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S.C. Supreme Court

The State of South Carolina
In the Supreme Court

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Case No. 2011-CP-00868

Supreme Court No. 2015-001531

Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela Respondent

vs.

Sam English Grading, Inc., Petitioner

**Supplemental Return to Petitioner's Motion to
Explain the Denial of Certiorari**

Counsel worked out all the details of a proposed wrongful death settlement after this Court denied Sam English's petition for a writ of certiorari but before counsel got notice of the Order. The circuit court is currently reviewing the proposed settlement. During a hearing on the proposal, the circuit court questioned whether this Court denied certiorari because the parties settled or whether the Order is an ordinary denial of certiorari.

The Estate asks this Court to give its Order its plain meaning and inform the circuit court to treat it like any other denial of certiorari.

Factual Background

On Thursday, October 8, 2015, this Court entered a two-sentence Order: “This matter is before the Court by way of a petition for a writ of certiorari to review the Court of Appeals’ decision in *Johnson v. Sam English Grading*, 412 S.C. 433, 772 S.E.2d 544 (Ct.App. 2015). The petition is denied.” Ex. A. The Court of Appeals had affirmed a multimillion dollar judgment against Sam English in a wrongful death case. 412 S.C. 433, 772 S.E.2d 544.

Sam English earlier wrote the Court that “the parties have settled this case” and told the Court that counsel was “preparing the appropriate release documents and an order dismissing the appeal and cert petition and directing the Court of appeals [sic] to depublish its opinion.” Entry on 9/24/15 in Case # 2015-001531. Within a week, the Estate wrote Sam English that the Estate never agreed to depublish the Court of Appeals opinion and would object if Sam English tried to depublish the opinion. Ex. B.

The parties were still negotiating this term and others when the Court issued its Order on October 8, 2015. Ex. A. That same day, the Court notified the Court of Appeals and entered on the Case Management System: “Ended - Matter Concluded.” The Court of

Appeals received the notification and issued a remittitur. Entries on 10/12/15 and 10/16/15 in Case # 2012-213307.

Counsel did not get the details of the settlement proposal fully worked out until Friday, October 9, 2015, the day after the Court denied certiorari but before counsel learned about the Order. Ex. C (Hearing Transcript), p. 5 ll.6-12, p. 7 l.25 - p. 8 l.3.

That next Monday, the circuit court held a hearing on whether to approve the proposed settlement. Ex. C. Counsel proposed to settle the wrongful death case for \$2.9 million. Ex. C, p. 5 ll.2-6. The Court questioned how it could approve the proposal if the case had ended, with finality, with Sam English owing \$600,000 more. Ex. C, pp. 5 l.17 - 6 l.2, p. 7 ll.13-22, p. 8 ll.15-25, p. 11 ll.13-14, p. 12 ll.1-5.

During this colloquy, the circuit court stated that it “need[ed] to know whether or not cert was denied because the Supreme Court had been advised that the case was settled.” “If it was not denied on its merits, simply denied because the parties advised that it had been settled, that may have a lot to do with it.” Ex. C, p. 13 ll.12-21.

Sam English then moved this Court to explain why it denied certiorari. The Estate filed a Return, stating that it intended to file another Return once it got an expedited transcript of the hearing on the

proposed settlement. This is that Supplemental Return. The transcript is attached as Ex. C.

Argument

The denial of Sam English's petition reads like an ordinary denial of certiorari and nothing like a remand to the circuit court for the circuit court to review a proposed settlement. The Court should let the circuit court know to treat the Order like any other denial of certiorari.

An order denying certiorari has features that an order granting a remand lacks. It "indicates that this Court has determined there is no need to discuss or further review the merits of the case." *Hollins v. Wal-Mart Stores, Inc.*, 392 S.C. 313, 313, 709 S.E.2d 625, 626 (2011). So the Court closes its case with finality. *See* Rule 221(a), SCACR (prohibiting a petition to rehear a denial of certiorari). The Court also notifies the Court of Appeals about the denial, thus triggering a remittitur. Rule 221(b), SCACR ("If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied.").

