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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

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.

PETITION FOR REHEARING *EN BANC*

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Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Respondent/Appellant Ashley Reeves, as Personal Representative for the Estate of Albert Carl "Bert" Reeves, respectfully petitions this Honorable Court for a rehearing of its Opinion filed May 1, 2019, whereby the Court misapplied the rules of contract construction, resulting in an erroneous interpretation of the Coverage Contract as providing a single coverage limit of $1,000,000 for the separate and distinct acts of the Town of Cottageville, Police Officer Price, and Police Chief John Craddock.

Further, the Opinion misconstrues a municipality with an insurance fund to incorrectly hold that the South Carolina Municipal Insurance Reserve Fund [SCMIRF] would be subject to the Tort Claims Act, S.C.Code Ann. § 15-78-10 *et seq.*, in a suit for the tort of bad faith.

Request for Rehearing *En Banc*

If the Opinion stands, its implication has a far and devastating reach across South Carolina, leaving municipalities and their local law enforcement officers with no insurance coverage when faced with claims of civil rights violations.

First, the Opinion incorrectly couches the overarching appellate issue as whether a claimant is entitled to coverage under the contract. However, the Coverage Contract provides for coverage to its insureds, not to claimants. This first error leads the Court's contract interpretation to focus on whether the claimants will get more than $1,000,000 in resolution of the harmful acts by the Town, by Officer Price, and by Chief Craddock, rather than correctly focusing on how much coverage the Coverage Contract provides to separate insureds for separate and distinct acts.

Second, the Opinion clearly errs in the "three-part analysis" it creates to determine whether the Coverage Contract provides for more than $1,000,000 in coverage for the separate acts of the Town, Officer Price, and Chief Craddock. The Court starts its insurance coverage analysis with

the "Definitions" in Section IV, Law Enforcement Liability, rather than starting where it should with the coverage section, the "Coverage Agreement", which provides the liability insurance coverage for the Member Town and its law enforcement employees. (R. p. 169-170; R. p. 156). By starting the coverage interpretation specifically with the definition of "Wrongful Act" the Court falsely narrows the liability coverage for towns and law enforcement employees to what is contained in the definition of "Wrongful Act". What the Opinion fails to address and overlooks is that "Wrongful Act", by definition, does not include civil rights violations

By the Contract's definition, "Wrongful Act" only occurs when the Member or Covered Person is "acting within both the course and scope of his or her official duties, as provided under the 'South Carolina Tort Claims Act'". (R. p 169-170). A covered person is not acting as provided under the Tort Claims Act when he violates an individual's civil rights, and the South Carolina Tort Claims Act does not provide liability for civil rights violations by law enforcement— actions brought under 42 U.S.C. § 1983. Thus, civil rights violations will never be a "Wrongful Act" under this Contract. If the definition is the starting point, there never will be coverage for civil rights violations.

However, the Contract's plain language in the "Coverage Agreement" provides coverage for Wrongful Acts by the Member Town and its law enforcement employees that result in Bodily Injury or Personal Injury. (R. p. 156). Section IV then explicitly defines Personal Injury to include "civil rights violations". (R. p. 169). Therefore, reading the Contract as a whole from Coverage through definitions, and in accordance with the rules of contract construction favoring coverage, the Contract clearly provides coverage for the Town and its employees, Price and Cradock's, separate wrongful acts, which resulted in bodily injury and personal injury. *See Walde v. Ass'n Ins. Co.*, 401 S.C. 431, 439, 737 S.E.2d 631, 635 (Ct. App. 2012).

In addition, the Court erroneously concludes: "Under this definition, we find in this case there is a Wrongful Act—the actions and omissions of Cottageville and Price which violated Reeves' rights and ultimately led to his death." (Opinion p. 12). This conclusion conflates the Town's Wrongful Acts with Price's Wrongful Acts (and makes no mention of Craddock's Wrongful Acts) and ignores the plain language of the Coverage Agreement that provides payment for money damages (1) "because of a **Wrongful Act** by a **Member**, a **Law Enforcement Employee**, or other **Covered Person(s)**..." that (2) "results in a. **Property Damage** or **Bodily Injury**... or b. **Personal Injury** or **Advertising Injury**...." (R. p. 156). The Court mistakenly combines the separate and distinct Wrongful Acts of three insureds into one Wrongful Act, finding the one Wrongful Act caused one civil rights violation and the one death of Bert Reeves.

