

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

Appeal from Colleton County
The Honorable Perry M. Buckner, III, Circuit Court Judge

Opinion No. 5643 (S.C. Ct. App. filed May 1, 2019)

Appellate Case No. 2019-001756

Lower Court Case No. 2014-CP-15-00135

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

v.

South Carolina Municipal Insurance and Risk Financing
Fund.....RESPONDENT.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

1. Do the claims made and the verdict rendered against the Town of Cottageville and Randall Price, related 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 a separate action?

2. 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, S.C. Code Ann. § 15-78-10 *et seq.*, assuming such a claim were otherwise valid?

INTRODUCTION

Pursuant to an agreement of the parties, there are two stipulated issues to be decided in this appeal. The first arises from the proper interpretation of the insurance coverage policy issued by the South Carolina Municipal Insurance and Risk Financing Fund (“SCMIRF”) to the Town of Cottageville in 2011 with respect to liability incurred by the Town, police officer Randall Price, and police chief John Craddock arising from the May 16, 2011 shooting death of Bert Reeves.

Petitioner Ashley Reeves’s position on this issue proceeds from a simple premise and decades of this Court’s jurisprudence. When interpreting coverage under an insurance contract, terms of coverage inclusion are to be viewed broadly, while terms of exclusion are to be narrowly construed. The decision below proceeds from the opposite premise. It takes patently ambiguous provisions and converts them into bars on coverage. It transforms a per occurrence policy into an aggregate limits policy. And, in rendering its coverage determination, it applies a presumption in favor of non-coverage so strong it focuses primarily on whether the Reeves Estate would receive more than \$1,000,000 for all of the harmful acts engaged in by the Town of Cottageville, Randall Price, and John Craddock, rather than properly focusing on how much coverage the *per occurrence* policy provides to these separate insureds for their separate and independent wrongful acts—in this case, conduct resulting in negligence, civil rights, wrongful death, and survival claims. If left undisturbed, the decision below will surely result in harsh implications for South Carolina municipalities and their law enforcement personnel by effectively reading out insurance coverage in cases alleging civil rights violations and inevitably forcing many police officers into bankruptcy.

The second issue presented arises from the text of the South Carolina Tort Claims Act, which includes a requirement that political subdivisions acquire tort liability insurance to cover risks for which sovereign immunity has been waived. Pursuant to the Act, municipalities may satisfy this requirement by obtaining insurance coverage through private carriers, through the state

Insurance Reserve Fund, through self-insurance, or by establishing pooled self-insurance liability funds with other South Carolina municipalities. SCMIRF, one of several pooled, self-insurance liability insurance funds that is operated and controlled by a private corporation that administers insurance claims for South Carolina municipalities, interprets the statutory directive that political subdivisions obtain insurance as conferring upon it and its private claims administrators the imprimatur of a “political subdivision” of the State of South Carolina, thereby extending to it limited immunity from suit brought by its member South Carolina municipalities, such as the Town of Cottageville, and their assigns for tortious bad faith in handling their insurance claims.

The issue on appeal here is not the theoretical question of whether municipalities can share functions with other municipalities and still retain some form of immunity under the Tort Claims Act—they can. Rather, the discrete issue is whether SCMIRF—a fund created, administered, and controlled by a private corporation that operates with no governmental oversight—is entitled to Tort Claims Act protection in a suit for bad faith in administering insurance claims brought on behalf of South Carolina municipalities and covered law enforcement personnel. None of the factors established in this Court’s precedent support the effective expansion of immunity to private insurers that make coverage decisions. Yet, the holding by the Court of Appeals accomplishes just that. Sound public policy strongly counsels against affirming this broad holding—the primary concern being that the decision below will undoubtedly open the floodgates to major industries pairing with financially vulnerable South Carolina municipalities solely to acquire the cloak of immunity over their private businesses. The better course, by far, is to dial back this extraordinary expansion of Tort Claims Act immunity by closely scrutinizing SCMIRF and making clear that private insurers that operate under the veneer of government control are not entitled to assert Tort

Claims Act immunity in defense of bad faith cases brought against them for the benefit of South Carolina's taxpayers.

STATEMENT OF THE CASE

This action originated on February 14, 2014, when Petitioner Ashley Reeves, as Personal Representative of the Estate of Albert Carl "Bert" Reeves, filed a declaratory judgment complaint against the South Carolina Municipal Insurance and Risk Financing Fund ("SCMIRF"), the Town of Cottageville ("Cottageville"), the Town of Cottageville Police Department, and Cottageville Police Officer Randall Price ("Price") seeking a declaration as to the amount of coverage available under the insurance policy issued by SCMIRF to the Town of Cottageville in 2011 ("Coverage Contract"). (*See* Compl., R. 41).¹ SCMIRF filed its Answer and Declaratory Judgment Counterclaim on May 15, 2014, (R. 60), and Reeves filed her Reply to SCMIRF's Counterclaim on June 11, 2014, (R. 66).

A. Underlying Litigation

The declaratory judgment action arose from two civil lawsuits filed in the wake of the May 16, 2011 shooting death of Bert Reeves, the former mayor of Cottageville, by Officer Price:

1. Cottageville Lawsuit

On August 28, 2012, Petitioner Reeves filed a lawsuit against Cottageville, the Cottageville Police Department, and Price alleging various negligence and civil rights violations on behalf of the Reeves Estate and its beneficiaries that was later removed to the U.S. District Court for the District of South Carolina ("Cottageville Lawsuit"). (*See* Cottageville Compl., R. 21). The Cottageville Lawsuit included eight causes of action: (1)

¹ References to the Record on Appeal are abbreviate as "R." and references to documents in the appendix are abbreviate as "App."

negligence against Cottageville, its police department, and Price for the killing of Bert Reeves, (*id.* ¶¶ 17-24, R. 25-26); (2) negligent hiring, supervision, and retention of Price as a police officer against Cottageville and its police department, (*id.* ¶¶ 25-34, R. 26-28); (3) claims for assault and (4) battery against all defendants (*id.* ¶¶ 35-43, R. 29-30); (5) violation Reeves’s constitutional right to be free from excessive force against Price, (*id.* ¶¶ 44-49, R. 30-31); (6) deliberate indifference to Reeves’s constitutional rights against Cottageville and its police department, (*Id.* ¶¶ 50-59, R. 31-33); (7) a survival action against all defendants on behalf of Reeves’s Estate; and (8) a wrongful death action against all defendants brought on behalf of Reeves’s children for their loss. (*Id.* ¶¶ 60-71, R. 33-35.)

2. Craddock Lawsuit

On May 14, 2014, Petitioner Reeves filed a separate action in federal court against Cottageville Police Chief John Craddock (“Craddock Lawsuit”). (Craddock Compl., R. 48). The Craddock Lawsuit alleged three discrete civil rights violations against Craddock under 42 U.S.C. § 1983 for events occurring before, during, and after the Reeves shooting: (1) Craddock’s failure to properly train and supervise Officer Price, (2) Craddock’s failure to intervene at the scene of the shooting to stop Price from using excessive force on Reeves, and (3) Craddock’s failure to render medical care to Reeves as he lay dying on the ground, causing Reeves to experience conscious suffering. (*Id.*, R. 53-58).

The present declaratory judgment action resulted from SCMIRF’s position during pre-trial settlement discussions in both cases that its insured, the Town of Cottageville, is entitled to a maximum of \$1,000,000 in indemnity coverage for all of the claims raised against it and its law enforcement personnel in both the Cottageville and Craddock Lawsuits.

Thereafter, the Cottageville Lawsuit proceeded to trial and, on October 15, 2014, a federal jury rendered a verdict in Petitioner Reeves's favor, awarding compensatory damages of \$7,500,000 against the Town of Cottageville and Price; punitive damages of \$30,000,000 against Price; and punitive damages of \$60,000,000 against the Town of Cottageville. (*See* Stip. of Facts and Issues, Ex. A. Verdict Forms and Judgment, R. 92-94). As part of its verdict, the jury made the following findings: (1) Officer Price was negligent in proximately causing Bert Reeves's death; (2) Price violated Bert Reeves's constitutional right to be free from the use of excessive force; (3) Price violated Bert Reeves's constitutional right to be free from unnecessary seizure; (4) the Town of Cottageville was negligent in its hiring of Price; (5) the Town of Cottageville was negligent in its supervision of Price; (6) the Town of Cottageville was negligent in its retention of Price; (7) the Town of Cottageville was negligent in its failure to train Price; (8) the Town of Cottageville maintained a custom or policy that enabled Price's use of excessive force and/or that it was deliberately indifferent to Price's use of excessive force; (9) the Town was deliberately indifferent to the constitutional rights of its citizens in its hiring of Price; and (10) the Town was deliberately indifferent to the constitutional rights of its citizens in failing to properly train Price. (*Id.*, Verdict Forms at R. 87-91; *see also* Order at R. 2-3). On October 21, 2014, the federal court entered judgment on the \$97,500,000 verdict. (R. 94).

