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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2021-000502
Case No. 2017-CP-40-6773

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

v.

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

Of Whom 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, is the ..... Appellant,

and

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

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a declaratory judgment action filed by the Appellant 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 Respondent South Carolina Insurance Reserve Fund ("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. (R. 101). 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 IRF issued a Tort Liability Insurance Policy to its named insured Berkeley County, with includes liability limits of $600,000. Following the appeal, the IRF tendered the sum of $992,013.63 to the Appellant in partial satisfaction of the judgments against the Assignors. The

Appellant 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 Appellant thereafter filed the present action as the assignee for the five Assignors. In her Amended Complaint, the Appellant 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 Appellant 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-3l77-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. (R. 102-103). The Appellant alleged three causes of action for breach of contract, negligence, and bad faith against the IRF.

The Respondent IRF filed a motion for summary judgment as to all claims. (R. 15-17). That motion was heard by Circuit Court Judge L. Casey Manning on July 15, 2019. By order filed September 26, 2019, Judge Manning granted summary judgment in favor of the IRF on all claims. (R. 1-8). The Appellant subsequently filed a motion to alter or amend order, which was denied by Judge Manning by form order filed April 22, 2021. (R. 9-11).

The Appellant thereafter filed an appeal to this Court.

STANDARD OF REVIEW

"A grant of 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." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40, 41 (2008). "An appellate court reviews the grant of summary judgment under the same standard applied by the trial court." *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct. App. 2009). "The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id*.

"When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders Firstsource - Southeast Group*, 413 S.C. 630, 776 S.E.2d 434, 437 (Ct. App. 2015).

ARGUMENTS

The trial court granted summary judgment and dismissed the Appellant's Amended Complaint on several separate and independent bases including: (1) that the Appellant's claims are barred by the applicable statutes of limitations, (2) that the personal liability of the Assignors was extinguished by covenants not to execute given by the Appellant, (3) that the Appellant failed to allege any breach of a contractual duty as part of her breach of contract claim, and (4) that the Appellant presented no evidence to support her "Tyger River" bad faith failure-to-settle claim. The trial court correctly ruled on each of those grounds, and summary judgment in favor of the IRF should be affirmed.

I. The trial court correctly ruled that the Appellant's claims are barred by the applicable statutes of limitations.

The trial court correctly ruled that the Appellant's claims are barred by the applicable statutes of limitations. As the Appellant concedes, there are two different statutes of limitations at play. 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 statute of limitations for the breach of contract cause of action is three years. *See*, S.C. Code Ann. § 15-5-530(1).

[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.

As the trial court correctly ruled, in adjudicating the statute of limitations defense, it is critical to recognize that the Appellant, who is the Personal Representative of the Estate of David Allan Woods, is bringing this action against the Respondent 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 Appellant 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).

A. Accrual of Causes of Action

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 breaches of duty, including an alleged failure to timely and reasonably adjust the claim and an alleged failure to establish reasonable procedures to process claims. *See,* Amended Complaint, ¶ 71. (R. 111-112). The same is also true for the bad faith claim. The Appellant 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. *See*, Amended Complaint, ¶ 93. (R. 114-116). As the trial court correctly ruled, "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." (R. 4). Because the alleged negligence and bad faith occurred no later than October 2014, the filing of the negligence and bad faith claims by the Appellant on November 6, 2017, was beyond the two-year statute of limitations for torts.

As for the breach of contract cause of action, the Appellant 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. (R. 110-111). Again, as the trial court correctly determined, "all of those alleged breaches of contract occurred prior to or during the Federal Court trial which took place in October 2014, with the judgment being entered on October 21, 2014." (R. 4). Because the alleged breach of contract occurred no later than October 2014, the filing of the breach of contract action by the Appellant on November 6, 2017, was beyond the three-year statute of limitations.

On appeal, the Appellant now argues that the trial court erred in determining the accrual date of those causes of action. The Appellant relies on *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016), which was never raised to nor cited in the trial court. In *Stokes-Craven*, the Supreme Court overturned prior precedent and adopted a new accrual rule *specifically for legal malpractice claims* where there is an appeal of the underlying litigation that gives rise to the alleged malpractice. The Supreme Court held: "until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice. Upon resolution of the appeal, a cause of action for legal malpractice accrues

triggering the statute of limitations." 787 S.E.2d at 495. However, the *Stokes-Craven* accrual rule has no applicability to this case. That accrual rule applies only in the context of legal malpractice actions and has not been extended to other types of negligence or other tort claims.

