STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2018-CP-32-01743

Desa Ballard and Desa Ballard P.A., d/b/a Ballard & Watson,

Plaintiffs,

v.

Admiral Insurance Company and Adele R. Pope, individually and as Special Administrator of the Estate of Gloria Corley,

Defendants.

ORDER GRANTING DEFENDANT ADMIRAL INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter comes before this court on a Motion for Judgment on the Pleadings (the "Motion") filed by Defendant Admiral Insurance Company ("Admiral"), seeking denial of the Plaintiffs Desa Ballard and Desa Ballard P.A., d/b/a Ballard & Watson's ("Plaintiffs") requested declaratory and injunctive relief, dismissal of Plaintiffs' bad faith claim against Admiral, and the granting of certain declarations sought by Admiral related to its lawyers' professional liability policy issued to Desa Ballard d/b/a Ballard & Watson, Attorneys at Law.

A hearing on the Motion was held on November 14, 2018. Attorneys Eric S. Bland and Ronald L. Richter, Jr. appeared on behalf of the Plaintiffs. Attorney Adam T. Silvernail appeared on behalf of the Estate of Gloria Corley. Attorney Adele J. Pope appeared pro se on her own behalf. Attorney Wesley B. Sawyer appeared on behalf of Admiral. After considering the Motion, Plaintiffs' Response in Opposition, Defendant Pope's Response, and arguments of counsel, the court grants Admiral's Motion, as specified below.

FACTUAL BACKGROUND

For purposes of this Motion, the court assumes the truth of well-pleaded factual allegations. This saga spans a period of years and two currently pending lawsuits. In 2010, Admiral issued a

lawyer's professional liability policy to Desa Ballard d/b/a Ballard & Watson, Attorneys at Law, which was renewed annually. Pls.' Complaint at pgs. 1-4. According to Plaintiffs, the specific policy at issue is the policy issued on July 12, 2014, Policy No. 91200935 (hereinafter the "Admiral Policy"). Pls.' Complaint at pg. 3.

Plaintiffs were retained to defend a lawsuit filed against the late Gloria Corley in March of 2011. Pls.' Complaint at 6. The lawsuit was brought by Ms. Corley's former attorney, Ms. Pope, in her individual capacity, and in that lawsuit, Ms. Pope sought to collect attorney fees that were owed to her by Ms. Corley for legal services regarding Ms. Corley's interest in a trust. Pls.' Complaint at pgs. 6-7. Upon the conclusion of Ms. Pope's services in that matter, Ms. Pope was to receive payment of attorney's fees by receiving a portion of Ms. Corley's annual disbursements from the trust. Pls.' Complaint at pg. 6.

In addition to defending Ms. Corley against Ms. Pope's action for attorney's fees, Plaintiffs also represented Ms. Corley in negotiating a buy-out of Ms. Corley's interests in the trust. Pls.' Complaint at pg. 6. The trust litigation ultimately settled, which resulted in a lump sum payment to Ms. Corley based in part on statutory life expectancy tables. Pls.' Complaint at pg. 7. At that time, it was Plaintiffs' and Ms. Corley's contention that Ms. Pope was no longer owed additional attorney's fees because Ms. Corley's interest in the trust was terminated. Pls.' Complaint at pg. 7. However, on August 21, 2013, Ms. Pope was awarded a judgment of one-third the gross amount of the trust settlement. Pls.' Complaint at pg. 8. On Ms. Corley's behalf, Plaintiffs filed and served an appeal of the judgment to the South Carolina Court of Appeals, which was apparently filed after the applicable deadline for filing such an appeal. Pls.' Complaint at pg. 8. The appeal was determined to be untimely and was dismissed. Pls.' Complaint at pg. 8.

On May 6, 2014, in accordance with their contractual obligations under the 2013-2014 Admiral Policy, Plaintiffs timely notified Admiral that a potential claim could be made against them by Ms. Corley as a result of the untimely appeal of Ms. Pope's judgment. Pls.' Complaint at pg. 9. By letter dated August 19, 2014, Admiral accepted notice of the matter as a circumstance that would fall within the coverage afforded to Plaintiffs under the 2013-2014 Admiral Policy if a claim subsequently arose from the circumstances reported on May 6, 2014. Pls.' Complaint at pg. 9.

