

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Alison Renee Lee, Circuit Court Judge

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

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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.

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**RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT**

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## STATEMENT OF THE CASE

This is an 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 its cross-appeal only as to the denial of directed verdict based upon the defense of discretionary immunity.

## ARGUMENTS

**I. The Circuit Court correctly ruled that S.C. Code Ann. § 15-78-60(6) granted absolute immunity to the Highway Patrol on the Estate's failure to protect claims.**

The Estate appeals the grant of directed verdict in favor of the Highway Patrol on the basis of immunity under Section 15-78-60(6), which provides: "The governmental entity is not liable for a loss resulting from ... (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection." S.C. Code Ann. § 15-78-60(6). In *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998), this Court recognized that a scrivener's error resulted in the omission of the word "or." After looking at the legislative history, this 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." 501 S.E.2d at 750.

In her Order filed July 19, 2016, Judge Lee correctly noted that after "[r]eviewing 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." (R. 14). Judge Lee's finding is supported by the opening argument of the Estate's trial counsel in which counsel exhaustively told the jury the case was about

Blackwelder's duty to protect Lindler and his failure to do so. (R. 53). In applying the law to the facts, Judge Lee appropriately determined Section 15-78-60(6) immunized the Highway Patrol for the alleged failure to provide police protection to Lindler.

The Estate insists such a ruling effectively immunizes police for everything they do. This assertion suffers from grandiose paranoia. Section 15-78-40 states that governmental agencies are "liable for their torts in the same manner and to the same extent as private individuals under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40. Thus, a police officer is liable for his negligent acts just as a private individual would be. Historically, the common law has imposed no duty on a person to act. *Rayfield v. South Carolina Department of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 913 (Ct. App. 1988). An individual "usually incurs no liability for failure to take steps to benefit others or to protect them from harm not created by his own wrongful act." *Id. citing Sharpe v. South Carolina Department of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987) (Bell, J., concurring). "Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002). In immunizing the police for failure to provide police protection via Section 15-78-

60(6), the Legislature simply afforded police officers the same protection the general public has always enjoyed under the common law. A police officer has no duty to protect any one individual. *See, Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590, 592 (1997) ("police owe a duty to the public at large and not to any individual"). More specifically, Blackwelder had no duty to protect Lindler, especially from himself.

The Estate argued at trial and in her opening brief that *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991), set forth the type of voluntary undertaking that creates a duty of care for Blackwelder. This argument is without merit for several reasons. Initially, the facts of the *Russell* case pre-date the institution of the South Carolina Tort Claims Act, and thus, the Act was inapplicable to the case. The Estate argues that the *Russell* suit was filed after the Tort Claims Act, and thus it applied. However, Section 15-78-20(a) notes that the legislature intended to provide for liability of governmental agencies only from July 1, 1986 forward. Section 15-78-180 further supports this position. The Supreme Court, in fact, clarified the effective date of July 1, 1986 was for the date of the incident and not the date on which the complaint was filed. *See, Brabham v. City of Columbia*, 293 S.C. 266, 360 S.E.2d 144 (1987). Therefore, the Tort Claims Act and its exceptions to the waiver of sovereign immunity were inapplicable to the *Russell*

facts, which explains why Tort Claims Act defenses were not addressed by the Supreme Court in that case.<sup>1</sup>

Moreover, the Estate's argument of a voluntary undertaking fails as a matter of law. The *Russell* Court analyzed the Restatement of Torts 2d, Section 324, which states:

One who being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the other to exercise reasonable care to secure the safety of the other while within the act as charged, or

(b) the actors discontinuing his aid or protection if by doing so he leaves the other in a worse position than when the actor took charge of him.

