IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

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.

FINAL BRIEF OF RESPONDENT ADMIRAL INSURANCE COMPANY

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STATEMENT OF ISSUES ON APPEAL

I. **THE CIRCUIT COURT CORRECTLY APPLIED THE PLAIN TERMS OF THE INSURANCE CONTRACT TO HOLD THAT THE INSURED CANNOT PREVENT SETTLEMENT NEGOTIATIONS AND THE "CONSENT TO SETTLE CLAUSE" MUST BE APPLIED AS WRITTEN.**

II. **THE CIRCUIT COURT CORRECTLY GRANTED JUDGMENT ON THE PLEADINGS BECAUSE THE DISPUTE BETWEEN THE PARTIES IS CONTROLLED BY A PURE QUESTION OF LAW – THE INTERPRETATION OF AN INSURANCE CONTRACT – AND IS RIPE FOR ADJUDICATION.**

STATEMENT OF THE CASE

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

As background, Appellants previously represented Gloria Corley in a fee dispute filed by Corley's former attorney, Adele Pope. (R. p. 98, ¶¶ 23–24). That case resulted in a substantial judgment entered against Corley and in favor of Pope. After Corley passed away, Pope was

appointed Special Administrator of Corley's estate (Estate) and filed a legal malpractice action against Appellants (Underlying Action). (R. p. 103, ¶¶ 57, 61).

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

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

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

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

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

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

Admiral originally removed the case to the United States District Court for the District of South Carolina. Because the complaint and counterclaim were controlled by purely legal issues dictated by the plain terms of the Policy, Admiral also moved for judgment on the pleadings. The District Court remanded the case without addressing the judgment on the pleadings motion.

Admiral then moved to transfer venue from Richland County to Lexington County. Appellants ultimately consented to the transfer, which took place on May 21, 2018. (R. p. 3). Appellants also agreed to dismiss certain defendants, including Monitor Liability Managers and Mendes & Mount, LLP. (R. pp. 206–207).

On May 31, 2018, after the transfer, Admiral renewed its Motion for Judgment on the Pleadings. (R. pp. 208–211). Admiral filed a supporting memorandum on August 31, 2018. (R. pp. 235–251). Appellants filed their Response in Opposition on October 10, 2018, and the Circuit Court held a hearing on the Motion on November 14, 2018.[1]

In a detailed Order, the Circuit Court granted Admiral's Motion. The Circuit Court entered declarations in Admiral's favor and dismissed Appellants' claims.[2] Specifically, the Circuit Court found that the issues in the case were controlled by two provisions in the insurance policy. The first provision states, "The **Insurer** shall have the sole right and the duty to defend any covered **Claim** . . .." and "Each **Insured** shall cooperate with the **Insurer** in the defense and settlement of any **Claim** . . .." (R. p. 16). Reading these two provisions, the Circuit Court held that Admiral had the right to control the defense of the case, which included the right to participate in settlement negotiations. (R. pp. 16–17).

The second provision is the Policy's consent to settle clause. (R. p. 17). The Circuit Court held that the consent to settle clause was unambiguous and must be enforced according to its plain terms. (R. pp. 17–18). Although Appellants argued that the clause could not be enforced unless

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[1] Adele Pope and the Estate of Gloria Corley filed Motions to Dismiss or, in the Alternative, to Strike. Those motions were also heard on November 14, 2018. The Circuit Court ultimately granted the motions to dismiss, and that order has not been appealed. (R. pp. 23–28). Therefore, the Estate and Pope are no longer parties to this action and are not Respondents in this appeal.

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

the named insured unreasonably refuses a settlement proposal that is recommended by the insurer and acceptable to the claimant, the Circuit Court refused to insert the word "unreasonably" into the Policy.

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

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

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

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

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

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

(R. p. 21). Most of these declarations closely track or recite the terms of the Policy.

Appellants did not file a motion to reconsider. Instead, they filed this appeal.

STATEMENT OF THE FACTS

A. The Underlying Action.

In March of 2011, Gloria Corley, now deceased, hired Desa Ballard and her law firm to defend her in a breach of contract action filed by Corley's former attorney Adele Pope.[3] (R. p. 98,

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

¶ 23). Pope sued Corley for recovery of fees under a written fee agreement based upon a prior matter in which Pope represented Corley (Fee Agreement Litigation). (R. p. 98, ¶ 25). Corley, with Appellants representing her, lost the fee agreement dispute. (R. p. 100, ¶ 38).

