

The State of South Carolina
in the Court of Appeals

Appeal from Chesterfield County
Court of Common Pleas

Honorable Paul M. Burch, Circuit Court Judge

Case No. 2013-001321

Auto-Owners Insurance Company,..... Appellant,

v.

Elouise Woody Benjamin, Melvin Benjamin,
Joshua Lee Cail, Naida L. Singelton, and Pee Dee
Heating and Cooling Specialists, Defendants,

Of whom Elouise Woody Benjamin and Melvin
Benjamin are the Respondents

Respondents' Initial Brief

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SC Court of Appeals

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Statement of the Issue

Is the “similar coverage” exclusion in Auto-Owners’s Commercial General Liability Policy at least as ambiguous as the “similar insurance” exclusion in *South Carolina Farm Bureau Mut. Ins. Co. v. Courtney*, 342 S.C. 271, 536 S.E.2d 689 (2000), *aff’d* 349 S.C. 366, 563 S.E.2d 648 (2002)?

Statement of Facts

Naida Singleton and her husband own Pee Dee Heating and Cooling, and gave its employee Joshua Cail a 2004 Toyota Tacoma truck to drive. Cail crashed the Tacoma into Ms. Elouise Benjamin. Declaratory Judgment Complaint, ¶¶ 11, 14-15, R.p. _____. Her medical expenses from the crash exceed \$500,000. Hearing Tr., p. 18 ll.4-6, R.p. _____.

When the crash occurred, Pee Dee had two Auto-Owners’s insurance policies. The first one is a CGL policy issued on February 15, 2008. Auto-Owners’s Initial Brief, p. 3. It generally excludes automobile accidents. CGL Policy, R.p. _____. An endorsement, however, extends \$1,000,000 in coverage if the automobile involved in the accident is used in Pee Dee’s business and is neither owned by Pee Dee, nor registered to Pee Dee, nor leased for more than consecutive 90 days by Pee Dee. Endorsement, R.p. _____. The endorsement does not specify any

vehicles that qualify for this protection and does not include uninsured or underinsured protection.

The endorsement further applies “only if you do not have any other insurance available to you which affords the same or similar coverage.” Endorsement, R.p. ____.

Auto-Owners issued Pee Dee an Auto Policy the day after it issued Pee Dee the CGL endorsement. Auto-Owners’s Initial Brief, p. 3. This second policy provides \$300,000 in liability, uninsured, and underinsured protection on six vehicles specified by make, model, and VIN number. The listed vehicles include the 2004 Tacoma that Cail crashed into Benjamin even though Pee Dee, the policy holder, did not own, register, or lease the truck. Auto Policy, R.p. _____. Naida Singeton owned the Tacoma. Declaratory Judgment Complaint, ¶ 12-15, R.p. _____.

Pee Dee paid 7% of the Premises Operation Premium for the extended CGL endorsement, and \$7,936.56 for the second policy. CGL Policy, R.p. ____; Auto Policy, R.p. _____.

After the crash, Auto-Owners filed declaratory judgment actions to determine if its policies cover Benjamin’s \$500,000+ medical bills. Over time, the dispute narrowed to whether Pee Dee’s decision to buy the second policy unambiguously eliminated \$1,000,000 in coverage from

the first policy's endorsement under the endorsement's "similar coverage" exclusion. The trial court held that it did not, and construed the exclusion against Auto-Owners because the exclusion is inherently ambiguous and because policies with such different coverage limits are not similar. Order, p. 2, R.p. ____.

Argument

Auto-Owners wants its cake and eat it too. After charging Pee Dee separate premiums for separate policies it issued a day apart, Auto-Owners argues that its second policy for \$300,000 terminated \$1,000,000 in coverage from its first policy. In this view, Pee Dee and Pee Dee's tort victims would have had been \$700,000 better off had Pee Dee never bought the second Auto-Owners policy.