Ms. Corley passed away on March 31, 2016, and the Estate of Gloria Corley was opened by the Lexington County Probate Court. Pls.' Complaint at pgs. 10-11. The Lexington County Probate Court appointed Ms. Pope, a creditor of the Estate of Gloria Corley, as the Special Administrator of the Estate of Gloria Corley. Pls.' Complaint at pg. 11. On February 23, 2017, Adele Pope, as the Special Administrator of the Estate of Gloria Corley, filed an underlying legal malpractice action in the Lexington County Court of Common Pleas against Desa Ballard and Desa Ballard, P.A., Civil Action No. 2017-CP-32-00618 (hereinafter the "Underlying Malpractice Action"). Pls.' Complaint at pgs. 5 & 11.

The above-captioned action for declaratory judgment arises from a clear disagreement between Plaintiffs and Admiral on the meaning of the applicable proffered liability policy, specifically their duties to one another based upon these contractual obligations. Pursuant to the Admiral Policy, Admiral is defending Plaintiffs against the claims asserted against them in the Underlying Malpractice Action. Admiral seeks to negotiate with the Estate of Gloria Corley in the Underlying Malpractice Action to determine if there is the possibility of a reasonable settlement. Plaintiffs seek an injunction to prevent Admiral from engaging in any settlement negotiations in the Underlying Malpractice Action. Plaintiffs also seek declarations that: (1)

Admiral may not terminate its defense of Plaintiffs in the Underlying Action; (2) Admiral may not initiate or make any settlement offers in the Underlying Malpractice Action without the express written consent of the Plaintiffs; and (3) Admiral may not withdraw its defense or indemnity coverage from Plaintiffs as a result of Plaintiffs' refusal to consent to settlement in the Underlying Malpractice Action. In addition, Plaintiffs have alleged a bad faith cause of action against Admiral based upon its undertaking of settlement negotiations in the Underlying Malpractice Action and refusal to renew the Admiral Policy after the 2016-2017 term.

By way of Counterclaim, Admiral seeks contrary declarations that: (1) Admiral has the right to negotiate a potential settlement as part of its defense of the Underlying Malpractice Action, including, but not limited to, participation in settlement negotiations at mediation; (2) Plaintiffs owe a duty to cooperate in the defense and settlement of the Underlying Malpractice Action and do not have the right to prevent Admiral from participating in settlement negotiations; (3) if Admiral recommends a settlement to its 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 any Claim Expense incurred up to the date of such refusal; and (4) if Admiral recommends a settlement to its 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.

Admiral also requests that the court dismiss Plaintiffs' claim for bad faith on the basis that it fails as a matter of law. Admiral's primary contention in support of the dismissal of the bad faith claim is that an insurance company may choose not to renew a policy for any reason.

STANDARD OF REVIEW

"A judgment on the pleadings shall be granted where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in the plaintiff's favor." *Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 231 (2013). "A judgment on the pleadings is in the nature of a demurrer, and all properly pleaded factual allegations are deemed admitted for purposes of the consideration of a demurrer." *Douglass 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). A motion for judgment on the pleadings "is proper where the pleadings entitled the party to judgment without proof, as where they disclose all the facts, or where the pleadings present no issue of fact or where the pleadings, under other circumstances, present an immaterial issue." *Wooten v. Standard Life and Casualty Insurance Company*, 239 S.C. 243, 249, 122 S.E.2d 637, 640 (1961).

