25 the defendant is simply not enough for a case to go to the

1 jury. Now if that were the only case law, I think it would
2 be an issue because that's kind of a weighing-type thing.
3 Let me find the case I'm looking for, Your Honor.

4 Your Honor, I'm looking for one case that I've got
5 printed out, but very briefly I can move on -- or I can
6 add to that. The Holston case actually -- that's not the
7 case I thought it was. And, Your Honor, this case is
8 Lydia v. Horton, and I actually think it's so analogous
9 to this case that Your Honor is all but obligated to grant
10 summary judgment here.

11 The cite is 355 S.C. 36, a 2002 case. It has no
12 negative case law. And, Your Honor, in that case an
13 individual borrows a car from someone, goes out, becomes
14 intoxicated, wrecks the car and then he sues the guy that
15 he borrowed the car from. Voluntary intoxicant is what
16 we're dealing with. And the court held, we conclude that
17 the policy considerations which support the legal theory
18 of third-party negligent entrustment are undermined by
19 applying them to a first-party cause of action. We hold
20 that Lydia cannot recover on a first-party negligent
21 entrustment cause of action for two reasons. Number one,
22 South Carolina's modified comparative negligence scheme
23 would bar recovery for this type of claim and, number two,
24 public policy considerations addressed by this court would
25 bar it as well. The court goes on to state, "We believe

1 that the State's modified comparative negligence system
2 bars an intoxicated adult's recovery on a first-party
3 negligent entrustment case. We cannot imagine how one
4 could be more than fifty percent negligent in loaning his
5 car to an intoxicated adult who subsequently injured
6 himself. We agree with the trial judge that Lydia's
7 admission that he was appreciably impaired and that he
8 lost control of the vehicle supports only one conclusion,
9 that Lydia's negligence exceeded Horton's".

10 Your Honor, similarly here the Plaintiff asks that
11 the Defendant be held responsible for his impairment and
12 the decisions that he made while impaired. The Defendant
13 in no way concedes any negligence whatsoever, but just like
14 Lydia v. Horton there is no scenario fathomable where a
15 per se negligence, a negligence per se, an intentional act
16 that's unforeseeable, an intentional act that he knows is
17 going to harm him, that an intentional act can be less
18 negligent than anything Blackwelder did or did not do.

19 Your Honor, based upon that, the court is -- it's
20 well within your discretion, Your Honor, and the facts of
21 this case, the evidence of this case, and the law of this
22 state allows you to grant a verdict, a directed verdict,
23 and dismiss this case because we cannot have a voluntary
24 intoxicant saying my actions are less negligent than
25 someone they simply come in contact with, someone who

1 simply loans them a car, someone who gets them off the
2 road. We can talk all day long about things that Travis
3 Blackwelder should have done better. There's no evidence
4 of gross negligence which they have to show. That's the
5 thing, Your Honor. We're weighing his negligence against
6 Blackwelder's gross negligence. It's gonna have to tip
7 the scales that Blackwelder's alleged gross negligence is
8 somehow more responsible, somehow more than fifty-one --
9 fifty-one or more responsible than a voluntary intoxicant's
10 actions and the court in Lydia v. Horton says you don't
11 have to do that. You can look at this evidence and say
12 wait a minute, I don't see how we can go forward on this.
13 You don't have to send that to a jury.

14 Everybody says questions of gross negligence is a
15 mixed question of law and fact and it should go to a --
16 it usually should go to the jury. I hear it all the time,
17 but, Your Honor, this is not the case. This is not simply
18 gross negligence, this is comparative negligence and
19 comparative negligence under Lydia v. Horton does not have
20 to go to the jury. If Your Honor -- Your Honor to get it
21 to the jury has got to make a decision that you think they
22 can reasonably determine, reasonably determine, that
23 Blackwelder's actions were more responsible for this than
24 Lindler's and, Your Honor, I do not see how that could be
25 the case.

1 Your Honor, there is a case out there which talks a
2 lot about what we should be talking about in this case,
3 why I say that the only piece of evidence in this case
4 that matters is that video, and I'm sure everybody's
5 tired of hearing it, but it's because it's the law. Your
6 Honor, the case of Weaks v. South Carolina State Highway
7 Department, 250 S.C. 535, you should judge the conduct of
8 the defendant by the position in which he found himself on
9 this date and not in hindsight. It is very easy to say
10 because of the toxicology report we know he was impaired,
11 but there has been no testimony whatsoever elicited that
12 Blackwelder knew anything about that toxicology. It's
13 impossible. The toxicology report was done afterwards.
14 So at least in considering this comparative negligence,
15 we request Your Honor to judge the video. That thirteen
16 minutes on that video is the only thing that should be
17 viewed in terms of Blackwelder's conduct. You should put
18 -- you should completely disregard any idea of anything
19 that he didn't know in judging his conduct because that's
20 what the Department is being judged on. Under the Tort
21 Claims Act you do not sue -- you do not sue the individual
22 employee, you sue the agency. The agency stands in the
23 shoes and takes responsibility for the actions of the
24 employee. They are alleging that Travis Blackwelder was
25 grossly negligent. He cannot be grossly negligent for

1 anything other than what was in that video. His conduct
2 is captured. We're talking about everything else, but his
3 conduct is captured, and if Your Honor finds that he's
4 grossly negligent in that contact, if Your Honor goes that
5 far and finds that he could reasonably be determined to be
6 grossly negligent, you still have to weigh it against the
7 negligence of Mr. Lindler. And you have to weigh it to the
8 point that a reasonable jury can find not twenty percent,
9 it's got to be fifty-one percent or more, and, Your Honor,
10 we just don't think they can do that.

11 Your Honor, there's just a lot of case law that
12 requires things of pedestrians. Pedestrians are always
13 under the general duty to maintain a proper lookout and to
14 do things which are reasonably necessary for their safety.
15 That's Thomas v. Bruton, 270 F.Supp. 33, a District Court
16 of South Carolina case, 1967. A pedestrian crossing a
17 highway is required to exercise ordinary care for his own
18 safety; that is such care that a reasonably prudent person
19 would under the same or similar circumstances. Your Honor,
20 we'd ask that you charge and I think you can direct verdict
21 on this issue. Under Mellen v. Lane, a defendant cannot be
22 held liable for unpredictable or unexpected consequences.
23 That's 377 S.C. 261, 2008.,

24 Your Honor, encompassed within the affirmative defense
25 of comparative negligence is the assumption of risk. The

1 case Cole v. Raut, that's R-A-U-T, 365 S.C. 434, a 2005
2 case. Your Honor, in order for the doctrine of the
3 assumption of risk to apply, the injured party must have
4 freely and voluntarily exposed himself to a known danger
5 which he understood and appreciated. In order to prove the
6 defense of assumption of risk, the Defendant must show the
7 following thing -- must show the following. The plaintiff
8 had knowledge of the facts constituting a dangerous
9 condition, the plaintiff knew the condition was dangerous,
10 the plaintiff appreciated the nature and extent of the
11 danger and the plaintiff voluntarily exposed him to the
12 danger. Now, in a vacuum, take impairment out of the
13 window, all of those are met and this case should go away.
14 If the Plaintiffs argue that his impairment affects his
15 ability to appreciate the risk, it is solved by Blackwelder
16 saying get out the road, it is solved by Blackwelder saying
17 if you cross this white line, you're wrong, it is solved by
18 Blackwelder saying when your help gets here, get them off
19 the road, get them inside the white line. He has knowledge
20 of the facts constituting the dangerous condition. It was
21 explained to him on the video this is a dangerous condition
22 and he walks into the roadway anyway.

23 Your Honor, obviously we've got to talk about the
24 Tort Claims Act, 15-78 Subsection 60. These are all
25 exemptions to the waiver of immunity and as Your Honor

1 knows prior to the Tort Claims Act the State of South
2 Carolina enjoyed sovereign immunity from all claims.
3 When the cases came down that said we're gonna allow the
4 Government to be sued, the Legislature passed the Tort
5 Claims Act that said we waive sovereign immunity but we
6 remain exempt from the following things. There is an
7 immunity for bringing causes of action that falls under
8 these matters. Subsection 4, Your Honor, I charge --
9 I'm sorry, I'm reading the charge. The Tort Claims Act
10 applies to this section -- or applies to this action.
11 As a governmental entity it is not liable for a loss
12 resulting from the failure to adopt or enforce any
13 policies; therefore, you cannot find this Defendant liable
14 for such a violation against the Plaintiff.

15 Now we believe the record shows the policies were not
16 violated at all. Every bit of testimony that Dr. Kirkham
17 elicited -- that was elicited from Dr. Kirkham about the
18 violation of policies says you have to read into these
19 policies. It's implicit in the policies, it's inherent in
20 the policies. There is no authority for him to make that
21 claim, first of all, but, secondly, the policies speak for
22 themselves. It says at the request of an individual, of a
23 disabled motorist, the officer must transport or take them
24 to a -- must arrange for them to get out of the hazardous
25 condition. The problem is, Your Honor, even if we violated

1 that policy, we're immune from it. You can't bring a claim
2 against a governmental entity for failure to enforce the
3 policy. You can't do it.

4 Your Honor, I'm gonna reserve Subsection 5 for a
5 minute because that's the one that's the biggy.
6 Subsection 6 though, a governmental entity is not liable
7 for a loss resulting from the failure to provide the
8 method of police protection. And I know that sounds
9 weird, Your Honor, but there's a case that clarifies it.
10 There is a case that clarifies it that basically finds as
11 a matter of law -- there's a typo in that. The failure
12 to provide the method of police protection is actually
13 supposed to be read the failure to provide or the method
14 of police protection. Your Honor, what is the Plaintiff
15 claiming the Defendant should have done? The Plaintiff is
16 -- this is a failure to protect claim that is explicitly
17 barred by the South Carolina Tort Claims Act. They are
18 saying that Travis Blackwelder should have kept Mr. Lindler
19 safe. He's obviously a police officer, it would obviously
20 be police protection, and the failure to provide that
21 police protection we're explicitly immune for and I think
22 you've got to look at what this Legislature is intending
23 to do. They're intending people to quit asserting duties
24 on officers that don't exist. There is no such thing in
25 the law for anybody to protect anyone, so why would it

1 exist for police? And that's what why our Legislature has
2 it in there. You cannot sue the police for failing to
3 protect you. It's right there. That's what this claim is.

4 **THE COURT:** What was the cite about the typo?

5 **MR. FLIPPIN:** Your Honor -- I'm sorry, Your Honor.
6 I'm searching for it right now.

7 **MR. HUGHES:** At the very least, I can e-mail it to you
8 as soon as I get out of here, but -- Subsection 21 is
9 also applicable here, Your Honor, and this is sort of the
10 if-you-give-them-the-grain-of-salt defense. A governmental
11 entity is not liable for a loss resulting from the decision
12 to or implementation of the release or discharge of any
13 person in the custody of any governmental entity, including
14 but not limited to, a prisoner, a patient or client. If
15 there was a special relationship established, this -- this
16 subsection right here bars the claim if that special
17 relationship is severed. As you heard Dr. Kirkham, this
18 special relationship extended from the start to the finish
19 of the video. It was severed and that is inarguable. A
20 governmental entity is not liable for a loss resulting from
21 the decision to or implementation of a release or discharge
22 of a person in custody. If he was in custody, when he let
23 him go, if something happened because you let him go, the
24 claim is barred.

25 That brings us to -- Your Honor, the case that I

1 cited that dealt with the typo, and clarified it, is
2 Wells v. City of Lynchburg. The cite is 331 S.C. 296.

3 I'm almost done. Your Honor, Subsection 5,
4 discretionary immunity. To properly analyze a defense
5 of discretionary immunity, you should assume that Travis
6 Blackwelder was grossly negligent. You should assume
7 that Travis Blackwelder was grossly negligent. A
8 governmental entity is not liable for a loss resulting
9 from the exercise of discretion or judgment by a
10 governmental employee or the performance or failure to
11 perform any act or service which is in the discretion of
12 the employee. There are two distinct acts as testified
13 by Dr. Kirkham of discretion in this matter. They are,
14 first, the decision of Mr. Blackwelder as to whether or
15 not Michael Lindler was impaired. He utilized his tools,
16 his training, his techniques to assess impairment and he
17 came down to a decision and they say it was reckless to
18 come down to that decision, no reasonable officer would
19 have come down to the decision, it was grossly negligent to
20 come down to the decision, but they still concede it was an
21 exercise of discretion and they concede that his decision
22 is ultimately what they allege -- they allege caused his
23 harm.

24 The second exercise in discretion is the Blackwelder
25 weighing whether or not to remain on the road with

1 Mr. Lindler or to leave the road and respond to the traffic
2 accident. You heard Dr. Kirkham very clearly state that
3 is an exercise of discretion. I had to get him in a vacuum
4 because he wanted to talk about it was grossly negligent,
5 but that doesn't matter for your purposes, Your Honor.
6 For your purposes, you should assume that it was grossly
7 negligent, but when an officer takes into consideration
8 competing alternatives, makes a decision and acts he is
9 exempt, he is immune -- his employer is immune from suit
10 even if it's grossly negligent.

11 Your Honor, this is the key misunderstanding of this
12 case. It's okay for Travis Blackwelder to be wrong. It's
13 okay in terms of legal liability. Police officers cannot
14 and should not be held to the standard of being right every
15 time. They cannot and should not be held to that standard.
16 Your Honor, this is an immunity from suit. It is not an
17 immunity from negligence. It is an immunity from suit.
18 You cannot bring grossly negligent, you cannot bring
19 recklessness, you cannot bring negligence. You cannot
20 bring this claim unless you're bringing it outside the
21 scope of the Tort Claims Act.

22 Your Honor, a couple of cases that I think is
23 beneficial to the Court to consider in analyzing this
24 motion for directed verdict. The first case is Brown v.
25 Brown. It's 360 S.C. 7. In this case, a motorist brought

1 a negligence action against a town after the town police
2 officer allowed him to drive away from the scene of a
3 traffic stop as a replacement driver for the driver who
4 had been deemed to be under the influence. Judge Jimmy
5 Williams granted summary judgment, it was appealed, and the
6 Court of Appeals confirmed that granted summary judgment.

7 **THE COURT:** Any other arguments?

8 **MR. HUGHES:** I'm sorry, I didn't hear you.

9 **THE COURT:** Any other arguments?

10 **MR. HUGHES:** I do very briefly, Your Honor. And in
11 that case, Brown v. Brown, Your Honor, the court found
12 that the officer appropriately exercised discretion and
13 dismissed the plaintiff's claim under Subsection 60-5.
14 And, Your Honor, there's some language in the case very
15 similar to this that I believe the Court would benefit
16 from hearing. This is the case I almost started talking
17 about a minute ago. This is -- this is a state court case
18 in Maryland called Holson v. State and the reasoning of
19 this case I believe puts in context what we're arguing.

20 And in this case, Your Honor, there was an intoxicated
21 passenger in a car and the driver was also intoxicated.
22 The driver was arrested and the passenger was left out on
23 the scene and the passenger jumps in the car and drives
24 off and he wrecks and he's injured and he sues the State
25 Patrol of Maryland for leaving him out on the side of the

1 road while he's intoxicated. And this court discusses it
2 and says generally there is no duty or special relationship
3 creating any such duty requiring police officers to
4 transport intoxicated passengers of arrested drivers to
5 their ultimate destination or any destination. It goes
6 on to state appellant's claim is not that the trooper
7 affirmatively acted to protect him, but the trooper failed
8 to protect him. Assuming the truth of appellant's
9 allegations, the trooper's failure to act may be contrary
10 to some moral obligation, but this failure to act does
11 not create a legal duty and so cannot be the basis for an
12 action in gross -- in negligence. A tort duty does not
13 always coexist with a moral duty. We have held that
14 the officer's failure to act to prevent the allegedly
15 intoxicated driver from speeding away did not create a
16 special relationship with the driver or a duty to protect
17 the person injured in the second accident of the driver.
18 Here the appellant was his own dangerous instrumentality.
19 His lack of sobriety caused his injury. He argues that
20 the officer should have taken him into custody or taken
21 charge of him in order to protect him from himself. This
22 is not the officer's duty under the cases we have reviewed.
23 There's no authority nor has any been found to support the
24 claim that a police officer's observation of a citizen's
25 conduct which might foreseeably create a risk of harm to

1 others or the officer's temporary detention of the citizen
2 creates a special relationship which imposes upon the
3 officer a duty to control the citizen's subsequent behavior
4 even in cases where the officers have not detained drunken
5 drivers and those drivers have ended up -- have injured
6 others. The courts have held there's no duty to the ones
7 injured because the officer had not taken charge of the
8 drunken driver. Moreover, the decision whether to arrest
9 is in the absence of a warrant a discretionary function.

10 Your Honor, this actually distinguishes between a
11 case -- a South Carolina case called Russel v. City of
12 Columbia. And in that case police officers were called to
13 a fight. When they arrive, the plaintiff is bloody, he's
14 obviously intoxicated. He's been rendered aid by some of
15 the good samaritans around him and the officers shoos them
16 away, stops the rendering of aid. They ask the guy if he
17 wants them to take him somewhere and he declines and they
18 say well, you need to leave here and he walks off and he
19 falls off a bridge. The City of Columbia in that case was
20 found to have exercised control and to -- and the case
21 could go forward to the jury. In the case that I'm citing,
22 Your Honor, Holson v. State, the court distinguishes it
23 and says no duty was assumed at all because the officer
24 declined to act in any way.

25 And, Your Honor, I'll end with -- I'd like to just

1 read into the record what this Maryland court ultimately
2 says because I think it's an important precedential effect
3 a ruling would have in saying an officer who gets it
4 wrong in the assessing of impairment is more liable than
5 an impaired person's unforeseeable tragic actions
6 afterward, and I'll read it to Your Honor. This is on
7 page 427 bleeding over to 428 of that Holson case. We
8 are especially cognizant of the obvious problems that
9 might exist should an officer take drunken passengers
10 into custody. Presumably any duty requiring an officer
11 to take control over this particular drunken passenger
12 would require the officer to take control over all drunken
13 passengers. In order to transport one or more drunken
14 passengers, an officer would then have to search them for
15 weapons before letting them in the vehicle. The officer
16 would not -- would also have to handcuff them for the
17 officer's own safety to prevent their actions from causing
18 an accident that might cause injury to others and probably
19 to protect them from each other. An officer who searches
20 and handcuffs passengers who have committed no illegal act
21 and might sue for false imprisonment or actions under
22 42 U.S.C. 1983 for depriving the intoxicated person of
23 their civil rights. Such actions have, in fact, been
24 maintained and several cites are mentioned in the record.
25 Additionally, what is the officer going to do with the

1 inebriants? If the inebriants are taken home, how far does
2 the duty extend? To the person's yard, porch, bedroom,
3 bed? Does the officer have the duty then to others in the
4 house to protect them from the inebriants who have been
5 taken into custody? We hold that absent continuing custody
6 or control of an inebriant a police officer has no special
7 relationship that creates any duty requiring the officer
8 to protect the person from the consequences of his or her
9 own acts.

10 Your Honor, in this case -- and since Ms. Shelley is
11 not in here, I can speak freely. In this case, as tragic
12 as it is, police officers cannot be held to this standard.
13 Police officers have got to have the ability to be wrong
14 or these suits will take over this courthouse. These are
15 exactly the precise kind of claims that are intended to be
16 excluded by the Legislature in the Tort Claims Act, that
17 are intended to be excluded by the Supreme Court and the
18 Court of Appeals in Lydia v. Horton and Brown v. Brown and
19 Holson v. Maryland, and that public policy needs to exclude
20 because police officers have got to feel comfortable that
21 when they go out there they can rely upon their training
22 and their skills and their experience, and that's all that
23 this State requires of them.

24 This case, if it goes forward, will have the
25 precedential value of actually harming law enforcement and

1 their ability to do their job and that would be in spite
2 of no duty, no breach of the duty, no proximate cause, no
3 foreseeability, no showing by the Plaintiff that there
4 was a failure to exercise even slight care, no reasonable
5 showing that in weighing the negligence against -- alleged
6 gross negligence of Blackwelder that he could reasonably
7 perceive, no reasonable showing that he did not assume his
8 risk, explicitly barred by the Tort Claims Act. Your
9 Honor, a voluntary inebriant has got to be held responsible
10 for his own conduct. Thank you.

11 **THE COURT:** Mr. Elliott?

12 **MR. ELLIOTT:** Judge, I kind of wish we -- I would
13 have asked Mr. Hughes to kind of stop during some of those.
14 I don't know what to say, Judge, to be honest with you.

15 **THE COURT:** Well, start -- start with the tort claims
16 ones.

17 **MR. ELLIOTT:** The tort claims? Well, I was just
18 gonna start with -- well, Judge, we believe that when we
19 -- and I have in the past filed these cases, I see that
20 in the defense or in the -- in the answers they
21 specifically usually leave out Section 25, which is --
22 Section 15-78-60(25). It says responsibility or duty
23 including, but not limited to, supervision, protection,
24 control, confinement, or custody of any student, patient
25 or prisoner or client of any governmental entity, except

1 when the responsibility or duty is exercised in a grossly
2 negligent manner.

3 And we understand that once you have that particular
4 situation, then according to Steinke versus South Carolina
5 Department of Labor, Licensing and Regulation, 336 South
6 Carolina 373, and 520 S.E.2d 142, that when an exception
7 containing the gross negligence standard applies, the same
8 standard will be read into any other applicable exception.
9 So if you can -- if you pass (25), Judge, then all the
10 other exceptions go out the window as well. So what
11 we're looking at is whether or not there was supervision,
12 protection or control exercised by Mr. Blackwelder -- or
13 Officer Blackwelder over the decedent during the time
14 period in question, and we think that we have done that.

15 I mean, I think that from the very beginning in
16 looking at the testimony of Dr. Kirkham -- and, again,
17 we're talking about relying on -- I heard a lot of argument
18 about thirteen minutes. I don't think Dr. Kirkham in his
19 three hours today or longer -- two hours yesterday, two
20 hours -- three hours today -- he concentrated the whole
21 time on those thirteen, fourteen minutes. Almost the
22 entire time that's all he talked about and he talked
23 about control and he talked about relationship. I mean,
24 he talked about control being not -- not able to leave and
25 as a police conduct expert he said that during that time

1 period whenever somebody's asking you for your driver's
2 license, whenever somebody's giving you a sobriety test,
3 whenever somebody's writing you a ticket, you can't leave.
4 You cannot -- I mean, that's how it works. You're on the
5 side of the roadway, a police officer stops and comes over
6 to you, when those things are happening you are not free to
7 leave. In fact, Trooper Blackwelder himself admitted on
8 one occasion whenever he couldn't stand up he said yeah,
9 at that particular time he was not free to leave. And,
10 you know, I asked Dr. Kirkman today when somebody is
11 writing you a ticket, you obviously can't leave, you can't
12 leave his -- you can't leave his control. So we think that
13 it's at least a question of fact for the jury, Judge, that
14 he was in Trooper Blackwelder's control.

15 And then that just kind of feeds right into this
16 relationship that Dr. Kirkham talked about and teaches
17 about. He said the minute that Trooper Blackwelder pulled
18 over on that side of the road in those conditions at that
19 time of day in that road construction zone, you know, with
20 all those hazards going on, the minute he pulled over
21 there and saw -- and saw the decedent sitting there in his
22 truck, the minute he walked up to where he was under that
23 hood and he started asking questions about not being able
24 to stand up, are you doing drugs, the minute he understood
25 that he was impaired, and we may disagree, but at least

1 our experts have testified, both of them, to those
2 thirteen minutes that he was obviously impaired that --
3 that Trooper Blackwelder knew he was impaired. The minute
4 he knew he was impaired, which started almost within the
5 first two minutes, then that's what kicked in his duties
6 which were to follow the policies and procedures of the
7 highway patrol, which is to get him to safe harbor, to
8 make sure he's protected from harm. I mean, that's what
9 creates the duty is him being there with him and looking at
10 him and going oh, my God, this kid is impaired and I'm out
11 here with him. Now I've got a duty to him, not to the
12 entire public, but to him to protect him from -- from harm,
13 and it's foreseeable harm.

14 And I know he kind of wears you out sometimes, but
15 I love him to death, Dr. Kirkham, but if he said
16 "foreseeability" once, he said it a hundred times. I
17 mean, he said this was foreseeable harm on that highway
18 at that time. If you leave him out there knowing he's
19 impaired on that roadway, it's like a lighter and a gas
20 can. He is going to die. If you walk out in that roadway,
21 there's just no other options, you're gonna get killed.
22 And so I just -- we believe -- and I think Dr. Kirkham
23 talked about it. Dr. Genecin said he was obviously
24 impaired, Dr. Kirkham said he believed that at least in his
25 opinion Trooper Blackwelder the entire time on that tape

1 knew that he was impaired and if he knows he's impaired,
2 that's what kicks in your duty to protect him from harm.

3 And those policies, he went through him. Mr. Hughes
4 may not like the way he talked about the policies, but he
5 said there were conscious violations of the policies. He
6 said he knew them, he was trained, he said that he was
7 well-trained, there's no question about it, he had
8 particular emphasis on detecting impairment of folks on
9 drugs, he had all this training, his policies were good,
10 but he con -- he knew the policies and he consciously
11 failed to follow the policies.

12 **THE COURT:** Let's -- let's go back to --

13 **MR. ELLIOTT:** Yes, ma'am.

14 **THE COURT:** You start -- you basically start with
15 the presumption that the decedent was impaired, but isn't
16 it -- even if -- even if he were under the control of
17 Blackwelder during the time that Blackwelder's making
18 his assessment, once Blackwelder decides based upon his
19 knowledge and training and whatever that he's not impaired,
20 is that not a discretionary decision? Is that not
21 something that would cause him to exercise discretion?
22 Whether it's correct or incorrect, isn't it an exercise
23 of discretion?

24 **MR. ELLIOTT:** I think that's a great question, Judge,
25 and I think that's what Dr. Kirkham talked about today in

1 great detail, and I wrote it down a couple of times, is
2 that Dr. Kirkham testified in his deposition and, more
3 importantly here at trial, that no, there is no discretion.
4 That's why he went through that -- that's why he went
5 through that policy is that while he might have discretion
6 to pull over and to check him out, you might have some
7 discretion there, but once you determine that he is
8 impaired, and that's what --

9 **THE COURT:** But, see, that's -- that's the exercise
10 of discretion is determining that he is impaired.

11 **MR. ELLIOTT:** What I'm saying, Judge, is once you
12 determine that there is no discretion to leave, you can't
13 leave, you have to follow your policy.

14 **THE COURT:** But you've -- but you've already gotten
15 past the question. The question is whether or not he was
16 impaired and whether -- and if Blackwelder is doing the
17 assessment and those things that the expert said that he
18 should do, ask the questions, maybe he didn't ask enough
19 questions, but he asked the questions and then he arrived
20 at a decision based upon everything that he heard and saw,
21 that -- that exercising his discretion he determined that
22 he was not impaired --

23 **MR. ELLIOTT:** Your Honor --

24 **THE COURT:** -- and if you make the decision that he's
25 not impaired and that decision is discretionary, then how

1 -- everything else is. Because I agree with you. Once
2 he makes the decision that he is impaired, then he's got
3 something else to do.

4 **MR. ELLIOTT:** Well, I think this is an important
5 question of fact for the jury, is he told him you can't
6 drive and he told him in that -- and it was read and
7 it was part of the video deposition, he said at that
8 particular time -- I said well, if you didn't think he was
9 impaired, Officer Blackwelder, why in the world did you
10 tell him he couldn't drive and his -- the girl had to drive
11 and he said well, you know -- then he started talking about
12 it was impairment, but it was caused by the flu and an
13 illness and all these other things.

14 He said he couldn't -- he could not drive because he
15 didn't trust him to drive because he was impaired and then
16 he got into a situation where what caused the impairment
17 and I said well, what difference does it make, Officer
18 Blackwelder, whether he's got the flu, whether he hasn't
19 a slept for three days, if it's dangerous, if there's
20 foreseeable harm, then your policies still kick in. Your
21 policies don't say you've to be drunk or on drugs, it just
22 says impairment. If you're impaired and you're a stranded
23 motorist and you're out there on that hazardous roadway,
24 it doesn't matter whether I'm just sleep deprived or the
25 flu or whatever it is, if he feels like he's -- there's a

1 foreseeable harm there, then he -- he's got the discretion,
2 he has to take those policies, and I think that's the key.
3 He told him you can't drive, you cannot leave here, you
4 have to let her drive, and that -- that doesn't do it.
5 He's admitted then that he's impaired and then he has no
6 discretion. He made the decision to leave, not to
7 determine if he was impaired or not. He knew that by
8 telling him not to drive. You can't drive. Why? Because
9 you're impaired, because you've -- you're in no position to
10 drive, and I think that's a question for the jury, Judge,
11 is that that impairment, him telling him that, and then --
12 and he admitted it.

13 I mean, over and over again he said yeah, I couldn't
14 let him drive in that condition and then we were splitting
15 hairs over well, what caused the impairment; well, it's
16 more likely than not the drugs that was found in his
17 toxicology results, and that's what Dr. Genecin testified
18 to, but everyone's testified he looked impaired and we
19 resolved that.

20 But -- I do understand what you're saying, Judge,
21 but when he made that decision not to let him drive, he
22 couldn't answer that. He could not provide me an answer
23 for why he said you can't drive, she has to drive, and I
24 think once he made that decision, whether he was impaired
25 from a thousand other different things, flu, like I say,

1 sleep deprivation. He told him he was on muscle relaxers,
2 whatever the -- the three or four things he cited to me,
3 he could not leave him. That's when his policies and
4 procedures kicked in, he's got no discretion to leave, he
5 has to follow those, and I think that's where we get into
6 gross negligence at that point, Judge. And Dr. Kirkham
7 testified that it was reasonably foreseeable harm to leave
8 him, it was the proximate cause of his death by leaving
9 him there, if he hadn't of left him there he does not get
10 killed, and I think that's -- I think that's the key.

11 Let's see. And I may have just said it, and if I did,
12 I apologize, but he said Trooper Blackwelder had tons of
13 training, he had all the policies, he knew the policies,
14 but he just consciously failed to do what he knew he had to
15 do and that was to stay. And that is the true definition
16 of gross negligence, failing to do what you know you had to
17 do, and here it was you cannot leave him impaired on the
18 side of that road. Whether he didn't -- he didn't admit to
19 it until that point. I do agree that he -- even though the
20 experts have opined he knew it, he knew it, by all his
21 questions he knew it, he looks impaired, anybody would have
22 seen he was clearly impaired, but when he said to him you
23 can't leave, you can't drive -- and then I just think this
24 thing with the control situation, Judge, and, I mean, I
25 think it's a question of fact, but I think it makes a ton

1 of sense. You can't -- if somebody's writing you a ticket,
2 somebody's asking you to do a sobriety test, you can't
3 leave. I mean, everybody knows you can't leave the
4 roadway. You can't say no, I'm not doing that, I'm out of
5 here. I mean, you can't leave his presence, he's in your
6 control. It wasn't until he drove that he was no longer
7 in his control, I do agree with that, because he left the
8 scene, but he made that decision to leave and that was --
9 that was in gross and reckless violation of their own
10 policies and procedures.

