STATE OF SOUTH CAROLINA
In the Supreme Court

Ronald E. Clark, Sr., individually and as Personal Representative of the Estate of Amy Danielle Clark,

Respondent,

v.

South Carolina Department of Public Safety and Charles Clyde Johnson,

Defendants,

Of whom South Carolina Department of Public Safety is the

Petitioner,

and

South Carolina Department of Natural Resources, South Carolina Law Enforcement Officer's Assoc., South Carolina Sheriff's Assoc., and South Carolina Troopers Assoc.,

Amicus Curiae

On Writ of Certiorari
To the Court of Appeals

CA No. 1998-CP-46-01460

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STATEMENT OF THE CASE

The Amici Curiae were granted permission to file this brief and adopt both the facts and the statement of the case set forth in the Appellant's brief.

ARGUMENT

I. **THE IMPLICATION OF THE CLARK DECISION APPEARS TO BE THAT AN OFFICER ENGAGED IN A HIGH SPEED PURSUIT MUST END HIS PURSUIT WHEN IT BECOMES APPARENT THAT THE CRIMINAL SUSPECT IS DOING EVERYTHING POSSIBLE TO AVOID ARREST. THE APPLICATION OF THIS STANDARD WOULD HAVE PROFOUND NEGATIVE EFFECTS ON THE LAW ENFORCEMENT AGENCIES OF THIS STATE. THE CORRECT STANDARD FOR OFFICERS ENGAGED IN HIGH SPEED PURSUITS SHOULD BE A BALANCING TEST WEIGHING THE NEED TO APPREHEND THE SUBJECT AGAINST THE DANGER TO THE PUBLIC ARISING FROM THE PURSUIT.**

In the instant case the Court of Appeals quoted with apparent approval the opinion of the plaintiff's expert Samuel Killman. Killman testified in essence that "once it became apparent that the subject would do anything to escape, the pursuit should have been terminated." *See* Clark v. South Carolina Dept. of Public Safety, Op. No. 3565 (S.C.Ct.App. filed Nov. 12, 2002).

It is not the purpose of this brief to argue whether the pursuit in this case should have been terminated but to urge the Court to make clear that not all pursuits must terminate once there is a threat to public safety. Such a rule would seriously impair the ability of South Carolina's law enforcement agencies to effectively combat crime in our state.

An officer must always balance the danger of a pursuit against the danger to the public in allowing a fleeing suspect to remain at large. In addition, as stated below, there are strong public policy reasons against a "no hot pursuit rule."

In the instant case, the subject involved in the pursuit tried to run over a police officer. At a minimum, this would constitute a felonious assault and indicate that allowing such a subject to remain at large would endanger the public. Indeed, this subject pled guilty to assault with intent to kill a police officer. In light of these facts, as well as the different dangerous circumstances which law enforcement officers must confront every day in their

efforts to combat crime, the amici urge the Court to announce that a balancing must take place in pursuit situations.

The implication of the ruling in Clark is that an officer must now abandon a pursuit as soon as a danger to public safety presents itself. To allow such a "no pursuit rule" to stand would impair law enforcement activities and ultimately prove self defeating to its purpose of protecting public safety. Thus, the ruling must be clarified to state that not all pursuits must end whenever a danger to the public might result.

Indeed the defendants' own expert recognized the danger of a "no pursuit rule" during his testimony. (R.p. 225, lines 5-11 and R. p. 244, line 21 - R. p. 245, line 5.) There is strong authority for the position that police officers must conduct a balancing test in high speed pursuits. Such a balancing test weighs the danger of the pursuit against the danger to the public in allowing the subject to remain at large. The best discussion of the need for a balancing test is set forth in City of Pinellas Park v. Brown, 604 So.2d 1222, 1227-28 (Fla. 1992), in which the court explained that:

> Deference will be shown to the reasonable decisions of law officers to maintain pursuit of certain offenders who are reasonably thought to be violent or to pose a danger to the public at large. What is required is for police to use reasonable means in light of the nature of the offense and threats to safety involved. For example, a high-speed chase is likely to be justifiable if its object is a gang of armed and violent felons who probably will harm others. As we have stated elsewhere, deference will be shown to police conduct when officers must choose between two different risks that both will adversely affect public safety.