The trial court rightly ruled that the policy language does not support this perversity because the term "similar" is inherently vague and because a \$300,000 policy and a \$1,000,000 policy are not similar. Order, p. 2, R.p. _____. And the ambiguities do not stop there because nothing in the language suggests that the "similar coverage" exclusion applies to insurance that the same company issued a day later on a different set of automobiles. These ambiguities must also be construed against Auto-Owners and provide additional sustaining grounds for the

judgment. *See* Rule 220(c), SCACR (providing that an appellate court may affirm on any ground found in the Record).

1. The term “similar” is inherently ambiguous.

Describing the term “similar,” this Court stated, “It is difficult to imagine being called on to interpret a more imprecise term. This inherent vagueness fully justifies the conclusion that the term ‘similar’ is ambiguous.” *Courtney*, 342 S.C. at 275, 536 S.E.2d at 691. While Auto-Owners argues that this observation only applies to automatic termination clauses, it does not explain why — and it is in any event treating its exclusion just like an automatic termination clause.

Auto-Owners does not explain why “similar” is imprecise or inherently vague only if it is within an automatic termination clause. Courts hold that the term is ambiguous in far different cases. *See, e.g., McCuen v. Am. Cas. Co. of Reading, Pennsylvania*, 946 F.2d 1401, 1408 (8th Cir. 1991)(concluding that term “similar” is “so elastic, so lacking in concrete content,” that it imports “substantial ambiguities” in determining how many losses occurred under an Officer and Director’s policy); *Caldwell v. Transp. Ins. Co.*, 234 Va. 639, 364 S.E.2d 1 (1988)(concluding that the term “similar” is ambiguous in determining if a well drilling operation is a covered loss in a drill equipment policy).

Auto-Owners at best cites cases on whether insuring against violations of state labor law is similar to insuring against violations of the Fair Labor Standards Act. Yet these cases construe the policies as similar to avoid the moral hazard of allowing employers to insure against their own unlawful labor-law violations. *See, e.g., California Dairies Inc. v. RSUI Indem. Co.*, 617 F.Supp.2d 1023, 1032-1039 (E.D.Cal. 2009). Protecting innocent automobile-accident victims lacks the same moral hazard. The moral hazard here is having a policy holder buy \$1,000,000 in third-party coverage and then lose it the next day by buying an extra policy from the same company.

Besides, the split of authority outside South Carolina on whether “similar” is inherently ambiguous is itself evidence of an ambiguity. Ambiguity is defined by the ability of reasonable people to disagree; so if judges disagree, other reasonable people can too. *See Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 639, 594 S.E.2d 455, 459 (2004)(“Therefore, the split of authority amongst the other courts that have addressed this issue militates in favor of finding ambiguity and an interpretation in favor of the insured.”).

Lastly, the attempt to distinguish automatic-termination clauses does not get Auto-Owners far. Auto-Owners’s entire appeal is that

\$1,000,000 in protection under its CGL endorsement ended when it issued the second policy a day later. This treats the “similar coverage” exclusion just like an automatic termination clause.

2. The “similar coverage” provision is ambiguous in context.

The policies’ other contexts deepen the ambiguity or create new ones because the two policies have disparate coverage limits, were issued by the same company a day apart, and because the policies provide different types of coverage on different types of automobiles.

a. The exclusion is ambiguous on whether a \$300,000 policy and a \$1,000,000 are similar.

The trial court rightly ruled that the policies lack similar coverage because their limits differ by \$700,000. Order, p. 2, R.p. _____. This disparity is much greater than the disparity that *Courtney* confronted.

