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

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

v.

South Carolina Highway Patrol, ... Respondent-Appellant.

APPELLANT'S BRIEF OF RESPONDENT-APPELLANT

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I. Did the Circuit Court err in denying the South Carolina Highway Patrol's motions for directed verdict on the basis of discretionary immunity?

STATEMENT OF THE CASE

This is a cross-appeal from a gross negligence action arising out of a Highway Patrolman's encounter with a disabled motorist in Richland County on December 17, 2012.

The Appellant-Respondent Rene Shelley, as the Personal Representative of the Estate of Michael Mann Lindler, (hereafter referred to as "Estate") filed a civil action on July 11, 2014. (R. 20-29). An Amended Complaint was later filed on July 30, 2014. (R. 30-39).

On December 17, 2012, Michael Lindler was traveling westbound on Interstate-20 in Richland County when his truck stopped in the right-hand lane of the highway at mile marker 81. Lindler was traveling with his girlfriend, Gabrielle Pelenski. Trooper Travis Blackwelder (hereafter "Blackwelder") came upon the disabled vehicle at approximately 5:05 p.m. (R. 84). The entire interaction between Blackwelder and Lindler lasted approximately thirteen minutes and was captured on Trooper Blackwelder's dash-cam video. (Video - Pl. Ex. 1).

Prior to Blackwelder arriving at the disabled vehicle, an unknown individual had stopped behind Lindler's truck. (R. 67, 179-180). Blackwelder had an inaudible, brief conversation with the unknown individual, and Blackwelder offered to push Lindler's truck with his push bumper allowing the unknown individual to leave the scene. (R. 67, 179-180). Blackwelder addressed Lindler, who informed him that his

truck "just shut down." (R. 180). Blackwelder and Lindler assessed the engine and the battery and determined that the battery cable was not connected. (R. 180).

After Lindler went to the driver's side of his truck to get some tools, Blackwelder asked him if he was okay and why he had stumbled. (R. 180). Lindler responded that he just had a long day, that he had not been drinking, and that he had not been doing any drugs. (R. 180). Lindler then offered that he was on Pre-Trial Intervention for a shoplifting charge and denied any drug or alcohol related offenses. (R. 187). As they continued to work on the battery, Blackwelder asked Lindler why he was stumbling. Lindler apologized and explained that he and his girlfriend had just left the hospital for treatment for the flu. (R. 189). Blackwelder asked for his driver's license and registration, but Lindler explained that his registration was sent to the wrong address. Lindler then advised he has had this similar issue with his truck for years. Blackwelder told Lindler to get back in the truck and see if it would start. Lindler was unable to start the vehicle. He explained they did run out of gas as well. (Video - Pl. Ex. 1). Blackwelder advised that he would push the vehicle off the roadway, that there was no emergency lane and that Lindler needed to be entirely in the grass. (R. 181). At that point, the truck started, and Blackwelder asked Lindler to pull the truck off the road. (R. 181, Video - Pl. Ex. 1).

Blackwelder then pulled his patrol SUV behind Lindler's truck on the side of the roadway. (R. 182). Blackwelder parked his vehicle at an angle to create a safety

zone for himself and Lindler as they continued their interaction. (R. 182). While parked in his patrol vehicle, Blackwelder called into dispatch to check Lindler's driver's license and license plate for warrants and to complete a Public Contact Form, which documented his contact with the disabled motorist in the construction zone. (R. 183). As Blackwelder was speaking with dispatch, Lindler stood on the edge of the roadway, within his open driver's side door, and smoked a cigarette. (Video - Pl. Ex. 1). Blackwelder used the public address system in his vehicle to instruct Lindler to shut his door and get out of the roadway. (R. 208-209). Apparently unable to hear Blackwelder's instruction, Lindler walked to Blackwelder's door window, where the Trooper again told him to get out of the roadway. (R. 190). Lindler complied and walked to the passenger side of the truck to speak with Pelenski. (R. 190).