*Russell*, 406 S.E.2d at 340. The Estate's claim does not meet the parameters of the voluntary undertaking doctrine for several reasons. First, there is no credible claim that Blackwelder ever "took charge" of Lindler. Second, Blackwelder testified he did not know that Lindler was impaired or "helpless adequately to aid or protect himself" as the doctrine envisions. Third, Lindler was not injured "while within the act as

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<sup>1</sup> Further, even if the Tort Claims Act and its defenses had been available to the City of Columbia in *Russell*, it is axiomatic that an appellate court's silence on an issue does not mean the issue does not exist or is not meritorious. As Chief Judge Alex Sanders so aptly stated, "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811, 817 (Ct. App. 1991). If Section 15-78-60(6) was not raised or argued, one should not expect it to be addressed in an appellate decision.

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. (Supp. R. 1-2). Further, Dr. Kirkham testified that Blackwelder did not prevent anyone, namely a "kind-hearted stranger," from rendering aid to Lindler. (R. 98). The voluntary undertaking argument, even were it not barred by Section 15-78-60(6), still fails.<sup>2</sup>

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

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<sup>2</sup> 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*.

Blackwelder knew he was impaired, Blackwelder ensured Lindler was not impaired by using his skills, training and techniques to assess his impairment. He ensured Lindler knew to stay out of the road and behind the white line. Dr. Kirkham set forth various other methods of protection that were either impractical or unreasonable; however, the failure to use those other methods of protection is precisely the conduct for which Section 15-78-60(6) was intended.

Moreover, the Estate's reliance on *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010), is misplaced. In *Edwards*, the plaintiff was assaulted by a detainee, her former paramour, during his bond revocation hearing. Without question, the assailant was in custody of the Sheriff's Department. The *Edwards* Court found that, based upon the "unique facts" of the case, the Sheriff's Department owed Edwards a duty of care.<sup>3</sup> Those unique facts include the state actor's prior knowledge of threats made by the assailant against Edwards, the state actor's knowledge that she was reluctant to attend the bond revocation hearing, and the state actor's insistence that she attend the hearing to testify.

In the instant case, Blackwelder inarguably had no knowledge of Lindler prior to arriving at the scene. Lindler was never in custody and certainly not a detainee as

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<sup>3</sup> The Supreme Court has stressed that its holding in *Edwards* resulted from the unique facts of that particular case. *See, Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). Thus, the appellate courts should be careful when relying upon the precedential value of its holding.

was the case in *Edwards*. Where the *Edwards* Court found the Sheriff's Department created a risk of harm to the victim, the risk of harm to Lindler, specifically being struck by a vehicle, existed before Blackwelder arrived and was lessened by Blackwelder assisting Lindler in getting out of the roadway.<sup>4</sup> Yet most importantly, the Supreme Court did not address the application of Section § 15-78-60(6) in the *Edwards* opinion. Without question, the Court's silence on a defense that was not raised cannot be construed as a rejection of that defense, which is precisely what the Estate is suggesting.<sup>5</sup>

Finally, the Estate's opening brief sets forth a statutory construction argument based upon Texas case law that was not raised before the lower court. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. South Carolina. Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 779–80 (2004). The Estate argues that Section 15-78-60(6) is "designed to avoid judicial review of the policy decision involving how much police or fire protection to provide a community" and cites to a Texas Supreme Court

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<sup>4</sup> Even in the unique facts of *Edwards*, the Supreme Court noted the defendants "were not under a duty to guarantee [her] safety with absolute certainty." *Edwards* at 294. Lindler walked into the roadway forty four minutes after Blackwelder left the scene, and he gave no indication he would take such an unpredictable action during their thirteen minute interaction. Only an absolute duty to protect could have prevented the harm to Lindler. The law of this state does not impose such an absolute duty.

<sup>5</sup> See, Footnote #1, *infra*.

case to support that position. This argument was not made before or ruled upon by Judge Lee and should be disregarded by this Court.

However, the Estate's argument is also incorrect. Several key rules of statutory construction make that clear. The Estate did not address these rules in its brief. First, it is well settled that provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." *See*, S.C. Code Ann. § 15-78-20(f). This rule of statutory construction was expressly adopted by the General Assembly and has likewise been applied by the appellate courts in construing the Tort Claims Act. *See, Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 540 (2002) ("[p]rovisions establishing limitations on liability must be liberally construed in the State's favor"). *See also, Baker v. Sanders*, 301 S.C. 170, 391 S.E.2d 229 (1990); *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).<sup>6</sup> Therefore, to the extent there is any ambiguity or the potential for construing the scope of Section 15-78-60(6) in inconsistent ways, the construction that favors limiting the liability of the State must control.

