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Oct 27 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Casey Manning, Circuit Court Judge

Common Pleas Court Case No.: 2017-CP-40-6773  
Appellate Case No. 2021-00502

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

v.

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

Of Whom Nancy Morris, as Assignee of Andrew J. Bland, PFC;  
Richard T. Burkholder, SGT: Leemon E. Carner, PFC;  
Priscilla Garrett Bland, PFC; and Jerry Speissegger, Jr., PFC, is the ..... Appellant

and

South Carolina Insurance Reserve Fund is the ..... Respondent

**RECORD ON APPEAL – VOL. II**

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County Superintendents/Administrators  
Division Directors  
Section Managers  
School Principals, Superintendents and Assistant  
Principal/Supervisor  
Wardens/Deputy Wardens

c. MAINTENANCE PERSONNEL INCLUDE, BUT ARE NOT LIMITED TO  
EMPLOYEES WHO:

Construction workers who maintain the buildings for the entity  
Personnel who maintain and clean sewers  
Operators of heavy equipment (operators of backhoes, road graders, etc.)  
Carpenters, Electricians, HVAC and Plumbers

d. CLERICAL EMPLOYEES INCLUDE, BUT ARE NOT LIMITED TO:

Billing or Clerical Specialists  
Administrative Specialists - Secretaries  
Postal Clerks - Credit Union Tellers  
Data Entry Clerks  
Telephone Operators  
Teacher's Aides - Librarians  
Artists - Photographers  
Stock Clerks

e. VOLUNTEERS INCLUDE, BUT ARE NOT LIMITED TO:

Volunteer Firemen  
Other Volunteers

f. OTHERS INCLUDE, BUT ARE NOT LIMITED TO:

Attorneys - Architects - Engineers  
Auditors - Accountants - Loan Officers  
Auto Mechanics/Helpers  
Caseworkers/Social Workers - Chaplains - Cottage (House) Parents  
Computer Programers  
Consumer Representatives  
Custodial Workers - Groundskeepers  
Drivers of Transportation Vehicles  
Food Service Employees  
Garbage Collection Employees  
Inspectors (Fire, Building, etc.)  
Judges  
Paramedics (Paid) - Firemen (Paid)  
Pilots  
Professors - Teachers - Counselors - Instructors  
Physicians - Dentists - Nurses - Pharmacists - Therapists  
Psychologists - Psychiatrists  
Veterinarians - Animal Control Employees

School Crossing Guards  
Sewage Treatment Plant Operators/Helpers  
Warehouse workers  
Water Treatment Plant Operators/Helpers

#### C. EMPLOYEE COUNT – TORT LIABILITY

1. Members of the Board of Directors, Commissioners, Town Councils. Count one for each person.
2. Members of Committees, except those members of committees serving in a ceremonial or honorary capacity and those who serve on committees as part of their job duties. Count one for each committee chairman and report in the "Directors, Executives and Managers" category. Report balance of committee members in the "volunteer" category based on a "full-time equivalency".
3. Full-time Employees. Count one for each person.
4. Part-time Employees. Report on a "full-time equivalent" basis.
5. Volunteers, except volunteer firemen and rescue squad members. Volunteers, as defined by Section 8-25-10 of the S. C. Code, should be reported on a "full-time equivalent" basis.
6. Volunteer Firemen and Rescue Squad Members. The number of volunteer firemen and rescue squad members reported should be based on the "average turnout". You should use the best information available to determine the "average".

#### FULL-TIME EQUIVALENT

One method of converting part-time employees to a full-time equivalent is to estimate, using the best information available, the total number of hours you expect all part-time employees will work annually, and then divide the total hours by 2,000 hours to convert to a full-time equivalent.

## D. POLICY FORMS

### 1. PROPERTY

- a. PD01(1-01) Common Policy Conditions
- b. PD02(1-91) Loss Payable Clause (optional)
- c. PD03(1-92) Commercial Property Conditions
- d. PD04(1-01) Building and Personal Property Coverage
- e. PD05(1-01) Causes of Loss - Special Form
- f. PD06(1-01) Outside Signs (optional)
- g. PD07(1-91) Radio or Television Antennas (optional)
- h. PD08(1-01) South Carolina Changes -Valuation
- i. PD09(1-91) Boiler and Machinery - Object Definitions
- j. PD10(1-91) Causes of Loss - Earthquake
- k. PD11(1-91) Flood Insurance Policy
- l. PD12(1-01) Boiler and Machinery Coverage Form
- m. PD13(1-01) Contractor's Equipment Floater Form
- n. PD14(1-01) Miscellaneous Articles Floater Form
- o. PD15(1-91) Ordinance or Law Coverage
- p. PD16(6-92) Mortgage Clause (optional)
- q. PD17(1-91) Business Income (Extra Expense) Coverage
- r. PD18(1-91) Watercraft Form
- s. PD19(1-91) Fine Arts Floater Coverage Form
- t. PD20(1-01) Electronic Data Processing Policy
- u. PD21(7-07) Museum Form
- v. PD23(1-91) Builder's Risk Coverage Form
- w. PD25(1-91) Commercial Inland Marine Conditions
- x. PD26(1-91) Additional Covered Property (optional)
- y. PD27(1-01) Architect Fees Limitations
- z. PD33 Certificate of Insurance (optional)
- aa. PD36 Coverage Territory Extension
- bb. PD37 Worldwide Coverage Territory Extension

### 2. TORT LIABILITY

- a. CD01(04-10) Tort Liability Insurance Policy
- b. CD10(09-90) Amendatory Endorsement (optional)
- c. CD12(03-94) Certificate of Insurance (optional)
- d. CD17(01-90) Limits of Liability (optional)
- e. CD37(01-01) Prepaid Legal Defense (Increased Limits) (optional)
- f. CD38(01-01) Water Backup of Sewers or Drains (optional)
- g. CD42(05-04) Contractual Liability Endorsement (for Charter Schools) (optional)
- h. CD45 Watercraft Endorsement (optional)

### 3. AUTOMOBILE

- a. CD12 Certificate of Insurance (optional)
- b. CD20(04-08) Automobile Policy
- c. CD30 Loss Payable Clause (optional)
- e. CD33(05-95) Garagekeepers Liability - \$50,000 Limit
- f. CD43(05-95) Garagekeepers Liability - \$100,000 Limit

4. SCHOOL ACTIVITY BUS ACCIDENT INSURANCE

- a. CD21(07-98) SC Uninsured Motorist Coverage
- b. CD34(02-87) Accident Insurance Policy
- c. CD32(5-10) District Owned Route Buses

5. MEDICAL PROFESSIONAL LIABILITY

- a. MD33 Physicians Certificate (optional)
- b. MD36(11-00) Medical Professional Liability Policy
- c. MD37 Additional Insured (optional)
- d. MD38 Certificate of Insurance (optional)
- e. MD43 CRN Anesthetist (optional)
- f. MD44 Nurse Practitioner (optional)
- g. MD45 Physician Assistant (optional)
- h. MD46 Certified Nurse Midwife (optional)

6. UNDERGROUND STORAGE TANK

- a. CD07(02-07) Pollution Liability Coverage for Owners of UST'S
- b. CD12(03-94) Certificate of Insurance (optional)

## APPENDIX I

### IRF CONTACTS

Coverage, risk management and underwriting for all lines of business.

Athena Western, Underwriting Office Manager  
Shealy McCoy, Jr., Property Underwriting Manager  
Patti Trevathan, Casualty Insurance Administrator  
George (Skip) Caughman, Field Representative  
Julian Rock, Field Representative  
Joanne Eargle, Administrative Assistant  
Shirl Coffey, Administrative Assistant

#### Claims:

David Abromaitis, Claims Manager  
Dan Parris, Assistant to the Claims Manager  
Kay Stock, Administrative Assistant

#### Special Litigation:

Barry Rice, Senior Consultant  
Hattie Taylor, Senior Consultant

#### Medical Malpractice:

David Stuckey, Manager  
Rex Maybin, Professional Liability Representative  
Teresa Camp, Professional Liability Representative  
Heather Hazel, Administrative Assistant

#### Property Casualty:

Nelson Chandler, District Claims Manager  
Dianne Watford, Administrative Assistant

Norman Caldwell, Senior Adjuster  
Bob Cummings, Senior Adjuster  
Dennis Elledge, Senior Adjuster  
Jackie Patterson, Senior Adjuster  
Jerry Anderson, Senior Adjuster  
Nancy Stevenson, Senior Adjuster  
Tony Chapman, Senior Adjuster

#### Small Claims/School Bus:

Libby Holder, Small Claims Unit Manager

Emma Clark, Claims Examiner  
Matthew Butler, Claims Examiner  
Kiana Jeffcoat, Claims Examiner  
Devon Lake, Claims Examiner  
Brenda Mitchell, Claims Examiner

## APPENDIX II

Claims adjusters by county assignments.

| <u>COUNTY</u> | <u>CLAIM AGENT</u> |
|---------------|--------------------|
| Abbeville     | Nancy Stevenson    |
| Aiken         | Nancy Stevenson    |
| Allendale     | Jackie Patterson   |
| Anderson      | Nancy Stevenson    |
| Bamberg       | Bob Cummings       |
| Barnwell      | Bob Cummings       |
| Beaufort      | Nelson Chandler    |
| Berkeley      | Dennis Elledge     |
| Calhoun       | Dennis Elledge     |
| Charleston    | Bob Cummings       |
| Cherokee      | Nancy Stevenson    |
| Chester       | Jerry Anderson     |
| Chesterfield  | Jackie Patterson   |
| Clarendon     | Dennis Elledge     |
| Colleton      | Nelson Chandler    |
| Darlington    | Jerry Anderson     |
| Dillon        | Norm Caldwell      |
| Dorchester    | Jerry Anderson     |
| Edgefield     | Tony Chapman       |
| Fairfield     | Jerry Anderson     |
| Florence      | Norm Caldwell      |
| Georgetown    | Norm Caldwell      |
| Greenville    | Tony Chapman       |
| Greenwood     | Tony Chapman       |
| Hampton       | Nelson Chandler    |
| Horry         | Norm Caldwell      |
| Jasper        | Nelson Chandler    |
| Kershaw       | Jackie Patterson   |
| Lancaster     | Jackie Patterson   |
| Laurens       | Bob Cummings       |
| Lee           | Bob Cummings       |
| Lexington     | Tony Chapman       |
| Marion        | Norm Caldwell      |
| Marlboro      | Norm Caldwell      |
| McCormick     | Bob Cummings       |
| Newberry      | Nancy Stevenson    |
| Oconee        | Nancy Stevenson    |
| Orangeburg    | Dennis Elledge     |
| Pickens       | Nancy Stevenson    |
| Richland      | Nelson Chandler    |
| Saluda        | Tony Chapman       |
| Spartanburg   | Tony Chapman       |
| Sumter        | Dennis Elledge     |
| Union         | Jackie Patterson   |
| Williamsburg  | Norm Caldwell      |
| York          | Jerry Anderson     |

STATE OF SOUTH CAROLINA )

County of Richland )

COURT OF COMMON PLEAS  
2017- CP- 40- 677

NANCY MORRIS, AS ASSIGNEE OF )  
ANDREW J. BLAND, PFC; LEEMON )  
E. CARNER, PFC; JERRY )  
SPEISSEGER, JR., PFC; )  
PRISCILLA GARRET, SGT; AND )  
RICHARD T. BURKHOLDER, SGT, )

TRANSCRIPT OF RECORD

PLAINTIFFS, )

vs. )

SOUTH CAROLINA INSURANCE )  
RESERVE FUND, )

DEFENDANT, )

**RECEIVED**

**May 17 2021**

**SC Court of Appeals**

July 25, 2019  
Columbia, South Carolina

BEFORE:

THE HONORABLE L. CASEY MANNING, JUDGE.

APPEARANCES:

GARRETT JOHNSON, ESQ.  
HAROLD STALEY, ESQ.  
Attorneys for the Plaintiffs

ANDREW F. LINDEMANN, ESQ.  
Attorney for the Defendant

KAREN AMBROZIAK  
Official Court Reporter

C O N T E N T S

I N D E X O F E X H I B I T S:

(Ther e wer e no exhi bi t s i n t r o d u c e d . )

I N D E X O F W T N E S S E S:

(Ther e wer e no wi t n e s s e s c a l l e d . )

1 THE COURT: Number three is Morris vs. South Carolina  
2 Insurance Reserve, Andrew Lindemann.

3 Motion to compel?

4 MR. LINDEMANN: Yes, Your Honor.

5 THE COURT: Summary judgment and a motion to compel;  
6 is that correct?

7 MR. LINDEMANN: Yes, Your Honor.

8 THE COURT: And I guess it's your motion to compel  
9 and his motion for summary judgment?

10 MR. STALEY: That's correct.

11 MR. JOHNSON: That's correct.

12 THE COURT: Would y'all be kind enough to identify  
13 yourself for the court reporter?

14 MR. JOHNSON: Garrett Johnson with Elrod Pope Law  
15 Firm for the Plaintiff.

16 MR. STALEY: Harold Staley with Elrod Pope Law Firm  
17 for the Plaintiff, Your Honor.

18 MR. LINDEMANN: Andrew Lindemann, Your Honor, for the  
19 Defendant, South Carolina Insurance Reserve Fund.

20 THE COURT: You may proceed, sir.

21 MR. JOHNSON: So this is Plaintiff's motion to  
22 compel. There's quite a bit of back story on this case.  
23 I'll fill in the Court on that briefly.

24 We represent the Estate of David Allen Woods, who was  
25 an inmate at a detention center in Berkeley County way

1 back in 2010. He was -- we allege he was not given  
2 appropriate medical treatment. He was rushed to the  
3 hospital, eventually passed away. So we filed a section  
4 1983 claim against the correctional officers that were in  
5 the facility at the time that were watching him --

6 THE COURT: Did you say Beaufort?

7 MR. JOHNSON: Berkeley County.

8 THE COURT: Berkeley.

9 MR. JOHNSON: Yes, Your Honor. So we were removed to  
10 federal court. We went through several years of  
11 litigation. And, particularly, what's relevant to this  
12 case is that for the first year-and-a-half or so of  
13 litigation, the Insurance Reserve Fund, which provided the  
14 insurance policy for the detention center and the inmates  
15 did not tender its policy limits.

16 They made an offer of judgment of \$500,000 when the  
17 policy limits were 600,000. They sent us a letter  
18 offering 500,000, as well. Did not tender their policy  
19 limits as admitted by the Defendant in this instant case  
20 until just a few months, two months before trial in  
21 August 12th, 2014.

22 At the trial, we got a verdict well in excess of the  
23 policy limits, it was \$2.95 million. And that case  
24 eventually went up on appeal to the Fourth circuit, which  
25 has upheld that, and now we filed this case, which is a

1 bad faith -- making bad faith allegations against the  
2 Defendant, IRF, for failing to tender their policy limits  
3 and protect their insured in that time period when this  
4 litigation was going on underlying that.

5 As part of this lawsuit, we -- well, first of all, we  
6 received assignments from those five correctional officers  
7 who the suit proceeded against, and they've given us their  
8 rights to pursue this claim against the Defendants and the  
9 South Carolina Insurance Reserve Fund.

10 Of course, we've served discovery as part of this  
11 case. We received responses that the majority of them  
12 were -- the majority of our interrogatories were objected  
13 to on the grounds of attorney/client privilege, same with  
14 the requests to produce.

15 So we went before Judge, I believe it was McClain  
16 about six months ago now.

17 THE COURT: In front of who?

18 MR. JOHNSON: McClain.

19 MR. LINDEMANN: McLeod.

20 THE COURT: McLeod. Okay.

21 MR. JOHNSON: And he -- on the same issue. He,  
22 basically, encouraged us to work it out, so we reached an  
23 agreement, and the Defendant did produce some documents to  
24 us as a result of that agreement, but it was everything we  
25 already had. It was deposition transcripts. It was

1 orders from the Court. It was communications between our  
2 two attorneys.

3 So there was nothing in what was produced to us  
4 that -- I believe nothing at all that we did not already  
5 have in our own file from working the case up. And,  
6 certainly, there was nothing that bore on the Defendant's  
7 decision not to tender those policy limits at mediation or  
8 any point in litigation before August of 2014, which was  
9 two months before trial.

10 So we filed this motion to compel saying that, in  
11 essence, the Defendant has to turn over to us those  
12 documents that went into that evaluation, that thought  
13 process so that the Court and the fact finder can properly  
14 evaluate whether or not they acted in bad faith. And  
15 we've promoted two arguments in favor of that.

16 So the first one is that there is an expressed waiver  
17 of attorney/client privilege based on the assignments that  
18 we have from those five county defendants, which in those  
19 assignments, all five assigners now have signed them, says  
20 that they expressly waive any attorney/client privilege  
21 concerning his or her prior representation in the civil  
22 action to the extent necessary to assist in the pursuit of  
23 any litigation arising from this assignment.

24 So our discovery requests are in the pursuit of this  
25 litigation and so we hold by the clear terms of those

1 assignments, any attorney/client privilege has been waived  
2 by the clients who are, of course, the ones who hold that  
3 privilege.

4 The second argument is that there is an implied  
5 waiver based on the defenses and the nature of this  
6 lawsuit. And most germane to that is a very recent  
7 Supreme Court case that was just handed down last month  
8 from our state Supreme Court. And I'm happy to hand up a  
9 copy of that to the bench if Your Honor would like. It's  
10 been cited in our brief at length, as well.

11 THE COURT: All right, sir.

12 MR. JOHNSON: Basically, the factual background of  
13 that is that there was a company called ContraVest that  
14 was involved in some litigation and their insurer, Munt  
15 Holly, declined to defend them and to defy them. And  
16 after ContraVest settled out of the underlying litigation,  
17 they filed a bad faith claim against Munt Holly.

18 It was removed to federal court, and Munt Holly has  
19 made, essentially, the same claims here as the Defendant  
20 in that all of their claims files and documents relating  
21 to their decision to deny coverage was covered by  
22 attorney/client privilege and was not discoverable.

23 And the Supreme Court in looking at this, they began  
24 by weighing the three main interests that they identified  
25 that go into these types of cases. And so the first of

1 those, on the one side is the importance of the  
2 attorney/client privilege. And on the other side, they  
3 weigh the importance of broad discovery, as well as the  
4 interest -- and I can quote this for you of -- that those  
5 in the insurance industry who failed to deal in good faith  
6 should be penalized. And the actual interest that they  
7 weighed was the interest of holding insurance companies  
8 accountable for their bad acts.

9 And in looking at various approaches that have been  
10 taken across the country, the Supreme Court decided to  
11 take a middle ground approach to find the answer depends  
12 on a case-by-case analysis of the facts as to whether or  
13 not the attorney/client privilege has been waived in these  
14 times of litigations.

15 And that alone is not very helpful, but the court did  
16 look at length in a case from Arizona, State Farm V. Lee,  
17 and they found this case instructive. Probably three  
18 pages of the opinion here is just quoting from the Arizona  
19 case, and so I might intermingle some of the quotations  
20 from the Court's analysis here, but essentially, they  
21 adopted the framework here with one addition that I'll  
22 speak to towards the very end.

23 And, basically, what the Arizona court reached, their  
24 conclusion is that in cases in which the litigant claiming  
25 the privilege relies on and advances as a claim or defense

1 a subjective and allegedly reasonable evaluation of the  
2 law, but an evaluation that necessarily incorporates what  
3 the litigant learned from its lawyer, the communications  
4 are discoverable and admissible.

5 The court went on to say even if the defendant or  
6 litigant affirmatively disavows expressed reliance on  
7 privileged communications, that's not enough to prevent a  
8 finding of waiver. And the Court's concern here is that  
9 if the advice received from counsel as part of its  
10 investigation, it's not only relevant on an issue like  
11 this, but it's inextricably intertwined with the Court's  
12 truth seeking functions.

13 THE COURT: Let me stop you. You're saying because  
14 they didn't tender the policy limit, that constitutes bad  
15 faith?

16 MR. JOHNSON: Yes, Your Honor.

17 THE COURT: Per se?

18 MR. JOHNSON: Well, I think that's a question of fact  
19 for the jury, but we do have an expert retained in this  
20 case who's going to offer that opinion for the Court.

21 THE COURT: All right. Do you have any specific case  
22 that mirrors your argument here today that gives me a  
23 basis to rule for you? Do you have a case on point?

24 MR. JOHNSON: I think that this case on point from  
25 Mount Holly, but as far as the bad faith for failure to

1 tender the policy limits, we go back all the way to the  
2 Tyger River case. I think Nichols, which is quoted at  
3 length, as well in this case also establishes that the  
4 insurance --

5 THE COURT: You said you got a \$2.9 million verdict?

6 MR. JOHNSON: Yes, Your Honor.

7 THE COURT: It was affirmed by the Fourth Circuit?

8 MR. JOHNSON: It was appealed to the Fourth Circuit,  
9 correct.

10 THE COURT: Was there any appeals from that Fourth  
11 Circuit decision?

12 MR. JOHNSON: No, Your Honor, the Fourth Circuit  
13 affirmed our verdict, and the defense chose not to move  
14 for cert to the U.S. Supreme Court.

15 THE COURT: Say that again.

16 MR. JOHNSON: The Fourth Circuit affirmed the lower  
17 court, the verdict in our case, and the Defendants did not  
18 pursue it to the United States Supreme Court.

19 THE COURT: Did they pay you money?

20 MR. JOHNSON: To date, they've paid the \$600,000  
21 policy -- what they claim is the policy limit, plus a  
22 little over \$400,000 in attorney's fees and costs  
23 associated with the litigation.

24 So I don't know the exact math off the top of my  
25 head, but I think after set offs and reductions, there's

1 still an amount of over \$2 million that's in dispute. And  
2 just for the Court's information, we actually have a  
3 declaratory judgment action in Richland County, as well,  
4 on the terms of the policy. So we've brought these twin  
5 actions to try to recover the remainder.

6 THE COURT: All right, sir.

7 MR. JOHNSON: So what the court -- after laying out  
8 that standard, the court acknowledges that this is  
9 difficult for insurance companies and for litigants. They  
10 actually used that word. It would be difficult for the  
11 insurer to respond to the insured's allegations of  
12 subjective bad faith without affirmatively alleging that  
13 it investigated and evaluated the claim

14 They even say that it puts them between Scylla and  
15 Charybdis, that whichever strategy the insurer chooses,  
16 it's faced with serious problems about the advice of  
17 counsel. And the one way the court specifies that maybe  
18 they might be able to get around that waiver of privilege  
19 is that they could do so simply by denying that they knew  
20 they were acting unlawfully and relying upon a defense of  
21 objective reasonableness. But the court said that despite  
22 that difficult standard for insurance --

23 THE COURT: So this is the Arizona case; is that  
24 correct?

25 MR. JOHNSON: Correct, and this is all quoted

1 directly by the South Carolina Supreme Court in their own  
2 decision. I'm reading from the South Carolina case, not  
3 the Arizona case.

4 THE COURT: I got you.

5 MR. JOHNSON: But the court says that it simply makes  
6 a mockery of the law to allow the litigant to claim on the  
7 one hand, it acted reasonably because it made a legal  
8 evaluation while at the same time allowing that litigant  
9 to withhold from its adversary and the fact finder  
10 information that it received from counsel on that very  
11 subject. You can't use it as both a sword and a shield is  
12 the court's take away from that.

13 As to this case, what we have here is not what the  
14 court spelled out as an exception in a defense of  
15 objective reasonableness. Instead, what we have is an  
16 inherently subjective matter about the evaluation of a  
17 claim and the refusal to pay the policy limits, which is  
18 well established South Carolina law under Tyger River and  
19 under Nichols.

20 The defense, in my mind, is now squarely between  
21 Scylla and Charybdis because if they claim on one hand  
22 that they did not rely on or did not consult attorneys at  
23 all about the evaluation of the claim that that's bad  
24 faith in my mind. And then if they do claim the input  
25 from their attorneys was relevant and went into their

1 evaluation claim well, then, under Munt Holly, it's  
2 discoverable and admissible.

3 In fact, in the privilege log that we just received  
4 from the Defendant, there are e-mails in here about  
5 mediation strategy, about case evaluation and those would  
6 seem to be squarely the types of communications that are  
7 set forth here in the Munt Holly standard.

8 Even though the Defendants made some very good, very  
9 artful -- obviously, they're very conscious of the issues  
10 here with their pleadings and did not plead good faith or  
11 reliance on counsel, that's specifically what the court  
12 said is not enough to avoid a waiver.

13 In fact, in their answer, they did argue that they  
14 evaluated the case. They did make that claim. They did  
15 claim that they evaluated the case less than the policy  
16 limits. That's in paragraphs 24 and 27 of their answer.  
17 And at bottom, in order to defend this suit, they have to  
18 argue that they made a subjective and reasonable  
19 evaluation of the law in the claim, that evaluation must  
20 have included what the Defendant learned from their  
21 attorneys and it makes those communications discoverable.

22 The one addition that the South Carolina court made  
23 to the Lee case from Arizona that they cited is that we  
24 are required to make a prima facie case of bad faith. And  
25 in our mind, the mere fact that they refused to tender

1 \$600,000 on a case that a jury ultimately found to be  
2 worth close to \$3 million satisfies that prima facie  
3 showing.

4 Now, to address a couple of things that the defense  
5 has brought up in their brief. They first tried to  
6 distinguish between an issue of law versus an issue of  
7 evaluation or, specifically, they point to the fact that  
8 these dealt with denials of coverage or denials of  
9 stacking on UM and UIM cases.

10 The Supreme Court, South Carolina Supreme Court, in  
11 weighing interest and in discussing the interest that are  
12 at hand here are not nearly that narrow or specific. In  
13 fact, as I alluded to earlier, in their discussion on  
14 insurance and bad faith claims, the very second sentence  
15 in the Supreme Court's opinion is that the court has  
16 recognized that there is a tort action for an insurer's  
17 bad faith refusal to pay benefits under an insurance  
18 policy, which is the exact situation we have here, is they  
19 refused to pay full benefits under the policy. Again,  
20 they cite at length Nichols, which is one of the seminal  
21 first party bad faith cases in insurance law.

22 And to the extent that they're arguing that this is  
23 not about a question of law, that almost puts them even  
24 more squarely in the crosshairs here with Mount Holly  
25 because they can't argue that it was simply a defense of

1 objective reasonableness, just an objective reading of a  
2 statute. It is necessarily a subjective process that has  
3 to rely on the advice of counsel.

4 The very last thing I'll say is the one point in  
5 their brief in which the defendants quoted the Court at  
6 length, they quote that we assume client and counsel  
7 confer in every case, that does not waive the privilege.  
8 We assume actions will be taken on counsel's advice, that  
9 does not waive the privilege.

10 Based on counsel's advice, the client will have some  
11 objective evaluations, that does not waive the privilege.  
12 They give a long block quoted here in the first cap of  
13 that paragraph.