While representing Corley in the Fee Agreement Litigation, Appellants also represented Corley and her daughter, Andra Williams, in negotiating a buyout of their interests in a family trust. (R. p. 98, ¶ 27). Corley accepted a reduced buyout, in part, because Appellants believed the structure of the buyout would preclude Corley from having to pay any additional amounts to Pope under the fee agreement. (R. pp. 99–100, ¶¶ 31–34, 36). However, when Pope learned about the buyout, she petitioned the circuit court in the Fee Agreement Litigation for her share of the buyout based on the fee agreement.[4] In that litigation, the circuit court agreed with Pope and awarded Pope a judgment against Corley in the amount of $248,673.87. (R. p. 100, ¶ 38). Thus, despite Appellants' intention to structure the trust buyout in such a way that it would shield Corley from owing Pope any fees arising out of the buyout, Appellants' plan failed, resulting in a sizeable judgment being entered against Corley.

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

To add insult to Corley's injury, the lump-sum payment for the trust buyout was given to Corley's attorney-in-fact, Williams, rather than being paid to a guardian ad litem or paid into a restricted account for Corley's benefit. Appellants concede that Williams "may have"

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

subsequently "mismanaged and/or misappropriated some or all of the trust settlement money . . ." (R. p. 102, ¶¶ 51, 54). Therefore, Corley did not have sufficient funds to satisfy the Pope Judgment.

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

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

1) Failing to recognize that termination of the trust was not in the best interest of Corley;
2) Failing to have a Guardian ad Litem appointed for Corley;
3) Representing Corley, Williams individually, and Williams as attorney-in-fact in violation of the rules governing conflicts of interest;
4) Failing to recognize that Pope's fee agreement entitled her to a percentage of the lump sum buyout payment;
5) Undertaking a frivolous defense and appeal of the Pope Action and failing to timely appeal the order.

(R. p. 36, ¶ 33).

B. The Current Dispute.

Appellants tendered defense of the Underlying Action to Admiral. Pursuant to the 2013-2014 Admiral Policy, Admiral is defending Appellants in the Underlying Action. Admiral, as it does in many cases, sought to investigate the possibility of resolving the Underlying Action. Admiral communicated this decision to Appellants, and Desa Ballard objected, stating that "no settlement offers were to be extended and no settlements were to be made in the legal malpractice

claim . . . ." (R. pp. 104–105, ¶¶ 65–70). Appellants went so far as to instruct Admiral that they objected to any mediations of the Underlying Case. (R. p. 104, ¶ 67).

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

On May 16, 2017, Admiral communicated in writing its decision not to renew the insurance policy. (R. pp. 106–107, ¶ 78–81). Appellants claim Admiral's decision not to renew the policy was made in bad faith. The Circuit Court dismissed this claim, and Appellants' brief does not address the dismissal of that cause of action. Therefore, that issue has not been preserved for appeal. *See Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 270, 818 S.E.2d 447, 455 (2018) ("[O]ur appellate jurisprudence has clearly established that '[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.'" (citation omitted)).[5]

STANDARD OF REVIEW

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009). "A judgment on the pleadings

[5] The Circuit Court also held that the only relevant insurance policy was the 2013-2014 Policy because all of the allegations in the Underlying Action constitute "Related Wrongful Acts." (R. pp. 14–15). Again, Appellants' Brief does not contest this ruling. Therefore, this ruling is not preserved for appeal and is abandoned.

is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." *Id.* (citation omitted).[6]

ARGUMENT

The Circuit Court properly held that neither the law nor the Policy gives Appellants the right to prevent Admiral from negotiating the Underlying Claim. The Policy gives Admiral the sole right and duty to defend the case, which includes deciding when to enter into settlement negotiations, and the Policy requires the insureds to cooperate in the defense and settlement of the case. The Circuit Court also properly applied the plain language of the Policy's consent to settle clause and rejected Appellants' invitation to rewrite the plainly worded contract.

Likewise, the Circuit Court properly entered judgment on the pleadings on all issues. The case is controlled by a pure question of law. Even if every properly pleaded factual allegation in the Complaint were true, the Policy's defense and consent to settle provisions control the parties' respective rights and obligations in this case by giving Admiral the right to control the defense of the case and by addressing what happens if Admiral recommends a settlement that the Estate of Gloria Corley would accept. Because Admiral is entitled to judgment as a matter of law regardless of any facts alleged in the Complaint, the Circuit Court's Order should be affirmed.

