THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2014-CP-15-135

Appellate Case No. 2016-001626

Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves,.....	Respondent/ Appellant,
v.	
South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF],.....	Appellant/ Respondent.

Final Reply Brief of Appellant/Respondent

C. Mitchell Brown
Brian P. Crotty
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH, LLP
Post Office Box 11070
Columbia, South Carolina 20211-1070
(803) 799-2000

Attorneys for South Carolina Municipal Insurance and Risk Financing Fund

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Argument

I. There is only a total of $1,000,000 of coverage under the SCMIRF Coverage Contract for the verdicts rendered against Cottageville and Price and the claims made against Craddock.

SCMIRF's Coverage Contract provides only a total of $1,000,000 in coverage for the verdicts rendered in the Cottageville Action and the claims asserted in the Craddock Action. Those verdicts and claims all fall solely within the "Personal Injury" coverage of Section IV of the Coverage Contract. The terms in the Coverage Contract's General Provisions Section (Section I), and Section IV (Law Enforcement Liability) establish that only a single limit of $1,000,000 in coverage applies to this situation. The fact that there exists multiple claimants, in the form of Reeves and his statutory beneficiaries, does not create duplication in coverage. Additionally, the fact that multiple covered persons, in the form of Price, Craddock and Cottageville, committed the civil rights violation also does not create duplications in coverage. Moreover, the fact that there may have been variations in the conduct by Price, Craddock, and Cottageville giving rise to the civil rights violation does not create a situation where duplication of the $1,000,000 limit exists. That is so because, even under Reeves's formulation of the Coverage Contract, the coverage question is decided by the type of injury suffered by Reeves as defined by the Coverage Contract, regardless of the number of "Occurrences." The unambiguous contract language yields but one conclusion—the verdict and Reeves's claims all constitute "Personal Injury" as defined by the Coverage Contract.

Where the question before a court is one of coverage, "the policy itself should be examined to see whether coverage is provided by its terms." *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 499, 544 S.E.2d 637, 640 (Ct. App. 2001). "Insurance policies," similar to the SCMIRF Coverage Contract, "are subject to general rules of contract construction," and courts "must give

policy language its plain, ordinary and popular meaning." *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). When the Coverage Contract is viewed in its entirety, the plain meaning of the provisions applicable to coverage under Section IV unambiguously establish that there is a $1,000,000 liability limit that applies to all of Reeves' claims.

In the present action, it is undisputed that the relevant Coverage Section is Section IV. Under that section, SCMIRF agreed to pay the sums a member or covered person becomes obligated to pay because of a "**Wrongful Act** ... which results in:

> a. ... **Bodily Injury** which is first caused and first become manifest during the **Coverage Period**, provided the **Wrongful Act** amounts to an **Occurrence**; or
>
> b. **Personal Injury** ... which is first caused and first becomes manifest during the **Coverage Period**.

(Coverage Contract at Sec. IV., ¶ A.1., R. 156) (emphasis in original). This provides two potential paths to coverage—coverage for "Bodily Injury" or coverage for "Personal Injury" where such injury is the result of a "Wrongful Act."

However, in this case, ***coverage cannot exist simultaneously under both of these paths*** because the Coverage Contract has clear provisions limiting the application of duplicate coverage under these circumstances. Specifically, the definition of "Bodily Injury" in Section IV. ¶ G.4. of the Coverage Contract provides:

> However, for purposes of this Section IV, **Bodily Injury** does not include such injuries if they result directly or immediately from the infliction of **Personal Injury**, including without limitation assault and battery; any such resulting injuries shall be deemed to be part of the **Personal Injury**.

(*Id.* at Sec. IV., ¶ G.4., R. 166) (bold emphasis in original; underline added). "Bodily Injury" that results from the infliction of "Personal Injury" is subsumed into the "Personal Injury." The

Coverage Contract's prohibition on duplicate coverage for related "Bodily Injury" and "Personal Injury" is reaffirmed in its general Provisions which explicitly provide that "[n]o **Offense** will be deemed also to constitute separately an **Occurrence** *for coverage purposes*, or vice-versa." (*Id.* at Sec. I., ¶ C.9., R. 112) (bold emphasis in original, italics added).