All this happened here. The Order describes Sam English's petition for a writ of certiorari and states "[t]he petition is denied[,] " not that the petition or appeal is dismissed or that the case is remanded for the

circuit court to review a proposed settlement. Ex. A. This Court also notified the Court of Appeals and closed its case. That Court then issued a remittitur.

An order granting a remand likewise has features that an order denying certiorari lacks. The proposed settlement must normally be submitted to this Court. *See* Rule 261(b), SCACR (“If a settlement agreement relates to a matter that is pending before an appellate court, the settlement agreement need not be submitted to the appellate court **unless** approval by the appellate court, a lower court or tribunal is required before the agreement can be effective[.]”)(emphasis added); S.C. Code Ann. § 15-51-41 (“Any settlement of a wrongful death or survival action must be approved by either a probate court, circuit court or United States District Court . . .”). And the proposed agreement that must be submitted “shall be in writing and signed by the parties or their attorneys.” Rule 261(a), SCACR.

Risking a tautology, a remand also requires the Court to then remand the case to the circuit court for the circuit court to review the proposal. *See* S.C. Code Ann. § 15-51-42(C)(3)(detailing the procedures to use when parties settle a wrongful death case while the case is pending on appeal).

None of this happened here. Sam English never sent this Court the settlement documents that it told the Court it would send. Sam English never sent this Court the proposed order to dismiss that it told the Court it would send. And Sam English never moved the Court to remand the case or asked the Estate to move the Court to remand.

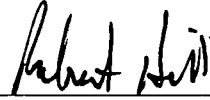
None of this happened because counsel did not get all the settlement terms worked out until after this Court had already denied certiorari. Ex. B (disputing that the Estate agreed to have the Supreme Court depublish the Court of Appeals opinion); Ex. C, p. 5 ll.6-12 (“So they certainly have – a settlement was reached, emails were exchanged. Before any documents actually had been signed – and I was in the midst of working all that out with Trey on Friday. We got notice Saturday morning that on Thursday the Supreme Court denied the Petition for Cert.”).

Conclusion

The Court should give its October 8, 2015 Order its plain meaning and let the circuit court know to treat it like it would any other denial of certiorari.

November 9, 2015
Lexington, SC

Respectfully,



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Aiken, SC 29802

Attorneys for the Estate

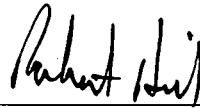
Certificate of Service

I on November 9, 2015 served the Supplemental Return to
Petitioner's Motion for an Explanation for the Denial of Certiorari by
first class mail addressed to:

Charles E. Carpenter, Jr.
Carpenter Appeals and Trial Support LLC
4825 Portobello Road
Columbia, SC 29206

James C. Cox, III
Grier, Cox & Cranshaw, LLC
P.O. Box 2823
Columbia, SC 29202-2823

Attorneys for Sam English Grading



Robert N. Hill, Esq.

The Supreme Court of South Carolina

Paige Weeks Johnson, as Personal Representative of the
Estate of Christie Lane Valenzuela, Respondent,

v.

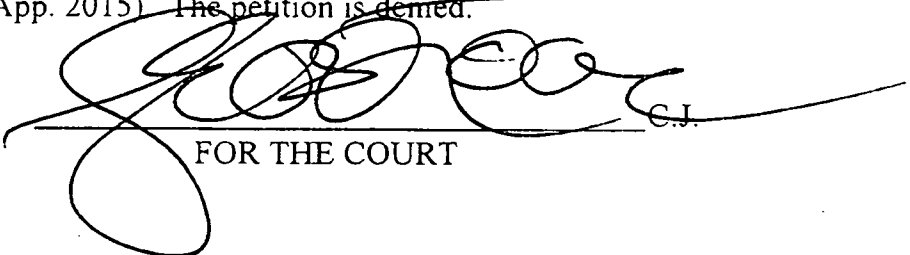
Sam English Grading, Inc., Petitioner.

