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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

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

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

v.

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

INITIAL BRIEF OF RESPONDENTS STATE FISCAL ACCOUNTABILITY AUTHORITY AND SOUTH CAROLINA INSURANCE RESERVE FUND

Andrew F. Lindemann
LINDEMANN & DAVIS, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

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

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STATEMENT OF THE CASE

This is a declaratory judgment action filed by the Appellant Nancy Morris, as Personal Representative of the Estate of David Allen Woods. This action seeks to obtain payment from the Respondents State Fiscal Accountability Authority ("SFAA") and the South Carolina Insurance Reserve Fund ("IRF") for judgments entered in a United States District Court action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG.[1] That case was tried before United States District Judge Richard M. Gergel and a jury in October 2014. On October 17, 2014, the jury returned a verdict finding against five correctional officers at the Hill-Finklea Detention Center operated by Berkeley County. The jury found that the officers had been deliberately indifferent to the decedent's medical needs in violation of the Fourteenth Amendment to the United States Constitution. (R. 300-304).

The verdict against the Defendants Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland, and Jerry Speissegger included the following: $500,000 in actual damages against all five officers jointly and severally, $1 million in punitive damages against Burkholder, $1 million in punitive damages against Priscilla Bland, $150,000 in punitive damages against Andrew Bland, $150,000 in punitive damages against Carner, and $150,000 in punitive damages against Speissegger. (R. 300-304).[2] Following a motion for set-off, the actual

[1] By Order filed March 27, 2018, the Court substituted the State Fiscal Accountability Authority as a party-defendant in place of the South Carolina State Budget and Control Board. Prior to the South Carolina Restructuring Act of 2014, the Insurance Reserve Fund was a Division of the South Carolina Budget and Control Board. 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, which was newly created.

[2] The Defendants Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland, and Jerry Speissegger have never made an appearance in this action.

damages were reduced to $171,875. (R. 73-74). Judge Gergel also made an award under 42 U.S.C. § 1988, including attorney's fees in the amount of $354,923 and costs totaling $31,820.62. (R. 88).

During the pendency of this litigation, the five correctional officers appealed the judgments to the Fourth Circuit Court of Appeals. In November 2016, the Fourth Circuit affirmed the judgments against each of the officers. *See, Morris v. Bland*, 666 Fed. Appx. 233 (4th Cir. 2016).

The IRF issued a Tort Liability Insurance Policy to its named insured Berkeley County, Policy Number T130080011, with includes liability limits of $600,000. (R. 93-99). Additionally, the policy provided coverage for "[a]ll expenses incurred by the Fund, all costs taxed against the insured in any suit defended by the Fund, and all interest on the entire amount of any judgement [sic] therein." (R. 95). Following the appeal, the IRF tendered the sum of $992,013.63 to the Appellant in partial satisfaction of the judgments against the five correctional officers. This partial satisfaction also included the awards of attorneys' fees, costs, and post-judgment interest for a total of $392,013.63. The partial satisfaction also included the $600,000 liability policy limit. (Supp. R. 676-678). The Defendant IRF separately tendered an additional $25,768.75 in satisfaction of attorneys' fees associated with the appeal. (Supp. R. 675).[3]

After the filing of this action, the Appellant also filed another lawsuit against the South Carolina Insurance Reserve Fund captioned *Morris v. South Carolina Insurance Reserve Fund*,

[3] The Appellant executed a document captioned "Partial Satisfaction of Judgment" which 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." (Supp. R. 677).

Civil Action No. 2017-CP-40-6773. In the Amended Complaint in that action, the Appellant alleges as follows:

> Andrew J. Bland, PFC; Priscilla Garrett Bland, SGT; Leeman 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.

See, Amended Complaint, Civil Action No. 2017-CP-40-6773, ¶ 6. (R. 566-567). A copy of four documents captioned "Assignment of Rights and Covenant Not to Execute" are attached as Exhibit A to that Amended Complaint, and those documents each include language that "Plaintiff hereby covenants not to execute against any assets of the undersigned." The trial court took judicial notice of the pleadings from Civil Action Number 2017-CP-40-6773.[4]

After the completion of discovery, the Appellant filed a motion for summary judgment. (Supp. R. 587-678).[5] The Respondents SFAA and IRF also filed a cross motion for summary

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[4] *See, Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records").

[5] By way of explanation, the Appellant filed two different motions for summary judgment during the course of the litigation in the Circuit Court. The first was filed on November 19, 2015. (R. 154-281). That motion was heard by Judge L. Casey Manning and denied by Form Order filed March 22, 2016. That motion was denied as premature because the appeal of the underlying case was still pending at the Fourth Circuit Court of Appeals. That Form Order has not been appealed by the Appellant. After the Fourth Circuit issued its decision in the underlying case, the parties filed cross motions for summary judgment which were heard and decided by Judge Alison Renee Lee, and it is that decision that has been appealed by the Appellant. The Appellant filed her second motion for summary judgment on November 7, 2017, and it is that motion that was denied as part of Judge Lee's Order which is on appeal. (Supp. R. 587-678).

