THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2023-001797
Case No. 2015-CP-40-0619

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

v.

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

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STATEMENT OF THE CASE

This is a declaratory judgment action filed by the Petitioner 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 Petitioner 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 Petitioner also filed another lawsuit against the South Carolina Insurance Reserve Fund captioned *Morris v. South Carolina Insurance Reserve Fund*,

[3] The Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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 Petitioner. 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 Petitioner. The Petitioner 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 Petitioner. (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 Petitioner. (R. 13-29). Judge Lee made several separate, independent rulings in favor of the Respondents. First, 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). Next, Judge Lee ruled that the Petitioner's claims for declaratory relief are moot. She explained:

> Plaintiff confirms that she has now received an assignment from the County Defendants, and in return, has entered into a Covenant Not to Execute extinguishing the personal liability of each of those parties. Defendants thus argue that those Covenants Not to Execute render the current action non-justiciable because the County Defendants are no longer personally liable for the judgments entered against them and on which the Plaintiff is seeking to recover from Defendants. This Court agrees with that analysis.

(R. 26). Lastly, Judge Lee ruled that "the actions of the five County Defendants constitute only one occurrence as defined in Policy Number T130080011 issued by the Insurance Reserve Fund to Berkeley County." (R. 28).

The Petitioner did not file a Rule 59(e) motion. Instead, she filed an appeal to the South Carolina Court of Appeals.

On May 24, 2018, the Court of Appeals issued an unpublished *per curiam* decision affirming the trial court's decision. Concluding that the Petitioner's declaratory judgment action was moot, the Court of Appeals explained: "because Morris released [the correctional officers] from all liability, the IRF and SFAA were likewise no longer liable to pay under the IRF policy and section 1-11-460." (Slip. Op. at 4). On October 18, 2023, the Court of Appeals denied a petition for rehearing and substituted a new opinion that corrected a clerical error but did not alter the Court's reasoning.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues warrant review on a writ of certiorari. Notably, in her petition, the Petitioner makes no reference to nor mention of Rule 242(b) nor of any of the factors. The Petitioner offers no analysis as to why this case is an appropriate candidate for a writ of certiorari under the test outlined in Rule 242(b). In contrast, the Respondents submit that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is actually unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion by the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. The *per curiam* opinion cites to and is fully supported by well-established precedent from this Court and from the Court of Appeals.

Finally, the *per curiam* opinion does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to nor bearing on other cases.

Based upon these considerations, there is no need for this Court to review the decision of the Court of Appeals.

II. The Petitioner's arguments are raised for the first time in either her petition for rehearing or her petition for writ of certiorari, and that is not permitted under South Carolina appellate practice.

This petition for writ of certiorari filed by the Petitioner should be denied because the Petitioner violates every established and conceivable rule of issue preservation recognized and applied under South Carolina appellate case law. This Court and the Court of Appeals 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).

As this Court has explained, "[i]Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW,* 395 S.C. 461, 719 S.E.2d 640, 642 (2011). *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). It is true that "a party is not required to use the exact name of a legal doctrine in order to preserve the issue." *Herron*, 719 S.E.2d at 642. But ″the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Id*.

There are also important preservation rules that govern the appeals process after an appeal is initially adjudicated in the Court of Appeals. For instance, this Court has ruled that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy*, 564 S.E.2d at 322. *See also*, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

Moreover, with respect to issues raised to this Court on certiorari, Rule 226(d)(2), SCACR, provides that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 226(d)(2), SCACR. Moreover, it is well settled that "[a]n issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley*, 526 S.E.2d at 221.

Finally, it is absolutely critical that "one cannot present and try a case on one theory and then attack the result below by presenting another on appeal." *Kennedy*, 564 S.E.2d at 323. *See also*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal"). In *Morris v. Anderson County*, 349 S.C. 607,

564 S.E.2d 649 (2002), this Court found it to be "well-settled that appellants cannot raise new arguments or change their grounds between trial and appeal." 564 S.E.2d at 651, n.4.

The basis for all of these error preservation rules is the concept of fundamental fairness which is the cornerstone of due process. These rules should be enforced in a consistent, even-handed manner, regardless of the type, significance or severity of the case. *See*, *Herron*, 719 S.E.2d at 642 (this Court recognized that even "[c]onstitutional arguments are no exception to the preservation rules"). In short, a litigant's case should not be decided on appeal by an issue that was never raised to or argued in the trial court.

