THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

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,

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS

At least five different police personnel were asked through discovery who had command control of the scene on July 22, 2007; at least five officers gave five different answers. The STACK assault team, whose job it is to suit up in riot gear and train together as a team in high stress situations, included individuals from other agencies that the team did not know. In addition, the Columbia Police and Richland Sheriff Department were not on the same radio frequency so that they could communicate with each other and tell their teams not to shoot each other as they pursued Mr. Catoe into the back yard when he fled, as they should have expected him to do upon being charged by a bunch of guys in the midst of an explosion.

Respondent indicates that Deputies White and Hendrick were positioned at the left rear corner of the house with their weapons drawn, but that "after approximately twenty minutes, the deputies were instructed to transition their role from non-lethal to lethal. In so doing, Deputy Hendrick holstered her Taser and drew her service weapon..." (Brief of Respondent, p. 3). It should be noted that Respondent does not claim that anything happened during that twenty minute interval which necessitated or explained the order to transition to a lethal role. As Appellant has argued, after waiting for only about twenty minutes, the officers and Deputies apparently had simply become tired of waiting for Mr. Catoe to lose consciousness or give up and, therefore, they transitioned to a lethal role.

Further, while Respondent asserts that an instruction was given to holster weapons, and, indeed, Chief Crisp recalled that the order was given to holster weapons before the flash bang was deployed. Chief Crisp 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, after the order was given to holster weapons, he would have expected all officers on the scene to comply. (Crisp Depo. p. 71). However, officer Roberts, indicated that he never heard an instruction to holster weapons. (Roberts Deposition p. 54). Officer Dauway stated that he never heard an order by radio to holster weapons prior to the 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).

Roberts recalled that after being hit by the stack, Mr. Catoe was "running backwards" and Roberts specifically recalled and testified that Mr. Catoe was not running towards Hendricks. (Roberts Depo. p. 35). Roberts reported, "Several shots were fired from my left. I turned briefly and observed a female deputy discharging rounds at the suspect…." (Roberts Depo. p. 35). Roberts heard the shots, indicating "it passed, I guess, over my left shoulder from what I remember because I heard several go by; "heard the whiz as they went past." (Depo. p. 37).

Officer White recalled that, when he regained eye line on Mr. Catoe, Officer 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 heard 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 Officer Hendrick and that Hendrick was not blocking Mr. Catoe's escape route into the woods. (White Depo. pp. 44-45).

ARGUMENT

I. The trial judge erred in granting summary judgment on the basis of sovereign immunity under Section 15-78-60(6) of the South Carolina Tort Claims Act.

A. The trial judge erred reversibly in granting summary judgment upon taking the facts in the light most favorable to the moving party.

Appellant pointed out in her Initial Brief that the judge's Order granted summary judgment upon his erroneously taking the facts in the light most favorable to the Sheriff, the moving party. Respondent now responds by arguing that the facts taken in any light are irrelevant to a decision regarding an assertion of immunity because the Sheriff, by claiming immunity, had conditionally admitted fault. Respondent asserts that, in any event, Judge Griffith, "did not conclude that there was no negligence or fault on the part of the RCSD deputies." Therefore, Respondent argues that, in granting summary judgment upon finding that the Department was immune from suit, it is immaterial that the judge took the facts in the light most favorable to the Sheriff's Department. Respondent has apparently only very recently adopted the opinion that the facts are irrelevant and that he is immune regardless of fault. In fact, Appellant does not recall Respondent's informing Judge Griffith that the Sheriff's Department was acknowledging wrongdoing; that it was at fault; or that the officers and Deputies had acted negligently in causing the death of Appellant's decedent when persuading the judge to apply *Huggins* to maintain immunity and to grant summary judgment in favor of the Sheriff.

Respondent's failing to recall or to remind the judge that the facts were immaterial and need not be considered by him because the Sheriff had conditionally admitted fault may explain why Judge Griffith's order in fact ***does*** read as if he had considered the facts and had concluded from the facts that the Sheriff was blameless; that the Sheriff's deputies acted reasonably and properly; and that the fatal result was not due to the outrageous negligence of the deputies, but

was Mr. Catoe's own fault. Interestingly, Respondent's Statement of Facts included in his Initial Brief is almost identical to the review of the facts and evidence included in Judge Griffith's Order granting summary judgment. Clearly, Respondent neither attempted nor succeeded in drafting ***his*** Statement of Facts in the light most favorable to Appellant. Instead, Respondent's Statement of Facts, like Judge Griffith's Order, sets out the facts most favorable to Respondent and omits the facts favoring Appellant.

