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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Common Pleas Court Case No. 2015-CP-40-00619
Appellate Case No. 2020-000719

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

vs.

State Fiscal Accountability Authority, at al.……Respondent

APPELLANT'S REPLY BRIEF

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RE-INTRODUCTION OF FACTS AND PROCEDURAL BACKGROUND

Judgment was rendered in the underlying case pursuant to 42 U.S.C. §1983 against the five defendants in the amount of $3,040,287, as follows:

Actual Damages		$ 171,875
Wrongful Death - $250,000 (reduced to $0.00 by set-off)		
Survival Claim - $250,000 (reduced to $171,875 by set-off)		
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		$ 418,412
TOTAL		**$3,040,287**

Pursuant to the IRF's "Tort Liability Policy" Respondents made payment of $1,018,412 which purportedly consists of $171,875 in actual damages; $418,412 in attorney fees and costs; and $428,125 in punitive damages. Thus, the unpaid balance of the judgment is $2,021,875.

Appellant (Morris) asserts the trial court erred in finding she was not entitled to payment on this judgment either (I) under S.C. Code Ann. § 1-11-460; and/or (II) because it constituted multiple occurrences under IRF's insurance policy. On appeal Respondents arguments are largely a resubmittal of the trial court's order with an occasional allusion to various mischaracterized "preservation" arguments. Morris herein replies.

ARGUMENT IN REPLY

Seemingly in response to Morris's contention that Section 1-11-460 functions like excess insurance coverage, Respondents assert this is not the case. (Resp. Br. p. 6 n. 5). However, this assertion is incongruous with its arguments and the record. At trial, Respondents specifically described Section 1-11-460 as "an indemnity statute," and explained it in a way that is strikingly akin to excess insurance, stating: there is a "first threshold [layer] of indemnity because the [IRF's]

insurance policy provides indemnity . . . [then] what 1-11-460 does is it provides a next layer of indemnity. **In essence an excess layer of indemnity**." (R. p. 484, lns. 2-3); (R. p. 470, lns. 6-7) (Oct. 3, 2019 Trans.) (bold added). Similarly, when it was convenient to a separate point, Respondents stated: "Your honor, [section] 1-11-460, while it's not an insurance policy and it's not a contract, it's an indemnity statute[,] and as an indemnity statute, it would be along the same lines as a contract for indemnity . . . [where in] the SFAA as the potential indemnitor stands in the shoes of the insured." (R. p. 430-31) (March 26 Trans.).

In short, Respondents cannot have their cake and eat it too. The attempts to waffle back and forth on these foundational principles expose the systemic flaw in their position.

I. Interpretation of Section 1-11-460.

A. Section 1-11-460 is not discretionary, and the non-delegation doctrine is applicable.

The thrust of Respondents' argument is that this Court should interpret the phrase "is authorized to pay" as providing the SFAA the sole discretion in whether, and in what amount to pay under Section 1-11-460. Citing Section 1-11-440, which provides the SFAA "must indemnify" its own employees, Respondents draw the conclusion that because Section 1-11-460 does not contain the same "must indemnify" language, it implies the Legislature intended something akin to "may indemnify" or "has discretion to indemnify." *See* S.C. Code Ann. § 1-11-440. The problem with this reasoning is it cuts both ways. The Legislature could have used these discretionary terms but chose "is authorized" instead. Thus, this Court should presume the Legislature's choice to employ the phrase "is authorized to pay" was deliberate and draw its meaning from the statute as a whole. *State v. Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 345 (Ct. App. 2002) (recognizing the cannon 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.").

Respondents contend the discretionary interpretation is permissible because Section 1-11-460 does not implicate the legislative power to appropriate funds, but instead merely authorizes the "administ[ration of] a governmental insurance program." (Resp. Br. p. 13). First, to claim this is an administrative statute is inconsistent with Respondents' contention that it is an indemnity provision. Second, this view misapprehends the context of the statute and neglects the larger legislative processes at work.

Because the Legislature holds the "power of the purse" South Carolina law commands that "[i]t shall be unlawful for any monies to be expended for any purpose or activity except that for which it is specifically appropriated, and no transfer from one appropriation account to another shall be made unless such transfer be provided for." S.C. Code Ann. § 11-9-10. However, contrary to Respondents' implication, the Legislature's right to control and appropriate funds is not limited to tax-payer funds, but includes all revenues "from any other source whatsoever," including those "other funds" which may be generated by an agency. 2019 Act No. 91, Part B, §117.1 (2019 appropriations act); *see* S.C. Code Ann. § 2-65-20 ("[t]he General Assembly shall appropriate all anticipated federal and other funds"); *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 637 (1982) (finding the Legislature has the authority to dictate the expenditure of other funds received by an agency and cannot delegate "the power to control expenditures . . . by administration rather than legislation.");[1] S.C. Code Ann. §2-65-15(8) ("Other funds means . . . not federal funds and [] not general funds appropriated by the General Assembly in the appropriations act."). Ordinarily, the expenditure of "other funds" in excess of the amount

