THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 20 2017
SC 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, ...	Appellant/ Respondent.

Final Respondent's 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 ii

Statement of Issue on Appeal 1

Statement of the Case 2

Statement of the Facts 6

Argument 8

I. SCMIRF is a political subdivision of the State and, therefore, any tort claim for bad faith asserted against SCMIRF is subject to the South Carolina Tort Claims Act, and the trial court should be affirmed on this issue 8

II. The issue of whether the Tort Claims Act would apply to a breach of the Coverage Contract is not before this Court 17

Conclusion 18

TABLE OF AUTHORITIES

Page(s)

Cases

Charleston Cty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) 9

Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 557 S.E.2d 670 (2001) 9

Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013) 13, 14, 15, 16, 17

Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983) 9

Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013) 8

Rules

S.C. R. Civ. P. 56(c) 8

S.C. R. Civ. P. 59(e) 17

Statutes

42 U.S.C. § 1983 ..... 2, 3

S.C. Code. Ann. § 15-78-10 *et seq.* 4

S.C. Code Ann. § 15-78-20 9

S.C. Code Ann. § 15-78-20(a) 9, 16

S.C. Code Ann. § 15-78-20(b) 10

S.C. Code Ann. § 15-78-20(f) 10

S.C. Code Ann. § 15-78-30(d) 10

S.C. Code Ann. § 15-78-30(e) 15

S.C. Code Ann. § 15-78-30(h) 10, 11, 15

S.C. Code Ann. § 15-78-120 9

S.C. Code Ann. § 15-78-140 ..... 7, 12, 14, 15

S. C. Code Ann. § 15-78-140(A) 7, 9, 12, 14, 16

S.C. Code Ann. § 15-78-200.....10, 16

S.C. Code Ann. § 58-25-20.....10, 11

Other Authorities

S.C. Const. Article VIII, § 13 .....7, 12, 14, 16

S.C. Const. Article VIII, § 13(A).....14

S.C. Const. Article VIII, § 13(B). 14

S.C. Op. Att'y Gen., 1990 WL 599264 (S.C.A.G. July 25, 1990) 11

S.C. Op. Att'y Gen., 2014 WL 7405219 (S.C.A.G. Dec. 17, 2014).....11, 12

Statement of Issue on Appeal

Would a tort claim for bad faith brought against the South Carolina Municipal Insurance and Risk Financing Fund be subject to the South Carolina Tort Claims Act, assuming such a claim were otherwise valid?

Statement of the Case

This action originated on February 18, 2014, when Respondent/Appellant Ashley Reeves ("Reeves"), as Personal Representative for the Estate of Albert Carl "Bert" Reeves ("Bert Reeves"), filed a declaratory judgment Complaint against the South Carolina Municipal Insurance and Risk Financing Fund ("SCMIRF"), the Town of Cottageville ("Cottageville"), and Randall Price ("Price") seeking a declaration as to the interpretation of the 2011 Coverage Contract (the "Coverage Contract") between SCMIRF and Cottageville. (Complaint filed 2/18/14, R. 41). SCMIRF filed its Answer and Declaratory Judgment Counterclaim on May 15, 2014, and Reeves filed a Reply on June 11, 2014. (SCMIRF's Answer and Counterclaim, R. 60; Reply to Counterclaim, R. 66). On June 19, 2014, SCMIRF filed an Amended Answer and Counterclaim, and Reeves filed a Reply to this amended pleading on June 26, 2014. (Am. Answer and Counterclaim, R. 68; Reply to Am. Answer, R. 74).