11 And, again, I think there was a ton of testimony about
12 proximate cause. And, again, Judge, I think that in that
13 statute if we prove supervision, protection, control of a
14 -- of a prisoner or -- I think when he's in his control
15 there, then he is -- he's created that special
16 relationship, a special relationship is when the duties
17 kick in, follow their procedures, protect him from
18 foreseeable harm, and at that particular time when he's
19 in his control, it fits this exception under this -- under
20 (25). When you prove gross negligence at that point,
21 which we at least have a question of fact for the jury, I
22 do think it's reasonably -- it's reasonably -- you can
23 determine here that there's gross negligence.

24 And I think that the case law says when reviewing a
25 ruling on a motion for directed verdict, the reviewing

1 court must view the evidence and all reasonable inferences
2 in the light most favorable to the plaintiff, Judge, or to
3 the nonmoving party, and I think here it's just -- it's
4 replete in the record with grossly negligent -- not only
5 allegations, but testimony from experts that all they did
6 was focus on that thirteen minutes, I agree with that, but
7 I do think it's also acceptable and according to the case
8 law is to look at the toxicology results and based on the
9 case law that we presented and this -- this -- Dr. Genecin
10 testified that he was impaired and the reason he was
11 impaired was most likely due to these drugs and exactly
12 what you see on that video is exactly what's caused by
13 these drugs and Officer Blackwelder had the training, had
14 the experience.

15 And, you know, all of the other cases that counsel
16 cited to about these other things, someone loaning car keys
17 and all these other things, those folks didn't have the
18 particular training in detecting people that are impaired.
19 This is all that these state troopers are trained to do is
20 to detect impairment, to protect you from harm, foreseeable
21 harm, and there's no question here that -- or at least it
22 is a question for the jury that these experts have
23 presented that this was certainly a foreseeable situation
24 that could have been prevented.

25 I'll be happy to address anything else you want me

1 to, Judge. I know he -- he brought up a lot of different
2 stuff and I wrote down some other stuff if you'd like me
3 to address it. I think that I wrote down the -- the
4 comparative negligence arguments. I think all of those is
5 a question of fact for the jury whether or not the Court
6 can determine -- I mean, Dr. Kirkham testified that when
7 you have these statutes, yeah, I think it's fair game to
8 argue them, but he was impaired and if you have impairment
9 that's certainly gonna come into play and whether or not
10 somebody is more than fifty percent or somebody is more
11 than the other, I don't think that's for the Court to
12 decide, I think that's a jury decision.

13 **THE COURT:** Well, what about the voluntary
14 intoxication part of it?

15 **MR. ELLIOTT:** The case that I -- I wrote down about
16 voluntary intoxicants was somebody loaning them a car and
17 that they ended up getting killed or something, but I --
18 I mean, my argument to that is, Judge, this isn't -- it's
19 not like loaning somebody a vehicle. This is -- you know,
20 he may or may not be vol -- I mean, if they argue that
21 he's voluntarily intoxicated, well, then he's impaired and
22 that in and of itself kicks in the --

23 **THE COURT:** But -- and I understand -- I understand
24 he is voluntarily intoxicated which makes him impaired,
25 but I'm also looking at, you know, is it --

1 **MR. ELLIOTT:** I just think it's -- the cases he cited
2 had to do with -- these are policemen or troopers that are
3 specially trained to recognize impairment and once you
4 recognize that impairment, I think their duties kick in.
5 I don't see these cases as an exception to that.

6 **THE COURT:** In other words, what you're saying is that
7 once -- if he's -- if he's impaired, then there can't be a
8 circumstance in which the Defendant's own actions -- I'm
9 sorry, the Plaintiff's own actions and his voluntary
10 intoxication excuses their conduct?

11 **MR. ELLIOTT:** I think it's a question for the jury,
12 yes, ma'am. I think that's certainly something they can
13 argue that, yeah, he's, you know, comparatively negligent
14 in the things that he did, but I don't think that -- I
15 don't think those cases would exclude this on directed
16 verdict. I mean, I'd have to research it, but I don't --
17 it doesn't seem like it. I mean, I know they -- they could
18 argue these things, but at the same time I don't see how
19 when we're -- we're saying and proving or at least trying
20 to prove gross negligence and we've got experts saying they
21 were grossly negligent, recklessly violating policies and
22 procedures, I mean, obviously the impairment -- if somebody
23 is impaired, then that's the whole purpose. If you leave
24 someone impaired and they get in the roadway because they
25 are impaired, that in and of itself is gross negligence. I

1 mean, I could easily see --

2 **THE COURT:** No, that's not the gross negligence. That
3 may be -- that may be acts that come about subsequently --

4 **MR. ELLIOTT:** Yes, ma'am.

5 **THE COURT:** -- but the gross negligence would be
6 leaving him --

7 **MR. ELLIOTT:** Leaving. And the leaving is --

8 **THE COURT:** -- and if he is, you know --

9 **MR. ELLIOTT:** If he never leaves --

10 **THE COURT:** You know, it's like saying I ran into the
11 car, but I was too drunk to know what I was doing. So does
12 that excuse your conduct? Is that a basis because you were
13 voluntarily intoxicated to excuse any kind of -- the
14 conduct that got you injured?

15 **MR. ELLIOTT:** No, ma'am, but if a policeman is there
16 with you and his whole job is to protect me from harm and
17 to recognize that you're impaired and to protect you from
18 you hurting yourself, that's his whole job to do that and
19 he's with you for thirteen minutes and he leaves you and
20 you immediately do the very thing he's supposed to stop,
21 and that is the very thing he's supposed to stop from
22 happening is to keep -- they have the policies -- this is
23 what they do. They see a disabled vehicle, there's someone
24 impaired, their duties kick in, they have to do it. They
25 don't have any discretion, they've got to do that, and once

1 you determine he's impaired, so then you just leave him and
2 then he just walks into the road?

3 I mean, I just -- I can't imagine -- I mean, that's
4 the highway patrol's sole duty, to protect citizens from
5 harm, and so if you leave them on the side of the road
6 knowing they're impaired, that's -- and if not for that
7 then he doesn't walk in the road and die. He didn't run
8 away from him and run in the road. He was doing everything
9 he asked. He would have done anything that he said; get in
10 the car, take him home, do whatever. He would have done
11 anything. He doesn't die if that trooper takes any action
12 whatsoever. If he takes him to the Clemson exit a mile
13 away, if he takes him to his house, if he stays there until
14 somebody gets there, then he doesn't die, Judge. I mean, I
15 think -- I think that's -- that's the key here is that that
16 is their sole responsibility, that's their sole duty to
17 take these -- is to determine somebody's impairment and
18 once you do, you can't leave.

19 And I do think it's fair game obviously to talk about
20 comparative negligence, but at the same time it's two
21 separate things. If they don't leave him, he doesn't get
22 in the roadway and die. That's their duty. Dr. Kirkham
23 testified that was -- it was reasonably foreseeable and
24 that the proximate cause of his death was him leaving there
25 and by him leaving there that's why he died. The proximate

1 -- the sole and proximate cause of his death was the fact
2 that him knowing -- Trooper Blackwelder knowing he was
3 impaired and leaving him there, that was the sole and
4 proximate cause of his death.

5 And I think we at least have, Judge, in the record by
6 and through the experts and the other testimony of Trooper
7 Blackwelder enough to -- to get past the directed verdict
8 and to submit it to a jury.

9 **MR. HUGHES:** Your Honor, I just have a few comments.
10 With all due respect to Plaintiff's counsel, there's a
11 gross misunderstanding of what the Tort Claims Act says
12 and we should clear it up on the front end so everybody's
13 operating under the same rule of law. Plaintiff's counsel
14 has said we're under the impression that (25) basically
15 gets everything in, Exception Number 25. (25) was not pled
16 in this action. The Court has access to the file. If the
17 Court wants a copy of the answer, I'll provide it right
18 now, but (25) was not pled as an affirmative defense, okay?
19 That's -- that's inarguable.

20 **THE COURT:** Well, that's what he said.

21 **MR. ELLIOTT:** He did it on purpose.

22 **THE COURT:** Yes.

23 **MR. HUGHES:** Exactly.

24 **MR. ELLIOTT:** They do it every time.

25 **MR. HUGHES:** Exactly I did it and I'll tell you why

1 and you'll know next time we have a case together.

2 **MR. ELLIOTT:** I've done a hundred cases with you. I
3 know exactly why you did it.

4 **MR. HUGHES:** Jones v. Lott is why we do it, Your
5 Honor, which is 387 South Carolina 339, a 2010 case from
6 the Supreme Court of South Carolina. And, Your Honor, this
7 is what we're doing, which is exactly it. Petitioner's
8 contention that 15-78-60(25), the gross negligence
9 standard, should be interpolated into the other pleaded
10 exceptions is misplaced. Respondent never raised an
11 affirmative defense that contained a gross negligence
12 standard. Thus, under the holding in Steinke, the gross
13 negligence standard is not interpolated into either
14 Subsection 60, Exemption Number 6 or Exemption Number 21.
15 So the gross negligence exception that is implied in (25)
16 is not applicable to this case.

17 Now, Your Honor, why does that matter? I'll tell
18 you exactly why that matters. 15-78 Subsection 60 reads
19 a government agency is not liable for the responsibility
20 or duty, including but not limited to, supervision,
21 protection, control, confinement, or custody of any
22 student, patient, prisoner, inmate, or client of any
23 government entity except when the responsibility or duty
24 is exercised in a grossly negligent manner.

25 Your Honor, what that is saying is you are responsible

1 in that scenario if you are grossly negligent. The
2 converse to that is, is unless that grossly negligent
3 language is either in the exception or imputed by pleading
4 it, then you are also immune for gross negligence. They
5 pled gross negligence, they have to carry their burden,
6 but it doesn't matter if they do if it falls within one of
7 these exceptions. This is not -- this is not an immunity
8 from a negligence claim. This is an immunity even from a
9 grossly negligent claim. Because we did not plead (25)
10 we are still immune for grossly negligent claims and that
11 is black letter law under Jones v. Lott.

12 Now, Your Honor, very quickly Plaintiff's argument
13 as expected, I would make it, too, if I was him, about
14 comparative negligence, it should just go to the jury,
15 we've submitted enough to go to the jury, what Lydia v.
16 Horton stands for certainly is the proposition that in a
17 negligent entrustment action, a first-party voluntary
18 intoxicant shouldn't be allowed to bring a claim, but it
19 should also stand for the proposition that any first-party
20 claim by a voluntary intoxicant should at least be highly
21 scrutinized by the court. It should at least be highly
22 scrutinized by the court. In Lydia v. Horton, it says you
23 can do it at directed verdict if you look at the evidence
24 as a thirteenth juror, not as a gatekeeper of what actually
25 gets to the jury, and if you look at it and say can a jury

1 reasonably find that Officer Blackwelder's conduct held
2 to a gross negligence standard was more responsible for
3 Lindler's harm than Lindler's conduct held to a negligent
4 standard. That is what Lydia v. Horton said.

5 This idea that it should go to a jury is great and
6 it's nice in a vacuum, but, Your Honor, Lydia v. Horton
7 tells you to look at it. It says trial courts, trial
8 judges, please be the gatekeeper of these kind of claims
9 and make sure. If Your Honor doesn't think that the jury
10 could reasonably come to that conclusion, then Your Honor
11 has a duty under Lydia v. Horton to grant a directed
12 verdict and given all the public policies reasons that
13 we've cited before, given all of the evidence of the
14 exercise of care in this matter, given all of the evidence
15 that Travis Blackwelder's conduct did not proximately cause
16 these injuries, Your Honor, a directed verdict should be
17 granted on this matter at least for discretionary immunity,
18 but comparative law. These are the kind of cases that
19 appellate courts are saying we need our trial courts to
20 vet, we need our trial courts to take care of these things,
21 because voluntary intoxicants have got to be held
22 accountable for their own actions.

23 **MR. ELLIOTT:** Judge, in response to that -- I guess I
24 was brain dead a minute ago, but -- I would have to read
25 the cases, but I would assume that in those other voluntary

1 intoxicant cases the defendant was trying like crazy the
2 whole time to say he's not intoxicated. He's hired a
3 toxicologist to prove that he wasn't intoxicated. I mean,
4 they are so far away from saying that he's not -- they want
5 to say he's not impaired, he's not intoxicated. I'm hiring
6 a toxicologist to strike whatever the toxicology readings
7 were. I mean, other than saying you can't leave and he's
8 impaired for other reasons, they still don't want to admit
9 that he's intoxicated and Officer Blackwelder did admit
10 that he was impaired because of the flu and not sleeping
11 and all these things and being on a muscle relaxer, but
12 they don't want to say he was intoxicated. And, like I
13 say, I don't -- I haven't read those cases, but I don't
14 think they're not fighting like crazy to prove that they
15 weren't intoxicated and then turn around and say a
16 voluntary intoxicant can't bring suit.

17 But I have got to read the cases, Judge. I don't
18 know. I'm not familiar with them, so we'll have to look
19 at them tonight and see, but I don't see how you can have
20 it both ways. I can't see how you fight the whole time and
21 say he's not intoxicated and then turn around and say that
22 you can't even bring this kind of suit because you are.

23 **THE COURT:** Okay. I'll look and I'll decide and give
24 you an answer in the morning.

25 **MR. HUGHES:** Thank you, Your Honor. We'll be ready to

1 proceed.

2 **THE COURT:** If you've got -- if you've got any copies
3 of cases you want me to take a look at --

4 **MR. HUGHES:** I don't have any copies of cases that
5 aren't just completely destroyed with my notes and that
6 wouldn't be proper, your Honor.

7 **MR. ELLIOTT:** The only thing I would say is, I guess
8 -- I mean, there's no question, Judge, that Dr. Kirkham
9 said that Trooper Blackwelder did a couple of things right.
10 I mean, he said look, I'm giving him credit, he got the car
11 off the road and so forth. I mean, there's no question
12 about that. He did say a couple of things that he did
13 right, but he did say beyond getting him off the road by
14 leaving him there that's when everything exploded. That's
15 when it was night, that's when the cars start speeding up,
16 you're taking away his only protection, the kid has no
17 flashers on his car, that's when everything gets a ton more
18 dangerous. So he said -- no, he didn't say it was less
19 dangerous to push him off the road. It helped things to
20 get him off -- to get the car off the road, but to leave
21 him there made it tons more dangerous. So I don't think
22 that -- I don't think that what Dr. Kirkham was testifying
23 to was slight care. He said that he did a couple of things
24 right, but what was the proximate cause of his death was
25 leaving him there and that's what created the treacherous

1 sort of conditions that caused the accident.

2 I just thought I'd hit that. Other than that, you
3 know, like I say, Judge, we'll look at some of these cases
4 tonight. We don't have any case law other than that
5 Steinke case and we don't have a copy of it, but we can
6 e-mail it to you. And then the Hurd case versus
7 Williamsburg County, which is just on the standard of
8 directed verdict, but I'm sure you've got that one.

9 **THE COURT:** All right. We'll see y'all in the
10 morning.

11 **MR. ELLIOTT:** Thank you, Judge.

12 **MR. HUGHES:** Thank you for your patience, Your Honor.

13 (Whereupon, the proceedings were concluded for
14 March 16, 2016, at 6:49 PM.)

15 (The following proceedings were held March 17, 2016,
16 beginning at 9:19 AM.)

17 **BAILIFF:** Court come to order. All rise, please.

18 **THE COURT:** Thank you. Everybody please be seated.

19 Is there anything that we need to take up before we
20 begin today?

21 **MR. ELLIOTT:** Judge, I just wanted to make sure that
22 we -- the Plaintiff, everything that we've stipulated to
23 we've properly moved into evidence.

24 **THE COURT:** And I think what you said yesterday is
25 that you were gonna go back and take a look at some --

1 **THE COURT:** And anything else from the Plaintiff at
2 this time?

3 **MR. ELLIOTT:** No, ma'am. That's the Plaintiff's
4 case.

5 **THE COURT:** We spent about two hours yesterday after
6 everyone left on the directed verdict motion and I have
7 not gone through all of them and so I've taken them under
8 advisement and we'll proceed on with the defense case and
9 I'll get to them. It was a lot of information to take in
10 and I'm glad we did it yesterday instead of this morning.

11 **MR. HUGHES:** Thank you, Your Honor, for your patience
12 last night.

13 **THE COURT:** I'm sorry?

14 **MR. HUGHES:** Thank you for patience last night.

15 **THE COURT:** Anything else before we bring the jury
16 in?

17 **MR. HUGHES:** Is the Plaintiff gonna formally rest in
18 front of the jury?

19 **THE COURT:** That's fine.

20 **MR. ELLIOTT:** I can if you want me to.

21 **THE COURT:** Okay. You can ask the jury to come in,
22 please.

23 (Whereupon, the jury enters the courtroom at 9:23 AM.)

24 **BAILIFF:** The jurors are all present, Your Honor.

25 **THE COURT:** Thank you.

1 Good morning, ladies and gentlemen. Is there anything
2 further from the Plaintiff at this time?

3 **MR. ELLIOTT:** No, ma'am. That's the Plaintiff's case.

4 **THE COURT:** Thank you. And we've already taken up
5 some legal issues and so, Mr. Hughes, I'll turn to the
6 defense. You may call your first witness.

7 **MR. HUGHES:** Your Honor, the Defendant Highway Patrol
8 will call Travis Blackwelder.

9 (Whereupon, Travis Blackwelder was duly sworn by the
10 Clerk of Court.)

11 **THE CLERK:** Thank you. Have a seat in the witness
12 box, please. State your name for the record, spelling
13 the last.

14 **THE WITNESS:** I'm sorry. I can't hear very well.

15 **THE CLERK:** State your name, please, for the record.

16 **THE WITNESS:** Travis Blackwelder.

17 **THE COURT:** And please spell your last name.

18 **THE WITNESS:** B-L-A-C-K-W-E-L-D-E-R.

19 TRAVIS BLACKWELDER,

20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. HUGHES:

23 Q. Sergeant Blackwelder, I appreciate you being here
24 today. If you would, just introduce yourself a little bit
25 to the jury and where you're from.

1 A. Again, my name is Travis Blackwelder. I'm originally
2 from North Carolina, the Asheville area. I grew up in
3 North Carolina. Shortly after graduating high school, I
4 joined the military, which I'm currently serving in a
5 reserve status. In 1999, I got out of the military. I
6 was a military police officer. I joined civilian law
7 enforcement in Aiken County, worked at Aiken County
8 Sheriff's Office for approximately five years. Within
9 Aiken County Sheriff's Office, I worked on the DUI task
10 force, was an instructor for the sheriff's office for DUI
11 detection and traffic enforcement. In 2005, I left the
12 sheriff's office and went to work for the highway patrol,
13 and in 2013 I left the highway patrol, went overseas and
14 did some contract work working with an explosive detection
15 dog in Afghanistan. In 2014, I left Afghanistan and went
16 back to the Aiken County Sheriff's Office, where I'm now
17 currently working full-time as a K-9 handler as well as a
18 trainer.

19 Q. Thank you, Sergeant Blackwelder. I noticed that you
20 are in your duty uniform today. Are you currently serving
21 in your reserve capacity?

22 A. I am. I'm at Fort Jackson. I'm teaching at the
23 chaplain school. The chaplains that enter the Army have
24 to go through certain training and it's just two weeks of
25 the training that my unit's teaching.

1 Q. We thank you for being here. Sergeant Blackwelder,
2 if you could, give the jury some idea about what sort of
3 military -- or what sort of law enforcement training that
4 you've received over the course of your career.

5 A. Well, my first training I would probably say was the
6 day I was born. My father was a North Carolina state
7 trooper, so from day one I've been in law enforcement so
8 to speak. In 1998, I changed my job duty at the Army from
9 the signal corps to the military police corps, and in that
10 training I received through the military police academy
11 training in law and order enforcement and the combat
12 military police duties.

13 When I left in 2000 -- correction, when I left in
14 1999, I was hired by the Aiken County Sheriff's Office
15 where then I attended the police academy in Columbia, was
16 certified with the State of South Carolina. Through my
17 career for the next five years, I attended various training
18 courses such as accident reconstruction, breathalyzer or
19 DataMaster, DUI instructor school, radar instructor school,
20 driving instructor school, and then after leaving the
21 sheriff's office in working for the highway patrol, I
22 continued those duties as an instructor where I assisted
23 with the academy classes with traffic stops and driving
24 instructor for the highway patrol academy and doing
25 in-service training.

1 Q. Have you received any specific training at any point
2 in time in your law enforcement career on assessing
3 impairment in individuals that you come across?

4 A. Yes, I have. Advanced DUI school is a school that
5 you attend that teaches you how to administer standardized
6 field sobriety tests. It tells you how to -- or teaches
7 you how to detect impairment through these tests, how to
8 read these tests. And not only that, I also attended the
9 instructor school on how to teach new officers how to
10 detect impaired drivers.

11 Q. Now do you actually receive any specific training
12 through the highway patrol academy or police academy or
13 any other training on how to deal with disabled motorists?
14 Do you receive specific training on that?

15 A. I don't think -- I don't recall actually specific
16 training as much as that's what through your FTO process
17 after graduating the highway patrol academy, those sort of
18 tasks were taught during that FTO when you're riding along
19 with, you know, a trainer.

20 Q. And tell the ladies and gentlemen, if you would, what
21 FTO stands for.

22 A. Field training officer.

23 Q. So it's just a part of the job that you learn on the
24 job that's gonna come along as you go; is that fair to say?

25 A. Yes, sir.

1 Q. Okay. Now there's been a lot of talk in this case,
2 and I recognize that you've not been here for the duration,
3 but there's been a lot of talk about this specialized
4 training that you've got as an officer. Are you a drug
5 recognition expert?

6 A. No, I've never attended that course at all.

7 Q. Do you have an understanding of what that course would
8 entail and then qualify you to do?

9 A. From my understanding, DRE, or drug recognition
10 expert, teaches you how to access an individual through
11 blood pressure, pupil size, respiration to determine if
12 someone is on substances other than alcohol.

13 Q. Okay. How would that differ from like drug
14 interdiction squad and things like that?

15 A. That's a 180-degree difference.

16 Q. Sure.

17 A. Drug interdiction is the enforcement of -- the
18 enforcement of transportation of illegal drugs in a
19 vehicle, not necessarily in a person's body.

20 Q. Okay. So drug interdiction has to do with sniffing
21 out and arresting people for transporting drugs and a drug
22 recognition expert is actually assessing --

23 **MR. ELLIOTT:** Object to leading, Judge.

24 **BY MR. HUGHES:**

25 Q. Would you explain the difference to the ladies and

1 gentlemen of the jury of interdiction versus drug
2 recognition expert, please.

3 A. Drug interdiction is -- is conducting a traffic stop
4 attempting to locate drugs within the vehicle. DRE would
5 be an assessment of an individual to see if they were,
6 in fact, currently under the influence of certain drugs.

7 Q. Okay. Sergeant Blackwelder, in your career do you
8 have an approximation of how many DUI stops you've made?

9 A. I would say over the years I'm -- I'm somewhere close
10 to maybe five hundred DUI stops through my sheriff's office
11 career and highway patrol career.

12 Q. Okay. And when you make these DUI stops, do you --
13 is part of that assessing impairment?

14 A. Yes, it is. Absolutely.

15 Q. So you've got at least five hundred instances of
16 assessing impairment in motorists that you deal with?

17 A. Yes, sir.

18 Q. Sergeant Blackwelder, we talked a little bit about
19 your employment history, but prior to December 3rd of 2012,
20 what was your assignment with the South Carolina Highway
21 Patrol?

22 A. Can you repeat the question, please?

23 Q. Sure. Prior to December 3rd -- and you understand
24 that this incident we're here to talk about was
25 December 17th?

1 A. Yes.

2 Q. Prior to December 3, 2012, what was your assignment
3 or your team with the highway patrol?

4 A. At that time, I was currently assigned to the ACE
5 team or the criminal enforcement team as a K-9 handler with
6 the sole purpose of conducting traffic stops to interdict
7 the illegal transportation of drugs, guns, drug proceeds or
8 wanted persons.

9 Q. And December 3, 2012, I understand you received a new
10 assignment?

11 A. That's correct.

12 Q. And what team or assignment did you receive?

13 A. I was transferred to the SIT team, which stands for
14 Safety Improvement Team. The SIT team is a team that
15 primarily works within construction zones and works with
16 DOT to reduce incidents within the construction zones.

17 Q. Is there any more or less interaction with motorists
18 in traffic situations from the ACE team to the SIT team?

19 A. On the enforcement team, the criminal enforcement
20 team, it was a constant traffic stop, rapid assessment
21 and release. The interaction was a lot more than in the
22 construction zone. A lot of times the signs within a
23 construction zone, most people obey those signs. There
24 wasn't a whole lot of enforcement action that really needed
25 to be done. Occasionally you'd get your speeding vehicle

1 or your broke down vehicle or a road hazard within that
2 construction zone that you'd have to take care of.

3 Q. Did you have to receive any different training on how
4 to deal with motorists in constructions zones than in the
5 ACE role that you were in?

6 A. No, there was no additional training.

7 Q. Okay. From December 3rd until December 17th, did you
8 have any interaction with any motorists during your time on
9 the SIT team?

10 A. Yes.

11 Q. Okay. Ordinary course of your job?

12 A. Just ordinary duties, yes, sir.

13 Q. Okay. Do you recall your interaction with Mr. Michael
14 Lindler on December 17, 2012?

15 A. Yes, sir.

16 Q. Okay. And you've had an opportunity to review the
17 video of that interaction; is that correct?

18 A. Yes, sir.

19 (Defendant's Exhibit Number 1 was marked for
20 identification.)

21 Q. And we're not gonna go through the whole video right
22 now, I think the jury has seen it several times at this
23 point, but if you could from your recollection describe
24 the conditions of that -- you know, we're about 5:00, a
25 few minutes before or after. Describe the conditions on

1 December 17, 2012.

2 A. Well, it was beginning to get dark, it was dusk, it
3 was in a construction zone, so traffic was moderate. It
4 was right at 5:00, which as you know is right around when
5 rush hour starts in the Columbia area. It was raining and
6 the road surface was wet at the time.

7 Q. Now, Sergeant Blackwelder, through your experience at
8 the South Carolina Highway Patrol, you understand that CAD
9 reports were created on these kind of -- just your general
10 interaction with the public; is that correct?

11 A. Yes, sir.

12 Q. Okay. I'm gonna show you an exhibit and, if you
13 could, tell me if you think this is a true and accurate
14 copy of the Michael Lindler interaction as well as the
15 response to his accident.

16 A. Yes, sir, that would be a CAD report generated through
17 dispatch. It details the dates and times of a responding
18 officer from start to finish.

19 Q. And to your knowledge from your time at the South
20 Carolina Highway Patrol, is this a document that would be
21 kept in the ordinary course and scope of business?

22 A. Yes, sir.

23 **MR. HUGHES:** Your Honor, I'd like to enter the CAD
24 report as Defendant's 1.

25 **THE COURT:** Any objection?

1 **MR. ELLIOTT:** Without objection.

2 **MR. HUGHES:** Thank you, Your Honor.

3 **THE COURT:** It's admitted.

4 (Defendant's Exhibit Number 1, a CAD report, was
5 admitted into evidence.)

6 BY MR. HUGHES:

7 Q. Sergeant Blackwelder, if you would, would look for me
8 on Page 4 in the bottom right-hand corner you'll see some
9 weird lawyer numbers, 9492A-59. Those will be the numbers
10 I'll refer to.

11 A. Okay.

12 Q. Page 59, does that appear to be the CAD log or log of
13 calls from your initial interaction with Michael Lindler?

14 A. Yes, sir.

15 Q. And can you tell from -- can you tell from the CAD
16 report about what time you actually got to Michael Lindler?
17 Just to speed it up, it's about eight blocks down -- or
18 eight entries down.

19 A. Well, at 16:56 it says that I got the vehicle out of
20 the roadway, so.

21 Q. That would have been about the time that you called
22 in and said -- so you'd already interacted with him on the
23 video?

24 **MR. ELLIOTT:** Judge, object to leading.

25 BY MR. HUGHES:

1 Q. At that point, had you interacted with Michael Lindler
2 for a period of time?

3 A. Yes. It took, I don't know, five, eight, ten minutes
4 to get him out of the roadway, maybe not that long. It
5 took just a few minutes just to get him out, so if I
6 already got him out of the roadway at 16:56, I would
7 probably have been on scene a few minutes before that.

8 Q. Okay. And down at the very bottom, can you tell me
9 what time that call was closed?

10 A. 17:06 or 5:06 PM.

11 Q. Okay. And would you be on-scene if that call was
12 closed?

13 A. No, I would not.

14 Q. When you first arrived to the scene, did you have an
15 initial impression of Michael Lindler?

16 A. No, sir.

17 Q. Okay. At what point in time -- or did you form an
18 impression of Michael Lindler through your interaction with
19 him prior to getting him off the road?

20 A. No, sir.

21 Q. What was the situation you encountered?

22 A. Well, when I initially arrived on-scene, I observed
23 two vehicles in the slow lane blocking traffic. We were
24 within a construction zone. Initially I made contact with
25 the first vehicle that I came to; I think was a bystander

1 that had stopped. I got him going out of the way and then
2 I made contact with the actual vehicle that was broke down,
3 which was in the roadway blocking the slow lane, or what we
4 call the Number 2 lane. I asked what was going on. He
5 said that his vehicle had broke down.

6 Q. Okay. And did you look at the vehicle with him?

7 A. I did. When I first contacted him at the vehicle, the
8 hood was up. We walked to the front of the vehicle and
9 started assessing the vehicle. He stated that it had just
10 -- if I remember, he stated that it had just died. From
11 some of my experiences, I knew that maybe that might be a
12 battery issue and we began to assess the battery.

13 Q. I think about that time you asked him why did he
14 stumble or something to that effect. Did you see him
15 stumble around the front of the truck?

16 A. Yes, when I was standing in front, he came around from
17 the driver's side to the front, I saw him stumble. The
18 edge of the road was right there. Not knowing why he
19 stumbled, I asked him why are you stumbling. And, again,
20 the edge of the pavement where it met the grass there's a
21 little drop off, so I asked him why he stumbled.

22 Q. And what did he tell you?

23 A. I believe he said that he was tired.

24 Q. Did that register anything in your mind? When you
25 were out there at that point, are you thinking anything?

1 A. No, at that point my main concern is to get him and
2 the vehicle out of the roadway. Being in the roadway,
3 there was a lot of traffic already backing up trying to
4 merge into one lane, so my main priority was getting that
5 vehicle out of the roadway and getting him out of the
6 roadway as well.

7 Q. Sergeant Blackwelder, you allowed Michael Lindler to
8 get in the driver's seat of the truck and pull it off the
9 road, didn't you?

10 A. Yes.

11 Q. Would you have done that if you thought he was
12 impaired?

13 A. Absolutely not.

14 Q. And why is that?

15 A. I wouldn't want an impaired person operating a motor
16 vehicle. It's against the law.

17 Q. Where did you tell Michael Lindler to take the truck?

18 A. Once we were able to get the vehicle started, I
19 instructed him to pull his vehicle all the way off the
20 road to the right side of the roadway into the grass.

