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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.....Plaintiff

v.

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

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

AMENDED RECORD ON APPEAL

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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.)

South Carolina Insurance Reserve Fund,)

Defendant.)

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This matter is before this Court on the Motion for Summary Judgment filed by the Defendant South Carolina Insurance Reserve Fund ("IRF"). A hearing was held on July 25, 2019, with all counsel of record present. After a review of the written submissions of the parties, the record presented, and the oral arguments of counsel, this Court grants the Defendant's motion and denies the declaratory relief sought by the Plaintiff on the bases addressed below.

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 IRF relating to judgments entered in a United States District Court action captioned *Morris 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, Morris v. Bland*, 666 Fed. Appx. 233 (4th Cir. 2016).

The Defendant 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 her capacity as the personal representative of the Estate of David Allan Woods, in partial satisfaction of the judgments against the Assignors. The Plaintiff as the personal representative then 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.

LEGAL ANALYSIS

I. Statute of Limitations Defense

The Defendant IRF argues as a threshold issue that the Plaintiff's claims are barred by the applicable statutes of limitations. The Plaintiff has alleged three causes of action for breach of contract, negligence, and "Tyger River" bad faith against the IRF.

Importantly, in adjudicating the statute of limitations defense, the Court is cognizant that the Plaintiff, who is the personal representative of the Estate of David Allan Woods, is bringing this action against the IRF as the assignee of Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland and Jerry Speissegger. These are not claims brought by the Estate, which is precluded by state law from bringing a direct action in contract or tort against an insurer for a third-party claim. See, *Swinton v. Chubb & Son, Inc.*, 283 S.C. 11, 320 S.E.2d 495, 496 (Ct. App. 1984) (a third-party claimant has "no right, either statutory or under common law, to maintain an independent action for damages solely against the insurer"). Instead, in bringing this action as an assignee, the Plaintiff stands in the shoes of the five Assignors. See, *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740, 745 (Ct. App. 2007) ("[a]n assignee stands in the shoes of its assignor"). Therefore, the assignee takes subject to the defenses that could be asserted against the assignors, and that includes a statute of limitations defense. *Dixie Wood Preserving Co. v. Albert Gersten & Asso.*, 244 S.C. 57, 135 S.E.2d 368, 371 (1964).

The statute of limitations for the breach of contract cause of action is three years. The Defendant IRF argues that the acts or omissions alleged as the basis for the breach of contract cause of action, in addition to the resulting harm as alleged, occurred more than three years prior

to the filing of this action on November 6, 2017. This Court agrees. Specifically, in her breach of contract cause of action, the Plaintiff alleges that the IRF breached the insurance policy by failing to consult with the Assignors about the offers to settle, by failing to obtain separate counsel to advise the Assignors about the offers to settle, and by failing to settle prior to trial and judgment. *See*, Amended Complaint, ¶ 65. All of those alleged breaches of contract occurred prior to the Federal Court trial which took place in October 2014, with the judgment being entered on October 21, 2014. *See*, Amended Complaint, Ex. G. Because the alleged breach of contract occurred no later than October 2014, this Court concludes that the filing of the breach of contract action by the Plaintiff on November 6, 2017, was beyond the three-year statute of limitations.

Moreover, the statute of limitations for the negligence and bad faith causes of action is two years pursuant to the South Carolina Tort Claims Act. *See*, S.C. Code Ann. § 15-78-110.¹ The Defendant IRF argues that the acts or omissions alleged as the basis for the negligence and bad faith causes of action, in addition to the resulting harm as alleged, occurred more than two years prior to the filing of this action on November 6, 2017. Again, this Court agrees. The negligence cause of action asserts similar alleged breaches of duty as claimed in the breach of contract cause of action, including an alleged failure to timely and reasonably adjust the claim. *See*, Amended Complaint, ¶ 71. The same is also true for the bad faith claim. The Plaintiff alleges a bad faith claim pursuant to the “Tyger River” doctrine and based on the allegation that the IRF failed to settle the underlying action within policy limits. Again, those alleged acts or omissions occurred prior to the Federal Court trial which took place in October 2014, and certainly longer than two years before this lawsuit was filed. Because the alleged negligence and

¹ In *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993), the South Carolina Supreme Court ruled that a bad faith cause of action is a tort claim, not a contract claim. Therefore, “as an action in tort, the South Carolina Tort Claims Act applies.” 437 S.E.2d at 10.

bad faith occurred no later than October 2014, this Court also concludes that the filing of the negligence and bad faith claims by the Plaintiff on November 6, 2017, was beyond the two-year statute of limitations for torts. Thus, each of the Plaintiff's causes of action brought as an assignee is barred by the applicable statute of limitations and therefore must be dismissed as untimely.

II. Personal Liability of Assignors is Extinguished

As discussed above, the Plaintiff alleges that she has received an assignment from the five correctional officers (the Assignors), and in return, the Estate of David Allan Woods entered into a Covenant Not to Execute extinguishing the personal liability of each of the Assignors. That is undisputed based on the language contained in the Covenants Not to Execute provided to the Assignors. *See*, Amended Complaint, Ex. A. The Defendant IRF thus argues that those Covenants Not to Execute render the current action non-justiciable because the Assignors are no longer personally liable for the judgments entered against them and on which the Plaintiff is seeking to recover from the IRF as an assignee.

It is well settled under South Carolina law that a liability policy is a contract of indemnity. *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640, 641 (1977). The South Carolina Supreme Court has explained that “[a]n insurance carrier is in the same legal position as its insured. A liability carrier only contracts to pay any debt the insured is liable to pay.” *Id.* Here, the insureds are the Assignors. Because the personal liability of the Assignors to pay the judgments has been fully extinguished by the Covenants Not to Execute, there is no longer any debt that the Assignors remain liable to pay. Thus, the IRF, as the liability insurer, is also relieved of any liability under the Tort Liability Policy. This Court thus finds that there remains no further personal liability of the insureds for which the Defendant IRF may be held responsible to indemnify, and as a result, the IRF is entitled to summary judgment on all claims.

III. No Breach of Any Contractual Duties.

As an additional basis for summary judgment on the Plaintiff's breach of contract cause of action, the Defendant IRF argues that none of the duties described in Paragraph 65 of the Amended Complaint are duties provided for by the contract, namely the Tort Liability Insurance Policy as issued to the named insured Berkeley County. *See*, Amended Complaint, Ex. B. In responses to interrogatories, the Plaintiff conceded that there is not a specific contract provision that explicitly imposes the contractual duties alleged in Paragraphs 65(a), 65(b), and 65(c). The Court finds that the same is also true with respect to the contractual duties alleged in Paragraphs 65(d) and 65(e). Paragraph 65(d) alleges a contractual duty "to settle Plaintiff's claim for an amount up to and including the full policy limits," and Paragraph 65(e) alleges a contractual duty "to accept Plaintiff's reasonable settlement offer within the policy limits." There is no contractual language, however, in the Tort Liability Insurance Policy that creates such contractual duties. The Court therefore agrees that the Plaintiff has not and cannot cite to any contractual language that the IRF has alleged breached. To the extent that the Plaintiff, as the assignee, has a claim, that would be pursuant to duties sounding in tort. Consequently, the Defendant IRF is entitled to summary judgment on the breach of contract claim.

IV. No Evidence to Support "Tyger River" Bad Faith Failure-To-Settle Claim

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 *Nichols v. State Farm Mut. Auto. Ins. Co.*, 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. (Emphasis added).

The Defendant IRF argues that the Plaintiff, in her capacity as the personal representative of the Estate of David Allan Woods, never made a demand to settle the underlying case of

Morris v. Bland, 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, but that demand exceeds the policy limits. *See*, Amended Complaint, Ex. C. In addition, it is undisputed that the IRF did make a settlement offer to the Plaintiff of the full policy limits of \$600,000 prior to trial and the judgment being entered, and that offer was rejected. Exhibit F to the Amended Complaint is a letter dated August 13, 2014 from the Estate's trial counsel to one of the defense counsel acknowledging and rejecting an offer to settle for \$600,000, which the parties agree is the policy limits. *See*, Amended Complaint, Ex. F. That offer was made more than two months prior to trial. Because a settlement offer of the policy limits was made and rejected more than two months prior to trial, the Court concludes that the Plaintiff, as the assignee, 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, as here, 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 tort liability. The Plaintiff has not presented this Court with any South Carolina precedent holding to the contrary.

Moreover, based on the undisputed evidence attached as exhibits to the Amended Complaint, this Court concludes that the Plaintiff as the assignee has failed to present evidence showing any bad faith on the part of the IRF. There is no evidence that the Plaintiff, in her capacity as the personal representative, was willing at any point to settle the underlying case for the policy limits of \$600,000 or less. The lowest demand in the underlying case was \$1 million, which is greater than the policy limits. In fact, the evidence reflects that the Plaintiff, in her capacity as the personal representative, increased her demand to \$3 million in September 2013, which was more than a year before the case went to trial. *See*, Amended Complaint, Ex. C. There is no allegation or evidence of a lower demand made during the course of year preceding the trial, and certainly no demand made within the policy limits.

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 has referred is not, in actuality, a Tyger River letter from the insureds to the IRF demanding settlement within policy limits. Instead, as mentioned above, the September 12, 2013 letter is written by the Estate's counsel and sent to the IRF, and that letter includes a demand for \$3 million which far exceeds the policy limits. *See*, Amended Complaint, Ex. C. That is not a "Tyger River letter."

In short, the Plaintiff has failed to present evidence of a Tyger River bad faith claim. At best, the Plaintiff has shown excess judgments were returned at trial, and this Court rules that the return of an excess judgment at trial is not evidence of bad faith. For these reasons, the Court concludes that the IRF is entitled to summary judgment on the merits of the Tyger River bad faith failure to settle for policy limits claim.

IT IS, THEREFORE, ORDERED that the Motion for Summary Judgment filed by the Defendant South Carolina Insurance Reserve Fund is granted. The Plaintiff's prayer for relief is denied, and the Amended Complaint is hereby dismissed with prejudice.

AND IT IS SO ORDERED.


L. CASEY MANNING
Presiding Circuit Court Judge
Fifth Judicial Circuit
Sgt. 25, 2019

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,)
)
Plaintiff,)

Civil Action No. 2017-CP-40-6773

V.

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

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND

This matter is before this Court on the Plaintiff's Motion to Alter or Amend Order filed October 4, 2019. Although the Plaintiff may have timely filed her motion pursuant to Rule 59(e), SCRPC, the Plaintiff never provided the Court with a copy of the motion in accordance with Rule 59(g), SCRPC, and as a result, the Court was not aware until recently that the motion had been filed. Based upon the failure of the Plaintiff to comply with Rule 59(g) SCRPC, the Motion to Alter or Amend Order is denied. *See, Smith v. Fedor*, 422 S.C. 118, 809 S.E.2d 612, 616 (Ct. App. 2017) (“the trial court properly denied Smith’s motion for reconsideration because he did not timely provide a copy of the motion to the judge”).

Moreover, after careful consideration of the Plaintiff's motion and the record in this case, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded.

In addition, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

IT IS, THEREFORE, ORDERED that the Plaintiff's Motion to Alter or Amend Order is denied.

AND IT IS SO ORDERED.

L. CASEY MANNING
Circuit Court Judge,
Fifth Judicial Circuit



Richland Common Pleas

Case Caption: Nancy Morris , plaintiff, et al vs South Carolina Insurance Reserve Fund
Case Number: 2017CP4006773
Type: Order/Other

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2021-04-22 14:40:08 page 3 of 3

ORM

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4006773

Nancy Morris et al
PLAINTIFF(S)

South Carolina Insurance Reserve Fund
DEFENDANT(S)

DISPOSITION TYPE CHECK ONE

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED** (____ Rule A ____ : ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☒ Other See below Statement of Judgment.
- ☐ **ACTION STRICTLY EN** (____ Rule A ____ : ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION ON APPEAL TO THE CIRCUIT COURT** ____ A ____ A ____ :
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Based on consent from both parties, both of Plaintiff's Motions to Compel Discovery dated July 9, 2018, are hereby withdrawn. Plaintiff has leave to refile said motions at a later date.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

C C O U O

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/04/2019 .

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

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

C R
E- N T E J E S
E- . S R . T , SCRCF.



Richland Common Pleas

Case Caption: Nancy Morris , plaintiff, et al vs South Carolina Insurance Reserve Fund

Case Number: 2017CP4006773

Type: Order/Electronic Form 4

So Ordered

s/Walton J. McLeod, 2765

Electronically signed on 2019-01-04 14:45:26 page 3 of 3

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,)

**NOTICE OF MOTION AND
 MOTION SUMMARY JUDGMENT**

v.)

South Carolina Insurance Reserve Fund,)

Defendant.)

TO: HAROLD C. STALEY, ANDREW W. CREECH, AND GARRETT B. JOHNSON,
 COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant South Carolina Insurance Reserve Fund will move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County Judicial Center, Columbia, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, SCRCPP, granting summary judgment and dismissing the Plaintiff's Amended Complaint with prejudice.

The Defendant's motion is based upon the following grounds:

1. The Plaintiff's claims are barred by the applicable statute of limitations. The statute of limitations for the breach of contract cause of action is three years. The acts or omissions alleged as the basis for the breach of contract cause of action, in addition to the resulting harm as alleged, occurred more than three years prior to the filing of this action on November 6, 2017. The statute of limitations for the negligence and bad faith causes of action is

two years pursuant to the South Carolina Tort Claims Act. The acts or omissions alleged as the basis for the negligence and bad faith causes of action, in addition to the resulting harm as alleged, occurred more than two years prior to the filing of this action on November 6, 2017.

2. The Defendant has no duty to indemnify the Plaintiff because the assignors are not legally obligated to pay damages to the Plaintiff. When the Plaintiff entered Covenants Not to Execute and relieved the assignors of their personal liability to pay the judgments against them, that also relieved the Defendant of any further liability under the Tort Liability Policy.

3. The purported assignment of the causes of action, including the claim for bad faith, to the Plaintiff is contrary to South Carolina law, invalid, illegal, in violation of S.C. Code Ann. 16-17-10, and against the public policy of the State of South Carolina.

4. The Plaintiff lacks standing to assert each of the causes of action against the Defendant, including the bad faith claim.

5. The Defendant is entitled to summary judgment on the Plaintiff's breach of contract cause of action because none of the duties described in Paragraph 65 of the Amended Complaint are duties provided for by the contract, namely the Tort Liability Insurance Policy as issued to the named insured Berkeley County. *see*, Amended Complaint, Ex. B. In responses to interrogatories, the Plaintiff has already conceded that there is not a specific contract provision that explicitly imposes the contractual duties alleged in Paragraphs 65(a), 65(b), and 65(c). The same is also true with respect to the contractual duties alleged in Paragraphs 65(d) and 65(e).

6. The Plaintiff never made a demand to settle the underlying case of *Richland v. [redacted]*, Civil Action Number 5:12-3177-RMG, within the policy limits of \$600,000. In addition, the Defendant did make a settlement offer to the Plaintiff of the policy limits of \$600,000 prior to trial and judgment being entered, and that offer was rejected. As a result, the Plaintiff cannot state a

claim under the “Tyger River” doctrine based on the allegation that the Defendant failed to settle the underlying action within policy limits.

7. The Plaintiff can present no evidence to support the specific allegations of negligence or gross negligence as pled in the Second Cause of Action.

8. Paragraphs 71(c), 71(d), and 71(e) should be dismissed in that those allegations fail to state proper allegations of negligence or gross negligence. Paragraph 71(c) only sets forth a statement of the reasonable man standard. Paragraph 71(d) alleges unspecified violations of laws or common law of the State of South Carolina.” Paragraph 71(e) alleges only that the Defendant is negligent or grossly negligent in any other matter that Plaintiff may discover through litigation.”

The Defendant’s motion is based upon the pleadings filed in this case, including exhibits attached to the Amended Complaint; the Plaintiff’s Responses to Defendant’s Interrogatories (attached); a supporting memorandum and affidavits as may be filed; the rules of court; and such other matters as may be presented to the Court at or before the time of the hearing.

LINDEMANN, DA IS & HUGHES, P.A.

BY: s Andre nde ann
 ANDREW F. LINDEMANN 13030
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 Columbia, South Carolina 29260
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 Email: andrew@ldh-law.com

*o nsel for efendant
 o th arol na ns ran e Reser e nd*

April 5, 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 RESPONSES TO
Plaintiffs,	)	DEFENDANT'S INTERROGATORIES
	)	
-vs-	)	
	)	
South Carolina Insurance Reserve Fund,	)	
	)	
Defendants.	)	

TO: THE ABOVE-NAMED DEFENDANT AND ITS ATTORNEY, ANDREW F. LINDEMANN, ESQUIRE:

RESPONSES

1. Give the names and addresses of persons known to the Plaintiff or her counsel to be witnesses concerning the facts of the 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

Nancy Morris
c/o Elrod Pope Law Firm
212 E. Black Street
Rock Hill, SC 29730

Ms. Morris will testify about the underlying litigation and her attempts to settle the case within the policy limits.

Andrew J. Bland
Leemon E. Carner
Jerry Speissegger, Jr.
Priscilla Garrett Bland
c/o Biering Law Firm
103 Broughton Rd
Moncks Corner, SC 29461

These correctional officers will testify about the underlying litigation and Defendant's failure to communicate with them and to protect them against an excess judgment.

Richard T. Burkholder
229 S. 9th Street
Connellsville, PA 15425

Mr. Burkholder will testify about the underlying litigation and Defendant's failure to communicate with him and to protect him against an excess judgment.

Sandra Senn
Robin L. Jackson
Senn Legal, LLC
3 Wesley Dr.
Charleston, SC 29407

Mrs. Senn and Mrs. Jackson represented the correctional officers through mediation, and are expected to testify as to any recommendations or advice given to Defendant concerning settlement.

Eugene P. Corrigan, III
Law Office of Eugene P. Corrigan, III
3 Broad Street, Fourth Floor
Charleston, SC 29401

Mr. Corrigan represented four of the correctional officers through trial and appeal, and is expected to testify as to any recommendations or advice given to Defendant concerning settlement.

James Stuckey
Stuckey Law Offices, LLC
123 Meeting Street
Charleston, SC 29401

Mr. Stuckey represented Mr. Burkholder through trial, and is expected to testify as to any recommendations or advice given to Defendant concerning settlement.

