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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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. ..... Petitioner

vs.

State Fiscal Accountability Authority, *et al.* ..... Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Certification of Counsel

Pursuant to South Carolina Appellate Court Rule 224(d)(1) the below signed certifies that a Petition for Rehearing was made and finally ruled upon by the South Carolina Court of Appeals on October 18, 2023.

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INTRODUCTION

In 2010 David Allen Woods died while in custody at the Hill-Finklea Detention Center, and his estate sued five corrections officers (the "Officers"[1]) under 42 U.S.C §1983. A jury returned a verdict for Woods, and judgment was entered against the Officers. The Insurance Reserve Fund (the "IRF") made partial payment of this judgment up to the "single occurrence" limits under a Tort Liability Policy. Nancy Morris ("Petitioner"), as personal representative of Woods' estate, brought this declaratory judgment action seeking payment on the balance of the judgment from either the IRF under the policy; or from the State Fiscal Accountability Authority (the "SFAA") under S.C. Code Ann. § 1-11-460—which authorizes payment of judgments issued pursuant to § 1983 against a defendant insured by the IRF.

After filing this action, and because the Officers were effectively judgment-proof, Petitioner executed identical "Assignment of Rights and Covenant not to Execute" with each of the Officers (collectively the "Covenant"). (Appx 829-47). In the Covenant, Petitioner promised not to enforce the excess judgment against the Officers' personal assets. In exchange the Officers agreed to participate in Petitioner's claims to collect the excess judgment from the IRF and/or the SFAA. The Officers also assigned all their claims against the IRF and/or the SFAA to Petitioner. (Appx. *id*).

Although the Covenant contemplated Petitioners' ability to pursue the judgment balance from the IRF and/or SFAA the Court of Appeals concluded the Covenant rendered this case moot. A result never intended. The essence of the Court of Appeals' ruling is that an insurer, like the IRF and SFAA, has no payment obligation unless its insured has personal assets available for the

[1] The Officers are: Andrew Bland, Richard Burkholder, Leemon Carner, Priscilla Garrett, and Jerry Speissegger, Jr.

injured party to execute against. In so ruling, the Court did not rest its decision on any factual support or the actual language of the Covenant, policy or statute at issue. Instead, it relied on a generalized assertion about indemnity, purported gleaned from *Smalls* and *Cobb*, that an insurer stands in the same position as its insured to incorrectly conclude that the IRF/SFAA has no duty to pay unless the Officers have paid the judgment first. Notwithstanding that the cases cited are inapposite, the Court's reasoning fundamentally misconstrues the nature of indemnity, conflating it with the separate obligations an insurer owes to an injured party as a beneficiary of an insurance policy. Had the Court considered it, it would have been apparent its reasoning was at odds with the language of the relevant Covenant, policy, and statute. Its reasoning is also contrary to the law and public policy of our State. For these reasons, and those set forth in more detail below, this Court should grant a Writ of Certiorari.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding the Covenant rendered this case "moot" where the plain language of the Covenant specifically contemplates the claims at issue here, and where the rationale employed by the Court of Appeals is unsupported by any factual findings or evidence in the record, and where the result of its reasoning is inconsistent with the plain language of the Covenant, policy, and statute at issue, as well as prior appellate court rulings regarding the nature of indemnity and the ability of a beneficiary under an insurance policy to bring an action against the carrier?

II. Does the Court of Appeals decision that an insurance company is not obligated to pay a judgment if its insured does not have personal assets at risk violate public policy?

III. Did the trial court err in finding the SFAA had no payment obligation under section § 1-11-460 where this interpretation is inconsistent with the language of the statute and violated the non-delegation doctrine?

IV. Did the trial court err in finding this matter constituted a single occurrence under the IRF's insurance policy?

FACTUAL HISTORY

For three days (November 5 - 8, 2010) the Officers ignored Woods' pleas for medical help and left him lying on the floor of his cell in clear distress. (Appx. 18-19). When he was finally taken to a hospital it was too late. He died of gastrointestinal bleeding on November 11. (*Id.*).

Petitioner sued the Officers under §1983 in the U.S. District Court. In 2015 a jury returned a verdict in favor of Petitioner for actual and punitive damages, and after the Officers unsuccessfully appealed, final judgment was entered for $3,040,287, including actual and punitive damages, together with attorney fees and interest as shown below:

Actual Damages (joint and several after set-off)		$ 171,875
Punitive Damages		$2,450,000
Burkholder - $1,000,000		
Garrett - $1,000,000		
Bland - $ 150,000		
Carner - $ 150,000		
Speissegger - $ 150,000		
Atty. Fees, Costs & Interest (joint and several)		$ 418,412
TOTAL		**$3,040,287**

(Appx. 19).

