

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Eugene C. Griffith, 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial judge err in granting summary judgment to the Defendant Sheriff where there are genuine issues of material fact and where the Defendant Sheriff was not entitled to judgment as a matter of law?
2. Did the trial judge err in granting summary judgment to the Defendant Sheriff on the basis that the Sheriff's Department owed no duty and had breached no duty of care leading to the death of Appellant's decedent?
3. Did the trial judge err in finding that the Defendant Sheriff was immune from suit pursuant to the Tort Claims Act's exception maintaining immunity for a loss resulting from "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of providing police or fire protection," where the Defendant Sheriff's merely engaging in police activities does not constitute the "method" of providing police protection for which the legislature intended to maintain immunity?

STATEMENT OF THE CASE

Plaintiff-Appellant, Evalena Catoe's, husband, Richard Catoe, was fatally shot by a Richland County Sheriff's Deputy on July 22, 2007. Appellant brought this action for wrongful death against the City of Columbia and Leon Lott, in his official capacity as Sheriff of Richland County, seeking damages for her husband's death, pain and suffering, and loss of consortium. A hearing on Defendant Sheriff Leon Lott'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. This appeal follows.

STATEMENT OF FACTS

On July 22, 2007, Columbia Police Department (CPD) officers observed smoke near Sampson Circle. Upon CPD Officer Huertado's arriving on the scene of a house fire at approximately 8:00 am, he considered whether the house fire was the result of arson and if the culprit would be found nearby. When Huertado saw Richard Catoe standing on the side of the street, he immediately yelled out to Catoe. At that point, Huertado noticed that Mr. Catoe had a knife in his right hand. Huertado indicated that Mr. Catoe was irate, asking what the officer wanted with him. Huertado stated that Mr. Catoe was "making threats toward us and himself from a distance of approximately 15 to 20 feet away." (R. p. 164).

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

within six to eight feet while holding a knife, he was in such fear that he shot Mr. Catoe in the abdomen. Huertado indicated that after he was shot, Mr. Catoe said, "You shot me" and retreated toward the driveway. (R. p. 164).

Officer Huertado indicated that he commanded Mr. Catoe to drop the knife and that, at that point, Mr. Catoe retreated a few steps and winced. Huertado indicated that Richland County had come upon the scene; among the officers to arrive at the scene were Officers Dodson, Dauway, Hassell, and Dingle; Sergeant Solomon; numerous deputies; and a City of Columbia negotiator. After he was shot, Mr. Catoe started flexing his left hand and stated he was thirsty and wanted to speak to his son. Officer Dingle retrieved his cell phone and offered him water and the phone if he put the knife down. However, Mr. Catoe did not drop the knife. (R. p. 165).

Chief Crisp and CPD officers including SWAT officer Dodson arrived on the scene at approximately 9:15 a.m. After some time, Chief Crisp decided that it was time to try to take Mr. Catoe into custody using the "least lethal means possible." (R. p. 124). SWAT Officer Dodson indicated that the plan was for a flash bang, also known as a stun grenade, to be deployed, followed by use of a shield to knock Mr. Catoe down, and an officer shooting non-lethal bean bags at Mr. Catoe. (R. p. 134). Dodson indicated that there was never any discussion or concern that there could be a cross-fire situation. (R. p. 134). Dodson indicated that Chief Crisp was advised and approved of the plan. (R. p. 136).

SWAT Officer Dodson was standing near Lieutenant Rowson, the Columbia Police Department negotiator. Dodson indicated, "I know that the chief, Chief Crisp, was standing near, Captain Johnson was near. I was more involved at that particular point with the SWAT element and their immediate action plans." (R. p. 135). 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 that the action plan involving the flash bang was shared with the other officers, “For safety. I mean, we don’t want any incidental gunfire. We wanted our officers to be aware of what was going to happen.” (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 that, when the order was given to CPD to holster weapons, Dodson was told to issue the same order to the SWAT officers. Chief Crisp indicated that, after the order was given to holster weapons, he would have expected all officers on the scene to comply. (R. p. 125). However, CPD officer, Bruce 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 the SWAT deployment of the flash bang (R. p. 132). Officer White indicated that he never heard an order to holster weapons and that he never heard such an order directed to Officer Hendrick. (R. pp. 153-154).

The stack was made up of officers from the City of Columbia and officers from the Richland County Sheriff’s Department(RCSD), with the first officer, Roberts, holding the ballistic shield. Richland County Deputy Dauway arrived on the scene and, after discussions with his immediate supervisor Corporal Bright, joined the stack team. (R. p. 131). Roberts was at the front of the stack, with a ballistic shield in front of him and wearing a fragmentation helmet. (R. p. 147). When asked about who was in charge, Roberts indicated that he was

answering to Auld; Auld was answering to Marsh; Marsh was answering to Dodson; and Dodson believes that Crisp was on the scene. (R. p. 148).

Officer Dauway recalled that they attempted to knock Mr. Catoe down with the shield and that he stumbled, but then he recovered and moved towards the back of the house. (R. p. 128). Officer Roberts indicated that the officers in the stack had made the turn so that they were behind the house after the flash bang was deployed. (R. p. 144). Roberts recalled that after being hit with the stack, Mr. Catoe was "running backwards" and that he was not running towards Hendrick. (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 indicated that he heard the shots and "it passed, I guess, over my left shoulder from what I remember because I heard several go by;" Roberts recalled that he "heard the whiz as they went past." (R. p. 147). Roberts indicated that he never heard an instruction to holster weapons. (R. p. 149).

RCSD Deputy Dauway indicated that, as they discussed the plan to use the flash bang, there was no discussion or any plan regarding the possibility that Mr. Catoe would flee or try to run. Therefore, Dauway explained that there was no attempt made to block Mr. Catoe from retreating into the back yard. (R. p. 128). Dauway recalled that only "some" of the stack members had on ear pieces so that they could communicate with each other and coordinate their movements, but that he did not have an ear piece. (R. p. 130). Dauway indicated that as he and the rest of the stack approached Mr. Catoe, Mr. Catoe then began to backpedal to the rear of the house, raising the knife to his own throat. Dauway indicated he saw Roberts, the officer with the shield; strike Mr. Catoe who stumbled briefly before moving backward. Dauway indicated that they never anticipated that Mr. Catoe would run and that there was no attempt to block Mr.

Catoe from retreating into the back yard. (R. p. 128). Dauway indicated that, after the flash bang, the stack had broken into a line formation. Dauway indicated that he went to the right, to the far end away from the house. Dauway indicated that he heard several shots and looked to the left and saw Deputy Hendrick in a crouched position with two hands on her weapon. Dayway indicated that, at that point, the suspect was still moving and then fell to the ground. (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). Deputy Hendrick indicated that Richland County Corporal Bright "was in contact with whomever was in command". (R. p. 111). Deputy Hendrick indicated, "Once we realized we did not have a "clear shot with the taser, I was instructed by Master Deputy White to holster my taser" and then back him up with lethal force, which was drawing my firearm." (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).

Officer Hendrick indicated that the plan for subduing Mr. Catoe was that they were going to do a stack. Hendrick indicated that there was never any conversation with her about what they were going to do about avoiding a crossfire. (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 that they were going to stack up, throw a flashbang, and try to subdue him. That was all we were told." (R. p. 118). Deputy Hendrick stated that it was instinct that made

her think that Mr. Catoe may run around the back of the house. Hendrick indicated, "Somebody's chasing you, you're going to run from them". (R. p. 118).