14 The very next word after the quote that the  
15 Defendants give in their brief is "but". And the court  
16 says, but the present case has one more factor. The  
17 insurer claims its actions were the result of its  
18 reasonable and good faith belief that its conduct was  
19 permitted by law and the subjective belief based on its  
20 claims agent's investigation into and evaluation of the  
21 law.

22 Here, we have them claiming or needing to claim that  
23 their actions were the result of reasonable and good faith  
24 belief and that that subjective belief had to have been  
25 based on the agent's investigation into and evaluation of

1 both the claim and the law that requires them to pay the  
2 policy limits.

3 That's all I have for you, Your Honor. I'm happy to  
4 answer or respond to any questions you may have.

5 THE COURT: None.

6 Mr. Lindemann.

7 MR. LINDEMANN: Thank you, Your Honor. May it please  
8 the Court. Your Honor, let me add a couple of details to  
9 the background, and I won't belabor that.

10 What Mr. Johnson indicated about the underlying case  
11 is accurate. It's a case that went through a trial before  
12 Judge Gergel and, ultimately, the Fourth Circuit affirmed  
13 the verdict against five correctional officers.

14 I would note, however, and this is important for the  
15 Court's consideration here, is those five correctional  
16 officers against whom the various judgments were  
17 ultimately entered were not the only defendants in the  
18 litigation.

19 There were -- and I haven't counted all of them but,  
20 at least, a dozen, maybe 15 more defendants that were at  
21 various times in the case defendants in the case and,  
22 ultimately, dropped out or got dismissed or a directed  
23 verdict was granted for them at trial.

24 In fact, I think the State law claims, if I remember  
25 correctly -- and I did not try the underlying case. If I

1 remember correctly, Berkeley County on the state Law  
2 claims was actually not dismissed until the middle of  
3 trial. Ultimately, there were only federal claims that  
4 went to the jury and the jury returned the verdict against  
5 the five officers in their individual capacities.

6 And that's very important because the lawyers who  
7 were involved in this case -- and there were three  
8 different sets of lawyers. Initially, it was Sandy Senn  
9 and her law firm represented all defendants. And then  
10 part way through the case, after the mediation, in fact,  
11 there was a separation and several of the defendants were  
12 represented by Rick Corrigan and several of the defendants  
13 were represented by Jimmy Stuckey.

14 So what we have here, Your Honor -- and we'll get to  
15 the merits of the bad faith claim in a moment when we talk  
16 about the second prong of the Munt Holly test, as well  
17 as, ultimately, with our motion for summary judgment. But  
18 what we have here is, in essence, they are seeking to  
19 recover a copy -- or for us to produce a copy of our  
20 entire claims file.

21 And one thing that I would add to what Mr. Johnson  
22 left out is that this case is not -- this motion before  
23 Your Honor is not solely about attorney/client privilege.  
24 It's also about work product privilege. And not just  
25 common law work product privilege under Rule 26, but,

1 also, a very unique statutory work product privilege that  
2 the General Assembly has provided specifically the  
3 Insurance Reserve Fund. And I'll get to those issues in a  
4 moment. It's not solely attorney/client privilege.

5 The big question for Your Honor is whether or not  
6 there's been a waiver of any of these privileges. And we  
7 submitted to the Plaintiff's counsel -- and it was a lot  
8 of work because there were a lot of e-mails, a lot of  
9 e-mails chains and a lot of documents. I mean, this case  
10 went on for a number of years and involved quite some  
11 complexity. It was just shy of a 6,000-page claim file.

12 And, ultimately, we did have a hearing in front of  
13 Judge McLeod back in either December or January. That was  
14 before the Mount Holly decision came out from the Supreme  
15 Court. We knew at that point in time that the Fourth  
16 Circuit -- and, basically, in the Mount Holly case, which  
17 is also known by some people as the ContraVest case, Judge  
18 Norton had that case pending before him and he ordered  
19 wholesale discovery claims file, and that was appealed  
20 based on a writ of mandamus immediately to the United  
21 States Fourth Circuit Court of Appeals and the Fourth  
22 Circuit certified a question to the South Carolina Supreme  
23 Court.

24 So at the time when we appeared in front of Judge  
25 McLeod, we knew that issue had been certified, and I

1 believe that we actually knew it had already been argued  
2 and we were waiting on the decision from the Supreme  
3 Court. So, ultimately, what we decided to do and Judge  
4 McLeod encouraged us without ruling, he encouraged us to  
5 see if there's a way you can work something out.

6 Ultimately, the agreement we made is as long as  
7 Plaintiff's counsel didn't contend that I waived anything,  
8 I would produce the parts of the claims file that, quite  
9 frankly, and I agree were relatively inconsequential to  
10 this case.

11 What they were was all the information that was in  
12 the claims file that would give the Plaintiff an idea of  
13 what information had been provided to the IRF in making  
14 their claims analysis, you know, pleading, depositions,  
15 medical records, all of those sort of things.

16 So about 5,000 pages have been produced. So what  
17 we're really here fighting over is the guts of the claims  
18 file dealing with the communications between counsel and  
19 the Insurance Reserve Fund, communications as far as  
20 analysis goes, log notes, that sort of thing.

21 And so the question that they have raised based on  
22 the Munt Holly case is whether or not there has been a  
23 waiver of those privileges, not just the attorney/client  
24 privilege, but we can't forget about the work product  
25 privilege, as well. That's probably the main focus in my

1 mind. And they've argued that there was an exclusive  
2 waiver, as well as an implied waiver. The explicit  
3 waiver, Your Honor, they're relying on the five  
4 assignments that they have received from the five  
5 correctional officers.

6 THE COURT: Are they still employed by the South  
7 Carolina Department of Corrections?

8 MR. LINDEMANN: These actually were Berkeley County,  
9 local detention center.

10 THE COURT: Okay.

11 MR. LINDEMANN: And, you know, Your Honor, I know one  
12 of them is living in Pennsylvania, so I can tell you one  
13 of them definitely is not. I don't represent them and I  
14 never did, but I'm not certain.

15 THE COURT: Just a question.

16 MR. LINDEMANN: Right. I understand, Your Honor.  
17 Anyway, the waivers -- initially, the waivers weren't  
18 properly executed. I will consider them executed.  
19 Anyway, they provide the following: The undersigned  
20 expressly waives any attorney/client privilege concerning  
21 his or her prior representations in civil action and gives  
22 the Federal Court civil action. These are the key  
23 language: To the extent necessary to assist in the  
24 pursuit of any litigation arising from this assignment.

25 So it's a partial waiver, it's not a complete waiver

1 and it only addresses the attorney/client privilege. It  
2 specifically says waives any attorney/client privilege.  
3 Did not waive work product that. Work product belongs to  
4 the client.

5 So, ultimately, Your Honor, I don't think this  
6 explicit waiver argument gets anywhere for them because,  
7 as I said, it's a partial waiver. It's pretty nebulous to  
8 what that means, to the extent necessary to assist in the  
9 pursuit of any litigation arising from this assignment.

10 I mean, where does the Court draw the line, where do  
11 the parties draw the lines in determining whether it fits  
12 within that partial waiver or not, number one. Number  
13 two, as I indicated, there is no waiver, explicit waiver  
14 of the work product privilege. And number three, and most  
15 importantly, as I mentioned a few moments ago, this case  
16 didn't involve simply these five defendants from the very  
17 beginning.

18 The federal case involved numerous defendants. I  
19 give a list of them on Page 4 of my memorandum of law. It  
20 includes Sheriff DeWitt, Berkeley County, Berkeley County  
21 Sheriff's Department, a host of other correctional  
22 officers were also named and at various times, fell out of  
23 the case. But all those people and their claims are part  
24 of this lawsuit. They are represented by the same  
25 lawyers, so there was a common interest.

1 And the common interest doctrine, we would submit,  
2 applies and the common interest doctrine, of course, is  
3 recognized in South Carolina in the *Tobaccoville USA vs.*  
4 *McMaster* case.

5 The Supreme Court recognized that doctrine, actually,  
6 relied on a Fourth Circuit case, which provides some  
7 additional information about the doctrine, but the key  
8 language from the *McMaster* case is it says that the common  
9 interest doctrine, Your Honor, is not a privilege itself,  
10 but it's an exception to the waiver of an existing  
11 privilege. And the court specifically said, thus,  
12 information covered by the common interest doctrine shall  
13 not or cannot be waived without consent of all parties who  
14 shared the privilege.

15 Well, the only thing that they have provided the  
16 Court with is a waiver from five correctional officers.  
17 They didn't provide a waiver nor, to my knowledge, has any  
18 of the other Defendants in the federal litigation ever  
19 been consulted nor are they before this Court in any way.  
20 They have not been joined in this case.

21 I don't believe that they've been given any type of  
22 notice that their rights are at stake here. And so, I  
23 don't believe that the Court can find an explicit waiver  
24 simply because five out of some 15 to 20 defendants who  
25 are jointly represented by the same lawyers waived

1 their -- or partially waived an attorney/client privilege.

2 So bottomline is all these other individuals have a  
3 complete attorney/client privilege and all those other  
4 individuals have a complete work product privilege that  
5 has not been explicitly waived. So I think that takes  
6 care of the explicit waiver part of the case.

7 Now, the implicit waiver, the implied waiver is a  
8 little bit more complicated and that's where the Munt  
9 Holly case comes in, Your Honor. Quite frankly, in  
10 talking with Plaintiff's counsel, you know, we have very  
11 different reads on Munt Holly.

12 When Munt Holly came out, it was like oh, does it  
13 help them? Does it help us? They think it helps them I  
14 think it helps the IRF. And obviously, you'll be the  
15 arbitrator of that, Your Honor. But the bottomline is,  
16 in answering the certified question, South Carolina  
17 Supreme Court did not agree with Judge Lloyd. They did  
18 not adopt per se what's called the Hearn vs. Rhay test  
19 that comes out of a Washington State case.

20 What they did was they adopted what they, in fact,  
21 called a middle ground approach that requires a quote  
22 case-by-case analysis of the facts. And what's  
23 interesting is at the very beginning of their opinion and  
24 discussion in this issue, the South Carolina Supreme Court  
25 addresses that there are three different approaches to

1     t h i s .

2             And I do want to highlight one point and, actually, I  
3     didn't include this in the brief and I should have, but  
4     when they described the first approach, which they say,  
5     quote, a substantial minority of jurisdictions have  
6     broadened the crime fraud exception to the attorney/client  
7     privilege and found that the privilege does not extend to  
8     any communications in furtherance of any crime or tort,  
9     including bad faith insurance claims.

10            Okay. They then go on to say that these  
11     jurisdictions have typically found that the entire  
12     pre-denial claim file is discoverable. And that's why  
13     this is important and I should have put it in my brief.  
14     They're talking about the claim file. That's what this  
15     case is about.

16            Those jurisdictions found that that's typically  
17     discoverable. They say we reject it. They rejected that  
18     approach. They recognize, they say, while this approach  
19     would certainly promote South Carolina's policies in favor  
20     of promoting broad discovery and holding insurers  
21     accountable when they act in bad faith, we reject it as  
22     the approach places only nominal value on the importance  
23     of the attorney/client privilege. So that right there  
24     shows they were not adopting the Hearn vs. Rhay test.

25            What is also important in looking at Mount Holly is

1     Mbunt Holly doesn't deal with on all fours with what we  
2     have here. Because in Mbunt Holly, it was a case that  
3     turned on a purely legal issue. I believe it was a  
4     stacking issue as to what Mr. Johnson said.

5             What happened in that case is there was a contention  
6     that the stacking laws that were applicable to the  
7     underlying litigation there were unclear. The insurance  
8     company, Mbunt Holly, retained counsel to provide legal  
9     advice as to how to interpret and apply the stacking laws,  
10    a purely legal question. And, ultimately, when they got  
11    sued for bad faith, they relied on and indicated a  
12    reliance on the advice of counsel.

13            So what the South Carolina Supreme Court did with  
14    that is they basically said if you've got a purely legal  
15    question and you're relying on legal advice to show that  
16    you acted reasonably, well, you can't just throw that out  
17    and not allow the plaintiffs bringing the bad faith claim  
18    to be able to look at what that advice was. You don't  
19    have to just take their word for it, in essence.

20            So that's what this case was about. They actually  
21    specifically talk about the fact that they were laying out  
22    a standard for whether or not the attorney/client  
23    privilege has been waived in a bad faith claim. But this  
24    is important, it's in a bad faith refusal to provide  
25    coverage case.

1           So it's a case where the insurer denied coverage.  
2           That's not this case. At no point did Insurance Reserve  
3           Fund deny coverage. This is a different type of bad faith  
4           case. This is a Tyger River bad faith case, failure to  
5           settle within policy limits.

6           So, ultimately, Munt Holly isn't on all fours with  
7           what's facing this Court in this case. Now, I think Munt  
8           Holly also gives very good indication to you how you  
9           should rule in this case and what framework you should  
10          apply because as I indicated, Munt Holly, the Supreme  
11          Court focused on whether or not there is a legal question  
12          on which legal advice was obtained from counsel. None of  
13          that is asserted in this case. I can submit to Your Honor  
14          that the issue in the underlying case was whether or not  
15          there was deliberate indifference because he was -- the  
16          plaintiff was a detainee, whether there was a deliberate  
17          indifference under the 14th Amendment.

18          Deliberate indifference standard, I don't know if  
19          Your Honor had a chance to deal with it. I know you don't  
20          get too many 1983 cases that stay in State Court, but it  
21          is a well settled area of law. There are literally dozens  
22          of United States Supreme Court cases and literally  
23          hundreds of Fourth Circuit and district court cases  
24          dealing with the standard.

25          This case didn't turn on what the law required. It

1 turned on an evaluation of the facts of this case and what  
2 the Plaintiff's damages were and what the potential  
3 recovery could be, a typical risk analysis, a typical  
4 claims analysis. And that's not what Mount Holly is  
5 about.

6 Supreme Court isn't telling Mount Holly you've got to  
7 produce your adjustor's subjective evaluations of how they  
8 approached this case. No, it was limited to the advice  
9 that you received on purely a legal question.

10 And it's clear from one of the quotes from the  
11 Arizona case and, in fact, I'm going to read this quote to  
12 you. It says, quote, we assume client and counsel will  
13 confer in every case trading information for advice. This  
14 does not waive the privilege. We assume most, if not all,  
15 actions taken will be based on counsel's advice. This  
16 does not waive the privilege. Based on counsel's advice,  
17 the client will always have subjective evaluations of its  
18 claims and defenses. I'll say that again, the client will  
19 always have subjective evaluations of its claims and  
20 defenses. This does not waive the privilege. All of this  
21 occurred in the present case and none of it, separately or  
22 together, created an implied waiver.

23 Then the court goes on and reads the "but" that he  
24 claims that I didn't include in my brief, and I did  
25 include in my brief because the language from the -- that

1 follows is the distinguishing factor. And, in fact, the  
2 distinguishing factor is this.

3 It's where the insurer claims its actions were the  
4 result of a reasonable and good faith belief that its  
5 conduct was permitted by law and its subjective belief  
6 based on its claims of agent's investigation into and  
7 evaluation of the law. Evaluation of the law. That's  
8 what this case turned on. This case does not turn on  
9 evaluation of the law. This case turns on what they point  
10 blank called subjective evaluations of the claims and  
11 defenses. And they followed that by saying that does not  
12 waive the privilege.

13 So I think the Mount Holly case actually points this  
14 Court in the correct direction into how to deal with this  
15 case even in a Tyger River failure to settle bad faith  
16 format.

17 With that said, so I don't believe that there can  
18 even be an argument that there's an implied waiver here.  
19 Clearly, we have not argued that IRF properly evaluated  
20 this case or relied on any type of legal issue that was  
21 determined by legal counsel. That has not been the claim  
22 here. As I indicated a second ago, the law in the  
23 underlying case was incredibly clearly established.

24 In addition, we didn't raise advice of counsel or  
25 good faith, reliance on counsel as an affirmative defense

1 in this case. And what's important is when Judge Norton  
2 decided the ContraVest case, he found following the Hearn  
3 versus Rhay test that, in essence, there is a per se  
4 implied waiver in a bad faith case. If you defend  
5 yourself -- if an insured defends itself in a bad faith  
6 case by saying we acted reasonably, you have brought in --  
7 essentially, you have implied to be waived any type of  
8 privileges.

9 The South Carolina Supreme Court soundly rejected  
10 that. In fact, they have said, we emphasize the sanctity  
11 of the attorney/client privilege. In this regard, the  
12 client does not waive the privilege simply by bringing or  
13 defending a lawsuit.

14 We adopt the framework in a tort action against an  
15 insured for bad faith or refusal to provide coverage and  
16 we impose the additional requirement that the party  
17 seeking waiver of attorney/client privilege make a prima  
18 facie showing of bad faith. And I'll get to that in a  
19 moment.

20 So the simple fact that they brought a bad faith case  
21 and we are not rolling over and we are actually denying  
22 that we acted in bad faith is not an implicit waiver. So  
23 under the Munt Holly standard, Your Honor, we don't  
24 believe they can show that there's been any implied waiver  
25 in this case.

1 But let me take that a step further. I mentioned  
2 earlier that you've got the situation with work product  
3 privilege. The South Carolina General Assembly, Your  
4 Honor, provides -- first of all, we've got the common law  
5 work product privilege under Rule 26, which was adopted in  
6 the federal rules, but we've got a statutory standard, as  
7 well. And I thought I had a copy of it, if I could hand  
8 this up. 1-11-140, Your Honor, is the enabling  
9 legislation which created the Insurance Reserve Fund and  
10 allows for the writing of insurance by the State of South  
11 Carolina. We deal with 1-11-140(a) all the time, but  
12 1-11-140(g) on the second page is what I'm relying on.

13 The South Carolina General Assembly provided the  
14 Insurance Reserve Fund with work product privilege. That  
15 section says, documentary or other material provided by or  
16 for the insurance reserve fund in providing any insurance  
17 coverage authorized by this section or any other provision  
18 of law which is contained in any claim file is subject to  
19 disclosure to the extent required by the Freedom of  
20 Information Act only after the claim is settled and  
21 finally concluded by a court of competent jurisdiction.

22 So there are two problems with that. Number one,  
23 that preserves all the rights under the Freedom of  
24 Information Act. The Freedom of Information Act has an  
25 exemption for attorney/client privilege. And number two,

1 it only applies the waiver -- there's a waiver after the  
2 claim has settled or resolved. Finally concluded are the  
3 words.

4 Well, this litigation has not finally concluded. The  
5 Plaintiff has received an assignment in this case. We've  
6 got this cases pending. We've got the 2015 declaratory  
7 judgment action pending.

8 So, ultimately, Your Honor, this waiver, we would  
9 contend, is in place and provides a work product privilege  
10 for the insurance reserve fund and protects its entire  
11 claims file, which is what we're here about today.

12 Let me touch on one last thing real quickly on the  
13 motion to compel. This will sort of bleed over to the  
14 motion for summary judgment. As I indicated, the one --  
15 and Mr. Johnson mentioned this, as well. The South  
16 Carolina Supreme Court went with the Arizona standard, but  
17 they added an additional requirement.

18 They said we impose the additional requirement that  
19 the party seeking waiver of the attorney/client privilege  
20 make a prima facie showing of bad faith. We contend, Your  
21 Honor, you can resolve this issue simply by finding  
22 there's no prima facie showing of bad faith.

23 What I heard Mr. Johnson say is their prima facie  
24 showing is --

25 THE COURT: You didn't tender the policy limits.

1 MR. LINDEMANN: I'm sorry, Your Honor.

2 THE COURT: That you didn't tender the policy limits.

3 MR. LINDEMANN: That we didn't tender the policy  
4 limits and they recovered a verdict in excess of it. But  
5 what they actually -- just so you know the background of  
6 it, Your Honor. Ultimately, the policy limits of \$600,000  
7 was tendered two months before trial. The case went to  
8 trial October of 2014.

9 The policy limits were tendered in August of 2014 and  
10 were rejected. At that point, there was a \$3 million  
11 demand made. Well, that doesn't trigger Tyger River.

12 So what their contention is, is earlier in the  
13 litigation -- this litigation has spanned over two years.  
14 Earlier in the litigation, they claim that they made a  
15 demand of a \$1 million, and they claim that that was made  
16 at mediation and Berkeley County was going to contribute  
17 400,000 and the Fund was going to contribute their policy  
18 limits.

19 Well, there are a couple of problems with that.  
20 Number one, for them to be able to present evidence of  
21 that, they have to violate the mediation confidentiality  
22 privilege rule, which is Rule 8(a) of the rules of ADR.

23 Because what happens in a mediation -- and we've  
24 raised this as a privilege in our privilege log, as well.  
25 What happens in a mediation -- and I'm not going to

1     acknowledge whether it's true or not because it's just  
2     immaterial and not discoverable because -- and that's  
3     their basis for contending that they ever made a demand  
4     for 600,000 earlier in the case because there was never a  
5     demand for just \$600,000. They never made a demand saying  
6     this will -- \$600,000 will settle the case. Never. Their  
7     lowest demand was a million dollars.

8             Now, it took a while for the Insurance Reserve Fund  
9     to offer \$1 million. At some point between the mediation  
10    and trial, an offer was made of \$500,000 on an offer of  
11    judgment. A copy of that is attached to the complaint.

12            And then, ultimately, in August of 2014, again, two  
13    months before trial, an offer was made of the full  
14    \$600,000. We contend that that satisfies the Tyger River  
15    requirements.

16            There's nothing in the Tyger River analysis or in the  
17    case law and you asked -- you asked them do they have a  
18    case that says per se a failure to tender policy limits  
19    per se doesn't constitute bad faith. There is no such  
20    case.

21            More importantly to this case, there is no case that  
22    says per se if you offer it eventually -- and I'm not  
23    talking on the eve of trial or the middle of trial, even  
24    though, you know, that's probably debatable whether that  
25    takes care of Tyger River, as well, this was two months

1 before trial.

2 I mean, cases develop -- literally dozens of  
3 depositions were taken in this case. 6,000-page claim  
4 file should give you some idea how much work was done on  
5 this case. The bottom line is, it is admitted. It is not  
6 disputed that we offered our policy limits and that they  
7 never came down to \$600,000. And at the point we offered  
8 our policy limits, they wanted \$3 million, and I think  
9 slightly off of that there was some negotiations between  
10 then and trial, but not significantly, not anywhere close.

11 So those facts, Your Honor, which are undisputed, in  
12 fact, they're relevant documents that are attached to the  
13 complaint do not give rise to a prima facie finding of bad  
14 faith under Tyger River for failure to tender policy  
15 limits.

16 So we contend -- and that's going to be our argument  
17 you'll hear in a minute on summary judgment, that they  
18 simply haven't presented a claim. And the only way they  
19 can try to suggest otherwise is to go into what happened  
20 during the mediation and that's not admissible evidence.  
21 So if it's not admissible evidence at trial in front of a  
22 jury, it's not admissible evidence for being able to show  
23 a prima facie case.

24 And one last point on the prima facie case issue,  
25 Your Honor. I would also submit that if you look at their

1 motion to compel on page two, they don't even say this  
2 conclusively. They say upon information and belief,  
3 Berkeley County was willing to pay the \$400,000, but the  
4 tentative settlement agreement fell apart when Defendant  
5 IRF refused to tender their policy limits. And then the  
6 previous sentence makes clear, in fact, it starts at a  
7 mediation conducted over a year prior to trial Plaintiff  
8 offered to accept \$1 million to settle.

9 So it references -- this all happened at mediation.  
10 And they say upon information and belief. And I cited in  
11 my memorandum Your Honor, some case law that talks about  
12 when evidence is presented upon information and belief, it  
13 is inherently inadmissible.

14 And there's a case out of the District of Maryland,  
15 Howard Acquisitions, LLC v. Giannasca New Orleans case,  
16 statements made upon information and belief are  
17 inadmissible and will not be considered; a case out of the  
18 Southern District of Georgia, Martin vs. Housing Authority  
19 City of Douglas, "Statements based upon information and  
20 belief rather than on personal knowledge do not constitute  
21 evidence sufficient to establish a prima facie case." And  
22 that's the evidence that they're presenting to this Court  
23 to establish a prima facie case. It's not evidence, it's  
24 not admissible and on top of that, it shouldn't be  
25 admissible and considered by the Court because of the ADR

1 Rule 8(a).

2 Your Honor, that might be the best way to dispose of  
3 this case with all candor to the Court because before  
4 Mount Holly, we didn't know whether that was an actual  
5 requirement, but for a motion to compel claims file and  
6 things of that nature.

7 The Supreme Court has definitely made that clear,  
8 that a party simply can't get wholesale discovery or  
9 claims information and claims file by simply alleging bad  
10 faith. You've got to do something more than allege it.  
11 You've got to make a prima facie showing of it. And they  
12 failed to do that. All you've got is an allegation, some  
13 of which are upon information and belief.

14 So on all of those bases, Your Honor -- and again, I  
15 would make one last point, too. The work product  
16 privilege that I indicated earlier, they have not been  
17 waived at all by the assignors, the five correctional  
18 officers, and they have not been waived at all by any of  
19 the other defendants whose correspondence, whose  
20 communications, whose attorneys' communications are all  
21 included in that claims file, what they want produced. So  
22 there has not been a waiver filed. Most parties aren't  
23 even before this Court. And we would submit, Your Honor,  
24 that those should be protected. Thank you.

25 MR. STALEY: Judge.

1 THE COURT: I need to take a break.

2 (WHEREUPON, a short break was taken.)

3 MR. STALEY: Judge Manning, I do not want to belabor  
4 this.

5 THE COURT: Look, let me help both of you guys out.  
6 I have nothing else in front of me. I have nothing to do.  
7 Do your job the best you can. Say what you need to say.

8 MR. STALEY: Thank you, Judge.

9 THE COURT: Plus, you know I'm going to make you  
10 submit proposed orders anyway. I can't decide this case  
11 today.

12 MR. STALEY: Sure.

13 THE COURT: I may be on the road, but I won't be in  
14 town. Do the best you can. That's all I'm saying. Take  
15 your time.

16 MR. STALEY: Thank you for that, Judge. I am going  
17 to be brief because I think they've both done a very good  
18 job. I would like to point out, I was involved in the  
19 negotiations.

20 We were blessed to have Mr. Lindemann who's joined us  
21 kind of years down the road. But I was involved in that  
22 mediation, and I was involved in the negotiations and what  
23 we think the --

24 THE COURT: Who tried the case?

25 MR. STALEY: I did.

1 THE COURT: For the Government?

2 MR. STALEY: Rick Corrigan and Jimmy Stuckey and  
3 Alyssa Leadso and Jimmy Story. There were four lawyers on  
4 the other side and me and Tommy Pope and Garrett and Drew  
5 on our side, Judge.

