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' Amended Initial Brief

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Table of Contents

Table of Authorities

Cases

Rules

Introduction

This is an insurance coverage dispute. At issue is whether an insurance policy unambiguously excludes coverage because the company sold the policy holder an extra policy that same day. The Benjamins submit that the policy is ambiguous on this point and that the policy holder, having paid for two policies, is entitled to the benefit of both bargains. Otherwise, the extra coverage is illusory.

Statement of the Issue

Is the "similar coverage" exclusion in Auto-Owners's CGL endorsement 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)?[1]

Statement of Facts

Mr. and Ms. Singleton own Pee Dee Heating and Cooling, and gave their employee Joshua Cail a 2004 Toyota Tacoma truck to drive. Cail crashed the Tacoma into Ms. Elouise Benjamin. Auto Owners' Complaint, ¶¶ 11, 14-15, R.p. ___. Her medical expenses from the crash exceed $500,000. Hearing Tr., p. 18 ll.4-6, R.p. ___.

[1]Copies of the *Courtney* decisions are attached to the brief as an addendum.

Pee Dee had two Auto-Owners's policies when the crash occurred. One is an Auto Policy that provides $300,000 in liability, uninsured, and underinsured protection on five scheduled drivers and six scheduled vehicles. Cail is not one of the five scheduled drivers. Auto Policy, R.p. ___. The Tacoma that he crashed into Benjamin is one of the scheduled vehicles even though Pee Dee, the policy holder, did not own, register, or lease the truck. Auto Policy, R.p. ___. Ms. Singeton owned the Tacoma. Auto-Owners's Complaint, ¶ 12-15, R.p. ___.

The day after it issued the Auto Policy, Auto-Owners issued Pee Dee a Comprehensive General Liability policy that generally excludes automobile accidents. CGL Policy, R.p. ___. Pee Dee paid Auto-Owners extra for a special endorsement, however, that provides $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 schedule any protected drivers or vehicles, and does not include uninsured or underinsured protection.

A clause in the 10-page endorsement says that the endorsement applies "only if you do not have any other insurance available to you which affords the same or similar coverage." Endorsement, R.p. ___.

Both policies are standardized, form contracts. Auto Policy, R.p. ___; CGL Policy, R.p. ___. Though issued a day apart, Pee Dee bought the two policies the same day and paid separate premiums for each. Hearing Tr., p. 6 ll.1-15, R.p. ___; Auto Policy, R.p. ___; CGL Policy, R.p. ___. There is no record evidence on how sophisticated Pee Dee's owners were when they bought the policies, and no showing that Pee Dee could have renegotiated the terms of the form contracts.

After the crash, Auto-Owners filed declaratory judgment actions to determine if its policies cover Benjamin's $500,000+ medical bills. The parties initially fought over whether Cail had Pee Dee's permission to drive the Tacoma when Cail crashed into Benjamin. The trial court ruled that he did. Order, R.p. ___.

The dispute then narrowed to whether Pee Dee's decision to buy the Auto Policy unambiguously eliminated $1,000,000 in coverage from the CGL endorsement under that endorsement's "similar coverage" exclusion. The trial court ruled 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. ___. Auto-Owners appealed.

Argument

Auto-Owners wants its cake and eat it too. After charging Pee Dee separate premiums for separate policies, Auto-Owners argues that its $300,000 policy eliminates its $1,000,000 endorsement. In this view, the auto coverage in the CGL endorsement is illusory. It could never apply. Pee Dee and Pee Dee's tort victims would have had been $700,000 better off had Pee Dee never bought the separate Auto 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. Nothing in the policy language suggests that the "similar coverage" exclusion applies to different types of insurance that the company sells to the policy holder for a different set of drivers and a different set of automobiles. These ambiguities must also be construed against Auto-Owners and provide additional grounds to sustain the judgment. *See* Rule 220(c), SCACR (an appellate court may affirm on any ground found in the Record).

1. The term "similar" is inherently ambiguous.

This Court concluded years ago that the "inherent vagueness" in the

term "similar" renders it ambiguous because "[i]t is difficult to imagine being called on to interpret a more imprecise term." *Courtney*, 342 S.C. at 275, 536 S.E.2d at 691. The trial court cited this conclusion when it ruled that this Court's focus was "term-centric," and that Auto-Owners's decision to use the term rendered its CGL policy as ambiguous as the *Courtney* policy. Order, p. 2, R.p. ___.

