THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2014-000194

Opinion No. 2015-UP-547

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 the Respondent.

PETITION FOR REHEARING

Now comes Evalena Catoe, individually and as personal representative of her husband's estate, hereinafter referred to as Petitioner, by and through undersigned counsel, pursuant to Rule 221, SCACR moves this Honorable Court for rehearing of its Unpublished Opinion No. 2015-UP-547, filed on December 2, 2015, in the above referenced matter. Petitioner respectfully submits the Court may have overlooked or misapprehended petitioner's arguments in the following particulars:

1. The Opinion of the Court does not address Plaintiff's argument that the trial judge had erred in granting summary judgment to the Sheriff's Department where the judge had erred as a matter of law in taking the facts in the light most favorable to the Sheriff; in failing to take the facts in the light most favorable to the non-moving party, Petitioner; and where there remained genuine issues of material fact as to whether the officers had failed to exercise due care in subduing the already-injured decedent and in order to protect him from death or serious bodily harm, as the result of gross negligence and a complete disregard for the decedent's life, such that the officers' negligence resulted in the unnecessary death; as to whether the Sheriff and his officers on the scene had failed to establish the command and control needed for joint operations; whether on-scene officers failed to establish consistent and clear lines of communication; whether the lack of command and control and the lack of organization and communication hindered decision making altogether, leading to the officer's changing her position against orders and causing the officer to be unaware of the Order to holster weapons; causing the officers to negligently employ a "flash bang;" thereby contributing to decedent's death; and all remaining material issues of fact which should have been decided by a jury rather than on summary judgment.

Petitioner respectfully suggests that the Court may have overlooked or misapprehended Petitioner's argument that 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 and that the failure to take the facts in the light most favorable to the nonmoving party is mandatory so that the trial judge's failure to do so constitutes reversible error.

Finally, the Court may have overlooked or misapprehended Petitioner's argument that the grant of summary judgment should be reversed and the case remanded in order to give Judge Griffith an opportunity to consider the facts in the light most favorable to the non-moving party

and to make his decision on Summary Judgment upon taking the facts in the proper light and in light of the Sheriff's newly asserted conditional admission of fault.

2. The Opinion indicates that, as to the issue of whether law enforcement owed a duty of care to Petitioner's husband, Richard L. Catoe, Jr., Petitioner's argument is manifestly without merit pursuant to authorities decided upon the absence of a legal duty of care; noting that one alleging negligence may rely upon a duty may be created by statute or on the common law; noting that the public duty rule is applied only when the alleged duty is founded upon a statute; that when the duty relied upon is founded on the common law, it is referred to as arising from 'special circumstances' and recognizing the five instances identified in *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002), in which a duty of care may arise, including when there is a special relationship; when a duty of care is voluntarily undertaken; and when the defendant negligently creates a risk. However, the Court may have overlooked or misapprehended Petitioner's arguments that under the South Carolina Tort Claims Act, a governmental entity is liable for its torts in the same manner and to the same extent as a private individual under like circumstances and that liability is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty," and her argument that the burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.

The Court may have overlooked that Petitioner's claim of negligence asserting a duty founded on the common law; that, where the duty relied upon is based upon the common law, the existence of that duty is analyzed as it would be were the defendant a private entity; and that petitioner had relied upon *Madison ex rel. Bryant v. Babcock Center, Inc.*, 638 S.E.2d 650 (2006),

to establish that, where she did not claim a loss due to a breach of duty by statute; the public duty rule would not apply. The Court may have overlooked or misapprehended Petitioner's argument interpreting the judge's citation of *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997); by footnote as an erroneous finding that Petitioner's claim was barred by the public duty rule as stated in *Wyatt*; and also may have overlooked the fact that the Respondent Sheriff argued on brief before the Court that the trial judge had actually made no ruling or finding as to a lack of duty and that there was no issue as to duty presented before the Court.

In addition, the Court may have overlooked or misapprehended Petitioner's argument that, 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; and where the defendant negligently or intentionally creates a risk; and her argument that 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 because the Sheriff bore a special relationship to Petitioner's decedent in that Richland County Deputies had voluntarily joined in the Columbia Police Department's attempt to take the decedent into custody in progress, after the decedent had already been shot in the abdomen; that Richland County Deputies were made aware that the decedent had been shot in the abdomen by the City of Columbia prior to their arrival and that, 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 immediate medical care. Petitioner argued that, where evidence was sufficient to establish that the Sheriff's deputies acted with gross negligent, the trial judge erred in failing to find that Defendant undertook a duty of care to the decedent upon voluntarily joining in

the City of Columbia's efforts to take Appellant's decedent into custody and upon asserting authority and control over Mr. Catoe and over the scene where he was confined; however, the Defendant failed to employ due care to protect Mr. Catoe from injury or to provide medical treatment.