Alissa Collins Lietzow
Charleston Pro Bono Legal Services
111 Church St
Charleston, SC 29401

Ms. Lietzow represented Mr. Burkholder through trial, and is expected to testify as to any recommendations or advice given to Defendant concerning settlement.

Karl Folkens
Folkens Law Firm, P.A.
601 W Evans St
Florence, SC 29501

Mr. Folkens is expected to testify that he mediated the case and the sides arrived at a settlement agreement, but the Defendant failed to follow through.

Defendant's representative
Address unknown

No written or recorded statements in Plaintiff's possession

2. For each person known to the Plaintiff or her 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 statements taken from such witnesses.

RESPONSE

Please see response to Interrogatory #1

3. Set forth a list of photographs, videotapes, audiotapes, plats, sketches, or other prepared documents in possession of the Plaintiff or her counsel that relate to any claims or defenses or coverage issues raised in this case.

RESPONSE

1. Assignments
2. Tort Liability Policy
3. Tyger River letter to Defendant
4. Letter from Defendant offering \$500,000
5. Offer of Judgment from County Defendants
6. Response Letter to County Offer
7. Clocked Judgment
8. Hesse CV

4. Please identify in complete detail each person whom the Plaintiff may call as an expert witness at the trial, and for each such person provide the following information:

- (a) Name, occupation, title, business address, area of specialization, if any, and professional relationship to the Plaintiff; and
- (b) The manner in which such person became familiar with the facts of this case.

RESPONSE

Tom Hesse

Attorney

Austen and Gowder, LLC

1629 Meeting Street, Suite A

Charleston, SC 29405

Expertise is in insurance claims handling

Mr. Hesse has been hired as Plaintiffs' expert. No prior relationship.

Mr. Hesse became familiar with the facts of the case through materials that were provided to him, which he reviewed.

5. As to each person who the Plaintiff has identified or intends to identify as an expert witness in this matter, please provide the following information:

- (a) The subject matter or area in which such person is to testify;
- (b) A statement of each opinion held by such person; and
- (c) A summary of the grounds or basis for each opinion.

RESPONSE

(a) Insurance claims handling

(b) Failure of the IRF to settle the claim when it had an opportunity to do so within the policy limits exposed the correctional officers to a judgment for \$2.95 million, including punitive damages of \$2.45 million that they otherwise would not have been exposed to.

(c) The pleadings, the judgment that was rendered, the offer of judgment, the Tyger River letter, and exhibits to the Complaint form the grounds for the opinion.

6. Identify by name and address of the "Assignors' personal attorney" that the Plaintiff refers to in Paragraph 48 of the Amended Complaint.

RESPONSE

Christopher P. Biering

Biering Law Firm

103 Broughton Rd

Moncks Corner, SC 29461

7. Identify by name and address each of the “counsel” that the Plaintiff refers to in Paragraph 65(b) of the Amended Complaint.

RESPONSE

Sandra Senn
Robin L. Jackson
Senn Legal, LLC
3 Wesley Dr.
Charleston, SC 29407

Eugene P. Corrigan, III
Law Office of Eugene P. Corrigan, III
3 Broad Street, Fourth Floor
Charleston, SC 29401

James Stuckey
Stuckey Law Offices, LLC
123 Meeting Street
Charleston, SC 29401

Alissa Collins Lietzow
Charleston Pro Bono Legal Services
111 Church St
Charleston, SC 29401

8. Identify by specific section and paragraph number that portion of the IRF Tort Liability Policy issued to Berkeley County that establishes the contractual duty described in Paragraph 65(a) of the Amended Complaint.

RESPONSE

Plaintiff does not maintain that there is a specific contract provision that explicitly imposes this duty on Defendant. Rather, it is a breach of Defendant’s duty of good faith and fair dealing that arises by operation of law.

9. Identify by specific section and paragraph number that portion of the IRF Tort Liability Policy issued to Berkeley County that establishes the contractual duty described in Paragraph 65(b) of the Amended Complaint.

RESPONSE

Plaintiff does not maintain that there is a specific contract provision that explicitly imposes this duty on Defendant. Rather, it is a breach of Defendant's duty of good faith and fair dealing that arises by operation of law.

10. Identify by specific section and paragraph number that portion of the IRF Tort Liability Policy issued to Berkeley County that establishes the contractual duty described in Paragraph 65(c) of the Amended Complaint.

RESPONSE

Plaintiff does not maintain that there is a specific contract provision that explicitly imposes this duty on Defendant. Rather, it is a breach of Defendant's duty of good faith and fair dealing that arises by operation of law.

11. Identify by specific section and paragraph number that portion of the IRF Tort Liability Policy issued to Berkeley County that establishes the contractual duty described in Paragraph 65(d) of the Amended Complaint.

RESPONSE

Section I of the Tort Liability Policy imposes a duty on Defendant to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury."

12. Identify by specific section and paragraph number that portion of the IRF Tort Liability Policy issued to Berkeley County that establishes the contractual duty described in Paragraph 65(e) of the Amended Complaint.

RESPONSE

Section I of the Tort Liability Policy imposes a duty on Defendant to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury."

13. Identify by name and address all persons who were involved in the negotiation of the documents captioned "Assignment of Rights and Covenant Not to Execute" that were entered by the Plaintiff and the Assignors (as defined in Paragraph 6 of the Amended Complaint).

RESPONSE

Harold C. Staley, Jr.
Andrew W. Creech
Garrett B. Johnson
Nancy Morris
c/o Elrod Pope Law Firm
212 E. Black Street
Rock Hill, SC 29730

Andrew J. Bland
Leemon E. Carner
Jerry Speissegger, Jr.
Priscilla Garrett Bland
c/o Biering Law Firm
103 Broughton Rd
Moncks Corner, SC 29461

Richard T. Burkholder
229 S. 9th Street
Connellsville, PA 15425

Christopher P. Biering
Biering Law Firm
103 Broughton Rd
Moncks Corner, SC 29461

14. Describe in detail all of the legal consideration that was received by the Assignors (as defined in Paragraph 6 of the Amended Complaint) for entering into the "Assignment of Rights and Covenant Not to Execute" as well as any other benefits, financial or otherwise, conveyed or promised to the Assignors by the Plaintiff or her counsel.

RESPONSE

Plaintiff craves reference to the Assignments, which speak for themselves. Supplemental proceedings that had been filed against Assignors in Berkeley County were dismissed, and Plaintiff covenanted

not to execute against any assets of the Assignors, as well as not to institute any further claims, lawsuits, bankruptcy proceedings, or other causes of action against them to enforce or collect on the above judgment. That judgment, of course, had already been entered, and the Assignments have no bearing whatsoever on collection efforts against Defendant with regard to that judgment.

15. Identify by name and address all legal counsel representing the Assignors (as defined in Paragraph 6 of the Amended Complaint) individually or jointly in the negotiations that led to the execution of the documents captioned "Assignment of Rights and Covenant Not to Execute."

RESPONSE

Christopher P. Biering
Biering Law Firm
103 Broughton Rd
Moncks Corner, SC 29461

16. Identify by name and address all legal counsel representing the Plaintiff in the negotiations that led to the execution of the documents captioned "Assignment of Rights and Covenant Not to Execute."

RESPONSE

Harold C. Staley, Jr.
Andrew W. Creech
Garrett B. Johnson
Elrod Pope Law Firm
212 E. Black Street
Rock Hill, SC 29730

17. Describe all personal and professional relationships that exist between any of the persons identified in response to Interrogatory #15 and any of the persons identified in response to Interrogatory #16.

RESPONSE

None

18. Specify the amount of the legal fees that were paid by the Assignors (as defined in Paragraph 6 of the Amended Complaint) individually or jointly to the persons identified in response to Interrogatory #15.

RESPONSE

Plaintiff has issued a subpoena to Christopher Biering for this information.

19. Set forth an itemized statement of the actual and/or consequential damages claimed to have been sustained by the Assignors (as defined in Paragraph 6 of the Amended Complaint) as a result of the alleged breach of contract and negligence.

RESPONSE

In addition to the attorney's fees set forth above, Assignors have suffered:

Outstanding personal judgments due to Defendant's failure to settle:

Andrew J. Bland- \$123,788.27
Richard T. Burkholder- \$825,255.10
Leemon E. Carner- \$123,788.27
Jerry Speissegger, Jr.- \$123,788.27
Priscilla Garrett- \$825,255.10

Mental anguish- Not yet calculated

20. Set forth an itemized statement of the actual and/or extracontractual damages claimed to have been sustained by the Assignors (as defined in Paragraph 6 of the Amended Complaint) as a result of the alleged bad faith.

RESPONSE

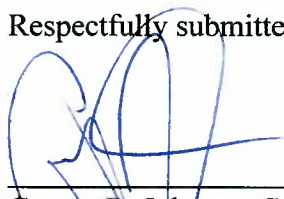
Please see response to Interrogatory #19.

21. Set forth an itemized statement of the "attorney's fees and expenses" identified in Paragraph 95(b) of the Amended Complaint, and state which of the Assignors incurred those fees and expenses, the name(s) of legal counsel to whom those fees and expenses were paid, the date those fees and expenses were paid, and the method of payment.

RESPONSE

Plaintiff has issued a subpoena to Christopher Biering for this information.

Respectfully submitted,



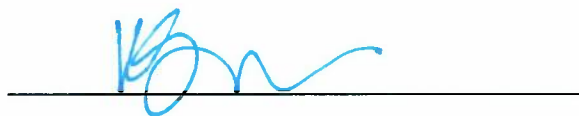
Garrett B. Johnson, SC Bar #81105
ELROD POPE LAW FIRM
212 E. Black Street
P.O. Box 11091 (29731)
Rock Hill, SC 29730
(803) 324-7574
GJohnson@ElrodPope.com
Attorney for Plaintiffs

May 14, 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;	)	
	)	CERTIFICATE OF SERVICE
Plaintiffs,	)	
	)	
-vs-	)	
	)	
South Carolina Insurance Reserve Fund,	)	
	)	
Defendants.	)	

The undersigned hereby certifies that a true copy of the foregoing **PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT** has been served upon opposing counsel by depositing same in the United States Mail with sufficient postage affixed thereto this 14 day of May 2018, using the following address:

Andrew F. Lindemann
Lindemann, Davis, & Hughes, P.A.
Post Office Box 6923
Columbia, South Carolina 29260



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 MEMORANDUM IN
Plaintiffs,	)	OPPOSITION TO DEFENDANT'S
	)	MOTION FOR SUMMARY JUDGMENT
-vs-	)	
	)	
South Carolina Insurance Reserve Fund,	)	
	)	
Defendants.	)	

This matter comes before the Court on Defendant's Motion for Summary Judgment, filed on April 5, 2019. Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be DENIED.

FACTUAL BACKGROUND

On or about September 2, 2010, Decedent David Woods was tried and convicted in absentia by way of bench trial on charges of Shoplifting Merchandise/Less than \$2,000 and Animal Nuisance. On October 12, a bench warrant was issued for his arrest, and he was booked and taken into custody at Hill-Finklea Detention Center. Over the course of the next several weeks, Mr. Woods complained to jail and medical personnel of health problems, including but not limited to liver disease, intestinal pain, and blood in his stool.

On the night of Friday, November 5, 2010, Mr. Woods was reported to be lying down on the floor of his cell and shaking. Sergeant Priscilla Bland (then Priscilla Garrett) transferred him to a medical observation cell. This occurred at approximately 10:30 p.m. While the jail had medical personnel on-call 24 hours a day, 7 days a week, there were no medical personnel on site

at that time. Neither were any medical personnel scheduled to work at the detention center during the weekend.

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, Defendants PFC Andrew Bland; Sgt Richard T. Burkholder; PFC Leemon E. Carner; Sgt Priscilla Bland (Garrett); and PFC Jerry Speissegger, Jr. (hereinafter collectively “the County Defendants”) each 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 duodenal ulcer.

PROCEDURAL POSTURE

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 personnel pursuant to 42 U.S.C. § 1983 and the South Carolina Tort Claims Act. The case was removed to the South Carolina District Court, Charleston Division. The medical defendants entered into a settlement agreement, and the SCTCA claims were dismissed. The District Court granted summary judgment to certain county defendants.

Trial proceeded against the remaining five defendants—Andrew Bland; Richard Burkholder; Leemon Carner; Priscilla Bland (Garrett); and Jerry Speissegger, Jr.—solely on the 42 U.S.C. § 1983 claims, on October 14, 2014. On October 17, 2014, 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.

The District Court later granted Defendants an offset, reducing the amount of the actual damages award to \$171,875. Plaintiff was granted attorneys' fees in the amount of \$354,923 and costs totaling \$31,820.62. Defendants appealed to the Fourth Circuit, which upheld the District Court on November 16, 2016. Independent of a court order, both sides stipulated that Plaintiff's attorneys' fees for the appeal totaled \$25,768.75. Total damages were thus \$3,040,287.37. In 2017, each of the defendants in the underlying action completed an assignment of rights in favor of Plaintiff Nancy Morris, allowing her to bring a bad faith action against Defendant.

LEGAL STANDARD

Under Rule 56(c), SCRCP, 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. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Zurich Am. Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010); Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181, 183

(Ct.App.2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004).

ARGUMENT

Defendant's Motion is sparse, providing little to no explanation for the reasoning behind the various grounds asserted for dismissal. Given the lack of detail, Plaintiff addresses each of the arguments to the best of her ability herein, and

1. Plaintiff filed her action within the applicable statute of limitations.

Plaintiff filed this action on November 6, 2017. Defendant objects that this was outside the two-year statute of limitations provided for by the South Carolina Tort Claims Act. However, Defendant appealed the verdict in the underlying case to the Fourth Circuit Court of Appeals, which only affirmed the decision on November 16, 2016. This is the date when Plaintiff's statute of limitations accrued and she had an actionable claim against Defendant. Had the Fourth Circuit overturned the District Court's decision and ordered a new trial, Plaintiff would not have had a claim against for bad faith until and unless a jury awarded another verdict, one that would survive an appeal. Only when Plaintiff had a final adjudication of the underlying case did her right to bring this action arise.

Incidentally, Plaintiffs did file a declaratory judgment concerning this very same underlying case. This suit was filed in 2015, shortly after the verdict was awarded. On March 23, 2016, Judge Casey Manning issued a Form 4 Order staying that case on the ground that it was "premature" while the appeal was pending. Judge Manning correctly recognized that any of Plaintiff's rights or causes of action arising out of the verdict awarded in the underlying matter would not accrue until the appeal was heard. The Court should follow the same logic in this

matter and find that the statute of limitations began to run on the date that the defendants' appeal in the underlying case was denied. Plaintiff accordingly filed her Summons and Complaint less than one year after the verdict was affirmed on appeal, which is well within the statutory period.

In their motion, Defendant does not provide an alternate date for when Plaintiff's statute of limitations accrued. To the extent that it argues that the statute began on a date earlier than the denial of the appeal, it should be estopped from claiming the statute of limitations as a defense because its own actions induced the delay. See Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136–37, 526 S.E.2d 218, 220 (2000). By repeatedly pushing back the trial date in the underlying action and by filing an ultimately fruitless appeal, Defendant induced the delay that caused Plaintiff to file this action only after the appeal had been decided. If Defendant's reasoning were to prevail, insurers would be incentivized to delay and appeal adjudication of claims so as to allow a sufficient amount of time to pass to bar any bad faith claim. The Court should instead look to the date when a final ruling was entered in the underlying matter, and calculate the statute of limitations from that date.

2. The assignments prepared by the defendants to the underlying action do not serve to relieve Defendant from liability.

In 2017, Andrew J. Bland, PFC; Richard T. Burkholder, SGT; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; and Priscilla Garrett, SGT entered into Assignments of Rights and Covenants Not to Execute. In these assignments, Plaintiff agreed "not to execute against any assets of the undersigned," to dismiss them from supplementary proceedings filed in Berkeley County, and not to institute any "further claims" against them. In exchange for this consideration, the correctional officers assigned to Plaintiff "any and all claims he/she may have against the South Carolina Insurance Reserve Fund... and the right to collect all actual and

punitive damages, attorney fees, or costs that may arise from those claims.” Defendant argues that these assignments serve to release Defendant from liability.

It is curious to suggest that an Assignment of Rights assigning Plaintiff “any and all claims” against the IRF excuses the IRF from liability. “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 common sense reading of the assignments shows that Defendant’s argument is unfounded. Their clear intention and effect are quite the opposite of what Defendant claims; far from relieving Defendant from liability, they assign Plaintiff the right to pursue an additional remedy against the agency.

In the declaratory judgment action regarding this matter, Defendant offers alleged support from two primary cases. The first, Smalls v. Blackmon, 269 S.C. 614 (1977), dealt with the Longshoremen’s Act. The plaintiff in Smalls was injured by a fellow employee, and received benefits under the Longshoremen’s Act. The Act provided that it was the exclusive remedy for injuries caused by co-workers. The plaintiff then attempted to sue the co-worker who had caused the injury. The Court ruled that the plaintiff could not “circumvent the clear language” of the Longshoremen’s Act, and that “The insurer is obligated to pay only those sums which the insured becomes legally obligated to pay.” Because the co-worker never had any liability under the clear language of the Act, his insurer was not obligated to pay anything to the plaintiff.

In the second case, Cobb v. Benjamin, 325 S.C. 573, 576 (Ct. App. 1997), a plaintiff entered into a covenant not to execute which “released State Farm, Williams, and Benjamin from

all liability arising out of the accident.” The plaintiff reserved rights against the defendant “solely for the purpose of establishing claims against underinsured motorist carriers for underinsured motorist benefits,” and agreed that she would “only seek to collect such judgment from such underinsured motorist carriers as may be found to have such coverage.” *Id.* at 576-77. She further promised that “any judgment be entered against the underinsured motorist carrier and not against” the defendants. *Id.* at 577. The plaintiff subsequently learned that the defendant had an additional liability insurance policy, and attempted to collect against it. The court found that the plaintiff had preserved her right to proceed only against “any applicable UIM carriers” and waived her rights to enter a judgment against or impose any liability on the defendant. *Id.* at 578-79. The defendant’s second liability carrier therefore had no obligation to pay. *Id.* at 579.

