

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2014-CP-15-135

Appellate Case No. 2019-001756

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

Petitioner,

v.

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

Respondent.

Brief of Respondent

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Statement of Issues

1. Did the Court of Appeals correctly hold that the terms of SCMIRF's Coverage Contract only provided a single limit of \$1,000,000 in indemnity coverage for all of Reeves' claims?
2. Did the Court of Appeals correctly hold that SCMIRF is a political subdivision and is, therefore, entitled to protection under the Tort Claims Act for any tort claim for bad faith?

Statement of Case

This action originated on February 18, 2014, when Petitioner Ashley Reeves (“Reeves”), as Personal Representative for the Estate of Albert Carl “Bert” Reeves (“Bert Reeves”), filed a declaratory judgment Complaint against the South Carolina Municipal Insurance and Risk Financing Fund (“SCMIRF”), the Town of Cottageville (“Cottageville”) and Randall Price (“Price”) seeking a declaration as to the interpretation of the 2011 Coverage Contract between SCMIRF and Cottageville. (App. 45).

This action arose from an underlying suit filed on August 28, 2012, by Reeves against Cottageville and Price, a police officer with the Cottageville Police Department, that was removed to the United States District Court for the District of South Carolina, Civil Action No. 2:12-02765-DCN (the “Cottageville Lawsuit”) on September 24, 2012. (App. 25, 19). The Cottageville Lawsuit related to the shooting death of Bert Reeves by Price. Reeves alleged that Cottageville and Price were negligent in the death of Bert Reeves and that Cottageville was negligent in the hiring, supervision, and retention of Price. (Cottageville Complaint at ¶¶ 17-34; App. 29-32). Reeves further alleged that, based on the same incident, Price and Cottageville violated Bert Reeves’ civil rights in violation of 42 U.S.C. § 1983. (*Id.* at ¶¶ 44-59, App. 34-39). Both survival and wrongful death claims were advanced. (*Id.* at ¶¶ 60-71, App. 37-39).

On May 14, 2014, Reeves filed a separate lawsuit also related to the death of Bert Reeves against John Craddock (“Craddock”), the Cottageville Police Department Chief of Police, in the United States District Court for the District of South Carolina, Civil Action No. 2:14-01918-DCN (the “Craddock Lawsuit”). (App. 52). The Craddock Lawsuit asserted survival and wrongful death claims based on 42 U.S.C. § 1983 alleging that Craddock failed to properly train and supervise

Price, failed to intervene in the altercation between Price and Bert Reeves, and failed to render medical care to Bert Reeves. (App. 53-62).

On October 15, 2014, the jury in the Cottageville Lawsuit rendered a verdict in Reeves' favor finding that Cottageville and Price were liable for negligence and for violation of 42 U.S.C. § 1983. (Verdict Forms 1 & 2, App. 91-95). The jury in the Cottageville Lawsuit awarded actual damages of \$7,500,000 against both Cottageville and Price, and punitive damages of \$60,000,000 against Cottageville and \$30,000,000 against Price. (Verdict Form 3, App. 96-97). On October 21, 2014, a Judgment was entered in the Cottageville Lawsuit based on that verdict. (Judgment entered 10/21/14, App. 98).

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

On February 26, 2015, the Parties entered into a universal settlement agreement which settled both the Cottageville Lawsuit and the Craddock Lawsuit (which had not yet gone to trial). (Settlement Agreement dated 2/26/15, App. 355). On April 20, 2015, and as part of the settlement, a partial stipulation of dismissal was filed leaving SCMIRF as the only defendant in the present action. (Partial Stipulation of Dismissal, App. 369). One of the material terms of the Parties' settlement was an agreement to litigate two questions in a declaratory judgment action:

- (1) Do the claims made and the verdict rendered against the Town of Cottageville and Randall Price, relating to the hiring, retention, supervision and shooting death of Bert Reeves result in there being more than \$1,000,000.00 in indemnity coverage available under the terms of the Coverage Contract with respect to all such claims including the claims made against John Craddock in the separately styled action referenced above? Reeves asserts that there is more than one occurrence based on

the facts and claims and the jury's verdict relating to the hiring, retention, supervision and shooting death of Bert Reeves, and, thus, there is more than \$1,000,000 in indemnity coverage available under the Coverage Contract. SCMIRF asserts the Coverage Contract is limited to a total of \$1,000,000 in indemnity coverage.

- (2) Allegations have been made that SCMIRF has engaged in bad faith with regard to its handling of the claims relating to the shooting death of Bert Reeves. SCMIRF denies it has engaged in bad faith. SCMIRF was informed that any bad faith claims that exist in favor of Cottageville would be assigned to Reeves. Would a tort claim for bad faith brought against SCMIRF be subject to the South Carolina Tort Claims Act (S.C. Code. Ann. § 15-78-10 *et seq.*), assuming such a claim were otherwise valid? [SCMIRF] asserts it would. Reeves asserts otherwise.

(Stipulation of Facts and Issues dated 10/7/2015, App. 87-90; Settlement Agreement dated 2/26/15 at ¶ 4.(a), App. 358-359). The Parties further stipulated that “no other facts are necessary for the Court to answer the stipulated issues,” that “no discovery is needed for the case,” and that “the stipulated issues are purely legal in nature.” (App. 89). Under the universal settlement agreement, Reeves would receive an additional \$1 million payment for each question upon which Reeves prevails. (App. 360). If Reeves prevails on neither question, she receives no further money aside from the \$10 million settlement payment already paid to Reeves. (*Id.*).

On June 3, 2015, the Parties jointly petitioned the South Carolina Supreme Court to hear and decide both questions in its original jurisdiction. (Consent Petition for Original Jurisdiction filed 6/3/15, App. 372). On July 24, 2015, the South Carolina Supreme Court declined the Petition. (Order denying Petition, App. 18).

Following the denial of the Petition to the South Carolina Supreme Court, on October 19, 2015, Reeves, with the consent of SCMIRF, filed an Amended Complaint setting forth the two declaratory judgment issues agreed upon by the Parties in their settlement. (Amended Complaint,

App. 80). SCMIRF filed its Answer to the Amended Complaint on October 30, 2015. (Answer to Amended Complaint, App. 248).

On December 15, 2015, both SCMIRF and Reeves filed their motions for summary judgment on the stipulated issues. (SCMIRF's Mot. for Sum. Judgment., App. 380; SCMIRF's Memo. in Supp. of Mot. for Sum. Judgment., App. 382; Reeves' Mot. for Sum. Judgment., App. 404; Reeves' Memo. in Supp. of Mot. for Sum. Judgment., App. 405). Opposition memoranda were filed by SCMIRF on January 15, 2016, and by Reeves on January 19, 2016. (SCMIRF's Memo. in Opp. to Reeves' Sum. Judgment. Mot., App. 538; Reeves' Memo. in Opp. to SCMIRF's Sum. Judgment. Mot., App. 529). Reeves filed a supplemental memorandum on May 19, 2016. (Reeves' Supp. Memo. filed 5/19/16, App. 561).

The trial court held a hearing on the cross-summary judgment motions on May 17, 2016. (Transcript of 5/17/16 Hearing, App. 256). On June 29, 2016, the trial court filed its summary judgment Order. (Order filed 6/29/16, App. 5). In this Order, as to the first stipulated issue addressing whether more than \$1,000,000 in indemnity coverage was available under SCMIRF's Coverage Contract, the trial court granted Reeves' motion for summary judgment and denied SCMIRF's motion. (*Id.* at 3-7, App. 7-11). Specifically, the trial court held "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." (*Id.* at 6, App. 10). The trial court then noted that the Cottageville Lawsuit "sought to recover damages for wrongful death, as well as conscious pain and suffering" and that "the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different." (*Id.* at 6-7, App. 10-11). The trial court then concluded that Reeves "suffered separate and distinct damages which could lead to additional coverage under the separate causes of action." (*Id.* at 7, App. 11). As to the second stipulated issue addressing whether a tort claim for bad faith brought against

SCMIRF would be subject to the South Carolina Tort Claims Act, the trial court granted SCMIRF's motion for summary judgment and denied Reeves' motion. (*Id.* at 8-10, App. 12-14).

On July 13, 2016, SCMIRF filed a timely motion to alter or amend the June 29, 2016 Order with respect to the coverage ruling. (SCMIRF's Mot. to Alter or Amend, App. 661). Reeves also filed a motion to alter or amend. (Reeves' Mot. to Alter or Amend, App. 648). Both motions were denied by the trial court's Order filed July 25, 2016. (Order filed July 25, 2016, App. 15). SCMIRF and Reeves filed this appeal on August 4, 2016, and August 15, 2016, respectively. (SCMIRF's Notice of Appeal, App. 669; Reeves Cross Notice of Appeal, App. 687).

In *Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves v. South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF]*, Op. No. 5643 (S.C. Ct. App. filed May 1, 2019) (Shearouse Adv. Sh. No. 18 pp. 26-52) ("Op. No. 5643") (App. 829), the South Carolina Court of Appeals correctly affirmed in part and reversed in part the circuit court's findings in this declaratory judgment action which presented the two stipulated questions for determination. The Court of Appeals reversed the trial court's ruling on the first stipulated issue and held that, under the terms of SCMIRF's Coverage Contract and the stipulated facts of this case, "there is one Wrongful Act giving rise to the same Offense which constitutes a Personal Injury, and the Offense is subject to a single Coverage Limit of \$1,000,000." (App. 845). As to the other stipulated issue, the Court of Appeals affirmed the trial court and held that SCMIRF is a political subdivision under the Tort Claims Act, and that any tort claim for bad faith brought against SCMIRF would be subject to its provisions. (App. 850-853).