Second, it is also well settled that statutes "should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or

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<sup>6</sup> This rule of construction is also in accord with the well established principle that any law in derogation of the common law must be strictly construed. *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989). There is no question that the Tort Claims Act, which is a waiver of sovereign immunity in certain particulars, is in derogation of the common law.

superfluous." *Abraham v. Palmetto Unified School District No. 1*, 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), citing *Matter of Decker*, 322 S.C. 215, 471 S.E.2d 462, 463 (1995). Similarly, the United States Supreme Court has described the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kengys v. United States*, 485 U.S. 759, 778 (1988). Here, the Estate contends Section 15-78-60(6) should be construed as providing immunity for formulating policy but not for the negligence of officers in carrying out the policy. See, Estate's Appellant's Brief, p. 10. However, "policy formulation" or the "adoption" of policies is already an immune function as a result of Section 15-78-60(4). Thus, if Section 15-78-60(6) also applies to the formulation of policy, then it is rendered superfluous and redundant. There would be two sections that have the same purpose and effect. However, as this Court, the State Supreme Court and the United States Supreme Court have made abundantly clear, no statute should be construed so as to render a provision superfluous or redundant. Consequently, given Section 15-78-60(4) and the immunity already provided for policy formulation, Section 15-78-60(6) must be construed to include something more within its scope.<sup>7</sup>

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<sup>7</sup> It is worth noting that the South Carolina Supreme Court has previously declined to recognize a distinction between planning activities and operational activities in construing

Clearly, Section 15-78-60(6) does not provide "blanket immunity" for all law enforcement conduct, as the Estate seems to suggest is the ultimate result of Judge Lee's ruling.<sup>8</sup> Section 15-78-60(6), nonetheless, was not intended by the General Assembly to apply to policy formulation for the reasons stated. Certainly, the applicability of Section 15-78-60(6) to the facts of this case cannot be reasonably challenged. The Court, in fact, does not need to necessarily address what the "method of providing police protection" encompasses.<sup>9</sup> Here, the Estate brought a "failure to protect" claim alleging that Blackwelder failed to take the appropriate action to protect Lindler from harm. There should be no question that Section 15-78-60(6) applies in this context. When the General Assembly adopted an immunity provision for the "failure to provide police protection," it is precisely this type of scenario for

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another provision of the Tort Claims Act, specifically Section 15-78-60(5) which provides for discretionary immunity. In *Clark v. South Carolina Department of Public Safety*, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002), this Court ruled that operational conduct -- as opposed to planning activities -- "is not the type of discretionary act contemplated in the Tort Claims Act." 578 S.E.2d at 23. However, on certiorari, the Supreme Court declined to recognize any distinction between planning and operational activities in evaluating a party's entitlement to discretionary immunity. *Clark v. South Carolina Department of Public Safety*, 362 S.C. 377, 608 S.E.2d 573, 579, n.3 (2005).

<sup>8</sup> Ironically, the Estate makes the "Chicken Little" argument that Judge Lee's ruling equates to immunity for all law enforcement activity. However, the Estate itself cites to numerous South Carolina cases where Section 15-78-60(6) immunity has not been asserted and/or cited to provide immunity to law enforcement in various scenarios.

<sup>9</sup> See, *Huggins v. Metts*, 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006). In *Huggins*, this Court affirmed summary judgment for the Lexington County Sheriff based upon Section 15-78-60(6) in a case where a suspect was shot by law enforcement. This Court explained that the Tort Claims Act "specifically exempts the Police from liability concerning the methods which they choose to utilize to provide police protection." 640 S.E.2d at 467.

which Section 15-78-60(6) was intended to afford absolutely immunity. The directed verdict based on Section 15-78-60(6) immunity should therefore be affirmed.