RCSD Deputy White arrived at Samson Circle to find CPD officers already at the scene. When White arrived, he was the ranking RCSD officer. (R. p. 151). White made contact with CPD to advise that Richland County was there to assist. White indicated that he was authorized to use a taser. After some discussions with the other officers at the scene, White proceeded, with Officer Hendrick, to the back of the house to possibly tase Mr. Catoe. (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 verbally. (R. pp. 151-152).

After determining that an attempt to subdue Mr. Catoe with a taser was not going to work, White moved to the other side of the house. He indicated that the decision to move to the side of the house was his. (R. p. 152). White recalled that he went to the front of the house when he heard the flash bang because he did not know whether Mr. Catoe would run that way. White recalled that he lost sight of Mr. Catoe when he ran back toward the house with SWAT in pursuit. White recalled hearing "somebody yelling that he's running" but that nothing was going on over the radio. When asked if instructions were going out on the radio at that time, White answered, "Not our radio." White testified that he never heard a command to holster weapons issued over the radio. (R. pp. 153-154). White testified that he was never told to holster his weapon and that he never heard anyone instruct Officer Hendrick to holster her weapon. (R. p. 154).

White recalled that, when he regained eye line on Mr. Catoe, Hendrick was looking towards the back yard. White recalled that Mr. Catoe was angled 45 degrees towards the house as he ran and that he was not facing straight. White indicated that he turned towards the back of the house and began moving that way. White then began hearing multiple loud popping sounds and saw Mr. Catoe running from behind the house across the backyard. White indicated that Mr. Catoe was not running towards Hendrick and that Hendrick was not blocking Mr. Catoe's escape route into the woods. (R. p. 155-156).

Officer Roberts recalled that as the stack approached Mr. Catoe, Mr. Catoe was facing Roberts with his knife raised, but that he was moving backwards. Roberts indicated that Mr. Catoe did not stop, even when Roberts and the stack were running toward him. Roberts indicated that at the time of the SWAT action plan, he was unaware that Mr. Catoe had already been shot once. (R. p. 144). Roberts recalled that after striking Mr. Catoe, he never turned back to look to see if the stack was still behind him but that he assumed so because "the less than lethal shotgun rounds came from behind me, past me, so they would had to be behind me." (R. p. 144). Roberts recalled that several shots were fired from his left and that Mr. Catoe never moved towards the officer that was shooting him. Roberts recalled that he turned briefly and observed a female deputy discharging rounds at Mr. Catoe who was hit several times. (R. p. 145).

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

STANDARD OF REVIEW

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

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

ARGUMENT

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

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

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

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

“Defendants failed to establish any semblance of command and control needed for joint operations. On-scene personnel failed to establish consistent and clear lines of communication throughout the event. Reports and statements by on-scene personnel place blame on others, deny accountability, or show uncertainty about who was in charge. There was no clear understanding as to who is actually in command of the scene.” Mr. Blum concluded: “The lack of command and control hindered decision making altogether, whereby contributing to [Appellant’s decedent’s] death.” (R. pp. 167-168).

Despite the fact that time was on the side of the officers, given that Mr. Catoe had already been shot so that he was getting weaker, and despite the fact that this incident went on for hours, from approximately 7:30 a.m. until after 10:35 a.m., the entire operation appears to have been hurried, confused, and last-minute. RCSD officers indicated that they were unable to communicate by radio with CPD officers. (R. pp. 151 and 109). Thus, the testimony and statements given by the officers reveal a lack of organization and communication within and among the RCSD and the CPD which caused a level of confusion at the scene amounting to chaos. The lack of clear communication reportedly led to the flash bang’s being deployed and SWAT’s moving in even after it was known that that they had lost the element of surprise. The lack of communication is also the explanation for why some officers heard the Order to holster weapons and others, including CPD Officer Roberts and RCSD Officers White, Dauway, and Hendrick did not hear the command to holster their weapons. (R. pp. 132, 149, and 154). This failure to hear the holster-weapons command combined with the lack of communication is the explanation for why officers were involved in a cross-fire situation.

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

see the backyard from the position on the side of the house she had been ordered to maintain, Officer Hendrick testified that she changed her position, moving from a position of cover on the side of the house into the open in the back yard. (R. p. 161). The chaotic scene also apparently convinced Officer Hendrick that she was the only one who could stop Mr. Catoe. Therefore, despite the fact that there were twenty or more officers ready to stop Mr. Catoe if it became necessary, Officer Hendrick indicated, "If I had not been able to stop him, there is no doubt in my mind that others who were nearby could have been seriously hurt by the subject." (R. pp. 161-162).

For his part, Mr. Catoe had already been shot once in the stomach and he had been confined to the area of a chair in the driveway on the side of a neighbor's house for hours by a circle of surrounding police officers. This mentally ill man was wounded, frightened, disoriented, and confused so that he responded to the explosion of the flash-bang by panicking and trying to run away from the danger which was apparently coming from the front of the house. Thus, as the result of Chief Crisp's attempt at a "non-lethal" action, the flash bang explosion and members of the SWAT team chased Mr. Catoe from the side of the house, into the backyard. Unfortunately, Mr. Catoe fled into the backyard where Officer Hendrick was now waiting with her revolver at the ready. Officer Hendrick stated that she aimed and fired once, but that she shot again when Mr. Catoe continued to "close the distance." (R. p. 161). Mr. Catoe was pronounced dead at 10:35 a.m. from four gunshot wounds to the chest.

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

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

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

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

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

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

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

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

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

officials, employees, and governmental entities from liability for the negligent performance of their official duties by negating the existence of a duty towards the Appellant, is applied only when an action is founded upon a statutory duty, not when the duty is grounded in the common law.” Where Appellant claims breach of a common law duty of care, the trial judge erred in finding that summary judgment was warranted on the basis that there was no duty owed under the public duty rule.

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

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

In *Jackson v. South Carolina Dep’t of Corrections* 301 SC 125, 390 SE2d 467 (Ct. App. 1989) the Court of Appeals recognized the Department of Corrections’ duty to control, confine

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

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

The officers asserted their authority and took control of the situation away from the individuals trying to render aid, depriving the decedent of these individuals’ help. The officers

determined that some disorderly conduct had occurred before they arrived, but neither Wood nor the other parties wished to file charges. The officers did not offer Wood assistance in connection with his injuries and did not otherwise detain him. After concluding their investigation, the officers "insisted" that Wood leave the premises. Wood walked alone unassisted from the scene in the general direction of a nearby railroad trestle. Wood's body was later found in a creek beneath the trestle from which he had fallen approximately 100 feet from the scene of the police investigation.

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

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

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

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

Section 323: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increased the risk of such harm; and

Section 324: One who being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the other to exercise reasonable care to secure the safety of the other while within the act as charged, or

(b) the actors discontinuing his aid or protection if by doing so he leaves the other in a worse position than when the actor took charge of him.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Governmental Function

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

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

The *Reed* case is a good example of the kind of suit attempting to attack the overall policy decisions establishing the method of providing police protection for which the South Carolina legislature likely sought to provide immunity. The *Reed* Court pointed out in contrast,

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

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

The *Terrell* Court held, "The term 'method' is defined as "a procedure or process for attaining an object" and as an "orderly arrangement, development or classification." Webster's Third New International Dictionary 1422-23 (1966). The term is synonymous with the words

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

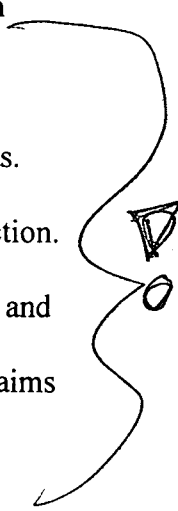
The *Terrell* Court found, instead, that “the clause exempting governments from liability for injuries arising out of the failure to provide police or fire protection is clearly designed to avoid judicial review of the policy decisions that governments must make in deciding how much, if any, police or fire protection to provide for a community.” The *Terrell* Court held, “We think, therefore, that the Legislature intended to exclude from the Act only those acts or omissions which constitute the execution of or the actual making of those policy decisions. For example, damages resulting from a government's decision to provide only three fire trucks for a community may not be recovered against the governmental unit on the theory that the

government was negligent in providing an inadequate number of fire trucks. Similarly, a government would not be liable for any injury or death resulting from a government's decision to use only minimal police efforts to control a riot or to control crime in a particular area of a city.”ⁱ

