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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-000719

Nancy Morris, as Personal Representative of the Estate of David Allan Woods. ..... Appellant

vs.

State Fiscal Accountability Authority, at al. ..... Respondent

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APPELLANT'S PETITION FOR REHEARING
&
PETITION FOR REHEARING *EN BANC*

INTRODUCTION

Appellant petitions this honorable Court for rehearing and for rehearing *en banc* pursuant to Rules 221 and 219, SCACR. On May 24, 2023, this Court issued Opinion No. 2023-UP-201, finding that a covenant not to execute, given in exchange for an assignment of the insured's rights to pursue payment from IRF and SFAA rendered this action—seeking payment form the IRF and SFAA—moot. This Court has misapprehended the factual circumstances of this case. It overlooked that the covenant not to execute given by Appellant specifically identifies and reserves the right to pursue the instant claims against the IRF and SFAA. This Court misconstrues the relevant case law to suggest that the general observation that "an insurer stands in the same position as its insured"—which has historically been applicable only in the context of subrogation—applies universally to all insurance such that the right to indemnity will only arise where the insured has first paid (or is at risk of paying)

the judgment with its own assets. This ruling misapprehends the nature of indemnity and is inconsistent with South Carolina law which recognizes a distinction between indemnity for liability and indemnity for loss. As a result, this Court has issued an opinion, albeit unpublished, that fundamentally changes the nature of the relationship between insureds and insurers in a way that is inconsistent with established case law and public policy. To maintain uniformity of case law and address this matter of exceptional importance, this Court should grant rehearing and/or rehearing *en banc*.

SUMMARY OF THE FACTS

After David Woods died at the Hill-Finklea Detention Center, his estate brought an action against five detention center employees (herein the "officers" or the "insureds") pursuant to 42 U.S.C. § 1983. A jury returned a verdict in Wood's favor. In 2015, Woods' estate brought this declaratory judgment action seeking payment of the unpaid balance of the judgment from either the State Fiscal Accountability Authority (the "SFAA") pursuant to S.C. Code Ann. § 1-11-460, or, alternatively, as multiple "occurrences" under an insurance policy issued by the Insurance Reserve Fund (the "IRF"). (R. pp. 31-39). In 2017, Woods' estate executed a covenant not to execute against personal assets of the employees, in exchange for assignment the right to pursue "any and all" claims the officers had against the IRF or SFAA for insurance coverage or any other payment obligation. (Supp. R. dated April 19, 2023 – **Exhibit A**)

There were three issues before this Court on appeal: (1) whether the payment was required from the SFAA under Section 1-11-460; (2) whether there were multiple occurrences under the IRF's insurance policy; and (3) whether the matter was mooted by the covenant not to execute. This Court affirmed the finding of mootness and therefore did not reach the other issues.

ARGUMENT

This Court's reasoning relies on the generalized notion that an insurance company stands in the same legal position as its insured—for which the Court primarily cites *Cobb v. Benjamin,* and *Smalls v. Blackmon.* However, the Court has misapprehended this concept, which (at least until the instant ruling) has been limited to the subrogation context.

An issue becomes moot when "judgment [if] rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Ex parte Doe*, 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011). Here, this Court determined the covenant not to execute rendered this case moot because it meant the Appellant could not seek collection from the officers and therefore it could not seek collection from the IRF and SFAA. (Order p. 3) (stating where the insured has no "personal obligation to pay the judgment the insurance company is relieved of its liability to pay under the policy.").

Naturally, this Court's conclusion only holds water if Appellant's ability to compel the officers to personally pay the judgment was a condition precedent to the payment obligation of the IRF and/or the SFAA. While there are many problems with the Court's reasoning, it begins with the fact that neither this Court nor the trial court cite to any provision of the policy, statute, or covenant not to execute that supports the notion that the payment obligation of the IRF and/or SFAA was contingent upon Appellant's ability to seek collection from the officers.[1] In fact, the court completely

[1] It should be noted that as a practical matter, the covenant not to execute had no effect on Appellant's ability to seek payment of the judgment from the officers. In 2015, long before the covenant was entered, the officers moved to stay execution of the judgment, and in granting this motion, the District Court made several findings of fact to indicate the officers were "judgment proof" and that the only ability for Appellant to seek recovery was from the IRF or SFAA. (R. p. 307-308) (finding none of the defendants have liquid assets" and none have appreciable equity in any real property). Thus, it can hardly be said that the covenant "removed the obligation to pay" as this Court notes. Having no assets which could be pursued, the officers could not have been obligated to pay the judgment—even in the absence of the covenant not to execute.

ignores the expressed language of the IRF's policy and the covenant not to execute which specifically identifies and reserves, through assignment, the very claims this Court purports to find moot. Second, this Court's assumption that the ability to compel the officer to pay was a condition precedent to the IRF/SFAA's payment obligation is inconsistent with general concepts of indemnity recognized in our law.

1. The Court misconstrues the extent of the trial court's ruling regarding justiciability.

The trial court's order addressed justiciability under the heading "personal liability of assignors extinguished" to conclude the matter was mooted by the covenant not to execute. For this conclusion the trial court cites *Smalls,* (and only *Smalls*). However, *Smalls* neither concerns a covenant not to execute nor does it contemplate mootness. *See Smalls v. Blackmon*, 269 S.C. 614, 617, 239 S.E.2d 640, 641 (1977). The problem, as noted by Appellant in her briefs, is that the effect of the covenant, and whether it implicates mootness, must necessarily turn on the contents of the covenant itself. *See* (App. Br. pp. 26-27). The primary flaw in the trial court's reasoning is that although ostensibly taking judicial notice of the covenants, it failed to identify any provision of the covenant itself or the policy that supported its conclusion, nor did it explain how the officers' responsibility for Appellant's damages were altered by the Covenant. The trial court ignored that as the moving party below, Respondents had the burden to provide a factual basis for their claim of mootness, yet they pointed to no provision of the policy or covenant to support this claim. (App. Br. pp. 26-27).

Similarly, when Respondents cited *Cobb* in their Respondents' Brief, Appellant replied by pointing out *Cobb* supports the same conclusion—*i.e.*, where the party reserves specific claims in the covenant, those claims cannot be deemed to have been released and thus cannot be the determined to be moot. (App. Reply Br. pp. 19-20).

The trial court's error was in drawing the false equivalency between the existence of a

covenant not to execute (in the abstract) and a *per se* release of the IRF and SFAA's payment obligations. In other words, while it may be theoretically possible that a post-judgment covenant or agreement could affect or relieve the IRF/SFAA of a payment obligation under an insurance policy or statute, that is not the question. The question is whether *this* covenant eliminated the IRF/SFAA's obligation under *this* policy and/or *this* statute.

