

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

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DEC 17 2013

The Honorable Paul M. Burch, Circuit Court Judge

SC Court of Appeals

Case No. 2013-001321

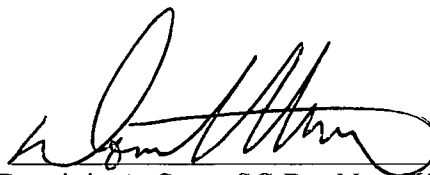
Auto-Owners Insurance Company,..... Appellant,

v.

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

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

APPELLANT'S REPLY BRIEF



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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in Appellant's Initial Brief, Appellant offers the following clarifications and rebuttals to the arguments raised by Respondents.

I. The Auto Exclusion does not function as an automatic termination clause

Throughout their initial brief, Respondents contend that the Appellant is "treating its exclusion just like an automatic termination clause." Respondents' Initial Brief, p. 4. Further, they explain that the purchase of the Auto policy somehow retroactively took away existing coverage, which "treats the 'similar coverage' exclusion just like an automatic termination clause." *Id* at 6. In fact, the Auto policy was issued before the CGL Policy, and the facts of the case do not support Respondents' position that the exclusion in the Auto policy functions as an automatic termination clause.

The Auto Policy was issued on February 14, 2008. Auto Policy, p. 1. The CGL Policy Plus Endorsement was issued on February 15, 2008. CGL Policy, p.1. Upon information and belief, these two policies were negotiated between the Appellant and Pee Dee at the same time. There was no period of time during which the CGL Policy was issued and/or effective and the Auto Policy was not. Respondents' argument that "Pee Dee's tort victims would have had [sic] been \$700,000 better off had Pee Dee never bought the second Auto-Owners policy" is without factual grounding. Instead, when the Auto Policy was issued, the Toyota Tacoma was named on the Auto Policy for \$300,000 in coverage. The issuance of the CGL Policy the following day did nothing to eliminate or modify this coverage.

An automatic termination clause is a policy term that cancels existing coverage when a new, different policy is purchased purporting to cover the same insurable interest. These clauses

carry with them important policy considerations because, when allowed by a jurisdiction, they can cause the unilateral cancellation of an existing insurance policy with no notice to the policyholder. Such was the concern when the Supreme Court of South Carolina affirmed South Carolina Farm Bur. Ins. Co. v. Courtney, 342 S.C. 271 536 S.E.2d 689 (Ct. App. 2000). South Carolina Farm Bur. Ins. Co. v. Courtney, 349 S.C. 366, 563 S.E.2d 648 (2002).

The exclusionary language of the CGL policy is therefore not analogous to an automatic termination clause. The exclusionary language in the CGL Policy was negotiated at the same time as the Auto Policy and issued the day after the Auto Policy. No notice was required because no unilateral cancellation of any insurance took place. Instead, a bargained-for system of coverages were negotiated and put into effect with no implication of any of the policy concerns underpinning the Courtney cases.

II. “Similar Coverage” existed at the time the Exclusion was issued

Respondents argue that the “similar coverage provision is ambiguous on when the similar coverage must exist.” Respondents’ Initial Brief, p. 9. Further, they state that if the clause is read in the present tense, as written, then it cannot refer to the Auto Policy as it was not in existence. Id at 9-10. However, as stated *supra*, the circumstances are exactly the opposite. The Auto Policy was issued the day before the CGL Policy Plus Endorsement containing the “similar coverage” clause. Therefore, Pee Dee knew of, and bargained for, the specific coverage afforded in the CGL Policy with the already-existing Auto Policy in place.

Likewise, Pee Dee chose to include the Tacoma involved in the accident as a covered vehicle in the Auto Policy. Had Pee Dee desired to have the Tacoma covered only under the CGL policy and believed it possible, Pee Dee had the opportunity to bargain for such an arrangement during the negotiations for the policies. In fact, Pee Dee was issued the CGL Policy

Plus Endorsement containing the “similar coverage” clause with the full knowledge that Pee Dee had specifically singled out the Tacoma and five other vehicles for coverage under the Auto Policy. There was no basis for Pee Dee to believe anything other than the exact circumstances presented here: its Tacoma was covered under the \$300,000 Auto Policy and therefore not covered under the CGL policy issued later.

III. The parties to the contract get the benefit of their bargain and were sophisticated in the eyes of the law

The Respondents also use the erroneous timeline from their brief as the basis for an argument that Pee Dee could not have known that “Auto-Owners may lessen or exclude coverage under one of its policies by selling the policy holder an extra policy.” Respondents’ Initial Brief, p. 9. Further, Respondents argue that there is no evidence that Pee Dee’s owners were sophisticated enough to understand the negotiations “or that they intended to pay Auto-Owners extra to replace its \$1,000,000 policy with a \$300,000 one.” *Id.* This argument fails on all accounts.

First, as argued *supra*, the exclusionary language of the CGL Policy was negotiated with full knowledge of the existence and terms of the Auto Policy. No “extra policy” was sold to Pee Dee that took away any existing coverage. The existing \$300,000 of coverage on the Tacoma from the Auto Policy remained in place after the issuance of the CGL Policy. A reversal of the Circuit Court would result in Pee Dee receiving the exact coverage for which it bargained during negotiations and issuance of these policies.

Second, determining the sophistication of a party to the contract is “very strictly interpreted” by the Court. Burwell v. South Carolina Nat’l Bank, 288 S.C. 34, 40, 340 S.E.2d 786, 789 (1986). It is also not an issue on appeal in this case. However, to the extent this


Honorable Court examines this issue, it is well settled that “every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.” *Id.* Brett and Dr. Naida Singleton, DMD are sophisticated business owners. They are both shareholders of Pee Dee, and the company has been incorporated in South Carolina since 2003. Also, Dr. Singleton is a practicing dentist in Bennettsville, South Carolina and has been licensed as a dentist in South Carolina since 2002. There is nothing in the record to suggest ignorance or lack of sophistication as to Pee Dee as it relates to the negotiation and acquisition of these policies.

CONCLUSION

For the reasons stated in Appellant’s Initial Brief and Appellant’s Reply Brief, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief of Auto-Owners Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on the 16th day of December 2013, addressed to the attorneys of record:

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