This action stemmed from a lawsuit filed on August 28, 2012, by Reeves against Cottageville and Price, a police officer with the Cottageville Police Department, that was removed to the United States District Court for the District of South Carolina (the "Cottageville Lawsuit") on September 24, 2012. (Cottageville Complaint, R. 21; Notice of Removal filed 9/24/12, R. 15). The Cottageville Lawsuit related to the shooting death of Bert Reeves by Price. Specifically, Reeves alleged that Cottageville and Price were negligent in the death of Bert Reeves and that Cottageville was negligent in the hiring, supervision, and retention of Price. (Cottageville Complaint at ¶¶ 17-34, R. 25-28). Reeves further alleged that, based on the same incident, Price and Cottageville violated Bert Reeves' civil rights in violation of 42 U.S.C. § 1983. (*Id.* at ¶¶ 44-59, R. 30-33). The Cottageville Lawsuit asserted both survival and wrongful death claims. (*Id.* at ¶¶ 60-71, R. 33-35).

On May 14, 2014, Reeves filed a separate lawsuit also related to the death of Bert Reeves against John Craddock ("Craddock"), the Cottageville Police Department Chief of Police, in the United States District Court for the District of South Carolina (the "Craddock Lawsuit"). (Craddock Complaint, R. 48). The Craddock Lawsuit asserted survival and wrongful death claims based on 42 U.S.C. § 1983 alleging that Craddock failed to properly train and supervise Price, failed to intervene in the altercation between Price and Bert Reeves, and failed to render medical care to Bert Reeves. (*Id.*, R. 53-58).

The present action resulted from SCMIRF's position that its Coverage Contract with Cottageville provided no more than $1,000,000 in indemnity coverage for Reeves' claims in both the Cottageville Lawsuit and the Craddock Lawsuit. Reeves disputed SCMIRF's position and filed this declaratory judgment action.

On October 15, 2014, the jury in the Cottageville Lawsuit rendered a verdict in Reeves' favor finding that Cottageville and Price were liable for negligence and for a violation of 42 U.S.C. § 1983. (Verdict Forms 1 & 2, R. 87-91). The jury in the Cottageville Lawsuit awarded actual damages of $7,500,000 against both Cottageville and Price and punitive damages of $60,000,000 against Cottageville and $30,000,000 against Price. (Verdict Form 3, R. 92-93). On October 21, 2014, a Judgment was entered in the Cottageville Lawsuit based on that verdict. (Judgment entered 10/21/14, R. 94).

On February 26, 2015, the parties entered into a universal settlement agreement which settled the both the Cottageville Lawsuit and the Craddock Lawsuit, which had not yet gone to trial. (Settlement Agreement dated 2/26/15, R. 351). On April 20, 2015, as part of the settlement, a partial stipulation of dismissal was filed leaving SCMIRF as the only defendant in the present

action. (Partial Stipulation of Dismissal, R. 365). One of the material terms of the parties' settlement was an agreement to litigate two declaratory judgment questions:

> (1) Do the claims made and the verdict rendered against the Town of Cottageville and Randall Price, relating to the hiring, retention, supervision and shooting death of Bert Reeves result in there being more than $1,000,000.00 in indemnity coverage available under the terms of the SCMIRF Coverage Contract with the Town of Cottageville with respect to all such claims including the claims made against John Craddock in the separately styled action referenced above? Reeves asserts that there is more than one occurrence based on the facts and claims and the jury's verdict relating to the hiring, retention, supervision and shooting death of Bert Reeves, and, thus, there is more than $1,000,000.00 in indemnity coverage available under the Coverage Contract. SCMIRF asserts the Coverage Contract is limited to a total of $1,000,000.00 in indemnity coverage.
>
> (2) Allegations have been made that SCMIRF has engaged in bad faith with regard to its handling of the claims relating to the shooting death of Bert Reeves. SCMIRF denies it has engaged in bad faith. SCMIRF was informed that any bad faith claims that exist in favor of Cottageville would be assigned to Reeves. Would a tort claim for bad faith brought against SCMIRF be subject to the South Carolina Tort Claims Act (S.C. Code. Ann. § 15-78-10 *et seq.*), assuming such a claim were otherwise valid? SCMIRF asserts it would. Respondent Reeves asserts otherwise.

