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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Opinion No. 5643 (S.C. Ct. App. Filed May 1, 2002)

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.

APPENDIX VOLUME II OF II

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In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
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Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, ...	Respondent/ Appellant,
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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 REPRESENTATIVE OF THE ESTATE OF CARL ALBERT "BERT" REEVES, Plaintiff, vs. TOWN OF COTTAGEVILLE, THE TOWN OF COTTAGEVILLE POLICE DEPARTMENT, and RANDALL PRICE, INDIVIDUALLY, Defendants.	CIVIL ACTION NO: 2:12-cv-02765-DCN

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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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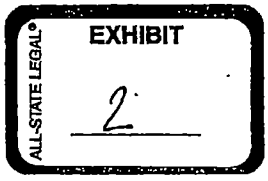

A P P E A R A N C E S

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

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the reading and signing of the transcript is waived by the Deponent.

HEATHER RICARD, SWORN.

DIRECT EXAMINATION

BY MR. MCLEOD:

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

A. Sure. I'm Heather Ricard.

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

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

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

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

the Director of Risk Management Services there. And prior to that, I worked for a city in California for nine years.

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

A. 1994.

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

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

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

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

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

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

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

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

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

Q. And what did you do for them?

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

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

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

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

A. A little over two years.

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

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

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

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

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

A. Cindy is the direct supervisor for

Holland, and I am the direct supervisor of Cindy.

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

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

Q. And is her office in Columbia?

A. Yes.

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

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

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

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

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

A. SCMIRF.

Q. -- or the Municipal Association?

A. SCMIRF. SCMIRF is a separate legal entity.

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

A. Where do the reserves come from?

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

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

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

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

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

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

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

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

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

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

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

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

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

A. That's correct.

Q. And then SCMIRF applies to all other claims?

A. Property and liability.

Q. All of the covered claims?

A. Right.

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

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

not attend any specific claims adjudication type courses.

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

A. That's correct.

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

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

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

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

MR. MCLEOD: Yeah. Mine is longer.

Q. Let me show you --

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

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

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

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

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

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

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

A. The trust was formed in 1990.

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

A. Since 1990; is that what you mean?

Q. Yes.

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

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

A. That's correct.

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

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

A. In the course and scope of their employment.

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

A. Yes.

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

A. Within the course and scope of their employment.

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

A. No.

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

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

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

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

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

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

MR. MURPHY: Same objection.

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

MR. MURPHY: Same question (sic). Witness will not answer. It's outside the scope. She's a 30(b)(6) designee.

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

MR. MURPHY: I know.

BY MR. MCLEOD:

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

A. Yes.

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

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

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

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

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

A. That's correct.

Q. How much insurance does he have?

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

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

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

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

Q. So what do you do?

A. There's only one coverage limit available.

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

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

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

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

there, there is a single injury.

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

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

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

A. Yes.

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

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

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

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

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

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

A. If that's what is awarded.

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

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

MR. MCLEOD: I disagree.

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

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

your 30(b)(6).

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

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

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

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

Q. On Exhibit 2, on your 30(b)(6) Notice, subparagraph B states, "The insurance policies and coverage 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." Did you see that?

A. I did.

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

A. I do.

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

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

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

Q. Available to whom?

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

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

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

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

A. That's correct.

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

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

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

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

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

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

A. The coverage contract, as it stands.

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

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

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

A. I do.

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

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

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

A. Correct.

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

see that?

A. Yes.

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

A. Yes.

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

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

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

A. Yes. That's correct.

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

A. That's correct.

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

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

A. That's correct.

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

A. That's correct.

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

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

Q. Tell me why.

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

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

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

there's multiple occurrences.

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

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

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

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

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

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

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

working there?

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

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

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

Q. Was that the Burke High School?

A. The Stratford.

Q. I mean, Stratford?

A. Yes.

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

A. I don't know the specific details.

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

A. Yes.

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

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

occurrence from our standpoint.

Q. And tell me why.

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

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

A. Yes.

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

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

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

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

occurrence; is that right?

A. Correct.

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

A. Yes.

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

A. Under section A?

Q. Yes, ma'am.

A. "To pay on behalf of the member or covered persons for all sums which the member or covered persons 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 therefrom 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."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. Okay.

A. But as I mentioned earlier, there may be

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

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

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

MR. MURPHY: I think it starts on 52.

Q. We'll read it into the record.

MR. MURPHY: It starts on 51.

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

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

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

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

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

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

A. Yes.

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

A. Okay. "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."

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

A. If there is more than one injury. But

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

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

A. Yes.

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

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

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

A. Yes.

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

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

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

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

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

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

A. Not that -- well, personal injury or

advertising injury, but --

Q. The answer is no?

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

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

A. Section I.

Q. -- Exhibit 3 or Exhibit 4?

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

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

A. It is --

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

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

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

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

A. These sections complement each other.

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.

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

A. That's correct.

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

A. "Any acts or omissions that might be

described under more than one coverage section or more than one category as an offense or an occurrence 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 and 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."

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

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

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

A. Yes.

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

A. Yes.

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

A. Per person, per occurrence.

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

A. Repeat that.

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

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

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

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

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

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

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

Q. Well, what injury are you talking about?

A. The death of Mr. Reeves.

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

A. Yes.

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

A. Yes.

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

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

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

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

A. Yes. I understand that.

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

A. Yes.

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

A. I understand that.

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

A. Up to the coverage limits that are available.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. No, that is not correct.

Q. Share with me why.

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

Q. Where does it say that?

A. It says it here. It says, "A single coverage limit applies to any offense or occurrence" -- and this is, I'm sorry, in General Provisions, specifically C-9. So, again, "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." So we are insuring for that one injury.

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

A. Yes.

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

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

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

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

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

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

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

A. It's substantially the same. It all

resulted in his death.

Q. No, no.

MR. MURPHY: She just answered the question.

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

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

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

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

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

A. Yes.

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

A. Those are substantially the same.

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

MR. MURPHY: Let me object. The witness

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

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

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

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

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

conclusions or mental impressions that are privileged work product.

Q. You're familiar with the Boiter case?

A. Yes.

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

A. Yes.

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

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

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

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

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

A. Two different entities.

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

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

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

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

Q. I understand.

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

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

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

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

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

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

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

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

MR. MCLEOD: I'm not threatening her.

MR. MURPHY: Then be quiet.

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

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

comment --

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

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

MR. MCLEOD: I know.

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

BY MR. MCLEOD:

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

A. It says "bodily injury."

Q. Where does it say it?

A. In the first sentence.

Q. And just read that, please.

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

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

the number of injuries?

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

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

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

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

A. That does state, "A single coverage

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

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

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

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

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

Q. Okay.

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

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

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

A. Well, if I may, under the Law Enforcement Liability, Section IV, there are a couple of sections under D-1, the Limit of Liability, "Only a single limit 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 repeated over the course of more than one coverage period."

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

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

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

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

A. Correct.

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

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

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

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

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

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

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

A. That would be a single occurrence.

Q. Tell me why.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(The deposition went off the record.)

BY MR. MCLEOD:

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

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

Q. And how much do you think SCMIRF would

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. Where does it say that in particular?

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

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

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

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

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

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

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

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

A. Yes.

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

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

Q. You do understand that SCMIRF insures

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

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

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

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

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

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

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

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

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

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

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

Q. And your position, again, is what?

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

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

A. That's correct.

MR. MURPHY: On the topics you noticed.

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

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

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

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

Q. What does that mean?

A. Well, the member that would be affected

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

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

A. Yes.

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

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

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

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

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

A. That's correct.

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

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

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

A. Yes.

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

A. Within the applicable coverage limits

and where the General Provisions limit also comes into play.

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

A. No.

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

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

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

A. That is correct.

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

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

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

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

A. That is correct.

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

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

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

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

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

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

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

A. Lake Summers and Dee Lide.

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

A. Yes.

Q. And not SCMIRF?

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

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

A. The Town of Cottageville.

Q. Who is Mr. Summers' actual client?

A. Mr. Price.

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

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

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

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

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

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

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

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

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

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

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

A. That's correct.

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

A. That is correct.

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

A. It would be in the definitions of the policy, which would be on -- let's see. It should be in the very back. On page 80, "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 it causes personal injury or advertising injury and when it is committed by a member or by a covered person while acting within both the course and the scope of his or her official duty, as provided under the South Carolina Tort Claims Act."

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

A. Yes.
Q. And what does that mean?
A. Again, it would be, regardless of the number of claims, the million is the most that they have available.
Q. Didn't you tell me earlier when I was asking you about the Dec page on section No. 3 that you don't offer aggregate policies?
A. Not for General Liability. This is Public Officials Liability. That's a different section of the coverage contract.
Q. What's the difference, from an underwriting standpoint?
A. From an underwriting standpoint, we are typically looking at Law Enforcement Liability and we're rating based on the number of sworn police officers. Whereas Public Officials Liability, we are basing it on the number of -- basically number of employees and number of council members, for example, that are covered.
Q. Did the Town of Cottageville decline excess coverage in this case?
A. Well, if you look at the application, the renewal application on page 3, it's not actually worded as excess coverage. It's just

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

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

A. No.

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

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

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

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

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

BY MR. MCLEOD:

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

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

Q. And as the person with SCMIRF who is in

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

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

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

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

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

A. Yes. There were two different entities involved.

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

A. They are saying, We have two separate

and distinct acts for two different entities.

Q. Well --

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

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

A. "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."

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

A. Correct.

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

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

Q. I'm just asking --

A. -- in this claim.

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

A. Correct.

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

A. Independent acts of negligence by two different entities.

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

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

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

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

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

A. That's an allegation.

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

would you agree with that?

A. Yes.

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

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

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

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

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

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

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

A. They're different allegations, yes. And, again, while I don't view this as multiple wrongful acts, multiple occurrences, it's considered one occurrence for us.

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

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

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

MR. MURPHY: Yeah, right.

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

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

Q. Okay. Now, do you also understand from

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

discuss that SCMIRF will provide a total liability of 1 million per member, and basically will provide that -- it will be limited to 1 million 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.

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

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

Q. So Randall Price is an insured under --

A. The member is insured.

Q. -- the policy?

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

Q. Is covered person synonymous with insured?

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

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

A. Yes.

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

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

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

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

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

A. No.

Q. -- than Randall Price?

A. No.

Q. You don't agree with that?

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

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

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

A. Yes.

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

A. He is a covered person.

Q. -- the Town of Cottageville?

A. He is a covered person.

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

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

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

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

Q. And share with me what type of training

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

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

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

A. Correct.

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

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

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

A. The death of Mr. Reeves.

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

Bert Reeves, potentially?

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

Q. And who is the injury to?

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

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

A. Correct. That's one accident.

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

A. It's one accident.

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

A. Correct.

Q. Because it's one accident?

A. Correct.

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

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

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

A. Yes.

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

MR. MURPHY: No questions.

(The deposition concluded at 4:00 p.m.)

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
Registered Professional Reporter
and Notary Public

My commission expires:
December 16, 2014

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] Defendant.	)	Civil Action No. 2013-CP-15-135 **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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**

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 Contact 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 <u>any agency, governmental health care facility, department, or subdivision thereof</u>.

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:"

Jury Finding(s) Outlined by Plaintiff		*Bodily Injury* or Personal Injury?
(1)	Price's negligence proximately caused the death of Bert Reeves, which resulted in the death of Bert Reeves;	*Bodily Injury*
(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;	Personal Injury
(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;	Personal Injury
(4)	Town of Cottageville's negligence in hiring Price;	*Bodily Injury*
(5)	Town of Cottageville's negligence in supervising Price which resulted in the death of Bert Reeves;	*Bodily Injury*
(6)	Town of Cottageville's negligence in retaining Price which resulted in the death of Bert Reeves;	*Bodily Injury*

(7)	Town of Cottageville's negligence in failing to train Price which resulted in the death of Bert Reeves;	*Bodily Injury*
(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;	Personal Injury
(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;	Personal Injury
(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.	Personal Injury

(*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 <u>one</u> 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 <u>all claims</u>* 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 b y 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 SCMIRF 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 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] Defendant.	)	Civil Action No. 2013-CP-15-135 **PLAINTIFF'S SUPPLEMENTAL MEMORANDUM AND EXHIBITS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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

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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	)	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] Defendant.	)	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

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:

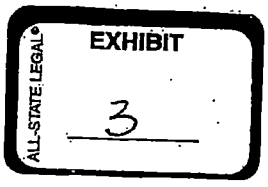
1. My name is Frederick "Fritz" Jekel. I am over eighteen (18) years of age and legally competent to make this affidavit, which is true and correct, is made voluntarily and not under duress, and is based on my personal knowledge of the facts set forth herein.

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.

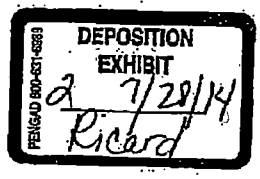
July 31, 2014

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

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

JARED L. BROOKS NOTARY PUBLIC SOUTH CAROLINA HANAHAN MY COMMISSION EXPIRES DEC 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

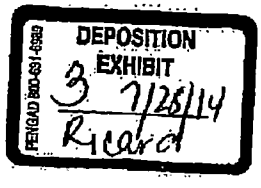
Date of Loss: May 16, 2011

Section I- 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.

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PENGAD 800-631-6989

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: 9/13/10
Completed By: Sandy N Cox
Telephone: 843-835-8655 ext. 10
Fax Number: 843-835-8581
E-Mail Address: Gmwsce@live.com
Name of Contact for Schedule Changes: Sandy N Cox
(if different than above)

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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RECEIVED 9-16-10

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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	LEAP	Heavy Truck (20,001 lbs gvw and over)	TK20001
Fire Car	FDP	Garbage Trucks	DMPTK
Private Passenger	PP	Fire Trucks	FDNP
Light Truck (under 10,000 lbs gvw)	TK	Public Transportation Buses	ICTYB
Medium Truck (10,001- 20,000 lbs gvw)	TK 10001	All other Buses (SWAT, Bookmobiles, etc	OTHB
Utility Trailer (0-2,000 lbs load capacity)	UTILTRL	Ambulances	AMBE
Trailers (over 2,000 lbs load capacity)	LRGTRL	Motorcycles	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 $1,213,830.57
- 2009 WC Audited Payroll (N/A if *SCMIT member)* ~~$ 893,987.~~
- 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.

