THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

RECEIVED
OCT 21 2014
SC Court of Appeals

Case No. 2013-CP-40-1047R

Evalena Catoe, individually and as Personal Representative of the Estate of Richard L. Catoe, Jr., deceased, Appellant,

v.

The City of Columbia and Leon Lott, in his official capacity as Sheriff of Richland County, Respondents,

---

AMENDED INITIAL BRIEF OF APPELLANT

Pamela R. Mullis
MULLIS LAW FIRM
1229 Elmwood Avenue
Post Office Box 7757
Columbia, SC 29202
(803) 799-9577

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial judge err in granting summary judgment to the Defendant Sheriff where there are genuine issues of material fact and where the Defendant Sheriff was not entitled to judgment as a matter of law?

2. Did the trial judge err in granting summary judgment to the Defendant Sheriff on the basis that the Sheriff's Department owed no duty and had breached no duty of care leading to the death of Plaintiff's decedent?

3. Did the trial judge err in finding that the Defendant Sheriff was immune from suit pursuant to the Tort Claims Act's exception maintaining immunity for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of providing police or fire protection," where the Defendant Sheriff's merely engaging in police activities does not constitute the "method" of providing police protection for which the legislature intended to maintain immunity?

STATEMENT OF THE CASE

Plaintiff, Evalena Catoe's husband, Richard Catoe, was fatally shot by a Richland County Sheriff's Deputy on July 22, 2007. Plaintiff brought this action for wrongful death against the City of Columbia and Leon Lott, in his official capacity as Sheriff of Richland County, seeking damages for her husband's death, pain and suffering, and for loss of consortium. A hearing on Defendant Sheriff Leon Lott's Motion for Summary Judgment pursuant to Rule 56, SCRCP, was held before Circuit Court Judge Eugene C. Griffith, Jr. on November 13, 2013. On January 9, 2014, Judge Griffith issued his Order granting summary judgment. This appeal follows.

STATEMENT OF FACTS

On July 22, 2007, Columbia Police Department (CPD) officers observed smoke near Sampson Circle. Upon CPD Officer Huertado's arriving on the scene of a house fire at approximately 8:00 am, he considered whether the house fire was the result of arson and if the culprit would be found nearby. When Huertado saw Richard Catoe standing on the side of the street, he immediately yelled out to Catoe. At that point, Huertado noticed that Mr. Catoe had a knife in his right hand. Huertado indicated that Mr. Catoe was irate, asking what the officer wanted with him. Huertado stated that Mr. Catoe was "making threats toward us and himself from a distance of approximately 15 to 20 feet away." (Statement of Huertado 7/22/07).

Officer Huertado recalled that Mr. Catoe was holding the knife to his own throat, threatening suicide and indicating that he had come there to die. The officer indicated that he was in fear for his safety because the knife changed positions; he told Mr. Catoe to stay back and not to make him shoot him. However, Huertado indicated that Mr. Catoe was moving 2 to 3 side to forward steps toward the CPD officers; Huertado indicated that upon Mr. Catoe's coming within six to eight feet while holding a knife, he was in such fear that he shot Mr. Catoe in the

abdomen. Huertado indicated that after he was shot, Mr. Catoe said, "You shot me" and retreated toward the driveway. (Statement of Huertado 7/22/07).

Officer Huertado indicated that he commanded Mr. Catoe to drop the knife and that, at that point, Mr. Catoe retreated a few steps and winced. Huertado indicated that Richland County had come upon the scene; among the officers to arrive at the scene were Officers Dodson, Dauway, Hassell, and Dingle, Sergeant Solomon, numerous deputies and a City of Columbia negotiator. After he was shot, Mr. Catoe started flexing his left hand and stated he was thirsty and wanted to speak to his son. Officer Dingle retrieved his cell phone and offered his water and the phone if he put the knife down. However, Mr. Catoe did not drop the knife. (Statement of Huertado 7/22/07).

Chief Crisp and CPD officers including SWAT officer Dodson arrived on the scene at approximately 9:15 a.m. After some time, Chief Crisp decided that it was time to try to take Mr. Catoe into custody using the "least lethal means possible " (Crisp Depo. p. 49). SWAT Officer Dodson indicated that the plan was for a flash bang, also known as a stun grenade, to be deployed, followed by use of a shield to knock Mr. Catoe down, and an officer shooting non-lethal bean bags at Mr. Catoe. (Dodson Depo. p. 38) Dodson indicated that there was never any discussion or concern that there could be a cross-fire situation. (Dodson Depo. p. 38). Dodson indicated that Chief Crisp was advised and approved of the plan. (Dodson Depo. p. 40).

SWAT Officer Dodson was standing near Lieutenant Rowson, the Columbia Police Department negotiator. Dodson indicated, "I know that the chief, Chief Crisp, was standing near, Captain Johnson was near. I was more involved at that particular point with the SWAT element and their immediate action plans." (Dodson Depo. p. 40). Dodson indicated, "there was a radio transmission sent out saying that we're going to initiate an action plan. There will be a

large explosion, there may be other sounds that sound like gunfire, which will be the bean bag rounds being fired, and to stand by." (Dodson Depo. p. 38). Dodson explained that the action plan involving the flash bang was shared with the other officers, "For safety. I mean, we don't want any incidental gunfire. We wanted our officers to be aware of what was going to happen." (Dodson Depo. p. 38).

Chief Crisp recalled that the order was given to holster weapons before the flash bang was deployed. He explained, "If you've got your weapon at ready - - you're a lot more apt to react instead of it in your holster and seeing what's going on. So we wanted to make sure that everybody was clear of what we were trying to do." (Crisp Depo. p. 71). Chief Crisp testified that it was it was his understanding that, when the order was given to CPD to holster weapons, Dodson was told to issue the same order to the SWAT officers. Chief Crisp indicated that, after the order was given to holster weapons, he would have expected all officers on the scene to comply. (Crisp Depo. p. 71). However, CPD officer, Bruce Roberts, indicated that he never heard an instruction to holster weapons. (Roberts Depo p. 54). Likewise, Officer Dauway stated that he never heard an order over his radio to holster weapons prior to the SWAT deployment of the flash bang (Dauway Depo p. 53). Officer White indicated that he never heard an order to holster weapons and that he never heard such an order directed to Officer Hendrick. (White Depo. p. 40)

The stack was made up of officers with the City of Columbia and officers from the Richland County Sheriff's Department, with the first officer, Roberts, holding the ballistic shield. Richland County Deputy Dauway arrived on the scene and, after discussions with his immediate supervisor Corporal Bright, joined the stack team. (Dauway Depo. p. 45). Roberts was at the front of the stack, with a ballistic shield in front of him and wearing a fragmentation helmet. (Roberts Depo p. 37). When asked about who was in charge, Roberts indicated that he was

answering to Auld; Auld was answering to Marsh; Marsh was answering to Dodson; and Dodson believes that Crisp was on the scene. (Roberts Depo. p. 44).

Officer Dauway recalled that they attempted to knock Mr. Catoe down with the shield and that he stumbled, but then he recovered and moved towards the back of the house. (Dauway Depo. p. 42). Officer Roberts indicated that the officers in the stack had made the turn so that they were behind the house after the flash bang was deployed. (Roberts Depo p. 30). Roberts recalled that after being hit with the stack, Mr. Catoe was "running backwards" and that he was not running towards Hendricks. (Roberts Depo. p. 35). Roberts indicated that "Several shots were fired from my left. I turned briefly and observed a female deputy discharging rounds at the suspect who was hit several times." (Roberts Depo p 35). Roberts indicated that he heard the shots and "it passed, I guess, over my left shoulder from what I remember because I heard several go by;" Roberts recalled that he "heard the whiz as they went past." (Roberts Depo. p. 37) Roberts indicated that he never heard an instruction to holster weapons. (Roberts Depo. p. 54).

RCSD Deputy Dauway indicated that, as they discussed the plan to use the flash bang, there was no discussion or any plan regarding the possibility that Mr. Catoe would flee or try to run. Therefore, Dauway explained that there was no attempt made to block Mr. Catoe from retreating into the back yard. (Dauway Depo p 42). Dauway recalled that only "some" of the stack members had on ear pieces so that they could communicate with each other and coordinate their movements, but that he did not have an ear piece. (Dauway Depo. p 54). Dauway indicated that as he and the rest of the stack approached Mr. Catoe, Mr. Catoe then began to backpedal to the rear of the house, raising the knife to his own throat. Dauway indicated he saw Roberts, the officer with the shield; strike Mr. Catoe who stumbled briefly before moving backward. Dauway indicated that they never anticipated that Mr. Catoe would run and that there was no attempt to block Mr.

Catoe from retreating into the back yard. (Dauway Depo. p. 42). Dauway indicated that, after the flash bang, the stack had broken into a line formation. Dauway indicated that he went to the right, to the far end away from the house. Dauway indicated that he heard several shots and looked to the left and saw Deputy Hendricks in a crouched position with two hands on her weapon. Dayway indicated that, at that point, the suspect was still moving and then fell to the ground. (Dauway Depo. p. 42).

