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Jul 13 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
WALTON J. MCLEOD, CIRCUIT COURT JUDGE

Appellate Case No. 2019-000367

Desa Ballard and Desa Ballard P.A.,
d/b/a Ballard & Watson Appellants,

v.

Admiral Insurance Company and
Adele R. Pope, individually and as
Special Administrator of the Estate
Of Gloria Corley, Respondents,

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellants Desa Ballard and Desa Ballard P A d/b/a
Ballard & Watson hereby petitions the Court for rehearing of its Opinion filed June 28, 2023.

1. The Court of Appeals erred, as did the circuit court in its declaratory judgment, in construing one insurance policy,¹ when the facts demonstrate that Ballard put the carrier on notice

¹ Admiral always misunderstood that notice was given under two different policy years and that there were two policies to be construed. See ROA p. 135, ¶ 10 (referring to a single policy) and ROA p. 143 ¶ 69; ROA p. 144 ¶ 82). Admiral’s pleadings always referred to only one policy. See also ROA p. 145, ¶ 91; ROA p. 149, ¶ 114 (which states that “the” policy had “effective dates of July 1, 2013 to July 1, 2014.” But also see ROA p. 150, ¶ 117, which states that Ballard tendered the lawsuit for defense in 2017). Also see Admiral’s Motion for Judgment on the Pleadings, which asked for judgment as to only the insurance policy for the 2013-2014 policy year (ROA 213-224; p. 230), which is not when Admiral undertook the defense of the Pope lawsuit. ROA p. 208. Oddly, Admiral Exhibit A to its Motion for Judgment on the Pleadings included one page of the policy which went into effect for the policy year 2014-2015 (ROA 234). The Memorandum In Support by Admiral made clear it was seeking a declaration as to the policy for the policy year 2013-2014, which is not the policy under which the defense was provided to Ballard. ROA p. 237 and p. 239 (referencing the policy year 2013-2014). Admiral confused the situation further with its Memorandum in Support

twice, under two separate policies, and Respondent only attached one of those policies to the motion which it attached to its motion for judgment on the pleadings (which of course made it a motion for summary judgment). This issue was brought to the Court of Appeals' attention on page 1, footnote 1, of Appellant's initial brief and not addressed by the Court of Appeals' decision.² The complaint in this matter, which had to be accepted as true, alleged that Admiral was given notice under two different policies in effect in two different years. (ROA p. 101 , ¶ 42 and p. 102, ¶ 55,). The Court of Appeals had to accept the allegations as true, and Admiral only argued for judgment on the pleadings as to one insurance policy, which was not the one under which it provided a defense to Ballard.³

2. The Court of Appeals erred in adding language to the policy and then concluding that the policy was unambiguous as a matter of law. The trial court ruled that “the consent to settle clause at hand is unambiguous and must be enforced as written.” (ROA p.19) The policy provided by Admiral expressly stated that “[e]ach Insured shall cooperate with the Insurer in the defense and settlement of any Claim. . .” (ROA p. 222). However, the Court of Appeals stated, “Ballard owed a duty to cooperate in the defense and settlement of the claim and could not prevent Admiral from participating in settlement negotiations.” The underlined language is not in the policy and was added by the Court of Appeals *sua sponte*.
3. The Court of Appeals erred in misstating Ballard's position regarding Admiral's engagement in settlement discussions. “Ballard asserted the Policy gave her the right to

for Judgment on the Pleadings, when it argued that coverage was only provided under the 2013-2014 policy. (ROA p. 239-240).

² The Court of Appeals was aware there were multiple policies involved when it construed “the policy” because it discussed both the notice Ballard provided under the 2013—2014 policy as well as the notice provided under the 2015 policy.

³ Admiral also mis-stated facts in its memorandum, in that it stated as a fact that Ballard represented both Mrs. Corley and her daughter Mrs. Williams. (ROA p. 238).

prevent settlement negotiations if it appeared Pope would benefit from the settlement.” Ballard never made that argument. Ballard argued that her contractual right to prohibit any settlement prevented Admiral from “initiating” any settlement discussions.” (ROA p. 105, ¶ 67 and 70). Only by initiating settlement discussions could Admiral put Ballard in a position of having to agree or disagree to a settlement and being accused of failing to cooperate.

4. The Court of Appeals erred in concluding that the trial court’s consideration of the “hammer clause” was not premature and that the issue could be addressed by the trial court even though no settlement number had been offered to or agreed upon between the parties to the legal malpractice case. Admiral admitted in its answer that it “would have offered \$100,000.00” to settle Pope’s claim against Ballard, but made no allegation that the offer would have been accepted. The policy which Admiral tendered in its pleadings did not define “duty to cooperate” or “cooperate.” ROA p. 219. There was no prohibition whatsoever for Ballard to instruct Admiral not to “initiate” settlement discussions. Doing so allowed Admiral to force Ballard into a position of having to agree or not agree to a proposed settlement, which never occurred. There is a world of difference between “initiating” settlement discussions and refusing to approve a settlement agreement that has been agreed to. Since Ballard was never presented with an offer to accept or reject, the trial court’s consideration of the “hammer clause” was premature.

The Court of Appeals assumed facts not in the Record in issuing its opinion. The documents tell a different story. For the reasons set forth above, Ballard respectfully asserts that the Court of Appeals’ opinion is factually and legally erroneous and should be vacated.

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Respectfully submitted,

s/ Ronald L. Richter, Jr.
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ATTORNEYS FOR APPELLANT

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Adele R. Pope, individually and as
Special Administrator of the Estate
Of Gloria Corley, Respondents,

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on July 13, 2023, I served a copy of the **Petition for Rehearing** in the above-captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

**Wesley Sawyer, Esquire
Murphy & Grantland, PA
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**Adam T. Silvernail, Esquire
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Beth Cogan, Paralegal

July 13, 2023
West Columbia, South Carolina

Beth Cogan

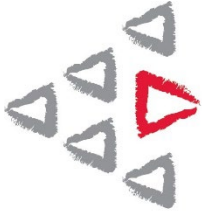
From: Beth Cogan
Sent: Thursday, July 13, 2023 11:27 AM
To: wsawyer@murphygrantland.com; adele@popelawfirm.com; adam@silvernaillawfirm.com
Cc: Ronnie Richter; scott@blandrichter.com; ericbland@blandrichter.com; TEAM
Subject: (Desa Ballard v. Admiral Insurance Company 2019-000367) Ltr to COA encl Petition for Rehearing
Attachments: 2023 07 13 Ltr to COA encl Petition for Rehearing.pdf; 2023 07 13 Petition for Rehearing.pdf; 2023 07 13 POS Petition for Rehearing.pdf

Good morning,

Please see the attached Petition for Rehearing for the above-referenced matter that is being filed today with the Court of Appeals.

Kindest Regards,
-Beth

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Via Email (ctappfilings@sccourts.org)
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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Re: *Desa Ballard PA v Admiral Insurance Company*
Appellate Case No: 2019-000367

Dear Ms. Kitchings:

Please find enclosed for filing a **Petition for Rehearing** in the above-referenced matter. Pursuant to paragraph (c) of the Supreme Court's administrative order dated May 6, 2022 ("Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules") a check for the filing fee is being forwarded separately via US mail. By copy of this letter and as evidenced by the Proof of Service, these filing has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

With warmest personal regards, I am,

Sincerely yours,

s/Desa Ballard

Desa Ballard
desab@desaballard.com

cc: Via Email
Wesley B. Sawyer, Esquire
Adam T. Silvernail, Esquire
Adele J. Pope, Esquire
Ronald L. Richter, Jr., Esquire
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