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.

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

This is a wrongful death action commenced by the Respondent, Ronald E. Clark, Sr., as the personal representative of the Estate of Amy Danielle Clark. The action was brought against the Petitioner, South Carolina Department of Public Safety (SCDPS), as well as Charles Clyde Johnson, who is not a party to this appeal.

The action arises out of a fatal motor vehicle accident occurring on April 5, 1997, between a vehicle driven by the decedent, Amy Clark, and a stolen vehicle driven by Johnson. At the time of the accident, Johnson was being pursued by Trooper J.N. Bradley of the South Carolina Highway Patrol.

This action proceeded to trial before Judge J.C. Nicholson, Jr. and a jury on June 26, 2000. At the close of Clark's case-in-chief and again at the close of evidence, SCDPS moved for a directed verdict, which motions were granted only in part. Specifically, the trial court dismissed the survival action and the claim for punitive damages. The remaining grounds for a directed verdict were denied. The jury ultimately returned a verdict of $3.75 million in favor of Clark against both

Johnson and SCDPS.[1] When it issued its verdict, the jury requested and was granted permission to make the following statement to explain its verdict: (R. 519)

> The Vehicle and Foot Pursuit Policy of SCDPS dictates supervision of all pursuits. During this pursuit no supervisors were present or notified until after the pursuit was ended. It is our decision that this designates gross neglect on the behalf of SCDPS.

(R. 520). As required under the Tort Claims Act, the jury also apportioned fault between the Defendants as follows: Johnson was found eighty percent at fault and SCDPS twenty percent at fault. (R. 6). The trial court thereupon reduced SCDPS' liability to $250,000.00, which represented the monetary cap under the Tort Claims Act. (R. 5).

On July 10, 2000, SCDPS filed a motion for judgment notwithstanding the verdict, a motion for new trial absolute, and a motion for new trial remittitur. (R. 20-28). Those motions were summarily denied in an order issued by Judge Nicholson, filed July 18, 2000. (R. 1). On July 30, 2000, SCDPS served a motion to vacate that order. (R. 29-31). By order dated August 2, 2000, Judge Nicholson vacated the July 18, 2000 order and allowed the parties the opportunity to brief the issues raised in the post-trial motions. (R. 2). After the parties filed briefs, Judge

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[1] Johnson was in default and accordingly was unable to contest his liability for the accident.

Nicholson issued a subsequent order filed September 22, 2000, whereby he again denied SCDPS' post-trial motions. (R. 3).

The Petitioner SCDPS thereafter filed a timely appeal to the South Carolina Court of Appeals. On November 12, 2002, the Court of Appeals issued a decision affirming the trial court's rulings. SCDPS filed a petition for rehearing, which was denied by order filed April 4, 2003. (App. 20-21).

SCDPS filed a petition for writ of certiorari, which was granted by the South Carolina Supreme Court.

STATEMENT OF FACTS

As indicated, this wrongful death action arises out of a fatal motor vehicle accident occurring in York County on April 5, 1997. The chain of events began when Trooper J.N. Bradley observed a burgundy van which was later determined to be driven by Charles Clyde Johnson. (R. 153). The van was clocked traveling at 57 miles per hour on US Highway 21 where the posted speed limit was 45 miles per hour. (R. 153-154). Trooper Bradley also noted that the van was driving in an erratic manner. (R. 154). He proceeded behind the van and attempted to stop the vehicle using his blue lights. The van refused to stop, and Bradley activated his siren. (R. 154). Bradley called in the license tag and later learned that the van had been stolen. (R. 167).

Eventually, Johnson disregarded a stop sign, traveled a short distance further, and made a left turn into a gravel parking lot and stopped. (R. 159). When Trooper Bradley exited his vehicle and approached the van, the driver immediately put the van into reverse and attempted to run over Bradley. Johnson then abruptly left the parking lot, throwing gravel up as he did. (R. 160). Bradley thereupon commenced his pursuit with blue lights and siren fully activated. It was approximately 1:30 a.m. The pursuit ultimately continued north on US-21 heading toward Interstate-77 and in a direction away from Rock Hill and into rural parts of York County.

