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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walter J. McLeod, Circuit Court Judge

Appellate Case No. 2019-000367

Deas 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.

ADMIRAL INSURANCE COMPANY'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Whether the Court of Appeals correctly affirmed the Circuit Court's judgment on the pleadings in favor of the insurer because the dispute between the parties is controlled by a pure question of law – the interpretation of an insurance contract – and was ripe for adjudication.

COUNTER-STATEMENT OF THE CASE

In their Petition, Desa Ballard and Desa Ballard P.A., d/b/a Ballard & Watson ("Petitioners") challenge the Circuit Court's and Court of Appeals' refusal to rewrite the terms of an insurance contract issued by Respondent Admiral Insurance Company ("Admiral"). Admiral issued a Lawyers Professional Liability Insurance policy ("Policy") to Desa Ballard dba Ballard & Watson, Attorneys at Law. When Admiral began defending Petitioners in an underlying legal malpractice action, Petitioners filed this action seeking to prevent Admiral from beginning settlement negotiations with the malpractice claimants. Admiral counterclaimed seeking a declaration that it had the right to negotiate and that the terms of the insurance contract are enforceable. Admiral moved for judgment on the pleadings. To avoid the Motion, Petitioners asked the Circuit Court to read into the Policy terms that do not exist. In other words, Petitioners asked the Circuit Court to rewrite the Policy. The Circuit Court refused and granted Admiral's Motion. This Court of Appeals affirmed. Because South Carolina's rules of contract construction require courts to construe contracts as they are written and according to their plain terms, the Court of Appeals properly affirmed.

As background, Petitioners previously represented Gloria Corley in a fee dispute filed by Corley's former attorney, Adele Pope. (R. p. 98, ¶¶ 23–24). That case resulted in a substantial judgment entered against Corley and in favor of Pope, and Petitioners missed an appeal deadline.

After Corley passed away, Pope was appointed Special Administrator of Corley's estate (Estate) and filed a legal malpractice action against Petitioners ("Underlying Action"). (R. p. 103, ¶¶ 57, 61).

Admiral has been defending Petitioners in the Underlying Action under a reservation of rights. A dispute arose between Petitioners and Admiral regarding a consent to settle clause in the Policy, which provides:

> The **Insurer** shall not settle any **Claim** without the **Named Insured's** consent. If, however, the **Named Insured** shall refuse to consent to any settlement recommended by the **Insurer**, which is acceptable to the claimant, and shall elect to contest the **Claim**, or continue any legal, administrative, or arbitration proceedings in connection with such **Claim**, then the **Insurer's** liability for the **Claim** shall not exceed the amount for which the Claim could have been settled, including **Claims Expense** incurred up to the date of such refusal. Such amounts are subject to the provisions of section V. In the event that the **Named Insured** refuses to consent to any settlement as set forth in this section VI. D., the **Insurer's** right and duty to defend such **Claim** shall end upon the date of such refusal.

(R. p. 371). By the terms of the consent to settle clause, Petitioners ultimately have the ability to reject a proposed settlement that is recommended by Admiral and which the Estate is willing to accept. However, if Petitioners reject the proposed settlement and choose to contest the claim, "then the Insurer's liability for the Claim shall not exceed the amount for which the Claim could have been settled, including Claims Expense incurred up to the date of such refusal." (R. p. 371). Also, "the Insurer's right and duty to defend such Claim shall end upon the date of such refusal." (R. p. 371). In other words, the insured retains the ultimate right to refuse a proposed settlement that the claimant would accept, but the insured can only do so by taking on the risk going forward – i.e. putting its own money on the line rather than gambling with insurance funds. Pursuant to the terms of the Policy, Admiral does not insure the risks associated with the insured's decision not to settle the case.

As is typical with most litigation, Admiral wanted to enter negotiations with the Estate in the Underlying Action to determine if there was an opportunity to reach a resolution of the malpractice claim. (R. p. 97, ¶ 18). After all, Petitioners admittedly missed an appeal deadline, among other problems that they would face in the malpractice claim. Aware of the consent to settle clause, Petitioners attempted to avoid the potential situation of having to choose whether or not to accept a settlement recommended by Admiral and which the Estate would accept by instructing Admiral not to make any offers and preemptively stating that they would not consent to any proposed settlement. (R. pp. 104–105, ¶¶ 65–67, 69–70). Petitioners even went so far as to object to any mediation of the underlying litigation even though mediation is mandatory. (R. p. 104, ¶ 67).

