

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM COLLETON COUNTY
Court of Common Pleas
Perry M. Buckner, III, Circuit Court Judge

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, [SCMIRF]

Appellant/
Respondent.

**RECORD ON APPEAL
VOLUME II**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ASHLEY REEVES, AS PERSONAL) CIVIL ACTION NO:
REPRESENTATIVE OF THE ESTATE) 2:12-cv-02765-DCN
OF CARL ALBERT "BERT")
REEVES,)

Plaintiff,)

vs.)

TOWN OF COTTAGEVILLE, THE)
TOWN OF COTTAGEVILLE POLICE)
DEPARTMENT, and RANDALL)
PRICE, INDIVIDUALLY,)

Defendants.)

* * * * *

DEPOSITION OF: HEATHER RICARD

DATE TAKEN: Monday, July 28, 2014

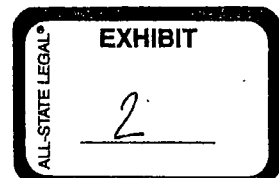
TIME: 2:00 p.m.

PLACE: Murphy & Grantland
4406 Forest Drive
Columbia, South Carolina

REPORTED BY: EVE WILBANKS
Registered Professional
Reporter, Certified LiveNote
Reporter and Notary Public

* * * * *

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1 S T I P U L A T I O N S

2 It is hereby stipulated and agreed by and
3 between the parties hereto, through their
4 respective counsel, that the reading and signing
5 of the transcript is waived by the Deponent.
6 HEATHER RICARD, SWORN.

7 DIRECT EXAMINATION

8 BY MR. MCLEOD:

9 Q. If you would, please, ma'am, state your
10 full name for the record.

11 A. Sure. I'm Heather Ricard.

12 Q. And, Ms. Ricard, how do you spell your
13 last name?

14 A. It's R-I-C-A-R-D.

15 Q. And if you would, just share with me a
16 little bit about your educational background and
17 then, of course, your professional background.

18 A. Sure. I have a Bachelor of Science
19 degree from the University of South Carolina; I
20 majored in accounting. And I also have a Master's
21 in Business Administration from California State
22 University. I've been with the Municipal
23 Association for a little over nine years, working
24 for the Risk Management Services Department. And
25 for the last about two and a half years, I've been

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1 the Director of Risk Management Services there.

2 And prior to that, I worked for a city in
3 California for nine years.

4 Q. All right. So what year did you
5 graduate South Carolina?

6 A. 1994.

7 Q. Did you go straight to get your
8 master's, or did you enter the work force and then
9 go back and get your master's?

10 A. I entered the work force and then worked
11 on my master's, but it was a very short time
12 period. I graduated with my master's degree in
13 '97.

14 Q. Starting in 1997 until today, have you
15 worked for any other employers other than the
16 Municipal Risk Fund or the municipality in
17 California?

18 A. No. I worked for the City of Vacaville
19 from 1996 to 2005. And then from 2005 until now
20 with the Municipal Association of South Carolina.

21 Q. What were your job responsibilities with
22 the municipality in California?

23 A. I worked specifically in the finance
24 department. My last position I held there was the
25 accounting supervisor. I supervised a staff of

1 nine folks, including general ledger accountants,
2 accounts payable clerks, purchasing, that sort of
3 thing.

4 Q. And when you first came on with the
5 South Carolina Municipal Insurance Reserve Fund,
6 what was your initial job title?

7 A. I was the financial manager when I
8 started there. Just to clarify, I work for the
9 Municipal Association of South Carolina, that
10 administers and sponsors the South Carolina
11 Municipal Insurance and Risk Financing Fund.

12 Q. And what did you do for them?

13 A. I specifically was responsible for the
14 financial accounting and reporting for the SCMIRF
15 insurance program, as well as the workers'
16 compensation program that we administer. And I
17 also was responsible for establishing a retiree
18 health care benefits trust to allow our cities to
19 advance fund retiree health care liabilities.

20 Q. Have you ever worked in claims at any
21 time?

22 A. No, I have not. Other than in my
23 position that I'm in now, obviously.

24 Q. And how long have you been in that
25 position?

1 A. A little over two years.

2 Q. How did you come to gain your new
3 position that involves claims?

4 A. Well, I was promoted to the Director of
5 Risk Management Services in March of 2005 --
6 excuse me -- March of 2012. Prior to that, I had
7 been -- I started as the financial manager, and
8 then I was promoted to the Chief Financial
9 Officer, and then I was promoted to the Assistant
10 Director of Risk Management Services. And then
11 when my predecessor retired, I was promoted into
12 that position. So I'm responsible for the
13 administration of both programs. It includes
14 financial accounting reporting, oversight of
15 claims and the underwriting and loss control
16 functions.

17 Q. So who is the adjuster working on the
18 Reeves versus the Town of Cottageville case?

19 A. Cindy Martilini (ph) is our claims
20 manager. She has the primary responsibility for
21 that. Holland Folsom is also a senior adjuster
22 that is involved with the claim.

23 Q. And do both of those individuals work
24 underneath your chain of command, so to speak?

25 A. Cindy is the direct supervisor for

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1 Holland, and I am the direct supervisor of Cindy.

2 Q. Is there anybody at SCMIRF who you
3 report to with regard to the Reeves versus Town of
4 Cottageville case?

5 A. I report directly to the Executive
6 Director, Miriam Hair. She's the Executive
7 Director of the Municipal Association.

8 Q. And is her office in Columbia?

9 A. Yes.

10 Q. Share with me the relationship, if you
11 will, between SCMIRF and the Municipal
12 Association.

13 A. The Municipal Association sponsored the
14 program back in 1990. And so the Municipal
15 Association is responsible for the overall
16 administration of the SCMIRF program. We do have
17 a nine-member Board of Trustees that are elected
18 from the membership that are responsible for the
19 overall governance of the program.

20 Q. Okay. Was the Municipal Association
21 enabled by statute or by private creation?

22 A. It's through the state statute that
23 formed the Tort Claims Act that provides for
24 cities and towns to be able to form risk-sharing
25 pools like SCMIRF.

1 Q. All right. And so when a town or a
2 municipality purchases insurance, who do they pay
3 the premium to? SCMIRF --

4 A. SCMIRF.

5 Q. -- or the Municipal Association?

6 A. SCMIRF. SCMIRF is a separate legal
7 entity.

8 Q. How does the Municipal Association get
9 paid for administering the programs?

10 A. There is an agreed-upon fee each year
11 that includes basically the straight reimbursement
12 of costs for any salaries of the employees that
13 are directly working for those programs. And
14 there is some general overhead that's included in
15 that. For example, for Miriam Hair's executive
16 oversight, there's a portion of overhead included
17 in that. Any type of supplies or anything like
18 that would be passed through directly to the
19 programs.

20 Q. Okay. When you talk about members of,
21 say, a risk pool, are those members part of the
22 SCMIRF entity, or are they part of the Municipal
23 Association entity or both?

24 A. They are specifically members of SCMIRF.
25 They have to actually adopt a resolution to

1 participate in the program. But typically, all
2 municipalities within the state are members of the
3 Municipal Association as well.

4 Q. And for a municipality, I'm assuming
5 they can purchase private insurance if they
6 choose; but according to the enabling statute, you
7 all have to provide it if they request it; is that
8 right?

9 A. Technically, we don't have to provide
10 it. There's actually an application process that
11 they go through, and the board then makes the
12 ultimate decision on whether they approve their
13 membership or not, based on loss control history
14 and that sort of thing.

15 Q. So is it your understanding that SCMIRF
16 can refuse to insure a municipality located within
17 the State of South Carolina?

18 A. Yes.

19 Q. Do you -- okay. Now, as far as the
20 municipalities are concerned, what type of
21 underwriting goes into determining whether or not
22 they should be approved to be part of the -- I
23 guess the SCMIRF entity?

24 A. Well, typically, the process starts with
25 the member contacts us or the prospective member

1 contacts us, and we will then reach out to them
2 and request exposure information. Because this
3 SCMIRF program also covers -- it provides property
4 coverage as well as liability coverage. So we
5 will request information regarding their
6 exposures; they do have to complete the renewal --
7 or an application, not a renewal application at
8 that point. When it's a prospective member,
9 they're completing that application. And then our
10 underwriting manager will go through the process
11 of looking at their loss data for the last five
12 years. We request that from their current
13 insurance provider.

14 And then once she actually rates up
15 their premium, our loss control staff will then go
16 out and prepare an assessment of the members,
17 basically meeting with various city or town staff,
18 asking various loss control questions. They then
19 write up an assessment, and we present the quote,
20 as well as the assessment, to our board for
21 consideration of approval.

22 Q. Okay. And in the event there is a loss
23 or a claim that's paid under a particular policy,
24 where do the reserves come from?

25 A. Where do the reserves come from?

1 Q. Uh-huh (indicating an affirmative
2 response).

3 A. They would be recorded on that
4 particular claim. So depending on the adjuster's
5 assessment of that particular claim, the adjuster
6 will record the reserves as they see appropriate.

7 Q. Well -- that probably wasn't an artful
8 question. Assume that a claim is paid out under a
9 policy for a million dollars, where does that
10 million dollars come from? Does it come from all
11 the members' dues? Does it come from a separate
12 account that's set aside by SCMIRF? Where does it
13 come from?

14 A. This is a risk pool. So all of the
15 funds are pooled together. So we would pay the
16 claim from the general cash balance of the pool.

17 Q. What is -- coming from an accounting
18 standpoint, I guess it's important to know how
19 much is in the pool on any given basis. Do you
20 all do quarterly audits or accountings of the
21 pool, or do you do it annually or what?

22 A. We're required to have an annual
23 financial statement audit.

24 Q. And are those reported to the Budget and
25 Control Board?

1 A. No. They are reported to our Board of
2 Trustees.

3 Q. What, on average, is in the fund on a
4 given year? For example, at the end of the fiscal
5 year of 2013, how much did the fund have available
6 to pay out in claims?

7 A. Well, we're required to record a reserve
8 for losses. And so, basically, at any given time,
9 you know, we may have about 35 million in cash in
10 investments available. But we have a reserve for
11 losses that's then recorded to basically account
12 for any incurred but not reported losses, any
13 losses that have actually been reported by the
14 adjuster. So all of that is included in the
15 reserve for losses. And we may have other
16 liabilities -- you know, accounts payables and
17 such -- that is recorded. And then we have a net
18 position within the trust, which as of December 31
19 -- I don't remember the exact number off the top
20 of my head. But, you know, it was some amount
21 less than the actual cash investments we have on
22 hand, because of the liabilities.

23 Q. And what is the difference between
24 SCMIRF and the Municipal Insurance Trust? Are
25 those two separate entities?

1 A. Yes. They're two separate entities.
2 The South Carolina Municipal Insurance Trust is
3 our workers' compensation program, where our
4 cities come together to pool their workers'
5 compensation risk.

6 Q. So the South Carolina Municipal
7 Insurance Trust only applies to workers'
8 compensation claims?

9 A. That's correct.

10 Q. And then SCMIRF applies to all other
11 claims?

12 A. Property and liability.

13 Q. All of the covered claims?

14 A. Right.

15 Q. All right. Now, when you became the
16 director of claims, did you undergo any specific
17 training as to claims handling, adjusting, the
18 Tort Claims Act, anything like that?

19 A. Keep in mind, I'm not the director of
20 claims. I'm the director of the entire
21 department. So I oversee the claims,
22 underwriting, loss control. And in regards to
23 specific training, I, of course, have attended
24 training courses. We offer training courses to
25 our members throughout the years. But, no, I did

1 not attend any specific claims adjudication type
2 courses.

3 Q. And correct me if I'm wrong, but the
4 SCMIRF was created specifically to provide
5 insurance to municipalities who were subject to a
6 suit after the passage of the Tort Claims Act; is
7 that right?

8 A. That's correct.

9 Q. Would it be fair to say that's the only
10 reason why SCMIRF exists, is to provide insurance
11 to municipalities or their employees who are sued
12 pursuant to the Tort Claims Act?

13 A. Well, we provide coverage to claims that
14 are outside of the Tort Claims Act as well to our
15 members through the single coverage limits that we
16 provide. So we also provide protection for 1983
17 actions as well.

18 Q. Do you know when the policy -- let me
19 make sure I've got the same --

20 MR. MURPHY: I think that's complete,
21 unless they didn't copy something.

22 MR. MCLEOD: Yeah. Mine is longer.

23 Q. Let me show you --

24 MR. MCLEOD: Well, let's just mark this
25 as Exhibit 1.

1 (Deposition Exhibit No. 1, SCMIRF 2011
2 Coverage Contract - Town of Cottageville, was
3 marked for identification.)

4 Q. Exhibit 1 is the contract of insurance,
5 which, at least for this point, we believe was the
6 policy issued in this case. Do you know whether
7 or not this policy is a standard policy that's
8 issued to municipalities, or has SCMIRF used
9 different language in different policies?

10 A. It is a standard policy overall, unless
11 the town has opted for some additional
12 endorsements, which would be included in the back
13 of the policy for the -- specifically for the
14 town. It would be endorsements that are available
15 to all members of SCMIRF.

16 Q. And as far as writing that policy and
17 offering it to sale to municipalities, is that
18 something that SCMIRF does internally, or do they
19 outsource that responsibility?

20 A. We have a coverage contract attorney
21 that assists us with this; J.R. Murphy's firm
22 assists us with that.

23 Q. And I guess obviously the first policy
24 that would have been issued would have been back
25 in 2000- --

1 A. The trust was formed in 1990.

2 Q. All right. Do you know whether or not,
3 from your own personal knowledge, from the time
4 you first came to work for SCMIRF until today,
5 whether or not the policy that is marked as
6 Exhibit No. 1 is substantially similar to other
7 policies that have been issued, or are there
8 provisions in this particular policy that you
9 believe are distinct or different than other
10 policies that have been sold?

11 A. Since 1990; is that what you mean?

12 Q. Yes.

13 A. I'm sure that there have been changes
14 over the years since 1990. But that would have
15 been integrated into the overall standard contract
16 and would have been offered to all members of
17 SCMIRF.

18 Q. Okay. And for the policy that has been
19 issued in this case, the intent behind that policy
20 was to insure the Town of Cottageville and its
21 employees; is that correct?

22 A. That's correct.

23 Q. When the Tort Claims Act was passed, do
24 you recall being trained or becoming made aware
25 that the purpose -- one of the purposes of the

1 Tort Claims Act was to allow for the state and its
2 employees to be sued just like private citizens?

3 A. In the course and scope of their
4 employment.

5 Q. Was that your understanding of one of
6 the provisions of the Tort Claims Act?

7 A. Yes.

8 Q. And would it have then been one of
9 SCMIRF's claims or objectives to insure
10 municipalities or their employees as if they were
11 private individuals?

12 A. Within the course and scope of their
13 employment.

14 Q. Okay. Now, have you had training while
15 you were with SCMIRF or anywhere else on the South
16 Carolina Claims Practices Act?

17 A. No.

18 Q. Have you ever been made aware that the
19 legislature has specifically indicated that
20 insurers or their representatives should not
21 knowingly make misrepresentations to their
22 insureds or third parties about the availability
23 of coverage?

24 MR. MURPHY: Let me object. The witness
25 is not going to answer. That's not even in

1 your Notice and it has nothing to do with this
2 case, and it would be a mental impression work
3 product, so --

4 MR. MCLEOD: I'm just asking her if
5 she's ever been made aware of that.

6 MR. MURPHY: And I'm telling her to not
7 answer. It's outside -- you asked nothing
8 about that.

9 Q. So you've never had any training on --

10 MR. MURPHY: Same objection.

11 Q. -- on whether it's proper or improper
12 claims handling?

13 MR. MURPHY: Same question (sic).

14 Witness will not answer. It's outside the
15 scope. She's a 30(b)(6) designee.

16 MR. MCLEOD: You can file your motion
17 within five days.

18 MR. MURPHY: I know.

19 BY MR. MCLEOD:

20 Q. Let me ask you this: For this
21 particular lawsuit, have you personally looked at
22 the Complaint?

23 A. Yes.

24 Q. And how many insureds are there as
25 Defendants in the Complaint?

1 A. The Town of Cottageville, Officer Price
2 and Police Chief Craddock, I believe.

3 Q. Okay. How much insurance is available
4 to Randall Price as a result of the allegations
5 contained in that Complaint?

6 A. Well, there are multiple allegations
7 within the Complaint, but we view this as one
8 occurrence with one single policy limit or
9 coverage limit available for this claim.

10 Q. We'll get to that. But my question is,
11 Randall Price obviously has insurance from your
12 company; is that right?

13 A. That's correct.

14 Q. How much insurance does he have?

15 A. There is a single policy limit or --
16 excuse me -- coverage limit that's available on
17 this particular claim. We view this, regardless
18 of the allegations or covered members, covered
19 entities, as one claim, one occurrence. So
20 there's a single coverage limit available of 1
21 million.

22 Q. So at the trial of this case -- and
23 we'll get into that. But at the trial of this
24 case, if there's a \$1,000,000 verdict against the
25 Town of Cottageville, a \$1,000,000 verdict against

1 Randall, and a \$1,000,000 verdict against Chief
2 Craddock, how much is SCMIRF going to send my
3 firm, and who are they going to ask to be
4 released?

5 A. Again, we view this as one occurrence,
6 because there was only one injury. If you look at
7 the provisions of the contract, the General
8 Provisions -- in particular, in Section I,
9 particularly in paragraph C-9 -- there's one
10 injury in this claim. And so, therefore, there is
11 one coverage limit available.

12 Q. So what do you do?

13 A. There's only one coverage limit
14 available.

15 Q. So you tell Mr. Price -- how do you
16 divvy up the million amongst your three insureds?

17 A. We consider that as one claim from our
18 standpoint.

19 Q. Okay. So when the Town of Cottageville
20 comes to SCMIRF and says, We need you to pay our
21 million dollar liability, what does SCMIRF say?

22 A. That there was one injury, so there was
23 one occurrence. There is one coverage limit
24 available for this claim; regardless of the
25 covered members, the allegations that are listed

1 there, there is a single injury.

2 Q. Okay. So does this policy provide
3 insurance protection to each of its insureds?

4 A. This is based on occurrence. But if
5 there are considered to be multiple occurrences,
6 which we do not think this particular claim is,
7 the General Provisions portion of the coverage
8 contract would be applicable in this case, and so
9 there would be a single limit of a million dollars
10 in coverage.

11 Q. You do understand that lawsuits are
12 oftentimes determined on the merits? You
13 understand that?

14 A. Yes.

15 Q. And you understand that available
16 coverage, really, from my standpoint, is of no
17 consequence regarding the merits of the case? Do
18 you understand that?

19 A. Again, there's one coverage limit
20 available because there was one injury, regardless
21 of the legal theories that you may be, you know,
22 arguing within the trial.

23 Q. What I'm trying to understand is, if
24 there's a verdict against Mr. Price for a million
25 dollars, the town for a million dollars and

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1 Craddock for a million dollars, then how do you
2 protect each of your insureds?

3 A. Again, it's considered one claim to us.

4 Q. I understand. So you send my firm a
5 check for a million dollars; is that right?

6 A. If that's what is awarded.

7 Q. And if my firm writes you back and says,
8 We're not going to accept this million dollars
9 because I've got a million dollar verdict against
10 the town and they can pay it, and we'd rather put
11 Price into bankruptcy and we'd rather put Craddock
12 into bankruptcy, what do you do to protect the
13 interest of your insureds?

14 MR. MURPHY: Objection. That's a mental
15 impression or conclusion on a hypothetical.
16 It's not subject to your 30(b)(6). It's
17 privileged work product, and the witness
18 doesn't have to answer that question.

19 MR. MCLEOD: I disagree.

20 Q. But I'll ask you a different question.
21 Do you think, as an insurer in South Carolina,
22 SCMIFF has an obligation to each of its insureds?

23 MR. MURPHY: Same objection. That's a
24 legal conclusion. The witness is not required
25 to answer that question, and it's not part of

1 your 30(b)(6).

2 Q. Do you think that SCMIRF has an
3 obligation to its insureds?

4 MR. MURPHY: Direct the witness not to
5 answer. Same objection.

6 MR. MCLEOD: We'll mark this as Exhibit
7 2.

8 (Deposition Exhibit No. 2, Notice of
9 Deposition, was marked for identification.)

10 Q. On Exhibit 2, on your 30(b)(6) Notice,
11 subparagraph B states, "The insurance policies and
12 coverage available to satisfy all or part of any
13 claims brought against the Town of Cottageville
14 for the shooting death of Bert Reeves, as alleged
15 in the Complaint." Did you see that?

16 A. I did.

17 Q. And paragraph C is, "The financial
18 coverage available or remaining on the Town of
19 Cottageville's policy to the extent that any of
20 the insurance policies are wasting policies or
21 otherwise have been reduced by the payment of
22 claims for any reason." Do you see that?

23 A. I do.

24 Q. So my question is, if there is a verdict
25 against Randall Price for a million dollars and

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1 there's a verdict against the Town of Cottageville
2 for a million dollars, how much insurance
3 protection does the Town of Cottageville have?

4 A. There is a single coverage limit of
5 \$1,000,000 available.

6 Q. Available to whom?

7 A. For the entire claim. Specifically, if
8 you look at the Law Enforcement Liability section
9 of the coverage contract, there is a limit of
10 liability that is \$1,000,000, where other
11 liability and/or coverage sublimits apply, and
12 then SCMIRF's liability will be limited to the
13 applicable sublimit.

14 And basically it says, SCMIRF'S
15 liability will be limited to 1,000,000 per member,
16 regardless of the covered persons, number of
17 claimants, the claims made or the number of
18 covered vehicles involved.

19 Again, we do not believe that -- even
20 though there are multiple allegations, we don't
21 believe there are multiple occurrences or wrongful
22 acts. So the provisions in Section I, the General
23 Provisions, specifically paragraph C-9, would be
24 applicable. Because there is one injury, there is
25 a single coverage limit that applies.

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ROA_0453

1 Q. Let's mark -- these are two documents
2 that you brought with you today, which appear to
3 be printed-off sections of the policy; is that
4 right?

5 A. That's correct.

6 MR. MCLEOD: Let's mark these as 3 and
7 4.

8 (Deposition Exhibit No. 3, General
9 Provisions, was marked for identification.)

10 (Deposition Exhibit No. 4, Limit of
11 Liability, was marked for identification.)

12 Q. Going back to your last answer, you said
13 that, We believe there's only one occurrence. Do
14 you have any legal authority that supports your
15 belief that the coverage available to the Town of
16 Cottageville and the additional insureds is only
17 \$1,000,000?

18 A. We have an opinion prepared by J.R.
19 Murphy that states that.

20 Q. Other than an opinion from Mr. Murphy,
21 do you have any other legal authority?

22 A. The coverage contract, as it stands.

23 Q. Okay. Has this -- has this insurance
24 policy ever been interpreted by any South Carolina
25 -- any State or Federal Court in South Carolina?

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ROA_0454

1 A. Other than, I guess, as various claims
2 arise and there are court cases, perhaps that
3 section. But, otherwise, not that I'm aware of.

4 Q. All right. Let's go to the policy, and
5 let's start with -- well, first off, let me ask
6 you, on page 28, that's where we'll start, and I'm
7 probably going to skip around -- but on 28, do you
8 see the Declarations page?

9 A. I do.

10 Q. What is an aggregate policy? What does
11 that mean?

12 A. Basically, that's -- regardless of the
13 number of claims, that's the total amount of
14 limits that's available.

15 Q. Okay. So in an aggregate policy, no
16 matter how many claims are made, no matter how
17 many injuries are made, no matter how many
18 negligent acts are involved, there's a \$1,000,000
19 policy in the aggregate -- aggregate period, end
20 of story?

21 A. Correct.

22 Q. And so in Section 3 on Exhibit --
23 Section 3 of Exhibit No. 2 -- I'm sorry, Exhibit
24 No. 1, the policy, do you see where in the General
25 Liability policy, the limit is \$1,000,000; do you

1 see that?

2 A. Yes.

3 Q. And the next indication is it's a per
4 occurrence policy; do you see that?

5 A. Yes.

6 Q. And when you sell a per occurrence
7 policy versus an aggregate policy, are the
8 premiums different?

9 A. I would assume so. We price the limits,
10 as you see here, for all of our members, using the
11 same limits, unless they opt to purchase
12 additional liability limits.

13 Q. Well, isn't it true that a -- the
14 premium for a per occurrence policy will typically
15 be greater than or higher than the premium for an
16 aggregate policy?

17 A. Yes. That's correct.

18 Q. And that is because the exposure or the
19 risk in the per occurrence policy is greater or
20 higher than the exposure under an aggregate
21 policy?

22 A. That's correct.

23 Q. And in this particular case, for the
24 insurance policy that you all issued to the Town
25 -- sold to the Town of Cottageville, you all sold

1 them a General Liability \$1,000,000 per occurrence
2 policy; is that right?

3 A. That's correct.

4 Q. And you all charged them for the per
5 occurrence policy; is that right?

6 A. That's correct.

7 Q. Had you all wanted to, you could have
8 sold them, under the General Liability policy, an
9 aggregate policy, couldn't you?

10 A. *No. We do not offer an aggregate policy
11 for limited -- for General Liability coverage.
12 It's a per occurrence, unless stated otherwise on
13 the contract declaration. But we do not offer an
14 aggregate policy.

15 Q. Tell me why.

16 A. I don't know the reason ultimately why,
17 other than to provide ongoing protection to our
18 members at that \$1,000,000 per occurrence or
19 offense limit.

20 Q. Okay. What do you believe -- first of
21 all, you would agree with me that if there are
22 multiple occurrences, then there's more than a
23 million dollars in coverage; you would agree with
24 that?

25 A. Again, in this case, I don't believe

1 there's multiple occurrences.

2 Q. I understand. I understand. But if
3 there were multiple occurrences in a case, there
4 would be more than a million dollars in coverage;
5 is that right?

6 A. Typically, unless there is a single
7 injury that is involved. And then the general --
8 the Section I, General Provisions, would apply,
9 and there would be a single coverage limit
10 available.

11 Q. Well, what is your understanding of what
12 the per occurrence policy protects against?

13 A. An occurrence is an accident that
14 results in bodily injury or property damage.

15 Q. And so if there are multiple accidents
16 or occurrences, then that is why we would have a
17 per occurrence policy; is that right?

18 A. If there are multiple injuries, perhaps.
19 But in this case, there was multiple allegations.
20 We don't believe that there's multiple occurrences
21 or wrongful acts. There was a single injury in
22 this case. So the General Provisions would apply,
23 paragraph C-9 specifically.

24 Q. What is the most money that the -- that
25 SCMIRF has paid out on a claim since you've been

1 working there?

2 A. For a General Liability claim, the most
3 we paid out is in the 900,000 range. We have
4 never paid the policy limit -- or coverage limits.

5 Q. Tell me about the 900,000 case. What
6 was that about?

7 A. It was a raid at a high school, and
8 there were multiple parties involved. I don't
9 know all the specific details, but we ultimately
10 settled the case for that amount.

11 Q. Was that the Burke High School?

12 A. The Stratford.

13 Q. I mean, Stratford?

14 A. Yes.

15 Q. And that was in Federal Court in
16 Charleston; is that right?

17 A. I don't know the specific details.

18 Q. And was it SCMIRF's position in that
19 case that there was only a million dollars in
20 coverage?

21 A. Yes.

22 Q. And in that case, you're aware that many
23 students claimed injuries as a result of the raid;
24 are you aware of that?

25 A. Yes. But, again, it was considered one

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1 occurrence from our standpoint.

2 Q. And tell me why.

3 A. I wasn't involved in the specifics of
4 that claim. I just know we considered it a --
5 considered it one occurrence from a policy
6 standpoint -- or from a coverage contract
7 standpoint.

8 Q. But you are aware that there were
9 multiple children who claimed multiple injuries as
10 a result of that raid at Stratford High School?

11 A. Yes.

12 Q. So in that case, SCMIRF took the
13 position that it was only one occurrence because
14 there was only one raid; would that be fair to
15 say?

16 A. Logically that sounds correct. But,
17 again, I don't know all of the specific details.

18 MR. MURPHY: We may -- if we're going to
19 continue this, you may have to amend your
20 Notice and I'll produce someone who knows more
21 about it if the Judge thinks it's relevant.
22 But let's move away from that.

23 Q. So based on your understanding of
24 SCMIRF's position in the Stratford case was, that
25 there was one raid, therefore, there was one

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1 occurrence; is that right?

2 A. Correct.

3 Q. And in this case -- let me ask you this:
4 To your knowledge, was the insurance policy issued
5 in the Stratford High case substantially similar
6 to the policy at issue in this case?

7 A. Yes.

8 Q. All right. Now, if you would, please,
9 ma'am, turn to page 29. All right. In the second
10 paragraph, if you would, please read that into the
11 record, the first sentence of the second
12 paragraph.

13 A. Under section A?

14 Q. Yes, ma'am.

15 A. "To pay on behalf of the member or
16 covered persons for all sums which the member or
17 covered persons shall be obligated to pay
18 exclusively as money damages by reason of the
19 liability imposed upon them by law on account of
20 bodily injuries, including death resulting
21 therefrom at any time, suffered or alleged to have
22 been suffered by any person or persons (except
23 employees of the member injured in the course of
24 their employment), and/or property damage arising
25 out of any occurrence other than as covered by

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1 Section IV (Law Enforcement), Section V (Public
2 Officials), and Section VI (Auto) of this
3 contract."

4 Q. Now, would you agree with me that this
5 provision of the contract tells SCMIRF's insureds
6 that SCMIRF will pay on the insured's behalf any
7 money that they shall be obligated to pay in the
8 event of liability?

9 A. In the event of liability, if the
10 coverage contract so stipulates, yes.

11 Q. Okay. So how do -- how does SCMIRF
12 comply with that provision of the contract when
13 there are verdicts against multiple insureds?

14 A. Again, under the General Provisions of
15 the coverage contract, there is an absolute limit
16 that's available to our members. If you would
17 like to see the section I'm referring to --

18 Q. We'll get to that, ma'am, yeah.

19 A. -- it is the General Provisions section,
20 I believe it's C-9.

21 Q. So would you agree with me that there
22 are covered items within this policy issued -- I
23 mean, we see as Exhibit No. 1 where there is a --
24 where there is specifically a single aggregate
25 limit?

1 A. There are some single aggregate limits,
2 like you mentioned, on the General Liability
3 Contract Declaration, the Products and Completed
4 Operations, that shows an aggregate.

5 Q. Well, turn to page 30. Isn't it true
6 that for members or covered persons who become
7 legally obligated as a result of sexual abuse,
8 SCMIRF has specifically stated that there is a --
9 \$1,000,000 single aggregate shall apply?

10 A. Yes. In this particular portion of the
11 coverage contract.

12 Q. And you would agree with me -- well,
13 first off, what does a single aggregate limit
14 mean?

15 A. It's what I mentioned earlier, that
16 regardless of the number of claims made, that's
17 the limit that's available, 1,000,000.

18 Q. Now, you would agree with me that this
19 single aggregate limit of a million dollars only
20 applies in the event of sexual abuse -- or in the
21 event of abuse?

22 A. The aggregate that's listed here applies
23 to, you know, sexual abuse.

24 Q. Okay.

25 A. But as I mentioned earlier, there may be

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1 multiple occurrences or allegations that are
2 listed. But in the event there is a single
3 injury, there would be one coverage limit
4 available of a million dollars.

5 Q. Okay. Now, would you agree with me that
6 in Section III and in Section IV -- well, let's go
7 to actually Section IV. There is no similar
8 provision stating that law enforcement liability
9 has a \$1,000,000 single aggregate limit?

10 A. Can you tell me on which page Section IV
11 starts?

12 MR. MURPHY: I think it starts on 52.

13 Q. We'll read it into the record.

14 MR. MURPHY: It starts on 51.

15 Q. Let's first do this so the record can
16 follow what we're doing. Keep your thumb on that
17 page, but go back to page 30, please, ma'am.
18 Okay. If you will, start -- read for the record
19 paragraph D, and I'll tell you when to stop.

20 A. Okay. "Liability coverage for any claim
21 based on a member's or covered person's failure to
22 supervise, disclose, warn of or prevent the
23 conduct of an employee or of any other person
24 whose conduct the member or covered person is
25 legally obligated to supervise, control, disclose,

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1 warn of or prevent, which results in the sexual
2 abuse or physical abuse or neglect of any person,
3 whether or not said person and/or the perpetrator,
4 tortfeasor, and/or defendant is in the custody or
5 care of the member or covered person, shall be
6 subject to a single aggregate limit of 1,000,000."

7 Q. And if you'll read the next sentence,
8 please.

9 A. "This single aggregate shall apply
10 regardless of the number of contract periods
11 during which the sexual abuse or physical abuse or
12 neglect began or allegedly began or continued, the
13 number of perpetrators, tortfeasors, and/or
14 defendants involved, and/or the number of victims
15 and/or claimants involved, and regardless of the
16 number of incidents of sexual abuse or physical
17 abuse or neglect that happened over time."

18 Q. Okay. First of all, would you agree
19 with me that Section -- that the injury or the
20 damage that results -- one of the injuries or
21 damages that results from sexual abuse is a
22 personal injury?

23 A. Yes.

24 Q. If you will, turn to page 52. And if
25 you'll read for the record paragraph 2.

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1 A. Okay. "As regards the General Liability
2 (Section III), Law Enforcement Liability (Section
3 IV), Public Officials Liability (Section V), and
4 Auto Liability (Section VI) coverages afforded by
5 this contract, the total liability of the South
6 Carolina Municipal Insurance and Risk Financing
7 Fund any one occurrence/accident/wrongful act will
8 be \$1,000,000 per member, excluding expenses and
9 defense cost; except where other liability and/or
10 coverage sublimits apply, then SCMIRF'S liability
11 will be limited to the applicable sublimit."

12 "SCMIRF's liability for any one
13 occurrence/wrongful act will be limited to
14 \$1,000,000 per member, regardless of the number of
15 covered persons, number of claimants or claims
16 made or the number of covered vehicles involved,
17 whether or not covered in one or more than one
18 capacity under this contract or under both this
19 contract and any SCMIRF coverage available to
20 other SCMIRF members."

21 Q. Now, you would agree with me that the
22 exposure that you just read on page 52 can be
23 greater than the exposure that you read on page
24 30?

25 A. If there is more than one injury. But

1 in this particular claim, again, there may be more
2 than one person involved, but there's one injury,
3 so a single limit of coverage applies.

4 Q. I'm not asking you about this case. I'm
5 just asking you, in the insurance context, isn't
6 it true that an insurer's potential exposure is
7 greater in a \$1,000,000 per occurrence scenario as
8 contrasted to a single aggregate limit scenario;
9 isn't that true?

10 A. Yes.

11 Q. Now, under the Law Enforcement
12 Liability, Section IV, would you agree with me
13 that nowhere in the policy does the contract call
14 for a single aggregate limit as it does under the
15 sexual abuse coverage section?

16 A. That is correct. It's a 1 million per
17 occurrence, unless there is only one injury.

18 Q. And, certainly, had SCMIRF wanted to
19 sell a single aggregate limit for Law Enforcement
20 Liability, they could have done so, just like they
21 did for the sexual abuse scenario that we see on
22 page 30; isn't that correct?

23 A. Yes.

24 Q. But for this particular policy, SCMIRF
25 elected to sell to their insureds a per occurrence

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1 policy for Law Enforcement Liability and not a
2 single aggregate policy like what we see in the
3 context of sexual abuse; isn't that correct?

4 A. Yes. But, again, if there -- there
5 could be multiple occurrences based on this, but
6 there would be a single limit of coverage that
7 would apply if there was a single injury, per the
8 General Provisions of the contract.

9 Q. Now, on page 52, in the Limits of
10 Liability, share with me where in paragraph 2 it
11 states that the limits of liability are based upon
12 the number of injuries.

13 A. Basically, in the -- paragraph 1 of
14 section 2, that shows there, "Except where other
15 liability and/or coverage sublimits apply, then
16 SCMIRF's liability will be limited to the
17 applicable sublimit," which ultimately refers back
18 to the General Provisions of the contract, because
19 that limits the overall liability for all of the
20 liability sections of the contract to a single
21 injury.

22 Q. My question is, in paragraph 2, does the
23 word "injury" appear anywhere in paragraph 2 on
24 page 52?

25 A. Not that -- well, personal injury or

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1 advertising injury, but --

2 Q. The answer is no?

3 A. No. There's -- like I said, other than
4 personal injury or advertising injury. But,
5 again, the General Provisions apply to this
6 section of the Law Enforcement Liability.

7 Q. And the General Provisions that you're
8 talking about, is that --

9 A. Section I.

10 Q. -- Exhibit 3 or Exhibit 4?

11 A. Exhibit 3. So it's Section I of the
12 coverage contract, General Provisions,
13 specifically General Conditions C. It's on page
14 7.

15 Q. All right. So on page 7, which
16 paragraph do you say supports your belief that --

17 A. It is --

18 Q. -- the occurrence is defined by an
19 injury -- by the number of injuries? I'm sorry.

20 A. It's paragraph C-9. Specifically the
21 next to the last sentence states, "A single
22 coverage limit applies to all claims or suits
23 involving substantially the same injury or damage
24 or progressive injury or damage."

25 Q. Now, you do understand that -- well,

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1 first, the No Duplication of Coverage Provision,
2 that provision on page 7 that you just referenced,
3 the purpose of this policy language is to inform
4 the insured that if they're covered under multiple
5 sections of the policy, they don't get to add that
6 coverage up; isn't that correct?

7 A. These sections complement each other.

8 Q. So, for example, if Randall Price is
9 covered under the General Liability portion,
10 Section III of the policy, and he's also covered
11 under the Law Enforcement Liability, and there's a
12 single occurrence, there -- he doesn't get
13 \$2,000,000 in insurance; he only gets \$1,000,000
14 in insurance; isn't that correct?

15 A. That is correct. There is no
16 duplication of coverage.

17 Q. Okay. And there's also no duplication
18 of coverage limits, isn't that right, under
19 paragraph 9 on page 7?

20 A. That's correct.

21 Q. Now, the single coverage limit -- so if
22 you go back to paragraph 9 -- and I'm going to
23 read this -- if you'll read this in the record,
24 beginning with "Any acts or omissions."

25 A. "Any acts or omissions that might be

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1 described under more than one coverage section or
2 more than one category as an offense or an
3 occurrence will be treated as a single event for
4 coverage purposes, subject to a single coverage
5 limit. A single coverage limit applies to any
6 offense or occurrence, regardless of the number of
7 claimants, suits or claims. A single coverage
8 limit applies to all claims and suits involving
9 substantially the same injury or damage or
10 progressive injury or damage. There is no
11 duplication of any coverage or benefits under this
12 contract."

13 Q. Isn't it true that the purpose behind
14 the provision that you just read into the record
15 is not to define occurrence based upon injuries,
16 but to inform the insured that if they're covered
17 under multiple sections, there's only one coverage
18 limit; isn't that correct?