Near the Celanese Plant, Trooper Thomas Justice entered US-21 in front of the van in an attempt to slow him down. The van went around Justice who took up secondary pursuit behind Bradley. (R. 165). Bradley encountered very light traffic and continued his pursuit of Johnson. Moments later, at the intersection with Road 160, Bradley did encounter other vehicles. Johnson did not stop for a red stoplight at that intersection, nearly resulting in a collision. (R. 171). Bradley and Justice slowed in order to clear the intersection. (R. 172-173). At that point, Johnson opened up a sizable distance on Bradley. Shortly after that intersection, Johnson encountered a pick-up truck on the two-lane road. He attempted to pass the pick-up truck on the right improved shoulder, at which time the truck veered to the right. To avoid a collision, Johnson veered back to the left, crossed the center line, and struck the vehicle driven by Amy Clark. (R. 174-175).

Given the distance Bradley was behind Johnson, there was no contact between the police vehicles and the van when the accident occurred. Likewise, there was no contact between the police vehicles and the automobile driven by Amy Clark. Amy Clark was killed instantly by the collision. The pursuit covered approximately eight miles and lasted no longer than six to eight minutes. (R. 200).

The district supervisor on duty during third shift was Sergeant John Vaughan, who was located that night in Chesterfield County. (R. 74). Sergeant Vaughan was the supervisor on duty but was unable at trial to recall specifically the pursuit in

question. (R. 75, 81-82). Vaughan was retired from the Highway Patrol as a result of a heart attack. (R. 81). On the dispatch tape, Sergeant Vaughan is heard immediately after the pursuit calling in to inquire whether he was needed at the scene. (R. 81).

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.

Police pursuits give rise to important public policy issues. The South Carolina General Assembly has not expressly addressed through legislation the propriety of police pursuits and has set forth essentially no parameters or guidelines within which pursuits are permissible. In many states, legislatures have set forth very specific rules and regulations governing policy pursuits and liability arising from such pursuits. For instance, the California legislature enacted a statute that allows police departments to receive absolute liability for vehicular pursuits as long as the departments have adopted a pursuit policy addressing certain topics specified in the legislation. *See e.g.*, Cal. Vehicle Code § 17004.7.

In South Carolina, however, there is no legislation that sets forth the duty of care owed by law enforcement in a vehicular pursuit. The only statutory provision that even remotely addresses police pursuits is S.C. Code Ann. § 56-5-760, which grants certain privileges to a police vehicle "when in the pursuit of an actual or suspected violator of the law." S.C. Code Ann. § 56-5-760(A). Those privileges include "proceed[ing] past a red or stop signal or stop sign but only after slowing

down as may be necessary for safe operation" and "exceed[ing] the maximum speed limit if he does not endanger life or property." S.C. Code Ann. § 56-5-760(B). The emergency vehicle statute further provides that "[t]he provisions of this section 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(D).

There are no other statutory provisions that are applicable to vehicular pursuits. Specifically for purposes of this lawsuit, there is no statute requiring that ongoing pursuits be supervised or monitored. While S.C. Code Ann. § 56-5-760(D) provides that the "driver of an authorized emergency vehicle" has a "duty to drive with due regard for the safety of all persons," that statute cannot be interpreted as creating any duty of care for anyone other than the driver.

In the present case, despite the lack of specific statutory law governing the duty of care owed during a policy pursuit, the trial court provided the jury with no instructions with respect to the legal duties owed by SCDPS. SCDPS submits that the trial judge had the responsibility to instruct the jury on the legal duties owed under the factual circumstances as alleged. Instead, the trial judge allowed the jury to decide what the appropriate legal duties were. The applicable standard of care should not, however, be subject to the whims and subjective beliefs of laypersons sitting on a jury nor should the determination of the legal duties owed by law

enforcement be subject to a "battle of experts." The standard of care applicable to police pursuits should be established by legislative rule so that the applicable duty does not constantly change from jury to jury or from expert to expert. As discussed, in South Carolina, there is no legislative rule requiring the supervision of police pursuits. Without law to that effect, the jury erred in finding a breach of duty by SCDPS arising out of the supervision or alleged lack of supervision of the pursuit.

In deciding this issue, the Court of Appeals misapprehended SCDPS' position and wrote only that "[w]e do not read the court's charge that way." *Clark*, Slip Op. at 16. (App. 16). The Court of Appeals, however, did not point to any aspect of the jury charge where the trial judge instructed the jury on any legal duties pertaining to police pursuits, such as when a pursuit should be terminated or, more importantly, whether the law requires contemporaneous supervision or monitoring of an ongoing pursuit. Instead, the trial court clearly allowed Clark's counsel to argue to the jury that it was within the jury's province to determine the legal duty to be applied. (R. 420-421). That was in clear violation of Article V, § 21 of the South Carolina Constitution, which requires the judge to "declare the law." By allowing the jury to determine the applicable legal duties, the trial court allowed the jury to "declare the

law," which is clearly unconstitutional and results in jury nullification. In its opinion, the Court of Appeals disregarded this argument entirely.[2]

