

**THE STATE OF SOUTH CAROLINA**  
In the Supreme Court

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

Appellate Case No. 2016-000300

**RECEIVED**

APR 15 2016

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

**S.C. SUPREME COURT**

Petitioner

v.

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

Defendants,

Of whom Leon Lott in his official capacity  
as Sheriff of Richland County is the

Respondent.

**REPLY TO RETURN TO PETITION  
FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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**I. The issue presented is a novel issue of first impression and one of great public interest and importance, warranting the issuance of a writ of certiorari.**

The proper construction, interpretation, and application of the exception to the waiver of sovereign immunity in S.C. Code Ann. Section 15-78-60(6) and the rectitude of the decisions in *Wells* and *Huggins* presents a novel question of statutory interpretation in a matter of community-wide importance.

Respondent argues that this case does not involve an issue of first impression nor any issue of great public interest or importance. To the contrary, in 2016, the question of whether law enforcement in South Carolina is afforded blanket immunity under all circumstances in which a citizen is injured and seeks redress is actually a matter of great public interest and importance. In fact, the question as framed in this case does present an issue of first impression where neither the statute itself nor any prior decision construing the statute establishes whether Subsection (6) is properly construed to maintain immunity (1) only for an agency's overall method of providing police protection for the community; or (2) only for the individual actions of law enforcement officers on the ground as to how they perform a task intended to provide police protection; or (3) in both instances. As indicated, this subsection has been cited in only three prior cases and it has never been examined or discussed by the Supreme Court.

South Carolina Code § 15-78-60's Subsection (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 (Ct. App. 1998), to maintain immunity for community-wide policy decisions establishing the overall method for a particular agency's provision of police or fire protection, which method 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. In *Wells*, the Court of Appeals agreed that the City and County were immune pursuant to Subsection (6), providing that a governmental entity is not liable for a loss resulting from “civil disobedience, riot, insurrection, or rebellion or the failure to provide or the method of providing police or fire protection” only after analyzing the particular claims raised by the Wells, and upon the Court’s noting that the Wells had “concede[s] that section 15-78-60(6) of the Tort Claims Act bars their action against Lee County for the alleged failure to provide adequate firefighting personnel and equipment.” The Wells had conceded that their claim relating to the allocation of resources and the provision of fire-fighting personnel and equipment was barred under the Tort Claims Act’s Subsection (6) exception maintaining immunity for the “method” of providing fire protection. However, having conceded that the claim against the County was barred by Subsection (6) because such constituted the “method of providing fire protection,” the Wells maintained that their claim for failure to inspect and/or maintain the system of fire hydrants and to notify proper authorities and the citizenry of inoperative fire hydrants, was not barred under Subsection (6) immunity.

It was in determining whether the claims the Wells raised against the City relating to its system for maintaining and inspecting fire hydrants came under Subsection (6) immunity, that the Court of Appeals referenced similar statutes from Oklahoma and Texas with approval. *Wells*, 501 S.E.2d at 760. Upon noting that Texas and Oklahoma had similar statutory language and that in both states the provision provided “no liability for any claim arising from the failure to provide or the method of providing police or fire protection,” the *Wells* Court then agreed with the reasoning of those jurisdictions, holding that the City and County were immune from suit

where “the maintenance of fire hydrants and the supply of water for fighting fires clearly is included in the exception from liability in Section 15-78-60 (6) for the method of providing fire protection and the discretionary act of maintaining the city water system with the resources available.”

At the time of the *Wells* decision, there was a split of authority, as to the meaning of the phrase, “the method of providing police protection,” with the jurisdictions cited by the *Wells* Court finding that Subsection (6) maintains immunity only for the formulation of policy as to the provision of police and fire protection for the community. The discussion in *Wells* focused on the City and County’s policies for directing the water supply and maintaining hydrants and described these as “discretionary” decisions. At the time of the issuance of the decision in *Wells*, referencing with approval Oklahoma and Texas’ versions of Subsection(6) as identical to South Carolina’s version, the courts of those states had not construed this language as maintaining immunity for any and all claims arising from activity providing police or fire protection, instead, those Courts had actually held and explained that the statutory language “the method of providing police or fire protection,” maintained immunity from suit for a loss related to the policies and established methods of providing police and fire protection, but that no such immunity exists where the loss was due to the negligence of officers on the scene, as opposed to some alleged fault with the policy itself. In fact, in Texas and Oklahoma at the time the *Wells* Court referenced those jurisdictions as informing its interpretation of Subsection (6), a Department was not immune from suit where the allegation was of negligence, not in the methods or policies of the police department for providing police protection to the community, but in an officer’s negligent implementation of department policy.