This Opinion ignores that the Coverage Agreement explicitly covers the Town, Price, and Craddock's Wrongful Acts separately and that the Coverage Agreement separately covers Wrongful Acts that cause different injuries, bodily injury and personal injury. The Court disregards that the three insureds' wrongful acts caused the beneficiary/children's wrongful death injuries and also disregards that the children's injuries are entirely separate and independent from Reeves's injuries. *See, e.g, Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 81 S.E. 89 (1914) (unequivocal that the claims and damages in wrongful death and survival actions are separate and independent from each other).

In short, the Opinion interprets the Contract to cover one wrongful act, by one person, resulting in one injury to Reeves, in direct contradiction of the facts presented for review of separate and distinct wrongful acts by three insureds and also in violation of the plain language of the Contract's coverage provision. If the Court's contract construction is allowed to stand, it will have harsh and vast implications, leaving Towns and their local law enforcement employees across

South Carolina with zero insurance coverage under Section IV for civil rights violations, despite the clear terms of the coverage section providing coverage.

Due to the exceptional importance of the issue, Respondent/Appellant suggests that the matter be heard *en banc*. Furthermore, the Opinion deviates from the general rules of contract construction and, consequently, rehearing by the full court "is necessary to secure or maintain the uniformity of its decisions" as to the solidity of the canons of contract construction. Rule 219(a), SCRAP.

ARGUMENT FOR RE-HEARING

I. The Opinion Misapplies the Well-Established Rules of Contract Construction, Resulting in an Incorrect Interpretation of the Contract with Devastating Impact on Municipalities and Their Local Law Enforcement.

The Opinion correctly cites, but misapplies, the governing rules of contract construction to the Coverage Contract.

Unmistakably, the general rules of contract construction govern insurance policies. *E.g. USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008); *Century Indem. Co. v. Golden Hills Builders, Inc.,* 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). The court's role in insurance contract construction is clear:

> Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.

Clegg, 377 S.C. at 655, 661 S.E.2d at 797 (internal citations omitted). Furthermore, "[p]olicies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer." *Walde*, 401 S.C. at 439, 737 S.E.2d at 635 (internal citations omitted).

The court is to read the insurance contract as a whole document and not point out a single sentence or clause in order to create an ambiguity. *Yarborough v. Phoenix Mut. Life Ins. Co.,* 266

S.C. 584, 592, 225 S.E.2d 344, 348 (1976); *Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). Moreover, "[w]hether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." *Canal Ins. Co. v. Nat'l House Movers, LLC*, 414 S.C. 255, 261, 777 S.E.2d 418, 421 (Ct. App. 2015) (quoting *Farr v. Duke Power Co.,* 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975) (citation omitted)).

Even if there is an ambiguity in the contract, the court is to construe any ambiguity in the favor of the insured. *E.g. Beaufort Cty. Sch. Dist.*, 392 S.C. at 516, 709 S.E.2d at 90.; *Reynolds v. Wabash Life Ins. Co.,* 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968) (An insurance contract which is "capable of two meanings must be construed in favor of the insured."); *Quinn v. State Farm Mut. Auto. Ins. Co.,* 238 S.C. 301, 304, 120 S.E.2d 15, 16 (1961) (Where the words of an insurance policy are capable of two reasonable interpretations, the interpretation most favorable to the insured will be adopted.); *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 49, 717 S.E.2d 589, 594 (2011) ("We look to the definition of occurrence, which is ambiguous and must be construed in favor of the insured, and find coverage was triggered.").

The Court's erroneous contract interpretation is the product of creating a "three-part analysis" to determine liability coverage for insureds that first looks at whether there is a Wrongful Act, as defined by Section IV's Definition of the Wrongful Act; second, whether the Wrongful Act resulted in either (a) Bodily Injury or (b) Personal Injury; and third, where there is Bodily Injury, whether the Bodily Injury falls exclusively under the Personal Injury coverage.

The fatal flaw of the "three-part analysis" is that it does not start where contract construction requires— with the actual liability coverage provision found in the Coverage Agreement. (R. p. 156). Instead it starts with the definition:

> **"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 scope of his or her official duties, as provided under the "South Carolina Tort Claims Act.

(R. p. 169-170).

