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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

**RECORD ON APPEAL
VOLUME II**

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INDEX

- VOLUME I -

I. ORDERS

Order on Declaratory Judgment filed July 23, 2019.....	1
Amended Order on Declaratory Judgment filed March 26, 2020	13

II. PLEADINGS

Summons & Complaint filed January 29, 2015.....	30
Exhibit A – Judgment of United States District Court for the District of South Carolina filed October 21, 2014	40
Exhibit B – Order of United States District Court District for the District of South Carolina filed December 31, 2014.....	42
Exhibit C – Order of United States District Court for the District of South Carolina filed January 15, 2015.....	75
Exhibit D – Part 1: IRF Tort Liability Insurance Policy.....	92
Part 2: Declaration Page.....	100
Exhibit E – SC Budget and Control Board Policyholder’s Manual.....	102
Answer filed March 30, 2015	144

III. SUMMARY JUDGMENT MOTIONS AND MEMORANDA

Plaintiff’s Motion for Summary Judgment filed November 19, 2015.....	154
Exhibit A – Declaration Page & IRF Tort Liability Insurance Policy.....	169
Exhibit B – SC Budget and Control Board Policyholder’s Manual	170
Exhibit C – (portions)	171
Defendants’ Affidavit of Anne Macon Smith filed February 17, 2016.....	282
Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, filed February 18, 2016	285

Attachment 1 – Judgment of United States District Court for the District of South Carolina filed October 21, 2014	300
Attachment 2 – United States District Court for the District of South Carolina Jury Verdict Form filed October 17, 2014.....	301
Attachment 3 – Order of United States District Court for the District of South Carolina filed March 23, 2015.....	305
Attachment 4 – Trial Transcript, Volume 1, October 14, 2014 (pages 1, 638, 629).....	310
Defendants’ Notice of Motion and Cross-Motion for Summary Judgment filed March 16, 2018.....	313
Plaintiff’s Memorandum in Support of Plaintiff’s Motion for Summary Judgment filed March 20, 2018.....	316
Attachment – Transcript of Deposition of Christopher M. Lombard Dated September 7, 2017	327
Plaintiff’s Memorandum in Opposition to Defendants’ Motion for Summary Judgment filed March 20, 2018	391
Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment filed March 21, 2018.....	392
Attachment 1 – Judgment of United States District Court for the District of South Carolina filed October 21, 2014 (duplicate)	408
Attachment 2 – United States District Court for the District of South Carolina Jury Verdict Form filed October 17, 2014 (duplicate)	409
Attachment 3 – Trial Transcript, Volume 1, October 14, 2014 (pages 1, 638, 629) (duplicate)	410
Plaintiff’s Memorandum of Law in Response to Defendants’ Memorandum in Support of Cross-Motion for Summary Judgment filed March 26, 2018	411

- VOLUME II -

IV. SUMMARY JUDGMENT HEARING TRANSCRIPT

Transcript of Record for Hearing dated March 26, 2018.....	417
Transcript of Record for Hearing dated October 3, 2019	458

V. POST-JUDGMENT MOTIONS

Defendants’ Notice of Motion and Motion to Alter or Amend filed August 2, 2019	535
Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Alter or Amend Order filed September 11, 2019	549

VI. MISCELLANEOUS MOTIONS, ORDERS, AND OTHER ITEMS

Plaintiff’s Motion for Substitution filed March 26, 2018	560
Order of Substitution filed March 27, 2018.....	563
Amended Complaint, Civil Action No. 2017-CP-40-06773 filed November 29, 2017	565
Notice of Appeal filed April 21, 2020	583
Certificate of Appellant.....	586

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF RICHLAND
4 -----x
5 NANCY MORRIS, as Personal)
6 Representative of the)
7 Estate of David Allan)
8 Woods,)
9 Plaintiff,)
10 vs.) Transcript of Record
11 STATE FISCAL) 2015-CP-40-00619
12 ACCOUNTABILITY AUTHORITY,)
13 et al.,)
14 Defendant.)
15 -----x
16 March 26, 2018
17 B E F O R E:
18 The Honorable Alison Renee Lee, Presiding Judge
19 A P P E A R A N C E S:
20 Andrew C. Creech, Esq.
21 Attorney for the Plaintiff
22 Andrew F. Lindemann, Esq.
23 Attorney for the Defendant
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I N D E X

	PAGE
Argument by Mr. Creech	3
Argument by Mr. Lindemann	11
Further Argument by Mr. Creech	32
Further Argument by Mr. Lindemann	37

E X H I B I T S

(None.)

P R O C E E D I N G S

(Whereupon, the following proceedings commenced as follows:)

THE COURT: We are here on Nancy Morris, as personal representative of the estate of the David Allan Woods versus the South Carolina Budget and Control Board and the South Carolina Insurance Reserve Fund and individuals. The plaintiff is represented by Thomas Pope and Garrett Johnson.

MR. CREECH: Andrew Creech, Your Honor.

THE COURT: I'm sorry. Andrew Creech. Change-up on me.

And the defendant's represented by Andrew Lindemann.

We're here on cross-motions for summary judgment. I have had the opportunity to look at the motions as well as the memoranda. Yesterday, I received some additional documentation. I think Plaintiff has a motion to substitute the proper parties since the Budget and Control Board no longer exists, to change it to the State Fiscal Accountability Authority. Is that correct?

MR. CREECH: Yes, Your Honor.

THE COURT: Mr. Lindemann, is there any objection to that?

MR. LINDEMANN: There's not, Your Honor. Plus Judge Hood issued an order late yesterday granting that motion.

THE COURT: Okay. So --

MR. LINDEMANN: That's my understanding.

THE COURT: It probably got copied to me as well as it

1 was e-filed, I would suspect. Then I don't need to deal with
2 that particular issue. Great. Thank you.

3 We'll start off by hearing the plaintiff's motion, and
4 then I'll hear the defendant's motion, and you-all can make
5 your arguments on the cross-motions at the time you present
6 your matters.

7 MR. CREECH: Thank you, Your Honor. May it please the
8 Court. Again, my name is Andrew Creech. I represent the
9 plaintiffs in this matter.

10 As you know, this is a declaratory judgment action with
11 cross-motions for summary judgment. I think both sides agree
12 there are no real issues of material fact existing at this
13 point. We are here today to ask the Court to interpret and
14 apply Statute 111-460.

15 THE COURT: And that's basically the only thing that I'm
16 charged with at this particular point because there's no
17 dispute as to the facts otherwise.

18 MR. CREECH: Yes, ma'am. That's correct.

19 Just to give you a little bit of background of the
20 underlying case before we get to the statute itself --

21 THE COURT: I'm familiar with a good portion of it, but
22 you can briefly describe it, if you'd like.

23 MR. CREECH: Thank you, Your Honor.

24 The underlying case of David Woods was a wrongful death
25 case. We brought a 1983 action against five individual

1 correctional officers for deliberate indifference to medical
2 needs. We tried the case in October of 2014 in federal court.
3 A sizable jury verdict was awarded, both actual damages and
4 punitive damages.

5 After the award, the Court offset the amount of actual
6 damages based on a prior settling defendant. They then
7 awarded a significant amount of attorney's fees and costs.
8 Case went up to the Fourth Circuit. It was affirmed, came
9 back down. Additional costs were paid. And here we are
10 today.

11 After all the dust settled, the total judgment amount
12 against all five defendants was about \$3,040,287.37.

13 THE COURT: And did you take up the issue about whether
14 or not there was more than one occurrence that occurred?

15 MR. CREECH: That was not taken up in the Fourth Circuit.
16 That is being argued today. That's one of the arguments
17 today.

18 THE COURT: Okay. And so it wasn't raised at all before
19 the trial court.

20 MR. CREECH: The occurrence issue was not raised in the
21 underlying case, no, ma'am.

22 THE COURT: Okay. Because that's generally where it's
23 raised, is before the trial court before the judgment's
24 entered. Okay.

25 MR. CREECH: So we're here today to ask the Court, based

1 on the underlying facts that the judge -- for the judgments,
2 \$3,040,000 to apply 111-460. It's our position that Statute
3 111-460 is an excess coverage statute that has been enacted by
4 the legislature to apply in very limited circumstances, which
5 this case meets.

6 The statute -- I think before we -- first, we need to
7 talk about, I think, why the statute was enacted. I think the
8 legislature has a history of protecting governmental employees
9 from liability. And we know that through the implementation
10 of state court claims act. That act, number one, prohibits
11 government employees from being sued in their individual
12 capacity; we can only sue the entity. And it limits the
13 amount of liability that the entity can have.

14 That only applies, though, as we know, to state court
15 claims. And so there's a gap in this protection for
16 government employees. And so in response to that gap in
17 protection, the legislature enacted 111-460 to provide further
18 protection in civil rights cases, and that's what we have here
19 today.

20 I think our argument that basically it's an excess
21 covered statute is further supported by the budget control --
22 formally the Budget Control Board's policyholder manual for
23 which they gave their insureds. We submitted that as an
24 exhibit to our motion as Exhibit B.

25 And if you look at it, that's the 2011 policyholder

1 guide. The policy period in this case is 2010, but the
2 defendants have stipulated that the language is the same.
3 They just couldn't find the 2010 version, but the language is
4 the same. And what's important in that policyholder guide,
5 which the IRF or the budget control board is telling their
6 insureds about their coverage that they purchased, is it
7 mentions, on page 9 of the policyholder guide, it talks about
8 tort liability insurance, and it first notices that the IRF
9 offers primary coverage of 600,000 and a million, and it's up
10 to the insured to choose what amount they want.

11 Then it goes into excess coverage in that same part, page
12 9. It says excess. And it recites the language of the
13 statute in 111-460.

14 And so it's Plaintiff's position, if you meet the
15 criteria as set forth in the statute, then payment has to be
16 made. And we believe that we have met the criteria. We know
17 that we have judgments in excess of a million dollars. It's a
18 million-dollar threshold. The judgments were rendered
19 pursuant to 1983. The judgments were rendered against these
20 employees in the course and scope of employment, and as such,
21 payment needs to be made.

22 I can go ahead and -- the defense argues, Your Honor,
23 their main -- they have got various arguments, but the crux of
24 their main argument is that this is a discretionary statute
25 that basically they have the discretion to pay the -- to use

1 this statute any time that they want to or not use it whenever
2 they want to. And it's our position that that kind of falls
3 on the face of reason. The legislature enacted the statute
4 for you for a purpose. We deposed -- we did a 30(b)(6)
5 deposition, which was binding testimony on behalf of the
6 agency. Chris Lumbert was the assistant director of claims,
7 and he testified on behalf of the Agency. And I asked him, I
8 said, What are the criteria that the Agency uses to pay these
9 claims? When would you pay it? He couldn't tell me. The guy
10 had no idea.

11 And so, you know, any decision that they would use to
12 either make or not use is outside of the statute would be
13 arbitrary and capricious. And so it's the insured's -- it's
14 the plaintiff's position we have met the criteria under the
15 statute, and we ask that the Court order payment.

16 Then that asks -- begs the question, okay, how much
17 ordered to be paid? We have an outstanding judgment of
18 3 million -- sorry; 3,040,280 -- I'm sorry; we have a total
19 judgment of \$3,040,287. Based on the \$1 million threshold and
20 the statute, I think we have to deduct a million dollars from
21 that total amount. Okay? So that then leaves us 2,040,287.

22 THE COURT: Does that include the punitives?

23 MR. CREECH: It does, yes, ma'am. And I could address
24 that in a moment if you wish me to.

25 The IRF has paid 400-and-some-thousand dollars in

1 attorney's fees and costs. We believe that the equitable
2 thing to do is further reduce that \$2,040,287, further reduce
3 it by the amount that they have already paid for attorney's
4 fees and costs, and that would render us a total amount to be
5 paid under -- pursuant to the statute of \$1,621,875.

6 With regard to punitive damages, it does -- it does
7 include punitive damages, Your Honor. The statute talks about
8 judgments. That is the word used within the statute. And as
9 we know, punitive damages are included within a judgment. And
10 so we believe that the legislature intended to -- intended
11 that when they granted the legislation.

12 Furthermore, the IRF has already paid us in this case, I
13 want to say, in excess of \$400,000 in punitive damages. They
14 have already paid punitives. So to sit here and say that they
15 don't -- that they shouldn't pay punitive damages, they have
16 already done it. And so I just -- I think that argument falls
17 flat.

18 Additionally, this argument that they weren't acting in
19 the course and scope, this case is six years old. That's the
20 first time we have ever heard that argument. The case was
21 never defended on a reservation of rights. The defense in the
22 underlying case stipulated that they are acting under the
23 cover of state law.

24 Additionally, as a prerequisite to payment under the
25 liability policy, you have to show that the defendants were

1 acting until the course and scope. That is a requisite for
2 payment of the policy. And they paid. They have already paid
3 that. So I think they're estopped from even arguing that.

4 I'm not sure what other arguments he has. I'll be happy
5 to address them in rebuttal or answer questions that the Court
6 has.

7 THE COURT: Is the issue ability the number of
8 occurrences or whether it's one occurrence or -- is that
9 something that needs to be discussed pursuant to the statute
10 or is it your position that simply it doesn't make any
11 difference?

12 MR. CREECH: The occurrence issue is separate and
13 distinct from the argument statute. We believe that, in
14 addition to payment being owed under the statute, that the
15 underlying facts have determined that they were -- that they
16 were five different occurrences. David Woods' death occurred
17 over a period of several days. During that time period, each
18 individual officer had their own individual interactions with
19 him, and they were each individually and deliberately
20 indifferent to his medical needs.

21 You're right that that was not decided in the underlying
22 case, but we do feel that it is proper that the Court can make
23 that determination in a declaratory judgment action based on
24 the facts that we know, the undisputed facts.

25 THE COURT: Thank you.

1 Yes, sir, Mr. Lindemann.

2 MR. LINDEMANN: Thank you. May it please the Court.

3 Andrew Lindemann on behalf of the defendants.

4 Your Honor, let me start with just drawing a couple of
5 distinctions for you. The plaintiffs are trying to take the
6 position that 111-460 is an excess insurance policy. There is
7 no excess insurance policy that has been issued by the
8 Insurance Reserve Fund. There is a general tort liability
9 policy that was issued to Berkeley County. That particular
10 policy was a \$600,000 limit policy. It also provided
11 supplemental payments, coverage for such things as attorney's
12 fees and post-judgment interest. So the amount that has been
13 paid -- and there's a partial satisfaction of judgment that
14 was entered in federal court after the appeal to the Fourth
15 Circuit was complete and it's attached to the plaintiff's
16 motion, so I'm not going to hand up another copy. That
17 particular partial satisfaction of the judgment lays out what
18 exactly was paid by the Insurance Reserve Fund. And they paid
19 \$600,000 of coverage, which included the remaining 171 of
20 actual damages that were awarded jointly and severally against
21 all five of the correctional officers, as well as a pro rata
22 share of the punitive damages awards against those four --
23 five individuals up to the \$600,000. And then the difference
24 in the amount, because it was a little over a million dollars
25 that was ultimately paid, was attorney's fees, post-judgment

1 interest, and then attorney's fees as well on appeal.

2 So that is what has been paid. That's been paid by the
3 Insurance Reserve Fund. That's been paid pursuant to a
4 policy.

5 111-460 is not an insurance policy. It doesn't create an
6 insurance policy. The Insurance Reserve Fund has never, and
7 certainly did not in this instance, issue any type of excess
8 insurance policies.

9 Before I get to a couple of judiciability issues, too, I
10 want to point out to the Court that they want to treat this as
11 one judgment, and when they talk about judgment, they add in
12 all of the attorney's fees and costs and post-judgment
13 interest. Well, that's not the case. What the lower court
14 entered was five different judgments. The actual damages was
15 jointly and severally awarded against the five individuals,
16 but the punitive damages were not, for obvious reasons, and we
17 actually attached the page from Judge Kirkle's (ph) colloquy
18 with counsel explaining why he would not treat those as one
19 joint award of punitive damages. So, in reality, what you're
20 looking at here is five separate judgments, one against each
21 of the five correctional officers.

22 But let me turn -- there are a couple of judiciability
23 issues that I believe the Court needs to focus on initially,
24 since that goes to jurisdictional issues. Number one,
25 clearly, 111-460 places some authority -- and, obviously, the

1 decision for this Court is whether it's discretionary
2 authority or some type of mandatory authority, but I would
3 submit to the Court that plaintiffs have not pursued a writ of
4 mandamus, but that authority, within the State fiscal
5 accountability authority.

6 What is undisputed in this case is no request was ever
7 made by the five correctional officers, and those are the five
8 individuals who would have standing to go before the SFAA and
9 ask for indemnity of any type of excess judgment that hasn't
10 been paid pursuant to the insurance coverage. No request as
11 ever been made to the SFAA. There's no decision by the
12 authority that's before this Court to make a determination.
13 They have now tried to interject into this case due process
14 type of arguments which, number one, is totally premature
15 because, as I indicated, SFAA has never taken this up, has
16 never issued any type of decision, has never exercised any
17 type of discretion, because they have never been asked to. So
18 this whole issue is premature for that reason.

19 Number two, Your Honor, as we have argued in our brief,
20 there was a recent change in circumstances in this case. The
21 plaintiff, Ms. Morris, filed a separate lawsuit in this court.
22 And it's Civil Action No. 2017-CP-40-6773. And that was --

23 THE COURT: 60 --

24 MR. LINDEMANN: 6773. And it's cited in our memorandum
25 of law. And in that amended complaint where they have sued

1 the South Carolina Insurance Reserve Fund, they have alleged
2 that the five officers have assigned their rights to the
3 plaintiff for any claims against the Insurance Reserve Fund.
4 But what's significant is not the assignment. What's
5 significant is what these officers received in consideration
6 for that assignment, and that was covenants not to execute.

7 I ask the Court, in my memo, to take judicial notice of
8 the documents that were attached to that amended complaint, if
9 I can hand up a copy to the Court. What those show, Your
10 Honor -- and that's Exhibit B, I believe, to the amended
11 complaint in the 2017 action. And what's significant in that
12 particular -- those particular documents, like I said, it's
13 not the assignment but it's what the plaintiff has given in
14 return for the assignment, and that is, they specifically
15 state in there that plaintiff hereby covenants not to execute
16 against any assets of the undersigned.

17 And why that's significant, Your Honor -- and we have
18 cited two cases to the Court in our memo -- the State v.
19 Blackman case and, more important -- I'm sorry, Smalls v.
20 Blackman case and the more important case of Cobb v. Benjamin,
21 which make it very clear in South Carolina that a liability
22 policy is a contract of indemnity.

23 So the tort liability policy that was issued by the
24 Insurance Reserve Fund is a contract of indemnity. In
25 addition to that, Your Honor, 111-460, while it's not an

1 insurance policy and it's not a contract, it's an indemnity
2 statute. And as an indemnity statute, it would be along the
3 same lines as a contract of indemnity for the purpose of what
4 these two cases stand for, and these two cases stand for the
5 proposition, Your Honor, that a liability carrier -- or, in
6 this particular case, the SFAA as the potential indemnitor --
7 stands in the shoes of the insured. If the insured is not
8 personally liable for the judgment, then the carrier cannot be
9 personally -- cannot be liable for the judgment. Or in the
10 case of 111-460, the SFAA cannot be obligated to pay in any
11 respect the judgment. And that is a change that has occurred
12 recently because of these assignments that were given in
13 exchange for covenants not to execute.

14 The covenants not to execute make it very plain that
15 these five correctional officers no longer have any liability
16 to the plaintiff. And if they don't have any liability to the
17 plaintiff, under Smalls and Cobb, neither does the Insurance
18 Reserve Fund and neither does the SFAA.

19 And what's interesting about the Cobb case is that really
20 illustrates it well. In Cobb, the parties didn't realize that
21 there were two liability carriers on the risk, and there was a
22 settlement with one liability carrier -- I believe Auto
23 Owners. Auto Owners paid a certain amount for a covenant not
24 to execute. The plaintiff gave the covenant not to execute to
25 the tortfeasor, who was Auto Owners insured. Well, Nationwide

1 also had a policy of coverage -- of liability -- liability
2 policy that would have covered the tortfeasor. And so the
3 issue was whether or not the plaintiff was able to execute on
4 a judgment against Nationwide. And, ultimately, this is what
5 the Court of Appeals said. They said, When Cobb removed the
6 obligation to pay a judgment from Benjamin, she also relieved
7 Nationwide of its liability to pay under Benjamin's policy.
8 The trial court was correct in its determination, the covenant
9 not to execute, relieved Nationwide from liability.

10 Well, the same is true here in this case. When they gave
11 a covenant not to execute to the five officers, that relieved
12 any type of obligation that there may be for the Insurance
13 Reserve Fund, for additional insurance under the tort
14 liability policy that they're claiming by arguing multiple
15 occurrences, but also, under 111-460, against the SFAA.

16 So our position initially is this case is not judicial
17 for two reasons. Number one, there's never been a request
18 made to the SFAA under 111-460. But in addition to that,
19 because of these covenants not to execute, Your Honor, that
20 has mooted out this case. There is absolutely no liability on
21 the part of the Insurance Reserve Fund or the SFAA because the
22 insureds themselves or the potential indemnitees themselves --
23 five officers -- are no longer personally liable for any
24 amount of money whatsoever to the plaintiff.

25 So that could dispose of the entire case. If it does

1 not, what I want to do next is address what 111-460 actually
2 means. That's the declaratory judgment action that the
3 plaintiff has brought.

4 The key language in 111-460 is the phrase "is authorized
5 to pay." It says, "The State Fiscal Accountability Authority,
6 through the division of insurance or services, is authorized
7 to pay judgments against individual governmental employees and
8 officials in excess of \$1 million," and then proceeds on.

9 So the question is, what does "is authorized to pay"
10 mean? Is it mandatory or is it discretionary? I think it's
11 very interesting, as I indicated earlier, that there's no writ
12 of mandamus that's pending before this Court.

13 Our position, which would be, obviously, the way to
14 pursue a claim that they were contending it was mandatory.
15 But our position is "is authorized to pay" intended to bestow
16 discretionary authority on the SFAA. We cited in our brief a
17 number of cases. The United States Supreme Court, from
18 several federal courts, and the South Carolina -- and a fairly
19 old South Carolina court, using that type of language "is
20 authorized to pay" and all of those courts determined that
21 that provided discretionary authority.

22 We also cited -- what's interesting is a lot of states
23 have indemnity statutes.

24 THE COURT: So are you saying that it's still
25 discretionary even if there's a request made?

1 MR. LINDEMANN: If there's a request made, the SFAA, we
2 would submit, under this statute, has the discretion as to how
3 they handle that request and how they respond to that request
4 and whether they grant it or not. It's discretionary
5 authority that's been bestowed upon the SFAA.

6 One of the cases that I cited to -- that I think is
7 interesting is a case called Wilcox v. Tennessee District
8 Attorneys General Conference. It's a federal case from 2002
9 out of the Eastern District of Tennessee. And they were
10 interpreting a Tennessee statute that provides for indemnity
11 in a similar manner. And that particular statute uses the
12 words "the board of claims is authorized to pay final
13 judgments for state employees." It uses the words "is
14 authorized to pay."

15 And the federal court, in interpreting that statute,
16 found that it was entirely discretionary, that there was no
17 requirement that the judgment be paid. That's how they
18 interpret "is authorized to pay."

19 Perhaps the strongest argument I have, as far as the "is
20 authorized to pay" language being discretionary is if you look
21 at the statute that immediately precedes 111-460, which is
22 111-440, part of the same chapter -- Chapter 11 of Article 1
23 of the South Carolina Code of Laws. And it's a provision
24 providing for the defense and indemnity of members of the
25 fiscal accountability authority, the director of the

1 Department of Administration. So it is part of the same
2 statutory scheme. Like I said, it's the very next statute
3 after -- or the statute right before 111-460. And in that
4 particular statute, the General Assembly uses such language as
5 "must defend," "must indemnify," and it's used repeatedly. So
6 that is a clear indication, I would submit to the Court, that
7 the General Assembly, when they intended to make
8 indemnification mandatory, they knew how to do it and the
9 language that they would use to do it was "must indemnify."
10 It's "authorized to pay" must mean something different. The
11 plaintiff wants to contend or does contend that "is authorized
12 to pay" is the equivalent of "must indemnify." Well, if
13 that's the case, the General Assembly would have used the
14 words "must indemnify." So there's got to be a difference in
15 the lingo. There's got to be a different meaning.

16 And "is authorized to pay" based on the other case law
17 that I submitted to the Court, the Wilcox case out of
18 Tennessee shows that the intent of the General Assembly in
19 enacting 111-460 was to create a discretionary system.

20 Now, the plaintiff, in their recent filing, is trying to
21 interject, Your Honor, an issue that's not before the Court,
22 never was pled before the Court, suggesting that somehow
23 there's a due process component to this case. They have never
24 pled the due process claim. I don't know how they would plead
25 the due process claim when they have never or when the five

1 officers never made a claim to the SFAA to contend -- I don't
2 know how you contend you were denied due process when you
3 never sought any type of ruling or any kind of decision --
4 discretionary decision from the SFAA.

5 But they tried to interject that into this case by
6 suggesting that Your Honor should be swayed in how you
7 interpret the statute by the fact that there are no policies
8 and procedures that are in place in terms of how this was
9 handled once a request was made.