It is undisputed that during the time period relevant to Cottageville Lawsuit and Craddock Lawsuit, SCMIRF provided indemnity coverage to the Town of Cottageville for certain risks through the 2011 Coverage Contract, which is the insurance agreement at issue in this appeal. (*See* Stip. of Facts and Issues ¶ 8 and Ex. D, R. pp. 84, 106). The Coverage Contract provides \$1,000,000 *per occurrence* for claims arising under the policy, including claims brought under Section IV of the policy covering "Law Enforcement Liability." (*See* Section IV declaration page,

R. 155). While the case was pending, however, and prior to the jury's verdict, Petitioner Reeves alleged that SCMIRF's insurance adjuster acted in bad faith in failing to reasonably settle the suit on behalf of its insured, the Town of Cottageville. SCMIRF denies it has engaged in bad faith, but was informed that any bad faith claims that exist in favor of the Town of Cottageville would be assigned to Petitioner Reeves. (Stip. of Facts and Issues, R. 86).

B. Settlement Agreement

On February 26, 2015, the parties entered a global settlement agreement to resolve both the Cottageville Lawsuit and the Craddock Lawsuit (which had not yet gone to trial) for \$10,000,000. (Settlement Agreement, R. 351.) As part of the agreement, a partial stipulation of dismissal was filed in this declaratory judgment action leaving SCMIRF as the only defendant. The settlement agreement provides for contingent payments from SCMIRF to Petitioner depending on which party prevails in the two stipulated questions presented in this appeal:

1. Coverage Issue: Do the claims made and the verdict rendered against the Town of Cottageville and Randall Price, related 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 separate action?
2. Political Subdivision Issue: Would a tort claim for bad faith brought against the SCMIRF be subject to the South Carolina Tort Claims Act, assuming such a claim were otherwise valid?

(*Id.* ¶ 4(a), R. 354-355; Stip. of Facts and Issues, R. 83-86). Under the settlement agreement, Petitioner Reeves will receive an additional \$1,000,000 payment from SCMIRF for each question resolved in her favor through final appeal. (*Id.*, ¶ 4(c), R. 356).

C. Declaratory Judgment Action

On June 3, 2015, SCMIRF filed a consent petition with this Court asking it to exercise its original jurisdiction over the declaratory judgment action. (Consent Pet. for Original Juris., R. 368). This Court denied SCMIRF's petition on July 24, 2015. (R. 14).

Thereafter, on October 19, 2015, Petitioner Reeves filed an Amended Complaint for Declaratory Judgment in the circuit court, (R. 76), and submitted the parties' Stipulation of Facts and Issues, (R. 83), which include as exhibits the verdict forms and judgment in the Cottageville Lawsuit, (Ex. A, R. 87), SCMIRF's Bylaws, (Ex. B, R. 95), the Intergovernmental Agreement for an Insurance and Risk Financing Fund for Risk Sharing (Ex. C, R. 99), and the 2011 Coverage Contract between SCMIRF and the Town of Cottageville, (Ex. D, R. 106). SCMIRF filed its Answer to the Amended Complaint on October 30, 2015, (R. 244), and the parties thereafter filed separate motions for summary judgment on the stipulated issues, accompanied by supporting memoranda and exhibits and opposition briefs, (*see generally* R. 376-576).

On May 17, 2016, the Hon. Perry M. Buckner, III held a hearing on the parties' cross-motions for summary judgment, (Hr'g Tr., R. 252), and, on June 29, 2016, issued an Order granting summary judgment as to Issue No. 1 (the Coverage Issue) and denying summary judgment as to Issue No. 2 (the Political Subdivision Issue). (*See* Order, R. 1). The parties filed separate motions to alter or amend the judgment on the respective issues, (Reeves Mot. to Amend, R. 639; SCMIRF's Mot. to Amend., R. 652), which the Circuit Court denied on July 25, 2016. (R. 11).

On August 4, 2016, SCMIRF filed a Notice of Appeal on the Coverage Issue in the Court of Appeals, (R. 660), and on August 15, 2016, Reeves filed her Cross Notice of Appeal on the Political Subdivision issue. (R. 678). The Parties thereafter submitted full briefing on both issues. The Court of Appeals took the case under submission without oral argument and, on May 1, 2019, issued an Order reversing the Circuit Court's judgment on the Coverage Issue and affirming its

judgment on the Political Subdivision Issue, (Op. No. 5643, App. 829). *See Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 427 S.C. 613, 832 S.E.2d 312 (Ct. App. 2019). Reeves then petitioned the Court of Appeals for rehearing *en banc*, (App. 854), which the court denied on September 19, 2019. (App. 884). On October 17, 2019, Reeves filed a Petition for a Writ of Certiorari in this Court, and SCMIRF filed a return in opposition on November 4, 2019. On March 12, 2020, this Court granted certiorari to review both stipulated issues.

STANDARD OF REVIEW

The standard of review for a declaratory judgment action is determined by the nature of the underlying issues. *See Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). The underlying issue on the first question presented in this appeal is the determination of coverage under an insurance policy. “A suit to determine coverage under an insurance policy is an action at law.” *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (citing *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 93, 522 S.E.2d 345, 348–49 (Ct.App.1999)).

The underlying issue on the second question presented here is the applicability of the South Carolina Tort Claims Act to an insurance bad faith action brought against SCMIRF. “Determining the proper interpretation of a statute is a question of law. . . .” *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). “Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below.” *S.C. Dep’t of Soc. Servs. v. Boulware*, 422 S.C. 1, 6, 809 S.E.2d 223, 226 (2018). In reviewing the grant or denial of summary judgment *de novo*, appellate courts apply the same standard of review that governs the trial court and, therefore, are free to consider the discovery conducted in the underlying action. *See Law v. S. Carolina Dep’t of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

ARGUMENTS

I. The Verdicts Rendered Against the Town of Cottageville and Price, and the Claims Raised Against Craddock, Constitute Multiple Occurrences Under the Policy

Because Petitioner's claims against the Town of Cottageville, Price, and Craddock constitute multiple, distinct and separate "occurrences" as that term is defined in the policy, there is more than \$1,000,000 in total indemnity coverage available in the underlying lawsuits.

A. Legal Standard for Interpreting Insurance Contracts

"Insurance policies are contracts to be interpreted in accordance with contract law." *Crossmann Cmtys. of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52, 717 S.E.2d 589, 595 (2011). "The 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 question 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). 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.*

An insurance contract, however, is to be read as a whole 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)). Indeed, whenever a term in an insurance contract is capable of two meanings, it must be construed in favor of the insured. *Crossman Cmtys. of N. Carolina, Inc.*, 395 S.C. at 47, 717 S.E.2d at 593 ("[W]e construe the ambiguous definition of occurrence in favor of the insured."); *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.”). These rules of construction make clear that clauses of exclusion are to be narrowly interpreted and clauses of coverage inclusion are to be broadly construed. *See Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 157 S.E.2d 633 (1967) (holding that clauses of inclusion are to be broadly construed in favor of coverage and, where doubt exists, policy language is to be “understood in its most inclusive sense”); *Forner v. Butler*, 319 S.C. 275, 277, 460 S.E.2d 425, 427 (Ct. App. 1995) (“[E]xclusions in an insurance policy are to be construed most strongly against the insurer.”)

B. The Coverage Contract Provides \$1,000,000 Indemnity Coverage on a “Per Occurrence” Basis

The Coverage Contract at issue is a “per occurrence” policy providing law enforcement liability coverage of \$1,000,000 for multiple wrongful acts deemed separate occurrences, as opposed to an “aggregate limits” policy that provides only a single total (aggregate) amount of coverage no matter how many wrongful acts are involved, no matter how many tortfeasors are involved, and no matter how many injuries arise or how many victims suffer. (*See H. Ricard Dep. Tr. 27:10-21, R. 463*). The declaration page of the Coverage Contract clearly provides \$1,000,000 in coverage *per occurrence* for claims brought under Section IV of the policy covering “Law Enforcement Liability.” (Section IV Declaration Page listing \$1,000,000 “per occurrence,” R. 155). Indeed, the Municipal Association of South Carolina’s Director of Risk Management Services, Heather Ricard (who, pursuant to SCMIRF’s bylaws, is the individual responsible for carrying out the daily operation and administration of SCMIRF, *see R. 97*), testified in this case that SCMIRF could have sold the Town of Cottageville a policy with a “single aggregate limit” of coverage for law enforcement liability, but instead sold the Town a “per occurrence” coverage policy that provides \$1,000,000 of coverage per occurrence. (*Ricard Tr. 39:18 – 40:4, R. 467-68*). Because an insurer’s risk exposure under a “per occurrence” policy is greater than its exposure

under an aggregate policy, the premium charged for per occurrence coverage is higher than for aggregate coverage. (*Id.* at 28:13-22, R. 456).² Therefore, it is undisputed that the Coverage Contract is a \$1,000,000 per occurrence policy for law enforcement liability (as well as other coverages, such as general liability), and the Town of Cottageville paid a higher premium than it would have for an aggregate policy in exchange for receiving greater coverage on a per occurrence basis. (*Id.* at 28:23-29:6, 39:11-40:4, R. pp. 456-57, 467-68).

C. The Coverage Contract Defines “Per Occurrence” Based on Conduct, Not on Resulting Injuries

In order to determine whether coverage exists for a claim made under the policy, the claim must arise out of an “occurrence.” And where there are multiple claims brought against covered persons, as there are here, the amount of coverage available under this “per occurrence” policy is based on the number of separate occurrences represented in the claims. Thus, the starting point for analysis of coverage is the definition of “occurrence” contained in the Coverage Contract.³ As set forth below, the term “occurrence” is based on *conduct* that causes an injury.