19 A. No. I don't think that's correct.
20 Because, in this case, this claim is covered under
21 the Law Enforcement Liability section. There are
22 multiple allegations and legal theories, but there
23 still is only one single coverage limit that's
24 applicable because it's the same injury for all of
25 the allegations.

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1 Q. You have automobile insurance, I'm
2 assuming?

3 A. Yes.

4 Q. Yeah, you have to. In some insurance
5 policies, you'll see, for example, in the
6 automobile context, \$25,000 per person, \$50,000
7 per accident; you're familiar with that type of
8 insurance?

9 A. Yes.

10 Q. And what would you -- what is your
11 definition of that type of policy?

12 A. Per person, per occurrence.

13 Q. Okay. And a single coverage limit of
14 policy -- a single coverage policy would either be
15 25,000 or 50,000; isn't that right?

16 A. Repeat that.

17 Q. Yeah. So in the \$25,000 per person,
18 \$50,000 per occurrence type policy, that is not a
19 single coverage limit policy; is that right?

20 A. I would think the 50,000 would be the
21 policy limit that would be available in that case.

22 Q. Do you not understand the distinction
23 between, in the insurance context, what a single
24 coverage limit policy is and a per person policy?

25 A. Yes, I do. But in this case, this is a

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1 single injury. So there are multiple allegations.
2 You may call them occurrences or wrongful acts,
3 but there is a single limit that is applicable
4 because there's only one injury.

5 Q. Do you think that Abby Reeves has an
6 injury for the loss of her father?

7 A. Again, there's a single limit that's
8 available because there is a single injury.

9 Q. Well, what injury are you talking about?

10 A. The death of Mr. Reeves.

11 Q. You're familiar with South Carolina's
12 Wrongful Death Statute, aren't you?

13 A. Yes.

14 Q. And the Survival Actions Statute, aren't
15 you?

16 A. Yes.

17 Q. Well, under the Survival Actions
18 Statute, Mr. Reeves would have injuries for
19 conscious pain and suffering, wouldn't he?

20 A. You're referring to the Tort Claims Act.
21 So, again, there's a single policy limit that
22 would occur or that would be applicable, which is
23 the million dollars.

24 Q. I understand that's what you were
25 brought here to say. What I want to understand

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1 is, do you recognize, in South Carolina, that the
2 estate of a decedent has an injury for -- a
3 potential injury for conscious pain and suffering?

4 A. Yes. I understand that.

5 Q. And you understand that is an injury
6 that's compensable under South Carolina law?

7 A. Yes.

8 Q. Do you also understand, under South
9 Carolina law, that an individual has injuries to
10 his or her constitutional rights, and those
11 injuries are compensable under federal law?

12 A. I understand that.

13 Q. And the policy at issue in this case is
14 designed to insure for those two injuries; isn't
15 that right?

16 A. Up to the coverage limits that are
17 available.

18 Q. Okay. But those type injuries are
19 covered under this particular policy; is that
20 right?

21 A. Yes.

22 Q. Now, you understand that Abby Ross has
23 an injury for the -- a compensable injury, under
24 South Carolina law, for the death of her father?

25 A. Yes.

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1 Q. You understand that her brother, Ross,
2 has a compensable injury, under South Carolina
3 law, for the loss of his father?

4 A. Yes.

5 Q. So there are multiple injuries in this
6 case; isn't that correct?

7 A. No, that is not correct.

8 Q. Share with me why.

9 A. The injury that we're insuring against
10 is the death of Mr. Reeves. That is one injury.

11 Q. Where does it say that?

12 A. It says it here. It says, "A single
13 coverage limit applies to any offense or
14 occurrence" -- and this is, I'm sorry, in General
15 Provisions, specifically C-9. So, again, "A
16 single coverage limit applies to any offense or
17 occurrence, regardless of the number of claimants,
18 suits, or claims. A single coverage limit applies
19 to all claims or suits involving substantially the
20 same injury or damage or progressive injury or
21 damage." So we are insuring for that one injury.

22 Q. Let's back up. Any conscious pain and
23 suffering that Mr. Reeves suffered before he left
24 earth, that would be an injury, correct?

25 A. Yes.

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1 Q. And you would agree with me that that
2 injury, his conscious pain and suffering, what it
3 feels like to die, is a different type of injury
4 than Abby Ross's injury of no longer having her
5 father?

6 A. No. Because it's substantially the same
7 injury that's related to the death of Mr. Reeves.

8 Q. What is the same about a child's injury?

9 A. It's all substantially related to the
10 death of Mr. Reeves.

11 Q. Where in your policy does it say
12 "substantially related"?

13 A. In this section C-9, the next to the
14 last sentence. "A single coverage limit applies
15 to all claims or suits involving substantially the
16 same injury or damage."

17 Q. Right. So what I want you to tell me
18 for this record, how do you believe that Abby
19 Ross's injuries for no longer having a father,
20 every birthday, every Christmas, every Easter, is
21 the same injury as Mr. Reeves' injury for the
22 conscious pain and suffering that he endured
23 before he left earth? How are those injuries the
24 same?

25 A. It's substantially the same. It all

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1 resulted in his death.

2 Q. No, no.

3 MR. MURPHY: She just answered the
4 question.

5 Q. Tell me -- we're talking about injuries.
6 Explain to me how the injuries are substantially
7 the same.

8 A. They're all related to his death. They
9 are substantially the same.

10 Q. Do you not recognize that the damage --
11 first, you would agree with me that those are two
12 injuries; you would agree with that?

13 A. No. They're substantially the same,
14 related to his death.

15 Q. Would you agree with me that Abby Ross
16 is a different person than her father, Bert
17 Reeves?

18 A. Yes.

19 Q. And you won't agree with me that her
20 compensable injuries, under South Carolina's
21 Wrongful Death Statute --

22 A. Those are substantially the same.

23 Q. What is your justification or support
24 for that other than page 7 of this Exhibit No. 1?

25 MR. MURPHY: Let me object. The witness

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1 doesn't have to give you her support.
2 That's -- my party is entitled to have that
3 attorney-client privilege, to have their own
4 work product protected, just like yours is.
5 She doesn't have to tell you why; she can just
6 tell you what, and she told you what about six
7 times.

8 Q. So it's your testimony today on behalf
9 of SCMIRF that a child's emotional grief and
10 sorrow, compensable under our Wrongful Death
11 Statute, is the same injury as the conscious pain
12 and suffering of a whole other person?

13 A. We consider this one occurrence because
14 it involves one injury, regardless of the
15 allegations. It involves substantially the same
16 injury.

17 Q. When the -- you are aware that the South
18 Carolina Courts have rejected the idea that the
19 definition of occurrence is based on the effect as
20 opposed to the causal theory; you're aware of
21 that, aren't you?

22 MR. MURPHY: Objection to the question.
23 My client doesn't have to divulge to you what
24 they're aware of or not aware of legally.
25 It's not on your 30(b)(6). It calls for

1 conclusions or mental impressions that are
2 privileged work product.

3 Q. You're familiar with the Boiter case?

4 A. Yes.

5 Q. In fact, if you go on the Municipal
6 Association's Website, they actually have it
7 published on there with a little comment, don't
8 they?

9 A. Yes.

10 Q. And you're aware that in that case, our
11 Supreme Court stated that the definition of
12 occurrence is based upon the number of acts as
13 opposed to the number of injuries; you're aware of
14 that, aren't you?

15 A. That case is not applicable in this case
16 because you're dealing with two different agencies
17 in that particular case.

18 Q. Okay. I'm just asking you about the
19 Boiter case. You're aware that our South Carolina
20 Supreme Court has stated that the definition of
21 occurrence is based upon the number of negligent
22 acts as opposed to what you're saying, the number
23 of injuries?

24 A. But it was acts of two different
25 agencies is my understanding.

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1 Q. Two different insureds, two different
2 entities? They can act --

3 A. Two different entities.

4 Q. And in this case we have three entities,
5 don't we?

6 A. No. They're all covered members of the
7 Town of Cottageville.

8 Q. You don't believe that Randall Price can
9 be negligent and that the Town of Cottageville can
10 also be negligent?

11 A. Again, you can allege multiple wrongful
12 acts, but, again, there's one occurrence from our
13 standpoint.

14 Q. I understand.

15 A. And, again, we believe that there's one
16 coverage limit available.

17 Q. If you would, turn to page 48. And if
18 you would read paragraph 22 into the record.

19 A. "The word 'Occurrence' in Section III
20 (General Liability) means an accident, including
21 continuous or repeated exposure to substantially
22 the same generally harmful conditions, which
23 results in property damage and/or bodily injury,
24 which arose in the coverage area and during the
25 policy period stated in the Declarations; was

1 actually caused by an act or even that first
2 happened during the policy period stated in the
3 Declarations; and arose from conduct in the course
4 and scope of the member or covered person's
5 official duties, as described in the South
6 Carolina Tort Claims Act."

7 Q. Now, would you agree with me that
8 nowhere in the definitions section of the word
9 "occurrence" does it indicate that occurrence is
10 based upon the number of injuries?

11 A. That is correct. But, again, as I
12 mentioned, you can have multiple occurrences, but
13 there's a single injury in this case. So a single
14 policy limit would be applicable.

15 Q. Well, ultimately, you all are going to
16 pay a very steep price for having that opinion.

17 MR. MURPHY: You don't need to threaten
18 my witness. You want to stop right now?

19 MR. MCLEOD: I'm not threatening her.

20 MR. MURPHY: Then be quiet.

21 MR. MCLEOD: You don't need to point
22 your finger at me, and you don't need to tell
23 me to be quiet. You've been making speaking
24 objections enough.

25 MR. MURPHY: I'm not going to have you

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1 comment --

2 MR. MCLEOD: I'm letting you know --
3 we'll keep going.

4 MR. MURPHY: No, Mullins, you're going
5 to listen to me. You're not going to ask them
6 about their claims handling or this lawsuit.

7 MR. MCLEOD: I know.

8 MR. MURPHY: Your Notice doesn't say
9 that.

10 BY MR. MCLEOD:

11 Q. Show me on page 48 where the policy that
12 you all sold to your insureds and collected their
13 money does it define occurrence -- does it even
14 say the word "injury"?

15 A. It says "bodily injury."

16 Q. Where does it say it?

17 A. In the first sentence.

18 Q. And just read that, please.

19 A. "The word 'occurrence' in Section III
20 (General Liability) means an accident, including
21 continuous or repeated exposures to substantially
22 the same generally harmful condition, which
23 results in property damage and/or bodily injury."

24 Q. Where does it say anywhere in the
25 definition of "occurrence" that it is defined by

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1 the number of injuries?

2 A. Again, in the General Provisions,
3 Section I, of the coverage contract, it
4 specifically states that "regardless of the
5 number" of occurrences -- which, again, we don't
6 think that this represents -- this particular
7 claim represents more than one occurrence or
8 wrongful act. But even if it did, there was one
9 injury, and that is stated in the General
10 Provisions portion of the contract.

11 Q. You would agree with me that nowhere in
12 the definitions portion of this contract for
13 "occurrence," as it is contained in this contract,
14 does it mention that "occurrence" is in any way
15 related to the number of injuries; you would agree
16 with that, wouldn't you?

17 A. It does not state the number of
18 injuries. It states "bodily injury."

19 Q. And so the only place that you believe
20 -- or the only place in the contract that supports
21 your belief that "occurrence" is defined by the
22 number of injuries is under the General Conditions
23 portion of the policy, which is Exhibit No. 3 to
24 this deposition?

25 A. That does state, "A single coverage

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1 limit applies to all claims or suits involving
2 substantially the same injury or damage or
3 progressive injury or damage." And additionally,
4 the sentence before that states, "A single
5 coverage limit applies to any offense or
6 occurrence, regardless of the number of claimants,
7 suits, or claims."

8 Q. So that's the only part of this contract
9 that you believe supports your view that
10 "occurrence" is defined or intended to mean the
11 number of injuries; is that right?

12 A. Well, "occurrence" is defined throughout
13 the contract. But, again, there is an absolute
14 limit that is mentioned in the General Provisions,
15 Section I, of the contract.

16 Q. How can you have a per occurrence policy
17 if there's an absolute limit?

18 A. There's an absolute limit if there's a
19 single injury.

20 Q. Okay.

21 A. So you can have multiple occurrences.
22 You can have multiple allegations or wrongful
23 acts, which, again, we don't think is applicable
24 in this case. But the Section I, General
25 Provisions, paragraph C-9, again, states that

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1 there is one coverage limit available when there
2 is a single injury or substantially the same
3 injury.

4 Q. So how does SCMIRF provide insurance to
5 multiple insureds? Because, obviously, Randall
6 Price would be legally obligated for a million
7 dollar verdict, and the town would be legally
8 obligated for a million dollar verdict. How does
9 SCMIRF protect their interest under the policy?

10 A. Well, if I may, under the Law
11 Enforcement Liability, Section IV, there are a
12 couple of sections under D-1, the Limit of
13 Liability, "Only a single limit from a single
14 contract for a single coverage period will apply,
15 regardless of the number of persons or
16 organizations injured or making claims or the
17 number of covered persons who allegedly caused
18 them or whether the damage or injuries at issue
19 were continuing or repeated over the course of
20 more than one coverage period."

21 Q. What would be a situation where there
22 were multiple injuries?

23 A. I don't know off the top of my head.

24 Q. Well, I mean, I guess your testimony is,
25 at least in this case, that in order for there to

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1 be multiple occurrences, there have to be multiple
2 injuries; is that correct?

3 A. Correct.

4 Q. So what is an example of a case where
5 you all have paid where there were multiple
6 injuries, i.e., multiple occurrences?

7 A. I can't think of a time where we would
8 have necessarily paid where there would have been
9 multiple injuries. These are -- in this
10 particular instance, there are allegations. But,
11 again, they're all resulting in the same injury or
12 substantially the same injury.

13 Q. What is your definition -- I'm sorry.
14 What is SCMIRF'S definition of different injuries?

15 A. I'm not sure that I know exactly how to
16 answer that question. I think that would be
17 hypothetical, based on the events of any given
18 claims.

19 Q. Well, Exhibit No. 3, under this
20 paragraph 9 under General Conditions, it says, "A
21 single coverage limit applies to all claims or
22 suits involving substantially the same injury or
23 damage." So what would be circumstances that
24 don't involve substantially the same injury, i.e.,
25 different injuries?

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1 A. Again, without knowing the specifics of
2 what claim may occur, I can't tell what you what
3 those may be. In this particular claim, which is
4 what we're here to discuss, there was a single
5 injury, the death of Mr. Reeves.

6 Q. If Randall Price runs a red light and
7 hits a car and kills the driver and the
8 passenger --

9 A. That would be a single occurrence.

10 Q. Tell me why.

11 A. Because the insured individual, Mr.
12 Price, was acting within the course and scope of
13 his employment, that's considered one occurrence
14 from our standpoint. Because, again, this is
15 considered -- like with this claim, you have
16 multiple allegations.

17 Q. Okay. So if Mr. Price runs a red light
18 and kills two people, a driver and a passenger,
19 it's SCMIIRF'S belief under this policy that that's
20 one occurrence?

21 A. Yes. It would be one occurrence with
22 multiple claimants, but, again, it's one
23 occurrence with one policy limit.

24 Q. And what would the available coverage be
25 for Mr. Price in that instance?

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1 A. It would be more than likely, because
2 that's a Tort Claims Act claim, there -- there
3 would be a million in coverage limits available,
4 but the Tort Claims Act would be -- would respond
5 to that. So it would be 300,000 per person,
6 600,000 for the occurrence.

7 Q. In that scenario, do you believe that
8 the death of a passenger is a different injury
9 than the death of a driver?

10 A. It's considered one occurrence for us.
11 Again, it may be multiple claimants, the driver
12 versus the passenger, but it's considered one
13 occurrence for us.

14 Q. And SCMIRF would consider it one
15 occurrence because Mr. Price only ran a red light
16 one time?

17 A. Because Mr. Price was involved in an
18 accident in that scenario.

19 Q. And he committed one negligent act; is
20 that right?

21 A. He was in an accident that resulted in
22 one occurrence.

23 Q. But I guess my question is, in
24 understanding why there's one occurrence, is that
25 because there was one negligent act? For example,

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1 he ran a red light one time, therefore, it's one
2 occurrence.

3 A. Uh-huh (indicating an affirmative
4 response).

5 Q. Therefore, he would only have available
6 to him one occurrence under the policy; is that
7 right?

8 A. We would consider that one occurrence,
9 like I said, with two claimants. And, again, I
10 think the General Conditions would apply because
11 it's substantially the same injury in that case.
12 It was the car accident.

13 MR. MURPHY: Do you mind if I grab a pen
14 from across the hall? I'm about to run out of
15 ink.

16 (The deposition went off the record.)

17 BY MR. MCLEOD:

18 Q. Now, going back to what I was just
19 asking you about, if Mr. Price runs a red light
20 and kills two people, why do you -- why would
21 SCMIRF view that as one occurrence?

22 A. It was one accident. There would be two
23 claimants in that case, but there's one accident,
24 so it's one occurrence.

25 Q. And how much do you think SCMIRF would

1 be obligated -- or based upon their standard
2 contract, be obligated to pay out to the claimants
3 in that situation?

4 A. It depends on the scenario, but, again,
5 I think that would fall under the Tort Claims Act,
6 and we would potentially have to pay out \$300,000
7 per person, 600,000 per occurrence.

8 Q. And under the Tort Claims Act scenario,
9 if there are multiple occurrences, then SCMIRF
10 would have to pay out 300 per person per
11 occurrence; isn't that right?

12 A. Up to 600,000. That's the max.

13 Q. Does the policy in Exhibit No. 1 provide
14 coverage for the Town of Cottageville, Mr. Price
15 or Mr. Craddock for judgments that include
16 attorneys' fees and costs?

17 A. If attorneys' fees and costs were
18 awarded, I assume that's what you're referring to,
19 the policy would provide coverage for that, but up
20 to the limit -- the single coverage limit that's
21 available of a million. So in no way would we
22 exceed the million dollars. That would include
23 the award, plus the attorneys' fees.

24 Q. What part of the contract indicates that
25 the insurance policy will coverage attorneys' fees

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1 and costs assessed against the Town of
2 Cottageville or any of its insureds?

3 A. That would be part of money damages,
4 which would be -- actually, probably under the
5 General Provisions. If you look under page 3,
6 Section I of General Provisions, specifically
7 section B-3, "Money damages means money awarded by
8 judgment or paid in settlement to compensate
9 another person, organization or entity for damages
10 arising out of liability to which this contract
11 applies." And if you want, I'll read the rest --

12 Q. No. That's fine. So this contract does
13 not exclude from coverage attorneys' fees and
14 costs that are assessed against an insured; is
15 that right?

16 A. That's correct. But it would only
17 provide coverage up to the single policy limit --
18 or coverage limit, rather.

19 Q. And what is the support or the provision
20 in the contract that supports that belief?

21 A. Again, it would be the section B-3 that
22 states, we will pay money damages, but it would
23 only be up to the applicable coverage limit.

24 Q. Where does it say that in particular?

25 A. Let's see. I don't know that it

1 specifically states attorneys' fees, but money --
2 well, that says do not include. Basically, we
3 would infer it to mean -- the first sentence that
4 I read, "Money damages means money awarded by
5 judgment or paid in settlement to compensate
6 another person, organization or entity for damages
7 arising out of liability to which this contract
8 applies."

9 Q. My question is, where in the insurance
10 contract does it state that the attorneys' fees
11 and costs are limited to the single limit that
12 you're saying is only a million dollars?

13 A. Well, you would have to refer back to
14 section C, the General Conditions in section 9 --
15 C-9 that basically states that there's a single
16 coverage limit that applies to all claims or suits
17 involving substantially the same injury or damage.
18 So that states that that million dollar limit is
19 available for the money damages related to a
20 single injury.

21 Q. Now, did SCMIRF purchase any reinsurance
22 or excess insurance for this particular policy?

23 A. Yes. We purchased reinsurance
24 specifically for this year through the National
25 League of Cities, Mutual Insurance Company. They

1 insure within our limits. We -- for this
2 particular year, we purchased basically 300,000 in
3 coverage. We provide or we pay for ground-up (ph)
4 losses for a claim up to policy limits. We pay
5 all of that, and then they attach at the \$300,000
6 level and so they would be responsible for amounts
7 up to the million dollar limit. But, again, we
8 pay the first dollar; they insure within our
9 limits -- or reinsure, rather.

10 Q. And if there were multiple occurrences,
11 then they would also insure in the event of
12 multiple occurrences; is that right?

13 A. Yes.

14 Q. And tell me a scenario where there are
15 multiple occurrences, according to SCMIRF.

16 A. Again, you know, that's a hypothetical.
17 At this point, I don't know when there -- I can't
18 think of a time where -- we could have had
19 multiple occurrences, for example, on the property
20 side. If there was hail damage in multiple
21 locations, that was considered one occurrence in
22 multiple locations. But from a liability
23 standpoint, I can't think of an example where
24 we've had multiple occurrences.

25 Q. You do understand that SCMIRF insures

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1 for multiple occurrences; you agree with that,
2 don't you?

3 A. Again, there may be multiple
4 occurrences, multiple wrongful acts, multiple
5 allegations, which I don't think is applicable in
6 this case, but there's a single limit of coverage
7 available per this section, C-9, in the General
8 Provisions.

9 Q. Would you agree with me that the policy
10 could also be read to mean that there's a million
11 dollars per occurrence in this particular policy?

12 A. In general, yes, we do provide per
13 occurrence limits of a million. But, again, the
14 provision in the General Provisions, this
15 paragraph C-9, states that there's an absolute
16 limit of a single coverage limit that would be
17 applicable in the event of a single injury or
18 substantially the same injury.

19 Q. And what I want to understand from
20 SCMIRF's standpoint is, regardless of Exhibit No.
21 3, what are circumstances where SCMIRF believes
22 there are multiple occurrences? Forget about how
23 much money they have to pay out. What constitutes
24 multiple occurrences?

25 A. Again, I can't think of something right

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1 off the top of my head. And even if -- like I
2 said, in this particular claim, you could argue or
3 there are allegations that there are multiple
4 occurrences. But, again, we don't view that
5 that's the case. We view that there is a single
6 limit available.

7 Q. What I'm asking you is, as a corporate
8 representative for SCMIRF, are you telling me
9 today that you can't give me an example of a
10 situation where there are multiple occurrences
11 under the insurance policies that SCMIRF sells?

12 A. No. Because, typically, under any type
13 of liability claims, we have multiple allegations
14 at times, just like what you have alleged in this
15 particular claim. But we consider it one
16 occurrence from our standpoint with one coverage
17 limit that's available.

18 Q. Can you tell me any example of any type
19 scenario that would involve multiple occurrences
20 under the SCMIRF policy?

21 A. Again, not that I can think of off the
22 top of my head.

23 Q. And your position, again, is what?

24 A. I'm the Director of Risk Management
25 Services.

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1 Q. You've been offered today as the
2 corporate representative of SCMIRF; is that right?

3 A. That's correct.

4 MR. MURPHY: On the topics you noticed.

5 Q. What has to be involved for a member to
6 have access to the Losses Exceeding Pool Limits?

7 A. I'm sorry. What do you mean by that
8 exactly?

9 Q. Well, look at page 8, please, of the
10 policy. And if you will, read that for the
11 record.

12 A. "In the event that members' combined
13 losses meet or exceed SCMIRF'S reinsurance limits,
14 sublimits or aggregated line of coverage, prior to
15 any payment, claim payments will be adjusted
16 proportionately." The aggregated line of coverage
17 -- excuse me. "The contributions for each line of
18 coverage affected by the loss, for each member
19 affected by the loss, will be divided by the total
20 contributions for all members affected by the loss
21 and then multiplied by the total limits available
22 to SCMIRF or as otherwise directed by the Board of
23 Trustees of SCMIRF."

24 Q. What does that mean?

25 A. Well, the member that would be affected

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1 by this loss would be the Town of Cottageville.
2 So really, the way I read that is -- basically,
3 just as it's stated. "The contributions for each
4 line of coverage affected by this loss," which
5 would be the Law Enforcement Liability coverage in
6 this particular claim, "will be divided by the
7 total contributions for all members affected by
8 this loss," which, again, would be the Town of
9 Cottageville, "and then multiplied by the total
10 limits available to SCMIRF or as otherwise
11 directed by the Board of Trustees of SCMIRF." And
12 the total pool limits in this case would be the
13 coverage limit available to the Town of
14 Cottageville, which is the \$1,000,000 limit.

15 Q. Now, "Where a pool limit" -- continuing
16 to read, "Where a pool limit described in the
17 Declarations is exhausted in the event of a common
18 disaster by the foregoing method of apportionment,
19 the member's recovery is limited to the smaller of
20 the following: 1. The amount thereby apportioned
21 to the member; or 2. The amount of any otherwise
22 applicable per-occurrence, per-member or other
23 coverage limit stated in the Declarations of this
24 contract." Do you see that?

25 A. Yes.

1 Q. So what does that mean? Say there's a
2 -- say there's a \$10,000,000 verdict against the
3 Town of Cottageville. Okay? How does this
4 provision work in that scenario?

5 A. Well, I believe the applicable portion
6 would be Section 2 of that sentence you just read.
7 It states, "The amount of any otherwise applicable
8 per-occurrence, per-member or other coverage
9 limits stated in the Declarations of this contract
10 would be applicable." So, for example, in this
11 particular claim, again, we believe it's
12 considered one occurrence, and, therefore, one
13 coverage limit applies. So there would be a
14 \$1,000,000 -- up to a \$1,000,000 limit available.

15 Q. Well, what is the -- why do you have a
16 provision talking about losses exceeding pool
17 limits?

18 A. I would think in a situation such as an
19 earthquake loss or something like that, on the
20 property side, we do have pool limits that are
21 available. So that would help -- and, of course,
22 it does mention there a common disaster, so that
23 would be a catastrophe, something like that, where
24 that would be applicable to tell us how to
25 adjudicate the claims.

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1 Q. Now, on page No. 28, under the General
2 Liability Declarations page, you would agree with
3 me that under General Liability it says that it's
4 \$1,000,000 per occurrence or offense?

5 A. That's correct.

6 Q. You would agree with me that it does not
7 say \$1,000,000 per injury?

8 A. That is correct. However, as I've said
9 before, the General Provisions portion of the
10 contract covers all sections of liability, General
11 Liability, Law Enforcement Liability and Public
12 Officials Liability.

13 Q. All right. If you'll look at page 51.
14 You would agree with me that paragraph 1, SCMIRF
15 agrees to insure its members or covered persons
16 for money that they're obligated to pay as a
17 result of acts arising out of the Tort Claims Act;
18 you see that, don't you?

19 A. Yes.

20 Q. And you would agree that that is what
21 SCMIRF is agreeing to insure, the person -- the
22 money damages that they have to pay because of the
23 acts taken under the -- by virtue of the Tort
24 Claims Act?

25 A. Within the applicable coverage limits

1 and where the General Provisions limit also comes
2 into play.

3 Q. Do you think that SCMIRF would be
4 allowed to offer and sell to municipalities an
5 insurance contract that conflicted with state law?

6 A. No.

7 Q. Would it be fair to say that the intent
8 behind the -- the overall intent behind the policy
9 at issue in this case is to comply with the Tort
10 Claims Act and to provide insurance accordingly?

11 A. The policy does comply with the Tort
12 Claims Act, but also provides additional
13 protections to our members with the coverage
14 limits up to a million dollars.

15 Q. Now, the language that we see in Exhibit
16 No. 3 is under the heading called "No Duplication
17 of Coverage or Coverage Limits"; isn't that right?

18 A. That is correct.

19 Q. Would you agree with me that the
20 language that we see in Exhibit 3 does not appear
21 anywhere in the contract under headings known as
22 Limits of Liability?

23 A. It is in the General Provisions section,
24 which is applicable to -- and it says general
25 application under Section I, General Provisions.

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1 "This section, General Provisions, shall apply to
2 Section II (Property) III (General Liability), IV
3 (Law Enforcement), V (Public Officials), VI
4 (Automobiles), VII (Excess Casualty), and VIII
5 (Crime), unless specific provisions are contained
6 in the appropriate section.

7 Q. My question is, under Section III, the
8 General Liability, or Section IV, you would agree
9 with me that this language in Exhibit No. 3 does
10 not appear under the Limit of Liability portion of
11 either Section III or Section IV?

12 A. That is correct.

13 Q. Has SCMIRF informed Randall Price what
14 coverage is available to him?

15 A. Through the attorney that's representing
16 him, I would assume that has occurred.

17 Q. And what did you all tell Mr. Price how
18 much coverage was available to him?

19 A. I can't speak on behalf of what the
20 attorney may have told him. But what is available
21 to the town is the 1 million in coverage limits.

22 Q. My question was, has SCMIRF ever reduced
23 to writing to either of -- any of the insureds in
24 this case that what -- the available insurance
25 protection they have?

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1 A. I don't know if that has been done by
2 our defense counsel or not. That would have
3 occurred through them.

4 Q. Well, who -- when you say your defense
5 counsel, who are you referring to?

6 A. Lake Summers and Dee Lide.

7 Q. Do you understand that neither Mr. Lide
8 nor Mr. Summers -- well, do you understand that
9 Mr. Lide represents the Town of Cottageville?

10 A. Yes.

11 Q. And not SCMIRF?

12 A. Well, through SCMIRF, he's representing
13 the Town of Cottageville.

14 Q. Who is Mr. Lide's actual client?

15 A. The Town of Cottageville.

16 Q. Who is Mr. Summers' actual client?

17 A. Mr. Price.

18 Q. So when you said, We advised them
19 through our attorney, who were you referring to?

20 A. Mr. Summers and Mr. Lide. Because
21 they're working -- we have appointed the defense
22 attorneys to work on behalf of the town and the
23 police officer.

24 Q. Well, do you view Mr. Lide as also being
25 SCMIRF's attorney?

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1 A. I view him as working for the Town of
2 Cottageville. It's our duty to defend our
3 members.

4 Q. Okay. Do you view Mr. Summers as an
5 attorney for SCMIRF?

6 A. I view him as working for the police
7 officer.

8 Q. Well, then, how -- when you say, We
9 would inform the insureds through our attorney,
10 what attorney are you talking about?

11 A. Again, I'm not sure if that
12 communication has occurred. But I would assume it
13 would have occurred through the attorneys that
14 SCMIRF has enlisted to help defend our members,
15 our covered employees of our members.

16 Q. Will you look at page 66 of the policy.

17 A. Uh-huh (indicating an affirmative
18 response).

19 Q. Under the Public Officials Liability,
20 the limits on the Declarations page is \$1,000,000
21 per each wrongful act; is that correct?

22 A. That's correct.

23 Q. You would agree with me that on that Dec
24 page, it does not say \$1,000,000 per injury?

25 A. That is correct.

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1 Q. Okay. What is your understanding --
2 what is SCMIRF's position of what a wrongful act
3 is?

4 A. It would be in the definitions of the
5 policy, which would be on -- let's see. It should
6 be in the very back. On page 80, "Wrongful act
7 means any actual or alleged error in the
8 performance or failure to perform an official
9 duty; or any misstatement, misleading statement or
10 misleading act made or done in the course of
11 official duty and upon which a claimant or
12 plaintiff has relied to his, her or its detriment;
13 or any omission or neglect in performing an
14 official duty; or any breach of an official duty,
15 including misfeasance, malfeasance and
16 nonfeasance; but only, with respect to any or all
17 of the foregoing, when it causes personal injury
18 or advertising injury and when it is committed by
19 a member or by a covered person while acting
20 within both the course and the scope of his or her
21 official duty, as provided under the South
22 Carolina Tort Claims Act."

23 Q. And going back to the Declarations page,
24 the member annual aggregate is \$1,000,000. Do you
25 see that?

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1 A. Yes.

2 Q. And what does that mean?

3 A. Again, it would be, regardless of the
4 number of claims, the million is the most that
5 they have available.

6 Q. Didn't you tell me earlier when I was
7 asking you about the Dec page on section No. 3
8 that you don't offer aggregate policies?

9 A. Not for General Liability. This is
10 Public Officials Liability. That's a different
11 section of the coverage contract.

12 Q. What's the difference, from an
13 underwriting standpoint?

14 A. From an underwriting standpoint, we are
15 typically looking at Law Enforcement Liability and
16 we're rating based on the number of sworn police
17 officers. Whereas Public Officials Liability, we
18 are basing it on the number of -- basically number
19 of employees and number of council members, for
20 example, that are covered.

21 Q. Did the Town of Cottageville decline
22 excess coverage in this case?

23 A. Well, if you look at the application,
24 the renewal application on page 3, it's not
25 actually worded as excess coverage. It's just

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1 additional limits that are available. And, yes,
2 they declined that.

3 Q. At any time after this application was
4 submitted, did they ever purchase the additional
5 coverage?

6 A. No.

7 MR. MURPHY: I don't know if we've
8 marked the application, but if you want to,
9 there's an extra copy.

10 MR. MCLEOD: If you want to, it doesn't
11 bother me.

12 MR. MURPHY: You can mark it whatever
13 the next exhibit would be.

14 (Deposition Exhibit No. 5, Application,
15 was marked for identification.)

16 (Deposition Exhibit No. 6, Westlaw
17 search - Boiter case, was marked for
18 identification.)

19 BY MR. MCLEOD:

20 Q. This is Exhibit No. 6, and this is the
21 Boiter case. I just want to hand it to you. Have
22 you ever read that case before?

23 A. Yes. I read it when it was originally
24 issued.

25 Q. And as the person with SCMIRF who is in

1 control of risk management, what did you
2 understand from an insurance context what that
3 case meant?

4 A. That, basically, the Supreme Court ruled
5 that there were two occurrences because there were
6 two agencies involved in this case.

7 Q. Okay. If you would, please, ma'am, read
8 for the record the highlighted and underlined
9 portion there.

10 A. "We have two separate and distinct acts
11 of negligence involving two separate and distinct
12 entities, together with separate 407 verdicts
13 against each of them."

14 Q. Okay. And was that your understanding
15 of why the Supreme Court determined that there
16 were multiple occurrences?

17 A. Yes. There were two different entities
18 involved.

19 Q. Okay. First, where the Supreme Court
20 says, we have two -- first off, you would agree
21 with me that the Supreme Court does not say that
22 whether or not there are multiple occurrences is
23 determined based upon the number of injuries; you
24 would agree with that?

25 A. They are saying, We have two separate

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1 and distinct acts for two different entities.

2 Q. Well --

3 A. The distinction in my mind is the
4 different entities.

5 Q. Let's -- if you will, read this
6 provision of the opinion, the highlighted and
7 underlined portion.

8 A. "In order to determine the number of
9 occurrences, the Boiters urge this Court to focus
10 on the number of negligent acts; in contrast,
11 Respondents contend we should look to the number
12 of injuries caused by those acts."

13 Q. And from an insurance standpoint,
14 reading this opinion as a person in the insurance
15 field, you understand that one side of that case
16 argued that you should define occurrences based
17 upon the number of negligent acts?

18 A. Correct.

19 Q. And another side of the case argued
20 that, no, you should define the number of
21 occurrences based upon the number of injuries?

22 A. Correct. But, again, I don't think this
23 particular case is applicable --

24 Q. I'm just asking --

25 A. -- in this claim.

1 Q. I understand. I'm just asking you about
2 -- you understood that as a person employed by
3 SCMIRF and within the insurance industry?

4 A. Correct.

5 Q. And you understand that in the Boiter
6 case, the South Carolina Supreme Court determined
7 that there were independent acts of negligence
8 and, therefore, there were multiple occurrences?

9 A. Independent acts of negligence by two
10 different entities.

11 Q. So let's first talk about separate and
12 distinct acts of negligence. Okay?

13 A. Okay. But, again, I don't think this
14 case is applicable to --

15 Q. I understand you all's position. Okay?
16 In an insurance context, would you agree with me
17 that the town -- the accusations -- the
18 allegations against the town for negligently
19 hiring Price are -- is one type of negligent act?

20 A. That is one allegation that's been made
21 in this claim, yes.

22 Q. That's one type of negligent act. Would
23 you agree with that?

24 A. That's an allegation.

25 Q. It's an allegation of a negligent act;

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1 would you agree with that?

2 A. Yes.

3 Q. Now, the lawsuit also has allegations of
4 acts of negligence regarding how Mr. Price was
5 retained and supervised during his employment with
6 the Town of Cottageville. Do you understand that?

7 A. Yes. I understand that there are
8 multiple allegations that have been made.

9 Q. And so the allegations regarding the
10 town's negligence with regard to monitoring or
11 supervising Mr. Price, you understand that to be a
12 type of negligent act?

13 A. I understand the allegations that have
14 been made. But, again, you've made multiple
15 allegations, multiple theories, but, again, we
16 consider it one occurrence because there was one
17 injury.

18 Q. I'm just asking you about the negligent
19 acts right now. Okay?

20 A. Uh-huh (indicating an affirmative
21 response).

22 Q. From an insurance standpoint, would you
23 agree with me that negligently hiring someone is a
24 different act from negligently supervising and
25 managing that person?

1 A. They're different allegations, yes.

2 And, again, while I don't view this as multiple
3 wrongful acts, multiple occurrences, it's
4 considered one occurrence for us.

5 Q. Just forgetting about this case, okay,
6 the Reeves case --

7 MR. MURPHY: Wait a minute. Your Notice
8 says it is about this case, so don't we have
9 to ask about this case?

10 Q. When I understand what other coverage is
11 available -- I can ask you about this case, it
12 doesn't matter to me. I'm trying to help you.
13 Okay?

14 MR. MURPHY: Yeah, right.

15 Q. Do you think, from an insurance
16 standpoint, that hiring someone can potentially be
17 a negligent act which is compensable under South
18 Carolina law?

19 A. Yes. There can be allegations of
20 negligent hiring, negligent supervision, but,
21 again, those are -- you can have multiple wrongful
22 acts, multiple occurrences. But they're -- based
23 on our policy, there is an absolute limit related
24 to one injury.

25 Q. Okay. Now, do you also understand from

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1 an insurance standpoint that whether an officer
2 uses excessive force and kills an innocent person,
3 that negligent act is different than the hiring
4 and the supervision; you understand that, don't
5 you?

6 A. Yes. I recognize that those are three
7 different allegations.

8 Q. And three distinct -- potential acts of
9 negligence?

10 A. Three allegations. Three wrongful acts
11 that have been alleged. But, again, we view it as
12 one occurrence.

13 Q. And I understand -- it's fair if -- you
14 keep using the word allegation, so I'll make it
15 easy for you. There are three distinct
16 allegations of wrongful conduct that have been
17 alleged; is that fair?

18 A. Yes. There are three wrongful acts,
19 allegations, theories of law, whatever you would
20 like to call it, that have been alleged. But,
21 again, the provisions that are in this Exhibit 3,
22 we keep coming back to the General Conditions of
23 Section I of the policy.