In affirming, this Court commits the same error by failing to identify any provision of the policy or covenant that supports the notion Appellant relinquished its claims against the IRF or SFAA. This is particularly confounding considering that the Court relied on *Cobb,* because the holding in *Cobb* tuned on the actual contents of the Covenant. *See Cobb v. Benjamin*, 325 S.C. 573, 578 482 S.E.2d 589, 592 (Ct. App. 1997) (explaining its holding by pointing out that "[Cobb] did not reserve the right to collect from any undiscovered liability carriers" in the covenant); *see also* (R. p. 14) (the trial court did not rely on *Cobb).* This Court should grant rehearing, at the very least, for the purpose of pointing out the facts and policy provisions that support its conclusion and explain why its finding can stand in the face of Appellant's explicit reservation of the claims against the IRF and SFAA in the covenant not to execute.[2]

Ultimately, this Court overlooks that trial court's error was in failing to address the question of whether and how *this* covenant not to execute relieves the IRF and SFAA of their obligations in *this* case. In affirming, this Court has issued an order that goes far beyond the point that was before

[2] It should not be overlooked that not one of the substantive cases relied on or cited by this Court (*i.e.*, *Travelers, Smalls, Cobb, Fowler,* or *Akerman*) raise these topics in the context of mootness. This is telling and supports the notion that whether the covenant not to execute satisfies or eliminates an indemnity obligation is a substantive question of the parties' rights, going to the merits of the case, and therefore should not be made without factual support. In essence, the Respondents have obtained an adjudication of their substantive rights under the IRF's policy, the statute, and/or the covenant without having to address the terms of these documents by masquerading the issue as one of mootness. This should not be.

the trial court. This Court has instead issued an opinion which makes the categorical determination that a covenant not to execute relieves an insurer of any indemnity obligation—as if it were posed a certified question. In so doing the Court has misconstrued and overlooked several aspects of the law as explained below.

2. The Court misapprehends the nature of indemnity.

This Court found that both the policy and Section 1-11-460 "functioned to indemnify Defendants for the amount they were liable to pay under the judgment." (Order p. 2). However, this is both wrong, and an oversimplification that misapprehends the nature of "indemnity." It overlooks the distinction between indemnity for *loss* as opposed to indemnity for *liability*. "Our courts have recognized two types of indemnity," (1) indemnity against liability and (2) indemnity against loss. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 n.8, 781 S.E.2d 737, 742 (Ct. App. 2015) "In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must [first] have made some form of payment.").[3]

Rather than looking to the policy, this Court's reasoning seemingly assumes the indemnity obligation of the IRF and SFAA was limited to indemnifying the officers for loss. But this assumption is incorrect. As it concerns the IRF, its indemnity obligation arises under its insurance policy which plainly creates an obligation to indemnify liability, not loss. *See* (ROA p. 95) ("The Fund will pay

[3] *See also, Bryant v. Blue Bird Cab Co.*, 202 S.C. 456, 463, 25 S.E.2d 489, 492 (1943) ("It expressly holds that where the contract of insurance is one of indemnity for the liability of the tort-feasor, and not for his loss, the injured person has, under the statutes and under the contract of insurance, a beneficial interest in the policy, and is entitled to sue before or after judgment has been rendered against the insured tort-feasor."); *Walker v. New Amsterdam Cas. Co.*, 157 S.C. 381, 388, 154 S.E. 221, 223-24 (1930) ("Where the indemnity is against liability, the cause of action is complete and the indemnitee may recover upon the contract as soon as his liability has become fixed and established, even though he has sustained no actual loss or damage at the time he seeks to recover. Thus, under such a contract, a cause of action accrues to the indemnitee upon the recovery of a judgment against him, and he may recover from the indemnitor without proof of payment of the judgment.")

on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [] Personal Injury."). The officers became legally obligated for Appellant's damages the moment the judgment was entered in the underlying §1983 claim, at which time both the officers, **and Appellant** accrued a claim for proceeds under the policy. The policy plainly provides this right accrues once "the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement." (R. p. 99). In other words, it is the judgment that creates the "obligation to pay."

Moreover, the right of either the insured or Appellant to seek payment under the policy is unaffected by any existing or intervening event might have otherwise allowed the insured to avoid payment. *See* (R. p. 99) (providing that "Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Fund of any of its obligations hereunder."). Because the IRF's obligation is to indemnify for liability, not loss, whether the insureds had assets at risk is immaterial. This Court's order is completely at odds with the nature of the IRF's indemnity obligation and effectively re-writes the IRF's policy to only provide indemnity from loss rather than indemnity from liability. *Contra Travelers Ins. Co. v. Allstate Ins. Co.*, 249 S.C. 592, 596, 155 S.E.2d 591, 593 (1967) (holding that courts cannot re-write the nature of the indemnity obligation provided for in an insurance policy).

As it concerns this Court's findings regarding the SFAA's purported "indemnity obligation," under Section 1-11-460, Appellant does not concede that this Code section creates an indemnity obligation in the traditional sense. Unlike other sections of the Code—such as Section 1-11-445(A)—which specifically addresses an "indemnity" obligation, the word "indemnity" appears **nowhere** in Section 1-11-460. Had the legislature intended this section to provide "indemnity" it would have said as much. *See State v. Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 345 (Ct. App. 2002) (recognizing the canon that to say one thing implied the exclusion of another and reiterating that "the text of a

statute is [] the best evidence of the legislative intent or will.").[4]

Instead, Section 1-11-460 simply creates an authorization "to pay judgments." *See* S.C. Code Ann. § 1-11-460 (providing in relevant part that "[t]he [SFAA] is authorized to pay judgments against individual governmental employees and officials"). This statute says nothing to suggest that the contemplated payment is only required where the judgment debtor has, or is threatened with, a loss by this judgment. Therefore, to the extent the Court deems this statute to create an "indemnity" obligation, it is more akin to indemnity against liability rather than indemnity for loss. This leads to the next problem with the Court's ruling.

3. The Court misapprehends what prior Court rulings meant when they observed that an insurer stands in the same position as its insured.

This Court relies primarily on *Cobb* and *Smalls,* for the dual premises that "an insurance carrier is in the same legal position as its insured" and that "a liability insurance carrier only contracts to pay any debt the insured is liable to pay." [5] However, these observations do no originate with *Cobb*

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[4] Section 1-11-445(A) provides in relevant part: "The State of South Carolina, . . . must defend the . . . the members of a governing board of the state agency, department, or instrumentality . . . and must indemnify them for an uninsured loss or judgment incurred by them as a result of the claim or suit."

[5] This Court relies on the following excerpt from *Cobb*

> The language relieves Benjamin from the personal obligation to pay any judgment. An insurance company is only obligated to pay 'those sums which the insured becomes legally obligated to pay.' [citing *Smalls v. Blackmon*]. An automobile liability insurance policy is a contract of indemnity and the carrier is placed in the same position as its insured. *Id.* When Cobb removed the obligation to pay a judgment from Benjamin, she also relieved Nationwide of its liability to pay under Benjamin's policy.