Auto-Owners argues that *Courtney* involved an automatic termination clause without explaining why the distinction matters. Courts have held that the term "similar" is inherently vague in widely different contexts. *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's citations are the ones that are distinguishable. These cases involve whether insuring against violations of state labor law is similar to insuring against violations of federal labor law, and 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). In contrast, there is no moral hazard in protecting innocent automobile-accident victims. The moral hazard is rendering $1,000,000 in third-party coverage illusory because the company convinced the policy holder to also buy a $300,000 policy.

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.").

2. The "similar coverage" provision is ambiguous in context.

The policies' other contexts deepen the ambiguities because the two policies have such disparate coverage limits; provide different types of insurance for different sets of drivers and different types of automobiles; and were sold by the same company on the same day.

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

Reading Auto-Owners's exclusion as a whole confirms that the term "similar" is ambiguous because it 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.

The trial court properly focused on the coverage amounts when ruled that the policies lack similar coverage because their limits differ by $700,000. Order, p. 2, R.p. ___. Auto-Owners concedes that the disparity shows the policies are not the "same" but contends they are still similar. In *Courtney*, however, this Court held that a $85,000 disparity creates ambiguities. *Courtney*, 342 S.C. at 275, 536 S.E.2d at 691. It follows that the greater, $700,000 disparity does too.

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.*

And again, if a $85,000 disparity create ambiguities, as *Courtney* held, a $700,000 one does too.

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

Comparing the CGL endorsement as a whole to the Auto Policy as a whole reveal further ambiguities. 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 yet lacks the uninsured or underinsured motorist protection found in the Auto Policy. Endorsement, R.p. ___.

Beyond this distinction, the two policies protect different sets of drivers. Unlike the Auto Policy, the CGL endorsement does not identify any scheduled drivers. The Auto Policy specifies five scheduled drivers – but does not include Cail, the at-fault driver who crashed into Benjamin. Auto Policy, R.p. ___. Cail is covered under the policies only because Pee Dee permitted him to drive. Order, R.p. ___.

A third distinction is that vehicles are covered 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 only overlap if the at-fault driver is driving with Pee Dee's permission and the automobile in the accident is listed 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.

Only Cail and the Tacoma seem to fall into this narrow overlap. Saying that this means that the policies are similar is like saying that the South Carolina judiciary is similar to philosophy graduates from Agnes Scott College; while Chief Justice Toal shows an overlap, this does not mean that the two are similar — at least not unambiguously.

c. The "similar coverage" provision is ambiguous on whether it applies to policies sold by the same company on the same day.

The even larger context surrounding the policies' sale further deepen the ambiguities because Auto-Owners sold Pee Dee the two policies on the same day and issued them only a day apart. Hearing Tr., p. 6 ll.1-15, R.p. ___; Auto Policy, R.p. ___; CGL Policy, R.p. ___.

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. *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 cases are apt. Auto-Owners collected $7,936.56 in premiums for the Auto Policy and another 7% of the Premises Operation Premium just for the CGL endorsement. Auto Policy, R.p. ___; CGL Policy, R.p. ___. After collecting premiums for both, Auto-Owners says that the $300,000 policy cancels out the $1,000,000 policy.

This renders the auto coverage in the CGL endorsement illusory. If Auto-Owners is right that its Auto Policy excludes its CGL endorsement, then it knowingly sold Pee Dee coverage that would never apply. The Auto Policy that it issued the day before would always cancel out the auto coverage in its CGL endorsement. Auto-Owners gets the quid without the quo.

Nothing in the policy language suggests that Auto-Owners is entitled to premiums for coverage that does not exist. And while Auto-Owners describes Pee Dee's owners as sophisticated, there is no record evidence that Pee Dee's owners are sophisticated — at all — much less

sophisticated enough to know that buying the Auto Policy meant that they were paying for $1,000,000 in coverage that could never apply.

3. Auto-Owners could have easily clarified the ambiguities.

The even larger historical context also provides a helpful perspective. Almost eight years before Auto-Owners issued the Pee Dee policies, *Courtney* put insurers on notice that "similar insurance" exclusions are problematic and construed the loose language against the drafter. Still, Auto-Owners chose to put a "similar coverage" exclusion into a $1,000,000 policy that it sold to Pee Dee the same day it sold Pee Dee a $300,000 policy on a truck that Pee Dee did not own, register, or lease. When it sold 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.

