

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-002168
Case No. 2014-CP-10-5663

RECEIVED
OCT 31 2017
SC Court of Appeals

Rene Hale Shelley, as Personal Representative of the
Estate of Michael Mann Lindler, Appellant-Respondent,

v.

South Carolina Highway Patrol, Respondent-Appellant.

MOTION TO SUPPLEMENT RECORD ON APPEAL

The Respondent-Appellant South Carolina Highway Patrol respectfully moves this Court to file a Supplemental Record on Appeal to include pages 485-486, 504-506, and 512-513 of the trial transcript which were inadvertently not designated for inclusion in the Record on Appeal.

The Respondent-Appellant South Carolina Highway Patrol's motion is based on the following grounds:

On pages 11, 20 and 31 of its Initial Respondent's Brief, the Respondent-Appellant South Carolina Highway Patrol cited to the Estate's expert's testimony at trial. (Trial Tr. pp. 485-486, 505, and 512-513). However, through inadvertence, these pages were not designated for inclusion in the Record on Appeal. (See attached pages from the Initial Respondent's Brief).

Additionally, on page 7 of its Initial Reply Brief, the Respondent-Appellant South Carolina Highway Patrol cited to the Estate's expert's testimony at trial. (Trial Tr. 504-506). However, through inadvertence, these pages were also not designated for inclusion in the Record on Appeal. (See attached pages from the Initial Reply Brief).

Counsel for the Appellant-Respondent has been consulted and has consented to the filing of a Supplemental Record on Appeal to correct these errors.

WHEREFORE, the Respondent-Appellant South Carolina Highway Patrol respectfully requests that it be allowed to file a Supplemental Record on Appeal that includes pages 485-486, 504-506, and 512-513 of the trial transcript.

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Columbia, South Carolina

October 31, 2017

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INITIAL RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT

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charged." Blackwelder got Lindler out of the road, assessed his impairment, determined he was not impaired, and instructed him to stay behind the white line. Blackwelder then left the scene. Lindler walked into traffic nearly forty-five minutes later. The time lapse between Blackwelder leaving the scene and Lindler's act of running into traffic severs any relationship that could arguably have been created between them. Fourth, no credible argument can be made that Lindler was in a worse position than when Blackwelder arrived. No reasonable juror could conclude this. Blackwelder got Lindler off of the road and informed him to stay behind the white line. The Estate's own expert, George Kirkham, opined that Blackwelder's actions made the situation much less dangerous than when he was in the roadway. (Tr. 485-86). Further, Dr. Kirkham testified that Blackwelder did not prevent anyone, namely a "kind-hearted stranger," from rendering aid to Lindler. (Tr. 494). The voluntary undertaking argument, even were it not barred by Section 15-78-60(6), still fails.²

Blackwelder used several methods of protection to assist Lindler. He assisted Lindler by getting him out of the road. He ensured help was on the way. He ensured their help knew where they were coming. Despite the Estate's contention that

² On the voluntary undertaking argument, the Highway Patrol asks this Court to take judicial notice of United States District Court Judge Joseph F. Anderson's analysis of the similar federal claim that the Estate asserted under *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Among other factual determinations taken in a light most favorable to the Estate, Judge Anderson specifically finds Blackwelder decreased the risk of harm to Lindler. See, Footnote #16 and accompanying text, *supra*.

argument, as noted several times by the Highway Patrol in the trial record and in its brief on discretionary immunity, is premised upon the allegation that Blackwelder, in fact, knew that Lindler was impaired. Despite both sides' expert witnesses testifying as to the proper and accepted techniques used by Blackwelder in assessing Lindler's impairment level, as well as Blackwelder's own testimony that he did not believe Lindler was impaired, the Estate continues to argue without evidentiary support that Blackwelder believed Lindler was impaired. The Estate's law enforcement expert, George Kirkham testified that Lindler "flawlessly" passed the sobriety test administered by Blackwelder. (Tr. 464-465). Kirkham also agreed that if Lindler was not impaired, Blackwelder would have no duty to transport him to another location. (Tr. 505).

In sum, the directed verdict based on Section 15-78-60(4) immunity should be affirmed. The Estate has failed to demonstrate that the DPS policy is even applicable to the scenario facing Blackwelder or that there is evidence that the policy was violated in any respect by Blackwelder. In addition, even if the policy may not have been enforced to the letter, which is denied, immunity nonetheless attaches under Section 15-78-60(4) as Judge Lee ruled.¹¹

¹¹ In her Order, Judge Lee also addresses the Estate's arguments at trial about the alleged failure by the Highway Patrol to terminate Blackwelder for policy violations addressed in an employment letter dated June 28, 2013. Judge Lee ruled as follows: "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)." (Order, p. 13). The Estate does not challenge this ruling on appeal.