Deputy Kellye Hendrick indicated that Deputy White was her supervisor when she arrived on the scene. She recalled, "When Corporal Bright arrived, he took over and told us what to do." (Hendrick Depo. p. 42). Deputy Hendrick indicated that Richland County Corporal Bright "was in contact with whomever was in command". (Hendrick Depo. p. 42). Deputy Hendrick indicated, "Once we realized we did not have a "clear shot with the taser, I was instructed by Master Deputy White to holster my taser" and then back him up with lethal force, which was drawing my firearm." (Hendrick Depo p. 43) Hendrick recalled, "We then were instructed to move to the other side of the house because the City of Columbia SWAT team, apparently, was going to come and devise a plan on how to take him into custody." (Hendrick Depo. p. 43).

Officer Hendrick indicated that the plan for subduing Mr. Catoe was that they were going to do a stack. Hendrick indicated that there was never any conversation with her about what they were going to do about avoiding a crossfire. (Hendrick Depo. p 56). Further, Hendrick stated that "they never came to us and told us what they were going to do". (Hendrick Depo. p. 57) Hendrick stated, "Corporal Bright was in contact with whomever was in command and he advised us what they were going to do. We never had direct communication with any of the command staff on what their plan was, other that they were going to stack up, throw a flashbang, and try to subdue him. That was all we were told." (Hendrick Depo. p. 57). Deputy Hendrick stated that it was

instinct that made her think that Mr. Catoe may run around the back of the house. Hendrick indicated, "Somebody's chasing you, you're going to run from them". (Hendrick Depo. p. 57).

RCSD Deputy White arrived at Samson Circle to find CPD officers already at the scene. When White arrived, he was the ranking RCSD officer. (White Depo p. 29). White made contact with CPD to advise that Richland County was there to assist. White indicated that he was authorized to use a taser. After some discussions with the other officers at the scene, White proceeded, with Officer Hendrick, to the back of the house to possibly tase Mr. Catoe. (White Depo p. 30). White was unsure if he was the ranking officer at that point, explaining that he was not in radio contact with CPD, CCPD command, or with SWAT. White recalled that he was communicating only with RCSD deputies, by radio and that he could communicate with Hendrick verbally. (White Depo pp 29-30).

After determining that an attempt to subdue Mr. Catoe with a taser was not going to work, White moved to the other side of the house. He indicated that the decision to move to the side of the house was his. (White Depo p 30). White recalled that he went to the front of the house when he heard the flash bang because he did not know whether Mr. Catoe would run that way. White recalled that he lost sight of Mr. Catoe when he ran back toward the house with SWAT in pursuit. White recalled hearing "somebody yelling that he's running" but that nothing was going on over the radio. When asked if instructions were going out on the radio at that time, White answered, "Not our radio." White testified that he never heard a command to holster weapons issued over the radio. (White Depo. p. 39-40). White testified that he was never told to holster his weapon and that he never heard anyone instruct Officer Hendrick to holster her weapon. (White Depo. p. 40)

White recalled that, when he regained eye line on Mr. Catoe, Hendrick was looking towards the back yard. White recalled that Mr. Catoe was angled 45 degrees towards the house

as he ran and that he was not facing straight. White indicated that he turned towards the back of the house and began moving that way. White then began hearing multiple loud popping sounds and saw Mr. Catoe running from behind the house across the backyard. White indicated that Mr. Catoe was not running towards Hendrick and that Hendrick was not blocking Mr. Catoe's escape route into the woods. (White Depo. pp. 44-45).

Officer Roberts recalled that as the stack approached Mr. Catoe, Mr. Catoe was facing Roberts with his knife raised, but that he was moving backwards. Roberts indicated that Mr. Catoe did not stop, even when Roberts and the stack were running toward him. Roberts indicated that at the time of the SWAT action plan, he was unaware that Mr. Catoe had already been shot once. (Roberts Depo. p. 30). Roberts recalled that after striking Mr Catoe, he never turned back to look to see if the stack was still behind him but that he assumed so because "the less than lethal shotgun rounds came from behind me, past me, so they would had to be behind me." (Roberts Depo. p. 30). Roberts recalled that several shots were fired from his left and that Mr. Catoe never moved towards the officer that was shooting him. Roberts recalled that he turned briefly and observed a female deputy discharging rounds at Mr. Catoe who was hit several times. (Roberts Depo. p. 35).

As Mr. Catoe was pushed toward the back of the house by the flash bang, shield and SWAT team, Officer Hendrick was unable to see Mr. Catoe and unable to see the back yard. Therefore, after the flash bang, Hendrick changed her position from the cover of the house, moving into the open in the back yard. At that point, as Hendrick saw Mr. Catoe going across the back yard, she shot him in the heart. Mr. Catoe had not been tased, sprayed with OC spray, subjected to the baton or to any less lethal measures before he was shot dead.

STANDARD OF REVIEW

Summary Judgment is appropriate only where "it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. In making a determination of whether there are genuine issues of material fact in dispute before the court "the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the non-moving party." Wiedemann v. Town of Hilton Head, 330 S.C. 532, 500 S.E.2d 783 (1998). Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. Summary judgment can only be granted in those cases where plain, palpable and indisputable facts exist on which reasonable minds cannot differ; all ambiguities, conclusions and inferences arising in and from evidence must be construed most strongly against the movant and in the light most favorable to the nonmoving party. Brockbank v. Best Capital Corp, 534 S.E.2d 688 (2000); Houck v. State Farm Fire and Cas. Ins. Co., 620 S.E.2d 326 (2005); Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. Brockbank, supra. The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

ARGUMENT

I. The trial judge erred in granting summary judgment to the Defendant Sheriff where there are genuine issues of material fact and where the Defendant Sheriff was not entitled to judgment as a matter of law.

The trial judge's Order sets out a description of the incident from which it would appear that the officers followed department procedures, that they acted with care and without negligence, and that the loss of Mr. Catoe's life was the result of an officer's justifiable and reasonable use of deadly force. However, the judge's factual review is not presented in the light most favorable to the plaintiff. In fact, although the officers should have taken due care in subduing the already- injured decedent to protect him from death or serious bodily harm, as the result of gross negligence and a complete disregard for the decedent's life, the RCSD officers on the scene on July 22, 2007, failed to exercise the level of care required.

Plaintiff's witness, Mr. Jon Blum, gave his expert opinion that actions taken by RCSD officers resulted in Mr. Catoe's unnecessary death. Mr. Blum applied his education, training, and twenty two (22) years of experience in law enforcement practices to reach his conclusions and expert opinion. Mr. Blum's experience includes but is not limited to the use of force, high risk situations and joint agency operations. Mr. Blum's personal knowledge and familiarity was gained through his experience as a sworn police officer for the State of North Carolina. Mr. Blum was a SWAT team member and instructor in the Use of Force for the North Carolina Department of Justice.

Noting the requirements of the Richland County Sheriff's Department's Use of Force Policy, Mr. Blum opined: "Defendants, including command level personnel, failed to provide, render, or otherwise do everything possible to secure immediate medical aid to Plaintiff who had been seriously injured by the use of deadly force." Mr. Blum further opined: "Defendants failed to

establish any semblance of command and control needed for joint operations. On-scene personnel failed to establish consistent and clear lines of communication throughout the event. Reports and statements by on-scene personnel place blame on others, deny accountability, or show uncertainty about who was in charge. There was no clear understanding as to who is actually in command of the scene." Mr. Blum concluded: "The lack of command and control hindered decision making altogether, whereby contributing to Plaintiff' death." (Blum Affidavit).

Despite the fact that time was on the side of the officers, given that Mr. Catoe had already been shot so that he was getting weaker, and despite the fact that this incident went on for hours, from approximately 7:30 a.m. until after 10:35 a.m., the entire operation appears to have been hurried, confused, and last-minute. RCSD officers indicated that they were unable to communicate by radio with CPD officers. (White Depo. p. 29, Hendrick Depo. p. 40) Thus, the testimony and statements given by the officers reveal a lack of organization and communication within and among the RCSD and the CPD which caused a level of confusion at the scene amounting to chaos. The lack of clear communication reportedly led to the flash bang's being deployed and SWAT's moving in even after it was known that that they had lost the element of surprise. The lack of communication is also the explanation for why some officers heard the Order to holster weapons and others, including CPD Officer Roberts and RCSD Officers White, Dauway, and Hendrick did not hear the command to holster their weapons. (Dauway Depo p. 53, Roberts Depo p. 54, White Depo. p 46) This failure to hear the holster-weapons command combined with the lack of communication is the explanation for why officers were involved in a cross-fire situation.

It was in this chaotic atmosphere that Deputy Hendrick changed her position so that she could see what was going on after she heard the flash-bang." Explaining that she was unable to

see the backyard from the position on the side of the house she had been ordered to maintain, Officer Hendrick testified that she changed her position, moving from a position of cover on the side of the house into the open in the back yard. (Hendrick Statement 7/24/07) The chaotic scene also apparently convinced Officer Hendrick that she was the only one who could stop Mr. Catoe. Therefore, despite the fact that there were twenty or more officers ready to stop Mr. Catoe if it became necessary, Officer Hendrick indicated, "If I had not been able to stop him, there is no doubt in my mind that others who were nearby could have been seriously hurt by the subject." (Hendrick Statement 7/24/07)

For his part, Mr. Catoe had already been shot once in the stomach and he had been confined to the area of a chair in the driveway on the side of a neighbor's house for hours by a circle of surrounding police officers. This mentally ill man was wounded, frightened, disoriented, and confused so that he responded to the explosion of the flash-bang by panicking and trying to run away from the danger which was apparently coming from the front of the house. Thus, as the result of Chief Crisp's attempt at a "non-lethal" action, the flash bang explosion and members of the SWAT team chased Mr. Catoe from the side of the house, into the backyard. Unfortunately, Mr. Catoe fled into the backyard where Officer Hendrick was now waiting with her revolver at the ready. Officer Hendrick stated that she aimed and fired once, but that she shot again when Mr. Catoe continued to "close the distance." (Hendrick Statement 7/24/07). Mr. Catoe was pronounced dead at 10:35 a.m. from four gunshot wounds to the chest.

