

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

Eugene C. Griffith, Circuit Court Judge

Court Of Appeals Opinion No. 2015-Up-547

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

Petitioner,

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 WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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SC SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 22, 2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Sheriff was immune from suit pursuant to the Tort Claims Act's Section 15-78-60, subsection (6), maintaining immunity for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection," where the Sheriff's deputies engaging in police activities does not constitute the "method" of providing police protection for which the legislature intended to maintain immunity and did the Court of Appeals err in affirming the trial court's error in misinterpreting and expanding the exception to the waiver of immunity in Subsection 6 so as to provide blanket immunity for police officers in South Carolina where such an interpretation, relying upon the authority of *Huggins*, is inconsistent with the prior interpretation of the exception by the Court in *Wells*?
2. Did the Court of Appeals err in affirming the grant of summary judgment to the Sheriff where summary judgment was granted upon the trial judge's erroneously failing to take the facts in the light most favorable to the non-moving party; where genuine issues of material fact remain; and where the Sheriff was not entitled to judgment as a matter of law?
3. Did the Court of Appeals err in affirming the grant of summary judgment on the basis that the Sheriff's Department owed no duty and had breached no duty of care?

STATEMENT OF THE CASE

Petitioner, Evalena Catoe's husband, Richard Catoe, was fatally shot by a Richland County Sheriff's Deputy. On July 22, 2007, Columbia Police Department (CPD) officers observed smoke; upon CPD Officer Huertado's arriving on the scene of a house fire at approximately 8:00 am, he saw Richard Catoe standing on the side of the street and he immediately yelled out to Catoe. At that point, Huertado noticed that Catoe had a folding pocket knife in his right hand and that he was irate, asking what the officer wanted. Huertado stated that Catoe was "making threats toward us and himself from a distance of approximately 15 to 20 feet away." (R. p. 164). Huertado recalled that

Catoe was holding the knife to his own throat, threatening suicide and indicating that he had come there to die. Huertado indicated that he was in fear for his safety because the knife changed positions. Huertado recalled that upon Catoe's coming within six to eight feet while holding the pocket knife, he was in such fear that he shot him. After he was shot in the abdomen, Catoe said, "You shot me" and retreated toward his driveway. (R. p. 164).

Officer Huertado commanded Catoe to drop the knife and, at that point, he retreated a few steps and winced. Huertado indicated that Richland County had come upon the scene; Chief Crisp and CPD officers arrived on the scene at approximately 9:15 a.m. After some time, Chief Crisp decided that it was time to try to take Catoe into custody using the "least lethal means possible." (R. p. 124). Officer Dodson indicated that the plan was for a flash bang to be deployed to surprise Catoe, followed by use of a shield to knock Catoe down, and an officer shooting non-lethal bean bags at him. Dodson indicated that that Chief Crisp was advised and approved of the plan, but that there was never any discussion or concern that there could be a cross-fire situation. (R. pp. 134-136).

Dodson indicated, "there was a radio transmission sent out saying that we're going to initiate an action plan. There will be a large explosion, there may be other sounds that sound like gunfire, which will be the bean bag rounds being fired, and to stand by." (R. p. 134). Dodson explained the action plan involving the flash bang was shared with the other officers, "For safety. I mean, we don't want any incidental gunfire. We wanted our officers to be aware of what was going to happen." (R. p. 134). Chief Crisp recalled that the order was given to holster weapons before the flash bang was deployed. He explained, "If you've got your weapon at ready - - you're a lot more apt to react instead of it in your holster and seeing what's going on. So we wanted to make sure that everybody was clear of what we were trying to do." (R. p. 125). Chief Crisp testified that it was his

understanding when the order was given to CPD to holster weapons, Dodson was told to issue the same order. Chief Crisp indicated that, after the order was given to holster weapons, he would have expected all officers on the scene to comply. (R. p. 125). However, Roberts, indicated that he never heard an instruction to holster weapons. (R. p. 149). Likewise, Officer Dauway stated that he never heard an order over his radio to holster weapons prior to deployment of the flash bang (R. p. 132). Officer White indicated he never heard an order to holster weapons and he never heard such an order directed to Officer Hendrick. (R. pp. 153-154).

