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SC Court of Appeals

.THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

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INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This matter arises out of the death of David Woods in November 2010, immediately following his confinement at Hill-Finklea Detention Center in Berkeley County, South Carolina. Mr. Woods's sister, Nancy Morris, was appointed as personal representative of his estate, and brought an action pursuant to 42 U.S.C. § 1983 against jail and county personnel.[1]

Andrew Bland, PFC; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Richard T. Burkholder, SGT; and Priscilla Garrett Bland, SGT (hereinafter "Assignors") were correctional officers working at Hill-Finklea at the time of Mr. Woods's confinement. Each Assignor interacted with Mr. Woods personally during the final 72 hours of his confinement, and were named as defendants in their individual capacities in the underlying matter. Assignors were covered by a tort liability insurance policy written by Defendant South Carolina Insurance Reserve Fund (hereinafter "IRF") with limits of six hundred thousand dollars ($600,000.00). At multiple points during litigation, IRF offered less than the full policy limits—only five hundred thousand dollars—to settle the case. Ms. Morris proceeded to trial against Assignors, and received a verdict in the amount of two million nine hundred fifty thousand dollars ($2,950,000.00).

Assignors subsequently assigned to Ms. Morris their right to "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). After receiving these assignments, Ms. Morris filed an action against the IRF alleging bad faith failure to settle her claim.

On September 26, 2019, Judge Casey Manning issued an order granting Defendant's Motion for Summary Judgment and dismissing Ms. Morris's Amended Complaint with

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

prejudice.

ISSUES ON APPEAL

I. The trial court erred in finding that the bad faith action was barred by the statute of limitations because the requirements imposed by the court are unjust, unduly burdensome, and inconsistent with the rulings of the South Carolina Supreme Court.

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

III. The trial court erred in finding that there was no breach of any contractual duties because Plaintiff pled breach of contractual duties that raise questions of fact.

IV. The trial court erred in finding that there was no evidence to support *Tyger River* bad faith failure-to-settle claim because the trial court misapplied the decisions of the South Carolina Supreme Court.

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STATEMENT OF THE CASE

I. The Underlying Case

On the night of Friday, November 5, 2010, correctional officers at Hill-Finklea Detention Center found Decedent David Woods trembling on the floor of his cell. He was moved to a medical observation cell, where surveillance footage over the next 60 hours shows Mr. Woods soiling himself, lying in his own feces, shaking, trembling, and falling. During this time, each of the five Assignors had multiple interactions with Mr. Woods. None of them called medical personnel or recommended that medical personnel be called for him, despite the fact that the jail had medical personnel on-call 24/7.

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 appointed personal representative of his estate,

and brought suit against detention center correctional officers and medical providers pursuant to 42 U.S.C. § 1983. The majority of these defendants, including all five Assignors, were covered by a tort liability insurance policy issued by the IRF with limits of six hundred thousand dollars ($600,000.00) per occurrence. (R. p. 211). However, the IRF offered only five hundred thousand dollars ($500,000.00) of their available liability limits to settle the claim on two separate occasions, once in a letter dated October 13, and again in an Offer of Judgement filed in January of 2014. (R. p. 95, R. pp. 97-100). Eventually, two months before trial and after almost two years of litigation, the IRF tendered the policy limits on August 12, 2014. (R. p. 104).

Ms. Morris declined this belated offer of the policy limits and proceeded against only the five Assignors. The jury returned a verdict in favor of Mr. Woods's estate, and awarded him $500,000.00 in actual damages, as well as punitive damages in the amount of $150,000.00 against Andrew Bland; $1,000,000.00 against Richard Burkholder; $150,000.00 against Leemon Carner; $1,000,000.00 against Priscilla Bland (Garrett); and $150,000.00 against Jerry Speissegger, Jr. (R. p. 106). The jury's award of actual damages was subject to set-off for prior settlements, and was adjusted to $171,875,[2] thus reducing the total verdict to $2,621,875.00. Assignors appealed to the Fourth Circuit Court of Appeals, which upheld the verdict in an opinion dated November 16, 2016. (R. pp. 356-57). Following the denial of the appeal, Plaintiff was awarded an additional $418,412.87 in attorneys' fees and costs. Thus, by the conclusion of the underlying case, the judgment totaled $3,040,287.00, as reflected below:

[2] The jury's finding of $500,000 in actual damages was apportioned $250,000 for Wood's wrongful death, and $250,000 for his survival damages. The trial court ruled that the prior settlements offset all the damages attributable to Wood's wrongful death and reduced the survival damages to $171,875. (R. p. 106).