10 Well, I would submit to Your Honor that's flawed in
11 several ways. Number one, it's flawed because no request has
12 never been made. We have submitted an affidavit actually two
13 years ago when this motion first came up in front of Judge
14 Manning of Ann Macon Smith, who is the head of the Insurance
15 Reserve Fund or head of the claims for the Insurance Reserve
16 Fund, and she indicated that they never had this issue arise
17 before.

18 So, obviously, that explains to some degree why there's
19 no history there. But more importantly, Your Honor, it's
20 totally premature to argue due process-type issues because the
21 Court isn't even in a position at this point to make a
22 determination whether due process applies to this. We would
23 submit that the statute doesn't create any type of
24 entitlement. It doesn't create any kind of property right.
25 Due process only attaches to property rights, property

1 interests, or liberty interests. And in this particular case,
2 Your Honor, there's no indication that that is what the
3 General Assembly intended with the 111-460. So we believe
4 that that argument that was just interjected just recently
5 with the submittal last week is totally premature and actually
6 inappropriate.

7 A couple of other points real quickly, Your Honor, on
8 111-460. Even if Your Honor were to agree with the
9 plaintiff's position, we would submit that the plaintiff
10 cannot -- has not shown that they can recover under 111-460.
11 111-460 has spilled into the statute several requirements to
12 be a qualifying judgment. Number one, the judgment has to
13 exceed \$1 million. For three of the correctional officers,
14 the judgment never exceeded \$1 million. Three of the
15 correctional officers shared the \$171,000 actual damage award
16 jointly and severally and got hit with \$150,000 in punitive
17 damages each. So those judgments for those three officers,
18 which were Andrew Bland, Leland Garner, and Jerry Spicinger,
19 they did not meet the \$1 million threshold. Richard
20 Burkeholder and Patricia Bland got hit with not just their
21 share of the actual damages but also a million dollars each in
22 punitive damages. So those would meet the \$1 million
23 threshold.

24 But the analysis doesn't stop there, Your Honor. There's
25 several other requirements. Number one, there must be proof

1 that the judgment itself was entered against those
2 correctional officers for actions taken within the scope of
3 their employment. That's the language used in the statute:
4 "Scope of employment."

5 Well, Your Honor, just as Your Honor's touched on the
6 fact that the issue of occurrences wasn't dealt with in the
7 underlying case, neither was the issue of scope of employment.

8 Now, I find that interesting that the plaintiff is
9 arguing that -- Court's indulgence -- that I have raised that
10 issue for the first time just recently and somehow that should
11 be -- we should be estopped. But that's clearly not the case.
12 The memorandum of law submitted to the Court is very similar
13 to the memorandum of law that I submitted to Judge Manning
14 back in February of 2016. It raised this exact issue.

15 But more importantly, Your Honor, my answer or the
16 defendant's answer, which was filed on March 30, 2015, raises
17 this exact issue. And if you look at paragraph 39 of that
18 answer, it says -- and if you don't mind me reading it to the
19 Court -- "The defendant submitted that the judgment was
20 entered in the underlying federal case," but it says -- go on
21 to say, then, "But upon information and belief, the
22 defendants, BCB and South Carolina Insurance Reserve Fund, are
23 not aware of any specific factual finding by the jury that
24 these individuals were acting at all times within the scope of
25 their employment. The defendant specifically object to any

1 attempt by the plaintiff to relitigate any factual questions.
2 This could have been litigated in civil action number," and
3 then gives the federal civil action number.

4 So we raised the issue actually in our answer, so this is
5 not something that was just dropped on them recently as he
6 suggested -- Mr. Creech suggested. And it's a legitimate
7 point.

8 Your Honor, there's plenty of case law in South Carolina.
9 In fact, one of the main cases the Prigam (ph) versus Ward,
10 which is a case I unfortunately lost in front of the Court of
11 Appeals. But in that particular case, the South Carolina
12 Court of Appeals found that the actions of the correctional
13 officials in that particular case, even though the actions
14 that were challenged took place at work, related to work, but
15 they found that, in response to our argument that it was all
16 covered by a scope of official capacity and therefore the
17 defendant, who was an individual and not the Department of
18 Corrections, could not be sued under the tort claims act, they
19 rejected that argument. They rejected that argument by
20 finding that there was some evidence of personal motivation.

21 So the simple fact that this case proceeded to judgment
22 in federal court does not mean that there was a determination
23 that these officers were acting within the scope of
24 employment. That was never determined in the underlying
25 court.

1 Now, the plaintiff, probably recognizing this weakness in
2 their case, the fact that they never proved that, never got
3 and established that -- and incidentally, we have cited in our
4 brief and cases, one of which I know Your Honor is familiar
5 with, the AnMed (ph) case that you handled in the lower court,
6 as well as Newsome vs. Auto (ph), you can't relitigate factual
7 issues that should have been litigated in the underlying
8 court. You can't do that as part of a DJ action, and our
9 South Carolina Supreme Court has made that clear both in the
10 AnMed case and actually more specifically in the Newsome case.
11 So it's a little too late to try to establish it in this
12 particular case.

13 But to try to get around that, the plaintiff is now
14 arguing, as of the memorandum they filed yesterday, that the
15 determination that the defendants were acting under color of
16 law requirement to prove a case under Section 1983 is the
17 equivalent of acting within the course of employment or the
18 scope of employment. That is absolutely not the case, Your
19 Honor. And there are many, many cases that hold that.

20 What I'd like to hand up to the Court -- and I know this
21 isn't binding or precedential, but, at the same time, it has
22 case law that supports this position. If I could hand the
23 Court a copy of a decision issued by Judge Nicholson, Bowers
24 v. Insurance Reserve Fund. This is a 2013 opinion that he
25 issued.

1 COURT REPORTER: Bowers versus -- I'm sorry?

2 MR. LINDEMANN: Insurance Reserve Fund.

3 And if you flip over to page 8 of that opinion, there is
4 discussion in that particular case, the plaintiff made the
5 exact same argument as was being made here, the argument that
6 there was a judgment in federal court. Clearly, the defendant
7 in this particular case, a professor at the College of
8 Charleston, was acting under color of law, and that that
9 somehow should equate with the fact that he was acting within
10 the scope of his official duties or scope of employment.

11 Judge Nicholson disagreed, gives a very good explanation
12 on page 8 and 9 of his opinion. Footnote 5 of that opinion
13 cites some cases from the Seventh Circuit that make it very
14 clear. In fact, I'll read this: The Graham v. South Prairie
15 Police Division case. The Seventh Circuit said a finding that
16 a public employee, acting under color of law for purposes of
17 Section 1983, does not automatically establish that the
18 employee acted within the scope of employment under the
19 Wisconsin indemnity statute.

20 The Court further noted, "Color of law category is
21 broader than the scope of employment category." And, Your
22 Honor, there are dozens of cases nationwide that I'd be happy
23 to get, Your Honor. I didn't have a chance to do a reply
24 memorandum because I just got that yesterday. But there are
25 dozens of cases, Your Honor, that hold that color of law is

1 broader than scope of employment. A good example is what
2 Judge Nicholson included in his order, which is where you have
3 police officers that you make misconduct for personal reasons,
4 such as sexual assault, but they're clearly acting under color
5 of law. They're using their police vehicle, they're wearing
6 their badge, they're wearing their uniform.

7 Color of law requires just a pretense that the officer is
8 acting officially, and it does not equate to scope of
9 employment. So I make that argument because they're trying to
10 equate the two, and they cited, not surprisingly, Your Honor,
11 in their brief they filed yesterday -- they didn't cite a
12 single case from that proposition, and I'm not sure they'd be
13 able to find one because every case I have looked at -- and I
14 have seen quite a few -- followed this same argument. Color
15 of law is much broader than scope of employment. Just the
16 scope of employment is broader than scope of official duty.

17 So they have not proven -- Your Honor asked if there were
18 any issues of fact in dispute. To the extent you reach this
19 particular issue, they have not proven, Your Honor, that these
20 five correctional officers were acting within the scope of
21 their employment, and that's necessary to qualify for any
22 indemnity under 111-460.

23 Lastly, under 111-460, one last point I would make is,
24 Your Honor, awarding punitive damages under that statute would
25 be against public policy of the State of South Carolina. We

1 have cited a number of cases where the State does not pay for
2 punitive damages. The plaintiff's argument in response to
3 that was, Well, Insurance Reserve Fund pays part of the
4 punitive damages, but of course that's a bit disingenuous.
5 They did not pay -- the Insurance Reserve Fund did not pay a
6 portion of the punitive damages under 111-460. They paid it
7 under insurance policy. The insurance policy did not have a
8 punitive damages exclusion. 111-460 is not an insurance
9 policy. It is a statute, and it is governed by sovereign
10 immunity just like any other statute that's been enacted.

11 And as we describe and provide you case law in our
12 memorandum, it is well settled that, for sovereign immunity to
13 be waived by the General Assembly, it must be equivocally
14 stated. In this particular case, Your Honor, there is nothing
15 in the legislative history, there's nothing in the statute
16 itself that would show that the General Assembly intended to
17 waive sovereign immunity for an award of punitive damages.
18 Punitive damages, under any other authority in South Carolina,
19 tort claims did (indiscernible) the principal of one that
20 we're all familiar with, it does not allow for the award of
21 punitive damages against the governmental entity. We, in
22 fact, cited the McMurray case, which predated the -- I believe
23 it predated the tort claims act and talked about the fact
24 that, for punitive damages to be awarded, they have to be
25 specifically statutorily provided for, and that is against the

1 public policy of the State of South Carolina to pay punitive
2 damages. And quite frankly, Your Honor, that makes sense. In
3 this instance, the only amount of the judgments that remain
4 unpaid -- because all the actual damages have been paid, all
5 the attorney's fees have been paid. The only thing that's
6 left is punitive damages, and the taxpayers of South Carolina
7 should not be required to pay punitive damages awarded against
8 individual employees. That is the rationale as to public
9 policy behind it.

10 And if 111-460 was intended to cover punitive damages, it
11 certainly needed to say so, and it is silent on that. So for
12 that additional argument, Your Honor, should you find or go
13 beyond the arguments that have been made on judiciability as
14 well as whether or not it's a discretionary statute, if you
15 reach the merits of 111-460 and how it should be applied in
16 this case, there should be no award because the only thing
17 remaining is punitive damages.

18 Lastly, and very quickly, they didn't really touch on
19 their occurrence issue. The occurrence issue is addressed
20 towards the -- doesn't have anything to do with 111-460. It
21 has to do with the tort liability policy. They made an
22 argument in their motion for summary judgment that each
23 officer should have been entitled to separate limits of
24 \$600,000, Your Honor. It just doesn't work that way. The
25 definition of occurrence includes or continues in repeated

1 exposure provision. The policy and the limits of liability
2 section, which is Section 5 of the policy, includes a
3 continuous exposure clause, and that clause says the
4 following, "For the purpose of determining the limit of the
5 funds' liability, all personal injury and property damage
6 arising out of continuous or repeated exposure to
7 substantially the same general condition shall be considered
8 as arising out of one occurrence." One occurrence of \$600,000
9 under this policy, that is what has been paid.

10 The federal court determined that the award against the
11 five correctional officers was jointly and severally for
12 actual damages. We have cited the Seventh Circuit case that
13 explains that, under 1983, joint and several liability -- and
14 this is a quote -- "is a theory of recovery, which requires
15 the plaintiffs in an action alleging tortious or
16 constitutionally repugnant conduct by multiple actors,
17 established that each defendant acted in concert to produce a
18 single, indivisible injury."

19 On this particular case, as I indicated, there was a
20 joint and several verdict that was awarded for actual damages.
21 The Court found that the officers acted in concert to produce
22 a single, indivisible injury, which ultimately was the result,
23 unfortunately, in the death of Mr. Woods.

24 So whether the officers acted at different times, they
25 acted in concert, and ultimately, there was one verdict that

1 was returned. Plaintiffs cannot now dispute that. That's the
2 way the case -- that was their theory of the case in the lower
3 court. That's the way it was presented to a jury. That's the
4 way the verdict came down.

5 There was no -- even though there was a special verdict
6 form, there was no request to the jury in that particular case
7 to determine whether they were separate occurrences by the
8 different employees, takes us right back to the AnMed case
9 that Your Honor handled in the lower court and is very
10 familiar with. You got affirmed by the Supreme Court on that.
11 And the issue of occurrence is, if you're going to raise it,
12 needs to be determined by at least the factual background that
13 it needs to be determined in the lower court. It cannot be
14 raised later, either on appeal or post-trial motions or, as in
15 this case, in a later filed declaratory judgment action.

16 Lastly, they have cited to the Boyer case. The Boyer
17 case deals with a definition of occurrence under the tort
18 claims act, which is an entirely different definition than
19 what we have in an insurance policy. And Boyer has nothing to
20 do with this particular case. The tort claims act are claims
21 that were brought by the plaintiff were actually dismissed
22 prior to go to the jury during the federal court trial. And
23 we have submitted a page from a trial transcript that verifies
24 that the plaintiffs did abandon their tort claims in that case
25 and settled the claims.

1 So this deals solely with a 1983 case. The policy
2 language is clear that the same and continuous exposure to the
3 same conduct is to be treated as one occurrence for purposes
4 of when it's a liability. That's what we have here. The
5 \$600,000 has already been paid.

6 So, Your Honor, that is, essentially, our position, not
7 just in response to the plaintiff's motion for summary
8 judgment but also in support of the defendant's motion for
9 summary judgment.

10 The one last thing that I overlooked, Your Honor, that
11 I'd like to just backtrack for just a second on, this issue of
12 scope of employment. I pulled the second amended complaint
13 from the joint appendix for the federal court case, and in
14 that particular second amended complaint, which I would hand
15 up to the Court and ask to ultimately become part of the
16 record and I'll file it afterwards, the plaintiff only alleged
17 repeatedly that the defendants were acting under color of law.
18 They never mentioned scope of employment.

19 So even in the pleadings themselves, they never alleged
20 that the plaintiff -- the defendants were acting within the
21 scope of their employment. They only allege they were acting
22 under color of law. Color of law is not the equivalent to
23 scope of employment.

24 Thank you, Your Honor.

25 THE COURT: Yes, sir.

1 MR. CREECH: Thank you, Your Honor. Just a couple of
2 points I'd like to make. I'll try to go in order that he made
3 them.

4 Mr. Lindemann indicated that one of the reasons that the
5 Agency isn't responsible for payment is no request has been
6 made.

7 THE COURT: I'm sorry?

8 MR. CREECH: That no request has been made.

9 Number one, I don't know where the statutory authority
10 comes from that he suggests that a request has to be made.
11 It's not listed anywhere in this statute. As a matter of
12 fact, I -- this is the first -- this is a novel issue, and so
13 the process that one needs to go through in order to have
14 payment under the statute is not outlined anywhere and
15 certainly not within the statute.

16 Secondly, I think it's a little disingenuous to say that
17 no request has been made when we filed a declaratory judgment
18 action against the Agency asking them to pay it. So we're
19 certainly requesting payment to be made.

20 We have obtained an assignment --

21 THE COURT: But there's -- to be clear, there's been
22 no -- there's been no administrative request. There's been no
23 documentation requesting a payment other than the lawsuit.
24 I'm just trying to make --

25 MR. CREECH: That's correct, Your Honor. We have not --

1 if there was some -- if there was some statutory outline, like
2 other statutes have, that tell us this is the procedure you
3 need to follow, we certainly would have done it. But it's
4 just not there. We have no idea where to go with this. We'd
5 certainly be happy to do that. They're certainly aware that
6 we want payment.

7 And, additionally, on -- you know, we have received an
8 assignment from the individual correctional officers who have
9 assigned all rights that they have to us. And so, on their
10 behalf, we have requested payment through this lawsuit.

11 This idea that this assignment somehow now extinguishes
12 them from liability, you know, that that's not the way it
13 works. We have got an assignment where the underlying
14 defendants have signed all rights to us, for us to pursue
15 against the IRF and the Agency.

16 We did agree not to -- not to execute an excess judgment,
17 but -- I'm sorry, not to execute the judgment itself as our
18 seize (ph) in assets, but the judgment still remains, which is
19 the only thing required under the statute.

20 Additionally, Mr. Lindemann cites two cases for his
21 support of the proposition. One of the cases is a
22 longshoreman's case where they collect during the
23 longshoreman's act and then try to sue a co-employee. And the
24 crux of that case was, this is an exclusive remedy. You go
25 under longshoreman's, you can't sue a tort. It has no

1 applicability to override or not.

2 The other case that he relied upon was the Cobb case.
3 That case is very fact-specific where you have -- you have
4 covenant not to execute or you have a primary policy, and the
5 plaintiff entered into a covenant not to execute and release
6 the primary policy and said we will only collect additional
7 monies against the uninsured employee -- UIM carrier. They
8 specifically said, "We will only collect because UIM. We
9 release everybody else."

10 Then they subsequently found a secondary primary policy,
11 and the Court said, Listen, you released them. You
12 specifically released that primary policy. That is not what
13 we have in this case.

14 The assignment that we have assigns all rights that they
15 have to collect everything that they may be legally entitled
16 to.

17 THE COURT: But -- but in conjunction with that, what
18 they -- what you have given up is to then try to execute
19 against them subsequently.

20 MR. CREECH: I can't seize their assets.

21 THE COURT: Okay.

22 MR. CREECH: The judgment still remains.

23 THE COURT: The judgment remains, but you can't -- you
24 have agreed that you will not go and try to seize the --

25 MR. CREECH: Correct.

1 THE COURT: -- any property that they have.

2 MR. CREECH: Yes, ma'am. Yes, ma'am.

3 And so the judgment's now -- we're now a judgment holder.
4 We're the judgment holder. We're just not going to go take
5 the cars and stuff like that.

6 And, again, we deposed the 30(b)(6), Mr. Lombard --

7 COURT REPORTER: Mister?

8 MR. CREECH: Mr. Lombard. And he is binding on the
9 agency. This is the first time anything like this has
10 happened. This is a novel issue. He had no real idea on what
11 the policy or procedure is to request this. He kind of
12 suggested, "Well, I guess you could ask them to put it on the
13 agenda," but that was just him kind of throwing something out
14 there. There's no real guideline for how you collect under
15 the statute.

16 I want to point out, he briefly -- Mr. Lindemann
17 mentioned that there are five separate judgments. That is
18 true. But the statute -- when you read the statute, it is
19 written in plural form. So it speaks to employees and
20 judgments, in the plural. There is one -- the threshold,
21 though, is the same. It's one million dollars. So if you
22 meet that \$1 million threshold, it doesn't matter if you have
23 one judgment or five, the statute is what applies.

24 With regard to the course and scope argument, number one,
25 when I suggested this was the first time it was raised, I was

1 talking about in the underlying 1983 case that we litigated
2 for almost four or five years. There was never any objection
3 or issue with the fact that they were not operating under
4 course and scope. The case was never defended under a
5 reservation of rights.

6 The first time we ever heard that was in this declaratory
7 judgment, post-judgment. What's important to know, though, is
8 that the IRF has already paid a significant portion of their
9 liability policy. And the requisite for paying that is that
10 they are an insured and that the definition of insured is
11 they're operating under course and scope.

12 So, in a way, they have -- it's disingenuous for them to
13 have paid under the policy and then to come in here and say,
14 but you're not under course and scope. It just doesn't
15 work -- it's not true.

16 Lastly, Your Honor, you know, the fact there were five
17 different judgments, I think that is, in an alternative
18 argument, that's an indication that we have five different
19 occurrences. You know, they kind of work against each other.

20 I'm happy to address any questions that I haven't
21 addressed yet that the Court may have.

22 THE COURT: I don't have any additional questions at this
23 particular time.

24 MR. LINDEMANN: Your Honor, briefly, on reply.

25 THE COURT: Very briefly.

1 MR. LINDEMANN: Thank you, Your Honor.

2 There's a point being made that the Insurance Reserve
3 Fund has already paid the \$600,000 worth of coverage under the
4 tort liability policy. Recognize, of course, the SFAA would
5 not have anything to do with that. But we were also very,
6 very careful and negotiated with plaintiff's counsel that the
7 partial satisfaction in judgment would not waive any of the
8 arguments or defenses that we previously raised in this
9 particular case. If you look at the partial satisfaction of
10 judgment, a copy of which is attached to the motion for
11 summary judgment filed by the plaintiff, it includes this
12 language. The plaintiff acknowledges that in agreeing to
13 tender the amounts stated herein, the South Carolina Insurance
14 Reserve Fund that's a division of the State Fiscal
15 Accountability Authority, expressly reserves and does not
16 waive any defenses as asserted in the pending action captioned
17 Morris v. South Carolina Budget Control Board citing this
18 civil action number.

19 So we specifically reserve the ability to argue defenses.
20 Otherwise, we wouldn't have paid that judgment or that -- the
21 partial part of that judgment. That was negotiated with them.
22 So it was not disingenuous at all for me to still continue to
23 argue that there is no proof of scope of employment. Plus
24 that issue goes to the SFAA part of this case, not the
25 Insurance Reserve Fund as part of this case. The SFAA is the

1 one who is being sought for additional amounts under 111-460.
2 SFAA had nothing to do with satisfying that particular
3 judgment.

4 THE COURT: And that's why there's the separate 2017
5 action.

6 MR. LINDEMANN: And they filed a separate 2017 action,
7 bringing, actually, a bad faith claim against the Insurance
8 Reserve Fund. And that's where they got the assignment and
9 entered a covenant, and I'll -- briefly on that point, too,
10 Your Honor.

11 The argument that the Cobb case doesn't apply to this
12 case, the Cobb case is exactly on point. The Smalls case we
13 cited just for the black letter law that indicated insurance
14 policy's a contract of indemnity. The facts of that are
15 somewhat different. Cobb is exactly like this. Cobb is a
16 case where the South Carolina Court of Appeals said, because
17 there's a covenant not to execute, you can't execute against
18 the personal assets of the tortfeasor, the insured. If
19 they're not responsible personally -- personally obligated,
20 which neither of these five correctional officers in this
21 particular case -- well, then the insurer cannot be. That was
22 Nationwide in that particular case. Nationwide is no
23 different than the Insurance Reserve Fund in this case, and we
24 would submit, since 111-460 is the plaintiffs argue it has an
25 indemnity statute, it would apply to that as well.

1 One last point, if Your Honor would indulge me; I forgot
2 to address the issue of the policyholder's manual that was
3 mentioned earlier by Mr. Creech. The policyholder's manual is
4 not an insurance policy. It's not issued by the SFAA. In
5 fact, Mr. Lombard, in his deposition, explains that it's an
6 underwriting document and was prepared in error.

7 But whatever the case, the policyholder's manual is not
8 going to determine the meaning of 111-460. In fact, it
9 doesn't even interpret the meanings of any policies because it
10 includes the following disclaimer. It says -- this is on page
11 1 of the policyholder's manual. It says, "This handbook
12 provides general information concerning the policies issued by
13 the Fund, including issue renewal instructions and claim
14 reporting instructions. While every effort is made to make
15 this manual as complete and accurate as possible, it does not
16 contain the full restatement of the contracts. In the event
17 of any conflict or omission, the terms of the actual contract
18 of insurance shall be paramount in every instance."

19 So it doesn't override the policies issued by the
20 Insurance Reserve Fund, and it certainly doesn't interpret the
21 statute that would apply to the SFAA, who is not even a party
22 to issuing that policyholder manual. To me, that's a red
23 herring, but I did want to mention that to Your Honor as well.
24 Thank you.

25 THE COURT: All right. Counsel, I have not had a chance

1 to look at all the attachments, and in light of your
2 arguments, I do need to go back and reread all the documents
3 again and look at additional case law.

4 To the extent that, as I go through, there may be some
5 documents that you haven't attached, I may very well contact
6 you about providing the copies of those, but I'll wait until I
7 get to that particular point.

8 So I'd take it under advisement and try to issue a ruling
9 as quickly as possible.

10 MR. CREECH: Thank you, Your Honor.

11 MR. LINDEMANN: Thank you, Your Honor.

12 THE COURT: Thank you.

13 (The above hearing concluded.)
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1 CERTIFICATE OF TRANSCRIBER

2 CASE/NO.: Nancy Morris vs. SFAA

3 2015-CP-40-00619

4 DATE OF PROCEEDING: March 28, 2018

5 ORIGINAL COURT REPORTER: Bonnie Kelly (retired)

6

7 I, Bobbi J. Fisher, do hereby certify that the
8 foregoing transcript is a true and correct record of the
9 recorded proceedings; that said proceedings were transcribed
10 to the best of my ability from the audio recording and
11 supporting information; and that I am neither counsel for,
12 related to, nor employed by any of the parties to this case,
13 and I have no interest, financial or otherwise, in its
14 outcome.

15

16



18

19 Bobbi J. Fisher, RPR, CET

20 NCRA Registered Professional Reporter (RPR)

21 AAERT Certified Electronic Transcriber No. CET-1148

22 Prepared: July 9, 2020

23

24

25

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

NANCY MORRIS, AS PERSONAL)
REPRESENTATIVE FOR THE)
ESTATE OF DAVID ALLAN WOODS,)

 PLAINTIFF,)

VERSUS)

THE SOUTH CAROLINA FISCAL)
ACCOUNTABILITY AUTHORITY,)
THE SOUTH CAROLINA INSURANCE)
RESERVE FUND, ET AL.,)

 DEFENDANTS.)
_____)

TRANSCRIPT OF RECORD

2015-CP-40-00619

OCTOBER 3rd, 2019
COLUMBIA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALLISON R. LEE

A P P E A R A N C E S:

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RESERVE FUND, ET AL.