Blackwelder then exited the patrol vehicle and asked Lindler to recite the alphabet. (R. 188). Lindler again complied. (R. 188). Lindler recited the alphabet without difficulty. (R. 188). Blackwelder asked Lindler what pills he was taking, but Lindler replied he had not taken any pills. He then informed Blackwelder he had taken a muscle relaxer four hours prior, but he explained the "muscle relaxer" was actually Theraflu, which Blackwelder noted was a mucus eliminator. (Video - Pl. Ex. 1). Lindler told Blackwelder he had the flu and an upset stomach. (R. 189). Blackwelder asked Lindler if his truck had cut off again, and Lindler confirmed that it did. (Video - Pl. Ex. 1). Blackwelder confirmed that Lindler and Pelenski had help

on the way. (R. 58-59). He instructed Lindler to make sure the help gets "all the way off the road" and reiterated that "if they're on that (left) side of the white line, they're wrong." (Video - Pl. Ex. 1).

After Blackwelder asked "you can't even stand up, what's wrong with you," Lindler responded the hill on which he was standing was affecting his balance. Blackwelder continued the discussion, and Lindler advised that he could pass a "field test." The Trooper told Lindler he did not agree. Lindler then explained he was nervous, and Blackwelder replied he had no reason to be nervous because he had simply broken down and had done nothing wrong. Blackwelder asked Lindler if Pelenski had a driver's license, but the response is unclear on the video. Blackwelder then told Lindler he needed to let her drive when they leave. (Video - Pl. Ex. 1). Blackwelder informed Pelenski, who appears to be on the phone, that they were at the "81 Westbound, on I-20." (R. 58-59, 61). As Blackwelder prepared to leave, Lindler said something inaudible to Blackwelder, and he responded "what drug were you on?" Lindler replied "weed" and Xanax but confirmed that he was not on the drug or medication at the present time. Lindler also said the Trooper would not find anything in the vehicle. (Video - Pl. Ex. 1). At that point, Blackwelder entered his patrol vehicle to leave, and Lindler sat down on the passenger side bumper of his truck. (R. 195). Blackwelder called dispatch to confirm the accident in the roadway on Clemson Road was still pending and left the scene. (R. 193).

The dispatch log shows Blackwelder left the scene at approximately 5:05 p.m. and arrived at the accident on Clemson Road at 5:11 p.m. (R. 86). The dispatch log also demonstrates the vehicle versus pedestrian accident in which Lindler was struck was called in by 911 at 5:49 p.m., which equates to roughly forty-four minutes between when Blackwelder left the scene and Lindler was struck by the van. (R. 87-88). The testimony reflected that Lindler walked into the roadway and was struck and killed, while in the left-hand lane of Interstate-20. (R. 61-62). The autopsy report revealed Lindler had Xanax and Methadone in his system at the time of death. (R. 108-109).

The Estate brought claims for gross negligence as survival and wrongful death causes of action. After completion of discovery, the case was tried beginning March 14, 2016, before Circuit Court Judge Alison Renee Lee and a jury. The trial concluded on March 18, 2016. At the close of the presentation of evidence, Judge Lee granted a directed verdict to the Highway Patrol on all claims. Specifically, she granted a directed verdict finding the Highway Patrol was entitled to immunity from suit pursuant to S.C. Code Ann. §§ 15-78-60(4) and (6). However, Judge Lee also denied the Highway Patrol's motions for directed verdict based on discretionary immunity under S.C. Code Ann. § 15-78-60(5).

On July 19, 2016, Judge Lee issued a written order with her findings. (R. 1-17). Thereafter, on August 2, 2016, the Estate filed a post-trial motion in the form of

a Motion to Reconsider or, in the Alternative, Alter or Amend the Judgment. (R. 45-47). By order filed September 23, 2016, Judge Lee amended her rulings to address additional arguments not previously discussed in her July 19, 2016 order. (R. 18-19). However, the directed verdict rulings remained in effect, and the case was dismissed.

The Estate thereupon filed a timely appeal, and the Highway Patrol followed with this cross-appeal only as to the denial of directed verdict based upon the defense of discretionary immunity.

