THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS

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.

BRIEF OF RESPONDENT

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V. Where the life of a promising young college student was prematurely taken, was the amount of verdict excessive and shocking?

STATEMENT OF THE CASE

Ronald Clark, Sr. brought this action on behalf of his deceased daughter and her estate against the South Carolina Department of Public Safety (SCDPS) and Charles Clyde Johnson. Clark alleged gross negligence against SCDPS arising out of a high-speed pursuit. The accident was caused when the fleeing suspect, Charles Clyde Johnson, crossed into oncoming traffic and killed Amy Clark.

Judge J. C. Nicholson, Jr. tried this case in a jury trial on June 26, 2000. SCDPS made motions for a directed verdict, wherein the Court dismissed Clark's survival action and struck claims for punitive damages. The remaining grounds SCDPS raised were denied and discussed at length by the Court. Following a full trial, the jury returned a verdict of $3.75 million in favor of Clark against both Johnson and SCDPS on a verdict form which neither party objected to. The jury apportioned its award to find Johnson eighty percent at fault and SCDPS twenty percent at fault. The jury requested permission to make a statement to explain the verdict, which was granted. This was not made part of the jury verdict and simply allowed the jurors to say in writing what they could say orally upon being dismissed. After the jury was dismissed, the Court reduced the verdict against SCDPS to the $250,000 cap imposed by the South Carolina Tort Claims Act (which was the limit at that time).

On July 10, 2000, SCDPS filed a motion for judgment notwithstanding the verdict, a motion for a new trial and a motion for a new trial remittitur, all of which were denied by the Court. SCDPS filed more materials, alleging that the summary denial order was not

sufficient, despite all such matters being orally addressed and ruled upon earlier in the trial. The final order in this case was filed October 4, 2000. SCDPS then timely appealed.

This case was heard before the Court of Appeals of South Carolina on September 10, 2002. In an opinion issued November 12, 2002, the Court of Appeals affirmed the trial court's decision. SCDPS filed a petition for rehearing which was denied by order filed April 4, 2003. On May 5, 2003, SCDPS filed a Petition for Certiorari to this Court, which was granted.

STATEMENT OF FACTS

At approximately 1:30 a.m. on April 5, 1997, Amy Clark and a friend were coming home from Applebee's (R. 155, 206). Amy was a 21-year old college student who excelled at her classes at Winthrop University (R. 69, 70). A former cheerleader and member of her high school basketball and softball teams, Amy wanted to be a teacher and worked daily after college with local children at the YMCA (R. 68, 69). There is no allegation that Amy or her friend did anything to cause or contribute to the accident that claimed her life.

On US 21 near the North Carolina border, which is described as a two-lane straight road having "camel hills", Amy went over one of the hills and when at the bottom "within a split second", was hit head-on by a person fleeing a high-speed police pursuit (R. 206, 208). Despite having their windows down and the radio dim enough for conversation, they heard no police siren nor had any warning of the chase (R. 207, 208).

The high-speed pursuit began when Officer Bradley, a trooper with SCPDS for three years, observed a burgundy van on 21 Bypass traveling 57 miles per hour where the speed limit was 45 miles per hour (R. 153, 154). Bradley also noticed that the van was driving erratically, skidding and not using turn signals (R. 154). After getting behind the van and activating his blue lights, Bradley realized that the van was not going to stop (Id.). Bradley then activated his siren and notified communications that he was "ten-zero", which means in a pursuit (Id.). The van then ran a stop sign at Langston Road and turned sharply without a signal onto Mount Camouth Road (R. 155). The van then

disregarded another stop sign and then surprisingly pulled over into a gravel parking lot (R. 159). Bradley pulled in about a car-length behind the van and exited his patrol car (Id.). As Bradley approached the van, the driver put the van in reverse and came close to running Bradley over (R. 160). As Bradley jumped out of the way, the van sped off and Bradley pursued in his car (Id.).

