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.

RESPONDENT'S BRIEF OF APPELLANT/RESPONDENT

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II. Whether the circuit court correctly held there was a jury question on the Tort Claims Act's "discretionary immunity" exception when there was evidence a highway patrolman violated protocol and knowingly left an impaired motorist on the side of the road, increasing the motorist's exposure to the danger that ultimately claimed his life.

STATEMENT OF THE CASE

This is an appeal from a directed verdict in favor of the S.C. Highway Patrol.

As the Court is aware, the basic facts are that a highway patrolman assisted Michael Lindler, a stranded motorist, before leaving Lindler and his passenger on the side of Interstate 20 outside Columbia, after the patrolman was assured help was on the way. The parties disputed some of the material facts: most importantly, whether there was evidence the patrolman knew Lindler was impaired even though the patrolman adamantly denied having concerns about leaving Lindler and his passenger before their help arrived.

The Highway Patrol raised a number of arguments for immunity in its motion for directed verdict. This brief concerns the Tort Claims Act's "discretionary immunity" codified in section 15-78-60(5) of the South Carolina Code (2005).

The Highway Patrol claimed two acts of protected discretion: first, the patrolman's decision about whether Lindler was impaired. (R.p.261, line 8 - p.263, line 20). Second, the patrolman's decision to leave Lindler in order to work another traffic incident nearby. (R.p.263, line 21 - p.264, line 10). The Highway Patrol claimed it could not be liable for the patrolman getting either decision incorrect. (R.p.264, line 11 - p.265, line 8). The Highway

Patrol argued these decisions were protected under discretionary immunity's "right to be wrong." (R.p.263, lines 10-11).

Lindler's estate ("Appellant") disagreed. Appellant referenced evidence suggesting the patrolman knew Lindler was impaired, contradicting the patrolman's story. (R.p.149, line 1- p.150, line 2; p.269, lines 10-14). Appellant also argued a patrolman does not have the discretion to leave an impaired person on the roadside or to stop giving aid once the officer starts helping. (R.p.150, line 14- p.153, line 6; p.267, line 22 - p.268, line 10).

The circuit court orally ruled there was some evidence the highway patrolman did not weigh competing considerations, make a conscious choice between alternatives, and exercise protected discretion. (R.p.300, lines 3-17). The circuit court used this same reasoning in its written order. (R.pp.13-14).

Despite finding a question of fact with respect to discretionary immunity, the court granted the Highway Patrol a directed verdict and ended the case. The court ruled regardless of whether the patrolman actually weighed competing alternatives, all allegations against the Highway Patrol were effectively a challenge to how the Highway Patrol provided Lindler with "police protection," and the circuit court held the Highway Patrol is immune under the Tort Claims Act from any such challenge. See (R.p.14 n.5) (referencing "police protection immunity" codified at §15-78-60(6)). It bears repeating that the circuit court granted the Highway Patrol judgment as a matter of law.

Appellant filed a short motion for reconsideration asking the circuit court to issue rulings on two arguments Appellant believed were not addressed by the prior rulings. Neither the motion nor the order denying it are relevant to discretionary immunity.

ARGUMENT

The Court should dismiss this cross-appeal. A party must be "aggrieved" by a decision in order to appeal it. The Highway Patrol is not aggrieved by an order taking the case from the jury and granting the Highway Patrol judgment as a matter of law. Appealability is controlled by statute. A party who wins immunity may not appeal.

Discretionary immunity is properly postured as an alternative sustaining ground instead of a cross-appeal. The Highway Patrol is arguing this Court should affirm the directed verdict because the circuit court's decision on discretionary immunity was wrong. The argument should lose on the merits, but it is a proper argument for a respondent to make.

When addressing discretionary immunity on the merits, the Court should hold the Highway Patrol is not entitled to a directed verdict, for two reasons.