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

The *Barefield* Court found that the “method” of performing an act refers to the governmental decision or plan for providing police or fire protection. “The government is not liable for any injury or death resulting from a government's decision to use only minimal police efforts to control a riot or to control crime in a particular area of a city. If, however, an officer or employee acts negligently in carrying out that policy, government liability may exist. *Id.*” The

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



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

In *Shockey*, the Appellant had alleged that Oklahoma City had negligently failed to properly maintain a fire hydrant or to warn the Appellants of its malfunction. In sustaining the dismissal of the Appellants’ action, the Oklahoma Supreme Court explained that, at that point in Oklahoma, the general rule was that the operation and maintenance of a fire department by a municipal corporation was an exercise of a governmental function so as to accord it sovereign immunity from liability when acting in such capacity. The *Wells* Court observed, “Oklahoma, by enactment of [its tort claims act] has statutorily recognized that a municipality’s immunity from tort liability applies to it “while engaged in fire protection and prevention.”

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

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

Presumably, had the Court of Appeals in *Wells* intended to hold that the City and County were immune (1) because they were immune whenever providing fire protection or (2) that officers' actually providing fire protection was what the legislature meant when it said, “the method of providing fire protection,” in Subsection 6, no discussion of the particulars of the *Wells* claim would have been necessary or useful. However, the *Wells* Court did examine and discuss the nature of the *Wells*' complaints, particularly identifying the functions for which it was finding the county immune as being related to the discretionary acts and decisions related to

establishing the method of providing fire protection and the overall operation for providing fire protection as related to the maintenance of fire hydrants. Therefore, the *Wells* Court's holding was arguably not simply that immunity barred suit in all cases where a loss was alleged to have resulted from any activity related to the provision of fire protection, but instead that immunity precluded suit alleging loss as the result of the decisions of the City and County in establishing the overall method of providing fire protection for the community.

In fact, the Court of Appeals in *Wells* explained that Subsection 6 provided immunity for the City and County's discretionary decisions in establishing a policy and method for providing fire protection. The *Wells* Court particularly relied upon the courts of Texas and Oklahoma as properly interpreting the scope of the exception to the waiver of immunity found in Subsection 6.

As indicated, in Texas, the provision substantially identical to Subsection 6 is interpreted to provide immunity only from suit related to the formulation of policies establishing the methods of providing protection but not from officers' negligent implementation of such policy.

Such an interpretation is also consistent with Oklahoma's more recent decisions rejecting the earlier *Shockey* interpretation of Subsection 6. In *Taylor v. City of Oklahoma City*, 914 P.2d 1073 (Okl.App. 1995), the Oklahoma Court of Appeals rejected the City's assertion of immunity relying on the *Shockey* decision. In 1995, the Oklahoma Court of Appeals held that the decision in *Shockey* was "not applicable." The *Taylor* Court noted that *Shockey* had predated the Oklahoma Supreme Court's decision in *Vanderpool v. State*, 672 P.2d 1153 (Okla.1983), which specifically "abrogated the protective cloak of immunity from liability for governmental, as opposed to proprietary, functions of government." The *Taylor* Court noted that the exceptions to liability in 1995 were exclusively enumerated in § 155 and that Section 155(6) provided that the State maintained immunity for a loss resulting from "6. Civil disobedience, riot, insurrection

or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.”

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

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

The *Taylor* Court held, “In light of the explicit language in §§ 11-106 and 11-405, we hold that the physical operation of an emergency vehicle when responding to an emergency call does not constitute a *method* of providing police protection. Although responding to an emergency call does certainly allow the responding officer to disregard many of the traffic ordinances and laws as a matter of public policy, when the responding officer fails to obey the duty of care specifically set out in the emergency vehicle statutes, citizens who are injured as a result must not be left without a remedy. As a result, § 155(6) does not protect the City from liability for the alleged torts of its employee.”

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

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

Had the legislature by Subsection 6 maintained immunity for a loss related to negligent policy decisions in establishing the method of providing police protection and also for the negligence of officers actually engaged in providing police protection, there would be no liability for a loss related to police departments or officers. However, the *Wells* holding was apparently not interpreted as having recognized in Subsection 6 a provision establishing immunity for all

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

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

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

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

As indicated above, the initial interpretation from *Wells* focused on the discretionary, overall system and method for providing fire protection to the community. In addition, the interpretation of the jurisdictions particularly relied upon by the *Wells* Court, Texas and Oklahoma, is that the government is immune from suit only for the method of providing police protection, i.e., for the policy decisions establishing the overall method for providing police and fire protection to the community at large, but not immune from the negligent implementation of such policy by its officers. Apparently, Huggins had argued in the Federal claim that the loss

resulted from deadly, excessive force, which claim was dismissed by the Federal Court upon the Court's finding that the officer's actions were objectively reasonable. However, before the State Court, Huggins' argument reportedly focused on the actual activities of the officers engaged in police activity at the time immediately leading up to the shooting. Nevertheless, the Court rejected Huggins' argument without making any differentiation between the policy decisions establishing the overall method of providing police protection to the community at large as opposed to the allegedly negligent actions of the officers which led to Huggins' death.

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

Because the issue regarding immunity pursuant to Subsection 6 was not decided by the Circuit Court, but was identified by the Court of Appeals in *Huggins* pursuant to Rule 220 (c), 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 on the ground as they carry out departmental policy, even though the actions of the officers are alleged to have been grossly negligent, the municipality is immune. Under such a broad, all-inclusive interpretation, any and all claims brought based on a loss alleged to result from police activities are found to be related to the "method" of providing police protection and, therefore, barred by the immunity provided by Subsection 6 to the Tort Claims Act.

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

Six years after the Court of Appeals decided *Wells*, the Court of Appeals issued its decision in *Brown v. Brown*, 598 S.E.2d 728 (Ct. App. 2004). The Court of Appeals held in *Brown* that the town was immune from a motorist's claim for injuries resulting from a police officer's selection of a passenger to serve as a substitute driver. The Court of Appeals held that the town was immune pursuant to Section 15-78-60(5), maintaining immunity for the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee. The Court of Appeals found that the officer had a choice of issuing a citation to the original impaired driver and having the car towed or selecting another driver. The Court noted

that the substitute driver volunteered and completed sobriety tests. The Court held that the police officer properly exercised his discretion and that the town was, therefore, immune from suit under Subsection 5. However, where the officer in *Brown* was certainly engaged in police activity, if the phrase, “method of providing police protection,” is properly interpreted to indicate that the legislature meant to immunize all losses resulting from police actions, the town would have been immune from suit under Subsection 6 and there would have been no need to analyze the more difficult issue of whether discretionary immunity was provided in Subsection 5.

Similarly, in *Clark v. South Carolina Dept. of Public Safety*, 353 S.C. 201, 578 S.E.2d 16 (Ct. App. 2002), *aff'd* 362 S.C. 377, 608 S.E.2d 573 (2005), the Court of Appeals, affirmed by the Supreme Court, held that whether a state trooper was grossly negligent in initiating and in failing to terminate his pursuit of a driver was a question for the jury. The Courts held that a law enforcement officer is not entitled to discretionary immunity for the decision on whether to begin or continue the immediate pursuit of a suspect. Again, the trooper was undoubtedly engaged in law enforcement activities; however, the Department of Public Safety did not rely upon Subsection 6, as providing immunity and neither the Court of Appeals nor the Supreme Court made any reference to immunity pursuant to that subsection.

