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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

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.

Respondent's Reply in Support of Petition for Rehearing

Pursuant to Rules 221(a) and 240(f) of the South Carolina Rules of Appellate Procedure the South Carolina Municipal Insurance and Risk Financing Fund ("SCMIRF") hereby files this reply in support of its petition for rehearing. For the reasons stated in its petition and this reply, SCMIRF respectfully requests that rehearing regarding Opinion No. 28034, (S.C. Sup. Ct. filed June 16, 2021 (Shearouse Adv. Sh. No. 20 at pp. 31-50) ("Op. No. 28034" or "Opinion")) be granted, and that this Court issue a new opinion as outlined herein.

Argument

I. The Court Incorrectly Determined Stipulated Issue One.

A. The 2017 Presentation is neither properly in the record of this appeal nor is it relevant to the proper interpretation of the 2011 Coverage Contract.

In her Return, Asley Reeves, as Personal Representative for the Estate of Albert Carl "Bert" Reeves ("Reeves") attached a 2017 presentation made by a representative of SCMIRF to League of Wisconsin Municipalities Mutual Insurance that discussed, in part, changes that SCMIRF made to its coverage contact several years after the judgment in the underlying lawsuit between Reeves and the Town of Cottageville and Randall Price. Reeves asserts that because SCMIRF changed its Coverage Contract in or around 2017, this "affirms" that the 2011 Coverage Contract contained ambiguities. (Return at pp. 2, 7-8). Reeves' reference to subsequent modification of the Coverage Contract and attachment of the presentation document in this appeal is both improper and irrelevant here.

First, it is improper for Reeves to seek to inject this 2017 presentation (and any subsequent modifications to the Coverage Contract) into an appeal of litigation that began in 2014. This presentation as well as any facts regarding subsequent modifications of SCMIRF's Coverage Contract are not in the record of this matter and have never been raised to any lower court in this matter.[1] South Carolina Appellate Court Rule 210(h) provides that "the appellate court will not consider any fact which does not appear in the Record on Appeal." Reeves is ignoring this rule of appellate procedure and is improperly asking this Court to do likewise.

Regardless, subsequent modifications of SCMIRF's Coverage Contract are irrelevant to the proper interpretation of the 2011 Coverage Contract. The changes discussed in this 2017 presentation took place years after the issuance of the 2011 Coverage Contract. Reeves' tactic is

[1] Additionally, the parties in this litigation entered into a Stipulation of Facts and Issues which set forth the complete factual record upon which this matter was to be decided and in which the parties expressly agreed "that no other facts are necessary for the Court to answer the stipulated issues…." (App. 89).

to argue that when a contract is amended or modified in a new version, this means the former version was ambiguous. However, contract terms are changed in various contracts quite frequently between parties in certain settings, as with insurance. Reeves' argument, if accepted, would mean that each time that occurs, this means the prior contract between the parties is ambiguous. Such is patently unreasonable and has been rejected by multiple courts. *Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1341 (9th Cir. 1989) (rejecting an attempt to rely upon a revised insurance policy to create a negative inference of ambiguity in the former policy); *State Farm Fire & Cas. Co. v. Eddy*, 218 Cal. App. 3d 958, 972–73, 267 Cal. Rptr. 379, 387 (Ct. App. 1990) ("We agree that evidence of subsequent revisions of an exclusionary clause in an insurance policy should be inadmissible because it lacks relevance, i.e., has no tendency to prove a material fact—is not probative on the issue of liability") (quoting *McKee v. State Farm Fire & Cas. Co.*, 145 Cal. App. 3d 772, 777–78, 193 Cal. Rptr. 745, 747–48 (Ct. App. 1983)); *Jensen v. USAA Prop. & Cas. Ins. Co.*, 246 Ill. App. 3d 66, 73, 614 N.E.2d 1361, 1366 (1993) ("We agree with USAA that the fact that it subsequently issued a revised policy to insureds including information about underinsured motorist coverage is not proof that the previous policy was insufficient").

Further, prior to this Court's Op. No. 28034, Reeves agreed with SCMIRF's interpretation of certain key provisions of the 2011 Coverage Contract and, prior to now, had never asserted that those certain key provisions were ambiguous in this litigation or its appeal. Specifically, with regard to SCMIRF's position that the Coverage Contract provided that any Bodily Injury that was also the result of Personal Injury was deemed to be merged into the Personal Injury, Reeves agreed previously. Reeves specifically acknowledged that "where one of 6 offenses constituting personal injury occurs along with bodily injury, the bodily injury will be deemed part of the personal

injury." (App. 752). Reeves further explained the definition of Bodily Injury's merger provision to the Court of Appeals as follows:

> where personal injury and bodily injury both exist, the bodily injury will not be treated separately from the personal injury within that occurrence. Instead, the distinct offense causing personal and bodily injury is considered one personal injury for coverage.