The *Wells* Court examined and discussed the nature of the Wells' complaints, particularly identifying the functions for which it was finding the county immune as being related to the discretionary acts and decisions related to establishing the method of providing fire protection and the overall operation for providing fire protection as related to the maintenance of fire hydrants for the community. Therefore, the *Wells* Court's holding was 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."

Thus, Subsection (6) was interpreted in *Wells* to maintain immunity for policy decisions made by governmental entities as to the overall method of providing fire protection for the community. In *Wells*, the Court explicitly examined and ruled upon immunity as the result of the county's overall method of providing fire protection to the community. Notably, the *Wells* Court did not address any question of negligence on the part of firemen while putting out a fire. Instead, the Court addressed the question raised by the Wells, whether the County was negligent in the method it chose to employ to maintain the water supply to hydrants and the failure to employ a method for providing fire protection which would ensure that all hydrants and lines were in working order or which would ensure that citizens were notified when a water line or hydrant was not in service. The *Wells* Court properly applied Subsection (6) to provide immunity only for the method of providing fire protection to the community and not for any alleged negligence of the firemen engaged in putting out the fire. The *Wells* Court held, "The maintenance of fire hydrants and the supply of water for fighting fires 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 city water system with the resources available.”

However, in contrast, in *Huggins v. Metts*, 371 S.C. 621, 640 SE2d 465 (Ct. App. 2006), Subsection (6) and the *Wells* decision were apparently interpreted, not only to maintain immunity for the overall method the agency chose to employ to provide police and fire protection to the community, but instead, to also maintain immunity in all situations where damages were claimed to result from an officer’s negligent or wrongful actions while acting as a police officer providing police protection. Under the interpretation apparently applied in *Huggins* and the interpretation argued before and accepted by Judge Griffith in this case, police officers in South Carolina are immune under Subsection (6) for any and all actions taken while engaged in providing police protection; according to this theory, if a loss is claimed to have resulted from either the method of providing protection to the community or from the actions of police officers who were engaged in providing police protection, immunity is maintained.

Thus, the Court of Appeals has construed and applied the subsection differently in two cases, *Wells* and *Metts*, resulting in an intolerable state of uncertainty as to the correct interpretation and application of the law. In *Wells*, the Court of Appeals construed Subsection (6) to maintain immunity for the method of providing fire protection to the community and not for any alleged negligence of the firemen engaged in putting out the fire. In contrast, in *Metts*, the Court of Appeals construed the subsection to maintain immunity also for the methods individual officers choose to use to provide police protection on the ground.

Respondent initially argued to the Circuit Court that Subsection (6) applied whenever law enforcement was providing police protection, maintaining immunity both for the community

wide method of providing police protection, as recognized in *Wells*, and for the actions of the individual officers on the scene, as per *Metts*. Petitioner responded to this theory by pointing out that such a construction of the subsection would operate to provide blanket immunity for law enforcement, whereby law enforcement maintained immunity both for its policy decisions establishing the method for providing protection to the community and also for actions of the individual officers on the ground carrying out that policy. Petitioner argued that the legislature did not actually intend such blanket immunity and that the Court of Appeals in *Metts* and the Solicitor had incorrectly interpreted the subsection to also apply to the operative acts taken by officers on the scene. Petitioner pointed out that an interpretation assigning such global impact to Subsection (6) was not consistent with the intent of the legislature and inconsistent with the Tort Claims Act. Petitioner has repeatedly challenged Respondent, assuming that his interpretation of the statute, combining the immunity recognized in *Wells* with the immunity recognized in *Metts* was correct, but nevertheless maintaining that such would not constitute blanket immunity, to identify a single cause of action involving law enforcement which would not be immune under that interpretation of Subsection (6).

