The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF GWENDOLYN L. ROBINSON, PETITIONER

Petitioner was definitely suspended from the practice of law. *In the Matter of Gwendolyn L. Robinson*, 424 S.C. 9, 817 S.E.2d 288 (2018). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
May 1, 2019

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF CHARLES E. HOUSTON, PETITIONER

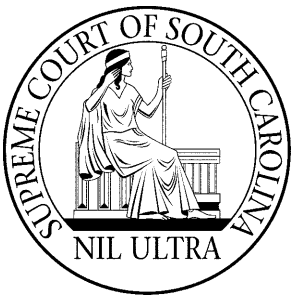
Petitioner was definitely suspended from the practice of law. *In the Matter of Charles E. Houston*, 415 S.C. 594, 784 S.E.2d 238 (2016). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
May 1, 2019



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
May 1, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Susan E. Rowell, Respondent.

Appellate Case Nos. 2019-000681 & 2019-000683

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and/or transfer Respondent to incapacity inactive status pursuant to Rule 28, RLDE, Rule 413, SCACR. The petition also seeks the appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, has been duly

appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

April 25, 2019

The Supreme Court of South Carolina

In the Matter of Theo Walker Mitchell, Respondent.

Appellate Case Nos. 2019-000285, 2019-000286

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

April 25, 2019

The Supreme Court of South Carolina

Re: Rule Amendments

Appellate Case Nos. 2018-001828; 2018-002058;
2017-001233; 2018-000121

ORDER

On January 31, 2019, the following orders were submitted to the General Assembly pursuant to Article V, § 4A of the South Carolina Constitution:

(1) An order amending Rule 3 and Rule 5 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

(2) An order amending Rule 4(c) of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

(3) An order amending Rule 13(a) of the South Carolina Rules of Criminal Procedure.

(4) An order amending Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.

Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 1, 2019

The Supreme Court of South Carolina

Re: Amendments to Rule 3 and Rule 5, South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2018-001828

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 3 and Rule 5 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2019

Rule 3, South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide:

Rule 3
Actions Subject to ADR

(a) Mediation. All civil actions filed in the circuit court, all cases in which a Notice of Intent to File Suit is filed pursuant to the provisions of S.C. Code 15-79-125(A), and all contested issues in domestic relations actions filed in family court, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules. Except for exempt cases, in all civil actions filed in the circuit court and all contested issues in domestic relations actions filed in family court, the parties may agree, in lieu of mediation, to conduct an arbitration or early neutral evaluation under these rules. The parties may select their own neutral and may mediate, arbitrate or submit to early neutral evaluation at any time.

(b) Exceptions. ADR is not required for:

(1) special proceedings, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

(2) requests for temporary relief;

(3) appeals;

(4) post-conviction relief (PCR) matters;

(5) contempt of court proceedings;

(6) forfeiture proceedings brought by governmental entities;

(7) mortgage foreclosures;

(8) family court cases initiated by the South Carolina Department of Social Services; and

(9) cases that have been previously subjected to an ADR conference, unless otherwise required by this rule or by statute.

(c) Motion to Exempt from ADR. A party may file a motion to exempt a case from ADR for case specific reasons. For good cause, the Chief Judge for Administrative Purposes of the circuit may grant the motion. For example, it may be appropriate to completely exempt a case from the requirement of ADR where a party is unable to participate due to incarceration or physical condition.

(d) Motion to Refer Case to Mediation. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

Rule 5(e), South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide:

(e) Motion to Defer. A party may file a motion to defer an ADR conference for case specific reasons. For good cause, the Chief Judge for Administrative Purposes of the circuit may grant the motion. For example, it may be appropriate to defer an ADR conference where a party is unable to participate due to incarceration or mental or physical condition.

The Supreme Court of South Carolina

Re: Amendments to Rule 4(c), South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2018-002058

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 4(c) of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2019

Rule 4(c), South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide:

> **(c) Appointment of Mediator by Circuit Court.** In circuit court cases subject to ADR in which no Proof of ADR has been filed on the 210th day after the filing of the action, the Clerk of Court shall appoint a primary mediator and a secondary mediator from the current Roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed. A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee. In the event of a conflict of interest with the primary mediator, the secondary mediator shall serve. In the event of a conflict of interest with the secondary mediator, and if the parties have not agreed to the selection of an alternative mediator, the plaintiff or the plaintiff's attorney shall immediately file with the Clerk of Court a written notice advising the court of this fact and requesting the appointment of two more mediators. In lieu of mediation, the parties may select non-binding arbitration or early neutral evaluation pursuant to these rules.
>
> In medical malpractice cases subject to pre-suit mediation as required by S.C. Code § 15-79-125(C), the Notice of Intent to File Suit shall be filed in accordance with procedures for filing a lis pendens and requires the same filing fee as provided for filing a lis pendens by S.C. Code § 8-21-310. The Notice of Intent to File Suit shall contain language directed to the defendant(s) that the dispute is subject to pre-suit mediation within 120 days. In cases where no Proof of ADR has been filed on the 75th day after the filing of the Notice of Intent to File Suit, the Clerk of Court shall appoint a primary mediator and a secondary mediator in the manner set forth in the paragraph above. Notwithstanding the clerk's appointments, the parties by agreement may choose a different mediator at any time.

The Supreme Court of South Carolina

Re: Amendments to Rule 13(a), South Carolina Rules of Criminal Procedure

Appellate Case No. 2017-001233

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 13(a) of the South Carolina Rules of Criminal Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2019

Rule 13(a), South Carolina Rules of Criminal Procedure, is amended to provide as follows:

RULE 13
SUBPOENAS

(a)(1) Issuance of Subpoenas. Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. An attorney, as an officer of the court, may also issue and sign subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at a specified court proceeding. The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any. The clerk of court or attorney issuing the subpoena shall utilize a court-approved subpoena form.

(2) Issuance of Subpoena for Personal or Confidential Information About a Victim. A subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

Note to 2019 Amendment:

The 2019 amendment provides that an attorney is also authorized to issue and sign a subpoena on behalf of a court in which that attorney is licensed to practice. The amendment also makes clear that subpoenas may only be issued to summon a witness to appear or present documentary evidence at a court proceeding. The rule allowing an attorney to issue and sign a subpoena does not apply to

any request for a subpoena for a witness located in another state, which is governed by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See S.C. Code. Ann. §§ 19-9-10 et seq. (2014). New paragraph (a)(2) adopts a version of the federal rule intended to provide a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. The amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party.

The Supreme Court of South Carolina

Re: Amendments to Rule 33(b)(9), South Carolina Rules of Civil Procedure

Appellate Case No. 2018-000121

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 33(b)(9) of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. The amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2019

Rule 33(b)(9) of the South Carolina Rules of Civil Procedure is amended to provide:

(9) Limitations. In addition to the standard interrogatories authorized by this paragraph, the court may order additional interrogatories for good cause shown in any case. In all actions in which the amount in controversy is not less than $25,000, and in all actions for declaratory or injunctive relief, or actions before the family court, a party may serve additional interrogatories including more than one set of interrogatories upon any other party; but the total number of general interrogatories to any one party shall not exceed fifty questions including subparts, except by leave of court upon good cause shown.

Note to 2019 Amendment

The amendment to paragraph (b)(9) permits parties in actions before the family court to serve additional interrogatories when engaging in discovery under Rule 25 of the South Carolina Family Court Rules.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves, Respondent/Appellant,

v.

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

Appellate Case No. 2016-001626

Appeal From Colleton County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 5643
Submitted December 6, 2018 – Filed May 1, 2019

AFFIRMED IN PART AND REVERSED IN PART

C. Mitchell Brown and Brian P. Crotty, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant/Respondent.

W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, both of McLeod Law Group LLC, of Charleston, for Respondent/Appellant.

WILLIAMS, J.: In this declaratory judgment action, the South Carolina Municipal Insurance and Risk Financing Fund (SCMIRF) appeals the portion of

the circuit court's order entering judgment in favor of Ashley Reeves (Reeves), Personal Representative of the Estate of Albert Carl Reeves (Bert Reeves), regarding indemnity coverage under a pooled self-insurance liability fund (the Coverage Contract). SCMIRF argues the circuit court erred in (1) finding Reeves was entitled to more than $1,000,000 in indemnity coverage under the Coverage Contract's terms; (2) failing to analyze the coverage issue exclusively under the Coverage Contract's "Personal Injury" provisions; (3) finding because there were separate wrongful death and survivorship action claims with different measures of damages there was more than $1,000,000 in indemnity coverage available under the Coverage Contract; and (4) finding an ambiguity in the Coverage Contract as to whether "Occurrence" is defined by different acts of negligence or the resulting damage. Reeves cross-appeals the portion of the circuit court's order entering judgment in favor of SCMIRF regarding the South Carolina Tort Claims Act[1] (the Act). Reeves asserts (1) SCMIRF is not subject to the Act because SCMIRF is a not political subdivision of South Carolina; and (2) the Act is inapplicable to, and does not limit the recovery in, a breach of contract claim. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

The parties stipulated to the facts of this case. The action before this Court stemmed from numerous lawsuits related to insurance coverage concerning the shooting death of Bert Reeves. On May 16, 2011, Randall Price, a police officer with the Town of Cottageville Police Department (the Police Department) shot and killed Bert Reeves while Price was acting in the course and scope of his employment.

