

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 24 2017

SC Court of Appeals

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 BRIEF OF RESPONDENT/APPELLANT

W. Mullins McLeod, Jr.
Jacqueline LaPan Edgerton
McLeod Law Group LLC
P.O. Box 21624
Charleston, South Carolina 29413
(843)277-6655
Attorneys for Respondent/Appellant

C. Mitchell Brown
Brian P. Crotty
Michael J. Anzelmo
Nelson, Mullins, Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211-1070
803-799-2000
Attorneys for Appellant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	7
I. <u>SCMIRF Is Not A Political Subdivision Subject To The Tort Claims Act, S.C.Code</u> <u>Ann. § 15-78-10 et seq., In A Tort Claim For Bad Faith.</u>	7
A. <u>SCMIRF is not a “political subdivision” of the State as defined by the Tort</u> <u>Claims Act.</u>	8
B. <u>Application of the <i>Health Promotion Specialists</i> factors clearly establishes</u> <u>that SCMIRF is not the State or its political subdivision</u>	10
II. <u>The Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq. Is Inapplicable To, And</u> <u>Does Not Limit The Recovery In, A Claim Of Breach Of Contract In Failing To</u> <u>Protect The Insured</u>	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES

<i>Attorney General Opinion</i> , 014 WL 7405219 (S.C.A.G. December 17, 2014)	9
<i>Attorney General Opinion</i> , 1990 WL 599264 (S.C.A.G. July 25, 1990)	9
<i>Board of County Commissioners of Bryan County v. Brown</i> , 520 U.S. 397 (1997)	6
<i>Callum v. CVS Health Corp.</i> , 2015 WL 5782077 (D.S.C. September 29, 2015)	6
<i>Canton v. Harris</i> , 489 U.S. 378 (1989)	6
<i>Charleston County Sch. Dist. v. State Budget and Control Bd.</i> , 313 S.C. 1, 437 S.E.2d 6 (1993)	15, 16
<i>Colorado Special Dists. Property and Liability Pool v. Lyons</i> , 277 P.3d 874 (Co. Ct. App. 2012)	12, 13
<i>Doe v. ATC, Inc.</i> , 367 S.C. 199, 624 S.E.2d 447 (Ct.App.2005)	6
<i>Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry</i> , 403 S.C. 623, 743 S.E.2d 808 (2013)	10, 11, 12, 16
<i>Law v. S. Carolina Dep't of Corr.</i> , 368 S.C. 424, 629 S.E.2d 642 (2006)	4
<i>Miles v. State Farm Mut. Ins. Co.</i> , 238 S.C. 374, 120 S.E.2d 217 (1961)	15
<i>Nichols v. State Farm Mut. Auto. Ins. Co.</i> , 279 S.C. 336, 306 S.E.2d 616 (1983)	14, 15
<i>Pembaur v. Cincinnati</i> , 475 U.S. 469 (1986)	6
<i>Shapiro v. Middlesex Co. Mun. Joint Ins. Fund</i> , 307 N.J.Super. 453 (N.J. Super. Ct. App. Div. 1998)	12
<i>State v. Ramsey</i> , 409 S.C. 206, 762 S.E.2d 15 (2014)	9
<i>Tyger River Pine Co. v. Maryland Cas. Co.</i> , 170 S.C. 286, 170 S.E. 346 (1933)	14, 15