Thus, under Section I, the basis for a "Personal Injury" (an "Offense") cannot also be the basis for a "Bodily Injury" (an "Occurrence"). Section IV makes clear the only available coverage is for "Personal Injury." Here, all of the claimed "Bodily Injuries" (the death of Bert Reeves and the mental anguish and suffering arising from that death) "result[ed] directly or immediately" from the claimed "Personal Injury" (the § 1983 violation), resulting in coverage only based on "Personal Injury" because any and all "Bodily Injuries" are deemed to be part of that "Personal Injury."

Reeves asserts that in order to determine whether more than $1,000,000 in coverage exists, there must first be a determination as to whether "separate and distinct occurrences, wrongful actions, or conduct occurred," and that only after that determination has been made should a decision as to whether any "Bodily Injury" is deemed part of the "Personal Injury." (Response Br. of Respondent/Appellant at 7). This is both incorrect and illogical. The Coverage Contact contains numerous provisions specifically intended to limit SCMIRF's liability in certain circumstances, including:

- Sec. I., ¶ B.5. (R. 108-109) (providing that repetitions of the same basic "Offense" will be treated as one "Offense" subject to a single coverage limit);
- Sec I, ¶ C.9. (R. 112) (providing that a single coverage limit applies to all claims or suits involving substantially the same injury or damage);
- Sec. I., ¶ C.9. (R. 112) (providing that the same conduct or wrongful act(s) cannot separately constitute both an "Offense" supporting Personal Injury and an "Occurrence" supporting Bodily Injury, and vice versa);
- Sec. I., ¶ C.9 (R. 112) (providing that a single Coverage Limit applies to any Offense or Occurrence, regardless of the number of claimants, suits, or claims);

- Sec I., ¶ C.9. (R. 112) (providing that any act(s) or omission(s) that might be described as either an "Offense" supporting Personal Injury or an "Occurrence" supporting Bodily Injury will be treated as a single event for coverage purposes, subject to a single Coverage Limit);

- Sec. IV., ¶ D.2 (R. 157) (providing that the total liability of SCMIRF for any one occurrence/wrongful act is limited to $1,000,000 per "Member" regardless of the number of "Covered Persons" involved or the number of claims made);

- Sec. IV., ¶ D.2. (R. 157) (providing that continuing, serial or repeated instances of Personal Injury will be considered as one occurrence/wrongful act, regardless of the number of covered persons involved in causing or failing to [prevent] such injuries – and only a single Coverage Limit applies); and

- Sec. IV., ¶ G.4. (R. 166) (providing that, for the purposes of Section IV, "Bodily Injury" does not include injuries that result directly and immediately from the infliction of Personal Injury, and that such injuries shall be deemed to be part of the Personal Injury).

Reeves' view ignores these provisions and their intended effect.

In this case there was only one "Wrongful Act" giving rise to the "Personal Injury"—the violation of Bert Reeves' civil rights resulting in his death. However, even if the different actions or omissions of Cottageville, Price and Craddock are considered, they are repetitions of the same basic "Offense," or constitute serial or repeated instances of "Personal Injury," and, under the terms of the Coverage Contract, they do not result in duplication of coverage. The Coverage Contract contains non-duplication provisions which focus specifically on "Personal Injury" and its sub-component "Offenses." With regard to "Offenses," Section I explicitly provides:

> All repetitions of the same basic **Offense** involving any offended person and/or organization or group of persons and/or organizations, whether or not there are different witnesses to the **Offense** or there is a variation in the conduct constituting the **Offense**, will be treated as one **Offense**, subject to a single **Coverage Limit**, even if the **Offense** occurs over more than one **Contract Period**.

