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SC Court of Appeals

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. 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.

FINAL BRIEF OF APPELLANT

Dominic A. Starr, SC Bar No. 66231
Alan G. Jones, SC Bar No. 10141
McAngus, Goudelock & Courie LLC
Post Office Box 1349
Myrtle Beach, South Carolina 29578
(843) 848-6000

Attorneys for Appellant

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I. DID THE CIRCUIT COURT ERR IN FINDING THAT PEE DEE HEATING AND COOLING'S COMMERCIAL GENERAL LIABILITY POLICY PROVIDED COVERAGE IN ADDITION TO ITS AUTO POLICY?

STATEMENT OF THE CASE

Auto-Owners Insurance Company ("Auto-Owners") brought a declaratory judgment action on July 8, 2011 under the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 et seq. The purpose of the action was to determine the rights and responsibilities of all parties with regard to a motor vehicle accident under a Commercial General Liability policy (the "CGL Policy") issued to Pee Dee Heating and Cooling Specialists, Inc. ("Pee Dee"). The CGL Policy was one of two at issue in this motor vehicle accident, the other of which was an automobile liability policy (the "Auto Policy"). In the underlying case, Auto-Owners and the Benjamins ("Respondents") entered into a Settlement Agreement, Covenant Not to Execute, and Policy Release ("Agreement") on June 14, 2011. Under the terms of the agreement, Auto-Owners paid Respondents an aggregate of $300,000, representing the policy limits, under the Auto Policy in exchange for covenants not to execute from each Plaintiff/Respondent and a release for Cail. In addition, the agreement stipulated that the parties would seek a judicial determination as to whether the CGL Policy would also provide coverage for the accident. The Global Settlement Agreement specifically states Auto-Owners' right to appeal any decision to the highest court possible.

Respondents and Auto-Owners filed cross-motions for summary judgment in the declaratory judgment action, each asserting their respective positions of coverage and no-coverage. Oral arguments were held January 28, 2013 in front of the Honorable Paul M. Burch. On March 22, 2013, Judge Burch issued an order granting Respondents' Motion for Summary Judgment but the parties did not receive this order until May 14, 2013. Auto-Owners filed a Motion to Alter or Amend on May 15, 2013. The Motion to Alter or Amend was denied on June 3, 2013, and Auto-Owners filed a Notice of Appeal on June 13, 2013.

FACTS

On February 14, 2008, Auto-Owners issued Pee Dee an Auto Policy having policy number 44-381-843-00, which covered several vehicles used by Pee Dee and its employees. (R. pp. 458-522.) On February 15, 2008, Auto-Owners issued to Pee Dee a Commercial General Liability Policy having policy number: 034616-36381843-08. (R. pp. 523-576.) Both Policies had an effective date of April 1, 2008. Pee Dee purchased the Auto Policy to cover its automobile liability and the CGL Policy to cover its business. The CGL Policy contained an Exclusion for automobile liability. (R. p.552.) The CGL Policy also had an Endorsement, setting out a limited circumstance under which automobile liability would be provided under the CGL Policy. (R. pp. 538-547.) On April 4, 2008, one of Pee Dee's employees, Joshua Lee Cail ("Cail") was involved in an automobile accident with Respondents while driving a vehicle owned by Naida Singleton ("Singleton") and used by Pee Dee for business purposes. (R. pp.4-12.).

On May 15, 2008, the Respondents filed a lawsuit in the Court of Common Pleas in Marlboro County, South Carolina, for alleged injuries and damages resulting from the accident with Cail. Id. Auto-Owners filed for declaratory relief seeking a declaration by the Court that the Auto Policy did not provide coverage to Cail because, at the time of the accident, Cail was not a permissive user as required in the policy language. (R. pp. 13-29.) With regard to the Auto Policy, Auto-Owners and the Respondents entered into a Settlement Agreement, Covenant Not to Execute, and Policy Release ("Agreement") on June 14, 2011. (R. pp.79-84.) The Agreement provided that Auto-Owners would pay the Auto Policy limits of $300,000 to the Respondents in return for a covenant not to execute against Naida Singleton and Pee Dee and a release as to Cail. Id.