24 Q. And for the three allegations of
25 separate acts or conduct, any one of those could

1 be compensable under South Carolina law; isn't
2 that right?

3 A. Yes. But, again, we view this as --
4 again, we don't think that there are three
5 occurrences or wrongful acts in this particular
6 claim.

7 Q. I understand. Do you recognize that
8 Randall Price is a separate legal entity than the
9 Town of Cottageville?

10 A. He is a covered employee for the Town of
11 Cottageville.

12 Q. Do you understand from an insurance
13 standpoint that Randall Price is an individual?

14 A. He is an individual that is covered
15 under the course and scope of his employment of
16 the Town of Cottageville.

17 Q. And this policy provides insurance
18 coverage to him as an individual, doesn't it?

19 A. It provides insurance coverage for this
20 particular loss, again, regardless of the
21 allegations, the number of covered employees that
22 are mentioned. Again, if we go back to the limit
23 of liability in the Law Enforcement Liability
24 section, which is what covers this particular
25 claim in addition to the General Provisions, we

1 discuss that SCMIRF will provide a total liability
2 of 1 million per member, and basically will
3 provide that -- it will be limited to 1 million
4 per member regardless of the number of covered
5 persons, number of claimants or claims made or the
6 number of covered vehicles involved, whether or
7 not covered in one or more capacity under this
8 contract.

9 Q. My question is very specific. Does
10 Randall Price, as an individual, have insurance
11 coverage under the insurance contract marked as
12 Exhibit No. 1?

13 A. As a covered employee, he would be
14 considered part of the covered entity -- the Town
15 of Cottageville.

16 Q. So Randall Price is an insured under --

17 A. The member is insured.

18 Q. -- the policy?

19 A. The member is the Town of Cottageville.
20 He would be considered a covered person.

21 Q. Is covered person synonymous with
22 insured?

23 A. He would be a member who would be
24 covered as a covered person within the coverage
25 contract.

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1 Q. Does the Law Enforcement Liability,
2 Section IV, include coverage for 1983 claims?

3 A. Yes.

4 Q. Do you understand that under section
5 1983, that individuals themselves are responsible
6 under 1983? You understand that, don't you?

7 A. Yes. But, again, there are three
8 allegations that have been made. So there's a
9 single limit of coverage that's provided for this
10 claim.

11 Q. Do you believe that the South Carolina
12 Municipal Risk Fund is providing insurance to
13 Randall Price as an individual?

14 A. It provides coverage for the town and
15 covered persons, which Mr. Price would be.

16 Q. You agree with me that the town is a
17 separate legal entity who could be responsible for
18 money damages --

19 A. No.

20 Q. -- than Randall Price?

21 A. No.

22 Q. You don't agree with that?

23 A. There is one coverage limit available
24 regardless of the allegations, the covered
25 persons; you know, it's clearly stated in the

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1 limit of liability, as far as regardless of the
2 number of covered persons. There is a million
3 dollar limit per member, the Town of Cottageville,
4 regardless of the number of covered persons,
5 whether that's Mr. Price or the chief.

6 Q. I'm not asking about limits. I'm asking
7 about who has protection, who are insureds under
8 the policy. Do you understand that?

9 A. Yes.

10 Q. So from a standpoint of who has
11 protection, would you agree with me that Randall
12 Price is a different entity than --

13 A. He is a covered person.

14 Q. -- the Town of Cottageville?

15 A. He is a covered person.

16 Q. And he is different than the Town of
17 Cottageville?

18 A. He is not a different insured member.
19 He is a covered person under our member, the Town
20 of Cottageville.

21 Q. When did you first read the Boiter case?
22 Before or after the Bert Reeves case was filed?

23 A. Before. It was when it was issued, back
24 in 2011, I guess it was.

25 Q. And share with me what type of training

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1 or administrative things happened at SCMIRF or the
2 Municipal Association following the Supreme
3 Court's decision in Boiter?

4 A. Our claims staff would have been made
5 aware of this Boiter decision, would have read the
6 decision, and, ultimately, it would be contingent
7 on whether that's applicable, again, because there
8 are separate entities involved. So, you know,
9 ultimately, they read the decision.

10 Q. And SCMIRF's position in this case is,
11 there's only a million dollars in coverage because
12 there's only one injury; is that right?

13 A. Correct.

14 Q. And SCMIRF's position in this case is
15 that you do not determine per occurrence based
16 upon the number of negligent acts; is that right?

17 A. Correct. You can have multiple
18 allegations. But, in this case, this General
19 Provisions section would be applicable.

20 Q. All right. And SCMIRF's position that
21 there is one injury in this case, what is the
22 injury?

23 A. The death of Mr. Reeves.

24 Q. And does SCMIRF -- how many compensable
25 injuries are there resulting from the death of

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1 Bert Reeves, potentially?

2 A. There's one. The death of Mr. Reeves.
3 That would be considered the injury that we're
4 referencing here, regardless of the theories and
5 allegations.

6 Q. And who is the injury to?

7 A. It would be the death of Mr. Reeves.

8 Q. And if Randall Price runs a red light
9 and kills two people, that's also one occurrence,
10 right?

11 A. Correct. That's one accident.

12 Q. And it's one occurrence, because he only
13 ran a red light one time; it's one accident?

14 A. It's one accident.

15 Q. And in that scenario, where Mr. Price
16 runs a red light, he kills the passenger, and he
17 kills the driver; and in that circumstance,
18 SCIRF'S position or belief is that it's still
19 only one occurrence?

20 A. Correct.

21 Q. Because it's one accident?

22 A. Correct.

23 MR. MCLEOD: I think that's all I have.

24 Q. Well, let me -- with regard to the
25 questions that I just asked you, the hypothetical

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1 regarding Mr. Price running the red light, the
2 belief or conclusion that there's one occurrence
3 because there's one accident, that belief would be
4 if the policy issued in this case were also
5 applicable in the running the red light case; is
6 that right?

7 A. Yes.

8 MR. MCLEOD: All right. I think that's
9 all I have.

10 MR. MURPHY: No questions.

11 (The deposition concluded at 4:00 p.m.)
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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional
Reporter and Notary Public, State of South Carolina
at Large, certify that I was authorized to and did
stenographically report the foregoing deposition;
and that the transcript is a true record of the
testimony given by the witness.

I further certify that I am not a
relative, employee, attorney or counsel of any of
the parties, nor am I a relative or employee of any
of the parties' attorney or counsel connected with
the action, nor am I financially interested in the
action.

WITNESS MY HAND AND OFFICIAL SEAL this
18th day of August, 2014, in the City of
Charleston, County of Charleston, State of South
Carolina.

Eve Wilbanks
Eve Wilbanks
Registered Professional Reporter
and Notary Public



My commission expires:
December 16, 2014

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Ashley Reeves as Personal	)	Civil Action No. 2013-CP-15-135
Representative for the Estate of	)	
Albert Carl "Bert" Reeves,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT'S
vs.	)	MOTION FOR SUMMARY
	)	JUDGMENT
South Carolina Municipal Insurance	)	
and Risk Financing Fund [SCMIRF]	)	
	)	
Defendant.	)	
	)	
	)	
	)	

COMES NOW Plaintiff, Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, by and through her undersigned counsel, in opposition to Defendant's Motion for Summary Judgment. Defendant is not entitled to summary judgment, and, rather, Plaintiff responds that summary judgment should be awarded in her favor with this Honorable Court issuing a declaratory judgment 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?

Answer: Yes; the Coverage Contract provides for \$1,000,000 per occurrence and more than one occurrence exists.

(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.*?

Answer: No, the Tort Claims Act does not apply to a claim for bad faith brought against SCMIRF because it is not a political subdivision of the State, and even if it is, the Tort Claims Act does not apply and

limit a claim by the insured for actual damages for breach of the Coverage Contract.

In support of Plaintiff's positions, Plaintiff incorporates by reference as if fully stated herein her *Motion and Memorandum in Support of Motion for Summary Judgment for Plaintiff*, filed with the Court on December 15, 2015. In addition, Plaintiff adds that Defendant, South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF's], has not brought forth cogent reasons for granting summary judgment on the issues as it appeals to the Court, and Plaintiff addresses the following more fully herein: (1) that SCMIRF is a fund and is not a governmental entity subject to the Tort Claims Act, S.C.Code Ann. § 15-78-10 *et seq.*, for purposes of any limitation on recovery in a bad faith insurance action brought against SCMIRF; and (2) that the 2011 Coverage Contract's provisions stating no duplication of coverage for a single occurrence have no bearing on defining occurrence or determining the number of occurrences, as Defendant erroneously contends.

In sum, Defendant is not entitled to summary judgment, and Plaintiff respectfully requests that the Court deny Defendant's motion and grant Plaintiff's motion for summary judgment on the two legal issues before the Court for declaratory judgment.

I. SCMIRF Is Not A State Governmental Entity And, Thus, The Tort Claims Act Does Not Apply To SCMIRF.

SCMIRF attempts to establish that it is a governmental entity and, thus, protected in a bad faith insurance claim by the recovery caps for tort liability under the Tort Claims Act, S.C.Code Ann. § 15-78-10 *et seq.* [TCA]. SCMIRF is wrong, as the TCA does not govern tort claims brought against SCMIRF, because SCMIRF is not a political subdivision of the state. In supplement to *Plaintiff's Memorandum in Support of Summary Judgment for Plaintiff*, pp. 15-19, Plaintiff notes that SCMIRF characterizes itself in its *Memorandum for Summary Judgment* as an "agency

established by municipalities.” SCMIRF is not an agency and has stipulated to this Court that it is “an unincorporated voluntary, self-insurance pool” of municipality members that agreed to pool its resources for the payment of property losses and liability claims on behalf of its members. *See Amended Complaint, Exhibit 1 Stipulation of Facts and Issues*, ¶¶ 6-7. SCMIRF’s only purpose is as a pooled resource fund, and it is organized and governed by bylaws created by its members and an agreement entered into by its members. *See Amended Complaint, Exhibit 1, Stipulation of Facts and Issues, Attachments B & C (Bylaws and Intergovernmental Agreement for Risk Sharing)*. SCMIRF is not organized and controlled by the General Assembly or by state statute, in contrast with the South Carolina Budget and Control Board Insurance Reserve Fund, which specifically is a Division of the South Carolina State Fiscal Accountability Authority and organized and controlled by numerous statutes. *See, e.g.*, S.C.Code Ann. §§ 1-11-140, 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, and 59-67-710.

Second, SCMIRF erroneously contends that the factors utilized by our State’s Supreme Court to determine that the South Carolina Board of Dentistry is a governmental entity establish that SCMIRF likewise is a governmental 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). However, applying the *Health Promotion Specialists* factors instead shows that SCMIRF differs from the Board of Dentistry in every factor and is not a governmental entity.

Specifically, the Supreme Court looked at whether the Board of Dentistry functions statewide, whether it performs work of the state, whether it was created by the legislature, and 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 state 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 (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 (2011)). 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.* at 636, 815.

In stark contrast, the General Assembly did not create SCMIRF. SCMIRF was created by its member municipalities to pool their risk of liability. The fact that statute authorizes state municipalities to procure insurance to cover risks for which immunity has not been waived under the TCA 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 as well, that the chosen private carrier becomes a state entity. The argument is absurd. 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 a private company that provides insurance to a state entity does. 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 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.

SCMIRF also points to two cases from Colorado and New Jersey as support for its argument that it is a governmental entity, but its citations also are 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 TCA. Further, in the Colorado case, the parties conceded that the liability pool at issue was a public entity, which is not the case here. *Colorado Special Dists. Property and Liability Pool*, 277 P.3d at 879. Second, unlike in the South Carolina Code, Colorado statute is broad and specifically defines "public entity" to include 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 subject to Colorado's Governmental Immunity Act. *Id.*

Likewise, New Jersey statute specifically governs the provision of insurance coverage, to include workers' compensation 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 TCA. *See* S.C.Code Ann. § 15-78-30(d), (e), & (h). A “governmental entity” within the meaning of the TCA “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). SCMIRF is not the State or a State office, agency, authority, department, commission, board, division, or instrumentality. SCMIRF is a fund created by municipalities. Furthermore, municipal pooled risk funds are not included within the TCA’s definition of “political subdivisions” 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). In accordance with the plain language of the TCA, SCMIRF is not a state governmental entity or 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 TCA, and a tort claim for bad faith brought against SCMIRF would not be subject to the TCA. Furthermore, any claim of breach of contract by SCMIRF in failing to protect its insured would not be subject to the TCA. *See Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993).

II. Defendant's Argument That The Coverage Contract Does Not Allow For Duplication Of Coverage For A Single Occurrence Does Not Address Definition Of Occurrence Or Number Of Occurrences Under the 2011 Coverage Contract.

It is indisputable that the plain language of the 2011 Coverage Contract defines occurrence based on a negligent act and not on a resulting injury; however, SCMIRF still contends that injury controls to define an occurrence. As referenced, Plaintiff incorporates her *Memorandum in Support of Summary Judgment for Plaintiff*, where she addresses the plain language of the Coverage Contract that specifically defines occurrence based on negligent act or omission and how the Contract's definition of occurrence is in line with *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 134, 712 S.E.2d 401, 407 (2011) and other decisions of this Court.

Furthermore, there is no disagreement that the 2011 Coverage Contract is a per occurrence policy, not an aggregate policy, and that general liability coverage is only offered through a per occurrence policy, as testified to by Heather Ricard, Director of Risk Management Services with the Municipal Association of South Carolina. *See Plaintiff's Memorandum in Support of Summary Judgment, Exhibit 2*, Deposition of Heather Ricard, July 28, 2014, pp. 28:23 to 29:19. Ms. Ricard also asserts that the Coverage Contract provides for \$1,000,000 per occurrence. *Id.*, Deposition of Ricard, p. 39:11-17. Yet, she and SCMIRF's position moving for summary judgment erroneously contends that an occurrence is based on injury and not on the state's negligent act or omission. Plaintiff additionally points out in supplement to her previously filed *Memorandum for Summary Judgment* that all of the Coverage Contract language Defendant cites to establish that an occurrence is based on a negligent act or omission, not resulting injury. *See Amended Complaint, Exhibit 1 Stipulation of Facts and Issues, Attachment D*, Sec. IV(A)(1); Sec. IV(G)(27); Sec. I(B)(4).

Moreover, the Contract's provisions that foreclose the duplication of coverage for a single occurrence that may fall under more than one policy section do not define occurrence or assist in

determining the number of occurrences. *See Plaintiff's Memorandum in Support of Summary Judgment*, pp. 11-15. Nonetheless, Defendant's argument for summary judgment in its favor rests on the no duplication of coverage provisions. The no duplication of coverage provisions make clear that where an act or omission may fall under more than one coverage section, that single act or omission will be covered only once at a limit of \$1,000,000 in coverage, and a "single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage" **from that specific act or omission**. *See Amended Complaint, Exhibit 1 Stipulation of Facts and Issues, Attachment D, Sec. I(C)(9); Sec. IV(D)(2)*). Simply stated, a single occurrence that may fall under more than one provision of liability in the Contract results in a single indemnity limit of \$1,000,000 for that single occurrence. However, the no duplication of coverage provisions have no bearing on multiple occurrences, with the policy covering each occurrence separately and providing an indemnity limit of \$1,000,000 per occurrence. Defendant's reliance on the no duplication of coverage provisions to define occurrence is misplaced.

In sum, as set forth in *Plaintiff's Memorandum in Support of Summary Judgment* and fully incorporated by reference herein, multiple and distinct actions by The Town of Cottageville, Officer Price, and John Craddock exist that each constitute a separate occurrence. The separate and distinct actions of the Town, Price, and Craddock are not causally connected to constitute the unfolding of a single sequence of events, or a single occurrence, that caused the death of Bert Reeves. *See Boiter*, 393 S.C. at 134, 712 S.E.2d at 407. The Coverage Contract provides for \$1,000,000 in indemnity coverage per occurrence, and, accordingly, the multiple occurrences here result in more than \$1,000,000 in coverage under the Coverage Contract. Defendant is not entitled to summary judgment on the issue of occurrences.

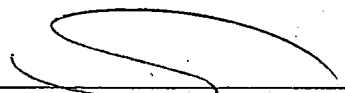
CONCLUSION

Based on the foregoing and Plaintiff's *Motion and Memorandum in Support of Summary Judgment for Plaintiff*, Defendant is not entitled to summary judgment on the two issues before the Court. Plaintiff respectfully requests that the Court deny Defendant's Motion for Summary Judgment and grant Plaintiff's Motion for Summary Judgment.

Plaintiff specifically requests that the Court enter a declaratory judgment that (1) the Coverage Contract provides for \$1,000,000 per occurrence, and the claims made and the verdict rendered against the Town of Cottageville and Officer Price, as well as the separate suit against John Craddock, relating to the hiring, retention, supervision and shooting death of Bert Reeves result in there being multiple occurrences and, thus, more than \$1,000,000 in indemnity coverage available under the terms of the Coverage Contract and (2) that the Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, does not govern a bad faith tort claim against SCMIRF because it is not a political subdivision of the State, and, even if it is, the Tort Claims Act does not apply and limit a claim by the insured for actual damages for breach of the Coverage Contract.

Respectfully submitted this 14 day of January 2016,

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STATE OF SOUTH CAROLINA)

COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Ashley Reeves as Personal
Representative for the Estate of Albert
Carl "Bert" Reeves,

Plaintiff,

vs.

South Carolina Municipal Insurance and
Risk Financing Fund ("SCMIRF"), the
Town of Cottageville, the Town of
Cottageville Police Department, and
Randall Price, individually,

Defendants.

Civil Action No. 2014-CP-15-135

MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

2016 JAN 15 AM 11:09

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

South Carolina Municipal Insurance and Risk Financing Fund ("SCMIRF"), by and through its undersigned counsel, and in accordance with the Scheduling Order dated December 10, 2015, respectfully submits this Memorandum in Opposition to Plaintiff Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves' ("Plaintiff") Motion for Summary Judgment. As outlined below, Plaintiff's arguments are erroneous, unsupported by applicable South Carolina law, and ignore parts of the 2011 Coverage Contract at issue in this case. For these reasons and the reasons outlined in SCMIRF's Motion for Summary Judgment, SCMIRF opposes Plaintiff's arguments and argues that it is entitled to judgment as a matter of law on the two declaratory judgment claims.

INTRODUCTION

As part of a settlement of two prior lawsuits, the Parties agreed to litigate two, specific questions through this action. The two questions before this Court are:

- (1) 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?
- (2) 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 Coverage Contract with respect to all such claims including the claims made against John Craddock in the separately styled action referenced above?

With respect to the first question, Plaintiff's arguments are two-fold. First, Plaintiff asks this Court to ignore an applicable opinion of the South Carolina Attorney General, fails to distinguish that opinion, and argues, erroneously, that SCMIRF is not a "political subdivision" as defined in S.C. Code Ann. § 15-78-30(h). Second, Plaintiff argues—in contravention to the Parties' settlement and agreement to litigate a specific question before this Court—that because she can allegedly assert a contract claim against SCMIRF, a bad faith claim would not be subject to the South Carolina Tort Claims Act ("TCA"). Both arguments are fatally flawed and do not support summary judgment in favor of Plaintiff as to the first declaratory judgment question.

As for the second question, Plaintiff asks this Court to interpret the 2011 Coverage Contract by looking only to provisions which Plaintiff deems advantageous to her position and ignoring relevant and applicable provisions that run directly counter to Plaintiff's arguments. Additionally, Plaintiff claims to support her erroneous position by looking to distinguishable cases which do not directly involve a contract governing coverage. In this case, because there is a contract at issue, the Court must look to the defined terms of the 2011 Coverage Contract to determine SCMIRF's liability. When all of the provisions are viewed together, as they must be, the 2011 Coverage Contract

clearly provides that 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 do not result in there being more than \$1,000,000.00 in indemnity coverage available to Plaintiff.

In sum, Plaintiff has not shown that she is entitled to judgment as a matter of law on the two declaratory judgment causes of action. For the reasons outlined herein, Plaintiff's arguments are unsupported and SCMIRF is entitled to judgment as a matter of law on both questions.

ARGUMENTS

I. The TCA is Applicable to a Bad Faith Claim Against SCMIRF, Assuming Such a Claim Could be Asserted, and Plaintiff's Arguments to the Contrary Should be Rejected.

As previously outlined in SCMIRF's Motion for Summary Judgment, SCMIRF's supporting Memorandum, and in the Complaint before this Court, the parties settled two lawsuits with a material term of the settlement being an agreement to litigate two specific declaratory judgment questions before this Court. (Am. Compl. at ¶ 16.) One question being whether "a tort claim for bad faith brought against SCMIRF [would] 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?" (*Id.* at ¶ 17.) Plaintiff argues the answer to that question is "no" based on, essentially, two arguments: (1) SCMIRF is a "fund," not a "political subdivision," and this Court should ignore the South Carolina Attorney General's well-reasoned opinion to the contrary; and (2) the TCA would not bar a breach of contract cause of action. Neither argument supports a grant of summary judgment in favor of Plaintiff.

A. SCMIRF is a “Governmental Entity” Due to It Satisfying the Definition of “Political Subdivision,” the Attorney General’s Opinion is Persuasive Authority Supporting this Finding, and Plaintiff Fails to Distinguish it.

Plaintiff’s first argument is that SCMIRF does not qualify as a “political subdivision” and, therefore, is not subject to the protections of the TCA as a “governmental entity.” This argument is unsupported by any authority (binding or persuasive) and unavailing. Instead, the only South Carolina authority on this question finds that SCMIRF is a “political subdivision,” thereby rendering it a “government entity and subject to the protections of the TCA. *See* S.C. Op. Att’y Gen., 2014 S.C. A.G. LEXIS 116, at *5 (S.C.A.G. Dec. 17, 2014.) This Court should decline Plaintiff’s unsupported arguments and issue a ruling in line with the well-reasoned opinion of the South Carolina Attorney General.

At the outset, despite Plaintiff’s unsupported arguments to the contrary, nothing in the TCA bars an entity from being a “fund” and also qualifying as a “political subdivision” as that term is defined in S.C. Code Ann. § 15-78-30(h). The terms are not mutually-exclusive. In fact, as conceded by Plaintiff, a markedly similar entity, the South Carolina Insurance Reserve Fund, is both a “fund” and a “political subdivision” subject to the protections of the TCA. (*See* Pl.’s Mem. in Supp. at p.17.) If the South Carolina Insurance Reserve Fund is subject to the protections of the TCA, and Plaintiff does not dispute this fact, necessarily then, so is SCMIRF.

In attempting to contrast the two “funds,” Plaintiff argues that the South Carolina Insurance Reserve Fund is “organized and controlled by numerous statutes” and argues that “SCMIRF is not organized and controlled by statute.” (Pl.’s Mem. in Supp. at p.17.) This argument is erroneous. SCMIRF is specifically *authorized* by statute and the South

Carolina Constitution. *See* S.C. Const. Ann. Art. VIII, § 13; S.C. Code Ann. § 15-78-140(b) (“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[.]”). Thus, Plaintiff’s “distinction” between the South Carolina Insurance Reserve Fund and SCMIRF is not a distinction at all. Both the South Carolina Insurance Reserve Fund and SCMIRF are distinct entities which can enter into contracts and take other actions that mere “funds,” as that word is commonly understood, cannot. (*See* Am. Compl. at Ex. 1, ¶¶ 6–7 (referencing SCMIRF’s Bylaws, attached as Exhibit B, and its entry into an Intergovernmental Agreement).) If the South Carolina Insurance Reserve Fund’s nature as a “fund” does not render it outside the bounds of protection under the TCA, SCMIRF’s nature as a “fund”—authorized by statute and the South Carolina Constitution—does not render it outside the bounds of the protections of the TCA either.

Finally Plaintiff requests that this Court “disagree” with the South Carolina Attorney General’s opinion on this very issue, essentially because Plaintiff disagrees with its conclusion. (Pl.’s Mem. in Supp. at p.16.) In making this argument, Plaintiff focuses on the last phrase “any agency, governmental health care facility, department, or subdivision thereof,” as used in S.C. Code Ann. § 15-78-30(h), in isolation. This statutory subsection, in its entirety, provides:

(h) “Political subdivision” means 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). Without case law or other support, Plaintiff argues that this last phrase (underlined above) “only qualifies ‘special districts of the State,’ which is the listed entity preceding the qualifying phrase.” (Pl.’s Mem. in Supp. at p.16.) This argument is unsupported by South Carolina precedent—binding or persuasive. In fact, the authority on this point is contrary to Plaintiff’s argument. The South Carolina Attorney General in two separate opinions has disagreed with the interpretation espoused by the Plaintiff. See S.C. Op. Att’y Gen., 2014 S.C. A.G. LEXIS 116, at *3–4 (S.C.A.G. Dec. 17, 2014); see also S.C. Op. Att’y Gen., 1990 S.C. A.G. LEXIS 173, at *4 (S.C.A.G. July 25, 1990). The South Carolina Attorney General has opined that “[t]he final phrase amplifies the term ‘political subdivision[.]’” S.C. Op. Att’y Gen., 1990 S.C. A.G. LEXIS 173, at *4 (S.C.A.G. July 25, 1990).¹ Accordingly, if this Court adopts Plaintiff’s position, it would be disregarding not one, but two, opinions of the South Carolina Attorney General and the *only authority*—persuasive or binding—as to this particular issue. See *Kalber v. Redfearn*, 215 S.C. 224, 243, 54 S.E.2d 791 (1949) (“While the opinions of the Attorney General are not binding upon the Court, they are persuasive, for that official occupies a quasi judicial position.”).

SCMIRF also notes that Plaintiff’s reliance on the South Carolina Supreme Court case of *State v. Ramsey*, 409 S.C. 206, 762 S.E.2d 15 (2014) is misplaced. While *Ramsey* does support the proposition that an opinion of the South Carolina Attorney General

¹ The South Carolina Attorney General initially came to the conclusion that “political subdivision” means or includes 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 in the 1990 opinion. See S.C. Op. Att’y Gen., 1990 S.C. A.G. LEXIS 173, at *4–5 (S.C.A.G. July 25, 1990). Since that time, the General Assembly has not amended Section 15-78-30(h) to reflect a contrary meaning. In such instances, the South Carolina Supreme Court has given some weight to the inaction of the General Assembly, such as exists here, in light of an opinion by the Attorney General on the particular issue. See, e.g., *Calhoun Life Ins. Co. v. Gambrell*, 245 S.C. 406, 140 S.E.2d 774 (1965).

serves as persuasive authority, it does not support Plaintiff's request that this Court "disagree" with the South Carolina Attorney General's opinion. In *Ramsey*, the South Carolina Supreme Court found the opinion of the South Carolina Attorney General (on an entirely unrelated statute not at issue here) to be flawed because it relied on opinions which the Supreme Court "deem[ed] inapposite." *Id.* at 212, 762 S.E.2d at 18. In this case, Plaintiff has failed to identify any flaw or fallacy in the South Carolina Attorney General's opinion as to SCMIRF qualifying as a "governmental entity" subject to the protections of the TCA. Thus, unlike in *Ramsey*, there is no basis identified by Plaintiff for this Court to disregard the South Carolina Attorney General's opinion. The analysis in the opinion is sound and Plaintiff fails to identify any supported argument to the contrary. For these reasons, Plaintiff's reading of Section 15-78-30(h) to exclude SCMIRF as a "political subdivision" is both flawed and unsupported by any relevant South Carolina authority.

B. Plaintiff's Arguments on the Applicability of the TCA to a Bad Faith Claim Against SCMIRF Improperly Attempts to Recast the Question Before this Court.

In addition to the flawed analysis regarding the definition of "political subdivision," Plaintiff mischaracterizes and attempts to recast the issue before this Court. Plaintiff's second argument is that even if a bad faith claim against SCMIRF is subject to the TCA, a claim for "breach of the Coverage Contract in failing to pay its insured's claims within the contract's limits" would not be subject to the TCA. (See Pl.'s Mem. in Supp. at p.18.) For purposes of this litigation, the argument raised by Plaintiff is a red herring. The only question before this Court is whether a *bad faith claim* against SCMIRF—which indisputably arises in tort—is subject to the TCA. See *Charleston*

Cnty. Sch. Dist. v. State Bdgt. & Control Bd., 313 S.C. 1, 7–8, 437 S.E.2d 6, 9 (1993) (holding claim for bad faith is one in tort).

As outlined in Plaintiff's Amended Complaint, Plaintiff alleges that "[d]uring the Federal lawsuit, Reeves alleged, and SCMIRF denied, that SCMIRF had acted in *bad faith in failing to reasonably settle* the Cottageville Action prior to trial." (Am. Compl. at ¶¶ 15, 28 (emphasis added).) Further, Plaintiff alleges that "Cottageville informed SCMIRF it intended to assign *any bad faith claims* in its favor that may exist against SCMIRF to Reeves." (*Id.* at ¶ 29 (emphasis added).) This issue of a purported claim for bad faith was part of the "comprehensive settlement of the Federal lawsuit," which "involved two contingent payments that are payable depending on the answers to the two stipulated legal questions, which, in turn, are based on stipulated facts." (*Id.* at ¶ 16.) Both Parties agreed, as part of the settlement, that the "specific question[s] posted by the Parties for this Court" is: "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?" (*Id.* at ¶ 17(2) (emphasis added); Ans. at ¶ 17 ("SCMIRF admits that the legal questions outlined are those which the parties agreed to have resolved as part of the settlement of the Federal Lawsuit.")) In this regard, Plaintiff is seeking, through this litigation, a "declaration from this Court that *a bad faith claim* against SCMIRF is not subject to the South Carolina Tort Claims Act." (Am. Compl. at ¶ 33 (emphasis added).) Notably, none of Plaintiff's allegations in the Amended Complaint or the specific question posed as part of the comprehensive settlement involve a purported claim for breach of the Coverage Contract. This question

is not part of this lawsuit, not a part of the comprehensive settlement, and not properly before this Court for a ruling.

In any event, even if the question is considered, Plaintiff would not have a claim for breach of contract under the Stipulated Facts here because a breach of contract cause of action does not exist for alleged failure to settle. In the cases relied upon by Plaintiff, the insureds brought claims for breach of contract and bad faith when their claims were submitted and refused, either in whole or in part, by the insurance company. *See, e.g., Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983) (“Respondent filed claims for reimbursement of repair costs with his insurance carrier and Insurer refused to pay the full claim. Respondent then brought suit alleging two causes of action, the first for breach of contract and the second for bad faith refusal to pay first party benefits.”); *Charleston County School District*, 313 S.C. at 3–4, 437 S.E.2d at 7 (noting the insurer “advanced some funds,” but when the “parties were unable to resolve their dispute, the District brought this breach of contract action and an action for bad faith refusal to pay benefits under the insurance contract”). Here, there are no facts evidencing a failure to pay a claim submitted. Instead, the Stipulated Facts and the Amended Complaint reference only the alleged “bad faith in failing to reasonably settle the Cottageville Action prior to trial” and the alleged “bad faith with regard to [SCMIRF’s] handling of the claims relating to the shooting and death of Bert Reeves.” (Am. Compl. at ¶¶ 15, 28, Ex. 1 at “Stipulated Issues, Issue 2.”) Unlike the *Nichols* and *Charleston County School District* cases, there are simply no facts before this Court regarding an alleged refusal to pay after a claim was submitted. *See Nichols*, 279 S.C. at 340–41, 306 S.E.2d at 619 (“In Respondent’s suit for breach of contract he must only

show that *his claim* is valid.” (emphasis added)). Accordingly, there are no facts indicating that there was a failure to pay insurance proceeds under the Coverage Contract and, therefore, a breach of contract cause of action cannot exist, as a matter of law.

For all of the foregoing reasons, the Stipulated Issue before this Court should be answered in the affirmative: A tort claim for bad faith brought against SCMIRF is subject to the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10 et seq.). *See Charleston County School District*, 313 S.C. at 8, 437 S.E.2d at 10 (“[A]s an action in tort, the South Carolina Tort Claim Act applies and we find there is no prejudice from the dismissal of the bad faith claim.”); 2014 S.C. A.G. LEXIS, at *8 (“[T]he Tort Claims Act itself expressly contemplates the approach taken by SCMIRF” and “SCMIRF serves as an agency or department of its municipality members,” thereby rendering it within the parameters of the TCA.). This Court should deny Plaintiff’s Motion and grant SCMIRF’s Motion as to this question.

II. Plaintiff Ignores Applicable Provisions of the Coverage Contract and Relies on Distinguishable Case Law in an Attempt to Circumvent the \$1 Million in Coverage For the Claims Made Against Craddock and the Verdicts Rendered Against the Town of Cottageville and Randall Price.

Plaintiff’s arguments regarding the coverage available under the Coverage Contract surround the ten enumerated “findings,” which Plaintiff identifies as part of the Federal Lawsuit, and inapplicable cases involving “occurrences” under the TCA. (*See* Pl.’s Mem. in Supp. at p.3, p.15 (arguing “[e]ach action is an occurrence[.]”); Am. Compl. at Ex. A.) Yet, there are two easily identifiable flaws in Plaintiff’s arguments. First, Plaintiff ignores applicable provisions of the Coverage Contract providing that where there exists both Bodily Injury and Personal Injury, *only* Personal Injury is recoverable. And, second, that where there is a contract at issue, such as the Coverage

Contract here, the Court must look to the language of the contract itself to determine SCMIRF's liability—not to any definition of "occurrence" under the TCA. Each of these issues will be addressed, in turn.

A. Each "Finding" Listed by Plaintiff and Found by the Jury in the Federal Lawsuit Amounts to Only \$1 Million in Total Coverage Under the Plain Terms of the Coverage Contract.

An analysis of each of the ten "findings" listed by Plaintiff compared against the language of the Coverage Contract leads to only one conclusion: Despite the number of claims asserted, the number of covered persons involved, or the number of questions presented to the jury, where the same resulting injury occurs, coverage is limited to \$1 million. Plaintiff lists the following ten "findings" of the jury in the Federal Lawsuit as against Randall Price ("Price") and the Town of Cottageville, essentially arguing that each "finding" amounts to a separate "occurrence:"

<u>Jury Finding(s) Outlined by Plaintiff</u>	<u>Bodily Injury or Personal Injury?</u>
(1) Price's negligence proximately caused the death of Bert Reeves, which resulted in the death of Bert Reeves;	<i>Bodily Injury</i>
(2) Price violated Bert Reeves' constitutional right to be free fro the use of excessive force under 42 U.S.C. § 1983, which resulted in the death of Bert Reeves;	<u>Personal Injury</u>
(3) Price violated Bert Reeves' constitutional right to be free from unnecessary seizure under 42 U.S.C. § 1983, which resulted in the death of Bert Reeves;	<u>Personal Injury</u>
(4) Town of Cottageville's negligence in hiring Price;	<i>Bodily Injury</i>
(5) Town of Cottageville's negligence in supervising Price which resulted in the death of Bert Reeves;	<i>Bodily Injury</i>
(6) Town of Cottageville's negligence in retaining Price which resulted in the death of Bert Reeves;	<i>Bodily Injury</i>

(7)	Town of Cottageville's negligence in failing to train Price which resulted in the death of Bert Reeves;	<i>Bodily Injury</i>
(8)	Town of Cottageville's liability under 42 U.S.C. § 1983, for Price's violation of Bert Reeves' constitutional rights which was performed pursuant to a custom, policy, ordinance, regulation, or decision of the Town of Cottageville or as a result of its deliberate indifference to the use of excessive force by Price which resulted in the death of Bert Reeves;	<u>Personal Injury</u>
(9)	Town of Cottageville's liability under 42 U.S.C. § 1983, for its deliberate indifference to the constitutional rights of its citizens in hiring Price which resulted in the death of Bert Reeves;	<u>Personal Injury</u>
(10)	Town of Cottageville's liability under 42 U.S.C. § 1983, for deliberate indifference to the constitutional rights of its citizens in failing to properly train Price which resulted in the death of Bert Reeves.	<u>Personal Injury</u>

(See Pl.'s Mem. in Supp. at p.3; *see also* Am. Compl. at Ex. A.) While Plaintiff concedes that the resulting injury is exactly the same, Plaintiff goes on to argue that "each negligent act and not the resulting injury" results in an occurrence. (Pl.'s Mem. in Supp. at p.3 (noting at the end of the list that "each of which the jury found proximately caused Bert Reeves' death"); p.5.). This argument, however, ignores relevant and applicable portions of the Coverage Contract.

For coverage to exist for any of these "findings," the actions must fall within the parameters of one of the two paths to coverage for Law Enforcement Liability under the Coverage Contract: A Wrongful Act resulting in (1) Bodily Injury or (2) Personal Injury. (See Am. Compl. at Ex. D, Sec. IV(A)(1).) Section IV, which governs Law Enforcement Liability, provides that SCMIRF agrees to pay on behalf of a member or covered person the sums those person(s) shall be obligated to pay as Money Damages because of a

"Wrongful Act" by those person(s) "which results in: a. **Property Damage or Bodily Injury** . . . provided the **Wrongful Act** amounts to an **Occurrence**; or b. **Personal Injury or Advertising Injury** which is first caused and first becomes manifest during the **Coverage Period.**" (*Id.* at Sec. IV(A)(1) (emphasis in original).) A "Wrongful Act" includes "any actual or alleged error in the performance or failure to perform an official duty," such as negligence, "when committed by a Member or by a Covered Person(s) while acting within both the course and scope of his or her official duties, as provided under the 'South Carolina Tort Claims Act.'" (*Id.* at Sec. IV(G)(27).) Coverage arises if that "Wrongful Act" results in "Bodily Injury" or "Personal Injury." "Bodily Injury" is defined as "physical injury to any person (including death) and any mental anguish or mental suffering associated with or arising from such physical injury." (*Id.* at Sec. IV(G)(4).) In this case, the negligence findings against Price and the Town of Cottageville, which the Jury found resulted in the death of Bert Reeves, would constitute "Bodily Injury" under the Coverage Contract. This is the first avenue to coverage.

Similarly, coverage is also available where there is a "Wrongful Act" which results in "Personal Injury." (*Id.* at Sec. IV(A)(1).) "Personal Injury" is defined as "only the following **Offenses** committed in the course of the Member's law enforcement activities," which include "a. assault and battery; b. illegal search, invasion of an individual's right to privacy, *violation of civil rights*, or discrimination other than in the course of the victim or alleged victim's employment with the **Member**; c. false arrest, detention or imprisonment, or malicious prosecution; false or improper service of process." (*Id.* at Sec. IV(G)(18) (bold emphasis in original; italics added).) "Offense" is defined in Section I as "conduct constituting **Personal Injury** or

Advertising Injury that happens in the course and scope of the **Member's** or **Covered Person's** official duties as described in The South Carolina Tort Claims Act." (*Id.* at Sec. I(B)(5).) Therefore, the Jury's findings as to Price and the Town of Cottageville's Section 1983 violations would constitute "Offenses" and fall under the definition of "Personal Injury." This is the second avenue to coverage.