The Town of Cottageville (Cottageville) entered into an Intergovernmental Agreement for an Insurance and Risk Financing Fund for Risk Sharing with SCMIRF and in doing so, Cottageville became a member of SCMIRF.[2]

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[1] S.C. Code Ann. § 15-78-10 through -220 (2005 & Supp. 2018).

[2] SCMIRF is an unincorporated, voluntary, self-insurance pool "created by and comprised of South Carolina municipalities and their agencies which are parties to an Intergovernmental Agreement . . . ." SCMIRF "establishes a pool for the payment of property losses and liability claims on behalf of its members pursuant

Cottageville and SCMIRF entered into the Coverage Contract, whereby SCMIRF provided liability coverage to Cottageville pursuant to the terms and limitations set forth in the Coverage Contract. The Coverage Contract provided liability coverage for Cottageville, as the "Member" named in the declarations page; the Police Department, as "the law enforcement department of the Member named;" and Price and John Craddock—the Police Department Chief of Police—"the individual law enforcement officers," as "Covered Persons."

On August 28, 2012, Reeves filed a lawsuit in the circuit court against Cottageville; the Police Department; and Price, individually (the Cottageville Action). The Cottageville Action was a survivorship and wrongful death action that alleged Cottageville, the Police Department, and Price were negligent in the death of Bert Reeves; Cottageville and the Police Department were negligent in the hiring, supervision, and retention of Price; and Cottageville, the Police Department, and Price violated Bert Reeves's civil rights under 42 U.S.C. § 1983 (2012). Pursuant to the Coverage Contract, SCMIRF retained attorneys to defended Cottageville and Price in the Cottageville Action. On September 25, 2012, the Cottageville Action was removed to the United States District Court for the District of South Carolina. On October 15, 2014, the jury in the Cottageville Action rendered a verdict in Reeves's favor finding Price liable for negligence; Cottageville liable for negligent hiring, supervision, retention, and training of Price; and both liable under Section 1983. The jury awarded Reeves 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. On October 21, 2014, a judgment was entered in the Cottageville Action based on the jury verdict.

On February 18, 2014, Reeves filed a declaratory judgment lawsuit in the circuit court against SCMIRF; Cottageville; the Police Department; and Price, individually (the Declaratory Judgment Action). The Declaratory Judgment Action sought a declaration that the Coverage Contract provided $1,000,000 in

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to [S.C. Code Ann. §] 15-78-140 [Supp. 2018]." Both the Act and the South Carolina Constitution authorize municipalities and other political subdivisions to establish pooled self-insurance liability funds. S.C. CONST. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A) (Supp. 2018).

coverage for each independent, separate act of negligence, relating to the claims asserted in the Cottageville Action, thus resulting in the Coverage Contract providing for more than $1,000,000 in coverage.

On May 14, 2014, Reeves filed a lawsuit in the United States District Court for the District of South Carolina against Craddock (the Craddock Action). The Craddock Action asserted survivorship and wrongful death claims based on Section 1983. The suit alleged 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.

On February 26, 2015, Reeves, SCMIRF, Price, and Craddock entered into a settlement agreement which settled both the Cottageville Action and the Craddock Action. On April 20, 2015, as part of the settlement, Reeves filed a partial stipulation of dismissal leaving SCMIRF as the only respondent in the present action. The settlement agreement stipulated Reeves and SCMIRF would litigate "the following two issues, and only these two issues" to resolve all claims arising from the Cottageville and Craddock Actions:

> (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 SCMIRF Coverage Contract with the Town of Cottageville with respect to all such claims including the claims made against John Craddock in the separately styled action referenced above? Reeves asserts 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 $1,000,000.00 in indemnity coverage available under the Coverage Contract. SCMIRF asserts the Coverage Contract is limited to a total of $1,000,000.00 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 and 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. Respondent Reeves asserts otherwise.

The settlement further stipulated Reeves would receive an additional $1,000,000 for each issue found in Reeves's favor. If Reeves did not prevail on either issue, Reeves would not receive any additional funds aside from the $10,000,000 settlement payment previously paid under the settlement agreement.

The parties jointly petitioned our supreme court to decide both issues in the court's original jurisdiction. Our supreme court declined the petition. Subsequently, Reeves filed an amended complaint in the circuit court setting forth the two stipulated issues in the settlement agreement and sought a declaration as to the interpretation of the Coverage Contract. SCMIRF filed an answer, and both parties filed motions for summary judgment regarding the stipulated issues.

The circuit court held a hearing on the cross-summary judgment motions. As to the first stipulated issue, the circuit court granted Reeves's summary judgment motion and denied SCMIRF's motion. The circuit court found the claims made and the verdict rendered in the Cottageville Action, and the claims made in the Craddock Action, resulted in more than $1,000,000 in indemnity coverage under the Coverage Contract. Specifically, the circuit court found, "there is ambiguity as to whether 'occurrence' is defined by different acts of negligence or the resulting damage." The circuit court noted the Cottageville Action "sought to recover damages for wrongful death, as well as conscious pain and suffering," and "the measure of damages for a wrongful death claim and a claim for conscious pain and suffering are different." The circuit court concluded Reeves "suffered separate and distinct damages which could lead to additional coverage under the separate causes of action." As to the second stipulated issue, the circuit court granted SCMIRF's

motion for summary judgment and denied Reeves's motion. The circuit court found a tort claim for bad faith brought against SCMIRF was subject to the Act.

Thereafter, Reeves and SCMIRF each filed motions to alter or amend the judgment. The circuit court denied both motions. This cross-appeal followed.

STANDARD OF REVIEW

Under Rule 56(c), SCRCP, summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The questions before us in this appeal are questions of law. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) ("It is a question of law for the court whether the language of a contract is ambiguous."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law . . . ."). The appellate court reviews questions of law de novo. *Id.* at 110, 662 S.E.2d at 41.

LAW/ANALYSIS

I. SCMIRF's Appeal

On appeal, SCMIRF argues this Court should reverse the circuit court's order regarding indemnity coverage because the circuit court erred in (1) finding Reeves was entitled to more than $1,000,000 in indemnity coverage under the Coverage Contract's terms; (2) failing to analyze the coverage issue exclusively under the Coverage Contract's provisions for Personal Injury; (3) holding that because there were separate wrongful death and survivorship action claims with different measures of damages there was more than $1,000,000 in indemnity coverage available under the Coverage Contract; and (4) finding an ambiguity in the Coverage Contract as to whether "occurrence" is defined by different acts of negligence or the resulting damage and this ambiguity resulted in more than $1,000,000 in indemnity coverage under the Coverage Contract. We agree.

"An insurance policy is a contract between the insured and the insurance company, and the policy's terms are construed according to the law of contracts." *Williams v. Gov. Emps. Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). "Where the

contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977).

"The construction of a clear and unambiguous contract is a question of law for the court." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Ins. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. "Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." *Williams*, 409 S.C. at 595, 762 S.E.2d at 710.

Section I (General Provisions) and Section IV (Law Enforcement Liability) of the Coverage Contract are at issue here. The Coverage Contract provides that Section I's general provisions apply to Section IV. 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 of providing law enforcement. Section IV provides coverage for a "Wrongful Act," committed by a law enforcement officer or other covered persons, which results in "**Bodily Injury**" "provided the **Wrongful Act** amounts to an **Occurrence**; or" a "**Personal Injury**." (emphasis in original).

Section IV's definition section provides:

> "**Wrongful Act**" means 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 . . . .

Section IV(G)(27) (emphasis in original).

> "**Bodily Injury**" means physical injury to any person (including death) and any mental anguish or mental suffering associated with or arising from such physical injury. However, for 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**.

Section IV(G)(4) (emphasis in original).

> "**Personal Injury**" in this Section means only the following **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].

Section IV(G)(18) (emphasis in original).