As further stated in the Agreement, Auto-Owners specifically reserved the right to file a declaratory judgment action to determine whether the CGL Policy provided coverage for the damages asserted by Respondents in the tort action. Id. at p. 51. If it is determined that coverage is available under the CGL Policy and Endorsement, then the limits of the CGL Policy will be added to the total coverage amount available to Respondents. Id. If a determination of no coverage is held, then Auto-Owners owes no further payment to Respondents. Id.

The policy provisions forming the basis of the declaratory judgment are contained in two portions of the CGL policy: (1) the Aircraft, Auto or Watercraft Exclusion ("Exclusion") and (2) the Commercial General Liability Plus Endorsement ("Endorsement"). Under the language of the Exclusion, the policy does not provide coverage for:

> Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any ... auto... owned or operated by or rented or loaned to any insured. Use includes operation and "loading and unloading."
>
> This exclusion applies even if the claims against the insured alleges negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved, the ownership, maintenance, use or entrustment to others of any ... "auto" ... that is owned or operated by or rented or loaned to any insured.

(R. p. 552.)

The Endorsement states a limited circumstance under which coverage would be offered arising out of the use of an automobile, stating:

> **HIRED AUTO AND NON-OWNED AUTO LIABILITY**
>
> Coverage for "bodily injury" and "property damage" liability under SECTION I COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, is extended as follows under this item, but only if you do not have any other insurance available to you which affords the same or similar coverage.

(R. p. 538.)

At summary judgment, the arguments centered on the final clause of the Endorsement quoted above. (R. pp. 415-438.) Auto-Owners argued that "similar" has been held to be ambiguous in South Carolina only in the context of automatic termination clauses and that the coverages afforded by the Auto Policy and the Endorsement are similar. Id. Respondents argued that the term "similar" is patently ambiguous and must therefore be construed against the Insurer. Id. In addition, Respondents argued that a difference in coverage limits prevented the Auto Policy and CGL policy from being "similar." Id.

STANDARD OF REVIEW

A declaratory judgment "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, 140, 511 S.E.2d 692 (Ct. App. 1999). A suit to determine coverage under a contract of automobile insurance is an action at law. Id. When dealing with an action at law heard without a jury, "the findings of fact made by the trial court will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENTS

The term "similar" is not patently ambiguous in a policy of insurance and, by extension, is not to be construed against the insurer. The cases relied upon by Respondents are limited to the context of automatic termination clauses, which the Supreme Court has held to be void in the State of South Carolina on other grounds[1]. Also, the inclusion of the word "same" precludes the Court from interpreting to mean "the same" or "identical." Event if this Court finds that "similar" is an ambiguous term, the context of the Policies, Exclusion, and Endorsement clarify the intent of the contracting parties. As a result, the CGL Policy and its terms are not ambiguous. Instead, the term "similar" should be applied by its ordinary plain meaning to the facts of this case in order to find that the insurance provided by the Auto Policy is similar to the insurance provided by the CGL Endorsement. Therefore, no coverage would be available from the CGL Policy and Respondents' recovery would be limited to the $300,000 already paid under the Auto Policy.

[1] S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 349 S.C. 366, 563 S.E.2d 648 (2002)(S. Ct. agreed "with the Court of Appeals's construction of the automatic termination clause but conclude such a clause is not valid in any event" due to statutory prohibition of unilateral cancelation without notice)(emphasis added).

I. THE CGL POLICY PROVIDES NO COVERAGE FOR THE MOTOR VEHICLE ACCIDENT IN THE UNDERLYING CASE

The Endorsement is a protection built into the CGL Policy to protect Pee Dee if it finds itself liable for an auto accident and does not have insurance protection. In such a situation, the Endorsement would step in to protect Pee Dee from personal exposure. Here, there is no personal exposure to Pee Dee. The Auto Policy provided $300,000 of coverage, and that money was paid to Respondents. In exchange, a Covenant Not to Execute was signed, protecting Pee Dee and its principals against any further liability. Because there is no exposure here, there is no reason for the CGL to apply. Any other interpretation of the Endorsement would render it excess insurance, an interpretation that has no basis in the language of the Policy.