21 Q. And where did he take the vehicle?

22 A. Exactly where I told him to take it, all the way off
23 of the roadway into the grass.

24 Q. What -- what do you do after that? After he gets off
25 the road, what is your course of action?

1 A. What I do is now he's out of the roadway, but I'm
2 still in the roadway, now I'm blocking traffic, so now I
3 return to my vehicle. I was parallel to a guardrail, so I
4 couldn't immediately just pull right off the road, so I
5 drove towards his vehicle, pulled off the road into the
6 grass. As I began to position my vehicle, I realized I
7 was too close to his vehicle and backed up towards the
8 guardrail. I do that to create a safety zone between my
9 vehicle and his vehicle and so that I have an area to work
10 between that's safer and so that if my vehicle were to be
11 hit by another vehicle there would be a space between my
12 car and the other vehicle so that hopefully my vehicle and
13 Mr. Lindler's vehicle would not collide if my vehicle were
14 struck by another vehicle.

15 Q. What kind of vehicle were you in that day?

16 A. I was in a Chevrolet Tahoe, which was still a K-9
17 vehicle at the time.

18 Q. And what was in the back of this Chevrolet Tahoe -- or
19 the K-9 Tahoe?

20 A. In that particular model, the whole back seat had been
21 removed and there was a dog cage that covered the entire
22 back seat from one door to the other and in the cargo area
23 was a storage box that contained all of my equipment --
24 assigned equipment.

25 Q. When you were operating in that vehicle and conducting

1 your job duties, if you make an arrest where are you gonna
2 put that individual?

3 A. I transfer them in the front seat beside me. There's
4 only one available seat in that vehicle.

5 Q. Now there's been some talk about you writing a ticket
6 to Michael Lindler that day. Do you recall writing him a
7 ticket for a violation?

8 A. No, sir, I did not write him a ticket.

9 Q. Okay. You would agree -- or did you get his license?

10 A. I did.

11 Q. And why would you have done that?

12 A. We had a form which is classified as a warning slash
13 public contact. In the construction zone, the SIT team is
14 partially funded by the Department of Transportation, or
15 DOT, so any interaction we have with the public within that
16 area has to be documented. That particular day I had
17 issued Mr. Lindler a public contact, it's titled assist
18 motorist, to let him know who had stopped, who had helped
19 him. The public contact is also as previously stated a
20 way to show DOT that we're actually out there in the zones
21 working and it also allows me to show that -- my supervisor
22 that I'm actually contacting the public within those zones
23 as well so that he knows that I'm -- I'm working.

24 Q. When you wrote the public contact ticket, was it
25 consistent in any way whatsoever with a traffic violation?

1 A. No, it was assist motorist only. That's what it was
2 titled.

3 Q. I'm just gonna show you a very quick portion of this
4 video and I want you to tell me if you see this ticket that
5 we're talking about.

6 (Whereupon, a portion of a video was played.)

7 Q. Can you see it?

8 A. Yes, sir. I can see it. Thank you.

9 Q. Is that a ticket in your hand?

10 A. It's not a ticket, it's a public contact.

11 Q. Okay. What do you do with it?

12 A. I give it to Mr. Lindler with his driver's license.

13 (Whereupon, a portion of a video was played.)

14 Q. Is that what you just did?

15 A. I'm not sure if I handed it to him at that point or
16 later.

17 Q. A little bit off camera, but you would have handed
18 him --

19 **MR. ELLIOTT:** Object to leading, Judge.

20 BY MR. HUGHES:

21 Q. Would you have handed him your ticket?

22 A. Yes, sir, the public --

23 Q. Or the public contact?

24 A. Yes, sir.

25 Q. So, Sergeant Blackwelder, at that point in time have

1 you made any determination in your mind whether Michael
2 Lindler is impaired?

3 A. At that point in time?

4 Q. At that point in time.

5 A. If he -- he is he impaired, is that what you're
6 saying?

7 Q. Yes. Have you made a determination whether he is or
8 -- whether he is or he isn't?

9 A. No, I'm still assessing the whole situation.

10 Q. So you wouldn't dispute that you assessed Lindler's
11 impairment?

12 A. Yes, sir.

13 Q. Yes, sir, you wouldn't -- you would agree that you
14 assessed Lindler's --

15 **MR. ELLIOTT:** Object to leading.

16 **BY MR. HUGHES:**

17 Q. Did you assess Lindler's impairment?

18 A. Yes. During the entire interaction with Mr. Lindler,
19 I was in a constant assessment mode.

20 Q. At what point during that interaction did you come to
21 your conclusion?

22 A. At the very last interaction with Mr. Lindler, I
23 had -- I had taken the totality of everything that I had
24 seen, heard, smelled, observed, everything, given the
25 conditions, the weather conditions, given the environment,

1 the terrain that we were standing on, given Mr. Lindler's
2 own explanation of why he was uneasy, his being up all
3 night, not having any sleep, being at the hospital, I
4 know how that is being at the hospital all day, being
5 sick, had not been asleep he had said since the day prior,
6 given everything that he had said, the totality of all
7 circumstances seen, I made the decision that he was not
8 impaired at the time and ended my interaction with him.

9 Q. Have you ever -- in your law enforcement career, have
10 you ever pulled over someone you thought was impaired and
11 found out that they were fatigued?

12 A. Absolutely.

13 Q. What -- what symptoms or factors do you observe
14 sometimes with fatigued drivers?

15 A. Fatigued drivers can show a lot of the same
16 indications that an impaired driver can show; uneasy on
17 their feet, slurred speech, inability to focus, swerving
18 in the roadway, not maintaining a lane properly. All
19 these things are all indicative of someone that's driving
20 while sleepy or even impaired.

21 Q. Do you have a -- in your experience have sleepy or
22 fatigued drivers exhibited any erratic or judgment issues
23 such as you would suspect they may run into the road?

24 A. No, sir.

25 Q. Did you find that Mr. Lindler was compliant with your

1 instructions?

2 A. Yes. In my interaction with Mr. Lindler, how brief
3 it was, ten, thirteen minutes, everything I asked him to
4 do he did. He was not belligerent, he cooperated with
5 everything I asked him to do. Every instruction I gave
6 him from pulling your vehicle all the way off the road
7 into the grass, to say your ABCs without singing them, he
8 complied with everything that I asked him to do, to me
9 indicated that he was not impaired.

10 Q. Did you find him to be upfront and honest?

11 A. Yeah. I think at one point he had offered
12 information that I didn't even request; that he was in
13 PTI, which is a pre-trial intervention. I didn't solicit
14 that information from him, he offered it willingly and
15 freely, which told me that he -- he's being honest right
16 now -- or at that time.

17 Q. Did you smell any alcohol on Mr. Lindler?

18 A. No. I had a good opportunity to be right beside
19 Mr. Lindler when we initially made contact when we were
20 both in front of the vehicle assessing the battery or the
21 engine. I could not smell any odors coming from him. I
22 didn't smell alcohol, I didn't smell marijuana. I didn't
23 smell anything.

24 Q. At one point, and you actually almost did it then,
25 we stopped video before it, at one point you did give the

1 ABC test to Mr. Lindler. Was there a reason you chose that
2 specific sobriety test for him?

3 A. Well, the ABC test -- I didn't smell alcohol. The
4 ABC test is a good test to determine if someone is under
5 the influence of drugs. There is an inability to speak
6 properly with the use of drugs and enunciating the
7 alphabet, saying the alphabet clearly, or even following
8 instructions. Mr. Lindler did everything that I asked him
9 to do. He said the ABCs with no problem, even through the
10 hardest part of L-M-N-O-P, enunciated each one of those
11 letters properly without hesitation, without mumbling,
12 without any mush mouth or anything.

13 Q. I believe you told me that -- but if not, what was
14 your determination as to Mr. Lindler's impairment?

15 A. My determination was he was not impaired.

16 Q. Did you have an opinion or did you come to a
17 conclusion as to whether or not you believed him to be a
18 danger to himself?

19 A. The assessment that I came to was that he was not
20 a danger to himself. And, again, that was based on
21 everything that I observed him doing, saying. Given the
22 environment we were in would help explain some of the
23 stuff, stumbling a little bit. We were on the side of the
24 Interstate, there's a hill on the shoulder, it was high
25 grass, clumpy grass, it was raining, conditions were wet.

1 He said he'd been up all night, he had worked, he got off,
2 he didn't go to bed, went to the hospital, sat at the
3 hospital all day with his girlfriend, been diagnosed, I
4 think he said, with the flu, had still not been to bed,
5 it was 5:00 in the afternoon. Given him -- that he's
6 so tired, not feeling well, it's raining, we're on a
7 hillside, it's clumpy grass, the surface is wet, I think
8 that he had explained himself satisfactorily at least to
9 my decision-making process that he was not impaired.

10 Q. In the video, and you've watched it and the jury's
11 seen it, on two occasions you tell Mr. Lindler to get out
12 of the road. Why did you tell him on two separate
13 occasions to get out of the road?

14 A. Well, I think the first time was once we had gotten
15 his vehicle out of the roadway and I'd repositioned my
16 vehicle also out of the roadway, I think he was standing
17 in -- in his doorjamb with the door open. I asked him to
18 get out of the roadway, he didn't move, he didn't give any
19 kind of indication that he had even heard me, so I think I
20 gave it to him again maybe over the PA system to allow him
21 -- to instruct him to get out of the roadway. Again, I
22 don't -- I don't think he heard me because he walked back
23 towards me and asked me what I'd said and I told him again
24 to get out of the roadway, this time a little bit more
25 forcefully. I wanted him to understand that I wanted him

1 out of the roadway immediately.

2 Q. What did he do when you'd said it more forcefully?

3 A. He got out of the roadway. He complied immediately.

4 Q. Is there any -- from your recollection or even your
5 experience, is there any reason why out there on the road
6 he wouldn't have heard you?

7 A. Well, I would think the traffic noise was pretty loud,
8 there were a lot of cars in the construction zone, we're
9 right there by the road, so I would imagine that maybe he
10 couldn't hear due to the environmental conditions at the
11 time.

12 Q. Do you find that in these kind of conditions in your
13 interactions with motorists that sometimes you have to
14 speak a little bit louder?

15 A. Yes. Absolutely.

16 Q. I want to talk about some of the things that you
17 learned or knew at the scene. Was it important to you in
18 any way that he was with his girlfriend on the scene?

19 A. I would say so. He had someone with him.

20 Q. Was it important to you whether they had a cell phone
21 or not?

22 A. Yes, sir.

23 Q. And why is that?

24 A. Well, if they had a cell phone, if they had any
25 trouble, they could call for help.

1 Q. Did you -- did you come to any knowledge about what
2 their plan was to get out of there?

3 A. Yes. During my interaction with Mr. Lindler, his
4 girlfriend was on the cell phone I believe talking to
5 Mr. Lindler's mom giving her directions on where they were
6 located at and telling her -- from my understanding the
7 mom was telling her that she was a few exits away, maybe
8 even a couple exits away, and that they -- that she would
9 be there shortly.

10 Q. Now, Sergeant Blackwelder, there's been some
11 discussion about highway patrol policies, specifically
12 the highway assistance policy contained within 300.14.
13 From your time with the highway patrol, are you familiar
14 with that policy?

15 A. Maybe not so much now.

16 Q. Would you have been familiar at the time when you were
17 on the job?

18 A. Yes, sir.

19 Q. Okay. I'm gonna show you that policy and show you
20 that little Subsection D there. From your review of that
21 policy, what is the requirement of highway patrolmen under
22 Subsection D?

23 A. Would you like me to read it or just --

24 Q. Sure. You can read it.

25 A. It says at the request of any stranded or disabled

1 motorist, officer will ensure that the motorist does not
2 remain in a hazardous location or environment, even if it
3 means transporting the motorist to a suitable public
4 location.

5 Q. Have you ever in your experience transported a
6 motorist that already told you they have transportation
7 arranged?

8 A. No.

9 Q. Would there be any reason to do that?

10 A. If they still requested me to take them to another
11 exit, that would be a reason. In this particular case,
12 Mr. Lindler nor his girlfriend never made any such request.

13 Q. What would you have done if they actually asked you
14 for a ride?

15 A. If they would have asked me for a ride, I would have
16 been obligated under the policy to give them a ride. It
17 would have had to have been done in two increments because
18 I only had one seat available in my vehicle due to the type
19 of vehicle it was and two of them -- I would have had to
20 leave one by themselves on the side of the road.

21 Q. Would you be more likely in your experience to leave a
22 young man or a young woman on the side of the road alone?

23 A. I would have most likely taken the female to the next
24 exit first. There is some southern hospitality in me I
25 guess you would say.

1 Q. Now we -- we only have -- on the video we only have a
2 few seconds before you actually come upon the disabled
3 motorist captured on the video. Prior to the start of this
4 video, did you have any knowledge of any other accidents
5 or situations in the roadway at the time you'd stopped to
6 assist Michael Lindler?

7 A. Yes. At 5:00 in Columbia it's raining, it's rush
8 hour, there's accidents. There had been accidents already
9 been broadcasted over the radio in certain locations; one
10 being not too far from my location, which was on Clemson
11 Road.

12 Q. Would you have -- in your experience in working
13 around that area, if that accident had been cleared when
14 you called would you expect there to be other accidents?

15 A. Absolutely. Unfortunately, especially in the Columbia
16 area or really anywhere, accidents breed accidents. Once
17 you have one accident a lot of times people rubbernecking
18 or not paying attention will cause an additional accident
19 behind the original accident, which in turn creates more
20 accidents behind that one. So once one accident kicks off,
21 it's a matter of time before you have additional accidents.

22 Q. Sergeant Blackwelder, at any point in time during
23 your interaction with Mr. Lindler, were you considering
24 arresting him?

25 A. No.

1 Q. Why not?

2 A. Mr. Lindler was not grossly intoxicated, he wasn't
3 falling down, he wasn't being belligerent, he could speak,
4 he wasn't shooting a firearm while he was intoxicated, he
5 was not -- he was not breaking any law other than just
6 being broken down, which happens to all of us.

7 Q. Why would those specific factors, grossly intoxicated,
8 falling down, shooting firearms, why were those ones that
9 you're considering?

10 A. Those are all the elements of disorderly conduct, so
11 it's got to be one of those three things in order to make
12 that charge.

13 Q. Is that -- is disorderly conduct also called public
14 drunkenness?

15 A. Yes, sir.

16 Q. Okay. Why didn't you charge him with DUI?

17 A. He wasn't impaired.

18 Q. Could you have charged him with DUI out there on the
19 scene?

20 A. No. In order to be considered DUI, your -- your
21 ability to operate a motor vehicle has to be appreciably
22 impaired. You'd have to be operating the motor vehicle.
23 When I found him, he was not operating a motor vehicle,
24 he was not impaired. He answered all my questions, did
25 everything I asked him to do without question and without

1 any disability to do it. He was able to do everything I
2 asked him to do.

3 Q. If you were never going to arrest Mr. Lindler, did
4 you ever feel that he was in your custody?

5 A. Mr. Lindler was never in my custody.

6 Q. What would you have done if at any point in time
7 Mr. Lindler said I want to leave?

8 A. Mr. Lindler was free to go.

9 Q. Is it uncommon in your experience for a disabled
10 motorist to walk up to an exit?

11 A. No, it's not uncommon at all.

12 Q. Would you have arrested Mr. Lindler if he walked away
13 and went up to the exit?

14 A. No.

15 Q. Sergeant Blackwelder, what is the last image that you
16 have in your mind of Mr. Lindler?

17 A. The last image I have was he was sitting on the bumper
18 of his vehicle at the rear of his vehicle far away on the
19 -- I guess the passenger side would be -- would be the most
20 farthest distance from the roadway.

21 Q. Now, Sergeant Blackwelder, you've had an opportunity
22 to review the video, you've given depositions, you've been
23 involved in this case for a good long while, was there
24 anything that you saw at the scene in that 13-minute
25 encounter that made you suspect that Michael Lindler would

1 do what he did?

2 A. There was no indication at all that I received from
3 Mr. Lindler that what happened would have happened. Not
4 at all.

5 Q. Now there has been some talk in this case and you have
6 seen these videos where you respond back to that incident
7 after you cleared the roadway and left. Do you recall
8 that?

9 A. I do.

10 Q. And by the way, the accident that you went to, were
11 the cars in the roadway?

12 A. Yes. The -- the accident that I mentioned earlier
13 that was on Clemson Road was initially broadcasted as
14 on Clemson Road, accident, still in the roadway. I had
15 that information before I went out with Mr. Lindler and
16 during that whole -- whole time of dealing or interacting
17 with Mr. Lindler I was constantly assessing if the
18 situation I'm faced with at hand right now in front of me,
19 which one is more -- more dangerous, which one has the
20 higher probability of additional incidences for injury.
21 The whole time that I am dealing with Mr. Lindler I'm
22 thinking assess this situation, do I need to go forward,
23 can I leave, is there something that I need to do here or
24 do I need to clear this and go to the next incident, which
25 has already been broadcasted in the roadway, much like

1 Mr. Lindler was when I first found him, still in the
2 roadway on Clemson Road, at 5:00, in the rain, still in
3 rush hour, which one -- which incident is the more
4 dangerous incident. After assessing Mr. Lindler, I
5 determined, however fast it was, whether it took the whole
6 thirteen minutes or it took the final last conversation
7 with Mr. Lindler, I determined that I don't have anything
8 here that I need to continue processing, I need to go to
9 the next incident, which is in the roadway, more dangerous,
10 at rush hour traffic, in the rain, as the sun's going down.
11 Q. When you come back to the scene and you learn what
12 happens, you are captured on videos that have been shown
13 to this jury where you say --

14 **MR. ELLIOTT:** Judge, I object to leading.

15 **THE COURT:** I think he's asking a question, so let him
16 finish the question and then you can object.

17 Q. -- where you say I kind of feel responsible. Sergeant
18 Blackwelder, what was going through your mind and why would
19 you have said that?

20 **MR. ELLIOTT:** I object to leading.

21 **THE COURT:** Overruled.

22 **THE WITNESS:** Well, I was just with this individual
23 an hour before or forty-five minutes before interacting
24 with him, talking with him, and I think anyone who was just
25 interacting with someone and then they're dead forty-five

1 minutes later would feel some sort of sympathy or could I
2 -- should I have seen this or should I have done that. I
3 think any one of us would have some sort of sympathy to say
4 I feel bad, you know, I was just here.

5 Q. In your time of reflecting out there on the scene,
6 what went on, what did I see, in your time of reflecting,
7 did you come up with anything that you could or should have
8 done differently?

9 A. Given the circumstances, I got Mr. Lindler out of the
10 roadway. Initially he was in the roadway, I got him out of
11 the roadway, he was all the way off the roadway, there was
12 a guardrail right behind him. I wasn't real concerned with
13 his vehicle getting hit due to that guardrail that was
14 right behind him, he had help on the way. Before I left, I
15 told girlfriend while she was still on the phone you're on
16 I-20 westbound at Mile Marker 81, tell them when they get
17 here to get off the road. Knowing that the next incident I
18 was going to at the time I felt was -- was a more -- more
19 dangerous situation, I felt like even though I had been
20 there before and I'm feeling some feelings because
21 Mr. Lindler is now hit and struck by a vehicle, I still
22 come to the same conclusion that leaving Mr. Lindler and
23 his girlfriend on the side of the road out of the road, not
24 in the flow of traffic, with help a couple of exits away,
25 to go to an accident that was still in the roadway like

1 Mr. Lindler was initially, I don't do anything differently.
2 I'd do the same thing.

3 Q. Sergeant Blackwelder, when you are on the scene and
4 you're assessing impairment of an individual, do you have
5 to use your discretion in making that determination?

6 A. You use your discretion and the training that you
7 received and the experiences that you've -- that you've
8 witnessed through your law enforcement career to assess
9 each situation of if I saw a guy fall down before while
10 doing a test all the way on the ground and he registered
11 very high on a breath machine and I see that same behavior
12 again, I'm putting two and two together, this guy is
13 probably like the other guy was, you know.

14 Q. In your experience and your training, aside from the
15 specific instance of Michael Lindler, but when you assess
16 impairment are you always right?

17 A. No.

18 Q. Is it an -- is it an exact science?

19 A. Not at all.

20 Q. And, in fact, tell the ladies and gentlemen of the
21 jury sort of the process when you assess impairment, what
22 goes on if you actually determine that someone's impaired,
23 for example, like a DUI stop.

24 A. So if I conduct a stop and through that stop I see
25 signs of what I believe to be someone impaired, then I

1 immediately go into an investigation to determine whether
2 I need to make an arrest. There's some mis -- misguided
3 information that we're just trying to gather evidence of
4 the person. That's not what we're doing. We're trying to
5 give that person a fair assessment of their ability to
6 operate a motor vehicle through standardized field sobriety
7 tests. Once those tests are complete, if I determine based
8 on my training that the subject did not do as well as they
9 should have, then the subject would be arrested. Once he's
10 arrested, the vehicle would be towed, which produces a bill
11 for him, he's taken to the jail where he's administered a
12 breathalyzer test. Depending on where you are within the
13 county, there's some time that it takes to get from a scene
14 to the county. Once you get to the jail, there's a process
15 that you have to go through to get into the jail, then you
16 administer the breath test, which takes approximately
17 thirty minutes, then you have to read certain paperwork,
18 check their mouth and you have to observe them for twenty
19 minutes on video. You have to sit there and watch this
20 person for twenty minutes to make sure they don't put
21 anything in their mouth, to make sure they're okay to take
22 the test. After that twenty minutes, you give them an
23 opportunity to blow. If they blow and they register higher
24 than the limits, then they're arrested, booked into the
25 jail and then after that you fill out your paperwork,

1 conclude your incident report. This whole process on
2 average is probably about a two-hour process before you
3 even write your report. So taking someone to jail for
4 suspicion of DUI is gonna be two hours before you're back
5 on the road doing anything else. It's two hours out of
6 that individual's time as well.

7 Q. And if you suspect DUI, you're gonna take them, aren't
8 you?

9 A. Absolutely.

10 Q. Why don't you just use the little -- the pocket
11 breathalyzers? Why don't you give them the little
12 handheld's out there on the scene?

13 A. Currently South Carolina doesn't allow us to do that.
14 We're only allowed to give a person one -- one test and
15 that test is the DataMaster, which is a fixed machine at
16 the detention center or other location. You have to solely
17 -- solely base your judgment off the training that you've
18 received and the experiences that you've seen on the side
19 of the road to determine if someone needs to go to the
20 machine to take that test.

21 Q. So if I understand your testimony, South Carolina
22 requires -- South Carolina law requires you to use your
23 discretion and make an assessment of impairment through
24 observation and training on the scene?

25 A. Yes.

1 Q. Sergeant Blackwelder, other than the thirteen minutes
2 captured on your dash cam video, what information did you
3 have on the scene to consider?

4 A. The only thing I had on the scene is what I was
5 observing. The only thing I had to consider was what he
6 was telling me based on the questions that I asked him.
7 I had no other information. I had no one else telling me
8 anything else, no one else whispering any additional
9 information other than what I -- what you saw on the video
10 is the same thing that I had. That's all I had.

11 Q. Sergeant Blackwelder, if -- if you had determined that
12 Michael Lindler was impaired and a danger to himself, would
13 you have stayed?

14 A. Absolutely.

15 Q. What would you have done had you stayed?

16 A. Well, Mr. Lindler was there with his girlfriend,
17 there was help on the way that was already confirmed
18 with a telephone call that his girlfriend was currently
19 on the at the time. Most likely due to the traffic
20 conditions, the time of day, it was raining, I would have
21 had Mr. Lindler sit in his vehicle, I would have stayed
22 there, I would have most likely returned to my vehicle,
23 sat in my vehicle and monitored the situation. Because it
24 was raining, I would probably have been sitting in my
25 vehicle to get out of the rain and also because it would

1 have been safer for me to sit in my vehicle instead of
2 standing out by the road.

3 Q. Do you have an understanding of what Mr. Lindler did
4 that resulted in this accident?

5 A. I think so, yes, sir.

6 Q. And what is that understanding?

7 A. From my understanding, he left his vehicle, walked
8 out into the roadway, turned and faced traffic and got hit
9 by a vehicle.

10 Q. Sergeant Blackwelder, if you're sitting in your car
11 out of the rain completing some paperwork and Michael
12 Lindler gets out of his car and runs into the road, can
13 you stop him?

14 A. No. I'm probably thirty -- thirty feet, maybe a
15 little bit more away from him sitting in my car. I'd
16 have to open the door, check traffic for myself to make
17 sure I could get out safely, get out of the car, start
18 running towards him, close that distance of thirty,
19 forty feet to try to grab him at the same time putting
20 myself in danger from stopping him where it would only
21 take him maybe three seconds to exit his vehicle and get
22 in the roadway. There's no way I could have stopped him
23 if I had still been on the scene in my vehicle.

24 Q. And if you still were on the scene in your vehicle and
25 you're watching him, even if you decide to stay, is there

1 anything in your mind that's gonna make you keep watching
2 him to see if he's gonna do that?

3 A. No, I had no indication other than his vehicle was
4 broke down, he had been up all night, he was sleepy, he
5 wasn't feeling well, he had help on the way. The only
6 thing I had, again, is what you ladies and gentlemen saw
7 on the video. That's -- that's the only thing that I had
8 to base any kind of judgment on. I had no other reason to
9 believe that he would have done anything other than stayed
10 there and waited on his mom to pick him up.

11 **MR. HUGHES:** I beg the Court's indulgence.

12 Sergeant Blackwelder, I appreciate your time today.
13 If you would answer any questions that Mr. Elliott may
14 have.

15 **MR. ELLIOTT:** May it please the Court?

16 **THE COURT:** You may cross-examine.

17 **MR. ELLIOTT:** Thank you.

18 CROSS-EXAMINATION

19 BY MR. ELLIOTT:

20 Q. Trooper Blackwelder, how are you doing?

21 A. I'm doing great, sir. How about yourself?

22 Q. I'm doing just fine. I noticed you said a few times
23 that you were having some trouble hearing. Can you hear
24 me?

25 A. Yes, sir.

1 because you can't get to the right, you can't get to the
2 left. You can't get off the road.

3 A. If you get stuck between those two barriers, you're
4 absolutely right, there would be nowhere to go.

5 Q. And if you decided to as a pedestrian to cross the
6 road right there, you can't because of that barrier,
7 there's nowhere to go. You can't get in the middle.

8 A. Absolutely. There would be no reason to go over
9 there.

10 Q. If you were you in -- if you were in your right mind,
11 there's absolutely no reason to go over there, correct?

12 A. I don't see what the point would be.

13 Q. I don't either. Nevertheless, at this particular
14 time on this particular day, not only were you in a
15 construction zone, but as you pointed out it was raining,
16 it was getting around 5:00 time, the dusky dark time and
17 all that kind of stuff, correct?

18 A. Yes, sir.

19 Q. All right. So you've got to factor those things in
20 as well as the construction zone, the time of the day, the
21 rain, as you say, the road conditions were slippery. In
22 other words, if the car's driving along there going 55 or
23 so and they have to lock up the brakes, they're gonna
24 slide.

25 A. Most likely, yes, sir.

1 Q. Okay. And that makes it more hazardous and dangerous?

2 A. It makes it more hazardous than a bright, sunny day.

3 Absolutely.

4 Q. Right. And these are the things you sort of have to
5 factor in when you approach a stranded vehicle or a
6 motorist or a pedestrian. You've got to not only factor in
7 what's going on with them, before you even start that in
8 your mind you're looking around and you're seeing the
9 environment and you're factoring everything in?

10 A. Absolutely. I think I was doing that the entire time
11 of assessing the situation with Mr. Lindler while at the
12 same time assessing the next incident that was pending, a
13 wreck in the roadway. The same considerations were being
14 given to that incident as the incident that I'm currently
15 with; do I need to stay there or do I need to go to the
16 more hazardous one.

17 Q. Sure. You've got to figure out in your mind what
18 was the biggest priority, who has got the most chance of
19 getting into some harm if I leave. I mean, if you've got
20 to make a decision, you've got to put it in priority, if
21 you will. You've got to make that decision in your mind;
22 can I leave here and go someplace else or is this place,
23 where I am at now, is this particular person in more
24 danger. You've got to make that call.

25 A. Absolutely. You're -- I'm consistently doing that

1 the whole time I'm there.

2 Q. Sure. While altogether, all the time factoring in
3 all these conditions, which included and I left out, those
4 heavy road conditions, those cars and 18-wheelers coming
5 by?

6 A. Yes, I'm constantly assessing, weighing the options
7 between one incident versus the other incident.

8 Q. Right. Because you don't want to get hit, as well as
9 you don't want the pedestrians or the motorists or the
10 stranded person to get hit?

11 A. Or the vehicles at the next incident in the roadway in
12 the collision.

13 Q. And you talked about that zone of protection when you
14 pulled back behind that stranded vehicle, the purpose of
15 that and a couple of things that you explained, that you're
16 creating this little area where you can walk and go back
17 and forth, you can talk to him, you've got your lights on
18 so cars know to go around you to the left, correct? That's
19 what they're sort of -- that's the purpose of it and that's
20 what you see most times when I'm driving if there's a
21 police car on the right, I know to get to the left if their
22 lights are on.

23 A. That's correct.

24 Q. Okay. While all the time, too, making sure like you
25 say that there's this kind of zone of protection, not only

1 A. The day that I wrote it.

2 Q. Well, sure. But what happened to it? Did you keep a
3 copy -- would there have been a copy of it kept?

4 A. I would think so.

5 Q. Yeah, me, too. That way we would have a copy of it to
6 look at it and talk about it, right?

7 A. Sure.

8 Q. See whether it was a warning ticket, a traffic ticket
9 or whatever you're talking about here, we'd know what it
10 is, correct?

11 A. Yes.

12 Q. But you never looked at that death fatality report,
13 right?

14 A. No, sir.

15 Q. Even though you took the pictures, you did the
16 diagram, you did all this work, you never looked at the
17 finished product?

18 A. No, sir.

19 Q. Okay. Let me ask you some questions about some of
20 your testimony from earlier about on the side of the road
21 there with Mr. Lindler. You say that after you saw him in
22 the roadway, he was in his car door, the car door was out
23 in the roadway, you had to get on the PA to tell him to
24 move. I didn't know that until today. I thought you were
25 just telling him. You actually were on your PA so he could

1 hear it from the speakers on your car get out of the road.

2 That was you on the PA?

3 A. Yes, sir.

4 Q. And you said today you still don't think he heard you?

5 A. I mean, it was -- you can see in the vehicle he walks
6 back to me and says what did you say.

7 Q. No doubt. And let me just clear this up for the jury.
8 We've talked about this. When he's walking back to your
9 car, he's on your side. Because your car is out in the
10 roadway a little bit, isn't it?

11 A. It's -- it's not all the way in the road, it's off the
12 road, but it's offset a little bit to create some sort of
13 barrier.

14 Q. Right. But your car door is out in the right lane.

15 A. When I exited the vehicle, yes.

16 Q. Okay. And when he finally did walk over to you when
17 you had to tell him again, he was walking on the other side
18 of your car, on the left side of your car, correct?