ARGUMENTS

I. The Circuit Court erred in denying the South Carolina Highway Patrol's motions for directed verdict on the basis of discretionary immunity.

The Highway Patrol moved for a directed verdict at the close of Shelley's case-in-chief and at the close of all evidence on the basis of discretionary immunity, as well as other grounds. These motions asserting discretionary immunity were denied by Judge Alison Renee Lee. On this cross-appeal, the Highway Patrol submits the Circuit Court erred in failing to rule as a matter of law that discretionary immunity bars the Estate's gross negligence claims.[1]

A. Overview of Discretionary Immunity

Discretionary immunity has historically protected discretionary decisions made by governmental officials acting in their official capacity. Discretionary immunity actually survived the abrogation of sovereign immunity by the Supreme Court in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1995). The Supreme

[1] The Highway Patrol has filed this cross-appeal as a precaution only. If the Court affirms the directed verdict granted by Judge Lee on other grounds, it will not be necessary for the Court to reach the discretionary immunity arguments set forth herein. The cross-appeal would be moot.

Court explained 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." 329 S.E.2d at 742. As a result, the Supreme Court "expressly decline[d] to allow tort liability for these discretionary acts" and specifically acknowledged that "[t]he exercise of discretion includes the right to be wrong." *Id.*

In response to the Supreme Court's partial abrogation of sovereign immunity in *McCall*,[2] the General Assembly enacted the South Carolina Tort Claims Act in 1986. With the Act, the legislature first reinstated sovereign immunity in full. The legislature then proceeded to set forth specific waivers and limitations on sovereign immunity as reinstated. In *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995), the Supreme Court explained as follows:

> In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity. The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity.

455 S.E.2d at 690. (Citations omitted).

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[2] *McCall* has been described as resulting in the absolute abrogation of sovereign immunity. *See also*, *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688, 690 (1995) ("[i]n *McCall* we abolished the doctrine of sovereign immunity"). That is not entirely correct because the *McCall* Court did not abolish discretionary immunity as it existed pre-*McCall*. In effect, *McCall* represents only a partial abrogation of sovereign immunity because discretionary immunity was left intact.

In enacting the Tort Claims Act, the General Assembly codified discretionary immunity. Section 15-78-60(5) exempts governmental entities from liability 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." S.C. Code Ann. § 15-78-60(5). The Supreme Court has interpreted Section 15-78-60(5) as requiring "[p]roof that the governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice." *Foster v. South Carolina Dept. of Highways and Public Transportation*, 306 S.C. 519, 413 S.E.2d 31, 35 (1992). In addition, "the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Id.* "It is not enough to say the defect was noted and a decision was made not to repair it." *Id.*

B. Discretionary Immunity Decision in Circuit Court

In her written order, Judge Alison Renee Lee made several key findings as to the discretionary immunity defense. She described the alleged discretionary acts as follows:

> 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.

(R. 13-14). She then concluded that "[i]n 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." (R. 14). Judge Lee also acknowledges that both sides' law enforcement experts, George Kirkham and Brian Batterton, agreed the decisions were discretionary in nature. (R. 14). Nonetheless, Judge Lee denied the directed verdict motion on the following basis: "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." (R. 14).

C. Evidence Fully Supports Finding of Discretionary Immunity

On appeal, the Highway Patrol submits that Judge Lee erred in denying the directed verdict motions on discretionary immunity. As discussed in detail below,

the evidence, when viewed in the light most favorable to the non-moving party, fully supports each of the elements that must be shown. Judge Lee ruled that there was an issue of fact in dispute as to whether Trooper Blackwelder actually weighed competing alternatives; however, the evidence in the record is actually undisputed on the issue. Blackwelder testified at length regarding the issues that he faced and the options or alternatives that he worked through. He explained that he weighed those alternatives. (R. 185-186, 205-207). There is quite frankly no evidence to create a factual issue in dispute on that point. The Estate presented no evidence that would reasonably suggest that Blackwelder did not consider or weigh the various options. In fact, leading questioning by the Estate's counsel confirmed and even emphasized Blackwelder's consideration of external factors and options. (R. 205-207).

