THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals

Case No. 2012-CP-01-00306
Appellate Case No. 2014-000946

Richard Wilson, Michael J. Antoniak, Jr., Marsha L. Antoniak, Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie Calhoun, Cynthia Gary, Robert Wayne Gary, Eugene P. Lawton, Jr., Jeanette Norman, James Robert Shirley, Robert W. Spires, Crystal Spires Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin Franklin Wofford, Jr., and Rebecca Hammond Wofford,.....Plaintiffs-Petitioners,

v.

Laura B. Willis and Jesse A. Dantice, individually, and as agents and/or brokers for Southern Risk Insurance Services LLC, Travelers Casualty Insurance Company of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., and Laurie Williams,.....Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Defendants-Respondents,

and

Of whom Laurie Williams is a .....Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

HAWTHORNE MERRILL LAW, ATTORNEY FOR PETITIONER LAURIE WILLIAMS
Jane H. Merrill
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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies she timely filed a Petition for Rehearing in the South Carolina Court of Appeals, and the Court of Appeals denied it by Amended Order filed June 27, 2016.

STATEMENT OF ISSUES

In reversing the circuit court's denial of Insurers' motion to compel arbitration, did the Court of Appeals err in holding Laurie Williams was not an "insured or beneficiary" under an insurance policy, and that the insurers did not waive their right to compel arbitration?

STATEMENT OF THE CASE

The trial court denied Insurers Peerless Insurance Company, Montgomery Insurance Company and Safeco Insurance Company's (Insurers) Motions to Compel Arbitration and Dismiss Claims in a total of fourteen actions involving Laurie Williams (Ms. Williams) and Petitioners (collectively, the Insureds.)

In an opinion filed March 2, 2016, the Court of Appeals reversed the trial court's denial of the Insurers' Motions to Compel Arbitration holding a valid contract existed between Insurers and the Agency; the contract was binding on the Insureds even though they did not sign the alleged Agency Agreement; the arbitration provision was "sufficiently broad to encompass a wide array of claims and should be construed accordingly;" the "commonplace" claims were "encompassed by the arbitration provision because the Insurers' alleged actions" did not constitute "illegal

and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings;" and the Insurers did not waive their right to arbitrate. (Appendix (App.), pp. 915-936).

The Petitioner timely filed a Petition for Rehearing, which the Court of Appeals denied by Amended Order filed June 27, 2016. (App. pp. 991-992).

Ms. Williams was severely injured when a sports utility vehicle, driven by Cynthia Gary, struck her while she walked along a rural road. Ms. Williams is a potential beneficiary of the insurance policy Ms. Gary purchased from an Insurer through its agent.

Ms. Williams became a party to this matter after the Insurers filed a crossclaim against her. (App. pp. 213-321). Ms. Williams has a separate pending negligence action against Ms. Gary in Abbeville County. (App. pp. 753-756).

Ms. Williams joins the arguments in the Petition for Certiorari filed by Attorneys Thomas E. Hite, Jr., Anne Marie Hempy, and Leslie A. Bailey. Rule 208(b)(6), SCACR. In the interests of judicial economy, this Petition only addresses the additional arguments unique to Ms. Williams.

STATEMENT OF THE FACTS

Cynthia Gary's sports utility vehicle struck Ms. Williams while she was walking along a rural road on July 26, 2012, causing serious injuries requiring a lengthy hospitalization and recovery.

On May 29, 2013, Ms. Williams filed suit against Cynthia Gary for negligence that caused extensive injuries. (App. pp. 753-756). Discovery is

complete. The court placed the case on the Abbeville trial docket. However, this appeal has prevented the negligence action from being resolved, and it is continued pending the outcome of this appeal. (App. p. 706).

Ms. Williams is only a party to this case because the Insurers sued her twice. Only a few months after Ms. Williams was catastrophically injured, First National Insurance Company of America, one of the Insurers, filed suit against Ms. Williams and Wayne and Cynthia Gary (the Garys) in the United States District Court of South Carolina. (App. pp. 30-85). The Insurer sought a judgment declaring it had no duty to defend or indemnify the Garys for the July 26, 2012 collision in which Ms. Williams was seriously injured. (App. p. 33, ¶ a.). The Insurer alleged the Garys fraudulently procured the applicable insurance policy. (App. pp. 31-33, ¶¶ 10-20)

The Insurers' Complaint said nothing about arbitration or alleged agency agreements. (App. pp. 30-33). After Ms. Williams and the Garys answered and counterclaimed, the parties stipulated to dismiss the federal court action. (App. pp. 108-111, pp. 707-739).

The Insurers again sued Ms. Williams. In response to the Garys' state court suit against them, the Insurers answered, and filed a cross claim against Ms. Williams. (App. pp. 213-321).

