THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-000719

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

vs.

State Fiscal Accountability Authority, at al.……Respondent

APPELLANT'S BRIEF

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INTRODUCTION

In 2010, David Woods died after the staff at the Hill-Finklea Detention Center ignored his pleas for medical help. In the lawsuit that followed,[1] the jury rendered a verdict against five detention center employees pursuant to 42 U.S.C. § 1983, and a judgment was entered against them in the amount of $3,040,287.37. (R. p. 15); (R. p. 300). Appellant, Nancy Morris, as the personal representative of Woods, commenced this declaratory judgment action seeking payment by the State Fiscal Accountability Authority (the "SFAA") pursuant to S.C. Code Ann. § 1-11-460, or, alternatively, seeking payment by the Insurance Reserve Fund (the "IRF") pursuant to an insurance policy covering the defendants on the grounds that the acts of five employees over the course of several days constituted multiple "occurrences" under the policy. (R. pp. 31-39)

The trial court initially granted summary judgment in favor of Morris finding the SFAA was required to pay the judgment pursuant to § 1-11-460. (R. pp. 1-11). However, nearly a year later the trial court issued an amended order, reaching the opposite conclusion and granting summary judgment in favor of Respondents, finding, among other things, the SFAA had the discretion to decide whether to pay the judgment under § 1-11-460, and the several acts of the employees constituted only one occurrence under the IRF's policy. (R. pp. 13-28).

ISSUES ON APPEAL

I. The trial court erred in interpreting § 1-11-460 to be discretionary because this interpretation is inconsistent with the purpose and intent of the statute and expressly prohibited by the rulings of the South Carolina Supreme Court.

II. The trial court erred in finding the judgment at issue here is not a "qualifying judgment" under § 1-11-460 because the requirements imposed by the court are inconsistent with plain language of the statute, illogical, and cannot be reconciled with the rulings of this court or the South Carolina Supreme Court.

[1] United States District Court Case Number 5:12-3177-RMG

III. The trial court erred in finding that a covenant not to execute rendered this matter not justiciable because this is contrary to the decisions of South Carolina's Appellate Courts and unsupported by the evidence.

IV. The trial court erred by interpreting the undisputedly ambiguous insurance policy at issue here in favor of the insurer rather than in favor of coverage as required by the law and public policy of South Carolina.

STATEMENT OF THE CASE

I. The Underlying Lawsuit Pursuant to 42 U.S.C. § 1983

On November 5, 2010, staff found Woods shaking on the floor of his cell in the Hill-Finklea detention center. Rather than seek medical help,[2] the staff transferred Woods to an observation cell where he was left for the next two-and-a-half days, alone and slowly dying, on the floor, covered in his own feces. (R. pp. 14-15); (R. p. 33, ¶¶ 18-20). Employees ignored Woods' pleas for help until November 8, when he was finally taken to the hospital. But it was too late, and Woods died of gastrointestinal bleeding from a duodenal ulcer on November 11. (R. pp. 14-15).

Morris, as the personal representative of Woods, brought the "underlying case" against five employees of the detention center—Andrew Bland, Richard Burkholder, Leemon Carner, Priscilla Garrett, and Jerry Speissegger, Jr. (collectively, the "Defendants"). (R. p. 15). Pursuant to 42 U.S.C. §1983, the jury returned a verdict for Woods awarding $500,000 in actual damages jointly and severally against all defendants, plus $2,450,000 in punitive damages as follows: $1 million each against Burkholder and Garrett; and $150,000 each against the three remaining defendants. (R. pp. 300-304). The trial court reduced the award of actual damages to $171,875[3] to account for

[2] Medical assistance was available "on call" 24 hours a day.

[3] The jury's finding of $500,000 in actual damages was apportioned $250,000 for Wood's wrongful death, and $250,000 for his survival damages. The trial court ruled that the prior settlements offset all the damages attributable to Wood's wrongful death and reduced the survival damages to $171,875. (R. pp. 69-74).

prior settlements, this lowering the total verdict to $2,621,875. (R. p. 305) Additionally, the district court awarded attorney fees, costs, and post-judgment interest, which after the defendants unsuccessfully appealed to U.S. Fourth Circuit Court of Appeals, were stipulated to be $418,412.87. (R. p. 15). Thus, at the conclusion of the underlying case, the judgment totaled $3,040,287 as reflected below:

Actual Damages (reduced by 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		$ 418,412
TOTAL		**$3,040,287**

II. The Instant Declaratory Judgment Action.

The Defendants were covered by a "Tort Liability Policy" issued by the IRF to their employer, Berkeley County. Pursuant to this policy, the IRF defended the underlying action. (R. pp. 93-99). Although the record contains no evidence that the IRF gave notice of reserving any rights to deny coverage, the IRF did not make payment on the judgment at the conclusion of the underlying case. Therefore, Morris brought this declaratory judgment asserting two alternative bases for payment. (R. pp. 30-39). First, Morris sought payment from the SFAA—the agency responsible to the administration of the IRF—pursuant to S.C. Code Ann. § 1-11-460.[4] (R. pp. 38-39). Second, Morris asserted payment was due under the "Tort Liability Policy" issued by the IRF. (R. pp. 36-37).

[4] Morris originally commenced this action against the South Carolina Budget and Control Board (the "Board"). However, during the pendency of this action the Board was abolished by the legislature and replaced with the SFAA, and the SFAA was substituted as a party. (R. p. 563).

After Morris commenced this action, the IRF made a partial payment of $1,017,782.37 pursuant to the "Tort Liability Policy." (R. p. 16). This payment purportedly consists of $600,000.00 in "per occurrence policy limits" plus $418,412.37 in attorney fees, costs, and interest. Thus, the unpaid balance of the judgment is $2,021,875—consisting of $825,255 against each of Burkholder and Garrett, and $123,788 against each of Bland, Carner, and Speissegger (R. at *id.*) & (R. 676-77). Meanwhile, Morris signed covenants not to execute against the defendants in exchange for an assignment of their claims.[5] (R. pp. 566-67).

The parties filed competing motions for summary judgment. The SFAA asserted its payment obligation under § 1-11-460 is purely discretionary. *See* (R. pp. 397-405) (Mot. for Summ. Jdgmt.); (R. pp. 535-48) (Rule 59 Motion); *see also* (R. pp. 372, ln. 22 – 373, ln. 1) (Lombard Depo.). Meanwhile, the IRF claimed there had been only one occurrence as defined by the policy and its payment obligation was limited to $600,000 (plus attorney fees and interest). *See* (R. pp. 405-07) (Mot. for Summ. Jdgmt.); (R. pp. 535-48) (Rule 59 Motion).