Of course, Appellant strongly disagrees with Respondent' current argument that where the judge granted summary judgment based on immunity, it is irrelevant that he ruled upon improperly taking the facts in the light most favorable to the moving party. Instead, as was recited by Judge Griffith in his Order, "It is well established that the Court, in considering a motion for summary judgment, must view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. A party opposing summary judgment may not rest on the mere allegations of the pleadings, but must set forth or point to specific facts in the record showing that there is a genuine issue of material fact. *Bravis v. Dunbar*, 449 S.E.2d 495 (Ct.App. 1994); *Dickert v.Metropolitan Life Ins. Co.*, 306 S.C. 3111, 313, 411 S.E.2d 672, 673 (Ct.App. 1991), rev'd in part on other grounds, 311 S.C. 218,428 S.E.2d 700 (1993)." (Order granting Summary Judgment, p. 4). Thus, Appellant believes that a South Carolina judge "must" take the facts in the light most favorable to the non-moving party when granting summary judgment and that the failure to do so constitutes reversible error.

A decision to grant summary judgment and to deprive a party of his chance to present and argue his case upon taking the facts in the light most favorable to his opponent is error as a matter of law. Here, the grant of summary judgment should be reversed and remanded in order to give Judge Griffith an opportunity to consider the facts in the light most favorable to the non-

moving party, Appellant, and to make the Summary Judgment decision after taking the facts in the proper light and in light of the Sheriff's conditional admission of fault.

B. Section 15-78-60(6)

South Carolina Code Ann. Section 15–78–60's subsection (6) provides: "The governmental entity is not liable for a loss resulting from: (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of providing police or fire protection." This subsection can reasonably be interpreted to maintain immunity in cases of a loss caused by the governmental entity's failure to provide police protection in a particular area or situation and in cases of loss caused by the governmental entity's chosen method of providing police protection to the community. However, it is an unwarranted expansion of the legislature's language to conclude that the State maintains immunity in all cases where a loss is claimed to result from the policies and actions of law enforcement officers prior to and during an incident.

Appellant agrees that the exceptions to the Tort Claims Act must be liberally construed in favor of limiting the liability of the State. However, such construction must not interpret away the substance of the statute. The legislature maintained immunity for losses caused by a governmental entity's "failure to provide or the method of providing police protection." The legislature referred to the "method," singular, and not "methods," plural, suggesting that the legislature referenced a Department's overall method as remaining immune, but did not intend "method" to include every decision and action made or taken by a police officer. It is not reasonable to interpret the Legislature's reference to a governmental entity's "method of providing police protection" to include all of "the methods police choose to utilize" so as to maintain immunity both for all policy decisions as to the method of providing police protection

to the community and also for all the day-to-day decisions made and actions taken by police officers during law enforcement operations. (See Initial Brief of Appellant pp. 21-26).

C. *Huggins v. Metts*

As Respondent argues, this case is factually similar to the case of *Huggins v. Metts*, 371 S.C. 621, 640 SE2d 465 (Ct.App. 2006). However, given the fact that both cases involved a group of officers and Sheriff's Deputies confronting a mentally ill citizen, the similarities between the two cases are actually not "uncanny" or even very surprising.

There are several notable differences between the two cases, including the fact that Huggins was threatening an officer with two "large butcher knives" while, in contrast, Catoe had only a folding, pocket knife. Also different is the fact that, Huggins was apparently threatening officers from the outset, while, in contrast, before he was shot Mr. Catoe had threatened to harm himself, holding the knife to his own throat. Also different is the fact that Huggins was presumably healthy, fit, belligerent, and advancing purposely and deliberately on an officer while voicing threats, ignoring warnings, and wielding two large butcher knives. In sharp contrast, Catoe had been shot in the stomach by a City of Columbia officer prior to the arrival of Richland County Deputies. Mr. Catoe was then forced to sit in a chair, bleeding. with no medical attention for an extended period of time, so that he was wounded, weakened, and disoriented when, as he tried to flee in panic from an explosion, he was shot as he ran across the yard from and by, not toward, Officer Hendrick.

Even in light of the similarities between the cases, it is jarring to hear this Sheriff exultantly reporting that, some six years prior to the shooting death of Mr. Catoe, almost exactly the same thing happened in Lexington County and the Lexington County Sheriff's response produced the same fatal result. Indeed, some six years before the Richland County's Sheriff's

Department confronted and killed Mr. Catoe, the Lexington County Sheriff's office had a factually similar situation with the same fatal results for the mentally ill citizen. However, the *Huggins* incident was apparently not considered by Richland County as a cautionary tale or as a learning experience; as asserted, Richland County took essentially the same actions taken by Lexington County with the same fatal result.