In determining a motion for judgment on the pleadings, the court may consider documents incorporated by reference in the pleadings. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 190 n.7, 539 S.E.2d 402, 410 n.7 (Ct. App. 2000) ("Generally, a court may consider documents outside of the complaint if the complaint incorporates the documents by reference."); *see also Fisher v. City of North Myrtle Beach*, 2012 WL 3638776, *1 (D.S.C. July 26, 2012); *In re MI Windows and Doors, Inc. Products Liability Litigation*, 2013 WL 3207423, *2 (D.S.C. June 24, 2013) ("When considering a motion for judgment on the pleadings, the court may consider the pleadings, exhibits attached thereto, documents referred to in the complaint that are central to the plaintiff's claims . . . ."). Here, in their Complaint, Plaintiffs specifically identify the 2013-2014 policy by its policy number. Moreover, their entire claim rests on the existence of the contract. Therefore, regardless of whether the Complaint is attached, it is incorporated by reference. *See, e.g., Brazell v. Windsor*,

384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) ("[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 benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.").

Moreover, Admiral specifically incorporates the Admiral Policy in its Answer and Counterclaim. Admiral originally removed this case to federal court and filed its Answer and Counterclaim concurrently with its Notice of Removal. In Paragraph 114 of the Answer and Counterclaim, Admiral states that it is attaching a copy of the Admiral Policy as Exhibit 1. At the hearing on the Motion, counsel for Admiral provided the court a copy of the policy bearing an electronic file stamp from the federal court with a stamped cover page labeled "Exhibit 1." Although it appears this filing was attributed to the Notice of Removal filed in federal court, the Notice of Removal did not refer to the policy as Exhibit 1. Thus, it is apparent that the Admiral Policy was filed with the Answer and Counterclaim, and any administrative error in attributing the policy to the Notice of Removal instead of the Answer and Counterclaim does not nullify the filing of the Policy with the Answer. Therefore, because Plaintiffs specifically identify and rely on the Admiral Policy in their Complaint and because Admiral attached a copy of the Admiral Policy as an exhibit with the filing of its Answer and Counterclaim, both parties have incorporated the Admiral Policy by reference into their respective pleadings. The action for declaratory judgment is ripe for a decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the heart of the dispute, Plaintiffs and Admiral disagree about their rights under the Admiral Policy. Plaintiffs seek to keep Admiral from participating in settlement negotiations, and Admiral seeks to enter into negotiations. Because the dispute centers on a written contract, the

terms of the contract control the court's analysis. Moreover, this matter is appropriately before the court on a Motion for Judgment on the Pleadings because the 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. For the reasons set forth below, the court finds the plain and unambiguous terms of the Admiral Policy require entry of an order granting Admiral's Motion as specified in this Order.

I. General rules of insurance contract interpretation.

As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory prohibition. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989). "South Carolina courts have a long history of formalistic interpretation with respect to all contracts and have repeatedly held . . . insurance policies are subject to general rules of contract construction . . . ." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 579, 757 S.E.2d 399, 406 (2014) (quotation omitted). "The foremost rule in interpreting an insurance contract is to give effect to the intent of the parties as shown by the language of the contract itself." *Laidlaw Envtl. Services (TOC), Inc. v. Aetna Cas. & Surety Co. of Illinois*, 338 S.C. 43, 48, 524 S.E.2d 847, 850 (Ct. App. 1999) (internal citation omitted).

"When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). "The court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully." *Id.* (internal quotations omitted). These rules guide the court's analysis here.

II. The Complaint alleges "related wrongful acts" and the 2013-2014 Policy is the only applicable policy.

As an initial matter, Plaintiffs argue that multiple policies are at issue because Plaintiffs notified Admiral of a potential claim during the 2013-2014 policy period, but suit was not filed by the Estate of Gloria Corley until a later policy period. Pls.' Resp. Opp. Def.'s Mot. at pg. 1, n. 1. However, the Admiral Policy states that "[a]ll Claims based upon or arising out of the same Wrongful Act or any Related Wrongful Acts, or one or more series of any similar, repeated or continuous Wrongful Acts or Related Wrongful Acts, shall be considered a single Claim." Also, "[e]ach Claim shall be deemed to be first made . . . when the earliest Claim arising out of such Wrongful Act or Related Wrongful Acts was first made." Therefore, all "related wrongful acts" will be deemed a single claim and will be attributed to the policy that was in effect when the first notice of claim was submitted to Admiral.