The trial court heard these motions on March 28, 2018. (R. pp. 417-57). On July 23, 2019, the trial court granted summary judgment in favor of Morris finding that §1-11-460 required the SFAA to pay the unpaid balance of judgment. (R. pp. 1-12). The SFAA moved for reconsideration, (R. pp. 535-48) which was heard on October 3, 2019. (R. pp. 458-534). On April 21, 2020, the trial court reversed course and issued an Amended Order granting summary judgment in favor of SFAA and the IRF. (R. pp. 13-29). This time, the trial court found the SFAA had the discretion to decide whether to pay the judgment pursuant to §1-11-460. (R. pp. 17-22). The trial court also concluded that regardless of whether § 1-11-460 is discretionary, the underlying judgment was not a "qualifying judgment" under § 1-11-460 and was not entitled to payment. (R. pp. 22-25). The

[5] These covenants were not entered in the record of this case.

trial court also found Morris' lawsuit was no longer justiciable in light of the covenants not to execute. (R. pp. 25-26). Finally, the trial court concluded there had only been one occurrence and therefore the IRF's payment obligation was limited to $600,000. (R. pp. 26-28). Morris appeals from these rulings.

ARGUMENT

The trial court erred by interpreting S.C. Code Ann. § 1-11-460, as "grant[ing] to the SFAA the discretion to determine on a case-by-case basis whether to pay a qualifying judgment." (R. p. 21) (Order). The trial court additionally erred in separately concluding the judgment at issue in this case is not a "qualifying judgment" under the court's novel interpretation of § 1-11-460. This interpretation is inconsistent with the purpose and intent of the law and prohibited by prior rulings of the South Carolina Supreme Court. Instead, where the objective elements of this statute are met, as here, the SFAA does not have the discretion to decline to make payment.

I. The trial court erred in interpreting payment under § 1-11-460 to be left to the discretion of the SFAA because this interpretation is prohibited by prior rulings of the South Carolina Supreme Court and inconsistent with the purpose and intent of the law.

"Questions of statutory interpretation are questions of law, which [this Court is] free to decide without any deference to the court below." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014); *citing CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

Section 1-11-460 provides:

> The State Fiscal Accountability Authority [previously the Budget and Control Board], 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. (italics added).

In finding that the SFAA has discretion to pay under this statute, the trial court asserted that "[i]n construing the meaning and application of S.C. Code Ann. § 1-11-460, the key language is the 'is authorized to pay' language." (R. p. 17) (Order). However, this interpretation is prohibited by the non-delegation doctrine as applied by the South Carolina Supreme Court, and it further violates the well-settled principle that a court should not consider a clause in isolation but should instead read the statute as a whole and in conjunction with the purpose and policy of the law. Therefore, this court should reverse the trial court's interpretation of § 1-11-460.

A. The trial court's interpretation of § 1-11-460 violates the non-delegation doctrine and is contrary to prior rulings of the Supreme Court of South Carolina.

The non-delegation doctrine "states simply that the Legislature may not delegate its power to make laws." *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978); *see* South Carolina Constitution Art. 1 §8 (commanding the Legislature must remain "forever separate and distinct from [the executive]"); *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") (*citing Gilstrap v. S.C. Budget & Control Bd.,* 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (finding that the "appropriation of public funds is a legislative function" and therefore subject to the non-delegation doctrine.)

The Supreme Court of South Carolina has explained the non-delegation doctrine prohibits a court from interpreting a statute so as to leave its application to the discretion of an executive agency—like the SFAA—unless the Legislature has drafted "the statue [to] declare the legislative

policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform" in exercising the purported discretion. *Bauer*, 271 S.C. at 232, 246 S.E.2d at 876 (stating that the in order for the Legislature's delegation of authority to be constitutional it must be made "with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.") (internal quotations omitted).

In *Gilstrap,* the supreme court applied the doctrine and made clear that it was error to interpret a statute in such a manner that would give the State Budget and Control Board (the "Board")—which is now the SFAA[6]—"an absolute, unregulated, and undefined discretion" because bestowing such "arbitrary powers" on an executive agency would be an "unlawful delegation of legislative powers." *Gilstrap,* 310 S.C. at 216, 423 S.E.2d at 105. More recently in *Hampton,* the supreme court again relied on this reasoning and applied the non-delegation doctrine to prohibit an interpretation of a statute that would provide "the Board can make its own choices as to [payment] based solely on what it believes to be the best [public] policy." *See Hampton*, 403 S.C. at 408, 743 S.E.2d at 265 (addressing, S.C. Code Ann. § 1-11-710, *inter alia* and holding "[w]e will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation"); *citing Joytime Distributors & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). The *Hampton* Court acknowledged that although an agency is not required to spend all the money appropriated by the Legislature, this general premise is "not

[6] As used herein the "Board" and the "SFAA" are synonymous. *See* 2014 Act No. 121, Pt. VII, §18A. (creating the SFAA to assume the administrative functions previously performed by the "Board"); *see generally, S.C. Ins. Res. Fund v. E. Richland Cty. Pub. Serv.,* 417 S.C. 149, 157 n.3, 789 S.E.2d 63, 67 (Ct. App. 2016) (noting that where applicable the SFAA has assumed the role of the Board) (vacated on other grounds by agreement of parties).

applicable [when] the agency's action in withholding the funds effectively contravened Legislative policy." *Id.* at 404-06, 743 S.E.2d at 263-64 (finding that where "the General Assembly decide[s] the State should cover the cost" of the expenditures at issue, the Board cannot refuse to make the expenditure) (internal quotation and citation omitted).

The supreme court has made clear that the doctrine applies broadly, prohibiting not only those interpretations that *would* leave the agency with unbridled discretion, but also prohibiting those interpretations that *could* result in the agency's exercise of unbridled discretion. *See Hampton*, 403 S.C. at 408, 743 S.E.2d at 264 (rejecting statutory interpretations that *could* give the Board "unbridled, uncontrolled or arbitrary power") (*quoting, Bauer*, 271 S.C. at 233, 246 S.E.2d at 876) (italics added); *see also Gilstrap,* 310 S.C. at 216, 423 S.E.2d at 105 (the court was not persuaded to make a discretionary interpretation by the fact that the discretion the Board sought to exercise in that case—*i.e.*, to make proportional budget reductions—was consistent with the original "proportional" means by which the Legislature allocated the funds to begin with).

The supreme court's application of the non-delegation doctrine demonstrates that any purported interpretation making it possible for the executive agency to invade the province of the Legislature or exercise unbridled discretion is reversible error. Yet that is precisely what the trial court has done here by accepting and empowering the SFAA's argument that it has the discretion to decide whether to make payment **regardless** of whether the objective requirements of § 1-11-460 are met. As Mr. Lombard testified:

> Q: . . . If a person meets all the criteria set forth in this statute, is it still within the discretion of the [SFAA] whether or not to pay that judgment?
>
> A: That is correct. They have discretion.

(R. pp. 375, ln. 23 – 376, ln. 3); *see also* (R. p. 379, lns. 2-3) (Mr. Lombard admitted "I can't tell you what [criteria the individual SFAA members] would consider if this came before them); *see*

also (R. p. 372, lns. 24-25) (testifying payment is simply a function of whether "the [SFAA] determined they wished to pay").

Morris asserted this type of discretionary interpretation of §1-11-460 is prohibited because the Legislature did not articulate any criteria in § 1-11-460 to guide the SFAA's purported discretion. (R. pp. 157-60); (R. pp. 320-25). Although the trial court found the statute "lack[ed] criteria for [the SFAA's] exercise of discretion," it overlooked that this specific finding is fatal to its discretionary interpretation of § 1-11-460. (R. pp. 21-22) (Order). This conclusion should have ended the trial court's analysis because it necessarily compels an interpretation of the statute in favor of payment. *See Bauer*, 271 S.C. at 232, 246 S.E.2d at 876 (providing "it is necessary that the statute declare the legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform").

