

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas**

Walton J. McLeod, Circuit Judge

Appellate Case No.: 2019-000367

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SC Court of Appeals

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.

Brief of Respondent Adele J. Pope, Individually

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Respondent, pro se

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¹ In addition to authorities cited in the Initial Brief of the Estate of Gloria P. Corley, incorporated herein.

STATEMENT OF ISSUES ON APPEAL

- I. Adoption of Brief of the Estate of Mrs. Corley.
- II. The Circuit Court Properly Rejected Appellants' Interpretation of the Hammer Clause
- III. The Hammer Clause issue is ripe and should be finally decided by this Court

COUNTER-STATEMENT OF THE CASE

On September 19, 2017 Appellants (collectively “Ballard”) commenced this action (Admiral Suit) against the Admiral Insurance Company and other insurance companies (Admiral); the Estate of Gloria P. Corley (Mrs. Corley); and Respondent Adele J. Pope, individually¹ in Richland County. Complaint. [R., pp.] Respondent was incorrectly identified in the Admiral Suit complaint as Adele R. Pope. [R., pp. 92 - 112]

The complaint seeks no relief against Mrs. Corley’s Estate or Pope, individually. [Complaint] In 2016, without objection of Hoyt Rowell, Esq. (Hoyt), Mrs. Corley’s son, and Andra Williams (Andra), her daughter, Respondent was appointed special administrator (SA) of Mrs. Corley’s Estate by the Honorable Daniel Eckstrom, Probate Judge for Lexington County, in a formal proceeding.

Ballard is former counsel to Mrs. Corley, who died in 2016, and to Andra. Ballard represented the two between 2011 and 2015. Affidavit, Pope, 10/23/17, pp. 2 [R., p. 114]

In the year of Mrs. Corley’s death, the *guardian ad litem* for Mrs. Corley in the proceeding in which she had been represented by Ballard, Heather Cairns, Esq., notified Ballard of her intention to negotiate a settlement related to Ballard’s service to Mrs. Corley. Through now-deceased counsel, Camden Lewis, Esq., Cairns presented Ballard with a proposed complaint and opinion of John Freeman, Esq., related to the service of Ballard, as required. Affidavit, Pope, 10/23/17 , pp 3-5 [R., pp. 115-117]

No settlement was reached.

Mrs. Corley’s Estate, through Pope, secured Mrs. Corley’s file files from Lewis and others. After filing suit in the Probate Court, Mrs. Corley’s Estate secured her file from Ballard, and from

¹ This Respondent was referred to in the complaint as Adele R. Pope. Efforts to have the caption corrected to reflect Respondent Pope’s correct name have, to date, been unsuccessful.

Kenneth Wingate, Esq.. Wingate had been engaged by Ballard as an expert in connection with its representation of Mrs. Corley and Andra. [Affidavit, 10/23/17, pp. 116, 117]

With virtually no liquidity, Mrs. Corley's Estate attempted to reach an early settlement with Ballard to avoid having to engage counsel on a 1/3 contingency. Affidavit, p. 5 [R., p. 117] Under the terms of the judgment against Mrs. Corley's Estate which resulted from representation by Ballard, engagement of a lawyer for collection would result in a much larger claim against Ballard by Mrs. Corley's Estate. Ballard, through counsel, declined to negotiate the claim. [R., pp. 114 - 117]

On February 23, 2017 Mrs. Corley's Estate sued Ballard in Lexington County Case No. 2017-CP-32-00618. Ballard cross-claimed against Andra, sole devisee of a will drafted for Mrs. Corley by Ballard during the period that Ballard represented Mrs. Corley and Andra. Affidavit, 10/23/17, pp. 2 -3 [R., pp. 114, 115]

On October 24, 2017 Respondent Pope, individually, and Mrs. Corley's Estate moved to dismiss the Admiral Suit complaint. [R., pp. 118 -122] In the alternative, Respondent Pope and Mrs. Corley's Estate asked the Court to strike paragraphs 24, 25, 39, 40, 41, 50, 58, 59, 60, 71 and 72 of the complaint because they contained immaterial, impertinent and/or scandalous factual allegations. Motion, p. 3 [R., p. 125] Respondent Pope and Mrs. Corley's Estate sought attorneys' fees and costs. [R., p. 120].