Lower Court Case No. 2011-CP-02-00868

Appellate Case No. 2015-001531

ORDER

This matter is before the Court by way of a petition for a writ of certiorari to review the Court of Appeals' decision in *Johnson v. Sam English Grading*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015). The petition is denied.



C.J.
FOR THE COURT

Columbia, South Carolina

October 8, 2015

cc:

The Honorable Jenny Abbott Kitchings

John Paul Detrick, Esquire

L. Lisa McPherson, Esquire

Robert Norris Hill, Esquire

Ronald A. Maxwell, Sr., Esquire

Charles E. Carpenter, Jr., Esquire

James C. (Trey) Cox, III, Esquire

Danielle F. Payne, Esquire

The Honorable Liz Góard

Ex. A

From: Law Office of Robert Hill [attorneyhill@twc.com]
Sent: Monday, September 28, 2015 9:20 AM
To: 'Charles Carpenter'
Cc: 'Paul Detrick'; Lisa McPherson (lisam@mcwhirterlaw.com)
Subject: Valenzuela v. Sam English, Appellate # 2015-001531

Dear Charlie,

Good morning! I tried to call and leave a voice mail but my phone or yours is acting up.

I got your letter dated September 23, 2015 to the Supreme Court letting the Court know about the Valenzuela settlement. I understand from Paul that the settlement did not include anything about depublishing the Court of Appeals decision.

If your proposed order has the Supreme Court directing the Court of Appeals to depublish its decision, please let the Supreme Court know that we object to depublishing the decision and will be filing a return.

Take care,

Robert Hill
Law Offices of Robert Hill
P.O. Box 1323
Lexington, SC 29071
803-520-4370



Ex. B

State of South Carolina
County of Aiken

Court of Common Pleas

In Re: Paige Weeks Johnson)
as Personal Representative)
of the Estate of Christie)
Lane Valenzuela,)
Respondent,)
v.)
Sam English Grading, Inc.,)
Appellant.)

Transcript of Record
2011-CP-02-00868

October 12, 2015
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

L. Lisa McPherson, Esquire
Ronnie Maxwell, Esquire
Attorneys for the Respondent

James C. "Trey" Cox, Esquire
Attorney for the Appellant

Bethanie K. Creppon
Circuit Court Reporter

Ex. C

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1 (The following proceedings were held October
2 12, 2015.)

3 THE COURT: Ms. McPherson.

4 MS. MCPHERSON: May it please the Court.

5 Your Honor, we're before the Court today asking
6 for approval of the settlement in Valenzuela vs.
7 English. Mr. Cox has passed up, I believe, all of
8 the pertinent documents. Judge, Paige Weeks
9 Johnson, who is the PR, by virtue of earlier
10 communication, you agreed for her to submit an
11 affidavit in lieu of actually being here today.
12 They had plans to be at Disney, and that's where
13 they are.

14 Judge, if I could add something to what you
15 have, I certainly want to make you aware of
16 everything, about a month ago, the clients decided
17 the heirs, who are present, Michael -- Senior and
18 Junior, Valenzuela, that they wanted to accept
19 \$3 million on the case --

20 THE COURT: What would it be to date? What
21 happened? Didn't they -- the Court of Appeals --

22 MR. COX: Circuit Court denied cert.

23 MS. MCPHERSON: Well, and \$3,577,000, I think,
24 is what was deposited. Judge, what happened is --
25 actually, Mr. Detrich, who is not here today, but

1 who we've spoken with today, negotiated that with
2 Mr. Cox. They decide on taking, essentially,
3 \$100,000 on Michael's Valenzuela's case, which is
4 not before the Court for approval, and settling the
5 death case for \$2,900,000, which is before the
6 Court. So they certainly have -- a settlement was
7 reached, e-mails were exchanged. Before any
8 documents actually had been signed -- and I was in
9 the midst of working all that out with Trey on
10 Friday. We got notice Saturday morning that on
11 Thursday the Supreme Court denied the Petition for
12 Cert.