Statement of the Facts

As part of the universal settlement of the Cottageville and Craddock matters, the Parties agreed that the determination of the two agreed upon declaratory judgment issues would be

governed by a Stipulation of Facts that was incorporated into the Amended Complaint in this action. (Stipulation of Facts, App. 87). This stipulation expressly provided that “[t]he Parties agree that no other facts are necessary for the Court to answer the stipulated issues, that no discovery is needed for the case, and that the stipulated issues are purely legal in nature.” (*Id.* at ¶ 11, App. 89).

Cottageville is a South Carolina municipality located in Colleton County, South Carolina. (*Id.* at ¶ 2, App. 87). Both Price and Craddock, at all relevant times, were policemen for Cottageville, and were acting within the scope of their employment as Cottageville police officers. (*Id.* at ¶¶ 3, 5, App. 87-88). On May 16, 2011, while acting in the scope of his employment as a police officer for Cottageville, Price shot and killed Bert Reeves. (*Id.* at ¶¶ 2-3, App. 87). The death of Bert Reeves led to the filing of the Cottageville Lawsuit and the Craddock Lawsuit.

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

SCMIRF asserts that it is an agency and an unincorporated voluntary, self-insurance pool in the State of South Carolina. (*Id.* at ¶ 6, App. 88). SCMIRF was established in accordance with Article VIII, section 13 of the South Carolina Constitution, which authorizes governmental entities to enter into interlocal contracts or agreements to undertake action collectively that each entity could otherwise undertake alone. S.C. CONST. art. VIII, § 13. SCMIRF was also established in accordance with S.C. Code Ann. § 15-78-140(A), which requires the political subdivisions of this State to procure tort liability insurance to cover the risks for which immunity has been waived, and which identifies as an option for such coverage the establishment of “pooled self-insurance liability funds, by intergovernmental agreement.” S.C. Code Ann. § 15-78-140(A).

Membership in SCMIRF is limited to municipal government units and institutions or agencies in the State of South Carolina in accordance with the terms of an Intergovernmental

Agreement. (SCMIRF Bylaws at Sec. II, App. 99; Intergovernmental Agreement at ¶ 9, App.

106). SCMIRF's Bylaws describe it as:

a Fund created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement which establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South Carolina, 1976, Section 15-78-140.

(SCMIRF Bylaws at Sec. I., App. 99; Stipulation of Facts at ¶ 7, App. 88). The Intergovernmental Agreement that all SCMIRF members are required to enter into describes SCMIRF as “a joint interlocal agency to operate a fund for liability risk sharing.” (Intergovernmental Agreement at ¶ 1, App. 104).

On February 4, 2008, Cottageville entered into an Intergovernmental Agreement for an Insurance and Risk Financing Fund For Risk Sharing with SCMIRF and, thus, Cottageville became a member and participant in SCMIRF. (Intergovernmental Agreement, App. 103; Stipulation of Facts at ¶ 7; App. 88). During the period of January 1, 2011 to January 1, 2012 SCMIRF provided coverage to Cottageville for certain risks as set forth in the 2011 Coverage Contract between SCMIRF and Cottageville (“Coverage Contract”). (Stipulation of Facts at ¶ 8, App. 88; 2011 Coverage Contract, App. 110). The Coverage Contract represents the complete agreement between SCMIRF and Cottageville regarding coverage. (Stipulation of Facts at ¶ 8, App. 88).

B. The terms of the Coverage Contract.

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

Section I – General Provisions
Section II – Property Coverage
Section III – General Liability Coverage
Section IV – Law Enforcement Liability
Section V – Public Official Liability

Section VI – Business Auto Coverage
Section VII – Commercial Crime
Section VIII – Excess Casualty Coverage
Section IX – Equipment Breakdown Coverage
Section X – Endorsements

(Coverage Contract, App. 110-247). The claims raised in the Cottageville and Craddock lawsuits fall exclusively under the Law Enforcement Liability Section (Section IV) and, to the extent they are not supplanted by Section IV, the General Provisions of Section I. Under Section IV, SCMIRF provides coverage for members or covered persons while they are acting both in the course and scope of their official duties to provide law enforcement. (*Id.* at Sec. IV., ¶ A.1., App. 160). The exclusive coverage of Section IV to this situation is reiterated by Section I’s General Provisions, which expressly provide that there is no duplication of coverage or coverage limits, and that “[n]o liability that is covered under any Coverage Section of This Contract will be deemed to be separately covered under any other Coverage Section.” (*Id.* at Sec. I., ¶ C.9, App. 116). Section IV governs the “Member” named in the declarations page, *i.e.*, Cottageville, “the law enforcement department of the Member named,” and “each of the individual law enforcement officers,” *i.e.*, Price and Craddock. (*Id.* at Sec. IV., ¶ A.1. and ¶ G.9., App. 160, 171-172). Here the parties have stipulated that the actions or omissions of Price and Craddock occurred while they were acting within the scope of their employment as Cottageville police officers. (Stipulation of Facts at ¶¶ 3, 5, App. 87-88).

The declaration page for Section IV of the Coverage contract provides for a “Liability Limit” of \$1,000,000 “Per Occurrence.” (Coverage Contract at Sec. IV., App. 159). “Occurrence” is not specifically defined within Section IV. Rather “Occurrence” is defined in Section I as “an accident which results in Bodily Injury . . . the original cause of which and the initial damage from which happened during the Contract Period set forth in the Declarations.” (*Id.* at Sec. I., ¶ B.4.,

App. 112). Additionally, “‘Occurrence’ includes continuing exposure to the same harmful conditions” and “[a]ll such continuing exposure, damage, or injury shall be treated as one Occurrence.” (*Id.*).

Under Section IV, subject to the Coverage Contract’s limitations, terms and conditions, SCMIRF agreed to pay on behalf of the member or covered person sums those person(s) shall be obligated to pay exclusively as “Money Damages” because of a “Wrongful Act” by those person(s) which results in either “Bodily Injury” where the “Wrongful Act” amounts to an “Occurrence,” or a “Personal Injury.” (*Id.* at Sec. IV., ¶ A.1., App. 160). Sections I and IV provide definitions for the key terms involved with this coverage section. Specifically:

“**Wrongful Act**” is defined to mean: “any actual or alleged error in the performance or failure to perform an official duty . . . or any omission or neglect in performing an official duty; or any breach of an official duty, including misfeasance, malfeasance and nonfeasance” (*Id.* at Sec. IV, ¶ G.27., App. 173-174);

“**Bodily Injury**” is defined as “physical injury to any person (including death) and any mental anguish or mental suffering associated with or arising from such physical injury.” (*Id.* at Sec. IV., ¶ G.4., App. 170);

“**Personal Injury**” is defined to include certain “Offenses” committed in the course of the Member’s law enforcement activities, including: “assault and battery;” “violation of civil rights;” and “false arrest, detention or imprisonment.” (*Id.* at Sec. IV., ¶ G.18., App. 173); and

“**Offense**” is defined as “conduct constituting Personal Injury . . . that happens in the course and scope of the Member’s or Covered Person’s official duties as described in The South Carolina Tort Claims Act.” (*Id.* at Sec. I., ¶ B.5., App. 112-113).

Significantly, Section IV’s definition of “Bodily Injury” clarifies the distinction between “Bodily Injury” and “Personal Injury” by providing that: “for the purposes of this Section IV, **Bodily Injury** does not include such injuries if they result directly and immediately from the infliction of **Personal Injury**, including without limitation assault and battery; any such resulting injuries shall

be deemed to be part of the **Personal Injury**.” (*Id.* at Sec. IV., ¶ G.4., App. 170) (emphasis in original).

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

“Only a single limit or Annual Aggregate from a single **Contract** for a single **Coverage Period** will apply, regardless of the number of persons or organizations injured or making claims, or the number of **Covered Persons** who allegedly caused them, or whether the damage or injuries were continuing or were repeated over the course of more than one **Coverage Period**.” (*Id.* at Sec. IV., ¶ D.1., App 160-161).

“[T]he total liability of [SCMIRF] [for] any one occurrence/accident/wrongful act will be \$1,000,000 per **Member** excluding expenses and defense costs. . . .” (*Id.* at Sec. IV., ¶ D.2., App. 161).

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

[A]ll continuing, serial, or repeated instances of **Personal Injury** . . . will be considered as one occurrence/wrongful act, regardless of the number of **Covered Persons** involved in causing or failing to permit [sic] such injuries or the number of persons injured, and only a single Coverage Limit or Aggregate for one year will apply to all claims arising from such continuing, serial, or repeated conduct, regardless of the number of **Coverage Periods** during which such conduct occurred or continued.” (*Id.*).

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

Section I’s General Provisions also provide that the same conduct or wrongful act(s) cannot separately constitute both an “Offense” and an “Occurrence.” Section I provides that “[n]o **Offense** will be deemed also to constitute separately an **Occurrence** for coverage purposes, or vice versa. . . . Any act(s) or omission(s) that might be described under more than one **Coverage**

Section or more than one category as an **Offense(s)** or an **Occurrence(s)** will be treated as a single event for coverage purposes, subject to a single Coverage Limit.” (*Id.* at Sec. I., ¶ C.9., App. 116). Additionally, Section I of the Contract provides that “[a]ll repetitions of the same basic **Offense** involving an offended person and/or . . . group of persons . . . , whether or not there are different witnesses to the **Offense** or there is a variation in the conduct constituting the **Offense**, will be treated as one **Offense**, subject to a single Coverage Limit, even if the **Offense** occurs over more than one Contract Period.” (*Id.* at Sec. I., ¶ B.5., App. 112-113). Section I further expressly provides that: (1) “[a] single Coverage Limit applies to any **Offense** or **Occurrence**, regardless of the number of claimants, suits, or claims”; and (2) “[a] single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage.” (*Id.* at Sec. I., ¶ C.9., App. 116).