Cobb v. Benjamin, 325 S.C. 573, 579 482 S.E.2d 589, 592 (Ct. App. 1997).

This Court also relies on the following excerpt from *Smalls:*

> It must be remembered that an automobile liability insurance policy is basically a contract of indemnity. The insurer is obligated to pay only those sums which the insured becomes legally obligated to pay. An 'insurance carrier is in the same legal position as its insured. A liability insurance carrier only contracts to pay any debt the insured is liable to pay.'

or *Smalls,* but with the earlier case of *Travelers Ins. Co. v. Allstate Ins. Co.*, 249 S.C. 592, 596, 155 S.E.2d 591, 593 (1967). In review of *Travelers,* there are two important points that frame the context of these observations and demonstrate why the Court has misapplied these concepts here. First, the insurance policy at issue in *Travelers* provided for indemnity against loss, not indemnity against liability as is the case here (*see supra*). Second, *Travelers* arose from an action in which an insurer brought a claim seeking contribution from a joint tortfeasor.[6] However, the law, at the time *Travelers* was decided, specifically barred such a contribution claim.

Travelers began after Mr. Gray was killed in a car accident and his estate subsequently obtained a sizable judgment against two joint tortfeasors—Reichhold and Bessinger. *Travelers*, 249 S.C. at 594-95, 155 S.E.2d at 592. Although both tortfeasors were insured—Reichhold by Travelers and Bessinger by Allstate—it seems Reichhold had far more assets, and therefore, became the primary target of Mr. Gray's efforts to collect on the judgment.[7] With Reichhold's assets facing immediate risk of attachment, Reichhold's insurance carrier (Travelers) was forced to pay the full judgment. *Id.* at 595, 155 S.E. 2d 592.[8] Travelers then sued Allstate (not Bessinger himself) seeking

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Smalls v. Blackmon, 269 S.C. 614, 617, 239 S.E.2d 640, 641 (1977).

[6] Although not expressly stated by the majority, the *Traveler's* Court ostensibly considered this claim as being one based on a purported right of subrogation. *See Travelers* 249 S.C. at 601, 155 S.E.2d at 595 (Bussey, A.J., and Brailsford, J., dissenting, and stating that had the claim been one purely of subrogation it would not disagree with the majority's premise that the "insurances carrier is the same legal position as its insured," but dissenting because they believed the plaintiff's claim for contribution should be viewed as arising independent of any right of subrogation).

[7] At the time, it was "the law of this State, one injured by the actionable negligence of two or more joint tort-feasors may elect that party or parties whom he will sue and may pursue the collection of a judgment procured against any one or more of the judgment debtors." *Travelers*, 249 S.C. at 598, 155 S.E.2d at 594.

[8] Because Allstate's indemnity obligation was only to indemnify against loss, and because Mr. Gray did not initially seek collection against Bessinger, Allstate's indemnity obligation was not triggered because Bessinger had not paid anything (*i.e.*, suffered any loss). *Infra.*

contribution. Travelers alleged it was unfair, that simply because Bessinger had no assets at risk of attachment that Allstate could avoid payment and leave the full burden of the judgment on Travelers. Ultimately the Court rejected Traveler's claim for the two reasons mentioned above—*i.e.*, Nationwide's indemnity obligation was only for *loss* (which was permissible at the time) and the prevailing law in South Carolina prohibited a claim for contribution from a joint tortfeasor. *See id.* at 592, 155 S.E.2d at 594 (citing the then prevailing "general rule is that there can be no indemnity among mere joint tortfeasors") (citation omitted)*; see also, id.* at 596, 155 S.E.2d at 593 (explaining South Carolina law permitted an auto insurer to "only contract[] to pay any debt the insured is liable to pay [because t]he motor vehicle liability policy approved by State law, Section 46-750.32, [only] requires a liability policy to protect the insured against **loss**") (emphasis added).

Importantly, South Carolina's law has changed on both points since *Travelers* was decided. Not only does South Carolina now recognize a claim for contribution among joint tortfeasors, it also requires that an auto insurer must indemnify against liability, not just loss.[9] This is important because *Traveler's* commentary (upon which this Court ultimately relied) was offered in discussion of the fact that the policy at issue only indemnified against loss. The *Travelers* Court stated:

> Throughout this case each insurance carrier is in the same legal position as its insured. A liability insurance carrier only contracts to pay any debt the insured is liable to pay.

[9] With the 1989 adoption of the South Carolina Contribution Among Joint Tortfeasors Act, the State now recognizes a claim for contribution. *See* S.C. Code Ann. § 15-38-10 *et. seq*. Moreover, the prior version of the Code which *Traveler's* noted as permitting an insurer to only indemnify against loss was replaced with by Automobile Insurance Reform Act of 1989, which as amended in 1997 at S.C. Code Ann. § 38-77-142, requires a policy provide indemnity for liability rather than only for loss. *See* S.C. Code Ann. § 38-77-142 (A) (No policy or contract of bodily injury or property damage liability insurance **covering liability** arising from the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State . . . unless the policy contains a provision insuring [the insured] **against liability** for death or injury sustained **or loss or damage incurred** within the coverage of the policy or contract as a result of negligence in the operation or use of the vehicle") (emphasis added); *see also* S.C. Code §38-77-30 (10.5) ("'Policy of automobile insurance' or 'policy' means a policy or contract for bodily injury or property damage liability insurance issued or delivered in this State **covering liability** arising from the ownership, maintenance, or use of any motor vehicle") (emphasis added); *accord Walker,* 157 S.C. at 388, 154 S.E. at 223-24 (*supra* at n. 2)

> The motor vehicle liability policy approved by State law, Section 46-750.32, requires a liability policy to protect the insured 'against loss from the liability imposed by law for damages arising out of the ownership,' etc.

Id.

Because Allstate's policy only indemnified Bessinger against actual *loss* rather than liability, was significant when considering the law made him immune from any claim for contribution because he could not be forced to make any payment—either by a joint tortfeasor or by Mr. Gray who had been paid in full, and without this payment Nationwide's indemnity obligation was never triggered[10]. Thus, the *Travelers* Court was left to conclude:

> [T]he **obligation of insurance carriers as established by contract** may not be changed without first altering the rights and obligations of the parties they insure. The debt to Gray as established in the original trial has been paid on behalf of one joint tort-feasor and when that debt was obliterated, the other joint tort-feasor was completely released and, accordingly, he has not and **cannot suffer a loss** and there is no debt existing for his own insurance carrier to pay. Bessinger cannot be made to pay under the substantive law of this State and Allstate has never contracted to protect anyone else. Any other ruling would, in effect, make a new contract for the parties. Accordingly . . . Allstate cannot be directed to pay unless and until Bessinger is first liable and directed to pay.