Moreover, during the discussions of discretionary immunity at the directed verdict stage, the Estate's counsel never argued that Blackwelder's actual weighing of options was in dispute or was not supported by the evidence. The Estate's counsel did not point to any evidence to give rise to such a dispute. Even after Judge Lee raised the potential issue, the Estate's counsel never made that specific argument or pointed to any evidence to suggest that Blackwelder did not weigh the

competing alternatives. (R. 266-271).[3] Thus, the lower court erred in finding that discretionary immunity turns on a factual issue in dispute – especially a factual dispute that was never even asserted by the Estate in opposition to the directed verdict motion. *See, City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462, 464 (Ct. App. 2004) ("[i]t is an error of law for a court to decide a case on a ground not before it").

Clearly, the evidence before the lower court supports a finding of discretionary immunity. As Judge Lee correctly determined, there are two distinct exercises of discretion relevant to Blackwelder's interaction with Lindler. Initially, Blackwelder conducted an informal assessment of Lindler's impairment at the

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[3] Instead, the Estate's counsel opposed the directed verdict on discretionary immunity by incorrectly arguing that there is a gross negligence exception to S.C. Code Ann. § 15-78-60(5). Clearly, S.C. Code Ann. § 15-78-60(5) does not include a gross negligence exception, and the Highway Patrol never pled an immunity defense under S.C. Code Ann. § 15-78-60 containing a gross negligence exception. The Supreme Court has held that "[w]hen a governmental entity asserts multiple exceptions to the waiver of immunity and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 904 (2010). In *Steinke v. South Carolina Department of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), the Supreme Court explained that a governmental defendant may select which immunity provisions to plead, and if no gross negligence exception is included, then there is no basis for limiting the immunity to acts of simple negligence. The *Steinke* Court further explained 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." 520 S.E.2d at 154. In *Jones*, the Supreme Court found that S.C. Code Ann. § 15-78-60(21) was not subject to a gross negligence exception "because [defendant] did not plead a section containing a gross negligence standard." *Jones*, 692 S.E.2d at 905. The same is true in the present case. The Highway Patrol asserted discretionary immunity under S.C. Code Ann. § 15-78-60(5) and never pled nor relied on any other immunity provision within S.C. Code Ann. § 15-78-60 containing a gross negligence exception. Judge Lee was correct then in not adopting the only argument that the Estate actually made in opposition to discretionary immunity; however, she should not have *sua sponte* adopted a different basis – one not argued by the Estate – for denying the discretionary immunity defense.

scene. In fact, the Estate's expert, George Kirkham, agreed that the assessment of an individual's sobriety by a law enforcement officer is a discretionary function. (R. 89-90, 92). Secondly, Blackwelder weighed competing alternatives of remaining on the scene with Lindler until his help arrived, transporting Lindler from the scene, or leaving Lindler to remain at the scene waiting for help while Blackwelder would respond to a nearby pending accident in the roadway. Likewise, as Judge Lee noted, Kirkham agreed this decision was a discretionary function as well. (R. 90-92).

When Blackwelder arrived upon the scene, the dash-cam video shows that he asked the civilian already assisting Lindler if Lindler was intoxicated. Blackwelder testified that he was making an assessment of Lindler's potential impairment throughout the duration of the encounter. (R. 185). Over the approximately eleven and one half minutes of their interaction on video, Blackwelder asked Lindler if he had been drinking, if he had taken pills, what pills he had taken, why he was previously in Pre-Trial Intervention, why he was stumbling, why he was nervous, when the last time was he had taken Xanax or marijuana, and whether he would find anything illegal if he searched Lindler or his vehicle. Blackwelder further instructed Lindler to say the alphabet. Blackwelder used the tools, training and skills at his disposal to carefully assess Lindler's

condition and make a reasoned determination as to whether additional action was necessary.