The Court may have overlooked or misapprehended Petitioner's argument relying upon the decision in *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991), establishing that, where officers voluntarily assert their authority and take control of a situation, depriving the decedent of the help of others, a duty of care was owed to the decedent in particular to care for, protect, assist, and provide treatment and to refrain from interfering with others available to render aid and Petitioner's reliance upon the Supreme Court's decision that the officers had voluntarily assumed a duty of care sufficient to support Russell's claim of negligence, based upon the language of the Restatement 2nd of Torts; and that, 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 or her argument that the officers acted in a grossly negligent manner in failing to exercise even slight care.

Finally, the Court may have overlooked or misapprehended Petitioner's argument that to the extent the trial judge granted summary judgment upon finding that the Department owed no duty of care to Petitioner's decedent, such ruling was error in light of the fact that RCSD officers had attempted, along with the Columbia Police Department, to place the 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, so that a special duty arose from such affirmative acts, requiring the officers to use due care and to protect petitioner's decedent.

3. The Opinion indicates that Petitioner's arguments are manifestly without merit as to whether the alleged negligent conduct was immune from liability under section 15-78-60(6) of the South Carolina Code (2005), providing 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;" pursuant to S.C. Code Ann. § 15-78-60(6) and § 15-78-20(f) (2005) providing "The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability ofthe State;" and *Huggins v. Metts*, 371 S.C. 621, 624-25, 640 S.E.2d 465, 466-67 (Ct. App. 2006), cert. denied Oct. 18, 2007.

As to the language and construction of §15-78-60, subsection 6, Petitioner would respectfully suggest that the Court may have overlooked or misapprehended Petitioner's particular arguments:

- that the trial judge erred in finding that the Defendant Sheriff was immune from suit pursuant to subsection 6, where the Defendant Sheriff's officers' merely engaging in police activities does not constitute the "method" of providing police protection for which the legislature intended to maintain immunity through subsection 6;

- that the trial judge erred in granting summary judgment upon agreeing with the argument that the Sheriff was entitled to absolute sovereign immunity for the petitioner's negligence claim, "which arose out of actions undertaken to provide police protection;"

- that the judge's particularly finding, "Similar to the *Huggins*' Court's evaluation, the key issue in the case at bar centers on the manner in which [Officer] 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,'" showed that the trial judge had 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;

- that by so interpreting the statute, the trial judge erroneously 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;

- that the trial judge's error resulted from a 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;

- that 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, but that Subsection 6 actually refers to the overall method of providing police protection to the community and not simply to actions taken by officers *engaged in* providing police protection while in the scope of their official duties;

- that the trial judge erred in so interpreting the statute where, 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."

- That the trial judge erred in failing to give meaning to the word, "method," in this provision as maintaining immunity where a loss is alleged to have resulted from the Departmental policies as established by policy makers and that, 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 and blanket immunity.

The Court may further have overlooked or misapprehended Petitioner's argument that, 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 Court may have overlooked or misapprehended Petitioner's argument that 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; that 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, so that 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.

The Court may have overlooked petitioner's argument that subsection 6 was properly interpreted in *Wells* 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. The Court may have overlooked

Petitioner's argument stressing that the subsection is drafted in terms of preparing for and responding to widespread emergencies and that it 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. Clearly, the legislature intended to maintain immunity in situations where rioting and mayhem break out, causing damage to persons or property. 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 protection the policy makers choose to provide, so that, where there is no fire or police response or an allegedly insufficient fire or police response, the citizens injured or whose property is damaged as a result of the rioting and civil unrest could hold the State or municipality responsible for their losses.

The Court may have overlooked and misconstrued Petitioner's argument that South Carolina Code § 15–78–60 subsection 6 was first properly construed and correctly applied by the South Carolina Court of Appeals in *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct.App 1998). Petitioner argued that, in *Wells*, the Court of Appeals had agreed that the City and County were immune pursuant to 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" and that, before finding that immunity applied, the *Wells* Court analyzed the particular claims raised by the Wells, noting 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." The Court may have overlooked petitioner's argument that, the decision in *Wells* was shaped at the outset by the Wells' 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's immunity for the "method" of providing fire protection. 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 immunity.

The Court may have overlooked petitioner's argument that, in determining whether the claims the Wells raised against the City relating to its system for maintaining and inspecting fire hydrants came under Subsection 6 immunity, 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.

The Court may have overlooked petitioner's argument that, 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 *Wells* Court then agreed with the reasoning of those jurisdictions, 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."