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

II. The Instant Bad Faith Action.

Subsequent to the denial of the appeal, Ms. Morris entered into a Covenant Not to Execute with each Assignor. These covenants assigned Ms. Morris "any and all claims [the Assignor] 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). (R. __pp. 73-84, 418-20). Under 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." (R. pp. 73-84, 418-20). Four of these assignments were executed on August 30, 2017, while the fifth was received in November 2017. That same month, on November 6, 2017, Ms. Morris instituted the underlying suit alleging bad faith failure to settle, breach of contract, negligence, and gross negligence. (Complaint) (R. pp. 52-106).

On April 9, 2018, Ms. Morris served the IRF with her initial interrogatories and requests to produce. In response, the IRF objected to no fewer than eleven of Plaintiff's interrogatories and nine of her requests to produce. (R. pp. 378-90). These objections were based on work product privilege, attorney-client privilege, and Rule 8(a) of the South Carolina Alternative

Dispute Resolution Rules. (R. pp. 378-90). On July 9, 2018, Ms. Morris filed a Motion to Compel Discovery from Defendant. *See* (Mot. To Compel.) (Rule 37 Motion) (R. pp. 322-29).

On December 10, 2018, a hearing was held before Judge Walton McLeod, IV. Before Judge McLeod issued a ruling, the parties agreed to a compromise in which the IRF would produce a number of additional documents. After receiving these additional documents, Ms. Morris renewed her Motion to Compel on April 17, 2019. *See* (Mot. To Compel.) (Rule 37 Motion) (R. pp. 330-38).

The IRF filed its Motion for Summary Judgment on April 5, 2019. *See* (Mot. For Summ. Judgmt.) (Rule 59 Motion) (R. pp. 339-50). In its motion, the IRF argued that Ms. Morris's action was barred by the statute of limitations, that the assignments had rendered the matter non-justiciable, and that Ms. Morris could not, as a matter of law, prove either bad faith or breach of contract by the IRF. *See* (Mot. For Summ. Judgmt.) (Rule 59 Motion) (R. pp. 339-50). Plaintiff filed a memo in opposition on June 5, 2019. (R. pp. 34-44). Defendant filed a memo in support on the same day. (R. pp. 45-52).

Oral argument was heard on both motions on July 25, 2019, with counsel for both parties present. (Tranx. July 25, 2019, hearing). In an order issued September 26, 2019, the trial court accepted the IRF's argument that the bad faith action was barred by the statute of limitations. (R. pp. 1-8). The trial court concluded that Ms. Morris's lawsuit was no longer justiciable in light of the assignments. (R. p. 5). The trial court found that there was no breach of any contractual duties by the IRF. (R. p. 6). Finally, the trial court concluded that there was no evidence to support "*Tyger River* Bad Faith Failure-to-Settle Claim." (R. pp. 6-8).

Plaintiff filed a Motion to Alter or Amend on October 4, 2019 *See* (Mot. To Alter) (Rule 59 Motion) (R. pp. 351-55). This Motion was denied by the trial court on April 22, 2021. (R. pp. 9-10).

ARGUMENT

The trial court erred in finding that Ms. Morris's lawsuit was blocked by the statute of limitations or rendered non-justiciable by the assignments. The trial court additionally erred in finding that there was no evidence to support either Plaintiff's Breach of Contract claim or *Tyger River* bad faith claim.

I. The trial court erred in finding that the bad faith action was barred by the statute of limitations because the requirements imposed by the court are unjust, unduly burdensome, and inconsistent with the rulings of the South Carolina Supreme Court.