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[6] Appellants erroneously argue that the trial court converted the judgment on the pleadings motion into one for summary judgment by considering the Admiral policy. (Appellants' Br. pp. 6-7). The Policy was part of the pleadings, both via Admiral's attachment of the Policy to its Answer and Counterclaim and via Appellants' specific reference to the Policy by policy number throughout their Complaint. In fact, Appellants acknowledge in their brief that their claim is based upon Policy Number 91200935. (Appellants' Br. p. 7). Therefore, the Circuit Court properly considered the Policy when it evaluated the Motion for Judgment on the Pleadings.

Even if the motion was converted to summary judgment, Admiral was still entitled to judgment as a matter of law. The interpretation of the Policy is a pure question of law, and the Policy's terms control.

I. The Circuit Court correctly applied the plain terms of the Policy when it held that Admiral had the right to defend and negotiate the claim, and the Circuit Court properly refused to rewrite the consent to settle clause to include a "reasonableness" condition.

Faced with an unambiguous contract, the Circuit Court faithfully applied the Policy's plain terms and granted Admiral's Motion for Judgment on the Pleadings. One of the primary goals of drafting a contract is to anticipate potential disputes between the parties and to set out – at the time of contracting and before the dispute ever arises – how the dispute will be handled. *See e.g., Severn Peanut Co., Inc. v. Industrial Fumigant Co.*, 807 F.3d 88, 91 (4th Cir. 2015) (discussing freedom of contract, which allows "parties to bargain over the allocation of risk."). Insurance is a transfer of risk, and the insurance contract communicates between the parties what risks the insurance company is assuming and what risks it is not willing to assume. *See e.g., Union Labor Life Ins. v. Pireno*, 358 U.S. 119, 130, 102 S. Ct. 3002, 3009 (1982) ("The transfer of risk from insured to insurer is effected by means of the contract between the parties – the insurance policy – and the transfer is complete at the time that the contract is entered."); *LM Ins. Corp. v. Kobys*, 21017 WL 1073352, *7 (D.N.J. March 20, 2017) ("The fundamental concept of insurance centers on the transfer of risk.").

Admiral agreed to take on certain risks – including the duty to defend and indemnify Appellants – but that transfer of risk was not absolute. In fact, the Policy anticipates the precise dispute between the parties here and addresses the allocation of risk. Admiral has control of the defense.[7] Appellants have a duty to cooperate in the defense and settlement of the case.[8] Although

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

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

the Named Insured retains the ultimate right to reject a potential settlement, Admiral did not agree to accept the risk of fighting a case to its end merely because its insured rejects a settlement. Instead, the Policy provides that if the insured rejects a proposed settlement recommended by Admiral that is acceptable to the Estate, then Admiral's exposure is limited. Because the Policy addresses each of these matters by its plain terms, the policy must be enforced as written, and the Circuit Court properly refused to rewrite the insurance contract.

"Courts must enforce, not write contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Auto Owners v. Benjamin*, 415 S.C. 137, 143, 781 S.E.2d 137, 141 (Ct. App. 2015) (quoting *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012)). Appellants' argument rests primarily on their request for this Court to rewrite the terms of the Policy – something South Carolina law prohibits. The Circuit Court correctly refused Appellants' invitation to write terms into the contract that are not there, and Admiral requests that this Court do the same.

A. The Circuit Court correctly held that Admiral has the right to negotiate with the Estate and that Appellants do not have the right to prevent those negotiations.

The Circuit Court rejected Appellants' attempts to prevent Admiral from negotiating with the Estate, holding: "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."[9] (R. p. 17). In doing so, the Circuit Court relied on two parts of the Policy's "Defense, Cooperation and Settlement" section:

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[9] Appellants' Brief does not appear to actually challenge this holding. Although Appellants cite this language to claim that it was the basis for the Court's holdings relating to the "hammer clause," the Court relied on these provisions in Section III of its "Findings of Fact and Conclusions of Law." (R. pp. 15–17). The hammer clause is addressed in Sections VI and V. (R. pp. 17–20). Thus, it does not appear Appellants have preserved a challenge to Section III of the Court's "Findings of Fact and Conclusions of Law." Nonetheless, Admiral addresses this portion of the Circuit Court's Order out of an abundance of caution.

VI. Defense, Cooperation and Settlement

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B. The **Insurer** shall have the sole right and duty to defend any covered **Claim**, and has the sole right to select defense counsel. . ..

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.**

(R. p. 371).

By its plain terms, the Admiral Policy gives Admiral the sole right to control the defense of the case. The duty to defend has included the duty to settle, when settlement is the reasonable thing to do, for at least as far back as 1933 when the South Carolina Supreme Court issued its decision in *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E.2d 346 (1933). The Supreme Court in *Tyger River* held, "an insurer against liability for accidents which assumes the duty of defending a claim owes the assured the duty of settling the claim if that is the reasonable thing to do." *Id.* at 349 (quotation omitted).