Both of these cases are readily distinguishable from the current situation. In *Smalls*, there was no obligation to pay because of the clear prohibition of the statute. In *Cobb*, there was no obligation to pay because the plaintiff signed a clear and unequivocal release that extinguished any right to pursue a claim against another liability carrier. In the current matter, neither statutory provisions nor contractual releases excuse Defendant from liability. In fact, the preservation and assignment of that liability, and claims to establish the same, were the consideration sought and received by Plaintiff. Defendant’s reading would result in the assignments essentially rendering themselves null and void; the causes of action conveyed by the assignments would be defeated by the assignment itself. This is the absurd and unusual result envisioned by the Court in *C.A.N. Enterprises*, and this Court cannot adopt such a reading.

3. The assignments and claims do not constitute barratry.

In perhaps its most obscure argument, Defendant argues that the assignments constitute the crime of barratry pursuant to S.C. Code § 16-17-10. It is difficult to see how the current

action could fall into the terms of this code section. Given that the statute does not limit its terms to actions against government entities, Defendant would seemingly be forced to argue that any and all bad faith claims utilizing assignments would run afoul of the statute, which is clearly contrary to well-established South Carolina public policy. See Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933). Moreover, even if this action does somehow fall under the terms of the statute, nothing in the statute calls for or warrants the dismissal of the action. Defendant's argument is therefore unavailing.

4. The assignments confer standing upon Plaintiff.

Defendant claims that Plaintiff lacks standing to assert each of the causes of action against Defendant, including the bad faith claim. Under Tyger River and its progeny, insureds have a cause of action against their insurer when that insurer fails to act in good faith and to exercise reasonable care. Id. The defendants in the underlying action have a cause of action that arose due to Defendant's failure to act reasonably in settling the case. Those causes of action were duly and properly assigned to Plaintiff. Plaintiff accordingly has the standing to bring this action.

5. Summary judgment is not appropriate on Plaintiff's Breach of Contract claim.

Defendant argues that certain elements of Plaintiff's Breach of Contract claim should be dismissed. Specifically, Plaintiff pled that Defendant breached the contract by not consulting with the assignees regarding Plaintiff's offer to settle; by not discussing the offer with the assignees; by not retaining independent counsel to advise assignees of their rights concerning offers to settle; by not settling Plaintiff's claim for an amount up to and including the full policy limits; and by not accepting Plaintiff's reasonable settlement offer within the policy limits. Plaintiff concedes that the first three items are not enumerated in the contract, but contends that

they arise under operation of law as part of Defendant's duty of good faith and fair dealing. ("Importantly, an insured need not prove a breach of an express contractual provision as a prerequisite to bringing a bad faith cause of action." Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996).)

Plaintiff contends that the remaining two items arise under the language of the contract that requires Defendant to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury." Whether or not Defendant's conduct violates this provision is a question of fact for the jury, rendering summary judgment improper.

6. Plaintiff's demands are irrelevant as to whether or not Defendant acted in bad faith.

Defendant argues that Plaintiff cannot state a claim under the Tyger River doctrine because she "never made a demand to settle the underlying case" within the policy limits. It is a factual issue whether or not Plaintiff's demands would have been satisfied had Defendant tendered the full policy limits at mediation. Plaintiff intends to demonstrate that she had agreed to a tentative settlement agreement following the mediation, in which Defendant would tender the policy limits and Berkeley County would pay \$400,000.00. Plaintiff is informed and believes that the only reason the settlement was not effected was that Defendant was not willing to tender its policy limits, thus subjecting its insured to personal liability and excess judgments.

In any event, under Tyger River and South Carolina state law, Defendant had an obligation to act in good faith and to make a reasonable effort to settle the claim. This duty is not limited to instances in which the plaintiff makes certain demands or conducts herself in certain ways. The question of fact before the jury is whether Defendant upheld this duty

throughout the litigation, particularly in the months and years before Defendant finally offered the full policy limits. If the jury finds that Defendant breached this duty, then Defendant is liable for the same, regardless of what Plaintiff's demands may or may not have been at the time. The breach lies in the Defendant's conduct, not the Plaintiff's.

Defendant is, of course, free to argue that their breach did not result in any damages to the assignees because Plaintiff would not have accepted an offer of the full policy limits at mediation or any time prior to the limits actually being offered. However, that is a question of fact that will be submitted to and answered by the jury, and summary judgment is inappropriate.

7. Whether Plaintiff can provide evidence of gross negligence is a question of fact.

Defendant objects that "Plaintiff can present no evidence to support the specific allegations of negligence or gross negligence as pled in the Second Cause of Action." This cause of action is negligence on the part of Defendant in failing to process and timely adjust Plaintiff's claims and deviating from a standard of care. Plaintiff has already produced evidence in the form of a verdict well in excess of the policy limits and Defendant's failure to tender the limits until years into the litigation. Plaintiff strongly suspects that the only reason that she has not been able to produce more evidence supporting these allegations is that Defendant has steadfastly refused to turn over its claims file. In any event, this is a question of fact not appropriate for summary judgment.

8. Defendant's objections to Paragraphs 71(c), 71(d), and 71(e) have been held in abeyance.

Defendant requests the dismissal of Paragraphs 71(c), 71(d), and 71(e) of Plaintiff's Complaint. The parties have already agreed and consented that Defendant's challenge to these paragraphs be held in abeyance until further discovery is completed, as memorialized in an order

signed and filed by Judge Hood on June 14, 2018. That discovery is still ongoing and is awaiting a decision on Plaintiff's Motion to Compel concerning certain matters that Defendant claims are privileged. Summary judgment is inappropriate until full discovery has been conducted.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be DENIED.

Respectfully submitted,

s/Garrett B. Johnson
Garrett B. Johnson, SC Bar #81105
ELROD POPE LAW FIRM
212 E. Black Street
P.O. Box 11091 (29731)
Rock Hill, SC 29730
(803) 324-7574
GJohnson@ElrodPope.com
Attorney for Plaintiff

June 5, 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 SUPPORT OF
MOTION SUMMARY JUDGMENT**

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 *Morris v. Burkholder* 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 Morris and Land*, 666 Fed. Appx. 233 (4th Cir. 2016).

The Insurance Reserve Fund 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 Defendant IRF has now filed a motion for summary judgment as to all claims.

ARGUMENTS

I. T P .

The Plaintiff's claims are barred by the applicable statutes of limitations. The statute of limitations for the breach of contract cause of action is three years. The acts or omissions alleged as the basis for the breach of contract cause of action, in addition to the resulting harm as alleged, occurred more than three years prior to the filing of this action on November 6, 2017. Specifically, in her breach of contract cause of action, the Plaintiff alleges that the IRF breached the insurance policy by failing to consult with the Assignors about the offers to settle, failed to obtain separate counsel to advise the Assignors about the offers to settle, and failed to settle prior to trial and judgment. *See*, Amended Complaint, ¶ 65. All of those alleged breaches of contract occurred prior to the Federal Court trial which took place in October 2014, with the judgment being entered on October 21, 2014. *See*, Amended Complaint, Ex. G. It is well settled that “[a]n assignee stands in the shoes of its assignor.” *Boore v. General*, 373 S.C. 209, 644 S.E.2d 740, 745 (Ct. App. 2007). Therefore, the assignee takes subject to the defenses that could be asserted against the assignors. *See Good v. Reser v. Alpert v. Ersten v. Asso*, 244 S.C. 57, 135 S.E.2d 368, 371 (1964). Because the alleged breach of contract occurred no later than October 2014, the filing of the breach of contract action by the Plaintiff on November 6, 2017, was beyond the three-year statute of limitations.

Moreover, the statute of limitations for the negligence and bad faith causes of action is two years pursuant to the South Carolina Tort Claims Act. *See*, S.C. Code Ann. § 15-78-110.¹

¹ In *Charleston County School District v. Tate* and *Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993), the South Carolina Supreme Court ruled that a bad faith cause of action is a tort claim, not a contract claim. Therefore, as an action in tort, the South Carolina Tort Claims Act applies. 437 S.E.2d at 10.

The acts or omissions alleged as the basis for the negligence and bad faith causes of action, in addition to the resulting harm as alleged, occurred more than two years prior to the filing of this action on November 6, 2017. The negligence cause of action asserts similar alleged breaches of duty as claimed in the breach of contract cause of action, including an alleged failure to timely and reasonably adjust the claim. *See*, Amended Complaint, ¶ 71. The same is also true for the bad faith claim. The Plaintiff alleges a bad faith claim pursuant to the “Tyger River” doctrine and based on the allegation that the IRF failed to settle the underlying action within policy limits. Again, those alleged acts or omissions occurred prior to the Federal Court trial which took place in October 2014, and certainly longer than two years before this lawsuit was filed. Because the alleged negligence and bad faith occurred no later than October 2014, the filing of the negligence and bad faith claims by the Plaintiff on November 6, 2017, was beyond the two-year statute of limitations for torts.

II. THE DEFENDANT'S POSITION ON THE ASSIGNMENT OF LIABILITY

The Plaintiff alleges that she has received an assignment from the five correctional officers, and in return, has entered into a Covenant Not to Execute extinguishing the personal liability of each of those parties. As a result, those Covenants Not to Execute render the current action non-justiciable because the Assignors are no longer personally liable for the judgments entered against them and on which the Plaintiff is seeking to recover from the IRF.

It is well settled under South Carolina law that a liability policy is a contract of indemnity. *Wells v. La Grone*, 269 S.C. 614, 239 S.E.2d 640, 641 (1977). As such, the Plaintiff is now precluded from recovering under the IRF Tort Liability Policy. The South Carolina

Supreme Court has explained that “[a]n insurance carrier is in the same legal position as its insured. A liability carrier only contracts to pay any debt the insured is liable to pay.” *alls*, 239 S.E.2d 640 at 641. Likewise, in *o en a n*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997), the Court of Appeals explained that a liability insurance policy “is a contract of indemnity and the carrier is placed in the same position as its insured.” 482 S.E.2d at 592. In that case, the plaintiff (Cobb) entered a Covenant Not to Execute in favor of the defendant (Benjamin), and the Court of Appeals ruled as follows: “When Cobb removed the obligation to pay a judgment from Benjamin, she also relieved Nationwide of its liability to pay under Benjamin’s policy. The trial court was correct in its determination the covenant not to execute relieved Nationwide from liability.” *d*.

The same is true in the present case. When the Plaintiff entered the Covenants Not to Execute and relieved the five corrections officers of their personal liability to pay the judgments against them, that also relieved the IRF of any further liability under the Tort Liability Policy. Thus, the Defendant IRF is entitled to summary judgment on all claims.

III. T P .

The Defendant is entitled to summary judgment on the Plaintiff’s breach of contract cause of action because none of the duties described in Paragraph 65 of the Amended Complaint are duties provided for by the contract, namely the Tort Liability Insurance Policy as issued to the named insured Berkeley County. *ee*, Amended Complaint, Ex. B. In responses to interrogatories, the Plaintiff has already conceded that there is not a specific contract provision that explicitly imposes the contractual duties alleged in Paragraphs 65(a), 65(b), and 65(c). The same is also true with respect to the contractual duties alleged in Paragraphs 65(d) and 65(e).

Consequently, the Defendant IRF is entitled to summary judgment on the breach of contract claim.

IV. THE PLAINTIFF

“Tyger River”

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 *Holtz v. State Farm Indemnity Co.*, 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.

In this action, the Plaintiff never made a demand to settle the underlying case of *Orre S. Land*, 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, the IRF did make a settlement offer to the Plaintiff of the policy limits of \$600,000 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 effect, the Plaintiff has failed to present evidence showing any bad faith on the part of the IRF. 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 has referred was not, in

actuality, a Tyger River letter from the insureds to the IRF demanding settlement within policy limits. There is no such letter. At any rate, that September 12, 2013 letter from Plaintiff's counsel to the IRF includes a demand for \$3 million which far exceeds the policy limits. *ee*, Amended Complaint, Ex. C. That is not a "Tyger River letter." In short, the Plaintiff has failed in presenting evidence of a Tyger River bad faith claim. At best, the Plaintiff has shown excess judgments were returned at trial, and that alone is not evidence of bad faith.

V. P , , A C .

Paragraphs 71(c), 71(d), and 71(e) of the Amended Complaint should be dismissed in that those allegations fail to state proper allegations of negligence or gross negligence. Paragraph 71(c) only sets forth a statement of the reasonable man standard. Paragraph 71(d) alleges unspecified violations of "laws or common law of the State of South Carolina." Paragraph 71(e) alleges only that the Defendant is negligent or grossly negligent in any other matter that Plaintiff may discover through litigation." Those allegations fail to provide the Defendant fair notice of specific allegations of negligence or gross negligence and, quite frankly, cannot form the basis of any claim proceeding to trial.

CONCLUSION

Based on the foregoing discussion, the Defendant South Carolina Insurance Reserve Fund respectfully requests that the Court grant its motion for summary judgment and dismiss the Amended Complaint with prejudice.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: s Andre nde ann
ANDREW F. LINDEMANN 13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
TEL: 803-881-8920
Email: andrew@ldh-law.com

*on behalf of Defendant
of the Carolinas Insurance Reserve Fund*

June 5, 2019

Nancy Morris, as assignee of Andrew J. Bland, et al

Plaintiff(s)

vs.

South Carolina Insurance Reserve Fund,

Defendant(s)

CIVIL ACTION COVERSHEET

2017-CP - 40- 00773Submitted By: Garrett B. JohnsonAddress: Elrod Pope Law Firm212 E. Black StreetP.O. Box 11091 (29731)Rock Hill, SC 29730SC Bar #: 81105Telephone #: (803) 324-7574Fax #: (803) 324-7545

Other: _____

E-mail: GJohnson@ElrodPope.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☒ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20 -NI- -
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts - Personal Injury

- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property

- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions

- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief

- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements

- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) _____

Appeals

- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____

Date: November 1, 2017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

C.A. No.: 2017-CP-40-

Plaintiffs,)

SUMMONS

(Jury Trial Demanded)

-vs-)

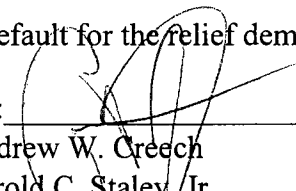
South Carolina Insurance Reserve Fund,)

Defendants.)

RICHLAND COUNTY
FILED
2017 NOV -6 PM 2:45
JEANETTE W. HOGAN
C.C.P. & C.S.

TO THE ABOVE NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED AND REQUIRED TO ANSWER the Summons and Complaint in this action, herewith of which a copy is served upon you, and to serve a copy of your answer to said Summons and Complaint on the subscriber at his office at 212 East Black Street, Rock Hill, SC, within thirty (30) days after the service hereof, exclusive of the day of such service; if you fail to answer the Summons and Complaint within the time aforesaid, the Plaintiff(s) in this action will apply to the Court for judgment by default for the relief demanded in the Complaint

By: 
Andrew W. Creech
Harold C. Staley, Jr.
Garrett B. Johnson
Elrod Pope Law Firm
212 E Black Street
Rock Hill, S.C. 29731
Phone: (803) 324-7574
ATTORNEYS FOR PLAINTIFF(S)

November 2, 2017

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-
Bland, PFC; Leemon E. Carner, PFC; Jerry	)	
Speissegger, Jr., PFC; and Priscilla Garrett,	)	
SGT;	)	
	)	COMPLAINT
Plaintiffs,	)	(Jury Trial Demanded)
	)	
-vs-	)	
	)	
South Carolina Insurance Reserve Fund,	)	
	)	
Defendants.	)	

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CLERK OF COURT
C.C.P. & J.S.

NOW COME the above-named Plaintiffs, complaining of the Defendants herein, who do allege and show unto this Honorable Court the following:

PARTIES AND JURISDICTION

1. Plaintiff Nancy Morris was, at all times relevant herein, a resident of the State of South Carolina, and is now a resident of the State of Missouri.
2. Plaintiff Nancy Morris is the duly-appointed personal representative for the Decedent, David Allan Woods.
3. Prior to his death in November 2010, David Allan Woods was a resident of Berkeley County, South Carolina.
4. Andrew J. Bland, PFC; Leemon E. Carner, PFC; Priscilla Garrett, SGT; and Jerry Speissegger, Jr. are residents of the State of South Carolina.
5. On August 30, 2017, Andrew J. Bland, PFC; Priscilla Garrett Bland, SGT; Leemon A. Carner, PFC; and Jerry Speissegger, Jr., PFC (hereinafter collectively referred to as "Assignors") did, for good and valuable consideration, irrevocably assign to Plaintiff Nancy Morris "any and all claims he/she may have against the South Carolina Insurance Reserve Fund

and/or any other persons, firms, government organizations, or entities that arise out of [C.A. No.: 5:12-cv-3177-RMG],” including, among others “bad-faith conduct and/or breach of contract by the Insurance Reserve Fund” in the handling of the claims related to that case. These assignments are attached as Exhibit A.

6. Plaintiff therefore has standing to assert all legally assignable claims, as alleged herein, against Defendant Insurance Reserve Fund.

7. Upon information and belief, Defendant IRF is a governmental entity organized and existing under the laws of the State of South Carolina and with its principle office in Richland County.

8. Upon information and belief, Defendant “functions as a governmental insurance operation with the mission to provide insurance specifically designed to meet the needs of governmental entities at the lowest possible cost. The Insurance Reserve Fund operates like an insurance company, by issuing policies, collecting premiums (based in consultation with actuaries), and by paying claims from the accumulated premiums in accordance with the terms and conditions of the insurance policies it has issued.”

FACTUAL BACKGROUND

9. On September 2, 2010, Mr. Woods was tried and convicted in absentia by way of bench trial on charges of Shoplifting Merchandise less than \$2,000.00 and Animal Nuisance.

10. Mr. Woods was ordered to pay a fine of \$2,130.00 or spend 30 days in jail for the shoplifting charge.

11. Mr. Woods was ordered to pay a fine of \$237.50 or spend 30 days in jail for the animal nuisance charge.

12. On October 12, 2010, a bench warrant was issued for Mr. Woods’s arrest.

13. Mr. Woods was booked and taken into custody at Hill-Finklea Detention Center.

14. Over the course of his confinement, Mr. Woods complained to jail and medical personnel of health problems including liver disease, intestinal pain, and blood in his stool.

15. At approximately 10:21 p.m. on Friday, November 5, 2010, Mr. Woods was reported to be lying on the floor of his cell and shaking.

16. At all times relevant herein, Hill-Finklea Detention Center contracted with Hope Clinic, LLC to provide medical services to inmates. Under the terms of this contract, Hope Clinic provided "nurse coverage... five (5) days per week, fifty-two weeks per year, except during County holidays, between the hours of 9:00 a.m. and 5:00 p.m."

