

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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AUG 7 2014

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

S.C. Supreme Court

Perry M. Buckner, Circuit Court Judge

Civil Action No. 2009-CP-25-00517
Appellate Case No. 2013-000391

401 S.C. 646, 737 S.E.2d 854 (Ct. App. 2012)

Maria T. Curiel and Martin L. Curiel,

Respondents,

v

Hampton County E.M.S.

Petitioner.

BRIEF OF RESPONDENTS

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SUMMARY OF ARGUMENT

The statute at issue is plain and unambiguous, and it does not provide immunity for an EMS unit (an ambulance) that is allegedly on its way to provide potential support for emergency personnel at the scene of a fire. Just because EMS contends that the language is ambiguous does not make it so. It has long been the law that where the language of a statute is plain, explicit and direct, it is not ambiguous. *Shell v. Duncan*, 31 S.C. 547, 10 S.E. 330 (1889). Here, the legislature used language that is plain, explicit and direct – the statute is *not* ambiguous. Divining an ambiguity for ambiguity’s sake is not the function of the court. Instead, where the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Storm M.H. ex rel. McSwain v. Charleston County Bd. of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012).

The legislature knew how to include “emergency medical services” within a statute that also governs fire or police protection, but it did not do so in Section 15-78-60(6). Furthermore, all of the foreign law upon which Petitioner bases its argument is meaningfully distinct from the law and facts in this case. Also, the hypothetical situations EMS presents in its Brief are meaningfully distinct from the facts of this case and should not persuade this Court to reverse the decisions of the trial court and the Court of Appeals. Lastly, there is an unappealed alternative basis to affirm the rulings below.

Accordingly, the Court should dismiss the Petition as improvidently granted or affirm the Court of Appeals.

QUESTIONS PRESENTED

- I. Did the Court of Appeals Correctly Apply Rules of Statutory Construction to the Statute That Is at Issue in this Case, Section 15-78-60(6) of the South Carolina Code, in Affirming the Circuit Court's Grant of Summary Judgment for Respondent?
- II. Is There an Unappealed Alternative Ruling So That this Court Need Not Address the Issue Presented by EMS?

COUNTER-STATEMENT OF THE CASE

This is an automobile wreck case. On November 17, 2009, the Curiels filed an action against Hampton County Emergency Medical Services ("EMS"), claiming Mrs. Curiel was injured when an EMS ambulance struck her car while trying to pass her as she made a proper left turn. Mr. Curiel sought to recover for property damage to the vehicle, which he owned. (Appx. pp. 11-13). EMS filed an answer admitting that the wreck occurred, but denying liability. EMS also raised the affirmative defense of sovereign immunity under the South Carolina Tort Claims Act ("the Act"). (Appx. pp. 14-17).

Following discovery the parties filed cross-motions for summary judgment. EMS filed its motion on November 4, 2010, and asserted it was entitled to judgment because it was immune under Section 15-78-60(6) of the Act "for the method of providing police and fire protection." (Motion for Summary Judgment of 11/4/10; Appx. p. 18). The Curiels filed their motion on November 15, 2010, and asserted they were entitled to judgment because EMS was not entitled to immunity under Section 15-78-60(6) as a matter of law. (Plaintiff's Motion for Summary Judgment; Appx. p. 20).

On January 4, 2011, the circuit court heard arguments on the cross-motions. On

January 25, 2011, the court denied EMS's motion, holding there was no evidence the EMS crew was responding to a fire so as to provide any fire protection services. (Order Filed 1/25/11; Appx. pp. 7-10). The court held that the Curiels had not sued EMS for the failure to provide fire protection nor the method it utilized to provide fire protection, but had instead sued EMS for the automobile collision which occurred while the employee was operating the vehicle within the course and scope of his duties as an Emergency Medical Technician (EMT). The court held that neither the statute nor the intent of the statute were meant to apply to the facts of the case, and thus denied EMS's motion.

EMS moved for reconsideration and argued the uncontroverted evidence in the record established the employees were responding to a fire at the time of the wreck. (Motion to Reconsider; Appx. p. 22). EMS also filed a "Notice of Waiver of Certain Tort Claims Act Defenses." EMS waived all immunities, limitations and defenses "except the immunity afforded in South Carolina Code Section 15-78-60(6)." (Notice of Waiver; Appx. p. 24).

The court heard arguments on EMS's motion for reconsideration and on June 8, 2011, the court denied EMS's motion. (Order filed 6/8/11; Appx. pp. 3-6). In that same order the court granted the Curiels' summary judgment motion, holding (1) the defense provided by Section 15-78-60(6) did not apply to this case, (2) EMS was not providing "fire protection," and (3) EMS was "not alleged to have failed to provide fire protection or utilized the wrong method of providing fire protection."¹

¹ This was a motion for partial summary judgment only as to this defense. The Curiels will still need to proceed with the case for liability and damages. (Tr. 3/15/11, p. 7, l. 22 - p. 8, l. 6; Appx. pp. 26-27).

On June 22, 2011, EMS filed and served a notice of appeal from the June 8, 2011, order denying its motion for reconsideration and granting the Curiel's motion for summary judgment. Following oral argument, the Court of Appeals issued its opinion affirming the trial court's decision. *Curiel v. Hampton County E.M.S.*, 401 S.C. 646, 737 S.E.2d 854 (Ct. App. 2012). The Court of Appeals subsequently denied EMS's petition for rehearing. EMS sought review and on May 8, 2014, this Court granted the petition and issued a writ of certiorari to review the Court of Appeals' decision.

FACTS

This matter was before the Court of Appeals on cross-motions for summary judgment. Under this posture the parties agreed that the case was before the Court for its decision as a matter of law. *See, e.g., Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011) (where cross motions for summary judgment are filed, the parties concede the issue before the appellate court should be decided as a matter of law). The narrow issue in this case was whether the trial court erred in granting summary judgment to the Curiels because EMS was purportedly entitled to judgment as a matter of law under Section 15-78-60(6). A second issue is whether EMS carried its burden of proof under the statute. The appeal in this case was *not* from the denial of EMS's motion for summary judgment, for that ruling is never appealable. *See, e.g., Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003) (the denial of a motion for summary judgment is not appealable, even after final judgment).

Finally, because this appeal was from the grant of the Curiels' cross-motion for

summary judgment, this Court must apply the same standard used by the trial court under Rule 56(c), SCRPC, in reviewing the trial court's decision. *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011); *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011). This Court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to EMS, who was the party opposing the motion that is the subject of this appeal. *Spence*.

Against this backdrop the facts are as follows. On November 22, 2008, Mrs. Curiel was driving Mr. Curiel's vehicle along Secondary Road 3 in Hampton County. (M. Curiel Dep. p. 18, l. 25 - p. 19, l. 17; Appx. pp.32-33). The roadway was a two-lane road, providing one lane in each direction with a solid double-yellow center line. (M. Curiel Dep., p. 19, ll. 1-24; p. 25, ll. 7-9; Appx. pp. 33, 34). The posted speed limit in the area was 55 miles-per-hour. (Schroyer Dep. p. 27, ll. 23-24; Appx. p. 41).

EMT Jason Schroyer was driving the EMS ambulance in the same direction along the same roadway as Mrs. Curiel and approached her vehicle from behind. (Schroyer Dep. p. 31, l. 24; Appx. p. 44). Schroyer's supervisor, Shannon Crouch, was also in the ambulance. (Schroyer Dep. p. 24, l. 19 - p. 25, l. 1; Appx. pp. 39-40). They claim they had received a dispatch to a structure fire and while in route just before the wreck they were informed that there was a burn victim at the site of the fire.² (Schroyer Dep. p. 23, l.