(Settlement Agreement dated 2/26/15 at ¶ 4.(a), R. 354-355; Stipulation of Facts and Issues dated 10/7/15, R. 83-86). Under the universal settlement agreement, Reeves would receive an additional $1,000,000 payment for each question upon which Reeves prevails. (Settlement Agreement at ¶ 4(c), R. 356). If Reeves prevails on neither question, Reeves receives no further money aside from the $10,000,000 settlement payment already paid to Reeves pursuant to the settlement. (*Id.*).

On June 3, 2015, the parties jointly petitioned the South Carolina Supreme Court to hear and decide both questions in its original jurisdiction. (Consent Petition for Original Jurisdiction

filed 6/3/15, R. 368). On July 24, 2015, the South Carolina Supreme Court declined the Petition and the parties proceeded, in accordance with the terms of their settlement agreement, before the circuit court. (Order denying Petition, R. 14).

Following the denial of the Petition to the South Carolina Supreme Court, on October 19, 2015, Reeves, with the consent of SCMIRF, filed an Amended Complaint setting forth the two declaratory judgment issues agreed upon by the parties in their settlement. (Amended Complaint, R. 76). This Amended Complaint included, as an exhibit, a Stipulation of Facts and Issues. (Stipulation of Facts and Issues, R. 83). The Stipulation of Facts and Issues included, as exhibits, the Verdict Form and Judgment in the Cottageville Lawsuit, (R. 87), the SCMIRF Bylaws, (R. 95), the Intergovernmental Agreement for an Insurance and Risk Financing Fund for Risk Sharing, (R. 99), and the 2011 Coverage Contract between SCMIRF and Cottageville, (R. 106). SCMIRF filed its Answer to the Amended Complaint on October 30, 2015. (Answer to Amended Complaint, R. 244).

On December 15, 2015, both SCMIRF and Reeves filed their motions for summary judgment on the stipulated issues. (SCMIRF's Mot. for Sum. Judgment, R. 376; SCMIRF's Memo. in Supp. of Mot. for Sum. Judgment, R. 378; Reeves' Mot. for Sum. Judgment, R. 400; Reeves' Memo. in Supp. of Mot. for Sum. Judgment, R. 401). Opposition memoranda were filed by SCMIRF on January 15, 2016, and by Reeves on January 19, 2016. (SCMIRF's Memo. in Opp. to Reeves' Sum. Judgment Mot., R. 530; Reeves' Memo. in Opp. to SCMIRF's Sum. Judgment Mot., R. 521). Reeves filed a supplemental memorandum on May 19, 2016. (Reeves' Supp. Memo. filed 5/19/16, R. 553).

A hearing on the cross-summary judgment motions was held on May 17, 2016. (Transcript of 5/17/16 Hearing, R. 252). Proposed orders were submitted to the trial court by Reeves on June

14, 2016, and by SCMIRF on June 16, 2016. (Reeves' Proposed Order, R. 577; SCMIRF's Proposed Order, R. 611). On June 29, 2016, the trial court filed its summary judgment Order. (Order filed 6/29/16, R. 1). In this Order, as to the first stipulated issue addressing whether more than $1,000,000 in indemnity coverage was available under SCMIRF's Coverage Contract, the trial court granted Reeves' motion for summary judgment and denied SCMIRF's motion. (*Id.* at pp. 3-7, R. 3-7). As to the second stipulated issue addressing whether a tort claim for bad faith brought against SCMIRF would be subject to the South Carolina Tort Claims Act, the trial court granted SCMIRF's motion for summary judgment and denied Reeves' motion. (*Id.* at pp. 8-10, R. 8-10).

On July 13, 2016, SCMIRF filed a timely motion to alter or amend the June 29, 2016 Order with respect to the coverage ruling. (SCMIRF's Mot. to Alter or Amend, R. 652). Reeves also filed a motion to alter or amend with respect to the Tort Claims Act ruling. (Reeves' Mot. to Alter or Amend, R. 639). Both motions were denied by the trial court's Order filed July 25, 2016. (Order filed July 25, 2016, R. 11). SCMIRF then filed this appeal on August 4, 2016. (Notice of Appeal, R. 660).