As stated above, this is the quintessential error preservation case. Every single one of the rules described herein has been violated at each stage of the appeal. The Petitioner has presented significantly different arguments to this Court than what was argued to Judge Lee and even to the Court of Appeals, particularly prior to the rehearing stage. At every stage of the case, the Petitioner makes new arguments and cites new authorities not previously offered. That is even true at this stage. Contrary to accepted principles of appellate procedure, the petition for writ of certiorari makes substantially different arguments and urges substantially different theories than what was just argued to the Court of Appeals in her petition for rehearing.

For starters, a review of the Petitioner's 21-page petition for rehearing easily demonstrates that the Petitioner tried to re-litigate anew the justiciability/mootness issue on which the Court of Appeals ruled in affirming the court below. In her petition for rehearing, the Petitioner made a substantially different argument than what she raised in the trial or what she even raised in her appellate briefs – that is, until she lost and then filed a petition for rehearing. As this Court has made clear, a petition for rehearing is not intended to allow a second bite at the apple when the first bite was unsuccessful.

As case in point, in her opening brief to the Court of Appeals, the Petitioner addressed the trial court's justiciability/mootness ruling in Part III which consisted of four paragraphs filling a page and one-half of text. In her analysis of the issue, the Petitioner relied specifically on the decision in *Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (2010). *See*, Petitioner's Opening Brief, pp. 26-27. Later, in her reply brief, the Petitioner addressed the justiciability/mootness ruling in Part II of her brief which again consisted of only four paragraphs filling a page and one-half of text. *See*, Petitioner's Reply Brief, pp. 19-20. In that brief, the Petitioner attempted to distinguish the cases of *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640 (1977) and *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). The Petitioner argued that *Smalls* is distinguishable because "it concerned immunity under the Federal Longshoremen's Act and whether a party's status as a 'permissive user' could circumvent immunity under the Federal Longshoremen's Act." *See*, Petitioner's Reply Brief, p. 19. The Petitioner argued that *Cobb* was distinguishable because there was a reservation in the covenant not to execute to collect against the UIM carrier. *See*, Petitioner's Reply Brief, p. 20.

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

After losing on her petition for rehearing, the Petitioner now seeks to take a third bite of the apple after the first two were unsuccessful. The Petitioner keeps changing her argument and theory. As case in point, the Court is urged to compare the petition for rehearing filed in the Court of Appeals to the petition for writ of certiorari. There are substantial differences. For instance, the Petitioner now argues that "[t]he payment obligation owed to Petitioner arises because Petitioner is a third-party beneficiary of the insurance policy and/or statute, which does not implicate the traditional notions of indemnity." *See*, Petition for Writ of Certiorari, pp. 10-11. Without question, the Petitioner never raised a "third-party beneficiary" theory in the trial court or in the Court of Appeals – not even in the petition for rehearing where the Petitioner changed arguments to try to avoid the bar of *Smalls* and *Cobb.*

In short, this case presents a classic example of using a petition for rehearing and then the petition for writ of certiorari as a vehicle to re-litigate the case that was just lost based on new and different arguments that were asserted in the courts below. That is clearly not the intent or purpose of the rules governing petitions for rehearing or petitions for writ of certiorari.

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

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

By way of background, during the pendency of this action, the Petitioner received an assignment from the five correctional officers, and in return, 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 for which the Petitioner is seeking to recover from the SFAA and the IRF.

It is well settled under this Court's precedent 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 Respondents argued in the trial court and then again in the Court of Appeals that the Petitioner is precluded from recovering under either the IRF Tort Liability Policy or Section 1-11-460. Importantly, this Court held in *Smalls* 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 and the Court of Appeals correctly ruled, the same is true in the present case. When the Petitioner 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

Court of Appeals ruled, the issues of statutory construction related to S.C. Code Ann. § 1-11-460 and the issues of policy interpretation are now moot.