Nevertheless, the cases are not legally similar in that Appellant has appealed and argued against the application of Subsection 6 immunity in his case. In contrast, as the Court of Appeals found, Huggins made no such argument in his appeal. Again, in *Huggins,* Subsection 6 immunity was not argued before the Court, but was applied as an additional sustaining ground.

Appellant suggests that Subsection 6 was properly interpreted in *Wells v. City of Lynchburg,* 331 S.C. 296, 501 S.E.2d 746 (Ct.App 1998). to apply to community-wide policy decisions establishing the overall method for a particular agency's provision of police or fire protection, which method would take into account the resources available and the needs of the community so as to maintain, in particular, a governmental entity's immunity for its decisions establishing the method of providing police and fire protection in a particular community, at a particular time. As indicated, the subsection is drafted in terms of preparing for and responding to widespread emergencies. The subsection most reasonably was intended to apply to maintain immunity for governmental agencies' methods of providing police and fire protection in preparation for and expectation of emergency situations. Thus, where, as the result of an outbreak of rioting, insurrection, rebellion. mayhem, or civil unrest, large numbers of citizens are injured and/or their property destroyed or burned, the State will not be subject to myriad lawsuits claiming that the authorities failed to adequately provide police and fire protection in response to the emergency. Citizens who suffer losses as the result of rioting, mayhem, insurrection,

rebellion, or civil unrest will not be able to argue that a county's method of providing police and/or fire protection was unreasonable or that the county's devotion of resources to one area at the expense of another location was unreasonable and, in hindsight, negligent.

As found by the *Wells* Court, where a fire unexpectedly broke out and there was no fire protection available or afforded, due to the City and County's allocation of resources to other areas, leaving the Wells' street without water or functioning hydrants, the City and County were found immune for the method by which fire protection was provided. Again, the Wells did not argue that the County's fire department was incompetent or that they were negligent in their operational, on-the-ground, fire fighting activity. The problem was not the fire fighters manning the hoses - - the problem was that, as the result of the County's method for providing fire protection, there was no water in the hoses. The Wells argued with the benefit of hindsight that the county should have developed a better system for allocating water resources and that the County should have had a better method for providing, tracking, and reporting the maintenance of its fire hydrants. The Wells asserted, with the benefit of hindsight, that the County should have had a better method for providing fire protection, in case of a fire. It was under these circumstances and in answer to this claim that Judge Anderson determined that immunity was maintained for the County's method of providing fire protection pursuant to Subsection 6. Under the explicit terms of subsection 6, a County's method of providing fire and police protection, its choosing not to devote fire and police resources to a particular problem or a particular community, and its decision to provide particular tools and resources for its officers and firefighters remain immune.

The purpose behind maintaining immunity in such situations is obvious - - the legislature understandably and predictably had no interest in subjecting decisions establishing governmental

entities' method of providing police and fire protection to the hindsight criticism and analysis of plaintiff's lawyers or to subject public resources to crippling damage awards in cases where the damage is extreme and/or widespread as the result of civil unrest, riots, insurrection, rebellion, or mayhem. To apply Respondent's theory and interpretation of subsection 6 from *Huggins* to the situation in *Wells*, the Wells would have had to be making an argument that the firefighters incompetently and negligently carried out the County's method for providing fire protection, making "tactical" decisions about the operational, on the ground, fighting of the fire; however, that was not the argument in *Wells* and that is not the immune function recognized in *Wells*.

Thus, Appellant suggests that Subsection 6 was wrongly applied in *Huggins* to maintain immunity for all police activities. As indicated, it is possible that the Supreme Court by its statement in *Jones* implied that Subsection 6 would not properly have been applied in that case involving law enforcement's providing police protection. The facts of *Huggins* support this interpretation. The wrong complained of by the defendant in *Huggins* was an officer's negligent action. There, Huggins apparently made no argument that the County's method for providing police protection was insufficient or contributed to his loss. Instead, *Huggins* reportedly argued that officers were negligent in the operational, on the ground, handling of the situation and that this negligence caused Huggins' harm. Where the county's overall "method" of providing police protection was not at issue, Subsection 6 should not have been applied to maintain immunity in *Huggins*. As noted, the application of Subsection 6 was not argued in *Huggins*; therefore, the facts were not fully developed; however, presumably, Huggins argued that the particular officer who shot Huggins' decedent did so negligently. However, there is no indication that *Huggins* made any argument that the governmental entity's method for providing police protection contributed to his loss. *Huggins* apparently did not argue that the county's method of training

the officer, equipping the officer, or deploying that particular officer contributed to his loss. Instead, *Huggins* argued that the officer on the scene acting to provide police protection took negligent action which caused him harm.