As outlined above, Plaintiff identifies five Jury "findings" which would be classified as "Bodily Injury" and five Jury "findings" which would be classified as "Personal Injury" for purposes of the two avenues for coverage. However, under the plain terms of the Coverage Contract, where there is both Bodily Injury and Personal Injury arising from the same, unfolding sequence of events—as is the case here—there is only one recovery totaling \$1 million. More specifically, in the definition of "Bodily Injury," the contract provides a specific exception in this regard for purposes of Law Enforcement Liability. It 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) (bold emphasis in original; underline added).) As acknowledged by Plaintiff, the jury found that "each" of the ten enumerated findings "proximately caused the death of Bert Reeves." (Pl.'s Mem. in Supp. at p.3.) As a result, the death of Bert Reeves, *i.e.*, the Bodily Injury, "result[ed] directly or immediately" from the Section 1983 violations by Price and the Town of Cottageville, as well as the negligence, and, as such, the "resulting injur[y] shall be deemed to be part of the **Personal Injury**." (Am. Compl. at Ex. D, Sec. IV(G)(4) (bold emphasis in original).) In addition to the Bodily

Injury being subsumed by the Personal Injury, each corresponding Offense is considered one for purpose of coverage. (*See id.* at Sec. I(B)(5) (“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.”).)

Moreover, because all ten of the enumerated Jury findings are considered “part of the Personal Injury” and constitute only one “Offense” under the Coverage Contract, Section IV(D)(2) dictates the resulting conclusion that there is only one occurrence—\$1 million—for coverage purposes. Section IV(D)(2) states:

[A]ll 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 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) (bold emphasis in original; underline and italics added).) Plaintiff ignores this section entirely, making no effort to distinguish its applicability to the Stipulated Facts before this Court. Yet, even the section’s title—“SCMIRF’s Limit of Liability”—is the crux of the declaratory judgment question before this Court and refutes Plaintiff’s position. Despite Plaintiff’s attempt to focus the Court’s attention elsewhere in an effort to extend coverage where it does not exist, this section, as a part of the Coverage Contract, must be read as part of the whole document. *See Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (“If the intention

of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.”). Here, because the death of Bert Reeves flows from the Personal Injury, *i.e.*, the constitutional violations by both Price and the Town of Cottageville, it is considered part of the Personal Injury and “one occurrence/wrongful act” for coverage purposes. (*Id.* (emphasis added).) Under Section IV(D)(2), the fact that there were two Covered Persons—Price and the Town of Cottageville—“involved in causing . . . such injuries” is of no moment in terms of SCMIRF’s liability. (*Id.*) Similarly, under this provision, the fact that more than one claim is asserted against each of the covered persons makes no difference in terms of available coverage. All told, “SCMIRF’s liability for any one occurrence/wrongful act will be limited to \$1,000,000 per Member regardless of the number of Covered Persons, number of claimants or claims made, or the number of covered vehicles involved whether or not covered in one or more capacity under This Contract[.]” (*Id.* (bold emphasis in original; underline added).)

Further bolstering this point are the General Conditions under Section I of the Coverage Contract. (*Id.* at Sec. I(C)(9).) The Coverage Contract provides that “[n]o **Offense** will be deemed also to constitute separately an **Occurrence** for coverage purposes, or vice-versa”. (*Id.*) Additionally, “[a]ny act(s) or omission(s) that might be described under more than one Coverage Section or more than one category as an **Offense(s)** or an **Occurrence(s)** will be treated as a single event for coverage purposes, subject to a single Coverage Limit.” Again, “[a] single Coverage Limit applies to any **Offense or Occurrence, regardless of the number of claimants, suits, or claims.**” (*Id.* (bold emphasis in original; underline added).)

Stated simply, “[t]here is no duplication of any coverage or benefits under this Contract.” (*Id.*) SCMIRF’s liability is limited to \$1 million under the plain terms of the Coverage Contract and, for these reasons, Plaintiff’s Motion should be denied.

B. Plaintiff’s Arguments Erroneously Seek to Separate the Wrongful Act from the Corresponding Injury.

Plaintiff also challenges SCMIRF’s position by arguing that each act of negligence must amount to a separate “occurrence” for coverage purposes and that “occurrence” is not linked to a resulting injury.² (*See* Pl.’s Mem. in Supp. at pp.5–7 (arguing occurrence is “based on a negligent act and not based on a resulting injury”).) This is an obvious attempt by Plaintiff to circumvent the fact that the Jury found only *one injury* flowing from the negligence of Price, the negligence of the Town of Cottageville, and the constitutional violations, which injury was the death of Bert Reeves. (*See* Am. Compl. at Ex. A (verdict forms outlining each question with the end result being the proximate cause of Bert Reeves’ death).) The Plaintiff’s argument is fatally flawed in two respects.

First, Plaintiff’s argument separates the Wrongful Act from the resulting injury and ignores the definition of Bodily Injury. The starting point in this analysis is asking the question: how does coverage exist for purpose of the negligence claim? Under the terms of the applicable Coverage Contract, a resulting injury is required to trigger coverage under Section IV. (*See* Am. Compl. at Ex. C, Sec. IV(A).) The obvious fallacy in Plaintiff’s position is that if there is no resulting injury associated with the Wrongful

² This case, as currently postured, poses two agreed-upon declaratory judgment questions to this Court as a result of a comprehensive settlement of the Federal Lawsuit and the Craddock Lawsuit. As part of the settlement, the Parties agreed that the Stipulated Facts filed with this Court would control all factual issues before the Court. For this reason, the Plaintiff’s inclusion of the transcript from the Rule 30(b)(6) deposition of Heather Ricard in a separate, and now settled, action as purported “evidence” is improper and it should not be considered by this Court. Instead, the Court should consider only the Stipulated Facts, Stipulated Issues, and law presented by the parties.

Act, there is no coverage under the Coverage Contract. Stated another way, there is no coverage under the Coverage Contract for a Wrongful Act alone. Instead, there must be a corresponding injury—be it Property Damage, Bodily Injury, Personal Injury, or Advertising Injury. (*See id.* at Sec. IV(A)(1).)

Section IV(A)(1) provides that SCMRF only agrees to pay:

Money Damages because of a **Wrongful Act** by a **Member, Law Enforcement Employee**, or other **Covered Person(s)** . . . *which results in:* a. **Property Damage** or **Bodily Injury** . . . provided the **Wrongful Act** amounts to an **Occurrence**; or b. **Personal Injury** or **Advertising Injury**[.]

(*Id.* (bold emphasis in original; italics added).) With the negligence in this case, i.e., the Wrongful Act, there is no corresponding Property Damage, Personal Injury, and Advertising Injury. That means for coverage to exist, the negligence of Price and/or the Town of Cottageville must have resulted in Bodily Injury. As noted above, Bodily Injury is defined as “*physical injury* to any person (including *death*) and any mental anguish or mental suffering associated with or arising from such physical injury.” (*Id.* at Sec. IV(G)(4) (italics added).)

Plaintiff’s argument also ignores the fact that the Jury found the *same* Bodily Injury resulted from *all* of the Wrongful Acts/Occurrence(s). (Am. Compl. at Ex. A (*See* Verdict Form 1, Question No. 1 (finding negligence of Price proximately caused Bert Reeves’ death; Verdict Form 2, Question No. 8 (finding Town of Cottageville was negligent in hiring and that negligence caused death of Bert Reeves), Question No. 9 (finding Town of Cottageville was negligent in supervising and that negligence caused Bert Reeves’ death), Question No. 10 (finding Town of Cottageville was negligent in retaining and that caused Bert Reeves’ death), Question No. 11 (finding Town of

Cottageville was negligent in failing to train and that caused death of Bert Reeves)).) It is not until there is that resulting injury that coverage arise. In these instances, because there is no duplication of coverage, the “Occurrence(s) will be treated as a single event for coverage purposes, subject to a single Coverage Limit.” (*Id.* at Ex. C, Sec. I(C)(9) (bold in original; underline added).) And, because there is the “same injury or damage,” “[a] single Coverage Limit applies to all claims or suits.” (*Id.* (“A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage.”).)

Hence, Plaintiff’s argument ignores important triggering requirements for coverage. Most notably, it ignores the specific requirement that an injury be associated with a Wrongful Act, or “Occurrence” where Bodily Injury is at issue, and, therefore, summary judgment in Plaintiff’s favor would not be proper.

C. The TCA Case Law Cited by Plaintiff is Inapplicable Where a Coverage Contract is at Issue.

Finally, Plaintiff continues with a flawed analysis by relying on cases that are inapplicable and easily distinguishable from the current case. (Pl.’s Mem. in Supp. at pp.7-11.) In these cases, the courts there are applying the definition of “occurrence” under certain statutory schemes and there is not a contract at issue specifically defining the term.³ See, e.g., *Boiter v. S.C. Dep’t of Transp.*, 393 S.C. 123, 131–135, 712 S.E.2d 401, 405–407 (2011) (applying definition in S.C. Code Ann. § 15-78-30(g) to determine

³ In *Williamson v. S.C. Ins. Res. Fund*, 355 S.C. 420, 586 S.E.2d 115 (2003), there was a policy issued by the Insurance Reserve Fund, but that policy did not define “occurrence” in the way it is defined in the Coverage Contract at issue here, and it involved a unique situation where the limits of liability were defined in the policy in the same manner as the statutory text of Section 15-78-120, and on the date the causes of action accrued, the caps had been repealed and not yet reinstated under the statute. Also, *Johnson v. Hunter*, 386 S.C. 452, 688 S.E.2d 593 (Ct. App. 2010) involved the court’s interpretation of UIM policy which hinged on the court’s interpretation of the phrase “each accident” a term that was not defined in the policy. Neither case is relevant, analogous or applicable here.

number of occurrences under the TCA); *Solomon v. Coastal Plains Physician Assoc., P.A.*, C.A. No. 2010-CP-25-105, Ex. 1 to Pl.'s Mem. in Supp at pp.4-6 (applying "per occurrence" in South Carolina Solicitation of Charitable Funds Act); *Brooks v. Memphis & Shelby Cnty. Hosp. Auth.*, 717 S.W.2d 292 (Tenn. App. 1986) (applying and defining "accident" in Tennessee's Tort Claims Act). By relying on these cases, Plaintiff essentially asks the Court to define "occurrence" in the Coverage Contract in the same way that the courts define the term under the TCA. 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").

The cases cited by Plaintiff can also be further distinguished on their facts. Plaintiff relies most heavily on *Boiter*, in which the South Carolina Supreme Court found that two separate agencies committed acts of negligence for which the plaintiff could recover under the TCA. 393 S.C. at 134, 712 S.E.2d at 406. There, the South Carolina Department of Transportation ("SCDOT") and the South Carolina Department of Public Safety ("SCDPS") were found negligent with respect to a motorcycle accident which occurred at an intersection where the traffic signals were burned out. The accident resulted in injuries to the plaintiffs. Specifically, the jury found that the SCDOT was negligent in failing to implement a re-lamping policy to replace bulbs when traffic signals burned out. *See id.* 125, 712 S.E.2d at 402. The jury also found a separate agency, the SCDPS, negligent in failing to notify a trooper to report to the scene and direct traffic

after a citizen notified it of a traffic signal outage just before the accident. *See id.* The issue there was whether these negligent acts constitute one or two occurrences under the TCA.

To reach its conclusion, the South Carolina Supreme 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 (emphasis added). The Court held that there were two occurrences under that definition because there were two acts of negligence—“one by the SCDOT and one by SCDPS.” *Id.* at 134, 712 S.E.2d at 406. The acts themselves did not combine and the Court held that it could not “see how SCDOT’s negligent act ‘unfolded’ into SCDPS’ negligent act.” *Id.* at 134, 712 S.E.2d at 407. In contrast, in the case before this Court, the negligent hiring, training, supervision, retention, etc. of the Town of Cottageville necessarily unfolded into and combined with the negligence of Price since it is undisputed that these events lead to and resulted in the shooting and death of Bert Reeves. (See Am. Compl. at Ex. 1, Stipulated Facts.) Additionally, it is undisputed that only one agency and/or department is involved here since Price and Craddock were both employed by the Town of Cottageville police department. (*Id.* at ¶ 2.) Therefore, not only is the “occurrence” analysis in the *Boiter* case distinguishable and irrelevant to this case, the case itself involves entirely distinguishable facts in that there exists in this case an unfolding sequence of events and only one agency involvement.

With respect to the other cases cited by Plaintiff, they similarly are distinguishable from this case on the facts. *Williamson* involved a unique situation in which a statute cited in the policy was repealed at the time the action arose, as described

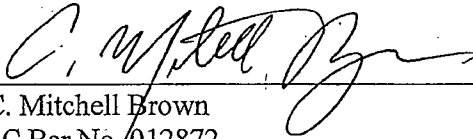
in footnote 3, *supra*; a situation that does not exist here. 355 S.C. at 427, 586 S.E.2d at 118. In *Solomon*, the trial court opinion relied upon by Plaintiff in her memorandum, the finding of two occurrences under the TCA hinged on the *Boiter* decision and the judge's specific finding that the "negligent acts [were] made on different date[sic], at different locations, *by different agents and employees of different institutions*," where there was "no evidence in the record establishing any special relationship between the parties," and where the "defense counsel argued that the *entities were completely distinct*." (Pl.'s Mem. in Supp. at p.6 (emphasis added).) Those facts are easily contrasted with the Stipulated Facts before this Court, which state that "Cottageville was, at all times relevant, the employer of Randall Price [Price] and John Craddock [Craddock], as policemen for the Town of Cottageville" and those individuals were acting within the course and scope of their employment. (Am. Compl. at Ex. 1, ¶¶ 2, 3, 5.) *Solomon* involved negligent acts by two individuals employed by different hospitals, whereas Price and Craddock were both employed by the Town of Cottageville in the police department.

In sum, none of the cases cited by or relied upon by Plaintiff are relevant to this Court's application of term "Occurrence," as defined by the Coverage Contract, to the Stipulated Facts. The Coverage Contract definition alone governs this matter. This Court should deny Plaintiff's Motion and, instead, find that 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, including the claims made against Craddock in the separate action, result in there being only \$1 million in indemnity coverage available under the terms of the SCMIRF Coverage Contract.

CONCLUSION

Plaintiff's analysis evidences a desire to apply those provisions of the Coverage Contract which she deems advantageous to her position and ignore the rest. South Carolina law does not provide for such piecemeal or selective application when it comes to a contract. In light of the erroneous analysis, Plaintiff's Motion must be denied. This Court should find, in light of the Stipulated Facts and applicable law, that SCMIRF is subject to the South Carolina Tort Claims Act and despite several claims being asserted against several defendants/covered persons, coverage under the Coverage Contract is limited to \$1 million for the death of Mr. Reeves.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Attorneys for South Carolina Municipal Insurance and
Risk Financing Fund ("SCMIRF")

Columbia, South Carolina

January 15, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Ashley Reeves as Personal	)	Civil Action No. 2013-CP-15-135
Representative for the Estate of Albert	)	
Carl "Bert" Reeves,	)	
	)	
Plaintiff,	)	PLAINTIFF'S SUPPLEMENTAL
	)	MEMORANDUM AND EXHIBITS TO
vs.	)	PLAINTIFF'S MOTION FOR SUMMARY
	)	JUDGMENT
South Carolina Municipal Insurance and	)	
Risk Financing Fund [SCMIRF]	)	
	)	
Defendant.	)	
	)	
	)	
	)	

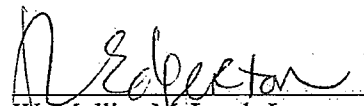
COMES NOW Plaintiff, Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, by and through her undersigned counsel, and respectfully supplements her Motion for Summary Judgment presently before the Court with the Exhibits attached to the Deposition of Heather Ricard, deposed on July 28, 2014 as the corporate representative of the South Carolina Municipal Insurance and Risk Financing Fund, taken pursuant to South Carolina Rule of Civil Procedure 30(b)(6). Plaintiff made the Ricard deposition an exhibit to her initial memorandum in support of summary judgment to the Court, filed on December 15, 2015, as Exhibit 2. Plaintiff includes herewith what appears as Exhibits 1-6 to the Ricard Deposition, which should have been included with the Ricard Deposition.

Plaintiff also supplements her Memorandum for Summary Judgment with the Affidavit of Frederick J. Jekel, Jr., which was referenced in the Hearing on Summary Judgment held on May 17, 2016, and explains where SCMIRF took the counter position on the definition of occurrence in the November 5, 2003 Stratford High School police raid case. Exhibit 3. Specifically, in the school raid case, SCMIRF took the position that the insurance contract defines occurrence based

on negligent acts opposite of its position asserted here that occurrence is based on number of injuries. Id.

Respectfully submitted this 18th day of May 2016.

McLEOD LAW GROUP LLC



W. Mullins McLeod, Jr.
Jacqueline LaPan Edgerton
Post Office Box 21624
Charleston, SC 29413
Telephone: (843) 277-6655
Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

Ashley Reeves as Personal
Representative for the Estate of
Albert Carl "Bert" Reeves,

Plaintiff,

vs.

South Carolina Municipal Insurance
and Risk Financing Fund [SCMIRF]

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
)

) Civil Action No. 2013-CP-15-135
)

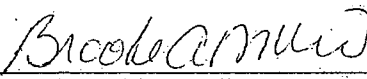
) **PLAINTIFF'S SUPPLEMENTAL**
) **MEMORANDUM IN OPPOSITION TO**
) **DEFENDANT'S MOTION FOR**
) **SUMMARY JUDGMENT**
)
)
)
)

Certificate of Service

I, the undersigned Paralegal of the law offices of McLeod Law Group, LLC, attorneys for Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, do hereby certify that I have served all counsel in this action with a copy of Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

C. Mitchell Brown, Esquire
Sarah B. Nielsen, Esquire
PO Box 11070
Columbia, SC 29201

Attorneys for the South Carolina Municipal Insurance and Risk Financing Fund



Brooke A. DiMeo, Paralegal

May 18, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

ASHLEY REEVES as Personal)
Representative for the Estate of)
Albert Carl "Bert" Reeves,)

Plaintiff,)

vs.)

SOUTH CAROLINA MUNICIPAL)
INSURANCE AND RISK)
FINANCING FUND ("SCMIRF"))
THE TOWN OF COTTAGEVILLE,)
THE TOWN OF COTTAGEVILLE)
POLICE DEPARTMENT and)
RANDALL PRICE, individually,)

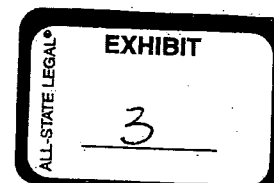
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2014-CP-15-135

AFFIDAVIT OF FREDERICK J. JEKEL

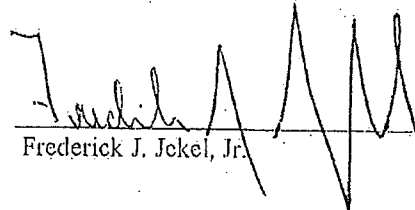
Personally appeared before me, Frederick J. Jekel, Esquire, who being duly sworn deposes and states:

1. My name is Frederick "Fritz" Jekel. I am over eighteen (18) years of age and legally competent to make this affidavit, which is true and correct, is made voluntarily and not under duress, and is based on my personal knowledge of the facts set forth herein.
2. I am attorney licensed to practice law in the State of South Carolina and am a partner in the Mt. Pleasant based law firm known as Jekel-Doolittle, LLC.
3. On the morning of November 5, 2003, fourteen law enforcement officers from the Goose Creek Police Department conducted a raid of Stratford High School located in Goose Creek, SC.
4. The raid was recorded on the school's surveillance cameras which showed students as young as 14 years old being forced to the ground as SWAT officers with bulletproof vests and guns drawn conducted searches of their school book bags.
5. I served as co-class counsel in the Class Action that was filed on behalf of many children who brought constitutional claims as a result of the raid. The Class Action was filed in the United States District Court for the District of South Carolina: C.A. No. 2:03-3845-23.



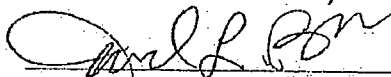
6. In my role as co-class counsel I negotiated extensively with the S.C. Municipal Insurance Risk Financing Fund ("SCMIRF") who insured the City of Goose Creek Police Department and its officers involved in the raid.
7. As my memory reflects, during the negotiations SCMIRF took the position there was only \$1,000,000 in insurance coverage because there was only one occurrence. SCMIRF rejected our position that there was more than one occurrence because there were numerous members of the class each of whom had a separate and distinct injury.
8. SCMIRF's representations that an occurrence under their insurance policy was determined based upon the negligent act and not the number of injuries was material to the negotiations that led to the settlement which was reached in the case.
9. I have recently been advised by W. Mullins McLeod, Jr. that SCMIRF has represented in the above-captioned case that the definition of occurrence in their standard insurance contract is based upon the number of injuries and not the number of negligent acts. These representations are opposite of the representations made to me in the Stratford High Case where they were also the insurer.

Further affiant sayeth not.

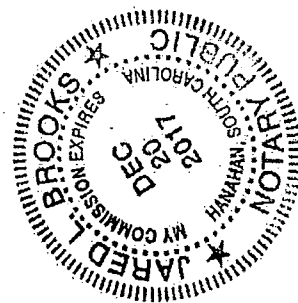

Frederick J. Jekel, Jr.

July 31, 2014

Sworn to and subscribed before me
This 31st day of July, 2014



Notary Public for South Carolina
My Commission Expires 12/20/2017



STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

ASHLEY REEVES as Personal)
Representative for the Estate of)
Albert Carl "Bert" Reeves,)

Plaintiff,)

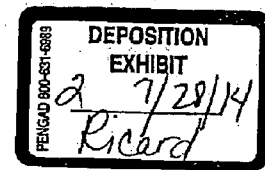
vs.)

SOUTH CAROLINA MUNICIPAL)
INSURANCE AND RISK)
FINANCING FUND ("SCMIRF"))
THE TOWN OF COTTAGEVILLE,)
THE TOWN OF COTTAGEVILLE)
POLICE DEPARTMENT and)
RANDALL PRICE, individually,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 14-CP-15-0135

**Amended Notice of 30(b)(6) Deposition of
a SCMIRFF Corporate Representative**



TO: South Carolina Municipal Insurance and Risk Financing Fund (SCMIRFF)

Please take notice that the Plaintiff's attorneys, pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, will take the deposition(s) of the **SCMIRFF Representative** at the time and place set forth hereinafter upon oral examination (via stenography and/or video) before the herein described Notary Public or before any other Notary Public or officer authorized by law to take depositions at which time you are notified to appear take part in such examination regarding the following issues:

- a. The issuance of insurance policies to municipalities in the State of South Carolina and in particular the Town of Cottageville.
- b. The insurance policies and coverage (whether self-insurance, excess insurance, primary insurance, and secondary insurance) available to satisfy all or part of any claims brought against the Town of Cottageville for the shooting death of Bert Reeves as alleged in the Complaint - *Reeves v. Town of Cottageville, et al*, 2012-cv-02765.

- c. The financial coverage available or remaining on the Town of Cottageville's policy – P-SCMIRF-1124-2011 (or any policy of insurance related to this claim) to the extent that any of the insurance policies are wasting policies (insurance coverage that is depleted by attorney's fees), or otherwise have been reduced by the payment of claims, or for any other reason.

Please take further notice that the person or persons so designated above by the Defendants are required to produce copies of all corresponding reports, records, writings or things regarding the above.

DATE: July 28, 2014

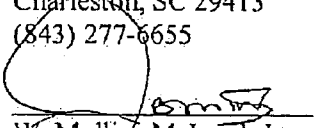
TIME: 12:00 p.m.

PLACE: Murphy & Grantland, P.A., 4406 Forest Dr., Columbia,
South Carolina 29206

COURT REPORTER: Carolina Reporting

The oral examination will continue from day to day until completed. These Depositions are being taken for the purpose of Discovery, for use of Trial, and for all other purpose as are permitted under the Rules of this Court and all applicable statutes and laws.

McLEOD LAW GROUP, LLC
PO Box 21624
Charleston, SC 29413
(843) 277-6655

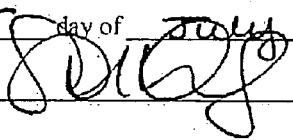

W. Mullins McLeod, Jr.
James B. Moore III
Attorneys for the Plaintiff

July 15, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 15th day of July, 2014



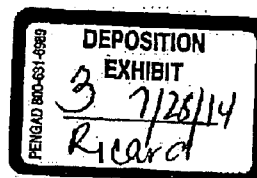
Town of Cottageville
SCMIRF Join Date June 1, 2008
SCMIRF Claim #SF-11-0402

Date of Loss: May 16, 2011

Section 1 General Provisions

C. General Conditions (Injury)

para 9. No Duplication of Coverage or Coverage Limits
No liability that is covered under any Coverage Section of This Contract will be deemed to be separately covered under any other Coverage Section. No Offense will be deemed also to constitute separately an Occurrence for coverage purposes, or vice-versa. Personal Injury will not be deemed to constitute separate Advertising Injury for coverage purposes, or vice-versa. Any act(s) or omission(s) that might be described under more than one Coverage Section or more than one category as an Offense(s) or an Occurrence(s) will be treated as a single event for coverage purposes, subject to a single Coverage Limit. A single Coverage Limit applies to any Offense or Occurrence, regardless of the number of claimants, suits, or claims. A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage. There is no duplication of any coverage or benefits under This Contract.



Section IV-Law Enforcement Liability

D-Limit of Liability (Occurrence)

D. Limit of Liability

1. Limit of Liability

For any action or claim brought under the provisions of Chapter 78 of the South Carolina Code of Laws, cited as the "South Carolina Tort Claims Act", the liability of SCMIRF shall not exceed the limit set forth by law.

In no event shall the total amount available to pay all claims for any one Member exceed the amount shown on the Contract Declarations Page for this Section under Member's Annual Aggregate. Only a single limit or Annual Aggregate from a single Contract for a single Coverage Period will apply, regardless of the number of persons or organizations injured or making claims, or the number of Covered Persons who allegedly caused them, or whether the damage or injuries at issue were continuing or were repeated over the course of more than one Coverage Period.

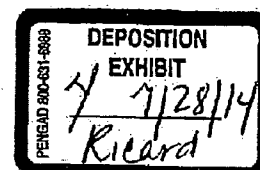
2. SCMIRF's Limit of Liability

As regards the General Liability (Section III), Law Enforcement Liability (Section IV) Public Officials Liability (Section V), and Auto Liability (Section VI) coverages afforded by this Contract, the total liability of the South Carolina Municipal Insurance and Risk Financing Fund any one occurrence/ accident/ wrongful act will be \$1,000,000 per Member excluding expenses and defense cost; except, where other liability and/or coverage sublimits apply, then SCMIRF's liability will be limited to the applicable sublimit.

SCMIRF's liability for any one occurrence/wrongful act will be limited to \$1,000,000 per Member regardless of the number of Covered Persons, number of claimants or claims made, or the number of covered vehicles involved whether or not covered in one or more than one capacity under This Contract or under both This Contract and any SCMIRF coverage available to other SCMIRF Members.

Subject to any special aggregates, 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 or Aggregate for one year 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.

In no event shall coverage under any liability Section of This Contract, combine with any other Section, to increase the per occurrence/accident/wrongful act limit of liability of \$1,000,000 as set out above.





SCMIRF

South Carolina
Municipal Insurance and
Risk Financing Fund

2011 Renewal Application

*Mailed
9/13/10*

DUE DATE: 9/27/2010

Town of Cottageville

Date Completed:

Completed By:

Telephone:

Fax Number:

E-Mail Address:

Name of Contact for Schedule Changes:

(if different than above)

9/13/10

Sandy N Cox

843-835-8655 Ext. 12

843-835-8581

Gulwice @ Live . com

Sandy N Cox

Due to the underwriting guidelines set by the SCMIRF program, it is imperative that we receive updated schedule and underwriting information from each member. This information directly affects the premium quoted to all members.

In order for any property (buildings, contents, vehicles, inland marine items, etc.) to be covered in the event of a loss, it must be scheduled on file with SCMIRF at the beginning of each coverage term. Addition of property valued at more than \$1,000,000 during the current coverage term will result in additional charges.

NOTE: If updated schedules are not provided by 10/15/2010, an automatic 10% surcharge will be applied. A completed application is required for renewal of coverage.

I. Property

Please update the attached schedules. Check off each item when returning renewal information.



N/A

Schedule of Property Locations and Contents. Fire Department Turnout Gear should be included in the contents values of Fire Department Buildings. This includes self-contained breathing apparatuses and supporting equipment.



N/A

Schedule of Property Extensions. The Coverage contract provides a \$100,000 sub-limit for Extra Expense and Business Income/Rental Income. Indicate on the Property Extension schedule the total amount of coverage desired if additional amount needed. Computer Equipment is included in the value of the building contents unless mobile in nature. Include value of mobile computer equipment on the Property Extension schedule.



N/A

Schedule of Inland Marine. Include values and serial #'s and departments.

Traffic lights \$ _____

Number of _____ (Submit separate schedule)

Street lights \$ _____

Number of _____ (Submit separate schedule)

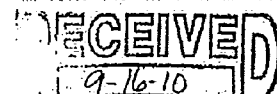
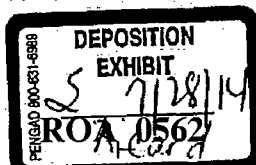
*Retaining Walls \$ _____

Number of _____ (Submit separate schedule)

*Retaining Walls must form a part of the building for coverage to apply.

Circle the correct Protection Class (ISO #) for scheduled properties: 1 2 3 4 5 6 7 8 9 10

If more than one class number applies, please mark appropriate Protection Class number beside property on schedules.



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SCMIRF

South Carolina
Municipal Insurance and
Risk Financing Fund

2011 Renewal Application

List below any buildings that are *vacant/unoccupied* (include location #, square footage, and brief description). **ONLY LIST LOCATIONS NOT ALREADY NOTED AS VACANT/UNOCCUPIED ON SCHEDULE.**

Unoccupied buildings are buildings that contain contents to conduct the Member's customary operations, but the building is not utilized for intended use for at least four months out of the year. Vacant buildings are buildings where 70% or more of the building is not utilized for its intended use for 60 consecutive days or more.

Totally or partially vacant and/or unoccupied buildings require special rating. Such buildings must be reported to SCMIRF immediately in writing. Losses to *unreported* vacant and/or unoccupied buildings will be reduced to \$10.00 per square foot and adjusted on an Actual Cash Value basis.

The following classes of property should not be included in your schedules. They represent only some of the property **excluded** by the SCMIRF coverage document: transmission lines, dams, underground property, underground sewer/water lines.

Notes:

FLOOD ZONE REMINDER

The SCMIRF property coverage is excess of the National Flood Insurance Program (NFIP) for locations in Flood Zones "A" or "V". If you desire NFIP quotes for your locations in these flood zones, please check here. ☐

II. Auto Liability /Auto Physical Damage

- ☐ Please update the attached schedule including values, year, make, model, & VIN #. Also, verify the original cost new for each vehicle. All vehicles and additional equipment will be automatically depreciated based on age. For LEAP and FDNP vehicles, if you have not done so already, please separate the Original Cost New from the value of Additional Equipment and show in the appropriate fields. Also, please verify and update vehicle VIN #'s. Vehicle Identification Numbers should be 17 digits in length.
(*See Vehicle type key code below.)

*AUTO TYPE KEY

Police Car
Fire Car
Private Passenger
Light Truck (under 10,000 lbs gvw)
Medium Truck (10,001- 20,000 lbs gvw)
Utility Trailer (0-2,000 lbs load capacity)
Trailers (over 2,000 lbs load capacity)

LEAP
FDP
PP
TK
TK 10001
UTILTRL
LRGTRL

Heavy Truck (20,001 lbs gvw and over)
Garbage Trucks
Fire Trucks
Public Transportation Buses
All other Buses (SWAT, Bookmobiles, etc)
Ambulances
Motorcycles

TK20001
DMPTK
FDNP
ICTYB
OTHB
AMBE
MTCYC

- ☒ Garage keepers coverage is included at \$50,000. To increase this coverage (maximum \$150,000), please advise the additional amount of coverage desired: \$_____.



SCMIRF

South Carolina
Municipal Insurance and
Risk Financing Fund

2011 Renewal Application

III. Employee Dishonesty/Crime

- Total # Employees 14 (FULL TIME AND PART TIME)
- The standard SCMIRF employee dishonesty limit is \$200,000. Limits are available up to \$500,000 for an additional premium. If a limit above \$200,000 is desired, please indicate the Limit desired: \$ _____

IV. Liability

- Population 800
- Total Expenditures \$ 1,213,830.57
- 2009 WC Audited Payroll (N/A if SCMIT member) \$ ~~897,987~~
- ☒ The SCMIRF Liability limit is \$1,000,000. Excess Liability is available for an additional premium. If a limit above \$1,000,000 is desired, please indicate the additional Limit desired:
☐ \$1,000,000 ☐ \$2,000,000 ☐ \$3,000,000 ☐ \$4,000,000
- Natural Gas Distribution Yes ☐ No ☒
- Jail Facilities (Prisoners held over 24 hours) Yes ☐ No ☒
 - Holding Cells (held less than 24 hours) Yes ☐ No ☒ If yes, how many? ✓
 - Regular Cells (held over 24 hours) Yes ☐ No ☒ If yes, how many? ✓
 - Juvenile Cells (held over 24 hours) Yes ☐ No ☒ If yes, how many? ✓
 - Federal Jail Cells Yes ☐ No ☒ If yes, how many? ✓
- # of Skate Parks N/A If yes, coverage desired with SCMIRF? Yes ☐ No ☒
 - If coverage desired, is a charge made for entering the Skate Park? Yes ☐ No ☒
 - If no charge made, is the Skate Park unsupervised? Yes ☐ No ☒
- # of Locations with Swimming Pools N/A
- # Full Time Sworn Police Officers 3
- Do you contemplate acquiring or creating any new departments during the upcoming coverage term?
Yes ☐ No ☒ If yes, please briefly explain and list the estimated payroll for the new departments:

-
- Inmate Labor Used? Yes ☐ No ☒
PLEASE NOTE: Bodily Injury to any prisoner in the custody of the Member while performing labor is EXCLUDED.



Note: If "yes" is checked, complete requested information.

EXCLUDED ACTIVITIES include, but are not limited to the following:

ROA 0565



SCMIRF

South Carolina
Municipal Insurance and
Risk Financing Fund

2011 Renewal Application

V. Special Events

The SCMIRF coverage contract provides coverage for *some* special events sponsored by the member, however in many instances a special events policy is required to cover those exposures not covered by SCMIRF. The SCMIRF coverage contract **does not cover** the following special event activities:

- Fireworks Displays
- Mechanical Amusement rides
- Trampolines and Rebounding Equipment – any liability arising out of ownership, maintenance, use or operation of any trampoline or other similar rebounding equipment (including, inflatable devices)
- Aircraft, Helicopter and ballooning rides or ballooning shows
- Automobile, motorcycle, watercraft, aircraft, racing, or stunting
- Archery
- Lifeguard operations
- Skateboarding
- Parachuting or Hang Gliding
- Concerts organized and promoted by outside parties
- Rodeos
- Traveling carnivals/circuses
- Waterslides over 10 feet (contracted only)
- Sale of Liquor
- Serving of Liquor where license is required
- Firing Ranges (contracted only)
- Pony Rides
- Bungee Jumping or any activity involving bungee cords

If you have a special event where any of the above activities will occur **AND** you want a quote for a special event policy, please contact SCMIRF.

Leigh Pothill
Underwriting Manager
Phone: 803.354.4752
Fax: 803.354.4753
E-mail: lpothill@masc.sc

or

Julie Hollaway
Underwriting Specialist
Phone: 803.354.4755
Fax: 803.354.4756
E-mail: jhollaway@masc.sc

Westlaw Delivery Summary Report for MCLEOD,MULLINS

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712 S.E.2d 401
393 S.C. 123, 712 S.E.2d 401
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H

Supreme Court of South Carolina.
Larry Lee **BOITER**, Appellant,

v.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION and South Carolina Department of Public Safety,
Respondents.

and

Jeannie **Boiter**, Appellant,

v.

South Carolina Department of Transportation and South Carolina Department of Public Safety, Respondents.

No. 26981.

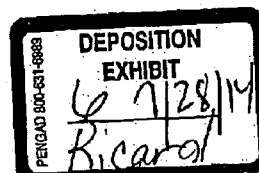
Heard Jan. 6, 2011.

Decided June 6, 2011.

Rehearing Denied July 21, 2011.

Background: Motorcyclist and passenger who were injured when motorist collided with them in intersection filed suit against motorist, and against Department of Transportation (DOT) and Department of Public Safety (DPS) under Tort Claims Act. The plaintiffs settled claim against motorist and proceeded to trial against DOT and DPS. Following trial, the jury awarded plaintiffs \$1.875 million. The Circuit Court, Spartanburg County, J. Mark Hayes, II, J., granted DOT's and DPS' motion to reduce verdict pursuant to statutory cap under Act. Plaintiffs appealed.

Holdings: The Supreme Court, Hearn, J., held that:



- (1) two-tier statutory damages cap under Tort Claims Act which imposed disparate limits on damages depending on identity of tortfeasor did not violate equal protection, and
- (2) distinct negligent actions of both DOT and DPS did not combine to constitute single occurrence so that damages were capped under Tort Claims Act, based on single occurrence, at \$600,000.

Affirmed in part; reversed in part.

Pleicones, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Automobiles 48A 313

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(B) Actions

48Ak313 k. Damages. Most Cited Cases

Constitutional Law 92 3746

92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)17 Tort or Financial Liabilities

92k3746 k. Damages in general. Most Cited Cases

Two-tier statutory damages cap under Tort Claims Act, which capped damages for claims against government entities at \$300,000 per person or \$600,000 per occurrence, but which capped damages for medical malpractice at \$1.2 million, did not violate equal protection based on injured motorcyclist's claim that disparate treatment was based solely on identity of tortfeasor, in action against Department of Transportation and Department of Public Safety for injuries sustained when motorist proceeded through intersection controlled by semaphore for which red light bulb had burnt out and struck motorcycle; distinction was rationally related to state's interest in relieving government of hardships of unlimited liability and in furthering accountable and competent healthcare while promoting affordable medical liability insurance. U.S.C.A. Const.Amend. 14; Code 1976, § 15-78-120.

[2] Constitutional Law 92 3057

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)6 Levels of Scrutiny

92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

Under the rational-basis test, the Equal Protection Clause is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. U.S.C.A. Const.Amend. 14.

131 Constitutional Law 92 ➡ 1040

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)4 Burden of Proof

92k1032 Particular Issues and Applications

92k1040 k. Equal protection. Most Cited Cases

Those attacking the validity of legislative classification under the rational basis test of the Equal Protection Clause have the burden to negate every conceivable basis which might support it. U.S.C.A. Const.Amend. 14.