Stranger still, the trial court implies that any argument related to the absence of criteria could not be considered because Morris failed to exhaust administrative remedies by making a claim before the SFAA, and that "[a]s a result, it is premature to question the SFAA's decision-making process." *See* (R. p. 22) (Order). First, this finding is wholly unsupported by the evidence which undisputedly establishes that no such administrative procedure exists. *See* (R. pp. 373, lns. 15-17 to 374 ln. 1). (Mr. Lombard testifying "there has never been a case . . . of this statute being used" and "there's no specific procedure for [it]"); *contra Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455 (1990) (finding that where it would be futile the exhaustion of administrative remedies is not required); *see also Ward v. State*, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000) (finding the exhaustion of administrative remedies is not required where the constitutionality of the remedy is disputed) (*citing Mitchell v. Owens*, 304 S.C. 23, 402 S.E.2d 888

(1991) for the proposition that statutes are presumed to be constitutional and will be construed so as to render them valid).

Second, this error highlights that the trial court fundamentally mistook how the absence of this criteria fits into the analysis. By suggesting the absence of "formal rules and procedures" does not *per se* violate Due Process" the trial court overlooks the fundamental point that the constitutional implications here are not about *application*, but instead concern the *interpretation* of § 1-11-460. *See Hampton,* at 408, 743 S.E.2d at 265 ("We will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation"). The question is not whether this 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.

Certainly, when the Legislature created the SFAA in 2014, it was aware of the supreme court's long-standing jurisprudence that in the absence of expressed criteria a statute must not be interpreted to be left to the discretion of the agency. *See Sims v. Amisub of S.C., Inc.*, 414 S.C. 109, 117, 777 S.E.2d 379, 383 (2015) (stating the "Legislature is presumed to be aware of this Court's interpretation of its statutes" and finding the failure to amend a statute is "evidence [it] agrees with this Court's interpretation") (*citing Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)). Thus, had the Legislature intended to leave the application of § 1-11-460 to the discretion of the SFAA it must be presumed it would have set forth the criteria, as required. Instead, the absence of this criteria combined with the purpose and intent of the law demonstrate

the trial court erred in finding the authority to pay under § 1-11-460 is left to the discretion of the SFAA.[7] Therefore, this court should reverse.

B. The trial court erred in analyzing the phrase "authorized to pay" in isolation rather than interpreting § 1-11-460 as a whole and in context with the purpose and policy of the law.

"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." *Se. Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 514, 693 S.E.2d 33, 36 (Ct. App. 2010) (*quoting Peake v. S.C. Dep't of Motor Vehicles,* 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007) ("Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.") (citation omitted).

Here, the trial court's analysis rests on its perceived ambiguity of the phrase "is authorized to pay." *Compare* (R. pp. 4-9) (July Order) with (R. pp. 16-25) (Amended Order). However, had the court considered the statue as a whole it would have seen there is no ambiguity. The context and purpose of the statute demonstrate the Legislature did not intend this phrase to be discretionary.

First, the notion that the phrase "is authorized to pay" can only be interpreted as permissive, rather than mandatory, is contrary to the Legislature's plain directive set out in the SFAA's enabling statute. At § 11-55-40(B) the Legislature sets forth the SFAA "**shall exercise all** functions, powers, duties, responsibilities, and **authority**, generally found in Title 11 [and] . . . other provisions of South Carolina law, [previously] exercised by the former Budget and Control

[7] Morris is mindful of the fact that ordinarily subsequent action of the Legislature does not shed light on the intent of its prior action. *See Home Health Servs., Inc. v. DHEC,* 298 S.C. 258, 262 n.1, 379 S.E.2d 734, 736 n.1 (Ct. App. 1989). However, it warrants mention that legislation is currently pending to add detailed provisions outlining both a procedure to petition the SFAA for payment, as well as establishing criteria upon which to make a payment decision under § 1-11-460. *See* 2019 Senate Bill S.386 (pending).

Board related . . . financial assistance to other entities." S.C. Code Ann. § 11-55-40(B) (emphasis added).

This plain language from the Legislature leaves no room for the courts to employ the rules of statutory construction to obfuscate this directive. *See State v. Sweat*, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008) (courts should first look to the words used); *see also, Univ. of S. Cal. v. Moran*, 365 S.C. 270, 275, 617 S.E.2d 135, 138 (Ct. App. 2005) ("The cardinal rule of statutory interpretation is to determine the intent of the legislature."). Thus, the trial court's implementation of the rules of statutory interpretation was neither necessary nor proper. *See Sweat*, 379 S.C. at 375, 665 S.E.2d at 650 ("If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning."); *see also, Lazicki-Thomas v. S.C. Budget & Control Bd.*, 378 S.C. 72, 75, 661 S.E.2d 374, 375 (2008) (affirming there is "no need to resort of the rules of statutory construction to determine the meaning of [a] term [when] the language was clear, plain and unambiguous").

Further the SFAA's "authority to pay" under § 1-11-460 does not exist in a vacuum and must be consisted within the broader purpose and policy of the law. The second sentence of § 1-11-460 provides; "These payments are limited to judgments rendered under 42 U.S.C. [§]1983 against governmental employees or officials **who are covered by a tort liability policy issued by the [IRF]**." S.C. Code Ann. § 1-11-460. (emphasis added). As a result, a tort liability policy issued by the IRF is a prerequisite to the SFAA's authority to pay under § 1-11-460. This is important because § 1-11-140 provides:

> The [SFAA], through the Insurance Reserve Fund, **is authorized to** provide insurance for . . . the personnel employed by the State . . . so as to protect . . . these personnel against tort liability arising in the course of their employment.

> . . provided, any insurance coverage provided by the authority may be on the basis of claims made or upon occurrences.

S.C. Code Ann. § 1-11-140(A) (emphasis added); *see also* S.C. Code Ann. § 1-11-140(B) (providing this authority extends to all allow a political subdivision to "procure [this] insurance [from the SFAA though the IRF] for itself and for its employees in the same manner").

When considered in context, rather than isolation, the "authority to pay" contemplated by § 1-11-460 is simply an extension of the very same "authority" the SFAA has to issue an insurance policy under § 1-11-140. Once the SFAA has exercised its authority to issue an insurance policy, its authority to pay under § 1-11-460 can be no more discretionary than its authority to pay under the IRF's policy.

This point is even clearer when considered in the broader context of the SFAA's authority to issue insurance in the first place, which the Legislature has stated is for the purpose of protecting government employees and "personnel against tort liability arising in the course of their employment." *See* S.C. Code Ann. § 1-11-140. It is important to appreciate that if the SFAA exercises its authority to issue an insurance policy (through the IRF) to a political subdivision, the law prohibits that political subdivision from obtaining additional coverage from any other source. *See* S.C. Code Ann. § 1-11-140(C) ("The procurement of tort liability insurance in the manner provided is the exclusive means for the procurement of this insurance."); *see also* S.C. Code Ann. § 15-78-140(A)(2) (mandating that "if a political subdivision procures its tort liability insurance, automobile liability insurance, or property and casualty insurance through the [IRF], all liability exposures of the political subdivision as well as its property and casualty insurance must be insured with the [IRF]").