Although the Officers were covered by the IRF's policy (which defended them at trial) the IRF did not initially tender payment of the judgment. (Appx. 99-103). Therefore, Petitioner brought this declaratory judgment action seeking payment from either the IRF under the policy, or from the SFAA pursuant to § 1-11-460.[2] (Appx. 40-43).

After this action commenced, the IRF made a partial payment of $1,018,412.37, which purportedly was $600,000.00 in "per occurrence policy limits" plus $418,412.37 in attorney fees, costs, and interest. (Appx. 20). This left a judgment balance of $2,021,875. Meanwhile, Petitioner

[2] After the Legislature abolished the South Carolina Budget and Control Board (the "Board") the SFAA, was substituted as the proper party. (Appx. 567).

executed the Covenant with the Officers which specifically contemplated the Petitioner pursuing the excess judgment either directly or through assignment, stating:

> The undersigned [Officer] agrees to be deposed and testify at trial in any cause of action that is brought against the State Fiscal Accountability Authority [*i.e.,* the SFAA], the South Carolina Insurance Reserve Fund [*i.e.,* the IRF], or any other insurance company . . . in order to collect the excess judgment.

And

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

(Appx. 829-30)

PROCEDURAL HISTORY

The parties filed competing motions for summary judgment which the trial court heard on March 28, 2018. (Appx. 421-61). Although Respondents claimed the Covenant defeated the justiciability of this case it did not present the Covenant to the trial court. Instead, Respondents asked the court to take judicial notice of the existence of this document. (Appx. 401-11; 539-52).

On July 23, 2019, the trial court issued an order granting summary judgment in favor of Petitioner and directing payment of the judgment by the SFAA under §1-11-460. (Appx. 5-16). The SFAA filed a motion to reconsider that was heard on October 3, 2019. (Appx. 462-538). On April 21, 2020, the trial court issued an Amended Order reversing its prior decision and granting summary judgment in favor of SFAA and the IRF. (Appx. 17-33). This time, the trial court found

the SFAA had the discretion to decide whether to pay the judgment under §1-11-460, and that the judgement was not a "qualifying judgment" under the statute. (Appx. 21-29). The trial court also found Petitioner's claims were moot. (Appx. 29-30). Finally, the trial court concluded there had only been one occurrence under the IRF's policy. (Appx. 30-32). Petitioner appealed.

On May 24, 2023, the Court of Appeals affirmed, finding the matter was moot and declining to address the remaining issues. (Appx. 801). Petitioner timely requested rehearing. (Appx. 806). On October 18, 2023, the Court of Appeals issued a substituted opinion but denied the Petition for Rehearing. (Appx. 871-78). This Petition for Writ of Certiorari to the Court of Appeals follows.

ARGUMENT

I. Did the Court of Appeals err in finding the Covenant rendered this case "moot" where the plain language of the Covenant specifically contemplates the claims at issue here, and where the rationale employed by the Court of Appeals is unsupported by any factual findings or evidence in the record, and where the result of its reasoning is inconsistent with the plain language of the Covenant, policy, and statute at issue, as well as prior appellate court rulings regarding the nature of indemnity and the ability of a beneficiary under an insurance policy to bring an action against the carrier?

An issue becomes moot when "judgment [if] rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Ex parte Doe*, 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011).

In this action Petitioner seeks payment of the unpaid judgment balance from Respondents. The ultimate question in the case is whether Respondents owe a payment obligation to Petitioner under the policy and/or statute. On the issue of justiciability, the Court of Appeals found the Covenant implicates the doctrine of mootness. However, the Covenant does not make it impossible for a court to grant effectual relief. An order finding that Respondents were obligated to pay the

judgment under the policy and/or statute would be effective and enforceable relief. This relief would only become ineffectual if the Covenant were interpreted to have satisfied the Respondents' payment obligation or otherwise waived the right to payment.

Accordingly, the question fits more squarely within the context of waiver and interpretation of the Covenant, than it does mootness. Therefore, Petitioner argued the trial court's failure to address the language of the Covenant was fatal. *See e.g.* (Appx. 721) (suggesting this is a matter of waiver); *citing e.g., Ex parte Doe,* 393 S.C. at 151, 711 S.E.2d at 894; *Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005); *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) (all for the proposition that the effect of a document on subsequent proceedings should turn on interpretation of the actual terms of the document).