More recently, the South Carolina Alternative Dispute Resolution Rules mandate an insurer's participation in settlement negotiations. Rule 6(b)(4), SCADR requires attendance at mediation in the Underlying Action by "a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim." Therefore, by having the sole right and duty to defend the Underlying Action, Admiral also has the right to negotiate a potential settlement of the claim.

Not only does Admiral have the right to negotiate a potential settlement, but also Appellants – as insureds – owe a duty to cooperate. The Policy states, "Each insured shall cooperate with the Insurer in the defense and settlement of any Claim . . . ." (R. p. 371) (emphasis

added). Thus, in addition to Admiral having control of the defense, Appellants – as insureds – have an obligation to cooperate in the defense and settlement of the case. Certainly, if the insured has a duty to cooperate in the defense and settlement of the case, then the clause does not give the insured the right to prohibit the insurer from negotiating the Underlying Action. To the contrary, the insured has a duty to cooperate.

The Circuit Court correctly applied the plain language of the two above-quoted policy provisions when it held Appellants could not prevent Admiral from negotiating with the Estate to see if there is an amount that Admiral would be willing to pay and the Estate would be willing to accept to settle the case. Once again, it is not clear that Appellants have appealed this portion of the Court's Order. To the extent they have, the Circuit Court ruled correctly and should be affirmed.

B. The Circuit Court correctly applied the consent to settle clause as it is written and rejected Appellants' request to rewrite the clause.

The Circuit Court's fourth and fifth declarations closely adhere to the plain language of the Policy's consent to settle clause. Because the clause is plainly worded, the Circuit Court was bound to apply the Policy's terms as written. Although Appellants asked the Circuit Court to read the word "unreasonably" into the consent to settle clause, the Circuit Court properly rejected this invitation. Some policies do include a "reasonableness" standard in their consent to settle clause, but this one does not. Appellants cannot ask this Court to rewrite a plainly worded contract merely because they purchased a policy that does not include the "reasonableness" standard.

i. Consent to settle clauses come in two forms – those that create consequences if an insured "unreasonably" rejects a proposed settlement and those, like Admiral's, that do not include a "reasonableness" qualification.

It is no surprise that different professional liability policies contain different consent to settle clauses. There are two key types relevant to this case.[10] Both types have certain overlapping characteristics. For example, they both give the insured the ability to reject a proposed settlement. They also both provide certain consequences if the insured rejects the proposed settlement. However, the two types have one distinction that is critical for purposes of this case.

Some consent to settle clauses include a "reasonableness" standard, and others do not. Admiral's does not. The case cited by Appellants – *Clauson v. New England Ins. Co.*, 254 F.3d 331 (1st Cir. 2001) – involved a consent to settle clause with a "reasonableness" provision. The clause stated:

> The company shall have the right to make any investigation it deems necessary and with the written consent of the insured, **said consent not to be unreasonably withheld**, any settlement of any claim covered by the terms of the policy.
>
> If the insured shall refuse to consent to any settlement or compromise recommended by the Company and acceptable to the claimant, and elects to contest the claim ... then the Company's liability shall not exceed the amount for which the Company would have been liable for damages if the claim or suit or proceeding had been so settled or compromised, when so recommended. The Company shall have no liability for claims expenses accruing thereafter and the Company shall have the right to withdraw from the further defense thereof by tendering control of said defense to the insured.

Id. at 336-37 (emphasis added).

[10] Admiral does not contend that there are only two types of consent to settle clauses. However, the cases cited by the parties here focus on two types of clauses. To simplify the issues, Admiral addresses these two types and their key distinction in this Brief.

The Appellants cited the similar case of *Freedman v. United Nat. Ins. Co.*, 211 WL 781919 (C.D. Cal. Mar. 1, 2011), in their memorandum before the Circuit Court. Like the clause in *Clauson*, the clause in *Freedman* also included a reasonableness standard:

> [Insurer] shall ... not settle any CLAIM without the written consent of the NAMED INSURED **which consent shall not be unreasonably withheld**. If however, the NAMED INSURED refuses to consent to a settlement recommended by [Insurer] and elects to contest the CLAIM or continue legal proceedings in connection with such CLAIM, [Insurer's] liability for the CLAIM shall not exceed the amount for which the CLAIM could have been settled ...

Id. at *1 (emphasis added).

