

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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Opinion No. 2015-UP-547
(S.C. Ct. App. filed December 2, 2015)

S.C. SUPREME COURT

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

v.

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

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a wrongful death action. The Petitioner 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 Petitioner 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The Petitioner then filed an appeal to the South Carolina Court of Appeals which issued an unpublished opinion on December 2, 2015, affirming the order of Judge Griffith. A subsequent petition for rehearing was denied.

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 Petitioner'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 decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The Respondent Leon Lott submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion. Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value. Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to other cases.

Based upon these considerations, there is simply no need for this Court to review the decision of the Court of Appeals.

II. The trial court, as affirmed by the Court of Appeals, 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 Petitioner 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 Petitioner's negligence action against Sheriff Lott falls within that immunity provision. In granting summary judgment, Judge Griffith relied substantially on the case of *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. Section 15-78-60(6)

Section 15-78-60(6) of the Tort Claims Act 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*,

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.

331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998), the Court of Appeals recognized that a scrivener's error resulted in the omission of the word "or." After looking at the legislative history, the Court of Appeals 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.

B. 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*, the Court of Appeals 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. The 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, the Court of Appeals 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), the 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).

To reiterate, a petition for writ of certiorari was filed in *Huggins*. This Court thus had the opportunity to review the *Huggins* decision and ultimately denied the petition. *See*, Order Denying Writ of Certiorari filed October 18, 2007. No member of this Court at that time even voted for a writ of certiorari to be granted. Likewise, in the present case, the Petitioner sought immediate certification of this case this Court in order to argue against the precedent established by *Huggins*, and this Court denied that motion by Order filed June 11, 2014.

C. Huggins as Controlling Authority

Judge Griffith found that "the precedent as set forth in *Huggins* is authoritative with respect to the instant manner." (R. 8). Likewise, the Court of Appeals found *Huggins* to be 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 Petitioner 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. 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 Petitioner 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 was correctly affirmed, and a writ of certiorari is not warranted.

D. Huggins was Correctly Decided

The Petitioner argues 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 Petitioner 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*, Petitioner, p. 19. According to the Petitioner, the immunity provided by Section 15-78-60(6) is for policy making and not for actual operational conduct.

However, the Petitioner is not correct. Several key rules of statutory construction make that clear. Not surprisingly, the Petitioner does 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). 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.

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 Petitioner'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 Petitioner contends that Section 15-78-60(6) provides immunity for "policy formulation." As stated repeatedly throughout her petition and her earlier briefs, 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*, Petition, p. 8. 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 and the United States Supreme Court have 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.²

² It is worth noting that this 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, this 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).

Moreover, Section 15-78-60(6) does not provide "blanket immunity" for all law enforcement conduct, as the Petitioner incorrectly asserts is the ultimate result of Judge Griffith's order.³ Section 15-78-60(6), however, is not applicable 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 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.

This whole notion of "blanket immunity" requires further discussion. The construction of Section 15-78-60(6) which provides immunity for police tactics that are implemented clearly does not cover all law enforcement activities that can result in litigation. A majority of law enforcement cases, in fact, include arrests without probable cause leading to claims for false arrest or malicious prosecution. Sheriff Lott does not contend Section 15-78-60(6)

³ Ironically, the Petitioner 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 Petitioner 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.

provides immunity for those claims. Similarly, this notion of "blanket immunity" suggests that there would be no deterrent or compensation for cases of severe police misconduct. That is also not true. The Fourth Amendment and causes of action brought under 42 U.S.C. § 1983 provide a sufficient deterrent as well as compensation for victims of police misconduct. There does not need to be concurrent state law liability and dual methods of compensation under state and federal law for police misconduct to be discouraged. Instead, it is entirely permissible and sound policy for the General Assembly to have placed reasonable limits on law enforcement's liability for negligence where police often work under the most difficult and trying of circumstances.

Finally, it is important for the Court to focus on the Petitioner's theory of liability proffered in the trial court – as opposed to the expanded view articulated on appeal. *See, Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995) (a party may not present one ground at trial and then change his theory on appeal). In the trial court, the Petitioner relied exclusively on the opinions of Jon Blum, her law enforcement expert, who interestingly enough *was critical of the law enforcement operation*. Blum 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, 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 Petitioner questions whether a non-lethal method of force should have been employed. *See*, Petitioner, p. 6. ("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).⁴

The Petitioner also spends considerable time discussing cases from Texas and Oklahoma which construe similar statutory language as Section 15-78-60(6) to suggest that *Huggins* was incorrectly decided. However, those cases are not controlling. 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 and affirmed by the Court of Appeals. Those cases draw a distinction between the formulation of policy and the implementation of policy, but none of those cases

⁴ Interestingly, 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.

appear to actually involve a law enforcement operation where tactical decisions or choices were made during the course of the operation, such as what occurred in *Huggins* and in the present case.

Finally, the Petitioner suggests that the decision in *Huggins* is somehow at odds with the decision in *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). The Petitioner attempts to portray *Wells* as a "policy formulation" rather than operations case. That is not true. That distinction was never drawn by the *Wells* Court. Instead, the allegations in *Wells* -- which were related to fire rather than policy protection -- consisted of several theories: (1) the County failed to promptly provide adequate firefighting personnel and equipment; (2) the City failed to inspect and/or maintain a system of fire hydrants, and (3) the City failed to notify authorities of inoperative fire hydrants. The *Wells* Court concluded that each of those theories was barred by Section 15-78-60(6). Those theories of liability clearly include operational methods or tactics. The failure to promptly provide personnel and equipment to adequately fight the fire is an operational rather than a policy error. Interestingly, not one of the theories of liability addressed in *Wells* can reasonably be described as "policy formulation." Therefore, the suggestion that *Huggins* is inconsistent with *Wells* is simply not supportable.

In sum, like the theories of liability in *Huggins*, the present case also focuses on operational tactics. The Petitioner complains that the operation was poorly planned and coordinated and also makes the suggestion (without expert testimony) that non-lethal methods of force could have been utilized as an alternative. Yet, just as the Court of Appeals 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). 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 was correctly affirmed. There is no basis nor need for the issuance of a writ of certiorari.⁵

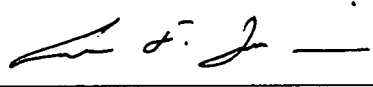
⁵ As a second ground for the issuance of a writ of certiorari, the Petitioner alleges in a general sense that Judge Griffith did not take the facts in a light most favorable to the non-moving party. That is a misreading of Judge Griffith's order. Judge Griffith did not conclude that there was no negligence 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"). For purposes of an immunity defense, the court is not required to determine fault. In actuality, a determination of fault is immaterial. The court instead makes a legal determination as to whether the plaintiff's theory of liability falls within the scope of the immunity provision. That is precisely what Judge Griffith as well as the Court of Appeals did. There was no reversible error.

CONCLUSION

Based on the foregoing discussion, the Respondent Leon Lott respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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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 **Return to Petition for Writ of Certiorari** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 21st day of March 2016:

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