[1] *Accord, State ex rel. Condon v. Hodges*, 349 S.C. 232, 244-45, 562 S.E.2d 623, 630 (2002) (the Legislature "has the right to specify the conditions under which the appropriated monies shall be spent"); *Gilstrap v. South Carolina Budget and Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992) (appropriation of public funds is a legislative function)

appropriated in the annual budget is subject to approval by the Executive Budget Office, under specific statutory standards. *See* S.C. Code Ann. § 2-65-40(B); *see also* S.C. Code Ann. § 2-65-40(B) (setting forth five standards to apply to these determinations may be applicable). However, the SFAA can review this decision and is permitted to "overrule the decision [of the Executive Budge Office] and authorize the expenditure" based on certain statutory considerations. S.C. Code Ann. § 2-65-130; *accord* 2019 Act No. 91, Part B, §117.1 (regarding transfers of appropriations).

This matters to the extent that Section 1-11-460 provides that the "SFAA is authorized to pay, *through the Division of Insurance Services*" which is funded yearly in the annual appropriations bills through appropriations of "other funds." S.C. Code Ann. § 1-11-460 (emphasis added); *see* 2015 Act No. 91 §104; 2016 Act No. 284 § 104; 2017 Act No. 97 §104; 2018 Act No. 264 §104; 2019 Act No. 91 §104 (all annual allocation acts since the creation of the SFAA); *see also* S.C. Code Ann. § 2-65-15(8) ("Other funds" defined). As a result, although the Division of Insurance Services may not be funded by the general fund, the Legislature still appropriates its spending. (*supra*).

It is within this context that the Legislature's use of the word "authorized" is significant and demonstrates the Legislature has bypassed any discretionary procedure that may otherwise apply to the decision. The statute applies based on objective criteria, as such there can be no discretion. *See 330 Concord St. Neighborhood Ass'n v. Campsen,* 309 S.C. 514, 518, 424 S.E.2d 538, 540 (Ct. App. 1992) (recognizing the concept of discretion requires that the agency must necessarily make a *subjective* judgment") (emphasis added).[2]

[2] South Carolina law has recognized that "if the State by statute places . . . money . . . in the hands of an officer with the discretion to pay or deliver it to particular persons upon their doing a particular thing . . . upon the designated persons doing the particular thing required by statute, the duty of the officer to pay over the money or deliver the property is purely ministerial." *State ex rel. Lyon v. State Dispensary Comm'n*, 79 S.C. 316, 331, 60 S.E. 928, 933-34 (1908).

This context also demonstrates why the non-delegation doctrine is implicated. Under Respondents' position the only purpose of the statute would be to bestow the SFAA with the discretion to arbitrarily decide whether to pay the judgments. However, this view must fail because although the Legislature has the discretion to make such arbitrary decisions on spending the SFAA does not. *See, Gilstrap.*, 310 S.C. at 216, 423 S.E.2d at 105 (finding that to "bestow[] arbitrary powers" regarding the appropriation of funds is an "unlawful delegation of legislative powers"). Respondents' position poses a simple question: If the Legislature did not want these judgments paid, why create Section 1-11-460? The only reasonable conclusion that can be drawn is that the Legislature intended the judgments *should* be paid. *See e.g., Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 127-28 (2008) ("[A] statute should not be construed by concentrating on an isolated phrase" and the "Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.") (internal citations omitted)

B. Respondents misapprehend the rules of issue preservation and Morris's argument regarding the non-delegation doctrine is preserved.

Respondents improperly contend Morris's arguments related to the non-delegation doctrine are not preserved. This is wrong. It is well settled that "error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review[i]nstead a litigant is only required to fairly raise the issue to the court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010); *accord White v. S.C. Dep't of Health & Envtl. Control,* 392 S.C. 247, 255, 708 S.E.2d 812, 816 (Ct. App. 2011) (demonstrating that preserving a question of statutory interpretation required no specific argument where interpretation of the statue was clearly implicated by the lower court's ruling) (overruled on other grounds).

The non-delegation doctrine precludes a statutory interpretation that would result in "bestowing arbitrary powers" or "absolute, unregulated [or] undefined discretion" on an agency. *Gilstrap,* 310 S.C. at 216, 423 S.E.2d at 105. While Morris did not call this doctrine out by specific name, she nearly exactly defined the non-delegation doctrine when arguing against an interpretation that would permit that the "SFAA would have *unlimited discretion* and could arbitrarily deny claims." (R. p. 321) ("[Respondents] promote the same sort of impermissibly broad, arbitrary, and standardless interpretation of [Section] 1-11-460" which would mean the "SFAA would have *unlimited discretion* and could arbitrarily deny claims.") (emphasis added); *see also* (R. 423-24) (arguing the contention that the SFAA could "use this statute any time [] they want[ed] to or not use it whenever they want[ed]" necessary "falls on the face of reason" because it would be "arbitrary and capricious").