SCMIRF

South Carolina Municipal Insurance and Risk Financing Fund

2011 Renewal Application

SCMIRF Exposure Checklist

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

Yes	No	
☐	☑	Airports or Helipads (Not covered under the SCMIRF contract)
☐	☑	Amusement Park Rides / Inflatable Rebounding Toys / Bungee Corded Elements (Not covered under the SCMIRF contract)
☐	☑	Dams/Reservoirs (Not covered under the SCMIRF contract)
☐	☑	Do you generate power?
☐	☑	Dump Site – Inert Materials (Not covered under the SCMIRF contract)
☐	☑	EMT's/Paramedics
☐	☑	Firing Range
☐	☑	Golf Course ("Tees to Greens" coverages available)
☐	☑	Landfills (Not covered under the SCMIRF contract)
☐	☑	Lifeguards # of pool lifeguards ___ # of beach lifeguards ___ # of lake/river # of beach chairs
☐	☑	Waste Water Treatment Average Gallons per day _____ Maximum Capacity _____
☐	☑	Water Distribution Average Gallons per day _____ Maximum Capacity _____
☐	☑	Watercraft – Municipally Operated 25 ft in length or less, # Owned Purpose of Watercraft:

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

Aircraft (owned and non-owned)
Firework Display
Special Events- see next page for EXCLUDED special event activities
Watercraft – over 25 ft. (owned and non-owned)
Zoos

SCMIRF

South Carolina Municipal Insurance and Risk Financing Fund

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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 Polhill
Underwriting Manager
Phone: 803.354.4752
Fax: 803.354.4753
E-mail: lpolhill@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

Your Search:	boiter
Date/Time of Request:	Monday, July 28, 2014 09:19 Central
Client Identifier:	710
Database:	SC-CS
Citation Text:	712 S.E.2d 401
Lines:	480
Documents:	1
Images:	0

Westlaw

712 S.E.2d 401
393 S.C. 123, 712 S.E.2d 401
(Cite as: 393 S.C. 123, 712 S.E.2d 401)

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:

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(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.

[3] **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.

[4] **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).

[5] **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.

[6] **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.

[7] **Statutes 361 ⇐1151**

361 Statutes
361III Construction
361III(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 Commc'ns 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 *Giammini 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." *Hamlet 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. Petty ex rel. Estate of Kaufman*, 848 S.W.2d 680 (Tex.1992) (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. Brooks v. Memphis & 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(g) (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	)	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] Defendant.	)	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, SCRCP, 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), SCRCP, 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 Contact'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. Szczepkowicz*, 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 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. 2013-CP-15-135 **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 Contact 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.

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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 Contact. 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."

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[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 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 with 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.

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[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. Judgmt. 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

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] Defendant.	)	Civil Action No. 2014-CP-15-135 **PLAINTIFF'S NOTICE OF AND MOTION TO ALTER OR AMEND JUDGMENT**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves will move before this Court at least ten days from the date hereof, or as soon thereafter as counsel may be heard, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, for an Order altering or amending the judgment of the Court, dated June 24, 2016, granting Plaintiff's Motion for Summary Judgment on Issue One and denying Plaintiff's Motion for Summary Judgment on Issue Two.

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.

Respectfully submitted this 30th day of June 2016.

Signature Page to Follow

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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] Defendant.	)	Civil Action No. 2014-CP-15-135 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT**

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), SCRCP, 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), SCRCP, 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.

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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 **Motion to Alter or Amend the Order dated June 24, 2016**

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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July 11, 2016

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

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

Respectfully submitted,

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August 4, 2016

EXHIBIT A

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] Defendant.	Civil Action No. 2014-CP-15-135 **ORDER**

This matter came before the Court on May 17, 2016, by way of the parties' cross-motions for Summary Judgement 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.

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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").

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

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?**

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"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."

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."

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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.).

#10

AND IT IS SO ORDERED!

Perry M. Buckner, III
Circuit Court Judge

Dated: June 24, 2016
Walterboro, South Carolina

EXHIBIT B

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] Defendant.	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), SCRCP, 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 RnB

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

£3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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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.

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

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
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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, Plaintiff, vs. South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF] Defendant.	)	Civil Action No. 2014-CP-15-135 **ORDER**

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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 Judgement 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.

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.

EXHIBIT A

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").

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

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?**

3 RMB

"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.

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."

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).

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!

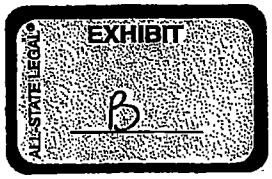
Perry M. Buckner, III
Circuit Court Judge

Dated: June 24, 2016
Walterboro, South Carolina

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] Defendant.	)	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.

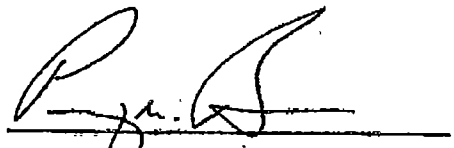
"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992), (*citing* Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 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

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.

PROOF OF SERVICE

I, the undersigned paralegal of the law offices of McLeod Law Group LLC, attorneys for Respondent, 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 the pleading(s) specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleading: Notice of Appeal

Counsel Served: NELSON MULLINS RILEY & SCARBOROUGH
C. Mitchell Brown
Brian Patrick Crotty
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Columbia, SC 29211-1070

Brooke A. DiMeo, Paralegal

8/15, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2014-CP-15-135

Appellate Case No. 2016-001626

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

Final Appellant's Brief of Appellant/Respondent

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Statement of the Case

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

This action stemmed from a lawsuit filed on August 28, 2012, by Reeves against Cottageville and Price, a police officer with the Cottageville Police Department, that was removed to the United States District Court for the District of South Carolina, Civil Action No. 2:12-02765-DCN (the "Cottageville Lawsuit") on September 24, 2012. (Cottageville Complaint, R. 21; Notice of Removal filed 9/24/12, R. 15). The Cottageville Lawsuit related to the shooting death of Bert Reeves by Price. Specifically, Reeves alleged that Cottageville and Price were negligent in the death of Bert Reeves and that Cottageville was negligent in the hiring, supervision, and retention of Price. (Cottageville Complaint at ¶¶ 17-34, R. 25-28). Reeves further alleged that, based on the same incident, Price and Cottageville violated Bert Reeves' civil rights in violation of 42 U.S.C. § 1983. (*Id.* at ¶¶ 44-59, R. 30-33). The Cottageville Lawsuit asserted both survival and wrongful death claims. (*Id.* at ¶¶ 60-71, R. 33-35).

On May 14, 2014, Reeves filed a separate lawsuit also related to the death of Bert Reeves against John Craddock ("Craddock"), the Cottageville Police Department Chief of Police, in the United States District Court for the District of South Carolina, Civil Action No. 2:14-01918-DCN (the "Craddock Lawsuit"). (Craddock Complaint, R. 48). The Craddock Lawsuit asserted survival and wrongful death claims based on 42 U.S.C. § 1983 alleging that Craddock failed to properly train and supervise Price, failed to intervene in the altercation between Price and Bert Reeves and failed to render medical care to Bert Reeves. (*Id.*, R. 53-58).

The present action resulted from SCMIRF's position that its Coverage Contract with Cottageville provided a total of $1,000,000 in indemnity coverage for Reeves' claims in both the Cottageville Lawsuit and the Craddock Lawsuit. Reeves disputed SCMIRF's position and filed this declaratory judgment action.

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

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

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

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

(Stipulation of Facts and Issues dated 10/7/2015, R. 83-86; Settlement Agreement dated 2/26/15 at ¶ 4.(a), R. 354-355). Under the universal settlement agreement, Reeves would receive an additional $1 million payment for each question upon which Reeves prevails. (R. 356). If Reeves prevails on neither question, Reeves receives no further money aside from the $10 million settlement payment already paid to Reeves pursuant to the settlement. (*Id.*).

On June 3, 2015, the Parties jointly petitioned the South Carolina Supreme Court to hear and decide both questions in its original jurisdiction. (Consent Petition for Original Jurisdiction filed 6/3/15, R. 368). On July 24, 2015, the South Carolina Supreme Court declined the Petition

and the Parties proceeded, in accordance with the terms of their settlement agreement before this Court. (Order denying Petition, R. 14).

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

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

A hearing on the cross-summary judgment motions was held on May 17, 2016. (Transcript of 5/17/16 Hearing, R. 252). Proposed orders were submitted to the trial court by Reeves on June 14, 2016, and by SCMIRF on June 16, 2016. (Reeves' Proposed Order, R. 577; SCMIRF's

Proposed Order, R. 611). On June 29, 2016, the trial court filed its summary judgment Order. (Order filed 6/29/16, R. 1). In this Order, as to the first stipulated issue addressing whether more than $1,000,000 in indemnity coverage was available under SCMIRF's Coverage Contract, the trial court granted Reeves' motion for summary judgment and denied SCMIRF's motion. (*Id.* at pp. 3-7, R. 3-7). Specifically, the trial court held "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." (*Id.* at p. 6, R. 6). The trial court then noted that the Cottageville Lawsuit "sought to recover damages for wrongful death, as well as conscious pain and suffering" and that "the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different." (*Id.* at pp. 6-7, R. 6-7). The trial court then concluded that Reeves "suffered separate and distinct damages which could lead to additional coverage under the separate causes of action." (*Id.* at p. 7, R. 7). As to the second stipulated issue addressing whether a tort claim for bad faith brought against SCMIRF would be subject to the South Carolina Tort Claims Act, the trial court granted SCMIRF's motion for summary judgment and denied Reeves' motion. (*Id.* at pp. 8-10, R. 8-10).

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

Statement of the Facts

As part of the universal settlement of the Cottageville and Craddock matters, the Parties agreed that the determination of the two agreed upon declaratory judgment issues would be governed by a Stipulation of Facts that was incorporated into the Amended Complaint in this

action. (Stipulation of Facts, R. 83). This stipulation expressly provided that "[t]he Parties agree that no other facts are necessary for the Court to answer the stipulated issues, that no discovery is needed for the case, and that the stipulated issues are purely legal in nature." (*Id.* at ¶ 11, R. 85).

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

A. SCMIRF, the Intergovernmental Agreement and the Coverage Contract.

SCMIRF, an agency of the State, asserts that it is an unincorporated voluntary, self-insurance pool in the State of South Carolina. (*Id.* at ¶ 6, R. 84). SCMIRF was established in accordance with Article VIII, section 13 of the South Carolina Constitution, which authorizes governmental entities to enter into interlocal contracts or agreements to undertake action collectively that each entity could otherwise undertake alone. S.C. CONST. art. VIII, § 13. SCMIRF was also established in accordance with S.C. Code Ann. § 15-78-140(b)(4), which requires the political subdivisions of this State to procure tort liability insurance to cover the risks for which immunity has been waived, and which identifies as an option for such coverage the establishment of "pooled self-insurance liability funds, by intergovernmental agreement...." S.C. Code Ann. § 15-78-140(b)(4).

Membership in SCMIRF is limited to municipal government units and institutions or agencies in the State of South Carolina in accordance with the terms of an Intergovernmental Agreement. (SCMIRF Bylaws at Sec. II, R. 95; Intergovernmental Agreement at ¶ 9, R. 102).

SCMIRF's Bylaws describe it as "a Fund created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement which establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South Carolina, 1976, Section 15-78-140." (SCMIRF Bylaws at Sec. I., R. 95; Stipulation of Facts at ¶ 7, R. 84). The Intergovernmental Agreement that all SCMIRF members are required to enter into describes SCMIRF as "a joint interlocal agency to operate a fund for liability risk sharing." (Intergovernmental Agreement at ¶ 1, R. 100).

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

B. The terms of the Coverage Contract.

The Coverage Contract between SCMIRF and Cottageville is comprised of the following ten sections:

Section I – General Provisions
Section II – Property Coverage
Section III – General Liability Coverage
Section IV – Law Enforcement Liability
Section V – Public Official Liability
Section VI – Business Auto Coverage
Section VII – Commercial Crime
Section VIII – Excess Casualty Coverage

Section IX – Equipment Breakdown Coverage
Section X – Endorsements

(Coverage Contract, R. 106-243). The claims raised in the Cottageville and Craddock lawsuits fall exclusively under the Law Enforcement Liability Section (Section IV) and, to the extent they are not supplanted by Section IV, the General Provisions of Section I. Specifically, under Section IV, SCMIRF provides coverage for members or covered persons while they are acting both in the course and scope of their official duties to provide law enforcement. (*Id.* at Sec. IV., ¶ A.1., R. 156). The exclusive coverage of Section IV to this situation is reiterated by Section I's General Provisions, which expressly provide that there is no duplication of coverage or coverage limits, and that "[n]o liability that is covered under any Coverage Section of This Contract will be deemed to be separately covered under any other Coverage Section.[1] (*Id.* at Sec. I., ¶ C.9, R. 112). 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 Sec. IV., ¶ A.1. and ¶ G.9., R. 156, 167-168). Here the parties have stipulated that the actions or omissions of Price and Craddock occurred while they were acting within the scope of their employment as Cottageville police officers. (Stipulation of Facts at ¶¶ 3, 5, R. 83-84).

The declaration page for Section IV of the Coverage contract provides for a "Liability Limit" of $1,000,000 "Per Occurrence." (Coverage Contract at Sec. IV., R. 155). "Occurrence" is not specifically defined within Section IV. Rather "Occurrence" is defined in Section I as "an

[1] Additionally, Section III of the Coverage Contract, governing General Liability Coverage, and Section V, governing Public Official Liability, specifically exclude any Law Enforcement Liability that is covered in Section IV, including any claims based on hiring, training, monitoring, supervising, or control of law enforcement employees. (Coverage Contract at Sec. III., ¶ J.24, R. 142; Sec. V., ¶ E.21., R. 176).

accident which results in Bodily Injury ... the original cause of which and the initial damage from which happened during the Contract Period set forth in the Declarations." (*Id.* at Sec. I., ¶ B.4., R. 108). Additionally, "'Occurrence' includes continuing exposure to the same harmful conditions" and "[a]ll such continuing exposure, damage, or injury shall be treated as one Occurrence." (*Id.*).

