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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walter J. McLeod, Circuit Court Judge

Published Opinion No. 5994 (S.C. Ct. App. filed June 28, 2023)

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

v.

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

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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PETITION FOR
WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioners Desa Ballard and Desa Ballard P A d/b/a Ballard & Watson hereby petition the Court for a writ of certiorari to the Court of Appeals to rehear and reconsider issues ruled upon in the Court of Appeals' decision in this matter, issued on June 28, 2023, which affirmed the trial court dismissal of Petitioners claims against Respondent Admiral

Insurance Company (hereafter "Admiral"). Petitioner sought rehearing before the Court of Appeals, which was denied by order dated February 21, 2024.

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing by the Court of Appeals was made and finally ruled on by the Court of Appeals on February 21, 2024.

QUESTIONS PRESENTED

1. Under South Carolina law, may a professional liability policy carrier pursue and later cram down a settlement that the insured opposes on grounds, either reasonable or unreasonable, when the policy at issue expressly included a "consent of the insured" provision, for which the insured paid an additional premium during the life of the policy?

2. Did the Court of Appeals err in its declaratory judgment in construing one insurance policy?

3. Did the Court of Appeals err in adding language to the policy and then concluding that the policy was unambiguous as a matter of law?

4. Did the Court of Appeals err in misstating Petitioner's position regarding Admiral's engagement in settlement discussions?

5. Did the Court of Appeals err 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?

STATEMENT OF THE CASE

Petitioner (hereafter "Ballard") filed the underlying action after her professional liability carrier, Respondent Admiral Insurance Company (hereafter "Admiral"), because Admiral refused to honor its contractual obligations to Petitioner by engaging in settlement discussions and making settlement offers on a claim asserted by a third-party (Respondent Adele Pope, hereafter "Ms. Pope") over Ballard's objection. Admiral moved for judgment on the pleadings, asserting that it had the absolute right to "cram-down" a settlement whether Ballard liked it or not, despite the express language contained in the policy giving Ballard the right to refuse to consent to settlement. Respondent Admiral contended that because of the insured's obligation to cooperate per the insurance policy, it could invoke a "hammer clause" to force settlement it chose without violating its contractual obligations to Petitioner. The trial judge granted Admiral's motion for judgment on the pleadings.

Ballard thereafter appealed the dismissal to the Court of Appeals, which affirmed the lower court order by opinion dated June 28, 2023. Ballard petitioned for rehearing, which was denied . This petition for Writ of Certiorari timely follows that denial.

FACTUAL BACKGROUND

Respondent Adele Pope has been making money and trying to make more money off her former client Gloria Corley since Ms. Pope represented Ms. Corley twenty-five years ago in 1998, when Gloria Corley hired Ms. Pope for assistance in probate matters related to Ms. Corley's husband's death. Ms. Pope represented Ms. Corley hourly for a short time. Ms. Corley terminated Ms. Pope because Ms. Pope's fees were too high. Ms. Corley's son, a lawyer Hoyt Rowell, was

pressured to encourage his mother to re-engage Ms. Pope. When Ms. Pope was reengaged, the fee agreement was a contingency agreement. (R. pp. 30-36; R. p. 52).

Ms. Pope represented Mrs. Corley for a period of about another six months, until an Agreement Among Successors was executed on January 13, 1999. (R. p. 40). The outcome of that agreement was an annual payment to Mrs. Corley from the M. L. Corley Trust for the balance of Mrs. Corley's life. The trust had already provided for a payment of $7,500 per month to Mrs. Corley BEFORE Ms. Pope got involved, but the agreement resulted in the addition of an annual $25,000 payment. Ms. Pope thereafter received one-third of the payments received by Ms. Corley. (R. p. 98; R. pp. 172-173). Ms. Pope received that fee share for approximately ten years until the attorney-in-fact for Ms. Corley, Andra/Angie Williams, concluded that Mrs. Pope had been fully compensated. Ms. Pope filed suit against Mrs. Corley for breach of contract after the fee was not paid for the 2010 payment. Petitioner was retained to defend that action.

Petitioner, as counsel for Mrs. Corley, coordinated with counsel for the M. L. Corley Trust and the then-trustee to liquidate Mrs. Corley's interest in the trust via lump-sum payment, calculated based only on the monthly payments the trust had originally left to Mrs. Corley and rejecting any calculation or payment based on the separate annual $25,000 that Ms. Pope had negotiated. The theory is that Mrs. Corley did not receive any funds thereafter as a result of Ms. Pope's representation and therefore nothing against which Ms. Pope could assert a lien.