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

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

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

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

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

It is apparent from its decisions in *Metts* and *Jones* that the Court of Appeals now equates the “method” of providing police protection with the actual providing of police protection by officers engaged in police activity, for the purposes of immunity pursuant to Subsection 6. In

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

Even assuming that providing EMS services was synonymous with fire protection so that EMS services were included under Subsection 6, where the allegation was only that Hampton County's ambulance was "engaging in fire protection" at the time of the loss and not that the loss resulted from the "method of providing fire protection," Hampton County would nevertheless not be entitled to immunity under the plain language of Subsection 6. However, notably, the Court of Appeals did not correct any misapprehension on the part of Hampton County that, were EMS services properly included in subsection 6, it would have been found immune because its

ambulance was indeed “engaging in fire protection” at the time of the loss. Apparently, had the Court of Appeals found that the activities engaged in by the County’s ambulance, i.e., rushing to the scene of a house fire to treat a burn victim, did constitute fire protection activities, the Court would have found that Subsection 6 immunity barred Curiel’s suit against Hampton County EMS regardless of whether Hampton County EMS was engaged in “the method of providing fire protection” rather than simply engaging in fire protection activities at the time of the loss. The ruling in *Curiel*, again, suggests that the Court of Appeals has expanded upon the legislature’s language and applied an unjustifiably broad interpretation of Subsection 6.

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

“When interpreting a statute, the Court’s primary function is to ascertain the intention of the legislature. The words used must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.” “The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Sloan* *Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011). “If a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.*; *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000)). When interpreting a statute, the court

“must read the language in a sense that harmonizes with its subject matter and accords with its general purpose.”

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

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. *Lester v. South Carolina Workers' Compensation Comm'n*, 334 S.C. 557, 514 S.E.2d 751 (1999). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. However, notably, neither the Court of Appeals nor the Supreme Court has made any attempt to define the word “method” in subsection 6. When faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning. *Strother v. Lexington County*

Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). The legislature's intent should be ascertained primarily from the plain language of the statute. However, Courts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). Statutory language must be read in a sense which harmonizes with its subject matter and accords with its general purpose.

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

Richland County has argued without explanation that the trial judge did not actually find that Subsection 6 immunity would apply to any and all cases where the loss was alleged to have resulted from the actions of officers providing police protection. However, the trial judge's order makes no differentiation and identifies no part of the activities of the Richland County officers

which would involve the “method” of providing police protection as opposed to simply engaging in providing police protection. Appellant is unaware of any parameters the trial judge identified or applied to justify his finding that the officers were engaged in the “method” of providing as opposed to simply providing police protection at the time of the loss. Instead, the trial judge, explicitly relying on the Court of Appeals’ interpretation as set out in *Metts*, erred in finding that simply because the officers were engaged in police activities at the time of the loss, the Richland County Sheriff’s Department was immune from suit for the loss.

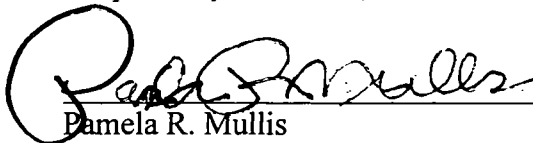
The trial judge erroneously expanded the parameters of the immunity preserved by the legislature in Subsection 6. The grant of summary judgment on the ground of immunity pursuant to Subsection 6 should be reversed so that Appellant may show a jury that the gross negligence of the Richland County officers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

CONCLUSION

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

Respectfully submitted,

February 10, 2015



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2013-CP-40-1047R

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

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

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

BRIEF OF RESPONDENT

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S.C. Code Ann. § 15-78-60(6).	passim
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Miscellaneous

Restatement (Second) of Torts, § 282 cmt. d (1965). 20

STATEMENT OF THE CASE

This is a wrongful death action. The Appellant Evalena Catoe, as Personal Representative of the Estate of Richard L. Catoe, Jr., brought this action against the City of Columbia and Sheriff Leon Lott of Richland County as a result of the death of her husband on July 22, 2007.

In her complaint, the Appellant has alleged a cause of action for negligence against the Respondent Lott. After discovery was completed, Sheriff Lott moved for summary judgment which was heard by Circuit Judge Eugene C. Griffith, Jr. By order filed January 14, 2014, Judge Griffith granted the motion on the basis of sovereign immunity under Section 15-78-60(6) of the South Carolina Tort Claims Act. Judge Griffith dismissed all claims against Sheriff Lott with prejudice.

The Appellant subsequently filed a timely appeal. No Rule 59(e) motion was filed.

STATEMENT OF FACTS

On Sunday, July 22, 2007, at approximately 8:00 a.m., Richland County Sheriff's Department ("RCSD") deputies received an "officer in need of assistance" call from the Columbia Police Department ("CPD"). A RCSD squadron proceeded in a back-up capacity to a residence at 69 Samson Circle in the City of Columbia. (R. 34). Upon their arrival, the deputies approached the house where Appellant's decedent, Richard L. Catoe, Jr. ("Catoe") was located in the front yard, holding a knife to his throat. (R. 34).

A CPD officer briefed deputies as to two incidences occurring moments before the deputies' arrival. First, Catoe threatened one of the CPD officers with a knife and, as a result, had been shot once in the torso. Secondly, Catoe was threatening to kill any officer who tried to arrest him. (R. 34)

The joint assemblage of officers from the two agencies discussed strategy which centered on potentially administering the taser devices if Catoe were in a tactically favorable position. The proposed plan was for the RCSD deputies to obtain a position at the rear of the residence and attempt to maneuver around the side of the house. Thus, by establishing the element of surprise, police may theoretically be in sufficient range to tase and apprehend Catoe. (R. 35).

At that time, RCSD deputies Todd White and Kellye Hendrick positioned themselves at the left rear corner of the house. Initially, both officers had their tasers drawn. However, after approximately twenty minutes, the deputies were instructed to transition their role from non-lethal to lethal. In so doing, Deputy Hendrick holstered her taser and drew her service weapon, a Model 23 Glock .40 caliber. (R. 35).

At some point, a trained CPD negotiator arrived and began attempting to negotiate with Catoe. Catoe was provided a chair in which to sit, and upon doing so, Deputy White no longer had a clear shot with which to administer the taser. At some point, Deputies White and Hendrick were informed via radio that a more dynamic approach would be undertaken by CPD SWAT team and that they should maneuver to the side of the house and not give up their position. (R. 35).

While situated at the side of the house, the deputies learned that there was a family confined within the house. Deputy Hendrick and her fellow RCSD deputies successfully extricated the family members from the house, removed them to a safe position, and then returned to their position at the side of the house. (R. 35-36).

CPD officials then sought to utilize a "flash-bang" device in hopes of distracting and subduing Catoe by way of a SWAT ballistic shield. The deputies were informed that upon deploying the "flash-bang," to be on the lookout for Catoe

as he might flee to the rear of the house. In such an event, the deputies should be prepared to take appropriate action. (R. 36).

The "flash-bang" was deployed, and the SWAT team directed Catoe to get down on the ground. Catoe failed to comply and proceeded to run into the backyard, at which point he was actively pursued by the SWAT members. (R. 36).

Deputy White was situated at the front right corner of the house, holding his Taser. Deputy Hendrick was positioned at the right rear corner of the house, holding her service weapon. As Catoe ran around the corner, Deputy Hendrick repositioned herself at the corner of the house to expand her view as to include the backyard. (R. 36).

