THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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.

FINAL BRIEF OF APPELLANTS

BLAND RICHTER, LLP
Ronald L. Richter, Jr. (SC Bar No. 66377)
Scott M. Mongillo (SC Bar No. 16574)
Peoples Building
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
843.573.9900 (telephone)
843.573.0200 (facsimile)
ronnie@blandrichter.com
scott@blandricter.com

Eric S. Bland (SC Bar No. 64132
1500 Calhoun Street
Post Office Box 72
Columbia, South Carolina 29202
803.256.9664 (telephone)
803.256.3056 (facsimile)
ericbland@blandrichter.com

ATTORNEYS FOR APPELLANTS

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STATEMENT OF THE CASE

Appellants Ballard (hereafter "Ballard") filed this action after her professional liability carrier Respondent Admiral (hereafter "Admiral") refused to honor its contractual obligations to Ballard. Admiral advised they intended to initiate settlement discussions and make a settlement offer on a potential civil claim being asserted (but not yet filed) by a third party against Ballard for purposes of attempting to resolve the claim, over Ballard's objection. Ballard was insured under a professional liability policy that expressly included her right to object to settlement by the insurer without her consent. Ballard's carrier advised Ballard it would withdraw coverage and leave her to defend the action on her own if she did not consent to allow them to initiate discussions and settle with third party claimant (hereafter "Mrs. Pope"). (ROA p. 104).

Mrs. Pope filed suit against Ballard on February 23, 2017. (ROA p. 97). While Admiral retained counsel to defend, Admiral continued to violate their duties to Ballard by pursuing settlement discussions with Mrs. Pope, over Ballard's objections. Ballard responded by filing the instant action. (ROA pp. 93-112).

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 in the policy giving Ballard the right to refuse to consent to settlement. Respondent carrier postured that, since Ballard had an obligation to cooperate per the insurance policy, it could invoke what it calls

a "hammer" clause to force whatever settlement it chose to make with Mrs. Pope without violating its contractual obligations to Ballard. The trial judge granted the Respondent carrier's motion. This appeal followed.

STANDARD OF REVIEW

On appeal from an order granting judgment on the pleadings, the appellate court applies the same standard of review applied by the circuit court. *Hambrick v. GMAC Mortgage Company*, 370 S.C. 118, 634 S.E.2d 35 (Ct. App. 2006). The trial court's order includes a section entitled "standard of review" which does not address whether the court's decision was one of law or whether the court's decision was based on the facts, as admitted, in the pleadings. (ROA pp. 11-12). However, the circuit court incorporated the provisions of the professional liability policy into its consideration[1] in granting judgment on the pleadings. (ROA p. 16). For that reason, and also because Admiral attached a copy of a policy to its Motion for Judgment on the Pleadings, Ballard asserts that the proper scope of review is the equivalent of the scope of review on grant of summary judgment. For that reason, the appellate court reviews the trial court's order by construing all evidence and facts in favor of the non-moving party. *Waters v. Southern Farm Bureau Life Ins.*, 365 S.C. 519, 687 S.E.2d 385 (Ct. App. 2005). "Even if there is no dispute as to evidentiary facts, but only as to the conclusions to be drawn from them, summary judgment is improper." *Id.*

[1] The trial court found, erroneously that the actual policy in question was attached to the Answer filed by Admiral that was filed in this case while it was still pending in federal court, before it was remanded to state court for improper removal. *Ballard v. Admiral*, Case No. 3:17-cv-01916-FJA-SVH (ECF 1-3). That is error. The federal court docket makes clear that a policy was attached as an exhibit to the Motion, not to the Answer filed by Admiral. (ECF 1-3). Admiral skirted this issue by attaching a copy of the policy in question to its Motion for Judgment on the Pleadings, (electronic docket filing 5-31-2018 @ 8:37 am), which effectively converted this motion into one for summary judgment. (ROA p. 12).

STATEMENT OF FACTS[2]

Ballard brought this action for declaratory, injunctive and related relief against her professional liability insurance carrier, Admiral, regarding the respective rights and obligations of the parties under that specific policy of professional liability covered issued to Ballard on July 12, 2014, Policy No. 91200935 (hereafter "**the Admiral policy**") (ROA p. 95).

Admiral renewed Ballard's policy each year until the policy year 2017-2018, when Admiral refused to renew, claiming Ballard had breached the terms and conditions of the policy by refusing it to engage in settlement discussions with Adele Pope (hereafter "Mrs. Pope"), a third party who had asserted a claim against Ballard under the 2014 policy. Mrs. Pope was ostensibly asserting a claim on behalf of the Estate of Gloria Corley, a former client of Ballard's who had previously been represented by Mrs. Pope. Mrs. Pope managed to get herself appointed special administrator of Mrs. Corley's estate so she could pursue collection of the debt owed to Mrs. Pope personally (the estate owned no other debts). (ROA pp. 97-105).