19 A. Yes, he was coming to the driver's side.

20 Q. Right. So there's absolutely no doubt when he was
21 coming to the driver's side he was out in the right lane
22 of the roadway, correct?

23 A. I'm sure there's a video. I don't know if he was out
24 in the roadway as you say it as much as he was on the edge
25 of the roadway where the white line is.

1 A. Okay. Thank you.

2 Q. Yes, sir.

3 You said: At this particular -- at this particular
4 moment in time, right, not knowing exactly what I'm
5 gonna know in the next two or three minutes with our
6 conversation, if he tried to get into the vehicle and
7 drive off, no, I probably -- I would not have let him
8 drive off.

9 So at that particular time he was not free to leave;
10 is that correct?

11 A. Yes, at that moment while I'm talking to him he just
12 breaks and runs and jumps in the car and tries to drive
13 off, that would raise my suspicion of what's going on and
14 he would not have been able to leave. I would have stopped
15 him.

16 Q. Right. And that was based on what you had just seen
17 about not being able to stand up and all that kind of
18 stuff?

19 A. Yeah, because --

20 **MR. ELLIOTT:** Okay. That's all I have.

21 **THE COURT:** Your Honor, I've got to redirect on that,
22 please.

23 **THE COURT:** I'm sorry?

24 **MR. HUGHES:** Can I have a re-redirect on that?

25 **THE COURT:** Yeah, the last -- the last time.

1 try to say it was the trooper's fault for not handling it,
2 so it was appropriate what he did there.

3 Then he went up and he spoke with Lindler and tried to
4 assess what the problem with the vehicle was. He commented
5 about twice on Lindler's stumbling. Lindler was able to
6 walk. He was able to talk clearly, he was not slurred. He
7 was able to communicate the problems with his vehicle; that
8 there was a battery problem, as well as a gas problem with
9 his vehicle. He was able to work in conjunction with the
10 trooper on correcting the battery problem so that the
11 vehicle could get started and pulled off the road. So
12 these things are things that I look at when I'm trying to
13 determine if somebody is impaired to the point where they
14 can't take care of them self. Typically you wouldn't find
15 somebody that was able to do all of the things that we just
16 watched on video if he was so impaired that he couldn't
17 care for himself.

18 Then he was able to pull the vehicle off the road in
19 the correct and best position that was there at the time.
20 The trooper then properly positioned his vehicle behind
21 Mr. Lindler's and then Lindler got out of the car -- or out
22 of the truck and he stood on the -- the correct side, the
23 right-hand side of the white line in the doorway of the
24 truck, and the trooper got on his PA, the loudspeaker, and
25 told him to get out of the road and from what it appears

1 and from what we read from what Trooper Blackwelder said,
2 Mr. Lindler didn't hear him or understand him. That
3 happens with PA systems because if the -- the mic sometimes
4 sounds garbled. It's on the side of the Interstate, so
5 there's a whole lot of other noise going on with vehicles
6 passing by, so it's conceivable that someone couldn't
7 understand a PA system.

8 So then you see him walk back to the trooper's vehicle
9 and for the time that he's on video at least you can see
10 that he was able to walk, he wasn't stumbling, he walked
11 fine, and he stayed on the correct side of that white line,
12 on the right-hand side of the white line, so he was not in
13 the road at that point. Then the trooper tells him louder
14 to get out of the road and the loudness is magnified
15 because troopers and police, they wear that mic that goes
16 to the transmitter that records down on their shirt, so
17 it's very close to your mouth so it always sounds louder
18 than -- than is perceived by people generally.

19 And then you see -- when he tells him to get out of
20 the road that second time, you see Lindler walk fine back
21 across the front of the police car in front of the camera
22 and start to head down the embankment to get out of the --
23 to get off the road or as far away from the road as he
24 could, so he was able to follow instructions and -- and do
25 so without falling down.

1 two hundred policies. They're broken down into different
2 categories; administrative, computer, you know, human
3 resources and so forth, and then you also have enforcement
4 policies and those are usually the 300 series. So during
5 training those are the ones that we -- we focus on during
6 basic training is the 300 series. And basically what we
7 do is -- what I do when I teach policy, day one I walk into
8 the classroom and they have the policy manuals with them
9 and I have a Power Point up on the board and I tell them
10 close your books and turn Power Point off, this is what
11 we're gonna do. I'm gonna make you the director of the
12 Department of Public Safety and you're gonna write a
13 policy, all right, and go to the board. I write who,
14 what, when, where, how, why and I have them -- I solicit
15 answers from them, let's answer these questions, all right?
16 These are people straight off the road that have no law
17 enforcement experience whatsoever. I tell them body armor
18 policy, that's usually the first one we cover, we're gonna
19 write this policy. When we're done and we've answered all
20 those questions, then we open the book back up and we look
21 at it and usually what we find is we're 90 percent right
22 on as to what the Department of Public Safety policy is.

23 So that's where I say look, a lot of our policies are
24 just common sense, all right? They're simple guidelines.
25 They guide you in what you do. And then we go through and

1 Now what is the -- Captain Talbot, if you would, let
2 me know please what has to happen for that to be triggered
3 -- that policy to be triggered.

4 A. Obviously there has to be a request from the disabled
5 motorist. That's -- that's the key word in the policy.
6 And if I could stay on the policy, too, when I teach
7 policy, policy is written to be literal intent or plain
8 meaning. There's no interpretation there. Officers are
9 instructed you don't interpret -- there's no way that
10 officers can know what the author intended of that policy
11 to mean. It is plain meaning, meaning you read it word for
12 word and you apply the meaning of each one of those words.
13 That's how we meet the guidelines that are set forth.

14 Q. There's another policy. You can actually leave that
15 on the railing, if you'd like. There's one more policy
16 we've already discussed several times here in this matter,
17 and let me hand this to you. Let the jury know what policy
18 you're looking at there.

19 A. This is policy 300.21, use of individual discretion.

20 Q. And this is one that you train on in the academy as
21 well?

22 A. Yes, sir.

23 Q. Okay. And I'm gonna read briefly from it. All DPS
24 officers -- and let me ask you, are DPS officers highway
25 patrol officers?

1 supplemental test. We wouldn't be able to testify as to
2 the full standardized field sobriety test, but you have to
3 be able to give them the supplemental test and stating the
4 ABCs is one of the supplemental tests.

5 Most of our tests are multitasking tests because we
6 know when somebody is under the influence of something they
7 can't multitask, they have to focus on one thing and one
8 thing only. So a lot of times one of the techniques we
9 do is we'll ask them to do two things at one time. Say
10 I walk up and say let me see your driver's license and
11 registration, usually what we get is we get one, all right,
12 and right there that's automatically a clue for me okay, I
13 need to start investigating further. But one of the main
14 -- other main things that we really look for in trying to
15 determine impairment is whether or not someone can follow
16 instructions. And in this case, Mr. Lindler clearly
17 followed all of the instructions that -- that Trooper
18 Blackwelder indicated.

19 Q. Did you notice in the video whether -- the line of
20 questioning that Trooper Blackwelder used in speaking with
21 Mr. Lindler?

22 A. I'm sorry, sir?

23 Q. Did you notice the line of questioning that Trooper
24 Blackwelder used in the video as he was assessing
25 Mr. Lindler?

1 A. No, sir, I wouldn't.

2 Q. I wouldn't think so.

3 MR. ELLIOTT: Thank you.

4 THE COURT: Any redirect?

5 MR. FLIPPIN: If I may briefly?

6 REDIRECT EXAMINATION

7 BY MR. FLIPPIN:

8 Q. Captain Talbot, is it a crime to be sleepy?

9 A. No, sir, it's not.

10 Q. Is it a crime to be under the influence of flu
11 symptoms?

12 A. No, sir, it's not.

13 Q. All right. And I'm gonna read briefly from the same
14 deposition. Will you follow along with me? I'm gonna
15 start on Page 42 and I'm going to read it verbatim to make
16 sure we're talking about the same thing. I'm gonna start
17 on Line 16. Are you there?

18 A. Yes, sir. Go ahead.

19 Q. And just, if you could, kind of expand a little bit on
20 that last part of it. When would you want to arrange for
21 transportation of the person? What sort of observations
22 are you making that you would expect the trooper, okay, I
23 should arrange for transportation of this individual? Your
24 answer: Well, we are still playing off of the fact that we
25 have made a decision that the person is under the influence

1 of something, correct? Correct.

2 Was that your testimony that day?

3 A. Yes, sir.

4 Q. And did you understand that all of the testimony you
5 gave that's been read here in this courtroom was given in
6 the context of a hypothetical situation that had an officer
7 making a decision of impairment?

8 A. Yes, sir. And I thought I -- I thought I made that
9 clear in the cross-examination. The question that was
10 posed to me was, you know, if you have an officer who made
11 a decision that you obviously have someone who is under
12 the influence of something, then, yeah, I would expect our
13 officers to do something, but I don't think that was the
14 case here.

15 Q. So with all your training and experience, you observed
16 the video, and you saw no reason for Trooper Blackwelder to
17 come to such a conclusion?

18 **MR. ELLIOTT:** Object to leading.

19 A. No, sir, I did not.

20 **MR. FLIPPIN:** Thank you. Nothing further.

21 **MR. ELLIOTT:** No questions, Judge, any further.

22 **THE COURT:** You may step down.

23 **THE WITNESS:** Thank you.

24 (Witness excused.)

25 **THE COURT:** Any additional witnesses from the defense?

1 **MR. HUGHES:** Your Honor, at this time the South
2 Carolina Highway Patrol rests.

3 **THE COURT:** Any rebuttal from the Plaintiff?

4 **MR. ELLIOTT:** No, ma'am.

5 **THE COURT:** Ladies and gentlemen, we have some legal
6 issues which we need to take up outside of your presence.
7 I'm going to ask you to retire to the jury room, but not
8 to begin to discuss this matter among yourselves. Even
9 though you've now heard all of the evidence, you've still
10 not heard my instructions to you as to the law and it would
11 be inappropriate for you to begin any deliberation at this
12 particular point. We'll bring you back as soon as we're
13 able to do that once we take up these legal issues.

14 Thank you.

15 (Whereupon, the jury retires to the jury room at
16 10:21 AM.)

17 **THE COURT:** Are there any motions by the Plaintiff at
18 this time?

19 **MR. ELLIOTT:** No, ma'am. I don't have any motions,
20 but I would like to bring up one thing that we talked about
21 before that I -- I think I understood it, Judge, and I
22 certainly did understand your ruling about that form, but
23 because -- and I don't plan on bringing up that form in any
24 way like you instructed, but just for purposes of arguing
25 whatever motions the defense might make, I'm assuming that

1 I can rely on the testimony from Trooper Blackwelder about
2 that, whatever it was he said, this public information
3 ticket or whatever it was, the whole line of questioning
4 about when you gave that you had his license, he was in
5 your control. I mean, that's all in evidence and that's
6 all I'm -- that's fair game I'm sure.

7 **MR. HUGHES:** Your Honor, I have no problem whatsoever
8 with any argument about the evidence as long as there's no
9 indication that -- that anything has been withheld.

10 **MR. ELLIOTT:** No. No, I'm not gonna -- I just wanted
11 to clear that up. Thank you, Judge.

12 **MR. HUGHES:** And I would reserve the right to
13 counterargue consistent with what the evidence showed.

14 **THE COURT:** Are there any motions by the Defendant?
15 I understand the Defendant raised several motions and I
16 guess if you just want to -- because I don't want to be
17 here an hour and a half hearing them again. Just tell me
18 again what the -- the high points were just to refresh my
19 recollection and make sure that my notes comport so that I
20 can rule on them and then anything that you want to add as
21 a result of -- now that all of the evidence is in.

22 **MR. HUGHES:** Thank you, Your Honor. May it please the
23 Court?

24 **THE COURT:** And we're gonna take them up one at a
25 time.

1 **MR. HUGHES:** Okay. Your Honor, at this time the
2 Defendant Highway Patrol would renew its motion for
3 directed verdict. The position of the highway patrol
4 is that it has already established at the rest of the
5 Plaintiff's case that this matter should not and cannot
6 go forward to the jury. The Plaintiff failed to carry
7 their burden of proof in the previously made arguments on
8 Wednesday evening of this week were sufficient to warrant
9 a grant of summary judgment and consistent with that the
10 Defendant Highway Patrol would ask that the Court
11 incorporate the entirety of that argument into this
12 argument for the purposes of the record preservation.

13 Now as Your Honor is aware, this is a gross negligence
14 case. The Plaintiff has the burden of proof that the
15 Defendant Highway Patrol, by and through the actions of
16 Travis Blackwelder, failed to exercise even slight care.
17 And, Your Honor, at this point the testimony is clear both
18 through Dr. Kirkham in the Plaintiff's case, as well as
19 Major Batterton, a qualified expert with twenty-two years
20 of concurrent and running law enforcement experience, that
21 Blackwelder -- Travis Blackwelder on December 17, 2012,
22 exercised more than even slight care.

23 In fact, Your Honor, the evidence shows that the
24 simple fact that he pulled behind Michael Lindler and got
25 him off the road is an exercise of not only more than

1 slight care, but it's an exercise of the only thing he's
2 required to do, clear the road. By doing that very
3 singular, simple act this case is entitled to directed
4 verdict.

5 But Plaintiff alleges, very simply, that Michael
6 Lindler was impaired and Travis Blackwelder got it wrong.
7 Well, Your Honor, Travis Blackwelder in determining and
8 assessing the impairment level of Michael Lindler went
9 through a series of interrogation, of techniques he's
10 trained in, of observation, of assessing the totality of
11 the circumstances in a combined thirteen minute window
12 in the field with traffic and rain, and all of these
13 conditions that have been talked about ad nauseam, and he
14 comes to the determination that in his mind, and that's the
15 only mind that matters, in his mind Michael Lindler was not
16 impaired.

17 Your Honor, there has been not one piece of evidence
18 or testimony that has said that Travis Blackwelder --
19 Travis Blackwelder did not believe he was impaired or
20 Travis Blackwelder actually believes he was impaired.
21 Dr. Kirkham testified that all of these things he did were
22 good and right and correct and proper police tactics, but
23 he came to the wrong conclusion, and we'll talk about what
24 that means and why that should also grant a directed
25 verdict, but the problem is this is a gross negligence

1 case, Your Honor, and when gross negligence requires the
2 heavy burden of showing an absence of even slight care or
3 the intentional doing of something that you shouldn't do,
4 the intentional doing of something that you shouldn't do,
5 there is zero evidence, there is no evidence whatsoever to
6 support that that could carry the burden to go to the jury.

7 Your Honor, we think that the issue of the duty has
8 not been established in --

9 **THE COURT:** Are you moving past the gross negligence?

10 **MR. HUGHES:** Oh, yeah. I'm sorry. I'm just trying to
11 speed up. I'm sorry, Your Honor.

12 **THE COURT:** Do not speed up that much. Mr. Elliott,
13 any response?

14 **MR. ELLIOTT:** Yes, Your Honor. Just to try to get
15 to a few of these things quickly. Obviously looking at
16 the facts in the light most favorable to the Plaintiff,
17 Judge, right, we do believe and we accept the burden of
18 proof standard of gross negligence in this case, Judge,
19 because we've had just a plethora or a ton of evidence
20 that this trooper on that particular day during that
21 thirteen minutes consciously failed. He knew the policy.
22 Their own expert said it, Dr. Kirkham said it. Trooper
23 Blackwelder admitted he knew the policies, but our expert
24 said that he consciously failed to follow the policies, and
25 I think that's the key. The case law says the intentional

1 or a conscious failure to do what you know you have to do,
2 what's incumbent upon you to do. These policies, there's
3 no discretion once a decision of impairment is made.
4 They've all testified time and time again, Sergeant Smith
5 did yesterday, once you make that determination the
6 underlying duty is to protect the safety -- protect the
7 motorist from safety or from foreseeable harm.

8 We have two different experts talking about the fact
9 that he was impaired on that video. We have obviously a
10 ton of testimony from Dr. Kirkham saying that it was likely
11 -- that there's no question in his mind anyway that Trooper
12 Blackwelder knew that he was impaired; however, there's a
13 couple of things now that we do know that we didn't know
14 before or a couple of things we knew from his deposition
15 that was played and then a couple of new things as well.
16 One thing as we talked about the other day, he told him not
17 to drive, he could not drive; if you're gonna leave, then
18 your girlfriend must drive.

19 Now there's been a lot of testimony, including from
20 Sergeant Smith and today from Captain Talbot, that it
21 doesn't matter what the impairment is. It doesn't. It's
22 just if you are significantly impaired to the point where
23 you are, then that's when these other policies kick in,
24 and the policies are you have to get them to a safe haven,
25 you have to take them home, you have to do something, you

1 have to stay there with them. From the testimony just
2 today we read into the record, or that was read and it was
3 discussed and agreed to, that you have to stay there with
4 them. That's part of the policy. And that doesn't kick
5 in until the determination of impairment.

6 So when Trooper Blackwelder said you cannot drive
7 and he testified, and we put it before the jury, the
8 definition, and I think again when he testified live, is
9 that he told him he couldn't drive because he thought he
10 was significantly impaired to the point where he shouldn't
11 be the one driving. Now he said but it was sleep and it
12 was the flu and, again, Judge, I think now through Sergeant
13 Smith and Captain Talbot they've all -- both testified it
14 doesn't matter what's causing the impairment, it just
15 doesn't. If the jury believes it was the flu and sleep
16 deprivation and muscle relaxers or if they believe it was
17 the Xanax and methadone from the toxicology report, it just
18 doesn't matter. It's the impairment that kicks in the
19 duties that they consciously failed to follow, and I think
20 -- I think that's the key.

21 And I do believe that this is a very important fact
22 now that we've heard from Trooper Blackwelder say an hour
23 after this event happened he was on video or on his audio
24 saying when I asked him about it, just an hour afterwards,
25 he really doesn't realize what he was doing. If that's not

1 an admission of impairment, I don't know what is. This
2 isn't our experts -- paid experts saying I believe he was
3 impaired, I believe he knew he was impaired and their
4 expert saying no, he didn't, this is the Defendant, this
5 is the man on the scene saying an hour after this thing
6 happened he was in that doorway smoking a cigarette, he
7 just didn't know what was going on. That's his admission
8 that he was impaired. He's -- he's the one who looked at
9 the -- he actually looked at the video just after this
10 thing happened. He looked at his own video, dash cam
11 video, and then made the statement on the audio that he
12 didn't know what he was doing. He wasn't really
13 understanding everything.

14 So, I mean, I just think, Judge, you know, all these
15 are questions for the jury of fact -- or questions --

16 **THE COURT:** I think that -- I think that -- what
17 I'm charged with is whether or not the evidence that's
18 presented leads to but one conclusion in order to direct a
19 verdict. In this particular case, I'm concerned with the
20 existence of evidence and in the light most favorable to
21 the Plaintiff I think that there are -- that there's more
22 than one inference that can be drawn from the testimony and
23 the evidence. I think there are factual issues that have
24 been created as to whether or not there's gross negligence
25 and so I'm gonna send it to the jury.

1 **MR. HUGHES:** Thank you, Your Honor. Your Honor, we
2 would also move for directed verdict on the elements of
3 gross negligence, and understanding the Court's ruling,
4 I'll go through those real quick.

5 Plaintiff has failed to establish a duty in this
6 matter. Plaintiff would have to concede the very general
7 idea that there is no duty to protect that actually matters
8 in South Carolina law that would apply, so in order to
9 establish the duty the Plaintiff is gonna have to say or
10 prove that Travis Blackwelder undertook a duty. There's
11 been no testimony that the decedent was ever in the custody
12 of Travis Blackwelder, that he was ever arrested by Travis
13 Blackwelder, and there has been no testimony that Travis
14 Blackwelder created or intensified the risk associated
15 here. In fact, the testimony has been quite the opposite
16 from Plaintiff's own expert that Travis Blackwelder
17 decreased the risk, the risk was less when he left than it
18 was when he arrived, so by doing that you cannot then
19 impute this duty upon Travis Blackwelder.

20 Also the law that we cited in the previous argument
21 required, you know, the other way to establish his duty
22 was that the damage occurred while in his charge. That
23 has not been established in any way. It would just be an
24 incredible argument from the Plaintiff that Blackwelder
25 somehow had him in his charge when he was hit by the car,

1 and I don't think Plaintiff would go there anyway. For
2 that reason, without a general duty and the Plaintiff's
3 failure to establish a duty, the Defendant would move for
4 summary judgment on the grounds of lack of a duty.

5 **THE COURT:** What about the testimony from the expert
6 that there was some special relationship created between
7 them?

8 **MR. HUGHES:** Well, Your Honor, that's where you come
9 in. The special relationship is a legal term. It is a
10 legal conclusion that you are charged to make. With all
11 due represent to Dr. Kirkham, he has no expertise in the
12 law and whether this special relationship is created and
13 to create a special relationship you have to look at the
14 law, and we discussed the law ad nauseam on Wednesday
15 night, but that's when I bring up this idea that the
16 special relationship, if it existed, ended. And that
17 restatement section that I just quoted says that the
18 damage has to occur while in the charge -- while in the
19 actor's charge, and that's not applicable here, or it has
20 to occur because the actor negligently or intentionally
21 increased the risk or created the risk, and there is no
22 reasonable inference whatsoever that that could be the
23 case here. Their own expert testified, their own expert
24 testified, he was in the road when I got there -- when
25 Blackwelder got there, he was out the road when he left,

1 and the risk was lessened.

2 **THE COURT:** So your view of -- if the jury were to
3 find -- or if I find that there was a special relationship
4 or there was evidence that there could be a special
5 relationship based upon the interaction on the side the
6 road, the fact that there were not then additional steps
7 taken or that there was according to the Plaintiff a
8 violation of policy, that would not -- that would not be
9 sufficient? You're saying that there has to be -- that the
10 risk was intensified during the course of their contact and
11 their interaction and not after he left the scene?

12 **MR. HUGHES:** I think that's absolutely correct, Your
13 Honor. We would not concede that point because the special
14 relationships, even if we assume they exist, can be ended.
15 I think that dovetails appropriately into what South
16 Carolina law requires that there's not a duty to protect,
17 there is no duty to protect. If I undertake this duty and
18 you get harmed because of what I do while I'm undertaking
19 the duty, that's sort of, you know, the good samaritan --
20 or that's the lineage of cases that arise out of this.
21 It's intended to be I did something wrong while I had an
22 ability to do something at all. That's what this entire
23 litany of cases focuses around. We have evidence of
24 forty-five minutes that passes before this accident occurs
25 and we also have evidence, or a lack of evidence, to show

1 from Dr. Genecin when he took these drugs. If we're going
2 down the road that Plaintiff is trying to say that he was
3 absolutely impaired and Blackwelder had to know it, they
4 cannot account for that forty-five minutes, they cannot
5 account for the forty-five minutes, and Dr. Genecin took
6 that stand and said I have no idea and no way to know when
7 those drugs were taken. And we also have the video of
8 Gabby saying I've been with him for the majority of the
9 day, we've been driving around for two hours, he's on no
10 meds and the only time in the evidence that we know he
11 wasn't with Gabby is the times after Blackwelder leaves
12 when he gets in and out of the truck. She says he's not on
13 anything, he's not on anything.

14 **THE COURT:** Mr. Elliott?

15 **MR. ELLIOTT:** Yes, ma'am. I mean, I understand what
16 you're saying, but there's also evidence of the toxicology
17 result that shows he absolutely was and we have evidence
18 from the medical doctor saying that more likely than not he
19 was on drugs before the stop because that's the way he was
20 acting during the video. He relied on the video, plus the
21 toxicology results, and so we do think we have established
22 the duty as we've talked about before. Every officer that
23 they put on the stand has testified not only do they have a
24 duty under the policies, but they have a general duty to
25 protect. Every one of them said it, I've asked every

1 single one of them, they have a general duty to protect
2 civilians from foreseeable harm. Every single person,
3 including their own experts, testified to that.

4 We do believe, again, that the relationship was
5 created by him stopping, when he stopped and started
6 talking to him, and the minute that it was reasonable --
7 that a jury could believe it was reasonable to recognize
8 the impairment, that's when the relationship kicked in.
9 That's what Dr. Kirkham testified to; that that
10 relationship lasted from the time he was there to the
11 end, and it was that stopping, that talking to him, that
12 conversing with him, that interrogating him. The control
13 that we talked about or that Joel brought up, you know,
14 somebody takes your license, and I think it's a fair
15 inference -- or the jury can absolutely believe if somebody
16 takes your license you can't leave, if somebody is giving
17 you a sobriety test, you can't leave, you're under their
18 control, at least there's an absolute reasonable inference
19 to that.

20 He actually testified, Judge, Officer Blackwelder, he
21 testified in his deposition and at trial that he could not
22 leave the scene after he told him he couldn't stand up.
23 he was definitely in his control at that point. This
24 question about was there some -- an additional risk
25 created, absolutely, Your Honor. Dr. Kirkham testified

1 that when he left him there that a bunch of stuff happened.
2 He took away the protective barrier that their expert
3 talked about. Not only did he take away his protective
4 barrier, he left him there with no flashers, it was getting
5 darker, there cars were going faster, meaning he doesn't
6 die -- Dr. Kirkham said that's the foreseeable harm. If
7 you leave him there under those conditions, impaired,
8 regardless of what the problem is, you've told him he
9 can't drive, if you leave him there under those conditions,
10 it was foreseeable that he would get in the roadway and
11 die, and that's -- that's an issue for the jury, Judge.

12 And I think -- he said it over and over again that
13 he created the condition by not taking the actions under
14 their own policies by not heeding to adhering to the
15 general policy of failing to protect the motorist from
16 foreseeable harm and by not doing that they left him out
17 on the roadway where it was foreseeable that he could --
18 that he was in danger and could get in that roadway and die
19 and there's testimony at least from the Plaintiff's case
20 where the jury could -- needs to be the trier of fact on
21 that. Thank you.

22 **MR. HUGHES:** Your Honor, a brief response to this
23 issue. I cite the Court to the case of Scott versus City
24 of Charlotte. Now this is a Court of Appeals in North
25 Carolina case, but it's analogous factually. In this

1 case --

2 **THE COURT:** What's the citation, please?

3 **MR. HUGHES:** Oh, I'm sorry, Your Honor. It's 203
4 North Carolina Appeal -- N.C. APP. 460, and it's a 2010
5 case. And, Your Honor, in this matter the police pull
6 over a suspected impaired driver. They administer a field
7 sobriety test and determine that this guy has some sort of
8 medical issue going on. They actually get on the phone and
9 speak with his wife and she says he's got recent history of
10 stroke, he could be relapsing, they say okay and she said
11 just make sure that you get him off of this highway, they
12 say okay, they put him in their truck or their vehicle and
13 they transport him and they leave him in the parking lot at
14 Pep Boys. They leave him in a parking lot, okay? They
15 leave him alone and he dies. He has a stroke on the scene
16 and he dies.

17 What this case says, Your Honor, and this is
18 discussing the restriction of freedom, this custody, this
19 control issue, Mr. Scott was pulled over on suspicion of
20 driving while under the influence but upon brief inquiry
21 the officer determined that Mr. Scott was not intoxicated
22 but was not able to safely operate his vehicle. Sounds
23 pretty familiar with what we're dealing with. Mr. Scott's
24 keys were taken so he could not attempt to drive, but
25 the officers never ordered Mr. Scott to remain with his

1 vehicle and he was free to leave the area at any time. A
2 reasonable person in that situation would not feel that
3 he or she was in police custody. Plaintiff's argument to
4 the contrary is without merit. And it further goes on
5 to say Mr. Scott was told that he could not operate his
6 vehicle and that his wife was coming to pick him up. The
7 officers made no specific promises of police protection to
8 Mr. Scott.

9 And then it goes on to discuss why the public duty
10 doctrine dismisses this case. In this case, which is
11 very similar to what we're dealing with, they find no
12 duty existed whatsoever, and they took his keys. Your
13 Honor, they took his keys. He couldn't drive off if he
14 wanted to. In this situation, we're just talking about a
15 license, assessing the license. He's just as free to walk
16 off without a license as he is without his keys.

17 **THE COURT:** I don't -- I don't believe he's in custody
18 and I don't think there's a custody issue. I understand,
19 you know, what was said about, you know, at the time of his
20 -- that he was administering the ABC's or -- I don't want
21 to call them field sobriety tests because that's not what
22 they were, but at the time he was doing the assessment and
23 when got out of the car and the decedent was over on the
24 side the road that he wasn't free to go, I think that's the
25 only -- that's the evidence, that he wasn't free to

1 go, but certainly he was not in custody. He was -- he
2 was detained temporarily for the purposes of making -- ,
3 determining whether or not he was impaired, but he -- I
4 think at any time he was free to go. And I won't even
5 address the argument about the driver's license, I don't
6 think that's a credible argument, but I think that in
7 determining whether or not there was a duty, that is a
8 jury question. It is not purely a legal question. When
9 there are facts that are in conflict about that, I think
10 it is incumbent upon the jury to make that decision, so
11 I'll send that to the jury.

12 And to get to your next one about whether there's a
13 breach of duty, I think that's all encompassed in there
14 as well as proximate cause.

15 **MR. HUGHES:** Your Honor, for purposes of the record
16 could you -- what facts are in dispute regarding the duty?
17 I'm not sure I'm clear on that.

18 **THE COURT:** I think -- I think in terms of determining
19 whether the duty is there, there is evidence in the record
20 that there was a duty in the form of the expert's testimony
21 and if I view the evidence in the light most favorable to
22 the Plaintiff, which is what I'm required to do, there was
23 evidence there that there was a duty created between the
24 officer and the decedent at the time that they had their
25 interaction on the side the road. You may disagree with it

1 and -- but there is evidence there from which the jury
2 should be able to make that decision and I think that it's
3 required for the jury to make that decision.

4 **MR. HUGHES:** Thank you, Your Honor. Understanding
5 the Court's ruling, we would just renew our argument as to
6 proximate cause, as well as the breach, which was really
7 subsumed in the first argument today.

8 Your Honor, I think at this point it's -- the
9 Defendant Highway Patrol would move for a directed verdict
10 as a matter of law on the issue of the Plaintiff's
11 negligence. Your Honor, we're asking the Court to decide
12 today, right now, before it goes to the jury, that as a
13 matter of law the Plaintiff was negligent. He was
14 negligent due to Dr. Kirk -- he was negligent based on
15 Dr. Kirkham's testimony that he failed to exercise due
16 care in his actions and he was negligent based on
17 Dr. Kirkham's testimony that the South Carolina statutes,
18 the pedestrian statutes, that was presented to him, that he
19 was familiar with, that they were similar to things that
20 he would have known about in other states, including his
21 own, that Michael Lindler violated all three of those and
22 obviously Your Honor knows that the violation of a statute
23 is negligence per se.