SANDRA H. DAVIS
OFFICIAL COURT REPORTER
EIGHTH JUDICIAL CIRCUIT
AT-LARGE, EIGHTH JUDICIAL CIRCUIT

THIS TRANSCRIPT WAS PREPARED FOR MR. ANDREW C. CREECH, ESQUIRE

I N D E X

ARGUMENT BY MR. LINDEMANN. 5

ARGUMENT BY MR. GARRETT. 55

ARGUMENT BY MR. LINDEMANN 65

CERTIFICATE 77

E X H I B I T S

(NO EXHIBITS WERE MARKED FOR THIS HEARING.)

P R O C E E D I N G S

October 3rd, 2019

THE COURT: We are here on docket number 2015CP4000619. This is Nancy Morris, as personal representative for the Estate of David Allan Woods, versus the State Fiscal Accountability Authority, the South Carolina Insurance Reserve Fund, and several individual defendants.

For the plaintiff is Garrett Johnson. Is that correct?

MR. JOHNSON: Yes, Your Honor.

THE COURT: And on behalf of the State Fiscal Accountability Authority and the Insurance Reserve Fund is Andrew Lindemann.

We are here on a Motion to Reconsider. I issued an Order back in July of this year -- it was actually filed July 23rd, 2019 -- on a Declaratory Judgement. I guess, cross-Motions for Summary Judgement, and I found in favor of the plaintiff and there was a Motion to Reconsider that was filed. I believe memoranda had been filed and exchanged, and I thought it would be helpful if I actually heard from the parties considering it's been a long time since I've heard the original argument.

And so, Mr. Lindemann, it was your motion and so I will -- I --

1 I -- And I'll tell you, I've -- I've re-read my
2 Order and I've read the memoranda that you sent. I've
3 pulled out some additional case law, and so I'll -- I'll be
4 happy to hear your -- your arguments and we'll --
5 hopefully, we'll see what kind of questions I'll have.

6 **MR. LINDEMANN:** Thank you, Your Honor.

7 **THE COURT:** Thank you.

8 **ARGUMENT BY MR. LINDEMANN**

9 **MR. LINDEMANN:** Good morning, Your Honor. May it
10 please the Court.

11 As indicated, Andrew Lindemann, on behalf of the
12 SFAA and the Insurance Reserve Fund. And thank you very
13 much, Your Honor, for granting oral argument on the Motion
14 for Reconsideration. I know that doesn't happen
15 frequently, and I definitely appreciate Your Honor taking -
16 - taking the time to hear from us.

17 As Your Honor gathers, this is a pretty important
18 case. A case of novel impression. It's the first time on
19 1-11-460 has been interpreted, as the Insurance Reserve
20 Fund indicated, and the evidence is before Your Honor,
21 there's never been a request under 1-11-460 made before
22 this case.

23 So, this is a very important case, and I do
24 appreciate Your Honor being willing to hear from us on
25 reconsideration.

1 And with all due respect, Your Honor, I -- we
2 would ask the Court reconsider its -- its decision. We've
3 laid out in our Motion a number of different grounds. I'm
4 going to focus on some, but if I don't touch on some of the
5 more minor ones, I certainly don't want my silence to be
6 interpreted for the record as an -- an abandonment.

7 I -- I think -- I think where I'd -- where I'd
8 like to start, Your Honor, is -- is probably the -- the --
9 the critical point.

10 This whole case turns on the -- the meaning of
11 the term "authorized to pay" that is used in the very first
12 line of 1-11-460.

13 Obviously, the Insurance Reserve Fund and the
14 SFAA take the position that that language is discretionary,
15 or to use a different term, permissive on the point it
16 argues that it's mandatory. And, Your Honor, in your Order
17 issued in -- in July came down on their side and indicated
18 that it was in your -- in your judgement a mandatory
19 provision.

20 With all due respect, Your Honor, I -- I don't
21 agree with that and I would ask the Court to reconsider
22 based on various points that I'm going to touch on. All of
23 these points were -- were argued below. Some of these
24 points, whether Your Honor considered them or not, I don't
25 know, but some of the points are not actually directly

1 addressed in your Order.

2 Obviously, part of my raising this by 59(e) is
3 not only to try to get you to reconsider your decision, but
4 also to make certain those issues are preserved for appeal.

5 THE COURT: Let -- Let me -- It -- Let me stop
6 you just to ask --

7 MR. LINDEMANN: Sure.

8 THE COURT: -- this; if it would be somewhat
9 helpful, and maybe -- may go a little more towards my
10 understanding of the role and -- and, perhaps, maybe
11 thereby understanding the -- the statutory scheme, to talk
12 -- just a little bit of background about where the
13 Insurance Reserve -- how the Insurance Reserve Fund comes
14 into play and the State Fiscal Accountability Authority,
15 which used to be the Budget and Control Board.

16 MR. LINDEMANN: That's correct, --

17 THE COURT: So I --

18 MR. LINDEMANN: -- Your Honor.

19 THE COURT: I think -- I -- I would assume that
20 SFAA has authority over a larger -- the large umbrella and
21 the Insurance Reserve Fund is under that.

22 MR. LINDEMANN: That's correct, --

23 THE COURT: And so --

24 MR. LINDEMANN: -- Your Honor.

25 THE COURT: -- basically we're talking -- the

1 entity we're really talking about is the Insurance Reserve
2 Fund and what they are able and -- and can and cannot do
3 based upon, in some ways, a statutory scheme.

4 **MR. LINDEMANN**: Actually, I disagree with that
5 last point you made.

6 **THE COURT**: Okay.

7 **MR. LINDEMANN**: But -- but the previous point,
8 you're exactly correct. The SFAA is -- is the entity that
9 took the place of the Budget and Control Board; serves
10 largely in the same manner. There are some -- some
11 differences as to the scope of the -- Some of the duties
12 that fell under the Budget and Control Board now have been
13 shifted to the newly formed Department --

14 **THE COURT**: Hmm-mm.

15 **MR. LINDEMANN**: -- of Administration. But as far
16 as insurance matters and the Insurance Reserve Fund, that
17 was a division under the old Budget and Control Board and
18 it remains a division under the SFAA. So, it falls under
19 the SFAA.

20 And so, as far as insurance matters, I agree with
21 Your Honor that that falls within the parameters of the
22 Insurance Reserve Fund. Insurance Reserve Fund, while it's
23 not recognized as the insurance company; it's not regulated
24 by the Department of Insurance like Allstate or Nationwide
25 is, it does act in many ways like an insurance company. It

1 does issue insurance policies that cover its insurers, and
2 its insurers include state agencies as well as local
3 subdivisions and local governmental entities who choose to
4 insure the Insurance Reserve Fund.

5 They don't have to, it's -- there are other
6 avenues in the state where entities can obtain insurance.
7 There are self-insured pools. For instance, the Municipal
8 Association has one; the School Board Trust has one; the
9 County Association has one. And there's also, in some
10 limited cases, where private insurance insures these --
11 these groups.

12 But the Insurance Reserve Fund, it acts as an
13 insurance company. It's not exactly an insurance company.

14 **THE COURT**: And so the policy that Berkeley
15 County had for its employees that were involved in this
16 particular incident would have derived from the Insurance
17 Reserve Fund?

18 **MR. LINDEMANN**: That's correct, Your Honor.

19 **THE COURT**: Okay.

20 **MR. LINDEMANN**: And they issue a number of
21 different policies. The one that's in play in this case is
22 general tort liability policy. What's important to
23 understand is the Insurance Reserve Fund will write
24 policies in two different amounts; either 600,000 or a
25 million.

1 **THE COURT:** Hmm-mm.

2 **MR. LINDEMANN:** In this particular case, Berkeley
3 County chose --

4 **THE COURT:** The 600,000.

5 **MR. LINDEMANN:** -- 600,000.

6 **THE COURT:** Okay.

7 **MR. LINDEMANN:** So that is the insurance that the
8 Insurance Reserve Fund is authorized to pay. And those
9 limits have been paid already in the underlying claim.
10 They paid --

11 **THE COURT:** Right.

12 **MR. LINDEMANN:** -- in excess of 600,000 because
13 the policy also had a supplemental payment provision that
14 covers things such as attorney's fees and costs over and
15 above the \$600,000 limit. So that's why you will see that
16 closer to a million dollars was paid; that's because there
17 was a very hefty attorney's fees award under section 1988
18 that was awarded by Judge Gergel on the underlying case.

19 But the amount that was paid, as far as the
20 actual damages and punitive damages against the five
21 correctional officers, was a total of \$600,000. The entire
22 actual damages award that was paid -- that was 171,000,
23 which was an amount that was reduced by Judge Gergel from a
24 half a million dollars based upon a setoff that other co-
25 defendants --

1 **THE COURT:** Hmm-mm.

2 **MR. LINDEMANN:** had paid prior to trial.

3 **THE COURT:** And -- and so, if I were to take
4 \$600,000 --

5 **MR. LINDEMANN:** Yes.

6 **THE COURT:** -- and subtract 171,875 that -- that
7 constitutes the actual damages, then everything else would
8 have been the other -- would have been, what I would call,
9 related to the punitive damage awards?

10 **MR. LINDEMANN:** That's correct. They took the --
11 We --

12 What we did was, I was involved in the post-trial
13 aspects of that case, and, ultimately, we took the -- the -
14 - the difference, the amount of punitive damages that for
15 which there was coverage under the IRF's policy, and -- and
16 applied it pro-rata to the five different defendants.

17 Because two of the defendants had a million
18 dollars in punitive damages awarded against them, and then
19 the other three \$150,000 each.

20 **THE COURT:** And -- and most of that was laid out
21 in -- in the Order.

22 And I -- And I just want to make sure that I
23 understand, specifically, because I think it relates to
24 your other arguments later on, that what was -- that --
25 that the policy limits were paid out and that that included

1 not only actual damages, but also punitive damages applied
2 on a pro-rata basis against the five individual defendants
3 in the 1983 action.

4 MR. LINDEMANN: That's correct.

5 THE COURT: Okay.

6 MR. LINDEMANN: Well, --

7 THE COURT: And -- and you said that that was
8 paid because there was a provision in the policy that
9 allowed for punitive damages to be paid. Is that correct?

10 MR. LINDEMANN: The policy does not exclude
11 punitive damages.

12 THE COURT: Okay.

13 MR. LINDEMANN: The policy itself.

14 And what's important to recognize in this case,
15 which sort of gets back to my second point with your
16 initial comments, what is -- what is provided under 1-11-
17 460 is not insurance coverage.

18 THE COURT: I understand that.

19 MR. LINDEMANN: Right. So it's -- it's not
20 something that the Insurance Reserve Fund has control over,
21 and, in fact, the authority under 1-11-460 is specifically
22 the SFAA, which decision makers are the five members of the
23 --

24 THE COURT: And so --

25 MR. LINDEMANN: -- board.

1 **THE COURT**: -- if it -- if -- And we talk about
2 -- We talk about -- I think the statute talks about if
3 the -- if the -- if the judgement exceeds a certain amount
4 --

5 **MR. LINDEMANN**: That's correct.

6 **THE COURT**: -- or the -- of the -- And so the --
7 that -- that the SFA -- SFAA is authorized to pay, and then
8 it goes through and -- and describes what the limits are,
9 and it has to be related to a 1983 action. It has to be,
10 you know, -- they have to be within the course and scope of
11 their employment and what -- and the other --

12 **MR. LINDEMANN**: That's correct.

13 **THE COURT**: -- and the other elements that --
14 that we --

15 **MR. LINDEMANN**: That's correct.

16 **THE COURT**: -- previously --

17 **MR. LINDEMANN**: Well, --

18 **THE COURT**: -- discussed.

19 **MR. LINDEMANN**: Well, what that is -- And --
20 and, you know, that might be a little ticky tack on my
21 part, but in one part of your Order you refer to it as
22 "excess coverage," and -- and we raised that as a --

23 **THE COURT**: Yeah, and I -- and I --

24 **MR. LINDEMANN**: -- a point of disagreement.

25 **THE COURT**: And I think it's just -- it's just

1 the use of the word. I -- I don't think I looked at it
2 necessarily as a -- an insurance policy, but -- but -- but
3 that the SFAA is authorized to pay them, to --

4 MR. LINDEMANN: Right.

5 THE COURT: -- pay judgements.

6 MR. LINDEMANN: It's an indemnity statute, is
7 what it is.

8 THE COURT: Okay.

9 MR. LINDEMANN: I -- And then -- And then, of
10 course, the key question is whether it's mandatory or
11 whether it's -- it's discretionary or permissive.

12 THE COURT: And -- and I'm sorry to keep
13 interrupting you, but --

14 MR. LINDEMANN: No. No. Please do.

15 THE COURT: And -- and your position, as it
16 relates to the indemnity, is that -- and -- and what I
17 gathered from reading your brief, is that it's -- it --
18 you're claiming that it is discretionary, but let's -- but
19 you've also stated that punitive damages are not something
20 that they -- that the SFAA would -- would cover. Is --

21 MR. LINDEMANN: That's correct. I -- I made that
22 -- They are -- They are two separate arguments, but --
23 but the punitive damages aspect, and what was critical in
24 this case, is the only thing that remains to be paid are
25 punitive damages.

1 So this is a -- this -- Given the facts of this
2 case, that's what we're focused on. And one of our
3 arguments is that, obviously, the public policy of this
4 state for years and years, it was expressed in such cases
5 as McMurray, is that the government does not pay punitive
6 damages; that there's obviously strong public policy
7 reasons for it.

8 I mean, interestingly enough, even under 1983,
9 under "Claims brought against a local governmental entity,"
10 the -- the *Fact Concerts versus The City of Newport* case
11 absolutely precludes the recovery of attorney's fees
12 against a local governmental entity. Of course, in this
13 particular case, it was individuals who were being sued.

14 But, assuming the case had gone forward against
15 Berkeley County, and they -- they got dropped either at
16 trial or right before trial, punitive damages couldn't have
17 been awarded against Berkeley County, even under Section
18 1983.

19 And the idea behind that is because of the strong
20 public policy reasons that the taxpayer shouldn't foot the
21 bill for intentional or reckless wrongdoing.

22 And -- and I know Your Honor had -- And I'll
23 jump to that issue. Your Honor had a -- a problem with
24 that. Number one, you distinguished McMurry because
25 McMurry actually used language talking about the state or

1 its political subdivisions and you indicated, "Well, we
2 don't have the state or political subdivisions here." But
3 it's the same public policy that applies; you're asking the
4 taxpayers, the State of South Carolina in this instance, to
5 pay punitive damages.

6 And our position is this: Number one; it's not
7 necessary to make the plaintiffs whole. I mean you did
8 have language in the Order saying it's important that 111-
9 460 be available -- able to make victims of constitutional
10 deprivations whole. That's not at issue in this case
11 because they've been made whole. They have received all of
12 what the jury awarded, as far as compensatory damages.
13 Punitive damages don't make anybody whole. They're there
14 as a deterrent and to punish. And, actually, quite
15 frankly, of insurance, an indemnity provision such as this
16 covers that. It defeats the deterrent portion of it.

17 If an individual, for instance, these
18 correctional officers, know that if they do something to
19 deliberately hurt somebody, or, in this particular case,
20 they've found deliberately indifferent to Mr. Morris'
21 medical needs; just basically left him in a cell, as the
22 allegations were, without providing him any medical care,
23 well, it's not much of a deterrent if they know that the
24 state taxpayers are going to pick up every dime that's
25 awarded against them. And so that's the public policy

1 rationale.

2 But, the second part of our argument on punitive
3 damages, Your Honor, is because historically sovereign
4 immunity has been in place and has -- has only been waived
5 to the extent of the South Carolina Tort Claims Act. And
6 it's very important to recognize that when *McCall v. -- v.*
7 *Batson* was decided in 1986, the South Carolina Supreme
8 Court aggregated sovereign immunity but then left it to the
9 General Assembly to effectuate that.

10 And what the General Assembly did, and this is --
11 I can get the Court the -- the case. It's well discussed
12 in a case called *Murphy versus Richland Memorial Hospital*
13 by the Supreme Court. What the -- What the General
14 Assembly did is they reinstated sovereign immunity
15 completely and then waived it with certain limitations and
16 exceptions.

17 And that's the extent of the waiver of sovereign
18 immunity, is for torts under the Tort Claims Acts. So
19 there was not a blanket waiver of sovereign immunity for
20 punitive damages, and certainly not under 1-11-460.

21 So our argument is this; that sovereign immunity
22 is still in place, and in order for there to be a waiver of
23 sovereign immunity, the case law -- I'm relying on U.S.
24 Supreme Court case law, but it would certainly be
25 applicable here. The waiver of sovereign immunity has to

1 be unequivocally stated within either the statute or the
2 legislative history.

3 And where I disagree with Your Honor's decision
4 is you found that the silence of the statute, the fact that
5 there wasn't language in the statute accepting punitive
6 damages, indicated to you that punitive damages would be
7 included in 1-11-460. But my argument is silence cannot
8 equate with an unequivocal waiver. In fact, silence is
9 never a waiver, even in other contexts.

10 So, on the punitive damages issue, that -- that's
11 basically our argument in a nutshell. It -- it doesn't
12 satisfy the public policy; sovereign immunity is in place;
13 and it certainly hasn't been waived.

14 Moving on back to the -- the -- the crux of the
15 statutory interpretation, unless Your Honor has any more
16 questions about the punitive damages aspect. I had to jump
17 to that because -- because you --

18 **THE COURT**: That's fine.

19 **MR. LINDEMANN**: -- did.

20 I am --

21 **THE COURT**: It doesn't have to be in order, as
22 long as --

23 **MR. LINDEMANN**: Okay.

24 **THE COURT**: -- I understand it.

25 **MR. LINDEMANN**: Great. Thank you, Your Honor.

1 Your Honor, I want to focus on -- on the -- on
2 the -- the crux of the issue, which is what is "authorized
3 to pay." What does that mean? And Your Honor found that
4 it was -- was mandatory language, and you -- you -- you
5 looked at the Tennessee case in the statute that we've
6 cited.

7 And I'm going to talk about that in a few minutes
8 because, quite frankly, I think when we first argued this,
9 I did a lousy job of explaining the Tennessee statute and I
10 -- I think I can do a better job of -- of showing you that
11 that statute is actually discretionary and not mandatory as
12 Your Honor found.

13 But, the bottom line, before we even get to the
14 Tennessee statute, because that was just presented to the
15 Court as a -- as a similar example of the statute where we
16 did have a federal case that interpreted "authorized to
17 pay" as being discretionary.

18 **THE COURT:** Well, I -- Frankly, I view the
19 Tennessee statutes as being -- Their whole statutory
20 scheme is completely different from what -- from South
21 Carolina's, and so there are a lot of other protections for
22 -- for parties in that statute, and it's a lot more
23 detailed and -- and explanatory than what we have in South
24 Carolina's, particularly as it relates to this particular
25 statute.

1 **MR. LINDEMANN:** Right. And -- and I'll touch on
2 that in a moment.

3 But -- but let me first start with one of the --
4 one of the issues that I have with your Order is -- And
5 this is no fault of Your Honor. You were not provided any
6 authority by the other side and still haven't been provided
7 any authority. There's not a single case that's cited in
8 the Order interpreting the language "authorized to pay" as
9 being mandatory; not from South Carolina, not from any
10 jurisdiction. And, in contrast, we cited a number of
11 different cases; both United States Supreme Court cases,
12 Federal District Court, the Court of Appeals cases, even a
13 couple of South Carolina cases, that all dealt with the
14 language "authorized to pay," and all of those cases
15 interpreted such language and statutory provisions as being
16 discretionary.

17 I know in their Return, plaintiff's counsel said,
18 "Well, you know, the cases deal with Indian tribes." Well,
19 two of the cases deal with Indian tribes. The rest don't.
20 I don't know what difference that makes. You know,
21 obviously, Indian tribes are well-regulated under statutes
22 -- United States Code. But there are a number of
23 provisions dealing with Indian tribes that have been
24 interpreted by the U.S. Supreme Court and by the claims
25 courts where that language is expressly found to be

1 discretionary -- be discretionary. We've cited a number of
2 other cases, as well.

3 Your Order doesn't address any of those cases,
4 doesn't refute any of those cases, but, as I indicated,
5 what I found most problematic, with all due respect, is you
6 didn't cite a single case that had that language and agree
7 that it was mandatory in any context. And I haven't found
8 any, and I presume plaintiff's counsel hasn't found any
9 because they haven't cited any.

10 So, the case law, we would suggest, number one,
11 supports our position. Number two, Your Honor, -- This is
12 another point that we raised in our briefs and argued
13 before Your Honor, and I'm sure you considered it. You
14 didn't address it in your Order, and I certainly want to
15 make sure I'm preserved on that.

16 But as part of the same statutory scheme, 1-11-
17 460 was part of -- it's basically part of the enabling
18 legislation for the Insurance Reserve Fund, and it was sort
19 of tacked on to the enabling legislation. It was not about
20 the -- the same time.

21 But there's also a provision, one provision
22 before, 1-11-440, and why I think this is important -- And
23 it is all part of the same statutory scheme.

24 And I apologize. If I could hand up this copy,
25 Your Honor?

1 **THE COURT:** That's all right.

2 (Mr. Lindemann presents document to the Court.)

3 **MR. LINDEMANN:** In 1-11-460, this is a -- and
4 this is a similar indemnity provision. It's providing
5 indemnity and a defense to actually members of the SFAA, as
6 well as the director of the Department of Administration,
7 against any claims that arise against them. And what's key
8 here is it doesn't use the "as authorized" language. It
9 point-blank says "the State must defend -- " It uses the
10 words "must defend" several times. It also uses, more
11 importantly, the term "must indemnify".

12 If you look about halfway through 1-11-440(a), it
13 says "must indemnify these officers, management employees,
14 the legislative employees for a loss of judgement incurred
15 by them as a result of such claim or suit." It also then
16 refers to this as a, quote, "commitment to defend and
17 indemnify".

18 So it uses those terms. It doesn't use
19 discretionary language. It doesn't use permissible
20 language. It uses "Must defend. Must indemnify." And so,
21 obviously, when it's used in the same statutory scheme, "is
22 authorized" must mean something else.

23 Because if the General Assembly intended that the
24 state must indemnify employees under 1-11-460, which is
25 this Court's interpretation, my point to the Court is they

1 would have used the words "must indemnify". They would
2 have used clearly mandatory language. They knew how to use
3 it. They used it in that statutory scheme, and they
4 deliberately chose not to use it in 1-11-460.

5 So, bottom line is, "is authorized" must mean
6 something different than "must indemnify," and what it
7 means is it would be discretionary.

8 So I think that's an important rule of statutory
9 construction that I would ask the Court to take another
10 look at on reconsideration because I think it was a very
11 compelling point that assists this Court interpreting 1-11-
12 460 as discretionary or permissive because I truly believe
13 that was the intent of the General Assembly.

14 **THE COURT:** In -- in looking at the Code, do you
15 understand that they were both enacted in -- ten years
16 apart?

17 **MR. LINDEMANN:** They were. But they're part of
18 the same scheme. There's -- there's no question about it.

19 **THE COURT:** With -- with the -- the "must
20 indemnify" language being the newer iteration of the
21 statutes order. Actually, this statute is -- is -- enacted
22 in 2003 as opposed to 1-11-460, which is 1992.

23 **MR. LINDEMANN:** And, of course, recognize that
24 there's nothing that stops the General Assembly when they
25 amend the statute --

1 **THE COURT:** Sure.

2 **MR. LINDEMANN:** -- to go back and make -- and
3 tweak different parts of the same statutory scheme, and
4 they chose not to. And, of course, there is a rule of
5 statutory construction, as well, so -- I know Your Honor
6 has dealt with, that you've got to assume that the General
7 Assembly understood and took a look at an entire statutory
8 scheme and attempted to construe it *in pari materia*, you
9 know, so that they would be consistent.

10 And so I don't believe that it's consistent to
11 say one statute is "must defend" and that's mandatory, and
12 another is -- is "authorized to pay" and that's also
13 mandatory even though it uses very different language.

14 And, again, you know, these are many different
15 levels, many different statutory arguments to all go to the
16 same point. I mean, I -- It's not like I'm -- I'm relying
17 just on -- on one of them.

18 Which turns me to -- to Tennessee.

19 And -- and, Your Honor, I don't know if you have
20 a copy of the Tennessee statute in front of you.

21 **THE COURT:** I do not.

22 **MR. LINDEMANN:** Let me -- Let me hand up a -- a
23 copy because I want to highlight a couple of points.

24 And I'm sorry, Garrett. I didn't have extra
25 copies prepared today.

1 (Mr. Lindemann presents document to the Court.)

2 And, as I indicated, and -- and -- and thinking
3 back on this, I think I did a pretty lousy job of -- of
4 comparing the two statutory schemes, because I do think
5 they're actually identical in most material respects.