6 THE COURT: Tommy Pope?

7 MR. STALEY: Tommy Pope. That's my firm Elrod Pope.

8 THE COURT: Okay.

9 MR. STALEY: But just I was involved in the  
10 negotiations. And what's at heart here is at mediation,  
11 and since it's been brought up and I think it is an  
12 important distinction here. This is not a case where we  
13 just said we wouldn't take 600,000. This is a case where  
14 the Defendants themselves saw how dangerous this case and  
15 how bad this case was and how a man over a three-day  
16 period wasted away in front of everyone's eyes and died in  
17 front of everybody and how he was ignored. That's what  
18 this case is about.

19 And the county was so concerned about it that the  
20 county, when we left mediation, they were going to County  
21 Council to get 400,000 to get it settled as long as the  
22 IRF tendered that.

23 So what happened at this mediation was it was  
24 officially offered this case can go away right now.  
25 They're right, two months before trial, but what

1 Mr. Lindemann neglected to say -- and I'm sure it wasn't  
2 intentionally -- I think 14, 15 months went by after  
3 mediation before it was actually tendered.

4 Our understanding is what these privilege logs and  
5 all these documents are going to show is that the county  
6 was, in fact, going to pay 400 in addition to the policy  
7 of six.

8 And I'll tell you, Judge, how the million came up,  
9 because, initially, in the case, we were told there was \$1  
10 million in coverage. So when we're prepping clients  
11 getting ready, saying the most we really can get -- so if  
12 they put up a million, then shortly there during the  
13 mediation or the day before, it was brought to our  
14 attention we don't have a million.

15 So this million number wasn't some arbitrary number.  
16 It was kind of what everybody was shooting for, and then  
17 it was determined they only had 600 in coverage. But then  
18 the county stepped up, and we think it's going to bear out  
19 in all of these documents.

20 What's going on, Judge, and if you read the  
21 interpretation that Mr. Lindemann wants to say, first of  
22 all, he brings out upon information and belief. We all  
23 know you put information and belief if it's my mom's name.  
24 Things happen in cases. You plead everything under  
25 information and belief.

1           We don't have the documents. I was involved in the  
2       conversations. I'm confident those documents exist, but  
3       it is information and belief. If I had them in hand, I  
4       would have attached them to the complaint and just cite  
5       it.

6           So this fact that somehow -- you don't prove your  
7       case in a pleading. We're a notice pleading state. You  
8       prove your case by discovery, by getting handwritten  
9       answers and also documents.

10          But, Judge, just without that, I can't go take  
11       Sheriff Dewitt's deposition and ask him "Isn't it true  
12       the county was going to pay four?" Because what he's  
13       going to say: "That's confidential, you can't answer  
14       that."

15          At the root of what he's doing is exactly what this  
16       case says you can't do. He's using it as a sword and a  
17       shield. He wants to argue to you, Your Honor, hey, my  
18       clients did everything right. We didn't do anything wrong  
19       in this process. We adjusted the claim and just came up.

20          Even though their own client was coming out of pocket  
21       400,000 to settle it and they wouldn't pay the policy.  
22       They go, "We did everything right." Then they want to use  
23       it as a sword.

24          The Court says but they also want to do what, use it  
25       as a shield and say, but I don't have to give you

1 anything. I get -- you just have to take my word we acted  
2 in good faith.

3 And I'm here to submit to you, Judge, if that's the  
4 reading, and that's not what this case says, I'm convinced  
5 of that, but if that's what the Court ultimately  
6 determined, Tyger River is going away. You won't be able  
7 to prove a Tyger River case. You can't prove a prima  
8 facie case without going through discovery and getting  
9 documents. You can't do that. And that's exactly what  
10 this Court -- and they cite Arizona. And I've read better  
11 opinions.

12 I've felt like, it's kind of a circular opinion, but  
13 the substance of what they say, Judge, is just that. You  
14 cannot use it as a sword and shield. You can't do it, and  
15 that's what's going on.

16 In regards, Judge, to this explicit waiver of the  
17 people that we have, they're the only parties to the suit.  
18 Everybody else is out. Statute of limitations are run.  
19 There is no privilege that attacks the summons that's no  
20 longer part of this lawsuit and faces no consequence from  
21 it.

22 So, Your Honor, I will tell you, this opinion. I had  
23 to read it multiple times. I'm just a country boy from  
24 Moncks Corner originally, but it's not the easiest case --

25 THE COURT: You're from Moncks Corner or a beach bum?

1 MR. STALEY: I'm from Fairlawn, which is right in  
2 Mncks Corner.

3 THE COURT: All right, sir.

4 MR. STALEY: But I know Bonneau very well and Wampee  
5 very well, over in Wampee Estates in Santee Cooper's  
6 hands. But in any event, that's essentially what's going  
7 on here, Your Honor. You know, we are prepared to move  
8 forward.

9 And let me just tell you why it guts -- if you take  
10 this interpretation, it guts our ability to do this. He's  
11 filed a motion to dismiss if we can't prove our case when  
12 he's got all the documents that prove it. And we've  
13 thought about, maybe we should go take some depositions,  
14 but to spare us all time, because I know what Andrew would  
15 have done, the minute I walked in and started getting into  
16 the substance of what they were communicating to their  
17 lawyers, settle the case, settle the case, settle the case  
18 and when they refuse to tender the policy, all of that is  
19 going to be objected to.

20 And that's what these documents, we're convinced --  
21 and that's why we say information and belief. Until we  
22 get them, we don't know. I'm pretty sure I know.

23 So, Judge, we would urge you -- and the last thing I  
24 would just say, if the Court's concerned -- there are  
25 things as a lawyer's lawyer, as we practice, we can do

1 confidentiality. Just because you turn them over doesn't  
2 mean it's going be admissible, doesn't mean it's going to  
3 see the light of day outside.

4 The next hearing you're going to hear, you're going  
5 to hear Mr. Lindemann argue we can't prove our prima facie  
6 case, can't prove it and you need to dismiss the whole  
7 thing. So he is being very masterful at using this as  
8 exactly the court said you can't, which is a sword and a  
9 shield. Thank you, Your Honor.

10 THE COURT: Yes, sir.

11 MR. LINDEMANN: Thank you, Your Honor. I think  
12 Mr. Staley is giving me more credit than I deserve. I'm  
13 not being masterful at all. I am not using it as a sword  
14 and a shield. I'm using it as a shield because that's  
15 what privileges do.

16 Attorney/client privilege is something obviously  
17 courts in this State take very seriously, work product  
18 privilege, as well. And, you know, the bottomline is the  
19 General Assembly has given the insurance reserve fund a  
20 specific work product privilege in this case and that  
21 governs in this case. And --

22 THE COURT: I think his point --

23 MR. LINDEMANN: That is potentially --

24 THE COURT: I think the Plaintiff's point is that you  
25 unilaterally decided what --

1           Let me help you both out a little bit. I've had two  
2 cases not exactly, but it was similar. I sort of  
3 appointed a special referee to review the file in camera  
4 and she issued a report to me. I might be inclined do  
5 something like that. I don't know yet. I haven't decided  
6 yet. But I don't think one side can say it is or it  
7 isn't.

8           Somebody, maybe a neutral person to look at it,  
9 that's probably a judge, but I don't want to assume they  
10 have the time to do that, so I would consider it. You can  
11 pick one, a referee, look at it, make any sense of it and  
12 report to me. I'm not going to have time do it. I  
13 haven't decided that yet. I'm just thinking about that.  
14 I think that might be the fairest way to approach this,  
15 eliminate a lot of things. But at the same time, I'm not  
16 issuing a ruling. This is an observation.

17           I will still invite y'all to submit proposed orders.  
18 After I read the orders, if I still so feel this way, I  
19 think I might ask somebody to take a closer look, somebody  
20 who's -- I've used Ms. Seymour at times. There's somebody  
21 out there. They could be a referee, take the time, look  
22 at this, say this is what I think, Judge, do you agree,  
23 disagree.

24           There's got to be some help in the process, I agree.  
25 I don't think you're entitled to say it is unilaterally.

1     Probably, unfortunately, a judge may have to look at it  
2     and make a decision.

3             But go ahead.

4             MR. LINDEMANN: Well, my thought on that, Your Honor,  
5     is using a special referee for that purpose would probably  
6     be useful in a case where the arguments are basically, you  
7     know, this piece of paper is privileged.

8             Granted, we've got a privilege log, and there's a lot  
9     to look at. If it gets to that point, I fully understand  
10    you don't want to look at every one of those e-mails and  
11    every one of those documents.

12            Putting the privilege log together almost killed me.  
13    I guess my point is that I don't know that you need to get  
14    there because the first question is purely a legal one,  
15    and that's whether or not under Mount Holly --

16            THE COURT: That's why I said you'll have a chance to  
17    submitted proposed orders, I could read the cases, take my  
18    time. I'm not going to be in a hurry. But if I still  
19    don't feel comfortable --

20            MR. LINDEMANN: Sure.

21            THE COURT: -- I might decide on a referee. This is  
22    not a ruling. This is an observation. Gentlemen, I have  
23    to look at it. I have to read it. I have to consider the  
24    arguments you've made and read every case you pointed out.  
25    It's going to take a little bit of time.

1 MR. LINDEMANN: Your Honor, do you want to hear on  
2 the summary judgment?

3 THE COURT: Yes, sure.

4 MR. LINDEMANN: Incidentally, Your Honor, if I can,  
5 here is the memorandum that I e-mailed them to you, as  
6 well. And I think Mr. Johnson --

7 THE COURT: Mr. Johnson, where are you from?

8 MR. JOHNSON: Fort Mill, Your Honor.

9 THE COURT: Fort Mill?

10 MR. JOHNSON: Yes, sir.

11 THE COURT: They do have a mill.

12 MR. JOHNSON: They do. There's not many people there  
13 anymore.

14 MR. STALEY: You'll appreciate this. Garrett's  
15 proactive in the Department of Education teaching kids  
16 mock trials. Garrett was one of my mock trial kids. I  
17 met him when he was 14 years old.

18 THE COURT: That's fine.

19 MR. STALEY: It's a good kind of --

20 THE COURT: Somebody from the Solicitor's Office is  
21 from Fort Mill. Do you know him?

22 (Whereupon, there was an off-the-record discussion).

23 THE COURT: Don't worry about it.

24 I'm sorry, Mr. Lindemann. You may proceed on your  
25 motion for summary judgment.

1 MR. LINDEMANN: Thank you, Your Honor. And,  
2 obviously, all the background that we provided to the  
3 Court applies to this, as well.

4 There's several legal grounds that we've raised for  
5 summary judgment, Your Honor. First of all, I raised the  
6 statute of limitations. What the Plaintiff has brought,  
7 Your Honor, is a breach of contract claim

8 And again, it's important to remember the Plaintiff,  
9 while she was the Plaintiff below, she is bringing this as  
10 the assignee of the five correctional officers based on  
11 the assignments that they provided to her.

12 The assignments, Your Honor, are also part of the  
13 Court's docket already based upon being attached to the  
14 complaint because they do play a part also in the summary  
15 judgment motion, but the causes of action are for breach  
16 of contract, for negligence and for bad faith. And,  
17 again, it's bad faith refusal to pay settlement -- pay the  
18 policy limits.

19 And, ultimately, Your Honor, we believe that this  
20 claim is barred by the statute of limitations. It was  
21 filed on November 6th, 2015. There's a previous suit that  
22 was brought in 2015 that's before Judge Lee. Actually,  
23 Judge Lee just issued an opinion two days ago. I'm sure  
24 you'll hear about that in a moment, but that dealt with a  
25 purely statutory construction issue. And that case was

1 actually brought by Ms. Morris, individually, not as an  
2 assignee.

3 But the bottom line is that suit was brought in 2015.  
4 This one was brought in 2017, November 6th, 2017. The key  
5 date to consider, Your Honor, is that the trial in federal  
6 court took place in October of 2014. The judgment was  
7 entered October 21, 2014. So everything that they're  
8 arguing about failure to settle prior to trial occurred  
9 prior to October of 2014.

10 So breach of contract is going to have a three-year  
11 statute of limitations. The negligence and the bad faith  
12 and, of course, South Carolina recognizes bad faith as a  
13 tort. So it falls under a Tort Claim Act with a two-year  
14 statute of limitations. So we contend that this case can  
15 be dealt with very easily based upon the fact that the  
16 statute of limitations has run at this point in time.

17 Now, the statute of limitations doesn't run from the  
18 judgment. It doesn't run from the appeal date because  
19 what they're arguing are things that took place before  
20 that.

21 THE COURT: Before the trial?

22 MR. LINDEMANN: Before the trial. Just so the Court  
23 is clear, you asked this question earlier. I didn't touch  
24 on it, but obviously, post-trial, almost a million dollars  
25 had been paid between -- first of all, Judge Gergel

1 granted a set off on the actual damages. The actual  
2 damages against the five officers ended up being \$171,000.  
3 The jury returned \$500,000 on actual, which would have  
4 fallen within the policy limits incidentally.

5 So, ultimately, the jury then returned verdicts of a  
6 million dollars each in punitives against two of the  
7 Defendants and \$150,000 in punitives against three. So  
8 out of the entire judgment -- entire verdict, there are  
9 five separate judgments of punitive damages totaling \$2.45  
10 million. So that's where the majority of it is.

11 But the bottomline is the IRF has tendered \$600,000,  
12 which is the policy limits, and has also paid attorneys'  
13 fees that were awarded in the federal court, as well, on  
14 interest that had accrued on that settlement.

15 My point in mentioning all that is that all happened  
16 post-trial. That's not at issue in this litigation.  
17 Everything that's at issue in this litigation is whether  
18 we properly advised the insureds, whether we properly  
19 tendered the limits, whether we properly handled the  
20 settlement negotiations.

21 All of those actions took place prior to trial, so we  
22 know they took place either in October 2014 or before  
23 that. Clearly, more than three years before the filing  
24 date of this case.

25 So we believe that this case can be simply resolved,

1 Your Honor. That's why I would ask the Court to entertain  
2 the motion for summary judgment with any conjunction with  
3 the motion to compel because it might make the motion to  
4 compel unnecessary. And I understand we've got a mere  
5 scintilla rule in South Carolina, but these are purely  
6 legal grounds I'm submitting for --

7 THE COURT: I guess your reference suggest that the  
8 Court may be able to count?

9 MR. STALEY: I missed that, I'm sorry, Your Honor.

10 THE COURT: I might be able to count.

11 MR. STALEY: Up to two years.

12 THE COURT: Up to two years.

13 MR. LINDEMANN: The other grounds are, Your Honor --

14 THE COURT: Up to three, I'm sorry.

15 MR. LINDEMANN: If you look at the assignments  
16 themselves -- if you look at the assignments themselves,  
17 the way they were done is the five correctional officers  
18 who all had partial judgments. Insurance Reserve Fund  
19 paid the 992 million -- I mean, the 992,000.

20 There were partial satisfactions that were entered,  
21 but each of these five Defendants still has some part of  
22 the judgments against them still outstanding. So what  
23 they have done is in exchange as to consideration for  
24 providing the assignment, Ms. Morris, the Plaintiff in the  
25 underlying case and the assignee, has extinguished all of

1 their personal liability for those judgments.

2 So as we sit here today, the assignees, Mr. Bland,  
3 Mr. Burkholder, Mr. Carner, Mr. Speissegger or Ms. Garret,  
4 none of them have any remaining liability whatsoever,  
5 personal liability.

6 And what's important to recognize, Your Honor, is  
7 that what we're dealing with is an insurance policy and  
8 it's a liability insurance policy. And the law in South  
9 Carolina is very clear that an insurer steps into the  
10 shoes of its insured. It only has liability that its  
11 insured has. So when the insured no longer has any  
12 liability, the insured doesn't either.

13 So our second argument, Your Honor, is that the  
14 judgments themselves have been extinguished by the actions  
15 of these assignments. And so, therefore, because the  
16 assignors are no longer personally liable, there's no  
17 longer any case or controversy here. And what we're  
18 relying on are two cases. One is called *Smalls vs.*  
19 *Blackmon*, where the South Carolina Supreme Court indicated  
20 that a liability policy is a contracted indemnity. And  
21 this is a quote from that case. It says, An insurance  
22 carrier is in the same legal position as its insured. A  
23 liability carrier only contracts to pay any debt the  
24 insured is liable to pay. The insured is not liable to  
25 pay anything, so there should be no issue anymore about

1 insurance -- a liability carrier being liable.

2 The other case that we cite is the case of Cobb vs.  
3 Benjamin, which is an interesting case. And it's got two  
4 twists to it. It's a UIM case. What happened in Cobb V.  
5 Benjamin is the plaintiff thought they were settling with  
6 the liability carrier before they went after the UIM  
7 Typical scenario, right? And the UIM carrier then gets a  
8 set off for whatever the liability carrier paid.

9 Well, in this particular case, after they settled  
10 with the liability carrier and went after the UIM it was  
11 learned that there was another liability policy that  
12 provided coverage. Naturally, the UIM carrier came back  
13 and said we're entitled to a set off for that amount, too.

14 So what, ultimately, was one of the questions before  
15 the South Carolina Court of Appeals, that's a 1997 case,  
16 is whether or not the plaintiff could go back after the  
17 insurer that had been discovered because he had already  
18 given a covenant not to execute to protect the personal  
19 liability of the --

20 THE COURT: It wasn't a general release, it was a  
21 covenant?

22 MR. LINDEMANN: Right, right. Now, the covenant did  
23 allow -- now, this is where Cobb gets confusing, I think  
24 it gets misinterpreted. There are two different issues in  
25 Cobb. One issue in Cobb was did they preserve the rights

1 to go after the UIM? I don't think there's any question.

2 You can in a covenant -- it happens all the time --  
3 release the at-fault driver, but still -- because it's a  
4 legal fiction that's created by our UIM statute, it  
5 allows -- essentially, you have to go after and get a  
6 judgment still against the at-fault party, but the  
7 at-fault party from the outset is not liable for it  
8 because they've been released, usually through a covenant  
9 not to execute.

10 And so part of that case was also whether or not you  
11 could properly go after the UIM I don't care. I'm not  
12 going to quibble with that. I'm not relying on that part  
13 of the case. I'm relying on the part of the case that  
14 said you can't go after insurer number two, liability  
15 insurer number two because you had already given a  
16 covenant not to execute to the at-fault driver. That  
17 makes my point.

18 The reason why I say Cobb is confusing is -- I hate  
19 to go into this, but I know they will and it's necessary  
20 for the Court to hear. The 2015 litigation that was  
21 brought by Ms. Morris against the IRF and against the SFAA  
22 involves the interpretation of 1-11-460, which is a  
23 statute, at least, part of this whole enabling  
24 legislation. I won't bore you with that. It's never been  
25 interpreted before. I guess it's going to be in this

1 case. But Judge Lee -- we'd argue that a year and a half  
2 ago -- and Judge Lee issued an opinion on Tuesday, lucky  
3 me, right before this hearing.

4 THE COURT: You mean Tuesday of this week?

5 MR. LINDEMANN: Tuesday of this week. And one of the  
6 issues that we raised was this same issue or similar  
7 issue, that bottomline is that 1-11-460 to the extent  
8 that they're arguing it's excess insurance, and we all  
9 consider it excess insurance, but that it would work the  
10 same way, that they've exhausted -- that they've  
11 extinguished the personal liability.

12 And if we can provide you a copy of her opinion, she  
13 doesn't cite Smalls and she doesn't cite my argument. She  
14 clearly misunderstood my argument and we're going to deal  
15 with that in a 59(e) motion, which is not due until next  
16 Friday. But she says -- she looked at Cobb and addressed  
17 it based on the part of Cobb that has no relevance to  
18 this. Saying oh, it was a broad enough reservation of the  
19 ability to go after the UIM carrier. That's not what I'm  
20 arguing. What I'm arguing is the first part of Cobb,  
21 which is if you provide a dismissal or extinguishment of  
22 the personal liability of an insured, the insured no  
23 longer has any liability.

24 And so I don't know how Judge Lee's ruling will  
25 ultimately affect this issue that's before, Your Honor. I

1 don't know that you're necessarily bound by it. Her  
2 decision is certainly not final. There's going to be a  
3 motion to reconsider.

4 I can tell the Court that with all certainty and  
5 there is going to be an appeal whoever, ultimately, loses  
6 after the 59(e). But I did want to make certain you knew  
7 about that decision because it did come out Tuesday. But  
8 like I said, I don't think you're bound by it. I think  
9 when you look at it, you'll see that it doesn't decide the  
10 issue that I am raising.

11 Lastly, Your Honor, they have asserted several  
12 contractual claims. As I said, the first cause of action  
13 in the complaint is a breach of contract. They have  
14 alleged several things, failure to consult with -- failure  
15 to consult as to the IRF's objection to Plaintiff's  
16 reasonable offer to settle with the -- they have,  
17 basically, four out of the five correctional officers.  
18 That's not a contractual duty.

19 They've admitted in answers to interrogatories that  
20 we've adopted -- that we've attached to our motion for  
21 summary judgment, but that doesn't arise out of a  
22 contractual duty. There's nothing in the policy itself  
23 that requires that.

24 The next one is to discuss any offer prior to  
25 rejecting with counsel for four of the five correctional

1 officers. Again, that's not a policy requirement. It's  
2 not in the policy. And it goes through two or three  
3 others. That's the same argument we made for each one.  
4 Each of those are not contractual duties. In order for  
5 you to bring a breach of contract claim in this settlement  
6 -- now, a failure to provide insurance coverage can be  
7 brought as a breach of contract claim because a breach of  
8 contract -- insurance contracts requires you to provide  
9 coverage, the insuring agreement. That's where you see  
10 breach of contract claims. This is not that. This is a  
11 Tyger River bad faith failure to settle case.

12 So we'd move for summary judgment on the breach of  
13 contract claim because this isn't a proper breach of  
14 contract claim. There are no contractual duties, but  
15 there were several that were breached.

16 Lastly, Your Honor, it's, basically, the argument  
17 you've already heard and it was addressing the whole idea  
18 of lack of a prima facie bad faith case. What the  
19 evidence in this case shows, even if you take the whole  
20 position about the mediation -- and again, I contend  
21 absolutely that is inadmissible what happened at a  
22 mediation under Rule 8(a). But the bottom line is, Your  
23 Honor, it is undisputed in the documents that are before  
24 the Court attached to the complaint that the insurance  
25 reserve fund made an offer of their limits in August 2014.

1 They increased it.

2 They offered \$500,000 sometime before that with an  
3 offer of judgment. And as the case progressed through  
4 discovery, they offered \$600,000 to settle the case, and  
5 it was rejected by the Plaintiff's counsel.

6 At that point in time, their demand was \$3 million.  
7 I don't know of anything where they demanded \$600,000 or  
8 less. I don't know of any document that would reflect  
9 that they demanded \$600,000 to settle this case. The  
10 lowest demand, and I think Mr. Stalely just conceded that,  
11 was a million dollars.

12 So they can't bring a prior fascia case. There is  
13 not a scintilla of evidence that supports a Tyger River  
14 bad faith case under these facts. I don't know of a  
15 single case, and I have looked, that suggests that you can  
16 bring a Tyger River bad faith claim when the insurer has  
17 offered every last dime that they offered during pretrial  
18 negotiations.

19 THE COURT: Well, this sounds silly, did they argue  
20 Tyger River yet?

21 MR. LINDEMANN: No. In fact, I'm glad you asked  
22 that.

23 THE COURT: Well, there was --

24 MR. LINDEMANN: The only thing that they're pointing  
25 to -- they actually saw the Tyger River letter that's

1 always sort of the bottom because I believe the real Tyger  
2 River letter doesn't come from the Plaintiff's lawyer. It  
3 comes from the insured saying I don't want this case  
4 settled.

5 But what they point to is a Tyger River letter that  
6 is Exhibit C to the amended complaint. It's a  
7 September 13 -- excuse me, September 12, 2013 letter. And  
8 in that letter, they make a demand of \$3 million from  
9 Berkeley County and the IRF to settle their claims against  
10 all Berkeley County Defendants. So the Tyger River --  
11 what they're pointing to as a Tyger River letter is a  
12 \$3 million demand.

13 Now, it references that there were previous  
14 negotiations. The second sentence says on August 1, 2013,  
15 we made a demand to the county and IRF in the amount of a  
16 million dollars. That demand was good through August 16,  
17 2013, and they say that deadline has now passed and they  
18 make a demand for \$3 million. That's what they argue is a  
19 Tyger River letter.

20 I don't think that is a Tyger River letter. It  
21 didn't come from our insured saying settle the case for  
22 \$600,000 because there's no such -- there was never such a  
23 demand for \$600,000.

24 But the bottom line is, Your Honor, I don't know of  
25 any case and I haven't seen them cite one, and I've looked

1 at their memorandum of law doesn't cite anything that  
2 says, ultimately, in pretrial negotiations where -- and  
3 Judge McLeod picked up on this in a previous hearing.

4 I mean, obviously, he didn't issue any ruling, but  
5 ultimately, if the insurer offers the full limit, in this  
6 case, it was two months before trial, I don't know how you  
7 can bring a bad faith Tyger River case.

8 Bad faith Tyger River cases are where insureds are  
9 holding out money and don't offer at any point all of  
10 their coverage. And we offered all of our coverage, and  
11 it wasn't on the courthouse steps. You see that a lot. I  
12 don't think there's anything necessarily wrong with that,  
13 but we didn't do that here.

14 It was in August, and the case was tried in October.  
15 So I think on those facts alone, and they're undisputed,  
16 that they don't have a bad faith claim and we're entitled  
17 to summary judgment on that basis.

18 THE COURT: Yes, sir.

19 MR. STALEY: Thank you, Judge. Harold Staley again  
20 with Elrod Pope.

21 Your Honor, I would submit to the Court that every  
22 single one of his arguments for summary judgment need --  
23 except for one, need to be held in abeyance until the  
24 Court rules on discovery. Tyger River is not created by  
25 me sending a letter. Tyger River and bad faith are

1 created by facts and conduct of an insurance company.

2 So in one breath, you're going to sit here and argue  
3 they can't prove a prima facie case. You're not turning  
4 the documents over. He's exactly right. It doesn't  
5 matter what I sent to them. It's what their insured does  
6 within closed doors and what the persons, like the county,  
7 that were encouraging them to pay.

8 We knew -- the county met in closed session, and they  
9 voted to give us 400,000. That was based on an  
10 understanding this case could go away if they tendered the  
11 policy. That's the facts and that's going to bear out  
12 when those documents are produced. And we'd go take  
13 depositions and I could prove it right now, but for the  
14 fact he's going to claim privilege every time I ask him a  
15 question.

16 So with all due respect, I think everything in this  
17 motion for summary judgment needs to be held in abeyance  
18 except for number one, the statute of limitations. And I  
19 get a little perturbed when you go get a verdict and then  
20 they appeal it. I don't have a judgment I can collect. I  
21 don't have an action I can collect on because you said the  
22 judge messed up, and I spend two years fighting it to get  
23 a judgment affirmed and get a judgment in place and then  
24 say you're too late now to sue you when the very nature of  
25 why this thing is delayed is because of their actions in

1 appealing. That makes no sense. If that's the ruling  
2 that we're going to follow, everybody would appeal. Just  
3 delay, delay, delay, delay the judgment because that's  
4 going to get you out of ever having to pay the verdict.  
5 That's what will happen, that's what will happen if you  
6 buy that rational.