judgment. (R. 313-315). Those motions were heard by Circuit Court Judge Alison Renee Lee on March 28, 2018. On July 23, 2019, Judge Lee issued an Order on Declaratory Judgment which granted summary judgment for the Appellant. (R. 1-12). On August 2, 2019, the Respondents filed a timely Motion to Alter or Amend Order pursuant to Rule 59(e), SCRCP. (R. 535-548). Judge Lee heard arguments on that motion on October 3, 2019. She then issued an Amended Order on Declaratory Judgment granting the Respondents' motion and denying the declaratory relief sought by the Appellant. (R. 13-29). Judge Lee ruled that "S.C. Code Ann. § 1-11-460 grants the State Fiscal Accountability Authority with discretion to determine on a case-by-case basis whether to pay a qualifying judgment in excess of $1 million entered in a Section 1983 case 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 Insurance Reserve Fund for tort liability insurance." (R. 28). Judge Lee further ruled that "the actions of the five County Defendants constitutes only one occurrence as defined in Policy Number T130080011 issued by the Insurance Reserve Fund to Berkeley County." (R. 28).

The Appellant did not file a Rule 59(e) motion. Instead, she filed an appeal to this Court.

STANDARD OF REVIEW

"A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40, 41 (2008). "An appellate court reviews the grant of summary judgment under the same standard applied by the trial court." *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct. App. 2009). "The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id*.

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Id*. "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders Firstsource - Southeast Group*, 413 S.C. 630, 776 S.E.2d 434, 437 (Ct. App. 2015).

ARGUMENTS

I. The trial court correctly ruled that Section 1-11-460 provides only discretionary authority in the State Fiscal Accountability Authority to pay qualifying judgments in a Section 1983 case, and there is no mandatory duty to indemnify created by the statute.

The Appellant contends that Section 1-11-460 mandates that the State Fiscal Accountability Authority pay the existing judgments entered against the five correctional officers. The central issue in this declaratory judgment action focuses on the meaning of Section 1-11-460 of the South Carolina Code of Laws, which provides as follows:

> 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. If a judgment is paid, the payment must be recovered by assessments against all governmental entities purchasing tort liability insurance from the Insurance Reserve Fund.

S.C. Code Ann. § 1-11-460 (1992).[6]

[6] The Appellant has referred to Section 1-11-460 as providing "excess coverage." However, neither the SFAA nor the IRF issues any excess insurance policies. In addition, the enabling legislation which creates the Insurance Reserve Fund, S.C. Code Ann. § 1-11-140, does not provide authorization from the General Assembly to issue an excess insurance policy or to provide excess insurance. The Appellant relies on language from a document entitled "Policyholder's Manual" (ed. August 2011), as issued by the South Carolina Budget and Control Board, which under the heading "Limits of Liability" used the word "excess" in a subtitle and then set forth a portion of the language in Section 1-11-460. (R. 118). That language is not a representation that a policyholder is provided excess insurance coverage under Section 1-11-460.

In construing the meaning and application of Section 1-11-460, the key language is the phrase "is authorized to pay." The Appellant contends this language is mandatory, thereby requiring the SFAA to pay judgments entered in a Section 1983 claim against a government employee acting within the scope of his employment. The Respondents, in contrast, have construed that language to provide for discretionary authority in the SFAA.

The trial court agreed with the Respondents' position. The trial court ruled that that "the language "is authorized to pay" as used in S.C. Code Ann. § 1-11-460 does not create a mandatory duty to indemnify on the part of Defendants." (R. 21). Instead, Section 1-11-460 "grants to the SFAA the discretion to determine on a case-by-case basis whether to pay a qualifying judgment in excess of $1 million entered in a Section 1983 case 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." (R. 21). The trial court then concluded that "[i]t is not the function of this Court to order the SFAA or the IRF to make such payment in the present case" and "[t]hat request for indemnification will need to be made to the SFAA in accordance with S.C. Code Ann. § 1-11-460, a request incidentally that the County Defendants have never made." (R. 21).

Moreover, it is important to recognize that the "Policyholder's Manual" is not a substitute for the policies of insurance discussed therein or the applicable statutory law. In fact, the "Policyholder's Manual" includes a disclaimer providing as follows: "This handbook provides general information concerning the policies issued by the Fund including issue/renewal instructions and claim reporting instruction. While every effort has been made to make this manual as complete and accurate as possible, it does not contain a full restatement of the contracts. In the event of any conflict or omission, the terms of the actual contract of insurance shall be paramount in every instance." (R. 104).

A. The trial court's statutory analysis determined that the "is authorized to pay" language in Section 1-11-460 is discretionary in nature.

The trial court applied several rules of statutory construction in reaching its decision. In particular, the trial court examined other parts of the same chapter of Title 1 of the Code of Laws as Section 1-11-460 which are *in pari materia* and should be construed together. *See, Joiner ex rel. Rivas v. Rivas,* 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("it is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result"). As the trial court found, 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. Section 1-11-440 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." As the trial court found, "[t]his 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." (R. 18). The trial court further found that these statutes show "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.'" (R. 18).[7]

In construing the meaning and application of Section 1-11-460, the trial court also cited to cases from both South Carolina and other jurisdictions that construed similar "is authorized to pay" 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"

[7] The Supreme Court has held 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 Respondents also presented evidence that the SFAA and the IRF, being the governmental entities charged with administering S.C. Code Ann. § 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. (R. 282-283). The trial court found that evidence persuasive. (R. 18).

