

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

RECEIVED

AUG 05 2019

SC Court of Appeals

Appellate Case No.: 2019-000367

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

Appellants,

v.

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

Respondents.

Initial Brief of Respondent Estate of Gloria P. Corley

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STATEMENT OF ISSUES ON APPEAL

- I. The Court's Decision on the Hammer Clause is both Ripe and Overdue.
- II. Appellants' Attempted Use of the Hammer Clause Violates Its Duty to Former Clients.
- III. Adoption of Arguments of Respondents Pope and, in part, of Respondent Admiral.

STATEMENT OF THE CASE

From 2011 until approximately 2014 Appellants (collectively “Ballard”), through two or more of its attorneys, represented Gloria P. Corley (Mrs. Corley) and her daughter Andra Williams (Andra).

Shortly before her death in May 2016, Mrs. Corley, by her guardian *ad litem* (GAL) Heather Cairns, Esq., sought damages against Ballard. Camden Lewis, Esq., provided Ballard with a proposed complaint for damages and an opinion of John Freeman, Esq. Mrs. Corley died before a settlement was reached.

In the summer of 2016, Mrs. Corley’s Estate obtained the Lewis file and other files related to Ballard. After commencing litigation in the Lexington County Probate Court, Mrs. Corley’s Estate also obtained her file from Ballard and from Kenneth Wingate, Esq., an expert selected by Ballard in connection with the representation of Mrs. Corley and Andra.

Mrs. Corley’s Estate, which was illiquid, commenced negotiation with Ballard, through counsel. The Estate’s claim was based, in part, on a \$243,000 judgment against Mrs. Corley which provided for interest of more than \$40 a day and all costs of collection, including attorneys’ fees. The Estate, which was illiquid, urged Ballard to settle before it was required to engage counsel to collect, when a 1/3 contingency fee and costs would substantially increase the claim against Ballard.

On February 23, 2017, after Ballard refused to negotiate, Mrs. Corley’s estate sued Ballard in Lexington County Case No. 2017-CP-32-00618 (Corley v. Ballard).

On September 19, 2017 Ballard commenced this action (the “Ballard/Admiral Suit”) against Admiral Insurance Company and other carriers (collectively “Admiral”). Ballard named as Defendants both Mrs. Corley’s Estate and the attorney who had secured a \$145,000 annual payment for Mrs. Corley for her lifetime which had been lost in the Ballard representation (Pope).

[Complaint, p.1] The Admiral complaint sought no individual relief against either Mrs. Corley's Estate or Pope. Complaint. [R., pp.]

Between 2017 and 2019 the Ballard Suit has moved from Richland County to Lexington County to U.S. District Court, and back to Lexington County, and Mrs. Corley's Estate, to assure that its interest be protected, has been required to respond to numerous filings by Ballard and others. Motion, Change Venue. [R., p.] Ans.Interrogatories. [R. p.]

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

On October 24, 2017 Mrs. Corley's Estate filed a Motion to Dismiss or, in the Alternative, to Strike and Motion for Attorneys' Fees and Costs. Motion Dismiss. [R., pp.] The motion alleged that Ballard had failed to state facts sufficient to support any cause of action against Mrs. Corley's estate or Pope, and that venue was improper. Motion, pp. 1-3 [R., pp.] In the alternative, Mrs. Corley's Estate asked the Court to strike paragraphs 24, 25, 39, 40, 41, 50, 58, 59, 60, 71 and 72 of the Ballard/Admiral complaint because the claimed factual allegations, in addition to being incorrect, made immaterial, impertinent and/or scandalous allegations against Mrs. Corley's daughter Andra and others. Motion, p. 3 [R., p.] Mrs. Corley's Estate sought attorneys' fees and costs for having to participate in a lawsuit which sought no relief against her but which attempted to bind her as to incorrect facts.