The explicit conduct constituting a "Wrongful Act" does not include conduct actionable under 42 U.S.C. § 1983 or intentional conduct. 42 U.S.C. § 1983 provides a vehicle for bringing an action for constitutional or federal law violations against state actors committed specifically when acting "under color of state law". Acting "under the color of state law" means the state actor "exercised the power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed by the authority of the state. *Revenue v. Charles County Comm'rs*, 883 F.2d 870, 872 (4th Cir. 1989) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). Liability under 42 U.S.C. § 1983 also rests on the state actor acting with some intent to harm that is unjustifiable by any government interest; the conduct "shocks the conscience". *E.g. County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 849 (1998); *Slaughter v. Mayor of Baltimore*, 682 F.3d 317, 321 (4th Cir. 2012). Thus, civil rights violations necessarily occur when the state actor acts outside the Tort Claims Act. Moreover, the Tort Claims Act does not provide for liability for civil rights violations, and, accordingly, civil rights violations will never be Wrongful Acts under this Contract. Therefore, if the definition of Wrongful Act is the starting point for the coverage analysis, then

coverage for Towns and their law enforcement in civil rights actions will never be covered by this Contract. As it stands, the impact of the Opinion leaves municipalities and local law enforcement unduly exposed to personal liability.

Another flaw with the Court's "three-part analysis" is that it analyzes the separate acts of the town, Price, and Craddock as one act resulting in the shooting death of Bert Reeves. The Court fails to address the multiple insureds who have committed separate and distinct Wrongful Acts and, instead, subsumes all the insureds' actions into one Wrongful Act without any basis and in contradiction of the plain language of the Contract.

Specifically, the Court's analysis ignores that the Wrongful Acts at issue for coverage also includes the Town's negligent hiring of Price, supervision of Price, retention of Price, and failure to train Price, as well as Chief Craddock's deliberate indifference in his supervision of Price the day of the shooting. Thus, there is not only one act at issue for liability coverage; not only one act at issue for a determination as to whether it resulted in either bodily injury or personal injury; and not only one act at issue for a determination as to whether it resulted in bodily injury that falls exclusively under personal injury. The Opinion is devoid of analyzing the separate and distinct acts of the Town, Officer Price, and Chief Craddock to determine the issue before it: whether the Coverage Contract provides for more than $1,000,000 in coverage for the three insureds' separate Wrongful Acts.

Proper Contract Interpretation

The Coverage Contract's Section IV, Law Enforcement Liability Contract Declarations, governs the insureds' conduct at issue here. (R. p. 155-170). The Law Enforcement Liability coverage is a "per occurrence" policy, providing a liability limit of $1,000,000 "per occurrence".

(R. p. 155). Section IV provides what insurance coverage is provided in its first full paragraph, Section IV.A.1:

> **A. Coverage Agreements**
>
> 1. Law Enforcement Employees Coverage
> 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...

Sec. IV.A.1 (R. p. 156). The plain language is clear that the Contract provides coverage for liability of not only the Member town, but its law enforcement employees and other covered persons as well and provides coverage for Wrongful Acts of each that results in either bodily injury or personal injury.

Section IV distinctly and separately defines Bodily Injury and Personal Injury within this Section:

> "**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**.

(R. p. 166) **********

"Personal Injury" in this Section means only the following **Offenses** committed in the course of the **Member's** law enforcement activities:

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;

d. False or improper service of process;

e. The publication or utterance of a libel or slander or of other defamatory or disparaging material about an individual or an organization, or a publication or utterance in violation of an individual's right to privacy; except publications or utterances in the course of or related to advertising, broadcasting, internet, or telecasting activities by or on behalf of the **Named Member**;

f. Humiliation or mental distress caused by the foregoing provided that such humiliation or distress produces physical symptoms requiring medical attention.

(R. p. 169).

The Wrongful Acts at issue here are (1) the Town's negligent hiring, supervision, retention, and failure to train Officer Price; (2) Officer Price's negligence; (3) the Town's municipal liability for civil rights violations under § 1983; (4) Officer Price's civil rights violations under § 1983; and (5) Chief Craddock's supervisory liability for civil rights violations under § 1983. (R. pp. 87-94). The Town's Wrongful Acts of negligently hiring Price, supervising him, retaining him, and failing to train him occurred over 18 months prior to Officer Price shooting Reeves on May 16, 2011. Officer Price's shooting and killing Reeves is a separate and distinct Wrongful Act by Price, and Chief Craddock's deliberate indifference to Price's violations of Reeves's civil rights on the day of the shooting is a separate and distinct Wrongful Act by Craddock. Furthermore, in the civil trial, the jury specifically found multiple and distinct acts that constituted constitutional violations

and multiple independent acts of negligence by Officer Price and the Town and that each act proximately caused Reeves's and his children's injuries. Had the jury not found against the Town, the verdict against Officer Price could still stand, and vice versa.