Mrs. Pope, in her individual capacity, had earlier filed suit against Mrs. Corley to collect attorney fees that Mrs. Pope asserted were due to her by Mrs. Corley for legal services rendered by Mrs. Pope a decade earlier (hereafter "**Mrs. Pope's claim for attorney fees**"). (ROA p. 98). This suit was brought even though Mrs. Pope had collected substantial attorney's fees during the representation in the 1990's and collected approximately $18,333.33 each year from 1999 through 2010 upon receipt by Mrs. Corley of each annual distribution from the Corley Trust.

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[2] Because this matter is decided on a motion for judgment on the pleadings, the facts alleged in the complaint are assumed to be true. *Home Builders Association of South Carolina v. School District No. 2 of Dorchester County*, 405 S.C. 458, 748 S.E.2d 230 (2013).

Ballard defended Mrs. Corley in Mrs. Pope's claim for attorney fees and costs sought, and asserted, among other defenses, that the fee agreement between Mrs. Pope and Mrs. Corley was void as against public policy. Ballard asserted that Mrs. Pope was attempting to charge an unreasonable fee to Mrs. Pope and to take advantage of Mrs. Corley who was elderly and in frail health. While defending Mrs. Pope's claim, Plaintiffs also represented Mrs. Corley in negotiating a buy-out of Mrs. Corley's interests in a trust established by her late husband, Martin L. Corley (hereafter "**the trust settlement**"). Mrs. Pope was not a party to the trust settlement and had no interest in it (she attempted to claim an interest because she had taken the extraordinary step in the 1999 settlement of making herself the "irrevocable design[ee]" to receive the annual payments to Mrs. Corley, so that Mrs. Pope could deduct her attorney's fees before disbursing the net proceeds to Mrs. Corley. In essence, Mrs. Pope had included language in the 1999 settlement that prohibited Mrs. Corley from terminating Mrs. Pope's services at any time during Mrs. Corley's lifetime. However, since the trust settlement did not include any funds generated by Mrs. Pope's legal services, her "irrevocable designee" status was not relevant.

The trust settlement Ballard negotiated for Mrs. Corley with the M. L. Corley trust was approved by the Lexington County probate court. (ROA p. 98). The payment excluded any of the annual payments to which Mrs. Pope had made herself the irrevocable beneficiary, so there would be no portion of the lump sum buyout to which Mrs. Pope could seek to recover attorney's fees. Mrs. Pope had been paid more than enough for her brief work for Mrs. Corley.

Despite Ballard's efforts, Mrs. Pope sought a judgment against Mrs. Corley for a percentage of the lump-sum buyout paid to Mrs. Corley under the theory that Mrs. Pope's interest in the payments to Mrs. Corley were irrevocable (and despite the unreasonableness of the fee

claimed by Mrs. Pope). Mrs. Pope claimed she was entitled to a percentage of anything Mrs. Corley received, regardless of whether the funds had been received as a result of any legal services Mrs. Pope had provided to Mrs. Corley, and a circuit court agreed. (ROA p. 100) Ballard filed an appeal of that judgment to the Court of Appeals, but the appeal was untimely, and the appeal was dismissed. Ballard notified Admiral of the potential claim. (ROA p. 101)

Unbeknownst to anyone, Mrs. Corley's daughter, Andra Williams, apparently stole the majority of Mrs. Corley's trust settlement obtained by Ballard, and Mrs. Pope's judgment against Mrs. Corley remained unpaid at the time of Mrs. Corley's death. Mrs. Pope applied to be special administrator of the Estate of Mrs. Corley so she could ensure the debt to herself personally was paid. She also threatened, then filed, suit against Ballard alleging legal malpractice with resulting damages to Mrs. Corley. Mrs. Pope individually was the only creditor of the estate, by virtue of her undeserved windfall judgment arising from the Corley trust settlement.

Ballard demanded a defense from Admiral, which indicated it intended to engage in pre-suit mediation with Mrs. Pope. Ballard objected as she had a right to do under the policy[3]. Nonetheless, Admiral continued its efforts and it is believed it engaged in settlement discussions in direct contravention of its duties to Ballard. Subsequently, Mrs. Pope filed suit against Ballard. Admiral threatened Ballard that, if it reached a settlement number that Mrs. Pope would agree to

[3] Admiral wished to initiate settlement discussions with Mrs. Pope, to try to reach a number which Mrs. Pope would agree upon, and which Admiral was willing to pay. Admiral's intent was to place Ballard in a position of having to consent or refuse to consent to a settlement figure (ROA pp. 104-105) No settlement figure was ever proposed to Ballard, so Ballard has not rejected any settlement proposal. Admiral said it would withdraw its defense if Ballard did not consent to some possible-future-settlement-offer. Of course, initiating settlement discussions to try to reach an agreed-upon-in-the-future-number would allow Admiral to put Ballard in that untenable position.

accept and Ballard refused to permit the settlement, Admiral would withdraw its defense of Ballard which it was obligated to provide under its policy(ies)[4].