ARGUMENT

I. The Court of Appeals correctly held that the terms of SCMIRF’s Coverage Contract only provided a single limit of \$1,000,000 in indemnity coverage for all of Reeves’ claims.

The Court of Appeals correctly determined that the proper coverage analysis of the Coverage Contract’s Section IV coverage was a three-part analysis. (App. 840). The first step in this analysis is whether a Wrongful Act occurred. (App. 840). The second step is the determination of whether the Wrongful Act resulted in either Bodily Injury or Personal Injury (or both). (App. 840-841). Finally, the third step occurs where both Bodily Injury and Personal Injury exist because the Coverage Contract requires that, where this is the case, such Bodily Injury is deemed to be part of the Personal Injury if the Bodily Injuries result directly and immediately from the infliction of the personal injury. (App. 841-842). Applying this three-part analysis, the Court of Appeals correctly concluded that here, while there were Wrongful Acts that resulted in both

Bodily Injury and Personal Injury, the injuries that comprised the Bodily Injury (the negligence claims) were also the direct and immediate result of the infliction of the Personal Injury (the § 1983 civil rights violations), and, therefore, the Bodily Injury was deemed to be part of the Personal Injury under the policy language. (App. 842). The Court of Appeals then correctly applied the “Duplication Clause” found in Section I.C.9. of the Coverage Contract and held that under this provision, as well as similar limitation of liability provisions found in Sections I.B.5, IV.D.1. and IV.D.2, only one coverage limit of \$1,000,000 was available under the Coverage Contract for this incident. (App. 842-845).

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

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

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

(Coverage Contract at Sec. IV., ¶ A.1., App. 160). Thus, Section IV provides two separate and distinct paths to coverage – coverage for “Bodily Injury” or coverage for “Personal Injury.” Both paths share the same starting point in that there must be a “Wrongful Act.” A “Wrongful Act” includes “any actual or alleged error in the performance or failure to perform an official duty . . . when committed by a **Member** or by a **Covered Person(s)** while acting within both the course and scope of his or her official duties, as provided under the ‘South Carolina Tort Claims Act.’”

(*Id.* at Sec. IV., ¶ G.27., App. 173-174). The Court of Appeals correctly concluded that the actions and/or omissions of Price and Craddock constituted the required “Wrongful Act.” (App. 840). The Court of Appeals then properly analyzed whether the “Wrongful Act” resulted in either “Bodily Injury” or “Personal Injury.”

1. Coverage for “Bodily Injury”

“Bodily Injury” is defined as “physical injury to any person (including death) and any mental anguish or mental suffering associated with or arising from such physical injury.” (*Id.* at Sec. IV., ¶ G.4., App. 170). In order for coverage to exist under this path, however, the “Wrongful Act” that caused it must “amount[] to an **Occurrence.**” (*Id.* at Sec. IV., ¶ A.1.a., App. 160). “Occurrence” is defined by the Coverage Contract to mean “an accident which results in **Bodily Injury.**” (*Id.* at Sec. I., ¶ B.4., App. 112).

It is not contested that “Bodily Injury” exists in this case. Nor is it contested that the “Wrongful Act” that resulted in the “Bodily Injury” in this matter would amount to an “Occurrence.” (App. 840-841). The Court of Appeals correctly recognized that this does not end the analysis, and that it remained necessary to look to the provisions in the Coverage Contract for “Personal Injury” and the interplay between these two paths for coverage.

2. Coverage for “Personal Injury”

The next step in the analysis is to assess whether the “Wrongful Act” results in a “Personal Injury.” “Personal Injury” is defined to include certain “Offenses” committed in the course of a Member’s law enforcement activities, including: “assault and battery;” “violation of civil rights;” and “false arrest, detention and imprisonment.” (*Id.* at Sec. IV., ¶ G.18., App. 173). The term “Offense” is defined as “conduct constituting **Personal Injury** . . . that happens in the course and scope of the **Member’s** or **Covered Person’s** official duties as described in the South Carolina

Tort Claims Act.” (*Id.* at Sec. I., ¶ B.5., App. 112-113) (emphasis in original). Therefore, for coverage to exist based on “Personal Injury,” the “Wrongful Act” must constitute a qualifying “Offense.” Significantly, whether coverage exists for “Personal Injury” does not involve any determination as to whether the underlying “Wrongful Act” amounts to an “Occurrence.”

Both the Cottageville and Craddock Lawsuits involved claims based on 42 U.S.C. § 1983. In fact, the Craddock Lawsuit only asserts § 1983 claims. (App. 52-63). The Court of Appeals correctly recognized that no one was contesting that the alleged civil rights violations constituted a “Wrongful Act” that included “Offenses” which caused “Personal Injury.” (App. 841). Thus, the Court of Appeals correctly recognized that, prior to advancing to the third step of its analysis, “there are two potential avenues for coverage here—coverage for Bodily Injury and coverage for Personal Injury.” (App. 841). However, the third step—the necessary analysis where both Bodily Injury and Personal Injury are present—was still necessary to examine.

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

Reeves’ negligence claims supported coverage for “Bodily Injury,” and Reeves’ Section 1983 claims supported coverage for “Personal Injury.” However, coverage cannot exist simultaneously under both because the Coverage Contract has clear provisions limiting the application of duplicate coverage under these circumstances. First, the Coverage Contract’s definition of “Bodily Injury” provides:

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

(*Id.* at Sec. IV., ¶ G.4., App. 170) (underline emphasis added). Thus, “Bodily Injury” that results from the infliction of “Personal Injury” is subsumed into the “Personal Injury.” The Coverage

Contract’s prohibition on duplicate coverage for related “Bodily Injury” and “Personal Injury” is reaffirmed in its General Provisions in Section I which also preclude duplication of “Personal Injury” and “Bodily Injury.” Paragraph C.9. of Section I provides that “[n]o **Offense** will be deemed also to constitute separately an **Occurrence** for coverage purposes, or vice-versa.” (*Id.* at Sec. I., ¶ C.9., App. 116). The term “Offense” relates only to “Personal Injury” and the term “Occurrence,” in this usage, relates only to “Bodily Injury.” Thus, under Section I, the basis for a “Personal Injury” cannot also be the basis for a “Bodily Injury,” or vice versa. Section IV then provides that where there is such a shared basis, the only available coverage is for “Personal Injury.”

The Court of Appeals correctly concluded that the resulting injury in this case is the same for both the negligence claims and the Section 1983 claim—that the conduct of Cottageville, Price and Craddock “proximately caused the death of Bert Reeves.” (App. 842, *see also* Reeves’ Memo. in Supp. of Sum. Judgment. at 3, App. 407) Thus, the claimed “Bodily Injury” in this case (the death of Bert Reeves and the mental anguish and suffering arising from that death) “result[ed] directly or immediately” from the claimed “Personal Injury” (the § 1983 violations), as well as the alleged negligence. (App. 842). The Court of Appeals then correctly applied the express provisions of the Coverage Contract which require that the resulting injury in this circumstance is “deemed to be part of the **Personal Injury**” and can no longer constitute a separate “Bodily Injury.” (App. 842; Coverage Contract at Sec. I., ¶ C.9. and Sec. IV., ¶ G.4., App. 116, 170). Therefore, the only coverage in these circumstances is under Section IV’s provisions for “Personal Injury.” Having established that the analysis properly focuses on “Personal Injury,” the Court of Appeals then properly analyzed whether the actions of Cottageville, Price and Craddock, and the injuries suffered by Bert Reeves and his statutory beneficiaries, constitute more

than one “Personal Injury.” (App. 842-845).

C. Numerous Provisions of the Coverage Contract Limit SCMIRF’s Liability to the \$1,000,000 Coverage Limit.

After determining that the Bodily Injury was deemed part of the Personal Injury, the Court of Appeals then correctly found that “the duplication clause¹ and other coverage provisions in the Coverage Contract act to limit coverage to a single limit.” (App. 843). Previously, at the trial court level, Reeves had been granted summary judgment on this issue based on the reasoning that the wrongful death and survival actions brought by Reeves were distinct claims and “the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different . . . [t]hey clearly are not substantially the same injury or damage.” (Order filed 6/29/16 at p. 6, App. 10). The trial court then concluded that “[Reeves] suffered separate and distinct damages which could lead to additional coverage under these separate causes of action.” (*Id.* at 7, App. 11). The Court of Appeals correctly reject this reasoning and held that “[c]overage does not turn on the legal theory under which liability is asserted, but on the cause of the injury.” (App. 843).

1. The Coverage Contract prohibits duplication of coverage.

The stated “Liability Limit” for coverage under Section IV of the Coverage contract is “\$1,000,000 Per Occurrence.” (Coverage Contract at Sec. IV., App. 159). Numerous provisions within the Coverage Contract establish that there is no duplication of coverage in various scenarios. First, the General Provisions set forth in Section I provide that there is no duplication among the separate coverage sections:

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

¹ Sec I.C.9. (App. 116) (providing that a single coverage limit applies to all claims or suits involving substantially the same injury or damage).