(App. 752). Thus, prior to Op. No. 28034, Reeves and SCMIRF were in complete agreement that the Bodily Injury definition converts all injuries otherwise qualifying as Bodily Injury into a Personal Injury in certain circumstances. The Court of Appeals agreed.

The fact that Reeves resorts to this tactic of pointing to a new document at this stage demonstrates the strength on the merits of SCMIRF's Rehearing Petition argument. This Court did not address the provision in the Coverage Contract regarding "serial" instances of conduct leading to the Reeves shooting and death constituting a single limit of available coverage - $1,000,000. Reeves' only response is to say that SCMIRF does not further define what that means in the Coverage Contract, and to point to later modifications in subsequent, inapplicable Coverage Contracts which are not before the Court. This Court should reject these arguments and grant rehearing, and issue a new opinion affirming the Court of Appeals.

B. The claims asserted against John Craddock were solely for Personal Injury and did not result in any duplication of the $1,000,000 coverage limit imposed by multiple provisions of the Coverage Contract.

In her Return, Reeves asserts that SCMIRF neglected to address the distinction between the claims against John Craddock (for failing to render aid) and the claims against Randall Price and Cottageville (for the shooting of Bert Reeves). (Return at pp. 2-3, 5-6). Reeves assumes that the Craddock claims are a separate covered event under the Coverage Contract than the claims against Price and Cottageville. This is incorrect.

The only claims asserted against Craddock were for alleged violation of 42 U.S.C. § 1983 (civil rights). (App. 52-63). Any coverage under the Coverage Contract would fall within the coverage provided for Personal Liability (because a civil rights violation is one of the enumerated "offenses" that can give rise to Personal Injury). In addition to its general non-duplication of coverage provisions, the Coverage Contract has certain non-duplication provisions which focus more specifically on Personal Injury and its sub-component offenses. Section I.B.5 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**.

(App. 112-113) (underline emphasis added). Here the offense is "violation of civil rights" and all repetitions of that offense are treated as one offense subject to a single coverage limit. Additionally, under this limiting language it does not matter if there is "a variation in conduct constituting the offense." Therefore, however Reeves attempts to characterize the civil rights violations that arise in connection with the shooting and death of Bert Reeves, they are still treated in the Coverage Contract only one offense with a single indemnity limit of $1,000,000 for coverage purposes. *See also*, Section C., *infra*.

C. The limiting language of Section IV.D.2. (serial instances of Personal Injury) focuses upon the offense and not the nature or even the existence of physical injury.

As set forth in SCMIRF's Petition for Rehearing, Op. No. 28034 does not address the limiting language found in Section IV.D.2. of the Coverage Contract which states, in pertinent part:

> **…<u>all continuing, serial, or repeated instances</u> of Personal Injury…<u>will be considered as *one* occurrence/wrongful act</u>, regardless of the number of Covered Persons involved causing or failing to permit such injuries or the number of persons injured ….**

(Pet. For Rehearing at p. 5 citing to App. 161 (emphasis added)). In her return, Reeves contends that this language is inapplicable to this situation because "Bert Reeves died a single death, thus it cannot be said that this injury was continuing, serial, or repeated." (Return at p. 5). Reeves improperly focuses on the physical injury and not the alleged conduct (offense) giving rise to the Personal Injury claim.

The limiting language from Section IV.D.2. applies to ***<u>Personal Injury</u>*** and Reeves has failed to recognize that the existence or nonexistence of ***physical*** injury is irrelevant for Personal Injury coverage under the Coverage Contract. Specifically, there is coverage for a Wrongful Act that results in Personal Injury—that is a Wrongful Act that is also one of the six "Offenses" enumerated in the Coverage Contract's definition of Personal Injury. (App. 173). There is no requirement for Personal Injury coverage that the claimant suffer any form of physical injury. If the claimant ***does*** suffer physical injury, mental anguish or mental suffering that is ***also*** the direct and immediate result of the infliction of the qualifying offense, then that physical/mental injury is merged into the Personal Injury under the provisions in the definition for Bodily Injury—but, such physical injuries are not necessary to establish Personal Injury. Therefore, the limiting language in Section IV.D.2. can only refer to "continuing, serial, or repeated" qualifying offenses (which, in this case are the claims for violation of civil rights). Yes, "Bert Reeves died a single death." Yet, all of the civil rights claims against Cottageville, Price and Craddock were "serial" in nature and under the clear terms of the Coverage Contract they are all to be considered "as one occurrence/wrongful act regardless of the number of Covered Persons involved" [Cottageville, Price and Craddock].