² Although Shroyer and Crouch both indicated in their depositions that they were dispatched to a structure fire and then learned of a victim en route, EMS put forth no other evidence in the form of dispatches or other reports establishing this to be true. Cf. S.C. Code Ann. § 23-47-20 (2013 as amended) (requiring all 911 calls be recorded and those recordings maintained for a period of time); S.C. Code Ann. § 44-61-30 (B) (1976) (requiring EMS services to establish an EMS Program that includes "an electronic patient care reporting system"); S.C. Code Ann. § 44-61-90 (1976) (requiring

23 - p. 24, l. 15; Appx. pp. 38-39; Crouch Dep. p. 6, ll. 15-17; Appx. p. 29).

Schroyer claimed he was driving about 45 miles-per-hour as he approached the Curiel vehicle. (Schroyer Dep. p. 27, ll. 20-22; Appx. p. 41). He claimed he had the emergency lights and siren in use. (Schroyer Dep. p.28, l. 24 - p. 29, l. 2; Appx. p. 42-43). Both vehicles slowed and Schroyer believed the Curiel vehicle had stopped. (Schroyer Dep. p. 31, l. 24 - p. 32, l. 2; Pl. Exh. 1; Appx. p. 44-45). Crouch and Schroyer both claimed Schroyer sounded his horn and began to pass the Curiel vehicle. (Schroyer Dep. p. 29, ll. 8-17; Appx. p. 43; Crouch Dep. p. 13, l. 22-23; Appx. p. 30). Schroyer crossed the center yellow line to move past the Curiel vehicle at the same time that Mrs. Curiel began a left turn into her driveway; Schroyer steered to the right but was unable to avoid the collision. (Schroyer Dep. p. 35, l. 11-p. 41, l. 16; Appx. pp. 46-52).

Following discovery both sides moved for summary judgment. The trial court heard argument and initially issued an order denying EMS's motion. EMS moved for reconsideration and the trial court heard argument again. The court issued an order denying EMS's motion for reconsideration and granting the Curiel's motion for summary judgment as to the Tort Claim Act defense. EMS appealed and the Court of Appeals affirmed. This Court subsequently issued a writ of certiorari to review that decision.

“ambulance service licensees” to create and maintain records regarding patient care).

DISCUSSION

I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE STATUTE AS A MATTER OF LAW IN AFFIRMING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT FOR RESPONDENTS

EMS states the "Question Presented" as follows:

Did the Court of Appeals err in affirming the trial court's order granting summary judgment to the Respondents on the issue of the applicability of the fire protection statute where the Appellant's ambulance was involved in a motor vehicle accident while driving to the scene of a fire to provide medical treatment to the firefighters and a burn victim?

(Petition, p. 1). This statement of the issue is not entirely accurate. Furthermore, the Court of Appeals correctly decided the issue.

First, EMS presented *no* evidence that its ambulance was driving to the scene of the fire "to provide medical treatment to the firefighters." There is no evidence that a firefighter (or anyone else) was injured and in need of services at the time the EMS unit was dispatched, as implied by EMS's statement of the issue. Instead, the only evidence was deposition testimony by the EMTs that the EMS unit was proceeding to the fire to be on the scene as a matter of practice in case the EMTs were eventually needed, and it was not until they were en route that they learned there may be a person at the scene who needed medical attention, or that the injured person may be a firefighter.

EMS tortures the facts further by asserting "it is uncontroverted that EMS personnel were deployed in response to a structure fire *at which there was a victim who required their assistance.*" (Pet. Br. pp. 12-13). What is actually "uncontroverted" solely for purposes of summary judgment is that the EMS unit was dispatched as a matter of

routine and did not learn about a “possible” victim until they were on their way.

Accepting the testimony as true, then the only evidence is that at the time EMS was dispatched, there was no known victim at the fire. EMS concedes as much elsewhere in its brief. (Pet. Br. p. 9).

The Court of Appeals correctly construed the statute. The Court held:

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).

Curiel v. Hampton County E.M.S., 401 S.C. 646, 651, 737 S.E.2d 854, 856 (Ct. App. 2012). The Court based its decision on the rule that, when determining the effect of statutory language, the canon of construction “*expressio unius est exclusio alterius*” or “*inclusio unius exclusio alterius*” holds that “to express or include one thing implies the exclusion of another, or the alternative.” *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). This was a correct statement of the law that has been the law of South Carolina for an extended period of time. *See Mairs v. Smith*, 14 S.C. L. (3 McCord) 52 (Ct. App. 1825) (“the express adoption of a specific provision of an act amounts to a virtual exclusion of all the rest”). As Judge Knott stated 188 years ago:

The act itself contains certain exceptions, and according to the stale maxim, that *expressio unius est exclusio alterius*, we are not to suppose that the legislature intended that any other should be made. The duty of courts is confined to the exposition of the law, and ought not to be extended to supplying supposed omissions of the legislature. We are not therefore authorized to add exceptions to those made by the act.

McCullough’s Adm’rx v. Speed, 14 S.C. L. (3 McCord) 455 (Ct. App. 1826).

In Section 15-78-60(6), the legislature specifically limited this particular

exception to the waiver of sovereign immunity to “the failure to provide [or] the method of providing police or fire protection.” This language thus provides governmental immunity for four (4) distinct things: (1) the provision of police protection; (2) the method of providing police protection; (3) the provision of fire protection; or (4) the method of providing fire protection. There is nothing in the plain words of the statute that includes emergency medical services, either by expression or by implication. The language is not ambiguous, and neither the trial court nor the Court of Appeals needed to construe “fire protection” broadly, as EMS advocates. (Pet. Brief, pp. 9-11).³

The exception found in Section 15-78-60(6) is plain and unambiguous, and protects only those persons who are either deciding the method for fire or police protection or those agencies actually engaged in putting those methods into effect. The underlying lawsuit is not against a municipality for making a negligent decision about how to provide fire protection. It is also not against the agency charged with carrying out the municipality’s decisions about how to provide fire protection for negligence in executing that plan. Instead, the lawsuit is against an ambulance driver for negligence in driving to the scene of a fire. This is not police work, and it is not fighting a fire.

Section 15-78-60(6) does not embrace EMS within its plain language, and to include EMS would be to redraft the statute’s language. As the Court of Appeals recently

³ EMS repeatedly uses some form of the word “clear” when it discusses the statute’s language (Pet. Br. pp. 10, 11, 12), yet then advocates for application of a rule of liberal construction of the language in its favor, contending the statute is ambiguous. (Pet. Br. p. 11). One thing that is truly “clear” from the express language of the statute, however, is its lack of inclusion of “emergency medical services” or “ambulance services” within its language.

stated, “[t]he court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy.” *Consumer Advocate for State v. South Carolina Dep’t of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012), citing *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951). And as this Court stated many years ago:

It is perhaps unnecessary to say that courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws. *There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced.* The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 146-147, 20 S.E.2d 645, 652 (1942). See also *Cox v. County of Florence*, 337 S.C. 340, 347 n. 10, 523 S.E.2d 776, 780 n. 10 (1999) (Court may not engraft additional terms or extra requirements onto a statute; “if [the] legislature had intended [a] certain result in a statute it would have said so”).

The Court of Appeals correctly applied rules of statutory construction in affirming the circuit court’s ruling. This Court should dismiss the writ of certiorari as improvidently granted or, alternatively, should affirm the Court of Appeals’ decision.

