THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Op. No. 3565
(S.C. Ct. App. filed November 12, 2002)

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 ..... Petitioner.

REPLY BRIEF OF PETITIONER

Andrew F. Lindemann
William H. Davidson, II
DAVIDSON, MORRISON AND LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ARGUMENTS

I. The South Carolina Court of Appeals erred in ruling that the trial judge acted appropriately in allowing the jury, rather than the court, to establish the legal duty of care owed by law enforcement during a police pursuit.

The Petitioner SCDPS contends that the trial judge erred in failing to provide any guidance to the jury as to the legal duties owed by the SCDPS officers -- both Trooper Bradley who was directly involved in the pursuit and any supervisors. SCDPS is critical of the fact that the trial judge left it to the jury's discretion to establish the legal duties owed by law enforcement during a police pursuit. In reply, the Respondent Clark argues only that the "standard of care" was appropriately charged. Yet, no standard of care was charged. The trial court allowed the jury to arrive at the standard of care or, more precisely, the legal duties owed.

As SCDPS argues, the South Carolina emergency vehicle statute, S.C. Code Ann. § 56-5-760, is limited in the duties it creates with respect to police pursuits. Certainly, there is no mention in the statute as to whether pursuits, or for that matter any other occasion where an emergency vehicle is in operation, must be under some degree of contemporaneous supervision. The absence of such statutory language is certainly suggestive that no such duty of contemporaneous

supervision of the operation of an emergency vehicle exists under South Carolina law.

Interestingly, in addressing this lack of statutory law, Clark suggests that the enactment of S.C. Code Ann. § 15-78-40 has some applicability. However, that is not the case. S.C. Code Ann. § 15-78-40 holds governmental entities "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. That provision is clearly inapplicable in that private individuals have no statutory right to engage in a pursuit of another vehicle or to disregard traffic laws in an attempt to apprehend a fleeing suspect.[1]

In sum, it is indisputably the function of the court to "declare the law." S.C. Const, art. V, § 21. The determination of the legal duties owed is *solely* the responsibility of the court. *See, Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996); *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997). This guiding principle does not appear to be disputed by Clark.[2] Yet, the record clearly reflects that it was the jury --

---

[1] It is also worth noting that S.C. Code Ann. § 15-78-40 was not charged by the trial judge.

[2] Interestingly, on page 12 of his brief, Clark insists that this case "involves TWO sets of duties." (Emphasis in original). However, nowhere is there a reference regarding those two sets of duties in the trial judge's charge. The trial judge never instructed the jury that there were "two sets of duties."

not the trial court -- that established the legal duties owed by the SCDPS officers in this case, and that constitutes reversible error warranting a new trial absolute.

II. The South Carolina Court of Appeals erred in ruling that there was sufficient evidence to demonstrate that Trooper J.N. Bradley acted with gross negligence in initiating and failing to terminate the pursuit.

SCDPS maintains that the trial court erred in failing to direct a verdict and in failing to grant its motion for judgment notwithstanding the judgment on Clark's claims that Trooper Bradley was grossly negligent in his decision to initiate and maintain the pursuit. In response, Clark now maintains that this issue was not properly preserved for appeal. Interestingly, a preservation issue was not raised at the Court of Appeals. Nonetheless, there is no basis for Clark's argument. During the course of oral argument on the directed verdict motion, SCDPS's counsel made the following argument:

> Next, your honor, we believe that there has been no evidence, taken in the light most favorable to the Plaintiff, either of negligence or of gross negligence that would give rise to liability to the Department in regard to the actions of the officers.

(R. 278). Thus, it is clear that an argument was raised as to whether the conduct of the SCDPS's officers, inclusive of Trooper Bradley, was grossly negligent. That issue was obviously raised, argued, and preserved for appellate review.

As to the merits of the issue of Trooper Bradley's conduct, Clark seems to concede that the decision to initiate the pursuit did not constitute gross negligence. Instead, Clark focuses only on the decision not to terminate the pursuit. However, no argument is made that Bradley was so indifferent to the consequence of his conduct as not to give slight care to what he was doing. Likewise, no argument is made that Bradley consciously failed to exercise due care. The record demonstrates that, at a minimum, slight care was exercised, and the evidence and inferences cited by Clark in his brief simply do not negate that indisputable conclusion. In fact, Clark's expert himself terms the decision not to stop to be "just an error in judgment." (R. 237). Clark seems to focus on proving that Trooper Bradley was negligent, but that was not the applicable standard under the law of this case.[3]