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. Additionally, the trial court recognized that "[t]he plain and ordinary meaning of 'to authorize' is not 'to require' or 'to mandate' some action. Instead, according to Black's Law Dictionary, 'authorize' means 'to give legal authority' or 'to empower.'" *See*, Black's Law Dictionary (10th ed. 2014). (R. 19).

The trial court also cited to the case of *Willcox v. Tennessee District Attorneys General Conference*, 2008 WL 4510031 (E.D. Tenn. 2008), which involved the interpretation of a Tennessee state statute that authorizes the indemnification of state employees. Section 9-8-112 of the Tennessee Code of Laws provides, in part: "The board of claims *is authorized to pay* final judgments for state employees, as defined in § 8-42-101, for any damages, including interest thereon, which are awarded in a final judgment in a civil lawsuit against the employee in a court of competent jurisdiction where it is determined by the board that the incident on which such damages were awarded occurred when the employee was acting in good faith within the scope of such employee's official duty and under apparent lawful authority or orders." Tenn. Code Ann. § 9-8-112(a)(1). (Emphasis added). The statute has the same "is authorized to pay" language as Section 1-11-460. The Tennessee statute has been interpreted, however, as not *requiring* indemnification. 2008 WL 4510031, *4, n.3. (Emphasis in original). Drawing a specific distinction between "authorizing" and "requiring," the actual cite from the federal district court is as follows: "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).

Based on this statutory analysis, the trial court ruled as a matter of law that Section 1-11-460 bestowed discretionary, rather than mandatory, authority on the SFAA.

B. The Appellant's argument that the trial court's interpretation of Section 1-11-460 violates the non-delegation doctrine was never raised to nor ruled upon by the trial court and, therefore, is not preserved for appellate review.

On appeal, the Appellant has not challenged the trial court's analysis and its reliance on the foregoing rules of construction and supporting authorities. Instead, the Appellant raises an issue that was never argued in the trial court. Specifically, the Appellant claims that the trial court's interpretation of Section 1-11-460 violates the non-delegation doctrine.

This Court and the Supreme Court routinely emphasize the "longstanding principle of error preservation" which recognizes that "[]preserving issues for appellate review is a fundamental component of appellate practice." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 323 (2001). Indeed, it is well settled that "South Carolina appellate courts do not recognize the plain error rule." *Id.*

There are several key rules of error preservation. First among equals is the rule that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 779-780 (2004). "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original). In short, "[i]t is axiomatic that an issue cannot be raised for the first time

on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). *See also, State v. Whitten*, 375 S.C. 43, 649 S.E.2d 505, 507 (Ct. App. 2007) (finding an appellate court is limited by appellate rules that allow the court to consider only the precise question that was before the trial judge and ruled upon by the judge).

As indicated, the Appellant's reliance on the non-delegation doctrine was never raised to nor decided by the trial court. Likewise, the Appellant never argued that Section 1-11-460, as interpreted by the trial court, violated the separation of powers doctrine or was otherwise unconstitutional. For these reasons, the issue is not preserved for appellate review.

C. If the Court consider the merits, the non-delegation doctrine has no application to Section 1-11-460 nor any of the statutes that authorize the SFAA and the IRF to administer a governmental insurance program.

Even if the Court considers the merits, the Appellant's reliance on the non-delegation doctrine is misplaced. The non-delegation doctrine is "a component of the separation of powers doctrine and prohibits the delegation of one branch's authority to another branch." *Hampton v. Haley*, 403 S.C. 395, 743 S.E.2d 258, 264 (2013). The doctrine is based on the premise that "the authority to transfer appropriated money lies with the General Assembly and not the executive branch." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623, 631 (2002). In *Gilstrap v. South Carolina Budget & Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992), the Supreme Court recognized that "[t]he appropriation of public funds is a legislative function" and accordingly, "[a] statute which, in effect, gives an administrative body *an absolute, unregulated, and undefined discretion* bestows arbitrary powers and is an unlawful delegation of legislative powers." *Gilstrap v. South Carolina Budget & Control Bd.*, 310 S.C. 210, 423 S.E.2d 101, 105 (1992). (Emphasis in ordinal). In *Gilstrap*, the Board had adopted a plan to reduce

appropriations due to projected revenue shortfalls. The Supreme Court found that "construing the Act to allow the Board to reduce appropriations with the only limitation being that its reductions be as uniform as possible would violate the nondelegation doctrine." 423 S.E.2d at 105, as cited in *Hampton*, 743 S.E.2d at 265. Similar, in *Hampton*, the Supreme Court explained: "if the Board could decline appropriated funds based on its own policy choices, it would have the unbridled power to disregard the General Assembly's appropriations and make its own appropriations decisions." *Hampton*, 743 S.E.2d at 265. Thus, the Supreme Court held that "the Board violated the separation of powers by acting beyond its statutory authority and infringing upon the General Assembly's power to make policy determinations, when it declined to use the appropriated funds for the premium increases and instead raised enrollee contribution rates." *Id*.

In short, the non-delegation doctrine is applicable where the SFAA or other executive agency violates the separation of powers doctrine by altering appropriations made by the General Assembly or otherwise declining to use appropriated funds as directed by the General Assembly. As indicated, the doctrine is premised on the General Assembly's legislative power to appropriate funds.