In *Courtney*, the Court resolved whether a Farm Bureau policy and a Unison policy unambiguously provided “similar insurance.” In finding ambiguities, this Court relied on cases which hold that a disparity in the amount of coverage creates ambiguities, in part because the coverage amount “is likely to be the most important and significant difference in the eyes of the insured.” *Courtney*, 342 S.C. at 278, 536

S.E.2d at 692. In particular, the Court relied on *Employer's Mut. Cas. Co. v. Martin*, 671 A.2d 798 (R.I. 1996), which held that differing policy limits render a "similar insurance" exclusion ambiguous even though the two policies provided the same type of automobile insurance. Applying this and other cases, this Court held that the "similar insurance" exclusion is ambiguous when applied to policy limits that differ by \$85,000. *Id.* at 273, 536 S.E.2d at 690.

The Supreme Court affirmed this Court's finding of an ambiguity. *Courtney*, 349 S.C. at 370 n. 1, 563 S.E.2d at 650 n. 1. While it further found it unnecessary to rely on the disparate limits alone, it did not disturb this Court's ruling on disparate limits. It cited approvingly the *Martin* case which turned on disparate limits alone. *Id.*

This ruling on disparate limits applies even more forcefully here because Auto-Owners's exclusion refers to "similar coverage" and not "similar insurance." The term "similar insurance" draws attention to the type of insurance and not just the amount of coverage. In contrast, "similar coverage" most naturally compares the coverage amounts.

Auto-Owners side-steps the point by arguing that its policy distinguishes between coverage that is the same and coverage that is similar. But the fighting issue is whether a \$300,000 policy and

\$1,000,000 policy are similar — unambiguously. *Courtney* answers the fighting issue because it held that a \$85,000 disparity creates ambiguities. It follows that a \$700,000 disparity does too.

b. The “similar coverage” provision is ambiguous on whether it applies to policies issued by the same company.

Reading the exclusion as a whole adds ambiguities because the same company issued both policies. A line of decisions agree that policy holders who pay the same company separate premiums for separate policies are entitled to the benefit of both bargains. These courts hold that “other insurance” language does not apply to insurance issued by the same company unless the language says so specifically. Absent this specificity, no one can reasonably expect that buying an extra policy eliminates other insurance from the same company. *See, e.g., Glidden v. Farmers Auto. Ins. Ass’n.*, 57 Ill.2d 330, 312 N.E.2d 247 (1974) (finding an “other insurance” provision ambiguous when one company issues both policies to the same policy holder); *Woolston v. State Farm Mut. Ins. Co.*, 306 F.Supp. 738, 741-742 (W.D.Ark. 1969)(same).

These decisions are apt. Auto-Owners contracted to pay up to \$1,000,000 under its CGL endorsement in exchange for premiums totaling 7% of the Premises Operation Premium. CGL Policy, R.p. ____.

It then separately contracted to pay up to \$300,000 in coverage in exchange for \$7,936.56 in premiums. Auto Policy, R.p. _____. Yet Auto-Owners now says that Pee Dee lost the benefit of its bargain for the \$1,000,000 endorsement by buying the extra policy from Auto-Owners.

Nothing in the language unambiguously says that Auto-Owners's may lessen or exclude coverage under one of its policies by selling the policy holder an extra policy. And nothing in the record shows that Pee Dee's owners are sophisticated enough to foresee that this could happen, or that they intended to pay Auto-Owners extra to replace its \$1,000,000 policy with a \$300,000 one.

c. The “similar coverage” provision is ambiguous on when the similar coverage must exist.

The exclusion as a whole is also ambiguous because it speaks in the present tense, extending coverage “only if you do not have any other insurance available to you which affords the same or similar coverage.” Endorsement, R.p. _____. In contrast, the exclusion in *Courtney* spoke in the future tense, referring to similar insurance that was acquired later — “If you obtain other insurance . . .” *Courtney*, 342 S.C. at 274, 536 S.E.2d at 691.

The distinction matters because Pee Dee did not have the second

policy when Auto-Owners issued the “similar coverage” exclusion. Again, Auto-Owners did not issue the policy that it argues is similar until a day later. If the exclusion is read in the present tense, as it is drafted, the second policy does not count because Pee Dee did not have it when Auto-Owners issued the exclusion.

