South Carolina Law Review

Volume 64
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 11

Summer 2013

In Pursuit of a Remedy: A Need for Reform of Police Officer Liability

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IN PURSUIT OF A REMEDY: A NEED FOR REFORM OF POLICE OFFICER LIABILITY

I. INTRODUCTION

According to FBI statistics, innocent bystanders account for 42% of fatalities in high-speed police pursuits.[1] Despite this staggering percentage, innocent bystanders face an almost insurmountable challenge to recovering from police departments for injuries or death.[2] This class of bystanders includes, among others, minor passengers in a vehicle being pursued and pedestrians.[3]

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1. David P. Schultz et al., *Evidence-Based Decisions on Police Pursuits: The Officer's Perspective*, FBI L. ENFORCEMENT BULL., Mar. 2010, at 1, 1–2 (quoting John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, FBI L. ENFORCEMENT BULL., July 2002, at 14, 15).

2. *See, e.g.*, Cnty. of Sacramento v. Lewis, 523 U.S. 833, 856 (1998) (applying a "shocks the conscience" standard for Fourteenth Amendment claims involving police pursuits and finding the standard was not met).

3. *See, e.g.*, *id.* at 836 (passenger on motorcycle); Meals v. City of Memphis, 493 F.3d 720, 723 (6th Cir. 2007) (minor passenger); Helseth v. Burch, 258 F.3d 867, 869 (8th Cir. 2001) (juvenile passenger); Evans v. Avery, 100 F.3d 1033, 1035 (1st Cir. 1996) (pedestrian); Jones v. City of Durham, 622 S.E.2d 596, 598 (N.C. 2005) (pedestrian); *see also* Anna M. Krstulic, Note,

Furthermore, the number of bystanders killed or maimed as a result of police pursuits may be significantly higher than the available statistics suggest.[4] Innocent-bystander fatalities and injuries remain an underreported portion of police pursuit statistics for two reasons: (1) most agencies do not report deaths that occur after the chase has ended, even if it is a matter of seconds or if the bystander dies at the hospital,[5] and (2) there is no mandatory nationwide system of reporting police pursuit statistics.[6]

Experts report that a majority of police pursuits were initiated following a traffic violation.[7] As many as 27% of suspects, interviewed as part of a grant study, reported that they failed to stop for police simply because of a suspended license.[8] However, despite the high social costs, in terms of loss of life, medical expenses, and increased criminal charges against the suspect, police pursuits still enjoy widespread public support for several reasons.

First, the sensationalism of these chases in the media has lead to a near fascination with police pursuits.[9] In 1994, millions watched a white Bronco proceed down the highways of Los Angeles carrying its notorious driver, O.J. Simpson.[10] Television shows, such as *Cops*, frequently involve vehicle chases of low-level criminals on urban streets.[11] Many action movies involve a police chase that results in the protagonist getting away at the expense of an untold number of bystanders.[12] Thousands of people sit anxiously in their theater seats hoping that the character gets away, despite the carnage that often ensues.

America's Most Shocking Standard: When Innocent Parties Are Injured or Killed in High-Speed Police Pursuits, What Police Conduct Sufficiently "Shocks the Conscience" to Allow Recovery?, 47 WASHBURN L.J. 785, 786 (2008) (citing Hill, *supra* note 1, at 14–15) (stating that in 1998, 114 "innocent bystanders" were killed in police pursuits).

4. *See* Hill, *supra* note 1, at 15 ("[A]ttempts by NHTSA to track pursuit fatalities . . . results in the collection of as little as one-half of the actual data.") (citing D.P. Van Blaricom, *He Flees—To Pursue or Not to That Is the Question*, POLICE MAG. (Nov. 1, 1998), http://www.policemag.com/channel/patrol/articles/1998/11/he-flees-to-pursue-or-not-to-that-is-the-question.aspx).

5. *See* Interview by Jim Phillips with Geoffrey Alpert, Professor, Univ. of S.C. (2003), *available at* http://pursuitwatch.org/stories/alpert.htm.

6. *See* Larry Copeland, *Chases by Police Yield High Fatalities*, U.S.A. TODAY, Apr. 23, 2010, at 3A.

7. *See* Schultz et al., *supra* note 1, at 1 (quoting Hill, *supra* note 1, at 15).

8. *Id.* at 2. ("[Thirty-two percent] were driving a stolen car, 27 percent had a suspended driver's license, 27 percent wanted to avoid arrest, and 21 percent were driving under the influence . . . .").

9. *See, e.g.*, Interview by Jim Phillips with Geoffrey Alpert, *supra* note 5 ("Police pursuits have attracted the attention of the public through the media, entertainment industry, and personal experiences. . . . Live broadcasts of pursuits may satisfy the appetites of those who need the excitement of risk and danger.").

10. *See* Seth Mydans, *Cornered at His House After He Is Accused of Killing Ex-Wife and Her Friend*, N.Y. TIMES, June 18, 1994, at 1.

11. *See, e.g.*, *Cops: Police Chases Special Edition* (FOX television broadcast Nov. 18, 2006) (documenting Florida police officers chasing a male who stole a vehicle, among other chases).

12. *See* Patrick T. O'Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 MERCER L. REV. 511, 513 (2006).

Society's exposure to police pursuits in such a sensational light has desensitized many to the effects and costs of these chases on the general public.[13]

Second, despite the ramifications of these chases, the public and officers do not want the suspects to remain at large.[14] Fear of repeat offenders and prevailing ideas of justice have led society to accept the deaths of innocent bystanders as a byproduct of the necessity of police pursuits.[15] The main goal of effective law enforcement is "to apprehend and arrest the suspect."[16] The United States Supreme Court has given great weight to the need to promote law enforcement interests, even though there is often a great cost to the individual and society.[17]

A few states and police agencies have instituted more restrictive pursuit policies.[18] A report on the Miami Metro-Dade Police Department indicated that a restrictive chase policy decreased the number of chases in one year from 279 to 51.[19] However, the overwhelming majority of police departments in South Carolina have not implemented restrictive chase policies,[20] which leads to the very real possibility of liability for injuries resulting from police pursuits.

In federal court, injured innocent bystanders currently must satisfy a rigorous, if not impossible, standard for § 1983 claims, and this standard is

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13. *See, e.g.*, Bill Mears, *Supreme Court Weighs Police Action in 100 mph Chase*, CNN (Feb. 28, 2007, 11:51 AM), http://www.cnn.com/2007/LAW/02/26/police.chases/index.html (quoting Transcript of Oral Argument at 28, Scott v. Harris, 550 U.S. 372 (2007) (No. 05-1631), http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1631.pdf) (indicating that media affects the Supreme Court in police pursuit cases and noting that Justice Antonin Scalia stated in oral arguments, "[The officer] created the scariest chase I ever saw since 'The French Connection.'").

14. *See, e.g.*, Geoffrey P. Alpert et al., *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 606 (1997) ("[M]any police officials still believe that the injuries and deaths caused by pursuits are worth the value of pursuing law violators.").

15. *See generally id.* ("[O]fficers and citizens who view the primary police mission as the apprehension of law violators tend to emotionally defend pursuit driving and its role in that mission.").

16. Schultz et al., *supra* note 1, at 2.

17. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 385 (2007) ("Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best."); Illinois v. Wardlow, 528 U.S. 119, 126 (2000) ("Indeed, the Fourth Amendment accepts [the risk that officers may stop innocent people in a *Terry* stop] in connection with more drastic police action."); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 855 (1998) ("Prudence . . . was subject to countervailing enforcement considerations, and while [the officer] exaggerated their demands, there is not reason to believe that they were tainted by an improper or malicious motive on his part.").