In short, the trial court should not have left it to the jury to determine the applicable legal duties. As SCDPS argued in its previous briefs, it is well established under South Carolina law that the determination of the existence of a duty is *solely* the responsibility of the court. *See*, *Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996). It is an issue of law for the court, not for the jury. *Id.* "Whether the law recognizes a particular duty is an issue of law to be decided by the court." *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3, 5 (1997).[3] As a result, the Court of Appeals, like the trial court, has allowed a jury of laypersons to determine the legal duties effecting a police pursuit in this State. As discussed in SCDPS's briefs to the Court of Appeals, allowing a jury to determine the law -- particularly in an area of first

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[2] The Court of Appeals instead criticized SCDPS for not requesting a jury charge "regarding the existence and nature of any alleged duty by its supervisors to monitor all police pursuits." *Clark*, Slip Op. at 16. (App. 16). SCDPS maintains that there is no such legal duty. It is plain error to require a party to request a charge on a legal duty it contends does not exist or apply. In other words, SCDPS should not be required to submit a request to charge that states that there is no legal duty to supervise.

[3] *See*, Restatement 2d of Torts § 328B, comment e (1965) ("it is the ... function of the court to determine whether, upon facts in evidence which the jury may reasonably find to be true, the law imposes upon the defendant any legal duty to act or to refrain from acting for the protection of the plaintiff. This decision is always for the court.")

impression with important public policy implications -- is dangerous and unprecedented and is, in fact, unconstitutional.

Moreover, it was error for the trial court to allow Samuel Killman to testify as to the legal duty applicable to this case. Just as it was error for the court to allow the jury to determine the legal duty, it was error to allow a witness to establish the legal standard of care.[4] If the court required assistance to determine the standard of care, which SCDPS submits was unnecessary in this case, the court could utilize the expert testimony to formulate the applicable standard of care. Nonetheless, even where expert testimony is properly admissible on standard of care questions, it was the province and prerogative of the court, not the jury, to determine what duties the law required. If there existed a difference in opinion between experts, that difference on questions of law is to be settled not by the jury, but by the court. Here, the court allowed the jury to determine the standard of care. This was particularly unwarranted and dangerous in this case because legal issues pertaining to the propriety of police pursuits should be determined by legislative action. Certainly, South Carolina law on police pursuits should not be established by twelve laypersons. In short, the trial

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[4] This is particularly true where the trial court allowed Killman to testify based upon hindsight and as an "arm chair quarterback" which was an inappropriate standard to apply. The trial court, nonetheless, denied the motion to strike Killman's testimony. (R. 275-276).

court erred in forsaking its duty to determine the applicable law, and for that reason, a new trial is warranted.

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.

The Petitioner 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. The Court of Appeals placed too great an emphasis on the jury's note that accompanied its verdict. The Court of Appeals failed to recognize that, even notwithstanding the jury's written explanation of its verdict, there was no evidence to support a verdict that Trooper Bradley was grossly negligent.

By way of background, there is no question that the applicable standard of liability at least in this case is gross negligence -- *not simple negligence* -- in assessing SCDPS's liability. 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). As the Court of Appeals properly concluded, that is the law of the case regardless of whether it is correct or not.[5]

The South Carolina appellate courts have defined gross negligence several different ways. Gross negligence is "the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Staubes v. City of Folly Beach*, 331 S.C. 192, 500 S.E.2d 160, 167 (Ct. App. 1998). "It connotes the failure to exercise slight care." *Id.* "Gross negligence involves a conscious failure to exercise due care." *Id.* Gross negligence occurs "where a person is so indifferent to the consequence of his conduct as not to give slight care to what he is doing." *Marietta Garage, Inc. v. South Carolina Department of Public Safety*, 337 S.C. 133, 522 S.E.2d 605, 609 (Ct. App. 1999).[6]

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[5] A gross negligence standard is consistent with North Carolina law governing police pursuits. The North Carolina Supreme Court has held that "in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability." *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547, 551 (1999).