Moreover, Morris argued that Respondents' discretionary interpretation would mean "the statute doesn't serve any purpose." (R. p. 513, ln. 14); (R. p. 516, lns. 12-16) (arguing "even [Respondents'] own 30(b)(6) representative doesn't know [the bounds of] when or how that discretion can be used, or what criteria its' based on, or even how the [SFAA]" would decide the scope of its discretion, leaving it a "nebulous, vague, series of [] nothing . . . that essentially make the statute a dead flower"). In sum, the simple fact that Morris did not call the doctrine out by name is of no consequence. The substance of Morris's argument was clearly raised to the trial court and is therefore preserved on appeal.

C. The cases cited by Respondents and the trial court offer no support for the proposition that the phrase "is authorized to pay" renders a statute *per se* "discretionary."

Respondents incorrectly assert that the cases cited by the trial court show other courts and jurisdictions interpret the phrase "is authorized to pay" will alone render a statute discretionary.

See (Order pp. 6-8) (citing *Creek Nation v. United States*, 318 U.S. 629, 631, 63 S. Ct. 784, 785 (1943); *Hopi Tribe v. United States*, 55 Fed. Cl. 81, 82 (2002); *Emmens v. United States*, 44 Fed. Cl. 524, 525 (1999); and *State v. Elliott*, 169 S.C. 208, 216, 168 S.E. 546, 549 (1933)). None of these cases—which are procedurally and factually distinguishable—compel a discretionary interpretation of Section 1-11-460.

The only South Carolina decision cited is *Elliott,* for which it is asserted "the South Carolina Supreme court held that a statute providing that a judge 'is authorized to' [] provides for discretionary authority." (R. p. 19) (Order); (Resp. Br. p. 10). However, what Respondents and the trial court fail to point out is that the Supreme Court made no such holding, and this citation is to the dissent. *See Elliott*, 169 S.C. at 216, 168 S.E. at 549 (Carter J., dissenting).[3]

1. Reliance on Tennessee law is misplaced.

Respondents also point to the trial court's reference to a single sentence from a footnote in *Willcox v. Tenn. Dist. Attorneys* stating: "[w]hile there is a state statute *authorizing* indemnification of state employees, Tenn. Code Ann. §9-8-112, it does not *require* indemnification." *Willcox v. Tenn. Dist. Attorneys Gen. Conference*, No. 3:07-cv-359, 2008 U.S. Dist. LEXIS 76681, at *13 (E.D. Tenn. Sep. 30, 2008) (citing Tenn. Code Ann. § 9-8-112(a)(1)). However, this single line of *dicta* is misleading because interpretation of the statute was not the issue in *Willcox.* Instead, the question concerned whether a state employee sued in his

[3] The statute the dissent addressed authorized the circuit court to commit a criminal defendant to a mental hospital to determine sanity if "it appears to the judge from any evidence brought before him" that there is a question of mental disease. *Elliot.* at 214, 168 S.E. at 549. The question was whether this commitment must be done before the trial or whether it was error for the trial court to wait until after a verdict. The dissent reasoned that the trial court had the discretion to do it either way provided it did not prejudice the defendant. *Id.* at 216, 168 S.E. at 549. Thus, even if this dissent were somehow germane, its reasoning is not because the statute specifically provided for discretion by stating "whenever it appears to the judge." *See id.*

individual capacity for violation of the Federal Fair Labor Standards Act could claim *sovereign* immunity under the Eleventh Amendment. *Id.* Because the Eleventh Amendment only affords sovereign immunity to states, not individuals, the District Court rejected the claim. *Id.* at 12-13. It was in rejecting this argument that the District Court's footnote appears, which states in full:

> Some courts have created an exception where the suit is only nominally against the state official in his individual capacity, but liability nevertheless would necessarily issue from the state. *See, e.g., Luder v. Endicott,* 253 F.3d 1020, 1023-25 (7th Cir. 2001). This exception, however, does not appear to be applicable in this case. While there is a state statute *authorizing* indemnification of state employees, Tenn. Code Ann. §9-8-112, it does not *require* indemnification, and in any case it is not yet apparent whether this suit would fall within the purview of indemnification. As long as indemnification is not required, the suit remains against the state official in his individual capacity and the Eleventh Amendment does not serve as a bar to suit. *Wilson v. Beebe,* 770 F.2d 578, 587-88 (6th Cir. 1985).

Id. at 13, n.3 (italics original).