The circuit court determined that the applicable statute of limitations for the assigned breach of contract claims is three years, and that the statute for the bad faith and *Tyger River* claims is two years. *See* (Order pp. 3-4). (R. pp. 3-4). Appellant does not disagree that these are the proper statutes of limitations in this matter. However, the circuit court failed to properly apply South Carolina law in determining the date on which these statutes began to run.

A. The statute of limitations runs from the date defendants'/Assignors' appeal was denied, not the date the District Court entered judgment.

The circuit court found that the IRF's alleged acts of negligence and/or breach of contract could have taken place no later than the date that the judgment in the underlying matter was entered, October 21, 2014. *See* (Order p. 4). (R. p. 4). Therefore, because Ms. Morris did not bring the bad faith action until more than three years later, on November 6, 2017, her claim was barred by the statute of limitations. *See* (Order p. 5). (R. p. 5).

The circuit court's order does not account for the reason why Ms. Morris was delayed in filing her bad faith suit: the IRF, on behalf of Assignors, appealed the judgment. (R. pp. 318-19). In January 2015, the IRF appealed to the Fourth Circuit Court of Appeals, requesting relief in the form of Judgment as a Matter of Law, remand, or an increase in the setoff amount granted by the District Court. (R. pp. 318-19). This appeal stretched on for nearly two years. It

was not until November 16, 2016 that the Fourth Circuit issued an opinion denying the IRF's appeal and upholding the rulings and judgment entered by the District Court. (R. pp. 356-57).

The circuit court's order fails to address the appeal at all in its section on the statute of limitations. This oversight constitutes error. The South Carolina Supreme Court addressed the same argument in a similar context in *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 787 S.E.2d 485 (2016). In *Stokes-Craven*, the plaintiff received an adverse verdict in his case in circuit court. *Id.* at 521, 787 S.E.2d at 487. He appealed the verdict, but the Supreme Court ultimately denied his appeal approximately four years after the jury verdict was entered. *Id.* at 522, 787 S.E.2d at 487. The plaintiff subsequently filed a lawsuit asserting legal malpractice on the part of his attorney in the underlying matter. *Id.* His attorney raised a statute of limitations defense on the ground that the alleged acts of negligence had occurred four years prior. *Id.*

The Court unanimously rejected this defense, holding that:

> a legal malpractice cause of action… is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice. In that particular scenario, there can be no legal malpractice cause of action without an adverse verdict, judgment, or ruling. Thus, if a client appeals the matter in which the alleged malpractice occurred, any basis for the legal malpractice cause of action is stayed by Rule 241(a) while the appeal is pending.

Id. at 534, 787 S.E.2d at 494. The Court went on to rule that there is no cause of action for legal malpractice until the appeal is resolved. *Id.* The statute of limitations accordingly runs from resolution of the appeal. *Id.* This ruling is consistent with the discovery rule, establishing that "a client knows or should know that he or she has a legally cognizable cause of action for legal malpractice at the conclusion of the appeal." *Id.* at 535, 787 S.E.2d at 494. The plaintiff has no claim for damage or harm until the verdict is affirmed on appeal. *Id.* at 536, 787 S.E.2d at 495.

Substitute "bad faith" for "legal malpractice" and "insurer" for "attorney," and Ms.

Morris, on behalf of the Assignors, is in an identical position. The bad faith claim is predicated on an injury or damage caused by the adverse result in the underlying court. There can be no bad faith claim without an adverse verdict; the verdict is a prerequisite. Therefore, when the Assignors appealed the matter, their basis for a bad faith claim—to wit, the verdict—was stayed by Rule 241(a). The statute of limitations accordingly runs from the conclusion of the appeal, because that is when the verdict was affirmed and the Assignors had a genuine claim for damage or harm. It was then, and only then, that the Assignors knew they had a legally cognizable cause of action for bad faith.

While the appeal was pending, it was well within the realm of possibility that the Fourth Circuit would grant Assignors and the IRF the relief they requested and would remand the case for a new trial or grant them Judgement as a Matter of Law. Either decision would have extinguished the verdict and judgment against Assignors, and they would have no bad faith cause of action because they had suffered no damage. Likewise, while the case was on appeal, Ms. Morris had no way of enforcing or executing the judgment against either the IRF or Assignors. In fact, the District Court issued a stay of execution on March 23, 2015, pending the appeal. (R. pp. 15-19).