STATUTES

42 U.S.C. § 1983	5, 6
Colo. Rev. Stat. Ann. § 24-10-103	13

N.J.S.A. 40A:10-36 p. 13	13
S.C.Code Ann. § 1-11-140	9, 10
S.C.Code Ann. § 1-11-147	9
S.C.Code Ann. § 10-7-10	9
S.C.Code Ann. § 10-7-40	9
S.C.Code Ann. § 10-7-120	9
S.C.Code Ann. § 10-7-130	9
S.C.Code Ann. § 11-9-75	9
S.C.Code Ann. § 15-78-10 <i>et seq.</i>	1, 2, 7, 14, 16
S.C.Code Ann. § 15-78-20	7, 10, 15
S.C.Code Ann. § 15-78-30	8, 9, 13
S.C.Code Ann. § 15-78-140	10, 11
S.C.Code Ann. § 38-13-190	9
S.C.Code Ann. § 40-15-10	11
S.C.Code Ann. § 40-15-20	11
S.C.Code Ann. § 40-15-50	11
S.C.Code Ann. § 40-15-60	11
S.C.Code Ann. § 59-67-710	9
S.C.Code Ann. § 59-67-790	9

COURT RULES

Rule 56, SCRCP	2, 4
----------------------	------

ISSUES ON APPEAL

1. Whether South Carolina Municipal Insurance and Risk Financing Fund is a political subdivision of South Carolina subject to the Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* in a tort claim for bad faith?
2. Whether the Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* is inapplicable to, and does not limit the recovery in, a claim of breach of the Coverage Contract in failing to protect the insured?

STATEMENT OF THE CASE

On October 16, 2015, Respondent/Appellant, Ashley Reeves as Personal Representative for the Estate of Albert Carl “Bert” Reeves, filed in the Court of Common Pleas, Fourteenth Judicial Circuit an Amended Complaint for Declaratory Judgment as to two questions stipulated by the parties as follows:

(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 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 a separately styled action?

(2) 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.*?

(Amended Complaint, R. pp.76-82).

On October 26, 2015, Appellant/Respondent, South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF], filed its Answer to the Amended Complaint. (Answer, R. pp. 244-251). The Parties mutually sought declaratory judgment on the above two issues and submitted a Stipulation of Facts and Issues, containing Exhibits A-D¹, filed with the Amended Complaint. (Amended Complaint, Exhibit 1 with attachments Exhibits A-D, R. pp. 83-243). Thereafter, both Reeves and SCMIRF respectively moved for Summary Judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, and filed accompanying memoranda in support of their positions, as well as in opposition of summary judgment for the opposing party. (Reeves’s Motion for Summary Judgment

¹ Exhibit A, Verdict Form and Judgment from Federal lawsuit, Civil Action No. 2:12-02765-DCN; Exhibit B, South Carolina Municipal Insurance and Risk Financing Fund Bylaws; Exhibit C, Intergovernmental Agreement executed on behalf of Town of Cottageville; and Exhibit D, 2011 Coverage Contract between South Carolina Municipal Insurance and Risk Financing Fund to Town of Cottageville.

and Memorandum in Support, R. pp. 400-520; SCMIRF's Motion for Summary Judgment and Memorandum in Support, R. pp. 376-399; Reeves's Memorandum in Opposition to SCMIRF's Motion, R. pp. 521-529; SCMIRF's Memorandum in Opposition to Reeves's Motion, R. pp. 530-552; Reeves's Supplemental Memorandum and Exhibits to Motion for Summary Judgment, R. pp. 553-576).

On May 17, 2016, the Honorable Perry M. Buckner, III held a hearing on both Reeves's and SCMIRF's Motions for Summary Judgment, where all parties were represented by counsel and heard on oral argument. (Transcript of Hearing, R. pp. 252-350). On June 29, 2016, Judge Buckner filed his Order, granting Reeves's Motion for Summary Judgment as to Issue #1 and denying Reeves's Motion as to Issue #2 and, in turn, denying SCMIRF's Motion for Summary Judgment as to Issue #1 and granting SCMIRF's Motion as to Issue #2. (Order On Summary Judgment, June 29, 2016, R. pp. 1-10).