The motion was supported by an affidavit of Pope, and based on Pope's personal knowledge. [Affidavit Pope, R., pp. 113 - 117] The affidavit stated that Pope had represented Mrs Corley; prepared a will for her; and secured for Mrs. Corley the settlement which was the subject of Mrs. Corley's claim against Ballard. The affidavit also set out Respondent Pope's qualifications as an attorney experienced in estate planning, probate and trust law, as well as fiduciary litigation. [R., pp. 113, 114]. The affidavit stated that the allegations in the Admiral

complaint against Mrs. Corley, her daughter Andra, and the affiant were scurrilous, false and misleading. Affiant described the proper procedure under which she had been appointed SA of Mrs. Corley's estate, rather than as personal representative (PR). Affiant stated that she could not support the will prepared by Ballard for Mrs. Corley (Ballard Will). The affidavit stated that the Ballard Will did not reflect Mrs. Corley wishes as to the disposition of her property at death as known to the affiant over more than ten years. [R., pp. 114, 115] In paragraph 11 of the affidavit, affiant set out what she believed to be the correct relevant facts to the cause of action. [R., pp. 115, 116]. This was followed by affiant's opinion of the way in which affiant, based on her experience and the relevant facts, failed to meet the standard of care with respect to her representation of Mrs. Corley. [R., pp. 116, 117] The affidavit stated that the actual facts known to Ballard at the time the scurrilous complaint was filed were:

- a. On August 28, 1998 Pope and Mrs. Corley entered into a contingency fee contract related to litigation with ML's estate and trust.
- b. The contract provided for Pope to receive 1/3 of all distributions from ML's estate and trust for the benefit of Gloria in excess of \$90,000 per year.
- c. By January 22, 1999 Pope had secured a settlement with ML's estate and trust which, in part, guaranteed Mrs. Corley \$145,000 per year. In the court-approved settlement Pope was irrevocably designated as the agent to receive and disburse all payments to Mrs. Corley in excess of \$90,000 per year.
- d. While both Andra and Hoyt were involved in all matters, after the settlement concluded Mrs. Corley directed Pope not to speak with Andra about her (Mrs. Corley's) business, and Pope honored the request.
- e. In March 2011 Andra called Pope to meet her to sign, as Mrs. Corley had done before, the \$55,000 annual check from ML's trust. (Gloria received \$90,000 outright each year).
- f. Pope went to the meeting where Andra snatched the check; announced that she was now in charge; and said she would pay Pope when she felt like it.
- g. Pope sued ML's trust to reissue the check, and to continue the contract as it had been carried out for more than a decade.
- h. Before Andra and/or Mrs. Corley hired Ballard, Mrs. Corley lived in her private apartment; enjoyed an income of about \$170,000 a year; a driver; personal care assistants; low taxes because of her high medical bills (she was over 80); and an obligation to Pope of about \$18,333 per year.

i. In addition, Mrs. Corley had a warm personal relationship with both of her children, and a will – drafted by Pope years earlier – which treated Andra and Hoyt equally. Her POA, also prepared by Pope, provided that gifts to her two children would be equal.

j. As a direct result of the Ballard representation, which lasted from 2011 to 2015, when Mrs. Corley died in 2016 she was penniless and living in a nursing home which was threatening to evict her for non-payment. Andra, based on advice from Ballard, had put all of Mrs. Corley's assets in her name, and dissipated many of them. Mrs. Corley had paid Ballard tens of thousands of dollars, and Wingate additional thousands; and Mrs. Corley had a judgment against her, at the time more than \$200,000, plus interest and costs of collection, including attorneys' fees. Andra, in part as a result of the directions from Ballard, faced a judgment of more than \$1.2 million.