Statement of the Facts

As part of the universal settlement of the Cottageville and Craddock matters, the parties agreed that the determination of the two agreed-upon declaratory judgment issues would be governed by a Stipulation of Facts and Issues that was incorporated into the Amended Complaint in this action. (Stipulation of Facts and Issues, R. 83). This stipulation expressly provided that "[t]he parties agree that no other facts are necessary for the Court to answer the stipulated issues, that no discovery is needed for the case, and that the stipulated issues are purely legal in nature." (*Id.* at ¶ 11, R. 85).

Cottageville is a South Carolina municipality located in Colleton County, South Carolina. (*Id.* at ¶ 2, R. 83). Both Price and Craddock, at all relevant times, were policemen for Cottageville, and were acting within the scope of their employment as Cottageville police officers. (*Id.* at ¶¶ 2, 5, R. 83-84). On May 16, 2011, while acting in the scope of his employment as a police officer for Cottageville, Price shot and killed Bert Reeves. (*Id.* at ¶¶ 2-3, R. 83). The death of Bert Reeves led to the filing of the Cottageville Lawsuit and the Craddock Lawsuit.

SCMIRF asserts that it is an agency and an unincorporated voluntary, self-insurance pool in the State of South Carolina. (*Id.* at ¶ 6, R. 84). SCMIRF was established in accordance with article VIII, section 13 of the South Carolina Constitution, which authorizes governmental entities to enter into interlocal contracts or agreements to undertake action collectively that which each entity could otherwise undertake alone. SCMIRF was also established in accordance with South Carolina Code section 15-78-140(A), which requires the political subdivisions of this State to procure tort liability insurance to cover the risks for which immunity has been waived, and which identifies as an option for such coverage the establishment of "pooled self-insurance liability funds, by intergovernmental agreement."

Membership in SCMIRF is limited to municipal government units and institutions or agencies in the State of South Carolina in accordance with the terms of an Intergovernmental Agreement. (SCMIRF Bylaws at Sec. II, R. 95; Intergovernmental Agreement at ¶ 9, R. 102). SCMIRF's Bylaws describe it as "a Fund created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement which establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South Carolina, 1976, Section 15-78-140." (SCMIRF Bylaws at Sec. I., R. 95; Stipulation of Facts and Issues at ¶ 7, R. 84). The

Intergovernmental Agreement that all SCMIRF members are required to enter into describes SCMIRF as "a joint interlocal agency to operate a fund for liability risk sharing." (Intergovernmental Agreement at ¶ 1, R. 100).

On February 4, 2008, Cottageville entered into an Intergovernmental Agreement for an Insurance and Risk Financing Fund with SCMIRF and, thus, Cottageville became a member and participant in SCMIRF. (Intergovernmental Agreement, R. 99; Stipulation of Facts and Issues at ¶ 7; R. 84). During the period of January 1, 2011 to January 1, 2012, SCMIRF provided coverage to Cottageville for certain risks as set forth in the 2011 Coverage Contract between SCMIRF and Cottageville. (Stipulation of Facts and Issues at ¶ 8, R. 84; 2011 Coverage Contract, R. 106).

Argument

In reviewing a grant of summary judgment, an appellate court must apply the same standard as the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Thus, summary judgment is proper if—viewing the evidence in a light most favorable to the nonmoving party—"there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.* "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Id.*

I. SCMIRF is a political subdivision of the State and, therefore, any tort claim for bad faith asserted against SCMIRF is subject to the South Carolina Tort Claims Act, and the trial court should be affirmed on this issue.

