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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2020-00719
Case No. 2015-CP-40-0619

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

v.

State Fiscal Accountability Authority, South Carolina
Insurance Reserve Fund, Andrew J. Bland, Richard T. Burkholder,
Leemon E. Carner, Priscilla Bland, Jerry Speissegger, Jr., ..... Respondents.

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**RETURN TO APPELLANT'S**
**PETITION FOR REHEARING**

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The Appellant Nancy Morris, as the Personal Representative of the Estate of David Alan Woods, has petitioned this Court for a rehearing of its recent unpublished opinion in *Morris v. State Fiscal Accountability Authority*, Op. No. 2023-UP-201 (S.C. Ct. App. filed May 24, 2023). In response, the Respondents State Fiscal Accountability Authority ("SFAA") and South Carolina Insurance Reserve Fund ("IRF") submit that this Court properly ruled on the issues challenged by the Appellant in her petition for rehearing.

## I. The Appellant's arguments are predominantly raised for the first time in a petition for rehearing which is not permitted under South Carolina appellate practice.

As an initial point, the extensive arguments that the Appellant has presented in her Petition for Rehearing are not properly preserved. Importantly, the purpose and scope of a petition for rehearing are extremely narrow under South Carolina appellate practice. In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), the Supreme Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322. *See also, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

Yet, a cursory review of the Appellant's 21-page Petition for Rehearing easily demonstrates that the Appellant is trying to re-litigate anew the justiciability/mootness issue on which this Court ruled in affirming the court below. The Appellant is now presenting a substantially different argument than what she raised below or what she even raised in this appeal – that is, until she lost and has now filed a Petition for Rehearing. However, as this Court and the Supreme Court have made clear, a petition for rehearing is not intended to allow a second bite at the apple when the first bite was unsuccessful.

As case in point, in her opening brief, the Appellant addressed the trial court's justiciability/mootness ruling in Part III which consisted of four paragraphs and a page and one-half of text. In her analysis of the issue, the Appellant relied specifically on the decision in *Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (2010). *See*, Appellant's Opening Brief, pp. 26-27. Later, in

her reply brief, the Appellant addressed the justiciability/mootness ruling in Part I.I of her brief which again consisted of only four paragraphs and a page and one-half of text. *See*, Appellant's Reply Brief, pp. 19-20. In that brief, the Appellant attempted to distinguish the cases of *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640 (1977) and *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). The Appellant argued that *Smalls* is distinguishable because "it concerned immunity under the Federal Longshoremen's Act and whether a party's status as a 'permissive user' could circumvent immunity under the Federal Longshoremen's Act." *See*, Appellant's Reply Brief, p. 19. The Appellant argued that *Cobb* was distinguishable because there was a reservation in the covenant not to execute to collect against the UIM carrier. *See*, Appellant's Reply Brief, p. 20.

The Appellant, however, never made the arguments that she now makes for the first time in her Petition for Rehearing. There was no mention of "two types of indemnity" or that the trial court applied the wrong type of indemnity. There was no argument that *Smalls* and *Cobb* were incorrectly decided or failed to correctly apply the decision in *Travelers Ins. Co. v. Allstate Ins. Co.*, 249 S.C. 592, 155 S.E.2d 591 (1967). There was no argument that the trial court's decision is at odds with *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995). In fact, neither the *Ackerman* decision nor the *Travelers* decision were even cited in the Appellant's appellate briefs nor do those decisions appear in the Record on Appeal as having been argued at any stage in the trial court.

In short, this case presents a classic example of using a petition for rehearing as a vehicle to re-litigate the case that was just lost – to take a second bite at the proverbial apple by submitting 20+ pages of new arguments where previously two pages was thought sufficient. That is clearly not the

intent or purpose of the rules governing petitions for rehearing nor permissible under South Carolina appellate practice.

## II. This Court correctly affirmed the trial court's ruling that the Appellant's claims for declaratory relief were no longer justiciable as a result of the Covenants Not to Execute entered in favor of the Defendants Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland, and Jerry Speissegger.

In addition to the preservation problems discussed above, the Appellant's new arguments are based on erroneous readings of prior cases, misperceived changes in the law, and flawed reasoning. In effect, the Appellant tries to confuse the issues and existing case law to suggest *Smalls* and *Cobb* do not provide the proper foundation for this Court's ultimate ruling.[1]

To start, the Appellant relies on the notion that there are "two types of indemnity," those being "indemnity against liability" and "indemnity against loss." The Appellant then argues that this Court treated the insuring agreement in the IRF Tort Liability Policy and the language of Section 1-11-460 as "indemnity against loss" provisions, meaning that the IRF's and SFAA's indemnity responsibilities are to reimburse a judgment debtor's loss only when that loss is actually paid by the insured/judgment debtor. That is simply contrived. There is no indication that this Court treated the indemnity provisions at issue as "indemnity against loss" provisions.