The Pope affidavit also stated that she and Mrs. Corley's Estate had requested the she, individually, and Mrs. Corley's Estate, be removed as parties to the Admiral Suit and that the false statements be withdrawn. Affidavit, p. 5 [R., p. 117]

In November 2017 Pope was required to answer Local rule 26.01 interrogatories in the Admiral Suit after it was removed to Federal Court. Interrogatory Answers, 11/8/17 Pope, pp. 1-3 [R., pp. 160 162], Mrs. Corley's Estate, pp. 1- 3 [R., pp. 157 - 159]

On November 15, 2017, Pope replied to Ballard's response to her motion to dismiss or strike.. The reply asserted that the reference to the malpractice action Mrs. Corley's Estate was pursuing against Ballard as the "Pope Litigation" was inaccurate and confusing to the Court. It stated:

The State Court malpractice action against Plaintiffs was brought by the Estate of Gloria P. Corley, and only the Estate of Gloria P. Corley. Defendant Adele Pope, individually, is not a party to the malpractice action, and neither Pope nor Gloria Corley's Estate should be a party to this lawsuit. [Reply, p.1]

The reply also stated:

In their Response, Plaintiffs [Ballard] suggest that movant Pope, individually, has a "material interest in this litigation and must be a party to this action. This argument is without merit. While it is certain that Mrs. Corley's creditors . . . may benefit from Mrs. Corley's Estate's recovery against Plaintiffs, to suggest that they must be made a part of this declaratory judgment is baseless. [Reply]

And:

This case is a dispute between an insured and a carrier over coverage, and movants are not necessary parties for full and final resolution of the issues presented. [Reply]

On March 20, 2018 the Federal Magistrate Judge issued a Report and Recommendation that the matter be remanded to State Court. [R., pp. 195 - 205.]

By order dated April 11, 2018 the matter was remanded to the Court of Common Pleas for Richland County. [R., pp. 1-2]

By order of the Honorable Allison Renee Lee signed May 18, 2018 the venue was changed from Richland County to Lexington County. [R., pp. 3 - 6]

On May 10, 2018 a consent Stipulation of Dismissal With Prejudice as to certain Admiral parties. [R., p. 206].

On May 31, 2018 Respondent Admiral filed a Motion for Judgment on the Pleadings. [R. pp. 208 - 234]

On July 13, 2018 Appellant moved for a continuance of the hearing scheduled for July 26, 2018, which was granted.

On October 9, 2018 Pope and Mrs. Corley's Estate responded to the motion of Admiral for judgment on the pleadings. Responses to Admiral Insurance Company Motion for Judgment on the Pleadings, dtd. 10/9/18

On January 29, 2019 a joint mediation was conducted in this case and in the case filed by Mrs. Corley's Estate against Ballard. Report of ADR [R., p. 310]

On February 1, 2019 Ronald Stanley, Esq., reported that the parties had reached an impasse. Ltr. Stanley/Carrig, dtd. January 31, 2019, Proof of ADR [R., p.310]

On November 14, 2018 a hearing was held before the Honorable Walton J. McLeod on the motions of Admiral for Judgment on the pleadings. Ballard argued that she had the rights to direct

that her lawyer not negotiate with Mrs. Corley's estate in the litigation brought by Mrs. Corley if Pope, one of Mrs. Corley's creditors, would benefit from a settlement.. Tr. Hearing, pp. [R., pp. 355- 359]

On February 15, 2019 Judge McLeod issued an Order Granting Defendant Admiral Insurance Company's Motion for Judgment on the Pleadings. Judge McLeod also issued a separate order dismissing Mrs. Corley's Estate and Pope, individually, as parties. [R., pp. 7 - 28]

On March 2, 2019 Ballard filed this appeal of the order granting Defendant Admiral's judgment on the pleadings. Even though Appellants failed to appeal a separate order dismissing Mrs. Corley's Estate and Pope as parties, Ballard designated both Mrs. Corley and Pope, individually, as Respondents to this appeal. Appellants then served Appellants with a brief of Appellants which repeated the false, scurrilous claims of Ballard against its former client Andra Williams, as well as against Pope.

STATEMENT OF THE FACTS²

When Andra Williams entered the Ballard office in 2011 Mrs. Corley, a vulnerable elderly adult, enjoyed an income of at least \$145,000 a year for life, secured for her by Pope more than ten years earlier from a trust created by Mrs. Corley's third husband (ML). From the \$145,000 each year, Mrs. Corley owed Pope only \$18,333, less than 15% of her customary annual payment. ML's

Mrs. Corley was at liberty to negotiate a lump sum settlement if she desired. If she did so, she could have contacted Pope about a reduction in the fee. Or, by simply structuring a payment over two calendar years, Mrs. Corley could have saved \$30,000 and been in full compliance with her contract with Pope.

² Appellant incorporates the Statement of the Case in her Statement of the Facts.