The non-delegation doctrine, however, has no application to Section 1-11-460 nor any of the statutes that authorize the SFAA and the IRF to administer a governmental insurance program. The IRF is not funded by any general appropriations from the General Assembly. Instead, the IRF is funded by the collection of premiums from its insureds and interest accrued on the insurance reserve funds. *See*, S.C. Code Ann. § 1-11-140, § 10-7-130. Certainly, any payment pursuant to Section 1-11-460 is not funded by the General Assembly. To the contrary, Section 1-11-460 explicitly provides that "[i]f a judgment is paid, the payment must be recovered

by assessments against all governmental entities purchasing tort liability insurance from the Insurance Reserve Fund." S.C. Code Ann. § 1-11-460. Therefore, where the SFAA exercises discretion to pay or decline to pay a judgment pursuant to Section 1-11-460, that does not implicate a legislative function for which any appropriation is received from the General Assembly. That decision is no different than the discretion that Section 1-11-140 bestows on the SFAA and IRF to adjust claims brought against its insureds. *See*, S.C. Code Ann. § 1-11-140 ("The authority has the exclusive control over the investigation, settlement, and defense of claims against the various entities and personnel for whom it provided insurance coverage and may promulgate regulations in connection therewith"). Yet, Section 1-11-140 does not violate the non-delegation doctrine where the General Assembly has not provided guidelines for the SFAA to use in adjusting insurance claims. As another example, Section 1-11-147 provides that the SFAA "is authorized to either self-insure, purchase reinsurance, or use a combination of self-insurance and reinsurance" for underwriting automobile liability insurance. *See*, S.C. Code Ann. § 1-11-147. Section 1-11-147, however, does not violate the non-delegation doctrine where the General Assembly has not provided guidelines for the SFAA to determine which alternative to choose. In short, the Appellant's reliance on the non-delegation doctrine is misplaced. The SFAA and IRF are not infringing on the legislature's province to control appropriations.

D. The trial court correctly ruled that the absence of promulgated guidelines or regulations do not provide a basis for the Appellant's argument that Section 1-11-460 was not intended by the General Assembly to vest discretion in the SFAA.

The Appellant appears to argue that the trial court found that she failed to exhaust her administrative remedies. That is a mischaracterization of the court's ruling. The trial court addressed the Appellant's argument that the absence of regulations or guidelines for the SFAA's

exercise of discretion does not violate due process. In rejecting that argument, the trial court made several rulings.

First, the trial court ruled that "[Appellant's] position presupposes that S.C. Code Ann. § 1-11-460 even creates a protected property interest or entitlement which its express language does not support. This Court does not conclude that due process safeguards are even required under the statutory scheme adopted by the General Assembly." (R. 21). The Appellant has not even appealed that ruling. Thus, the "two-issue" rule is dispositive on the due process argument.[8]

Second, the trial court ruled that "even if subject to due process protections, the absence of regulations or guidelines does not violate due process." (R. 21). The trial court is correct. 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. In the case at bar, the Appellant focuses on the absence of guidelines for the exercise of the SFAA's discretion in evaluating

[8] In applying the "two-issue" rule, the Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

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 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 does not convert discretionary authority into a mandate.

This is especially the case where there had never been a request for indemnity under Section 1-11-460. As the trial court correctly ruled, "assuming a property interest is even implicated, once a request is made and a decision is rendered by the SFAA on a request for indemnity, then there would be an opportunity to challenge that decision as being arbitrary or capricious." (R. 22). As a result, "[the Appellant's] 'due process' related arguments are premature and do not provide a basis for arguing that S.C. Code Ann. § 1-11-460 was not intended by the General Assembly to vest discretion in the SFAA." (R. 22). Neither the Appellant nor the five correctional officers ever made a request to the SFAA for indemnification pursuant to Section 1-11-460. The trial court thus was correct in its ruling that "it is premature for the Plaintiff or this Court to question the SFAA's decision-making process." (R. 22).

E. Section 11-55-40(B) does not require Section 1-11-460 to be read as a mandatory, rather than a discretionary, statute.

In her opening brief, the Appellant makes another new argument that was not raised to or ruled upon by the trial court. The Appellant cites to Section 11-55-40(B) which provides as follows: "The authority shall exercise all functions, powers, duties, responsibilities, and authority, generally found in Title 11 of the 1976 Code, but also contained in certain other provisions of South Carolina law, exercised by the former Budget and Control Board related to grants, loans, and other forms of financial assistance to other entities." S.C. Code Ann. § 11-55-

40(B). Section 11-55-40(B) was adopted as part of the South Carolina Restructuring Act of 2014, which provided for the abolishment of the Budget and Control Board, the creation of the SFAA, and the transfer of certain functions to the SFAA. The Appellant suggests that the language "is authorized to pay" in Section 1-11-460 should be construed as mandatory because Section 11-55-40(B) uses the mandatory language "shall exercise."

There are a number of flaws in this argument. First, as indicated, this argument was not made in the trial court and thus is not preserved for appellate review. Second, the use of "shall exercise" in Section 11-55-40(B) does not re-write the language in Section 1-11-460. Third, Section 11-55-40(B) applies to laws "related to grants, loans, and other forms of financial assistance to other entities." Section 1-11-460 does not involve grants or loans or financial assistance to entities; it pertains to indemnity to individuals. Fourth, "[t]he general rule of statutory construction is that a specific statute prevails over a more general one." *Atlas Food Systems & Services, Inc. v. Crane Nation Vendors*, 319 S.C. 556, 462 S.E.2d 858, 859 (1995). Clearly, Section 1-11-460 is the more specific statute and is controlling regardless of the use of the words "shall exercise" in Section 11-55-40(B).