According to the Admiral Policy, the term "related wrongful acts" is defined as "Wrongful Acts which are logically or causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event or decisions." The Underlying Malpractice Action alleges claims against Desa Ballard and Desa Ballard, P.A. all arising out of Desa Ballard's legal representation of the late Gloria Corley. Plaintiffs' Complaint describes acts which are "logically or causally connected by reason of common" facts, circumstances and transactions because all the allegations asserted by the Estate of Gloria Corley in the Underlying Malpractice Action arise out of Plaintiffs' representation of the late Gloria Corley in the same or substantially related matters.

Plaintiffs have acknowledged that the claims arise out of related acts. In footnote 1 of Plaintiffs' opposition memorandum, Plaintiffs argue that at least two policies apply. However, in support of that argument, they concede that the claims arise out of the same client matter:

> Paragraph 8 of the complaint identifies by policy number only the policy issued on July 14, 2013, and under which Ballard's first notice of potential claim was given. However, the complaint reflects that Ballard gave notice of a possible second claim to Admiral **regarding the same client matter** on a later occasions, in 2017, under a later policy.

(emphasis added).

The United States Court of Appeals for the Fourth Circuit recently addressed nearly identical policy language in *Stewart Engineering, Inc. v. Continental Cas. Co.*, __ Fed. Appx. __, 2018 WL 5832805 (4th Cir. Nov. 7, 2018). In that case, an engineer contracted to design multiple bridges on a college campus. Both bridges collapsed, resulting in claims. The insured firm argued that the separate collapses constituted separate claims. However, the policy treated "related claims" as a single claim, and described "related claims" as "all claims . . . that are logically or causally connected by any common fact, situation, event, transaction, advice or decision." *Id.* at *1. Applying the "related claims" definition, the Fourth Circuit held that the separate bridge collapses were "related claims" and therefore only gave rise to a single claim. *Id.* at *2.

The Admiral Policy definition of "related wrongful acts" is nearly identical to the "related claims" definition at issue in *Stewart Engineering*. Like the claim in that case, the claims asserted by the Estate of Gloria Corley all share common facts, not the least of which is the fact that the claims all arise out of Plaintiffs' representation of Gloria Corley. Therefore, the court is persuaded and finds that the aforementioned claims constitute a single claim. Plaintiffs' Complaint and Response in Opposition states that Plaintiffs' first notice of a potential claim was given under the 2013-2014 policy term. Therefore, the claim is deemed to have occurred during that policy period and only the terms of that policy, Policy No. 91200935, are at issue in this matter.

III. The Admiral Policy allows Admiral to control the defense, which includes negotiations, and Plaintiffs owe a duty to cooperate with Admiral.

As discussed above, this case involves the interpretation of an insurance contract, and "[t]he court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully." *B.L.G. Enters., Inc.*, 334 S.C. at 535, 514 S.E.2d at 330. Therefore, the court finds that its analysis begins—and here, ends—with a plain reading of the insurance contract.

The Admiral Policy sets out the duties of the Plaintiffs and Admiral:

> **VI. Defense, Cooperation and Settlement**
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> B. The **Insurer** shall have the sole right and the duty to defend any covered **Claim**, and has the sole right to select defense counsel.
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> C. Each **Insured** shall cooperate with the **Insurer** in the defense and settlement of any **Claim** . . . . Upon the request of the **Insurer**, the **Insured** shall . . . attend hearings, depositions and trials, assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses . . . and meeting with such representatives for the purposes of investigation or defense, all without charge to the **Insurer.**

By its plain terms, the Admiral Policy gives Admiral the right to control the defense of the case. As the South Carolina Supreme Court held in *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E.2d 346, 349 (1933), the duty to defend includes the "duty of settling the claim" if that is the reasonable thing to do. Furthermore, Rule 6(b)(4), SCADR, specifically requires a representative of the insurer to attend mediation with "full authority to settle the claim." Thus, settlement negotiations constitute part of the duty to defend. Because the Admiral Policy gives Admiral the "sole right and duty to defend," Admiral has control over the decision of how to defend the case and whether to participate in settlement negotiations.