13 THE COURT: Well, do you want to back out?

14 MS. MCPHERSON: Judge, the clients don't want
15 to back out. We have thoroughly discussed that with
16 them. Mr. Detrich --

17 THE COURT: Well, where is this left? I mean,
18 if the cert had been denied, don't they owe him the
19 whole thing? What other remedy do they have?

20 MS. MCPHERSON: Judge, we've talked about that
21 with the clients.

22 THE COURT: I'm asking you. What other remedy
23 do they have?

24 MS. MCPHERSON: I believe that would end it,
25 Judge.

1 THE COURT: Then how could I, in good
2 conscience, approve it?

3 MS. MCPHERSON: And, of course, that's up to
4 the Court. I talked -- I talked to
5 Mr. and Mrs. Valenzuela -- excuse me, the two
6 Mr. Valenzuelas. Paige Johnson all of those lawyers
7 have talked to them. They just believe that if you
8 were to not approve the settlement, that that may be
9 appealable and may be some further delay, and they
10 would like to get this over with today. We've
11 advised them about --

12 THE COURT: For me to refuse a settlement
13 because I have to do what's in the best interest of
14 the parties is appealable? I don't think so. Show
15 me any case that's ever been -- where denial of a
16 settlement has ever been appealed or even an
17 appealable issue. How much money are they going to
18 walk away from, assuming cert has been denied
19 and the full judgment will pay today? How much
20 would it be?

21 MS. MCPHERSON: Judge, I -- well, I know the
22 amount deposited is \$3,577,000.

23 THE COURT: Well, that stopped the interest;
24 right?

25 MS. MCPHERSON: That stopped the interest, yes,

1 sir.

2 THE COURT: And that 3.5 would get a little bit
3 of interest, but --

4 MS. MCPHERSON: That's true. And then --

5 THE COURT: So they're giving up half a million
6 dollars.

7 MS. MCPHERSON: Part of the settlement was the
8 3 million total would include Michael Valenzuela's
9 settlement. We have told him on his injury case,
10 which has been stayed pending this appeal, we told
11 Michael that we believe his case is probably worth
12 2- to \$300,000 --

13 THE COURT: Well, that's not concerning me now.
14 What concerns me is my duty to approve a wrongful
15 death and survival action when I know that it's not
16 anything negotiable anymore.

17 MS. MCPHERSON: It would be the difference,
18 Judge, between \$2,900,000 and \$3,577,000 and some
19 change, plus --

20 THE COURT: \$600,000 and some change.

21 MS. MCPHERSON: Yes, sir.

22 THE COURT: Mr. Cox, how can I approve this?

23 MR. COX: Your Honor, we had actually -- and we
24 had talked about this, me and the plaintiffs'
25 counsel, before we came here this morning. And I

1 learned this morning that cert had been -- our
2 Petition for Cert had been denied by the Supreme
3 Court.

4 Your Honor, back in the early part of September
5 while the appeal was pending, we reached a
6 settlement agreement with plaintiffs' attorneys.
7 They spoke with their clients, we agreed and we
8 notified the Court that a settlement agreement had
9 been -- the Supreme Court that a settlement
10 agreement had been reached --

11 THE COURT: But not approved.

12 MR. COX: -- at that time. And, Your Honor,
13 we've also received an affidavit from -- signed by
14 the Valenzuelas and --

15 THE COURT: Mr. Cox, I agree with you on all of
16 that. And, you know, what y'all did was in the
17 course of business. But facts have changed. The
18 fact now is that cert has been denied and that's the
19 end of the case. And my job is to make sure that
20 it's in the best interest of the parties. And what
21 if I find that it's not? I mean, notwithstanding
22 the fact that you've settled it doesn't mean I have
23 to approve it. And you show me some law that says
24 that I have to do it and I may, but if you can't
25 show me the law, I'm not going to approve it.