attempting to deflect the responsibility that should be imposed upon Lindler towards another. Accordingly, the same principles of comparative negligence and public policy, as applied in *Lydia* and *Tobias*, should also be applied as a bar on liability in the present case. If a voluntarily intoxicated plaintiff cannot recover for his injuries from a tavern owner who served him or from an entrustor who provided a vehicle, then a law enforcement officer in the position of Blackwelder could likewise have no liability. As the Supreme Court observed in *Lydia*, it is not conceivable that a reasonable jury could conclude that Lindler's negligence did not exceed Blackwelder's alleged negligence. More specifically, no reasonable jury could find an intoxicated person who walks into the middle of oncoming traffic in the road is less than or equally at fault as a law enforcement officer who responded to a disabled motorist. During cross-examination, Dr. Kirkham agreed that Lindler violated several of the South Carolina pedestrian statutes, which made him negligent per se. (Tr. 512-513). Judge Lee also found that Lindler was negligent and stated her intent to instruct the jury on that issue, but she was unwilling at that point in the trial to rule that Lindler's negligence exceeded that of Blackwelder. (Tr. 1070-1071).

In sum, as part of the public policy of the State, the Supreme Court has rejected claims by adults injured by their own intoxication against parties who did not prevent the injured person from ultimately harming themselves. Those same policy considerations, including the application of comparative negligence to the

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INITIAL REPLY BRIEF OF RESPONDENT-APPELLANT

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Importantly, the SCHP asserts that once discretionary immunity is granted on the issue of Blackwelder's determination that Lindler was not impaired, the court need go no further to evaluate Blackwelder's decision to leave the scene. Kirkham agreed that an individual who was not impaired could be left in the conditions Lindler faced. (R. 504-507).⁵ Put simply, the second issue -- whether Blackwelder properly weighed the competing alternatives to leave the scene or to stay with Lindler -- is derivative of the initial issue -- the impairment issue. Once discretionary immunity attaches to Blackwelder's decision on impairment, the SCHP cannot be held liable under S.C. Code Ann. § 15-78-60(5). In short, the SCHP is clearly entitled to discretionary immunity on the impairment issue, and based thereon, a directed verdict should have been granted on this additional basis.⁶

dash-cam video, is conclusive evidence that Blackwelder weighed competing alternatives before rendering the decision. In *Scott v. Harris*, 550 U.S. 372 (2007), the United States Supreme Court ruled that video footage should be utilized to reject an argument that testimony on an issue is in dispute where the video shows what actually transpired. The Supreme Court explained that when the record contains video footage that is not open to more than one interpretation and contradicts the non-movant's assertions, the court must "view the facts in the light depicted by the videotape." 550 U.S. at 381.

⁵ The Estate also argues the notion, derived from the failure to protect claim and Good Samaritan case law, that the "net effect of this encounter was to make things worse." See, Estate's Respondent's Brief, p. 12. This argument is fundamentally flawed in that, again, the Estate attempts to counter the opinions of her own expert, Dr. Kirkham, who testified clearly that Blackwelder improved Lindler's situation by getting him off the road and where Blackwelder left Lindler was better than he where found him. Further, this issue was ruled upon by Judge Joseph F. Anderson, Jr. in the District Court case, was not challenged on appeal by the Estate in that case, and thus it is now entitled to preclusive effect and is not subject to collateral attack.

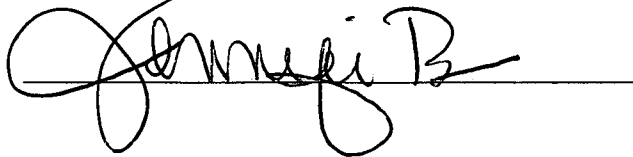
⁶ Strangely, the Estate also resorts to arguing the distinction between "planning" decisions and "operational" decisions that this Court raised in *Clark v. South Carolina Department of Public Safety*, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002). This Court

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent-Appellant, South Carolina Highway Patrol, does hereby certify that service of the **Motion to Supplement Record on Appeal** in the above captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 31st day of October 2017:

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A handwritten signature in black ink, appearing to read "Jennifer B.", is written over a horizontal line.

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SC Court of Appeals

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October 31, 2017

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Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: Rene Hale Shelley, Individually and as Personal Representative of the Estate of Michael Mann Lindler v. South Carolina Highway Patrol
Court of Appeals Case Number: 2016-002168
Civil Action Number: 2014-CP-40-5663
Claim Number: 61007
Our File Number: 103.9492

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Motion to Supplement Record on Appeal** in the above referenced matter. Please file the original motion and return a clocked-in copy to me by way of my courier. I have not enclosed the filing fee since the South Carolina Highway Patrol is exempt.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
October 31, 2017
Page Two

cc: (w/ Enclosure)

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