The IRF itself has advanced these very same arguments in other litigation related to this matter. In 2015, Ms. Morris filed a declaratory judgment action seeking a ruling on the amount of coverage available under the applicable tort liability policy. (R. pp. 137-253). In a memorandum filed with the circuit court on February 17, 2016, the IRF argued that "no right to recover can accrue to [injured party] against… insurance company until and unless [the tortfeasor] becomes liable to pay." (R. p. 393). The judgment against Assignors "is not currently collectible because Judge Richard M. Gergel granted a stay of execution pending appeal." (R. p. 394). "Therefore, at the present time, there is no final judgment that is presently

collectible." (R. p. 394). The IRF went on to acknowledge that the Fourth Circuit might order a new trial or reduce the judgment, in which case, "the Plaintiff can make no argument that she is entitled to any relief under § 1-11-460 or for multiple occurrences under the IRF Tort Liability Policy." (R. p. 394). In that case, the district court would be issuing a mere advisory opinion rather than resolving a justiciable controversy. (R. p. 394). The IRF concluded by requesting that the court dismiss the action as not ripe for adjudication. (R. p. 394).

The IRF is trying to have its cake and eat it too. If litigation is not justiciable and ripe for adjudication while an appeal is pending, then the statute of limitations for bad faith actions cannot begin to run until that appeal is denied. The right to recover does not accrue until the tortfeasor becomes liable to pay, and that did not occur until the IRF's appeal was denied. Plaintiff filed the current action less than one year after the Fourth Circuit's opinion was issued, well within the two- and three-year statutes of limitations. This Court should accordingly find that the circuit court erred on this point.

B. Equitable tolling should be applied to extend Ms. Morris's statute of limitations.

The circuit court's calculation of the statute of limitations is inequitable, and fails to comport with South Carolina law on the matter of equitable tolling. As stated above, the circuit court found that the bad-faith statute of limitations began to run on the date the judgment was entered, October 21, 2014, and therefore expired on October 21, 2016. *See* (Order p. 4). (R. p. 4). The Fourth Circuit opinion upholding the verdict was entered four weeks later, on November 16, 2016. (R. pp. 356-57). Thus, under the circuit court's reasoning, by virtue of initiating a two-year appeal of the district court verdict, the IRF effectively extinguished any possibility of being sued for bad faith for its handling of this matter.

The South Carolina Supreme Court has implemented the idea of equitable tolling for

similarly unjust situations. "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). The principle is invoked "in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Id.* Equitable tolling has been applied where "extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim." *Id.* at 116. "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.* at 116-17. "Equitable tolling may be applied where it is justified under all the circumstances." *Id.* at 117.

In this case, circumstances outside Ms. Morris's control—the Assignors' decision to appeal—made it impossible for her to bring a bad faith claim in the timeframe the trial court envisions. As the trial court acknowledges in its order, Ms. Morris did not and could not bring a bad faith lawsuit in her own capacity. *See* (Order p. 3). (R. p. 3). Instead, she was required to receive assignments from the Assignors.

However, for the entire pendency of the appeal, Assignors were represented by counsel. This was the same counsel who had been hired by the IRF, had defended Assignors at trial, and were representing Assignors before the Fourth Circuit. There is an apparent conflict of interest with attorneys hired by the IRF advising their clients about their right and ability to sue the IRF. However, for this two-year period, these IRF-hired attorneys were the gatekeepers to the Assignors. Rule 4.2 of the Rules of Professional Conduct prohibited counsel for Ms. Morris from contacting Assignors without the permission of Assignors' attorneys. *See* Rules of Professional Conduct, Rule 4.2, RPC, Rule 407, SCACR Thus, it was a practical impossibility for counsel for Ms. Morris to speak to or obtain assignments from Assignors while the appeal

was pending.