Bradley testified that when the van sped off "the speed was so high that it [the van] traveled off the left side of the Roadway. At that time…[he] called into communications that he had a ten-fifty …[Bradley] felt like he was going to wreck the vehicle"(R. 161). At a curve, the van "spun out of control" and "actually spun around"—then driving towards the pursuing trooper (R. 162). At a high rate of speed, the van sped through two railroad tracks, wherein Bradley asked communications to notify Rock Hill, since their city limits were approaching and "because I felt like my life was in danger" (R. 161). At a green light, the van made a sharp right turn, got in the opposite land and passed one car (Id.). During the chase up to this point, Bradley testified that when Troopers to 10-0 [chase], the pursuing officer is relaying all traffic communications and no one else is to talk on the radio unless necessary (R. 156). A supervisor is to be on the radio instantaneously when the Trooper goes 10-1 for judgment calls (Id.).

Trooper Justice then joined in the chase as the secondary car and took over the radio as the second in command (R. 165, 170). Seeing Trooper Justice enter the road in front of him, the driver got into the left hand lane, into oncoming traffic, and zoomed past Trooper Justice (R. 106, 107). They then approached a very narrow bridge and notified Fort Mill that they were approaching their city limits (R. 169, 170). Then Officer

Richardson of the Fort Mill police department joined the chase and testified the van "was really running wide open. I mean like in the eighties" (R. 302). They approached an intersection, where the van was running about 65 m.p.h. (Id.). "Fortunately, the light was green, but there was traffic stopped and standing by waiting" (Id.).

After the intersection, Officer Bradley went to pull in front of the van to box it in (Id.). The van swerved, evaded Bradley and tried to run Bradley off of the Road (R. 107). "If Officer Bradley wouldn't have moved over, he [the van] would have hit him" (R. 107, 108, 109). At this time, Bradley testified that the intentions of the van driver "were to run me off the Road" (R. 170).

They continued up US 21 with other traffic on the Road when the van "flat out ran the light. He almost T-boned a car... it was a very close call"(R. 171). Bradley and Justice then slowed down to proceed through the intersection, and then tried to catch up to the van going 80-86 m.p.h. (R. 172, 173). When they were around 5-6 miles from the North Carolina line, where the border was "pretty much a straight-away", the van came up to a pick-up truck in its lane (R. 174). Bradley testified that by this time "I knew he wasn't going to stop" (Id.). The van tried to pass the pick up truck to the right, but the van was pulling off to the right because it has seen the blue lights and was trying to get out of the way (Id.). To avoid hitting the truck, the van "jerked" to the left and hit Amy Clark in the oncoming lane head on (R. 175).

Bradley acknowledged the crash site was a straight shot to the North Carolina border and he would have had to call off the chase when the can crossed it—which was only

approximately 5 miles away (R. 174, 168).

Samuel Killman, former Police Chief of Charlotte, NC and Myrtle Beach, SC testified for the Plaintiff. Killman testified that he was familiar with the standards of due care in high-speed police chases and that they tended to be similar from place to place (R. 234). He stated that it is a standard of care for supervisors to monitor such dangerous cases (R. 237) because the pursuing officer, emotionally involved in the case, may make mistakes (R. 238). This "standard of care" is so known that it is also embodied in SCDPS's pursuit policy, which was admitted into evidence without objection (R. 57). Killman further stated that the pursuing and secondary officers have a duty to relay sufficient information so that an impartial supervisor, taking the public interest in account, can independently assess whether the chase should continue (Id.). Killman also listened to the tape of the chase and opined that if he were the supervisor he would have terminated the chase because the chase had escalated, with several near accidents before the fatal collision (R. 239-244).