(*Id.* at Sec. I., ¶ C.9., App. 116). Duplication of coverage based on the form of injury is also prohibited. Duplication of “Personal Injury” and “Bodily Injury” is avoided through the provision stating:

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

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

Any act(s) or omission(s) that might be described under more than one Coverage Section or more than one category as an **Offense(s)** or an **Occurrence(s)** will be treated as a single event for coverage purposes, subject to a single Coverage Limit. . . .

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

A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or progressive injury or damage. There is no duplication of coverage or benefits under **This Contract**.

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

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

Only a single limit or Annual Aggregate from a single **Contract** for a single **Coverage Period** will apply, regardless of the number of persons or organizations injured or making claims, or the number of **Covered Persons** who allegedly caused them, or whether the damage or injuries at issue were continuing or were repeated over the course of more than one **Coverage Period**.

(*Id.* at Sec. IV., ¶ D.1., App. 161) (underline emphasis added). Thus, the Coverage Contract’s \$1,000,000 Liability Limit applies regardless of whether there are multiple persons injured (Bert Reeves and his statutory beneficiaries) or whether multiple covered persons caused the injuries

(Cottageville, Price and Craddock). This limitation is further emphasized under the very next subsection, titled “SCMIRF’s Limit of Liability,” which provides:

SCMIRF’s liability for any one occurrence/wrongful act will be limited to \$1,000,000 per **Member** regardless of the number of Covered Persons, number of claimants or claims made . . .

(*Id.* at Sec. IV., ¶ D.2., App. 161) (underline emphasis added).

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

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

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

(*Id.* at Sec. I., ¶ B.5., App. 112-113) (underline emphasis added). Thus, when addressing the issue of coverage for “Personal Injury,” if the same basic “Offense” offends multiple people, it is treated as only one “Offense” and is subject to the \$1,000,000 Coverage Limit, even if there is some variation in the conduct that constitutes the “Offense.” Applied to the facts of this case, the “Offense” was the violation of Bert Reeves’ civil rights. While it involved Cottageville, Price and Craddock as the alleged offenders, their repetition of this same basic offense does not result in there being multiple offenses. Similarly, the fact that there are multiple offended parties (Bert Reeves and his statutory beneficiaries) does not result in duplication of coverage. Rather, the Coverage Contract requires that this be treated as one “Offense” subject to a single Coverage Limit.

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

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

(*Id.* at Sec. IV., ¶ D.2., App. 161) (bold emphasis in original, underline emphasis added). As previously discussed, the coverage analysis under Section IV begins with a “Wrongful Act.” Here, because the “Wrongful Act” results in a “Personal Injury,” any potential coverage for “Bodily Injury” is subsumed into the “Personal Injury” coverage by operation of the Coverage Contract’s provisions. (*Id.* at Sec. IV., ¶ G.4., App. 170). Under the above provision, where there are continuing, serial, or repeated instances of “Personal Injury,” they are treated as only one “Wrongful Act.” This applies whether or not there are multiple persons causing the injuries, or multiple persons injured. The result remains that only a single Coverage Limit will apply in this situation.

The Court of Appeals correctly concluded that under these provisions “if the same basic Offense injures multiple people who bring multiple claims—even if the conduct that constitutes the Offense varies and involves multiple members and covered persons—there is only one Offense for coverage purposes and recovery is limited to \$1,000,000.” (App. 845).

D. The Court of Appeals correctly concluded that the amount of available coverage was not determined by the number of negligent acts and/or civil rights violations.

Reeves asserts that because the Coverage Contract lists the Liability Limit as “Per Occurrence” that the focus should be on the conduct (the various acts of negligence and civil rights

violations) and not the resulting injuries. (Reeves' Brief pp. 10-16). This ignores the fact that only "Personal Injury" coverage is available under these circumstances, and that there was only one basic "Offense" giving rise to such coverage.

Under the provisions of Sections I, ¶ B.5. and IV., ¶ D.2., there is only one coverage limit available even though there were multiple covered persons who committed the "Offense" and multiple claimants. Reeves' focus on separate conduct is misplaced because it fails to account for the interplay between "Personal Injury" and "Bodily Injury" coverages where the injuries sustaining the "Bodily Injury" coverage are the direct and immediate result of the infliction of the "Personal Injury." Here, no matter how many negligent acts are found to have occurred, the injuries flowing from those acts are all also the result of the civil rights violation giving rise to the "Personal Injury."

Reeves asserts that Bodily Injury claims exist simultaneously with the Personal Injury claims in this matter, allowing for multiple coverage limits. (Reeves Brief pp. 24-26). Reeves argues that the wrongful death damages compensate the decedent's beneficiaries for their own loss and that these beneficiaries' injuries could only be covered as "Bodily Injury" and not "Personal Injury" "[b]ecause the children's civil rights were not violated." (Reeves' Brief p. 25). Stated differently, Reeves attempts to assert that the wrongful death causes of action relate only to the negligence claims and not to the civil rights violations claims. This is simply incorrect. This is most clearly illustrated by the Complaint in the Craddock Lawsuit—which asserted both survival and wrongful death claims based solely upon three Section 1983 claims. (App. 52-63). The wrongful death claim in the Craddock Lawsuit (which is essentially the same as the wrongful death claim asserted in the Cottageville Lawsuit) could only be based on the Section 1983 claim as there was no negligence claim asserted in that action. Thus, Reeves' argument that the only path to

coverage for the beneficiaries is under Bodily Injury is belied by Reeves’ own pleadings. The Court of Appeals correctly found that “the resulting injury is the same for both the negligence claims and the Section 1983 claims—that the conduct . . . ‘proximately caused the death of Bert Reeves’” and that “[t]he Bodily Injury—Bert Reeves’s death and the mental anguish and suffering associated with his death—‘result[ed] directly or immediately’ from the Personal Injury—the Section 1983 Violations.” (App. 842). When that is the case, as it is here, the resulting injury is deemed part of the Personal Injury. (App. 842).

Additionally, Reeves’ reliance on *Boiter v. S.C. Dep’t of Transp.*, 393 S.C. 123, 131–135, 712 S.E.2d 401, 405–407 (2011), to attempt to change the definition of “Occurrence” from that stated in Section I of the Coverage Contract is misplaced. Reeves seeks to use *Boiter*, which dealt with a statutory definition of “occurrence” that applied in a different setting, to support a redefining of the term in this case. In the *Boiter* case, the South Carolina Supreme Court held that the plaintiff in an action stemming from a vehicle accident caused by burned out traffic signals could recover from two separate government agencies under the S.C. Tort Claims Act (“TCA”) for their separate acts of negligence. *Id.* at 134, 712 S.E.2d at 406. The issue was whether the two separate acts of negligence by the separate agencies constituted two “occurrences” under the TCA. To reach its conclusion, the *Boiter* Court looked to S.C. Code Ann. § 15-78-30(g), defining “occurrence” under the TCA as an “unfolding sequence of events which proximately flow from a single act of negligence.” *Id.* at 132, 712 S.E.2d 405. *Boiter* has no relevance in a situation such as this where a Coverage Contract defines the meaning of the term “Occurrence.” Reeves is essentially asking this Court to use the TCA’s definition of “occurrence” and ignore the Coverage Contract’s definition and related terms. This is improper where, as here, the Coverage Contract provides its own definition of the term. *See Horry Cnty. v. Ins. Reserve Fund*, 344 S.C. 493, 499, 544 S.E.2d

637, 640 (Ct. App. 2001) (“[W]e look to the terms of the policy itself to determine coverage.”); *see also Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) (finding the “policy itself should be examined to see whether coverage is provided by its terms”).

E. The Court of Appeals properly applied a three-step analysis of the coverage contract that started with whether there was a “Wrongful Act.”

Reeves asserts that the Court of Appeals’ three-step analysis of the Coverage Contract was in error and that the Court of Appeals should not have started its analysis with whether there was a “Wrongful Act.” (Reeves’ Brief pp.16-17). This assertion is based on faulty logic and a misinterpretation of the Coverage Contract’s provisions. Reeves asserts that the key language in Section IV of the Coverage Contract that creates the coverage at issue in this action is not limited to “Wrongful Acts” but, instead, somehow extends to “conduct that goes beyond that defined as a Wrongful Act.” (Reeves’ Brief p. 16). Reeves asserts that the coverage cannot be conditioned on the existence of a “Wrongful Act” because, in Reeves’ view, “Wrongful Acts” do not include civil rights violations that are otherwise included in the category of “Personal Injury.” (Reeves’ Brief pp. 16-17). Reeves appears to contend that civil rights violations cannot be “Wrongful Acts” because only violations of South Carolina State law and conduct within the immunities of the Tort Claims Act can qualify as “Wrongful Acts.” (Reeves Brief p. 16). This is incorrect.

The language of Section IV.A.1. is clear—SCMIRF agrees to “pay on behalf of the **Member or Covered Person(s)** for sums which the **Member or Covered Person(s)** may 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).**” (App. 160 (bold emphasis in original, underline emphasis added)). As the Court of Appeals concluded, and as this provision states, the prerequisite for any coverage (whether for “Bodily Injury” caused by an “Occurrence”

or for “Personal Injury” caused by an “Offense” is there must be a “Wrongful Act.” (App. 839). The contention that this coverage language actually applies to something that is not a “Wrongful Act” must be rejected.²

Additionally, Reeves contends that conduct actionable under Section 1983 does not qualify as a “Wrongful Act” because it is outside the Tort Claims Act if it involves an intent to harm. (Reeves’ Brief pp.16-17). Reeves’ argument on this point begins with the fact that the definition of Wrongful Act requires the person committing the Wrongful Act to be acting within the course and scope of their official duties “as provided under the South Carolina Tort Claims Act.” (*Id.* at 16). Reeves then asserts that “[l]iability under 42 U.S.C. § 1983 may require a showing of an intent to harm that is unjustifiable by any government interest.” (*Id.* at 17). Next, Reeves asserts that “civil rights violations necessarily occur when the state actor acts outside the Tort Claims Act.” (*Id.*). Thus, Reeves concludes that will never be a Wrongful Act under SCMIRF’s Coverage Contract. (*Id.*). These conclusions are without merit.