18. *See, e.g.*, Geoffrey P. Alpert, *Police Pursuit: Policies and Training*, NAT'L INST. JUST. RES. BRIEF, May 1997, at 1, 4 & tbl.2, https://www.ncjrs.gov/pdffiles/164831.pdf ("When Metro-Dade adopted a 'violent felony only' pursuit policy . . . the number of pursuits decreased 82 percent the following year.").

19. *See id.* at 4 tbl.2.

20. Interview with Wesley K. Cook, Chief of Police, Town of Eutawville, S.C. (Mar. 24, 2013).

inequitable based on the word "intent" and the "judicial conscience."[21] This Note suggests that, under current South Carolina and federal law, it is easier and more probable for a fleeing suspect, who was harmed in a police pursuit, to recover than it is for an innocent bystander to receive complete or partial recovery. Current South Carolina law should be reformed to allow for complete recovery for innocent bystanders harmed as a result of high-speed police chases to comport with traditional notions of fairness and equality.

Part II of this Note describes current county and municipal liability under the South Carolina Tort Claims Act. Part III discuses claims in South Carolina courts, analyzes current United States Supreme Court standards applicable to federal claims brought in state court, and examines the reasoning employed by the courts for limiting police department liability. Part IV analyzes the interplay of the impact of the courts' standards and the application of the South Carolina Tort Claims Act. Part V offers recommendations and suggestions for changes in South Carolina law. Part VI concludes this Note.

II. BACKGROUND: SOUTH CAROLINA TORT CLAIMS ACT

Enacted in 1986, the South Carolina Tort Claims Act[22] provides the state, as well as its political subdivisions and employees, immunity from tortious liability for occurrences within the scope of official state duties, subject to exceptions[23] that waive such immunity.[24] The South Carolina Court of Appeals has reiterated this purpose, finding that "[t]he Act does not create a cause of action. Rather, it removes the common law bar of sovereign immunity in certain circumstances . . . ."[25]

With regard to the claims of innocent bystanders, concern lies with three main provisions of the Tort Claims Act: the exceptions to the waiver of immunity,[26] the statutory cap on damages,[27] and the exclusive and sole remedy provision.[28] First, section 15-78-60 of the South Carolina Code provides the exceptions to immunity, which limit the applicability of sovereign immunity to

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21. *See, e.g.*, *Lewis*, 523 U.S. at 856 (applying the "shocks the [judicial] conscience" standard for Fourteenth Amendment claims involving police pursuits and finding the standard was not met); Brower v. Cnty. of Inyo, 489 U.S. 593, 596–97 (1989) (holding that the Fourth Amendment seizure standard for police pursuits is "means intentionally applied").

22. South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10 to -220 (2005 & Supp. 2012).

23. *See id.* § 15-78-60 (listing forty exceptions to the statutory waiver of immunity, including, for example, legislative or judicial action, exercise of discretion of a government employee, a nuisance, and natural conditions on a public way).

24. *See* S.C. CODE ANN. § 15-78-20(b) (2005).

25. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 121, 542 S.E.2d 736, 739 (Ct. App. 2001) (citing Summers v. Harrison Constr., 298 S.C. 451, 454, 381 S.E.2d 493, 495 (Ct. App. 1989)).

26. § 15-78-60.

27. *See* S.C. CODE ANN. § 15-78-120 (2005).

28. *See id.* § 15-78-200.

the state and its actors.[29] Of the forty exceptions listed, subsection (5) is a relevant and frequently invoked exception to municipal liability for police pursuits.[30] Under subsection (5), police departments are not liable for losses resulting from "the exercise of discretion or judgment by the [officer] or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or [officer]."[31] Section 15-78-60 highlights the importance that the element of duty plays in determining whether liability or immunity exists in a particular case.[32] The duty of care is analyzed under common law standards, and once the other elements of negligence are established, the court's next step is "to analyze the applicability of exceptions to the waiver of immunity."[33]

The second applicable provision of the South Carolina Tort Claims Act is section 15-78-120, which limits the liability and provides the statutory cap on recovery for claims against county and municipal police departments.[34] A single loss or occurrence, such as a collision resulting from a high-speed police chase, cannot lead to more than $300,000 in damages for the victim.[35] This provision also prohibits recovery for punitive damages, exemplary damages, and interest prior to judgment, no matter how egregious the injury suffered as a result of the officer's conduct while in the scope of his duties.[36] The statutory cap and the prohibition on punitive damages, in effect, function so as to eliminate any equitable factors the court or jury may consider in awarding recovery. Any judgment, even if it is $3.75 million, awarded against a county or municipality must be reduced to the statutory cap,[37] leaving it up to the injured victim's insurance to possibly cover the remaining costs associated with the victim's injuries.[38]

Finally, section 15-78-200 states that the Tort Claims Act is the "exclusive and sole remedy for any tort committed by a [police officer] while acting within

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29. *See* § 15-78-60.

30. *See, e.g.*, Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 386, 608 S.E.2d 573, 578 (2005) (quoting § 15-78-60(5)) (citing Pike v. S.C. Dep't of Transp., 343 S.C 224, 230, 540 S.E.2d 87, 90 (2000); Summer v. Carpenter, 328 S.C. 36, 46, 492 S.E.2d 55, 60 (1997); Niver v. S.C. Dep't of Highways & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990)) (discussing whether the subsection should be applied).

31. § 15-78-60(5).

32. *See id.*

33. Madison *ex rel.* Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 142, 638 S.E.2d 650, 660 (2006) (citing § 15-78-60; Trousdell v. Cannon, 351 S.C. 636, 642, 572 S.E.2d 264, 267 (2002); Arthurs *ex rel.* Estate of Munn v. Aiken Cnty., 346 S.C. 97, 105, 551 S.E.2d 579, 583 (2001)).

34. *See* S.C. CODE ANN. § 15-78-120 (2005).

35. *See* § 15-78-120(a)(1).

36. *See* § 15-78-120(b).

37. *See* Clark v. Dep't of Pub. Safety, 362 S.C. 377, 381, 608 S.E.2d 573, 575–76 (2005) (noting that jury returned a $3.75 million verdict for the plaintiffs and that Department's liability was subsequently reduced to $250,000.).

38. *See generally* S.C. CODE ANN. § 38-71-10 (2002) (providing that accident insurers are entitled to pay for healthcare services).

the scope of the [officer's] official duties."[39] The General Assembly also provided the courts with guidance in interpreting the statute, requiring that any inferences or ambiguities be construed liberally "in favor of limiting the liability of the governmental entity."[40] This guidance leaves the courts with little doubt of the intent of the General Assembly as to the purposes behind the enactment of the Tort Claims Act. The Editor's Notes to this provision go further in stating that the intent is to allow the government to be liable for a reasonable amount only as expressly provided for in the Tort Claims Act.[41]

These three provisions of the South Carolina Tort Claims Act are the foundational principles guiding the courts in determining county and municipal liability for high-speed police pursuits. Part IV of this Note will show how these provisions work together to prevent complete recovery for innocent bystanders injured by county and municipal police officers.