17. At the time this report was made concerning Mr. Woods, Hope Clinic medical personnel had already left the facility for the weekend.

18. Sgt. Priscilla Garrett Bland responded to the call, along with PFC Ashley Harber, and transferred Mr. Woods to a medical observation cell.

19. For the next 60 hours, video surveillance footage shows Mr. Woods shaking and disoriented. He is unsteady on his feet, staggers around his cell, and falls at least twice. He defecates and urinates on himself, at one point lying in his own feces for a period of 16 hours.

20. During this 60-hour period, each of Assignors had multiple interactions with Mr. Woods. None attempted to secure medical assistance for him or to contact Hope Clinic personnel.

21. At approximately 8:30 a.m. on Monday, November 8, 2010, Mr. Woods was found lying on the floor of his cell naked and unresponsive. He was evaluated by the Hope Clinic nurse, who recommended that Mr. Woods be transported to the hospital.

22. EMS arrived at 9:52 a.m. and took Mr. Woods to Trident Medical Center, where "he could speak but only in a weak voice and not in sentences. He was receiving blood at the time,

had bright red blood and dark red blood around his rectum.” His prognosis was felt to be “bleak.”

23. Mr. Woods died three days later, on November 11, 2010, due to “severe blood loss with total body failure” secondary to an upper gastrointestinal bleed.

LIABILITY POLICY

24. At the time of Decedent’s death, Berkeley County maintained a policy of General Tort Liability Insurance issued by the South Carolina Budget and Control Board, Insurance Reserve Fund, Policy Number T130080011, attached as Exhibit B (hereinafter “the policy.”)

25. The policy was properly issued under S.C. Code § 1-11-140.

26. The effective dates of the policy were 2/13/2010 through 2/13/2011 and was thus in effect during the dates of Decedent’s confinement and death.

27. The policy obligated the Insurance Reserve Fund to “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: A. Personal injury.”

28. Persons insured under the policy included “Any employee of the entity designated in the declarations as named insured... but only while the employee is acting in the scope of his or her official duties.”

29. Berkeley County was a named insured under the policy.

30. At the time of the events complained of in the underlying action, Assignors were employees of Berkeley County acting within the course and scope of their employment and official duties.

31. Assignors are and were therefore entitled to coverage under the policy.

32. The position of Defendant Insurance Reserve Fund is that the maximum coverage available under the policy for the underlying action was \$600,000.00.

UNDERLYING ACTION: POSTURE

33. On September 20, 2012, Nancy Morris, as personal representative of the Estate of

David Allan Woods, filed suit against Defendants The Hope Clinic, LLC; Temisan Etikerentse, M.D.; Sue Brabham, R.N.; Berkeley County Sheriff H. Wayne DeWitt; Andrew J. Bland, PFC; Richard T. Burkholder, SGT; James M. Brophy, PFC; Leemon E. Carner, PFC; Patricia D. Collins, SGT; Charles A. DeSanto, CPL; Kendra B. Habersham, Staff SGT; Ashley A. Harber, PFC; Priscilla Scheetz¹, SGT; Jerry Speissegger, Jr., PFC; PFC Daaf; and John Does in the Circuit Court for Berkeley County, alleging causes of action under 42 U.S.C. 1983, Wrongful Death, Survival Action, and Intentional Infliction of Emotional Distress.

34. On November 2, 2012, Defendants removed the case to the United States District Court for the District of South Carolina, asserting federal question jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343.

35. Robin Jackson of Senn Legal, LLC appeared as counsel for Assignors and the other defendants employed by Berkeley County.

36. Over the next nine months, the parties engaged in detailed written discovery, and took no fewer than 14 depositions, including those of all the Assignors and seven other county employees.

37. During this time, Defendant Insurance Reserve Fund and its attorney had ample opportunity to review deposition testimony, speak to its own clients, and observe the video footage from the medical observation cell demonstrating Mr. Woods's deteriorating condition and acute suffering, as well as the indifference of its own employees.

38. Defendant Insurance Reserve Fund had access to Mr. Woods's medical records, and was well aware of the fact that he had passed away as a result of its insureds' inaction.

¹ Priscilla Scheetz was divorced after the events complained of and prior to filing of the lawsuit, and the suit was subsequently amended to reflect her name as Priscilla Garrett. Prior to trial, she married Andrew J. Bland, PFC, but is referred to in the instant suit as Priscilla Garrett.

39. Defendant Insurance Reserve Fund was aware that Plaintiff was claiming punitive damages against its insureds, including Assignors, as was clearly set forth in her Complaint.

40. Defendant Insurance Reserve Fund was aware that Plaintiff was pursuing a claim under 42 U.S.C. 1983, which did not provide its insureds, including Assignors, with the damages caps set forth by the South Carolina Tort Claims Act, and therefore exposed them to a judgment in excess of the alleged \$600,000.00 policy limits.

41. Defendant Insurance Reserve Fund was aware that, pursuant to 42 U.S.C. 1988, Plaintiff's 42 U.S.C. 1983 claim, if successful, would entitle her to reasonable attorney's fees and costs.

UNDERLYING ACTION: NEGOTIATIONS

42. On August 1, 2013, the parties conducted a mediation at Elrod Pope Law Firm in Rock Hill, South Carolina. Robin L. Jackson, Esquire, of Senn Legal was present for the Defendant South Carolina Insurance Reserve Fund.

43. At the mediation, Plaintiff offered to accept \$1 million to settle all claims against the County Defendants, including Assignors, with \$600,000.00 to come from the Defendant Insurance Reserve Fund and \$400,000.00 to come from Berkeley County.

44. This constituted a reasonable offer to settle within the Insurance Reserve Fund's policy limits, and would have protected Assignors from the risk of any excess judgment.

45. Upon information and belief, Berkeley County was willing to pay the \$400,000.00.

46. Upon information and belief, Defendant Insurance Reserve Fund rejected Plaintiff's reasonable offer to settle the case within their policy limits and declined to tender the full \$600,000.00.

47. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits

without discussing the matter with Assignors or Assignors' personal attorney.

48. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without retaining independent counsel to advise Assignors of their rights with respect to Plaintiff's offer to settle.

49. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without informing Assignors that the offer had been rejected.

50. Plaintiff's position was reiterated in a letter addressed to Hattie Taylor on September 12, 2013 indicating that Plaintiff would now seek to collect any excess judgment obtained against Berkeley County from the IRF, pursuant to Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933). (Exhibit C).

51. Defendant Insurance Reserve Fund reiterated their refusal to tender the policy limits in a letter of October 22, 2013, written by Chris Lombard, in which Defendant offered \$500,000.00 "to settle this matter on behalf of Berkeley County and all the Berkeley County individual defendants." (Exhibit D).

52. Defendant Insurance Reserve Fund again staked out their position on January 10, 2014, when they made an Offer of Judgment of \$500,000.00 through new counsel Eugene P. Corrigan, III. (Exhibit E).

53. It was not until August of 2014 that counsel for Assignors and the County Defendants offered \$600,000.00 to settle the case, which offer was declined in a letter of August 13, 2014. (Exhibit F).

54. It was not until the day of trial, October 14, 2014, that counsel for Assignors and the County Defendants offered the \$1,000,000.00 that Plaintiff initially demanded at mediation. Plaintiff declined the offer, choosing to pursue an excess verdict against Defendant Insurance

Reserve Fund's insureds.

UNDERLYING ACTION: TRIAL AND JUDGMENT

55. Prior to trial, Plaintiff had dismissed her state court claims and numerous defendants, proceeding to trial solely against Assignors on the 42 U.S.C. 1983 claim.

56. On October 17, 2014, Plaintiff obtained a judgment in the amount of \$500,000.00 for actual damages; \$150,000.00 in punitive damages against Andrew J. Bland, PFC; \$150,000.00 in punitive damages against Leemon E. Carner, PFC; \$150,000.00 in punitive damages against Jerry Speissegger, Jr., PFC; \$1,000,000.00 in punitive damages against Richard T. Burkholder, SGT; and \$1,000,000.00 in punitive damages against Priscilla Garrett, SGT. (Exhibit G).

57. By order of the court, the verdict for compensatory damages was partially offset and reduced to \$171,875.00.

58. Plaintiff was subsequently awarded \$354,293.00 in attorney's fees and \$31,820.62 in costs.

59. Assignors appealed the decision to the Fourth Circuit, which affirmed the District Court on November 16, 2016.

60. Defendant IRF's rejection of Plaintiff's reasonable offer to settle for the available limits of the policy and the resulting judgment against Assignors provides Assignors with a cause of action against Defendant IRF for breach of contract and breach of the implied covenant of good faith and fair dealing, in light of (i) the nature and scope of damages suffered by David Woods; (ii) the probable liability of Assignors; (iii) the substantial risk of a recovery in excess of Plaintiff's reasonable offer to settle; and (iv) the danger of a judgment in excess of the limits of the policy.

61. Each and every Assignor possesses these causes of action individually.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

62. Plaintiff hereby incorporates by reference all foregoing allegations.
63. Assignors and Defendant Insurance Reserve Fund had a mutually binding contract of insurance.
64. Defendant IRF breached that contract of insurance by its failure, refusal, and neglect:
- a. To consult as to Defendant IRF's rejection of Plaintiff's reasonable offer to settle with:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - b. To discuss said offer prior to rejecting with or with counsel for:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - c. To retain independent counsel to provide advice concerning Plaintiff's reasonable offer to settle and his or her rights concerning the same to:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;

- d. To settle Plaintiff's claim for an amount up to and including the full policy limits;
- e. To accept Plaintiff's reasonable settlement offer within the policy limits.

65. Defendant IRF breached the contract as set forth above with regard to each and every Assignor individually.

66. As a proximate result of Defendant IRF's breach of contract, Assignors have been injured and otherwise suffered damages, as set forth more fully herein.

67. By nature of her assignments, Plaintiff is entitled to recover from Defendant IRF all damages incurred by Assignors as a result of this breach, including all actual damages, both pre-judgment and post-judgment interest, attorney's fees and costs, and for such other and further relief, in law or in equity, in favor of Assignee as this Court may deem just and proper.

FOR A SECOND CAUSE OF ACTION
(Negligence/Gross Negligence)

68. Plaintiff hereby incorporates by reference all foregoing allegations.

69. Defendant Insurance Reserve Fund had notice of Plaintiff's claim by September 20, 2012 at the latest.

70. Defendant IRF was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to process and adjust in a timely fashion Plaintiff's claims against:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
- b. In failing to establish reasonable procedures for the processing and handling of claims that are made against its insureds;

- c. In deviating from the standard of care that a reasonable and prudent insurance company would employ under the circumstances;
- d. In any other such acts that constitute a violation of the laws or common law of the State of South Carolina;
- e. In any other matter that Plaintiff may discover through litigation.

71. Defendant IRF's negligent, grossly negligent, careless, reckless, willful, and wanton conduct affected each Assignor individually.

72. As a proximate result of Defendant IRF's negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness, Assignors have been injured and otherwise suffered damages, as set forth more fully herein.

73. Assignors' damages would not have occurred but for Defendant IRF's conduct, described more fully herein.

74. Assignors' damages occurred as a natural and probable consequence of Defendant IRF's conduct.

75. By nature of her assignments, Plaintiff is entitled to recover from Defendant IRF actual, compensatory damages, including the full amount of the verdict not yet satisfied, plus interest accruing from October 17, 2014; exemplary or punitive damages in an amount that is fair, just, and reasonable under the circumstances; and whatever costs, interest, both pre-judgment and post-judgment, and attorney's fees that the Court deems proper.

FOR A THIRD CAUSE OF ACTION
(Bad Faith)

- 76. Plaintiff hereby incorporates by reference all foregoing allegations.
- 77. Defendant Insurance Reserve Fund provides insurance to governmental entities.
- 78. Upon information and belief, Defendant IRF presents claims made against its

insureds to adjusters to oversee these files and to work toward adjusting and resolving those claims.

79. Upon information and belief, once a claim is presented to an adjuster, that adjuster maintains control over the claim and is involved in all claims handling decisions.

80. Upon information and belief, the underlying claim of Plaintiff Nancy Morris as Personal Representative of the Estate of David Allan Woods was assigned to an adjuster employed by Defendant IRF, and at all relevant times, Defendant IRF assumed and maintained control of Plaintiff's claim.

81. Defendant IRF has a duty to deal in good faith and fair dealing with its insureds, including Assignors.

82. Defendant IRF held that duty to each Assignor individually.

83. Assignors and/or their employer promptly reported the underlying claim to Defendant IRF, and have otherwise performed all conditions required by the policy.

84. Assignors did not make any demand or request to Defendant IRF, or to any of its adjusters or employees, that Defendant IRF not settle Plaintiff's claim.

85. Assignors did nothing to impair Defendant IRF's assessment of the substantial risk of an excess judgment.

86. Defendant IRF failed to promptly and effectively investigate Plaintiff's claim.

87. Defendant IRF failed to timely settle Plaintiff's claim within the available policy limits, even though Defendant IRF had the opportunity to do so.

88. Defendant IRF rejected Plaintiff's offer to settle within the policy limits without consulting Assignors; did not conduct an adequate or appropriate investigation into Plaintiff's claim; failed to retain independent counsel to advise Assignors of their rights with respect to Plaintiff's reasonable offer to settle; did not retain coverage counsel to properly review Plaintiff's

reasonable offer to settle; and otherwise failed to act as a reasonable and prudent insurer would act under similar circumstances.

89. Defendant IRF's failure to timely evaluate and settle Plaintiff's claim caused Plaintiff's settlement demand to be withdrawn, exposing Assignors to personal financial risk.

90. Defendant IRF has refused, and continues to refuse, to protect Assignors from personal exposure in this matter.

91. Defendant IRF has breached the implied covenants of good faith and fair dealing with regard to the insurance policy by, among other acts or omissions, failing to settle Plaintiff's claim for the amount of the applicable insurance coverage when presented with the opportunity to do so.

92. Defendant IRF has acted in bad faith and/or was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to timely investigate Plaintiff's liability claim;
- b. In failing to make an offer of the full \$600,000.00 policy limits in response to Plaintiff's reasonable demand to settle the case for that amount;
- c. In failing to timely inform of Plaintiff's reasonable offer to settle the case;
- d. In failing to retain independent counsel to protect the interests of:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
- e. In failing to retain independent counsel to advise:
 - i. Andrew J. Bland, PFC;

- ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
- f. In exposing to excess personal liability:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
- g. In failing to act reasonably in light of the totality of the circumstances presented by Plaintiff's claim;
- h. In failing to act as a reasonable and prudent insurer would act in regards to Plaintiff's claim;
- i. In failing to acknowledge with reasonable promptness pertinent communications with respect to Plaintiff's underlying claim;
- j. In failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims, including Plaintiff's claim, arising under its policies;
- k. In failing to attempt in good faith to effect a fair, prompt, and equitable resolution to Plaintiff's claim after liability had become reasonably clear;
- l. In compelling Plaintiff to institute a suit to recover amounts reasonably due or payable with respect to claims arising under Defendant IRF's policy by offering substantially less than the amounts ultimately recovered through suits brought by the claimants as the result of the inability of Plaintiff to effect reasonable settlements with Defendant IRF;

- m. In offering to settle Plaintiff's claim for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that Plaintiff would be required to incur attorneys' fees to recover the amount reasonably due or payable;
- n. In engaging in practices which constituted an unreasonable delay in paying or an unreasonable failure to pay Plaintiff's claim;
- o. In violating the laws and statutes of the State of South Carolina, including but not limited to S.C. Code § 38-59-20.

93. Defendant IRF's breach of its duty of good faith and fair dealing was the direct and proximate cause of damage to each and every Assignor in his or her individual capacity, those damages including mental anguish, anxiety, stress, expenses, and incurring personal judgments.

94. As a direct and proximate result of Defendant IRF's breach of its duty of good faith and fair dealing, each and every Assignor in his or her individual capacity has been and continue to be injured in the following ways:

- a. In suffering personal exposure to unsatisfied judgments;
- b. In incurring attorney's fees and expenses;
- c. In suffering the mental anguish, anxiety, and stress of being sued by Plaintiff and the knowledge that such suit would likely lead to excessive personal financial responsibility;
- d. In such other ways as would cause Assignors' additional and unnecessary pain, suffering, mental anguish, and aggravation.

95. Each and every Assignor's damages in their individual capacity would not have occurred but for Defendant IRF's breach of its duty of good faith and fair dealing.

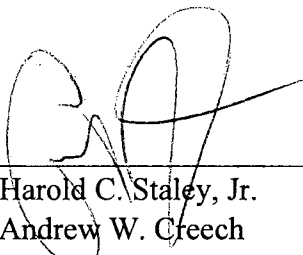
96. By nature of the assignments, Plaintiff is entitled to judgment against Defendant IRF for actual, compensatory damages, including the full amount of the verdict not yet satisfied, plus interest accruing from October 17, 2014; exemplary or punitive damages in an amount that is fair, just, and reasonable under the circumstances; and whatever costs, interest, both pre-judgment and post-judgment, and attorney's fees that the Court deems proper.

97. Moreover, Defendant IRF is liable to Plaintiff for attorney's fees in prosecuting this action pursuant to S.C. Code Ann. § 38-59-40.

WHEREFORE, Plaintiff prays for judgment against Defendant in a sum to be determined by a jury of Plaintiff's peers and to exceed one hundred thousand dollars (\$100,000.00), thus meeting the requirements set under the South Carolina Rules of Civil Procedure Rule 30 (h), and should include actual damages, future damages, punitive damages in a reasonable amount, and the costs and disbursements of this action and for such other and further relief that this Court or jury deems just and proper.

Respectfully,

By:



 Harold C. Staley, Jr.
 Andrew W. Creech
 Garrett B. Johnson
 Elrod Pope Law Firm
 212 E Black Street
 P.O. Box 11091 (29731)
 Rock Hill, S.C. 29730
 Phone: (803) 324-7574

ATTORNEYS FOR PLAINTIFF

November 2, 2017
 Rock Hill, South Carolina

EXHIBIT A

Record on Appeal0068

1

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.