Instead, the traditional and well-established rules on the accrual date of a cause of action apply to the claims alleged by the Appellant. "The question of when a cause of action arises or accrues is a question of law." *Menezes v. W.L. Ross & Co.*, LLC, 403 S.C. 522, 744 S.E.2d178, 182 (2013). In *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004), the Supreme Court held that "[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it. *The law presumes at least nominal damages at that point.* The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." 596 S.E.2d at 46. (Emphasis added). Similarly, in *Grooms v. Medical Society of South Carolina*, 298 S.C. 399, 380 S.E.2d 855 (Ct. App. 1989), this Court ruled that "[a] cause of action or claim for damages accrues the moment the defendant breaches a duty owed to the plaintiff." 380 S.E.2d at 857. "The fact that an injured party may not comprehend the full extent of the damage is immaterial." *Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 532 S.E.2d 1, 3 (Ct. App. 2000). This Court has further recognized that "South Carolina's statute of limitations requires very little to start the clock." *Maher v. Tietex Corp.*, 321 S.C. 371, 500 S.E.2d 204, 208 (Ct. App. 1998). In fact, "in a negligence action, the statute of limitations accrues at the time of the negligence, or when facts or circumstances would put a person of common knowledge on notice that he might have a claim against another party." *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88, 90 (1995).

To reiterate, the causes of action brought against the IRF do not accrue when the Appellant has a legal right to sue; rather, the Appellant is bringing these claims *solely* as the

assignee of the five Assignors. The Court must assess when the causes of action accrued for the Assignors, that is, when the Assignors had the legal right to sue. The alleged wrongful or tortious conduct, as the trial court ruled, occurred by the time the judgment was entered in Federal Court. It was the alleged pre-trial acts or omissions by the IRF in its adjustment of the claim and its failure to settle that are the bases of each of the causes of action asserted in this case by the Appellant as the assignee. Based on the Appellant's allegations, the Assignors were harmed when the Federal Court litigation was not settled. The Assignors were harmed by being compelled to proceed through the trial itself and having a judgment entered against them. The Appellant, in fact, concedes that very point in her brief where she avers that "the Assignors suffered damages throughout the litigation process." *See*, Appellant's Brief, p. 15. Such damages were also pled in the Amended Complaint, where the Appellant sought recovery for the Assignors' "suffering the mental anguish, anxiety, and stress of being sued by Plaintiff" and "in such other ways as would cause Assignors' additional and unnecessary pain, suffering, mental anguish, and aggravation." *See,* Amended Complaint, ¶¶ 67, 74, 95. (R. 111, 112, 116-117). In addition, on the date of the jury's verdict in the Federal Court action, the Assignors had the additional stress of having a judgment entered. The Appellant cannot now distance herself from her pleadings to which she is judicially bound.[2] In short, the record demonstrates that the Assignors sustained damages, for which the Appellant has sued, that occurred well before the

[2] In *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322 (Ct. App. 1992), this Court held that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." 418 S.E.2d at 323. "The allegations, statements or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." *Id*. *See also, Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 700 (2015); *Kitchen Planner, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

Federal Court appeal was finally decided. Those damages resulted in an accrual of the Assignors' claims against the IRF by October 21, 2014, as the trial court correctly ruled. Clearly, the Appellant's causes of action – where she is stepping into the shoes of the Assignors – are time-barred.

B. Equitable Tolling

In an effort to salvage her claims, the Appellant asserts equitable tolling, which the Supreme Court has counseled "is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Senior Services & Rehabilitation Center*, 386 S.C. 108, 687 S.E.2d 29, 32 (2009). Under South Carolina law, "[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." *Id.*

The Appellant's reliance on equitable tolling is misplaced for both procedural and substantive reasons. In the trial court, the Appellant raised the doctrine of equitable tolling for the first time in her Rule 59(e) motion to alter or amend order. Of course, a new issue or defense cannot be raised in a Rule 59(e) motion. *See, Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693, 695 (2014) ("a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not"). Moreover, the trial court denied the Rule 59(e) motion because the Appellant failed to comply with Rule 59(g), SCRCP. (R. 9). *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"). The Appellant, however, has not

appealed from the denial of her Rule 59(e) motion. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"). Similarly, the two-issue rule is implicated as an additional basis for affirmance.[3]

As to the merits, the Appellant makes a critical error in her application of the equitable tolling doctrine – she treats the claims as her own rather than as an assignee of the five Assignors in whose shoes she has stepped. The Appellant insists that she was unable to file the breach of contract, negligence, and bad faith claims earlier because she had not received the assignments from the Assignors earlier. She complains that she was unable to communicate with the Assignors until after the statute of limitations expired. However, the right to assert equitable tolling must be assessed from the viewpoint of the Assignors and not the Appellant. The dispositive question asks whether the Assignors were prevented from asserting their claims against the IRF within the two-year and three-year limitations periods, and clearly, the Appellant has not made that showing. There is no evidence that the Assignors were prevented for any reason from suing the IRF for breach of contract, negligence, or bad faith, and hence, equitable tolling has no application – that is, even if the Court finds that the issue was timely raised below and properly preserved for appeal.