III. STATE AND FEDERAL CLAIMS: A COMPARISON

It is important to examine the distinction between claims brought under state law and those brought under federal law, or a combination of the two, to show how the law creates a loophole allowing fleeing felons to recover when innocent bystanders cannot. State law claims in South Carolina are based on a gross negligence standard,[42] while the federal law standard depends on the constitutional amendment relied upon by the plaintiff in a § 1983 action.[43]

A. State Law Claims

In *Clark v. South Carolina Department of Public Safety*,[44] the South Carolina Supreme Court addressed the liability of a police department for the death of an innocent bystander.[45] In *Clark*, a state trooper attempted a traffic stop following the driver of a van's erratic behavior.[46] The van failed to stop and a pursuit ensued.[47] After briefly stopping during the pursuit, the driver of the van attempted to run over the trooper, and the chase resumed.[48] The van's driver also ran through a red light, almost crashing into another vehicle.[49] The trooper

39. S.C. CODE ANN. § 15-78-200 (2005).
40. *Id.*
41. *Id.* at editor's note.
42. *See Clark*, 362 S.C. at 383, 608 S.E.2d at 576.
43. *Compare* Brower v. Cnty. of Inyo, 489 U.S. 593, 597 (1989) (Fourth Amendment liability applies a "means intentionally applied" standard), *with* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 855 (1998) (Fourteenth Amendment liability applies a "shocks the conscience" standard).
44. 362 S.C. 377, 608 S.E.2d 573.
45. *See id.* at 381, 608 S.E.2d at 575–76.
46. *See id.* at 383, 608 S.E.2d at 577.
47. *See id.*
48. *See id.* at 383–84, 608 S.E.2d at 577.
49. *See id.* at 384, 608 S.E.2d at 577.

radioed to dispatch and his supervisor that the trooper believed a crash was imminent; however, he did not abandon pursuit of the vehicle.[50] While traveling approximately eighty miles per hours, the driver of the van attempted to pass another vehicle in the emergency lane and swerved, crashing head-on into Amy Clark's car.[51] Clark died at the scene of the accident.[52] The accident occurred within five to six miles of the North Carolina border, at which point the trooper would have been forced to terminate the pursuit.[53]

Amy Clark's father, as personal representative of the estate, brought a wrongful death claim against the driver of the fleeing vehicle and the South Carolina Department of Public Safety,[54] the agency that oversees the South Carolina Highway Patrol.[55] At trial, the jury awarded Clark $3.75 million and apportioned 80% fault to the driver of the fleeing vehicle and 20% fault to the South Carolina Department of Public Safety.[56] This apportionment left the Department with a $750,000 verdict, which the trial court subsequently reduced to $250,000 in accordance with the limit of the Tort Claims Act at the time the trial commenced.[57]

The Department appealed to the South Carolina Court of Appeals, which affirmed the ruling of the trial court.[58] The South Carolina Supreme Court granted certiorari to review five issues on appeal by the Department.[59] This Note will focus on two of the issues—the gross negligence standard and qualified immunity.

1. Gross Negligence Standard

On appeal, the Department alleged that the court of appeals erred in holding that the trial court properly instructed the jury that gross negligence is the standard of care law enforcement officers owe in pursuits.[60] The legal duty that police officers owe to the public at large is established in section 56-5-760, which allows officers "to exceed the maximum speed limit and to disregard certain traffic violations during a police pursuit."[61] However, the statute goes on

50. *See id.* at 383, 384, 608 S.E.2d at 577.
51. *See id.* at 384, 608 S.E.2d at 577.
52. *See id.* at 381, 608 S.E.2d at 575.
53. *See id.* at 385, 608 S.E.2d at 578.
54. *See id.* at 381, 608 S.E.2d at 575.
55. *See* S.C. CODE ANN. § 23-6-20 (2007) (establishing that the South Carolina Highway Patrol is a division of the South Carolina Department of Public Safety).
56. *See Clark*, 362 S.C. at 381, 608 S.E.2d at 575–76.
57. *See id.* at 381, 608 S.E.2d at 576. The Tort Claims Act has been amended to raise the statutory cap to $300,000 since the time of the *Clark* trial. *See* S.C. CODE ANN. § 15-78-120 (2005).
58. Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002), *aff'd* 362 S.C. 377, 608 S.E.2d 573 (2005).
59. *See Clark*, 362 S.C. at 380–81, 608 S.E.2d at 575–76.
60. *See id.* at 382, 608 S.E.2d at 576.
61. *Clark*, 353 S.C. at 299, 578 S.E.2d at 20 (citing S.C. CODE ANN. § 56-5-760(B) (2006)).

to state that these allowances "do not relieve the [police officer] from the duty to drive with due regard for the safety of all persons."[62] The court of appeals noted that the parties agreed to the gross negligence standard, but the court suggested an argument could be made for an ordinary negligence standard as well.[63] Both the supreme court and the court of appeals noted that because the parties agreed to this standard of care, it would be the rule of the case, but seemed to suggest that this standard may be open to a different interpretation in future cases.[64]

According to the trial court, gross negligence is "the failure to exercise a slight degree of care."[65] The court of appeals also indicated that the South Carolina Supreme Court previously defined gross negligence as "the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."[66] The supreme court found that the trial court's definition of gross negligence was consistent with South Carolina law.[67]

Turning to the question of whether sufficient evidence existed to support a verdict that the trooper was grossly negligent in continuing to pursue the fleeing vehicle, the supreme court found that "the evidence . . . could yield a finding of gross negligence."[68] Both the supreme court and the court of appeals heavily relied upon three key pieces of evidence in determining that sufficient evidence existed for a jury to find gross negligence on behalf of the trooper.[69] First, Clark's expert witness, an experienced law enforcement officer and expert in high-speed pursuits, testified that the trooper should have terminated the pursuit because it was clear the fleeing driver was not going to stop.[70] Also, the expert stated that in order for an officer to meet the standard of care necessary in pursuits, the officer must continuously "weigh the danger of apprehending the

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62. *Id.* (quoting § 56-5-760(D)).

63. *See id.* at 300 & n.7, 578 S.E.2d at 20 & n.7. The South Carolina Court of Appeals noted that there is a split among jurisdictions whether the language of § 56-5-760 creates an ordinary negligence standard. *See id.* at 300 n.7, 578 S.E.2d at 20 n.7. Further, the court stated that the legislature deleted the "reckless conduct" standard of § 56-5-760 and there is no mention of "gross negligence" in the statute. *See id.* However, counsel did not raise the issue on appeal. *See id.*

64. *See Clark*, 362 S.C. at 382 & n.2, 608 S.E.2d at 576 & n.2.

65. *Id.* at 382, 608 S.E.2d at 576 (internal quotation marks omitted).

66. *Clark*, 353 S.C. at 301, 578 S.E.2d at 21 (quoting Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 331, 566 S.E.2d 536, 544 (2002)) (internal quotation marks omitted). The court also noted that the definition of gross negligence includes "the failure to exercise the slightest care" and that it has been defined as "the absence of care that is necessary under the circumstances." *Id.* (citing *Faile*, 350 S.C. at 331–32, 566 S.E.2d at 544; Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952)). Although a technical distinction, the differences in the two definitions could be quite profound. The "conscious failure" language could be interpreted more similarly to "reckless conduct" than the "absence of care." However, in the *Clark* case, the differing definitions did not weigh heavily on the result and the court did not differentiate between them. *See id.*

67. *Clark*, 362 S.C. at 382, 608 S.E.2d at 576.

68. *Id.* at 383, 608 S.E.2d at 577.

69. *See id.* at 385, 608 S.E.2d at 577–78 (quoting *Clark*, 353 S.C. at 302, 578 S.E.2d at 22).