[6] Citing *Hicks v. McCandlish*, 221 S.C. 410, 70 S.E.2d 629 (1952), the Court of Appeals also defined gross negligence as "the absence of care that is necessary under the circumstances." *Clark*, Slip Op. at 7. (App. 7). Although recognizing that this Court has also used that definition for "gross negligence" in prior cases, SCDPS submits that that definition is incorrect and represents a misreading of *Hicks*. In actuality, that definition describes simple or mere negligence which is the absence of due care, i.e., "the care that is necessary under the circumstances." In *Hicks*, this Court was commenting on the type of negligence that did not support an award of punitive damages. The Court explained that regardless

SCDPS submits that the trial court erred in failing to direct a verdict and later grant the 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 order to evaluate whether the Bradley's actions give rise to gross negligence, it is important to focus on the whole duty of care owed by law enforcement officers under such circumstances and not just the duty of due care owed in operating a police vehicle. It is well recognized that "police officers have a duty to apprehend lawbreakers and society has a strong interest in allowing the police to carry out that duty without fear of becoming insurers for the misdeeds of the lawbreakers they pursue." *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547, 550 (1999). "In such a situation, the law enforcement officer must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury." *Id.*

The courts have also recognized that police pursuits of fleeing suspects serve a legitimate law enforcement purpose. Not only do pursuits allow for the

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of its name, gross negligence or ordinary negligence, the "absence of care that is necessary under the circumstances" will not support an award of punitive damages. As such, the Court was describing what is today recognized as mere or simple negligence. The *Hicks* definition is not a fair or reasonable explanation of gross negligence for it creates absolutely no clear distinction or demarcation between gross negligence and simple negligence.

apprehension of criminals, pursuits also serve as a deterrence of criminal conduct. The Seventh Circuit Court of Appeals explained:

> Political society must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee — and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders.

Mays v. City of East St. Louis, 123 F.3d 999, 1003 (7th Cir. 1997). Not only will successful flights, as recognized in *Mays*, result in fewer solved crimes, but the increase in fleeing motorists will increase the risks of accidents caused by those fleeing motorists.

In applying these fundamental principles to the present case, it is clear that Trooper Bradley was not grossly negligent and, as a result, SCDPS is entitled to judgment as a matter of law. On Trooper Bradley's decision to initiate the pursuit of Charles Clyde Johnson, even Clark's own expert witness, Samuel Killman, testified that Bradley acted appropriately. (R. 235, 261). There was absolutely no evidence to suggest that the pursuit should not have been initiated. Yet, the trial court failed to direct a verdict on that issue, and the Court of Appeals entirely disregarded the issue on appeal.

With respect to the decision not to terminate the pursuit, the Court of Appeals disregarded all of the evidence that demonstrated that Trooper Bradley properly

considered the applicable factors to be assessed in exercising his judgment on whether to terminate the pursuit. There is no evidence that Trooper Bradley consciously or intentionally failed to consider the appropriate factors. There is no evidence that Bradley consciously or intentionally failed to take what he perceived to be the appropriate action. Clark's own expert, Samuel Killman, testified as follows regarding the decision not to terminate: "I don't think it was an intentional violation. I think it was just an error in judgment." (R. 237). The Court of Appeals erroneously gave no weight to this opinion of Clark's own expert.

The only "evidence" found by the Court of Appeals to support a finding of gross negligence is described as follows: "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." *Clark*, Slip Op. at 9. (App. 9). The Court of Appeals was referring to testimony at page 161 of the Record on Appeal, which sets forth an account of the earliest stage of the pursuit. The reference is to the fact that Johnson took a sharp turn too fast on Mt. Camouth Road, where the speed limit was only 20 miles per hour, causing Johnson's vehicle to drive off the pavement and almost wreck. This occurred immediately after Johnson had stopped and then tried to run over Bradley. It occurred still in an urban setting and miles from the accident site. No one, including Samuel Killman, was critical of the pursuit at this early stage. Killman never suggests that the pursuit should have been

terminated on Mt. Camouth Road. Yet, that is the only evidence that the Court of Appealed pointed to as evidence of gross negligence. It is also unfair to characterize this testimony as showing Bradley's belief that "a crash was imminent." The testimony cited by the Court of Appeals in footnote 17 and the accompanying text is not evidence of gross negligence that proximately caused the death of Amy Clark. As the Court of Appeals' reliance on this testimony alone demonstrates, there is absolutely no evidence in the record of gross negligence by Trooper Bradley in failing to terminate the pursuit.

Even with the evidence taken in a light most favorable to Clark, the evidence supports but one reasonable inference — that Bradley did not act with gross negligence. The evidence indisputably shows that Bradley continuously evaluated the pertinent factors that the experts agreed must be considered in deciding to terminate a pursuit. Bradley considered the severity of the criminal offense. He knew that he was pursuing a stolen vehicle, but he did not know the identity of the occupant (or occupants). (R. 188). Because the vehicle was stolen, he had no way to identify the suspect. The suspect was attempting to evade law enforcement and had attempted to run Bradley over when he was initially stopped. (R. 159-160). Johnson, in fact, pled guilty to assault with the intent to kill a police officer. (R. 361).