The plain terms of the Policy gave Admiral the right and duty to control the defense, which includes engaging in settlement negotiations. When Admiral communicated its intent to enter into negotiations with the Estate to see if there was an amount that Admiral would recommend and the Estate would accept, Petitioners filed this action seeking an injunction to prevent Admiral from negotiating, seeking certain declaratory relief, and asserting bad faith. (R. pp. 108–112).

Admiral answered and counterclaimed seeking declaratory relief to enforce the Policy as written. Specifically, the counterclaim sought declarations that: (1) Admiral had the right to participate in settlement negotiations in the underlying legal malpractice action; (2) Appellants owed a duty to cooperate in the defense and settlement of the case and could not prevent Admiral from participating in settlement negotiations; and (3) the consent to settle clause would be enforced as written. (R. pp. 151–53, ¶¶ 124–137).

Because the complaint and counterclaim were controlled by purely legal issues dictated by the plain terms of the Policy, Admiral filed a Motion for Judgment on the Pleadings. (R. pp. 208–211). In a detailed Order, the Circuit Court granted Admiral's Motion. The Circuit Court entered

declarations in Admiral's favor and dismissed Petitioners' claims.[1] Specifically, the Circuit Court found that the issues in the case were controlled by two provisions in the insurance policy. The first provision states, "The Insurer ***shall have the sole right and the duty to defend*** any covered Claim . . .." and "Each Insured ***shall cooperate*** with the Insurer ***in the defense and settlement of any Claim*** . . .." (R. p. 16) (emphasis added). Reading these two provisions, the Circuit Court held that Admiral had the right to control the defense of the case, which included the right to participate in settlement negotiations. (R. pp. 16–17).

The second provision is the Policy's consent to settle clause. (R. p. 17). The Circuit Court held that the consent to settle clause was unambiguous and must be enforced according to its plain terms. (R. pp. 17–18). Although Petitioners argued that the clause could not be enforced unless the named insured unreasonably refuses a settlement proposal that is recommended by the insurer and acceptable to the claimant, the Circuit Court refused to insert the word "unreasonably" into the Policy.

Based on the above, the Circuit Court entered the following declarations:

a. Admiral has the right to negotiate a potential settlement as part of its defense of the Underlying Malpractice Action;

b. Admiral has a right to participate in settlement negotiations at mediation in the Underlying Malpractice Action;

c. Plaintiffs owe a duty to cooperate in the defense and settlement of the case and do not have a right to prevent Admiral from participating in settlement negotiations with the Estate of Gloria Corley;

d. If Admiral recommends a settlement to the Named Insured which is acceptable to the Estate of Gloria Corley, and the Named Insured rejects the settlement and chooses to contest the Underlying Malpractice Action, then Admiral's liability for the Claim shall not exceed the amount for which the Claim could have been settled, including Claim Expenses incurred up to the date of such refusal; and

[1] The Circuit Court dismissed Petitioners' bad faith claim without prejudice. (R. p. 21).

e. If Admiral recommends a settlement to the Named Insured which is acceptable to the Estate of Gloria Corley, and the Named Insured rejects the settlement and chooses to contest the Underlying Malpractice Action, then Admiral's right and duty to defend the Underlying Malpractice Action shall end upon the date of such rejection.

(R. p. 21). These declarations closely track or recite the terms of the Policy. Petitioners did not file a motion to reconsider. Instead, they filed an appeal. In a published Order, the Court of Appeals affirmed "the well-reasoned order of the circuit court." *Ballard v. Admiral Ins. Co.*, 442 S.C. 22, 26, 897 S.E.2d 183, 185 (Ct. App. 2023), *reh'g denied* (Feb. 21, 2024).