The "exception" referenced in this footnote concerns the jurisdiction of the Federal Court to hear a claim for wrongful conduct—i.e., whether an individual defendant should be entitled to the sovereign immunity that is ordinarily exclusive to states under the Eleventh Amendment. Further, this exception arises only when a plaintiff sues individual defendants as a ruse in "an effort to get around the Eleventh Amendment and collect from a state for the authorized actions of its agents and employees." *Beebe*, 770 F.2d at 587 (applying "[o]nly if the [ulterior] purpose of the lawsuit is to coerce state action by the official sued and to impose a liability which must be paid from public funds.") (internal quotations and modification omitted). Of paramount importance is that in South Carolina this fear of "coercion" of state action does not arise because Section 1-11-460 only concerns payment of judgments rendered pursuant to 42 USC § 1983, to which sovereign immunity under the Eleventh Amendment is inapplicable. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58, 66, (1989) (finding claims against the state are not permitted under 42 USC § 1983

not because of the Eleventh Amendment but because the statute it limited to claims against a "person"). There is simply no "Eleventh Amendment" immunity that a plaintiff could try to "get around" in a § 1983 action, so the exception referenced in *Willcox* is not compelling here.

Further, neither *Willcox* nor any other court has held the phrase "is authorized to pay" is what makes the Tennessee statute discretionary. Instead, it is discretionary because it plainly provides for discretion, for instance, stating: "the [agency] may, **in its sole discretion**, reduce the reimbursement provided in this subsection." Tenn. Code Ann. § 9-8-112(h) (emphasis added).

There is more, in relevant part, Tennessee's statute provides:

> The board of claims is authorized to pay final judgments for state employees . . . where it is determined by the board that . . . the employee was acting in good faith within the scope of such employee's official duty[.]

Tenn. Code Ann. § 9-8-112(a).

> The board of claims, upon determining that the officer or employee was acting within the scope of the officer's or employee's official duties, **shall** [pay] . . . [a] judgment or settlement up to the limits [(i.e., $300,000)] . . . where the state officers' or employees' immunity set forth in § 9-8-307(h) is not sustained.[4] Notwithstanding the foregoing, the board of claims may, in **its sole discretion**, reduce the reimbursement provided in this subsection (h) if the board finds a circumstance to exist which makes such a reduction proper and just. . . In cases where the judgment or settlement is in excess of the limits [ ] the board of claims may pay any of the amounts in excess of those limits where such reimbursement is found to bear a reasonable relationship to the officer's or employee's liability or the injury or damage caused

Tenn. Code Ann. § 9-8-112(h)(1) (emphasis added)

[4] Tennessee's Claims Act provides an employee is "absolutely immune from liability for acts or omissions within the scope of [his] employment, except for willful, malicious, or criminal acts or . . . [those] for personal gain." Tenn. Code Ann. §9-8-307(h). Thus, for any judgment submitted to the board it stands that either a court has already determined scope of their employment; or scope of employment was not an element of the underlying claim. Consequently, and unlike South Carolina's law, Section 9-8-112 provides the board with the criteria for which to determine what actions are "deemed to be within the scope of official duties."

Additionally, the Tennessee statute includes a definition of "scope of official duties" that is to apply to the board's evaluation, as well as provides that payment "may be denied" if the "employee's actions were grossly negligent, willful, malicious, criminal or done for personal gain." Tenn. Code Ann. § 9-8-112(h)(3); *see* Tenn. Code Ann. § 9-8-112(h)(2) (defining scope of official duties for purposes of the statue). Finally, and importantly, the statute provides that "the board's decision shall be judicially reviewable." Tenn. Code Ann. § 9-8-112(e).

On the whole, Tennessee's statute is substantially and dispositively different from South Carolina's in several important ways: (1) it applies to both judgments and settlements; (2) it is not limited to claims pursuant to 42 USC §1983; (3) it expressly grants the agency power to decide both whether to pay, and how much to pay; (4) it specifically defines scope of employment for the purposes of determining whether a payment obligation arises; (5) once the payment obligation arises it explicitly provides the agency with the discretion to limit that payment; (6) it sets out specific guidelines to consider in the agency's exercise of that discretion; and (7) it prohibits the agency from exercising unfettered or arbitrary discretion by making the agency's decision appealable to a court of law. None of these elements are found in Section 1-11-460.

In sum, the simple fact that the phrase "is authorized" to pay appears in Tennessee's law is not what renders the statute discretionary. It is discretionary because the plain language of the statute makes it so. Thus, neither *Willcox* nor the Tennessee statute offer any support for the idea that the phrase "is authorized to pay," standing alone confers absolute discretion under Section 1-11-460. *See Se. Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.,* 387 S.C. 508, 514, 693 S.E.2d 33, 36 (Ct. App. 2010) ("A court should not consider a particular clause in a statute in

isolation but should read it in conjunction with the purpose of the entire statute and the policy of the law."). [5]

2. Reliance on Federal Court authorities is misplaced.

Respondents, like the trial court, make passing citation to "*Seminole Nation*" (the reported title of this case is *Creek Nation v. United States*, 318 U.S. 629); *Hopi Tribe v. United States*, 55 Fed. Cl. 81; and *Emmens*, 44 Fed. Cl. 524. (R. pp. 18-19) (Order); (Resp. Br. p. 9). These cases provide no support for the same reason discussed above.