The motion was supported by an Affidavit in Support of Motion to Strike and Motion for Attorneys' Fees and Costs of Pope. [R., pp.] The affidavit was based on Pope's personal knowledge, including knowledge gained from the three years she represented Mrs. Corley; secured \$145,000 a year for life for Mrs. Corley; prepared a will for Mrs. Corley; and prepared a power of attorney (POA) which, like the will, provided for equal treatment of Andra and Mrs. Corley's son

Hoyt Rowell (Hoyt), an attorney. In addition to the representation, Pope's affidavit confirmed that she had at least annual contact with Mrs. Corley in the decade before Ballard undertook to represent Mrs. Corley and Andra. Affidavit, Pope. [R., pp.] The affidavit also set out Respondent Pope's qualifications as an attorney experienced in estate planning, probate and trust law, as well as fiduciary litigation, and opined that the will prepared by Ballard was inconsistent with Mrs. Corley's long-stated expressed intent to treat Andra and Hoyt equally.[Aff., pp. 1-2]. Affiant stated that as Mrs. Corley's fiduciary she could not support the will prepared by Ballard for Mrs. Corley (Ballard Will). [Affidavit, pp.] In paragraph 11 of the affidavit, affiant set out what she believed to be the correct relevant facts to the cause of action. [affidavit, pp 3-4]. The affidavit stated that in the affiant's opinion, based on her experience and the relevant facts, Ballard failed to meet the standard of care with respect to her representation of Mrs. Corley. [Aff., pp. 4,5]

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

On November 8, 2017 Mrs. Corley's Estate responded to Admiral's Crossclaim. [Pope, Mrs. Corley Estate, Replies, dtd. 11/8/17]

On November 15, 2017 Mrs. Corley's Estate filed a Reply [to] Response of Plaintiffs to Motion of Estate of [Mrs. Corley] to Dismiss, or, in the Alternative, to Strike and Motion for Attorneys' Fees and Costs. [Reply, dtd. 11/15/17, pp. 1-4] The reply asserted that references to Corley v. Ballard as the "Pope Litigation" were both inaccurate and confusing to the Court. [Reply, p. 1] It stated:

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

The reply asserted that the affidavit correctly stated the facts:

...including specifically that [Ballard] represented both Mrs Corley and her daughter Andra [Williams]. Reply, p. 2. [R., p.]

The reply also stated:

... While it is certain that Mrs. Corley's creditors. . . may benefit from Mrs. Corley's Estate's recovery against Plaintiffs, to suggest that they must be made a part of this declaratory judgment is baseless.

This case is a dispute between an insured and a carrier over coverage, and movants are not necessary parties for full and final resolution of the issues presented. Movant Estate of Gloria P. Corley's malpractice action against Plaintiffs presents the question of whether the Estate is entitled to damages against Plaintiffs [Ballard] for legal malpractice, and the Estate seeks judgment against Plaintiffs in that action, not against the insurance carrier....

... Whether Plaintiffs have coverage will not affect the Estate's entitlement to a judgment in the malpractice suit. *See Blue Cross and Blue Shield v. SC Industrial Comm'n*, 274 S.C. 274, 204, 262 S.E.2d 35(1980)... Reply, p.2 [R., p]

On March 20, 2018 the Magistrate Judge issued a Report and Recommendation that the matter be remanded to State Court. [Report., Magistrate Jg.]

By order dated April 11, 2018 the matter was remanded to the Court of Common Pleas for Richland County. [Order dtd.4/11/18]

By order of the Honorable Allison Renee Lee signed May 18, 2018 the venue was changed from Richland County to Lexington County. [Order dtd. 5/18/18]

On May 10, 2018 a consent Stipulation of Dismissal with Prejudice as to certain Admiral parties was entered. [Stipulation of Dismissal].

On May 31, 2018 Respondent Admiral filed Defendant Admiral Insurance Company's Motion for Judgment on the Pleadings. [Mot. Jmt. Pleadings]

On July 13, 2018 Appellant moved for a continuance of the hearing scheduled for July 26, 2018. [Motion continuance] By order of the Honorable Allison Renee Lee the continuance was

granted.

On January 29, 2019 a joint mediation was conducted in the Admiral suit and Corley v. Ballard with H. Ronald Stanley, Esq.