COUNTER-STATEMENT OF THE FACTS[2]

A. The Underlying Action.

In March of 2011, Gloria Corley, now deceased, hired Desa Ballard and her law firm to defend her in a breach of contract action filed by Corley's former attorney Adele Pope.[3] (R. p. 98, ¶ 23). Pope sued Corley for recovery of fees under a written fee agreement based upon a prior matter in which Pope represented Corley ("Fee Agreement Litigation"). (R. p. 98, ¶ 25). Corley, with Petitioners representing her, lost the fee agreement dispute. (R. p. 100, ¶ 38).

While representing Corley in the Fee Agreement Litigation, Petitioners also represented Corley and her daughter, Andra Williams, in negotiating a buyout of their interests in a family trust. (R. p. 98, ¶ 27). Corley accepted a reduced buyout, in part, because Petitioners believed the structure of the buyout would preclude Corley from having to pay any additional amounts to Pope under the fee agreement. (R. pp. 99–100, ¶¶ 31–34, 36). However, when Pope learned about the

[2] Although not germane to the purely contractual issues presented in this case, Petitioners continue to portray a false factual history to the Court with few references to the Record. *See* (Pet. for Writ of Cert.).

[3] For purposes of a Judgment on the Pleadings, "all properly pleaded factual allegations are deemed admitted . . . ." *Douglas ex rel. Louthian v. Boyce*, 336 S.C. 318, 323, 519 S.E.2d 802, 805 (Ct. App. 1999), *aff'd*, 344 S.C. 5, 542 S.E.2d 715 (2001). Therefore, Admiral recites the facts as alleged in Petitioners' Complaint. Admiral disputes many of these facts.

buyout, she petitioned the circuit court in the Fee Agreement Litigation for her share of the buyout based on the fee agreement.[4] In that litigation, the circuit court agreed with Pope and awarded Pope a judgment against Corley in the amount of $248,673.87. (R. p. 100, ¶ 38). Thus, despite Petitioners' intention to structure the trust buyout in such a way that it would shield Corley from owing Pope any fees arising out of the buyout, Petitioners' plan failed, resulting in a sizeable judgment being entered against Corley.

Petitioners filed an appeal on Corley's behalf in the Fee Agreement Litigation, but the appeal was filed untimely and was dismissed. (R. p. 100, ¶ 41). After missing the appeals deadline, Petitioners notified Admiral of a potential claim arising out of their representation of Corley. (R. p. 101, ¶¶ 42–46).

To add insult to Corley's injury, the lump-sum payment for the trust buyout was given to Corley's attorney-in-fact, Williams, rather than being paid to a guardian ad litem or paid into a restricted account for Corley's benefit. Petitioners concede that Williams "may have" subsequently "mismanaged and/or misappropriated some or all of the trust settlement money . . . ." (R. p. 102, ¶¶ 51, 54). Therefore, Corley did not have sufficient funds to satisfy the Pope Judgment.

Corley passed away in March of 2016. (R. p. 102, ¶ 56). As a judgment creditor of the Estate, Pope sought and obtained appointment as Special Administrator of Corley's Estate. (R. p 103, ¶¶ 57–58). Pope, acting as the administrator of the Estate, initiated the Underlying Action by filing a Summons and Complaint in the Lexington County Court of Common Pleas, Case Number 2017-CP-32-00618, captioned Estate of Gloria P. Corley, by its Special Administrator vs. Desa Ballard and Desa Ballard, P.A. (hereinafter "Underlying Complaint").

[4] The fee agreement provided a contingency component entitling Pope to payment of any amounts Corley received from the trust in any given year in excess of $90,000.00. Thus, the lump sum payment in excess of $90,000.00 triggered payment obligations under the fee agreement.

The Underlying Complaint alleges Petitioners were negligent in the following ways:

1) Failing to recognize that termination of the trust was not in the best interest of Corley;

2) Failing to have a Guardian ad Litem appointed for Corley;

3) Representing Corley, Williams individually, and Williams as attorney-in-fact in violation of the rules governing conflicts of interest;

4) Failing to recognize that Pope's fee agreement entitled her to a percentage of the lump sum buyout payment;

5) Undertaking a frivolous defense and appeal of the Pope Action and failing to timely appeal the order.

(R. p. 36, ¶ 33).