6 Now, I recognize that Your Honor found that
7 there's more detail as to how to bring a claim in the
8 Tennessee statute, and I don't disagree with Your Honor on
9 that.

10 But here -- This is how the Tennessee scheme
11 works, and let me compare it to the South Carolina scheme:

12 There are two levels of indemnity in both
13 schemes. In the Tennessee scheme, instead of using
14 insurance -- an insurance policy to provide the first
15 level, everything goes to this Board of Claims. And so the
16 Board of Claims has the authority to provide coverage, for
17 lack of a better word. Well, let me say -- use the word
18 "indemnity." That's the proper word. Indemnity for the
19 initial threshold of liability, and in Tennessee that is --

20 And we -- we have this cited in our Motion for
21 Reconsideration. But if you look at 9-8-112(h), that's the
22 key provision, on the second page, of what I handed up to
23 you. And it references limits found in section 9-8-307(e).

24 And I didn't make a copy of that for you. I'll
25 be happy to email it for you. I don't -- didn't bring it

1 with me either.

2 But what that provision is is excess the limits
3 of \$300,000 per incident, one million per occurrence. So
4 that is the first layer of indemnity. And what this
5 statutory scheme -- If you read subsection (h) and read it
6 carefully, the first sentence deals with that level of
7 indemnity, and that level of indemnity is mandatory. It
8 says, "The Board of Claims, upon determining -- " blah,
9 blah, blah, " -- shall reimburse." It does sort of peel
10 that back a little bit with the next sentence by saying,
11 "Notwithstanding the foregoing, the Board of Claims may,
12 in it's sole discretion, reduce the reimbursement provided
13 in subsection (h) if the Board finds a circumstance to
14 exist that makes such a reduction proper and just."

15 But the bottom line is those first two sentences
16 of (h), subsection one, deal with that first layer of
17 indemnity, the 300,000, aggregate of a million.

18 What's key for this Court to focus on, though, is
19 how the Tennessee statute deals with judgements in excess
20 of those threshold limits, and that's where the last
21 sentence of subsection (h)¹ comes into play. And that --
22 It shows that this is purely a discretionary statute for
23 anything in excess of that first threshold. It says, "In
24 cases where the judgement or settlement are in excess of
25 the limits found in 9-8-307(e) -- " Again, that's the

1 \$300,000, one million aggregate. It goes on to say, " --
2 the Board of Claims may pay any of the amounts in excess of
3 those limits where reimbursement is found to bare a
4 reasonable relationship to the officers or employees
5 liability or the injury or damage caused."

6 Clearly, Your Honor, that last sentence is purely
7 discretionary with the Board of Claims, and that is the
8 excess indemnity, anything over that initial threshold.

9 South Carolina works the exact same way. The
10 only material difference is instead of South Carolina
11 having a Board of Claims or having the SFAA step in and
12 deal with that initial layer of indemnity, we provide that
13 through an insurance policy that initial layer is provided
14 in either 600,000 or a million, whichever the -- the
15 governmental entity chooses to purchase, that is provided
16 by the Insurance Reserve Fund like that, and those claims
17 have been adjusted just like insurance claims.

18 The Insurance Reserve Fund has adjusters on
19 staff. They -- they act just like adjusters do in -- in
20 private insurance things. They're not governed by the
21 Claims Practices Act or any of the statutes dealing with
22 that, but they act in the same manner.

23 That is that first threshold of indemnity because
24 the insurance policy provides indemnity, so it's the same
25 concept. And that is -- As I've indicated, it's either

1 600 or a million. In this particular case, it's 600.

2 What 1-11-460 does is it provides a next layer of
3 indemnity. In essence, an excess layer of indemnity over
4 and above a million dollars for qualifying judgements.

5 That is absolutely on par with what Tennessee has
6 for their second layer of indemnity. It's purely
7 discretionary.

8 So I think it is very persuasive, Your Honor,
9 that the Tennessee statute uses the words "as authorized to
10 pay" just like South Carolina does. Its statutory scheme
11 really, if you boil it down as I have -- And, like I said,
12 I wish I'd done a better job the first time around. If you
13 really boil it down and look at it, it works the exact same
14 way. Because there's an initial threshold covered by --
15 that -- that's -- that's mandatory. In essence, it's
16 mandatory if you reach those limits.

17 In the case of the Morris case here, the
18 Insurance Reserve Fund paid those limits once there was a
19 judgement. But that second layer is purely discretionary,
20 and 1-11-460 is that second layer, and it's purely
21 discretionary with the SFAA.

22 The Tennessee Court, the Legislation used the
23 words "as authorized to pay." South Carolina does, as
24 well. And when we have that case -- Granted, it's an
25 unpublished decision. There are lots of unpublished

1 federal decisions that are cited all of the time. In fact,
2 the Fourth Circuit in the District Court of South Carolina
3 cite unpublished decisions all the time. I recognize it's
4 an out-of-circuit -- out-of-jurisdiction case, but, of
5 course, it's a district court in Tennessee interpreting
6 Tennessee law. I don't know really why it's -- I mean, I
7 know the plaintiff's attorney made a big deal, like, "Well,
8 it's an out-of-jurisdiction case." It really is in
9 jurisdiction for interpreting Tennessee statute.

10 But, the bottom line is, in Wilcox, which is the
11 one case that we have, interpreted that provision as
12 discretionary. And I think it's correct, and I would think
13 -- I would ask that Your Honor take another look at it
14 because the excess portion, anything over and above
15 300,000, 1 million dollar threshold, is discretionary in
16 Tennessee. The Wilcox case is exactly correct.

17 So I don't think the Tennessee case, as Your
18 Honor found in your Order, actually helps the plaintiff
19 because basically you said, "Defendant cited a statute,"
20 but it really doesn't help them; it helps -- helps the
21 plaintiff. I disagree with that, respectfully, and -- and,
22 hopefully, giving you this better explanation, I -- and
23 focusing on -- on the two different portions of subsection
24 (h) make that clear. But I don't think there's any
25 question, at least not in my mind, that the -- anything

1 over and above that initial threshold of indemnity is
2 absolutely discretionary in Tennessee.

3 Now, Tennessee, I recognize does have built-in --
4 a little bit more of an explanation as to how you make a
5 claim. In South Carolina -- Of course, part of the issue
6 here in South Carolina is we've never had a claim, and so
7 there aren't any regs in place, there aren't any guidelines
8 in place, and that doesn't make -- with all due respect,
9 that doesn't make a statutory scheme mandatory rather than
10 discretionary; it's just a process that needs to be put in
11 place.

12 We cited the Tall Tower case, Your Honor,
13 indicating from the South Carolina Supreme Court that the
14 absence of guidelines or regulations doesn't violate due
15 process.

16 And, in fact, let me touch on that for -- for a
17 moment because I think part of the issue here, too, is I
18 don't even believe that due process is even going to apply
19 under 1-11-460. I don't think that's necessarily a
20 decision, Your Honor, needs to be -- to make to resolve the
21 declaratory judgement that's before Your Honor. But, the
22 bottom line is, in order for there to be a requirement of
23 due process, there first has to be shown to be a property
24 interest or an entitlement, and there's no property
25 interest or entitlement by 1-11-460 if it's interpreted as

1 a discretionary provision.

2 But even so, Your Honor, the fact that there
3 hasn't been a request made to the SFAA or its predecessor,
4 the Budget and Control Board, since 1992, doesn't mean this
5 is all of a sudden mandatory. It means, perhaps, they need
6 to adopt some regulations in order to develop a process.

7 But, just like as Mr. Lombard testified in his --
8 in the 30(b)6 deposition, the way you get -- get before the
9 SFAA is you make a request to get on the agenda and you get
10 before the board.

11 In this particular case, it's definitely putting
12 the cart before the horse, with all due respect, to suggest
13 that the -- the plaintiff, as the assignee of the five
14 correctional officers or the five correctional officers
15 prior the assignment, weren't allowed to get before the
16 SFAA. They never tried. There was never an attempt.

17 I -- I think it's also incredibly premature to
18 suggest that that's okay; they couldn't properly exercise
19 their discretion. Because no one has asked them to.

20 And, quite frankly, if a -- a request is made to
21 the SFAA and they're -- and the -- the insured, or, in this
22 case, the assignee of the insured's are turned down, then
23 they would potentially have a claim if they believe it's
24 arbitrary and capricious to seek judicial review for it
25 being arbitrated --

1 **THE COURT**: So are you --

2 **MR. LINDEMANN**: -- and capricious.

3 **THE COURT**: -- saying that there wasn't even a --
4 a claim made before its predecessor? The SFAA's --

5 **MR. LINDEMANN**: No. There's -- there's never --

6 And, in fact, we submitted early on in this case
7 an affidavit of Anne Macon Smith, who is the head of the
8 Insurance Reserve Fund, and she offered evidence that
9 there's never been a claim made under 1-11-460. This is
10 the first one.

11 **THE COURT**: Oh. Oh. Okay. But I'm -- But --

12 **MR. LINDEMANN**: But there's never been a claim
13 made by these particular --

14 **THE COURT**: That's what I'm trying --

15 **MR. LINDEMANN**: -- by -- by the five correctional
16 officers prior to assignment or by Ms. -- Ms. Morris after
17 the assignment. There's been no -- no request made.

18 And so -- And -- and that's why I -- I take
19 issue relying on this whole argument -- these whole --
20 these due process concerns because it's very difficult to
21 say, "This is mandatory because you didn't have a process
22 in place."

23 And, again, -- Again, it's -- it's -- it's
24 really putting the cart before the horse, if you think
25 about it rationally, because there's no requirement for

1 there to be due process in place -- or due process
2 guidelines in place unless it implicates the property
3 interest creates an entitlement, which it doesn't, if you
4 interpret it the way we interpret it; that it's
5 discretionary.

6 So, at that point, the sole issue that can be
7 asserted later --

8 **THE COURT**: I'm sorry.

9 **MR. LINDEMANN**: -- on --

10 **THE COURT**: I'm -- I'm stuck on something back --

11 **MR. LINDEMANN**: Sure.

12 **THE COURT**: So -- And I -- And I heard you say
13 it, but -- but it's -- it's kind of sinking in. So you're
14 saying that there's -- if -- if the -- if the statute is
15 interpreted as -- as being discretionary, that is the SFAA
16 may pay money, that there's no property -- that there's no
17 property interest and, basically, nobody -- What I hear
18 you saying is that nobody has the -- has the -- the
19 opportunity to -- to come before them and -- and receive
20 some type of due process.

21 **MR. LINDEMANN**: Well, I -- I think the way it
22 would be handled, and we don't know because no request was
23 actually made, which makes a whole -- that these arguments
24 a bit premature. But the way I believe it would be handled
25 is a request would be made to the SFAA to provide this

1 additional indemnity under 1-11-460. I would assume that
2 there would be a process that would be allowed for the
3 parties seeking that indemnity to be able to make a
4 presentation, either in writing, in person, or both, making
5 that request. I mean, the request would have to come to
6 them in some sort of formal fashion, and -- and that they
7 would need to provide their explanation as to whether
8 they're granting it or not. And, ultimately, if there's an
9 argument that that's arbitrating capricious and there's a
10 argument that they were denied due process and that due --
11 due process even attaches to this, and those are a lot of
12 ifs, that there would then be, obviously, a judicial remedy
13 for that.

14 **THE COURT:** So what -- So what I hear you saying
15 is that there -- there may be these due process -- that
16 there may be a mechanism or there -- there -- there might
17 be the opportunity for someone to receive some type of
18 process, but the SFAA doesn't have one in place, doesn't
19 intend to put one in place until somebody formally makes a
20 request because they've never had one in 20 years and so
21 there's no reason for them to -- to -- to address something
22 that's -- that hasn't come up.

23 **MR. LINDEMANN:** That's basically it. I mean I
24 suppose they could have, but they haven't.

25 And I've -- And I cite the Tall Tower case

1 because in that case what the Supreme Court was dealing
2 with was the -- the appellant in that particular case was
3 complaining that... And that case is actually stronger
4 than this because in that case the General Assembly
5 actually authorized the procurement review panel to adopt
6 the regulations that they never had. In this particular
7 case, 1-11-460 is silent as far as adopting any type of
8 regulations or process. But, the bottom line is, in the
9 Tall Tower case, the Supreme --

10 **THE COURT:** But --

11 **MR. LINDEMANN:** -- Court said there's no due
12 process violation simply because they didn't adopt those
13 regulations.

14 **THE COURT:** But that overlooks the fact that the
15 SFAA can -- can promulgate regulations or guidelines
16 regardless of whether or not they're authorized to do so
17 because they're authorized to -- to promulgate for a whole
18 bunch of things.

19 **MR. LINDEMANN:** Well, they'd still have to go
20 through the Administrative --

21 **THE COURT:** Sure.

22 **MR. LINDEMANN:** -- Procedures Act and --

23 **THE COURT:** Yes. They'd have -- They'd have to
24 do that.

25 **MR. LINDEMANN:** That's a pretty detailed process

1 that ultimately goes back to the General Assembly to
2 approve so --

3 THE COURT: Right. So -- But -- I mean, but
4 there is a process for them to go through and do. It's not
5 like they're not -- they're not authorized to --

6 MR. LINDEMANN: Absolutely. And -- and another
7 point I make, if this does implicate the -- the due process
8 clause -- I'm certainly not conceding that it does. You
9 know, there's a provision in the South Carolina
10 Constitution, I think it's Section 1 -- Article 1, Section
11 22 -- I'm going off of memory -- that talks about you
12 always have the right to seek review for decisions of
13 government. I mean I'm very much paraphrasing it. But, I
14 mean, there's constitutional provisions in -- And -- and
15 that's what -- what has actually triggered the
16 Administrative Procedures Act. There's a lot of case law
17 dealing with Section 1 -- excuse me -- Article 1, Section
18 22.

19 So I don't think the plaintiff or, you know, the
20 -- the five correctional officers would have been without a
21 remedy, but what they're arguing is because he didn't have
22 a process in place this must be mandatory, and I don't
23 think that's a fair -- a -- a fair look at it. I think you
24 have to interpret the statutory language and not look at
25 whether or not there was a process that was ultimately put

1 in place when there was never a request made, and still, to
2 this day, there hasn't been a request made, so we really
3 don't know how the SFAA specifically will deal with it.

4 Now, Mr. Lombard, who is not with the SFAA, but
5 he was the plaintiff's attorney 30(b)6 witness on behalf of
6 both entities, but he is the assistant claims manager at
7 the Insurance Reserve Fund. He did the best he could at
8 predicting how it would potentially be handled. But, you
9 know, ultimately, that should not be the determinant
10 decision. Not at this stage. Not at this stage. It --

11 If they go before the SFAA and don't get relief
12 and believe they were treated unfairly and -- and convince
13 the Court that due process safeguards apply, that's
14 something that can be litigated in a -- in a -- in a
15 different case, and that's why I make the point that it's
16 essentially putting the cart before the horse.

17 Going back, one last point, with this "authorized
18 to pay" language. One additional thing that I looked at,
19 Your Honor, that I'd like to hand up to the Court, is the
20 General Assembly has used that language in -- in numerous
21 contexts. And I pulled five different statutes, did that
22 last night, just sort of to see if I can make an additional
23 point as to the General Assembly not intending in using
24 that language to be mandatory.

25 (Mr. Lindemann presents document to the Court.)

1 And, I mean, I won't go through each of these. I
2 probably state them on the record, if I can; 63-7-2345, 8-
3 11-35, 59-21-530, 11-45-55, 55-11-510, and 5-21-628. Each
4 of those uses the words "as authorized to pay." It's
5 actually highlighted in each of those statutes. And I
6 think if you read those statutes, you'll come to the
7 conclusion that none of those statutes are using that term
8 as mandatory.

9 For instance, just to give the Court one example:
10 59-21-530 comes from Title 59, the Education Code, the
11 title of the Code, and it talks about -- the last sentence
12 of that statute says "The superintendent is authorized to
13 pay the salary of such additional personnel from the
14 appropriation to the State Department of Education of hard
15 of hearing and speech program." It doesn't say they have
16 to say from that source. It just gives them the ability to
17 use those funds to make those payments.

18 To give the Court another example -- I think the
19 last one in your stack dealing with Title Five. It's 5-21-
20 620, and it's from the Municipal Corporations Title in the
21 code, and it -- it talks -- It's actually in the
22 definition section, but it goes a little bit beyond that.
23 It talks about assessments, and the last phrase of -- of
24 that provision says, "For which such municipality shall be
25 authorized to pay, in whole or implied, through the means

1 of assessments against the real property benefitted there
2 from." "Authorized to pay -- " again, " -- in whole or
3 implied." It --

4 **THE COURT**: Yeah.

5 **MR. LINDEMANN**: -- does not use -- suggest that
6 it absolutely has to be paid from those particular funds.

7 **THE COURT**: I -- And I -- And -- and I
8 understand that. I also understand that the qualifier is
9 that -- the fact that it's being authorized to pay from a
10 certain fund, and so, to me, that's totally different than
11 the language we have in this particular statute.

12 Now, some of the other ones that you've passed up
13 may -- may be more of -- more supportive of yours -- of
14 your argument, but those -- There a couple of your
15 examples, the two that you just mentioned, plus another
16 one, that talks about being authorized to pay from funds
17 that are appropriate from a certain account.

18 I -- I --

19 **MR. LINDEMANN**: Right.

20 **THE COURT**: I -- I think that, you know, when you
21 come -- you're talking about paying from a particular fund,
22 I think that's -- that's total -- When you look at the
23 context of it, it's totally different than what -- I guess,
24 what I'm seeing or -- or any qualifiers that are put on --
25 on this particular statute. But I'm -- I'm -- I'm open to

1 your -- your argument, --

2 MR. LINDEMANN: Well, --

3 THE COURT: -- so I'm -- I'm trying to understand
4 it. I -- I -- I understand the --

5 MR. LINDEMANN: I -- I guess -- I guess --

6 THE COURT: -- point that you're trying to make.

7 MR. LINDEMANN: -- my point being is really 1-11-
8 460 doesn't do anything different when it's talking about
9 paying money from a fund.

10 I mean the money -- the money to be paid is going
11 to come from the Insurance Reserve Fund, which is -- and --
12 and based upon -- If you read through 1-11-460, it talks
13 about them making an assessment upon every governmental
14 entity in the state of South Carolina that isn't insured
15 under the Insurance Reserve Fund. Every state agency,
16 every local government that actually is insured with the
17 Insurance Reserve Fund, is going to be stuck paying that
18 excess amount.

19 So it's -- it is simple. It's authorizing
20 payment from a fund of money -- or a fund to be procured
21 from various governmental entities around the state.

22 The last point that I would make --

23 Again, this isn't in our brief, but just to -- I
24 -- I -- I very rarely ever go to Black's Law Dictionary,
25 but I figured I'd throw that out, as well. The word

1 "authorized" in Black's Law Dictionary is defined "to give
2 legal authority to empower." So there's nothing mandatory
3 in the use of the word "authorized." "Give legal authority
4 to empower." It doesn't say to require or to mandate.

5 So, the point I want to get across to the Court
6 is there's many reasons, many statutory construction
7 arguments, numerous case law, numerous statutes, the same
8 statutory scheme that uses the words "must defend."

9 The history of that the Insurance Reserve Fund,
10 how they've interpreted this statute over the years, which
11 we submit is entitled to some deference, as well, in the
12 absence of any other authority; all of those rules of
13 statutory construction all are in favor of finding that
14 this particular statute is discretionary.

15 And, again, even if you look at the Tennessee
16 statute, which granted is different in it's -- in it's
17 level of detail, but it's the same in its scheme, is also
18 clearly discretionary as the Wilcox Court found, and it
19 uses the words "as authorized to pay."

20 So, again, not to beat a dead horse, but the
21 plaintiffs haven't presented this Court with a single case,
22 a single case, where any Court anywhere interpreted "as
23 authorized to pay" as mandatory.

24 Now I'm not saying that there isn't some remote
25 case somewhere in some jurisdiction. You know, if you look

1 hard enough you can probably find just about anything you
2 want in -- in case law, but they haven't found it. And I
3 will submit to the Court that I've looked and I haven't
4 found one, and the Court hasn't cited any, and we've cited,
5 you know, not the Court of Appeals in Colorado -- not that
6 there's anything wrong with Court of Appeals in Colorado --
7 but we've cited the U.S. Supreme Court in several cases;
8 we've cited Federal Claims Court in several cases, and
9 we've cited the South Carolina Supreme Court in a similar
10 case. Not directly on point, and it's from the 1930s, but,
11 still, this particular language is typically interpreted to
12 be discretionary, and I don't believe that this statutory
13 scheme mandates something different.

14 Just touching on a couple of other points real
15 quick, and, again, as I indicated, anything that I don't
16 specifically cover that's in -- in -- in our Motion, I'm
17 certainly not intending to abandon it.

18 As far as the -- the elements themselves who have
19 a qualifying judgement, one of the issues is whether or not
20 the five correctional officers were acting in the scope of
21 their employment. The Court rejected that argument on a
22 couple of premises. That was never decided in the lower
23 court. And, quite frankly, based on the *Newman versus Auto*
24 *Owner's* case, as we've argued previously in this Court, you
25 can't start relitigating issues anew in declaratory

1 judgement actions.

2 But, the bottom line is, Your Honor, there was
3 never a determination as to whether these five correctional
4 officers were acting within the scope of their employment.

5 They were found liable under section 1983, which
6 only means that they were acting under color of law. Under
7 color of law it is not synonymous with acting within the
8 scope of employment. Let me --

9 THE COURT: So -- So --

10 MR. LINDEMANN: -- give you a perfect example.

11 THE COURT: So -- Well, so the IRF -- the IRF
12 policy with Berkeley County, would -- would that not have
13 covered conduct that was within the course and scope of
14 their employment in order -- in order for the policy to pay
15 up?

16 MR. LINDEMANN: It -- it does. And let me -- let
17 me -- let me make this one point and I'll -- I'll totally
18 address that issue.

19 I want to give Your Honor the example -- The
20 difference between acting under color of law, which is
21 what's required under 1983, versus in the scope of
22 employment.

23 The perfect example is a case I handled years
24 ago. The coverage part of it was decided by the South
25 Carolina Supreme Court. There was a police officer up in

1 Tega Cay who was stopping females for traffic stops, and
2 then young females then required sexual favors in order not
3 to ticket them. Well, the argument was, in the section
4 1983 case that was brought against him, is he was acting
5 under color of law. He had his car. He used his blue
6 light to stop. He was wearing a badge. He was wearing a
7 gun. You know, all the -- of official governmental action.

8 So he was acting under color of law, but the
9 South Carolina Supreme Court found that he was not acting
10 in the scope of his official duties or within the scope of
11 his employment because he was acting obviously for a very
12 personal reason. So, that is a perfect example of a case.

13 In this particular case, the issue never went
14 into whether or not any of these correctional officers were
15 acting within -- for personal reasons in how they were
16 dealing with Mr. Woods. I called him Mr. Morris earlier.
17 I meant to call him Mr. Woods.

18 And -- and we have case law in South Carolina
19 that indicates -- The case of *Pridgen versus Ward*, which
20 is a -- a case that the Court of Appeals ruled against me
21 on, where Mr. Pridgen was an associate warden at SCDC and
22 the Court found that -- that -- It was either the Supreme
23 Court or our Court of Appeals, found that even though Mr.
24 Ward, who was the Director of Operations at the time, was
25 within -- was acting, you know, as an employee of SCDC, he

1 still was acting for personal reasons because of a alleged
2 -- and we disputed that, but an alleged vendetta against
3 the plaintiff.

4 So, they don't go hand in hand, is -- is my
5 point. And that hasn't been established in this case.

6 Now, touching on Your Honor's point, because I
7 recognize that is a weakness, the Insurance Reserve Fund
8 provides coverage of employees acting within the scope of
9 their official duties.

10 In this particular case, they went ahead and they
11 did pay the -- the coverage, the \$600,000 in coverage.
12 However, what is important to recognize is we did so
13 preserving the right to make the argument that we're making
14 in this case. It was done with the consent of plaintiff's
15 counsel that we were going to go ahead and make that
16 argument, but we were not waiving this particular defense.
17 And, in fact, we cited it in our -- in our Motion for
18 Reconsideration. It was attached to our original
19 submissions to this Court.

20 **THE COURT:** So it's in -- it's in the Court file
21 in the Circuit Court?

22 **MR. LINDEMANN:** It -- it is, Your Honor. There -
23 - there -- The Partial Satisfaction of Judgement
24 specifically includes the following language: It says,
25 "The plaintiff acknowledges that in agreeing to tender the

1 amount stated herein, the South Carolina Insurance Reserve
2 Fund, as a division of the State Fiscal Accountability
3 Authority, expressly reserves and does not waive any
4 defenses as asserted in the pending action captioned
5 'Morris v. Budget and Control Board'" At that time, that's
6 the way it was, when this case was brought citing this
7 civil action number.

8 **THE COURT:** All right. "Reserves the --
9 Reserves the rights..."

10 **MR. LINDEMANN:** "Reserves and does not waive any
11 defenses as asserted in the pending action." When were
12 ready to assert that this argument in that action at that
13 point.