In an attempt to create an issue of fact, Clark has resorted to the same mischaracterization of the record employed by the Court of Appeals. Clark argues that Bradley admitted to dispatchers that "a crash was imminent." *See*, Respondent's Brief, p. 11. Yet, as discussed in detail in SCDPS's opening brief, that "admission" by Bradley was in the earliest stage of the pursuit where Johnson took a sharp turn too fast on Mt. Camouth Road (still in the city limits) causing his vehicle to drive off

---

[3] At trial, Clark's counsel agreed that the applicable standard of liability under S.C. Code Ann. § 56-5-760 is gross negligence. (R. 286).

the pavement and almost wreck. No such admission was made after the point that Clark's expert opined that the pursuit should have been terminated.

When the evidence is fairly analyzed from a gross negligence (i.e., slight care) perspective rather than a simple negligence (i.e., due care) perspective, it is clear that Trooper Bradley's conduct did not rise to the level of gross negligence. The jury itself implied no less with the note that accompanied its verdict. Yet, that note aside, a reasonable jury could not conclude that Trooper Bradley failed to exercise at least slight care under the tense and trying circumstances that he encountered, and for that reason, SCDPS was entitled to a directed verdict and JNOV with respect to his conduct.

III. The South Carolina Court of Appeals erred in failing to recognize that the negligent operation of a vehicle and the negligent supervision of that conduct are not independent torts.

In his brief, Clark continues to maintain that there are two legal duties at play in this case -- the duty owed by Trooper Bradley in conducting the pursuit and the duty owed by a supervisor in supervising the pursuit. Clark errs, however, in arguing that the two duties are independent and distinct from each other.. To the contrary, the duty owed by Trooper Bradley in conducting the pursuit and the duty to supervise Bradley's conduct are **not** independent or distinct from each other.

It is well established in tort law that the duty to supervise is a form of derivative or cumulative liability.[4] SCDPS cites in its principal brief numerous cases that hold failure to supervise claims to be derivative in nature.[5] Recognizing that many of those cases are federal decisions, Clark argues that those cases are distinguishable because of Eleventh Amendment immunity, which frankly makes no sense and has no basis. *See*, Respondent's Brief, p. 15. The Eleventh Amendment provides immunity in federal court only for claims against a state or state entity seeking monetary damages payable from a state treasury. Of course, the Eleventh Amendment does not prohibit federal constitutional claims arising from police pursuits that are asserted against local law enforcement entities or even state officers sued in their individual capacities. Thus, the attempt to write off the impact of the federal authority with a causal and misinformed reference to the Eleventh Amendment is ineffective. In truth, the federal authority cited by SCDPS is persuasive and should apply equally to constitutional torts and common law torts.

---

[4] The South Carolina Court of Appeals recognized that negligent supervision is derivative in nature: "Negligent failure to train and supervise as a distinct cause of action was not exclusive of, *but rather was derived from*, the ownership, operation, and use of the patrol car in this case." *McPherson v. Michigan Mutual Insurance Co.*, 306 S.C. 456, 412 S.E.2d 445, 462 (Ct. App. 1991), *aff'd as modified*, 310 S.C. 316, 426 S.E.2d 770 (1993). (Emphasis added).

[5] *See also*, Footnote #6, *infra.*

Likewise, Clark's attempt to distinguish cases such as *McPherson*, *supra*, as being only "an insurance case" is equally meritless. *McPherson* stands for a correct and very applicable proposition of law -- that "negligent supervision cannot exist apart from negligent operation." 426 S.E.2d at 772, n.2, *citing Behrens v. Aetna Life & Casualty*, 153 Ariz. 301, 736 P.2d 385 (Ariz. Ct. App. 1987). That proposition has been repeated in many contexts, including in the context of police pursuits, as evidenced by the federal case law cited by SCDPS in its opening brief.

In short, assuming there exists a legal duty under S.C. Code Ann. § 56-5-760 or some other uncited law for the operation of an emergency vehicle to be contemporaneously supervised, there can be no liability for any alleged shortcomings in the supervision where Trooper Bradley's conduct did not in itself give rise to liability. Both in "general negligence cases" (as described by Clark in his brief) as well as in police pursuit cases, liability for negligent or grossly negligent supervision is wholly derivative in nature. Thus, SCDPS was entitled to judgment as a matter of law on all theories of gross negligence.