However, in finding this matter moot, the Court of Appeals did not rely on the language of the Covenant, nor did it consider the language of the policy or statute. Instead, it relied on generalized principles concerning the doctrine of indemnity. This lack of evidentiary support is the fatal flaw in the Court of Appeals' reasoning. Regardless of whether the issue is viewed through the lens of mootness or waiver, both are factually specific and require evidentiary support. *See Provident Life*, 317 S.C. at 478, 451 S.E.2d at 929 (stating waiver is a factual question of whether there has been a "voluntary and intentional relinquishment of a known right," and "the burden of proof is upon the party who asserts it."); *see also Skydive Myrtle Beach, Inc. v. Horry Cty.*, 428 S.C. 638, 643, 837 S.E.2d 485, 487 (2020) (recognizing that mootness is a factually specific inquiry and reversing this Court's finding of mootness where there was "nothing in th[e] record to indicate" there was factual support for this Court's ruling).

Naturally, the effect of the Covenant on any potential payment obligation depends, not only on the language of the Covenant, but it also depends on the nature of that purported payment obligation. Thus, the question cannot be answered without considering **both** the language of the Covenant, and the language of the policy and/or statute which purportedly creates that payment obligation. Here, the Court of Appeals did neither.

A. *The Court of Appeals failed to consider the language of the Covenant.*

"A Covenant Not to Execute is a promise not to enforce a right of action or execute a judgment when one had such right at the time of entering into the agreement." *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 146, 456 S.E.2d 408, 413 (Ct. App. 1995); *quoting Poston by Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987).[3] A covenant not to execute is distinct from a release and treated differently than a release. *Cobb v. Benjamin*, 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997) ("A covenant not to execute is treated differently than a settlement agreement which is a release."); *Ackerman,* 318 S.C. at 146, 456 S.E.2d at 413 (explaining that a covenant not to execute is a promise to "not go against the personal assets of [an insured] in collecting on any judgment" and rejecting the argument that such a promise relieved an insurer from indemnity because the injured party was no longer "legally entitled to recover" from the insured.).

[3] The Court of Appeals provides a parenthetical definition of a "covenant not to sue."(Appx. 877). *citing Cobb v. Benjamin*, 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997) (for the parenthetical that "*a covenant not to sue* is a promise not to enforce a right of action or to execute a judgment when one had such right at the time of entering into the agreement.") (italics added). However, this is actually the definition of a covenant not execute, it is not the definition of a covenant not to sue. *See Ackerman*, 318 S.C. at 146, 456 S.E.2d at 413 (properly providing this as the definition of covenant not to execute, which is "closely akin" to, but not the same as a covenant not to sue); *contra Cobb,* 325 S.C. at 578, 482 S.E.2d at 591 (misquoting *Akerman's* definition of covenant not to execute by using it as the definition of a covenant not sue).

Unlike a covenant, which is a promise not to enforce a right as against a particular person(s), a release contemplates the immediate discharge of a legal right or claim, which is effective against any party who may have responsibility. *See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC,* 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007) ("Technically, in the case of a release, there is an immediate discharge [of a legal claim]; whereas in the case of a covenant [] there is merely an agreement not to pursue [a legal claim.]").

"Whether a particular agreement constitutes a release [as opposed to a covenant] is to be determined from the intent of the parties." *Ecclesiastes,* 374 S.C. at 492, 649 S.E.2d 494, 498. However, where the agreement does not provide for full satisfaction of the injured party's claims, or it contemplates further claims, it cannot be deemed a release. *Id. citing Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (1971) ("unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction [i]t, therefore, becomes unnecessary . . . to determine whether the instrument involved here is a release rather than a covenant."); *and Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990) (rejecting a release where the document "evidences no intent to release others from liability and in fact contemplates further action against other tortfeasors to fully compensate [the injured plaintiff].").

Here, the Court of Appeals merely cherry-picked a few words from the Covenant. However, had it considered the totality of its language it would be apparent that it did not fully satisfy Petitioner's damages. To the contrary, the Covenant specifically contemplates Petitioner pursuing the balance of the judgment against the IRF and/or SFAA though either direct claims or assigned claims. *See* (Appx. 829-30) (wherein the Officers agreed to participate in actions "against the [SFAA], the [IRF] or any other insurance company. . . in order to collect the excess judgment");

and (assigning "any claim the [Officers] may have against the [IRF]" and "other government organizations" . . . "that arise out of any insurance coverage.").[4]

While the Covenant might have affected the ability of the Officers to seek indemnity against Respondents, as explained below Petitioners' right to payment is distinct from the Officers' right to seek indemnity. Therefore, because the Covenant specifically contemplated the possibility of Petitioner pursuing claims against Respondents for the balance of the judgment the Covenant does not function as a release or waiver of Petitioner's claims against Respondents.[5]

Here, the effect of the Covenant was plain. Like any other covenant it functioned as a promise that Petitioner would not go against the Officers' personal assets. *Accord Ackerman,* 318 S.C. at 146, 456 S.E.2d at 413 (finding that a covenant not to execute functioned as an agreement an agreement "not go against the personal assets of" the insured). Therefore, the question of whether the Covenant defeated the justiciability of this action, boils down to this: Is Petitioner's ability to collect against the Officer's personal assets a condition precedent to the payment that Petitioner seeks from the IRF/SFAA through this action?