(*Id.* at Sec. I., ¶ B.5., R. 109) (bold emphasis in original, underline emphasis added). Even if the same basic "Offense" offends multiple people, it is treated as only ***one*** "Offense" and is subject to

a single $1,000,000 Coverage Limit. Furthermore, this limitation applies even if there is some ***variation in the conduct*** that constitutes the "Offense." Thus even if different conduct resulted in the "Offense," it remains only one "Offense." Applied to the facts of this case, the "Offense" was the violation of Bert Reeves' civil rights. While it involved Cottageville, Price and Craddock as the offenders, their repetition of this same offense does not result in their being multiple offenses. Similarly, the fact that there are multiple offended parties (Bert Reeves and his statutory beneficiaries) does not result in duplication of coverage. Rather, the Coverage Contract requires that this be treated as one "Offense," subject to a single Coverage Limit.

Section IV of the Coverage Contract also addresses this point. Specifically, paragraph D.2. of that section provides:

> ... all continuing, serial, or repeated instances of **Personal Injury** or **Advertising Injury** will be considered as one occurrence/wrongful act, regardless of the number of **Covered Persons** involved in causing or failing to permit such injuries or the number of persons injured and only a single Coverage Limit . . . will apply to all claims arising from such continuing, serial, or repeated conduct, regardless of the number of Coverage Periods during which such conduct occurred or continued.

(*Id.* at Sec. IV., ¶ D.2., R. 157) (bold emphasis in original, underline emphasis added). Under the above provision, where there are continuing, serial, or repeated instances of "Personal Injury" they are treated as only one "Wrongful Act." This applies whether or not there are multiple persons causing the injuries or multiple persons injured. The result remains that only a single Coverage Limit applies.

Reeves asserts that the non-duplication of coverage provision found in Section I.B.5 of the Coverage Contract only applies to repetition of the "same basic conduct," and that where "non-similar and separate acts or omissions occur" they result in "separate and individual offenses." (Response Br. of Respondent/Appellant at 11). This argument, however, flatly misstates the

relevant language of the Coverage Contract and ignores key language that directly refutes this contention. Specifically, Section I., ¶ B.5. **does not** use the phrase "same basic conduct" which Reeves repeatedly misquotes throughout her brief. Rather, it states "repetition of the *same basic* ***Offense***." (Coverage Contract, Sec. I., ¶ B.5., R. 109) (Bold emphasis in original, italics and underline added). The "Offense" in question is the violation of Bert Reeves' civil rights. The issue is whether that same "Offense" is repeated multiple times, by multiple actors, against one or more offended persons. The issue is ***not*** whether there were "non-similar acts or omissions" resulting in the "Offense." To the contrary, Section I., ¶ B.5. specifically provides that repetitions of the "same basic Offense" will be treated as just one Offense "**whether or not ... there is *variation in the conduct* constituting the Offense**." (*Id.*) (emphasis added). Thus, directly contrary to Reeves' argument, the Coverage Contract explicitly contemplated that different acts or omissions and different conduct might occur but still provides that where such variations in conduct result in the same basic "Offense," all such conduct results in there being only one "Offense," and one coverage limit.

Reeves similarly attempts to avoid the non-duplication of coverage provision contained in Section IV.D.2. (providing that continuing, serial, or repeated instances of "Personal Injury" will be considered as one occurrence/wrongful act, regardless of the number of Covered Persons). First, Reeves asserts that coverage under Section IV is triggered by a wrongful act that amounts to an occurrence. (Response Br. of Respondent/Appellant at 11-12). Reeves then contends that the liability limiting provisions of Section IV require separate analysis of each occurrence/wrongful act such that the involvement of multiple covered persons in one specific wrongful act would be subject to a single $1,000,000 limit, but separate wrongful acts by separate covered persons would not. (Response Br. of Respondent/Appellant at 13). This argument is flawed. Coverage under

Section IV is ***not*** triggered merely by a wrongful act. Rather, coverage is only triggered by a wrongful act *which results in* either "Bodily Injury" or "Personal Injury."

As previously discussed, a wrongful act cannot be the basis for coverage under both "Bodily Injury" and "Personal Injury" where the injury results from the "Personal Injury." In such cases coverage only exists under the "Personal Injury" provisions. Thus, multiple separate acts of negligence that are ultimately subsumed by the same basic "Offense" giving rise to a "Personal Injury" do not result in duplication of coverage.