First, there is nothing in the Tort Claims Act that provides an explicit exception to the waiver of immunity for civil rights violations. Instead, it appears that Reeves is attempting to rely on S.C. Code Ann. § 15-78-60(17) which provides that “[t]he governmental entity is not liable for a loss resulting from: . . . (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.” *Id.* In this case, it is uncontested that Price and Craddock were acting within the scope of their

² This argument was not asserted by Reeves to either the trial court or the Court of Appeals in Reeves’ briefing. Rather, this argument was raised for the first time in Reeves’ Petition for Rehearing to the Court of Appeals. (App. 863-864). A party may not raise an issue for the first time in a petition for rehearing. *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011); *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). For this reason alone, it should be disregarded.

employment with the Cottageville Police Department. (Stipulation of Facts and Issues at ¶¶ 3, 5, App. 87-88). Thus, it appears the basis for Reeves’ conclusion that Section 1983 claims are outside of the Tort Claims Act is the assertion that Section 1983 claims include the element of an “intent to harm.” However, this is incorrect. Intent to harm is not an element of the Section 1983 claims in this case. All of Reeves’ Section 1983 claims center on the alleged use of excessive force. (Price Complaint at ¶¶ 47, 52, App. 34-35; Craddock Complaint at ¶¶ 23, 33, 42, App. 58, 60-61). Contrary to Reeves’ unsupported assertions, intent to harm is not an element of a section 1983 excessive force case. *Howard v. Hudson*, No. 2:13-0247-KD-N, 2016 U.S. Dist. LEXIS 185458, at *4-5 (S.D. Ala. Feb. 29, 2016) (“Intent is not an element of a § 1983 Fourth Amendment excessive force claim; to the contrary, the Supreme Court has taken pains to explain that ‘[a]n officer’s evil intentions will not make a . . . violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.’”); *Garret v. City of Milford*, No. 3:03-cv-1216-N, 2004 U.S. Dist. LEXIS 32420, at *5 (N.D. Tex. Nov. 12, 2004) (“[The plaintiff’s] state law claim appears to be based on the same facts as her excessive force claim under Section 1983, and intent is not an element of [the Section 1983] claim.”).³ Thus, S.C. Code Ann. § 15-78-60(17)’s exception for “intent to harm” does not

³ Reeves cites to *Sacramento v. Lewis*, 523 U.S. 833 (1998), and *Slaughter v. Mayor & City Council of Baltimore*, 682 F.3d 317 (4th Cir. 2012), in apparent support of the assertion that intent to harm is a requirement. (Reeves’ Brief p. 17). However, each of those cases is distinguishable from the stipulated facts of this case. In *Sacramento v. Lewis*, the Supreme Court rejected an argument that deliberate indifference is sufficient to constitute a section 1983 violation in a high-speed chase. 523 U.S. at 852. The Court found when a police officer must make decisions “in haste, under pressure, and frequently without the luxury of a second chance”—for example, in a high-speed chase or prison riot where the officer faces competing obligations of restoring order and avoiding harm to others—he deprives a person of substantive due process only if he acts with an intent to harm that person. *Id.* at 853. The court clarified that in other situations where it is possible for the officer to deliberate before acting, “deliberate indifference” may be sufficient. *Id.* at 852–53. *Slaughter v. Mayor & City Council of Baltimore* addressed a civil rights claim brought by the estate of a firefighter killed in training. The Fourth Circuit explained that a voluntary

apply to this situation and Reeves' assertion that civil rights violations will never be covered under the Coverage Contract is incorrect. In this case, the Section 1983 claims in the underlying cases do fall within the scope of the Tort Claims Act, and, therefore, do fall within the scope of the term "Wrongful Act" as defined in the Coverage Contract. There was no error in the Court of Appeals' analysis which initially and correctly focused on the meaning of Wrongful Act, and there is no danger of municipalities and law enforcement personnel who fall within SCMIRF's Coverage Contracts being unduly exposed to personal liability.

F. The Court of Appeals correctly held that coverage only existed for Personal Injury and that this coverage was limited to \$1,000,000 by the terms of the Coverage Contract.

Reeves seeks to create multiple coverages by attempting to separate the negligence claims from the civil rights claims. (Reeves' Brief pp. 18-23). Reeves seeks to separately assert claims for Bodily Injury under the negligence claims and claims for Personal Injury under the civil rights claims. Basically, Reeves attempts to create separate coverage limits for both Bodily Injury and Personal Injury by asserting that they are not one in the same. (Reeves' Brief p. 25). This, however, completely ignores the merger provision in the definition of "Bodily Injury." If the Bodily Injury is the direct and immediate result of the infliction of the Personal Injury, then the two injuries are merged under the policy into the Personal Injury. And the Court of Appeals was correct in so holding. (App. 846).

government employee is deprived of substantive due process only if he can prove an intent to harm. 682 F.3d at 322. The court reasoned that a voluntary employee can decide to relinquish his employment—or not participate in a dangerous activity—at any time and, therefore, in those limited circumstances "deliberate indifference" does not give rise to a section 1983 claim. *Id.* Neither of these cases applies to the excessive use of force situation present in this matter.

Additionally, Reeves attempts to shift this Court's focus from the common injury to the different Wrongful Acts of Cottageville, Price and Craddock. (Reeves' Brief pp. 29). This misdirection fails, however, because coverage under the Coverage Contract does not exist for Wrongful Acts standing alone. Coverage is only triggered where a Wrongful Act results in either Bodily Injury or Personal Injury. As explained above, where an injury that qualifies as Bodily Injury is also the direct and immediate result of the infliction of a Personal Injury, then it is deemed part of that Personal Injury and the only potential coverage is under the Personal Injury provisions of the Coverage Contract.

Here, as the Court of Appeals correctly concluded, the Bodily Injury was "Bert Reeves' death and the mental anguish and suffering associated with his death" and this injury "'resulted directly or immediately' from the Personal Injury—the Section 1983 violations." (App. 842). As the Court of Appeals explained, "the Coverage Contract does not insure against theories of liability; it insures against Wrongful Acts which result in Bodily Injury or Personal Injury." (App. 843). After determining that the Bodily Injury was deemed part of the Personal Injury, the Court of Appeals then correctly found that "the duplication clause⁴ and other coverage provisions in the Coverage Contract act to limit coverage to a single limit." (App. 843).

The Court of Appeals correctly concluded that under the Coverage Contract's provisions "if the same basic Offense injures multiple people who bring multiple claims—even if the conduct that constitutes the Offense varies and involves multiple members and covered persons—there is only one Offense for coverage purposes and recovery is limited to \$1,000,000." (App. 845).

⁴ Sec I.C.9. (App. 116) (providing that a single coverage limit applies to all claims or suits involving substantially the same injury or damage).

Reeves' attempt to create separate duplicative coverages for Bodily Injury caused by negligence and Personal Injury caused by Section 1983 violations ignores these provisions.

Reeves now asserts that there are four separate \$1,000,000 limits available in this matter—comprised of \$1,000,000 for the negligence claims against Cottageville/Price, and three separate \$1,000,000 limits for the civil rights claims against Cottageville, Price and Craddock, respectively. (Reeves' Brief p. 29). Thus, Reeves seeks to duplicate limits for both Bodily Injury and Personal Injury while also duplicating three separate Personal Injury limits. Reeves' arguments and positions regarding the number of coverage limits available have inexplicably changed. In her Respondent's brief on this issue to the Court of Appeals and in her summary judgment motion to the circuit court, Reeves asserted that separate liability limits exist for ten separate "occurrences." (Final Response Brief of Respondent/Appellant pp. 5, 29, App. 740, 764; Plaintiff's Memorandum in Support of Summary Judgment pp. 3, 10-11, App. 407, 414-415). This change from ten to four comes from a change in Reeves' entire theory of interpretation of the Coverage Contract.

Reeves now asserts that the Duplication Clause in Section I.C.9 and the definitions for "Occurrence" and "Offense" found in Section I have no bearing on the interpretation of coverage under Section IV. (Reeves' Brief pp. 30-31). Additionally, Reeves now asserts that the "Limit of Liability" provision in Section IV.D.1. (App. 160-161) applies only to negligence claims brought under the Tort Claims Act and that this provision limits Reeves to only one coverage limit for her negligence claims. (Reeves' Brief pp. 26-30). Reeves then claims that the "SCMIRF's Limit of Liability" provision in Section IV.D.2. (App. 161) applies to limit any one Occurrence or Wrongful Act to only one coverage limit. (Reeves' Brief pp. 27-28). This argument, which was raised for

the first time in Reeves' petition for rehearing to the Court of Appeals,⁵ hinges on Section I's provisions, particularly Section I.C.9 and the definition of Offense found in Section I.B.5, having no application to Section IV in this matter. This argument should not be considered at all, as it is unpreserved. If it is considered, it should be rejected.