The circuit court therefore erred in finding that Appellant's claims are barred by the statute of limitations, and this Court should reverse its grant of summary judgment.

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

As discussed above, the Assignors executed assignments in favor of Ms. Morris providing her 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). (R. pp. 73-84, pp. 418-20). The trial court found that these assignments extinguish the personal liability of each of the Assignors, and thereby relieve the IRF of any liability under the Tort Liability policy and render the current action non-justiciable. *See* (Order p. 5). (R. p. 5).

The trial court's reasoning flies in the face of logic. "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Finance Com.*, 296 S.C. 373, 377 (1988). The clear intention of the assignments is to afford Ms. Morris the right to pursue a bad faith claim against the IRF. The trial court's interpretation of these contracts would serve to defeat the very purpose of the assignments, rendering them essentially null and void.

The South Carolina Supreme Court has previously rejected this same argument. *See Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (2010). In that case, the Fowlers were injured in a motorcycle accident and initiated suit against the Hunters and their commercial insurance

carrier, which denied coverage and forced the parties to initiate a declaratory judgment action. *Id.* at 359, 697 S.E.2d at 533. While the declaratory judgment action was pending, the Fowlers settled with the Hunters for their personal insurance policy coverage, and signed a covenant not to execute in their favor. *Id.* at 360, 697 S.E.2d at 533. The commercial carrier subsequently filed for summary judgment on the ground that "the covenant not to execute entered into by the parties relieved Hunter and GOA from further liability from any and all claims arising from the motorcycle accident. Therefore… the Fowlers, standing in the shoes of Hunter and GOA, could never prove damages with respect to [the commercial carrier's] alleged failure to provide insurance coverage." *Id*. at 360, 697 S.E.2d at 534.

While the trial court was persuaded by the commercial carrier's argument, the Court of Appeals reversed. *Id.* at 361, 697 S.E.2d at 534. The Supreme Court agreed with the appellate court, citing our State's "willingness to depart from the technicalities of the common law in order to promote reasonable settlements in civil suits." *Id.* at 362, 697 S.E.2d at 535. The Court agreed that the primary concern in such matters is "the risk of collusion when an insured is protected from liability by an agreement not to execute prior to the entry of judgment in the underlying tort action." *Id.* However, because South Carolina courts favor settlement and there was no collusion involved in the settlement, the trial court had erred and the covenants not to execute did not render the matter non-justiciable. *Id.* at 363, 697 S.E.2d at 535.

As in *Fowler*, there was no collusion involved in Assignors' execution of the Assignment of Rights and Covenant Not to Execute, and the trial court makes no finding of the same. Therefore, and in keeping with the courts' preference for settlement, the assignments do not render this matter non-justiciable.

Moreover, the trial court's ruling in this regard is without evidentiary support. Generally, a release or covenant will only render a case moot to the extent its "plain language . . . resolved

all of Appellants' claims" and "did not reserve any rights." *See e.g.*, *Ex parte Doe*, 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011) (finding a case moot where the appellant executed a release which "by [its] plain language . . . resolved **all** of Appellants' claims" and "did not reserve any rights") (emphasis supplied by court) (*citing Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (stating a "release is a contract, and the scope of a release is gathered by its terms"). Waiver is a factual question of whether there has been a "voluntary and intentional relinquishment of a known right," and "the burden of proof is upon the party who asserts it." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). Here, the trial court failed to make any finding that Ms. Morris waived, released, or otherwise relinquished any claim as against Assignors. In fact, the trial court never cites the language of these Assignments in reaching its conclusion. (R. pp. 1-8). The trial court erred on this point and should be reversed.

III. The trial court erred in finding that there was no breach of any contractual duties because Plaintiff pled breach of contractual duties that raise questions of fact.

The trial court found that Ms. Morris had no breach of contract claims, only claims that would be pursuant to duties sounding in tort. *See* (Order p. 6). (R. p. 6). The Tort Liability Policy required the IRF to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury." (R. p. 87). Appellant contends that the IRF violated this provision by failing to settle the underlying action for an amount up to and including the full policy limits. Whether or not the IRF's conduct violates this provision is a question of fact for the jury, and thus makes the trial court's grant of summary judgment erroneous. *See White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004)("Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.")