**II. The Circuit Court correctly ruled that S.C. Code Ann. § 15-78-60(4) barred the Estate's claims for alleged violations of policy by the Highway Patrol.**

The Estate also contends that Judge Lee erred in applying Section 15-78-60(4) to grant sovereign immunity to the Highway Patrol. Section 15-78-60(4) precludes liability for a governmental agency for the "[a]doption, 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." S.C. Code Ann. § 15-78-60(4).

DPS Policy 300.14, section XI, states, in relevant part as follows:

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...

C. Officers shall ensure the protection of stranded persons on the highway by directing them away from traffic...

D. At the request of any stranded or disabled motorist, the officer will ensure the motorist does not remain in a hazardous location or environment, even if it means transporting the motorist to a suitable public location.

(R. 325-332). Frankly, the language of the policy demonstrates that immunity under Section 15-78-60(4) is unnecessary because the policy was not violated in any respect. Clearly from the video, Blackwelder stopped and assisted Lindler, a disabled motorist, satisfying subsection B, and he directed Lindler away from traffic several times thereby satisfying subsection C. Subsection D is also satisfied because Blackwelder did, in fact, remove Lindler from the hazardous location by getting his vehicle out of the roadway and onto the shoulder of the road. Most importantly, the Estate simply disregards the clause "at the request of any stranded or disabled motorist" in asserting that subsection D was violated. There is no credible argument that Lindler requested to be transported to another location. To the contrary, Lindler advised Blackwelder that he was not impaired and that he had help on the way. Any argument that DPS Policy 300.14 was violated requires the Court to ignore the facts as presented in the video and the very language of the policy itself. *See, Scott v. Harris*, 550 U.S. 372 (2007) (a court should view the facts in the light depicted by a videotape).

Although the policy was not violated, Judge Lee did not err in finding immunity for the Highway Patrol in the event the Estate's claim was based upon a failure to enforce a policy. In the leading case of *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993), the Supreme Court explained that "[t]he provisions of Section 15-78-60(4) are clear and unambiguous on their face, and are not subject to judicial

interpretation. The statute clearly exempts from liability any loss resulting from the failure to enforce an ordinance." 439 S.E.2d at 824. The same is true with respect to an internal policy.

Moreover, as a new issue or argument raised for the first time on appeal and never considered in the court below,<sup>10</sup> the Estate now argues that the case of *Clark v. South Carolina Department of Public Safety*, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002), precludes a governmental agency from claiming absolute policy immunity when a policy "[is] merely a statement of generally accepted law enforcement guidelines." 578 S.E.2d at 23. *Clark* is inapposite here because neither the policy in question nor generally accepted law enforcement guidelines were violated. Furthermore, contrary to the Estate's new argument, the policy is not a simple recitation of the general standard of care of law enforcement.

As indicated, the Estate's claim focuses on how an officer should handle an impaired individual, but the policy at issue addresses assistance for a disabled motorist. DPS Policy 300.14 is not an impaired driver policy. The Estate's entire

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<sup>10</sup> It is well established that a new issue or argument raised for the first time on appeal is not preserved for appellate review. In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), citing *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, and ruled upon by, the trial court." *Id.* (Emphasis in original).

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. (R. 89-90). Kirkham also agreed that if Lindler was not impaired, Blackwelder would have no duty to transport him to another location. (Supp. R. 4).

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.<sup>11</sup>

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<sup>11</sup> 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)." (R. 13). The Estate does not challenge this ruling on appeal.

**III. The Circuit Court correctly ruled that S.C. Code Ann. § 15-78-60(25) was not interpolated to the exceptions to the waiver of sovereign immunity actually pled by the Highway Patrol based upon Supreme Court precedent.**

The Estate also argues that Judge Lee erred in not applying Section 15-78-60(25) so as to interpolate a gross negligence exception to Sections 15-78-60(4) and (6). Applying the precedent established by such Supreme Court cases as *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), and *Steinke v. South Carolina Department of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), Judge Lee recognized that the Highway Patrol never raised Section 15-78-60(25) immunity in either its answer or in its directed verdict arguments. On that basis, she correctly ruled that Section 15-78-60(25)'s "gross negligence standard would not be interpolated into Defendant's other immunity defenses." (R. 16).