7 I'm asking the Court not to buy that rational. He  
8 will not dispute the minute that judgment was filed and  
9 was valid and no appeals were taken within a short period  
10 after that, this action for bad faith was filed, as well  
11 as any type of contractual allegations, as well as are his  
12 clients.

13 Judge, the only other thing, because I do think it's  
14 premature until the Court rules on discovery, but -- one  
15 second, Your Honor.

16 THE COURT: Take your time.

17 MR. STALEY: His argument that these -- the people  
18 that actually had the verdict waive any types of judgment,  
19 Judge, every single bad faith action that has ever been  
20 filed in this state, I guarantee you, to get that right to  
21 go after, you'd have to -- it's called -- you have to give  
22 something, consideration. And consideration in every  
23 single one of those agreements is always we're not coming  
24 after you personally. Let us go after to collect against  
25 the people that let you down and committed bad faith.

1           So, again, some of these arguments I think  
2           Mr. Lindemann makes, you know, if we buy them are going to  
3           totally irradiate any Tyger River. We won't be able to  
4           prove the case because we won't be able to get documents.  
5           And guess what else, you don't have a case because in  
6           order to get the assignment, you had to give something in  
7           exchange. It won't exist.

8           Judge, I think the first argument that we didn't  
9           somehow meet the statute of limitations -- and I have  
10          total confidence the judge can count two years, but I  
11          would ask that the Judge count two years from the date  
12          this judgment was actually entered into and was --

13          THE COURT: Let me ask you both, do you have a case  
14          on point about the statute? Do you have a case to support  
15          your argument? Do you have a case to support your  
16          argument on point?

17          MR. STALEY: I think there are none directly on point  
18          in a party seeking --

19          THE COURT: I'm just asking. If it were, I would  
20          assume y'all would have cited it.

21          MR. LINDEMANN: Your Honor, if I might -- and I don't  
22          want to cut in front of Harold if he's not through --

23          THE COURT: Well, I'm going to give you both -- go  
24          ahead.

25          MR. LINDEMANN: The important thing to recognize on

1 the statute of limitations issue, which I think needs to  
2 be overlooked in this case is who is the actual plaintiff.  
3 The actual plaintiff -- he's arguing it like Ms. Morris.  
4 Ms. Morris had to go and get that judgment affirmed at the  
5 Fourth Circuit. Ms. Morris is not the plaintiff in this  
6 case. She's the plaintiff --

7 THE COURT: She was a defendant, wasn't she?

8 MR. LINDEMANN: No, she was the plaintiff in the  
9 underlying case.

10 THE COURT: Okay.

11 MR. LINDEMANN: She is the assignee in this case.

12 THE COURT: I understand.

13 MR. LINDEMANN: The actual plaintiffs -- she stepped  
14 into the shoes of the five correctional officers. So when  
15 you're judging the statute of limitations in this  
16 particular case, you don't judge it from the mindset or  
17 position of Ms. Morris, who is the plaintiff in the  
18 underlying case, you judge it from the position of the  
19 assignors and when were they damaged. They were damaged,  
20 Your Honor, when that judgment was issued.

21 THE COURT: Gentlemen, thank you all. Proposed  
22 orders.

23 MR. STALEY: Thank you, Judge.

24 (Whereupon, the proceedings were concluded.)  
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA       )  
                                                  )  
COUNTY OF RICHLAND            )

**RECEIVED****May 17 2021****SC Court of Appeals**

I, Karen Ambroziak, Official Court Reporter for the  
5th Judicial Circuit of the State of South Carolina, do  
hereby certify that the foregoing is a true, accurate and  
complete Transcript of Record of the proceedings had and  
evidence introduced in the trial of the captioned case,  
relative to appeal, in the Court of Common Pleas for  
Richland County, South Carolina, on the 25th day of July,  
2019.

May 14, 2021

Karen Ambroziak

Karen Ambroziak, RPR  
Circuit Court Reporter

**NOTICE OF APPEAL IN A CIVIL CASE**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Casey Manning, Circuit Court Judge

Case No. 2017-CP-40-6773

Nancy Morris, as Assignee of  
Andrew J. Bland, PFC;  
Leemon E. Carner, PFC; Jerry  
Speissegger, Jr., PFC; Priscilla  
Garrett, SGT; and Richard T.  
Burkholder, SGT; Appellant,

v.

South Carolina Insurance  
Reserve Fund Respondent.

**NOTICE OF APPEAL**

Nancy Morris, as Assignee of Andrew J. Bland, PFC; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Priscilla Garrett, SGT; and Richard T. Burkholder, SGT; appeals the order of the Honorable Casey Manning dated April 22, 2021. Appellant received written notice of entry of this order on April 22, 2021.

May 11, 2021

s/Garrett B. Johnson  
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Attorney for Respondent

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

NANCY MORRIS, as personal representative )  
of the estate of DAVID ALLAN WOODS, )

Plaintiff, )

vs. )

ANDREW J. BLAND, PFC, officially and )  
individually; RICHARD T. BURKHOLDER, )  
SGT., officially and individually; LEEMON )  
E. CARNER, PFC, officially and individually; )  
PRISCILLA GARRETT, SGT., officially and )  
individually; JERRY SPEISSEGGER JR., )  
PFC, officially and individually; )

Defendants. )

Case No. 5:12-cv-3177-RMG

**JOINT NOTICE OF APPEAL**

Notice is hereby given that Andrew J. Bland, Richard T. Burkholder, Leemon E. Carner, Priscilla Garrett, and Jerry Speissegger Jr. (“Defendants”) in the above-captioned case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the following judgment and orders in this action: Judgment entered in this action on the 21st day of October, 2014; the Order entered in this action on the 31st day of December, 2014 denying Defendants’ motions for Judgment as a Matter of Law, New Trial and Remittitur and granting in part and denying in part Defendants’ motions for Set-off; the Order entered in this action on the 15th day of January, 2015 granting in part and denying in part the Plaintiff’s motion for attorney’s fees and costs; and the Order entered in this action on the 30th day of January, 2015 granting in part and denying in part the Plaintiff’s supplemental request for costs.

[SIGNATURES ON NEXT PAGE]

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January 30, 2015  
Charleston, South Carolina

ATTORNEYS FOR DEFENDANT RICHARD T.  
BURKHOLDER, SGT.

|                                           |   |                              |
|-------------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND                        | ) | FIFTH JUDICIAL CIRCUIT       |
|                                           | ) |                              |
| Nancy Morris, as assignee of Andrew J.    | ) | C.A. No.: 2017-CP-40-06773   |
| Bland, PFC; Leemon E. Carner, PFC; Jerry  | ) |                              |
| Speissegger, Jr., PFC; Priscilla Garrett, | ) |                              |
| SGT; and Richard T. Burkholder, SGT;      | ) |                              |
|                                           | ) | PLAINTIFF'S MOTION TO        |
| Plaintiffs,                               | ) | COMPEL DISCOVERY             |
|                                           | ) |                              |
| -vs-                                      | ) |                              |
|                                           | ) |                              |
| South Carolina Insurance Reserve Fund,    | ) |                              |
|                                           | ) |                              |
| Defendants.                               | ) |                              |

NOW COMES PLAINTIFF, by and through undersigned counsel and pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, and hereby moves this Court to enter its Order compelling Defendants to respond to discovery.

#### INTRODUCTION

On October 12, 2010, Decedent David Woods was booked and taken into custody at Hill-Finklea Detention Center. On the night of Friday, November 5, 2010, Mr. Woods was found trembling on the floor of his cell and was transferred to a medical observation cell.

Over the next sixty hours, surveillance footage from the observation cell shows Mr. Woods soiling himself, lying in his own feces, shaking, trembling, and repeatedly falling. During this time, PFC Andrew Bland; Sgt Richard T. Burkholder; PFC Leemon E. Carner; Sgt Priscilla Bland (Garrett); and PFC Jerry Speissegger, Jr. (hereinafter collectively "Assignors") all had multiple interactions with Mr. Woods. None of them called for medical personnel or recommended that medical personnel be called.

At approximately 10:00 a.m. on Monday, November 8, Mr. Woods was found lying naked on the floor of his cell. EMS was called, and he was taken to Trident Medical Center. There, his

hemoglobin was measured at 4, and his prognosis was felt to be “bleak.” On November 11, Mr. Woods died of gastrointestinal bleeding from a duodenal ulcer.

Mr. Woods’s sister, Nancy Morris, was duly appointed personal representative of his estate, and brought suit against the detention center correctional officers and medical providers pursuant to 42 U.S.C. § 1983. After some defendants and claims were dismissed, trial proceeded against Assignors and only Assignors. The jury returned a verdict of \$500,000 in actual damages, and punitive damages of \$150,000 against Andrew Bland; \$1,000,000 against Richard Burkholder; \$150,000 against Leemon Carner; \$1,000,000 against Priscilla Bland (Garrett); and \$150,000 against Jerry Speissegger, Jr.

At mediation, Plaintiff offered to accept \$1 million to settle all claims against Assignors and the other correctional officers who were at that time parties to the lawsuit. Of this \$1 million, Berkeley County would pay \$400,000.00, while Defendant Insurance Reserve Fund was to tender their policy limits of \$600,000.00. Upon information and belief, Berkeley County was willing to pay the \$400,000.00, but the tentative settlement agreement fell apart when Defendant IRF refused to tender their policy limits. Defendant IRF entrenched their position with an offer of \$500,000.00 in October of 2013 and an Offer of Judgment for \$500,000.00 filed in January of 2014. Defendant has conceded that the policy limits were not offered until August 12, 2014.

Plaintiff has received Assignments from each of Assignors, providing Plaintiff with “any and all claims he/she may have against the South Carolina Insurance Reserve Fund,” including failure to act in good faith to effect a settlement within the policy limits, pursuant to Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933). As part of these Assignments, each Assignor “expressly waives any attorney/client privilege concerning his/her

prior representation in [the underlying action] to the extent necessary to assist in the pursuit of any litigation arising from this assignment.”

On April 9, Plaintiff served Defendant IRF with her initial interrogatories and requests to produce. In response, Defendant objected to no fewer than eleven of Plaintiff’s interrogatories and nine requests to produce. These objections were based on work product privilege, attorney-client privilege, and Rule 8(a) of the South Carolina Alternative Dispute Resolution Rules. Defendant did not provide a discovery log listing the allegedly privileged items and did not provide any response to the majority of the interrogatories to which it objected.

### ARGUMENT

#### I. DEFENDANT HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT ATTORNEY-CLIENT PRIVILEGE APPLIES.

Under South Carolina law, the party which asserts the existence of an attorney-client privilege bears the burden of establishing that confidential nature of that communication. State v. Doster, 276 S.C. 647, 653 (1981). Defendant must accordingly prove every element of the test set forth in Doster:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. Id.

This test is strictly construed and must be tailored to protect “only confidences disclosed within the relationship.” Id. The Court is perfectly clear that not every communication within the attorney-client relationship is privileged, and that the public policy protecting those communications must be weighed against the public interest “in the proper administration of justice.” Id.

In their objections to discovery, Defendant has not made any effort to set forth or establish the elements listed in Doster. Plaintiff submits that there are multiple undisclosed documents and communications for which Defendant will be unable to meet several elements of this test, particularly the final four. In the absence of such a showing, the Court should compel discovery and overrule Defendant's objections to the same.

II. THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN EXPLICITLY WAIVED.

"The attorney-client privilege is owned by the client and, therefore, can be waived by the client." Floyd v. Floyd, 365 S.C. 56, 89, 615 S.E.2d 465, 483 (Ct.App.2005); see also State v. Thompson, 329 S.C. 72, 76, 495 S.E.2d 437 (1998). "Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject." Marshall v. Marshall, 282 S.C. 534, 538, 320 S.E.2d 44, 46–47 (Ct.App.1984).

As Exhibit A to her Amended Complaint, Plaintiff included signed assignments from the assignors. All five assignors have signed these documents, which "expressly waiv[e] any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment." The assignors owned the attorney-client privilege, and had every right to waive it. Now that they have done so, the privilege does not apply, and the Court should overrule Defendant's objections and compel discovery.

III. ALL OTHER PRIVILEGE HAS BEEN IMPLICITLY WAIVED BY DEFENDANT IN ITS ANSWER TO PLAINTIFF'S AMENDED COMPLAINT.

Defendant has further objected on the ground of work-product privilege and under Rule 8(a) of the South Carolina Alternative Dispute Resolution Rules. The work product doctrine covers documents "prepared in anticipation of litigation, unless a substantial need can be shown

by the requesting party.” Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294 (2010). Rule 8(a) applies to communications “disclosed during a mediation,” as well as “all records, reports or other documents created solely for use in the mediation.” The rule provides for several exceptions, including use to prove or disprove professional malpractice or misconduct.

Defendant has failed to meet its burden in establishing that these privileges apply, and has implicitly waived any remaining privilege by injecting those issues into the litigation. Waiver may be either explicit or implied, and a party “may implicitly waive the privilege by placing a privileged communication ‘at issue’ in a case.” Hege v. Aegon USA, LLC, No. 1:10-CV-1635-GRA, 2011 WL 1791883, at \*4 (D.S.C. May 10, 2011), citing Floyd v. Floyd, 365 S.C. 56, 89, 615 S.E.2d 465, 483 (Ct.App.2005)(where a defendant’s attestations that he had acted on advice of counsel were sufficient to place those communications with counsel at issue, thereby waiving the privilege).

Given the central role of privilege in bad faith cases, the issues of work-product privilege, implicit waiver, and the interests of justice have been examined repeatedly in that context. The most in-depth review is provided by ContraVest Inc. v. Mt. Hawley Ins. Co., 273 F. Supp. 3d 607 (D.S.C. 2017). While this is a federal court case and not binding authority, ContraVest provides a comprehensive review of South Carolina state law and sets forth a persuasive approach to conducting discovery in bad faith cases.

ContraVest relies heavily on City of Myrtle Beach, 2010 WL 3420044, which in turn draws on “the widely accepted approach” articulated in Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975). Hearn found that “if a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer [voluntarily] waives, explicitly or impliedly, the attorney-client privilege.” ContraVest at 614 (internal citations omitted). In a bad faith claim, virtually any insurer will be

forced to claim that it acted in good faith, thus injecting that issue into the case and waiving privilege. Id. at 615. The court acknowledged that this served practically as a per se waiver, but required that “[a] substantial showing of merit to plaintiff's case must be made before a court should apply the exception to the attorney-client privilege defined herein.” Id. quoting Hearn at 582.

The defendant in ContraVest argued that former Justice Pleicones’s concurrence in Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014) blocked any application of the Hearn approach. However, after a careful examination of the case law, the court in ContraVest rejected this argument. The District Court found that:

At least four separate judges in this district have applied, or at least recognized, the City of Myrtle Beach decision. See, e.g., Graham v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA, No. 0:16-cv-01153, 2017 WL 116798, at \*4 (D.S.C. Jan. 12, 2017) (relying on City of Myrtle Beach to hold that defendant “waived the attorney-client privilege by asserting that it ‘did not act unreasonably or in bad-faith’ ”); State Farm Fire & Cas. Co. v. Admiral Ins. Co., No. 4:15-cv-2745, 2016 WL 4051271, at \*4 (D.S.C. July 25, 2016) (relying on City of Myrtle Beach to hold that the plaintiff's assertion of its own good faith “waives privilege and work product protections”); Hege v. Aegon USA, LLC, No. 1:10-cv-1635, 2011 WL 1791883, at \*5 (D.S.C. May 10, 2011) (relying on City of Myrtle Beach to find that affirmative defenses of good faith and reasonableness waived the privilege); see also First S. Bank v. Fifth Third Bank, N.A., No. 7:10-cv-2097, 2013 WL 1840089, at \*12 (D.S.C. May 1, 2013) (citing City of Myrtle Beach and recognizing there are some cases, “such as ... bad faith insurance cases ... where advice of counsel is squarely at issue ... or where the subject matter is so entwined with counsel's advice simply based on the nature of the case itself”).

Id. at 616. Although not cited in ContraVest, the language from Floyd, 365 S.C. 56, 89, 615 S.E.2d 465, 483 (Ct.App.2005), quoted above, provides further support for the Hearn approach. While acknowledging that allowing discovery “does damage to the attorney-client privilege, it is equally true that the attorney-client privilege is uniquely damaging to plaintiffs’ ability to recover in bad faith cases.” Id. at 616–17. Judge David C. Norton thus joined Judge Margaret B. Seymour, Judge

Richard Mark Gergel, Judge G. Ross Anderson, and Judge Mary Lewis in applying the Hearn standard.

The court in ContraVest also considered whether the Plaintiff would need to show a prima facie case of bad faith before allegedly privileged materials could or should be turned over. While the court did not ultimately make a determination, it praised the wisdom of requiring “evidence of a fact... which may ultimately be rebutted.” Id. at 620, quoting § 9:2. Prima facie case, Trial Handbook for South Carolina Lawyers. However, such a prima facie case signified only that “sufficient evidence has been introduced to warrant submission to the jury of the issue to which the evidence is directed.” Id.

The Court should follow the approach of Hearn and its progeny in the current situation and find that Defendant has implicitly waived its claim to privilege. Like in the cases listed above, Plaintiff alleged bad faith in the Third Cause of Action of her Amended Complaint, paragraphs 77 to 97. While Defendant did not specifically plead that it acted in good faith in its Answer, it did admit the allegations of paragraph 82, “Defendant IRF has a duty to deal in good faith and fair dealing with its insureds, including Assignors.” Defendant then denied paragraph 93, “Defendant IRF has acted in bad faith and/or was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars...” Defendant admitted that the claim “was assigned to adjusters and supervisors who collaborated on the adjustment of the claim and the management of the litigation” (paragraph 55) and that Defendant “had the opportunity to and did evaluate the liability and damages issues during the pendency of the action” (paragraph 24). The evaluations and collaborations of these adjusters and supervisors, as well as their adjustment of the claim and management of the litigation have thus been injected into the case and are subject to discovery. Likewise any and all documents that bear on Defendant’s denial that it acted in bad faith.

Plaintiff has made a prima facie showing of bad faith through her Amended Complaint and the exhibits attached thereto, which include a Tyger River letter, a letter and offer of judgment from Defendant offering less than the policy limits, and the ultimate judgment, which was far in excess of the policy limits. In one of the interrogatories it did answer, Defendant admitted that the policy limits were not tendered until August 12, 2014, only two months before trial. (Def Responses to Plaintiff's Interrogatories, #18). The standard set forth in Hearn has accordingly been met,, and the Court should overrule Defendant's objections and compel discovery.

### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court find that Defendant has not met its burden on establishing privilege, that the attorney-client privilege has been explicitly waived by Assignees, and that any other privilege has been implicitly waived by Defendant's Answer. Plaintiff accordingly requests that the Court enter an Order overruling Defendant's objections and compelling discovery within 14 days of the date of its Order.

Respectfully submitted,

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July 9, 2018

|                                           |   |                              |
|-------------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND                        | ) | FIFTH JUDICIAL CIRCUIT       |
|                                           | ) |                              |
| Nancy Morris, as assignee of Andrew J.    | ) | C.A. No.: 2017-CP-40-06773   |
| Bland, PFC; Leemon E. Carner, PFC; Jerry  | ) |                              |
| Speissegger, Jr., PFC; Priscilla Garrett, | ) |                              |
| SGT; and Richard T. Burkholder, SGT;      | ) |                              |
|                                           | ) | PLAINTIFF'S RENWED           |
| Plaintiffs,                               | ) | MOTION TO COMPEL DISCOVERY   |
|                                           | ) | AND RESPONSE TO SUBPOENA     |
| -vs-                                      | ) |                              |
|                                           | ) |                              |
| South Carolina Insurance Reserve Fund,    | ) |                              |
|                                           | ) |                              |
| Defendants.                               | ) |                              |

NOW COMES PLAINTIFF, by and through undersigned counsel and pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, and hereby renews its motion for this Court to enter its Order compelling Defendants to respond to discovery.

#### FACTUAL BACKGROUND

On October 12, 2010, Decedent David Woods was booked and taken into custody at Hill-Finklea Detention Center. On the night of Friday, November 5, 2010, Mr. Woods was found trembling on the floor of his cell and was transferred to a medical observation cell.

Over the next sixty hours, surveillance footage shows Mr. Woods soiling himself, lying in his own feces, shaking, trembling, and falling. During this time, PFC Andrew Bland; Sgt Richard T. Burkholder; PFC Leemon E. Carner; Sgt Priscilla Bland (Garrett); and PFC Jerry Speissegger, Jr. (hereinafter collectively "Assignors") all had multiple interactions with Mr. Woods. None of them called for medical personnel or recommended that medical personnel be called.

At approximately 10:00 a.m. on Monday, November 8, Mr. Woods was found lying naked on the floor of his cell. EMS was called, and he was taken to Trident Medical Center. There, his

hemoglobin was measured at 4, and his prognosis was “bleak.” On November 11, Mr. Woods died of gastrointestinal bleeding from a duodenal ulcer.

Mr. Woods’s sister, Nancy Morris, was duly appointed personal representative of his estate, and brought suit against the detention center correctional officers and medical providers pursuant to 42 U.S.C. 1983. After some defendants and claims were dismissed, trial proceeded against only the Assignors. The jury returned a verdict of \$500,000 in actual damages, and punitive damages of \$150,000 against Andrew Bland; \$1,000,000 against Richard Burkholder; \$150,000 against Leemon Carner; \$1,000,000 against Priscilla Bland (Garrett); and \$150,000 against Jerry Speissegger, Jr.

At a mediation conducted over a year prior to trial, Plaintiff offered to accept \$1 million to settle all claims against Assignors and the other correctional officers who were at that time parties to the lawsuit. Of this \$1 million, Berkeley County would pay \$400,000.00, while Defendant Insurance Reserve Fund was to tender their policy limits of \$600,000.00. Upon information and belief, Berkeley County was willing to pay the \$400,000.00, but the tentative settlement agreement fell apart when Defendant IRF refused to tender their policy limits. Defendant IRF entrenched their position with an offer of \$500,000.00 in October of 2013 and an Offer of Judgment for \$500,000.00 filed in January of 2014. Defendant has conceded that the policy limits were not offered until August 12, 2014.

Plaintiff has received Assignments from each of Assignors, providing Plaintiff with “any and all claims he/she may have against the South Carolina Insurance Reserve Fund,” including failure to act in good faith to effect a settlement within the policy limits, pursuant to Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933). As part of these Assignments, each Assignor “expressly waives any attorney/client privilege concerning his/her

prior representation in the underlying action to the extent necessary to assist in the pursuit of any litigation arising from this assignment.”

### PROCEDURAL POSTURE

On April 9, Plaintiff served Defendant IRF with her initial interrogatories and requests to produce. In response, Defendant objected to no fewer than eleven of Plaintiff’s interrogatories and nine requests to produce. These objections were based on work product privilege, attorney-client privilege, and Rule 8(a) of the South Carolina Alternative Dispute Resolution Rules. Defendant did not provide a discovery log listing the allegedly privileged items and did not provide any response to the majority of the interrogatories to which it objected. On July 9, 2018, Plaintiff filed a Motion to Compel Discovery from Defendant.

On December 10, 2018, a hearing was held before Judge Walton McLeod, I . Immediately following the hearing, and before Judge McLeod issued a ruling, the parties agreed to a compromise in which Defendant would produce a number of additional documents. On January 4, 2019, the parties consented to the dismissal of both Motions to Compel with leave to refile at a later date.

Defendant ultimately produced the additional documents, which consisted primarily of deposition transcripts, court orders, and materials exchanged in discovery. Plaintiff is accordingly refiling her motion to compel a more complete response.

### ARGUMENT

#### I. DEFENDANT HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT ATTORNEY-CLIENT PRIVILEGE APPLIES.

Under South Carolina law, the party which asserts the existence of an attorney-client privilege bears the burden of establishing the confidential nature of that communication. State v.

Doster, 276 S.C. 647, 653 (1981). Defendant must accordingly prove every element of the test set forth in Doster:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. Id.

This test is strictly construed and must be tailored to protect “only confidences disclosed within the relationship.” Id. The Court is perfectly clear that not every communication within the attorney-client relationship is privileged, and that the public policy protecting those communications must be weighed against the public interest “in the proper administration of justice.” Id.

In their objections to discovery, Defendant has not made any effort to set forth or establish the elements listed in Doster. Plaintiff submits that there are multiple undisclosed documents and communications for which Defendant will be unable to meet several elements of this test, particularly the final four. In the absence of such a showing, the Court should compel discovery and overrule Defendant’s objections to the same.

## II. THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN EXPLICITLY WAIVED.

“The attorney-client privilege is owned by the client and, therefore, can be waived by the client.” Floyd v. Floyd, 365 S.C. 56, 89, 615 S.E.2d 465, 483 (Ct.App.2005); see also State v. Thompson, 329 S.C. 72, 76, 495 S.E.2d 437 (1998). “Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject.” Marshall v. Marshall, 282 S.C. 534, 538, 320 S.E.2d 44, 46–47 (Ct.App.1984).

As Exhibit A to her Amended Complaint, Plaintiff included signed assignments from the assignors. All five assignors have signed these documents, which “expressly waiv[e] any

attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.” The assignors owned the attorney-client privilege, and had every right to waive it. Now that they have done so, the privilege does not apply, and the Court should overrule Defendant’s objections and compel discovery.

III. ALL OTHER PRIVILEGE HAS BEEN IMPLICITLY WAIVED BY DEFENDANT IN ITS ANSWER TO PLAINTIFF’S AMENDED COMPLAINT.

Defendant has further objected on the ground of work-product privilege and under Rule 8(a) of the South Carolina Alternative Dispute Resolution Rules. The work product doctrine covers documents “prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.” Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294 (2010). Rule 8(a) applies to communications “disclosed during a mediation,” as well as “all records, reports or other documents created solely for use in the mediation.” The rule provides for several exceptions, including use to prove or disprove professional malpractice or misconduct.

Defendant has failed to meet its burden in establishing that these privileges apply, and has implicitly waived any remaining privilege by injecting those issues into the litigation. Waiver may be either explicit or implied, and a party “may implicitly waive the privilege by placing a privileged communication ‘at issue’ in a case.” Hege v. Aegon USA, LLC, No. 1:10-CV-1635-GRA, 2011 WL 1791883, at \*4 (D.S.C. May 10, 2011), citing Floyd v. Floyd, 365 S.C. 56, 89, 615 S.E.2d 465, 483 (Ct.App.2005)(defendant’s attestations that he had acted on advice of counsel were sufficient to place those communications with counsel at issue, thereby waiving the privilege).