1 MR. COX: Your Honor, I may --

2 THE COURT: And I'm not trying to be difficult.

3 MR. COX: I would ask that --

4 THE COURT: I gave y'all every opportunity in
5 the world to settle this case long ago.

6 MR. COX: Your Honor, I would just submit to
7 the Court that a good-faith settlement agreement was
8 reached long ago. It's in writing, pursuant to
9 43 (k), we've got a signed document by the
10 plaintiffs. And --

11 THE COURT: I agree with you. I agree that you
12 settled it. My job is to make sure the settlement
13 is fair. And until I make that determination, you
14 can agree all day long. I don't think it's binding
15 until it's passed muster with the Court.

16 MR. COX: And, Your Honor --

17 THE COURT: And what y'all did is what good
18 lawyers would do. But, you know, you may have
19 waited too long. I don't know. I don't know the
20 answer to it.

21 MR. COX: Your Honor --

22 THE COURT: I've never had that in 42 years.

23 MR. COX: And I don't know -- we're just
24 learning this this morning. And with my appellate
25 counsel, Mr. Carpenter, being -- he's been affected

1 by the national emergency in Columbia. His house
2 has been damaged by the storm. I don't know, Your
3 Honor -- I don't know the circumstances around the
4 denial of the Petition for Cert. I don't know if
5 it's because the matter became moot because the --
6 because we had notified the Court that a settlement
7 had been reached and so they're denying the cert. I
8 don't know the circumstances of that, Your Honor.

9 THE COURT: I don't either.

10 MS. MCPHERSON: Your Honor, and I did speak
11 with Mr. Hill --

12 THE COURT: Mister who?

13 MS. MCPHERSON: Robert Hill, who is our
14 appellate lawyer. What did happen is that once --
15 at some point -- and I don't know the date -- after
16 the settlement was reached, their appellate lawyer,
17 Charlie Carpenter, wrote the Supreme Court and said
18 a settlement had been reached. He did include a
19 term that we could never agree to, which was that
20 the Court of Appeals would vacate it. We had never
21 agreed to that. Mr. Cox knows --

22 THE COURT: I'm not sure you can agree to that.

23 MS. MCPHERSON: In any event, he said, I will
24 therefore be preparing paperwork to send you. But
25 Mr. Carpenter never prepared any paperwork, so

1 nothing further went to the Supreme Court.

2 MR. COX: Your Honor, that's the settlement
3 paperwork that's before the Court today. The
4 settlement paperwork would be submitted in the
5 settlement -- that's the settlement paperwork here
6 today, Your Honor. There were never any terms
7 changed or -- or -- by way of that letter.

8 Mr. Carpenter put the Supreme Court on notice
9 that the case had been settled, and then the appeal
10 at that point, Your Honor, we would submit became
11 moot. And we also agree that it was a very fair
12 settlement, under the circumstances. It's --

13 THE COURT: What circumstances? The
14 circumstances now is that you've lost.

15 MR. COX: Under the circumstances at the time,
16 Your Honor. The appeal was pending and the offer on
17 this case, the \$3 million, we believe, was a very
18 fair settlement under those circumstances at that
19 time.

20 THE COURT: The Court must make a finding that
21 the settlement is fair and reasonable and in the
22 best interest of the statutory beneficiaries in the
23 survival action of the Estate, then it may issue an
24 order -- or it shall issue an order approving the
25 settlement.

1 So the question is, do I find it to be fair and
2 fair and reasonable? And how can I find it to be
3 fair and reasonable with the \$600,000 from there and
4 the cert has been denied and I don't know that
5 you've got further remedies in the Appellate Court?