Respondent argues that his interpretation of Subsection (6) does not provide blanket immunity for law enforcement because that subsection actually does not apply in cases where an agency made policy decisions based on community resources and needs to establish the method of providing police protection. Thus, apparently Respondent actually does not intend to add the immunity recognized in *Metts* to the immunity recognized and applied in *Wells* - - he now suggests that it is the earlier *Wells* decision which was wrongly decided and/or that *Wells* turned on purely operational facts without any reference to the overall method of providing protection to

the community. The Respondent Sheriff, has now provided his own interpretation of the subsection, in line with *Metts*, to maintain immunity only for “tactical, operational, actions and decisions taken and made by individual officers acting on the ground.” Respondent argues that Subsection (6) maintains immunity only for the tactical operational actions and decisions taken and made by individual officers acting on the ground, as per *Metts*, and that the subsection does not apply to the agency’s establishing a policy and method for providing protection to the community, upon taking into account the resources and needs of the community, as per *Wells*.

Respondent actually now argues that *Wells* was not a case involving community-wide policy setting the method for providing fire protection, and that, instead, the case involved tactical, operational, actions and decisions taken and made by individual officers acting on the ground. To the contrary, as indicated, the Court in *Wells* first recognized and approved the *Wells*’ concession that Subsection (6) *would* apply to maintain immunity for their claim that the county was negligent in failing to provide adequate firefighting personnel and equipment for their area. Thus, the *Wells* court clearly recognized the “method” as relating to the discretionary decisions of the county and department relating to the allocation of resources and water to the various communities as immune under Subsection (6). Respondent argues that Subsection (6) applies only in operational tactical situations and not in cases involving discretionary decisions establishing the method of providing protection to the community. To the contrary, the clear import of the *Wells* decision was that Subsection (6) maintained immunity for “the method of providing fire protection and the discretionary act of maintaining the city water system with the resources available.”

Respondent asserts that Subsection (6) only applies to the individual actions of the officers on the ground and that Subsection (6) does not maintain immunity in cases where community wide policy decisions are made establishing the method by which the agency would provide police protection. Respondent now asserts that such policy decisions are discretionary decisions and that Subsection (6) applies to operative actions and not to discretionary actions or decisions. Petitioner would note that this argument would come as quite a surprise to the *Wells* Court.

Respondent has indicated that, if Plaintiff's interpretation of the subsection, relying upon the earlier decision in *Wells* is correct, then *Metts* was wrongly decided. (*Brief of Respondent*, p. 13). Petitioner can now only respond that, if the Sheriff's current interpretation relying on *Metts* is correct, then the earlier *Wells* case was wrongly decided. Thus, the issue presented by this case is a matter of great public interest and a novel issue of statutory interpretation is presented. If this Court does not take this opportunity to analyze and decide the issue presented, the proper construction and interpretation of Subsection (6) will remain undecided, unclear, and confused.

In addition, the Respondent has now, for the first time, identified a particular class of causes of action which he now concedes would not be subject to immunity as provided by his interpretation of Subsection (6). Sheriff Lott now indicates that he does not contend that Section 15-78-60(6) provides immunity for claims of false arrest or malicious prosecution. (*Return to Petition for Certiorari*, at pp. 16-17). However, the Sheriff fails to explain his reasoning or provide an analysis of why the immunity he claims under Subsection (6) would not apply in such cases. There is no indication in the subsection itself or in the decisions interpreting the subsection that the actions taken by officers in false arrest and malicious prosecution cases would not come within its purview as a method chosen by the individual officer to provide police

protection. Thus, the only analysis and application of the subsection is currently provided by the legislature's statute, as interpreted by the Court of Appeals differently in two different cases, and as now explained and amended by the Return to a Petition for Certiorari filed by the Sheriff of Richland County in this case. However, the Sheriff does not explain if his concession is one of precedential significance or how it would operate should another sheriff attempt to rely upon Subsection (6) immunity in a case of false arrest. Petitioner would again suggest that the overall confusion as to the proper application of Subsection (6) is intolerable and that the issue should more properly be decided and explained by this Court upon granting certiorari.

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

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.

Respondent continues to argue that it is immaterial that the trial judge granted summary judgement only upon taking the facts and circumstances of the case in the light most favorable to the moving party on the basis that, by claiming immunity, Respondent had conceded fault so that fault was irrelevant. In fact, by his Motion for Summary Judgment, the Respondent actually asserted, not that he was conceding fault, but instead that he specifically denied any culpable conduct, asserting "the actions of the Plaintiff's decedent was the sole negligence giving rise to his injuries and/or death." (*R.* p. 30).