The Brown case goes on to discuss the balancing approach established by an earlier case, Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989), explaining that

> "We agree that the actual execution of a hot-pursuit policy is entitled to a high degree of judicial deference consistent with reason and public safety. Kaisner specifically noted that special deference is given to pressing emergencies, and that certain police actions may involve a level of such urgency as to be considered discretionary and not operational. Kaisner, 543 So.2d at 738 n. 3. However, this does not mean that state agents can escape liability if they

themselves have created or substantially contributed to the emergency through their own negligent acts or failure to adhere to reasonable standards of public safety.

To fall within the Kaisner exception, the serious emergency must be one thrust upon the police by lawbreakers or other external forces, that requires them to choose between different risks posed to the public. In other words, no matter what decision police officers make, someone or some group will be put at risk; and officers thus are left no option but to choose between two different evils. It is this choice between risks that is entitled to the protection of sovereign immunity in appropriate cases, because it involves what essentially is a discretionary act of executive decision-making." Brown, 604 So.2d at 1227.

The same balancing test established in the Florida cases has been explicitly stated by the Supreme Court as the proper means of determining when a high speed chase should begin or terminate.

"A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders." County of Sacramento v. Lewis, 523 U.S. 833, 853 (1998).

Another Florida case describing an officer's duty of care in high speed pursuits explains that:

"The rule governing the conduct of [a] police [officer] in pursuit of an escaping offender is that he must operate his car with due care and, in doing so, he is not responsible for the acts of the offender. Although pursuit may contribute to the reckless driving of the pursued, the officer is not obliged to allow him to escape."

City of Miami v. Horne, 198 So.2d 10, 13 (Fla. 1967); *citing* Wrubel v. State, 174 N.Y.S. 2d 686 (NY Ct. Cl. 1958)

The standard of care in Horne was also described in an Alabama case, Madison v. Weldon, 446 So.2d 21 (Ala. 1984). There, the Alabama court ruled that a jury had received improperly prejudicial jury charges on the standard of care for officers in high speed chases. The court cited with approval the standard set forth above as being the proper standard to

apply in cases involving high speed pursuits.

The Alabama court quoted the New York court's analysis in Wrubel, *supra*, pointing out the absurdity of requiring officers to call off pursuits as soon as a danger to public safety arises.

> "An operator who is speeding, or who is a reckless driver on the highway, would know that all he had to do was to go faster--and under claimants' theory escape would be possible--there would be no chase. A burglar, bank robber or any other felon could threaten to shoot and under claimants' theory escape would be possible and arrest avoided. It is fantastic to further expand claimants' theory--such thinking would place a police officer in the same category as the Marquis of Queensbury in a pier six brawl." Weldon 446 So. 2d at 28; *citing* Wrubel 174 N.Y.S. 2d at 689.

In the face of the realities which law enforcement officials must face every day, the Court of Appeals' proposed modification of the rules governing current pursuit practices presents a remarkably impractical means of balancing the interests and rights at stake. Indeed, the state's interests in effective law enforcement, the apprehension of criminals, the prevention of crime and the protection of members of the general populace must be identified and considered before such a drastic rule may be made. Further, such a question of public policy should remain within the province of the legislative branch and under our constitutional scheme of separation of powers, judicial intervention in the legislative and executive processes should be severely limited.

Finally, the amici urge the Court to address the opinion regarding the discretionary immunity provision of the South Carolina Tort Claims Act. *See* S.C. Code Ann § 15-78-60(5). As the Texas court held in the recent case of Harless v. Niles, 2002 WL 31863229 (Tex.App.-San Antonio filed Dec. 24, 2002) "the decision to pursue a particular suspect will fundamentally involve the officer's discretion, because the officer must, in the first instance, elect whether to undertake pursuit. Beyond the initial decision to engage in the chase, a high

speed pursuit involves the officer's discretion on a number of levels, including, which route should be followed, at what speed, should back- up be called for, and how closely should the fleeing vehicle be pursued." Harless v. Niles, holding that police officers' engaging in a high-speed chase was a discretionary act *and citing* City of Lancaster v. Chambers, 883 S.W.2d 650, 655 (Tex. 1994).

