

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-000719

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

vs.

State Fiscal Accountability Authority, *et al.*..... Respondent.

**PETITIONER NANCY MORRIS' REPLY TO THE RETURN TO PETITION FOR
WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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RE-INTRODUCTION

The question before the trial court was what effect, if any, the Covenant had on the justiciability of Petitioner's action to enforce the rights provided under the Policy, and by extension statute. The law has traditionally made such a question factually specific, turning on the terms of the Covenant and Policy at issue. (Pet. Cert. pp. 5-18). However, the trial court purported to resolve this question without making any factual findings regarding the terms of the Covenant. In affirming, the Court of Appeals made summary conclusions about the effect and intent of the Covenant and Policy without considering the actual terms of these documents. To date, no court has properly evaluated the question or offered factual support (based on the terms of the relevant documents) that demonstrates the terms of the Covenant were intended to fully resolve and settle all the rights created by the Policy. The point of the underlying appeal was to assert the trial court's ruling could not stand in the absence of the trial court making factual findings to support it. The point of the instant petition is to assert that if an appellate court is going to venture to make its own findings to justify the trial court's ruling, those findings should be consistent with the actual terms of the documents rather than assumptions about their effect based on generalizations about indemnity that are not rooted in the evidence of *this* particular case.

SUMMARY OF ARGUMENT IN REPLY

Because there is no factual support for the conclusion that the Covenant defeated the justiciability of this case, Respondents resort to a misguided preservation argument. Respondents seemingly suggest that the explanation of the Court of Appeals' error, as set out in the Petition for Certiorari, are not preserved because these points were not raised in Petitioner's Appellate Brief. However, this overlooks that although the trial court and Court of Appeals might have reached similar conclusions, these two courts did not err for the same reason. Thus, the arguments offered

in regard the Court of Appeals' ruling are naturally different than those related to the trial courts' ruling. Consequently, these arguments could not have been made sooner.

In the simplest sense, the trial court's error lies in ruling on justiciability without considering the language of the Covenant and without offering any factual support for its conclusion. On the other hand, the Court of Appeals claimed to have based its ruling on the language of the Covenant, but it did so only by cherry-picking a select few words (taken out of context) that it claimed supported its reasoning. Moreover, where the trial court found that questions regarding interpretation of the Policy were moot, the Court of Appeals specifically rationalized its finding of mootness by suggesting its conclusion was consistent with the terms of the Policy.¹ Thus, where the trial court's error was in ruling on justiciability without providing a factual basis, the Court of Appeals error is that the "facts" on which it relied are inconsistent with the evidence—*i.e.*, the Court of Appeals' misinterpreted the Covenant and Policy. These are two different things, and the Petitioner could not have predicted the Court of Appeal's opinion (or the error of that opinion) before it was issued. Contrary to Respondents' implication, the rules of issue preservation do not require Petitioner to be clairvoyant.

Similarly, to the extent Respondents suggest the argument set out the Petition for Certiorari is not identical to the Petition for Rehearing this does not implicate preservation. The rationale and principles asserted are the same. While Petitioner may have elaborated on, refined, or reworded her arguments this does not render them unpreserved. Respondents offers no rule of preservation

¹ How the trial court could find the question of interpretation of the Policy to be moot, and the Court of Appeals subsequently offer its conclusions/interpretation of what the Policy provided (*i.e.*, the very thing the trial court found moot) as justification for affirming is an irreconcilable logical fallacy. This demonstrates that the trial court and Court of Appeals did different things.

that requires a verbatim regurgitation of prior arguments. If that were required a Petition for Certiorari would serve no purpose.

ARGUMENT IN REPLY

- I. **The rules of issue preservation do not require clairvoyance; therefore, Petitioner was not required to articulate the problems with the Court of Appeals' ruling before that ruling is issued.**

This appeal arises from cross-motions for summary judgment in which Respondents asserted the Covenant defeated the justiciability of Petitioner's claim. Petitioner opposed this argument asserting that there was nothing about the Covenant that operated as a release or defeated the justiciability of this case. (Appx. 416-18; 457-59; 527-28). In response, the trial court initially found in favor of Petitioner and issued an order *denying* Respondents' motion. (Appx. 5-15). In this initial order the trial court evaluated the language of the Covenant and held that "[Petitioner] did not release any claims against any parties in the [Covenant], but rather **reserved the right to pursue any and all claims.**" (Appx. 13) (emphasis added). However, in response to Respondents' Rule 59 Motion the trial court reversed course and issued an amended order finding the matter not justiciable. But curiously, the trial court never made any contrary factual findings in this amended order to support that conclusion. (Appx. 17-33).