As a result, any political subdivision that obtains insurance through the IRF is effectively prohibited from obtaining additional coverage for liability in excess of the cap on damages

imposed by the South Carolina Tort Claims Act (the "SCTCA"). *See* S.C. Code Ann. § 15-78-140 (a political subdivision is required to procure insurance to cover those "risks for which immunity has been waived"); *see also* S.C. Code Ann. § 15-78-10 *et. seq*. (the SCTCA imposing a cap of $300,000 per person and $600,000 per occurrence on damages for claims arising thereunder).

Under this system, government employees covered by an IRF policy are protected from personal liability because the SCTCA's cap on damages ensures liability cannot exceed the limits of the IRF's policy. However, a claim brough under 42 U.S.C. § 1983 is not subject to the SCTCA's cap on damages; thus, an employee is not only exposed to personal liability, but the law prohibits the employee (or his or her employer) from procuring additional insurance to guard against this risk. This problem becomes even more precarious for employees when considering the "[SFAA] has exclusive control over the investigation, settlement, and defense of the claim" against the employee. S.C. Code Ann. § 1-11-140(A). As a result, if it were not for § 1-11-460, a government employee insured by the IRF would be left totally exposed and unable to insure himself against liability for 42 U.S.C. § 1983. Therefore, to find that payment under § 1-11-460 is left purely in the discretion of the SFAA—*i.e.*, the agency that issued the prerequisite insurance policy—would thwart the very purpose for which the SFAA was authorized to issue insurance in the first place.

In this way, the SFAA's payment obligation under § 1-11-460 becomes co-extensive with its payment obligation under the IRF's insurance policy, with the singular difference being the maximum amount of the payment the SFAA is required to make under § 1-11-460 (as discussed *infra)*. *See* S.C. Code Ann. § 1-11-460 (making a condition of payment being that the employee is "covered by a tort liability policy issued by the [IRF]" and for acts in the scope of employment); *see also* (R. pp. 95-6) (the policy extending coverage to employees of a political subdivision for

acts in the "scope of his or her official duties"). This is to say that where payment would be required under the IRF's policy—but for the policy limits being insufficient—then the SFAA's payment obligation under § 1-11-460 cannot be discretionary.

Here there is no dispute that the defendants are covered by the IRF's policy. Further, because the IRF defended the underlying action, and has not presented any evidence that it issued a notice of reservation of rights to dispute coverage, Respondents cannot claim now—after the fact—that the defendants' conduct was not within the "scope of his or her official duties" as required by the policy. (R. pp. 95-6) (the policy); *see*, *Harleysville Grp. Ins. v. Heritage Cmtys., Inc*., 420 S.C. 321, 339, 803 S.E.2d 288, 298 (2017) ("grounds not identified in the reservation of rights may not be asserted later by the insurer" in a declaratory judgment action, particularly when the insurer controlled the defense); *see also S.C. State Budget & Control Bd. v. Prince,* 304 S.C. 241, 244, 403 S.E.2d 643, 645 (1991) (recognizing the IRF could assert the scope of employment as a coverage defense where it gave notice of reservation of rights to the defendant). With no dispute that defendants acted in the scope of their "official duties" it therefore stands that they acted in the "scope of employment" (as required by § 1-11-460) which courts have defined broadly, as inclusive of acts in the scope of official duty. *See id; see also Frazier v. Badger*, 361 S.C. 94, 102, 603 S.E.2d 587, 591 (2004) (finding that "scope of employment is a broader term than scope of official duties.").

When compared to its first order (which properly found the SFAA was required to pay the judgment), the trial court's analysis in its Amended Order seems driven by its contention that § 1-11-460 does not provide "excess coverage." (R. p. 4). However, this is a distinction of semantics not consequence. As explained above, regardless of what it is called, whether payment is required under § 1-11-460 is coextensive with whether payment would be required under the IRF's

insurance policies. Thus, while § 1-11-460 may not create an excess insurance contract in the technical sense, the practical (and very limited) effect of § 1-11-460 is to protect government employees from personal liability under 42 U.S.C. §1983, when *but for* the absence of a statutory cap on damages, the IRF's policy would otherwise insulate the employee from this personal liability. *See* (R. p. 118) (Policy Handbook explaining the policies per occurrence limits under the heading "Primary" and then listing § 1-11-460 under the heading "Excess").

In summation, the trial court erred by interpreting § 1-11-460 to grant the SFAA discretion to unilaterally reject its "authority to pay"— after the fact—because this is anathema to the purpose and intent of the law.

II. The trial court erred by finding the judgment is not a "qualifying judgment" under § 1-11-460.

Despite finding that payment under § 1-11-460 was within the discretion of the SFAA, the trial court went on to articulate various subjective requirements of a "qualifying judgment" and concluded the judgment at issue here did not satisfy this newly articulated rule because: (A) the judgment amount did not meet a minimum threshold amount; (B) a portion of the judgment contained punitive damages, thus payment would violate public policy; and (C) in order for a plaintiff in a § 1983 action to seek payment under § 1-11-460, it is necessary that the plaintiff prove to the jury, in the underlying § 1983 trial, that the conduct was committed in the scope of the defendant's employment. (R. pp. 21-4). The trial court erred in unilaterally establishing these requirements. The judgment at issue here satisfies § 1-11-460 and is entitled to payment by the SFAA.

A. The trial court erred in finding that a judgment must exceed $ 1 million against a single person to be entitled to payment under § 1-11-460.

The trial court ruled that a "qualifying judgment" must be in excess of $1 million as to each defendant. Although the judgment here exceeds $3 million—on a joint and several verdict—the trial court concluded this minimum value requirement applied separately to each defendant and therefore was only satisfied in relation to Burkholder and Bland because these are the only defendants whose individual portion exceeded $1 million. (R. p. 22) (Order) (although finding the judgment against these defendants did not meet the "qualifying judgment" rule for other reasons).

Initially, the trial court's piecemeal approach of considering each defendant independently is contrary to the plain language of the statute which speaks to "judgment**s**"—in the plural form—against "employee**s**"—also plural. *See* S.C. Code Ann. § 1-11-460 (*infra*). Regardless, the trial courts' imposition of a rule that turns on the judgment amount is error because the plain language of § 1-11-460 concerns the amount of *payment* the SFAA will make, not the amount of the judgment that is rendered. The trial court confused the *maximum payment,* contemplated by § 1-11-460 with somehow creating a minimum value requirement for the judgment. However, this type of minimum requirement is simply not contemplated by the statute.

The relevant portion of § 1-11-460 is contained in the first sentence, stating:

> 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 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. §1983.

S.C. Code Ann. § 1-11-460. (italics for discussion).

