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.

REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENTS

I. This Court correctly denied the Appellant-Respondent's motion to dismiss because the cross-appeal is appropriately before this Court.

The Appellant-Respondent Rene Shelley, as the Personal Representative of the Estate of Michael Mann Lindler, (hereafter referred to as "Estate") argues the Respondent-Appellant South Carolina Highway Patrol ("SCHP") is not an "aggrieved party," and therefore, the cross-appeal before this Court should be dismissed. By Order filed June 7, 2017, this Court previously considered and rejected this very argument pursuant to the Estate's motion to dismiss the cross-appeal. The Court did not grant leave to re-argue that issue in the briefs, but the Estate is attempting to do so. Nonetheless, to the extent that the Court chooses to consider the appealability issue once again, the SCHP would refer to and rely upon the arguments made in their Return to Appellant-Respondent's Motion to Dismiss Cross-Appeal.

Of note, the Estate readily agrees that the SCHP may raise the error of Circuit Court Judge Alison Lee's ruling on discretionary immunity, but it may do so *only* as an additional sustaining ground rather than by cross-appeal. While that is not necessarily correct for the reasons that the SCHP has previously argued, the issue of discretionary immunity is fully briefed and should be considered by this Court in the

event that the Court does not affirm the directed verdict on the other immunity defenses. Suffice it to say, the decision by Judge Lee on discretionary immunity was adverse to the SCHP. The SCHP was aggrieved by that ruling because it was in error. Consequently, the SCHP should be permitted to obtain appellate review in the event this Court finds error with respect to the two grounds on which the directed verdict was granted.[1]

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

The Estate concedes in her response brief that evidence exists to show Trooper Blackwelder made a conscious decision while using accepted professional standards. The Estate's concession here is not surprising, as arguing otherwise

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[1] There is also an important distinction between an issue raised as an additional sustaining ground vis-a-vis one raised by a direct appeal -- which should give a party who receives an adverse ruling the ability to raise the issue by direct appeal if it chooses. The consideration of an additional sustaining ground is discretionary with the appellate court while a ground raised by a direct appeal is not discretionary. The Supreme Court has stated that "[i]t is within the appellate court's discretion whether to address any additional sustaining grounds." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 723 (2000). The Supreme Court has further explained that "[t]he 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.* Thus, if an adverse ruling is only presented as an additional sustaining ground, as the Estate suggests is the only proper approach, there is no requirement for the appellate court to even consider it. However, when raised as a ground for appeal, the issue must be addressed unless the appellate court finds the issue to be "manifestly without merit," Rule 220(b)(2), SCACR, or the appellate court determines the it does not need to reach remaining issues on appeal when disposition of prior issues are dispositive. *See, Futch v. McAlister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591, 598 (1999).

would require the Estate to discount the opinions of its own expert, George Kirkham. Judge Lee agreed that Blackwelder made a conscious determination that Lindler was not impaired and that the accident to which Blackwelder responded was a higher priority. However, despite the explicit testimony of Blackwelder and agreement between law enforcement experts Kirkham and Brian Batterton, Judge Lee ruled that a question of fact remained for the jury to determine whether Blackwelder actually weighed the competing alternatives before making a decision.

Judge Lee's ruling is in error. If the standard that Judge Lee applied to this matter was appropriate, the defense of discretionary immunity, despite its historical significance, would be nullified entirely. Initially, there can be no question that Blackwelder considered whether Lindler was impaired and decided he was not. The fact that Blackwelder assessed Lindler by asking him questions, observing his behavior and utilizing a sobriety test is evidence he exercised judgment and determined Lindler was not impaired. Moreover, Blackwelder offered uncontested testimony that he, in fact, weighed competing alternatives before leaving Lindler and responding to another accident at a different location. No testimony was elicited to the contrary.[2]

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[2] In its opening brief, the SCHP wrote: "[D]uring 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