First, "*Seminole Nation*," concerned a labyrinth of treaties and statutes that contained a provision that the Secretary of Interior was "authorized to bring suit" against railroad companies for failure to pay rents on land leased by the railroads on Indian reservations. *Creek Nation v. United States*, 318 U.S. at 639. The issue was whether this provision created a claim for money damages directly against the Government when the Secretary did not bring suit. *Id.* The Court determined the statutory authorization was discretionary because the Secretary's authority in this regard "was traditionally given wide discretion" which was necessary because of circumstances where suit was impossible—for instance, the railroad had gone bankrupt—and therefore, it would be impractical for the duty to sue to be mandatory. *Id.* at 639-40. Plus, because the Indian tribe could also sue the railroad company itself, the statute could not be interpreted as creating a

[5] Because Respondents argue that Section 1-11-460 does not function like excess insurance, and that it somehow implicates sovereign immunity, it is worth noting that unlike South Carolina's law, Tennessee's statute expressly provides that is "shall not be construed . . . as making the state an insurer of the aforementioned state employees nor as constituting a waiver of sovereign immunity." Tenn. Code Ann. § 9-8-112(d). Being enacted nearly a decade before South Carolina's this would suggest that had South Carolina's Legislature intended these concepts to be incorporated it would have stated as much.

mandatory obligation on the Secretary that would support an independent claim for damages against the government arising from inaction. *Id.* at 640.

Additionally, *Hopi Tribe*, 55 Fed. Cl. 81; and *Emmens*, 44 Fed. Cl. 524; are inapplicable. These cases concern whether there was jurisdiction under the Tucker Act to maintain a suit for money damages against the Government. *Hopi Tribe,* addressed whether there was jurisdiction over a claim for the attorney fees the tribe incurred for litigating with other tribes over the partitioning of reservation land. The relevant statute (since repealed) authorized the Secretary of Interior to pay "any or all" of such fees incurred by all the tribes involved in the litigation. *Hopi Tribe*, 55 Fed. Cl. at 86-89. Because the Secretary's "authority" was to pay "any or all" the language suggested the statute was not mandatory. *Id.* at 87. However, the Court recognized the analysis could not turn on this standalone phrase, and therefore found additional support for this discretion from the statute as a whole, which provided the Secretary a finite amount of money for this purpose. *Id.* at 90. The Court concluded the statute did not create jurisdiction under the Tucker Act because the Secretary necessarily had to exercise discretion when requested reimbursements exceeded the funds available—hence the "any or all" language of the statute. *Id.* at 91.

Next, *Emmens*, 44 Fed. Cl. 524, concerned whether there was jurisdiction under the Tucker Act for a direct claim for damages for not paying reward money for assisting in obtaining a criminal conviction. The relevant statute authorized the attorney general to pay rewards "in such sum or sums of money *as he may deem appropriate*." *Id.* (emphasis supplied by the Court). Because the statute reserved the right of the attorney general to decide what was appropriate, it was determined not to be mandatory for purposes of the Tucker Act. *Id.*

Notwithstanding that these cases are procedurally, jurisdictionally, factually, and logically distinguishable, these cases do not support the proposition that the phrase "is authorized to pay"

renders a statute *per se* discretionary. Rather, any support these authorities provide confirm this determination cannot be made in a vacuum and must look beyond this isolated phrase.

D. Respondents' reliance on the Two-Issue Rule is meritless.

At trial and on appeal Morris argues the absence of criteria in the statute prohibits a discretionary interpretation. In response to this argument the trial court stated that Morris's position "presupposes [the] statute creates a protected property interest or entitlement" and that "this court does not conclude that due process safeguards are even required under the statute." (R. p. 21) (Order). Respondents claim Morris "has not even appealed this ruling, [t]hus the two-issue rule is dispositive of the due process issue." (Resp. Br. p. 15).

Like most of Respondents' preservation arguments, this conclusory statement is the full extent of the argument on the two-issue rule. There is no explanation how this passing comment constitutes an independent ruling that mandates affirming. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 904 (2010) (explaining the two-issue rule is applicable only where a separate unappealled ruling constitutes an independent basis which requires affirming). Respondents offer no argument because there is no argument to be made that the two-issue rule applies.