The first part of this sentence defines the authorization being given—*i.e.*, the authorization "to pay judgments." *Id.* The second part of this sentence places limitations on this authorization by making any payment "in excess of one million dollars [] subject to [certain] maximum[s]." *Id.*

However, the trial court interprets what the statute calls "a maximum," to create exactly the opposite—*i.e.*, a "minimum."[8]

Although the trial court does little to explain this logical leap, it seems to read the clause "*in excess of one million dollars*" to modify the word "judgments" rather than the commanded act; "to pay." In other words the trial court seems to have read this sentence to say; the SFAA is authorized to pay judgments in excess of one million dollars against individual government employees; rather than what it actually says: "The [SFAA] is authorized to pay judgments against individual government employees." *See* S.C. Code Ann. § 1-11-460. Because the clause "*in excess of one million dollars*" is set off in commas the trial court's reading of the statute is grammatically inconsistent with the plain text. *See* Texas Man. Usage & Style, Rule 1.21 & 1.22 (10th Ed., 2005) (explaining only non-restrictive or non-essential clauses are set off in commas when modifying a noun, and directing that if such a clause in fact modifies a noun—*rather than an action*—the clause must be removable from the sentence without changing its meaning) (italics added); *see also The MLA Handbook,* Commas, Conjunctions, and Modifiers, online at https://style.mla.org.[9]

The context also demonstrates the subject of § 1-11-460 is the *payments* rather than the *judgment* because the next two sentences each begin with the words: "**These payments**." S.C. Code Ann. § 1-11-460 (stating "**These payments** are limited to" § 1983 judgments, and "**These payments** are a limited to judgments against governmental employees") (emphasis added). This is also bolstered by the Legislature's choice to impose a "**fiscal**" year maximum. *See* S.C. Code

[8] Although not articulated by the trial court it would appear this forced interpretation was necessary for it to distinguish § 1-11-460 from the concept of "excess insurance," which as explained above is a distinction without a consequence.

[9] Under the trial court's reading if the clause "in excess of one million" were removed it would change the meaning of the sentence because there would no longer be $1 million threshold judgment amount. Thus, the clause must be modifying the action "to pay."

Ann. § 1-11-460 (setting "a maximum of twenty million dollars in excess of five million dollars in one **fiscal** year.") (emphasis added); *see also* Black's Law Dic. 7ed. at 650 (West Publishing, 1999) ("fiscal [] *adj.* 1. Of or relating to financial matters <fiscal year>. 2. Of or relating to public finances or taxation <the city's fiscal policy>."). Because judgments entered pursuant to §1983 are not subject to any "maximum," it would be illogical to interpret the statute as applying to the judgments, rather than the payments.

For these reasons the trial court was wrong to interpret § 1-11-460 as creating a minimum judgment amount. Instead, the plain language of § 1-11-460 authorizes *payments*, provided that payments "in excess of one million dollars" do not exceed the statutory maximums. Here, the judgment was entered against the defendants for $3,040,287—of which $2,021,875 remains outstanding. Payment of this would not exceed either the "one employee" or "per fiscal year" maximums contained in § 1-11-460. First, payment would not implicate the "one employee" maximum because the judgment is against multiple employees (moreover even if it were against one employee the payment would not exceed $ 4 million in excess of $ 1 million). Second, there is no evidence payment would exceed the "fiscal year" maximum because the SFAA has conceded it has not made any prior payment on any other judgements. (R. pp. 373, lns. 15-22). Therefore, the SFAA should pay $2,021,875.[10]

[10] Respondents have suggested payment is required, if at all, only on those portions of the judgment which exceed $1 million. While Appellant asserts this approach is inconsistent with language of the statute, (and also contrary to Respondent's contention that the statute does not function as excess coverage) it is of no practical consequence because it would actually require the SFAA to pay a higher amount—i.e., $2,040,287. However, because the trial court found the judgment did not qualify for other reasons (i.e., punitive damages, and because the jury did not decide scope of employment) it never determined how much the SFAA would have to pay. Therefore, to the extent this Court does not agree that the full balance of the judgment is payable pursuant to § 1-11-460, the matter should be remanded for determination of what amount is properly payable.

B. The supreme court has rejected the trial court's assertion that public policy would be offended by the SFAA's payment of the judgment because it contained an award of punitive damages.

The trial court found that to require the SFAA to pay a judgment that contains punitive damage would violate public policy because § 1-11-460 does not "unequivocally waive[] sovereign immunity." (R. p. 23) (Order) (relying on the doctrine of sovereign immunity and stating, "that in the absence of statutory authority, there is no right to recover exemplary or punitive damages against a municipal corporation of state.")

As a threshold point, this issue has been waived because Respondents have already tendered over $400,000 in punitive damages. (R. p. 8) (July Order). Regardless, even if this issue is not waived, the trial court's reliance on the concept of sovereign immunity, as addressed in the SCTCA, completely misses the mark. It would be illogical for § 1-11-460—which applies only to judgments rendered pursuant to 42 U.S.C. §1983—to waive sovereign immunity because a § 1983 claim can only be brought against individual defendants, not the State. Individual defendants, unlike the government, are not entitled to sovereign immunity. Because it would be futile (and non-sensical) for § 1-11-460 to waive sovereign immunity where it never existed to begin with, the trial court's reasoning is fatally flawed and must be reversed.

Further, even if the policy considerations of sovereign immunity and the SCTCA were germane—which they are not—the trial court's policy concern that "the State and specifically the taxpayers should not be burdened with paying punitive damages awarded against the [] defendants" is unfounded. (R. p. 23) (Order). In 1991, prior to the Legislature enacting § 1-11-460, the supreme court rejected the specific notion that South Carolina's public policy is offended by requiring a state agency—such as the SFAA—to pay punitive damages through the IRF on claims which were not subject to the SCTCA. *See Prince,* 304 S.C. at 248, 403 S.E.2d at 648

(finding that the IRF, a recipient of tax payer money, cannot call upon public policy to avoid indemnity for intentional acts of an employee of the state who is sued in his individual capacity, rather under the SCTCA and where the damages, including punitive damages, exceeded the limits of the SCTA). If the payment of punitive damages would violate the public policy objectives of § 1-11-460, it must be assumed the Legislature would have expressly prohibited punitive damages as it did, for example, in the SCTCA. *See e.g., Sims v. Amisub*, 414 S.C. at 117, 777 S.E.2d at 383 (stating the "[l]egislature is presumed to be aware of this Court's interpretation of its statutes" and rulings); *compare Pa. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 554-55, 320 S.E.2d 458, 463 (Ct. App. 1984) (recognizing "[a] well-established rule of statutory construction is *expressio unius est exclusio alterius*, which means that the enumeration of particular things excludes the idea of something else") (*citing Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447 (1933)) (internal quotations omitted) *with* S.C. Code Ann. § 15-78-120 (plainly proscribing that "No award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment").[11]

Ultimately, the focus of the trial court's policy argument is misplaced, overlooking the fundamental point that § 1-11-460 is itself the Legislature's declaration of a "separately approved public policy" that payment is proper. *See Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.,* 406 S.C. 534, 547, 753 S.E.2d 437, 444 (Ct. App. 2013) (reversing the trial court's public policy decision by finding that although § 38-77-340 might be inconsistent with the public policy of other

[11] That the legislature likely intended § 1-11-460 to include punitive damages is also evidenced by the large payments it contemplates—*i.e.,* in the millions of dollars. According to the U.S. Department of Justice, in 1992 (the year § 1-11-460 was enacted) the average jury verdict was $130,000.00, and less than 1.5% of verdicts exceeded $1 million (inclusive of punitive damages). *See Special Report, Civil Justice Survey of State Courts 1992,*U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, pp. 5 & 7, Table 7, (July 1995)(www.bjs.gov/content/pub/pdf/cjcavilc.pdf).

statutes, § 38-77-340 "constitutes separately approved public policy"). Thus, the trial court erred in suggesting public policy prohibits a judgment which includes punitive damages from qualifying for payment under § 1-11-460.