Section I's definition section provides:

> "**Offense**" means 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.
>
> All repetitions of the same basic **Offense** involving any offended person and/or . . . group of persons . . . , whether or not there are different witnesses to the **Offense** or there is 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**.

Section I(B)(5) (emphasis in original).

> "**Occurrence**" means 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. Without limitation, all references to any type of injury arising out of or from an **Occurrence** or being caused by an **Occurrence** employ the foregoing meaning. Subject to the foregoing, "**Occurrence**" includes continuing exposure to the same harmful conditions. All such continuing exposure, damage, or injury shall be treated as one **Occurrence**.
>
> Only when used to describe coverage limits on a per "**Occurrence**" basis or when otherwise describing whether an event or series of events constitutes one loss for coverage purposes or more than one loss, the word "**Occurrence**" means a covered event of the sort expressly described in the Insuring Agreement of the relevant Coverage Section pertaining to the loss or claim, whether an **Occurrence** (as defined in the opening paragraph of this General Definition or as defined in the separate definition, if any, appearing in the Definitions part of the relevant Coverage Section), a **Wrongful Act**, a **Loss**, or an **Offense** causing **Personal Injury** . . . as those terms are defined in the relevant Coverage Section.

Section I(B)(4) (emphasis in original).

Numerous provisions in the Coverage Contract limit SCMIRF's liability. Section I(C)(9), No Duplication of Coverage or Coverage Limits, provides:

> No liability that is covered under any Coverage Section of **This Contract** will be deemed to be separately covered under any other Coverage Section. No **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. A single Coverage Limit applies to any **Offense** or **Occurrence**, regardless of the number of claimants, suits, or claims. A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage . . . . There is no duplication of any coverage or benefit under **This Contract**.

(emphasis in original). Section IV(D) addresses the "Limit of Liability" and "SCMIRF's Limit of Liability" which read as follows:

> 1. Limit of Liability
>
> . . .
>
> 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**.
>
> 2. SCMIRF's Limit of Liability
>
> [T]he total liability of [SCMIRF] [for] any one occurrence/accident/wrongful act will be $1,000,000 per **Member** excluding expenses and defense cost[s] . . . .
>
> 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 . . . 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**.
>
> Subject to any special aggregates, all 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.
>
> 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.

(emphasis in original).

A. Interpreting Section IV Coverage

SCMIRF argues the circuit court erred by failing to analyze the coverage issue exclusively under the Coverage Contract's provisions for Personal Injury. We agree.

The Coverage Contract limits liability coverage under Section IV to $1,000,000 per Occurrence. Section I's duplication clause states, liability covered under one Coverage Section will not be covered under another Coverage Section, and provides:

> No **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.

(emphasis in original). Section IV, governing law enforcement liability, states: SCMIRF agrees to pay the sums a member or covered person becomes obligated to pay because of a Wrongful Act committed by a law enforcement officer or other covered persons which results in:

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

(emphasis in original). Section IV's definition of Bodily Injury clarifies the distinction between Bodily Injury and Personal Injury by providing, "for purposes of this Section IV, **Bodily Injury** does not include such injuries if they result directly and immediately from the infliction of **Personal Injury**, including without limitation assault and battery; any such resulting injuries shall be deemed to be part of the **Personal Injury**." (emphasis in original).

SCMIRF argues the following analysis must take place to determine liability coverage under Section IV: (1) determine if there was a Wrongful Act, (2) determine whether the Wrongful Act resulted in either (a) Bodily Injury or (b) Personal Injury, and (3) determine whether Bodily Injury falls exclusively under Personal Injury coverage. SCMIRF argues, under this analysis, coverage falls solely under Personal Injury because the Bodily Injury here is a direct result of the Personal Injury. Conversely, Reeves asserts in order to determine whether more than $1,000,000 in indemnity coverage exists, there must first be a determination of whether "separate and distinct occurrences, wrongful actions, or conduct occurred," and, only after this determination is made, should the analysis turn to whether Bodily Injury is deemed part of the Personal Injury for coverage purposes.

Under the terms of the Coverage Contract, we find coverage analysis begins with the coverage language of the applicable section, Section IV—governing law

enforcement liability. Under Section IV, there are two means of obtaining coverage, (1) coverage for *Bodily Injury* or (2) coverage for *Personal Injury*: when such injury *is the result of a Wrongful Act*. We find SCMIRF's proposed three-part analysis is the correct analysis for determining whether a Wrongful Act resulted in Personal Injury and/or Bodily Injury. This three-part analysis establishes coverage under the applicable coverage section and aids in determining whether the acts or omissions—that might be described under more than one Coverage Section or more than one category as an Offense or an Occurrence—are treated as a single event for coverage purposes under Section I's duplication clause.

First, under the three-part analysis, there must be a Wrongful Act. Section IV defines Wrongful Act as "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 . . . ." Under this definition, we find in this case there is a Wrongful Act—the actions and omissions of Cottageville and Price which violated Reeves's rights and ultimately led to his death.[3]

Second, the Wrongful Act must result in either (a) Bodily Injury or (b) Personal Injury. Section IV defines Bodily Injury as "physical injury to any person (including death) and any mental anguish or mental suffering associated with or arising from such physical injury." In order to recover under Bodily Injury, Section IV requires the Wrongful Act that caused the Bodily Injury to amount to

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[3] In the Cottageville Action, the jury found Price was negligent, his negligence proximately caused Bert Reeves's death, and he violated Bert Reeves's constitutional rights under Section 1983 to be free from the use of excessive force and unnecessary seizure. The jury found Cottageville was grossly negligent in its hiring, supervising, failing to train, and retaining of Price and such negligence proximately caused Bert Reeves's death. The jury found Cottageville was liable under Section 1983 because Price's violation of Bert Reeves's rights was done pursuant to a custom, policy, ordinance, regulation, or decision of Cottageville or as a result of Cottageville's deliberate indifference to the use of excessive force by Price; and Cottageville was deliberately indifferent to the constitutional rights of its citizens in hiring and failing to properly train Price and such deliberate indifference caused Bert Reeves's death.

an Occurrence. Section I defines Occurrence as "an accident which results in **Bodily Injury**." (emphasis in original). We find in this case there is Bodily Injury—Bert Reeves's death and the mental anguish and suffering associated with his death. Reeves and SCMIRF do not contest Reeves's negligence claims support finding coverage for Bodily Injury, and the Wrongful Act which caused the Bodily Injury amounts to an Occurrence under Section IV coverage.

Section IV defines Personal Injury as "the following **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." (emphasis in original). Section I defines Offense as "conduct constituting **Personal Injury** . . . that happens in the course and scope of the **Member's** or **Covered Person's** official duties . . . ." (emphasis in original). Thus, to recover under Personal Injury, the Wrongful Act that caused the Personal Injury must amount to a covered Offense. We find in this case there is Personal Injury—the violation of Bert Reeves's civil rights under Section 1983 which caused his death. Reeves and SCMIRF do not contest Reeves's Section 1983 claims support coverage for Personal Injury, and that the Wrongful Act which caused the Personal Injury amounts to an Offense under Section IV coverage. Prior to step three, we find there are two potential avenues for coverage here—coverage for Bodily Injury and coverage for Personal Injury.

Third, if there is both Bodily Injury and Personal Injury, we must determine whether the Bodily Injury is deemed part of the Personal Injury for coverage purposes. The definition for Bodily Injury states "**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**." (emphasis in original). The Wrongful Act that causes the Bodily Injury must amount to an Occurrence. The definition of Occurrence provides that when the term Occurrence is used to determine whether an event or series of events constitutes one loss, Occurrence can mean "an **Offense** causing **Personal Injury**." (emphasis in original). Section I prohibits the basis for coverage under Personal Injury (an Offense) to be the same basis for coverage under Bodily Injury (an Occurrence), stating "[n]o **Offense** will be deemed also to constitute separately an **Occurrence** for coverage purposes, or vice-versa." (emphasis in original). We find the circuit court failed to analyze the Coverage Contract's distinction between Bodily Injury and Personal Injury under

Section IV and the limitations imposed under Sections I and IV when both are present. *See McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Williams*, 409 S.C. at 595, 762 S.E.2d at 710 ("Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract.").

Under the terms of Section I and Section IV, we find when both Bodily Injury and one of the six Offenses constituting Personal Injury occur, the Bodily Injury is deemed part of the Personal Injury for coverage purposes. Here, the resulting injury is the same for both the negligence claims and the Section 1983 claims—that the conduct of Cottageville and Price "proximately caused the death of Bert Reeves." The 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. We find the resulting injury is "deemed to be part of the **Personal Injury**" and cannot constitute a separate Bodily Injury under the Coverage Contract. (emphasis in original). Therefore, Bodily Injury is encompassed within SCMIRF's liability for Cottageville and Price's Section 1983 violations—the Offense—which constituted a Personal Injury.