Five different officers were asked who was in charge of the scene and they gave five different answers. When asked who was in charge, Roberts indicated that he was answering to Auld; Auld was answering to Marsh; Marsh was answering to Dodson; and Dodson believed that Crisp was on the scene. (R. p. 148). Roberts recalled that after being hit by the stack, Catoe was "running backwards" and that he was not running towards Hendricks. (R. pp. 144-145). Roberts indicated that "Several shots were fired from my left. I turned briefly and observed a female deputy discharging rounds at the suspect who was hit several times." (R. p. 145). Roberts heard the shots and "it passed, I guess, over my left shoulder from what I remember because I heard several go by;" Roberts recalled that he "heard the whiz as they went past." (R. p. 147). Roberts indicated that he never heard an instruction to holster weapons. (R. p. 149).

The stack was made up of officers with the City of Columbia and officers from the Richland County Sheriff's Department. (R. p. 148). Roberts recalled that after being hit with the stack, Catoe was "running backwards" and that he was not running towards Hendricks. (R. pp. 144-145). Roberts indicated, "Several shots were fired from my left. I turned briefly and observed a female deputy discharging rounds at the suspect who was hit several times." (R. p. 145). Roberts heard the

shots and "it passed, I guess, over my left shoulder from what I remember because I heard several go by;" Roberts recalled that he "heard the whiz as they went past." (R. p. 147). Dauway indicated that there was no discussion or any plan regarding the possibility that Catoe would flee or try to run from the flash bang; therefore, there was no attempt made to block him from retreating into the back yard. (R. p. 128). The officers on the scene were unable to communicate with each other due to different radio frequencies; Dauway recalled that only "some" of the stack members had on ear pieces so that they could communicate with each other and coordinate their movements, and he did not have an ear piece. (R. p. 130). Dauway indicated that as the the stack approached Catoe, he began to backpedal to the rear of the house, raising the knife to his own throat. Dauway heard several shots and saw Deputy Hendricks in a crouched position with two hands on her weapon. (R. p. 128).

Deputy Kellye Hendrick indicated that Deputy White was her supervisor when she arrived on the scene. She recalled, "When Corporal Bright arrived, he took over and told us what to do." (R. p. 111). She stated, "Once we realized we did not have a "clear shot with the taser, I was instructed by Master Deputy White to holster my taser" and then back him up with lethal force, which was drawing my firearm." (R. p. 112). Hendrick recalled, "We then were instructed to move to the other side of the house because the City of Columbia SWAT team, apparently, was going to come and devise a plan on how to take him into custody." (R. p. 112). Hendrick indicated that the plan for subduing Catoe was that they were going to do a stack. Hendrick indicated that there was never any conversation with her about what they were going to do about avoiding a crossfire. (R. p. 117). Further, Hendrick stated that "they never came to us and told us what they were going to do". (R. p. 118). Hendrick stated, "Corporal Bright was in contact with whomever was in command and he advised us what they were going to do. We never had direct communication with any of the

command staff on what their plan was, other than that they were going to stack up, throw a flashbang, and try to subdue him. That was all we were told.” (R. p. 118). Hendrick stated that it was instinct that made her think that Catoe may run around the back of the house, indicating, “Somebody’s chasing you, you’re going to run from them”. (R. p. 118). As Catoe was pushed around the back of the house, fleeing from the flash bang, Officer Hendrick was unable to see Catoe and unable to see the entire back yard. Therefore, Hendrick changed her position from the cover of the house, the position she was ordered to maintain, and moved into the back yard for a better view. At that point, Hendrick saw Catoe going across the back yard and she shot him.

When RCSD Deputy White arrived, he proceeded, with Officer Hendrick, to the back of the house to possibly tase Catoe. (R. p. 152). White was unsure if he was the ranking officer at that point, explaining that he was not in radio contact with CPD, CPD command, or with SWAT. White recalled that he was communicating only with RCSD deputies, by radio and that he could communicate with Hendrick only verbally. (R. pp. 151-152). White moved to the other side of the house; he lost sight of Catoe when he ran from the explosion. White recalled hearing “somebody yelling that he's running” but that nothing was going out over the radio. When asked if instructions were going out on the radio at that time, White answered, “Not our radio.” White never heard a command to holster weapons; he was never told to holster his weapon; and he never heard anyone instruct Hendrick to holster her weapon. (R. p. 154). White recalled that, when he regained eye line on Catoe, Hendrick was looking towards the back yard while Catoe was angled 45 degrees towards the house as he ran and he was not facing straight. White then began hearing loud popping sounds and saw Catoe running across the backyard. White indicated that Catoe was not running towards Hendrick and that Hendrick was not blocking Catoe’s escape into the woods. (R. p. 155-156).