On July 6, 2016, Reeves filed a Motion to Alter or Amend the June 29, 2016 judgment, and on July 11, 2016, SCMIRF also filed a Motion to Alter or Amend the judgment. (Reeve's Motion to Alter or Amend, R. pp. 639-651; SCMIRF's Motion to Alter or Amend, R. pp. 652-659). Thereafter, on July 25, 2016, Judge Buckner denied both parties' Motions to Alter or Amend the Summary Judgment Order of June 29, 2016. (Order denying all Motions to Alter or Amend Judgment, filed July 25, 2016, R. pp. 11-13).

SCMIRF first served its Notice of Appeal on August 4, 2016. (NOA SCMIRF and Certificate of Service, R. pp. 660-677). Reeves served her Notice of Appeal on August 15, 2016. (NOA Reeves and Certificate of Service, R. pp. 678-698).

STATEMENT OF FACTS

The two issues initially presented to the Circuit Court for declaratory judgment arise out of two underlying federal lawsuits brought by Reeves in the United States District

Court for the District of South Carolina against various Defendants for liability in the wrongful death of Bert Reeves that occurred on May 16, 2011— (1) Civil Action No. 2:12-02765-DCN against the Town of Cottageville, South Carolina; the Cottageville Police Department; and Police Officer Randall Price, individually, and (2) Civil Action No.: 2:14-cv-01918-DCN against John Craddock, individually. In the Amended Complaint for declaratory judgment below, the parties stipulated to the above two issues for declaratory judgment, as well as to stated facts in the Stipulation of Facts and Issues. The parties agreed that no further discovery need be taken to decide the two issues. However, in rendering summary judgment on the issues presented and pursuant to Rule 56, SCRCPP, the court is to consider discovery conducted prior to the Motions for Summary Judgment. *See, e.g., Law v. S. Carolina Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

Of first matter, the Town of Cottageville entered into an Intergovernmental Agreement for an Insurance and Risk Financing Fund for Risk Sharing with other member municipalities to create SCMIRF [South Carolina Municipal Insurance and Risk Financing Fund] in order to insure and pool their risk of exposure to certain liabilities. (Amended Complaint, Stipulation of Facts and Issues, Exhibit C, R. pp. 99-105). “SCMIRF asserts it is an unincorporated voluntary, self-insurance pool in the State of South Carolina.” (Amended Complaint, Stipulation of Facts and Issues, at ¶ 6, R. p. 84). SCMIRF was created specifically to provide insurance to municipalities who are subject to lawsuits. (Reeves’s Motion for Summary Judgment, Exhibit 2, Deposition of Heather Ricard, July 28, 2014, p. 15:3-8, R. p. 443). During the period of January 1, 2011 to January 1, 2012, SCMIRF provided insurance coverage to the Town of Cottageville, as set forth in the 2011 Coverage Contract, P-SCMIRF-1124-2011 [Coverage Contract], which was the contract

at issue before the Circuit Court in the declaratory judgment. (Stipulation of Facts and Issues, Exhibit D, R. pp. 106-243). In Plaintiff's federal lawsuit, Civil Action No. 2:12-02765-DCN, SCMIRF retained attorneys to defend the Town of Cottageville and Officer Price, individually, who by stipulation was acting in the scope of his employment during all times relevant.

The federal lawsuit proceeded to a jury trial, and, on October 15, 2014, the jury found (1) that Officer Price was negligent in proximately causing Bert Reeves's death; (2) that Price violated Bert Reeves's constitutional right to be free from the use of excessive force, actionable under 42 U.S.C. § 1983; (3) that Price violated Bert Reeves's constitutional right to be free from unnecessary seizure, actionable under 42 U.S.C. § 1983; (4) that the Town of Cottageville was negligent in its hiring of Price; (5) that the Town was negligent in its supervision of Price; (6) that the Town was negligent in its retention of Price; (7) that the Town was negligent in its failure to train Price; (8) that the Town was liable under 42 U.S.C. § 1983 for Price's use of excessive force in accordance with the Town's custom, policy, ordinance, regulation, or decision; (9) that the Town was liable under 42 U.S.C. § 1983 for its deliberate indifference to the constitutional rights of its citizens in hiring Price; and (10) that the Town was liable under 42 U.S.C. § 1983 for its deliberate indifference to the constitutional rights of its citizens in failing to properly train Price, each of which the jury found proximately caused Bert Reeves's death. (Amended Complaint, Stipulation of Facts and Issues, Exhibit A, Verdict Forms and Judgment, R. pp. 87-98).