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.

The *Jones* case, in particular, demonstrates that Judge Lee ruled correctly. In that case, the estate of an arrestee, who was shot and killed by deputy sheriffs as he tried to escape, brought a wrongful death and survival action against a county sheriff. The sheriff was granted a directed verdict based in part on Section 15-78-60(6) immunity. The plaintiff then made the same argument as the Estate does in the present case. The plaintiff argued that "the gross negligence standard of section 15-78-60(25) applies to all claims of immunity raised by Respondent, including sections 15-78-60(6) and (21)." *Jones*, 692 S.E.2d at 904. The Supreme Court rejected that argument and affirmed the directed verdict with the following analysis:

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 either section 15-78-60(6) or (21).

*Id.* The Supreme Court then reiterated that Section 15-78-60(21) was not subject to a gross negligence exception "because Respondent did not plead a section containing a gross negligence standard." 692 S.E.2d at 905.

The same is obviously true in the present case. The Highway Patrol asserted immunity under Sections 15-78-60(4) and (6) and never pled nor relied on any immunity provision within Section 15-78-60 containing a gross negligence exception.

The Estate obviously recognizes that *Jones* is controlling on this issue. As a result, for the first time on appeal,<sup>12</sup> the Estate now attempts to discount *Jones* as mere "dictum." The critical language in *Jones* is cited above. That is not dictum; that is the Supreme Court affirming the immunity defenses based on Sections 15-78-60(6) and (21).

Moreover, as an additional argument also made for the first time on appeal, the Estate urges this Court to disregard *Jones*, which is the latest and the dispositive appellate decision on the issue, in favor of cases that the Estate admits are inconsistent with *Jones*. The Estate asks this Court to apply the decision in *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013), where this Court simply overlooked the Supreme Court's decision in *Jones*. Clearly, a decision of this Court does not take precedence over a Supreme Court

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<sup>12</sup> See, Footnote #10, *infra*.

decision. *See*, S.C. Const. art. V, § 9 ("[t]he decisions of the Supreme Court shall bind the Court of Appeals as precedents"); *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611, 618 (Ct. App. 2012) (recognizing the Court of Appeals is bound by the decisions of the Supreme Court). In *Chakrabarti*, this Court erred in relying on Section 15-78-60(12) even though that immunity section was never pled or asserted by the defendant. That ruling was directly at odds with *Jones*.

Likewise, the Estate's reliance on *Plyler v. Burns* 373 S.C. 637, 647 S.E.2d 188 (2007), is misplaced. *Plyler* is not the latest decision from the Supreme Court on the issue, and frankly, in *Plyler*, the Court overlooked the pertinent language from the *Steinke* decision stating 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." *Steinke*, 520 S.E.2d at 154.<sup>13</sup>

Therefore, what controls are the immunity sections that the defendant *asserts* and not the immunity sections that the plaintiff wishes would be asserted.<sup>14</sup> As the Supreme Court made clear in *Jones*, "[w]hen a governmental entity *asserts*

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<sup>13</sup> The Estate never cited to the *Chakrabarti* and *Plyler* cases in the lower court. Consequently, Judge Lee never had the opportunity to rule on the applicability – or lack thereof – of those cases.

<sup>14</sup> *See, Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916 (1988) ("Immunity is an affirmative defense which must be pleaded and can be waived").