A. Introduction – Insurance Contract Interpretation in South Carolina

In South Carolina, policies of insurance are subject to the general rules of contract construction. Beaufort Co. Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). When interpreting insurance policies, "(c)ourts must enforce, not write, contracts of insurance. Id. (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)). Also,

> (I)f not ambiguous or uncertain, the express terms and language of the parties used should be given effect and their intention must be derived from the language employed. If the intention of the parties is clear, the Courts have no authority to change the contract in any particular. The Court has no power to interpolate into the agreement between an insurer and the insured a condition or stipulation not contemplated either by the law or by the contract between the parties.

S.S. Newell & Co. v. American Mut. Liability Ins. Co., 199 S.C. 325, 332, 19 S.E.2d 463, 466 (1942).

An insurance contract is read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C.

584, 592, 225 S.E.2d 344, 348(1976). Likewise, "(a) clause in an insurance contract will not be read in isolation." Beaufort, 392 S.C. at 518, 709 S.E.2d at 91. If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Most importantly, the cardinal rule of contract interpretation "is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Id.

B. The CGL Policy and its terms are not ambiguous

i. Courtney and related cases deal with automatic termination clauses only

The Circuit Court erred in stating that the word "similar" is ambiguous across all contexts. The Circuit Court's reliance on South Carolina Farm Bureau Ins. Co. v. Courtney, 342 S.C. 271, 536 S.E.2d 689 (Ct. App. 2000) is misplaced, as that case deals specifically, and only, with automatic termination clauses. Courtney's analysis of "similar insurance" language is limited to "the context of automatic termination clauses..." Id. Indeed, the Court of Appeals opinion references "automatic termination clauses" more than ten times. Each of the three cases cited in Courtney from other jurisdictions[2] deals specifically with automatic termination clauses in situations where (1) a covered individual purchases a new auto policy and (2) the original policy carrier canceled the previous policy with no notice to the insured. In describing the issue of the case, the Courtney Court stated that "(t)he meaning of "similar" insurance in the automatic termination clause in Farm Bureau's policy is a novel question in this state." Id. at 691 (emphasis added).

[2] Employers Mutual Casualty Co. v. Martin, 671 A.2d 798 (R.I. 1996), Motors Insurance Corp. v. Bodie, 770 F. Supp 547 (E.D. Cal. 1991), and United Fire & Casualty Co. v. Victoria, 576 N.W.2d 118 (Iowa 1998).

In Courtney, a husband and wife owned two automobiles, a Camaro and a Saturn, both insured by Farm Bureau. When the Camaro was totaled, the wife bought a pickup truck and insured it through Unisun. Farm Bureau never provided notice to the husband and wife of any cancellation of the Camaro policy. When the husband was involved in a wreck in his Saturn, Farm Bureau allowed the Saturn policy UIM limits to be paid but denied stacking of the Camaro policy under the reasoning that an "automatic termination clause" in the Camaro policy was triggered when the Unisun policy was purchased on the new pickup truck.

Unlike in Courtney and its related cases, the Auto-Owners CGL Policy and Endorsement at issue in this case do not automatically terminate a policy or any coverage. Upon review in S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 349 S.C. 366, 563 S.E.2d 648 (2002), the Supreme Court of South Carolina noted that automatic termination clauses are not valid in South Carolina because they violate statutory requirements for notice of termination and statutory prohibitions on unilateral cancelation by insurers. The clause at issue in this case is designed to provide coverage in the event that the insured were to lose or fail to maintain auto insurance. It is a "bonus" add-on to the CGL Policy meant to fill a gap in coverage in the event the Auto Policy is not available. It is not excess or additional coverage to be provided on top of the Auto Policy as Respondents would argue. Therefore, coverage is not being unilaterally canceled by the insurer in this case. Instead, the Endorsement is not triggered because "other insurance" exists which provides "the same or similar coverage."