Per the Coverage Agreement, the Town and Price's negligence actionable under the Tort Claims Act did not cause Personal Injury, because to be a Personal Injury, the offensive act must be one of the enumerated offenses listed in the Personal Injury definition. However, the Town and Price's Wrongful Acts of negligence resulted in Bodily Injury, specifically the physical injury and conscious pain and suffering of Bert Reeves and the separate injuries to the beneficiary/children of their pain and suffering and pecuniary damages of losing their father. Thus, the Town and Price's Wrongful Acts of negligence resulting in Bodily Injury are covered under Section IV.A.1.a liability coverage.

The Town, Price, and Craddock's Wrongful Acts causing the civil rights violations of Reeves are covered by the Coverage Agreement as Wrongful Acts which resulted in Personal Injury. Again, to be a Personal Injury, the offensive act must be one of the enumerated offenses listed in the Personal Injury definition, which clearly includes "violation of civil rights". Reeves is the only claimant who suffered a "violation of civil rights". Therefore, the Contract in Section IV.A.1.b provides coverage for the Member town, Officer Price, and Chief Craddock for the Wrongful Acts taken by each that caused Reeves's Personal Injury. Therefore, a proper reading of the Contract "as a whole document" establishes that civil rights violations are explicitly covered in the liability coverage for Towns and their law enforcement employees. *See Beaufort Cty. Sch. Dist.*, 392 S.C. at 516.

Accordingly, the Opinion clearly errs in finding only one Wrongful Act and then, in turn, concluding that the one Wrongful Act caused one Bodily Injury that subsumes into the Reeves's

Personal Injury. Bodily Injury and Personal Injury for coverage purposes are clearly defined as separate and distinct within the Coverage Section (R. p. 156) and within the definitions (R. p.166, 169). Further, Section IV specifically excludes Personal Injury from its definition of Bodily Injury. The Court errs in ignoring the Bodily Injury caused by the negligent Wrongful Acts of the Town and Price that resulted in Bodily Injury to Reeves and to his beneficiary/children.

In doing so the Court disregards the plain language contained in the coverage agreement in Section IV. Under Section IV, the Town (as a Member) and Price and Craddock (as law enforcement employees/covered persons) each are afforded insurance coverage for their Wrongful Acts that result in Bodily Injury, as well as coverage for their Wrongful Acts that result in Personal Injury. This distinction has real meaning for coverage purposes. Because the children's civil rights were not violated, the policy provides the Town and Price insurance coverage for the children's injuries under the Bodily Injury coverage in Section IV, not under Personal Injury. Section IV clearly provides coverage for Wrongful Acts that result in Bodily Injury AND Wrongful Acts that result in Personal Injury. The Court erroneously holds that Bodily Injury and Personal Injury are one and the same.

Furthermore, the Court's interpretation of Section IV's coverage and limitations to coverage is impermissibly based on language and definitions from Section I, General Provisions. The Court inserts Section I's definitions of occurrence and offense into Section IV to defeat the plain meaning of Section IV's Coverage for Wrongful Acts that result in Bodily Injury or Personal Injury. The Court's action is contrary to the direction in Section 1, General Provisions that the general provisions apply "unless specific provisions are contained in the appropriate section." (R. p. 108). Specific provisions on liability coverage and the definitions of bodily injury and personal injury are contained within Section IV, as are the limitations of liability applicable to Section IV

coverage. Thus, the Court erred in going to Section 1 for its determination as to coverage and the amount of coverage available for these insureds under Section IV.

How Much Coverage is Provided

Having answered what coverage is provided under the Contract, the next question is how much coverage is provided to the three insureds for their Wrongful Acts that resulted in Bodily Injury and Personal Injury. Section IV contains its own explicit "Limit of Liability" section. (R. p. 156-157). Limit of Liability Part 1 applies specifically and only to "any action or claim brought under...the Tort Claims Act", limiting liability as:

> 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**.