Reeves next attempts to temporally separate the offenses by asserting that Cottageville's negligent hiring and supervision took place years before the incident and that certain claims only arose after Bert Reeves' death. (Return at p. 5). This fails to recognize that the hiring/supervision/retention- based claims only became actionable and complete when the incident occurred and that the wrongful death claims are also the direct and immediate result of the civil rights violations. Here the serial instances of Personal Injury should have been treated as one occurrence/wrongful act for the purposes of applying the Coverage Contract's "$1,000,000 "per occurrence" limit. Respectfully, the Court of Appeals was correct, and should have been affirmed.

D. The Coverage Contract was intended by both SCMIRF and Cottageville to place reasonable and necessary limits on the maximum coverage available for incidents such as were present here.

Throughout her Return, Reeves asserts that SCMIRF is attempting to convert a "per occurrence" coverage contract into a "single limits" coverage contract. (Return at pp. 4-6). The implication being that both SCMIRF and the Town of Cottageville intended the Coverage Contract to provide more than $1,000,000 in coverage for an incident such as is before the Court. This is not the case.

The Coverage Contract was designed to provide coverage for separate events ***without*** an aggregate annual limit in certain circumstances. ***However,*** it also simultaneously capped the maximum coverage for related claims that might be pled (as was the case here) in a multiplicitous manner, through various nonduplication and capping provisions, including the one quoted above not addressed by this Court. Reeves' original position on this matter to the trial court and Court of Appeals was that there was $10,000,000 in coverage available for her claims. (App. 407, 424-415, 740). She now is apparently agreeing with this Court's opinion (aside from Justice Kittredge)

that there is $5,000,000 in coverage for this shooting death. There is only $1,000,000 applicable. The Court of Appeals was correct in its analysis and should be affirmed.

II. This Court Should Address the Tort Claims Act Issue

With regard to this Court's declining to address the Tort Claims Act issue, Reeves asserts that SCMIRF has failed to state with particularity the point which the Court overlooked or misapprehended. (Return at pp. 9-10). This is incorrect. As stated in SCMIRF's Petition for Rehearing, SCMIRF alerted this Court to the fact that the Court's concerns as to the validity and/or assignability of a bad faith claim in this instance should not prevent its addressing the stipulated issue because the parties agreed as part of their stipulation that validity of the bad faith claim should otherwise be assumed. (Pet. For Rehearing at pp. 18-19). Thus, this Court overlooked the fact that the parties removed those concerns as part of their stipulation at the beginning of this state court litigation.

Reeves also now suggests that other facts should be considered on question two and that this Court was correct to decline to answer the question. During oral argument, questions were asked by members of this Court regarding whether the stipulated questions should be answered by the Court. The position of both counsel to the Court then was that the stipulated questions were part of the settlement agreement before the Court, and both parties were seeking to have both questions answered.

The parties settled the very significant federal court case by way of stipulations and agreed that part of their settlement was that both questions would be answered. The parties further agreed to stipulated facts, and that they would use "good faith efforts" to get both questions answered on those facts. Reeves is now advocating against its own settlement agreement, and is not engaging in such good faith efforts by urging this Court to continue to decline to answer question two. This

question was addressed in SCMIRF's favor by the trial court and the Court of Appeals. This Court should affirm those lower courts' decisions.

Conclusion

For the foregoing reasons set forth herein and in SCMIRF's petition for rehearing, and for the reasons and arguments set forth in SCMIRF's appellate briefs and other filings, all of which are deemed to be incorporated herein, this Court should grant rehearing and issue a new opinion which affirms the Court of Appeals as to both stipulated issues. Failing that, this Court should grant rehearing and issue a new opinion which affirms the Court of Appeals as to the second issue.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: s/ C. Mitchell Brown

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
Brian P. Crotty
SC Bar No. 16983
E-Mail: brian.crotty@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for South Carolina Municipal Insurance and Risk Financing Fund

Columbia, South Carolina
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