If the legislature had intended "method" merely to refer to an officer's actions whenever he is acting to provide police protection, there would be no liability for the actions of police officers causing harm. If "method" actually refers to merely how an officer does something related to police protection, the State has not waived its immunity as the Legislature claimed it had. The legislature included in the South Carolina Tort Claims Act the indication: "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." S.C.Code Ann. § 15–78–40. However, if Subsection 6 immunity applies to any and all actions taken by officers in providing police protection, the exception is so broad and all-inclusive as to deprive the citizens of this state of a chance for redress of their losses.

Appellant remains unable to conceive of a situation where officers, through negligent, on-the-ground, operational actions cause harm and where the State would not be immune under Subsection 6 as now interpreted by Respondent. For example, the Department in *Clark v. South Carolina Dept. of Public Safety*, 608 S.E.2d 573, 362 S.C. 377 (2005), would have been immune from suit for losses claimed to have resulted from the agency's method of providing police protection by authorizing high speed pursuits. However, where, in spite of the County's recognized method for providing police protection through permitting high speed pursuit pursuant to its pursuit policy, the particular officer in *Clark* acted negligently and inconsistently with the County's methods, there would be no immunity for the officer's conduct under a proper

interpretation and application of subsection 6. Had the Department in *Clark* claimed immunity under Subsection 6, as interpreted in *Huggins*, it is doubtful that the Court would have concluded that the officer's actions in continuing drive his vehicle, in continuing to maintain pursuit speed despite all countervailing considerations constituted "the method" adopted by the County for providing police protection. Instead, the County's method of providing police protection, including its particular pursuit policy, would have been immune from suit under Subsection 6, while the officer's negligent actions actually providing police protection would not be immune.

Similarly, in *Brown v. Brown*, 598 S.E.2d 728, 360 S.C. 7 (Ct.App. 2004), the officer on the ground at the scene, making operational, "tactical," decisions, took several actions which the plaintiff argued contributed to his loss. The officer chose to designate a substitute driver and chose to allow him to drive away from the scene. Under the *Huggins* interpretation of Subsection 6 explained and espoused by Respondent, the officer's choosing to take each of these actions would be considered a "method" he chose to use in providing police protection, and thus immune. Therefore, under this broad interpretation of Subsection 6 whereby an officer taking any action as he is providing police protection constitutes an "operational tactic" or a "method" of providing police protection for which immunity is maintained, the officer in *Brown* would have been immune from suit under Subsection 6 without resort or reference to Subsection 5. The Court found that the officer's actions in *Brown* were immune under subsection 5 as the result of his making a discretionary choice of options. However, it is unlikely that, if claimed by the State in *Brown*, immunity would have been found under Subsection 6 on the basis that the officer's actions and the "tactics" he employed in dealing with the situation constituted an immune "method" of providing police protection - - again, the officer was simply acting as a police officer and not making decisions relating to the provision of police protection to the community.

Similarly, here, the Sheriff's Department has a method for providing police protection, including maintaining a certain number of officers with a certain amount of training, maintaining the ability to work with other agencies, the use of tasers, flash bangs, stacks, radios, and negotiators. However, Appellant does not claim or assert that the County's method for providing police protection was wanting as the result of this overall "method" of providing police protection. Instead, Appellant claims that in taking action according to the County's established method to provide police protection, the Sheriff's deputies acted unreasonably and negligently. Thus, Plaintiff does not complain that the County wrongly included within its methods for providing police protection the use of tasers; and he does not claim that his loss was caused by the County's method of providing police protection whereby only certain and not all officers on the scene were equipped with tasers. Instead, Plaintiff complains that the officers negligently employed or failed to employ the taser and that proper use of tasers, permitted and encouraged as an approved method of providing police protection in Richland County, would likely have saved his life. Under a proper application of Subsection 6, the Department would, of course, remain immune from a claim of loss resulting from its method of providing police protection by providing and encouraging its officers to use a taser in appropriate situations. However, officers' negligent or improper use or failure to use a taser would not constitute a "method" for providing police protection for which immunity is maintained.

Likewise, Appellant does not assert that the County's method of providing police protection, including its approval of the use of a flash bang device to provide police protection, was the cause of his injury. Instead, Appellant asserts that, here, the flash bang was used improperly and negligently, contributing to his death. In this instance, the County's chosen method of providing police protection by providing and permitting the use of a flash bang would

be immune from suit, while the negligent, incorrect, implementation of a flash bang would not constitute a "method" of providing police protection and would not be immune.