As Catoe rapidly approached her and without delay, Deputy Hendrick very loudly identified herself as a Sheriff's Deputy and gave clear verbal commands for Catoe to drop the knife. Catoe ignored these repeated and unequivocal instructions and quickly advanced on Hendrick, grasping the knife in an elevated, striking position. (R. 36).

At that precise moment, Deputy Hendrick was placed in fear of immediate serious bodily harm or death at Catoe's hands. She brought her service weapon up from the ready position, aimed at Catoe, and fired once. Despite being struck with the bullet, Catoe never wavered and again quickly closed the distance between himself and Deputy Hendrick. Deputy Hendrick then fired a second round and

again struck Catoe. This caused Catoe to turn, ambulate several yards, and then fall to the ground. His injuries were fatal. (R. 36).

ARGUMENTS

I. The trial court correctly granted summary judgment to Sheriff Lott on the basis of absolute sovereign immunity under Section 15-78-60(6) of the South Carolina Tort Claims Act.

The Appellant appeals the grant of summary judgment in favor of the Respondent Leon Lott. Circuit Judge Eugene C. Griffith, Jr. ruled that Section 15-78-60(6) of the South Carolina Tort Claims Act provides absolute sovereign immunity for the "method of providing police protection" and that the conduct that forms the basis for the Appellant's negligence action against Sheriff Lott falls within that immunity provision. In granting summary judgment, Judge Griffith relied substantially on this Court's decision in *Huggins v. Metts*, 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006), which involved a substantially similar factual scenario and is controlling precedent.¹

A. Plaintiff's Allegations of Negligence

As an initial issue on appeal, the Appellant argues that there exist genuine issues of material fact in dispute that should have precluded summary judgment. In

¹ The South Carolina Supreme Court denied a petition for writ of certiorari which had been filed in *Huggins*. See, Order Denying Writ of Certiorari filed October 18, 2007.

making that claim, the Appellant proceeds to argue that Judge Griffith's order makes it "appear that the officers followed department procedures, that they acted with care and without negligence, and that the loss of Mr. Catoe's life was the result of an officer's justifiable and reasonable use of deadly force." *See*, Appellant's Brief, p. 10.

That is a misreading of Judge Griffith's order. He did not conclude that there was no negligence or fault on the part of the RCSD deputies. Instead, he granted summary judgment based upon absolute sovereign immunity under Section 15-78-60(6), and it is well settled that an immunity defense by definition presupposes a conditional finding of negligence or fault. *See, Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 916 (1988) ("[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability"). While Sheriff Lott did not admit fault on the part of his deputies, for purposes of an immunity defense, the court is not required to determine fault. In actuality, a determination of fault is immaterial.

Instead, the focus is on the alleged conduct that gives rise to the negligence claim, and if that alleged conduct falls within the scope of an immunity provision under the Tort Claims Act, the defendant may not be held liable. Therefore, summary judgment is not precluded by the Appellant's assertion that genuine issues of material fact exist with respect to a determination of negligence or fault.

As stated, that issue is indeed immaterial in assessing a defendant's entitlement to immunity because fault is conditionally admitted.

Nonetheless, the conduct that forms the basis of the alleged negligence is material to a determination of a defendant's entitlement to immunity. In the case at bar, the Appellant has relied on expert testimony to establish what she believes to be the conduct that forms the basis for her negligence claim. The Appellant presented an affidavit of Jon B. Blum, a law enforcement expert with 22 years of experience in "law enforcement practices" including "the use of force, high risk situations, and joint agency operations." (R. 166). Blum was critical of the law enforcement operation. He opines that the "Defendants failed to establish any semblance of command and control needed for joint operations" and more specifically that "[t]here was no established method or action plan for coordinating efforts between agencies on the same scene." (R. 167-168). He further was critical that "[t]he Defendants had no established procedure, protocol, or systematic plan within reasonable law enforcement standards on July 22, 2007." (R. 168). Blum did not express opinions regarding the reasonableness of Deputy Hendrick's action in the force that she used or the method of force employed. Therefore, based on Blum's testimony, the Appellant complains in her brief about the "lack of organization and communication within and among the RCSD and the CPD." *See*, Appellant's Brief, p. 11.

B. Section 15-78-60(6)

Judge Griffith granted summary judgment to Sheriff Lott based on Section 15-78-60(6) of the Tort Claims Act, which provides: "The governmental entity is not liable for a loss resulting from ... (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection." S.C. Code Ann. § 15-78-60(6). In *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998), this Court recognized that a scrivener's error resulted in the omission of the word "or." After looking at the legislative history, this Court concluded that sovereign immunity under Section 15-78-60(6) extends to "the failure to provide or the method of providing police or fire protection." 501 S.E.2d at 750.

C. Huggins v. Metts

This case is remarkably similar – factually and legally – to the 2006 case of *Huggins v. Metts*, 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006). In *Huggins*, this Court affirmed summary judgment for the Lexington County Sheriff based upon Section 15-78-60(6) in a case where a suspect was shot by law enforcement. This Court explained that the Tort Claims Act "specifically exempts the Police from

liability concerning the methods which they choose to utilize to provide police protection." 640 S.E.2d at 467.

In *Huggins*, the Lexington County Sheriff's Department responded to a call from the plaintiff stating that Huggins had threatened to burn down several homes and to commit suicide. After deputies could not locate him at his home, bloodhounds discovered Huggins in the woods behind his residence. When the deputies approached Huggins, they observed that he was armed with two large butcher knives. Huggins was directed to drop the knives. Not only did he fail to do so, he also stated to the deputies that they were going to have to kill him. 640 S.E.2d at 465.

The deputies then brought in a negotiator to attempt to speak with Huggins, but that was unsuccessful. After a period of time, the deputies radioed for a taser to subdue Huggins; however, upon hearing this, Huggins exclaimed: "you're not going to tase me." 640 S.E.2d at 465-466. Thereupon, Huggins indicated that he was "going home" and began walking towards his residence. The deputies attempted to position themselves between Huggins and the residence while continuing to demand that Huggins drop the knives. 640 S.E.2d at 466. When Huggins continued to advance towards one of the deputies, he was expressly warned "do not come any closer or I will shoot." Huggins, still armed with two large butcher knives, continued to approach the officer. Once he closed in within

fifteen feet, the deputy discharged his service weapon and shot Huggins. After being shot, Huggins continued to advance in the direction of the officer at which point two other officers shot Huggins. Huggins died as a result of these gunshot injuries. *Id.*

The plaintiff, who was Huggins' father, initially filed suit in federal court. After the federal claims were dismissed, the plaintiff brought claims against Sheriff Metts in state court, and the late Circuit Judge Marc Westbrook granted summary judgment for the sheriff. On appeal, the plaintiff argued that his state claims focused on "the preparation and events leading up to the time immediately preceding the shooting of Deceased." 640 S.E.2d at 467. Nonetheless, this Court found that the lawsuit "concerned the manner in which the police chose to provide police protection." *Id.* Applying the immunity provision set forth in Section 15-78-60(6), this Court affirmed the summary judgment for the Sheriff and reasoned as follows:

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*. We find no genuine issues of material fact, and, therefore, we affirm the circuit court's granting of summary judgment.

Id. (Emphasis added).

D. Huggins as Controlling Authority

Not surprisingly, Judge Griffith found that "the precedent as set forth in *Huggins* is authoritative with respect to the instant manner." (R. 8). The *Huggins* case is clearly controlling. As indicated, the facts are remarkably the same. In both cases, the officer who used deadly force was assailed by a mentally unstable individual wielding a knife. In both cases, the force was employed as part of a multi-officer operation designed to respond to the decedents' conduct. A negotiator was used to no avail in both situations. Alternative tactics, including the use of a taser, were explored to subdue the decedents. The decedent in both cases made actual threats to harm the officers. Likewise, the decedents were requested on multiple instances to put down their weapons. As both decedents advanced on the officers wielding a knife, they were warned in clear, concise terms to stop and drop their weapons. Both decedents refused and continued to advance, which resulted in the officers' use of force.