14 And so I -- I recognize it's not our strongest
15 argument that you have heard, but we went ahead didn't hold
16 up paying the 600,000, but we didn't waive that issue
17 either because it is a legitimate issue, and I don't think
18 it's proper to argue -- to -- to find that it's waived.

19 And Your Honor, in the beginning of your Order,
20 found that that particular issue was waived, and we didn't
21 waive it, specifically preserved it in that partial
22 satisfaction judgement, number one.

23 Number two, you also indicated that there was no
24 reservation of rights that was at issue, and that's true,
25 but the reservation of rights was for the Insurance Reserve

1 Fund to issue.

2 1-11-460 is not insurance, and SFAA, under 1-11-
3 460, is not acting as an insurance company. It is an
4 indemnity statute. There's nothing that requires a -- the
5 SFAA to, number one, know about all of these cases at the
6 time they're filed. And think about this from a -- from a
7 logical, practical standpoint. There's no way for the SFAA
8 to know of every case that's cited, that if it goes to
9 trial could potentially exceed a million dollars in a -- in
10 a judgement --

11 THE COURT: So --

12 MR. LINDEMANN: -- so -- so that they could
13 somehow reserve rights.

14 THE COURT: So just thinking out loud, then; what
15 -- what that -- what that does is that it raises the
16 possibility that there is a -- a trial of some form or
17 fashion on that particular issue.

18 MR. LINDEMANN: I disagree because of the Newman
19 case. The Newman case says you can't relitigate that
20 issue. That issue needed -- had been litigated before the
21 trial judge. That jury could have answered the special
22 interrogatory that indicated whether or not the jurors were
23 in the correctional officers -- All of them, or some of
24 them, were acting for personal reasons and not within the
25 scope of their employment. But there was no request made

1 in the underlying case to do that.

2 Their comeback to that was simply "Well, there
3 was -- " It was stipulated that the officers were acting
4 in the color -- under color of state law. And, again, I
5 can see that, but, as I indicated to the Court, there's a
6 huge difference, and I can cite the Court numerous cases.

7 I've actually had that case litigated several
8 times in coverage matters, and there's case law -- a good
9 bit of case law, actually, out of the Seventh Circuit. But
10 -- but there is a difference between color of law and scope
11 of -- scope of employment.

12 In fact, I have a -- I know it's not precedent,
13 Your Honor, but I'd be happy to try to dig it out. I have
14 a case from Judge Nicholson in a coverage case involving
15 the College of -- the College of Charleston, Professor
16 Reid. But I recognize that there was that distinction.

17 **THE COURT:** I -- And I -- Okay. And --

18 **MR. LINDEMANN:** But any way --

19 **THE COURT:** And I -- I understand that. I'm just
20 -- I'm just thinking in my head as you're speaking about
21 the practicality and, you know, if it's -- if it's not part
22 of the 1983, then why would somebody -- why would someone
23 specifically as for a special interrogatory on that? But I
24 understand that if somebody has to think way down the
25 road...

1 **MR. LINDEMANN:** Well, it also goes to punitive
2 damages, potentially, too. Because if they're acting
3 outside the scope of their employment for a personal
4 vendetta or personal reasons, I mean, that issue would have
5 come out because that would have made that a --

6 **THE COURT:** So are you inferring that the fact
7 that there was a -- there -- there was a punitive damages
8 award in this case that they're -- that they must have been
9 acting outside of the --

10 **MR. LINDEMANN:** No. I mean, they can -- That --
11 But that -- that's the point; that determination hasn't
12 been made.

13 Now punitive damages standard under federal court
14 is not based on that. My point being that that could have
15 been an additional argument that could have been litigated
16 in front of the underlying court. It's not like asking the
17 -- the federal court in this case to decide some incredibly
18 collateral issue, is my point.

19 But now the standard of the -- is very similar to
20 the state system. They have to show a clear and gross
21 disregard for the rights of others or recklessness, a
22 reckless disregard for the rights of others. That's the
23 standard that I'm -- I'm sure, if we look at the charge,
24 that's what Judge Gergel charged.

25 I also recognize these -- these issues, as to

1 whether or not it's a qualifying judgement or not, those
2 are not issues Your Honor has to reach if you decide the
3 discretionary versus mandatory issue in our favor. So
4 these are only issues that you need to reach ultimately if
5 you maintain your previous decision that it's mandatory.

6 THE COURT: Well, right now, all I'm doing is
7 interpreting the -- the statute, right?

8 MR. LINDEMANN: Right.

9 THE COURT: That's the only --

10 MR. LINDEMANN: That's right.

11 THE COURT: -- issue before me, so...

12 MR. LINDEMANN: Well, but you're also finding --
13 If you -- if you interpret it, you're -- you're also --
14 made a Ruling that the SFAA was required to pay because
15 they did qualify. You did find that these particular
16 correctional officers met all of the qualifying elements
17 under 1-11-460, which raises --

18 I have two real quick additional points, and then
19 I'll -- I'll stop.

20 Number one, the other qualifying issue that Your
21 Honor ruled against us on and I'd ask the Court to
22 reconsider is if you look at the specific language of 1-11-
23 460, Your Honor, it -- it is triggered by a judgement in
24 excess of a million dollars. In this particular case, you
25 have judgements that are entered against five different

1 correctional officers in different amounts. Only two of
2 the correctional officers were found liable for in excess
3 of a million dollars. And -- and I don't have those names
4 off the top of my head, but I can tell you real quick.
5 It's the --

6 THE COURT: Well, yeah, --

7 MR. LINDEMANN: -- two that --

8 THE COURT: I -- I know which ones. They're --

9 MR. LINDEMANN: It's -- it's the two that got --

10 THE COURT: -- in my -- It's in my Order.

11 MR. LINDEMANN: It's the two that got hit with a
12 million dollars in punitive --

13 THE COURT: Right.

14 MR. LINDEMANN: -- damages.

15 THE COURT: And that's listed --

16 MR. LINDEMANN: Okay.

17 THE COURT: -- in the Order.

18 MR. LINDEMANN: And those are the only two that
19 would -- would qualify. We don't look at the five
20 judgements collectively to say that they total over a
21 million dollars.

22 Now, granted, if you do add them all up, they do
23 total over a million dollars, but the three that were less
24 than a million dollars don't get the benefit of that. And
25 the reason for that is -- If you look at -- I -- I think

1 that's clear from the language of the statute because the
2 statute actually talks about -- Where it says, "In excess
3 of one million dollars -- " And then goes on and says, " -
4 - subject to a maximum of four million dollars and in
5 excess of one million dollars for one employee, and a
6 maximum of twenty million dollars in excess of five million
7 dollars in one fiscal year."

8 So the key language there is "four million
9 dollars in excess of one million dollars for one employee."
10 That right there indicates the General Assembly indicated
11 that the one employee was to have a judgement in excess of
12 a million dollars. You can't collectively combine them all
13 in order to meet that limit.

14 Now, two of them do have that -- do meet that
15 limit. Three of them don't. So we would ask the Court to
16 reconsider on that point.

17 And then, the last point, I blame myself on this
18 one because I think I got bogged down with the *Cobb versus*
19 *Benjamin* case, which really wasn't the best case to -- to
20 make this point, and -- and that is -- It -- it -- it is a
21 very simple and straightforward point. This is an
22 indemnity provision and the law is very, very clear that an
23 indemnitee, which in this case would be the SFAA, would
24 only be able -- be required -- assuming it's mandatory
25 where they -- in their discretion and they agreed to it,

1 they would only be required to indemnify these five
2 correctional officers from what they are actually liable
3 for. They have to personally be liable. If the indemntee
4 is not liable, there's nothing for the indemnitor to
5 indemnify them for. It's a basic indemnity/indemnitor
6 principle.

7 Where we see that come into play, and that's why
8 I cited the Cobb case, is in the insurance setting.
9 Because an insurance policy, there's no indemnity -- it's
10 an indemnity contract, and if the insured is not liable,
11 the insurance company has nothing that they have to
12 indemnity them for. Pretty straightforward concept. But
13 the nuisances of insurance don't come into play with 1-11-
14 460 because it's purely an indemnity provision.

15 The other case that we cited, and Your Honor
16 didn't address in your Order, is probably a better case to
17 look at, and it's *Smalls versus Blackmon*. The plaintiffs
18 tried to distinguish that case on the facts because of some
19 longshoreman case. I don't care about the facts of that
20 case at all. What I care about is the one paragraph of --
21 and it says as follows: And this is a South Carolina
22 Supreme Court case from 1977. It says, "It must be
23 remembered that an automobile liability insurance policy is
24 basically a contract of indemnity. The insured is
25 obligated to pay only the sums of which the insured become

1 legally obligated to pay. The insurance carrier is in the
2 same legal position as its insured. A legal liability
3 insurance carrier only contracts to pay any debt the
4 insured is liable to pay."

5 Well, that's true for any contract of indemnity.
6 That's true for an indemnity statute, such as what 1-11-460
7 is. The indemnitor is only responsible to indemnify the
8 indemnatee for what the indemnatee is and remains liable
9 for.

10 In this particular case, Your Honor, it is well -
11 - it's undisputed that in order to obtain the assignment
12 from the five correctional officers, Ms. Morris, the
13 personal representative of the estate, provided a covenant
14 not to execute to each of those five correctional officers
15 which extinguished their personal liability.

16 None of those five individuals are personally
17 liable at this point. Therefore, they are the indemnitees.
18 Even though there was an assignment, case law is very clear
19 that the assignor steps into the shoes of the assignee.
20 So, in this particular case, the assignees -- I'm sorry.
21 I got that backwards. The assignee steps into the shoes of
22 the assignor.

23 So, Ms. Morris steps into the shoes of the five
24 correctional officers. And, in this case, the five
25 correctional officers have no personal liability whatsoever

1 for any of the judgments any longer. There is a covenant
2 not to execute against their personal assets. They are no
3 longer personally liable so, therefore, the indemnitor, in
4 this case the SFAA, has absolutely no duty to indemnify
5 them for anything. That's a clean-cut issue. It's basic
6 indemnity law, and there shouldn't be any question that 1-
7 11-460 is the indemnification statute.

8 So that's another basis, and Your Honor ruled
9 against us on that particular issue by distinguishing the -
10 - the Cobb case. You know, honestly, I think -- I think
11 Cobb probably still applies, but I won't push Cobb because
12 it does have some nuance because that was a UIM case and
13 UIM cases always have a little bit of nuance because you
14 get a covenant not to execute, you can still pursue the
15 lawsuit in order to establish what the liability is for the
16 UIM carrier. There's a fiction that's created by the UIM
17 statutes that make Cobb versus Benjamin probably not the
18 best case to make this point. The much better case is
19 *Smalls versus Blackmon*.

20 But what I'm really relying on is not insurance
21 law. I'm relying on basic indemnity law. And based on
22 that, Your Honor, we believe that that also is a nice,
23 clean clear-cut issue that Your Honor didn't -- didn't rule
24 on in our favor and probably avoid all of the, possibly,
25 statutory construction issues.

1 I think I've covered all of my points. Thank you
2 very much, for Your Honor giving me this time. Unless
3 there are any other questions that Your Honor has, thank
4 you, Your Honor.

5 THE COURT: Mr. Johnson.

6 ARGUMENT BY MR. JOHNSON

7 MR. JOHNSON: Yes, Your Honor. I'll keep this
8 relatively brief.

9 Of course we feel that the Order that you've
10 issued in this case already is correct, that the issues by
11 both sides have already been briefed, have already been
12 argued to the Court. Both sides submitted Proposed Orders
13 and we feel that the Court reached the correct decision as
14 to the statutory interpretation of 1-11-460.

15 Mr. Lindemann obviously is a skilled attorney and
16 has brought up a lot of points before the Court here,
17 addressed those in a memorandum addressed to the Court,
18 filed with the Court, as well as listing all of the
19 initially filings back when this was initial -- occurred.

20 I don't want to get bogged down too much in the
21 weeds here, but what I'll -- I'll just articulate as to the
22 plaintiff's argument -- argument throughout this litigation
23 and what I'll submit to the Court, that the defendants have
24 not offered a -- a satisfactory explanation or alternative
25 purpose for, is that the purpose of this statute is to

1 facilitate payments of 1983 judgements and to provide
2 protections to the employees who have them entered against
3 them.

4 In the absence of a statute, I will submit to the
5 Court there would be no way for plaintiffs to recover on
6 any verdicts that go -- come in above and beyond the policy
7 limits of the case, and there would be no protections for
8 employees who are subject to those lawsuits.

9 If the legislator was happy with that status quo
10 and didn't have any concerns about protections for
11 employees or about claims being paid, there would be no
12 reason for them to enact the statute.

13 The statute doesn't serve any other purpose.
14 It's not like we're trying to shoot for one language here
15 into one little footnote or subsection when really ninety
16 percent of the statute addresses some other issue.

17 The sole purpose of this statute would have been
18 and only could have been to address situations like the one
19 in this case where we have judgements that have been
20 entered against employees, state employees, under Section
21 1983, and the Legislature, in enacting this -- this
22 legislation, would have done so to address some lack or
23 defect that they saw in the existing statutory scheme.

24 And, now, I'll agree with Mr. Lindemann that the
25 language is authorized. It's not as clear as I would like

1 for it to be. Certainly, I wish the Legislator had just
2 come out and said it must be paid. I'm sure he wishes they
3 had come out and just said may be paid. But there is
4 certainly room for interpretation there because it's not a
5 hundred percent clear one way or the other, and I think
6 that the Court is beholden to interpret that in a way that
7 serves the purposes of the Legislature in enacting this --
8 this statute.

9 These are the first time that I've seen these
10 statutes here today that Mr. Lindemann handed up that also
11 used these "authorized to pay" language. But, as Your
12 Honor alluded to during his argument, it seems that the
13 discretion here is what source the funds come from and the
14 payment itself has to be mandatory.

15 If you look at 59-21-530, it says, "The state
16 superintendent of education is authorized to pay the salary
17 of such additional personnel from the appropriation to the
18 State Department of Education for the hard of hearing and
19 speech program."

20 I certainly don't interpret that to say that at
21 the end of the school year the superintendent of education
22 can say, "Hey, this statute is discretionary, so I'm not
23 going to pay you a salary at all." The discretion is in
24 that the -- the funds come from this appropriation for the
25 hard of hearing and speech program; not in whether the

1 amount gets paid at the end of the day.

2 And I have seen a similar thing with a couple of
3 these. Those are about authorized to pay reasonable
4 compensation for services provided by employees, or
5 authorized to pay a cost for improvements to streets and
6 sidewalks and -- and paving and installation of gutters.

7 At the end of the day, the state or the -- the
8 agency can't just say, "Well, I'm not going to pay for that
9 at all." It -- It's, "I can pay for it this way, or maybe
10 I can pay for it another way."

11 Likewise, the -- the Tennessee statute -- again,
12 as Your Honor mentioned during Mr. Lindemann's argument --
13 is just a completely different framework than ours. It
14 provides a very clear-cut process for how you get before
15 the Court. It provides criteria on which -- on which the
16 decision should be made. For example, whether the officer
17 employee fully cooperated in the investigation and defense
18 of the litigation.

19 And, certainly, South Carolina Legislature could
20 have enacted a similar sort of scheme or really detailed
21 legislative framework here as Tennessee did, and maybe we
22 would have been better served if they had because we
23 certainly would have followed that authority, but it seems
24 to me that they simply authorized payment based on the
25 criteria that they put in their statute, whereas, Tennessee

1 authorizes payment based on the criteria and the process
2 that they put in their statute. And where that leads us is
3 that their own 30(b)6 representative, Mr. Lombard, could
4 not even provide us with an explanation of how to get a
5 claim for payment in front of the Court.

6 And so, at the end of the day, what we're left
7 with here is the plaintiff also met -- has -- has provided
8 a very clear, very straightforward explanation of when and
9 how payment is to be provided, and that's based on what the
10 statute says, all of the criteria laid out here, and when
11 those criteria are met, the payment is made.

12 On the other hand, we have a process laid out by
13 the defense where everything is discretionary. Their own
14 30(b)6 representative doesn't even know when or how that
15 discretion can be used, or what criteria it's based on, or
16 how to get before the board. It's just a nebulous, vague -
17 - a series of -- of nothing, really, that -- that,
18 essentially, makes the statute a dead flower. And I think
19 that when you have these two contrasting views on the
20 statute, that though may be permissible under the statutory
21 language, then what you need to look at is what the
22 Legislature intended.

23 And, again, as -- as I've argued already, the
24 clear intent of the Legislature was to fill a gap that
25 existed in the statutory system and framework.

1 I think it's evident that they've looked at the
2 South Carolina Tort Claims Act and they noticed that, well,
3 sovereign immunity is being abrogated here so we're going
4 to provide protections to plaintiffs so that they can
5 recover under claims, and we're also going to provide
6 protections to defendants so that they can't be named
7 personally; it has to be gross negligence, there are caps
8 on that.

9 Well, with 1983, the federal government basically
10 tossed sovereign immunity out the window, and the abrogated
11 that a lot of those protections that might have otherwise
12 been provided, and so the state says, "Well, we still want
13 to protect plaintiffs so that they can require -- recover
14 for very serious violations, including the violation of
15 constitutional rights, which should be at the foundation of
16 our society, but we also want to provide protections to
17 defendants, and since we can't modify or alter the 1983
18 scheme, -- " which is handed down by the federal
19 government, " -- then what we can do instead is add
20 statutes like 1-11-460 that do provide them protection by
21 providing them coverage on these excess verdicts and that,
22 likewise, can -- can protect plaintiffs who have their
23 constitutional rights violated, as well.

24 That's basically our position in a nutshell, Your
25 Honor. As I said, in response to all of the -- the more

1 technical and semantic arguments raised by defendant in the
2 course of their arguments, in the pleadings, I feel like
3 those have been covered *ad nauseam*, at this point, in -- in
4 memorandums and the Motions for Summary Judgement.

5 I'm happy to respond to any questions that Your
6 Honor might have for me, but in the interest of time and
7 simplicity, that's basically what our case boils down to.

8 THE COURT: Thank you. I'm thinking at this
9 particular point.

10 MR. LINDEMANN: Can I make a couple of points on
11 reply, Your Honor?

12 THE COURT: I just want to make -- I just want
13 to make sure I don't have any additional --

14 MR. LINDEMANN: Oh.

15 THE COURT: -- questions, or something I want him
16 to cover specifically about what -- what you stated.

17 (Court reviews documents.)

18 THE COURT: Mr. Johnson, if you would -- if you -
19 - I know that you mentioned -- You covered, I think,
20 everything in your memorandum, but, if you would, just
21 respond at least to the arguments that were made in
22 reference to the -- the assignment and -- and covenant not
23 to execute, and the other one is in reference to the
24 finding about whether they were acting within the course
25 and scope of their employment.

1 **MR. JOHNSON:** Yes, Your Honor. As to the
2 assignments, these are very specifically couched as
3 covenants not to execute and not as releases. They do not
4 serve to extinguish personal liability, only the means by
5 which we will recover. As we specifically state,
6 "Plaintiff hereby covenants not to execute against any
7 assets of the undersigned."

8 We do a lot of personal injury and car crash
9 cases and this is essentially standard language that we use
10 in any covenant not to execute once we recover the
11 liability language and we agree that we're not going to
12 pursue any further causes of action against the defendant's
13 personal assets. But we leave open the possibility in the
14 covenant not to execute to go against them personally. As
15 Mr. Lindemann mentioned, it's kind of a legal fiction so as
16 to recover the under-insured coverage against them.

17 I'll also point out that the only consideration
18 that Ms. Morris received as a -- as -- on receiving these
19 assignments was essentially the right to go against the IRF
20 and the SFAA for -- for pursuing various claims. And if
21 the -- the argument is that the assignments that transfers
22 those claims also extinguishes those claims, then suddenly
23 there's no consideration and the interpretation makes the
24 assignments themselves self-defeating, and so this would...

25 Again, this is standard practice throughout

1 personal injury. It would have -- It would essentially
2 strike down the entire practice of recovery against UIM
3 benefits or establishing assignments of rights of any kind
4 by what I see as -- as essentially a circular reasoning or
5 -- or -- or a reasoning that makes the assignments circular
6 by defeating the very thing that they're designed and
7 intended to assign.

8 As -- as -- as for the course and scope of
9 employment, as has been mentioned, it was stipulated prior
10 to trial that they were acting under the color of state
11 law. I understand Mr. Lindemann's argument, but the two
12 are not one in the same. But there's absolutely no
13 indication anywhere in any record that they were not acting
14 in the course and scope of -- of their employment.

15 And, as we also pointed out in the brief, the IRF
16 paid under -- And their policy is -- is only applicable if
17 they were, in fact, acting in the course and scope of their
18 employment.

19 The reservation that Mr. Lindemann has talked
20 about is a document that was signed after the verdict was
21 returned, and, essentially, was just what we have to do in
22 order to get the money that -- that the jury had returned
23 to us.

24 To the best of my recollection, and I will submit
25 to the Court that I don't have my entire file from the

1 underlying action here in front of me, that I do not recall
2 any issue ever being raised, or any reservation of rights
3 ever being raised by the IRF prior to trial, that there was
4 any intention or any indication that any of the employees
5 or defendants were not acting in the course and scope of
6 their employment.

7 So, to me, it's kind of gotcha argument when you
8 go through three years of litigation, nobody says a word
9 about course and scope of employment, even if we -- even
10 though we would have specifically asked in discovery if
11 this is being dependent under a reservation of rights, the
12 right of anything, and we could have -- have stuck in the
13 special interrogatory if that were the case. And now to
14 bring it up years after the case has been tried, and after
15 the jury has been dismissed, I just don't think it's --
16 it's an equitable argument. And I think that any argument
17 that the -- the employees were not acting in the course and
18 scope of their employment is just completely speculative.
19 And -- and, to this point, I -- I don't know if it would be
20 unjust for the Court simply to offer a ruling as a matter
21 of law based on everything we have in record. We can pull
22 those transcripts, if you want to, but they were acting in
23 the course and scope of their employment.

24 **THE COURT:** Thank you.

25 Mr. Lindemann.

ARGUMENT BY MR. LINDEMANN

MR. LINDEMANN: Your Honor, I -- I will add, on that last point, what again is important is not to inflate the Insurance Reserve Fund with the SFAA. The Insurance Reserve Fund has certain obligations based upon their policy. And, of course, the policy has been fully paid. It's not -- no longer at issue in this particular case. So what you're focused on is what the SFAA's responsibilities were.

The SFAA was not involved in the underlying case, as we've argued already to the Court. The SFAA does not have the responsibility to issue any type of reservation of rights. It's not even sure to be -- entirely impractical to expect them to know what claims could potentially exceed a million dollars down the road and be presented to them.

And, in this particular case, the obligation is on the plaintiff to know what the issues are.

It kind of goes back to the same point that Your Honor dealt with years ago on a number of occurrences. The case that Your Honor decided up in -- in Anderson for the AnMed case, and I ended up getting involved in that appeal and got you affirmed by that appeal because, ultimately, you were exactly right because, ultimately, it fell on the plaintiff to make the proper request of the jury and they didn't do that in that particular case.

1 You can't relitigate the number of occurrences
2 later. You can't relitigate whether or not somebody was
3 acting in the scope of their employment.

4 THE COURT: Could -- Let me ask this, could that
5 not be decided by a -- by the Court, in terms of reading
6 the transcript and determining whether or not there's
7 evidence to -- to demonstrate whether, you know, there's --
8 there's some malice or some other evidence that would
9 demonstrate that they would not be acting within the course
10 and scope?

11 MR. LINDEMANN: Well, part of the problem is --
12 is -- And I can't say. If I have read the entire
13 transcript, it was a long time ago. This case -- These
14 cases have been around for a while.

15 I don't know that that evidence would even come
16 up because I'm not sure that that evidence was even
17 addressed.

18 But I think the important thing is, number one,
19 the point I just made based on the AnMed case, but really
20 the South Carolina Supreme Court has dealt with that issue
21 in the *Newman versus Auto Owners'* case and -- and said you
22 can't use a declaratory judgement action to relitigate
23 underlying findings of fact that were not litigated in the
24 underlying case. And I think that's the exact situation we
25 have here, as well.

1 Just a couple of other real quick points. This
2 whole idea of what the intent of the General Assembly was
3 in passing 1-11-460 -- And I -- and I recognize Your --
4 Your Honor has agreed with the plaintiffs that the General
5 Assembly intended to provide this type of additional
6 indemnity in 1983 cases.

7 Ultimately, however, though, there's no
8 legislative history. There's nothing that indicates
9 exactly why the General Assembly wanted to adopt it, but,
10 most importantly, there's no legislative history that
11 indicates whether it should be mandatory or permissible.
12 Whether or not it was subject to the General Assembly
13 doesn't mean -- excuse me -- that the General Assembly has,
14 in essence, delegated the authority to the SFAA to decide
15 what cases would be appropriate; what cases that might not.

16 You know, one -- something that -- that dawned on
17 me while sitting here listening to Mr. Johnson is you can -
18 - you can somewhat see an additional point in the language
19 of the statute that -- that hints to that.

20 I think it's important to note that if this is a
21 mandatory indemnity provision, as Your Honor has ruled that
22 it is and the plaintiffs take the position it is, it's not
23 unlimited. There are caps, and it's not capped per claim;
24 it's -- there's an aggregate cap, as well. So it's capped
25 at four million dollars for every -- for each employee, but

1 the most important part -- part is the -- the cap for
2 twenty million dollars for any fiscal year.