In sum, Section 11-55-40(B) does not require Section 1-11-460 to be read as a mandatory, rather than a discretionary, statute.

II. The trial court correctly ruled that the Appellant has not and cannot show that she has received a qualifying judgment that would be collectible under Section 1-11-460.

The trial court found 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. The trial

court concluded that the judgments against Andrew Bland, Leemon Carner, and Jerry Speissegger did not have judgments in excess of $1 million entered against them. (R. 22). The trial court further ruled that Section 1-11-460 "should be construed as providing for payments for compensatory or actual damages awards and not for punitive damages awards being claimed in this case." (R. 23). Finally, the trial court ruled that the Appellant had not shown that the judgments entered against the five correctional officers were for acts committed within the scope of their employment with Berkeley County. (R. 25). The Appellant challenges each of these rulings.

A. Qualifying Judgment

Section 1-11-460 is applicable to "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." S.C. Code Ann. § 1-11-460. 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 the County Defendants jointly and severally. (R. 41). That amount was then reduced by the United States District Judge Richard M. Gergel to $171,875 to reflect an offset from the settling medical defendants. (R. 74). 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 officers 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. Based thereon, the trial court ruled that the judgments entered against Andrew

Bland, Leemon Carner, and Jerry Speissegger are not qualifying judgments.

On appeal, the Appellant argues that the judgments against the five officers are to be treated in the aggregate and that the total of the judgments exceeds $3 million on a joint and several verdict. That is incorrect.[9] There is no language in Section 1-11-460 that even suggests that multiple judgments against multiple governmental employees or officials are to be considered in the aggregate. The fact the statute uses the plural of "judgments" and "employees" does not support such a construction. Otherwise, if that literal construction applies, then a singular "judgment" against a singular "employee" would not be qualifying, and that obviously would be an absurd construction. Instead, as the trial court correctly ruled, a qualifying judgment is a judgment against each employee in excess of $1 million.

Moreover, the Appellant argues for the first time that there is no $1 million threshold for a qualifying judgment. This is yet another argument that is improperly made for the first time on appeal and is not properly preserved for appellate review. The Appellant contends that the phrase "in excess of one million dollars" modifies the verb "to pay" rather than "judgments." She presents a grammatical analysis that is simply incorrect and frankly makes no sense. From a practical standpoint, the Appellant's construction actually creates a higher threshold than $1 million. By way of example, where there is a $1.5 million judgment that has been reduced to $900,000 by the payment of $600,000 in liability insurance coverage, the SFAA would lack the discretion to make a payment because the amount owed is less than $1 million. Clearly, the phrase "in excess of one million dollars" modifies the word "judgments" and creates a $1 million threshold for the qualifying judgments. This also makes practical sense because the IRF writes liability insurance in two

[9] As discussed below, the actual damages award is joint and several; however, the punitive damages awards are not. In other words, one defendant is not jointly and severally liable for punitive damages awarded against another defendant.

amounts, $600,000 and $1 million. Thus, the $1 million threshold amount recognizes that fact.

In sum, the trial court's interpretation of Section 1-11-460 is a correct one, and the only qualifying judgments are those against Richard Burkholder and Priscilla Bland, which exceeded the $1 million threshold.

B. Payment of Punitive Damages

In the underlying case, the Estate of David Woods was awarded actual damages of $500,000 which were reduced by Judge Gergel to $171,875. (R. 74). That award of actual damages has been fully paid under the IRF Tort Liability Policy. (Supp. R. 676). Thus, the Estate has been "made whole" as to the actual or compensatory damages. The only damages at issue in this litigation for which indemnity is sought from the State under Section 1-11-460 are punitive damages.

The trial court ruled, however, that punitive damages are not recoverable under Section 1-11-460. 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. Certainly, there is no *unequivocal* language authorizing the State to indemnify a wrongdoer for punitive damages awarded against them *in their individual capacities*. Therefore, Section 1-11-460 was correctly construed as providing for payments, at most, for compensatory or actual damages awards and not for punitive damages awards, which is all that is being claimed in the present case.

In her opening brief, the Appellant argues that the IRF already tendered over $400,000 in punitive damages, which waives the argument that punitive damages are not recoverable under Section 1-11-460. That is incorrect. While the IRF has paid over $400,000 in punitive damages, that payment was made pursuant to the contractual terms of the IRF Tort Policy and not pursuant to Section 1-11-460. The Appellant improperly conflates the contractual requirements per the IRF Tort Policy and the statutory requirements under Section 1-11-460. They are not the same. The IRF paid a portion of the punitive damages up to its limits of coverage as required by the case of *South Carolina State Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991), which construed the term "damages" in the insuring agreement as including punitive damages. Contrary to the Appellant's suggestion, the *Prince* case has no applicability to Section 1-11-460, which may not be construed as indemnifying an award for punitive damages for the reasons discussed above.