Id. at 596-97, 155 S.E.2d at 593 (emphasis added)

Plainly the observations and reasoning in *Travelers* are constrained to the circumstances of that case, which are not present here. *Travelers* concerned a contribution claim in the face of an obligation to indemnify against loss. This case is unlike *Travelers* on all fronts. It is not for contribution, it involves a covenant, and it concerns indemnity against liability. Thus, the commentary from *Travelers,* has no import here. The fact that *Travelers* was later cited by *Smalls* and *Cobb,* is immaterial.

[10] The posture of this case is very different. This case is not about whether the indemnity obligation of the IRF/SFAA was triggered to begin with (it was). The question is whether this indemnity obligation was extinguished by the covenant not to execute. This serves as just another example as to why the issue should be framed as one of waiver, not mootness, and why the actual terms of the covenant and the policy are so critical. *See* (App. Br. p. 26-27)

4. **The Court misinterprets and misapprehends *Smalls* and *Cobb,* it overlooks that the Covenant Not to Execute specifically reserves the right to pursue payment from the IRF and SFAA, and in so doing offers an opinion that is in direct conflict with prior opinions of this Court.**

The concepts in *Travelers* (discussed above) were subsequently cited by the Supreme Court in *Smalls* in 1977 and then again by this Court in *Cobb* in 1997. However, neither *Smalls* nor *Cobb* support the Court's reasoning in this case.[11]

A. *The Court misapprehends Smalls*.

This Court relies on *Smalls* for the proposition that, "an automobile liability insurance policy is basically a contract of indemnity [in which] the insurer is obligated to pay only those sums which the insured becomes legally obligated to pay." (Order p. 2). Notwithstanding that this case does not involve automobile insurance, this observation, standing alone, is not necessarily problematic when considering the IRF's policy provides similarly. *See* (R. p. 95) (providing "The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as a damages because of [] Personal Injury."). However, the problem arises with the Court's assumption that the covenant not to execute provides the insurer the ability to claim the officers have no obligation for Appellant's damages.

As discussed in more detail below, this Court has already determined in *Ackerman* that a covenant not to execute does not give rise to a claim that the insured is no longer "legally obligated to pay." *See Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 146-7, 456 S.E.2d 408, 413 (Ct. App. 1995) (rejecting "Travelers argue[ment] this [covenant not to execute] operates to release the liability insurer because it would no longer be "legally obligated to pay" damages, and finding that despite

[11] To the extent that the law in South Carolina has changed such that there is now a right to contribution, and that insurance contracts may extend to indemnity for liability, rather than merely loss, Appellant does not concede that *Travelers* remains good law in South Carolina. By extension, Appellant's discussion of *Smalls* and *Cobb,* is offered without conceding that either of these cases remain good law.

the covenant not to execute "the Ackermans are still entitled to recover damages from Scott; they merely agreed not to legally enforce the judgment.").

Ultimately the Court's reliance on *Smalls,* to support the notion that the covenant not to execute eliminates the IRF's indemnity obligation is misplaced for the simple reason that *Smalls* neither involved a covenant not to execute, nor did it concern the concept of mootness.

In *Smalls,* the plaintiff, who was an auto-mechanic, was hurt at work by a co-worker's negligent operation of a customer's vehicle. *Smalls*, 269 S.C. at 616, 239 S.E.2d at 640. After recovering under the Federal Worker's Compensation Act, the plaintiff brought suit against his co-worker asserting the co-worker was a "permissive user" under the customer's auto insurance policy. *Id.* The Supreme Court affirmed the dismissal of the plaintiff's claim because the Federal Worker's Compensation Act provided a co-worker "absolute civil immunity." *Id.* In addressing *dicta* from a prior case, the Court commented on the purely hypothetical scenario in which a defendant's status as a "permissive user" might give rise to a direct claim against the insurance company. It was in speaking to this hypothetical that the Court cites *Travelers,* for the general proposition that an insurer is in the same position as its insured, to support that notion that even if that hypothetical claim were brought, the carrier would be able to assert the immunity afforded to the co-worker. *Id.*at 617, 239 S.E.2d at 641 (stating "Neither the existence of a covering insurance policy or a defendant's status as an insured creates a cause of action" against the insurance company, but even if such a claim were brough, "such defenses as were available to [the permissive user] would be equally available to his insurance carrier.").

B. The Court misapprehends Cobb.

The Court relies on *Cobb* for the proposition that where an insured is relieved of a personal obligation to pay any judgment, the insurance company is relieved of its liability to pay under the

policy. This is a misinterpretation of *Cobb.*[12]

As a threshold matter, to the extent that *Cobb* relies on *Travelers,* it must be assumed that the policy at issue in *Cobb* was one for indemnity against loss rather than indemnity against liability. Moreover, it is also important to note that although the *Cobb* Court found that covenant not to execute at issue there relieved the insurer's obligation to pay, the *Cobb* Court was also sure to point out that "it was possible [that] Nationwide's policy of insurance may have contained language which would have triggered coverage to Cobb, despite the settlement agreement" but the Court could not make this determination because the policy was not in the record. *Cobb*, 325 S.C. at 579 n.1, 482 S.E.2d at 592.

Unlike *Cobb,* in this case, the IRF's policy is in the record and makes clear that both Appellant and the officers have a claim for payment under the policy regardless of whether the insureds might have had their personal assets exposed. (*supra*). As the moving party at trial, it was incumbent on Respondents to point out the provisions that support the contention that their obligations had been extinguished, but they failed to do so.

Second, in relying on *Cobb,* this Court seems to conflate a covenant not to execute with a release. *See id.*, at 578, 482 S.E.2d at 591. ("A covenant not to execute is treated differently than a settlement agreement which is a release") (*citing Ackerman,* 318 S.C. 137, 456 S.E.2d 408.) This case deals only with a covenant not to execute. *Cobb* addressed both a covenant not to execute and a release. The distinction between a covenant and a release is significant because a covenant not to

[12] In its discussion of *Cobb*, this Court states the following: "Moreover, the *Cobb* court enforced the reservation of right to proceed against any available underinsured motorist (UIM) coverage under the covenant not to execute. This is an important factual distinction for this case because in *Cobb*, the UIM coverage acted as first party coverage for the complainant, not the insured." (Opinion p. 3). It is not entirely clear the reason the Court makes this statement, but it bears mention that the issue in *Cobb* was **not** about whether the injured party could collect UIM coverage, it was about whether the injured party could collect liability coverage from a previously unknown liability carrier.

execute does not release the underlying tortfeasor's liability for the damages but is simply a promise not to execute the judgment against the tortfeasor's personal assets. *Ackerman*, 318 S.C. at 147, 456 S.E.2d at 413. ("The Ackermans [who signed the covenant not to execute] are still entitled to recover damages from Scott; they merely agreed not to legally enforce the judgment. In fact, the covenant expressly reserves the Ackermans' right to obtain a judgment against Scott.").