141 Automobiles 48A ➡ 313

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(B) Actions

48Ak313 k. Damages. Most Cited Cases

Negligence by Department of Transportation in failing to implement re-lamping policy to replace bulbs in traffic signals before they burnt out did not unfold into negligence of Department of Public Safety in failing to respond to citizen call about burnt out red light bulb at intersection one hour and 27 minutes prior to accident, and thus, negligent actions of different agencies did not constitute single occurrence so that damages in action against both Departments for injuries sustained by motorcyclist and passenger who were struck by motorist in intersection were capped under Tort Claims Act, based on single occurrence, at \$600,000. Code 1976, § 15-78-120(2).

151 Statutes 361 ➡ 1343

361 Statutes

361III Construction

361III(L) Determination of Construction

361k1343 k. Questions of law or fact. Most Cited Cases

(Formerly 361k176)

Questions of statutory construction are a matter of law.

161 Statutes 361 ➡ 1080

361 Statutes

361III Construction

361III(A) In General

361k1078 Language

361k1080 k. Language and intent, will, purpose, or policy. Most Cited Cases
(Formerly 361k184, 361k181(1))

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute.

171 Statutes 361  1151

361 Statutes

361111 Construction

361111(E) Statute as a Whole; Relation of Parts to Whole and to One Another

361k1151 k. In general. Most Cited Cases

(Formerly 361k206, 361k205)

In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect.

****402** James Fletcher Thompson, of Spartanburg, for Appellants.

Andrew F. Lindemann, of Davidson & Lindemann, of Columbia and Ronald H. Colvin, of Spartanburg, for Respondents.

Justice HEARN.

***125** Two issues are presented in this appeal: (1) whether the two-tier statutory cap in the South Carolina Tort Claims Act is constitutional, and (2) whether two separate governmental entities' negligent acts, which resulted in severe injuries to ***126** Larry Lee and Jeannie Boiter (collectively, the Boiters) constitute one or two occurrences under the Tort Claims Act. The circuit court found the statutory caps constitutional and that only one occurrence was presented by the facts. We affirm in part and reverse in part.

FACTS

The Boiters were injured when the motorcycle they were riding collided with a car driven by Nancy Kochenower at an intersection near Inman, South Carolina. The red signal light bulbs for the road that Kochenower was traveling had burned out earlier that day. The Boiters suffered significant injuries as a result of being thrown from the motorcycle, requiring lengthy hospital stays and incurring \$888,756 in medical bills and \$203,897 in lost wages. They settled with Kochenower for her policy limits of \$50,000.

The Boiters filed four separate lawsuits against South Carolina Department of Transportation (SCDOT) and South Carolina Department of Public Safety (SCDPS) (collectively, Respondents), alleging negligence in their failure to prevent the accident. With respect to SCDOT, the Boiters alleged SCDOT failed to implement an appropriate re-lamping policy to replace bulbs in traffic signals before they burn out. With respect to SCDPS, the Boiters alleged that a citizen's call one hour and twenty-seven minutes prior to the accident reporting the outage should have resulted in SCDPS notifying a trooper to report to the scene and direct traffic. The negligence of both agencies is undisputed in this appeal. At trial, the jury found in favor ****403** of the Boiters and awarded each of them a total of 1.875 million dollars.

Thereafter, Respondents filed motions for judgment notwithstanding the verdict, a new trial; and to reduce the verdict amount pursuant to the Tort Claims Act. In response, the **Boiters** filed a motion challenging the constitutionality of the two-tier cap in the Tort Claims Act, and in the alternative, asserted that Respondents' negligence constituted two separate occurrences under the Act. The circuit court denied Respondents' motions for judgment notwithstanding the verdict and a new trial as well as the **Boiters'** motion challenging the cap's constitutionality, but the court found there was only *127 one occurrence and granted Respondents' motion to reduce the verdict pursuant to the Act. Therefore, the **Boiters'** verdict was reduced to \$300,000 each, for a total of \$600,000. This appeal followed.

ISSUES

The **Boiters** raise two issues on appeal:

- (1) Did the circuit court err in failing to find that the two-tier cap on damages under the Tort Claims Act is unconstitutional as a violation of equal protection?
- (2) Did the circuit court err in failing to find that two separate occurrences gave rise to the **Boiters'** injuries?

ANALYSIS

I. CONSTITUTIONALITY OF CAP

[1] Section 15-78-120 of the South Carolina Code (2005) states the following, in pertinent part:

(1) Except as provided in Section 15-78-120(a)(3), no person shall recover ... a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

(2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed six hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

(3) No person may recover in any action or claim ... caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million two hundred thousand dollars because of loss arising from a single occurrence....

(4) The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, may not exceed one million *128 two hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

Therefore, a two-tier statutory cap on damages exists based on who allegedly committed the act. For state-employed physicians and dentists, the cap is 1.2 million dollars per person and per occurrence. For all other state entities, the cap is \$300,000 per person and \$600,000 per occurrence. The **Boiters** allege this disparate treatment based solely on the identity of the tortfeasor violates their constitutional right to equal protection of the laws.

[2][3] Because no fundamental right has been infringed, we focus our analysis on the rational basis test. See *Wright v. Colleton County School Dist.*, 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990). Under this framework, the Equal Protection Clause is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Samson v. Greenville Hospital System*, 295 S.C. 359, 368 S.E.2d 665 (1988). "Those attacking the validity of legislation [under the rational basis test of the Equal Protection Clause] have the burden to negate every conceivable basis which might support it." *Lee v. SC Dept. of Natural Resources*, 339 S.C. 463, 470 n. 8, 530 S.E.2d 112, 115 n.8 (2000)(citing to ***404 Fed'l Comm'n's Comm'n v. Beach Comm'n, Inc.*, 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). The **Boiters** argue the two-tier cap's different treatment of injured plaintiffs based on the identity of the tortfeasor does not have a rational basis sufficient to withstand constitutional scrutiny. Respondents counter that this Court has consistently upheld the constitutionality of the monetary caps, and the **Boiters** have not put forth sufficient evidence to depart from this precedent.

This Court has upheld the constitutionality of the statutory caps in three prior cases. In *Wright*, the Court upheld the general existence of statutory caps. *Wright*, 301 S.C. at 292, 391 S.E.2d at 570. There, a child was injured while working with a product on the school district's premises. *Id.* at 284, 391 S.E.2d at 566. Wright, who was the child's mother, and the child filed actions against the school district, among other *129 entities. See *id.* The circuit court granted judgment to Wright and the child in the amount of \$750,000. *Id.* at 285, 391 S.E.2d at 566. Wright and the child appealed, arguing numerous constitutional challenges, including equal protection. See *id.* at 290, 391 S.E.2d at 569. This Court upheld the constitutionality of the statute, finding:

The limitation on damages as set forth in the statute bears a reasonable relationship to the legislative objectives as expressed in Section 15-78-20(a) of relieving the government from hardships of unlimited and unqualified liability and preserving the finite assets of governmental entities which are needed for an effective and efficient government. The limitations set forth in the statute rest on a reasonable basis and are not arbitrary in that the legislature has balanced the needs for services and demand for reasonable taxes against the fair reimbursement of injured tort victims. Finally, we find that the damage limitation provisions apply to similar plaintiffs in a similar manner.

Id. at 291, 391 S.E.2d at 570.

In *Foster v. South Carolina Department of Highways & Public Transportation*, 306 S.C. 519, 413 S.E.2d 31 (1992), the Court had an opportunity to examine the two-tier cap at issue in this case. Foster sued the Highway Department after she was involved in a car accident, claiming the Highway Department failed to give proper warning of a low shoulder and failed to maintain the highway. Foster was awarded three million dollars, and the circuit court reduced the verdict amount to \$250,000. *Id.* at 522, 413 S.E.2d at 33-34. Foster appealed, claiming the two-tier cap was unconstitutional as a violation of her right to equal protection. *Id.*

This Court found Foster, as the party asserting the unconstitutionality of the statute, failed to meet her burden of proof to show that the classification was arbitrary and without any reasonable basis. See *id.* at 526-27, 413 S.E.2d at 36. The Court noted that it affords great deference to a legislative classification and will uphold a classification if it is "not plainly arbitrary and there is any reasonable hypothesis to support it." *Id.* at 526, 413 S.E.2d at 36. In finding against Foster, we said, "The fact that the classification results in some inequity does not render it in violation of the Constitution." *130 *Id.* at 527, 413 S.E.2d at 36 (citing *State v. Smith*, 271 S.C. 317, 247 S.E.2d 331 (1978)). The Court also articulated a specific basis found in the statute for the two tiers: "These higher limits and mandated coverages are recognition by the General

Assembly of significantly higher damages in cases of medical malpractice." In regards to Foster's burden of proof, the Court instructed,

Foster must offer evidence that the legislative finding of higher awards in actions of medical malpractice was unfounded and thus no rational basis for the classification existed. She has not met her burden of proof by the bare assertion that her damages are as high as damages that might be assessed against a physician or dentist.

Id.

Sixteen years after *Foster*, this Court decided *Giannini v. South Carolina Department of Transportation*, 378 S.C. 573, 664 S.E.2d 450 (2008). There, a car hydroplaned and crossed into the other lane of traffic, striking two cars; one person was killed and two others suffered serious bodily injuries. *Id.* at 578, 664 S.E.2d at 452. After citing to both *Wright* and *Foster*, this Court found the "[l]egislature's aggregate limitation on liability**405 is supported by a rational basis such that there is no equal protection violation." *Id.* at 584, 664 S.E.2d at 456. This Court noted the legislation was in line with the purposes of preserving finite governmental assets and treating similar plaintiffs in a similar manner. *See id.* This Court then cited to cases from other jurisdictions which have also held that general liability caps do not violate equal protection. *See id.* at 585, 664 S.E.2d at 456 (citing *Wilson v. Gipson*, 753 P.2d 1349 (Ok.1988) and *Lee v. Colorado Dep't of Health*, 718 P.2d 221 (Colo.1986)).

With these three cases in mind, we now turn to the Boiters' argument. At the hearing before the circuit court on the constitutionality of the two-tier system, the Boiters produced substantial evidence in the form of national and state studies designed to establish that there is no empirical evidence to justify the difference in the respective caps. The Boiters submitted the following in support of the cap's unconstitutionality: (1) Three U.S. Department of Justice Bulletins detailing the number of trials and verdicts in large counties for civil *131 cases, tort cases, and medical malpractice cases; (2) U.S. Department of Justice report on Medical Malpractice Insurance Claims in Seven States ^{FN1}; (3) South Carolina Legislative Audit Council Report in 2000 and 2004, reviewing the Medical Malpractice Compensation Fund; (4) SCDOT and SCDPS budgets for 2007–2008; and (5) correspondence from the State Budget and Control Board, Boiters' counsel, and Respondents' counsels regarding the above reports. The Boiters argue that consistent with the degree of proof suggested by the Court in *Foster*, they introduced sufficient evidence to demonstrate the constitutional infirmity in the two-tier system. However, even taking all of their evidence into account, it cannot overcome the great deference this Court must give to the General Assembly's stated classification. Under settled principles, we will sustain such classifications if any reasonable hypothesis exists to support them. *Samson*, 295 S.C. at 367, 368 S.E.2d at 665; *Foster*, 306 S.C. at 526, 413 S.E.2d at 36.

^{FN1}. South Carolina was not one of the seven states discussed in this report.

Two reasonable hypotheses exist in the code to substantiate section 15-78-120:(1) relieving the government from the hardships of unlimited liability; and (2) furthering accountable and competent healthcare while promoting affordable medical liability insurance. S.C.Code Ann. § 15-78-20(a), (g) (2005). The evidence submitted by the Boiters before the circuit court does not overcome these two reasonable hypotheses, and we are not persuaded that the General Assembly's two-tier classification is arbitrary or without rational basis. Moreover, our precedent in this area, although perhaps not as compelling from a factual or evidentiary standpoint as this case, convinces us that the Boiters' constitutional challenge should be denied. Therefore, we find that the two-tier cap meets the rational basis test, and we affirm the circuit court's finding of constitutionality.

II. OCCURRENCE

[4] The **Boiters** argue that the circuit court erred in failing to find two separate occurrences in the two separate acts of negligence committed by SCDOT and SCDPS. We agree.

*132 Under Section 15-78-30(g) of the South Carolina Code (2005), "occurrence" is defined as an "unfolding sequence of events which proximately flow from a single act of negligence." In its order denying the **Boiters'** arguments that there were two separate occurrences, the circuit court stated:

The Plaintiffs present a logical argument as to the statutory construction of the term 'occurrence,' but under the facts of this case, where the jury's verdict has to be read as finding both Defendants as concurrently at fault in bringing about the damages to the Plaintiffs, the definition of occurrence limits the award to the statutory cap.

We disagree and find the facts here present a classic case of two occurrences.

[5][6][7] Questions of statutory construction are a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "All **406 rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." Saniter Police Dep't v. Blue Mazda Truck, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct.App.1998). "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

Only one appellate case ^{FN2} in South Carolina has considered the issue of occurrence under section 15-78-30. In Chastain v. AnMed Health Foundation, 388 S.C. 170, 694 S.E.2d 541 (2010), the plaintiff suffered severe and permanent injuries as a result of the poor care given to her by six nurses at AnMed, *133 a charitable institution. Id. at 171-72, 694 S.E.2d at 542. The jury returned a general verdict against AnMed for 2.2 million dollars, and the trial judge reduced it to the \$300,000 statutory cap based on his finding of one occurrence. Id. at 172-73, 694 S.E.2d at 542-43. In affirming the verdict reduction, this Court noted that the burden to prove more than one occurrence rested on the plaintiff and that from the general verdict rendered, it was impossible to conclude that the jury had found more than one occurrence. Id. at 174, 694 S.E.2d at 543. Because the facts presented here are so different than those involved in Chastain, that case provides little guidance to us.

^{FN2}. In Williamson v. South Carolina Insurance Reserve Fund, two different physicians examined a mother during childbirth and failed to take necessary steps, at different times during the delivery, to prevent harm to the child. See 355 S.C. 420, 422, 586 S.E.2d 115, 116 (2003). The circuit court found two occurrences had been established for purposes of the Tort Claims Act because neither doctor's actions was the result of the other's. See id. at 423, 586 S.E.2d at 116. On appeal, this Court declined to address whether two occurrences existed. See id. at 426, 586 S.E.2d at 118.

Cases from other jurisdictions are similarly inapposite because they involve a single governmental entity which committed multiple acts of negligence, a completely different situation than the one before us. See Tex. Dep't of Mental Health & Mental Retardation v. Fort B. & Harough-Kandarian, 848 S.W.2d 680 (Tex.1993) (one occurrence after

department committed multiple acts of negligence); *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990) (negligence by highway department which resulted in truck striking five separate vehicles in collision was only one occurrence under statute); cf. *Brinks v. Memorial & Shelby County Hosp. Auth.*, 717 S.W.2d 292 (Tenn.App. 1986) (finding two occurrences when one employee negligently let patient fall off stretcher and a second employee negligently gave an overdose of medication, resulting in patient's death). Accordingly, we determine the issue before us based solely on the peculiar facts of this case.

In order to determine the number of occurrences, the **Boiters** urge this Court to focus on the number of negligent acts; in contrast, Respondents contend we should look to the number of injuries caused by those acts. The circuit court specifically found in its order that "each of [the Respondents] committed a separate wrongful act that led to the damages," and that "[t]he wrongful acts [of Respondents] were separate and distinct." Nevertheless, the circuit court found that each act of negligence was "a part of the same 'unfolding sequence of events' that resulted in the **Boiters'** damages." Therefore, the circuit court accepted Respondents' argument and equated occurrence with the number of injuries sustained by the **Boiters**. While we do not adopt a bright-line test based on the *134 existence of multiple acts of negligence, we find the circuit court erred in tying the number of occurrences to the number of injuries sustained by the **Boiters**.

We are persuaded that two independent and separate acts of negligence occurred here—one by SCDOT and one by SCDPS. There is no indication that the Respondents' actions combined to form a single act of negligence. Unlike the situation presented in *Chastain*, we have two separate and distinct acts of negligence involving two separate and distinct entities together with separate **407 verdicts against each of them. As found by the jury, SCDOT was negligent in not having a re-lamping policy in place, and SCDPS was negligent in not following its own policy to notify a SCDOT technician when a light had burned out. Based on the facts presented here, we cannot see how SCDOT's negligent act "unfolded" into SCDPS' negligent act. SCDPS only became involved due to a citizen call regarding the burned-out light bulb; SCDOT never called SCDPS regarding the light, and SCDPS never informed SCDOT about the citizen call. We can find no causal connection between the actions of SCDOT and SCDPS; had the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is also true. Therefore, we do not believe that these two separate and independent acts of negligence constituted an unfolding sequence of events which injured the **Boiters**.

Respondents cite to language found in section 15-78-120(2), ^{FN3} arguing that it demonstrates the General Assembly's recognition that the number of governmental entities involved in a particular occurrence does not increase the statutory limits on liability. While we do not disagree with Respondents' view, we do not believe this ends the inquiry. In many situations, negligent acts from more than one entity would still equal but one occurrence. However, under these facts, there were two separate entities which committed two separate and independent acts of negligence, and we do not believe the General Assembly's intent was to limit recovery in such situations based on there being only one occurrence. Accordingly, we hold each Respondent's act of negligence was a separate *135 occurrence entitling the **Boiters** to a combined verdict of 1.2 million dollars, and we reverse the circuit court.

^{FN3} The subsection notes that liability is limited to \$600,000 regardless of the number of agencies or political subdivisions involved.

CONCLUSION

We hold that the two-tier statutory cap on damages is constitutional against an equal protection challenge. However, we also hold that more than one occurrence existed in this situation. Therefore, we affirm in part and reverse in part the circuit court's order.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur.

PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

Justice PLEICONES.

I concur in part and dissent in part. I agree with the majority that the differential caps created by the Tort Claims Act (TCA) are constitutional. I disagree, however, with the majority's conclusion that there was more than one occurrence here. I would therefore affirm the circuit court's order.

In my opinion, the majority errs when it focuses on the number of acts of negligence rather than on the TCA's definition of occurrence: "an unfolding sequence of events which proximately flow from a single act of negligence." S.C. Code Ann. § 15-78-30(e) (2005). Under the TCA, an occurrence is not defined by the number of individual acts of negligence, nor does it require, as would the majority, a "causal connection" between these independent acts. Here, appellants' theory was that as the result of the SCDOT's negligent failure to have a replacement bulb policy a traffic light was not functioning properly, and when a concerned citizen notified SCDPS of the dangerous situation, that agency negligently failed to send a trooper to the scene to direct traffic. This unfolding sequence of events proximately led to the accident and appellants losses.

In my view, an occurrence is not defined by the number of agencies involved, or by the acts of negligence committed, nor by temporal proximity. Instead, the occurrence ends when the unfolding sequence of events is broken by an unnatural or intervening cause. Here, there was no such break, and thus *136 appellants each suffered only one compensable loss as the result of a single occurrence.

I would affirm.

S.C., 2011.

Boiter v. South Carolina Dept. of Transp.

393 S.C. 123, 712 S.E.2d 401

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STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

Ashley Reeves as Personal
Representative for the Estate of
Albert Carl "Bert" Reeves,

Plaintiff,

vs.

South Carolina Municipal Insurance
and Risk Financing Fund [SCMIRF]

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
)

) Civil Action No. 2014-CP-15-135
)

) **PROPOSED ORDER GRANTING**
) **PLAINTIFF'S MOTION FOR**
) **SUMMARY JUDGMENT**
) **AND**
) **DENYING DEFENDANT'S MOTION**
) **FOR SUMMARY JUDGMENT**
)
)
)
)

This matter comes before the Court in the Amended Complaint for Declaratory Judgment, filed on October 16, 2015, by Plaintiff, Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, 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.*?

On October 26, 2015, Defendant, South Carolina Municipal Insurance and Risk Financing Fund, filed its Answer to the Amended Complaint. The Parties mutually seek declaratory judgment on the above two issues and have submitted a *Stipulation of Facts and Issues*, containing *Exhibits A-D*¹, filed with the Amended Complaint. Furthermore, both Plaintiff and Defendant

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

have 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.

On May 17, 2016, the Court held a hearing on both Plaintiff and Defendant's Motions for Summary Judgment, where all parties were represented by counsel and heard on oral argument.

The Court, having fully considered all memoranda submitted in support of summary judgment, as well as in opposition to the other party's motion for summary judgment; the evidence presented; and the oral arguments of counsel, and for the reasons that follow, GRANTS Plaintiff's Motion for Summary Judgment on the two issues presented and DENIES Defendant's Motion for Summary Judgment on the two issues presented.

BACKGROUND

The two issues presented to the Court for declaratory judgment arise out of two underlying federal lawsuits brought by Plaintiff 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 to this Court, the parties have stipulated to the above two issues presented for declaratory judgment, as well as to stated facts in the *Stipulation of Facts and Issues*. The parties agree that no further discovery need be taken to decide the two issues. However, in rendering judgment on the issues presented and pursuant to Rule 56, SCRPC, the Court considers discovery

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.

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 the South Carolina Municipal Insurance and Risk Financing Fund [hereinafter SCMIRF] in order to insure and pool their risk of exposure to certain liabilities. *See Stipulation of Facts and Issues, Exhibit C.* "SCMIRF asserts it is an unincorporated voluntary, self-insurance pool in the State of South Carolina." *Stipulation of Facts and Issues*, at ¶ 6. SCMIRF was created specifically to provide insurance to municipalities who are subject to lawsuits. *See Exhibit 1, Deposition of Heather Ricard*, July 28, 2014, p. 15:3-8. 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 is the contract at issue before the Court. *See Stipulation of Facts and Issues, Exhibit D.* 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. *Stipulation of Facts and Issues, Exhibit A, Verdict Forms and Judgment*. 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, Plaintiff 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, Plaintiff 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. See Exhibit 2, Judge Norton's Order Approving Settlement in the United States District Court for South Carolina and Settlement Agreement, Feb. 26, 2015. The settlement agreement contains two contingent payments that are payable to Plaintiff, depending on the answers to the two stipulated questions that are presently before this Court for declaratory judgment.

At this time, Plaintiff moves for summary judgment as to both issues, contending that the Court should answer as follows:

- (1) That the Coverage Contract provides for \$1,000,000 indemnity coverage per occurrence of negligence, and the claims made and verdicts rendered against the Town and Officer Price, as well as the suit against Craddock, result in there being more than one occurrence and, thus, more than \$1,000,000 total indemnity coverage, and
- (2) That the Tort Claims Act does not apply to a claim for bad faith brought against SCMIRF, because it is not a political subdivision of the State, and, even if it were, the Tort Claims Act does not apply and limit a claim for actual damages for breach of the Coverage Contract in failing to protect the insured.

Defendant moves for summary judgment on both issues as well, contending in opposition that the Court should answer as follows:

- (1) That the Coverage Contract provides \$1,000,000 per occurrence of injury, and in this case only provides for \$1,000,00 in total coverage with respects to all claims Plaintiff has against the Town of Cottageville, Randall Price, and John Craddock, and
- (2) That a tort claim for bad faith brought against SCMIRF is subject to the South Carolina Tort Claims Act.

The Court agrees with Plaintiff on both issues and, specifically, holds that the 2011 Coverage Contract provides for \$1,000,000 per occurrence, with occurrence defined by act of negligence, and that because there were more than one separate and distinct negligent acts in the

underlying lawsuits, more than \$1,000,000 in indemnity coverage exists. The Court further holds that SCMIRF is not a political subdivision of South Carolina, and, accordingly, SCMIRF is not subject to the Tort Claims Act. The Court also holds that, in any event, even if the Tort Claims Act applied to the tort liability of SCMIRF, a claim for breach of the coverage contract against SCMIRF for actual damages incurred in the failure to protect the insured would not be subject to the Tort Claims Act and, consequently, not subject to the Tort Claims Act's statutory monetary limits. Accordingly, for the reasons that follow, the Court grants Plaintiff summary judgment as to Issues One and Two and denies Defendant's motion for summary judgment in its entirety.

ANALYSIS

I. The Coverage Contract Provides For \$1,000,000 Indemnity Coverage Per Occurrence Of Negligence, And The Claims Made And Verdicts Rendered Against The Town And Officer Price, To Include The Suit Against Craddock, Result In There Being More Than One Occurrence.

It is undisputed by the parties that during the time period relevant to Plaintiff's federal lawsuit against the Town of Cottageville and Police Officer Price, in his individual capacity, as well as Plaintiff's suit against Police Chief John Craddock, individually, SCMIRF provided coverage to the Town for certain risks through the 2011 Coverage Contract. *See Stipulation of Facts and Issues*, ¶ 8. The Coverage Contract provides \$1,000,000 in coverage per occurrence of negligent action or omission. In this case, there exist multiple covered occurrences that include the separate and distinct actions of the Town of Cottageville, Officer Price, and John Craddock. Specifically, Plaintiff's claims and the resulting separate verdicts against the Town of Cottageville and Officer Price for separate and distinct actions, each of which proximately caused Bert Reeves's conscience pain and suffering and the damages sustained by his statutory beneficiaries' in their pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship of Mr. Reeves, involve separate occurrences, as well as does the separate claim

against John Craddock. Accordingly, more than \$1,000,000 in total indemnity coverage exists under the Coverage Contract for the Town of Cottageville in the two underlying lawsuits.

The Court begins its analysis with the basic rules of contract construction. “Insurance policies are subject to the general rules of contract construction,” and “[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Beaufort County Sch. Dist. v. United Nat’l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct.App.2011) (internal citations omitted). Where the contract language is clear and unambiguous, “the language alone, understood in its plain, ordinary, and popular sense, determines the contract’s force and effect.” *Id.* However, an insurance contract is to be read as a whole document so that “one may not, by pointing out a single sentence or clause, create an ambiguity.” *Id.* (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). Furthermore, it is long established that whenever an insurance contract is capable of two meanings, it must be construed in the favor of the insured. *Id.* (citing *Reynolds v. Wabash Life Ins. Co.*, 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968)); see also *Town of Duncan v. State Budget and Control Bd., Div. of Ins. Services*, 326 S.C. 6, 12, 482 S.E.2d 768, 772 (1997) (“Terms in an insurance policy should be liberally construed in favor of the insured.”).

A. The Coverage Contract defines occurrence based on negligent act or omission and not by resulting injury.

The Coverage Contract at issue is a “per occurrence” policy for general liability, as well as law enforcement liability, as opposed to an aggregate policy, which provides a single total amount (aggregate) of coverage no matter how many claims are made, no matter how many injuries occur, and no matter how many acts of negligence are involved. See *Exhibit 1, Deposition of Heather Ricard*, July 28, 2014, p. 27:10-21. Under Rule 30(b)(6), SCRPC, the SCMIRF designee most knowledgeable as to the 2011 Coverage Contract at issue, Heather Ricard, Director of Risk

Management Services, was deposed prior to the filing of the Amended Complaint, and testified that in the Coverage Contract SCMIRF could have sold the Town of Cottageville a single aggregate limit of coverage for law enforcement liability but, instead, sold per occurrence coverage that provides \$1,000,000 per occurrence. *Exhibit 1, Deposition of Heather Ricard*, July 28, 2014, p. 39:18-23. The premiums for per occurrence coverage are higher than the premiums for aggregate coverage, because the exposure or risk for SCMIRF is greater than the exposure under an aggregate policy. *Exhibit 1, Deposition of Heather Ricard*, July 28, 2014, p. 28:13-22. Therefore, it is undisputed that the Coverage Contract at issue is a per occurrence policy for general liability and law enforcement liability, and SCMIRF charged the Town of Cottageville accordingly. *Exhibit 1, Deposition of Heather Ricard*, July 28, 2014, pp. 28:23 to 29:6; 39:11-40:4.

Turning next to the Coverage Contract's language, the definition of occurrence is clear and unambiguous, defining occurrence based on the negligent act and not the resulting injury. As such, the Coverage Contract's language alone determines the contract's force and effect. *See, e.g., Beaufort County Sch. Dist.*, 392 S.C. at 516, 709 S.E.2d at 90. The actions at issue in the underlying federal lawsuits invoke the General Provisions (Section I) and Law Enforcement (Section IV) sections of the Coverage Contract.

The Court begins its review of the Coverage Contract's opening provisions, Section I- General Provision, defines occurrence for the policy:

"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. Without limitation, all references to any type of injury arising out of or from an Occurrence or being caused by an Occurrence employ the foregoing meaning. Subject to the foregoing, **"Occurrence" includes continuing exposure to the same harmful conditions**. All such continuing exposure, damage, or injury shall be treated as one Occurrence.

Only when used to describe coverage limits on a per “Occurrence” basis or when otherwise describing whether **an event or series of events** constitutes one loss for coverage purposes or more than one loss, **the word “Occurrence” means a covered event of the sort expressly described in the Insuring Agreement** of the relevant Coverage Section pertaining to the loss or claim.

See Stipulation of Facts and Issues, Exhibit D, Coverage Contract, at p. 3, I.B.4 (emphasis added).

The contract language makes clear that the determination of an occurrence is based on action: “an accident,” “an event or series of events,” “continuing exposure to the same harmful conditions,” and “a covered event of the sort expressly described in the Insuring Agreement.” *Id.*

The General Provisions also define “Offense” based on action:

Offense means conduct constituting **Personal Injury** or **Advertising Injury** that happens in the course and scope of the **Member’s** or **Covered Person’s** official duties....[a]ll 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 pp. 3-4, I.B.5. Accordingly, conduct governs whether an offense has occurred. By the plain language of the Coverage Contract, a distinct act or omission— “the same basic conduct”— causing an injury equates to an offense, and when “the same basic conduct” is repeated, it will be treated as a single offense. Thus, the emphasis is on whether the same conduct is occurring and repeating in order to treat it as a single offense. Where non-similar and separate acts or omissions occur, by the Contract’s definition, separate and individual offenses have occurred as well.

The general liability section reiterates that occurrence is determined by conduct: “occurrence means an accident, including continuous or repeated exposure to substantially the same generally harmful conditions, which results in Property Damage and/or Bodily Injury....” and, relevant here, that “arose from conduct in the course and scope of the **Member’s** or **Covered Person’s** official duties...” *Id.* at p. 48, III.N.22 (underlining added). The definition goes on to

state that “[a]ll **Bodily Injury** to one or more persons and/or all **Property Damage** arising out of an event or causally related sequence of events is considered to be one ‘**Occurrence**’.” *Id.* Nowhere do these definitions define and limit the number of occurrences based on the resulting damages or injuries, and Ricard, on behalf of SCMIRF, agrees that nowhere in the definition of occurrence does it indicate that an occurrence is determined by the number of injuries. *Exhibit 1, Deposition of Heather Ricard*, July 28, 2014, p. 53:7-11. Instead, within the Coverage Contract, occurrence is driven by action (accident, conduct, event) that results in damages or injury, and includes all damages or injuries that come out of that one occurrence of action. The Coverage Contract’s definition distinguishes one occurrence from another based on an action that causes injury, not based on the resulting injury itself.

The Coverage Contract’s liability coverage provisions for general liability and for law enforcement liability likewise define occurrence based on a negligent act and not resulting injury. Specifically, Section III provides general liability coverage with limits of \$1,000,000 “per occurrence or offense,” (*Stipulation of Facts and Issues, Exhibit D, Coverage Contract*, p. 28, III), with SCMIRF agreeing:

To pay on behalf of the Member or Covered Person(s) for all sums which the Member or Covered Person(s) shall be obligated to pay exclusively as Money Damages by reason of the liability imposed upon them by law on account of Bodily Injuries, including death resulting there from at any time, suffered or alleged to have been suffered by any person or persons (except employees of the Member injured in the course of their employment), and/or Property Damage, **arising out of any Occurrence** other than as covered by Section IV (Law Enforcement), Section V (Public Officials), and Section VI (Auto) of This Contract.

Id. at p. 29, Sect. III.A (emphasis added).

Similarly, Section IV, Law Enforcement Liability Contract Declarations, provides a liability limit of \$1,000,000 “per occurrence” and repeats SCMIRF’s limit of liability coverage of

\$1,000,000 for “any one occurrence/accident/wrongful act”. *See Id.* at pp. 50, IV; 52, IV.D.2. Section IV, Law Enforcement Declarations, does not separately define occurrence but specifies within Section IV that liability is “subject to the limits of liability, exclusions, definitions, and conditions contained in the General Provisions, Section I”, as noted above. *Id.* at p. 51, IV (emphasis added). Thus, the definition of occurrence in the Coverage Contract, General Provisions applies to Section IV as well.

The provision on Law Enforcement Employees Coverage also is clear and unambiguous that liability coverage arises out of, and is triggered by, the employees’ actions, not out of resulting injuries:

SCMIRF agrees, subject to the limitations, terms, and conditions hereunder mentioned to pay on behalf of the **Member or Covered Person(s)** for sums which the **Member or Covered Person(s)** shall be obligated to pay exclusively as **Money Damages because of a Wrongful Act** by a **Member, a Law Enforcement Employee** or other **Covered Person(s)** while acting in conjunction with **Law Enforcement Employees, which is committed while acting** in both in the course and the scope of his or her official duties...or while acting in both the course and the scope of a mutual aid agreement...and which results in:

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

Any liability covered by this Section IV must arise out of the performance of a Covered Person’s duties to provide law enforcement or other SCMIRF approved activities...

Id. at p. 51, IV.A.1 (underlining added).

Moreover, the Contract’s General Liability Coverage reiterates that coverage for Law Enforcement liability is covered by Section IV when the liability at issue is covered in Section IV; when the liability is against a “**Law Enforcement Employee**...whether or not such liability or

claim is covered by Section IV”, and when the liability is against other persons or entities “who are also defined as **Covered Persons** in Section IV that is based on the conduct or alleged conduct of such **Law Enforcement Employees**, including without limitation claims based on the hiring, training, monitoring, or supervision of, or on the control of or failure to control, such **Law Enforcement Employees**.” *Id.* at p. 37, III.J.24 (underlining added). SCMIRF’s obligation to pay liability coverage under the Contract specifically arises out of the conduct of the covered persons or employees. Liability coverage pays for the damages or injuries incurred by the covered member’s conduct, but nowhere in the Coverage Contract is occurrence determined by the number of injuries. Coverage is triggered by the wrongful act amounting to a covered occurrence, as the Contract unambiguously states that the money damages will be paid because of a wrongful act, “provided the **Wrongful Act** amounts to an **Occurrence**”. *Id.* at p. 51, IV.A.1.b.

SCMIRF, however, contends that an occurrence is defined by the resulting injury from a covered act or offense, because the fact that a Wrongful Act is committed, alone, is insufficient to invoke coverage and that there must be a “Wrongful Act ... which results in ... Bodily Injury.” *Id.* SCMIRF argues that in the absence of resulting injury, coverage is not triggered, and, thus, for coverage to exist in this case, the negligence of Price, Craddock or Cottageville must have resulted in “Bodily Injury.” SCMIRF’s reasoning does not support the conclusion that occurrence is defined by the resulting injury and not by the causative conduct. The Coverage Contract’s plain language addresses whether the covered member or person’s conduct amounts to an occurrence, and then once an occurrence is determined, the injuries within that occurrence are examined. The injuries do not conversely determine whether an occurrence exists or not; the tail does not wag the dog. Likewise, Section IV, Law Enforcement Liability coverage for a “wrongful act” unambiguously makes clear that coverage is based on action and not resulting injury:

any actual or alleged error in the performance or failure to perform an official duty; or any misstatement, misleading statement, or misleading act made or done in the course of official duty and upon which a claimant or plaintiff has relied to his, her, or its detriment; or any omission or neglect in performing an official duty; or any breach of an official duty, including misfeasance, malfeasance and nonfeasance; but only, with respect to any or all of the foregoing, when committed by a Member or by a Covered Person(s) while acting within both the course and scope of his or her official duties, as provided under the "South Carolina Tort Claims Act.

Id. at p. 64-65, IV.G.27 (emphasis added).

Further defining occurrence based on negligent act rather than resulting injury, the General Provisions of the Coverage Contract provide a limitation of known claims based on covered actions and omissions, covering **"Occurrences/accidents/Wrongful Acts** during the Contract Period". *Id.* at p. 6, I.C.7. Coverage is not triggered for each injury but rather for each action or omission causing an injury. Also, a covered member has a duty to give written notice to SCMIRF when aware of any "Wrongful Act, offense, or Occurrence which could reasonably be expected to be the basis of a claim or suit...", not when aware of a resulting injury. *Id.* at p. 6, I.C.8.a. It is the member or covered person's actions that drive the required notice, not any resulting injury.

The Court also notes that the Coverage Contract's language deeming when the original cause of an injury occurred for triggering insurance coverage purposes is not relevant to determining the number of occurrences covered. *See id.* at p. 3, I.B.4 ("Occurrence means an accident...the original cause of which and the initial damage from which happened during the Contract Period..."). South Carolina, along with other jurisdictions, hold that such "deemer clauses" are intended to address when coverage under the policy is triggered for injuries that span multiple policy periods and have no bearing upon the separate question of number of occurrences:

As the courts have recognized, this coverage-triggering inquiry is analytically distinct from the question whether a policy treats a series of related acts or incidents as one or multiple occurrences. In *TIG Insurance [Co. v. Smart School]*, 401 F.Supp.2d 1334 (S.D.Fla. 2005)], for instance, the court noted that "numerous

cases involving occurrence policies” had “ma[d]e a distinction between the issue of whether and under what policy particular claims are covered versus the issue of whether, if there is coverage, the claims amount to more than one occurrence.” 401 F.Supp.2d at 1347. Similarly, in a case “present[ing] the question of what constitutes a separate ‘occurrence’” under the policies at issue, the Sixth Circuit repeatedly emphasized that the portions of the policies addressing coverage-triggering issues— i.e., that specified “when and where an occurrence must take place for...coverage to exist”— had no bearing on the distinct question of “the number of occurrences.” *Michigan Chemical Corp. v. American Home Assurance Co.*, 728 F.2d 374, 378, 381-82 (6th Cir. 1984)...Consistent with this distinction, the Court concludes that the “first occurs” policy language in this case is intended to address the trigger-of-coverage issue, and has no bearing upon the separate question whether a series of related acts of molestation should be treated as one or multiple occurrences.

Beaufort County Sch. Dist., 392 S.C. at 519-20, 709 S.E.2d at 92 (quoting *Western World Ins. Co. v. Lula Belle Steward Center, Inc.*, 473 F.Supp.2d 776, 785 (E.D.Mich. 2007)) (holding deemer clause has no bearing on how many occurrences presented). Likewise here, the Coverage Contract’s language deeming when the original cause of an injury occurred for coverage purposes has no bearing on determining whether the claims amount to more than one occurrence.