24 So because Michael Lindler was negligent as
25 established in their case, we'd ask for a directed verdict

1 that he was negligent, that issue not be left for the jury
2 to decide, and also that his negligence was a proximate
3 cause of his injuries. He walked into the road and was hit
4 by a car and there's no arguing otherwise that that was at
5 least a cause of the injuries he suffered. We'd ask for
6 the Court to not leave that hand -- that issue in the hands
7 of the jury and they be instructed that you have found that
8 the law requires -- or that the law holds him as negligent.

9 **THE COURT:** Mr. Elliott?

10 **MR. ELLIOTT:** Judge, I think it's certainly a fair
11 jury charge to charge the jury as I've tried some cases
12 in the past about whether or not violations of applicable
13 statutes are negligence or, you know, that violations of
14 applicable statutes can be considered negligence in the
15 jury charges. I still think it's a question of fact.
16 I think Dr. Kirkham talked about the fact that he was
17 impaired and that factors into the whole thing and all
18 those -- all those issues. I mean, I don't think it's a
19 requirement for the Court to tell the jury that he was
20 negligent. I mean, I think that's still a question of fact
21 for the jury whether it's comparatively -- comparatively
22 negligent and as to whether or not any comparative
23 negligence exceeds the gross negligence of the Department
24 and I think is a question of fact and I think whether or
25 not the Plaintiff was negligent that's something they have

1 to prove.

2 I mean, they have statutes saying he walked out of
3 the roadway, no question, and there's statutes pertaining
4 to that, but I still think it's a question of fact and
5 not proper for the Court just to tell the jury that the
6 Plaintiff was negligent.

7 **THE COURT:** So the only -- the only issue for you as
8 far as negligence is the question of impairment?

9 **MR. ELLIOTT:** Oh, in terms of what we're trying to
10 show?

11 **THE COURT:** Well, no, in terms of -- in terms of
12 any defense that you're raising as to the Plaintiff's
13 negligence.

14 **MR. ELLIOTT:** Walking down the road? Well, I mean, I
15 just think, yeah, that he --

16 **THE COURT:** I mean, I --

17 **MR. ELLIOTT:** Number one, I think our main argument
18 is, Judge, that if he's not left on the side -- this is
19 not one of those cases that's typical where you have an
20 accident and somebody runs a red light and the other
21 person -- who was more negligent, one person or the other.
22 This is one of those arguments where if the train doesn't
23 leave the station, he doesn't die. If they're not grossly
24 negligent, then he doesn't walk in the roadway and die.
25 It's a -- it's a different kind of case. It's just --

1 it's almost like a defect case. It's one of these things
2 where we're arguing if they're not grossly negligent, then
3 the next event does not happen period. It's not like two
4 things are happening at one time where the jury has to
5 decide well, wait a minute, which one of these folks were
6 more negligent than the other based on this thing. We're
7 saying it was foreseeable to -- our expert testified it
8 was foreseeable for him to get into the roadway and die
9 because he had just done it twice, he had been in the
10 roadway.

11 So that's what I think distinguishes the case that
12 counsel just brought up about car keys. Yeah, there was
13 a concern about him getting in his car and driving. The
14 main concern was it was foreseeable that he would get into
15 the roadway and die and that's what Dr. Kirkham testified
16 over and over. It was foreseeable and that's why they
17 had to follow the policies and not let him leave. If he
18 doesn't leave, he doesn't die, and I think that's what --
19 that's the difference in all these cases about comparative
20 negligence. This is not a typical case. It's -- our
21 argument will be if he doesn't leave him, then he doesn't
22 have a chance to get in the roadway or be negligent. So,
23 I mean, I just think it's a question of fact for the jury.
24 I don't think they can get to comparative negligence if
25 they believe they were grossly negligent. I think there's

1 certainly a way for them to do that. I mean, how do you
2 even get to his negligence if they follow their job and
3 follow their duties? It doesn't even happen.

4 **THE COURT:** Any response to that?

5 **MR. HUGHES:** Your Honor, this -- You Honor, this idea
6 of a question of fact as to whether or not Michael Lindler
7 was negligent, you've got to show me what the fact is.
8 The fact that he's impaired, he is responsible for his
9 own actions, and there's a litany of cases, including
10 Lydia v. Horton, which we'll talk about in a little bit,
11 that holds voluntary intoxicants responsible for their
12 negligent actions. There's no exception or language in
13 these statutes if we're talking statutory instruction where
14 it says pedestrians but not impaired pedestrians. There's
15 no question that Michael Lindler was a pedestrian, there's
16 no question that he entered the road suddenly and walked
17 into the field of traffic. And I don't think I need to
18 cite for the record these statutes because they're in
19 Dr. Kirkham's testimony, but there cannot be a reasonable
20 juror, much less jury, that can say he didn't violate
21 statute and, as Your Honor knows, if you violate a statute,
22 you are negligent per se and that cannot be left to a jury
23 to get wrong. They have to consider that. And if Your
24 Honor finds it as a matter of law, then it is considered.

25 **THE COURT:** I think the question -- the question is

1 though at what point do they get to consider that? Under
2 -- under the normal scheme of how cases are presented to
3 the jury and the charge goes, it's only after there's been
4 a determination as to whether or not the Defendant is
5 negligent and the Defendant's negligence was a proximate
6 cause of the injuries do they then go on to consider the
7 Plaintiff's negligence.

8 **MR. HUGHES:** Absolutely, Your Honor.

9 **MR. ELLIOTT:** But, Your Honor --

10 **MR. HUGHES:** Did I interrupt you? I'm sorry.

11 **THE COURT:** Mr. Elliott was about to interrupt.

12 **MR. ELLIOTT:** I'm sorry.

13 **THE COURT:** And so -- and so the question is, his
14 argument, and you've heard his argument, his argument is
15 that if they find that the Defendant is negligent, then in
16 his view the Plaintiff would not have been in the roadway.

17 **MR. HUGHES:** I understand his view, but I didn't see
18 any law cited, I didn't see any precedential basis for
19 that. The issue is we're gonna tell that jury we've shown
20 in this case that we don't believe we're negligent in any
21 way, much less gross negligent. No negligence, no gross
22 negligence, and if we win on that ground, Your Honor,
23 like we think we should, that's fine, we win. That's a
24 defense verdict, we go home and the jury has made the
25 proper decision. But if the jury finds that we were

1 grossly negligent, then they get to that issue. They
2 don't find damages at that point. They have to consider
3 that issue if Your Honor charges it. They have to consider
4 comparative negligence. I've been given no indication,
5 and I don't see how comparative negligence can't be charged
6 in this case. So if you're gonna charge comparative
7 negligence, they have to consider whether or not the
8 Plaintiff was negligent and as a matter of law they are
9 and that should not be anything they deliberate on at all.
10 You should tell them based upon the evidence established
11 by their own expert, he was negligent and the proximate
12 cause -- a proximate cause. Because I'm not asking for
13 "the". I know the language, Your Honor, that there can
14 be more than one proximate cause, but they need to know
15 as a matter of law that none of them can reasonably find
16 otherwise.

17 **MR. ELLIOTT:** Judge, I think just briefly, real
18 briefly, the voluntary intoxicant cases that we looked
19 at that Joel talked about the other day, or Mr. Hughes
20 did, most all of those, if not every single one, were
21 happening all at the same time, everything -- every issue
22 was going on, you know, who was more negligent than the
23 other, at the exact same time, the exact same event.
24 Again, here we're talking about a totally different kind
25 of deal where we're saying if not for their gross

1 negligence in leaving him there, he does not get out in
2 the roadway and die, and I think that's -- that's a huge
3 difference in the cases he's citing and we're talking
4 about here because they may never get to the Plaintiff's
5 comparative negligence if they decide they're grossly
6 negligent because if they're grossly negligent, then
7 there's certainly a question of fact as to whether or not
8 the Plaintiff ever leaves his truck -- or the decedent
9 leaves his truck and dies. I mean, that's a huge
10 difference in the cases he's citing and this particular
11 case because in this -- they'll be so confused as to what
12 -- if they have to find that he's negligent because we
13 never get to that stage if they believe they did their job.

14 **MR. HUGHES:** Your Honor, unless you don't charge
15 comparative negligence, that's not the case. They have
16 -- they have to weigh the negligence. They have to. We
17 have met the burden to get that charge. We met it in
18 their case. We met it in their very first witness.

19 **THE COURT:** I'll consider that one a little bit
20 longer. What's your next one?

21 **MR. HUGHES:** Thank you, Your Honor. Your Honor, I
22 will just note for the record for all -- everyone, you
23 know, that has input in this. We're gonna withdraw our
24 Charge Number 27, so we're not -- we'll, actually strike
25 our motion for directed verdict on 15-78-60, Subsection 21,

1 which is the Tort Claims Act exception for the release or
2 discharge or the implementation of the release or discharge
3 of someone in custody. The preservation issue requires not
4 to assume facts in evidence and not to argue facts -- you
5 know, not to argue a claim that's not been established, so
6 since there is no custody issue we don't want that charge
7 because we don't want the Plaintiff to later think about
8 coming back and saying have your cake and eat it, too, so
9 we would strike that and our motion for directed verdict on
10 that ground.

11 We would raise, Your Honor, under 15-78, Subsection
12 16, and at this time, Your Honor, for the record -- well,
13 not quite at this time. Subsection 4 is the governmental
14 entity is not liable for a loss resulting from the failure
15 to adopt or enforce any policy. These policy claims that
16 they are making are barred by this statute and we would
17 raise that.

18 Now, Your Honor, I'm gonna skip Subsection 5 and,
19 frankly, Your Honor, I think I'm gonna make it very easy
20 on this Court to send us home today. South Carolina Code
21 Annotated 15-78-60(6) and, Your Honor, in our previous
22 argument we provided the case cite for Wells v. City of
23 Lynchburg, which fixes the typo in this subsection, and
24 it says a governmental entity is not liable for a loss
25 resulting from the failure to provide or the method of

1 providing police protection. Wells v. City of Lynchburg
2 clarified the intention of that statute.

3 Your Honor, you just heard Mr. Elliott say we have
4 established that they failed to protect our client. That
5 is their claim, Your Honor. Their claim that Travis
6 Blackwelder on December 17, 2012, had a duty to protect
7 Mr. Lindler.

8 **THE COURT:** Tell me which subsection again.

9 **MR. HUGHES:** Subsection 6, Your Honor. And it needs
10 to be read in the context of the City of Lynchburg case,
11 which clarifies there's a missing "or", so it should be
12 read liable for a loss resulting from the failure to
13 provide or the method of providing police protection. In
14 other words, if you don't provide protection at all, as
15 the law in South Carolina says, there is no duty to
16 protect. It's codified by the South Carolina Legislature
17 if you don't provide protection or if you provide it in
18 a method that they are arguing about, you are immune from
19 suit.

20 And, Your Honor, it -- it has to be stated and it
21 has to be understood by everybody we are immune from
22 gross negligence. This misunderstanding that just because
23 you plead gross negligence it goes to the jury, this is
24 immunity from negligence and gross negligence unless (25)
25 or I believe it's (14), the licensing, or some other

1 negligent -- or some other exemption to the waiver of
2 liability is pled, that imputes the exception for gross
3 negligence into those rules. That is clearly established
4 in the Jones v. Lott case that I raised on Wednesday night.

5 The Steinke case establishes when you plead (25) and
6 they plead gross negligence, it's probably going to go
7 the jury, but Jones v. Lott said you cannot use the Tort
8 Claims Act as a sword. It is a shield from liability and
9 it is not a sword. You cannot plead for me, for the
10 Defendant, the highway patrol, you can't plead it for us.
11 I'm in control of my pleadings. We didn't raise (25). It
12 was actually a good decision not to raise (25) because he
13 was never in custody, but because we didn't raise it, nor
14 did we raise any gross negligence exception, this right
15 here, Subsection 6, is an immunity for any claim;
16 negligence, gross negligence, recklessness, willful or
17 wanton. That is an exemption from the waiver of sovereign
18 of immunity. The State of South Carolina retains sovereign
19 immunity for any claim that we failed to provide police
20 protection, and if there is anything that is disagreed
21 about this isn't a failure to protect claim, I have not
22 heard one piece of evidence to show otherwise.

23 **THE COURT:** Mr. Elliott?

24 **MR. ELLIOTT:** Judge, as we -- as we argued the other
25 day, and I'm just sitting here reading, if we rely on

1 Section 25 of the same statute that Mr. Hughes is relying
2 on, that's the subsection that talks about responsibility
3 or duty, including but not limited to, supervision,
4 protection, control, confinement, or custody of any
5 student, patient, prisoner of any governmental entity,
6 except when the responsibility or duty is exercised in a
7 grossly negligent manner, because we've already been
8 through the gross negligence --

9 **THE COURT:** Well, wait a minute. That -- that
10 subsection has to be pled as a defense before that even
11 comes into play.

12 **MR. ELLIOTT:** Yes, ma'am, but I don't think that
13 Mr. Hughes is correct in that Jones v. Lott, this case
14 somehow -- it says that if they don't plead that as a
15 defense then all of a sudden you don't get to -- then you
16 don't have any way to sue for gross negligence?

17 **THE COURT:** I think -- I think what Jones v. Lott and
18 Steinke says is that if you plead -- if you plead any one
19 of these exceptions that contains -- as a defense that
20 contains a provision that relates to gross negligence --

21 **MR. ELLIOTT:** Yes, ma'am.

22 **THE COURT:** -- Number 12, Number 25, and there are
23 probably a couple of others, those are the ones I see just
24 quickly, then that gross negligence standard would apply to
25 all of the other exceptions that you pled as your defense,

1 but if you don't plead any subsection under 17 -- 15-78-60
2 that contain the provision except for when done in a
3 grossly negligent manner, then all you consider is the
4 exemption and whether that applies to the cause of action.

5 Your cause of action here is for gross negligence,
6 but because they are pleading an absolute defense under
7 one of these subsections that doesn't say except if you're
8 grossly negligent, then those -- those subsections would --
9 would apply unless -- unless you can give me some other
10 reason why it shouldn't apply.

11 **MR. ELLIOTT:** Well, Number 4 talks about the adoption,
12 enforcement or compliance with any law or failure to adopt
13 any law or written policy. What we have here, Judge, is
14 tons of testimony about the fact that --

15 **THE COURT:** Well, let's -- I'm speaking on Number 6
16 right now. I'm sorry. I'm on the method of police --
17 to provide police protection or the method of police
18 protection.

19 **MR. ELLIOTT:** I'm sorry. Let me read it real quick.
20 Right. Judge, we've already argued that ad nauseam and
21 I think that their own policies -- and I asked this
22 particular witness this morning, underlying in every one
23 of your written policies is this duty to protect the
24 public from foreseeable harm and we've also talked about
25 -- and these two policies and procedures, although they

1 don't agree with it, but their own written policies and
2 procedures are what we believe they grossly violated. I
3 mean, there's testimony that he knew the policies, he knew
4 his training. Not just policies, but also training, he
5 knew them and he consciously failed to follow his own
6 training and his own policies, and that's what this -- we
7 let into evidence. That's what this letter said; that he
8 had a history of failing to follow established guidelines,
9 policies, procedures and all those kind of things. This
10 is what they established for him to follow.

11 **THE COURT:** But -- but what -- what the exceptions --
12 what they do, these exceptions, both 4 and 6, is it says
13 that when you have a claim that arises out of any of these
14 things, whether it arises out of the failure to enforce
15 your policies or arises out of the failure to provide
16 police protection or the method of police protection, that
17 those claims are barred because of immunity under these.
18 So no matter what the issue is, whether -- whether it's
19 negligence, whether it's gross negligence, whether it's
20 willful, reckless, wanton or whether -- any other claims
21 that you want to raise, that those are barred because there
22 is immunity from the failure to enforce any law, valid or
23 invalid, including any rules or regulations or written
24 policies and/or, you know, relates to the failure to
25 provide police protection or the method of providing police

1 protection. Do you see what I'm saying?

2 **MR. ELLIOTT:** Yes, ma'am, but I think that --

3 **THE COURT:** And you've got to tell me why it doesn't
4 apply under that.

5 **MR. ELLIOTT:** Well, I think if you go to (25) -- what
6 I'm just not familiar with, Judge, is I don't believe
7 there's a case right on point that says just because the
8 Defendant strategically leaves out a particular subsection,
9 and does it on purpose that there's -- that there's no way
10 that we can get any gross negligence.

11 **THE COURT:** Well, you don't -- you don't get to invoke
12 your immunity unless you claim one of the subsections and
13 there's nothing that says that you have to claim all
14 thirty, forty or however many there are and they can pick
15 and choose which ones -- which ones apply and which ones
16 they think that they should plead.

17 **MR. ELLIOTT:** Yes, ma'am.

18 **THE COURT:** So I don't -- I don't -- well, if -- and
19 it does take a while to -- to read through the cases and
20 understand the context in which they're taken, and it took
21 me a long time to figure it out because it seems like it is
22 such a circuitous argument, but unless you can tell me why
23 this case doesn't fall under one of the exceptions, I may
24 be inclined to agree with them. And I don't think (25) is
25 what gets you -- (25) does not get you there.

1. **MR. ELLIOTT:** Yes, ma'am. Look at Number -- I'm
2 sorry. Excuse me. Would the Court look at Number 5?

3 **THE COURT:** Sure.

4 **MR. ELLIOTT:** In terms of discretion, in this case
5 there's been testimony --

6 **THE COURT:** We haven't gotten there. He hasn't argued
7 any discretion yet. I know that's coming.

8 **MR. HUGHES:** Yes, ma'am.

9 **MR. ELLIOTT:** Would it be okay if I went ahead and
10 just inject -- because I think that one and since it is --
11 you said to point to one in here, on discretion there's
12 been testimony and evidence from a number of different
13 witnesses, including Dr. Kirkham, who, said no, there is
14 -- once impairment is decided, once that there is --
15 impairment kicks in, it automatically kicks in these
16 duties and you have to do these particular things. So
17 there is no discretion and he -- and he testified to that.
18 There is no discretion. You have to do these particular
19 things and if you do not do them, then that is evidence of
20 gross negligence.

21 I mean, so there is no discretion here, Judge, and
22 there's been plenty of evidence and testimony from the
23 experts about that issue. I mean, there is a discretion --
24 there's a policy on discretion, but everybody has testified
25 to once the determination of impairment is made there is

1 no discretion, you have to go to these three or four things
2 that you have to do to provide safety to the decedent,
3 and they didn't do that, and failure to do that is gross
4 negligence.

5 **MR. HUGHES:** Your Honor, as Your Honor very correctly
6 pointed out and used the phraseology or terminology that I
7 should have used, this is an absolute immunity. Sovereign
8 immunity pre McCall v. Batson stood for the proposition
9 that the state of South Carolina and its arms and its
10 government cannot be sued for anything. You cannot recover
11 money damages against the Government pre McCall v. Batson
12 and when that waived it, the court specifically instructed
13 the Legislature to address it within one year and the
14 Legislature did and they codified 15-78, Subsection --
15 15-78, et al. The entire Tort Claims Act was written. The
16 Legislature specifically said if you're bringing a failure
17 to protect claim or a failure of police protection claim,
18 police or fire is the language, if you bring a failure of
19 police protection claim, we retain absolute immunity.
20 That's what Subsection 60 is. These are exemptions from
21 the waiver of absolute immunity. In other words, gross
22 negligence doesn't get you there. To get there, you have
23 to be outside of the state court tort system and, Your
24 Honor, we'll deal with that issue later, not in this forum,
25 but a claim against the highway patrol pursuant to the Tort

1 Claims Act is barred and they have no reason otherwise to
2 argue. There's not a case out there, there's not a claim
3 out there, there's no precedent to say that you can bring
4 this kind of claim against the police in state court when
5 this is raised and you didn't raise a gross negligence
6 exception with it.

7 Discretionary immunity I am happy to address, but it
8 has nothing to do with the fundamental basis of their claim
9 that we failed to protect Michael Lindler. They cannot go
10 to the jury on any other idea. There's no other theory to
11 go to the jury.

12 **MR. ELLIOTT:** Judge, if I could address that real
13 quickly. That (6) actually says civil disobedience, riot,
14 insurrection, or rebellion or the failure to provide the
15 method of providing police protection. In this particular
16 case, Judge, we're not talking about the -- the method in
17 which they did it. We're saying they did not do it, they
18 didn't provide any protection whatsoever, and I think
19 that's a -- that's a clear distinction in this particular
20 case.

21 **THE COURT:** And what you need to do is look at the
22 Wells versus City of Lynchburg case which states that the
23 court -- and I'm actually reading from the primer on the
24 Tort Claims Act.

25 **MR. ELLIOTT:** Yes, ma'am.

1 **THE COURT:** It says that the court addressed the
2 somewhat bizarre wording of this exception and held
3 that under the Tort Claims Act a governmental entity is
4 not liable for the failure to provide police or fire
5 protection or the method of providing police or fire
6 protection and the omission of the conjunctive "or"
7 between the failure to provide and the method of providing
8 police or fire protection was a mere scrivener's error.
9 Having so decided, the court held this exception barred
10 the Plaintiff's claims arising from the city's alleged
11 failure to provide adequate, in that case, firefighting
12 personnel and equipment. And so they -- basically the
13 courts have corrected what they perceived to be a
14 scrivener's error by putting an "or" in there. And in
15 light of that, I'll be happy to hear your argument about
16 it.

17 **MR. ELLIOTT:** The case, Judge, is which one?

18 **THE COURT:** Wells versus City of Lynchburg 331 South
19 Carolina 296. It's a Court of Appeals 1998 case. I think
20 it's still good law, so it hasn't been -- it hasn't been
21 specifically adopted by the Supreme Court, but nor has it
22 been distinguished by the Supreme Court or overruled.

23 **MR. ELLIOTT:** I just don't have it sitting in front
24 of me, Judge. I hear what you're saying and I think that
25 takes us to -- you know, we obviously want to talk about

1 the discretion in this particular case. There is --
2 there's been testimony from different witnesses and
3 there's certainly a question of fact for the jury that
4 there was no discretion in this case. Once you determine
5 impairment, there is no discretion, they have to act, and
6 there's been testimony from their witnesses, from ours,
7 and that's a -- that's a huge distinction. There is no
8 discretion. There just isn't. Dr. Kirkham said once you
9 determine or there's a determination of impairment -- both
10 of their witnesses yesterday and today said once that kicks
11 in, then the duties kick in and that's it. I mean, there
12 is no discretion in the case for them to act. They don't
13 -- they don't get to do that and there's been plenty of
14 testimony about that issue.

15 **THE COURT:** Before -- before I hear anything further
16 about the discretionary element, let's take a break.

17 **MR. ELLIOTT:** Yes, ma'am.

18 **MR. HUGHES:** Thank you, Your Honor.

19 **MR. ELLIOTT:** Thank you.

20 (Recess taken.)

21 **BAILIFF:** Court come to order. All rise.

22 **THE COURT:** Be seated, please. Yes, sir.

23 **MR. ELLIOTT:** Yes, ma'am. Judge, we did find several
24 cases in relation to our argument. One case that we --

25 **THE COURT:** Which argument are we on?

1 **MR. ELLIOTT:** I guess the -- just the exceptions that
2 don't apply and those things.

3 **THE COURT:** Which exceptions are we talking about?

4 **MR. ELLIOTT:** I guess under discretion, Judge, (5).

5 **THE COURT:** Okay. Yeah, I haven't heard from
6 Mr. Hughes yet about discretion.

7 **MR. ELLIOTT:** This case -- this is in the case of
8 James {sic} v. Lott. This is Edwards versus Lexington --

9 **THE COURT:** Jones v. Lott?

10 **MR. ELLIOTT:** Yes, ma'am. Well, this case is talked
11 about in Jones v. Lott, and I'll pull it as well, but it's
12 Edwards versus Lexington, referred to in Jones v. Lott.
13 It says -- supports the proposition that officers owed a
14 duty of care to Jones by virtue of the special relationship
15 they had to Jones. In that particular case, Judge, that
16 was the case where I think that they told the lady to come
17 to court, she didn't want to come and then she came to
18 court and she got injured by a person, and so in that case
19 they determined that when the special relationship started
20 and when it existed that the duty of care exists and so
21 there is no discretion at that point. Once you establish
22 that special relationship, there is no discretion to do
23 anything else but to follow your policies and procedures.

24 In this case, we certainly have enough evidence
25 and testimony for the jury that there was a special

1 relationship that existed and once that special
2 relationship existed according to this case cited in
3 Jones v. Lott, Edwards versus Lexington, then a duty of
4 care automatically is created.

5 The other case I want to hand up is --

6 **THE COURT:** Well, what's the cite on Edwards?

7 **MR. ELLIOTT:** Yes, ma'am. It is 688 S.E.2d 125, 2010.

8 This other case I want to bring to the Court's
9 attention, Judge, is Russell v. Columbia, and this is just
10 a case where the officers took someone in control -- took
11 somebody in a bar that was acting up. They had them in
12 their -- well, I'm sorry. When they first got to the
13 scene, some secondary person was there that waved them on
14 and then took control of the person. This case says that
15 once the police officers took control of the situation
16 and preempted individuals already attempting to aid the
17 petitioner's obviously injured and intoxicated -- I'm
18 sorry. Let me read it again. Petitioner's -- once the
19 police officers --

20 **THE COURT:** What's the citation?

21 **MR. ELLIOTT:** Yes, ma'am. It is -- it is 406 S.E.2d
22 338 and I'm gonna pass it up to you in just --

23 **THE COURT:** 406 S.E.2d 338?

24 **MR. ELLIOTT:** 406 S.E.2d 338, yes, ma'am. And it
25 says that once the police officers took control of the

1 situation and preempted individuals already attempting to
2 aid the petitioner's obviously impaired and intoxicated
3 decedent, respondents incurred a duty to follow through
4 and finish what was begun. Under common law, even when
5 there is no duty to act but an act is voluntarily
6 undertaken, actor assumes the duty to use due care.

7 I'll just give this one to you, Judge. Thank you.
8 So that both of those cases, Judge, I just think follow
9 the premise that once you've started this special
10 relationship, once you've started this duty to act, once
11 you've undertaken this, exactly what we have in the case,
12 once Trooper Blackwelder began this relationship, once he
13 started the duty to act, he created this relationship and
14 whether it's common law or not they then have a duty to
15 him, a duty of care, and so there is no discretion. The
16 discretion's out the window. Once they start, as their
17 own officers have testified to, they cannot not follow
18 their policy, they have to do that, and so that's why we
19 believe that -- that Section 5 doesn't apply.

20 We have a couple of other arguments. Do you want me
21 to go ahead and do them now or do you just want to --

22 **THE COURT:** I haven't heard from Mr. Hughes about
23 discretion, so I'll hear from Mr. Hughes.

24 **MR. ELLIOTT:** Yes, ma'am.

25 **MR. HUGHES:** So moving past (6), we're now on (5),

1 which I can raise, Your Honor. Do you want me counter
2 those points real quick or just go to (5)?

3 **THE COURT:** Well, you can include them as part of your
4 arguments.

5 **MR. HUGHES:** Okay.

6 **THE COURT:** And let me say that lunch is here, so I
7 can go ahead and let the jury eat while we're talking, if
8 that's okay? Yes, sir.

9 (Pause in the proceedings.)

10 **MR. HUGHES:** Are you ready, Your Honor?

11 **THE COURT:** Go ahead.

12 **MR. HUGHES:** All right. Points just made that I
13 think dovetail with this Subsection 5 issue, first, the
14 Plaintiff has now argued that where there is a duty of law
15 -- or where the law -- where the duty of care is enacted
16 you no longer have the ability to exercise discretion.
17 There's no law that I'm aware of that says that. In fact,
18 discretion is a part of every law enforcement function
19 that they do and until I see a law that says that, I don't
20 even know how to address it. That's just an absurd point.
21 The exercise of discretion comes up in every single police
22 activity. If you have an impaired individual, which as
23 Your Honor very correctly pointed out on Wednesday, the
24 discretion at issue -- one of the key points of discretion
25 at issue is the determination itself. Plaintiff's entire

1 argument seems to be related upon once he's determined
2 he's impaired. That's an exercise of discretion. But even
3 once you have this person determine that he's impaired,
4 it's discretionary what to do with him. Do you arrest him?
5 Do you transport him? Do you wait with him? Do you do
6 nothing? Those are all exercises of discretion.

7 But that being -- all of that aside, all of that
8 aside, I also need to address this Russell case. The facts
9 in Russell predate the Tort Claims Act. It happened in
10 1985, Your Honor. Batson was decided in 1985. Batson --
11 McCall v. Batson decided that we're gonna waive sovereign
12 immunity. Russell dovetails under that very short time in
13 there before the Tort Claims Act says whoa, whoa, whoa,
14 remember us, we're gonna bring back some of this sovereign
15 immunity that the court gave us time to do. So the facts
16 of Russell, while analogous, the law is in no way, shape
17 or form controlling over this case because --

18 **THE COURT:** This -- the facts are -- you're saying the
19 facts predate --

20 **MR. HUGHES:** The facts predate and as Your Honor --

21 **THE COURT:** -- because the decision is 1990? That's
22 why I was --

23 **MR. HUGHES:** That's correct. That's correct. And
24 I -- when Todd told me that it was 1990, I said wait a
25 minute, I'm -- you'll notice in that language, the Tort

1 Claims Act is never mentioned because the Tort Claims Act
2 didn't exist at the time.

3 Okay. So going into discretionary immunity, Your
4 Honor, the Government is not liable for a loss resulting
5 from the exercise of discretionary judgment by the employee
6 or the performance or failure to perform any act or service
7 which is in the discretion of the employee. And, Your
8 Honor, for the purposes of the record we need to talk about
9 the history of discretionary immunity.

10 Discretionary immunity is historically protected
11 discretionary decisions made by governmental officials
12 acting in their official capacity. It predated the
13 decision in McCall v. Batson and it survived the decision
14 of McCall v. Batson. Even while the Tort Claims Act was
15 not drafted, McCall v. Batson with -- withheld or kept
16 safe the immunity of discretionary immunity. The Supreme
17 Court in Batson said discretionary activities cannot be
18 controlled by threat of tort liability by members of the
19 public who take issue with the decisions made by public
20 officials. The Supreme Court expressly declined to allow
21 tort liability for these discretionary acts and it
22 specifically acknowledged, and this is the key language
23 for this entire case when it comes to discretionary
24 immunity, specifically acknowledged that the exercise of
25 discretion includes the right to be wrong.

1 Your Honor, we have to distinguish between the
2 concepts of duty and immunity. In the case Rayfield v.
3 South Carolina Department of Corrections, which is
4 297 S.C. 95, it's a 1988 case, Court of Appeals, the court
5 explains one who pleads immunity conditionally admits the
6 plaintiff's case, but asserts that the immunity is a bar
7 to liability.

8 As I told Your Honor on Wednesday, the way to analyze
9 this claim for discretionary immunity is you assume that
10 we were grossly negligent. You assume that on that day
11 Travis Blackwelder was grossly negligent and then you look
12 at the immunity and you have to weigh the considerations.
13 The discretionary immunity does not require a showing that
14 discretion was exercised without error or that a correct
15 decision was actually made as a result of the exercise of
16 discretion. Your Honor, if that was the case, if you had
17 to be right when you exercised discretion, then why would
18 you need the immunity? The immunity is for when you
19 exercise the discretion and you get it wrong and there is
20 no gross negligence exception. There's nothing in that
21 language which says when you're grossly negligent in
22 exercising that discretion. This is when you actually
23 exercise discretion.

