

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2014-CP-15-135

Appellate Case No. 2019-001756

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

v.

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

PETITIONER'S REPLY TO RESPONDENT'S RETURN IN OPPOSITION FOR A
WRIT OF CERTIORARI

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TABLE OF CONTENTS

PRELIMINARY STATEMENT1

ARGUMENT.....2

 I. The Court Should Address Whether the Terms of SCMIRF’s Coverage Contract
 Provide A Single Limit for All of Injuries to All Parties Arising from the Murder of
 Bert Reeves2

 A. The Importance of This Issue Is Undisputed2

 B. Respondent’s Merits Argument Only Confirms the Certworthiness Of the
 Issue4

 II. The Court Should Address Whether SCMIRF Is A “Political Subdivision” of the State
 Entitled to Sovereign Immunity Under the Tort Claims Act.....4

CONCLUSION.....6

PRELIMINARY STATEMENT

Respondent South Carolina Municipal Insurance and Risk Financing Fund's ("SCMIRF") opposition to the Petition for Writ of Certiorari is curious considering in June 2015, with the consent of the Petitioner, SCMIRF asked this very Court to resolve these very issues. (*See*, Consent Petition for Original Jurisdiction, App. 372.) Notwithstanding, Petitioner explained in detail in her Petition for Writ of Certiorari why this Court should now resolve these two important questions. More particularly, the Court of Appeal's interpretation of the insurance coverage contract at issue in this case misapplied well-established rules of contract construction and its decision would result in harsh implications for South Carolina municipalities and law enforcement personnel by effectively eliminating insurance coverage for law enforcement officers for cases alleging civil rights violations. Rather than joining issue on the merits of the decision below, Respondent attempts to kick up dust to create the appearance that none of the stipulated issues presented justify issuance of a writ. Yet, resolution of both issues is paramount to providing clarity and finality to questions of law that clearly remain ambiguous and ripe for judicial review.

Put simply, the importance of the questions presented is manifest to ensuring proper resolution of liability claims in South Carolina for both injured parties and public tortfeasors. First, if the Court of Appeals erroneous interpretation stands, then law enforcement officers across South Carolina could be left without insurance coverage for claims resulting from acts or omissions committed by them under the color of law. Further, law enforcement agencies would be placed at an extreme competitive disadvantage when hiring law enforcement officers considering insurance protection is an expected employment benefit. Lastly, private parties injured by those acting under color of state law would, in many cases, have virtually no recovery for damages arising from the most egregious civil rights violations one can imagine—in this case, the taking of an innocent man's life by a rogue police officer. Additionally, the notion that SCMIRF takes on the sovereign

characteristic of municipalities that contract with it for coverage and, therefore, is immune from tortious liability for bad faith, has no basis in South Carolina law. Put another way, neither the South Carolina Constitution or state legislature has subdelegated to towns or municipalities the authority to confer waiver of immunity on a third-party insurance entity that those towns or municipalities neither wholly-control nor operate. Accordingly, for the reasons given in the Petition and the reasons set forth below, this Court should grant the Petition.

ARGUMENT

I. The Court Should Address Whether the Terms of SCMIRF's Coverage Contract Provide A Single Limit for All of Injuries to All Parties Arising from the Murder of Bert Reeves

The question of whether SCMIRF's Coverage Contract provides more than a single limit of liability coverage for all negligence and civil rights claims brought by multiple parties against multiple defendants arising from a law enforcement shooting death deserves review in this Court. The legal and practical importance of resolving the scope and availability of insurance coverage for separate and distinct claims brought by multiple claimants is unquestionably important and extends well beyond the stipulated facts of this case.

A. The Importance of This Issue Is Undisputed

Resolution of the coverage issue in this case first began in June 2015 when SCMIRF filed its Consent Petition for Original Jurisdiction requesting this Court's review. (*See App. 372.*) In its petition, SCMIRF plainly advocated in favor of this Court exercising its original jurisdiction over these same legal questions on the basis that "the public interest in plainly involved here, and the circumstances constitute grounds of emergency or other good reason" for resolution. (*App. 374-75.*) Specifically, SCMIRF conceded that "if Reeves' legal positions and averments are followed and accepted in South Carolina, SCMIRF's ability to adequately and economically insure

its members becomes threatened.” (App. 376.) On this, Petitioner agrees—as argued in the Petition and in the lower courts, SCMIRF’s insistence in cramming all manner of disparate claims under the veneer of a single “occurrence” is precisely why its continuation of its claims handling practices threatens law enforcement officers with personal liability for civil rights claims.¹

The importance of reconciling the plain language of the Coverage Contract with the interpretation of it by the Court of Appeals is laid bare in Respondent’s brief. On one hand, Respondent argues that “the necessary starting point for any coverage analysis under [Section IV of the Coverage Contract] is the existence of a Wrongful Act,” (Resp. Br. at 4), but Respondent then states that the Court of Appeals started its analysis one step prior with the coverage provision. (*Id.* at 5 (“The Court of Appeals did start with the coverage provision and *then* properly focused on the key element that triggered the existence or nonexistence of coverage—whether there was a Wrongful Act.” (emphasis added)). Indeed, it is the “order of operations” that the Court of Appeals applied in examining the Coverage Contract, and its concomitant failure to properly construe ambiguous contract provisions that led to its error.