The heart of the problem here is that a covenant not to execute *might* eliminate an indemnity obligation where that obligation is only to indemnify for loss, but a covenant not to execute does not eliminate an obligation to indemnify against liability, and this case concerns the latter. Thus, The IRF's obligation was triggered when the judgment was entered,[13] and the Court's suggestion the covenant not to execute changed that is contrary to *Ackerman.*

Like the IRF's policy here, the policy in *Ackerman,* covered the damages the insured was "legally obligated to pay." Pointing to this, the insurance company argued the covenant not to execute eliminated the insurer's obligation to pay. This Court expressly rejected that argument, holding:

> Because the Ackermans agreed in the Covenant Not To Execute that they would not go against the personal assets of Scott in collecting on any judgment they might attain against [Scott], Travelers argues this operates to release the liability insurer because it would no longer be 'legally obligated to pay' damages. Under these circumstances, **Travelers argues, there is no coverage under the liability policy which provides only for payment of such sums as an insured is 'legally entitled to recover' from an underinsured motorist. <u>We disagree</u>**.

Id. at 146, 456 S.E.2d at 413.

This Court misapprehends *Cobb,* in another significant way. The essence of *Cobb,* (as well

[13] *See e.g. Bryant*, 202 S.C. at 463, 25 S.E.2d at 492 ("where the contract of insurance is one of indemnity for the liability of the tort-feasor, and not for his loss, the injured person has . . . a beneficial interest in the policy, and is entitled to" stake the claim immediately); and *Walker*, 157 S.C. at 388, 154 S.E. at 223-24. ("Where the indemnity is against liability" the obligation arises "as soon as [the insureds] liability has become fixed and established, even though he has sustained no actual loss or damage")

as other cases cited by Appellants) is that the effect of the covenant not to execute is based upon the intent of the parties to be gleaned from the language of the covenant. This Court overlooked that the reason the covenant not to execute at issue in *Cobb* prevented the injured party from pursuing liability coverage was because "[Cobb] did not reserve the right to collect from any undiscovered liability carriers." *Cobb*, 325 S.C. at 578, 482 S.E.2d at 592.

Here, this Court, like the trial court, ignored that the covenant not to execute plainly identified, reserved, and obtained (by assignment) the right to pursue both insurance coverage and/or payment of the judgment (among other things). (Supp. R. dated April 19, 2023 – **Exhibit A**).

This makes the case at hand unlike *Cobb.* In *Cobb,* in exchange for signing the covenant not to execute, the injured party was paid money by the liability carrier. This is significant because "[w]hen a liability insurance carrier provides consideration for a release, the release protects the insured. The money for a release is paid by or on behalf of the insured." *Cobb*, 325 S.C. at 579, 482 S.E.2d at 592; *citing Brown v. Walker Lumber Co.,* 128 S.C. 161, 165, 122 S.E. 670, 671 (1924). Therefore, as a matter of law, the payment of this monetary consideration provided a *release* separate and apart from the covenant not to execute. *See id.*

Here, Appellant received no monetary payment in exchange for the covenant not to execute.[14] To the contrary, the only consideration that Appellant received in exchange for the covenants was assignment of the corrections officers' rights to pursue payment and/or insurance coverage—the very thing this Court has now deprived them of. Thus, this Court's decision has totally defeated the intent of the parties those contracts (*i.e.*, Appellant and the officers) in favor of the interests of the IRF

[14] By accepting partial payment Appellant did not release or waive of any claim. The partial satisfaction of judgment filed with circuit court "expressly reserves the right and does not waive her claim as asserted in the pending action [bearing] Civil Action No. 2015-CP-40-0619" (*i.e.*, the underlying action from which this case arises). *See* (R. p. 677).

which was not a party to that contract. Why?[15]

In review of the cases cited by this Court, it remains that until it issued its opinion in this case, this Court has never asserted the notion that an insurer stands in the same position as its insured outside of the context of subrogation. While the Supreme Court referred to this concept in *Smalls,* (which did not involve subrogation) that reference was made in *dicta* and in response to hypothetical. This point alone should serve as a strong incentive for this Court to reexamine its reasoning and holding and grant the instant petition for rehearing.

5. In dismissing Appellant's reliance on *Fowler,* this Court misapprehends and/or incorrectly concludes that this case does not involve the assigned claims.

As this Court pointed out, Appellant relied on *Fowler v. Hunter*, 388S.C. 355, 697 S.E.2d 531 (2010). Although the arguments and reasoning that were rejected in *Fowler* are identical to those offered by Respondent here, this Court concluded that *Fowler* was not controlling because this case does not involve the claims assigned to Appellant. *See* (Order p. 3) ("*Fowler* is inapplicable because [Appellant] signed a post-judgment covenant not to execute and this case does not involve the assigned claims."). This is wrong. This case does involve the assigned claims. Just like the trial court, this Court ignored the actual language of the covenant not to execute which provides:

> "the undersigned hereby assigns to Nancy Morris [as personal representative of the estate of David Wood] any and all claims he/she may have against the South Carolina Insurance Reserve Fund and/or any other persons, firms, government organizations, or entities that arise out of the above-captioned case. These claims include, but are not limited to, claims arising out of the negligent, reckless and/or bad faith conduct, and/or breach of contract by the Insurance Reserve Fund, its agents, servants, and/or employees, its law firm, insurance agency, insurance broker, or any other party in relation to: the handling of this matter; the judgment entered in this case; any other matters related to the claim which resulted in the judgment being entered against the

[15] As a point of logic, if the officers were not authorized or permitted to assign Appellant their claims against the Respondents, then the consideration for covenant not to execute has failed. Thus, if this Court is going to accept that Respondents are in the same position as the officers then it follows that Respondents can only obtain the benefit of the covenant not to execute to the extent Appellant has been provided something of value in return. Under this Court's position she has not.

> undersigned; for any claims the undersigned may have against the Fund that arise out of any insurance coverage applicable to the instant case; and the right to collect all actual and punitive damages, attorneys fees, or costs that may arise from those claims."

(Supp. R. dated April 19, 2023 – **Exhibit A**).

This action, which asserts claims against the IRF and the SFAA (a government organization) for insurance coverage and collection of actual and punitive damages, is plainly within the ambit of the claims assigned to Appellant. Yet this was completely overlooked by this Court.

6. **The Court must still address the question of occurrences under the policy, and obligation to pay under the statute**.