Turning next, to the Section IV’s Limit of Liability provision of the Coverage Contract, it highlights that “the total liability of [SCMIRF] [for] any one occurrence/accident/wrongful act will be \$1,000,000 per **Member**...” “SCMIRF’s liability for any one occurrence/accident/wrongful act will be \$1,000,000 per **Member** regardless of the number of **Covered Persons**, number of claimants or claims made, or the number of covered vehicles involved...” *Id.* at p. 52, IV.D.2. Accordingly, the language is explicit that for any one, SINGLE, occurrence, accident, or wrongful act, SCMIRF’s liability will be \$1,000,000, and the limitations apply as to that SINGLE occurrence. Thus, where in a single occurrence of negligence (conduct) there exists more than one covered person involved, or more than one resulting claimant or claims, or more than one covered vehicle, there remains one occurrence with a \$1,000,000 indemnity coverage for that one occurrence. However, the limitation of liability provision does not serve to turn separate and

distinct occurrences of negligence into a single occurrence. Quite simply, the plain language of the contract in Section IV.D.2. does not impose any limitations of coverage where there are multiple occurrences of distinct and separate actions.

Nonetheless, SCMIRF urges the Court to find that Section IV.D.2's next paragraph supports its claim that a single coverage limit applies to the underlying cases. That provision states "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...such injuries" and "only a single Coverage Limit . . . will apply to all claims arising from such continuing, serial, or repeated conduct." *Id.* at p. 52, IV.D.2. SCMIRF contends that this limitation is reiterated in Section I.B.5 (pp. 3-4 of the Coverage Contract), which provides that all repetitions of the same basic offense will be treated as one offense and subject to a single coverage limit, and that because the death of Bert Reeves flows from the Personal Injury, it is considered to be solely part of the Personal Injury and constitutes only one offense or one occurrence/wrongful act that is subject to a single Coverage Limit.

First, as previously addressed, *infra* p. 9, under Section I.B.5, the contract language is clear that when "the same basic conduct" causes an injury, that "same basic conduct" will equate to an offense, even when the conduct is repeated. Thus, the contract looks at the conduct to determine if it is a single offense, as opposed to different conduct that constitutes separate and distinct offenses or occurrences, which is the case at hand. The underlying lawsuits involved separate and distinct actions by the Town, by Price, and by Craddock, rather than "the same basic conduct," rendering this provision inapplicable here.

Second, the provision addressing "continuing, serial, or repeated instances of **Personal Injury** or **Advertising Injury**" is not applicable to the underlying cases. *Id.* at p. 52, IV.D.2.

“(C)ontinuing, serial, or repeated instances” of injury, for instance, exist in a case of continuing publication of defamatory material over a length of time and would be considered a single occurrence per this provision of the contract rather than as multiple occurrences generated over the entire length of time defamation continues. However, here there are no “continuing, serial, or repeated instances” of personal injury or advertising injury present in the underlying cases. Accordingly, the Court disagrees with SCMIRF’s contention that Sections IV.D.2 and I.B.5 are applicable to define occurrence or that the provisions limit the number of occurrences in this case to one.

Neither is the “No Duplication of Coverage or Coverage Limits” provision, located in the General Liability Section, p. 7, I.C.9, applicable to define occurrence. The “No Duplication of Coverage” provision states:

No liability that is covered under any Coverage Section of This Contract will be deemed to be separately covered under any other Coverage Section....Any act(s) or omission(s) that might be described under more than one Coverage Section or more than one category as an Offense(s) or an Occurrence(s) will be treated as a single event for coverage purposes, subject to a single Coverage Limit. A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage. There is no duplication of any coverage or benefits under This Contract.

Stipulation of Facts and Issues, Exhibit D, at p. 7, I.C.9. The “single Coverage Limit” provision explains that there will be no duplication of policy coverage for an act that may fall under more than one coverage sections. The provision makes clear that where an act or omission may fall under more than one coverage section, that single act or omission will be covered only once, and a “single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage” from that specific act or omission. *Id.*

Ms. Ricard agrees that the “No Duplication of Coverage or Coverage Limits” provision means that a policy holder cannot collect for the same occurrence under more than one section of the Coverage Contract:

Q. So, for example, if Randall Price is covered under the General Liability portion, Section III of the policy, and he’s also covered under the Law Enforcement Liability, and there’s a single occurrence, there—he doesn’t get \$2,000,000 in insurance; he only gets \$1,000,000 in insurance; isn’t that correct?

A. That is correct. There is no duplication of coverage.

Exhibit 1, Ricard Deposition, p. 42:8-16.

Thus, “[a]ny act(s) or omission(s) that might be described under more than one Coverage Section or more than one category as an Offense(s) or an Occurrence(s) will be treated as a single event for coverage purposes, subject to a single Coverage Limit” specifically addresses a single occurrence and its treatment under the Contract. *Stipulation of Facts and Issues, Exhibit D*, at p. 7, I.C.9. However, whether or not there is duplication of coverage for a single occurrence simply does not serve to define an occurrence. Moreover, Section I.C.9 does not address multiple separate occurrences. Thus, the “no duplication of coverage” provision has no bearing on whether multiple occurrences exist under the Coverage Contract, and Defendant’s reliance on the no duplication of coverage provisions to define occurrence is misplaced. *See Exhibit 1, Ricard Deposition*, pp. 21:5-11; 55:19 to 56:19.

SCMIRF overlooks the specific Coverage Contract provisions defining occurrence, conduct, and wrongful act and instead urges the Court to define occurrence based on the definitions of “Personal Injury” and “Bodily Injury” in Section IV, Law Enforcement Liability. SCMIRF contends that the injury definitions necessitate finding that occurrence is defined based on the

resulting injury rather than defined by the action that causes the injury.² The Court disagrees. SCMIRF's argument is based on personal injury and bodily injury resulting from a single occurrence being subsumed in one another and resulting in a single coverage limit. SCMIRF's contention fails in the same manner as the argument that the No Duplication of Coverage provision fails. That the contract provides \$1,000,000 in indemnity coverage for a single occurrence that results in both personal injury and bodily injury has no application where there are multiple distinct occurrences that proximately cause injury. The definitions of personal injury and bodily injury do not define occurrence based on injuries and do not prohibit coverage for multiple distinct occurrences.

Moreover, the Coverage Contract defines "Personal Injury" as "**Offences** committed in the course of the **Member's** law enforcement activities" and then proceeds to list six distinct actions (to include assault and battery) that are considered offenses causing personal injury. *Stipulation of Facts and Issues, Exhibit D*, at p. 64, IV.G.18. The definition of personal injury is driven by the acts of the covered member, which lends no support to Defendant's contention that occurrence is defined by the number of injuries. In addition, the definition of "Bodily Injury" does not in any way speak to or define occurrence. *Id.* at p. 61, IV.G.4. Personal injury and bodily injury are defined within an occurrence, and nothing in the Coverage Contract's language lends support to Defendant's contention that their definitions define occurrence by the number of injuries.

² SCMIRF argues as follows: that Plaintiff's claims are governed by Sections I and IV of the Coverage Contract, which provide coverage for Bodily Injury and Personal Injury and contend that Plaintiff's negligence claims fall under Bodily Injury and the Section 1983 claims fall under Personal Injury. SCMIRF argues that the Bodily Injury involved in the negligence claims (the death of Bert Reeves) is also the direct and immediate result of the "Personal Injury" involved in the Section 1983 claims, and that under Section IV.G.4, where the Bodily Injury results directly and immediately from the infliction of Personal Injury, it is deemed to be part of the Personal Injury. Additionally, Under Section I.C.9, conduct constituting an offense giving rise to a Personal Injury cannot also constitute an occurrence giving rise to a Bodily Injury. Rather, the Bodily Injury in such circumstances is subsumed into the Personal Injury and there is no duplication of coverage.

Furthermore, despite Defendant's assertion to the contrary, the underlying cases do not involve a single injury. Rather, the cases involved Mr. Reeves's own injury of conscious pain and suffering and the separate injuries of his children for the loss of their father's support and companionship, pursuant to S.C.Code §§ 15-51-10 *et. seq.* Yet, despite the contract language defining occurrence based on the covered member or person's actions, and not the resulting injury, Defendant contends that there is one occurrence here based on the presence of a "single injury"—that being the pain and suffering of Bert Reeves— and, hence, a single policy limit. SCMIRF's assertion now that the Coverage Contract defines occurrence based on the number of injuries rather than the negligent acts not only is counter to the policy language but contradicts the position SCMIRF has taken in the past in regards to the same contract language.

In insuring liability for the police raid of Stratford High School in 2003, SCMIRF contended that the same policy language defined occurrence by act of negligence and not by number of injuries, as admitted by Ms. Ricard. *Exhibit 1, Ricard Deposition*, pp. 31 to 33:7. Ms. Ricard concedes that the raid case involved multiple separate injuries claimed by numerous and individual students; yet, instead of defining occurrence based on each individual injury, SCMIRF claimed liability coverage for one occurrence based on there being one raid— in other words, based on one act of negligence. *Id.*; see also *Exhibit 3, Affidavit of Frederick J. Jekel, Jr.*, July 31, 2014. SCMIRF did not contend that the number of injuries governed the number of occurrences.

Applying SCMIRF's previous assertion that occurrence is based on act of negligence to this case would mean that the multiple and distinct acts of negligence by the Town of Cottageville, Officer Price, and John Craddock, each proximately causing Mr. Reeves's and his surviving children's injuries, result in multiple occurrences. To apply SCMIRF's current position that occurrence is based on number of injuries would mean that the raid case actually consisted of

multiple occurrences—one occurrence for each individual student’s injury. It appears to the Court that SCMIRF seeks to apply its preferred definition of occurrence based on the insurable situation at hand. However, the Coverage Contract is clear and unambiguous, and the contract language governs to define occurrence based on negligent act or omission by law enforcement: “a **Wrongful Act...**which is committed while acting in both in the course and scope of his or her official duties...” See *Stipulation of Facts and Issues, Exhibit D* at p. 51, IV.A.1. The Coverage Contract does not define occurrence based on number of injuries.

In sum, the Coverage Contract’s language is clear and unambiguous that an occurrence, triggering coverage under the Contract, is based on a negligent act or omission by the member or covered person. As a “per occurrence” policy, the Coverage Contract explicitly provides \$1,000,000 per occurrence of negligence that proximately caused an injury, and, here, where separate and distinct occurrences exist, \$1,000,000 indemnity coverage exists for each separate occurrence.

B. *Boiter* explains occurrence defined by negligent act and serves to illustrate the separate and distinct liability arising from each occurrence regardless of the resulting injury.

The South Carolina Supreme Court’s decision of *Boiter v. S.C. Dep’t of Transp.*, 393 S.C. 123, 134, 712 S.E.2d 401, 407 (2011), which defined occurrence under the Tort Claims Act based on negligent act rather than resulting injury, serves to illustrate how separate and distinct acts of covered negligence, each proximately causing injury, constitute separate and distinct occurrences. The Court rejects SCMIRF’s request that the Court not consider *Boiter* and its progeny, because *Boiter* assists in explaining an occurrence as defined by negligent act in the Coverage Contract at issue here.

In *Boiter*, our Supreme Court held that an occurrence is defined by a negligent action and not controlled by the resulting injury so that the distinct and separate acts of negligence by two different entities constitute two separate occurrences for liability coverage. Specifically in the case, the South Carolina Department of Transportation failed to implement an appropriate re-lamping policy to replace bulbs in traffic signals, and the South Carolina Department of Public Safety separately failed to notify a trooper to direct traffic when it received a phone call reporting the signal outage approximately an hour and a half before the collision at issue. 393 S.C. at 125, 712 S.E.2d at 402. The Supreme Court held that “two independent and separate acts of negligence occurred,” and “there is no indication that the [departments’] actions combined to form a single act of negligence.” 393 S.C. at 134, 712 S.E. 2d at 406.

Moreover, in *Boiter*, the jury issued separate verdicts against SCDOT and SCDPS for each department’s distinct act of negligence, and the Supreme Court found no causal connection between the two entity’s actions that would constitute an unfolding sequence of events that injured the plaintiffs. “[H]ad the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is also true.” 393 S.C. at 134, 712 S.E.2d at 407. Accordingly, the two separate and distinct acts of negligence amounted to two occurrences, regardless of proximately causing the same injury.

This Judicial Circuit also has specifically applied *Boiter* to determine whether more than one occurrence existed for purposes of applying statutory caps under the South Carolina Solicitation of Charitable Funds Act, which implements a recovery cap on a “per occurrence” basis. See *Solomon as Personal Representative of Estate of Will Solomon, Jr. v. Coastal Plains Physician Assoc., PA and Hampton Regional Medical Ctr.*, C.A. No.: 2010-CP-25-105 (S.C.Sup.Ct. filed March 31, 2012). In that medical malpractice case, this Circuit agreed with the

plaintiff that two separate occurrences existed- one act of negligence on December 17th, when treated by Defendant Hampton Regional Medical Center and Dr. Jansen, and a second act of negligence on December 19th, when treated by Coastal Plains and Dr. Koreckij. *Id.* at p. 5-7. The verdict form gave the jury distinct options for determining liability: (1) solely against Hampton Regional Medical Center; (2) solely against Coastal Plains Physician Associates; (3) in favor of both defendants; OR (4) against both defendants. *Id.* at p. 6. The jury found both defendants negligent in the treatment of the deceased and that both acts of negligence proximately caused the same injury— the deceased’s conscience pain and suffering. *Id.* Applying *Boiter’s* reasoning, this Circuit Court found that the two negligent acts by two separate defendants that were independent of each other constituted two occurrences, even though they resulted in the same injuries to the plaintiff. *Id.* at p. 5-7. Accordingly, two occurrences existed, each subject to the statutory cap of \$1.2 Million, with a total cap of \$2.4 Million for the case. *Id.*

Furthermore, the mere fact that multiple state actors within the same state entity commit separate acts of negligence does not serve to turn the acts of negligence into one unfolding sequence of events. Multiple occurrences may exist based on distinct unconnected acts of negligence. For example, in *Williamson v. South Carolina Ins. Reserve Fund*, 355 S.C. 420, 422-23, 586 S.E.2d 115, 116 (2003), the Supreme Court found two occurrences established for purposes of the Tort Claims Act where negligent acts of two different physicians were separate and apart from the other. Each physician had examined the plaintiff during childbirth and failed to take necessary steps at different times during the delivery to prevent harm to the child, constituting two occurrences that caused the injury. *Id.* (lower court’s ruling on occurrences not at issue on appeal where Supreme Court held recovery caps under §. 15-78-120(a)(3) & (4) not applicable because claims arose/accrued before reinstatement of caps).

Likewise, the Tennessee Court of Appeals has found multiple occurrences by a single governmental hospital under Tennessee's applicable tort claims act where one employee negligently failed to prevent the patient from falling off a stretcher, resulting in personal injury to the patient, and a second employee, thereafter, negligently provided an overdose of medication, which ultimately resulted in the patient's death. See *Brooks v. Memphis & Shelby County Hosp. Auth.*, 717 S.W.2d 292, 297 (Tenn. App. 1986). The court found each act of negligence constituted a separate occurrence, individually subject to the applicable indemnity limit, despite there being one resulting death. *Id.*

Moreover, the reasoning in our Court of Appeals' decision of *Johnson v. Hunter*, 386 S.C. 452, 688 S.E.2d 593 (Ct.App. 2010) is instructive to explain how a single entity may incur liability for multiple occurrences. While in *Johnson*, the Court of Appeals considered the novel question in South Carolina of how to determine if a single motor vehicle accident or multiple accidents occurred for purposes of insurance liability limits, the court's process of analyzing the issue is applicable to determining when multiple occurrences by a single entity have occurred. The court looked to other jurisdictions and concluded that most courts evaluate the circumstances under the causation theory: "[c]ourts applying the 'cause' theory uniformly find a single accident 'if cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event.'" *Id.* at 455, 595 (quoting *Ill. Nat'l Ins. Co. v. Szczepkowitz*, 542 N.E.2d 90, 92 (Ill. 1989)). The cause theory stands in opposition to the effect test, which determines the number of occurrences based on each injury. *Mitsui Sumitomo Ins. Co. of Am. v. Duke Univ. Health Sys., Inc.*, 509 F. App'x 233, 238 (4th Cir. 2013) (acknowledging North Carolina has adopted the cause theory).

While under the cause theory an accident means a "single, sudden, unintentional occurrence and is used to describe the event, no matter how many persons or things are involved," the accident or occurrence is viewed from the perspective of cause and not effect. *Id.* (citing *Olsen v. Moore*, 202 N.W.2d 236, 241 (Wis. 1972)). Thus, the cause theory requires consideration of the particular facts of the case to examine the timing of actions, or space interval between actions, and whether one source of negligence set all the subsequent events in motion verses multiple distinct acts of negligence causing the injury at issue. *Id.* at 457-58, 596 (holding extremely short time between collisions, close distance of defendant's car to plaintiff that he could not stop, and plaintiff's assertion that he did not believe defendant could have done anything to avoid hitting him constituted one accident). The cause theory mirrors the Supreme Court's reasoning in *Boiter* that where there is no causal connection between separate negligent actions, multiple independent acts of negligence caused the injury rather than one unfolding sequence of events. 393 S.C. at 134, 712 S.E.2d at 407. Each independent act of negligence constitutes an occurrence regardless of the resulting injury or injuries.

The distinct actions taken separately by the Town of Cottageville, Officer Price, and John Craddock over the course of the Town's hiring of Price, supervision of Price, and retention of Price up to, and including, Officer Price's actions in shooting and killing Bert Reeves, are not the unfolding of a single sequence of immediate events. Rather the negligent actions were separate and distinct, made on different days, at different locations, and by different individuals that resulted in the death of Bert Reeves. Furthermore, the jury specifically found multiple actions that constituted constitutional violations, as well as independent acts of negligence, by Officer Price and the Town of Cottageville separately and that each act proximately caused Reeves's and his children's injuries. The jury found Defendant Price violated Bert Reeves's constitutional right

against the use of excessive force, violated Bert Reeves's constitutional right against unreasonable seizure, and found Officer Price negligent in his actions. *See Stipulation of Facts and Issues, Exhibit A.* The jury also found the Defendant Town of Cottageville violated Bert Reeves's constitutional rights in its hiring of Officer Price; in its retention of Officer Price; in its supervision of Officer Price; and in its failure to train Officer Price, and found the Town negligent in its actions as well. *Id.*

The Coverage Contract defines occurrence based on negligent conduct and not based on resulting injury. The jury verdict establishes that multiple and independent actions by The Town of Cottageville and Officer Price exist that were not causally connected to constitute the unfolding of a single sequence of events, or a single occurrence, that proximately caused the death of Bert Reeves and his statutory beneficiaries' injuries. Had the jury not found against the Town of Cottageville, the verdict against Officer Price could still stand, and vice versa. *See Boiter*, 393 S.C. at 134, 712 S.E.2d at 407 ("had the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is also true"). Furthermore, the separate actions of Craddock, for supervisory liability under 42 U.S.C. § 1983, constitute a separate and distinct occurrence. *See Boiter*, 393 S.C. at 134, 712 S.E.2d at 407.

Each distinct and separate action is an occurrence, and the Coverage Contract provides for \$1,000,000 in indemnity coverage per occurrence. Accordingly, each occurrence here results in \$1,000,000 coverage per that occurrence, which ultimately results in more than \$1,000,000 in total coverage under the Coverage Contract. As such, the Court GRANTS Plaintiff's Motion for Summary Judgment as to Issue One and DENIES Defendant's Motion for Summary Judgment as to Issue One.

II. The Tort Claims Act Does Not Apply To A Claim For Bad Faith Brought Against SCMIRF.

A. SCMIRF is not a governmental entity or political subdivision subject to the Tort Claims Act.

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 South Carolina. 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.*

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).

SCMIRF argues that it is political subdivision based on the foregoing definition of political subdivision, interpreting 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.” SCMIRF makes its assertion by relying on Attorney General opinion that SCMIRF is an agency or department of the municipality. *See* 014 WL 7405219 (S.C.A.G. December 17, 2014) & 1990 WL 599264 (S.C.A.G. July 25, 1990). 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).

This Court disagrees with the Attorney General's opinion, because the plain language of the definition of “political subdivision” is written such 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.

Furthermore, even under the Attorney General's expansive definition of agency, department, and subdivision, SCMIRF is not an agency, department, or subdivision of a municipality to qualify as a political subdivision. 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” of municipalities, to include the Town of Cottageville, that agreed to create a pooled fund for the payment of property losses and liability claims on behalf of its members. *See Stipulation of Facts and Issues*, ¶¶ 6-7, and *Exhibit B*.

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 of 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. *See Exhibit 1, Ricard Deposition*, pp. 8:8; 9:20-24; 14:1-12. 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.

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), has 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. Both Plaintiff and Defendant assert that assessing SCMIRF under the *Health Promotion Specialists* factors supports their respective position as to whether SCMIRF is a

political subdivision or not. The Court applies *Health Promotion Specialists* factors and finds that SCMIRF is not the state or its political subdivision, agreeing with Plaintiff.

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 (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 (2011)). 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 risk 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 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(e). 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 state governmental entity or 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.

B. Even if SCMIRF were a political subdivision of the state, the Tort Claims Act does not apply and limit a claim of breach of the Coverage Contract in failing to protect the insured.

The Court holds that SCMIRF is not a political subdivision of South Carolina, but even it were, the Tort Claims Act has no effect on SCMIRF's liability, or any political subdivision's liability for that matter, based on breach of contract. *See* S.C.Code Ann. 15-78-20(d). The Court disagrees with SCMIRF's contention that it may not make a finding as to whether a contract claim would be subject to the Tort Claims Act. The issue was specifically addressed at the hearing on the motions for summary judgment by both Plaintiff and SCMIRF, and Plaintiff raises the issue and argument in her motion for summary judgment. The issue has been raised within the request for declaratory judgment, and, as such, the Court will issue a holding. For the reasons that follow, the Court holds that 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.

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, 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 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, even if SCMIRF constituted 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. SCMIRF would be liable for the insurance proceeds it failed to pay its insured— that being, \$1,000,000 per occurrence of negligence.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiff's motion for summary judgment and denies Defendant's motion for summary judgment. The Court hereby enters declaratory judgment as follows: (1) the Coverage Contract provides for \$1,000,000 per occurrence of negligence, and the claims made and the verdict rendered against the Town of Cottageville and Officer Price, as well as the separate suit against John Craddock, relating to the hiring, retention, supervision and shooting death of Bert Reeves result in there being multiple occurrences and, thus, more than \$1,000,000 in indemnity coverage available under the terms of the Coverage Contract and (2) that the Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, does not govern a bad faith tort claim against SCMIRF, because SCMIRF is not a political subdivision of the State; however, even if it were, the Tort Claims Act does not apply and limit a claim by the insured for actual damages for breach of the Coverage Contract.

AND IT IS SO ORDERED!

BY THE COURT

Perry M. Buckner, III
Circuit Court Judge

Dated: June ____, 2016
Walterboro, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON) FOURTEENTH JUDICIAL CIRCUIT

Ashley Reeves as Personal) Civil Action No. 2013-CP-15-135
Representative for the Estate of Albert)
Carl "Bert" Reeves,)

Plaintiff,)

vs.)

South Carolina Municipal Insurance and)
Risk Financing Fund ("SCMIRF"), the)
Town of Cottageville, the Town of)
Cottageville Police Department, and)
Randall Price, individually,)

Defendants.)

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

This matter is before the Court on the Parties' cross-motions for summary judgment filed December 15, 2015. A hearing on these motions was held before this Court on May 17, 2016. After considering all written submissions presented by the parties and the arguments of counsel presented at the hearing, for the reasons stated herein, this Court grants the Defendants' motion for summary judgement and denies Plaintiff's motion for summary judgment

Introduction

This action originated on February 18, 2014, when Plaintiff Ashley Reeves ("Reeves" or "Plaintiff") as Personal Representative for the Estate of Albert Carl "Bert" Reeves ("Bert Reeves") filed a Complaint for Declaratory Judgment seeking a declaration as to the interpretation of the 2011 Coverage Contract between the South Carolina Municipal Insurance and Risk Financing Fund ("SCMIRF") and the Town of Cottageville ("Cottageville"). This action stemmed from a separate lawsuit related to the shooting death of Albert Carl "Bert" Reeves that was filed by

Plaintiff against the Cottageville and Randall Price ("Price") and was being litigated in the United States District Court for the District of South Carolina, Civil Action No. 2:12-02765 (the "Federal Lawsuit"). A separate lawsuit was also filed by Plaintiff against John Craddock ("Craddock"), Civil Action No. 2:14-01918, in the United States District Court for the District of South Carolina (the "Craddock Lawsuit") related to his alleged negligence regarding the death of Bert Reeves. SCMIRF informed counsel for Plaintiff that its Coverage Contract with Cottageville provided a total of \$1 million in indemnity coverage for the claims of the Plaintiff in both the Federal Lawsuit and the Craddock Lawsuit. Plaintiff disputed SCMIRF's position and filed the current action seeking a declaration that the Coverage Contract provided \$1 million per occurrence and asserted that more than one occurrence existed under the facts pled in the lawsuits.

In the Federal Lawsuit, Plaintiff obtained a judgment against Cottageville and Price in the total amount of \$97.5 million. The jury found both Price and the Cottageville were liable for (1) negligence and (2) violation of 42 U.S.C. § 1983. In the separate Craddock Lawsuit, which did not go to judgment, Plaintiff alleged that, in his supervisory capacity over Price, Craddock also violated 42 U.S.C. § 1983, by, among other things, failing to properly train and supervise Price, and in failing to intervene in the altercation between Price and Bert Reeves and by failing to render medical care to Bert Reeves.

Thereafter, the Parties settled the Federal Lawsuit and the Craddock Lawsuit and, as a material term of the settlement, agreed 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 Coverage Contract with respect to all such claims including the claims made against John Craddock in the separately styled action referenced above?

- (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.*), assuming such a claim were otherwise valid?

On June 3, 2015, the Parties jointly petitioned the South Carolina Supreme Court to hear and decide both questions in its original jurisdiction. 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 this Court.¹

Following the denial of the Petition to the South Carolina Supreme Court, Plaintiff, with the consent of SCMIRF, filed an Amended Complaint and the Parties' Stipulated Facts with this Court. Both Parties have now moved for summary judgment in accordance therewith.

Stipulated Facts and Issues

By stipulation entered into by the Parties and dated October 7, 2015, the following facts are accepted by the Court as true:

1. Reeves is the duly appointed personal representative of the Estate of Albert Carl "Bert" Reeves.
2. Cottageville is a South Carolina municipality located in Colleton County, South Carolina. Cottageville was, at all times relevant, the employer of Price and Craddock, as policemen for Cottageville.
3. On May 16, 2011, Price, while acting within the scope of his employment as a Cottageville police officer, shot and killed Albert Carl "Bert" Reeves.

¹ On April 20, 2015, and as part of the settlement, a partial stipulation of dismissal was filed leaving only SCMIRF as a defendant in this action. The Complaint was also amended to conform to the stipulations of the parties.

4. Reeves held a judgment obtained in the Federal Lawsuit in the sum of Ninety Seven Million Five Hundred Thousand Dollars and No Cents (\$97,500,000.00) against the defendants in that action, the Cottageville and Price.

5. In addition to the judgment, Reeves claims that Craddock was negligent with regard to the death of Bert Reeves due to certain actions or omissions attributable to him in the scope of his employment as a Cottageville police officer, and these claims were the subject of the Craddock Lawsuit.

6. SCMIRF asserts it is an unincorporated voluntary, self-insurance pool in the State of South Carolina. SCMIRF's Bylaws were incorporated into the Parties' Stipulation of Facts.

7. Members participating in SCMIRF have entered into an Intergovernmental Agreement. Cottageville is among the municipalities that entered into the Intergovernmental Agreement and is a member/participant in SCMIRF. The Intergovernmental Agreement executed on behalf of Cottageville was incorporated into the Parties' Stipulation of Facts.

8. 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 ("the Contract"), subject to all terms, conditions, limitations and exclusions set forth therein. A copy of the Contract was incorporated into the Parties' Stipulation of Facts. The Contract represents the complete agreement between SCMIRF and Cottageville regarding coverage.

9. The Federal Lawsuit has been settled, but a material term of the settlement is that there be a final appellate court decision regarding the two issues listed below in litigation between the Parties.

10. The Parties have agreed 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.

11. The Parties agree that the resolution of the stipulated issues is a part of the settlement of the litigation involving them referenced herein, but that the stipulated issues will also materially affect SCMIRF and litigation relating to members of SCMIRF in other future matters.

As indicated by the Stipulated Facts, the Parties' stipulation also set forth the two issues to be decided by this Court. Those two issues are stated as follows:

Issue 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 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.

Issue 2: Allegations have been made that SCMIRF has engaged in bad faith with regard to its handling of the claims relating to the shooting and 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? Petitioner asserts it would. Respondent Reeves asserts otherwise.

Summary Judgment Standard

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Englert, Inc. v. Leaf Guard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008) (citation omitted). "[W]hen plain, palpable, and indisputable facts

exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. AT&T Co.*, 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001) (citation omitted)). Further, “[w]here cross motions for summary judgment are filed, the parties concede the issue[s] before [the court] should be decided as a matter of law.” *Wiegand v. United States Auto. Ass’n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

Analysis

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

In the Federal Lawsuit, Plaintiff obtained a judgment against Price and Cottageville for negligence and deprivation of rights pursuant to 42 U.S.C. § 1983, in the total sum of \$97.5 million. (See Am. Compl. at ¶ 14; see also Ex.1, ¶ 4; Ex. A. to Stipulated Facts). The total actual damages figure for all claims totaled \$37.5 million. (See *id.*) The claims and resulting judgment were based on the injuries resulting from the shooting death of Bert Reeves by Price, while Price was acting within the scope of his employment as a police officer with the Town of Cottageville. (*Id.* at Ex. 1, ¶¶ 2–3.) In addition to the claims in the Federal Lawsuit, Plaintiff also filed the separate Craddock Lawsuit asserting similar claims. (*Id.* at Ex. 1, ¶ 5.)

During the relevant period, Cottageville was among the municipalities participating in an Intergovernmental Agreement and was a member of SCMIRF’s self-insurance pool. (See *id.* at Ex. 1, ¶¶ 6–8.) While the Parties have settled the Federal and Craddock Lawsuits, a material term of the settlement is a final appellate decision regarding whether the \$1 million Coverage Limit set forth in the Coverage Contract applies to the Plaintiff’s claims and the verdict. SCMIRF contends that coverage for all claims asserted by Plaintiff is limited to a total of \$1 million under the terms of the Coverage Contract. Plaintiff contends that Plaintiff’s claims involve multiple occurrences

resulting more than \$1 million in total indemnity coverage under the terms of 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,” such as 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). Only if the Court finds an ambiguity to exist would it interpret the contract adversely to SCMIRF. *Id.* For the reasons set forth below, this Court finds that the total indemnity coverage available for all of Plaintiff’s claims under the Coverage Contract is limited to \$1 million.

A. Applicable provisions in the Coverage Contract.

At the outset, the Coverage Contract includes a specific section—Section IV—which governs “Law Enforcement Liability.” (See *Am. Compl.*, Stipulated Facts at ¶ 8; Ex. D to Stipulated Facts, at pp.50–65). Section IV governs the “**Member**” named in the declarations page, *i.e.*, Cottageville, “the law enforcement department of the **Member** named,” and “each of the individual law enforcement officers,” *i.e.*, Price and Craddock. (*Id.* at Ex. D, Sec. IV(A)(1) and (G)(9).) Section IV also provides that for the Contract Period, the liability limit is \$1 million, “Per Occurrence.” (*Id.* at Ex. D, Sec. IV, p.50 (“Law Enforcement Liability Contract Declarations”).)

In addition to the specific section governing law enforcement, the Coverage Contract also includes “General Provisions” in Section I, which govern “unless specific provisions are contained in the appropriate section.” (*Id.* at Ex. D, Sec. I(A).)² Here, the relevant individuals are either the

² Both the General Liability and Public Officials sections, Section III and Section V respectively, exclude coverage of

“member” or individual law enforcement officers acting within the scope of their employment. Therefore, Section IV, specifically governing Law Enforcement Liability, and Section I, to the extent it is not displaced by Section IV, will govern with regard to the verdict and claims of Plaintiff.

Section IV of the Coverage Contract covers “**Money Damages** because of a **Wrongful Act** by a **Member**, a **Law Enforcement Employee**, or other **Covered Persons(s)** while acting in conjunction with **Law Enforcement Employees.**” (*Id.* at Ex. D, Sec. IV(A)(1).) The “Wrongful Act” must be committed in the “course and scope of [the employee or covered person’s] official duties, as provided under the ‘South Carolina Tort Claims Act’ where a South Carolina state law is involved.” (*Id.*)³ Further, the “Wrongful Act” must result in:

- a. **Property Damage or Bodily Injury**⁴ which is first caused and first becomes manifest during the Coverage Period, provided the **Wrongful Act** amounts to an **Occurrence**; or
- b. **Personal Injury or Advertising Injury**⁵ which is first caused and first becomes manifest during the **Coverage Period**.

(*Id.* at Ex. D, Sec. IV(A)(1)(a)–(b).) Thus, there are two routes by which coverage could arise in this situation under Section IV – coverage for “Bodily Injury” or coverage for “Personal Injury.” These are discussed, in turn, below.

claims related to the conduct of law enforcement officers, including negligent hiring and supervision claims. (*See* Am. Compl., Ex. D to Stipulated Facts at Sec. III(J)(24); Sec. V(E)(21).)

³ For purposes of this case, the Parties have stipulated that “[o]n May 16, 2011, Price, while acting within the scope of his employment as a Cottageville police officer, shot and killed Albert Carl ‘Bert’ Reeves.” (Am. Compl., Stipulated Facts at ¶ 3.) The Parties further stipulated as to Craddock that “Reeves claims that Craddock was negligent with regard to the death of Bert Reeves due to certain actions or omissions attributable to him in the scope of his employment as a Cottageville police officer.” (*Id.* at ¶ 5.)

⁴ “**Bodily Injury**” means physical injury to any person (including death) and any mental anguish or mental suffering associated with or arising from such physical injury. However, for purposes of this Section IV, **Bodily Injury** does not include such injuries if they result directly and 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 Ex D, Sec. IV(G)(4).)

⁵ Advertising Injury is not at issue in this case.

1. Coverage for Bodily Injury.

First, if Bodily Injury is the resulting damage at issue, the “Wrongful Act” resulting in the Bodily Injury must amount to an “Occurrence” to be covered under the Coverage Contract. The term “Wrongful Act” is specifically defined in Section IV, as follows:

“**Wrongful Act**” means any actual or alleged error in the performance or failure to perform an official duty; or any misstatement, misleading statement, or misleading act made or done in the course of official duty and upon which a claimant or plaintiff has relied to his, her, or its detriment; or any omission or *neglect in performing an official duty*; or any *breach of an official duty*, including misfeasance, malfeasance and nonfeasance; but only, with respect to any or all of the foregoing, when committed by a **Member** or by a **Covered Person(s)** while acting within both the course and the scope of his or her official duties, as provided under the “South Carolina Tort Claims Act.”

(*Id.* at Ex D, Sec. IV(G)(27) (emphasis added).) Accordingly, the “Wrongful Act” would be the alleged negligence of the officer in the performance of his/her duties. The term “Occurrence” is specifically defined in the General Definitions section of Section I, as follows:

“**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. Without limitation, all references to any type of injury arising out of or from an **Occurrence** or being caused by an **Occurrence** employ the foregoing meaning. Subject to the foregoing, “**Occurrence**” includes continuing exposure to the same harmful conditions. All such continuing exposure, damage, or injury shall be treated as once Occurrence.

(*Id.* at Ex D, Sec. I(B)(4).) Therefore, for coverage to exist based on Bodily Injury, the Wrongful Act, *i.e.*, negligent act(s), must amount to an “Occurrence.”

2. Coverage for Personal Injury.

The second possible area of coverage is where the resulting damage from a “Wrongful Act” is a “Personal Injury.” “Personal Injury” is defined to include certain “Offenses” committed

in the course of a Member's law enforcement activities, including: "assault and battery;" "violation of civil rights;" and "false arrest, detention and imprisonment." (*See id.* at Ex D, Sec. IV(G)(18)). The term "Offense" is defined as "conduct constituting **Personal Injury** or **Advertising Injury** that happens in the course and scope of the Member's or Covered Person's official duties as described in the South Carolina Tort Claims Act." (*Id.* at Ex D, Sec. I(B)(5).) Therefore, for coverage to exist based on Personal Injury, the "Wrongful Act" must constitute a qualifying "Offense."

3. **General provisions regarding the \$1 million Coverage Limit.**

As described above, coverage for "Bodily Injury" is limited to "Wrongful Acts" that amount to an "Occurrence," and coverage for "Personal Injury" is limited to "Wrongful Acts" that constitute the commission of certain "Offenses." However, under the terms of the Coverage Contract, **there is no duplication of these coverages.** Rather the \$1 million Coverage Limit still applies. Specifically, the 2011 SCMIRF Coverage Contract states:

No liability that is covered under any Coverage Section of **This Contract** will be deemed to be separately covered under any other Coverage Section. No **Offense** will be deemed also to constitute an **Occurrence** for coverage purposes, or vice-versa. **Personal Injury** will not be deemed to constitute separate **Advertising Injury** for coverage purposes, or vice-versa. Any act(s) or omission(s) that might be described under more than one Coverage Section or more than one category as an **Offense(s)** or an **Occurrence(s)** will be treated as a single event for coverage purposes, subject to a single Coverage Limit. A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage. There is no duplication of coverage or benefits under **This Contract**.

(*Id.* at Ex. D, Sec. I(C)(9) (underline and italics emphasis added).) Thus, for coverage purposes, conduct amounting to an "Offense" supporting "Personal Injury" coverage cannot also constitute an "Occurrence" supporting "Bodily Injury" coverage, and vice versa. Additionally, where all of

the “claims or suits” involve “substantially the same injury or damage,” such as the death of Bert Reeves in this case, only “[a] single Coverage Limit applies” and “[t]here is no duplication of coverage or benefits.” (*Id.*) Thus, under the terms of the Coverage Contract—regardless of the number of claims or suits pursued—where they involve substantially the same injury or damage, there is a \$1 million Coverage Limit.

Additionally, the Coverage Contract provides that only a single limit will apply regardless of the number of persons injured or the number of covered person(s) who caused them. (*See id.* at Ex D, Sec. IV(D)(1).) This point is emphasized under the subsection titled “SCMIRF’s Limit of Liability.” (*Id.* at Ex. D, Sec. IV(D)(2).) The limitation on liability subsection provides: “SCMIRF’s liability for any one occurrence/wrongful act will be limited to \$1,000,000 per **Member** regardless of the number of **Covered Persons**, number of claimants or claims made . . . whether or not covered in one or more than one capacity under **This Contract**[.]” (*Id.*) Where there are “continuing, serial, or repeated instances of **Personal Injury** or **Advertising Injury** [it] 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** or **Aggregate** for one year will apply to all such claims arising from such continuing, serial or repeated conduct[.]” (*Id.* (underline emphasis added).)