Under Section IV, subject to the Coverage Contract's limitations, terms and conditions, SCMIRF agreed to pay on behalf of the member or covered person sums those person(s) shall be obligated to pay exclusively as "Money Damages" because of a "Wrongful Act" by those person(s) which results in either "Bodily Injury" where the "Wrongful Act" amounts to an "Occurrence," or a "Personal Injury." (*Id.* at Sec. IV., ¶ A.1., R. 156). Sections I and IV provide definitions for the key terms involved with this coverage section. Specifically:

> **"Wrongful Act"** is defined to mean: "any actual or alleged error in the performance or failure to perform an official duty ... or any omission or neglect in performing an official duty; or any breach of an official duty, including misfeasance, malfeasance and nonfeasance...." (*Id.* at Sec. IV,, ¶ G.27., R. 169-170);
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> **"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., R. 166);
>
> **"Personal Injury"** is defined to include certain "Offenses" committed in the course of the Member's law enforcement activities, including: "assault and battery;" "violation of civil rights;" and "false arrest, detention or imprisonment." (*Id.* at Sec. IV., ¶ G.18., R. 169); and
>
> **"Offense"** is defined as "conduct constituting Personal 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., R. 108-109).

Significantly, Section IV's definition of "Bodily Injury" clarifies the distinction between "Bodily Injury" and "Personal Injury" by providing that: "for the 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 Sec. IV., ¶ G.4., R. 166) (emphasis in original).

The Coverage Contract also contains numerous provisions designed to limit SCMIRF's liability to the $1,000,000 liability limit. Paragraph D of Section IV addresses "Limit of Liability" and, more specifically, "SCMIRF's Limit of Liability." This sections provides:

> "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 were continuing or were repeated over the course of more than one **Coverage Period.**" (*Id.* at Sec. IV., ¶ D.1., R. 156-157) (emphasis in original).
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> "[T]he total liability of [SCMIRF] [for] any one occurrence/accident/wrongful act will be $1,000,000 per **Member** excluding expenses and defense costs...." (*Id.* at Sec. IV., ¶ D.2., R. 157) (emphasis in original).
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> "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." (*Id.*) (emphasis in original).
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> "... all 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 [sic] 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." (*Id.*) (emphasis in original).
>
> "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.*) (emphasis in original).

Section I's General Provisions also provide that the same conduct or wrongful act(s) cannot separately constitute both an "Offense" and an "Occurrence." Specifically, the Section I provides that "[n]o **Offense** will be deemed also to constitute separately an **Occurrence** 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." (*Id.* at Sec. I., ¶ C.9., R. 112) (emphasis in original). Additionally, Section I of the Contract provides that "[a]ll repetitions of the same basic **Offense** involving an offended person and/or ... group of persons ..., 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 **Offence**, subject to a single Coverage Limit, even if the **Offense** occurs over more than one Contract Period." (*Id.* at Sec. I., ¶ B.5., R. 108-109) (emphasis in original). Section I further expressly provides that: (1) "[a] single Coverage Limit applies to any **Offense** or **Occurrence**, regardless of the number of claimants, suits, or claims"; and (2) "[a] single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage." (*Id.* at Sec. I., ¶ C.9., R. 112) (emphasis in original).

Argument

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

In its Order granting Reeves' motion for summary judgment and denying SCMIRF's cross-motion, the trial court misinterpreted the terms of the Coverage Contract and failed to recognize the interplay between key provisions that explicitly limit coverage in situations such as those present in this case. The trial court incorrectly concluded that "ambiguities exist that create uncertainty as to coverage within the contract." (Order filed 6/29/2016 at p. 6, R. 6). More specifically, the trial court improperly focused on the term "occurrence" resulting in the erroneous ruling that "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence

or the resulting damage." (*Id.*). The trial court incorrectly cast the issue as whether the Coverage Contract is a "negligent acts policy" or a "damages policy." (*Id.* at pp. 6-7, R. 6-7). Additionally, the trial court misinterpreted SCMIRF's position as being that where there was only one "wrongful death," there was only one "'occurrence' under the policy," and mischaracterized SCMIRF's position as being that "the Coverage Contract is viewed as a damages policy for purposes of coverage determination." (*Id.*). This misinterpretation then led the trial court to conclude that, because there were separate claims for wrongful death and conscious pain and suffering in the underlying actions, and because those claims had different measures of damages, even if the Coverage Contract is viewed as a "damages policy," the existence of separate and distinct damages suffered by Reeves and his statutory beneficiaries "could lead to additional coverage under these separate causes of action." (*Id.*).

In reaching this conclusion, the trial court failed to consider the Coverage Contract's distinction between "Bodily Injury" and "Personal Injury" and the limitations imposed when both types of injuries are present. Additionally, the trial court failed to apply the Coverage Contract limitation of coverage where a "Personal Injury" involves multiple injured persons or multiple wrongful actors.

Where the question before a court is one of coverage, "the policy itself should be examined to see whether coverage is provided by its terms." *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 499, 544 S.E.2d 637, 640 (Ct. App. 2001). "Insurance policies," similar to the SCMIRF Coverage Contract, "are subject to general rules of contract construction," and courts "must give policy language its plain, ordinary and popular meaning." *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). When the Coverage Contract is viewed in its entirety, the plain meaning of the provisions applicable to coverage under Section IV

unambiguously establish that there is a $1,000,000 liability limit that applies to all of Reeves' claims.

A. The Coverage Contract provides two paths to coverage in Section IV, Coverage for "Bodily Injury" or coverage for "Personal Injury."

As previously stated, the claims raised in the Cottageville and Craddock Lawsuits fall exclusively under the Section IV of the Coverage Contract governing Law Enforcement Liability. Section IV provides that SCMIRF agrees to pay the sums a member or covered person becomes obligated to pay because of a "**Wrongful Act** ... which results in:

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

(Coverage Contract at Sec. IV., ¶ A.1., R. 156) (emphasis in original). Thus, Section IV provides two separate and distinct paths to coverage – coverage for "Bodily Injury" or coverage for "Personal Injury."[2] The starting point for both paths is that there must be a "Wrongful Act." 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., R. 169-170) (emphasis in original). In this case, the actions and/or omissions of Price and Craddock constituted the required "Wrongful

[2] In Section IV, "Bodily Injury" is coupled with "Property Damage" and "Personal Injury" is coupled with "Advertising Injury." This case does not involve claims for either "Property Damage" or "Advertising Injury." Therefore, those categories of coverage are not discussed herein.

Act." The proper analysis then moves to whether the "Wrongful Act" resulted in either "Bodily Injury" or "Personal Injury."

1. Coverage for "Bodily 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., R. 166). In order for coverage to exist under this path, however, the "Wrongful Act" that caused it must "amount[] to an **Occurrence**." (*Id.* at Sec. IV., ¶ A.1.a., R. 156) (emphasis in original). "Occurrence" is defined by the Coverage Contract to mean "an accident which results in **Bodily Injury**...." (*Id.* at Sec. I., ¶ B.4., R. 108) (emphasis in original).

It is not contested that "Bodily Injury" exists in this case. Nor is it contested that the "Wrongful Act" that resulted in the "Bodily Injury" in this matter would amount to an "Occurrence." This, however, is not the end of the analysis, and the Court must look to the provisions in the Coverage Contract for "Personal Injury" and the interplay between these two paths for coverage.

2. Coverage for "Personal Injury"

The second possible path to coverage is where the "Wrongful Act" results in 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." (*Id.* at Sec. IV., ¶ G.18., R. 169). The term "Offense" is defined as "conduct constituting **Personal 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., R. 108-109) (emphasis in original). Therefore, for coverage to exist based on "Personal Injury," the "Wrongful Act" must constitute a qualifying

"Offense." Significantly, whether coverage exists for "Personal Injury" does not involve any determination as to whether the underlying "Wrongful Act" amounts to an "Occurrence."

Both the Cottageville and Craddock Lawsuits involved claims based on 42 U.S.C. § 1983. It is not contested that the "Wrongful Act" in this case included "Offenses," such that the "Wrongful Act" resulted in "Personal Injury." Thus, in this case, coverage ***appears*** to exist under ***both*** the "Bodily Injury" and the "Personal Injury" provisions of Section IV. ¶ A.1. However, The Coverage Contract has clear provisions limiting the application of duplicate coverage in such a situation.

B. The Coverage Contract explicitly provides that "Personal Injury" coverage subsumes "Bodily Injury" under the facts here.

As discussed above, Reeves' negligence claims support coverage for "Bodily Injury," while Reeves' Section 1983 claims support coverage for "Personal Injury." These two types of injury, however, are both the direct result of the shooting death of Bert Reeves. Under the clear terms of the Coverage Contract, both types of injuries cannot co-exist in these circumstances. Rather, where the injuries supporting both the "Bodily Injury" and the "Personal Injury" coverages stem from the same source, those 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., R. 166) (bold emphasis in original; underline added). The General Provisions in Section I of the Coverage Contract also preclude duplication of "Personal Injury" and "Bodily Injury." Paragraph C.9. of Section I provides that "[n]o **Offense** will be deemed also

to constitute separately an **Occurrence** for coverage purposes, or vice-versa." (*Id.* at Sec. I., ¶ C.9., R. 112) (emphasis in original). The term "Offense" relates only to "Personal Injury" and the term "Occurrence," in this usage, relates only to "Bodily Injury." Thus, under Section I, the basis for a "Personal Injury" cannot also be the basis for a "Bodily Injury," or vice versa. Section IV then provides that where there is such a shared basis, the only available coverage is for "Personal Injury."

Here, 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." (Reeves' Memo. in Supp. of Sum. Judgment. at 3, R. 403) Thus, the claimed "Bodily Injury" in this case (the death of Bert Reeves and the mental anguish and suffering arising from that death) "result[ed] directly or immediately" from the claimed "Personal Injury" (the § 1983 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. I., ¶ C.9. and Sec. IV., ¶ G.4., R. 112, 166). (emphasis in original). Therefore, ***the only coverage in these circumstances is under Section IV's provisions for "Personal Injury."*** The trial court failed to recognize that the coverage analysis in this case involved solely coverage for "Personal Injury." Having established that the analysis properly focuses only on "Personal Injury," the proper inquiry at this point is whether the actions of Cottageville, Price and Craddock, and the injuries suffered by Bert Reeves and his statutory beneficiaries, constitute more than one "Personal Injury." Under the terms of the Coverage Contract, they do not.

C. Numerous provisions of the Coverage Contract limit SCMIRF's liability to the $1,000,000 Coverage Limit under the circumstances present here.

In granting Reeves' motion for summary judgment and denying SCMIRF's motion, the trial court focused upon the fact that "[Reeves] sought to recover damages for wrongful death, as well as conscious pain and suffering, among other things." (Order filed 6/29/16 at p. 6, R. 6). The trial court then reasoned that because "the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different ... [t]hey clearly are not substantially the same injury or damage." (*Id.*). The trial court then concluded that "[Reeves] suffered separate and distinct damages which could lead to additional coverage under these separate causes of action." (*Id.* at p. 7, R. 7). The trial court's focus on the fact that there were different legal claims asserted which had different measures of damages was misplaced. Rather, the terms of the Coverage Contract establish that there is no duplication of coverage, and that, under these circumstances, there is only one "Personal Injury" for liability limitation purposes.

1. The Coverage Contract prohibits duplication of coverage.

The stated "Liability Limit" for coverage under Section IV of the Coverage contract is "$1,000,000 Per Occurrence." (Coverage Contact at Sec. IV., R. 155). Numerous provisions within the Coverage Contract establish that there is no duplication of coverage in various scenarios. First, the General Provisions set forth in Section I provide that there is no duplication among the separate coverage sections:

> No liability that is covered under any Coverage Section of **This Contract** will be deemed to be separately covered under any other Coverage Section....

(*Id.* at Sec. I., ¶ C.9., R. 112) (emphasis in original). Duplication of coverage based on the form of injury is also prohibited. Specifically, as previously discussed, duplication of "Personal Injury" and "Bodily Injury" is avoided through the provision stating:

> ... No **Offense** will be deemed also to constitute an **Occurrence** for coverage purposes, or vice-versa....

(*Id.*) (emphasis in original). Additionally, duplication of coverage is prohibited based on the underlying act or omission through the provision stating:

> ... 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....

(*Id.*) (emphasis in original). Moreover, where there are multiple claims or suits which involve the substantially the same injury or damage, only a single Coverage Limit applies, as provided by this provision:

> ... 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.*) (bold emphasis in original, underline emphasis added).

Section IV of the Coverage Contact reiterates and expands its provisions avoiding duplication of coverage. Specifically, Section IV. ¶ D.1. provides:

> ... 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**.

(*Id.* at Sec. IV., ¶ D.1., R. 157) (bold emphasis in original, underline emphasis added). Thus, the Coverage Contract's $1,000,000 Liability Limit applies regardless of whether there are multiple persons injured (Bert Reeves and his statutory beneficiaries) or whether multiple covered persons caused the injuries (Cottageville, Price and Craddock). This limitation is further emphasized under the very next subsection, titled "SCMIRF's Limit of Liability," which 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 . . .

(*Id.* at Sec. IV., ¶ D.2., R. 157) (bold emphasis in original, underline emphasis added).

2. The Coverage Contract contains specific provisions prohibiting duplication of coverage for "Personal Injury" that are applicable to this matter.