Respondents ignore that the issue on appeal is the interpretation of a statute. Morris spoke to the trial court's due process comment in her initial brief by explaining that whether there has been a due process violation is not the issue. (App. Br. p.9-10).[6] As it relates to the interpretation of the statute, the trial court's reference to due process is backwards. The suggestion that due

[6] Morris argued the trial court's commentary on Due Process demonstrates it "overlooks the fundamental point that the constitutional implications here are not about *application*, but instead concern the *interpretation* of § 1-11-460 . . . [because the] question is not whether [the] lack of criteria might support a potential future challenge to the SFAA's exercise of this purported discretion, but instead whether this lack of criteria prohibits the statute from being interpreted to afford the SFAA that discretion to begin with." (App. Br. p. 10).

process is not implicated by the statute can only be true if the statute is discretionary—the very conclusion that is in dispute on appeal. In other words, whether due process is implicated is the *result* of the statute being interpreted as mandatory or discretionary, not the *cause* for such an interpretation. *See e.g., Wicker v. S.C. Dep't of Corr.,* 360 S.C. 421, 424, 602 S.E.2d 56, 57 (2004) (recognizing that where the state has "created a statutory right to payment" due process protections are implicated).

Finally, Respondents' invocation of the two-issue rule ignores that this is a declaratory judgement action which, by its very nature, contemplates that Morris is a person "whose rights, status or other legal relation [is] affected by [the] statute." S.C. Code Ann. § 15-53-30. Respondents have never argued, and the trial court has never held, that Morris lacks rights under the statute. Thus, the question of whether Respondents' exercise of discretion (even assuming it has such discretion, which it does not) would give rise to a due process claim is a separate question entirely from the interpretation of the statute.

E. Respondents misapprehend Morris's argument that the trial court erred by evaluating each party's individual liability rather than the judgment as a whole.

Respondents assert that Morris "argues for the first time" that there is no $1 million threshold for a judgment. (Resp. Br. p. 19). Respondents are confused. Morris's argument that the trial court was wrong to interpret the statute as creating a minimum judgment amount is in the context of the trial court's decision to consider each defendant separately, rather than considering the singular judgment in the aggregate—i.e., there is no minimum judgment amount for each defendant. (Rep. Br. pp. 17-19). As Morris points out in her brief, the focus of Section 1-11-460 is on the payment amount not the judgment amount. (App. Br. pp. 17-18). As a practical matter, it is true that payment "in excess of $1 million," will not be necessary where the judgment does not exceed $1 million. However, this is entirely different than a requirement that each defendant's

individual liability on that judgment must exceed $1 million. The only reference in the statute concerning an individual's liability is to impose a "maximum" on the *payment* that can be made for any one defendant. *See* S.C. Code Ann. § 1-11-460. The statute provides "authoriz[ation] to pay judgments" not authorization to reimburse individual defendants for their individual liability under those judgments. S.C. Code Ann. §1-11-460.

The $1 million threshold applies on an aggregated basis, not per person. This is plain from Respondents' own reasoning. They argue that by employing an "in excess of $1 million" provision in Section 1-11-460 the Legislature was "recogniz[ing] the fact" that "the IRF writes liability insurance in two amounts $600,000 and $1 million." (Resp. Br. p. 20). However, it is paramount that these are the "**per occurrence**" limits available on IRF policies—these are not the per person limits. (R. p. 96). By incorporating these per occurrence limits, the statute necessarily contemplates that payment was intended to be provided on the same "per occurrence" (i.e., aggregate) basis. *Accord* (R. p. 484) (Respondents acknowledge that the IRF's policy provides the "first threshold [layer] of indemnity" and that Section 1-11-460 "provides a next layer of indemnity[,] in essence, an excess layer."). Thus, where the IRF's policy treats the judgment in the aggregate (i.e., arising from one occurrence), then indemnity under Section 1-11-460 must likewise be applied in the aggregate. *See* (Appr. Br. p. 29 at n. 14) ("This internal contradiction is irreconcilable and demonstrates that for one reason or another, the trial court's order must be reversed.").

Regardless of whether the trial court erred in considering the defendants separately rather than in the aggregate, it stands that the trial court concluded that at least as against Burkholder and Garret the statutory indemnity was triggered—although not qualifying for payment for other reasons. As a result, the thrust of this issue concerns whether upon remand, if ordered, the payment

contemplated by Section 1-11-460 should be calculated in regard to the total judgment amount or simply the judgment amount as against these two defendants.