The trial court was also correct in considering 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), where the Supreme Court explained that "[i]n the absence of statutory authority, there is no right to recover exemplary or punitive damages against a municipal corporation or state." 367 S.E.2d at 151. The Supreme Court further concluded that "there is no statute authorizing the recovery of punitive damages from the State of South Carolina or its agencies." *Id.* The Supreme Court explained that "*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." *Id.* (Emphasis added).

In sum, the only monies still owed on the judgments entered against the five correctional

officers are for the punitive damages awards levied against them in their individual capacities. The trial court correctly held that the State should not be liable under Section 1-11-460 for judgments for punitive damages, particularly where the General Assembly has not unequivocally waived sovereign immunity to allow for the State's payment of punitive damages and where such an award is contrary to public policy.

C. Scope of Employment

Further, in order to be a qualifying judgment, 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. Therefore, in order to seek payment under Section 1-11-460, the Appellant has the burden of proving that the judgment in Civil Action Number 5:12-3177-RMG was for acts committed by the five correctional officers within the scope of their employment. The jury in that action, however, never made any specific factual finding that the five correctional officers were acting within the scope of their employment with Berkeley County when they were found deliberately indifferent to David Woods' medical needs.

The jury returned a special verdict form; however, the jury was never asked to answer any special interrogatories. (R. 301-304). Not only was there never any finding by the jury that the officers were acting within the scope of their employment, there was no stipulation to that effect either. The jury simply was not asked to make that determination. 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.[10] Under South Carolina law, 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).

As the trial court correctly ruled, the "scope of employment" element of the Appellant's claim under Section 1-11-460 cannot be simply inferred. Moreover, South Carolina law actually precludes the Appellant from attempting to prove that element in a subsequent declaratory judgment action; that determination needed to have been made by the jury in Civil Action Number 5:12-3177-RMG. As the Supreme Court explained in *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), the purpose of a declaratory judgment action is not to "relitigate" any issue that could have been litigated in the underlying action. 684 S.E.2d at 547. Similarly, in *Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010), the Supreme Court explained that the number of occurrences under the Tort Claims Act cannot be litigated post-judgment. In that case, the jury was never instructed on the definition of occurrence nor asked to determine whether there was more than one occurrence either in the jury instructions or on the verdict form. Thus, the plaintiff lost the opportunity to prove multiple occurrences. The same is true in this case with the "scope of employment" issue. The Appellant cannot prove based on the jury instructions and the verdict form that the jury concluded that the five correctional officers were acting within their "scope of employment." The jury was simply

[10] 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).

never asked to make that determination, and thus the Appellant cannot show that the judgment was entered against the officers for acts committed within the scope of their employment.

On appeal, the Appellant relies on the Supreme Court's recent decision in *Ex Parte Builders Mutual Ins. Co.*, 431 S.C. 93, 847 S.E.2d 87 (2020), in which the Court explained that "[i]t is not the intent in *Newman* to categorically foreclose a subsequent declaratory judgment action to resolve a coverage dispute. To the extent *Newman* may be read to foreclose an insurance company's subsequent declaratory judgment action to resolve the coverage dispute, we modify *Newman* accordingly." 847 S.E.2d at 93. Thus, the *Builders' Mutual* decision allows for an insurance company to bring a post-judgment declaratory judgment action to adjudicate a coverage question. In this case, the declaratory judgment action is not brought by any insurance company. Likewise, Section 1-11-460 is an indemnity statute and does not provide for insurance coverage. Moreover, the present action was brought by the Appellant, not by the SFAA or IRF. Likewise, the Appellant has the burden of proving that each of the requirements under Section 1-11-460 have been satisfied. There is no evidence in this record to support the Appellant's position that each of the five correctional officers were acting within the scope of their employment with Berkeley County when they were found deliberately indifferent to David Woods' medical needs. The Appellant therefore has not met her burden of proof.[11]

[11] The Appellant is attempting to improperly shift the burden of proof. It is the Appellant that must prove that she is entitled to relief under Section 1-11-460, which requires proof that the five correctional officers were acting in the scope of their employment with Berkeley County. Under South Carolina law, summary judgment is proper when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. The applicable standard for adjudicating a summary judgment motion is discussed at length by the South Carolina Supreme Court in *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991), wherein the Court adopted and applied the *Celotex* standard promulgated by the United States Supreme Court. "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." 410 S.E.2d at 545. "With respect to an issue upon

In addition, the Appellant argues that the IRF defended the underlying case without issuance of a reservation of rights. There are several flaws to that argument. First, the absence of a reservation of rights is not an issue because, as stated above, Section 1-11-460 is an indemnity statute and does not provide for 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 for indemnity may later be made to the SFAA after a final judgment is entered. That would create an absurd burden on the SFAA which would have no way of guessing that a judgment could exceed $1 million. 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. 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). The absence of a reservation of rights may only result in the waiver of policy exclusions or policy conditions.

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

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which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing -- that is, pointing out to the trial court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* The Respondents satisfied that burden of persuasion. The Appellant failed to present evidence to create an issue of fact to be tried.

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." (Supp. R. 677-678). Thus, 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.

III. The trial court correctly ruled that the Appellant's claims for declaratory relief are not justiciable as a result of the Covenants Not to Execute entered in favor of the Defendants Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland, and Jerry Speissegger.