The jury found multiple and independent acts of negligence and federal liability against the Town and Price, individually— each act separate and distinct from each other.

See Callum v. CVS Health Corp., 2015 WL 5782077, *28-29 (D.S.C. September 29, 2015) (South Carolina holds that “[n]egligent hiring and negligent retention are distinct theories of recovery separate from negligent supervision.”) (citing *Doe v. ATC, Inc.*, 367 S.C. 199, 205, 624 S.E.2d 447, 450 (Ct.App.2005)); *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997) (reiterating that municipality liability under 42 U.S.C. § 1983 may be triggered for separate actions of inadequate training; a decision by a final municipal decision maker that deprives a plaintiff of federal rights; and for hiring decisions) (citing *Pembaur v. Cincinnati*, 475 U.S. 469, 485 (1986); *Canton v. Harris*, 489 U.S. 378, 387 (1989)).

The jury awarded \$7,500,000 in compensatory damages against Officer Price and the Town of Cottageville and awarded punitive damages against Officer Price in the amount of \$30,000,000 and against the Town of Cottageville in the amount of \$60,000,000. *Id.* During the lawsuit, Reeves alleged that SCMIRF acted in bad faith in failing to reasonably settle the suit on behalf of its member, the Town of Cottageville, prior to trial.

After the above jury verdict against the Town of Cottageville and Officer Price, Reeves settled the case, along with the lawsuit against Craddock, by a comprehensive settlement agreement that involved a primary payment made by SCMIRF and a reinsurer that was approved by the federal court. (Summary Judgment Hearing Transcript, Exhibit 1, Judge Norton’s Order Approving Settlement in the United States District Court for South Carolina and Settlement Agreement, Feb. 26, 2015, R. pp. 351-364). The settlement agreement contains two contingent payments that are payable to Reeves, depending on the answers, pursuant to exhaustive appeal, to the two stipulated questions that were presented to the Circuit Court for declaratory judgment.

ARGUMENT

Reeves appeals the decision of the Circuit Court, holding that a claim for bad faith brought against SCMIRF is subject to the Tort Claims Act, S.C.Code Ann. § 15-78-10 *et seq.* The judgment is in error, because SCMIRF is not a political subdivision of South Carolina and, accordingly, not subject to the Tort Claims Act. Further, the Circuit Court failed to address that whether or not the Tort Claims Act applied to the tort liability of SCMIRF, a claim for breach of contract against SCMIRF for actual damages incurred in the failure to protect its insured would not be subject to the Tort Claims Act and, consequently, not subject to the Tort Claims Act's statutory monetary limits. Thus, the judgment below should be overturned and summary judgment for Reeves should be entered on Issue #2.

I. SCMIRF Is Not A Political Subdivision Subject To The Tort Claims Act, S.C.Code Ann. § 15-78-10 et seq. In A Tort Claim For Bad Faith.

The Tort Claims Act, S.C.Code Ann. § 15-78-10 *et seq.*, does not govern claims brought against SCMIRF, because SCMIRF is not a political subdivision of the State. The Tort Claims Act provides for some limitations on tort liability for the State and its political subdivisions out of recognition by the General Assembly “that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities.” S.C.Code Ann. § 15-78-20(a). Thus, in consideration of balancing the costs and effectiveness of governing with liability for tortious conduct, the Tort Claims Act provides the State and its political subdivisions immunity from tort liability, except as waived by the Act. S.C.Code Ann. § 15-78-10 *et seq.* SCMIRF, however, does not govern our State and does not face any consideration of balancing government with liability for tortious conduct.