Ballard put Admiral on notice of two claims: the missed appeal in 2014 and the claim by Mrs. Pope in 2017 as special administrator of Mrs. Corley's estate. Ballard instructed that no settlement discussions were to be had with Mrs. Pope, and that she intended to defend the claims asserted by Mrs. Pope. Ballard also brought a third-party action against Mrs. Corley's daughter Andra Williams for the theft of the funds Ballard had obtained and entrusted to Ms. Williams who was Mrs. Corley's attorney-in-fact. Ballard asserted that any damages sustained by Mrs. Corley were the result of the theft by Ms. Williams, and any negligence by Ballard was superseded by Ms. Williams' theft of funds from her mother.

Ballard filed this lawsuit, seeking a declaratory judgment that Admiral owed an obligation to defend Ballard in the suit brought by Mrs. Pope and not to seek or enter into a settlement with Mrs. Pope. Admiral moved for judgment on the pleadings, claiming that its "hammer clause" was enforceable as a matter of law, and that the facts didn't matter. In other words, Admiral claimed that Ballard's right under the policy to refuse to consent to settlement was meaningless. The circuit court agreed.

[4] While the first notice of possible claim, related to the missed appeal, was made in 2014, the second notice of claim by Mrs. Corley's estate was made in 2017, Admiral never designated which policy it claimed was applicable to its rights. It has been presumed throughout that the 2014 policy is the applicable policy, although Admiral has never so stated.

ISSUE

CONSIDERATION OF THE "HAMMER CLAUSE" IS PREMATURE AND THE RECORD REFLECTS NO FACTS UPON WHICH A COURT COULD DETERMINE WHETHER BALLARD'S REFUSAL TO PERMIT SETTLEMENT WAS REASONABLE.

A. Consideration of the "hammer" clause is premature.

The following language is quoted from the order on appeal, which quoted what the court believed to be the relevant portions of the insurance policy which is the subject of this action. (ROA p. 16).

> **VI. Defense, Cooperation and Settlement**
>
> ***
>
> B. The **Insurer** shall have the sole right and the duty to defend any covered **Claim...**
>
> C. . . . Each **Insured** shall cooperate with the **Insurer** in the defense and settlement of any **Claim**. . . Upon request of the **Insurer,** the **Insured** shall . . . assist in effecting settlement. . .
>
> D. The **Insurer** shall not settle any **Claims** without the **Named Insured's** consent. . .

As Ballard pointed out in opposing the motion, an insurance policy that is ambiguous must be interpreted in favor of the insured. *Reynolds v. Wabash Life Ins. Co.*, 251 S.C. 165, 161 S.E.2d 168 (1968).

Section VI (A) gives the Admiral the "sole right and obligation to defend." Section VI(C) prohibits Admiral from settling any claim without the consent of Ballard. Section VI(B), which obligated Ballard to "assist in effecting settlement" has not occurred and may

never occur. Admiral is defending. Ballard has not been presented with a settlement offer which Admiral wishes to make. As postured by Admiral in its motion for judgment on the pleadings, paragraphs VI(A) and VI (C) would seem to conflict. Paragraph VI(B) is an attempt to bridge the conflicting obligations of the Insurer and its Insured, but does not thing to eliminate the ambiguity.

This lawsuit does not seek to prevent a settlement from occurring. Instead, it seeks to prevent Admiral "pursu[ing] a settlement" or "seek[ing] to settle" the claim so as to put Ballard in a position of having to invoke the "consent" provision of the policy. That has not happened yet. The "hammer clause" is not before the court.

Admiral did not allege nor assert in its pleadings that Ballard failed to cooperate in the handling of the claim. The gist of its argument, as accepted by the trial judge, that Ballard's refusal to allow initiation of settlement discussions by Admiral constituted a "failure to cooperate" as a matter of law, thus rendering the "consent" term of the policy a nullity. However, no settlement has been offered, nor purportedly accepted, by Admiral. Admiral was attempting to come up with a number that it could try to force on Ballard. Doing so clearly was adverse to Ballard, and put her in the position of having to decide on her position on the "consent" provision of the policy.