Christopher P. Biering
David C. Stahl 1.
Attorney for Andrew J. Bland

Christopher P. Biering
Andrew Bland
Printed Name

Andrew J. Bland
Andrew J. Bland

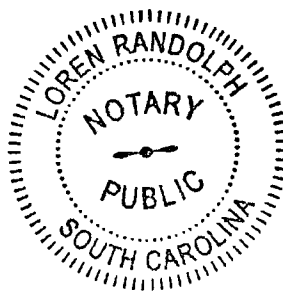
W. H. Green
Witness

SWORN to and Subscribed Before Me

This 30th day of August, 2017.

Loren Randolph
Notary Public of South Carolina

My Commission Expires: 6-1-2026



I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Andrew J. Bland.

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

Record on Appeal0071

C.A. No.: 5:12-cv-3177-RMG

ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

v.

Defendants.

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.

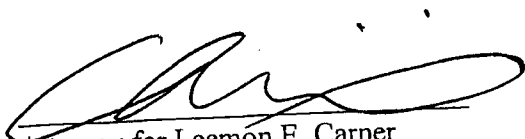
The undersigned expressly waives any attorney/client privilege concerning his/her prior representation in civil action number 5:12-cv-03177-RMG to the extent necessary to assist in the pursuit of any litigation arising from this assignment.

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.

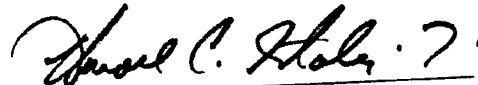
This assignment is intended to bind the parties hereto and their heirs and assigns.

THIS ASSIGNMENT IS IRREVOCABLE.


Attorney for Leemon E. Carner

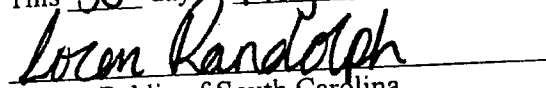
Christopher P. Bierning
Printed Name


Leemon E. Carner

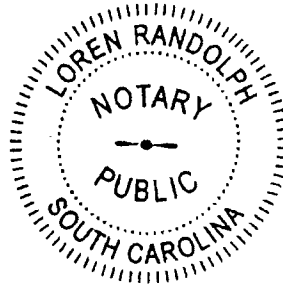

Witness

SWORN to and Subscribed Before Me

This 30th day of August, 2017.


Notary Public of South Carolina

My Commission Expires: 6-1-2026



I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Leemon E. Carner.

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

Record on Appeal0074

For valuable consideration, the receipt of which is hereby acknowledged, and after receiving the advice of independent counsel, the undersigned hereby assigns to 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 the above-captioned case. These claims include, but are not limited to, claims arising out of the negligent, reckless and/or bad-faith conduct, and/or breach of contract by the Insurance Reserve Fund, its agents, servants, and/or employees, its law firm, insurance agency, insurance broker, or any other party in relation to: the handling of this matter; the judgment entered in this case; any other matters related to the claim which resulted in the judgment being entered against the undersigned; for any claims the undersigned may have against the Fund that arise out of any insurance coverage applicable to the instant case; and the right to collect all actual and punitive damages, attorney fees, or costs that may arise from those claims.

1

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.

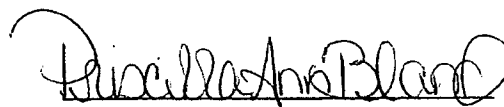
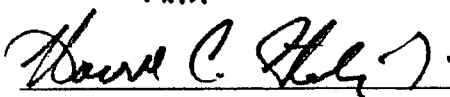
In consideration of this assignment, Plaintiff hereby covenants not to execute against any assets of the undersigned. Plaintiff furthermore agrees to dismiss the undersigned from civil action number 2017-CP-08-1439, currently pending in Berkeley County. Plaintiff covenants not to institute any further 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.

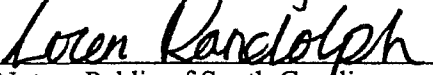

Attorney for Priscilla Garrett Bland

Christopher P. Bicing
Printed Name

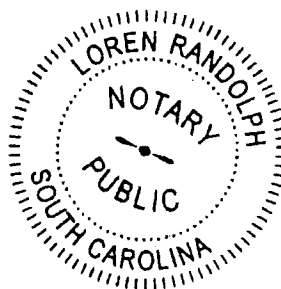

Priscilla ~~Garrett~~ Bland
Ann

Witness

SWORN to and Subscribed Before Me

This 30th day of August, 2017.


Notary Public of South Carolina

My Commission Expires: 6-1-2026



I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Priscilla Garrett Bland.

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

Record on Appeal0077

C.A. No.: 5:12-cv-3177-RMG

ASSIGNMENT OF RIGHTS AND COVENANT NOT TO EXECUTE

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 Jerry Speissegger, Jr.

Christopher P. Biering

Printed Name

Jerry D. Speissegger, Jr.

Jerry Speissegger, Jr.

David C. Haly Jr.

Witness

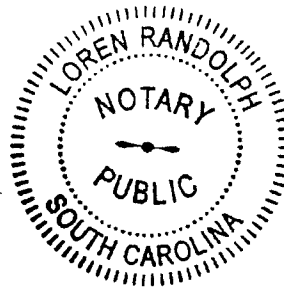
SWORN to and Subscribed Before Me

This 30th day of August, 2017.

Loren Randolph

Notary Public of South Carolina

My Commission Expires: 6-1-2026



I hereby accept this assignment and agree that all sums received shall be applied to the judgment against Jerry Speissegger, Jr.

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

EXHIBIT B

THE SOUTH CAROLINA STATE BUDGET AND CONTROL BOARD

OFFICE OF INSURANCE RESERVE FUND
POST OFFICE BOX 11066
COLUMBIA, SOUTH CAROLINA 29211

Phone: (803) 737-0020

TORT LIABILITY INSURANCE POLICY**POLICY PROVISIONS****STATE BUDGET AND CONTROL BOARD****OFFICE OF INSURANCE RESERVE FUND
(HEREINAFTER CALLED THE FUND)**

P. O. BOX 11066
1201 MAIN STREET, SUITE 500
COLUMBIA, S. C. 29211
803-737-0020

These policy provisions, with declarations, and endorsements, if any, issued to form a part thereof, complete your Tort Liability Insurance Policy. This policy is made and accepted subject to the following provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

The time of inception and the time of expiration of this policy and of any schedule or endorsement attached shall be 12:01 AM standard time at the location of property involved. To the extent that coverage in this policy replaces coverage in other policies terminating noon standard time on the inception date of this policy, coverage under this policy shall not become effective until other such coverage has terminated.

This policy is made and accepted subject to the foregoing stipulations and conditions and to the following stipulations and conditions printed on back hereof, or attached hereon, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed herein or added hereto; and no officer, agent or other representative of said Board shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power to be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Insured unless so written or attached.

Assignment of this Policy shall not be valid except with the written consent of the Fund.

IN WITNESS THEREOF The State Budget and Control Board of the State of South Carolina, through the Office of Insurance Reserve Fund executed and attested these presents.

OFFICE OF INSURANCE RESERVE FUND

By James E. Bennett
Insurance Reserve Fund Officer

STATE BUDGET AND CONTROL BOARD OFFICE OF INSURANCE RESERVE FUND

I. COVERAGE A - PERSONAL INJURY LIABILITY COVERAGE B - PROPERTY DAMAGE LIABILITY

The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

- A. Personal Injury or
- B. Property Damage to which this applies caused by an occurrence.

The Fund shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Fund shall not be obligated to pay any claim or judgement or to defend any suit after the applicable limit of the Fund's liability has been exhausted by payment of judgements or settlements.

II. SUPPLEMENTARY PAYMENTS

The Fund will pay, in addition to the applicable limit of liability:

- (a) All expenses incurred by the Fund, all costs taxed against the insured in any suit defended by the Fund and all interest on the entire amount of any judgement therein which accrues after entry of the judgement and before the Fund has paid or tendered or deposited in court that part of the judgement which does not exceed the limit of the Fund's liability thereon.
- (b) Premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed \$250 per bail bond, but the Fund shall have no obligation to apply for or furnish any such bonds.
- (c) At the request of the insured, to or for each person who sustains bodily injury caused by an accident all reasonable medical expense incurred within one year from the date of the accident on account of such bodily injury, provided such bodily injury arises out of (a) a condition in the insured premises, or (b) operations with respect to which the named insured is afforded coverage for bodily injury liability under this policy, not to exceed \$1,000 per person, such payments shall be excess over any valid and collectible insurance, Medicare, or Medicaid. The applicable limit of the Fund's liability will be reduced by any medical expense payments.
- (d) Reasonable expenses incurred by the insured at the Fund's request in assisting the Fund in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed \$250 per day.
- (e) Defense costs, including legal fees, travel, expert witness fees, and court reporter fees, for all suits against an insured not covered by this policy, auto liability policies, aircraft liability policies, or medical professional liability policies, but only if the suit was served on or after January 1, 2001, subject to an annual aggregate limit of \$15,000 for defense costs for all suits covered under this paragraph.

III. DEFINITIONS

When used in this policy:

"Automobile" means a licensed or unlicensed land motor vehicle, trailer or semi-trailer designed for use principally on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment.

"Bodily Injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

"Handicap" means physical disability.

"Insured" means any person, entity or organization qualifying as an insured in the "Persons Insured" provision. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the Fund's liability.

"Mobile Equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled;

- (1) not subject to motor vehicle registration,
- (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or
- (3) designed for use principally off public roads, or
- (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment.

"Named Insured" means the person or entity named in Item 1 of the declarations of this policy.

"Occurrence" means 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.

"Personal Injury" means:

- (1) bodily injury caused by an occurrence.
- (2) injury arising out of one or more of the following offenses committed during the policy period:
 - (a) false arrest, detention, imprisonment, malicious prosecution; or humiliation resulting from false arrest, detention, imprisonment or malicious prosecution.
 - (b) wrongful entry or eviction or other invasion of the right of private occupancy;
 - (c) a publication or utterance of a libel or slander or other defamatory or disparaging material;
 - (d) assault and battery not committed by or at the direction of the insured unless committed for the purpose of protecting persons or property;
 - (e) discrimination on the basis of race, sex, age, religion, or handicap;
 - (f) denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States;

- (g) violation of the following Amendments to the Constitution of the United States:

First Amendment
Fourth Amendment
Eighth Amendment

"Policy Territory" means:

- (1) the United States of America, its territories or possessions, or
- (2) international waters or air space, provided the personal injury or property damage does not occur in the course of travel to any other country or nation, or
- (3) anywhere in the world with respect to "bodily injury, property damage or personal injury" arising out of the activities of any "insured" permanently domiciled in the United States of America, though temporarily outside the United States of America, its territories and possessions or Canada, provided the original suit for damages because of any such injury or damage is brought within the United States of America, its territories or possessions.

Such insurance as is afforded by paragraph (3) above shall not apply to Premises Medical Payments Coverage.

"Professional Services" means the rendering of medical or architectural services by individuals with training in the profession who are licensed or certified to practice the profession.

"Property Damage" means:

- (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
- (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period.

"Volunteer Employee" means:

- (1) any person or entity who, of his own free will, provides goods or services, without any financial gain, to any agency, instrumentality or political subdivision of the State; or
- (2) any person performing public service employment, either voluntarily or as directed by a court or other authority, in lieu of fines and/or incarceration.

IV. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

- (a) The entity designated in the declarations as **named insured** is an insured.
- (b) Any employee of the entity designated in the declarations as **named insured** is an insured, but only while the employee is acting in the scope of his or her official duties.
- (c) Any **volunteer employee** of the entity designated in the declarations as **named insured** is an insured, but only while the **volunteer employee** is acting in the scope of his or her official duties.
- (d) With respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law;
 - (i) an employee of the **named insured** while operating any such equipment in the scope of his or her official duties for the insured, and
 - (ii) any other person while operating with the permission of the **named insured** any such equipment registered in the name of the named insured and any person or organization legally responsible for such operation, but only if there is no other valid and collectible insurance available, either on a primary or excess basis, to such person or

organization; provided that no person or organization shall be an insured under this paragraph (d) with respect to:

- (1) **bodily injury** to any fellow employee of such person injured in the scope of his or her official duties for the insured, or
- (2) **property damage** to property owned by, rented to, in charge of or occupied by the named insured or the employer of any person described in subparagraph (ii).

V. LIMIT OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **personal injury** or **property damage**, or (3) claims made or suits brought on account of **personal injury** or **property damage**, the Fund's liability is limited as follows:

The total liability of the Fund for all damages as the result of any **occurrence** including damages for care and loss of services, because of **personal injury** sustained by one or more persons, because of all **property damage** sustained by one or more persons or organizations, or by any combination of **personal injury** or **property damage** sustained by one or more persons or organizations, shall not exceed the limit of liability stated in the declarations as applicable to each **occurrence**. However, for any action or claim brought under the provisions of Chapter 78 of the South Carolina Code of Laws, cited as the "South Carolina Tort Claims Act", the liability of the Fund shall not exceed the following limits:

- (a) Occurrences arising prior to July 1, 1998:
 - (1) No person shall recover in any one action or claim a sum exceeding 250,000 dollars because of loss arising from a single **occurrence** regardless of the number of agencies or political subdivisions involved.
 - (2) The total sum recovered arising out of a single **occurrence** shall not exceed 500,000 dollars regardless of the number of agencies or political subdivisions involved.
- (b) Occurrences arising on or after July 1, 1998:
 - (1) No person shall recover in any one action or claim a sum exceeding 300,000 dollars because of loss arising from a single **occurrence** regardless of the number of agencies or political subdivisions involved.
 - (2) The total sum recovered arising out of a single **occurrence** shall not exceed 600,000 dollars regardless of the number of agencies or political subdivisions involved.

Liability limits in excess of those stated in (a) and (b) shall apply only in actions or claims to which Chapter 78 does not apply.

The property damage liability coverage applies only to the amount of damages in excess of a \$250 per claim deductible sustained by one person or organization as the result of any one **occurrence**. The Fund may pay any part or all of the deductible amount to effect settlement of any claim or suit and, upon notification of the action taken, the Insured shall promptly reimburse the Fund for such part of the deductible amount as has been paid by the Fund.

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 arising out of one **occurrence**.

VI. EXCLUSIONS

This insurance does not apply:

- (a) to liability assumed by the insured under any contract or agreement;
- (b) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) any automobile or aircraft owned or operated by or rented or loaned to any insured and/or
 - (2) any other automobile or aircraft operated by any person in the scope of his or her official duties for the insured; but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobiles are not owned by or rented or loaned to any insured, or
 - (3) any aircraft under the guidance of an air traffic controller employed by any insured;
- (c) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of any **mobile equipment** while being used in any prearranged or organized racing, speed, or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity;
- (d) to **personal injury or property damage** arising out of and in the course of the transportation of **mobile equipment** by an automobile owned or operated by or rented or loaned to any insured;
- (e) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) any watercraft, in excess of twenty-six (26) feet in length, owned or operated by or rented or loaned to any insured, or
 - (2) any other watercraft, in excess of twenty-six (26) feet in length, operated by any person in the scope of his or her official duties for the insured; by any insured; but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;
- (f) to **personal injury or property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritant, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;
- (g) to **personal injury or property damage** due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the following, with respect to
 - (1) liability assumed by the insured under contract
 - (2) expenses for medical expense under the Supplementary Payments provision;
- (h) to any obligation for which the insured or any carrier as his insurer may be held liable under any workers' compensation; unemployment compensation or disability benefits law, or under any similar law;
- (i) to **bodily injury** to
 - (1) an employee of the insured arising out of and in the scope of his or her official duties for the insured; or
 - (2) the spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

This exclusion applies:

- (1) whether the insured may be liable as an employer or in any other capacity; and
 - (2) to any obligation to share damages with or repay someone else who must pay damages because of the injury.
- to **property damage** to
- (1) property owned or occupied by or rented to the insured,
 - (2) property used by the insured,
 - (3) property in the care, custody or control of the

insured or as to which the insured is for any purpose exercising physical control, or

- (4) property (including money) seized by the insured whether legally or illegally;
- (k) to **property damage** to premises alienated by the named insured arising out of such premises or any part thereof;
- (l) to loss of use of tangible property which has not been physically injured or destroyed resulting from a delay in or lack of performance by or on behalf of the insured or any contract or agreement;
- (m) to **personal injury or property damage** due to rendering of or failure to render any professional service;

(n) NUCLEAR ENERGY LIABILITY EXCLUSION (Broad Form)

I. This policy does not apply:

A. Under any Liability Coverage, to personal injury or property damage

- (1) with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

- (2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments Coverage, to expenses incurred with respect to personal injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

C. Under any Liability Coverage, to personal injury or property damage resulting from the hazardous properties of nuclear material, if

- (1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of an insured, or (b) has been discharged or dispersed therefrom;
- (2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured, or
- (3) the personal injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereat.

II. As used herein:

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or byproduct material;

"source material," "special nuclear material," and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

- (a) any nuclear reactor;
- (b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel or (3) handling, processing or packaging waste;
- (c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;
- (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property;

- (o) to any **personal injury** or **property damage** resulting from retaliation. This policy excludes coverage for any claim or suit that is based upon any statute which provides a remedy for retaliation or which prohibits retaliation including, but not limited to, whistleblower statutes and those statutory remedies prescribed for retaliation based upon the making of a complaint or upon participation in some proceeding or process. This exclusion applies to any statutory remedy for retaliation or to any retaliation prohibited by statute even where the retaliation relates to a covered personal injury or property damage.
- (p) to **bodily injury** or **property damage** arising out of or in any way connected with the operation of the principals of eminent domain, condemnation proceedings, inverse condemnation, or takings, by whatever name called, whether such liability accrues directly against the insured or by virtue of any agreement entered into by or on behalf of the insured.

VII. CONDITIONS

1. Premium.

All premiums for this policy shall be computed in accordance with the Fund's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

The **named insured** shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the Fund at the end of the policy period and at such times during the policy period as the Fund may direct.

2. Inspection and Audit.

The Fund shall be permitted but not obligated to inspect the **named insured's** property and operations at any time. Neither the Fund's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

The Fund may examine and audit the **named insured's** books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

3. Financial Responsibility Laws.

When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for **bodily injury** liability or for **property damage** liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The insured agrees to reimburse the Fund for any payment made by the Fund which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

4. Insured's Duties in the Event of Occurrence, Claim or Suit.

- (a) In the event of an **occurrence**, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the insured to the Fund or any of its authorized agents as soon as practicable.
- (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the Fund every demand, notice, summons or other process received by him or his representative.
- (c) The insured shall cooperate with the Fund and, upon the Fund's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

5. Action Against Fund.

No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the claimant and the Fund.