On November 29, 2017, after filing her motion for summary judgment in the case at bar, the Appellant filed an Amended Complaint in a companion action and attached thereto a copy of four documents captioned "Assignment of Rights and Covenant Not to Execute." The Appellant alleged that she received an assignment from the five correctional officers, and in return, has entered into a Covenant Not to Execute extinguishing the personal liability of each of those persons. As a result, those Covenants Not to Execute 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 Appellant is seeking to recover from the SFAA and the IRF.

It is well settled under South Carolina law that a liability policy is a contract of indemnity. *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640, 641 (1977). Likewise, Section 1-11-460 is an indemnification statute. As such, the Appellant is now precluded from recovering under either the IRF Tort Liability Policy or Section 1-11-460. Importantly, the South Carolina Supreme Court has explained 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." *Smalls*, 239 S.E.2d 640 at 641. Likewise, in *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997), the

Court of Appeals explained that a liability insurance policy "is a contract of indemnity and the carrier is placed in the same position as its insured." 482 S.E.2d at 592. In that case, the plaintiff (Cobb) entered a Covenant Not to Execute in favor of the defendant (Benjamin), and this Court ruled as follows: "When Cobb removed the obligation to pay a judgment from Benjamin, she also relieved Nationwide of its liability to pay under Benjamin's policy. The trial court was correct in its determination the covenant not to execute relieved Nationwide from liability." *Id*.

As the trial court correctly ruled, the same is true in the present case. When the Appellants entered Covenants Not to Execute and relieved the five correctional officers of their personal liability to pay the judgments against them, that also relieved the IRF of any further liability under the Tort Liability Policy. It also relieved the SFAA of any liability or statutory obligation it may have to indemnify those officers under Section 1-11-460. As the trial court ruled, the issues of statutory construction related to S.C. Code Ann. § 1-11-460 and the issues of policy interpretation are now moot.

IV. The trial court correctly ruled that the judgment entered in the underlying action was for a single occurrence under the IRF Tort Liability Policy.

In the trial court, the Appellant argued that the actions of the five correctional officers constituted multiple occurrences under the IRF Tort Liability Policy issued to the named insured, Berkeley County. The trial court rejected that argument, including the Appellant's reliance on the Supreme Court's decision in *Boiter v. South Carolina Department of Transportation*, 393 S.C. 123, 712 S.E.2d 401 (2011). The Appellant has not appealed that ruling. The trial court also found that there was only one occurrence under the terms of the policy because the jury in the underlying case awarded a joint verdict for actual damages and the Appellant cannot

therefore argue that "the officers' acts or omissions, i.e., their deliberate indifference to Woods' medical needs, were not in concert or caused different injuries." (R. 27).

The IRF Tort Liability Policy defines "occurrence" as "an accident, including continuous or repeated exposure to conditions which result in personal injury or property damage neither expected nor intended from the standpoint of the insured." (R. 95). The Policy also includes the following provision in Section V – Limit of Liability: "For the purpose of determining the limit of the Fund's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions *shall be considered as rising out of one occurrence*." (R. 96). (Emphasis added).

On appeal, the Appellant argues that the trial court found this policy language to be ambiguous, and accordingly, the court erred in failing to construe the language in favor of the insured. The Appellant's position is incorrect for several reasons.

First, the Appellant never argued that the "occurrence" language in the Policy is ambiguous. That allegation was never pled in the Complaint, and it was never argued either at the hearing nor in any filings in the trial court. Second, the trial court never ruled that the "occurrence" language is ambiguous.[12] The Amended Order includes no ruling as a matter of law by the trial court that the policy, or any part thereof, is ambiguous. Nor could the trial court make that ruling because, as indicated, it was never raised. Consequently, this is yet another issue raised for the first time on appeal, which is not preserved for appellate review. *See, Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the

[12] The Appellant is critical that the IRF did not appeal the trial court's ruling that the policy is ambiguous. *See*, Appellant's Brief, p. 28, n. 13. The reason for that is obvious: the trial court never ruled that the policy was ambiguous.

trial judge to be preserved for appellate review").

Furthermore, in her opening brief, the Appellant makes arguments on the issue of ambiguity that were never raised to nor decided by the trial court. The Appellant appears to suggest that there are "internal inconsistencies" with the definition of "occurrence" similar to the Supreme Court's discussion in *South Carolina State Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991). In *Prince*, the Supreme Court found an inconsistency between the policy's definition of "personal injury" (which included defamation) and the portion of the definition of "occurrence" which required evidence that the "personal injury" was "neither expected or intended from the standpoint of the insured," the latter of which was inconsistent with an intentional tort such as defamation. 403 S.E.2d at 647. No such issue is raised in the case at bar. The definition of "personal injury" includes a claim for the denial of due process under the Fourteenth Amendment, which is the claim on which the verdict was returned against the five corrections officers, and the IRF never denied coverage for lack of an "occurrence," as was the scenario in *Prince*.