First, there was evidence the patrolman knew Lindler was impaired but left him anyway. Second, there was evidence the patrolman did not have any discretion to leave an impaired motorist like Lindler on the side of the road.

This situation was uncommonly dangerous. Lindler and his passenger were inches away from heavy traffic, in dwindling twilight with no margin for error. The patrolman's reason for leaving—that he thought help was close—actually makes his leaving more perplexing. Lindler and his passenger were protected while the patrolman was there. His flashing lights were a clear signal to other drivers and his patrol car created a safe zone for working on Lindler's car. It would be sensible to keep this protection in place for a few minutes more if help was near; especially when leaving the scene would *increase* Lindler's exposure to danger. A jury could find the patrolman did not have the discretion to leave.

I. This Court should dismiss the cross-appeal because the Highway Patrol is not "aggrieved" by a circuit court order that granted a directed verdict in the Highway Patrol's favor.

Only an "aggrieved" party may appeal. This is required by court rule, see Rule 201(b), SCACR, and by statute. S.C. Code Ann. § 18-1-30 (2014).

The word "aggrieved" refers "to a *substantial* grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation." *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) (emphasis added). One prominent authority defines "aggrieved party" as "[a] party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." BLACK'S LAW DICTIONARY 515 (2d ed. 2001) (Second pocket edition).

Being aggrieved requires a "legal" injury. *State v. Rearick*, 417 S.C. 391, 398 n.9, 790 S.E.2d 192, 196 n.9 (2016). Appellate review is reserved for errors that have "*practically* wronged the appealing party." *Cisson v. McWhorter*, 255 S.C. 174, 177-178, 177 S.E.2d 603, 605 (1970) (emphasis added). The court has the "duty to reject an appeal" taken by a party who is "not aggrieved in the legal sense" by a trial court's judgment. *Id.* at 178, 177 S.E.2d at 605. If a party is not aggrieved, the appeal should be dismissed.

The circuit court granted the Highway Patrol a directed verdict, finding the Highway Patrol was immune from suit. The Highway Patrol is not aggrieved by that decision.

The Court need not take Appellant's word for it. The State successfully employed the same argument *State v. Rearick*, a case where a criminal defendant claimed he was aggrieved by an order granting him a mistrial but ruling jeopardy had not attached and permitting the State to prosecute the defendant again. 417 S.C. at 396, 790 S.E.2d at 194-

195. *Rearick* emphasizes the test for appealability is "whether the party bringing the appeal is aggrieved." *Id.* at 402, 790 S.E.2d at 198 (quoting *State v. Gregorie*, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000)). *Rearick* also said a decision denying a criminal defendant's request for immunity is similar to a decision denying a motion to dismiss, see 417 S.C. at 402, 790 S.E.2d at 198, and *Rearick* favorably cited a prior decision holding an order denying immunity does not involve the merits and is not immediately appealable. *State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 679 (2013). Appellant is not aware of any principled basis for giving the State a better appealability standard than a private individual. If a defendant is not aggrieved by an order denying him immunity, the same would necessarily be true of an order denying immunity to the State.

It is also important to recall that this order did not deny the Highway Patrol immunity—it *granted* a directed verdict. If a party is not aggrieved by a denial of immunity, it is surely not aggrieved by a grant of immunity. The Highway Patrol won. It has no injury.

Candor requires disclosing Appellant moved to dismiss the cross-appeal during the briefing process. The Court denied that motion and Appellant respects that decision.

Appellant nevertheless firmly believes the cross-appeal is improper and must be dismissed. Discretionary immunity is appropriately postured as an alternative sustaining ground under Rule 220(c), SCACR. See also *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling."). The Court should address the issue in that context. Failing to dismiss the cross-appeal has the potential to create confusion when parties attempt to fit this case's decision into the larger body of existing precedent.

II. The circuit court correctly held there was a jury question on discretionary immunity when there was evidence a highway patrolman violated protocol and knowingly left an impaired motorist on the side of the road, increasing the motorist's exposure to the danger that ultimately claimed his life.

