

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HAMPTON COUNTY
Perry M. Buckner, Circuit Court Judge

Civil Action No. 2009-CP-25-00517
Appellate Case No. 2013-000391

Maria T. Curiel and Martin L. Curiel Respondents

v.

Hampton County E.M.S. Petitioner

REPLY TO RETURN TO PETITION
FOR WRIT OF CERTIORARI

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Argument

I. EMS asks the Court to interpret the fire protection statute, not rewrite it.

EMS's argument does not require the Court to rewrite the applicable statute, much less "torture the statute's language," contrary to the Curiels' contention. (Return to Pet. for Writ of Cert. ("Return") p. 8.) The plain language of the statute demonstrates that it applies to any "governmental entity" that is providing "fire protection," not merely fire departments. S.C. Code Ann. § 15-78-60(6) (2005) ("The governmental entity is not liable for a loss resulting from: . . . (6) . . . the failure to provide [or] the method of providing . . . fire protection."). The Curiels' and the Court of Appeals' reliance on the canon of construction that the inclusion of one implies the exclusion of another, (Return p. 10; App. p. 108), is misplaced. This would be an entirely different case if the statute provided that fire departments are not liable for losses resulting from the failure to provide or the method of providing fire protection. It does not. The statute applies to any "governmental entity." S.C. Code Ann. § 15-78-60(6). As there is no question that EMS is a "governmental entity," the only question is whether it was providing "fire protection."

This question—whether EMS was providing fire protection—was

completely ignored by the Court of Appeals. In its sole paragraph of analysis, the Court of Appeals merely stated that “[b]y including police and fire protection as exceptions to the State’s waiver of immunity, but not specifically listing emergency medical services, the Legislature did not intend to include emergency medical services as an exception to the waiver of immunity in section 15-78-60(6).” (App. p. 108.) This reflects a fundamental misunderstanding of EMS’s argument.

EMS did not ask the Court of Appeals, nor does it ask this Court, to rewrite the statute to add emergency medical services as an exception to the waiver of immunity. Rather, EMS’s argument is that, in this particular situation, where an EMS unit was dispatched to the scene of a fire to provide medical assistance to any firefighters who were injured and to provide medical assistance to a burn victim, EMS was providing “fire protection” within the meaning of the statute. Because the statute applies to “governmental entit[ies],” not merely fire departments, the fact that EMS is not within the actual fire department is irrelevant.

As noted above, this would be a different case (in the Curiels’ favor) if the statute provided that fire departments are immune when providing fire protection. It would also be different (in EMS’s favor) if the statute provided that governmental entities are immune when providing emergency

medical services. The statute does neither. The question here is not whether governmental entities are immune in all situations where they are providing emergency medical services—the statute clearly does not provide this immunity. The question here is whether EMS’s actions in this particular factual situation come within the definition of “fire protection.”

Admittedly, the statute is not plain on its face that a governmental entity responding to the scene of a fire to render medical assistance is providing fire protection. If this case existed in a vacuum, the Curiels’ implication that the provision of “fire protection” ends at some point, wherever that point may be, prior to the entity driving to the scene of the fire, would be perfectly reasonable. However, because this claim comes within the Tort Claims Act, more than mere lip service must be paid to the General Assembly’s admonishment that the Tort Claims Act “must be liberally construed in favor of limiting the liability of the governmental entity.” S.C. Code Ann. § 15-78-20(f) (2005). Where the Tort Claims Act applies, the Court should find that the governmental entity is protected by the statute if a reasonable argument can be made that the statute’s language encompasses the facts of the case.

The Mississippi case of *Estate of Williams v. City of Jackson*, 844 So. 2d 1161 (Miss. 2003) supports the proposition that driving to the scene of a

fire is included within the definition of fire protection. There, the statute at issue provided that

A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim: . . . (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury

Miss. Code Ann. § 11-46-9(1)(c). Thus, there were three questions presented by this statute:

- (1) Was the employee of the governmental entity providing fire protection?
- (2) Did the employee act in reckless disregard of the injured person's safety and well-being?
- (3) Was the injured person engaged in criminal activity at the time?