As mentioned above, in the trial court and the Court of Appeals, the Petitioner only tried to distinguish *Smalls* and *Cobb.* She also argued that a different result was required by this Court's decision in *Fowler, supra*, a position that has now been abandoned. Then, for the first time in her petition for rehearing, the Petitioner relied on the notion that there are "two types of indemnity," those being "indemnity against liability" and "indemnity against loss." The Petitioner then argued that the Court of Appeals treated the insuring agreement in the IRF Tort Liability Policy and the language of Section 1-11-460 as "indemnity against loss" provisions, meaning that the IRF's and SFAA's indemnity responsibilities are to reimburse a judgment debtor's loss only when that loss is actually paid by the insured/judgment debtor. That is simply contrived. There is no indication that the Court of Appeals treated the indemnity provisions at issue as "indemnity against loss" provisions.

The Petitioner also makes that argument in an effort to discredit the *Smalls* and *Cobb* decisions. By her reasoning, the holdings in *Smalls* and *Cobb* are based on this Court's decision in *Travelers Ins. Co. v. Allstate Ins. Co.*, 249 S.C. 592, 155 S.E.2d 591 (1967), and if *Travelers* addressed an "indemnity against loss" provision, then *Smalls* and *Cobb* were decided incorrectly. Notwithstanding the fact that the Petitioner never argued against precedent in her briefs or at oral argument, the Petitioner's new argument fails because she misreads *Travelers.*

This Court in *Travelers* recognized that "each insurance carrier is in the same legal position as its insured. A liability insurance carrier only contracts to pay any debt the insured is liable to pay." *Travelers*, 155 S.E.2d at 593. The opinion does not recite the insuring agreements in the Travelers or Allstate policies at issue. But the opinion does cite to the Motor Vehicle Financial

Responsibility Act, specifically Section 46-750.32 of the 1962 Code, which "requires a [motor vehicle] liability policy to protect the insured 'against loss from the liability imposed by law for damages arising out of the ownership,' etc." *Id*. The Petitioner contends that the 1962 Code required insurance "against loss," and that is no longer the law and liability policies today do not insure "against loss." In truth, the modern-day successor to Section 46-750.32 of the 1962 Code is Section 38-77-140(A) of the 1976 Code, which states:

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

S.C. Code Ann. § 38-77-140(A). (Emphasis added). Importantly, the same "against loss" language from the 1962 Code as cited in *Travelers* is still included verbatim in Section 38-77-140(A). The italicized language is the verbatim language cited in *Travelers*. No court has held that Section 38-77-140(A) or its predecessor requires an automobile liability policy to include an "indemnity against loss" provision whereby an insured must first pay a loss before being reimbursed or indemnified. To the contrary, that statutory language, like all liability insurance policies, is construed as "indemnity against liability" policies. The *Travelers* case is no different: it involved two liability policies with "indemnity against liability" provisions. *Travelers* is only unique in today's jurisprudence because it pre-dated the Uniform Contribution Among Tortfeasors Act and applied the prevailing common law at that time that the release of one joint tortfeasor released all joint tortfeasors. That is why the Supreme Court in *Travelers* ruled that Bessinger's liability as a joint tortfeasor was extinguished when the insurer for the other joint tortfeasors (Reichold and DeLoach) paid the entire judgment.

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

Likewise, the Petitioner misconstrues and misapplies the Court of Appeals' decision in *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), which was cited for the first time in her petition for rehearing and is again referenced in her petition for writ of certiorari. The Petitioner treats *Ackerman* as if it involves third-party liability insurance. In reality, *Ackerman* addresses only first-party underinsured motorist (UIM) coverage, which probably explains why it was not cited previously by the parties, the trial court, or the Court of Appeals. The Petitioner tries to confuse the issue by claiming the policy in *Ackerman* covered the damages the insured was 'legally obligated to pay.'" *See*, Petition for Writ of Certiorari, p. 15. That is simply not true. The UIM policy at issue in *Ackerman* includes the following insuring agreement: "We will pay in accordance with the South Carolina Uninsured Motorists Law all sums the insured is *legally entitled to recover* as damages from the owner or driver of an uninsured motor vehicle...." 456 S.E.2d at 412-413. (Emphasis added). The operative language was "legally entitled to

recover" and ***not*** "legally entitled to pay." Again, the reason is obvious – a UIM policy is a first-party policy and *not* a liability policy.