The non-duplication provisions of the Coverage Contract also focus specifically on "Personal Injury" and its sub-component "Offenses." With regard to "Offenses," Section I explicitly provides:

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

(*Id.* at Sec. I., ¶ B.5., R. 108-109) (bold emphasis in original, underline emphasis added). Thus, when addressing the issue of coverage for "Personal Injury," if the same basic "Offense" offends multiple people, it is treated as only ***one*** "Offense" and is subject to the $1,000,000 Coverage Limit, even if there is some variation in the conduct that constitutes the "Offense." Applied to the facts of this case, the "Offense" was the violation of Bert Reeves' civil rights. While it involved Cottageville, Price and Craddock as the offenders, their repetition of this same basic offense does not result in their being multiple offenses. Similarly, the fact that there are multiple offended parties (Bert Reeves and his statutory beneficiaries) does not result in duplication of coverage. Rather, the Coverage Contract requires that this be treated as one "Offense" subject to a single Coverage Limit.

In addition to the provisions in Section I that are specific to "Personal Injury, Section IV provides:

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

(*Id.* at Sec. IV., ¶ D.2., R. 157) (bold emphasis in original, underline emphasis added). As was previously discussed, the coverage analysis under Section IV begins with a "Wrongful Act." Here, because the "Wrongful Act" results in a "Personal Injury," any potential coverage for "Bodily Injury is subsumed into the "Personal Injury" coverage by operation of the Coverage Contract's provisions. (*Id.* at Sec. IV., ¶ G.4., R. 166). Under the above provision, where there are continuing, serial, or repeated instances of "Personal Injury" they are treated as only one "Wrongful Act," This applies whether or not there are multiple persons causing the injuries, or multiple persons injured. The result remains that only a single Coverage Limit will apply in this situation.

Here, there was only one "Wrongful Act" giving rise to the "Personal Injury" – the violation of Bert Reeves' civil rights resulting in his death. However, even if the different actions or omissions of Cottageville, Price and Craddock are considered, they are repetitions of the same basic "Offense," or constitute continuing, serial or repeated instances of "Personal Injury." Thus, under the terms of the Coverage Contract they are treated as one "Offense" and one "Wrongful Act," and remain subject to the $1,000,000 Coverage Limit.

The trial court's emphasis on the fact Reeves' claims involved both wrongful death and conscious pain and suffering, and that those claims had different measures of damages was misplaced. (Order filed 6/29/16 at pp. 6-7, R. 6-7). The trial court focused on the provision in Section I of the Coverage Contract that "[a] single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage", and

concluded that because the measure of damages for these claims differed, they did not involve "substantially the same" injury of damage. (*Id.* at p. 6, R. 6; Coverage Contract at Sec. I., ¶ C.9., R. 112). This was incorrect. It is of no significance that the wrongful death claim and the survival action related to different persons and have different measures of damages. Both claims involve the same "Personal Injury" that is based on the same "Offense" (the violation of Bert Reeves' civil rights). When the provision in Section I., ¶ C.9. addressing "substantially the same injury of damage," is read in conjunction with the provisions of Section I., ¶ B.5. and Section IV., ¶ D.2,. discussed above, which specifically contemplate multiple "offended persons" and multiple "injured persons," the result is that there is but one "Offense" and "Wrongful Act" and it is subject to a single Coverage Limit.

Therefore, when a complete analysis of the facts of this matter is performed, considering all applicable provisions of the Coverage Contract, the proper conclusion is that Reeves' claims, in both the Cottageville and Craddock Lawsuits, fall solely within Section IV's coverage for "Personal Injury." It does not matter if multiple persons or entities caused the injuries or committed the offenses, and it does not matter if multiple people were offended or suffered different injuries. Thus, when the terms of the Coverage Contract are applied to the facts of this case, there is only a single applicable $1,000,000 Coverage Limit.

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

The trial court held that "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." (Order filed 6/29/16 at p. 6, R. 6). This was in error. The trial court's emphasis on the term "occurrence" was misplaced and its finding of an ambiguity as to the meaning of that term was incorrect. The Coverage Contract provides an unambiguous definition for this term – "'**Occurrence**' means an accident which results in **Bodily**

Injury or **Property Damage**, the original cause of which and the initial damage from which happened during the **Contract Period** set forth in the Declarations." (Coverage Contract at Sec. I., ¶ B.4., R. 108).

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

As discussed previously, the coverage under the Coverage Contract in this situation was coverage for "Personal Injury." The term "Occurrence" in the Coverage Contract, as it applies in this case, relates to coverage for "Bodily Injury." (Coverage Contract at Sec. IV., ¶ A.1.a., R. 156) In contrast, the term "Occurrence" is **not** part of the coverage for "Personal Injury." (*Id.* at Sec. IV., ¶ A.1.b., R. 156) (providing coverage for a "Wrongful Act" that results in "Personal Injury"). Thus, even if there existed ambiguity as to how "Occurrence" was defined, which is denied, such ambiguity has no effect on the "Personal Injury" coverage here.[3]

[3] Similarly, Reeves' attempt to change the definition of "Occurrence" from that stated in Section I of the Coverage Contract based on *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 131–135, 712 S.E.2d 401, 405–407 (2011), was improper. Reeves sought to create an ambiguity with regard to

The trial court also suggested that the Coverage Contract was ambiguous based on its inclusion of an unambiguous single aggregate limit for incidents involving "sexual abuse" elsewhere in its provisions. (Order filed 6/29/16 at p. 7, R. 7). The Court states that "[t]here is no uncertainty or ambiguity in the policy ... on the issue of coverage involving 'sexual abuse'" and noted that SCMIRF could have provided a similar aggregate limit for law enforcement coverage. (*Id.*). This comparison, however, is improper. The fact that SCMIRF choose to impose an aggregate limit for situations involving sexual abuse does not change, in any way, the numerous provisions in Sections I and IV that limit the coverage under these facts. This situation is analogous to separate exclusions in an insurance policy. One such exclusion cannot be used to create an ambiguity in a different exclusion. The settled rule in South Carolina is that "[e]xclusions in an insurance policy are to be read independently of each other; they are not to be read cumulatively." *Engineered Products, Inc. v. AETNA Casualty & Surety Co.*, 295 S.C. 375, 378, 368 S.E.2d 674, 675 (Ct. App. 1988). Rather, an exclusion must be "read with the insuring agreement independently of every other exclusion." *Id.* at 379, 368 S.E.2d at 676. Here, the separate inclusion of an aggregate limit for sexual abuse situations does not make ambiguous or nullify the other provisions of the Coverage Contract that limit the coverage for a "Personal Injury" under these facts.

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the meaning of "Occurrence" by relying on *Boiter*. In the *Boiter* case, the South Carolina Supreme Court held that the plaintiff in an action stemming from a vehicle accident caused by burned out traffic signals could recover from two separate government agencies under the S.C. Tort Claims Act ("TCA") for their separate acts of negligence. *Id.* at 134, 712 S.E.2d at 406. The issue was whether the two separate acts of negligence by the separate agencies constituted two "occurrences" under the TCA. To reach its conclusion, the *Boiter* Court looked to S.C. Code Ann. § 15-78-30(g), defining "occurrence" under the TCA as an "unfolding sequence of events which proximately flow from a single act of negligence." *Id.* at 132, 712 S.E.2d 405. *Boiter* has no relevance in a situation such as this where a Coverage Contract defines the meaning of the term "Occurrence."

Conclusion

For the foregoing reasons, this Court should reverse the judgment entered below regarding the amount of coverage available under SCMIRF's Coverage Contract, and enter judgment in favor of SCMIRF as to that issue. The judgment was correct and should be affirmed as to the second issue relating to SCMIRF's protection under the Tort Claims Act.

Respectfully submitted,

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January 20, 2017

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2014-CP-15-135

Appellate Case No. 2016-001626

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

CERTIFICATE OF COUNSEL

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

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v.

South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF] ..... Appellant/Respondent.

FINAL RESPONSE BRIEF OF RESPONDENT/APPELLANT

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1. Do the claims made and the verdict rendered against the Town of Cottageville and Officer Price, relating to the hiring, retention, and supervision of Officer Price 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. Did the circuit court properly find that there was an ambiguity in the Coverage Contract as to whether coverage of $1,000,000 "per occurrence" is defined by different acts of negligence or the resulting damages, and because the separate causes of action involved multiple distinct damages, more than $1,000,000 in indemnity coverage was available?

3. If the circuit court erred in finding the Coverage Contract ambiguous as to whether "per occurrence" is defined by act of negligence or damage, does the Coverage Contract unambiguously define "occurrence" by act of negligence, thereby resulting in more than $1,000,000 in indemnity coverage available in the underlying cases at issue due to multiple distinct acts of negligence?

RESPONDENT/APPELLANT'S STATEMENT OF THE CASE

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

> (1) Do the claims made and the verdict rendered against the Town of Cottageville and Randall Price, relating to the hiring, retention, supervision and shooting death of Bert Reeves result in there being more than $1,000,000 in indemnity coverage available under the terms of the SCMIRF Coverage Contract with the Town of Cottageville with respect to all such claims, including the claims made against John Craddock in a separately styled action?
>
> (2) Would a tort claim for bad faith brought against SCMIRF be subject to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*?

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

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

[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.

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

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

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

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

STATEMENT OF FACTS

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

Court for the District of South Carolina against various Defendants for liability in the wrongful death of Bert Reeves that occurred on May 16, 2011— (1) Civil Action No. 2:12-02765-DCN against the Town of Cottageville, South Carolina; the Cottageville Police Department; and Police Officer Randall Price, individually, and (2) Civil Action No.: 2:14-cv-01918-DCN against John Craddock, individually. In the Amended Complaint for declaratory judgment below, the parties stipulated to the above two issues for declaratory judgment, as well as to stated facts in the Stipulation of Facts and Issues. (R. pp. 83-86) The parties agreed that no further discovery need be taken to decide the two issues. However, in rendering summary judgment on the issues presented and pursuant to Rule 56, SCRCP, the court is to consider discovery conducted prior to the Motions for Summary Judgment. *See, e.g., Law v. S. Carolina Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

Of first matter, the Town of Cottageville entered into an Intergovernmental Agreement for an Insurance and Risk Financing Fund for Risk Sharing with other member municipalities to create SCMIRF [South Carolina Municipal Insurance and Risk Financing Fund] in order to insure and pool their risk of exposure to certain liabilities. (Amended Complaint, Stipulation of Facts and Issues, Exhibit C, R. pp. 99-105). "SCMIRF asserts it is an unincorporated voluntary, self-insurance pool in the State of South Carolina." (Amended Complaint, Stipulation of Facts and Issues, at ¶ 6, R. p. 84).

SCMIRF was created specifically to provide insurance to municipalities who are subject to lawsuits. (Reeves's Motion for Summary Judgment, Exhibit 1, Deposition of Heather Ricard, July 28, 2014, p. 15:3-8, R. p. 443). During the period of January 1, 2011 to January 1, 2012, SCMIRF provided insurance coverage to the Town of Cottageville, as

set forth in the 2011 Coverage Contract, P-SCMIRF-1124-2011 [Coverage Contract], which was the contract at issue before the circuit court in the declaratory judgment. (Stipulation of Facts and Issues, Exhibit D, R. pp. 106-243). In Plaintiff's federal lawsuit, Civil Action No. 2:12-02765-DCN, SCMIRF retained attorneys to defend the Town of Cottageville and Officer Price, individually, who by stipulation was acting in the scope of his employment during all times relevant.

The federal lawsuit proceeded to a jury trial, and, on October 15, 2014, the jury found (1) that Officer Price was negligent in proximately causing Bert Reeves's death; (2) that Price violated Bert Reeves's constitutional right to be free from the use of excessive force, actionable under 42 U.S.C. § 1983; (3) that Price violated Bert Reeves's constitutional right to be free from unnecessary seizure, actionable under 42 U.S.C. § 1983; (4) that the Town of Cottageville was negligent in its hiring of Price; (5) that the Town was negligent in its supervision of Price; (6) that the Town was negligent in its retention of Price; (7) that the Town was negligent in its failure to train Price; (8) that the Town was liable under 42 U.S.C. § 1983 for Price's use of excessive force in accordance with the Town's custom, policy, ordinance, regulation, or decision; (9) that the Town was liable under 42 U.S.C. § 1983 for its deliberate indifference to the constitutional rights of its citizens in hiring Price; and (10) that the Town was liable under 42 U.S.C. § 1983 for its deliberate indifference to the constitutional rights of its citizens in failing to properly train Price— each of which the jury found proximately caused Bert Reeves's death. (Amended Complaint, Stipulation of Facts and Issues, Exhibit A, Verdict Forms and Judgment, R. pp. 87-94).

The jury found multiple and independent acts of negligence by Price and by the Town, as well as federal liability against the Town and Price, individually. *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. (Amended Complaint, Stipulation of Facts and Issues, Exhibit A, Verdict Forms and Judgment, R. pp. 87-94). During the lawsuit, Reeves alleged that SCMIRF acted in bad faith in failing to reasonably settle the suit on behalf of its member, the Town of Cottageville, prior to trial. However, after the above jury verdict against the Town of Cottageville and Officer Price, Reeves settled the case, along with the lawsuit against Craddock, by a comprehensive settlement agreement that involved a primary payment made by SCMIRF and a reinsurer that was approved by the federal court. (Summary Judgment Hearing Transcript, Exhibit 1, Judge Norton's Order Approving Settlement in the United States District Court for South Carolina and Settlement Agreement, Feb. 26,

2015, R. pp. 351-364). The settlement agreement contains two contingent payments that are payable to Reeves, depending on the answers, pursuant to exhaustive appeal, to the two stipulated questions that were presented to the circuit court for declaratory judgment.

ARGUMENT

I. The Claims Made And The Verdict Rendered Against The Town Of Cottageville And Randall Price, Relating To The Hiring, Retention, And Supervision Of Price 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.

SCMIRF argues that the circuit court erred in finding that by the terms of the Coverage Contract more than $1,000,000 in indemnity coverage was available for the claims made and the verdict rendered against the Town of Cottageville and Randall Price. SCMIRF supports its argument with the erroneous contention that the coverage issue must be analyzed solely under the Coverage Contract's provision for "personal injury", and that when so focused, damages of bodily injury and personal injury subsume into one injury and, accordingly, a single coverage limit of $1,000,000 for the claims at issue in the underlying lawsuits exists. *See* Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. IV.G.4 & 18, (R. p. 166 & 169).