Reeves claims that SCMIRF engaged in bad faith with respect to its handling of the claims associated with the shooting and death of Bert Reeves.[1] (Am. Compl. at ¶¶ 14–16, R. 79). Where

[1] SCMIRF understood prior to the settlement of the federal lawsuits that Cottageville, as the insured, intended to assign any bad faith claims that may exist to Reeves. (Stipulation of Facts and Issues at Issue 2, R. 86).

an "insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a *tort* action." *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) (emphasis added); *see also Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001) (noting a tort action exists where an insured can demonstrate bad faith or unreasonable action by an insurer in processing a claim). If an insured "can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." *Nichols*, 279 S.C. at 340, 306 S.E.2d at 619. The question before this court is, assuming a bad faith claim could otherwise be made against SCMIRF[2], whether any such claim would be subject to the Tort Claims Act. *See Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993) (holding a claim for bad faith associated with an insurance claim is subject to the Tort Claims Act and dismissal of a bad faith claim did not prejudice the appellant where the proceeds obtained already exceeded the statutory cap).

The Tort Claims Act provides limitations on liability for torts asserted against the State and its political subdivisions. *See* S.C. Code Ann. § 15-78-20. It states the public policy of South Carolina is "that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." S.C. Code Ann. § 15-78-20(a). The Tort Claims Act provides a cap on the amount of damages a plaintiff can recover when she sues a governmental entity in tort and creates other restrictions on recovery. *See* S.C. Code Ann. § 15-78-120.

---

[2] SCMIRF is—by law—not an insurer, and it denies the existence of any bad faith. *See* S.C. Code Ann. § 15-78-140(A) (providing the procurement of insurance by establishing a pooled self-insurance fund, like SCMIRF, "may not be construed as transacting the business of insurance or otherwise subject to state laws regulating insurance"). However, this issue is not before this Court.

The Tort Claims Act extends to employees and agents of the State and its political subdivisions and provides "the exclusive civil remedy . . . for any tort committed by a governmental entity, its employees, or its agents" acting within the scope of their official duty. S.C. Code Ann. § 15-78-20(b); *see also* S.C. Code Ann. § 15-78-200. The Tort Claims Act "must be liberally construed in favor of limiting the liability of the governmental entity." S.C. Code Ann. § 15-78-200; *see also* S.C. Code Ann. § 15-78-20(f) (stating "provisions of [the Tort Claims Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State").

The trial court correctly held that SCMIRF is a governmental entity as defined by the Tort Claims Act and is therefore subject to the provisions of the Act. "Governmental entity" is a defined term in the Tort Claims Act meaning "the State and its political subdivisions." S.C. Code Ann. § 15-78-30(d). The term "political subdivision" is defined in section 15-78-30(h) as

> the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of § 58-25-20 which provides public transportation on behalf of a regional transportation authority, and special purpose districts of the State *and any agency, governmental health care facility, department, or subdivision thereof.*

S.C. Code Ann. § 15-78-30(h) (emphasis added). Reeves argues the emphasized phrase in section 15-78-30(h) qualifies only the preceding phrase relating to special purpose districts. According to Reeves, the Tort Claims Act applies to agencies, governmental healthcare facilities, departments, and subdivisions of only special purpose districts and not to agencies of counties or municipalities. (App. Br. 9). The trial court correctly rejected this argument. Further, two South Carolina Attorney General opinions have reached the opposite conclusion and construed the emphasized

phrase consistent with SCMIRF's construction. *See* S.C. Op. Att'y Gen., 1990 WL 599264 (S.C.A.G. July 25, 1990); S.C. Op. Att'y Gen., 2014 WL 7405219 (S.C.A.G. Dec. 17, 2014).

In 1990, the Attorney General wrote, "The final phrase amplifies the term 'political subdivision' and cannot be reasonably read to modify the term 'State' since that term, as used in this paragraph, exists only to further describe special purpose districts." 1990 WL 599264, at *2. The Attorney General explained, "Each clause is of equal status and no phrase exists as modification or explanation of another." *Id.* Rather, when the statute is "reduced to its simplest terms," the definition of "political subdivision" includes the following entities:

1. counties;
2. *municipalities*;
3. school districts;
4. regional transportation authorities established pursuant to Chapter 25 of Title 58;
5. an operator as defined in item (8) of Section 58-25-20;
6. special purpose districts; and
7. any *agency*, governmental health care facility, *department or subdivision of any of the aforementioned political subdivisions*.