These officers were required to take non-lethal steps and to maintain control of the scene and the situation in order to avoid injury or death. However, as the result of gross negligence and because the officers were not able to communicate with each other or with the other department on the scene, confusion reigned. The officers indicated confusion as to who was giving

orders and they were not able to communicate by radio. Thus, these RCSD officers had numerous non-lethal devices, manpower, protective gear, and time on their side; nevertheless, as the result of gross negligence and an utter disregard for the decedent's life or safety, the situation degenerated into chaos from which the best result this group of more than 25 officers could achieve was to shoot Mr Catoe through the heart.

Thus, genuine issues of material fact remain to be resolved as to Defendant Sheriff's negligent failure to establish command and control of the scene; the failure to have compatible radios so that the officers could communicate; the failure to coordinate with or to give weight to the negotiator; the failure to establish or follow an integrated plan communicated to all offers on the scene; and as to the officers' failure to use due care in order to avoid loss of life. The grant of summary judgment is appropriate only if it is perfectly clear that no genuine issue of material fact exists, that inquiry into the facts is not desirable to clarify the application of the law, and that the movant is entitled to judgment as a matter of law. Gilmore v. Ivey, 290 S.C 53, 57, 348 S.E.2d 180. 183 (Ct. App. 1986) Here, the trial judge erred in granting summary judgment where genuine issues of material fact remain to be resolved The grant of summary judgment should be reversed and the matter remanded for trial before a jury.

II. The trial judge erred in granting summary judgment to the Defendant Sheriff on the basis that the Sheriff's Department owed no duty and had breached no duty of care leading to the death of Plaintiff's decedent.

Under the South Carolina Tort Claims Act, "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." Proctor v. Dep't of Health & Envtl. Control, 368 S.C., 279, 290, 628 S.E.2d 496, 502 (Ct.App.2006); S.C.Code Ann. § 15–78–40. The legislature specifically provided that any person who may suffer a loss proximately

caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim. Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." Sections 15-78-20; -40; and -50.

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Steinke, 336 S.C. at 393, 520 S.E.2d at 152; accord Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994); Faile v.S.C. Dep't of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 540(2002); Proctor, supra.

A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law. Where the duty relied upon is based upon the common law, e.g. the duty to warn in Rogers v. South Carolina Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995), then the existence of that duty is analyzed as it would be were the defendant a private entity.

The trial judge granted summary judgment, in part, upon finding by footnote that the claim was barred by the public duty rule and the decision in Wyatt v. Fowler, 326 S.C. 97, 484 S.E.2d 590 (1997). The trial judge found that the Sheriff's Department owed a duty only to the public at large and, accordingly, he found that there was no duty owed to the Plaintiff's decedent. However, Plaintiff does not claim loss due to a breach of duty by statute; therefore, the public duty rule would not apply. In Madison ex rel. Bryant v. Babcock Center, Inc., 638 S.E.2d 650 (2006), the Supreme Court explained: "The public duty rule," which insulates public officials, employees, and governmental entities from liability for the negligent performance of their

official duties by negating the existence of a duty towards the plaintiff, is applied only when an action is founded upon a statutory duty, not when the duty is grounded in the common law." Where Plaintiff claims breach of a common law duty of care, the trial judge erred in finding that summary judgment was warranted on the basis that there was no duty owed under the public duty rule.

Under South Carolina common law a duty of care exists where the defendant has a special relation to the victim; where the defendant has a special relation to the injurer; where the defendant voluntarily undertakes a duty; where the defendant negligently or intentionally creates a risk; and where a statute imposes a duty on the defendant. Madison, supra; Faile, supra. The circumstances of this case fall within the exceptions to the general rule and give rise to a duty of care on the Defendant Sheriff to take reasonable care in taking and maintaining custody of the decedent; to take reasonable measures to protect him and to avoid loss of life; and to provide him with medical care for his injuries.

Defendant Sheriff bore a special relationship to Plaintiff's decedent in that Richland County Deputies had joined in the Columbia Police Department's attempt to take the decedent into custody in progress, after Plaintiff's decedent had already been shot in the abdomen. Richland County Deputies were made aware that the decedent had been shot in the abdomen by the City of Columbia prior to their arrival. Under these circumstances, the Sheriff's officers were required to make every attempt to protect the decedent from harm, to use due care, and to provide Mr. Catoe with immediate medical care.

In Jackson v. South Carolina Dep't of Corrections 301 SC 125, 390 SE2d 467 (Ct. App. 1989) the Court of Appeals recognized the Department of Corrections' duty to control, confine and maintain custody of an inmate and found that the evidence was sufficient to sustain a jury

verdict on the question of gross negligence as to the manner by which officers transferred the inmate with a tendency to violent outbursts. The Court of Appeals held that there was sufficient evidence to support a finding that transfer of the inmate from one institution to another, where he killed an inmate, was the result of gross negligence. The Court of Appeals found, "While Atkinson's transfer was admittedly an act requiring the discretion and judgment of the Department, Section 15-78-60(25) provides an exception to immunity where the governmental entity exercises its responsibility or duty in a grossly negligent manner. Section 15-78-60(5) must be read in light of this exception. If discretion is exercised in a grossly negligent manner, the exception to the normal rule of immunity applies."

Here, Defendant undertook a duty of care to the decedent upon voluntarily joining in the City of Columbia's efforts to take Plaintiff's decedent into custody, and upon asserting authority and control over Mr. Catoe and over the scene where he was confined; however, Defendant failed to employ due care to protect Mr. Catoe from injury or to provide medical treatment. In Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991), Wood had become intoxicated at a Columbia restaurant and he went outside after being asked to leave the premises. Once outside, Wood engaged in an altercation during which he sustained a severe head laceration. As a result of the disturbance, the City of Columbia Police Department's officers, Ray and Hall responded to the scene. Upon their arrival, Ray and Hall observed Wood in a seriously injured condition with blood all over his head and clothing, that other persons were attempting to render aid to Wood; and that Wood was highly intoxicated.

The officers asserted their authority and took control of the situation away from the individuals trying to render aid, depriving the decedent of these individuals' help. The officers determined that some disorderly conduct had occurred before they arrived, but neither Wood nor

the other parties wished to file charges. The officers did not offer Wood assistance in connection with his injuries and did not otherwise detain him. After concluding their investigation, the officers "insisted" that Wood leave the premises. Wood walked alone unassisted from the scene in the general direction of a nearby railroad trestle. Wood's body was later found in a creek beneath the trestle from which he had fallen approximately 100 feet from the scene of the police investigation.

Russell filed a wrongful death action, alleging negligence on the part of the respondents. Russell contended the respondents owed a duty of reasonable care to the public at large and to the decedent in particular to care for, protect, assist, and provide treatment and to refrain from interfering with others available to render aid. Further, Russell alleged the respondents failed to follow procedures promulgated by the Columbia Police Department's Policy and Procedures Manual, to the detriment of the decedent.

The circuit court granted summary judgment, finding that there was an absence of any legal duty to petitioner's decedent by the respondents and that the complaint failed to state a cause of action. The Court of Appeals affirmed, holding that petitioner did not assert, by pleading or argument, that any statute, contract, relationship or property interest created a duty on the part of the respondents toward petitioner's decedent. The Court of Appeals determined that there was no basis for finding a duty owed to Wood under general principles of negligence law. However, on appeal, the Supreme Court found that the allegations alleged by Russell's pleadings were sufficient to state a claim for negligence.

Noting that our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties and, further, that a judgment on the pleadings

is considered to be a drastic procedure by our courts, the Supreme Court in Russell, referenced the language of the Restatement 2nd of Torts:

> Section 323: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increased the risk of such harm; and
> Section 324: One who being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
> (a) the failure of the other to exercise reasonable care to secure the safety of the other while within the act as charged, or
> (b) the actors discontinuing his aid or protection if by doing so he leaves the other in a worse position than when the actor took charge of him.

The Russell Court reversed the Court of Appeals' affirmance of the grant of summary judgment, explaining, "Under common law, even where there is no duty to act but an act is voluntarily undertaken, the actor assumes the duty to use due care." Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986); Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984).

Thus, under the reasoning of Russell, the Defendant Sheriff's Department, having come voluntarily on the scene and having exerted authority over Mr. Catoe, who at that point was helpless to aid or protect himself, owed Mr. Catoe a duty to exercise reasonable care to secure his safety and a duty not to discontinue aid and protection where doing so left Mr. Catoe in a worse position than when the Sheriff's Department arrived. S.C. Code Ann. § 15-78-60 (25) provides that a governmental entity is not liable for a loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." Gross negligence is the

intentional conscious failure to do something which it is incumbent upon one to do or the doing of thing intentionally that one ought not to do. It is the failure to exercise slight care. Gross negligence has also been defined as a relative term and means the absence of care that is necessary under the circumstances. Jinks, 355 S.C. at 345, 585 S.E.2d at 283. To the extent plaintiff's case is premised on the failure of the deputies to follow procedures, such failure is also subject to the gross negligence standard. When a governmental entity asserts exceptions to the waiver of immunity and at least one of the relevant exceptions contains a gross negligence standard, the gross negligence standard may be interpolated into the other exceptions which apply.