Mrs. Corley had a loving relationship with her son Hoyt, an attorney, and daughter, Andra. Mrs. Corley's Will and power of attorney (POA), both prepared by Pope years earlier, provided for all gifts, if any, to be made equally to Andra and Hoyt, and for an equal division of her assets between them at her death.

Had Ballard not agreed to represent Mrs. Corley based on Andra's POA, and later Andra herself, Mrs. Corley, by 2016, would have received over \$700,000.00 secured for her by Pope; owed Pope only about \$100,00; lived comfortably on the Pope settlement and her generous social security from ML; and devised the remainder to Hoyt and Andra, ML's trust paying would have paid the estate taxes related to Mrs. Corley's estate. In addition, Andra would have received \$50,000 from ML's Trust.

Instead, as a result of Ballard's representation of Mrs. Corley and Andra in a settlement with former attorney Richard Breibart and ML's trustee intended to prevent Pope from being paid, Mrs. Corley died penniless in a nursing home, under a threat of being evicted for nonpayment. Her funds, at the direction of Ballard, had been transferred from her name, but not jointly to Hoyt and Angie as the POA required. She owed Pope more than \$200,000, with interest at more than \$40 a day and costs of collection, including attorneys' fees. And, at Ballard's direction, she had signed a disastrous gift tax return, leaving her estate responsible for taxes ML's trust should have paid. Nor did Andra, Ballard's other client, fare much better. [R., pp. 113 - 117]

Andra had spent or transferred much of the money Ballard had instructed her to transfer out of Mrs. Corley's name. She didn't get the \$50,000 from ML's Trust at her mother's death. And Ballard had not reasonably informed both Andra and Mrs. Corley that the lump sum payment deal Ballard made with Breibart and MLs' trust ended Angie's \$50,000 payment from ML's trust. [R., pp. 113 - 117]

In short, Mrs. Corley paid Ballard and a biased expert selected by Ballard more than \$50,000 to solve an \$18,333 contract problem. Ballard undertook to convert it to an ethics problem, but, in fact,

created substantial practical, trust and transfer tax problems for Mrs. Corley and Statute of Elizabeth problems for Andra. [R., pp. 113 - 117]

Ballard pursued an appeal of the \$243,000 judgment against Mrs. Corley without discussing with Mrs. Corley the possibilities for settlement. Then Ballard missed the deadline for the notice of appeal. Ballard even set aside funds from Mrs. Corley's lump sum payment for ML's trustee to defend himself.

Shortly before Mr. Corley died, Heather Cairns, Esq., was appointed guardian *ad litem* (GAL) for Mrs. Corley in the suit in which Ballard formerly represented Mrs. Corley. [R., pp. 115, 116]. A receiver, Katherine Palinski, Esq. , was appointed to recover funds Andra had transferred after being directed to do so by Ballard. Cairns, as GAL, engaged now-deceased attorney Camden Lewis, Esq., to investigate losses caused by Ballard. [R., p.116]

Lewis investigated the Ballard actions; secured an affidavit of John Freeman, Esq., and attempted to negotiate with Ballard before Mrs. Corley's death in 2016.

After Mrs. Corley's death Andra filed the Ballard Will, which left everything Andra, and nothing to Hoyt. Andra made no effort to be named personal representative (PR). Hoyt, excluded by the Ballard Will, declined to serve as PR. Pursuant to proper statutory procedure, Pope was appointed as special administrator of Mrs. Corley estate (SA). She did not seek appointment as PR because she could not defend the Ballard Will. It was inconsistent with Mrs. Corley's wishes for her estate plan as Pope had known them to be for a decade. Affidavit, 10/23/17, pp. 2,3 [R., pp.114, 115]

Prior to engagement of counsel, and with interest on Mrs. Corley's debt caused by Ballard continuing to accrue at more than \$40 a day, and costs of collection, including attorneys' fees, to be added, Mrs. Corley's Estate attempted in 2016 to negotiate with Ballard to reach a solution to the problems Ballard had caused. Ballard would not negotiate the matter.