Bradley was well aware of the locale of the pursuit. He knew that at 1:30 a.m., the traffic conditions would be very light with "no traffic or very few cars and no

pedestrians." (R. 191). He indicated that once beyond Interstate-77, he encountered only "very little traffic, if any at all." (R. 195). He knew the road well and that it was a two-lane road with an improved emergency lane. (R. 198). He considered the weather conditions which were good. He was aware that the road was dry and relatively straight. (R. 197-198). He knew that there were few businesses in the area and that the area was rural. (R. 191, 197). The speed limit on the road was 55 miles per hour. (R. 126). The speeds in the pursuit never exceeded 80 to 85 miles per hour. (R. 267). The pursuit itself covered approximately eight miles and lasted no more than six to eight minutes. (R. 200). Trooper Bradley had emergency equipment activated including lights and siren. (R. 269).

This evidence demonstrates that Trooper Bradley properly considered the applicable factors to be assessed in exercising his judgment on whether to terminate the pursuit. Clark's own expert never testified that Bradley failed to weigh or consider the appropriate factors. He never concluded or even suggested that Bradley intentionally or consciously failed to take the appropriate action. He instead stated the opposite: "I don't think it was an intentional violation. I think it was just an error in judgment." (R. 237).

Reasonable minds may disagree as to when it is appropriate to terminate a police pursuit. However, where there is no question that the relevant factors were evaluated by Trooper Bradley, that the factors led to a correct decision to initiate the

pursuit, and that the same factors are to be and were considered in deciding if and when to terminate, then the only reasonable inference to be drawn from the evidence is that Trooper Bradley was not grossly negligent. In other words, the evidence does not give rise to a reasonable inference that Bradley was so indifferent to the consequence of his conduct as not to give slight care to what he was doing. The Court of Appeals' decision must be reversed, and judgment as a matter of law should be entered for SCDPS.

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.

On the issue of supervisory liability, the Court of Appeals failed to recognize that the duty to monitor or supervise the police pursuit, if such a legal duty exists,[7] is not an independent duty. In fact, the Court of Appeals entirely disregarded decisions of this Court holding that the negligent operation of a vehicle and the negligent supervision of that conduct are indeed *not independent torts*. Specifically, in *McPherson v. Michigan Mutual Insurance Co.*, 310 S.C. 316, 426 S.E.2d 770 (1993), this Court explained: "[W]ithout the police officer's allegedly negligent operation of the patrol car, there is no link by which [the supervisor's] negligence

[7] Please refer to Section I of this brief for arguments that there is no duty owed to the decedent to monitor or supervise the police pursuit.

can be independently connected to [the plaintiff's] injuries." 426 S.E.2d at 772. The Supreme Court, in fact, cited an Arizona case for the proposition 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).[8]

Other courts have also held that the operation of a vehicle and the supervision of the operation of the vehicle are not are *not* independent or distinct from each other. In the context of a police pursuit, the case of *Oberkramer v. City of Ellisville*, 650 S.W.2d 286 (Mo. Ct. App. 1983), is instructive. In *Oberkramer* , the plaintiff alleged that the defendant City was negligent in part because of the failure to properly supervise the officers during the course of a police pursuit. The court found that the officers engaged in the pursuit were not negligent. As a result, the court concluded that the derivative claim for failure to supervise also did not give rise to any liability. The Missouri Court of Appeals explained as follows:

> If the police officers' manner of conducting the chase did not in itself plead negligence, then the failure to have a policy governing the conduct of high speed pursuits or the municipalities' failure to supervise the police officers during the high speed pursuit does not plead negligence.

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[8] The South Carolina Court of Appeals had previously 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).

> The failure to have a policy and the failure to supervise the officers may have been a cause for the police officers' failure to conduct this chase in a different manner, but, as long as the manner they conducted the chase was not negligent, the failure to conduct the chase in a different manner would not be negligent.

650 S.W.2d at 293.

The issue of supervisory liability has arisen frequently in pursuit cases brought pursuant to 42 U.S.C. § 1983. The principle of derivative or cumulative liability was recognized by the United States Supreme Court in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), where the Court explained that derivative claims, such as for lack of supervision or inadequate policies and procedures, are not actionable where the actions of the officer do not give rise to liability. The federal case law addressing derivative liability is equally applicable to state law claims raising negligence based upon a lack of supervision of an employee's conduct.