Auto-Owners could have easily followed this Court's lead and fixed the loose language by excluding coverage if there is any other insurance, including other insurance issued by Auto-Owners. *See Courtney*, 342 S.C. at 275 n. 1, 536 S.E.2d at 691 n.1 (distinguishing policies that exclude "*any other* contract of insurance, not 'similar insurance.'")(emphasis in original). The change would have at least clarified Auto-Owners's apparent intent that those who buy its Auto

Policy and its CGL endorsement get less coverage than those who only buy its CGL endorsement.

As it is, the loose language does not compel this oddity. It is not unfair to hold Auto-Owners to its poor drafting choice.

Conclusion

The trial court properly construed the CGL endorsement in favor of Pee Dee and its employees' horribly injured tort victims. The judgment should be affirmed.

Respectfully submitted,

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342 S.C. 271
Court of Appeals of South Carolina.

SOUTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Appellant,
v.
William H. COURTNEY, III and Unisun Insurance Company of whom William H. Courtney, III, is Respondent.

No. 3228. | Heard May 10, 2000. | Decided July 24, 2000. | Rehearing Denied Sept. 2, 2000. | Certiorari Granted Jan. 11, 2001.

The automobile insurer for a wrecked car sought a declaratory judgment that the policy on the replacement vehicle provided similar insurance and terminated the prior policy. The Circuit Court, Sumter County, James E. Brogdon, Jr., J., determined that both policies remained in effect. Insurer appealed. The Court of Appeals, Shuler, J., held on a novel issue that the policies did not provide similar insurance necessary for automatic termination.

Affirmed.

West Headnotes (6)

[1] **Declaratory Judgment**
Legal or equitable

A declaratory judgment action is neither legal nor equitable, but is determined by the nature of the underlying issue.

[2] **Declaratory Judgment**
Legal or equitable

A suit to determine coverage under an automobile insurance policy, based in contract, is an action at law.

[3] **Insurance**
Obtaining additional insurance

A policy covering a replacement vehicle with limits of $15,000 per person and $30,000 per occurrence and no underinsured motorist (UIM) coverage did not provide "similar insurance" to a policy covering a wrecked car with UIM coverage and limits of $100,000 per person and $300,000 per occurrence, and, thus, an automatic termination clause did not end the policy on the wrecked car when the new policy was purchased.

[4] **Insurance**
Obtaining additional insurance

The word "similar" in an automatic termination clause terminating similar insurance provided by an automobile policy on the effective date of other insurance on a covered automobile does not mean "identical" and is not satisfied by the simple sharing of common characteristics or the existence of liability coverage in each policy.

1 Cases that cite this headnote

[5] **Insurance**
Duration of coverage

In order to determine whether two automobile insurance policies are sufficiently alike to be deemed similar, a court must examine the policies as a whole under an automatic termination clause terminating similar insurance provided by an automobile policy on the effective date of other insurance on a covered automobile.

1 Cases that cite this headnote

[6] **Insurance**
Obtaining additional insurance

Where a second, subsequent automobile insurance policy differs in both the amount of coverage and the kind of coverage provided, the policies are not "similar insurance" as contemplated in an automatic termination clause terminating similar insurance provided by an automobile policy on the effective date of other insurance on a covered automobile.

1 Cases that cite this headnote

Attorneys and Law Firms

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William Ceth Land and John C. Land, III, both of Land, Parker & Reeves, of Manning, for respondent.

Opinion

SHULER, Judge:

In this declaratory judgment action, the trial court found the automobile insurance policy on a replacement vehicle was not "similar" insurance sufficient to invoke the automatic termination clause in the replaced vehicle's policy. South Carolina Farm Bureau appeals. We affirm.

FACTS/PROCEDURAL HISTORY

In the summer of 1997, William Courtney owned two automobiles, a 1997 Saturn and a 1995 Chevrolet Camaro. Farm Bureau insured both vehicles in separate policies. Each policy contained personal liability and underinsured motorist coverage (UIM) in limits of $100,000 per person and $300,000 per occurrence with property damage limits of $25,000 per accident (100/300/25).

In September 1997, the Camaro, driven by Courtney's wife Susan, was involved in an accident. Farm Bureau declared the car a total loss and tendered payment under the vehicle's collision coverage. Although the Camaro's insurance policy was set to expire at 12:01 a.m. on October 4, Farm Bureau never issued Courtney a notice of cancellation or refunded any unearned premiums. On October 4, using the proceeds from Farm Bureau's payout on the Camaro, Susan Courtney purchased a pick-up truck. She subsequently insured the truck with Unisun Insurance Co. on October 8, apparently without her husband's knowledge or consent. The Unisun policy provided personal liability limits of $15,000 per person and $30,000 per occurrence with property damage limits of $25,000. *274 The policy provided for identical uninsured motorist coverage (UM) but afforded no UIM coverage.