Prior to his interaction with Lindler, Blackwelder had more than 500 previous instances in which he was required to assess the impairment of an individual. (R. 174). Consistent with his training, Blackwelder considered the "totality of everything [he] had seen, heard, smelled, observed, everything, given the conditions, the weather conditions, given the environment, the terrain that we were standing on, given Mr. Lindler's explanation on why he was uneasy, his being up all night, not having any sleep, being at the hospital ... being sick, had not been asleep he had said since the day prior" before making his decision that he was not impaired at the time and the encounter could end. (R. 185-186). Blackwelder explained that he chose the alphabet test because he did not smell alcohol, and it is a good test to use to determine if someone is on drugs by testing the individual's ability to enunciate and to follow instructions. (R. 187-188). Blackwelder then confirmed that he made the determination that Lindler was not impaired. (R. 60, 188). The record is replete with testimony demonstrating Blackwelder weighed two alternatives, whether Lindler was (a) impaired or (b) stable, coherent and capable of caring for himself -- and rendered a conscious and considered decision that Lindler was not impaired. Consistent with the requirements of the *Foster* decision, Blackwelder used generally accepted techniques, as described by the

Estate's own expert, to render this decision. As such, discretionary immunity is a total bar to recovery, and the Circuit Court judge should have granted the Highway Patrol's directed verdict motion on this ground.

At trial, the Highway Patrol maintained that the court and jury should not consider the post-mortem toxicology report because Blackwelder could not have known the results of the testing during his brief interaction on the scene. George Kirkham actually agreed that the only fair way to judge Blackwelder's actions was to limit critique to the observations captured on the dash-cam video. (R. 97). Judge Lee overruled those objections and allowed the results into evidence. To the extent those results prove Lindler was in fact impaired, this only bolsters the need for and purpose of discretionary immunity in this scenario. Blackwelder, like any law enforcement officer, must have the right to be wrong. *See*, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741, 742 (1985) ("[t]he exercise of discretion includes the right to be wrong"). Discretionary immunity is rendered meaningless and unnecessary if it is only triggered when an officer makes the correct decision.

In *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), this Court explained that "[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability." 374 S.E.2d at 916. Therefore, the assertion of any immunity defense, including discretionary immunity, assumes a breach of the duty of care but

nonetheless serves as a bar to liability. If a defendant is entitled to immunity, the court need not determine whether there was a breach of a duty -- it is assumed. For that reason, it is a fundamental error to tie any entitlement to immunity to whether there is a breach of a duty of care. They are mutually exclusive concepts. If there is no breach of duty, the issue of immunity need not be reached. Conversely, to properly consider a defendant's entitlement to discretionary immunity, the court should assume negligence. In order words, the existence or non-existence of negligence does not preclude a governmental entity's entitlement to discretionary immunity.

The discretionary immunity defense, therefore, does not require a showing that discretion was exercised without error, or that a correct decision was actually made as a result of the exercise of discretion. If that were what is required, there would obviously be no need for an immunity defense. *See*, *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196, 198 (2002) ("[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something"). The governmental entity does not need immunity where it acted reasonably or made a correct decision -- in that instance, the entity was not negligent and would not be liable irregardless of immunity. Instead, a governmental entity is entitled to discretionary immunity *especially* in those

instances where it is alleged that errors were made in the exercise of discretion, or where it is alleged that an incorrect decision was ultimately made.

Importantly, any theory of recovery from the Highway Patrol is derivative of the fact that Lindler was *actually* impaired. However, were that the case, it would wholly disregard the discretionary decision, whether right or wrong, that was made by Blackwelder in determining that Lindler was not impaired. An officer who correctly determines an individual is not impaired would certainly have no duty to remain with the individual or transport him from the road, especially in the case here where pending accidents required Blackwelder's attention. Discretionary immunity becomes relevant and appropriate in this case because the court was required, in fact, to assume that Blackwelder made the wrong decision but then to review whether Blackwelder used his training, skills and experience to weigh competing alternatives before making a decision. The Highway Patrol submits that Blackwelder's exercise of discretion in judging Lindler's impairment fully supports the application of discretionary immunity, and a directed verdict should have been granted by Judge Lee on that basis.