II. THE COURT OF APPEALS’S CONSTRUCTION OF THE PLAIN LANGUAGE OF THE STATUTE SHOULD NOT YIELD TO EMS’S CONTENTION THAT THE EXCEPTION SHOULD EMBRACE ANY GOVERNMENTAL EMPLOYEE AT THE SCENE OF A FIRE OR POLICE MATTER

EMS asserts that the exception to the waiver of sovereign immunity found in Section 15-78-60(6) should embrace *any* governmental employee who is on the scene of a fire, so long as they are providing “those services logically provided in conjunction with fire prevention and fire fighting, which clearly would include emergency medical personnel sent in response to a fire, in addition to fire fighting personnel.” (Pet. Br. pp. 10-11). The Court should not be persuaded by this argument.

A. The Legislature Did Not Intend That EMS Be Included with the Term “Fire Protection”

As EMS contends (Pet. Br. p. 10), the Court must liberally construe the Tort Claims Act’s provisions most favorably to limit a governmental entity’s liability. S.C. Code Ann. §15-78-20(f) (2005). EMS notes that “fire protection” is undefined and then invites the Court to “liberally construe” Section 15-78-60(6) to “include those services logically provided in conjunction with fire prevention and fire fighting, which clearly would include emergency medical personnel sent in response to a fire, in addition to fire fighting personnel.” (Pet. Br. pp. 10-11). This argument, however, is not an invitation to “liberally construe” the statute; it is instead an open request for this Court to rewrite the statute to say, “[t]he governmental entity is not liable for a loss resulting from (6) ... the failure to provide [or] the method of providing police or fire protection and all services

logically provided in conjunction with police or fire protection.” The statute does not say that, nor does it say “the failure to provide [or] the method of providing police, emergency medical or fire protection.” The Court should decline this invitation to engraft this language onto the statute.

i. The Court Should Not Rewrite the Statute

In applying the rule of liberal statutory construction, the Court should not rewrite the statute to include language the legislature did not include. *Vaughan v. McLeod Reg'l Med. Ctr.*, 372 S.C. 505, 510, 642 S.E.2d 744, 747 (2007) (where statute’s language is clear and explicit, courts cannot rewrite statute and inject matters into statute which are not in the legislature’s language). Even if this Court is “troubled by this result,” the Court is “not at liberty to rewrite the statutes, and any amendment must come from the Legislature.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 144, 628 S.E.2d 38, 42 (2006). *See also Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (“While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a plain statute.”).

Nor should the Court torture the statute’s language to achieve the result EMS seeks. *Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm’n*, 298 S.C. 179, 379 S.E.2d 119 (1989) (court should not torture the meanings of the statute; words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation). As this Court explained in *Santee Cooper Resort*:

“There is a marked distinction between a liberal construction of statutes ... and the act of a court in ingrafting upon a law something that has been omitted....” [*Hatchett v. Nationwide Mutual Insurance Co.*, 244 S.C. 425, 431, 137 S.E.2d 608, 611 (1964)]. To hold that the statute authorizes more than its plain language allows is to legislate.

Santee Cooper Resort, at 184, 379 S.E.2d at 122. *See, also, Michau v. Georgetown County ex rel. South Carolina Counties Workers’ Compensation*, 396 S.C. 589, 723 S.E.2d 805 (2012) (words in a statute should be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation).

The Court of Appeals decided this case based upon an application of the well-established rule “*expressio unius est exclusio alterius*” or “*inclusio unius exclusio alterius*,” or “to express or include one thing implies the exclusion of another, or the alternative.” There is nothing novel in the application of this maxim of statutory construction to the statutory provision in this case.

This Court should either dismiss the writ as improvidently granted or affirm the lower courts’ rulings.

ii. The Legislature Knows How to Include “Emergency Medical Services” in a Statute That Also Covers Fire and Police Protection

The legislature knows how to include “emergency medical services” or “ambulance services” within a statute, including a statute that also covers police or fire protection. *See, e.g.*, S.C. Code Ann. § 4-21-10 (1976) (“The governing body of any county may by ordinance or resolution provide that the county shall provide *fire protection services, ambulance services* and medical clinic facilities.”) (emphasis added); S.C. Code Ann. § 6-1-530(B)(1) (1997 & Cum. Supp.) (“In a county in which at least

nine hundred thousand dollars in accommodations taxes is collected annually pursuant to Section 12-36-920, the revenues of the local accommodations tax authorized in this article may also be used for the operation and maintenance of those items provided in (A)(1) through (6) including *police, fire protection, emergency medical services*, and emergency-preparedness operations directly attendant to those facilities.”) (emphasis added); S.C. Code Ann. § 6-11-330 (A) (2000) (“A special purpose district that was empowered as of March 7, 1973, to provide *fire protection services* to the area within its boundaries may provide *emergency medical services* to the area within its boundaries if it has received permission, by written resolution, from the governing body of the county or counties in which the district is located, provided that these emergency medical services may not be provided to those parts of the district’s area where emergency medical services are being provided by a governmental entity at the time the district’s governing body determines to utilize the provisions of this section.”) (emphasis added); S.C. Code Ann. § 6-29-510 (D)(5) (1994 & Cum. Supp.) (“A local comprehensive plan must include, but not be limited to, the following planning elements...a community facilities element which considers water supply, treatment, and distribution; sewage system and wastewater treatment; solid waste collection and disposal, *fire protection, emergency medical services*, and general government facilities; education facilities; and libraries and other cultural facilities.”) (emphasis added); S.C. Code Ann. § 23-47-20 (A) (1991 & Cum. Supp.) (“Service available through a 911 system includes *law enforcement, fire, and emergency medical services.*”) (emphasis added). The legislature specifically limited the coverage of Section 15-78-60(6) to fire and police protection and the method of

providing *only* those two services, and did not include “ambulance services” or “emergency medical services” in the section as the legislature had done in other code provisions.

In fact, in May 2013, State Senator Larry Martin introduced S. 380⁴, which would have added the following as an exception to the waiver of sovereign immunity:

“SECTION 1. Section 15-78-60 of the 1976 Code is amended by adding an appropriately numbered item at the end to read:

"() an operator or driver of an Emergency Medical Vehicle as defined by Section 56-5-170(A)(3), while operating or driving the Emergency Medical Vehicle in providing emergency services, unless the vehicle is operated or driven in a grossly negligent manner."

SECTION 2. This act takes effect July 1, 2013, and applies to all actions filed on or after this date.

http://www.scstatehouse.gov/sess120_2013-2014/bills/380.htm.

The bill was amended in committee, passed the Senate on second reading by a 40-0 roll call vote, and received a third reading before being introduced in the House of Representatives. After receiving first reading, however, the bill stalled in the House Judiciary Committee and did not survive *sine die*. The point is that the South Carolina General Assembly considered amending Section 15-78-60 to provide for emergency medical services, indicating its awareness and belief that the current statute providing for exceptions to the waiver of immunity *did not* include those

⁴ This Court may take judicial notice of the legislature’s actions on S. 380 during the 2013-2014 legislative session. See, e.g., *State v. Blackmon*, 304 S.C. 270, 274 n. 2, 403 S.E.2d 660, 662 n. 2 (1991) (Supreme Court took judicial notice of several bills proposed in the legislature on the topic before the Court).

services and that the Court of Appeals' decision is correct.