Respondent's argument that it was not reversible error or even improper for the trial judge to grant summary judgment only upon taking the facts in the light most favorable to the moving party because fault is irrelevant where immunity is claimed is particularly unpersuasive given the Respondent's persistent presentation of hotly contested issues of fact. For example, Plaintiff presented the testimony of Officer Roberts who 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). Similarly, Officer White recalled that, when he regained eye line on Mr. Catoe, Officer Hendrick was looking towards the back yard. White testified that Mr. Catoe was angled 45 degrees towards the house as he ran and that he was not facing straight. 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 at the time of the shooting. (R. pp. 155-156).

Thus, both Officers Roberts and White testified that Richard Catoe fled from the flash bang explosion, running across the back yard, but that he was not running toward Hendricks and that she was not blocking his escape. Thus, taking the evidence in the light most favorable to Petitioner, the Court should analyze the case from the factual standpoint that the officer shot the decedent as he was running by her, but not toward her. However, the Respondent has, in its Return, once again asserted that Catoe was closely approaching her and getting closer to her so that Hendricks was forced to fire. If the Respondent actually or genuinely believed that the facts and circumstances of the case had no impact on the trial judge's summary judgment decision and will have no impact on the decision of the appellate courts, it is difficult to understand Respondent's insistently presenting the disputed facts in the light most favorable to his argument.

**III. The interpretation of S.C. Code Ann. Section 15-78-60, Subsection (6) as applying to discretionary decisions related to the adoption of policies for the method of providing police protection as set out in *Wells* does not render Subsections (4) and (5) redundant or superfluous.**

By his Answer, Respondent, in this case, relied upon several exceptions to the waiver of sovereign immunity: S.C. Code Ann. Section 15-78-60, Subsections (4),(5),(6), and (20). (R. p. 21). It was only at summary judgment that the Respondent asserted that he was relying only upon Subsection (6). Thus, apparently, the Solicitor originally believed that he was entitled to immunity on the basis that the actions of his deputies were discretionary and/or taken pursuant to the adoption of policy under Section 15-78-60, subsections (4) and (5). However, at this point, the Respondent argues that Subsection (6) is not properly interpreted as it was in *Wells* to maintain immunity for losses resulting from discretionary decisions and/or policy decisions made by an agency establishing the overall method for providing protection to the community because such an interpretation would render Subsection (6) duplicative and redundant to Subsections (4) and (5).

To the contrary, the Court in *Wells* specifically and particularly interpreted Subsection (6) to maintain immunity for an agency's established method of providing protection to the community, with the Court explicitly explaining that the "method" was based on the agency's adoption of policy and use of discretion in establishing that "method" of protection for the overall community. There was apparently no argument made before the *Wells* Court that such an interpretation would render any subsection of the Tort Claims Act redundant or superfluous. In fact, the Tort Claims Act includes numerous exceptions to the waiver of immunity, some very particular and some more general. The agency is given the power to select which of the exceptions to rely upon. While there is overlap in the exceptions to the waiver of immunity so

that a particular subsection such as Subsection (6) may identify immunity based factors also included in another, more particular exception, this fact does not render any section redundant or superfluous.

**IV. Petitioner's arguments and the issues raised were fully and properly presented before the Circuit Court and before the Court of Appeals.**

Respondent suggests for the first time in its Return to Petition for a Writ of Certiorari to the Court of Appeals that Appellant has somehow "expanded" upon her argument on appeal. Respondent does not actually argue that the issues and grounds presented and argued before the Court of Appeals were not properly before the Court because not argued below; however, having suggested that Petitioner's argument had expanded on appeal and citing precedent establishing that a party may not argue one ground at trial and another on appeal, Respondent merely urges this Court to focus on the theory presented in the trial court. (Return at p. 17).

In fact, the issue and argument presented in the trial court by Plaintiff, as included in her hearing argument and in her Response to Motion for Summary Judgment, is precisely the same argument presented to the Court of Appeals and it is the same argument now presented on certiorari. (See R. p. 90).

**CONCLUSION**

For the reasons stated, petitioner respectfully asks the Court to grant her Petition for a Writ of Certiorari to the Court of Appeals.