On October 27, William Courtney, driving his Saturn, sustained serious injuries when another vehicle crossed the center line and struck him head-on. These injuries confined Courtney to a wheelchair for nine weeks and later required him to use a walker. The at-fault driver's insurer disbursed its minimum limits coverage for the accident, but Courtney's medical bills and other losses far exceeded the amount received. As a result, Farm Bureau paid Courtney the UIM limits from his policy on the Saturn but denied his attempt to stack UIM coverage from the Camaro's policy, claiming the Unisun policy obtained by Susan Courtney automatically terminated Farm Bureau's policy on the Camaro.

Farm Bureau brought this declaratory judgment action against Courtney and Unisun, seeking judicial determination of its obligation on the Camaro's policy. At Farm Bureau's request, the trial court dismissed Unisun as a party to the lawsuit. The court held a hearing and issued an order finding the Unisun policy on Susan Courtney's pick-up truck did not terminate the Farm Bureau policy on William Courtney's Camaro. This appeal followed.

LAW/ANALYSIS

[1] [2] A declaratory judgment action is neither legal nor equitable, but is determined by the nature of the underlying issue. *Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 511 S.E.2d 692 (Ct.App.1999). A suit to determine coverage under an automobile insurance policy, based in contract, is an action at law. *Id.* This Court's jurisdiction, therefore, is limited to correcting errors of law, and the trial court's factual findings will not be disturbed unless unsupported by any evidence. *Id.*

[3] Farm Bureau contends Susan Courtney's purchase and insurance of the pick-up truck with Unisun relieved it of any obligation to indemnify William Courtney under the UIM provision of the Camaro's policy. The automatic termination clause in Farm Bureau's policy states in pertinent part:

> **691 If you obtain other insurance on your covered auto, any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

*275 In refusing to find termination automatic under this clause, the trial court determined the phrase "any similar insurance," as employed in the Farm Bureau policy, was ambiguous. Construing the term in favor of Courtney, the named insured, the court found that the Farm Bureau and Unisun policies did not afford similar insurance because of the "vast difference" in coverage between the two. In

particular, the trial court noted the Farm Bureau policy provided both liability and UIM coverage in amounts of 100/300/25 while the Unisun policy furnished only the minimum liability insurance required by law and no UIM coverage at all. Farm Bureau, on the other hand, claimed the two policies "share sufficient characteristics in common" because they both provide first-person liability insurance and thus are substantially similar.

The meaning of "similar" insurance in the automatic termination clause in Farm Bureau's policy is a novel question in this state. [1] Initially, we agree with the trial court that the term "similar" is ambiguous. It is not defined in the policy itself and creates uncertainty as to its precise meaning. [2] In describing an identical automatic termination provision in *Motors Insurance Corp. v. Bodie,* the district court stated:

> "Similar" is not defined by the policy and may be used in English to mean the "same" or "identical" though it is defined as "showing some resemblance; related in appearance or nature; alike though not identical." It is difficult to imagine being called upon to interpret a more imprecise term. This inherent vagueness fully justifies the conclusion that the term "similar" is ambiguous.
>
> 770 F.Supp. 547, 550 (E.D.Cal.1991) (citation and footnote omitted). Likewise, Black's Law Dictionary defines the term as:
>
> > ***276** Nearly corresponding; resembling in many respects; somewhat alike; having a general likeness, although allowing for some degree of difference.... [S]imilar is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance, although in some cases "similar" may mean identical or exactly alike. It is a word with different meanings depending on [the] context in which it is used.
>
> *Black's Law Dictionary* 1383 (6th ed. 1990) (internal citations omitted).

On appeal, Farm Bureau argues that the word "similar" should not be construed as being synonymous with "identical" and contends that because both its policy and the Unisun policy contained first-party liability insurance, the policies are sufficiently similar to invoke its automatic termination clause.

[4] **[5]** We agree with Farm Bureau that "similar" should not be construed as being synonymous with "identical." *See Diamond State Ins. Co. v. Homestead Indus.,* 318 S.C. 231, 456 S.E.2d 912 (1995) (noting this court must give policy language its plain, ordinary, and popular meaning). However, we reject Farm Bureau's argument that the two policies are sufficiently similar simply because they both provide first-party liability insurance. Doubtless, every automobile insurance policy is inherently alike in that respect. Rather, in order to determine whether the two are sufficiently alike to be deemed similar, the policies must be examined as a whole.