The UIM insurer in *Ackerman* attempted to rely on third-party case law and argue that the covenant not to execute which extinguished the at-fault motorist's liability should also extinguish the UIM insurer's liability, and the *Ackerman* Court obviously rejected that argument. However, the Court of Appeals never ruled in *Ackerman* that the covenant not to execute which extinguished the at-fault motorist's liability did not also extinguish the liability insurer's liability. That is the dispositive issue in the case at bar. *Ackerman* is not controlling or even helpful on that question.[6]

As indicated, the Petitioner now tries to characterize her claim as a "third-party beneficiary" claim citing such cases of *Pharr v. Canal Insurance Co.*, 233 S.C. 266, 104 S.E.2d 394 (1958). However, neither the trial court nor the Court of Appeals decided this case based on a lack of standing of the Petitioner to sue for declaratory relief. But the fact that the Petitioner has standing to sue for declaratory relief does not mean that the claim for declaratory relief is justiciable. That is the very essence of the Respondents' argument and the Court of Appeals' decision. The crux of the Petitioner's declaratory claims is that the IRF and/or SFAA is required to indemnify the judgment debtors, i.e., the five correctional officers, and pay the portion of the judgments entered in the United States District Court action which has not as yet been paid under the IRF Tort Liability

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

Policy. *See*, Complaint. (R. 31-39).[7] However, once the Petitioner entered into the Covenant Not to Execute and extinguished the five correctional officers' personal liability, all of the coverage issues and indemnity issues became moot or otherwise non-justiciable. To reiterate, this Court has held 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. Thus, if the insured is no longer liable to pay, neither is the insurer or the indemnifying party – here the IRF and SFAA.

The Petitioner's convoluted arguments or theory about being a "third-party beneficiary" requires no different result. There is no separate or independent obligation of the IRF or SFAA to pay the Petitioner other than what is provided in the insuring agreement of the IRF Tort Policy or the language of Section 1-11-460.[8] In other words, the Petitioner cannot make an end run of the fact that the IRF Policy is an indemnity policy and that Section 1-11-460 is an indemnity statute. Thus, where the insured/indemnitee has no liability because it was extinguished, the insurer/indemnitor has no liability. That is the premise of indemnity law and third-party liability insurance law. That is also the foundation of the rulings made by the trial court, as affirmed by the Court of Appeals. The Petitioner has not shown that decision to be in error, and she certainly

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[7] Following the Fourth Circuit appeal, the IRF tendered the sum of $992,013.63 to the Petitioner 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).

[8] For the first time in her petition for writ of certiorari, the Petitioner claims to be "seeking payment in her own right, as a beneficiary under the policy, not under the traditional rubric of indemnity." *See*, Petition for Writ of Certiorari, p. 12. Not surprisingly, the Petitioner never explains what rights she has under the IRF Policy if not to recover under the insuring agreement which provides third-party coverage to the five correctional officers and not first-party coverage to the Petitioner. The Petitioner, quite simply, is not an insured or an indemnitee – regardless of whether she has standing to sue after a judgment is entered per cases like *Pharr*. That does not convert the Petitioner into an insured or an indemnitee.

has not – on her third bite of the apple – shown that there is any valid basis for the issuance of a writ of certiorari.

IV. The Petitioner is mistaken in her argument that public policy considerations exist that warrant the issuance of a writ of certiorari.

Finally, the Petitioner offers a myriad of reasons why she believes the Court of Appeals' decision is "bad law" or creates "bad policy" that will be "confusing to the bar and bench." However, the Court of Appeals chose not to publish this opinion, and as a result, it is not precedent on which bar or bench may rely. *See*, *Ford v. Beaufort County Assessor*, 398 S.C. 508, 730 S.E.2d 335, 339, n.3 (Ct. App. 2012) (recognizing that unpublished appellate opinions are not binding authority). *See also,* Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved"). Moreover, the Petitioner hypothesizes about a litany of fact patterns and issues different from the case at bar and suggests, with no valid basis, that this case will impact future litigation. That argument is simply meritless. In addition, non of these "public policy" arguments were made in the trial court nor in the Court of Appeals, that is, until the filing of the petition for rehearing.[9]

[9] The Questions Presented III and IV raise the alternative rulings by the trial court that the Court of Appeals did not find it necessary to reach. In the event the Court does grant a writ of certiorari with respect to Questions Presented I or II and subsequently reverses on that ground for dismissal, the Court is respectfully requested to affirm the trial court's dismissal of the declaratory judgment action on those alternative rulings.

CONCLUSION

Based on the foregoing discussion, the Respondents State Fiscal Accountability Authority and South Carolina Insurance Reserve Fund respectfully request that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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