C. The trial court's finding that it was necessary to submit a special interrogatory to the jury on the issue of "scope of employment" during the §1983 trial contravenes the supreme court's ruling in *Builder's Mutual*, and effectively rewrites federal law by adding "scope of employment" as an element to a claim under 42 USC §1983 claim.

Section 1-11-460 provides that "[t]hese payments are limited to judgments against governmental employees and officials for acts committed within the scope of employment." S.C. Code Ann. § 1-11-460. Based on this and relying on *Auto Owners Ins. Co., Inc., v. Newman,* 385 S.C. 187, 684 S.E.2d 541 (2009) the trial court concluded Morris "cannot show that the judgment was entered against the [defendants] for acts committed within the scope of their employment" because the "jury [in the underlying §1983 trial] was never asked to answer any special interrogatories" on this question. (R. p. 25) (Order); *see also* (R. p. 24) (Order stating "the jury simply was not asked to make that determination[, and] it is certainly possible that the actions of the [defendants] were not with the scope of employment.").

This ruling must be reversed for a variety of reasons but most notably because the supreme court has since rejected any interpretation of *Newman* to the extent it would support the trial court's conclusion that the issue can (or should) be litigated in the underlying liability trial. *See Ex Parte: Builders Mutual Ins. Co.,* Op. No. 27970 (S.C. filed Aug. 12, 2020) (Shearouse Adv. Sht. No. 31, p. 21) (in which the supreme court held "we modify *Newman* accordingly" so as to avoid the very application relied on by the trial court here).[12]

[12] The trial court additionally cited *Chastain v. Anmed Health Found.*, 388 S.C. 170, 172, 694 S.E.2d 541, 542 (2010) for the proposition that in claims subject to the SCTCA, a plaintiff must establish the number of actionable occurrences. However, the trial court's reliance on *Chastain* is

In *Builders Mutual* an insurance company relied on *Newman* to attempt to intervene for the purposes of submitting special interrogatories on questions that would be necessary to an anticipated declaratory judgment action. *Id.* (explaining that "According to the Insurer's, their [demands for special interrogatories] were mandated by our decision in [*Newman*].") However, the supreme court flatly rejected the notion that *Newman* required such issues be litigated in the underlying trial rather than in the declaratory judgment action, and expressly stated that "to the extent *Newman* may be read [this way] . . . **we modify *Newman* accordingly**." *Id.* at 22. ("It was not the intent of *Newman* to categorically foreclose a subsequent declaratory judgment action to resolve" factual issues regarding a party's obligation to pay judgments entered against their insureds and stating; "South Carolina has long recognized the efficacy of declaratory judgment action in this context."); *citing Sims v. Nationwide Ins. Co.,* 247 S.C. 82, 145 S.E.2d 523 (1965).

Not only did the trial court create this rule in an *ex post facto* manner, the practical ramifications of requiring Morris to litigate scope of employment in the underlying action creates an unworkable process and highlights why *Builders Mutual* flatly rejected this approach. How does this get resolved at the underlying trial without entering evidence of insurance? *Contra* Rule 411, SCRE; Rule 411, FRE (generally prohibiting evidence of insurance). What if the trial court declines the request for a special interrogatory? *Contra e.g. Smalls v. S.C. Dep't of Educ.,* 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000) (submission of special interrogatories is within the discretion of the trial court). Importantly, the SFAA, like all insurers, "has the exclusive control over the investigation, settlement, and defense of claims against the various entities and personnel

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not compelling because the issue there did not arise in the context of a declaratory judgment action but instead as a motion to reduce a verdict pursuant to the statutory cap on damages imposed by the SCTCA. *Chastain*, 388 S.C. at 171, 694 S.E.2d at 542. Unlike *Chastain,* this claim arises pursuant to 42 U.S.C. §1983, not the SCTCA, and is therefore wholly distinguishable.

for whom it provided insurance coverage." *See* S.C. Code Ann. § 1-11-140. As a result, to force this issue to be litigated in the underlying trial would create a significant conflict of interest between a defendant who prefers the act be deemed within the scope of employment to gain the protection from personal liability, while the SFAA would prefer the opposite. All of these issues were contemplated by the supreme court in *Builders Mutual* to justify upholding the well-settled procedure to litigate such issues in a declaratory judgment action. *See Builders Mutual,* Op. No. 27970 at pp. 25-28.

Second, the trial court's ruling effectively adds elements to a cause of action under 42 U.S.C. §1983 and alters a plaintiff's burden of proof. *Contra Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923 (1980) (establishing "two**—and only two**—allegations are required in order to state a cause of action under [§1983, f]irst, the plaintiff must allege that some person has deprived him of a federal right[, and s]econd, he must allege that the person who has deprived him of that right acted under color of state or territorial law"); *see also Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 1054 (1978) (If a plaintiff is successful in proving these two elements he is entitled to recover "nominal damages without proof of actual damages"). There is simply no authority to support the trial court's ability to unilaterally add elements to a cause of action existing under Federal law. Thus, it was fundamentally error for the trial court to rely on this to grant summary judgment to the SFAA in this declaratory judgment action.

Contrary to the trial court's finding, scope of employment issue (even if the SFAA can dispute it) must necessarily be resolved in this declaratory judgment action. *See Builders Mutual,* Op. No. 27970 at pp. 25 (preserving a declaratory judgment action as the proper vehicle and reiterating that where an issue is not litigated at the liability trial, the trial court can receive "additional evidence [provided it is] narrowly tailored to matters that were not actually litigated in

the first trial"). As with any factual question, summary judgment is only proper when the evidence reveals there is no question of material fact. *See Edgewater on Broad Creek Owners Ass'n v. Ephesian Ventures, LLC,* 430 S.C. 400, 405, 845 S.E.2d 211, 214 (S.C. Ct. App. 2020). However, relying on its erroneous assumption that scope of employment had to be litigated in the § 1983 trial, the trial court excused Respondents' utter failure to carry the burden necessary for summary judgment. *See Brandt v. Gooding*, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (2006) ("The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact."). The only finding the trial court made in support of summary judgment was to find that "[i]t is certainly possible that the actions of the [1983 defendants] were not within the scope of employment." (R. p. 24) (Order). This finding is actually dependent on the existence of a factual dispute, and precisely why the law does not permit summary judgment based on a mere possibility of the moving party's success. *See Walde v. Ass'n Ins. Co.,* 401 S.C. 431, 448, 737 S.E.2d 631, 639 (Ct. App. 2012) (reversing summary judgment in favor of a party who simply "raised the possibility" of an occurrence under an insurance policy).

As discussed above, the IRF defended the underlying trial without reservation of rights to dispute coverage based on whether the defendants' conduct was outside the scope their official duties. While Morris asserts this failure is dispositive of the issue, even if it is not, when viewed in the light most favorable to Morris it creates an inference that defendants' conduct was within the scope of defendants' employment. *Id.* ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party."). Thus, the trial court erred in grating summary judgment on the issue of whether the defendant's conduct was within the scope of their employment.