Additionally, in the Coverage Contract’s definition of “Offense” it specifically provides that “[a]ll 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 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 Ex D, Sec. I(B)(5).) And, finally, Section IV provides that “[i]n no event shall coverage under

any liability Section of **This Contract**, combine with any other Section, to increase the per occurrence/accident/wrongful act limit of liability of \$1,000,000 as set out above.” (*Id.* (underline emphasis added).)

Thus, the Coverage Contract, on its face, provides that coverage is limited to \$1 million despite the number of person(s) involved, the number of claimants, the number of claims made, the number of repetitions of the same basic “Offense,” or whether “Bodily Injury,” “Personal Injury,” or both, is claimed. Moreover, in those instances where conduct is alleged that would constitute both an “Occurrence” and an “Offense,” both Section IV and the general provisions of Section I provide that only a single coverage limit applies. (*See id.* at Ex. D, Sec. I(C)(9); Sec. IV(D)(1).)

B. Applying the Coverage Contract terms results in only \$1 million in coverage.

The claims made and/or the verdict rendered against Cottageville, Price and Craddock relating to the hiring, retention, supervision and shooting death of Bert Reeves do not result in there being more than \$1,000,000.00 in indemnity coverage available under the terms of the Coverage Contract. This conclusion is supported by multiple provisions of the Coverage Contract, including, but not limited to:

- Sec I(C)(9) p. 7 (providing that a single coverage limit applies to all claims or suits involving substantially the same injury or damage);
- Sec. IV(D)(2) p. 52 (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. I(C)(9) p. 7 (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) p. 7 (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(G)(4) p. 61 (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);
- Sec. IV(D)(2) p. 52 (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);
- Sec. I(B)(5) pp. 3-4 (providing that repetitions of the same basic “Offense” will be treated as one “Offense” subject to a single coverage limit);
- Sec. I(B)(4) p. 3 (distinguishing the meaning of “occurrence” when used in the context of the coverage limits and providing that conduct amounting to a Wrongful Act, an “Offense” supporting Personal Injury, and/or an “Occurrence” supporting Bodily Injury could constitute one loss for coverage purposes);
- Sec. I(C)(9) p. 7 (providing that a single Coverage Limit applies to any Offense or Occurrence, regardless of the number of claimants, suits, or claims).

1. Under the terms of the Coverage Contract, all of Plaintiff’s claims against Cottageville, Price and Craddock constitute only a “Personal Injury” and are subject to a single Coverage Limit.

As previously discussed, for coverage to exist in this matter, there must be a “Wrongful Act” that results in either “Bodily Injury” or “Personal Injury.” (See Am. Compl. at Ex. D, Sec. IV(A)(1).) Plaintiff’s negligence claims would fall under “Bodily Injury” and his Section 1983 claims would fall under Personal Injury. However, the “Bodily Injury” involved in the negligence claims is also the direct and immediate result of the “Personal Injury” involved in the Section 1983 claims. Under the clear terms of the Coverage Contract, both types of injuries cannot co-exist in these circumstances. Rather, where the conduct implicates both the “Bodily Injury” and the “Personal Injury” categories, the resulting injuries are deemed to be part of the “Personal Injury” and cannot also constitute a separate “Bodily Injury.”

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) (bold emphasis in original; underline added).)⁶ Under both the negligence claims and the Section 1983 claims, the resulting injury is the same—that the conduct of Cottageville, Price and Craddock “proximately caused the death of Bert Reeves.” (Pl.’s Mem. in Supp. of Sum. Judgmt. at 3.) Thus, the claimed “Bodily Injury” in this case (the death of Bert Reeves) “result[ed] directly or immediately” from the claimed “Personal Injury” (the § 1983 violations), as well as the negligence. In such circumstances, under the express provisions of the Coverage Contract, the resulting injury is “deemed to be part of the **Personal Injury**” and can no longer constitute a separate “Bodily Injury.” (Am. Compl. at Ex. D, Sec. IV(G)(4) (bold emphasis in original).)

Because the “Bodily Injury” is subsumed into the “Personal Injury” in these circumstances, the focus is properly on whether the actions of Cottageville, Price and Craddock constitute more than one covered “Personal Injury.” Under the terms of the Coverage Contract, they do not.

Specifically, Section IV(D)(2) of the Coverage Contract provides:

[A]ll 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 permit such injuries or the number of persons injured and *only a single Coverage Limit . . . will apply to all claims* arising from such

⁶ This is reiterated in the Coverage Contract’s General Provisions, which provide that “[n]o **Offense** [which relates to “Personal Injury”] will be deemed also to constitute an **Occurrence** [which relates to “Bodily Injury”] for coverage purposes, or vice-versa.” (*Id.* at Sec. I(C)(9).)

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) (bold emphasis in original; underline and italics added).) The title of this key section of the Coverage Contract—“SCMIRF’s Limit of Liability”—is the crux of the declaratory judgment question before this Court.⁷ This section, as a part of the Coverage Contract, must be read as part of the whole document. *See Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (“If the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.”).

This limitation is reiterated in the Coverage Contract’s General Provisions as well. As discussed above, coverage for “Bodily Injury” is limited to “Wrongful Acts” that amount to an “Occurrence,” and coverage for “Personal Injury” is limited to “Wrongful Acts” that constitute the commission of certain “Offenses.” With regard to “Offenses,” Section I(B)(5) of the Coverage Contract’s General Provisions explicitly provides that

“[a]ll 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.”

⁷ Plaintiff contends that Section IV.D.2. does not impose any limitations of coverage where there are multiple occurrences of distinct and separate conduct causing injury. Plaintiff asserts that Section IV.D.2’s next paragraph, which states “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...such injuries” and “only a single Coverage Limit . . . will apply to all claims arising from such continuing, serial, or repeated conduct,” provides that all repetitions of the same basic offense will be treated as one offense and subject to a single coverage limit. Plaintiff interprets this to mean that when “the same basic conduct” causes an injury, that “same basic conduct” will equate to an offense, even when the conduct is repeated. Thus, Plaintiff’s position is that the contract looks at the conduct to determine if it is a single offense as opposed to different conduct that will constitute a separate and distinct offense.

See *id.* at Sec. I(B)(5) (emphasis added).

Because the death of Bert Reeves flows from the “Personal Injury,” *i.e.*, it is considered to be solely part of the “Personal Injury” and constitutes only “one Offense” or “one occurrence/wrongful act” which is “subject to a single Coverage Limit.” (*Id.* at Sec. I(B)(5); Sec. IV(D)(2) (emphasis added).) It does not matter that more than one Covered Person was involved. (*Id.* at Sec. IV(D)(2).) It also does not matter if there was a variation in the conduct constituting the “Offense.” (*Id.* at Sec. I(B)(5).) In these circumstances, only a single Coverage Limit applies. (*Id.* at Sec. I(B)(5); Sec. IV(D)(2).)⁸

C. The claims asserted and/or the jury findings against Cottageville, Price and Craddock do not constitute separate “occurrences.”

Plaintiff asserts that the Coverage Contract provides \$1 million in coverage “per occurrence,” and that more than \$1 million in coverage is available because Plaintiff’s claims against Price, Cottageville, and Craddock involve multiple “occurrences.” (Pl.’s Memo. in Supp. of Sum. Judgmt. at 4.) Additionally, Plaintiff contends that the Coverage Contract’s definition of “occurrence” is based on the negligent act, and not the resulting injury. (*Id.* at 5-6). Plaintiff then supports this position with cases interpreting the Tort Claims Act. (*Id.* at 7-9.) For the reasons stated below, this Court rejects Plaintiff’s arguments.

1. Because, under the Coverage Contract, Plaintiff’s claims all fall within “Personal Injury,” the separate “findings” of the jury or the separate claims asserted against the different parties cannot constitute separate “occurrences” that would increase the \$1 million Coverage Limit.

Plaintiff’s arguments regarding the coverage available under the Coverage Contract center on the various “findings,” which Plaintiff identifies as part of the Federal Lawsuit and the claims

⁸ The Court rejects Plaintiff’s argument that the underlying lawsuits involved separate and distinct actions, unconnected, by the Town, by Price, and by Craddock and that there are no “continuing, serial, or repeated instances” of personal injury or advertising injury present here.

asserted in the Craddock Lawsuit. However, Plaintiff's arguments are flawed. Plaintiff ignores applicable provisions of the Coverage Contract (discussed above) which provide that where "Bodily Injury" is the direct and immediate result of the infliction of "Personal Injury," *only* Personal Injury is recoverable. Plaintiff then ignores the Coverage Contract's explicit provisions that, regardless of the number of covered persons committing "offenses," and regardless of the existence of a variation in their conduct, only a single Coverage Limit will apply.

2. Plaintiff's arguments erroneously seek to separate the Wrongful Act from the corresponding injury.

Plaintiff also asserts that each act of negligence constitutes a separate "occurrence" for coverage purposes because "occurrence" is not linked to a resulting injury.⁹ (See Pl.'s Mem. in Supp. of Sum. Judgmt. at 5–7.) In addition to the fact that Plaintiff's argument is inapplicable to "Personal Injury," which is the only injury under which coverage applies and which focuses on "offenses" rather than "occurrences," Plaintiff's argument is also flawed in two other respects.

⁹ Plaintiff asserts that the Coverage Contract provides for \$1,000,000 per occurrence, and defines occurrence based on the negligent act rather than the resulting injury. Plaintiff then asserts that, because there were more than one separate and distinct negligent acts in the underlying lawsuits, more than \$1,000,000 in indemnity coverage exists. With regard to "offenses," Plaintiff contends that "conduct" governs whether an offense has occurred, and in cases of "repetitions of the same basic **Offense**", it is treated as "one Offense, subject to a single Coverage Limit." Section I.B.5. Plaintiff contends that a distinct act or omission—"the same basic conduct"—causing an injury equates to an offense, and that when "the same basic conduct" is repeated, it will be treated as a single offense but these provisions impose no limitations on multiple offenses or occurrences. Plaintiff asserts that Section III of the Coverage Contract (General Liability) reiterates that occurrence "means an accident, including continuous or repeated exposure to substantially the same generally harmful conditions, which results in Property Damage and/or Bodily Injury...." and, relevant here, that "arose from conduct in the course and scope of the **Member's** or **Covered Person's** official duties..." Section III.N.22. The definition goes on to state that "[a]ll **Bodily Injury** to one or more persons and/or all **Property Damage** arising out of an event or causally related sequence of events is considered to be one '**Occurrence**'." *Id.* Plaintiff contends that these under these definitions occurrence means action that results in damages or injury, and includes all damages or injuries that come out of that one occurrence of action. Plaintiff also reads Section IV of the Coverage Contract as providing that liability coverage arises out of, and is triggered by, the employees' actions, not out of resulting injuries. Section IV.A.1. Plaintiff asserts that liability coverage pays for the damages or injuries incurred by the covered member's wrongful act, and is governed by the wrongful act amounting to a covered occurrence rather than the number of injuries. Section IV.A.1.b. Plaintiff also contends that the definitions of "Personal Injury" and "Bodily Injury" in Section IV do not define occurrence based on resulting injuries and do not prohibit coverage for multiple distinct occurrences.

First, Plaintiff's argument would improperly separate the required "Wrongful Act" from the necessary resulting injury. Under the terms of the Coverage Contract, the fact that a "Wrongful Act" is committed, alone, is insufficient to invoke coverage. Rather, there must be a "Wrongful Act ... which results in ... Bodily Injury." (Sec. IV(A)(1).) In the absence of resulting injury, coverage is not triggered. The resulting injury aspect simply cannot be separated from "occurrence" under the Coverage Contract.

Plaintiff's argument also ignores the fact that *substantially the same* Bodily Injury resulted from *all* of the Wrongful Acts/Occurrence(s). It is not until there is that resulting injury that coverage arises. In these instances, because there is no duplication of coverage, the "Occurrence(s) will be treated as a single event for coverage purposes, subject to a single Coverage Limit." (Sec. I(C)(9) (bold in original; underline added).) And, because there is the "same injury or damage," "[a] single Coverage Limit applies to all claims or suits." (*Id.* ("A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage."))¹⁰

3. The TCA case law cited by Plaintiff is inapplicable where a Coverage Contract is at issue.

Plaintiff attempts to support the assertion that "occurrence" is not linked to the resulting injury by citing to cases interpreting Tort Claims Acts. (Pl.'s Mem. in Supp. of Sum. Judgmt. at 7-11.) These cases, however, are inapplicable to the case at hand because they apply the definition of "occurrence" under certain statutory schemes and they do not involve situations, as is the case here, where there is a contract specifically defining the term and otherwise limiting coverage. *See*,

¹⁰ Plaintiff contends that this provision is not applicable to define occurrence, and argues that merely means that where an act or omission may fall under more than one coverage section, that single act or omission will be covered only once, and that the single Coverage Limit will apply to all claims or suits involving substantially the same injury or damage from that specific act or omission. This Court disagrees.

e.g., *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 131–135, 712 S.E.2d 401, 405–407 (2011) (applying definition in S.C. Code Ann. § 15-78-30(g) to determine number of occurrences under the TCA); *Solomon v. Coastal Plains Physician Assoc., P.A.*, C.A. No. 2010-CP-25-105, Ex. 1 to Pl.'s Mem. in Supp at pp.4–6 (applying “per occurrence” in South Carolina Solicitation of Charitable Funds Act). By relying on these cases, Plaintiff essentially asks the Court to define “occurrence” in the Coverage Contract in the same way that the courts define the term under the TCA. 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”).

For all of the foregoing reasons, this Court answers the Stipulated Issue on the Coverage Limit question as follows: There is only a total of \$1 million in indemnity coverage available under the terms of the SCMIRF Coverage Contract with the Town of Cottageville with respect to the verdict rendered against Cottageville and Price as well as the claims asserted against Craddock.

II. **A tort claim for bad faith against SCMIRF related to its handling of the claims relating to the shooting and death of Bert Reeves is subject to the South Carolina Tort Claims Act.**

Plaintiff asserts that that SCMIRF engaged in bad faith with respect to its handling of the claims associated with the shooting, and ultimately the death, of Bert Reeves. (Am. Compl. at ¶¶ 14–16.) The limited issue before this Court is, assuming *arguendo* that a **bad faith claim** could otherwise be maintained by Reeves against SCMIRF via an assignment, whether any such claim would be subject to the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10, *et seq.*) (“TCA”).

The TCA provides limitations on liability for torts asserted against the State and its political subdivisions. *See* S.C. Code Ann. § 15-78-10. It provides that the “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 TCA also extends to employees of the State and provides 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.” S.C. Code Ann. § 15-78-200. In sum, it “establish[es] limitations on and exemptions to the liability of the governmental entity and *must be liberally construed in favor of limiting the liability of the governmental entity.*” *Id.* (emphasis added).

Under the TCA, the “State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.” S.C. Code Ann. § 15-78-40. The limitation on liability is found in section 15-78-120, which provides for a statutory damages cap and prohibits recovery of punitive or exemplary damages and pre-judgment interest. *See* S.C. Code Ann. § 15-78-120. If a bad faith claim, such as the one proposed by Plaintiff, is asserted against an entity covered by the TCA, any resulting damages would be subject to the limitations described therein.

A. SCMIRF is a “governmental entity” entitled to the protections of the TCA.

SCMIRF asserts that it, as an agency established by municipalities for liability risk sharing, is a “governmental entity” under the TCA and, therefore, is entitled to the immunity protections of the TCA. This Court agrees. The TCA, and its limitations on liability and damages, applies to the “State, an agency, a political subdivision, and a *governmental entity.*” S.C. Code Ann. § 15-78-40 (emphasis added). “Governmental entity” is a defined term meaning “the State and its

political subdivisions.” S.C. Code Ann. § 15-78-30(d) (emphasis added). The term “political subdivision,” as used therein, is defined in Section 15-78-30(h) of the TCA as:

[T]he 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).

Plaintiff contends that SCMIRF is merely a “fund” and does not qualify as a “governmental entity” under the TCA. (Pl.’s Memo. in Supp. of Sum. Judgmt. at 15-16). Specifically, Plaintiff contends that section 15-78-30(h)’s phrase “any agency, governmental health care facility, department, or subdivision thereof” only qualifies the phrase “special purpose districts of the State” within this section. This interpretation, however, is unsupported by any precedent, and is in direct conflict with the South Carolina authority that does exist. Specifically, the South Carolina Attorney General has opined that “[t]he final phrase [of section 15-78-30(h)] 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.” S.C. Op. Att’y Gen., 1990 S.C. A.G. LEXIS 173, at *4 (S.C.A.G. July 25, 1990); *see also id.* at *5 (“Each clause is of equal status and no phrase exists as modification or explanation of another.”). Rather, the term “political subdivision” “when reduced to its simplest terms provides that a political subdivision means or includes the following:

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. at *4–5 (emphasis added). Since the issuance of this opinion in 1990, the General Assembly has not amended section 15-78-30(h) to reflect a contrary meaning. In such instances, the South Carolina Supreme Court has given some weight to the inaction of the General Assembly, such as exists here, in light of an opinion by the Attorney General on the particular issue. *See, e.g., Calhoun Life Ins. Co. v. Gambrell*, 245 S.C. 406, 140 S.E.2d 774 (1965).

The conclusion that SCMIRF is a governmental entity falling under the TCA is supported by the case of *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013), in which the South Carolina Supreme Court outlined certain factors to be analyzed in determining whether an entity is a political subdivision subject to the protections of the TCA. In *Health Promotions*, the Court considered whether the Board of Dentistry constituted a governmental entity that could invoke the immunity protections of the TCA. In answering the question in the affirmative, this Court looked to the following “factors:”

“[1] [W]hether 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 the nature of the function performed by the entity.”

Id. at 636, 743 S.E.2d at 814 (citing 81A C.J.S. *States* § 552 (Supp. 2013) (footnote omitted).) Applying the *Health Promotion* factors to SCMIRF, this Court finds they support the conclusion that SCMIRF is a governmental entity sufficient to invoke the protections of the TCA.

First, SCMIRF functions statewide in that it provides coverage contracts to municipalities across the state, who become members of the fund. Second, SCMIRF performs the work of the

State by providing coverage contracts to political subdivisions of the State. Third, SCMIRF is a pool of funds administered by an agency that is created by municipalities in accordance with the provisions of the Constitution of the State of South Carolina and statutory mandate under the TCA. See S.C. Const. Ann. Art. VIII, § 13; S.C. Code Ann. § 15-78-140.¹¹ Fourth, as in *Health Promotions*, the funds allotted to and controlled by SCMIRF are public funds in that they are pooled by municipalities to cover losses attributable to liability claims of its members. See *Health Promotions*, at 636, 743 S.E.2d at 814–15. Fifth, and also like *Health Promotions*, the individual members of SCMIRF—municipalities and their employees—“are entitled to immunity for actions performed in the course of their official duties.” *Id.*, at 636, 743 S.E.2d at 815; see also S.C. Code Ann. §§ 15-78-20(a), 15-78-200. Thus, by recognizing the need for intergovernmental agreements such as the one created by SCMIRF, the General Assembly intended for SCMIRF “as a whole to come within the purview of the TCA.” *Health Promotions*, 403 S.C. at 636, 743 S.E.2d at 815. This Court finds that all of the *Health Promotions* factors weigh in favor of a finding that SCMIRF is a “governmental entity” sufficient to invoke the immunity protections of the TCA.¹²

In addition to the 1990 Attorney General Opinion and the consideration of the *Health Promotions* factors, this precise issue was the subject of a more recent Attorney General Opinion.

¹¹ More specifically, Art. VIII, § 13 of 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. Ann. 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, whether within or without this State.” *Id.* at § 13(B). Additionally, the TCA 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(b) (emphasis added). Thus, the SCMIRF was created as 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.”

¹² Plaintiff asserts that SCMIRF is not analogous to the Board of Dentistry and that the *Health Promotions* factors weigh against finding SCMIRF to be a governmental entity. This Court Disagrees.

See S.C. Op. Att’y Gen., 2014 S.C. A.G. LEXIS 116, at *5 (S.C.A.G. Dec. 17, 2014). This recent opinion stemmed from a request by the City Manager for the City of Cayce, as a participating municipality of SCMIRF, for an opinion as to the applicability of the TCA to torts asserted against SCMIRF. See *id.* at *1. The Attorney General, after performing the same textual analysis of the provisions of the TCA, compared it to the creation and purpose of SCMIRF, and found the TCA applicable to SCMIRF as a “governmental entity.” See *id.* at *5 (“[W]e believe a court would likely conclude that SCMIRF is a ‘governmental entity’ for purposes of the Tort Claims Act.”). The Attorney General concluded that “[b]ecause SCMIRF *clearly serves as an agency or department of its municipality members*, it therefore falls within the foregoing definition [of “governmental entity”] and is *subject to tort suits only pursuant to the terms of the Act.*” *Id.* at *5–6 (emphasis added). The 2014 opinion concludes with a finding that “[t]he members’ participation in SCMIRF is an exercise of an essential governmental function” and, it is therefore “certainly reasonable for municipalities to ensure financial security and provide a collective source for paying liability from tort suits, as authorized and limited by the Tort Claims Act.” *Id.* at *7–8.

In addition to being supported by two separate Attorney General Opinions as well as an analysis of the *Health Promotions* factors, this Court’s conclusion that SCMIRF is a governmental entity within the meaning of the TCA is in line with analogous decisions from other states which considered similar pooling agreements. Further, courts have concluded that state insurance funds, such as the Insurance Reserve Fund in South Carolina, are covered by corresponding state tort claims acts. See, e.g., *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320, 326 (Tex. 2006) (“We conclude that the Fund’s ‘nature, purposes and powers’ demonstrate legislative intent that it exist as a distinct governmental entity entitled to assert immunity in its own right for the

performance of a governmental function. With regard to that function, the Fund enjoys the same governmental immunity as other political subdivisions.”); *Fehring v. State Ins. Fund*, 19 P.3d 276, 283 (Ok. 2001) (finding the Oklahoma State Insurance Fund is a state entity falling under the Governmental Tort Claims Act); *Dryden v. State Accident Ins. Fund Corp.*, 746 P.2d 240, 241–42 (Or. Ct. App. 1987) (finding State Accident Insurance Corporation Fund covered by the Oregon Tort Claims Act). Second, and by logical extension, other jurisdictions considering similar insurance pooling agreements for political subdivisions have found that they are also subject to immunity and the protections of those states’ versions of the TCA. *See, e.g., Shapiro v. Middlesex County Mun. Joint Ins. Fund*, 704 A.2d 1316, 1320 (N.J. 1998) (“JIF, formed to act on behalf of a group of municipalities, is also immune as a public entity under the Tort Claims Act (N.J.S.A. 59:1-1 to:12-3).”); *Colo. Special Dists. Prop. & Liab. v. Lyons*, 277 P.3d 874 (Colo. 2012) (affirming finding that Colorado Special Districts Property and Liability Pool is governed by the Colorado Governmental Immunity Act).

Plaintiff requests that this Court disagree with the Attorney General’s opinions.¹³ However, while South Carolina Attorney General opinions are not binding on this Court, they are highly persuasive. *See Kalber v. Redfearn*, 215 S.C. 224, 243, 54 S.E.2d 791, 799 (1949) (adopting opinion which notes that “[w]hile the opinions of the Attorney General are not binding upon the Court, they are persuasive, for that official occupies a quasi judicial position[.]”). Here, Plaintiff has failed to identify any flaw or fallacy in the South Carolina Attorney General’s opinion as to SCMIRF qualifying as a “governmental entity” subject to the protections of the TCA.

¹³ Plaintiff contends that the 1990 Attorney General Opinion is wrong and asserts that it is not binding on this court under *State v. Ramsey*, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014). Plaintiff further asserts that even under the Attorney General’s interpretation, SCMIRF is not an agency or a department of a municipality to qualify as a political subdivision. This Court disagrees.

Plaintiff attempts to distinguish SCMIRF as merely a “fund” rather than a governmental entity, and attempts to contrast SCMIRF with the Insurance Reserve Fund, which is a Division of the South Carolina State Fiscal Accountability Authority and is subject to the protections of the TCA.¹⁴ (Pl.’s Memo. in Supp. of Sum. Judgmt. at 17-18.) This distinction, however, is unavailing. Nothing in the TCA bars an entity from being a “fund” and also qualifying as a “political subdivision” as that term is defined in S.C. Code Ann. § 15-78-30(h). The terms are not mutually-exclusive. This is illustrated by the fact that South Carolina’s Insurance Reserve Fund, which is a similar entity, is both a “fund” and a “political subdivision” subject to the protections of the TCA. In attempting to contrast the two “funds,” Plaintiff argues that the Insurance Reserve Fund is “organized and controlled by numerous statutes” and argues that “SCMIRF is not organized and controlled by statute.” (Pl.’s Mem. in Supp. of Sum. Judgmt. at 17.) This argument is erroneous. SCMIRF is specifically *authorized* by statute and the South Carolina Constitution. See S.C. Const. Ann. Art. VIII, § 13; S.C. Code Ann. § 15-78-140(b) (“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[.]”). Thus, both the Insurance Reserve Fund and SCMIRF are distinct entities which can enter into contracts and take other actions that mere “funds,” as that word is commonly understood, cannot. (See Am. Compl. at Ex. 1, ¶¶ 6–7 (referencing SCMIRF’s Bylaws and its entry into an Intergovernmental Agreement).) Just as the South Carolina Insurance Reserve Fund’s nature as a “fund” does not render it outside the bounds of protection under the TCA, SCMIRF’s nature as a “fund”—

¹⁴ Plaintiff asserts that unlike the Insurance Reserve Fund, SCMIRF is not organized and controlled by statute. Rather, Plaintiff states that SCMIRF is “an unincorporated voluntary, self-insurance pool” of municipalities, and that SCMIRF does not engage in governing our State.

authorized by statute and the South Carolina Constitution—does not render it outside the bounds of the protections of the TCA either.

Based on the foregoing, on the TCA issue, this Court finds that SCMIRF serves as an agency or department of its municipality members, thereby falling within the parameters of the TCA.

B. Plaintiff's argument that the TCA does not apply to or limit a claim based on breach of the Coverage Contract is beyond the issues submitted to this Court by agreement of the Parties.

In addition to the issue of whether SCMIRF is a governmental entity within the meaning of the TCA, Plaintiff has also asserted that even if a bad faith claim against SCMIRF is subject to the TCA, a claim for “breach of the Coverage Contract in failing to pay its insured’s claims within the contract’s limits” would not be subject to the TCA. (*See* Pl.’s Mem. in Supp. of Sum. Judgment at 18.) This, however, is an attempt to recast the limited issues raised by the agreement of the Parties. The stipulated question before this Court is whether a *bad faith claim* against SCMIRF is subject to the TCA. A bad faith claim indisputably arises in tort. *See Charleston Cnty. Sch. Dist. v. State Bdgt. & Control Bd.*, 313 S.C. 1, 7–8, 437 S.E.2d 6, 9 (1993) (holding claim for bad faith is one in tort).

As outlined in Plaintiff’s Amended Complaint, Plaintiff alleges that “[d]uring the Federal lawsuit, Reeves alleged, and SCMIRF denied, that SCMIRF had acted in *bad faith in failing to reasonably settle* the Cottageville Action prior to trial.” (Am. Compl. at ¶¶ 15, 28 (emphasis added).) Further, Plaintiff alleges that “Cottageville informed SCMIRF it intended to assign *any bad faith claims* in its favor that may exist against SCMIRF to Reeves.” (*Id.* at ¶ 29 (emphasis added).) This issue of a purported claim for bad faith was part of the “comprehensive settlement of the Federal lawsuit,” which “involved two contingent payments that are payable depending on

the answers to the two stipulated legal questions, which, in turn, are based on stipulated facts.” (*Id.* at ¶ 16.) Both Parties agreed, as part of the settlement, that the “specific question[s] posted by the Parties for this Court” is: “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?” (*Id.* at ¶ 17(2) (emphasis added); Ans. at ¶ 17 (“SCMIRF admits that the legal questions outlined are those which the parties agreed to have resolved as part of the settlement of the Federal Lawsuit.”).) In this regard, Plaintiff is seeking, through this litigation, a “declaration from this Court that a *bad faith claim* against SCMIRF is not subject to the South Carolina Tort Claims Act.” (Am. Compl. at ¶ 33 (emphasis added).) Notably, none of Plaintiff’s allegations in the Amended Complaint or the specific question posed as part of the comprehensive settlement involve a purported claim for breach of the Coverage Contract. This question is not part of this lawsuit, not a part of the comprehensive settlement, and not properly before this Court for a ruling.

Hence, this Court answers the Stipulated Issue on the TCA question as follows: A tort claim for bad faith brought against SCMIRF is subject to the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10 *et seq.*). Therefore, on the submitted TCA issue, this Court grants SCMIRF’s motion for summary judgment and denies Plaintiffs’ motion for summary judgment.

NOW THEREFORE, based upon the foregoing findings and conclusions, IT IS HEREBY ORDERED that Defendant’s motion for summary judgment is GRANTED in its entirety, and Plaintiff’s motion for summary judgment is DENIED in its entirety.

AND IT IS SO ORDERED.

The Honorable Perry M. Buckner, III
Circuit Court Judge, Fourteenth Judicial Circuit

Walterboro, South Carolina
_____, 2016

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-15-135

**PLAINTIFF'S NOTICE OF
AND MOTION TO ALTER OR AMEND
JUDGMENT**

VS.

Defendant.

This Motion is supported by a memorandum of law filed contemporaneously hereto and by the pleadings and Stipulation of Facts and Issues and attached Exhibits, previously filed with the Court.

Signature Page to Follow

McLEOD LAW GROUP LLC

A handwritten signature in cursive script, appearing to read "W. Mullins McLeod, Jr.", is written over a horizontal line.

W. Mullins McLeod, Jr.

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Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Ashley Reeves as Personal	)	Civil Action No. 2014-CP-15-135
Representative for the Estate of	)	
Albert Carl "Bert" Reeves,	)	
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	PLAINTIFF'S MOTION TO ALTER
	)	OR AMEND JUDGMENT
vs.	)	
	)	
South Carolina Municipal Insurance	)	
and Risk Financing Fund [SCMIRF]	)	
	)	
Defendant.	)	
	)	
	)	
	)	

COMES NOW Plaintiff, Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, by and through her undersigned counsel, and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and respectfully moves the Court to alter or amend its Order and judgment rendered on June 24, 2016, granting Plaintiff summary judgment as to Issue One and denying Plaintiff summary judgment as to Issue Two.

A motion to alter or amend a judgment pursuant to Rule 59(e), SCRPC, is properly viewed not only as a request of the trial court to alter or amend judgment but also as a vehicle to seek reconsideration of issues and arguments presented to the Court. *See Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004). "Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Id.* at 779 (citing, e.g., *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and

appellate courts describe a Rule 59(e) motion as a “motion to reconsider” or “motion for reconsideration”); James Flanagan, *South Carolina Civil Procedure* 474-475 (2d ed. 1996)).

Moreover, issues and arguments on appeal must have been raised to and ruled on by the trial judge to be preserved for appellate review. *Id.* at 779-780; *see also, Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

Plaintiff moves the Court to alter and amend its judgment as to Issue Two and find that the Tort Claims Act does not apply to a claim for bad faith brought against the South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF], because SCMIRF is not a political subdivision of the State, and even if it is, the Tort Claims Act does not apply and limit a claim by the insured for actual damages for breach of the Coverage Contract.

I. Plaintiff Requests That The Court Alter Its Judgment On Issue Two And Find That The Tort Claims Act Does Not Apply To A Claim For Bad Faith Brought Against SCMIRF Because It Is Not A Political Subdivision Of South Carolina.

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 South Carolina. 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.*

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).

SCMIRF argues that it is political subdivision based on the foregoing definition of political subdivision, interpreting 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.” SCMIRF makes its assertion by relying on Attorney General opinion that SCMIRF is an agency or department of the municipality. *See* 014 WL 7405219 (S.C.A.G. December 17, 2014) & 1990 WL 599264 (S.C.A.G. July 25, 1990). 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 Attorney General's opinion errs. The plain language of the definition of "political subdivision" is written such 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.

Furthermore, even under the Attorney General's expansive definition of agency, department, and subdivision, SCMIRF is not an agency, department, or subdivision of a municipality to qualify as a political subdivision. 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" of municipalities, to include the Town of Cottageville, that agreed to create a pooled fund for the payment of property losses and liability claims on behalf of its members. *See Stipulation of Facts and Issues*, ¶¶ 6-7, and *Exhibit B*.

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 of 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. *See Exhibit 1, Ricard Deposition*, pp. 8:8; 9:20-24; 14:1-12. As an insurance fund, SCMIRF does not share in the concerns of the State, and its political subdivisions, with the balance between financial exposure to tort liability and the 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 South Carolina.

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), has 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. It is clear in applying the *Health Promotion Specialists* factors 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 (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 (2011)). 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 risk 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 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(e). 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 state governmental entity or political subdivision falling within its ambit.

Accordingly, Plaintiff respectfully requests the Court alter its judgment and hold that any tort committed by SCMIRF, its employees, or agents is not governed by and subject to the Tort Claims Act because SCMIRF is not a political subdivision, and, thus, a tort claim for bad faith brought against SCMIRF would not be subject to the Tort Claims Act.

II. Plaintiff Requests That The Court Amend Its Judgment on Issue Two and Find That Even If SCMIRF Is A Political Subdivision Of South Carolina, The Tort Claims Act Does Not Apply And Limit A Claim By The Insured For Actual Damages For Breach Of The Coverage Contract.

Regardless of the Court's holding as to whether SCMIRF is or is not a political subdivision of South Carolina and subject to the Tort Claims Act, Plaintiff respectfully requests the Court to amend its judgment and find that, regardless, the Tort Claims Act has no effect on SCMIRF's liability, or any political subdivision's liability for that matter, based on breach of contract. *See* S.C.Code Ann. 15-78-20(d). More specifically, 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. The issue was specifically addressed at the hearing on the motions for summary judgment by both Plaintiff and SCMIRF, and Plaintiff raises the issue and argument in

her motion for summary judgment. Accordingly, the issue has been raised within the request for declaratory judgment.

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 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, 9. The Supreme Court also made very clear that a breach of contract claim is not subject to the Tort Claims Act. *See Nichols*, 279 S.C. at 341, 306 S.E.2d at 619. Specifically, 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 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.*

Plaintiff respectfully moves the Court to amend its judgment on Issue Two and find that even if SCMIRF constituted 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. SCMIRF would be liable for the insurance proceeds it failed to pay its insured—that being, \$1,000,000 per occurrence of negligence.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court alter or amend its judgment and find that the Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, does not govern a bad faith tort claim against SCMIRF because it is not a political subdivision of the State, and, even if it is, the Tort Claims Act does not apply and limit a claim by the insured for actual damages for breach of the Coverage Contract.

Respectfully submitted this 30th day of June 2016.

McLEOD LAW GROUP LLC

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W. Mullins McLeod, Jr.

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Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA)

COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Ashley Reeves as Personal)
Representative for the Estate of Albert)
Carl "Bert" Reeves,)

Plaintiff,)

vs.)

South Carolina Municipal Insurance and)
Risk Financing Fund ("SCMIRF"), the)
Town of Cottageville, the Town of)
Cottageville Police Department, and)
Randall Price, individually,)

Defendants.)

Civil Action No: 2014-CP-15-135

Motion to Alter or Amend
the Order dated June 24, 2016

2016 JUL 13 PM 1:01

PAAC GRANT
COLLETON COUNTY
COMMON PLEAS

Pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, Defendant South Carolina Municipal Insurance and Risk Financing Fund ("SCMIRF") hereby respectfully requests that this Court alter or amend the Order dated June 24, 2016 ("the Order") which granted in part and denied in part both Plaintiff's and SCMIRF's motions for summary judgment. SCMIRF received written notice on June 29, 2016, that this Order had been sent to the Clerk of Court for filing, and this motion is timely filed within ten days of the entry of this Order. This motion requests that this Court alter or amend the Order with respect to Issue One - whether more than \$1,000,000 in indemnity coverage was available. With regard to Issue One, this Court granted Plaintiff's motion for summary judgment and denied SCMIRF's motion for summary judgment. For the reasons stated herein, SCMIRF respectfully requests that this Court reconsider its conclusion on this issue and amend the Order so as to grant SCMIRF's motion and deny Plaintiff's motion on this issue.

SCMIRF hereby incorporates herein all prior arguments, authorities and exhibits submitted to this Court, whether orally or in writing, in this matter, including but not limited to the arguments made at the May 17, 2016 hearing, and the following filings and submissions:

- a. SCMIRF's Motion for Summary Judgment filed December 15, 2015;
- b. SCMIRF's Memorandum in Support of its Motion for Summary Judgment filed December 15, 2015; and
- c. SCMIRF's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed January 15, 2016.

To the extent that the findings of fact and conclusions of law contained in the Order conflict with the facts, legal arguments, and authorities as set forth in these prior filings and submissions, SCMIRF respectfully requests that this Court reconsider such findings and rulings.

I. SCMIRF's motion for summary judgment should be granted as to Issue One because the only coverage available under the Coverage Contract in this case is coverage for Personal Injury and such coverage is strictly limited to a single coverage limit of \$1,000,000.

The Order correctly notes SCMIRF's position that there are two possible avenues for coverage under Section IV of the Coverage Contract for alleged "Wrongful Acts" – coverage for "Wrongful Acts" that result in "Bodily Injury" OR coverage "Wrongful Acts" that result in "Personal Injury." Additionally, "Bodily Injury" coverage is limited to "Wrongful Acts" that amount to an "Occurrence," while "Personal Injury" coverage is limited to "Wrongful Acts" that constitute the commission of certain "Offenses." Here, Plaintiff's negligence claims fall under "Bodily Injury" and his Section 1983 claims fall under "Personal Injury." However, the "Bodily Injury" involved in the negligence claims is also the direct and immediate result of the "Personal Injury" involved in the Section 1983 claims. Under these circumstances, the provisions of the Coverage contract make it clear that only the "Personal Injury" coverage applies.

Under the clear terms of the Coverage Contract, where the conduct implicates both the “Bodily Injury” and the “Personal Injury” categories, the resulting injuries are deemed to be part of the “Personal Injury” and cannot also constitute a separate “Bodily Injury.” 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.

(Coverage Contract at Sec. IV(G)(4) (bold emphasis in original; underline added).) This is reiterated in the Coverage Contract’s General Provisions section, which provides that “[n]o **Offense** [which relates to “Personal Injury”] will be deemed also to constitute an **Occurrence** [which relates to “Bodily Injury”] for coverage purposes, or vice-versa.” (Coverage Contract at Sec. I(C)(9).)