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*, 692 S.E.2d at 904. (Emphasis added). The Supreme Court in *Steinke* and *Jones* has thus recognized that the defendant controls its defense and cannot be made to assert affirmative defenses it chooses not to assert.<sup>15</sup>

The Estate's reliance on gross negligence and Section 15-78-60(25) is misplaced for additional reasons. Quite simply, the Estate has not shown that Section 15-78-60(25) has any applicability to the facts of this case – even assuming that the Estate could compel the Highway Patrol to involuntarily assert that immunity defense. Section 15-78-60(25) provides immunity for a loss 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." *See*, S.C. Code Ann. § 15-78-60(25). The evidence reflects, however, that Lindler was not a student, patient, prisoner, inmate or client of the Highway Patrol. Likewise, Lindler was not in the custody or control of Blackwelder at any point.

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<sup>15</sup> In *Jones*, unlike the case at bar, the applicability of Section 15-78-60(25) as a potential defense was clear. The decedent in *Jones* had been arrested and was clearly in custody. The Supreme Court, however, did not compel the defendant to assert Section 15-78-60(25) as an affirmative defense but rather left it to the defendant to decide what defenses he chose to assert. Thus, *Jones* clearly illustrates that the Estate's concerns about "creative pleading" have no merit.

This is further demonstrated by reference to the unappealed order entered January 17, 2017, in the federal companion case of *Shelley v. Blackwelder*, Civil Action Number 3:15-4989-JFA, where United States District Judge Joseph F. Anderson, Jr. granted summary judgment on Shelley's federal substantive due process claim.<sup>16</sup> That "failure to protect" claim required proof that Blackwelder created a "special relationship" with Lindler which arises when the State takes a person into custody. Judge Anderson explained that "Plaintiffs assert that Blackwelder limited Lindler's freedom during their roadside interaction and therefore created a special relationship." *Shelley*, at page 7 of 11. Judge Anderson then concluded as follows:

Blackwelder's deposition testimony indicates that Lindler may have been placed into custody had he attempted to drive off at that very moment. However, Lindler did not attempt to drive off and therefore Blackwelder never made any attempt to restrain Lindler. Additionally, Blackwelder also stated that Lindler was not under arrest and free to leave at any time. Moreover, Plaintiffs' expert, Dr. George Kirkham, opined that Lindler was never in custody, either actual or constructive. The video evidence clearly shows that Lindler was never under arrest, confined, or held against his will. Despite Blackwelder's "knowledge of his predicament," Lindler was never confined and therefore an affirmative duty was never triggered.

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<sup>16</sup> See, Order filed January 17, 2017, *Shelley v. Blackwelder*, Civil Action Number 3:15-4989-JFA (can be found on PACER at <https://ecf.scd.uscourts.gov/doc1/16318951571>). See, *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records").

*Id.* Consequently, a judicial determination has already been made that Lindler was not in the custody, control or confinement of Blackwelder. The elements for issue preclusion or collateral estoppel are (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Argoe v. Three Rivers Behavioral Health, LLC*, 392 S.C. 462, 710 S.E.2d 67, 72 (2011). Each of those elements has been demonstrated here. The Estate is therefore barred from relitigating or now claiming on appeal that Lindler was in the custody, control or confinement of Blackwelder. Accordingly, on this additional basis, Section 15-78-60(25) has no applicability.<sup>17</sup>

In sum, the Highway Patrol never pled nor relied on any immunity provision within Section 15-78-60 containing a gross negligence exception. As a result, Judge Lee correctly ruled that the immunity defenses based on Sections 15-78-60(4) and (6) are not subject to a gross negligence exception. The Estate's arguments to the contrary should be rejected.

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<sup>17</sup> In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* See also, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

**IV. As an additional sustaining ground, no reasonable juror could find the Highway Patrol's gross negligence outweighed the negligence of the decedent and the directed verdict may also be affirmed pursuant to the doctrine of comparative negligence as well as public policy.**

At the direct verdict stages, the Highway Patrol also argued that the Estate's claims are barred by comparative negligence and public policy as a matter of law. Judge Lee did not grant a directed verdict on that basis, but the issue is presented on appeal as an additional sustaining ground.

In *Bloom v. Ravoir*, 339 S.C. 417, 529 S.E.2d 710 (2000), the Supreme Court explained that a circuit court may find a plaintiff's claim is barred as a matter of law "if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." 529 S.E.2d at 713. The *Bloom* Court ruled that the evidence in that case, even when viewed in a light favorable to the plaintiff, demonstrated that the plaintiff was more than fifty percent negligent.