This Court frequently reviews language from other portions of the Code to highlight the fact that members of the General Assembly know how to expressly include the language a party claims is implied in a particular statute. *See, e.g., State v. Ramsey*, Op. No. 27418 (S.C. Sup. Ct. filed July 16, 2014) (Shearouse Adv. Sh. No. 28 at 109, 112) (in rejecting the State's contention that the term "offense committed in the presence of a law enforcement officer" found in S.C. Code Ann. § 56-7-15(A) included a "freshly committed crime," the Court stated "use of the term 'freshly committed' in [S.C. Code Ann. §] 23-13-60 illustrates the legislature knows how to draft a statute extending an officer's authority to freshly committed crimes."); *Berkeley County School Dist. v. South Carolina Dep't of Rev.*, 383 S.C. 334, 357 n. 15, 679 S.E.2d 913, 925 n. 15 (2009) (Kittredge, J, dissenting) (criticizing an argument about the effect of a tax statute by pointing out "[t]he South Carolina General Assembly knows how to write an unqualified property exemption. See S.C. Code Ann. § 12-37-250 (Supp.2008) (providing an unqualified homestead tax exemption for taxpayers sixty-five and older, among others). Section 12-37-220(B)(47)(a) is a qualified statutory exemption."); *Sonoco Prods. Co. v. South Carolina Dep't of Rev.*, 378 S.C. 385, 662 S.E.2d 599 (2008) (noting that when the legislature drafts one statute it is aware of the use of terms in other code sections).

Had the General Assembly intended that Section 15-78-60(6) include emergency medical services or ambulance services, then the General Assembly knew how to include those entities within the statute. And the fact that the legislature sought to add these services during the most recent legislative session is persuasive evidence that even that

body does not believe Section 15-78-60(6) in its current iteration includes EMS.

Accordingly, this Court should dismiss the writ as improvidently granted or, alternatively, should affirm the Court of Appeals' decision.

B. There Is Nothing about Following the Express Language of the Statute that is Unreasonable or Unjust

EMS asserts that failing to include "emergency medical services" within the term "fire protection" would render "an unreasonable and unjust result." (Pet. Br. pp. 11-14). The Court should not be persuaded to reverse based upon this argument.

Initially, EMS points out for the first time in its brief to this Court two code sections it contends support its view. EMS notes that the South Carolina Code describes "fire departments" (which EMS deems to be "more narrow" than the terms used in Section 15-78-60(6)) as "any organization providing rescue, fire suppression, and related activities including any public or government sponsored organizations engaged in rescue, fire suppression, and related activities." S.C. Code Ann. § 40-80-10(B)(4) (2001). EMS also points out that the Code provides that the "appropriate 'fire authority'" has powers "at a 'scene of a fire or other emergency involving the protection of life or property or any part thereof,'" including "the power and authority to direct such operation as may be necessary to extinguish or control the fire, perform any rescue operation, evacuate hazardous areas, investigate the existence of suspected or reported fires, gas leaks, or other hazardous conditions or situations, and of taking any other action necessary in the reasonable performance of their duty," citing S.C. Code Ann. § 6-11-1420 (1983). (Pet. Br. p. 12). EMS contends these sections mean that "unequivocally, emergency medical

services should be read to fall within the term ‘fire protection,’ [whereas] in this case, it is uncontroverted that EMS personnel were deployed in response to a structure fire at which there was a victim who required their assistance.” (Pet. Br. pp. 12-13).

The difficulties with this argument are three-fold. First, as noted previously, that last sentence distorts the facts. The thing that is *truly* “uncontroverted” is that EMS was *not* dispatched to provide assistance to a victim.

The second difficulty is that this argument is being made for the first time in EMS’s Brief of Petitioner. EMS did not present this position to the trial court or get a ruling from that court on these two provisions. Furthermore, EMS did not make this argument about these Code sections in its brief to the Court of Appeals (App. pp. 57-69), at oral argument, in its petition for rehearing to that Court (App. pp. 110-120), or in its petition for writ of certiorari to this Court. This precise argument is coming very late in this process.

The third difficulty EMS has with this argument is that by pointing out these other statutory provisions, what EMS has further demonstrated to the Court is that the General Assembly was aware of those provisions but did not take any steps to amend Section 15-78-60 until this past legislative session to include EMS within the protection of the statute.

The General Assembly enacted Section 15-78-60 in 1986 as part of the Tort Claims Act in response to the abrogation of the common law doctrine of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). 1986 Act No. 463, § 1. The section initially had twenty-six (26) paragraphs enumerating different

exceptions. Since that time, Section 15-78-60 has been amended sixteen (16) times, most times adding more exceptions to the waiver of sovereign immunity – the statute currently has forty (40) paragraphs. *See* 1988 Act No. 352, §§ 5, 6 (amending paragraphs (15) and (19) to broaden their coverage); 1988 Act No. 373, § 2 (adding paragraph (27)); 1988 Act No. 664 (adding paragraph (28)); 1988 Act No. 675, § 1 (adding paragraph (29)); 1989 Act No. 132, § 2 (adding paragraph (30)); 1990 Act No. 351, § 2 (adding paragraph (31)); 1996 Act No. 386, § 3 (adding paragraph (32)); 1997 Act No. 35, § 6 (adding paragraph (33)); 1999 Act No. 77, § 4 (adding paragraph (34)); 2000 Act No. 362, § 1 (adding paragraph (36)); 2000 Act No. 387, Part II, § 69A.5 (adding paragraph (35)); 2000 Act No. 387, Part II, § 97B (adding paragraph (37)); 2000 Act No. 407, § 3 (adding a paragraph identical to paragraph (37)); 2005 Act No. 6, § 2, eff January 13, 2005 (adding paragraph (39)); 2005 Act No. 81, § 2, eff May 26, 2005 (adding a different paragraph (40)); 2005 Act No. 137, § 2, eff May 25, 2005 (adding paragraph (38)). With complete knowledge of the two code sections EMS cites in its brief – *i.e.*, that a special purpose district for a fire authority provides broad powers under Title 6 and the Firefighters Employment and Registration Act (Chapter 80 of Title 40) defines “fire department” broadly – the legislature *still* did not seek to amend the exceptions to the waiver of immunity to include “emergency medical services” within the ambit of fire protection.

EMS posits that the Court of Appeals’ analysis restricts application of the exception to the waiver of sovereign immunity to the protection of property but not of persons, and provides a string of hypothetical scenarios it contends point up the absurdity of that view. (Pet. Br. pp. 13-14). The short answer to these contentions is that none of

this is what happened in this case – instead, this case involved the claim that an EMT negligently drove an ambulance and caused a traffic collision, injuring Respondents. Furthermore, the behavior EMS sets forth in its hypotheticals would likely cover the actions of a firefighter, who is on the scene to provide fire protection to the property and people for whom the firefighter was dispatched to assist.

Even so, this kind of “slippery slope” argument in which EMS hypothesizes that unless this Court add them to the statute, all forms of mischief will occur, should not be persuasive. (Pet. Br. pp. 13-14). As the Federal Third Circuit Court of Appeals recently stated:

[Appellant] invokes a parade of horrors that, in its view, would follow from our framework.... Like all slippery-slope arguments, the [Appellant’s] point can be inverted with equal logical force.... See Frederick Schauer, *Slippery Slopes*, 99 Harv. L.Rev. 361, 381 (1985) (“[I]n virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim.”). The ease of turning a slippery-slope argument on its head explains why the persuasiveness of such a contention does not depend on its logical validity. *Id.* Instead, the correctness of a slippery-slope argument depends on an empirical prediction that a proposed rule will increase the likelihood of some other undesired outcome occurring. *Id.* (“To some people, one argument will seem more persuasive than the other because the underlying empirical reality ... makes one equally logical possibility seem substantially more likely to occur than the other.”); see also Eugene Volokh, *The Mechanism of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1066–71 (2003) (making a similar point in the context of extending precedent). Because courts usually lack the data necessary for such a prediction, “fear of ... what’s at the bottom of a long, slippery slope is not a good reason for today’s decision.” *Marozsan v. United States*, 852 F.2d 1469, 1499 (7th Cir.1988) (*en banc*) (Easterbrook, J., dissenting). “The terror of extreme hypotheticals produces much bad law,” and so our answer to the [Appellant’s] “extreme hypothetical[s]” is that we will “cross that bridge when we come to it.” *Id.*

B.H. ex rel. Hawk v. Easton Area School Dist., 725 F.3d 293, 317-318 (3rd Cir. 2013).