70. *See id.* at 384, 608 S.E.2d at 577.

subject against the danger the chase is creating."[71] Second, the trooper radioed dispatch and indicated that he believed that a crash was imminent.[72] The trooper witnessed the fleeing vehicle almost hit several vehicles, drive at a high rate of speed, run a red light, and attempt to pass vehicles in the emergency lane, leading to this belief.[73] Finally, the supreme court relied on evidence that the accident occurred within five or six miles of the North Carolina border, where the trooper would have been required to terminate the pursuit.[74]

The supreme court compared this evidence with the applicable definitional standards of gross negligence and determined that sufficient evidence existed for a jury to return a verdict against the trooper for gross negligence.[75] The supreme court affirmed the court of appeals, finding that the trial court did not err in denying the Department's motion for a directed verdict and judgment notwithstanding the verdict.[76]

2. *Qualified Immunity*

The supreme court also addressed the issue of whether the discretionary immunity provided in the South Carolina Tort Claims Act could protect the trooper from liability.[77] The Department raised the issue on appeal, contending that the trooper was protected by discretionary immunity; however, the court of appeals and the supreme court found that he was not protected.[78]

The government carries the burden of proving the affirmative defense that the conduct fits within an exception to the waiver of immunity.[79] In order to establish that the conduct fits within the discretionary immunity provided under section 15-78-60(5), the Department must prove that the officer "faced with alternatives, actually weighed competing considerations and made a conscious choice."[80] Merely proving that the officer could exercise discretion is not enough to qualify for discretionary immunity.[81] Further, in weighing these

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71. *Id.*

72. *Id.* at 385, 608 S.E.2d at 578 (quoting *Clark*, 353 S.C. at 303, 578 S.E.2d at 22) ("[T]he Court of Appeals concluded that the 'heightened dangerousness of the pursuit' was evidenced by evidence [the trooper] notified the dispatcher he believed a crash was imminent.").

73. *See id.* at 383–84, 608 S.E.2d at 577.

74. *See id.* at 385, 608 S.E.2d at 578.

75. *See id.* (citing *Clark*, 353 S.C. at 303, 578 S.E.2d at 22).

76. *Id.* at 382, 388, 608 S.E.2d at 576, 579.

77. *See id.* at 386, 608 S.E.2d at 578.

78. *See id.*

79. *See id.* (citing Niver v. S.C. Dep't of Highways & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990)); *see also* Washington v. Whitaker, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994) ("[W]e overrule the antiquated rule that sovereign immunity is a jurisdictional bar and, accordingly, cannot be waived. We . . . hold that sovereign immunity is an affirmative defense that must be pled.").

80. *Id.* (citing Pike v. S.C. Dep't of Transp., 343 S.C 224, 230, 540 S.E.2d 87, 90 (2000)).

81. *See id.* (citing Summer v. Carpenter, 328 S.C. 36, 46, 492 S.E.2d 55, 60 (1997)).

considerations, it must be shown that the officer "utilized accepted professional standards appropriate to resolve the issue before [him]."[82]

The court of appeals found that the initiation and continuation of a pursuit is operational in nature and "not the type of discretionary act contemplated in the Tort Claims Act."[83] The supreme court focused on weighing the conflicting duties of a police officer,[84] and the court found that police officers have a duty to apprehend criminals but that their "paramount duty is to protect the public."[85] The court further found that conduct, such as pursuing fleeing drivers, is not justified when such conduct subjects the public to unreasonable risks of injury.[86] The supreme court set striking precedent for future cases by holding that "a law enforcement officer is not immune from liability under [s]ection 15-78-60(5) for the decision on whether to begin or continue the immediate pursuit of a suspect."[87] Thus, the trooper's decision to begin and continue the pursuit, despite the rapid and emotional decisionmaking that took place, could not be protected by discretionary immunity under the Tort Claims Act.[88]

B. Federal Claims

Under federal law, the claim innocent bystanders typically present arises under 42 U.S.C. § 1983, which establishes a civil action for deprivation of rights.[89] Two essential elements make up a § 1983 claim.[90] First, the innocent bystander must prove that the officer who committed the conduct was acting under the color of state law.[91] Second, the bystander must prove that such conduct deprived the innocent bystander of "rights, privileges, or immunities secured by the Constitution."[92] The second element must state with specificity which right, privilege, or immunity has allegedly been violated, because § 1983 only provides a remedy, not a right.[93]

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82. *Id.* (citing *Pike*, 343 S.C at 230, 540 S.E.2d at 90).
83. Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 305, 578 S.E.2d 16, 23 (Ct. App. 2002).
84. *See Clark*, 362 S.C. at 386–87, 608 S.E.2d at 578–79.
85. *Id.* at 386–87, 608 S.E.2d at 578.
86. *See id.* at 387, 608 S.E.2d at 578–79.
87. *Id.* at 387, 608 S.E.2d at 579.
88. *See id.*
89. *See* 42 U.S.C. § 1983 (2006).
90. *See id.*
91. *See id.*; *see also* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999) ("[R]espondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law.").
92. 42 U.S.C. § 1983.
93. *See* Albright v. Oliver, 510 U.S. 266, 271 (1994) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"). Further, identifying the "specific constitutional right allegedly infringed" in the plaintiff's complaint is the first step in § 1983 actions. *Id.* (citing Graham v. Connor, 490 U.S. 386, 394 (1989); *Baker*, 443 U.S. at 140).

In § 1983 actions, innocent bystanders typically claim a violation of their Fourth or Fourteenth Amendment rights, or a combination of the two.[94] Fourth Amendment claims center on the premise of an unreasonable seizure, and Fourteenth Amendment claims center on a violation of due process.[95]

1. Fourth Amendment

The preeminent case on Fourth Amendment liability for injuries caused by police pursuits is *Brower v. County of Inyo*.[96] Although factually distinct in that the Court was not presented with a claim by innocent bystanders, the standard the Court established in *Brower* nevertheless applies to innocent-bystander cases.[97]

In *Brower*, the police pursued a stolen vehicle on a twenty-mile chase, which resulted in the death of the driver of the fleeing vehicle.[98] Brower alleged the police strategically placed a tractor-trailer across a highway at night.[99] Hidden behind a blind curve, Brower further alleged the police aimed their headlights in the direction of the oncoming vehicle in an effort to conceal the tractor-trailer.[100] The driver of the vehicle allegedly never saw the tractor-trailer, collided head-on with it, and died as a result of the crash.[101]

The driver's representative brought a § 1983 action, claiming a violation of the driver's Fourth Amendment rights because the officers unreasonably seized the driver by intentionally creating a roadblock meant to harm the driver.[102] The district court found that "establishing a roadblock [was] not unreasonable under the circumstances."[103] The United States Court of Appeals for the Ninth Circuit, as a divided panel, affirmed the district court's dismissal for failure to state a claim by reasoning that no seizure had occurred.[104]

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94. *See* Krstulic, *supra* note 3, at 790 (citing O'Connor & Norse, *supra* note 12, at 546).

95. *See* O'Connor & Norse, *supra* note 12, at 546; *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

96. 489 U.S. 593 (1989).

97. *See, e.g.*, Cone v. Nettles, 308 S.C. 109, 113, 417 S.E.2d 523, 525 (1992) (citing *Brower*, 489 U.S. at 596–97) (applying the *Brower* standard to facts concerning a passenger killed as a result of a police pursuit).

98. *See Brower*, 489 U.S. at 594.

99. *See id.* (citation omitted).

100. *See id.* (citation omitted).

101. *See id.* (citation omitted).

102. *See id.*

103. *Id.* (alteration in original) (citation omitted) (internal quotation marks omitted).

104. *See* Brower v. Cnty. of Inyo, 817 F.2d 540, 546, 548 (9th Cir. 1987), *rev'd*, 489 U.S. 593 (1989) ("Brower's seizure, if any, was the result of his own effort in avoiding numerous opportunities to stop.").