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

On November 14, 2018 a hearing was held before the Honorable Walton J. McLeod on the motions of Respondents. Ballard, through counsel, asserted it had a right to prevent negotiation if it appeared that Pope would benefit from the settlement. Tr., Hearing, pp. [R., p.]

On February 15, 2019 Judge McLeod issued an Order Granting Defendant Admiral Insurance Company's Motion for Judgment on the Pleadings. Judge McLeod also issued a separate order dismissing Mrs. Corley's Estate and Pope, individually, as parties. [Orders, dtd. 2/15/19]

On March 2, 2019 Ballard filed this appeal of the order granting Defendant Admirals judgment on the pleading. Although Ballard did not appeal the dismissal of Mrs. Corley's Estate or Pope, it named both as Respondents and served them with Appellants' initial brief.

STATEMENT OF THE FACTS¹

When Andra Williams engaged Ballard in 2011 Gloria Corley lived in her home; had good care; and enjoyed an annual income stream of no less than \$145,000 a year for life, secured for her by Pope more than a decade earlier. As the settlement was paid, Mrs. Corley owed Pope \$18,333 per year, less than 15% of her customary annual payment. The settlement also called for estate taxes when Mrs. Corley died to be paid from the trust of her third husband (ML). Andra would receive \$50,000 from ML's trust at Mrs. Corley's death.

¹ Appellant incorporates the Statement of the Case in her Statement of the Facts.

If Mrs. Corley chose to receive a lump sum payout from ML's Trust, she could address the issue with Pope. Or, she could be paid over two years or more, reducing Pope's payment under her 1998 contract to be paid 1/3 of all amounts Mrs. Corley received from ML in excess of \$90,000 per year.

In addition, Mrs. Corley had a loving relationship with son Hoyt and daughter Andra. The will and POA prepared for her by Pope a decade earlier both provided for gifts and devises to Andra and Hoyt to be equal.

Had Ballard not undertaken to represent Andra and Mrs. Corley in a deal with former attorney Richard Breibart and ML's trustee, by the time she died in 2016, Mrs. Corley would have lived comfortably for five years; received over \$700,000 from the Pope settlement; paid Pope about \$100,000; and left a generous inheritance for Hoyt and Andra. Instead, Mrs. Corley died penniless in a nursing home, under threat of being evicted for nonpayment.

At her death, as a result of the Ballard/Breibart arrangement with ML's Trust, Mrs. Corley owed Pope more than \$200,000, with interest and costs of collection, including attorneys' fee. She owed Cairns, her GAL in the lawsuit where she was formerly represented by Ballard. She faced possible tax problems which ML's trust had agreed to pay in the Pope settlement. And Hoyt was disinherited by Mr. Corley in favor of Andra, in a will prepared by Ballard.

Andra, directed by Ballard, had taken all of Mrs. Corley's money out of her name, with no direction that Hoyt, under the POA, should receive half of any transfers. Andra had spent much of it. Ballard had accepted a lump sum from ML's trust for both Andra and Mrs. Corley without advising either of her clients, one of whom was elderly and vulnerable, as to how it should be allocated.

For resolving what should have been an \$18,333 contract declaratory action, Ballard had charged \$50,000; set aside another \$50,000 of Mrs. Corley's money to defend ML's trustee's actions; and even secured expert Kenneth Wingate, Esq., to opine (at Mrs. Corley's expense) that Pope's contract to be paid \$18,333 of the \$145,000 annual payment she secured for Mrs. Corley violated public policy.

Before Mrs. Corley died, Cairns was appointed guardian *ad litem* (GAL) for Mrs. Corley in the suit where Ballard had represented Mrs. Corley. A receiver, Katherine Palinski, Esq., had been appointed to recover funds Andra had transferred. Cairns had engaged Lewis to seek redress for the losses Ballard had caused Mrs. Corley.

Lewis investigated the Ballard actions; secured an affidavit from former Professor John Freeman, Esq., and attempted to negotiate with Ballard. The negotiations failed.