Because South Carolina has no case on point, we find it helpful to turn to courts of other jurisdictions. In the context of automatic termination clauses, at least three courts interpreting identical language have held policies differing in the amount of coverage ****692** provided are not "similar" insurance as contemplated by the parties. [3]

1 Farm Bureau's assertion that *Camden Wholesale Grocery v. National Fire Ins. Co.,* 106 S.C. 467, 91 S.E. 732 (1917), and *Walker v. Queen Ins. Co.,* 136 S.C. 144, 134 S.E. 263 (1926), are analogous is without merit. In these fire insurance cases, the court upheld the denial of coverage based on automatic termination clauses. The clauses therein, however, expressly stated the policies would terminate if the insured procured *any other* contract of insurance, not "similar insurance."

2 *See Black's Law Dictionary* 79-80 (6th ed. 1990) (words are ambiguous when "their signification seems doubtful and uncertain to persons of competent skill and knowledge to understand them").

3 Additionally, in *Franklin v. Kimberly,* 1997 WL 379173 (Tenn.Ct.App.1997), an unreported opinion, the Tennessee Court of Appeals found that the word "similar" was ambiguous and must be construed against the insurer. In so construing, the court held that insurance coverage in two separate policies are similar only to the extent the policy amounts are similar. (We note that the Tennessee Rules of Appellate Procedure, unlike the analogous South Carolina rules, do not prohibit the use of unpublished opinions so long as a copy is provided to the judge and opposing counsel. *Compare* Rule 11,

Tennessee Rules of Appellate Procedure *with* Rule 239, SCACR).

In *Employers Mutual Casualty Co. v. Martin,* 671 A.2d 798 (R.I.1996), the Martins purchased insurance through Employers in April 1989; the policy had liability limits of $300,000 per accident. In May 1989, Employers informed the Martins that ***277** due to their poor driving records, it was canceling the policy on July 10. At the end of May, the Martins applied for and received insurance coverage from the Metropolitan Property and Liability Insurance Company. The Metropolitan policy had limits of $100,000 per person and $300,000 per accident. From May 25 to July 10, the Martins were covered under both policies.

On July 9, Paul Martin was involved in an automobile accident with an uninsured driver that resulted in the death of his five-year old son, Paul, Jr. The Martins filed claims with both Employers and Metropolitan. Under the Metropolitan policy, the Martins' recovery was limited to $200,000; however, under Employers' policy, the Martins could recover up to $300,000.

In a declaratory judgment action, Employers asserted that its policy automatically terminated when the Martins purchased "similar" insurance from Metropolitan, and thus Employers was not liable under its policy. The Rhode Island Supreme Court disagreed. In holding the two policies were not sufficiently similar to effectuate an automatic cancellation, the court specifically found the "disparity in coverage" between the policies precluded any interpretation that they represented similar insurance as intended by the policy language. *Id.* at 801.

In *Motors Insurance Corp. v. Bodie,* Patrick Bodie obtained a policy from Motors on his pick-up truck with limits of 25/50/10. A few months later the Bodies sought to add a Corvette to the Motors' policy. Motors, however, refused to insure the Corvette. Teresa Bodie, Patrick's wife, then insured the Corvette in her own name with Financial Indemnity Co., along with the truck. The Financial policy had liability limits of 15/30/10. The Bodies did not inform Motors that Financial had issued a policy covering the truck.

Shortly thereafter, Patrick Bodie was involved in a serious accident when his truck struck a vehicle occupied by six other ***278** people. The Bodies immediately reported the accident to Motors, which settled the collision claim on the truck. Upon learning of the Financial policy, however, Motors denied coverage based on its policy's automatic termination clause.

The federal district court, applying California law to interpret the two allegedly "similar" insurance policies, ultimately determined the policies were "not the same" because each provided "different limits for third party liability." *Bodie,* 770 F.Supp. at 550. In so finding, the court declared that "[t]his difference [in coverage] is likely to be the most important and significant difference in the eyes of the insured." *Id.* The court, therefore, concluded the Financial policy did not effect an automatic termination of the Motors' insurance policy. *Id.*

Finally, the Iowa Supreme Court addressed this issue in *United Fire & Casualty Co. v. Victoria,* 576 N.W.2d 118 (Iowa 1998). In *United,* the Victorias were in the process of switching their insurance from United to State Farm. United, however, never refunded the premiums, and for five days, the Victorias were covered by both United and State Farm. During that time period, Victor and Mabel Victoria, along with their son Roger, collided head on with Timothy Hatting. Mabel was killed in the accident. After the accident, Victor and Roger filed claims with United. United denied coverage under its contract, asserting that its policy automatically terminated with the purchase of the State Farm policy because the coverages were "similar insurance" under its policy.