Id. (emphasis added). Under this analysis, the term "political subdivision" would necessarily include SCMIRF because SCMIRF is an agency of municipalities.

In 2014, the Attorney General again reached the same conclusion as to the interpretation of section 15-78-30(h). *See* 2014 WL 7405219, at *1. In that opinion, the Attorney General considered the exact question at issue in this case: "whether SCMIRF is a 'governmental entity[]' as defined in the Tort Claims Act, such that tort claims brought against SCMIRF are subject to the Act." *Id.* The Attorney General quoted the analysis of the 1990 opinion and concluded, based on that interpretation, that SCMIRF is a governmental entity for purposes of the Tort Claims Act because it "clearly serves as an agency or department of its municipality members." *Id.* at *2. The Attorney General noted the "very purpose and structure of SCMIRF is contemplated in and

authorized by" the Tort Claims Act. *Id.* at *3; *see also* S.C. Code Ann. § 15-78-140(A). Accordingly, the Attorney General opined that SCMIRF's liability is subject to the Tort Claims Act. 2014 WL 7405219, at *3. The trial court here agreed.

This Court should affirm. Although Reeves argues SCMIRF is a fund, rather than an agency, *see* (App. Br. 10), the intergovernmental agreement that created SCMIRF established SCMIRF "as a *joint interlocal agency* to operate a fund for liability risk sharing." (Intergovernmental Agreement at ¶ 1, R. 100) (emphasis added). Further, SCMIRF's bylaws state that SCMIRF

> is a Fund created by and *comprised of South Carolina municipalities and their agencies* which are parties to an Intergovernmental Agreement which establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South Carolina, 1976, Section 15-78-140.

(SCMIRF Bylaws at p. 1, R. 95) (emphasis added). It is undisputed that Cottageville is a municipality of the State and is therefore a political subdivision. All other SCMIRF members are "municipal local government unit[s]" and therefore are also political subdivisions. *See* (SCMIRF Bylaws at pp. 5-6, R. 97-98). The joining together of municipalities and their agencies for the purposes of providing liability coverage and sharing risk is expressly authorized by the Tort Claims Act and the South Carolina Constitution. S.C. Code Ann. § 15-78-140(A) ("The political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived by . . . (4) establishing pooled self-insurance liability funds, by intergovernmental agreement . . . ."); S.C. Const. art. VIII, § 13 ("(A) Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof. (B) Nothing in this Constitution may be construed to prohibit the State or any of its counties,

incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State."). It would be an absurd result for the legislature to create a scheme in which municipalities and agencies lose their status as political subdivisions—and thus lose the protection of the Tort Claims Act—when they join together for the purpose of complying with their statutory obligations. If one municipality is covered by the Tort Claims Act, a group of political subdivisions sharing a joint self-insurance pool run by an agency – here SCMIRF - must also be covered by the Tort Claims Act.

Beyond the plain reading of the statute, the South Carolina Supreme Court has outlined factors a court should consider in determining whether the Tort Claims Act applies to an entity. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 636, 743 S.E.2d 808, 814-15 (2013). In *Health Promotion*, the Supreme Court considered whether the Board of Dentistry constituted a governmental entity that could invoke the immunity protections of the Tort Claims Act. 403 S.C. at 626-27, 743 S.E.2d at 809-10. In answering the question in the affirmative, the court looked to the following "factors":

> "[1] whether the entity functions statewide, [2] whether the entity performs the work of the state, [3] whether the entity was created by the legislature, and [4] whether the entity is subject to local control." Additionally, we have examined [5] "the character of the power delegated to the entity, and [6] the nature of the function performed by the entity."

Id. at 636, 743 S.E.2d at 814. When all six factors from *Health Promotion* are applied to SCMIRF, they indicate SCMIRF is a governmental entity subject to the protections of the Tort Claims Act.