If the answer to (1) was "yes," then there would be immunity if the answer to (2) was "no" or the answer to (3) was "yes." If the employee was not providing fire protection, then the inquiry would be over and there would be no immunity. Only if the court first determined that the employee was providing fire protection would the court then move on to the next questions. Thus, whether or not the employee was providing fire protection was an integral part of the court's analysis.

The court's analysis of this question left no room for doubt: "Fire

Truck 20 was answering a fire call and was therefore providing ‘fire protection’ within the meaning of § 11-46-9(1)(c).” *Williams*, 844 So. 2d at 1164. The fact that the court so easily disposed of this threshold question and moved onto the next questions so quickly does not help the Curiels’ argument, as they appear to believe. In fact, it supports EMS’s argument because the Mississippi court evidently felt that this issue was so obvious that the court’s discussion of the topic did not merit more than a single sentence of analysis.

The Curiels assert that “the operative fact in the decision in *Williams* was the express grant of immunity where a plaintiff is engaged in criminal activity. Whether the employees in *Williams* were engaged in ‘fire protection’ was irrelevant because even if they were not, plaintiff could not recover.” (Return p. 15.) That is simply incorrect. The following chart, which lists all of the possible combinations of answers to these three questions, is helpful in evaluating this claim:

Row	Fire Protection?	Reckless Disregard?	Criminal Activity?	Outcome
1	Yes	Yes	Yes	Immunity
2	Yes	Yes	No	No immunity
3	Yes	No	Yes	Immunity
4	Yes	No	No	Immunity
5	No	Yes	Yes	No immunity
6	No	Yes	No	No immunity
7	No	No	Yes	No immunity
8	No	No	No	No immunity

The Curiels claim that the question of fire protection was irrelevant because even if the employees were not providing fire protection, they would have still been entitled to immunity because of the injured person's criminal activity. (Return p. 15.) As seen in Rows 5 and 7, this is not the case. In any situation where the employee was not providing fire protection, there would be no immunity under this statute, regardless of whether or not the injured person was engaged in criminal activity. The court's findings in *Williams* were in line with Row 3: the employee was providing fire protection, the employee did not act with reckless disregard, and the injured person was engaged in criminal activity. *Williams*, 844 So. 2d at 1164. Thus, the governmental entity was entitled to immunity. *Id.*

Furthermore, the *Williams* case is not the only time where a court has determined that a state's fire protection statute provides immunity to a governmental entity responding to the scene of a fire. See *Varshock v. Dep't*

of Forestry & Fire Prot., 125 Cal. Rptr. 3d 141, 147 (Cal. Ct. App. 2011) (“[T]he Legislature intended immunity to apply to any claim based on death, personal injury, or property damage that results from an act or omission of a public entity or employee while responding to or combating an actual fire.”); *see also Jewett v. City of New Haven*, 38 Conn. 368, 386 (Conn. 1871) (holding that the city was immune under the common law when the city’s driver of a horse-drawn hose-cart injured the plaintiff while the driver was responding to the scene of a fire).

Another recent Mississippi case, *Herndon v. Mississippi Forestry Commission*, 67 So. 3d 788 (Miss. Ct. App. 2010), demonstrates the outer limits to which the fire protection statute extends. In *Herndon*, the driver of a Mississippi Forestry Commission (“MFC”) transport truck was involved in a car accident while traveling to pick up a bulldozer. *Herndon*, 67 So. 3d at 790. The bulldozer was going to be used to create fire lanes and clear storm debris from Hurricane Katrina. *Id.* at 793. After noting that, “on its face, the statute does not limit such immunity to police officers and fire departments,” *id.* at 792, the court held that the driver’s task of picking up the bulldozer was within the scope of the statute and the MFC was therefore entitled to immunity, *id.* at 793.