SCMIRF's argument has two fatal flaws. One, it ignores that the Coverage Contract is a "per occurrence" coverage policy. Two, it ignores that a determination first must be made of whether separate and distinct occurrences, wrongful actions, or conduct occurred for coverage and then second make a determination of whether bodily injury and personal injury both exist within a distinct occurrence such that bodily injury shall be deemed to be a part of the personal injury. In short, SCMIRF ignores that the Contract's

definitions of "bodily injury" and "personal injury" in the Law Enforcement Liability Contract Declarations addresses injuries within an occurrence, and the two definitions do not answer whether a single coverage limit of $1,000,000 exists for the claims in the underlying lawsuits here. *Id.* As such, SCMIRF's argument does not establish that the circuit court erred in granting summary judgment for Reeves.

Review of the Coverage Contract begins 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.").

The Coverage Contract is a "per occurrence" policy for general liability, as well as law enforcement liability, as opposed to an aggregate policy, which instead would provide

a single total amount 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:

- General Liability Contract Declarations provides limit of $1,000,000 "Per Occurrence or Offense" and
- Law Enforcement Liability Contract Declarations provides limit of $1,000,000 "Per Occurrence".

(Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. III, p. 28 & Sec. IV, p. 50, R. pp. 133 & 155).

Under Rule 30(b)(6), SCRCP, 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. (Reeves's Memorandum in Support of Summary Judgement Exhibit 2, Deposition of Heather Ricard, July 28, 2014, p. 39:18-23, R. p. 467). In fact, the Coverage Contract does specify a single aggregate limit of $1,000,000 in coverage for incidents involving sexual abuse, not applicable here but demonstrative of the two different types of liability coverage. (Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. III.D & Sec. IV.D.3, R. pp. 135 & 157). 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. (Reeves's Memorandum in Support of Summary Judgement Exhibit 2, Deposition of Heather Ricard, July 28, 2014, p. 28:13-22, R. p. 456). It is undisputed that for general

liability and law enforcement liability, the Coverage Contract provides coverage "per occurrence", and SCMIRF charged the Town of Cottageville accordingly. (Reeves's Memorandum in Support of Summary Judgement, Exhibit 2, Deposition of Heather Ricard, July 28, 2014, pp. 28:23 to 29:6; 39:11- 40:4, R. pp. 456-457, 467-468).

Specifically, the Coverage Contract, Section IV, Law Enforcement Liability Contract Declarations, provides that SCMIRF's limit of liability coverage for "any one occurrence/accident/wrongful act will be $1,000,000." (Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. IV.D.2., R. p. 157). Section IV, Law Enforcement Declarations, does not separately define occurrence but, rather, specifies in the opening of Section IV that liability is "subject to the limits of liability, exclusions, definitions, and conditions contained in the General Provisions, Section I". (Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. IV, p. 51, R. p. 156) (emphasis added). Thus, the definition of occurrence in the Coverage Contract, General Provisions applies to Section IV, Law Enforcement Declarations.

The Coverage Contract's Section I- General Provisions 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.

(Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. I.B.4, R. p. 108) (emphasis added).

The Coverage Contract's Section I- General Provisions also defines "Offense":

> **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 Sec. I.B.5 (R. p. 108-109). By the plain language of the Coverage Contract, "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. *Id.* 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.

Section IV, Law Enforcement Liability, specifically applies when the liability at issue pertains to 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 Sec. III.J.24 (R. p. 142). Further,

Section IV specifies that coverage arises out of, and is triggered by, a law enforcement employee's "wrongful act" provided it amounts to an occurrence:

> 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 Sec. IV.A.1 (R. p. 156) (underlining added).

Section IV defines "wrongful act" to mean:

> 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 Sec. IV.G.27 (R. p. 169-170). Accordingly, Section IV's liability coverage applies to cover injuries or damage from a wrongful act, provided it amounts to an occurrence as defined in Sec. I.B.4., and to a personal injury or advertising injury first caused in the coverage period.

Next, Section IV Law Enforcement "Limit of Liability" specifically focuses on limitations "for any **one** occurrence/accident/wrongful act", providing 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 Sec. IV.D.2 (R. p. 157) (emphasis added). Thus, the Contract language explicitly requires addressing liability within any one, SINGLE, occurrence, accident, or wrongful act, as well as any applicable limitations as to that SINGLE occurrence. Therefore, where in a single occurrence 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. *Id.*

Likewise, Section IV.D.2's provisions that "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" applies within an occurrence or offense. (R. p. 157). Section IV.D.2 does not prohibit coverage for multiple separate and distinct occurrences. Similarly, Section I.B.5's provision that when "the same basic conduct" causes an injury that "same basic conduct" will equate to an offense, even when the conduct is repeated, means that all repetitions of the same basic offense will be treated as one offense and subject to a single coverage limit. (R. p. 108-109). Therefore, the

contract provisions look at the conduct at issue to determine if a single occurrence exists and then specifies limitations that may apply within a discrete occurrence.

In sum, the Coverage Contract's limitations on continuing, serial or repeated instances of personal injury or advertising injury consisting of one occurrence with a single coverage limit do not abolish liability and coverage for each separate and distinct occurrence where multiple occurrences exist. "[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. Limiting liability coverage to a single occurrence where the same basic offense is repeated does not serve to eliminate liability for multiple distinct occurrences, each with their own liability coverage. Here, there are no "continuing, serial, or repeated instances" of personal injury or advertising injury present in the underlying lawsuits or repetition of "the same basic conduct". Instead, the suits involved separate and distinct actions by the Town, by Price, and by Craddock; thus, Sections IV.D.2 and I.B.5 are not applicable to limit the number of occurrences to one or to limit liability coverage to a single limit of $1,000.000.

Neither is the "No Duplication of Coverage or Coverage Limits" provision, located in the General Liability Section, I.C.9, applicable to define occurrence or limit coverage in the underlying cases. 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.

(Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. I.C.9, R. p. 112). The "single Coverage Limit" provision explains that there will be no duplication of policy coverage for an occurrence that may fall under more than one coverage section. The provision makes clear that where an act or omission may fall under more than one coverage section, that distinct 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 for SCMIRF 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.

(Reeves's Memorandum in Support of Summary Judgement Exhibit 2, Deposition of Heather Ricard, July 28, 2014, p. 42:8-16, R. p. 470). Accordingly, the "No Duplication of Coverage or Coverage Limits" provision specifically addresses a single occurrence and its treatment under the Contract. (Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. I.C.9, R. p. 112). Prohibiting duplication of coverage for one occurrence simply does not serve to define "occurrence" or serve to eliminate coverage for separate and distinct occurrences and has no bearing on whether multiple occurrences exist

under the Coverage Contract in the underlying claims and verdict rendered against the Town, Price and the separate suit against Craddock. (Reeves's Memorandum in Support of Summary Judgement Exhibit 2, Deposition of Heather Ricard, July 28, 2014, pp. 21:5-11; 55:19 to 56:19; R. pp. 449, 483-484).

Liability coverage and any limitations on coverage apply within an occurrence/accident/wrongful act, and, as such, whether there is more than one distinct occurrence must be determined before analyzing coverage and applicable limitations **per** occurrence. SCMIRF errs in its argument, because it goes right to analyze limitations on any one occurrence without first determining whether separate and distinct occurrences exist. In short, SCMIRF attempts to rework the "per occurrence" Coverage Contract into an aggregate policy for law enforcement liability, despite the explicit "per occurrence" nature of the coverage.

Specifically, SCMIRF's argument focuses on the definitions of "bodily injury" and "personal injury" in the Coverage Contract to erroneously contend that a single coverage limit must apply to the underlying claims. The Contract defines each as follows:

> **"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**.

****

> **"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.

(Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. IV.G.4 & 18, R. pp. 166 & 169). In short, where one of the 6 offenses constituting personal injury occurs along with bodily injury, the bodily injury will be deemed part of the personal injury.

SCMIRF ignores that the presence of bodily injury subsuming into personal injury takes place within a discrete occurrence, and SCMIRF's argument that these definitions govern liability coverage for the underlying claims at issue here puts the cart before the horse. What the definitions do explain is that within a single occurrence where personal injury and bodily injury both exist, the bodily injury will not be treated separately from the personal injury within that occurrence. Instead the distinct offense causing personal and bodily injury is considered one personal injury for coverage. However, where there are multiple separate and distinct offenses or occurrences, the bodily and personal injury definitions in no way direct that distinct occurrences causing the same injuries become one occurrence. *Id.* SCMIRF's contention fails in the same manner as its argument that the No Duplication of Coverage provision governs. That the contract provides $1,000,000 in

indemnity coverage for a single occurrence that results in both personal injury and bodily injury does not apply to multiple distinct occurrences. Bodily injury subsumes into personal injury within a single occurrence, not across multiple occurrences.

In conclusion, the definitions of personal injury and bodily injury neither define occurrence nor prohibit coverage for multiple distinct occurrences. The definitions of bodily injury and personal injury do not answer the stipulated question of whether the claims and verdicts in the underlying cases result in more than $1,000,000 in indemnity coverage available under the Coverage Contract.

II. The Circuit Court Properly Found That There Was An Ambiguity In The Coverage Contract As To Whether Coverage Of $1,000,000 "Per Occurrence" Is Defined By Acts Of Negligence Or The Resulting Damages, And Because The Separate Causes Of Action Involved Separate And Distinct Damages, More Than $1,000,000 In Indemnity Coverage Was Available.

The circuit court correctly held that the Coverage Contract is ambiguous as to whether "occurrence" is defined by different acts of negligence or the resulting damage. (Order on Summary Judgment, June 29, 2016, R. pp. 1-10). However, whether "occurrence" is defined by negligent act or defined by resulting damage, more than one occurrence exists here in the underlying claims. Specifically, Reeves's claims and the resulting separate verdicts against the Town of Cottageville and Officer Price were for separate and distinct actions, each of which proximately caused (1) Bert Reeves's conscience pain and suffering and (2) 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. Accordingly, not only were there multiple acts of negligence but two separate and distinct resulting damages as well.

Specifically, in Reeves's underlying lawsuit against the Town of Cottageville and Price, individually, there were numerous federal and state causes of actions for distinct actions by the Defendants. Reeves also sought to recover for two different injuries: for wrongful death and for Bert Reeves's conscious pain and suffering before death, damages that the circuit court correctly noted "clearly are not 'substantially the same' injury or damage.'" (R. p. 6). Wrongful death damages compensate the statutory beneficiaries for the death of their father, to include compensation for 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 (1994) (internal citations omitted). An award in a survival action is for the decedent's conscious pain and suffering that he endured from the injury itself. *Boan v. Blackwell*, 343 S.C. 498, 501-502, 541 S.C.2d 242, 244 (2001).

Therefore, even if the Contract is ambiguous as to whether "occurrence" is defined by act or resulting injury, there were multiple separate and distinct actions and more than one resulting injury, rendering more than one occurrence in the underlying claims under either definition. Therefore, the circuit court correctly held that more than $1,000,000 in total indemnity coverage exists under the Coverage Contract for the Town of Cottageville in the two underlying lawsuits, and summary judgment for Reeves on Issue #1 was properly granted.

III. Alternatively, If The Circuit Court Erred In Finding The Coverage Contract Ambiguous As To Whether "Occurrence" Is Defined By Act Of Negligence Or Damages, The Coverage Contract Unambiguously Defines "Occurrence" By Act of Negligence, Thereby Resulting In More Than $1,000,000 In Indemnity Coverage For The Underlying Cases.

In the Coverage Contract, the definition of occurrence is clear and unambiguous, defining occurrence based on the negligent act and not the resulting injury.[2] 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. 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, thereby resulting in $1,000,000 in indemnity coverage per occurrence and, in total, more than a single coverage limit of $1,000,000.

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. As discussed, Section I- General Provisions defines "occurrence" as used within the policy, making 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." (Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. I.B.4, R. p. 108). Likewise, the General Provisions also define "offense" based on action. *Id.* at I.B.5 (R. p. 108-109). 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

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[2] In accordance with Rule 220(c), SCRAP, the appellate court may affirm summary judgment on Issue #1 for Reeves "upon any ground(s) appearing in the Record on Appeal." Reeves specifically argued throughout the lower proceedings that the Coverage Contract defined occurrence unambiguously by negligent act. *See* Reeves's Motion for Summary Judgment and Memorandum in Support (R. pp. 400-520); Reeves's Memorandum in Opposition to SCMIRF's Motion (R. pp. 521-529); Reeves's Supplemental Memorandum and Exhibits to Motion for Summary Judgment (R. pp. 553-576); and Summary Judgment Hearing Transcript (R. pp. 252-350).

when "the same basic conduct" is repeated, it will be treated as a single offense. Thus, offense is determined by whether the same conduct is occurring and repeating in order to treat it as a single offense. *Id.* Where non-similar and separate acts or omissions occur, by the Coverage Contract's definition, separate and individual offenses have occurred as well.

To reiterate Section IV's Law Enforcement Employees Liability coverage is triggered:

> 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...

(Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. IV.A.1, R. p. 156) (underlining added).

The Coverage Contract also specifically defines "wrongful act" 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 Sec. IV.G.27 (R. pp. 169-170) (emphasis added).

Further defining occurrence and wrongful act 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 Sec. I.C.7 (R. p. 111). Coverage is not triggered for each injury but rather for each act 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 Sec. I.C.8.a (R. p. 111). It is the member or covered person's actions that drive the required notice, not any resulting injury.

In addition, the Contract's General Liability Coverage also reiterates that coverage for Law Enforcement liability is based on action— triggered "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 Sec. III.J.24 (R. p. 142) (underlining added). Accordingly, SCMIRF's obligation to pay liability coverage under the Coverage 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 Sec. IV.A.1.b (R. p. 156). Further, in direct response to SCMIRF's arguments on appeal, when an offense constitutes "personal injury" and "bodily injury" also occurs from the offense, the Coverage Contract considers all of the injury as one within that offense. (Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Sec. IV.G.4 & 18, R. pp. 166 & 169). However, the injury definitions do not apply outside of a discrete offense and do not foreclose coverage for more than one offense or occurrence. *Id.*, Sec. I.B.5 (definition of "offense") (R. p. 108-109).