III. The trial court erred in finding that a covenant not to executed rendered this matter not justiciable.

The trial court erroneously found that "Morris relinquished her standing" by signing a covenant not to execute and concluding that as a result "the issues of statutory construction . . . and the issues of [insurance] policy interpretation are now moot." (R. p. 25) (Order) (accepting Respondents' argument that this "renders the current action non-justiciable because the [1983] defendants are no longer personally liable for the judgments").

First the finding that a covenant not to execute renders a case moot or not justiciable is contrary to the decisions of this court as well as the supreme court. *See e.g., Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) (rejecting the very argument advanced here that execution of a covenant not to execute extinguished liability such that the case was not justiciable); *accord Fowler v. Hunter,* No. 4422, 2008 S.C. App. LEXIS 175 (Ct. App. Oct. 28, 2008) (unpublished) (Konduros, J., being affirmed by the supreme court).

Second, the trial court's ruling is without any evidentiary support. Generally, a release or covenant applies to the extent its "plain language . . . resolved **all** of Appellants' claims" and "did not reserve any rights." *See e.g., Ex parte Doe,* 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011) (finding a case moot where the appellant executed a release which "by [its] plain language . . . resolved **all** of Appellants' claims" and "did not reserve any rights") (emphasis supplied by court) (*citing Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (stating a "release is a contract, and the scope of a release is gathered by its terms"). 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." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994).

Here, and even to the extent these covenants were presented to the trial court—which Morris does not concede—the trial court failed to make any finding that Morris waived, released, or otherwise "relinquished" any claim as against Respondents. Nor did the trial court make any finding that Morris did not reserve these claims. To the contrary, the trial court never mentions the language of these covenants, except for the title. (R. pp. 25-6) (Order). Thus, the trial court erred in finding this case not justiciable, and this ruling must be reversed. *See also Fowler*, 388 S.C. at 363, 697 S.E.2d at 535 (*supra*).

IV. The trial court erred in finding there was only a single occurrence under the IRF's insurance policy.

"The determination of coverage under an insurance policy is an action at law" and on appeal this Court is to determine "whether the trial court based its ruling on an error of law or on a factual conclusion without evidentiary support." *Stringer v. State Farm Mut. Auto. Ins. Co.*, 386 S.C. 188, 192, 687 S.E.2d 58, 59-60 (Ct. App. 2009) (*en banc*) (cert. denied May 6, 2011) (citations omitted). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law [in which] . . . an appellate court may make its own determinations concerning questions of law and need not defer to the trial court's rulings." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404-05 (2014). "We review questions of law *de novo* [and because the ambiguity of contracts and statutes are questions of law, we do not view the evidence in any particular light." *PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 429 S.C. 30, 38, 837 S.E.2d 662, 666 (Ct. App. 2019) (internal citation and quotations omitted).

The IRF contends coverage is limited to $600,000 because the acts of the five defendants, over the course of several days, should be deemed a single "occurrence." *See* (R. p. 96) (the policy purporting to limit the "total liability of the [IRF] for all damages as the result of any occurrence"

to $600,000). The policy defines "Occurrence" as "an accident, including continuous or repeated exposure to the conditions, which result in personal injury or property damage neither expected nor intended from the standpoint of the insured." (R. p. 95)

Finding the policy "provides no additional guidance in clarifying the term [occurrence]," the 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. 26-7) (Order). However, the trial court inexplicably accepted the IRF's position and applied this ambiguity to find *against* coverage. (R. at *id*.). Standing alone, the failure to interpret this undisputedly ambiguous contract in favor of coverage warrants reversal. *See Prince,* 304 S.C. at 248, 403 S.E.2d at 647 (finding that where an ambiguity as to an "occurrence" leaves a tort policy issued by the IRF "susceptible to more than one reasonable interpretation, one of which would provide coverage, **this Court must hold as a matter of law in favor of coverage**.") (*citing Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 108, 245 S.E.2d 598, 602 (1978)) (emphasis added).[13] Although the analysis could end here Morris continues for the sake of completeness.

Rather than addressing the actual language of the policy, the trial court rests its conclusion on the assumption the jury in the underlying case implicitly found "but one occurrence" because "damages w[ere] awarded jointly against the five defendants." (R. p. 27) (Order). The trial court

[13] Because Respondents have not appealed the trial court's ruling that the policy is ambiguous and must be interpreted in favor of coverage, this is the law of the case. *See e.g., Charleston Lumber Co. v. Miller Hous. Corp*., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (an "unappealed ruling is the law of the case") (citation omitted); *see also Ross v. Med. Univ.,* 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (the doctrine applies to explicit and implicit rulings); *see also Appellate Practice in South Carolina,* Toal, 2d. ed., pp. 80-81 (2002).

explained that "by obtaining a joint verdict against the [defendants, Morris] necessarily proved that the [defendants] acted in concert to produce a single and indivisible injury [and therefore Morris] cannot now argue that the [defendants'] acts . . . were not in concert or caused different injuries." (R. at *id*).[14] This is wrong.

The trial court's assumption that a joint and several verdict precludes separate occurrences misapprehends the law. As this Court has explained, "a single injury, which is the proximate result of the **separate and independent acts** of negligence of two or more parties, subjects the tortfeasors, **even in the absence of community of design or concert of action, to liability which is both joint and several**." *Collins v. Bisson Moving & Storage*, 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998) (*quoting Rourk v. Selvey*, 252 S.C. 25, 28, 164 S.E.2d 909, 910 (1968) (emphasis added); *accord Consumer Prot. Div. v. Morgan,* 387 Md. 125, 874 A.2d 919, 950 (Md. 2005) ("Joint and several liability may be imposed on two categories of defendants: true joint tortfeasors, defined as those who act in concert, and concurrent tortfeasors"); *Watts v. Laurent,* 774 F.2d 168, 179 (7th Cir. 1985) (explaining the principles of joint and several liability under section 1983 and stating "[i]t is axiomatic that where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will be held jointly and severally liable for the entire injury.")[15]

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[14] Importantly this finding is inconsistent with the reasoning the trial court employed when analyzing § 1-11-460 which rested on the presumption that the single verdict rendered in the underlying action should be treated as multiple separate judgments against each of the individual defendant. (*supra*). Yet now, when that logic would necessarily compel a finding of multiple occurrences, the Court flips this basic presumption. However, it cannot be both ways. If this was a single "occurrence," then it must also be considered a single judgment—not multiple judgments—for the purpose of analyzing § 1-11-460. This internal contradiction is irreconcilable and demonstrates that for one reason or another, the trial court's order must be reversed.