Other Mississippi cases are in accord. *See Maldonado v. Kelly*, 768

So. 2d 906, 912 (Miss. 2000) (holding that a police officer who was involved in an accident while driving his patrol car to the service shop for maintenance was entitled to immunity under § 11-46-9(1)(c)); *Reynolds v. County of Wilkinson*, 936 So. 2d 395, 396 (Miss. Ct. App. 2006) (holding that a sheriff's deputy who was involved in an accident while driving a sheriff's vehicle to a hardware store to have spare keys made for county gas pumps was entitled to immunity under § 11-46-9(1)(c)).

These cases all support EMS's position that it is irrelevant that EMS is not part of the fire department and that EMS was traveling to the scene of the fire when the accident occurred. Thus, the actions of EMS's personnel in this case came within the definition of "fire protection," particularly when considering the General Assembly's admonishment that the provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the governmental entity." S.C. Code Ann. § 15-78-20(f).

II. To the extent it was necessary to do so, EMS challenged the trial court's finding that EMS failed to carry its burden.

The Curiels argue that EMS failed to challenge the trial court's finding that EMS "has failed to meet its burden of showing that [the Curiels'] allegation fall [sic] within this exception to the waiver of

immunity.” (App. p. 6 n.3; Return p. 16.) As an initial matter, it is not clear that this is different from the trial court’s primary finding. The trial court held that “this statute is not as broad as [EMS] urges and does not apply to the facts in this case,” and, in a footnote, stated that EMS failed to show that the Curiels’ allegations fall within this exception. (App. p. 6 & n.3.) It is not clear what distinction the Curiels are trying to make between the statute not applying and EMS failing to show that the Curiels’ allegations fall within the statute, but to the extent there is a distinction, the Court should reject their argument.

The Curiels incorrectly assert that EMS did not address in its primary brief to the Court of Appeals the trial court’s finding that EMS failed to show that the Curiels’ allegations fall within the fire protection statute. (Return p. 16.) In its brief, EMS stated that “[t]he lower court’s finding, that the E.M.S. was not providing fire protection is belied by the testimony before it.” (App. p. 63.) EMS later stated that “it is uncontroverted that the EMTs were deployed in response to a structure fire at which there was a victim who required their assistance.” (App. p. 66.) Finally, EMS stated that the ambulance driver’s choice to pass the Curiels’ vehicle falls within the statute, and asked the Court of Appeals to “grant immunity for [EMS’s] decision to overtake the [Curiels’] vehicle in order to deliver medical

attention to a burn victim at a fire location.” (App. p. 67.) Thus, to the extent EMS needed to challenge the trial court’s footnote, EMS did so.

Additionally, the footnote misstates the law. “The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense.” *Plyler v. Burns*, 373 S.C. 637, 651, 647 S.E.2d 188, 196 (2007) (citation omitted). Thus, the burden in this case was on EMS to demonstrate that it was providing fire protection. The burden was not, as the trial court stated, on EMS to show “that [the Curiels’] allegation fall [sic] within this exception to the waiver of immunity.” (App. p. 6 n.3.)

There is no dispute as to the facts relevant to this appeal: EMS’s personnel were involved in an accident while responding to the scene of a fire to provide medical assistance to any firefighters who were injured while fighting the fire, and, while en route, EMS’s personnel were informed that there was also a burn victim at the scene. (App. p. 39, lines 4–15; p. 53, line 21–p. 54, line 5.) The fire protection statute either does or does not apply to these facts.

Conclusion

For the reasons stated, EMS respectfully requests that the Court grant this Petition to decide the applicability of the Tort Claims Act's fire protection statute.

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I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on May 1, 2013, I placed a copy of the Petitioner's *Reply to Return to Petition for Writ of Certiorari* in the US Mail, with first-class postage prepaid, and addressed as follows:

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