Writing for the majority of the United States Supreme Court, Justice Scalia developed what is now known as the "means intentionally applied test."[105] Under the rule of *Brower*, a Fourth Amendment seizure occurs in police pursuits "only when there is a governmental termination of freedom of movement *through means intentionally applied*."[106] In determining whether a driver or bystander has been seized in a police pursuit, the Court does not inquire into an officer's subjective intent, but "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result."[107] Further, Justice Scalia explicitly pointed out that a seizure would not occur when the government merely terminated freedom of movement, such as the movement of an "innocent passerby."[108] The Supreme Court found in *Brower* that a seizure occurred because the officers intended to stop the fleeing driver by means of the roadblock.[109] The Court remanded the case for a determination of whether the seizure was unreasonable.[110]

Shortly after *Brower*, the South Carolina Supreme Court addressed the issue of unreasonable seizures under the Fourth Amendment in an innocent-bystander case. In *Cone v. Nettles*,[111] the police pursued a motorcycle on which the plaintiff, then age sixteen, was a passenger.[112] The officer in pursuit noticed that both the driver and the passenger looked young but continued pursuit, despite the motorcycle traveling at a high speed.[113] At 100 miles per hour, the driver of the motorcycle lost control and seriously injured the passenger.[114] The passenger brought suit against a county deputy and a city police officer who were involved in the pursuit, alleging a violation of Fourth Amendment rights under 42 U.S.C § 1983.[115]

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105. *See Brower*, 489 U.S. at 596–97.

106. *Id.*

107. *Id.* at 599.

108. *See id.* at 596–97.

109. *See id.* at 599–600.

110. *Id.* On remand, the Ninth Circuit Court of Appeals declined to resolve the issue of unreasonableness, for the reason that this issue was not properly to be decided on a motion to dismiss a claim. *See* Brower v. Cnty. of Inyo, 884 F.2d 1316, 1318 (9th Cir. 1989). However, the court of appeals did raise the question to be determined under the *Tennessee v. Garner* standard of deadly force: "Did a reasonably non-deadly alternative exist for apprehending the suspect?" *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 11–12 (1985)). The Court opined that this is a question of fact because it "cannot be said with certainty that no non-deadly alternative existed." *Id.*

111. 308 S.C. 109, 417 S.E.2d 523 (1992).

112. *See id.* at 110, 417 S.E.2d at 524.

113. *See id.* Although the court did not expressly discuss the importance of this fact, it appears the court noted it for two reasons. First, the court possibly tried to show that the officer knew the young age and immaturity of the driver being pursued. Second, the court may have been inferring that this observation is another reason the officer initiated the pursuit, because in South Carolina, anyone under the age of 21 must wear a helmet on a motorcycle. *Id.* at n.1 (citing S.C. CODE ANN. § 56-5-3660 (2006)).

114. *See id.* at 111, 417 S.E.2d at 524.

115. *See id.*

On direct appeal, the South Carolina Supreme Court approached the deputy and the officer's liability differently under § 1983.[116] Only "persons" can be held liable under 42 U.S.C. § 1983.[117] The court found that the deputy was not a "person" within § 1983 because he acted in his official capacity as a state official.[118] The court further noted that the South Carolina Constitution establishes the sheriff's office, and the General Assembly prescribes the duties of sheriffs and their deputies.[119] Accordingly, the court reasoned that deputy sheriffs are state officials.[120] Therefore, the deputy was found not individually liable in his official capacity.[121]

Turning to the city police officer, the court found that he was a "person" in his official capacity, such that § 1983 liability attached if the other elements of the statute were met.[122] The court then addressed the plaintiff's claim that an unreasonable seizure occurred in violation of the Fourth Amendment.[123] Applying the "means intentionally applied" test, the court found that no seizure took place because "mere pursuit of a fleeing suspect, absent physical force" does not rise to the level of a seizure.[124] Further, the officer only made a "show of authority" through lights and sirens; the driver of the motorcycle caused the accident through his own recklessness.[125] Ultimately, the South Carolina Supreme Court affirmed the trial court's granting of summary judgment to the defendants, the deputy and the officer.[126]

2. *Fourteenth Amendment*

The Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law."[127] The

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116. *See id.* at 111–13, 417 S.E.2d at 524–25 (citations omitted).

117. *See* 42 U.S.C. § 1983 (2006).

118. *See Cone*, 308 S.C. at 112, 419 S.E.2d at 525. The court also discussed *Will v. Michigan Dep't of State Police*, in which the United States Supreme Court held that "neither the state, nor a state official acting in an official capacity, are 'persons' within § 1983." *Id.* at 111–12, 419 S.E.2d at 524 (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989)).

119. *Cone*, 308 S.C. at 112, 417 S.E.2d at 525 (citing S.C. CONST. art. V, § 24; Gulledge v. Smart, 691 F. Supp. 947, 954 (D.S.C. 1988)).

120. *See id.*

121. *See id.*

122. *See id.* "[C]ity officials are 'persons' within § 1983." *Id.* (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978)).

123. *See id.* at 113, 417 S.E.2d at 525 (citing California v. Hodari D., 499 U.S. 621, 626 (1991); Brower v. Cnty. of Inyo, 489 U.S. 593, 596–97 (1989); Terry v. Ohio, 392 U.S. 1, 16 (1968); Patterson v. City of Joplin, 878 F.2d 262, 263 (8th Cir. 1989)).

124. *Id.* (citing *Hodari D.*, 499 U.S. at 626).

125. *See id.* (citing *Hodari D.*, 499 U.S. at 626). The court also made a point of noting that the officer testified that he had terminated the pursuit prior to the crash because the fleeing motorcycle drove out of the county. *See id.* at n.4.

126. *See id.* at 114, 417 S.E.2d at 526.

127. U.S. CONST. amend. XIV, § 1.

Fourteenth Amendment's guarantee of substantive due process serves as the basis for many § 1983 claims.[128]

The United States Court of Appeals for the Fourth Circuit adopted the "shocks the conscience" standard for substantive due process violations under the Fourteenth Amendment.[129] In *Temkin v. Frederick County Commissioners*,[130] during a high-speed police pursuit, the fleeing driver lost control and struck an innocent driver's vehicle.[131] In turn, this collision caused the deputy sheriff in pursuit to collide with the innocent victim's car on the driver's side, which led to the victim's debilitating injuries.[132] On appeal, the Fourth Circuit reviewed the district court's application of the shocks the conscience standard and found that this standard was in accord with other circuits and Fourth Circuit precedent.[133]

The Fourth Circuit found the officer's conduct did not shock the conscience of the court,[134] even though the officer pursued the vehicle for spinning tires at a gas station, followed too closely at speeds ranging from 65 to 105 miles per hour, and continued the pursuit through an area of town where a carnival took place and cars were parked on both sides of the road.[135] The court held that the officer's conduct, "while disturbing and lacking in judgment, [fell] short of the 'shocks the conscience' standard."[136]

In 1998, seven years after *Temkin*, the United States Supreme Court changed the face of police liability under the Fourteenth Amendment and imposed a strict standard that still stands today.[137] In a unanimous opinion, the Supreme Court adopted the shocks the conscience standard for substantive due process violations under § 1983.[138] In *County of Sacramento v. Lewis*,[139] police pursued a motorcycle carrying a sixteen-year-old passenger at speeds of up to 100 miles per hour through a residential neighborhood.[140] The police followed the motorcycle "at a distance as short as 100 feet; at that speed, [the officer's] car

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128. *See generally* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (citing Zinermon v. Burch, 494 U.S. 113, 125 (1990)) ("[S]ubstantive due process violations are actionable under § 1983.").