The question on appeal was whether a trial court erred in finding the Covenant rendered this matter not justiciable when neither the trial court nor Respondents offered any factual support that the intended effect of the Covenant was to resolve the claims Petitioner made in this case. (Appx. 721-22). The trial court and Respondents were inconsistent in their characterization of this topic. Making references to standing, mootness, and "relief" from liability.² Meanwhile, at trial,

² The trial court and Respondents seemed to employ terms like mootness, standing, and relief as if synonymous. While not synonymous, the fact remains that each of these concepts is factually specific. *See* (Appx. 25-26) (the trial court stating: "[Respondents] argue that [Petitioner] has

in her Appellate Brief, at oral argument to the Court of Appeals, and now in her Petitioner for Cert, Respondent has reiterated this issue is most logically considered as one of waiver or release.³ It seems the Court of Appeals agreed this was a question about release. *See* (Appx. 877) (the Court of Appeals asserting that because “[Petitioner] **released** [the Officers] from all liability the [Respondents] were likewise no longer liable.”) (bold added).

However, and regardless of whether justiciability is considered in the context of mootness, release, or waiver, the bottom line is the same: justiciability is a factual question. And the problem with the trial court’s ruling was that it made no factual findings and offered no factual support for its conclusion that the Covenant rendered this case non-justiciable. This point was plainly argued on appeal to the Court of Appeals. Moreover, considering that the trial court made an initial ruling that explicitly rejected Respondents’ argument based on a finding that the terms of the Covenant “did not release any claims” (*supra*), the question of whether there is factual support for the trial court’s ultimate ruling on justiciability was plainly preserved. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)

relinquished her **standing**” and “[Respondents] argue [the Covenant] renders the current action **non-justiciable**,” referencing Appellants having “relieved” the Officers and Respondents of liability, and stating “issues of policy interpretation are now **moot**”).

³ *See* (Appx. 721-22) (arguing on appeal for reversal because, among other things, the trial court “failed to make any finding [to support] that [Appellant] waived, released, or otherwise ‘relinquished’ any claim against Respondents”); *accord* (Appx. 457) (arguing to the trial court that against the idea that the language of the Covenant “somehow now extinguishes them from liability” and explaining “that’s not the way it works. We have got an assignment where the [Officers] have signed all right to us, for us to pursue against the [Respondents].”); (Appx. 458) (arguing to the trial court that the claim was not “specifically release” and explaining “that is not what we have in this case. The [Covenant] that we have assigns all right that they have to collect everything they may be legally entitled to” from Respondents); (Appx. 527) (arguing against Petitioner’s Rule 59 Motion by pointing out the Covenants “are very specifically couched as covenants not to execute and not as releases.” And pointing out that “the only consideration that [Petitioner] received [in exchange for the Covenants] was essentially the right to go against the [Respondents].”).

(“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues.”); *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (providing that the rules of issue preservation require only the argument be made “sufficiently clear to bring [it] into focus . . . so that it can be reasonably understood by the judge.”).

Ultimately, the issue *should* turn on the specific language of the Covenant itself. But the trial court made no findings with regard to the language to support its ruling. Thus, the question to the Court of Appeals was whether this ruling could stand in the absence of any factual findings. Ostensibly, the Court of Appeals determined it could not because, unlike the trial court, the Court of Appeals did not wholly ignore the language of the Covenant. Instead, the Court of Appeals asserts that the terms of the Covenant support its conclusion of mootness—inherently an act of interpretation.

In its opinion, the Court of Appeals made the summary assertion that the trial court took judicial notice of the terms of the Covenant. (Appx. 878). Notwithstanding that the trial court never stated it took judicial notice of the terms of the Covenant (*see* Appx. 29-30), the Court of Appeals purports to examine the terms of the Covenant—something the trial court did not do in its amended order. *See* (Appx. 877-78). The problem is that in doing so the Court Appeals cherry-picked a few select words from the Covenant which it offers (out of context) to suggest that terms of the Covenant support the finding of mootness.⁴ Thus, the Court of Appeals purports to have done

⁴ The Court of Appeals only references the portion of the Covenant wherein Petitioner agrees not to pursue supplemental proceedings against the Officers but ignores the language of the Covenant that specifically contemplates Petitioner pursuing the balance of the judgment against the IRF and/or SFAA though either direct claims or assigned claims. (Pet. for Cert. p. 8); *see* (Appx. 876) (the Court of Appeals stating Petitioner covenanted “not to execute against any assets of the [Officers]” and “not to institute any further claims, lawsuits, bankruptcy proceedings or other causes of action against the [Officers] to enforce or collect the [District Court] judgment.”); *contra* (Appx. 829-30) (the plain language of the Covenant providing that Officers agreed to participate in actions “against the [SFAA], the [IRF] or any other insurance company. . . in order to collect

something the trial court never did—interpret this specific Covenant. However, it did so in a manner that is inconsistent with the language of the Covenant.