B. Application of the Duplication Clause

SCMIRF argues the circuit court erred in holding that because it found separate wrongful death and survivorship action claims with different measures of damages, there was more than $1,000,000 in indemnity coverage. We agree.

Section I's "No Duplication of Coverage or Coverage Limits," provides:

> No liability that is covered under any Coverage Section of **This Contract** will be deemed to be separately covered under any other Coverage Section. No **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. A single Coverage Limit applies to any **Offense** or **Occurrence**, *regardless of the number of claimants, suits, or claims*. A single Coverage Limit applies to all claims or suits involving *substantially the same injury or damage* . . . . There is no duplication of any coverage or benefits under **This Contract**.

(bold emphasis in original) (italic emphasis added).

The circuit court found the duplication clause did not limit SCMIRF's liability because there were different legal claims asserted—"wrongful death, as well as conscious pain and suffering, among other things"—which had different measures of damages. The circuit court found the damages recoverable for a wrongful death claim—damages sustained by the beneficiaries resulting from the death of the decedent, including mental shock and suffering, wounded feelings, grief, sorrow and loss of companionship—were not the same damages recoverable for a pain and suffering claim—damages sustained by the injured individual for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Thus, the circuit court concluded Bert Reeves suffered separate and distinct damages—which were not "substantially the same injury or damage" contemplated by the duplication clause. This finding led the circuit court to award coverage under the separate causes of action resulting in more than $1,000,000 in indemnity coverage.

Specifically, SCMIRF argues the circuit court erred by focusing on the different measures of damages for the different legal claims. SCMIRF asserts the duplication clause applies here because there is only one Personal Injury for coverage purposes.

Coverage does not turn on the legal theory under which liability is asserted, but on the cause of the injury. *McPherson v. Mich. Mut. Ins.*, 306 S.C. 456, 462, 412 S.E.2d 445, 448 (Ct. App. 1991), *affirmed as modified* 310 S.C. 316, 426 S.E.2d 770 (1993). Section IV of the Coverage Contract does not insure against theories of liability; it insures against Wrongful Acts which result in Bodily Injury or Personal Injury. We find asserting claims under multiple legal theories does not impact coverage under the Coverage Contract. For coverage purposes here, Bodily Injury is deemed part of Personal Injury. Because the Personal Injury caused Bert

Reeves's death and Bert Reeves's death is the basis for all of Reeves's claims, we find Reeves's claims involve "substantially the same injury or damage" contemplated by the duplication clause. Therefore, under the facts of the case, the duplication clause applies.

We find the duplication clause and other coverage provisions in the Coverage Contract act to limit coverage to a single Coverage Limit. Coverage Contract language prohibits duplicate coverage here despite having (1) multiple claimants—Bert Reeves and his statutory beneficiaries; (2) multiple members or covered persons—Cottageville and Price; and (3) members and covered persons who committed various acts and omissions over a period of time—negligence and Section 1983 violations. The Coverage Contract specifically contemplates injury or damage, as the result of the acts or omissions of numerous members or covered persons, to more than one person, in the following provisions:

1. "A single Coverage Limit applies to any **Offense** or **Occurrence**, *regardless of the number of claimants, suits, or claims*." Section I(C)(9) (bold emphasis in original) (italic emphasis added).

2. "*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." Section I(C)(9) (bold emphasis in original) (italic emphasis added).

3. "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 *variation in the conduct constituting the **Offense***, will be treated as one **Offense**, subject to a single Coverage Limit . . . ." Section I(B)(5) (bold emphasis in original) (italic emphasis added).

4. "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**." Section IV(D)(1) (bold emphasis in original) (italic emphasis added).

5. "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 . . . .*" Section IV(D)(2) (bold emphasis in original) (italic emphasis added).

6. "Subject to any special aggregates, *all 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 . . . .*" Section IV(D)(2) (bold emphasis in original) (italic emphasis added).

Under the aforementioned provisions, we find 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. *See McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Williams*, 409 S.C. at 595, 762 S.E.2d at 710 ("Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract."). The circuit court erred in focusing on the different measures of damages for Reeves's legal claims and finding the duplication clause did not apply here. We find 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.

C. Ambiguous Policy: Occurrence

SCMIRF argues the circuit court misplaced its emphasis on the term Occurrence, and it erred in finding the term ambiguous. We agree.

The Coverage Contract defines Occurrence as "an accident which results in **Bodily Injury** . . . ." (emphasis in original). In determining coverage under the Coverage Contract, the circuit court found "there is ambiguity as to whether 'occurrence' is

defined by different acts of negligence or the resulting damage." The circuit court interpreted SCMIRF's position to mean if there was one wrongful death, there was one Occurrence under the policy, and it characterized SCMIRF's position as viewing the Coverage Contract "as a damages policy for purposes of coverage determination." The circuit court concluded, even if viewed as a "damages policy," Reeves's underlying actions included separate claims with different measures of damages which "could lead to additional coverage under these separate causes of action." The court granted Reeves's motion for summary judgment and found there were multiple covered Occurrences which allowed for more than $1,000,000 in coverage.

Reeves cites *Boiter v. South Carolina Department of Transportation*, for the proposition that multiple acts of negligence constitute separate Occurrences under the Coverage Contract. 393 S.C. 123, 712 S.E.2d 401 (2011). However, *Boiter* is distinguishable on two distinct and important points: first, it did not address the Coverage Contract, rather it involves the definition of "occurrence" under the Act; and second, it discussed liability for two acts of negligence by entirely separate entities with no causal connection between the two. *Id.* at 133, 712 S.E.2d at 406 (distinguishing *Boiter* from other cases "because they involve[d] a single governmental entity which committed multiple acts of negligence, [and] completely different situation[s] than the one before [*Boiter*]" and deciding there were two occurrences "based solely on the peculiar facts of [*Boiter*]"). Thus, the instant case is factually distinguishable from *Boiter* and does not compel a finding of multiple occurrences.

We find the circuit court misplaced its focus on the definition of Occurrence. Occurrence relates to coverage for Bodily Injury, and Offense relates to coverage for Personal Injury. Here, we find a single Offense constituting a Personal Injury for coverage purposes. Thus, coverage for *Offense* is at issue, not coverage for *Occurrence*. Our finding that there is a single Offense constituting a Personal Injury is dispositive of whether Occurrence is ambiguous. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); *see also McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Williams*, 409 S.C. at

595, 762 S.E.2d at 710 ("Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract.").

For the foregoing reasons, we reverse the circuit court's order finding Reeves was entitled to more than $1,000,000 in indemnity coverage, and we enter judgment in favor of SCMIRF as to this issue.

II. Reeves's Appeal

On appeal, Reeves argues the circuit court erred in granting the portion of SCMIRF's summary judgment motion regarding the Act because (1) the Act does not govern claims brought against SCMIRF because SCMIRF is not a political subdivision of the state, and (2) the Act does not apply to, and limit the recovery in, a breach of contract claim. We address each argument in turn.

A. Political Subdivision

i. "Political Subdivision" Interpretation

On appeal, Reeves argues the circuit court misinterpreted the definition of political subdivision within the Act. We disagree.

Questions of statutory construction are a matter of law. *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *Sumter Police Dep't v. Blue Mazda Truck*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

The South Carolina Constitution provides:

> (A) Any county, incorporated municipality, or other 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.

S.C. CONST. art. VIII, § 13. The Act mandates, "The political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived [in the Act] by: . . . (4) establishing pooled self-insurance liability funds, by intergovernmental agreement." S.C. Code Ann. § 15-78-140(A) (Supp. 2018).

The Act provides limitations on liability for torts asserted against the State and its political subdivisions. *See* S.C. Code Ann. § 15-78-20(a) (2005) ("[I]t is declared to be the public policy of the State of South Carolina 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."). The 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." S.C. Code Ann. §15-78-200 (2005). "The provisions of [the Act] establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity." *Id.* "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, [under the Act]." S.C. Code Ann. §15-78-40 (2005).

The Act defines "governmental entity" as "the State and its political subdivisions." S.C. Code Ann. §15-78-30(d) (2005). "Political subdivision" is defined 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) (2005) (emphasis added).