Reeves also suggests that SCMIRF cannot impose any coverage limitations in its coverage contracts with municipalities for claims that are permitted under the Tort Claims Act because that Act requires the municipalities to procure insurance to cover such claims.⁶ (Reeves' Brief p. 27). In support of this assertion, Reeves cites to *Penn. Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). The *Pennsylvania National* case on which Reeves relies addressed the wholly distinguishable situation of whether an automobile insurance policy's business use exclusion contravened the coverage required by the Motor Vehicle Financial Responsibility Act. This case, however, does not address an exclusion that seeks to avoid any coverage. Rather, the Coverage Contract in this case expressly provided only \$1,000,000 in coverage and contained numerous provisions that clarified that coverage was limited to the \$1,000,000 coverage limit. Reeves is essentially arguing that SCMIRF must provide unlimited coverage to municipalities, because those municipalities are required by the Tort Claims Act to acquire insurance coverage. In addition to being unpreserved, this argument is illogical, and

⁵ A party may not raise an issue for the first time in a petition for rehearing. *Herron*, 395 S.C. at 469, 719 S.E.2d at 644; *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

⁶ This particular issue has never been raised by Reeves at any stage of this case, and, for that reason alone, should be rejected. *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); Rule 242(d)(2), SCACR; *Kleckley v. Northwestern Nat'l Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (holding that an issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari); *McCray v. State*, 317 S.C. 557, 559 n.1, 455 S.E.2d 686, 687 n.1 (1995) (rejecting an issue briefed in Petitioner's Supreme Court brief because it was not raised in his petition for a writ of certiorari).

should be rejected. The Tort Claims Act’s requirement that municipalities obtain coverage in some form (whether or not via establishing pooled self-insurance liability funds) does not mean that the coverage to be provided by such mechanisms must be unlimited. SCMIRF is permitted to contractually limit its coverage to a specified amount – and it did in this instance.

The Court of Appeals’ analysis of the Coverage Contract was well-reasoned. It correctly determined that, under the circumstances of this case, only a **single** limit of \$1,000,000 was available. Thus, this Court should affirm the Court of Appeals’ decision.

II. The Court of Appeals correctly held that SCMIRF is a political subdivision and is, therefore, entitled to protection under the Tort Claims Act for any tort claim of bad faith.

A. Reeves improperly seeks to raise a new issue before this Court.

In Argument II of Petitioner’s Brief, Reeves focuses almost exclusively upon an argument that Tort Claims Act immunity does not extend to Respondent because it allegedly is “controlled” by a “private entity”—the Municipal Association of South Carolina (“Municipal Association”). (Reeves’ Brief pp. 34-41). This issue and argument are the crux of Sections II.A., II.B., and II.C of Reeves’ Brief. However, this issue and argument were never raised by Reeves to the trial court, the Court of Appeals, or in the petition for a writ of certiorari to this Court, and thus are improperly included in Petitioner’s Brief.⁷

It would be patently unfair for this Court to allow Reeves to inject this entirely new issue into this case at this final stage of the litigation. This litigation was confined by the Parties to two very discrete, agreed upon issues. (See Settlement Agreement pp. 4-5, App. 358-359; Amended

⁷ On July 7, 2020, SCMIRF filed a Motion to Strike the portions of Section II of Reeves’ Brief that raised this new issue. By Order dated July 14, 2020, this Court denied this motion without prejudice to SCMIRF’s right to raise the arguments in its Brief that this new issue is unpreserved.

Complaint at ¶ 17, App. 83-84; Stipulation of Facts and Issues, App. 89-90). This issue has never been briefed or argued to any lower court.

The parties negotiated and agreed upon a specific Stipulation of Facts and Issues that set the limited parameters of this dispute. (App. 87). This Stipulation included, as exhibits, SCMIRF's Bylaws and the Intergovernmental Agreement whereby Cottageville joined with other municipalities in becoming a member of SCMIRF. (App. 88, 99, 103). Additionally, the Stipulation of Facts expressly states that "[t]he parties agree that no other facts are necessary for the court to answer the stipulated issues, that no discovery is needed for the case, and that the stipulated issues are purely legal in nature." (emphasis added) (Stipulation of Facts and Issues at ¶ 11, App. 89). Thus, the only record before this Court is that contained in this Stipulation, SCMIRF's Bylaws, and the Intergovernmental Agreement. Reeves seeks to add to this record by citing to the July 28, 2014, Rule 30(b)(6) deposition of Heather Ricard as the corporate representative of SCMIRF. (Reeve's Brief pp. 38-39). This deposition, however, was taken in the underlying lawsuit by Reeves against Cottageville and Price, not in this lawsuit (App. 437), did not include in the designated topics anything having to do with the Municipal Association (App. 566), and predated the Stipulation of Facts and Issues and the Amended Complaint which defined the limited nature of this dispute by more than a year. Reeves is attempting to create an issue as to the alleged "control" of SCMIRF by cherry-picking facts from the record out of context.

The second question presented by Reeves in her petition for a writ of certiorari to this Court was:

Whether the South Carolina Municipal Insurance and Risk Financing Fund is a political subdivision of South Carolina subject to the Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* for a tort claim for bad faith.

(Reeves' Petition for Writ of Certiorari p. 1). This second question stems from one of two issues specifically stipulated to by the parties as the questions to be litigated in this action. (*See* Stipulated Issue No. 2 at App. 90). These two stipulated issues were resolved by the trial court on cross-summary judgment motions. (App. 5). In her motion, as to this issue Reeves argued that SCMIRF is not a political subdivision based upon the definition of "political subdivision" in S.C. Code Ann. 15-78-30, and SCMIRF was merely a "fund," not an agency or department—unlike the Insurance Reserve Fund, which is a division of the State. (App. 415-422). In her response to SCMIRF's motion for summary judgment, Reeves repeated these arguments and made an effort to support it by reference to the factors set forth in *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013). (App. 530-534). Similarly, Petitioner's oral argument to the trial court focused upon the assertion that SCMIRF did not qualify under the statutory definition of "political subdivision," that SCMIRF was merely a fund distinguishable from the Insurance Reserve Fund, and that the *Health Promotion Specialists* factors supported her position. (App. 299-303, 341). The trial court ruled in SCMIRF's favor on this issue. (App. 8-9). In her motion to alter or amend the trial court's ruling on this issue, Reeves raised the same points on this question. (App. 651-657). At no point did Reeves raise the issue of the alleged "control" of SCMIRF by the Municipal Association as a basis for denying Tort Claims Act immunity to SCMIRF.

At the Court of Appeals stage on this issue, in her Respondent/Appellant's Final Brief, Reeves again asserted the arguments she previously made to the trial court: the statutory definition of "political subdivision," the assertion that SCMIRF is merely a "fund" and not an agency or department like the Insurance Reserve Fund, and that the *Health Promotion Specialists* factors supported this argument. (App. 794-801). Like the trial court, the Court of Appeals ruled in favor

of SCMIRF on the Tort Claims Act issue. (App. 846-852). Reeves then filed a petition for rehearing with the Court of Appeals, and again argued that SCMIRF was not within the statutory definition of “political subdivision,” contrasted SCMIRF with the Insurance Reserve Fund, and asserted that the *Health Promotion Specialists* factors weighed in her favor. (App. 877-879). At no point did Reeves raise the issue of the alleged “control” of SCMIRF by the Municipal Association as a basis for denying Tort Claims Act immunity to SCMIRF. In fact, the Municipal Association is never even mentioned in Reeves’ merit briefing or petition for rehearing to the Court of Appeals.

After the Court of Appeals denied rehearing (App. 883), Reeves sought a writ of certiorari from this Court. Yet again, the petition for a writ of certiorari only asserted that SCMIRF was not within the statutory definition of “political subdivision,” contrasted SCMIRF with the Insurance Reserve Fund, and asserted that the *Health Promotion Specialists* factors supported that argument. (Reeves’ Petition for Writ of Certiorari pp. 20-23). There was no mention of the Municipal Association or the assertion that the alleged “control” of SCMIRF by the Municipal Association was a basis for denying Tort Claims Act immunity to SCMIRF.

Therefore, this Court should reject the argument contained in Sections II.A, II.B, and II.C, of Reeves’ Brief⁸ because it was not raised to, or ruled upon by, any lower court in this matter and is unpreserved. There are multiple layers of lack of preservation. First, Reeves failed to preserve this issue because it was never raised to the trial court. “It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to

⁸ Additionally, the last two paragraphs of Argument II.E. (and any other references to the Municipal Association) should not be considered by this Court because they seek to inject the Municipal Association issue into the *Health Promotion Specialists* factors argument, despite its omission from that argument to the trial court and the Court of Appeals.

be preserved for appellate review.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (citing *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). In *Elam v. S.C. DOT*, this Court characterized this rule as “[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004). Thus, where a party fails to raise the issue in its briefing and argument to the trial court, that party is precluded from raising that issue on appeal. *Easterling v. Burger King Corp.*, 416 S.C. 437, 452-453, 786 S.E.2d 443, 451-452 (Ct. App. 2016).

As this Court explained in *Herron v. Century BMW*:

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal citations and quotations omitted). “The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” *I’On, L.L.C.*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Reeves never raised this issue to the trial court and thus it never had the opportunity to rule on this issue. It should not be considered by an appellate court.

Next, Reeves failed to raise this issue to the Court of Appeals. For an issue to be preserved for review by this Court on a petition for a writ of certiorari, the argument must have first been raised in the arguments made to the Court of Appeals. See Rule 242(d)(2), SCACR; *Kleckley v.*

Northwestern Nat'l Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (holding that an issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari); *City of Columbia v. Ervin*, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (holding that an argument not made to an intermediate appellate court is not preserved for review by the Supreme Court). In fact, to preserve an issue for this Court's review, it must have been raised in both the merits briefing and in any petition for rehearing. See *Kleckley*, 338 S.C. at 138, 526 S.E.2d at 221; see also Rule 242(d)(2), SCACR; *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 235, 797 S.E.2d 387, 393 (2016) (rejecting an argument as unpreserved because it was not previously raised in the petition for rehearing with the Court of Appeals); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 307-308, 618 S.E.2d 876, 880 (2005). Here, Petitioner failed to raise this new issue in either her briefing to the Court of Appeals or her petition for rehearing.