In contrast, Admiral's clause does not include a reasonableness standard. The Admiral clause states: "If, however, the Named Insured shall refuse to consent to **any** settlement recommended by the Insurer, which is acceptable to the claimant, and shall elect to contest the Claim ... then the Insurer's liability for the Claim shall not exceed the amount for which the Claim could have been settled ...." (R. p. 371) (emphasis added). As discussed below, this type of consent to settle clause has been addressed by the United States Courts of Appeals for the Second and Ninth Circuits. *See Cowan v. Codelia*, 50 Fed. Appx. 36 (2d Cir. 2002); *Security National Ins. Co. v. City of Montebello*, 680 Fed. Appx. 525 (9th Cir. 2017).

At its heart, Appellants' contention rests on the false premise that the consent to settle clause in the Admiral policy includes a reasonableness standard. It does not.

ii. The Admiral consent to settle clause must be applied according to its plain and unambiguous terms.

The Circuit Court correctly held that the Admiral Policy's consent to settle clause is plain and unambiguous. As such, the clause must be applied according to its plain terms. Moreover, the Circuit Court properly relied upon cases from the Second and Ninth Circuit enforcing consent to settle clauses that – like the Admiral Policy clause – do not include a reasonableness standard.

In *City of Montebello*, the United States Court of Appeals for the Ninth Circuit addressed the very argument raised by Appellants here. Like Appellants here, the insured in *City of Montebello* argued that it acted reasonably by refusing to settle a case with a former employee. *Id.* at 527. Therefore, the insured argued that the consent to settle clause could not be used to limit the insurer's liability. However, the Ninth Circuit rejected that argument, holding "the hammer clause does not limit the insurer's right to invoke the clause to instances where the insured was unreasonable in rejecting the offer. ***To hold otherwise would impermissibly rewrite the hammer clause to the policyholder's benefit.***" *Id.* (citations omitted) (emphasis added). This rule is identical to South Carolina's rule prohibiting courts from rewriting plainly worded contracts. *See Benjamin*, 415 S.C. at 143, 781 S.E.2d at 141 ("Courts must enforce, not write contracts of insurance . . ..").

Like the rule applied by the Ninth Circuit in *City of Montebello*, "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 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) (citation omitted). "When a contract is unambiguous, it must be construed according to the terms the parties have used." *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 428 (2013) (citing *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 326, 330 (1999)).

Appellants argue the judgment on the pleadings was premature because "the record reflects no facts upon which a court could determine whether Ballard's refusal to permit settlement was **reasonable**." (Appellants' Br. p. 11) (emphasis added). In doing so, Appellants attempt to convert the consent to settle clause in the Policy from one which does not include a "reasonableness" standard to one that does. In other words, Appellants ask this Court – like they did the Circuit Court – to rewrite the policy. This request directly contravenes South Carolina law because the terms of the Policy are plain and unambiguous. *See Benjamin*, 415 S.C. at 143, 781 S.E.2d at 141 ("Courts must enforce, not write contracts of insurance . . ..").

"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." *B.L.G. Enterprises, Inc.*, 334 S.C. at 535, 514 S.E.2d at 330 (internal quotations omitted). While exclusions are construed against an insurer, "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 a statutory prohibition." *Id.* at 535-36, 514 S.E.2d at 330 (citation omitted).

There is no split of authority when it comes to enforcing consent to settle clauses. Appellants have not cited any court holding that consent to settle clauses are unenforceable. Instead, Appellants cite to the First Circuit's decision in *Clauson* to argue that the consent to settle clause cannot be enforced unless the insured "unreasonably" rejects a proposed settlement. However, contrary to the Appellants' broad contention, the First Circuit in *Clauson* did nothing more than faithfully apply the language of that policy's consent to settle clause, which included the "unreasonably withheld" language. On the other hand, courts interpreting clauses that do not contain the "unreasonably withheld" language hold the clause must be applied regardless of

whether the insured "unreasonably withholds" her consent. However, all courts hold that these clauses are enforceable.

Notably, the Ninth Circuit in *City of Montebello* contrasted the consent to settle provision in that case with the consent to settle provision at issue in *Freedman* – a case relied upon by Appellants before the Circuit Court – which stated consent could not be "unreasonably withheld." *City of Montebello*, 680 Fed. Appx. at 527. The Ninth Circuit refused to write into the insurance policy the "unreasonably withheld" language that was at issue in the *Freedman* policy. *See also Cowan, supra* (enforcing a consent to settle clause when the trial court found the insured constructively rejected proposed settlement by making "phantom objections" and "illusory" complaint about the settlement).