(R. p. 156-157). Accordingly, the language is clear that a single limit of $1,000,000 will be provided to cover a Member town for its liability for negligence under the Tort Claims Act for "all claims", despite there being the Member town and a Covered Person, Price, acting and causing two separate injuries, that being Reeves's survival action damages and the beneficiary/children's wrongful death damages. However, the plain language of Part 1 does not address limitations of liability for Wrongful Acts that result in civil rights actions brought under § 1983.

Moving to Part 2 of the "Limit of Liability", it provides that:

> 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 the Contract, the total liability of [SCMIRF] any one occurrence/accident/wrongful act will be $1,000,000.00 per **Member**..."

(R. p. 157). The language referencing "occurrence/accident/wrongful act" recognizes that each liability section uses different words to identify the conduct that is covered in that section: for

example, General Liability provides coverage for an "Occurrence"; Law Enforcement Liability for a "Wrongful Act"; Public Officials Liability for "Personal Injury or Advertising Injury"; and Auto Liability for "Bodily Injury" and "Property Damage". (R. p. 134, 156, 172, 188). Any one act that is covered in its corresponding Section, regardless of what it is called, will receive one coverage limit.

Part 2 goes on to limit SCMIRF's liability for "for any one occurrence/wrongful act" "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..." *Id.* Again, the amount of coverage limitation applies for any one wrongful act, and within one wrongful act, it applies a single coverage limit even if there are more than one covered persons or claims involved in that one wrongful act. The plain language does NOT say that for multiple and distinct Wrongful Acts there will be one coverage limit.

Moreover, the next paragraph of Part 2 explicitly states the limitation of "continuing, serial, or repeated instances of Personal Injury or Advertising Injury will be considered as one occurrence/wrongful act." Thus, where a wrongful act repeats or continues to cause Personal Injury, that wrongful act causing repeated injury gets one coverage limit, not a coverage limit for each instance the wrongful act caused personal injury. For example, the Town's violations of Reeves's civil rights by its deliberate indifference in its supervision of Officer Price occurred over the course of a year or more. Yet under this limitation, the Town is covered with one coverage limit for its wrongful acts causing Reeves's personal injury.

In contrast, Part 1 of the Limits of Liability states differently that for claims under the Tort Claims Act, "[i]n no event shall the total amount available to pay all claims for any one Member" exceed the single coverage limit. Part 1 is right above Part 2, demonstrating that SCMIRF

understood how to articulate the concept of applying a single coverage limit to all claims verses applying a single coverage limit for each "one" wrongful act. SCMIRF explicitly treated claims under the Tort Claims Act and other claims differently for how much coverage would be provided in this Contract. *See Beaufort Co. School Dist.*, 392 S.C. at 517-518, 709 S.E.2d at 91-92 (holding no error in trial court's determination that demonstrated use of the singular and plural in a contract shows insurer understood how to articulate the concept of the plural when it wanted to).

Furthermore, if SCMIRF and the Town had wanted to have a coverage contract that applied a special aggregate limit to civil rights violations, they could have. In fact, in the very next paragraph of the Limit of Liability, it provides for a special aggregate limit for the amount of coverage for negligent supervision resulting in sexual abuse. (R. p. 157). Clearly, SCMIRF also knew how to explicitly provide for a single aggregate coverage limit, and, by the plain language of the Contract, there is no single aggregate limit applicable to civil rights violations. Following the "rule that enumeration of particular things excludes idea of something else not mentioned"— or "expressio unius est exclusio alterius"— supports that if SCMIRF had wanted to sell its Member a single aggregate limit policy for civil rights violations, it could have and would have explicitly stated the aggregate limit in the policy. *See Pennsylvania Nat'l Mutual Casualty Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App.1984). In addition, the special aggregate limit for the amount of coverage for sexual abuse liability limits coverage "for any claim", not for "any one occurrence/wrongful act". (R. p. 157). Again, demonstrating that SCMIRF distinguished between limits on claims and limits on a distinct wrongful act.

Lastly, Part 2 concludes with "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." *Id.* Therefore, if a Wrongful Act falls under

more than one section for liability coverage, it will only be covered once with one limit of $1,000,000. For example, if a law enforcement employee is involved in a police cruiser wreck, liability coverage may fall under Law Enforcement Liability and Auto Liability, but the Wrongful Act (the wreck) will only be covered once with one coverage limit of $1,000,000— not covered twice, each with $1,000,000.