B. The Current Dispute.

Petitioners tendered the defense of the Underlying Action to Admiral. Pursuant to the 2013-2014 Admiral Policy, Admiral is defending Petitioners in the Underlying Action. Admiral, as it does in many cases, sought to investigate the possibility of resolving the Underlying Action. Admiral communicated this decision to Petitioners, and Desa Ballard objected, stating that "no settlement offers were to be extended and no settlements were to be made in the legal malpractice claim . . . ." (R. pp. 104–105, ¶¶ 65–70). Petitioners went so far as to instruct Admiral that they objected to any mediations of the Underlying Case. (R. p. 104, ¶ 67).

South Carolina's Alternative Dispute Resolution Rules would require Admiral to participate in mediation in the Underlying Case and to send "a representative . . . who has full authority to settle the claim." Rule 6(b)(4), SCADR. Moreover, the Admiral Policy gives Admiral control over the defense of the case and even requires Petitioners to cooperate "in the defense **and settlement** of any Claim." (R. p. 371, ¶ VI.C.) (emphasis added).

STANDARD OF REVIEW

The Court "will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power." *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170 (2008) (citation omitted); *South Carolina Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020). Pursuant to Rule 242 of the South Carolina Appellate Court Rules, reasons for granting certiorari include "novel questions of law," "[w]here there is a dissent in the decision of the Court of Appeals," "where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court," where substantial constitutional issues are directly involved, or where federal questions are included. Rule 242(b), SCACR. None of these situations applies here. The rules of construction at issue are well established, the Court of Appeals' decision had no dissent, and the Court of Appeals faithfully applied prior decisions of this Court. Likewise, this case does not involve any substantial constitutional issues or federal questions.

ARGUMENT

I. Petitioners' Petition for Writ of Certiorari fails to set forth any "special reasons" justifying the Court's review in this case.

The unanimous decision of the Court of Appeals does not merit review because it is in full accord with the rulings of this Court and does not involve a novel question of law. Under the standards set forth by this Court, neither the interpretation of the plain terms of the insurance contract nor the ripeness of this pure question of law merits this Court's review.

A. The interpretation of the Admiral insurance Policy's plain terms does not present a novel question of law.

As both the Circuit Court and Court of Appeals correctly recognized, this case involves a pure question of contract interpretation. *See* (R. p. 12, February 15, 2019 Circuit Court Order ("Because the dispute centers on a written contract, the terms of the contract control the court's

analysis….[T]he interpretation of the contract is a legal question for the court and a resolution of the contract question is dispositive regardless of the factual allegations.")); *Ballard*, 442 S.C. at 36, 897 S.E.2d at 190 ("We find the circuit court correctly analyzed the clear and unambiguous language of the Policy in finding Ballard could not prevent Admiral from negotiating with the Estate to settle the Pope claim."). The issue of contract interpretation does not present a novel question of law. This Court has longstanding contract construction rules, which settle the contract interpretation issues in this case.

"Insurance policies are subject to the general rules of contract construction." *Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977); *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (same). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (same). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134; *McGill*, 381 S.C. at 185, 672 S.E.2d at 574 (same).

Insurance is a transfer of risk, and the insurance contract communicates between the parties what risks the insurance company is assuming and what risks it is not willing to assume. *See e.g.*, *Severn Peanut Co., Inc. v. Industrial Fumigant Co.*, 807 F.3d 88, 91 (4th Cir. 2015) (discussing freedom of contract, which allows "parties to bargain over the allocation of risk"); *Union Labor Life Ins. v. Pireno*, 358 U.S. 119, 130, 102 S. Ct. 3002, 3009 (1982) ("The transfer of risk from insured to insurer is effected by means of the contract between the parties – the insurance policy – and the transfer is complete at the time that the contract is entered."); *LM Ins. Corp. v. Kobys*,