The circuit court correctly held there was a jury question on discretionary immunity. The standard for discretionary immunity requires a showing by the greater weight of the evidence that a government actor made a conscious decision while using accepted professional standards. There is some evidence that was done, but there is also evidence going the other way, making this case no different from the variety of other cases where discretionary immunity was properly sent to the jury.

a. Discretionary immunity protects conscious and deliberate decisions, requiring the government to satisfy an "inherently factual" standard.

The Tort Claims Act codifies sovereign immunity, then waives sovereign immunity, and lists forty exceptions to that waiver. The "discretionary immunity" exception explains a governmental entity is not liable for a loss 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.

S.C. Code Ann. §15-78-60(5) (2005).

This Court's decision in *Niver v. S.C. Department of Highways & Public Transportation* is one of the key cases examining this exception, explaining discretionary immunity is "contingent on proof" that a government entity, "faced with alternatives, actually weighed competing considerations and made a conscious choice[.]" 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990). *Niver* favorably cites a Georgia decision instructing a

"discretionary act" is an act that "calls for the exercise of reasoned judgment and entails examining facts, reaching reasoned conclusions, and acting on the conclusions in a way that has not been specifically directed." *Id.* at 464, 395 S.E.2d at 730.

The Supreme Court specifically affirmed *Niver*'s interpretation of discretionary immunity two years later, in a different case. *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992). That decision announces what the government must prove in order to prevail on discretionary immunity. Discretionary immunity does not protect all decisions. It only protects judgment calls, and even then, only those judgment calls when a government employee "actually weighed competing considerations and made a conscious choice." *Id.* at 525, 413 S.E.2d at 35. The government must prove "that in weighing the competing considerations and alternatives, it utilized accepted professional standards[.]" *Id.* at 525, 413 S.E.2d at 35.

Like all the Tort Claims Act's immunities, this is an affirmative defense, and it is judged like any other defense at the directed verdict stage: The court must view the evidence in the non-moving party's favor. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (affirming denial of directed verdict on discretionary immunity). This Court has specifically noted the standard for discretionary immunity is "inherently factual." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 304, 578 S.E.2d 16, 22 (Ct. App. 2002) (like *Sabb*, affirming the denial of directed verdict on discretionary immunity).

Government entities have a history of taking a robust view of immunity, previously arguing the government only needs to produce "some evidence" in order to win on discretionary immunity. *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 227, 540 S.E.2d 87, 88

(2000). That was in response to one of this Court's decisions explaining a directed verdict deals only with the existence of evidence, not its weight. 332 S.C. 605, 610, 506 S.E.2d 516, 518 (Ct. App. 1998). The Supreme Court affirmed this Court's decision, holding the government has the burden of proving discretionary immunity and does not win discretionary immunity "merely by creating an issue of fact." 343 S.C. at 232, 540 S.E.2d at 91.

b. A directed verdict would not be proper here. The patrolman's credibility is in question and there is evidence he did not have the discretion to leave.

Two experts opined the patrolman knew Lindler was impaired and vulnerable, creating a factual dispute with respect to the patrolman's testimony.

Dr. George Kirkham, a specialist in police standards, explained this officer knew something about Lindler was amiss; this officer was "too trained and too experienced not to know." (R.p.65, lines 3-6; p.78, lines 8-25). Dr. Kirkham described the patrolman as "like a dog with a bone" during the encounter, repeatedly asking questions to find out what was wrong with Lindler. (R.p.69, line 16 - p.70, line 8). Dr. Kirkham opined the patrolman's testimony that he did not believe Lindler was impaired was contradicted by the patrolman's own statements, explaining "no reasonable police officer . . . could or would have left this person . . . in a position of harm's way." (R.p.82, line 10 - p.83, line 2). Dr. Kirkham did not fault the patrolman for not knowing precisely what was wrong with Lindler, but Dr. Kirkham *did* opine that the patrolman knew it was not safe to leave someone in Lindler's condition on the side of the road. (R.p.101, line 18 - p.102, line 4).