The Admiral Policy also requires Plaintiffs, as insureds, to "cooperate with [Admiral] in the defense and settlement of any Claim." As noted above, Plaintiffs ask the court to enter an injunction preventing Admiral from participating in settlement negotiations. However, the court

is bound by the plain terms of the parties' contract. The court finds that the Admiral Policy does not give Plaintiffs a right to impede Admiral's efforts to negotiate a potential settlement. To the contrary, the terms of the Admiral Policy specifically require Plaintiffs' cooperation. Therefore, Plaintiffs' request for an injunction is denied, and the court finds that Admiral is entitled to its requested declaration that it has the right to negotiate a potential settlement as part of its defense of the Underlying Malpractice Action and that Plaintiffs owe a duty to cooperate.[1] It follows that Admiral also has a right to participate in settlement negotiations at mediation in the Underlying Malpractice Action.

IV. The Admiral Policy's "consent to settle" clause must be enforced as written.

The Admiral Policy includes a consent to settle clause, commonly referred to as a "Hammer Clause". This clause gives the named insured—Desa Ballard P.A. d/b/a Ballard & Watson, Attorneys at Law—the final right to reject a settlement proposed by Admiral. However, the clause sets forth specific consequences if a settlement recommended by Admiral and acceptable to the Estate of Gloria Corley is rejected:

> **VI. Defense, Cooperation and Settlement**
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> D. 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.

[1] As discussed below in Part IV, Admiral has the authority to negotiate a potential settlement, but the Named Insured retains the right to reject a settlement that Admiral recommends and the Estate of Gloria Corley would accept. However, the Admiral Policy sets forth certain consequences if the Named Insured rejects such a proposed settlement.

Plaintiffs do not allege in the Complaint that the terms of this provision are ambiguous. Thus, under the plain terms of the Admiral Policy, if Admiral recommends a settlement to the named insured that is acceptable to the claimant, the Estate of Gloria Corley, then the named insured has the ultimate right to reject the settlement and continue defending the Underlying Malpractice Action. However, rejecting this proposed settlement would end Admiral's duty to defend and limits Admiral's liability to the proposed settlement amount, including claims expenses incurred up to the date of the named insured's rejection of the proposed settlement.

A consent to settle clause that is unambiguous must be enforced as written. *See Auto Owners v. Benjamin*, 415 S.C. 137, 143, 781 S.E.2d 137, 141 (Ct. App. 2015) ("Courts must enforce, not write contracts of insurance, and their language must be given its plain, ordinary and popular meaning." (quoting *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012))). Courts in other jurisdictions have enforced similar clauses according to their plain terms. *See, e.g., Security National Insurance Company v. City of Montebello*, 680 Fed. Appx. 525 (9th Cir. 2017); *Cowan v. Codelia*, 50 Fed. Appx. 36 (2d Cir. 2002).

Plaintiffs cite the cases of *Clauson v. New England Ins. Co.*, 254 F.3d 331 (1st Cir. 2001) and *Freedman v. United Nat. Ins. Co.*, No. CV 09-5959 AHM CTX, 2011 WL 781919 (C.D. Cal. Mar. 1, 2011) for the proposition that the consent to settle clause can only be enforced if the insured unreasonably rejects a settlement. (Emphasis added). However, those two cases are distinguishable because the "hammer clauses" in those cases contained specific language limiting the effect of the clause to unreasonable refusals to settle. The Admiral Policy at hand does not contain this limiting language.

The insured in *City of Montebello* raised the same "reasonableness" argument that the Plaintiffs raise here. However, the Ninth Circuit recognized that the policy at issue in that case—

like the Admiral Policy here—did not include similar language limiting the clause to unreasonable refusals to settle. Finding that the policy did not include such language, the Ninth Circuit held "However, the hammer clause does not limit the insurer's right to invoke the clause to instances where the insured was unreasonable in rejecting an offer. To hold otherwise would impermissibly rewrite the hammer clause to the policyholder's benefit."[2] 680 Fed. Appx. at 527.