IV. The trial court erred in finding that there was no evidence to support *Tyger River*

bad faith failure-to-settle claim because the trial court misapplied the decisions of the South Carolina Supreme Court.

The trial court found that "because a settlement offer of the policy limits was made and rejected more than two months prior to the date of trial… there is no basis for *Tyger River* tort liability." *See* (Order p. 7). (R. p. 7). The court went on to hold that "the Plaintiff as the assignee has failed to present evidence showing any bad faith on the part of the IRF." *See* (Order p. 7). (R. p. 7). The trial court's ruling is erroneous on both counts.

Under the *Tyger River* doctrine, an insurer owes a duty of good faith to satisfy its duties to defend and indemnify within policy limits. *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346, 348 (1933). If an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. *Nichols v. State Farm Mut. Auto. Ins. Co.*, 306 S.E.2d 616, 618-619 (1983). Such a bad faith claim is predicated on: "(1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 451, 450 S.E.2d 582, 586 (1994).

Appellant has alleged that the IRF acted in bad faith by not defending and indemnifying the Assignors within the policy limits until two months before trial. Appellant specifically alleges, and has provided evidence to the trial court, that the IRF offered less than its policy limits to settle the case on two separate occasions. (R. p. 94, p. 96). Appellant alleges that, by offering less than its policy limits, the IRF acted unreasonably and in bad faith in processing Ms. Morris's claim under its insurance contract. Ms. Morris has alleged there was a mutually

binding contract of insurance between the IRF and the Assignors; that the IRF refused to pay the benefits due under that contract by refusing to tender the policy limits at various points in the litigation; that said refusal was the result of bad faith and unreasonable action; and that the Assignors suffered damages throughout the litigation process and by incurring a multi-million dollar verdict against them. *See also Skinner v. Horace Mann Ins. Co.*, 369 F. Supp. 3d 649, 653 (D.S.C. 2019). Appellant has accordingly alleged everything necessary under South Carolina law to assert a bad faith claim against the IRF.

The trial court's order does not and cannot point to any of the *Howard* elements that Ms. Morris failed to allege. Instead, the trial court seeks to impose an additional element on bad-faith plaintiffs: that the plaintiff make a demand within the insurance policy limits. ("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"). *See* (Order p. 7) (R. p. 7). Notably, the trial court points to no case law in support of this proposition. At best, the trial court's reasoning appears to revolve on the element of causation—that any offer to settle within the policy limits would have been in vain because Ms. Morris would have refused to accept it. Causation, however, is ordinarily a question of fact for the jury. *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 135, 558 S.E.2d 271, 276 (Ct. App. 2001).

Granting summary judgment on causation is additionally inappropriate because Ms. Morris was denied the opportunity to conduct meaningful discovery in this matter. As discussed above, the IRF objected to a vast number of Ms. Morris's discovery requests and failed to provide any meaningful documentation showing settlement negotiations or whether any other parties were willing to contribute any money to resolve the case. Appellant is informed and believes that, if discovery were provided, the evidence will show that if the IRF had been willing to tender its policy limits in summer of 2013, the case would have resolved at that point.

Appellant maintains that insurers have a duty to tender their policy limits in order to protect their insureds from personal liability. Such a duty attaches regardless of what demands the claimants have or have not made. The IRF breached this duty when it failed to offer its $600,000 policy limits on what ultimately proved to be a $3,000,000.00 case. Plaintiff has brought sufficient evidence to proceed with a *Tyger River* claim, and the trial court erred on this point.

CONLCUSION

For the reasons stated above this Court should reverse the trial court's grant of summary judgment on all points.

Respectfully submitted,

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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

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PROOF OF SERVICE

I hereby certify that the enclosed was served on all other parties to this matter by electronic

mail on this day and properly posted for delivery to the following address:

Andrew F. Lindemann
Andrew@ldlawsc.com

s/Garrett B. Johnson
Garrett B. Johnson, SC Bar No. 81105
Attorney for the Appellant

October 27, 2021