First, SCMIRF functions statewide by providing coverage contracts to municipalities across the state that become members of the fund. (SCMIRF Bylaws at p. 1, R. 95; Intergovernmental Agreement at p. 1, R. 99). Second, SCMIRF performs the work of the State by

providing coverage contracts to political subdivisions of the State—specifically, "Municipal government units, institutions or agencies." *See* (SCMIRF Bylaws at p. 1, R. 95; Intergovernmental Agreement at p. 2, ¶ 1, R. 100). As to the third and fourth factors, although SCMIRF was not created by the legislature, it is a pool of funds administered by an agency that was created by municipalities—in accordance with the provisions of the South Carolina Constitution—to comply with a statutory mandate for liability coverage under the Tort Claims Act. *See* S.C. Const. art. VIII, § 13; S.C. Code Ann. § 15-78-140. The South Carolina Constitution authorizes an "incorporated municipality, or other political subdivision" to "agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof." S.C. Const. art. VIII, § 13(A). It also provides that "[n]othing in this Constitution may be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments." *Id.* at § 13(B). Additionally, the Tort Claims Act itself provides that "political subdivisions of this State, in regard to tort and automobile liability, property and casualty insurance *shall procure insurance* to cover these risks for which immunity has been waived by . . . (4) *establishing pooled self-insurance liability funds, by intergovernmental agreement.*" S.C. Code Ann. § 15-78-140(A) (emphasis added).

In its consideration of the third and fourth factors, the court in *Health Promotion* also noted the fees received by the Board of Dentistry become the property of the State general fund and must be deposited to the account of the State Treasurer. *See* 403 S.C. at 636, 743 S.E.2d at 815. Similarly, the funds allotted to and controlled by SCMIRF are public funds that are pooled by municipalities to cover losses attributable to liability claims of its members and are "deposit[ed]

to the account of the Fund." *See* (Intergovernmental Agreement at p. 3, ¶ 7, R. 101). Reeves argues these factors weigh against the application of the Tort Claims Act to SCMIRF because SCMIRF is not controlled by a state office and its funds are not controlled by the State Treasurer. (App. Br. 12). However, there is no specific requirement that an entity must be controlled by a state office or have its funds controlled by the State Treasurer for the entity to be a political subdivision. Rather, the Governor and State Treasury's control over the Board of Dentistry in *Health Promotion* is relevant because the Board of Dentistry is *the State*, not a political subdivision. *See* S.C. Code Ann. § 15-78-30(e) (defining "State" as "the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, *boards*, divisions, instrumentalities . . . and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges" (emphasis added)). SCMIRF does not contend that it is the State; it contends that it is a political subdivision as defined in section 15-78-30(h). SCMIRF is a "[f]und created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement" to "establish[] a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South Carolina, 1976. Section 15-78-140," thereby meeting the third and fourth factors of *Health Promotion.* (SCMIRF Bylaws at p. 1, R. 95).

The fifth and sixth factors were not addressed in detail in the *Health Promotion* opinion, but the court noted "the individual members of the Board are entitled to immunity for actions performed in the course of their official duties. Thus, by creating this governmental entity, the General Assembly intended for the Board as a whole to come within the purview of the [Tort Claims Act]." 403 S.C. at 636, 743 S.E.2d at 815. The individual members of SCMIRF—municipalities and their employees—are also entitled to immunity for their conduct while acting

within the scope of their official duty. *See* S.C. Code Ann. § 15-78-20(a) (granting "the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter"); S.C. Code Ann. § 15-78-200 (providing the Tort Claims Act "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty").

Beyond the immunity of SCMIRF's members, the fifth and sixth factors support a finding that SCMIRF is subject to the Tort Claims Act. As to the fifth factor—"the character of the power delegated to the entity"—the members of SCMIRF entered into an intergovernmental agreement which grants SCMIRF the type of power normally exercised by governmental entities. For example, the intergovernmental agreement provides that SCMIRF's board of trustees "shall establish, operate, and enforce administrative rules, regulations, and bylaws governing the relationship between the individual members of the Fund and the Fund." (Intergovernmental Agreement at ¶ 5, R. 101). Those powers are the type of power that political subdivisions of the State normally exercise. Therefore, the character of the power delegated by municipalities to SCMIRF is that of a governmental entity. As to the sixth factor—"the nature of the function performed by the entity"—SCMIRF's provision of liability coverage is the performance of a function required of municipalities by the South Carolina Constitution and the Tort Claims Act. S.C. Const. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A). SCMIRF therefore performs the function of a municipality.