Derivative liability issues have, in fact, arisen in pursuit cases. For instance, in the Fourth Circuit case of *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), the plaintiff was injured when the vehicle she was driving was struck by a fleeing suspect and an officer pursuing him. The defendant had a written policy in force requiring the supervision of all pursuits. The Fourth Circuit found that the actions of the officer in conducting the pursuit did not violate the plaintiff's Fourteenth Amendment rights under the "shock the judicial conscience" standard. Accordingly, the court found no liability for any alleged failure to train or supervise

where there was no constitutional violation on the part of the person being supervised or requiring supervision.

Similarly, in *Sturges v. Matthews*, 53 F.3d 659 (4th Cir. 1995), the plaintiff brought suit against Lexington County, Lexington County Sheriff James Metts, and a deputy sheriff who was involved in a police pursuit. The plaintiff's decedent lost control during the pursuit, crashed into a telephone pole, and died. The court found no liability on the part of the deputy sheriff. With respect to the training and supervision claims against the County and Sheriff Metts, the Fourth Circuit ruled that those claims were derivative of the deputy's liability and, hence, dismissal was appropriate. *See also*, *Wilson v. Spain*, 209 F.3d 713 (8th Cir. 2000); *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000).

Therefore, like the trial court, the Court of Appeals failed to recognize that Clark's negligent supervision claim is entirely derivative of the claim that Trooper Bradley was grossly negligent in commencing the pursuit and then continuing the pursuit until the accident occurred.[9] Because SCDPS was entitled to a judgment as a matter of law for Trooper Bradley's conduct, SCDPS may not be held liable under any theory for the alleged failure to supervise Trooper Bradley. If SCDPS is not

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[9] The Court of Appeals also erred in characterizing SCDPS's argument that supervisory liability is "vicarious." *Clark*, Slip Op. at 9. (App. 9). That is not the argument at all. As explained above, SCDPS contends that the duty to supervise is a form of derivative or cumulative liability. Vicarious liability is an entirely different legal concept.

liable for Bradley's conduct, it likewise cannot be liable for the supervisor's conduct. In other words, even though Clark may have shown that the supervision of the pursuit was not adequate or not in accordance with the policy, the fact that Trooper Bradley was not grossly negligent in his conduct makes the alleged lack of adequate supervision inconsequential. 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.

The Court of Appeals ruled that Trooper Bradley's conduct was not subject to discretionary immunity under S.C. Code Ann. § 15-78-60(5). In making that ruling, the Court of Appeals erred in two primary respects. First, 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. Second, 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.

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.

In addition to maintaining that there is no evidence as a matter of law that Trooper Bradley was grossly negligent, SCDPS also argued that it was entitled to absolute discretionary immunity under the Tort Claims Act. S.C. Code Ann. § 15-78-60(5) provides as follows:

> The governmental entity is not liable for a loss resulting from the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.

S.C. Code Ann. § 15-78-60(5).

In construing this section of the Tort Claims Act, the South Carolina appellate courts have explained that discretionary immunity is contingent upon proof that the governmental entity, faced with alternatives, actually weighed competing considerations and made a conscious decision to act or not to act. *Niver v. South Carolina Department of Highways and Public Transportation*, 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990). "Further, the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Foster v. South Carolina Department of Highways and Public Transportation*, 306 S.C. 519, 413

S.E.2d 31, 35 (1992). *See also, Jensen v. Anderson County Dept. of Social Services*, 304 S.C. 195, 403 S.E.2d 615, 619 (1991) ("[g]enerally, a government official may not be held liable for the negligent performance of a discretionary duty").

In the present case, 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. The Court of Appeals suggested that there is evidence from Clark's expert, Samuel Killman, to make this a disputed question of fact for the jury to decide. There is no such testimony from Killman.

Killman testified as to the factors to be considered by Trooper Bradley in his decision-making process. The undisputed evidence, as discussed above, is that Bradley considered those factors. Killman does not suggest that Bradley did not weigh competing considerations nor does he suggest that Bradley did not utilize accepted professional standards. In fact, Killman acknowledged repeatedly in his testimony that the decision to pursue and decision not to terminate were judgment calls requiring the exercise of discretion. Killman characterized Trooper Bradley's decision not to terminate as "an error in judgment." (R. 237). Killman further testified as follows:

> Q. And you would agree that the type factors you look at in determining whether to pursue are the same type factors that you decided to terminate on. Correct?