[15] Although not clear, to the extent the trial court suggests this was a "continuous or repeated exposure," any assumption that this precludes more than one occurrence has been rejected by the supreme court in *Crossman,* which stated: "[w]e reject the argument that there can be only one

In conflating the concepts of joint and several liability with an "occurrence" the trial court has improperly blended two distinct logical ideas. The jury in the underlying case was never asked to determine the number of occurrences under the policy, nor would it be proper to do so. *See Builders Mutual,* Op. No. 27970 at pp. 25 (prohibiting the submission of special interrogatories to resolve insurance coverage issues in the liability trial); *see also* Rule 411, SCRE *and* Rule 411 FRE (prohibiting evidence that party is insured when deciding liability). Thus, the jury's verdict alone simply cannot answer whether the defendants' actions amount to one or multiple occurrences—that is precisely the issue to be resolved in this declaratory judgment action. Consequently, the trial court's grant of summary judgment was error and must be reversed.[16]

In *Prince*—a declaratory judgment action regarding whether there was an occurrence under a policy issued by the IRF—the supreme court specifically rejected the proposition that the IRF could rely on implicit findings from a jury verdict in the underlying action to establish there had not been an "occurrence." *Prince,* at 248, 403 S.E.2d at 647. There, a jury issued a verdict against a government employee on a claim for defamation. *Id.* In the subsequent declaratory judgment

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occurrence in a case where property damage results from continuous or repeated condition of exposure." *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 56, 717 S.E.2d 589, 597 (2011) (*quoting Industrial Steel Container[] Co. v. Fireman's Fund Ins. Co.,* 399 N.W.2d 156, 159 (Minn. Ct. App. 1987)).

[16] Even assuming for the sake of argument the issue of occurrence could be decided simply by looking to the jury's verdict in the underlying case, the trial court's grant of summary judgment would still be error. It is undisputed that the jury assigned punitive damages of $1 million against defendants Burkholder and Garrett while only $150,000 against defendants Bland, Carner, and Speissegger. (R. p. 15); (R. pp. 300-04). In the light most favorable to Morris, this creates an inference the jury determined these two groups of defendants did not act in concert, thus constituting multiple—or at least two—occurrences. *See Edgewater,* 430 S.E.2d at 405, 845 S.E.2d at 214 (in a declaratory judgment action, summary judgment is only proper when there is no question of material fact when the "inferences arising in and from the evidence [are viewed] in a light most favorable to the non-moving party"); *see also Prince,* 304 S.C. at 248, 403 S.E.2d at 647 (recognizing the IRF has the burden to prove the facts did not meet the definition of "occurrence" under a tort policy).

action the IRF argued because the jury necessarily found the employee acted with malice or otherwise intended the damage, the act could not be an "occurrence" because the damage was not unintended "from the standpoint of the insured." *Id.* (the definition of occurrence there—like the definition of occurrence here—contained this language). However, because the policy specifically provided coverage for defamation (and other intentional torts) the supreme court found this created an "internal inconsistency in the policy" that would leave the definition of "occurrence" to vary from case to case—for instance in a defamation action as opposed to a negligence action. *Id.* Therefore, the Court found it was required it to accept the interpretation that would provide coverage. *Id.* at 248-49, 403 S.E.2d at 647-48 (rejecting the IRF's interpretation of occurrence and going on to find coverage for both actual and punitive damages under the terms of the IRF's tort policy).

The same internal inconsistencies that compelled the supreme court's reasoning in *Prince* exist here. Specifically, the policy provides coverage for "actions or claims brought under the provisions of [the SCTCA]" as well as providing coverage for "actions or claim to which [the SCTCA] does not apply." (R. p. 96). Thus, the policy's single definition "occurrence" must apply equally to all claims regardless of whether they arise under the SCTCA. The problem, as even the trial court recognized, is that the SCTCA's definition "is substantially different from the policy definition of occurrence." (R. pp. 27-8) (Order); *compare* S.C. Code Ann. § 15-78-30(g) (defining under the SCTCA as meaning "an unfolding sequence of events which proximately flow from a single act of negligence") *with* (R. p. 95) (the policy defining occurrence as "an accident, including continuous or repeated exposure to the conditions, which result in personal injury or property damage neither expected nor intended from the standpoint of the insured."). Thus, just as in *Prince,* because the meaning of occurrence must necessarily vary between claims arising under the

SCTCA and claims which do not, a court "must hold, as a matter of law, in favor of coverage." *Prince,* at 248, 403 S.E.2d at 647; *accord Town of Duncan v. State Budget & Control Bd.,* 326 S.C. 6, 12, 482 S.E.2d 768, 771 (1997) (finding that the tort policy issued by the IRF must be liberally construed in favor of the insured and must be interpreted at least as broadly as the SCTCA); *accord Padgett v. S.C. Ins. Res. Fund,* 340 S.C. 250, 254, 531 S.E.2d 305, 307 (Ct. App. 2000) (indicating that under a policy issued by the IRF the definitions must be interpreted to be at least as broad as those of the SCTCA).

Additional internal inconsistencies in the policy further support a finding that the acts of each defendant constitute separate occurrences—specifically five occurrences. Turning first to the insuring agreement of the policy, this provides:

> The [IRF] will pay on behalf of the insured all . . . damages as a result of
> A. Personal Injury or
> B. Property Damage to which this applies **caused by an occurrence**

(R. p. 95) (emphasis added).

The policy defines Personal Injury to include:

> (1) bodily injury **caused by an occurrence**. [or]
> (2) injury arising out of one or more of the following offenses committed during the policy period: . . . (g) violation of the [First, Fourth, or Eighth] Amendments to the Constitution of the United States.

(R. p. 95) (emphasis added).

These provisions demonstrate that unlike its obligation to pay damages for "Property Damage" which must be "caused by an occurrence" the IRF's obligation to pay for Personal Injury does not depend on being caused by an occurrence. *See* (R. p. 95). Similarly, the policy contemplates injury from the violation of the Constitution as a separate type of Personal Injury than bodily injury. Tellingly however, while bodily injury must be "caused by an occurrence" there is no requirement in the policy that injury from a Constitutional violation be caused by an

occurrence. (R. p. 95). Finally, the policy defines insured by stating "The insurance afforded applies separately to each insured against whom claim is made or suit is brought." (R. 95). Together these provisions indicate that the IRF's obligation to pay for the injuries arising from an insured's violation of the Constitution are not limited by "occurrence" and therefore support an interpretation that there were five separate occurrences—one for each defendant. This is the only interpretation consistent with the existence of § 1-11-460 (as discussed above) and the policy's directive that an occurrence must be evaluated "**from the standpoint of the insured**." (R. p. 95) (emphasis added).

Therefore, the trial court erred in finding there was only a single occurrence, and this court should reverse and find five occurrences as a matter of law. Alternatively, and to the extent the court deems further factual inquiry to be necessary, this court should reverse and remand the matter for a determination by the trial court on the number of occurrences.

CONLCUSION

For the reasons stated above this Court should reverse the trial court's grant of summary judgment as to SFAA's obligation to pay under § 1-11-460; or in the alternative reverse the trial court's grant of summary judgement finding there was only one occurrence under the IRF policy; or in the alternative reverse and remand as articulated herein.

Respectfully submitted,

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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

Appellate Case No. 2020-000719

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

vs.

State Fiscal Accountability Authority, at al……Respondent

CERTIFICATE OF COUNSEL

The undersigned attorneys hereby certify that the Final Appellant's Brief and Final Appellant's Reply Brief comply with Rule 211(b), SCACR.

Respectfully submitted,

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The above-signing lawyer has signed this certification electronically in accordance with paragraph (f) of The Supreme Court of South Carolina's Amended Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020).