21017 WL 1073352, *7 (D.N.J. March 20, 2017) ("The fundamental concept of insurance centers on the transfer of risk.").

In the insurance contract, Admiral agreed to take on certain risks – including the duty to defend and indemnify Petitioners – but that transfer of risk was not absolute. In fact, the Policy anticipates the precise dispute between the parties here and addresses the allocation of risk. Under the plain terms of the Policy, Admiral has sole control of the defense.[5] Petitioners have a duty to cooperate in the defense and settlement of the case.[6] Although the Named Insured retains the ultimate right to reject a potential settlement, Admiral did not agree to accept the risk of fighting a case to its end merely because its insured rejects a settlement. [7] Instead, the Policy provides that if the insured rejects a proposed settlement recommended by Admiral that is acceptable to the Estate, then Admiral's exposure is limited. *Id.* Because the Policy addresses each of these matters by its plain terms, the Policy must be enforced as written under the rules set forth by this Court.

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[5] Section "VI. Defense, Cooperation and Settlement," Paragraph B. states, "The Insurer shall have the ***sole*** right and duty to defend any covered claim . . .." (R. p. 371) (emphasis added)

[6] Section "VI. Defense, Cooperation and Settlement," Paragraph C. states, "Each Insured shall cooperate with the Insurer in the defense ***and settlement*** of any Claim . . .." (R. p. 371) (emphasis added).

[7] Section "VI. Defense, Cooperation and Settlement," Paragraph D. states, "The Insurer shall not settle any Claim without the Named Insured's consent. If, however, the Named Insured shall refuse to consent to any settlement recommended by the Insurer, which is acceptable to the claimant, and shall elect to contest the Claim, or continue any legal, administrative, or arbitration proceedings in connection with such Claim, ***then the Insurer's liability for the Claim shall not exceed the amount for which the Claim could have been settled***, including Claims Expense incurred up to the date of such refusal. Such amounts are subject to the provisions of section V. In the event that the Named Insured refuses to consent to any settlement as set forth in this section VI. D., ***the Insurer's right and duty to defend such Claim shall end upon the date of such refusal***." (R. p. 371) (emphasis added).

The Circuit Court and Court of Appeals faithfully applied those contract construction rules and enforced the contract as written. [8]

Petitioner argues that the Court should read into the Admiral Policy her right to "reasonably" reject a settlement offer, despite the plain language of the consent to settle clause. Some consent to settle clauses include a "reasonableness" standard, and others do not. Admiral's does not. The cases previously cited by Petitioners involved consent to settle clauses with a "reasonableness" provision. *See, e.g., Clauson v. New England Ins. Co.*, 254 F.3d 331 (1st Cir. 2001) ("The company shall have the right to make any investigation it deems necessary and with the written consent of the insured, said consent not to be unreasonably withheld, any settlement of any claim covered by the terms of the policy."); *Freedman v. United Nat. Ins. Co.*, 211 WL 781919 (C.D. Cal. Mar. 1, 2011) ("[Insurer] shall … not settle any CLAIM without the written consent of the NAMED INSURED which consent shall not be unreasonably withheld.").

In contrast, Admiral's clause does not include a reasonableness standard. The Admiral clause states: "If, however, the Named Insured shall refuse to consent to **any** settlement recommended by the Insurer, which is acceptable to the claimant, and shall elect to contest the Claim … then the Insurer's liability for the Claim shall not exceed the amount for which the Claim

[8] In essence, Petitioners want to handcuff Admiral to the defense and indemnification of the Underlying Action with the only limit to Admiral's liability being the policy limits. This is not what the parties agreed to in the contract. Admiral agreed to defend its insured up to its policy limits or up to the amount of a settlement that Admiral would recommend and that the Estate would accept. Petitioners retained the right to object to a proposed settlement, but only if they were willing to take on the risk that exposure in the case may exceed the amount of that proposed settlement. What Petitioners did not retain the right to do is prevent Admiral from attempting to negotiate a settlement. In other words, Petitioners may choose to continue fighting the case even after it could have been settled, but they cannot do so with the carrier's money. Once Petitioners decide over Admiral's advice to continue litigating the case, Petitioners take on the risk of that decision as well. Once again, the Policy predicts this dispute and sets out the parties' respective rights. The Circuit Court and Court of Appeals properly enforced it as written.