A. I would say — well, they may vary, but I'd have to say yes.

Q. That's the judgment call?

A. Judgment call.

Q. And that's what was involved in this case by the officer?

A. By the officer, yes.

(R. 263). Later, Killman testified as follows:

Q. You would agree with me that the officer, Jeff Bradley, in that car, is the one that's charged with the decision to decide whether or not to proceed with pursuit. Correct?

A. Yes.

Q. You would agree with me that is purely a judgment call based on his training and his skill. Is that correct?

A. Are you talking about initiating the pursuit?

Q. Yes.

A. Yes, I would agree with that.

Q. You would agree that the officer that is in the car is in the best position, who is actually following this suspect during this period, to make a judgment call whether to terminate or not?

A. He would be in the best position within the policy guidelines.

Q. The policy ...

A. The policy is there to help him make a good decision, but he use that, and he could see what's going on, yes.

Q. And in this case, you just question his judgment, don't you?

A. As far as the officers are concerned, yes. Again, it's hindsight, but it's what we do as managers all the time, is to review officers' work and decide if they acted properly or not.

(R. 271).

Thus, the undisputed evidence shows that Trooper Bradley was faced with alternatives, weighed competing factors, performed the balancing test set forth in the SCDPS Pursuit Policy, and made a decision to pursue Johnson up until the accident occurred. The undisputed evidence further demonstrates that Bradley utilized accepted professional standards. As a result, Bradley's actions were entitled to absolute immunity. SCDPS's entitlement to discretionary immunity is particularly appropriate in this context. As the United States Supreme Court recognized in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998),

> [T]he police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance.

523 U.S. at 853. (Citations omitted). The Supreme Court's description fits the situation facing Trooper Bradley. His discretion, which was exercised consistently with his training and professional standards, should not give rise to liability for him or SCDPS under the Tort Claims Act.

Killman candidly admitted that his criticism for Bradley was in hindsight and the result of "arm chair quarterbacking." (R. 237). S.C. Code Ann. § 15-78-60(5) is designed precisely for this situation -- to bar liability based on second guessing that occurs after an event is long over and with the luxury of careful reflection and deliberation. The Court of Appeals thus erred in concluding that SCDPS was not entitled to discretionary immunity for Bradley's actions.

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.

As a second basis for denying discretionary immunity and what may be described as only *dicta*, the Court of Appeals created a distinction between planning activities and operational activities in analyzing a governmental entity's entitlement to discretionary immunity. The Court of Appeals ruled that operational conduct -- as opposed to planning activities -- "is not the type of discretionary act contemplated in the Tort Claims Act." *Clark*, Slip Op. at 12. (App. 12).

In enacting S.C. Code Ann. § 15-78-60(5), the General Assembly did not distinguish between types of discretionary conduct. If it had been the intent of General Assembly to limit the types of conduct to which discretionary immunity applied, it certainly would have so stated. To the contrary, S.C. Code Ann. § 15-78-60(5) is written in very broad terms so as to include "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform ***any act or service*** which is in the discretion or judgment of the governmental entity or employee." *See*, S.C. Code Ann. § 15-78-60(5). (Emphasis added). The use of the phrase "any act or service" cannot be reasonably construed as meaning only "planning acts or services."

In construing S.C. Code Ann. § 15-78-60(5) as applying only to planning activities, the Court of Appeals also disregarded the basic rule of construction set forth in the Tort Claims Act, which provides that "[t]he provisions of this chapter establishing limitations on and exemptions to the liability of the State ... must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f). *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). In the present

case, the Court of Appeals' novel construction of Section 15-78-60(5) clearly does not limit the liability of the State. The Court of Appeals likewise did not construe Section 15-78-60(5) liberally in the State's favor.

Finally and perhaps most importantly, the Court of Appeals' construction of S.C. Code Ann. § 15-78-60(5) also disregards contrary precedent of the Supreme Court as well as the historical basis for discretionary immunity in South Carolina. *See*, *Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940); *Long v. Seabrook*, 260 S.C. 562, 197 S.E.2d 659 (1973). In *Jensen v. Anderson County Department of Social Services*, 304 S.C. 195, 403 S.E.2d 615 (1991), the Supreme Court discussed discretionary immunity at length:

> Generally, a government official may not be held liable for the negligent performance of a discretionary duty. Immunity for discretionary acts may be traced to *Parker*, *supra* and was discussed at length in *Long v. Seabrook*, 260 S.C. 562, 197 S.E.2d 659 (1979).
>
> The duties of public officials are in general classified as ministerial and discretionary. They are also referred to as being ministerial and quasi-judicial. The character of an official's public duties is determined by the nature of the act performed. The duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Quasi-judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. ... In a tort suit against a public official whose duties are discretionary, it must be shown that in the performance or non-performance of those duties the

> public official was guilty of corruption, or bad faith, or influenced by malicious motives, before a recovery can be had.