Respondent argues that, if Subsection 6 is interpreted to maintain immunity for the policy decisions of law enforcement in establishing the method of providing police protection, the subsection is superfluous because Subsection 4 maintains immunity for a governmental entity's "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." Appellant agrees that a statute must not be interpreted in such a way as to make any of its provisions redundant or superfluous; however, he does not agree that Subsection 4 duplicates Subsection 6. Instead, Subsection 4, applying to all State entities focuses on legislative immunity while Subsection 6 particularly provides immunity for governmental entities' method of providing police and fire protection. Understandably, the legislature believed that further and more specific immunity should be maintained in the case of police and fire protection in emergency situations. Thus, the fact that there are multiple exceptions which could apply to maintain immunity with some overlap does not indicate that the exceptions are duplicative or that any section is superfluous.

D. If correctly decided, *Huggins* was wrongly applied in this case

The Sheriff asserts that *Huggins*, like this case, involved only operational decisions made by officers on the ground. The Sheriff may well be correct; however, from the opinion itself, it is difficult to determine. The Court did note that Huggins contended that his state claim alleged "negligence in the time frame leading up to the moment preceding the shooting." The Court further noted that Huggins had argued before the circuit court that the claim was about the "preparation and events leading up to the time immediately preceding the shooting of Deceased."

Citing §15–78–60(6), the Court then found, without further discussion or detail, "This action concerns the manner in which the police chose to provide police protection."

Assuming that the claim Huggins sought to argue was that the Department's procedures, preparation, training, allocation or assignment of officers and resources, and/or method of providing police protection prior to the fatal incident with Huggins contributed to and caused his loss, the case was properly decided because the government is immune for the method of providing police protection pursuant to Subsection 6. However, because the opinion in *Huggins* contains no detailed description or analysis of the arguments made that the claim was "about the preparation and events leading up to the time immediately preceding the shooting," while *Huggins* may have been correctly decided, the decision is open to misinterpretation.

The application of Subsection 6 in *Huggins,* even if correct, has nevertheless been wrongly interpreted by the Sheriff and it was wrongly applied by Judge Griffith in this case. If, as the Sheriff asserts, Huggins' argument went only to operational actions taken by police officers on the scene and not to the Department's method of providing police protection, Appellant would respectfully maintain that the case was wrongly decided as the result of a misinterpretation of Subsection 6. Notably, Respondent concedes, "If the Appellant is correct, *Huggins* was incorrectly decided by this Court because, like the case at bar, Huggins involved strictly operational conduct and not policy formulation." (Brief of Respondent, p. 13).

The Sheriff follows the *Huggins* decision's indication that Subsection 6 could be paraphrased to maintain immunity for the "manner in which the police chose to provide police protection" in now himself arguing that Subsection 6 actually maintains immunity for the "operational conduct where law enforcement chooses or employs particular methods or tactics,"" i.e., the decisions and actions of its law enforcement officers. However, to the contrary,

Subsection 6 is wrongly interpreted and unreasonably expanded beyond the plain meaning of the legislature's language where it is interpreted to maintain immunity beyond "the method" by which a governmental entity provides police protection to the community so as to also maintain immunity for any and all actions taken by police officers while providing police protection.

The interpretation of Subsection 6 in *Huggins* should be revisited as this is a matter of some import requiring legal analysis critical to an understanding of what immunity is maintained by the police and Sheriff's Departments in South Carolina. This is the reason Plaintiff respectfully moved to have this case certified to the Supreme Court so that a complete answer to the question would expeditiously result; however, at that point, the Sheriff argued that there was no legitimate question as to the rectitude or application of *Huggins*. At this point, on brief, the Sheriff, despite acknowledging that Appellant presents a question of arguable merit, fails to fully address that argument.

Respondent has essentially ignored the substance of Plaintiff's admittedly extensive analysis of the authorities from Texas and Oklahoma. Respondent addresses these cases only by noting the obvious fact that these authorities are not binding precedent in South Carolina and by asserting incorrectly that the cases cited by Plaintiff involve only policy decisions and do not involve the actions of officers on the scene, which the Sheriff now refers to as "operational, tactical, decisions." Respondent asserts that the cases from Texas and Oklahoma are "not truly at odds with Huggins or the ruling by Judge Griffith." Respondent explains, "Those cases draw a distinction between the formulation of policy and the implementation of policy, but none of those cases involve a law enforcement operation where tactical decisions or choices are made during the course of the operation, such as what occurred in *Huggins* and in the present case." To the contrary, Plaintiff referenced several cases from Texas and Oklahoma involving claims of

immunity which were rejected on the basis that, although the State's policy decisions establishing the method of providing police protection are subject to immunity, there is no such immunity for the negligent actions of officers on the ground.

On brief, Appellant indicated that he was "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." However, Respondent fails to respond to this argument and fails to point to any such differentiation in Judge Griffith's decision between the officers here just acting as police officers and an immune "method" of providing police protection. Respondent likewise fails to identify or explain that any such differentiation was made in *Huggins* between officers acting as police officers and an immune "method of providing police protection."