In the instant case, SCMIRF contends it is a political subdivision based on the foregoing definition, arguing the phrase "any agency, governmental health care facility, department, or subdivision thereof" qualifies all terms before it. Under SCMIRF's interpretation, political subdivisions include: any agency, governmental health care facility, department, or subdivision of "counties, municipalities, school districts, a regional transportation authority . . . , and an operator as defined in item (8) of Section 58-25-20 . . . and special purpose districts of the State . . . ." S.C. Code Ann. §15-78-30(h). SCMIRF relies on Attorney General's opinions finding SCMIRF is an agency or department of the municipality and tort claims brought against SCMIRF are subject to the Act.[4] *See* S.C. Op. Att'y Gen., 1990 WL

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[4] A 1990 Attorney General's opinion analyzed the definition of political subdivision in the Act and found the phrase "any agency, governmental health care facility, department, or subdivision thereof" "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 opinion found,

> [a] reading of the statutory language when reduced to its simplest terms provides that a political subdivision means or includes the following:
>
> 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

599264 (S.C.A.G. July 25, 1990); S.C. Op. Att'y Gen., 2014 WL 7405219 (S.C.A.G. December 17, 2014).

Conversely, Reeves contends SCMIRF is not a political subdivision, arguing the phrase "any agency, governmental health care facility, department, or subdivision thereof" only qualifies the phrase "special purpose districts of the State." S.C. Code Ann. § 15-78-30(h). Under Reeves's interpretation, political subdivisions include: any agency, governmental health care facility, department, or subdivision of special districts of the State. Reeves concludes, SCMIRF is not an agency, department, or subdivision of a special district of the State and, accordingly, not a political subdivision. In response to SCMIRF's reliance on the Attorney General's opinions, Reeves argues the Attorney General's opinions may be persuasive authority, but they are not binding, and this Court should disagree with the

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7. *any agency, governmental health care facility, department or subdivision of any of the aforementioned political subdivisions*.

Id. (emphasis added). "Each clause is of equal status and no phrase exists as modification or explanation of another." *Id.*

A 2014 Attorney General's opinion addressed the issue of whether SCMIRF is a governmental entity as defined in the Act, "such that tort claims brought against SCMIRF are subject to the Act." 2014 WL 7405219, at *l. Building on the Attorney General's 1990 interpretation of the definition of political subdivision, the opinion found the definition of political subdivision included any agency or department of one or more municipalities. *Id.* at *2. The opinion noted the "very purpose and structure of SCMIRF is contemplated in and authorized by the Act." *Id.* at *3; *see* 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*.") (emphasis added). The opinion found "SCMIRF clearly serves as an agency or department of its municipality members, it therefore falls within the [] definition and is subject to tort suits only pursuant to the terms of the Act." *Id.* Accordingly, the Attorney General's opinion opined that SCMIRF's liability is subject to the Tort Claims Act. *Id.* at *3.

opinions' reasoning and decline to adopt them. *See Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560–61, 713 S.E.2d 604, 609 (2011) ("Attorney General opinions, while persuasive, are not binding upon this Court."); *but cf. Price v. Watt*, 280 S.C. 510, 513 n.1, 313 S.E.2d 58, 60 n.1 (Ct. App. 1984) (demonstrating Attorney General's opinions should not be disregarded without cogent reason).

The circuit court agreed with SCMIRF's interpretation, found SCMIRF is a political subdivision of the state, and found a tort claim for bad faith brought against SCMIRF is subject to the Act. The circuit court granted SCMIRF's motion for summary judgment on the issue.

We find the circuit court did not err in finding SCMIRF is a political subdivision under the Act. SCMIRF is a voluntary self-insurance pool created by municipalities of the state under the authorization of the State Constitution and the Act. The Act and the South Carolina Constitution authorize municipalities and other political subdivisions to establish pooled self-insurance liability funds. S.C. CONST. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A). It would be an absurd result for the legislature to create a scheme in which a municipality loses its status as a political subdivision under the Act—and, thus, loses the protection of the Act—when it joins together with other municipalities for the purpose of complying with statutory obligations. We find SCMIRF is a political subdivision under the language of the Act.

ii. Health Promotion Specialists[5] Factors

Reeves argues the factors established in *Health Promotion Specialists* clearly establish that SCMIRF is not a political subdivision of the state. We disagree.

Beyond the plain language of the Act, our supreme court in *Health Promotion Specialists* specified the following factors to determine whether an entity is the state or its political subdivision for purposes of coverage under the Act:

> [1] whether the entity functions statewide, [2] whether the entity performs the work of the state, [3] whether the

[5] *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).

> 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 (citation omitted). Specifically, Reeves contends SCMIRF is not a political subdivision under the Act because it is merely a fund, the General Assembly did not create SCMIRF nor provide for any control over it, and SCMIRF's funds are not controlled by the State Treasurer.

SCMIRF functions statewide in municipalities across the state, enabling municipalities to enter into an intergovernmental agreement for insurance coverage. Its purpose is to provide insurance coverage to municipal government units, institutions, or agencies in the state—a function required of municipalities under the State Constitution and the Act. S.C. CONST. art. VIII, § 13; S.C. Code Ann. § 15-78-140(A). The legislature did not create SCMIRF, however. Municipalities created SCMIRF at the direction of the Act. The State Constitution provides, "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." S.C. CONST. art. VIII, § 13(B). The Act mandates "[t]he political subdivisions of this State . . . shall procure insurance to cover these risks for which immunity has been waived [in the Act] by: . . . (4) establishing pooled self-insurance liability funds, by intergovernmental agreement." S.C. Code Ann. § 15-78-140(A). In providing liability coverage, SCMIRF is performing a mandated function of a municipality. We find the *Health Promotion Specialists* factors weigh in favor of finding SCMIRF is a political subdivision subject to the Act.

For the foregoing reasons, we find the circuit court did not err in finding SCMIRF is subject to the Act when a tort claim for bad faith is brought against it. We affirm the circuit court's order granting SCMIRF's motion for summary judgment on this issue. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.").

B. Applicability of Torts Claims Act: Breach of Contract

Reeves argues regardless of whether SCMIRF is a political subdivision, the Act has no impact on SCMIRF's liability based on a breach of contract. Specifically, Reeves asserts a claim against SCMIRF for a breach of the Coverage Contract sounds in contract and is not subject to the Act's coverage limitations. We disagree.

The parties agreed in their settlement agreement to litigate "the following two issues, and only these two issues": (1) whether the Coverage Contract provides more than $1,000,000 in indemnity coverage to Reeves's claims; and (2) whether "a *tort claim* for bad faith brought against SCMIRF [was] subject to the [] Act." (emphasis added). The settlement agreement provided that if the court found a bad faith tort claim against SCMIRF was not subject to the Act, SCMIRF would pay Reeves an additional $1,000,000. The circuit court found the tort claim for bad faith brought against SCMIRF *was* subject to the Act and granted SCMIRF's motion for summary judgment on issue two. Reeves filed a Rule 59(e), SCRCP, motion requesting the circuit court amend its order to find the Act does not apply to, nor limit the recovery in, a breach of contract claim. The circuit court denied Reeves's Rule 59(e) motion regarding the second issue. The circuit court found the breach of contract issue was not before the circuit court because the stipulated question was whether a *tort claim* for bad faith brought against SCMIRF was subject to the Act.

"A stipulation is an agreement, admission[,] or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them." *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 393, 496 S.E.2d 624, 626 (1998); *see Belue v. Fetner*, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968) ("When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided."). "A stipulation is an agreement, an understanding. The court must construe [a stipulation] like a contract, i.e., interpret it in a manner consistent with the parties' intentions." *Porter v. S.C. Pub. Serv. Com'n*, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1998). "The interpretation of a stipulation is addressed to the sound discretion of the [circuit] court and will not be reversed on

appeal absent an abuse of that discretion." *Milton P. Demetre Family Ltd. P'ship v. Beckmann*, 413 S.C. 38, 50, 773 S.E.2d 596, 603 (Ct. App. 2014).

The second stipulated question for litigation was not whether the Act would apply to a *breach* of the Coverage Contract; rather, the question was whether a *tort claim* for bad faith brought against SCMIRF was subject to the Act. *See Porter*, 333 S.C. at 30, 507 S.E.2d at 337 ("Because the court construes it like a contract, a stipulation that is unambiguous and explicit must be construed according to the terms the parties have used, as those terms are understood in their plain, ordinary, and popular sense."). We find the circuit court properly enforced the plain meaning of the stipulation at issue in this case. Accordingly, we affirm the circuit court's order granting SCMIRF's motion for summary judgment on this issue.

AFFIRMED IN PART AND REVERSED IN PART.[6]

HUFF and SHORT, JJ., concur.

[6] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries,
Respondent,

v.

White Oak Manor, Inc.; White Oak Management, Inc.; and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg, Appellants.

Appellate Case No. 2016-001732

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5644
Submitted February 11, 2019 – Filed May 1, 2019

AFFIRMED

John Elliott Rogers, II and Ginger D. Goforth, both of The Ward Law Firm, P.A., of Spartanburg, for Appellants.