Any person or organization or the legal representative thereof who has secured such judgement or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Fund as a party to any action against the insured to determine the insured's liability, nor shall the Fund be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Fund of any of its obligations hereunder.

6. Other Insurance.

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Fund's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the Fund shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(a) Contribution by Equal Shares.

If all of such other valid and collectible insurance provides for contribution by equal shares, the Fund shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(b) Contribution by Limits.

If any of such other insurance does not provide for contribution by equal share, the Fund shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. Subrogation.

In the event of any payment under this policy, the Fund shall be subrogated to all the insured's rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

8. Changes.

Notices to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Fund from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized officer or representative of the Fund.

9. Assignment.

Assignment of interest under this policy shall not bind the Fund until its consent is endorsed hereon; if, however, the named insured shall die, such insurance as is afforded by this policy shall apply (1) to the named insured's legal representative, as the named insured, but only while acting within the scope of his duties as such, and (2) with respect to the property of the named insured, to the person having proper temporary custody thereof, as insured, but only until the appointment and qualification of the legal representative.

10. Cancellation and Non-Renewal.

- (a) This policy may be cancelled by the named insured by mailing to the Fund a 90 day written advance notice stating when thereafter the cancellation shall be effective. A political subdivision may cancel all policies with the Fund by mailing to the Fund a 90 day written advance notice as provided in §15-78-140 of the South Carolina Code of Laws.
- (b) The Fund may cancel this policy for non-payment of premium by mailing a notice of cancellation giving not less than 30 days notice of the cancellation as provided in §15-78-160 of the South Carolina Code of Laws.
- (c) If this policy is cancelled in accordance with (a) or (b) above, earned premium shall be computed in accordance with the customary short rate table and procedure. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.
- (d) For the purposes of this policy, the term "non-renewal" shall mean "cancellation" if the insured is ceasing all coverages with the Fund and conditions as provided in sections (a), (b) and (c) above apply.

11. Declarations.

By acceptance of this policy, the **named insured** agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Fund or any of its agents relating to this insurance.

EXHIBIT C

September 12, 2013

Hattie Taylor
South Carolina Insurance Reserve Fund
1201 Main Street, Suite 500
Columbia, SC 29201

RE: The Estate of Woods v. Hope Clinic, LLC, et al
C.A. No.: 5:12-cv-03177-RMG-KDW

Dear Ms. Taylor:

I am writing in regards to the settlement proceedings that have occurred in the above-captioned case. On August 1, 2013, we made a demand of the county and IRF in the amount of \$1,000,000.00. That demand was to be good through August 16, 2013. That deadline has now come and gone without any acceptance from the county, and we wish to make it clear that we will no longer honor the initial \$1,000,000 demand.

As this constituted an offer to settle within the policy limits as to the Insurance Reserve Fund, we will now seek to collect any excess judgment obtained against Berkeley County from the IRF, pursuant to Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933). However, as an offer to compromise, we will now accept \$3 million from Berkeley County and the IRF to settle the claims against all Berkeley County defendants. Thank you for your time and attention to this matter. Please feel free to contact me if you have any questions. With kindest regards,

Very truly yours,

Garrett B. Johnson

EXHIBIT D

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



SC BUDGET AND CONTROL BOARD

INSURANCE RESERVE FUND

POST OFFICE BOX 11066
COLUMBIA, SOUTH CAROLINA 29211
(803) 737-0020
FAX: (803) 737-0042

HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE COMMITTEE

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS

MARCIA ADAMS
EXECUTIVE DIRECTOR

Record on Appeal 0090

October 22, 2013

via email: acreech@elrodpope.com

Andrew W. Creech, Esq
Elrod Pope Law Firm
PO Box 11091
Rock Hill, SC 29731

Your Client: Nancy Morris as personal Representative of the Estate of David Alan Woods
Our Policyholder: Berkeley County
Our Claim #: 77271
Date of Loss: 10/17/2010

Dear Mr. Creech:

I am writing to you as the insurer for Berkeley County in the above captioned matter.

I note that an unsuccessful mediation was held in this matter on August 1st. My reading of the meeting was there was a lack of clarity among the parties as to policy limits, indemnification agreements and liability, hence an inability to reach an agreement. Further attempts to reconcile these issues with the carrier for the Hope Clinic/ Dr. Etikerentse/Sue Brabahm have been fruitless.

In an effort to move this case along, we would like to offer \$500,000 to settle this matter on behalf of Berkeley County and all the Berkeley County individual defendants. We will also agree to drop our indemnification claims against the Hope Clinic/ Dr. Etikerentse/Sue Brabahm. As you are aware, the Hope Clinic's policy is a declining policy limit to start with and therefore any recovery by Berkeley County under the terms of the contractual indemnity agreement will further reduce the already dwindling limits. Settlement with Berkeley County today guarantees your client a \$500,000 recovery with the potential for further recovery from the Hope Clinic.

We ask that you please confer with your client and contact this writer of his acceptance or rejection within the next 7 days.

Sincerely,

Chris Lombard, CPCU, ARM, AIC
Assistant Director of Claims

EXHIBIT E

CORRIGAN & CHANDLER LLC

ATTORNEYS AT LAW

Eugene P. Corrigan III
(843) 577-5450 (direct)
rick@corriganhandler.com

REPLY TO:
P.O. Box 547
Charleston, SC 29402

January 10, 2014

VIA U.S. MAIL

Thomas E. Pope, Esquire
Harold C. Staley, Esquire
Andrew W. Creech, Esquire
Garrett B. Johnson, Esquire
Elrod Pope Law Firm
212 East Black Street
Rock Hill, SC 29730

Re: *Nancy Morris, as personal representative of the estate of David Allan Woods v. Hope Clinic, LLC, et. al*
Case No. 5:12-cv-3177-RMG-KDW

Dear Counsel:

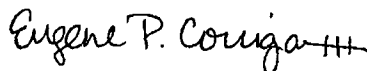
Enclosed for service upon you, please find an *Offer of Judgment* made on behalf of the Berkeley County Defendants in regards to the above-referenced case.

By copy of this letter, I am serving all counsel of record with the same.

Should you wish to discuss this further, please do not hesitate to contact me. I look forward to your response.

With best regards, I am

Yours very truly,



Eugene P. Corrigan III

Enclosure

EPC:eff

cc: James A. Stuckey Jr, Esquire
Alissa R. Collins, Esquire
Elizabeth W. Ballentine, Esquire
Chilton G. Simmons, Esquire

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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

Plaintiff,)

v.)

HOPE CLINIC, LLC, officially and)
individually; TEMISAN ETIKERENTSE,)
MD, officially and individually; SUE)
BRABHAM, R.N., officially and)
individually; BERKELEY COUNTY)
SHERIFF H. WAYNE DeWITT, officially)
and individually; ANDREW J. BLAND,)
PFC, officially and individually; RICHARD)
T. BURKHOLDER, SGT., officially and)
individually; JAMES M. BROPHY, PFC,)
officially and individually; LEEMON E.)
CARNER, PFC, officially and individually;)
CHARLES A. DeSANTO, CPL, officially)
and individually; KENDRA MOORE,)
STAFF SGT., officially and individually,)
ASHLEY A. HARBER, PFC, officially and)
individually; PRISCILLA GARRETT,)
SGT., officially and individually; JERRY)
SPEISSEGGER JR., PFC, officially and)
individually; PFC KANSAS DAAB,)
officially and individually; JOHN DOE(S),)
officially and individually; CLIFFORD L.)
McELVOGUE, DIRECTOR, officially and)
individually,)

Defendants.)

C.A. No. 5:12-cv-3177-RMG-KDW

OFFER OF JUDGMENT

TO: PLAINTIFF AND HER ATTORNEYS

The Defendants, Berkeley County Sheriff H. Wayne DeWitt, Andrew J. Bland, PFC,
James M. Brophy, PFC, Leemon E. Carner, PFC, Kendra Moore, Staff Sgt., Priscilla Garrett,

SGT, Jerry Speissegger Jr., PFC, PFC Kansas Daab, Clifford L. McElvogue, Director, John Doe(s), represented by Corrigan & Chandler LLC, and Richard T. Burkholder, Sgt., Charles A. Desanto, CPL, Ashley A. Harber, PFC, represented by Stuckey Law Offices, LLC (collectively "Berkeley County Defendants"), by and through their undersigned attorneys, offer to allow judgment to be entered on behalf of the Plaintiff Nancy Morris, as personal representative of the estate of David Allan Woods ("Plaintiff"), in the amount of Five Hundred Thousand (\$500,000.00) Dollars, in order to bring to an end with prejudice all claims by Plaintiff against Berkeley County Defendants, arising from or in any way related to the allegations set forth in the above-captioned lawsuit, including all claims for attorney's fees and other costs.

This is an offer made jointly for Five Hundred Thousand (\$500,000.00) Dollars, including all claims for attorney's fees and costs, on behalf of Berkeley County, and all of its employees, including its Sheriff, Detention Center employees, and any other persons employed by or connected to Berkeley County, including any referred to as John Doe or otherwise, whether represented by Corrigan & Chandler LLC or Stuckey Law Offices, LLC.

THE REST OF THIS PAGE INTENTIONALLY LEFT BLANK.

[SIGNATURE PAGE TO FOLLOW]

CORRIGAN & CHANDLER LLC

STUCKEY LAW OFFICES, LLC

/S/ EUGENE P. CORRIGAN III

Eugene P. Corrigan III, Esq.

E-Mail: rick@corriganhandler.com

16 Charlotte Street, Suite B

Charleston, SC 29403

843-577-5410

/S/ JAMES A. STUCKEY, JR.

James A. Stuckey, Jr., Esq.

E-Mail: jstuckey@stuckeylaw.com

123 Meeting Street

Charleston, SC 29401

(843) 577-9323

ATTORNEYS FOR DEFENDANTS

BERKELEY COUNTY SHERIFF H. WAYNE

DEWITT, ANDREW J. BLAND, PFC,

JAMES M. BROPHY, PFC, LEEMON E.

CARNER, PFC, PRISCILLA GARRETT,

SGT, KENDRA MOORE, STAFF SGT.,

JERRY SPEISSEGGER JR., PFC, PFC

KANSAS DAAB, CLIFFORD L.

MCELVOGUE, DIRECTOR, AND JOHN

DOE(S)

ATTORNEY FOR DEFENDANTS

RICHARD T. BURKHOLDER, SGT.,

CHARLES A. DESANTO, CPL, ASHLEY A.

HARBER, PFC

January 10, 2014

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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

Plaintiff,)

v.)

HOPE CLINIC, LLC, officially and)
individually; TEMISAN ETIKERENTSE,)
MD, officially and individually; SUE)
BRABHAM, R.N., officially and)
individually; BERKELEY COUNTY)
SHERIFF H. WAYNE DeWITT, officially)
and individually; ANDREW J. BLAND,)
PFC, officially and individually; RICHARD)
T. BURKHOLDER, SGT., officially and)
individually; JAMES M. BROPHY, PFC,)
officially and individually; LEEMON E.)
CARNER, PFC, officially and individually;)
CHARLES A. DeSANTO, CPL, officially)
and individually; KENDRA MOORE,)
STAFF SGT., officially and individually,)
ASHLEY A. HARBER, PFC, officially and)
individually; PRISCILLA GARRETT,)
SGT., officially and individually; JERRY)
SPEISSEGGER JR., PFC, officially and)
individually; PFC KANSAS DAAB,)
officially and individually; JOHN DOE(S),)
officially and individually; CLIFFORD L.)
McELVOGUE, DIRECTOR, officially and)
individually,)

Defendants.)

C.A. No. 5:12-cv-3177-RMG-KDW

CERTIFICATE OF SERVICE

I certify that I have served the foregoing **OFFER OF JUDGMENT** on all parties of record by depositing copies of the same in the United States Mail, postage prepaid, addressed to the following:

Thomas E. Pope, Esquire
Harold C. Staley, Esquire
Andrew W. Creech, Esquire
Garrett B. Johnson, Esquire
Elrod Pope Law Firm
212 East Black Street
Rock Hill, SC 29730
Attorneys for Plaintiff

James A. Stuckey Jr, Esquire
Alissa R. Collins, Esquire
Stuckey Law Offices, LLC
123 Meeting Street
Charleston SC 29401
*Attorneys for Defendants Ashley A. Harber,
PFC, Charles A. Desanto, CPL and
Richard T. Burkholder, SGT*

Chilton G. Simmons, Esquire
Elizabeth W. Ballentine, Esquire
Buyck Sanders & Simmons LLC757
Johnnie Dodds Boulevard, Suite 100
P.O. Box 2424
Mt. Pleasant SC 29464

*Attorneys for Defendants Hope Clinic,
LLC, Temisan Etikerentse, MD, And Sue
Brabham, RN*

CORRIGAN & CHANDLER LLC


Elizabeth F. Fulton
P.O. Box 547
Charleston, South Carolina 29402
(843) 577-5412 (phone)
(843) 577-5650 (fax)
elizabeth@corriganhandler.com

Charleston, South Carolina
January 9, 2014

EXHIBIT F

August 13, 2014

VIA EMAIL

James A. Stuckey
Stuckey law Offices, LLC
123 Meeting Street
Charleston, SC 29401-2217

RE: Nancy Morris as Personal Representative of the Estate of
David Allan Woods v Hope Clinic, et al.
Civil Action No.: 5:12-cv-03177-RMG-KDW

Dear Jim,

Thank you for the recent offer to settle the Woods case for \$600,000.00. My client has instructed me to reject the offer. While I am disappointed that we were unable to reach a settlement, I am very appreciative of your efforts.

Kind regards,

Harold C. Staley, Jr.

cc: The Honorable Richard Gergel
Eugene Corrigan, Esquire
Nicole Ewing, Esquire
Hattie Taylor

EXHIBIT G

AO 450 (SCD 04/2010) Judgment in a Civil Action

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

A TRUE COPY

Attest: Robin L. Blume

By:

DEPUTY CLERK

Record on Appeal 0101

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;	)	
	)	
Plaintiffs,	)	AMENDED COMPLAINT
	)	(Jury Trial Demanded)
-vs-	)	
	)	
South Carolina Insurance Reserve Fund,	)	
	)	
Defendants.	)	

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CLERK OF COURT
C.C.P. 2017

NOW COME the above-named Plaintiffs, complaining of the Defendants herein, who do allege and show unto this Honorable Court the following:

PARTIES AND JURISDICTION

1. Plaintiff Nancy Morris was, at all times relevant herein, a resident of the State of South Carolina, and is now a resident of the State of Missouri.
2. Plaintiff Nancy Morris is the duly-appointed personal representative for the Decedent, David Allan Woods.
3. Prior to his death in November 2010, David Allan Woods was a resident of Berkeley County, South Carolina.
4. Andrew J. Bland, PFC; Leemon E. Carner, PFC; Priscilla Garrett, SGT; and Jerry Speissegger, Jr. are residents of the State of South Carolina.
5. Richard T. Burkholder, SGT is a resident of the Commonwealth of Pennsylvania.
6. Andrew J. Bland, PFC; Priscilla Garrett Bland, SGT; Leemon A. Carner, PFC; Jerry Speissegger, Jr., PFC; and Richard T. Burkholder, SGT (hereinafter collectively referred to as "Assignors") did, for good and valuable consideration, irrevocably assign to Plaintiff Nancy

Morris “any and all claims he/she may have against the South Carolina Insurance Reserve Fund and/or any other persons, firms, government organizations, or entities that arise out of [C.A. No.: 5:12-cv-3177-RMG],” including, among others “bad-faith conduct and/or breach of contract by the Insurance Reserve Fund” in the handling of the claims related to that case. These assignments are attached as Exhibit A.

7. Plaintiff therefore has standing to assert all legally assignable claims, as alleged herein, against Defendant Insurance Reserve Fund.

8. Upon information and belief, Defendant IRF is a governmental entity organized and existing under the laws of the State of South Carolina and with its principle office in Richland County.

9. Upon information and belief, Defendant “functions as a governmental insurance operation with the mission to provide insurance specifically designed to meet the needs of governmental entities at the lowest possible cost. The Insurance Reserve Fund operates like an insurance company, by issuing policies, collecting premiums (based in consultation with actuaries), and by paying claims from the accumulated premiums in accordance with the terms and conditions of the insurance policies it has issued.”

FACTUAL BACKGROUND

10. On September 2, 2010, Mr. Woods was tried and convicted in absentia by way of bench trial on charges of Shoplifting Merchandise less than \$2,000.00 and Animal Nuisance.

11. Mr. Woods was ordered to pay a fine of \$2,130.00 or spend 30 days in jail for the shoplifting charge.

12. Mr. Woods was ordered to pay a fine of \$237.50 or spend 30 days in jail for the animal nuisance charge.

13. On October 12, 2010, a bench warrant was issued for Mr. Woods's arrest.
14. Mr. Woods was booked and taken into custody at Hill-Finklea Detention Center.
15. Over the course of his confinement, Mr. Woods complained to jail and medical personnel of health problems including liver disease, intestinal pain, and blood in his stool.
16. At approximately 10:21 p.m. on Friday, November 5, 2010, Mr. Woods was reported to be lying on the floor of his cell and shaking.
17. At all times relevant herein, Hill-Finklea Detention Center contracted with Hope Clinic, LLC to provide medical services to inmates. Under the terms of this contract, Hope Clinic provided "nurse coverage... five (5) days per week, fifty-two weeks per year, except during County holidays, between the hours of 9:00 a.m. and 5:00 p.m."
18. At the time this report was made concerning Mr. Woods, Hope Clinic medical personnel had already left the facility for the weekend.
19. Sgt. Priscilla Garrett Bland responded to the call, along with PFC Ashley Harber, and transferred Mr. Woods to a medical observation cell.
20. For the next 60 hours, video surveillance footage shows Mr. Woods shaking and disoriented. He is unsteady on his feet, staggers around his cell, and falls at least twice. He defecates and urinates on himself, at one point lying in his own feces for a period of 16 hours.
21. During this 60-hour period, each of Assignors had multiple interactions with Mr. Woods. None attempted to secure medical assistance for him or to contact Hope Clinic personnel.
22. At approximately 8:30 a.m. on Monday, November 8, 2010, Mr. Woods was found lying on the floor of his cell naked and unresponsive. He was evaluated by the Hope Clinic nurse, who recommended that Mr. Woods be transported to the hospital.
23. EMS arrived at 9:52 a.m. and took Mr. Woods to Trident Medical Center, where

“he could speak but only in a weak voice and not in sentences. He was receiving blood at the time, had bright red blood and dark red blood around his rectum.” His prognosis was felt to be “bleak.”