Plaintiff would respectfully suggest that the lack of detail and clarity regarding the proper application of Subsection 6 in *Huggin*s, in light of the decision in *Wells*, has had a profound effect due to the very nature of the Tort Claims Act. In this situation, where the defendants have the option to raise and rely upon whichever of the exceptions in the Tort Claims Act best suit their situation and they may raise as many exceptions as they like. However, as indicated by Respondent, in numerous cases involving a loss claimed to have resulted from law enforcement officers' actions taken in providing police protection, law enforcement has ***not*** raised or relied upon Subsection 6 immunity. From this situation, Plaintiff can only conclude that for seven years, the State's agencies and municipalities have taken the long view, choosing *not* to raise or rely upon Subsection 6 immunity or upon the *Huggins* decision even though both could apparently be argued to provide complete, unquestionable immunity. Appellant can only assume that law enforcement has taken this approach because they doubted that Subsection 6 was

correctly analyzed or correctly applied in *Huggins* and, thus, they have been loathe to subject the decision to further analysis. It would appear that only in cases where the State believed that Subsection 6 was the only arguable route to maintaining immunity under a particular set of facts, and, perhaps only in cases where the citizen plaintiff was unsympathetic, so that his plight would raise no great interest, has Subsection 6 been relied upon.

Thus, as argued, in *Clark* the Department chose not to rely upon Subsection 6 to maintain immunity where the Trooper in *Clark* was unquestionably acting to provide police protection; implementing the Department's established method of providing police protection by using his lights, siren, and vehicle in pursuit of a criminal. The Department's adoption of the pursuit policy was certainly part of its method for providing police protection and, thus, immune. Under the Respondent's theory, the Trooper made operational decisions choosing which "methods" and actions to employ as he maintained his pursuit; continuing to drive at a high rate of speed until the crash; and, therefore, the Department would be immune from suit under Subsection 6 if interpreted to include all actions and decisions made by law enforcement officers. In fact, under the Respondent's theory and analysis of Subsection 6 immunity, it is incredible that the Department in *Clark* actually failed to rely upon Subsection 6, choosing instead to rely upon the, more difficult to establish, immunity provided in Subsection 5. The Department chose in Clark to rely upon Subsection 5 and not to mention Subsection 6 so that, after years of litigation before the Court of Appeals and the Supreme Court, the Department was found not to be immune under the Tort Claims Act, but liable for Clark's damages.

Respondent argues that the subsection *was* rightly applied in *Huggins* and its progeny to preserve immunity both for the overall method of providing police protection and also for the operational tactics, i.e., actions taken by officers in providing police protection. Respondent then

somewhat disingenuously suggests that Appellant is making a "chicken little" argument when he predicts that this analysis, if correct, results in law enforcement's having blanket immunity. Respondent reassures the Court that in the seven years since the *Huggins* decision, Subsection 6 has not been asserted or relied upon in numerous tort claims involving law enforcement. Of course, this observation is made by a party who most likely is aware that there has been reluctance by the State to bring the *Huggins* decision back before the Courts. In fact, the State and its defenders have been surprisingly successful and, perhaps lucky, that *Huggins* has not been seriously questioned or examined in depth over the last seven years. However, the State has now explained its position and revealed the overwhelming breadth of the immunity it claims.

Appellant does not argue that affirmance of Judge Griffith's order will *result* in law enforcement in South Carolina being, thereafter, afforded blanket immunity. Instead, Appellant argues that the legislature's version of the Tort Claims Act's Subsection 6 exception to the waiver of immunity was intended to maintain liability only in matters related to policy decisions made as to the method of providing police and fire protection to the community at large. The language of the subsection actually indicates that the subsection maintains immunity for harm caused as the result of decisions made as to provision of police and fire protection in situations where the State is not in control, but its provision of police and fire protection will be called into question, i.e., in cases of riot, mayhem, civil unrest, insurrection, or rebellion. Clearly, the legislature intended to maintain immunity in situations where rioting and mayhem break out and damage is caused to the person or property of citizens. The legislature, therefore, particularly excepted from the waiver of immunity an agency's policy decisions as to the method of providing police or fire protection, meaning the amount and type of police and fire protection to provide to the community. Thus, in a case where rioting and mayhem breaks out and there is no

fire or police response or an allegedly insufficient fire or police response, the citizens injured or whose property is injured as a result of the rioting and civil unrest would be prevented from holding the State or municipality responsible for their losses. Under the plain language of Subsection 6, citizens will not be able to complain that the State had notice of impending unrest and, yet, negligently decided not to provide increased police or fire protection. Citizens will not be able to hold the government responsible for their losses by claiming that the State had the resources necessary to address the rioting and civil unrest, but negligently chose to allocate resources elsewhere. The plain language of Subsection 6 shows that the legislature intended to maintain immunity for policy decisions regarding providing or the method of providing police or fire protection in cases of riot, rebellion, civil unrest, mayhem, and insurrection. In such cases, under Subsection 6,the State or the municipalities' overall method of providing police and fire protection, the preparedness of police and fire authorities, and the decisions as to the allocation of resources according to the perceived needs of the community are not open to debate and do not subject the government to liability.