Like the policy at issue in our case, the United policy did not define the word "similar." ****693** The Iowa Supreme Court, noting *Bodie,* found the term to be ambiguous. The court then noted that the differences between the two policies were apparent. The State Farm policy had limits of $100,000 per person and $300,000 per accident whereas the United policy had limits of $250,000 and $500,000, respectively. Moreover, the State Farm policy also provided no-fault coverage and road-side services that the United policy did not, while the United policy included UIM coverage that the State Farm policy did not. Based on these differences, the Iowa Supreme Court determined that the State Farm policy was not "similar" so as to effectuate automatic termination of the United policy.

[6] ***279** We are persuaded by these authorities that "similar" insurance as used in Farm Bureau's automatic termination clause cannot be held to mean simply sharing common characteristics, particularly in light of this state's policy of construing insurance policies in favor of coverage for the insured. *See Diamond,* 318 S.C. at 236, 456 S.E.2d at 915 (holding that ambiguities are construed against the insurer); *accord Bodie,* 770 F.Supp. at 550 ("Under

applicable rules of interpretation, therefore, the court cannot interpret 'similar' to mean 'showing some resemblance' for that would be to resolve the ambiguity in favor of the insurer."). Where, as here, a second, subsequent automobile insurance policy differs in both the amount of coverage and the kind of coverage provided, the policies will not be held to be "similar" insurance as contemplated in an automatic termination provision. Accordingly, the Unisun policy purchased by Susan Courtney did not cancel Farm Bureau's policy on the Camaro. [4]

[4] Because we affirm the trial court on this ground, we need not reach Farm Bureau's other issues.

AFFIRMED.

HEARN, C.J., and ANDERSON, J., concur.

Parallel Citations

536 S.E.2d 689

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349 S.C. 366
Supreme Court of South Carolina.

SOUTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Petitioner,
v.
William H. COURTNEY, III, and Unisun Insurance Company, Defendants,
Of whom William H. Courtney is Respondent.

No. 25464. | Heard March 20, 2002. | Decided May 6, 2002.
| Rehearing Denied May 29, 2002.

The automobile insurer for a wrecked car sought a declaratory judgment that the policy on the replacement vehicle provided similar insurance and terminated the prior policy. The Circuit Court, Sumter County, James E. Brogdon, Jr., J., determined that both policies remained in effect. Insurer appealed. The Court of Appeals, Shuler, J., 342 S.C. 271, 536 S.E.2d 689, affirmed. Certiorari was granted. The Supreme Court, Moore, J., held that automatic termination clause allowing unilateral cancellation by insurer when the insured obtains similar coverage on a covered automobile is invalid.

Affirmed in result.

West Headnotes (5)

[1] **Insurance**
⇦ Grounds for Cancellation
Insurance
⇦ Obtaining Additional Insurance

Automatic termination clause allowing unilateral cancellation by an insurer when the insured obtains similar coverage on a covered automobile is invalid, since statute allows cancellation only for license suspension or revocation or an insured's failure to pay. Code 1976, § 38-77-123.

1 Cases that cite this headnote

[2] **Insurance**
⇦ Ambiguity, Uncertainty or Conflict

Any ambiguity in an insurance policy must be construed liberally in favor of the insured.

[3] **Insurance**
⇦ Obtaining Additional Insurance

Automobile policy covering replacement vehicle without underinsured motorist (UIM) coverage was not "similar insurance" within the meaning of an automatic termination clause allowing unilateral cancellation by an insurer when the insured obtains similar coverage on a covered automobile; the insured was seeking UIM benefits under policy covering car before it was totaled and replaced.

1 Cases that cite this headnote

[4] **Insurance**
⇦ Grounds for Cancellation
Insurance
⇦ Notice

A new insurance policy on a replacement vehicle was not in itself an "overt action" within the meaning of statute permitting cancellation without notice by the insurer if the insured has demonstrated intent to cancel by some overt action to the insurer or its agent. Code 1976, § 38-77-120(b)(2).

[5] **Insurance**
⇦ Violation of Statute

An insurer has the right to impose only those conditions that do not conflict with a statutory mandate.

Attorneys and Law Firms

**649 *368 M.M. Weinberg, III, and M.M. Weinberg, Jr., both of Weinberg, Brown & Curtis, of Sumter, for petitioner.

William Ceth Land and John C. Land, III, both of Land, Parker & Welch, P.A., of Manning, for respondent.