Gary W. Poliakoff and Raymond Paul Mullman, Jr., both of Poliakoff & Associates, PA, of Spartanburg, and Jordan C. Calloway of McGowan, Hood & Felder, LLC, of Rock Hill for Respondents.

WILLIAMS, J.: In this civil case, White Oak Manor, Inc. (White Oak)—a skilled nursing facility—appeals the circuit court's order denying White Oak's motion to compel arbitration of wrongful death and survival actions brought by Hilda Stott as personal representative of the estate of Jolly P. Davis (Decedent). On appeal, White Oak argues the circuit court erred in finding Stott lacked the authority to execute White Oak's admission documents—including an arbitration agreement (the Arbitration Agreement)—on Decedent's behalf. We affirm.

FACTS/PROCEDURAL HISTORY

On December 22, 2012, Emergency Medical Services transferred Decedent to Spartanburg Regional Medical Center (Spartanburg Regional) after Decedent informed his niece, Stott, that his oxygen saturation levels had dropped. After Decedent was stabilized at Spartanburg Regional, he was admitted to White Oak on January 2, 2013, for "rehabilitation [and] possibly long-term care." The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative,[1] signed White Oak's admission documentation—including the Arbitration Agreement. Decedent's initial evaluation at White Oak found he possessed intact mental functioning and he was alert and oriented to time, place, and situation. Decedent also correctly answered questions about his location, his age, his birthday, the current date and year, and current and past presidents. Over the next two weeks, Decedent was transferred between Spartanburg Regional and White Oak multiple times before Decedent passed away on January 16, 2013.

On December 16, 2015, Stott filed wrongful death and survival actions against White Oak alleging Decedent was "overmedicated and dehydrated which led to his untimely death." White Oak filed a motion to compel arbitration based on the

[1] On May 11, 2012, Decedent executed a durable power of attorney for finance and a durable health care power of attorney, both of which authorized Stott to serve as his attorney-in-fact. The durable power of attorney for finance was recorded on January 8, 2013. The durable health care power of attorney was never recorded.

Arbitration Agreement.[2] At the circuit court's hearing, Stott argued her durable power of attorney for finance was ineffective to grant her the authority to sign the Arbitration Agreement on Decedent's behalf. White Oak argued Stott's durable power of attorney for finance was effective to authorize her to sign the Arbitration Agreement on Decedent's behalf because Decedent was physically disabled.

The circuit court ruled in Stott's favor and issued an order denying White Oak's motion to compel arbitration. The circuit court found (1) Decedent had full capacity to sign the Arbitration Agreement at the time of his admission to White Oak, (2) Stott's durable power of attorney for finance did not become effective until after Stott signed the Arbitration Agreement because it was not recorded as required by law, and (3) Stott's healthcare power of attorney did not authorize Stott to enter into the Arbitration Agreement because Decedent was competent when the Arbitration Agreement was signed. The circuit court relied on *Coleman v. Mariner Health Care, Inc.*[3] in finding "the authority to make healthcare decisions does not extend to arbitration agreements." This appeal followed.

STANDARD OF REVIEW

Whether a claim is arbitrable "is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The appellate court reviews the circuit court's determination of whether a claim is arbitrable under a de novo standard. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Timmons v. Starkey*, 380 S.C. 590, 595, 671 S.E.2d 101, 104 (Ct. App. 2008).

LAW/ANALYSIS

I. Durable Power of Attorney for Finance

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[2] Paragraph one of the Arbitration Agreement states, "All monetary claims between the parties of $25,000.00 or more will be resolved by arbitration and will be subject to the terms and provisions of this Agreement."

[3] 407 S.C. 346, 755 S.E.2d 450 (2014).

White Oak first argues Stott had the authority to sign the Arbitration Agreement on Decedent's behalf under a valid durable power of attorney for finance. We disagree.

"[A]rbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004). "[T]he holder of [the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

"A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). A power of attorney classified as "durable" contains language establishing the principal's intent that the attorney-in-fact or agent's authority be exercisable during periods of the principal's physical or mental incapacity. *See Gaddy*, 359 S.C. at 344 n.11, 597 S.E.2d at 20 n.11 ("'Durable' is a term of art signifying that a power of attorney survives the principal's disability."). In South Carolina, a durable power of attorney for finance must be recorded in order to be effective. S.C. Code Ann. § 62-5-501(C) (2009 & Supp. 2013);[4] *see also Timmons*, 380 S.C. at 593 n.2, 671

[4] The General Assembly replaced section 62-5-501 with South Carolina's Uniform Power of Attorney Act (the Act), which became effective January 1, 2017. *See* S.C. Code Ann. § 62-8-101 through -403 (Supp. 2018). Although section 62-8-109(c) of the Act also requires durable powers of attorney to be recorded, section 62-8-403(c) of the Act states, "[T]he applicable law in effect before the effective date of this act applies to a power of attorney created or restated before the effective date of this act." Both of the powers of attorney at issue in this case were

S.E.2d at 103 n.2 ("S.C. Code Ann. § 62-5-501(C) . . . require[d] a durable power of attorney to be recorded to be effective, unless the authority of the attorney-in-fact relates solely to the person of the principal.").

On May 11, 2012, Decedent signed the durable power of attorney for finance in favor of Stott. On January 2, 2013, Stott signed the Arbitration Agreement. However, Stott's durable power of attorney for finance was not recorded until January 8, 2013. Therefore, Stott's durable power of attorney for finance was not effective to authorize her to sign the Arbitration Agreement on Decedent's behalf. *See Timmons*, 380 S.C. at 593 n.2, 671 S.E.2d at 103 n.2 ("S.C. Code Ann. § 62-5-501(C) . . . require[d] a durable power of attorney to be recorded to be effective, unless the authority of the attorney-in-fact relates solely to the person of the principal.").

White Oak contends Stott's durable power of attorney for finance was effective even though it was not recorded when Stott signed the Arbitration Agreement because of the Arbitration Agreement's "opt out" clause. The Arbitration Agreement's opt out clause provides the following information:

> 16. At the time of signing this Agreement, [Stott] acknowledges having . . . been advised that, beginning seven (7) days from date hereof, and for another ten (10) days thereafter, he/she has the right to "opt out" of this Agreement, and *no longer* be bound by it. In the event the party signing below determines to opt out, he/she must give [White Oak] written notice thereof within the time provided. If written notice of [Stott] having opted out of this Agreement is not received within the time frame set forth, the within Agreement *will remain and continue in full force and effect*.

(emphasis added). White Oak asserts the Arbitration Agreement did not become binding until the time period in the opt out clause expired on January 19, 2013. Therefore, White Oak contends Stott had the authority to sign the Arbitration

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executed before January 1, 2017; therefore, we apply the previous version of the statute in effect at the time of the execution of the powers of attorney.

Agreement when the Arbitration Agreement became binding on January 19, 2013, because Stott recorded her durable power of attorney for finance before the opt out clause expired.

We find White Oak's argument regarding the opt out clause is meritless in light of the language italicized above. *See Watson*, 407 S.C. at 455, 756 S.E.2d at 161 ("Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." (quoting *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993))). The opt out clause states Stott had the right to opt out of the Arbitration Agreement and "no longer" be bound by it, which indicates the Arbitration Agreement was binding at the time Stott signed it. By stating the Arbitration Agreement "will remain and continue in full force and effect," the opt out clause indicates Stott was bound by the Arbitration Agreement during the opt out period referenced in the clause. In light of the opt out clause's language, we find the Arbitration Agreement was binding during the opt out period. Therefore, we find Stott's unrecorded durable power of attorney for finance was not effective to authorize her to sign the Arbitration Agreement on Decedent's behalf.

II. Health Care Power of Attorney

White Oak next argues Stott had the authority to sign the Arbitration Agreement on Decedent's behalf under a valid durable health care power of attorney. We disagree.

"A health care power of attorney is an instrument in which an individual known as the principal authorizes another person known as the attorney-in-fact, or agent, to make health care decisions on his behalf." 12 S.C. JUR. *Death and Right to Die* § 14 (2019); *see* S.C. Code Ann. § 62-5-504(B)(1) (2009 & Supp. 2013). Section 62-5-504(D) of the South Carolina Code (2009 & Supp. 2013) provides a statutory form of the health care power of attorney (the statutory form). All health care powers of attorney executed on or after January 1, 2007, must be in substantially the same form as the statutory form. *Id.* The authority of the agent in the statutory form only activates if the principal is unable to make or participate in health care

treatment decisions.[5] *See* S.C. Code Ann. § 62-5-504(D) & (S)(1)(a) (2009 & Supp. 2013); Franchelle C. Millender et al., *A Practical Guide to Elder and Special Needs Law in South Carolina* 83 (4th ed. 2014). Like the durable power of attorney for finance, a health care power of attorney can be classified as "durable" if it contains language establishing the principal's intent that the agent's authority be exercisable during periods of the principal's physical or mental incapacity. *See Gaddy*, 359 S.C. at 344 n.11, 597 S.E.2d at 20 n.11 ("'Durable' is a term of art signifying that a power of attorney survives the principal's disability.").