Dr. Paul Genecin is a medical doctor. (R.p.107, lines 13-22). He explained a doctor cannot hold a policeman to a medical standard of care, but he also explained:

> I mean, this is not a situation of someone who's sober and has no detectible impairment where no one could possibly have know[n] that he was impaired. *He* [Lindler] *was clearly impaired.* Now that's not – *I think that's something that was plainly visible to him* [the patrolman] *and something that he* – that [the patrolman] *described repeatedly in the video*[.]

(R.p.110, line 25 - p.111, line 6) (emphasis added). In other words, like Dr. Kirkham, Dr. Genecin believed Lindler's actions, and the patrolman's questions based on those actions, "all reflected the fact that [Lindler] was impaired." (R.p.111, lines 8-11). This raises an inference Lindler's impairment was obvious, especially to a patrolman trained to detect impairment. (R.p.56, line 22 - p.57, line 7). That inference precludes a directed verdict.

There was also testimony supporting a finding that a police officer does not have the discretion to leave a vulnerable individual like Lindler on the side of the road. The patrolman himself admitted he had a "duty" to stay with Lindler if he thought Lindler was in danger. (R.p.63, lines 21-25). Dr. Kirkham explained when an officer encounters someone who is disturbed, sick, or injured, an officer has duty to help that person. (R.p.76, lines 1-8). Dr. Kirkham listed a "range of things" the patrolman could have done, "none of which he did do." (R.p.83, line 19 - p.85, line 14). There was no effort to explain why some of these things—things like staying for a few minutes more, pushing Lindler's vehicle further out of the road, or offering a ride to the gas station—were considered and rejected based on prevailing professional standards, as discretionary immunity requires. And there was no exigency compelling the patrolman to leave. He candidly admitted he would have given Lindler a ride from the scene if Lindler had asked for one. (R.p.64, lines 1-4).

Dr. Kirkham was highly critical of the patrolman's decision to leave. The patrolman specifically instructed Lindler not to cross the white line marking the edge of the roadway,

but Lindler was stranded because his truck was out of gas, and Lindler's gas cap was on the side of his truck that was closest to the road. (R.p.72, lines 2-14). It was 5:00 in the afternoon, in December. (R.p.66, lines 5-10). It was dark and getting darker. *Id.* It was raining, and Lindler was broken down in a construction zone where there was no emergency lane. *Id.* The flashing lights and the protective corridor to work on Lindler's car disappeared when the patrol car left. (R.p.72, lines 14-18). Dr. Kirkham believed this was "an extremely dangerous situation." (R.p.72, lines 14-22). He said:

> I can't see a way how you could possibly put gas in that vehicle . . . without stepping out into the roadway and the only lights you're gonna have is if you've got a little . . . flashlight with you. I don't know if mom [Lindler's on-the-way help] has that or not, but the only light you're gonna have is the headlights of oncoming cars and you're gonna just be a dark blob off there on the side and it would be very, very easy for – for somebody to hit you.

(R.p.73, line 23 - p.74, line 6). Dr. Kirkham opined "a rookie would foresee this involved great danger," (R.p.73, lines 16-21); that someone could not safely do what the officer knew Lindler planned to do, (R.p.77, lines 10-19); and that although it was reasonable for the patrolman to trust that help was on the way, five or ten minutes without the officer's presence was too much. (R.p.98, line 24 - p.99, line 6). Dr. Kirkham gave this opinion repeatedly, (R.p.80, line 13 - p.81, line 3; p.94, line 20 - p.95, line 14), eventually expressing fear he was "beating a dead horse." (R.p.106, lines 5-12).

c. This case is similar to other cases where discretionary immunity has properly gone to the jury.