Moreover, the plaintiffs in both cases had similar, if not identical, theories of liability. As in *Huggins*, the Appellant in the case at bar offered expert testimony challenging the operation as a whole and specifically the police tactics that were employed. The plaintiffs in both cases questioned the method of force that was employed and why a non-lethal method was not used instead.

The similarities of the two cases are uncanny. Clearly, this Court's decision in *Huggins* is authoritative, as Judge Griffith found. The application of the law, specifically the immunity provision set forth in Section 15-78-60(6), is dispositive in the present case as it was in *Huggins*. Therefore, the Appellant is simply incorrect in her position that Section 15-78-60(6) does not bar liability in this case. The summary judgment in favor of Sheriff Lott should be affirmed.

E. Huggins was Correctly Decided

The Appellant obviously agrees that *Huggins* is dispositive. Accordingly, the Appellant attempts to argue that *Huggins* was incorrectly decided and, more precisely, that Section 15-78-60(6) should be interpreted differently than it was in *Huggins*.

Specifically, the Appellant focuses on the term "method" in Section 15-78-60(6) and insists that "method" refers to "the orderly formulation of policy by policymakers – i.e., the determination of the overall *method* of providing police protection to the community." *See*, Appellant's Brief, p. 22. According to the Appellant, the immunity provided by Section 15-78-60(6) is for policy making and not for actual operational conduct. If the Appellant is correct, then *Huggins* was incorrectly decided by this Court because, like the case at bar, *Huggins* involved

strictly operational conduct and not policy formulation.

However, the Appellant is not correct and *Huggins* is. Several key rules of statutory construction make that clear. Not surprisingly, the Appellant did not address these rules.

First, it is well settled that provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." *See*, S.C. Code Ann. § 15-78-20(f). This rule of statutory construction was expressly adopted by the General Assembly and has likewise been applied by the appellate courts in construing the Tort Claims Act. *See, Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 540 (2002) ("[p]rovisions establishing limitations on liability must be liberally construed in the State's favor"). *See also, Baker v. Sanders*, 301 S.C. 170, 391 S.E.2d 229 (1990); *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).² Therefore, to the extent there is any ambiguity or the potential for construing the term "method" in inconsistent ways, the meaning of the term that favors limiting the liability of the State must control.

² This rule of construction is also in accord with the well established principle that any law in derogation of the common law must be strictly construed. *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989). There is no question that the Tort Claims Act, which waives sovereign immunity in certain particulars, is in derogation of the common law.

Second, it is also well settled that statutes "should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Abraham v. Palmetto Unified School District No. 1*, 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), citing *Matter of Decker*, 322 S.C. 215, 471 S.E.2d 462, 463 (1995). Similarly, the United States Supreme Court has described the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kengys v. United States*, 485 U.S. 759, 778 (1988). However, the Appellant's construction of Section 15-78-60(6) and specifically the term "method" renders that provision superfluous and redundant. It would serve no purpose.

To reiterate, the Appellant contends that Section 15-78-60(6) provides immunity for "policy formulation." As stated repeatedly throughout the Appellant's brief, Section 15-78-60(6) should be construed as providing immunity for "the formulation of policy for the method of providing police protection, but not for the negligence of officers in implementing policies." *See*, Appellant's Brief, p. 23. However, "policy formulation" or the "adoption" of policies is already an immune function as a result of Section 15-78-60(4). Thus, if Section 15-78-60(6) also applies to the formulation of policy, then it is rendered superfluous and redundant. There would be two sections that have the same purpose and effect. However, as this Court, the State Supreme Court

and the United States Supreme Court has made abundantly clear, no statute should be construed so as to render a provision superfluous or redundant. Consequently, given Section 15-78-60(4) and the immunity already provided for policy formulation, Section 15-78-60(6) must be construed to include something more within its scope.³

Clearly, Section 15-78-60(6) does not provide "blanket immunity" for all law enforcement conduct, as the Appellant incorrectly asserts is the ultimate result of Judge Griffith's order.⁴ However, Section 15-78-60(6) is not limited to policy formulation either. Instead, a correct reading of Section 15-78-60(6) brings within its scope operational conduct where law enforcement chooses or employs particular methods or tactics. In fact, the Court is urged to focus on

³ It is worth noting that the South Carolina Supreme Court has previously declined to recognize a distinction between planning activities and operational activities in construing another provision of the Tort Claims Act, specifically Section 15-78-60(5) which provides for discretionary immunity. In *Clark v. South Carolina Department of Public Safety*, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002), this Court had ruled that operational conduct -- as opposed to planning activities -- "is not the type of discretionary act contemplated in the Tort Claims Act." 578 S.E.2d at 23. However, on certiorari, the Supreme Court declined to recognize any distinction between planning and operational activities in evaluating a party's entitlement to discretionary immunity. *Clark v. South Carolina Department of Public Safety*, 362 S.C. 377, 608 S.E.2d 573, 579, n.3 (2005).

⁴ Ironically, the Appellant makes the "Chicken Little" argument that the affirmance of Judge Griffith's order will result in "blanket immunity" for all law enforcement activity. However, *Huggins*, on which Judge Griffith based his decision, has been the law in South Carolina since 2006, and there has not been "blanket immunity" provided for all law enforcement activities. In fact, to the contrary, the Appellant herself cites to numerous South Carolina cases where Section 15-78-60(6) immunity has not been asserted and/or cited to provide immunity to law enforcement in various scenarios.

the term "tactics" which is an appropriate synonym for "methods" within the context of law enforcement functioning. Therefore, where law enforcement chooses to employ certain police tactics in the course of an operation, those tactics or methods are entitled to immunity.

With regard to the present case, the Appellant's law enforcement expert was critical of the command structure and communications employed for the "joint operation" between RCSD and CPD. Jon Blum, in fact, found the need for a better "method or action plan." (R. 167-168). It is precisely such methods of operation that fall within the scope of Section 15-78-60(6). Similarly, in her brief, the Appellant questions whether a non-lethal method of force should have been employed. *See*, Appellant's Brief, p. 6. ("Mr. Catoe had not been tased, sprayed with OC spray, subjected to the baton or to any less lethal measures before he was shot dead"). However, the method of force used, i.e., a decision of operational tactics, also falls within the scope of Section 15-78-60(6).

In sum, like the theories of liability in *Huggins*, the present case also focuses on operational tactics. The Appellants complain that the operation was poorly planned and coordinated and also make the suggestion (without expert testimony) that non-lethal methods of force could have been utilized as an alternative. Yet, just as this Court correctly held in *Huggins*, this case likewise turns on the methods that law enforcement chose to utilize to provide police protection, and those

choices are entitled to immunity under Section 15-78-60(6). In short, the methods and tactics chosen by the deputies in attempting to disarm Richard Catoe and to take him into custody cannot give rise to liability, and for that reason, the summary judgment in favor of Sheriff Lott should be affirmed.⁵

II. The trial court correctly ruled that Sheriff Lott may not be held vicariously liable under a negligence theory for any intentional act committed by his deputies, including the use of deadly force.