IV. The South Carolina Court of Appeals erred in ruling that that Trooper Bradley's conduct was not subject to discretionary immunity and in ruling that discretionary immunity applies only to planning activities and not to operational activities.

A. The Court of Appeals erred in concluding that there were material issues of fact in dispute as to whether Trooper Bradley actually weighed competing considerations in making the decision not to terminate his pursuit.

SCDPS has shown in its opening brief that the parties' experts agreed that Trooper Bradley utilized accepted professional standards and weighed competing considerations in making the decision not to terminate his pursuit prior to the accident. The testimony of Clark's expert, Samuel Killman, cannot be construed any other way. In her brief, in an attempt to create an issue of fact in dispute where one does not exist, Clark points to Killman's opinion that Trooper Bradley "deviated from the standard of care." (R. 236). Yet, in answering the very next question from Clark's counsel seeking the basis for that opinion, Killman not only admits that he was benefiting from hindsight and was "arm chair quarterbacking" (R. 237), but most importantly he closes with the following statement: "So, I don't think it was an intentional violation. *I think it was just an error of judgment.*" (R. 237). (Emphasis added). That cannot be interpreted or spun to mean something different so as to manufacture some disputed issue of fact. To the contrary, Killman's opinion is clear

-- he found that Bradley's failure to terminate was *an error in judgment* meaning that Bradley was indeed exercising judgment, i.e., discretion.

In actuality, this is the classic case for the application of discretionary immunity. This case presents clear evidence that the officer was confronted with a rapidly developing situation, that he was weighing competing considerations in his decision-making process, and that he was applying the professional standards on which he was trained for this very occurrence. Reasonable minds may disagree as to when it might have been appropriate for the pursuit to have been terminated, if at all. However, Trooper Bradley was appropriately exercising discretion, and the General Assembly has provided in S.C. Code Ann. § 15-78-60(5) that SCDPS cannot be held liable for discretionary conduct even where, as a result of hindsight and "arm chair quarterbacking," an expert witness or a jury or a judge may believe that an error in judgment was made. SCDPS was clearly entitled to discretionary immunity for Bradley's conduct.

B. The Court of Appeals erred in creating a distinction between planning activities and operational activities and in ruling that discretionary immunity applies only to planning activities.

In his brief, Clark has conceded that the creation by the Court of Appeals of a distinction between planning activities and operational activities in analyzing a

governmental entity's entitlement to discretionary immunity was only *dicta*. Nonetheless, Clark argues that this distinction is a correct one. Ironically, Clark cites the case of *Jensen v. Anderson County Department of Social Services*, 304 S.C. 195, 403 S.E.2d 615 (1991), in support of his argument. To the contrary, *Jensen*, as SCPDS argues in its opening brief, demonstrates that the General Assembly did not intend to limit discretionary immunity to planning activities. While this Court in *Jensen* did conclude that the duty of DSS to conduct an investigation was a ministerial duty, the manner in which the investigation is conducted is typically regarded as discretionary conduct. This Court specifically pointed out that "the decision to classify a report of abuse as 'unfounded' and close the file is a discretionary act because it involves the application of judgment to the particular facts." 403 S.E.2d at 620. Thus, this Court in *Jensen* did find that the operational activities at issue in that case were nonetheless subject to discretionary immunity.

Ironically, in the recent case of *Brown v. Brown*, Op. No. 3827 (S.C. Ct. App. filed June 21, 2004), the Court of Appeals cited its own decision in *Clark* but then did not apply the distinction announced in *Clark* between planning activities and operational activities. In *Brown*, the Court of Appeals ruled that the Town of Harleyville and specifically its police officer were entitled to discretionary immunity in selecting one of the passengers in the vehicle to assume driving responsibilities. The Court concluded that "Officer McKee's selection of Joseph was a considered,

discretionary judgment" and that the Town was immune from suit under S.C. Code Ann. § 15-78-60(5). Clearly, Officer McKee's conduct would be classified as operational activities (as opposed to planning activities); yet, the Court of Appeals found discretionary immunity to be applicable. If Officer McKee in *Brown* is entitled to discretionary immunity, there can be no disputing the fact that Trooper Bradley and SCDPS are entitled to discretionary immunity. The Court of Appeals erred in holding otherwise and in creating a distinction between planning activities and operational activities which was never intended by the General Assembly.[6]

V. The South Carolina Court of Appeals erred in not granting a new trial absolute where the amount of the verdict was so excessive and so shockingly disproportionate to the damages sustained by the decedent's statutory beneficiaries so as to indicate that the jury acted out of passion, caprice, prejudice or other improper considerations including a desire to punish the Defendants.