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[4] Another way to view this is that Covenant did not provide consideration for the release of Petitioner's rights to pursue payment from other sources. *See e.g., Cobb*, 325 S.C. at 579, 482 S.E.2d at 592 (recognizing it is the payment of monetary consideration that affords a release.). Here the only payment Petitioner received was the partial payment from the IRF. However, the partial satisfaction "expressly reserves the right and does not waive her claim as asserted in the pending action [bearing] Civil Action No. 2015-CP-40-0619" (*i.e.*, the underlying action from which this case arises). *See* (Appx. 681).

[5] While the Court of Appeals does not expressly find the Covenant to be a release, it seems to implicitly conflate a covenant with a release. Although the Court of Appeals correctly defines a covenant as a promise not to enforce a judgment, it also states "because [Petitioner] **released** [the Officers] from all liability, the IRF and SFAA were likewise now longer liable to pay." (Appx. 877)(emphasis added). Because a release is distinct from a covenant (*supra*) to the extent the Court's reasoning assumes that the Covenant operated as a release, this assumption is without any evidentiary support.

The answer is no. But because the Court of Appeals failed to consider the actual language of the policy and/or statute at issue here it leaves this question unanswered.[6] Had the Court of Appeals looked to the circumstances of this case, rather than relying on generalized principles of indemnity, it would have been clear that Petitioner's ability to pursue payment from the IRF and/or SFAA is unaffected by her ability to go against the assets of the Officers.

B. The Court of Appeals failed to consider the language of the policy and statute.

Rather than pointing to any provision of the policy or statute to support the idea that Petitioner's right to payment is dependent upon the Petitioner's ability to go against the assets of the Officers, the Court of Appeals reasoning relies on the general observations on the principles of indemnity. Specifically, the Court cites *Cobb* and *Smalls* for the idea that "an insurance carrier is in the same legal position as its insured" and that "a liability insurance carrier only contracts to pay any debt the insured is liable to pay." (Appx. 876-77) *citing Cobb*, 325 S.C. at 579 482 S.E.2d at 592; and *Smalls v. Blackmon*, 269 S.C. at 617, 239 S.E.2d at 641.

The inherent problem with the Court of Appeals reasoning is that it assumes, without evidentiary support, that the nature of Respondents' payment obligation to Petitioner (which is the subject of this lawsuit) is the same as the nature of Respondents' payment obligation to the Officers (which is not the subject of this lawsuit). However, Respondents' obligations to Petitioner and the Officers are not the same. While Respondents' duties to the Officers implicate the traditional notions of indemnity, Respondents' obligations to Petitioner do not. The payment obligation owed to Petitioner arises because Petitioner is a third-party beneficiary of the insurance policy and/or

[6] As explained in more detail below, by relying on generalized concepts of indemnity, the question the Court of Appeals answered would be more accurately summarized as whether Petitioners' ability to go against the assets of the Officers is a condition precedent to the *Officers* right to seek *indemnity* from the IRF/SFAA (as opposed to this being a condition precedent to the Petitioner's right to seek payment under the policy as third party beneficiary).

statute, which does not implicate the traditional notions of indemnity. By drawing a false equivalency between the indemnity owed to the Officer and the payment obligation owed to Petitioner the Court of Appeals has fundamentally misapprehended the nature of the law concerning indemnity.

Indemnity, which may arise by agreement or operation of law, is defined as "that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). However, as Judge Bell pointed out in *Winnsboro,* "[u]nfortunately, **indemnity is sometimes confused with other legal concepts such as** suretyship, consequential damages, assignment, or **third party beneficiary rights**." *Id.* (emphasis added). That seems to be what has occurred here.

Considered in context of the definition of indemnity, this is **not** a case in which a second party (*i.e.,* the Officers), is seeking payment from a first party (*i.e.,* IRF/SFAA), for damages incurred to a third party (*i.e.,* Petitioner). This case is something different altogether. It presents a scenario in which a third party (*i.e.,* Petitioner) is seeking payment from the first party (IRF/SFAA). This case simply does not implicate the traditional concept of indemnity. By finding the Petitioner's right to payment was dependent upon the Officers' ability to recover indemnity the Court conflates indemnity with the distinct concept of third party beneficiary rights.