Officer Roberts recalled that several shots were fired from his left, but that Catoe never moved towards the officer that was shooting. Roberts recalled that he turned and observed a female deputy discharging rounds at Catoe who was hit several times. (R. p. 145). Catoe had not been tased, sprayed with OC spray, or subjected to any less lethal measures before he was shot dead by an officer who was out of position and did not hear the order to holster weapons.

Plaintiff brought an action for wrongful death against the City of Columbia and Leon Lott, in his official capacity as Sheriff of Richland County, seeking damages for her husband's death, pain and suffering, and for loss of consortium. A hearing on the Sheriff's Motion for Summary Judgment pursuant to Rule 56, SCRPC, was held before Circuit Court Judge Eugene C. Griffith, Jr. on November 13, 2013. On January 9, 2014, Judge Griffith issued his Order granting summary judgment. The Court of Appeals affirmed the judgment of the circuit court by unpublished opinion, *Catoe v. The City of Columbia and Sheriff of Richland County*. Op. No. 2015-UP-547 (Ct. App. filed December 2, 2015). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

I. The Court of Appeals should have held that the trial judge erred in ruling, in reliance upon the apparent holding in *Huggins v. Metts*, that the Sheriff was entitled to blanket immunity under S.C. Code Ann. § 15-78-60(6) for any actions taken by deputies acting as officers.

The Court of Appeals rejected Petitioner's arguments as to immunity of the Sheriff from liability under the exception provided by Section 15-78-60, subsection (6), 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;" The Court of Appeals affirmed the trial judge's interpretation of and reliance upon S.C. Code Ann. § 15-78-60(6), as

applied by the Court in *Huggins v. Metts*, 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006), cert. denied Oct. 18, 2007, to provide blanket immunity in all cases where an officer acts as a police officer to provide police protection. The proper construction, interpretation, and application of the exception to the waiver of sovereign immunity and the rectitude of the decision in *Huggins* presents a novel question of statutory interpretation in a matter of community-wide importance.

The issue of immunity under the Tort Claims Act was actually not decided by the trial court in *Huggins* but was found to be an additional sustaining ground pursuant to Rule 220(c), SCACR. Although the Supreme Court denied Huggins' Petition for Certiorari, there is no indication from the denial of certiorari of the substance of Huggins' petition before the Court or of the Court's basis for denying Huggins' Petition. In fact, there is no indication that the Supreme Court analyzed the interpretation of Subsection (6) in denying Huggins' petition. In fact, this issue has escaped the scrutiny of the Supreme Court and the *Huggins* decision has been largely ignored for the past nine years. The Court of Appeals has cited to the exception found in Subsection 6, but without discussion, analysis, or construction of the statutory language. Therefore, where the issue of immunity for the negligence of police officers is a matter of public concern; where the state of the law is unclear given that the Court of Appeals has interpreted the exception differently in different decisions; and where there has been no analysis or discussion of the issue from the Supreme Court, this Petition for a Writ of Certiorari to the Court of Appeals should be granted.

Petitioner argued before the Court of Appeals that the trial judge had erred in finding that the Defendant Sheriff was immune from suit pursuant to subsection 6 simply because the officers were acting as police officers acting to provide police protection, where the Defendant Sheriff's officers' merely engaging in police activities does not constitute the immune "method" of providing police

protection for which the legislature intended to maintain immunity through subsection 6. Petitioner argued that the trial judge had erred in interpreting the *Huggins* decision and the exception to the waiver of immunity in subsection 6 to bestow blanket immunity upon law enforcement officers so that whenever law officers are engaged in law enforcement activities, providing protection, immunity is maintained based on the bare fact that the officers were acting as officers at the time of the loss.

The Tort Claims Act is more properly 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, and not for the negligent implementation of policy by officers actually engaged in providing police protection as they perform their law enforcement function.

South Carolina Code § 15-78-60's 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), to maintain immunity for community-wide policy decisions establishing the overall method for a particular agency's provision of police or fire protection, which method takes into account the resources available and the needs of the community so as to maintain 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.

In *Wells*, the Court of Appeals agreed that the City and County were immune pursuant to Subsection (6), only after analyzing the particular claims raised by the Wells, and upon the Court's noting that the Wells had "concede[s] that section 15-78-60(6) of the Tort Claims Act bars their action for the alleged failure to provide adequate firefighting personnel and equipment." The Wells had conceded that their claim relating to the allocation of resources and the provision of fire-fighting personnel and equipment was barred under the Tort Claims Act's exception maintaining 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 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.