The Circuit Court in this case correctly applied the reasoning of the Ninth Circuit in *City of Montebello* and rejected Appellants' invitation to rewrite the plainly worded Policy. Appellants purchased an insurance contract that does not include the "unreasonably withheld" standard. Instead, the consent to settle clause in the Admiral Policy states that the consequences of a refusal to settle are automatic if the insured rejects a proposed settlement that Admiral recommends and the Estate would accept. Because the contract is plainly worded, it must be enforced as written. Moreover, because the contract does not include a "reasonableness" standard, there was no need for any development of a factual record in this case, and Appellants' reasoning for trying to prevent any settlement negotiations is simply not relevant. The Policy must be applied according to its plain terms. Therefore, the Circuit Court should be affirmed.[11]

[11] In essence, Appellants want to handcuff Admiral to the defense and indemnification of the Underlying Action with the only limit to Admiral's liability being the policy limits. This is not what the parties agreed to in the contract. Admiral agreed to defend its insured up to its policy limits or up to the amount of a settlement that Admiral would recommend and that the Estate would accept. Appellants retained the right to object to a proposed settlement, but only if they were

C. Enforcing the consent to settle clause as written, the reasonableness or unreasonableness of the insured's refusal to settle is irrelevant.

In their brief, Appellants argue the Circuit Court's ruling on the consent to settle clause was premature because "the record reflects no facts upon which a court could determine whether Ballard's refusal to permit settlement was reasonable." (Appellants' Br. p. 11). However, as explained above and required by South Carolina law, the Circuit Court interpreted the consent to settle clause according to its plain terms and refused to rewrite the clause to include a "reasonableness" standard. Therefore, Appellants' reasons for refusing to permit settlement are irrelevant. Appellants' argument that the Circuit Court was required to make a factual inquiry into the matter is unfounded. The plain terms of the Policy control regardless of the factual allegations in the Complaint, and the Circuit Court properly granted judgment on the pleadings.

II. The Circuit Court correctly granted judgment on the pleadings when the issues in the case are controlled by the interpretation of the Policy, which is a question of law ripe for the Circuit Court's review.

The dispute between the parties boils down to two questions: 1) whether Admiral, as the insurer bearing the right and duty to defend, can enter into negotiations with the Estate, the third-party claimant; and 2) did the Circuit Court err by granting judgment on the pleadings when there was no evidentiary finding of whether Appellants "reasonably" refused to allow any settlement negotiations. The first question can be stated differently – as stated in Appellants' Complaint – can the insured enjoin a liability insurer from participating in settlement negotiations with the

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willing to take on the risk that exposure in the case may exceed the amount of that proposed settlement. What Appellants did not retain the right to do is prevent Admiral from attempting to negotiate a settlement. In other words, Appellants may choose to continue fighting the case even after it could have been settled, but they cannot do so with the carrier's money. Once Appellants decide over Admiral's advice to continue litigating the case, Appellants' take on the risk of that decision as well. Once again, the Policy predicts this dispute and sets out the parties' respective rights. It must be enforced as written.

claimant? The second question can be rephrased by asking whether the Court can rewrite an unambiguous contract. As discussed above, the plain terms of the policy and common sense answer both questions in the negative. The Circuit Court correctly recognized these issues are pure legal questions that were proper for judgment on the pleadings,[12] and therefore, its judgment should be affirmed.

A. The judgment on the pleadings was ripe for the Circuit Court's review.

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

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

> This lawsuit . . . seeks to prevent Admiral from pursuing a settlement or seeking to settle the claim so as to put Ballard in a position of having to invoke the "consent" provision of the policy.

[12] The Circuit Court held, "[T]his 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." (R. p. 13).

(Appellants' Br. p. 12). Moreover, Appellants' Complaint states that prior to filing suit they "notified the Insurance Defendants that no settlement offers were to be extended and no settlements were to be made in the legal malpractice claim with Mrs. Pope . . ." (R. p. 104, ¶ 65). Appellants claim they were entitled to do so under the Admiral Policy. (R. p. 104, ¶ 65). By filing this suit and making these proclamations, Appellants identified a dispute as to the parties' rights under the Policy – specifically the "Defense, Cooperation and Settlement" provision which includes the consent to settle clause. That dispute was ripe for adjudication by the Circuit Court.

One of the purposes of the Declaratory Judgment Act is to allow parties to seek a ruling from the courts before breaching a contractual provision. As the United States Supreme Court has held:

> Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 241, 57 S. Ct. 461, 464 (1937) (citations omitted). The very purpose of the Declaratory Judgment Act was to provide a means by which a party may determine the terms of a contract or the rule of law before taking action that could be deemed a breach of the contract. *See e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134, 127 S. Ct. 764, 774 (2007) ("The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III."). As the United States Supreme Court held in *MedImmune*, a dispute is sufficiently ripe if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 126, 127 S. Ct. at 771 (quoting *Maryland*

Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510 (1941)). The goal of the Declaratory Judgment Act is to allow parties an alternative to breaching a contract or the law and then seeking approval from the court. *Id.* at 129, 127 S. Ct. at 772 ("As then-Justice Rehnquist put it in his concurrence, 'the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.'" (citation omitted)).