The "hammer" clause has not yet been triggered. Only when and if Admiral and Mrs. Pope agree to a settlement number would the "hammer clause" be triggered. That might not ever happen. It certainly hasn't happened yet. But Admiral was attempting to place Ballard in a position of having to evaluate her rights by attempting to initiate and come up with a settlement figure that it was willing to pay, and Mrs. Pope was willing to accept. In other words, Admiral was breaching its obligation by initiating settlement

discussions in order to place Ballard in an adverse position by having to accept or reject a settlement number that might have been agreed on.

The only provision of the policy raised by this litigation is Ballard's right to refuse settlement. Cases that have construed this type of provision in a professional liability insurance policy have stated that, in determining the applicability of the "consent" provision, the fact finder must determine whether the insured's reasons for refusing settlement are reasonable. *Clauson v. New England Insurance Co.*, 254 F.3d 331 (1st Cir. 2001). Specifically, the "hammer clause" is applicable only when the insured "unreasonably" refuses to consent to a settlement. *Id.* The rule is not limited to professional liability insurance policies for legal services; the rule is the same in other liability policies. *Security Insurance Company of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377 (7th Cir. 1995). *See also Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864 (9th Cir. 1979).

Therefore, the Court's application and construction of the "hammer" clause is premature, because no settlement proposal had been made which Ballard had rejected. The only provision of the policy placed in issue by this litigation is the "consent" provision. Ballard sought to prevent Admiral from initiating settlement discussions, because doing so would place Admiral in a conflict with Ballard herself if a settlement number was reached between Admiral and Mrs. Pope.

B. **There is no evidence of Ballard's reasoning to enable the court to consider whether her consent is unreasonable.**

The Court made no inquiry, nor did Admiral offer any facts, as to the reasons Ballard opposed settlement discussions or settlement with Mrs. Pope. Since the matter was

decided as a matter of law, there was no factual basis upon which the Court could conclude that Ballard's rationale for refusing to permit settlement discussions was unreasonable. Even if there had been, that determination would likely be a factual one to be made by the factfinder and not an issue to be decided as a matter of law. *Bishop v. Benson*, 297 S.C. 14, 374 S.E.2d 517 (1988).

Additionally, as discussed above, no settlement offer had been made which Ballard could refuse. Any analysis as to the reasonableness of Ballard's position could not be determined unless or until a settlement proposal was made and Ballard had rejected it.

There are <u>two</u> issues tied ever-so-slightly together and they were buried by the Court's consideration of a hammer clause that is not relevant to the issues before the Court. Admiral violates it contractual obligations to Ballard by initiating settlement discussions for the purpose of placing her in a position of having to either accept a settlement proposal or forfeit her right to a defense under the policy. Ballard is Admiral's insured. It cannot take actions which are detrimental to her. There may be an occasion in the future in which the hammer clause comes into effect in the dispute between Ballard and Admiral, but it certainly has not happened yet. Consideration of the hammer clause is not appropriate at this point. The only issue is whether Admiral may begin the process of throwing Ballard under the bus by initiating settlement discussions in order to put Ballard in a position of having to weigh her options under the "consent" provision of the policy.

CONCLUSION

For the reasons stated, the Court erred in considering and ruling upon the application of the "hammer clause" when that issue is not ripe for determination. Additionally, even if consideration of the "hammer clause" could be made at this point, the

record reflects no facts upon which any court can determine whether Ballard's reasons for invoking the "consent" provision of her policy with Admiral were reasonable. Therefore, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

/s Ronald L. Richter, Jr.
BLAND RICHTER, LLP
Ronald L. Richter, Jr. (SC Bar No. 66377)
Scott M. Mongill (SC Bar No. 16574)
Peoples Building
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
843.573.9900 (telephone)
843.573.0200 (facsimile)
ronnie@blandrichter.com
scott@blandricter.com

Eric S. Bland (SC Bar No. 64132
1500 Calhoun Street
Post Office Box 72
Columbia, South Carolina 29202
803.256.9664 (telephone)
803.256.3056 (facsimile)
ericbland@blandrichter.com

ATTORNEYS FOR APPELLANT

March 25, 2020

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Certificate of Counsel

The undersigned hereby certifies that the **Final Brief** complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

/s Ronald L. Richter, Jr.
BLAND RICHTER, LLP
Ronald L. Richter, Jr. (SC Bar No. 66377)
Scott M. Mongill (SC Bar No. 16574)
Peoples Building
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
843.573.9900 (telephone)
843.573.0200 (facsimile)
ronnie@blandrichter.com

scott@blandricter.com

Eric S. Bland (SC Bar No. 64132
1500 Calhoun Street
Post Office Box 72
Columbia, South Carolina 29202
803.256.9664 (telephone)
803.256.3056 (facsimile)
ericbland@blandrichter.com

ATTORNEYS FOR APPELLANT

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