Based on its determination regarding "mootness," this Court elected not to address any of the other issues on appeal. For all the reasons explained herein this matter is not moot and therefore this Court should grant rehearing and address the remaining issues on appeal regarding the number of occurrences under the IRF's and/or the SFAA's payment obligation under Section 1-11-460. To this Appellant incorporates the arguments and citations made in her Appellant's Brief and Reply Brief in full, and as if restated herein verbatim.

7. **The Court should grant rehearing *en banc* because the Court's order implicates a matter of substantial importance and marks a significant shift in the law that is contrary to public policy.**

It is the well-established public policy of this state to favor reasonable settlements of civil matters over adherence to insignificant technicalities. *See Fowler v. Hunter*, 388 S.C. 355, 362, 697 S.E.2d 531, 535 (2010) ("South Carolina has expressed a willingness to depart from the technicalities of the common law in order to promote reasonable settlements in civil suits."). Such reasonable settlement is precisely what is embodied by the covenant not to execute that Appellants provided in this case. But this Court threw that by the wayside, for reasons not fully articulated. This will not only adversely affect Appellant, but other litigants in the state. Mindful that this Court does not typically make decisions of public policy, Appellant nonetheless points out that this Court's decision

opens to door to litany of consequences that adversely affect the public interest, including (but not limited to) the following.

A. *The Court's reasoning sanctions the judicial re-writing of contracts*.

Here, the Court's interpretation of the indemnity obligations of the IRF and SFAA stems not from any provision of the insurance policy of covenant, but rather from a categorical assumption that the payment obligation of the insured, in all cases, is contingent upon the ability to enforce the judgment against the insured. This allows Court's to determine the nature and extent of the insurer's indemnity obligation without regard to the terms of the insurance contract. For example, if the terms of a policy provided for indemnity against liability, or contained a provision that made clear the indemnity obligation was not affected by whether the insured has sufficient personal assets to pay (as was the case here), a court would nonetheless be either obligated or empowered to ignore this language, to be replaced by the generalized declaration that an insurer stands in the same position as its insured.

B. *The Court's ruling creates an avenue for insurers to exploit their insured's lack of financial means to circumvent their payment obligations.*

The Court's opinion provides an avenue for insurers to deny coverage where the insured may not otherwise have personal assets exposed or sufficient personal assets to pay the judgment. This poses a substantial risk to residents of South Carolina that are injured by parties, who although insured, are otherwise immune from execution of judgment. For example, the Court's reasoning would permit an insurance company to claim the benefit of its insureds' insolvency, or homestead exemption to limit or eliminate the extent of its obligation to pay under a policy, based on nothing other than the financial status of its insured.

C. *Public Policy should favor the ability of insureds to assign their claims against their insurers to injured plaintiffs*.

It is in the best public interest to allow insureds to assign their claims against their insurers to

injured plaintiffs who have the means and incentive to prosecute such claims. In the absence of an insured being able to assign its claims, the ability of the injured plaintiff to recover would depend upon the ability and desire of a potentially insolvent insured to pursue its claims against the carrier. This would only encourage bad faith. Incentivizing an insurer to take advantage of the fact that an insolvent insured will likely have neither the means nor the incentive to pursue an action against its insured. This opens the door to the possibility an insurer could avoid its payment obligations with impunity.

D. *The Court's opinion threatens substantial confusion to the bench and bar*.

The practice of providing a covenant not to execute in exchange for the assignment of claims is common practice among the bar. Considering that Appellant in this matter specifically identified, and obtained assignment of the very claims that the Court now finds moot. Mindful this opinion is unpublished, it will still serve as persuasive authority to the bench and bar. Therefore, the Court should therefore give guidance not only on why the covenant here was insufficient to save the matter from mootness, but also how a litigant is to make such a reservation in the future, and how its decision here is reconcilable with *Fowler* and *Ackerman* (among others).

E. *The Court's reason creates the ultimate gotcha game, favoring insurers over both insureds and injured plaintiffs*.

Had the officers in this case had the financial means to pay Appellant's judgment there would never have been a need for the covenant not to execute. To the contrary the covenant not to execute was entered precisely because the officers were judgment proof. The only thing of value that the officers had to offer as payment to Appellants was their potential claims against their insurer. Therefore, in exchange for the covenant, the officers assigned these claims to Appellant. However, in finding this matter moot, this Court has completely stymied the intent of the parties. The officers will never be able to assert their claims against their insurer for rightfully due to them, and Appellant

will never be able to collect his judgment. The Court's decision deprives both Appellant and the officers of something of value and gives it to the Respondents, who were never a party to the covenant in the first place. The only winners in this are the insurance companies.

CONCLUSION

For these reasons, the Court should grant the instant petition for re-hearing and/or re-hearing *en banc.*

THURMOND KIRCHNER & TIMBES, P.A.

s/ T.J. Rode
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Additional Attorneys for the Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Common Pleas Court Case No. 2015-CP-40-00619
Appellate Case No. 2020-000719

Nancy Morris, as Personal Representative of the Estate of David Allan Woods. ..... Appellant

vs.

State Fiscal Accountability Authority, at al. ..... Respondent

---

EXHIBIT A

To Petition for Rehearing and Petition for Rehearing *En Banc*

THURMOND KIRCHNER
& TIMBES, P.A.
ATTORNEYS AT LAW

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April 19, 2023

VIA E-MAIL ONLY

V. Claire Allen, Chief Deputy Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Nancy Morris v. State Fiscal Accountability Authority
Appellate Case No. 2020-000719

Dear Ms. Allen:

In response to this Court's letter dated April 17, 2023, please find enclosed copies of the Assignment of Rights and Covenants Not to Execute that the appellant entered into with Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; and Priscilla Garrett, SGT (labeled Appellate Case No. 2020-000719, 04/19/2023, 1-19). If this Court requires anything further, please let me know.

Very truly yours,

THURMOND KIRCHNER & TIMBES, P.A.

Thomas J. Rode (SC Bar #77480)

TJR/src
cc: Counsel of Record (via e-mail only)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

NANCY MORRIS, as personal representative of the estate of DAVID ALLAN WOODS, Plaintiff, v. Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Priscilla Garrett, SGT; Defendants.	)	C.A. No.: 5:12-cv-3177-RMG ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

For valuable consideration, the receipt of which is hereby acknowledged, and after receiving the advice of independent counsel, the undersigned hereby assigns to Nancy Morris any and all claims he/she may have against the South Carolina Insurance Reserve Fund and/or any other persons, firms, government organizations, or entities that arise out of the above-captioned case. These claims include, but are not limited to, claims arising out of the negligent, reckless and/or bad-faith conduct, and/or breach of contract by the Insurance Reserve Fund, its agents, servants, and/or employees, its law firm, insurance agency, insurance broker, or any other party in relation to: the handling of this matter; the judgment entered in this case; any other matters related to the claim which resulted in the judgment being entered against the undersigned; for any claims the undersigned may have against the Fund that arise out of any insurance coverage applicable to the instant case; and the right to collect all actual and punitive damages, attorney fees, or costs that may arise from those claims.