The cross claim against Ms. Williams said nothing about arbitration or alleged agency agreements. (App. pp. 224-234, ¶¶ 45-112, pp. 235-136, ¶¶ a – h).

In response, Ms. Williams filed a cross claim against Insurers. (App. pp. 740-752). In their Answer to Ms. Williams' cross claim, Insurers set forth nine affirmative defenses, but like their federal court Complaint, said nothing about arbitration or alleged agency agreements. (App. pp. 761-764, ¶¶ 28-37).

One year and one day after first filing suit against Ms. Williams in federal court, the Insurers filed a motion to compel arbitration on October 31, 2013. Insurers sought to enforce an arbitration provision contained in an alleged agreement (Agency Agreement) between Insurers and Dantice, the owner of the insurance agency from whom the Garys purchased their automobile insurance policy.

The trial court heard oral arguments on the motions on January 21, 2014, and the Insureds filed their briefs in opposition the same day. The Insurers filed a reply memorandum on February 11, 2014 and attached additional evidence for the court to consider, including an opinion affidavit of an employee of Insurers.[1] (App. pp. 520-522, pp. 645-652).

On March 25, 2014, the Court issued its order denying the Insurers' motion, finding the Insurers "failed to meet their burden of proof in

[1] The presiding judge granted the Insurers' request to file a reply brief only to address two points raised in the Insureds' Memoranda in Opposition. He specifically declined to leave the record open for the addition of any new evidence. (App. p. 444, lines 7-11 ("So I'm assuming that by allowing them to do a reply brief, you're not leaving this hearing open." "No. Just to respond to the issues that you raised that they were not apprised to it. It's just two as I understand it.")).

establishing a valid, binding contract by which the [Insureds] should be forced to arbitrate their claims." (App. p. 18, pp. 16-25). Thereafter, on April 8, 2014, the Insurers filed a Motion to Alter or Amend, which the court denied on April 21, 2014. (App. pp. 28-29, pp. 674-684).

The Insurers filed their Notice of Appeal on April 25, 2014. (*See* Notice of Appeal). Thereafter, the Insurers filed a Consent Motion to Consolidate Appeals in all fourteen cases. (*See* Consent Motion to Consolidate). The Court granted the Motion, consolidating the appeals pursuant to Rule 214, SCACR, on June 18, 2014. (*See* Order).

In an opinion filed March 2, 2016, the Court of Appeals reversed the trial court's denial of the Insurers' Motions to Compel Arbitration holding a valid contract existed between Insurers and the Agency; the contract was binding on the Insureds even though they did not sign the alleged Agency Agreement; the arbitration provision was "sufficiently broad to encompass a wide array of claims and should be construed accordingly;" the "commonplace" claims were "encompassed by the arbitration provision because the Insurers' alleged actions" did not constitute "illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings;" and the Insurers did not waive their right to arbitrate. (App. pp. 915-936).

Petitioner Laurie Williams now petitions for a writ of certiorari to review the Court of Appeals decision. Rule 242, SCACR.

Additionally, Ms. Williams adopts the entire Statement of the Facts in the Petition for Writ of Certiorari filed by Attorneys Thomas E. Hite, Jr., Anne Marie Hempy, and Leslie A. Bailey. Rule 208(b)(6), SCACR.

ARGUMENT

1. The Court of Appeals erred in finding Petitioner Williams' claim is not one of an "insured or beneficiary under any insurance policy" that would be exempt from arbitration pursuant to S.C. Code Ann. subsection 15-48-10(b)(4).

South Carolina specifically excludes "[a]ny claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract" from the law that recognizes "a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable." S.C. Code Ann. § 15-48-10(b)(4).

Despite this clear statutory mandate, the Court of Appeals held Ms. Williams' claim was not one of "'any insured or beneficiary under any insurance policy' that would exempt this action from arbitration pursuant to subsection 15-48-10(b)(4)." All of Ms. Williams' claims arise from her personal injuries. (App. pp. 753-756, pp. 740-752).

To support its holding, the Court of Appeals made two internally inconsistent factual findings: 1. the alleged 2010 Agency Agreement was the basis for the Insureds' causes of action, and therefore it, and not the insurance policy, is the contract "at issue;" (App. p. 935), and, 2. the Insureds did not know the 2010 Agency Agreement existed until many months after filing suit. (App. p. 928). How can the Insureds have based their suits on a contract they knew nothing about?

To further support its holding, the Court of Appeals cited *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 731 S.E.2d 324 (Ct. App. 2012). In *Walden*, the Court determined the parties' contract, a car lease agreement, was not an insurance policy. *Id.* at 207, 731 S.E.2d at 325. As such, the contract's arbitration provision was not subject to the statute excluding "any insured or beneficiary under any insurance policy or annuity contract" from arbitration. *Id.* at 210; 731 S.E.2d at 327; S.C. Code Ann. § 15-48-10(b)(4).