403 S.E.2d at 619.

The Supreme Court in *Jensen* then addressed the scope of discretionary immunity under the Tort Claims Act. Interestingly, the Court noted that the duty of the Department of Social Services to conduct an investigation of alleged child abuse is a ministerial duty to which no immunity applies. However, "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.

The *Jensen* Court dispels the notion that S.C. Code Ann. § 15-78-60(5) creates a distinction between planning and operational activities. The decision to classify a case of child abuse as "unfounded" and to close an investigation is not a planning activity; it is operational conduct. Thus, if the decision to close a child abuse investigation is entitled to discretionary immunity under the Tort Claims Act, the decision not to terminate a police pursuit is likewise an exercise of discretion to which absolute immunity attaches.

In sum, there is no basis in the legislative history or in existing case law for the Court of Appeals' newly created distinction between planning activities and operational activities in determining a governmental entity's entitlement to

discretionary immunity under the Tort Claims Act. Such a distinction should be rejected, and this Court is urged to find that SCDPS is entitled to discretionary immunity under the undisputed facts of this case.

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 Court of Appeals failed to recognize that the jury's verdict was "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." *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640, 641 (1991).

The jury returned a verdict of $3.75 million on the wrongful death claim. The evidence submitted does not support the verdict. In fact, Clark presented no evidence of any economic loss sustained by the beneficiaries. (R. 148-150). The decedent had reached majority and no longer resided with her parents, who were the sole beneficiaries. She provided no financial support to her parents. Hence, the only damages recoverable would be for loss of companionship, grief, wounded feelings, and funeral expenses. The only evidence of nonpecuniary damages,

however, was the extremely brief testimony of the decedent's father. (R. 149-150). The mother did not testify, and there were no other damages witnesses.

The Court of Appeals' decision on this issue is at odds with this Court's prior decision in *Zorn v. Crawford*, 252 S.C. 127, 165 S.E.2d 640 (1969). In *Zorn*, this Court overturned as excessive a verdict of $250,000 in actual damages sustained by parents as a result of the death of their fifteen-year-old daughter. Although a $250,000 verdict in the 1960s is significantly greater in value that that same amount in the year 2000, a contemporary verdict of $3.75 million would be substantially greater than the verdict in *Zorn*. Moreover, in *Zorn*, as in the present case, there was no evidence that the parents suffered any pecuniary loss from the death of their daughter. Recognizing that the primary damages recoverable would be for loss of companionship, grief, and wounded feelings, this Court explained as follows:

> The assessment of such intangible elements of damage is most difficult and the court is always reluctant to interfere with the exercise of the jury's discretion in fixing the amount to be awarded. The loss to parents from the untimely death of a devoted child is not to be minimized. However, there must be some limitation on the amount to be awarded in such cases.

165 S.E.2d at 645. The *Zorn* Court ultimately ruled that the $250,000 verdict "is not supported by the evidence and can only be explained upon the basis of sympathy, passion or prejudice on the part of the jury." 165 S.E.2d at 646.

The same rationale is clearly applicable to the present case. The evidence frankly does not support a verdict of such magnitude, absent the role of sympathy, passion or prejudice. SCDPS submits that the size of the verdict reflects an obvious desire by the jury to punish one or both Defendants. Importantly, the jury was denied the opportunity to award punitive damages against Charles Clyde Johnson, and hence, the actual damages award was the only vehicle the jury could use to make a statement and/or to inflict some degree of punishment for Johnson's reprehensible conduct. Such a motive was improper and renders the verdict grossly excessive.

In sum, the excessiveness of the verdict in light of the very limited evidence on damages presented compels the conclusion that the jury acted out of caprice, passion, prejudice, partiality, or other improper motives. That verdict should not be permitted to stand. A new trial absolute, at the very least, should be ordered.[10]

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[10] The new trial must include both issues of liability and damages. *See*, S.C. Code Ann. § 15-33-125. Clark did not move for nor was he entitled to a directed verdict on liability.

CONCLUSION

Based on the foregoing discussion, the Petitioner, South Carolina Department of Public Safety, respectfully requests 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,

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April 28, 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 **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 28th day of April, 2004, addressed as follows:

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