Auto-Owners will likely retort that “similar coverage” refers to coverage that exists when the exclusion later became effective or when the claim was made. But the language it drafted does not say that, or at least does not say that clearly. The exclusion, drafted in the present tense, can reasonably be read to apply only if the similar coverage existed when the exclusion was issued.

This timing also answers Auto-Owners’ charge that the trial court effectively turned its endorsement into excess coverage. Under this analogy, the endorsement is primary because it was issued first. The second automobile policy would be the excess coverage.

d. The exclusion is ambiguous on whether it applies to policies with different types of insurance on different types of automobiles.

The ambiguities further multiply when comparing the CGL policy as a whole to the Auto Policy as a whole. The CGL policy generally excludes all the automobile coverage that the Auto Policy provides.

CGL Policy, R.p. _____. The CGL endorsement then provides limited liability protection but still lacks the uninsured or underinsured motorist protection found in the Auto Policy. Endorsement, R.p. _____.

Beyond this distinction, the policies' liability insurance protect automobiles under vastly different criteria. For the CGL endorsement to apply, the automobile must be used in the policy holder's business; must not be owned by the policy holder; must not be registered to the policy holder; and must not be leased by the policy holder for more than consecutive 90 days. Endorsement, R.p. _____. In contrast, the Auto Policy applies to "your automobile," defined as one of the six "automobile[s] described in the Declarations." Auto Policy, R.p. _____. The Auto Policy's extension of coverage to nonowned, unspecified vehicles only provides excess coverage and does not apply because Singleton, Pee Dee's co-owner, owned the Tacoma truck in the wreck. Auto Policy, R.p. _____.

So the two policies overlap only if an automobile is specified in the Auto Policy's declarations; is used in the policy holder's business; is not owned by the policy holder; is not registered to the policy holder; and is not leased by the policy holder for more than consecutive 90 days.

There is no record evidence that any vehicle other than the Tacoma falls within this narrow overlap. Apparently none of the other five

vehicles listed in the Auto Policy qualifies. This too confirms that the policies are not similar — at least not unambiguously — because the Tacoma is the policies' only shared point.

Conclusion

Courtney put insurance companies on notice that “similar insurance” exclusions are problematic and construed the loose language against Farm Bureau even though Unison issued the other insurance. Auto-Owners nevertheless chose to put a “similar coverage” exclusion into a \$1,000,000 policy that it issued to Pee Dee the day before it issued a \$300,000 policy to Pee Dee on a truck that Pee Dee did not own, register, or lease. When it issued both policies, Auto-Owners knew about both policies, pocketed premiums for both policies, and chose to use the loose language that *Courtney* construed years before. It is not unfair to hold Auto-Owners its choice.

The trial court properly ruled that the “similar coverage” exclusion is ambiguous enough to construe it in favor of Pee Dee and its employees' horribly injured tort victims. The judgment should be affirmed.

Respectfully submitted,



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The State of South Carolina
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The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2011-CP-13-271

Auto-Owners Insurance Company Appellant,

v.

Elouise Woody Benjamin, Melvin Benjamin, Joshua
Lee Cail, Naida L. Singleton, and Pee Dee Heating
Cooling Specialists, Inc. Defendants,

Of whom Elouise Woody Benjamin and Melvin
Benjamin are the..... Respondents

Certificate of Service

I on November 25, 2013 served the Respondents' Initial Brief by
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November 25, 2013

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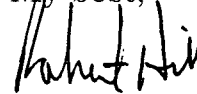
Re: Auto-Owners Insurance Co. v. Benjamin
Civil Action No. 2011-CP-13-271

Dear Ms. Kitchings:

Enclosed is the Respondents' Initial Brief and certificate of service.

We will not be filing a separate Designation of Matter.

My best,



Robert Hill

cc: William P. Hatfield, Esq.
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