Although a durable power of attorney is traditionally effective upon execution, any durable power of attorney can provide that it will not take effect *until* the principal becomes incapacitated. *See* Millender at 86 ("[A] [durable power of attorney] can provide that it will not take effect *until* the principal becomes [incapacitated]."); Elizabeth G. Patterson, *Planning for Health Care Using Living Wills and Durable Powers of Attorney: A Guide for the South Carolina Attorney*, 42 S.C. L. REV. 525, 552 (1991) (explaining how an alternative form of a durable power of attorney does not become effective until the principal's disability). This type of durable power of attorney is often called a "springing" durable power of attorney because the agent's authority "springs" into effect when activated either by the principal or because of the principal's incapacity. *Id.*; 12 S.C. JUR. *Death and Right to Die* § 14(c) (2018). The springing durable power of attorney is often used by principals who want to retain control of their health care until they no longer have legal capacity to do so. Patterson, 42 S.C. L. REV. 525, 573 (1991). South Carolina law authorizes the use of both the traditional and springing forms of the durable power of attorney. *See* S.C. Code Ann. § 62-5-501(A) (2009 & Supp. 2013). The statutory form is a springing durable power of attorney. *See* § 62-5-504(D); 12 S.C. JUR. *Death and Right to Die* §14(c); Millender at 83. The principal's mental incompetence triggers the attorney-in-fact or agent's authority under the statutory form. *See* § 62-5-504(D); 12 S.C. JUR. *Death and Right to Die* §14(c); Millender at 83.

[5] The only exception to this rule is the authorization for health care records under the Health Insurance Portability and Accountability Act (HIPAA). *See* § 62-5-504(D).

Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney. *See Thames*, 344 S.C. at 571, 544 S.E.2d at 857 (analyzing an action to set aside a power of attorney under contract law); *Watson*, 407 S.C. at 454, 756 S.E.2d at 161 (analyzing an action to interpret a power of attorney under contract law). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Watson*, 407 S.C. at 454–55, 756 S.E.2d at 161 (quoting *Sphere Drake Ins. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993)). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Watson*, 407 S.C. at 455, 756 S.E.2d at 161 (quoting *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707). "The [c]ourt's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.* at 455, 756 S.E.2d at 162 (quoting *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707).

Stott's durable health care power of attorney is identical to the statutory form. Stott's durable health care power of attorney contains a provision entitled "EFFECTIVE DATE AND DURABILITY" that states, "By this document [Decedent] intends to create a durable power of attorney effective upon, and only during, any period of mental incompetence." *See Watson*, 407 S.C. at 455, 756 S.E.2d at 161 ("Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." (quoting *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707). During the circuit court's hearing, White Oak conceded that it was questioning Decedent's physical disability, not his mental competence, and White Oak does not raise the issue of Decedent's mental competence on appeal.

The medical evidence in the record supports White Oak's concession. Decedent's medical admission forms at White Oak indicate Decedent was alert and oriented to time, place, and situation. The admission forms also evidence Decedent's correct answers to questions about his location, his age, his birthday, the current date and year, and current and past presidents. Decedent's mental status evaluation indicated his mental functioning was intact. We find there is ample evidence to support the circuit court's factual finding that Decedent was mentally competent at the time Stott signed the Arbitration Agreement. *See Timmons*, 380 S.C. at 595, 671 S.E.2d at 104 ("[A] circuit court's factual findings will not be reversed on

appeal if any evidence reasonably supports those findings."). Because Decedent was mentally competent, we find Stott's durable health care power of attorney was not effective to authorize her to sign the Agreement on Decedent's behalf.

Because we find Decedent was mentally competent to sign the Arbitration Agreement, we affirm the circuit court's decision that Stott did not have authority under her durable health care power of attorney to sign the Arbitration Agreement. Because neither power of attorney was effective to grant Stott the authority to sign the Arbitration Agreement on Decedent's behalf, we find White Oak is unable to compel arbitration of Stott's claims under the Arbitration Agreement.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

GEATHERS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League, Respondents,

v.

Town of Awendaw, and EBC, LLC, Defendants,

Of whom Town of Awendaw is the Appellant.

Appellate Case No. 2014-002118

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5645
Submitted January 4, 2019 – Filed May 1, 2019

AFFIRMED

Newman Jackson Smith, of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Appellant.

W. Jefferson Leath, Jr., of Leath Bouch & Seekings, LLP, of Charleston; and James B. Holman, IV and Christopher K. DeScherer, both of Southern Environmental Law Center, of Charleston; all for Respondents.

LOCKEMY, C.J.: This case comes before this court on remand after our supreme court's decision in *Vicary v. Town of Awendaw*, 425 S.C. 350, 822 S.E.2d 600 (2018), with instructions to address the Town of Awendaw's arguments that

the circuit court erred in finding: (1) the Town never received a proper petition requesting the annexation of land within the Francis Marion National Forest (Ten-Foot Strip); (2) the Town falsely claimed it had a proper petition to annex the Ten-Foot Strip; (3) the Town was estopped from asserting a statute of limitations defense; and (4) the statutory time period for challenging the annexation was tolled. We affirm the circuit court.

FACTS/PROCEDURAL BACKGROUND

The merits of this appeal concern three parcels of land the Town seeks to use as links in a chain necessary to satisfy contiguity requirements for annexation. The first link, the Ten-Foot Strip, is a ten-foot wide, 1.25 mile-long parcel of land in the National Forest, which is managed by the United States Forest Service. The second link is property owned by the Mt. Nebo AME Church (Church Tract), and the third link is approximately 360 acres of unimproved real estate surrounded by the National Forest on three sides (Nebo Tract).

In the fall of 2003, the Town sought to annex the Ten-Foot Strip, which required a petition signed by the Forest Service. The Town's representatives sent the Forest Service four letters from November 2003 through February 2004 in an effort to obtain its approval. Through verbal discussions, the Town learned the Forest Service was generally opposed to annexations because of their impact on the Forest Service's ability to conduct controlled fire burns. Additionally, the Forest Service indicated any petition would likely have to come from officials in Washington D.C., a process that could take several years. Thereafter, without receiving written authorization, the Town annexed the Ten-Foot Strip. In doing so, the Town relied on a 1994 letter from a Forest Service representative, stating it had "no objection" to annexing several strips of property within the same vicinity. However, the Town realized the letter may have not clearly related to the proposed annexation, as it noted in a 2003 letter to the Forest Service, "Although we did previously receive a letter from the forest department giving Awendaw the right of way, that documentation is unclear…We would like to clarify that you will allow the Town to annex the portion of your property that is necessary in order to annex Mt. Nebo AME Church [the Church Tract]."

Despite the 1994 letter being a decade old and ostensibly not involving the same property, in May of 2004, the Town passed an ordinance, purportedly under the 100% petition method, claiming it had obtained a signed annexation petition from the Forest Service. Relying on the annexed Ten-Foot Strip to satisfy contiguity,

the Town passed another ordinance annexing the Church Tract after receiving a petition from church representatives.

Five years later, EBC, LLC, the owner of the Nebo Tract, requested the Town annex its property pursuant to the 100% petition method. On October 1, 2009, the Town passed an ordinance annexing the property, and simultaneously rezoned it as a "planned development" to permit residential and commercial development. In annexing the property, the Town relied on the Church Tract and the Ten-Foot Strip to establish contiguity. Without either component, there would be no contiguity and annexation would be impossible.

In November 2009, Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League (Respondents) filed a complaint against the Town and EBC, which they amended in April 2010, alleging, *inter alia*, the Town lacked authority to annex the Ten-Foot Strip because the Forest Service never submitted a petition for annexation. The Town and EBC moved for partial summary judgment, contending Respondents lacked standing to challenge the annexation and regardless, the statute of limitations barred their claims. The circuit court denied partial summary judgment on both grounds, finding Respondents had standing to challenge the Town's annexation of the Ten-Foot Strip under the public importance exception, the Declaratory Judgment Act,[1] and as taxpayers. The Town subsequently appealed to this court, which dismissed the appeal as not immediately appealable. Thereafter, the Town sought certiorari from the supreme court, which denied certiorari on the same ground.