Further, Pee Dee bargained for this exact coverage when it purchased the Auto Policy and the CGL Policy on consecutive days. As a sophisticated party to the contract, Pee Dee is in a different position than an automobile owner buying a boilerplate contract of insurance from an agent. Pee Dee must be presumed to have understood the nature of the Endorsement and the fact

that it only provided coverage in the event that the Auto Policy was not available. Therefore, the public policy arguments underpinning the invalidity of automatic termination clauses are not present in this case.

ii. The inclusion of the term "same" renders the term "similar" unambiguous

The primary language cited by the Circuit Court in the instant case is quoted in Courtney and originates from a California case, Motors Insurance Corp. v. Bodie, 770 F. Supp. 547 (E.D. Cal. 1991). Bodie, it is critical to note, is also a case dealing with an automatic termination clause. The passage states, with regard to the word "similar":

> 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. 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.

Bodie, 770 F.Supp. at 550.

The automatic termination clause in Bodie is stated as follows: "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." Bodie, 770 F.Supp. at 548 (emphasis added). The Bodie opinion noted that the term similar could be defined as either (1) "the same or identical" or as (2) "showing some resemblance; related in appearance or nature; alike though not identical." Bodie, 770 F.Supp. at 550. Utilizing the rule that all ambiguities must be construed against the insurer, the Bodie court ruled that it had to interpret "similar" to mean "the same or identical" in order to find coverage for the insured. Id. Courtney also made use of this argument, stating that the "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 the insured." Courtney, 342 S.C. at 279, 536 S.E.2d at 693.

However, unlike in Bodie and Courtney, the Endorsement in this case provides that coverage is afforded "but only if you do not have any other insurance available to you which affords the same or similar coverage." (Emphasis added). In its analysis of the Bodie decision, the Eastern District of California noted, "if 'the same' or 'identical' were the intended meaning, then such narrower terms could have been utilized." Cal. Dairies, Inc. v. RSUI Indem. Co., 617 F. Supp. 2d 1023, 1037 (E.D. Cal. 2009). The inclusion of the term "same" precludes any possibility that "similar" could be construed as meaning "the same or identical." Auto-Owners, having made the choice to include the two terms, prevented the possibility of the alternative reading given in Bodie and utilized in Courtney. Since no such reading is possible in the Endorsement, the term is not "as ambiguous in the Courtney policy as it is in the instant CGL policy." Order, p. 2. Rather, "similar" is unambiguous in the Endorsement and must be given its plain and ordinary meaning.

iii. The context of the Policies resolves any ambiguity

As stated *supra*, a single term or clause cannot be read in isolation from the rest of an insurance policy. Beaufort, 392 S.C. at 518, 709 S.E.2d at 91. Even if this Court determined that the word "similar" was *per se* ambiguous, the analysis should not stop there. The Eastern District Court of California noted in distinguishing its case from Bodie, "assuming, *arguendo*, that the (Bodie) court was correct to conclude that the term "similar" is inherently ambiguous, by interpreting it to mean "the same" or "identical," the court did not perform the required analysis (i.e., examining whether the ambiguity is eliminated by the language and context of the policy)." Cal. Dairies, 617 F. Supp. 2d at 1037 (E.D. Cal. 2009). In Cal Dairies, an insurance policy excluded coverage for violations of a litany of labor and employment provisions "or any similar

provision of federal, state or local law or common law..." Id at 1029. In upholding the exclusion, the Court was not persuaded by the arguments in Bodie.

Just as Courtney and its related cases all hold that "similar" is ambiguous in the automatic termination clause context, Cal Dairies is one of an entirely different line of cases in other jurisdictions stating that the term "similar" is not ambiguous when determining whether coverage is available for violations of laws "similar" to the Fair Labor Standards Act.[3] This further reinforces the fact that an interpretation of the word "similar" is not "term-centric" as stated in the Circuit Court's Order, but rather a context-specific analysis.

In the instant case, the clause in the Endorsement, the Auto Policy, the CGL Policy, and Exclusion show a clear plan of coverage for Pee Dee. Through its purchase of the Auto Policy, Pee Dee has liability coverage on all of its automobiles and insureds. Through the CGL Policy, Pee Dee's business is insured for liabilities arising out of the activities of the business. The Exclusion clearly states that no coverage is available through the CGL to the business for auto liability. Finally, the Endorsement provides coverage through the CGL for auto liability but only in the event that other insurance is not available that provides the same or similar coverage. Any other reading of the Policies would render the Endorsement excess insurance, a result that is not evidenced by any language in the Policy, Exclusion, or Endorsement.