Section I of the Coverage Contract, entitled “General Provisions,” provides definitions that “shall apply” throughout the coverage sections of the policy, except where a different meaning is

² The Coverage Contract is reinsured through a private insurance carrier such that the actual risk to the SCMIRF under the policy is limited to a maximum of \$300,000, while the reinsurance carrier is responsible for paying the balance of liability in excess of \$300,000, including liability for multiple occurrences resulting in multi-million dollar payments. (Ricard Dep. Tr. 64:21 – 65: 13, R. 492-493). In this case, the 2011 Coverage Contract was reinsured through NLC Mutual Insurance Company, a private reinsurance carrier domiciled in Vermont. (*Id.*)

³ In a prior case where SCMIRF sought to *deny* coverage to a municipality, it argued to the court the *opposite* of what it argues here: that coverage under its policy is to be determined based on the existence of an occurrence. *See* SCMIRF’s Mem. in Supp. of Pl.’s Mot. for Summary Judgment in *S.C. Mun. Ins. & Risk Fin. Fund v. City of Myrtle Beach et al.*, No. 03-CP-26-1063, 2004 WL 5648154 (Ct. Comm. Pl. filed May 6, 2004) (“In order for there to be coverage under the policy, ‘property damage’ must arise out of an ‘Occurrence.’”).

provided in the specific coverage section of the policy. (See Coverage Contract Sec. I at §§ A, B, R. 108.) The term “occurrence” is defined in Section I and carries two distinct meanings depending on the context of where the term arises. First,

“**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.

(Coverage Contract § I(B)(4) (underlining added), R. 108). Thus, the face of the Coverage Contract makes clear that an “occurrence” is based on conduct that results in injuries and distinguishes one occurrence from another based on the action that causes injury, not the resulting injury itself. Indeed, the contract’s explicit use of the phrases “an accident,” “an event or series of events,” “continuing exposure to the same harmful conditions,” and “a covered event” to describe what constitutes an “occurrence” resolves any doubt that the starting point for determining coverage begins with the conduct at issue. (*Id.*)

Second, the Coverage Contract states that when the term “occurrence” is used to describe coverage limits on “per occurrence” basis, the term is not confined to “accidents” but may also include intentional “offenses” and “wrongful acts,” as those terms are used in the policy.

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 . . . , a Wrongful Act, a Loss, or an Offense causing Personal Injury or Advertising Injury.

(*Id.* emphasis added.) Thus, multiple “Offenses” and multiple “Wrongful Acts” can be separately covered under the policy on a “per occurrence” basis. Indeed, SCMIRF’s corporate designee, Heather Ricard, testified in this case that the meaning of “occurrence” is not determined by the

number of injuries. (R. 418, Ricard Tr. 53:7-11 (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”)).

The term “Offense” is defined in Section I to cover *conduct* engaged in by covered persons:

“**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.

(Coverage Contract § I (B)(5) (underlining added), R. 108-09). Accordingly, it is the insured’s *conduct* that governs whether an “offense” has occurred.

The term “Wrongful Act” is defined in Section IV of the policy to cover *errors* or *neglect* in the performance of law enforcement duties:

“**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 any official duty, including misfeasance, malfeasance and nonfeasance; **but only, with respect to any of 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.* § IV(G)(27) (underlining added), R. 169-70). Again, as with the other covered events in the policy, “Wrongful Act” is defined in terms of *conduct*, rather than injury.

The coverage provision for Law Enforcement in Section IV of the policy is likewise 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, as provided under the South Carolina Tort Claims Act where a South Carolina state law is involved, 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.* § IV(A)(1) (underlining added) R. 156).

Thus, in determining whether coverage is provided for multiple claims brought against an insured, the analysis must begin with the conduct prompting the claim. Indeed, this is the appropriate first step because (1) the coverage agreement in Section IV of the policy encompasses conduct broader than that defined in particular terms used in the policy; (2) doing so at the outset culls out claims arising from “continuous exposure to the same harmful conditions” that may rightfully be considered a single occurrence under the policy; and (3) Section IV of the policy includes a failsafe “limit of liability” clause which, as described below, prevents a single occurrence or offense that meets the coverage criteria under more than one section of the policy from being covered twice. Accordingly, because SCMIRF wrote a “per occurrence” policy for Law Enforcement coverage and not an “aggregate” or “damages” policy with a defined maximum limit, the preliminary issue to be addressed in evaluating coverage is determining the number of

occurrences among the claims brought against the Town of Cottageville and its employees, Randall Price and John Craddock.

D. The Coverage Contract Broadly Indemnifies Law Enforcement Conduct That Results In “Bodily Injury” or “Personal Injury,” Not Merely Conduct Meeting the Definition of “Wrongful Act”

The starting point for determining what conduct is covered under the Law Enforcement liability section of the policy begins with the “Coverage Agreement” for that section, which is quoted above. (*See* § IV(A)(1), R. 156). The plain language clearly states that the Coverage Contract provides coverage for conduct, including Wrongful Acts, that results in bodily injury or personal injury. Section IV further defines Bodily Injury and Personal Injury:

- “**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.* § IV(G)(4), R. 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. (*Id.* § IV(G)(18), R. 169).

Thus, under the Section IV coverage agreement, conduct that *at a minimum* constitutes a Wrongful Act resulting in Personal Injury or Bodily Injury is covered.

Critically, however, the coverage agreement language cited above includes coverage for conduct that goes beyond that defined as a “Wrongful Act.” This is because the definition of “Wrongful Act” is limited to conduct “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.’” (R. 169-70 (emphasis added)). Yet, Section IV of the policy plainly recognizes coverage for official conduct falling outside of the South Carolina Tort Claims Act. Indeed, the resulting “Personal Injury” referenced in the coverage agreement is defined to include conduct that goes beyond that for which immunity has been waived under the South Carolina Tort Claims Act—namely, federal civil rights violations.⁴ Thus, to provide coverage for civil rights and other claims, the agreement specifies that coverage for Wrongful Acts will not be restricted to just those acts committed within the course and scope of a Member or Covered Person’s official duties “as provided under the South Carolina Tort Claims Act.” Rather, it plainly states that the South Carolina Tort Claims Act limitation applies “only where a South Carolina state law is involved.” (Sec. IV(A)(1), R. 156). And civil rights violations brought under 42 U.S.C. § 1983 arise under the U.S. Constitution, not state law.

Thus, the coverage agreement in Section IV goes beyond the conduct described in the policy’s definitions—which is why analysis of whether coverage provided under this policy should

⁴ See, e.g., *Haywood v. Drown*, 556 U.S. 729, 736 (2009) (holding that the Supremacy Clause of the U.S. Constitution prohibits states from enacting laws affecting immunity from § 1983 suits).

never begin with whether conduct meets the definition of “Wrongful Act.” Indeed, the Court of Appeals erred in this regard by adopting a “three-part analysis” to determining coverage for insureds that starts with whether given conduct meets the definition of “Wrongful Act.” (See App. 840 (“First, under the three-part analysis, there must be a Wrongful Act.”)). This error is further compounded because the Tort Claims Act waives liability for non-intentional torts and, depending on the constitutional right violated, liability under 42 U.S.C. § 1983 may require a showing of an intent to harm that is unjustifiable by any government interest. See, e.g., *Sacramento v. Lewis*, 523 U.S. 833, 834 (1998) (holding that certain police conduct done “with no intent to harm suspects physically or to worsen their legal plight do not give rise to substantive due process liability” actionable under § 1983); *Slaughter v. Mayor of Baltimore*, 682 F.3d 317, 321 (4th Cir. 2012) (discussing “intent to harm” element of § 1983 due process claim).⁵ Thus, civil rights violations necessarily occur when the state actor acts outside the Tort Claims Act.

Therefore, if the definition of Wrongful Act is the starting point for the coverage analysis, then coverage for Towns and their law enforcement in federal civil rights actions will *never* be indemnified under the Coverage Contract—leaving municipalities and local law enforcement unduly exposed to personal liability. This is a critical error—if the Court of Appeals’ holding that coverage begins with the definition of “Wrongful Act” is affirmed, the impact will be to strip away such coverage for South Carolina law enforcement officers and the municipalities that employ them, leaving those individuals personally exposed to financial ruin. Doing so also presents a significant public policy concern, particularly if the next law enforcement officer faced with §

⁵ While SCMIRF may point to certain § 1983 actions that can be brought without a showing of “intent to harm,” such instances are irrelevant to determining the proper starting point for coverage analysis, as nothing in the Coverage Contract states that its coverage determination varies depending on which constitutional right has been violated.

1983 liability is denied coverage by SCMIRF and is forced into bankruptcy. The collateral effects of such an outcome on law enforcement recruitment and retention, which is already strained across the state, will be further harmed. Indeed, SCMIRF will be entitled to argue that civil rights actions are barred from coverage despite clear language to the contrary in the definition of “Personal Injury.” This is not a mere hypothetical concern—SCMIRF has previously demonstrated its willingness to avoid coverage obligations to municipalities on the basis that a claim is not one covered by the Tort Claims Act. *See City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 549, 677 S.E.2d 574, 581 (2009) (“[SCMIRF] contends that ‘if there is no liability under the Tort Claims Act, [the City] has no grounds for arguing that coverage must be provided.’”).