No other case provides a perfect analogy, but this case is most comparable to *Clark v. S.C. Department of Public Safety*, a decision where this Court and the Supreme Court affirmed the denial of a directed verdict on discretionary immunity with respect to a police

officer's decision to begin and continue a high speed pursuit of a suspect. Both this Court's decision and the Supreme Court's decision are useful resources. The Supreme Court explained although some police decisions are made rapidly a police officer's paramount duty is to protect the public. 362 S.C. 377, 386-387, 608 S.E.2d 573, 578-579 (2005). This Court noted the plaintiff presented expert testimony that the police officer did not properly balance the competing considerations of the situation, creating a question of fact. 353 S.C. at 305, 578 S.E.2d at 23.

This Court also noted in *Clark* that all traffic stops involve discretion and the Court observed some jurisdictions have distinguished between "planning" decisions and "operational" decisions. *Id.* at 305, 578 S.E.2d at 23. The Supreme Court left this question open, see 362 S.C. at 387 n.3, 608 S.E.2d at 579 n.3, but persuasive authority supports the distinction. The Texas Supreme Court explained discretionary immunity is similar to "police protection immunity" in that both have the purpose of "avoid[ing] a judicial review that would question the wisdom of a government's exercise of its discretion *in making policy decisions*." *State v. Terrell*, 588 S.W.2d 784, 787 (Tex. 1979) (emphasis added). Another authority—like the Texas case, not a binding one—explained:

> Immunity remains if the injury results from a deliberate choice in the formulation of policy. If the injury results from negligent execution of the policy, then the act is ministerial and liability ensues.

Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462, 472 (1971).

This Court need not examine the distinction between planning and operational activities in the present case. The only point of mentioning the distinction is that nearly

everything a police officer does will involve some measure of discretion. A robust interpretation of discretionary immunity would insulate police officers from all liability. One court ably explained that legislation waiving sovereign immunity is designed to treat the government "more like a commoner than like the Crown." *United States v. Wong*, 135 S. Ct. 1625, 1637 (U.S. 2015). Commoners do not get immunity from reckless conduct, and they certainly do not get immunity simply by claiming they made a judgment call.

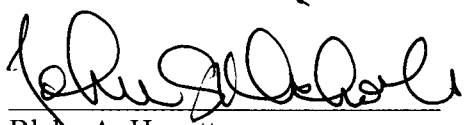
Another favorable comparison is provided by *Pike v. South Carolina Department of Transportation*. The circuit court cited *Pike* in ruling discretionary immunity presented a jury question. (R.p.14). As in this case, *Pike* involved competing evidence. The plaintiff presented evidence the DOT failed to use accepted standards in analyzing a problem; the DOT presented evidence disputing plaintiff's claim. See 343 S.C. at 229, 540 S.E.2d at 90. There again, the case involved a factual dispute.

Just like those cases, a court cannot credit the patrolman's testimony over Dr. Kirkham's testimony at the directed verdict stage. The patrolman is entitled to maintain he acted appropriately, but Appellant had evidence from which a jury could find the patrolman must not have weighed the competing considerations using prevailing standards because if the patrolman *had* performed that exercise, no reasonable officer would have left Lindler and his passenger on the interstate. Yes, the patrolman got Lindler's vehicle out of the road, but another motorist had parked behind Lindler's vehicle with hazard lights activated before the patrolman arrived. When the patrolman left, the good Samaritan was gone, the protective barrier was gone, and the patrolman's expertise was gone. The net effect of this encounter was to make things worse. The right to be wrong does not include the right to be reckless.

CONCLUSION

This is not a proper cross-appeal. The Highway Patrol wants this Court to affirm the judgment below, an argument appropriately made in a respondent's brief. The Court should not affirm. Instead, the Court should reverse the circuit court's directed verdict and remand this case for a new trial.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant, Brief of Respondent, and Reply Brief of Appellant/Respondent* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

October 4, 2017

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