The Court may have overlooked or misapprehended Petitioner's argument that, at the time of the issuance of the decision in *Wells*, referencing with approval Oklahoma and Texas' versions of Subsection 6 identical to South Carolina's version, the courts of those states had not construed this language as maintaining immunity for any and all claims arising from police or fire activity, but instead, those Courts had actually held and explained that the statutory language "the method of providing police or fire protection," maintained immunity from suit related to policies and established methods of providing police and fire protection, but that no such immunity exists where the loss was due to the negligent implementation of policy by officers on the scene, as opposed to some alleged fault with the policy itself.

The Court may have overlooked Petitioner's indication that, in 1979, some eighteen years prior to the *Wells*' Court's referencing with approval Texas' interpretation of subsection 6, Texas' Supreme Court had issued *State v. Terrell*, 588 S.W.2d 784 (Tex. 1979), a decision distinguishing between the negligent *formulation* of policy, for which sovereign immunity is preserved, as opposed to the negligent *implementation* of policy, for which immunity is waived: *Terrell*, 588 S.W.2d at 787-88. The Court may have overlooked or misconstrued Petitioner's citation to decisions indicating that, in Texas and Oklahoma, the jurisdictions relied upon by the *Wells* Court, a Department js not immune from suit where the allegation was of negligence, not in the methods

or policies of the police department, but in an officer's implementation of department policy, where Petitioner cited to and relied upon the authorities from Texas and Oklahoma, establishing that, at the time our Court held out Texas' interpretation of subsection six as being correct and as the same as that applied in South Carolina, in Texas, the "method" of providing police protection is construed to refer to a City's plan, design, or system for providing police protection

The Court may have overlooked Petitioner's referencing the *Terrell* decision as showing that, in Texas, *at that time*, "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) and the term is synonymous with the words "mode," "plan," "design," or "system." Id. Petitioner argued that 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 Court may have overlooked Petitioner's argument that 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, 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.

The Court may have overlooked petitioner's argument that, 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 in *Wells* had 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), where 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." 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."

The Court may have overlooked or misconstrued petitioner's argument that, 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 for the community. 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.

The Court may have overlooked petitioner's argument that, 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 where, in Texas and Oklahoma, 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.

The Court may have overlooked Petitioner's argument that, at the time of the Wells decision, there was 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 the jurisdictions cited by the Wells Court finding that Subsection 6 maintains immunity only for the formulation of policy as to the provision of police protection. Petitioner noted that 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.

The Court may have overlooked or misapprehended petitioner's argument that, even assuming that the *Wells* Court had intended to construe Subsection 6 as providing blanket immunity for any loss related to police or fire protection, such holding would have been (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. Petitioner pointed out that, 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.

The Court may have overlooked petitioner's argument that the counties and municipalities and their police departments had not interpreted 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, and that the governmental entities had not claimed such immunity under subsection 6. Petitioner argued that, 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. 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.

The Court may have overlooked Petitioner's distinguishing the case of *Huggins v. Metts*, 371 S.C. 621, 640 SE2d 465 (Ct.App. 2006), on the basis of 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; 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; 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 where 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. Petitioner further argued that the cases were not legally similar in that Petitioner had appealed and argued against the application of Subsection 6 immunity in her case while, in contrast, as the Court of Appeals found, Huggins made no such argument in his appeal so that, in *Huggins,* Subsection 6 immunity was not argued before the Court, but was applied as an additional sustaining ground.

The Court may have overlooked the fact that, in addition to distinguishing the case, Petitioner argued that *Huggins v. Metts* was wrongly decided in that the opinion misconstrued the statute in finding that subsection six maintained immunity for the actions of police officers by finding that the actions of the officers on the scene of an incident constituted "the method of providing police protection" without making a 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 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.

The Court may have overlooked or misconstrued Petitioner's indication that the circuit court judge in *Huggins* had not ruled upon the issue of immunity under the Tort Claims Act, but that the Court of Appeals had nevertheless 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). Petitioner noted that, although the statute 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 more broadly immune for 'the *methods chosen to utilize* to provide police protection.'

The Court may have overlooked or misapprehended Petitioner's argument that the initial interpretation of the subsection in *Wells had* focused on the discretionary, overall, system and method for providing fire protection to the community and that 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. However, 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.

The Court may have overlooked Petitioner's argument that, 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), SCACR, 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 as they carry out departmental policy, even though the actions of the officers are alleged to have been grossly negligent, the municipality is immune.

The Court may have overlooked Petitioner's argument that, under such an overly-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 maintained by subsection 6; however, that such an expansive interpretation of Subsection 6 is inconsistent with the legislature's language and contradicted by existing South Carolina jurisprudence, so that, following the issuance of the decision in *Huggins v. Metts in 2006*, our courts had 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

relying upon Subsection 6.immunity; and that, in those cases, the officers were certainly engaged in police activities, so that, if the phrase, "method of providing police protection," is properly interpreted to indicate that the legislature meant to immunize all losses resulting from police actions, the agencies would have been immune from suit under Subsection 6 and there would have been no need to analyze the more difficult issues of immunity under the Tort Claims Act.