The undersigned agrees to be deposed and testify at trial in any cause of action that is brought against the State Fiscal Accountability Authority, the South Carolina Insurance Reserve

Fund or any other insurance company, adjuster, agency, broker, or organization in order to collect the excess judgment or to prosecute any of the claims hereby assigned to Nancy Morris.

The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.

The undersigned acknowledges that he/she has sought the advice of counsel regarding this assignment, is under no undue coercion or duress, is of sound mind and body, and believes the assignment to be in his/her best interests and supported by valuable consideration.

In consideration of this assignment, Plaintiff hereby covenants not to execute against any assets of the undersigned. Plaintiff furthermore agrees to dismiss the undersigned from civil action number 2017-CP-08-1439, currently pending in Berkeley County. Plaintiff covenants not to institute any further claims, lawsuits, bankruptcy proceedings, or other causes of action against the undersigned to enforce or collect on the above judgment.

This assignment is intended to bind the parties hereto and their heirs and assigns.

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Andrew J. Bland

Andrew J. Bland

Christopher P. Biering
Andrew Bland
Printed Name

Witness

SWORN to and Subscribed Before Me

This 30th day of August 2017.

Notary Public of South Carolina

My Commission Expires: 6-1-2026

LOREN RANDOLPH NOTARY PUBLIC SOUTH CAROLINA

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Andrew J. Bland.

Nancy Morris, as personal representative
of the Estate of David Allan Woods

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Andrew J. Bland

Christopher P. Biering
Andrew Bland
Printed Name

Andrew J. Bland

Witness

SWORN to and Subscribed Before Me

This 30th day of August 2017.

Notary Public of South Carolina

My Commission Expires: 6-1-2026

LOREN RANDOLPH NOTARY PUBLIC SOUTH CAROLINA

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Andrew J. Bland.

Nancy Morris, as personal representative
of the Estate of David Allan Woods

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

NANCY MORRIS, as personal representative of the estate of DAVID ALLAN WOODS, Plaintiff, v. Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Priscilla Garrett, SGT; Defendants.	)	C.A. No.: 5:12-cv-3177-RMG ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

For valuable consideration, the receipt of which is hereby acknowledged, and after receiving the advice of independent counsel, the undersigned hereby assigns to Nancy Morris any and all claims he/she may have against the South Carolina Insurance Reserve Fund and/or any other persons, firms, government organizations, or entities that arise out of the above-captioned case. These claims include, but are not limited to, claims arising out of the negligent, reckless and/or bad-faith conduct, and/or breach of contract by the Insurance Reserve Fund, its agents, servants, and/or employees, its law firm, insurance agency, insurance broker, or any other party in relation to: the handling of this matter; the judgment entered in this case; any other matters related to the claim which resulted in the judgment being entered against the undersigned; for any claims the undersigned may have against the Fund that arise out of any insurance coverage applicable to the instant case; and the right to collect all actual and punitive damages, attorney fees, or costs that may arise from those claims.

The undersigned agrees to be deposed and testify at trial in any cause of action that is brought against the State Fiscal Accountability Authority, the South Carolina Insurance Reserve

Fund or any other insurance company, adjuster, agency, broker, or organization in order to collect the excess judgment or to prosecute any of the claims hereby assigned to Nancy Morris.

The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.

The undersigned acknowledges that he/she has sought the advice of counsel regarding this assignment, is under no undue coercion or duress, is of sound mind and body, and believes the assignment to be in his/her best interests and supported by valuable consideration.

In consideration of this assignment, Plaintiff hereby covenants not to execute against any assets of the undersigned. Plaintiff furthermore agrees to dismiss the undersigned from civil action number 2017-CP-08-1439, currently pending in Berkeley County. Plaintiff covenants not to institute any further claims, lawsuits, bankruptcy proceedings, or other causes of action against the undersigned to enforce or collect on the above judgment.

This assignment is intended to bind the parties hereto and their heirs and assigns.

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Richard T. Burkholder

Richard T. Burkholder

Printed Name

Witness

SWORN to and Subscribed Before Me

This _____ day of _____, 2017.

Notary Public of South Carolina

My Commission Expires: _____

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Richard T. Burkholder.

Nancy Morris as personal representative
of the Estate of David Allan Woods

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

NANCY MORRIS, as personal representative of the estate of DAVID ALLAN WOODS, Plaintiff, v. Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Priscilla Garrett, SGT; Defendants.	)	C.A. No.: 5:12-cv-3177-RMG ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

For valuable consideration, the receipt of which is hereby acknowledged, and after receiving the advice of independent counsel, the undersigned hereby assigns to Nancy Morris any and all claims he/she may have against the South Carolina Insurance Reserve Fund and/or any other persons, firms, government organizations, or entities that arise out of the above-captioned case. These claims include, but are not limited to, claims arising out of the negligent, reckless and/or bad-faith conduct, and/or breach of contract by the Insurance Reserve Fund, its agents, servants, and/or employees, its law firm, insurance agency, insurance broker, or any other party in relation to: the handling of this matter; the judgment entered in this case; any other matters related to the claim which resulted in the judgment being entered against the undersigned; for any claims the undersigned may have against the Fund that arise out of any insurance coverage applicable to the instant case; and the right to collect all actual and punitive damages, attorney fees, or costs that may arise from those claims.

The undersigned agrees to be deposed and testify at trial in any cause of action that is brought against the State Fiscal Accountability Authority, the South Carolina Insurance Reserve

Fund or any other insurance company, adjuster, agency, broker, or organization in order to collect the excess judgment or to prosecute any of the claims hereby assigned to Nancy Morris.

The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.

The undersigned acknowledges that he/she has sought the advice of counsel regarding this assignment, is under no undue coercion or duress, is of sound mind and body, and believes the assignment to be in his/her best interests and supported by valuable consideration.

In consideration of this assignment, Plaintiff hereby covenants not to execute against any assets of the undersigned. Plaintiff furthermore agrees to dismiss the undersigned from civil action number 2017-CP-08-1439, currently pending in Berkeley County. Plaintiff covenants not to institute any further claims, lawsuits, bankruptcy proceedings, or other causes of action against the undersigned to enforce or collect on the above judgment.

This assignment is intended to bind the parties hereto and their heirs and assigns.

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Leemon E. Carner

Christopher P. Biering
Printed Name

Leemon E. Carner

Witness

SWORN to and Subscribed Before Me

This 30th day of August, 2017.

Loren Randolph
Notary Public of South Carolina

My Commission Expires: 6-1-2026

LOREN RANDOLPH
NOTARY
PUBLIC
SOUTH CAROLINA

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Leemon E. Carner.