Opinion

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS.

Justice MOORE:

We granted a writ of certiorari in this case to review the Court of Appeals's decision [1] construing an automatic termination clause in an automobile insurance policy. We affirm in result.

1 *South Carolina Farm Bureau Mut. Ins. Co. v. Courtney*, 342 S.C. 271, 536 S.E.2d 689 (Ct.App.2000).

FACTS

In 1997, respondent Courtney (Husband) owned two cars, a Chevrolet Camaro and Saturn, both insured with petitioner (Insurer). Both policies had underinsured motorist coverage (UIM). [2]

2 UIM coverage was: $100,000 bodily injury per person; $300,000 bodily injury per accident; and $25,000 property damage per accident.

In September 1997, Husband's wife, Susan Courtney (Wife), was in an accident in the Camaro and the vehicle was a total loss. Insurer paid for the vehicle under Husband's collision coverage. On October 4, 1997, Wife purchased a Chevrolet pickup truck as a replacement vehicle and insured it with Unisun Insurance Company. The Unisun policy had no UIM coverage.

On October 27, 1997, Husband was in an accident in the Saturn and was seriously injured. He filed a claim with Insurer attempting to stack the UIM coverage from the two policies issued by Insurer covering the Camaro and the Saturn.

Insurer brought this declaratory judgment action to determine whether the UIM coverage on both policies could be stacked or whether only the Saturn UIM coverage applied. ***369** Although the Camaro policy was not actually cancelled for non-payment of premiums until January 23, 1998, Insurer claimed it terminated on October 4, 1997, when Wife insured the replacement vehicle with Unisun. Insurer relied on an automatic termination clause in the policy which provides:

> If you obtain other insurance on your covered auto, [3] any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

3 Under the policy, "covered auto" includes a replacement vehicle.

The trial court found the Camaro policy was not terminated for three reasons: 1) Wife had no authority to terminate the Camaro policy by buying insurance for the replacement vehicle without Husband's consent; 2) the automatic termination clause was not triggered because the insurance purchased for the replacement vehicle did not qualify as "similar insurance;" and 3) termination under the automatic termination clause did not comport with S.C.Code Ann. § 38-77-120(b)(2) (2002) which requires an overt act of the insured's intent to cancel the policy.

The Court of Appeals affirmed on the ground the insurance purchased on the replacement vehicle was not "similar insurance" and so the automatic termination clause was not triggered. It declined to address the alternative rulings of the trial ****650** court although Insurer appealed these rulings as well.

ISSUE

Is an automatic termination clause valid under South Carolina law?

DISCUSSION

The Court of Appeals affirmed the trial court's finding that the Unisun policy purchased by Wife did not qualify as "similar insurance" because the Unisun policy did not include UIM coverage and it had different liability limits than the policy with Insurer.

[1] [2] [3] While we agree with the Court of Appeals's construction of the policy, we find an automatic termination clause allowing unilateral cancellation by an insurer is invalid under ***370** our statutory scheme. [4] Section 38-77-120(b)(2), which was cited by the trial court in support of its decision, provides:

4 As noted by the Court of Appeals, the term "similar insurance" is not precisely defined in the policy; further, any ambiguity in an insurance policy must be construed liberally in favor of the insured. *Diamond State Ins. Co. v. Homestead Indus.*, 318 S.C. 231, 456 S.E.2d 912 (1995). Construing the automatic termination clause in favor of the insured in this case, the Unisun policy does not qualify as similar insurance because it does not include the type of coverage (UIM) Husband is claiming under his policy with Insurer. This dissimilarity is enough in itself even without considering the different liability limits of the two policies. Other courts have reached the same conclusion based on different types of coverage and liability limits when construing automatic termination clauses referring to "similar insurance." *See, e.g., United Fire & Cas. Co. v. Victoria*, 576 N.W.2d 118 (Iowa 1998); *Employers Mut. Cas. Co. v. Martin*, 671 A.2d 798 (R.I.1996).

§ 38-77-120. **Requirements for notice of cancellation of or refusal to renew policy.**

(a) No cancellation or refusal to renew by an insurer of a policy of automobile insurance is effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.

....

(b) Subsection (a) of this section does not apply if the:

....

(2) named insured has demonstrated by some overt action to the insurer or its agent that he expressly intends that the policy be canceled or that it not be renewed.