The Appellant also argues that the IRF's obligation to pay as stated in the insuring agreement does not depend on being caused by an "occurrence." That argument was not raised to nor decided by the trial court so as to be properly preserved for appellate review. Nonetheless, even if the Court addresses the merits, the Appellant's position is wrong. The insuring agreement provides that "[t]he Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. Personal Injury or B. Property Damage to which this applies caused by an occurrence." (R. 95). Moreover, Section V – Limit of Liability provides that the limit of liability "shall not exceed the limit of liability stated in the declarations," which in this case is $600,000 per occurrence. (R. 93, 96). Thus, there is no

ambiguity with respect to the "occurrence" language in the Policy. Likewise, as the trial court correctly ruled, the definition of "occurrence" in the Tort Claims Act "has no bearing on the interpretation and application of the policy definition." (R. 28).[13]

The Appellant also takes issue with the trial court's ruling that the jury in the underlying case awarded a joint verdict for actual damages and, as a result, the Appellant cannot argue that "the officers' acts or omissions, i.e., their deliberate indifference to Woods' medical needs, were not in concert or caused different injuries." (R. 27). The Appellant insists that a joint and several verdict does not preclude there being separate occurrences. She contends that the trial court "conflated" the concepts of "joint and several liability" and "occurrence." That argument lacks merit.

The trial court correctly found that the "actual damages award was entered jointly against the five correctional officers." (R. 27). This is consistent with *Morris v. Bland*, 666 Fed. Appx. 233 (4th Cir. 2016), where the Fourth Circuit found that "[t]he jury award was entered jointly against the five correctional officers." 666 Fed. Appx. at 237.[14] The joint verdict, which was

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[13] The Appellant's reliance on *Padgett v. South Carolina Insurance Reserve Fund*, 340 S.C. 250, 531 S.E.2d 305 (Ct. App. 2000), is misplaced. Contrary to the Appellant's argument, this Court did not rule that a Tort Claims Act definition of a term *must* be used to interpret a term in the IRF Policy. Instead, this Court explained only that "the definition of 'scope of official duty' in the Tort Claims Act is *useful* in determining the phrase's meaning under the IRF policy." 531 S.E.2d at 307, n.1. (Emphasis added). The Tort Claims Act definition is by no means controlling. That is particularly true with respect to the meaning of "occurrence" which is a defined term in the Policy, and that definition is "substantially different" from the Tort Claims Act definition. (R. 27, 95). Critically, "scope of official duty" was not a defined term in the IRF Policy and hence this Court looked to the Tort Claims Act definition to assist with the term's construction. Additionally, it is also important to recognize that the Appellant's recovery against the five correctional officers was not based on any state claim brought pursuant to the Tort Claims Act but rather on a Section 1983 claim for a due process violation.

[14] In footnote 16 of her opening brief, the Appellant suggests that there were at least two occurrences because the jury in the underlying case awarded punitive damages of $1 million

entered on a verdict form agreed to by the Appellant, demonstrates that the Appellant "necessarily proved that the officers acted in concert to produce a single, indivisible injury." (R. 27). Accordingly, that factual finding from the underlying case demonstrates, as the trial court ruled, that there was a single occurrence. The joint verdict shows that the Appellant proved in the underlying case that the decedent suffered from the "continuous or repeated exposure to substantially the same general conditions," and based on the policy language, that "shall be considered as rising out of one occurrence." (R. 96).

The Appellant's reliance on the case of *Crossman Communities of North Carolina v. Harleysville Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), is misplaced. The Supreme Court cited a Minnesota case in stating: "We reject the argument that there can be only one occurrence in a case where property damage results from continuous or repeated conditions of exposure." 717 S.E.2d at 597, *citing Industrial Steel Container Co. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156 , 159 (Minn. Ct. App. 1987). The Appellant takes that quote entirely out of context. The Supreme Court was addressing its adoption of a continuous trigger theory which was modified to require an injury-in-fact during each policy period. That is the coverage trigger in construction

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each against two officers and punitive damages of $150,000 each against the three other officers. Curiously, the Appellant argues that the different levels of culpability which led to different punitive damages awards suggests there were two occurrences rather than a single occurrence under the Policy language. The Appellant argues that the differing punitive damages awards somehow shows the officers were not acting in concert. That makes no sense. To the contrary, the jury simply held the supervisors to greater culpability with a higher punitive damages award. Moreover, the Appellant is also mistaken to the extent she suggests that the punitive damages awards are joint and several. That is inconsistent with federal law requiring, as does state law, that punitive damages awards be determined on an individual basis. *See*, *McFadden v. Sanchez*, 710 F.2d 907, 908 (2d Cir. 1983) ("in section 1983 actions liability for punitive damages and their amount must be determined on an individual basis"); *McKinnon v. Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984) ("[t]he assessment of punitive damages against individual defendants creates no problem; punitive damages, like criminal fines, which they resemble, are always assessed individually").

defect litigation where there are allegations of progressive loss such as that caused by water intrusion. The *Crossman* case is entirely inapplicable to a bodily injury case such as the case at bar. Nonetheless, a careful review shows that the Supreme Court in *Crossman* was justifying the finding of an "occurrence" under successive policies or policy periods. The Supreme Court did not in any respect invalidate or "reject" the concept that "continuous or repeated exposure to substantially the same general conditions" will give rise to a single occurrence under a single policy or policy period.

In sum, the trial court correctly ruled the judgment entered in the underlying action was for a single occurrence under the IRF Tort Liability Policy. That ruling should be affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund respectfully request that this Court affirm the Amended Order on Declaratory Judgment as issued by Circuit Court Judge Alison Renee Lee.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

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

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund certifies that the Final Brief of Respondents State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund complies with Rule 211(b), SCACR.

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

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

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund certifies that the Final Brief of Respondents State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

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

July 16, 2021