129. *See* Temkin v. Frederick Cnty. Comm'rs, 945 F.2d 716, 720 (4th Cir. 1991).

130. 945 F.2d 716.

131. *See id.* at 718.

132. *See id.*

133. *See id.* at 719–23 (citations omitted). The court further noted that "conduct which 'shocks the conscience,' or conduct which 'amount[s] to a brutal and inhumane abuse of official power literally shocking to the conscience,' violates the substantive guarantees of the Due Process Clause," regardless of the availability of remedies through state law. *Id.* at 720 (alteration in original) (quoting Rochin v. California, 342 U.S. 165, 172 (1952); Hall *ex rel.* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980)).

134. *See id.* at 723.

135. *See id.* at 718.

136. *Id.* at 723.

137. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 855 (1998).

138. *See id.*

139. 523 U.S. 833.

140. *See id.* at 836–37.

would have required 650 feet to stop."[141] The motorcycle fell over during the pursuit, and one of the chasing officers could not stop before running into the sixteen-year-old passenger of the motorcycle.[142] This collision caused the young boy to be thrown seventy feet down the road, and he died from the massive injuries he sustained due to the officer running him over.[143]

The boy's parents brought a § 1983 action against Sacramento County, the Sheriff's Department, and the officer, alleging that the boy's Fourteenth Amendment substantive due process right to life had been violated.[144] The district court granted summary judgment to all the defendant parties.[145] As to the officer, the district court reasoned that no opinion rendered before the accident recognized a substantive due process right for injuries from high-speed police pursuits.[146] The Ninth Circuit reversed the district court's finding and applied a different standard of "deliberate indifference to, or reckless disregard for, a person's right to life and personal security."[147] The court of appeals found that this lack of standard raised a genuine issue of material fact, precluding summary judgment.[148]

On appeal, the United States Supreme Court recognized generally the right to claim violations of substantive due process ensured by the Fourteenth Amendment in a § 1983 action.[149] The Court thoroughly analyzed previous case law and determined that a sliding scale of culpability exists within the shocks the conscience standard.[150] At the lowest end of the spectrum is negligence because the Fourteenth Amendment does not guarantee due care by police officers.[151] The middle level of the scale is more than negligence but less than gross negligence.[152] The Supreme Court stated that there are certain instances where

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141. *Id.* at 837.

142. *See id.*

143. *See id.* One commenter interestingly noted that prior to the release of the *Lewis* decision, "[o]ne morning next spring, the nine justices of the U.S. Supreme Court will file from behind the velvet curtain and announce their decision in *Lewis v. Sacramento County*. There is a virtual statistical certainty that later the same day, someone in the United States will die in a high speed vehicular pursuit." M. Amanda Racines, Note, *To Chase or Not to Chase: What "Shocks the Conscience" in High-Speed Police Pursuits?*—County of Sacramento v. Lewis, 523 U.S. 833 (1998), 73 TEMP. L. REV. 413, 413 (2000) (quoting Michael Avery, *Police Chases: More Deadly Than a Speeding Bullet?*, TRIAL, Dec. 1997, at 52, 52).

144. *See Lewis*, 523 U.S. at 837.

145. *See id.* at 837, 838 n.2.

146. *See id.* at 837–38 (citation omitted).

147. *Id.* at 838 (quoting Lewis v. Sacramento Cnty., 98 F.3d 434, 441 (9th Cir. 1996)) (internal quotation mark omitted).

148. *See id.* at 838–39 (citing *Lewis*, 98 F.3d at 442).

149. *See id.* at 854. However, the Court further explained that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.*

150. *See id.* at 845–55 (citations omitted).

151. *See id.* at 849 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.").

152. *See id.* (citing Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986)).

this middle-of-the-spectrum approach may be actionable under § 1983 but that these actionable instances deal with pretrial detainees and prisoners.[153] The highest level of the shocks the conscience scale involves "the most egregious official conduct,"[154] "brutal and offensive"[155] conduct, and conduct that "interferes with rights 'implicit in the concept of ordered liberty.'"[156]

The Supreme Court then turned to police pursuits and adopted a requirement of an intent to harm because high-speed police pursuits involve "unforeseen circumstances demand[ing] an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock."[157] Applying this requirement of intent to harm in order to "shock the conscience," the Supreme Court found that the officer in *Lewis* did nothing to cause the reckless driving or the accident that ensued.[158] The Court reasoned that the officer's reaction was grounded in his instinct to perform his job and not in intent to kill or harm the passenger of the motorcycle.[159] The Court's reasoning infers two key points about the shocks the conscience standard. First, the court looks at intent objectively, not subjectively.[160] Second, the action must shock the court's conscience, not the conscience of the public or a reasonable person.[161] Ultimately, the Supreme Court found that the officer's conduct did not rise to the level of shocking the conscience for the § 1983 action.[162]

IV. THE IMPLICATIONS OF SOUTH CAROLINA AND FEDERAL LAW: AN UNJUST BURDEN

A. Effect of Current Case Law and the South Carolina Tort Claims Act

An analysis of relevant case law leads to the conclusion that an innocent bystander harmed as a result of a high-speed police chase faces two realities. First, the United States Supreme Court, in *County of Sacramento v. Lewis* and *Brower v. County of Inyo*, essentially foreclosed recovery for damages that

153. *See id.* at 849–50 (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)).

154. *Id.* at 846 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).

155. *Id.* at 847 (quoting Breithaupt v. Abram, 352 U.S. 432, 435 (1957)).

156. *Id.* (quoting United States v. Salerno, 481 U.S. 739, 746 (1987)).

157. *Id.* at 853–54 (quoting *Daniels*, 474 U.S. at 332).

158. *See id.* at 855.

159. *See id.*

160. *See id.* at 856 (Kennedy, J., concurring) ("I join the opinion of the Court, and write this explanation of the objective character of our substantive due process analysis."). Justice Kennedy also noted that the phrase "shocks the conscience" "has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with considerable skepticism." *Id.* at 857.

161. *See id.* at 850 (majority opinion) ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and [the court's] concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.").

162. *See id.* at 855.

innocent bystanders incur as a result of police pursuits.[163] Second, even if the bystander can prove gross negligence in a state law claim, the South Carolina Tort Claims Act will limit his recovery to $300,000.[164] The chilling effect of these two realities is that an innocent bystander injured or killed by police officers during a pursuit will not be able to recover more than $300,000 in nearly every situation. An analysis of current law reveals that this subset of the population is left without an adequate remedy to compensate their losses.

This conclusion should itself "shock the conscience" because it leads to the understanding that a fleeing felon who is harmed during a police pursuit will likely be able to recover in situations where an innocent bystander cannot. Under South Carolina law, the result would be the same $300,000 statutory cap; however, in a § 1983 action, the fleeing felon has an easier time proving the requisite intent of the officer under the *Brower* "means intentionally applied" test.[165]

B. The Intent Requirement

Although gross negligence is the standard for South Carolina state law claims,[166] a showing of intent would likely rise to that level. Under federal law, a showing of intent prevents foreclosure of the § 1983 claim.[167] Both Fourth and Fourteenth Amendment claims require some showing of proof of intent in high-speed police pursuits to have a cognizable § 1983 action as set forth in *Brower*[168] and *Lewis*.[169] However, an objective view of intent leads to the conclusion that in almost every case, an officer does not have the intent to harm or seize an innocent bystander.