The agreement was entered into and approved by the probate court. Ms. Pope later sued the parties involved for not providing notice to Ms. Pope that Mrs. Corley was rejecting the annual settlement payment going forward. Ms. Pope obtained a judgment and has received more than one

million dollars in damages to herself personally.[1] Appeal of that order was not timely made, and notice of that fact made to Admiral by Petitioner.

Petitioners sued Admiral Insurance when it attempted to engage in settlement discussions with Ms. Pope (in her capacity as special administrator of the Corley estate) and then proceeded with those discussions over Petitioners' objection. Admiral moved to dismiss, arguing the "consent of the insured" clause meant nothing, and the circuit court granted the motion to dismiss. That dismissal was in error for several reasons set forth in Petitioners' complaint and briefs to the Court of Appeals. Those errors were magnified because the case was disposed of based solely on the complaint and a copy of <u>one</u> of the two insurance policies involved,[2] before discovery had taken place. Admiral did not even care to know why Petitioners were objecting to settlement discussions. Perhaps they will realize, reading this, that Ms. Pope has pulled off a financial windfall of more than a million dollars for her six months of legal work almost three decades ago, and is going after more.[3]

BASIS FOR WRIT

South Carolina has not addressed the provisions of a professional liability policy that includes a separately purchased and paid-for provision that reserves to the insured the right to

[1] Order granting Judgment Against Andra Williams, Estate of Samuel Corley and M. L. Corley Trust dated July 15, 2016, Case No. 2011-CP-32-1109 (of record, Lexington County). The judgment was satisfied as to the Estate of Samuel Corley and the M. L. Corley Trust, meaning Andra/Angie Williams still has a judgment against her in favor of Ms. Pope. Satisfaction of Judgment dated August 23, 2017 (of record, Lexington County).

[2] The inclusion of the copy of one of the policies in question should have converted the issue to one for summary judgment. Rule 12(b), SCRCP.

[3] Petitioners defended Ms. Pope's lawsuit against Mrs. Corley based on several different theories, one being that Ms. Pope's fees were unreasonable as a matter of law. When that motion was denied, the trust interest was liquidated so Ms. Corley could receive the benefits her late husband intended. Because Mrs. Corley did not live as long as the life expectancy tables used to calculate that liquidation predicted, the lump-sum received by Mrs. Corley was more than she would have received had she <u>not</u> liquidated her interest in the trust with the assistance of Petitioners.

reject a settlement. When the trial judge granted the motion to dismiss filed by Admiral (that attached one of the two policies in question), he cited to no South Carolina authority. This petition presents a novel question: Does the insured's duty to cooperate negate the carrier's bought-and-paid-for agreement to give the insured right to prevent a settlement from being made over her objection?

The Court of Appeals' opinion, gives no clue that it is dealing with a novel issue of law and cites to law from Massachusetts for the definition Admiral Insurance uses for the "hammer clause." That clause does not exist as a recognized clause under South Carolina case law, yet Admiral was not embarrassed to invoke the clause as if it were settled law in South Carolina.

Cases cited by Petitioners in the briefs to the decisions from jurisdictions have held that, in determining the application of the policy, the insured's reasons for refusing to permit settlement must be considered. Cases cited by Petitioner before the Court of Appeals require an examination of whether the insured's position was reasonable. On information and belief, there is some form of agreement reached between Ms. Pope and Ms. Corley's attorney-in-fact regarding the split of proceeds of the legal malpractice case if it is allowed to move forward. Petitioner's revulsion at the scheme by Ms. Pope that continues to enrich her in various ways for six months of legal work that ended in 1998, and other objectively reasonable justifications based on the legal and factual issues involved in the underlying circumstances and litigation, is a factor that is relevant in consideration of Petitioners' refusal to allow a settlement with Ms. Pope to be considered by its carrier.

Admiral, the trial court, and the Court of Appeals think the insured's reasons and the bais therefore do not matter, she can be kicked to the curb regardless of the injustice being pursued by

the legal malpractice plaintiff, and regardless of whether the insured paid extra premiums to secure a "right to consent" to herself. However, as pointed out on appeal, notice was provided to Admiral on two occasions. Their motion to dismiss/judgment on the pleadings contained only one policy. Maybe Admiral still doesn't know what the second policy says.

Rule 242(b)(1) sets forth guidelines for this Court to consider when deciding whether to grant a writ. Subsection (1) specifically identifies "novel questions of law" as among the categories of cases that are suitable for the extraordinary relief of a discretionary review by this Court.

The specific issues below were brought to the Court of Appeals' attention on rehearing and denied without comment. However, Petitioners believe it is important for this Court to realize, when deciding whether to grant the writ, is that the person seeking to obtain a judgment in the underlying case, and to which Petitioners are objecting, is the same Adele Pope this Court has threatened several times regarding her multiple over-reaching and outrageous attempts to enrich herself for a brief period in which she was appointed co-personal representative of the late singer James Brown. *Ex Parte Adele Pope, In re Estate of James Brown*, S.C.Sup.Ct. Order dated June 10, 2015 (addressing multiple related appellate cases).