The Appellant makes that argument in an effort to discredit the *Smalls* and *Cobb* decisions. By her reasoning, the holdings in *Smalls* and *Cobb* are based on the Supreme Court's decision in *Travelers Ins. Co. v. Allstate Ins. Co.*, 249 S.C. 592, 155 S.E.2d 591 (1967), and if *Travelers* addressed an "indemnity against loss" provision, then *Smalls* and *Cobb* were decided incorrectly.

[1] By way of example, the Appellant repeatedly makes the bald statement that the concept that a liability insurer stands in the same legal position as its insured is a concept limited to the "subrogation context." Not surprisingly, no authority has been cited for that incorrect proposition at each point in her petition where it is reiterated. In fact, none of the cases discussed in this litigation with that holding including *Smalls* and *Cobb* are subrogation cases.

Notwithstanding the fact that the Appellant never argued against precedent in her briefs or at oral argument, the Appellant's new argument fails because it is she that is misreading *Travelers* – not this Court or the courts in *Smalls* and *Cobb*.

The Supreme Court in *Travelers* recognized that "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." *Travelers*, 155 S.E.2d at 593. The opinion does not recite the insuring agreements in the Travelers or Allstate policies at issue. But the opinion does cite to the Motor Vehicle Financial Responsibility Act, specifically Section 46-750.32 of the 1962 Code, which "requires a [motor vehicle] liability policy to protect the insured 'against loss from the liability imposed by law for damages arising out of the ownership,' etc." *Id*.[2] The Appellant contends that the 1962 Code required insurance "against loss," and that is no longer the law and liability policies today do not insure "against loss." In truth, the modern-day successor to Section 46-750.32 of the 1962 Code is Section 38-77-140(A) of the 1976 Code, which states:

> (A) An automobile insurance policy may not be issued or delivered in this State to the owner of a motor vehicle or may not be issued or delivered by an insurer licensed in this State upon a motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the persons defined as insured *against loss from the liability imposed by law for damages arising out of the ownership*, maintenance, or use of these motor vehicles within the United States or Canada ….

S.C. Code Ann. § 38-77-140(A). (Emphasis added). Importantly, the same "against loss" language from the 1962 Code as cited in *Travelers* is still included verbatim in Section 38-77-140(A). The italicized language is the verbatim language cited in *Travelers*. No court has held that Section 38-

[2] Note that the Appellant in her Petition for Rehearing does not provide the full quote from Section 46-750.32 and cuts off the quote at the word "loss" to try to give the inaccurate perception that the statute required insurance "against loss" rather than "against loss from the liability imposed by law for damages." The Appellant even placed emphasis on the word "loss" in the incomplete quotation. *See*, Petition for Rehearing, p. 10.

77-140(A) or its predecessor requires an automobile liability policy to include an "indemnity against loss" provision whereby an insured must first pay a loss before being reimbursed or indemnified. To the contrary, that statutory language, like all liability insurance policies, is construed as "indemnity against liability" policies. The *Travelers* case is no different: it involved two liability policies with "indemnity against liability" provisions. *Travelers* is only unique in today's jurisprudence because it pre-dated the Uniform Contribution Among Tortfeasors Act and applied the prevailing common law at that time that the release of one joint tortfeasor released all joint tortfeasors. That is why the Supreme Court in *Travelers* ruled that Bessinger's liability as a joint tortfeasor was extinguished when the insurer for the other joint tortfeasors (Reichold and DeLoach) paid the entire judgment.

What is key from that case – and still valid today – is the following: when an insured's liability is extinguished, the insurer's liability is also extinguished. That is because "each insurance carrier is in the same legal position as its insured." *Travelers*, 155 S.E.2d at 596. That is the holding from *Travelers* that was later cited with favor in *Smalls* and *Cobb*, and which this Court also relied on in its decision in the case at bar. In *Cobb*, the plaintiff (Cobb) entered a covenant not to execute in favor of the defendant (Benjamin), and this Court ruled as follows: "When Cobb removed the obligation to pay a judgment from Benjamin, she also relieved Nationwide of its liability to pay under Benjamin's policy. The trial court was correct in its determination the covenant not to execute relieved Nationwide from liability." *Id*. That holding is not at odds with the *Travelers* decision and remains "good law" despite the Appellant's protestations to the contrary.