3 So, ultimately, if this was a mandatory provision
4 -- if this was intended as a mandatory provision, there
5 wouldn't be a cap like that because what happens -- Let's
6 say you have -- And -- and, granted, I know this is a bit
7 of a hypothetical because we haven't had a single claim
8 under 1-11-460 in almost 30 years. But let's assume the
9 Court finds that it's mandatory and we start having a
10 situation, which is very possible, where 1983 cases won't
11 be settled anymore because this additional layer of
12 indemnity is not available unless there's a judgement. So
13 let's say you have plaintiffs' attorneys who are no longer
14 settling these cases and you have a swarm of these cases
15 getting tried. If they were big dollar cases -- Which is
16 one of the negatives of the public policy considerations, I
17 would submit, of Your Honor's ruling is that it works
18 against settlement of 1983 cases. But, beside that, let's
19 assume you start a having a number of catastrophic cases
20 going forward. Ultimately, what this provision says is
21 once you have twenty million dollars in one year, you have
22 no more.

23 So what happens to that claimant in October or
24 November? There had been a swarm of them earlier in the
25 year. October and November, they have a four-million-

1 dollar verdict and they turn around and go to the SFAA and
2 say "Judge Lee says it's mandatory. You owe me three
3 million dollars because I got a four-million-dollar
4 verdict. It's -- Three million is above a million
5 dollars, but only three million. No discretion. Pay it,"
6 and SFAA goes, "Sorry. We've already spent twenty million
7 this year. You're out of luck."

8 Well, first of all, that would probably violate
9 equal protection, and second of all, it clearly shows that
10 the General Assembly did not intend this to be a mandatory
11 statutory scheme where there's absolutely no discretion
12 that comes into play.

13 So, that's an additional point to take into
14 consideration for that exact reason. And I know that's a
15 bit of a stretch because, like I said, we haven't had a
16 claim in 30 years.

17 But if this becomes law, there will probably be
18 plenty of plaintiffs for which are going to say, "I'm not
19 going to settle my case. I'm going to take it to trial and
20 hope to ring the bell for ten million or fifteen million
21 dollars in some really bad egregious case because I'm going
22 to turn around -- I've got a great punitives case and Judge
23 Lee has indicated that punitive damages are covered by
24 this." I'm not putting it on you, but you know what I'm
25 saying. "And -- and so ultimately we're going to ring --

1 We could probably get ten million in punitives against this
2 poor correctional officer or this -- this drunk employee
3 who was driving a state vehicle at ten o'clock a night, you
4 know, plastered down I-26. We're going to get punitive
5 damages against them and turn around and collect it from
6 the SFAA." When you have enough of those claims, it's
7 going to run out.

8 Clearly, that wasn't the intent of the General
9 Assembly, I'd submit, and that's why we haven't had these -
10 - this issue come up for 30 years and we haven't had these
11 claims for 30 years.

12 The last point, I'd like to just reiterate, Mr.
13 Johnson indicated there's no way for plaintiffs to recover
14 excess verdicts. That's not the case. You know, some --
15 obviously, some defendants have personal assets. You know,
16 you can recover from that. But that's not even an issue in
17 this case because this -- this case -- We can't lose sight
18 of the fact that this case is entirely about punitive
19 damages, and punitive damages are not intended to make
20 plaintiffs whole.

21 Ms. Morris, the Estate of Allan Woods, has been
22 made whole. They have recovered every dime of compensatory
23 damages. So this is not a case about providing for the
24 plaintiffs to be made whole. This is also not a case about
25 the state needing to protect their employees. It goes back

1 to my argument early on about the fact that punitive
2 damages shouldn't be provided for this indemnity statute
3 anyway; not just because sovereign immunity wasn't waived,
4 but it goes against public policy that if you start
5 insuring -- or, in this case, providing blanket indemnity
6 for millions of dollars worth of punitive damages, and
7 that's what this case is.

8 So 2.45 million dollars in punitive damages were
9 awarded. What you're doing is you're giving those
10 employees the freedom of knowing that they're not going to
11 be on the hook for anything. The state is going to step in
12 and going to provide indemnity for punitive damages. So
13 that actually works against public policy.

14 Employees who commit the type of acts that
15 warrant punitive damages in a federal case, that's a high
16 standard, just like it is in state court, are not deserving
17 to be protected, and, as I indicated, defeats the whole
18 purpose of deterrents if they know that the state is going
19 to turn around and -- and pay when, in essence --

20 What is punitive damages? In -- in essence, a
21 civil -- civil penalty. They're going to step in and pay
22 that civil penalty for them, and that's not good public
23 policy, at all, and I certainly don't think that was the
24 intent of the General Assembly, if you're looking at --
25 looking at intent.

1 Thank you, Your Honor.

2 **THE COURT**: Counsel, I -- I'm -- I -- I would
3 like for you to do Proposed Orders. I've -- I know that I
4 may not have touched on all of the arguments that were made
5 the last time, and so I -- I would like to have y'all --
6 for the opportunity to have your input.

7 If you all will, provide Proposed Orders covering
8 all of the issues by October the 21st, which is a Monday.
9 You can send them to me electronically, email; not efile.

10 **MR. LINDEMANN**: Do not efile?

11 **THE COURT**: Do not efile because it just stays in
12 my queue.

13 **MR. LINDEMANN**: Okay.

14 **THE COURT**: Because if I -- If I get them, I can
15 take care of them that way, and then they just don't sit in
16 the queue all of that time.

17 **MR. JOHNSON**: Your Honor, if I may, we're going
18 to be in trial all next week. I expect it's going to spill
19 into the second week. Would it be possible to get an extra
20 week?

21 **THE COURT**: Sure. I don't have a --

22 **MR. JOHNSON**: Thank you.

23 **THE COURT**: -- problem with that. Say the --
24 Move that one to the 28th?

25 **MR. JOHNSON**: Yes, Your Honor.

1 **THE COURT**: I'm on vacation that week, so I -- I
2 won't see it until I get back, but that -- that's fine.

3 **MR. JOHNSON**: Thank you, Your Honor.

4 **THE COURT**: And -- And then I'll -- I'll -- I'll
5 look at them when I -- when I return.

6 And if to the extent that there may be some --
7 some additional --

8 I -- I think you've -- I think you've all been
9 consistent about what you've cited previously, so I don't
10 think there's anything really new. If it's -- If it's not
11 South Carolina law or a non-Supreme Court case and you --
12 and you all cite something, please make sure you just
13 provide me a copy of it. Sometimes we're restricted on
14 what we can get off of our search engines.

15 **MR. LINDEMANN**: Does that apply to cases we've
16 already cited?

17 **THE COURT**: No. If --

18 **MR. LINDEMANN**: Okay. Just --

19 **THE COURT**: Well, --

20 **MR. LINDEMANN**: Because I -- I'll be happy to
21 provide the non-South Carolina cases already cited, because
22 I intend to cite them again.

23 **THE COURT**: Okay. If -- Then -- Then --

24 **MR. LINDEMANN**: Okay.

25 **THE COURT**: -- please do.

1 **MR. LINDEMANN:** Okay.

2 **THE COURT:** And instead of -- And I'll tell you
3 what, instead of -- instead of -- Well, send me a copy
4 electronically, but send me a hard copy of your -- And you
5 can just have it -- have it delivered to the courthouse,
6 and I'll -- and I'll -- I'll get it.

7 And to the extent that you need to repeat
8 anything that you may have repeated -- you may have cited
9 in your first -- in your first memos, please do. Don't --
10 don't just refer back. I'd like -- I'd like to make it
11 complete, and make sure that I've covered everything, and
12 so -- so people won't have to go back to -- refer back to -
13 - to other Orders.

14 And -- and -- and then maybe what I'll do is
15 instead of calling it a -- an Order of Reconsideration,
16 it's a -- it's an Amended Order, or whatever, that -- that
17 cites all of the same information previously.

18 **MR. LINDEMANN:** Sure.

19 **THE COURT:** Any other questions?

20 Let me write down --

21 **MR. LINDEMANN:** No, Your Honor.

22 **THE COURT:** What I'd say? Ten -- 10/28?

23 And, you know, I don't -- If -- if you really,
24 really want to respond -- Hopefully, you won't, because of
25 -- you've read everything and you can incorporate

1 everything. If you just desperately feel like you need to
2 respond to something that's been said, just let me know and
3 -- and I'll look at that.

4 MR. LINDEMANN: Okay.

5 THE COURT: And so -- I'm trying to keep down
6 the paperwork, but I'll be -- I'll be happy to consider it
7 if there's something that you -- you just really think it's
8 -- has not addressed that needs to be addressed in
9 response. Okay.

10 MR. LINDEMANN: Great.

11 THE COURT: Thank you all, --

12 MR. JOHNSON: Thank you, Your Honor.

13 MR. LINDEMANN: Thank you.

14 THE COURT: -- again, for your patience, and I'm
15 -- I'm sorry it took me so long to get something scheduled,
16 but when you're -- when you're working out of circuit, it
17 makes it hard, and it's hard -- hard to get court time
18 sometimes.

19 MR. LINDEMANN: Sure. Well, thank you for giving
20 a -- giving us a hearing.

21 THE COURT: It -- it was -- it was -- it was very
22 helpful, I -- I must say, --

23 MR. LINDEMANN: Thank you.

24 THE COURT: -- so I appreciate it.

25 Thank you.

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MR. LINDEMANN: Thank you, Your Honor.

(WHEREUPON, THE HEARING IN THE ABOVE-
ENTITLED MATTER WAS CONCLUDED.)

Be it known that I, the undersigned Sandra H. Davis, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing transcript represents a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, before the Court of Common Pleas for Richland County, South Carolina, so given on the 3rd day of October, 2019, to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

IN WITNESS WHEREOF I have hereunto set my hand
and seal this 15th day of June, 2020.

Sandra H. Davis
Official Court Reporter
Notary Public for South Carolina
My commission expires 6/3/2026.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND) **IN THE COURT OF COMMON PLEAS**

Nancy Morris, as Personal Representative)
 of the Estate of David Allan Woods,) Civil Action No. 2015-CP-40-0619
)
 Plaintiff,)

v.)
) **NOTICE OF MOTION AND**
 State Fiscal Accountability Authority,) **MOTION TO ALTER OR AMEND ORDER**
 South Carolina Insurance Reserve Fund,)
 Andrew J. Bland, Richard T. Burkholder,)
 Leemon E. Carner, Priscilla Bland,)
 Jerry Speissegger, Jr.,)
)
 Defendants.)
)

TO: THE HONORABLE ALISON RENEE LEE

ANDREW W. CREECH, HAROLD C. STALEY, AND GARRETT B. JOHNSON,
 COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendants South Carolina State Fiscal Accountability Authority (SFAA) and South Carolina Insurance Reserve Fund (IRF) will move before the Honorable Alison Renee Lee, at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRCP, reconsidering, altering and/or amending the Order on Declaratory Judgment as filed July 23, 2019. The Defendants' counsel received written notice of entry of the Order on Declaratory Judgment on July 23, 2019.

The Defendants' motion is based on the following:

1. In its Order filed July 23, 2019, the Court erroneously referred to Section 1-11-460 as providing "excess coverage." Neither the SFAA nor the IRF has issued any excess

insurance policy. In addition, the enabling legislation, Section 1-11-140, does not provide authorization from the General Assembly to issue an excess insurance policy or to provide excess insurance.

2. In construing the meaning and application of Section 1-11-460, the Court failed to properly or completely analyze the language of the statute and failed to employ the rules of statutory construction, as raised by the Defendants, and as articulated by precedent for interpreting a statute, particularly a statute that has never previously been construed by an appellate court. The key language for this Court to construe is the “is authorized to pay” language. The Defendants have construed that language to provide for discretionary authority in the SFAA as opposed to a statutory mandate. The Court, with all due respect, failed to address in its Order many of the construction arguments presented by the Defendant.

Specifically, the Court was urged to consider language from other parts of same chapter of Title 1 of the Code of Laws as Section 1-11-460. That statutory scheme, when considered as a whole, demonstrates that the General Assembly used expressly mandatory language where the legislative intent was to make a duty to indemnify mandatory. In its Order, the Court failed to consider or even mention Section 1-11-440, which provides, in part, that “[t]he State must defend the members of the State Fiscal Accountability Authority and the Director of the Department of Administration against a claim or suit that arises out of or by virtue of their performance of official duties on behalf of the authority or the department, as applicable, and *must indemnify* them for a loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both.” S.C. Code Ann. § 1-11-440. (Emphasis added). In fact, Section 1-11-440 uses the term “must indemnify” three times and describes a “commitment to defend and indemnify.” *Id.* In

contrast, Section 1-11-460 uses the term "is authorized to pay." This contrast in language used by the General Assembly in statutes in the same chapter of Title 1 strongly indicates that "must indemnify" and "is authorized to pay" have different meanings and create differing duties. This further shows that, where the General Assembly intended to make a duty to indemnify mandatory, it knew how to do so using the mandatory language "must indemnify." The Court is respectfully asked to reconsider this argument and to specifically address the point that the contrasting language in Section 1-11-440, which is part of the very same statutory scheme, demonstrates that the General Assembly knew to and did use mandatory language when the duty to indemnify was intended to be mandatory. The "is authorized to pay" language was therefore intended to convey a much different duty, specifically a discretionary duty.

3. In construing the meaning and application of Section 1-11-460, the Court failed to discuss or distinguish the wealth of precedent that the Defendants presented from other courts, including the United States Supreme Court and the South Carolina Supreme Court, that construed similar "is authorized to pay" language. Instead, those guiding authorities were entirely disregarded, and in fact, no alternative case law was even cited to support the Court's construction of the key language. Specifically, in the case of *Seminole Nation v. United States*, 318 U.S. 629 (1943), the United States Supreme Court held that the use of the word "authorized to bring suit" did not create an obligation in the Secretary of the Interior but rather allowed for the exercise of discretion. The Supreme Court explained that "the use of the word 'authorized' in this context necessarily reserved to the Secretary the right to determine his own course of action." 318 U.S. at 639. Similarly, in *Hopi Tribe v. United States*, 55 Fed. Cl. 81 (2002), the Federal Claims Court concluded that a statute stating that "the Secretary of the Interior is authorized to pay ..." created a discretionary duty. The Claims Court explained that the statute at

issue "merely stated that the Secretary 'is authorized' to reimburse the tribes for various types of legal fees" and "the plain language of the statute demonstrates that the Secretary's duty to compensate plaintiff under § 640d-7 is discretionary." 55 Fed. Cl. at 87. Also, in *Emmens v. United States*, 44 Fed. Cl. 524 (1999), the Federal Claims Court explained that "[t]he Attorney General is authorized to pay" language in 21 U.S.C. § 886(a) "vests in the Attorney General the discretionary authority to reward informants." 44 Fed. Cl. At 527. Likewise, in *State v. Elliott*, 169 S.C. 208, 168 S.E. 546 (1933), the South Carolina Supreme Court held that a statute providing that a judge "is authorized to ..." provides for discretionary authority. In sharp contrast, the Court did not cite to a single case in its Order where any court from any jurisdiction interpreted the "is authorized to pay" language as mandatory rather than discretionary. On reconsideration, the Court is respectfully asked to consider the precedent cited by the Defendants and to give effect to that governing case law in construing the language "is authorized to pay" as used in Section 1-11-460.

4. In construing the meaning and application of Section 1-11-460, the Court failed to discuss, let alone apply, the rule of statutory construction holding that "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132, 133 (1987). The Defendants presented evidence that the SFAA and the IRF, being the governmental entities charged with administering Section 1-11-460, have construed the statute "as enabling legislation that grants the Budget and Control Board and now the State Fiscal Accountability Authority the discretion as to whether to pay judgments in excess of \$1 million entered in Section 1983 cases against individual governmental employees and officials acting within the scope of their employment

with an agency or political subdivision that is a named insured with the IRF for tort liability insurance, subject to the caps cited in the statute." See, *Smith Aff.*, ¶ 3. The Court, however, entirely disregarded that evidence as well as the rule of statutory construction which makes such an interpretation worthy of "respectful consideration" and not to be overruled "absent compelling reasons." The Court did not discuss or make a finding of any such compelling reasons. The Court is respectfully requested to address this evidence and rule of statutory construction on reconsideration.

5. The Court instead focused on the absence of existing criteria or guidelines on how the discretion is to be exercised by the SFAA in addressing a request for indemnity under Section 1-11-460. The Court construed the apparent absence of guidelines to suggest that the duty to indemnify cannot be construed as being discretionary. In reaching that conclusion, the Court entirely disregarded (or at least did not address) the arguments made by the Defendants relying on specific South Carolina Supreme Court authority that is on point. Under South Carolina law, discretionary authority is the same as quasi-judicial authority. In *Redmond v. Lexington County School District Four*, 314 S.C. 431, 445 S.E.2d 441 (1994), the Supreme Court explained that "[t]he duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial)." 445 S.E.2d at 437. The Supreme Court further explained that "a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." 445 S.E.2d at 438. The exercise of discretionary or quasi-judicial authority, however, does not require the adoption or promulgation of guidelines. Here, the Court has focused on the absence of guidelines for the exercise of the SFAA's discretion in evaluating claims asserted under Section 1-11-460. However, in *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363

S.E.2d 683 (1987), the South Carolina Supreme Court found no due process violation where formal rules or procedures had not been adopted by the Procurement Review Panel. Thus, the absence of formal rules or procedures, especially where there has never been a request for indemnity under Section 1-11-460 in the past, does not convert discretionary authority into a mandate. The Court is respectfully requested on reconsideration to consider and address the impact of these authorities, including the *Tall Tower* decision, on this question. In addition, the Court's analysis presupposes that Section 1-11-460 even creates a protected property interest or entitlement which its express language does not support.

6. Additionally, as the Defendants have pointed out as well, the interpretation of Section 1-11-460 as mandatory rather than discretionary should not turn on any perceived "due process" or procedural concerns that have, as yet, never occurred. Here, the five correctional officers never made a request to the SFAA for indemnity. As a result, it is entirely premature for the Plaintiff or the Court to question the SFAA's decision-making process, and certainly it was not fair to cite to Rule 30(b)(6) testimony as a basis for concluding that discretion could not be appropriately exercised by the five members of the SFAA. At any rate, assuming a property interest is even implicated, once a request is made and a decision is rendered by the SFAA, then there will be an opportunity to challenge that decision as being arbitrary or capricious. However, it is in error to conclude that a statute does not allow for discretion to be exercised simply because certain procedures for making and adjudicating a claim under Section 1-11-460 have yet to be established. It is the classic "putting the cart before the horse" type analysis.

7. In its Order, the Court addresses at length the Tennessee employee indemnification laws and reaches the erroneous conclusion that the statute at issue provides for mandatory, not discretionary, indemnification. The Court is respectfully asked to reconsider its

reading of the Tennessee statute. The Court reads Section 9-8-112 of the Tennessee Code of Laws, which uses the same “is authorized to pay” language as in Section 1-11-460, as creating a mandatory payment requirement. The Court’s reading, however, is at complete odds with the Federal District Court in *Willcox v. Tennessee District Attorneys General Conference*, 2008 WL 4510031 (E.D. Tenn. 2008), which wrote: “While there is a state statute *authorizing* indemnification of state employees, Tenn. Code Ann. § 9-8-112, it does not *require* indemnification.” 2008 WL 4510031, *4, n.3. (Emphasis in original). Additionally, the Court failed to cite to the key language of Section 9-8-112(h) that makes the reimbursement by the board of claims *explicitly* discretionary: “Notwithstanding the foregoing, the board of claims may, *in its sole discretion*, reduce the reimbursement provided in this subsection (h) if the board finds a circumstance to exist which makes such a reduction proper and just.” Tenn. Code Ann. § 9-8-112(h). (Emphasis added). The statute provides further: “In cases where the judgment or settlement is in excess of the limits found in § 9-8-307(e), the board of claims *may pay* any of the amounts in excess of those limits where such reimbursement is found to bear a reasonable relationship to the officer’s or employee’s liability or the injury or damage caused.” *Id.* (Emphasis added).¹ Thus, as the words “may pay” show, this provision makes it clear that indemnity for claims in excess to the tort claims limits of \$300,000 per claimant and \$1 million per occurrence is purely discretionary. In sum, a proper reading of the Tennessee statutory scheme shows that indemnity paid by the board of claims is absolutely discretionary as the *Willcox* court recognized. Likewise, a proper reading of Section 1-11-460 -- using that same “is

¹ In Section 9-8-307(e), Tennessee provides for tort claims limits of \$300,000 per claimant and \$1 million per occurrence. Tenn. Code Ann. § 9-8-307(e).

authorized to pay” language -- shows that indemnity paid by the SFAA is also absolutely discretionary.²

8. In its Order issued July 31, 2019, the Court also disregarded and did not address the Defendants’ argument that Section 1-11-460 is only applicable to qualifying judgments, meaning those in excess of \$1 million entered in a Section 1983 case against individual governmental employees and officials acting within the scope of their employment. In the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, the judgment of \$500,000 in actual damages was entered against all five corrections officers jointly and severally. That amount was then reduced by Judge Gergel to \$171,875 to reflect an offset from the settling medical defendants. Given the joint and several judgment of \$171,875 and the punitive damages awards of \$150,000 each against Andrew Bland, Leemon Carner and Jerry Speissegger, the total judgments against those three Defendants do not meet the \$1 million threshold. However, given the punitive damages awards of \$1 million each against Richard Burkholder and Priscilla Bland, the judgments against them are the only ones that meet the \$1 million threshold (although they are not qualifying for other reasons discussed herein). The Court did not address whether the judgments against Andrew Bland, Leemon Carner and Jerry Speissegger even qualified for consideration under Section 1-11-460.

9. The Court also failed to fully address the Defendants’ arguments as to why Section 1-11-460 should not be construed to provide for indemnity for punitive damages and also erred in its analysis of that issue. The Court concluded that indemnity for punitive damages is provided by

² Under the South Carolina scheme, the initial limits are provided by the IRF Tort Liability Policy rather than by statute. In this case, those limits are \$600,000. But, in accordance with Section 1-11-460, the payment of any qualifying judgment in excess of \$600,000 is purely discretionary with the SFAA.

Section 1-11-460 because of the statute's *silence* on that point. The Court ruled that the General Assembly could have added the words "excluding punitive damage" to the statute. That, however, turns the traditional and well-settled sovereign immunity analysis on its head. As the Defendants argued, it is well settled that "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'" in the legislation. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). *See also, United States v. Bormes*, 133 S.Ct. 12, 16 (2012). Section 1-11-460, however, does not include any language that unequivocally provides that the State has waived sovereign immunity for the payment of punitive damages under Section 1-11-460. In fact, the Court ruled that the statute is *silent* with respect to indemnifying for punitive damages. Certainly, there is no *unequivocal* language authorizing the taxpayers to indemnify a wrongdoer for punitive damages awarded against them in their individual capacities. That waiver of sovereign immunity should be unequivocal in the statutory language. It is not. Therefore, Section 1-11-460 should be construed as providing for payments, at most, for compensatory or actual damages awards and not for punitive damages awards, which is what is being claimed in the present case.

10. Likewise, in addressing the punitive damages issue, the Court wholly rejects the public policy considerations articulated in such cases as *Macmurphy v. South Carolina Department of Highways and Public Transportation*, 295 S.C. 49, 367 S.E.2d 150 (1988), by suggesting that while the public policy rejects taxpayer funding of punitive damages against the State or a political subdivisions, the five correctional officers are persons sued in their individual capacities and are technically "are not municipal corporations or states." *See*, Order, p. 8. With all due respect, there is a greater rationale for taxpayer funding to be denied to indemnify an individual's wrongdoing than a governmental entity's collective wrongdoing. In particular,

individual wrongdoing should not be accorded such protection because it entirely defeats the deterrence purpose for punitive damages. Moreover, as the Supreme Court recognized in *Macmurphy*, “the recovery of punitive damages against governmental entities are contrary to sound public policy because such awards would burden the taxpayers and citizens for whose benefit the wrongdoer is assessed punitive damages.” *Macmurphy*, 367 S.E.2d at 151. The Court simply disregarded the inherent public policy considerations involved in this question. That is also evident because the Court justified its interpretation of Section 1-11-460 by finding that “in the absence of a governmental guarantee, these plaintiffs will never be made whole and will never be able to collect these verdicts from individual governmental employees named in their individual capacities.” *See*, Order, p. 6. However, this case is not one of an injured party being “made whole”; punitive damages are not compensatory and do not serve to make an injured party whole. In fact, in the case at bar, the Estate of David Woods was awarded actual damages of \$500,000 which were reduced by Judge Richard Gergel to \$171,875. That award of actual damages has been fully paid. The Estate has been “made whole.” The only damages at issue in this litigation for which indemnity is sought *from the taxpayers* under Section 1-11-460 are punitive damages.