Cf. Robert H. Bork, *The Tempting of America* 169 (1990) (“Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”), *cited in Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 195 n. 16 (1999).

Lastly, even if the Court believes the result of this case is “unjust,” it is not within this Court’s purview to address that allegedly harsh result. *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 144, 628 S.E.2d 38, 42 (2006) (Court stated “although we are troubled by this result, we are not at liberty to rewrite the statutes, and any amendment must come from the Legislature?”). Rewriting this section is the legislature’s job, and that body considered addressing this very issue with S. 380 during this past session but did not make that change.

The Court should dismiss this writ as improvidently granted or, alternatively, affirm the decisions of the trial court and the Court of Appeals.

C. The Authority EMS Cites Is Meaningfully Distinct from This Case

EMS contends that the Court of Appeals has previously applied a broad interpretation to the “fire protection” exception to the waiver of sovereign immunity. (Pet. Br. pp. 14-15). EMS also cites to cases from other jurisdictions that it claims should persuade this Court to reverse. (Pet. Br. pp. 14-18). The Court should reject these arguments.

i. *Wells v. City of Lynchburg*

EMS contends that the Court of Appeals previously interpreted the “fire protection” statute broadly, citing *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). (Pet. Br. pp. 14-15). *Wells*, however, is meaningfully distinct.

In *Wells*, the plaintiffs’ home was destroyed by fire. They sued the City of Lynchburg claiming negligence in failing to inspect and maintain the fire hydrants and/or water lines for three nearby fire hydrants, and in failing to notify the fire department that the hydrants were not operational. Plaintiffs claimed Lee County was negligent in failing to promptly provide adequate personnel and equipment to extinguish the fire.

The Court of Appeals noted that the “essence” of the complaint against the County was that it failed to provide adequate firefighting personnel and equipment, and that the plaintiffs conceded Section 15-78-60(6) barred that claim. However, the plaintiffs contended their remaining claim against the City for failure to inspect and/or maintain a system of fire hydrants and to notify the proper authorities of inoperative fire hydrants survived despite Section 15-78-60(6).

The Court of Appeals disagreed. The Court first noted that in *Shockey v. Oklahoma City*, 632 P.2d 406 (Okla.1981), the Oklahoma Supreme Court interpreted its version of section 15-78-60(6) based on facts similar to the facts in *Wells*. In *Shockey*, the plaintiff alleged the city negligently failed to properly maintain a fire hydrant or to warn the plaintiffs of its malfunction. In sustaining the dismissal of the plaintiffs’ action, the Court explained:

The general rule is that the operation and maintenance of a fire

department by a municipal corporation is an exercise of a governmental function so as to accord it sovereign immunity from liability when acting in such capacity. 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.

Under § 155(6) appellee is exempted from liability for failure to provide, or the method it employs in providing, fire protection. Fire hydrants, as such, 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. The fire hydrants were installed for the purpose of fire protection. 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.

Wells, 331 S.C. at 304, 501 S.E.2d at 750, quoting *Shockey* at 408 (citations omitted)

(underline added). The Court of Appeals held:

We agree with the reasoning of the Oklahoma court in *Shockey* and hold the South Carolina Tort Claims Act precludes Appellants' action. 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. See, e.g., *Pierce v. Village of Divernon*, 17 F.3d 1074 (7th Cir.1994) (Illinois tort claims act codifies common law rule that a municipality owes the public no general duty of fire protection and that it therefore cannot be held liable either for failing to provide or negligently providing fire protection services; an alleged failure to provide sufficient water or water pressure could be viewed either as a complete failure to provide fire protection or as a failure to provide sufficient facilities to suppress or contain a fire; either way, the municipality is immune); *Lainer Invs. v. Department of Water and Power*, 170 Cal. App.3d 1, 215 Cal. Rptr. 812 (1985) (where California code provided no public entity is liable for the failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities, the city was immune from tort liability for inadequate water supply where valve to city water line was not fully open); *Gans Tire Sales Co. v. City of Chelsea*, 16 Mass. App. Ct. 947, 450 N.E.2d 668 (1983)

(actions against city for negligently failing to supply sufficient water to sprinkler systems to avert fire damages were barred as a matter of law by the doctrine of municipal immunity); *City of Columbus v. McIlwain*, 205 Miss. 473, 38 So.2d 921 (1949) (municipality is not responsible for the destruction of property within its limits by a fire merely because, through the negligence or other default of the municipality or its employees, the members of the fire department failed to extinguish the fire regardless of whether this failure is due to an insufficient supply of water, the interruption of the service during the course of a fire, the neglect or incompetence of the firemen, the defective condition of the fire apparatus, negligence in permitting fire hydrants to become clogged or defective, etc.); *Ross v. City of Houston*, 807 S.W.2d 336 (Tex. App.1990) (city's policy of inspecting fire hydrants was directly connected to the city's method of providing fire protection; therefore, the state tort claims act exclusion from governmental liability for claims arising from the failure to provide or the method of providing fire protection barred suit by homeowner).

Wells, 331 S.C. at 304-305, 501 S.E.2d at 750-751 (emphasis added).

The activities alleged as a basis for liability (failing to inspect, maintain, and warn of defective hydrants) in *Wells* are obviously within the ambit of providing fire protection. *Wells* actually supports the trial court's ruling that driving an ambulance to the scene of a fire to treat and transport anyone who might become injured is not providing fire protection, nor is it the method of providing fire protection.

The Court should find that *Wells* does not support reversal of the trial court or the Court of Appeals. Instead, the Court should either dismiss the writ as improvidently granted or should affirm both lower courts and hold that Section 15-78-60(6) does not include "emergency medical services" within its exception to the waiver of sovereign immunity.

ii. **Cases from Mississippi, Connecticut and California**

EMS contends that “driving to the scene of a fire is included within the definition of ‘fire protection,’” and points to the Mississippi case of *Estate of Williams ex rel. Williams v. City of Jackson*, 844 So.2d 1161 (Miss. 2003) as support for this contention. (Pet. Br. p. 16). *Williams*, however, is meaningfully distinct from this case.

In *Williams*, the narrow issue was immunity for the government because the plaintiff was engaged in criminal activity at the time of the automobile collision. The statute at issue, Section 11-46-9(1)(c) of the Mississippi Code of Laws, provided:

A governmental entity shall not be liable for any claim:

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in disregard of the safety and well-being of any person not engaged in criminal activity at the same time of the injury.

(Emphasis added). The Supreme Court of Mississippi stated: “Fire Truck 20 was answering a fire call and was therefore providing ‘fire protection’ within the meaning of § 11-46-9(1)(c).” That language is what EMS contends supports its position. However, the Court’s focus in *Williams* was on the fact that the plaintiff in that case was “engaged in criminal activity” at the time of the injury. The Mississippi Supreme Court stated:

It is undisputed that Williams’s blood alcohol content was .20%, two times over the limit allowed under the law of Mississippi, at the time of the accident. Driving under the influence is criminal activity in Mississippi.

Williams, 844 So.2d at 1164. Williams contended that his car was stopped at the time of the wreck and, therefore, the fact he was drunk was irrelevant. The Court responded:

Even had plaintiffs' contention been supported by the facts, it would not change the fact that Williams was intoxicated. It is therefore immaterial because it could have had no effect on the outcome of this action. Operating a vehicle involves both the moving and the stopping of a vehicle and when these are done under the influence of alcohol, it is considered criminal activity which, in this instance, operates to limit the duty owed by police and fire personnel under § 11-46-9(1)(c).