C. The Auto Policy constitutes "similar insurance" under the CGL Policy.

Similar has been defined as follows:

1. having characteristics in common : strictly comparable

2. alike in substance or essentials : corresponding <no two animal habitats are exactly similar — W. H. Dowdeswell>

[3] See Cal. Dairies, Inc. v. RSUI Indem. Co., 617 F. Supp. 2d 1023, 1037 (E.D. Cal. 2009); Payless Shoesource, Inc. v. Travelers Cos., Inc., 585 F.3d 1366, 2009 U.S. App. LEXIS 24728 (10th Cir. 2009); TriTech Software Sys. v. U.S. Specialty Ins. Co., 2010 U.S. Dis. LEXIS 132245 (C.D. Cal. 2010); Cadete Enters. V. Phila. Indem. Ins. Co., 2012 Mass. Super. LEXIS 204, 30 Mass. L. Rep. 181 (Super. Ct. Mass. 2012).

3. not differing in shape but only in size or position <similar triangles> <similar polygons>

Merriam-Webster Dictionary, http://www.merriamwebster.com (last visited Aug. 28, 2013).

and,

1. Having a resemblance in appearance or nature; alike though not identical.

2. Mathematics: Having corresponding angles equal and corresponding line segments proportional. Used of geometric figures: similar triangles.

The American Heritage Dictionary, www.ahdictionary.com (last visited Aug. 28, 2013).

Because the term "similar" is not ambiguous in the Endorsement, the term and the Endorsement should be given their plain and ordinary meanings. Schulmeyer, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). The Auto Policy and the Endorsement have "characteristics in common" and are "alike although not identical." Both provide coverage for "bodily injury" and "property damage" liability arising from the use of an auto in furtherance of Pee Dee's business. Both provide coverage to Pee Dee and any permissive user of a vehicle. Both are designed to protect Pee Dee from personal liability arising out of an auto accident.

The Circuit Court listed the difference in coverage limits between the two Policies as reason enough to declare that they are not "similar" under Courtney. Order, p. 2. However, the difference in coverage limits merely shows that the coverages are not "the same." As stated *supra*, Courtney is read through the lens of construing "similar" to mean "identical" in order to resolve it in favor of the insured. Such a reading is not possible under the "same or similar" language present in the Endorsement. While the limits are different, the essential nature and provisions of coverage are similar. As such, this Court should hold that the Auto Policy provides

"similar" insurance to that of the Endorsement and, therefore, no coverage is available under the CGL Policy.

CONCLUSION

The terms of the CGL Policy and its Endorsement are not ambiguous. Further, the term "similar" is not *per se* ambiguous. Rather, the coverage provided in the Auto Policy is "similar" coverage to that provided by the Endorsement. As a result, no coverage is available under the CGL Policy. For the reasons stated, this Court should reverse the judgment of the Circuit Court and hold that no coverage is available to Respondents under the CGL Policy.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

Dominic A. Starr, SC Bar No. 66231
Alan G. Jones. SC Bar No. 100141
Post Office Box 1349
Myrtle Beach, South Carolina 29578
(843) 848-6000

Attorneys for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

April 30, 2014

Dominic A. Starr, SC Bar No. 66231
Alan G. Jones, SC Bar No. 100141
McAngus, Goudelock & Courie LLC
Post Office Box 1349
Myrtle Beach, South Carolina 29578
(843) 848-6000

Attorneys for Appellant

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant on counsel for Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on the 30th day of April, 2014 addressed to their attorney of record,

William P. Hatfield, Esquire
The Hyman Law Firm, LLP
Post Office Box 1770
Florence, South Carolina 29503-1770

Robert N. Hill, Esquire
Law Offices of Robert Hill
Post Office Box 51
Newberry, South Carolina 29108

April 30, 2014

Dominic A. Starr
SC Bar No. 66231
Alan G. Jones
SC Bar No. 100141
McAngus, Goudelock & Courie LLC
Post Office Box 1349
Myrtle Beach, South Carolina 29578
(843) 848-6000

Attorneys for Appellant