Not surprisingly, the Estate's response brief argues instead that Blackwelder was wrong in determining Lindler was not impaired. Again, for purposes of the discretionary immunity analysis, this position should be assumed by the reviewing court. *See*, *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916 (Ct. App. 1988) ("[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability"). A governmental defendant need not assert immunity for making correct decisions; the defense affords a state actor immunity from liability when the incorrect decision is made but the state actor utilized generally accepted professional techniques in weighing the competing alternatives before making the decision. Judge Lee correctly challenged the Estate's trial counsel during argument in warning that the Estate was bypassing altogether the issue of discretion and noting that "the exercise of discretion is determining that he is impaired." (R. 150-151). Trial counsel continued to argue, as does appellate counsel now, that no reasonable officer could determine Lindler was not impaired. Their mistake is they challenge the conclusion Blackwelder made as opposed to the process he took in making the decision. In their response brief, the Estate notes "Dr. Kirkham was highly critical

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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. 266-267). *See*, SCHP's Appellant's Brief, pp. 12-13. In its response brief, the Estate did not refute this and show any evidence that was pointed out to Judge Lee during the colloquy on the directed verdict motions to show that Blackwelder's actual weighing of options was in dispute *at trial*.

of the patrolman's ***decision*** to leave." *See*, Estate's Respondent's Brief, p. 9. (Emphasis added). However, the Estate does, and must, concede that Blackwelder utilized generally accepted techniques (i.e., interaction, observation, questioning, testing), which was captured on the dash-cam video, in making his determination Lindler was not impaired. Most critically, discretionary immunity protects incorrect decisions when the appropriate processes are undertaken.[3]

The Estate also makes a flawed *res ipsa loquitor* argument: the fact that Blackwelder determined he could leave the scene is evidence that Blackwelder must not have weighed competing alternatives "because no reasonable officer would have left Lindler and his passenger on the interstate." *See*, Estate's Respondent's Brief, p. 12. This is not the law, nor is there precedent for this analysis. It is well settled that South Carolina does not recognize the doctrine of *res ipsa loquitur*. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797, 803, n.7 (Ct. App. 1991). "South Carolina's rejection of *res ipsa loquitur* is consistent with its general adherence to fault based liability in tort." *Id.* The medical malpractice case of *Fletcher v. Medical University of South Carolina*, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010), is instructive on this point. In affirming a

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[3] The Estate argues that "[t]he right to be wrong does not include the right to be reckless." *See*, Estate's Respondent's Brief, p. 12. Through this argument, the Estate concedes the SCHP has the right to be wrong, but seemingly argues that gross negligence or "recklessness" is an exception to discretionary immunity. However, S.C. Code Ann. § 15-78-60(5) does not include a gross negligence exception nor was any exception containing a gross negligence exception raised by the SCHP in its pleadings or at trial.

directed verdict, this Court held in *Fletcher* that the plaintiff was responsible for showing how the physician deviated from the standard of care, and that the occurrence of a complication is not evidence of negligence. This Court relied on the fact that South Carolina law does not recognize *res ipsa loquitur*. 702 S.E.2d at 374.

Similarly, in the case at bar, Blackwelder's decision to leave and respond to another accident scene is not evidence that he failed to weigh the competing considerations. Indeed, it is an argument that not only violates the doctrine of *res ipsa loquitur* but also ignores the undisputed evidence. All of the experts agreed and the dash-cam video shows that Blackwelder utilized several accepted police tactics to assess Lindler's condition. Blackwelder's testimony that he constantly evaluated whether Lindler was impaired and made the decision that Lindler was not impaired has not been challenged. The only challenge the Estate makes is that his conclusion was wrong. This is an insufficient basis to overcome discretionary immunity. As indicated, the SCHP established through testimony that Blackwelder utilized generally accepted police techniques in evaluating Lindler's condition and made the ultimate determination that he was not impaired. That alone entitles the SCHP to discretionary immunity.[4]

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[4] Frankly, the competing alternatives to this issue is simple: was Lindler impaired or not? It is not credible to challenge, nor is it a jury question, whether Blackwelder actually weighed the competing alternatives. His actions of assessing impairment, as captured on the

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. (Supp. R. 3-5, R. 100).[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]

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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

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant South Carolina Highway Patrol respectfully renews its request 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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had 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. There are two problems with the Estate's reliance on that argument. First, on certiorari, despite affirming this Court, the Supreme Court expressly 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). Second, this issue was never raised in the court below and cannot now be raised for the first time on appeal.

CERTIFICATE OF COUNSEL

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