Moreover, Ms. 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. (Reeves's Memorandum in Support of Summary Judgement Exhibit 2, Deposition of Heather Ricard, July 28, 2014, p. 53:7-11, R. p. 481). 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. Of note, SCMIRF previously contended that the same policy language at issue here defined occurrence by act of negligence and not by number of injuries in insuring liability for the police raid of Stratford High School in 2003. Ms. Ricard of SCMIRF 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.*, pp. 31 to 33:7 (R. pp. 459-461); Reeves's Supplemental Memorandum and Exhibits to Motion for Summary Judgment Exhibit 3, Affidavit of Frederick J. Jekel, Jr., July 31, 2014 (R. pp. 556-557). 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.

In sum, the Coverage Contact's language is clear and unambiguous that an occurrence triggering liability coverage is based on a negligent act or omission by the member or covered person. *See* Amended Complaint, Exhibit 1 with attachment D, Coverage Contract, Secs. I.B.4; I.B.5; IV.A.1; IV.G.27 (R. pp. 108-109, 156, 169-170). 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 per occurrence. As such, the circuit court's grant of summary judgment to Reeves on Issue #1 was proper.

A. *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. *Boiter* 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 *Boiter*, 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.

The Judicial Circuit where the current appeal originated 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) (R. pp. 421-428). In that medical malpractice case, the Fourteenth 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 (R. pp. 425-427). 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 (R. p. 426). 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, the Fourteenth Circuit 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 (R. pp. 425-427). 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 their 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), two occurrences were 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.* (Supreme Court held that recovery caps under § 15-78-120(a)(3) & (4) not applicable because claims arose/accrued before reinstatement of statutory caps and, as such, unnecessary for Court to address occurrence issue).

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.*

In addition, the reasoning in this Court's decision of *Johnson v. Hunter*, 386 S.C. 452, 688 S.E.2d 593 (Ct.App. 2010), also is instructive to explain how a single entity may incur liability for multiple occurrences. While in *Johnson*, the Court 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. Szczepkowicz*, 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, to determine whether one source of negligence set all the subsequent events in motion or whether multiple distinct acts of negligence caused 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.

Here, 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 ultimately resulted in the death of Bert Reeves. The jury specifically found multiple and distinct acts that constituted constitutional violations and multiple independent acts of negligence by Officer Price and the Town of

Cottageville and that each act proximately caused Reeves's and his children's injuries. (Amended Complaint, Exhibit 1 with attachment A, Verdict Form and Judgment, R. pp. 87-94). Specifically, 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. *Id.* 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 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 that proximately caused the death of Bert Reeves and his statutory beneficiaries' injuries. Specifically, 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. In sum, separate liability exists "per occurrence" for the distinct acts of the Town, Officer Price, and Craddock, resulting in multiple occurrences in the underlying cases. Therefore, pursuant to the Coverage Contract, more than $1,000,000 in liability coverage exists, and summary judgment for Reeves on Issue #1 was properly granted.

CONCLUSION

The claims made and the verdict rendered against the Town of Cottageville and Randall Price, along with the separate actions of John Craddock, result in more than $1,000,000 in indemnity coverage available under the Coverage Contract. The underlying cases involve multiple and distinct acts that caused multiple and distinct injuries. Therefore, whether "occurrence" is defined by action or injury, multiple occurrences exist, each with $1,000,000 in coverage "per occurrence". Accordingly, the circuit court correctly found that the definition of "occurrence" is ambiguous, but the presence of the wrongful death injuries and the decedent's own injury of conscious pain and suffering result in more than $1,000,000 in indemnity coverage.

Alternatively, if the circuit court erred in finding "occurrence" ambiguous in the Coverage Contract, summary judgment nonetheless was properly granted to Reeves on Issue #1, because "occurrence" is defined by act, and multiple separate and distinct actions exist in the underlying lawsuit, rendering more than $1,000,000 in coverage applicable.

Lastly, SCMIRF errs in its contention that the definitions of "bodily injury" and "personal injury" dictate that a single coverage limit of $1,000,000 applies, as its argument ignores that the Coverage Contract is a "per occurrence" policy and that a determination of whether separate and distinct occurrences, wrongful action, or conduct occurred must first be made before determining whether bodily injury and personal injury both exist within a single occurrence. Bodily injury subsumes into personal injury within a single occurrence, not across multiple occurrences.

As such, the circuit court's grant of summary judgment to Reeves on Issue One was proper, and Reeves, as Respondent/Appellant, respectfully requests that the Court AFFIRM the lower court's June 29, 2016 Order as to Issue #1.

Respectfully submitted this 23rd day of January 2017,

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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.

CERTIFICATE OF COMPLIANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reeves' view ignores these provisions and their intended effect.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Coverage Contract provides an unambiguous definition for this term:

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,

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January 20, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2014-CP-15-135

Appellate Case No. 2016-001626

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

CERTIFICATE OF COUNSEL

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

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STATEMENT OF THE CASE

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

> (1) Do the claims made and the verdict rendered against the Town of Cottageville and Randall Price, relating to the hiring, retention, supervision and shooting death of Bert Reeves result in there being more than $1,000,000 in indemnity coverage available under the terms of the SCMIRF Coverage Contract with the Town of Cottageville with respect to all such claims, including the claims made against John Craddock in a separately styled action?
>
> (2) Would a tort claim for bad faith brought against SCMIRF be subject to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*?

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

S.C.Code Ann. § 15-78-30(e). The Act defines "political subdivision" as:

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

S.C.Code Ann. § 15-78-30(h).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCULSION

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

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

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

Respectfully submitted this 23rd day of January 2017,

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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

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Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, ... Respondent/Appellant,

v.

South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF] ..... Appellant/Respondent.

CERTIFICATE OF COMPLIANCE

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

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Statement of Issue on Appeal

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

Statement of the Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statement of the Facts

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

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

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

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

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,

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January 20, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2014-CP-15-135

Appellate Case No. 2016-001626

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

CERTIFICATE OF COUNSEL

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

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January 20, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF], Appellant/Respondent.

Appellate Case No. 2016-001626

Appeal From Colleton County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 5643
Submitted December 6, 2018 – Filed May 1, 2019

AFFIRMED IN PART AND REVERSED IN PART

C. Mitchell Brown and Brian P. Crotty, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant/Respondent.

W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, both of McLeod Law Group LLC, of Charleston, for Respondent/Appellant.

WILLIAMS, J.: In this declaratory judgment action, the South Carolina Municipal Insurance and Risk Financing Fund (SCMIRF) appeals the portion of the circuit court's order entering judgment in favor of Ashley Reeves (Reeves), Personal Representative of the Estate of Albert Carl Reeves (Bert Reeves),

regarding indemnity coverage under a pooled self-insurance liability fund (the Coverage Contract). SCMIRF argues the circuit court erred in (1) finding Reeves was entitled to more than $1,000,000 in indemnity coverage under the Coverage Contract's terms; (2) failing to analyze the coverage issue exclusively under the Coverage Contract's "Personal Injury" provisions; (3) finding because there were separate wrongful death and survivorship action claims with different measures of damages there was more than $1,000,000 in indemnity coverage available under the Coverage Contract; and (4) finding an ambiguity in the Coverage Contract as to whether "Occurrence" is defined by different acts of negligence or the resulting damage. Reeves cross-appeals the portion of the circuit court's order entering judgment in favor of SCMIRF regarding the South Carolina Tort Claims Act[1] (the Act). Reeves asserts (1) SCMIRF is not subject to the Act because SCMIRF is a not political subdivision of South Carolina; and (2) the Act is inapplicable to, and does not limit the recovery in, a breach of contract claim. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

The parties stipulated to the facts of this case. The action before this Court stemmed from numerous lawsuits related to insurance coverage concerning the shooting death of Bert Reeves. On May 16, 2011, Randall Price, a police officer with the Town of Cottageville Police Department (the Police Department) shot and killed Bert Reeves while Price was acting in the course and scope of his employment.

The Town of Cottageville (Cottageville) entered into an Intergovernmental Agreement for an Insurance and Risk Financing Fund for Risk Sharing with SCMIRF and in doing so, Cottageville became a member of SCMIRF.[2]

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[1] S.C. Code Ann. § 15-78-10 through -220 (2005 & Supp. 2018).

[2] SCMIRF is an unincorporated, voluntary, self-insurance pool "created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement . . . ." SCMIRF "establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant to [S.C. Code Ann. §] 15-78-140 [Supp. 2018]." Both the Act and the South Carolina Constitution authorize municipalities and other political subdivisions to establish pooled self-insurance liability funds. S.C. CONST. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A) (Supp. 2018).

Cottageville and SCMIRF entered into the Coverage Contract, whereby SCMIRF provided liability coverage to Cottageville pursuant to the terms and limitations set forth in the Coverage Contract. The Coverage Contract provided liability coverage for Cottageville, as the "Member" named in the declarations page; the Police Department, as "the law enforcement department of the Member named;" and Price and John Craddock—the Police Department Chief of Police—"the individual law enforcement officers," as "Covered Persons."

On August 28, 2012, Reeves filed a lawsuit in the circuit court against Cottageville; the Police Department; and Price, individually (the Cottageville Action). The Cottageville Action was a survivorship and wrongful death action that alleged Cottageville, the Police Department, and Price were negligent in the death of Bert Reeves; Cottageville and the Police Department were negligent in the hiring, supervision, and retention of Price; and Cottageville, the Police Department, and Price violated Bert Reeves's civil rights under 42 U.S.C. § 1983 (2012). Pursuant to the Coverage Contract, SCMIRF retained attorneys to defended Cottageville and Price in the Cottageville Action. On September 25, 2012, the Cottageville Action was removed to the United States District Court for the District of South Carolina. On October 15, 2014, the jury in the Cottageville Action rendered a verdict in Reeves's favor finding Price liable for negligence; Cottageville liable for negligent hiring, supervision, retention, and training of Price; and both liable under Section 1983. The jury awarded Reeves actual damages of $7,500,000 against both Cottageville and Price; and punitive damages of $60,000,000 against Cottageville and $30,000,000 against Price. On October 21, 2014, a judgment was entered in the Cottageville Action based on the jury verdict.

On February 18, 2014, Reeves filed a declaratory judgment lawsuit in the circuit court against SCMIRF; Cottageville; the Police Department; and Price, individually (the Declaratory Judgment Action). The Declaratory Judgment Action sought a declaration that the Coverage Contract provided $1,000,000 in coverage for each independent, separate act of negligence, relating to the claims asserted in the Cottageville Action, thus resulting in the Coverage Contract providing for more than $1,000,000 in coverage.

On May 14, 2014, Reeves filed a lawsuit in the United States District Court for the District of South Carolina against Craddock (the Craddock Action). The Craddock Action asserted survivorship and wrongful death claims based on Section 1983. The suit alleged Craddock failed to properly train and supervise Price, failed to

intervene in the altercation between Price and Bert Reeves, and failed to render medical care to Bert Reeves.

On February 26, 2015, Reeves, SCMIRF, Price, and Craddock entered into a settlement agreement which settled both the Cottageville Action and the Craddock Action. On April 20, 2015, as part of the settlement, Reeves filed a partial stipulation of dismissal leaving SCMIRF as the only respondent in the present action. The settlement agreement stipulated Reeves and SCMIRF would litigate "the following two issues, and only these two issues" to resolve all claims arising from the Cottageville and Craddock Actions:

> (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.
>
> (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? SCMIRF asserts it would. Respondent Reeves asserts otherwise.

The settlement further stipulated Reeves would receive an additional $1,000,000 for each issue found in Reeves's favor. If Reeves did not prevail on either issue, Reeves would not receive any additional funds aside from the $10,000,000 settlement payment previously paid under the settlement agreement.

The parties jointly petitioned our supreme court to decide both issues in the court's original jurisdiction. Our supreme court declined the petition. Subsequently, Reeves filed an amended complaint in the circuit court setting forth the two stipulated issues in the settlement agreement and sought a declaration as to the interpretation of the Coverage Contract. SCMIRF filed an answer, and both parties filed motions for summary judgment regarding the stipulated issues.

The circuit court held a hearing on the cross-summary judgment motions. As to the first stipulated issue, the circuit court granted Reeves's summary judgment motion and denied SCMIRF's motion. The circuit court found the claims made and the verdict rendered in the Cottageville Action, and the claims made in the Craddock Action, resulted in more than $1,000,000 in indemnity coverage under the Coverage Contract. Specifically, the circuit court found, "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." The circuit court noted the Cottageville Action "sought to recover damages for wrongful death, as well as conscious pain and suffering," and "the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different." The circuit court concluded Reeves "suffered separate and distinct damages which could lead to additional coverage under the separate causes of action." As to the second stipulated issue, the circuit court granted SCMIRF's motion for summary judgment and denied Reeves's motion. The circuit court found a tort claim for bad faith brought against SCMIRF was subject to the Act.

Thereafter, Reeves and SCMIRF each filed motions to alter or amend the judgment. The circuit court denied both motions. This cross-appeal followed.

STANDARD OF REVIEW

Under Rule 56(c), SCRCP, summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The questions before us in this appeal are questions of law. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) ("It is a question of law for the court whether the language of a contract is ambiguous."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a

statute is a question of law . . . ."). The appellate court reviews questions of law de novo. *Id.* at 110, 662 S.E.2d at 41.

LAW/ANALYSIS

I. SCMIRF's Appeal

On appeal, SCMIRF argues this Court should reverse the circuit court's order regarding indemnity coverage because the circuit court erred in (1) finding Reeves was entitled to more than $1,000,000 in indemnity coverage under the Coverage Contract's terms; (2) failing to analyze the coverage issue exclusively under the Coverage Contract's provisions for Personal Injury; (3) holding that because there were separate wrongful death and survivorship action claims with different measures of damages there was more than $1,000,000 in indemnity coverage available under the Coverage Contract; and (4) finding an ambiguity in the Coverage Contract as to whether "occurrence" is defined by different acts of negligence or the resulting damage and this ambiguity resulted in more than $1,000,000 in indemnity coverage under the Coverage Contract. We agree.