But the Court of Appeals did not review and interpret the parties' contract, as the *Walden* court did. Instead, it ignored the parties' contracts. The Insureds entered into contracts with the Insurers by purchasing insurance policies.

After disregarding the contracts between the Insureds and Insurers, the Court of Appeals then put on blinders to reach its illogical and incorrect holding compelling arbitration. It needed a contract to support its holding, and the insurance policies did not include arbitration clauses, so it considered a marginally relevant contract to which the Insureds were not parties and knew nothing about when they filed suit, to be the contract "at issue." (App. p. 935).

South Carolina statutory law clearly excludes "[a]ny claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract" from arbitration, and all of Ms. Williams' claims arise from her personal injuries. S. C. Code Ann. § 15-48-10; (App. pp. 753-756, pp. 740-752). Nevertheless, the Court of Appeals held that Ms. Williams must arbitrate.

2. The Court of Appeals failed to recognize facts in the record that contradict its holding that the Insurers did not waive their right to compel arbitration, particularly that Ms. Williams has engaged in significant discovery and been significantly prejudiced.

The Insurers filed their motion to arbitrate more than one year after first suing Ms. Williams. She has engaged in extensive discovery and is ready for trial in the negligence action she filed, and is significantly prejudiced by the Insurers' motion to compel arbitration and subsequent appeal. More than four years have passed since she suffered serious personal injuries, and she cannot move forward with it until this matter is resolved. (App. p. 706, pp. 753-756).

In determining whether a party has waived its right to compel arbitration, our courts have looked to the following factors: 1) the length of time between commencement of the action and the filing of the motion to compel, 2) if the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and 3) the prejudice on the non-moving party by the moving party's delay in seeking arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

Regarding the first factor, the Court found "the complicated nature of this action rendered" the time lapse, more than one year after the Insurers first sued Ms. Williams, "even more reasonable under the circumstances." (App. p. 933). This is internally inconsistent with the court's earlier factual finding that "such tort claims are rather commonplace." (App. p. 929).

In analyzing the second factor, the Court ignored that Ms. Williams, a potential beneficiary of an insurance policy, has engaged in significant discovery, and is ready for trial in her companion negligence case. (App. pp. 753-756). This appeal has prejudiced Ms. Williams because it has rendered her unable to proceed with the negligence case, a fact the Court of Appeals also ignored. (App. p. 706).

Looking at the third factor, the Court ignored the significant prejudice to Ms. Williams when it held that the Insurers' actions do "not rise to the level of prejudice necessary to waive the right to compel arbitration against...Williams in particular." (App. p. 933). More than four years have passed since Ms. Williams suffered serious injuries that required surgeries and a lengthy hospital stay, but the Court of Appeals inexplicably suggests that Ms. Williams is somehow the least prejudiced.

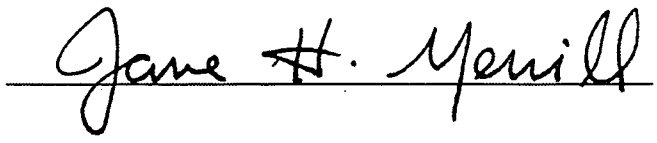
3. Petitioner Williams adopts and incorporates into this Petition the Petitioners' arguments, in their entirety, presented in the Petition for Writ of Certiorari filed by Attorneys Thomas E. Hite, Jr., Anne Marie Hempy, and Leslie A. Bailey. Rule 208(b)(6), SCACR.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

HAWTHORNE MERRILL LAW, LLC



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August 2, 2016

Greenwood, South Carolina

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SC Court of Appeals

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Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. of America are.....Defendants-Respondents,

and

Of whom Laurie Williams is a .....Petitioner.

PROOF OF SERVICE

I, legal assistant with Hawthorne Merrill Law, LLC, certify that I have served all counsel of record on August 2, 2016, with a copy of the pleading(s) specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Petition for Writ of Certiorari to the South Carolina Court of Appeals

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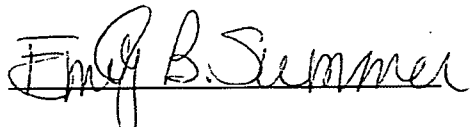

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August 2, 2016

Ms. Jenny Abbott Kitchings
SC Court of Appeals
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Re: Appellate Case No. 2014-000946

Dear Ms. Kitchings:

Enclosed please find a scanned copy of the Petition for Writ of Certiorari and Proof of Service that was sent to the SC Supreme Court.

Thank you for your kind attention to this matter.

Sincerely,

Jane H. Merrill

Jane H. Merrill
JHM/amm
Enclosures

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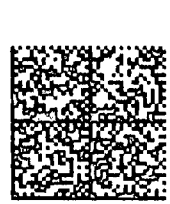

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