E. The Claims Raised in The *Cottageville* and *Craddock* Lawsuits Represent More Than One Occurrence Under the Coverage Contract

SCMIRF’s argument in the Court of Appeals for construing the Coverage Contract in reverse order—by first attempting to combine various acts engaged in by various individuals into a single “injury” without first considering whether those acts are separate occurrences under the policy, is designed to limit its exposure at the expense of its insured municipalities. The Circuit Court flatly rejected this approach as it is manifestly flawed for two principle reasons. First, SCMIRF’s approach ignores that coverage for acts engaged in by law enforcement personnel are provided on a “per occurrence” basis, as that term is defined in Section I of the policy, which means that multiple instances of negligent or wrongful acts are separately covered. To set aside this initial determination of whether the *conduct* engaged in by its insureds constitutes one or more occurrences under the policy before diving into the specifics of whether those acts meet the definition of “bodily injury” or “personal injury” implicitly rewrites the policy in a manner that severely limits the amount of coverage provided to the Town of Cottageville. This is a critical flaw, as it serves to undermine the “per occurrence” benefit of the policy and implicitly convert it

to an “aggregate” policy against the interests of the Town of Cottageville. *See S.C. State Budget & Control Bd., Div. of Gen. Servs., Ins. Reserve Fund v. Prince*, 304 S.C. 241, 248, 403 S.E.2d 643, 647 (1991) (“[T]he policy purports to provide coverage for certain intentional torts under the policy’s definition of covered personal injuries, yet it attempts to deny coverage for injuries expected or intended under the definition of an occurrence. This internal inconsistency in the policy renders it ambiguous.”).

The definition of “occurrence” in Section I of the Coverage Contract describing coverage on a “per occurrence” basis is clear: “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 . . . , a Wrongful Act, a Loss, or an Offense causing Personal Injury.” (Coverage Contract § I(B)(4), R. 108). Thus, determining whether the claims in the underlying cases amount to one or more occurrences under the policy can be answered by looking to whether the conduct is considered a covered event, regardless of whether termed an Occurrence, Wrongful Act, or Offense. Only then can any limitations on liability provisions in the policy be properly applied to determine whether there is more than \$1,000,000 in coverage for all claims.

The underlying *Cottageville* and *Craddock* cases raised numerous claims arising from multiple independent acts engaged in by different tortfeasors—namely, separate tortious conduct by the Town of Cottageville, Officer Price, and Chief Craddock—over a period of three years. Each of these acts is a “covered event” under Section IV of the Coverage Contract, thus they are each a separate occurrence under the policy. This is true regardless of whether they can be combined with other acts to constitute a single claim under the policy, as the definition of “per occurrence” is not so limited. The Court’s decision in *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, illustrates how separate and distinct acts of covered negligence, each proximately causing injury, constitute separate and distinct occurrences. There, the 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. 393 S.C. at 134, 712 S.E. 2d at 406.

In the Cottageville Lawsuit, the jury found that Price was (1) negligent in his actions, (2) that he violated Bert Reeves's constitutional right to be free from unlawful seizure and (3) excessive force. (Stip. of Facts and Issues, Ex. A Verdict Forms, R. 87-88). The jury further found that the Town of Cottageville was (4) negligent in its hiring of Price, (5) negligent in its supervision of Price, (6) negligent in its retention of Price, and (7) negligent in its training of Price as a police officer. (*Id.* R. 89-90). Further, the jury found that (8) Price's violation of Reeves's constitutional rights was done pursuant to the Town's custom or policy or as a result of its deliberate indifference; (9) that the Town was deliberately indifferent to the constitutional rights of *its citizens* in hiring Price; and (10) that the Town was deliberately indifferent to the constitutional rights of *its citizens* in failing to properly train Price. (*Id.*) The Craddock Lawsuit, which was settled prior to trial, alleged three discrete civil rights violations against Craddock under 42 U.S.C. § 1983 for events occurring before, during, and after the Reeves shooting: (11) Craddock's failure to properly train and supervise Price, (12) Craddock's failure to intervene at the scene of the shooting to stop Price's use of excessive force on Reeves, and (13) Craddock's failure to render medical care to Reeves as he lay dying on the ground, causing Reeves to experience conscious suffering. (*Id.*, R. 53-58).

Each of the 13 claims raised in the lawsuits is a Wrongful Act (as that term is modified by the coverage agreement in Sec. IV(A)(1)) that has resulted in either Bodily Injury or Personal Injury. These actions are not the unfolding of a single sequence of immediate events; rather, they

are separate and distinct, happening on different dates, at different locations, and caused by different individuals. For example, the Town's wrongful acts of negligently hiring, supervising, retaining, and failing to train Price began with his hiring in 2008—years before Price's lethal shooting of Reeves on May 16, 2011. (R. 24 ¶ 11). Similarly, Price's shooting of Reeves is a Wrongful Act separate and distinct from Craddock's wrongful acts of deliberate indifference to Price's violations of Reeves's civil rights on the day of the shooting. Furthermore, in the Cottageville trial, the jury found the Town and Price engaged in distinct acts that amounted to constitutional violations as well as multiple, independent acts of negligence that each proximately caused Reeves's and his children's injuries. Had the jury not found the Town liable for its acts of negligence and constitutional injury, the verdict against Price would still stand, and vice versa.

Per the Coverage Contract, the Town and Price's wrongful acts of *negligence* amounted to Bodily Injury and, specifically, the physical injury and conscious pain and suffering of Bert Reeves, his resulting death, and the separate injuries to his minor children for mental anguish from losing their father. As the Court of Appeals noted:

We find in this case there is Bodily Injury—Bert Reeve's death and the mental anguish and suffering associate 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.

(Ct. of App. Op., App. 841). The Court of Appeals likewise found that violation of Bert Reeves's constitutional rights under § 1983 amounted to personal injuries. (*Id.* (“Reeves and SCIMRF do not contest that 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.”)).

The Court of Appeals erred, however, in its comparison of Reeves's Bodily Injury claims with his Personal Injury claims and wrongfully conflating one with the other. The definition of

Bodily Injury provides that “Bodily Injury does not include such [physical and mental] injuries if they result directly and immediately from the infliction of Personal Injury.” (R. 166). In concluding that Reeves’s bodily injuries resulted “directly and immediately” from his constitutional harm, the Court of Appeals erroneously concluded that the constitutional harm Reeves suffered *was the cause of his physical injuries*. (*Id.*, R. 841). But this conclusion reflects a fundamental misconception of the nature of constitutional injuries and finds no support in the facts of this case or the law governing § 1983 claims.

An action under § 1983 may be brought against a state actor who subjects a citizen “to the deprivation of any rights, privileges, or immunities secured by the Constitution.” 42 U.S.C. § 1983. Civil rights actions exist to punish a state’s infringement on an individual’s constitutional rights. *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 685 (1978) (“Section 1983 claims are intended to give a broad remedy for violations of federally protected civil rights”). While the amount of damages awarded from these constitutional injuries may take into consideration any physical or mental harm flowing from the deprivation of a right, it is the constitutional injury itself that a § 1983 claim seeks to vindicate. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) (“[E]ven if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process.”). This is no more evident from the law’s recognition that an individual need not suffer any compensatory injury to prevail on a § 1983 claim. *Id.* at 266 (holding that § 1983 claims “should be actionable for nominal damages without proof of actual injury”). Rather, an individual can prevail on a civil rights action merely by proving the violation of the constitutional right in the absence of compensatory damages—as this is the true actionable injury that allows such an action to exist under the law. Here, the fact that Reeves’s

civil rights may be established without any showing of physical injury demonstrates that that the harm he suffered is the violation of his rights—full stop.

In the Cottageville Lawsuit, the jury found that Price violated two of Reeve’s constitutional rights: his right to be free from excessive force and his right to be free from unlawful seizure. (Verdict Form, R. 88). Had the jury, instead, found Price not liable on the § 1983 claims, Reeves’s bodily injuries would be no different; thus, they cannot be said to have “resulted directly and immediately” from the violation of Reeves’s constitutional rights. Similarly, the § 1983 claims raised in the Craddock Lawsuit relate to his failure to supervise Price, his failure to intervene to prevent Price from violating Reeves’s constitutional rights, and his failure to render medical care at the scene during the approximately twenty minute period after the confrontation ended *while Reeves remained alive* and before fire and rescue officials arrived on scene. (Craddock Comp. ¶ 16, R. 52.) Moreover, there was not just one application of excessive force to Reeves in this case. Rather, prior to and in addition to the fatal gunshot wound to his chest, he was subject to “blunt head trauma, scalp abrasion, and scalp hemorrhage.” (*Id.*). Yet Craddock rendered no medical care to treat any of Reeves’s non-fatal injuries while he lay alive, despite Reeves then suffering while effectively in police custody. To be clear, Craddock’s § 1983 liability for failure to render medical care does not rise and fall on whether he could have saved Bert Reeves’s life; rather, at that point in time Reeves was in need of emergency medical care, yet Craddock—a police chief and licensed paramedic—stood there for twenty minutes in deliberate indifference to Reeves’s medical needs, including indifference to the non-fatal injuries inflicted on him, resulting in Reeves experiencing extreme pain and suffering. (*Id.* ¶ 41-46, R. 58). Put simply, Reeves’s death (i.e. his Bodily Injury) did not result “directly and immediately” from Craddock’s failure to provide medical aid for Reeves’ serious, but non-fatal injuries. Thus, this claim represents a separate

occurrence for coverage purposes in addition to the negligence, excessive force, and unlawful seizure claims.