The jury was presented with evidence that NO supervisor of SCDPS bothered to monitor the airwaves and the high-speed pursuit that ensued (R. 240). All the Troopers who testified (Plyler, Vaughn, Perry) admitted that there were no supervisors that night monitoring the chase (R. 92, 147). Trooper Plyer, who was a supervisor, acknowledged that it was a supervisor's duty to know the conditions of the chase and monitor it—he just did not feel it was his duty (R. 139). The district supervisor, Sergeant John Vaughn, was the supervisor on duty but could not recall the pursuit or monitoring it (R. 74, 75, 81, 82).

ARGUMENTS

I. The jury was properly instructed regarding the "standard of care" applicable in this case.

The question of whether SCDPS was grossly negligent on April 5, 1997 was an appropriate issue for the jury. The applicable standard for liability, agreed to by both parties at trial, was gross negligence. This standard was articulated as "the failure to exercise even the slightest care" and "the absence of care that is necessary under the circumstances." Clark v. South Carolina Dept. of Public Safety, Op. No. 3565 at 9-10 (S.C.Ct.App. filed Nov. 12, 2002) (citing Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002); Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952)). The jury was instructed on general principles of negligence law which adequately covered the law applicable to this case. Such general charges have been held acceptable by the courts. See Morris v. Barrineau, 269 S.C. 84, 236 S.E.2d 409 (1977); Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). Further, Petitioner did not specifically request a jury instruction regarding these legal duties.

Petitioner contends that public policy dictates that this Court should resolve the question of what legal duties are involved in police chases, because the legislature has failed to address this issue. However, the South Carolina Legislature has spoken through its enactment of Section 15-78-40 which states that state agencies and governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances" subject to the limits and exemptions of

the Act. S.C. Code Ann. § 15-78-40 (Supp. 2001). Additionally, Section 56-5-760 states that although police officers using a siren and flashing light are authorized to exceed the maximum speed and to disregard certain traffic regulations during pursuit, these provisions "do not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons." S.C. Code Ann. § 56-5-760(A)-(C) (1991). The determination of negligence has long been established to be within the purview of the courts and existing case law is more than instructive on the level of care required to prove gross negligence. This case offers no novel application of such standards. Petitioner failed to request a more specific jury charge at trial and cannot now demand that this Court be used as a vehicle to test alternative theories of its case.

II. Where testimony established that SCDPS, through its officers, was grossly negligent for failing to call off a high-speed chase where the fleeing vehicle eventually crashed head-on and killed a college student, the South Carolina Court of Appeals acted properly in deciding that there was ample evidence to demonstrate that Trooper J. N. Bradley acted with gross negligence in initiating and failing to terminate the pursuit.

Petitioner argues that there was insufficient evidence to support a finding of gross negligence on the part of Trooper Bradley. However, the record clearly dispels such an argument. Respondent's expert, Mr. Killman, had thirty-five years experience in law enforcement. Except for this case, not once in his numerous times testifying as an expert did he ever testify for the Plaintiff (R. 216, 221). While Killman stated that the initial pursuit "was a good pursuit", he then testified that he felt the "officer should have

discontinued" the pursuit based on the "very dangerous driving of the suspect" (R. 236). Killman stated the particular points that the chase should have been terminated as when the van tried to run the officer off the Road or when the van "almost T-bones another vehicle at the intersection" (R. 236). Killman, experienced at both conducting and supervising chases said, "The longer it [the chase] went on, the clearer at least to me looking at the evidence–the clearer it became that the guy was not going to stop. He was simply going to wreck or he was going to do something, but he was not going to stop for the officer." (R. 237). Despite Petitioner's contention otherwise, the totality of Mr. Killman's testimony demonstrates that given the circumstances (the lack of severity of the initial offense, the reckless driving in response to pursuit, the failed attempts to halt the suspect's vehicle, the near "T-boning" of an innocent's car, the duration of the pursuit, the proximity of the North Carolina border, etc.) the risk to public safety far outweighed the need to apprehend the suspect in the early morning hours of April 5, 1997, and the trooper's acts were grossly negligent. (R. 234-245).