Subsection 6 was interpreted in *Wells* to maintain immunity for discretionary policy decisions made by governmental entities as to the overall method of providing fire protection for the community. In *Wells*, the Court explicitly examined and ruled upon immunity as the result of the county's overall method of providing fire protection to the community. Notably, the *Wells* Court did not address a question of negligence on the part of firemen while putting out a fire. Instead, the Court addressed the question raised by the Wells, whether the County was negligent in the method it chose to employ to maintain the water supply to hydrants and the County's failure to employ a method for providing fire protection which would ensure that all hydrants and lines were in working order or which would ensure that citizens were notified when a water

line or hydrant was not in service. The *Wells* Court applied Subsection 6 to provide immunity only for the method of providing fire protection to the community.

As argued, *Wells* and Subsection 6 were wrongly applied in *Huggins*. In *Huggins*, Subsection 6 and the *Wells* decision were apparently interpreted, not to maintain immunity for the overall method the agency chose to employ to provide police and fire protection to the community, but instead, to maintain immunity in all situations where damages were claimed to result from an officer's negligent or wrongful actions while acting as a police officer providing police protection. As argued, under the interpretation apparently applied in *Huggins* and the interpretation certainly applied by Judge Griffith in this case, police officers in South Carolina are immune under Subsection 6 for any and all actions taken while engaged in providing police protection; according to this theory, if a loss is claimed to have resulted from the actions of police officers who were engaged in providing police protection, immunity is maintained.

Notably, Respondent has failed to identify any situation involving police officers in which the *Huggins* interpretation of subsection 6 would not operate to maintain immunity for law enforcement. Respondent points out that, even since *Huggins* was issued, Subsection 6 has only once been relied upon by defendants in cases involving the provision of police protection. However, Respondent does not argue that Subsection 6 as currently interpreted and as apparently applied in *Huggins* would not have resulted in a finding of immunity in every law enforcement tort case if it had been in existence and if it had been raised in defense. Appellant believes that, up to issuance of the *Wells* decision, Subsection 6 may have been construed and understood only to apply in cases of riot, mayhem, rebellion, insurrection, and civil unrest and, thus, it was relied upon rarely, if at all. However, upon issuance of the decision in *Huggins*, Appellant believes that the State and its defenders were incredulous - - happy, but cautious about a decision that

appeared to be too good to be true. The State reasonably doubted the rectitude of the *Huggins* decision's apparent recognition of all-encompassing immunity for law enforcement under Subsection 6. However, as long as the *Huggins* decision wasn't challenged, raised, or brought back before the Courts, the erroneous notion that police were immune in South Carolina whenever they were acting as police officers would persist.

Presumably, there is some element which caused the law enforcement defendants to forgo reliance upon Subsection 6, choosing instead to shoulder the much more onerous burden of proving that its officers' actions were immune due to legislative immunity as provided in subsection 4 or discretionary immunity as provided in subsection 5. However, Appellant is unaware of what that difference could be. For example, in *Clark*, the State attempted to rely only upon subsection 5, maintaining immunity for discretionary decisions. The Court rejected the State's argument, finding that the State had failed to establish that the officer made a choice after considering options under a proper standard of care. However, Appellant is unable to conceive how the officer in *Clark* would not have been plainly immune under the current interpretation of Subsection 6. The State in *Clark* was unable to convince the Court that it was immune pursuant to Subsection 5 because the Trooper's actions were discretionary. However, the State would clearly have had a much easier row to hoe had it chosen instead only to attempt to convince the Court that the officer in *Clark* was engaged in providing police protection.

Appellant naturally is reluctant to make any argument which could be characterized as predicting that the sky is falling, however, she must follow the Respondent's current argument to its logical conclusion. Thus, if the government is immune for its policies, methods, and also for the actions of its officers taken in providing police protection, where a County's method of providing police protection includes providing its officers with tasers and authorizing its officers

to use tasers against its citizens, the County will be immune if an officer tases a three year old child. Under subsection 6, the County would surely be immune for its method for providing police protection under which it provides and allow its officers to use tasers in their law enforcement capacity. In addition, under the analysis now put forward by Respondent, the county would be immune for a loss claimed to result from the officer's actions as long as he was acting in his official capacity. The officer's decisions leading to the tasing of the child would be immune as an operational tactic, choice, and, under the State's theory, "method" of providing police protection. The County would not be required to explain the officer's tasing a baby - - under the State's current theory, the facts of the situation and whether the officer's actions were somehow reasonable and justified in that particular situation would never be explored because the State would never have to explain and it could never be held responsible.