Likewise, the Appellant misconstrues and misapplies this Court's decision in *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), which is cited for the first time in the Petition for Rehearing. The Appellant treats *Ackerman* as if it involves third-party

liability insurance. In reality, *Ackerman* addresses only first-party underinsured motorist (UIM) coverage, which probably explains why it was not cited previously by the parties, the trial court, or this Court. The Appellant tries to confuse the issue by writing: "Like the IRF's policy here, the policy in *Ackerman* covered the damages the insured was 'legally obligated to pay.'" *See*, Petition for Rehearing, p. 15. That is simply not true. The UIM policy at issue in *Ackerman* includes the following insuring agreement: "We will pay in accordance with the South Carolina Uninsured Motorists Law all sums the insured is *legally entitled to recover* as damages from the owner or driver of an uninsured motor vehicle...." 456 S.E.2d at 412-413. (Emphasis added). The operative language was "legally entitled to recover" and ***not*** "legally entitled to pay." Again, the reason is obvious – a UIM policy is a first-party policy and *not* a liability policy.

The UIM insurer in *Ackerman* attempted to rely on third-party case law and argue that the covenant not to execute which extinguished the at-fault motorist's liability should also extinguish the UIM insurer's liability, and this Court obviously rejected that argument. However, this Court never ruled in *Ackerman* that the covenant not to execute which extinguished the at-fault motorist's liability did not also extinguish the liability insurer's liability. That is the dispositive issue in the case at bar. *Ackerman* is not controlling or even helpful on that question.

As this Court well knows, the laws governing underinsured motorist cases create a legal fiction whereby the UIM insurer is actually the real party in interest even though the tort action is brought in name alone against the at-fault driver who, by the time the UIM insurer can assume the defense, has settled with the claimant and extinguished the at-fault liability limits in exchange for a covenant not to execute. In such a scenario, this Court recognizes that "the rights of the UIM carrier and the named defendant are not synonymous, and, in fact, may be conflicting." *Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204, 208 (Ct. App. 2003). This Court further

explained:

> [T]he interests of a UIM carrier and a named defendant are separate and distinct. Clearly, once the named defendant has settled for his liability policy limits, he no longer has a stake in the outcome of the litigation. The UIM carrier, on the other hand, still has a viable, financial interest in the case. As a result, the attorney for the UIM carrier represents the carrier and not the named defendant. Even though the UIM carrier "steps into the shoes" of the named defendant, the procedure is not in totality but merely to the point of coverage. Thus, there is no direct relationship between the UIM carrier's attorney and the named defendant.

589 S.E.2d at 209. Moreover, "the UIM carrier's attorney has no control over the named defendant because the attorney represents the insurance company and the named defendant no longer has an interest once a covenant not to execute is entered into with the defendant's liability carrier." *Id*. As a result, as this Court held, "an attorney-client relationship is not established between a UIM carrier's attorney and a named defendant." 589 S.E.2d at 210.

The foregoing discussion from *Crawford* explains why first-party UIM cases such as *Ackerman* are not controlling in third-party liability cases. A UIM policy is not an indemnity contract; it is a first-party contract, and contrary to the Appellant's assertions, a UIM policy does not cover damages that an insured is "legally obligated to pay." In sum, the Appellant's new-found reliance on *Ackerman* is misplaced.[3]

The Appellant engages in other misstatements as well. This Court correctly distinguished *Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (2010), as follows:

> Morris relies on *Fowler v. Hunter* in support of her argument that the Covenants did not extinguish Defendants' liability or render her case moot. *Fowler* is factually distinguishable from the instant case because it involved a *prejudgment* covenant not to execute

[3] While this Court did not address *Ackerman*, this Court did recognize there is an "important factual distinction" between UIM cases and liability/indemnity cases, such as the case at bar, because "the UIM coverage acted as first party coverage for the complainant, not the insured." Slip op. at 4.

> that assigned an insured's pending claim for professional liability against its insurance agent to the plaintiff. *Id.* at 359-60, 697 S.E.2d at 533-34. In *Fowler*, our supreme court held the prosecution of an *assigned* professional negligence claim against the insurer could proceed when a covenant not to execute was entered into. *Id. Fowler* is inapplicable because Morris signed a post-judgment covenant not to execute and this case does not involve the assigned claims.