The result of the Court's reasoning is at odds with the plain language of the policy which specifically makes Petitioner a beneficiary thereunder. It contemplates that Petitioner can pursue payment in her own right, and also makes plain this right does not depend on the ability to recover against the personal assets of the insured. Providing under the heading "Action Against the Fund:"

> No action shall accrue against the Fund [*i.e.,*IRF] unless, as a condition precedent thereto . . . the amount of the insured's obligation to pay shall

> have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the claimant and the Fund.
>
> **Any person** or organization or legal representative thereof **who has secured such judgment** or written agreement **shall thereafter be entitled to recover under this policy to the extent of insurance afforded by this policy**. No person or organization shall have any right under the policy to join the Fund as a party to any action against the insured to determine the insured's liability, nor shall the Fund be impleaded by the insured or his legal representative. Bankruptcy or **insolvency of the insured or of the insured's estate shall not relieve the Fund of any of its obligations hereunder**.

(Appx.103) (emphasis added).

Having obtained a judgment, all conditions precedent to an action against the IRF are met. Petitioner is therefore "entitled to recover under the policy to the extent of insurance provided." (Appx. *id.*); *Accord, Pharr v. Canal Ins. Co.*, 233 S.C. 266, 276, 104 S.E.2d 394, 399 (1958) (holding that the same policy language quoted above gave the injured party the right to sue the insurer as a beneficiary of the policy once judgment was entered). While the indemnity obligations owed to the Officers might be relevant to the determining the "extent of insurance afforded by this policy" Petitioner is seeking payment in her own right, as a beneficiary under the policy, not under the traditional rubric of indemnity. *Id.* (recognizing that as a beneficiary under the insurance policy the injured party had a right to maintain an action against the insurance company which was described as "new relationship of debtor and creditor" and which was unaffected by the insured's insolvency).

In addition to being inconsistent with the language of the policy, the Court of Appeals reasoning also demonstrates that it has misconstrued the law regarding the nature and types of indemnity. The difference between traditional indemnity and the right of a beneficiary to seek payment directly are inherent in the types of indemnity recognized by the law. Specifically, "[o]ur

courts have recognized two types of indemnity," (1) indemnity against *liability* and (2) indemnity against *loss*. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 n.8, 781 S.E.2d 737, 742 (Ct. App. 2015) (italics added). "In a contract for indemnity against *liability*, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against *loss*, the indemnitee must [first] have made some form of payment." *Id.* (italics added). In other words, the obligation to indemnify against *loss* only arises when the insured has actually paid or is at actual risk of losing his own assets by execution of the judgment. On the other hand, the obligation to indemnify against liability is triggered by entry of a judgment against the insured and is unaffected by whether the insured is actually able to pay the judgment with his personal assets.[7]

The Court of Appeals' reasoning only holds water if Respondents' obligations under the policy and statute are limited to a duty to indemnify the Officers against loss. If the policy provides for indemnity against liability, then the Court's ruling cannot stand.

However, whether a policy provides indemnity against loss or indemnity against liability depends on the language of the agreement, but the Court of Appeals never considered that. *See Shealey v. Am. Health Ins. Corp.*, 220 S.C. 79, 82-3, 66 S.E.2d 461, 462 (1951) (explaining a

[7] *Compare e.g. Andrews v. Poole*, 182 S.C. 206, 214, 188 S.E. 860, 863 (1936) ("[P]olicies that cover indemnity for loss usually provide that the [insured] must first fight the case in Court and defend it and pay any judgments obtained against him before he can look to the insurance company for any indemnification."); *Bailey v. United States Fid. & Guar. Co.*, 185 S.C. 169, 175, 193 S.E. 638, 641 (1937) (stating that in the case of indemnity against liability "the insurer's obligation becomes fixed when liability attaches to the insured" where as in the context of indemnity against loss "the insurer's liability does not attach until loss has been suffered, that is, when the insured has paid the damages."); *Bryant v. Blue Bird Cab Co.*, 202 S.C. 456, 463, 25 S.E.2d 489, 492 (1943) ("where the contract of insurance is one of indemnity for the liability of the tort-feasor, and not for his loss, the injured person has, under the statutes and under the contract of insurance, a beneficial interest in the policy, and is entitled to sue before or after judgment has been rendered against the insured tort-feasor."); *Walker v. New Amsterdam Cas. Co.*, 157 S.C. 381, 388, 154 S.E. 221, 223-24 (1930) ("Where the indemnity is against liability . . . the indemnitee may recover [] as soon as his liability has become fixed and established, even though he has sustained no actual loss or damage at the time he seeks to recover [and]. . . without proof of payment of the judgment.")

policy either provides indemnity against loss or indemnity against liability and stating: "Whether it is the one or the other depends on the intention of the parties as shown by the phraseology of the agreement contained in the policy."). Herein lies the problem with the Court's reliance on generalized principles of indemnity rather than the actual evidence in this case. Had the Court considered the policy here, it would demonstrate Respondents' obligations are not limited to indemnity for the Officers' loss, but also include an obligation to indemnify liability.