Finally, in order for an issue to be properly included in a merits brief to this Court it must have been raised in the petition for a writ of certiorari. *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (rejecting an issue briefed in Petitioner's Supreme Court brief because it was not raised in his petition for a writ of certiorari). Reeves' failure to raise this issue to the trial court and Court of Appeals was repeated in her petition. Reeves' repeated failure to raise, and therefore preserve, this issue to any lower court alone warrants this Court's rejection of this argument.

In addition to being unpreserved, Reeves's assertion that SCMIRF is "controlled" or "dominated" by the Municipal Association is also unsupported by the record as well as South Carolina law. In *Colleton County Taxpayers v. School District of Colleton County*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006), this Court addressed the alter-ego theory of liability which required a showing of domination and control. The *Colleton County Taxpayers* Court held that

“[c]ontrol may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity.” *Id.* Thus, in order for Reeves to actually establish that SCMIRF is “dominated” and “controlled” by the Municipal Association, Reeves would have to show that SCMIRF only functions to achieve the goals of the Municipal Association and has no independent interests. The record does not support such a finding.

Both SCMIRF’s Bylaws (App. 99) and the Intergovernmental Agreement that the Municipalities enter in order to become SCMIRF Members (App. 103) clearly establish the governmental nature of SCMIRF and that SCMIRF is controlled by its member municipalities through their elected Board of Trustees. As the Bylaws dictate, membership in SCMIRF is “limited to Municipal government units, institutions, or agencies of the State of South Carolina.” (App. 99). All members must be approved by SCMIRF’s Board of Trustees. (App. 102). SCMIRF’s nine-member Board is elected *by its members from among its members*. (App. 99). While it is true that the Director of Risk Management Services of the Municipal Association serves as the Secretary/Treasurer of SCMIRF’s Board of Trustees, SCMIRF’s Bylaws expressly provide that this person serves “without voting privileges.” (App. 100). The primary officers of SCMIRF’s Board (the Chairman and Vice Chairman) are elected by the Board of Trustees. (App. 100). While the Bylaws provide that the Municipal Association’s Director of Risk Management Services is “responsible for carrying out the daily operation and administration of SCMIRF,” this function is performed “on behalf of the Board of Trustees” and “as the Board of Trustees may direct.” (App. 101)

The Intergovernmental Agreement states that SCMIRF acts through its Board of Trustees who “direct the affairs of the fund.” (App. 103). According to the Intergovernmental Agreement, it is the Board that is vested with the power to “adopt policies and procedures for implementing

and administering the Fund.” (App. 103). Additionally, while the Intergovernmental Agreement notes that the Municipal Association has been designated as the “Administrator of the Fund and its assets,” this administration is “subject to the provisions of this Agreement and the policies adopted by the Board of Trustees of the Fund.” (App. 103). It is SCMIRF’s Board that established the schedules for types and levels of coverage (App 104) and it is SCMIRF’s Board that is granted the authorization to enter into agreements with such agents, contractors, persons, etc., as it deems appropriate to provide the services necessary for the operation of SCMIRF. (App. 105). Put simply, this new, unpreserved argument is refuted by the express provisions in the Bylaws and the Intergovernmental Agreement.⁹

B. The Court of Appeals correctly held that SCMIRF is a political subdivision.

Reeves claims that SCMIRF engaged in bad faith with respect to its handling of the claims associated with the shooting and death of Bert Reeves.¹⁰ (Am. Compl. at ¶¶ 14–16, App. 83). Where an “insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action.” *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) (emphasis added). The stipulated question on this issue is, assuming a bad faith claim could otherwise be made against SCMIRF,¹¹ whether any such claim would be subject to the Tort Claims

⁹ The Rule 30(b)(6) deposition of Heather Ricard as the corporate representative of SCMIRF, which Petitioner improperly relies on as detailed above, also fully *supports* the fact that SCMIRF is controlled by its Board of Trustees. Specifically, Ms. Ricard testified that SCMIRF is a separate legal entity from the Municipal Association (App. 445), It is SCMIRF’s Board that is responsible for its overall governance (App. 444), and that SCMIRF’s members purchase coverage from SCMIRF, not the Municipal Association. (App. 445).

¹⁰ SCMIRF understood prior to the settlement of the federal lawsuits that Cottageville, as the insured, intended to assign any bad faith claims that may exist to Reeves. (Stipulation of Facts and Issues at Issue 2, App. 90).

¹¹ SCMIRF is—by law—not an insurer, and it denies the existence of any bad faith. *See* S.C. Code Ann. § 15-78-140(A) (providing the procurement of insurance by establishing a pooled self-

Act. *See Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993) (holding a claim for bad faith associated with an insurance claim is subject to the Tort Claims Act and dismissal of a bad faith claim did not prejudice the appellant where the proceeds obtained already exceeded the statutory cap).

The Tort Claims Act provides limitations on liability for torts asserted against the State and its political subdivisions. *See* S.C. Code Ann. § 15-78-20. It states the public policy of South Carolina is “that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein.” S.C. Code Ann. § 15-78-20(a). The Tort Claims Act provides a cap on the amount of damages a plaintiff can recover when she sues a governmental entity in tort and creates other restrictions on recovery. *See* S.C. Code Ann. § 15-78-120. The Tort Claims Act extends to employees and agents of the State and its political subdivisions and provides “the exclusive civil remedy . . . for any tort committed by a governmental entity, its employees, or its agents” acting within the scope of their official duty. S.C. Code Ann. § 15-78-20(b); *see also* S.C. Code Ann. § 15-78-200. The Tort Claims Act “must be liberally construed in favor of limiting the liability of the governmental entity.” S.C. Code Ann. § 15-78-200; *see also* S.C. Code Ann. § 15-78-20(f) (stating “provisions of [the Tort Claims Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State”).

The Court of Appeals correctly affirmed the circuit court on this issue and held that SCMIRF was a political subdivision within the meaning of the Tort Claims Act and entitled to the

insurance fund, like SCMIRF, “may not be construed as transacting the business of insurance or otherwise subject to state laws regulating insurance”). However, this issue is not before this Court.

protections of that Act. (App. 850-851). Reeves asserts that SCMIRF falls outside of the definition of political subdivision because SCMIRF is not an agency, department, or subdivision of its member municipalities. (Reeves' Brief pp. 42-44). The Court of Appeals, however, correctly held that that "SCMIRF is a voluntary self-insurance pool created by municipalities of the state under the authorization of the State Constitution and the [Tort Claims] Act" and found that both the Tort Claims Act and the Constitution authorize municipalities and other political subdivisions to establish such pooled self-insurance funds. (App. 850).

"Governmental entity" is a defined term in the Tort Claims Act as "the State and its political subdivisions." S.C. Code Ann. § 15-78-30(d). The term "political subdivision" is defined in section 15-78-30(h) as:

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

S.C. Code Ann. § 15-78-30(h) (emphasis added). Reeves argues the emphasized phrase in section 15-78-30(h) qualifies only the preceding phrase relating to special purpose districts. (Reeves' Brief p. 43). According to Reeves, the Tort Claims Act applies to agencies, governmental healthcare facilities, departments, and subdivisions of only special purpose districts and not to agencies, departments, or subdivisions of counties or municipalities. (Reeves' Brief p. 43). Both the trial court and the Court of Appeals correctly rejected this argument. Further, two South Carolina Attorney General opinions have reached the opposite conclusion and construed the emphasized phrase consistent with SCMIRF's construction. *See* S.C. Op. Att'y Gen., 1990 WL 599264 (S.C.A.G. July 25, 1990); S.C. Op. Att'y Gen., 2014 WL 7405219 (S.C.A.G. Dec. 17, 2014).

In 1990, the Attorney General wrote: “The final phrase amplifies the term ‘political subdivision’ and cannot be reasonably read to modify the term ‘State’ since that term, as used in this paragraph, exists only to further describe special purpose districts.” 1990 WL 599264, at *2. The Attorney General explained that “[e]ach clause is of equal status and no phrase exists as modification or explanation of another.” *Id.* Rather, when the statute is “reduced to its simplest terms,” the definition of “political subdivision” includes the following entities:

1. counties;
2. *municipalities*;
3. school districts;
4. regional transportation authorities established pursuant to Chapter 25 of Title 58;
5. an operator as defined in item (8) of Section 58-25-20;
6. special purpose districts; and
7. any *agency*, governmental health care facility, *department or subdivision of any of the aforementioned political subdivisions*.

Id. (emphasis added). Under this analysis, the term “political subdivision” would necessarily include SCMIRF because SCMIRF is an agency of municipalities.

In 2014, the Attorney General again reached the same conclusion as to the interpretation of section 15-78-30(h). *See* 2014 WL 7405219, at *1. In that opinion, the Attorney General considered the exact question at issue in this case: “whether SCMIRF is a ‘governmental entity[]’ as defined in the Tort Claims Act, such that tort claims brought against SCMIRF are subject to the Act.” *Id.* The Attorney General quoted the analysis of the 1990 opinion and, based on that interpretation, concluded that SCMIRF is a governmental entity for purposes of the Tort Claims Act because it “clearly serves as an agency or department of its municipality members.” *Id.* at *2. The Attorney General noted the “very purpose and structure of SCMIRF is contemplated in and authorized by” the Tort Claims Act. *Id.* at *3; *see also* S.C. Code Ann. § 15-78-140(A).