Reeves also argues that the "No Duplication of Coverage or Coverage Limits" provision contained in Section I., ¶ C.9. of the Coverage Contract does not apply to limit coverage in this case to the single $1,000,000 limit. (Response Br. of Respondent/Appellant at 14-15). Specifically, Reeves provides an edited quote from this section and asserts that it only applies to limit coverage where entirely different coverage sections of the Coverage Contract could apply. This argument, however is disingenuous. The portion of this section that is omitted from Reeves' brief is the key passage at issue—which provides: "No **Offense** will be deemed also to constitute separately an **Occurrence** for coverage purposes, and vice versa." (Coverage Contract, Sec. I., ¶ C.9., R. 112) (emphasis in original). This provision is explicitly intended to apply "***for coverage purposes,***" and this omitted language directly refutes Reeve's argument on this point. "Occurrence" in this passage refers to coverage for "Bodily Injury." Thus, in addition to providing that one cannot recover under multiple coverage section of the Coverage Contract, Section I.C.9. also provides that, for coverage purposes, an "Offense" giving rise to "Personal Injury" cannot also be an "Occurrence" giving rise to "Bodily Injury."

II. The relevant provisions of the Coverage Contract are not ambiguous.

Reeves asserts that the trial court correctly held that there is an ambiguity in the Coverage Contract as to whether "occurrence" is defined by different acts of negligence or the resulting damage. (Response Br. of Respondent/Appellant at 18-19). This is incorrect. The trial court held that "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." (Order filed 6/29/16 at p. 6, R. 6). The trial court's emphasis on the term "occurrence" was misplaced and its finding of an ambiguity as to the meaning of that term was incorrect.

The Coverage Contract provides an unambiguous definition for this term:

> "**Occurrence**" means an accident which results in **Bodily Injury** or **Property Damage**, the original cause of which and the initial damage from which happened during the **Contract Period** set forth in the Declarations.

(Coverage Contract at Sec. I., ¶ B.4., R. 108). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Williams v. GEICO*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). The definition provided in the Contract does not create any ambiguity. Moreover, the meaning of the term "Occurrence" has no effect on the existence or amount of coverage in this matter.

The term "Occurrence" in the Coverage Contract, as it applies in this case, relates to coverage for "Bodily Injury." (Coverage Contract at Sec. IV., ¶ A.1.a., R. 156). In contrast, the term "Occurrence" is **not** part of the coverage for "Personal Injury." (*Id.* at Sec. IV., ¶ A.1.b., R. 156) (providing coverage for a "Wrongful Act" that results in "Personal Injury"). Thus, even if there existed ambiguity as to how "Occurrence" was defined, which is denied, such ambiguity has no effect on the "Personal Injury" coverage here. Because the "Bodily Injuries" suffered for any and all negligent acts were also the direct an immediate result of the "Personal Injury" in the form of the civil rights violation, it is only the "Personal Injury" coverage that applies. *See* Coverage Contract, Sec. IV., ¶ G.4., R. 166. Moreover, by operation of the provisions of Sections I., ¶ B.5., I., ¶ C.9., and IV., ¶ D.2., there are not multiple instances of an "Offense."

Additionally, Reeves' and the trial court's emphasis on the fact Reeves' claims involved both wrongful death and conscious pain and suffering, and that those claims had different measures of damages, is misplaced. (Response Br. of Respondent/Appellant at 18-19; Order filed 6/29/16 at pp. 6-7, R. 6-7). The trial court improperly focused on the provision in Section I of the Coverage Contract that "[a] single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage," and concluded that because the measure of damages for these claims differed, they did not involve "substantially the same" injury of damage. (*Id.* at p. 6, R. 6; Coverage Contract at Sec. I., ¶ C.9., R. 112). It is of no significance that the wrongful death claim and the survival action related to different persons and have different measures of damages. Both claims involve the same "Personal Injury" that is based on the same "Offense" (the violation of Bert Reeves' civil rights). When the provision in Section I., ¶ C.9. addressing "substantially the same injury of damage," is read in conjunction with the provisions of Section I., ¶ B.5. and Section IV., ¶ D.2,. which specifically contemplate multiple "offended

persons" and multiple "covered persons" with variations in conduct, the result is that there is but one "Offense" and "Wrongful Act" and it is subject to a single Coverage Limit.