The Court may have overlooked petitioner's argument that the decision in *Huggins v. Metts* had not been construed or cited until cited in *Jones v. Lott*, 665 S.E.2d 642 (Ct.App. 2008), where the Sheriff's Department claimed immunity based on Subsection 6 and the *Huggins* decision and Jones attempted to argue that the trial judge had improperly interpreted and 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. 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 the Sheriff's Department was entitled to immunity under Subsection 6. However, the Court may have overlooked or misconstrued petitioner's argument that the Supreme Court's opinion could be interpreted to indicate 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 Court may have overlooked petitioner's argument that, 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 in the decisions noted would have easily claimed the immunity by indicating that the officers were acting as officers and the 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.

The Court may have overlooked or misapprehended petitioner's argument that the Sheriff had 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 and that, the Respondent had disingenuously stressed the fact that, even since *Huggins* was issued, Subsection 6 has only once been relied upon by defendants in cases involving the provision of police protection without arguing 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.

The Court may have overlooked petitioner's argument that, up to issuance of the *Wells* decision, Subsection 6 was 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 and that, upon issuance of the decision in *Huggins*, the State and its defenders were cautious about a decision that appeared to be too good to be true so that the State, reasonably doubting the rectitude of the *Huggins* decision's apparent recognition of all-encompassing immunity for law enforcement under Subsection 6, chose not to bring the *Huggins* decision back before the Courts so that the erroneous notion that police were immune whenever they were acting as police officers would persist.

The Court may have overlooked Petitioner's indication that the statute should be interpreted to ascertain the intention of the legislature, giving words their plain and ordinary meaning; that where the meaning of the statutory language is clear, there is no need to construe the statute and another meaning may not be imposed, that a statute must be construed so as to harmonize with the statutory subject matter, with any ambiguity being resolved in favor of a just, beneficial, and equitable operation of the law. Finally, Petitioner argued that our 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, and that, 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 and is so broad and all-inclusive as to deprive the citizens of a chance for redress of their losses.

The Court may have overlooked or misapprehended Petitioner's indication that although the Respondent had 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, the trial judge's order made no differentiation and identified no part of the activities of the Richland County officers which would involve the "method" of providing police protection as opposed to their simply engaging in providing police protection so that Appellant and the Court are left without 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. Petitioner argued instead that the trial judge, explicitly relying on the interpretation as set out in *Metts*, had 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.

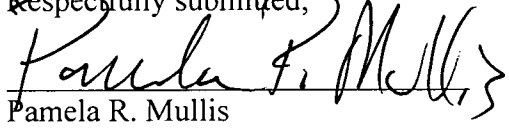
The Court may have overlooked petitioner's argument that the application of Subsection 6 in *Huggins,* even if correct, has nevertheless been wrongly interpreted by the Sheriff and it was wrongly applied by Judge Griffith in this case where, if, as the Sheriff asserts, Huggins' argument went only to operational actions taken by police officers on the scene and not to the Department's method of providing police protection, petitioner would respectfully maintain that the case was wrongly decided as the result of a misinterpretation of Subsection 6. The Court may have overlooked the Sheriff's concession on brief that, "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."

The Court may have overlooked or misapprehended Petitioner's argument that the trial judge had erroneously expanded the parameters of the immunity preserved by the legislature in Subsection 6 and that the grant of summary judgment on the ground of immunity pursuant to Subsection 6 should be reversed so that Petitioner could show a jury that the gross negligence of the Richland County officers while engaging in police activity was the compensable, non-immune, cause of her husband's death.

CONCLUSION

For all the forgoing reasons, Petitioner requests that the Court grant this Petition for Rehearing.

Respectfully submitted,



December 17, 2015
Columbia, South Carolina

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

COUNSEL FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 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 the Respondent.

PROOF OF SERVICE

I, the undersigned, an employee of the MULLIS LAW FIRM do hereby certify that I have served Appellant's Petition for Rehearing this 17h day of December, 2015, by by mailing one copy of same, by regular U.S. mail, with proper postage affixed, addressed to the following:

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

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

78181

MULLIS LAW FIRM

1229 Elmwood Avenue
The Haltiwanger House
Post Office Box 7757
Columbia, South Carolina 29202-7757

Office: (803) 799-9577 • Fax (803) 254-8956

Pamela R. Mullis | **J. Marvin Mullis, Jr.** 1940-2012 | **Joseph M. Epting, Jr.**

December 17, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

VIA HAND DELIVERY

RE: Evalena Catoe, individually and as personal representative of the estate of Richard L. Catoe, Jr., Appellate Case No. 2014-000194

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of Appellant's Petition for Rehearing and Proof of Service in the above-matter.

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

Sincerely,

Pamela R. Mullis

Pamela R. Mullis

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