In Dauffenbach v. City of Wichita, 233 Kan. 1028, 1035-1037, 667 P.2d 380, 386 - 387 (Kan.,1983), the Kansas Supreme Court noted, "The conclusion of law that Dauffenbach failed to carry the burden of proof that the force used was excessive or abusive was based on the trial judge's conclusion that a peace officer is presumed to have acted properly until that presumption is overcome by clear and convincing evidence. The latter conclusion permeates all the trial judge's other conclusions of law concerning liability." Dauffenbach had argued that a law enforcement officer making an arrest for a misdemeanor was not permitted to use such force as is likely to cause death or great bodily harm.

The Dauffenbach Court observed the majority rule concerning the arrest of misdemeanants: "It allows a law enforcement officer to use any force he or she believes necessary to effect an arrest, but prohibits the use of force which is likely to cause death or great bodily harm except to prevent death or great bodily harm to the officer or another person, or unless the suspect is attempting to escape by the use of a deadly weapon or otherwise indicates he or she will endanger human life or inflict great bodily harm unless arrested without delay."

However, the Court continued, indicating, "Conversely, the public should be protected from overreaction by law enforcement officers. It is not the duty of a law enforcement officer to punish a suspect by using unreasonable force or to wantonly or maliciously injure the suspect. A public citizen should be compensated when unreasonable force by a law enforcement officer causes an injury whether the injured party is a pillar of the community, an incoherent drunk or mentally ill. We see no reason to make a distinction between a traffic accident which involves a vehicle driven by a law enforcement officer (or the felling of a tree) and the unreasonable use of force in making an arrest." Dauffenbach , supra.

Thus, in Kansas, "Liability arises where an officer breaches a specific or special duty owed an individual. Such a special duty arises in two circumstances: (1) where there is an affirmative act by the officer causing injury; and (2) when a specific promise or representation by the officer is made under circumstances creating justifiable reliance." The Dauffenbach Court noted as examples of situations within the first category, placing an individual under arrest or committing an assault. Here, where RCSD officers had attempted, along with the Columbia Police Department, to place Plaintiff's decedent in custody, had rushed him in a stack of officers behind a shield, and exercised authority over the scene where he had already been injured by an officer, a special duty arose from such affirmative acts, requiring the officers to use due care.

Therefore, the trial judge erred in granting summary judgment upon finding that there could be no common law duty of care. The trial judge erred in finding, pursuant to the authority of Russell, that the Department owed no duty of care to Plaintiff's decedent; the grant of summary judgment should be reversed.

III. The trial judge erred in finding that the Defendant Sheriff was immune from suit pursuant to the Tort Claims Act's exception §15-78-60(6), maintaining immunity for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of providing police or fire protection," where the Defendant Sheriff's merely engaging in police activities does not constitute the "method" of providing police protection for which the legislature intended to maintain immunity?

In 1985, the South Carolina Supreme Court issued its decision in McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985), abolishing the doctrine of sovereign immunity. In 1986, the South Carolina legislature enacted the South Carolina Tort Claims Act (SCTCA), S.C.Code Ann. §§ 15-78-10 to 200, waiving immunity while also providing specific, enumerated exceptions limiting the liability of the state and its political subdivisions in certain circumstances.

Immunity pursuant to 15-78-60(6):

The trial judge agreed with and accepted the argument made by Defendant Sheriff that he was entitled to absolute sovereign immunity for the Plaintiff's negligence claim, "which arose out of actions undertaken to provide police protection." The trial judge erroneously granted summary judgment to the Sheriff, upon finding that the Defendant Sheriff was immune from suit pursuant to S.C.Code Ann. § 15–78–60, subsection (6). Subsection 6 provides that a governmental entity is not liable for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of providing police or fire protection." The trial judge in particular found, "Similar to the Huggins' Court evaluation, the key issue in the case at bar centers on the manner in which Hendrick chose to provide police protection. The Tort Claims Act contains clear, plain, and unambiguous language specifically exempting the police from liability concerning 'the methods which the officer chose to utilize.'" Thus, the trial judge erred in finding that the statute referred to the "methods" which an officer chose to utilize to provide police protection, rather than that the statute referred to the overall method chosen by

policy makers for providing police protection. By so interpreting the statute, the trial judge found the Defendant Sheriff immune upon finding only that these were police officers, engaged in law enforcement activities, and, therefore, they were immune as a matter of law.

The trial judge's error results from the misconstruction and unjustified expansion of the legislature's use of the word "method" to refer only very basically to a way of doing something, as opposed to the word "method's" referring to the orderly formulation of policy by policy makers- - *i e* , the determination of the overall *method* of providing police protection to the community. The trial judge erred in reading and interpreting the provision to maintain immunity for a loss resulting from the actions of those *engaged in* providing police protection rather from the decisions of policy-makers as to the "method" of providing police protection. However, Subsection 6 refers to the overall method of providing police protection and not simply to actions taken by officers engaged in providing police protection while in the scope of their official duties.

Had the legislature intended to provide blanket immunity for police officers' actions whenever acting in the scope of their law enforcement duties, the legislature would have said just that. However, the legislature did not provide in Subsection 6 that the governmental entity is immune from liability for any loss resulting from the actions of law enforcement officers taken while acting within the scope of their official duty. Instead, the legislature maintained immunity only for losses resulting from "*the method of* providing police protection."

Giving meaning to the word, "method," this provision maintains immunity where a loss is alleged to have resulted from the Departmental policies established by policy makers. To interpret Subsection 6 as providing immunity both for the making of policy decisions establishing the method of providing police protection and immunity for the negligence of

officers engaged in providing police protection, would result in the exception's swallowing the rule.

Where the legislature maintained immunity not for all actions taken by officers engaged in providing police protection but, instead, for the "method" of providing police protection, i.e., the formulation of official policy as to the overall method of providing police protection, the trial judge's ruling equating law enforcement actions with the "method" of providing police protection included in the statute, effectively omits the word "method" from the provision and, therefore, fails to distinguish the "method" of providing police protection, i.e., the formulation of official policy establishing the "method" of providing police protection, from the actions of officers on the ground, merely implementing departmental policy. The Tort Claims Act should be interpreted to find that Subsection 6 provides immunity for the method of providing police protection, i.e., the formulation of policy for the method of providing police protection, but not for the negligence of officers in implementing policies. The policies setting out the method of providing police protection are determined by those policy makers responsible for deciding, after taking law enforcement concerns and the community's needs and resources into account, the appropriate method of providing police protection. Subsection 6 is more properly interpreted to provide immunity for such formulation of policy but not for the negligent implementation of policy by officers actually engaged in providing police protection as they perform law enforcement duties.

South Carolina Code § 15–78–60(6) was first construed and applied by the South Carolina Court of Appeals in Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (CtApp 1998). In Wells, after their home was destroyed by fire, homeowners brought a claim against the City of Lynchburg for negligent maintenance and inspection of its fire hydrants. The Wells

claimed that the City was negligent in failing to inspect and maintain the fire hydrants and/or water lines for fire hydrants near their home, and in failing to notify the Lee County Fire Department that certain fire hydrants were inoperative. The Wells claimed two of the hydrants did not have sufficient water pressure, that a third hydrant was rusted shut, and they alleged that Lee County was negligent in failing to promptly provide adequate firefighting personnel and equipment at its disposal to extinguish the residential fire at the Wells home.

The City and County asserted the Tort Claims Act barred the Wells' claims and, further, that no duty of care existed to the Wells specifically and individually. Concluding that the action was barred by the Tort Claims Act and the public duty rule, the trial judge granted summary judgment in favor of the City of Lynchburg and Lee County. The Court of Appeals agreed that the City and County were immune pursuant to S.C.Code Ann. § 15–78–60's Subsection (6), providing that a governmental entity is not liable for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of providing police or fire protection." However, before finding that immunity applied, the Wells Court analyzed the particular claims raised by the Wells.

The Court of Appeals first noted that the Wells' complaint against Lee County was that the County had failed to promptly provide firefighting personnel and equipment for adequate fire protection. The Court observed that the Wells "concede[s] that section 15-78-60(6) of the Tort Claims Act bars their action against Lee County for the alleged failure to provide adequate firefighting personnel and equipment." Thus, the decision in Wells was shaped at the outset by the plaintiffs' conceding that their claim against Lee County relating to the allocation of resources and the provision of fire fighting personnel and equipment was barred under the Act. However, having conceded that the claim against the County was barred as such constituted the

"method of providing fire protection," the Wells maintained that their claim against the City of Lynchburg for failure to inspect and/or maintain the system of fire hydrants and to notify proper authorities of inoperative fire hydrants, was not barred under Subsection 6. The Court of Appeals in Wells proceeded to determine whether the claims the Wells raised against the City relating to its system for maintaining and inspecting fire hydrants came under Subsection 6.