Thus, by recognizing the need for intergovernmental agreements such as the one created by SCMIRF, the legislature must have intended for SCMIRF "as a whole to come within the purview of the [Tort Claims Act]." *Health Promotion*, 403 S.C. at 636, 743 S.E.2d at 815. All of the *Health Promotion* factors thus weigh in favor of a finding that SCMIRF is a "governmental

entity" subject to the immunity protections of the Tort Claims Act. Based on the plain language of the Tort Claims Act, the nature and purpose of SCMIRF, and the *Health Promotion* factors, this court should affirm the trial court's finding that the Tort Claims Act applies to a bad faith tort claim asserted against SCMIRF.

II. The issue of whether the Tort Claims Act would apply to a breach of the Coverage Contract is not before this Court.

Reeves argues in her brief that the Tort Claims Act "is inapplicable to and does not limit the recovery in a claim of breach of contract in failing to protect the insured." (App. Br. 14). Reeves is attempting to recast the stipulated issue before this Court. The parties agreed as part of their settlement agreement to "litigate, to a final appellate decision, the following two issues, and only these two issues:" (1) whether the Coverage Contract provides more than $1,000,000 in indemnity coverage to Reeves' claims, and (2) whether a "***tort* claim** for bad faith brought against SCMIRF" would be subject to the Tort Claims Act. (Settlement Agreement at p. 5, R. 355) (emphasis added). In the Stipulation of Facts and Issues, the parties repeated their agreement to litigate only the two issues stated in the settlement agreement. (Stipulation of Facts and Issues, R. 85-86). Moreover, in its Order denying Reeves' Rule 59(e) motion, the trial court stated "the issue before this Court, as stated in the stipulated issues, is 'would a *tort claim* for bad faith brought against SCMIRF be subject to the Tort Claims Act . . . ?'" (Order filed July 25, 2016, R. 12). Therefore, the trial court correctly ruled the application of the Tort Claims Act to a breach of contract claim "is not presently before this Court." (Order filed July 25, 2016, R. 12).

The question of whether the Tort Claims Act would apply to a breach of contract claim brought against SCMIRF is irrelevant and not before this court. At the summary judgment hearing, Reeves argued she could recover damages for SCMIRF's alleged bad-faith breach of the Coverage Contract under either a bad faith tort theory or a breach of contract for failure to pay theory, which

would not be subject to the Tort Claims Act. (Transcript of 5/17/16 Hearing at p. 45-46, R. 296-297. In a normal case, Reeves may be able to make such an argument. In this case, however, Reeves relinquished her right to pursue damages under a breach of contract theory. (Settlement Agreement at pp. 3-7, R. 353-357). The parties' settlement agreement does not provide for any contingent payment by SCMIRF to Reeves in the event contractual liability exists. Rather, a contingent payment on the Tort Claims Act issue is due only if there is a determination that "a bad faith **tort** claim against SCMIRF **is not** subject to the South Carolina Tort Claims Act." (*Id.* at ¶ 4(c)(ii), R. 356 (first emphasis added, second emphasis in original)). Thus, Reeves and SCMIRF agreed to reduce the bad faith issue to a single, narrow question—whether the Tort Claims Act applies to a ***tort*** claim for bad faith. (*Id.*). Any liability for breach of contract has been released by the Settlement Agreement and is wholly irrelevant.

Conclusion

For the foregoing reasons, this court should affirm the trial court's granting of summary judgment in favor of SCMIRF as to the second stipulated 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 Respondent's 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

RECEIVED
JAN 20 2017
SC Court of Appeals