11. In its Order filed July 23, 2019, the Court also failed to fully or correctly consider the Defendants’ argument that Section 1-11-460 also requires that “[t]hese payments are also limited to judgments against governmental employees and officials for acts committed within the scope of employment.” S.C. Code Ann. § 1-11-460. As the Defendants argued, the Plaintiff must first demonstrate that the judgment in Civil Action Number 5:12-3177-RMG was for acts committed within the scope of employment of Andrew Bland, Richard Burkholder, Leemon Carner, Priscilla Bland and Jerry Speissegger. The jury in that action, however, never made any specific factual finding that the five corrections officers were acting within the scope of their

employment with Berkeley County when they were found to be deliberately indifferent to David Woods' medical needs. The Court, however, rejects that argument by finding that it was waived because (1) the issue was not raised in the underlying action, (2) there is no evidence of a reservation of rights letter, and (3) the IRF partially satisfied the judgment with insurance proceeds under the Tort Liability Policy. The Court's analysis, with all due respect, is in error and should be reconsidered on the following bases.

First, the Defendants SFAA and IRF were not parties to the underlying case, and as a result, cannot be penalized for failing to litigate an issue in a lawsuit to which they were not a party. That is clear and fundamental. Just as there cannot be a waiver under such circumstances, there can be no preclusive effect.

Second, the absence of a reservation of rights is not an issue because Section 1-11-460 is not insurance coverage. Indeed, the statutory language does not explicitly or implicitly suggest that the SFAA is required to reserve rights in litigation in which a request to indemnify may later be made to the SFAA after a final judgment is entered. That would create an absurd burden on the SFAA. Furthermore, even in a purely insurance setting, a governmental insurer is not required to reserve rights on whether the governmental actor was ultimately acting within the scope of their employment and thus qualifies as an insured. And, it is well settled that the absence of a reservation of rights does not constitute a waiver that creates coverage that otherwise does not exist. See, *Alverson v. Minnesota Mut. Life Ins. Co.*, 287 S.C. 432, 339 S.E.2d 140, 42 (Ct. App. 1985) (“[w]aiver cannot create coverage and cannot bring into existence something not covered in the policy”); *Laidlaw Environmental Services. Aetna Cas. & Surety Co.*, 338 S.C. 43, 524 S.E.2d 847, 852 (Ct. App. 1999) (same).

Third and finally, the fact that the IRF partially satisfied the judgment cannot be deemed

a waiver of this defense. The Partial Satisfaction of Judgment includes the following language: “the Plaintiff acknowledges that in agreeing to tender the amounts stated herein, the South Carolina Insurance Reserve Fund, as a division of the State Fiscal Accountability Authority, expressly reserves and does not waive any defenses as asserted in the pending action captioned *Morris v. South Carolina Budget and Control Board*, Civil Action No. 2015-CP-40-0619.” This language was argued to the Court. The Partial Satisfaction of Judgment is included in the record, but the Court disregarded this critical point. The Partial Satisfaction of Judgment cannot be treated as a waiver of any defenses asserted by the SFAA or the IRF with respect to its liability, if any, under Section 1-11-460.

Because the Court erred in finding a waiver by the Defendants, the Court is requested on reconsideration to address whether there was a finding of fact in Civil Action Number 5:12-3177-RMG that the five correctional officers were acting within the scope of their employment. There is no such finding by the jury. As the Defendants have argued and this Court has not addressed, it is certainly possible that the actions of the five correctional officers were not within the scope of employment. Their deliberate indifference could have been motivated by malicious or personal reasons.³ Under South Carolina law, it is well settled that intentional conduct by corrections employees that is personally and not professionally motivated falls outside the scope of employment. *See, Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).

³ It is important to note that “[d]eliberate indifference requires ‘more than ordinary lack of due care for the prisoner’s interests or safety.’” *Whitley v. Albers*, 475 U.S. 312, 319 (1986). “Deliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the [prisoner] or that they actually knew of and ignored a [prisoner’s] serious need for medical care.” *Young v. City of Mt. Ranier*, 238 F.3d 567, 575-76 (4th Cir. 2001).

12. On the justiciability issue raised by the Defendants, the Court disregarded that the Covenants Not to Execute given by the Plaintiff to the five correctional officers render the current action non-justiciable because the five correctional officers are no longer personally liable for the judgments entered against them and on which the Plaintiff is seeking to recover from the SFAA and the IRF. In rejecting that argument, the Court disregarded the decision of the South Carolina Supreme Court in *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640 (1977), where the Court ruled that “[a]n insurance carrier is in the same legal position as its insured. A liability carrier only contracts to pay any debt the insured is liable to pay.” 239 S.E.2d 640 at 641. Section 1-11-460, while not “excess coverage” as the Court calls it, is nonetheless a type of indemnification statute. As such, the Plaintiff is now precluded under basic principles of indemnity as described in *Smalls* from recovering under Section 1-11-460. Quite simply, because the prospective indemnitees (the five correctional officers) are no longer personally liable -- an undisputed fact given the language of the Covenants not to Execute -- then any duty to indemnify under Section 1-11-460 is likewise extinguished. Fundamentally, an indemnitor cannot be deemed liable when the indemnitee is not liable. On reconsideration, the Court is respectfully requested to apply the clear precedent of the *Smalls* decision.

The Defendants’ motion is based upon the pleadings filed in this case; the Order on Declaratory Judgment filed July 23, 2019; the Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment, filed March 21, 2018; the proposed order submitted by the Defendants on May 24, 2019; the rules of court; and such other matters as may be properly presented to the Court at the time of the hearing.

LINDEMANN, DAVIS & HUGHES, P.A.

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*Counsel for Defendants State Fiscal Accountability
Authority and South Carolina Insurance Reserve
Fund*

August 2, 2019

ORAL ARGUMENT REQUESTED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Nancy Morris, as personal representative	)	CASE NO: 2015-CP-40-619
of the Estate of David Allan Woods,	)	
	)	
Plaintiff(s)	)	PLAINTIFF'S MEMORANDUM
	)	OPPOSING DEFENDANTS'
vs.	)	MOTION TO ALTER OR
	)	AMEND ORDER
State Fiscal Accountability Authority;	)	
South Carolina Insurance Reserve Fund;	)	
Andrew J. Bland; Richard T. Burkholder;	)	
Leemon E. Carner; Priscilla Bland;	)	
Jerry Speissegger, Jr.;	)	
	)	
Defendant(s).	)	

This matter comes before the Court on the parties' competing Motions for Summary Judgment. Following oral argument and consideration of each party's position, the Court, on July 23, 2019, entered its order granting Plaintiff's Motion for Summary Judgment in part and denying Defendants' Motion for Summary Judgment in part. Defendants State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund subsequently filed a Motion to Alter or Amend the Court's order. Defendants assert twelve grounds for the Court to amend or alter its Order. All of these grounds have been carefully considered by the Court, and Defendants' motion should accordingly be denied.

By way of background, the bulk of the arguments before the Court center on S.C. Code Ann. § 1-11-460, which provides that:

The State Fiscal Accountability Authority... is authorized to pay judgments against individual governmental employees and officials, in excess of one million dollars, subject to a maximum of four million dollars in excess of one million dollars for one employee and a maximum of twenty million dollars in excess of five million dollars in one fiscal year. These payments are limited to judgments rendered under 42 U.S.C. Section 1983 against governmental employees or officials who are covered by a tort liability policy issued by the Insurance Reserve Fund. These payments are also limited to judgments

against governmental employees and officials for acts committed within the scope of employment.

In their respective Motions for Summary Judgment, Plaintiff argued that the statute was fundamentally mandatory, while Defendants argued that it was discretionary. Ultimately, the Court agreed with Plaintiff in finding that the statute is mandatory once the criteria set forth in the statute itself are met. Those criteria were met in the current situation, and payment is accordingly authorized.

While Defendants may claim that the statute is discretionary, neither Defendants nor their 30(b)(6) representative have been able to provide any explanation of any criteria that might be used in determining when that discretion might be utilized. This is in sharp contrast to a statute cited by Defendants themselves in their motion, Tenn. Code Ann. § 9-8-112, which sets forth detailed criteria and a judicial review process for determining when payment of similar judgments is appropriate. In the absence of any such explanation or statutory scheme, the Court properly decided that the criteria provided in the statute are the only criteria to be considered in determining whether payment is authorized.

The Court further relied on a comparison of 42 U.S.C. § 1983 litigation with that brought under the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 (2005 & Supp 2014). The SCTCA protects government employees by capping damages and preventing them from being sued in their individual capacities. Section 1983 provides no such protection. The Court accordingly found that the legislature enacted § 1-11-460 to fill a key gap in the legislative scheme and to protect both government employees and § 1983 plaintiffs alike. Despite Defendants' objections, the Court's order was rightly reasoned and decided, and Defendants' arguments in their Motion to Alter or Amend are without merit for the following reasons.

1. Defendants take issue with the Court referring to § 1-11-460 as providing “excess coverage,” claiming that neither Defendant has issued any excess insurance policy. This appears to be nothing more than a semantic argument, and has no substantive effect on the Court’s order.

In any event, the Court’s usage is well-warranted. Section 1-11-460 itself uses the word “excess” three times in the body of the statute and once in its title. Similarly, Defendants themselves prepared a Policyholder Manual that, according to their 30(b)(6) representative, is “put out by the underwriting department for the purpose of educating insureds.” (Lombard Depo., p. 27, lines 20-22). In this very manual, § 1-11-460 is discussed under a heading titled, “Excess.” This argument provides no cause to alter or amend the Order.

2. Defendants claim that the Court “failed to properly or completely analyze the language of the statute and failed to employ the rules of statutory construction.” With all due respect to Defendants, the fact that the Court did not accept their arguments is not evidence that the Court did not consider those arguments or properly apply the law to the facts in this case.

Defendants’ argument centers on the fact that S.C. Code Ann. § 1-11-440 uses mandatory language, such as “must indemnify,” to establish a mandatory duty. Because § 1-11-460 uses “is authorized” instead of “must indemnify,” so the argument goes, § 1-11-460 is discretionary rather than mandatory.

Defendants’ argument, however, is a double-edged sword. In this same chapter, the legislature uses clearly discretionary and permissive language, such as in § 1-11-140, which states that insurance “may be provided to physicians and dentists employed by the State.” To the extent that the legislature knew how to use mandatory language, it equally knew how to use discretionary language. If § 1-11-460 was intended to be purely discretionary, there was no reason for the legislature to avoid using similar, clearly discretionary language.

As discussed above, the term “is authorized” was carefully examined by the Court in the context of the criteria set forth by § 1-11-460 and by the Tennessee statute cited by Defendants and discussed at length later herein. After taking account of all of the evidence, including the general statutory scheme and the testimony of Defendants’ 30(b)(6) representative, the Court properly concluded that the language of § 1-11-460 is mandatory. This ground does not provide cause for the Court to alter or amend its order.

3. Defendants rehash their argument on discretionary vs. mandatory language in point 3. Neither the United States Supreme Court case nor the South Carolina Supreme Court case cited by Defendants contains the phrase “authorized to pay,” nor do they analyze such language in a context remotely similar to that involved in the instant case. Any cases from the Federal Claims Court are not binding on this Court, and this country’s treatment of Native Americans is hardly a standard this Court should wish to emulate. For the reasons given above, the Court’s interpretation of the “is authorized” language was well-considered, and the inapposite cases cited by Defendants are not cause to alter or amend.

4. Defendants’ next ground is that the Court “entirely disregarded” Defendants’ own interpretation of the statute, which should be allowed added deference. Among the evidence presented to the Court of the Defendants’ own interpretation of this statute was the deposition of Chris Lombard, the assistant director of claims for the Insurance Reserve Fund and Defendants’ 30(b)(6) designee. The Court had ample opportunity to review and consider Mr. Lombard’s testimony, and was wholly justified in finding that Mr. Lombard’s and Defendants’ interpretation of the statute was sorely lacking.

When asked what factors or considerations the State Fiscal Accountability Authority would use in determining whether to authorize payment under § 1-11-460, Mr. Lombard replied, “The

SFAA Board has five individual members... What personal criteria—what criteria they individually use to make a decision of anything that comes before them on the agenda, I can't comment on.” When asked under what scenarios the SFAA would authorize payment, Mr. Lombard testified, “We can't speak to what scenarios they will authorize payment if it comes before them because we cannot determine what five individual members made a decision.” When asked what the procedure is to request indemnification, Mr. Lombard stated, “There has never been a case to anybody's knowledge of this statute being used... To my knowledge, there's no specific procedure for 1-11-460.”

Defendants' interpretation of the statute was thus unconvincing and unpersuasive, and this argument is not a ground to alter or amend.

5. Defendants claim that the Court again “entirely disregarded” one of their arguments, relating to quasi-judicial authority. In their brief, Defendants cite two cases, Redmond v. Lexington County School District Four, 314 S.C. 431, 445 S.E.2d 441 (1994) and Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987). Upon reviewing Defendants' Motion for Summary Judgment and memorandum in support, there appears to be no instance in which Tall Tower was cited. Therefore, to the extent that case stands for any new issue, it is not properly before the Court. See Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 344 (Ct. App. 2008)(“Generally a party cannot use a motion ... to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not.”)

Redmond involved the decision of a school district to enter into a contract to build a new middle school. Redmond at 442. All parties apparently agreed that the decision undertaken by the school district was discretionary, the plaintiffs simply claimed that the school district abused its discretion in taking the action it did. See Redmond at 437. (“Plaintiffs also allege that the

District abused its discretion in selecting the proposed site for the new school.”) In the current case, the Court clearly found that § 1-11-460 was not discretionary once the criteria outlined by the statute are met. Therefore, Defendants do not have discretion and do not have the quasi-judicial duty or authority they claim in their motion and Redmond is inapposite.

As for Tall Tower, the Court found that the appellants were not denied due process during bidding for a particular project because they “were given notice of the issues to be determined, afforded an opportunity to be heard by presenting favorable witnesses, and were given the right to cross-examine adverse witnesses before a tribunal during four days of hearings.” Id. at 233. Adequate process was provided, even if formal rules were not promulgated. The contrast with the current case, in which no process or hearing is or can be described by Defendants, is clear, and neither of these cases provide any ground to alter or amend.

6. Defendants claim that the interpretation of § 1-11-460 should not turn on any perceived due process concerns that have not yet occurred. The Court never relied on or cited due process concerns in its Order. The Court is well within its rights to interpret a statute even if no due process violation has yet occurred.

7. Defendants next claim that the Willcox v. Tennessee District Attorneys General Conference, 2008 WL 4510031 (E.D. Tenn. 2008) case should be instructive in the Court’s decision in the current case. The language Defendants cite comes from a footnote from an unreported case from a federal court from a different jurisdiction from a different judicial circuit in a case where no verdict had been entered. Willcox therefore is of no precedential value.

However, in the current case, the Court closely examined the language of the actual Tennessee statute, not only the portions quoted by Defendants. It correctly found that the Tennessee statute lays out a detailed procedure and review process for any judgments that fall

under its purview. Once the review board determines that the statutory criteria are met, the board “shall reimburse the affected officer or employee for actual damages and costs, including attorney’s fees, awarded by judgment or settlement.” Tenn. Code Ann. § 9-8-112(h). Any decisions made by the board are subject to judicial review. Id. This is a far cry from the procedure outlined by Mr. Lombard in his 30(b)(6) deposition testimony.

Defendants go on to emphasize language in the Tennessee statute stating the “the board of claims may, in its sole discretion, reduce the reimbursement,” and that the “board of claims may pay.” There is no dispute that this is clearly discretionary language. There is also no dispute that this same discretionary language was not used in § 1-11-460. While Defendants may prefer to conflate the two, there is a clear distinction between “is authorized to pay” and “may pay.” The latter is clearly discretionary; the former is not. The South Carolina legislature was well aware of the meaning of the word “may,” and was free to use it in § 1-11-460. They did not, and the Court reached the correct decision in its order.

8. Defendants claim that the judgment is not a “qualifying judgment” under § 1-11-460 because the punitive damages were spread among five employees, and, for two of those employees, the total amount was less than \$1 million. Plaintiff received one “Judgment in a Civil Action” for one harm suffered by one person in what the Court found to constitute one occurrence. There are not five judgments in the instant case, there is one, and it far exceeds the \$1 million threshold provided by § 1-11-460.

Even if the Court accepts Defendants’ argument that there are multiple judgments at play in the instant case, § 1-11-460 uses plural language. The statute clearly says that the SFAA “is authorized to pay judgments against individual governmental employees and officials, in excess of one million dollars.” (emphasis added). In § 1983 cases, which frequently involve multiple

government employees contributing to one deprivation of Constitutional rights, it is foreseeable that one verdict would be rendered against multiple defendants. The legislature accounted for that possibility by explicitly utilizing the plural form of “judgments.”

9. Defendants argue that § 1-11-460 cannot be construed to provide indemnity for punitive damages, relying on the doctrine of sovereign immunity. The judgment received by Plaintiff in the instant case is against the county defendants in their individual capacity, not against a state or municipal requirement. It is a cornerstone of § 1983 litigation that a plaintiff whose constitutional rights have been violated may recover punitive damages. It would be strange indeed if the legislature, which explicitly referenced § 1983 in § 1-11-460, was somehow unaware of this possibility and did not contemplate that § 1983 awards might include punitive damages. The legislature could and should have excluded punitive damages from § 1-11-460 if that were their intent, but clearly did not do so. Moreover, Defendant IRF has already tendered \$428,125.00 in punitive damages in this case already.

10. Defendants again claim that the Court “simply disregarded” their argument about public policy and payment of awards. Once the Court determined that the statute was mandatory, not discretionary, public policy concerns are no longer at issue. The legislature has spoken, and the law must be followed. Defendants also fail to provide any explanation for why the payment of punitive damages should be different under § 1-11-460 than under the insurance policy provided by Defendant IRF that is also funded by the taxpayers. This appears to be another case of the Court not disregarding Defendants’ arguments, but simply finding them unpersuasive.

11. Defendants allege that the Court failed to fully or correctly consider their argument that the county defendants may not have been acting in the course and scope of employment at the

time of their tortious conduct. The arguments put forth by Defendants in this section are inconsistent in a number of ways.

First, Defendant argues that it was not a party to the underlying case. In virtually all of the civil litigation that takes place in this country, the defendant's insurance carrier is not a party to the litigation. This does not stop juries from rendering verdicts that directly influence the rights of that insurance carrier by obligating them to pay sums on behalf of their insureds. If the insurer intends to contest any such award based on a factual issue, it is incumbent on them to bring forth that factual issue at trial. In this case, Defendant IRF provided the defense for the county defendants throughout the course of litigation and trial, and never once provided any party with any notice that they would contest coverage on the ground that the county defendants may not have been acting in the course and scope of their employment. The defense has been waived, and Defendants should be estopped from bringing it here, as the Court correctly found.

Second, Defendant SFAA objects that it is not an insurance carrier and therefore not required to file a reservation of rights. With this argument, Defendants are trying to have their cake and eat it too. Later in their brief, they claim that they are not liable because "an insurance carrier is in the same legal position as its insured." While Defendants attempt to sidestep any inconsistency by distinguishing between indemnitors and insurers, that distinction appears to appear and vanish at Defendants' convenience. In any event, it is beyond dispute that Defendant SFAA was, at the very least, an indemnitor, and that Defendant IRF was an insurer for the county defendants. It is likewise undisputed that Section IV.(b) the insurance policy drafted by Defendant IRF extended coverage only to "any employee of the entity... but only while the employee is acting in the scope of his or her official duties." Defendant IRF had over two years of litigation prior to trial in which to file a reservation of rights or otherwise contest that the county defendants were

acting in the course and scope of their official duties as county employees. They failed to do so, and accordingly waived that argument.

Moreover, both sides stipulated at trial that the county defendants were acting under color of state law, and Defendant IRF has already paid over \$992,013.63 in partial satisfaction of the judgment. The Court correctly considered and rejected Defendants' argument on this ground.

12. Defendants conclude by arguing that the Covenants Not to Execute and Assignments executed by the correctional officers in favor of Plaintiff somehow excuse Defendants from liability. For this proposition, Defendants rely on Smalls v. Blackmon, 269 S.C. 614 (1977), a case dealing with an exclusive remedy. Smalls involved the Longshoremen's and Harbor Workers' Compensation Act. Id. at 615. Mr. Smalls was injured in the course and scope of his employment as a longshoreman. Id. at 616. He collected workers' compensation benefits under the Act. Id. Mr. Smalls then filed suit against one of his co-employees. Id.

The Longshoremen's Act provided that, "(t)he right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, . . . by the negligence or wrong of any other person, or persons in the same employ." Id. The Court added that "The clear language of this provision has been accorded a literal interpretation "(I)t extends to the employer and fellow employee an absolute civil immunity." Id.

The Court found that in suing his co-employee, Smalls was "attempt[ing] to circumvent the clear language of s 933(i)." Id. Under the statute, the co-employee was "not subject to suit, and no cause of action exists against him by virtue of the immunity granted in s 933(i) of the Longshoremen's Act." Id. at 617-18. The fact that the co-employee was a permissive user of the automobile that injured Mr. Smalls, and had an insurance policy covering him in that capacity, "does not, in itself, give rise to a cause of action." Id. at 615.

Thus, while Defendants are correct that an insurance carrier is in the same legal position as its insured, the contexts of the two situations could scarcely be more different. In Smalls, there was and never could be a cause of action against the co-employee under the clear language of the statute. In the instant case, not only was there a valid cause of action against the county defendants, but that cause of action was pursued to trial, where a judgment was entered against them. Defendants now stand in the shoes of the county defendants to the tune of having a \$2 million judgment outstanding against them.

For the foregoing reasons, Defendants' Motion to Alter or Amend should be denied. Defendants provide no convincing ground for how the Court misunderstood or misapplied their arguments, merely that the Court chose not to accept them. As with the appellant in Tall Tower, Defendants are able to show "little more than mere disagreement with the rulings of the presiding officer." Tall Tower at 233. This is not a sufficient ground to alter or amend the Court's well-considered and correctly-decided order.

Respectfully submitted,

s/Garrett B. Johnson
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Attorney for Plaintiff

September 11, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Nancy Morris, as personal representative	)	CASE NO: 2015-CP-40-619
of the Estate of David Allan Woods,	)	
	)	
Plaintiff(s)	)	PLAINTIFF'S MOTION
	)	FOR SUBSTITUTION
vs.	)	
	)	
South Carolina State Budget and Control	)	
Board; South Carolina Insurance Reserve	)	
Fund; Andrew J. Bland; Richard T.	)	
Burkholder; Leemon E. Carner; Priscilla	)	
Bland; Jerry Speissegger, Jr.,	)	
	)	
Defendant(s).	)	

Plaintiff, by and through undersigned counsel and pursuant to Rule 25 of the South Carolina Rules of Civil Procedure, hereby requests that this Court enter its Order substituting the State Fiscal Accountability Authority ("SFAA") for Defendant South Carolina Budget and Control Board.

Plaintiff filed this action on January 29, 2015. As Defendants point out in their Cross-Motion for Summary Judgment, the SCBCB was abolished effective July 1, 2015 and the Insurance Reserve Fund transferred to the State Fiscal Accountability Authority. Plaintiff seeks permission to substitute the parties to reflect this reorganization.

Substitution of parties is governed by Rule 25 of the South Carolina Rules of Civil Procedure. This rule allows for parties to be substituted in the case of death, incompetency, transfer of interest, or, in the case of public officials, separation from office. With regard to this last instance, the rule states "any misnomer not affecting the substantial rights of the parties shall be disregarded." Rule 25(d)(1), SCRCF. Likewise, Rule 25(c) states that in the case of any

transfer of interest, “the action may be continued by or against the original party” unless the court orders substitution.

The test for whether substitution should be allowed is “whether the amendment will prejudice or work an injustice to the adverse party.” Shah v. Richland Mem’l Hosp., 350 S.C. 139, 147 (Ct. App. 2002). As with other amendments, the burden is on the party opposing the motion to demonstrate prejudice. Id. In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion. Id.

A similar situation to the one at hand is examined by the Court of Appeals in Bryant v. Waste Mgmt., Inc., 342 S.C. 159 (Ct. App. 2000). In that case, the plaintiff sued a waste management company that was later merged into another company. Id. at 164. The court found that “When a corporate defendant is absorbed by merger during the pendency of an action against it, the plaintiff is entitled to have the absorbing corporation substituted as a party defendant.” Id. Trial courts have sound discretion “sound discretion to substitute parties when some act has affected the capacity of a named party to be sued,” and their decisions are reviewed for abuse of discretion. Id. at 165.

The Court should follow Bryant in this case. Defendants in their own memorandum used the very word “transfer” to describe the shift in authority. (“Effective July 1, 2015, the South Carolina Budget and Control Board was abolished, and the Insurance Reserve Fund was transferred to the State Fiscal Accountability Authority (‘SFAA’), which was newly created.”) This coincides neatly with the “Transfer of Interest” language used in Rule 25(c) and mirrors the situation in Bryant. This Court should accordingly permit Plaintiff to substitute the State Fiscal Accountability Authority for Defendant South Carolina Budget and Control Board or, in the alternative, permit her to continue the action by and against the original party.

Undersigned counsel hereby certifies that he attempted to consult with counsel for Defendants prior to filing this Motion, but was unable to reach him.