As an alternative ruling, Judge Griffith agreed with Sheriff Lott's position that he cannot be held vicariously liable under a negligence theory for the intentional acts of his deputies. The Appellant alleged only a cause of action for negligence. She has not pled a cause of action for battery arising from the shooting of Richard Catoe. *See, Horton v. City of Columbia*, 408 S.C. 27, 757 S.E.2d 537 (Ct. App. 2014).⁶

⁵ The Appellant spends much of her lengthy brief discussing cases from Texas and Oklahoma which construe similar statutory language as Section 15-78-60(6). However, those cases are not controlling, while this Court's decision in *Huggins* is. More importantly, however, when closely read, the cases from Texas and Oklahoma are not truly at odds with *Huggins* or the ruling by Judge Griffith. Those cases draw a distinction between the formulation of policy and the implementation of policy, but none of those cases involve a law enforcement operation where tactical decisions or choices are made during the course of the operation, such as what occurred in *Huggins* and in the present case.

⁶ In paragraph 16 of her complaint, the Appellant does appear to improperly include a tort of outrage claim as part of the cause of action for negligence. To the extent it were found that the tort of outrage claim has been properly pled, Sheriff Lott did seek summary judgment on that claim, which ultimately was an issue that Judge Griffith did not find it necessary to reach given the dismissal of all tort claims based on sovereign immunity under

In *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997), the South Carolina Supreme Court ruled that a sheriff and his deputies were entitled to judgment as a matter of law on a negligence action arising out of the execution of an arrest warrant. The Supreme Court concluded that "the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them." 484 S.E.2d at 592. The Court explained that "police owe a duty to the public at large and not to any individual." *Id.* Consequently, *Wyatt* demonstrates that South Carolina does not recognize a cause of action for negligent arrest or a negligent performance of a criminal investigation.

Moreover, it is well settled under South Carolina law that intentional torts "cannot be committed in a negligent manner." ^{Insurance K-} *State Farm Fire and Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 137 (2000). Likewise, in *Wannamaker v. Traywick*, 136 S.C. 21, 134 S.E. 234 (1926), the Supreme Court explained that the term "negligence" is "ordinarily used in common-law terminology to express the foundation for civil liability for injury to person or property, when such injury is not the result of premeditation and formed intention." 134 S.E. at 235. Thus,

Section 15-78-60(6). Nonetheless, it is well settled that the Appellant cannot assert a tort of outrage claim against Sheriff Lott. That claim would be governed by the Tort Claims Act. The definition of "loss" contained in the Tort Claims Act specifically excludes "the intentional infliction of emotional harm." *See*, S.C. Code Ann. § 15-78-30(f). Hence, as an additional sustaining ground, Sheriff Lott is entitled to sovereign immunity on any outrage claim.

intent and negligence are mutually exclusive, and there is no claim of negligence that flows from intentionally tortious conduct.

As indicated, the Appellant has not alleged a cause of action for a battery stemming from the conduct of Deputy Kellye Hendrick in her use of deadly force. The intentional tort of battery cannot be transformed into a negligence claim. Negligence and battery are mutually exclusive, and there is no such cause of action as negligent assault and battery. See, *Restatement (Second) of Torts*, § 282 cmt. d (1965). Consequently, as Judge Griffith concluded, Sheriff Lott cannot be held vicariously liable under a negligence theory for an intentional act by one of his deputies.

The Appellant has not addressed this issue on appeal. The Appellant has instead argued that Judge Griffith ruled that her claims are barred by the public duty rule and that there is no duty of care owed to the Appellant's decedent. That was not the argument made by Sheriff Lott nor the ruling rendered by Judge Griffith in footnote #2 of his order. The Appellant has simply missed the point. The Appellant's arguments regarding the public duty rule are superfluous, as are the arguments that Sheriff Lott had voluntarily assumed a duty of care owed to Richard Catoe.

The Appellant's reliance on gross negligence and Section 15-78-60(25) is equally misplaced. Sheriff Lott did not plead sovereign immunity under Section

15-78-60(25),⁷ nor would that provision have any applicability because Richard Catoe was not a student, patient, prisoner, inmate or client of the RCSD, nor was he in the custody or control of the deputies. Just the opposite was true. The officers on the scene were attempting to place Catoe under arrest and into custody. That had not occurred.

In sum, as an additional basis for summary judgment, Judge Griffith was correct in concluding that Sheriff Lott is not liable under a negligent theory for any intentional act committed by his deputies, including the use of deadly force.

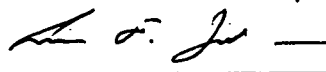
⁷ The Supreme Court has held that "[w]hen a governmental entity asserts multiple exceptions to the waiver of immunity and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 904 (2010). In *Steinke v. South Carolina Department of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), the Supreme Court explained that a governmental defendant may select which immunity provisions to plead, and if no gross negligence exception is included, then there is no basis for limiting the immunity to acts of simple negligence. The *Steinke* Court further explained that "the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception." 520 S.E.2d at 154. In *Jones*, the Supreme Court found that Section 15-78-60(21) was not subject to a gross negligence exception "because [defendant] did not plead a section containing a gross negligence standard." *Jones*, 692 S.E.2d at 905. The same is true in the present case. Sheriff Lott asserted immunity under Section 15-78-60(6) and never pled nor relied on any immunity provision within Section 15-78-60 containing a gross negligence exception.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Leon Lott, in his official capacity as Sheriff of Richland County, respectfully requests that this Court affirm the Order of Circuit Judge Eugene C. Griffith, Jr. granting summary judgment in favor of Sheriff Lott.

Respectfully submitted,

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February 10, 2015

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent Leon Lott, in his official capacity as Sheriff of Richland County, certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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February 10, 2015

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent Leon Lott, in his official capacity as Sheriff of Richland County, certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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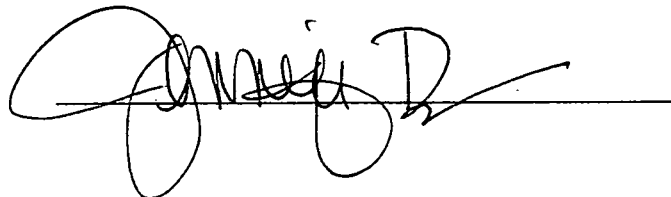
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent Leon Lott, does hereby certify that service of the **Final Brief of Respondent** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 10th day of February 2015:

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A handwritten signature in black ink, appearing to read "Mandy D. Powers-Norrell", is written over a horizontal line. The signature is stylized and cursive.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Eugene C. Griffith, 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.

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STATEMENT OF FACTS

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

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

Further, while Respondent asserts that an instruction was given to holster weapons, and, indeed, Chief Crisp recalled that the order was given to holster weapons before the flash bang was deployed. Chief Crisp explained, “If you’ve got your weapon at ready - - you’re a lot more apt to react instead of it in your holster and seeing what’s going on. So we wanted to make sure that everybody was clear of what we were trying to do.” (R. p. 125). Chief Crisp testified that,

after the order was given to holster weapons, he would have expected all officers on the scene to comply. (R. p. 125). However, Officer Roberts indicated that he never heard an instruction to holster weapons. (R. p. 149). Officer Dauway stated that he never heard an order by radio to holster weapons prior to the deployment of the flash bang (R. p. 132). Officer White indicated that he never heard an order to holster weapons and that he never heard such an order directed to Officer Hendrick. (R. p. 154).

Roberts recalled that after being hit by the stack, Mr. Catoe was "running backwards" and Roberts specifically recalled and testified that Mr. Catoe was not running towards Hendricks. (R. p. 145). Roberts reported, "Several shots were fired from my left. I turned briefly and observed a female deputy discharging rounds at the suspect...." (R. p. 145). Roberts heard the shots, indicating "it passed, I guess, over my left shoulder from what I remember because I heard several go by; "heard the whiz as they went past." (R. p. 147).