Williams, 844 So.2d at 1165 (emphasis added). The Court added:

Plaintiffs' contention that Williams was safely stopped at the intersection is contradicted by the testimony of several witnesses, the point of impact and rest, and the results of the accident reconstruction. The reality is that Williams either stopped in the middle of the intersection or tried to beat the fire truck through the intersection and failed. Either of these possibilities were poor decisions likely induced by Williams's intoxication. A sober person would not stop in the middle of an intersection with a fire truck coming at them. A sober person would also know that they should not try to beat a fire truck across an intersection. All the other drivers at the intersection yielded to the fire truck.

Id. Hence, the operative fact in the decision in *Williams* was the express grant of immunity where the plaintiff, Williams, was engaged criminal activity (DUI). Whether the employees in *Williams* were engaged in "fire protection" was irrelevant because even if they were not, plaintiff could not recover. In sum, the language of the Mississippi statute and the facts of *Williams* renders the fact that a firetruck was providing "fire protection" by answering a fire call irrelevant to the holding, *i.e.*, *obiter dictum*. See, *e.g.*, *Hampton v. Richland County Council*, 296 S.C. 72, 72, 370 S.E.2d 714, 714 (1988) (concluding discussion of a legal principle in an opinion was *dicta* where it was "clearly unnecessary to a resolution of the issue before the court"). *Williams* is thus meaningfully distinct from this case, and should not guide this Court's decision.

EMS next gives parenthetical cites to two more Mississippi cases that it claims are

“in accord” with its description of *Williams*. (Pet. Br. pp. 16-18). Each of these other cases, however, are distinct from both *Williams* and this case in meaningful ways.

The first case is *Maldonado v. Kelly*, 768 So.2d 906 (Miss. 2000). In *Maldonado*, a sheriff’s deputy, accompanied by a fellow officer, was driving his patrol car to the service shop for regular maintenance. He collided with Kelly’s car as he proceeded through an intersection after stopping at the stop sign. The narrow issue in the case was whether Deputy Maldonado’s actions rose to the requisite level of “reckless disregard for the safety of Kelly” at the time of the wreck under Mississippi’s Tort Claims Act. That Act provided governmental entities and their employees immunity for acts within the employee’s course and scope of employment:

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury....

Miss. Code Ann. § 11-46-9(1)(c) (Supp.2000) (emphasis added). In a 5-3 decision, the majority held as a matter of law that the officer’s actions, while negligent, did not rise to the level of reckless disregard necessary for liability under the Act. The Court did not focus on the nature of the activity to decide whether Deputy Maldonado was “engaged in the performance or execution” of his duties as inferred by EMS’s parenthetical description of the case. The precise issue was whether the trial court applied the appropriate standard of care, not whether the Act applied to the deputy’s actions. Citing this case in the manner in which EMS cited it is, therefore, misleading.

The second case, *Reynolds v. County of Wilkinson*, is equally unavailing to EMS.

936 So.2d 395 (Miss. Ct. App. 2006). In *Reynolds*, the Court noted the relevant statute provided that a governmental entity or employee is immune from suit as long as that person is “engaged in the performance or execution of duties or activities relating to police or fire protection....” Miss. Code Ann. § 11-46-9(1)(c) (Rev. 2002). The Court stated:

* * * This does not require that a law enforcement officer be then engaged in direct action to apprehend a criminal. Maintenance of a police vehicle has been held to constitute an activity “related to police ... protection.” *McGrath v. City of Gautier*, 794 So.2d 983, 986 (Miss. 2001). The *McGrath* court reasoned under precedents that predated the Tort Claims Act that the relevant distinction revolved around “whether the municipality acted in a governmental or proprietary capacity.” *Id.* The court held that under the Tort Claims Act, when “an injury is caused by a police vehicle, operated and maintained by the police department, liability will automatically be precluded because the maintenance of a police department is a governmental function, for which municipalities are exempt.” *Id.* at 987.

The same reasoning applies to county-owned and operated law enforcement vehicles. Using a county sheriff’s vehicle to drive to a location in order to procure keys for county gas pumps is as much of a governmental function as the vehicle maintenance discussed in *McGrath*.

936 So.2d at 397. Thus, the Court was deciding only the issue of whether a police officer’s actions were governmental or proprietary at the time of the wreck. The narrow holding here is that a police officer who was using a county-owned and operated law enforcement vehicle to go to a hardware store to obtain spare keys for a county gas pump was acting in a “governmental” capacity for purposes of the Mississippi statute that expressly covers “activities relating to police or fire protection....” This is a far cry from stating that the Mississippi statute would reach an emergency medical services vehicle on the same mission, or even proceeding to the scene of a fire or police emergency.

EMS contends that “the outer limits to which the fire protection statute extends” is demonstrated by the Mississippi case of *Herndon v. Mississippi Forestry Comm’n*, 67 So.3d 788 (Miss. Ct. App. 2010). That case, however, is distinct from this case in important and meaningful ways. As with all of these cases, the facts are important.

In August 2005, Hurricane Katrina caused widespread destruction, including an extremely high amount of downed timber and storm debris. This situation, coupled with severe drought conditions in October 2005, created a significant wildfire hazard in southern Mississippi. In September 2005, the Mississippi Forestry Commission (MFC) issued a news release stating that twenty counties in southern Mississippi, including Pearl River County, were under “official bans on open outdoor burning.” The MFC determined it needed a bulldozer for fire-protection services in Pearl River County and in October 2005, MFC employee Jimmy Bond, was ordered by his supervisor to drive an MFC transport truck to pick up the bulldozer from the repair shop the following morning.

The next morning Bond arrived at the MFC field office in Poplarville, Mississippi. Bond drove the transport truck to the field office entrance, preparing to enter onto Highway 53. There was a heavy fog present. Bond looked up and down the highway for oncoming traffic, and seeing none, he began turning onto the road.

At the same time, Herndon was traveling at approximately 40 miles per hour on Highway 53. Herndon came upon the MFC truck, and he swerved, hitting the rear tires of the MFC truck. Herndon and his wife filed a complaint alleging that the MFC and Bond were liable for his resulting injuries. The circuit court granted a motion for summary judgment filed by the MFC, holding that the MFC and Bond, as its employee, were

immune from liability under the Mississippi Tort Claims Act (MTCA) and the Mississippi Emergency Management Law (MEML). The circuit court also found that Bond's actions did not constitute reckless disregard.

The Mississippi Court of Appeals affirmed, stating:

While the Herndons are correct that our courts have not applied this statute to the MFC, on its face, the statute does not limit such immunity to police officers and fire departments. It merely states that the duties or activities must relate "to police or fire protection." Bond was not merely a truck driver; he was a forest ranger with fire-suppression duties clearly outlined in his job description. In his affidavit, Bond stated: "As a fire crew member, I was responsible for operating trucks and bulldozers, maintaining fire lanes, assisting with back burning to prevent fires, and performing general fire-fighting duties. In particular, on October 20, 2005, I was operating the 1991 International Flatbed truck in route to pick-up the bulldozer needed for fire prevention, fire suppression and general fire-fighting duties on that day." As the MFC participates in fire-fighting activities, it is prone to emergency situations such as those faced by the police or traditional firefighters. In fact, the record reflects that numerous wild fires were occurring all over south Mississippi during that time period, including three in Pearl River County on the day prior to the accident. Thus, we find nothing that would preclude the application of this statute to the MFC.