24 Now that doesn't mean, Your Honor, that I get to come
25 in here and say it's discretionary and that's all it takes;

1 no. The court sets out things that we've got to prove.
2 What the court requires is to show that the governmental
3 employee encounters a situation where he had competing
4 alternatives, he had choices to make, and he used his --
5 he used and exercised his discretion in weighing those
6 alternatives and made a decision and acted. And as Your
7 Honor heard, Dr. George Kirkham stood in front of this jury
8 and said it is an exercise in discretion the determination
9 of whether or not someone is impaired.

10 As I have said this entire week, Your Honor, the
11 Plaintiff has tried a case that says he was impaired so we
12 lose. Because Michael Lindler was impaired, the Department
13 of -- the highway patrol loses. That's their case. The
14 problem is they have entirely missed the exercise of
15 discretion in determining whether he is impaired. That
16 is not -- it doesn't matter whether he's impaired or not
17 when it comes to discretionary immunity. You are to assume
18 that he is impaired, but their own expert said yes, you use
19 these skills, they are the right skills, you interrogated
20 him, you used sobriety tests, you observed him, you
21 maintained this special relationship, this circuit, you
22 did all of these things and they were the right thing to
23 do, that's what a reasonable police officer does, but no
24 reasonable police officer could have come up with the
25 grossly reckless conclusion that he came up with and he

1 goes on and on.

2 Nobody could have made this decision. Your Honor,
3 you have to assume that is the case. Assume when you're
4 analyzing this that Travis Blackwelder could not have come
5 up with that decision, it was grossly negligent for him
6 to come up with that decision. As long as he used the
7 training and skills that Captain Talbot just stood up and
8 said he was trained in, that their own experts said were
9 good police tactics, as long as he did that, he has the
10 right to be wrong.

11 He has the right to be wrong and that is such an
12 important right for police officers because they do this
13 every day. They do it every day and there is a litany of
14 cases where they let the drunk passenger get in the car
15 and drive off. No, discretionary immunity, they can be
16 right -- I mean, they can be wrong. It happens all the
17 time. You cannot hold police officers who are in the field
18 for thirteen minutes and have no previous knowledge, you
19 can't hold them to that standard that they've got to be
20 right.. You can't. That's -- that's what this is about.

21 And, Your Honor, that's not the only exercise in
22 discretion that matters here. Dr. Kirkham also agreed that
23 it was an absolute discretionary decision whether or not
24 he needed to go to this accident on Clemson Road, and he
25 fought me tooth and nail. You can't -- you can't make

1 that decision because of what you're -- you know, this
2 presumption that he's impaired and it's so dangerous,
3 matches and gasoline, an airplane pilot, this line,
4 everything word for word that he said in his deposition.
5 He said you can't reasonably come to that conclusion.
6 You have to assume it was grossly negligent for him to
7 come to that conclusion because that's what absolute
8 immunity is for. You have to assume that he was wrong in
9 deciding that the Clemson Road accident was not -- was a
10 priority over this one.

11 Assume it and assume he was grossly wrong, assume he
12 was recklessly, wantonly, willfully, assume that he was
13 wrong because under this case that dates back to absolute
14 waiver of sovereign immunity in McCall v. Batson, under
15 that very case it said we're gonna retain it because it's
16 so important. It has existed since the common law. It's
17 the common law that gave sovereign immunity to the
18 Government, it has existed since the Magna Carta and it's
19 so important to governmental functions, Your Honor, it's
20 so important that when we get rid of it, when we get rid
21 of this sovereign immunity, we're still gonna retain that.
22 It is the most important function and shield of liability
23 that governmental agents have and they reserved it and
24 then the Legislature found it so important they actually
25 codified it and now the courts have looked at it and said

1 well, absolutely we're not gonna mess with this, we're
2 gonna tell you exactly what you have to do. They have to
3 use skills, use training, use technical techniques and then
4 weigh alternatives. They have to weigh the alternatives
5 and then they make that decision based upon all of that
6 and as soon as they make that decision, Your Honor,
7 discretionary immunity applies. It applies when they are
8 wrong because they don't need it if they are right.

9 **THE COURT:** So you're saying that it shouldn't --
10 that it shouldn't be a factual issue whether or not the
11 officer properly exercised his discretion or appropriately
12 weighed the competing interests in reaching his decision?

13 **MR. HUGHES:** It absolutely shouldn't. And, in fact,
14 Your Honor, you should assume the facts go against him.
15 You should assume that the facts go against him because
16 that's what this immunity requires. This is immunity,
17 Your Honor. It's absolute immunity. You need to assume
18 that Travis Blackwelder did everything wrong. You need
19 to assume that -- that in light of what Dr. Kirkham said,
20 using rightfully Travis and his training and all, no
21 reasonable officer could have come to this conclusion. You
22 need to assume all of that, but then as long as he did it
23 the right way, as long as he actually exercised discretion.
24 Discretionary immunity, as I just said, Your Honor, is
25 not just me saying it's discretionary. It's proving it.

1 It's proving it through facts. It's putting into evidence
2 that he actually used his training and his skills, that
3 he actually weighed competing alternatives, and that he
4 actually made a choice.

5 **THE COURT:** Isn't that a -- isn't that a factual
6 issue?

7 **MR. HUGHES:** Absolutely not, Your Honor, because when
8 you look at this, you're looking at the facts against this.

9 **THE COURT:** No, no, no. I'm saying isn't it a factual
10 issue as to whether or not he actually used discretion?

11 **MR. HUGHES:** It is not, Your Honor.

12 **THE COURT:** That he actually -- that he actually
13 weighed competing interests?

14 **MR. HUGHES:** It would be a factual issue if there was
15 evidence against it. They have not --

16 **THE COURT:** Against what?

17 **MR. HUGHES:** If there was evidence that he did not.
18 They have not once said you didn't really consider that
19 or that you didn't really use these techniques. It's
20 on video his exercise of discretion, Your Honor. The
21 assessment of impairment is on video. It is evidence
22 that we've stipulated to and shown over and over and over
23 again. It is not a factual issue as to whether or not he
24 exercised discretion and weighed those competing -- the
25 alternative is he's impaired or he's not and he goes

1 through thirteen minutes to determine that, and that's all
2 that the court requires of him, all that the South Carolina
3 Legislature requires of him, all the common law requires
4 of him, and that's the issue with this case, Your Honor,
5 is you have to assume that it's all wrong.

6 **THE COURT:** Any response?

7 **MR. ELLIOTT:** Yes, ma'am. Let me first state, Judge,
8 I'm re-reading again and looking at Edwards v. Lexington
9 County Sheriff's Department. This case really doesn't talk
10 about discretion. It says -- if you don't mind if I sit
11 right here, it says -- and this is, I think, part of what
12 Joel argued the other day during his directed verdict
13 argument. It says -- in this Edwards versus Lexington
14 County Sheriff's Department case, it says in Parker v.
15 Brown they adopted a total duty rule thinking. Under this
16 rule statutes which create or define the duties of public
17 office create no duty of care towards individual members of
18 the general public. South Carolina has followed the public
19 duty rule since 1940 and this rule remains the law of South
20 Carolina today. However, we have carved out the narrow
21 exception.

22 The five exceptions, Judge, are where the defendant
23 had a special relationship to the victim, which in this
24 case we believe it is at least a question of fact for
25 the jury, and, three, where the defendant voluntarily

1 undertakes the duty. And at least two of those of the five
2 that they raised in this case are definitely situations we
3 have in this particular case. This case doesn't talk about
4 discretion. It just says when you undertake -- where the
5 defendant has a special relationship, and we clearly have
6 evidence and testimony to support that issue or at least
7 a question of fact, or where the defendant has a --
8 voluntarily undertakes a duty, which he definitely has,
9 then that just creates the duty of care. There is no --
10 this case doesn't talk about discretion or no discretion.
11 This is the case -- these cases create the duty of care
12 and I think that's an important distinction with this
13 discretionary argument. I mean, this case just sets it up.

14 Let me also say, too, Judge, that I -- I feel pretty
15 good this is still the law of the State that discretionary
16 immunity shouldn't apply if the discretionary decision made
17 is in a grossly negligent manner. I mean, I just totally
18 kind of forgot about that basic law that even if -- I don't
19 think in this case discretion applies. I think if you have
20 a -- a special relationship exists, if they voluntarily
21 undertook the duty, then that gets you straight to a duty
22 of care. But going back to the discretionary argument, if
23 you --

24 **THE COURT:** Wait a minute. Go back and say that
25 again.

1 **MR. ELLIOTT:** Well, I just don't believe that Edwards
2 versus Lexington County Sheriff's Department has anything
3 to do with discretion.

4 **THE COURT:** I got that, but --

5 **MR. ELLIOTT:** Oh, the case law, Jackson versus SCDC,
6 which is 301 S.C. 125, a Court of Appeals, a 1989 decision,
7 says discretionary immunity still shouldn't apply if the
8 discretionary decision-making was done in a grossly
9 negligent manner. There is still -- I mean, that case
10 law has always been there. Even if he made a -- even we
11 believed there was discretion to decide impairment, and
12 we don't think Dr. Kirkham said that at all, I totally
13 disagree with that, he said he -- he said no, obviously he
14 always thought he was impaired, but if there is discretion
15 in the case and let's say there was discretion in coming
16 up with that decision whether he was impaired, if the
17 discretionary decision-making is done in a grossly
18 negligent manner, then that's the exception to it. And
19 that -- that's still good case law, Judge, we've looked
20 it up and I think that's always been the case. So we
21 believe there's a special duty exception, but based on the
22 special relationship. That gets you straight to a duty
23 and -- without even talking about discretion. We believe
24 that's the case that's controlling, but if there was
25 discretion involved, then the discretionary decision-making

1 was done in a grossly negligent manner as well.

2 **MR. HUGHES:** Your Honor?

3 **THE COURT:** Yes, sir.

4 **MR. HUGHES:** Edwards -- the Edwards case in its own
5 language and as affirmed by Jones v. Lott, this court
6 stressed our holding results from the unique facts of that
7 case. In other words, don't use the facts of that case
8 precedentially. That's clear appellate language we always
9 see. These are unique facts and we're limiting it to
10 this. More importantly, there is nothing in Edwards that
11 discusses discretionary immunity probably because it wasn't
12 raised and/or argued. The court does not sua sponte assert
13 defenses for the defendant any more than it allows the
14 plaintiff to assert defenses for the defendant. There is
15 no gross negligent exception in Subsection 5. There is no
16 gross negligent exception.

17 As Your Honor very directly pointed out just a minute
18 ago, sovereign immunity is absolute. This Jackson case
19 that was cited also pled (25) and (25) applied because it
20 was an inmate case. And, most importantly, Your Honor,
21 Jones v. Lott is a 2010 case. I think Jackson is 1989.
22 1989. We cannot -- I just can't say it anymore. We can't
23 impute this gross negligence exception.

24 **THE COURT:** Do you have any other argument?

25 **MR. HUGHES:** I do. Moving from discretion?

1 **THE COURT:** Yes.

2 **MR. HUGHES:** Thank you, Your Honor.

3 **MR. ELLIOTT:** All I would say before we move past
4 that, Judge, is that Jones v. Lott actually cites the
5 Edwards v. Lexington.

6 **THE COURT:** Yes, I've got it. I was reading it as
7 you were talking. I was looking at it.

8 **MR. ELLIOTT:** Okay. Thank you. Yes, ma'am. Thank
9 you.

10 **THE COURT:** It discusses Lott. Actually it discusses
11 why Edwards doesn't apply in the Jones case, so.

12 **MR. HUGHES:** We discussed (6).

13 Okay. Your Honor, we also would move, again -- I
14 guess we're renewing and incorporating our requests for
15 directed verdicts on comparative negligence as a matter
16 of law. We do not think that any reasonable juror --

17 **THE COURT:** Didn't we already cover that?

18 **MR. HUGHES:** I don't believe we did, Your Honor. I
19 think I mentioned it in terms of the idea --

20 **THE COURT:** Well, you mentioned it terms of the idea
21 of directing a verdict to instruct them that there was --
22 that the plaintiff was negligent.

23 **MR. HUGHES:** This goes a step further. This is we're
24 asking you to direct a verdict that he was negligent, that
25 he was the proximate cause of his injuries, and that no

1 reasonable juror sitting that box could find that the
2 actions of Travis Blackwelder were more responsible than
3 his actions by 51 percent or 50 percent. There is no
4 reasonable juror that can look at this and say that a young
5 man who walked into the road and got hit by a car is less
6 responsible than an officer that had thirteen minutes with
7 him forty-five minutes prior. That -- it's just -- and
8 that is just the case.

9 And Your Honor under *Lydia v. Horton* has the ability
10 to scrutinize these type of cases. Again, that's a
11 negligent entrustment case, but it still stands for the
12 proposition that a voluntary intoxicant should be held
13 accountable for their own actions and it also stands for
14 the proposition that even if someone else has some
15 negligence that the court has a role in gatekeeping and
16 scrutinizing that decision. Everybody just wants to say
17 gross negligence is a question of law and should go to the
18 jury to decide, but that case, *Lydia v. Horton*, asks you,
19 the trial court, to be a gatekeeper and to not allow a
20 juror -- a jury -- to not allow a jury to consider
21 comparative negligence if they couldn't reasonably find
22 for the plaintiff.

23 And, Your Honor, it is just simply the case in this
24 matter. It's tragic and I know it's a harsh ruling, but
25 it's the right ruling under the law and we ask you to

1 exercise your role as gatekeeper in directing a verdict on
2 that ground.

3 **MR. ELLIOTT:** Your Honor, I think the case, if I can
4 recall from the other day that Mr. Hughes brought up, was
5 a case where a drunk guy gave somebody his keys and then
6 ended up driving off the road and so forth and I just have
7 forgotten the counterargument to that which we may have
8 made, and I can't remember, was that -- and this case is
9 obviously totally different than that in the facts. In
10 this case, you've got a police officer with special
11 training and all that kind of stuff to recognize
12 impairment, he had thirteen minutes with him where he
13 should have -- obviously should have done his job, and
14 that's the main difference between that case and the one
15 that Mr. Hughes had argued the other day where somebody
16 gave up their car keys to somebody and no training to
17 recognize and all that kind of stuff. I think there's a
18 clear difference here and if it's not I won't bother the
19 court and go into the rest of it. It's our same argument
20 we had before about comparative negligence is a question
21 of fact, we believe, for the jury, especially with the
22 circumstances of this case.

23 **MR. HUGHES:** Your Honor, very briefly I'd like to give
24 Mr. Elliott the opportunity to argue *Lydia v. Horton*, which
25 is a negligent entrustment case. This was the individual

1 that borrowed the car, goes out, gets drunk, wrecks,
2 injures himself and then sues the person that loaned him
3 the car.

4 **MR. ELLIOTT:** Right. It's basically the same argument
5 in that I don't believe that person in that case had no
6 special training to recognize social impairment, had no
7 specific duty to do certain things after the recognition
8 of impairment kicks in, and I think it's inapplicable to
9 the facts of this case, Your Honor.

10 **THE COURT:** Anything else else, Mr. Hughes?

11 **MR. HUGHES:** Yes, Your Honor. We would move for a
12 directed verdict on the claim for survival.

13 **MR. ELLIOTT:** Judge, before we get there, just two
14 other things. Did we argue Number 4? You brought up (4),
15 didn't you, Joel?

16 **THE COURT:** Yes, it's already been argued. He argued
17 it. Do you have a response?

18 **MR. ELLIOTT:** Yes, ma'am. The only thing I want to
19 bring up briefly about (4) was -- was that it talks about
20 adoption, enforcement or compliance with the failure to
21 adopt or enforce any law, included but not limited to, any
22 charter, provision, ordinance, resolution, rule, regulation
23 or written policy. And I think what's left out of that
24 particular subsection, Judge, is training. In this
25 particular case, there's been a lot of testimony about

1 training. There's been testimony about policy and
2 procedure as well and the underlying policy in those two
3 policies we talked about. There's also been a ton of talk
4 about training. The letter talks about a pattern and
5 practice of failing to following training. In this case,
6 there would be certainly a failure to follow training and
7 I just think -- it's not in there, it's not in (4),
8 anything about training, so it's just -- I think it's --
9 it's not in there.

10 **THE COURT:** Well, did you not say at the beginning
11 of this -- at some point during the course of the trial
12 that this really wasn't about training, it was about the
13 Department's review of information relating to the videos
14 which they were supposed to do and they had -- if they had
15 supervised -- properly supervised him, then there would not
16 have been this issue?

17 **MR. ELLIOTT:** There's no question, Judge, as I said
18 over and over in the opening as well, he had all the
19 training he ever would have needed to do the right thing,
20 he just consciously failed to follow it. And that
21 particular subsection doesn't -- it doesn't discuss
22 training. I think training is fair game. No, we said no
23 question you've got proper training, you've got tons of
24 training, you just consciously failed to follow it. And,
25 like I say, training is not even mentioned in that

1 particular subsection. In as much as we've said you have
2 great policy --

3 **THE COURT:** So let's make sure that the training is
4 separate and apart from the policy.

5 **MR. ELLIOTT:** Yes, ma'am.

6 **THE COURT:** You're saying that somehow he -- he didn't
7 follow specific training about how to interact or how to
8 make a decision about what occurred or about -- about what
9 he observed on the side the road and he failed to follow
10 his training about how to determine whether or not somebody
11 was impaired or -- what are you saying with training?

12 **MR. ELLIOTT:** Yes, ma'am. Just like the training
13 officer testified to, they had -- he'd never used that
14 video for his training officers because he violated the
15 training that he knew he had to do. This is not only
16 about policies he failed to follow, but also his specific
17 training he got from the highway patrol. I mean, it's a
18 case about a conscious failure to follow your policies
19 and procedures, but also your training that you have, and
20 that's what this letter talks about, the termination
21 letter. It says it's a pattern and practice of not only
22 failing to follow policies and procedures, but it also says
23 training, and that just goes right into what we're saying
24 in our case. It's a failing to follow training and a
25 failing to follow policy. And then I'm just pointing out

1 to the Court training is not in (4). Everything else,
2 policies, rules and all that kind of stuff is, but not (4).

3 And the last argument about the discretion I'd make,
4 Judge, before we sit down on this is that we also talked
5 about this failure to fire, which we talked about failure
6 to terminate at the time in a way, that this letter
7 obviously -- well, not obviously, but at least it should
8 be a question for the jury, did he -- did he enter into a
9 pattern and practice of failing to follow policies and
10 procedures and training in 2012 prior to the December
11 the 17th incident, and Officer Blackwelder testified all
12 of these incidents that were talked about in this paragraph
13 all predated this particular situation. There's been
14 testimony that -- from Officer Blackwelder, he said it
15 again, they looked at every one of my videos, every single
16 one of them. And he even -- he even said the other day,
17 you know, I wish I would have known. They came to me on
18 June 23, 2013, and just handed me this letter and told me I
19 was fired. Well, he said I wish they would have told me
20 along and along and that way I might have know to change
21 something.

22 And, I mean, that's a part of our -- that's not even
23 addressed, what I'm brining up now, Judge. The failure
24 to terminate is not even addressed within the -- the
25 exemptions. It's a whole totally separate cause of

1 action that we talked about the other day; their failure
2 to take action, to terminate him, to discipline him, to
3 take him off the road. And he said the other day well,
4 they could have taken me off the road until I figured out
5 what I was doing wrong. So that's just another thing I
6 bring up, Judge, that's not discussed in the exemptions
7 is that failure to terminate, failure to take action in a
8 timely way, is something that's not exempted from us being
9 able to argue to the jury. Thank you, Judge.

10 **THE COURT:** Any response to that?

11 **MR. HUGHES:** Yes, ma'am. Your Honor, failure to train
12 here is not established by anybody. Dr. Kirkham says this
13 is a highly skilled, highly specialized, highly trained,
14 well-trained, good policies, talking directly about
15 Blackwelder. Blackwelder elicited all of the training
16 he's had. Captain Talbot talks about I trained him, he's
17 trained in accordance with our policies and procedures.
18 The failure to train? Are they literally saying he wasn't
19 trained? Is that what I'm hearing?

20 **THE COURT:** He saying the failure to follow the
21 training.

22 **MR. HUGHES:** Failure to follow the training. Okay.
23 Your Honor, this is why I didn't want this letter to even
24 be talked about. It's a failure to --

25 **MR. ELLIOTT:** The one in evidence you mean?

1 **MR. HUGHES:** The one in evidence, yes. The one that's
2 in evidence over objection. The failure to follow training
3 regarding traffic stops, regarding arguing with a motorist,
4 mocking speech, searching for counterfeit items, pulling
5 aside somebody. It actually says these contradict the
6 way you were trained in interdiction. This is not an
7 interdiction case, this isn't some sort of drug seizure or
8 anything, transport of drugs for sure. Your Honor, most
9 importantly, most importantly, is if it's derivative of a
10 termination idea, they've still got to establish proximate
11 cause. The failure to terminate Blackwelder, the failure
12 to be on notice, specific notice, that this would happen,
13 that he would exercise discretion, get it wrong and an
14 individual do an intentional act that harms himself, the
15 failure to terminate is proximate cause of this? It's --

16 **MR. ELLIOTT:** Judge, let me just --

17 **MR. HUGHES:** -- just absurd.

18 **MR. ELLIOTT:** Judge, I don't know how many people
19 testified they run this like the military. They said
20 you have to follow established policies, procedures and
21 training or what happens? People get hurt and they die.
22 They run it like the military. This is what they have to
23 do. They have to follow established training and policies
24 and so forth. I don't know how many of their folks
25 testified they have to do that. If they don't, if they

1 don't do it -- they're -- they're the ones out there on
2 the roadway with these folks. If they don't follow their
3 policies and training, then folks get hurt. So I don't
4 think it -- it's definitely foreseeable to have somebody
5 with this sort of pattern and practice of failing to follow
6 training out on the roadway something bad is gonna happen,
7 it's definitely foreseeable, and it's clearly a question of
8 fact for the jury.

9 **MR. HUGHES:** Well, Your Honor, if that was the case,
10 which I just think it's kind of absurd to argue that, but
11 in the complaint, the amended complaint, that reads from
12 A to JJ of negligent things we did, grossly negligent
13 things we did, there's no failure to terminate in here.
14 Your Honor, this case -- if this case is really gonna be
15 decided on that letter, then what -- what has gone on? The
16 case that they have tried is that Blackwelder couldn't have
17 determined that he was impaired and got it wrong. If this
18 case is gonna go to that jury, sneak by because he wasn't
19 terminated because of 2012 irrelevant things, that's not
20 the case they tried and it's not the case they pled and
21 it's not the case we conducted discovery on and it has
22 nothing to do with Michael Lindler. There is a -- as a
23 matter of law, Your Honor, we would request that you direct
24 a verdict as to the proximate cause issue on that.

25 **MR. ELLIOTT:** Judge, as we discussed earlier, I'm not

1 gonna go through it again, except we did plead failure to
2 monitor and supervise, and certainly that's not a reach
3 from there to failing to do what they should have done,
4 which is to terminate him, or take action, do something,
5 take him off the roadway, make sure he's compliant with the
6 training he already knows he has. That letter talks about
7 you have extensive training, but it said despite your
8 extensive training, you have failed to follow established
9 guidelines and training. And that's -- I have asked -- I
10 didn't just try the case about the thirteen minutes. We
11 asked questions about that of most of the witnesses, so I
12 would appreciate counsel not saying my argument's absurd.
13 They may disagree with them, but I --

14 **MR. HUGHES:** I apologize.

15 **MR. ELLIOTT:** All right.

16 **MR. HUGHES:** And, Your Honor, I also don't see a
17 failure to follow training in A through JJ. There's
18 failure to train throughout, but I don't see a single
19 failure to follow training.

20 **MR. ELLIOTT:** It just says -- it says failure to train
21 or monitor its officers. It's SCDC's {sic} job to train,
22 supervise, or monitor and we have the failure to supervise
23 or monitor its officers.

24 **MR. HUGHES:** Your Honor, this letter that is about
25 irrelevant things shouldn't be considered anyway. It

1 alleges he failed to follow training and they have not
2 pled in this case that Blackwelder failed to follow
3 training. They pled that he was -- failed to -- that SC
4 highway patrol failed to train him.

5 **THE COURT:** Your next argument?

6 **MR. HUGHES:** Yeah, I was going to argue about
7 survival. Your Honor, we would ask for a directed verdict
8 on the survival cause of action. We do believe that it
9 would not be proper to go to the jury because there's no
10 evidence of conscious pain or suffering by the decedent,
11 Mr. Michael Lindler. Your Honor, this is -- sort of
12 follows under the "have your cake and eat it too" theory.
13 Plaintiffs have gone through great pains to show how out
14 of his mind Michael Lindler was. They brought in a doctor,
15 you know, to say that he had drugs in his system and that
16 he was grossly intoxicated as evidenced by this video and
17 so impaired that he had, you know, no reasonable
18 appreciation of his surroundings. If he is so out of his
19 mind and so appreciably impaired such that he is not making
20 good or conscious decisions, then how can he then have a
21 conscious regard for his pain and suffering?

22 **MR. ELLIOTT:** I think, Judge, it's a question of fact
23 for the jury in that we obviously called Jay Sirmon to the
24 stand and he talked about, you know, he came out there,
25 he saw him get hit once and then twice. I think it's

1 obviously a question of fact for the jury. I think he
2 probably suffered pain the first time he got hit by the
3 mirror or whatever it was, he spun around and he got hit
4 again. He was -- you know, I don't know how far he was
5 pushed or taken down the road and after that this Jay
6 Sirmon comes along and sees him, he's alive, he's gurgling.
7 They certainly haven't offered any medical evidence or
8 testimony that he did not know he was consciously
9 suffering, and he was, and I think it's certainly a
10 question of fact based on the witness's testimony he was
11 alive at the time. I wouldn't have called him, and I hated
12 to do it anyway, but, I mean, it was to establish he was
13 alive and so I think just by saying that he had some other
14 problems, he was on drugs, sure, I think that's a question
15 of fact for the jury, but I don't think it's something to
16 exclude.

17 **THE COURT:** And I'm gonna deny that particular motion.

18 **MR. HUGHES:** Thank you, Your Honor.

19 **THE COURT:** Anything else?

20 **MR. HUGHES:** I think that's all, Your Honor.

21 **THE COURT:** Okay. There are a couple of cases I'd
22 like to read, so I'll do that. I'll give y'all a chance
23 to take a lunch break and then we'll come back and I'll be
24 prepared to rule.

25 I will say I did hear the argument about the

1 comparative negligence as it relates to an instruction
2 that the Plaintiff would be negligent, and I would agree
3 with that. I understand -- I understand the argument
4 that's been made about if the jury were to find that
5 the Defendant was grossly negligent and that it was the
6 proximate cause then you really don't get to the question
7 about whether or not the Plaintiff was negligent -- or the
8 decedent was negligent, I disagree with that, and what I'd
9 instruct them is that if they get to that particular point,
10 then they would have to consider the defense is -- one of
11 the defenses by the Defendant is that the decedent was, in
12 fact, negligent in causing his own injuries and that in
13 connection with that, then I would charge them as a matter
14 of law that there were violations of those three statutes.
15 I would not charge them as to proximate cause. They would
16 have already received the charge and they would have to
17 determine whether that negligence was the proximate cause
18 of the decedent's own injuries and I would not charge them
19 on the percentage.

20 I think the case that you cited to me, Lydia, in Lydia
21 I think the court came to that conclusion because it says
22 we agree with the trial judge that Lydia's admission that
23 he was appreciably impaired and that he lost control of
24 the vehicle supports only one conclusion, that Lydia's
25 negligence exceeded Horton's, and so I think that was the

1 basis for them arriving at that conclusion. I can't say
2 that in this case that's the only conclusion that they can
3 reach, that it exceeded. Certainly if they determine that
4 the Defendant is grossly negligent and that that negligence
5 was a proximate cause of the decedent's injuries, then they
6 could certainly determine whether -- whether or not the
7 decedent's own negligence caused his injuries and did --
8 would agree as such, and so that would deny the one where
9 you asked me to find that the decedent's comparative
10 negligence exceeds that of any other -- of the defendant,
11 so I'll deny that one, but I will grant at least
12 instructing them that there was negligence on the part of
13 the decedent.

14 **MR. HUGHES:** Thank you for your consideration, Your
15 Honor.

16 **THE COURT:** I need to look at a couple of other
17 things. I'm -- what I'm most concerned about at this
18 particular time are the immunity portions under the Tort
19 Claims Act and that's what I'm gonna focus my attention on,
20 and specifically we're talking about Numbers 4, 5 and 6.

21 **MR. HUGHES:** Thank you, Your Honor.

22 **THE COURT:** Come back at 1:45 and we'll go from there.

23 **MR. HUGHES:** Thank you, Judge.

24 (Whereupon, a luncheon recess taken.)

25 **BAILIFF:** Court come to order all rise.

1 **THE COURT:** Good afternoon. Be seated, please.

2 I will tell you what I'm having trouble with is this
3 whole issue about training and that he should have been
4 terminated before Plaintiff --, before this happened, and
5 the reason I guess I'm having some problems with that is
6 because during -- throughout the course of this trial I've
7 not heard any questions or -- well, let me back up. I
8 thought -- I thought that Plaintiff's Exhibit Number 7 was
9 relevant and it was relevant for the Plaintiff to be able
10 to discuss whatever issues, if any, that Blackwelder had
11 about enforcing policies and -- and to some -- that it
12 really wasn't a training issue and I never heard that
13 training -- that he wasn't properly trained or that he
14 wasn't trained in what to do and so, you know, I allowed
15 that portion of the letter.

16 I understand that yesterday Sergeant Smith said it
17 before anyone could stop him and so that -- we can't
18 un-ring that bell. And I understand that because of the
19 rulings I made that there was not really an issue about --
20 there was not discussion about the fact that Blackwelder
21 had been terminated and, therefore, he should have been
22 terminated before this time period. But I also didn't hear
23 any discussion or questions about Exhibit Number 7 and
24 the fact that the Department failed to take steps before
25 July of 2013 relating to reviewing that information and

1 what they should have done. I mean, there really hasn't
2 been any testimony about -- other than the supervisors are
3 supposed to review, there's been no discussion about the
4 procedure, what's to occur, there's been none of that.

5 So I guess I'm having a hard time at this point trying
6 to understand the claim that was raised by the Plaintiff at
7 this particular point that the allegations are about, you
8 know, he was trained, but he didn't -- but they failed to
9 supervise him or that they failed to make sure that he was
10 following his training, and I think it -- and I think it
11 makes a difference. I think that there are perhaps --
12 that there's perhaps sufficient evidence to indicate that
13 there's immunity on some issues, but I'm trying to figure
14 out basically if -- if I follow what I think may be correct
15 with respect to some of the immunities, what's left in this
16 particular case and what goes to the jury and how -- how
17 do those issues get presented to the jury. And so I guess
18 I need a little bit more information, Mr. Elliott, about
19 what your claims and your allegations are about this
20 failure to train or failure -- well, it's not even -- you
21 didn't say he wasn't trained properly.