could have been settled ….” (R. p. 371) (emphasis added). At its heart, Petitioners’ contention rests on the false premise that the consent to settle clause in the Admiral policy includes a reasonableness standard. It does not. Given this Court’s long-standing contract construction rules, the Circuit Court and Court of Appeals properly refused to rewrite this provision to include a reasonableness standard. Like the Circuit Court and Court of Appeals, other courts addressing this type of consent to settle clause have recognized this distinction and refused to rewrite the policy provision to include a reasonableness standard. *See Cowan v. Codelia*, 50 Fed. Appx. 36 (2d Cir. 2002); *Security National Ins. Co. v. City of Montebello*, 680 Fed. Appx. 525 (9th Cir. 2017) (holding “the hammer clause does not limit the insurer’s right to invoke the clause to instances where the insured was unreasonable in rejecting the offer. To hold otherwise would impermissibly rewrite the hammer clause to the policyholder’s benefit.”). To hold otherwise would violate this Court’s contract construction rules. *See, e.g., Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134 (“Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage.”); *Dean v. Am. Fire & Cas. Co.*, 249 S.C. 39, 41, 152 S.E.2d 247, 248 (1967) (stating “the well settled rule that if the intention of the parties is clear the courts have no authority to change the contract in any particular and have no power to interpolate into the agreement between the insurer and the insured a condition or stipulation not contemplated by the contract between the parties”).

Petitioners’ desire to inject a “reasonableness” requirement in the contract also does not present a novel question of law. This Court has repeatedly stated: “Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.” *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012); *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (same); *Sloan Const. Co.*,

269 S.C. at 185, 236 S.E.2d at 819 (same). "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction…." *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003).

Because the contract is plainly worded, it must be enforced as written. Moreover, because the contract does not include a "reasonableness" standard, there was no need for any development of a factual record in this case, and Petitioners' reasoning for trying to prevent any settlement negotiations is simply not relevant. Under this Court's longstanding rules, the Policy must be applied according to its plain terms. This contract interpretation issue does not present a novel question of law. Consequently, Petitioners have failed to set forth any "special reasons" justifying the Court's review in this case.

B. Petitioners' pretextual ripeness argument does not present a novel question of law.

Petitioners make the surprising argument that the very action they filed is actually premature. Petitioners filed this action asking the Circuit Court to enter an injunction against Admiral and to make certain declaratory judgment findings, including numerous findings regarding the terms of the insurance contract. (R. pp. 108–110, ¶¶ 88 & 93, including sub-parts). In their first enumerated cause of action, Petitioners "seek a declaratory judgment and order of the court…of the rights and obligations of the parties with respect to the Admiral policy . . . ." (R. pp. 108–109, ¶ 88). After the Circuit Court evaluated the Policy and ruled on the issues the Petitioners raised, the Petitioners changed their mind and contended that the case is actually premature. However, under the standards previously set forth by this Court, the matter was fully ripe for consideration.

Petitioners filed the current action to prevent Admiral from entering into settlement negotiations with the Estate, essentially attempting to "cut off at the pass" the effects of the consent to settle clause in the Policy. Petitioners admit as much in their Petition:

> Petitioners argued their contractual right prohibited Admiral from "initiating" any discussions. Only by initiating settlement discussions could Admiral put Ballard in a position of having to agree or disagree to a settlement….Admiral stated it intended to "engage in pre-suit mediation" and Petitioners objected.

(Pet. for Writ of Certiorari, p. 9); *see also* (Appellants' Br. p. 12 ("This lawsuit . . . seeks to prevent Admiral from pursuing a settlement or seeking to settle the claim so as to put Ballard in a position of having to invoke the "consent" provision of the policy.")). Moreover, Petitioners' Complaint states that prior to filing suit they "notified the Insurance Defendants that no settlement offers were to be extended and no settlements were to be made in the legal malpractice claim with Mrs. Pope . . ." (R. p. 104, ¶ 65). Petitioners claim they were entitled to do so under the Admiral Policy. (R. p. 104, ¶ 65). By filing this suit and making these proclamations, Petitioners identified a dispute as to the parties' rights under the Policy – specifically the "Defense, Cooperation and Settlement" provision which includes the consent to settle clause. That dispute was ripe for adjudication by the Circuit Court and Court of Appeals.