For an insurance policy to be limited to indemnity for loss the court must find the policy clearly provided such. *See Pickett v. Fid. & Cas. Co.*, 60 S.C. 477, 490, 38 S.E. 160, 165 (1901) (rejecting the assertion that a policy was only for indemnity against loss by stating: "If the insurer meant to stipulate that payment of the judgment rendered in the suit for damages was a condition precedent to recovery on the policy, it was easy to say so")*; see also Shealy,* 220 S.C. at 83, 66 S.E.2d at 462. (stating that when interpreting policies, the court will only interpret it as indemnity against loss when "the indemnity is clearly [limited to] one against loss or damage").

Moreover, where a policy provides an injured third party the right to pursue payment against the insurer, and where a policy provides the insurer's obligation is unaffected by the bankruptcy or insolvency of the insured—as was the case here—the policy cannot be deemed to be limited to indemnity against loss. *See Pharr,* 233 S.C. at 274, 104 S.E.2d at 398 (addressing a policy with language that was nearly identical to the language of the "Actions Against the Fund" paragraph contained in the IRF's policy here, and observing that it could not be denied that "the policy in question is one for indemnity against liability and not indemnity against loss.").[8]

[8] The insuring language of the policy provides the IRF "will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [] Personal Injury." (Appx. 99). It bears mention that the insuring language in *Pharr* was the same, and the Court concluded this language provided indemnity against liability not just loss. *See Pharr,* 233 S.C. at 274, 104 S.E.2d at 398 (where the policy provided the insurer would make payment on "behalf of

Because Respondents' obligation under the policy and statute are not limited to a duty to indemnify against loss, the fact that the Covenant promised not to go against the assets of the Officers is not dispositive of Respondents' payment obligations to Petitioner. *Accord, Ackerman*, 318 S.C. at 146-7, 456 S.E.2d at 413 (rejecting "[insurer's] argue[ment that a[covenant not to execute] operates to release the liability insurer because it would no longer be "legally obligated to pay" damages; and explaining "The Ackermans [who signed the covenant not to execute] are still entitled to recover damages from Scott; they merely agreed not to legally enforce the judgment); *Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) (affirming an unpublished opinion of the Court of Appeals which rejected a very similar argument to the one advanced here that execution of a covenant not to execute extinguished liability such that the case was not justiciable).

Ultimately, it could be the case that the Covenant might render a claim for indemnity brought by the Officers' moot (because the Officers would never have to pay the judgment their ability seek indemnity would never arise). However, this case does not seek to recover indemnity on behalf of the Officers. This matter concerns Petitioners' ability to seek payment from the IRF and/or SFAA in her own right, and this demonstrates why the Court's reliance on principles of indemnity is misplaced.[9]

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the insured [for] all sum which the insured shall become legally obligated to pay as damages" the court stated "It is not denied that the policy in question is one for indemnity against liability and not indemnity against loss.")

[9] For the purposes of the discussion herein, the triggering of the SFAA's payment obligation statute should be considered coextensive with the IRF's payment obligation under the policy. Section 1-11-460 provides:

> [the SFAA] 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

C. The Court of Appeals' reliance on Cobb and Smalls is misplaced.

For sake of completeness, Petitioner points out that the Court's reliance on *Cobb* and *Smalls* is also misplaced for the same general reasons discussed above. Specifically, the general statement that "an insurance carrier is in the same legal position as its insured" and that "a liability insurance carrier only contracts to pay any debt the insured is liable to pay" relied on by the Court have no import to the context of this case. These observations, which appear largely as *dicta* in *Smalls* and *Cobb,* actually originate from *Travelers Ins. Co. v. Allstate Ins. Co.*, 249 S.C. 592, 596, 155 S.E.2d 591, 593 (1967). However, *Travelers,* is distinguishable from this case in two important ways. First, the insurance policy at issue in *Travelers* provided for indemnity against loss, not indemnity against liability as is the case here (*see supra*). Second, *Travelers* arose from an action in which an insurer brought a claim seeking contribution from a joint tortfeasor.

In *Travelers,* the plaintiff obtained a judgment against two joint tortfeasors—"A" and "B." A's insurance carrier paid the judgment in full then sought contribution from B's insurance carrier. Importantly, B's policy only provided indemnity for loss, and it was only in discussion of this specific fact that *Travelers* made the statements that would later be cited by *Smalls* and *Cobb* (and

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> 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.