[3] In applying the "two-issue" rule, the Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

II. The trial court correctly ruled that the Respondent has no duty to indemnify the Assignors because they are not "legally obligated to pay" damages to the Appellant.

The trial court also ruled that the Appellant's claims were non-justiciable because the Assignors are no longer personally liable for the judgments entered against them and on which the Appellant is seeking to recover from the IRF as an assignee. As discussed above, the record demonstrates that the Appellant received an assignment from the five correctional officers, and in return, entered into a Covenant Not to Execute extinguishing the personal liability of each of those parties.

As the trial court discusses, 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). As such, the Appellant is 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." *Smalls*, 239 S.E.2d 640 at 641.

The case of *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997), is also instructive. In *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997), this Court 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 this Court 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." *Id.*

The same is true in the present case. When the Appellant entered Covenants Not to

Execute and relieved the five Assignors of their personal liability to pay the judgments against them, that also relieved the IRF of any further liability under the Tort Liability Insurance Policy. Thus, as the trial court ruled, "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." (R. 5).

In her brief, the Appellant attempts to rely on the case of *Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (2010), which was never cited to nor argued in the trial court. Even though raised for the first time on appeal, *Fowler* is inapposite to the present case. In *Fowler*, an injured party obtained an assignment from the tortfeasor as part of the settlement *of the underlying litigation*. That assignment was not obtained to pursue a breach of contract or bad faith claim against the tortfeasor's insurer. Instead, the assignment allowed the injured party to pursue a professional negligence claim against the tortfeasor's insurance *agent* because the agent failed to procure the insurance that had been requested, which would have resulted in there being an additional $4 million in liability coverage for the accident. The Supreme Court, in fact, cited favorably to the case of *Campione v. Wilson*, 422 Mass. 185, 661 N.E.2d 658 (1996), which addressed the same fact pattern – an assignment allowing a professional negligence claim to be asserted against the insured's insurance broker for allegedly failing to procure adequate insurance.

There are also significant differences between the scenario in *Fowler* and what occurred in the case at bar. The Supreme Court in *Fowler* adopted this relaxed rule on the requirement of damages in a tort case precisely because South Carolina courts favor settlements. In *Fowler*, allowing the assignment of the claim against the insurance agent fostered the ability to settle complex litigation where the agent had refused to participate in a global settlement worked out

by the tortfeasor and several layers of insurers. In her brief, the Appellant argues that the assignments here were proper because they were "in keeping with the courts' preference for settlement." *See,* Appellant's Brief, p. 12. However, the assignments in this case – unlike in *Fowler* – did not facilitate any settlement. The underlying litigation was never settled. Ironically, that is the very point of the Appellant's case – that the IRF unreasonably failed to settle for policy limits. Thus, there is no settlement in this case brought about by the assignments. To the contrary, in this case, the assignments, if deemed proper, have actually generated more litigation, not less.

In short, the Assignors did not assign their claims against the IRF to settle any ongoing litigation; instead, they assigned their claims only to obtain a covenant that the Appellant will not execute on the judgment entered against them. Yet, under South Carolina law, namely the *Smalls* and *Cobb* cases, where the insured is not liable, the insurer cannot be held liable. That is frankly basic indemnity law. The indemnitor cannot be held liable where the indemnitee has no liability or where its liability has been extinguished. Thus, the trial court correctly granted summary judgment on this issue.

III. The trial court correctly ruled that the Appellant failed to identify any contractual duty of care that was breached by the Respondent.

As an additional basis for summary judgment on the Appellant's breach of contract cause of action, the 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. (R. 81-86). In responses to interrogatories, the Appellant 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). (R. 22-23). As the trial court ruled, 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." *See*, Amended Complaint, ¶ 65. (R. 110-111). There is no contractual language, however, in the Tort Liability Insurance Policy that creates such contractual duties.

On appeal, the Appellant obviously recognizes that Paragraph 65 does not create any contractual duties that correlate to the Tort Liability Insurance Policy. Instead of relying on what was actually pled and conceded in discovery responses, the Appellant now argues that the IRF breached the insuring agreement which requires the IRF 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 or B. Property Damage to which this applies caused by an occurrence." (R. 82). However, there is no evidence of such a breach. In fact, the Appellant 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. (R. 2, 141-142). Thus, the Appellant has not alleged nor shown any breach of the insuring agreement.

As the trial court correctly ruled, "the Plaintiff has not and cannot cite to any contractual language that the IRF has allegedly breached. To the extent that the Plaintiff, as the assignee, has a claim, that would be pursuant to duties sounding in tort." (R. 6). On this additional basis, the IRF was properly granted summary judgment on the breach of contract claim.