Additionally, Trooper Bradley testified that he did not feel the van was going to stop. He opined "His [the van's] intentions were to get away from me." (R. 164) and that at the time he did not doubt that the van would do anything to get away from him (R. 171). Then, approximately five miles from the North Carolina border (wherein Bradley stated he would have to call off the chase anyway due to jurisdiction problems), on a two-lane "straight-away" road with "camel-back" hills, Bradley continued the chase despite acknowledging that there was no impediment to the border and that the van clearly intended to flee at all costs (R. 164, 168, 171). As noted by the Court of Appeals,

"The heightened dangerousness of the pursuit is particularly evidenced by the fact that Bradley himself admittedly notified dispatchers at one point that he believed a crash was imminent" (App. 9). While at trial Bradley was not remorseful of any part of the chase during the trial, at the hospital he told Mr. and Mrs. Harvey (the parents of the surviving college student accompanying Amy) that "he had initiated the chase and it was his fault" (R. 212, 215). In light of the dangerous circumstances that occurred on April 5, 1997, which included several risky maneuvers by the suspect and a near broadside of another car, there was ample evidence from which a jury could reasonably conclude that Trooper Bradley was grossly negligent.

This case was against the Department of Public Safety, not against Trooper Bradley. The jury made a finding against the Department, which was the sole state defendant. From the record, there is no evidence of any request that the jury make an independent finding regarding whether Trooper Bradley was independently negligent and, if so, to what degree. There was no objection to the charges in the case nor to the verdict form. Even if there were not ample evidence upon which a jury could find gross negligence against Trooper Bradley, this argument only was advanced after the verdict. In its motion for directed verdict at the close of Plaintiff's case, SCDPS did claim that Plaintiff did not demonstrate gross negligence—but argued that Plaintiff had failed to show that the conduct of SCDPS was the proximate cause of Amy Clark's death (R. 278, 279).

However, as addressed in the next section, even if a jury were to find that Trooper Bradley was not "grossly" negligent, but was only "negligent"—or even not at

fault—this would not relieve SCDPS of liability in this case. This case actually involves different "duties" by officers/supervisors functioning completely differently: One set of duties belonged to the pursuing officer/officers. The other duties are for an impartial monitoring supervisor. This argument is addressed below.

III. Where an expert testifies that SCDPS supervisors should have terminated a high-speed pursuit and the evidence reveals that the supervisors were not even listening to the pursuit, a jury may properly find gross negligence against the department.

Petitioner argues that without a finding of negligence on the part of the trooper there can be no finding of negligence on the part of the supervisor. This logic is flawed in that this case involves TWO sets of duties. One set of duties belonged to Trooper Bradley—the pursuing officer. While he has a duty to evaluate conditions, it was undisputed that the Trooper in the chase has to be supervised by an impartial monitor. The pursuing officer—in the heat of the chase, is naturally biased and has many considerations on his mind (including driving his own car) to rationally assess a public danger (R. 244). The second set of duties belongs to a supervisor—to monitor and continually assess a chase – and to terminate a chase when the risks warrant such (R. 260, 244).

Supervisor Plyler, who was busy administering a B.A. machine elsewhere, heard the chase initiate on the radio and the request for assistance, but had no further involvement with the chase or monitoring it (R. 131,132, 147). Retired Sergeant Vaughn testified that a corporal or higher could be a supervisory officer (R. 71, 72). Sergeant

Vaughn agreed that a police chase is "very serious, dangerous" and "is a danger to everyone. The person doing the pursuing, the person being pursued, innocent bystanders" (R. 75, 76). At first, Vaughn said he did not remember if he supervised this chase, then could not answer questions because "I [Vaughn] was not directly involved in the chase" (R. 74, 75). The highest ranking supervisor in the district at the time of the accident, he did not know of any other supervisor who would have been monitoring the chase (R. 78, 82). Vaughn acknowledged that the only two people who can terminate a pursuit are the initiating officer and the supervisor (R. 86). Lance Corporal Perry confirmed that there were no supervisors giving directions that night (R. 92).