Aside from the payment cap, the statute contains the same perquisites as the IRF's policy—*i.e.,* the issuance of a judgment against a defendant who is covered by a tort liability policy issued by the IRF. Moreover, unlike other sections of the Code—such as Section 1-11-445(A)—which specifically addresses an "indemnity" obligation, the word "indemnity" appears **nowhere** in Section 1-11-460. Had the Legislature intended this section to provide "indemnity" in the traditional sense it would have said as much. *See State v. Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 345 (Ct. App. 2002) (recognizing the canon that to say one thing implied the exclusion of another and reiterating that "the text of a statute is [] the best evidence of the legislative intent or will."). Accordingly, on its face Section 1-11-460 does not require the Officers to have first paid the judgment. Thus, for the same reasons Petitioner is a beneficiary under the IRF's policy she should also be considered a beneficiary under the statute for the discussions made herein.

the Court of Appeals). Because the policy in *Travelers* only indemnified against loss, the *Travelers* court was left to conclude that because the judgment was satisfied in full by A, it followed that B "had not and cannot suffer a loss." The *Travelers* ruling is based upon the fact that the specific policy at issue only provided indemnity for loss. The outcome would have been different had B's carrier had a duty to indemnify liability. *Id.* at 596-97, 155 S.E.2d at 593 (concluding B's carrier could not be directed to pay until B was first made to pay).

Travelers is unlike this case on all fronts. This case is not for contribution, it involves a covenant, and it concerns indemnity against liability not loss. Thus, the commentary from *Travelers,* has no import here.

Finally, and perhaps recognizing that the Covenant at issue here specifically reserves the right to pursue the IRF and SFAA for the balance of the judgment, the Court makes a misguided effort to distinguish this case from *Cobb.* In *Cobb,* an injured party entered a settlement agreement that released the at-fault driver but reserved the right to pursue a judgment against him for the purposes of obtaining UIM coverage. In the agreement, the plaintiff covenanted not to execute this judgment against the at-fault driver, instead agreeing to limit her recovery to any UIM coverage. *Cobb*, 325 S.C. at 578, 482 S.E.2d at 591. The *Cobb* Court recognized that by reserving the right to pursue UIM, the ability to pursue this claim had not been waived. *Id.* The Court of Appeals purports to distinguish this case by suggesting that unlike UIM coverage—which the Court says "operates as first party coverage for the complainant"—the coverage at issue here operates as coverage for the *insured.* (Appx. 877). However, as explained above this reasoning is wrong. Petitioner is a beneficiary of Respondents' duty to indemnify liability under the policy and/or statute and therefore has a claim in her own right. The nature of Petitioner's claim does not seek coverage on behalf of the insured Officers. (*Supra*).

For all these reasons this Court should issue a Writ of Certiorari to review the Court of Appeals decision regarding justiciability.

II. Does the Court of Appeals decision that an insurance company is not obligated to pay a judgment if its insured does not have personal assets at risk of execution violate public policy?

It is the well-established public policy of this State to favor reasonable settlements of civil matters over adherence to insignificant technicalities. *See Fowler*, 388 S.C. at 362, 697 S.E.2d at 535 ("South Carolina has expressed a willingness to depart from the technicalities of the common law in order to promote reasonable settlements in civil suits."). Such reasonable settlement is precisely what is embodied by the Covenant, but the Court of Appeals threw that by the wayside, for reasons not fully articulated. This will not only adversely affect Petitioner, but other litigants in the State. The Court's decision opens the door to a litany of consequences that adversely affect the public interest, including (but not limited to) the following.

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

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

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

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

C. Public Policy should favor the ability of injured parties to pursue third-party beneficiary rights against insurers directly and to permit insureds to assign their claims against their insurers to injured plaintiffs.

It is in the best public interest to allow injured plaintiffs the ability to pursue collection of judgments themselves either as direct beneficiaries or under assignments. Unlike the insureds, injured plaintiffs are more likely to have the ability, and most importantly, the incentive to prosecute such claims. In the absence of an insured being able to assign its claims, the ability of the injured plaintiff to recover would depend upon the ability and desire of a potentially insolvent insured to pursue its claims against the carrier. This would only encourage bad faith. Incentivizing an insurer to take advantage of the fact that an insolvent insured will likely have neither the means nor the incentive to pursue an action against its insured. This opens the door to the possibility an insurer could avoid its payment obligations with impunity.

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

The practice of providing a covenant not to execute in exchange for the assignment of claims, and with reservations of other claims is common practice among the bar. Considering that Petitioner in this matter specifically identified, and obtained assignment of the very claims that the

Court now finds moot, Petitioner effectively had the rug pulled our from under her. In this way there is a need for clarification on if this practice can continue, and if so how. Mindful that the Court of Appeals' opinion was unpublished, it will nonetheless be held up to serve as persuasive authority to the bench and bar going forward. Therefore, the Court should give guidance not only on why the covenant here was insufficient to save the matter from mootness, but also how a litigant is to make such a reservation in the future, and how its decision here is reconcilable with *Fowler* and *Ackerman* (among others).