ARGUMENT

1. The Court of Appeals erred, as did the circuit court in its declaratory judgment, in construing one insurance policy,[4] when the facts demonstrate that Petitioners put the

[4] Admiral always misunderstood, or ignored, that notice was given under two different policy years and that there were two policies to be construed. *See* R. p. 135, ¶ 10 (referring to a single policy) and R. p. 143 ¶ 69; R. p. 144 ¶ 82). Admiral's pleadings always referred to only one policy. *See also* R. p. 145, ¶ 91; R. p. 149, ¶ 114 ("the" policy had "effective dates of July 1, 2013 to July 1, 2014." But *also see* R. p. 150, ¶ 117, "Petitioners tendered the lawsuit for defense in 2017"). *Also see* Admiral's Motion for Judgment on the Pleadings, that asked for judgment as to only the insurance policy for the 2013-2014 policy year (R. pp. 213-224; p. 230), this is not when Admiral undertook the defense of the Pope lawsuit. R. p. 208. Oddly, Admiral's Exhibit A to its Motion for Judgment on the Pleadings

carrier on notice twice, under two separate policies, and Admiral only attached one of those policies to its motion for judgment on the pleadings (of course this 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 to the Court of Appeals and was not addressed by the Court of Appeals' decision or its denial of rehearing.[5] The complaint for declaratory judgment in this matter, had to be accepted as true and did not include copies of either of the insurance policies to prevent a pre-emptive strike such as the one accomplished by Admiral, alleged that Admiral was given notice under two different policies in effect in two different years. (R. 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 Petitioners.[6]

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." (R. p.19). The policy provided by Admiral expressly stated that "[e]ach Insured shall cooperate with the Insurer jn the defense and settlement of any Claim. . ." (R. p. 222). However, the

included one page of the policy that went into effect for the policy year 2014-2015 (R. p. 234). The Memorandum In Support by Admiral also made clear it was seeking a declaration as to the policy for the policy year 2013-2014, and is not the policy under which the defense was provided to Petitioners. (R. p. 237; p. 239 (referencing the policy year 2013-2014)). Admiral confused the situation further with its Memorandum in Support for Judgment on the Pleadings, when it argued that coverage was only provided under the 2013-2014 policy. (R. p. 239-240).

[5] The Court of Appeals was aware there were multiple policies involved when it construed "the policy" because it discussed both the notice Petitioners provided under the 2013—2014 policy as well as the notice provided under the 2015 policy.

[6] Admiral also misstated facts in its memorandum, in that it stated as a fact that Petitioners represented both Mrs. Corley and her daughter Andra/Angie Williams. (R. p. 238).

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*. Additionally, as pointed out above, only one of the applicable policies was attached to Admiral's Motion to Dismiss, and Petitioners had given notice to Admiral under two *different* applicable policies.

3. The Court of Appeals erred in misstating Petitioners' position regarding Admiral's engagement in settlement discussions. "Ballard asserted the Policy gave her the right to prevent settlement negotiations if it appeared Pope would benefit from the settlement." Ballard never made that argument. Petitioners argued their contractual right prohibited Admiral from "initiating" any settlement discussions." (R. 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 thereafter accuse her of failing to cooperate. That is exactly what happened. Admiral stated it intended to "engage in pre-suit mediation" and Petitioners objected.

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 Admiral tendered in its pleadings did not define "duty to cooperate" or "cooperate." (R. p. 219). There was no prohibition whatsoever for Ballard to instruct Admiral not to "initiate" settlement discussions. By

doing so, Admiral was able to force Ballard into a position where she had to either agree or not agree to a proposed settlement, which ultimately 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.

5. The decision of the Court of Appeals involved a novel question, *i.e.,* what is the effect of a separately purchased and paid for provision in a professional liability policy that preserves to the insured the right to approve any settlement on the standard "duty to cooperate" when the liability carrier retains counsel to defend and provides a defense to the insured in a legal malpractice action. In addition, what effect, if any, does the insured's position have on why she refused permission to the insurer to settle; does it matter that the case going forward would further enrich a lawyer who has abused the judicial system not just in this case but in others as well? These questions have not been answered in any South Carolina precedent.

CONCLUSION

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, Petitioners respectfully asserts that the Court of Appeals' opinion is factually and legally erroneous and seeks an order vacating the Court of Appeals' opinion and the circuit court's order and remanding the matter to circuit court.

[signature page follows]

Respectfully submitted,

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