III. The Coverage Contract's provisions limiting "Bodily Injury" coverage where such injuries are the result of "Personal Injury" make it irrelevant whether the number of "occurrences" is determined by the number of negligent acts.

Reeves' also asserts, alternatively, that the Coverage Contract defines "occurrence" by act of negligence, and that more than a single $1,000,000 would apply because there were multiple acts. (Response Br. of Respondent/Appellant, 19-24). This ignores the fact that only "Personal Injury" coverage is available under these circumstances, and that there was only one basic offense giving rise to such coverage. Under the provisions of Sections I., ¶ B.5. and IV., ¶ D.2., there is only one coverage limit available even though there were multiple covered persons who committed the "Offense" and multiple claimants.

Reeves' focus on separate negligent acts is misplaced because it fails to account for the interplay between "Personal Injury" and "Bodily Injury" coverages where the injuries sustaining the "Bodily Injury" coverage are the direct and immediate result of the infliction of the "Personal Injury." In such instances, the proper focus is on the damages caused and not the acts. Section IV., ¶ G.4.'s definition of "Bodily Injury" specifically provides that "Bodily Injury" does not include such injuries if they result directly and immediately from the infliction of personal injury." (Coverage Contract, Sec. IV., ¶ G.4., R. 166). Thus, where both "Bodily Injury" and "Personal Injury" are present (as here), an assessment as to whether the damages caused are the same is a prerequisite before coverage for "Bodily Injury" exists. In this action, no matter how many negligent acts are found to have occurred, the injuries flowing from those acts all also the result of the civil rights violation giving rise to the "Personal Injury."

Additionally, Reeves' reliance on *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 131–135, 712 S.E.2d 401, 405–407 (2011), to attempt to change the definition of "Occurrence" from that stated in Section I of the Coverage Contract is misplaced. Reeves seeks to use *Boiter*, which dealt with a **statutory definition** of "occurrence" that applied in a different setting, to support a redefining of the term in this case. In the *Boiter* case, the South Carolina Supreme Court held that the plaintiff in an action stemming from a vehicle accident caused by burned out traffic signals could recover from two separate government agencies under the S.C. Tort Claims Act ("TCA") for their separate acts of negligence. *Id.* at 134, 712 S.E.2d at 406. The issue was whether the two separate acts of negligence by the separate agencies constituted two "occurrences" under the TCA. To reach its conclusion, the *Boiter* Court looked to S.C. Code Ann. § 15-78-30(g), defining "occurrence" under the TCA as an "unfolding sequence of events which proximately flow from a single act of negligence." *Id.* at 132, 712 S.E.2d 405. *Boiter* has no relevance in a situation such as this where a **Coverage Contract** defines the meaning of the term "Occurrence." Reeves is essentially asking this Court to use the TCA's definition of "occurrence" and ignore the Coverage Contract's definition and related terms. This is improper where, as here, the Coverage Contract provides its own definition of the term. *See Horry Cnty. v. Ins. Reserve Fund*, 344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001) ("[W]e look to the terms of the policy itself to determine coverage."); *see also Town of Duncan v. State Bdgt. & Control Bd.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) (finding the "policy itself should be examined to see whether coverage is provided by its terms").

Conclusion

For the foregoing reasons, this Court should reverse the judgment entered below regarding the amount of coverage available under SCMIRF's Coverage Contract, and enter judgment in favor of SCMIRF as to that issue.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
Brian P. Crotty
Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

Attorneys for South Carolina Municipal Insurance and Risk Financing Fund

Columbia, South Carolina
January 20, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

RECEIVED
JAN 20 2017
SC Court of Appeals

Case No. 2014-CP-15-135

Appellate Case No. 2016-001626

Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, ...	Respondent/ Appellant,
v.	
South Carolina Municipal Insurance and Risk Financing Fund, ...	Appellant/ Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of Appellant/Respondent complies with Rule 211(b) SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
Brian P. Crotty
Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant/Respondent South Carolina Municipal Insurance and Risk Financing Fund

Columbia, South Carolina

January 20, 2017