24. Mr. Woods died three days later, on November 11, 2010, due to “severe blood loss with total body failure” secondary to an upper gastrointestinal bleed.

LIABILITY POLICY

25. At the time of Decedent’s death, Berkeley County maintained a policy of General Tort Liability Insurance issued by the South Carolina Budget and Control Board, Insurance Reserve Fund, Policy Number T130080011, attached as Exhibit B (hereinafter “the policy.”)

26. The policy was properly issued under S.C. Code § 1-11-140.

27. The effective dates of the policy were 2/13/2010 through 2/13/2011 and was thus in effect during the dates of Decedent’s confinement and death.

28. The policy obligated the Insurance Reserve Fund to “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: A. Personal injury.”

29. Persons insured under the policy included “Any employee of the entity designated in the declarations as named insured... but only while the employee is acting in the scope of his or her official duties.”

30. Berkeley County was a named insured under the policy.

31. At the time of the events complained of in the underlying action, Assignors were employees of Berkeley County acting within the course and scope of their employment and official duties.

32. Assignors are and were therefore entitled to coverage under the policy.

33. The position of Defendant Insurance Reserve Fund is that the maximum coverage available under the policy for the underlying action was \$600,000.00.

UNDERLYING ACTION: POSTURE

34. On September 20, 2012, Nancy Morris, as personal representative of the Estate of David Allan Woods, filed suit against Defendants The Hope Clinic, LLC; Temisan Etikerentse, M.D.; Sue Brabham, R.N.; Berkeley County Sheriff H. Wayne DeWitt; Andrew J. Bland, PFC; Richard T. Burkholder, SGT; James M. Brophy, PFC; Leemon E. Carner, PFC; Patricia D. Collins, SGT; Charles A. DeSanto, CPL; Kendra B. Habersham, Staff SGT; Ashley A. Harber, PFC; Priscilla Scheetz¹, SGT; Jerry Speissegger, Jr., PFC; PFC Daaf; and John Does in the Circuit Court for Berkeley County, alleging causes of action under 42 U.S.C. 1983, Wrongful Death, Survival Action, and Intentional Infliction of Emotional Distress.

35. On November 2, 2012, Defendants removed the case to the United States District Court for the District of South Carolina, asserting federal question jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343.

36. Robin Jackson of Senn Legal, LLC appeared as counsel for Assignors and the other defendants employed by Berkeley County.

37. Over the next nine months, the parties engaged in detailed written discovery, and took no fewer than 14 depositions, including those of all the Assignors and seven other county employees.

38. During this time, Defendant Insurance Reserve Fund and its attorney had ample opportunity to review deposition testimony, speak to its own clients, and observe the video footage from the medical observation cell demonstrating Mr. Woods's deteriorating condition and acute suffering, as well as the indifference of its own employees.

¹ Priscilla Scheetz was divorced after the events complained of and prior to filing of the lawsuit, and the suit was subsequently amended to reflect her name as Priscilla Garrett. Prior to trial, she married Andrew J. Bland, PFC, but is referred to in the instant suit as Priscilla Garrett.

39. Defendant Insurance Reserve Fund had access to Mr. Woods's medical records, and was well aware of the fact that he had passed away as a result of its insureds' inaction.

40. Defendant Insurance Reserve Fund was aware that Plaintiff was claiming punitive damages against its insureds, including Assignors, as was clearly set forth in her Complaint.

41. Defendant Insurance Reserve Fund was aware that Plaintiff was pursuing a claim under 42 U.S.C. 1983, which did not provide its insureds, including Assignors, with the damages caps set forth by the South Carolina Tort Claims Act, and therefore exposed them to a judgment in excess of the alleged \$600,000.00 policy limits.

42. Defendant Insurance Reserve Fund was aware that, pursuant to 42 U.S.C. 1988, Plaintiff's 42 U.S.C. 1983 claim, if successful, would entitle her to reasonable attorney's fees and costs.

UNDERLYING ACTION: NEGOTIATIONS

43. On August 1, 2013, the parties conducted a mediation at Elrod Pope Law Firm in Rock Hill, South Carolina. Robin L. Jackson, Esquire, of Senn Legal was present for the Defendant South Carolina Insurance Reserve Fund.

44. At the mediation, Plaintiff offered to accept \$1 million to settle all claims against the County Defendants, including Assignors, with \$600,000.00 to come from the Defendant Insurance Reserve Fund and \$400,000.00 to come from Berkeley County.

45. This constituted a reasonable offer to settle within the Insurance Reserve Fund's policy limits, and would have protected Assignors from the risk of any excess judgment.

46. Upon information and belief, Berkeley County was willing to pay the \$400,000.00.

47. Upon information and belief, Defendant Insurance Reserve Fund rejected Plaintiff's reasonable offer to settle the case within their policy limits and declined to tender the

full \$600,000.00.

48. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without discussing the matter with Assignors or Assignors' personal attorney.

49. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without retaining independent counsel to advise Assignors of their rights with respect to Plaintiff's offer to settle.

50. Defendant IRF rejected Plaintiff's reasonable offer to settle within the policy limits without informing Assignors that the offer had been rejected.

51. Plaintiff's position was reiterated in a letter addressed to Hattie Taylor on September 12, 2013 indicating that Plaintiff would now seek to collect any excess judgment obtained against Berkeley County from the IRF, pursuant to Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933). (Exhibit C).

52. Defendant Insurance Reserve Fund reiterated their refusal to tender the policy limits in a letter of October 22, 2013, written by Chris Lombard, in which Defendant offered \$500,000.00 "to settle this matter on behalf of Berkeley County and all the Berkeley County individual defendants."

53. Defendant Insurance Reserve Fund again established their position on January 10, 2014, when they made an Offer of Judgment of \$500,000.00 through new counsel Eugene P. Corrigan, III.

54. It was not until August of 2014 that counsel for Assignors and the County Defendants offered \$600,000.00 to settle the case, which offer was declined in a letter of August 13, 2014.

55. It was not until the day of trial, October 14, 2014, that counsel for Assignors and

the County Defendants offered the \$1,000,000.00 that Plaintiff initially demanded at mediation. Plaintiff declined the offer, choosing to pursue an excess verdict against Defendant Insurance Reserve Fund's insureds.

UNDERLYING ACTION: TRIAL AND JUDGMENT

56. Prior to trial, Plaintiff had dismissed her state court claims and numerous defendants, proceeding to trial solely against Assignors on the 42 U.S.C. 1983 claim.

57. On October 17, 2014, Plaintiff obtained a judgment in the amount of \$500,000.00 for actual damages; \$150,000.00 in punitive damages against Andrew J. Bland, PFC; \$150,000.00 in punitive damages against Leemon E. Carner, PFC; \$150,000.00 in punitive damages against Jerry Speissegger, Jr., PFC; \$1,000,000.00 in punitive damages against Richard T. Burkholder, SGT; and \$1,000,000.00 in punitive damages against Priscilla Garrett, SGT.

58. By order of the court, the verdict for compensatory damages was partially offset and reduced to \$171,875.00.

59. Plaintiff was subsequently awarded \$354,293.00 in attorney's fees and \$31,820.62 in costs.

60. Assignors appealed the decision to the Fourth Circuit, which affirmed the District Court on November 16, 2016.

61. Defendant IRF's rejection of Plaintiff's reasonable offer to settle for the available limits of the policy and the resulting judgment against Assignors provides Assignors with a cause of action against Defendant IRF for breach of contract and breach of the implied covenant of good faith and fair dealing, in light of (i) the nature and scope of damages suffered by David Woods; (ii) the probable liability of Assignors; (iii) the substantial risk of a recovery in excess of Plaintiff's reasonable offer to settle; and (iv) the danger of a judgment in excess of the limits of the policy.

62. Each and every Assignor possesses these causes of action individually.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

63. Plaintiff hereby incorporates by reference all foregoing allegations.

64. Assignors and Defendant Insurance Reserve Fund had a mutually binding contract of insurance.

65. Defendant IRF breached that contract of insurance by its failure, refusal, and neglect:

a. To consult as to Defendant IRF's rejection of Plaintiff's reasonable offer to settle with:

- i. Andrew J. Bland, PFC;
- ii. Leemon E. Carner, PFC;
- iii. Jerry Speissegger, Jr., PFC;
- iv. Priscilla Garrett, SGT;
- v. Richard T. Burkholder, SGT;

b. To discuss said offer prior to rejecting with or with counsel for:

- i. Andrew J. Bland, PFC;
- ii. Leemon E. Carner, PFC;
- iii. Jerry Speissegger, Jr., PFC;
- iv. Priscilla Garrett, SGT;
- v. Richard T. Burkholder, SGT;

c. To retain independent counsel to provide advice concerning Plaintiff's reasonable offer to settle and his or her rights concerning the same to:

- i. Andrew J. Bland, PFC;

- ii. Leemon E. Carner, PFC;
- iii. Jerry Speissegger, Jr., PFC;
- iv. Priscilla Garrett, SGT;
- v. Richard T. Burkholder, SGT;

- d. To settle Plaintiff's claim for an amount up to and including the full policy limits;
- e. To accept Plaintiff's reasonable settlement offer within the policy limits.

66. Defendant IRF breached the contract as set forth above with regard to each and every Assignor individually.

67. As a proximate result of Defendant IRF's breach of contract, Assignors have been injured and otherwise suffered damages, as set forth more fully herein.

68. By nature of her assignments, Plaintiff is entitled to recover from Defendant IRF all damages incurred by Assignors as a result of this breach, including all actual damages, both pre-judgment and post-judgment interest, attorney's fees and costs, and for such other and further relief, in law or in equity, in favor of Assignee as this Court may deem just and proper.

FOR A SECOND CAUSE OF ACTION
(Negligence/Gross Negligence)

69. Plaintiff hereby incorporates by reference all foregoing allegations.

70. Defendant Insurance Reserve Fund had notice of Plaintiff's claim by September 20, 2012 at the latest.

71. Defendant IRF was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to process and adjust in a timely fashion Plaintiff's claims against:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;

- iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- b. In failing to establish reasonable procedures for the processing and handling of claims that are made against its insureds;
 - c. In deviating from the standard of care that a reasonable and prudent insurance company would employ under the circumstances;
 - d. In any other such acts that constitute a violation of the laws or common law of the State of South Carolina;
 - e. In any other matter that Plaintiff may discover through litigation.

72. Defendant IRF's negligent, grossly negligent, careless, reckless, willful, and wanton conduct affected each Assignor individually.

73. As a proximate result of Defendant IRF's negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness, Assignors have been injured and otherwise suffered damages, as set forth more fully herein.

74. Assignors' damages would not have occurred but for Defendant IRF's conduct, described more fully herein.

75. Assignors' damages occurred as a natural and probable consequence of Defendant IRF's conduct.

76. By nature of her assignments, Plaintiff is entitled to recover from Defendant IRF actual, compensatory damages, including the full amount of the verdict not yet satisfied, plus interest accruing from October 17, 2014; exemplary or punitive damages in an amount that is fair, just, and reasonable under the circumstances; and whatever costs, interest, both pre-judgment and

post-judgment, and attorney's fees that the Court deems proper.

FOR A THIRD CAUSE OF ACTION
(Bad Faith)

77. Plaintiff hereby incorporates by reference all foregoing allegations.
78. Defendant Insurance Reserve Fund provides insurance to governmental entities.
79. Upon information and belief, Defendant IRF presents claims made against its insureds to adjusters to oversee these files and to work toward adjusting and resolving those claims.
80. Upon information and belief, once a claim is presented to an adjuster, that adjuster maintains control over the claim and is involved in all claims handling decisions.
81. Upon information and belief, the underlying claim of Plaintiff Nancy Morris as Personal Representative of the Estate of David Allan Woods was assigned to an adjuster employed by Defendant IRF, and at all relevant times, Defendant IRF assumed and maintained control of Plaintiff's claim.
82. Defendant IRF has a duty to deal in good faith and fair dealing with its insureds, including Assignors.
83. Defendant IRF held that duty to each Assignor individually.
84. Assignors and/or their employer promptly reported the underlying claim to Defendant IRF, and have otherwise performed all conditions required by the policy.
85. Assignors did not make any demand or request to Defendant IRF, or to any of its adjusters or employees, that Defendant IRF not settle Plaintiff's claim.
86. Assignors did nothing to impair Defendant IRF's assessment of the substantial risk of an excess judgment.
87. Defendant IRF failed to promptly and effectively investigate Plaintiff's claim.
88. Defendant IRF failed to timely settle Plaintiff's claim within the available policy

limits, even though Defendant IRF had the opportunity to do so.

89. Defendant IRF rejected Plaintiff's offer to settle within the policy limits without consulting Assignors; did not conduct an adequate or appropriate investigation into Plaintiff's claim; failed to retain independent counsel to advise Assignors of their rights with respect to Plaintiff's reasonable offer to settle; did not retain coverage counsel to properly review Plaintiff's reasonable offer to settle; and otherwise failed to act as a reasonable and prudent insurer would act under similar circumstances.

90. Defendant IRF's failure to timely evaluate and settle Plaintiff's claim caused Plaintiff's settlement demand to be withdrawn, exposing Assignors to personal financial risk.

91. Defendant IRF has refused, and continues to refuse, to protect Assignors from personal exposure in this matter.

92. Defendant IRF has breached the implied covenants of good faith and fair dealing with regard to the insurance policy by, among other acts or omissions, failing to settle Plaintiff's claim for the amount of the applicable insurance coverage when presented with the opportunity to do so.

93. Defendant IRF has acted in bad faith and/or was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to timely investigate Plaintiff's liability claim;
- b. In failing to make an offer of the full \$600,000.00 policy limits in response to Plaintiff's reasonable demand to settle the case for that amount;
- c. In failing to timely inform of Plaintiff's reasonable offer to settle the case;
- d. In failing to retain independent counsel to protect the interests of:
 - i. Andrew J. Bland, PFC;

- ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- e. In failing to retain independent counsel to advise:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- f. In exposing to excess personal liability:
 - i. Andrew J. Bland, PFC;
 - ii. Leemon E. Carner, PFC;
 - iii. Jerry Speissegger, Jr., PFC;
 - iv. Priscilla Garrett, SGT;
 - v. Richard T. Burkholder, SGT;
- g. In failing to act reasonably in light of the totality of the circumstances presented by Plaintiff's claim;
- h. In failing to act as a reasonable and prudent insurer would act in regards to Plaintiff's claim;
- i. In failing to acknowledge with reasonable promptness pertinent communications with respect to Plaintiff's underlying claim;
- j. In failing to adopt and implement reasonable standards for the prompt investigation

and settlement of claims, including Plaintiff's claim, arising under its policies;

- k. In failing to attempt in good faith to effect a fair, prompt, and equitable resolution to Plaintiff's claim after liability had become reasonably clear;
- l. In compelling Plaintiff to institute a suit to recover amounts reasonably due or payable with respect to claims arising under Defendant IRF's policy by offering substantially less than the amounts ultimately recovered through suits brought by the claimants as the result of the inability of Plaintiff to effect reasonable settlements with Defendant IRF;
- m. In offering to settle Plaintiff's claim for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that Plaintiff would be required to incur attorneys' fees to recover the amount reasonably due or payable;
- n. In engaging in practices which constituted an unreasonable delay in paying or an unreasonable failure to pay Plaintiff's claim;
- o. In violating the laws and statutes of the State of South Carolina, including but not limited to S.C. Code § 38-59-20.

94. Defendant IRF's breach of its duty of good faith and fair dealing was the direct and proximate cause of damage to each and every Assignor in his or her individual capacity, those damages including mental anguish, anxiety, stress, expenses, and incurring personal judgments.

95. As a direct and proximate result of Defendant IRF's breach of its duty of good faith and fair dealing, each and every Assignor in his or her individual capacity has been and continue to be injured in the following ways:

- a. In suffering personal exposure to unsatisfied judgments;

- b. In incurring attorney's fees and expenses;
- c. In suffering the mental anguish, anxiety, and stress of being sued by Plaintiff and the knowledge that such suit would likely lead to excessive personal financial responsibility;
- d. In such other ways as would cause Assignors' additional and unnecessary pain, suffering, mental anguish, and aggravation.

96. Each and every Assignor's damages in their individual capacity would not have occurred but for Defendant IRF's breach of its duty of good faith and fair dealing.

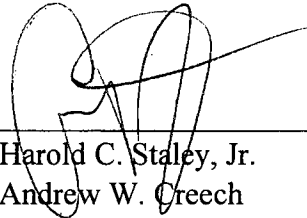
97. By nature of the assignments, Plaintiff is entitled to judgment against Defendant IRF for actual, compensatory damages, including the full amount of the verdict not yet satisfied, plus interest accruing from October 17, 2014; exemplary or punitive damages in an amount that is fair, just, and reasonable under the circumstances; and whatever costs, interest, both pre-judgment and post-judgment, and attorney's fees that the Court deems proper.

98. Moreover, Defendant IRF is liable to Plaintiff for attorney's fees in prosecuting this action pursuant to S.C. Code Ann. § 38-59-40.

WHEREFORE, Plaintiff prays for judgment against Defendant in a sum to be determined by a jury of Plaintiff's peers and to exceed one hundred thousand dollars (\$100,000.00), thus meeting the requirements set under the South Carolina Rules of Civil Procedure Rule 30 (h), and should include actual damages, future damages, punitive damages in a reasonable amount, and the costs and disbursements of this action and for such other and further relief that this Court or jury deems just and proper.

Respectfully,

By:

A handwritten signature in black ink, appearing to be "H. Staley, Jr.", written over a horizontal line.

Harold C. Staley, Jr.
Andrew W. Creech
Garrett B. Johnson
Elrod Pope Law Firm
212 E Black Street
P.O. Box 11091 (29731)
Rock Hill, S.C. 29730
Phone: (803) 324-7574

ATTORNEYS FOR PLAINTIFF

November 27, 2017
Rock Hill, South Carolina

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,)

ANSWER TO AMENDED COMPLAINT

v.)