Given the central role of privilege in bad faith cases, the issues of work-product privilege, implicit waiver, and the interests of justice have been examined repeatedly in that context. The most in-depth review is provided by Contra Est Inc. v. Mt. Hawley Ins. Co., 273 F. Supp. 3d 607

(D.S.C. 2017). While this is a federal court case and not binding authority, Contra est provides a comprehensive review of South Carolina state law and sets forth a persuasive approach to conducting discovery in bad faith cases.<sup>1</sup>

Contra est relies heavily on City of Myrtle Beach, 2010 WL 3420044, which in turn draws on “the widely accepted approach” articulated in Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975). Hearn found that “if a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer voluntarily waives, explicitly or impliedly, the attorney-client privilege.” Contra est at 614 (internal citations omitted). In a bad faith claim, virtually any insurer will be forced to claim that it acted in good faith, thus injecting that issue into the case and waiving privilege. Id. at 615. The court acknowledged that this served practically as a per se waiver, but required that “[a] substantial showing of merit to plaintiff’s case must be made before a court should apply the exception to the attorney-client privilege defined herein.” Id. quoting Hearn at 582.

The defendant in Contra est argued that former Justice Pleicones’s concurrence in Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014) blocked any application of the Hearn approach. However, after a careful examination of the case law, the court in Contra est rejected this argument. The District Court found that:

At least four separate judges in this district have applied, or at least recognized, the City of Myrtle Beach decision. See, e.g., Graham v. Nat l Union Fire Ins. Co. of Pittsburgh, PA, No. 0:16-cv-01153, 2017 WL 116798, at 4 (D.S.C. Jan. 12, 2017) (relying on City of Myrtle Beach to hold that defendant “waived the attorney-client privilege by asserting that it ‘did not act unreasonably or in bad-faith’ ”); State Farm Fire & Cas. Co. v. Admiral Ins. Co., No. 4:15-cv-2745, 2016 WL 4051271, at 4 (D.S.C. July 25, 2016) (relying on City of Myrtle Beach to hold that the plaintiff’s assertion of its own good faith “waives privilege

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<sup>1</sup> Contra est has since been appealed to the Fourth Circuit Court of Appeals, which certified the question, “Does South Carolina law support application of the “at issue” exception to the attorney-client privilege such that a party may waive the privilege by denying liability in its answer ” to the South Carolina Supreme Court. See In re Mt. Hawley Ins. Co., 736 F. App x 392 (4th Cir. 2018). As of the date of this filing, the Supreme Court has not issued an opinion.

and work product protections”); Hege v. Aegon USA, LLC, No. 1:10-cv-1635, 2011 WL 1791883, at 5 (D.S.C. May 10, 2011) (relying on City of Myrtle Beach to find that affirmative defenses of good faith and reasonableness waived the privilege); see also First S. Bank v. Fifth Third Bank, N.A., No. 7:10-cv-2097, 2013 WL 1840089, at 12 (D.S.C. May 1, 2013) (citing City of Myrtle Beach and recognizing there are some cases, “such as ... bad faith insurance cases ... where advice of counsel is squarely at issue ... or where the subject matter is so entwined with counsel’s advice simply based on the nature of the case itself”).

Id. at 616. The language from Floyd, 365 S.C. 56, 89, 615 S.E.2d 465, 483 (Ct.App.2005), quoted above, provides further support for the Hearn approach. While acknowledging that allowing discovery “does damage to the attorney-client privilege, it is equally true that the attorney-client privilege is uniquely damaging to plaintiffs’ ability to recover in bad faith cases.” Id. at 616–17. Judge David C. Norton thus joined Judge Margaret B. Seymour, Judge Richard Mark Gergel, Judge G. Ross Anderson, and Judge Mary Lewis in applying the Hearn standard.

The court in Contra est also considered whether the Plaintiff would need to show a prima facie case of bad faith before allegedly privileged materials could or should be turned over. While the court did not ultimately make a determination, it praised the wisdom of requiring “evidence of a fact... which may ultimately be rebutted.” Id. at 620, quoting 9:2. Prima facie case, Trial Handbook for South Carolina Lawyers. However, such a prima facie case signified only that “sufficient evidence has been introduced to warrant submission to the jury of the issue to which the evidence is directed.” Id.

The Court should follow the approach of Hearn and its progeny in the current situation and find that Defendant has implicitly waived its claim to privilege. Like in the cases listed above, Plaintiff alleged bad faith in the Third Cause of Action of her Amended Complaint, paragraphs 77 to 97. While Defendant did not specifically plead that it acted in good faith in its Answer, it did admit the allegations of paragraph 82, “Defendant IRF has a duty to deal in good faith and fair dealing with its insureds, including Assignors.” Defendant then denied paragraph 93, “Defendant

IRF has acted in bad faith and/or was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars...” Defendant admitted that the claim “was assigned to adjusters and supervisors who collaborated on the adjustment of the claim and the management of the litigation” (paragraph 55) and that Defendant “had the opportunity to and did evaluate the liability and damages issues during the pendency of the action” (paragraph 24). The evaluations and collaborations of these adjusters and supervisors, as well as their adjustment of the claim and management of the litigation have thus been injected into the case and are subject to discovery, as have any and all documents that bear on Defendant’s denial that it acted in bad faith.

Plaintiff has made a prima facie showing of bad faith through her Amended Complaint and the exhibits attached thereto, which include a Tyger River letter, a letter and offer of judgment from Defendant offering less than the policy limits, and the ultimate judgment, which was far in excess of the policy limits. In one of the interrogatories it did answer, Defendant admitted that the policy limits were not tendered until August 12, 2014, only two months before trial. (Def Responses to Plaintiff’s Interrogatories, #18). The standard set forth in Hearn has accordingly been met, and the Court should overrule Defendant’s objections and compel discovery.

### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court find that Defendant has not met its burden on establishing privilege, that the attorney-client privilege has been explicitly waived by Assignees, and that any other privilege has been implicitly waived by Defendant’s Answer. Plaintiff accordingly requests that the Court enter an Order overruling Defendant’s objections and compelling discovery within 14 days of the date of its Order.

AFFIRMATION

Counsel for Plaintiff has consulted with counsel for Defendant on these matters and been unable to resolve them, and further consultation would serve no purpose.

Respectfully submitted,

s/Garrett B. Johnson

Garrett B. Johnson, SC Bar 81105

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Attorney for Plaintiff

April 17, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Nancy Morris, as assignee of Andrew J. )  
 Bland, PFC; Leemon E. Carner, PFC; Jerry )  
 Speissegger, Jr., PFC; Priscilla Garret, SGT; )  
 and Richard T. Burkholder, SGT, )

Civil Action No. 2017-CP-40-6773

Plaintiffs, )

v. )

**MEMORANDUM IN OPPOSITION TO  
 PLAINTIFF'S RENEALED  
 MOTION TO COMPEL**

South Carolina Insurance Reserve Fund, )

Defendant. )

**INTRODUCTION**

This is a declaratory judgment action filed by the Plaintiff Nancy Morris, as assignee of Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland and Jerry Speissegger (hereafter referred to as "Assignors"), against the Defendant South Carolina Insurance Reserve Fund ( IRF ) relating to judgments entered in a United States District Court action captioned *Orrell v. Bland* Civil Action Number 5: 12-3177-RMG. That case was tried before United States District Judge Richard M. Gergel and a jury in October 2014. On October 17, 2014, the jury returned a verdict finding against the Assignors, who were five corrections officers at the Hill-Finklea Detention Center operated by Berkeley County. The jury found that the Assignors had been deliberately indifferent to the decedent's medical needs in violation of the Fourteenth Amendment to the United States Constitution.

The verdict against the Assignors included the following: \$500,000 in actual damages against all five officers jointly and severally, \$1 million in punitive damages against Burkholder,

\$1 million in punitive damages against Priscilla Bland, \$150,000 in punitive damages against Andrew Bland, \$150,000 in punitive damages against Carner, and \$150,000 in punitive damages against Speissegger. Following a motion for set-off, the actual damages were reduced to \$171,875. Judge Gergel also awarded attorney's fees and costs under 42 U.S.C. § 1988. The Assignors appealed the judgments to the Fourth Circuit Court of Appeals. In November 2016, the Fourth Circuit affirmed the judgments against each of the officers. *See Orr v. Laney*, 666 Fed. Appx. 233 (4th Cir. 2016).

The IRF issued a Tort Liability Insurance Policy to its named insured Berkeley County, which includes liability limits of \$600,000. Following the appeal, the IRF tendered the sum of \$992,013.63 to the Plaintiff in partial satisfaction of the judgments against the Assignors. The Plaintiff executed a document captioned Partial Satisfaction of Judgment which reflects payment of the full \$600,000 in liability limits as well as supplemental payments for attorney's fees, costs, and post-judgment interest.

The Plaintiff thereafter filed the present action as the assignee for the five Assignors. In her Amended Complaint, the Plaintiff alleges as follows:

Andrew J. Bland, PFC; Priscilla Garrett Bland, SGT; Leeman A. Carner, PFC; Jerry Speissegger, Jr., PFC; and Richard T. Burkholder, SGT (hereinafter collectively referred to as Assignors) did, for good and valuable consideration, irrevocably assign to Plaintiff Nancy Morris any and all claims he/she may have against the South Carolina Insurance Reserve Fund and/or any other persons, firms, government organizations, or entities that arise out of C.A. 0: 5: 12-cv-3177-RMG, including, among others bad-faith conduct and/or breach of contract by the Insurance Reserve Fund in the handling of the claims related to that case.

*See* Amended Complaint, ¶ 6. The Plaintiff has alleged three causes of action for breach of contract, negligence and bad faith against the IRF.

The Plaintiff served a set of interrogatories and requests for production on April 9, 2018. The Plaintiff granted an extension through May 21, 2018. Timely responses and objections were served by the Defendant IRF on that date. To many of the requests, the IRF asserted privileges including the attorney-client privilege, work-product privilege, and the confidentiality requirement for information related to the mediation process per Rule 8(a), SCADR. On July 7, 2018, the Plaintiff filed a motion to compel arguing that the attorney-client privilege and other privileges have been explicitly and/or impliedly waived. That motion was heard by Judge Walton McLeod, I on December 10, 2018, who did not rule on the motion. While the motion was under advisement, the parties reached a compromise which allowed for the IRF to produce additional documents and to allow for the South Carolina Supreme Court to issue its decision in the *n re t a ley n o* case that was pending before the Court on a certified question from the Fourth Circuit Court of Appeals.

Before the Supreme Court ruled, the Plaintiff filed a renewed motion to compel on April 17, 2019, which is the motion currently before this Court for adjudication. In the interim, on June 12, 2019, the Supreme Court issued its decision in *n re t a ley n o*, 2019 WL 2441119 (S.C. 2019). and that decision has now been cited by the Plaintiff in an updated argument on the implied waiver issue. In the current motion, the Plaintiff argues that the Assignors have explicitly waived the attorney-client privilege and that other privileges have been impliedly waived by the IRF in its Answer filed to the Amended Complaint. The IRF opposes the motion as discussed below.

## ARGUMENTS

### I. THE PLAINTIFF

CIVIL ACTION NUMBER 5:12-03177-RMG.

In asserting that the attorney-client privilege has been explicitly waived, the Plaintiff is relying on the Assignment of Rights and Covenants Not to Execute, which is Exhibit A to the Complaint, to argue that the purported Assignors – Bland, Burkholder, Carner, Speissegger and Garrett – have waived their attorney-client privilege. The Assignment of Rights and Covenants Not to Execute, however, provide only for, at most, a *part al* waiver of the attorney-client privilege. The specific language states: “The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action 5:12-cv-03177-RMG *to the extent necessary to a litigate the proper resolution of any litigation arising from that representation*” (Emphasis added). The purported waiver of the attorney-client privilege is partial and is expressly limited by the italicized language. It is unclear how that italicized language should be applied and how a determination may be made as to what information and documents fall within the scope of that limiting language. In effect, the documents fail to explain how and by whom it is determined whether a particular request falls within the scope of the limited waiver.

In addition, it is critical to recognize that the five Assignors were not the only clients that the attorneys had in Civil Action Number 5:12-03177-RMG. They were only the party-defendants against whom judgments were ultimately entered. Additional party-defendants represented by some or all of the attorneys as clients during the course of litigation include Sheriff H. Wayne Dewitt, Berkeley County, Berkeley County Sheriff’s Department, Clifford McElvogue, Ashley A. Harbor, Sgt. Sanders, Sandra Moore, Patricia D. Collins, Brophy James, Ansas Daab, and Charles A. Desanto. The Plaintiff has not shown that any of these clients represented by the

attorneys have waived their attorney-client privilege, nor has the Plaintiff shown that those clients have even been given notice of the attempt to obtain privileged communications. At the very least, the Plaintiff should not be entitled to discover any privileged and confidential communications unless all party-defendants represented by the attorneys in Civil Action Number 5:12-03177-RMG have jointly waived the attorney-client privilege.<sup>1</sup>

## II. The Defendant Insurance Reserve Fund has not “ A A C ly waived” any privileges

The Plaintiff also challenges the IRF’s assertion of the attorney-client privilege, work-product privileges, and the privilege/confidentiality requirement for mediation-related information per Rule 8(a), SCADR. The Plaintiff contends only that those privileges were “impliedly waived” by the IRF in its Answer to the Amended Complaint.

In making that assertion, the Plaintiff relies exclusively on the recent decision of the South Carolina Supreme Court in the case of *In re t a ley n o*, 2019 WL 2441119 (S.C. 2019). However, the *t a ley* decision does not support the Plaintiff’s position for two primary reasons.

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<sup>1</sup> In *o a o lle A n a ter*, 387 S.C. 287, 692 S.E.2d 526 (2010), the Supreme Court explained that “[t]he common interest doctrine is not a privilege in itself, but is instead an exception to the waiver of an existing privilege.” 692 S.E.2d at 531. The Supreme Court further ruled that “[t]he doctrine protects the transmission of data to which the attorney-client privilege or work product protection has attached when it is shared between parties with a common interest in a legal matter. It is an exception to the general rule that disclosure of privileged information waives the applicable privilege. Thus, information covered by the common interest doctrine cannot be waived without the consent of all parties who share the privilege.” . (Citations omitted). The Supreme Court relied favorably on the Fourth Circuit’s decision in *n re ran ry poena*, 902 F.2d 244, 248 (4th Cir. 1990), in which the Court recognized “the need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.” 902 F.2d at 249. Moreover, “as an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine.” .

First, in answering the certified question posed by the Fourth Circuit, the Supreme Court “set forth the proper framework to be applied in South Carolina in a tort action by an insured against the insurer *for a faith refusal to provide coverage.*” 2019 WL 2441119 at 3. (Emphasis added). The Supreme Court did not, however, specifically address the framework to be applied in a “Tyger River” bad faith failure-to-settle claim, which is what the present case is.

Second, and most importantly, the Supreme Court in *Ata Ley* held that “a denial of bad faith and/or the assertion of good faith in the answer does not, standing alone, place a privileged communication ‘at issue’ in a case such that the attorney-client privilege is waived.” 2019 WL 2441119 at 10. The Supreme Court emphasized that “a client does not waive the privilege simply by bringing or defending a lawsuit.” . Stated another way, the Supreme Court’s approach “prohibits a finding of waiver based solely on the mere filing of a bad faith action, the denial of bad faith in the answer to the complaint, or the affirmative claim of good faith.” 2019 WL 2441119 at 8. This is an absolute rejection of the test employed by the United States District Court decision in *Contra et al. v. Ata Ley, Inc.*, 273 F.Supp.3d 607 (D.S.C. 2017), which framed the Plaintiff’s position in its Renewed Motion to Compel.

Although *Ata Ley* is not a bad faith failure-to-settle claim, there is still guidance that can be drawn from the Supreme Court’s decision. For instance, it is reasonable to conclude that the Supreme Court would apply the same “middle-ground approach” which employs a “case-by-case analysis of the facts.” 2019 WL 2441119 at 7. Additionally, the *Ata Ley* test focuses on situations where the insurer asserts its subjective reliance on the advice of counsel on purely issues of law to justify or support its coverage decision. Citing the *Ariona* case of *Ata Ley v. Ariona*, 199 Ari. 52, 13 P.3d 1169 (2000), which the Supreme Court described as “instructive,” the Court recognized that the mere seeking of legal counsel is not sufficient to constitute a waiver. The Supreme Court quoted the following from *ee*:

We assume client and counsel will confer in every case, trading information for advice. This does not waive the privilege. We assume most if not all actions taken will be based on counsel's advice. This does not waive the privilege. Based on counsel's advice, the client will always have subjective evaluations of its claims and defenses. This does not waive the privilege. All of this occurred in the present case, and none of it, separately or together, created an implied waiver.

2019 WL 2441119 at 10. Instead, the distinguishing factor is where “the insurer claims its actions were the result of its reasonable and good-faith belief that its conduct was permitted by law *and* its subjective belief based on its claims agents’ investigation into and evaluation of the law. . (Emphasis in original). Again, the emphasis is on purely issues of law -- not an evaluation of the settlement value of a claim which is not a legal question.

In the case at bar, it is critical to recognize that the IRF did not interject with its Answer to Amended Complaint any affirmative defense that explicitly or impliedly waives any privilege. The IRF did not affirmatively plead any “good faith” or “reliance on counsel’s advice” defense as is often seen in bad faith litigation. The Plaintiff actually concedes this very point. *See*, Plaintiff’s Renewed Motion to Compel, p. 8 (“While Defendant did not specifically plead that it acted in good faith in its Answer”). Moreover, pertinent to the *Waller* test, the IRF also has not alleged that it relied on the advice of counsel on any disputed issue of law. In fact, the Plaintiff has not alleged that there was a central issue of law in the underlying case that the IRF misapplied or misunderstood. The underlying case, in fact, did not turn on any disputed issue of law. The federal law on the “deliberate indifference” standard under the Fourteenth Amendment was well established.

Instead, the alleged “failure to settle” was premised on an evaluation of liability under the facts as developed and an evaluation of the potential damages that could be recovered, i.e. a traditional claims analysis, or as the Supreme Court referred to it in *Waller*, “subjective evaluations of its claims and defenses.” But, the Supreme Court has explained that the advice of

counsel with respect to such evaluations “does not waive the privilege.” 2019 WL 2441119 at 10. Consequently, under the facts presented and the case-by-case analysis suggested in *t a ley*, this Court should not find an implied waiver of any privilege, including the attorney-client privilege, the work-product privileges, or the privilege created by Rule 8(a), SCADR, as addressed by the Plaintiff in her motion. Accordingly, the Plaintiff’s renewed motion to compel should be denied.

### III. T P of a “Tyger River”

In *t a ley*, the Supreme Court did clearly “impose the additional requirement that the party seeking waiver of the attorney-client privilege make a prima facie showing of bad faith.” *t a ley* 2019 WL 2441119 at 10. Clearly, that would also be an element of the test in a “Tyger River” failure-to-settle bad faith claim just as the Supreme Court identified it as a critical element in a bad faith refusal-to-provide-coverage claim. However, the Plaintiff in the case at bar has made no attempt to present any evidence to this Court to show the existence of bad faith by the IRF. The Plaintiff presents no admissible evidence but instead makes the following statement in her motion:

At a mediation conducted over a year prior to trial, Plaintiff offered to accept \$1 million to settle all claims against Assignors and the other correctional officers who were at that time parties to the lawsuit. Of this \$1 million, Berkeley County would pay \$400,000.00, while Defendant Insurance Reserve Fund was to tender their policy limits of \$600,000.00. Upon information and belief, Berkeley County was willing to pay the \$400,000.00, but the tentative settlement agreement fell apart when Defendant IRF refused to tender their policy limits. Defendant IRF entrenched their position with an offer of \$500,000.00 in October of 2013 and an Offer of Judgment for \$500,000.00 filed in January of 2014. Defendant has conceded that the policy limits were not offered until August 12, 2014.

*ee*, Plaintiff’s Renewed Motion to Compel, p. 2. That statement was not supported by any

evidence, and in fact, the Plaintiff stated key information only “upon information and belief” which makes it inherently inadmissible. *See, e.g., Anderson v. Anna A. E. Rlean*, 2010 WL 3834917, \*3 (D.Md. 2010) (“statements made ‘upon information and belief’ are inadmissible and will not be considered”); *Art v. O. N. A. Th. of Ty of O. la*, 2007 WL 3511300, \*4 (S.D. Ga. 2007) (“statements based upon information and belief, rather than on personal knowledge, do not constitute evidence sufficient to establish a prima facie case”).

But the critical issue with the Plaintiff’s representation is that she has, by her own description, violated Rule 8(a), SCADR, by revealing information learned at mediation and that information, even if true, is confidential and inadmissible. Rule 8(a) specifically prohibits a party to the mediation from “rely[ing] on, or introduc[ing] as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation” which is inclusive of “proposals made ... by the mediator” and “the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.” *See*, Rule 8(a), SCADR. Thus, the statement about what transpired at mediation, whether true or not, should not be considered by this Court.

Later, in her renewed motion, the Plaintiff also writes: “Plaintiff has made a prima facie showing of bad faith through her Amended Complaint and the exhibits attached thereto, which include a Tyger River letter, a letter and offer of judgment from Defendant offering less than the policy limits, and the ultimate judgment, which was far in excess of the policy limits.” *See*, Plaintiff’s Renewed Motion to Compel, p. 8. Those documents, however, fail to make a *prima facie* showing of any bad faith on the part of the IRF.

As indicated, the Plaintiff has brought suit under the “Tyger River” doctrine based on the allegation that the IRF failed to settle the underlying action within policy limits. In the leading

case of *Holgate v. American*, 279 S.C. 336, 306 S.E.2d 616 (1983), the Supreme Court explained that “an insurer’s unreasonable refusal to settle within policy limits subjects the insurer to tort liability.” 306 S.E.2d at 618.

Yet, the Plaintiff never made a demand to settle the underlying case of *Worland*, Civil Action Number 5:12-3177-RMG, for \$600,000 or less. Instead, the Plaintiff alleges that she made a settlement demand of \$1 million which exceeded the policy limits. *See*, Amended Complaint, Ex. C. In addition, as the Plaintiff fully concedes, the IRF did make a settlement offer to the Plaintiff of the policy limits of \$600,000 at least two months prior to trial and judgment being entered, and that offer was rejected. *See*, Amended Complaint, Ex. F. As a result, the Plaintiff cannot state a claim under the “Tyger River” doctrine based on the allegation that the IRF failed to settle the underlying action within policy limits. Where the plaintiff in the underlying action was offered policy limits prior to trial, and those policy limits were rejected, there is no basis for Tyger River liability.

In sum, there is no evidence that the Plaintiff was willing at any point to settle the underlying case for the policy limits of \$600,000 or less. Likewise, there is no evidence that the Assignors ever demanded or even requested that the IRF pay the policy limits in settlement of the claims against them. The so-called “Tyger River letter” to which the Plaintiff refers was not, in actuality, a Tyger River letter from the insureds to the IRF demanding settlement within policy limits. There is no such letter. Moreover, that September 12, 2013 letter from Plaintiff’s counsel to the IRF includes a demand for \$3 million which far exceeds the policy limits. In short, the Plaintiff has woefully failed in presenting a *prima facie* case of Tyger River bad faith. At best, the Plaintiff has shown excess judgments were returned at trial, and that alone is not evidence of bad faith. Consequently, on this additional basis, the Plaintiff’s renewed motion to compel should be denied.

#### IV. T P

#### IR 's claims file .

In addition, the Plaintiff has failed to demonstrate that the work-product privilege that protects the IRF's claims files and claims information has been explicitly or impliedly waived. The South Carolina General Assembly has provided for a statutory work-product privilege for the IRF's claims files. Specifically, S.C. Code Ann. 1-11-140(G) provides: "Documentary or other material prepared by or for the Insurance Reserve Fund in providing any insurance coverage authori ed by this section or any other provision of law which is contained in any claim file is subject to disclosure to the extent required by the Freedom of Information Act only after the claim is settled or finally concluded by a court of competent jurisdiction." S.C. Code Ann. 1-11-140(G). That statutory privilege has not been waived by the IRF and remains in force.<sup>2</sup>

In addition, the Plaintiff has not shown that any of the party-defendants in Civil Action Number 5:12-03177-RMG, including the purported Assignors, nor the attorneys themselves have waived the work-product privilege. The Assignment of Rights and Covenants Not to Execute, which is Exhibit A to the Complaint, does not make any reference to a waiver of the work-product privilege by the Assignors. Finally, there has been no waiver by the other party-defendants in Civil Action Number 5:12-03177-RMG who likewise enjoy the privilege under a common interest.

In sum, the documents sought by the Plaintiff in her renewed motion to compel, which includes portions of the IRF claims files, are protected from disclosure by the work-product privileges discussed herein.

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<sup>2</sup> That statutory privilege also preserves the attorney-client privilege which is recogni ed and preserved under the Freedom of Information Act. *ee*, S.C. Code Ann. 30-4-40(7) (exempting "[c]orrespondence or work product of legal counsel for a public body and any other material that would violate attorney-client relationships").

## CONCLUSION

Based on the foregoing discussion, the Defendant South Carolina Insurance Reserve Fund respectfully requests that the Court deny the Plaintiff's renewed motion to compel.

Respectfully submitted,

LINDEMANN, DAVID S. HUGHES, P.A.

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*on behalf of the Defendant*  
*South Carolina Insurance Reserve Fund*

July 17, 2019

|                                           |   |                              |
|-------------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND                        | ) | FIFTH JUDICIAL CIRCUIT       |
|                                           | ) |                              |
| Nancy Morris, as assignee of Andrew J.    | ) | C.A. No.: 2017-CP-40-06773   |
| Bland, PFC; Leemon E. Carner, PFC; Jerry  | ) |                              |
| Speissegger, Jr., PFC; Priscilla Garrett, | ) |                              |
| SGT; and Richard T. Burkholder, SGT;      | ) |                              |
|                                           | ) | PLAINTIFF'S MOTION TO ALTER  |
| Plaintiffs,                               | ) | OR AMEND ORDER               |
|                                           | ) |                              |
| -vs-                                      | ) |                              |
|                                           | ) |                              |
| South Carolina Insurance Reserve Fund,    | ) |                              |
|                                           | ) |                              |
| Defendants.                               | ) |                              |

Plaintiff, by and through undersigned counsel, and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, hereby moves the Court to enter an Order reconsidering, altering, and/or amending the Order Granting Defendant's Motion for Summary Judgment, filed on September 26, 2019. Counsel for Plaintiff received notice of the Order on that same day, September 26, 2019.

#### BAC GROUND

This matter arises out of an underlying wrongful death/survival action lawsuit involving the death of Ms. Morris's sister, David Woods. In that underlying matter, Defendant was the liability insurer for the five Assignors named above. Plaintiff alleges that Defendant acted in bad faith, negligently, and grossly negligently, and breached the terms of the contract, by failing to tender the liability insurance limits in a timely fashion.