The Court of Appeals referenced similar statutes from Oklahoma and Texas with approval, "Okla. Stat. Ann. tit. 51, § 155(6) (Supp.1998) (statute excludes liability for "civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection") and Tex. Civ. Prac. & Rem.Code Ann. § 101.055(3) (1997) (no liability "from the failure to provide or the method of providing police or fire protection"). Wells, 501 S.E.2d at 760. Upon noting that Texas and Oklahoma had similar statutes and that in both states the provision provided "no liability for any claim arising from the failure to provide or the method of providing police or fire protection," the Court of Appeals then agreed with the Oklahoma Court's reasoning in the Shockey decision, ruling that the City and County were immune from suit where "the maintenance of fire hydrants and the supply of water for fighting fires clearly is included in the exception from liability in Section 15-78-60 (6) for the method of providing fire protection and the discretionary act of maintaining the city water system with the resources available."

Notably, at the time of the issuance of the decision in Wells, referencing Oklahoma and Texas' versions of Subsection 6, the courts of those states had construed this Subsection not to provide immunity for any and all claims arising from police or fire activity. Texas Courts had actually held and explained that, under Texas' construction of "the method of providing police or fire protection," "while a municipality is immune from suit related to its policies and established

methods of providing police and fire protection, no such immunity exists where the loss was due to the negligent implementation of policy as opposed to some alleged fault with the policy itself." In 1979, some eighteen years prior to the Wells' Court's referencing with approval Texas' interpretation of Section 101.055(3), the Texas TCA's provision maintaining immunity for the "failure to provide or the method of providing police and fire protection," the Texas Supreme Court had issued the decision in State v. Terrell, 588 S.W.2d 784 (Tex. 1979).

In Terrell, the Texas Supreme Court elaborated on the distinction necessary to analyze governmental liability. Considering both the police protection and the discretionary powers exemptions to the Texas Tort Claims Act, the Court distinguished between the negligent *formulation* of policy, for which sovereign immunity is preserved, and the negligent *implementation* of policy, for which immunity is waived:

> As we understand the two provisions, the purpose of both is the same: to avoid a judicial review that would question the wisdom of a government's exercise of its discretion in making policy decisions. The interests to be served by these provisions are several— e.g., effective, unfettered performance of officials in making policy decisions and the maintenance of the separation of powers between the executive, legislative, and judicial branches of government....Thus, if the negligence causing an injury lies in the formulating of policy - - i.e., the determining of the method of police protection to provide - the government remains immune from liability. If, however, an officer or employee acts negligently in carrying out that policy, government liability may exist under the Act.

Terrell, 588 S.W.2d at 787-88, (emphasis added). It is unclear from the discussion in Wells whether the Court of Appeals intended to reference only the similar language found in the Texas statute's Subsection 6, or if the Court also intended to adopt the reasoning and construction applied by the Texas courts.

More recently, in Reed v. Prince, 194 S.W.3d 101 (Tex.App. 2006), the Texas Court of Appeals again examined and construed the Texas exception for "the failure to provide or the method of providing police or fire protection" as applied to a claim against a Sheriff's Department. The Court explained, "Section 101.055(3) does not provide for absolute immunity for acts involving the provision of police protection; Section 101.055(3) does not provide immunity against claims focusing on an act or omission characterized as a negligent implementation of department policy." The Reed Court compared Reed's allegations to the those raised in City of San Augustine v. Parrish, 10 S.W.3d 734, 739 (Tex.App.-Tyler 1999), where the court had examined allegations that a city police officer failed to adhere to the department's policy when he fatally shot a man. Parrish, 10 S.W.3d at 738, 741–42. The Court found that the allegations in Parrish were "in the nature of negligent *implementation* of policy for which the TTCA did not provide immunity." Id. at 740. In contrast, the Reed Court explained that Reed's claims against the Sheriff's Office were subject to immunity because, rather than asserting that deputies negligently implemented policies of the sheriff's office, for which immunity would not have applied, Reed made global allegations against the Sheriff's Department's policies in general, raising allegations of an overall pattern of negligence in the Department's failure to provide adequate law enforcement services, the particular departmental policy regarding reports of property crimes, and seeking the return of his property taxes. The Reed Court, accordingly, ruled that the Sheriff's Department was immune from any such suit where Reed's allegations went to the policy decisions establishing the method of providing police protection for the community.

The Reed case is a good example of the kind of suit attempting to attack the overall policy decisions establishing the method of providing police protection for which the South

Carolina legislature likely sought to provide immunity. The Reed Court pointed out in contrast, that the allegations in *Parrish* focused on the negligence of an officer and his negligent failure to implement the department's policies. The ruling in Parrish was that the Department was not immune from suit where the allegation was negligence, not in the methods or policies of the police department, but in an officer's implementation of department policy. Thus, in Texas, the "method" of providing police protection refers to the City's plan, design, or system for providing police protection and the general implementation of any policies which the police department establishes. See Terrell, 588 S.W.2d at 788.

In Terrell, a highway patrolman collided with Mr. Terrell's vehicle while in pursuit of a speeding motorist. The court noted that the Texas Highway Department has a policy of detecting and apprehending individuals who exceed the speed limit by use of radar and motor vehicles and that such a policy is **not** susceptible to an attack of negligence under the Act. However, the court pointed out that the policy does not include directing an officer to strike any vehicle in his path in apprehending a speeder. Thus, the court concluded that the accident in Terrell was not a part of the formulated policy and that the State was subject to liability for injuries resulting from the negligence, if any, of its highway patrolman. Id. at 788. In Terrell, the State relied upon the Texas exception concerning the method of providing police and fire protection. The Court rejected the State's argument of immunity, explaining, "The State would construe this clause to be a general exclusion for any act or omission that occurs while an officer is providing police or fire protection to the public. We think that the Legislature did not intend to create such a broad exclusion."

The Terrell Court held, "The term 'method' is defined as "a procedure or process for attaining an object" and as an "orderly arrangement, development or classification." Webster's

Third New International Dictionary 1422-23 (1966). The term is synonymous with the words "mode," "plan," "design," or "system." Id. Thus, the "method" of performing an act refers to the decision or plan as to how the act is to be performed. Similarly, the "method of providing police or fire protection" refers to the governmental decisions as to how to provide police or fire protection. The clause exempting governments from liability for injuries arising out of the failure to provide police or fire protection is clearly designed to avoid judicial review of the policy decisions that governments must make in deciding how much, if any, police or fire protection to provide for a community. The State's argument is that this provision applies to all claims that arise out of actions taken by policemen in providing police protection. The effect of the State's broad construction of this statutory exception would be to relieve governmental units from liability for the negligent acts of police and firemen if those acts occur while the government employees are acting in the course and scope of their employment. Since a governmental unit is liable only if its employees or officers are acting within the scope of their employment, this construction of the statute would exempt virtually all activities of police and firemen from the Texas Tort Claims Act. We do not believe the Legislature intended to create such a broad exclusion."

The Terrell Court found, instead, that "the clause exempting governments from liability for injuries arising out of the failure to provide police or fire protection is clearly designed to avoid judicial review of the policy decisions that governments must make in deciding how much, if any, police or fire protection to provide for a community." The Terrell Court held, "We think, therefore, that the Legislature intended to exclude from the Act only those acts or omissions which constitute the execution of or the actual making of those policy decisions. For example, damages resulting from a government's decision to provide only three fire trucks for a

community may not be recovered against the governmental unit on the theory that the government was negligent in providing an inadequate number of fire trucks. Similarly, a government would not be liable for any injury or death resulting from a government's decision to use only minimal police efforts to control a riot or to control crime in a particular area of a city."[1]

In Barefield v. City of Houston, 846 S.W.2d 399, 405–06 (Tex.App.- Houston [14th Dist.]1992, writ denied), where plaintiffs brought suit after being attacked by third parties outside a city-operated coliseum, the city was found immune on claims arising from the policy decisions regarding the manner of providing police protection. The appellants in Barefield, claimed that the City of Houston was negligent because it failed to provide adequate security for a concert or failed to warn appellants of an unreasonably dangerous condition, the potential criminal activity. Appellants asserted the City created the unreasonably dangerous condition by not providing a police presence on the streets of Houston. Appellants contended their injuries were caused by the dangerous condition on the City's property, the sidewalk and the street next to the Coliseum. Appellants also asserted the City contributed to their injuries by failing to provide police protection in downtown Houston where previous crimes had occurred. In affirming the grant of summary judgment, the Barefield Court noted that if the negligence causing an injury lies in the formulation of policy, i.e., the determination of the method for providing police protection, the government remains immune from liability. Id. at 405 (citing Terrell, 588 S.W.2d at 788).

The Barefield Court found that the "method" of performing an act refers to the governmental decision or plan for providing police or fire protection. "The government is not liable for any injury or death resulting from a government's decision to use only minimal police efforts to control a riot or to control crime in a particular area of a city. If, however, an officer or

employee acts negligently in carrying out that policy, government liability may exist. Id." The Court in Barefield explained that the provision of the Texas Tort Claims Act exempting governments from liability for injuries arising out of failure to provide police or fire protection was designed to avoid judicial review of the policy decisions that governments must make in deciding how much, if any, police or fire protection to provide for a community. The Court found that the El Paso Police Department had determined the policy for policing certain areas. The Court explained, "The policy, once implemented, is a method of providing police protection. The City is exempt from any liability arising from the method of providing police protection and is also immune for its failure to provide police protection. A municipality is not liable for claims arising "from the failure to provide or the method of providing police or fire protection."