[4] Here, as found by the trial court, Insurer gave no notice of cancellation as required under subsection (a) to validate its cancellation based on the automatic termination clause. Further, there is no evidence Husband communicated to Insurer that he intended the Camaro policy be cancelled to trigger the exception to notice provided in subsection (b). The fact that a new insurance policy was obtained on the replacement vehicle does not in itself qualify as an overt act showing an insured's intent to cancel. *See Tyner v. Cherokee Ins. Co.*, 262 S.C. 462, 205 S.E.2d 380 (1974) (the mere procuring of a policy of insurance with the intent that it should be substituted for an existing policy does not effect a cancellation of the existing policy unless such substitution is accepted by both the ***371** insured and the insurer); *see generally T.B. Ector v. American Liberty Ins. Co.*, 138 Ga.App. 519, 226 S.E.2d 788 (1976) (noting that vast majority of jurisdictions reject the so-called "substitution rule" and hold the mere procurement of additional insurance without notice of intent to cancel by the insured is not sufficient). Cancellation based solely on an automatic termination clause without notice to the insured violates § 38-77-120.

Moreover, even if notice were given, S.C.Code Ann. § 38-77-123 (2002) limits unilateral cancellation by an insurer. This section provides as follows in subsection (B):

(B) No insurer shall cancel a policy except for one or more of the following reasons:

(1) The named insured or any other operator who either resides in the same household or customarily operates a motor vehicle insured under the policy has had his driver's license suspended or revoked during the policy period or, if the policy is a renewal, during its policy period or the ****651** ninety days immediately preceding the last anniversary of the effective date.

(2) The named insured fails to pay the premium for the policy or any installment of the premium, whether payable to the insurer or its agent either, directly or indirectly under any premium finance plan or extension of credit.

This section does not authorize unilateral cancellation by an insurer for any other reason.

[5] Automobile insurance is a highly regulated area of the law. It is well-settled that an insurer has the right to impose only those conditions that do not conflict with a statutory mandate. *Jordan v. Aetna Cas. & Sur. Co.*, 264 S.C. 294, 214 S.E.2d 818 (1975); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct.App.1984). Since the legislature has limited an insurer's unilateral right to cancel to two reasons-license suspension or revocation or an insured's failure to pay-an automatic termination clause for obtaining "similar insurance" is invalid. [5]

5 We note there is no public policy reason to construe § 38-77-123(B) less restrictively since an insurer may prevent any windfall to the insured by including a pro rata "other insurance" clause in its policy. The policy in this case in fact includes such a clause, providing "if policies issued by other insurers apply, we are liable only for our share."

*372 In conclusion, we agree with the Court of Appeals's construction of the automatic termination clause but conclude such a clause is not valid in any event. [6]

6 As noted in the Court of Appeals's decision and Insurer's brief, we have recognized the validity of similar automatic termination clauses in the context of fire insurance. *See Walker v. Queen Ins. Co.*, 136 S.C. 144, 134 S.E. 263 (1926); *Camden Wholesale Grocery v. National Fire Ins. Co.*, 106 S.C. 467, 91 S.E. 732 (1917). Until 1986, however, there was no statutory limitation on an insurer's right to unilateral cancellation of fire insurance and therefore these cases did not consider the validity of such clauses in the face of such a limitation. *See* S.C.Code Ann. § 38-75-730 (2002) (enacted by 1986 S.C. Act No. 338).

AFFIRMED IN RESULT.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

Parallel Citations

563 S.E.2d 648

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The State of South Carolina
In the Court of Appeals

Appeal from Chesterfield County
Court of Common Pleas

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

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Certificate of Service

I on March 24, 2014 served the Respondents' Amended Initial Brief by first class mail, sufficient postage prepaid, addressed to:

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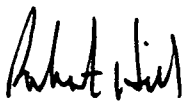

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March 24, 2014

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

Enclosed is the Respondents' Amended Initial Brief and a Certificate of Service.

My best,

Robert Hill

cc: William P. Hatfield, Esq.
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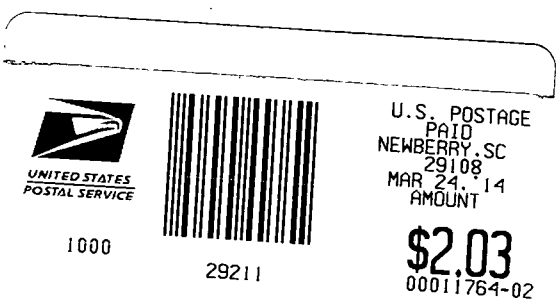

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