Additionally, the wrongful death and survival actions brought in the Cottageville Lawsuit represent two separate, independent causes of action that the South Carolina Legislature chose to codify 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). Long established precedent makes 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 Ry., Gas & Elec. Co., 97 S.C. 27, 27, 81 S.E. 189, 189 (1914).

Due to these claims being separate and independent, South Carolina historically did not allow the wrongful death and the survival claim to be joined in a single action. *Id.* While both claims may now be joined in the same case upon appropriate consent, the law still requires that “there must be separate verdicts and separate judgments” as to these separate claims. *Id.*; *see also Deaton v. Gay Trucking Co.*, 275 F. Supp. 750 (D.S.C. 1967) (holding under South Carolina law that a judgment for defendant in a wrongful death action did not amount to estoppel by judgment in a subsequent survival action). Further, as the *Bennett* Court explained, the separate and independent causes of action for wrongful death and survival have separate and independent

damages unique to each claim. *Bennett*, 97 S.C. at 27, 81 S.E. at 189. Wrongful death damages compensate the decedent's beneficiaries for their own loss of their loved one. *See Ballard v. Ballard*, 314 S.C. 40, 41-42, 443 S.E.2d 802, 802 (1994). These damages include: "(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). Survival actions, on the other hand, do not speak to any of those harms.

Accordingly, by failing to analyze the numerous causes of action raised in the underlying lawsuits, the Court of Appeals incorrectly found just one Wrongful Act and then, in turn, concluded that the one and only Wrongful Act caused one Bodily Injury that subsumes into Reeves's Personal Injury. (App. 841 ("We find in this case there is Personal Injury—the violation of Bert Reeves's civil rights under Section 1983 which caused his death.")). The Court of Appeals further erred in ignoring that the Bodily Injury caused by the negligent Wrongful Acts of the Town and Price resulted in Bodily Injury to both Reeves and his beneficiary/children, which are separate and distinct from the Wrongful Acts that resulted in the civil rights violations. In doing so, the Court of Appeals disregarded the plain language contained in Section IV of the coverage agreement, which provides insurance coverage to the Town (as a Member) and Price and Craddock (as law enforcement employees/covered persons) for their Wrongful Acts that resulted in Bodily Injury and provides coverage for their Wrongful Acts that resulted 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, yet the Court of Appeals erroneously held that Bodily Injury and Personal Injury are one and the same here.

F. There Is More than \$1,000,000 in Coverage Available to the Town of Cottageville, Price, and Craddock in the Underlying Lawsuits

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 set forth in three paragraphs. (Sec. IV(D)(1), R. 156-57). The first paragraph addresses actions brought under the South Carolina Tort Claims Act, and purports to limit liability as follows:

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**.

(*Id.*, R. 156-57). The language above indicates that a single limit will be provided to cover a Member town for its liability for negligence for “all claims” brought under the Tort Claims Act, despite there being two claims arising under the Tort Claims Act caused by two Covered Persons (the Town of Cottageville and Price) acting and causing separate injuries (e.g., Reeves’s survival action damages and the beneficiary/children’s wrongful death damages). Thus, the language in this paragraph is silent on limiting liability for Wrongful Acts that result in civil rights violations under § 1983 because these do not arise under the Tort Claims Act. More importantly, this paragraph is ambiguous on its face, as it purports to limit coverage to the maximum “amount shown on the Contract Declarations Page for this Section under Member’s Annual Aggregate.”

Yet, unlike other coverage sections of this policy, the Section IV declaration page contains no “Member’s Annual Aggregate.” (*Compare* Section IV Declaration Page at R. 155 (omitting reference to any Annual Aggregate), *with* Section V declaration page at R. 171 (providing a Member Annual Aggregate for public officials liability)). In the absence of any Member’s Annual Aggregate on the Section IV declarations page, there can be no corresponding limitation on liability stemming from this paragraph to the coverage provided to Section IV claims. “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). Moreover, it is not entirely clear that SCMIRF can impose an aggregate limit for claims under the Tort Claims Act, as municipalities are required by statute “to procure insurance to cover these risks for which immunity has been waived.” S.C.Code Ann. § 15-78-140(A). “Where a statute requires insurance for the benefit of the public, however, the insurer is not permitted to nullify its purposes through engrafting exceptions from liability as to uses which it was the evident purpose of the statute to cover.” *Penn. Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984).

Next, Paragraph 2, entitled “SCMIRF’s Limit of Liability,” provides:

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**...

(Sec. IV(D)(2), R. 157). The language referencing “occurrence/accident/wrongful act” confirms that each liability section uses different terms to identify separate occurrences and, thus, the importance of determining the number of occurrences at issue before calculating the amount of coverage available. Here, maximum liability “for any one occurrence/wrongful act” is set at \$1,000,000, irrespective of the number of covered persons or claimants in a given Wrongful Act.

The next paragraph states that “continuing, serial, or repeated instances of Personal Injury or Advertising Injury will be considered as one occurrence/wrongful act.” Thus, where a wrongful act is serial or ongoing it is subject to a single coverage limit. For example, the Town of Cottageville’s deliberate indifference in its supervision of Price unfolded over the course of years, yet there is a coverage limit of \$1,000,000 for this particular claim given its continuous nature.

The contrasting language in the first and second enumerated parts of the Limit of Liability section demonstrates SCMIRF’s ability to articulate the application of a single coverage for all claims versus a single coverage limit for each Wrongful Act. While the first part is inherently ambiguous due to the policy’s lack of an Annual Aggregate on the declaration page, it nonetheless confirms that SCMIRF chose to limit claims under the Tort Claims Act differently than non-Tort Claims Act claims. *See Beaufort Co. School Dist.*, 392 S.C. at 517-518, 709 S.E.2d at 91-92 (finding that the demonstrated use of the singular and plural in a contract shows insurer understood how to articulate the concept of the plural when necessary). Furthermore, if SCMIRF and the Town had wanted a coverage contract that applied a special aggregate limit to civil rights violations, they could have. In fact, the very next part of the Limit of Liability section, paragraph no. 3, provides a special aggregate limit of coverage for negligent supervision resulting in sexual abuse. (Sec. IV(D)(3), R. 157). As the Circuit Court recognized, SCMIRF knew how to explicitly provide for a single aggregate coverage limit for certain claims, but, by the plain language of the Coverage Contract, there is no single aggregate limit applicable to civil rights violations. (Ct. Comm. Pl. Op. at 7, R. 7). The canon of interpretation “*expressio unius est exclusio alterius*” states that the enumeration of particular things excludes the idea of something else not mentioned. *Penn. Nat’l Mutual Casualty Ins. Co.*, 282 S.C. at 554, 320 S.E.2d at 463. Here, if SCMIRF wanted to

sell its insureds a policy with a single aggregate limit for civil rights violations, it could have done so explicitly in the policy.

Finally, paragraph no. 2 of the Section IV Limit of Liability provision concludes, “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.” (Sec. IV(D)(2), R. 157). This is a simple concept: if a claim covered in Section IV also qualifies for coverage under a different section of the Coverage Contract, such as Section II Property Coverage or Section III General Liability, the per occurrence limit of \$1,000,000 cannot be increased.

In sum, the Limit of Liability contained in paragraph no. 2 limits coverage within one occurrence only. Therefore, based on the limits of liability set forth in Section IV of the policy, the following coverage is available for the three insureds:

- Negligence by the Town of Cottageville and Price: \$1,000,000 per occurrence for acts arising under the Tort Claims Act (i.e., negligence, wrongful death, survival) due to the absence of any “Member Annual Aggregate” on the declaration page;
- Civil Rights violations by the Town of Cottageville (deliberate indifference): \$1,000,000;
- Civil Rights violations by Price (excessive force, unlawful seizure): \$1,000,000;
- Civil Rights Violations by Craddock (failure to supervise, bystander liability, failure to render medical care): \$1,000,000 per occurrence for Craddock’s indifference to Reeves’s medical needs resulting in pain and suffering; \$1,000,000 each for failure to supervise Price and for § 1983 bystander liability.

Because the first question presented in this appeal requires that the Court only determine whether there is more than \$1,000,000 in coverage available for the claims brought in the *Cottageville* and

Craddock Lawsuits, it is not necessary to analyze whether coverage is available for each and every claim if the Court concludes there are at least two separate covered occurrences under the policy.⁶

Yet, the Court of Appeals failed to analyze coverage under the Limit of Liability provision in Section IV and, instead, applied Section I’s “No Duplication of Coverage or Coverage Limits” provision. (App. p. 116). In doing so, the court disregard the Coverage Contract’s clear direction in Section 1 that the General Provisions in the policy give way to “specific provisions [] contained in the appropriate section.” (*See* Coverage Contract Sec. 1(A), R. 108 (“This Section I (General Provisions) shall apply to [Sections IV] unless specific provisions are contained in the appropriate section.”)). As outlined above, Section IV contains specific provisions related to limitations on liability entitled “Limit of Liability.” Nevertheless, the Court of Appeals plowed ahead with its analysis using Section I’s limitations clause.

Even if Section I’s “No Duplication of Coverage” clause is applied here, it still does not work to limit the amount of coverage available to the Town of Cottageville, Price, and Craddock to just \$1,000,000. 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....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.