Nancy Morris, as personal representative
of the Estate of David Allan Woods

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Leemon E. Carner

Christopher P. Biering
Printed Name

Leemon E. Carner

Witness

SWORN to and Subscribed Before Me

This 30th day of August, 2017.

Loren Randolph
Notary Public of South Carolina

My Commission Expires: 6-1-2026

LOREN RANDOLPH NOTARY PUBLIC SOUTH CAROLINA

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Leemon E. Carner.

Nancy Morris
Nancy Morris, as personal representative
of the Estate of David Allan Woods

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

NANCY MORRIS, as personal representative of the estate of DAVID ALLAN WOODS, Plaintiff, v. Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Priscilla Garrett, SGT; Defendants.	C.A. No.: 5:12-cv-3177-RMG ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

For valuable consideration, the receipt of which is hereby acknowledged, and after receiving the advice of independent counsel, the undersigned hereby assigns to Nancy Morris any and all claims he/she may have against the South Carolina Insurance Reserve Fund and/or any other persons, firms, government organizations, or entities that arise out of the above-captioned case. These claims include, but are not limited to, claims arising out of the negligent, reckless and/or bad-faith conduct, and/or breach of contract by the Insurance Reserve Fund, its agents, servants, and/or employees, its law firm, insurance agency, insurance broker, or any other party in relation to: the handling of this matter; the judgment entered in this case; any other matters related to the claim which resulted in the judgment being entered against the undersigned; for any claims the undersigned may have against the Fund that arise out of any insurance coverage applicable to the instant case; and the right to collect all actual and punitive damages, attorney fees, or costs that may arise from those claims.

The undersigned agrees to be deposed and testify at trial in any cause of action that is brought against the State Fiscal Accountability Authority, the South Carolina Insurance Reserve

Fund or any other insurance company, adjuster, agency, broker, or organization in order to collect the excess judgment or to prosecute any of the claims hereby assigned to Nancy Morris.

The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.

The undersigned acknowledges that he/she has sought the advice of counsel regarding this assignment, is under no undue coercion or duress, is of sound mind and body, and believes the assignment to be in his/her best interests and supported by valuable consideration.

In consideration of this assignment, Plaintiff hereby covenants not to execute against any assets of the undersigned. Plaintiff furthermore agrees to dismiss the undersigned from civil action number 2017-CP-08-1439, currently pending in Berkeley County. Plaintiff covenants not to institute any further claims, lawsuits, bankruptcy proceedings, or other causes of action against the undersigned to enforce or collect on the above judgment.

This assignment is intended to bind the parties hereto and their heirs and assigns.

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Jerry Speissegger, Jr.

Jerry Speissegger, Jr.

Christopher P. Biering
Printed Name

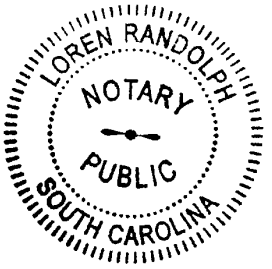
Witness

SWORN to and Subscribed Before Me

This 30th day of August, 2017.

Loren Randolph
Notary Public of South Carolina

My Commission Expires: 6-1-2026



I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Jerry Speissegger, Jr.

Nancy Morris, as personal representative
of the Estate of David Allan Woods

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Jerry Speissegger, Jr.

Christopher P. Bierings
Printed Name

Jerry Speissegger, Jr.

Witness

SWORN to and Subscribed Before Me
This 30th day of August, 2017.

Loren Randolph
Notary Public of South Carolina

My Commission Expires: 6-1-2026

LOREN RANDOLPH NOTARY PUBLIC SOUTH CAROLINA

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Jerry Speissegger, Jr.

Nancy Morris, as personal representative
of the Estate of David Allan Woods

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

NANCY MORRIS, as personal representative of the estate of DAVID ALLAN WOODS, Plaintiff, v. Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Priscilla Garrett, SGT; Defendants.	)	C.A. No.: 5:12-cv-3177-RMG ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

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The undersigned agrees to be deposed and testify at trial in any cause of action that is brought against the State Fiscal Accountability Authority, the South Carolina Insurance Reserve

Fund or any other insurance company, adjuster, agency, broker, or organization in order to collect the excess judgment or to prosecute any of the claims hereby assigned to Nancy Morris.

The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.

The undersigned acknowledges that he/she has sought the advice of counsel regarding this assignment, is under no undue coercion or duress, is of sound mind and body, and believes the assignment to be in his/her best interests and supported by valuable consideration.

In consideration of this assignment, Plaintiff hereby covenants not to execute against any assets of the undersigned. Plaintiff furthermore agrees to dismiss the undersigned from civil action number 2017-CP-08-1439, currently pending in Berkeley County. Plaintiff covenants not to institute any further claims, lawsuits, bankruptcy proceedings, or other causes of action against the undersigned to enforce or collect on the above judgment.

This assignment is intended to bind the parties hereto and their heirs and assigns.

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Priscilla Garrett Bland

Priscilla ~~Garrett~~ Ann Bland

Christopher P. Bicking
Printed Name

Witness

SWORN to and Subscribed Before Me
This 30th day of August, 2017.

Loren Randolph
Notary Public of South Carolina

My Commission Expires: 6-1-2026

LOREN RANDOLPH NOTARY PUBLIC SOUTH CAROLINA

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Priscilla Garrett Bland.

Nancy Morris, as personal representative
of the Estate of David Allan Woods

THIS ASSIGNMENT IS IRREVOCABLE.

Attorney for Priscilla Garrett Bland

Priscilla ~~Garrett~~ Ann Bland

Christopher P. Bicking
Printed Name

Witness

SWORN to and Subscribed Before Me
This 30th day of August, 2017.

Loren Randolph
Notary Public of South Carolina

My Commission Expires: 6-1-2026

LOREN RANDOLPH NOTARY PUBLIC SOUTH CAROLINA

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Priscilla Garrett Bland.

Nancy Morris, as personal representative
of the Estate of David Allan Woods

RECEIVED
Jun 08 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Common Pleas Court Case No. 2015-CP-40-00619
Appellate Case No. 2020-000719

Nancy Morris, as Personal Representative of the Estate of David Allan Woods. ..... Appellant

vs.

State Fiscal Accountability Authority, at al. ..... Respondent

---

PROOF OF SERVICE

I hereby certify that the enclosed was served on all other parties to this matter by email and with an offer to send the same by US Mail on this day and properly posted for delivery to the following addresses:

Andrew F. Lindemann
Lindemann Davis & Hughes
5 Calendar Court, Suite 202 (29206)
P.O. Box 6923
Columbia, SC 29260

THURMOND KIRCHNER & TIMBES, P.A.

s/ Thomas J. Rode

Dated: June 8, 2023