In rejecting the Wells' argument that Subsection 6 did not bar their claim alleging that the governmental entities had negligently failed to maintain and inspect the fire hydrant system, negligently allocated water resources, and negligently failed to advise that certain water lines were not active and/or that certain hydrants were not in working order, the Court of Appeals cited to and quoted from the Oklahoma Supreme Court's 1981 decision in Shockey v. Oklahoma City, 632 P.2d 406 (Okla.1981), interpreting Oklahoma's early version of Subsection (6).

In Shockey, the plaintiff had alleged that Oklahoma City had negligently failed to properly maintain a fire hydrant or to warn the plaintiffs of its malfunction. In sustaining the dismissal of the plaintiffs' action, the Oklahoma Supreme Court explained that, at that point in Oklahoma, the general rule was that the operation and maintenance of a fire department by a municipal corporation was an exercise of a governmental function so as to accord it sovereign immunity from liability when acting in such capacity. The Wells Court observed, "Oklahoma,

by enactment of [its tort claims act] has statutorily recognized that a municipality's immunity from tort liability applies to it "while engaged in fire protection and prevention."

In Shockey, the Oklahoma Court had found that Oklahoma City was exempted from liability for failure to provide or the method it employs in providing fire protection, explaining that fire hydrants are a part of the physical structure of the fire department and their maintenance, including an adequate supply of water, and their repair are incidental to the operation of the fire department. Noting that the fire hydrants were installed for the purpose of fire protection, the Oklahoma Court held, "Although appellants' damages may have resulted from a failure of the water service, supplying water to the fire hydrants was *just a part of appellee's overall operation in providing fire protection.* Assuming, arguendo, appellee negligently failed to employ the proper methods in checking its water service for the proper operation of its fire hydrants, § 155(6) clearly exempts it from liability." *Id* at 408.

The South Carolina Court of Appeals indicated in Wells, "We agree with the reasoning of the Oklahoma court in Shockey and hold the South Carolina Tort Claims Act precludes Appellants' action clearly is included in the exceptions from liability in Section 15-78-60 for the method of providing fire protection and the discretionary act of maintaining the maintenance of fire hydrants and the supply of water for fighting fires the city water system with the resources available."

Presumably, had the Court of Appeals in Wells intended to hold that the City and County were immune (1) because they were immune whenever providing fire protection or (2) that officers' actually providing fire protection was what the legislature meant when it said, "the method of providing fire protection," in Subsection 6, no discussion of the particulars of the Wells claim would have been necessary or useful. However, the Wells Court did examine and

discuss the nature of the Wells' complaints, particularly identifying the functions for which it was finding the county immune as being related to the discretionary acts and decisions related to establishing the method of providing fire protection and the overall operation for providing fire protection as related to the maintenance of fire hydrants. Therefore, the Wells court's holding was arguably not simply that immunity barred suit in all cases where a loss was alleged to have resulted from any activity related to the provision of fire protection, but instead that immunity precluded suit alleging loss as the result of the decisions of the City and County in establishing the overall method of providing fire protection for the community.

In fact, the Court of Appeals in Wells explained that Subsection 6 provided immunity for the City and County's discretionary decisions in establishing a policy and method for providing fire protection. The Wells Court particularly relied upon the courts of Texas and Oklahoma as properly interpreting the scope of the exception to the waiver of immunity found in Subsection 6. As indicated, in Texas, the provision substantially identical to Subsection 6 is interpreted to provide immunity only from suit related to the formulation of policies establishing the methods of providing protection but not from officers' negligent implementation of such policy.

Such an interpretation is also consistent with Oklahoma's more recent decisions rejecting the earlier Shockey interpretation of Subsection 6. In Taylor v. City of Oklahoma City, 914 P.2d 1073 (Okl.App. 1995), the Oklahoma Court of Appeals rejected the City's assertion of immunity relying on the Shockey decision. In 1995, the Oklahoma Court of Appeals held that the decision in Shockey was "not applicable." The Taylor Court noted that Shockey had predated the Oklahoma Supreme Court's decision in Vanderpool v. State, 672 P.2d 1153 (Okla.1983), which specifically "abrogated the protective cloak of immunity from liability for governmental, as opposed to proprietary, functions of government." The Taylor Court noted that the exceptions

to liability in 1995 were exclusively enumerated in § 155 and that Section 155(6) provided that the State maintained immunity for a loss resulting from "6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection."

The Oklahoma Supreme Court held, "Strictly construing § 155(6), we cannot say that the undisputed facts of this case involve a 'method of providing police protection [or] law enforcement.'" The Oklahoma Court explained, "Statutory exceptions such as § 155(6) contemplate decisions regarding such matters as the number and type of police cars considered necessary for the operation of city police departments, where such patrol cars are to operate, and how law enforcement officials are trained and equipped."

The Oklahoma Court found, "While the Act provides immunity from liability for the *method* of providing police protection, the *operation* of emergency vehicles is governed by the Oklahoma Highway Safety Code, specifically 47 O.S.1991 §§ 11-106 and 11-405, supra. The "duty of due care created by the emergency vehicle statutes applies only to the operation of the emergency vehicle itself [and] cannot be the basis for the City's liability for negligence *absent evidence that the emergency vehicle itself was being driven in an unsafe manner*" Kelly v. City of Tulsa, 791 P.2d 826, 828 (Okla.Ct.App.1990).

The Taylor Court held, "In light of the explicit language in §§ 11-106 and 11-405, we hold that the physical operation of an emergency vehicle when responding to an emergency call does not constitute a *method* of providing police protection. Although responding to an emergency call does certainly allow the responding officer to disregard many of the traffic ordinances and laws as a matter of public policy, when the responding officer fails to obey the duty of care specifically set out in the emergency vehicle statutes, citizens who are injured as a

result must not be left without a remedy. As a result, § 155(6) does not protect the City from liability for the alleged torts of its employee."

Thus, there is a split of authority, not recognized or referenced by the Court in Wells, as to the meaning of the phrase, "the method of providing police protection," with jurisdictions finding that Subsection 6 maintains immunity only for the formulation of policy as to the provision of police protection while others find that their version of Subsection 6 maintains immunity both for the formulation of policy for the method of providing police protection and also for the negligent acts of officers acting pursuant to such policy. As indicated, the discussion in Wells focused on the City and County's policies for directing the water supply and maintaining hydrants and described these as "discretionary" decisions. The Wells Court did not appear to announce that, under its decision, any and all decisions and actions taken by those actually engaged in providing fire protection services constituted a "method of providing fire protection" so that municipalities would be immune from suit related to any and all decisions or actions related to fire protection.

However, assuming that the Wells Court did intend to construe Subsection 6 as providing blanket immunity for any loss related to police or fire protection, such holding is (1) internally inconsistent with the Court's discussion of the immune functions as discretionary and relating to the method of providing fire protection; (2) in direct contrast to the construction of Subsection 6 applied by the Courts in Oklahoma and Texas, the two states whose statutes the Wells Court referenced; and (3) inconsistent with South Carolina practice and jurisprudence.

Had the legislature by Subsection 6 maintained immunity for a loss related to negligent policy decisions in establishing the method of providing police protection and also for the negligence of officers actually engaged in providing police protection, there would be no liability

for a loss related to police departments or officers. However, the Wells holding was apparently not interpreted as having recognized in Subsection 6 a provision establishing immunity for all decisions related to how police protection would be provided and for all actions by officers engaged in police activity. Plainly the counties and municipalities and their police departments did not interpret the Wells decision as providing them a free pass for their negligence, as long as the actions alleged to have resulted in a loss were police activities. Had the Wells' Court's decision been interpreted to approve such a construction of Subsection 6, the parties in cases such as Gist, Arthurs, Brown, Clark, Jackson, and Edwards would have, upon being sued for negligent actions while engaged in police activities, immediately moved for dismissal on the basis of such immunity as a matter of law.[1] However, no such argument was made or accepted from 1998, when the Wells decision was issued, until 2006; in the interim, Subsection 6 was ignored.

In the 2006 case of Huggins v. Metts, 371 S.C. 621, 640 SE2d 465 (Ct.App. 2006) the Court of Appeals again applied Subsection 6 to provide immunity. The Court of Appeals found that the actions of the officers in Huggins constituted "the method of providing police protection." However, the Court of Appeals made no distinction between the formulation of policy and the implementation of policy for the provision of police protection - - apparently holding that the government is immune from suit for a loss related either to the orderly

[1] See Gist v. Berkeley County Sheriff's Dept., 521 S.E.2d 163, 336 S.C. 611 (Ct.App. 1999); Arthurs v. Aiken County, 338 S.C. 253, 525 S E.2d 542(Ct. App. 1999); Brown v. Brown, 598 S.E.2d 728, 360 S.C 7 (Ct.App. 2004), Clark v. South Carolina Dept. of Public Safety , 578 S E 2d 16 (Ct App. 2002), Clark v. South Carolina Dept. of Public Safety, 608 S E 2d 573, 362 S C. 377 (2005);Jackson v City of Abbeville, 366 S C. 662, 623 S.E.2d 656 (Ct.App.,2005), Edwards v. Lexington County Sheriff's Dept.,386 S.C. 285, 294, 688 S E.2d 125, 130 (2010).

formulation of policy for the provision of police protection and also immune from suit related to the negligent implementation of policy by police officers engaged in police activity.