The jury returned a verdict of $3.75 million on the wrongful death claim. In response to SCDPS' contention that the evidence did not support a verdict of that

---

[6] Interestingly, the case of *Brown v. Brown*, Op. No. 3827 (S.C. Ct. App. filed June 21, 2004), is also instructive on the issue of derivative liability discussed above. In additional to claiming Officer McKee was negligent in allowing Joseph to drive, the plaintiff in *Brown* also alleged deficiencies in training *and supervision*. The Court of Appeals discounted those derivative claims and emphasized that, having found the officer was immune, the Court also concluded that the Town was immune under S.C. Code Ann. § 15-78-60(5). The Court found no separate or independent liability against the Town for failure to train or supervise.

magnitude, Clark argues only that "[f]or SCDPS to argue that Amy Clark's life was not worth at least $3.75 million is an insult to the value of human life." *See*, Respondent's Brief, p. 22.

Clark, however, clearly misstates the applicable standard for determining damages in a wrongful death case. The "value" of the decedent's life is immaterial. In *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), the Court of Appeals set forth the rule of law as follows:

> In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death.

536 S.E.2d at 421. *See also*, *Zorn v. Crawford*, 252 S.C. 127, 165 S.E.2d 640 (1969). Thus, the "value" of Amy Clark's life is not a proper consideration in evaluating the excessiveness of the jury's verdict.

While improperly focusing on the "value" of Amy Clark's life, Clark fails to provide any recitation of the damages evidence presented to support such a large verdict. Clark does not dispute the fact that no evidence of any economic loss sustained by the beneficiaries was presented. He also does not dispute that the only evidence of damages was his own extremely brief testimony. (R. 149-150). Importantly, Amy's mother did not testify, and there were no other damages witnesses. Consequently, the jury was simply not presented sufficient evidence to

support a $3.75 million verdict for wrongful death. Contrary to Clark's analysis, it is simply not a question of placing a value on Amy Clark's life.

Furthermore, in his brief, Clark attempts to argue that the verdict against SCDPS was not excessive because it was reduced to the statutory cap of $250,000. That argument, however, is seriously flawed. The issue is the excessiveness of the jury's verdict. The jury did not reduce its verdict to $250,000. If the jury's verdict is unduly liberal, the court may grant a remittitur. SCDPS is not arguing, however, that the verdict was unduly liberal but rather that the verdict was excessive. Where a verdict is "grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other considerations not founded on the evidence," the trial court is obligated to set aside that verdict and grant a new trial absolute. *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640, 641 (1991). It is not sufficient for the trial court to grant a remittitur of an excessive verdict or to reduce that verdict to the statutory cap.

In sum, the trial court erred in failing to set aside the excessive verdict. SCDPS is, therefore, entitled to a new trial absolute.

CONCLUSION

Based on the foregoing discussion, the Petitioner, South Carolina Department of Public Safety, respectfully renews its request that this Court reverse the decision of the Court of Appeals as well as the orders of Judge J.C. Nicholson, Jr. and remand for entry of judgment in favor of the Petitioner. In the alternative, the Petitioner requests that this Court remand for a new trial absolute.

Respectfully submitted,

DAVIDSON, MORRISON AND
LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR PETITIONER

Columbia, South Carolina

July 9, 2004

CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Morrison & Lindemann, P.A., attorneys for the Petitioner, does hereby certify that service of three copies of the **Reply Brief of Petitioner** in the above-referenced action was made upon the all counsel of record by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 9th day of July 2004, addressed as follows:

Suzanne E. Coe, Esquire
Coe & Coe
Post Office Box 56068
862 Camp Street
New Orleans, Louisiana 70156-6068

Sammy G. Diamadoros, Esquire
White, Diamadoros & Diamadoros
108 West South Street
Post Office Drawer 350
Union, South Carolina 29379

William M. Brice, III, Esquire
Brice Law Firm
Post Office Drawer 300
York, South Carolina 29745

James A. Quinn, Esquire
South Carolina Department of
Natural Resources
Post Office Box 12559
Charleston, South Carolina 29422

Stephanie McDonald, Esquire
3 Wesley Drive
Charleston, South Carolina 29407

Vinton D. Lide, Esquire
Post Office Box 2189
Lexington, South Carolina 29071

John A. O'Leary, Esquire
2008 Lincoln Street
Columbia, South Carolina 29290