The *Bloom* Court also reaffirmed the decision of this Court in *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996). In *Hopson*, this Court affirmed the trial court's grant of a directed verdict where the evidence demonstrated that the plaintiff's negligence was greater than any potential negligence of the defendant. Similarly, this Court in *Bass v. Gopal, Inc.*, 384 S.C. 38, 680 S.E.2d 917 (Ct. App. 2009), concluded as a matter of law that the

plaintiff's negligence claim was barred because the only reasonable inference to be drawn from the evidence was that the plaintiff's actions in leaving his hotel room and confronting his assailant exceeded the defendant innkeeper's possible negligence.<sup>18</sup>

Like the *Bloom*, *Hopson* and *Bass* cases, the present case is also most appropriate for a judicial determination as a matter of law that the plaintiff's degree of fault exceeds fifty percent. In addition, the public policy that the South Carolina Supreme Court has adopted and applied in cases brought by intoxicated persons further supports the affirmance of the directed verdict granted in this case.

At directed verdict, the Highway Patrol discussed the case of *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), as establishing a bar on liability in this case. In *Lydia*, the plaintiff, who was intoxicated, borrowed a vehicle and then drove the vehicle in an intoxicated state which resulted in a single-car accident that rendered the plaintiff a quadriplegic. The plaintiff then brought a negligent entrustment claim against the owner of the vehicle. The Supreme Court, however, ruled that the plaintiff "cannot recover on a first party negligent entrustment cause of action for two reasons: (1) South Carolina's modified comparative negligence scheme would bar recovery for this type of claim, and (2) public policy

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<sup>18</sup> In *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011), the Supreme Court affirmed this Court on different grounds. The Supreme Court did not reach or comment on the comparative negligence defense. Justice Pleicones, however, concurred by concluding "that the Court of Appeals correctly affirmed the grant of summary judgment on the comparative negligence ground." 716 S.E.2d at 917.

considerations addressed by this Court in *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998)." 583 S.E.2d at 752. With respect to the comparative negligence defense, the *Lydia* Court explained that "[w]e cannot imagine how one could be more than fifty percent negligent in loaning his car to an intoxicated adult who subsequently injured himself." *Id.* The Supreme Court thus affirmed the dismissal of the negligent entrustment claim on that basis.

In addition, the *Lydia* Court cited the case of *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), where the Court had held that South Carolina does not recognize a "first party" claim against a tavern owner by an intoxicated adult. In *Tobias*, as also quoted in *Lydia*, the Supreme Court stated that "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Tobias*, 504 S.E.2d at 320. The Supreme Court in *Lydia* further observed as follows:

The essence of this case and the *Tobias* case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another. Just as this plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor.

*Lydia*, 583 S.E.2d at 754.

In the present case, as was the scenario in *Lydia* and *Tobias*, the Estate is

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. (Supp. R. 6-7). 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. (R. 284-285).

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

facts of this case, compel the same result here. If a tavern owner and an entrustor of a vehicle are not liable to an intoxicated person for their discretionary conduct, then a law enforcement officer should enjoy the same protection under the law. In fact, such a ruling is mandated by Section 15-78-40 of the Tort Claims Act, which requires that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances." S.C. Code Ann. § 15-78-40. The directed verdict for the Highway Patrol should, therefore, be affirmed on this additional basis.

**CONCLUSION**

Based on the foregoing discussion and analysis, the Respondent-Appellant South Carolina Highway Patrol respectfully requests that this Court affirm the directed verdict granted by Circuit Court Judge Alison Renee Lee and the dismissal of this action with prejudice.

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Respectfully submitted,

OCT 31 2017

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**CERTIFICATE OF COUNSEL**

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

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**CERTIFICATE OF COMPLIANCE**

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The undersigned counsel for the Respondent-Appellant South Carolina Highway Patrol certifies that the Final Respondent'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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