Huggins had first brought suit in federal court where the case was dismissed. The Court of Appeals noted that Huggins had argued before the trial judge that, unlike the claims brought before the federal court, the state claim was about the preparation and events leading up to and immediately preceding the shooting of the deceased. However, the circuit court judge did not rule upon the issue of immunity under the Tort Claims Act. Nevertheless, the Court of Appeals decided without explaining, "This action concerns the manner in which the police chose to provide police protection. Because the Act specifically exempts the Police from liability concerning *the methods* which they choose to utilize to provide police protection, we need not address Huggins's other claims. Even were we to accept all of Huggins's assertions as true, it would not remove the immunity which the legislature has bestowed on the Police in this situation." (Emphasis added). Notably, while the Tort Claims Act excepts from the waiver of immunity claims resulting from "the failure to provide or the method of providing police protection," the Huggins Court found that the Department was immune for 'the *methods chosen to utilize* to provide police protection.' The Court found that the legislature had bestowed on the police immunity "in this situation." However, it is unclear to which precise situation the Court referred.

As indicated above, the initial interpretation from Wells focused on the discretionary, overall system and method for providing fire protection to the community. In addition, the interpretation of the jurisdictions particularly relied upon by the Wells Court, Texas and Oklahoma, is that the government is immune from suit only for the method of providing police protection, i.e., for the policy decisions establishing the overall method for providing police and

fire protection to the community at large, but not immune from the negligent implementation of such policy by its officers. Apparently, Huggins had argued in the Federal claim that the loss resulted from deadly, excessive force, which claim was dismissed by the Federal Court upon the Court's finding that the officer's actions were objectively reasonable. However, before the State Court, Huggins' argument reportedly focused on the actual activities of the officers engaged in police activity at the time immediately leading up to the shooting. Nevertheless, the Court rejected Huggins' argument without making any differentiation between the policy decisions establishing the overall method of providing police protection to the community at large as opposed to the allegedly negligent actions of the officers which led to Huggins' death.

Without making any distinction, the Huggins Court held, "Because the Act specifically exempts the police from liability concerning the methods which they choose to utilize to provide police protection, we need not address Huggins's other claims. Even were we to accept all of Huggins's assertions as true, it would not remove the immunity which the legislature has bestowed on the police in this situation." Therefore, it is difficult to determine whether the Huggins Court found that the claim was barred because the Department was immune under Subsection 6 because the claim related to policy decisions establishing the method of providing police protection or whether the Court found that the claim was barred simply because the loss was related the actions of officers engaged in police activity which the Court of Appeals equated with the "method of providing police protection" referenced in Subsection 6.

Because the issue regarding immunity pursuant to Subsection 6 was not decided by the Circuit Court, but was identified by the Court of Appeals in Huggins pursuant to Rule 220 (c), as a ground for affirmance appearing in the record, the issue was not well developed before the Court. Therefore, the Court of Appeals' finding that Huggins' claim related to the method of

providing police protection without differentiating whether the basis of the claim related to the establishment of policy for the overall method of providing police protection to the community or to the negligent implementation of that policy by officers engaged in police activity, has been interpreted to stand for the proposition that both when a municipality engages in policy decisions relating to the method of providing police protection to the community at large and when a municipality's officers are engaging in police activities and taking actions on the ground as they carry out departmental policy, even though the actions of the officers are alleged to have been grossly negligent, the municipality is immune. Under such a broad, all-inclusive interpretation, any and all claims brought based on a loss alleged to result from police activities are found to be related to the "method" of providing police protection and, therefore, barred by the immunity provided by Subsection 6 to the Tort Claims Act.

However, such an expansive interpretation of Subsection 6 is inconsistent with the language used by the legislature and contradicted by existing South Carolina jurisprudence. Following Wells, our courts have issued several decisions finding that governmental entities were not immune from suit alleging a loss related to police activity, without the parties' or the court's referencing or mentioning Subsection 6.

Six years after the Court of Appeals decided Wells, the Court of Appeals issued its decision in Brown v. Brown, 598 S.E.2d 728 (Ct. App. 2004). The Court of Appeals held in Brown that the town was immune from a motorist's claim for injuries resulting from a police officer's selection of a passenger to serve as a substitute driver. The Court of Appeals held that the town was immune pursuant to Section 15-78-60(5), maintaining immunity for 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. The Court of Appeals found that the officer had a choice of issuing a citation to the original impaired driver and having the car towed or selecting another driver. The Court noted that the substitute driver volunteered and completed sobriety tests. The Court held that the police officer properly exercised his discretion and that the town was, therefore, immune from suit under Subsection 5. However, where the officer in Brown was certainly engaged in police activity, if the phrase, "method of providing police protection," is properly interpreted to indicate that the legislature meant to immunize all loses resulting from police actions, the town would have been immune from suit under Subsection 6 and there would have been no need to analyze the more difficult issue of whether discretionary immunity was provided in Subsection 5.

Similarly, in Clark v. South Carolina Dept. of Public Safety, 578 S.E.2d 16 (Ct. App. 2002), aff'd 362 S.C. 377 (2005), the Court of Appeals, affirmed by the Supreme Court, held that whether a state trooper was grossly negligent in initiating and in failing to terminate his pursuit of a driver was a question for the jury. The Courts held that a law enforcement officer is not entitled to discretionary immunity for the decision on whether to begin or continue the immediate pursuit of a suspect. Again, the trooper was undoubtedly engaged in law enforcement activities; however, the Department of Public Safety did not rely upon Subsection 6, as providing immunity and neither the Court of Appeals nor the Supreme Court made any reference to immunity pursuant to that subsection.

In Edwards v. Lexington County Sheriff's Dept. 386 S.C. 285, 688 S.E.2d 125 (S.C. 2010), a domestic violence victim sued the Lexington County Sheriff's Department and the County of Lexington after she was attacked in a magistrate's court bond revocation hearing she had been urged to attend by Respondents where no security was provided. Summary judgment was reversed upon the Supreme Court's finding that Respondent owed a common law duty of

care because of the "special circumstances" due to Respondents' relationship with attacker and the Department's actions in creating the risk of harm.

In Jones v. Lott, 379 S.C. 285, 665 S.E.2d 642 (Ct.App. 2008), the Sheriff's Department claimed immunity based on Subsection 6 and the decision in Huggins. The trial judge granted a directed verdict upon finding that the Sheriff was immune under Section 15-78-60(6). Jones attempted to argue on appeal that the trial judge had improperly interpreted and improperly based his finding of immunity on Section 15-78-60(6). However, the Court of Appeals held that Jones had failed to preserve this argument for appellate review. Therefore, the Court of Appeals held that the trial judge's ruling of immunity pursuant to Subsection 6 was the law of the case. Before the Supreme Court, Jones again argued that he had indeed preserved for appellate review his argument that the trial judge had erred in granting a directed verdict on the issue of immunity under section 15-78-60(6). However, the Supreme Court rejected this argument, noting that on brief Jones had made no mention of Tort Claims Act immunity or Subsection 6. Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010). Therefore, the Supreme Court held that the Court of Appeals was correct in holding that Jones had failed to preserve for appellate review his argument that the trial judge had erred in ruling that the Sheriff's Department was entitled to immunity under Subsection 6.

The Supreme Court further noted that the Sheriff had raised Section 15-78-60(21) as an additional sustaining ground in his directed verdict motion. The Supreme Court held that the court of appeals had correctly found that immunity pursuant to the Tort Claims Act's Subsection 21 was an additional sustaining ground. However, the Supreme Court may have suggested by negative implication that the Sheriff would actually not have been properly found immune pursuant to Subsection 6, had that issue been properly preserved for review by Jones. The

Supreme Court indicated that even if all of Jones' issues *had been* preserved for appellate review, including the argument that the judge had erred in ruling that the Sheriff was entitled to immunity under Subsection 6, the deputies would still be "immune from suit pursuant to section 15-78-60(21)." It is noteworthy that the Supreme Court did not indicate that, had the issue regarding immunity under Subsection 6 been properly preserved, the deputies would properly have been found immune under either or both Subsection 6 and Subsection 21. Thus, according to the Supreme Court, even if Jones had preserved for appellate review his arguments so that the Supreme Court was able to consider his argument that the Sheriff's Department was not immune from suit pursuant to Subsection 6, the Department would have remained immune pursuant to Subsection 21.

If Subsection 6 is correctly interpreted to immunize the government from liability for any and all claims brought based on a loss alleged to have resulted from or which was sustained through police action, the governmental entities subjected to suit above would have claimed the immunity and our appellate courts would not have been required to devote their efforts to analyzing and determining whether, under certain circumstances, the State is immune from suit related to a loss allegedly resulting from the negligence of police officers. Appellant is well aware that it is the governmental entity which must identify and rely on a particular exception to the Tort Claims Act as maintaining immunity. However, it is preposterous to suppose that, if Subsection 6 meant what it is being widely interpreted to mean, there would have been no mention by the parties or our Courts of Subsection 6 when addressing thorny questions related to assertions of immunity in cases where the loss was alleged to have resulted from negligent actions of law enforcement officers.