(Sec. I(C)(9), R. 112). This is essentially the same limitation in Section IV’s Limit of Liability, paragraph 2, that if an act may be covered under more than one coverage section, it will be covered

⁶ Nor is it necessary for the Court to determine the exact amount of damages that should be awarded for each claim, as the question here is focused on *available coverage*. Thus, for purposes of the § 1983 claims, the Court can assume at a minimum a nominal damages award of \$1 for any of those violations which, when coupled with \$1,000,000 in coverage for negligence, amounts to more than \$1,000,000 in coverage available under the policy.

only once with a single Coverage Limit.⁷ (Cf. Sec. IV(D)(2), R. 157). The No Duplication provision, which is inherently a term of exclusion, cannot be read to mean that the Town of Cottageville, Price, and Craddock share a single coverage limit for all their separate acts. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010) (“Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.”). Nor could such a broad reading comport with the statutory requirement that municipalities “procure insurance to cover these risks for which immunity has been waived.” See S.C.Code Ann. § 15-78-140(A).⁸ Further, though Section I’s “No Duplication of Coverage” clause refers to Occurrences, Offenses, Advertising Injury, and Personal Injury (which are terms used throughout the various coverage sections of the policy), it excludes reference to Wrongful Acts, which are distinctly at issue for coverage in Section IV, further underscoring that Section I’s limitations on liability do not apply to Section IV Wrongful Acts.

Section I’s “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.

⁷ Though capitalized in Section I’s “No Duplication of Coverage” provision, the term “Coverage Limit” is defined nowhere in the policy and, thus, is ambiguous on its face. Giving the term its “plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation,” it reasonably refers to the “Limits” of Coverage set forth in each Coverage Section’s declaration page. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The term “Declaration Page” is defined in Section IV as “the page or pages at the beginning of each Section showing the Member and general provisions or *limits of coverage*.” (R. 168 (emphasis added)). For Section IV claims, the limit of coverage is \$1,000,000 per occurrence.

⁸ Nor could SCMIRF credibly reconcile such an argument with its companion claim that it is a *bona fide* political subdivision of South Carolina municipalities manifested into existence by § 15-78-140(A) of the Tort Claims Act—all the while ignoring § 15-78-140(A)’s requirement that those same municipalities are to obtain proper insurance coverage for all tort liability waived under the Act.

(Sec. I(C)(9), R. 112R. 112). The Court of Appeals interpreted 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.’” (App. p. 843 (emphasis added). By focusing on the magnitude of injuries as the overriding factor (i.e., Reeves’s death), the Court of Appeals mistakenly concluded that the other injuries Reeves suffered *prior to his death* are subsumed under the policy in a single occurrence of bodily injury. But this reasoning is flawed for an obvious reason: the various claims raised in the Cottageville and Craddock Lawsuits are discrete and independent and arise from different conduct applied by different actors at different times resulting in wholly-different types of harm suffered by Reeves *and* his beneficiaries. For example, the unlawful seizure verdict against Price arises from his unlawful trapping of Reeves *before his death*. (Cottageville Compl. ¶¶ 15, 42 (“Officer Randall Price blocked Decedent’s travel down Nut Hatch lane and presented his service revolver to Decedent Bert Reeves, placing Decedent in reasonable fear of immediate and grave bodily harm.”), R. 24-25, 29-30). The excessive force claim arises from Price’s application of unnecessary deadly force to Reeves *while he was alive* (and which he suffered through for almost an hour until he finally succumbed). The injury in these constitutional claims is to compensate him for the deprivation of his constitutionally-protected rights. Indeed, Reeves would have a viable excessive force and unlawful seizure claim had he survived the shooting—so it is not his *death* that forms the basis of these claims. Further, the claim against Craddock for failing to render medical care arose from *Craddock’s* conduct in standing over Reeves but refusing to provide medical care—in this claim,

it matters not how Reeves's injuries arose, only that Craddock failed in his duty to provide medical care to Reeves despite his constitutional obligation as a state actor to provide it.

To resolve any doubt about the Court of Appeals' gross misinterpretation of this provision, SCMIRF's administrator, Heather Richard, testified that Section I's "No Duplication of Coverage" clause is simply a mechanism to prevent double payment on a single occurrence:

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.

(Ricard Tr. 41:25 - 42:16, R. 469-70). As explained above, Reeves's death is not the only injury he suffered, and he is not the only person suffering an injury in this case. The Court of Appeals completely ignored the separate wrongful death claim brought for his two minor children to compensate them for their separate and unique damages. If left to stand, the Court of Appeal's holding will upend over a hundred years of precedent on the distinction between wrongful death and survival actions and the injuries and damages arising from each.

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.E.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 v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). For this reason, facts about the beneficiaries and their relationship to the decedent have no bearing or relevancy to a survival action or an award of damages to the estate for a decedent's pain and suffering prior to death. *See Wooten v. Amspacher*, 279 S.C. 325, 326, 307 S.E.2d 232, 233 (1983) (finding an estate's administrator's

separation from her husband (the decedent) and her subsequent remarriage was irrelevant to any damages her husband suffered). Here, the Court of Appeals clearly misapplied Section I's "No Duplication of Coverage" clause with the consequence of destroying the distinction between the independent claims and injuries brought in the wrongful death action versus those brought in the survival action.

In sum, the Court of Appeals did not interpret the policy or construe its terms in "liberally in favor of the insured and strictly against the insurer," as it was required to do. *Diamond State Ins. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "Courts must enforce, nor 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). Yet, the Court of Appeals chose to construe the Coverage Contract's limitations on liability liberally against the interests of the insured municipalities and law enforcement officers. Accordingly, Petitioner Reeves respectfully submits that this Court should reverse the Court of Appeals decision and hold that the Coverage Contract provides indemnity coverage in excess of \$1,000,000 for the separate and distinct acts of the Town of Cottageville, Price, and Craddock set forth in the Cottageville and Craddock Lawsuits.

II. Privately Controlled SCMIRF Is Not Subject to the South Carolina Tort Claims Act in An Insurance Bad Faith Action

Many momentous sovereign immunity disputes have come before this Court. This dispute, regarding the request to extend South Carolina Tort Claims Act immunity to the decisions of a private corporation administering and directing insurance coverage decisions and reinsurance policies purchased with money pooled from various South Carolina municipalities, need not be one of them. Contrary to what SCMIRF contends, there is simply no legal authority justifying its unprecedented grab for immunity for "bad faith" insurance coverage decisions made solely by the

private entity that administers its fund. What is unprecedented is the extraordinary breadth of the arguments that SCMIRF raised in the courts below about its purported status as a “political subdivision of the State” and that its pool of money is “run by an agency,” without so much as acknowledging that it was created by, is administered through, and remains under the control of a private corporation, the Municipal Association of South Carolina (“Municipal Association”), which lacks any political accountability. Nothing in the text of the South Carolina Constitution, the South Carolina Code, or this Court’s precedent supports the wholesale extension of Tort Claims Act immunity to the private entity responsible for breaching the duties of good faith and fair dealing in insurance policies sold to South Carolina municipalities and law enforcement. The issue presently before this Court is not whether municipalities can share functions with other governments and retain their sovereign character, but whether SCMIRF is entitled to Tort Claims Act protection in an insurance bad faith action stemming from a policy sold to a South Carolina municipality. The arguments on this issue in the lower courts make clear that SCMIRF wants the benefits of sovereign immunity under the Tort Claims Act, but the record in this case makes clear that it is essentially a private organization existing without the burdens of public oversight and accountability.

A. Immunity Under the South Carolina Tort Claims Act

Sovereign immunity finds its origins in English common law, which espoused the belief that because “the law ascribes to the king the attribute of sovereignty, or pre-eminence . . . no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.” 1 W. Blackstone, *Commentaries on the Laws of England* 234-35 (1765) (Blackstone); see also *Nevada v. Hall*, 440 U.S. 410, 414–15 (1979), overruled on other grounds by *Franchise Tax Bd. of California v. Hyatt*, 139 S.Ct. 1485 (2019). The doctrine first took root

in South Carolina jurisprudence in the 1820 case of *Young v. Commissioners of Roads*, where the Constitutional Court of Appeals applied the doctrine to set aside a verdict of liability in favor of a plaintiff whose horse and wagon were injured when crossing a bridge maintained by the overseer of roads in Edgefield. *See Young v. Commissioners of Roads*, 2 Nott & McC. 537, 1820 WL 601 (S.C. Const. App. 1820). Yet, even the seminal *Young* case was not without dissent. As courts grappled with how to fairly apply the doctrine over the ensuing 165 years, sovereign immunity would face greater scrutiny as inequities in the doctrine began to surface. *See, e.g., State v. Corbin & Stone*, 16 S.C. 533, 543–44 (1882) (“There can be no doubt, however, that there is an underlying principle of justice, which might permit defendants, under proper regulations, to have their claims against the State, if any, considered and passed upon by the same tribunal before which they may be summoned to answer the State.”); *McKenzie v. City of Florence*, 234 S.C. 428, 435, 108 S.E.2d 825, 828 (1959) (“We realize the immunity rule has been criticized by some Courts as being archaic and outmoded.”); *Boyce v. Lancaster Cty. Nat. Gas Auth.*, 266 S.C. 398, 405, 223 S.E.2d 769, 772 (1976) (Ness, J., dissenting) (“The purposes undergirding the broad and indiscriminate application of the doctrine have long since vanished.”); *Tucker v. Kershaw Cty. Sch. Dist. & Bd. of Trustees*, 276 S.C. 401, 403, 279 S.E.2d 378, 379 (1981) (Harwell J., dissenting) (“[T]he judge-made doctrine of sovereign immunity is no longer justifiable.”).