In sum, the Limitation of Liability Part 2 limits coverage within one Wrongful Act, and nowhere does the Contract's plain language state that a single coverage limit applies to cover separate and distinct Wrongful Acts of civil rights violations by separate insureds. Therefore, based on the Contract Coverage and its limitations, the amounts of coverage available here for the three insureds are: the Member town has $1,000,000 in coverage for all of the Tort Claims Act negligence claims resulting in bodily injury to Reeves and the beneficiary/children; the Member town has $1,000,000 in coverage for its Wrongful Acts resulting in personal injury to Reeves; Officer Price has $1,000,000 in coverage for his Wrongful Acts resulting in personal injury to Reeves; and Chief Craddock has $1,000,000 in coverage for his Wrongful Act resulting in personal injury to Reeves.

To note, the Opinion completely fails to analyze the applicable coverage limitation provision here under Section IV's Limitation of Liability Section. Instead, the Court cites Section IV's Limitation of Liability without discussion and later moves on to apply only Section I's "No Duplication of Coverage or Coverage Limits" provision. (R. p. 112).

First and foremost, the Court violates the Contract's direction that the General Provisions Section does not apply where "specific provisions are contained in the appropriate section." (R. p. 08). Thus, the Court erred in applying the General Provisions' clause on limitations to liability instead of the liability limitations provision found within Section IV, the appropriate Section under

review for coverage and any limitations on coverage. The Court should not have analyzed Section I's "No Duplication of Coverage or Coverage Limits", as it simply does not apply here.

However, even if the General Provisions' "No Duplication" clause is applied here, it still does not limit the coverage available to the three insureds, as the Court mistakenly concluded. The "No Duplication of Coverage" provision first 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.

(R. p. 112). This is a repeat of the same limitation in Section IV's Limit of Liability Part 2, that there will be no duplication of policy coverage for an act that may fall under more than one coverage section. (R. p. 157). Where an act may fall under more than one coverage section, that distinct act will be covered only once and covered by a single limit. The No Duplication provision does NOT say that three insureds with separate acts have one coverage limit. The provision simply does not say what the Court interprets and applies it to say. Also, nowhere in Section I's "No Duplication" clause does it refer to Wrongful Act, which is distinctly at issue for coverage in Section IV, further underscoring that Section 1's "No Duplication" clause does not apply,

The "No Duplication of Coverage" provision concludes with:

> 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.

(R. p. 112). The Court interprets this part of the clause to erroneously hold that for coverage purposes "[b]ecause the Personal Injury caused Bert Reeves's death and Bert Reeves's death is the basis for all of Reeves's claims, we find Reeves's claims involve 'substantially the same injury or

damage' contemplated by the duplication clause" and applies "to limit coverage to a single Coverage Limit". (Opinion, p. 14-15).

Reeves's death is not the only injury, and Reeves is not the only claimant. The Court completely ignores that the beneficiary children not only have separate claims from Reeves but their own separate and unique damages from Reeves as well. If left to stand, the Court's Opinion completely upends over a hundred years of law on wrongful death and survival actions and corresponding damages in our State.

There are two separate, independent causes of action that may exist upon the death of an injured person: a wrongful death action by the decedent's beneficiaries and the survival of the decedent's own claim for his injuries. Our Legislature has codified the actions separately. *See* S.C.Code Ann. §15-5-90 (right of action for personal injuries survives the death of the injured to be brought by the decedent's estate on behalf of his estate); S.C.Code Ann. §§ 15-51-10 & 20 (civil action may be brought for the wrongful death of a decedent for the benefit of the surviving beneficiaries). Moreover, long established case precedent is crystal clear that a survival action and a wrongful death action are entirely separate and independent from each other:

> While the party plaintiff is nominally the same as to each cause of action [where estate representative and beneficiary is the same], in reality his relation to and interest in each is entirely separate and distinct. In the one he is the representative of the estate of the deceased, and the recovery, if any, is for damages resulting from the injury to deceased, and the amount recovered will go into his hands as assets of the estate, liable for the payment of debts and other claims against the estate. In the other he is the representative of the beneficiaries named in the statute, and the recovery, if any, is for damages resulting to them, and the amount recovered will be distributed amongst them.