F. Respondents' argument that punitive damages are precluded by sovereign immunity is illogical.

Respondents' suggestion that sovereign immunity demonstrates the indemnity provided by Section 1-11-460 does not contemplate punitive damages is fatally flawed for two reasons. *See* (Res. Br. pp. 20-21). First, this is incompatible with its assertion that Section 1-11-460 is discretionary because this would leave the determination of sovereign immunity to the discretion of the SFAA, where this is a decision properly for the Legislature. *See generally, McCall v. Batson,* 285 S.C. 243, 245, 329 S.E.2d 741, 742 (1985) (abolishing common law sovereign immunity and leaving the issue for the Legislature). Second, if sovereign immunity is applied to limit indemnity under Section 1-11-460, it would render the statute meaningless and Courts must reject such "self-destructive" interpretations of a statute. *See Graham v. State,* 109 S.C. 301, 305, 96 S.E. 138, 140 (1918) (relying on "the elementary rules [that] require [a court to] presume the legislature knew the law" and did not undertake a futile act, to rule that when addressing the extent to which a statute waived sovereign immunity the court must find immunity was waived if to conclude otherwise would render the statue meaningless).[7]

G. *Builders Mutual* applies here and Respondent's argument that it is distinguishable is self-defeating.

The argument that the scope of employment must have been litigated in the underlying trial rests on an interpretation of one sentence from *Auto Owners Ins. Co., Inc., v. Newman,* 385 S.C.

[7] In yet another example of Respondents' contradictory positions, it argues public policy does not support payment of punitive damages with "taxpayer" money. (Rep. Br. p. 21). However, it conversely argues the non-delegation doctrine does not apply because taxpayer money is not implicated by the statute. *See* (Resp. Br. pp. 13-14). It cannot be both.

187, 684 S.E.2d 541 (2009).[8] However, the Supreme Court has since explicitly declared, this interpretation to be improper in *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 105, 847 S.E.2d 87, 93 (2020) (addressing the same sentence and holding "we modify *Newman* accordingly."). Nonetheless, Respondents assert *Newman* is still applicable, arguing *Builders Mutual* is distinguishable because in that case the purported indemnitor was an insurance company and aligned as a plaintiff, whereas in the present case the purported indemnitor (i.e., the SFAA) is neither an insurance company nor aligned as the plaintiff. (Resp. Br. p 24).

This argument makes no sense. First, Respondents' have conceded that for purposes of whether it has an indemnity obligation under Section 1-11-460 it should be treated like an insurance company. (R. p. 430-31) (*supra*). Second, in *Newman* the plaintiff was an insurance company. If *Builders Mutual* is distinguishable because it was initiated by an insurer, as Respondents argues, it stands that *Newman* also has no application here. As a result, Respondents' argument defeats itself by eliminating the very basis for the trial court's ruling on this issue.

Finally, if the Legislature had truly intended that the issue of scope of employment be litigated in the underlying trial, it would have mandated such a requirement as it has in other provisions of law. *See* 2019 Act. No. 91 Part B §117.86 (providing that if a state or government employee is sued for civil conspiracy, in order for the state to pay the defense costs "the court must, prior to trial, make a final determination whether the action. . . [was] within the scope of their official duty").

[8] Respondents contend the issue of the scope of employment must have been litigated in the underlying trial. First, this is manifestly incongruous with its contention that Section 1-11-460 is "discretionary." If it was to be litigated in the underlying trial what discretion could the SFAA have in this regard?

H. Respondents' assertion that Morris is attempting to shift the burden of proof regarding scope of employment is wrong.

Respondents claim Morris is attempting to shift the burden of proof and that there is no evidence in the record to demonstrate the defendants acted in the scope of their employment. (Resp. Br. p. 24). This misses the point entirely. The question here is not whether Morris met her burden because the trial court specifically deprived her of that opportunity, ruling: "**South Carolina law actually precludes the Plaintiff from attempting to prove** [scope of employment] in a subsequent declaratory judgment action." (R. p. 24) (Order). Morris was prepared to and did offer evidence in support of scope of employment. *See* (R. pp. 159-60); (R. pp. 204-22). However, the point of this appeal is that the trial court erred in finding Plaintiff was precluded from attempting to prove this, not that the evidence was insufficient. (R. p. 24) (Order). It was apparent the trial court believed it could not consider Morris's evidence, not that the evidence was inadequate. This is the error.

I. Even if the Covenants Not to Execute were presented to the trial court, Respondents' argument that this claim is not justiciable is unsupported by the law and contrary to its claim that is not an "insurer."

On this point the trial court (like Respondents) conclude that the Covenants Not to Execute "relieved [the IRF] of any further liability under the [policy]" and by extension "also relieved the SFAA of any liability or statutory obligation." (R. p. 26) (Order); *see also* (Resp. App. Br. p. 27). However, the legal theory Respondents' rely on for this only apply to the extent it is an insurer and if the statute functions like excess insurance—a point on which Respondents waffles back and forth as it suits them. But it cannot be both ways. Respondents' arguments are simply mutually exclusive of one another and thus must fail in one way or another. This is just another example of that.