South Carolina courts follow the same rule applied by the Ninth Circuit in *City of Montebello*: "Courts must enforce, not write contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Benjamin*, 415 S.C. at 143, 781 S.E.2d at 141. Therefore, to the extent that Plaintiffs argue rejection of a settlement can only trigger the consent to settle clause if the rejection is unreasonable, such argument cannot be sustained. For the court to agree, the court would have to change the terms of the Admiral Policy, which was previously agreed to by the parties. Accordingly, the court finds that the consent to settle clause at hand is unambiguous and must be enforced as written.

V. Even if the consent to settle clause is a condition precedent, South Carolina does not prohibit such conditions in this context.

Plaintiffs argue the consent to settle clause is a condition precedent and argue that it is unlawful to include the consent to settle clause in the Admiral Policy. In support of this contention, Plaintiffs cite South Carolina Code § 38-81-300, which provides:

> The policy form whether on a claims-made or occurrence basis may not require as a condition precedent to settlement or compromise of any claim the consent or acquiescence of the insured. However, such settlement or compromise is not considered an admission of fault or wrongdoing by the insured.

[2] The Ninth Circuit in *City of Montebello* specifically distinguished the *Freedman* case because the policy in *Freedman* limited the clause to situations in which the insured "unreasonably withheld" consent to settlement. 680 Fed. Appx. at 527.

S.C. Code Ann. § 38-81-300(C). Plaintiffs' reliance on this statute is misplaced for two reasons. First, this statute applies to policies written by the Legal Professional Liability Insurance Joint Underwriting Association, a legislatively created entity to provide for certain liability insurance if such insurance is not available through normal channels. S.C. Code Ann. §§ 38-81-210, 38-81-230, and 38-81-260. The Admiral Policy was written by Admiral. Therefore, the court finds that S.C. Code Ann. 38-81-300(C) does not apply to the Admiral Policy.

Admiral argued that even if South Carolina Code § 38-81-300 did apply to the Admiral Policy, the statute would actually prohibit an insurance policy from giving the insured the right to objection to a settlement. Because the court finds that the statute is inapplicable to the Admiral Policy, the court declines to address this alternative argument. Further, the court needs not determine whether the consent to settle clause is a condition precedent.

VI. Plaintiffs' bad faith claim is not yet ripe.

Plaintiffs' bad faith claim should be dismissed without prejudice because the action is not yet ripe to be heard on the merits. A bad faith cause of action requires: "(1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) **refusal by the insurer to pay benefits due under the contract**; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (internal citation omitted and emphasis added). A claim that involves a "pure hypothesis and speculation" is not ripe for judicial review. *See Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 243, 638 S.E.2d 685, 695 (2006).

Based on the pleadings, there has not yet been a refusal by Admiral to pay the benefits as there are no benefits yet due under the Admiral Policy. The court notes that its declaratory

judgment will allow the pending litigation to proceed, which may in turn lead to the "anticipatory breach of contract" alleged by Plaintiffs. Pls.' Complaint at pg. 17. Because the matter is not yet ripe, Plaintiffs' cause of action for bad faith is merely dismissed without prejudice.

THEREFORE, IT IS HEARBY ORDERED that Admiral's Motion for Judgment on the Pleadings as to the action for declaratory judgment is GRANTED, as declared below. Likewise, Plaintiffs' cause of action for bad faith is also DISMISSED but without prejudice.

THIS COURT HEREBY **DECLARES** AS FOLLOWS:

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

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.

AND IT IS SO ORDERED.

[ELECTRONIC SIGNATURE PAGE TO FOLLOW]

Lexington Common Pleas

Case Caption: Desa Ballard , plaintiff, et al VS Admiral Insurance Company , defendant, et al

Case Number: 2018CP3201743

Type: Order/Other

So Ordered

s/Walton J. McLeod, 2765