April 11, 2016

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APR 15 2016

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

**SC SUPREME COURT**

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,

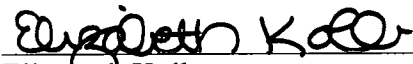
Of whom Leon Lott in his official capacity  
As Sheriff of Richland county is the

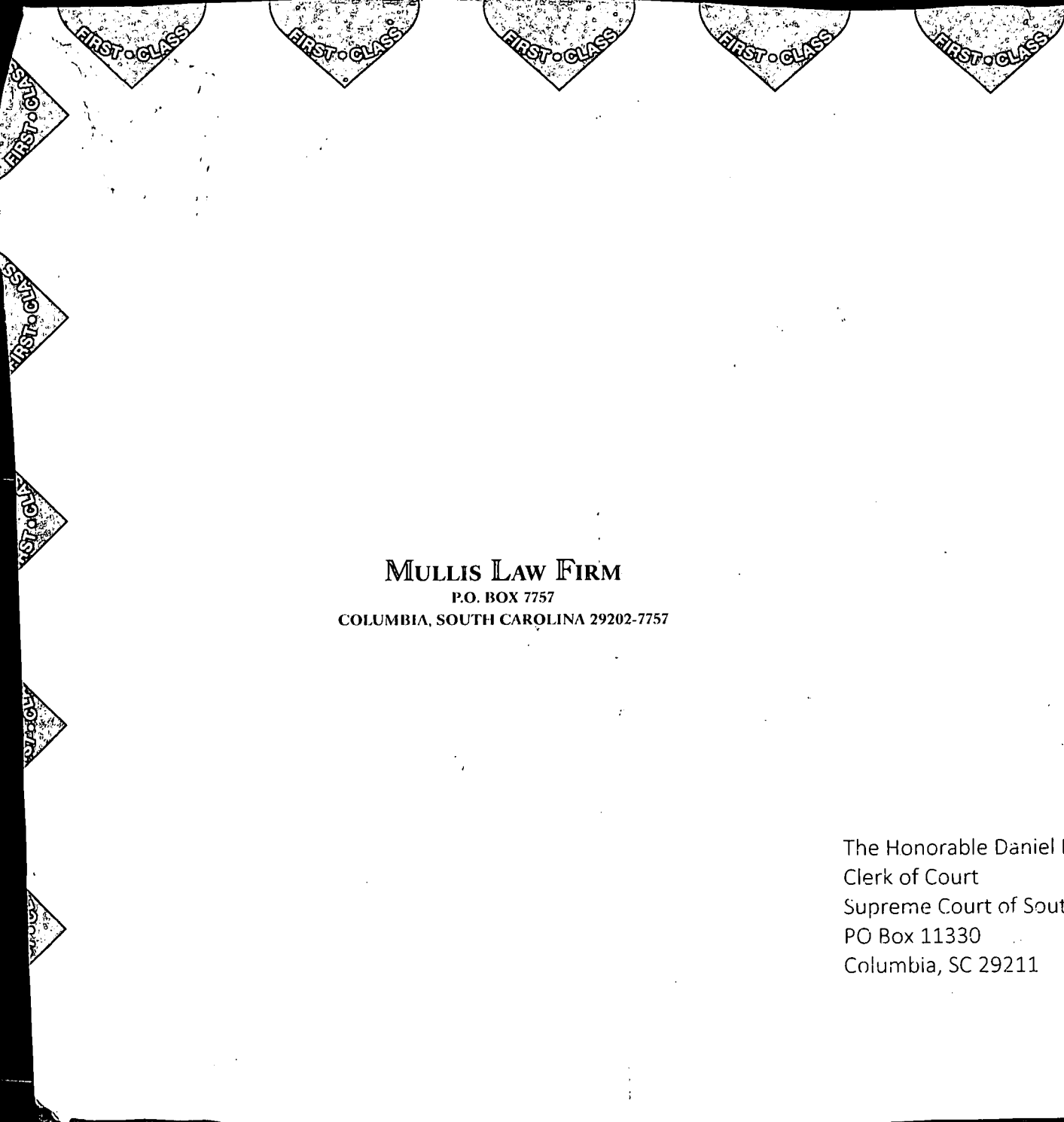
Respondent.

**PROOF OF SERVICE**

I, Elizabeth Kolb, the undersigned employee of the MULLIS LAW FIRM, do hereby certify that I have served one copy of Petitioner's Reply to Return to Petition for Writ of Certiorari to the Court of Appeals this 11th day of April 2016, by regular U.S. mail with proper postage affixed, addressed to the following:

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