The term "intent" has a variety of uses and meanings in our legal system.[170] The intent required for intentional tortious conduct can be implied or transferred.[171] Also, criminal intent required for many crimes can be presumed

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163. *See id.*; Brower v. Cnty. of Inyo, 489 U.S. 593, 599–600 (1989).

164. *See* S.C. CODE ANN. § 15-78-120(a) (2005).

165. *See Brower*, 489 U.S. at 596–97.

166. *See supra* notes 60–67 and accompanying text.

167. *See, e.g.*, *Brower*, 489 U.S. at 596–97 (creating the "means intentionally applied" standard for § 1983 claims in relation to seizures).

168. *See id.* at 599 ("It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock . . . .").

169. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 855 (1998).

170. *See generally* BLACK'S LAW DICTIONARY 881–82 (9th ed. 2009) (providing definitions for varying types of "intent").

171. *See generally id.* at 882 (defining implied intent as "[a] person's state of mind that can be inferred from speech or conduct . . ." and defining transferred intent as "[i]ntent that the law may shift from an originally intended wrongful act to a wrongful act actually committed"). The transferred-intent doctrine is "[t]he rule that if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal or tortious intent toward the second applies to the third as well." *Id.* at 1636.

and transferred.[172] The United States Supreme Court's standards of intent and conscience-shocking in police pursuit liability differ from state court standards of liability for police pursuits.[173] The tests imposed on innocent bystanders for intent lead to the conclusion, albeit not explicitly stated, that the Supreme Court approaches such cases with a presumption that intent does not exist.[174] This presumption that intent is lacking, together with the other burdens an innocent bystander must shoulder, has created a basic foreclosure of federal claims under § 1983 for these victims of police pursuits.

C. The Sliding Scale of Liability in State Law Claims: A Conundrum for the Courts

South Carolina adopted the gross negligence standard in state law claims of police pursuit liability in *Clark v. South Carolina Department of Public Safety*;[175] however, the standard has not always been that of gross negligence.[176] Until 1990, section 56-5-760 of the South Carolina Code required reckless disregard of public safety before police officers could be held liable for conduct involving the operation of their patrol cars.[177]

Across the country, a sliding scale of culpability has developed in the context of police pursuit liability and innocent bystanders.[178] This scale ranges from almost absolute immunity to almost absolute liability.[179] It includes

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172. *See, e.g.*, State v. Fennell, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000) ("Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim . . . is transferred to the unintended victim."); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (finding that for the burglary statute's requirement of intent to be satisfied, actions after entering the house can be evidence of intent to commit a crime therein).

173. *Compare Lewis*, 523 U.S. at 855 (shocks the conscience standard for innocent bystanders), *and Brower*, 489 U.S. at 597 ("means intentionally applied" test for those fleeing the police), *with* Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 382, 608 S.E.2d 573, 576 (2005) (gross negligence standard).

174. In *Brower*, the Supreme Court noted that the police only sought to stop the suspect by a "means" of a show of authority, such as flashing lights. *See Brower*, 489 U.S. at 597. The "means" that actually stopped the vehicle were of the fleeing driver's own doing. *See id.* This analysis implies that officers must take action further than just chasing the vehicle. *See id.* (stating, hypothetically, that "[i]f . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, then the termination of the suspect's freedom of movement would have been a seizure").

175. *See Clark*, 362 S.C. at 382, 608 S.E.2d at 576.

176. *See* Jones v. Way, 278 S.C. 295, 295, 294 S.E.2d 432, 432 (1982) (citing S.C. CODE ANN. § 56-5-760 (1976) (amended 1990)) ("[The South Carolina code] absolves the driver of an authorized emergency vehicle from negligence, and imposes liability only when the conduct becomes reckless.").

177. S.C. CODE ANN. § 56-5-760 (Supp. 1977) (amended 1990); *see also* Act of June 11, 1990, No. 580, 1990 S.C. Acts 2467 (repealing the phrase "nor shall such provisions protect the driver from the consequences of his reckless disregard of others").

178. *See generally* O'Connor & Norse, *supra* note 12, for a more detailed discussion on a "continuum" of liability in state law claims.

179. *Compare* CAL. VEH. CODE § 17004 (West 2000) (absolute immunity), *with* NEB. REV. STAT. § 13-911(1) (2007) (no immunity).

reckless disregard, gross negligence, and negligence standards as well.[180] A clear consensus does not exist as to which standard should be applied.

California is on the extreme end of the scale towards absolute immunity. The California legislature enacted section 17004 of the Vehicle Code in 1959,[181] and it has since been amended on only one occasion.[182] This statute forecloses recovery by innocent bystanders, stating in relevant part that "[a]n [officer] is not liable for civil damages on account of personal injury to or death of any person . . . when in the immediate pursuit of an actual or suspected violator of the law."[183] Other states adopted a similar almost absolute immunity standard.[184] Georgia also created an exception to the waiver of immunity for "method[s] of law enforcement" and interpreted that terminology to include vehicle pursuits.[185]

The next standard on the sliding scale is reckless disregard. Several states adhere to the reckless disregard standard that was once a part of South Carolina law; for example, Kansas,[186] Iowa,[187] New York,[188] Mississippi,[189] Oklahoma,[190] and Rhode Island.[191] Factors that are often cited as determining recklessness in a police pursuit involve the length of the chase, departmental policy, need for apprehension, and danger to the public.[192]

In the middle of the scale is gross negligence. North Carolina has adopted a gross negligence standard similar to South Carolina's. In *Eckard v. Smith*,[193] the North Carolina Court of Appeals found that "in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in

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180. *See, e.g.*, MISS. CODE ANN. § 11-46-9(c) (2012) (reckless disregard); *see also, e.g.*, Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 382, 608 S.E.2d 573, 576 (2005) (gross negligence).

181. 1959 Cal. Stat. 1653.

182. *See* 1965 Cal. Stat. 3620.

183. § 17004. Additionally, section 17004.7 provides immunity for public agencies employing police officers that have a written policy for training in police pursuits. *See* § 17004.7(b).

184. *See, e.g.*, N.J. STAT. ANN. § 59:5-2 (West 2006) (stating that "[n]either a public entity nor a public employee is liable for . . . any injury resulting from or caused by a law enforcement officer's pursuit of a person").

185. *See* Blackston v. Ga. Dep't of Pub. Safety, 618 S.E.2d 78, 79–80 (Ga. Ct. App. 2005) (quoting Hilson v. Dep't of Pub. Safety, 512 S.E.2d 910, 912 (Ga. Ct. App. 1999)) (holding that a patrolman is not liable for injuries to an innocent bystander sustained during a vehicle pursuit and that "[c]hasing a speeding vehicle is a method of law enforcement subject to exception under Georgia law").

186. *See* KAN. STAT. ANN. § 8-1506(d) (2001).

187. *See* IOWA CODE § 321.231 (Supp. 2012).

188. *See* N.Y. VEH. & TRAF. LAW § 1104(e) (McKinney 2011).

189. *See* MISS. CODE ANN. § 11-46-9(c) (2012).

190. *See* State *ex rel* Okla. Dep't of Pub. Safety v. Gurich, 238 P.3d 1, 8 (Okla. 2010).

191. R.I. GEN. LAWS § 31-12-9 (2010).

192. *See, e.g.*, Johnson v. City of Cleveland, 846 So. 2d 1031, 1037 (Miss. 2003) (citing City of Jackson v. Brister, 838 So. 2d 274, 280 (Miss. 2003); City of Jackson v. Lipsey, 834 So. 2d 687, 692–93 (Miss. 2003); City of Jackson v. Perry, 764 So. 2d 373, 377 (Miss. 2000); Maye v. Pearl River Cnty., 758 So. 2d 391, 395 (Miss. 1999)) (listing these factors as ones to be considered to determine if police act with reckless disregard).