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. Upon noting that Texas and Oklahoma had similar statutory language 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.”

At the time of the *Wells* decision, there was a split of authority, 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 and fire protection for the community. The discussion in *Wells* focused on the City and County’s policies for directing the water supply and maintaining hydrants. At the time of the issuance of the decision in *Wells*, referencing with approval Oklahoma and Texas’ versions of Subsection 6 as similar to South Carolina’s version, the courts of those states had not construed the language as maintaining immunity for any and all claims arising from activity providing police or fire protection, instead, those Courts had actually held and explained that the statutory language “the method of providing police or fire protection,” maintained immunity from suit for a loss related to the policies and established methods of providing police and fire protection, but that no such immunity exists where the loss was due to the negligence of officers on the scene, as opposed to some alleged fault with the policy itself.

In 1979, some eighteen years before the *Wells*’ Court referenced 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, i.e., the method of providing police protection for which sovereign immunity is preserved, as opposed to the negligent implementation of policy by officers operating on the ground, for which immunity is waived: *Terrell*, 588 S.W.2d at 787-88. In Texas and Oklahoma, the jurisdictions relied upon by the *Wells* Court, a Department is not immune from suit where the allegation was of negligence, not in

the methods or policies of the police department for providing police protection to the community, but in an officer's negligent implementation of department policy.

When the Court of Appeals first interpreted Subsection 6, referencing with approval Texas' interpretation of subsection 6 as being correct and as being similar to the immunity maintained by subsection 6 in South Carolina, in Texas, the "method" of providing police protection was construed to refer to a City's plan, design, or overall system for providing police protection and not to refer to or to immunize the actions of officers. Under *Terrell*, in Texas, at the time of the *Wells* decision, "The term 'method' was defined as "a procedure or process for attaining an object" and as an "orderly arrangement, development or classification." *Id.* The *Terrell* court held, "The "method of providing police or fire protection" refers to the governmental decisions as to how to provide police or fire protection to the community. The language 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 particular community." *Id.* The *Terrell* Court found 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 only where the negligence causing an injury lies in the formulation of policy, i.e., the determination of the method for providing police protection to the community, does the government remain immune from liability. *Id.*

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 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 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 of Appeals in *Wells* explained that Subsection 6 provided immunity for the City and County’s decisions in establishing a policy and method for providing fire protection.

Thus, Subsection 6 was interpreted in *Wells* to maintain immunity for 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 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 properly applied Subsection 6 to provide immunity only for the method of providing fire protection

to the community and not for any alleged negligence of the firemen engaged in putting out the fire.

However, *Wells* and Subsection 6 were then wrongly applied in *Huggins v. Metts*, 371 S.C. 621, 640 SE2d 465 (Ct.App. 2006). In *Huggins*, Subsection 6 and the *Wells* decision were apparently interpreted, not only to maintain immunity for the overall method the agency chose to employ to provide police and fire protection to the community, but instead, to also 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. 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 either the method of providing protection to the community or from the actions of police officers who were engaged in providing police protection, immunity is maintained.

The *Huggins* case may be distinguished from *Catoe* on the basis of several notable differences, 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 *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. *Catoe* was then forced to sit in a chair, bleeding, with no medical attention for hours 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. However, more significantly, 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, without discussion, only as an additional sustaining ground.

In addition to distinguishing the case, Petitioner argues that *Huggins v. Metts* was wrongly decided to the extent 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 discussion or explanation and without making any 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 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 circuit court judge in *Huggins* had not ruled upon the issue of immunity under the Tort Claims Act, but the Court of Appeals 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." Although the statute excepts from the waiver of immunity claims resulting from "the method of providing police protection," the *Huggins* Court found that the Department was immune for "the methods chosen to

utilize to provide police protection.” Despite the fact that the initial interpretation from *Wells* had focused on the overall system and method for providing fire protection to the community and 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, the *Huggins* Court apparently found immunity without making any differentiation between the policy decisions establishing the overall method of providing police protection to the community as opposed to the allegedly negligent actions of the officers involved.

The *Huggins* Court provided no analysis and included no indication that the Court recognized that there was a split of authority; that the *Wells* Court had adopted one view; or that the *Huggins* Court was adopting, without discussion, the contrary view and interpretation of subsection 6 immunity. 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 since been interpreted by the Court of Appeals 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 entity is immune.