At first, both Ballard and Wingate refused to release the entire file to Mrs. Corley's estate, but both did so after Mrs. Corley's estate sued to obtain her files. [R., p. 116] Then Ballard, by its own

admission, required Admiral to provide counsel for Ballard's defense, but directed it not to negotiate with Mrs. Corley's Estate. Ballard went to extraordinary lengths to reinvent the facts by filing the Admiral lawsuit and making Mrs. Corley's Estate and Pope parties with the intention of binding them to the known-false assertions in the Admiral complaint. Affidavit, 10/23/17 [R., pp. 113- 117]

Over three years, including during mediation, Admiral remained counsel of record while accepting Ballard's directions not to fairly negotiate with Mrs. Corley's Estate for the loss it had caused. Ballard took the unprecedented position that it had the right to control what Mr. Corley's Estate would do with the damage award it got from the loss it caused.

When the circuit court dismissed Mrs. Corley's Estate and Pope from the Admiral Suit, Ballard still did not stop its quest to rewrite the facts and bind Mrs. Corley to them. In its brief Ballard simply repeated the false narrative, and named both Mrs. Corley's Estate and Pope as Respondents.

Since filing the Admiral Suit complaint in 2017 Ballard has not, and could not, present any affidavit or other sworn evidence in the Admiral Suit to refute the facts as presented in the Pope October 23, 2017 affidavit.

In short, between 2011 and 2015 Ballard damaged Mrs. Corley in multiple ways, including by the Will; the Breibart/ML Corley trust deal; the failure to address conflicts of Andra and Mrs. Corley; the failure to present generous offers to Mrs. Corley; and the failure to address serious estate tax problems caused by the Breibart/Corley deal. [R., pp. 116, 117]

Argument

Scope of Review

If the Court finds that review under the Rule 56 Summary Judgment standard is appropriate, the October 23, 2017 affidavit and the admission by Appellants that they have refused to negotiate with Mrs.

Corley and Mrs. Corley's Estate since 2016, including at mediation, are the only relevant facts properly presented to the Court. They are undisputed.

I. Adoption of Brief of Estate of Mrs. Corley

Pope, individually, adopts in its entirety the brief of the Estate of Mrs. Corley filed by Pope, through counsel, in her capacity as SA.

II. The Circuit Court Properly Rejected Appellant's Interpretation of the Hammer Clause.

Appellant's attempt to control the Estate of Mrs. Corley by requiring Admiral to serve as counsel but directing it not to negotiate with Mrs. Corley's Estate is unprecedented and unacceptable. It distorts the necessary balance our Supreme Court has recognized between Admiral's desire to resolve litigation while providing a fair defense to Ballard. There is nothing fair about Ballard's vitriolic, false attacks either on Andra Williams or Pope, the attorney who secured for Mrs. Corley the \$145,000 annual payment Ballard, through its representation, took away. The filing of a collateral proceeding and joining Mrs. Corley's Estate and Pope in an attempt to bind them to the false narrative is unwarranted and manifestly unjust to both of Ballard's former clients in this matter.

If the Court condones the interpretation of the hammer clause proposed by Ballard, wronged clients such as Mrs. Corley will be deprived of the level playing field required by the Due Process clause of the U.S. Constitution. Ballard and other attorneys, officers of the Court, will be relieved of even a duty of fundamental fairness to their former clients. Insurance carriers and attorneys may even collude to bring "coverage suits" to rewrite the facts of the representation in favor of the former attorney and against the former client.

Ballard has now wasted three years and more than doubled the claim which Mrs. Corley's Estate has against it by collateral litigation that should have been brought, if at all, before Mrs. Corley died, when she had a GAL to protect her interest.

III. The Hammer Clause issue is ripe and should be finally decided by this Court.

The Hammer clause issue in this matter was ripe, if not earlier, in 2016 before Mrs. Corley died. A proper balance of the interest of the insured and Ballard would have been for the Admiral Suit to be brought, if at all, no later than early 2016 when Mrs. Corley first presented a proposed complaint and claim.

To the extent that Admiral's brief expands this argument without conflict with this brief, or that of the Estate of Mrs. Corley, Respondent Pope adopts its argument supporting the conclusions of the Circuit Court.

Conclusion

Appellants ask the Court to consider facts inconsistent with the actual facts of Ballard's representation of Mrs. Corley and Andra. It then asks the Court to give Appellants the unfettered right to exercise the hammer clause in a manner which deprives two prior clients of Ballard of a level playing field. The issue is ripe. It should be decided by this Court. The Court should affirm the order of the Circuit Court.

Respectfully submitted,



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May 6, 2020