6 MR. COX: Your Honor, I would submit it's
7 because the settlement agreement was reached before
8 the Supreme Court made any decisions, and the
9 Supreme Court was given notice that we'd reached the
10 settlement agreement, Your Honor. And I'd suggest
11 or submit that the fairness of the settlement should
12 be looked at at the time that it was entered into.

13 THE COURT: I'll let you do this: I'll let
14 both of you give me memos on how to handle it. If
15 it's something I can approve and -- I mean --

16 MR. COX: And, Your Honor --

17 THE COURT: Strike that. Not that it's
18 something I can approve. But if I can disregard the
19 fact that it's over in the Appellate Court and look
20 at it at the time y'all were negotiating and get
21 your documents together before the cert was denied,
22 that's one thing. But if I have to look at it in
23 the totality of the circumstances and the cert's
24 denied, I'm not going to approve it.

25 MR. COX: Does Your Honor want the matter

1 briefed?

2 THE COURT: Yes, sir.

3 MR. COX: How long do we have to --

4 THE COURT: How long do you want?

5 MR. COX: I would ask for a couple of weeks,

6 Your Honor.

7 THE COURT: Tell me. Thirty days?

8 MR. COX: Thirty days would be appreciated,

9 Your Honor.

10 THE COURT: Very well.

11 MS. MCPHERSON: Thank you, Your Honor.

12 THE COURT: And I also need to know whether or
13 not cert was denied because the Supreme Court had
14 been advised that the case was settled. Did anybody
15 advise the Court that it was settled?

16 MR. COX: Yes, Your Honor. I've got a copy of
17 that letter.

18 THE COURT: Okay. If it was not denied on its
19 merits, simply denied because the parties advised
20 that it had been settled, that may have a lot to do
21 with it.

22 MS. MCPHERSON: And, Judge, all the order said
23 was it's before us on a petition for cert, that is
24 denied. So we don't know from the order.

25 THE COURT: It may not be --

1 MS. MCPHERSON: In fact, I should probably make
2 a copy of that order part of the record, Judge. And
3 Mr. --

4 THE COURT: Mr. Cox, I've never had this
5 question posed to me in my 30 years as a lawyer and
6 12 years as a judge, so I really don't know the
7 answer to it.

8 MS. MCPHERSON: Mr. Maxwell has pointed out
9 that it does say that instead of being dismissed,
10 that the petition is simply denied. I don't know
11 how we --

12 THE COURT: I don't know what that means.

13 MR. COX: Your Honor, I've not been faced with
14 this either. The Court --

15 THE COURT: And I'm not being critical.

16 MR. COX: We tried to avoid this situation,
17 Your Honor. Both parties had agreed to it. We had
18 agreed to forego the appeal, we wrote the Court,
19 said that we reached a settlement agreement,
20 and then were trying to get it in court and have it
21 approved. The agreement --

22 THE COURT: You said you'd forego the Petition
23 for Cert?

24 MR. COX: Yes. We -- we -- Your Honor, we
25 wrote the Court and let the Court know that we had

1 settled the case. And I'm looking for a copy of the
2 letter.

3 THE COURT: You can just mail it to me or
4 however you want to do it. I'm not being critical
5 of anything you've done. It's just a weird
6 situation.

7 MR. COX: That was the reason for the letter.
8 And it was copied on all the parties to let the
9 Supreme Court know that the parties have settled
10 this case. And that was on September 23rd, 2015.
11 And I've got a copy of an affidavit, Your Honor,
12 that I will also hand up, which is outlining the
13 settlement agreement signed by the plaintiffs and
14 their attorney on September 3rd, Your Honor.

15 THE COURT: I believe you on that. There's no
16 question on that.

17 MS. MCPHERSON: Thank you, Judge. So 30 days?

18 THE COURT: Thirty days.

19 MR. COX: Thank you, Judge.

20 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Aiken County, South Carolina, on the 12th of October, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 4, 2015

s/Bethanie K. Creppon

Bethanie K. Creppon
Circuit Court Reporter