As stated in the Petition, where there are multiple claimants with different claims, the proper starting point must be how much coverage the contract provides to separate insureds for separate claims. As made plain in the Coverage Contract, a “Wrongful Act,” by definition, does not include civil rights violations redressable under 42 U.S.C. § 1983 or intentional conduct. Thus,

¹ Respondent erroneously contends that Petitioner “raised for the first time” in her Petition for Rehearing to the Court of Appeals an argument *responding* to the Court of Appeals interpretation of the coverage contract; namely, that its view of the term “Wrongful Act” erroneously encompasses civil rights violation contrary to the plain language of the contract. (Resp. Br. at 5 n.1.) Contrary to Respondent’s characterization of Petitioner’s motion for reconsideration, the questions presented in this case have remained the same since both parties stipulated to the issues to be resolved in their February 2015 universal settlement agreement that prompted the declaratory action. (*See App.* pp. 358-59.) Thus, the mere explanation by Petitioner of *why* the lower court’s interpretation of a term in the Coverage Contract is flawed does not amount to a new “argument” on appeal. Were it so, a party would be hamstrung from effectively seeking appellate review of any erroneous conclusion of law by a lower court.

by leaving unreviewed the lower court's conclusion that coverage analysis must start with whether the underlying conduct falls within the definition of a "Wrongful Act," which plainly excludes civil rights violations, such claims would never be payable under the Coverage Contract leaving towns and law enforcement personnel unduly exposed to liability.

B. Respondent's Merits Argument Only Confirms the Certworthiness Of the Issue.

Contrary to its prior petition to the Court on this issue, Respondent now argues that certiorari should be denied because it contends the decision from the Court of Appeals is apparently correct. (*E.g.*, Resp. Br. at 3-4.) But this "merits" argument is no ground to deny certiorari. Whether or not the Court of Appeals was correct on the merits is irrelevant for purposes of granting certiorari. If anything, the lengthy procedural history of this case highlights the inconsistent decisions from the lower courts on these issues, and lack of any clear authority guiding them, thus warranting this Court's review. Indeed, it is telling that Respondent now argues that "[t]here is no novel question of law" presented in the petition, yet in arguing the merits of its position in its Return to the Petition is unable to cite any binding authority squarely addressing the issues of substantial importance raised here. As set forth in the Petition, whether or not the Court of Appeals correctly reached its decision is an issue of proper contract interpretation that should be resolved with finality given the enormous public policy implications flowing from it.

II. The Court Should Address Whether SCMIRF Is A "Political Subdivision" of the State Entitled to Sovereign Immunity Under the Tort Claims Act

This Court should also grant certiorari to consider whether SCMIRF is entitled to the immunity protections offered under the Tort Claims Act. This issue unquestionably remains a novel question of law the importance of which may very well impact the extent municipalities may confer the benefits of sovereign immunity to third-parties over which they exercise virtually no exclusive control.

The issue for consideration here is not whether municipalities can share functions with other governments, but rather whether SCMIRF is an agency, department or subdivision of its member municipalities entitled to Tort Claims Act protection. Respondent argues that because South Carolina law authorizes municipalities to join together to share functions without shedding the protections of the Tort Claims Act, it necessarily renders SCMIRF a beneficiary of the Act. (Resp. Br. at 14-15.) In making this argument, Respondent highlights language from the SCMIRF bylaws to suggest that it is “comprised of South Carolina municipalities and their agencies.” (*Id.* at 14). Yet a critical question left unanswered by Respondent (and the Court of Appeals) is the extent to which a participating municipality can exercise reasonable oversight or control over SCMIRF’s operations sufficient to render it an agency of that municipality. The SCMIRF bylaws (App. 99-102) and corresponding Intergovernmental Agreement establishing SCMIRF (App. 103-109) limit the extent to which participating municipalities may control its operations, going so far as to give its nine-member Board of Trustees the exclusive right to decide who may join it. (App. 106 (“The Trustees shall be sole judge of whether or not an applicant is admitted to membership.”).) The lack of meaningful oversight and control over SCMIRF by each of its participating municipalities renders it distinct from other shared purpose entities that carry the imprimatur of a political subdivision, such as school districts, regional transportation authorities, and other special purpose districts of the State.

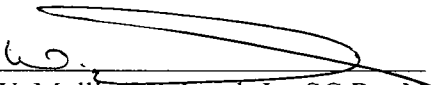
It is SCMIRF’s lack of political accountability to South Carolina citizens, lack of meaningful control by its members, and lack of shared concerns with the State and political subdivisions that renders it outside the norm of other shared-purpose inter-governmental entities, like the state Insurance Reserve Fund, that typically enjoy status as a political subdivision. Thus, resolution of the manner and extent to which municipalities can share functions through the

creation of virtually unaccountable third-parties while retaining protection of the Tort Claims Act demands review from this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 13th day of November 2019.


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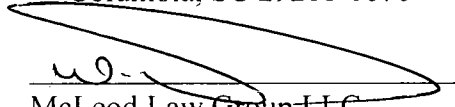
I certify I have served the Respondent and the Clerk of the Supreme Court of South Carolina a copy of the Reply to Respondent's Return in Opposition for Writ of Certiorari on this 13th day of November 2019.

Via Federal Express

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