South Carolina Insurance Reserve Fund,)

Defendant.)
_____)

RICHLAND COUNTY
FILED
2018 JAN 11 AM 11:17
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

The Defendant South Carolina Insurance Reserve Fund, reserving all rights pursuant to a
Motion to Make More Definite and Certain and Motion to Strike, answers the Plaintiff's Amended
Complaint herein as follows:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of the Plaintiff's Amended
Complaint not hereinafter specifically admitted, qualified, or explained.

2. As to the allegations set forth in Paragraph 1 of the Plaintiff's Amended
Complaint, the Defendant lacks sufficient information to admit or deny that the Plaintiff is a
resident and citizen of the State of Missouri.

3. The allegations set forth in Paragraph 2 of the Plaintiff's Amended Complaint are,
upon information and belief, admitted.

4. As to the allegations set forth in Paragraph 3 of the Plaintiff's Amended Complaint, the Defendant lacks sufficient information to admit or deny those allegations and, as a result, denies those allegations.

5. As to the allegations set forth in Paragraph 4 of the Plaintiff's Amended Complaint, the Defendant lacks sufficient information to admit or deny the residency of Andrew J. Bland, Leemon E. Carner, Priscilla Garrett Bland and Jerry Speissegger, Jr.

6. As to the allegations set forth in Paragraph 5 of the Plaintiff's Amended Complaint, the Defendant lacks sufficient information to admit or deny the residency of Richard T. Burkholder.

7. As to the allegations set forth in Paragraph 6 of the Plaintiff's Amended Complaint, the Defendant lacks sufficient information to admit or deny those allegations and, as a result, denies those allegations.

8. The allegations set forth in Paragraph 7 of the Plaintiff's Amended Complaint are denied.

9. As to the allegations set forth in Paragraph 8 of the Plaintiff's Amended Complaint, the Defendant admits that the South Carolina Insurance Reserve Fund is a division of the South Carolina State Fiscal Accountability Authority, which is an agency of the State of South Carolina created and administered under state statutory law. The Defendant further admits that its principal offices are located in Richland County.

10. The allegations set forth in Paragraph 9 of the Plaintiff's Amended Complaint are admitted.

11. The allegations set forth in Paragraphs 10 through 24 of the Plaintiff's Amended Complaint are denied as immaterial to the action filed by the Plaintiff. Further answering, the duty

to indemnify, if any, owed by the South Carolina Insurance Reserve Fund to its insureds shall be adjudged based upon the judgment ultimately entered in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG. Further answering, the Defendant craves reference to the Special Verdict Form as returned by the jury in Civil Action Number 5:12-3177-RMG, which does not include any special interrogatories or findings that support the Plaintiff's allegations as set forth in Paragraphs 10 through 24. The Defendant specifically objects to any attempt by the Plaintiff to re-litigate any factual questions as may have been litigated or could have been litigated in Civil Action Number 5:12-3177-RMG.

12. The allegations set forth in Paragraph 25 of the Plaintiff's Amended Complaint are admitted.

13. As to the allegations set forth in Paragraph 26 of the Plaintiff's Amended Complaint, the Defendant admits that S.C. Code Ann. § 1-11-140 is the enabling statute that authorizes the South Carolina State Fiscal Accountability Authority, through the Office of Insurance Services, to issue insurance coverage for the State, its agencies and political subdivisions.

14. The allegations set forth in Paragraph 27 of the Plaintiff's Amended Complaint are admitted.

15. As to the allegations set forth in Paragraphs 28 and 29 of the Plaintiff's Amended Complaint, the Defendant craves reference to the Tort Liability Insurance Policy as issued to its named insured Berkeley County as the best evidence of the provisions of that policy.

16. The allegations set forth in Paragraph 30 of the Plaintiff's Amended Complaint are admitted.

17. The allegations set forth in Paragraph 31 of the Plaintiff's Amended Complaint are too vague and uncertain to allow for a proper response. The Plaintiff fails to specify "the events complained of in the underlying action," and for that reason, the Defendant denies those allegations as pled.

18. The allegations set forth in Paragraphs 32 of the Plaintiff's Amended Complaint are denied as stated. Further answering, the Defendant admits only that a Tort Liability Insurance Policy was issued to its named insured Berkeley County which may provide liability coverage -- subject to the terms, conditions, limitations, and exclusions of the policy -- to Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland and Jerry Speissegger, Jr. with respect to the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG.

19. As to the allegations set forth in Paragraph 33 of the Plaintiff's Amended Complaint, the Defendant admits that the Tort Liability Insurance Policy as issued to the named insured Berkeley County provides limits of liability of \$600,000 per occurrence as that term is defined by the policy language.

20. As to the allegations set forth in Paragraph 34 of the Plaintiff's Amended Complaint, the Defendant craves reference to the pleadings filed in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, as the best evidence of the parties and causes of action pled.

21. As to the allegations set forth in Paragraph 35 of the Plaintiff's Amended Complaint, the Defendant craves references to the Notice of Removal and related filings in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, as the best evidence of the removal and the basis thereof. Further answering, the Defendant was not a party to Civil Action Number 5:12-3177-RMG and, therefore, was not a party to the removal.

22. The allegations set forth in Paragraph 36 of the Plaintiff's Amended Complaint are admitted.

23. As to the allegations set forth in Paragraph 37 of the Plaintiff's Amended Complaint, the Defendant craves references to the discovery and depositions taken in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, as the best evidence of the scope and extent of discovery conducted.

24. As to the allegations set forth in Paragraph 38 of the Plaintiff's Amended Complaint, the Defendant admits only that it had the opportunity to and did evaluate the liability and damages issues during the pendency of the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG. The remaining allegations of the Paragraph 38 are denied, including allegations that the Assignors were employees of the Insurance Reserve Fund.

25. As to the allegations set forth in Paragraph 39 of the Plaintiff's Amended Complaint, the Defendant admits only that it had the opportunity to and did evaluate the liability and damages issues during the pendency of the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG. The remaining allegations of the Paragraph 39 are denied.

26. As to the allegations set forth in Paragraph 40 of the Plaintiff's Amended Complaint, the Defendant admits only that it had the opportunity to and did evaluate the liability and damages issues during the pendency of the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, including the prayer for punitive damages.

27. As to the allegations set forth in Paragraph 41 of the Plaintiff's Amended Complaint, the Defendant admits that it was aware that the claim pursuant to 42 U.S.C. § 1983 is not subject to damages caps under the South Carolina Tort Claims Act. As to the remaining allegations, the Defendant denies that it evaluated the claim in excess of the policy limits.

28. The allegations set forth in Paragraph 42 of the Plaintiff's Amended Complaint are admitted.

29. The allegations set forth in Paragraph 43 of the Plaintiff's Amended Complaint are admitted.

30. As to the allegations set forth in Paragraphs 44 and 45 of the Plaintiff's Amended Complaint, the Defendant objects that such allegations are properly pled or otherwise admissible under state law. To the extent a response is required, the allegations are denied as stated.

31. The allegations set forth in Paragraph 46 of the Plaintiff's Amended Complaint are denied as stated.

32. The allegations set forth in Paragraphs 47 through 50 of the Plaintiff's Amended Complaint are denied as stated.

33. The allegations set forth in Paragraph 51 of the Plaintiff's Amended Complaint are denied.

34. The allegations set forth in Paragraph 52 of the Plaintiff's Amended Complaint are denied as stated. The Defendant craves reference to the letter dated October 22, 2013, as the best evidence of its contents.

35. As to the allegations set forth in Paragraph 53 of the Plaintiff's Amended Complaint, the Defendant craves reference to the Offer of Judgment served in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, as to the best evidence of its contents.

36. As to the allegations set forth in Paragraph 54 of the Plaintiff's Amended Complaint, the Defendant craves reference to letters dated August 12, 2014 and August 13, 2014, as the best evidence of the settlement negotiations.

37. As to the allegations set forth in Paragraph 55 of the Plaintiff's Amended Complaint, the Defendant admits, upon information and belief, that defense counsel in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, offered a total of \$1 million, including monies from Berkeley County, to settle the litigation on or about October 14, 2014, and that the offer was rejected by the Plaintiff.

38. The allegations set forth in Paragraph 56 of the Plaintiff's Amended Complaint are denied as stated.

39. As to the allegations set forth in Paragraph 57 of the Plaintiff's Amended Complaint, the Defendant craves reference to the Judgment entered in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, as the best evidence of its contents.

40. As to the allegations set forth in Paragraphs 58 and 59 of the Plaintiff's Amended Complaint, the Defendant craves reference to the post-trial orders of Judge Richard M. Gergel entered in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, as the best evidence of their contents.

41. The allegations set forth in Paragraph 60 of the Plaintiff's Amended Complaint are admitted.

42. The allegations set forth in Paragraph 61 of the Plaintiff's Amended Complaint are denied.

43. The allegations set forth in Paragraph 62 of the Plaintiff's Amended Complaint are denied.

44. As to the allegations set forth in Paragraph 63 of the Plaintiff's Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer set forth herein.

45. The allegations set forth in Paragraph 64 of the Plaintiff's Amended Complaint are denied as stated.

46. The allegations set forth in Paragraph 65 of the Plaintiff's Amended Complaint, including all subparts, are denied.

47. The allegations set forth in Paragraphs 66, 67, and 68 of the Plaintiff's Amended Complaint are denied.

48. As to the allegations set forth in Paragraph 69 of the Plaintiff's Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant objects to the jumbling of causes of action.

49. The allegations set forth in Paragraph 70 of the Plaintiff's Amended Complaint are denied.

50. The allegations set forth in Paragraph 71 of the Plaintiff's Amended Complaint, including all subparts, are denied.

51. The allegations set forth in Paragraphs 72, 73, 74, 75, and 76 of the Plaintiff's Amended Complaint are denied.

52. As to the allegations set forth in Paragraph 77 of the Plaintiff's Amended Complaint, the Defendant reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant objects to the jumbling of causes of action.

53. The allegations set forth in Paragraph 78 of the Plaintiff's Amended Complaint are admitted.

54. As to the allegations set forth in Paragraphs 79 and 80 of the Plaintiff's Amended Complaint, the Defendant admits that it uses claims adjusters and supervisors to adjust claims

against its insureds and those individuals are involved in the decision-making process as to the adjustment process.

55. As to the allegations set forth in Paragraph 81 of the Plaintiff's Amended Complaint, the Defendant admits that the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, was assigned to adjusters and supervisors who collaborated on the adjustment of the claim and the management of the litigation.

56. The allegations set forth in Paragraphs 82, 83, 84, and 85 of the Plaintiff's Amended Complaint are admitted.

57. The allegations set forth in Paragraph 86 of the Plaintiff's Amended Complaint are denied as stated.

58. The allegations set forth in Paragraphs 87 through 92 of the Plaintiff's Amended Complaint are denied.

59. The allegations set forth in Paragraph 93 of the Plaintiff's Amended Complaint, including all subparts, are denied.

60. The allegations set forth in Paragraphs 94 through 98 of the Plaintiff's Amended Complaint are denied.

61. The allegations and relief as set forth in the prayer for relief are denied.

FOR A SECOND DEFENSE

62. The Plaintiff's Amended Complaint fails to state a cause of action upon which relief may be granted. The Defendant reserves its right to file a motion pursuant to Rule 12(b)(6), SCRCRCP.

FOR A THIRD DEFENSE

63. The Plaintiff's Amended Complaint fails to set forth a claim that is ripe for adjudication.

FOR A FOURTH DEFENSE

64. The Defendant has no duty to indemnify the Plaintiff because the assignors are not "legally obligated to pay" damages to the Plaintiff.

FOR A FIFTH DEFENSE

65. The Plaintiff lacks standing to assert each of the causes of action against the Defendant, including the bad faith claim.

FOR A SIXTH DEFENSE

66. The Plaintiff's claims are, in whole or in part, barred by release.

FOR A SEVENTH DEFENSE

67. The Plaintiff's claims are, in whole or in part, barred by waiver and estoppel.

FOR AN EIGHTH DEFENSE

68. The Plaintiff's claims are, in whole or in part, barred by accord and satisfaction.

FOR A NINTH DEFENSE

69. The Plaintiff's claims are, in whole or in part, barred by the applicable statute of limitations.

FOR A TENTH DEFENSE

70. The Defendant is immune from suit pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, specifically S.C. Code Ann. § 15-78-60(1), (2), (4), (5), (17), and (20).

FOR AN ELEVENTH DEFENSE

71. The Defendants assert the defense of sovereign immunity, pursuant to the terms of the South Carolina Tort Claims Act as well as pursuant to the common law, including but not limited to the damages caps set forth in S.C. Code Ann. § 15-78-120 and the bar on the recovery of attorney's fees, pre-judgment interest, and punitive damages.

FOR A TWELFTH DEFENSE

72. The Defendant is absolutely immune pursuant to S.C. Code Ann. § 15-78-50(b) of the South Carolina Tort Claims Act with respect to the Third Cause of Action.

FOR A THIRTEENTH DEFENSE

73. The Plaintiff's claims are, in whole or in part, barred by the doctrine of sovereign immunity.

FOR A FOURTEENTH DEFENSE

74. This Court lacks subject matter jurisdiction over this claim. The Defendant reserves its right to file a motion pursuant to Rule 12(b)(1), SCRPC.

FOR A FIFTEENTH DEFENSE

75. The Plaintiff's claims are is barred, in whole or in part, by operation of collateral estoppel, also known as issue preclusion, from re-litigating any factual questions as may have been litigated or could have been litigated in the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG.

FOR A SIXTEENTH DEFENSE

76. The Plaintiff's claims are is barred, in whole or in part, by operation of res judicata, also known as claim preclusion.

FOR A SEVENTEENTH DEFENSE

77. The South Carolina Insurance Reserve Fund is not an "insurer" as defined under Title 38 of the South Carolina Code of Laws, and as a result, the Defendants as a matter of law cannot be held liable for attorney's fees under S.C. Code Ann. § 38-59-40.

FOR AN EIGHTEENTH DEFENSE

78. The purported assignment of the causes of action, including the claim for bad faith, is invalid, illegal, champertous, and against the public policy of the State of South Carolina.

FOR A NINETEENTH DEFENSE

79. The purported assignment of the causes of action, including the claim for bad faith, is invalid, illegal, in violation of S.C. Code Ann. § 16-17-10 and against the public policy of the State of South Carolina.

FOR A TWENTIETH DEFENSE

80. The Plaintiff's claim for attorney's fees have no legal basis and should be stricken and/or dismissed.

FOR A TWENTY-FIRST DEFENSE

81. The Defendant reserves its right to oppose the Plaintiff's request for a trial by jury.

FOR A TWENTY-SECOND DEFENSE

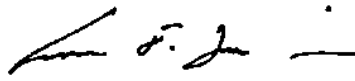
82. Upon information and belief, service of process upon the Defendant was insufficient because the Defendant is not an insurer subject to the provisions of S.C. Code Ann. § 38-5-70. The Defendants reserve their right to file a motion pursuant to Rule 12(b)(5), SCRPC.

FOR A TWENTY-THIRD DEFENSE

83. This Court lacks personal jurisdiction over the Defendant. As a result, the Defendant reserve its right to file a motion pursuant to Rule 12(b)(2), SCRPC.

WHEREFORE, the Defendant South Carolina Insurance Reserve Fund prays that the Plaintiff's Amended Complaint be dismissed with prejudice; for the costs of this action; and for such other and further relief as the Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.

BY: 

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*Counsel for Defendants South Carolina
Insurance Reserve Fund*

Columbia, South Carolina

January 8, 2018

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 nt 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, Mount Holly isn't on all fours with
7 what's facing this Court in this case. Now, I think Mount
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, Mount 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 were 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
Garrett B. Johnson, SC Bar 81105
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Attorney for Respondent

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,

s/Garrett B. Johnson
Garrett B. Johnson, SC Bar #81105
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Attorney for Plaintiff

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.¹

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

¹ 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 *Morris v. Burkholder* 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 Morris and Land*, 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 ns 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 ns 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-CV-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 assist in the preparation of any litigation arising from this assignment*” (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.¹

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 ns o*, 2019 WL 2441119 (S.C. 2019). However, the *t a ley* decision does not support the Plaintiff’s position for two primary reasons.

¹ In *o a o lle A n aster*, 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.” *d.* (Citations omitted). The Supreme Court relied favorably on the Fourth Circuit’s decision in *n re rand ry poenas*, 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.” *d.*

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 bad 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 *Int'l Flavors Corp. v. IFF Ltd.* 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.” *Id.* 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 Est. Int'l Flavors Corp. v. IFF Ltd.*, 273 F.Supp.3d 607 (D.S.C. 2017), which framed the Plaintiff’s position in its Renewed Motion to Compel.

Although *Int'l Flavors Corp. v. IFF Ltd.* 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 *Int'l Flavors Corp. v. IFF Ltd.* 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 *Ariosa* case of *Artis v. Aetna*, 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 *Artis*:

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. *d.* (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 *Id.*, 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. THE PLAINTIFF’S FAILURE TO SETTLE IS NOT A “Tyger River”

In *Id.*, 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.” *Id.* 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.

Id., 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. Harris*, 2010 WL 3834917, *3 (D.Md. 2010) (“statements made ‘upon information and belief’ are inadmissible and will not be considered”); *Artis v. Johnson*, 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 *Holts v. Tate & Sons*, 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 *Worries Land*, 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 re uired 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.²

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.

² 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,

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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. Ebenezer 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

Record on Appeal 0232

For valuable consideration, the receipt of which is hereby acknowledged, and after receiving the advice of independent counsel, the undersigned hereby assigns to 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 the above-captioned case. These claims include, but are not limited to, claims arising out of the negligent, reckless and/or bad-faith conduct, and/or breach of contract by the Insurance Reserve Fund, its agents, servants, and/or employees, its law firm, insurance agency, insurance broker, or any other party in relation to: the handling of this matter; the judgment entered in this case; any other matters related to the claim which resulted in the judgment being entered against the undersigned; for any claims the undersigned may have against the Fund that arise out of any insurance coverage applicable to the instant case; and the right to collect all actual and punitive damages, attorney fees, or costs that may arise from those claims.

1

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.

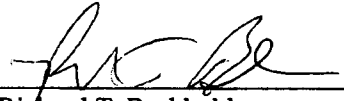
The undersigned acknowledges that he/she has sought the advice of counsel regarding this assignment, is under no undue coercion or duress, is of sound mind and body, and believes the assignment to be in his/her best interests and supported by valuable consideration.

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