In discovery, Plaintiff sought the production of certain documents, including the claim file for the underlying litigation. Defendant claimed that these documents were privileged, and declined to produce them. Plaintiff filed a Motion to Compel seeking production of these documents. Defendant filed a memorandum in opposition, as well as a Motion for Summary

Judgment. Both motions were heard on July 25, 2019, with all counsel of record present. This Court issued its order awarding Defendant summary judgment on September 26, 2019, rendering Plaintiff's Motion to Compel moot.

### ARGUMENT

Defendant moved for summary judgment on four grounds: statute of limitations, the alleged effect of the releases in extinguishing the assignors' liability, the alleged lack of breach of contractual duties, and the alleged lack of evidence to support a Tyger River bad faith failure-to-settle claim. The Court seemingly adopted the language of Defendant's proposed order wholesale, and did not address any of Plaintiff's arguments made in her own brief or proposed order. Plaintiff respectfully requests that the Court reconsider its Order based on the following.

1. The statute of limitations should run from the date of the appeal and/or should be equitably tolled during the pendency of the appeal. As Plaintiff pointed out in her proposed order, the date of the judgment in the underlying action, which is the last date on which Defendant would allow an appeal, was October 21, 2014. Defendant subsequently appealed to the Fourth Circuit, which did not deny Defendant's appeal until November 16, 2016. Thus, the entire two-year statute of limitations that Defendant would allow Plaintiff in order to file her bad faith claim elapsed before the verdict was even finalized or upheld. Moreover, Plaintiff was prevented from contacting the Assignors, who were still represented by their counsel in the underlying matter in connection with the appeal, for that entire two-year period.

The proper date for the statute of limitations to begin is the date the appeal was denied and the judgment became final. Prior to the appellate court upholding the verdict, there was no enforceable judgment against the county defendants, and they had suffered no damages. Adopting a statute of limitations dating from the entry of the verdict in the underlying case would encourage

defendants to file frivolous appeals to the Court of Appeals and Supreme Court simply in order to run out the time allotted for a Tyger River claim.

At the very least, the statute of limitations should have been tolled under the doctrine of equitable tolling. The appeal and the county defendants' representation during that appeal constituted "extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim." Hooper v. Ebene er Sr. Servs. Rehab. Ctr., 386 S.C. 108, 116, 687 S.E.2d 29, 32 (2009). The Court did not address either equitable tolling or the appeal in its Order, and Plaintiff respectfully requests that it reconsider based on these grounds.

2. The assignments executed by assignors specifically identify as covenants not to execute, and do not serve to release Defendant from liability. In its brief, Defendant argues that this case is comparable to Smalls v. Blackmon, 269 S.C. 614, 239 S.E.2d 640 (1977). Smalls deals with the Longshoremen s and Harbor Workers Compensation Act, and finds that the plaintiff did not have a cause of action against a fellow employee under the limitations of the Act. It is utterly inapposite to this case, and the Court did not offer any analysis of how the Longshoremen's Act affects a Tyger River bad faith claim.

The assignments completed by the county defendants were explicitly labeled as covenants not to execute and not releases. Defendants cite to no language in the releases that extinguish assignors' personal liability, because none exist. Plaintiff did not agree to release them from liability, only to refrain from executing against their assets. This is standard language used by plaintiffs across the state and country in drafting covenants not to execute that preserve their right to collect against a defendant's underinsured coverage. To hold that such documents relieve insurers from any obligation to indemnify would be to overturn the entire practice of UIM collection statewide.

Moreover, Defendants' argument renders the assignments a nullity. The consideration Plaintiff receives under the assignments is the ability to bring bad faith claims against Defendants. If the assignments nullify the very consideration they are designed to convey, then they fail for want of consideration. To construct the assignments in such a way creates an absurd result that clearly frustrates the intention of the parties, and is not in accord with South Carolina's principles of contractual construction. Plaintiff accordingly requests reconsideration.

3. Plaintiff has made valid allegations that Defendant breached implied contractual duties. Genuine questions of material fact exist on this point, and Plaintiff requests reconsideration.

4. Plaintiff has set forth adequate evidence to support a Tyger River bad faith claim. Defendant's argument centers on the fact that Plaintiff never made a demand for the policy limits or less. Defendant has been unable to produce any case law or statute establishing that a demand within the policy limits is a necessary precondition before they are required to act in good faith. By contrast, the entire structure of South Carolina statutory and case law imposes a duty on insurers to act in good faith, independent on the actions of the insured or third-party claimant. Defendant's argument is one of causation—to wit, that their bad faith was irrelevant because Plaintiff would not have accepted the policy limits even had they been offered. This is a question of fact for the jury, making summary judgment inappropriate.

#### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reconsider its Order of September 26, 2019 and that Defendant's Motion for Summary Judgment be DENIED.

s/Garrett B. Johnson

Garrett B. Johnson, SC Bar 81105

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Attorney for Plaintiff

October 4, 2019

5:12-cv-03177-RMG Date Filed 12/08/16 Entry Number 282 Page 1 of 20  
Appeal: 15-1115 Doc: 56 Filed: 11/16/2016 Pg: 1 of 20

UNPUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 15-1115

NANCY MORRIS, as personal representative of the Estate of  
David Allan Woods,

Plaintiff - Appellee,

v.

ANDREW J. BLAND; RICHARD T. BURKHOLDER, SGT, officially and  
individually; LEMON E. CARNER, PFC, officially and  
individually; JERRY SPEISSEGER, JR., PFC, officially and  
individually; PRISCILLA GARRETT, SGT, officially and  
individually,

Defendants - Appellants,

and

THE HOPE CLINIC, LLC; TEMISAN ETIKERENTSE; SUE BRABHAM,  
R.N., officially and individually; H. WAYNE DEWITT, Berkeley  
County Sheriff, officially and individually; JAMES M.  
BROPHY, PFC, officially and individually; PATRICIA D.  
COLLINS, SGT, officially and individually; CHARLES A.  
DESANTO, CPL, officially and individually; ASHLEY A. HARBER,  
PFC, officially and individually; KANSAS DAAB, PFC,  
officially and individually; JOHN DOES, officially and  
individually; CLIFFORD L. MCELVOGUE, Director, officially  
and individually; BERKELEY COUNTY; BERKELEY COUNTY SHERIFF'S  
DEPARTMENT; KENDRA MOORE, Staff SGT, officially and  
individually,

Defendants.

Appeal from the United States District Court for the District of  
South Carolina, at Orangeburg. Richard M. Gergel, District  
Judge. (5:12-cv-03177-RMG)

5:12-cv-03177-RMG Date Filed 12/08/16 Entry Number 282 Page 2 of 20  
Appeal: 15-1115 Doc: 56 Filed: 11/16/2016 Pg: 2 of 20

Argued: September 20, 2016

Decided: November 16, 2016

Before TRAXLER and DUNCAN, Circuit Judges, and DAVIS, Senior  
Circuit Judge.

Affirmed by unpublished per curiam opinion.

**ARGUED:** Harold C. Staley, Jr., ELROD POPE LAW FIRM, Rock Hill,  
South Carolina, for Appellee. **ON BRIEF:** Eugene P. Corrigan,  
III, Amanda K. Dudgeon, CORRIGAN & CHANDLER LLC, Charleston,  
South Carolina; James A. Stuckey, Jr., Alissa C. Lietzow,  
STUCKEY LAW OFFICES, LLC, Charleston, South Carolina, for  
Appellants. Garrett B. Johnson, ELROD POPE LAW FIRM, Rock Hill,  
South Carolina, for Appellee.

UNPUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 15-1115

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NANCY MORRIS, as personal representative of the Estate of  
David Allan Woods,

Plaintiff - Appellee,

v.

ANDREW J. BLAND; RICHARD T. BURKHOLDER, SGT, officially and  
individually; LEEMON E. CARNER, PFC, officially and  
individually; JERRY SPEISSEGER, JR., PFC, officially and  
individually; PRISCILLA GARRETT, SGT, officially and  
individually,

Defendants - Appellants,

and

THE HOPE CLINIC, LLC; TEMISAN ETIKERENTSE; SUE BRABHAM,  
R.N., officially and individually; H. WAYNE DEWITT, Berkeley  
County Sheriff, officially and individually; JAMES M.  
BROPHY, PFC, officially and individually; PATRICIA D.  
COLLINS, SGT, officially and individually; CHARLES A.  
DESANTO, CPL, officially and individually; ASHLEY A. HARBER,  
PFC, officially and individually; KANSAS DAAB, PFC,  
officially and individually; JOHN DOES, officially and  
individually; CLIFFORD L. MCELVOGUE, Director, officially  
and individually; BERKELEY COUNTY; BERKELEY COUNTY SHERIFF'S  
DEPARTMENT; KENDRA MOORE, Staff SGT, officially and  
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Appeal from the United States District Court for the District of  
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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

This appeal arises from a plaintiffs' verdict in connection with the death of David Allan Woods during his incarceration at the Hill-Finklea Detention Center ("HFDC") in South Carolina. The jury awarded substantial damages based on its finding that Andrew J. Bland, Richard T. Burkholder, Leemon Carner, Priscilla Garrett, and Jerry Speissegger, Jr. (collectively, "Appellants"), five HFDC employees present during the final weekend of Woods's incarceration, had been deliberately indifferent to Woods's serious medical needs, and thereby deprived him of rights guaranteed by the Eighth and Fourteenth Amendments. On appeal, Appellants challenge various evidentiary rulings, the punitive damages award, the setoff calculation, and the denial of several post-trial motions. Finding no error, we affirm.\*

I.

We detail the facts in the light most favorable to the jury's findings and conclusions. David Allan Woods, then 50 years old, was incarcerated at HFDC from October 12 to November 8, 2010. At the time of Woods's incarceration, HFDC had contracted with Hope Clinic, LLC to provide medical services to

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\* Although counsel for Appellants did not appear for oral argument in this case, we have fully considered the arguments set forth in the brief filed on their behalf.

inmates. Medical personnel did not generally work onsite after 5 p.m., before 9 a.m., or over the weekend. Accordingly, if a medical issue arose after hours, a shift sergeant was responsible for alerting on-call medical staff.

At approximately 10:30 p.m. on Friday, November 5, 2010, in response to a call from the central tower, Shift Sergeant Garrett found Woods shaking on the floor of his cell. Garrett asked Woods what was wrong, if he could walk, and if he could stand up. Woods responded "I don't know" to each question. J.A. 487-88. Garrett helped Woods to his feet and directed him to a cell in M-Pod, a medical observation unit with cameras that fed to the front control station. Privates were assigned to the front desk and were responsible for monitoring the video feed during four-hour shifts.

Once in his M-Pod cell, Woods was unsteady on his feet and needed assistance from his new cell mate, Freeman Ingraham, when taking off his uniform, sitting on the toilet, and drinking water from a cup. On several occasions, Ingraham attempted to contact the front desk through the intercom system. When Garrett returned to the cell, Ingraham informed her that he believed he saw blood in Woods's stool. Because Woods and Ingraham had flushed the toilet, Garrett was unable to verify the presence of blood.

At 4:28 a.m. on Saturday, November 6, Speissegger entered the cell to administer Woods's medication. Woods did not respond when asked if he would take his medication. Woods's hands were visibly shaking and, despite instructions from both Speissegger and Ingraham, Woods was unable to cup his hand to accept the medication. After the medication fell to the ground, Speissegger left and noted in his log that Woods had refused the medication.

At 5:30 a.m., Burkholder relieved Garrett as shift sergeant. Garrett notified Burkholder of Ingraham's report of blood in Woods's stool, but Burkholder did not call the nurse or attempt to observe any continued presence of blood. Burkholder testified that he visited Woods once during this shift, during which he "saw [Woods] walking" and believed Woods "was fine." J.A. 634.

The record contains several clips of Woods taken during Burkholder's shift. In one, Woods stands swaying in the middle of his cell before falling backward onto his bunk. In another, Woods is lying on his bunk with a dark substance covering the lower half of his uniform and bed. Burkholder noted in his log that Woods was "lying in his own feces and refused to shower." J.A. 650, 1165-66. Garrett returned to duty at 5:30 p.m., and she received and read the above log entry. Another video clip

from approximately 12:20 a.m. on Sunday, November 7, shows that Woods's condition remained unchanged.

At approximately 12:30 a.m. on November 7, Garrett arranged for a work crew, including Carner and Speissegger, to clean Woods's cell and escort Woods to the showers. Carner testified that Woods stood, walked, undressed, and bathed without assistance. However, Garrett observed that Woods's uniform was soiled with a dark, black, and hardened substance, and she noticed he was shaking, disoriented, and unsteady. Approximately 30 minutes after he returned to his cell, Woods appeared disoriented and struggled to put on his uniform. Three hours later, when Carner brought Woods his breakfast, Woods was lying naked on the floor. Woods was disoriented, shivering, and barely able to stand, and he required assistance when putting on his uniform. Carner believed that Woods's symptoms were the result of waking up on the cold floor, not from any need for medical attention.

Garrett and Burkholder changed shifts at approximately 5:30 a.m., at which point Garrett told Burkholder he may want to call the nurse to treat Woods. Burkholder responded that he would contact the nurse later on in his shift, but he did not do so. At approximately 6:00 a.m., another HFDC employee, James Brophy, interacted with Woods. Brophy noticed that Woods had wet himself, and he and another officer assisted Woods in changing

his uniform. Brophy prepared a written incident report wherein he noted that Woods was disoriented, was "not able to stand but for a short period of time," "did not respond to any question asked [of] him," and "didn't know where he was or why he was here." J.A. 597-98, 1171. The incident report was ultimately passed to Burkholder. Burkholder testified that when he checked on Woods, Woods "was up walking around, coherent, [and] talking," and Burkholder believed "[t]here was nothing wrong with Mr. Woods at that time." J.A. 659. Burkholder did not call the nurse, but he copied the incident report and left it for superior officers and medical staff to receive on Monday morning.

At 5:30 p.m. on Sunday, November 7, Burkholder and Garrett again changed shifts. Garrett checked on Woods shortly after 6 p.m. and found him sitting naked in his cell. She asked Woods to put on his uniform to avoid the cold, and she asked if Woods was in pain or had any complaints. Woods responded to all her questions with grunts. Garrett testified that she believed Woods was being "defiant," though she admitted having no knowledge of any past, uncooperative behavior from Woods. J.A. 504-05.

At 10:19 p.m., Bland was at the front desk and observed Woods lying naked on the cell floor. Through the intercom, Bland instructed Woods to get dressed. Woods stood up, walked

to the uniform lying on his bunk, and urinated onto it. Woods then stood, trembling violently, as he held onto the wall for support. At 2:15 a.m. on Monday, November 8, Bland entered Woods's cell to give him his medication. Woods was again unable to properly cup his hand, and Bland noted in his log that Woods had refused his medication. Bland testified that he believed Woods was being "difficult." J.A. 729, 737.

After a new sergeant came on duty on Monday, November 8, the staff nurse was called to examine Woods. Woods was then released with his sentence time-served and was transported to Trident Medical Center, where he was found to be "stuporous" and "hypotensive" with "a hemoglobin of 4." J.A. 450-51, 1257. Woods's "prognosis was felt to be bleak" when he was admitted. J.A. 1258. Woods then underwent several procedures to address bleeding ulcers in his duodenum. Woods suffered a cardiac arrest during the first procedure, but he was resuscitated. On November 11, 2010, Woods suffered another major intestinal bleed above his stomach. Woods passed away at 4:50 p.m. on November 11, 2010. An autopsy revealed his cause of death as gastrointestinal bleeding from a duodenal ulcer, bleeding esophageal ulcers, cirrhosis of the liver with esophageal varices, and cardiac arrest secondary to gastrointestinal bleeding.

Appellee Nancy Morris, as personal representative of Woods's estate, filed this survival and wrongful death action pursuant to 42 U.S.C. § 1983. Morris filed the action against eighteen defendants: the Hope Clinic and two of its employees (collectively, the "Hope Defendants"), as well as Appellants, Berkeley County, its Sheriff's Office, and eight other county employees (collectively, the "County Defendants"). Prior to trial, the district court approved a settlement reached by Morris and the Hope Defendants. Ten of the County Defendants were also dismissed voluntarily or by summary judgment. The case then proceeded to trial only on Morris's deliberate indifference claim against Appellants. During trial, the parties were limited to presenting evidence that related to the period between November 5 and 8, 2010, when Appellants' deliberate indifference allegedly occurred. The district court also prohibited Appellants from introducing evidence regarding the Hope Defendants, the settlement, their prior treatment of Woods, or Woods's history of alcohol use.

The jury determined that Appellants had been deliberately indifferent to Woods's serious medical needs during his last weekend of incarceration. The jury awarded compensatory damages of \$500,000 jointly, punitive damages of \$150,000 each against Bland, Carner, and Speissegger, and punitive damages of \$1,000,000 each against Burkholder and Garrett. The district

court then resolved a number of post-trial motions filed by Appellants. The district court denied Appellants' motions for judgment as a matter of law, new trial, and remittitur. However, it granted in part Appellants' motion for setoff and, upon applying portions of the Hope settlement proceeds, reduced the compensatory damages award to \$171,875. Appellants timely appealed. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## II.

We begin by addressing Appellants' various evidentiary challenges. This Court reviews the district court's rulings on the admissibility of evidence for abuse of discretion. Minter v. Wells Fargo Bank, N.A., 762 F.3d 339, 349 (4th Cir. 2014) (citation omitted).

Appellants first argue that the district court improperly excluded evidence related to the Hope Defendants, the settlement, and their treatment of Woods before November 5, 2010. Appellants contend this evidence is relevant to determining causation and the subjective state of mind required for deliberate indifference. However, the district court correctly noted that the central dispute at trial was whether Woods's need for medical treatment over his last weekend of incarceration was obvious to a layperson such that Appellants should have reported his symptoms to medical personnel.

Appellants repeatedly testified they had no knowledge of Woods's medical history. Nor did they provide any evidence to suggest they relied on the Hope Defendants' treatment history when they observed and failed to adequately respond to Woods's deteriorating health over the November 5-8 period. Given these considerations, we agree that the Hope Defendants' role or alleged negligence in treating Woods before this period was irrelevant to the deliberate indifference claim. See, e.g., Cooper v. Dyke, 814 F.2d 941, 947 (4th Cir. 1987) (holding that the paramedics' negligence "could not have constituted an 'intervening' cause" where the plaintiff's "claim was based on defendants' deliberate indifference to his . . . suffering after the time of the initial paramedic exam."). Accordingly, the district court did not abuse its discretion in excluding the aforementioned evidence.

Appellants also contend that the district court improperly excluded evidence of Woods's alcohol and drug use as well as its impact on his medical condition. However, Appellants provide nothing but mere speculation when they argue that Woods's use of alcohol and drugs "accelerat[ed]" the deterioration of his health such that "no act or omission by Appellants proximately caused his death." Appellants' Br. 48. Given the likely prejudicial effect of such evidence, and given Appellants' failure to articulate the relevance or probative value of this

evidence, we find no abuse of discretion in its exclusion under Federal Rule of Evidence 403.

Finally, Appellants argue that the district court erred when it "prohibited" Appellants from soliciting expert testimony from Morris's qualified medical expert, Dr. Jack Raba, as well as Appellants' two fact witnesses. Appellants' Br. 44. Contrary to their assertion, Appellants were permitted wide latitude to vigorously cross-examine Dr. Raba regarding his testimony, especially as it pertained to causation. We therefore discern no abuse of discretion as to this expert testimony.

We similarly find no abuse of discretion as to the examination of Appellants' two fact witnesses, Dr. John Sanders and Dr. Ellen Reimers. Dr. Sanders was Woods's treating physician before and after his incarceration at HFDC, and Dr. Reimers was the pathologist who conducted Woods's autopsy. Notably, however, neither witness prepared an expert report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B). Numerous courts have held that a physician is exempt from this written report requirement only as to opinions formed during the course of treatment. See, e.g., Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 824-26 (9th Cir. 2011) (collecting cases). Here, both Dr. Sanders and Dr. Reimers were fully permitted to discuss their examination of Woods and their

diagnoses or findings. Their testimony was disallowed only to the extent Appellants sought to "offer [expert] opinions as to proximate cause" that were not formed during the course of treatment and thereby fell outside the scope of their opinions as mere fact witnesses. J.A. 380; see Fed. R. Evid. 701. Under Federal Rule of Civil Procedure 37(c)(1), a party who fails to provide information as required by Rule 26(a), including a Rule 26(A)(2)(B) expert report, is subsequently "not allowed to use that information . . . at a trial" and may be sanctioned for this failure. Fed. R. Civ. P. 37(c)(1). Accordingly, the district court did not abuse its discretion in excluding the above testimony from Dr. Sanders and Dr. Reimers.

### III.

Appellants next contend that Morris failed to provide adequate evidence to support the jury's finding of deliberate indifference and, as a result, the district court erred in denying their Rule 50(b) motion for judgment as a matter of law and their Rule 59(a) motion for a new trial. We review de novo the denial of a Rule 50(b) motion. Durham v. Jones, 737 F.3d 291, 298 (4th Cir. 2013) (citation omitted). "If, viewing the facts in the light most favorable to the non-moving party, there is sufficient evidence for a reasonable jury to have found in [the non-moving party's] favor, we are constrained to affirm the jury verdict." First Union Commercial Corp. v. GATX Capital

Corp., 411 F.3d 551, 556 (4th Cir. 2005) (alteration in original) (quoting Lack v. Wal-Mart Stores, 240 F.3d 255, 259 (4th Cir. 2001)). The denial of a Rule 59(a) motion is reviewed for abuse of discretion, and it "will not be reversed 'save in the most exceptional circumstances.'" FDIC v. Bakkebo, 506 F.3d 286, 294 (4th Cir. 2007) (quoting Figg v. Schroeder, 312 F.3d 625, 641 (4th Cir. 2002)).

To prevail on an Eighth Amendment claim of inadequate medical care, a plaintiff must establish both a subjective and an objective component to her claim. Iko v. Shreve, 535 F.3d 225, 241 (4th Cir. 2008). "The plaintiff must demonstrate that the [prison] officers acted with 'deliberate indifference' (subjective) to the inmate's 'serious medical needs' (objective)." Id. (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Id. (quoting Henderson v. Sheahan, 196 F.3d 839, 846 (7th Cir. 1999)). To satisfy the subjective component, the plaintiff must demonstrate that the officer had "actual knowledge of the risk of harm to the inmate" and that the officer "recognized that his actions were insufficient to mitigate the risk of harm . . . arising from [the inmate's] medical needs." Id. (internal quotation marks, citations, and

emphasis omitted). Whether an officer "had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." Farmer v. Brennan, 511 U.S. 825, 842 (1994) (citations omitted).

Upon viewing the trial testimony and evidence provided by the parties, we find that the evidence supports the jury's finding of a serious medical need. The videos of Woods's conditions, Ingraham's recognition of Woods's need for medical attention, and Brophy's testimony and incident report suggest that Woods's medical need was "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Iko, 535 F.3d at 241 (citation omitted). There is also ample circumstantial evidence to support the subjective component of this claim. Based on the obviousness of an inmate's medical need, a jury is permitted to conclude that the prison officers knew of the risk of harm to the inmate. Farmer, 511 U.S. at 842. Moreover, "a factfinder may conclude that the official's response . . . was so patently inadequate as to justify an inference that the official actually recognized that his response to the risk was inappropriate under the circumstances." Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 303 (4th Cir. 2004). As described, testified to, and captured in the record, the obviousness of Woods's medical need and Appellants'

inadequate reactions to Woods's symptoms amply support the jury's finding of deliberate indifference. Accordingly, we discern no error in the district court's denial of Appellants' motions for relief under Rule 50(b) and Rule 59(a).

#### IV.

Appellants next challenge the jury's punitive damages award. Appellants contend that the evidence did not support a finding of punitive damages under 42 U.S.C. § 1983, that the punitive damages award was unconstitutionally excessive, and that the awards against Garrett and Burkholder — which were almost seven times the awards against the remaining Appellants — indicate the jury erred by holding the shift sergeants liable for the conduct of their subordinates. Appellants seek review of the denials of their 50(b) motion for judgment as a matter of law, motion for remittitur, and 59(a) motion for new trial on the above bases.

We review de novo the denial of a 50(b) motion on a punitive damages award, and we review de novo the denial of a motion for remittitur on a punitive damages award alleged to be constitutionally excessive. EEOC v. Fed. Express Corp., 513 F.3d 360, 370-71 (4th Cir. 2008) (citations omitted). We review the denial of a 59(a) motion for abuse of discretion. Gregg v. Ham, 678 F.3d 333, 342-43 (4th Cir. 2012) (citation omitted).

Punitive damages are available in § 1983 actions "for conduct that involves 'reckless or callous indifference to the federally protected rights of others,' as well as for conduct motivated by evil intent." Cooper v. Dyke, 814 F.2d 941, 948 (4th Cir. 1987) (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)). Based on the record before us, we conclude that Appellants' deliberate indifference to Woods's serious medical needs satisfies the requirement that their conduct involve reckless or callous indifference to Woods's federally-protected rights. See id. (finding that the "callous indifference required for punitive damages is essentially the same as the deliberate indifference required for a finding of liability on the § 1983 claim" for inadequate medical care).

Moreover, we do not find the punitive damages award to be constitutionally excessive. Contrary to Appellants' contentions, the factors enumerated by the Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mutual Auto Insurance Co. v. Campbell, 538 U.S. 408 (2003), support the jury's punitive damages award. First, given Appellants' repeated and deliberate indifference over a three-day period, Woods's physical vulnerability, and Woods's resulting physical harm, we find that Appellants' misconduct was sufficiently "reprehensible as to warrant the imposition of further sanctions [beyond compensatory damages] to achieve

punishment or deterrence.” Campbell, 538 U.S. at 419 (citation omitted). Second, the total punitive damages award is approximately five times the compensatory damages award, and single digit ratios generally do not present a constitutional issue. Id. at 425. Appellants emphasize that the individual punitive awards against Burkholder and Garrett reflect a 10-to-1 ratio, but a high ratio may nonetheless “comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’” Id. (citation omitted). Here, the compensatory damages award was deflated due to Woods’s lack of lost wages. Based on the facts of this case, we “will not use the low economic damages award to limit a punitive damages award that was otherwise justified by the reprehensibility of [Appellants’] behavior.” Siggers-El v. Barlow, 433 F.Supp.2d 811, 819 (E.D. Mich. 2006). Third, we note that the punitive damages award in this case is not inconsistent with similar deliberate indifference cases. See, e.g., Murphy v. Gilman, 551 F. Supp. 2d 677, 685-86 (W.D. Mich. 2008) (upholding a punitive damages award of \$1.25 million against each prison officer defendant for deliberate indifference over a five-day period during which an inmate received no medical care and little food and water, resulting in his death).

Finally, we find Appellants' argument regarding supervisory liability to be without merit. The evidence supports a finding that Burkholder and Garrett were more culpable than Bland, Speissegger, and Carner in their deliberate indifference to Woods's serious medical needs. Thus, the record in this case supports Burkholder and Garrett's larger share of the punitive damages award. We therefore discern no error in the punitive damages award or in the district court's denial of Appellants' post-trial motions.