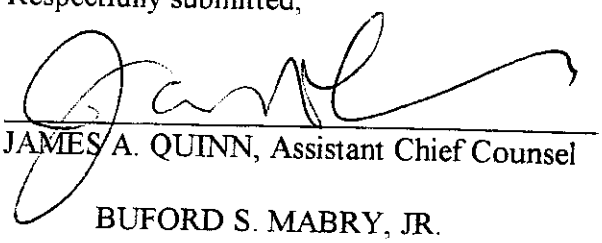
Numerous jurisdictions have agreed. *See e.g.*, Selby v. Cumberland County, 796 A.2d 678 (Me. 2002) decision whether to engage in high-speed chase with driver who failed to stop for traffic violation was discretionary, and thus county sheriff's officer was immune from negligence action brought by passenger of vehicle that failed to stop, despite sheriff's department policy discouraging high-speed pursuits in non-felony cases, as officer's acts did not lose their discretionary character merely because there were policy guidelines delineating how discretion should be exercised; Haynes v. Hamilton County, 883 S.W.2d 606 (Tenn. 1994) in determining whether decision to initiate or continue pursuit is reasonable under statute providing when county may be liable in action brought by third party who is injured by fleeing suspect, the risk of injury to innocent third parties should be weighed against the interest in apprehending suspects; factors relevant to that determination include the speed and area of the pursuit, weather and road conditions, presence or absence of pedestrians and other traffic, alternative methods of apprehension, applicable police regulations, and danger posed to public by suspect being pursued; Pletan v. Gaines, 494 N.W.2d 38, 40-41 (Minn. 1992) "The decision to engage in a car chase and to continue the chase involves the weighing of many factors. How dangerous is the fleeing suspect and how important is it that he be caught? To what extent may the chase be dangerous to other persons because of weather, time of day, road, and traffic conditions? Are there alternatives to a car chase, such as a road block up ahead? These and other questions must be considered by the police officer in deciding whether

or not to engage in a vehicular pursuit. And these questions must be resolved under emergency conditions with little time for reflection and often on the basis of incomplete and confusing information. It is difficult to think of a situation where the exercise of significant, independent judgment and discretion would be more required".

CONCLUSION

The ruling in the instant case needs to be clarified. The case appears to establish a rule against high speed pursuits if they present any danger to the public. The application of such a rule would substantially impair the ability of the State's law enforcement agencies to perform their duties to the public. The amici urge the Court to modify or reverse the ruling in the instant case and announce that a balancing test must be performed in pursuit situations and that such balancing necessarily involves the exercise of significant, independent judgment and discretion.

Respectfully submitted,



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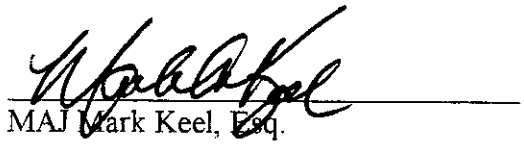

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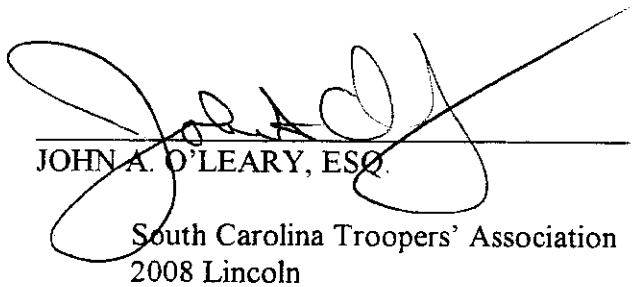

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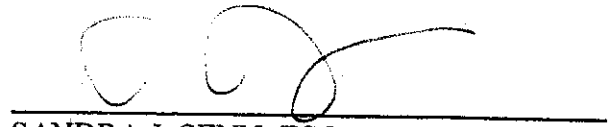

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CERTIFICATE OF COUNSEL

The undersigned certified that this Amici Curiae Brief on Rehearing complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned, Margie W. Rish, does hereby certify that service of the Petition to File Amicus Brief and the Amici Curiae Brief in the above-referenced matter was made by placing same in the United States Mail, first class postage prepaid, on this the 8th day of March, 2004 addressed as follows:

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