Accordingly, the Attorney General opined that SCMIRF's liability is subject to the Tort Claims Act. 2014 WL 7405219, at *3. Both the trial court and the Court of Appeals in this matter agreed.

This Court should affirm the Court of Appeals. Contrary to Reeves' assertions to the trial court and the Court of Appeals that SCMIRF is merely a "fund,"¹² the Intergovernmental Agreement that created SCMIRF established it "as a *joint interlocal agency* to operate a fund for liability risk sharing." (Intergovernmental Agreement at ¶ 1, App 104) (emphasis added). Further, SCMIRF's Bylaws state that SCMIRF:

is a Fund created by and *comprised of South Carolina municipalities and their agencies* which are parties to an Intergovernmental Agreement which establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South Carolina, 1976, Section 15-78-140.

(SCMIRF Bylaws p. 1, App. 99) (emphasis added). It is undisputed that Cottageville is a municipality of the State and is therefore a political subdivision. All other SCMIRF members are "municipal local government unit[s]" and thus are also political subdivisions. *See* (SCMIRF Bylaws pp. 5-6, App. 101-102). The joining together of municipalities and their agencies for the purposes of providing liability coverage and sharing risk is expressly authorized by the Tort Claims Act and the South Carolina Constitution. S.C. Code Ann. § 15-78-140(A) ("The political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived by . . . (4) establishing pooled self-insurance liability funds, by intergovernmental agreement . . ."); S.C. Const. art. VIII, § 13 ("(A) Any county, incorporated municipality, or other

¹² Reeves took a deposition of a "corporate representative" of SCMIRF pursuant to Rule 30(b)(6) of the SCRCF. (App. 437-527, 558-559). Rule 30(b)(6) only applies to public or private corporations, partnerships, associations or governmental agencies. *See* SCRCF, Rule 30(b)(6). This begs the question of how such a deposition could be taken if SCMIRF were merely a "fund." Thus, Reeves' 30(b)(6) deposition notice of SCMIRF (App. 558-559) contradicts her assertion that SCMIRF is not a political subdivision.

political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof. (B) Nothing in this Constitution may be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State.”).

The Court of Appeals correctly concluded that “[i]t would be an absurd result for the legislature to create a scheme in which a municipality loses its status as political subdivision under this Act—and, thus loses the protection of the Act—when it joins together with other municipalities for the purpose of complying with statutory obligations.” (App. 850). If one municipality is covered by the Tort Claims Act, a group of political subdivisions sharing a joint self-insurance pool run by an agency—here SCMIRF—must also be covered by the Tort Claims Act.

Beyond the plain reading of the statute, this Court has outlined factors a court should consider in determining whether the Tort Claims Act applies to an entity. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 636, 743 S.E.2d 808, 814-15 (2013). In *Health Promotion*, the Court considered whether the Board of Dentistry constituted a governmental entity that could invoke the immunity protections of the Tort Claims Act. 403 S.C. at 626-27, 743 S.E.2d at 809-10. In answering the question in the affirmative, the Court looked to the following “factors”:

“[1] whether the entity functions statewide, [2] whether the entity performs the work of the state, [3] whether the entity was created by the legislature, and [4] whether the entity is subject to local control.” Additionally, we have examined [5] “the character of the power delegated to the entity, and [6] the nature of the function performed by the entity.”

Id. at 636, 743 S.E.2d at 814. When all six factors are applied to SCMIRF, they illustrate that it is a governmental entity subject to the protections of the Tort Claims Act.

First, SCMIRF functions statewide by providing coverage contracts to municipalities across the state that become members of the fund. (SCMIRF Bylaws p. 1, App. 99; Intergovernmental Agreement p. 1, App. 103). Second, SCMIRF performs the work of the State by providing coverage contracts to political subdivisions of the State—specifically, “Municipal government units, institutions or agencies.” *See* (SCMIRF Bylaws p. 1, App. 99; Intergovernmental Agreement p. 2, ¶ 1, App. 104). As to the third factor, although SCMIRF was not created by the legislature, it is a pool of funds administered by an agency created by municipalities—in accordance with the provisions of the South Carolina Constitution—to comply with a statutory mandate for liability coverage under the Tort Claims Act. *See* S.C. Const. art. VIII, § 13; S.C. Code Ann. § 15-78-140. The South Carolina Constitution authorizes an “incorporated municipality, or other political subdivision” to “agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof.” S.C. Const. art. VIII, § 13(A). It also provides that “[n]othing in this Constitution may be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments.” *Id.* at § 13(B). Additionally, the Tort Claims Act itself provides that “political subdivisions of this State, in regard to tort and automobile liability, property and casualty insurance *shall procure insurance* to cover these risks for which immunity has been waived by . . . (4) *establishing pooled self-insurance liability funds, by intergovernmental agreement.*” S.C. Code Ann. § 15-78-140(A) (emphasis added).

As to the fourth factor—whether the entity is subject to local control—SCMIRF is not controlled by any one of its municipality members. Rather, SCMIRF’s Board of Trustees is elected by its members from among its membership to accomplish SCMIRF’s purposes. In its consideration of the third and fourth factors, *Health Promotion* Court also noted the fees received by the Board of Dentistry become the property of the State general fund and must be deposited to the account of the State Treasurer. *See* 403 S.C. at 636, 743 S.E.2d at 815. Similarly, the funds allotted to and controlled by SCMIRF are public funds that are pooled by municipalities to cover losses attributable to liability claims of its members and are “deposit[ed] to the account of the Fund.”¹³ (*See* Intergovernmental Agreement p. 3, ¶ 7, App. 104). Significantly, there is no specific requirement that an entity must be controlled by a state office or have its funds controlled by the State Treasurer for the entity to be a political subdivision. Rather, the Governor and State Treasury’s control over the Board of Dentistry in *Health Promotion* was relevant because the Board of Dentistry is *the State*, not a political subdivision. *See* S.C. Code Ann. § 15-78-30(e) (defining “State” as “the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, *boards*, divisions, instrumentalities . . . and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges” (emphasis added)). SCMIRF does not contend that it is the State; it contends that it is a political subdivision as defined in section 15-78-30(h). SCMIRF is a “[f]und created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement” to “establish[] a pool for the payment of property losses and liability claims on behalf of its members pursuant to the provisions of the Code of Laws of South

¹³ As SCMIRF’s Rule 30(b)(6) designee testified, SCMIRF’s members pay SCMIRF, those funds are pooled together, and claims are then paid from the cash balance of the pool. (App. 445, 448).

Carolina, 1976. Section 15-78-140,” thereby meeting the third and fourth factors of *Health Promotion*. (SCMIRF Bylaws p. 1, App. 99).

The fifth and sixth factors were not addressed in detail in the *Health Promotion* opinion, but the court noted “the individual members of the Board are entitled to immunity for actions performed in the course of their official duties. Thus, by creating this governmental entity, the General Assembly intended for the Board as a whole to come within the purview of the [Tort Claims Act].” *Health Promotion*, 403 S.C. at 636, 743 S.E.2d at 815. The individual members of SCMIRF—municipalities and their employees—are also entitled to immunity for their conduct while acting within the scope of their official duties. *See* S.C. Code Ann. § 15-78-20(a) (granting “the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter”); S.C. Code Ann. § 15-78-200 (providing the Tort Claims Act “is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee’s official duty”).

Beyond the immunity of SCMIRF’s members, the fifth and sixth factors support a finding that SCMIRF is subject to the Tort Claims Act. As to the fifth factor—“the character of the power delegated to the entity”—the members of SCMIRF entered into an intergovernmental agreement which grants SCMIRF the type of power normally exercised by governmental entities. For example, the intergovernmental agreement provides that SCMIRF’s Board of Trustees “shall establish, operate, and enforce administrative rules, regulations, and bylaws governing the relationship between the individual members of the Fund and the Fund.” (Intergovernmental Agreement at ¶ 5, App. 105). Therefore, the character of the power delegated by municipalities to SCMIRF is that of a governmental entity. As to the sixth factor—“the nature of the function

performed by the entity”—SCMIRF’s provision of liability coverage is the performance of a function required of municipalities by the South Carolina Constitution and the Tort Claims Act. S.C. Const. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A). SCMIRF therefore performs the function of a municipality.

Thus, by recognizing the need for intergovernmental agreements such as the one created by SCMIRF, the legislature must have intended for SCMIRF “as a whole to come within the purview of the [Tort Claims Act].” *Health Promotion*, 403 S.C. at 636, 743 S.E.2d at 815. All of the *Health Promotion* factors thus weigh in favor of a finding that SCMIRF is a “governmental entity” subject to the immunity protections of the Tort Claims Act. Based on the plain language of the Tort Claims Act, the nature and purpose of SCMIRF, and the *Health Promotion* factors, this Court should affirm the Court of Appeals’ finding that the Tort Claims Act applies to a bad faith tort claim asserted against SCMIRF.

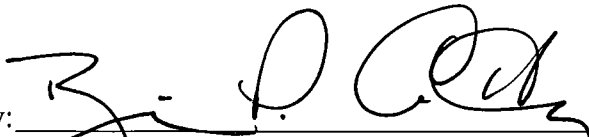
Conclusion

For the foregoing reasons, as well as those asserted in SCMIRF’s briefing to the Court of Appeals and in opposition to the Petition for a Writ of Certiorari, this Court should affirm the Court of Appeals’ decision in this matter.

Signature Page Attached

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