The very purpose of the Declaratory Judgment Act is to provide a means by which a party may determine their rights and duties under a contract before taking action that could be deemed a breach of the contract. As this Court has previously acknowledged:

> The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship.

Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (citations omitted); *see also Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951) ("[T]here should be an existing controversy, or at least the 'ripening seeds of a controversy,'…but the basic purpose of the act is to provide for declaratory judgments without awaiting a breach of existing rights."); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134, 127 S. Ct. 764, 774 (2007) ("The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III."). As the United States Supreme Court held in *MedImmune*, a dispute is sufficiently ripe if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 126, 127 S. Ct. at 771 (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510 (1941)). The goal of the Declaratory Judgment Act is to allow parties an alternative to breaching a contract or the law and then seeking approval from the court. *Id.* at 129, 127 S. Ct. at 772 ("As then-Justice Rehnquist put it in his concurrence, 'the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.'" (citation omitted)).

Under this Court's standards, the dispute between the parties in this case is ripe. It was ripe enough for Petitioners to file suit against Admiral. It was certainly ripe for the Circuit Court's and Court of Appeals' consideration. The pertinent facts of this case are concrete. An underlying suit has been filed against the Petitioners. Admiral is defending that suit under a reservation of rights. Admiral wanted to attempt to negotiate a potential settlement of the Underlying Action, and Petitioners wanted to stop Admiral from doing so. The issues are clear, cogent, and present. This is exactly the sort of dispute for which the Declaratory Judgment Act was designed. Thus, the Circuit Court's grant of judgment on the pleadings was not premature.

Moreover, all of the issues in the case are controlled by the interpretation of the insurance contract, which is a pure question of law. "A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." *Sapp v. Ford Motor Co*., 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009) (citation omitted). Without a doubt, Admiral contests nearly every factual allegation set forth in the Petitioners' Complaint. Moreover, the facts alleged in the Petitioners' Complaint are refuted by findings of the Circuit Court made in the prior lawsuit between Adele Pope and Gloria Corley. However, those facts do not matter. The dispute between Admiral and Petitioners is a narrow one: Does the Policy allow Petitioners to stop Admiral from participating in settlement negotiations with the Estate? That question is wholly controlled by the plain terms of the Policy. Either the Policy gives Petitioners the right to prevent Admiral from negotiating or it does not. Petitioners apparently thought this issue so ripe that they pled in their Complaint for an injunction *pendente lite*. (R. p. 106, ¶ 77). Thus, Petitioners' ripeness argument also does not present any "special reasons" justifying the Court's review in this case.

II. The Circuit Court and Court of Appeals properly considered the 2013-2014 Admiral Policy.

Petitioners erroneously argue that the Circuit Court converted the Judgment on the Pleadings Motion into one for summary judgment by considering the Admiral Policy. (Pet. for Writ of Cert., pp. 5 n.2, 8). The Policy was incorporated by reference into the pleadings by both the Petitioners' Complaint and by Admiral's Counterclaim. When determining a motion for judgment on the pleadings, "a court may consider documents outside of the complaint if the complaint incorporates the documents by reference." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190 n.7, 539 S.E.2d 402, 410 n.7 (Ct. App. 2000); *see also* Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part

thereof for all purposes if a copy is attached to such pleading."). "When considering a motion for judgment on the pleadings, the court may consider the pleadings, exhibits attached thereto, [and] documents referred to in the complaint that are central to the plaintiff's claims . . . ." *In re MI Windows and Doors, Inc. Products Liability Litigation*, 2013 WL 3207423, *2 (D.S.C. June 24, 2013).

In the Complaint, Petitioners specifically identify the 2013-2014 policy by its policy number. (R. p. 95, ¶ 8) ("This is an action for declaratory, injunctive and related relief arising out of a dispute between Plaintiffs and the Insurance Defendants, regarding the respective rights and obligations of the parties under **that specific policy of professional liability coverage issued to Plaintiffs on July 12, 2014, Policy No. 91200935** . . . .") (emphasis added). Thus, the Policy is a "document referred to in the complaint that [is] central to the plaintiff's claim." *Id.*

This Court has previously held that a circuit court is permitted to consider items incorporated by reference even if they are not actually attached to the pleading. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). In doing so, this Court recognized the inherent injustice and judicial inefficiency that would result if a plaintiff could file an action based upon a contract and avoid a motion to dismiss or judgment on the pleadings by simply choosing not to attach the contract to the pleadings. "[A]llowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefitting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based." *Id.* Petitioners' entire claim rests on the existence of the insurance contract.