67 So.3d at 792-793 (emphasis added). Thus, the employee in *Herndon* was a "fire crew member" and had as part of his job description "fire suppression duties." His employer, MFC, "participate[d] in fire-fighting activities." The employee, Bond, and his employer, MFC, were each expected to be regularly "engaged in the performance or execution of duties or activities relating to ... fire protection " under Mississippi Code Annotated Section 11-46-9(1)(c).

Next, the Mississippi Court of Appeals noted that the Herndons contended that because Bond's task was merely to pick up a bulldozer, which is a maintenance job and

not contemplated under the statute, he was not immune from liability as the statute contemplates emergency services provided by policemen and firemen. The Court stated:

However, immunity under the MTCA may still apply in cases where the employee is engaged in ordinary duties related to police and fire protection. In *Maldonado*, a deputy sheriff was driving to get his patrol car serviced and was involved in a vehicular accident at an intersection where his vision was partially blocked. The Mississippi Supreme Court held that the deputy was immune from liability. Also, in [*Reynolds*], this Court held that a deputy sheriff, who was involved in an accident while going through an intersection “en route to a hardware store to have spare keys made for county gas pumps[,]” was engaged in a governmental function and subject to immunity under the MTCA. See also [*McGrath*] (“the maintenance of a police department is a governmental function, for which municipalities are exempt.”).

Here, the bulldozer that was to be picked up by Bond was used to create fire lanes and clear storm debris. It was being used for a task related to the fire-protection services of the MFC. Therefore, Bond’s task of picking up the bulldozer was within the scope of the statute. Accordingly, we find no error in the circuit court’s finding that the MFC and Bond were immune from liability under the MTCA.

67 So.3d at 792-793(emphasis added; citations omitted). That is, because the reason that Bond was acting for the MFC related directly to “fire-protection services of the MFC,” the fire protection statute was triggered. The facts in *Herndon*, therefore, are distinct from this case in a very meaningful way.

EMS also points to a case from California and a case from Connecticut, but neither of these cases supports reversal here. In *Varshock v. Dept. of Forestry & Fire Protection*, the California Court of Appeals for the Fourth District described the question before the court as:

[W]hether sovereign immunity under Government Code section 850.4 (section 850.4) “for any injury caused in fighting fires” or an exception under Vehicle Code section 17001 imposing liability for death

or injury “proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle” applies when death and injury result from the use of a fire engine in an attempt to rescue persons and save a home from being destroyed by a wildfire. We conclude that section 850.4 immunity prevails over the Vehicle Code section 17001 exception where, as here, death or injury results from a firefighter’s allegedly negligent operation of a motor vehicle at the scene of a fire while attempting to rescue persons from the fire and to extinguish the fire. We therefore affirm the summary judgment in favor of California Department of Forestry and Fire Protection (CAL-FIRE).

125 Cal.Rptr.3d 141, 144 (Cal. Ct. App. 2011) (emphasis added). The facts of *Varshock* are revealing:

Several wildfires burned through San Diego County in October and November 2007. One such fire was the Harris Ranch fire, which swept over more than 90,000 acres and destroyed more than 450 structures.

Thomas Varshock (now deceased) lived with his wife Dianne and their son Richard in a mobilehome on a piece of property (the Property) atop a remote ridge within the area consumed by the Harris Ranch fire. When the fire approached the Property, the Varshocks evacuated. Dianne drove away first, and Thomas and Richard followed approximately five minutes later in separate vehicles.

As they were evacuating, Thomas and Richard encountered a group of firefighters. They demanded that the firefighters “do something” to save the Property.

The firefighters then proceeded in their engine towards the Property, and Thomas and Richard followed on their all-terrain vehicle (ATV). When the engine encountered thick smoke, the fire captain decided to back out to a location where he and his crew could await reinforcements. While backing out, the fire engine struck the ATV, which apparently had already broken down; Richard and Thomas got off the ATV, manually moved it to the side of the road and banged on the windows of the fire engine. Because the ATV had broken down and conditions were too dangerous to leave them outside, the fire captain told Richard and Thomas to get inside the fire engine. At that point, the fire captain saw flames behind the fire engine and believed there was a clearing at the Property, so he again proceeded toward the Property.

When they arrived at the Property, the firefighters found a shed that was ablaze and saw several small spot fires near the mobilehome, which did not then appear to be on fire. The fire captain parked alongside the mobilehome, and the firefighters exited the fire engine and began spraying water on the burning shed and embers beneath the mobilehome. As the fire captain walked around the mobilehome, he heard glass breaking and saw the interior was on fire. He instructed his crew to get back into the fire engine so that they could get away from the burning mobilehome.

As the captain tried to back the fire engine away from the fire, the wind increased and directed flames across the engine. The engine “died,” and the vehicle was subjected to intense heat and surrounded by thick smoke. When the windows of the fire engine shattered and flames entered the cab, the captain instructed everyone to get out.

Thomas was unable to exit the engine and perished at the scene. Richard and the firefighters survived, but each sustained serious burn injuries.

125 Cal.Rptr.3d at 144. The California statute provided:

Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, for any injury caused in fighting fires.

West’s Ann. Cal. Gov. Code § 850.4 (2012). The Court of Appeals stated:

[T]he type of conduct to which the Legislature intended section 850.4 immunity apply is indicated by its choice of the phrase “injury caused in fighting fires.” “The language ‘injury caused’ necessarily implies that an ‘act or omission’ has occurred....” The language “in fighting fires” further indicates the Legislature intended to restrict the scope of section 850.4 immunity to public entities’ and their employees’ tortious acts or omissions “committed during the course of fighting fires.” Included within the course of fighting fires are acts or omissions of public entities or employees in responding to a fire, because “[g]etting to the fire quickly is of the very essence of firefighting.”

125 Cal.Rptr.3d at 146-147(citations omitted). The Court held:

In sum, we conclude that by relieving public entities and

employees of liability “for any injury caused in fighting fires” under section 850.4, the Legislature intended immunity to apply to any claim based on death, personal injury, or property damage that results from an act or omission of a public entity or employee while responding to or combating an actual fire.

125 Cal.Rptr.3d at 147.

The key to the case was that the death occurred while a firefighter was engaged in fighting the fire. EMS plucks the last clause of the last sentence out of context to give the impression that the Court’s holding was broader than it was. Placed back into the context of the factual background, it is apparent that the actors there (firefighters) were engaged in activity (fighting a fire) that was covered by the California statute.

In *this* case, however, the actors were not firefighters, but were EMTs, and they were purportedly driving an ambulance to the scene of a fire in the event medical services were needed. The employees testified that neither of them were intending to fight the fire, nor were they there to do so. *Varshock*, therefore, is irrelevant and deals with circumstances that are both factually and legally different from this case.

Finally, EMS cites to the Connecticut case of *Jewett v. City of New Haven*, 38 Conn. 368 (Conn. 1871), claiming the court held “the city was immune under the common law when the city’s driver of a horse-drawn hose-cart injured the plaintiff while the driver was responding to the scene of a fire.” (Pet. Br. p. 17). Apart from the fact that *Jewett* was decided over 140 years ago under common law sovereign immunity, the case is completely irrelevant to this case.

In *Jewett*, the plaintiff was injured through the carelessness of one of the members of the fire department of the city of New Haven, called a hose-cart driver, who was

engaged with the department at the time in efforts to extinguish a fire that was raging in one of the wards of the city. At this time fires had broken out in different sections of the city threatening serious destruction to property. At one of the fires the department was in need of additional hose, and the driver was told by his superior officer to proceed with all possible dispatch to the engine house and procure the necessary hose. The plaintiff's injury occurred while the driver was obeying the order.