"An insurance policy is a contract between the insured and the insurance company, and the policy's terms are construed according to the law of contracts." *Williams v. Gov. Emps. Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977).

"The construction of a clear and unambiguous contract is a question of law for the court." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Ins. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. "Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." *Williams*, 409 S.C. at 595, 762 S.E.2d at 710.

Section I (General Provisions) and Section IV (Law Enforcement Liability) of the Coverage Contract are at issue here. The Coverage Contract provides that Section I's general provisions apply to Section IV. Under Section IV, SCMIRF provides coverage for members or covered persons while they are acting both in the course and scope of their official duties of providing law enforcement. Section IV provides coverage for a "Wrongful Act," committed by a law enforcement officer or other covered persons, which results in "**Bodily Injury**" "provided the **Wrongful Act** amounts to an **Occurrence**; or" a "**Personal Injury**." (emphasis in original).

Section IV's definition section provides:

> "**Wrongful Act**" means any actual or alleged error in the performance or failure to perform an official duty; . . . or any omission or neglect in performing an official duty; or any breach of an official duty, including misfeasance, malfeasance[,] and nonfeasance . . . .

Section IV(G)(27) (emphasis in original).

> "**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 the 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**.

Section IV(G)(4) (emphasis in original).

> "**Personal Injury**" in this Section means only the following **Offenses** committed in the course of the **Member's** law enforcement activities: [including: assault and battery; violation of civil rights; and false arrest, detention or imprisonment].

Section IV(G)(18) (emphasis in original).

Section I's definition section provides:

> **"Offense"** means conduct constituting **Personal 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.
>
> All repetitions of the same basic **Offense** involving any offended person and/or . . . group of persons . . . , whether or not there are different witnesses to the **Offense** or there is 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**.

Section I(B)(5) (emphasis in original).

> **"Occurrence"** means an accident which results in **Bodily Injury** . . . 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, whether an **Occurrence** (as defined in the opening paragraph of this General Definition or as defined in the separate definition, if any, appearing in the Definitions part of the relevant Coverage Section), a **Wrongful Act**,

> a **Loss**, or an **Offense** causing **Personal Injury** . . . as those terms are defined in the relevant Coverage Section.

Section I(B)(4) (emphasis in original).

Numerous provisions in the Coverage Contract limit SCMIRF's liability. Section I(C)(9), No Duplication of Coverage or Coverage Limits, provides:

> 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. . . . 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 . . . . There is no duplication of any coverage or benefit under **This Contract**.

(emphasis in original). Section IV(D) addresses the "Limit of Liability" and "SCMIRF's Limit of Liability" which read as follows:

> 1. Limit of Liability
>
> . . .
>
> 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

> [T]he total liability of [SCMIRF] [for] any one occurrence/accident/wrongful act will be $1,000,000 per **Member** excluding expenses and defense cost[s] . . . .
>
> 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** 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** . . . will be considered as one occurrence/wrongful act, regardless of the number of **Covered Persons** involved in causing or failing to permit [sic] 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.

(emphasis in original).

A. Interpreting Section IV Coverage

SCMIRF argues the circuit court erred by failing to analyze the coverage issue exclusively under the Coverage Contract's provisions for Personal Injury. We agree.

The Coverage Contract limits liability coverage under Section IV to $1,000,000 per Occurrence. Section I's duplication clause states, liability covered under one

Coverage Section will not be covered under another Coverage Section, and provides:

> No **Offense** will be deemed also to constitute separately an **Occurrence** 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.

(emphasis in original). Section IV, governing law enforcement liability, states: SCMIRF agrees to pay the sums a member or covered person becomes obligated to pay because of a Wrongful Act committed by a law enforcement officer or other covered persons which results in:

> a. . . . **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** . . . which is first caused and first becomes manifest during the **Coverage Period**.

(emphasis in original). Section IV's definition of Bodily Injury clarifies the distinction between Bodily Injury and Personal Injury by providing, "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**." (emphasis in original).

SCMIRF argues the following analysis must take place to determine liability coverage under Section IV: (1) determine if there was a Wrongful Act, (2) determine whether the Wrongful Act resulted in either (a) Bodily Injury or (b) Personal Injury, and (3) determine whether Bodily Injury falls exclusively under Personal Injury coverage. SCMIRF argues, under this analysis, coverage falls solely under Personal Injury because the Bodily Injury here is a direct result of the Personal Injury. Conversely, Reeves asserts in order to determine whether more than $1,000,000 in indemnity coverage exists, there must first be a determination of whether "separate and distinct occurrences, wrongful actions, or conduct

occurred," and, only after this determination is made, should the analysis turn to whether Bodily Injury is deemed part of the Personal Injury for coverage purposes.

Under the terms of the Coverage Contract, we find coverage analysis begins with the coverage language of the applicable section, Section IV—governing law enforcement liability. Under Section IV, there are two means of obtaining coverage, (1) coverage for *Bodily Injury* or (2) coverage for *Personal Injury*: when such injury *is the result of a Wrongful Act*. We find SCMIRF's proposed three-part analysis is the correct analysis for determining whether a Wrongful Act resulted in Personal Injury and/or Bodily Injury. This three-part analysis establishes coverage under the applicable coverage section and aids in determining whether the acts or omissions—that might be described under more than one Coverage Section or more than one category as an Offense or an Occurrence—are treated as a single event for coverage purposes under Section I's duplication clause.

First, under the three-part analysis, there must be a Wrongful Act. Section IV defines Wrongful Act as "any actual or alleged error in the performance or failure to perform an official duty; . . . or any omission or neglect in performing an official duty; or any breach of an official duty, including misfeasance, malfeasance[,] and nonfeasance . . . ." Under this definition, we find in this case there is a Wrongful Act—the actions and omissions of Cottageville and Price which violated Reeves's rights and ultimately led to his death.[3]

Second, the Wrongful Act must result in either (a) Bodily Injury or (b) Personal Injury. Section IV defines Bodily Injury as "physical injury to any person (including death) and any mental anguish or mental suffering associated with or

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[3] In the Cottageville Action, the jury found Price was negligent, his negligence proximately caused Bert Reeves's death, and he violated Bert Reeves's constitutional rights under Section 1983 to be free from the use of excessive force and unnecessary seizure. The jury found Cottageville was grossly negligent in its hiring, supervising, failing to train, and retaining of Price and such negligence proximately caused Bert Reeves's death. The jury found Cottageville was liable under Section 1983 because Price's violation of Bert Reeves's rights was done pursuant to a custom, policy, ordinance, regulation, or decision of Cottageville or as a result of Cottageville's deliberate indifference to the use of excessive force by Price; and Cottageville was deliberately indifferent to the constitutional rights of its citizens in hiring and failing to properly train Price and such deliberate indifference caused Bert Reeves's death.

arising from such physical injury." In order to recover under Bodily Injury, Section IV requires the Wrongful Act that caused the Bodily Injury to amount to an Occurrence. Section I defines Occurrence as "an accident which results in **Bodily Injury**." (emphasis in original). We find in this case there is Bodily Injury—Bert Reeves's death and the mental anguish and suffering associated with his death. Reeves and SCMIRF do not contest Reeves's negligence claims support finding coverage for Bodily Injury, and the Wrongful Act which caused the Bodily Injury amounts to an Occurrence under Section IV coverage.

Section IV defines Personal Injury as "the following **Offenses** committed in the course of the **Member's** law enforcement activities" including: "assault and battery;" "violation of civil rights;" and "false arrest, detention or imprisonment." (emphasis in original). Section I defines Offense as "conduct constituting **Personal Injury** . . . that happens in the course and scope of the **Member's** or **Covered Person's** official duties . . . ." (emphasis in original). Thus, to recover under Personal Injury, the Wrongful Act that caused the Personal Injury must amount to a covered Offense. We find in this case there is Personal Injury—the violation of Bert Reeves's civil rights under Section 1983 which caused his death. Reeves and SCMIRF do not contest Reeves's Section 1983 claims support coverage for Personal Injury, and that the Wrongful Act which caused the Personal Injury amounts to an Offense under Section IV coverage. Prior to step three, we find there are two potential avenues for coverage here—coverage for Bodily Injury and coverage for Personal Injury.

Third, if there is both Bodily Injury and Personal Injury, we must determine whether the Bodily Injury is deemed part of the Personal Injury for coverage purposes. The definition for Bodily Injury states "**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**." (emphasis in original). The Wrongful Act that causes the Bodily Injury must amount to an Occurrence. The definition of Occurrence provides that when the term Occurrence is used to determine whether an event or series of events constitutes one loss, Occurrence can mean "an **Offense** causing **Personal Injury**." (emphasis in original). Section I prohibits the basis for coverage under Personal Injury (an Offense) to be the same basis for coverage under Bodily Injury (an Occurrence), stating "[n]o **Offense** will be deemed also to constitute separately an **Occurrence** for coverage purposes, or vice-versa." (emphasis in original). We find the circuit court failed to analyze the Coverage Contract's distinction between Bodily Injury and Personal Injury under Section IV and the limitations imposed under Sections I and IV when both are

present. *See McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Williams*, 409 S.C. at 595, 762 S.E.2d at 710 ("Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract.").

Under the terms of Section I and Section IV, we find when both Bodily Injury and one of the six Offenses constituting Personal Injury occur, the Bodily Injury is deemed part of the Personal Injury for coverage purposes. Here, the resulting injury is the same for both the negligence claims and the Section 1983 claims—that the conduct of Cottageville and Price "proximately caused the death of Bert Reeves." The Bodily Injury—Bert Reeves's death and the mental anguish and suffering associated with his death —"result[ed] directly or immediately" from the Personal Injury—the Section 1983 violations. We find the resulting injury is "deemed to be part of the **Personal Injury**" and cannot constitute a separate Bodily Injury under the Coverage Contract. (emphasis in original). Therefore, Bodily Injury is encompassed within SCMIRF's liability for Cottageville and Price's Section 1983 violations—the Offense—which constituted a Personal Injury.

B. Application of the Duplication Clause

SCMIRF argues the circuit court erred in holding that because it found separate wrongful death and survivorship action claims with different measures of damages, there was more than $1,000,000 in indemnity coverage. We agree.

Section I's "No Duplication of Coverage or Coverage Limits," provides:

> 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. . . . 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* . . . . There is no duplication of any coverage or benefits under **This Contract.**

(bold emphasis in original) (italic emphasis added).

The circuit court found the duplication clause did not limit SCMIRF's liability because there were different legal claims asserted—"wrongful death, as well as conscious pain and suffering, among other things"—which had different measures of damages. The circuit court found the damages recoverable for a wrongful death claim—damages sustained by the beneficiaries resulting from the death of the decedent, including mental shock and suffering, wounded feelings, grief, sorrow and loss of companionship—were not the same damages recoverable for a pain and suffering claim—damages sustained by the injured individual for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Thus, the circuit court concluded Bert Reeves suffered separate and distinct damages—which were not "substantially the same injury or damage" contemplated by the duplication clause. This finding led the circuit court to award coverage under the separate causes of action resulting in more than $1,000,000 in indemnity coverage.

Specifically, SCMIRF argues the circuit court erred by focusing on the different measures of damages for the different legal claims. SCMIRF asserts the duplication clause applies here because there is only one Personal Injury for coverage purposes.

Coverage does not turn on the legal theory under which liability is asserted, but on the cause of the injury. *McPherson v. Mich. Mut. Ins.*, 306 S.C. 456, 462, 412 S.E.2d 445, 448 (Ct. App. 1991), *affirmed as modified* 310 S.C. 316, 426 S.E.2d 770 (1993). Section IV of the Coverage Contract does not insure against theories of liability; it insures against Wrongful Acts which result in Bodily Injury or Personal Injury. We find asserting claims under multiple legal theories does not impact coverage under the Coverage Contract. For coverage purposes here, Bodily Injury is deemed part of Personal Injury. Because 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. Therefore, under the facts of the case, the duplication clause applies.

We find the duplication clause and other coverage provisions in the Coverage Contract act to limit coverage to a single Coverage Limit. Coverage Contract

language prohibits duplicate coverage here despite having (1) multiple claimants—Bert Reeves and his statutory beneficiaries; (2) multiple members or covered persons—Cottageville and Price; and (3) members and covered persons who committed various acts and omissions over a period of time—negligence and Section 1983 violations. The Coverage Contract specifically contemplates injury or damage, as the result of the acts or omissions of numerous members or covered persons, to more than one person, in the following provisions:

1. "A single Coverage Limit applies to any **Offense** or **Occurrence**, *regardless of the number of claimants, suits, or claims*." Section I(C)(9) (bold emphasis in original) (italic emphasis added).

2. "*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." Section I(C)(9) (bold emphasis in original) (italic emphasis added).

3. "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 *variation in the conduct constituting the **Offense***, will be treated as one **Offense**, subject to a single Coverage Limit . . . ." Section I(B)(5) (bold emphasis in original) (italic emphasis added).

4. "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.**" Section IV(D)(1) (bold emphasis in original) (italic emphasis added).

5. "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 . . . .*" Section IV(D)(2) (bold emphasis in original) (italic emphasis added).

6. "Subject to any special aggregates, *all 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 [sic] such injuries or the *number of persons injured* . . . ." Section IV(D)(2) (bold emphasis in original) (italic emphasis added).

Under the aforementioned provisions, we find if the same basic Offense injures multiple people who bring multiple claims—even if the conduct that constitutes the Offense varies and involves multiple members and covered persons—there is only one Offense for coverage purposes and recovery is limited to $1,000,000. *See McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Williams*, 409 S.C. at 595, 762 S.E.2d at 710 ("Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract."). The circuit court erred in focusing on the different measures of damages for Reeves's legal claims and finding the duplication clause did not apply here. We find there is one Wrongful Act giving rise to the same Offense which constitutes a Personal Injury, and the Offense is subject to a single Coverage Limit of $1,000,000.