Officer White recalled that, when he regained eye line on Mr. Catoe, Officer Hendrick was looking towards the back yard. White recalled that Mr. Catoe was angled 45 degrees towards the house as he ran and that he was not facing straight. White indicated that he turned towards the back of the house and began moving that way. White then heard multiple loud popping sounds and saw Mr. Catoe running from behind the house across the backyard. White indicated that Mr. Catoe was not running towards Officer Hendrick and that Hendrick was not blocking Mr. Catoe's escape route into the woods. (R. pp. 155-156).

ARGUMENT

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

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

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

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

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

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

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

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

B. Section 15-78-60(6)

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

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

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

C. *Huggins v. Metts*

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

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

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

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

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

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

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

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

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

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

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

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

If the legislature had intended “method” merely to refer to an officer’s actions whenever he is acting to provide police protection, there would be no liability for the actions of police officers causing harm. If “method” actually refers to merely how an officer does something related to police protection, the State has not waived its immunity as the Legislature claimed it had. The legislature included in the South Carolina Tort Claims Act the indication: “The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein.” S.C.Code Ann. § 15–78–40. However, if Subsection 6 immunity applies to any and all actions taken by officers in providing police protection, the exception is so broad and all-inclusive as to deprive the citizens of this state of a chance for redress of their losses.

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

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

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

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

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

County's chosen method of providing police protection by providing and permitting the use of a flash bang would be immune from suit, while the negligent, incorrect, implementation of a flash bang would not constitute a "method" of providing police protection and would not be immune.

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

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

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

“preparation and events leading up to the time immediately preceding the shooting of Deceased.” Citing §15-78-60(6), the Court then found, without further discussion or detail, “This action concerns the manner in which the police chose to provide police protection.”

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

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

The Sheriff follows the *Huggins* decision’s indication that Subsection 6 could be paraphrased to maintain immunity for the “manner in which the police chose to provide police protection” in now himself arguing that Subsection 6 actually maintains immunity for the “operational conduct where law enforcement chooses or employs particular methods or tactics,”

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

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

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

the contrary, Plaintiff referenced several cases from Texas and Oklahoma involving claims of immunity which were rejected on the basis that, although the State's policy decisions establishing the method of providing police protection are subject to immunity, there is no such immunity for the negligent actions of officers on the ground.

On brief, Appellant indicated that he was "unaware of any parameters the trial judge identified or applied to justify his finding that the officers were engaged in the "method" of providing as opposed to simply providing police protection at the time of the loss." However, Respondent fails to respond to this argument and fails to point to any such differentiation in Judge Griffith's decision between the officers here just acting as police officers and an immune "method" of providing police protection. Respondent likewise fails to identify or explain that any such differentiation was made in *Huggins* between officers acting as police officers and an immune "method of providing police protection."

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

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

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

Respondent argues that the subsection *was* rightly applied in *Huggins* and its progeny to preserve immunity both for the overall method of providing police protection and also for the

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

Appellant does not argue that affirmance of Judge Griffith’s order will *result* in law enforcement in South Carolina being, thereafter, afforded blanket immunity. Instead, Appellant argues that the legislature’s version of the Tort Claims Act’s Subsection 6 exception to the waiver of immunity was intended to maintain liability only in matters related to policy decisions made as to the method of providing police and fire protection to the community at large. The language of the subsection actually indicates that the subsection maintains immunity for harm caused as the result of decisions made as to provision of police and fire protection in situations where the State is not in control, but its provision of police and fire protection will be called into question, i.e., in cases of riot, mayhem, civil unrest, insurrection, or rebellion.

Clearly, the legislature intended to maintain immunity in situations where rioting and mayhem break out and damage is caused to the person or property of citizens. The legislature, therefore, particularly excepted from the waiver of immunity an agency’s policy decisions as to the method of providing police or fire protection, meaning the amount and type of police and fire

protection to provide to the community. Thus, in a case where rioting and mayhem breaks out and there is no fire or police response or an allegedly insufficient fire or police response, the citizens injured or whose property is injured as a result of the rioting and civil unrest would be prevented from holding the State or municipality responsible for their losses. Under the plain language of Subsection 6, citizens will not be able to complain that the State had notice of impending unrest and, yet, negligently decided not to provide increased police or fire protection. Citizens will not be able to hold the government responsible for their losses by claiming that the State had the resources necessary to address the rioting and civil unrest, but negligently chose to allocate resources elsewhere. The plain language of Subsection 6 shows that the legislature intended to maintain immunity for policy decisions regarding providing or the method of providing police or fire protection in cases of riot, rebellion, civil unrest, mayhem, and insurrection. In such cases, under Subsection 6, the State or the municipalities' overall method of providing police and fire protection, the preparedness of police and fire authorities, and the decisions as to the allocation of resources according to the perceived needs of the community are not open to debate and do not subject the government to liability.

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

and lines were in working order or which would ensure that citizens were notified when a water line or hydrant was not in service. The *Wells* Court applied Subsection 6 to provide immunity only for the method of providing fire protection to the community.

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

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

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

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

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

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

However, under the Respondent's current theory of subsection 6 immunity, there is actually no need to limit the analogy merely to tasers; where as a part of its method for providing police protection, the Sheriff's Department permits its officers to employ a range of responses to its citizens, culminating in the application of deadly force, were a Deputy to shoot and kill a child, the child's parents could complain and file suit, but they might never receive an explanation for why the officer chose to shoot a child and the Sheriff would be immune from any responsibility for the child's death.

Under the Respondent's theory, as long as the Deputy was acting in his role as an officer providing police protection, the Sheriff would be immune as a matter of law, regardless of the facts. Although these examples may seem outrageous and absurd, Appellant has always thought it was absurd and outrageous that her decedent, in his injured, weakened, condition was ever

reasonably thought to present any more danger to this phalanx of armed, Kevlar-clad, officers than would a three year old child.

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

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

Respondent further indicates that there can be “no claim of negligence flowing from intentionally tortious conduct.” This indication is irrelevant to Appellant’s argument, assuming that Respondent did not intend by this statement to admit that the conduct of his deputies constituted intentionally tortious conduct. Appellant has always maintained that the deputies acted negligently; however, even Appellant has not argued that the deputies’ actions were “intentionally” tortious. In fact, no one has ever alleged that Deputy Hendricks stepped into the

yard that day intending to point blank shoot the Plaintiff. Any such argument would be absurd; however, the deputy should have never been at this scene, the deputy should have had proper communication, clear direction from a supervisor, knowledge of the tactical plan, and awareness that a mentally ill, frightened, injured, and panicked man might attempt to flee.

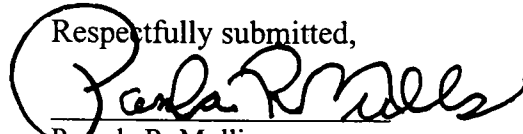
Respondent concludes this argument by indicating that “since an allegation of intent to commit a wrongful act is irrelevant in a negligence action, the Defendant Sheriff cannot be held liable for its intentional acts at the relevant times and there is no claim for negligence flowing therefore.” Appellant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

CONCLUSION

For all the forgoing reasons, taking the facts in the light most favorable to the Plaintiff, genuine issues of material fact remain in dispute from which a jury could find the Respondent breached a duty of care to the Plaintiff's decedent and that the resulting fatality was caused by a breach of that duty. The trial judge erroneously granted summary judgment upon wrongly finding that Respondent was immune from suit pursuant to a misinterpretation of S.C. Code. Ann. § 15-78-60(6). Therefore, the trial judge erred as a matter of law in granting Defendant Sheriff's Motion for Summary Judgment. The trial judge's Order granting summary judgment should be reversed and the matter remanded for trial.

February 10, 2015

Respectfully submitted,



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