A. SCMIRF is not a “political subdivision” of the State as defined by the Tort Claims Act.

A “governmental entity” within the meaning of the Tort Claims Act “means the State and its political subdivisions”. S.C.Code Ann. § 15-78-30(d). The Act defines “State” as:

the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System For the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges.

S.C.Code Ann. § 15-78-30(e). The Act defines “political subdivision” 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 Section 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).

The Circuit Court erred in finding that SCMIRF is a political subdivision based on the foregoing definition of political subdivision. The court’s decision misinterprets the language “any agency, governmental health care facility, department, or subdivision thereof” to qualify all terms listed before it, such that political subdivisions include any agency, governmental health care facility, department, or subdivision of “counties, municipalities, school districts, regional transportation authorities, operators defined in item (8) of Section 58-25-20..., and special purpose districts of the State.” S.C.Code Ann. § 15-78-30(h).

Before the Circuit Court, SCMIRF argued for this misinterpretation of the definition of “political subdivision” by relying on an Attorney General opinion that

SCMIRF is an agency or department of a municipality. *See* 014 WL 7405219 (S.C.A.G. December 17, 2014) & 1990 WL 599264 (S.C.A.G. July 25, 1990). However, it is well settled by our Supreme Court that although it may be persuasive authority, an Attorney General's opinion is not binding, and the court may disagree with the opinion's reasoning and decline to adopt it. *See, e.g., State v. Ramsey*, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014). The Court should decline to adopt the Attorney General's opinion in this instance as flawed.

Here, the plain language of the statutory definition of "political subdivision" is that "any agency, governmental health care facility, department or subdivision thereof" only qualifies "special districts of the State", which is the listed entity directly preceding the qualifying phrase. S.C.Code Ann. § 15-78-30(h). Political subdivisions, therefore, include any agency, governmental health care facility, department or subdivision of special districts of the State only. *Id.* SCMIRF is not an agency, department, or subdivision of a special district of the State and, accordingly, not a political subdivision.

Furthermore, in its own right SCMIRF is not a county, municipality, school district, regional transportation authority, operator as defined in item (8) of Section 58-25-20, or a special purpose district of the State. *Id.* In contrast with the Insurance Reserve Fund, which is a Division of the South Carolina State Fiscal Accountability Authority and organized and controlled by numerous statutes, *see* S.C.Code Ann. §§ 1-11-140, 1-11-147, 10-7-10, 10-7-40, 10-7-120, 10-7-130, 11-9-75, 15-78-10 to 15-78-150, 38-13-190, 59-67-710, and 59-67-790, SCMIRF is not organized and controlled by statute. Instead, SCMIRF is "an unincorporated voluntary, self-insurance pool" created by municipalities, to include the Town of Cottageville, to fund the payment of property losses and liability claims on

behalf of its members. (Amended Complaint, Stipulation of Facts and Issues, ¶¶ 6-7, R. p. 84; and Exhibit B, R. pp. 95-98).

Municipalities, as political subdivisions of the State, may procure insurance to cover risks for which immunity has not been waived under the Tort Claims Act by either the purchase of insurance pursuant to S.C.Code Ann. § 1-11-140, by the purchase of insurance from a private carrier, or by self-insurance or an established pooled liability fund. *See* S.C.Code Ann. § 15-78-140(b). The Tort Claims Act's allowance for municipalities to create voluntary self-insurance pools no more renders the pooled funds political subdivisions of the State than the Act's allowance of the purchase of private insurance transforms private insurance carriers into political subdivisions of the State.