V.

Finally, Appellants challenge the district court's calculation of the setoff amount. A district court's decision to set off a damage award is reviewed for clear error. Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 596 (4th Cir. 1996) (citations omitted).

"[S]tate law governs the substantive right to setoff." Id. Under South Carolina law, "[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." Rutland v. S.C. Dep't of Transp., 734 S.E.2d 142, 145 (S.C. 2012) (citation omitted). Here, given that Morris's settlement with the Hope Defendants divided the settlement proceeds 50/50 between the survival and wrongful death claims, the district court applied the same division with respect to the jury's \$ 1983 verdict. Because

Woods could experience only one wrongful death, the court fully offset the \$250,000 of the jury verdict attributable to wrongful death. The district court then considered the survival portion of Morris's claims. The court observed that the Hope Defendants interacted with Woods over 29 days whereas Appellants' interactions were limited to Woods's last four days of incarceration, which amounted to only 14% of the settlement time period. However, the district court also noted that Woods experienced more pain and suffering during his last weekend of incarceration. Accordingly, the court allocated 25% of the survival settlement proceeds to the survival portion of the jury verdict. This determination resulted in a total setoff of \$328,125.

The above calculation is reasonably based on the evidence and fairly advances the policy of preventing double recovery. Accordingly, we discern no clear error or abuse of discretion in the district court's calculation.

VI.

For the foregoing reasons, the judgment is

AFFIRMED.

# LINDEMANN, DAVIS & HUGHES, P.A.

Attorneys at Law

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May 21, 2018

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Record on Appeal 378

Harold C. Staley, Esquire  
Andrew W. Creech, Esquire  
Garrett B. Johnson, Esquire  
Elrod Pope Law Firm  
Post Office Box 11091  
Rock Hill, South Carolina 29731-1091

RE: Nancy Morris, as assignee of Andrew J. Bland, PFC; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Priscilla Garret, SGT; and Richard T. Burkholder, SGT v. South Carolina Insurance Reserve Fund  
Civil Action Number: 2017-CP-40-6773  
Claim Number: B5578  
Our File Number: 104.10332

Counsel

Please find enclosed and served upon you the following discovery documents with regard to the above referenced matter:

1. Responses to Plaintiff's Initial Interrogatories
2. Responses to Plaintiff's Initial Requests to Produce

If you have any questions, please advise.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb  
Enclosures

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND ) IN THE COURT OF COMMON PLEAS

Nancy Morris, as assignee of Andrew J. )  
Bland, PFC; Leemon E. Carner, PFC; Jerry ) Civil Action No. 2017-CP-40-6773  
Speissegger, Jr., PFC; Priscilla Garret, SGT; )  
and Richard T. Burkholder, SGT, )  
) Plaintiffs, )  
) v. )  
) )  
South Carolina Insurance Reserve Fund, )  
) )  
Defendant. )  
\_\_\_\_\_ )

**RESPONSES TO PLAINTIFF'S  
INITIAL INTERROGATORIES**

TO: GARRETT B. JOHNSON, COUNSEL FOR PLAINTIFF

Pursuant to Rule 33, SCRCF, the Defendant South Carolina Insurance Reserve Fund responds to the Plaintiff's Initial Interrogatories as follows:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of this case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

**RESPONSE #1:**

**Andrew J. Bland  
Leemon E. Carner  
Jerry Speissegger, Jr.  
Priscilla Garrett Bland  
Richard T. Burkholder**

**These witnesses are the purported Assignors of their rights to the Plaintiff. It is anticipated that they will testify as to the purported assignments, how they were negotiated, and the consideration that received in exchange for those purported assignments.**

**Christopher P. Biering  
Biering Law Firm  
103 Broughton Road  
Moncks Corner, South Carolina 29461**

**This witness is understood to be the legal counsel for all or some of the purported Assignors. It is anticipated that he will testify as to the purported assignments, how they were negotiated, and the consideration that received in exchange for those purported assignments.**

2. Set forth a list of photographs, plats, sketches or any and all other documents in possession of the party that relate to any claim or defense in this case.

**RESPONSE #2:**

**None.**

3. For each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment, please state:

- a. The name and address of the insurer;
- b. The amount of coverage available to satisfy such a judgment;
- c. The claims in this case for which such insurance may be available;
- d. The conditions, if any, that the insurer has stated must be satisfied before it will satisfy, indemnify, or reimburse for payments made to satisfy, such a judgment; and
- e. The conditions, if any, upon which the insurer has purported to reserve its rights to decline coverage

**RESPONSE #3:**

**None.**

4. Describe any umbrella or excess liability insurance coverage, over and above the basic or primary coverage, that may be responsible for paying any part of a judgment against you in this case.

**RESPONSE #4:**

**None.**

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statement taken from such witness.

**RESPONSE #5:**

**See Response to Interrogatory #1.**

6. State the name, address, and qualifications of each expert who may be called as an expert witness at the trial for this case, along with the following information:

- a. A complete statement of all opinions the witness will express and the basis and reasons for them;
- b. The facts or data considered by the witness in forming those opinions;
- c. The witness's qualifications, including a list of all publications authored in the previous ten years;
- d. A list of all other cases in which, during the previous 5 years, the witness testified as an expert at trial or by deposition;
- e. A list of the compensation paid to the expert for these cases; and
- f. A statement of the compensation to be paid in this case.

In lieu of responding to this interrogatory, an expert report containing the above information may be provided.

**RESPONSE #6:**

**The Defendant has not retained an expert witness at this time. The Defendant reserves the right to supplement this response.**

7. When did Defendant first retain counsel in the underlying suit, 5:12-cv-03177-RMG (hereinafter "the case")?

**RESPONSE #7:**

**The Defendant first retained defense counsel to defend the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, on or about October 11, 2012.**

8. How often and when did Defendant meet with legal counsel to discuss the value of the case? Please identify Defendant's employees who participated in these meetings by job title, phone number, and last known address.

**RESPONSE #8:**

**Objection.** This interrogatory is unclear and vague in what is meant by the term "meet." It is unclear whether the Plaintiff is seeking information about in person, face-to-face meetings (such as in a mediation setting which is confidential under Rule 8(a), SCADR) or any other types of communications. Further answering, there were numerous communications between the Defendant's employees and legal counsel, but that number cannot be determined with any specific certainty. Generally speaking, communications took place in person, by telephone, by correspondence, and by electronic mail.

9. What steps did Defendant take to prepare for the mediation of August 1, 2013 and ensure that they could properly value the case at this mediation?

**RESPONSE #9:**

**Objection.** The information sought by this interrogatory is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

10. What recommendations were made by Defendant's legal counsel following this mediation, including but not limited to any recommendations regarding whether Defendant should tender their policy limits?

**RESPONSE #10:**

**Objection.** The information sought by this interrogatory is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

11. Who made the decision not to tender the policy limits at this time? Please identify these persons by job title, phone number, and last known address.

**RESPONSE #11:**

**Objection.** The information sought by this interrogatory is protected work product. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

12. Why did Defendant refuse to tender the policy limits following this mediation?

**RESPONSE #12:**

**Objection.** The information sought by this interrogatory is protected work product. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

13. Was Defendant at any other time advised to tender the policy limits? If so, please identify both the person who made this recommendation and the person to whom the recommendation was made, by phone number and last known address.

**RESPONSE #13:**

**Objection.** The information sought by this interrogatory is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

14. If the answer to Interrogatory #13 is yes, how many times was Defendant advised to tender its policy limits? Please provide the date of each instance.

**RESPONSE #14:**

**Objection.** The information sought by this interrogatory is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

15. If the answer to Interrogatory #13 is yes, please list all employees involved in making the decision whether or not to tender the policy limits, and what considerations they took into account in reaching that decision.

**RESPONSE #15:**

**Objection.** The information sought by this interrogatory is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

16. Please describe any other conversations, written or oral, that took place with legal counsel concerning the value of the case, including the dates, the persons present, and the content of such conversations.

**RESPONSE #16:**

**Objection.** The information sought by this interrogatory is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

17. Apart from conversations with counsel, did Defendant or any of its employees take any steps to determine the value of the case? If so, please describe these actions in detail, along with the names and contact information of any employees involved.

**RESPONSE #17:**

**Objection.** The information sought by this interrogatory is protected work product. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

18. When did Defendant first tender their policy limits?

**RESPONSE #18:**

**The policy limits of \$600,000 were tendered to the Plaintiff on August 12, 2014.**

19. Who made the decision to tender the policy limits at this time?

**RESPONSE #19:**

**Objection.** The information sought by this interrogatory is protected work product.

20. What criteria did Defendant rely upon in making this determination?

**RESPONSE #20:**

**Objection. The information sought by this interrogatory is protected from discovery by the work product privilege and the attorney-client privilege.**

21. What conversations, if any, did Defendants have with Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Priscilla Garrett Bland, SGT; and/or Jerry Speissegger, Jr., PFC concerning settlement? Please provide the dates of these conversations and identify the persons who conducted them by job title, phone number, and last known address.

**RESPONSE #21:**

**Upon information and belief, there were no direct conversations between the Defendant and the persons named. The Defendant relied upon defense counsel representing those persons to keep them advised of their representation including the status of the litigation.**

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

ANDREW F. LINDEMANN #13030  
5 Calendar Court, Suite 202  
Post Office Box 6923  
Columbia, South Carolina 29260  
T: 803-881-8920  
Email: andrew@ldh-law.com

*Counsel for Defendant  
South Carolina Insurance Reserve Fund*

Columbia, South Carolina

May 21, 2018

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Nancy Morris, as assignee of Andrew J. )  
Bland, PFC; Leemon E. Carner, PFC; Jerry )  
Speissegger, Jr., PFC; Priscilla Garret, SGT; )  
and Richard T. Burkholder, SGT, )

Civil Action No. 2017-CP-40-6773

Plaintiffs, )

v. )

**RESPONSES TO PLAINTIFF'S  
INITIAL REQUESTS TO PRODUCE**

South Carolina Insurance Reserve Fund, )

Defendant. )

TO: GARRETT B. JOHNSON, COUSNEL FOR PLAINTIFF

Pursuant to Rule 34, SCRCP, the Defendant South Carolina Insurance Reserve Fund responds to the Plaintiff's Initial Requests for Production as follows:

1. Any and all documents identified by Defendant in Defendant's response to Plaintiff's interrogatories.

**RESPONSE #1:**

**None.**

2. True and correct copies of any and all insurance agreements or policies under which any person or entity carrying on an insurance business may be liable to satisfy part or all of the judgment that may be rendered in this action, or to indemnify or reimburse for payments made to satisfy the judgment, including but not limited to any liability insurance policy covering Defendant at the time of the accident.

**RESPONSE #2:**

None.

3. Copies of any and all statements, written or recorded, as well as any and all letters or other prepared materials given by any person, group, corporation, or entity who has any information, knowledge, opinions, or facts that are or may be applicable to this case.

**RESPONSE #3:**

**Objection.** The information sought by this request for production is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

4. Any and all documents within the possession of Defendant that contain information as to any investigations pertaining to the incident in question.

**RESPONSE #4:**

**Objection.** The information sought by this request for production is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

5. Copies of employment with any attorneys who at any time represented Defendant in the underlying case.

**RESPONSE #5:**

**Objection.** This request for production is unclear. Nonetheless, to the extent that the Plaintiff is seeking any communications with legal counsel retained by the Defendant, that information is protected from discovery by the work product privilege and the attorney-client privilege.

6. Any and all correspondence with such attorneys.

**RESPONSE #6:**

**Objection.** The information sought by this request for production is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

7. Any and all documentation created internally by Defendant or Defendant's employees concerning the litigation.

**RESPONSE #7:**

**Objection.** The information sought by this request for production is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

8. Any and all documentation reviewed by Defendant or Defendant's employees concerning the litigation.

**RESPONSE #8:**

**Objection.** The information sought by this request for production is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

9. Minutes for any meetings at which Defendant or Defendant's employees discussed the underlying litigation.

**RESPONSE #9:**

The Defendant does not keep minutes of meetings. Further answering, any information regarding meetings or discussions or other communications related to the underlying litigation is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

10. The complete case file for the underlying litigation.

**RESPONSE #10:**

**Objection.** The information sought by this request for production is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR. In addition, this request is objectionable as overly broad.

11. Any and all documents whatsoever regarding to Defendant's valuation of the case, offers to settle the case, and the reasoning by which Defendant arrived at that valuation.

**RESPONSE #11:**

**Objection.** The information sought by this request for production is protected from discovery by the work product privilege and the attorney-client privilege. In addition, to the extent that the Plaintiff is seeking information related to the mediation process, that information is confidential pursuant to Rule 8(a), SCADR.

12. Personnel files for any and all employees mentioned in response to Interrogatories or otherwise involved in the decision-making process or evaluation of the underlying case.

**RESPONSE #12:**

**Objection.** The information sought by this request for production is not relevant nor designed to lead to the discovery of relevant evidence. In addition, the Defendant's employees, who are not parties to this litigation, enjoy privacy rights related to information contained in their personnel files. Further, this request is objectionable as overly broad.

LINDEMANN, DAVIS & HUGHES, P.A.

BY:   
 ANDREW F. LINDEMANN #13030  
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*Counsel for Defendant  
 South Carolina Insurance Reserve Fund*

Columbia, South Carolina

May 21, 2018

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Nancy Morris, as assignee of Andrew J. )  
Bland, PFC; Leemon E. Carner, PFC; Jerry )  
Speissegger, Jr., PFC; Priscilla Garret, SGT; )  
and Richard T. Burkholder, SGT, )

Civil Action No. 2017-CP-40-6773

Plaintiffs, )

CERTIFICATE OF SERVICE

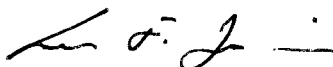
v. )

South Carolina Insurance Reserve Fund, )

Defendant. )

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Defendant, South Carolina Insurance Reserve Fund, does hereby certify that service of the **Responses to Plaintiff's Initial Interrogatories** and the **Responses to Plaintiff's Initial Requests to Produce** in the above-captioned matter was made upon Plaintiff's counsel by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 21st day of May 2018:

Harold C. Staley, Esquire  
Andrew W. Creech, Esquire  
Garrett B. Johnson, Esquire  
Elrod Pope Law Firm  
Post Office Box 11091  
Rock Hill, South Carolina 29731-1091



STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2015-CP-40-0619

Plaintiff, )

v. )

**MEMORANDUM IN OPPOSITION  
TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

South Carolina State Budget and )  
Control Board, South Carolina Insurance )  
Reserve Fund, J. Bland, Richard T. )  
Burkholder, Leemon E. Carner, Priscilla )  
Bland, and Jerry Speissegger, Jr., )

Defendants. )

**INTRODUCTION**

This is a declaratory judgment action filed by the Plaintiff Nancy Morris, as Personal Representative of the Estate of David Allen Woods. This action seeks to obtain payment from the Defendants South Carolina State Budget and and Control Board and South Carolina Insurance Reserve Fund for a judgment entered in a United States District Court action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG.<sup>1</sup> That case was tried before United States District Judge Richard M. Gergel and a jury in October 2014. On October 17, 2014, the jury returned a verdict finding against five corrections officers at the Hill-Finklea Detention Center operated by Berkeley County. The jury found that the officers had been deliberately indifferent to

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<sup>1</sup> Prior to the South Carolina Restructuring Act of 2014, the Insurance Reserve Fund was a Division of the South Carolina Budget and Control Board. Effective July 1, 2015, the South Carolina Budget and Control Board was abolished, and the Insurance Reserve Fund was transferred to the State Fiscal Accountability Authority. *See*, Smith Aff., ¶ 2.

the decedent's medical needs in violation of the Fourteenth Amendment to the United States Constitution.

The verdict against the Defendants Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland and Jerry Speissegger included the following: \$500,000 in actual damages against all five officers jointly and severally, \$1 million in punitive damages against Burkholder, \$1 million in punitive damages against Priscilla Bland, \$150,000 in punitive damages against Andrew Bland, \$150,000 in punitive damages against Carner, and \$150,000 in punitive damages against Speissegger. Following a motion for set-off, the actual damages were reduced to \$171,875. Judge Gergel also awarded attorney's fees and costs under 42 U.S.C. § 1988.

The five officers have appealed the judgment to the Fourth Circuit Court of Appeals. That appeal remains pending at this time. The Plaintiff obtained a writ of execution on February 26, 2015. Thereafter, on March 23, 2015, Judge Gergel issued a stay of the execution of that judgment pending appeal.

The Insurance Reserve Fund issued a Tort Liability Insurance Policy to its named insured Berkeley County. The Plaintiff is seeking to recover under that policy as well as Section 1-11-460 of the South Carolina Code of Law.

The Plaintiff has filed a motion for summary judgment. The Defendants South Carolina State Budget and Control Board and South Carolina Insurance Reserve Fund oppose that motion on the following grounds:

## LEGAL ARGUMENTS

- I. The Plaintiff's claims for declaratory relief are not ripe for adjudication because the judgment in the underlying action is currently on appeal and is not a final judgment. In addition, a stay of execution pending appeal has been entered by the trial judge.**

The Defendants contend that this declaratory judgment action is not ripe for adjudication. The South Carolina Supreme Court has explained that the Declaratory Judgment Act clearly "has its limits." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462, 466 (2004). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Id.* As the Supreme Court has explained, "[a] justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Id.* "An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act." *Id.*

The case of *Park v. Safeco Ins. Co. of America*, 251 S.C. 410, 162 S.E.2d 709 (1968), is controlling on this issue. In that case, the Supreme Court explained that an injured party has no right to call upon the tortfeasor nor the tortfeasor's liability carrier for payment of damages until he establishes liability. The Court held that "no right to recover can accrue to [injured party] against ... insurance company until and unless [the tortfeasor] becomes liable to pay." 162 S.E.2d at 413.

In the present case, it is anticipated that the Plaintiff will argue that this case is ripe for adjudication because she did sue the Defendants Andrew J. Bland, Richard Burkholder, Leemon

E. Carner, Priscilla Garrett Bland and Jerry Speissegger in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, and obtained a judgment against them. However, that judgment is currently on appeal to the Fourth Circuit Court of Appeals. In addition, that judgment is not currently collectible because Judge Richard M. Gergel granted a stay of execution pending appeal on March 23, 2015. The appeal filed by Andrew Bland, Burkholder, Carner, Priscilla Bland and Speissegger remains pending before the Fourth Circuit Court of Appeals. Oral argument, in fact, is tentatively scheduled for May 2016 term of court. Therefore, at the present time, there is no final judgment that is presently collectible. The Fourth Circuit appeal may result in a new trial or may result in a reduction in the amount of the judgment given that the awards of punitive damages are being challenged. If the judgment is overturned on appeal or if the \$1 million punitive damages awards are overturned, then the Plaintiff can make no argument that she is entitled to any relief under Section 1-11-460 or for multiple occurrences under the IRF Tort Liability Policy. Instead, this Court will be issuing merely an advisory opinion, and one that will be moot or otherwise invalid if the Fourth Circuit grants Andrew Bland, Burkholder, Carner, Priscilla Bland and Speissegger any relief on appeal.

In sum, this declaratory judgment action is not currently ripe for adjudication. The Court should either dismiss the action on this basis without prejudice or, at the very least, issue a stay until such time that all appeals in Civil Action Number 5:12-3177-RMG are exhausted.

**II. Section 1-11-460 provides only discretionary authority in the State Fiscal Accountability Authority to pay qualifying judgments in a Section 1983 case, and there is no mandatory duty to indemnify created by the statute. In addition, the Plaintiff has not and cannot show that he has received a qualifying judgment that would nonetheless be collectible under Section 1-11-460.**

In the event that the Court addresses the merits of the Plaintiff's declaratory judgment action,

the central issue focuses on the meaning of Section 1-11-460, which provides as follows:

The State Fiscal Accountability Authority, 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. 1983 against governmental employees or officials who are covered by a tort liability policy issued by the Insurance Reserve Fund. These payments are also limited to judgments against governmental employees and officials for acts committed within the scope of employment. If a judgment is paid, the payment must be recovered by assessments against all governmental entities purchasing tort liability insurance from the Insurance Reserve Fund.

S.C. Code Ann. § 1-11-460.

The State Fiscal Accountability Authority and the Insurance Reserve Board, which is the governmental entity charged with administering Section 1-11-460, has construed the statute "as enabling legislation that grants the Budget and Control Board and now the State Fiscal Accountability Authority the discretion as to whether to pay judgments in excess of \$1 million entered in Section 1983 cases against individual governmental employees and officials acting within the scope of their employment with an agency or political subdivision that is a named insured with the IRF for tort liability insurance, subject to the caps cited in the statute." *See*, Smith Aff., ¶ 3. Furthermore, according to the testimony of Anne Macon Smith, the Director of the IRF, "[t]he State Fiscal Accountability Authority (and formerly the Budget and Control Board) as well as the Insurance Reserve Fund have never applied Section 1-11-460 as mandating that the State Fiscal Accountability Authority or the IRF pay judgments in excess of \$1 million in Section 1983 cases." *See*, Smith Aff., ¶ 3.

The Defendants' analysis focuses on the language "is authorized to pay," which the Defendants construe as providing for discretionary authority as opposed to a statutory mandate. The Defendants' interpretation, which is entitled to great weight,<sup>2</sup> is based on the premise that "is authorized to pay" – in contrast to mandatory language such as "must pay" or "shall pay" or "must indemnify" – allows for the exercise of discretion on the part of the State Fiscal Accountability Authority. This conclusion is supported by reference to Section 1-11-440, which is part of the same chapter of Title 1 of the Code of Laws as Section 1-11-460. Section 1-11-440 provides, in part, that "[t]he State must defend the members of the State Fiscal Accountability Authority and the Director of the Department of Administration against a claim or suit that arises out of or by virtue of their performance of official duties on behalf of the authority or the department, as applicable, and *must indemnify* them for a loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both." S.C. Code Ann. § 1-11-440. (Emphasis added). Section 1-11-440, in fact, uses the term "must indemnify" three times and describes a "commitment to defend and indemnify." *Id.* In contrast, Section 1-11-460 uses the term "is authorized to pay." This contrast in language used by the General Assembly in statutes in the same chapter of Title 1 strongly indicates that "must indemnify" and "is authorized to pay" have different meanings and create differing duties. This further shows that, where the General Assembly intended to make a duty to indemnify mandatory, it knew how to do so using the mandatory language "must indemnify." The use of the language "is authorized to pay, in

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<sup>2</sup> See, *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132, 133 (1987) ( "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons").

contrast, is not mandatory but rather creates a discretionary duty, which is consistent with how the Defendants have construed Section 1-11-460.

The Defendants further submit that reference to case law from South Carolina and other jurisdictions supports their construction of the "is authorized to pay" language. For instance, in the case of *Seminole Nation v. United States*, 318 U.S. 629 (1943), the United States Supreme Court held that the use of the word "authorized to bring suit" did not create an obligation in the Secretary of the Interior but rather allowed for the exercise of discretion. The Supreme Court explained that "the use of the word 'authorized' in this context necessarily reserved to the Secretary the right to determine his own course of action." 318 U.S. at 639. Similarly, in *Hopi Tribe v. United States*, 55 Fed. Cl. 81 (2002), the Federal Claims Court concluded that a statute stating that "the Secretary of the Interior is authorized to pay ..." created a discretionary duty. The Claims Court explained that the statute at issue "merely stated that the Secretary 'is authorized' to reimburse the tribes for various types of legal fees" and "the plain language of the statute demonstrates that the Secretary's duty to compensate plaintiff under § 640d-7 is discretionary." 55 Fed. Cl. at 87. Likewise, in *State v. Elliott*, 169 S.C. 208, 168 S.E. 546 (1933), the South Carolina Supreme Court held that a statute providing that a judge "is authorized to ..." provides for discretionary authority.

Perhaps the most instructive case, however, is *Willcox v. Tennessee District Attorneys General Conference*, 2008 WL 4510031 (E.D. Tenn. 2008), which involved the interpretation of a Tennessee state statute that authorizes the indemnification of state employees. Section 9-8-112 of the Tennessee Code of Laws provides, in part: "The board of claims *is authorized to pay* final judgments for state employees, as defined in § 8-42-101, for any damages, including interest thereon, which are awarded in a final judgment in a civil lawsuit against the employee in a court

of competent jurisdiction where it is determined by the board that the incident on which such damages were awarded occurred when the employee was acting in good faith within the scope of such employee's official duty and under apparent lawful authority or orders." Tenn. Code Ann. § 9-8-112(a)(1). (Emphasis added). The statute has the same "is authorized to pay" language as Section 1-11-460. The Tennessee statute has been interpreted, however, as not *requiring* indemnification. 2008 WL 4510031, \*4, n.3. The same should be the interpretation of Section 1-11-460.

In sum, the language "is authorized to pay" as used in Section 1-11-460 does not create a mandatory duty to indemnify on the part of the State Fiscal Accountability Authority or the Insurance Reserve Fund. It provides the Authority with discretion to determine on a case-by-case basis whether to pay a qualifying judgment in excess of \$1 million entered in a Section 1983 case against individual governmental employees and officials acting within the scope of their employment with an agency or political subdivision that is a named insured with the IRF for tort liability insurance. It is, therefore, not the function of this Court to order the State Fiscal Accountability Authority or the Insurance Reserve Fund to make such payment in the present case. That request, after there is a final judgment, will need to be made to the State Fiscal Accountability Authority in accordance with Section 1-11-460. The Plaintiff's summary judgment motion should therefore be denied.

Moreover, Section 1-11-460 is only applicable to qualifying judgments, meaning those in excess of \$1 million entered in a Section 1983 case against individual governmental employees and officials acting within the scope of their employment. In the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, the judgment of \$500,000 in actual damages was entered against all five Defendants jointly and severally. That amount was then reduced by Judge

Gergel to \$171,875 to reflect an offset from the settling medical defendants. Given the joint and several judgment of \$171,875 and the punitive damages judgment of \$150,000 each against Andrew Bland, Leemon Carner and Priscilla Bland, the total judgments against those three Defendants do not meet the \$1 million threshold. However, given the punitive damages awards of \$1 million each against Burkholder and Speissegger, the judgments against them are the only ones that meet the \$1 million threshold (although they are not qualifying for other reasons discussed below).

Nonetheless, Section 1-11-460 was not intended by the General Assembly to provide indemnity to a governmental employee for punitive damages awards. In *Macmurphy v. South Carolina Department of Highways and Public Transportation*, 295 S.C. 49, 367 S.E.2d 150 (1988), the South Carolina Supreme Court explained that "[i]n the absence of statutory authority, there is no right to recover exemplary or punitive damages against a municipal corporation or state." 367 S.E.2d at 151. The Supreme Court further concluded that "there is no statute authorizing the recovery of punitive damages from the State of South Carolina or its agencies." *Id.* The Supreme Court explained that "*recovery of punitive damages against governmental entities are contrary to sound public policy* because such awards would burden the taxpayers and citizens for whose benefit the wrongdoer is assessed punitive damages." *Id.* (Emphasis added).