In April 2014, the case proceeded to a bench trial. There, Robert Frank, a registered land surveyor, testified the 1994 Forest Service letter referred to a different strip of land than the Ten-Foot Strip. In response, Bill Wallace, the Town's administrator, noted the Town had used the letter at least seven times prior to the 2004 annexation of the Ten-Foot Strip, and that he believed the letter incorporated it. Further, Wallace stated that no one representing the Forest Service had ever objected to those annexations. Kent Prause, one of the Respondents who lived about three to four miles from the Nebo Tract, testified as to the potential future harm caused by developing the property. He noted the unique species of animals, as well as the overall use and enjoyment of the National Forest, which nearby development could threaten. Additionally, development potentially threatened the Forest Service's ability to conduct prescribed fire burnings necessary to maintain the health of the forest.

[1] S.C. Code Ann. Code Ann. § 15-53-30 (2005).

The circuit court found Respondents had standing to challenge the annexation, and the statute of limitations did not bar their claims. Reaching the merits, the court concluded the Town's 2004 annexation of the Ten-Foot Strip was *void ab initio* because it never received a petition from the Forest Service. As a result, the Town's 2009 annexation of the Nebo Tract lacked contiguity and was also *void ab initio*.

The Town appealed, arguing the circuit court erred in finding: (1) Respondents had standing to challenge the annexation of the Ten-Foot Strip; (2) the Town did not have a petition requesting annexation; (3) the Town was estopped from asserting a statute of limitations defense; and (4) the statutory time period for challenging the annexation was tolled. This court found Respondents lacked standing, concluding our supreme court's jurisprudence addressing standing to challenge annexations purportedly accomplished through the 100% petition method afforded standing only to the State and to a challenger asserting "an infringement of its own proprietary interests or statutory rights." *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 572, 707 S.E.2d 402, 406 (2011) ("Notably, residents of the annexing municipality are not permitted to challenge a 100% petition annexation. Rather, '[i]n order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.'" (quoting *St. Andrews Pub. Serv. Dist. v. City Council of Charleston*, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002))). We declined to address the Town's remaining arguments.

Our supreme court granted certiorari to determine whether Respondents had standing to challenge the Town's annexation of the Ten-Foot Strip. The supreme court held Respondents had standing, finding: (1) while the court's "jurisprudence has historically carved a narrow avenue to challenge annexations carried out under the 100% method," an annexing body arguably engaging in deceitful conduct is subject to a lawsuit challenging its compliance with the petition method used to carry out the annexation; and (2) Respondents satisfied the "future guidance" prong of the public importance exception. The supreme court then instructed this court to address the Town's remaining arguments initially presented to, but not reached by, this court.

STANDARD OF REVIEW

The present case is an action in equity. *See Sloan v. Greenville Cty.*, 356 S.C. 531, 544, 590 S.E.2d 338, 345-46 (Ct. App. 2003) (finding a declaratory judgment

action brought by a taxpayer citizen requesting declaratory relief is an action in equity). In an appeal from an action in equity tried by a judge, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976). "While this standard permits a broad scope of review, an appellate court will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

LAW/ANALYSIS

I. Annexation Petition

The Town argues the circuit court erred in finding: (1) there was no petition for the annexation of the Ten-Foot Strip, and (2) the Town falsely claimed it had a proper petition for the annexation. We disagree.

Section 5-3-150 of the South Carolina Code (2004) sets forth the requirements for an annexation when either all or 75% of the landowners sign a petition to be annexed. Pursuant to the 75% method, a municipality is permitted to annex property with the consent of less than all of the persons who own property in the annexed area. § 5-3-150(1). Pursuant to the 100% method, a municipality is allowed to annex property upon the signature of all persons who own real estate in the annexed area. § 5-3-150(3).

The circuit court determined the Town's annexation of the Ten-Foot Strip never occurred because the Town never received a petition from the Forest Service requesting annexation. The court further held the 1994 letter was not a petition and did not contain a valid legal description of any property.

On appeal, the Town asserts section 5-3-150(3) does not mandate a particular form of a petition, and the court "superimpose[ed] certain requirements that are expressly confined to § 5-3-150(1)." Specifically, the Town takes issue with the circuit court's reliance on the trial testimony of land surveyor Robert Frank in finding the 1994 letter "does not even contain a valid legal description of any property and is too vague to describe any identifiable strip." The Town contends

section 5-3-150(2)[2] specifically provides that the substantive requirement of a legal description of the area to be annexed applies only to proceedings under section 5-3-150(1). The town further contends it did not have the burden of establishing that the Ten-Foot Strip was among the lands described in the 1994 letter. *See Ballenger v. City of Inman*, 336 S.C. 126, 131, 518 S.E.2d 824, 827 (Ct. App. 1999) ("The burden is upon the party attacking the annexation to show that there has not been a compliance with the law.").

We find the circuit court properly determined there was no petition requesting annexation as required by section 5-3-150(3). As the circuit court noted, pursuant to section 5-3-150(3), an annexation is complete only upon the acceptance of a petition *requesting* annexation. Here, the Town never received anything from the Forest Service requesting annexation of the Ten-Foot Strip. The 1994 letter the Town used as a petition referenced three specific strips of land described by their borders. Expert witness Frank testified none of the strips described in the 1994 letter were the Ten-Foot Strip. The Town argues that by referring to this testimony, the court imposed stricter requirements for annexation petitions than those found in section 5-3-150(3). We disagree. It is necessary that an actual petition for annexation exist and that the petition at the very least identify the property proposed for annexation. Based on the expert testimony in evidence, we find the 1994 letter failed to do so.

II. Statute of Limitations

The Town argues the circuit court erred in finding it was estopped from asserting a statute of limitations defense. In addition, the Town contends the circuit court erred in finding the statutory time period for challenging the 2004 annexation was tolled. We disagree.

Pursuant to section 5-3-270 of the South Carolina Code,

> [w]hen the limits of a municipality are ordered extended, no contest thereabout shall be allowed unless the person interested therein files, within sixty days after the result has been published or declared, with both the clerk of the municipality and the clerk of court of the county in which

[2] "The conditions relating to petitions set forth in this section apply only to the alternate method of annexation as defined in subsection (1) of this section." § 5-3-150(2). Subsection (1) addresses the 75% petition method.

> the municipality is located, a notice of his intention to contest the extension, nor unless, within ninety days from the time the result has been published or declared an action is begun and the original summons and complaint filed with the clerk of court of the county in which the municipality is located.

S.C. Code Ann. § 5-3-270 (2004).

The circuit court held that despite the Town's contention that Respondents missed the 90-day deadline to challenge the annexations of the Ten-Foot Strip and the Nebo Church Tract, "it is axiomatic that the passage of time cannot transform a void and unauthorized annexation into a valid one." The circuit court noted statutes of limitation are not automatic bars to claims; rather, they are affirmative defenses that can be waived and are subject to equitable doctrines, including estoppel and tolling. The court found both doctrines apply here. The court held Respondents have shown the Town had unclean hands in issuing the annexation ordinance for the Ten-Foot Strip because the Town falsely claimed the Forest Service had filed a proper petition for annexation. Moreover, the court noted the Town did not notify Charleston County it had assumed control over the Ten-Foot Strip and Nebo Church Tract until October 2009, five years after the alleged annexations were consummated. The circuit court found that given the Town's misrepresentation and failure to provide notice regarding the annexations, it was estopped from asserting a statute of limitations defense and the time period for challenging the 2004 annexations was tolled.

On appeal, the Town argues the circuit court erred in finding it was estopped from asserting a statute of limitations defense where Respondents failed to plead and prove the elements of equitable estoppel. Conversely, Respondents contend their claims were not barred by the statute of limitations where the 2004 annexations were void and the Town engaged in intentionally deceitful conduct.

We find the circuit court did not err in holding the Town was estopped from asserting a statute of limitations defense and the statutory time period for challenging the 2004 annexation was tolled. We do not believe there was a valid annexation of the Ten-Foot Strip due to the Town's deceitful conduct (i.e., its false statement that it had received a petition from the Forest Service). Furthermore, we find Respondents' challenge to the purported annexations was not barred by the statute of limitations because the passage of time cannot transform a void annexation into a valid one. *See Bostick v. Beaufort*, 307 S.C. 347, 350, 415

S.E.2d 389, 391 (1992) (holding a "fatally flawed" annexation petition renders an annexation ordinance "a nullity upon origination," and cannot be retroactively validated).

Accordingly, the decision of the circuit court is

AFFIRMED.

WILLIAMS and MCDONALD, JJ., concur.