It is apparent from its decisions in Metts and Jones that the Court of Appeals now equates the "method" of providing police protection with the actual providing of police protection by officers engaged in police activity, for the purposes of immunity pursuant to Subsection 6. In fact, in Curiel v. Hampton County E.M.S., 401 S.C. 646, 737 S.E.2d 854 (2012), a motorist filed suit against county emergency medical service (EMS) for loss arising out of ambulance's collision with motorist while the ambulance was responding to a structure fire to provide assistance to a burn victim. Hampton County EMS argued that the trial court had erred in determining that it was not immune upon finding that its ambulance was not providing fire protection and therefore, the County was not immune pursuant to Section 15–78–60(6). The Court of Appeals affirmed, holding that the exception to the waiver of immunity for loss from "failure to provide the method of providing police or fire protection" did not apply to EMS. The Court of Appeals rejected Hampton County's claim that it was immune because its ambulance was "engaged in providing fire protection" as provided in Subsection 6, holding, "By including police and fire protection as exceptions to the State's waiver of immunity, but not specifically listing emergency medical services, the Legislature did not intend to include emergency medical services as an exception to the waiver of immunity in section 15–78–60(6)." However, the Court of Appeals gave no indication that it differentiated between the County's claim of immunity under subsection 6 because it was "engaged in providing fire protection," and the actual immunity provided by subsection 6 for "the method of providing police or fire protection."

Even assuming that providing EMS services was synonymous with fire protection so that EMS services were included under Subsection 6, where the allegation was only that Hampton County's ambulance was "engaging in fire protection" at the time of the loss and not that the loss resulted from the "method of providing fire protection," Hampton County would nevertheless

not be entitled to immunity under the plain language of Subsection 6. However, notably, the Court of Appeals did not correct any misapprehension on the part of Hampton County that, were EMS services properly included in subsection 6, it would have been found immune because its ambulance was indeed "engaging in fire protection" at the time of the loss. Apparently, had the Court of Appeals found that the activities engaged in by the County's ambulance, i.e., rushing to the scene of a house fire to treat a burn victim, did constitute fire protection activities, the Court would have found that Subsection 6 immunity barred Curiel's suit against Hampton County EMS regardless of whether Hampton County EMS was engaged in "the method of providing fire protection" rather than simply engaging in fire protection activities at the time of the loss. The ruling in Curiel, again, suggests that the Court of Appeals has expanded upon the legislature's language and applied an unjustifiably broad interpretation of Subsection 6.

Under the Court of Appeals interpretation of Subsection 6, as exemplified in Metts, Jones, and Curiel, the legislature may as well have left out the word "method" and simply provided instead that a governmental entity is immune from suit for a loss resulting "from the provision of police or fire protection." Thus, the legislature's arguably apparent intention to immunize only the overall policy making decisions and choices of the government in allocating resources and in establishing the overall "method" of providing police and fire protection has been lost. However, the legislature's language should not be so ignored.

"When interpreting a statute, the Court's primary function is to ascertain the intention of the legislature. The words used must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." Sloan Constr. Co. v. Southco Grassing, Inc., 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011). "If a

statute's language is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Id.; Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000)). When interpreting a statute, the court "must read the language in a sense that harmonizes with its subject matter and accords with its general purpose."

Here, excising from Subsection 6 the word "method" and failing to recognize that "method" implicates an orderly deliberative process and not simply a way of doing something, leads to a much broader and seemingly all inclusive maintenance of sovereign immunity in any cases where the loss was alleged to have resulted from police or fire activities. Under such an overly broad construction of subsection 6, finding immunity from any and all claims for loss related to the negligence of officers merely engaged in providing police or fire protection, the exception has effectively swallowed the rule. See Roe v. Reeves, 392 S.C. 143, 152, 708 S.E.2d 778, 783 (2011)(If this is sufficient to constitute thwarting, the exception to literal compliance with the requirements of section 63–9–310(A)(5)(b) has swallowed up the rule."); Smith v. South Carolina Retirement System, 336 S.C. 505, 527, 520 S.E.2d 339, 351 (Ct.App.,1999)("To allow appellants to avoid the administrative process on their unsupported allegation of futility would allow the futility exception to swallow the exhaustion rule." Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000).

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. However, notably,

neither the Court of Appeals nor the Supreme Court has made any attempt to define the word "method" in subsection 6. When faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). The legislature's intent should be ascertained primarily from the plain language of the statute. However, Courts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997). Statutory language must be read in a sense which harmonizes with its subject matter and accords with its general purpose.

What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. However, an ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. In construing a statute, the court looks to the language as a whole in light of its manifest purpose. A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct.App.,2005). Here, the construction of Subsection 6 as providing immunity for all negligent acts of officers because they were engaged in police activities is inconsistent with the stated purpose of the Tort Claims Act.

Richland County has argued without explanation that the trial judge did not actually find that Subsection 6 immunity would apply to any and all cases where the loss was alleged to have resulted from the actions of officers providing police protection. However, the trial judge's order makes no differentiation and identifies no part of the activities of the Richland County officers which would involve the "method" of providing police protection as opposed to simply engaging in providing police protection. Plaintiff is unaware of any parameters the trial judge identified or applied to justify his finding that the officers were engaged in the "method" of providing as opposed to simply providing police protection at the time of the loss. Instead, the trial judge, explicitly relying on the Court of Appeals' interpretation as set out in Metts, erred in finding that simply because the officers were engaged in police activities at the time of the loss, the Richland County Sheriff's Department was immune from suit for the loss.

The trial judge erroneously expanded the parameters of the immunity preserved by the legislature in Subsection 6. The grant of summary judgment on the ground of immunity pursuant to Subsection 6 should be reversed so that Plaintiff may show a jury that the gross negligence of the Richland County officers while engaging in police activity pursuant to Departmental Policy was the compensable cause of her husband's death.

CONCLUSION

For all the forgoing reasons, taking the facts in the light most favorable to the Plaintiff, genuine issues of material fact remain in dispute from which a jury could find the Defendant breached a duty of care to the Plaintiff's decedent and that the resulting injuries were caused by a breach of that duty. Therefore, the trial judge erred as a matter of law in granting Defendant Sheriff's Motion for Summary Judgment. The trial judge's Order granting summary judgment should be reversed and the matter remanded for trial.

Respectfully submitted,

October 20, 2014

Pamela R. Mullis
Mullis Law Firm
1229 Elmwood Avenue
Post Office Box 7757
Columbia, SC 29202
(803) 799-9577
COUNSEL FOR PLAINTIFF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED
OCT 21 2014
SC Court of Appeals

Case No. 2013-CP-40-1047R

Evalena Catoe, individually and as Personal Representative of the Estate of Richard L. Catoe, Jr., deceased, — Appellant,

v.

The City of Columbia and Leon Lott, in his official capacity as Sheriff of Richland County, — Defendants,

Of whom Leon Lott, in his official capacity as Sheriff of Richland County, is — Respondent

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Amended Initial Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully submitted,

October 20, 2014

Pamela R. Mullis
MULLIS LAW FIRM
P.O. Box 7757
Columbia, SC 29202
(803) 799-9577

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Eugene C. Griffith, Jr., Circuit Court Judge

2014-000194

Evalena Catoe, individually and as Personal Representative of the Estate of Richard L. Catoe, Jr., deceased, — Appellant,

v.

The City of Columbia and Leon Lott, in his official capacity as Sheriff of Richland County, — Defendants,

Of whom Leon Lott, in his official capacity as Sheriff of Richland County, is — Respondent

CERTIFICATE OF SERVICE

I, the undersigned, an employee of the MULLIS LAW FIRM do hereby certify that I have served Appellant's Amended Initial Brief and Amended Designation of Matter to be included in the Record on Appeal this 20th day of October, 2014, by regular U.S. mail, with proper postage affixed, addressed to the following:

Robert D. Garfield, Esquire
DAVIDSON & LINDEMANN, P.A.
P.O. Box 8568
Columbia, SC 29202

Attorney for Respondent

Elizabeth Kolb
MULLIS LAW FIRM
P.O. Box 7757
Columbia, SC 29202
(803) 799-9577

MULLIS LAW FIRM

1229 ELMWOOD AVENUE
THE HALTIWANGER HOUSE
PO BOX 7757
COLUMBIA, SOUTH CAROLINA 29202-7757
Office (803) 799-9577 • Fax (803) 254-8956

PAMELA R. MULLIS
ATTORNEY AT LAW

J. MARVIN MULLIS, JR.
1940 - 2012

October 20, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Evalena Catoe, individually and as Personal Representative of the Estate of Richard L. Catoe, Jr., deceased v. The City of Columbia and Leon Lott, in his official capacity as Sheriff of Richland County, Case No 2014-000194

Dear Ms. Kitchings:

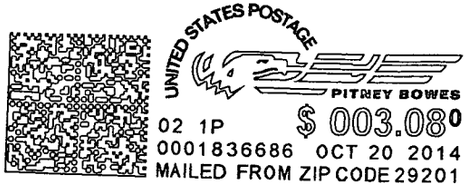
Please find enclosed for filing one copy of Appellant's Amended Initial Brief and Amended Designation of Matter to be included in the Record on Appeal in the above-referenced case along with proof of service.

Please do not hesitate to contact me should there be any questions or concerns.

Sincerely yours,

Pamela R. Mullis

PRM/etk
Enclosures
cc: Robert D. Garfield, Esquire



First Class Mail

MULLIS LAW FIRM
P.O. BOX 7757
COLUMBIA, SOUTH CAROLINA 29202-7757

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201