Moreover, SCMIRF is a fund, not an agency or department of the State. (Reeves's Motion for Summary Judgment, Exhibit 1, Ricard Deposition, pp. 8:8; 9:20-24; 14:1-12, R. pp. 436-437 & 442). As an insurance fund, SCMIRF does not share in the concerns of the State and its political subdivisions with the balance of financial exposure to tort liability with costs of governing our State, which underlies the purpose of the Tort Claims Act. *See* S.C.Code Ann. § 15-78-20(a). SCMIRF does not engage in governing our State.

B. Application of the *Health Promotion Specialists* factors clearly establishes that SCMIRF is not the State or its political subdivision.

In addition, the Supreme Court in *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 636, 743 S.E.2d 808, 814-15 (2013), specified factors to apply to determine whether an entity is the State or its political subdivision for purposes of coverage of the Tort Claims Act. Application of the *Health Promotion Specialists* factors clearly establishes that SCMIRF is not the State or its political subdivision.

Specifically, in *Health Promotion Specialists*, the Supreme Court considered whether the Board of Dentistry is a state entity by considering the following: (1) whether it functions statewide, (2) whether it performs work of the state, (3) whether it was created by the legislature, and (4) whether it is subject to local control. *Id.* The Supreme Court also “examined the character of the power delegated to the entity, and the nature of the function performed by the entity.” *Id.* In determining that the South Carolina Board of Dentistry is a state entity, the Supreme Court emphasized that the General Assembly created the Board as a statewide regulatory authority for dentists and hygienists, codified at S.C.Code Ann. § 40-15-10 *et seq.* (2011); that the Governor appoints several members of the Board, S.C.Code Ann. § 40-15-20; and that the Board’s funds are controlled by the State Treasurer, S.C.Code Ann. § 40-15-50. *Id.* Furthermore, the General Assembly specified in the Board’s creation that the Board’s individual members are entitled to immunity for actions performed in the course of their official duties. *Id.* (quoting S.C.Code Ann. § 40-15-60). As noted by the Supreme Court, the General Assembly created the Board of Dentistry and “intended for the Board as a whole to come within the purview of the TCA.” *Id.* 403 SC at 636, 743 S.E.2d at 815.

In stark contrast, the General Assembly did not create SCMIRF. SCMIRF was created by its member municipalities to pool their own risks of liability. The fact that statute authorizes state municipalities to procure insurance to cover risks for which immunity has not been waived under the Tort Claims Act by self-insurance or an established pooled liability fund does not render the pooled liability fund a creation of the General Assembly. *See* S.C.Code Ann. § 15-78-140(b). Such an argument by its logical extension would mean that since the statute also authorizes municipalities to purchase

insurance from a private carrier, that the chosen private carrier becomes a state entity. The argument falls flat. The provision allowing for a pooled risk fund and the purchase of private insurance does no more than provide options for a municipality. The statute does not turn either private carriers or pooled funds into state governmental entities.

Further, SCMIRF is not exercising a governmental function any more than does a private company that provides insurance to a state entity. The General Assembly did not create SCMIRF by statute or provide for any provision of state control by the Governor, the State Treasury, the General Assembly, or any other state office. SCMIRF's funds are not controlled by the State Treasurer. SCMIRF is not analogous to the Board of Dentistry, and applying the *Health Promotion Specialists, LLC* factors establishes that SCMIRF is not a governmental entity subject to the provisions of the TCA.

Likewise, SCMIRF's reliance below on two cases from Colorado and New Jersey as support for its argument that it is a governmental entity is misplaced. *See Colorado Special Dists. Property and Liability Pool v. Lyons*, 277 P.3d 874 (Co. Ct. App. 2012); *Shapiro v. Middlesex Co. Mun. Joint Ins. Fund*, 307 N.J.Super. 453 (N.J. Super. Ct. App. Div. 1998). Colorado and New Jersey's common law and statutory authority do not govern whether SCMIRF is a South Carolina governmental entity and, thus, subject to the Tort Claims Act. Further, unlike the case here, in the Colorado case, the parties conceded that the liability pool at issue was a public entity. *Colorado Special Dists. Property and Liability Pool*, 277 P.3d at 879. Second, unlike in the South Carolina Code, the Colorado statute explicitly includes in its definition of "public entity" instrumentalities created by intergovernmental agreement between municipalities:

'Public entity' means the state, the judicial department of the state, any county, city and county, municipality, school district, special improvement

district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.