As Justice Ness recognized in his dissenting opinion in *Boyce*, the doctrine evolved far away from the English common law’s concern over suing the authority that makes the law and became more about the “pragmatic” effect of preserving state coffers. *Boyce*, 266 S.C. at 407, 223 S.E.2d at 773 (“Reliance on the indiscriminate application of the ancient doctrine to thwart compensation for an injured party . . . does little to enhance the betterment of society.”). Justice Ness would prevail in abolishing judicial recognition of the doctrine of sovereign immunity in the

seminal case of *McCall by Andrews v. Batson*, declaring that “[f]ew principles of modern law have been so uniformly criticized. . . . Sovereign immunity can no longer be tolerated in this State.” *McCall by Andrews v. Batson*, 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985). *McCall* overruled over 120 contrary holdings, including the ones above, going back to *Young v. Commissioner of Roads*. *Id.*

In the wake of *McCall*, and at this Court’s direction, the South Carolina legislature enacted the South Carolina Tort Claims Act, S.C.Code Ann. § 15–78–20 *et seq.* The Act begins with the legislature’s recognition “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.” *Id.* § 15-78-20(a). Thus, in considering the sovereign’s need to balance its exercise of power within the constraints of limited public funding, the Act provides the State and its political subdivisions limited immunity from tort liability.

As set forth below, SCMIRF is not a political subdivision of the State, nor is it subject to any of the limitations or constraints of a *bona fide* political subdivision. It is not a governing body in any sense, has no need to balance its “power” against the constraints of limit public funding, nor is it politically accountable to the citizens of the South Carolina or state leaders. Rather, it is essentially a captive insurance operation created and controlled by a private corporation no different in most respects than carriers such as Wells Fargo, AIG, American Southern, and GEICO.

B. SCMIRF Is A Manifestation of a Private Corporation, Not the Legislature

SCMIRF is a self-described “joint interlocal agency to operate a fund for liability risk sharing.” (R. 100.) Yet, unlike the state Insurance Reserve Fund (“IRF”), which 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, SCMIRF was not created by the

legislature. There is no statute calling it into existence, nor any directive instructing South Carolina municipalities to create it. Rather, the law simply instructs municipalities to obtain insurance for liability waived under the Tort Claims Act and permits them to do so in several ways: by purchasing insurance coverage from the IRF or private carriers, through self-insurance, or by pooling funds with other municipalities. § 15-78-140(A). If SCMIRF did not exist, no legislative mandate would be left unfulfilled.

SCMIRF was created in 1990 by the Municipal Association of South Carolina (“Municipal Association”), which is a private corporation run by private individuals paid to operate pooled insurance liability and worker’s compensation insurance funds. (Ricard Tr. 8:10-16, R. 436 (“The Municipal Association sponsored the program back in 1990. And so the Municipal Association is responsible for the overall administration of the SCMIRF program.”)); *see also id.* Tr. 13:23 – 14:14, R. 441-42). While SCMIRF’s membership consists of various South Carolina municipalities, SCMIRF’s bylaws—which contain provisions for its governance and management—clearly state that its initial Board of Trustees “shall be appointed by the Municipal Association Board of Directors,” (SCMIRF Bylaws § III) R. 95), rather than appointed by the governor, the legislature, or its member-municipalities.

SCMIRF’s membership is exclusive: municipalities must be approved for membership and are vetted by the Municipal Association before joining. (*Id.* Tr. 10:15-18, R. 438 (Q: So is it your understanding that SCMIRF can refuse to insure a municipality located within the State of South Carolina? A: Yes.”)). Members come and go depending on the attractiveness and affordability of its insurance products and based on whether they are permitted by Municipal Association managers to remain in the program. (*Id.* Tr. 10:9-14, R. 438 (“Technically, we don’t have to provide [insurance]. 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.”)).

By joining SCMIRF, its members sign-on to a hybrid scheme where they self-insure against liability for claims under \$300,000 through pooled funds and obtain reinsurance coverage from private carriers for liability amounts over \$300,000. (Ricard Dep. Tr. 64:21 – 65: 13, R. 492-493). Thus, claims adjustment for liability under \$300,000 rests with the Municipal Association, which is paid to manage the pooled funds, while liability over \$300,000 rests with the private reinsurance carrier. (*Id.*) In this case, the 2011 Coverage Contract was reinsured through NLC Mutual Insurance Company, a private reinsurance carrier domiciled in Vermont. (*Id.*) As set forth below, the claims decisions that led to tortious bad faith actions are not governmental functions in any sense, nor are they made by government employees.

C. The Private Municipal Association Operates and Controls SCMIRF, Including Its Insurance Function

Since its inception, SCMIRF has been controlled by the privately-operated Municipal Association, which is a wholly-domestic private corporation operated and controlled by private individuals who serve no role in South Carolina government. In addition to creating and “sponsoring” SCMIRF, the Municipal Association dominates control over SCMIRF’s operations and SCMIRF’s Board of Trustees. For example, SCMIRF’s bylaws provide that the Municipal Association’s Director of Risk Management Services “shall serve as Secretary/Treasurer of [SCMIRF’s] Board of Trustees,” (SCMIRF Bylaws § IV, R. 96), that SCMIRF’s meetings “shall be held at the offices of the South Carolina Municipal Association in Columbia,” (*id.* § V), and that the “[a]dministration of SCMIRF shall be under the direction of the Municipal Association of South Carolina as Administrator,” (§ VI). Thus, SCMIRF’s organizational documents plainly

establish the permanence of the Municipal Association’s control over SCMIRF’s operations and budget.

SCMIRF’s Bylaws further provide that the Municipal Association designates its own Director of Risk Management Services “to be responsible for carrying out the daily operation and administration of SCMIRF,” (§ VI), including “claims administration, loss control services, obtaining stop loss and excess loss coverage, investment of funds, administrative services, and any other services deemed expedient for the proper administration of SCMIRF.” Thus, SCMIRF’s Bylaws also demonstrate that its creation was manifested by the privately-held Municipal Association, which profits from collecting fees for administering SCMIRF’s insurance program.

Indeed, the “Intergovernmental Agreement For An Insurance and Risk Financing Fund for Risk Sharing” (hereinafter, “Risk Sharing Agreement”)—one of the foundational organizational documents that its members must sign and that SCMIRF contends establishes it as a “joint interlocal agency”—makes clear that SCMIRF is, in fact, a captive entity of the privately-controlled Municipal Association. (*See* Risk Sharing Agreement, R. 99-105). For example, the Risk Sharing Agreement reiterates that the private Municipal Association shall serve “as the Administrator of the Fund” and “shall provide overall supervision of the Fund.” (*Id.* ¶ 7, R. 101). Each member-municipality is required to adopt this agreement, which further grants the Municipal Association effective control of SCMIRF’s Board of Trustees—so much so that the Municipal Association has the unilateral right to reduce the size of SCMIRF’s Board of Trustees at will:

[T]he members hereby appoint the Board of Directors of the Municipal Association of South Carolina agents to make any amendments to this agreement . . . [including] an amendment to increase or decrease the number of members of [SCMIRF’s] Board of Trustees or their terms.”

(*Id.* ¶ 12, R. 104.) Thus, if SCMIRF is truly a joint inter-local agency and political subdivision of the State of South Carolina, how can a private corporation have the legal authority to reduce the size of its governing body?

To the extent there is doubt over the Municipal Association's dominance over SCMIRF, it is put to rest by reviewing the Municipal Association's federal tax filings, which by law are made available for public inspection. In its Form 990 filings, the Municipal Association *claims SCMIRF as a related tax-exempt organization.*⁹ How can a political subdivision of the State of South Carolina be claimed as a related entity by a private corporation in its tax filings?

These facts regarding the Municipal Association's dominance over SCMIRF and control over its insurance functions raise substantial questions regarding SCMIRF's entitlement to immunity under the Tort Claims Act. How can a political subdivision of the State of South Carolina be managed and controlled by a private organization run by private individuals that have no political accountability to the citizens of the municipalities who participate in it? How can a private organization retain dominance over a political subdivision's such that it can unilaterally eliminate, and therefore, reconstitute, the joint inter-local agency's governing body? If the Municipal Association was merely an outsourced third-party contractor brought on to help with administrative functions, it would have none of these rights, nor would its conduct be subject to limited liability under the Tort Claims Act. *See* S.C.Code § 15-78-30(c).

⁹ *See* SCMIRF 2015 IRS Form 990-O, Schedule R, Part II (Identification of Related Tax-Exempt Organizations), at p. 23 of 57, *available at* https://projects.propublica.org/nonprofits/display_990/576000743/2016_12_EO%2F57-6000743_990O_201512

D. SCMIRF Is Not A Political Subdivision of the State of South Carolina

By its express terms, the Tort Claims Act applies only to “governmental entities,” which it defines as “the State and its political subdivisions.” S.C.Code Ann. §§ 15-78-20, 30(d). 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.