A second and distinct exercise of discretion was also elicited via testimony at trial. Specifically, Blackwelder weighed whether he needed to stay on the scene and wait with Lindler and his girlfriend or respond to one of the numerous pending accidents he had heard discussed on the radio prior to his stopping to help Lindler

get off the roadway. The Estate's expert witness, George Kirkham testified that Blackwelder's options were more limited on the scene: he could stay with Lindler or transport Lindler from the scene. (R. 77). Initially, this presumption again ignores the fact that Blackwelder made the discretionary determination that Lindler was not actually impaired. However, Kirkham's testimony also fails to take into account the vehicle Blackwelder was operating was a K-9 equipped Chevrolet Tahoe that had a dog cage in the rear in place of a back seat. (R. 182). Therefore, if Blackwelder determined Lindler and Pelenski needed to be transported from the scene, this transport would have required two trips because he only had one seat in his vehicle. (R. 192). Had Blackwelder made the decision to transport Lindler from the scene, he would likely have transported Pelenski first which would have left Lindler alone on the highway. (R. 192). Therefore, Blackwelder's realistic options were to stay on the side of the road and wait for Lindler's help to arrive or to respond to one of the multiple pending incidents of which he had learned.

Blackwelder specifically testified he had prior knowledge of the accident nearby on Clemson Road prior to his interaction with Lindler. (R. 193). He further knew the vehicles in that accident were in the roadway, which created a danger for the citizens involved in the accident as well as those who were traveling around the accident on Clemson Road. (R. 196). Blackwelder was constantly assessing the priority between his presence on the side of Interstate-20 with Lindler

and the pending accident just a few miles away. (R. 206). Blackwelder testified that "accidents breed accidents" and the longer the accident on Clemson Road was unattended, the greater the danger became. (R. 193). Having determined that there was nothing that required or necessitated further action with Lindler, Blackwelder made the decision to respond to the other accident that was a higher priority in his judgment. (R. 197).

This is precisely the scenario that discretionary immunity is intended to address. An officer is faced with two options, and based upon his weighing of the competing considerations, he chose one of the options. While Lindler and Pelenski remained on the side of the road, Blackwelder responded to an accident which he had determined was a higher priority than remaining on the scene with the disabled motorists. Questions remain whether Blackwelder could have even prevented Lindler from running into traffic had he remained on scene. (R. 203-204). Those questions are irrelevant and immaterial when evaluating discretionary immunity in this instance. Blackwelder made a determination that Lindler was not impaired and that the accidents pending were a higher priority than the disabled motorists. Although in hindsight and certainly unavailable to Blackwelder on the scene, toxicology reports later revealed Methadone and Xanax were in Lindler's system. However, as discussed above, this Court may assume the decisions Blackwelder made were wrong but should nonetheless overturn the lower court's denial of

discretionary immunity because wrong decisions are exactly why discretionary immunity is afforded to state actors under the Tort Claims Act and pursuant to the common law that pre-existed the Tort Claims Act. The Supreme Court has consistently recognized that "the exercise of such discretion includes the right to be wrong." *See, Giannini v. South Carolina Dept. of Transportation*, 378 S.C. 573, 664 S.E.2d 450, 454, n.1 (2008). *See also, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741, 742 (1985) ("[t]he exercise of discretion includes the right to be wrong").[4]

For each of the reasons discussed above, the South Carolina Highway Patrol respectfully submits that it is entitled to discretionary immunity for Blackwelder's discretionary decisions. The Circuit Court therefore erred in failing to grant a directed verdict on that additional basis.

[4] *See also, Jensen v. Anderson County Dept. of Social Services*, 304 S.C. 195, 403 S.E.2d 615, 619 (1991) ("[g]enerally, a government official may not be held liable for the negligent performance of a discretionary duty").

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant South Carolina Highway Patrol respectfully requests that this Court reverse the ruling of Circuit Court Judge Alison Renee Lee denying the Highway Patrol's motions for directed verdict on the basis of discretionary immunity.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent-Appellant South Carolina Highway Patrol certifies that the Final Appellant's Brief of Respondent-Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent-Appellant South Carolina Highway Patrol certifies that the Final Appellant's Brief of Respondent-Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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