Id. (citing Colo. Rev. Stat. Ann. § 24-10-103). In the Colorado case, the Special Districts Property and Liability Pool at issue was such an instrumentality created among districts by intergovernmental contract and explicitly subject to Colorado's Governmental Immunity Act. *Id.*

Similarly, New Jersey statute specifically governs the provision of insurance coverage in a municipal insurance risk pool subject to New Jersey insurance statutes. *Shapiro*, 307 N.J.Super. at 455-461 (citing N.J.S.A. 40A:10-36). In contrast, South Carolina's General Assembly has not included municipal risk pools, or instrumentalities of municipalities, in its definition of state entities subject to the Tort Claims Act. *See* S.C.Code Ann. § 15-78-30(d), (e), & (h). SCMIRF is not the State or a State office, agency, authority, department, commission, board, division, or instrumentality. *See* S.C.Code Ann. § 15-78-30(d), (e), & (h). SCMIRF is a fund created by municipalities. Furthermore, municipal pooled risk funds are not included within the Tort Claims Act's definition of "political subdivision." *See* S.C.Code Ann. § 15-78-30(h). In accordance with the plain language of the Tort Claims Act, SCMIRF is not a political subdivision falling within its ambit.

In sum, SCMIRF differs from the South Carolina Budget and Control Board Insurance Reserve Fund in that SCMIRF is not created by and controlled by state statute, and SCMIRF is not a division or entity of the State. Accordingly, any tort committed by SCMIRF, its employees, or agents, is not governed by and subject to the Tort Claims Act,

and a tort claim for bad faith brought against SCMIRF would not be subject to the Tort Claims Act.

II. The Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq., Is Inapplicable To And Does Not Limit The Recovery In A Claim Of Breach Of Contract In Failing To Protect The Insured.

Regardless of whether SCMIRF is a political subdivision or not, the Tort Claims Act has no effect on SCMIRF's liability based on breach of contract. *See* S.C.Code Ann. 15-78-20(d). A claim against SCMIRF for breach of the Coverage Contract in failing to pay its insured's claims within the contract's limits of \$1,000,000 per occurrence sounds in contract and is not subject to the limitations on tort claims contained in the Tort Claims Act. Whether a contract claim would be subject to the Tort Claims Act was specifically addressed at the hearing on the motions for summary judgment by both Reeves and SCMIRF, and Reeves raised the issue and argument in her motion for summary judgment and, again, in her Motion to Alter or Amend Judgment. The issue has been raised within the request for declaratory judgment, and, as such, the Circuit Court should have issued a ruling.

Claims against an insurance carrier for the failure to protect its insured and pay claims may be brought as claims of breach of contract or, if bad faith is present, as tort claims. *See Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983). South Carolina's Supreme Court first recognized bad faith tort liability of an insurer in the context of an insurer's unreasonable refusal to settle within the policy's limits. *See Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). Thereafter, the Supreme Court recognized tort liability for the amount of a judgment against the insured in excess of the policy limits where the insurer unreasonably refused to

accept an offer of compromise settlement. *Miles v. State Farm Mut. Ins. Co.*, 238 S.C. 374, 120 S.E.2d 217 (1961). Then, based on the same duty of good faith and fair dealing underlying the above tort liability, the Supreme Court held that an insurer may be liable in tort for bad faith in the handling of a claim for first party benefits. *Nichols*, 279 S.C. at 340, 306 S.E.2d at 619.