Under this 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, such an expansive interpretation of Subsection 6 is inconsistent with the language used by the legislature and contradicted by existing South Carolina jurisprudence. Following the issuance of the decision in *Huggins* in 2006, our courts issued several decisions finding that governmental entities were not immune from suit alleging a loss related to police activity, without the parties’ or the court’s referencing or mentioning Subsection 6 immunity. In those cases, the officers in question were certainly engaged in police activities, providing police protection at the time of the incident, 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. However, subsection 6 was not asserted as a basis for immunity and therefore, the decision in *Huggins v. Metts* had not been construed or addressed until cited in *Jones v. Lott*, 379 S.C. 285, 665 S.E.2d 642 (Ct.App. 2008), where the Sheriff’s Department claimed immunity based on Subsection 6 as interpreted in *Huggins* and *Jones* attempted to argue on appeal that the trial judge had improperly interpreted and improperly based his finding of immunity on Section 15-78-60(6). However, the Court of Appeals held that *Jones* had failed to preserve this argument for appellate review and that the trial judge’s ruling of immunity pursuant to Subsection 6 was the law of the case.

Before the Supreme Court, Jones 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 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 Subsection 6 immunity. In fact, the Supreme Court's opinion in *Jones* may be interpreted to indicate by negative implication the Sheriff would actually not have been properly found immune pursuant to Subsection 6, had that issue been properly preserved for review.

Despite being challenged to do so, the Sheriff has failed to identify any situation involving police officers in which the apparent interpretation of Subsection 6 in *Huggins* would not operate to maintain immunity for law enforcement. Instead, the Sheriff has 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. However, the Sheriff tacitly concedes that Subsection 6 as interpreted by the trial judge and by the Court of Appeals as apparently applied in *Huggins* would have resulted in a finding of immunity in every law enforcement tort case if it had been raised in defense. In fact, 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; however, upon issuance of the decision in *Huggins*, the State and its defenders reasonably doubted the rectitude of the *Huggins* decision's apparent recognition of all-encompassing immunity for law enforcement under Subsection 6 and therefore, the State did not bring the *Huggins* decision back before the Court, so that the erroneous notion that police were

immune from suit in South Carolina whenever acting as police officers was allowed to persist.

The statute should be interpreted to ascertain the intention of the legislature, giving words their plain and ordinary meaning; 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. 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 this state a chance for redress of their losses.

Although the Sheriff 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 acting as police officers at the time of the loss. The trial judge, explicitly relying on the Court of Appeals' interpretation as apparently set out in *Huggins*, 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 application of Subsection 6 immunity 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, petitioner would respectfully maintain that the case was wrongly decided as the result of a misinterpretation of Subsection 6. In fact, the Sheriff has conceded 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." (Brief of Respondent, p. 13).

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 - - i.e., the determination of the overall method of providing police protection to the community. The trial judge particularly found, "Similar to the *Huggins*' Court's evaluation, the key issue in the case at bar centers on the manner in which Hendrick chose to provide police protection. The Tort Claims Act contains clear, plain, and unambiguous language specifically exempting the police from liability concerning 'the methods which the officer chose to utilize.'" (R. p. 3). To the contrary, the trial judge misquoted the statute, adding words and changing the legislature's meaning. Subsection (6) refers to the singular "method" by which an agency chooses to provide police protection and not to plural "methods" as employed by every individual police officer in the state. The statute maintains no immunity for the methods individual officers choose to use in providing police protection; instead, the statute refers to the overall method chosen by the agency for providing protection.

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 and all losses resulting from the actions of law enforcement officers taken while acting within the scope of their official duty to provide police protection; instead, the legislature maintained immunity only for losses resulting from “the method of providing or the failure to provide police protection.” The trial judge, relying upon the apparent meaning of the *Huggins* decision, 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 overall policies of policy makers. To interpret Subsection 6 as providing immunity both for the making of policy decisions establishing the method of providing police protection and for the negligence of officers engaged in providing police protection, results in the exception’s swallowing the rule and blanket immunity for law enforcement. 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 Court of Appeals should have held that the trial judge’s ruling equating any law enforcement action with the “method” of providing police protection included in the statute was error where such an analysis effectively omits the word “method” from the provision and, therefore, fails to distinguish the “method” of providing police protection from the actions of officers on the ground, merely implementing departmental policy.

II. The Court of Appeals should have held that the trial judge erred in granting summary judgment for the Sheriff upon taking the facts in the light most favorable to the Sheriff and upon the trial judge’s erroneously failing to take the facts in the light most favorable to the non-moving party; where genuine issues of material fact remain; and where the Sheriff was not entitled to judgment as a matter of law.