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

Had the Officers had the financial means to pay the judgment there would never have been a need for the Covenant. To the contrary the Covenant not to execute was entered precisely because the Officers were judgment proof. The only thing of value that the Officers had to offer was their potential claims against their insurer. Therefore, in exchange for the Covenant, the Officers assigned these claims to Petitioner. However, in finding this matter moot, the Court has completely stymied the intent of the parties. The Officers will never be able to assert their claims against their insurer, and Petitioner will never be able to collect her judgment. The Court's decision deprives both Petitioner and the Officers of something of value and gives it to the Respondents, who were never a party to the Covenant in the first place. The only winners in this are the insurance companies.

Therefore, this Court should issue the requested Writ of Certiorari to determine whether the Court of Appeals decision is consistent with public policy of this State.

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Because the Court of Appeals affirmed the finding of mootness it declined to address the merits of the remaining issues on appeal concerning the interpretation of Section 1-11-460 or the

interpretation of the number of occurrences under the IRF's policy. For the sake of completeness, these issues are addressed briefly.

III. Did the trial court err in finding the SFAA had no payment obligation under section § 1-11-460 where this interpretation is inconsistent with the language of the statute and violated the non-delegation doctrine.

Section 1-11-460 provides that the SFAA is authorized to pay judgments entered pursuant to §1983, when such judgment is entered against an individual who is insured by a policy issued by the IRF. The statute provides:

> The [SFAA] through the Division of Insurance Services, 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.

The essence of the dispute here concerns whether the payment contemplated by this statute is discretionary or mandatory, and/or whether the judgment issued here qualified for payment under the statute. The trial court initially held the payment was required, but later amended its order to find the payment was discretionary. Petitioner asserted that it was unconstitutional to interpret the statute as discretionary because it violated the non-delegation doctrine. *See, Gilstrap v. S.C. Budget & Control Bd.,* 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (finding the non-delegation doctrine precludes a court from interesting a statute to give the Board (now the "SFAA") "an absolute, unregulated, and undefined discretion" because bestowing such "arbitrary powers"

on an executive agency would be an "unlawful delegation of legislative powers."); *see also Hampton v. Haley*, 403 S.C. 395, 408, 743 S.E.2d 258, 265 (2013) (finding a court must "refuse[] to construe [a] statute as unconstitutional when a constitutional reading [is] possible"). Petitioner also asserted the trial court's finding that this judgment did not qualify for payment under the statute was inconsistent with the plain language of the statute. (App. Br. pp. 16-24) & (Reply Br. pp. 14-18). However, the Court of Appeals did not address these arguments.

In the interest of judicial expediency, upon granting the requested Writ of Certiorari, this Court should review the trial court's decision on this issue. In support of this request, Petitioner incorporates the arguments set out in her Appellant's Brief and Appellant's Reply Brief.

IV. Did the trial court err in finding this matter constituted a single occurrence under the IRF's insurance policy.

Petitioner also appealed the trial court's interpretation of the IRF's policy concerning the number occurrences. During the pendency of this action the Supreme Court issued a decision in *Reeves v. S.C. Mun. Ins. Risk Fin. Fund*, 434 S.C. 18, 862 S.E.2d 248 (2021), which Petitioner asserts has import to the facts of this case. *See* Court's Record – March, 23, 2023, Notice of Supplemental Authority (Petitioner providing notice of supplemental authority to the Court of Appeals). However, the Court of Appeals did not address this issue.

In the interest of judicial expediency, upon granting the requested Writ of Certiorari, this Court should review the trial court's decision on this issue. In support of this request, Petitioner incorporates the arguments set out in her Appellant's Brief and Appellant's Reply Brief (Appx. 690-728 & 773-98) together with this Court's intervening decision in *Reeves,* which Petitioner asserts has application here.

CONCLUSION

For these reasons, this Court should grant the instant request for Writ of Certiorari to the Court of Appeals.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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. ..... Petitioner

vs.

State Fiscal Accountability Authority, *et al.* ..... Respondent.

PROOF OF SERVICE

The undersigned certifies that he served a copy of the foregoing **Petitioner Nancy Morris' Petition For Certiorari To The Court Of Appeals and Appendix** to all counsel of record on November 27, 2023, by e-mailing a copy of the same, as follows:

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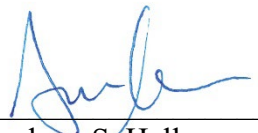

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