22 **MR. ELLIOTT:** No, ma'am.

23 **THE COURT:** You said they didn't -- they didn't
24 monitor his training or monitor -- or make -- I'm not sure
25 that I understand the argument. Maybe that's part of my

1 problem.

2 **MR. ELLIOTT:** Okay. Yes, ma'am. I think what
3 Dr. Kirkham testified to is that he had -- the issue with
4 this case and with Trooper Blackwelder is he had all the
5 training in the world. In fact, he had specialized
6 training with the sheriff's department before he got to
7 the highway patrol on recognition of impairment, but he
8 had the training. It's just that he consciously failed to
9 use it.

10 Similar to the policy and procedure argument, he knew
11 the policies, he knew they were there, he just consciously
12 failed to follow them, and I think that's what that -- it
13 kind of dovetails into the letter. You know, Dr. Kirkham
14 said that, said he had the training, he knew what to
15 do, and I think that's where you -- in terms of gross
16 negligence and in terms of what Professor -- Dr. Kirkham
17 was talking about is that's the conscious failure. You
18 know exactly what to do, you're just making a conscious
19 decision not to do it, and the same is true with the
20 policies and procedures and his training and I think that
21 letter says it.

22 I mean, in the last sentence, and I read it to almost
23 everybody who -- from the Defendant and to the experts and
24 so forth, where it says you have failed to follow -- it
25 says in the last sentence you have extensive training, but

1 despite that you failed to follow it and you do these
2 things.

3 **THE COURT:** So that really goes to discretion. That
4 goes to whether or not he exercised or he -- he made the
5 appropriate -- he made the appropriate evaluation and
6 consideration to determine whether Lindler was impaired.

7 **MR. ELLIOTT:** But it has to do with training, which
8 is not included within that --

9 **THE COURT:** But that's not training because you said
10 he was trained and he just failed to exer -- he failed to
11 use it, so.

12 **MR. ELLIOTT:** Well, one way or the other, if you have
13 the training or don't have it, if it's about training,
14 whether you have it in your head and you failed to use
15 it or you don't have it, it's still the issue is about
16 training and that's not discussed within that subsection.

17 **THE COURT:** I'm not -- I'm not referring to that
18 subsection specifically.

19 **MR. ELLIOTT:** I'm sorry.

20 **THE COURT:** I'm referring generally. Because I don't
21 -- I agree that training is not under -- directly is not
22 under that subsection.

23 **MR. ELLIOTT:** Yes, ma'am.

24 **THE COURT:** So while you're talking about training,
25 you're really talking about his discretion.

1 **MR. ELLIOTT:** Well, I -- and I had another issue about
2 that. Failing to train could also be -- if it's -- it's
3 him who we're talking about now, that he didn't have the
4 training, therefore, they -- I mean, he had the training
5 and he failed to follow his training and then you have
6 this issue of the Department and the letter that's been
7 admitted that they failed to supervise him. In other
8 words, they knew he had all the training, they knew he
9 knew the policies, but yet for that entire year leading
10 up to December they failed to monitor him. Now whether
11 it's firing him or whether it's doing exactly what Trooper
12 Blackwelder said. I said did you even know about this and
13 he said I had no idea anybody was even looking at me, I
14 would have loved to have known so I could have done
15 something about that.

16 In other words, there's a bunch of things they could
17 do other than fire him. They could take him off the road,
18 they could do something, suspend him, take some action
19 until he started complying, but instead he says they bring
20 him in in June of 2013 and they fire him and they don't
21 give him any notice. That's the first time I've ever heard
22 of a case like that. Most of the time they give them tons
23 of different -- and maybe they did and he lied about it,
24 but that's what he testified to is yeah, I didn't know
25 about it, they brought me in and gave it to me, therefore,

1 you know, I had no notice and he said it -- he said it on
2 the stand this week. He said I'd love to have known as far
3 back as January or March when they were looking at my
4 videos that they felt like I was violating existing
5 standards, that I was not following my training because,
6 you know, then I could have corrected it.

7 And I think that there's definitely things that could
8 have been done and I think it's foreseeable -- definitely
9 reasonably foreseeable to believe that if somebody is
10 failing to follow their own policies and failing to follow
11 their own training, if they had extensive training, and
12 they know it and yet they're failing as a department to
13 take action to do anything about it leading right up to
14 the time. I mean, Mr. Smith testified -- or Sergeant
15 Smith, he got -- right after this thing happened is when
16 they let him go or -- but it's based on actions from
17 before, so. But it was just their failure as a department
18 to take action, to do things that could have stopped him.
19 It was reasonably foreseeable I think that something bad
20 was gonna happen if they didn't get him off the roadway if
21 they know he's failing to do those things. You know, I'd
22 say in terms of the training, it could be the training of
23 the supervisors that we're also talking about. I mean, I
24 don't think it's a reach to say if you've got supervisors
25 that are seeing him do these things on these videos and

1 they're keeping up with it, but yet they're failing to do
2 their job, I mean, it could be that they're not trained
3 properly. If they're not -- I mean, Sergeant Smith only
4 saw him for a couple of months, but they talked about other
5 supervisors and why would these supervisors not take action
6 if they're looking at it every single month? I mean,
7 they've all testified it runs like the military, Judge,
8 they're supposed to do it and if the don't follow policy,
9 if they don't understand their training and follow their
10 training, then bad things can happen and they allow him as
11 supervisors to continue down this road of failing to follow
12 his own training, failing to follow policies.

13 So not only would it be the training of Officer
14 Blackwelder failing to use his training that he knows,
15 but also the failure of the supervisors to follow their
16 training because they -- I think we have enough testimony
17 in the record that they're supposed to follow and keep up
18 with what's going on and make sure that he's following his
19 training and his policies and procedures -- or in this case
20 the training.

21 Like I say, Judge, I think there's enough in the
22 record that they could have done something. In fact,
23 Trooper Blackwelder said I wish they could have done
24 something so that I could have corrected my actions because
25 the letter itself says despite having extensive training

1 they didn't take any action or they didn't take it until
2 June of '13.

3 And I think there's also been testimony that there's
4 no discretion for them. I mean, there is no discretion for
5 them. They have to fire him. They have to follow policies
6 or you get fired. There's no discretion in that.

7 **THE COURT:** I don't -- well, I'm not sure that there's
8 any evidence about that particular point, but --

9 **MR. ELLIOTT:** Anyway, I thought about -- somebody
10 said it was black and white and either you're following
11 policy -- I asked somebody, Judge, and I can't remember, if
12 you're not following policy, if you're not following your
13 training, you have to -- you have to take action, you have
14 to do something and somebody said yes, I can't remember
15 exactly who it was, but I asked him -- I said you have to
16 follow the policies and your training or bad things happen,
17 and I can't remember who said it, one of the witnesses said
18 yes, that's correct. And I do think that if -- going back
19 to the discretion, Judge, on that issue --

20 **THE COURT:** Well, we don't need to go back to
21 discretion.

22 **MR. ELLIOTT:** Okay. All right.

23 **THE COURT:** I'm not concerned with the discretion.

24 **MR. ELLIOTT:** Yes, ma'am.

25 **THE COURT:** Yes, sir.

1 **MR. HUGHES:** Thank you, Your Honor. I think there's
2 a number of issues that we face in this idea of this
3 failure to terminate or failure to follow training. I
4 would agree -- or I think this is the Court's position,
5 but I -- at least it's our position that that case hasn't
6 been tried and there has not been enough evidence submitted
7 that they should have terminated him or not. In fact, the
8 only supervisory testimony that we have is Darrell Smith
9 who said he watched the video and didn't see anything
10 wrong and Talbot who's not a direct supervisor that said
11 I watched it in the course of this litigation and didn't
12 think he did anything wrong. There has been no evidence
13 whatsoever that he was disciplined for this. So my problem
14 with all of this is, is the idea that it should have been
15 a failure to terminate -- a failure to terminate at some
16 point, I guess, December 16, 2012, previous. We have a
17 letter, it was objected to, I don't think it's relevant,
18 but it's in evidence. We have this letter, but it -- it's
19 analogous, it's some, and we believe, and it's interdiction
20 and traffic stops, and nothing to do with this, and we
21 don't know, you know, at what point in time they come to
22 this idea. You're certainly not gonna terminate him for
23 one, you're certainly not -- maybe you don't terminate him
24 for two, I don't know, but when they finally get to this
25 idea it seems to be 2013 and there's no testimony about how

1 that decision was come to and there is an argument that was
2 proffered before the Court in limine that evidence -- I
3 guess I need to submit it for trial if this goes forward,
4 but there is deposition evidence that he was actually
5 allowed to resign. There actually isn't a determination
6 by the highway patrol that he was terminated, it's -- he
7 resigned, and that's sort of thinking in advance if it gets
8 this far.

9 I have a few other problems with this issue, Your
10 Honor. I think if this claim of a failure to terminate
11 were to go forward, they would still have to meet certain
12 elements, they would still have to show that there was a
13 duty to Michael Lindler to terminate. They would have to
14 show that and I don't see how they get there. They would
15 have to show that this failure to terminate was the
16 proximate cause of this injury and the problem with that,
17 Your Honor, is this is -- this is that old game of if he
18 didn't get out of bed that morning, you know. We could
19 come up with a thousand things that have nothing to do with
20 this that would stop it, we could come up with a hundred
21 thousand things, and that's the game that I fear that we're
22 getting into because when you take extrinsic evidence that
23 doesn't have anything to do with this incident you could
24 create all sorts of scenarios that could prevent this.
25 And if we went outside of this incident and talked about

1 Michael Lindler, we could create all sorts of things he
2 could have done differently that don't have anything to do
3 with this incident. I mean, that's a dangerous game to
4 play.

5 ~ And then lastly, Your Honor, on this failure to
6 terminate idea -- well, not lastly. I did have Todd just
7 briefly search failure to terminate and pulled up case law
8 and I -- in the past five minutes. I'm not aware of any
9 third-party cause of action for a failure to terminate. I
10 think that kind of goes to the duty issue that I raised now
11 that I think about it, but that's a tough claim, especially
12 since that's not really the case we tried.

13 But then there's also the issue, Your Honor, that
14 this failure to train -- or not failure to train, but
15 failure to terminate idea is still held to a gross
16 negligence standard and I know there's law about it's
17 ordinarily a mixed question of law, but you've still got
18 to put something in. That letter that's not necessarily
19 relevant, you know, and doesn't even mention Lindler or
20 any of the issues that Dr. Kirkham talked about in terms
21 of assessing impairment, in terms of the decision to leave,
22 in terms of the decision to stay, the things that he wanted
23 him to do, none of that's addressed in there.

24 And, again, it's just such an odd concept to me,
25 Your Honor, that I'm having trouble wrapping my head

1 around it, but I do feel like they should have to show
2 something that would make it gross negligence as opposed
3 to negligence. And then I'm not sure that I would concur
4 that it's not subsumed by (4) in the sense that they're
5 saying termination's for violation of policy. I mean,
6 that's what that letter says. And maybe now that I'm
7 talking about it, maybe I see the light. That letter says
8 we -- well, the full letter that, one paragraph, says we
9 have found that you violated policies and procedures in
10 these particular -- well, to be fair to Plaintiff it says
11 in some instances, review of some of your videos. It then
12 goes on to talk about exactly what -- well, I don't want
13 to speak out over the evidence, but it does say that these
14 are the things that we're specifically gonna tell you
15 about and then it ends as has been argued ad nauseam by
16 Plaintiff these are inconsistent with your policies and
17 procedures. I'm not sure that doesn't in retrospect
18 dovetail under -- oh, wow, that's a discretionary decision,
19 the decision to terminate, and they -- I guess, Your Honor,
20 I'd have to really sit down and think if we tried that
21 case. I guess the duty would be on me to put it in there,
22 the evidence that they weighed competing -- but that's not
23 the case we tried.

24 **THE COURT:** I agree it's not the case that was tried.

25 **MR. HUGHES:** And that's the real -- the real problem

1 with that, Your Honor --

2 **MR. ELLIOTT:** Judge --

3 **MR. HUGHES:** -- is the jury -- the jury really
4 shouldn't be allowed to render a decision based upon just
5 -- it's almost like a -- I don't want to say intentional.
6 I don't know that there's a dearth of evidence for the jury
7 to reach that conclusion and I guess we need to move for a
8 directed verdict as a matter of law on that just because it
9 hasn't been presented. I have a lot of problems with that,
10 Your Honor. I think I've put them on the record and I'm
11 happy to address specific issues with it, but it's -- it's
12 an odd situation, Your Honor.

13 **MR. ELLIOTT:** Your Honor, I do recall, and I wrote it
14 down in my notes whenever Dr. Kirkham testified, he said it
15 at least three times, it was reasonably foreseeable that
16 someone who has entered into a pattern and practice of
17 failing to adhere to his training, had a failure follow
18 policies, that something like this would happen, and he
19 said that a number of different times and he said -- he
20 talked about I've been doing this for over fifteen years
21 and I'm not gonna change, this is the way I do it. I mean,
22 he brought that up a number of times in his testimony. I
23 mean, to say it was reasonably foreseeable that this would
24 happen, I mean, that -- that was the proximate cause.

25 **THE COURT:** Well, that's -- that's all as relates to

1 policies and whether or not the policies were followed and
2 whether -- and whether he followed that policy.

3 **MR. ELLIOTT:** Sure, but I don't think it's a far reach
4 to say if it's reasonably foreseeable that someone has a
5 pattern and practice of doing that that something bad would
6 eventually happen. I said why didn't you take some action.
7 I know we're saying the word "termination", but termination
8 is one thing, but also take -- take action. Take him off
9 the street, suspend him without pay or with pay, make sure
10 he's gonna comply with the policies and procedures and his
11 training. They know about it, they're seeing it, they're
12 keeping up with it, but they're failing to do what they
13 know they have to do, and I think, you know, it's a good
14 argument there that that's -- that they grossly negligently
15 failed to do their job in terms of supervising.

16 **MR. HUGHES:** Your Honor, just very briefly just for
17 record purposes, I guess. I think, you know, one of our
18 charges is about causation and foreseeability and it
19 says an injury is foreseeable if it is the natural and
20 probable consequence of a breach of a duty. It's not
21 determined from hindsight. It must be a foreseeable
22 consequence of the act. There's case law that says you
23 judge the conduct of the Defendant by the position in
24 which he found himself on this date. Causation, in fact,
25 is proved by establishing the Plaintiff's injury would not

1 have occurred but for the Defendant's action. I mean,
2 that's the "get out of bed" argument. I don't know.

3 **THE COURT:** Well, let me say that with the exceptions
4 of 15-78-60, at least with Subsection 5, the discretion
5 argument, I think that -- I think that those are jury
6 arguments and I think the jury does have to make some
7 factual decision as relates to whether -- as to whether
8 there was an exercise of discretion. Not necessarily one
9 that was properly exercised, but in whether there was a
10 weighing of competing interests or other information and
11 while the -- I think there's evidence that he weighed and
12 I think there's evidence that he failed to weigh and so I
13 think that is a factual question as to whether or not he
14 was faced with competing interests and that he made a
15 conscious choice of competing interests and whether in
16 his interactions that he exercised discretion, so I think
17 that's a jury issue.

18 **MR. HUGHES:** Thank you, Your Honor.

19 **THE COURT:** In considering the evidence in the light
20 most favorable to the Plaintiff, the question becomes
21 whether the interaction in this particular case -- whether
22 there was a failure to provide for police protection or
23 whether there was -- or the method of police protection.
24 What I gather the allegations are and what's been
25 established at least in terms of the evidence presented

1 by the Plaintiff is that there was a responsibility and
2 a duty and it was part of the -- part of Blackwelder's
3 responsibility to enforce and monitor the highways and the
4 traffic, that there was a vehicle in the highway that was
5 disabled, that his responsibility at that particular point
6 was to ensure the safety of the public and the -- causing
7 the car to be removed from the highway.

8 And, further, the allegations are that because it
9 was a disabled vehicle and through his interactions with
10 Lindler he should have determined that he was impaired or
11 -- and based upon what the Plaintiff is claiming that
12 there was this special duty and relationship that occurred
13 between Lindler and Blackwelder and that as a result of
14 that there was a duty to make sure that he was safe and
15 to follow policies and that he should have done something
16 that would have prevented him from being left on the side
17 the road, and done something for his own safety. I
18 understand that under the public duty rule there's no --
19 we've talked about there's not a responsibility to -- to
20 him individually unless there's an exception and the
21 Plaintiff has at least established some evidence through
22 their expert testimony that there may have been an
23 exception, that there was a special duty that came up
24 between the two of them and that the officer owed a duty
25 to him to make sure that when he left the scene that he

1 was protected and that he was out of harm's way.

2 And the Plaintiff also indicates that by Blackwelder
3 leaving the scene without making sure that -- that Lindler
4 was adequately protected by removing him from the side the
5 road, by removing him from the potential danger, in light
6 of the fact that they believed that he was impaired, and
7 that Lindler improperly -- or failed to determine
8 appropriately that he was impaired, that there -- that
9 there was a responsibility to make sure that -- that he
10 was protected and that he should have been moved from the
11 highway or some additional steps should have been taken for
12 his own safety. That, in my view, really -- based upon the
13 statutory provision really falls -- falls under providing
14 police protection. It's not the typical police protection
15 in that I have a duty to ensure that you are -- that
16 there's some particularized harm to you and that I have
17 to provide protection for you individually. I think
18 it falls clearly under the duties and responsibilities
19 exercised by the highway patrol in making sure that the
20 highways are safe or that persons who use our highways
21 are safe.

22 And so to the extent that there's some claim or some
23 reason to believe that there should have been protection
24 for him as an individual based upon the special duty, I
25 think that falls under police protection and I think that

1 under Section 15-78-60, Subsection 6, that there would be
2 immunity under the Tort Claims Act for any acts arising out
3 of that police protection.

4 Under 15-78-60, Subsection 4, the defense has alleged
5 that they're entitled to immunity for the -- under that
6 particular section of the governmental entity is not liable
7 for a loss resulting from the adoption, enforcement or
8 compliance within the law or the failure to adopt or
9 enforce any law, including but not limited to, regulation
10 or written policies. To the extent that there's a claim
11 that Officer Blackwelder did not follow policy in how he
12 interacted with Lindler and -- and based upon what the
13 Plaintiff's position is and the evidence that the Plaintiff
14 has put up that there was a failure to follow the policy
15 relating to -- I think it was 300.12 {sic} or the other
16 policy, Subsection B, C and D, I believe is what it is,
17 that is about -- from what I recall moving him off the
18 highway, making -- determining whether he was impaired,
19 then if requested to provide transportation or to make
20 sure that -- and also make sure he's far enough -- the
21 person is in a position that's out of danger or harm's
22 way or sufficiently off the highway, and I believe that
23 those -- those regulations would have been exhibited in
24 the -- in Plaintiff's Exhibit Number 5. And considering
25 the evidence in the light most favorable to the Plaintiff

1 -- it's not this one. Let's see the other one, Number 4,
2 or -- or Number 6 -- I've got it.

3 I'm looking at Plaintiff's Exhibit Number 5 starting
4 on page 7. That's the 300.14 policy. The policy -- I'm
5 looking at Section 11, highway assistance. Subsection B
6 talks about the officers stopping to assist disabled
7 motorists not to -- necessarily to repair but to help the
8 motorist to contact someone for mechanical assistance or
9 towing. C, officer shall ensure the protection of stranded
10 persons on the highway by directing them away from traffic,
11 officer should be prepared to provide first aid, extinguish
12 small fires and call for medical and/or fire assistance,
13 if necessary. And Subsection D is at the request of any
14 stranded or disabled motorist, the officer should ensure
15 the motorist does not remain in a hazardous location on
16 the highway even if it means transporting the motorist to
17 a suitable public location.

18 That the acts complained of in this particular lawsuit
19 as relates to Officer Blackwelder would certainly be ones
20 that would fall under their allegations that he failed to
21 follow the policies and failed to follow 300.14, Exhibit
22 Number 5. That -- again, that is in the light most
23 favorable -- considering all of the evidence in the light
24 most favorable to the Plaintiff that even if those facts
25 are correct in that he failed to follow those policies,

1 that would fall under Section 15-78-60, Subsection 4,
2 related to the enforcement or compliance with a regulation
3 or written policy. And so, therefore, the Department would
4 be immune from suit relating to those particular issues.
5 These factors are considered independent of other issues
6 relating to whether there was a duty or whether there was
7 a breach of the duty.

8 As I've reviewed some of the case law, and I cannot
9 put my finger on the exact case, there -- as it relates to
10 the Tort Claims Act I think there's a case that indicates
11 that first you determine whether or not there is a duty
12 and then if there is a duty, then you go to look at the
13 exemptions. In this case, I presumed that there was a
14 duty and I presumed that all of the facts as presented by
15 the Plaintiff were true and as indicated in the arguments
16 by the Defendant I've presumed that there was a duty to
17 -- between Mr. Lindler and the officer, I presumed that
18 there was a responsibility to follow and to look at those
19 policies, I presumed that based upon the testimony of
20 Dr. Kirkham that there was a violation of those policies,
21 that there was a breach of whatever duty would have been
22 owed to Lindler at the time that these events occurred. I
23 do not -- and so having reached that, I did not get to the
24 issue of proximate cause and I don't think I need to reach
25 proximate cause in order to determine whether or not they

1 would be entitled to the immunity under the provisions.

2 And so, again, what I'm trying to figure out is
3 what's -- what's left. While I have indicated that I
4 thought it was a factual issue about discretion, I did not
5 take discretion into consideration in ruling on these --
6 the issues relating to police protection or the policies.
7 I presumed that -- again, that the -- that any acts that
8 were done by Blackwelder were improper and started from
9 that particular point instead of trying to weigh whether
10 or not they were discretionary or not discretionary.
11 While I do believe that that is a factual issue, that's
12 something far from what I considered on the other two
13 provisions. If, as I've ruled, that the subject matter
14 and the issues raised in this particular lawsuit as it
15 relates to Blackwelder at least were related to police
16 protection and that it's also related to policies and
17 procedures, those would be barred from any further
18 proceedings at this particular point.

19 And so, again, I'm not sure where that leaves us and
20 so I'll be happy -- you can give those back. I do -- I
21 don't have an issue with respect to arguments that the
22 Department should have done something to supervise --
23 more appropriately supervise -- and I'm talking from the
24 Plaintiff's standpoint -- more appropriately supervise
25 the actions of Officer Blackwelder. I do have an issue

1 talking about termination since that has not, in essence,
2 been the focus of this case and that but for the blurting
3 out by Sergeant Smith yesterday we wouldn't be talking
4 about termination. I do think it's appropriate to raise
5 the issue about the Department should have been reviewing
6 and supervising, but, again, that's not really -- while
7 it's been mentioned and while it's been discussed, that's
8 not really the case that's been presented to this jury and
9 from -- one of the first comments I wrote to myself is
10 during the opening statements I heard nothing about the
11 Department didn't properly supervise him or properly train
12 him, it was all about Officer Blackwelder's conduct and
13 what he did and what he should have done and that he didn't
14 follow the policies, he didn't follow procedures and he
15 didn't protect Lindler.

16 Anything -- so I don't know where that leaves us with
17 respect to the trial and the jury.

18 **MR. HUGHES:** Your Honor, just -- and, again, I'm
19 sort of going off the cuff on this issue because I hear
20 the Court sort of in an odd place to be in. I would
21 note for the record -- and the Court has the file, the
22 original file, I'd ask the Court to take judicial notice
23 of Paragraphs 3 through 12 of the Plaintiff's amended
24 complaint. That is the complaint that we're operating
25 under. I believe --

1 **THE COURT:** That's the factual recitation of -- in
2 this case that was the premise for the lawsuit?

3 **MR. HUGHES:** That's correct, Your Honor. The factual
4 recitation of allegations from the Plaintiff. I'm skimming
5 it now. I do not see any factual allegation that would put
6 the Defendant Highway Patrol on notice, on well-pleaded,
7 actual notice, that there is any supervisory or employment
8 disciplinary issue that the Department would have been on
9 factual notice to defend and I believe if at this stage
10 this case is allowed to go to the jury where the Defendant
11 has had no option -- or no opportunity to provide evidence
12 in rebuttal of this claim that as the Court I believe has
13 said, and I know I have said, it's not the case that we
14 tried, I don't see anything in the factual pleadings that
15 would put it us on notice as required by the rules to
16 defend that action, and certainly we would be prejudiced
17 to try to defend it in simply closing argument.

18 And, again, Your Honor, I'm not sure that there's
19 been any sort of record established sufficiently for the
20 Plaintiff to carry the burden under a gross negligence
21 standpoint. I'm gonna look at the pleadings rules, but I
22 do think that they're required to give us notice of what
23 factually went on that they're alleging caused this with
24 regard to supervision or training. They don't -- I'll
25 leave it at that.

1 **MR. ELLIOTT:** Judge, I tried to write down most of
2 what you said or the main parts. I think based on the two
3 cases we handed up earlier, I think that based upon the
4 special relationship that existed at the time and based
5 upon them engaging and entering down the road -- or going
6 down the road to Mr. Lindler, that that created the duty
7 of care. So I think they had a duty -- a duty of care to
8 Mr. Lindler at the time. And so if the arguments are
9 limited to his failure to supervise Officer Blackwelder's
10 actions and if -- I mean, if they had a duty to him for
11 the officer to exercise due care, I'm fine with arguing
12 that if that's where we are, but they definitely had a
13 duty to use care based on those two cases. Once we've
14 established that special relationship and it gets past
15 the general -- the public duty doctrine and that they had
16 a special duty with him and when you have that special
17 relationship that we had Dr. Kirkham testify to then, they
18 owe him a duty of care and --

19 **THE COURT:** Which ones are you referring to
20 specifically?

21 **MR. ELLIOTT:** Russell v. Columbia and/or that -- the
22 case that was cited, the Edwards case, Judge, that we
23 talked about the two exceptions that you pointed out that
24 I wrote down earlier, that that -- we meet two exceptions.
25 One is the special relationship.

1 **THE COURT:** And that's -- and that's based upon
2 Russell versus Columbia and what was the other case?

3 **MR. ELLIOTT:** Edwards versus Lexington County
4 Sheriff's Department, I think, and that was -- establishes
5 the duty -- both of those cases say once you establish --
6 or I think Columbia -- the Columbia case -- sorry. The
7 Columbia case says once you started the duty, you have to
8 follow through, and that's the intoxicated decedent. Once
9 you've incurred the duty, you have to follow through and
10 finish what was begun. So if he's there, he's in his
11 protection and control or he's in whatever we call it, he's
12 there, he's with him, nothing bad happens as long as he's
13 there. But once you get there, you have to finish what you
14 started and you have to finish what was begun is exactly
15 what this case law says. So once that involvement --
16 there's no duty to act, but once the voluntary duty --
17 once you've voluntarily undertaken to do something, like
18 in this case, the actor assumes the duty of care. So it's
19 the duty of due care and I think it's just -- the argument
20 is that simple. You have a duty of care to this individual
21 based on that special relationship that you've established
22 with him by and through these two cases.

23 **THE COURT:** But how does that not arise out of
24 providing police protection or providing protection to
25 him as a police officer?

1 **MR. ELLIOTT:** Well, I mean, it's a duty of care owed
2 to him whether it's to supervise or whatever we decide
3 to call it. If the police officer is there, they've
4 undertaken a duty, they voluntarily stopped on the side
5 the road to -- now that he's got a relationship going with
6 Mr. Lindler. Based on that first minute he was there
7 Dr. Kirkham said that the minute that he understood that
8 he was impaired, that that special relationship kicked in,
9 then he's got a duty of care.

10 **THE COURT:** So are you trying to say that the special
11 relationship takes you out of any of the -- any of the
12 immunity portions under the Tort Claims Act?

13 **MR. ELLIOTT:** No, ma'am.

14 **THE COURT:** I mean, I understand Russell was before
15 tort claims, but --

16 **MR. ELLIOTT:** No, ma'am. I -- I think it does and
17 I think these cases don't -- exactly. They say this
18 creates a duty of care directly to him is exactly what
19 it's saying, Judge. Those two cases say it. That once
20 you make -- once you've undertaken this un -- involuntarily
21 or voluntarily undertaken this interaction with --

22 **THE COURT:** So you're saying the duty is separate and
23 apart from police protection? Is that what you're trying
24 to argue?

25 **MR. ELLIOTT:** Yes, ma'am. You have a duty of care

1 to him, whatever we want to call it. Now that you've
2 established this duty of care to him, whatever we want to
3 call it, they have a duty and then a breach of that duty
4 was what caused the death. And so, you know, it's just
5 duty of care just like a regular -- any kind of wreck case
6 or anything we argue. You have a duty to act responsibly.

7 **THE COURT:** And that's any -- you're saying that that
8 would apply regardless of whether or not he's a police
9 officer or you wouldn't have to use any police skills or
10 the fact that he was employed by the highway patrol doesn't
11 relate to police protection?

12 **MR. ELLIOTT:** That's what the Tort Claims Act says,
13 Your Honor, is that you're liable just as though a private
14 individual would be. I mean, they have established --
15 these two cases say once you've done this, once there's a
16 special relationship, then that changes all of the rules.
17 Now you have established the relationship with that person
18 to -- to maintain due care.

19 **THE COURT:** And so you're saying that that takes it
20 out of any immunity? Because that's -- I understand
21 exactly what you're saying about the duty, and I understand
22 that -- that if this were some person other than a police
23 agency, you know, we wouldn't be having this discussion.
24 My question still -- yes, there -- there can always be a
25 duty, but we're talking about -- we're talking about the

1 immunity.

2 **MR. ELLIOTT:** Yes, ma'am.

3 **THE COURT:** There's always the possibility that
4 there's a duty --

5 **MR. ELLIOTT:** Yes, ma'am.

6 **THE COURT:** -- but I'm trying to say that because of
7 this particular case we are talking about a police officer
8 and a police agency that is entitled to immunity for
9 actions relating to protection, police protection, does
10 that not preempt the ability to be able to -- to bring a
11 claim for these actions?

12 **MR. ELLIOTT:** Well, the Edwards case certainly doesn't
13 say that, Judge. It doesn't say that they were somehow
14 prohibited from doing that. And I realize Mr. Hughes is
15 saying it wasn't discussed in here, but it's a recent case.
16 You know, it doesn't say that because of the Tort Claims
17 Act they were prohibited from being able to do. It just
18 says when you maintain that special relationship or it's
19 created, then that's it, that's all you have to do, then
20 there's a duty of care owed to the Plaintiff. And I don't
21 know if it would be -- they talk about common law duty of
22 care in both of those cases. I mean, it's a duty of care
23 at that point. Now you've changed the rules, you are out
24 of the Tort Claims Act, you have a common law duty of care
25 owed to him. It may very well be just regular negligence

1 duty of care. A duty of care to do -- owed to him to keep
2 him safe. I've looked all the way through Edwards, which
3 is the 2010 case, and it -- you know, it -- it's against
4 the sheriff's department.

5 **THE COURT:** Yeah, I read it before. I'm looking at
6 it again.