The Court of Appeals’ Opinion does not address Plaintiff’s argument that the trial judge erred in granting summary judgment to the Sheriff 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; and where there remained genuine issues of material fact which should have been decided by a jury and not on summary judgment. It is well established that our courts, in considering a motion for summary judgment, *must* view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party, so that the trial judge's failure to do so constituted reversible error.

The Sheriff disputed that the judge had granted summary judgment upon failing to take the facts in the light most favorable to Petitioner. However, notably, the Sheriff's Statement of Facts included in his Brief of Respondent is almost identical to the review of the facts and evidence included in Judge Griffith's Order granting summary judgment. Clearly, the Sheriff neither attempted nor succeeded in drafting *his* Statement of Facts in the light most favorable to Petitioner. Instead, Respondent's Statement of Facts, like Judge Griffith's Order, sets out the facts most favorable to the moving party and omits the facts favoring the non-moving party.

The Sheriff further responded by indicating for the first time that, by claiming immunity, he had conditionally admitted fault so 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. To the contrary, as 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." (R. p. 4). Thus, 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. The grant of summary judgment should be reversed and remanded in order to give Judge Griffith an opportunity to consider application of the law to the facts upon taking the facts in the light most favorable to the non-moving party.

III. To the extent the Court of Appeals affirmed the grant of summary judgment to the Sheriff on the basis that the Sheriff's Department owed no duty and had breached no duty of care leading to the death of Plaintiff's decedent, that ruling was error where no such issue was presented before the Court and where Plaintiff asserted a duty under the common law.

The Court of Appeals Opinion found, on the basis of the trial judge's mention of the public duty rule by footnote, that Petitioner's assertion that the Sheriff owed her decedent a duty of care was manifestly without merit, referencing authorities decided on the basis of the absence of a legal duty of care. However, the Court's opinion notes that one alleging negligence may rely upon a duty created by statute or by 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.

Under the 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.” Petitioner’s claim of negligence asserted a duty founded on the common law. Where the duty relied upon is based in the common law, the existence of that duty is analyzed as it would be were the defendant a private entity. Where Petitioner did not claim loss due to a breach of a statutory duty, the public duty rule would not apply. *Madison ex rel. Bryant v. Babcock Center, Inc.*, 638 S.E.2d 650 (2006). Thus, the trial judge’s reference to *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997); by footnote, if meant as a finding that petitioner’s claim was barred by the public duty rule, was error as a matter of law.

Further, the Respondent Sheriff argued on brief and before the Court of Appeals that the trial judge had actually made no ruling as to a lack of duty and that there was no issue as to duty presented before the Court. (Brief of Respondent p. 20). The circumstances of this case fall within the exceptions to the general rule and give rise to a duty of care on the 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. Under the decision in *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991), in a situation where officers are made aware the subject has been injured and is in need of medical care, where officers voluntarily assert their authority and take control of a situation, preventing and depriving the decedent of assistance from others, a duty of care is 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. 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; supports Petitioner’s unchallenged assertion that, under the policy and reasoning of *Russell*, the Sheriff’s Department, having come voluntarily on the

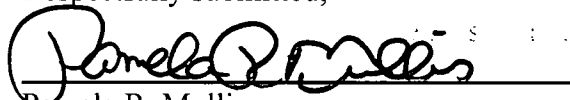
scene and having exerted authority over the wounded Catoe, who at that point was helpless to aid or protect himself, owed Catoe a duty to exercise reasonable care to secure his safety and a duty not to discontinue aid and protection where doing so left Catoe in a worse position than when the Sheriff arrived, took control, failed to render aid, and participated in negligently injuring Catoe resulting in his death. Finally, given the Sheriff's admission that there was no issue as to duty presented before the trial judge, to the extent the trial judge granted summary judgment upon finding no duty of care, such ruling was error.

CONCLUSION

For the reasons stated, the Court should grant the petition.

February 19, 2016

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

FEB 19 2016
SC SUPREME COURT

Eugene C. Griffith, Circuit Court Judge

Court Of Appeals Opinion No. 2015-Up-547

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

PETITIONER,

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, Elizabeth Kolb, the undersigned employee of the MULLIS LAW FIRM, do hereby
certify that I have served one copy of the Petition for Writ of Certiorari to the Court of Appeals
this 19th day of February, 2016, by regular U.S. mail with proper postage affixed, addressed to
the following:

Robert D. Garfield, Esquire
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