When Mrs. Corley died, Andra submitted the Ballard will to Lexington County, as required, but made no effort to be appointed personal representative (PR). Hoyt declined to serve. Pope was properly appointed special administrator without objection of either. She did not seek to be PR, disclosing that she could not defend the Ballard will because it failed to reflect her understanding of Mrs. Corley's desires for her estate plan.

Ballard delayed delivery of Mrs. Corley's file to her Estate, as did Wingate. Mrs. Corley's Estate was required to file suit in the Lexington Probate Court to obtain the files.

Prior to the Estate's engagement of counsel to replace Lewis, and with interest on Mrs. Corley's debt caused by Ballard continuing to accrue at more than \$40 a day, and costs of collection to be added, Mrs. Corley's Estate attempted to negotiate with Ballard to reach a solution to the problems Ballard had caused. Ballard refused to negotiate.

For more than three years since Mrs. Corley's death in 2016, Ballard increased the damage to both Mrs. Corley and Andra by directing counsel not to negotiate with Mrs. Corley's Estate.

In 2017, increasing the damage to Mrs. Corley's Estate, Ballard filed the Admiral Suit. In the Admiral complaint Ballard misstated known facts and launched vitriolic personal attacks against both Andra and Pope. The Admiral Suit's complaint is a fictional retelling of what Ballard, with Breibart and ML's trustee did to damage both Mrs. Corley and Andra. Mrs. Corley's Estate and Pope were added as parties to bind them to a false narrative where Ballard had actual knowledge of the correct facts.

The Admiral Suit has resulted in more than a doubling of the damage Ballard had inflicted on Mrs. Corley as of the date of her death.

At the 2018 hearing on Admiral's motion for judgment on the pleadings, Ballard, through counsel, asserted the right to direct Admiral not to negotiate based on Ballard's view of how Mrs. Corley's estate would be distributed. Transcript, Hearing, 11/14/18 [R. pp.] Ballard's 3-year attempt to insert itself into the operation of the Estate of Mrs. Corley, its former client, for its own benefit, by refusing to negotiate based on who the distributees of Mrs. Corley's estate will be, is unprecedented. It is made more problematic by Ballard's cross-claim against Andra, its other client, in *Corley v. Ballard*. This is especially true where a will prepared for the vulnerable, elderly Mrs. Corley made Andra the sole devisee of Mrs. Corley's estate, a disposition inconsistent with her earlier estate plans.

Ballard's inclusion of Mrs. Corley's Estate and Pope as Respondents in this appeal, and its continuation of the false narrative, continue the damage to Mrs. Corley's Estate.

Argument

I. The Court's Decision on the Hammer Clause is both Ripe and Overdue.

In *Sentry Select Insurance Co. v. Maybank Law Firm, LLC*, 426 S.C. 154, 826 S.E.2d 270 (2019) our Supreme Court has recently addressed the delicate balance that exists where an insurance carrier provides counsel to any attorney protecting himself or herself in a malpractice claim. Appellant's attempt to use both a separate lawsuit and the "Hammer clause" in her malpractice insurance contract to hammer two former clients – a now-deceased vulnerable elderly adult and her daughter and beneficiary – is an illogical and imbalanced extension of the Court's decision.

Ballad knew by 2014 that it was facing a malpractice claim and by early 2016 that Mrs. Corley's GAL had already engaged counsel; secured a professional opinion; and prepared a complaint. Yet it waited for two years or more, directing its agent and attorney not to negotiate in good faith. When it got sued in 2017, Ballard crossclaimed against the client it had made the sole beneficiary of Mrs. Corley's Estate. Then it sued Mrs. Corley's Estate and the attorney who had secured the \$145,000 a year Mrs. Corley lost through Ballard's representation in an effort to create a false narrative of the actual facts.

Our Supreme Court recognizes that there must be a balance between the desire of Appellants' malpractice carrier to resolve claims against Appellant in an efficient manner and Appellants' right to protect its reputation and challenge claims it reasonably believes to be of little merit. That is not the case here.

In this case, Appellants have for more than three years wielded a hammer (clause) against two former clients and the lawyer who enriched Mrs. Corley. In doing so they have needlessly required Mrs. Corley's Estate to file suit to get a file which should have been handed to her; refused

to negotiate; and needlessly made Mrs. Corley's Estate and the lawyer who drafted her pre-Ballard will parties to a suit and an appeal to create an false narrative about Ballard's representation.