Moreover, the trial court's ruling on this issue rests on the conclusion that where an insured is not subject to personal liability neither is an insurance carrier.[9] The only authority cited by the trial court was *Smalls v. Blackmon,* 269 S.C. 614, 617, 239 S.E.2d 640, 641 (1977). However, this case has no bearing here 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". *Id.*

Apparently recognizing that *Smalls* is of no help, on appeal Respondents rely on *Cobb v. Benjamin*, 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997). However, *Cobb* is likewise of no import here. In *Cobb*, the plaintiff was injured in a car accident caused by an at-fault driver who was driving a car he did not own. *Id.* After collecting the policy limits from the owner of the at-fault car, the plaintiff signed a covenant not to execute in favor of both the driver and the owner. *Id.* However, when it was later discovered that the driver had a separate policy that plaintiff was not aware of, and sought to collect, the Court ruled the covenant not to execute precluded coverage under the at-fault driver's policy because "[i]n the covenant, Cobb explicitly reserved the right to collect proceeds from [her] UIM carriers[, but s]he did not reserve the right to collect from any undiscovered liability carriers." *Id*. at 578, 482 S.E.2d at 592 (noting the agreement must "must be construed according to the terms").

In the case at hand, and even assuming the Covenants are properly in the record, the language of these Covenants plainly reserved "any and all claims [] against the South Carolina [IRF] and/or any other . . . government organizations or entities" and additionally contemplate "any cause of action brought against the [SFAA]." (R. pp. 566-67); *see* (Resp. Br. p. 3) (describing

[9] As an aside, this simplified rule would lead to absurd results. For instance, if an insured, against whom judgment was entered, had no assets and was therefore not exposed to any personal liability, it would permit the insurance company to avoid indemnity.

the same as reserving "any and all claims" against the IRF or other "government organizations."). Thus, there is simply no evidence to support that these claims were not reserved.

II. Interpretation of "occurrence" under the IRF's policy.

On this issue, Respondents offer two conclusory and vague allusions to the rules of issue preservation. Both are meritless—as best they can be deciphered.

First, at the beginning of its argument, Respondents state the trial court rejected Morris's argument for multiple occurrences and their reliance on *Boiter,* and then summarily states: "[Morris] has not appealed that ruling." (Resp. Br. p. 27)(citing *Boiter v. S.C. Dept. Trans.,* 393 S.C.123, 712 S.E.2d 401 (2011)). The falsity of this assertion is apparent from the very argument heading of Morris's brief which reads "the trial court erred in finding there was only a single occurrence under the IRF's insurance policy." (App. Br. p. 27). The problem, again, is that Respondents completely misrepresent, or misunderstand, that the effect of the trial court's ruling was to prevent this question from being raised because it was not litigated in the underlying trial. (Order p. 15) (concluding as a result of the joint and several verdict that Morris "cannot now argue" there were multiple occurrence under the policy).

Respondents suggest "[Morris] never argued," and "the trial court never ruled the policy was ambiguous." (Resp. Br. p. 28 n. 11). Again, this is wrong. In her Motion for Summary Judgment, Morris specifically argued "the contract provides little meaningful guidance in clarifying the term" occurrence and as a result, "the contract must be construed most liberally in favor of the insured and where the words of the policy are ambiguous, . . . the construction will be adopted which is more favorable to the insured." (R. pp. 165-66) (*citing Kingman v. Nationwide Mut. Ins. Co.,* 243 S.C. 405, 411, 134 S.E.2d 217, 220 (1964) (recognizing that ambiguous contracts are to be interested in favor of the insured while unambiguous contract are provided no

such treatment)). The trial court agreed, finding "the contract provides no additional guidance in clarifying the term [occurrence]." Therefore, the trial court concluded the policy, like all ambiguous policies, "must be construed most liberally in favor of the insured and where the words [] are ambiguous or [] capable of two reasonable interpretations that construction will be adopted which is most favorable to the insured." (R. p. 27) (Order). Why would the court find that the contract provided "no additional guidance for clarifying the term" and then state the rule applicable only to ambiguous contracts? Plainly, the issue is preserved. *See generally, Brannon*, 388 S.C.at 502, 697 S.E.2d at 595-96 (preservation rules do not require magic language, just that the trial court be given fair opportunity to understand the issue and rule).

Ultimately, like all its allusions to issue preservation, these too are meritless, and since Respondents found the conclusory arguments unworthy of explanation, this Court should find them unworthy of consideration.

CONCLUSION

For these reasons, Respondent's arguments are not compelling, and this court should reverse and remand.

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s/ *T.J. Rode*

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Common Pleas Court Case No. 2015-CP-40-00619
Appellate Case No. 2020-000719

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

vs.

State Fiscal Accountability Authority, at al.……Respondent

PROOF OF SERVICE

I hereby certify that the enclosed was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on this day and properly posted for delivery to the following addresses:

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s/ Thomas J. Rode_____

Dated: May 7, 2021