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

B. All of the issues in the case are controlled by the interpretation of the insurance contract, which is a pure question of law.

"A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." *Sapp*, 386 S.C. at 146, 687 S.E.2d at 49 (citation omitted). Without a doubt, Admiral contests nearly every factual allegation set forth in the Appellants' Complaint. Moreover, the facts alleged in the Appellants' Complaint are refuted by findings of the Circuit Court made in the prior lawsuit between Adele Pope and Gloria Corley. However, those facts do not matter. The dispute between Admiral and Appellants is a narrow one: Does the Policy allow Appellants to stop Admiral from participating in settlement negotiations with the Estate? That question is wholly controlled by the plain terms of the Policy. Either the Policy gives Appellants the right to prevent Admiral from negotiating or

it does not. Appellants apparently thought this issue so ripe that they pled in their Complaint for an injunction *pendente lite*. (R. p. 106, ¶ 77).

It is well established that the interpretation of an insurance contract is a question of law for the court. *See Reeves v. South Carolina Municipal Ins. and Risk Financing Fund*, 427 S.C. 613, 623, 832 S.E.2d 312, 317 (Ct. App. 2019) ("The construction of a clear and unambiguous contract is a question of law for the court.") (citations omitted). Because the interpretation of a contract is a question of law for the court and the construction of the Policy controlled all the issues in this case, the matter was proper for judgment on the pleadings.

III. Appellants' remaining arguments do not accurately reflect the Circuit Court's holding.

Respectfully, Appellants' remaining arguments confuse the issue, and do not reflect Admiral's contentions or the Circuit Court's holdings. For example, Appellants claim the Circuit Court held that Appellants' failure to cooperate relieved Admiral from the terms of the consent to settle provision. (Appellants' Br. p. 12). This has never been Admiral's contention, and it was not the Circuit Court's holding. Likewise, Appellants contend that the Policy should not have been considered at the judgment on the pleadings stage and that Admiral somehow "skirted" this issue. Again, this is incorrect. The Circuit Court's Order spends more than a page addressing this very issue. (R. pp. 11–12).

A. The Circuit Court did not rely on Appellants' non-cooperation when it held that the consent to settle clause must be applied according to its plain terms.

Appellants argue incorrectly that "[t]he gist of [Admiral's] argument, as accepted by the trial judge, is that Ballard's refusal to allow initiation of settlement discussions by Admiral constituted a 'failure to cooperate' as a matter of law, thus rendering the 'consent' term of the policy a nullity." (Appellants' Br. p. 12). At this time, Admiral has not asserted that Appellants'

failure to cooperate relieves Admiral of its duty to defend or indemnify.[13] Instead, Appellants' Complaint and the declaratory relief sought by Admiral focused on different issues: (1) whether Admiral has the right to negotiate with the Estate; and (2) whether the consent to settle clause would be enforced as written. While the "Defense, Cooperation and Settlement" clause in the Admiral Policy is relevant to the first question, Admiral has not contended that the relief it seeks is based upon Appellants' failure to cooperate.

Appellants' representation that Admiral is relying on the cooperation clause as being somehow tied to application of the consent to settle clause is simply wrong. Admiral cited the cooperation provision for a different purpose – in its request for a ruling that it be allowed to negotiate with the Estate. Paragraphs B. and C. of the Defense, Cooperation and Settlement provision make it clear that Admiral controls the defense – and thus the decision of whether to negotiate the case. Appellants have a duty to cooperate in the defense and settlement of the case – and thus they do not have the right to prevent Admiral from entering into those negotiations.[14] This issue is addressed by the Circuit Court separately in Section III of the "Findings of Fact and Conclusions of Law." (R. pp. 15–17). On the other hand, the Circuit Court's analysis of the consent to settle clause is located separately in Sections IV and V of the "Findings of Fact and Conclusions of Law." (R. pp. 17–20). Thus, the two provisions are addressed in completely

[13] Although Admiral has not sought to be relieved of its coverage obligations due to Appellants' failure to cooperate, the filing of a lawsuit seeking to enjoin Admiral from negotiating the underlying case certainly appears to be a failure to cooperate. Admiral reserves the right to bring a failure to cooperate action in the future.