However, under the Respondent's current theory of subsection 6 immunity, there is actually no need to limit the analogy merely to tasers; where as a part of its method for providing police protection, the Sheriff's Department permits its officers to employ a range of responses to its citizens, culminating in the application of deadly force, were a Deputy to shoot and kill a child, the child's parents could complain and file suit, but they might never receive an explanation for why the officer chose to shoot a child and the Sheriff would be immune from any responsibility for the child's death. Under the Respondent's theory, as long as the Deputy was acting in his role as a officer providing police protection, the Sheriff would be immune as a matter of law, regardless of the facts. Although these examples may seem outrageous and absurd, Appellant has always thought it was absurd and outrageous that her decedent, in his injured, weakened, condition was ever reasonably thought to present any more danger to this phalanx of armed, Kevlar-clad, officers than would a three year old child.

II. Appellant alleged a cause of action for the negligent wrongful death.

By a footnote, Judge Griffith cited *Wyatt v. Fowler*, 326 SC 97, 484 S.E.2d 590(1997), for the proposition that "the police owe a duty to the public at large and not to any individual." Appellant responded to this footnote by indicating to the contrary, that the Respondent did owe her decedent a duty of care pursuant to *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). However, Respondent now argues that the judge's observation by footnote was not related to Respondent's owing a duty of care to Mr. Catoe. Respondent points out that the decision in *Wyatt* also demonstrated that South Carolina does not recognize a cause of action for negligent arrest or a negligent performance of a criminal investigation. However, this demonstration is irrelevant where Appellant has made no claim either for negligent arrest or for negligent performance of a criminal investigation, as Defendants did neither. Appellant would note that South Carolina does recognize a cause of action for negligence which applies where an individual or, as here, an entire entity has breached a duty of care and failed to follow a standard of minimal conduct which the law requires to simply protect others against the risk of harm caused by their actions.

Respondent further indicates that there can be "no claim of negligence flowing from intentionally tortious conduct." This indication is irrelevant to Appellant's argument, assuming that Respondent did not intend by this statement to admit that the conduct of his deputies constituted intentionally tortious conduct. Appellant has always maintained that the deputies acted negligently; however, even Appellant has not argued that the deputies' actions were "intentionally" tortious. In fact, no one has ever alleged that Deputy Hendricks stepped into the yard that day intending to point blank shoot the Plaintiff. Any such argument would be absurd; however, the deputy should have never been at this scene, the deputy should have had proper

communication, clear direction from a supervisor, knowledge of the tactical plan, and awareness that a mentally ill, frightened, injured, and panicked man might attempt to flee.

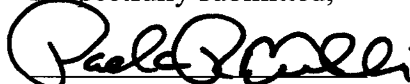
Respondent concludes this argument by indicating that "since an allegation of intent to commit a wrongful act is irrelevant in a negligence action, the Defendant Sheriff cannot be held liable for its intentional acts at the relevant times and there is no claim for negligence flowing therefore." Appellant would note that she has not alleged that the Sheriff or his deputies intentionally committed wrongful acts, other than the negligent acts complained of. This argument would appear to have little relevance to the issues raised on appeal.

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 Respondent breached a duty of care to the Plaintiff's decedent and that the resulting fatality was caused by a breach of that duty. The trial judge erroneously granted summary judgment upon wrongly finding that Respondent was immune from suit pursuant to a misinterpretation of S.C. Code. Ann. § 15-78-60(6). 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,

December 22, 2014



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

2014-000194

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SC Court of Appeals

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 Initial Reply Brief this 22nd day of December, 2014, by regular U.S. mail, with proper postage affixed, addressed to the following:

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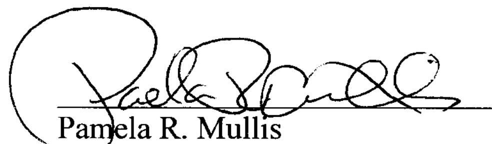

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December 22, 2014

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 the original and one copy of Appellant's Initial Reply Brief in the above-referenced case along with a certificate of service. Upon filing the original, please return the file-stamped copy to the bearer of this letter in the enclosed self-addressed stamped envelope.

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

Sincerely yours,

Pamela R. Mullis

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

Priority Mail
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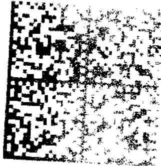

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