The Circuit Court and Court of Appeals correctly applied this Court's holding in *Brazell* when they found that the Policy was incorporated by refence by both parties and was properly before the Court on the Motion for Judgment on the Pleadings.[9]

Petitioners also erroneously argue that the Circuit Court erred "in construing one insurance policy" instead of two. (Pet. for Writ of Cert, pp. 2, 7-9). The Circuit Court held that the only relevant insurance policy was the 2013-2014 Policy because all of the allegations in the Underlying Action constitute "Related Wrongful Acts" under the terms of the Policy. (R. pp. 14–15). Petitioners' Court of Appeals Brief did not contest this Circuit Court ruling. *See* (Appellants' Br.).[10] Consequently, this argument is not preserved for review. *See Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 270, 818 S.E.2d 447, 455 (2018) ("[O]ur appellate jurisprudence has clearly established that '[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.'" (citation omitted)).

[9] In addition to being a document central to Petitioners' Complaint – which seeks declaratory judgments interpreting the provisions of the Policy – Admiral attached the Policy to its Answer and Counterclaim. In their Brief, Petitioners argued in a footnote that the Policy was attached as an exhibit to Admiral's Notice of Removal, not its Answer and Counterclaim. (Appellants' Br. p. 6 n.1). Respectfully, the Circuit Court and Court of Appeals considered this very issue and correctly held that the Policy was attached to the Counterclaim. Specifically, the Policy bore a cover sheet identifying it as "Exhibit 1." The Notice of Removal did not refer to any "Exhibit 1." However, Paragraph 114 of the Answer and Counterclaim states that Admiral was attaching a copy of the Policy as Exhibit 1. (R. p. 149, ¶ 114). Thus, it is clear the electronic attachment of the Policy to the Notice of Removal on the District Court's electronic filing program was a mere administrative error. Admiral's Answer and Counterclaim was filed at the same time as the Notice of Removal. Therefore, the Circuit Court correctly held that the Policy was attached to the Answer and Counterclaim. It was filed at the same time, bore the "Exhibit 1" designation referenced in the Answer and Counterclaim, and was specifically referenced in the Counterclaim.

[10] To the extent that Petitioners argue "[t]his issue was brought to the Court of Appeals' attention on page 1, footnote 1, of Appellant's initial brief", the first footnote in their Brief makes no mention of a second policy, much less argues that the Circuit Court erred in holding that the 2013-2014 Policy is the only relevant one. *Compare* (Pet. for Writ of Cert., p. 8) *with* (Appellants' Br., n.1).

Therefore, these arguments by Petitioners also do not set forth novel questions of law or otherwise present any "special reasons" justifying the Court's review in this case.

CONCLUSION

As shown above, Petitioners fail to set forth any "special reasons" justifying the Court's review in this case. Neither the interpretation of the plain terms of the insurance contract nor the ripeness of this pure question of law merits this Court's review. They do not involve novel questions of law.

All of the disputes between the parties are controlled by the plain terms of the Policy. Under those plain terms, Admiral has the sole right and duty to defend, and Petitioners have a duty to cooperate in the defense and settlement of the Underlying Action. Thus, Admiral has a right to negotiate a potential settlement with the Estate, and Petitioners do not have the right to prevent Admiral from participating in those settlement discussions.

Petitioners asked the Circuit Court to prevent Admiral from negotiating the Underlying Action, and Admiral asked the Circuit Court to hold that it could negotiate. Thus, the matter was ripe and proper for judgment on the pleadings.

These issues are subject to longstanding contract construction and ripeness rules, which the Circuit Court and Court of Appeals faithfully applied. Therefore, Admiral respectfully requests that the Court deny the Petition for Writ of Certiorari.

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Columbia, South Carolina
April 22, 2024