The Supreme Court has held that the State Budget and Control Board, as a State governmental entity as defined in the Tort Claims Act, may be liable under a tort claim of bad faith failure to pay a claim. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993). Such bad faith tort liability is subject to the statutory cap of the Tort Claims Act. *Id.* However, in holding that the State Budget and Control Board may be liable under a claim for bad faith, the Supreme Court made very clear that the Board also may be liable for breach of contract to its insured in the handling of a claim. *Id.* at 7, 437 S.E.2d at 9. A breach of contract claim does not require a showing of bad faith or unreasonable conduct, and contract claims are not subject to the Tort Claims Act. *See Nichols*, 279 S.C. at 341, 306 S.E.2d at 619. Furthermore, under a breach of contract claim, the State Budget and Control Board would be liable for the insurance proceeds it failed to pay, and actual damages in a breach of contract claim are not subject to any recovery cap. *See S.C.Code Ann. § 15-78-20(d); Charleston County Sch. Dist.*, 313 S.C. at 7, 437 S.E.2d at 9.

In *Charleston County Sch. Dist.*, the Supreme Court found no prejudice to the school district in the dismissal of its bad faith tort claim because its breach of contract claim survived. The insurance proceeds claimed as breach of contract damages by the district greatly exceeded the Tort Claims Act's recovery cap that would have applied to any

recovery under the bad faith claim. 313 S.C. at 7, 437 S.E.2d at 9. However, no statutory cap applies to recovery in a breach of contract claim, and thus there would be no statutory cap on actual damages in the contract claim. Accordingly, the district could be awarded its actual damages from the Budget and Control Board's breach of contract, exceeding the Tort Claims Act statutory cap. *Id.*

Therefore, regardless of whether or not SCMIRF constitutes a political subdivision of South Carolina subject to the Tort Claims Act, a claim for breach of contract would not be covered by the Tort Claims Act and there would be no statutory limits on recovery of damages. SCMIRF would be liable for the insurance proceeds it failed to pay its insured—that being, \$1,000,000 per occurrence of negligence.

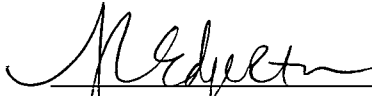
CONCLUSION

Under the plain language of the Tort Claims Act's definition of "political subdivision", SCMIRF is not a political subdivision of the State and, thus, not subject to the limitation of tort liability on the State and its political subdivisions. *See S.C. Code Ann. § 15-78-10 et seq.* Furthermore, applying the *Health Promotion Specialists, LLC* factors to SCMIRF clearly establishes that it is not the State or its political subdivision. 403 S.C. at 636, 743 S.E.2d at 814.

In addition, the Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, does not apply to breach of contract claims against the State or its political subdivisions and, accordingly, would not limit the recovery in a claim of breach of the Coverage Contract at issue here in failing to protect the insured, even if SCMIRF were a political subdivision of the State.

Therefore, Reeves respectfully requests that the Court reverse the lower court's June 29, 2016 Order as to Issue #2 and grant summary judgment for Reeves on Issue #2.

Respectfully submitted this 23rd day of January 2017,

A handwritten signature in black ink, appearing to read 'W. Mullins McLeod, Jr.', written over a horizontal line.

W. Mullins McLeod, Jr., SC Bar No. 14148

Jacqueline LaPan Edgerton, SC Bar No. 100920

McLEOD LAW GROUP

Post Office Box 21624

Charleston, SC 29413

Telephone: (843) 277-6655

Attorneys for Respondent/Appellant

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 24 2017

Appellate Case No. 2016-001626

SC Court of Appeals

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.

CERTIFICATE OF COMPLIANCE

Respondent/Appellant's counsel certifies that her final brief complies with Rule
211(b), SCACR.



W. Mullins McLeod, Jr., SC Bar No. 14148
Jacqueline LaPan Edgerton, SC Bar No. 100920

McLEOD LAW GROUP
Post Office Box 21624
Charleston, SC 29413
Telephone: (843) 277-6655

Attorneys for Respondent/Appellant