C. Ambiguous Policy: Occurrence

SCMIRF argues the circuit court misplaced its emphasis on the term Occurrence, and it erred in finding the term ambiguous. We agree.

The Coverage Contract defines Occurrence as "an accident which results in **Bodily Injury** . . . ." (emphasis in original). In determining coverage under the Coverage Contract, the circuit court found "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." The circuit court interpreted SCMIRF's position to mean if there was one wrongful death, there was one Occurrence under the policy, and it characterized SCMIRF's position as viewing the Coverage Contract "as a damages policy for purposes of coverage determination." The circuit court concluded, even if viewed as a "damages policy," Reeves's underlying actions included separate claims with different measures of damages which "could lead to additional coverage under these separate causes of action." The court granted Reeves's motion for summary judgment and found there were multiple covered Occurrences which allowed for more than $1,000,000 in coverage.

Reeves cites *Boiter v. South Carolina Department of Transportation*, for the proposition that multiple acts of negligence constitute separate Occurrences under

the Coverage Contract. 393 S.C. 123, 712 S.E.2d 401 (2011). However, *Boiter* is distinguishable on two distinct and important points: first, it did not address the Coverage Contract, rather it involves the definition of "occurrence" under the Act; and second, it discussed liability for two acts of negligence by entirely separate entities with no causal connection between the two. *Id.* at 133, 712 S.E.2d at 406 (distinguishing *Boiter* from other cases "because they involve[d] a single governmental entity which committed multiple acts of negligence, [and] completely different situation[s] than the one before [*Boiter*]" and deciding there were two occurrences "based solely on the peculiar facts of [*Boiter*]"). Thus, the instant case is factually distinguishable from *Boiter* and does not compel a finding of multiple occurrences.

We find the circuit court misplaced its focus on the definition of Occurrence. Occurrence relates to coverage for Bodily Injury, and Offense relates to coverage for Personal Injury. Here, we find a single Offense constituting a Personal Injury for coverage purposes. Thus, coverage for *Offense* is at issue, not coverage for *Occurrence*. Our finding that there is a single Offense constituting a Personal Injury is dispositive of whether Occurrence is ambiguous. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); *see also McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Williams*, 409 S.C. at 595, 762 S.E.2d at 710 ("Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract.").

For the foregoing reasons, we reverse the circuit court's order finding Reeves was entitled to more than $1,000,000 in indemnity coverage, and we enter judgment in favor of SCMIRF as to this issue.

II. Reeves's Appeal

On appeal, Reeves argues the circuit court erred in granting the portion of SCMIRF's summary judgment motion regarding the Act because (1) the Act does not govern claims brought against SCMIRF because SCMIRF is not a political subdivision of the state, and (2) the Act does not apply to, and limit the recovery in, a breach of contract claim. We address each argument in turn.

A. Political Subdivision

i. "Political Subdivision" Interpretation

On appeal, Reeves argues the circuit court misinterpreted the definition of political subdivision within the Act. We disagree.

Questions of statutory construction are a matter of law. *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "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." *Sumter 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).

The South Carolina Constitution provides:

> (A) Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof. (B) Nothing in this Constitution may be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State.

S.C. CONST. art. VIII, § 13. The Act mandates, "The political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived [in the Act] by: . . . (4) establishing pooled self-insurance liability funds, by intergovernmental agreement." S.C. Code Ann. § 15-78-140(A) (Supp. 2018).

The Act provides limitations on liability for torts asserted against the State and its political subdivisions. *See* S.C. Code Ann. § 15-78-20(a) (2005) ("[I]t is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein."). The Act "is the exclusive and

sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. §15-78-200 (2005). "The provisions of [the Act] establish 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.* "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, [under the Act]." S.C. Code Ann. §15-78-40 (2005).

The Act defines "governmental entity" as "the State and its political subdivisions." S.C. Code Ann. §15-78-30(d) (2005). "Political subdivision" is defined as:

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

S.C. Code Ann. §15-78-30(h) (2005) (emphasis added).

In the instant case, SCMIRF contends it is a political subdivision based on the foregoing definition, arguing the phrase "any agency, governmental health care facility, department, or subdivision thereof" qualifies all terms before it. Under SCMIRF's interpretation, political subdivisions include: any agency, governmental health care facility, department, or subdivision of "counties, municipalities, school districts, a regional transportation authority . . . , and an operator as defined in item (8) of Section 58-25-20 . . . and special purpose districts of the State . . . ." S.C. Code Ann. §15-78-30(h). SCMIRF relies on Attorney General's opinions finding SCMIRF is an agency or department of the municipality and tort claims brought against SCMIRF are subject to the Act.[4] *See* S.C. Op. Att'y Gen., 1990 WL

[4] A 1990 Attorney General's opinion analyzed the definition of political subdivision in the Act and found the phrase "any agency, governmental health care facility, department, or subdivision thereof" "amplifies the term 'political subdivision' and cannot be reasonably read to modify the term 'State' since that term, as used in this paragraph, exists only to further describe special purpose districts." 1990 WL 599264, at *2. The opinion found,

599264 (S.C.A.G. July 25, 1990); S.C. Op. Att'y Gen., 2014 WL 7405219 (S.C.A.G. December 17, 2014).

> [a] reading of the statutory language 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. (emphasis added). "Each clause is of equal status and no phrase exists as modification or explanation of another." *Id.*

A 2014 Attorney General's opinion addressed the issue of whether SCMIRF is a governmental entity as defined in the Act, "such that tort claims brought against SCMIRF are subject to the Act." 2014 WL 7405219, at *1. Building on the Attorney General's 1990 interpretation of the definition of political subdivision, the opinion found the definition of political subdivision included any agency or department of one or more municipalities. *Id.* at *2. The opinion noted the "very purpose and structure of SCMIRF is contemplated in and authorized by the Act." *Id.* at *3; *see* S.C. Code Ann. § 15-78-140(A) ("The political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived by: . . . (4) *establishing pooled self-insurance liability funds, by intergovernmental agreement.*") (emphasis added). The opinion found "SCMIRF clearly serves as an agency or department of its municipality members, it therefore falls within the [] definition and is subject to tort suits only pursuant to the terms of the Act." *Id.* Accordingly, the Attorney General's opinion opined that SCMIRF's liability is subject to the Tort Claims Act. *Id.* at *3.

Conversely, Reeves contends SCMIRF is not a political subdivision, arguing the phrase "any agency, governmental health care facility, department, or subdivision thereof" only qualifies the phrase "special purpose districts of the State." S.C. Code Ann. § 15-78-30(h). Under Reeves's interpretation, political subdivisions include: any agency, governmental health care facility, department, or subdivision of special districts of the State. Reeves concludes, SCMIRF is not an agency, department, or subdivision of a special district of the State and, accordingly, not a political subdivision. In response to SCMIRF's reliance on the Attorney General's opinions, Reeves argues the Attorney General's opinions may be persuasive authority, but they are not binding, and this Court should disagree with the opinions' reasoning and decline to adopt them. *See Charleston Cty. 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."); *but cf. Price v. Watt*, 280 S.C. 510, 513 n.1, 313 S.E.2d 58, 60 n.1 (Ct. App. 1984) (demonstrating Attorney General's opinions should not be disregarded without cogent reason).

The circuit court agreed with SCMIRF's interpretation, found SCMIRF is a political subdivision of the state, and found a tort claim for bad faith brought against SCMIRF is subject to the Act. The circuit court granted SCMIRF's motion for summary judgment on the issue.

We find the circuit court did not err in finding SCMIRF is a political subdivision under the Act. SCMIRF is a voluntary self-insurance pool created by municipalities of the state under the authorization of the State Constitution and the Act. The Act and the South Carolina Constitution authorize municipalities and other political subdivisions to establish pooled self-insurance liability funds. S.C. CONST. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A). It would be an absurd result for the legislature to create a scheme in which a municipality loses its status as a political subdivision under the Act—and, thus, loses the protection of the Act—when it joins together with other municipalities for the purpose of complying with statutory obligations. We find SCMIRF is a political subdivision under the language of the Act.

ii. Health Promotion Specialists[5] Factors

Reeves argues the factors established in *Health Promotion Specialists* clearly establish that SCMIRF is not a political subdivision of the state. We disagree.

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[5] *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).

Beyond the plain language of the Act, our supreme court in *Health Promotion Specialists* specified the following factors to determine whether an entity is the state or its political subdivision for purposes of coverage under the Act:

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

Id. at 636, 743 S.E.2d at 814 (citation omitted). Specifically, Reeves contends SCMIRF is not a political subdivision under the Act because it is merely a fund, the General Assembly did not create SCMIRF nor provide for any control over it, and SCMIRF's funds are not controlled by the State Treasurer.

SCMIRF functions statewide in municipalities across the state, enabling municipalities to enter into an intergovernmental agreement for insurance coverage. Its purpose is to provide insurance coverage to municipal government units, institutions, or agencies in the state—a function required of municipalities under the State Constitution and the Act. S.C. CONST. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A). The legislature did not create SCMIRF, however. Municipalities created SCMIRF at the direction of the Act. The State Constitution provides, "Nothing in this Constitution may be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State." S.C. CONST. art. VIII, § 13(B). The Act mandates "[t]he political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived [in the Act] by: . . . (4) establishing pooled self-insurance liability funds, by intergovernmental agreement." S.C. Code Ann. § 15-78-140(A). In providing liability coverage, SCMIRF is performing a mandated function of a municipality. We find the *Health Promotion Specialists* factors weigh in favor of finding SCMIRF is a political subdivision subject to the Act.

For the foregoing reasons, we find the circuit court did not err in finding SCMIRF is subject to the Act when a tort claim for bad faith is brought against it. We affirm the circuit court's order granting SCMIRF's motion for summary judgment on this

issue. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.").

B. Applicability of Torts Claims Act: Breach of Contract

Reeves argues regardless of whether SCMIRF is a political subdivision, the Act has no impact on SCMIRF's liability based on a breach of contract. Specifically, Reeves asserts a claim against SCMIRF for a breach of the Coverage Contract sounds in contract and is not subject to the Act's coverage limitations. We disagree.

The parties agreed in their settlement agreement to litigate "the following two issues, and only these two issues": (1) whether the Coverage Contract provides more than $1,000,000 in indemnity coverage to Reeves's claims; and (2) whether "a *tort claim* for bad faith brought against SCMIRF [was] subject to the [] Act." (emphasis added). The settlement agreement provided that if the court found a bad faith tort claim against SCMIRF was not subject to the Act, SCMIRF would pay Reeves an additional $1,000,000. The circuit court found the tort claim for bad faith brought against SCMIRF *was* subject to the Act and granted SCMIRF's motion for summary judgment on issue two. Reeves filed a Rule 59(e), SCRCP, motion requesting the circuit court amend its order to find the Act does not apply to, nor limit the recovery in, a breach of contract claim. The circuit court denied Reeves's Rule 59(e) motion regarding the second issue. The circuit court found the breach of contract issue was not before the circuit court because the stipulated question was whether a *tort claim* for bad faith brought against SCMIRF was subject to the Act.

"A stipulation is an agreement, admission[,] or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them." *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 393, 496 S.E.2d 624, 626 (1998); *see Belue v. Fetner*, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968) ("When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided."). "A stipulation is an agreement, an understanding. The court must construe [a stipulation] like a contract, i.e., interpret it in a manner consistent with the parties' intentions." *Porter v. S.C. Pub. Serv. Com'n*, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1998). "The interpretation of a stipulation is

addressed to the sound discretion of the [circuit] court and will not be reversed on appeal absent an abuse of that discretion." *Milton P. Demetre Family Ltd. P'ship v. Beckmann*, 413 S.C. 38, 50, 773 S.E.2d 596, 603 (Ct. App. 2014).

The second stipulated question for litigation was not whether the Act would apply to a *breach* of the Coverage Contract; rather, the question was whether a *tort claim* for bad faith brought against SCMIRF was subject to the Act. *See Porter*, 333 S.C. at 30, 507 S.E.2d at 337 ("Because the court construes it like a contract, a stipulation that is unambiguous and explicit must be construed according to the terms the parties have used, as those terms are understood in their plain, ordinary, and popular sense."). We find the circuit court properly enforced the plain meaning of the stipulation at issue in this case. Accordingly, we affirm the circuit court's order granting SCMIRF's motion for summary judgment on this issue.

AFFIRMED IN PART AND REVERSED IN PART.[6]

HUFF and SHORT, JJ., concur.

[6] We decide this case without oral argument pursuant to Rule 215, SCACR.

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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,

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

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

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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

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SC Court of Appeals

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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V. CLAIRE ALLEN
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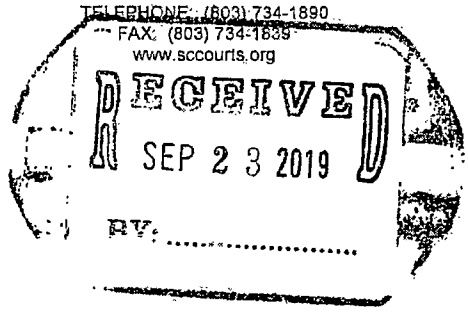

September 19, 2019

Mr. William Mullins McLeod, Jr., Esquire
PO Box 21624
Charleston SC 29413

Ms. Jacqueline LaPan Edgerton, Esquire
PO Box 21624
Charleston SC 29413

Re: Ashley Reeves v. SCMIRF
Appellate Case No. 2016-001626

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: C. Mitchell Brown, Esquire
Brian Patrick Crotty, Esquire

The South Carolina Court of Appeals

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

v.

South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF], Appellant/Respondent.

Appellate Case No. 2016-001626

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Cuffe J.

Paul E. Short, Jr. J.

H. B. Wilson J.

Columbia, South Carolina

cc:
C. Mitchell Brown, Esquire
Brian Patrick Crotty, Esquire
William Mullins McLeod, Jr., Esquire

FILED
September 19, 2019 S.S.

Jacqueline LaPan Edgerton, Esquire
The Honorable Perry M. Buckner, III