In sum, as the *Macmurphy* opinion makes clear, the State and specifically the taxpayers should not be burdened with paying the punitive damages awarded against the Defendants Andrew Bland, Burkholder, Carner, Priscilla Bland and Speissegger in Civil Action Number 5:12-3177-RMG. Any payment of the punitive damages awarded under Section 1-11-140 would clearly violate public policy. In addition, the General Assembly, in enacting Section 1-11-460, did not expressly provide any authority for the State Fiscal Accountability Authority to pay punitive damages awards. Importantly, any governmental liability for punitive damages is in derogation of

the common law, namely sovereign immunity. Yet, it is well settled that "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'" in the legislation. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). See also, *United States v. Bormes*, 133 S.Ct. 12, 16 (2012). Section 1-11-460, however, does not include any language that unequivocally provides that the State has waived sovereign immunity for the payment of punitive damages under Section 1-11-460. Section 1-11-460, therefore, should be construed as providing for payments, at most, for compensatory or actual damages awards and not for punitive damages awards, as what is being claimed in the present case.

Finally, in order to be a qualifying judgment, Section 1-11-460 also requires that "[t]hese payments are also limited to judgments against governmental employees and officials for acts committed within the scope of employment." S.C. Code Ann. § 1-11-460. Therefore, in order to seek any payment under Section 1-11-460, the Plaintiff must demonstrate that the judgment in Civil Action Number 5:12-3177-RMG was for acts committed within the scope of employment of Andrew Bland, Richard Burkholder, Leemon Carner, Priscilla Bland and Jerry Speissegger. The jury in that action, however, never made any specific factual finding that Andrew Bland, Burkholder, Carner, Priscilla Bland and/or Speissegger were acting within the scope of their employment with Berkeley County when they were found deliberately indifferent to David Woods' medical needs.

The jury returned a special verdict form; however, the jury was never asked to answer any special interrogatories. Not only was there never any finding by the jury that Andrew Bland, Burkholder, Carner, Priscilla Bland and Speissegger were acting within the scope of their employment, there was no stipulation to that effect either. The jury simply was not asked to make that determination. It is certainly possible that the actions of Andrew Bland, Burkholder,

Carner, Priscilla Bland and Speissegger were not within the scope of employment. Their deliberate indifference could have been motivated by malicious or personal reasons.<sup>3</sup> Under South Carolina law, intentional conduct by corrections employees that is personally and not professionally motivated falls outside the scope of employment. *See, Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).

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

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<sup>3</sup> It is important to note that "[d]eliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" *Whitley v. Albers*, 475 U.S. 312, 319 (1986). "Deliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the [prisoner] or that they actually knew of and ignored a [prisoner's] serious need for medical care." *Young v. City of Mt. Ranier*, 238 F.3d 567, 575-76 (4th Cir. 2001).

to make that determination, and thus the Plaintiff cannot show that the judgment was entered against Andrew Bland, Burkholder, Carner, Priscilla Bland and Speissegger for acts committed within the scope of their employment. For this additional reason, the Plaintiff cannot prove her entitlement to relief under Section 1-11-140, and the Plaintiff's motion for summary judgment should be denied.

**III. The Plaintiff has not demonstrated that the judgment entered in the underlying action was for multiple occurrences under the IRF Tort Liability Policy.**

The Plaintiff also argues that the actions of the Defendants Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland and Jerry Speissegger constituted multiple occurrences under the IRF Tort Liability Policy issued to the named insured, Berkeley County. This argument lacks merit for several reasons.

First, the IRF Tort Liability Policy defines "occurrence" as 'an accident, including continuous or repeated exposure to conditions which result in personal injury or property damage neither expected nor intended from the standpoint of the insured.' The Policy also includes the following provision in section V – Limit of Liability: "For the purpose of determining the limit of the Fund's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions *shall be considered as rising out of one occurrence.*" (Emphasis added). Thus, the injury and death resulting to David Woods from what was found to be the same general conditions by the jury is but one occurrence with a liability limit of \$600,000. The Plaintiff cannot dispute this because the actual damages award was entered jointly and severally against the five corrections officers. In Section 1983 jurisprudence, "[j]oint and several liability is a theory of recovery which requires that the

plaintiffs, in an action alleging tortious or constitutionally repugnant conduct by multiple actors, establish that each defendant acted in concert to produce a single, indivisible injury." *Harper v. Albert*, 400 F.3d 1052, 1061-62 (7th Cir. 2005). By obtaining a joint and several verdict against the officers, the Plaintiff necessarily proved that the officers acted in concert to produce a single, indivisible injury. Thus, given the joint and several verdict, the Plaintiff cannot now argue that the officers' acts or omissions, i.e., their deliberate indifference to Woods' medical needs, were not in concert or caused different injuries. In sum, the verdict form, which was agreed to by the Plaintiff's counsel, provides for joint and several liability and does not establish separate "occurrences" as defined by the policy. *See*, Trial Transcript, p. 638.

Second, the Plaintiff relies in error on the definition of "occurrence" from the South Carolina Tort Claims Act as well as the discussion of occurrences set forth in the South Carolina Supreme Court's decision in *Boiter v. South Carolina Department of Transportation*, 393 S.C. 123, 712 S.E.2d 401 (2011). Civil Action Number 5:12-3177-RMG did not involve any state law claims under the Tort Claims Act. Those claims were alleged against Berkeley County only and were voluntarily withdrawn during the trial. *See*, Trial Transcript, p. 629. Thus, the verdict obtained by the Plaintiff was not governed by the Tort Claims Act. Moreover, the term "occurrence" is defined in the Tort Claims Act as "an unfolding sequence of events which proximately flow from a single act of negligence." *See*, S.C. Code Ann. § 15-78-30(g). That definition is substantially different than the policy definition of "occurrence." As a result, the interpretation of the statutory definition by the Courts has no bearing on the interpretation and application of the policy definition.

For these reasons, the Plaintiff's motion for summary judgment on the issue of occurrences should be denied.

**CONCLUSION**

Based on the foregoing analysis and discussion, the Defendants South Carolina State Budget and Control Board and South Carolina Insurance Reserve Fund respectfully request that this Court deny the Plaintiff's motion for summary judgment.

Respectfully Submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

\_\_\_\_\_  
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*Counsel for Defendants South Carolina State  
Budget and Control Board and  
South Carolina Insurance Reserve Fund*

Columbia, South Carolina

February 17, 2016

## UNITED STATES DISTRICT COURT

for the

District of South Carolina

Nancy Morris, as personal representative of the  
Estate of David Allan Woods,

*Plaintiff*

v.

Andrew J. Bland, PFC; Richard T. Burkholder, SGT;  
Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC;  
Priscilla Garrett, SGT,

*Defendants*

Civil Action No. 5:12-cv-03177-RMG

**JUDGMENT IN A CIVIL ACTION**

The court has ordered that *(check one)*:

☒ the plaintiff Nancy Morris, as personal representative of the Estate of David Allan Woods, recover from the defendants, Andrew J. Bland, Richard T. Burkholder, Leemon E. Carner, Jerry Speissegger, Jr., and Priscilla Garrett actual damages in the amount of Five Hundred Thousand dollars (\$500,000.00), and punitive damages against defendant Andrew J. Bland in the amount of One Hundred Fifty Thousand dollars (\$150,000.00); against defendant Richard T. Burkholder in the amount of One Million dollars (\$1,000,000.00); against defendant Leemon E. Carner in the amount of One Hundred Fifty Thousand dollars (\$150,000.00); against defendant Jerry Speissegger in the amount of One Hundred Fifty Thousand dollars (\$150,000.00); against defendant Priscilla Garrett in the amount of One Million dollars (\$1,000,000.00), plus postjudgment interest at the rate of 0.10 %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* \_\_\_\_\_ recover costs from the plaintiff *(name)* \_\_\_\_\_.

☐ other:

This action was *(check one)*:

☒ tried by a jury, the Honorable Richard M. Gergel, U.S. District Judge presiding, and the jury has rendered a verdict.

☐ tried by the Honorable \_\_\_\_\_ presiding, without a jury and the above decision was reached.

☐ decided by the Honorable \_\_\_\_\_

Date: October 21, 2014

CLERK OF COURT

s/Eunice Ravenel-Bright

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

|                                                         |   |                      |
|---------------------------------------------------------|---|----------------------|
| Nancy Morris, as <i>Personal Representative</i>         | ) | No. 5:12-cv-3177-RMG |
| of the Estate of David Allan Woods,                     | ) |                      |
|                                                         | ) |                      |
| Plaintiff,                                              | ) | <b>VERDICT FORM</b>  |
|                                                         | ) |                      |
| vs.                                                     | ) |                      |
|                                                         | ) |                      |
| Andrew J. Bland, <i>PFC</i> ; Richard T.                | ) |                      |
| Burkholder, <i>SGT</i> ; Leemon E. Carner, <i>PFC</i> ; | ) |                      |
| Jerry Speissegger, Jr., <i>PFC</i> ; Priscilla Garret,  | ) |                      |
| <i>SGT</i> ,                                            | ) |                      |
|                                                         | ) |                      |
| Defendants.                                             | ) |                      |
|                                                         | ) |                      |

We, the jury, unanimously find as follows:

**Deliberate Indifference Claim Under 42 U.S.C. § 1983**

1. As to the Deliberate Indifference Claim against Andrew J. Bland, we find:

☒ For the Plaintiff

☐ For Defendant Andrew J. Bland

*Proceed to Number 2.*

2. As to the Deliberate Indifference Claim against Richard T. Burkholder, we find:

☒ For the Plaintiff

☐ For Defendant Richard T. Burkholder

*Proceed to Number 3.*

3. As to the Deliberate Indifference Claim against Leemon E. Carner, we find:

☒ For the Plaintiff

☐ For Defendant Leemon E. Carner

*Proceed to Number 4.*

4. As to the Deliberate Indifference Claim against Jerry Speissegger, Jr., we find:

☒ For the Plaintiff

☐ For Defendant Jerry Speissegger, Jr.

*Proceed to Number 5.*

5. As to the Deliberate Indifference Claim against Priscilla Garrett, we find:

☒ For the Plaintiff

☐ For Defendant Priscilla Garrett

*If you found for Plaintiff against any defendant in Numbers 1-5, proceed to Number 6. If you found for Defendants in all matters in Numbers 1-5, your Foreperson should sign and date the Verdict Form and advise the court security officer you have reached a verdict.*

**Damages/ Actual Damages**

6. We award actual damages to Plaintiff in the amount of \$ 500,000.

*Proceed to Number 7.* Five hundred thousand dollars

**Punitive Damages for Deliberate Indifference Claim under 42 U.S.C. § 1983**

7. *If you found for Plaintiff against Defendant Andrew J. Bland in the Deliberate Indifference Claim at Number 1, address the question below. If not, proceed to Number 8.*

In regard to Plaintiff's claim of Punitive Damages against Defendant Andrew J. Bland, we:

- ☒ Award Punitive Damages in the amount of \$ 150,000.  
 One hundred fifty thousand dollars  
☐ Decline to award punitive damages.

*Proceed to Number 8.*

8. *If you found for Plaintiff against Defendant Richard T. Burkholder in the Deliberate Indifference Claim at Number 2, address the question below. If not, proceed to Number 9.*

In regard to Plaintiff's claim of Punitive Damages against Defendant Richard T. Burkholder, we:

- ☒ Award Punitive Damages in the amount of \$ 1,000,000.  
 One million dollars  
☐ Decline to award punitive damages.

*Proceed to Number 9.*

9. *If you found for Plaintiff against Defendant Leemon E. Carner in the Deliberate Indifference Claim at Number 3, address the question below. If not, proceed to Number 10.*

In regard to Plaintiff's claim of Punitive Damages against Defendant Leemon E. Carner, we:

- ☒ Award Punitive Damages in the amount of \$ 150,000.  
 One hundred fifty thousand dollars  
☐ Decline to award punitive damages.

*Proceed to Number 10.*

10. *If you found for Plaintiff against Defendant Jerry Speissegger, Jr. in the Deliberate Indifference Claim at Number 4, address the question below. If not, proceed to Number 11.*

In regard to Plaintiff's claim of Punitive Damages against Defendant Jerry Speissegger, Jr., we:

- ☒ Award Punitive Damages in the amount of \$ 150,000  
*One hundred fifty thousand dollars*
- ☐ Decline to award punitive damages.

*Proceed to Number 11.*

11. *If you found for Plaintiff against Defendant Priscilla Garrett in the Deliberate Indifference Claim at Number 5, address the question below. If not, your Foreperson should sign and date the Verdict Form and advise the court security officer that you have reached a verdict.*

In regard to Plaintiff's claim of Punitive Damages against Defendant Priscilla Garrett, we:

- ☒ Award Punitive Damages in the amount of \$ 1,000,000  
*One million dollars*
- ☐ Decline to award punitive damages.

*Your Foreperson should sign and date the Verdict Form and advise the court security officer that you have reached a verdict.*

October 17, 2014  
Charleston, South Carolina

  
FOREPERSON 

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA**

Nancy Morris, as *Personal Representative* )  
of the Estate of David Allan Woods, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Andrew J. Bland, *PFC*; Richard T. )  
Burkholder, *SGT*; Leemon E. Carner, *PFC*; )  
Jerry Speissegger, Jr., *PFC*; Priscilla Garret, )  
*SGT*; )  
 )  
Defendants. )  
 )

This matter is before the Court on Defendants' Motion to Stay Execution of Judgment Pending Appeal (Dkt. No. 272). For the reasons stated below, the motion is GRANTED.

## I. Background

After a jury verdict in her favor, the Clerk entered judgment in favor of Plaintiff and against the Defendants in the following amounts: \$500,000 in actual damages against all five Defendants jointly and severally, \$1 million in punitive damages against Defendant Burkholder, \$1 million in punitive damages against Defendant Garrett, \$150,000 in punitive damages against Defendant Bland, \$150,000 in punitive damages against Defendant Carner, and \$150,000 in punitive damages against Defendant Speissegger. Following Defendants' motions for set-off, the Court reduced the award for actual damages to \$171,875. (Dkt. No. 259 at 32). The Court also awarded \$354,293 in attorneys' fees and \$31,820.62 in costs. (Dkt. Nos. 260, 266). Defendants filed a Notice of Appeal on January 30, 2015. (Dkt. No. 267). Plaintiff obtained a writ of execution on February 26, 2015. (Dkt. No. 271). Defendants then filed the instant motion to

stay execution of judgment pending appeal, asking the Court to stay execution without requiring Defendants to post a supersedeas bond.

## II. Discussion

Rule 62(d) entitles an appellant to stay an execution of judgment as a matter of right if she posts a supercedeas bond. *E.g., Se. Booksellers Ass'n v. McMaster*, 233 F.R.D. 456, 457 (D.S.C. 2006) (citing cases). However, Rule 62 does not address or affect a district court's "inherent discretionary power to stay judgments pending appeal on the basis of less than a full supersedeas bond, or no bond." *Se. Booksellers*, 233 F.R.D. at 458 (quoting *Alexander v. Chesapeake, Potomac & Tidewater Books, Inc.*, 190 F.R.D. 190, 192 (E.D.Va.1999)).

The Fourth Circuit has not addressed what factors a court should consider when deciding whether to grant a unsecured stay pending appeal. *Id.* However, in *Southeast Booksellers*, Judge Duffy laid out various standards used by other federal appellate courts as well as district courts in the Fourth Circuit. *See id.* at 458-59. Throughout these cases and more recent ones, courts hold that a district court should act to "preserve the status quo while protecting the non-appealing party's rights pending appeal." *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190-91 (5th Cir. 1979); *ABT, Inc. v. Juszczuk*, No. 5:09CV119-RLV, 2012 WL 117142, at \*2 (W.D.N.C. Jan. 13, 2012); *D.B. v. Bedford Cnty. Sch. Bd.*, No. 6:09-CV-00013, 2010 WL 3323489, at \*9 (W.D. Va. Aug. 23, 2010); *TransPacific Tire & Wheel, Inc. v. Orteck Int'l, Inc.*, No. CIV.A. DKC 2006-0187, 2010 WL 2774445, at \*5 (D. Md. July 13, 2010); *Hofmann v. O'Brien*, No. CIV. WDQ-06-3447, 2009 WL 3216814, at \*2 (D. Md. Sept. 28, 2009); *CapitalSource Fin. LLC v. Pittsfield Weaving Co.*, No. CIV. A.AW-06-2028, 2008 WL 3850385, at \*1 (D. Md. Mar. 7, 2008); *Willcox v. Stroup*, 358 B.R. 835, 839 (D.S.C. 2006);

*Conn. Gen. Life Ins. Co. v. Riner*, No. 1:00 CV 00065, 2005 WL 151933, at \*1 (W.D. Va. Jan. 24, 2005); *Kirby v. Gen. Elec. Co.*, 210 F.R.D. 180, 195 (W.D.N.C. 2000); *Alexander*, 190 F.R.D. at 193.

Normally, this principle is “best served by requiring a full supersedeas bond as a condition to the issuance of a stay.” *Alexander*, 190 F.R.D. at 193. However, a bond may not be necessary “(i) when the judgment debtor can currently easily meet the judgment and demonstrates that it will maintain the same level of solvency during appeal, and (ii) when the judgment debtor’s present financial condition is such that the posting of a full bond would impose an undue financial hardship.” *E.g.*, *Poplar Grove*, 600 F.2d at 1191; *TransPacific Tire & Wheel*, 2010 WL 2774445 at \*5; *Hofmann*, 2009 WL 3216814 at \*2; *CapitalSource Fin. LLC*, 2008 WL 3850385 at \*2; *Kirby*, 210 F.R.D. at 195; *Alexander*, 190 F.R.D. at 193; *see also* 7 James Wm. Moore et al., *Moore’s Federal Practice* § 62.03[2] (finding courts had waived the bond requirement “where the judgment is so large that requiring the appealing party to post a bond would jeopardize the rights of the appealing party’s other creditors”).

The second of these circumstances is present here. Two of the defendants do not own any real property, two other defendants share a residence worth less than the mortgage on it, and the fifth lives in a mobile home that he does not own with his wife and five children on property worth just over \$13,000.<sup>1</sup> (Dkt. No. 272 at 4). None of the defendants have liquid assets, and their primary personal assets are their personal vehicles. (*Id.* at 5). If Defendants lost their vehicles, they could lose their ability to get to and from work, possibly causing them to lose their jobs and further hindering Plaintiff’s ability to collect a judgment.

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<sup>1</sup> Plaintiff does not dispute these facts.

The parties all recognize that Plaintiff's ability to recover the judgment largely rests with recovering from the South Carolina Insurance Reserve Fund (IRF). (*See* Dkt. No. 272 at 7; Dkt. No. 274 at 1). Plaintiff has filed a declaratory judgment suit against the IRF in state court seeking a determination of coverage limits under the applicable policy. (Dkt. No. 272 at 7). This state court suit will continue while this action is on appeal.

Under these circumstances, the Court finds a stay is warranted even absent a bond. Defendants are arguably insolvent and unable to post a bond. Plaintiff's ability to collect her judgment will not materially change while the appeal is pending. It is unlikely Defendants will sell their personal vehicles, their only means of transportation to and from work, during the pendency of the appeal, and there do not appear to be any other assets for Defendants to spirit away while the appeal is pending. Furthermore, staying execution of the judgment pending appeal will not affect Plaintiff's pursuit of payment from IRF, the only means of collecting a sizable amount of the judgment.

Preserving the status quo while protecting Plaintiff's rights in this instance requires staying execution of the judgment pending appeal. In staying execution, all parties will largely be in the same position at the conclusion of the appeal, and Plaintiff's ability to collect her judgment will not materially change. However, if the Court does not stay execution of the

judgment, Defendants could be irreparably harmed. Therefore, the Court grants the stay.<sup>2</sup>

### III. Conclusion

Defendants' Motion to Stay Execution of Judgment Pending Appeal (Dkt. No. 272) is **GRANTED**. Execution of the judgment is **STAYED PENDING APPEAL**. This ruling does not effect, in any way, Plaintiff's ability to pursue payment from the IRF.

**AND IT IS SO ORDERED.**



Richard Mark Gergel  
United States District Judge

March 23, 2015  
Charleston, South Carolina

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<sup>2</sup> The Court reaches the same conclusion applying the *Hilton* factors, which have been applied by some district courts in the Fourth Circuit. *See, e.g., ABT, Inc.*, 2012 WL 117142 at \*1. These factors are “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). While Defendants have not made a strong showing that they are likely to succeed on the merits, they will be irreparably injured absent a stay and issuance of the stay will not substantially injure Plaintiff. As explained above, execution of the judgment would result in the loss of Defendant's transportation to and from work and could cause them to lose their livelihoods, an irreparable injury. Plaintiff's ability to collect her judgment will not materially change; thus, she is not substantially injured. The Court finds that to the extent the public interest factor is at play, it lies with granting the stay and that the second and third factors outweigh the first in this instance.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

NANCY MORRIS, as personal : VOLUME I  
representative of the estate :  
of DAVID ALLAN WOODS :  
vs. :  
ANDREW J. BLAND, PFC, ET AL. : 5:12 CV 3177

Trial commences in the above matter on Tuesday,  
October 14, 2014, commencing at 10:13 a.m., before the  
Hon. Richard M. Gergel, in Courtroom I, United States  
Courthouse, 81 Meeting St., Charleston, South Carolina,  
29401.

APPEARANCES:

THOMAS E. POPE, ESQ., HAROLD C. STALEY, ESQ.,  
ANDREW W. CREECH, ESQ., GARRETT JOHNSON, ESQ.,  
BENJAMIN P. LEADER, ESQ., 212 East Black St.,  
Rock Hill, SC, appeared for plaintiff.

EUGENE P. CORRIGAN, III, ESQ.,  
JAMES M. JOHNSON, ESQ., 16 Charlotte St.,  
Charleston, SC, appeared for defendants.

JAMES A. STUCKEY, JR., ESQ.,  
ALLISON C. LIETZOW, ESQ., 123 Meeting St.,  
Charleston, SC, appeared for Defendant Bland.

TRANSCRIBED DEBRA LEE POTOCKI, RMR, RDR, CRR  
Official Reporter for the U.S. District Court  
Charleston Division  
P.O. Box 835  
Charleston, SC 29402  
843/723-2208

1 THE COURT: Yes. How about the proposed verdict  
2 form. From the plaintiff?

3 MR. POPE: No objection, Your Honor.

4 THE COURT: From Mr. Corrigan?

5 MR. CORRIGAN: Your Honor, the only question I have  
6 is just as a matter of understanding, certainly understand  
7 that each of the defendants need to be addressed separately.

8 THE COURT: Yes.

9 MR. CORRIGAN: Then when you get to the award of  
10 punitive damages, if they are so inclined, are they being  
11 asked to award punitive damages to each individual, or is it  
12 one collective sum?

13 THE COURT: It can not be one -- No. I have to get a  
14 punitive damage -- it is directed at the individual, so that a  
15 group number would be improper for punitive damages. It is  
16 for purposes of punishment and deterrence, and there's one  
17 number for each. And you know, they have to address each one.  
18 Of course, I give them the instruction, to the extent they  
19 awarded -- they do not award actual damages, they can't get  
20 punitive damages. So I try to move them beyond that issue.  
21 And then I ask them, do they do it, and if they do, the  
22 amount. And they would be individual -- that would be  
23 individual responsibility. That's my understanding of how I'm  
24 supposed to do it. And if I did it the other way, I  
25 understood that would be improper.

1 defendants did the proposed charge right, that is, they  
2 separated different requests to charge by number, because  
3 otherwise I'm basically going through paragraphs trying to  
4 identify these various charges. But, you know, we dealt with  
5 it.

6 The wrongful death action charge, which is on the first  
7 page, is substantially charged in the Court's proposed charge.

8 The state, of course, the South Carolina Tort Claims Act  
9 section we did not, because of that cause of action no longer  
10 is present.

11 The 1983 charge, we substantially charged that in the  
12 Court's charge.

13 The deliberate indifference charge, we substantially made  
14 that charge.

15 The one thing we did not do was at the bottom of that next  
16 page, which that merely refused language that Mr. Pope loves,  
17 and I understand why he loves it, but one day, if you should  
18 get a verdict, you'll be happy I didn't charge it.

19 MR. POPE: I long for that day, Your Honor.

20 THE COURT: Yes. And then punitive damages, I  
21 substantially charge the plaintiff's request. Actually the  
22 plaintiff and defense, a lot of these were very similar.

23 Now to the defense charge number one, deliberate  
24 indifference, I largely charge the -- it's incorporated into  
25 the Court's charge.

## Record on Appeal 418

The undersigned agrees to be deposed and testify at trial in any cause of action that is brought against the State Fiscal Accountability Authority, the South Carolina Insurance Reserve

Fund or any other insurance company, adjuster, agency, broker, or organization in order to collect the excess judgment or to prosecute any of the claims hereby assigned to Nancy Morris.

The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.

The undersigned acknowledges that he/she has sought the advice of counsel regarding this assignment, is under no undue coercion or duress, is of sound mind and body, and believes the assignment to be in his/her best interests and supported by valuable consideration.

In consideration of this assignment, Plaintiff hereby covenants not to execute against any assets of the undersigned. Plaintiff furthermore agrees to dismiss the undersigned from civil action number 2017-CP-08-1439, currently pending in Berkeley County. Plaintiff covenants not to institute any further claims, lawsuits, bankruptcy proceedings, or other causes of action against the undersigned to enforce or collect on the above judgment.

This assignment is intended to bind the parties hereto and their heirs and assigns.

THIS ASSIGNMENT IS IRREVOCABLE.

\_\_\_\_\_  
Attorney for Richard T. Burkholder

  
\_\_\_\_\_  
Richard T. Burkholder

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Witness

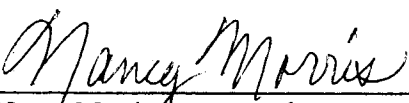
SWORN to and Subscribed Before Me

This \_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
Notary Public of South Carolina

My Commission Expires: \_\_\_\_\_

I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Richard T. Burkholder.

  
\_\_\_\_\_  
Nancy Morris, as personal representative  
of the Estate of David Allan Woods

RECEIVED

Oct 27 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Casey Manning, Circuit Court Judge

Common Pleas Court Case No.: 2017-CP-40-6773  
Appellate Case No. 2021-00502

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

v.

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

Of Whom Nancy Morris, as Assignee of Andrew J. Bland, PFC;  
Richard T. Burkholder, SGT: Leemon E. Carner, PFC;  
Priscilla Garrett Bland, PFC; and Jerry Speissegger, Jr., PFC, is the .....  
Appellant

and

South Carolina Insurance Reserve Fund is the ..... Respondent

**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the Record on Appeal contains all material  
proposed to be included by any of the parties and not any other material.

**s/Garrett B. Johnson**

Garrett B. Johnson, SC Bar No. 81105

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*Attorney for the Appellant*