IV. The trial court correctly ruled that the Appellant failed to prove the elements of a "Tyger River" bad faith failure-to-settle claim.

The Appellant 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). To establish a bad faith claim under South Carolina law, the insured must plead and prove the following elements:

1. The existence of a mutually binding contract of insurance between the plaintiff and defendant;

2. A refusal by the insured to pay benefits due under the contract;

3. Resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; and

4. Causing damage to the insured.

Bartlett v. Nationwide Mut. Ins. Co., 290 S.C. 154, 348 S.E.2d 530 (Ct. App. 1986).

In this action, the Appellant 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 Appellant alleges that she made a settlement demand of $1 million which exceeded the policy limits. *See*, Amended Complaint, Ex. C. (R. 88). 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. (R. 99). That offer was made more than two months prior to trial. Based on this evidence attached to the Appellant's own pleadings, the trial court ruled as follows:

> 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.

(R. 7). That ruling should be affirmed.

On appeal, the Appellant makes the curious argument that the trial court "impose[d] an additional element on bad-faith plaintiffs: that the plaintiff make a demand within the insurance policy limits." *See*, Appellant's Brief, p. 15. In actuality, the trial court did not impose a new element; instead, it insisted on there being evidence of the element of causation. The Appellant concedes that the trial court's reasoning may have been tied to causation, which it clearly was. She then suggests that causation presents a jury question, which is not necessarily true. Where there is no evidence to support a finding of causation, summary judgment is certainly proper. *See e.g., Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010).

To the extent that the Appellant disputes whether causation is an element of a bad faith claim, the IRF points to the countless cases that describe the fourth element of a bad faith claim as "*causing* damage to the insured." *Howard v. State Farm Mut. Auto Ins. Co.*, 316 S.C. 445, 450 S.E.2d 582, 586 (1994). (Emphasis added). *See also, AOH Occupational Health, LLC v. State Farm Mut. Auto. Ins. Co.*, 2017 WL 4099686, *2, n.2 (D.S.C. 2017) ("Causation is undisputedly an element of plaintiffs' breach of contract and bad faith claims"). Additionally, it is well settled that "[t]he elements of a tort are (1) duty, (2) breach of that duty; (3) proximate

causation; and (4) injury." *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 316 S.E.2d 424, 426 (Ct. App. 1984).

In short, as the trial judge correctly observed, in the absence of evidence that the Appellant would have accepted the policy limits of $600,000 to settle the case, the Appellant cannot prove that the IRF's refusal to pay the policy limits proximately caused any damage. There is no evidence in the record that the Appellant, 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. (R. 88). There is no allegation or evidence of a lower demand made during the course of the year preceding the trial, and certainly no demand made within the policy limits. In effect, there is no evidence that the Appellant was willing at any point to settle the underlying case for the policy limits of $600,000 or less. To reiterate, when the $600,000 was offered two months before trial, it was rejected. *See*, Amended Complaint, Ex. F. (R. 99).[4]

[4] In that vain, the Appellant argues in a two short sentences without any citation of authority that "insurers have a duty to tender their policy limits in order to protect their insured from personal liability" and "[s]uch duty attaches regardless of what demand the claims have or have not made." *See*, Appellant's Brief, p. 16. That issue should be treated as abandoned because it is stated "in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). Clearly, the Appellant has not cited any law for that proposition, and there is no basis for arguing that an insurer must offer its policy limits even where no such demand was made and there is no indication that the plaintiff would even accept that amount. Nonetheless, that argument is meritless in this case anyways because the IRF did offer the limits of $600,000 two months before trial, and it was turned down by the Appellant.

Likewise, as the trial court also explained, 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 Appellant 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. The September 12, 2013 letter from Appellant's counsel to the IRF includes a demand for $3 million which far exceeds the policy limits. *See*, Amended Complaint, Ex. C. (R. 89). That is not a "Tyger River letter." In short, the Appellant has failed in presenting evidence of a Tyger River bad faith claim. At best, the Appellant has shown excess judgments were returned at trial, and that alone is not evidence of bad faith.[5]

[5] In a single paragraph consisting of three sentences and without any citations to the record or supporting authority, the Appellant makes the conclusory statement that she was unable to conduct meaningful discovery prior to summary judgment being granted. An issue is typically treated as abandoned where it is stated "in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). The Appellant has not provided a sufficient statement of her position to even allow the IRF to properly respond. Instead, the Appellant offers only a speculative statement as to what the evidence may show.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent South Carolina Insurance Reserve Fund respectfully requests that this Court affirm the order issued by Circuit Judge L. Casey Manning granting summary judgment to the Insurance Reserve Fund on all claims.

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent South Carolina Insurance Reserve Fund certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent South Carolina Insurance Reserve Fund certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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