Slip Op. at 4. (Emphasis in original).[4]

The Appellant argues that this Court is "wrong" in finding that this case does not involve the assigned claims. *See,* Petition for Rehearing, p. 17. This Court is not wrong. This case was brought solely as a declaratory judgment action. In fact, that is precisely how the trial court described the case. (R. 14) ("This is a declaratory judgment action filed by the Plaintiff Nancy Morris …"). The operative Complaint is actually captioned by the Appellant as a "Complaint for Declaratory Judgment." (R. 31). The action was commenced on January 29, 2015, which pre-dates by more than two years the execution of the Covenants Not to Execute. (R. 31). There is no indication that the Appellant brought this action as the assignee of Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland, and Jerry Speissegger. Indeed, those individuals are named as Defendants – rather than as assignees or plaintiffs -- in this action.[5] Moreover, contrary to the Appellant's assertion, the Appellant did not make a claim in this action

[4] There is one clerical error in this quotation. In *Fowler*, the professional negligence claim was allowed to proceed against Insurance Associates, Inc., which was an insurance agency rather than an insurer.

[5] By way of clarification, there is a second lawsuit that was brought by the Appellant. After the filing of this action, the Appellant filed a lawsuit naming only the South Carolina Insurance Reserve Fund which is captioned *Morris v. South Carolina Insurance Reserve Fund*, Civil Action No. 2017-CP-40-6773. (R. 565-582). That action was brought by the Appellant as the assignee of Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland, and Jerry Speissegger, and includes causes of action for breach of contract, negligence, and bad faith. The IRF received summary judgment in that action, and that decision is also currently on appeal.

for actual and punitive damages. The "Complaint for Declaratory Judgment" seeks just that – only declaratory relief.

Thus, the Appellant has not shown any error in this Court's analysis of the *Fowler* case. Just as this Court observed, *Fowler* is inapplicable to the case at bar because *Fowler* involved a pre-judgment covenant not to execute and the prosecution of the assigned claim, while in contrast, this case involves a post-judgment covenant not to execute and no adjudication of any assigned claims.

## III. The Appellant is mistaken in her argument that public policy considerations exist that warrant a rehearing.

Finally, the Appellant offers a myriad of reasons why she believes this Court's decision is "bad law" or creates "bad policy" that will be "confusing to the bar and bench." However, this Court has chosen not to publish this opinion, and as a result, it is not precedent on which bar or bench may rely. *See*, *Ford v. Beaufort County Assessor*, 398 S.C. 508, 730 S.E.2d 335, 339, n.3 (Ct. App. 2012) (recognizing that unpublished appellate opinions are not binding authority). *See also*, Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved"). Moreover, the Appellant hypothesizes about a litany of fact patterns and issues different from the case at bar and suggests, with no valid basis, that this case will impact future litigation. That argument is simply meritless.

In sum, the Court correctly affirmed the judgment entered in the court below. The Respondents, therefore, respectfully request that this Court deny the Appellant's Petition for Rehearing.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

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July 10, 2023

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APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2020-00719
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Nancy Morris, as Personal Representative of the Estate of David Allan Woods, ..... Appellant,

v.

State Fiscal Accountability Authority, South Carolina Insurance Reserve Fund, Andrew J. Bland, Richard T. Burkholder, Leemon E. Carner, Priscilla Bland, Jerry Speissegger, Jr., ..... Respondents.

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**CERTIFICATE OF SERVICE**

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Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Respondents State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund, does hereby certify that service of the **Return to Appellant's Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 10th day of July 2023 as follows:

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Thurmond Kirchner & Timbes, P.A.
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*s/ Andrew F. Lindemann*

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SC Court of Appeals

July 10, 2023

***Via Email Only***
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Nancy Morris, as Personal Representative of the Estate of David Allan Woods v. State Fiscal Accountability Authority, South Carolina Insurance Reserve Fund, Andrew J. Bland, Richard T. Burkholder, Leemon E. Carner, Priscilla Bland, Jerry Speissegger, Jr.
Appellate Case Number: 2020-000719
Our File Number: 104.9622

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court' s Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended May 6, 2022), please find enclosed for filing the **Return to Appellant's Petition for Rehearing** in the above referenced matter. In accordance with Section (d)(1) of this same Order, I am hereby serving a copy on Appellant's counsel.

If you have any questions, please advise.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Thomas J. Rode, Esquire *(w/ Enclosure, Via Email Only)*
Andrew W. Creech, Esquire *(w/ Enclosure, Via Email Only)*
Harold C. Staley, Esquire *(w/ Enclosure, Via Email Only)*
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