Here, there are negligence claims and section 1983 claims. However, the resulting injuries for both are exactly the same. Therefore, the claimed “Bodily Injury” in this case “result[ed] directly or immediately” from the claimed “Personal Injury” (the § 1983 violations), as well as the negligence. In such circumstances, the Coverage Contract expressly provides that the resulting injury is “deemed to be part of the **Personal Injury**” and can no longer constitute a separate “Bodily Injury.” (Coverage Contract at Sec. IV(G)(4) (bold emphasis in original).)

Because the “Bodily Injury” is subsumed into the “Personal Injury” in these circumstances, this Court’s focus should have centered upon the issue of whether the actions of Cottageville, Price and Craddock constitute more than one covered “Personal Injury.” Under the terms of the Coverage Contract, they do not.

Specifically, Section IV(D)(2) of the Coverage Contract provides:

[A]ll 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 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.

(Coverage Contract at Sec. IV(D)(2) (bold emphasis in original; underline and italics added).) This limitation is reiterated in the Coverage Contract's General Provisions as well. Coverage for "Personal Injury" is limited to "Wrongful Acts" that constitute the commission of certain "Offenses." With regard to "Offenses," Section I(B)(5) of the Coverage Contract's General Provisions explicitly provides that

"[a]ll 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."

See Coverage Contract at Sec. I(B)(5) (emphasis added).

Because the death of Bert Reeves flows from the "Personal Injury," *i.e.*, it is considered to be solely part of the "Personal Injury" and constitutes only "one Offense" or "one occurrence/wrongful act" which is "subject to a single Coverage Limit." (*Id.* at Sec. I(B)(5); Sec. IV(D)(2) (emphasis added).) It does not matter that more than one Covered Person was involved. (*Id.* at Sec. IV(D)(2).) It also does not matter if there was a variation in the conduct constituting the "Offense." (*Id.* at Sec. I(B)(5).) In these circumstances, only a single Coverage Limit applies. (*Id.* at Sec. I(B)(5); Sec. IV(D)(2).) This Court's Order failed to recognize that the coverage analysis in this case involved solely coverage for "Personal Injury," and that, under the provisions of the Coverage Contract, only a single \$1,000,000 coverage limit applies.

II. The Order mischaracterizes the issue with regard to the applicability of the coverage limit and misinterprets the Coverage Contract's provisions.

The Court in its Order states that "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." (Order at p. 6). However, here there is not a question of whether the coverage limit applies only to different acts or only to different damages. Rather, the issue is whether, under the stipulated facts, the provisions of the Coverage Contract apply the single coverage limit of \$1 million.

First, the Coverage Contract provides that "[a]ll 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 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**." (Coverage Contract at Sec. I(B)(5).) This is reiterated in Section IV(D)(2), which provides 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. (Coverage Contract at Sec. IV(D)(2).) Thus, only one coverage limit would apply under the Coverage Contract's provisions.

Second, regardless of the number of negligent acts and actors, if the injuries or damages ultimately suffered are substantially similar, a single coverage limit would also apply. Section I(C)(9) provides that "[a] single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage." (Coverage Contract at Sec. I(C)(9).) Section I(C)(9) further provides that "[a] single Coverage Limit applies to any Offense or Occurrence, regardless of the number of claimants, suits, or claims." (Coverage Contract at Sec. I(C)(9) (emphasis added).) This is reiterated in Section IV(D)(2) which provides

that SCMIRF's total liability for any one wrongful act "will be limited to \$1,000,000 per Member regardless of the number of Covered Persons" involved or "the number of claimants or claims made" based on the wrongful act. (Coverage Contract at Sec. IV(D)(2).) Thus, the Coverage Contract explicitly contemplated situations where a wrongful act constituting an "offense" giving rise to a "Personal Injury" might involve multiple covered persons (such as Price and Craddock), and multiple claimants (such as Reeves and his statutory beneficiaries) asserting multiple and/or different claims (such as damages for conscious pain and suffering vs. loss of companionship, etc.). Under such circumstances, the Coverage Contract specifically provides that only a single coverage limit of \$1,000,000 applies.

This Court's Order incorrectly casts the issue as whether the Coverage Contract is a "negligent acts policy" or a "damages policy." (Order at pp. 6-7.) Additionally, the Order mischaracterizes SCMIRF's position as being that the Coverage Contract is a "damages policy." This is inaccurate. As explained in Section I of this motion, all of the claims here are subsumed into the Coverage Contract's provisions for Personal Injury. Thus, even if there were separate wrongful acts committed by Price and Craddock, "[a]ll repetitions of the same basic **Offense** ... whether or not there ... is a variation in conduct constituting the offense, will be treated as one **Offense**, subject to a single coverage limit." (Coverage Contract at Sec. I(B)(5).) Additionally, serial or repeated instances of Personal Injury are treated as one wrongful act subject to a single coverage limit regardless of the number of people involved in committing them. (Coverage Contract at Sec. IV(D)(2).) Therefore, under the facts of this case, the Coverage Contract provides for only one \$1,000,000 coverage limit despite the fact that multiple acts were alleged.

The Order incorrectly focused upon the language "substantially the same injury or damage" in concluding that the coverage limit did not apply. (Order at p. 6.) Specifically, the Order

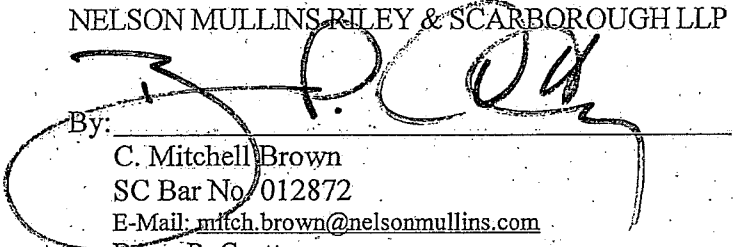
concluded that “the Plaintiff suffered separate and distinct damages” in the form of damages for wrongful death and damages for conscious pain and suffering, and held that these are not “‘substantially the same’ injury or damage.” (Order at pp. 6-7.) This misconstrues Section I(C)(9)’s provision that “[a] single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage.” Section I(C)(9) applies to limit coverage where substantially the same injury or damage serves as the basis for multiple claims. However, this is not the only provision in the Coverage contract regarding the application of the coverage limit. In addition to this provision, the Coverage Contract in Section IV(D)(2) provides that only one coverage limit will apply to multiple claims or claimants based on the same wrongful act. Thus, even if there are separate claims with different measures of damages, a single coverage limit applies where, as is the case here, the wrongful conduct constitutes a single offense as defined under the terms of the agreed upon Coverage Contract.

Conclusion

For the foregoing reasons, SCMIRF respectfully requests that this Court alter or amend its Order dated June 24, 2016, and find that there is only a total of \$1 million in indemnity coverage available under the terms of the SCMIRF Coverage Contract with the Town of Cottageville with respect to the verdict rendered against Cottageville and Price as well as the claims asserted against Craddock.

Respectfully submitted,

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Columbia, South Carolina

July 11, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

AUG 04 2016

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

Ashley Reeves as Personal Representative for the Estate
of Albert Carl "Bert" Reeves, ...

Respondent,

v.

South Carolina Municipal Insurance and Risk Financing
Fund, ...

Appellant.

NOTICE OF APPEAL

The South Carolina Municipal Insurance and Risk Financing Fund ("SCMIRF") hereby
appeals:

- (a) The Order of the Honorable Perry M. Buckner, III filed June 29, 2016 ("the June 29th Order"), granting in part Plaintiff Ashley Reeves' motion for summary judgment (attached as Exhibit A); and
- (b) The Order of the Honorable Perry M. Buckner, III filed July 25, 2016 ("the July 25th Order"), denying SCMIRF's motion to alter or amend the June 29th Order (attached as Exhibit B).

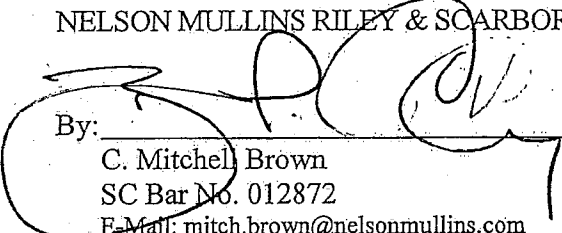
SCMIRF received written notice of entry of the July 25th Order on July 22, 2016.

Signature Page Attached

ROA_0660

Respectfully submitted,

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Columbia, South Carolina

August 4, 2016

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

Ashley Reeves as Personal
Representative for the Estate of
Albert Carl "Bert" Reeves,

Plaintiff,

vs.

South Carolina Municipal Insurance
and Risk Financing Fund [SCMIRF]

Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-15-135

ORDER

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SC Court of Appeals

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COLLETON COUNTY
COMMON PLEAS

This matter came before the Court on May 17, 2016, by way of the parties' cross-motions for Summary Judgment on the Plaintiff's Amended Complaint for Declaratory Judgment, filed on October 16, 2015. Present on behalf of the Plaintiff, Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, were Mullins McLeod, Esquire and Jackie Edgerton, Esquire. Present on behalf of the Defendant, South Carolina Municipal Insurance and Risk Financing Fund, hereinafter (SCMIRF), were Mitch Brown, Esquire and Mark Phillips, Esquire.

#1
PMB
The Parties mutually seek summary judgment on two issues and have submitted a *Stipulation of Facts and Issues*, containing *Exhibits A-D*¹, filed with the Amended Complaint.

The two questions stipulated by the parties are 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

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.

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.*?

BACKGROUND

The two issues presented to the Court for declaratory judgment arise out of two underlying federal lawsuits brought by Plaintiff 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 (the “Federal Lawsuit”), and (2) Civil Action No.: 2:14-cv-01918-DCN against John Craddock, individually (the “Craddock Lawsuit”).

#2
PMB
The Federal Lawsuit involving Randall Price 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. *Stipulation of Facts and Issues, Exhibit A, Verdict Forms and Judgment.*

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.*

After the above jury verdict in the Federal Lawsuit, Plaintiff settled the case, along with the Craddock Lawsuit, by a comprehensive settlement agreement. *See Exhibit 2, Judge Norton's Order Approving Settlement in the United States District Court for South Carolina and Settlement Agreement dated March 3, 2015.* The settlement agreement contains two contingent payments that are payable to Plaintiff, depending on the answers to the two stipulated questions that are presently before this Court by cross-motions for summary judgment.

ANALYSIS

- #3
Pmb
- I. 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?

"Insurance policies 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). Where the contract language is clear and unambiguous, "the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." *Beaufort County Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct.App.2011). However, when an insurance contract is capable of two meanings, it must be construed in the favor of the insured.

Beaufort County Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct.App.2011) (*citing Reynolds v. Wabash Life Ins. Co.*, 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968)).

During the time period relevant to Plaintiff's federal lawsuit against the Town of Cottageville and Officer Price, as well as Plaintiff's suit against Police Chief John Craddock, individually, SCMIRF provided coverage to the Town for certain risks through the 2011 Coverage Contract. *See Stipulation of Facts and Issues*, ¶ 8.

The Coverage Contract's opening provisions, Section I- General Provision, defines occurrence for the policy:

"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. Without limitation, all references to any type of injury arising out of or from an Occurrence or being caused by an Occurrence employ the foregoing meaning. Subject to the foregoing, "Occurrence" includes continuing exposure to the same harmful conditions. All such continuing exposure, damage, or injury shall be treated as one Occurrence.

Only when used to describe coverage limits on a per "Occurrence" basis or when otherwise describing whether an event or series of events constitutes one loss for coverage purposes or more than one loss, the word "Occurrence" means a covered event of the sort expressly described in the Insuring Agreement of the relevant Coverage Section pertaining to the loss or claim.

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P.B.
Stipulation of Facts and Issues, Exhibit D, Coverage Contract, p. 3, Sec. I(B)(4).

Plaintiff contends that the Coverage Contract defines occurrence based on negligent acts or omissions and not by a resulting injury. In the Plaintiff's view, the determination of an occurrence is based on action: "an accident," "an event or series of events," "continuing exposure to the same harmful conditions," and "a covered event of the sort expressly described in the Insuring Agreement." *Stipulation of Facts and Issues*, Exhibit D, Coverage Contract, p. 3, Sec. I(B)(4). Specifically, Plaintiff contends that the claims and separate verdicts rendered against the Town of Cottageville and Officer Price, as well as the separate claim against John

Craddock, create multiple covered occurrences under the policy, allowing for more than \$1,000,000 in coverage.

SCMIRF contends that Section IV of the policy, specifically governing Law Enforcement Liability, covers "Money Damages because of a Wrongful Act by a Member, a Law Enforcement Employee, or other Covered Persons(s) while acting in conjunction with Law Enforcement Employees." *Stipulation of Facts and Issues*, Exhibit D, Coverage Contract, p. 51, Sec. IV(A)(1). The "Wrongful Act" must be committed in the "course and scope of [the employee or covered person's] official duties, as provided under the 'South Carolina Tort Claims Act' where a South Carolina state law is involved." *Id.* Further, the "Wrongful Act" must result in:

- a. Property Damage or Bodily Injury which is first caused and first becomes manifest during the Coverage Period, provided the Wrongful Act amounts to an Occurrence; or
- b. Personal Injury or Advertising Injury which is first caused and first becomes manifest during the Coverage Period.

Coverage Contract, p. 51, Sec. IV(A)(1)(a)-(b).

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mb
Thus, according to SCMIRF, there are two routes by which coverage could arise under Law Enforcement Liability (Section IV) – coverage for "Bodily Injury" or coverage for "Personal Injury." Coverage for "Bodily Injury" being limited to "Wrongful Acts" that amount to an "Occurrence," which is defined as "an accident which results in bodily injury." *Coverage Contract*, p. 3, Sec. I(B)(4). Coverage for "Personal Injury" is limited to "Wrongful Acts" that constitute the commission of certain "Offenses," assault and battery and civil rights violations being the relevant "offenses" here. *Coverage Contract*, p. 64, Sec. IV(G)(18).

Therefore, SCMIRF concludes that under the terms of the Coverage Contract, the fact that a "Wrongful Act" is committed, alone, is insufficient to invoke coverage. Rather, there must be a "Wrongful Act ... which results in ... bodily injury", or results in the commission of a

certain "offense." *Coverage Contract*, p. 3, Sec. I(B)(4) & p. 64, Sec. IV(G)(18). According to SCMIRF coverage is not triggered without a resulting injury.

As part of the stipulation, the parties agreed that "no other facts are necessary for the Court to answer the stipulated issues. . ." Stipulation of Facts and Issues, ¶ 11.

The Court, in interpreting this Coverage Contract, must read it as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (citing Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). In interpreting the present Coverage Contract, the Court finds that ambiguities exist that create uncertainty as to coverage within the contract.

Although "occurrence" is defined in the policy, there is ambiguity as to whether "occurrence" is defined by different acts of negligence or the resulting damage. In addition, the duplication clause in the policy only allows a coverage limit for "substantially the same injury or damage."

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P.B.
In the Federal Lawsuit, Plaintiff sought to recover damages for wrongful death, as well as conscious pain and suffering, among other things. As noted above, counsel for the Defendant argues that coverage is triggered in part based on the damage suffered. Counsel contended that there is only one "wrongful death" and therefore only one "occurrence" under the policy. However, the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different. They clearly are not "substantially the same" injury or damage. Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including mental shock and suffering, wounded feelings, grief, sorrow, and loss of companionship. Ballard v. Ballard, 314 S.C. 40, 41-42, 443 S.E.2d 802, 802

(1994) (*citing Garner v. Houck*, 312 S.C. 481, 488, 435 S.E.2d 847, 850 (1993)); *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972). An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. *Boan v. Blackwell*, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001).

Therefore, even if the Coverage Contract is viewed as a damages policy for purposes of coverage determination as contended by counsel for the Defendant, the plaintiff suffered separate and distinct damages which could lead to additional coverage under these separate causes of action. The Court does not need to reach the question of supervision, retention, and hiring as a basis of separate "occurrences" within the policy, which was contended by counsel for the Plaintiff.

Additionally, the Coverage Contract also provides coverage in a single aggregate limit of \$1,000,000 for incidents involving "sexual abuse". *Stipulation of Facts and Issues*, Exhibit D, Coverage Contract, p. 30, Sec. III(D) & p. 52, Sec. IV(D)(3). The Plaintiff contends that because SCMIRF, the insurer in this case, chose to give aggregate limits for sexual abuse coverage, that they could have done the same for law enforcement or general liability if they wished in order to limit the coverage to an aggregate amount of one million dollars (\$1,000,000.00). There is no uncertainty or ambiguity in the policy, in the opinion of this Court, on the issue of coverage involving "sexual abuse."

Therefore, in construing the policy in favor of the insured, the Court GRANTS Plaintiff's Motion for Summary Judgment as to issue one and respectfully DENIES Defendant's Motion for Summary Judgment as to issue one.

II. 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.?

Plaintiff alleges that that SCMIRF engaged in bad faith with respect to its handling of the claims associated with the shooting, and ultimately the death, of Bert Reeves. *Am. Compl.* at ¶¶ 14-16.

The South Carolina Tort Claims Act, hereinafter ("TCA"), provides limitations on liability for torts asserted against the State and its political subdivisions. S.C. Code Ann. § 15-78-10 et seq. It provides that the "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 term "political subdivision" is defined under the TCA as:

[T]he 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).

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P.B.

SCMIRF contends that it is a "political subdivision" based on the foregoing definition, interpreting 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." SCMIRF relies on the Attorney General's opinions stating that the SCMIRF is an agency or department of the municipality members. S.C. Op. Att'y Gen., 014 WL 7405219 (S.C.A.G. December 17, 2014) & 1990 WL 599264 (S.C.A.G. July 25, 1990).

Plaintiff argues 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. State v. Ramsey, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014) (*referencing Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560–61, 713 S.E.2d 604, 609 (2011) (“Attorney General opinions, while persuasive, are not binding upon this Court.”)). Specifically, Plaintiff contends that section 15-78-30(h)'s phrase “any agency, governmental health care facility, department, or subdivision thereof” only qualifies the phrase “special purpose districts of the State” within this section. Pl.'s Memo. in Supp. of Sum. Judgmt. p. 15-16.

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 the following factors to determine whether an entity is the state or its political subdivision for purposes of coverage by the Tort Claims Act:

“[1] [W]hether 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 the nature of the function performed by the entity.”

Id. at 636, 743 S.E.2d at 814 (*citing* 81A C.J.S. States § 552 (Supp. 2013)).

Plaintiff contends that SCMIRF is merely a “fund”, which does not qualify as a “governmental entity” under the TCA and that the General Assembly did not create the SCMIRF. Pl.'s Memo. in Supp. of Sum. Judgmt. p. 15-16.

However, SCMIRF contends that it functions statewide in municipalities across the state; performs the work of the state by providing coverage contracts to political subdivisions of the state; is administered by an agency created by municipalities in accordance with the Tort Claims

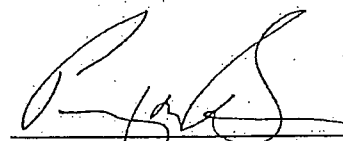
Act; and the funds are allotted and controlled by SCMIRF. Defendant's Memo. in Supp. of Sum. Judgmt. p. 8-9.

The Court, having fully considered all memoranda submitted; the evidence presented; and the oral arguments of counsel, GRANTS Defendant's Motion for Summary Judgment on issue two and respectfully DENIES Plaintiff's Motion for Summary Judgment on issue two.

CONCLUSION

Based on the foregoing, the Court hereby enters declaratory judgment as follows: (1) 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 do 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 and (2) that a tort claim for bad faith brought against SCMIRF is subject to the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10 et seq.).

AND IT IS SO ORDERED!


Perry M. Buckner, III
Circuit Court Judge

Dated: June 24, 2016
Walterboro, South Carolina

EXHIBIT B

RECEIVED

AUG 04 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT

) Ashley Reeves as Personal
) Representative for the Estate of
) Albert Carl "Bert" Reeves,

) Civil Action No. 2014-CP-15-135

) Plaintiff,

) vs.

ORDER

) South Carolina Municipal Insurance
) and Risk Financing Fund [SCMIRF]

) Defendant.

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COLLETON COUNTY
COMMON PLEAS

This matter comes by way of Plaintiff's Motion to Reconsider filed on July 6, 2016 and Defendant's Motion to Reconsider filed on July 11, 2016 pursuant to SCRCP 59(e). Defendant's Motion to Reconsider asks this Court to alter or amend its ruling in the Court's Order, dated June 24, 2016, which granted Plaintiff's Motion for Summary Judgment and denied Defendant's Motion for Summary Judgment as to issue one set forth in the Plaintiff's Amended Complaint. Plaintiff's Motion to Reconsider asks this Court to alter or amend its ruling in the same Order, dated June 24, 2016, which granted Defendant's Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment as to issue two.

El
2B
A motion made pursuant to Rule 59(e) "may in the discretion of the court be determined on briefs filed by the parties without oral argument." SCRCP 59(f). The Court may decide a Rule 59(e) motion without oral argument or additional briefs when the moving party has submitted a motion that sets forth arguments on the issues raised. Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994). The Court exercises its discretion to decide the

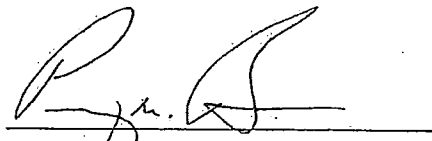
Motions to Reconsider without oral argument and both the Plaintiff and Defendant have submitted memorandum regarding these motions.

"The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992), (*citing* Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 1720, 100 L.Ed.2d 178, 184 (1988) (*citing* White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, L.Ed.2d 325, 330-31 (1982)). A Rule 59(e) motion, in essence, asks the Court to reconsider "all relevant facts, law, and arguments" to determine whether "it is has ruled wrongly". ION, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

With respect to Defendant's Motion for Reconsideration as to issue one, the Court has again reviewed and considered the parties' arguments and submissions, the transcript of the hearing, and the applicable law regarding the parties' Motions for Summary Judgment. I find my Order dated June 24, 2016 properly granted Plaintiff's Motion for Summary Judgment and denied Defendant's Motion for Summary Judgment as to issue one. Accordingly, Defendant's Motion for Reconsideration is respectfully DENIED.

#2
Pmb
With respect to Plaintiff's Motion for Reconsideration as to issue two, Plaintiff requests that the Court amend its Order, dated June 24, 2016, to find that the South Carolina Tort Claims Act does not apply and limit a claim for breach of contract. However, 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 South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq.?" *Stipulation of Facts and Issues*, at p. 4. Therefore, the issue raised in Plaintiff's Motion is not presently before this Court and Plaintiff's Motion for Reconsideration is respectfully DENIED.

AND IT IS SO ORDERED!


Perry M. Buckner, III

Dated: July 19, 2016

Walterboro, South Carolina

13

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

AUG 04 2016

Perry M. Buckner, III, Circuit Court Judge

SC Court of Appeals

Case No. 2014-CP-15-135

Ashley Reeves as Personal Representative for the Estate
of Albert Carl "Bert" Reeves, ...

Respondent,

v.

South Carolina Municipal Insurance and Risk Financing
Fund, ...

Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant South Carolina Municipal Insurance and Risk Financing Fund, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Notice of Appeal

Counsel Served:

W. Mullins McLeod, Jr., Esquire
Jacqueline LaPan Edgerton, Esquire
McLeod Law Group, LLC
P.O. Box 21624
Charleston, SC 29413

Meredith S. Keane
Meredith S. Keane
Paralegal

8/4, 2016

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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
Appeal No. 2016-001626

Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves
..... Respondent,

v.

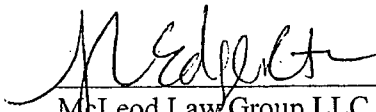
South Carolina Municipal Insurance and Risk Financing
Fund,.....Appellant.

CROSS NOTICE OF APPEAL

Ashley Reeves, as Personal Representative for the Estate of Albert Carl "Bert" Reeves, appeals the order of the Honorable Perry M. Buckner, III, dated June 24, 2016, granting in part summary judgment to South Carolina Municipal Insurance and Risk Financing (Exhibit A). Appellant received written notice of this order on June 27, 2016.

Thereafter, both parties filed timely motions to alter or amend the judgment, which Judge Buckner denied by order dated July 19, 2016 (Exhibit B). Respondent (cross-Appellant) received written notice of the order denying the motions to alter or amend judgment on July 25, 2016.

August 15, 2016


McLeod Law Group LLC
W. Mullins McLeod, Jr., SC Bar #14148
Jacqueline LaPan Edgerton, SC Bar #100920
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Charleston, South Carolina 29413
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Attorneys for Appellant

Other Counsel of Record:

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Columbia, SC 29211-1070

(803) 799-2000

Attorneys for Respondent

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
)

Ashley Reeves as Personal
Representative for the Estate of
Albert Carl "Bert" Reeves,

) Civil Action No. 2014-CP-15-135
)
)

) Plaintiff,
)

) vs.
)

) South Carolina Municipal Insurance
) and Risk Financing Fund [SCMIRF]
)

) Defendant.
)
)
)
)

ORDER

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COMMON PLEAS
COLLETON COUNTY
SOUTH CAROLINA

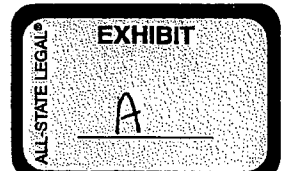
This matter came before the Court on May 17, 2016, by way of the parties' cross-motions for Summary Judgment on the Plaintiff's Amended Complaint for Declaratory Judgment, filed on October 16, 2015. Present on behalf of the Plaintiff, Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, were Mullins McLeod, Esquire and Jackie Edgerton, Esquire. Present on behalf of the Defendant, South Carolina Municipal Insurance and Risk Financing Fund, hereinafter (SCMIRF), were Mitch Brown, Esquire and Mark Phillips, Esquire.

‡1
2MB The Parties mutually seek summary judgment on two issues and have submitted a *Stipulation of Facts and Issues*, containing *Exhibits A-D*¹, filed with the Amended Complaint.

The two questions stipulated by the parties are 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

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.



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.*?

BACKGROUND

The two issues presented to the Court for declaratory judgment arise out of two underlying federal lawsuits brought by Plaintiff 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 (the “Federal Lawsuit”), and (2) Civil Action No.: 2:14-cv-01918-DCN against John Craddock, individually (the “Craddock Lawsuit”).

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B The Federal Lawsuit involving Randall Price 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. *Stipulation of Facts and Issues, Exhibit A, Verdict Forms and Judgment.*

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.*

After the above jury verdict in the Federal Lawsuit, Plaintiff settled the case, along with the Craddock Lawsuit, by a comprehensive settlement agreement. *See Exhibit 2, Judge Norton's Order Approving Settlement in the United States District Court for South Carolina and Settlement Agreement dated March 3, 2015.* The settlement agreement contains two contingent payments that are payable to Plaintiff, depending on the answers to the two stipulated questions that are presently before this Court by cross-motions for summary judgment.

ANALYSIS

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- I. 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?

"Insurance policies 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). Where the contract language is clear and unambiguous, "the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." *Beaufort County Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct.App.2011). However, when an insurance contract is capable of two meanings, it must be construed in the favor of the insured.

Beaufort County Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct.App.2011) (*citing* Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968)).

During the time period relevant to Plaintiff's federal lawsuit against the Town of Cottageville and Officer Price, as well as Plaintiff's suit against Police Chief John Craddock, individually, SCMIRF provided coverage to the Town for certain risks through the 2011 Coverage Contract. *See Stipulation of Facts and Issues*, ¶ 8.

The Coverage Contract's opening provisions, Section I- General Provision, defines occurrence for the policy:

"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. Without limitation, all references to any type of injury arising out of or from an Occurrence or being caused by an Occurrence employ the foregoing meaning. Subject to the foregoing, "Occurrence" includes continuing exposure to the same harmful conditions. All such continuing exposure, damage, or injury shall be treated as one Occurrence.

Only when used to describe coverage limits on a per "Occurrence" basis or when otherwise describing whether an event or series of events constitutes one loss for coverage purposes or more than one loss, the word "Occurrence" means a covered event of the sort expressly described in the Insuring Agreement of the relevant Coverage Section pertaining to the loss or claim.

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Stipulation of Facts and Issues, Exhibit D, Coverage Contract, p. 3, Sec. I(B)(4).

Plaintiff contends that the Coverage Contract defines occurrence based on negligent acts or omissions and not by a resulting injury. In the Plaintiff's view, the determination of an occurrence is based on action: "an accident," "an event or series of events," "continuing exposure to the same harmful conditions," and "a covered event of the sort expressly described in the Insuring Agreement." *Stipulation of Facts and Issues*, Exhibit D, Coverage Contract, p. 3, Sec. I(B)(4). Specifically, Plaintiff contends that the claims and separate verdicts rendered against the Town of Cottageville and Officer Price, as well as the separate claim against John

Craddock, create multiple covered occurrences under the policy, allowing for more than \$1,000,000 in coverage.

SCMIRF contends that Section IV of the policy, specifically governing Law Enforcement Liability, covers "Money Damages because of a Wrongful Act by a Member, a Law Enforcement Employee, or other Covered Persons(s) while acting in conjunction with Law Enforcement Employees." *Stipulation of Facts and Issues*, Exhibit D, Coverage Contract, p. 51, Sec. IV(A)(1). The "Wrongful Act" must be committed in the "course and scope of [the employee or covered person's] official duties, as provided under the 'South Carolina Tort Claims Act' where a South Carolina state law is involved." *Id.* Further, the "Wrongful Act" must result in:

- a. Property Damage or Bodily Injury which is first caused and first becomes manifest during the Coverage Period, provided the Wrongful Act amounts to an Occurrence; or
- b. Personal Injury or Advertising Injury which is first caused and first becomes manifest during the Coverage Period.

Coverage Contract, p. 51, Sec. IV(A)(1)(a)-(b).

Thus, according to SCMIRF, there are two routes by which coverage could arise under Law Enforcement Liability (Section IV) – coverage for "Bodily Injury" or coverage for "Personal Injury." Coverage for "Bodily Injury" being limited to "Wrongful Acts" that amount to an "Occurrence," which is defined as "an accident which results in bodily injury." *Coverage Contract*, p. 3, Sec. I(B)(4). Coverage for "Personal Injury" is limited to "Wrongful Acts" that constitute the commission of certain "Offenses," assault and battery and civil rights violations being the relevant "offenses" here. *Coverage Contract*, p. 64, Sec. IV(G)(18).

Therefore, SCMIRF concludes that under the terms of the Coverage Contract, the fact that a "Wrongful Act" is committed, alone, is insufficient to invoke coverage. Rather, there must be a "Wrongful Act ... which results in ... bodily injury", or results in the commission of a

certain "offense." *Coverage Contract*, p. 3, Sec. I(B)(4) & p. 64, Sec. IV(G)(18). According to SCMIRF coverage is not triggered without a resulting injury.

As part of the stipulation, the parties agreed that "no other facts are necessary for the Court to answer the stipulated issues. . ." Stipulation of Facts and Issues, ¶ 11.

The Court, in interpreting this Coverage Contract, must read it as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (citing Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). In interpreting the present Coverage Contract, the Court finds that ambiguities exist that create uncertainty as to coverage within the contract.

Although "occurrence" is defined in the policy, there is ambiguity as to whether "occurrence" is defined by different acts of negligence or the resulting damage. In addition, the duplication clause in the policy only allows a coverage limit for "substantially the same injury or damage."

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In the Federal Lawsuit, Plaintiff sought to recover damages for wrongful death, as well as conscious pain and suffering, among other things. As noted above, counsel for the Defendant argues that coverage is triggered in part based on the damage suffered. Counsel contended that there is only one "wrongful death" and therefore only one "occurrence" under the policy. However, the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different. They clearly are not "substantially the same" injury or damage. Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including mental shock and suffering, wounded feelings, grief, sorrow, and loss of companionship. Ballard v. Ballard, 314 S.C. 40, 41-42, 443 S.E.2d 802, 802

(1994) (*citing Garner v. Houck*, 312 S.C. 481, 488, 435 S.E.2d 847, 850 (1993)); *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972). An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. *Boan v. Blackwell*, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001).

Therefore, even if the Coverage Contract is viewed as a damages policy for purposes of coverage determination as contended by counsel for the Defendant, the plaintiff suffered separate and distinct damages which could lead to additional coverage under these separate causes of action. The Court does not need to reach the question of supervision, retention, and hiring as a basis of separate "occurrences" within the policy, which was contended by counsel for the Plaintiff.

Additionally, the Coverage Contract also provides coverage in a single aggregate limit of \$1,000,000 for incidents involving "sexual abuse". *Stipulation of Facts and Issues*, Exhibit D, Coverage Contract, p. 30, Sec. III(D) & p. 52, Sec. IV(D)(3). The Plaintiff contends that because SCMRF, the insurer in this case, chose to give aggregate limits for sexual abuse coverage, that they could have done the same for law enforcement or general liability if they wished in order to limit the coverage to an aggregate amount of one million dollars (\$1,000,000.00). There is no uncertainty or ambiguity in the policy, in the opinion of this Court, on the issue of coverage involving "sexual abuse."

Therefore, in construing the policy in favor of the insured, the Court GRANTS Plaintiff's Motion for Summary Judgment as to issue one and respectfully DENIES Defendant's Motion for Summary Judgment as to issue one.

II. 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.?

Plaintiff alleges that that SCMIRF engaged in bad faith with respect to its handling of the claims associated with the shooting, and ultimately the death, of Bert Reeves. *Am. Compl.* at ¶¶ 14-16.

The South Carolina Tort Claims Act, hereinafter ("TCA"), provides limitations on liability for torts asserted against the State and its political subdivisions. S.C. Code Ann. § 15-78-10 et seq. It provides that the "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 term "political subdivision" is defined under the TCA as:

[T]he 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).

SCMIRF contends that it is a "political subdivision" based on the foregoing definition, interpreting 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." SCMIRF relies on the Attorney General's opinions stating that the SCMIRF is an agency or department of the municipality members. S.C. Op. Att'y Gen., 014 WL 7405219 (S.C.A.G. December 17, 2014) & 1990 WL 599264 (S.C.A.G. July 25, 1990).

Plaintiff argues 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. State v. Ramsey, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014) (*referencing Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011) ("Attorney General opinions, while persuasive, are not binding upon this Court.")). Specifically, Plaintiff contends that section 15-78-30(h)'s phrase "any agency, governmental health care facility, department, or subdivision thereof" only qualifies the phrase "special purpose districts of the State" within this section. Pl.'s Memo. in Supp. of Sum. Judgmt. p. 15-16.

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 the following factors to determine whether an entity is the state or its political subdivision for purposes of coverage by the Tort Claims Act:

"[1] [W]hether 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 the nature of the function performed by the entity."

Id. at 636, 743 S.E.2d at 814 (*citing* 81A C.J.S. States § 552 (Supp. 2013)).

Plaintiff contends that SCMIRF is merely a "fund", which does not qualify as a "governmental entity" under the TCA and that the General Assembly did not create the SCMIRF. Pl.'s Memo. in Supp. of Sum. Judgmt. p. 15-16.

However, SCMIRF contends that it functions statewide in municipalities across the state; performs the work of the state by providing coverage contracts to political subdivisions of the state; is administered by an agency created by municipalities in accordance with the Tort Claims

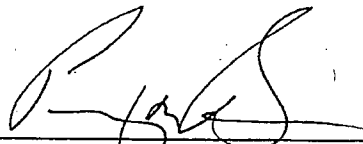
Act; and the funds are allotted and controlled by SCMIRF. Defendant's Memo. in Supp. of Sum. Judgmt. p. 8-9.

The Court, having fully considered all memoranda submitted; the evidence presented; and the oral arguments of counsel, GRANTS Defendant's Motion for Summary Judgment on issue two and respectfully DENIES Plaintiff's Motion for Summary Judgment on issue two.

CONCLUSION

Based on the foregoing, the Court hereby enters declaratory judgment as follows: (1) 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 do 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 and (2) that a tort claim for bad faith brought against SCMIRF is subject to the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10 et seq.).

AND IT IS SO ORDERED!


Perry M. Buckner, III
Circuit Court Judge

Dated: June 24, 2016
Walterboro, South Carolina

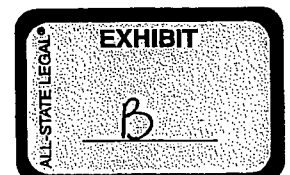
IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-15-135

ORDER

This matter comes by way of Plaintiff's Motion to Reconsider filed on July 6, 2016 and Defendant's Motion to Reconsider filed on July 11, 2016 pursuant to SCRCP 59(e). Defendant's Motion to Reconsider asks this Court to alter or amend its ruling in the Court's Order, dated June 24, 2016, which granted Plaintiff's Motion for Summary Judgment and denied Defendant's Motion for Summary Judgment as to issue one set forth in the Plaintiff's Amended Complaint. Plaintiff's Motion to Reconsider asks this Court to alter or amend its ruling in the same Order, dated June 24, 2016, which granted Defendant's Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment as to issue two.

A motion made pursuant to Rule 59(e) “may in the discretion of the court be determined on briefs filed by the parties without oral argument.” SCRCP 59(f). The Court may decide a Rule 59(e) motion without oral argument or additional briefs when the moving party has submitted a motion that sets forth arguments on the issues raised. Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994). The Court exercises its discretion to decide the



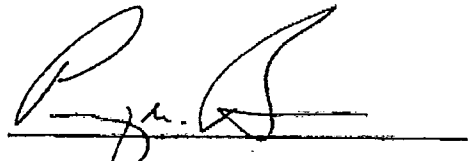
Motions to Reconsider without oral argument and both the Plaintiff and Defendant have submitted memorandum regarding these motions.

"The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992), (citing Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 1720, 100 L.Ed.2d 178, 184 (1988) (citing White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, L.Ed.2d 325, 330-31 (1982))). A Rule 59(e) motion, in essence, asks the Court to reconsider "all relevant facts, law, and arguments" to determine whether "it is has ruled wrongly". I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

With respect to Defendant's Motion for Reconsideration as to issue one, the Court has again reviewed and considered the parties' arguments and submissions, the transcript of the hearing, and the applicable law regarding the parties' Motions for Summary Judgment. I find my Order dated June 24, 2016 properly granted Plaintiff's Motion for Summary Judgment and denied Defendant's Motion for Summary Judgment as to issue one. Accordingly, Defendant's Motion for Reconsideration is respectfully DENIED.

#2
Pmb
With respect to Plaintiff's Motion for Reconsideration as to issue two, Plaintiff requests that the Court amend its Order, dated June 24, 2016, to find that the South Carolina Tort Claims Act does not apply and limit a claim for breach of contract. However, 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 South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq.?" *Stipulation of Facts and Issues*, at p. 4. Therefore, the issue raised in Plaintiff's Motion is not presently before this Court and Plaintiff's Motion for Reconsideration is respectfully DENIED.

AND IT IS SO ORDERED!


Perry M. Buckner, III

Dated: July 19, 2016

Walterboro, South Carolina

13