Respectfully submitted,

s/Garrett B. Johnson
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Attorney for Plaintiff

March 26, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Nancy Morris, as personal representative	)	CASE NO: 2015-CP-40-619
of the Estate of David Allan Woods,	)	
	)	
Plaintiff(s)	)	ORDER OF SUBSTITUTION
	)	
vs.	)	
	)	
South Carolina State Budget and Control	)	
Board; South Carolina Insurance Reserve	)	
Fund; Andrew J. Bland; Richard T.	)	
Burkholder; Leemon E. Carner; Priscilla	)	
Bland; Jerry Speissegger, Jr.,	)	
	)	
Defendant(s).	)	

This matter comes before the Court on motion by Plaintiff, pursuant to Rule 25 of the South Carolina Rules of Civil Procedure. The State Fiscal Accountability Authority is hereby substituted for Defendant South Carolina State Budget and Control Board.

IT IS SO ORDERED.

[Judge's signature to follow]



Richland Common Pleas

Case Caption: Nancy Morris , plaintiff, et al vs South Carolina State Budget And Control Board , defendant, et al

Case Number: 2015CP4000619

Type: Order/Substitution of Parties

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2018-03-27 14:34:15 page 2 of 2

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Nancy Morris, as assignee of Andrew J.)
Bland, PFC; Leemon E. Carner, PFC; Jerry)
Speissegger, Jr., PFC; Priscilla Garrett,)
SGT; and Richard T. Burkholder, SGT;)

C.A. No.: 2017-CP-40-06773

Plaintiffs,)

AMENDED SUMMONS
(Jury Trial Demanded)

-vs-)

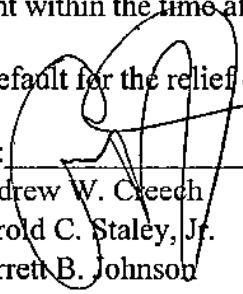
South Carolina Insurance Reserve Fund,)

Defendants.)

NOTED
FILED
2017 NOV 29 PM 1:45
JEANETTE W. MORRIS
C.C.P. & G.S.

TO THE ABOVE NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED AND REQUIRED TO ANSWER the Summons and Complaint in this action, herewith of which a copy is served upon you, and to serve a copy of your answer to said Summons and Complaint on the subscriber at his office at 212 East Black Street, Rock Hill, SC, within thirty (30) days after the service hereof, exclusive of the day of such service; if you fail to answer the Summons and Complaint within the time aforesaid, the Plaintiff(s) in this action will apply to the Court for judgment by default for the relief demanded in the Complaint

By: 
Andrew W. Creech
Harold C. Staley, Jr.
Garrett B. Johnson
Elrod Pope Law Firm
212 E Black Street
Rock Hill, S.C. 29731
Phone: (803) 324-7574
ATTORNEYS FOR PLAINTIFF(S)

November 27, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Nancy Morris, as assignee of Andrew J.)
Bland, PFC; Leemon E. Carner, PFC; Jerry)
Speissegger, Jr., PFC; Priscilla Garrett,)
SGT; and Richard T. Burkholder, SGT;)

C.A. No.: 2017-CP-40-06773

Plaintiffs,

AMENDED COMPLAINT
(Jury Trial Demanded)

-vs-

South Carolina Insurance Reserve Fund,)

Defendants.

RICHLAND COUNTY
FILED
2017 NOV 29 PM 1:45
JERAMIE W. HIGBRIE
C.C.P. & G.S.

NOW COME the above-named Plaintiffs, complaining of the Defendants herein, who do allege and show unto this Honorable Court the following:

PARTIES AND JURISDICTION

1. Plaintiff Nancy Morris was, at all times relevant herein, a resident of the State of South Carolina, and is now a resident of the State of Missouri.

2. Plaintiff Nancy Morris is the duly-appointed personal representative for the Decedent, David Allan Woods.

3. Prior to his death in November 2010, David Allan Woods was a resident of Berkeley County, South Carolina.

4. Andrew J. Bland, PFC; Leemon E. Carner, PFC; Priscilla Garrett, SGT; and Jerry Speissegger, Jr. are residents of the State of South Carolina.

5. Richard T. Burkholder, SGT is a resident of the Commonwealth of Pennsylvania.

6. Andrew J. Bland, PFC; Priscilla Garrett Bland, SGT; Leemon A. Carner, PFC; Jerry Speissegger, Jr., PFC; and Richard T. Burkholder, SGT (hereinafter collectively referred to as "Assignors") did, for good and valuable consideration, irrevocably assign to Plaintiff 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 [C.A. No.: 5:12-cv-3177-RMG],” including, among others “bad-faith conduct and/or breach of contract by the Insurance Reserve Fund” in the handling of the claims related to that case. These assignments are attached as Exhibit A.

7. Plaintiff therefore has standing to assert all legally assignable claims, as alleged herein, against Defendant Insurance Reserve Fund.

8. Upon information and belief, Defendant IRF is a governmental entity organized and existing under the laws of the State of South Carolina and with its principle office in Richland County.

9. Upon information and belief, Defendant “functions as a governmental insurance operation with the mission to provide insurance specifically designed to meet the needs of governmental entities at the lowest possible cost. The Insurance Reserve Fund operates like an insurance company, by issuing policies, collecting premiums (based in consultation with actuaries), and by paying claims from the accumulated premiums in accordance with the terms and conditions of the insurance policies it has issued.”

FACTUAL BACKGROUND

10. On September 2, 2010, Mr. Woods was tried and convicted in absentia by way of bench trial on charges of Shoplifting Merchandise less than \$2,000.00 and Animal Nuisance.

11. Mr. Woods was ordered to pay a fine of \$2,130.00 or spend 30 days in jail for the shoplifting charge.

12. Mr. Woods was ordered to pay a fine of \$237.50 or spend 30 days in jail for the animal nuisance charge.

13. On October 12, 2010, a bench warrant was issued for Mr. Woods's arrest.
14. Mr. Woods was booked and taken into custody at Hill-Finklea Detention Center.
15. Over the course of his confinement, Mr. Woods complained to jail and medical personnel of health problems including liver disease, intestinal pain, and blood in his stool.
16. At approximately 10:21 p.m. on Friday, November 5, 2010, Mr. Woods was reported to be lying on the floor of his cell and shaking.
17. At all times relevant herein, Hill-Finklea Detention Center contracted with Hope Clinic, LLC to provide medical services to inmates. Under the terms of this contract, Hope Clinic provided "nurse coverage... five (5) days per week, fifty-two weeks per year, except during County holidays, between the hours of 9:00 a.m. and 5:00 p.m."
18. At the time this report was made concerning Mr. Woods, Hope Clinic medical personnel had already left the facility for the weekend.
19. Sgt. Priscilla Garrett Bland responded to the call, along with PFC Ashley Harber, and transferred Mr. Woods to a medical observation cell.
20. For the next 60 hours, video surveillance footage shows Mr. Woods shaking and disoriented. He is unsteady on his feet, staggers around his cell, and falls at least twice. He defecates and urinates on himself, at one point lying in his own feces for a period of 16 hours.
21. During this 60-hour period, each of Assignors had multiple interactions with Mr. Woods. None attempted to secure medical assistance for him or to contact Hope Clinic personnel.
22. At approximately 8:30 a.m. on Monday, November 8, 2010, Mr. Woods was found lying on the floor of his cell naked and unresponsive. He was evaluated by the Hope Clinic nurse, who recommended that Mr. Woods be transported to the hospital.
23. EMS arrived at 9:52 a.m. and took Mr. Woods to Trident Medical Center, where

“he could speak but only in a weak voice and not in sentences. He was receiving blood at the time, had bright red blood and dark red blood around his rectum.” His prognosis was felt to be “bleak.”

24. Mr. Woods died three days later, on November 11, 2010, due to “severe blood loss with total body failure” secondary to an upper gastrointestinal bleed.

LIABILITY POLICY

25. At the time of Decedent’s death, Berkeley County maintained a policy of General Tort Liability Insurance issued by the South Carolina Budget and Control Board, Insurance Reserve Fund, Policy Number T130080011, attached as Exhibit B (hereinafter “the policy.”)

26. The policy was properly issued under S.C. Code § 1-11-140.

27. The effective dates of the policy were 2/13/2010 through 2/13/2011 and was thus in effect during the dates of Decedent’s confinement and death.

28. The policy obligated the Insurance Reserve Fund to “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: A. Personal injury.”

29. Persons insured under the policy included “Any employee of the entity designated in the declarations as named insured... but only while the employee is acting in the scope of his or her official duties.”

30. Berkeley County was a named insured under the policy.

31. At the time of the events complained of in the underlying action, Assignors were employees of Berkeley County acting within the course and scope of their employment and official duties.

32. Assignors are and were therefore entitled to coverage under the policy.

33. The position of Defendant Insurance Reserve Fund is that the maximum coverage available under the policy for the underlying action was \$600,000.00.

UNDERLYING ACTION: POSTURE

34. On September 20, 2012, Nancy Morris, as personal representative of the Estate of David Allan Woods, filed suit against Defendants The Hope Clinic, LLC; Temisan Etikerentse, M.D.; Sue Brabham, R.N.; Berkeley County Sheriff H. Wayne DeWitt; Andrew J. Bland, PFC; Richard T. Burkholder, SGT; James M. Brophy, PFC; Leemon E. Carner, PFC; Patricia D. Collins, SGT; Charles A. DeSanto, CPL; Kendra B. Habersham, Staff SGT; Ashley A. Harber, PFC; Priscilla Scheetz¹, SGT; Jerry Speissegger, Jr., PFC; PFC Daaf; and John Does in the Circuit Court for Berkeley County, alleging causes of action under 42 U.S.C. 1983, Wrongful Death, Survival Action, and Intentional Infliction of Emotional Distress.

35. On November 2, 2012, Defendants removed the case to the United States District Court for the District of South Carolina, asserting federal question jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343.

36. Robin Jackson of Senn Legal, LLC appeared as counsel for Assignors and the other defendants employed by Berkeley County.

37. Over the next nine months, the parties engaged in detailed written discovery, and took no fewer than 14 depositions, including those of all the Assignors and seven other county employees.

38. During this time, Defendant Insurance Reserve Fund and its attorney had ample opportunity to review deposition testimony, speak to its own clients, and observe the video footage from the medical observation cell demonstrating Mr. Woods's deteriorating condition and acute suffering, as well as the indifference of its own employees.

¹ Priscilla Scheetz was divorced after the events complained of and prior to filing of the lawsuit, and the suit was subsequently amended to reflect her name as Priscilla Garrett. Prior to trial, she married Andrew J. Bland, PFC, but is referred to in the instant suit as Priscilla Garrett.

39. Defendant Insurance Reserve Fund had access to Mr. Woods's medical records, and was well aware of the fact that he had passed away as a result of its insureds' inaction.

40. Defendant Insurance Reserve Fund was aware that Plaintiff was claiming punitive damages against its insureds, including Assignors, as was clearly set forth in her Complaint.

41. Defendant Insurance Reserve Fund was aware that Plaintiff was pursuing a claim under 42 U.S.C. 1983, which did not provide its insureds, including Assignors, with the damages caps set forth by the South Carolina Tort Claims Act, and therefore exposed them to a judgment in excess of the alleged \$600,000.00 policy limits.

42. Defendant Insurance Reserve Fund was aware that, pursuant to 42 U.S.C. 1988, Plaintiff's 42 U.S.C. 1983 claim, if successful, would entitle her to reasonable attorney's fees and costs.

UNDERLYING ACTION: NEGOTIATIONS

43. On August 1, 2013, the parties conducted a mediation at Elrod Pope Law Firm in Rock Hill, South Carolina. Robin L. Jackson, Esquire, of Senn Legal was present for the Defendant South Carolina Insurance Reserve Fund.

44. At the mediation, Plaintiff offered to accept \$1 million to settle all claims against the County Defendants, including Assignors, with \$600,000.00 to come from the Defendant Insurance Reserve Fund and \$400,000.00 to come from Berkeley County.

45. This constituted a reasonable offer to settle within the Insurance Reserve Fund's policy limits, and would have protected Assignors from the risk of any excess judgment.

46. Upon information and belief, Berkeley County was willing to pay the \$400,000.00.

47. Upon information and belief, Defendant Insurance Reserve Fund rejected Plaintiff's reasonable offer to settle the case within their policy limits and declined to tender the

full \$600,000.00.

48. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without discussing the matter with Assignors or Assignors' personal attorney.

49. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without retaining independent counsel to advise Assignors of their rights with respect to Plaintiff's offer to settle.

50. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without informing Assignors that the offer had been rejected.

51. Plaintiff's position was reiterated in a letter addressed to Hattie Taylor on September 12, 2013 indicating that Plaintiff would now seek to collect any excess judgment obtained against Berkeley County from the IRF, pursuant to Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933). (Exhibit C).

52. Defendant Insurance Reserve Fund reiterated their refusal to tender the policy limits in a letter of October 22, 2013, written by Chris Lombard, in which Defendant offered \$500,000.00 "to settle this matter on behalf of Berkeley County and all the Berkeley County individual defendants."

53. Defendant Insurance Reserve Fund again established their position on January 10, 2014, when they made an Offer of Judgment of \$500,000.00 through new counsel Eugene P. Corrigan, III.

54. It was not until August of 2014 that counsel for Assignors and the County Defendants offered \$600,000.00 to settle the case, which offer was declined in a letter of August 13, 2014.

55. It was not until the day of trial, October 14, 2014, that counsel for Assignors and

the County Defendants offered the \$1,000,000.00 that Plaintiff initially demanded at mediation. Plaintiff declined the offer, choosing to pursue an excess verdict against Defendant Insurance Reserve Fund's insureds.

UNDERLYING ACTION: TRIAL AND JUDGMENT

56. Prior to trial, Plaintiff had dismissed her state court claims and numerous defendants, proceeding to trial solely against Assignors on the 42 U.S.C. 1983 claim.

57. On October 17, 2014, Plaintiff obtained a judgment in the amount of \$500,000.00 for actual damages; \$150,000.00 in punitive damages against Andrew J. Bland, PFC; \$150,000.00 in punitive damages against Leemon E. Carner, PFC; \$150,000.00 in punitive damages against Jerry Speissegger, Jr., PFC; \$1,000,000.00 in punitive damages against Richard T. Burkholder, SGT; and \$1,000,000.00 in punitive damages against Priscilla Garrett, SGT.

58. By order of the court, the verdict for compensatory damages was partially offset and reduced to \$171,875.00.

59. Plaintiff was subsequently awarded \$354,293.00 in attorney's fees and \$31,820.62 in costs.

60. Assignors appealed the decision to the Fourth Circuit, which affirmed the District Court on November 16, 2016.

61. Defendant IRF's rejection of Plaintiff's reasonable offer to settle for the available limits of the policy and the resulting judgment against Assignors provides Assignors with a cause of action against Defendant IRF for breach of contract and breach of the implied covenant of good faith and fair dealing, in light of (i) the nature and scope of damages suffered by David Woods; (ii) the probable liability of Assignors; (iii) the substantial risk of a recovery in excess of Plaintiff's reasonable offer to settle; and (iv) the danger of a judgment in excess of the limits of the policy.

62. Each and every Assignor possesses these causes of action individually.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

63. Plaintiff hereby incorporates by reference all foregoing allegations.

64. Assignors and Defendant Insurance Reserve Fund had a mutually binding contract of insurance.

65. Defendant IRF breached that contract of insurance by its failure, refusal, and neglect:

- a. To consult as to Defendant IRF's rejection of Plaintiff's reasonable offer to settle with:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- b. To discuss said offer prior to rejecting with or with counsel for:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- c. To retain independent counsel to provide advice concerning Plaintiff's reasonable offer to settle and his or her rights concerning the same to:
 - i. Andrew J. Bland, PFC;

- ii. Leemon E. Carner, PFC;
- iii. Jerry Speissegger, Jr., PFC;
- iv. Priscilla Garrett, SGT;
- v. Richard T. Burkholder, SGT;

- d. To settle Plaintiff's claim for an amount up to and including the full policy limits;
- e. To accept Plaintiff's reasonable settlement offer within the policy limits.

66. Defendant IRF breached the contract as set forth above with regard to each and every Assignor individually.

67. As a proximate result of Defendant IRF's breach of contract, Assignors have been injured and otherwise suffered damages, as set forth more fully herein.

68. By nature of her assignments, Plaintiff is entitled to recover from Defendant IRF all damages incurred by Assignors as a result of this breach, including all actual damages, both pre-judgment and post-judgment interest, attorney's fees and costs, and for such other and further relief, in law or in equity, in favor of Assignee as this Court may deem just and proper.

FOR A SECOND CAUSE OF ACTION
(Negligence/Gross Negligence)

69. Plaintiff hereby incorporates by reference all foregoing allegations.

70. Defendant Insurance Reserve Fund had notice of Plaintiff's claim by September 20, 2012 at the latest.

71. Defendant IRF was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to process and adjust in a timely fashion Plaintiff's claims against:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;

iii. Jerry Speissegger, Jr., PFC;

iv. Priscilla Garrett, SGT;

v. Richard T. Burkholder, SGT;

b. In failing to establish reasonable procedures for the processing and handling of claims that are made against its insureds;

c. In deviating from the standard of care that a reasonable and prudent insurance company would employ under the circumstances;

d. In any other such acts that constitute a violation of the laws or common law of the State of South Carolina;

e. In any other matter that Plaintiff may discover through litigation.

72. Defendant IRF's negligent, grossly negligent, careless, reckless, willful, and wanton conduct affected each Assignor individually.

73. As a proximate result of Defendant IRF's negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness, Assignors have been injured and otherwise suffered damages, as set forth more fully herein.

74. Assignors' damages would not have occurred but for Defendant IRF's conduct, described more fully herein.

75. Assignors' damages occurred as a natural and probable consequence of Defendant IRF's conduct.

76. By nature of her assignments, Plaintiff is entitled to recover from Defendant IRF actual, compensatory damages, including the full amount of the verdict not yet satisfied, plus interest accruing from October 17, 2014; exemplary or punitive damages in an amount that is fair, just, and reasonable under the circumstances; and whatever costs, interest, both pre-judgment and

post-judgment, and attorney's fees that the Court deems proper.

FOR A THIRD CAUSE OF ACTION
(Bad Faith)

77. Plaintiff hereby incorporates by reference all foregoing allegations.

78. Defendant Insurance Reserve Fund provides insurance to governmental entities.

79. Upon information and belief, Defendant IRF presents claims made against its insureds to adjusters to oversee these files and to work toward adjusting and resolving those claims.

80. Upon information and belief, once a claim is presented to an adjuster, that adjuster maintains control over the claim and is involved in all claims handling decisions.

81. Upon information and belief, the underlying claim of Plaintiff Nancy Morris as Personal Representative of the Estate of David Allan Woods was assigned to an adjuster employed by Defendant IRF, and at all relevant times, Defendant IRF assumed and maintained control of Plaintiff's claim.

82. Defendant IRF has a duty to deal in good faith and fair dealing with its insureds, including Assignors.

83. Defendant IRF held that duty to each Assignor individually.

84. Assignors and/or their employer promptly reported the underlying claim to Defendant IRF, and have otherwise performed all conditions required by the policy.

85. Assignors did not make any demand or request to Defendant IRF, or to any of its adjusters or employees, that Defendant IRF not settle Plaintiff's claim.

86. Assignors did nothing to impair Defendant IRF's assessment of the substantial risk of an excess judgment.

87. Defendant IRF failed to promptly and effectively investigate Plaintiff's claim.

88. Defendant IRF failed to timely settle Plaintiff's claim within the available policy

limits, even though Defendant IRF had the opportunity to do so.

89. Defendant IRF rejected Plaintiff's offer to settle within the policy limits without consulting Assignors; did not conduct an adequate or appropriate investigation into Plaintiff's claim; failed to retain independent counsel to advise Assignors of their rights with respect to Plaintiff's reasonable offer to settle; did not retain coverage counsel to properly review Plaintiff's reasonable offer to settle; and otherwise failed to act as a reasonable and prudent insurer would act under similar circumstances.

90. Defendant IRF's failure to timely evaluate and settle Plaintiff's claim caused Plaintiff's settlement demand to be withdrawn, exposing Assignors to personal financial risk.

91. Defendant IRF has refused, and continues to refuse, to protect Assignors from personal exposure in this matter.

92. Defendant IRF has breached the implied covenants of good faith and fair dealing with regard to the insurance policy by, among other acts or omissions, failing to settle Plaintiff's claim for the amount of the applicable insurance coverage when presented with the opportunity to do so.

93. Defendant IRF has acted in bad faith and/or was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to timely investigate Plaintiff's liability claim;
- b. In failing to make an offer of the full \$600,000.00 policy limits in response to Plaintiff's reasonable demand to settle the case for that amount;
- c. In failing to timely inform of Plaintiff's reasonable offer to settle the case;
- d. In failing to retain independent counsel to protect the interests of:
 - i. Andrew J. Bland, PFC;

- ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- e. In failing to retain independent counsel to advise:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- f. In exposing to excess personal liability:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- g. In failing to act reasonably in light of the totality of the circumstances presented by Plaintiff's claim;
- h. In failing to act as a reasonable and prudent insurer would act in regards to Plaintiff's claim;
- i. In failing to acknowledge with reasonable promptness pertinent communications with respect to Plaintiff's underlying claim;
- j. In failing to adopt and implement reasonable standards for the prompt investigation

and settlement of claims, including Plaintiff's claim, arising under its policies;

- k. In failing to attempt in good faith to effect a fair, prompt, and equitable resolution to Plaintiff's claim after liability had become reasonably clear;
- l. In compelling Plaintiff to institute a suit to recover amounts reasonably due or payable with respect to claims arising under Defendant IRF's policy by offering substantially less than the amounts ultimately recovered through suits brought by the claimants as the result of the inability of Plaintiff to effect reasonable settlements with Defendant IRF;
- m. In offering to settle Plaintiff's claim for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that Plaintiff would be required to incur attorneys' fees to recover the amount reasonably due or payable;
- n. In engaging in practices which constituted an unreasonable delay in paying or an unreasonable failure to pay Plaintiff's claim;
- o. In violating the laws and statutes of the State of South Carolina, including but not limited to S.C. Code § 38-59-20.

94. Defendant IRF's breach of its duty of good faith and fair dealing was the direct and proximate cause of damage to each and every Assignor in his or her individual capacity, those damages including mental anguish, anxiety, stress, expenses, and incurring personal judgments.

95. As a direct and proximate result of Defendant IRF's breach of its duty of good faith and fair dealing, each and every Assignor in his or her individual capacity has been and continue to be injured in the following ways:

- a. In suffering personal exposure to unsatisfied judgments;

- b. In incurring attorney's fees and expenses;
- c. In suffering the mental anguish, anxiety, and stress of being sued by Plaintiff and the knowledge that such suit would likely lead to excessive personal financial responsibility;
- d. In such other ways as would cause Assignors' additional and unnecessary pain, suffering, mental anguish, and aggravation.

96. Each and every Assignor's damages in their individual capacity would not have occurred but for Defendant IRF's breach of its duty of good faith and fair dealing.

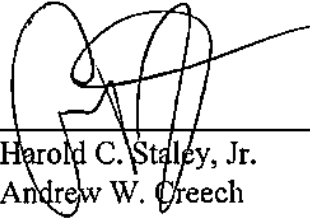
97. By nature of the assignments, Plaintiff is entitled to judgment against Defendant IRF for actual, compensatory damages, including the full amount of the verdict not yet satisfied, plus interest accruing from October 17, 2014; exemplary or punitive damages in an amount that is fair, just, and reasonable under the circumstances; and whatever costs, interest, both pre-judgment and post-judgment, and attorney's fees that the Court deems proper.

98. Moreover, Defendant IRF is liable to Plaintiff for attorney's fees in prosecuting this action pursuant to S.C. Code Ann. § 38-59-40.

WHEREFORE, Plaintiff prays for judgment against Defendant in a sum to be determined by a jury of Plaintiff's peers and to exceed one hundred thousand dollars (\$100,000.00), thus meeting the requirements set under the South Carolina Rules of Civil Procedure Rule 30 (h), and should include actual damages, future damages, punitive damages in a reasonable amount, and the costs and disbursements of this action and for such other and further relief that this Court or jury deems just and proper.

Respectfully,

By:



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Andrew W. Creech

Garrett B. Johnson

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ATTORNEYS FOR PLAINTIFF

November 27, 2017
Rock Hill, South Carolina

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2015-CP-40-00619

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

v.

State Fiscal Accountability Authority, et al, Respondent.

NOTICE OF APPEAL

Nancy Morris, as Personal Representative of the Estate of David Allan Woods, appeals the order of the Honorable Alison Renee Lee dated March 26, 2020. Appellant received written notice of entry of this order on March 26, 2020.

April 20, 2020

s/Garrett B. Johnson
Garrett B. Johnson, SC Bar #81105
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Attorney for Respondent

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

vs.

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

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CASE NO.: 2015-CP-40-00619

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Notice of Appeal along with Chief Administrative Judge Alison Renee Lee's March 26, 2020 Amended Order has been served upon opposing counsel by electronic mail this 21st day of April 2020, using the following address:

Andrew F. Lindemann
Lindemann, Davis & Hughes, P.A.
5 Calendar Court, Suite 202
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RECEIVED
May 07 2021
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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

THURMOND KIRCHNER & TIMBES, P.A.

s/ *T.J. Rode*

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