Bennett v. Spartanburg Railway, Gas & Electric Co., 97 S.C. 27, 81 S.E. 89 (1914).

Due to the claims being separate and independent, South Carolina historically did not allow for the wrongful death and the survival claims to be joined into one action. *Id.* While at this time

the claims may be joined in one action upon appropriate consent, it remains that "[n]ecessarily, therefore, there must be separate verdicts and separate judgments" as to the separate claims. *Id.*; *see also Deaton v. Gay Trucking Co.*, 275 F.Supp. 750 (D.S.C. 1967) (held that under South Carolina law, judgment for defendant in wrongful death action was not res judicata and did not constitute estoppel by judgment in subsequent survival action because actions entirely separate and independent of each other).

Furthermore, the separate and independent actions have separate and independent damages unique to each claim. Wrongful death damages compensate the decedent's beneficiaries for their own loss of their loved one. *Ballard v. Ballard*, 314 S.C. 40, 41-42, 443 S.E.2d 802 (1994). The damages recoverable to the beneficiaries include their own: "(1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries...." *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 610 (2d ed.1997) and *Mishoe v. Atlantic Coast Line R.R.*, 186 S.C. 402, 97 S.E. 97 (1938)).

Distinctly, the damages in a survival action award the decedent's estate for the decedent's conscious pain and suffering that he endured in the injury. *Boan v. Blackwell*, 343 S.C. 498, 501-502, 541 S.C.2d 242, 244 (2001). "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Scott*, 340 S.C. at 170, 530 S.E.2d at 395. Facts about the beneficiaries and their relationship to the decedent have no bearing or relevancy to the decedent's survival action or an award of damages to the decedent's estate for his pain and suffering prior to death. *See Wooten v.*

Amspacher, 279 S.C. 325, 326, 307 S.E.2d 232, 233 (1983) (the estate's administrator's separation from her husband (the decedent) and her subsequent remarriage held entirely irrelevant to any damages her husband suffered and admission of irrelevant and prejudicial evidence constituted error). Here, the Court clearly misapplied the "No Duplication of Coverage" clause with the consequence of upending the distinct and independent claims and injuries in a wrongful death and a survival action. Moreover, the definitions in Section IV are clear that Bodily Injury includes the children's injuries and does not include civil rights violations.

In sum, the Opinion does not interpret the policy or construe the terms in the policy "liberally in favor of the insured and strictly against the insurer" as it must do. *See Canal Ins. Co.*, 414 S.C. at 265-66, 777 S.E.2d at 424. Instead the Opinion construes the policy against its plain language and, at every opportunity, liberally in favor of the insurer SCMIRF (to the detriment of the Members and local law enforcement officers). The plain language of Section IV provides liability coverage to the Town for its wrongful acts that caused bodily injury, to the Town for its wrongful acts that caused personal injury, to Price for his wrongful acts that caused bodily injury, to Price for his wrongful acts that caused personal injury, and to Craddock for his wrongful acts that caused personal injury.

In regards to <u>how much</u> coverage is afforded each insured, the plain language of the "limitations of liability" of Section IV coverage makes clear that (1) the Wrongful Acts by the Town and Price that fall under the Tort Claims Act will be covered with one coverage limit of $1,000,000; (2) the Town's Wrongful Acts causing personal injury to Reeves will be covered with one coverage limit of $1,000,000; (3) Price's Wrongful Acts causing personal injury to Reeves will be covered with one coverage limit of $1,000,000; and (4) Craddock's Wrongful Acts causing

personal injury to Reeves will be covered with one coverage limit of $1,000,000. Thus, there is more than one coverage limit available for these insureds' liability under the Contract.

Accordingly, and respectfully, Respondent/Appellant submits that the Court's Opinion should be reheard and reissued to answer Issue #1 that the Coverage Contract provides for more than one coverage limit of $1,000,000 to these insureds for their separate and distinct acts, causing two separate and independent injuries.

II. The Opinion Confuses the Tort Liability of a Municipality with Tort Liability of an Insurance Fund, Which is Not a Political Subdivision of the State.

The Court's Opinion also errs in holding that a tort claim for bad faith brought against SCMIRF would be subject to the Tort Claims Act. The Court's error resides in its erroneous holding that SCMIRF is a political subdivision.