Moreover, the Court of Appeals then proceeds to rationalize its ruling by relying on the “important **factual** distinction” between this matter and *Cobb*. (Appx. 877) (emphasis added). According to the Court of Appeals, that important factual distinction is that *Cobb* dealt with “first party coverage for the complainant” where this case deals with first party coverage for the insured. *See* (Appx. 877) (pointing out “[T]his is an important factual distinction for this case because in *Cobb*, the UIM coverage acted as first party coverage for the complainant, not the insured.”). Unlike the Court of Appeals, the trial court’s amended order neither mentioned nor discussed *Cobb*. (Appx. 29-30). Naturally, the “factual distinction” relied upon by the Court of Appeals assumes the evidence (*i.e.*, the Policy) supports the conclusion that the Policy only creates a first party payment obligation directly to the Officers (*i.e.*, indemnity against loss rather than indemnity against liability).⁵

Thus, unlike the trial court’s ruling, the Court of Appeals’ ruling implicates questions concerning interpretation of the Policy. The problem, however, is that the Court’s basis for this “factual” distinction is not based on the actual facts. To the contrary, as Petitioner has articulated in both her Petition for Rehearing and Petition for Certiorari, the plain language of the Policy is exactly opposite of the Court of Appeals’ assumption that the Policy only creates a first-party payment obligation to the Officers. The Policy explicitly creates indemnity for loss and a third-

the excess judgment”); *and* (assigning “any claim the [Officers] may have against the [IRF]” and “other government organizations” . . . “that arise out of any insurance coverage.”)

⁵ As explained in both her Petition for Rehearing and now her Petitioner for Certiorari, this type of first party payment obligation is coined “indemnity against loss” as compared to indemnity against liability, the latter of which creates a third-party beneficiary right which can be easily confused with the traditional concept of indemnity. *See* (Pet. Cert. pp. 10-17)

party beneficiary right, obligating payment to the Petitioner without regard to the ability to collect against the Officers. *See* (Pet. Cert. 5-17); (Appx. 811-13). Therefore, when explaining the Court of Appeals’ error Petitioner expounded on the topics related to the interpretation (or misinterpretation) of the Covenant and Policy, including the distinction between indemnity against loss and indemnity against liability, the latter of which creates a third-party beneficiary right. *See* (Pet. Cert. pp. 7-17) (explaining the same). These topics were not discussed in Petitioner’s Appellant’s Brief for the simple reason that time flows in only one direction. Appellant could not explain the errors in the Court of Appeals’ opinion before that opinion was issued.

At bottom, the trial courts’ error was in failing to make any factual findings to support its ruling on justiciability. Perhaps recognizing this error, the Court of Appeals’ opinion at least claims to rely on facts. However, the Court of Appeals’ error is that the “facts” on which it relies are inconsistent with the evidence—specifically the terms of the Covenant and Policy. *See* (Pet. for Cert. pp. 5-18) (explaining in detail these inconsistencies and misinterpretations). The *consequences* of this error are that it eliminates the distinction between indemnity for *loss* and indemnity for *liability*, a point that is synonymous with confusing indemnity with third-party beneficiary rights, as well as various other consequences that adversely affect public policy. *See (id.)*. To the extent that these topics were not raised in Petitioner’s Appellate Brief it was because the error committed by the trial court was different than the error committed by the Court of Appeals, and Appellant could not have anticipated that. The rules of issue preservation do not require Petitioner to predict and articulate the problems with the Court of Appeals’ ruling before that ruling was made. *Accord generally, State v. Tapp*, 398 S.C. 376, 386, 728 S.E.2d 468, 473 (2012) (holding that South Carolina’s preservation rules “certainly do not require clairvoyance”).

Therefore, Respondents' claims of issue preservation miss the mark, and this Court should grant the requested Writ of Certiorari and ultimately reverse the Court of Appeals and Order this matter be reversed or remanded so that the Covenant and Policy can be fully and properly interpreted in a manner supported by the evidence.

In closing, Petitioner returns to core of this matter. Because the trial court failed to make any finding to support the conclusion that the Covenant resolved this case the trial court's order should have been reversed, but it was not. Further, to the extent the Court of Appeals purports to rescue the trial court's ruling the Court of Appeals' ruling must be reversed because its interpretation of the Covenant as releasing Respondents from their liability to pay is consistent with the plain language of the Covenant. The remaining arguments are secondary, serving as further explanation of the problems that flow from the Court of Appeals' failure to give effect to the plain language of the Covenant.

CONCLUSION

For these reasons, this Court should grant the instant request for Writ of Certiorari to the Court of Appeals.

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