All of the witnesses acknowledged the serious nature posed by high-speed pursuits. Lance Corporal Perry even admitted that "virtually half" of the chases he has been involved with "usually end up resulting where the individual loses control and goes off the Road himself (R. 95). Upon hearing the facts of this case, Perry (an SCDPS Officer) said that if it appeared the fleeing car was "hell-bent on getting away", he would try to make as much identification as possible and "probably just back off" (R. 97).

Trooper Justice, the secondary pursuit car, summarized the situation saying "The whole pursuit was dangerous" (R. 109). When the accident occurred, he had to ASK for a supervisor to come to the scene – since one was not on the airwaves (R. 104). Trooper Bradley, the initiating pursuit car, did not feel that the van was going to stop. Bradley opined, "His [the van's] intentions were to get away from me" (R. 164). Bradley further testified that in the chases he has been involved in, "sometimes people stop and sometimes people wreck" (R. 167). On a Road such as US 21 (where the wreck

occurred), Bradley acknowledged that if someone was determined to get away and there is not much traffic on the Road, the only thing that would stop a fleeing car would be for an officer to force him off the Road (R. 166).

After Bradley tried to box the van in and the van tried to run Bradley off the Road, Bradley testified as follows:

> Q: Now, at this time, did you have any doubt that he would do anything in his power to get away from you?
>
> A: Correct, no doubt that that was his purpose.
>
> (R. 171)

Then, approximately five miles from the North Carolina border (wherein Bradley stated he would have to call off the chase anyway due to jurisdiction problems), on a two-lane, "straight-away" Road with "camel-back" hills, Bradley continued the chase despite acknowledging that there was no impediment to the border and that the van clearly intended to flee at all costs (R. 164, 168, 171).

Samuel Killman, former chief of police for Charlotte and Myrtle Beach, testified as Plaintiff's expert that he felt the "officer should have discontinued" the pursuit based on the "very dangerous driving of the suspect" (R. 236). Killman stated the particular points that the chase should have been terminated as when the van tried to run the officer off of the road or when the van "almost T-bones another vehicle at the intersection" (R. 236). Killman, experienced at both conducting and supervising high-speed chases, said "The longer it [the chase] went on, the clearer at least to me looking at the evidence—the

clearer it became that the guy was not going to stop. He was simply going to wreck or he was going to do something, but he was not going to stop for the officer" (R. 237).

Killman stated that a detached supervisor has a "duty" to "continually monitor the pursuit" and is to direct and make decisions, not be a bystander" (R. 237, 238, 244). Killman listened to the tape, reviewed all the evidence and "saw no evidence that there was any supervisor monitoring at all. I heard no one notify the supervisor as to what was occurring, which is, in my opinion, what should be in a good standard of care policy" (R. 241). Killman also saw no evidence of the officers backing off the chase at all (R. 243). He stated that there is also a standard of care as to what information the supervisor has to base his decision to terminate/continue a chase upon; the supervisors must know enough to control the pursuit (R. 244).

The cases which SCDPS cites are not applicable in this case and hold that where an officer is not negligent in operating his vehicle, there can be no liability for negligent supervision. This makes sense in general negligence cases. However, in this case, there is NOT a finding by the jury that Officer Bradley was not negligent. There is no finding one way or the other as to Officer Bradley's actions (whether as pursuing officer he was grossly negligent, simply negligent, or not negligent nor was such an independent finding regarding Bradley requested by SCDPS). None of the cases cited by SCDPS involve a situation where both expert testimony and testimony from officers recognize independent duties (as does their own policy which mirrors Killman's testimony). SCDPS also cites federal cases—which have completely different standards under immunities under the Eleventh Amendment. SCDPS cites McPherson v. Michigan Mutual Insurance Co., 310