193. 603 S.E.2d 134 (N.C. Ct. App. 2004).

determining the officer's liability."[194] Other jurisdictions that have adopted the gross negligence standard include North Dakota[195] and the District of Columbia.[196]

At the lower end of the sliding scale of culpability is ordinary negligence. This standard is the same as ordinary tort liability and gives the officer the least protection available without statutory action.[197] Far fewer courts have adopted this standard over gross negligence, reckless disregard, or discretionary immunity.[198] Nebraska is one of the few states that statutorily confers no immunity for police officers that harm innocent bystanders in a high-speed police chase.[199]

V. CHASING CHANGE: SUGGESTIONS FOR REFORM IN SOUTH CAROLINA

South Carolina courts and the General Assembly could take three different avenues to cure this unjust remedy imposed on innocent bystanders. First, the South Carolina General Assembly can amend the Tort Claims Act to resemble Nebraska Revised Statute section 13-911. Nebraska's statute on vehicular pursuit by law enforcement officers states that "[i]n case of death, injury . . . to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during a vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer."[200]

A similar statute in South Carolina would provide the most just conditions for innocent bystanders to fully recover for their losses in police pursuits. It would circumvent the numerous standards federal law imposes and the question of which standard of culpability to impose on the sliding scale. Courts would have to turn no further than the statute to determine liability, and the question

194. *Id.* at 138 (quoting Parish v. Hill, 513 S.E.2d 547, 551 (N.C. 1999)) (internal quotation marks omitted).

195. *See* Jones v. Ahlberg, 489 N.W.2d 576, 581 (N.D. 1992).

196. *See* D.C. CODE § 2-412 (LexisNexis 2001).

197. *See generally* O'Connor & Norse, *supra* note 12, at 528–29 (citing NEB. REV. STAT. § 13-911 (1987); Henery v. City of Omaha, 641 N.W.2d 644, 646–49 (Neb. 2002)) (requiring only proximate cause for liability and noting that the "proximate cause standard is not difficult to achieve").

198. *See generally id.* (citing § 13-911; *Henery*, 641 N.W.2d at 646–49) (describing only Nebraska as having a statute of this kind and stating that it is the "most plaintiff favorable state").

199. *See* NEB. REV. STAT. § 13-911(1) (2007).

200. *Id.* This statute confers strict liability on the political agency that employs the officers who participate in the pursuit and the pursuit proximately causes an innocent bystander injury or death. *See* Staley v. City of Omaha, 713 N.W.2d 457, 465, 470–71 (Neb. 2006) (citing Stewart v. City of Omaha, 494 N.W.2d 130, 133 (Neb. 1993), *disapproved of by Henery*, 641 N.W.2d at 644) (holding that the lower court did not err in finding an innocent bystander's injuries were proximately caused by the non-negligent actions of a police officer in a vehicle pursuit and upholding a jury verdict of $1 million against the City of Omaha).

would then only turn on the amount of recovery.[201] Such a statute would lessen the hardships and burdens carried by this class of victims, who currently have no avenue of proper relief in the courts. The statute also could be written to allow the political subdivision to be reimbursed for damages paid to the innocent bystander.[202] Police pursuits are dangerous, no matter the conditions that surround them, and innocent bystanders should not be forced to bear the cost of their injuries caused by these dangerous activities.

In the alternative of enacting an innocent-bystander statute, the South Carolina Supreme Court should shift the standard from gross negligence to ordinary negligence. In *Clark v. South Carolina Department of Public Safety*, the sole case on this issue in South Carolina, the officer faced forced termination of the pursuit, despite the need to apprehend the vehicle because the vehicle was five miles from leaving the state's jurisdiction.[203] In most instances where innocent bystanders are harmed in police pursuits, this gross negligence standard will be difficult to meet. The *Clark* case is an exception, rather than an ordinary occurrence. The South Carolina Tort Claims Act states that government entities are liable for their torts in the same manner as average citizens.[204] In the same vein as the innocent-bystander statute, counties and municipalities should not be able to deny recovery to people harmed as a consequence of the actions taken by the government's employees.

In addition to the above suggestions, regardless of which action is taken, if any, the South Carolina Tort Claims Act should be amended to raise the statutory cap or provide for equitable allowances for innocent bystanders. The current cap of $300,000 is particularly low when viewed in the context of the loss of a loved one or a lifetime of medical care as a result of debilitating injuries.[205] In many cases, the amount awarded will go to reimburse insurance companies, in whole

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201. However, "innocent bystanders" will need to be defined at the outset, or the courts will face issues about whether passengers in fleeing vehicles are innocent. The Nebraska Supreme Court noted that a passenger may qualify as an innocent bystander under the statute if "[he] has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle." *Henery*, 641 N.W.2d at 649.

202. *See, e.g.*, § 13-911(2) (allowing for reimbursement by the political subdivision from the driver of the fleeing vehicle, insurers of the driver, any company or organization liable for the driver's conduct, insurers of the company or organization, any political subdivision whose officers contributed to the proximate cause of the accident, and other sources).

203. *See* Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 383–84, 608 S.E.2d 573, 577 (2005) (involving a lengthy and dangerous police pursuit that resulted in the death of an innocent bystander when the fleeing felon's vehicle collided head-on with Clark's vehicle).

204. *See* S.C. CODE ANN. § 15-78-40 (2005).

205. *Cf.* GA. CODE ANN. § 50-21-29 (2009) (providing a $1 million dollar statutory cap for claims under the Georgia Tort Claims Act); VA. CODE ANN. § 8.01-195.3 (2007) (providing a statutory cap of $100,000 or "the maximum limits of any liability policy maintained . . . whichever is greater").

or in part, for medical expenses.[206] The innocent bystander very well may walk away with nothing but scars and a traumatic memory, should he be that lucky.

Equitable allowances, such as grievous injury or death as a result of police pursuits, should be built into the Tort Claims Act. It should not be a bright line that can never be crossed.

VI. CONCLUSION

Under current South Carolina and federal law, it is easier and more probable for a fleeing suspect who was harmed in a police pursuit to recover than it is for an innocent bystander to receive complete or partial recovery.[207] The South Carolina Supreme Court's decision in *Clark* established the gross negligence standard of liability in South Carolina,[208] but this case still does not provide the standard necessary to afford innocent bystanders total relief.[209] While the need for effective law enforcement and the desire to not let criminals run free are strong and compelling governmental interests, they should not be enshrined at the expense of innocent bystanders. Society should not ask this class of individuals to bear the burden of medical costs or the loss of a loved one simply because it was necessary to catch the traffic-law offender.

As a nation, the United States has not accepted the notion that the need for more efficient law enforcement justifies the expense of infringing on the rights of individuals. The right to an adequate remedy is one that should not be denied to this subset of the population. Therefore, South Carolina courts and the General Assembly should take affirmative steps to ensure that innocent bystanders are able to obtain a just remedy, instead of the unjust one available today.

Bonnie E. Bull

206. *See generally* S.C. CODE ANN. § 38-71-190 (2002) (allowing for insurance contracts to provide for subrogation by the insurer to amounts the insured recovers from liable third parties).

207. *See supra* notes 163–65 and accompanying text.

208. *Clark*, 362 S.C. at 382, 608 S.E.2d at 576.

209. *See supra* notes 200–06 and accompanying text.