[14] Admiral does not contend that the right to control the defense means the right to enter into a final and binding settlement over the insured's objections. The consent to settle clause addresses that question. The named insured has the ultimate right to reject a settlement that Admiral recommends and the Estate finds acceptable. However, such a rejection triggers the consequences of the consent to settle clause.

separate portions of the Circuit Court's Order. Therefore, contrary to what the Appellants argue, the Circuit Court did not make a finding that Appellants' failure to cooperate had anything to do with application of the consent to settle clause.

B. The Policy was incorporated by reference into the pleadings both by the Appellants' Complaint and by Admiral's Counterclaim.

When determining a motion for judgment on the pleadings, "a court may consider documents outside of the complaint if the complaint incorporates the documents by reference." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190 n.7, 539 S.E.2d 402, 410 n.7 (Ct. App. 2000). "When considering a motion for judgment on the pleadings, the court may consider the pleadings, exhibits attached thereto, [and] documents referred to in the complaint that are central to the plaintiff's claims . . . ." *In re MI Windows and Doors, Inc. Products Liability Litigation*, 2013 WL 3207423, *2 (D.S.C. June 24, 2013).

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

In addition to being a document central to Appellants' Complaint – which seeks declaratory judgments interpreting the provisions of the Policy – Admiral attached the Policy to its Answer and Counterclaim. Appellants argue in a footnote that the Policy was attached as an exhibit to Admiral's Notice of Removal, not its Answer and Counterclaim. (Appellants' Br. p. 6 n.1). Respectfully, the Circuit Court considered this very issue and correctly held that the Policy was attached to the Counterclaim. Specifically, the Policy bore a cover sheet identifying it as

"Exhibit 1." The Notice of Removal did not refer to any "Exhibit 1." However, Paragraph 114 of the Answer and Counterclaim states that Admiral was attaching a copy of the Policy as Exhibit 1. (R. p. 149, ¶ 114). Thus, it is clear the electronic attachment of the Policy to the Notice of Removal on the District Court's electronic filing program was a mere administrative error. The Answer and Counterclaim was filed at the same time as the Notice of Removal. Therefore, the Circuit Court correctly held that the Policy was attached to the Answer and Counterclaim. It was filed at the same time, bore the "Exhibit 1" designation referenced in the Answer and Counterclaim, and was specifically referenced in the Counterclaim.

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

The Circuit Court correctly applied the Supreme Court's holding in *Brazell* when it held that the Policy was incorporated by refence by both parties and was properly before the Court on the Motion for Judgment on the Pleadings.

CONCLUSION

The Circuit Court's Order faithfully applied the plain terms of the contract entered into between Admiral and Appellants. By the plain terms of the Policy, Admiral has the sole right and

duty to defend, and Appellants have a duty to cooperate in the defense and settlement of the Underlying Action. Therefore, Admiral has a right to negotiate a potential settlement with the Estate, and Appellants do not have the right to prevent Admiral from participating in those settlement discussions.

Likewise, the Policy clearly addresses what happens when Admiral and the Estate are willing to settle the case and Appellants are not. The Policy predicts this dispute and sets out the parties' respective rights. Admiral did not agree to take on the risk of litigating a case beyond the point where it could have been settled. At that point, the risk shifts back to Appellants in accordance with the written agreement between the parties. It is well established in South Carolina that courts must enforce insurance policies, not write them. Therefore, the Circuit Court correctly refused Appellants' invitation to rewrite the Policy's consent to settle clause to add a "reasonableness" standard that is not there.

All of the disputes between the parties are controlled by the plain terms of the Policy. Because the interpretation of an unambiguous insurance contract is a question of law for the court, the Circuit Court correctly granted judgment on the pleadings. The dispute between the parties is clearly defined and present. Appellants asked the Court to prevent Admiral from negotiating the Underlying Action, and Admiral asked the Court to hold that it could negotiate. Therefore, the matter was ripe and proper for judgment on the pleadings, and the Circuit Court should be affirmed.

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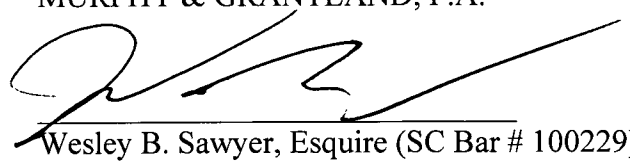

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Columbia, South Carolina
March 19, 2020

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

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.

CERTIFICATE OF COUNSEL

I, Wesley B. Sawyer, Esquire, attorney for Respondent Admiral Insurance Company, certify that the Final Brief of Respondent Admiral Insurance Company complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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