The Court described the issue before it as follows:

the case presents the naked question whether the driver was the servant of the city while engaged in driving the hose-cart that injured the plaintiff, so that the principle of *respondeat superior* applies to the city. This question suggests the consideration of another question, and that is were the fire department acting for the public in the extinguishment of these fires, or were they simply transacting the private business of the city?

Slip Op. at 3. The Court compared fire fighting to police protection, described the impact fires have on the economy and social structure, and answered the question as follows:

In view of these considerations, we think this law must be regarded as imposing a public duty for the public welfare, and that the fire department of the city when engaged in extinguishing fires are exercising one of the functions of government for the general good.

Slip Op. at 5.

Thus, the issue in *Jewett* became whether the City was liable for the tort of the fireman under *respondeat superior* (that is, because the fireman was purportedly transacting the City's private business and not performing acts for the public good). The Court concluded:

A majority of the court are satisfied that the relation of master and servant does not exist between the city and its fire department. We think, in a case like the present one, where the question is whether the principle

of *respondeat superior* applies to a municipal corporation, it should distinctly appear, in order to hold them liable, that the service in which the party doing the mischief was engaged at the time was private and not public; that it was not rendered for others as acts of benevolence, while the party was laboring for their benefit, in their employment. Municipal corporations are different from those of a monied character. A stranger coming to reside within the territorial limits of a city becomes *instante* a member of the corporation by force of law. He has no will of his own to exercise in the matter. Surely the principles of law should not be strained in order to hold such a party bound for the acts of those he had no voice in appointing.

A majority of the court are therefore of the opinion that judgment should be rendered for the defendants; and so we advise.

Slip Op. at 9.

Therefore, *Jewett* stands for the narrow holding that fire fighting is a public duty for the public benefit and is not the City's private business. See *Bailey v. City of Middletown*, 7 Conn. Supp. 90 (Conn. Super. 1939) (characterizing *Jewett* as standing for the proposition that "a municipal corporation is exercising a governmental function when maintaining and operating a fire department pursuant to its legislative authority, and while in the exercise of that function is not liable for the negligent acts of its officers and servants"). *Jewett* does not provide some broad pronouncement that would embrace the activity in this case within the confines of Section 15-78-60(6).

Contrary to EMS's contention, these cases do *not* support its position that "it is a governmental entity that's provision of emergency medical services in response to a fire, require it to be included [within] the fire protection exception...."(Pet. Br. p. 18). EMS has either misstated the narrow holdings of these cases or plucked sentences out of context. As demonstrated above, once the facts of each of these cases is examined and the

statements are placed properly in context, the principles contained in those cases are irrelevant to the issue presented by this case.

The Court should dismiss the writ in this case as improvidently granted or, alternatively, should affirm the decisions of the trial court and the Court of Appeals.

III. THIS COURT SHOULD AFFIRM BASED UPON THE UNCHALLENGED FINDING BY THE TRIAL COURT THAT EMS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE CURIELS' ALLEGATIONS FALL WITHIN THE EXCEPTION TO THE WAIVER OF IMMUNITY FOUND IN SECTION 15-78-60(6)

In a footnote, the trial court stated:

Furthermore, as the burden of proof is on the governmental entity asserting a limitation upon liability, this Court finds that Hampton County E.M.S. has failed to meet its burden of showing that Plaintiffs' allegation[s] fall within this exception to the waiver of immunity. See, *Wooten v. S.C.D.O.T.*, 326 S.C. 516, 485 S.E.2d 119 (S.C. Ct. App. 1997).

(Appx.6, n. 3) (emphasis added). This is a separate ruling that even if the exception to the waiver of immunity under Section 15-78-60(6) was implicated, EMS failed to carry its burden of establishing that the Curiels' allegations in the complaint fell within it.

EMS did not challenge this separate ruling in its statement of the issues on appeal in its brief to the Court of Appeals. (Appx. p. 60). Furthermore, there is no argument in the brief that this finding by the court is erroneous; in fact, there was no challenge at all to it. Accordingly, this ruling is now the law of this case. *See, e.g., Robinson v. Estate of Harris*, 391 S.C. 114, 705 S.E.2d 41 (2011) (an unchallenged ruling, right or wrong, is the law of the case); *Garnett v. WRP Enterprises, Inc.*, 380 S.C. 206, 669 S.E.2d 591

(2008) (an unchallenged finding becomes the law of the case). This ruling is therefore an appropriate basis to affirm the trial court's decision. *See Portman v. Garbade*, 337 S.C. 186, 522 S.E.2d 830 (Ct. App. 1999) (unappealed alternative ground stands as the law of the case and constitutes a basis for affirming the trial court); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (failure to appeal an alternative ground of the judgment below will result in affirmance).

Furthermore, the record supports this finding by the trial court. Shannon Crouch was the EMS crew chief (R.p.37, ll. 19-25; Appx. p. 39) and was in the ambulance at the time of the wreck. In her deposition, Ms. Crouch stated:

Q. * * * On this call were you responding on behalf of the fire department?

A. We were responding to a patient that was burned.

Q. Okay. So the answer would be no?

A. No.

Q. You weren't going to fight the fire?

A. No.

(R.p.27, ll. 15-21; Appx. p. 29).

In his deposition, EMT Jason Schroyer, who was driving the ambulance, stated that he worked part-time for Allendale County EMS and was a volunteer fireman with the Brunson Volunteer Fire Department. (R.p.34, l. 25 - p.35, l. 5; Appx. p. 36). When asked whether he was responding to a call at the time of the wreck, Schroyer stated, "Yes, sir. We had just left Hampton Hospital to respond to a structure fire." (R.p.36, l. 23 - p.37, l.

1; Appx. pp. 38-39). However, when asked if he was working for the fire department in Hampton at the time of the wreck, Shroyer stated, "No, sir, I do not believe I was."

(R.p.51, ll. 6-8; Appx. p. 53). The following colloquy then took place:

- Q. * * * But when you were responding to the call and driving that ambulance, you weren't working for the - -
- A. No. Not the - -
- Q. - - fire department?
- A. - - fire department, no, sir.
- Q. And you weren't responding to provide any fire protection. You weren't responding to the fire in that capacity, were you?
- A. No, sir. We were there for rehab. Of course, our - - we had our patient was our number one priority. We were also there for, you know, rehab of the firefighters if some - - if some injury were to occur, we would be there.
- Q. Okay. Well, were y'all there to rehab the firemen or were you called out to this burn victim?
- A. We didn't know about the burn victim at first, so - - but as soon as we - - if we'd have made it on scene and we knew we had a burn victim, that burn victim was the number one priority.

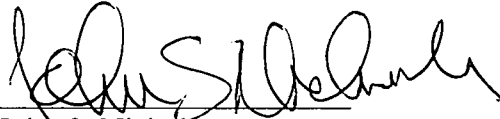
(R.p.51, l. 12 - p.52, l. 5; Appx. pp. 53-54). EMS did not present any evidence that the EMTs were engaged in any activity that constituted providing fire protection, or the method of providing fire protection. The trial court's alternative ruling is therefore supported by the record.

Accordingly, this Court should determine this unappealed ruling is the law of the case and is dispositive of this matter.

CONCLUSION

For the reasons stated, this Court should dismiss the Writ of Certiorari as improvidently granted. Alternatively, the Court should affirm the Court of Appeals and should remit this case to the circuit court for further proceedings consistent with its ruling.

Respectfully submitted,



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August 5, 2014

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Civil Action No. 2009-CP-25-00517
Appellate Case No. 2013-000391

401 S.C. 646, 737 S.E.2d 854 (Ct. App. 2012)

Maria T. Curiel and Martin L. Curiel, Respondents,

v.

Hampton County E.M.S., Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Brief of Respondents* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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AUG 7 2014

S.C. Supreme Court