The Town of Cottageville entered into an Intergovernmental Agreement for an Insurance and Risk Financing Fund for Risk Sharing with other member municipalities in order to insure and pool the towns' risks of exposure to certain liabilities. (R. p. 99-105). The result is the South Carolina Municipal Insurance and Risk Financing Fund— SCMIRF: "an unincorporated voluntary, self-insurance pool in the State of South Carolina." (R. p. 84).

The Tort Claims Act provides for some limitations on tort liability for the State and its political subdivisions out of recognition by the General Assembly "that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities." S.C.Code Ann. § 15-78-20(a). Thus, in consideration of balancing the costs and effectiveness of governing with liability for tortious conduct, the Tort Claims Act provides the State and its political subdivisions immunity from tort liability, except as waived by the Act. S.C.Code Ann. § 15-78-10 *et seq.*

SCMIRF does not govern our State and does not face any considerations of balancing government with liability for tortious conduct. Furthermore, by definition, SCMIRF is not a political subdivision of the State. The Tort Claims Act defines "Political subdivision" as:

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

S.C.Code Ann. § 15-78-30(h).

The Opinion errs in finding that SCMIRF is a political subdivision. In its own right SCMIRF is not a county, municipality, school district, regional transportation authority, operator as defined in item (8) of Section 58-25-20, or a special purpose district of the State. *Id.* In contrast with the Insurance Reserve Fund, which is a Division of the South Carolina State Fiscal Accountability Authority and organized and controlled by numerous statutes, *see* S.C.Code Ann. §§ 1-11-140, 1-11-147, 10-7-10, 10-7-40, 10-7-120, 10-7-130, 11-9-75, 15-78-10 to 15-78-150, 38-13-190, 59-67-710, and 59-67-790, SCMIRF is not organized and controlled by statute. Instead, SCMIRF is "an unincorporated voluntary, self-insurance pool" created by municipalities, to include the Town of Cottageville, to fund the payment of property losses and liability claims on behalf of its members. (R. p. 95-98).

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

of the purchase of private insurance transforms private insurance carriers into political subdivisions of the State.

Quite simply, SCMIRF is a fund, not an agency, department, or subdivision. (R. p. 436-437 & 442). It is not a political body. 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, applying the factors from *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 636, 743 S.E.2d 808, 814-15 (2013), to determine whether SCMIRF is the State or its political subdivision for purposes of coverage of the Tort Claims Act clearly establishes that SCMIRF is not the State or its political subdivision.

In sum, SCMIRF is not a political subdivision of the State and, thus, not subject to the limitation of tort liability on the State and its political subdivisions. *See* S.C.Code Ann. § 15-78-10 *et seq.* Respectfully, the Respondent/Appellant submits that the Court's Opinion should be reheard and reissued to answer Issue #2 that an action for the tort of bad faith against SCMIRF would not be governed by the Tort Claims Act.

III. Conclusion

Respondent/Appellant Ashley Reeves, as Personal Representative for the Estate Reeves, respectfully asks that the Court rehear the appeal *en banc* and issue a new Order (1) affirming the lower court's holding 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 results in there being more than $1,000,000 in indemnity coverage available under the terms of the SCMIRF Coverage Contract with the Town with respect to all such claims

including the claims made against John Craddock in a separately styled action and (2) reversing the lower court's holding that 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.*

Respectfully submitted this 15 day of May 2019,

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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

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.

PROOF OF SERVICE OF PETITION FOR REHEARING

I certify that I have served Respondent/Appellant's Petition for Rehearing on the above-named Appellant/Respondent via U.S. Mail and to the South Carolina Court of Appeals via Federal Express Overnight shipping on May 15, 2019, addressed to the following:

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August 15, 2016

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
1220 Senate Street
Columbia, SC 29201

Re.: Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves v. South Carolina Municipal Insurance and Risk Financing
Case No.: 2014-CP-15-135
Appeal No.: 2016-001626

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Respondent/Appellant's Petition for Rehearing *En Banc* in the above-referenced matter. Also enclosed, please find my firm's check in the amount of $50.00 for the filing fee and the Proof of Service. Please file the original and return a file-stamped copy in the enclosed, self-addressed, stamped envelope. Please call me with any questions or concerns.

With kind regards, I am

Sincerely,

Brooke A. DiMeo

Brooke A. DiMeo, paralegal to
W. Mullins McLeod, Jr.

/bad
Enclosures

cc: C. Mitchell Brown, Esquire