7 **MR. ELLIOTT:** Yes, ma'am. I mean, this case is really
8 just talking about establishing a duty. Just going back --

9 **THE COURT:** Yeah, I think Edwards talks about the duty
10 and I --

11 **MR. ELLIOTT:** Yeah, but when it's saying -- it's
12 saying duty, they're just talking about negligence. I
13 mean, I think when you're talking -- you're going back to
14 -- you establish that special relationship, you're back to
15 the negligence standard, a duty of care, I mean, and this
16 -- this is applicable to the -- this governmental entity.
17 Once they did that, then they're out of the Tort Claims
18 Act. This case --

19 **THE COURT:** Well, I don't think Edwards said that and
20 Edwards is completely silent as to whether or not it was
21 even tort claims -- you know, a question of immunity raised
22 at all from what I can tell by looking at it. I understand
23 it talks about the special relationship with Edwards, it
24 talks about, you know, whether there's a statutory duty,
25 it talks about establishing the duty, but nowhere does it

1 talk about whether or not there were any exceptions or
2 whether there was any immunity sought by Lexington County.
3 It's completely silent on all issues relating to immunity
4 and whether or not the claim that Lexington County didn't
5 protect her would have been covered under the Tort Claims
6 Act, and that's my question. I don't necessarily disagree
7 with you, Mr. Elliott, you know, about -- about the duty
8 and about -- at least having it go to the jury relating to
9 a duty, but my question is in light of the fact that we're
10 talking here about providing police -- providing protection
11 to him, you know, and does the fact that it's raised as an
12 immunity -- immunity is raised whether or not that would
13 address the entire issue regardless of the special
14 relationship. That's my question.

15 **MR. ELLIOTT:** I understand, Judge. I just know this
16 case was cited in the main case that Mr. Hughes has been
17 talking about all day. I can't -- I mean, if anything,
18 Judge, we have everything alleged in the complaint as we
19 normally would in any case that we do where there's an
20 allegation of a duty, a breach of the duty and proximate
21 cause to the injuries. I mean, you know, I think it has to
22 -- it has to mean something that the special relationship
23 was created in this case by and between the highway patrol
24 and Mr. Lindler by Mr. -- Officer Blackwelder's actions.
25 I mean, it has to be. I mean, that's the case and when

1 you establish that due care arrangement out there with
2 him, he's got to act accordingly and that his actions
3 proximately caused the injuries and death. At least that's
4 our allegation.

5 The other case, Judge, the Columbia case, it talks
6 about just voluntarily going down that road, voluntarily
7 entering into a relationship with that person, and they --
8 I mean, it's a due care standard. It's a duty of care
9 and it's a regular negligence standard. And I realize it
10 doesn't say anything about it, but it doesn't say that you
11 can't. If this thing says it creates a duty, how can you
12 just assume the Tort Claim Act just cancels it out?

13 **THE COURT:** Well, only because of whatever -- and I'll
14 have to find where I read it, but, you know, the case law
15 -- there is case law that says when you look at whether --
16 when you look at the Tort Claims Act, first you have to
17 establish that there's a duty. And I'm assuming for
18 purposes of my discussion that there was a duty. And then
19 -- and then you look at the immunities that are raised by
20 the defense and, you know, the immunities raised relate to
21 police protection and also relate to the policies, the
22 written policies of the Department, and so that's -- as
23 we've discussed, I view that as being, you know, absolute
24 in that the issues that are related to what was done and
25 the duties and carrying out those duties all fall under

1 police protection and the protection to this particular
2 individual and, therefore, under the Tort Claims Act, you
3 know, the immunity would apply.

4 **MR. ELLIOTT:** Judge, I think that's really where it
5 gets back to the issue of -- and I know we've talked about
6 it, and I'm certainly not gonna beat it to death, but I
7 think that's where we get back to when we're talking about
8 duty of care in these two cases is that Officer Blackwelder
9 -- they're only policies and I get that they're policies
10 that were talked about in that particular subsection of the
11 Tort Claims Act, we go back to training. He's been trained
12 his entire life to do things a particular way and the
13 training is not in there.

14 So if he's been trained, we've established that he's
15 got a history of violating the way he's been trained and
16 not acting in the way he's been trained as a police officer
17 and a patrolman, Dr. Kirkham said it's foreseeable. If
18 somebody has a history of doing that, it was certainly
19 foreseeable on this day that he would do it. So on this
20 particular day he didn't act -- he had all the training in
21 the world, but he didn't do what he was supposed to do.
22 I mean, that in and of itself that's not specifically
23 exempted by the Tort Claims Act, a failure to act based on
24 your training. It may be a failure to act based on your
25 policies, but I'm relying on his training for him to do the

1 right thing. It's not that these guys are just supposed
2 to know the right thing to do and that's -- it doesn't
3 necessarily have to be from a policy, it could just be
4 from their training that they've gotten, and we've talked
5 a ton about that.

6 That's definitely a case we tried here, Judge. Not
7 only about the -- the policies, but also about the
8 training. Dr. Kirkham brought it up over and over again
9 in his testimony that this man had tons of training, he
10 just failed to exercise it. And so if you've got a duty
11 of care to use your training out there and you failed to
12 do it and as a consequence somebody gets injured or killed,
13 I think that's -- I think that's something we should be
14 able to argue. He was well-trained, there's no question
15 about it, but he failed to -- and then we've established
16 that he's in the past violated what he's learned in terms
17 of training and that it was foreseeable if he did that in
18 the past he would do it on this particular day and he did
19 and that, to me, violates a duty of care that they created
20 -- that he created when he was there and that special
21 relationship existed and at that point in time that he had
22 a duty to use his training to do the right thing.

23 Forget about those two policies. It's just you need
24 to do -- you need to do the right thing. In fact, Judge,
25 if I'm not mistaken, Officer Talbot, we established on the

1 record today, said common sense, you just use your good
2 old common sense to know what to do here, you don't have to
3 have any policies. That's in the record. If you fail to
4 use common sense and that breaches your duty of care by
5 failing to do just what common sense tells you to do, I
6 think we should be able to get there in those two cases.

7 **THE COURT:** Mr. Hughes?

8 **MR. HUGHES:** Yes, Your Honor. A few things to address
9 just regarding Mr. Elliott's comments. Any idea whatsoever
10 this is outside the Tort Claims Act should be immediately
11 struck for a number of reasons. First, their second
12 paragraph in their pleadings state this political
13 subdivision existing under the laws of South Carolina
14 cites the Tort Claims Act and then alleges that the highway
15 patrol carried on its business, by and through its agents,
16 to include Blackwelder. Additionally, during the time
17 period set out these employees were operating within the
18 course and scope of their officially assigned and/or
19 compensated duties, and I believe in our answer filed
20 September 18, 2014, Defendant would admit that at all
21 times Lance Corporal Blackwelder was acting in accordance
22 with his employment as a trooper with the highway patrol.

23 Your Honor, it just is a fact that if you bring a
24 claim against an individual acting in the course and scope
25 of his official duties and he's a government agent, the

1 Tort Claims Act is the exclusive remedy. You cannot get
2 outside the Tort Claims Act unless you plead it outside of
3 the Tort Claims Act, unless you plead it outside of the
4 Tort Claims Act, and certainly, Your Honor, there's been
5 no -- that case has not been alleged nor tried.

6 The Edwards case we had mentioned previously is a very
7 special and unique set of circumstances not to be used for
8 precedential value, but, I mean, really the thing is I know
9 Pat Frawley really well and I know how we've tried these
10 cases, there's no discussion of the Tort Claims Act in
11 here. Sometimes you take a shot at summary judgment on
12 something else, but this does not address in any way what
13 Your Honor just ruled upon. Your Honor, specifically has
14 addressed Subsection 60 of the Tort Claims Act and that
15 case does not address it in any way.

16 Your Honor, the Russell case I said before, but I
17 just need to mention, is pre Tort Claims Act. Factual,
18 analogous in some sense, but it does not have the
19 parameters of the Tort Claims Act. I think what we're
20 seeing here, and I certainly understand it is a scramble
21 to get out from -- from the umbrella of Subsection 4 and
22 6 of Tort Claims Act, the exceptions to the waiver of
23 immunity -- of absolute immunity, and I understand it, but
24 you can't in this case. Any alleged failure to follow
25 training with regard to Michael Lindler still is derivative

1 of the protection that they seek that we should give --
2 that they allege should have been afforded to them. They
3 are suing the highway patrol for the actions of Defendant
4 Blackwelder. All of the claims are derivative of the
5 umbrella of Subsection 6 and 4 and scrambling just to pick
6 -- cherry pick some evidence to get outside of it is not
7 sufficient, Your Honor. This is a failure to protect
8 claim. I think we all recognized it from day one, I think
9 we tried that case, I think we have argued the law more
10 than sufficiently, I think everybody knows what the case
11 law stands for at this point. There's nothing in the
12 record that could pull you out from under the fact that
13 they say Travis Blackwelder on December 17, 2012, should
14 have protected Michael Lindler and I believe Your Honor in
15 your detailed ruling in consideration set forth that it all
16 comes under that umbrella.

17 I think I'm on the record in terms of my other
18 objections and proximate cause I think is a very huge issue
19 there as well.

20 **THE COURT:** You know, we can go back and forth and we
21 can --

22 **MR. ELLIOTT:** But, Judge, he said that I didn't plead
23 it. We pled in our complaint as well negligence, not only
24 gross negligence but negligence, in consciously failing
25 to take reasonable steps and actions which would have

1 prevented the accident. I mean, that's -- that's exactly
2 it. You've got a duty of care. You're not acting in a
3 common sense way to protect him from a duty of care. This
4 is -- we have alleged negligence and based upon that
5 negligence one of the allegations in C is consciously
6 failing to take reasonable steps or actions which would
7 have prevented the accident in question. Section JJ says
8 in consciously failing to take reasonable steps and actions
9 which would have prevented his suffering and death. So one
10 way or the other, we pled it both ways.

11 And this case is a 1991 case, Judge. It hasn't been
12 overturned. I mean, it establishes a duty of care one way
13 or the other. Once you create that special relationship,
14 it's there. So, you know, if it's -- if it's policies, if
15 it's whatever else, I think we can still argue that they
16 failed to take reasonable steps which would have prevented
17 the acts in question. We have alleged it, Captain Talbot
18 has said it's common sense the things you've got to do to
19 help people in a situation like that. I mean, I don't
20 think it prevents us from not being able to argue it.

21 **MR. HUGHES:** Your Honor, I would just note very
22 briefly that Paragraph 14 of the amended complaint under
23 the heading gross negligence, they plead -- or they have
24 told the jury they're gonna establish gross negligence.
25 This case is not a negligence case, it never has been. It

1 wasn't approached as a negligence case at any point in
2 time. And, again, this idea that the special relationship
3 somehow doesn't get tucked under the failure to protect,
4 Your Honor, is just not the case. In fact, the special
5 relationship case law all comes out of the litany of the
6 public duty rule, the no general duty to protect cases.
7 The special relationship is a legal term that's established
8 and the definitions they rely upon are failure to protect
9 cases and I think the Court has appropriately addressed
10 that issue.

11 **THE COURT:** Counsel, I do understand what -- what the
12 ruling, in effect, does. I can't say that I reached the
13 decision lightly. I've had -- I've listened to your
14 arguments, I've tried to see it from both sides, I've
15 looked at the case law. I just -- I think that there's
16 support for how I've ruled and I do understand what impact
17 that has and so I think -- I think the Tort Claims Act and
18 the immunities that have been pled requires based upon the
19 case law that -- you know, that the Department is entitled
20 to immunity.

21 I have no doubt that there will be a lot of discussion
22 about it after the fact. I am going to ask Mr. Hughes
23 to provide a supplemental order so that it can be in
24 writing and with a view and I'll edit it and adjust it
25 accordingly. I'm not -- I'm not asking that all of my

1 rulings be in terms of the other -- relating to those other
2 provisions of the tort -- of the directed verdict motions.
3 I'm merely asking for a supplemental order as it relates
4 strictly to the Tort Claims Act and the immunities.

5 As I indicated, I thought that under Number 5 that
6 that would be under the discretionary portion, that they
7 were questions of fact, so that in the event that the other
8 -- the two do not survive, only need appellate review. You
9 know, that there's rulings that -- as relates to the
10 immunity for the discretionary acts that that would be a
11 factual question that would have gone to the jury, but I
12 think the other two provisions -- either one of the other
13 ones would be taken out, and I'll ask that you prepare it
14 and send it to me within twenty days. Of course, a copy
15 to the other side, and I'll give the other side ten days
16 to respond to it and then I'll review and issue as
17 appropriate.

18 **MR. HUGHES:** Thank you, Your Honor.

19 **THE COURT:** And so with that I find that, again, that
20 the Tort Claims Act immunities would bar further action in
21 this case and I'll grant that portion a directed verdict.

22 **MR. HUGHES:** Thank you, Your Honor.

23 **THE COURT:** Do the parties wish me to bring the
24 jury in or do you want me to just go and talk to them
25 individually?

South Carolina Department of Public Safety

Office of the Director

10311 Wilson Blvd. Blythewood, SC Post Office Box 1993 Blythewood SC 29016



POLICY	300.14
EFFECTIVE DATE	FEBRUARY 10, 1997
ISSUE DATE	APRIL 16, 2001
SUBJECT	TRAFFIC ENFORCEMENT
APPLICABLE STATUTES	§56-5-760; Title 56, Chapter 5, Article 33
APPLICABLE STANDARDS	<u>1.2.6, 1.2.7, 41.2.1, 44.2.1, 61.1.1, 61.1.2, 61.1.3, 61.1.4, 61.1.5, 61.1.7, 61.1.8, 61.1.10, 61.1.11, 61.4.1, 61.4.3, 81.2.5, 83.2.2</u>
DISTRUBTION	TO ALL EMPLOYEES

THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE AN EMPLOYMENT CONTRACT BETWEEN THE EMPLOYEE AND THE AGENCY. THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS. THE AGENCY RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT, IN WHOLE OR IN PART. NO PROMISES OR ASSURANCES, WHETHER WRITTEN OR ORAL, WHICH ARE CONTRARY TO OR INCONSISTENT WITH THE TERMS OF THIS PARAGRAPH CREATE ANY CONTRACT OF EMPLOYMENT.

I. PURPOSE

The purpose of this policy is to establish guidelines for conducting traffic enforcement while providing maximum safety to the officer and others involved and maintaining a level of professionalism and courtesy.

II. POLICY

In order to enhance the safety of Department of Public Safety (DPS) officers and the general public, officers shall maintain good public relations and service through uniform guidelines for contacting violators and taking proper enforcement action. [61.1.8]

III. GENERAL PROCEDURES

A. DPS officers shall ensure that:

1. They conduct themselves in a professional and courteous manner at all times while interacting with the public. This requirement must be balanced with the need for caution and detection of criminal activity. [61.1.7 (a)] [61.1.8]
2. Department vehicles are operated, stopped and parked in a manner which will provide the greatest degree of safety to the officer and the motoring public and which is consistent with applicable state law and department policy. [61.1.7 (a)]
3. Every precaution is taken when approaching the violator and the officers shall position themselves at the vehicle so as to observe all occupants of the vehicle and approaching traffic. [61.1.7 (a)]
4. Appropriate enforcement action is taken. [61.1.7 (a)]

Page 1 of 8

Policy 300.14
Traffic Enforcement

B. DPS officers shall comply with the provisions of §56-5-760 and department policy when operating an authorized emergency vehicle. Officers will carefully weigh any contemplated use of the radio system and ascertain that the nature of their communication is either urgent in nature or pertains to official police business. Officers and Telecommunication Operators (TCOs) shall use the following codes for calls ranging from routine to emergency.

1. CODE-1 Normal Run
2. CODE-2 No Delay - Silent Run - No Lights or Siren
3. CODE-3 Urgent - Use Lights and Siren [41.2.1] [61.1.7 (a)]

C. Tele-communications operators and officers are required to follow the rules and regulations pertaining to the operation of the radio along with the Federal Communications Commission regulations to use complete radio identification numbers in communicating with other units. For instance, if a station or an officer is to call A-40, it is necessary to use all three digits and not abbreviate by using only the digit "40".

D. DPS enforcement and accident report data shall be compiled through the utilization of electronic data processing. Analyzed data shall be distributed to enforcement supervisors who will utilize these reports in planning enforcement efforts and assigning officers in their area. Planning may be based on the evaluation of traffic volume, numbers of accidents, and frequency of traffic violations. [61.1.1 (a-f)]

IV. DRIVING UNDER THE INFLUENCE ENFORCEMENT COUNTERMEASURES [61.1.10]

A. DPS is dedicated to the cause of reducing alcohol and drug-related offenses and accidents on South Carolina highways. In doing so, officers shall:

1. Maintain a high level of alertness to detect alcohol and drug impaired drivers while performing their normal duties.
2. Follow appropriate training and guidelines in apprehending, stopping and processing alcohol and drug impaired drivers.

B. Supervisors shall:

1. Monitor alcohol and drug-related arrests, collisions, fatal crashes and complaints to determine the location, day of week, and time of day of these incidents and target these areas when necessary. Data may be obtained using selective enforcement data, pin-map system, officer reports, information from other police agencies, and any other reliable source.
2. Ensure various enforcement programs are utilized to combat driving under the influence violations within their area. These may include but are not limited to:
 - a. supervised saturation patrols in known areas of high DUI cases and collisions;
 - b. supervised line patrols on certain highways or streets;
 - c. checkpoints in known areas of high DUI cases and collisions;
 - d. observation of movement near nightclubs and bars;

- e. public announcements of stepped-up enforcement;
- f. public relations programs to encourage public reporting; and
- g. swift prosecution of DUI cases.

V. STOPPING THE VIOLATOR [61.1.7 (a)]

- A. The officer shall use discretion when selecting a place where the violator can be stopped promptly and safely. Officers should avoid stopping vehicles on hills, curves and other hazardous locations. Both vehicles should be positioned off the traveled portion of the road as far as possible. DPS officers shall position their vehicles in one of three ways during unknown risk traffic stops, depending on the circumstances: left offset, in line, or right offset.
- B. Emergency equipment (i.e., blue lights and sirens) shall be operated in accordance with §56-5-760 when initiating a traffic stop. Absent extenuating circumstances, blue lights shall remain on during the traffic stop in order to ensure safety and visibility at the scene. [41.2.1]
- C. Every reasonable effort should be made by the officer to identify himself as a law enforcement officer without jeopardizing his/her safety or the safety of others. Absent extenuating circumstances, officers shall be in full uniform before initiating a traffic stop. If, while attempting to stop a violator, the officer perceives that the violator is unable to identify him/her as an officer, the following procedures should be employed:
 - 1. wear the campaign hat;
 - 2. activate the dome light during hours of darkness;
 - 3. use the vehicle's public address system; and/or
 - 4. pull alongside the violator.
- D. The Communications Center shall be notified of all traffic stops initiated by DPS officers. Officers who have patrol cars equipped with mobile data terminals (MDT's) may notify Communications either by MDT or by radio. Prior to exiting the vehicle, the officer shall provide the location of the stop, license plate number, make, model and color of the vehicle(s), and number of occupants and description, if known. The officer shall contact Communications within 10 minutes after the stop to advise if the stop will take an extended period of time. If Communications has not been notified within 10 minutes, the TCO shall radio the officer. The officer shall also notify Communications when the traffic stop is complete. Communications shall maintain a log of all traffic stops. [81.2.5 (e)]
- E. Officers operating DPS vehicles equipped with video cameras shall activate the audio-video equipment as soon as the emergency equipment has been activated. The audio-video equipment shall not be stopped, paused or otherwise interfered with at any time during the stop and shall remain on record mode until the traffic stop is complete. If an individual is transported by the officer as a result of the stop, the audio -video equipment shall remain on record mode until arrival at the jail or other appropriate destination. [41.2.1] [83.2.2].

VI. APPROACHING THE VIOLATOR [61.1.7 (b)]

- A. In every case, officers shall use caution in approaching the violator and/or the violator's vehicle and shall be alert to any suspicious movements within the vehicle.
- B. While conducting traffic stops, DPS officers shall conduct themselves in a professional and courteous manner. The officer shall identify him/herself and inform the driver of the reason for the stop. At no time should the officer argue with the violator. [61.1.8]
- C. Officers shall fully explain the rights and requirements of violators. The officer shall explain the violation(s) and all actions required of the violator including: [61.1.8]
 - 1. optional or mandatory court appearance and court date; [61.1.4 (a) (b)]
 - 2. how and where to pay fines; and [61.1.4 (c)]
 - 3. any other information pertinent to the specific violation or situation. [61.1.4 (d)]
- D. If during the course of the stop, an officer develops probable cause that the violator or vehicle possesses contraband or evidence of a crime, any search shall be conducted in accordance with DPS policy and procedure and applicable laws.
- E. During dark hours, the officer may use the spotlight/take-down lights if necessary to see inside the vehicle after the violator has stopped while using caution not to project the light toward on-coming traffic.

VII. HIGH RISK STOPS [61.1.7 (c)]

- A. If the officer has reason to believe a wanted person is being stopped or the violator has committed a serious offense, the officer should request backup.
- B. Officers shall use their body armor in accordance with DPS policy when attempting a high risk stop.
- C. When officers are dealing with a known or suspected felon, officers shall remain in a protected position and may use the vehicle's public address system to instruct the occupant(s) to exit the vehicle.
- D. All occupants shall be ordered from the vehicle one at a time with hands above the head, palms showing.
- E. All searches and any subsequent arrests shall be conducted in accordance with DPS policy and procedure.

VIII. STOPPING COMMERCIAL VEHICLES [61.1.5 (g)] [61.1.7 (a)]

- A. All procedures and guidelines provided within this policy apply to commercial motor vehicles. However, special or additional precautions may be necessary when stopping commercial vehicles in order to enhance the safety of the officer and motoring public.
- B. The officer shall position the enforcement vehicle in such a manner that the driver can see its emergency lights while attempting to make the stop.
- C. The driver should be allowed sufficient time and distance to make a safe stop. The officer should avoid stopping a commercial vehicle on steep upgrades or downgrades.
- D. Generally, commercial vehicle stops are best conducted with the patrol vehicle positioned at the front of the truck. However, an officer should position the patrol vehicle at the safest position depending upon the circumstances of the stop.

- E. When feasible, the officer shall request the driver to climb down out of the commercial vehicle and come to the officer in order to conduct the traffic stop.

IX. CITING THE VIOLATOR

A. Uniform Enforcement

Department of Public Safety officers shall uniformly enforce South Carolina traffic laws and have a thorough knowledge of the traffic laws and the elements of the law that comprise the violations. [61.1.3 (e)] Enforcement efforts of traffic laws shall be in accordance with the South Carolina Code of Laws and shall include, but not be limited to, the following violations: [61.1.5 (a-l)]

1. driving under the influence of alcohol/drugs or suspension; [61.1.5 (a) (b)]
2. speed and equipment violations; [61.1.5 (c) (f)]
3. violations resulting in traffic accidents; [61.1.5 (k)]
4. commercial motor vehicle violations; [61.1.5 (g)]
5. multiple violations; [61.1.5 (i)]
6. off-road vehicle violations; [61.1.5 (e)]
7. pedestrian and bicycle violations; [61.1.5 (l)]
8. newly enacted laws and/or regulations; and [61.1.5 (i)]
9. other hazardous and non-hazardous violations. [61.1.5 (d) (h)]

B. Warning Tickets

Warning tickets may be issued to violators who, in the officer's opinion, are not in violation to the degree that a summons ticket would be in order under the existing circumstances. Officers shall exercise their discretion and good judgment in using this enforcement tool. A summons for arrest shall be issued in all cases of driving under the influence, reckless driving, hit and run, reckless homicide and driving under suspension. Warnings shall not be issued for these offenses or any other offenses where a warning is prohibited by the department or division(s). [1.2.6] [1.2.7] [61.1.2 (a)] [61.1.3 (b)] [61.1.5 (a) (b)] [61.1.11]

C. Uniform Traffic Tickets [61.1.2 (a) (b)]

1. DPS officers will use the uniform traffic ticket as prescribed in §56-7-10. DPS officers are empowered by law to accept a cash bond, when not statutorily prohibited, from any person apprehended and charged with a violation of traffic law in lieu of incarceration. The person charged shall be issued an official summons on which the violator will be receipted for any sum of cash bond deposited with the arresting officer. The person charged may be permitted to leave until further appearance before the proper court if required by the summons. Once a summons has been served, the officer has jurisdiction to dispose of the case. [1.2.6] [44.2.1 (b)] [61.1.3 (b)]
 - a. When a bond is accepted at the time the summons is issued, the exact amount received shall be shown on all five copies of the summons ticket in the space marked "Bail Deposited".

- b. When accepting a bail bond card, the name of the bail bond company shall be entered in the "Bail Deposited" block of the summons and no amount of money shall be entered there. The appropriate amount of bond will be written on the top right, front side of the violator's copy only.
 - c. When a courtesy summons is given and no bond is accepted, the word "none" shall be written in the "Bail Deposited" block.
 - d. If the violator is arrested and transported to a detention facility and no bond is accepted, the word "jail" shall be written in the "Bail Deposited" block.
2. The nature of bonds accepted should be cash, properly endorsed traveler's checks, or bail bonds. Personal checks are not accepted. No officer shall accept personal property of any description as a bond or pawn.
 3. When a cash bond is accepted, the officer shall turn the full amount of bond received over to the trial officer within 72 hours of receipt, excluding weekends and holidays. The trial officer's copies of the Uniform Traffic Ticket shall be received by the magistrate or municipal judge within 72 hours from the time of the alleged traffic violation.
 4. When a summons is issued to an out-of-state driver whose home state is a member of the Non-resident Violator's Compact, the driver may be permitted to continue without posting bond. Exceptions to this are offenses that would result in the suspension or revocation of the driver's license under the laws of this state. Failure by the driver to comply with the summons will result in the suspension of the violator's driver's license by the home state. [61.1.3 (a)]
 5. When an out-of-state motorist is not a resident of a compact member state, the officer shall explain the procedure of accepting cash bond and court proceedings and may request bond be deposited. [61.1.3 (a)]
 6. The officer should ascertain the trial date that would be convenient to an out-of-state motorist and if possible, the officer shall set the date of trial accordingly. [61.1.3 (a)]
 7. Legibility and correctness is vital when writing a summons ticket. Officers shall exercise care to properly document all information correctly on summons tickets to avoid voiding tickets due to carelessness. Writing over errors or using liquid paper is not permitted. In the event an error or correction is necessary, a single line shall be drawn through the error and the correct information written above the error on all copies of the summons. Exceptions to this include information in the nature of offense block, violation section number, bail deposited block, BA level, or any part of the disposition section.
- D. Size and Weight Summons Tickets [61.1.2 (b)]

State Transport Police Officers will issue the Uniform Size and Weight Summons Tickets prescribed by the Department. Tickets must be issued for violations contained in Title 56, Chapter 5, Article 33, of the S.C. Code of Laws, entitled "Size, Weight and Load." At the time that a uniform size and weight ticket is issued, the officer must inform the individual receiving the ticket that he has the option, at that time, to elect to pay his fine directly to the department or to receive a hearing in magistrate's court. Fines assessed by ticket for size and weight violations must be paid to the State

Transport Police within 28 days to avoid the addition of assessments to the original fine. [61.1.4 (b) (c)] [61.1.5 (g)]

X. OPERATIONAL PROCEDURES FOR ABANDONED VEHICLES

An abandoned vehicle is any vehicle that is left unattended on a highway for more than 48 hours, or a vehicle that has remained on private or other public property for a period of more than seven days without the consent of the owner or person in control of the property. DPS officers shall comply with existing laws, rules and regulations concerning identifying, tagging, contacting owners, towing and reporting abandoned vehicles.

A. The following procedures will be observed when dealing with an abandoned vehicle on the highway:

1. Notify the Communications Center to run a stolen vehicle and registration check to establish if the vehicle is stolen and determine ownership.
2. Place a tag on the vehicle in a conspicuous place, in accordance with §56-5-5850.
3. Conduct another stolen check after 48 hours.
4. When practical, attempt to contact the owner prior to having the vehicle towed. If the owner cannot be contacted, dispatch for towing.
5. Prior to releasing the vehicle to the towing service, inventory the contents of the vehicle when possible using an approved DPS form.
6. Advise the Communications Center of the date, time, location, make, model and tag number of the towed vehicle.
7. Once towed, the owner should be notified immediately of the location of the vehicle.
8. If the vehicle is stolen, verify the stolen report with the originating agency, advise them of the recovery, and complete an incident report. The originating agency is responsible for notifying the owner.

B. The following procedures will be observed when dealing with an abandoned vehicle situated in unlawful or dangerous areas:

1. If a vehicle is abandoned or unattended on a bridge, causeway, underpass, in the roadway, on a railroad track, within an intersection, or blocking an entranceway or exit, the officer should stop, activate the emergency lights, and contact the Communications Center for stolen and registration reports.
2. A reasonable attempt to contact the owner should be made. However, if contact cannot be made, the vehicle should be towed in accordance with DPS policy.

XI. HIGHWAY ASSISTANCE

A. Department of Public Safety officers will provide general assistance and information to the motoring public upon request. [61.4.1 (a)]

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. [61.4.1 (b)]

- C. Officers shall ensure the protection of stranded persons on the highway 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. [61.4.1 (c) (d)]
- 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. [61.4.1 (c) (d)]

By Order of the Director Date: April 16, 2001
B. Boykin Rose
Director S C Department of Public Safety
The Original Signed Copy of this Policy is on File in the Office of the General Counsel

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-40-5663
Appellate Case No. 2016-002168

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

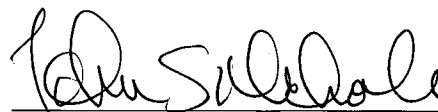
v.

South Carolina Highway Patrol. Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Amended Record on Appeal contains all
material proposed to be included by any of the parties and not any other material.

October 4, 2017



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Attorneys for Appellant/Respondent

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OCT 04 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

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

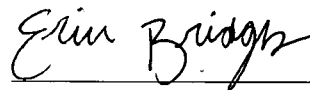
v.

South Carolina Highway Patrol Respondent/Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent/Appellant with a copy of the *Motion to Amend the Record on Appeal, the conditionally filed Amended Record on Appeal, and the final briefs of Appellant/Respondent* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Andrew F. Lindemann
Joel S. Hughes
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202-8568



Erin Bridges

October 4, 2017

October 4, 2017

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

OCT 04 2017

SC Court of Appeals

Re: Renee Hale Shelley v. SC Highway Patrol
Case Tracking No.: 2016-002168

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a *Motion to Amend the Record on Appeal* along with the conditionally filed original and fifteen (15) copies of the *Amended Record on Appeal* in this matter. Also enclosed are the original and fifteen (15) copies of the final briefs of Appellant/Respondent. I have also enclosed a proof of service of these documents on counsel for the Respondent/Appellant and a \$25.00 check for filing this motion. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,


Erin Bridges

/emb

Enclosures

cc: Lauren V. Knight, Esquire (without enclosures)
Joel S. Hughes, Esquire (without enclosures)
Andrew F. Lindemann, Esquire