The lower court's ruling that Appellants, under the present facts, may not use the hammer clause as Ballard has done both ripe and long overdue.

II. Appellants' Attempted Use of the Hammer Clause Violates its Duty to Former Clients.

Rule 1.9(a) of the South Carolina Rules of Professional Conduct addresses an attorney's representation of persons materially adverse to a former client. Exceptions exist to the general rule that where a lawyer has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. This instance, however, provides a unique and troublesome fact pattern.

Mrs. Corley, and the Mrs. Corley's Estate, have sought damages from Ballard. Ballard has, undisputedly, failed to conduct an appeal which it asserted was meritorious. The failure has resulted in a \$248,000 judgment against Mrs. Corley, plus interest, plus attorneys' fees and other costs of collection.

In both the Admiral Suit and in Corley vs. Ballard, Mrs. Corley's Estate is directly adverse to Ballard. In Corley vs. Ballard, Ballard has a cross-claim against former client Andra Williams; is defending itself against Mrs. Corley's Estate; but refuses to negotiate and has even filed a separate lawsuit to try to bind Mrs. Corley's Estate to facts which never existed.

A hammer clause in Ballard's contract should not be read to allow this breach of duty by Appellants to two former clients, Mrs. Corley's Estate and her daughter and devisee.

III. Adoption of Arguments of Respondent Pope and, In Part, of Respondent Admiral.

Respondent Pope represented Mrs. Corley for approximately three years, beginning in 1988. Pope remained in contact with Mrs. Corley at least annually until Ballard undertook to represent her in 2011. She also had contact with Mrs. Corley's son Hoyt, an attorney, both before and after Mrs. Corley's death.

Pope navigated Mrs. Corley through a complex, tax-driven settlement process with the estate and trustee of her third husband, ML. In doing so, Pope kept in close touch with both of Mrs. Corley's children, who were the equal objects of her affection. As a direct result of Pope's service, Mrs. Corley had an estate plan which carried out her wishes and a POA which provided for equal gifts to Hoyt and Andra. Mrs. Corley enjoyed, as a direct result of Pope's service, at least \$145,000 a year for life, at a legal cost of just \$18,333 a year. With a generous social security benefit as ML's widow, Mrs. Corley, but for Ballard, would have been comfortable for life, and able to leave a substantial devise to her children.

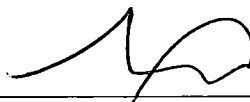
Pope did nothing adverse to Mrs. Corley. When Andra snatched the check from Pope in 2011, Pope took the least aggressive approach, simply asking the Court to direct that the trustee of ML's trust reissue the check and future ones in accordance with the settlement which was approved by the Court with the consent of all of ML's children, his trust and his PR.

Mrs. Corley's Estate adopts in its entirety the brief and arguments of Pope in this appeal. To the extent not inconsistent with this brief, and the brief of Respondent Pope, Mrs. Corley's Estate also adopts such arguments of Admiral as support the prevention of use of the hammer clause in the manner adopted by Ballard since 2016.

Conclusion

The Estate of Gloria P. Corley respectfully requests that this Court find that Appellants have improperly joined Mrs. Corley's Estate in this suit and appeal; that the facts asserted by Appellants in the Admiral complaint and in Appellants' brief are a material misstatements of the facts known to Ballard, made with the intention of damaging two former clients; that the matter was ripe for decision of the circuit court, and should have been addressed in 2105; and that this Court should affirm the lower court's decision. The Court should find that a balancing of interests of an attorney and his or her former clients does not allow the use of hammer clauses to circumvent their duties as officers of the Court and their duties to former clients.

Respectfully submitted,



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August 5, 2019

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Proof of Service

The undersigned hereby certifies that on August 5, 2019, he has served a copy of the Initial Brief of Respondent Estate of Gloria Corley on counsel for Appellant herein by hand-delivering a copy of same to Appellant's counsel, addressed as follows:

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