Id. § 15-78-30(h). SCMIRF is not a county, municipality, school district, regional transportation authority, or operator as defined in item (8) of Section 58-25-20. Rather, SCMIRF claims that the latter portion of the definition addressing “any agency, governmental health care facility, department, or subdivision thereof” applies to “municipalities,” and, therefore, SCMIRF is an “agency” of its member-municipalities. Indeed, the Court of Appeals found this to be an attractive argument on its face, endorsing the reasoning set forth in two Attorney General opinions without regard to the specific facts presented here.¹⁰ (App. pp. 848-850).

The Court of Appeal’s holding is flawed for two reasons: first, it ignored the substantial evidence from the record regarding the Municipal Association’s dominance and control over SCMIRF that renders the need to interpret the definition of “political subdivision” a semantical exercise in this case. As set forth above, the extensive entanglement between SCMIRF and the private Municipal Association should resolve any question about whether SCMIRF is a political

¹⁰ The Opinions from the Attorney General issued in 1990 and 2014 addressed the definition of “political subdivision” and SCMIRF’s status as one under the Tort Claims Act. *See* S.C. Op. Att’y Gen., 2014 WL 7405219 (S.C.A.G. Dec. 17, 2014) & S.C. Op. Att’y Gen., 1990 WL 599264 (S.C.A.G. July 25, 1990). Those opinions, however, were rendered without the benefit of an adversarial proceeding. Moreover, the 2014 Opinion expressly qualified that it was “[b]ased on the information provided to us.” It is not clear from that opinion what, if any, factual information regarding SCMIRF or the Municipal Association was provided to or considered by the Attorney General.

subdivision of the State. Further, the Tort Claims Act's allowance for municipalities to create voluntary self-insurance pools no more renders those pooled funds political subdivisions of the State any more than the Act's allowance of the purchase of private insurance transforms private insurance carriers into political subdivisions. State funds are state funds and do not manifest immunity simply because they are pooled and placed with one private insurer over another.

Second, even if SCMIRF's status as a political subdivision of the state rises and falls on the proper interpretation of the term "political subdivision" in the Tort Claims Act, the Court of Appeals failed to apply the proper rules of constitution in concluding that the term encompasses agencies of municipalities. First, the definition is clear that the phrase "any agency, governmental health care facility, department, or subdivision thereof" must refer only to "special purpose districts of the State," as it would be nonsensical to apply those modifiers the other items in the list, such as "regional transportation authorities," because among other things, regional transportation authorities do not operate "governmental health care facilities." Further, a comparison to the legislature's definition of "State" in same section of the Tort Claims Act demonstrates that it understood how to apply modifiers to effect its intent. *See* S.C.Code. Ann. § 15-78-30(d) (defining "State" as "the State of South Carolina and any of its officer, agencies, authorities, departments, commissions, boards, divisions, instrumentalities . . ."). Had the legislature wanted to define "political subdivision" to include "municipalities and any of their agencies" it clearly could have done so in the text in the same manner it did in its definition of "State." Yet it declined to do so.

Moreover, when a statute includes a list of terms followed by a limiting clause, it should be understood in light of the "rule of the last antecedent," which provides that a limiting clause or

phrase should ordinarily be read to modify only the noun or phrase that it immediately follows.

As this Court recently observed:

The presence of a comma separating a modifying clause in a statute from the clause immediately preceding it is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one” 82 C.J.S. *Statutes* § 443 (2009). Where there is no comma, however, “clauses are to be applied to the immediately preceding words or phrase. Such ... clauses are not to be construed as extending to or modifying others that are more remote” *Id.* Therefore, the absence of a comma setting off the “as certified by” clause is an indication the Legislature did not intend the clause to apply to the first item in the series. In other words, the absence of a comma in this instance creates an ambiguity.

Commissioners of Pub. Works of the City of Laurens v. City of Fountain Inn, 428 S.C. 209, 219–20, 833 S.E.2d 834, 839 (2019) (Few, J. concurring), *reh’g denied* (Oct. 31, 2019). By way of example, the U.S. Supreme Court explained why application of the rule of the last antecedent makes intuitive sense:

[I]magine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year’s World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year’s championship team, but to look more broadly for catchers and shortstops.

Lockhart v. United States, 136 S. Ct. 958, 963 (2016).

Here, it is no less natural to read the definition of “political subdivision” in the same manner. In the definition of “political subdivision,” there is no comma between “special purpose district” and “and any agency, governmental health care facility, department, or subdivision thereof.” Thus, the last antecedent principle reaffirms that the phrase “any agency, governmental health care facility, department, or subdivision thereof” modifies “special purpose district of the State” rather than of “counties, municipalities, school districts.”

E. Application of the *Health Promotions Specialists* Factors Demonstrates that SCMIRF Is Not A Political Subdivision of the State

In *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, this Court identified the following factors to be considered when determining whether an entity constitutes a political subdivision of the State that may invoke the protections of the Tort Claims 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.

Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 636, 743 S.E.2d 808, 814 (2013) (quoting 81A C.J.S. *States* § 552 (Supp. 2013)). Application of these six factors here establishes that SCMIRF cannot be credibly described as a political subdivision of the State.

First, SCMIRF does not function statewide. To the contrary, its operations are limited to only those municipalities that participate as members, which varies from year to year. More importantly, no South Carolina municipality has the right to join SCMIRF's insurance pool; rather, SCMIRF can deny participation to any town for any reason. In contrast, the *Health Promotions Specialists* Court found the South Carolina Board of Dentistry to be a statewide operation because the General Assembly created it as a *statewide regulatory authority* for dentists and hygienists.

Second, SCMIRF does not perform the work of the State—it is simply a pool of money, not an entity that performs any function. *Cf. S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 305 (4th Cir. 2008) (“[T]he ‘Insurance Reserve Fund’ is not an entity, but rather an account that holds funds designated to pay losses under insurance issued by the Budget and Control Board.”). Even if the Court were to ascribe a function to SCMIRF, it could not be governmental in nature, as selling insurance and adjusting claims is an eminently private sector activity. In reaching the opposite conclusion, the Court of Appeals mistakenly read the Tort

Claims Act's mandate that political subdivisions *obtain* tort liability insurance as a mandate that they *provide* insurance. (App. 851). Nothing in the Act supports such a reading.

Third, there can be no credible argument that SCMIRF was created by the legislature. As discussed above, it was first manifested into existence by the private Municipal Association, which retained the power to appoint its initial Board of Trustees. Fourth, SCMIRF is not subject to "local control." Rather, the Municipal Association controls its Board of Trustees, serves as its Secretary and Treasurer, and has been designated in the Risk Sharing Agreement to administer all its functions. (Risk Sharing Agreement, R. 99 ("[T]he members and Trustees have designated the Municipal Association of South Carolina as Administrator of the Fund and its assets.")).

Fifth, unlike the State Board of Dentistry, no "power" has been delegated to SCMIRF by the General Assembly, other than the implicit permission to exist, so this factor likewise weighs against SCMIRF. Sixth, the function provided by SCMIRF is merely serving as a repository of funds from which some is reserved for self-insurance and some is used to purchase reinsurance policies from private carriers on the open market. To the extent SCMIRF "functions," it does so entirely through the Municipal Association. Yet, even crediting SCMIRF with selling insurance and adjusting claims, the nature of this function is no different than a private insurance carrier.

In sum, none of the *Health Promotions Specialists* factors support the Court of Appeal's broad holding that SCMIRF is a political subdivision of the State subject to the Tort Claims Act. However governmental SCMIRF may appear at a distance, upon close inspection of the facts it becomes clear that it was created by, is operated by, and remains under the captive-control of a private organization having no connection to the State and answerable to no South Carolina citizens, thus belying any sense that it is a political subdivision of the State.

If the Court of Appeal's broad holding on this issue is affirmed, SCMIRF's status as a political subdivision of the State of South Carolina would fundamentally alter the nature and character of what it means to be a "political subdivision" in this State. More so, it would raise grave questions for future courts to grapple with: Under what legal authority can private companies create and control political subdivisions? How can a "political subdivision" of the State of South Carolina be created, controlled, and administered by a private entity that has no governmental oversight or political accountability to the citizens of South Carolina? If private corporations can manifest into existence "political subdivisions" with the mere acquiescence of counties and municipalities, what safeguards are in place to ensure those same "political subdivisions" do not run roughshod over the rights of South Carolina citizens once they receive limited immunity under the Tort Claims Act? Indeed, it becomes difficult to reconcile the *McCall* Court's recognition that "[s]overeign immunity can no longer be tolerated in this State," with the creeping expansion of immunity under the Court of Appeal's holding. *McCall*, 285 S.C. at 246.

The question presented in this appeal is specific to whether SCMIRF is subject to the Tort Claims Act in an action for insurance bad faith. And where it remains clear in the record that SCMIRF's insurance function is administered entirely by the Municipal Association, the Court can avoid all of these public policy concerns by vacating the decision below on this issue and holding that, with respect to an action for bad faith, SCMIRF is not subject to the Tort Claims Act.

CONCLUSION

For the reasons stated, the Court should reverse the judgment of Court of Appeals on the Coverage Issue, and vacate the judgment below as to the Political Subdivision Issue and find that a tort claim for bad faith brought against SCMIRF would not be subject to the Tort Claims Act.

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Respectfully submitted,

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